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,

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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

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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

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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

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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

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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

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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

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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 polices.

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,

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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:

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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

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[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,

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[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

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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.

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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

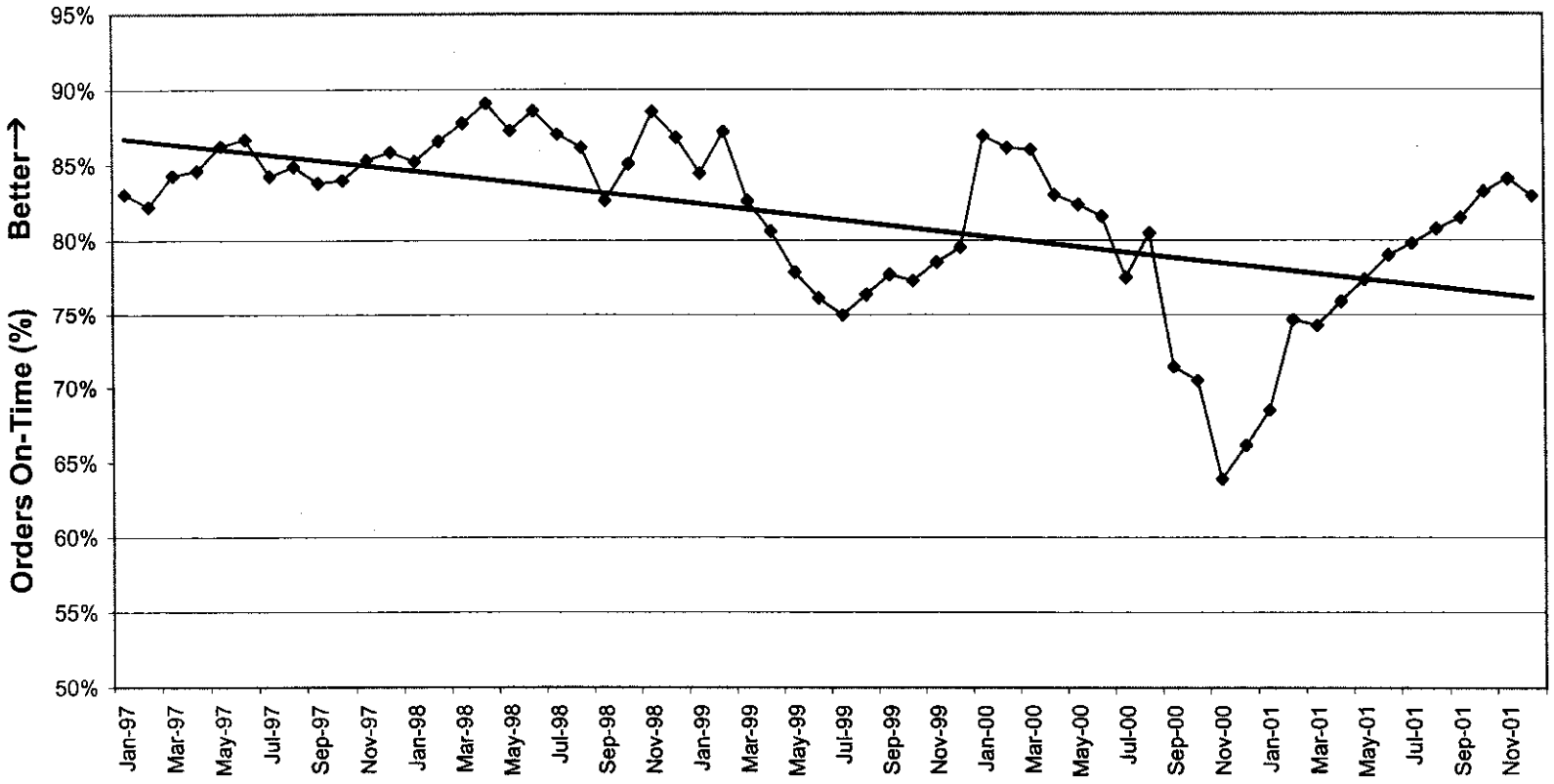
Maureen A. Swift

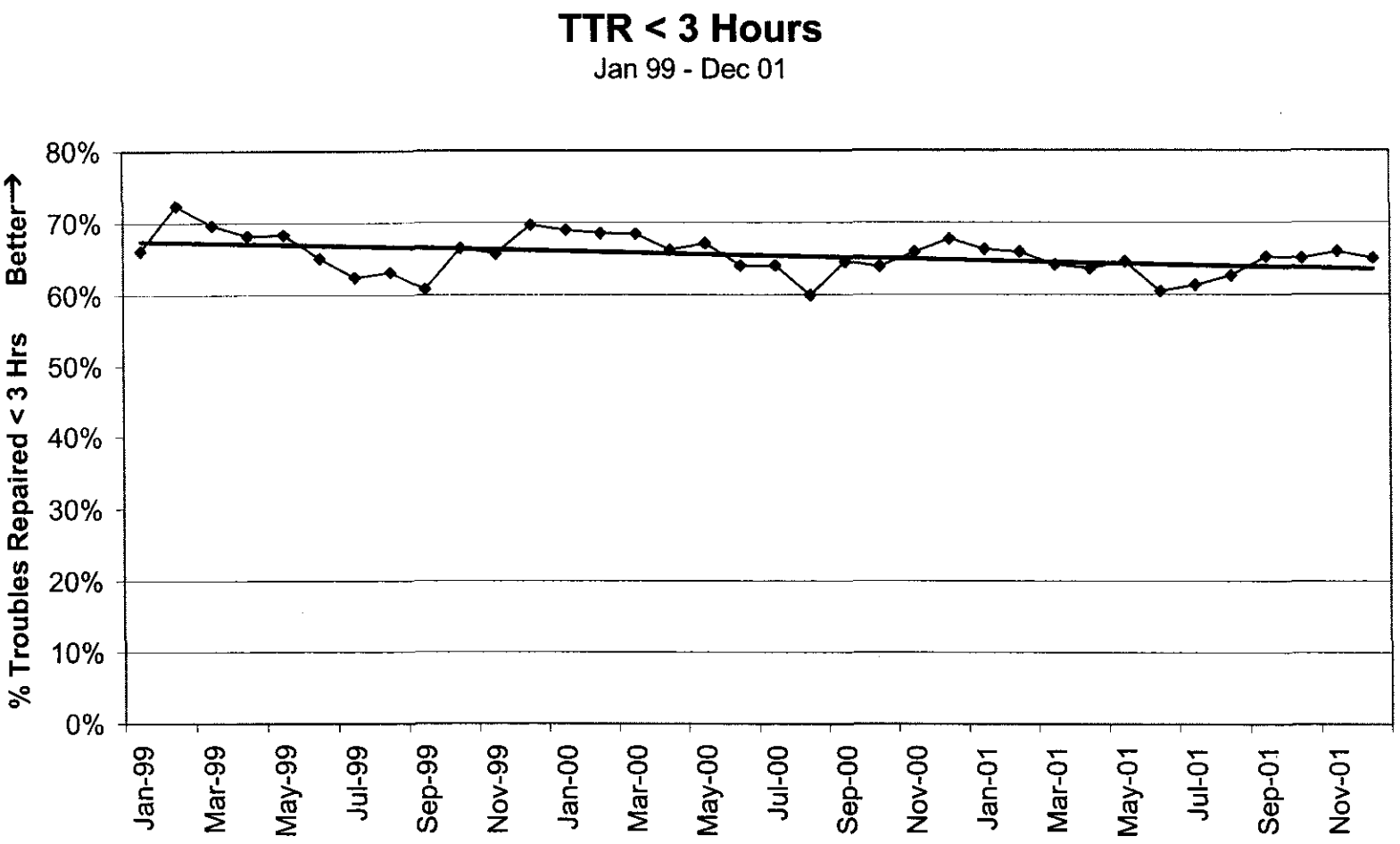
Dated: This 12th day of February, 2002.

ATTACHMENT A

DS1 On-Time Performance

Jan 1997 - Dec 2001




TTR < 3 Hours
Jan 99 - Dec 01
% Troubles Repaired < 3 Hrs Better→
80%
70%
60%
50%
40%
30%
20%
10%
0%
Jan-99
Mar-99
May-99
Jul-99
Sep-99
Nov-99
Jan-00
Mar-00
May-00
Jul-00
Sep-00
Nov-00
Jan-01
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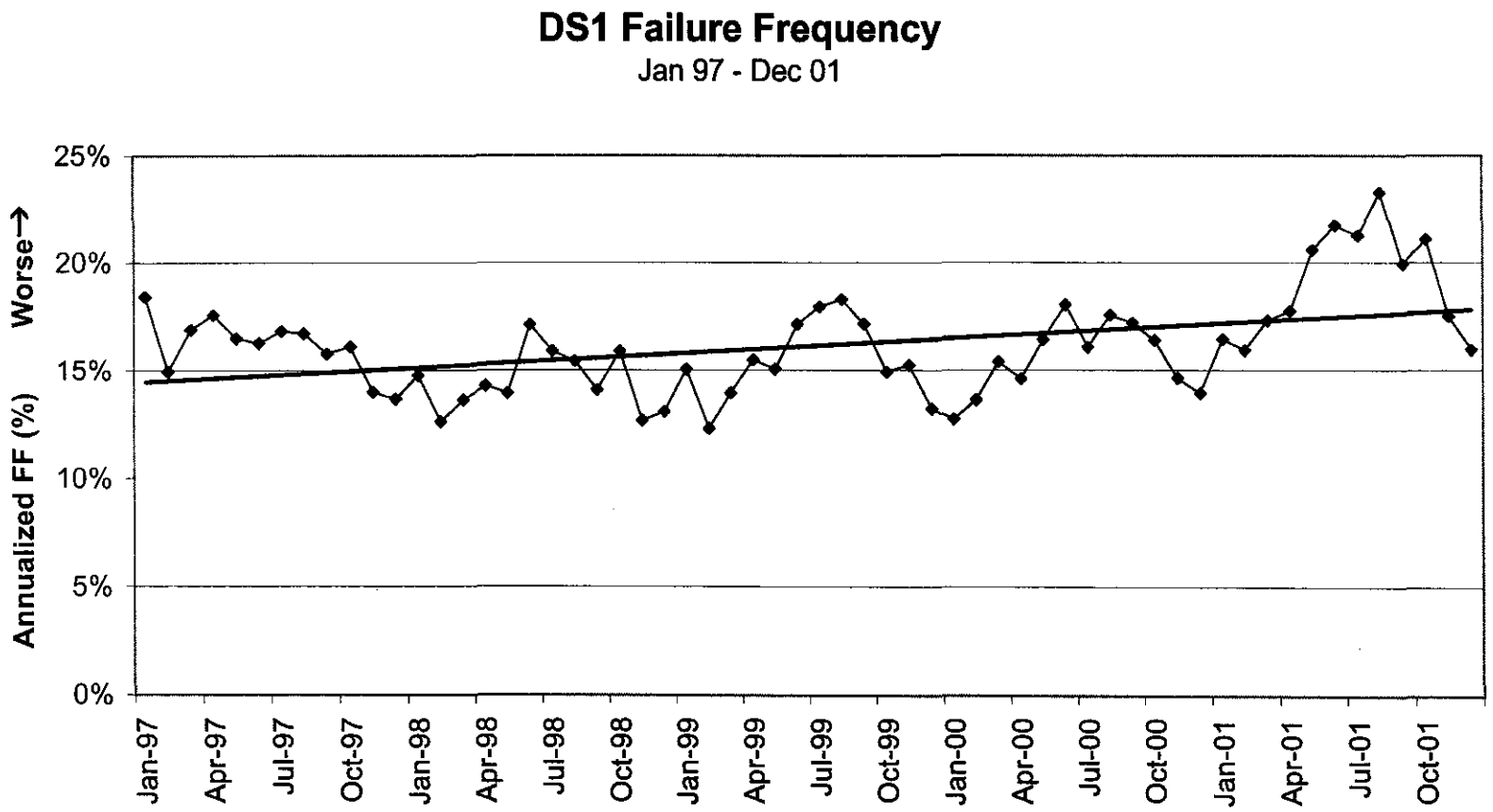
May-01
Jul-01
Sep-01
Nov-01


DS1 Failure Frequency
Jan 97 - Dec 01
Annualized FF (%)
Worse→
25%
20%
15%
10%
5%
0%
Jan-97
Apr-97
Jul-97
Oct-97
Jan-98
Apr-98
Jul-98
Oct-98
Jan-99
Apr-99
Jul-99
Oct-99
Jan-00
Apr-00
Jul-00
Oct-00
Jan-01
Apr-01
Jul-01
Oct-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.