though in a much lower amount. While Pacific has thus recognized the need for higher penalties for chronic and widespread out-of-parity performance, it has failed to recognize that such behavior can affect the CLEC industry as a whole. Pacific's proposal lacks any disincentive for such behavior.

Cox Position:

With respect to the proposed Tier III incentives, Cox believes that the proposed remedy should not be adopted because it raises due process concerns. Cox submits that CLEC's already have remedies available to them under the California Public Utilities Code ("P. U. Code") and other applicable laws. (See, § k Exclusive Remedy)

Furthermore Cox believes that the P.U. Code permits CLEC's to institute complaint proceedings against Pacific for violations/non-compliance of the Commission's forthcoming performance incentive order.

Sprint position:

Sprint's proposal is hinged upon two critical points:

1. The PUC must administer penalties in a swift and equitable manner which results in corrective behavior, and

2. No penalty process will ensure that local competition will flourish without active support from the ILECs, CLECs and regulatory bodies.

Sprint recognizes that CLECs have different business plans and therefore it is unreasonable to try to define a sub-set of measurements for penalties. A Performance measure and/or a Sub-measure is deemed to be out of compliance when the critical value for the sub-measure, as calculated using the modified z-test, exceeds a predetermined level.

A Performance Measurement which is disaggregated is deemed to be out of compliance at the aggregate level when the weighted average results for the CLEC (weighted by the CLEC volumes) of the Performance Sub-Measurements are not within 5% of parity compared to the weighted average ILEC results (also weighted by the CLEC volumes). When calculating the weighted average, any CLEC results which exceed parity with the ILEC results at the sub-measurement level would be adjusted to the parity level to eliminate the ability for an ILEC to offset poor performance on a sub-measure level with good performance on another sub-measure within the same performance measure.

Sprint proposes that penalties be assessed based upon three types of out of compliance situations which will be identified as "Occurrences" as follows:

Type A Occurrence:

Defined as when the ILEC is out of compliance for three consecutive months on the same Performance Sub-Measurement or Performance Measurement at the aggregate level.

Type B Occurrence:

Defined as when the ILEC fails to reach a 90% threshold level of Performance Measurements met in any single month for three consecutive months, or four months within any rolling six-month period. For example, a Type B Occurrence would occur when an ILEC misses 4 or more of the Performance Measurements.

Type C Occurrence:

Defined as when the ILEC fails to reach a 75% threshold level of Performance Measurements met in any single month. For example, when an ILEC misses 10 or more of the Performance Measurements as currently agreed to by the parties in California.

For the First Occurrence of Type A, Type B, or Type C:

The ILEC will be required to waive non-recurring charges and to refund monthly service charges to the affected CLEC(s) for those months where non-compliance occurred. The waiver of non-recurring and monthly service charges would be limited to those individual observations within the Performance Measurement, or Sub-measurement where the performance result was worse than parity. For example, if the average time to complete an order for an ILEC's POTS retail service is 3.5 days and it is determined that the results for a particular CLEC are not in compliance, then the ILEC would refund monthly service charges and non-recurring charges for those CLEC orders completed in more than 3.5 days. Invocation of this penalty will be automatic (i.e., absent any state commission involvement), however, the CLEC(s) will bear the obligation of requesting such waivers and refunds from the ILEC.

For the Second Occurrence of Type A, Type B or Type C:

Two Occurrences within a rolling twelve-month period will result in a swift and severe penalty. However, before the penalty is imposed, the ILEC has the opportunity, before the state commission, to avoid or lessen the penalty for non-compliance. The ILEC will have thirty days to prove to the state commission that the measurement is incorrect or flawed, or that the data feeding the measurement is incorrect or flawed, or that the ILEC is not at fault, thereby rendering the Occurrence(s) invalid. The ILEC must prove that 1) the Occurrence(s) are invalid and/or 2) it has not exhibited a repeat offender pattern of behavior suggesting willful neglect of performance improvement. Otherwise, swift and severe penalties should result, up to and including the loss of joint marketing, based upon the state commission's evaluation of the offense. The joint marketing loss should not be defined so broadly so as to mean that the ILEC could not keep long distance customers or market long distance through the long distance channel. The joint marketing penalty will be lifted after six months without one Occurrence.

e. Exceptions to incentive assessments

Pacific Bell position:

The following conditions and limitations should also apply in the assessment of performance incentives. Pacific should not be liable for performance incentives when failure to meet performance measures is caused in whole or in part by: 1) any delay or failure to act by an end user, or the relevant CLEC or its agent, including the specific exceptions identified in the approved OSS OII Performance Measurement Plan; 2) any CLEC process or system failure; or 3) a force majeure event. Force majeure events include acts of God or a public enemy, fires, floods, labor disputes, earthquakes, volcanic actions, wars, civil disturbances, or other causes beyond the reasonable control of Pacific. If performance is prevented by one of these conditions, then the affected activity will be excluded from the calculation of the relevant performance measure.

CLEC position:

There should be no preset exceptions to incentive assessments. Instead, any assertions by Pacific that incentives should not have to be paid should be addressed as part of a root cause analysis.

Specific exceptions due to acts by the end user, CLEC or its agent have already been accounted for in each submeasurement where appropriate as can be seen by the definition of the measurement itself. Therefore, Pacific's concern related to failure to act, either on the part of the end user or the CLEC, have already been cared for and no further adjustment is necessary.

The CLECs oppose a blanket "exception" for causes beyond Pacific's reasonable control because this would provide excuses for performance measurements where the CLECS and Pacific have previously concluded that no exclusion is warranted. *Force majeure* events are also to be dealt with in the root cause analysis. If equity requires relief from incentives, and the event was not cared for though the definition or exclusion and the impact upon Pacific is material and on-going, then relief can be provided on a case by case basis through application to the Commission for a waiver of the particular incentive payment.

Sprint position:

Since Sprint's approach allows a specified number of performance measurements to be out of compliance before any penalties are applied, no exceptions to incentive assessments should be allowed. Similarly, any force majeure exceptions as reasons for Pacific not paying penalties should be considered as part of the Root Cause analysis and thus be taken into consideration by the CPUC.

f. **Mitigation**

Two possible methods of mitigation were discussed: credits for performance results that exceed parity, or root cause analysis.

1. **Credits**

Pacific Bell position:

Under the plan proposed by Pacific and the CLECs, the alpha value is set at 15%. By setting the alphas value at 15% (critical value of one standard deviation), both plans assume a degree of reliability of only 85%. To offset the inequity that may result from imposing penalties on Pacific where the degree of reliability is only 85%, Pacific proposes a credit plan that allows Pacific to balance out the random variation at both ends of the distribution curve. In other words, by offsetting bad performance with good performance, the effects of random variation are largely mitigated. Assuming Pacific is providing nondiscriminatory service, the tail of the distribution curve lying beyond one standard deviation on the right of parity will be offset by the tail of the distribution curve lying beyond one standard deviation on the left. (This offsetting effect works similarly for the area of the curve beyond three standard deviations.)

As an additional mitigating mechanism, under Pacific's plan incentives are not imposed for variations greater than one standard deviation and less than three deviations (a Category 1 deviation) until the second consecutive month. This reduces the risk of random variation to 2.25% (15% x 15%) that Pacific will be assessed with penalties through no fault of its own in a two month interval. Without this mitigation, an assessment of nonparity in any single month for a Category 1 deviation is 15% likely to be wrong, on average.

Examining the CLEC proposal explains why these mitigation mechanisms are necessary. Two of the primary concerns Pacific has with the structure of the CLECs' proposal – completely aside from the amounts of incentives and the lack of incentive caps – is that the CLECs' proposal does not contain a credit plan, and it applies penalties the first month for a Category 1 deviation.

Under a plan that sets the alpha value at 15% (i.e., one standard deviation as the critical value), and that assesses an incentive for one month over one standard deviation, and that contains no credit plan, Pacific can be expected to miss and pay for, on average, 15% of all performance submeasures per month, due solely to random variation. Accordingly, under the CLECs' proposal, Pacific can be expected to pay 15% x $25,000/measure x 1,000 submeasures, or $3,750,000 per CLEC, per month, through no fault of Pacific. Assuming conservatively that only 20 CLECs are in operation, Pacific can be expected to pay $75,000,000 in incentives per month for random variation, or approximately $1,000,000,000 per year. (Even assuming conservatively that these 20 CLECs are eligible for incentives under only 100 submeasures, Pacific still pays $7,500,000 per month.) And this is only for the first box in Tier I, i.e., a Category 1 deviation for one month.

The expected cost of Tier I is substantially higher than $1,000,000,000, since the probability of missing a measure twice in six months under the CLECs' plan is 22%, i.e., even greater than the probability of a single miss in a single month of 15%. Because the penalty associated with a second miss in six months is $50,000, the expected cost of Tier I penalties rises well above $1,000,000,000 per year, without even looking at the penalty for a one month deviation greater than three standard deviations (a Category 2 deviation).

The amount Pacific pays in Tier I may be increased dramatically under Tier II. Under the CLECs' proposal, Pacific pays $1,500,000 (20 x $75,000) in Tier II if it misses 20 measures out of 100, once in three months. Since Pacific can be expected to miss 15 measures per month on average due to random variation, Pacific pays the Tier II penalty when it provides actual discriminatory service on 5 of the 100 measures, just once in three months. Moreover, the likelihood is 5% that Pacific will miss 20 measures per month due solely to random variation. As a result, Pacific is likely to be in Tier II with one out of 20 CLECs, each month, on average. (The penalties increase dramatically on a basis of 1,000 measures.) A Tier II violation under the CLECs' plan automatically keeps Pacific out of the long-distance market, and requires another six months of no Tier II violations before Pacific can get approval.

The analysis of Tier II thus far has only examined the penalty for missing once in three months. The penalties increase by two-fold for a second finding in six months, and three-fold for a third finding in twelve months. Again, the statistical likelihood of an event happening twice in six months is greater than the likelihood that it will happen once in a given month (it is even higher for three times in twelve months). Thus, the chronic element factor is not reasonable.

Statistically, the Tier III analysis is similar in terms of Pacific's likelihood of being penalized. However, the penalties increase dramatically. A one month violation in three months costs $8,000,000 ($.50 x approx. 16MM lines). The second violation in a six month period costs $16,000,000, and a third violation in a twelve month period costs $32,000,000. Pacific can be expected to pay these penalties every month, on average.

To penalize Pacific further, the CLECs propose that Pacific not be permitted to enter the long-distance service if any Tier II or Tier III violations have been imposed in the past six months. Because a Tier II or Tier III violation is a near statistical certainty in a six-month period, Pacific will never be allowed into the long-distance market under the CLECs' plan. Even if Pacific miraculously gained approval, Pacific would be likely to lose approval in the first month (i.e., getting a Tier I or Tier II violation).

As shown there are numerous problems with the CLECs' proposal. One of the primary problems, however, is that the plan does not account for random variation. An incentive cap, by itself, does not solve the random variation problem. It merely ensures that Pacific hits the cap nearly every month, at whatever level the cap is set.

Changing the formulas and reducing the penalty amounts in Tier II and Tier III is certainly necessary. But even with the less draconian amounts in Tier I, Pacific pays over $2,000,000,000 per year due to random variation, even if it provides nondiscriminatory service.

Root cause analysis, by itself, does not solve the problem either. The number of events, and the permutation of those events, that may affect a result due to random variation is countless. Root cause analysis would only identify the tip of the random variation problem.

Credits, on the other hand, balance out random variation in a self-executing, easy to administer, and very straightforward manner. A credit plan eliminates the need to constantly debate the underlying cause of misses, and litigate whether and in what amounts incentives should apply.
Pacific supports accrual of credits because, in some months, incentives will be greater than credits and payment will be required, but in other months, credits will be greater than incentives. Without the ability to carryover credits, the credits would be lost, as would the overall balancing effect of the credit mechanism. However, Pacific agrees that credits, if approved by the Commission, should only be used to offset incentives in like categories of measurements. Credits apply only within a major service category and can only be used to offset incentives within the same service category.

Major service categories for credit purposes include:

- Pre-Ordering
- Ordering
- Provisioning
- Maintenance
- Network Performance
- Billing
- Database Updates/Other (Interfaces)
- Collocation

The CLECs reject Pacific's credit plan and propose that the parties accept an "equal risk" solution. However, the CLECs' proposal does not "equalize" the "impact" that a wrong decision will have on both parties. It makes no quantitative assessment at all about the impact on the CLECs of a wrong decision.

The impact of a wrong decision on Pacific, a Type 1 error, is easily quantifiable. As we have seen, under the CLECs' plan, Pacific will pay on average $75,000,000 in incentives, per month, for the first box in Tier I alone.

The impact on the CLECs of a Type 2 error is nearly impossible to quantify. However, certain reasonable conclusions can be drawn from a Type 2 error. For this analysis, it helps to examine exactly what is meant by a Type 2 error.

A Type 2 error occurs when Pacific's systems, processes, personnel, or any other critical elements necessary to provide nondiscriminatory service are not designed, equipped, motivated or otherwise fit to provide nondiscriminatory service to the CLECs, but through random variation, the CLECs nevertheless receive better service than Pacific. This could occur under numerous different scenarios. For example, even though Pacific may be better equipped to process its own orders, it may nevertheless receive very simple orders from the CLECs that take a much shorter time to complete. Or, for example, under the same scenario, the CLECs may submit their orders for processing at a time when other volumes are particularly low in comparison to Pacific's orders, and as a result, the CLECs' orders are processed more quickly. The end result of a Type 2 error is that, even though Pacific may not have been ready or equipped to provide nondiscriminatory service to the CLECs, they nevertheless received better service through random variation. The bottom line, under this scenario, is that the CLECs are not harmed by a Type 2 error.

The analysis of a Type 2 error becomes a bit more complex when parity is determined by allowing for a normal distribution of events, as the parties have done here. For example, under the CLECs' and Pacific's proposal, incentives are applied when the standard deviation is greater than one. Under this scenario, a Type 2 error would include not only the distribution of points that is better than parity, but also the distribution of points that is between parity and one standard deviation.

Although the CLEC impact of a Type 2 error under this scenario cannot be quantified, five things are certain. First, the CLECs acknowledge that for the Type 2 area that is better than parity, there is no harm. They call this the "no harm, no foul" area. Second, because parity is a relative concept, no harm is likely to occur in the remaining portion of the Type 2 area when Pacific is providing itself exceptional service, since the CLEC customers in this area are likely receiving very good service. Third, very little difference in service is likely to be noticeable or appreciable for some portion of the remaining Type 2 area that is much closer to the parity cut-off than the one standard deviation cut-off. Fourth, in some instances, a difference of one standard deviation may not be noticeable at all to end users. In fact, Pacific's and the CLECs' incentive proposals are premised on the notion that Pacific is not penalized when the difference in service is only one standard deviation from parity.

Given these first four mitigating aspects of Type 2 errors, one cannot conclude with any reasonable degree of reliability or certainty that the harm suffered by CLECs for a Type 2 error "equalizes" the harms suffered by Pacific for a Type 1 error, i.e., paying billions of dollars per year for random variation alone.

Most important, however, is the fifth aspect of a Type 2 error under a credit plan: The Type 2 error is completely balanced out by those instances in which Pacific treats CLECs better than parity, but due to random variation receives no credit. In those instances, it will appear as though parity exists, yet a greater proportion of Pacific's customers will be receiving worse service than the CLECs' customers in the exact same area depicted by the Type 2 error about which the CLECs are concerned. Under a credit plan, the Type 2 error is completely balanced out.

CLEC and Sprint position:

There should be no credits for performance exceeding parity. Pacific Bell has proposed credits as a means to offset the harm Pacific experiences when there is a Type I error, i.e., a test result that shows non-parity when Pacific in fact provided parity service. If Pacific were the only entity to be subjected to statistical errors, then the credit program would seem like a reasonable mitigation proposal.

However, CLECs experience Type II errors, i.e., a test result that indicates parity when in fact non-parity service was provided, as often as Pacific experiences Type I errors under the statistical methodology proposed by the CLECs.

Credits tip the scales to favor Pacific. Under the statistical methodologies proposed, Pacific and the CLECs face an equal risk of getting a "wrong" test result and then suffering the financial consequences of the "wrong" result. Credits would further insulate Pacific from Type I errors but would leave CLECs exposed to Type II errors and the corresponding financial harm. Moreover, credits applied at the category level would enable Pacific to consistently discriminate in a specific submeasure and to offset those penalties with credits from other submeasures.

Pacific's credit proposal provides Pacific with the ability to game its performance and provide discriminatory treatment while avoiding penalty payments. For example, Pacific could greatly exceed the benchmark, and thus earn a credit, for Avg. Completion Notice Interval, which could be used to offset lack of parity performance for Due Dates Missed.

From a more practical standpoint, the crediting mechanism proposed by Pacific will generate highly damaging customer experiences for the CLECs. First, the arrangement incents highly variable performance by Pacific. If Pacific's support of a CLEC fails by 3 standard deviation in one month then, to avoid adverse impacts, the incentive is to provide performance that is superior (to Pacific's) by 3 standard deviations. In such a case, Pacific's performance will be stable but that for the CLEC is potentially varying, from month-to-month, over a range of six standard deviations. Thus a customer sees erratic performance from the CLEC and stable performance from Pacific.

Even if this oscillatory performance did not occur, Pacific's credits proposal is fatally flawed due to a second consideration. Pacific presumes the marketplace rewards good performance as quickly and to an equal degree as it does poor performance. Practical experience and intuition show this presumption is flawed. That is, poor performance quickly results in dissatisfied customers, tarnished brand image and failure to attract new customers. On the other hand, poor performance is only over-come by continued stable and excellent performance

Rather than tilt the scales one way or the other with credits, the CLECs and Sprint propose that credits be rejected and that each side shoulder the burden of its respective risk. Certainly, it is not justifiable to address the remote possibility of fines being applied solely due to random variation of results through a mechanism that would interject at least perverse if not anti-competitive incentives.

Finally, and because invariably there will be "root cause negotiations" between the CLC and Pacific to determine whether Pacific is at fault, and thus whether penalties are due to the CLC, there is the potential risk that the individual CLEC and Pacific could negotiate an agreement which provides the CLEC preference or advantage, relative to other CLECs, in violation of Public Utilities Code §453. As a precaution against such potential discrimination, parties should endeavor to adhere to the root cause analysis as the method for mitigation, and monetary penalties as the method to incent Pacific to comply with the established performance standards. If there are agreements between CLCs and Pacific in this regard, all such agreements should be served upon all parties in the form of an Accessible Letter.

2. Root cause analysis

Pacific Bell position:

Root cause analysis is another method for mitigating certain factors that are outside of Pacific's control. However, as stated in the credits discussion, root cause analysis will capture only a small portion of the effects caused by random variation. Thus, root cause analysis is woefully inadequate for purposes of mitigating random variation.

Under a root cause analysis plan, root cause analysis would be performed for all measures failing the statistical test of compliance in a reporting period. This analysis would be completed and reviewed before incentives were assessed. Incentive assessments may very well be appropriate after the submission of the analysis reports where no reasonable explanation for variance exists or a significant cause is found that was within Pacific's control. However, without due diligence in this area, it will be impossible to determine if discrimination has occurred and whether performance penalties should be assessed.

Root cause analysis reports, which would be supplied for all non-compliant measurements, would include raw data supporting the measurement results, verifiable facts regarding identifiable causes of the service failure and any special circumstances or conditions which may have existed. The root cause analysis would not have the sole purpose of absolving Pacific of any responsibility to pay monetary damages. The goal of the root cause analysis would be to take analysis of the measurement results beyond just statistics and to determine if the non-compliant result truly reflects a problem on the part of Pacific. Additionally, if, as a result of this analysis, operational problems were identified, a corrective action plan would be documented, with commitments for its implementation.

In order to assess if monetary incentives should apply, the root cause analysis reports would be provided to the relevant CLEC for review within 30 days of availability of the related performance report. If, after discussion between the

CLEC and Pacific, there is no agreement relative to incentives, then the report would be sent to a designated arbitrator (as part of the Commission staff or as agreed to by both parties) for resolution. Should the decision be that incentives apply, either after review by the CLEC and Pacific or the third party arbitrator, payment of these incentives would be made.

Again, it is critical to understand that root cause analysis will not mitigate the better part of random variation. For root cause analysis to work, some form of credit plan is necessary, either in the form proposed by Pacific, or some other form such as "freebies" (i.e., Pacific is given a certain number of measures that it can miss per month before performance incentives are applied). Otherwise, it is a near statistical certainty that there will be a continuous and substantial revenue stream from Pacific to the CLECs in the form of performance incentives.

CLEC and Sprint position:

A limited form of root cause analysis could be used as a form of mitigation, but only under very narrow circumstances Of the mitigation approaches discussed during the workshops, root cause analysis appeared to be an effective means for determining if an apparent lack of parity service is due to Pacific's conduct or to circumstances beyond Pacific's control. If a mitigation tool is required, root cause analysis is a more precise method than the credit methodology proposed by Pacific.

If such a methodology is adopted, and it would be a resource intensive undertaking, the CLECs propose that root cause analysis be completed for all applicable measures failing the statistical test of compliance in a reporting period. This analysis should be delivered to CLECs within 30 days after Pacific submits to CLECs its monthly performance reports that document a lack of parity. Thus, for example, activities that occurred during April would appear on the May performance measurements reports that would be distributed to the CLECs by the 15th of May. Pacific would then have its root cause analysis report distributed to the CLECs by the 15th of June.

Once a lack of parity has been documented in the monthly performance reports sent to the CLECs, Pacific Bell should immediately pay any disputed incentive amounts owed into an interest-bearing escrow account. If, after root cause analysis is completed by Pacific, and the CLEC and Pacific mutually agree that Pacific was not at fault for the lack of parity, then the money paid into the escrow account would be returned to Pacific. If the CLEC and Pacific agree that Pacific is at fault for the lack of parity, or the root cause analysis cannot conclusively demonstrate Pacific is not at fault, then the money in the escrow account would be disbursed to the CLEC.

However, if the CLEC reviews the root cause analysis submitted by Pacific and still believes the test result accurately reflected lack of parity caused by Pacific, then the money in escrow would be disbursed to the CLEC. If Pacific believes the test result was inaccurate, Pacific can seek a determination from the Commission using expedited dispute resolution as adopted in this proceeding.

Root cause analysis allows Pacific to "explain" a test result, but the presumption is that the test result is correct. Therefore, the incentive payment would only be returned to Pacific if the CLEC agreed it was appropriate to do so.

The eligible criteria for root cause analysis should be clarified and restricted. As an initial matter, Pacific has agreed to develop detailed definitions of each performance measure, including precise formulas, definitions, data sets, data sources, analogs/benchmarks, and exclusions for each of the measurements and levels of disaggregation. Because these factors will already have been accounted for, the root cause criteria will be exceptions and allowances above and beyond them. For example, any force majeure events would be an eligible reason in the root cause analysis for Pacific to miss its parity obligation, and thus be excused from paying incentives for that result, for that CLEC, for that month, so long as the force majeure adversely affected results for the CLEC but to a greater extent compared to the results for Pacific. The universe of possible exceptions needs to be developed before root cause analysis can be used.

Finally, CLECs believe that not all measurements should be subject to root cause analysis. Certain measurements that address electronic systems and processes would not satisfy the root cause criteria. These include measurements 1b, 2a, 4(electronic only), the maintenance measurements and the billing measurements.

Cox Position:

Cox believes that disputes regarding root cause analysis should be resolved pursuant to the dispute resolution process contained in the parties' respective interconnection agreements.

g. Forecasts/trending

Pacific Bell position:

Performance on certain measures is impacted when Pacific receives unexpectedly high volumes of work. In order to meet its performance obligations for these measures, Pacific requires forecasted work volumes from CLECs. Accurate work volume forecasts from the CLECs, both for end user service and interconnection, are important to Pacific as significant amounts of capital and human resource investments are at risk on the CLECs' forecasts. When forecasted order volumes do not materialize, a tremendous amount of invested resources are wasted.

Conversely, when demand exceeds the forecasts, the likelihood is high that there will be inadequate resources to meet CLEC demands. CLECs should be responsible for providing forecasts on service order volumes (by major service group type) if Pacific is subject to performance incentives. Pacific must receive forecasts from the CLECs on a quarterly basis, three months in advance of the relevant quarter.

In the event CLECs fail to produce adequate forecasts, Pacific agrees that trending can be an acceptable substitute for performance incentives purposes. Under Pacific's plan, Pacific is not relieved where CLECs fail to provide adequate forecasts as long as actual aggregate CLEC volumes during the relevant month do not exceed the volume of the average of the previous three months by more than 20%. However, should adequate forecasts not be received and aggregate CLEC volumes exceed the 20% level, incentives should be excused for any measure/submeasure identified, with an asterisk, on Attachment A, for the reporting period.

CLEC position:

Pacific takes the business position that it may be unprepared to deal with sudden and substantial surges in CLEC order activity that it could not have reasonably foreseen. CLECs oppose Pacific's suggestion that forecast accuracy serve as a basis for mitigation. A specified maximum volume becomes a *de facto* barrier to CLEC entry into the local market.

Pacific's trending proposal is also unacceptable. In order for a competitive market to develop, growth cannot be constrained by the 20% limit that Pacific proposes. Incentives should remain in place even in the absence of such a limit.

Sprint position:

While Sprint appreciates Pacific's concern for risks associated with capital investments associated with forecasting, this is an industry issue, which is of equal concern to both the ILEC and CLEC. Today, forecasting occurs among the parties as a normal course of business. For example, Pacific meets with interconnecting companies, both local exchange carriers and interexchange carriers, to agree upon forecast levels. Often, these meetings are face-to-face with the Network Engineers from both companies.

Sprint proposes this same process be implemented with the CLECs. In the initial stages of local competition, it seems logical that the demand forecasts would be minor in the total scope of Pacific's forecasting models. Conversely, as the industry matures, volumes and the associated investment risks can and should grow and therefore, liability should become integral in defining the forecasts.

Ultimately, some relief from incentives/penalties may be appropriate in instances where forecasts are missed beyond some tolerable range.

However, it should be clear that any relief should be directly attributable <u>only</u> in those instances where incremental human resources are required to meet increasing levels of demand. For example, if order activity is performed by order entry clerks, and Pacific has either over or under invested in this resource due to inaccurate forecasts, then relief would be warranted.

On the other hand, those performance measures that measure processes that are either wholly or substantially supported by systematic or automated solutions should not be granted relief. For example, an automated pre-order interface, which was designed to accommodate commercial demand levels, should not be affected by the accuracy of a CLEC forecast. The same would be true for those ordering interfaces that are automated, such as FOC Notice intervals and reject notice intervals. Similarly, functions that are performed as an adjunct to an existing ILEC process, such as maintenance and repair, should not be adversely affected by the incremental demand of a CLEC.

Therefore, Sprint recommends that initially, unless highlighted during the face-to-faee meetings, Pacific should be held to the performance measurement requirements and associated incentives. Ultimately, any relief that is warranted in the future should be limited to only those instances where Pacific has secured human resources in anticipation of a given forecasted level of demand.

h. Reporting and auditing

Pacific Bell position:

Performance reports will be made available to the CLECs by the fifteenth calendar day of the month succeeding the reporting period. In addition to the performance measure results themselves, the raw data supporting the results will be accessible by the CLECs. Raw data will be archived for a period of 24 months.

Pacific supports one yearly comprehensive audit of its performance reporting procedures and reportable data. This audit would be on behalf of the entire CLEC community. Pacific would pay for half of the costs for the full audit. Pacific would also support allowing individual CLECs to audit 5 individual measures per year ("mini-audits") if the CLEC has a good faith reason to question the results produced for these measures. CLECs would pay for the mini-audits of the individual measures, unless Pacific is found to have been reporting inaccurately in terms of compliance, in which case, Pacific would pay. If during the mini-audits of individual measures, more than 50% of the measures in a major service category (n.b.: 50% of the measures in the category; not 50% of the mini-audits) are found to have flawed data or reporting procedures, the entire service category of measures will be re-audited by Pacific.

CLEC and Sprint position:

In order to ensure the accuracy of Pacific's reporting, the CLECs recommend that Pacific provide the CLECs, on a monthly basis, the raw data it uses to calculate monthly incentives. This will provide the CLECs with the opportunity to compare their experience with the data reported by Pacific.

The raw data must be preserved for a minimum of 24 months to provide an adequate audit trail and the data must be retained with sufficient detail so that the CLEC can reasonably reconcile the data capture by Pacific (for the CLEC) with its own internal data. Furthermore, data related to Pacific's own performance must be retained, at a consistent level of disaggregation to that reported for the CLECs and must, at a minimum, reflect the mean, the standard error for the mean, the number of data points used to compute the mean and an indication of the "shape" of the distribution for the mean (e.g., gamma, bi-modal, etc.) The minimum time limit for data retention is that needed to afford time to perform the audit and to allow time to review the data, should questions arise regarding the accuracy of the audit. Likewise, the detail retained is the minimum necessary to permit independent validation of results without an audit of Pacific.

The "raw data" should include the specific trouble report disposition code "12 and 13" exceptions that Pacific excludes from the calculation of certain performance measures because it considers the CLEC to be the cause of the reported trouble. Disposition Code "12 and 13" exceptions apply to a limited number of performance measures per the OSS OII Performance Measurement Plan. Further, the Code "12 and 13" exclusions should be provided to CLECs as a summary report that includes Pacific's trouble ticket number and the affected telephone number. The exclusion report will allow a CLEC to compare the troubles Pacific excludes from the performance measures with all the troubles reported to Pacific by the CLEC.

Monthly access to the data Pacific excludes from the calculation of certain performance measures is critical because CLECs need timely access to the excluded data in order to ensure that Pacific has properly coded the problem as caused by a CLEC. To be effective, a CLEC must compare Pacific's highly subjective exclusions with its own trouble data as close in time as possible to when the trouble occurred.

The audits should be performed on an annual basis, by independent CPAs, on behalf of all the certificated CLECs in California. As discussed below, Pacific should pay the cost of the first comprehensive audit; the CLECs and Pacific should share the costs for subsequent comprehensive audits.[11]

In addition to the annual audits, the CLECs would have the opportunity to invoke mini-audits during the year. When a CLEC has reason to believe it is not receiving parity, it has the right to have a mini-audit performed on specific submeasures. Each CLEC would be limited to auditing five single submeasures or one category of measures during the year. If a problem is discovered, an option for a broader audit would be triggered.

For the mini-audits, if the ILEC was determined to be at fault, the ILEC would bear the cost of the mini-audit. If the ILEC was not found to be at fault, the CLECs would pay for the mini-audit. "At fault" means that, as a result of the mini-audit, a determination was made that Pacific did not successfully pass the audit.

As an absolute minimum, due to the crucial nature of performance measurement and the associated system of incentives, Pacific should be obligated to present a one-time initial independent audit and certification that its implementation of the performance measurement system conforms to the definitions, exclusion and disaggregations set forth for the measurements; that the data collection is timely, accurate and complete; that the calculation of performance results conforms to documented agreement and, where ambiguity may exist, what treatment was afforded; and, that the data reflected in the reports for performance and the data store is complete, accurate, timely and readily accessible to CLECs. Such an audit and certification should be at the expense of Pacific, with the result made public no later than simultaneously with the submission of a section 271 application.

Cox and ICG Position:

Cox and ICG disagree with sharing the cost of annual audits. Cox and ICG believe that Pacific should bear the cost of the annual audits because it, and not CLECs, has the burden of ensuring that it is providing parity services to CLECs.

i. Expedited dispute resolution

Pacific Bell position:

Pacific is interested in further discussions surrounding an expedited dispute resolution procedure. However, Pacific believes that the appropriate procedure can best be developed once the parties have a better understanding of what the final incentive plan will look like.

[11] Northpoint and Covad have not taken a position on who pays the costs of the audits.

CLEC and Sprint position:

The operation of the performance incentives plan may depend upon the determination of facts or action by a party. In the event of a dispute, the parties desire an expedited process to enforce the incentives plan. There is no process at the CPUC that guarantees parties a decision within the timeframe necessary to promote the essential incentive nature of this plan.

We propose a fast track dispute resolution (DR) procedure for the Commission's consideration. It incorporates all of the procedural due process protections normally provided to parties at the Commission.

- Before a party may initiate fast track DR, the complainant is required to prove that it asked the defendant to fix the problem and gave it a reasonable opportunity to do so before filing the complaint. The process also builds in a mandatory mediation session before hearings are held.

- Under normal circumstances, an evidentiary hearing, after discovery, will be held 30 days after the complaint has been filed, and a Commission order would be effective 66 days after the filing of the complaint.

- If the presiding officer agrees with the complainant that an expedited ruling is warranted by commercial considerations, an evidentiary hearing may be held two weeks after the complaint was filed and a Commission order would be effective approximately 5 weeks after filing.

- An order necessary to protect the public or preserve the status quo may be issued within 48 hours of the filing of a complaint.

The following procedures and timelines for the DR process should be used:

SERVICE:

Service of any pleading, demand, request, response, or notice under this procedure will be made by delivery in-hand to the recipient or its authorized representative and by either e-mail or fax. All pleadings should be served upon the respondent, the executive director, and the general counsel of the Commission at the time of the filing.

NOTICE:

The petitioner must provide at least 48 hours' advance notice of petitioner's intent to seek fast track dispute resolution and allow respondent at least 48 hours to correct the situation.

VERIFICATION:

The petition must include a verification that the 48 hour notice was given and that the respondent did not correct the situation as requested. A copy of the letter giving notice and any response must be attached as an exhibit to the petition.

DISCOVERY:

Any party seeking discovery shall serve its written discovery concurrent with the filing of the party's initial pleading in the case. Notices of deposition may be served separately. Responses to discovery must be provided to the propounding party within 14 days after the request for discovery was served. Objections to any discovery request, along with a copy of the objectionable request, shall be served on the propounding party and filed with the Commission with the objector's next pleading, and in any event, no later than seven days after receipt of the discovery request.

ALJ DETERMINATION AND PREHEARING CONFERENCE:

Within 48 hours of the filing, the ALJ will determine which timeline will apply to the petition, standard or expedited. If emergency relief is sought, the ALJ will either grant or deny such relief at this time. If evidentiary hearings are warranted, a PHC will be held within 14 days after the answer is filed. The PHC may be conducted by telephone. At the PHC, the parties will determine whether the ALJ or a designee will serve as the hearing officer. The ALJ will resolve all discovery disputes, establish a schedule for completion of discovery, and attempt to resolve the primary dispute through non-binding mediation.

EMERGENCY RELIEF:

The ALJ's decision on emergency relief will have the force and effect of an order of the Commission. The order granting emergency relief will remain in effect during the pendency of the underlying action and until all review, reconsideration, or rehearing of Commission's order with respect to the matter has been exhausted, or until subsequent order of the hearing officer or of the Commission.

EVIDENTIARY HEARING:

A determination as to reasonable grounds for the petition and a notice of evidentiary hearing shall be issued within 3 days after the date on which the answer is filed. The hearing will begin within 30 days or 15 days of the petition's filing, depending on whether the standard or expedited procedure is used. Evidence may be either written or oral, and a record of the hearing will be made.

DECISION OF THE PRESIDING OFFICER:

The written decision will be issued within 45 days after the date on which the petition is filed. It will include reasons for the disposition of the complaint, and if necessary, the assessment of performance incentives and directions for action.

RATIFICATION BY COMMISSION ORDER:

The decision of the presiding officer will be adopted by the Commission at its next regularly scheduled public meeting and shall be effective no later than 21 days after issuance by the presiding officer, unless the Commission enters its own order within 20 days of the decision of the presiding officer.

RECONSIDERATION AND APPEAL:

OF HEARING OFFICER'S DECISION DUE TO PROCEDURAL FAILURE OR ERROR OF LAW OR FACT:

The aggrieved party must file within 3 days of the issuance of the hearing officer's decision. The other party has 3 days within which to respond. The Commission may issue an alternate to the hearing officer's decision within 20 days of the issuance of the challenged decision, but if the Commission has not adopted an alternate by the 21st day, the hearing officer's decision becomes final.

OF COMMISSION'S DECISION (NOT APPLICABLE TO EMERGENCY ORDERS)

An application for rehearing may be filed within 15 days of the Commission's decision. Any response may be filed within the next 15 days. The Commission may act on the application for rehearing within the next 15 days; otherwise, the application is deemed denied and may be subject to judicial review.

Timelines for Fast Track Dispute Resolution

Standard Procedural Schedule

day	**action**
(2)	Petitioner makes final and good faith demand on respondent
0	Petition is filed and concurrently served on respondent, E.D. and Chief ALJ
7	Response is filed and concurrently served on respondent, E.D. and Chief ALJ

10	Notice of evidentiary hearing (daily calendar)
21	PHC (discovery disputes and non-binding mediation)
31	Evidentiary hearing (ALJ or designee approved by the parties)
47	Issuance of hearing officer's written decision (findings, directions, penalties)
(varies)	Alternate adopted by Commission (potential, only)
66	Effective date of hearing officer's decision, unless Commission has adopted alternate.

Expedited Procedural Schedule

- Available when one carrier claims that another carrier's wrongful act(s) impairs its ability to provide or receive service.
- Triggered by filing of "Petition and Request for Expedited Ruling"

day	action
(2)	Petitioner makes final and good faith demand on respondent
0	Petition and Request for Expedited Ruling is filed & served
3	Response is filed and concurrently served on respondent, E.D. and Chief ALJ
5	ALJ determines whether petition merits expedited ruling. If so,
6	ALJ convenes PHC to set date for evidentiary hearing, conduct mediation, and establish a discovery schedule that requires all exchange to be completed 3 days before hearing. Same discovery rules as above
16	Evidentiary hearing (ALJ or designee approved by the parties)
17	Issuance of hearing officer's written decision (findings, direction, penalties) by fax to the parties
(varies)	Commission adoption of decision

38	Effective date of hearing officer's decision, unless Commission has adopted an alternate.

Emergency Relief Pending Dispute Resolution

- Petition may be filed with a petition to obtain emergency relief from complained of acts.

- Decision on petition within 48 hours of filing

- Decision of presiding officer to grant or deny emergency relief has effect of an order of the Commission and remains in effect pending final Commission action on the underlying action or a subsequent order of the presiding officer or Commission.

Reconsideration and Appeal

Of Hearing Officer's Decision due to procedural failure or error of law or fact

day	action
45/17	Issuance of hearing officer's decision
48/20	Aggrieved party files petition for review by Commission
51/23	Response
65/37	Commission may issue alternate to hearing officer's decision
66/38	Hearing officer's decision effective unless Commission has adopted alternate

Of Commission's Decision (not available for emergency orders)

day	action
0	Commission decision
15	Application for rehearing filed
30	Response to application for rehearing filed
45	Commission action on application for rehearing (deemed denied)

j. **Applicability of performance incentives to Section 271**

Pacific Bell position:

Monetary incentives will be sufficient to motivate Pacific to perform to its obligations. Pacific does not support non-monetary incentives as part of a self-executing incentive plan. In particular, performance incentives should not include a self-executing impact on Pacific receiving 271 authority, regardless of whether that impact is withholding or revocation of 271 authority. Such a drastic remedy should be available only through an appropriate proceeding in which Pacific has a fair opportunity to present all relevant evidence on the issue of whether its 271 authority should be restricted or revoked. A self-executing plan that denies Pacific the opportunity to be heard raises serious due process concerns.

Moreover, as discussed in the section on credits, the CLEC plan virtually guarantees, to a statistical certainty, that Pacific will never enter the long-distance market.

CLEC position:

The use of performance incentives is an integral part of compliance with performance measures that are imposed in conjunction with a Section 271 application by Pacific. Accordingly, any performance incentives plan must include a Section 271 component for the incentives to have meaning in that process.

The CLECs recommend two rules related to Section 271 in connection with their incentive proposal. First, if Section 271 approval has not yet been recommended for Pacific by the CPUC, a Tier II or Tier III violation should result in a denial of such a recommendation. In such a circumstance, the CPUC should not issue a Section 271 approval for Pacific until six months has elapsed without another Tier II or Tier III violation. (Note: if the CPUC has recommended Section 271 approval but the FCC has not yet acted, the CPUC should withdraw its recommendation for the same six month period.)

Second, if Pacific has received Section 271 approval from the FCC, a Tier III violation should cause the CPUC to undertake an investigation into the question of recommending to the FCC that Pacific's Section 271 approval be suspended.

Certain aspects of the proposed incentive structure (e.g., a two-month, one standard deviation threshold test and considering only a limited set of performance measurement to which incentive payments are applicable) are not acceptable for making the critical determination, in a pre-271 environment, of whether or not Pacific has met its obligations to open the local marketplace to competition. The risks of forestalling competition if Pacific is allowed to provide long distance service before the local marketplace is truly open dwarf the risks of deferring Pacific's long distance entry for some interval in order to be confident that the empirical data truly shows nondiscriminatory provision of resale, UNE, and interconnection services to CLECs. Application of incentive payments, whether Tier I, II or III, may be sufficient to cause reservation regarding a Section 271. However, the incentive measurements are only a subset of the total set of approved measurements. The Section 271 review process of this Commission must consider performance with respect to all adopted performance measurements and the criteria cannot be based upon a design largely intended to limit Pacific's exposure to incentive payments on a month-to-month basis.

Cox Position:

Cox would like to remind the Commission that any performance incentive program adopted by the Commission represents only one aspect of the Commissions inquiry into whether or not to recommend approval of Pacific's Section 271 Application. For example, Public Utilities Code § 709.2 sets forth numerous findings and considerations that the Commission must make as part of its Section 271 inquiry. Therefore the Commission may consider, but should not rely exclusively on, Pacific's performance under the incentive plan when making its Section 271 determination.

Sprint position:

Pacific should demonstrate parity by providing at least 6 consecutive months of performance reporting without one occurrence prior to the CPUC making a recommendation to the FCC that the RBOC has met the 271 requirements. The joint marketing loss should not be defined so broadly so as to mean that the ILEC could not keep long distance customers or market long distance through the long distance channel. The joint marketing penalty should be lifted after six months without one Occurrence. Additionally, if Pacific has received Section 271 approval from the FCC and the CPUC has determined that the non-compliance is at such a level to warrant the most severe of penalties, the CPUC should recommend to the FCC that Pacific's Section 271 approval be suspended.

k. Exclusive remedy

The parties agree that monetary performance incentives are not the exclusive remedy available to address Pacific's service problems. CLECs believes that the incentives represent only one of many possible remedies CLECs have available to address Pacific's substandard parity service problems. For example, if Pacific should engage in discriminatory conduct, a CLEC could file a complaint with the Commission for violation of Public Utilities Code ("P.U. Code") §453 and potentially recover damages under §2107 that would be in addition to any monetary performance incentives. Additionally in the event that Pacific should violate a Commission order, a CLEC could also pursue sanctions against Pacific under P.U. Code §701 and §2107 that would be in addition to monetary performance incentives.

ATTACHMENT A

PRE-ORDERING

1b. Average Response Time*

ORDERING

3a. Av. FOC Notice Interval*
4. Av. Reject Notice Interval (electronic only)*
8a. % of Flow-through Orders

PROVISIONING

7b. % Orders Given Jeopardy Notice
7c. Av. Jeopardy Notice Interval*
10c. Av. Completed Interval*
12a. % of Due Dates Missed*
14a. % of Troubles in 30 days for New Orders
18a. Delay Order Interval To Completion Date*
7a. Av. Completion Notice Interval*
20a. Held Order Interval*

MAINTENANCE

22c Customer Trouble Report Rate
23b. % of Cust.Troubles Resolved w/in Est. Time
24b. Av. Time to Restore
26b. Frequency of Repeat Troubles in 30 day period

NETWORK PERFORMANCE

28a. % Blocking on Common Trunks
29c. %Blocking on Interconnection Trunks
32-81 Network Outage Notification
64a. NXX Loaded by LERG Eff. Date

BILLING

38b. Usage Timeliness
39b. Accuracy of Usage Feed (with CLECs agreeing to an audit of the process used to determine the accuracy of the usage feed)
40b. Wholesale Bill Timeliness
41 Usage Completeness
42a. Recurring Charge Completeness
43a. Non-Recurring Charge Completeness
44a. Bill Accuracy
44b. Accuracy of Mechanized Bill Feed (with CLECs agreeing to an audit of the process used to determine the accuracy of the mechanized bill feed)

DATABASE UPDATES

62a-52b. Av. Database Interval*
62a.-52b. Percent Database Accuracy (excluding CLEC-caused errors)
61a ALI Database Update Average*

COLLOCATION

82. Av. Time to Respond to Collo. Request
83. Av. Time to Provide Collo. Arrange.

OTHER

2a. % of Time Interface is Avail.
16b. Av. Notification of Outages
30a. Center Responsiveness*

* Incentives would not apply to these measures if aggregate CLEC service order volumes are 20% higher in the reporting month than the average volumes of the previous three months.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **Motion to Accept Joint Comments Regarding Report on Performance Incentives** to all known parties to **R.97-10-016/I.97-10-017** by mailing a properly addressed copy by first-class mail with postage prepaid to the attached official service list.

Executed on October 5, 1998, at San Francisco, California.

Katy M. Lindsay