BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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

REPLY COMMENTS OF TIME WARNER TELECOM AND XO COMMUNICATIONS, INC.

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AND XO COMMUNICATIONS, INC.

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REPLY COMMENTS OF TIME WARNER TELECOM AND XO COMMUNICATIONS, INC.

Time Warner Telecom Corporation ("TWTC") and XO Communications, Inc. ("XO") (collectively, "Joint Commenters"), by their attorneys, hereby submit these reply comments in response to the Notice of Proposed Rulemaking[1] in the above-referenced proceeding.

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1 *See Performance Measurements and Standards for Interstate Special Access Services*, Notice of Proposed Rulemaking, FCC 01-339 (rel. Nov. 19, 2001) ("NPRM").

I. INTRODUCTION AND SUMMARY

The comments filed by the ILECs in this proceeding are a study in evasion tactics. The ILECs brush off the possibility that service quality regulations are required with assertions that the market for special access is competitive. This competition, they assert, has caused them to work hard to tailor specific offerings to the needs of their special access customers and to voluntarily commit to binding performance standards and reporting.[2]

Of course, these arguments are utterly unencumbered by the facts. The ILECs ignore the fact that the Commission has repeatedly concluded that ILECs have market power in the provision of special access. They ignore the fact that, for most customers, they are the sole supplier of high-capacity end user connections, an essential input of production for most providers of local, long distance, and even special access. They also ignore the widely accepted economic principle, one that the Commission has embraced, that a firm with market power in the provision of wholesale inputs has the incentive to deny, delay, and degrade the quality of the inputs when provided to competitors.

To be sure, competition has developed in the provision of special access. Competitive providers of special access such as the Joint Commenters have built transport networks and in some cases even loop connections to end users. But in many cases, the Joint Commenters cannot build their own end user connections.[3] In such cases, the Joint Commenters are completely at the mercy of the ILECs. Moreover, as TWTC and XO explained in their comments, there are

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[2] As used herein, the terms "performance measurements," "standards," and "reporting requirements" all have the meaning attributed to them in the NPRM. *See* NPRM ¶ 1 and n.1.

[3] *See* Time Warner Telecom and XO Communications Comments at 4-7 (filed Jan. 22, 2002) ("TWTC and XO Comments").

currently no regulations constraining the ILECs' ability to engage in non-price discrimination. *See id.* at 41-47.

The ILECs' behavior in the marketplace demonstrates that they are under no pressure to provide good service quality when providing special access. As explained in the attached declaration of Tim Kagele, TWTC's Vice President for Carrier Relations and Interconnect Operations, notwithstanding its assertion to the contrary, SBC has not committed to binding and comprehensive special access performance quality measurements, standards, and reporting for TWTC.[4] Moreover, as explained in the attached declaration of Carolyn Marek, TWTC's Vice President for Regulatory Affairs for the Southeast Region, BellSouth has engaged in endless discussions, made repeated promises that agreement is just around the corner, and yet a year and a half has passed with no meaningful commitment to performance rules.[5] This is not the behavior of firms that feel the pressure of competition. This is the behavior of dominant firms with control over bottleneck facilities that are trying to give the appearance of cooperation to avoid regulation, or to increase competitors' costs by making them pay more for reasonable service quality. Even where ILECs provide reports on certain aspects of their service, those reports simply demonstrate the need for penalties for poor service. As Mr. Kagele explains, this is exactly TWTC's experience with Verizon's repair service for special access.

Finally, ILEC claims that the Commission lacks the authority to impose self-enforcing damages for failure to provide special access in accordance with performance measurements and standards are simply beside the point. The incentive plan described by the Joint Commenters in

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4 Declaration of Timothy Kagele on Behalf of Time Warner Telecom, ¶ 7 ("Kagele Declaration").

5 Declaration of Carolyn M. Marek on Behalf of Time Warner Telecom, ¶¶ 4-18 ("Marek Declaration").

their comments does not include any self-enforcing damages payments. Rather, it calls for automatic application of discounts and waivers of special access rates, a requirement the Commission can impose pursuant to its general authority under Sections 201, 202, and 205. It also calls for the issuance of Notices of Apparent Liability where ILECs fail to comply with defined service quality thresholds, a requirement that does not result in automatic damages payments and fully preserves the ILECs' due process rights.

II. ILEC CLAIMS THAT THEY HAVE NO INCENTIVE OR OPPORTUNITY TO DISCRIMINATE AGAINST COMPETITORS IN THE PROVISION OF SPECIAL ACCESS ARE UNFOUNDED.

In the comments, the ILECs assert that the special access market is competitive and thus the Commission does not need to adopt performance measurements or other regulations. *See* SBC Comments at 8-10; BellSouth Comments ¶¶ 19-40; Verizon Comments at 4-7. But these arguments blithely ignore the Commission's recent holdings that the ILECs have market power in the provision of special access, in particular high capacity end-user connections, and that the ILECs have the incentive to degrade the quality of their competitors' wholesale inputs. Moreover, the ILECs offer nothing new in this proceeding to doubt the correctness of past Commission decisions.

A. ILEC Arguments That They Lack Market Power In The Provision Of Special Access Are Easily Rejected.

The ILECs have repeatedly failed to convince the Commission that the special access market is competitive, and that the ILECs should be considered non-dominant carriers in this market. First, in the *UNE Remand* proceeding, the ILECs attempted to convince the Commission that they lack market power in the provision of high-capacity end user connections studies provided by Quality Strategies consulting group, they are nondominant in the provision of special access. For example, Bell Atlantic asserted that, by 1998, competitors had captured over 30 percent of the high capacity special access market. *Bell Atlantic Petition* at 7. SBC claimed that the CLECs had captured 36 percent of the special access market in its region. *SBC Petition* at 13-15. US West claimed that "the high capacity services market has evolved from a market containing only a few competitors into a highly competitive market containing many competitors," and that therefore it could no longer exercise market power in this market. *US West Petition* at 9. Finally, Ameritech claimed that the Chicago market was "highly competitive" and that an analysis of the Chicago market demonstrates that Ameritech could not exercise market power for high capacity services. *Ameritech Petition* at 11.

The Commission rejected these arguments. Although the BOCs were given pricing flexibility in the special access market, the Commission denied the petitions in all other respects.[8] The Commission found that the BOCs' petitions simply did not provide enough data to support the general conclusion that a competitive market exists. Specifically, the Commission found that it could not "rely on the BOC petitioners' market share information because they did

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[8] *Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, Petition of the SBC Companies for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Specified MSAs, Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Seattle Washington MSA, Petition of Bell Atlantic Telephone Companies for Forbearance from Regulation as Dominant Carriers in Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Washington, D.C., Vermont, and Virginia, Petition of Ameritech for Forbearance from Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA*, Memorandum Opinion and Order, 14 FCC Rcd 19947, ¶ 13 (1999), *remanded, AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001) ("*BOC Forbearance Order*"). Although the D.C. Circuit remanded this decision to the Commission for further review, it did so on the grounds that the Commission had only looked at market share data, and not other aspects of the traditional non-dominance analysis. *AT&T Corp. v. FCC*, 236 F.3d at 737. The court did not question the validity of the Commission's market share analysis, and there is no reason to believe that, when it examines other aspects of the traditional non-dominance test, the Commission will reach a different conclusion.

not provide any raw data underlying the market share claims presented in the Quality Strategies' reports." *BOC Forbearance Order* ¶ 25. The Commission also found that the BOCs' use of a "DS1 equivalent" to measure market share "overstates competitive inroads in a market by placing a disproportionate emphasis on DS3 circuits," and thus "fails to provide an accurate measure of competition for special access." *Id.* ¶ 27. Importantly, the Commission also found that the BOCs "distort the level of competitive entry to the extent they rely on loss of 'retail' market share," since retail providers may well continue to rely on the ILECs for the underlying facilities used to provide the services. *Id.* ¶ 29.

More recently, the ILECs rehashed the same tired arguments regarding competition in the provision of high-capacity end-user connections in a Joint Petition requesting the elimination of mandatory unbundling of high-capacity loops and dedicated transport.[9] The Joint Petition relies heavily on the so-called Special Access Fact Report, which purports to demonstrate that the ILECs lack market power in the provision of special access. Specifically, the Fact Report states that there are 349 competitive access providers, that CLECs' share of the market has grown to 36 percent, and that competitive carriers have "one or more fiber-based collocation arrangements in wire centers that cover at least 30 percent of the incumbent LECs' special access revenues in 60 percent of the MSAs in the country." *Fact Report* at 1. Finally, the Fact Report also claims that

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[9] USTA Report, Prepared for BellSouth, SBC, Qwest, and Verizon, Competition for Special Access Service, High-Capacity Loops, and Interoffice Transport, submitted as Attachment B to Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport, CC Docket No. 96-98 (filed Apr. 5, 2001) ("*Fact Report*"). The Joint Petition has been incorporated into the Commission's Triennial Review of its UNE policies. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, FCC 01-361, ¶ 12 (rel. Dec. 20, 2001).

there is widespread availability of alternatives to the ILECs' high capacity loops and interoffice transport, consisting of wholesale suppliers, CLEC facilities and fixed wireless connections. *Id.*

While the Commission has not yet addressed this analysis in an order, it is clear that it will reject this attempt just as it has the others. As AT&T has demonstrated, the Special Access Fact Report overstates both the availability of alternative facilities and the extent of competition generally.[10] Indeed, AT&T estimates that the CLECs' true market share in the special access market is only 21.8 percent, including revenue data from resale providers. But regardless of the true market share, the more important question is the extent to which ILECs control the underlying facilities. In this regard, AT&T notes that the Fact Report exaggerates the amount of local fiber deployed by CLECs. *AT&T Response to Fact Report* at 19-20. For example, the Fact Report states that Winstar is the largest deployer of fiber, when in fact only 30 percent of the fiber deployed by Winstar is local and the company has been in bankruptcy since April 2001. *Id.* at 20. Moreover, since AT&T conducted its analysis, more firms with fiber transport facilities listed in the Fact Report have been forced into bankruptcy.[11] AT&T also disputes the ILECs' claim that dedicated transport is competitively available as a result of collocation and that there

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[10] Reply Comments of AT&T Corp. on Use of Unbundled Network Elements to Provide Exchange Access Services, CC Docket No. 96-98, at 16-17 (filed Apr. 30, 2001) ("*AT&T Response to Fact Report*").

[11] For example, e.spire, Global Crossing, Network Plus, McLeodUSA, and Winstar have all filed for Chapter 11 bankruptcy within the last year. *See* e.spire Communications, Inc., Press Release, *Bankruptcy Court Approves Sale of e.spire Internet Subsidiary to George F. Schmitt* (Jan. 9, 2002); Jonathan Stempel, *Telecom Bond Woes Not Over Post-Global Crossing*, Reuters, Jan. 28, 2002; *Network Plus Says Files for Chapter 11*, Reuters, Feb. 5, 2002; Siobhan Kennedy, *McLeodUSA Files for Bankruptcy*, Reuters, Feb. 1, 2002; Winstar, Press Release, Winstar Files for Voluntary Chapter 11 Petition (Apr. 18, 2001). Additionally, other companies listed in the Fact Report, such as Level 3 and Williams Communications, are experiencing financial difficulties or are reportedly considering filing for Chapter 11 protection from their creditors. *See* Kennedy, *McLeodUSA Files for Bankruptcy* (noting that Level 3 recently issued a warning that it may violate a debt covenant, but hopes to avoid bankruptcy); Rebecca Byrne, *Williams Cos. Facing Tough Choices*, www.thestreet.com, Feb 5, 2002 (noting a 14 percent drop in Williams Communications' stock after lenders told the company that it might be in default on its credit agreement).

exists significant competition in those MSAs where the ILECs have been granted Phase II pricing flexibility. *Id.* at 27. Perhaps most importantly, the Fact Report offers no basis for concluding that the market for the provision of high capacity end-user circuits is competitive. The only data contained in the report, which concerns collocation and fiber deployed, does not by itself say anything about the competitiveness of loop facilities.[12]

Nor have the ILECs submitted any evidence in this proceeding that calls into question the Commission's past findings. For example, Verizon states that competitive special access providers' revenues in 2000 were over $7.3 billion. Verizon Comments at 4. This fact hardly demonstrates that ILECs lack market power in the provision of special access. It merely indicates the presence of some competitive entry. But as explained, competitive entrants are critically dependent on ILEC end user connections.

In addition, Verizon asserts that "most tellingly, collocation by facilities-based competitors is so prevalent that 80 percent of BOC special access revenue qualifies for Phase I pricing flexibility and nearly two-thirds qualifies for Phase II relief." *Id.* at 5. Qwest also relies on the grant of pricing flexibility to argue that the special access market is competitive and asserts that "[t]he extent of collocation provides a reasonable surrogate for actual measurements of competition." Qwest Comments at 8. But collocation data says nothing about whether competitors have actually deployed end-user connections.[13] If anything, the fact that a carrier

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[12] As TWTC and XO explained in their comments, their experience is that the market for high capacity end-user facilities remains dominated by the ILECs, since ILECs are often the sole providers of those facilities. *See* TWTC and XO Comments at 7-11.

[13] Moreover, since Phase I relief requires that at least one facilities-based collocator be present in at least 15 percent of the wire centers in an MSA, it follows that there is likely no competition at all in the remaining 85 percent

feels the need to purchase collocation from the ILEC indicates that the carrier must purchase end-user connections from the ILEC. In fact, if competitors were able to construct their own end-user facilities, there would be essentially no need for collocation.[14]

Similarly, BellSouth submitted in its comments a study on special access competition that relies on the amount of collocation CLECs have purchased.[15] Again, this evidence is utterly unhelpful. In addition, the BellSouth Study cites the amount of fiber deployed by competitors, which again says nothing about whether that fiber connects end-user locations. *BellSouth Study* at 3.

B. ILECs Have The Incentive And The Opportunity To Degrade The Quality Of Special Access Provided To Their Competitors.

Evidence of ILEC market power demonstrates the incoherence of BellSouth's assertion that it would have no incentive to discriminate against its competitors in the provision of special access because those carrier competitors are its largest special access customers. *See* BellSouth Comments at 15. Any incentive analysis of course must account for the costs and benefits an ILEC would experience as a result of engaging in non-price discrimination. It is true that, on the cost side, non-price discrimination would cause an ILEC to experience decreased revenue in terms of wholesale sales to competitor carriers. ILECs would also risk detection and punishment by regulators. But such losses would likely be more than offset by increased downstream retail

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of wire centers in an MSA with Phase I pricing flexibility. Even where a carrier has obtained Phase II pricing flexibility in an MSA, up to 50 percent of the wire centers could have no competitor present.

14 Where CLECs have already purchased collocation to obtain access to ILEC end-user facilities, they often exchange traffic with the ILEC using collocated equipment. These interconnection functionalities can, however, be performed using different physical arrangements that do not require collocation, such as meet point arrangements.

15 Special Access Competition, The Eastern Management Group, Comments of BellSouth, Attachment (filed Jan. 22, 2002) ("*BellSouth Study*").

revenues. As former Chief FCC Economist Michael Katz (writing with Stephen Salop) have concluded, an ILEC can earn a net profit from non-price discrimination. This is because, when competitor offerings are degraded and therefore are not as much of a competitive threat, the ILECs are free to increase profit margins in the retail market in which the competitors try to compete. For example, once competitor offerings are degraded, the ILEC can (1) expand output to serve demand formerly served by competitors; (2) retain current levels of output while raising prices; or (3) retain current levels of output and avoid price decreases that competition would have forced on the ILEC.[16] Indeed, Katz and Salop applied these principles to hypothetical examples featuring assumed (but developed based on empirical evidence) ILEC profit margins in wholesale and retail markets. They concluded that there is a very significant possibility that an ILEC could profit from non-price discrimination. *See* Katz & Salop at 28-32.

The Commission has fully accepted this logic.[17] As it has explained,

> Incumbent LECs have an incentive to discriminate against rivals to gain the business that these rivals lose as a result of such discrimination. This incentive exists in all retail markets in which they participate. Incumbent LECs' ability to discriminate against retail rivals stems from their monopoly control over key inputs that rivals need in order to offer retail services.

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16 *See* Declaration of Dr. Michael L. Katz and Dr. Steven C. Salop, *Using A Big Footprint To Step On Competition: Exclusionary Behavior And The SBC-Ameritech Merger*, Petition to Deny of Sprint, CC Dkt. No. 98-141, Attachment B at 18-28 (filed Oct. 15, 1998) ("Katz & Salop").

17 *See Applications of Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999), *vacated on other grounds, Ass'n of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) ("*SBC/Ameritech Merger Order*"); *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*").

SBC/Ameritech Merger Order ¶ 190; *Bell Atlantic/GTE Merger Order* ¶ 176. It is hard to imagine a clearer description of the dynamic at work in special access.

Nor is there any merit to the argument that ILEC wholesale systems are so standardized as to offer little opportunity for ILEC discrimination against competitor purchasers of special access. *See* Verizon Comments at 11.[18] In fact, Verizon itself states that it has "tailored its special access ordering and provisioning to accommodate the distinct preferences of its end-user and carrier customers." *See id.* at 17. This ability to tailor offerings to particular end-user needs would seem to offer the opportunity to discriminate against particular end-users. Moreover, as Dale Hatfield has explained, the ILEC networks are increasingly intelligent. This change increases opportunities to discriminate among long distance purchasers of access.

> But this very ability to customize means that the BOCs or other [ILECs] can "fine tune" their exchange networks to favor (a) their own interexchange operations over their interexchange carrier competitors and/or (b) their own end user customers over the end user customers of their interexchange competitors. Stated another way, the incumbent local exchange carriers . . . will have additional -- and generally more subtle -- methods of discrimination available to them.[19]

It is logical to conclude that the same level of discrimination could be achieved among all purchasers of ILEC wholesale inputs, including purchasers of special access that use that input to provide competitive local and/or long distance service.

But there are many other less sophisticated ways in which ILECs can discriminate among purchasers of special access. For example, the ILECs can slow roll CLEC requests for new

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[18] Of course, to the extent that the ILECs claim that all special access offerings are "exactly the same" (BellSouth Comments at 15; *see also* Verizon Comments at 11), they merely prove that the services provided to their carrier and end-user customers are "like" each other and must therefore be subject to parity performance standards under Section 202(a).

[19] Affidavit of Dale N. Hatfield on Behalf of MCI Telecommunications Corp., submitted as Exhibit to Comments of MCI Telecommunications Corp., CC Dkt. No. 97-137, at 5 (filed June 10, 1997).

arrangements that are out of the ordinary, or they can refuse to construct new facilities, or they can construct them slowly. No doubt there are many other means of harming CLECs; it is indeed impossible to predict all of the opportunities for anticompetitive behavior that will present themselves. But there can be no doubt that they will.

In the face of these fundamental realities, the ILECs lamely attempt to fall back on the argument "that the pricing flexibility triggers constrain an incumbent LEC's ability" to engage in non-price discrimination in the provision of special access. SBC Comments at 10; *see also* Verizon Comments at 7-8; BellSouth Comments at 14; Qwest Comments at 7-8. The Commission's pricing flexibility regime includes detailed regulations designed to prevent ILECs from engaging in unreasonable price discrimination in those parts of an MSA in which it retains market power after receiving Phase I or Phase II pricing flexibility. Those regulations include the requirement that ILECs continue to make service available at generally tariffed rates to all customers.[20] That requirement was expressly established to preclude ILECs from "abusing their *market power* by charging dramatically higher rates to customers that lack competitive alternatives." *Pricing Flexibility Order* ¶ 79 (emphasis added). In addition, the Commission established substantial restrictions on the extent to which an ILEC may deaverage its tariffed rates within a study area. *See id.* ¶ 62 (requiring that each zone account for at least 15 percent of an ILEC's trunking basket revenues in a study area).

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[20] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 79 (1999), *aff'd, WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) ("*Pricing Flexibility Order*").

But the *Pricing Flexibility Order* contained no such limitations on an ILEC's ability to engage in non-price discrimination in areas where it continues to have market power. Ironically, the presence of regulations preventing price discrimination only increase a dominant firm's incentive to engage in non-price discrimination. As Professor Marius Schwartz describes it, "regulation often is more capable of constraining an incumbent's price than non-price conduct, thereby biasing exclusion to take more wasteful non-price forms."[21] Thus, if anything, the pricing flexibility regime established by the Commission for special access *increases* the need for regulations that restrict ILEC opportunities to engage in non-price discrimination.

Finally, there is no need to take seriously BellSouth's makeweight claim that the past policy of not applying performance measurements, standards, reporting, and penalty requirements to special access shows that such requirements are unnecessary now. *See* BellSouth Comments at 8-10. For most of the pre-1996 Act period, the ILECs (with limited exceptions among the independent ILECs) did not provide special access to competitors. Competitors were in general prohibited from providing competitive local service, and the BOCs did not provide in-region long distance service because of the line of business restrictions in the MFJ. Where a firm is not competing with its wholesale customers, it does not have the incentive to engage in non-price discrimination. There was therefore no need for performance rules and penalties. The 1996 Act of course changed this situation by allowing competitors to enter the local market and by allowing the BOCs to enter the in-region long distance market (without any need to demonstrate that they provide special access on non-discriminatory terms and

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[21] *See* Marius Schwartz, The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets, 18 Journal of Regulatory Economics 247, 261 (Nov. 2000) ("Schwartz").

conditions). All ILECs, but especially large ILECs,[22] therefore have powerful incentives to engage in non-price discrimination that did not exist in anything close to the same magnitude before the passage of the 1996 Act.

C. The ILECs Offer No Basis For Concluding That They Have Improved Service Quality Monitoring In Response To Increased Competition.

In a vain attempt to demonstrate that they have responded to what they claim are the pressures of competition, the ILECs cite to various voluntary commitments to meet performance requirements. But the obviously deficient nature of these commitments simply proves the utter bankruptcy of the ILECs' position.

For example, SBC and Verizon claim that they have voluntarily committed to providing their competitors with special access service quality performance reports. *See* SBC Comments at 12-13; Verizon Comments at 9. In fact, SBC states that it "negotiated [a] special access performance plan[] with Time Warner [sic]" which it claims was "tailored specifically to" TWTC's "needs." SBC Comments at 12-13. But as explained in the attached declaration of Tim Kagele, this is simply untrue. SBC provides TWTC with generic monthly reports that track such things as on-time provisioning, failure frequency, repair restoral, repeat troubles, and percent circuit availability. Kagele Declaration ¶ 8.

But SBC is not legally bound to provide these performance measurement reports. It can therefore stop providing them at any time, change the definitions in measurements and reporting format unilaterally, and indeed even misrepresent performance (inadvertently or otherwise) without consequence. Nor does SBC suffer any financial penalties for failure to meet the

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22 *See* Comments of TWTC and XO at 15 (summarizing the big footprint theory).

performance standards in the performance reports it provides to TWTC. *Id.* Furthermore, the reports provided to TWTC are not tailored to TWTC's needs, but simply track categories of performance that SBC had previously agreed to track for larger special access customers. *Id.* TWTC has been in discussions with SBC for the past several months in an attempt to obtain binding reporting commitments that meet TWTC's needs. It has not obtained any such commitment from SBC. *Id.* ¶ 7.

SBC's reliance on the performance measurements and penalties in its tariffs is no more convincing. *See* SBC Comments at 11-12. SBC points to the fact that it has included performance measurements and "penalties" in its special access tariff for on-time installation and service interruption. *Id.* at 11. As Tim Kagele explains, however, SBC's tariff offers no performance measurements on many critical aspects of wholesale service, such as timely receipt of firm order confirmations, repeat trouble reports, past due circuits, and new installation failure rates. Kagele Declaration ¶ 4.

Moreover, while SBC offers more extensive performance measurements and penalties in its Managed Value Plan ("MVP") tariff, Mr. Kagele explains that this offering is essentially unavailable to competitors. *Id.* ¶ 5. For example, the SBC-Ameritech MVP tariff requires that a customer commit to a 5 year term and meet a minimum annual billing requirement of $10 million. Although TWTC purchases a significant amount of special access, it cannot meet that annual billing requirement. Indeed, it would seem highly unlikely that any carrier, except possibly one of the big three long distance carriers could meet this requirement. Even in the unlikely event that a competitor could meet these requirements, unreasonable access-to-wholesale ratio requirements and high early termination penalties essentially poison pill the MVP tariff for competitors.

Additionally, TWTC's experience in trying to obtain binding and comprehensive performance reports from BellSouth further demonstrates that the ILECs generally have no intention of making such commitments. As explained in the declaration of Carolyn Marek, fully 18 months after TWTC and BellSouth began negotiating performance measurements and penalties, BellSouth still has not committed to a set of mandatory performance measurements and penalties. Marek Declaration ¶ 18. As with other ILECs, BellSouth has simply tried to create the appearance of working with individual customers to avoid regulation while not making genuine commitments to performance rules. Indeed, BellSouth has insisted on conditioning any commitment to improved service on TWTC meeting revenue goals. *Id.* ¶¶ 7, 10. In other words, BellSouth has insisted that TWTC bear the expense of purchasing more service as a way of addressing the degraded nature of the service. This is simply unacceptable to TWTC.

In addition, as Mr. Kagele explains, TWTC's experience with Verizon's deficient repair service for special access demonstrates that, where ILECs do provide performance reports for special access, it becomes clear that they are subject to no real pressure to improve service. Kagele Declaration ¶¶ 12-15. As Mr. Kagele explains, despite numerous meetings between TWTC and Verizon, Verizon's mean time to repair remains above 8 hours, a level more than twice what TWTC deems the bare minimum level of acceptable performance and fully four times what is truly appropriate.[23]

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[23] *Id.* ¶ 15; *see also* JCIG Proposal at 13 (proposing a standard of 2 hours MTTR for below DS3, and 1 hour for DS3 circuits and above).

III. ILEC CLAIMS THAT SPECIAL ACCESS PERFORMANCE REQUIREMENTS WOULD DISTORT COMPETITION ARE BASELESS AND SHOULD BE REJECTED.

The ILECs make two related assertions regarding the effect of performance rules and penalties on competition in the provision of special access service. First, they claim that the imposition of performance rules would deprive ILECs of the opportunity to design their special access offerings to meet the needs of their individual customers. *See* BellSouth Comments at 11-13; SBC Comments at 14-16. Second, they argue that, if imposed only on ILECs, performance rules would place ILECs at an unfair competitive disadvantage vis a vis competitors such as XO and TWTC. From this second point the ILECs conclude that performance rules should at least apply to all providers of special access. *See* BellSouth Comments at 11-12; Verizon Comments at 12. Both of these claims are utterly baseless.

To begin with, ILECs have done little to date to utilize the "opportunity" to meet individual customers' service quality needs. But should they choose to do so, having standardized performance rules and penalties in place would do little to limit the ILECs' flexibility to design customized offerings to customers. All that performance rules and penalties ensure is that a customer that wishes to take advantage of the performance measures, standards, reporting requirements, and penalties in the ILEC tariffs may do so. They perform the exact same function for non-price discrimination that tariffed rates perform for price discrimination. Of course, in either case, an ILEC that has received Phase II pricing flexibility in an MSA is free to enter into a service contract with a particular customer in which it offers price or service quality commitments that differs from those in the tariff. If the customer agrees, then neither the tariff prices nor the tariff service quality requirements would apply to the customer. Thus, performance rules and penalties would only deprive ILECs of the flexibility to deny customers without competitive alternatives any meaningful and binding performance commitments.

Moreover, the ILECs' claim that performance rules and penalties applied only to ILECs would result in a competitive imbalance between ILECs and competitive providers of special access is ridiculous.[24] The performance rules and penalties proposed by the Joint Commenters are designed to track ILEC performance in the provision of high-capacity end user connections for which are there no alternatives to the ILEC network. ILECs cannot suffer a competitive disadvantage in the provision of these facilities because there is little or no meaningful competition for the provision of these facilities.

ILEC assertions that the cost of imposing reporting requirements on special access would be prohibitive are also not credible. *See* Verizon Comments at 12; BellSouth Comments at 4 (stating that carriers subject to reporting requirements "would find themselves with a cost structure that is not competitive"); *id.* at 11; SBC Comments at 4 (describing costs as "enormous"). As Mr. Kagele explains, the BOCs are generally required to report on their performance in the provision of interconnection trunks, facilities that are ordered via access service requests ("ASRs"). Kagele Declaration ¶ 17. Special access is ordered using ASRs as well. Thus, Mr. Kagele explains that the incremental cost of reporting on special access performance should be quite small. *Id.* This is even more the case since, as they assert, the ILECs already provide some performance reports on special access. *See* Verizon Comments at

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[24] Of course, as explained in the TWTC and XO Comments, CLECs have no incentive to degrade the quality of their special access service, since CLEC customers that receive bad service can always switch to another carrier (the ILEC is always an option). TWTC and XO Comments at 31-32. Thus, there is no need to apply performance rules to CLECs' special access. *See id.*

9; SBC Comments at 12-13. As explained these reports are not generally of much help to CLECs, and in TWTC's experience have not been tailored to customer needs. But the ILECs have unquestionably established the capability to perform the reporting function for special access. Standardized reports that are comprehensive and binding would therefore add few incremental costs, and even then would likely be largely or completely canceled out by cost savings resulting from the elimination of existing (but ineffective) special access ARMIS reporting requirements. The ILECs' true concern, therefore, is the expense they would incur from penalties and enforcement actions that would apply and be brought if reporting requirements were comprehensive, binding, and effective.

Nor is it any answer to assert that CLECs must be required to incur the costs of performance rule compliance to level the playing field with ILECs in the provision of retail service. To begin with, given the ILEC's control over bottleneck facilities and their ability to harm competitors, it is absurd to speak in terms of the need to introduce regulation to tilt the playing field in their favor. But even if this were not the case, this is simply not an efficient basis for intervening into the market. As Professor Farrell has described it (in an analogous context), when designing rules to establish a level playing field for competition,

> [i]t's important that the playing field should be leveled upwards, not downwards. Like most economists, I am uncomfortable with rules that forbid a firm from exploiting efficiencies just because its rivals cannot do likewise. Such handicapping, or leveling without regard for up or down, may make for a good game, but the game is only a metaphor. When firms are hamstrung, even in order to equalize them with other firms, consumers are liable to lose out.[25]

[25] Joseph Farrell, *Creating Local Competition*, 49 Fed. Comm. L.J. 201, 212 (1996) ("Farrell").

In other words, it makes no sense to introduce regulations solely for the purpose of increasing some firms' costs. The ILECs already have enough opportunities to do this on their own.

IV. THE ESTABLISHMENT OF PERFORMANCE RULES AND PENALTIES FOR ILEC SPECIAL ACCESS IS FULLY CONSISTENT WITH THE GOALS OF THE ACT.

The ILECs make much of the fact that one of the goals of the Communications Act is the reduction of regulation. They assert that establishing performance rules and penalties for special access would somehow conflict with the broader goals of the Act. *See* Qwest Comments at 3-6; SBC Comments at 5-8. But this is nonsense. To begin with, special access is purchased under the 1934 Act provisions, Sections 201 and 202. Congress did not express a deregulatory goal in establishing those provisions. More importantly, the goals of the 1996 Act are to establish a "pro-competitive, de-regulatory national policy framework" for the United States telecommunications industry.[26] But it is clear that Congress intended regulation to play an extremely important role in disciplining ILEC behavior until such time as competition could be adequately relied upon to ensure efficient outcomes. As Senator Ernest F. Hollings explained, "competition is the best regulator of the marketplace. But until that competition exists, until markets are opened, monopoly-provided services must not be able to exploit the monopoly power to the consumers' disadvantage."[27]

The local competition provisions of the 1996 Act of course reflect the important role of regulation in the introduction of local competition. Section 251(c) imposes extensive and intrusive behavioral regulations on the ILECs. Congress deemed these obligations necessary to

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26 *See* S. Conf. Rep. No. 104-230, at 1 (1996).

27 *See* 141 Cong. Rec. S7894 (daily ed. June 7, 1995).

ensure that competitors can obtain access to the inputs they need to compete. Moreover, the Commission has repeatedly recognized the importance of performance rules and penalties in ensuring that the ILECs comply with these obligations.[28] Given that special access circuits must, as explained by the Joint Commenters, be viewed for these purposes like a category of UNE, the logic of the 1996 Act dictates that the same regulations should apply to ILEC provision of special access.

Indeed, the only way the Commission can advance the deregulatory goal of the 1996 Act is to ensure that the facilities-based competitors like TWTC and XO are able to obtain the inputs they need to serve their customers. If this occurs, competitors can develop economies of scale and scope that will allow them to build more facilities. When enough alternative facilities are in place, the need for regulation will be eliminated and regulators can allow markets to discipline carrier behavior. As Professor Farrell described it when working as the Chief Economist at the FCC during the initial implementation of the 1996 Act,

> The point is that the procompetitive interconnection and unbundling rules, like the procompetitive antitrust laws, swim upstream against some powerful anticompetitive forces. So we need to implement rules to make sure those forces don't win out. That's why we're up late and why we're busy, and why Congress had to sound regulatory in what, in the long run, will indeed be an extraordinarily deregulatory Act.

Farrell at 212.

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[28] *See SBC-Ameritech Merger Order* ¶¶ 422, 428; *Bell Atlantic/GTE Merger Order* ¶ 328.

V. ILECS OFFER NO BASIS FOR DOUBTING THE COMMISSION'S AUTHORITY TO ADOPT THE RULES AND PENALTIES PROPOSED BY THE JOINT COMMENTERS.

The ILECs make several legal arguments intended to limit the enforcement of performance rules for special access. Each of these arguments is either meritless or irrelevant to the TWTC/XO proposal. First, although it concedes that the Commission has the authority to require ILECs to include performance rules in their special access tariffs, BellSouth asserts that such a tariff prescription must be the result of "LEC-specific analysis" rather than a general rulemaking. *See* BellSouth Comments at 22. But this is simply wrong. The Commission may satisfy the "hearing" requirement in Section 205 with a rulemaking where it addresses issues that are generic in nature and common to all carriers subject to the regulation in question.[29] This is exactly the case here. All Class A ILECs (*i.e.*, those subject to the regulations in this proceeding) are dominant providers of special access and, as explained, all have the incentive to engage in price and non-price discrimination. Just as the Commission was free to prescribe safeguards against ILEC price discrimination in the provision of special access in the *Pricing Flexibility Order*, so here the Commission has the authority to do so for non-price discrimination.

Second, all of the ILECs argue that the Commission lacks the authority to impose a scheme that includes self-enforcing damage payments and forfeitures on the ILECs. *See* SBC Comments at 1 n.1; BellSouth Comments at 24-25; Verizon Comments at 21-23; Qwest Comments at 11-16. Even if true, this in no way affects the plan proposed by TWTC and XO.

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[29] *See American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 22 (2nd Cir. 1978) (finding that the Section 205(a) requirement to hold a hearing is satisfied by a rulemaking proceeding where the purpose of the proceedings is to establish policy that applies to a class of carriers or services, rather than to adjudicate a matter).

The rate discounts and waivers that would apply under that proposal would be established pursuant to the Commission's general authority to ensure that rates, terms and conditions of interstate service are just and reasonable and not unjustly or unreasonably discriminatory. *See* 47 U.S.C. §§ 201(b), 202(a). The discounts and waivers would not be damage awards and would not therefore be subject to the procedural requirements applicable to a party seeking an award of damages. Any carrier harmed by poor special access service quality could of course seek such damages in a Section 208 complaint. Such a claim would be completely distinct from and unrelated to a discount or waiver that may apply as a result of the incentive plan.

There is also nothing in Section 503 or anywhere else in the Act that prevents the Commission from establishing guidelines for forfeitures that the Commission would seek (not impose) when an ILEC's service level reaches a specified level of degradation. ILECs would have the opportunity to justify their failure to meet the applicable service quality standard in response to a notice of apparent liability. ILEC due process rights would not in any way be violated. Moreover, by defining the nature of their obligations and specifying the level of the fine should such a violation be unjustified, the Commission would provide greater predictability and transparency to the enforcement process.

Finally, ILEC claims that the complaint process provides an adequate protection against discrimination are easily rejected. *See* Verizon Comments at 21, n.51. As explained in the Joint Commenter comments, TWTC's experience in the accelerated docket context illustrates that complaint proceedings are simply not viable in the absence of clear performance rules. *See* TWTC/XO Comments at 48-51. For example, the reports that TWTC had received from BellSouth indicated that BellSouth failed to meet the customer desired due date (*i.e.*, the date requested by TWTC) about 25 percent of the time. In order to demonstrate that this level of service was discriminatory, TWTC at the very least needed data on the percentage of customer desired due dates met for BellSouth's other customers. But that information was not available, since ARMIS reports only include the percentage of committed due dates (*i.e.*, the date that an ILEC commits to provision a special access circuit). *See id.* at 49-50. Moreover, data on the percentage of ILEC committed due dates met is of limited utility since the ILECs are free to choose whatever due date they like and need not even include standard intervals in their tariffs. Furthermore, TWTC had a very difficult time obtaining reporting from BellSouth regarding the timeliness of FOCs. Once it finally obtained such reports (after filing the accelerated docket request), they showed terrible performance in this category. *See id.* at 50 n.71. Yet there was no performance benchmark against which to compare this performance, and BellSouth could (and did) simply claim that it was under no legal obligation to provide FOCs for special access in a timely manner. It was therefore very difficult to try to document whether BellSouth or any other ILEC provided special access service on terms and conditions that are reasonable and nondiscriminatory. Only performance rules can address this problem. Moreover only a performance incentive plan such as the one described by the Joint Commenters can create the incentive for ILECs to comply with performance standards without imposing substantial and unnecessary litigation costs on the industry and regulators.

VI. CONCLUSION

The Commission should adopt performance rules and self-enforcing penalties applicable to special access services provided by Class A ILECs in the manner described in the TWTC/XO comments in this proceeding.

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