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

In the Matters 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 for 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 Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

COMMENTS OF
CABLE & WIRELESS USA, INC.

Audrey Wright
CABLE & WIRELESS USA, INC.
Director, Domestic Regulatory Affairs
1130 Connecticut Ave., NW, Suite 1201
Washington, DC 20036
(202) 912-2471
(202) 530-8094

Steven A. Augustino
Ronald J. Jarvis
KELLEY DRYE & WARREN, LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
(202) 955-9895 (voice)
(202) 955-9792 (facsimile)

Dated: January 22, 2002

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SUMMARY

Cable & Wireless strongly recommends that the Commission adopt a set of performance measurements and standards governing incumbent local exchange carrier ("ILEC") provisioning of special access services. Any performance measurements should be backed by vigorous enforcement mechanisms to provide the ILECs with meaningful incentives to meet these standards.

FCC-endorsed performance metrics and enforcement mechanisms are critically needed at this time for several reasons. First, although competitive access providers have existed for some time, they do not reach a sufficient number of the critical end user buildings for carriers such as Cable & Wireless to utilize them exclusively. Cable & Wireless estimates that its non-ILEC vendors, for example, have exclusively their own fiber facilities into only two percent of the office buildings nationwide.

Second, for over two years, Cable & Wireless has experienced significant problems in obtaining special access services in a timely and reasonable manner. In many instances, ILECs routinely failed to meet their promised due dates for provisioning special access services over 40 percent of the time. Moreover, circuits frequently were provisioned in intervals substantially longer than the published "standard" installation period. These failures harmed Cable & Wireless and delayed its ability to provide IP-based services to customers.

Although Cable & Wireless has attempted to rectify these issues on a business level ILEC performance did not improve to satisfactory levels.

Cable & Wireless is now pursuing its enforcement options – and has filed a formal complaint with the Commission for the most egregious case. Nevertheless, meaningful improvement in ILEC special access provisioning is not likely to result solely through the

enforcement process or through business to business discussions. In order to ensure that special access is provided on a satisfactory level nationwide, the Commission should step in now, and establish a clear set of performance standards applicable to all ILECS. The ILECs' performance in meeting requests for special access should be tracked through a uniform set of performance measures and backed by a meaningful enforcement mechanism.

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COMMENTS OF
CABLE & WIRELESS USA, INC.

Cable & Wireless USA, Inc. ("Cable & Wireless"), by its counsel, hereby submits its Comments in the above-captioned matter. As discussed in greater detail below, Cable & Wireless strongly favors the adoption of performance measurements, standards and concomitant enforcement mechanisms governing incumbent local exchange carrier ("ILEC") provisioning of special access services. Indeed, Cable & Wireless believes that the adoption of performance

measurements and standards is critical to ensuring that special access services are provisioned in a just, reasonable and non-discriminatory manner.

BACKGROUND

Cable & Wireless provides a variety of services to business customers, including, but not limited to, Internet access, high-speed data transmission, video conferencing and voice telephony. Over the last decade, Cable & Wireless has successfully transitioned from its traditional heritage as a major telecommunications provider to become one of the global leaders in Internet Protocol (IP) networks and services. In the United States alone, Cable & Wireless has made more than a half billion dollar investment annually in recent years. Much of this investment has been used to transform a legacy IP infrastructure acquired from MCI into one of the largest and most advanced IP backbone networks in the world. Cable & Wireless has replaced the MCI infrastructure with a state-of-the-art network that offers 16 times more capacity than the original offered in 1998. Currently, this network has 51 nodes in operation (23 in the U.S. alone), and, when complete, will operate at OC-192 (9.6 Gps) capacity and incorporate 84 international nodes within the same autonomous system assigned to Cable & Wireless's IP infrastructure.

Utilizing its enhanced network, Cable & Wireless can offer its customers fully managed, collaborative Internet technology solutions, such as Internet access, web hosting, data equipment, applications and support services. With its recent merger with Digital Island, Cable & Wireless is now positioned to offer a comprehensive range of IP/data transport, hosting, content delivery and other value added services. Cable & Wireless does not own or operate local access facilities. Thus, the company cannot provide its services without timely and reliable "last mile" dedicated

access to its customers. Cable & Wireless must rely special access services provisioning by ILECs throughout the United States in order to obtain this critical link.

Cable & Wireless has a particularly urgent interest in the present rulemaking proceeding because of the highly unsatisfactory experience it has had in purchasing special access services from ILECs such as Verizon. In fact, Cable & Wireless' data show that since June 1999, Verizon has failed to provision new special access circuits within the promised interval nearly *half* of the time. On September 4, 2001, Cable & Wireless filed with the Commission a formal complaint, naming Verizon as a defendant, and alleging, *inter alia*, repeated violations of Sections 201(b), 202(a), 203, 251(g) and 272 of the Communications Act of 1934, as amended (the "Act"),[1] for Verizon's repeated and ostensibly deliberate failures to provision special access on a just, reasonable, timely and non-discriminatory basis. Cable & Wireless' experience in obtaining special access services from ILECs such as Verizon underscores the need for Commission intervention in the special access arena to prevent unreasonable behavior by ILECs that hinder the growth of broadband and IP-based services.

DISCUSSION

I. ADOPTION OF PERFORMANCE MEASUREMENTS AND STANDARDS FOR ILEC SPECIAL ACCESS PROVISIONING IS NECESSARY TO FOSTER THE WIDESPREAD AVAILABILITY OF BROADBAND TELECOMMUNICATIONS AND IP-BASED APPLICATIONS AND SERVICES

A. Local Access Remains a Bottleneck

Although Cable & Wireless has deployed one of the most advanced Internet backbone networks in the world, Cable & Wireless is not a CLEC and does not have local distribution facilities of its own. Cable & Wireless remains dependent upon other providers for the critical

[1] *Cable & Wireless USA, Inc. v. Verizon New York, Inc., et al.*, FCC Docket No. EB-01-MD-022 (filed September 4, 2001).

local access connections needed to connect customer premises to Cable & Wireless' backbone network. Due to the poor performance of ILECs in provisioning special access services, Cable & Wireless makes use of alternative (non-ILEC) special access providers whenever possible. In fact, before placing an order with an ILEC, Cable & Wireless personnel first check whether the services can be provisioned by a competitive access provider. If such facilities exist, Cable & Wireless places the order with the non-ILEC vendor. If, however, the vendor relies upon the ILEC's facilities in whole or in part, Cable & Wireless generally deals directly with the ILEC and places the order on its own behalf. Despite this preference for using competitive access providers whenever possible, non-ILEC vendors accounted for only a small percentage of Cable & Wireless' total installations in 2001: Verizon still accounts for over 40% of Cable & Wireless' total circuits nationwide. Clearly, if non-ILEC circuits were more widespread, Cable & Wireless would be much less dependent upon the ILECs' special access services.

The reasons for the ILECs' dominance are patently clear when one looks at the buildings covered by ILEC and non-ILEC special access vendors. There are more than 750,000 office buildings in the United States.[2] Cable & Wireless' records indicate that the competitive access providers it uses presently serve only about 14,805 street addresses with their own fully-independent fiber facilities. This is less than two percent of existing office buildings.[3] Moreover, no single vendor serves more than 5,700 buildings nationwide.

Furthermore, there are no realistic alternatives to fiber access. Wireless technology cannot yet deliver reliably the speeds required for advanced services. Cable modem services

[2] *See Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, FCC 00-366 (released October 25, 2000) at ¶ 10, *citing Access to Buildings and Facilities by Telecommunications Providers: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce,* 106th Cong. 24 (1999) (Written Testimony of William J. Rouhana Jr.).

may represent a substitute for broadband for residential consumers, but not for businesses. Thus, it is simply not accurate to claim, as ILECs and their representatives are wont to do, that ready alternatives exist to ILEC special access provisioning. Where usable alternatives exist, competitive companies such as Cable & Wireless already make use of them; however, for the foreseeable future, both interexchange carriers ("IXCs") and competitive local exchange carriers ("CLECs") will depend heavily upon ILEC special access. Therefore, reasonable, timely and economical provision of special access by ILECs will continue to be absolutely crucial to the survival and development of competitive telecommunications services.

B.

C. Available Evidence Demonstrates Unsatisfactory ILEC Performance In Provisioning Special Access

Cable & Wireless, along with other purchasers of special access services, has experienced a decline in ILEC special access performance in recent years.[4] As explained in Cable &

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[3] 14,805/750,000 = .01974, or less than two percent.

[4] *See* Comments of the Competitive Telecommunications Association in *Application by Verizon New England Inc. et al. for Authorization to Provide In-region, InterLATA Services in Massachusetts,* CC Docket No. 01-9 (submitted February 6, 2001) ("CompTel MA 271 Comments") at 3:

> Cable &Wireless USA (C&W USA) has continued to experience persistent and extended delays in the installation of special access services ordered from Verizon. In fact, Verizon has missed the due date on over half of the DS1 circuits ordered by C&W USA, for most of the past 18 months (region-wide). During this time, Verizon's average provisioning interval for DS1 circuits to C&W USA was almost ***twenty days*** -- more than twice the standard provisioning interval for such circuits according to Verizon's interstate access tariffs.
>
> Verizon's performance in Massachusetts was no different. There Verizon has missed its own due date for provisioning DS1 circuits to C&W USA more than 50% of the time over the past six months. Furthermore, the provisioning intervals for DS1 circuits have been as long as 43 days, with an average interval of over ***26 days*** (almost three times the tariffed interval). Even while under the section 271 spotlight in December, 2000, Verizon only managed to provision only two-thirds of both the DS0 and DS1 circuits ordered by C&W USA on time.

Wireless' comments in Verizon's 271 application for Massachusetts, this decline appears to come in part as a by-product of an ILEC's focus on obtaining 271 relief in the state. Nevertheless, the trend seems to be both persistent and nationwide. Cable & Wireless has summarized (see Exhibit 1, attached hereto) presently-available ILEC special access performance data reported by ILECs and collected by the FCC as part of its ARMIS 43-05 reports in order to illustrate the nature of the problem faced by competitive carriers in attempting to obtain special access from ILECs. The FCC's ARMIS 43-05 reports require price cap LECs to report, *inter alia*, (i) the percentage of installation appointments met for special access, (ii) the average installation days for special access, and (iii) the mean time to repair for special access. As can be seen from the Exhibit, all three of these measures on average show a decline since 1997. In 1997, price cap LECs reported a 90.7% on-time performance; in 2000 (the most recent year), it was 85.6%. Average installation days rose from 14.6 days in 1997 to 23.1 days in 2000, nearly a 59% increase! Similarly, repair times increased from 4.6 hours on average to 5.3 hours for the same period. These data confirm what Cable & Wireless and other carriers have contended: ILECs are fulfilling fewer of their installation promises, and are taking longer to provide the services. This trend must be reversed if the Commission is to see the benefits that broadband can provide.

State Commissions that have examined ILECs' special access performance have expressed their concern over declining and apparently discriminatory provisioning of special access services. State Commissions in New York and Texas have ongoing dockets examining the dominant ILEC's special access services.[5] In addition, the Massachusetts Department of

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Also see Affidavit of Theresa Hennesy, Vice President of Service Delivery for Cable & Wireless USA, annexed to CompTel MA 271 Comments.

[5] *See Proceeding on Motion of the Commission to Review Service Quality Standards for Telephone Companies,* Order Adopting Revisions to Inter-Carrier Service Quality Guidelines,

Telecommunications and Energy has ordered Verizon to report performance data for interstate special access services in the same manner as it currently reports data on intrastate special access services.[6]

In New York, the Public Service Commission ("NYPSC") recently affirmed a June 15, 2001 decision concluding that Verizon's own reported performance data suggests Verizon is discriminating in favor of retail special access customers.[7] The NYPSC stated:

> Neither does Verizon provide new data or show errors of law with respect to the discrimination issue. Verizon merely reiterates its claim that it provisions service equally with competitors and its own retail customers. Verizon claims that average delay day results evidence no discrimination because all customers, on average, realize the same number of delay days. AT&T points out that average delay day results provide perspective on only a piece of the equality issue: how long after an installation commitment is missed that on average, service is provided. It gives no perspective on overall installation performance such as that provided by the Percent On Time Performance metric (SS-PR-1). It was on the basis of performance under the On Time Performance metric that we concluded Verizon treats other carriers less favorably than its retail customers.[8]

Cable & Wireless' own experiences confirm the negative trend illustrated by the ARMIS data and motivating the state inquiries. In Verizon territory, for example, Cable & Wireless has received especially poor service in violation of both Verizon's tariffed commitments and its obligations under the Act. As Cable & Wireless described in its FCC complaint, for over two years, Verizon has engaged in dilatory and haphazard provisioning of special access services to

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Case 97-C-0139 (December 15, 2000); *New York State Carrier-to-Carrier Guidelines Performance Standards and Reports,* NYPSC Case 97-C-0139 (Jan. 2001); *Texas Performance Remedy Plan and Performance Measurement, Attachment 17 to Texas 271 Agreement (Version 2.0)* (Aug. 2001). These documents are part of the record in the instant proceeding, *see* NPRM at n.42.

[6] *See* Massachusetts Department of Transportation and Energy, *Investigation by the Department of Telecommunications and Energy on its Own Motion Pursuant to G.L. c. 159 §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' Provision of Special Access Services*, DTE 01-34 at 12 (August 9, 2001).

[7] The NYPSC refers to special access services as "special services." *See NYPSC Rehearing Order* at 1 n.1.

[8] *NYPSC Rehearing Order* at 10.

Cable & Wireless. Specifically, Cable & Wireless has found that Verizon routinely provisions *over 40 percent* of Cable & Wireless' orders well after the promised due date set by Verizon, and it takes approximately twice as long to do so as its 9-day and 20-day standard intervals allow. Moreover, on countless occasions, Cable & Wireless informed Verizon of its deficiencies and attempted to work cooperatively with Verizon to improve its on-time performance, all to no avail.

Although Cable & Wireless is pursuing remedies available to it pursuant to section 208 of the Communications Act, the fact that a complaint was necessary illustrates the severity of the problem that special access customers are experiencing. Verizon has defended the complaint action in part by claiming that its tariff does not require service by the promised due date, and that no "standard intervals" are contained in its tariff, thereby, if its defenses are successful, potentially placing special access customers in a "Catch-22" situation of neither having an enforceable tariff right nor regulatory standards governing the ILEC's actions.

II. THE COMMISSION HAS BOTH THE JURISDICTION AND THE STATUTORY MANDATE REQUIRED TO ADOPT AND ENFORCE PERFORMANCE MEASUREMENTS AND STANDARDS FOR ILEC SPECIAL ACCESS PROVISIONING

A. In Light of the Predominantly Interstate Character of Special Access, The FCC Must Take the Lead Role in Setting Standards

Due to the FCC's requirement that lines carrying 10% or more interstate traffic be characterized as "interstate," most special access is purchased through ILEC FCC tariffs. Although the states also have a role with respect to ILEC provisioning of special access that is wholly interstate, the predominant interstate character of special access dictates that the Commission must take the lead in setting performance standards, measurements and enforcement mechanisms for special access. In fact, in the ongoing New York, Texas and Massachusetts

proceedings, the ILEC has contested the state commission's authority to even examine the issue, contending that only the FCC can act in this area.[9]

The benefits of a federal solution are clear: a nationally uniform policy that applies to the overwhelming majority of special access transactions, and discourages anticompetitive activity by powerful ILECs. Once the Commission has acted, states could use the FCC model as a template for application to ILEC provisioning of intrastate special access, including self-executing remedies. In addition, states could require detailed reports on special access performance, and those reports could be taken into account by the FCC in its section 271 proceedings.

B. The Communications Act Provides Ample Legal Authority For Commission Action

The Act provides ample legal authority for the Commission to take action to prevent ILEC special access abuses and to ensure the just and reasonable provisioning of special access services. There are several feasible alternatives to approaching this problem. For example, section 201(b) prohibits unjust or unreasonable "charges, practices, classifications and regulations for and in connection with any . . . communication service" and also mandates that the [FCC] "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[10] ILEC failure to furnish special access services to competitive carriers on reasonable terms, and at reasonable costs, and within a reasonable period of time, is within the ambit of section 201(b), and the Commission is explicitly empowered to take necessary action to remedy such abuse.

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[9] *See, e.g., NYPSC Rehearing Order* at 4 ("Verizon claims that the Commission lacks authority on interstate special services, and asserts that when it develops the ability to measure only intrastate service, it will cease reporting interstate results.")

[10] 47 U.S.C. § 201(b).

In addition, as noted above, available evidence indicates that ILECs are discriminating in favor of themselves and their retail customers by failing to provide CLECs and IXCs special access services on a parity basis with the services they furnish themselves. Section 202(a) of the Act prohibits unjust or unreasonable discrimination in charges, practices or facilities, or to give any undue or unreasonable preference or advantage to any person. In failing to provide special access services at parity, ILECs clearly run afoul of this statutory provision – and again, the FCC has ample power to prescribe rules and take other actions necessary to ensure compliance.

Since special access services are typically purchased from an ILEC's FCC tariff, the requirements of Section 203(c)(3) of the Act also apply, specifying that the ILEC may not "extend to any person any privilege or facilities, in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule [*viz.,* the tariff]."[11] To the extent that the ILEC tariff contains time frames for provisioning special access to other carriers, and those time frames are not met, or if there is a material parity issue that suggests differential treatment, the ILEC could be subject to a monetary forfeiture of up to $6,000 for each such instance.[12]

Section 251(g) of the Act requires each wireline local exchange carrier to provide access "in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations . . . that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission," unless and until such requirements are explicitly

[11] 47 U.S.C § 203(c)(3).

[12] *See* 47 U.S.C. § 203(e).

superseded.[13] Prior to enactment of the 1996 Act, the Bell Operating Companies ("BOCs") were required to provide equal access and nondiscriminatory interconnection pursuant to the provisions of the Modification of Final Judgment ("MFJ"). The MFJ specifically prohibits the BOCs from discrimination in their provisioning of products and services in the "interconnection and use of the BOCs' telecommunications service and facilities" and the "provision of new services and the planning for and implementation of the construction or modification of facilities" used to provide access.[14] These standards remain in place, with Section 251(g) entrusting the FCC with the responsibility to apply and enforce them on a going-forward basis.

Finally, Section 272(e)(1) of the Act requires BOCs to fulfill requests for telephone exchange service and exchange access from unaffiliated entities at parity with the fulfillment of such requests by itself and its affiliates. The Commission could use any of these rationales, individually or in combination, to ensure that special access services are provided in a just, reasonable and non-discriminatory manner.

C. The *Pricing Flexibility Order* is No Bar to the Adoption of Performance Measures and Standards

Most ILECs have not disputed (at least to Cable & Wireless) that their special access performance is inadequate at this time. For example, in the two years prior to Cable & Wireless' complaint, Verizon repeatedly acknowledged that it was missing customer deadlines and that it needed to improve its performance. Nevertheless, the ILECs generally have resisted the adoption of performance metrics, claiming that such actions are inconsistent with the Commission's *Pricing Flexibility* decisions. These claims, however, are incorrect. The *Pricing Flexibility Order* explicitly recognized that the ILECs remained dominant providers and refused

[13] *Id.*

to apply non-dominant treatment to ILEC special access services. This is with good reason, as the *Pricing Flexibility Order* recognized the dangers of non-price forms of discrimination.

The Commission's *Pricing Flexibility Order*[15] is no bar to the Commission's adoption of performance measurements, standards and enforcement mechanisms for ILEC special access provisioning. First of all, the pricing flexibility granted to eligible ILECs for special access services does not directly pertain to the questions of quality of service, timeliness of service, or parity in terms of provisioning. Second, not all ILECs are eligible for pricing flexibility with regard to special access, because the regulatory "triggers" that must precede grant of pricing flexibility are not extant in all cases. Finally, the Commission has recognized that, because Phase II relief for an entire Metropolitan Standard Area ("MSA") may be granted to an ILEC even when there is no competitive entry in a large percentage of wire centers, ILECs qualifying for Phase II relief may yet retain the strong incentive to charge unreasonable rates "to an area [within that MSA] that lacks a competitive alternative."[16]

The adoption of performance measures, standards and enforcement mechanisms is a *complementary* initiative that seeks to address a different, but related issue in ILEC special access provisioning. There is no conflict between the Commission's deregulatory intent as represented by the *Pricing Flexibility Order* and its regulation of abusive ILEC practices with regard to special access provisioning that deter and damage the growth of competition envisioned by the Act.

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[14] *Id.* at 227*; see also* MFJ Appendix B, 552 F. Supp. at 233 (the BOCs may not provide access that is "superior or inferior in type or quality").

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

[16] *Pricing Flexibility Order* at ¶ 144.

III. THE COMMISSION SHOULD USE THE INDUSTRY CONSENSUS SPECIAL ACCESS PERFORMANCE METRICS AS A STARTING POINT FOR ILEC PERFORMANCE STANDARDS

Cable & Wireless supports the creation of a set of separate, uniform federal metrics for several important reasons. First and foremost, uniform metrics would enable the Commission to benchmark the performance of each ILEC. Through such benchmarking, the Commission could evaluate the effectiveness of its policies and, more generally, the openness of the local exchange access market. By including all ILECs, rather than just the Regional Bell Operating Companies ("RBOCs"), the Commission can also draw important conclusions about the relative ability of carriers to comply with the Commission's rules.

The net effect of such benchmarking could produce very tangible benefits, particularly in the enforcement arena. The deterrent effect of such uniform metrics should not be underestimated. Knowing that their performance would finally be subject to clear and equitable comparisons with similarly situated carriers, ILECs would be much more inclined to ensure that their individual performance is satisfactory. As the Commission made use of these metrics in evaluating petitions for various relief (*i.e.* §271 authority, license transfers), the self-policing nature of the measurements would grow stronger.

Moreover, special access services are analog services in many existing state UNE performance plans. These plans require the ILEC to provide certain UNE functions at parity with its performance in providing special access to retail and carrier customers. The adoption of performance metrics and standards for special access services, coupled with adoption of UNE

performance metrics,[17] will provide the Commission and state commissions with a basis upon which to make this comparison and to monitor trends in UNE and special access services.

With uniform metrics in place, ILEC-specific enforcement action becomes much easier to accomplish. FCC or state commission initiated investigations can be completed more efficiently and expeditiously with metric issues already resolved. Carrier-specific actions, such as those pursuant to Section 208 of the Communications Act, could be evaluated and resolved with the speed envisioned by the Commission.[18]

From a purely regulatory perspective, uniform metrics could assist the Commission in the efficient fulfillment of its statutory duties. The newly enhanced benchmarking ability would enable the Commission to make the cross-RBOC performance comparisons that are difficult under the current regime. In considering an application from BellSouth or Qwest for pricing flexibility, for example, the Commission could compare the applicant's performance on an equal basis with the performance of Verizon or SBC,[19] enhancing the more thorough data frequently collected by the States. Similarly, applications from ILECs for license transfers attendant to mergers could be evaluated more easily (from a performance perspective at least) with a set of uniform metrics. Obviously, post-approval monitoring and enforcement become easier tasks as well, with well-defined metrics established and the ability to benchmark already in place.

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[17] *See Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, CC Docket No. 01-318 (released November 19, 2001).

[18] Currently, one of the first hurdles facing Commission staff in any Section 208 proceeding is determining which of several data sets are most comparable and useful. The availability of FCC-adopted performance metrics would greatly simplify this task.

[19] The oft-cited claim that "that other RBOC measures this item differently than we do" would thankfully be retired.

A. Cable & Wireless Supports the Industry Consensus Special Access Metrics

Cable & Wireless supports the Joint Competitive Industry Group Proposed ILEC Performance Measurements and Standards (filed with the Commission under separate cover today), and urges the Commission to utilize these metrics as the starting point for the performance standards to be developed in this docket.[20]

IV. DILIGENT ENFORCEMENT BY THE COMMISSION, AND STREAMLINED RESOLUTION OF DISPUTES, WILL BE NECESSARY TO ENSURE THE EFFICACY OF THE PERFORMANCE METRICS

A. In Order for Performance Measurements and Standards to Achieve Their Objectives, It Will be Necessary to Structure Appropriate Remedies

1. Monetary Forfeitures Should be Assessed under Section 503(b) for ILEC Non-compliance

To encourage ILEC compliance, the Commission should impose monetary forfeitures under Section 503(b) of the Act for continuing violations. A base forfeiture amount should be established, and the base amount should be sufficiently high to interrupt a pattern of misbehavior. Section 503(b) allows imposition of a forfeiture of up to a maximum of $100,000 for each instance of violation, or each day of a continuing violation, up to a total of $1,000,000. Cable & Wireless contends that the Commission should be willing to impose the statutory maximum under 503(b), because a lesser amount will likely not be sufficient to deter further ILEC violations.

This is consistent with the Commission's action of last week, when it issued a Notice of Apparent Liability against SBC Communications for violations of established performance

standards.[21] As the Commission did in that case, it could pre-determine through a proceeding under what non-price terms and conditions ILECs must offer its services.[22] In some instances, as in the SBC case, the Commission could use a comparative/parity standard; in others, it could use an absolute standard. Should the ILEC fail to meet the particular standard, it would be subject to a penalty.

In light of the quite limited penalty caps set forth in Section 503(b)(2)(B),[23] however, the Commission would likely want to determine that each increment of performance below the standard or each failure to meet that standard with respect to an individual carrier would constitute a separate violation.[24] As a result, each increment or carrier-specific failure could be considered a separate, continuing violation which would therefore be subject to separate penalty caps.

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[20] *See* Comments of Joint Competitive Industry Group in CC Docket No. 01-321 (submitted January 22, 2002)

[21] *SBC Communications, Inc. Apparent Liability for Forfeiture,* Notice of Apparent Liability for Forfeiture, File No. EB-01-IH-0030, Released January 18, 2002.

[22] *SBC 2002 NAL,* at ¶ 3, *citing Application of Ameritech Corp, Transferor, and SBC Communications, Inc., Transferee, 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*, CC Docket No. 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, 15023-24, Appendix C, ¶ 56 (1999), (*"SBC/Ameritech Merger Order"*), *reversed in part on other grounds*, *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

[23] 47 U.S.C. § 503(b)(2)(B); *see also* 47 C.F.R. § 1.80(b)(2) (Establishing maximum penalty of $120,000 for each violation, or for each day of a continuing violation, up to a maximum of $1,200,000 for any single act or failure to act).

[24] The statute requires that the Commission consider "ability to pay" in considering the appropriate forfeiture amount. 47 U.S.C. § 503(b)(2)(D). The Commission has repeatedly recognized that it will "take into account a violator's ability to pay in determining the amount of a forfeiture so that forfeitures against 'large or highly profitable entities are not considered merely an affordable cost of doing business.'" *SBC 2002 NAL*, at ¶ 22, *citing The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission's Rules*, Report and Order, 12 FCC Rcd 17087, 17100 (1997) ("*Forfeiture Policy Statement*"); *recon. denied* 15 FCC Rcd 303 (1999) and 47 C.F.R. § 1.80(b)(4). In light of the enormous size and profitability of the ILECs at issue here, the Commission must structure a plan in such a way that the penalties imposed are consistent with the statutory maximum while at the same time are not dismissed by the ILECs as simply affordable costs of doing business.

2. Self-effectuating Remedies Should Result in Automatic Payments to Carriers Purchasing ILEC Special Access

In addition to the monetary forfeitures, the Commission should seek to put in place self-effectuating mechanisms that result in automatic monetary payments to carriers purchasing special access when ILEC provisioning materially departs from established performance measures. These automatic payments should be of a fixed and certain amount, keyed to the type and magnitude of the ILEC violation, and should be of sufficient amount both to compensate purchasing carriers for the detriment they incur, and to discourage continuing ILEC violations.

Section 206 of the Act provides a specific source of authority for the establishment of carrier-specific payments for performance failures.[25] That section provides that any carrier that does anything prohibited by the Act, or *shall omit to do any act, matter, or thing in this Act required to be done,* such carrier "shall be liable" to the person(s) injured thereby for the "full amount of damages sustained in consequence" of any such violation.[26] Once a metric has been defined, establishing what is "required to be done" pursuant to section 201 and 251 of the Act, the failure to meet that standard would be a *per se* violation of section 206 entitling those affected to recover consequential damages. The level of those consequential damages could be pre-determined by the Commission for various levels of violations, and then awarded to the affected carriers automatically. Section 207 adds additional support for the recovery of damages for violations of the Act, recognizing the right to such damages and providing two separate venues for their recovery.[27]

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[25] 47 U.S.C. § 206.

[26] *Id.*

[27] 47 U.S.C. § 207. This section permits aggrieved parties to seek relief from either the Commission or U.S. District Court.

B. The Commission Should Also Consider the Adoption of Streamlined Procedures for the Review and Resolution of Individual Company Complaints

In addition to the forfeitures and self-executing penalties discussed above, and in recognition of the critical nature of special access services, the Commission should consider the concomitant adoption of streamlined complaint handling procedures to resolve disputes in individual cases. Simply fining the ILEC for noncompliance over a period of time may not address the acute problems faced by CLECs and IXCs that are experiencing untenable delays and other obstacles in obtaining the services necessary to provide service to their customers – and the loss of customers and business reputation may be irreparable if individual disputes cannot be addressed within a reasonable timetable.

Although these sorts of disputes could be considered under the present complaint rubric of the Commission's Rules, it would be helpful to put in place a presumptive consequential damage model that would facilitate a faster recovery by aggrieved carriers when cognizable violations occur.

CONCLUSION

Consistent with the foregoing discussion, Cable & Wireless requests that the Commission adopt a workable set of performance measures and standards governing ILEC special access services. These measurements should be modeled on the Joint Industry Group's consensus metrics for ordering, provisioning and maintenance. These measurements should be backed by a suitable enforcement mechanism, so that the recurring problems with ILEC provision of special access services may be remedied, consistent with the requirements of the Act, and the public's interest in fostering a competitive marketplace for telecommunications services.

Respectfully submitted,

CABLE & WIRELESS USA, INC.

By **[signed]**

Steven A. Augustino
Ronald J. Jarvis
KELLEY DRYE & WARREN, LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
(202) 955-9895 (voice)
(202) 955-9792 (facsimile)

Its Attorneys

Audrey Wright
CABLE & WIRELESS USA, INC.
Director, Domestic Regulatory Affairs
1130 Connecticut Ave., NW, Suite 1201
Washington, DC 20036
(202) 912-2471 (voice)
(202) 530-8094 (facsimile)

Dated: January 22, 2002

EXHIBIT 1

Access Service Provided to Carriers – Special Access

1996

	Ameritech	BA	BS	NYNEX	Pacific	SBC	US West	GTE	Sprint		Avg.
% Installation Cmtmnts Met	87.9	92.4	89.2	77.5	93.6	80.9	83.8	92.3	97.0		88.3
Avg. Installation Interval (Days)	18.4	14.6	13.2	29.3	22.6	0.0	14.2	11.5	6.2		16.3
Avg. Repair Interval (Hrs)	3.7	2.5	3.3	10.7	4.7	2.1	5.1	8.9	3.1		4.9

1997

	Ameritech	BA	BS	NYNEX	Pacific	SBC	US West	GTE	Sprint		Avg.
% Installation Cmtmnts Met	92.5	93.4	88.5	98.6	89.4	80.1	86.7	89.7	97.8		90.7
Avg. Installation Interval (Days)	13.4	14.8	13.9	11.8	20.8	NA	22.1	12.9	7.1		14.6
Avg. Repair Interval (Hrs)	3.1	2.4	3.3	3.1	5.2	2.0	3.4	7.3	11.7		4.6

1998

	Ameritech	BA	BS	NYNEX	Pacific	SBC	US West	GTE	Sprint		Avg.
% Installation Cmtmnts Met	93.9	87.0	85.1	98.2	89.3	97.4	88.7	91.1	78.9		89.95
Avg. Installation Interval (Days)	14.6	17.4	14.7	22.0	20.1	0.0	22.3	14.8	13.9		17.5
Avg. Repair Interval (Hrs)	3.1	2.4	3.7	3.3	4.7	2.2	4.6	7.9	6.9		4.3

EXHIBIT 1

1999

	SBC/ Amrtch	Qwest	BS	SBC /Pcfc	SBC/ SWstrn	Verizon North	Verizon South	Verizon /GTE	Sprint		Avg.
% Installation Cmtmnts Met	93.6	84.0	85.1	74.9	97.0	84.0	85.4	90.6	80.0		86.1
Avg. Installation Interval (Days)	15.7	23.3	15.9	22.3	0.0	20.4	15.1	20.6	9.8		17.9
Avg. Repair Interval (Hrs)	3.0	4.4	4.4	4.4	2.7	4.0	4.2	7.9	13.5		5.4

2000

	SBC/ Amrtch	Qwest	BS	SBC /Pcfc	SBC/ SWstrn	Verizon North	Verizon South	Verizon /GTE	Sprint		Avg.
% Installation Cmtmnts Met	88.0	90.7	89.7	69.5	94.3	85.0	79.4	84.4	89.3		85.6
Avg. Installation Interval (Days)	15.6	21.7	16.3	37.3	0.0	27.4	20.1	28.4	17.7		23.1
Avg. Repair Interval (Hrs)	2.9	3.4	4.6	4.5	1.7	8.3	4.1	10.2	8.0		5.3