3. Exceptions and Reply Exceptions

BA-PA contends that the ALJs erred in not adopting the New York guidelines for use in the Commonwealth. (BA-PA Exc., pp. 33-38, *passim*).

4. Disposition

The NYPSC, having before it a similar record compiled by many of the same Parties to this proceeding, reached many conclusions similar to those reached herein. It is clear that the ALJs and the Parties to this proceeding were familiar with, and conversant in, the particulars of the New York guidelines at their evolving stages. This Opinion and Order is not, however, simply an adoption of the New York guidelines. To the contrary, the Commonwealth is uniquely situated in many respects, and certain issues essential to our marketplace were not addressed by the NYPSC.

We agree with the approach taken by the ALJs, and we shall not adopt the New York guidelines *in toto* as urged by BA-PA. Our proceeding is complete in itself, and all Parties herein were given the opportunity to participate in the compilation of the record and presentation of arguments. The Parties and issues deserve, and have received, the full attention and consideration of this Commission in its adjudicative capacity.

B. Commission's Authority

As a general proposition, BA-PA urges the Commission to reject the ALJs' recommended performance measurements, standards, and remedies and to adopt instead BA-PA's proposed "Pennsylvania Carrier-to-Carrier Guidelines Performance

Measurements, Standards, and Reports"[5] and proposed financial incentive plan. (BA-PA Exc., p. 1). BA-PA argues that the Commission is precluded from adopting the ALJs' recommended Service Quality Plan and remedies and is likewise precluded from implementing performance measures, standards, and remedies to which BA-PA does not agree. BA-PA characterizes this proceeding as an investigation which cannot be binding on the Parties without compliance with the procedures for adoption of regulations established by the Commonwealth Documents Law, 45 P.S. §§1102, 1201-1208, and the Regulatory Review Act, 71 P.S. §§745.1-745.15. (BA-PA Exc., p. 2). For this reason, according to BA-PA, the standards and incentives adopted in this proceeding can apply only to the extent that BA-PA accepts them as a condition to a grant to provide interLATA long distance service in Pennsylvania. (BA-PA Exc., p. 2).

BA-PA's position appears to be that, absent BA-PA's concurrence, the Commission lacks the authority to adopt and implement performance measures, standards, and remedies in this proceeding. We strongly disagree. Indeed, the Commission's authority to address the issues of service quality standards and appropriate remedies for noncompliance is derived from both state and federal authority.

We find it interesting that BA-PA raises an objection to the Commission's authority for the first time in its Exceptions to the ALJs' Recommended Decision. Although the purpose of this proceeding was clearly announced in our *April 30, 1999 Order*, BA-PA did not voice any objection to our authority to direct the implementation of performance measures, standards, and remedies until after the actual close of the

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[5] "Performance measures and standards" and "metrics" are generally interchangable terms within this Opinion and Order. The performance measures and standards (*i.e.*, metrics) adopted herein will be incorporated into the revised Pennsylvania Guidelines that BA-PA shall be directed to file in compliance with this Opinion and Order.

record in this proceeding. Indeed, BA-PA makes no mention of its intention to challenge the Commission's authority until after the ALJs recommend in their Recommended Decision that the Commission not adopt BA-PA's proposed PA Guidelines and financial incentives plan in its entirety.

While we find that, on its face, BA-PA's argument is flawed and without merit, we also conclude that BA-PA's objection is procedurally untimely. BA-PA's objection to the Commission's authority to impose performance measures, standards, and remedies was raised neither during this proceeding nor in the post-hearing Briefs. Having failed to address this issue, BA-PA is deemed to have waived its right to challenge the Commission's authority in the first instance. (*See Application of Apollo Gas Company*, Docket No. A-120450, F0003 (February 10, 1994)).

Although BA-PA's failure to properly raise this issue during the evidentiary stages of this proceeding constitutes a waiver of its right to challenge our authority, we will address the merits of BA-PA's Exceptions on this issue.

At the outset, we note that we possess continuing authority over rates charged and all services rendered by jurisdictional utilities. In addition, it is well settled that the Commission has a duty to set just and reasonable rates and to establish fair and adequate terms of service. (*See* 66 Pa. C.S. §§1301, 1501). In our view, the provision of jurisdictional wholesale services and OSS are telephone services[6] which must comport with these well-established legal precepts. Clearly, the adoption and implementation of

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[6] Quoting telephone rates is a "service" under the Public Utility Code, *AT&T v. PaPUC*, 568 A.2d 1362 (Pa. Cmwlth. 1990).

performance measures and standards rest soundly within the purview of our statutory authority.

We have broad authority to take appropriate action to assure compliance with our Orders and Regulations. (66 Pa. C.S. §501). Similarly, the Commission has the authority to develop and impose remedies for noncompliance with Commission-mandated service quality standards and performance measurements. (*See* 66 Pa. C.S. §3301).

In our *April 30, 1999 Order*, we advised the Parties that service quality plan issues as well as an incentive plan would be explored in this proceeding.[7] As demonstrated by the record of this proceeding, all Parties were given an opportunity to present pre-filed direct and rebuttal testimonies, to conduct cross-examination of witnesses, and to file Main and Reply Briefs. It is evident that due process rights to notice and opportunity to be heard were provided to all Parties. (*See* 66 Pa. C.S. §§703(e) and (g)).

In addition, the Commission has an affirmative obligation under Chapter 30 of the Public Utility Code to promote the development of local telephone competition in Pennsylvania. (66 Pa. C.S. §3001). Specifically, we have a statutory duty "to ensure that local exchange telecommunications companies do not make or impose unjust preferences, discriminations or classifications for protected telephone service and other noncompetitive services." (66 Pa. C.S. §3009(b)(2)). The Commission's development of

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[7] In Ordering Paragraph No. 3 of our *April 30, 1999 Order*, we said:

> [T]hat portion of the Joint Petition for an Order Establishing a Formal Investigation of Performance Standards, Remedies and Operations Support Systems Testing for Bell Atlantic-Pennsylvania, Inc., requesting that the Commission commence a formal adversarial proceeding to establish performance standards and self-executing remedies is granted to the extent set forth in this Opinion.

performance measures, standards, and remedies in this proceeding is a very efficient means of fulfilling our Chapter 30 responsibilities in this area.[8]

As we previously mentioned, our authority to impose performance measures, standards, and remedies stems from both state and federal statutory authority.

In 1996, Congress enacted the Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110, 110 Stat. 56, codified at 47 U.S.C. §§151, *et seq.*, (TA-96). TA-96 mandated, *inter alia*, the opening of local telecommunications markets to competition. More specifically, under TA-96, ILECs, like BA-PA, are obligated, among other things, "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis. . . ." (47 U.S.C. §251(c)(3)). The Commission has oversight authority to ensure that ILECs, including BA-PA, provide nondiscriminatory access to their OSS pursuant to Section 251. This Commission's implementation of performance measures and standards is a legitimate exercise of the Commission's authority to ensure that BA-PA fulfills its Section 251 obligations.

Similarly, after BA-PA files its Section 271 Application for in-region interLATA toll service authority with the Federal Communications Commission (FCC), the Commission is required, pursuant to Section 271, to file a consultative report with the FCC, which is not binding on the FCC, in which the Commission will express its opinion as to whether BA-PA has complied with the provisions of Section 271. In our *April 30,*

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[8] *See Application of MFS Intelenet of Pennsylvania, et al.*, Docket No. A-310203F002, *et al.*, (October 4, 1995), (*MFS-I*).

1999 Order, we announced our expectations prior to rendering a Section 271 consultative report in favor of BA-PA's Section 271 Application.[9] Specifically, we said:

> BA-PA must understand, however, that absent the existence of such self-effectuating remedies, in a form and in amounts that do indeed prevent competitive backsliding, BA-PA cannot have any reasonable expectation that this Commission will file a favorable Section 271 consultative report with the FCC.

(*April 30, 1999 Order*, p. 16).

BA-PA's contention that the Commission lacks authority to order the implementation of performance measures, standards, and remedies is contrary to its own concession that performance measures, standards, and appropriate, self-executing remedies are a necessary prerequisite to the Commission's review of BA-PA's anticipated Section 271 Application. (BA-PA Exc., p. 4). To the extent that BA-PA concedes that its need to obtain Section 271 approval is the primary, if not the sole, impetus for adoption of performance measures and standards, we can infer its consent to the modifications of its proposed Guidelines in this Opinion and Order.

Our authority to establish performance measures, standards, and self-executing remedies is based on authority delegated to us by TA-96. If an ILEC such as BA-PA chooses not to accept Commission-implemented performance measures, standards, and remedies by it own volition, this Commission has the authority to direct

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[9] On April 23, 1998, this Commission opened *Investigation into Re: BA-PA's Entry into In-Region InterLATA Services under Section 271 of TA-96*, Docket No. I-00980075. That proceeding was closed on September 30, 1999.

performance measures, standards, and remedies as regulatory requirements pursuant to Section 271. This position is consistent with that of the FCC.[10]

C. Extra Record Evidence

Among the primary issues in this matter is the application of remedies to the benchmarks established in this proceeding. The ALJs directed the Parties in this proceeding to submit their respective final proposals on May 28, 1999. However, in its Reply Brief, AT&T filed Appendix B and Table I which purported to outline AT&T's remedy calculations and application of remedies proposals. By letter dated July 21, 1999, BA-PA filed a Motion to Strike Appendix B and Table 1 to AT&T's Reply Brief, arguing that AT&T was attempting to admit extra record evidence through its Reply Brief.

After additional filings were received, the ALJs granted BA-PA's Motion to Strike, emphasizing that the Parties were clearly instructed not to submit extra record evidence in their briefs. (R.D., p. 24; Tr. 297). The ALJs observed that AT&T's evidentiary treatment of benchmark metrics and their thresholds for remedies was brief, vague and insufficient to apprise BA-PA of AT&T's full proposal. (R.D., pp. 27-29). The ALJs rejected AT&T's argument that Appendix B and Table 1 to AT&T's Reply Brief were mere clarifications of evidence previously offered in AT&T's Exhibit D entitled AT&T Communications of Pennsylvania, Inc.'s Submission of Proposals for Performance Measurements, Standards, and Remedies. The ALJs also disagreed with AT&T's assertion that the comments made in AT&T's Rebuttal Testimony of its witness,

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[10] *See In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, FCC 97-298 (Order Rel. August 19, 1997), (*Michigan*).

c. Exceptions and Reply Exceptions

BA-PA asserts that any errors in this area are measured in Metric OR-6. (BA-PA Exc., pp. 78-81).

d. Disposition

We find the ALJs recommendation to include this metric to be reasonable. Metric OR-6 measures focus on the contents and accuracy of orders and not the content of the information as it is entered into a data base. Accordingly, we shall adopt the ALJs' recommendation on this metric.

H. General Metrics

1. GE-1 Directory Proofs

The issue in this metric is the accuracy of the directories

a. Parties' Positions

BA-PA stated that it provides a listing Verification Report ninety (90) days[23] before the close out date and provides a Directory Listing view of Listings through the Web GUI. (BA-PA St. 1.1, App., p. 94). BA-PA also stated that it does not have the capability to report this performance area and that it has established a process that gives

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[23] BA-PA reports that this practice was recently changed. BA-PA now provides listing verification reports thirty (30) business days before the close date. (BA-PA Exc., p. 81, footnote 237).

the CLECs an opportunity to review directory listings. BA-PA claimed that it was unaware of any failures of this process. BA-PA maintained that the fact that it does not provide performance reports for this metric does not necessarily mean that it cannot show nondiscriminatory treatment of the CLECs. (R.D., pp. 168-169).

AT&T proposed that BA-PA provide written documentation of directory errors so that errors can be tracked and audited. AT&T emphasized that errors in customers' directory listings usually cannot be corrected for a year. (AT&T St. 1.0, p. 53). AT&T maintained that verbal notification of errors is inherently unreliable. For these reasons, directory listings should be accurate when first posted. (AT&T M.B., pp. 59-60; R.D., pp. 168-169). AT&T also noted that BA-PA provides its retail operations with the opportunity to review customer directory listings before publication. AT&T added that, without a performance standard and metric to evaluate the service, there is no current mechanism in place to assure that BA-PA is providing this service to the CLECs at parity to BA-PA's retail operations.

CTSI agreed with AT&T that a performance standard and metric for this service is necessary. CTSI referred to a recent incident where a customer's name in a directory listing was changed. CTSI also pointed out that BA-PA's failure to include CTSI customers in the 1998 Harrisburg directory was problematic for the CLEC. CTSI maintained that these incidents reveal that BA-PA's performance in this area needs to be addressed and measured. (CTSI M.B., p. 26; R.D., p. 169).

b. ALJs' Recommendation

The ALJs agreed with AT&T and CTSI that this metric is necessary to ensure CLEC parity. The ALJs recommended adoption of the AT&T proposal to add this metric and the standard of parity to BA-PA's retail operations. (R.D., p. 170).

c. Exceptions and Reply Exceptions

BA-PA excepts to the ALJs' recommendation of a parity standard for this metric. BA-PA agrees to measuring whether the Listing Verification Report was issued in a timely fashion. (BA-PA Exc., p. 81). BA-PA asserts that it is uncertain whether it has an analogous retail activity to which a parity comparison can be made. (BA-PA Exc., p. 82). BA-PA maintains that, if it is unable to identify an analogous retail activity which is consistent with its other proposed metrics in its Compliance Filing, a standard requiring that 95% of Listing Verification Reports be provided on-time should be implemented. (BA-PA Exc., p. 82).

AT&T argues that, if there is no retail analog for the timeliness of delivering Listing Verification Reports, then the objective standard should be 100% of the reports delivered on time. (AT&T R.Exc., pp. 84-85).

d. Disposition

We find that this metric should be added with a standard of 95% of Listing Verification Reports be provided on time. This metric is important because, without a metric and performance standard to evaluate directory proofs, it is not possible to assure CLEC parity.

VII. ENFORCEMENT REMEDIES

A. Levels of Incentive Payments

The ALJs directed all Parties to submit their remedies proposals on or before May 28, 1999. Proposed remedies plans were filed by BA-PA, AT&T, MCIW and Sprint/United. CTSI filed a letter indicating its endorsement of AT&T's proposal. The respective remedies proposals were further discussed in the Parties' Main and Reply Briefs. NEXTLINK did not file a brief but instead indicated by letter dated July 6, 1999, to the ALJs that it endorsed the AT&T and MCIW proposals.

1. Parties' Positions

As previously discussed in this Opinion and Order, BA-PA proposed that the modified Z-score be used to determine whether a disparity is present. BA-PA maintained that other methods should be used to determine the need and magnitude of a remedy. BA-PA's witness, Mr. Stapleton, briefly summarized BA-PA's plan as follows:

> After BA-PA has identified the metrics for which it did not meet the applicable standard, the next step in the process is to compute the amount of any incentive payment. Under BA-PA's proposal, the amount of the incentive payment will be a function of four factors: (1) the degree by which the standard was missed; (2) the number of times over a six month period that standard was missed; (3) the relative importance of that standard to the CLECs; and (4) the number of standards missed during the reporting period. These four factors are explained below.
>
> BA-PA proposes that the amount of the incentive payment will increase with the degree by which it provided substandard performance. After BA-PA has identified the metrics for which it provided substandard performance, BA-PA will calculate the actual difference between its

performance and the Guidelines standard, and then assign "performance points" to each substandard metric based on the amount of the actual difference. The greater the degree by which the performance standard was missed, the greater the number of performance points assigned, and the larger the incentive payment at the end of the computational process. The use of performance points gives BA-PA an incentive to keep its performance as close as possible to the standard; they make it more costly to miss by a mile than by an inch. Table 1 of Exhibit 2 in Appendix C shows how BA-PA intends to calculate and use performance points.

BA-PA's proposed system will also link the amount of the penalty to the frequency with which BA-PA provided substandard performance for a metric in the last six months. The more frequently the metric was missed in the last six months, the higher the frequency factor. The purpose of the frequency factor, of course, is to encourage BA-PA to fix problems quickly. Table 2 of Exhibit 2 in Appendix C shows the frequency factors that BA-PA proposes to use.

Some services provided by BA-PA will be more important to CLECs than others. BA-PA proposes to account for this by assigning a weight to each metric ranging from 1 (least important) to 4 (most important). A higher "relative importance" will result in a higher incentive payment at the end of the computational process. For the incentive payment calculation to be consistently applied, however, the weight assigned to a metric should be the same for all CLECs. Footnote 2 of Exhibit 2 in Appendix C explains how BA-PA will calculate and apply the weighting factor.

Finally, under BA-PA's proposal, the amount of the incentive credit increases with the number of missed metrics. This gives BA-PA an incentive to guard against missing a large number of metrics, even by a small amount.

Under BA-PA's proposal, a CLEC receiving substandard performance will receive a credit for a percentage of the amount the CLEC owed BA-PA. BA-PA proposes three levels of credits ranging from 5% to 30%. Any credit

> due a CLEC will be applied to CLEC bills by the conclusion of the second month after the reporting month.

(BA-PA St. 1.0, pp. 22-24) (Emphasis in original).

BA-PA subsequently withdrew the weighting component of its plan. (BA-PA M.B., p. 80; BA-PA R.B., p. 32; R.D., p. 293).

BA-PA proposed that any CLEC receiving substandard performance would receive credit for a percentage of the amount the CLEC owed BA-PA. (BA-PA St. 2.0, pp. 22-24). The amount of the credit under BA-PA's plan would range from 5% to 30%. BA-PA maintained that, under its proposal, the amount of incentive credit increases with the number of missed metrics. BA-PA explained that, even if the -1.645 threshold is met, the question should still remain as to whether a remedy was needed. BA-PA claimed that (1) the amount of the incentive payment should be controlled by the degree of missed metrics; (2) the number of times over a six (6)-month period; and (3) the number of standards missed during the reporting period. (BA-PA St. 2.0, pp. 22-24).

BA-PA contended that its risk should be limited to 30% of its total billed wholesale revenues. BA-PA opined that the 30% limit was sufficient to deter it from providing inadequate service. BA-PA noted that its plan was not the exclusive remedy for the CLECs which also had the option to file complaints before the FCC and the Commission. (BA-PA M.B., pp. 78-79; R.D., pp. 244-245, 277).

AT&T proposed a two-tiered remedies plan. AT&T Tier I remedies would be a form of liquidated damages which, according to AT&T, encompasses BA-PA's unjust enrichment as a result of failing to meet specific service standards, as well as the need to deter discriminatory or illegal conduct. (AT&T M.B., p. 74). Under AT&T's

proposal, the amount of the remedy would increase as the value of the modified Z-score increases. AT&T's Tier I remedies would automatically apply when BA-PA fails to meet a specific service measurement, *i.e.*, when the value of the modified Z-score exceeded -1.04. (AT&T M.B., p. 74; R.D., pp. 233-242).

AT&T's Tier I remedies proposal can be summarized as follows:

> When the modified Z-score exceeds 1.04, but is equal to or less than -1.645, BA-PA would pay $2,500, to each affected CLEC per failure occurrence per month. AT&T referred to this as a basic failure.
>
> When the modified Z-score exceeds -1.645, but is equal to or less than 3.000, BA-PA would pay $5,000, to each affected CLEC per failure occurrence per month. AT&T referred to this as an intermediate failure.
>
> When the modified Z-score exceeds 3.000, BA-PA would pay $25,000, to each affected CLEC per failure occurrence per month. AT&T referred to this as a severe failure.
>
> When there are three or more consecutive months of failures, BA-PA would pay $25,000 to each affected CLEC per failure occurrence per month. AT&T referred to this as a chronic failure.

(AT&T M.B., p. 74; AT&T May 28, 1999 Submission, Exh. C).

AT&T proffered that its Tier II remedies should be assessed when BA-PA fails to meet the service standards for a sufficient number of submeasures, based on aggregated CLEC data, if the failures exceed the number of failures attributable to random chance at a 95% level of statistical confidence. (AT&T M.B., p. 75, citing AT&T St. 2.0, p. 11). AT&T proposed that, unlike the Tier I remedy which required payments to a specific CLEC, Tier II payments would be submitted to an industry fund or to the Commonwealth treasury. AT&T advocated that BA-PA be prohibited from

receiving any benefit resulting from making the payments or recovering the payments as an exogenous event under BA-PA's alternative regulation plan pursuant to Chapter 30. (AT&T M.B., p. 76). AT&T's proposal required that Tier II remedies be applied in addition to any applicable Tier I remedies. AT&T also recommended that, if system-wide failures are found, the Commission not support BA-PA's Section 271 Application. In the event that systemic failures are found after FCC approval of BA-PA's Section 271 Application, the Commission, in AT&T's view, should petition the FCC to revoke or to suspend BA-PA's Section 271 authority. (AT&T M.B., p. 76; R.D., pp. 233-242).

AT&T's Tier II remedies proposal can be summarized as follows:

> Upon first finding that BA-PA has failed to provide nondiscriminatory performance to the CLEC industry as a whole (based upon aggregated CLEC data), BA-PA would pay Tier I payments plus $.50 per access line into the industry fund.
>
> Upon two such findings within a 6-month period, BA-PA would pay Tier I payments plus $1.00 per access line into the industry fund.
>
> Upon three such findings within a 12-month period, BA-PA would pay Tier I payments plus $2.00 per access line into the industry fund, plus the Commission would not recommend Section 271 approval or if Section 271 approval has already been granted, the Commission will recommend to the FCC revocation of BA-PA's 271 approval.

(AT&T M.B., p. 75).

CTSI supported AT&T's proposal. CTSI noted that a CLEC could suffer short-term harm by the loss of the customer as well as long-term harm for the damage to its reputation. CTSI believed that BA-PA's plan failed to adequately address both concerns. CTSI maintained that the remedies outlined in AT&T's plan would deter

BA-PA from providing disparate treatment as well as remedy the resulting harm to the CLECs. (CTSI M.B., p. 34; R.D., pp. 242-243).

MCIW proposed to use the modified Z-score to determine the magnitude of the penalties for those metrics which have parity as the performance standard. MCIW's proposal was based on a three (3)-tier system. MCIW claimed that its approach appropriately matches the magnitude of the remedy to the magnitude of the violation and the impact it could have on the promotion of local competition. (MCIW St. 1.0, p. 14). Under MCIW's proposal, Tier I penalties would apply when individual CLECs receive service that is not at parity with service BA-PA provides its own retail customers or affiliates, or when a benchmark standard is missed once. (MCIW St. 1.0, p. 14; R.D., pp. 243-244).

In incidences where a parity standard or benchmark standard is missed by a great magnitude or for one (1) month, MCIW proposed Tier II remedies which would increase the amount of the penalties. MCIW claimed that a statistical methodology should be used to determine when Tier II penalties would apply for the parity standards that are missed by a great magnitude. (MCIW St. 1.0, p. 14). According to MCIW, the methodology, *i.e.*, modified Z-score, should be used to determine when a penalty should be applied and the actual level of the penalty. (MCIW St. 1.0, p. 14). MCIW also recommended that, if Tier II penalties are applied, the Commission not support BA-PA's Section 271 Application or, if approval has been granted, that the Commission initiate an investigation into the quality of BA-PA's service. (MCIW St. 1.0, p. 14; R.D., pp. 243-244).

MCIW proposed the assessment of Tier III penalties in addition to Tier I and Tier II penalties when it is shown that BA-PA has provided substandard service overall to the CLEC industry. (MCIW St. 1.0, p. 14). Under MCIW's proposal, BA-PA

would pay remedies into a state-created fund that would be used to fund independent audits of BA-PA's performance. MCIW's witness summarized MCIW's Tier III penalties as follows:

> If Tier III remedies are invoked, §271 approval should be denied. To determine whether market suppression (Tier III) penalties apply, results for parity and benchmark violations are compiled for the CLEC industry as a whole. If from the aggregated CLEC results, the base remedy or minimum penalty would apply (using the parity and benchmark tables from Attachment 3, page 5) for more than 5% of the sub-measures, then Tier III penalties would apply as follows:
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> | | |
> |---|---|
> | First month of violation | $0.50/access line/month |
> | Second month of violations within a 12 month period | $1.00/access line/month |
> | Each additional month of violations (beyond two months) within a 12 month period | $2.00/access line/ month |
>
> If more than 15% of the submeasures are missed for the CLEC industry in the aggregate, then the Commission should investigate and possibly recommend suspension of any existing authority.

(MCIW St. 1.0, p. 15).

2. ALJs' Recommendation

The ALJs concluded that there were significant flaws with each of the Parties' proposals. The ALJs viewed BA-PA's plan as being too complicated. The ALJs determined that it would be difficult for the CLECs, as well as the Commission, to monitor and ascertain whether the remedies were being properly generated. (R.D.,

p. 258). The ALJs disagreed with BA-PA's contention that a remedy was not necessarily required once the -1.645 threshold had been crossed. The ALJs further emphasized that the basic premise of BA-PA's plan is flawed for three (3) reasons: (1) BA-PA failed to consider that Section 271 mandates that BA-PA provide nondiscriminatory service to the CLECs as a precondition to the granting of its request to provide interLATA service; (2) BA-PA overlooked the agreement among BA-PA and the CLECs that the standard for nondiscriminatory service is parity with BA-PA retail services; and (3) BA-PA failed to acknowledge that, if it provides nonparity service, it should be liable for a remedy. (R.D., pp. 258-259). The design flaws of BA-PA's plan, according to the ALJs, demonstrated BA-PA's unwillingness to comply with the mandates of TA-96 and its failure to meet the FCC requirement that BA-PA's incentive plan act as a deterrent to ensure that the CLECs receive nondiscriminatory access and interconnection. (R.D., p. 259).

The ALJs further agreed with the CLECs' position that BA-PA's plan was too lenient. The ALJs interpreted BA-PA's proposal as allowing it to underperform by 50%, in any or all metrics, on a monthly basis, but yet requiring the CLECs to pay 100% of the bill, subject only to a maximum 30% credit at the second consecutive month. The ALJs reasoned that, given the time and money expended by the CLECs to pay for the metrics, BA-PA's proposed incentive plan would not economically deter BA-PA from providing disparate service. (R.D., p. 259).

For these reasons, the ALJs recommended against adoption of BA-PA's plan in its entirety. The ALJs recommended a financial incentive plan which can be summarized as follows:

Tier I Payments

a. If data shows a disparity of 0% to 49.99%, BA-PA must return 50% of the fee charged for that service to affected CLECs in first month of occurrence.

b. If data shows a disparity of 50% or greater, BA-PA must return 100% of the fee charged to affected CLECs in the first month of occurrence.

c. The standard described in "b" is repeated for each metric where a disparity occurs.

d. For metrics for which there is no corresponding fee, BA-PA must take the total individual CLEC monthly fee for metric services and divide by total number of services and submetrics used by that CLEC in that month. The average metric fee for that month is then used to calculate repayment amounts described above.

Beginning with the second violation of the same metric within two (2) months of the first violation, the ALJs recommended "liquidated damages."

For the second violation of same metric within two (2) months of the first violation, in addition to returning half or all of the fee charged in accordance with the above proposal, BA-PA must also pay affected CLECs $2,500 in "liquidated damages" for violation of the same metric.

For the third violation of the same metric within two (2) months of the first violation, in addition to returning half or all of the fee charged in accordance with the above proposal, BA-PA must also pay affected CLECs $5,000 for violation of the same metric.

For the fourth violation of the same metric within two (2) months of the first violation, in addition to returning half or all of the fee charged in accordance with the above proposal, BA-PA must also pay affected CLECs $25,000.

The ALJs proposed that liquidated damages be imposed until after two consecutive months without violating the same metric.

(R.D., pp. 268-269).

Tier II Payments

The ALJs recommended that Tier II payments should be imposed when BA-PA fails to provide nondiscriminatory service to the CLEC industry as whole (based on aggregate CLEC data).

For the first metric violation in the same month, BA-PA must make Tier I payments plus pay $.50 per access line into the Universal Service Fund.

For subsequent violations in the same month, BA-PA must make Tier I payments plus pay $.10 per access line into the Universal Service Fund.

(R.D., pp. 273-274).

The ALJs recommended that the Commission withhold its Section 271 consultative report until BA-PA's discriminatory conduct has ended for a period of six (6) to twelve (12) months without a single recurrence. (R.D., p. 271). If the Commission's favorable Section 271 consultative report has been given but no FCC action has been taken, the ALJs proposed that the Commission revoke its favorable rating and impose a financial remedy. (R.D., p. 272). The ALJs recommended that the Commission allow the financial remedies to remain in place even if BA-PA's Section 271 Application is granted and/or subsequently revoked since TA-96 does not require the FCC to permit a second consultative report from this Commission. (R.D., p. 272).

The ALJs also recommended that payments made to CLECs and the Universal Service Fund should not be passed on to BA-PA customers as part of an exogenous pass-through. The ALJs further recommended that an escalator clause similar to that in BA-PA's Chapter 30 Plan be implemented in this proceeding to track inflation/deflation because of the concern that growth of the economy could outpace the sizes of the remedies and undermine their effectiveness. The ALJs also suggested that the remedies track the Gross Domestic Product Index (without a productivity offset) and that the base year be set the same as the effective year date. (R.D. p. 274).

3. Exceptions and Reply Exceptions

BA-PA excepts generally to the ALJs' rejection of its financial incentives proposal. BA-PA asserts that while the ALJs correctly acknowledged that the payments levels contained in the proposals of AT&T and MCIW were too severe, the ALJs' recommended financial incentive plan, if adopted by the Commission, would result in payments, which in some instances, are much higher than those proposed by AT&T and MCIW. (BA-PA Exc., pp. 4-6).

BA-PA also disagrees with the ALJs' conclusion that the its proposal is too complicated. BA-PA repeats its earlier contention that its proposal would ensure that it earn negative profits, if BA-PA violates the performances measures and standards. For this reason, according to BA-PA, its financial incentive proposal is sufficient to deter BA-PA from providing nondiscriminatory access and interconnection and should be adopted by the Commission (BA-PA Exc., pp. 8-13).

In addition, BA-PA argues that the ALJs' recommended remedies plan is flawed and should be rejected in its entirety. The ALJs' plan, in BA-PA's view, fails to adjust for the probability of Type I errors and, as such, would require BA-PA pay penalties even when it has complied with the performance measures and standards. BA-PA urges the Commission to allow a reasonable adjustment for the probability of Type I error. (BA-PA Exc., pp. 19-20).

AT&T contends that the ALJs' proposed remedies plan is flawed for several reasons:[27] (1) the ALJs' plan improperly allows BA-PA to violate parity without paying a penalty; (2) the ALJs erred in partially tying the remedy to the CLEC bill; and (3) the ALJs' two tiered plan does not adequately deter BA-PA from discriminating against the CLECs or properly compensate CLECs for BA-PA's discriminatory service provision. (AT&T Exc., pp. 23-44).

AT&T also argues that the ALJs erred in failing to adopt AT&T remedies proposal. AT&T claims that its remedies plan achieves the dual goals of compensating

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[27] The other reasons articulated by AT&T are discussed in the "Performance Standards and Measures" discussion section of this Opinion and Order.

the CLECs for the damages incurred as a result of BA-PA's inadequate service and deterring BA-PA from future discriminatory conduct. (AT&T Exc., pp. 45-50).

MCIW supports the ALJs' rejection of BA-PA's proposal. MCIW argues, however, that the ALJs' plan does not provide appropriate remedies for initial and recurring disparities. MCIW also takes the position that the ALJs' remedy scheme, as recommended, does not deter discriminatory conduct by BA-PA. According to MCIW, the ALJs' recommended remedies plan does not adequately account for all of the harms which could be caused by BA-PA's substandard service to the CLECs. (MCIW Exc., pp. 8-9).

MCIW urges the Commission to adopt its remedies proposal. MCIW contends that, compared to the ALJs' recommended plan, its proposal would ensure that BA-PA has the proper incentive to provide nondiscriminatory service. (MCIW Exc., pp. 11-12).

MCIW also objects to the ALJs' state fund recommendation. Instead of placing BA-PA industry wide discrimination penalties into a Universal Service Fund, as recommended by the ALJs, MCIW proposes that the penalties be deposited into a separate fund created by the Commission to advance the development of a competitive local market in the Commonwealth of Pennsylvania. Contrary to the ALJs' recommendation, the Commission should , in MCIW's view, withhold a favorable Section 271 consultative report as well as require BA-PA to pay into a fund at the same time. (MCIW Exc., pp. 12-14).

In its Exceptions, Sprint/United states that, while it supports the ALJs' plan in concept, it seeks clarification on certain terms of the ALJs' recommended plan. Specifically, Sprint/United makes the following inquiries:

> Whether the term "fee" means monthly charges, non-recurring charges or both?
>
> Whether the penalty would apply to all activity for the month or just the portion which is noncompliance?
>
> How would non-order-type activities be handled?

(Sprint/United Exc., p. 14).

Sprint/United argues that the ALJs' recommendation would result in a penalty that would change every month and differ among the various CLECs in situations concerning the use of a proxy or average cost for those metrics or submetrics not having an associated fee. (Sprint/United Exc., p. 14). Sprint/United adds that, because this approach is neither simple to calculate nor to verify, the Commission should impose a fixed penalty. (Sprint/United Exc., p. 15).

Sprint/United disagrees with the ALJs' recommendation that Tier II payments be deposited into the Universal Service Fund. Sprint/United claims that monetary payments into a public fund alone would not serve as a strong deterrent for Tier II violations.

Sprint/United supports the ALJs' recommendation to withhold a Section 271 consultative report where Tier I and II remedies have been imposed and BA-PA continues to demonstrate a pattern of discriminatory conduct. (Sprint/United Exc., p. 16). In situations where Section 271 authority has already been granted, Sprint/United contends that the alternatives outlined in its Main Brief are a better

alternative to the ALJs' recommended plan. (Sprint/United Exc., p. 17, citing Sprint M.B., pp. 7-8).

Sprint/United argues that the ALJs did not go far enough to ensure that the standards and measures become effective immediately. Sprint/United suggests that we should use the results of at least three (3) months of testing under these metrics to determine whether a favorable consultative report on BA-PA's Section 271 Application should be made. (Sprint/United Exc., pp. 4-5).

4. Disposition

As we stated at the outset, this matter should not be about penalties. It should be about performance. However, the BA-PA plan does not go far enough. This proceeding and its outcome is not an opportunity for the CLECs to wring dollars from BA-PA.

With regard to the ALJs' suggested plan, while we appreciate their efforts, we are concerned that, as a proposition of fundamental fairness, any plan should contain remedies that flow to the affected party: if one does not get the service, one should not have to pay. Additionally, while we should consider liquidated damages in an overall incentive plan, a balance must be achieved in our attempt to "incentivize," before we "penalize." Liquidated damages in the amount of $25,000 are clearly a penalty, and this Commission is reluctant at this time to adopt such a measure.