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August 12, 1997

William Caton
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
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Re: Written Ex Parte: Petition for Expedited Rulemaking by LCI International Telecom Corp. and Competitive Telecommunications Association; and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934: CC 96-98/RM-9101; CC 96-149

Dear Mr. Caton:

Teleport Communications Group Inc. ("TCG") has long promoted the use of performance reporting as an objective and streamlined means of assuring that ILECs meet the performance Parity requirements of Sec. 251(c)(2)(c) and Sec. 251(c)(3). The Massachusetts Department of Public Utilities ("DPU"), in a recent decision (attached), has endorsed this approach and imposed Performance Parity standards, reporting requirements, and monetary penalties on NYNEX.

In addition to setting a "no change in parity" standard restricting NYNEX's performance from falling below current levels, the DPU required NYNEX to collect and report data pertaining to ordering, provisioning, and maintenance for resale, unbundled elements, and interconnection trunks. NYNEX must report this data on a monthly basis for 1)each CLEC, 2) the aggregate of CLECs, 3) all of NYNEX's customers, and 4) NYNEX's top 100 customers. Equally important to the monthly reporting requirements are the monetary penalties and fines imposed on NYNEX for failing to meeting individual installation deadlines and quarterly Performance Parity reviews.

The Performance Parity requirements and penalties adopted by the Massachusetts DPU provide an excellent basis on which the Commission can build similar measures to determine if interconnection, OSS and other unbundled elements, and resale services are

being provided in parity with that which the ILEC provides itself. The 1996 Act makes such a determination of Performance Parity a necessary condition for approving an RBOC's application for Sec. 271 long distance authority.

Please feel free to call me if you would like to discuss this matter in greater detail.

Pursuant to Sec. 1.1206(b)(1) of the Commission's rules, attached please find an original and two copies of this letter.

Sincerely,

Judith E. Herrman
Manager, Federal Regulatory Affairs

Attachment

cc: Regina Keeney
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The Commonwealth of Massachusetts COPY

DEPARTMENT OF PUBLIC UTILITIES

July 29, 1997

D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 3-B)

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a NYNEX, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between NYNEX and the aforementioned companies.

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I. INTRODUCTION

This is an arbitration proceeding being held pursuant to the Telecommunications Act of 1996 ("the Act"). On December 4, 1996, the Department of Public Utilities ("Department") issued an order ("Phase 3 Order") which set forth our rulings with regard to various issues surrounding the interconnection agreements to be entered into by New England Telephone and Telegraph Company, d/b/a NYNEX ("NYNEX") and the competitive local exchange carriers ("CLECs") in this consolidated arbitration proceeding. On February 5, 1997, the Department issued a second order ("Phase 3-A Order") denying a motion for reconsideration from MCI Telecommunications Corporation ("MCI") on the issue of liquidated damages.

A portion of the Phase 3 Order dealt with the determination of performance standards to be met by NYNEX in providing services to the CLECs. Examples of such services include connecting customers to resold services, like local exchange service; responding to repair calls; and processing of unbundled network elements ("UNEs"). The Department found that NYNEX should provide services to the CLECs at parity with services it provides to itself and that the level of service NYNEX provides to itself today should be the base-line level of performance it is required to provide in the future to the CLECs. This standard was termed the "no-change-in-parity" standard. We also found that two levels of performance should be measured by NYNEX. One, "the internal process standard," would ensure that there is parity with regard to NYNEX's own internal processes in handling CLEC requests for service. The second metric, "the retail process standard," would ensure that there is parity in the delivery of service to the retail customer. In addition, we found that NYNEX

should report on the level of service NYNEX currently achieves in its internal processes with respect to its 100 largest business customers and compare that service level with that offered the CLECs. Phase 3 Order at 20-24.

Another portion of the Phase 3 Order dealt with the remedies that would be available to the CLECs if NYNEX fails to meet the performance standards that have been established. We found that liquidated damages should be available to carriers in the event NYNEX fails to achieve parity. Noting that the record in the Phase 3 proceeding did not provide support for a particular level of liquidated damages, we directed the parties to reconvene negotiations to determine an appropriate level of liquidated damages, and if they were unable to reach an agreement, to petition the arbitrator to determine appropriate levels based on a more complete record. Id. at 27.

On February 25, 1997, the parties to this proceeding reported back to the arbitrator, Paul F. Levy, that agreement on these issues could not be reached, and he established a procedural schedule for the Department's resolution of them (Tr. 12, at 61-65). On March 11, 1997, NYNEX submitted its proposal on performance standards and liquidated damages. On March 24, 1997, Teleport Communications Group, Inc. ("TCG") submitted a reply to NYNEX's proposal. On March 25, 1997, AT&T Communications of New England, Inc. ("AT&T") submitted its response to NYNEX's filing and offered an alternative proposal. On March 25 and March 26, 1997, MCI filed testimony on these topics. On March 28, 1997, NYNEX supplemented its March 11 filing with the actual performance data it proposed to utilize in calculating liquidated damages.

At a hearing held on March 31, 1996, several witnesses testified: Julie A. Canny.

managing director - operation support and implementation of legal requirements from NYNEX; Kevin Moss, manager in MCI's local markets division, and Michelle Berkowitz, associate commercial counsel from MCI; Paul Kouroupas, attorney, and John F. Kelley, director of operations, from TCG; and Eileen M. Halloren, vendor management official from AT&T. NYNEX was permitted to file supplemental testimony in response to the other parties' proposals on April 14, 1997, and an additional hearing was held on April 23, 1997, at which time further testimony was received from Ms. Canny, Ms. Halloren, and Gregory E. Knight, reporting and measurements program coordinator for local markets for MCI.

At the April 23 hearing, the arbitrator asked the parties to brief the following issues:

(1) Measurement. What measures should form the basis for the parity standard adopted by the Department? What standards should be adopted for those measures? Over what time periods and intervals should the measures be reviewed to determine compliance with those performance standards? What is the level of performance that NYNEX is providing today?

(2) Principles. What principles should be applied in establishing the level of liquidated damages? Should the Department consider the harm done to CLECs by NYNEX's failure to meet performance standards, and if so, how should it evaluate or quantify that harm? How should the Department consider and evaluate the incentive value of liquidated damages? Should CLECs have remedies beyond liquidated damages for NYNEX's failure to meet performance standards set by the Department? If so, what should those remedies be?

(3) Application of principles. Based on the principles set forth, what dollar amounts of liquidated damages are appropriate for NYNEX's failure to meet the various standards

adopted by the Department?

Briefs were filed by TCG on May 13 and by AT&T and MCI on May 14. ACC National Telecom Corporation ("ANTC"), which was granted an opportunity to participate in this proceeding, in parallel to a separate ANTC/NYNEX interconnection dispute, also filed a brief on May 14. NYNEX filed a reply brief on May 28. TCG filed a reply brief on June 3, the other three CLECs filed their reply briefs on June 4, and NYNEX submitted a reply letter on June 9.

Except as certain general principles may be enunciated herein, this Order does not address the internal process standards envisioned in the Phase 3 Order because NYNEX's filing on those measures has been scheduled to be submitted after this order is issued. Those metrics will be addressed in a subsequent order.

II. MEASUREMENT

A. Introduction

The standard we have adopted in the Phase 3 Order—no change in parity—clearly envisions that NYNEX is required to provide service at the same level it offers to its own customers. In this sense, the debate is over what the basis for the standard should be. However, the standard raises several sets of questions, including the key question of what is to be measured. NYNEX has offered its proposal of the service functions to be measured. The carriers have offered a number of functions. In some cases NYNEX has agreed, in some it may have agreed in principle but states that it does not currently collect data on its performance of those functions (even for its own customers), and in some it disagrees altogether. Beyond resolving this issue, we also need to determine, for those functions

chosen as indicative of parity, what values are to be measured and reported.

B. Requirement to Collect Data

Before turning to the many specific issues raised by the parties, we address a threshold question. NYNEX has argued that it currently does not collect data on several types of service functions that the CLECs argue are important to their competitive interests. In a number of instances, it asserts that it should not have a requirement to collect data for others that it does not collect for itself. For example, NYNEX does not collect data on billing accuracy. Instead it relies on customer complaints to bring billing errors to its attention (Tr. 14, at 88-89). AT&T, however, states that NYNEX should be required, in this and other areas, to develop a measuring and reporting capability. AT&T notes that problems in any of the areas it seeks to measure can have significant damaging effects on the emergence of competition and that measuring performance in each of these areas is a critical step in first evaluating and then achieving service parity (AT&T Initial Brief at 6, 9). MCI, too, argues that, where historical data do not exist on business processes it deems important, NYNEX should be required to begin compiling data (MCI Initial Brief at 5). ANTC also supports this position (ANTC Initial Brief at 7-8, ANTC Reply Brief at 2-4).

As noted in the Phase 3 Order, the Department is not averse to requiring NYNEX to produce metrics for functions deemed important to the purposes of the Act, but we are also mindful of the administrative burdens and costs that such requirements can impose on NYNEX. Although NYNEX is in the unique position of being the incumbent local exchange carrier, we do not believe that, in this context, it is the intent of the Act to create requirements for it that are not necessary to demonstrate parity. As a general matter, we

will not order NYNEX to collect data on service functions that it does not currently collect to measure performance to its own customers, unless it has been demonstrated in this record that there is reason to believe that there is something inherent in the provision of those services to the CLECs' customers that can be distinguished from the provision of those services to NYNEX's own customers.

The billing accuracy issue is a case in point. NYNEX currently bills its customers without undertaking an analysis of billing accuracy. With the advent of local exchange competition, NYNEX will be providing the CLECs the exact same type of billing information (i.e., collected and processed by the same switching equipment). As noted by Ms. Canny, "the switch doesn't differentiate" (Tr. 14, at 89). Hence, there is no reason to believe that there will be a difference in the degree of billing accuracy to the CLECs' customers. The Department understands that the CLECs want their customers to have accurate bills, and that those carriers might have a commercial interest in having an assessment of what percentage of bills are likely to be inaccurate in any given month. However, in the absence of a determination that this information is essential to ensure parity, the CLECs' desire for this information does not provide sufficient reason for the Department to order NYNEX to collect it.

We now to turn to the specifics of the NYNEX proposal and the CLECs' responses to it. We first address resale, then UNEs, and then other services.

C. Resale

1. NYNEX Proposals

NYNEX has proposed to measure its performance in the resale arena in two major

product categories, POTS (plain old telephone service) and Specials (DS0, DS1, DS3, and other special services), and compare its performance for all of its Massachusetts customers, its 100 largest Massachusetts customers, those of each CLEC, and those of all CLECs combined. Within each product category, it proposes to measure two segments of service, provisioning and maintenance. Within each segment of service, it proposes a number of metrics. For provisioning of POTS service, these include:

- the percentage of appointments completed within five days for residence customers;
- the percentage of appointments completed within five days for business customers;
- the percentage of appointments missed, both for those requiring dispatch of a service technician and for those not requiring dispatch;
- the percentage of appointments completed in one business day, both for dispatch and non-dispatch;
- the percentage of appointments completed in two business days, both for dispatch and non-dispatch;
- the percentage of appointments completed in three business days, both for dispatch and non-dispatch;
- the percentage of appointments completed in four business days, for dispatch and non-dispatch combined;
- the percentage of appointments completed in five business days, for dispatch and non-dispatch combined;
- the percentage of appointments completed in six business days, for dispatch and non-dispatch combined;
- the percentage of customers who report installation troubles within seven days after installation; and
- the percentage of customers who report installation troubles within thirty days after installation.

NYNEX also proposes to report on, but not be measured by, the number of installation orders, the average provisioning interval in business days, and the percentage of missed appointments where the customer was at fault.

For maintenance of POTS service, NYNEX proposed to measure the following items:

- the percentage of missed appointments;
- the percentage of lines out of service for over four hours;

- the percentage of lines out of service for over 12 hours;
- the percentage of lines out of service for over 24 hours;
- the percentage of lines cleared within 24 hours; and
- the percentage of repeat trouble reports within 30 days.

NYNEX also proposes to report on, but not be measured by, the total number of troubles reported, the customer trouble report rate, the mean time to repair, the percentage of troubles that are related to customer premises equipment, the percentage of subsequent trouble reports, the percentage of no-trouble-found incidents, and the percentage of visits where no access was available to the customer's premises.

For provision and maintenance of special services, NYNEX proposes virtually identical measures, although there is no breakdown between business and residential service since most special services are ordered by business customers.

Finally, for all measurements, NYNEX proposes that its reports be audited annually by an independent third party and that the results of the audit be provided to the Department and to every carrier with an interconnection agreement.

2. Analysis and Findings

The CLECs have made a number of proposals with regard to performance measures for resold services, which we will describe and review here. Some of these proposals also relate to UNEs. To the extent they do, the conclusions reached herein should also be deemed as applying to UNEs. Furthermore, those NYNEX proposals that are not discussed in this section or elsewhere in this order should be deemed as approved.

MCI proposes that a measure be used to report on NYNEX's performance in meeting installation orders on time. It would measure the percentage of orders processed for a

requested due date that is equal to or greater than the standard interval, by service and by product (MCI Initial Brief, Attachment A at 4). As noted above, NYNEX has proposed to measure the percentage of orders missed for groups of products. It asserts that because of the multitude of products and services provided for its own end users and for resale, specific product performance comparisons are not practical. It states that sample sizes would be too small, in many instances, to determine parity (Exhibit NYNEX LD-4, Attachment B at 1).

We agree with NYNEX that its proposed completion intervals for the range of products offered will provide a good gauge of whether parity is being achieved. The multitude of products offered by NYNEX to its customers and through resale—both today and as that mix changes over time—would make a more discrete listing of installation measurement unworkable and not meaningful.

AT&T and MCI propose that there should be a standard for order accuracy, which would measure the accuracy and completeness of the NYNEX provisioning service by comparing what was ordered with what was completed. The measurement associated with this function would be the percentage of provisioning orders completed without error (AT&T Initial Brief, Attachment A at 4; MCI Initial Brief, Attachment A at 6). NYNEX responds that it can measure order accuracy only from the perspective of troubles reported after an order has been completed. Hence, it has proposed that the percentage of installation troubles reported after seven and 30 days be used to measure performance (Exhibit NYNEX LD-4, Attachment A at 3).

This dispute is analogous to the billing issue raised above. We can understand why AT&T and MCI might have a commercial interest in the measures they propose, but the

data that support those measures are not collected by NYNEX. NYNEX has proposed an alternative measure of installation quality that it uses for its own customers. That measure, in our view, is a reasonable one to assure parity in the quality of installations between NYNEX's customers and the CLECs' customers, and we will accept it.

AT&T proposes that the Department should set a standard for the timing of receipt of order status reports, both for provisioning and repair. This standard would measure the response time from the time an order is sent until a status report is received, indicating that the order has been completed (AT&T Initial Brief, Attachment A at 4, 7). MCI joins in this proposal (MCI Initial Brief, Attachment A at 6). NYNEX responds that it does not send completion notices to its own retail channels. Each completion is indicated on the technician's contemporaneous log and can be accessed by a query to the customer service record. NYNEX states that it does not have the ability to measure the timeliness of this recordkeeping. Its technicians enter status reports on their work throughout the day, and the data is used to measure their productivity (Exhibit NYNEX LD-4, Attachment A at 3).

This dispute is again analogous to the one raised above, and we find that NYNEX should not be required to maintain the records requested by the CLECs. They will have access to customer service records comparable to NYNEX's. They will be able to query, without charge, the customer information system to determine the status of provisioning and repair orders (Tr. 14, at 74-76, 82-83). In this regard, they have parity with NYNEX. Further, NYNEX has proposed a variety of metrics that, among other things, will enable AT&T and MCI to compare the percentage of installations achieved within a given number of days, and repairs that are achieved within a given number of hours. These metrics should

provide a sufficient indication of parity in the provisioning and maintenance of these services.

AT&T and MCI propose a more discrete measurement of time to restore service than does NYNEX. NYNEX has proposed to report on repair intervals of four, 12, and 24 hours. The two CLECs recommend intervals of four, eight, and 16 hours where dispatch is required; two, three, and four hours where dispatch is not required; and 24 hours for all troubles. NYNEX indicates that it does maintain records that could be used to reflect the more discrete periods (Exhibit NYNEX LD-4, Attachment A at 5). Accordingly, since the CLECs indicate that these intervals would be more useful to them and since there is no incremental cost in providing them, we will require those intervals to be used as the performance measures.

AT&T also proposes that the mean time to repair be used as a metric (AT&T Initial Brief, Attachment A at 6). While NYNEX has indicated that it will maintain records on the mean time to repair service and that it will report these data, it suggests that this metric not be used as a measure of parity. This is a potential "belt and suspenders" issue. The Department wants to have sufficient measures in place to ensure parity, but we do not want to overburden the parity-recording system with measures that duplicate or overlap and measure essentially the same functions. Here, while the interval measures offer some protection to the CLECs that parity is being achieved, they do not cover the full range of time periods for restoration of service. Accordingly, we direct that the mean time to repair be included as a performance measure. Adding the mean time will cover the full range of time periods.

AT&T has proposed that NYNEX report on the percentage of installation troubles and the percentage of repeat troubles, using a 60-day interval as a performance measure (AT&T Initial Brief, Attachment A at 6). NYNEX indicates that it measures these items using a 30-day interval and proposes this interval for its performance measurement (Exhibit NYNEX LD-4, Attachment A at 6). This 30-day period is also supported by MCI, although it asks for a breakdown by service and by product (MCI Initial Brief, Attachment A at 6). NYNEX states that it does not maintain full product detail in repair data bases. We find no reason for NYNEX to change its measurement interval for these items, and we do not find a persuasive reason for it to begin to maintain the detailed product information requested by MCI. Thus, we conclude that the NYNEX proposals offer adequate measures for installation and repeat troubles.

AT&T suggests that the time to restore service as compared to the time estimated to the customer should be used as a performance measure. It suggests the metric for this item should be the percentage of appointments met. NYNEX agrees and has proposed such a metric, noting that its performance in 1996 was 25.17 percent (NYNEX Exhibit LD-4, Attachment A at 6).

AT&T would like to ensure that it receives timely notice if a NYNEX repair crew will miss a repair visit. NYNEX states that it has issued methods and procedures to require notification calls to all customers one hour prior to a missed appointment for repair (NYNEX Exhibit LD-4, Attachment A at 6). AT&T advocates a measurement that would indicate the percentage of missed notifications. We understand that AT&T's request would provide a variant on the variety of other measurements with regard to missed appointments, but we

find that such a measure is effectively redundant given the other measures we are adopting.

Finally, we address a general issue raised by AT&T, that NYNEX's proposal inappropriately aggregates measurements for the purposes of determining parity in a way that allows NYNEX to hide a lack of parity with regard to particular services (AT&T Initial Brief at 6-7). NYNEX responds that both its and AT&T's proposals assemble services into groupings for reporting purposes. Using resold services as an example, it argues that its proposed six categories, while different from AT&T's proposed six categories, encompass all of the services in the AT&T proposal but enable it to compare like-to-like services better and to ensure correct sample sizes (NYNEX Initial Brief at 12).

There are many possible ways to disaggregate NYNEX's services for purposes of reporting parity. We understand why AT&T might prefer to have different groupings, but there is nothing unreasonable about NYNEX's proposal. As noted by Ms. Canny, the groupings proposed by NYNEX are based on how NYNEX assesses the services today for itself (Tr. 13, at 140). Accordingly, we will accept them for purposes of reporting. The question of which measures should serve as triggers for liquidated damages is a different issue, however, and we discuss that below.

D. Unbundled Network Elements

1. NYNEX Proposals

As in the case of resale, NYNEX has proposed to measure its performance in the UNEs arena in two major product categories, POTS (dial tone services) and Specials, and to compare its performance for all of its Massachusetts customers, its 100 largest Massachusetts customers, those of each CLEC, and those of all CLECs combined. Within each product

category, it proposes to measure two segments of service, provisioning and maintenance. Within each segment of service, it proposes a number of metrics. For provisioning of POTS service, these include:

- the percentage of appointments completed in one business day, both for dispatch and non-dispatch;
- the percentage of appointments completed in two business days, both for dispatch and non-dispatch;
- the percentage of appointments completed in three business days, both for dispatch and non-dispatch;
- the percentage of appointments completed in four business days, for dispatch and non-dispatch combined;
- the percentage of appointments completed in five business days, for dispatch and non-dispatch combined;
- the percentage of appointments completed in six business days, for dispatch and non-dispatch combined;
- the percentage of missed appointments, both for dispatch and non-dispatch;
- the percentage of customers who report installation troubles within seven days after installation; and
- the percentage of customers who report installation troubles within thirty days after installation.

NYNEX also proposes to report on, but not be measured by, the number of installation orders, the average provisioning interval in business days, and the percentage of missed appointments where the customer was at fault.

For maintenance of POTS service, NYNEX proposed to measure the following items:

- the percentage of missed appointments;
- the mean time to repair loop trouble;
- the mean time to repair central office trouble;
- the percentage of UNEs out of service for over four hours;
- the percentage of UNEs out of service for over 12 hours;
- the percentage of UNEs out of service for over 24 hours;
- the percentage of UNEs cleared within 24 hours; and
- the percentage of repeat trouble reports within 30 days.

NYNEX also proposes to report on, but not be measured by, the percentage of

troubles that are related to customer premises equipment, the percentage of subsequent trouble reports, the percentage of no-trouble-found incidents, and the percentage of visits where no access was available to the customer's premises.

For provision of special services UNEs, NYNEX proposes the following:

- the percentage completed within five days, both for dispatch and non-dispatch;
- the percentage of missed appointments, both for dispatch and non-dispatch; and
- the percentage of customers who report installation troubles within thirty days after installation.

NYNEX also proposes to report on, but not be measured by, the number of installation orders, the average installation interval in business days, and the percentage of appointments missed because of customer actions.

For the maintenance of special services UNEs, NYNEX proposes the following:

- the mean time to repair;
- the percentage of UNEs out of service for over four hours;
- the percentage of UNEs out of service for over 24 hours; and
- the percentage of repeat trouble reports within 30 days.

NYNEX also proposes to report on, but not be measured by, the percentage of troubles that are related to customer premises equipment, the percentage of subsequent trouble reports, the percentage of no-trouble-found incidents, and the percentage of visits where no access was available to the customer's premises.

Finally, as in the case of resale, NYNEX proposes that its reports for all measurements be audited annually by an independent third party and that the results of the audit be provided to the Department and to every carrier with an interconnection agreement.

2. Analysis and Findings

The CLECs have made a number of proposals with regard to performance standards

for the provisioning and maintenance of UNEs. Many of those proposals parallel those made for resale, and we will not address them again, as the directives we have issued above will apply to the UNEs as well. The other proposals made by the parties are not relevant to parity. For example, AT&T has proposed that there be an absolute standard of 100% for the percentage of UNE orders completed on the due date (AT&T Initial Brief, Exhibit A at 2). This is not a parity standard that compares NYNEX's own performance with that to a CLEC; it is an absolute standard. Therefore, we will not adopt it or other similarly stated proposals.

E. Other Services

The CLECs have proposed that a number of additional services be monitored for performance to ensure parity. The categories include billing, operator and directory assistance ("O&DA"), and network performance. We have dealt with the billing issue above and need not repeat that discussion here.

In the O&DA arena, AT&T has requested that NYNEX report on answer time for calls to NYNEX operators. NYNEX responds that its operator platforms do not separately and discretely process the traffic of individual carriers. Therefore, it argues, all carriers receive the same level of service, making separate reports by carrier unnecessary to ensure that parity is being achieved. Given these facts, we agree with NYNEX that there appears to be no reason to maintain the records sought by AT&T for O&DA service.

Both AT&T and ANTC have requested measurements of network reliability, availability, and blockage (AT&T Initial Brief at 6; ANTC Initial Brief at 9). NYNEX argues that such measurements do not go to the issue of parity but seek to identify the level

of service inherent in NYNEX's network which is common to all users. It states that the Phase 3 Order does not require that NYNEX create measurements for activities that cannot operationally be separated by carrier and for which all carriers will receive the same level of service (NYNEX Initial Brief at 14, 12). We have discussed this general issue above (see, supra, Section II.B). For the reasons set forth by NYNEX, we agree with NYNEX that these measurements have not been shown to be necessary to establish that parity is being met and accordingly will not require them.

III. PRINCIPLES

A. Introduction

This section focuses on the principles that are to apply in establishing the level of liquidated damages. In its initial filing, NYNEX suggested that an enforceable liquidated damages clause should meet three criteria: (1) the actual injury or damages caused by the breach must be difficult to estimate accurately; (2) the parties must intend to provide for damages rather than a penalty; and (3) the stipulated sum must be a reasonable estimate of probable loss. In making this suggestion, NYNEX relied on rules relating to liquidated damages in contract law (NYNEX Exhibit LD-1 at 10-11). We review here whether this is a reasonable statement of the standards we should apply. The competing carriers have suggested that an alternative standard is appropriate in this case because this is not a typical contract, in that NYNEX may have an incentive to provide poor service to its competitors who, to a certain extent, have limited options for obtaining that service. They argue that this is unlike most contract situations, in which the provider generally has a commercial incentive to provide very high levels of service to its customers.

The arbitrator asked the parties to address another issue with regard to principles: whether the liquidated damages provision of the contract should be the sole remedy available to the carriers for substandard performance by NYNEX. That is, should the interconnection agreement provide that NYNEX should also be subject to consequential damages in a court of law for failure to meet the parity standard? If so, does such a provision affect the principles that should be used in the design of the liquidated damages? A subsidiary question is whether any liquidated damages which have been collected mitigate or offset any ultimate damage amounts found by a court.

B. Positions of the Parties

1. AT&T

AT&T asserts that the basic principle of breach of contract damages is that the injured party should recover damages sufficient to put it in as good a position as it would have been if the other party had fully performed. It argues that the wronged party should receive the benefit of its bargain. AT&T notes that if NYNEX does not meet the parity standard, CLECs can be harmed by being less successful in attracting and keeping local exchange customers. Admitting that quantification of like damage is difficult in these early days of local exchange competition, AT&T posits several principles that should govern the assessment of the level of damages that should be included in the interconnection agreements.

First, says AT&T, the damage amounts must be sufficiently high that they are not viewed by NYNEX merely as a cost of business that NYNEX feels comfortable paying to prevent competitors from making inroads into the local service market. Second, the specific monetary remedies provided in the interconnection agreement for liquidated damages should

not be the sole damage remedy available. AT&T argues that the ability to seek more significant damages should be preserved, although it agrees that the contractual damages should be treated as an offset to any such damages awarded. Third, there should also be a remedial plan requirement imposed for failure to meet parity of service standards. Such a plan would assure that NYNEX would make efforts to bring CLEC service up to parity with the service NYNEX provides to itself and its customers. In making this suggestion, AT&T suggests that this requirement of remedying a failure to achieve service parity is more likely to achieve parity than any damage system that can be developed (AT&T Initial Brief at 10-12).

2. MCI

MCI argues that an interconnection agreement between NYNEX and a CLEC is not analogous to an ordinary commercial contract. In such a contract, where a supplier is competing to provide service to a buyer, there are natural incentives in place for the supplier to provide the best possible service, and liquidated damages are used simply to avoid litigation and the costs of litigation. Here, argues MCI, NYNEX has no natural incentive to provide a CLEC with high quality service and may in fact be driven by an incentive to provide it with substandard service. Therefore, says MCI, liquidated damages are not appropriate, but if the Department orders their inclusion in the interconnection agreement, the CLECs should be free to seek consequential damages for breach of parity in a court of law (MCI Initial Brief at 10-11). On the other hand, MCI is willing to forego certain consequential damages — excluding willful misconduct or gross negligence or repeated breach of the material terms of the agreement — if its proposed system of credits is adopted