by the Department (id. at 8).[1]

3. TCG

TCG also disagrees with NYNEX over the appropriate meaning of the term "liquidated damages" in the context of the interconnection agreements. It argues that the Uniform Commercial Code's standards for liquidated damages, cited by NYNEX, should not bind the Department in this instance. Like AT&T and MCI, TCG argues that an alternative standard is appropriate given that an interconnection agreement is not a typical contract. It suggests that the damage methodology selected should meet the standard proposed by NYNEX in its initial filing, i.e., to give NYNEX a "monetary incentive to ensure parity and to provide good service, while simultaneously supplying a certain, timely payment to carriers for possible damages incurred" (TCG Brief at 2-3).

4. NYNEX

NYNEX agrees that the interconnection agreements arbitrated by the Department are not classic forms of contractual relationship entered into by parties in a normal commercial setting. It points out, however, that the Act ensures that there will be pervasive regulatory oversight at both the federal and state levels of this relationship. Accordingly, states NYNEX, the liquidated damages provisions of the agreements should be viewed as an incentive to complement the Department's enforcement powers. The payment, it asserts,

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[1] Notwithstanding the Phase 3 Order and the Phase 3-A Order, MCI has declined, here and in the early phase of this proceeding, to equate its system of credits to liquidated damages, presumably because it argues for the right to seek consequential damages, as well. However, the two issues may be considered separately. Therefore, we will view MCI's credit proposal as analogous to liquidated damages and discuss its proposal in this context.

should be viewed in relation to the entire regulatory framework in which the interconnection agreements are being fashioned and implemented (NYNEX Initial Brief at 16-17).

Further, according to NYNEX, carriers are not entitled to damages, except in the event of willful misconduct, because of the limitations of liability that apply to regulated telecommunications service. These limitations, state NYNEX, do not permit customers to seek damages beyond a waiver of the proportionate charge to the customer for the period of service during which service quality standards were not met.[2] NYNEX provides a number of legal citations in support of this premise and notes, in particular, the Department's findings in D.P.U. 91-30-LL (1994) (id. at 17-19). The company argues that the public policy rationale for these previous rulings remains in force today, that opening NYNEX to consequential damages would subject it to large and uncertain levels of liability. Thus, it asserts, consideration of the payments mandated by the Department in this proceeding should not be used to expand greatly the liability of NYNEX. The goal, rather, should be to provide a reasonable incentive for the company to meet the no-change-in-parity standard (id. at 20).

C. Analysis and Findings

An interconnection agreement is not a typical commercial contract. It is the embodiment of federal law and regulation that requires an incumbent local exchange carrier

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[2] Section 1.4.3.A in Part A of NYNEX's Massachusetts Tariff No. 10 states in part that NYNEX's liability shall in no event exceed an amount equivalent to the proportionate charge to the customer for the period of service in which a mistake, omission, interruption, delay, error, or defect in transmission, or failure or defect in facilities, occurs.

to provide services to its competitors. Unlike normal commercial arrangements, where the supplier has financial incentives to maintain high levels of service quality to its customers, here the supplier has the opposite incentives. It has an underlying commercial interest in slowing down the loss of its market share to its wholesale customers. We dealt with this issue at length in the Phase 3 Order, where we found that, in this context, liquidated damages can be a useful tool to help ensure service parity to the CLECs.

We accept the overall principle proposed by NYNEX, that liquidated damages should provide NYNEX with monetary incentive to ensure parity and to provide good service, while simultaneously supplying a certain, timely payment to carriers for possible damages incurred (NYNEX Exhibit LD-1, at 12). We agree with AT&T, however, that an accompanying principle must be that the damage amounts 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. Given the large stakes in the local exchange market, the potential for liquidated damages must be sufficiently large that they are not viewed as a minor annoyance in the pursuit of less than adequate service to the CLECs.

We also agree with the CLECs that the specific monetary remedies provided in the interconnection agreement for liquidated damages should not be the sole damage remedy available. Liquidated damages are meant to provide a fast, efficient method for compensation, but there may be instances where consequential damages are appropriate as well, and the contract should provide that a court of law may be brought in to rule on such disputes. We have directed the inclusion of a liquidated damages provision here for a

specific public policy purpose, to help ensure that the no-change-in-parity standard is met, and we trust that the measures we have chosen and the financial remedies we establish will help accomplish this end. However, we have determined below that such payments are not to be based on the possible damage suffered by the CLECs. Rather, we have based them on providing a sufficient financial incentive to NYNEX. As noted by TCG and others, the history of limitations of consequential damages for regulated utilities in Massachusetts cited by NYNEX are not relevant to the issue at hand. Those limitations, included in most carriers' public tariffs, are integrally tied to the provision of tariffed services to the public, and are not related to the inter-carrier parity question raised by the interconnection agreements (TCG Reply Brief at 2-3). As AT&T notes, given the impossibility of estimating precisely the damages flowing from NYNEX's failure to provide service parity to CLECs, it would be unfair to allow NYNEX to liquidate its damage liability completely (AT&T Initial Brief at 11). Accordingly, we find that the interconnection agreements should provide for both liquidated damages and the ability to seek consequential damages for failure to meet parity and that the contractual damages be treated as an offset to any such consequential damages awarded.[3] With respect to disputes arising out of the performance standards adopted here, we note that the Department should not be considered by the parties as the first forum for resolution. The Department's current dispute resolution process, adopted in Local

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[3] We explicitly do not address the issue of whether the CLECs should have a right to seek consequential damages for reasons other than a failure to meet parity. That issue has not been presented to the Department for arbitration (AT&T Reply Brief at 8). The instant issue, however, is clearly before us, and its resolution does not, contrary to NYNEX's argument, prejudice or undermine other aspects of the limitation of liability question (NYNEX Reply Letter at 3).

Competition, D.P.U. 94-185 (1996), is not specifically designed to resolve contract disputes that may arise from interconnection agreements. However, interconnection agreements have been drafted in such a way as to anticipate disputes and address those situations. Therefore, parties should look first to the agreements themselves to address disputes and then only to the Department if the agreement is silent.

Finally, while we find intriguing AT&T's suggestion that there should also be a remedial plan requirement imposed for failure to meet parity of service standards, we conclude, as a matter of principle, that such a requirement should not be necessary if we adhere to the principles we have just adopted. If NYNEX has proper financial incentives to meet parity requirements, an additional administrative procedure should not be necessary. We believe, in relying on this record to set liquidated damages levels, that we will provide sufficient financial incentives to NYNEX to maintain parity. The parties retain their rights, however, to petition the Department for relief in the future if this turns out not to be the case.

IV. APPLICATION OF PRINCIPLES

A. Introduction

This section covers the topic of how the chosen principles should be applied to develop the specific monetary amounts that will be paid by NYNEX for failing to meet the parity standard. The arbitrator properly made clear to the parties that, in arguing the level of damages that are appropriate for failure to meet the parity standard, carriers may not and should not take into account their desire that they want to achieve a higher level of service than that offered by NYNEX to its own customers. Liquidated damages are for a failure by

NYNEX to meet the parity standard, not for a failure to meet another absolute standard that might be desirable to the carriers. To the extent carriers rely on NYNEX for the delivery of services, the carriers will have to adapt their own commercial practices, including their relationships with their customers. As noted in the introduction, that issue was clearly and completely covered in the Phase 3 Order and will not be reopened here.[4] In the Phase 3 Order, the Department specifically rejected an absolute standard beyond the "no-change-in-parity test". Phase 3 Order at 23-24.

B. Form of Payments

NYNEX has proposed two forms of payments, incident-based payments for failure to meet certain appointments, and performance payments for failure to meet parity over a stated period of time (NYNEX Exhibit LD-1, at 12-14). TCG, too, endorses these forms of payments. TCG views the incident credits as mirror images of the credits it would issue its own customers as a result of NYNEX's failure to perform a specific function in a timely or quality manner. Performance credits, in contrast, would apply to NYNEX's consistent failure to provide quality service over time as determined by the performance reports (TCG Initial Brief at 4-5). Likewise, ANTC, MCI and AT&T suggest that these two types of payments are appropriate.

We conclude that incident payments and performance payments are useful companion tools to help ensure that parity is achieved. While performance payments will help ensure

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[4] For example, this is not the forum to address the point raised by AT&T that customers are entitled to better service than what NYNEX has been providing (AT&T Initial Brief at 10).

that general levels of parity are achieved, incident payments will reinforce these global measures by helping to ensure that CLEC customers receive a level of service at parity on a day-to-day basis. Accordingly, incident credits will be imposed for NYNEX's failure to perform a specific function in a timely manner. Performance credits will be imposed for NYNEX's failure to meet given performance standards over a given time period.

C. Incident Payments

NYNEX has proposed a schedule of increasing payments for missed appointments. The first missed appointment would result in a payment of 25 percent of the associated non-recurring charge ("NRC"), the second payment would impose an additional payment equal to 35 percent of the NRC, and a third missed appointment would result in a payment of the remaining 40 percent of the NRC. In each instance in which a resold service or UNE is out of service for over 24 hours, NYNEX would pay the CLEC 1/30th of the applicable recurring charge (NYNEX Exhibit LD-1 at 12).

The other carriers all assert that these incident payments are too low, stating that they do not provide sufficient monetary incentive to NYNEX for good performance to CLEC customers. See, for example, MCI Exhibit LD-4, at 4. AT&T proposes that a missed installation result in liquidated damages equal to the total NRC, and it proposes that liquidated damages for poor maintenance should exceed one day's worth of the monthly recurring charge (AT&T Exhibit LD-1, at 11). TCG proposes that the NRC be waived for failure to meet a first appointment, that 150 percent of the NRC be credited for missing a second appointment, and that 200 percent of the NRC be credited for failure to meet a third appointment (TCG Exhibit LD-1, at Exhibit 1). Likewise, MCI cites interconnection

agreements from Iowa and Minnesota, in which a missed commitment to a customer generates a waiver of the NRC and one month's recurring charge for the applicable service or element (MCI Initial Brief at Attachment C).

In reply, NYNEX asserts that the level of payments it proposes is reasonable and appropriate because it will provide NYNEX with an ongoing incentive to perform every installation and repair in a timely manner and because it is linked to the charges that customers pay for service. NYNEX also points out that the incident-based payments are in addition to the performance credits that would be imposed if there is an on-going failure to meet parity standards. Thus, under its proposal, individual customers could receive credits even if the overall parity standard is being met. It further notes that the amounts it proposes for incident payments exceed the payments NYNEX would make to its own customers for failure to meet appointments, giving it an extra incentive to give priority to the CLEC customer (NYNEX Initial Brief at 23-25).

Our goal, as noted above, is to chose a level of incident payments that are 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.[5] NYNEX is correct to note that the incident payments can come into play even if

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[5] We are also aware that the CLECs have argued that the NYNEX proposals do not sufficiently compensate them for the damages they will suffer if they lose customers. See, for example, AT&T Initial Brief at 14. There is, however, no evidence in the record to establish the level of such damages. It is the CLECs, not NYNEX, who would have such information in their possession, and they did not offer it in this case. See, for example, Tr. 13, at 170-173, 196-198. Accordingly, our discussions and conclusions herein must rely on the principle we have enunciated above, that the level

(continued...)

the company is satisfying the overall parity standard, but they play an important role in helping to ensure that, on a day-to-day basis, NYNEX is not tempted to engage in behavior that stifles competition by giving bad service to a customer that is of particular importance to a CLEC or by choosing to devote scarce resources to its own customer before that of a CLEC. In this regard, we note that the mere existence of an incident payment is a strong step in the right direction, for it provides the NYNEX foreman or service technician with an incentive to give equal priority to the CLEC customer, since there is no such credit for NYNEX's own customers (Tr 13, at 29-30). Ms. Canny persuasively described the thought process that would face a NYNEX foreman, given this payment system, and made a strong case that parity would be served by such a system. She further noted that the imposition of the credit would mean that NYNEX would expend greater costs in meeting the service call than it would recover from the CLEC (Tr. 13, at 52-54).

In light of these two factors, (1) that the incident payments are additive to overall payments for failing to meet parity and (2) that the incident payments provide NYNEX with a day-to-day incentive to give priority to CLEC customers over NYNEX customers, we find that NYNEX's proposed incident payments are reasonable. The CLECs' proposals are overly punitive in this context. They go beyond the level needed to ensure parity. In addition, they could possibly force NYNEX to favor CLEC customers over its own customers. In reaching this conclusion, we recognize that the CLECs' proposals may, in

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[5](...continued)
of liquidated damages provides sufficient monetary incentive to NYNEX to achieve service parity.

part, reflect their own practices in offering rebates to customers for missed appointments. TCG states, for example: "Incident credits are designed to compensate TCG for the credits it must issue to its own customers as a result of NYNEX's failure to perform a specific function in a timely or quality manner," (TCG Exhibit LD-1, at 5). There is, however, no requirement that NYNEX's payments mirror the payments or credits that CLECs choose to offer their own customers. The incident payments we impose here are meant to serve the goal of parity, not the marketing choices made by the CLECs.

D. Performance Payments

1. Introduction

Under NYNEX's proposal, monthly comparability measurement reports would be used to determine when a deviation from parity persists over an annual review period. Performance payments would be assessed in such instances, and the level of payments would increase with the amount of deviation between the quality of service provided to a CLEC and the service quality provided to NYNEX's own end-user customers. For example, the parity standard for missed appointments for dispatched POTS appointments would be 19.7 percent, the rate experienced by NYNEX customers in 1996. If the rate for a given CLEC's customers was higher than this in the reporting period, NYNEX would provide an additional rebate per line for all customers with missed installation appointments (Tr. 13, at 33). The rebate for a 20.0 percent missed appointment rate would be $15 per line, growing to $65 per line for a missed appointment rate of 25.0 percent (NYNEX Exhibit LD-2). Even if NYNEX's performance to its own customers deteriorated, the historical level of service would be used to measure parity, in accord with the no-change-in-parity standard.

The NYNEX proposal raises a number of issues which have been discussed by the other parties. One topic is the relevant performance review period. A second is the choice of parity measurements that are to be subject to automatic payments. The third is the level of payments that should be assessed.

Before turning to these areas of disagreement, we first note that there is no disagreement with NYNEX's proposal that 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. In light of the importance of satisfying all parties that the information collected be as accurate as possible, we adopt this proposal.

2. Performance Review Period

As noted, NYNEX has proposed an annual review period. AT&T argues that measuring parity on an annual basis is inadequate, and that a year of discriminatory service provision could effectively block entry by competitors. It argues that remedies should be invoked no less often than every quarter to be meaningful (AT&T Initial Brief at 14-15). MCI points out that there is especially a concern during the "critical ramp-up period" to competition, and it argues that the use of a monthly period for parity determination is reasonable, noting that NYNEX will be preparing monthly reports in any event (MCI Initial Brief at 5-6). ANTC suggests that parity should be measured on a quarterly basis, noting that a twelve-month period would put a CLEC at risk because it would have to wait a year to react and recover from disparate treatment. This would especially be a problem, notes ANTC, during the first few months that are so crucial to a new entrant (ANTC Initial Brief at 11).

In response, NYNEX maintains that the argument that performance payments should be based on monthly deviations ignores the need to consider reasonable data sizes and avoid transient short-term shifts in performance. It argues that seasonal variations and deviations occurring because of occasional or localized situations should not result in parity violations if, over the course of a year, performance parity is achieved (NYNEX Initial Brief at 26).

We find that the arguments of the CLECs have merit. We need a system that is especially alert to a failure to achieve parity during the early months of competition. It is during this period that CLECs will begin their intensive marketing programs and where disparities in treatment of customers can have the most detrimental effect on the introduction of competition. A year is too long to wait to measure and respond to such disparate treatment. NYNEX will be collecting and reporting data on a monthly basis. The use of a quarterly performance period will provide a sufficient amount of data to smooth out statistical anomalies of the sort mentioned by NYNEX.[6] Accordingly, we will set a quarterly performance period, and any payments due from NYNEX will be credited to the CLECs within 30 days of the end of the quarter.

3. Measurements Covered

NYNEX has proposed that payments be made for seven measurements, although it will collect and report data on more than these. The seven it has proposed, with the proposed parity performance level, are:

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[6] Further, we note in passing that we see no a priori reason for seasonal variations to affect parity. Presumably snow, rain, ice, and wind will affect service without prejudice, i.e., whether a customer is served by NYNEX or a CLEC.

- POTS (residential and business combined) missed appointments, with dispatched orders. 1996 rate = 19.7%.
- POTS (residential and business combined) missed appointments, with non-dispatched orders. 1996 rate = 0.35%.
- Complex (over 2 lines per order) missed appointments. 1996 rate = 8.2%.
- POTS service orders completed within 5 days, with dispatched orders. 1996 rate = 62.34%.
- POTS service orders completed within 5 days, with non-dispatched orders. 1996 rate = 88.78%.
- POTS out of service for over 24 hours. 1996 rate = 56%.
- Special services mean time to repair. March 1996 through March 1997 rate = 9 hours and 20 minutes (NYNEX Exhibit LD-2).

NYNEX is also planning to propose a number of performance measurements for UNEs, and it will offer those in its later filing. We will address those in the review of that filing.

The CLECs generally argue that there should be more performance measurements that are subject to parity payments. For example, AT&T states that NYNEX's proposal would leave it with no incentive to comply with other measurements and no remedy for the CLECs even if NYNEX falls far short of compliance with regard to other standards (AT&T Initial Brief at 12).

NYNEX argues that many of the elements have limited sample sizes and disaggregated data often measure essentially the same service element. It gives the example that it will provide reports for installation completion percentages within two, three, four, five and six days; and it states that payments for deviations for each of the measurements would double-count the same parity violation (NYNEX Initial Brief at 26).

We agree in part and disagree in part with NYNEX on this latter point. We do not want to impose performance payments in a manner that would double-count the same parity

violation, but we do need to hold NYNEX accountable for some degree of differential performance within the more aggregated measures it has proposed. For example, there is a compelling pro-competition reason to hold NYNEX accountable for meeting parity on provisioning appointments for residence customers and business customers separately, as opposed to NYNEX's proposal to join them together. The other parties have likewise correctly noted that NYNEX has omitted performance payments on some other measures that have substantial value in ensuring that parity is maintained. We therefore conclude that a greater level of disaggregation is required to ensure that, within and across a wider variety of market segments, parity is being measured and, if not met, will result in financial losses to NYNEX.

We do not, however, find a compelling reason for all of the other measures proposed by the CLECs. Since NYNEX will be providing reports on all of the measures, we will, over time, be able to analyze whether many more disaggregated performance payment measures are needed. An example is the number of troubles reported per 100 lines per month, which both AT&T and NYNEX agree should be measured and reported. While AT&T appears to propose that this metric be used to determine liquidated damages, NYNEX states that it has informational value only and should not be used to set damages. We do not see a purpose in using this metric for liquidated damages, as it represents a composite of many factors that are dealt with more specifically in other measures.

Accordingly, upon review of the testimony and comments offered by the parties, we have used our best judgment to determine which measures should be subject to performance payments. We believe that the measures we have chosen will not suffer from too small a

sample size, but AT&T has a worthy suggestion which we will adopt. If there are fewer than 10 in a sample size for a given measure in a given performance review period, damage payments will not be assessed for that period. In addition, based on the record in this proceeding, none of these measures requires additional data collection by NYNEX. NYNEX is directed, however, to disaggregate the data it has to establish the performance rate for each measure (adopted below) and to file a compliance filing with those figures and supporting information.

To be clear, we also adopt NYNEX's proposal that it report data on both the measures that are subject to performance payments and the ones that it has proposed to be presented for informational purposes. If, after at least six months of experience, there is an indication that more or fewer measures are necessary to support the parity standard, either as informational items or as measures subject to performance payments, parties may petition the Department to that effect. However, the Department will only consider changes to the standards adopted here if parties can show compelling reason why such changes are necessary.

For provisioning of POTS service, the following measures will be subject to performance payments. Next to each measure, we have given the performance standard that is indicated in this record. Where no standard is given, or where we may have misinterpreted the record, NYNEX is directed to provide the appropriate figure in its compliance filing.

- The percentage of appointments missed, residence and business combined, for those requiring dispatch. 1996 rate = 19.7% (NYNEX Exhibit LD-4, Attachment A at 1).

- The percentage of appointments missed, residence and business combined, for those not requiring dispatch. 1996 rate = 0.35% (NYNEX Exhibit LD-4, Attachment A at 1).
- The percentage of complex (over two lines per order) appointments missed. 1996 rate = 8.2% (NYNEX Exhibit LD-2, Attachment II, at 2).
- The percentage of appointments completed in one business day for residence customers, for non-dispatch. 1996 rate to be supplied by NYNEX.
- The percentage of appointments completed in three business days for residence customers, for dispatch. 1996 rate to be supplied by NYNEX.
- The percentage of appointments completed in one business day for business customers, for non-dispatch. 1996 rate to be supplied by NYNEX.
- The percentage of appointments completed in three business days for business customers, for dispatch. 1996 rate to be supplied by NYNEX.
- The percentage of appointments completed within five days, residence and business combined, for dispatch. 1996 rate = 62.34%.
- The percentage of appointments completed within five days, residence and business combined, for non-dispatch. 1996 rate = 88.78%
- The percentage of customers who report installation troubles within seven days after installation, residence and business combined. 1996 rate to be supplied by NYNEX.
- The percentage of customers who report installation troubles within thirty days after installation, residence and business combined. 1996 rate = 5.3% (NYNEX Exhibit LD-4, Attachment A at 6).

For maintenance of POTS service, the following measures will be subject to performance payments. As above, next to each measure we have given the performance standard that is indicated in this record. Where no standard is given, or where we may have misinterpreted the record, NYNEX is directed to provide the appropriate figure in its compliance filing.

- The mean time to repair, residence and business combined. March 1996 through March 1997 rate = 9 hours and 20 minutes.
- The percentage of missed appointments, residence and business combined. 1996 rate = 25.17% (NYNEX Exhibit LD-4, Attachment B at 6).
- The percentage of lines out of service restored in eight hours, residence and business combined, for dispatch. 1996 rate = 17.4% (NYNEX Exhibit LD-4, Attachment A at 5).
- The percentage of lines out of service restored in two hours, residence and business combined, for non-dispatch. 1996 = 14.7% (NYNEX Exhibit LD-4,

Attachment A at 5).

- The percentage of lines out of service restored in 24 hours, residence and business combined. 1996 rate = 57.66% (NYNEX Exhibit LD-4, Attachment A at 5).
- The percentage of repeat trouble reports within 30 days, residence and business combined. 1996 rate = 12.0% (NYNEX Exhibit LD-4, Attachment A at 6).

For special services and interconnection trunks, performance rates have not been given by NYNEX in most cases. We adopt the following items as being subject to performance payments and direct NYNEX to file performance rates with its compliance filing. For provision of special services:

- The percentage of appointments missed, for those requiring dispatch;
- The percentage of appointments missed, for those not requiring dispatch;
- The percentage of appointments completed in one business day, for non-dispatch:
- The percentage of appointments completed in three business days, for 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.

For maintenance of special services:

- The mean time to repair;
- The percentage of missed appointments;
- The percentage of lines out of service for over eight hours, for dispatch;
- The percentage of lines out of service for over two hours, for non-dispatch;
- The percentage of lines cleared within 24 hours; and
- The percentage of repeat trouble reports within 30 days.

For provisioning of interconnection trunks:

- The percentage of missed appointments;
- The percentage of installation troubles within 30 days.

For maintenance of interconnection trunks:

- The mean time to repair;
- The percentage out of service for over two hours;
- The percentage out of service for over four hours;
- The percentage out of service for over twelve hours;

- The percentage out of service for over 24 hours;
- The percentage of repeat trouble reports within 30 days.

4. Payment Schedule

As noted, NYNEX has proposed an increasing payment schedule for increasing levels of deviation from parity. The CLECs generally argue that the proposed amounts are too low. AT&T proposes a credit based on a percentage of the total local services bill to the CLEC. This amount, says AT&T, is designed to provide some compensation for the greater damages it asserts AT&T will suffer because of the loss of customers likely to occur if NYNEX fails to provide parity of service in critical areas. The company suggests that the percentage of total bill credit should vary with the volume of CLEC business. When volume is small, the credit would be a higher percentage, five percent, to provide a strong financial incentive to NYNEX to achieve parity. As CLEC volume increases, the percentage credited would drop, but never below one percent (AT&T Initial Brief at 16-17). TCG proposes a credit equal to a percentage of all monthly recurring charges for the affected service, plus an additional payment if there are more than four consecutive months of substandard performance. Thus, at one month of substandard performance, there would be a credit of 20 percent of all monthly recurring charges for the affected service. At five months of substandard performance, NYNEX would issue the CLEC a credit of 100 percent of all monthly recurring charges for the affected service, plus $250,000 (TCG Initial Brief at Exhibit 1, at 2). ANTC proposes that NYNEX would rebate to the affected CLEC a pro rata portion of the payments made by that CLEC (ANTC Initial Brief at 16).

NYNEX responds that these arguments do not address the Department's objective in

ordering payments and are totally unsupported by the record. It asserts that the purpose of the automatic payments is to complement the Department's ability to enforce the parity standard through a self-enforcement mechanism. It states that the damages proposed by the CLECs conflict with the limitations of liability imposed on regulated services (NYNEX Initial Brief at 26-27).

As we have noted above in our discussion of incident payments, there is no record evidence that quantifies the CLECs' contentions about the damage they will suffer if parity is not achieved, whether generally or with respect to any of the specific measures discussed. As in the case of incident payments, our conclusions herein rely on the principle we have enunciated, that the level of liquidated damages should provide sufficient monetary incentive to NYNEX to achieve service parity.

NYNEX proposes payments of $15 to $65 per line for all customers with missed appointments during the performance review period when any performance measure is not met.[7] Contrary to the assertions of the CLECs, this is not an insignificant amount of money. Depending on the payment imposed and the type of customer, the fee can equal or exceed one month's recurring charge for POTS service. Based on the 1996 rates of missed appointments, a CLEC would receive a rebate for over 20 percent of the number of customers who requested installations. This could generate a significant rebate, and if other parity measures are not met during the same period, the total rebate could grow quite large. (Recall, too, that this payment would be in addition to the incident based payments that

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[7] In the case of failure to meet the mean-time-to-repair parity measurement, the amount is assessed for each line out of service in excess of 24 hours.

would be equal to a portion of the NRC multiplied by the affected number of customers.) Because we have established a quarterly performance review period; there is the potential that NYNEX would have to make such payments four times per year. We conclude that the potential sums involved in such payments provide sufficient incentive to NYNEX to maintain parity, and we therefore accept NYNEX's proposed performance payment schedule.

Because we have required additional measures subject to performance payments beyond those suggested by NYNEX, we will need to develop a performance payment schedule for each of these additional measures. We find that NYNEX's performance payment schedule for the measures it has presented is reasonable, and we adopt that approach for the additional measures we are adopting (Tr. 13, at 88-89). Therefore, we direct the company, in its compliance filing, to offer similar schedules for the additional measures. The per line rebate will range from $15 to $65, and NYNEX will provide a reasonable set of "break-points" for the imposition of each level of payment.

A different level of payments, however, is appropriate for failure to meet parity with regard to provisioning and maintaining interconnection trunks. Each such trunk has important commercial value, and we therefore need to provide NYNEX with a greater incentive to meet parity for these measures. We believe that the determination of this amount should bear some rational relationship to the per line payments used by NYNEX in its proposal. One approach might be to multiply the per line rebates proposed by NYNEX for the other measures by the number of simultaneous messages that can be delivered on a given type of trunk. This amount would then be credited for each trunk that was, for example, out of service for over 24 hours, or for each trunk for which an installation

appointment was missed. However, no evidence has been offered on this point, and we are reluctant to establish a dollar figure on the basis of a less than complete record. (For example, the rather linear methodology just outlined does not reflect how traffic theory is used to determine the required number of redundant trunks along a given route, and so it might overstate the appropriate credit.) NYNEX is therefore directed to propose an associated performance payment schedule for interconnection trunks in its compliance filing, along with the associated support for this calculation.

V. ORDER

After due notice, hearing and consideration, it is

ORDERED: That the issues under consideration in this Phase 3-B Order be determined as set forth above; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a NYNEX file a proposal for internal process standards within 21 days of the date of this Order; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a NYNEX make a compliance filing on the issues decided herein within 21 days of the date of this Order.

By Order of the Department,

John B. Howe

John B. Howe, Chairman

Janet Gail Besser

Janet Gail Besser, Commissioner

A true copy
Attest:

Mary L. Cottrell

MARY L. COTTRELL
Secretary