

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.

In another instance, the Commission adopted rules permitting new competitors to enter the interexchange market and, as part of that proceeding, the Commission considered mandating tariff provisions pertaining to service quality and reliability for those new entrants.^{128/} Specifically, the Commission proposed that the new entrants submit periodic reports to the FCC concerning service complaints, refunds, and the level of reliability actually achieved, as well as provisions relating to the proposed reliability of the service and the ability of a customer to receive refunds when the service fails to meet the specified standards in the tariff.^{129/} The Commission stated that these types of policy decisions were best suited to a rulemaking proceeding because “the adoption of policy, like that of a basic change in policy, ‘is better and more fairly examined and considered in rule making proceedings, where the inquiry can be thorough and where all interested parties can participate.’”^{130/} Ultimately, the Commission declined to mandate these tariff provisions because of a lack of comment on the issue.^{131/} In sharp contrast, this proceeding has generated substantial public participation by carriers, customers, and state regulators, and the overwhelming majority of commenters strongly urged the Commission to adopt a meaningful remedy regime.

In a more recent proceeding, the Commission initiated a tariff review process of ILEC collocation tariff provisions that impeded the CLECs’ provision of interstate access services,

^{128/} See *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission’s Rules*, 29 F.C.C.2d 870, 936-37 (1971) (“*Specialized Common Carrier Order*”).

^{129/} See *id.* at 936.

^{130/} See *id.* at 897 (quoting *Hale v. FCC*, 425 F.2d 556, 560 (D.C. Cir. 1970)).

^{131/} See *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43 and 61 of the Commission’s Rules*, 78 F.C.C.2d 1291, 1294 (1980).

pursuant to its authority under Sections 201-205 of the Act.^{132/} Upon finding that the ILEC rates were unreasonable, the Commission ordered the ILECs to provide refunds for overcharges and submit those refund plans to the Commission for approval.^{133/} In addition, the Commission gave detailed instructions to the ILECs on how those refund provisions should be structured in their revised tariffs.^{134/} The Commission specifically held that it had authority under Section 204(a) to require refunds if the ILECs' tariff rates were not justified.^{135/} Alternatively, the Commission stated that its authority under Section 4(i) of the Act also permitted it to order remedial action for those overcharged carriers "under a theory of *quantum meruit* if considerations of equity demanded a remedy in the nature of refunds to do equity."^{136/}

Using this same approach here, the Commission should find that the current standards and remedies in ILEC special access tariffs are unlawfully deficient because they permit the ILECs to engage in unjust, unreasonable, and discriminatory behavior.^{137/} The Commission should then adopt national special access performance standards and remedies and compel the ILECs to put those standards and remedies in their respective tariffs. Contrary to BellSouth's claim,^{138/} the Commission does not need to examine every ILEC tariff individually and has not

^{132/} See *Expanded Interconnection Order*, 12 FCC Rcd at 18733.

^{133/} See *id.* at 18740.

^{134/} See *id.* at 18758.

^{135/} See *id.* at 18742.

^{136/} See *id.* at 18743 (citing 47 U.S.C. § 154(i)).

^{137/} See *supra* Section I.B.2. (discussing commenters views on the deficiency of ILEC tariffs).

^{138/} BellSouth ¶ 52.

done so in the past.^{139/} As noted above, 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. The evidence here plainly demonstrates that the ILECs behave discriminatorily and anticompetitively in violation of the Act. Accordingly, tariff and contract revisions are warranted.

In addition, under Supreme Court precedent, the Commission has an independent basis to prescribe a change in existing carrier-to-carrier contract rates when it finds them to be unlawful^{140/} and to modify other provisions of carrier-to-carrier contracts when necessary to serve the public interest.^{141/} In particular, the Commission has required a carrier to modify a contract term that "adversely affect[s] the public interest -- as where it might . . . cast upon other consumers an excessive burden, or be unduly discriminatory."^{142/} The effects of the ILECs' discriminatory and commercially unreasonable special access performance clearly meet these criteria.^{143/} The comments show that the ILECs' special access performance is unduly

^{139/} See *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369 (1992) (requiring Tier 1 local exchange carriers to file tariffs offering interstate special access expanded interconnection service to all interested parties).

^{140/} See *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956); see also *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, 10 FCC Rcd 654, 656 (1994).

^{141/} See *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 381 (1956); see also *ACC Long Distance*, 10 FCC Rcd at 656; *IDB Mobile Communications, Inc. v. COMSAT Corp.*, 16 FCC Rcd 11474, 11480, ¶ 14, n.50 (2001) (noting the Commission's view that the Sierra-Mobile doctrine does not apply to Section 251/252 interconnection agreements because the Communications Act provides a standard of review for those agreements).

^{142/} See *ACC Long Distance*, 10 FCC Rcd at 657.

^{143/} The D.C. Circuit Court of Appeals upheld the Commission's use of the Sierra-Mobile doctrine to modify agreements between U.S. and foreign carriers to set the benchmark rates that U.S. carriers would have to pay foreign carriers for the termination of calls. See *Cable & Wireless v. FCC*, 166 F.2d 1224, 1232 (D.C. Cir. 1999). The court found the Commission's modifications were in the public interest because such modifications furthered the Commission's goals to eliminate the competitive distortion in the market for international telephony services.

discriminatory, makes it virtually impossible for competitors to compete fairly against the ILECs, and is a substantial and clear detriment to competition and the public interest generally. Thus, the Commission plainly has the authority to require ILECs to incorporate Commission-mandated performance standards and remedies into their existing carrier-to-carrier contracts, unless an individual carrier expressly agrees to waive such rights in return for other stated consideration.^{144/}

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

While Tier 1 remedies are valuable (at least theoretically) for making competitors whole, the comments support AT&T's showing that these remedies will not provide ILECs with sufficient incentives to make the significant behavioral changes that are needed to support a fully competitive market.^{145/} Thus, it is essential that the Commission also adopt a "Tier 2" component to deter continued non-compliance by the ILECs. As numerous commenters -- and Chairman Powell himself -- point out, these forfeitures must be more than the cost of doing business.^{146/} There is substantial evidence that forfeitures of the current magnitudes for the

^{144/} Even if individual carriers opt out of the federal Tier 1 plan, the ILEC should still remain subject to mandatory reporting requirements and Tier 2 forfeitures for non-compliant performance to all special access purchasers as a whole.

^{145/} *E.g.*, AT&T at 39; ASCENT at 7-8; AT&T Wireless at 15; Cable & Wireless at 17; Cablevision Lightpath at 6; DirecTV Broadband at 13-14; Focal, Pac-West and US LEC at 31-32; Minnesota Department of Commerce at 5; Sprint at 14-15; WorldCom at 47.

^{146/} *E.g.*, ASCENT at 7-8; AT&T Wireless at 16; Cable & Wireless at 17; Cablevision Lightpath at 6; DirecTV Broadband at 13-14; Focal, Pac-West and US LEC at 31-32; Minnesota Department of Commerce at 5; Sprint at 14-15; WorldCom at 9; *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").

ILECs' failure to comply with their merger obligations and other market-opening requirements have not succeeded in making the ILECs act lawfully.^{147/} It is also critical that the Tier 2 portion of the enforcement plan provides a streamlined process that avoids the unnecessary delays and paperwork often associated with the current complaint process. Therefore, the Commission should adopt a significantly time-truncated Tier 2 remedy plan that promptly assesses significant penalties when an ILEC's *own data* demonstrate its failure to meet defined performance standards.

For these reasons, AT&T generally supports the type of Tier 2 remedy approach advocated by WorldCom and Focal,^{148/} and offers a similar approach. In particular, each ILEC

^{147/} See, e.g., Robert Luke, *BellSouth Hits New Snag: FCC Raises Questions About Filing to Offer Long-Distance in Ga., La.*, THE ATLANTA CONSTITUTION, Dec. 21, 2001, at 3D (BellSouth has incurred nearly **\$40 million** in penalties levied by the Georgia Public Service Commission in 2001 for "poor performance in doing business with competitors"); *Techbits*, INVESTOR'S BUSINESS DAILY, at A7 (Jan. 7, 2002) (SBC has paid the federal government **\$53.5 million** in fines for failure to meet merger conditions since regulators approved SBC's merger with Ameritech Corp. in 1999); *Ameritech: Phone Company Pays More Fines*, CRAIN'S CHICAGO BUSINESS, at 1 (July 23, 2001) (Ameritech paid the Illinois Commerce Commission **\$24.2 million** for failing to provide adequate service to competing phone companies from July 2000 through July 2001); *Monopoly Claim Against Bell Atlantic Corp. Is Dismissed Where No Willfulness Is Alleged; Law Offices of Curtis v. Trinko, LLP v. Bell Atlantic Corp.*, NEW YORK LAW JOURNAL, at 25 (Dec. 4, 2000) (In March 2000, Bell Atlantic paid the Commission "a **\$3 million** fine to end an investigation into its alleged failure to provide adequate access to local phone service competitors in New York;" in addition, Bell Atlantic paid "**\$10 million** to competing local telephone service providers for injuries resulting from its misconduct in handling their orders.") (emphasis added); *Service Provider Briefs*, NETWORK WORLD, at 33 (Dec. 10, 2001) (Verizon paid the federal government about **\$4 million** for failing to meet performance targets from August to November 2001); Letter from Dee May, Verizon, to Magalie Roman Salas, Secretary, FCC (Dec. 28, 2001) (Verizon voluntarily pays **\$1 million** fine for metrics missed under its merger conditions); *SBC Communications, Inc. Apparent Liability for Forfeiture*, FCC 02-7, ¶ 1 (rel. Jan. 18, 2002) (finding SBC apparently liable for a **\$6 million** forfeiture for violating the merger condition requiring SBC to offer shared transport to competitors pursuant to certain terms and conditions); Regulation, Law & Economics, *Verizon, SBC Pay Nearly \$4 Million for Missing Service-Quality Standards* (Jan. 31, 2002) (noting that SBC paid **\$2.894 million** for service problems in September to November 2001, and that Verizon has paid nearly **\$6 million** since August 2001 for missing performance measurements).

^{148/} Focal, Pac-West and US LEC at 27-31; WorldCom at 47-49.

should be required to submit a monthly report to the Commission that sets forth its aggregate special access performance for that month. For measures for which parity is the standard, these data should be statistically analyzed at the submeasure level,^{149/} using a z-test governed by a balancing critical value that accounts for random error.^{150/} If the ILEC fails the standards prescribed by the Commission, then the Commission should begin the procedure to assess Tier 2 forfeitures using its authority under Section 503(b) of the Act.^{151/} In sharp contrast, there is no need to test data measured against a benchmark standard for random error; in these cases a bright

^{149/} Measures must be reported and analyzed at disaggregated submeasure levels (e.g., service types and geographic areas) so that apples are compared to apples, not oranges.

^{150/} This test is a simplified version of the computation proposed in the Louisiana Statistician's Report. See *Second Application by BellSouth Corp. et. al., for Provision of In-Region, InterLATA Services in Louisiana*, Brief in Support of Second Application by BellSouth, CC Docket No. 98-121 (filed July 9, 1998). While AT&T and BellSouth agreed on the statistical methodology to be used to determine whether the ILEC's performance passed or failed a particular measurement standard, they disagreed on the methodology for calculating amounts to be paid for performance failures. Specifically, AT&T objects to penalty calculations that would be made on a per transaction basis for a particular submeasure because counting transactions would inject subjectivity into the penalty process and because penalties based on counting failed transactions tends to underestimate the extent and impact of the failure, particularly for small data samples.

^{151/} Section 503(b) applies to willful or repeated violations of the Act or any rule, regulation, or order issued by the Commission. A violation is "willful" if the relevant act was not an inadvertent error, but was consciously or deliberately committed or omitted, "irrespective of any intent to violate any provision of [the] Act or any rule or regulation of the Commission." *MAPA Broadcasting, L.L.C. WSLA(AM) Slidell, Louisiana*, Forfeiture Order, DA 01-2922, ¶ 8 (rel. Dec. 19, 2001) ("*MAPA Forfeiture Order*"). In other words, "willful means that the licensee knew he was doing the act in question, regardless of whether there was an intent to violate the Act or Commission rules." *Application for Review of Southern California Broadcasting Company License, Radio Station KIEV(AM) Glendale, California*, 6 FCC Rcd 4387, 4387-88, ¶ 5 (1991) ("*Southern California Application*") (quoting H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982)). A violation is repeated if, among other things, it happened on more than one occasion or continued over more than one day. See *Southern California Application* ¶ 5; *SBC Communications, Inc. Apparent Liability for Forfeiture*, 16 FCC Rcd 19091, 19111, n.67 (2001). Since forfeitures would be based on an ILEC's aggregate performance for all CLECs on a particular submeasure, they would, by definition, be applied to "repeated" behavior.

line test is sufficient. Thus, any failure to meet the benchmark should begin the Tier 2 process.^{152/}

Immediately after receiving an ILEC monthly report showing that the ILEC failed to meet one or more performance standards, the Commission should issue an NAL, pursuant to Section 503(b)(4).^{153/} In addition, since monthly reports will not be submitted for some time after the reporting month,^{154/} the Commission should require ILECs to submit any requests for waiver or exceptions simultaneously with the monthly report, providing a detailed explanation as to why an NAL should not automatically issue. The Commission should accept only very narrow excuses in such cases, *i.e.*, the occurrence of force majeure type events (*e.g.*, emergency, catastrophe, natural disaster, and severe storm) for benchmark measures.^{155/}

Because the Commission's determination of liability would be based solely on the ILECs' own reported data -- which is presumed to be accurate^{156/} -- and because the ILECs would be offering any excuses for violating the Commission-mandated standards at the same time as they submit their reports, the due process concerns raised by some ILECs are

^{152/} Benchmarks already have accounted for random variation since they rarely require perfect service.

^{153/} In order to facilitate this process, the Commission should develop a standardized form NAL for use in addressing ILECs' performance failures.

^{154/} Reports should be submitted no later than twenty-five days after the close of the month being reported.

^{155/} Force majeure excuses should not be permitted for measures for which the standard is parity because the event should presumably have affected both the ILEC and affected carriers similarly. Likewise, force majeure should not be an excuse for benchmark standards unless the measurement process does not already afford exclusion of the data according to the existing business rules. As a result, force majeure should never be a sizeable issue.

^{156/} The ILECs' data are considered correct when filed with the Commission. 47 U.S.C. § 412; *see also Notice* at n.45.

addressed.^{157/} Nevertheless, it would be reasonable for the Commission to give ILECs fifteen days to provide a full response to the NAL, including all factual evidence it relies on to avoid liability.^{158/} Affected competitors should thereafter have another fifteen days in which to comment on the ILEC excuses and proposed exclusions. After receipt of any such information, in order to assure that the ILEC faces swift consequences for its performance failures, the Commission should follow up with an order that rules on the NAL within thirty days of the date for the competitors' filings.

ILECs must be potentially subject to the maximum statutory penalty^{159/} for non-compliance with each submeasure^{160/} for each month in each state where the ILEC provided service that failed to meet the Commission's standard. The amount of the forfeiture in any

^{157/} BellSouth ¶¶ 58-60; Qwest at 11; Verizon at 22-23.

^{158/} Focal, Pac-West and US LEC at 32. The number of days that an ILEC has to respond to a NAL for poor performance should be addressed by the Commission as a clarification to its Rule 1.80. 47 C.F.R. § 1.80(d) (providing that the response period is "usually" thirty days, but not setting a specific minimum).

^{159/} The current statutory maximum is \$1.2 million, but this figure is the subject of congressional legislation -- H.R. 1765 -- seeking to raise the forfeiture amount that the Commission can impose because Congress has recognized that the current level of forfeitures are not deterring the ILECs' anticompetitive behavior. See 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."); 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.").

^{160/} The disaggregated number of submeasures reported in each state should be correlated with the amount of the statutory maximum penalty to be able to reach a procedural cap -- 40% of the ILEC's special access revenues -- of each ILEC in each state. One way to achieve this result is to disaggregate the measures upon which ILECs report by ILEC operating region. Such disaggregation is reasonable because the ILECs themselves typically measure, track and manage their own performance in such manner. See AT&T Comments, CC Docket No. 98-56, at 34-36 (June 1, 1998).

specific case should be adjusted to reflect the magnitude of the violation and the duration of the poor performance. This process would alleviate any legitimate ILEC concern about notice and the opportunity to be heard before the imposition of forfeitures. Indeed, the ILECs recognize that the Commission has explicit authority to impose forfeitures using an NAL process under Section 503,^{161/} and this process follows the requirements of that section to the letter.^{162/}

Finally, AT&T supports the requests of numerous commenters that the Commission also clearly state its intention to apply -- as additional enforcement tools -- non-monetary remedies to rectify ILEC performance deficiencies.^{163/} These should include, at a minimum, the imposition of affirmative injunctive relief requiring improved performance within a specific timeframe or the implementation of process changes designed to improve performance.^{164/} Further, the Commission should view ILEC special access performance failures as evidence that the retail special access market is not sufficiently competitive to warrant an ILEC's continued ability to take advantage of pricing flexibility. All of these remedies may in fact be required to provide the ILECs with the incentives they need to overcome their natural (and obvious) inclination to discriminate against competitors that are forced to rely on their special access services.

^{161/} BellSouth ¶¶ 16, 58; Qwest at 11; Verizon at 21-23.

^{162/} The ILECs also note that they retain the right to refuse to pay any Commission-imposed forfeiture and may avail themselves of a trial de novo in federal district court. *E.g.*, Qwest at 12-15. However, the ILECs' suggestion that they might use the trial de novo process to delay payments and ultimately avoid complying with the Commission's rules is further evidence of their anticompetitive behavior and their willingness to disregard of the Commission's pro-competitive policies.

^{163/} Mpower at 13; WorldCom at 52-55.

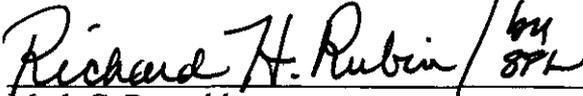
^{164/} To the extent that competitors must use special access as a substitute for unbundled network elements to provide competitive local service, potential remedies should also include suspension or revocation of a Bell Operating Company's Section 271 authority.

CONCLUSION

For the reasons stated in its initial comments and those stated above, and consistent with the views of the vast majority of commenters, AT&T respectfully requests that the Commission adopt the performance measures, business rules, and disaggregation levels consistent with the principles set forth herein and in the JCIG Proposal. In addition, AT&T urges the Commission to use the JCIG Remedies Proposal as a starting point for the adoption of a meaningful, essentially self-executing enforcement plan, which both compensates injured carriers and provides the ILECs with strong incentives to comply with the Act and the Commission's rules.

Respectfully submitted,

AT&T CORP.

 *Richard H. Rubin* / *by*
SRH

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

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

Attorneys for AT&T Corp.

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CERTIFICATE OF SERVICE

I, Angela Collins, hereby certify that on this 12th day of February 2002, copies of the foregoing Reply Comments of AT&T Corp. were sent via first-class mail, postage prepaid, to the following:

*Kyle Dixon
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Uzoma Onyeije
Policy and Program Planning,
Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Room 5-C217
Washington, DC 20554

*Matthew Brill
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Jordan Goldstein
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

*Sam Feder
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Susan M. Gately
Elizabeth P. Tuff
Economics and Technology, Inc.
Two Center Plaza
Suite 400
Boston, MA 02108-1906

Wayne V. Black
C. Douglas Jarrett
Keller and Heckman LLP

1001 G Street, N.W., Suite 500 West
Washington, DC 20001

Charles C. Hunter
Catherine M. Hannan
Hunter Communications
Law Group
1424 Sixteenth Street, NW
Suite 105
Washington, DC 20036

Steven A. Augustino
Ronald J. Jarvis
Kelley Drye & Warren, LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036

Robert J. Aamoth
Kelley Drye & Warren, LLP
1200 19th Street, NW
Washington, DC 20036

Kevin DiLallo
Levine, Blaszak, Block &
Boothby, LLP
2001 L Street, N.W., Suite 900
Washington, DC 20036

Jonathan Askin
Teresa K. Gaugler
ALTS
888 17th Street, NW
Washington, DC 20005

Audrey Wright
Cable & Wireless USA, Inc.
1130 Connecticut Ave., NW
Suite 1201

Washington, DC 20036

Carol Ann Bischoff
Jonathan D. Lee
Competitive Telecommunications
Association
1900 M Street, NW
Suite 800
Washington, DC 20036

Patrick J. Donovan
Paul B. Hudson
Swidler Berlin Shereff
Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

Richard J. Metzger
Focal Communications
Corporation
7799 Leesburg Pike
Suite 850 North
Falls Church, VA 22043

John Sumpter
Pac-West Telecomm, Inc.
1776 March Lane
Suite 250
Stockton, CA 95207

Wanda Montano
US Lec Corp.
Three Morrocroft Centre
6801 Morrison Blvd.
Charlotte, NC 28211

Richard M. Rindler
Patrick J. Donovan
Michael W. Fleming
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

Myra Karegianes
Thomas G. Aridas
Illinois Commerce Commission

160 N. LaSalle, Suite C-800
Chicago, IL 60601

David W. Zesiger
ITTA
1300 Connecticut Avenue, NW
Suite 600
Washington, DC 20036

Karen Brinkmann
Richard R. Cameron
Elizabeth R. Park
Latham & Watkins
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304

Anna Sokolin-Maimon, Esq.
Metropolitan Telecommunications
44 Wall Street, 14th Floor
New York, NY 10005

Susan L. Peirce
Minnesota Department of Commerce
85 7th Place East, Suite 500
St. Paul, MN 55101-2198

Russell I. Zuckerman
Francis D.R. Coleman
Richard E. Heatter
Marilyn H. Ash
MPower Communications Corporation
175 Sully's Trail, Suite 300
Pittsford, NY 14534

Richard A. Askoff
National Exchange Carrier
Association, Inc
80 South Jefferson Road
Whippany, NJ 07981

Margot Smiley Humphrey
Holland & Knight
2099 Pennsylvania Avenue, Suite 100
Washington, DC 20006

Stuart Polikoff

Organization for the Promotion and
Advancement of Small
Telecommunications Companies
21 Dupont Circle, NW, Suite 700
Washington, DC 20036

Marie Guillory
Daniel Mitchell
National Telephone Cooperative
Association
4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

Lawrence G. Malone
Brian P. Ossias
NYDPS
Three Empire State Plaza
Albany, NY 12223-1350

Eric J. Branfman
Harry N. Malone
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

Benjamin H. Dickens, Jr.
Gerard J. Duffy
Douglas W. Everette
Blooston, Mordkofsky, Dickens,
Duffy & Prendergast
2120 L Street, NW, Suite 300
Washington, DC 20037

Susan J. Bahr
Law Offices of Susan Bahr, PC
P. O. Box 86089
Montgomery Village, MD 20886-6089

Richard Juhnke
Jay C. Keithley
Norina Moy
Sprint
401 9th Street, NW, Suite 400
Washington, DC 20004

Lawrence E. Sarjeant

US Telecom Association
1401 H Street, NW, Suite 600
Washington, DC 20005

Brian T. O'Connor
Robert A. Calaff
Harold Salters
VoiceStream Wireless Corporation
401 9th Street, NW, Suite 550
Washington, DC 20004

Douglas G. Bonner
Elizabeth Dickerson
LeBoeuf, Lamb, Greene &
MacRae, L.L.P.
1875 Connecticut Avenue, NW
Washington, DC 20009

Gregg C. Sayre
Citizens Communications
180 South Clinton Avenue
Rochester, NY 14646

Richard M. Sbaratta
BellSouth Corporation
675 West Peachtree Street, NE
Suite 4300
Atlanta, GA 30375-0001

Lisa B. Smith
Lisa R. Youngers
WorldCom, Inc.
1133 19th Street, NW
Washington, DC 20036

Ruth Milkman
Gil M. Strobel
Lawler, Metzger & Milkman
1909 K Street, NW
Suite 820
Washington, DC 20006

Michael E. Glover
Edward Shakin
Verizon Communications, Inc.
1515 North Courthouse Road

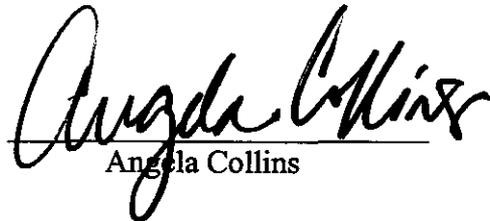
Suite 500
Arlington, VA 22201-2909

Jeffrey S. Linder
Rebekah P. Goodheart
Wiley Rein & Fielding LLP
1776 K Street, NW
Washington, DC 20006

Thomas Jones
Christi Shewman
Kelly N. McCollian
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
SBC Communications Inc.
1401 Eye Street, NW, Suite 400
Washington, DC 20005

Robert B. McKenna
Sharon J. Devine
US West
Suite 700
1020 19th Street, NW
Washington, DC 20036



Angela Collins

*Via Hand Delivery

WDC 308637v1

**Declaration of Maureen A. Swift
On Behalf of AT&T Corp.**

1. My name is Maureen A. Swift. My business address is 900 Route 202/206, Bedminster, New Jersey.

2. I am employed by AT&T as a Division Manager in the Local Services and Access Management group in AT&T's Network Services organization. In this position I am responsible for the oversight of both the special access services and unbundled network elements purchased by AT&T from incumbent local exchange carriers ("ILECs"). Additionally, I work closely with colleagues in the AT&T Business Services unit to identify the needs and expectations of our customers who purchase services that rely on inputs from other carriers. I am a 1977 graduate of Nazareth College of Rochester, with a B.S. in Mathematics and Management Sciences. In 1985, I received an MBA (with concentration in Accounting and Operations) from the University of Rochester Simon School of Management. From 1985 to 1992, I was employed by Rochester Telephone in Rochester, New York, in the area of separations and settlements. In September 1992, I accepted the position of Manager of Business Development with ACC Corporation, a competitive long distance provider. At ACC, I was also part of a team charged with developing a competitive local service product, and handled carrier relations with the incumbent local exchange carriers, including interconnection negotiations and performance issues. Through a series of acquisitions, ACC became part of AT&T in July 1998. I continued in a carrier relations capacity until February 1999, when I was promoted to Division Manager for National Negotiations policy, where I was responsible for coordinating AT&T's policies for interconnection negotiations. I assumed my present position in September 2000.

3. The purpose of my declaration is to describe AT&T's experience with ILEC suppliers of special access services, and to elaborate on specific service quality problems AT&T has faced over the last several years. In particular, I will discuss why neither market forces nor existing mechanisms have proven sufficient to address such problems.

4. In its capacity as an interexchange carrier ("IXC"), AT&T must purchase local access from ILECs for the provision of both voice services as well as other high-capacity services including ATM and frame relay. Although recent years have seen the growth of alternative access providers and the acquisition by AT&T of some of its own local facilities, the vast majority of local access is purchased from the incumbents.

5. AT&T also relies on ILEC special access facilities for the provision of a significant amount of the local service it provides. For the provision of high-capacity services, AT&T uses ILEC DS-1 and/or DS-3 facilities to reach its customers. While AT&T would prefer to serve its local customers using entirely its own network, a number of limitations necessitate the use of portions of the incumbents' networks to reach end-users. Among these limitations are the need to cost justify augments to the existing network, the availability of construction pre-requisites (such as rights-of-way and collocation facilities), the feasibility of building within the time frame required by the customer, and prior volume and/or term commitments that make it uneconomic to convert to alternative facilities (whether self-provided or provided by a third-party) due to termination penalties.^{1/} AT&T's ability to secure the ILEC facilities it needs in the form of unbundled network elements is constrained by numerous factors, including use

^{1/} See Declaration of Anthony Fea and William J. Taggart III on Behalf of AT&T Corp., *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).

restrictions adopted by regulators and additional impediments imposed unilaterally by the ILECs.^{2/}

6. Although, as large purchasers of local access, IXCs and CLECs (including AT&T) have been major customers of ILECs, the conditions under which these supplier-customer relationships were created produce a far different dynamic than is found in an efficiently functioning competitive market. Unlike those markets, carriers seeking to purchase local access in a given situation routinely have no alternatives to ILEC-provided special access service. Therefore, although large customers in most commercial settings have significant bargaining power to demand a specific level of service, competitive carriers seeking local access must typically rely on the good will of their suppliers for service improvement.

7. The critical fact for this proceeding is that ILECs' good will has been insufficient to meet the needs of both AT&T and other wholesale purchasers and those carriers' retail customers. Over the years, AT&T has developed specific quality measurements (often referred to as direct measurements of quality or "DMOQs") and spent literally years working on a business-to-business basis with ILECs to obtain service consistent with those standards. But despite the considerable time and resources AT&T has devoted to this effort, the ILECs' provisioning and maintenance of their special access services generally remain commercially unacceptable.

8. Requiring the ILECs to provide information needed to support an appropriate performance measurement and remedy regime would not be burdensome. AT&T provides its vendors with specific DMOQs, including category-specific expectations or benchmarks. AT&T

^{2/} See, e.g., Declaration of Alice Marie Carroll and Cynthia S. Rhodes on Behalf of AT&T Corp., at 5-6, *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).

then requests that the vendor provide data that track its performance against those DMOQs. In general, vendors have been forthcoming in providing these data on a regular basis. However, such data are almost always subject to AT&T's explicit agreement not to disclose its company-specific data to others, even in the context of regulatory proceedings. However, based on my knowledge of current ILEC data gathering and reporting capabilities, it is my belief that ILECs would not be required to institute new capabilities or significantly modify existing capabilities in order to provide the reporting for the measures identified in the Joint Competitive Industry Group Proposal.^{3/}

9. Critically, even though AT&T receives periodic data from its ILEC special access vendors on their performance, those data have not been sufficient to enable AT&T to obtain better quality service – the kind of services its customers demand. Although AT&T's agreements with individual ILECs preclude it from providing data on an individual basis, I can affirmatively report that the ILECs' data have consistently shown performance that does not meet AT&T's DMOQs. Moreover, even in those cases where AT&T has seen some improvements, those improvements often have not been sustained over time. And since AT&T's ability to obtain the self-reported data is conditioned on confidentiality agreements that limit its ability to use those data solely to its business-to-business dealings with the ILEC, they provide little leverage to motivate the ILECs to improve.

10. It is also important to recognize that the ILECs' motivation to meet AT&T's business needs will be further reduced as ILECs begin to enter the interexchange market and compete against IXCs on a head-to-head basis in the provision of long distance services. Thus, I

^{3/} Letter from Joint Competitive Industry Group, to Michael K. Powell, Chairman, FCC, CC Docket No. 01-321 (filed Jan. 22, 2002) ("JCIG Proposal").

cannot expect the situation to improve in the future; indeed, the ILECs' clear incentives would lead them in exactly the opposite direction.

11. Although I am not permitted to provide special access performance data on any specific ILEC, the aggregate data for all large ILECs^{4/} between 1997 and 2001 show that AT&T has not been able to use its position as a large customer to obtain or consistently maintain adequate ILEC performance. These data, attached to my declaration as Attachment A, show nationally aggregated ILEC performance for three specific DMOQs: (1) DS1 On-time Performance, (2) DS1 Failure Frequency, and (3) Total Time to Repair greater than 3 hours.^{5/} Although these measures are not precisely the same as those defined in the JCIG Proposal supported in this proceeding, they are similar enough to show that ILECs' special access service quality is generally poor and unpredictable.

12. Attachment A shows that, on a national basis, ILECs failed to provision AT&T's DS1s orders in a timely manner significantly more than 10% of the time. More disturbing, the data reflects a *downward* trend in on-time performance. Further, over the five-year period reflected in the analysis, DS1 failure frequency was as high as approximately 23%, and *always* well above 10%. Similarly, the ILECs' failure rate also seems to be growing at a modest rate.

^{4/} These companies include Ameritech, BellSouth, Pacific Bell, Qwest (formerly U S West), SWBT and Verizon (formerly Bell Atlantic and GTE.)

^{5/} (1) DS1 On-Time Performance is measured by dividing the number of orders that were not provisioned on the Customer Desired Due Date ("CDDD") for exchange access reasons, by the number of orders completed in the reporting calendar month. (2) DS1 Failure Frequency is measured by dividing the monthly network failures by the total number of circuits purchased by AT&T on the last day of the reporting calendar month. (3) Total Time to Repair > 3 hours is measured by dividing the number of troubles restored in more than 3 hours in the report period by total number of troubles in the period.

Finally, the aggregate data shows that restoration intervals exceed three hours approximately 30% of the time.^{6/}

13. While these results are disquieting, they are even more troubling when viewed in light of AT&T's aggressive efforts over the last several years to obtain better service. As noted by some of the ILEC commenters, AT&T representatives meet with their account managers on a frequent basis to review the ILECs' self-reported data, identify the root causes for poor performance, and design remedies. In fact, AT&T prefers this kind of business-to-business process as a means to resolve performance issues, and has committed significant resources to such efforts. Yet despite the thousands of hours expended on these efforts, improvement, if any, is generally short-lived, and overall service quality continues to be mediocre. Clearly, it appears that the ILECs have determined that the "hassle" factor related to dealing with unhappy customers is far outweighed by the benefit they obtain from supplying those customers -- who are also competitors -- with poor service.

14. More recently, some ILECs have introduced tariffs and contracts that include specific performance targets coupled with penalties for failure to reach those targets. AT&T was pleased see ILECs implement plans that directly link poor performance with monetary consequences, and has been quick to avail itself of those alternatives where available.^{7/} While these plans have resulted in consequences for the vendors' failure to meet agreed-upon targets,

^{6/} Customer satisfaction is clearly linked to the ability of a carrier to avoid outages and, in the event an outage occurs, to restore service quickly. Therefore, the finding that more than 30% of outages last more than 3 hours is particularly troublesome since it tracks restoration time frames well in excess of AT&T's DMOQ of less than two hours (which is similar to the level proposed by the JCIG). Even when measured against this much lower standard of performance, ILEC services still fail almost one-third of the time.

^{7/} SBC (at n.24) correctly points out that AT&T requested that the Texas PUC not take any action that would pre-empt the terms of its Managed Value Plan ("MVP") contract with SWBT.

they have not yet succeeded in providing service at the level required by AT&T (and agreed to by the ILEC).^{8/} This experience suggests that even the most comprehensive mechanisms available to AT&T are currently insufficient to address the problem of poor ILEC special access performance.

15. Additionally, there is a growing gap between what AT&T's customers expect and AT&T's ability to obtain the ILEC special access services needed to meet those expectations. It is certainly true that end user purchasers of special access (and services that incorporate ILEC special access service) are generally knowledgeable about the complexities involved in providing that service. Nevertheless, their business needs still require (and customers demand) predictable and reliable installation, maintenance, and repair intervals. Current mechanisms available to AT&T have failed to produce consistent and sustainable improvement in the ILECs support for special access. Thus, those mechanisms do little to address customers' most urgent needs. Although customer feedback regarding special access service is addressed more fully in the Declaration of Deborah S. Waldbaum, my personal contact with AT&T end-user customers indicates that there is a remarkably high level of frustration among those seeking our services.

16. As a result of the above, AT&T finds itself in an untenable position. Although AT&T values the ability to negotiate with its ILEC suppliers to obtain critical inputs that are specifically designed to meet AT&T product needs, experience shows that ILECs remain the dominant suppliers of special access services and in most cases there are few (if any) alternatives available. Thus, relying on negotiation alone cannot -- and does not -- assure AT&T will be able

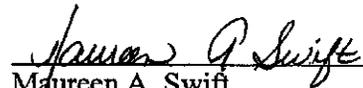
This position is fully consistent, however, with AT&T's request that the Commission adopt *minimum* national standards that may be supplemented by specific carrier-to-carrier agreements.

^{8/} This is not to say that, under the right conditions, such mechanisms could not provide a satisfactory result. For example, in 2001, AT&T's non-ILEC providers of special access

to meet its customers' needs. Therefore, the most immediate and effective means to provide ILECs with the incentives they need to provide acceptable service quality for interstate special access services is for the Commission to adopt a federal performance measurement plan based on the JCIG Proposal, accompanied by efficient, prompt, and effective remedies.

generally maintained a failure frequency rate of less than 5% (vs. 19.09% for ILECs), in compliance with contractual obligations that are linked to monetary penalties.

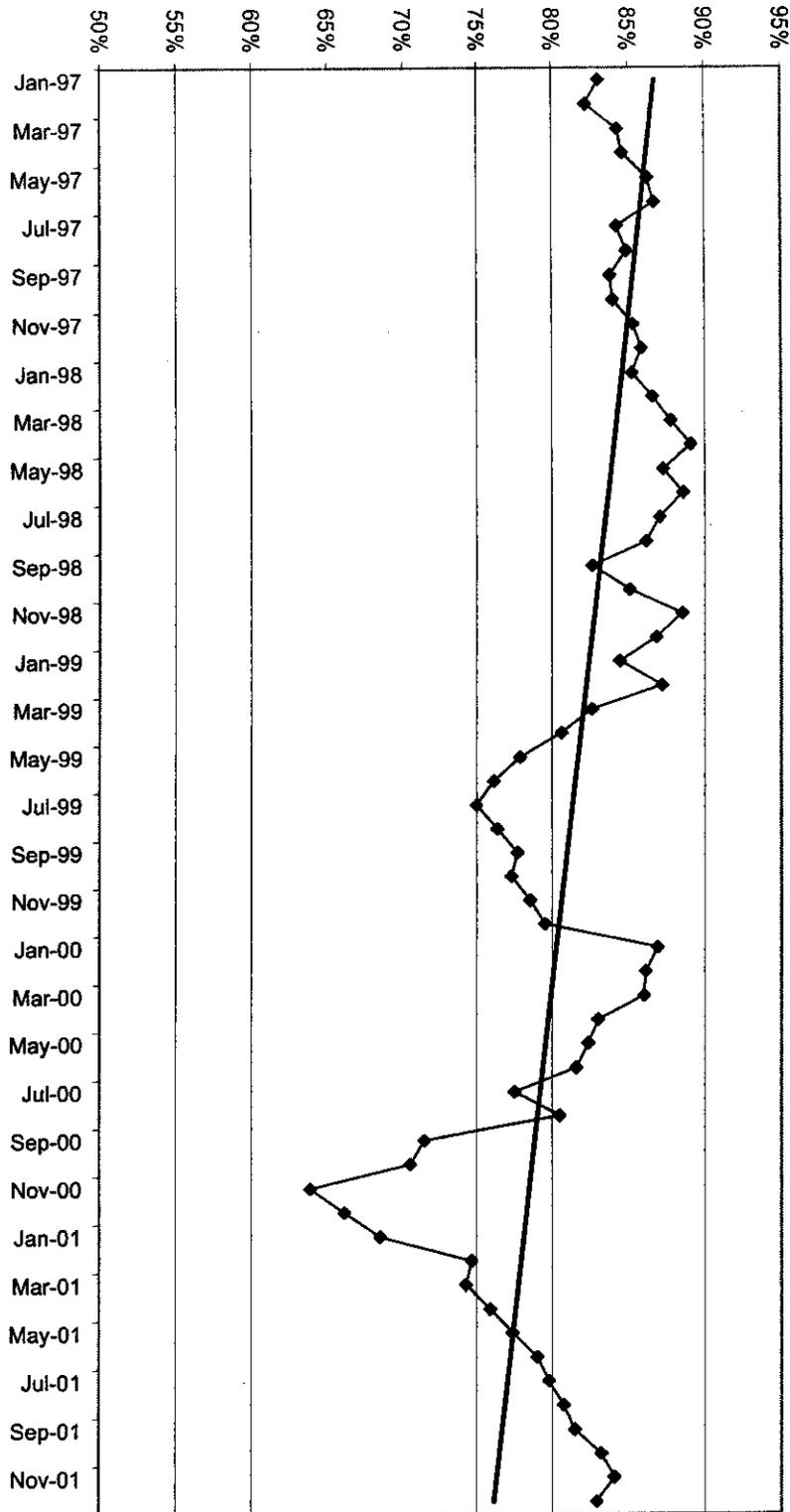
I declare under penalty of perjury that the foregoing is true and correct.


Maureen A. Swift

Dated: This 12th day of February, 2002.

ATTACHMENT A

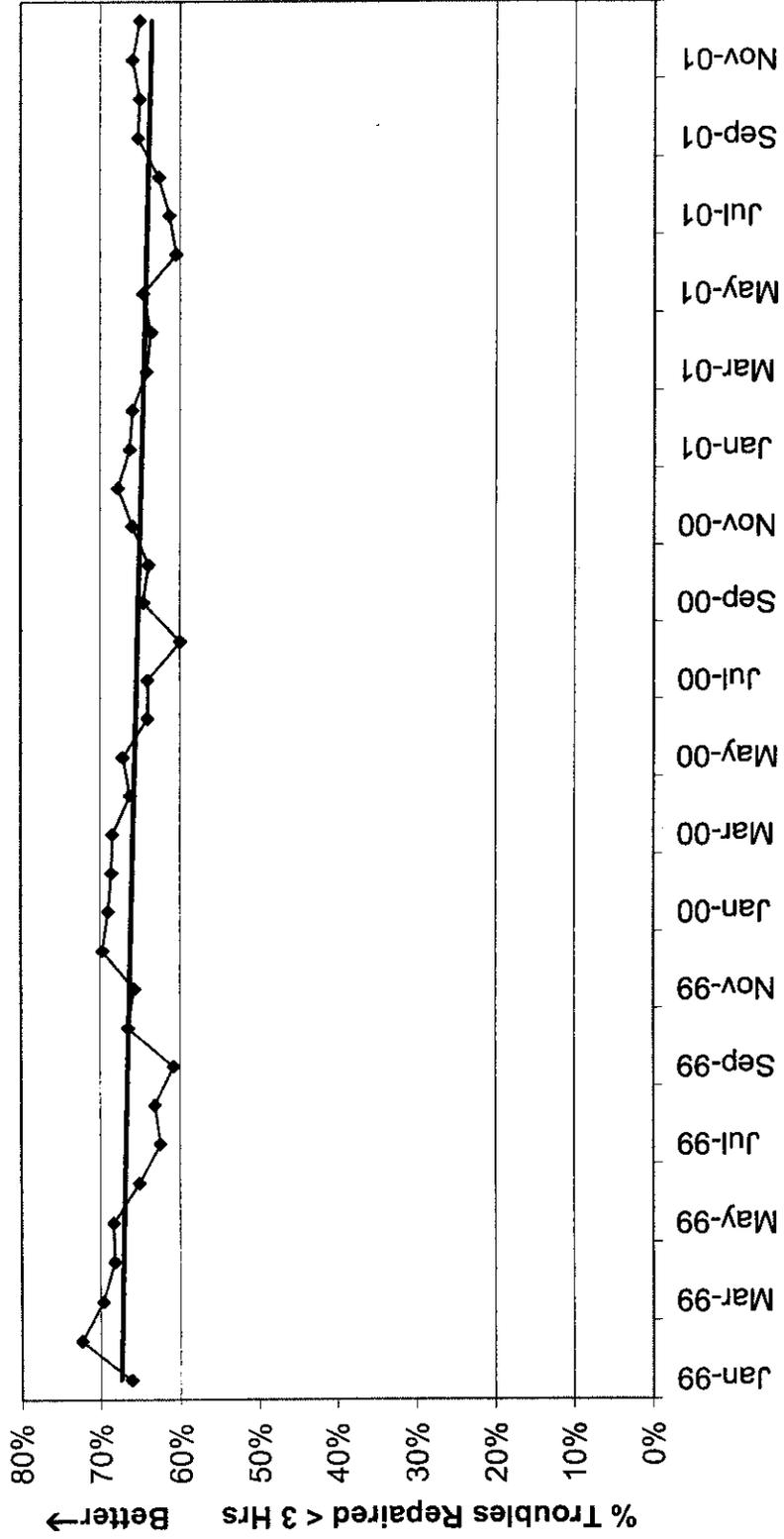
Orders On-Time (%) Better →



DS1 On-Time Performance
Jan 1997 - Dec 2001

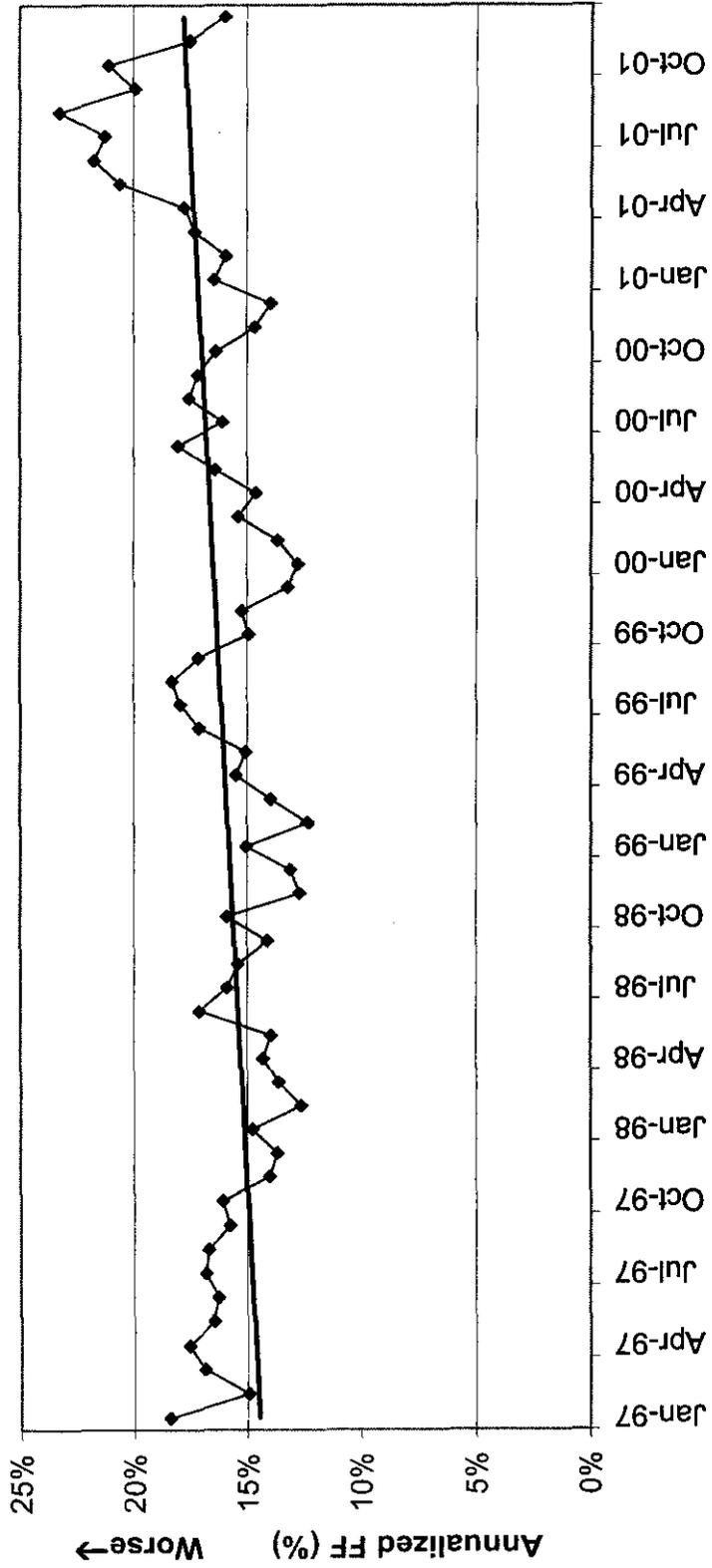
TTR < 3 Hours

Jan 99 - Dec 01



DS1 Failure Frequency

Jan 97 - Dec 01



**Declaration of Deborah S. Waldbaum
On Behalf of AT&T Corp.**

1. My name is Deborah S. Waldbaum. My business address is 7979 E. Tufts Avenue, Suite 900, Denver, Colorado.
2. I presently am employed as a Senior Attorney in AT&T's Law and Government Affairs unit. In this position I represent AT&T's Local Network Services business unit, including the client organization responsible for the provision of local service and the Local Service and Access Management ("LSAM") organization. I also work directly with the AT&T managers who are responsible for identifying and implementing opportunities to improve the quality of service for facilities AT&T leases from other carriers, including incumbent local exchange carriers ("ILECs") and third-parties, to serve its long distance, local and data customers.
3. I have an A.B. with honors in Sociology from the University of California, Berkeley (1977), and earned my J.D. from University of California, Hastings College of the Law (1980). I joined AT&T in July 1999. Prior to that time I served as Western Region Regulatory Counsel for TCG, Inc. In that capacity I represented TCG in regulatory proceedings in Colorado, Nebraska, Arizona, Utah, Oregon, Washington and California. In addition, I provided support for Interconnection Agreement negotiations with Pacific Bell and GTE. I also participated in the interconnection negotiations and arbitrations of interconnection agreements with US West (now Qwest). Prior to joining TCG, I served as an Assistant Attorney General in the Colorado Attorney's General, where I represented the Office of Consumer Counsel in both telecommunications and energy regulatory proceedings.

4. In about October 2000, as a result of a request by the AT&T Business Services (“ABS”) unit, I was asked to review a number of complaints from customers and AT&T Account Representatives regarding the ILECs’ provision of special access services. The purpose of this assignment was to identify specific problems and determine whether the existing mechanisms for remedying ILEC performance problems were efficient and effective enough to meet customers’ expectations.

5. In order to begin my analysis, I was provided with information regarding more than twenty (20) incidents for which customer and/or AT&T personnel involved with specific customer special access orders believed that provisioning and/or maintenance problems relating to such orders were the result of discriminatory treatment by an ILEC. The information provided to me for this analysis included specific ordering information and customer contact information. During the course of my evaluation I was provided with additional incidents to review.

6. In the course of my review, I directly contacted a number of AT&T’s business services customers. Although the nature and size of the customers’ businesses varied, each customer had ordered services (voice and/or data) from AT&T and also purchased services from the relevant ILEC. During those contacts, I asked the customers to describe their experiences and explain the circumstances that supported their belief that their service problems were the result of discriminatory treatment by an ILEC. Although my questions to customers were very general, many of the customers described similar scenarios, including:

- AT&T’s inability to get any response -- sometimes for weeks, and even months -
- for orders it had placed with the ILEC on behalf of customers;

- ILEC offers to provide the customer with facilities identical to those AT&T had ordered within significantly shorter time frames (*e.g.*, days versus months) if the customer was willing to purchase the local access facility directly from the ILEC;
- Untrue statements by ILEC employees seeking to justify the ILEC's failure to deliver facilities AT&T had ordered in a timely manner due to actions by the customer;
- Inconsistent responses on maintenance and outage issues depending on whether the facility was purchased from AT&T, or directly from the ILEC, with better response times provided when the use of a facility was purchased directly from the ILEC.

7. During my review, I spoke with a variety of customer representatives including business owners, office managers and, in a number of cases, managers responsible for information services for multiple business locations throughout the United States. Although most of these customers were willing to discuss their experiences openly with me, they were uniformly unwilling to "go on the record" with their stories. Specifically, I was told that customers feared to do so because (i) their companies relied on the ILEC for other vital services, (ii) they frequently had no other source from which to obtain those services, and (iii) public statements about possible discrimination could result in retaliation by the ILEC, which could result in business disruption.

8. Over the approximately sixteen months since the initiation of my inquiry, I have continued to talk with both AT&T account representatives and customers. Although I continue to hear experiences that are similar to those described above, none of the customers I have

spoken with have been willing to document those experiences for public use for reasons similar to those stated above.

I declare under penalty of perjury that the foregoing is true and correct.

Deborah S. Waldbaum
Deborah S. Waldbaum

Dated: This 12th day of February 2002.