BELLSOUTH

BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

February 13, 2002

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth Telecommunications, Inc.*
Docket No. 01-00193

Dear Mr. Waddell:

On February 6, 2002, Time Warner submitted to the Authority a copy of proposed special access metrics filed recently by WorldCom in Georgia Public Service Commission Docket No. 7892-U. BellSouth would also like to make the Authority aware of recent filings involving special access. Enclosed are 14 copies of comments and reply comments recently filed by BellSouth Corporation in FCC Docket No. 01-321.

Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards For Interstate Special Access Services	)	CC Docket No. 01-321
	)	
Petition of US West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate US West's Provision of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
	)	
Petition of Association for Local Tele-Communications 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 BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

Richard M. Sbaratta

Its Attorney

Suite 4300, 675 West Peachtree Street, N. E.
Atlanta, Georgia 30375-0001
(404) 335-0738

Date: January 22, 2001

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COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), hereby submits its comments in response to the *Notice of Proposed Rulemaking* ("*Notice*") released on November 19, 2001 in the above referenced proceeding.[1]

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[1] *In the Matter of Performance Measurements and Standards for Interstate Special Access Services, et al.*, CC Docket No. 01-321, *Notice of Proposed Rulemaking,* FCC 01-339 (rel. Nov. 19, 2001) ("*Notice*").

I. INTRODUCTION AND SUMMARY

1. Competition is the underpinning of the Telecommunications Act of 1996. To achieve this goal, the Commission has long recognized that its actions must streamline regulation, remove regulatory barriers and increase consumer choice. The fundamental question faced by the Commission in this proceeding is whether special access performance measures would contribute to the achievement of this competitive objective. The answer is that such measures would not advance competitive goals.

2. Adoption of performance measures for interstate special access operates at the polar opposite of the types of Commission actions that are necessary for competition to flourish. Rather than streamlining regulation, mandated performance measures increase regulation in an unprecedented way. They likewise increase regulatory barriers because the uneven application of such measures has disruptive market effects. Finally, consumer choice is stunted. Rather than market mechanisms defining the price and quality of special access services, mandated performance measures substitute regulatory fiat for market-based selection.

3. Since the time that interstate access charges were first conceived and implemented, the Commission has refrained from interfering with LEC operations or engaging in micromanagement of a LEC's business. As was the case then, there continues to be today a wide variation in the way in which LECs provide their services. Never before has the Commission attempted to homogenize LEC operations and curtail the ability of a LEC to make decisions that make sense in light of its specific circumstances.

4. At a time when the market was far less competitive than it is today, the Commission did not engage in the type of restrictive regulation that performance measures represent. The Commission recognized that whether or not a LEC was providing service in an unreasonable

manner was a question that required an analysis of many facts. The Commission could not fulfill its statutory obligation by adopting a set of rigid requirements and holding carriers to a strict liability standard for any deviation. There is a wide range of practices that can satisfy the statute's just and reasonable standard. The Commission cannot act arbitrarily to truncate the statutory standard.

5. To suggest, as the *Notice* does, that the benefit of imposed performance measures makes the provisioning process transparent misses the point. Customers are fully aware of how special access is provided. Transparency is not a real benefit. The proponents of performance measures are trying to goad the Commission to act in a manner that it has consistently avoided in the past. On the thinnest of allegations, the Commission is supposed to adopt an extreme regulatory response and pursue a course that is more intrusive than that ever followed by the Commission since access charges were first introduced in 1984.

6. The competitive environment faced by LECs in the provision of special access makes the contemplated increased regulation of special access through the enactment of performance measures wrong. BellSouth competes in the marketplace and serves a diverse customer body. Not all customers place the same emphasis or value on provisioning metrics. There are many combinations of attributes that make up the price/performance continuum. The regulatory focus on performance measures elevates provisioning above all other attributes. The regulatory imposition of performance measures would force LECs to shift resources to these elements and potentially have to sacrifice other service elements that are also important to customers.

7. The regulatory mandate of special access performance measures would not be competitively neutral and would distort the interaction of competitive forces in the marketplace. ILECs and others (if any) subject to the performance measure regulations would be unable to

compete efficiently against providers of transport services not subject to such heavy-handed regulation. Subject carriers would find themselves with a cost structure that is not competitive in the marketplace. More importantly, the competitive disadvantage resulting from this aberrant cost structure would not be of the carriers making or control.

8. The most puzzling aspect of proposed performance measures for special access is that such a regulatory approach represents a significant departure from the competitive policies and objectives to which the Commission has steadfastly adhered over the last three decades. The Commission has sought to foster competition in the telecommunications market. Its pro-competitive policy has been comprehensive, enveloping all industry participants. Contrary to the implications here, the Commission's pro-competitive policy does not exclude ILECs. The Commission, recognizing the success its policies have had in bringing competition to the interstate access market, has granted ILECs pricing flexibility. The essence of pricing flexibility is to permit ILECs to negotiate contract offerings that have differing mixes of price/performance characteristics based on customer demand. While this mechanism is well suited to address market demand for enhanced performance levels associated with special access services, such market-based, competitive solutions are incompatible with the type of regulatory-imposed performance measures that are being contemplated here.

9. Pricing flexibility aside, there is no reason for the Commission to introduce a level of regulation that has never been imposed since interstate access charges were first implemented after the break-up of the Bell System. Some proponents of performance measures have argued that such measures are necessary to prevent discrimination between carrier customers and end user customers. These arguments are bogus. It is specious to suggest that ILECs can or do engage in conduct that favors end user special access customers. Such a discriminatory plan

does not make any sense. The largest special access customers are carriers. It would be contrary to the financial interest of the ILEC to favor its end user customers over its carrier customers. Apart from the fact that there is no economic incentive to engage in such discriminatory conduct, such conduct could not escape detection.

10. Other proponents of special access performance measures argue that such measures are necessary in order for CLECs to compete with ILECs for local services. This argument attempts to equate special access services with UNEs. Special access services are not UNEs and they are not necessary for CLECs to compete with ILECs. A report prepared by the Eastern Management Group, which is attached to these comments, concludes that purchasers of special access in BellSouth's territory are highly likely to have multiple choices of competitive alternatives to BellSouth's special access services.

11. It would be poor public policy for the Commission to interfere with the operation of economic forces in the determination of price/quality attributes of special access. The Commission cannot legislate an outcome that is inconsistent with the market outcome without injuring competition and competitors. Mandated performance measures for special access epitomize regulation at its worst.

12. While it is clear that the Commission should not adopt special access performance measures, another line of inquiry in the *Notice* relates to the Commission's authority to adopt such measures. The Commission has jurisdiction over interstate special access services, which are provided by ILECs pursuant to Title II of the Communications Act. As a general matter, Title II confers upon the Commission a variety of mechanisms to regulate charges, practices, classifications or regulations as they pertain to such interstate services. Nevertheless, the Commission's powers are not unlimited or boundless. Instead, Section 201 of the

Communications Act establishes the legal standard – just and reasonable – that the Commission must apply in its regulation of the charges, practices, classifications and regulations pertaining to interstate services.

13. With regard to special access performance measures, the actions that the Commission can take consistent with its statutory authority vary. For example, Section 201 confers upon the Commission general rulemaking authority. If the Commission were to exercise such authority for the purpose of enacting special access measures, such rules would be rules of general applicability, not specific metrics, because the specific metrics would be regulations that pertain to offer of service and would have to be set forth in a LEC's interstate tariff. For the Commission to adopt specific metrics, the Commission would have to employ the process and procedures set forth in Section 205 of the Act.

14. Under Section 205, the Commission must first identify the existing tariff provisions that address provisioning aspects that are unjust and unreasonable. Because LEC tariffs differ in these respects, the Commission must, under the statute, engage in a LEC-specific analysis. Even if the Commission finds a specific tariff provision unlawful, such finding, alone, is not sufficient for the Commission to prescribe special access performance metrics. The statute requires that the Commission issue an order finding that the prescribed regulation is fair and reasonable. In order for the Commission to fulfill this requirement the decision must be based on a record and reflect reasoned decision-making. In this context, the Commission would have to address why the prescribed regulations are reasonable in light of the competitive environment and the fact that the Commission in the past in a far less competitive environment never required such regulations. Essentially, the Commission will have to find that competition in the special access

market creates the need for intrusive regulation and then rationalize that finding with its prior policy decisions that provide for reduced regulation with the development of competition.

15. The statute provides the Commission specific enforcement powers to ensure just and reasonable conduct on the part of common carriers and prescribes specific remedies for violations of Commission rules or orders. In using its enforcement powers, the Commission cannot act arbitrarily nor can it deviate from the Act's express provisions.

16. Section 503(b) of the Communications Act, which governs forfeitures, precludes the application of an automatic, self-executing penalty. The statute requires that the Commission apply specific criteria on a case-by-case basis in determining forfeiture amounts. A predetermination of forfeiture amounts would fly in the face of the statute's express requirements and could not withstand judicial scrutiny.

17. Similarly, the Communications Act governs the award of damages. While an individual may seek damages under the Act, such damages are limited to amounts that are related to damages actually sustained and proved. There is absolutely no authority under the Act for the Commission to establish a system of self-effectuating liquidated damages.

18. The Commission's policy has always been to promote competition, not individual competitors. It should not abandon this policy now by adopting special access performance measures. By focusing on ILECs, such performance measures would not be competitively neutral and would provide a huge market and regulatory advantage to the ILECs' competitors without any benefit to competition. In the competitive environment that exists for special access, special access performance measures are a poor concept that should not be enacted.

II. THE COMMISSION SHOULD NOT ADOPT PERFORMANCE MEASURES FOR INTERSTATE SPECIAL ACCESS SERVICES.

19. The penultimate question before the Commission is whether the Commission should adopt performance measures for interstate special access services. The *Notice* frames the issue as one of an evaluation of the relative benefits and burdens that may be associated with such measures. The purported benefit of performance measures identified in the *Notice* is that such measures would supposedly provide a greater transparency of the incumbent LECs' special access provisioning process.[2] The counterweight is the burden that imposition of performance measures creates. The *Notice* mentions the cost of reporting as a potential burden and recognizes that other burdens can be associated with performance measures.[3] In BellSouth's view, the overarching detriment associated with agency imposed special access performance measures is the distortion such regulatory action creates in the competitive market place. If the Commission prescribes performance measures, it substitutes regulation for the unencumbered operation of competitive market forces. Such a result is at odds not only with the goals of the Telecommunications Act of 1996, but with the Commission's own pro-competitive policies that predate the Telecommunications Act.

20. The perceived benefit of "transparency" of the provisioning process is suspect. The local exchange carriers ("LECs") have provided special access for nearly eighteen years. During that time, the Commission has never seen fit to dictate the specific terms by which LECs provide access services. Take the example of installation intervals. When the Commission reviewed the first access tariffs, it directed LECs to file installation intervals in their access tariffs with the

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2 *Notice,* ¶ 13.

3 *Id.*

1985 annual filing.[4] This requirement was never implemented. The Commission waived the tariff requirement, recognizing that publication of intervals for each and every service type would be voluminous.[5] The Commission further acknowledged that such intervals would likely change frequently and that revising the intervals through tariff filings would unnecessarily increase administrative expenses.[6]

21. From the very beginning of access, the Commission refrained from interfering with LEC operations or engaging in micromanagement of the LEC's business. There existed then and there continues to exist today a wide variation in the way in which LECs provided their services. Never before has the Commission attempted to homogenize LEC operations and curtail the ability of a LEC to make decisions that make sense in light of its specific circumstances.

22. Even at a time when the market was far less competitive than it is today, the Commission did not engage in the type of restrictive regulation that performance measures represent. The Commission recognized that whether or not a LEC was providing service in an unreasonable manner was a question that required an analysis of many facts. The Commission could not fulfill its statutory obligation by adopting of a single set of rigid requirements and holding carriers to a strict liability standard for any deviation.

23. Put in another way, under the Communications Act, a LEC must provide service in a just and reasonable manner. The statutory standard of just and reasonable is not a single point. There is a wide variety of practices that can fall within the range of outcomes that are just and

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4 *In the Matter of Investigation of Access and Divestiture Related Tariffs,* CC Docket No. 83-1145 Phase I, *Memorandum Opinion and Order,* 97 F.C.C.2d 1082, 1216 (1984).

5 *In the Matter of Petitions for Waiver Concerning 1985 Annual Access Tariff Filings, Memorandum Opinion and Order* (Mimeo No. 5007), 1985 FCC Lexis 3191, *17-*18, ¶¶ 18-19 (June 7, 1985).

6 *Id.*

reasonable. The Commission cannot arbitrarily truncate the statutory standard. Even where a LEC holds itself out to provide service in a manner consistent with a particular performance measure, failure to meet the measure does not axiomatically means that the LEC has acted unreasonably. Such a determination can only be made after consideration of all of the relevant facts and circumstances.

24. To ensure LEC compliance with its statutory obligations, the Commission has relied on the Section 208 complaint process as the mechanism for aggrieved parties to seek redress. It is the appropriate mechanism where the predominant question is one of fact, such as whether the LEC has acted unreasonably with regard to the provisioning of special access services.

25. To suggest, as the *Notice* does, that the benefit of imposed performance measures makes the provisioning process transparent misses the point. Customers are fully aware of how special access is provided. Transparency is not the issue. The proponents of performance measures are trying to goad the Commission to act in a manner that it has consistently avoided in the past. On the thinnest of allegations, the Commission is supposed to adopt an extreme regulatory response and pursue a course that is more intrusive than any ever followed by the Commission since access charges were first introduced in 1984.

26. The competitive environment faced by LECs in the provision of special access makes the contemplated increased regulation of special access through the enactment of performance measures absurd. BellSouth has to compete in the marketplace and serve a diverse customer body. Not all customers place the same emphasis or value on provisioning. There are many combinations of attributes that make up the price/performance continuum. The regulatory focus on performance measures elevates provisioning above all other attributes. The regulatory

imposition of performance measures would force LECs to shift resources to these elements and potentially have to sacrifice other service elements that are important to other customers.

27. Currently, BellSouth, in its service offerings, balances the needs of all of its customers. It must do so to remain competitive. If BellSouth fails to be responsive to its customers, it will lose them. A fundamental problem associated with regulatory-imposed performance measures is that the Commission eviscerates BellSouth's ability to be responsive in the marketplace. Such regulation places BellSouth at a competitive disadvantage.

28. Proponents of performance measures for special access approach the topic as if adoption and implementation of such regulations would be cost free, at least to the special access user. Such an assumption is wrong. Any performance measures that require LECs to undertake activities such as modifying systems, gathering data, and reporting data, represent potential cost increases associated with providing service. Such costs are appropriately recovered from customers.[7]

29. Unless every provider of special access equivalents, including non-carrier providers, were subject to the same performance measures and regulations – a highly unlikely outcome – ILECs would find themselves with a cost structure that is not competitive in the marketplace. More importantly, the competitive disadvantage resulting from this aberrant cost structure would not be of the ILECs making or within their control. In essence, the regulatory mandate of special access performance measures would not be competitively neutral and would distort the interaction of competitive forces in the marketplace. ILECs and others (if any) subject to the

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[7] Indeed, if the Commission imposes new regulatory requirements, it must provide for a mechanism by which carriers can recover their costs. For price cap regulated LECs, the Commission must afford such carriers an exogenous adjustment equal to the full cost of implementing and complying with the new regulations.

performance measure regulations would be unable to compete efficiently against providers of transport services not subject to such heavy-handed regulation.

30. The most puzzling aspect of proposed performance measures for special access is that such a regulatory approach represents a significant departure from the competitive policies and objectives to which the Commission has steadfastly adhered to over the last three decades. The Commission has sought to foster competition in the telecommunications market. Its pro-competitive policy has been comprehensive, enveloping all industry participants. Contrary to the implications here, the Commission's policy does not exclude ILECs. The Commission, recognizing the success its policies have had in bringing competition to the interstate access market, modified its regulation of ILECs in its *Pricing Flexibility Order.*[8] The *Pricing Flexibility Order* granted flexibility in the form of streamlined introduction of new services, geographic deaveraging of certain rates, the removal of interexchange services from price cap regulation, and a framework that enabled LECs to offer contract tariffs (Phase I) and to remove dedicated transport and special access service from price cap regulation (Phase II) based on competitive showings. The Phase I and II pricing flexibility framework was specifically enacted to afford ILECs the flexibility they needed to be responsive in an increasingly competitive market.

31. The essence of pricing flexibility is to permit ILECs to negotiate contract offerings that have differing mixes of price/performance characteristics based on customer demand. While this mechanism is well suited to address market demand for enhanced performance levels associated with special access services, such market-based, competitive solutions are

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[8] *In the Matter of Access Charge Reform, et al.,* CC Docket No. 96-262, *Fifth Report and Order and Further Notice of Proposed Rulemaking,* 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*").

incompatible with the type of regulatory – imposed performance measures that are being contemplated here.

32. There are several reasons for such incompatibility. The mere suggestion that the Commission may intervene and establish performance standards chills the negotiation process. Instead of negotiating a mutually acceptable offering, the focus shifts to the regulatory process. The issue becomes one of prognosticating the likelihood that the Commission will act and the form that such action will take. In short, regulatory gaming becomes the primary focus.

33. Even worse than the regulatory gaming that is encouraged by the threat of Commission action is a Commission-imposed set of performance measures. Such action substitutes a regulatory approach for the give and take of the marketplace. Essentially, regulatory-imposed performance measures takes away the flexibility just given to the ILECs to negotiate market-based special access services.

34. The *Notice*, in addressing the *Pricing Flexibility Order*, notes that the pricing flexibility order did not confer non-dominant status on the ILECs that satisfy Phase I or II competitive criteria for pricing flexibility and did not go so far as to find that incumbents do not have market power with respect to the services subject to pricing flexibility. While this may be the case the Commission did find:

> The pricing flexibility framework we adopt in this Order is designed to grant greater flexibility to price cap LECs as competition develops, while ensuring that: (1) price cap LECs do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) price cap LECs do not increase rates to unreasonable levels for customers that lack competitive alternatives. In addition, these reforms will facilitate the removal of services from price cap regulation as competition develops in the marketplace, without imposing undue administrative burdens on the Commission or the industry.[9]

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[9] *Pricing Flexibility Order,* 14 FCC Rcd at 14225, ¶ 3.

35. Thus, the pricing flexibility plan was a comprehensive regulatory approach in which the degree of regulation was adjusted to reflect competitive developments. Having granted BellSouth Phase I pricing flexibility for dedicated transport and special access in 39 MSAs and Phase II pricing flexibility in 38 MSAs, it is impossible to reconcile the regulatory intrusion represented by Commission mandated performance measures in light of the Commission's comprehensive pricing flexibility plan that extracts the Commission from managing the business of ILECs.

36. Without question, the *Pricing Flexibility Order* adopted a self-adapting framework that decreased regulation commensurate with competition in the marketplace. Having determined that sufficient competition exists in the MSAs to grant pricing flexibility, it is incongruous to superimpose a regulatory scheme that is more restrictive and intrusive than that which existed prior to the *Pricing Flexibility Order*. Yet, Commission-imposed performance measures represent such a regulatory scheme. At a minimum, to preserve the pricing flexibility regime and its attendant competitive benefits, if the Commission were to adopt performance measures, such measures should not apply to MSAs that have qualified for pricing flexibility.

37. Pricing flexibility aside, there is no reason for the Commission to introduce a level of regulation that has never been imposed since interstate access charges were first implemented after the break-up of the Bell System. The few proponents of special access performance measures have not provided credible facts that would support such extraordinary regulatory action.

38. For example, AT&T contends that such performance measures are necessary to detect ILEC discrimination between carrier-customers of special access and end user-customers of special access. In making this argument, AT&T attempts to cobble an argument that is similar to

the one that is made in support of performance measures for unbundled network elements ("UNEs"). Performance measures for UNEs have been implemented to assure that competitors obtaining UNEs receive a comparable level of service from the ILEC to that which the ILEC employs in providing retail local services.

39. In the case of special access, all special access customers subscribe to exactly the same service, regardless of their status as a carrier or an end user. It is specious to suggest that ILECs can or do engage in conduct that favors end user special access customers. Such a discriminatory plan would not make any sense. The largest special access customers are carriers. It would be contrary to the financial interest of the ILEC to favor its end user customers over its carrier customers. Apart from the fact that there is no economic incentive to engage in such discriminatory conduct, such conduct could not escape detection. Carriers would quickly discover any preferences that are extended to end user customers exclusively because these same end users are also customers of the carriers. Moreover, the mere suspicion of inappropriate conduct has always been sufficient for carriers to pursue enforcement actions. There is absolutely no reason to believe that carriers would not be quick to file complaints if they believed ILECs were discriminating against them.[10] In summary, phantom allegations of discrimination do not establish a need for performance measures for special access.

[10] The absence of any such complaints strongly underscores the lack of substance to the allegation that ILECs are engaging in discriminatory conduct.

40. Other proponents of special access performance measures argue that such measures are necessary in order for CLECs to compete with ILECs for local services. This argument attempts to equate special access services with UNEs. Special access services are not UNEs and they are not necessary for CLECs to compete with ILECs. As an initial matter, BellSouth offers a complete array of high capacity UNEs. Table 1 shows the high capacity UNEs that CLECs can obtain.

TABLE 1

Hi-Capacity Offerings

Stand Alone UNEs

Loops	Interoffice Transport	Local Channel
4 Wire DS1 Digital Loop	DS1	DS1
DS3 Loop	DS3	DS3
STS-1 Loop	STS-1	STS-1
OC3 Loop		
OC12 Loop		
OC48 Loop		

Combinations with Hi-Capacity Services

EELs

DS1 Interoffice Channel + DS1 Channelization + 2-wire VG Local Loop
DS1 Interoffice Channel + DS1 Channelization + 4-wire VG Local Loop
DS1 Interoffice Channel + DS1 Channelization + 2-wire ISDN Local Loop
DS1 Interoffice Channel + DS1 Channelization + 4-wire 56 kbps Local Loop
DS1 Interoffice Channel + DS1 Channelization + 4-wire 64 kbps Local Loop
DS1 Interoffice Channel + DS1 Local Loop
DS3 Interoffice Channel + DS3 Local Loop
STS-1 Interoffice Channel + STS-1 Local Loop
DS3 Interoffice Channel + DS3 Channelization + DS1 Local Loop
STS-1 Interoffice Channel + DS3 Channelization + DS1 Local Loop

Loop/Port

4-wire ISDN Primary Rate Interface, DS1 loop, unbundled end office switching, unbundled end office trunk port, common transport per mile per MOU, common transport facilities termination, tandem switching, and tandem trunk port.

4-wire DS1 Trunk port, DS1 Loop, unbundled end office switching, unbundled end office trunk port, common transport per mile per MOU, common transport facilities termination, tandem switching, and tandem trunk port.

4-wire DS1 Loop with normal serving wire center channelization interface, 2-wire voice grade ports (PBX), 2-wire DID ports, unbundled end office switching, unbundled end office trunk port, common transport per mile per MOU, common transport facilities termination, tandem switching, and tandem trunk port.

41. Because a CLEC may elect to use special access services instead of UNEs does not nor should it mean that special access services should be treated like UNEs. CLECs are free to use any combination of services and facilities to offer competitive local services. By choosing special access services, which are premium services, the CLEC may be attempting to differentiate its offerings from that of the ILEC.

42. Whatever the motivation of a CLEC may be, it is incontrovertible that ILEC special access is not necessary for CLECs to compete with ILECs. Attached to these comments is a Special Access Competition Report prepared by the Eastern Management Group.[11] The Report reaches two fundamental conclusions. The first is that during the last fifteen years the number of special access competitors nationwide has grown steadily and substantially.[12] Next and more significantly, the Report concludes that "both wholesale and retail buyers of Special Access services in BellSouth's territory are highly likely to have multiple choices of competitive alternatives to that company's Special Access services, to the point where the marketplace is able to provide any level of service performance for which there is sufficient demand."[13]

43. The Report shows that between 1993 and 2000, over 500 CAPs /CLECs and 200 IXCs came into existence. The growth in competitive providers over the period indicates that there is a substantial pool of facilities that is available as an alternative to ILEC special access services.[14]

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11 "Special Access Competition," The Eastern Management Group (Jan. 22, 2002) ("Report" or "Special Access Report").

12 Special Access Report at 2.

13 *Id.*

14 *Id.* at 5.

44. The Report also contains an analysis that determines the likelihood that special access-type facilities will be available in BellSouth's operating territory. Because all carriers want to maximize the use of their facilities, the presence of such facilities in a wire center indicates an alternative to BellSouth special access. The Report estimates the likelihood that wholesale and retail alternatives to BellSouth special access services are present. With respect to wholesale, the Report concludes:

> When an IXC or CLEC is collocated with other CLECs in an ILEC wire center, the opportunity exists for special access wholesaling among these entities as an alternative to the purchasing of ILEC special access. A conservative view of the likelihood (or probability) of finding a non-ILEC special access source within BellSouth territory is 0.759.[15]

45. Opportunities for alternative special access also exist on the retail side:

> Additionally, there is an opportunity afforded to commercial enterprises to purchase retail special access from non-ILEC sources. We conservatively estimate the likelihood of CLEC retail special access availability to be 0.673.[16]

46. The information provided in the Report establishes two important premises. The first is that there are substantial alternatives to BellSouth provided special access. The second point is that, if there is a real market demand for particular service performance levels, providers other than BellSouth can satisfy the demand. In these circumstances, it would be poor public policy for the Commission to interfere with the operation of economic forces in the determination of price/quality attributes of special access. The Commission cannot legislate an outcome that is inconsistent with the market outcome without injuring competition and competitors. Mandated performance measures for special access epitomize regulation at its worst.

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15 *Id.* at 7.

16 *Id.*

III. THE COMMISSION'S JURISDICTION AND ENFORCEMENT AUTHORITY IS CIRCUMSCRIBED BY THE COMMUNICATIONS ACT.

A. Jurisdiction And Authority

47. At the outset, the scope of the Commission's jurisdiction must be understood. Section 152(b) of the Communications Act states that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ."[17] Thus, to the extent the Commission were to adopt performance measures for special access, such performance measures would only be applicable to jurisdictionally interstate special access services. The statute specifically limits Commission jurisdiction and denies the Commission any authority over intrastate special access services.

48. Interstate special access services are provided by LECs pursuant to Title II of the Communications Act. As a general matter, Title II confers upon the Commission a variety of mechanisms to regulate charges, practices, classifications or regulations as they pertain to such interstate services. Nevertheless, the Commission's powers are not unlimited or boundless. Instead, Section 201 of the Communications Act establishes the legal standard – just and reasonable – that the Commission must apply in its regulation of the charges, practices, classifications and regulations pertaining to interstate services.[18]

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17 47 U.S.C. § 152(b).

18 Section 201 states in pertinent part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful[.]

47 U.S.C. §201(b)

49. With regard to special access performance measures, the actions that the Commission can take consistent with its statutory authority vary. For example, Section 201 confers upon the Commission general rulemaking authority. If the Commission were to exercise such authority for the purpose of enacting special access measures, such rules would be rules of general applicability, not specific metrics because the specific metrics would be regulations that pertain to offer of service and would have to be set forth in a LEC's interstate tariff. As discussed below, for the Commission to adopt specific metrics, the Commission would have to employ the process and procedures set forth in Section 205 of the Act.

50. Under its rulemaking authority, the Commission has the authority to adopt rules that would require LECs to incorporate special access performance measures into their interstate access tariff. The rules could identify the aspects of providing special access service (*e.g.,* installation) that LECs would be responsible for establishing and filing in their interstate tariffs. Obviously, however, to adopt such rules, the Commission must have a proper record and engage in reasoned decision-making. In the instant case, reasoned decision-making requires that the Commission address the competitive marketplace for special access and how adoption of special access performance measure rules would not be inconsistent with, and a reversal of, the Commission's pro-competitive, deregulatory policies and practices.

51. To the extent that the Commission is anticipating that it could adopt specific metrics associated with special access performance measures, the Commission would have to follow the process set forth in Title II. Such metrics would be practices and regulations in connection with the provision of special access service and, pursuant to Section 203 of the Communications

Act,[19] would have to be set forth in the LEC's interstate access tariff. In order for the Commission to prescribe specific regulations in a tariff, the Commission must act pursuant to Section 205.[20] Section 205 provides that after a full opportunity for hearing and the Commission "shall be of the opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe . . . what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed . . . ."[21]

52. The authority to prescribe tariff practices does not axiomatically lead to the conclusion that the facts and circumstances support a prescription of special access performance measures. Under Section 205, the Commission must first find that the existing tariff provisions that address provisioning aspects of special access are unjust and unreasonable. Such a finding cannot be based on generalizations or speculative assertions. Indeed, because LEC tariffs differ in these respects, the Commission must, under the statute, engage in a LEC-specific analysis. Even if the Commission finds a specific tariff provision unlawful, such a finding, alone, is not sufficient for the Commission to prescribe special access performance metrics. The statute requires that the Commission issue an order finding that the prescribed regulation is fair and reasonable. In order for the Commission to fulfill this requirement the decision must be based on a record and reflect reasoned decision-making. In this context, the Commission would have to address why the prescribed regulations are reasonable in light of the competitive environment and the fact that the Commission in the past in a far less competitive environment never required

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19 47 U.S.C. § 203(a).

20 47 U.S.C. § 205.

21 47 U.S.C. § 205(a).

such regulations. Essentially, the Commission will have to find that competition in the special access market creates the need for intrusive regulation and then rationalize that finding with its prior policy decisions that provide for reduced regulation with the development of competition.

53. The *Notice* suggests two other statutory provisions for its authority to establish performance measures: Sections 202(a) and 272(e)(1). Neither section provides authority to establish performance measures. Section 202(a) of the Communications Act declares as unlawful unreasonable discrimination "in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service . . . ."[22] Thus, not every difference in service constitutes an unlawful discrimination under this Section. This Section only prohibits unjust and unreasonable discrimination. Whether or not a particular conduct constitutes an unjust and unreaseasonable discrimination is a question of fact. The Commission can address the question of fact through a complaint pursuant to Section 208 of Communications Act or through a Section 205 hearing. In any event, for the Commission to prescribe specific metrics, the Commission must proceed pursuant to Section 205. Section 202(a) does not afford the Commission any greater latitude or a different process by which to adopt performance measures, nor does it relieve it of its statutory requirements under Sections 201 and 205.

54. Likewise, Section 272(e)(1) does not broaden the Commission's Title II authority. All that Section 272(e)(1) does is establish a nondiscriminatory requirement that is applicable to an ILEC when it fulfills a request for service for a Section 272 affiliate. Section 272(e)(1) requires that requests for service from non-affiliates be fulfilled within the same period of time that an affiliate's requests are fulfilled. This Section does not provide the Commission with any authority to establish rules or provide for any other mechanism to create performance metrics.

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22 47 U.S.C. § 202(a).

Again, the Commission is limited to Sections 201 and 205 for such purposes and must meet the statutory requirements as set forth in those sections of the Communications Act.

A. Enforcement

55. The statute provides the Commission specific enforcement powers to ensure just and reasonable conduct on the part of common carriers and prescribes specific remedies for violations of Commission rules or orders. In using its enforcement powers, the Commission cannot act arbitrarily nor can it deviate from the Act's express provisions.

56. Assuming the Commission could justify establishing special access performance measures, the *Notice* questions what forfeiture or penalties would be applicable. The correct starting point of the analysis is Section 503 of Act. Section 503(b)(1)(B) makes a carrier liable for a forfeiture penalty if it is determined that the carrier has "willfully or repeatedly failed to comply with any provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter . . . ."[23] This same provision states that this subsection does not apply "to any conduct which is subject to forfeiture under subchapter II of this chapter . . . ."[24] Thus, as an initial matter, to determine whether Section 503 applies, it must be known how the Commission proceeded, and under what authority were the performance measures adopted.

57. If the Commission uses its Section 205 authority to prescribe specific metrics and such metrics are incorporated as regulations within each LEC's access tariff, then Section 203 governs. Section 203 provides that a carrier shall not "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or

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23 47 U.S.C. § 503(b)(1)(B).

24 47 U.S.C. § 503(b)(1).

practices affecting such charges, except as specified in such schedule."[25] Section 203(e) provides for a forfeiture for noncompliance with Section 203 of $6,000 for each offense and $300 for each day that the violation continues. Since Section 203 provides for a specific forfeiture, Section 503(b) and the forfeitures set forth therein would not apply.

58. Even assuming Section 503(b) applies, this section circumscribes the manner in which the Commission may determine the amount of a forfeiture. The Commission must "take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[26] The language of this statutory provision is mandatory, not discretionary. Accordingly, the Commission, in order to meet its obligations under Section 503, must evaluate each and every violation using the statutory criteria before it may determine a forfeiture amount. A predetermination of forfeiture penalties flies in the face of the statute's express requirements and could not withstand judicial scrutiny.

59. In the same way that the statute bounds the manner in which forfeitures may be assessed, the statute also establishes the parameters by which a person may seek damages from a carrier. If failure to meet a performance measure constituted an unlawful act, an access customer may bring a complaint for damages against the carrier pursuant to Section 207 of the Act.[27] Under Section 206, a carrier's liability for damages is limited to damages actually sustained as a consequence of its unlawful conduct.[28] Thus, damages are limited to actual damages that the

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25 47 U.S.C. § 203(c).

26 47 U.S.C. § 503(b)(2)(D).

27 47 U.S.C. §208.

28 47 U.S.C. §206.

complainant can prove. There is absolutely no authority under the Act for the Commission to establish a system of self-effectuating liquidated damages absent the consent of the carrier.

60. Contrary to the Commission's belief, the automatic enforcement mechanisms would not be pro-competitive. Such mechanisms just distort the competitiveness of special access. Automatic penalties and damages associated with special access performance measures are just an invitation to join a regulatory game – a very one-sided game. It unfairly targets the ILEC to the exclusion of every other competitor and provides a financial and competitive advantage to the ILEC's competitors. Fortunately, the statute precludes such a biased result.

IV. CONCLUSION

61. Looking at the Commission's evolutionary approach to regulation, its first priority was to establish competition in each and every facet of interstate communications. Special access has been no exception. Some form of competitive alternative has always been present since the first day that special access tariffs came into existence in 1985. Each year thereafter the number and type of alternatives have increased. Likewise, the Commission, through actions such as its expanded interconnection initiative, altered its regulations to encourage the growth of competitors and alternative networks. Although competition grew rapidly, the Commission continued to regulate comprehensively LEC special access offerings. It was not until 1999 that the Commission established a regulatory framework in the *Pricing Flexibility Order* that reduced the regulation of LECs as competition continued to evolve.

62. Less than three years after the adoption of the progressive policies set forth in the *Pricing Flexibility Order,* the Commission, in this proceeding, is considering embarking on a regulatory course that would increase regulation to a level that is greater than that which existed in 1985. The Commission never imposed special access performance measures on LECs. Given

the variety of operational and market considerations associated with such measures, it relied on Section 208 complaints to identify unreasonable conduct. It followed this approach in 1985 when the alternatives to LEC special access were limited. In 2002, where there are numerous alternatives to LEC-provided special access and where demand for special access can be satisfied by non-LEC providers, it is impossible to rationalize the introduction of a one-sided, intrusive regulatory scheme that special access performance measures represent with the Commission's commitment to competition.

63. The Commission, time and again, has made clear that its policies have always been to promote competition, not individual competitors. Special access performance measures would abandon this policy. The focus on ILECs is not competitively neutral and enactment of such measures provides a huge market and regulatory advantage to the ILECs' competitors without any benefit to competition. Special access performance measures are a poor concept that should not be enacted.

Respectfully submitted,

BELLSOUTH CORPORTION

By: /s/ Richard M. Sbaratta
Richard M. Sbaratta

Its Attorney

Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375-0001
(404) 335-0738

Date: January 21, 2002

CERTIFICATE OF SERVICE

I do hereby certify that I have this 22nd day of January 2002 served the following parties to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH CORPORATION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed below.

+Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals, 445 Twelfth Street, S. W.
Room TW-B204
Washington, D. C. 20554

+Qualex International
The Portals, 445 Twelfth Street, S. W.
Room CY-B402
Washington, D. C. 20554

/s/ Juanita H. Lee
Juanita H. Lee

+ VIA ELECTRONIC FILING

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards For Interstate Special Access Services	)	CC Docket No. 01-321
	)	
Petition of US West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate US West's Provision of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
	)	
Petition of Association for Local Tele-Communications 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

REPLY COMMENTS OF BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

Richard M. Sbaratta

Its Attorney

Suite 4300, 675 West Peachtree Street, N. E.
Atlanta, Georgia 30375-0001
(404) 335-0738

Date: February 12, 2002

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards For Interstate Special Access Services	)	CC Docket No. 01-321
	)	
Petition of US West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate US West's Provision of Federally Tariffed Interstate Services	)	CC Docket No. 00-51
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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

REPLY COMMENTS OF BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

Richard M. Sbaratta

Its Attorney

Suite 4300, 675 West Peachtree Street, N. E.
Atlanta, Georgia 30375-0001
(404) 335-0738

Date: February 12, 2002

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Federal Communications Commission
Washington, D.C. 20554

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REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), hereby submits its Reply Comments in response to the comments filed in

response to the *Notice of Proposed Rulemaking* ("*Notice*") released on November 19, 2001 in the above referenced proceeding.[1]

I. INTRODUCTION AND SUMMARY

1. The Commission is at a crossroads. It can continue on the path toward increased competition and reduce regulation or it can embark on a road of re-regulation attendant with its missteps, miscalculations and disincentives. This proceeding has a surrealistic quality because the issue, special access performance measures, represents a level of regulation of interstate services that has no precedent. After twenty years of policies designed to increase competition and reduce regulation, it is startling to believe that the Commission would abruptly change course and embrace a regulatory scheme that is more intrusive than any other approach ever employed by the Commission.

2. Advocates of special access performance standards assert three arguments that purportedly would justify Commission action: (1) special access is not competitive; (2) inadequate UNE rules force competitors to use special access; and (3) ILECs discriminate in the provision of special access. As shown in this reply, none of these arguments have merit.

3. With regard to the competitiveness of the special access market, none of the competitors offer any substance to support their assertions that competitive alternatives do not exist. In contrast, BellSouth submitted a report by The Eastern Management Group that showed competitors had alternatives to ILEC provided special access and that the marketplace is able to provide any level of service performance for which there is sufficient demand.

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[1] *In the Matter of Performance Measurements and Standards for Interstate Special Access Services, et al.*, CC Docket No. 01-321, *Notice of Proposed Rulemaking,* FCC 01-339 (rel. Nov. 19, 2001) ("*Notice*").

4. Stripped of the rhetoric, the only fact that commenters offer the Commission as justification for taking the extreme regulatory action of mandating special access performance measures is that they use special access services in competition with the ILECs. Such use, however, does not evidence a lack of competitive alternatives—instead, it reflects a business decision and an economic choice. Competitors' business decisions should not become the basis of Commission action.

5. No more compelling is the commenters' complaints that the Commission's UNE rules "force" them to use special access services. The Communications Act does not give competitors unqualified access to unbundled network elements. Instead, the Act only requires access to UNEs that are necessary and where failure to provide access would impair a carrier's ability to provide service. The Commission, as it must, in its UNE determinations has given substance to the necessary and impair standard of the Act. In any event, whether or not commenters like the UNE rules has no bearing on special access services nor do their opinions create a basis upon which the Commission can justify imposing UNE-type performance standards on special access. Just because a competitor makes a business decision to use ILEC special access rather than an alternative does not mean that special access should be treated like a UNE. To do so would contravene the Commission's objectives that its unbundling rules should favor facilities based competition because such rules foster investment and innovations and permit the Commission to reduce regulation.

6. Finally, commenters attempt to justify regulatory mandated special access standards by arguing that they are necessary to prevent ILEC discrimination in favor of their retail customers. BellSouth, in its comments, showed that this speculative argument of the commenters made no economic sense. Moreover, there has been a process in place to redress

grievances that commenters may have regarding an ILEC's performance in its provision of special access service—a Section 208 complaint. The current situation is not one in which this remedial procedure is flawed or has failed to function; instead, it has never been used. To discard this process along with its due process and fundamental fairness principles when it has never been tried, in favor of an entirely new and intrusive regulatory regime, is unwarranted and unsound.

II. PERFORMANCE MEASUREMENTS ARE INAPPROPRIATE FOR SPECIAL ACCESS SERVICES.

7. Commenters attempt to portray special access as essential to their ability to compete with ILECs. Not unexpectedly, they raise arguments such as the lack of alternatives to ILEC-provided special access or the inadequacy of the Commission's UNE rules. Nevertheless, anything more than a superficial reading of these comments quickly reveals that the commenters' laments ring hollow. Is the Commission to seriously consider statements that there are no competitive alternatives in Chicago[2] or that WorldCom (who is in the business of being a carriers' carrier), AT&T and others cannot build out facilities to their customers? And, even if these statements were accurate, they simply do not provide a basis for the Commission to enact the draconian regulatory measures advocated by these parties.

8. The reality is that competitors choose to use special access services—they do not have to use them. Just because a competitor makes the choice to use special access services, that election does not convert special access service into the equivalent of a UNE. Yet, proponents of special access performance measures advocate that the Commission adopt a regulatory approach

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[2] Comments of Focal Communications Corporation, Pac-West Telecom, Inc., and US LEC Corp. at 12 ("Focal Comments" or "US LEC Comments").

that parallels the regulation of UNEs. Such a regulatory regime, which would be unprecedented in its intrusiveness on common carrier operations, cannot be reconciled with the competitive market that exists or with the Commission's and the Telecommunications Act's pro-competitive policies.

A. Special Access Services Are Competitive.

9. Many competitors argue that special access performance standards are justified because ILEC special access services are necessary inputs for the competitive services that they provide.[3] Other than their assertions, the commenters offer little to support their proposition.[4]

10. In stark contrast to these comments, BellSouth submitted with its comments a report prepared by The Eastern Management Group ("EMG") on special access competition. In the expert opinion of EMG, the number of competitors offering special access has grown steadily and dramatically over the last fifteen years. EMG further concludes that purchasers of BellSouth's special access services are likely to have multiple choices of competitive alternatives and that the marketplace is able to provide any level of service performance for which there is sufficient demand.

11. The market reality is vastly different than that portrayed by the proponents of special access performance standards. BellSouth, in conjunction with Verizon and SBC, filed a Joint

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[3] *See, e.g.,* Comments of the Association for Local Telecommunications Services at 6-9 ("ALTS Comments"); Comments of AT&T Corporation at 4-8; Comments of Time Warner Telecom and XO Communications, Inc. at 4-7 ("Time Warner/XO Comments"); Comments of WorldCom, Inc. at 5-6.

[4] Indeed, the proposition that performance measures for special access is essential is called immediately into question when these same commenters advocate that such measures only be applied to a very selective group of ILECs. The advocacy of special access performance standards amounts to little more than a poorly disguised attempt to use the regulatory forum to place (selected) ILECs at a competitive disadvantage.

Petition to eliminate the mandatory unbundling requirement for high capacity loops and dedicated transport.[5] As the Joint Petitioners showed, special access competition has been around for nearly 20 years and CLECs are formidable competitors with seven billion dollars in annual revenues and a market share of 36 percent.[6] Competition is so widespread that markets generating 80 percent of BOC special access revenue qualify for Phase I pricing flexibility and markets generating nearly two-thirds of such revenues qualify for Phase II relief.[7]

12. As competition has grown, CLECs have built 218,000 local fiber miles and 645 fiber networks in the top 150 MSAs. The densest MSAs often have fifteen or more competing fiber networks and 77 of the top 100 MSAs have at least three.[8] These alternative facilities are not just connecting to ILEC central offices but also connect to buildings where there is demand for high capacity services. It is estimated that competitive networks already connect to office buildings accounting for 20 million business access lines with additional locations being added continuously.[9] Thus, these competitive network providers target and establish networks in areas where special access and high capacity users are concentrated.

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5 On April 5, 2001, BellSouth, Verizon and SBC ("Joint Petitioners") filed a Petition for the Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport in CC Docket No. 96-98. Joint Petitioners filed Reply Comments ("JPRC") on June 25, 2001.

6 JPRC at 2.

7 *Id.*

8 *Id.*

9 *Id.* at 3.

13. It is evident that ILEC competitors have been successful. In an attempt to blunt their competitive successes, some commenters argue that they cannot expand their market presence without ILEC special access.[10] Again, the facts belie these claims.

14. In conjunction with Reply Comments of the United States Telecom Association ("USTA") Dr. Robert W. Crandall submitted an expert analysis that showed that CLEC facilities already exist close to locations housing businesses that account for the vast majority of the demand for dedicated, high-capacity loops and special access services.[11] Given where competitive networks are already deployed and the pattern of extensions that competitors have made, Dr. Crandall showed it would be economically rational for competitors like CLECs to continue to build out to additional end user locations.[12]

15. Commenters have not introduced any information that refutes the competitiveness of the special access marketplace. In tacit recognition of the weakness of their argument that there are no alternatives to ILEC special access services, some commenters take the tack that the classification of ILECs as dominant carriers diminishes the competitiveness of the special access market. Thus, these commenters are quick to point out that in the *Pricing Flexibility Order*[13] the Commission did not declare the ILECs non-dominant carriers. In the commenters' view, the

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10 *See, e.g.*, Time Warner/XO Comments at 9-10; Comments of MPower Communications Corp at 12.

11 Reply Comments of the United States Telecom Association, CC Docket No. 96-98, filed April 30, 2001, Reply Declaration of Robert W. Crandall at 6-7, 18 *et seq.* ("Crandall Reply Declaration").

12 Crandall Reply Declaration at 5, 7, 34.

13 *In the Matter of Access Charge Reform, et al.*, CC Docket No. 96-26, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*").

failure to declare the ILECs non-dominant justifies increasing the regulation of the ILECs by imposing special access performance standards on them.

16. Even the selective reading of the *Pricing Flexibility Order* in which the commenters engage cannot support increasing the regulation of special access services. Although the commenters are in denial, the fact remains that the *Pricing Flexibility Order* recognizes the competitiveness of the special access market and that the presence of competition warrants reduced regulation.[14] Although the Commission did not confer non-dominant status on the ILEC with regard to its provision of special access, it did establish a comprehensive regulatory program that reduced regulatory intervention commensurate with demonstrated levels of competition. Having granted BellSouth Phase I pricing flexibility for dedicated transport and special access in 39 MSAs and Phase II pricing flexibility in 38 MSAs, it would be impossible to reconcile the extraordinary regulatory intrusion represented by mandatory special access performance measures with the Commission's own view of pricing flexibility where its purpose was to extract itself from the regulation of the ILEC's business of providing special access services.

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[14] The Commission affirmed its view that granting pricing flexibility was for the purpose of reducing regulation because of competition:

> More recently, as competition in the provision of interstate access services increased, the Commission recognized that many incumbent LECs remained subject to significant regulatory constraints. Accordingly, the Commission's *Pricing Flexibility Order* granted pricing flexibility to incumbent LECs subject to price cap regulation, once certain competitive thresholds were met, to increase their ability to respond to competition in this market. The *Pricing Flexibility Order* designed a framework to provide greater flexibility to incumbent LECs and to facilitate the removal of services from price cap regulation as competition developed in the exchange access market, while ensuring that these LECs could not use this flexibility to engage in anticompetitive behavior. (footnotes omitted)

In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, CC Docket No. 01-337, *Notice of Proposed Rulemaking*, (FCC 01-360), released Dec. 20, 2001, ¶12.

17. The *Pricing Flexibility Order* was a comprehensive, self-adapting framework that decreased regulation commensurate with increasing levels of competition. Having determined that sufficient competition exists to grant pricing flexibility, it is incongruous to suggest, as some commenters do, that the Commission can superimpose a regulatory scheme of mandated performance measures that is more restrictive and intrusive than that which existed prior to the adoption of the *Pricing Flexibility Order.*

18. Pricing flexibility aside, there simply is no reason for the Commission to introduce a level of regulation that has never before been imposed on an interstate access service. The proponents of special access measures have not provided the Commission with any credible facts that would justify the Commission's reversal of its regulatory course and the abandonment of the pro-competitive policies it has followed for decades.

19. Stripped of the rhetoric, the only fact that commenters offer the Commission as justification for taking an extreme regulatory action and mandating special access performance measures is that they use special access services in competition with the ILECs. Such use, however, does not evidence a lack of competitive alternatives—instead, it reflects a business decision and an economic choice.

20. Contrary to the apparent wishes of the ILECs' competitors, their use of special access should not result in the creation of "UNE-type" regulations for special access services. In using special access, the competitors are exercising an economic prerogative. Having made these choices independently, the competitors should not be afforded extra-economic rewards established by regulators. Such unearned rewards distort the market in two ways. First, they favor specific competitors over competition, which is a result that is precisely the exact opposite of long standing Commission policy. Second, it chills innovation and choice. For example,

Williams Communication offers Private Line Quality of Service. The Private Line Quality of Service offers four options (Platinum, Gold, Silver and Bronze) with varying pricing and service level agreements, depending on the needs of its customers.[15] If the Commission mandates performance metrics, the Commission is essentially taking away from the ILEC the ability to compete in the same way that Williams is addressing market demand. Further, if the Commission, in creating the metrics and associated regulations, "gets it wrong," which is a highly likely regulatory outcome, it can undermine the market by distorting the two key characteristics upon which competitors compete—price and quality.

B. Commenters' Dissatisfaction With UNE Rules Does Not Justify Imposition of Special Access Performance Standards.

21. Another argument some commenters use to justify imposition of special access performance standards is the claim that they are "forced" to employ special access because of the limitations that the Commission has placed on UNEs regarding commingling or extended loop transport.[16] These arguments fall flat for a number of reasons.

22. As an initial matter, the Commission's determinations regarding UNEs reflects that the Communications Act does not give unqualified access to unbundled network elements. Instead, the Act only requires access to UNEs that are necessary and where failure to provide access would impair a carrier's ability to provide service. The Commission, as it must, has given substance to the necessary and impair standard of the Act.

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15 Attachment 1 is a Williams Communications advertisement for Private Line Quality of Service.

16 ALTS Comments at 7-8; AT&T Comments at 4-8; Time Warner/XO Comments at 12-15; WorldCom Comments at 21-24; Comments of Competitive Telecommunications Association at 3-5 ("CompTel Comments").

23. To the extent commenters disagree with the Commission's UNE determinations, the Commission has provided them with a forum to advocate their positions. The Commission has commenced a rulemaking proceeding for the purpose of conducting a comprehensive evaluation of its unbundling rules.[17]

24. Nevertheless, whether or not commenters like the UNE rules has no bearing on special access services nor do their opinions create a basis upon which the Commission can justify imposing UNE-type performance standards on special access. The commenters' arguments are nothing more than another attempt to transform special access services into UNE-equivalents.

25. These arguments, however, do not alter the fact that special access services are competitive and that CLECs have a wide range of alternatives in how they compete with incumbents that include UNEs, resale, self-provisioning and the services of competitive network providers. In the face of these alternatives, it would be unjustified to begin treating special access as if it were a UNE and impose performance standards. Just because a competitor makes a business decision to use ILEC special access does not mean that special access should be treated like a UNE. Indeed, to do so would contradict the Commission's standing objective that its unbundling rules should favor the development of facilities based competition because such rules would provide the incentives for all industry participants to invest and innovate and would allow the Commission to reduce regulation.[18]

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17 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *Notice of Proposed Rulemaking*, FCC 01-361, released Dec. 20, 2001 (*"Trienial Review NPRM"*).

18 *Triennial Review NPRM*, ¶9.

26. A variation on the commenters' dissatisfaction theme is that they are "forced" to use special access services because they often encounter situations where no facilities are available and that the ILECs have no obligation to construct UNEs. For example, Time Warner/XO argue that "[w]here CLECs cannot rely on their own loop facilities, however, new construction is often needed. The FCC has, at least for now, apparently acquiesced in the ILECs' construction of their obligation (or lack thereof) to construct UNEs."[19] In the commenters' view, in the absence of available UNEs or an ILEC duty to construct, they have no choice but to purchase special access.

27. As a threshold matter, BellSouth has voluntarily included in its standard interconnection agreement, which any CLEC may adopt, the following provision:

> To the extent available within BellSouth's network at a particular location, BellSouth will offer Loops capable of supporting telecommunications services. If a requested loop type is not available, and cannot be made available through BellSouth's Unbundled Loop Modification process, then <<customer_name>> can use the Special Construction process to request that BellSouth place facilities in order to meet <<customer_name>>'s loop requirements. Standard Loop intervals shall not apply to the Special Construction process.[20]

28. Even if BellSouth did not voluntarily agree to specially construct UNE high capacity loops were facilities were not available, the fact that UNE loops are not available at a particular location does not justify the imposition of performance standards on special access. CLECs have other alternatives including self-provisioning. CLEC arguments that they cannot self-provision are in reality a statement that they are making a business decision to employ the services of the ILEC rather than to make a capital investment. The fact that the CLEC finds it in its economic interest to use ILEC special access services rather than to choose self-provisioning or an

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19 Time Warner/XO Comments at 12.

20 BellSouth has negotiated a variety of variations to this clause that have been included in approved interconnection agreements, including that of XO.

alternative supplier's services cannot serve as a reason for the Commission to establish a regulatory scheme that treats ILEC special access services as if they are UNEs.[21]

C. Claims Of Discrimination Or That Special Access Service Has Deteriorated Lack Merit.

29. The laments regarding service performance are equally suspicious. For the most part, the comments are anecdotal recitations regarding the performance failures (*e.g.*, installation or maintenance) or complaints regarding the ordering process. Overhanging these allegations is the basic question of why these commenters have not pursued their complaints with the Commission. AT&T states that it has raised performance issues regarding interstate special access services with state commissions, but seems chagrinned at the fact that state commissions have not acted because of jurisdictional limitations.[22] US LEC complains it has endured extraordinary outages, but has chosen not to seek redress with the Commission.[23] Time Warner references a request that a complaint against BellSouth be considered on the Commission's accelerated docket. Time Warner's request was denied, and Time Warner did not pursue its complaint.

30. It is far easier to complain than it is to prove that an ILEC has acted unreasonably, as these comments demonstrate. Time Warner's comments are a case in point. They present their

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21 Equally uncompelling are wireless carriers claims that their use of special access services somehow merits the imposition of performance standards. Wireless carriers' asserted dependence on special access services, like that of CLECs, stems from a business decision where the wireless carriers have determined that it is in their economic interest to use ILEC services rather than to build-out their own networks with their own facilities. The wireless carriers economic choice cannot translate into a regulatory imperative for the imposition of onerous performance standards on ILECs. Nor should the Commission distort the operation of the competitive marketplace and create pecuniary rewards that market forces simply do not support.

22 AT&T Comments at 21-22.

23 US LEC Comments at 11.

litany as if they have demonstrated unreasonable conduct on BellSouth's part. Contrary to Time Warner's belief, none of their allegations amounted to a cognizable claim under Section 208 of the Communications Act. For example, Time Warner argues that BellSouth has missed Time Warner's customer desired due date (CDDD) on a quarter of its orders for 1999 and for January through September 2000.[24] Customer desired due date is the date the customer would like to have the service installed. It is not the committed service date. The service date is the date that BellSouth returns to the customer on the Firm Order Confirmation ("FOC") and represents BellSouth's committed customer due date under its access tariff. Section 5.1.1(E) of BellSouth's access tariff unambiguously states that "[t]he service date is the date service is to be made available to the customer and billing will commence."[25] Indeed, BellSouth provides a Service Installation Guarantee on DS1 and DS3 special access services.[26] Under the Service Installation Guarantee, BellSouth "assures that orders for services to which the Service Installation Guarantee applies will be installed and available for customer use no later than the Service Date . . . ."[27] If BellSouth fails to meet the Service Date, the customer receives a credit equal to the nonrecurring charges associated with the service that was ordered.[28]

31. Despite the fact that the service date represents the date that BellSouth commits to install service and that Time Warner was made fully aware of this fact during the proceedings

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24 Time Warner/XO Comments at 49.

25 BellSouth Telecommunications Inc., Tariff F.C.C. No. 1, § 5.1.1(E), 10th Revised Page 5-1-1.

26 BellSouth Telecommunications Inc., Tariff F.C.C. No. 1 § 2.4.9.

27 BellSouth Telecommunications Inc., Tariff F.C.C. No. 1, § 2.4.9(A), 2nd Revised Page 2-49.0.19.

28 This provision was added as a result of the competitive pressures and demands of the marketplace.

before the Enforcement Bureau on its request for accelerated docket treatment, Time Warner argues that in 1999, BellSouth met its committed date for only 76 percent of Time Warner's orders compared to 85 percent of the orders for all BellSouth special access orders. As it did in its request for accelerated docket treatment, Time Warner again erroneously compares its customer desired due date percentages to metrics based on Service Date. A proper comparison, *i.e.*, one based on committed service date, shows that for 1999, the percent of Time Warner's orders completed on or before BellSouth's committed service date was 92 percent.

32. Time Warner also reprises its flawed accelerated docket claim that BellSouth failed to provide it with timely documentation regarding the status of its orders.[29] It erroneously asserts that BellSouth is obligated to provide an FOC (Firm Order Confirmation) within 48 hours after it receives an Access Services Order ("ASR"). Time Warner's conclusion is predicated on a mistaken view that BellSouth's *Guide To Interconnection*, which BellSouth provides as an aid for its access customers, alters the provisions of its access tariff. It does not.[30] Even if that were not the case, the *Guide to Interconnection* merely states that return of an FOC within 48 hours is a BellSouth target—it is not a BellSouth commitment, as Time Warner attempts to characterize it.

33. Time Warner continues with its faulty arguments by repeating its claim regarding when an FOC is changed to PF (Pending Facility) status. It argues that there are times in which an FOC, which has an committed due date (*i.e.*, Service Date), will be changed to PF status either the day before or the day on which service is to be installed. Using the same ploy it used

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29 Time Warner/XO Comments at 50.

30 *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998).

in its accelerated docket request, innuendo through selective use of italicized type, Time Warner attempts to attach a nefarious motive on the part of BellSouth for the change in status. As BellSouth explained in response to Time Warner's accelerated docket request, when a technician goes to install a circuit, he or she may discover that the facilities are in need of repair or that a mistake was made and the facilities are not actually available. These circumstances are normal business occurrences and not the result of any deficiency in BellSouth's ordering procedures. Further, when such occurrences happen, BellSouth compensates Time Warner through its Service Installation Guarantee.

34. About the only thing Time Warner's comments get right is that its accelerated docket request was denied and that it was free to file a Section 208 complaint. Time Warner, like virtually every other commenter who complains about ILEC special access services, has not done so. Instead, the tack has been and continues to be to lobby the Commission to enter the field and establish an unprecedented regulatory scheme to govern the installation and maintenance of an interstate service. To paraphrase Sherlock Holmes, "the game is afoot."[31] If the Commission can be lured into the game, these commenters are hopeful of obtaining superior services for free, of obtaining unearned cash transfers and of hamstringing the competitiveness of the ILECs.

35. There has been a process in place to redress grievances against ILECs—a Section 208 complaint. This is not a situation where the remedial procedure is flawed or has failed to function — the process has not been used. To discard it, along with the due process and

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[31] If there is any doubt that this has become a game, the Commission need only review the tortured reasoning of the proponents for only applying the performance standards and proposed penalties to the four or five largest ILECs.

fundamental fairness principles that are embodied in the complaint procedures, when it has never been tried, is unwarranted and unsound.

III. THE COMMISSION'S AUTHORITY TO ESTABLISH SELF-EFFECTUATING PENALITIES IS HIGHLY CIRCUMSCRIBED.

36. For proponents of mandatory performance standards, a key element is that the Commission create self-effectuating penalties which should be comprised of substantial forfeitures as well as penalty payments to be made directly to purchasers of special access service. To make this money transfer system work, these commenters envision new requirements that will require ILECs to prepare and file new service quality monthly reports. These commenters, while excellent at detailing to the nth degree every performance measure they want and every report they expect to be filed, fall well short of explaining the authority under which the Commission can lawfully act.

37. Many commenters suggest that the Commission must establish monthly special access service reports regarding service quality.[32] In support of this reporting requirement, some commenters proclaim that since the report would be duplicative of the information set forth in ARMIS service quality reports, the annual ARMIS report could be eliminated.[33]

38. BellSouth agrees that the proposed new monthly reports and the ARMIS reports would be duplicative. Commenters, however, fail to recognize that the Telecommunications Act of 1996 limited the frequency of ARMIS reports to once a year. Thus, the Commission cannot, under the guise of special access performance standards, change the name of the ARMIS service quality report and require that it be filed on a monthly basis. If the Commission is going to

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32 Time Warner/XO Comments at 23; AT&T Comments at 26.

33 *See, e.g.*, Time Warner/XO Comments at 53.

continue to require service quality reporting, the Commission does not have the authority to require that such reports be filed more than once a year.

39. Several commenters urge the Commission to adopt a multi-tiered penalty system. The first tier would consist of payments to carriers. Commenters suggest a variety of forms that such payments could take, such as credits for recurring and nonrecurring charges, discounts on charges and, liquidated damages.[34] While commenters are imaginative in conjuring up payments that they should receive, they are not as effective in brewing up the authority by which the Commission is to establish these self-executing payments.

40. The Communications Act bounds the Commission's actions. While the Commission may prescribe rates and regulations that would apply to interstate services, such prescription must be just and reasonable. Accordingly, the Commission cannot arbitrarily establish credit mechanisms or rate discounts that are unrelated to the service outage actually experienced by the customer and the amount that the customer has paid for the service. Even to the extent that the Commission were able to devise a mechanism that could pass statutory muster, the Commission must permit ILECs to recover the cost of the mechanism because such costs are incurred for the provision of service. Anything less would be an expropriation of ILEC property in violation of the 5th Amendment of the Constitution.

41. Similarly, the Commission has no authority to prescribe liquidated damages. The commenters who point to interconnection agreements as authority for the use of liquidated damages miss the point. There is a significant difference between negotiated interconnection agreements and the Commission's prescription authority. Indeed, under the Communications

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[34] *See, e.g.,* Focal Comments at 20; Time Warner/XO Comments at 25; Comments of AT&T Wireless Services, Inc. at 16 ("AT&T Wireless Comments").

Act, parties are free to negotiate agreements that are inconsistent with the provisions of the Communications Act. The Commission, however, is not free to act in a manner inconsistent with statute. While a person can bring a complaint against a carrier and the Commission may award actual damages that the complainant proves, the Commission has no authority to award phantom damages, liquidated damages or punitive damages. No commenter has provided any competent authority to show otherwise.

42. Likewise, the Commission's forfeiture authority is limited. As BellSouth explained in its comments, the Commission must "take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."[35] The language of this statutory provision is mandatory, not discretionary. Accordingly, the Commission, in order to meet its obligations under Section 503, must evaluate each and every violation using the statutory criteria before it may determine a forfeiture amount. A predetermination of forfeiture penalties flies in the face of the statute's express requirements and could not withstand judicial scrutiny.

43. Even where the Commission follows the appropriate steps in determining a forfeiture amount, payment of the forfeiture cannot be self executing. As Qwest points out:

> The assessment of fines, forfeitures, monetary penalties and damages by the Commission is severely curtailed by the Communications Act, which ensures that no monetary penalty may be demanded of a carrier unless full due process has been afforded in that particular instance. In fact, no monetary penalty can be enforced against a carrier in the absence of a full judicial proceeding at which the carrier has the right to challenge on a *de novo* basis the Commission's finding that

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[35] 47 U.S.C. § 503(b)(2)(D).

a penalty is due. Imposition of 'automatic' damage awards or 'baseline' forfeiture amounts would violate these legal constraints and be unlawful.[36]

44. Although some commenters urge the Commission to establish self-executing forfeitures, such a mechanism cannot meet statutory muster. The statute (Section 503(b)(3)) requires both notice and full opportunity for hearing before the Commission can impose a fine. The requirement for a hearing is simply at odds with the notion of baseline forfeiture amounts or similar self-executing devices.

IV. CONCLUSION

45. Competition or regulation — that is the choice that confronts the Commission. Make no mistake; mandated special access performance measures do not promote competition. They may well favor specific competitors, but as the Commission has long recognized, the interests of competition do not equate to the interests of individual competitors. Nothing has been presented to the Commission that would warrant the abandonment of its long standing policies to promote competition and reduce regulation. BellSouth urges the Commission to choose competition.

Respectfully submitted,

BELLSOUTH CORPORATION

By: /s/ Richard M. Sbaratta
Richard M. Sbaratta

Its Attorney

Suite 4300 ,675 West Peachtree Street, N. E.
Atlanta, Georgia 30375-0001
(404) 335-0738

Date: February 12, 2002

[36] Comments of Qwest Communications International Inc. at 11.

CERTIFICATE OF SERVICE

I do hereby certify that I have this 12th day of February 2002 served the following parties to this action with a copy of the foregoing **REPLY COMMENTS OF BELLSOUTH CORPORATION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

/s/ Juanita H. Lee
Juanita H. Lee

Service List CC Docket Nos. 01-321, 00-51, 98-147, 06-98, 08-141, 95-149 and 00-229

Lawrence G. Malone
Brian P. Ossias
Public Service Commission of
The State of New York
Three Empire State Plaza
Albany, New York 12223-1350

Jonathan Askin
Teresa K. Gaugler
Association for Local
Telecommunications Services
888 17th Street, NW
Washington, DC 20005

Wayne V. Black
C. Douglas Jarrett
The American Petroleum
Institute
1001 G Street, N. W.
Suite 500 West
Washington, D. C. 20001

Charles C. Hunter
Catherine M. Hannan
Association of Communications
Law Group
Hunter Communications Law Group
Suite 105
1424 Sixteenth Street, N. W.
Washington, D. C. 20036

James L. Casserly, Sara F. Leibman
Robin E. Tuttle, Angela F. Collins
AT&T Corporation
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P. C.
Suite 900
701 Pennsylvania Ave., N. W.
Washington, DC 20004

Mark C. Rosenblum, Lawrence J. Lafaro
Richard H. Rubin, James W. Grudus
Deborah S. Waldbaum
AT&T Corporation
Room 1134L2
295 North Maple Avenue
Basking Ridge, NJ 07920

Howard J. Symons, Michael Pryor,
Russ Taylor, Christopher R. Bjornson,
AT&T Wireless Services, Inc.
Mintz, Levin, Cohn, Ferris, Glovsky
And Popeo
Suite 900
701 Pennsylvania Avenue, N.W.
Washington, D. C. 20004

Douglas I. Brandon
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Audrey Wright
Cable & Wireless USA, Inc.
Director, Domestic Regulatory Affairs
1130 Connecticut Avenue, N. W.
Suite 1201
Washington, D. C. 20036

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

Cherie R. Kiser
Lisa N. Anderson
Cablevision LightPath, Inc.
Mintz Levin Cohn Ferris
Glovsky and Popeo, PC
701 Pennsylvania Avenue, N.W.
Washington, D. C. 20004

Carol Ann Bischoff
Jonathan D. Lee
Competitive Telecommunications
Association
Suite 800
1900 M Street, N.E.
Washington, D. C. 20036

Robert J. Aamoth
Competitive Telecommunications
Association
Kelly Drye & Warren LLP
Suite 500
1200 19th Street, N. W.
Washington, D.C. 20036

Patrick J. Donovan
Paul B. Hudson
DIRECTV Broadband, Inc.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N. W.
Suite 300
Washington, D. C. 20007

Gregg C. Sayre
Frontier and Citizens Incumbent
Local Exchange Carriers
180 South Clinton Avenue
Rochester, New York 14646

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

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

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

Margot Smiley Humphrey
National Exchange Carrier
Association, Inc.
Suite 100
2099 Pennsylvania Avenue
Washington, D. C. 20006

Stuart Polikoff
Organization for The Promotion and
Advancement of Small
Telecommunications Companies
21 Dupont Circle, NW
Suite 700
Washington, D. C. 200036

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

Eric J. Branfman
Harry N. Malone
Paetec Communications, Inc.
Swidler Berlin Shereff Friedman, LLP
300 K Street, N. W., Suite 300
Washington, D. C. 20007

Robert B. McKenna
Sharon J. Devine
Qwest Communications
International, Inc.
Suite 700
1020 19th Street, N. E.
Washington, DC 20036

Benjamin H. Dickens, Jr.
Gerald J. Duffy
Douglas W. Everette
Rural ILEC Coalition
Blooston, Mordkofsky, Dickens,
Duffy & Prendergast
2120 L Street, NE, Suite 300
Washington, D.C. 20037

Christopher M. Heimann
Gary L. Phillips
Paul K. Mancini
SBC Communications Inc.
1401 Eye Street, N.W., Suite 400
Washington, D.C. 20005

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

Max Yzaguirre
Brett A. Perlman
Rebecca Klein
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, Texas 78711-3326

Thomas Jones, Christi Shewman
Kelly N. McCollian
Time Warner Telecom and
XO Communications, Inc.
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N. E.
Washington, D. C. 20036

Lawrence E. Sarjeant
United States Telecom Association
1401 H Street, NW, Suite 600
Washington, DC 20005

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

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

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

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

Richard Metzger, Jr.
The Joint Competitive Industry Group
Lawler, Metzger & Milkman, LLC
1909 K Street, NE
Suite 820
Washington, D. C. 20006

+Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals, 445 Twelfth Street, S. W.
Room TW-B204
Washington, D.C. 20554

+Qualex International
The Portals, 445 Twelfth Street, S. E.
Room CY-B02
Washington, D.C. 20554

+ **VIA ELECTRONIC FILING**

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2002, a copy of the foregoing document was served on the following parties, via the method indicated:

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

James Lamoureux, Esquire
AT&T
1200 Peachtree St., NE
Atlanta, GA 30309

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Henry Walker, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Jon E. Hastings, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Charles B. Welch, Esquire
Farris, Mathews, et al.
618 Church St., #300
Nashville, TN 37219

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Dana Shaffer, Esquire
XO Communications, Inc.
105 Malloy Street
Nashville, TN 37201