

1 Julie, what you just said. Does that mean that Verizon's  
2 consent to a post-271 performance assurance plan, including  
3 the penalties, means that the PUC can modify the plan after  
4 any Verizon Pennsylvania application for 271 authority is  
5 granted?

6 MS. CONOVER: I think what I would say is the metrics  
7 clearly have the unilateral power to modify. We believe,  
8 however, that we would agree to a reasonable modification on  
9 the liquidated damages side, but we cannot agree and I would  
10 think we would reserve the right ultimately to challenge the  
11 underlying Commission's ability to impose a liquidated  
12 damage remedy.

13 Now, whether or not we would ever, in fact, challenge  
14 that, because, assuming everyone is operating in good faith,  
15 the level of liquidated damages or penalties would be  
16 reasonable, but what if the Commission were to come back and  
17 say, okay, we're going to impose, you know, a million  
18 dollars for every missed metric per CLEC? We would  
19 certainly, I think, challenge that.

20 I don't want to say that there is an open-ended  
21 agreement, but we would agree and we've said we would agree  
22 to a reasonable penalties post-271.

23 MS. MARTIN: So if I could put it another way, that  
24 hypothetical challenge, would it be not based on an error of  
25 law question; that you would sort of assume or agree that

1 the Commission has authority to impose penalties, but that  
2 you would be wanting to talk about like an abuse of  
3 discretion standard and that the amount of penalty imposed,  
4 you would want to reserve your right to argue that that was  
5 an abuse of discretion, the actual amount, but not the  
6 actual fact that there would be a dollar amount of penalties  
7 required to be paid?

8 MS. CONOVER: I guess what I would have to say is  
9 that our legal position is that the Commission does not have  
10 the statutory authority to impose the liquidated damages.  
11 If we withdrew our appeal today, that would still be our  
12 legal position, and I don't think that there is any reason  
13 -- if we withdrew our appeal today and later you were to  
14 impose greater penalties and we wanted to take an appeal, I  
15 think that issue would still be open to us to appeal.

16 However, let me make it very clear. We are willing  
17 to agree voluntarily to the performance assurance plan with  
18 the level of penalties that exists today, and we would be  
19 willing to agree to -- there may be other reasonable plans  
20 that are different than that we would also be willing to  
21 agree to.

22 MR. LOWE: I think that responds to Ms. Melillo's  
23 concern. We are, in fact, relying and will rely at the FCC  
24 on the performance assurance plan that is in place now in  
25 Pennsylvania, because we think it matches the sort of

1 magnitude of exposure for backsliding that the FCC has said  
2 is required for 271.

3 So we are willing to enter a consent decree, if  
4 that's what's necessary, to say that the current plan is  
5 something we will abide by and will not challenge, but there  
6 is still the concern we have that we don't believe that that  
7 plan was issued pursuant to statutory authority that this  
8 Commission has under Pennsylvania law, and we can't give  
9 that away, because five years from now there may be a  
10 different Commission and they may say, well, what the heck,  
11 a million dollars a measure.

12 So we need to be able to challenge that and preserve  
13 that position, but as far as consenting to what's in place  
14 now on a prospective basis, we would sign on the dotted line  
15 for that. It's really the question of what do the statutes  
16 of Pennsylvania authorize the Commission to do additional to  
17 what we've consented to. And that consent, obviously, would  
18 be subject to, as Julie indicated, further discussions,  
19 modifications.

20 I mean, we don't think this is a perfect plan. We  
21 suggest some modifications. Others may suggest some. I  
22 think it could be improved, but we think that that needs to  
23 be part of a sort of collaborative consent process.

24 MS. MARTIN: Okay. So if there was future  
25 modification of the plan involving penalties, dollars

1 involved, your position would be that you might agree to  
2 that, but that if you did agree to it, it would be like on a  
3 voluntary basis; that the Commission couldn't order you to  
4 pay particular dollar amounts?

5 MR. LOWE: Under the current statutes of  
6 Pennsylvania, I think that's right.

7 MS. MARTIN: I'd like to ask a little bit about New  
8 York and Massachusetts. Are there performance assurance  
9 plans with penalties in New York and Massachusetts?

10 MR. LOWE: I'm sorry. Are there?

11 MS. MARTIN: Yes.

12 MR. LOWE: Yes.

13 MS. MARTIN: Dollar amounts are attached to those  
14 plans?

15 MS. CONOVER: Yes.

16 MR. LOWE: Yes.

17 MS. MARTIN: Is it Verizon's position that the  
18 respective Commissions in those cases have authority to  
19 impose requirements upon Verizon to pay the dollar amounts?

20 MR. LOWE: I believe the answer to that -- I'd have  
21 to check, but I believe the answer to that is no, we don't  
22 think those Commissions have the authority to order  
23 liquidated damages structure to be put in place. However,  
24 we've consented to those structures in both states.

25 MS. MARTIN: The structures that are in place then in

1 New York and Massachusetts, did they come out of a  
2 Commission order in those cases?

3 MR. LOWE: They came out of proceedings, yes,  
4 Commission orders, and I don't know -- if your next question  
5 is were they appealed, I don't know the answer to that.

6 MS. CONOVER: I think at least in New York, the  
7 penalties were not paid, I believe, until after 271.

8 MR. LOWE: I just had something corrected. The  
9 Massachusetts plan is not in effect. It goes into effect  
10 with 271 approval, and that was part of a consent on  
11 Verizon's part. Essentially, the Massachusetts plan is the  
12 New York plan transplanted.

13 MS. MARTIN: Thank you.

14 JUDGE WEISMANDEL: Mr. Giesy.

15 MR. GIESY: Your Honor, the issue of future  
16 modifications is an important one, because the substance of  
17 MCI's appeal of the performance assurance plan is the fact  
18 that the Commission changed the Recommended Decision of the  
19 Administrative Law Judge in that case on the assumption that  
20 there would be a structural separations in place; in other  
21 words, softened the damages on the assumption that  
22 structural separations would be place and, therefore,  
23 softening of damages was appropriate.

24 Depending upon the Commission's decision on  
25 structural separations, that may necessitate an increase in

1 amount of damages; and, again, that is the substance of our  
2 appeal to the Commonwealth Court in this case. So it's a  
3 trivial issue of whether Verizon -- this is a very important  
4 issue; whether Verizon agrees with the Commission's  
5 authority to implement damages here, because if the  
6 Commission does something on structural separations that  
7 necessitates an increase in penalties in the performance  
8 plan, if Verizon disagrees with it, Verizon will be right  
9 back in court challenging that. It is their legal right to  
10 do so, but, again, it goes to the efficacy of the plan.

11 JUDGE WEISMANDEL: I think, unless staff has some  
12 other questions, I think it was fruitful to explore the  
13 parties' positions as to what weight and what consideration  
14 should be given to the fact that these things are out there  
15 in this proceeding. I think it was even more fruitful in  
16 that I think at least one-and-a-half, if not two offers were  
17 made; and I'll leave to the parties to whom those offers  
18 apply to respond to them in due course and in some other  
19 context than right here right now.

20 I do think -- and I thank Mr. McClelland and OCA. I  
21 think this was worthwhile. I think it clarifies some things  
22 for the staff to at least know what they're going to have to  
23 deal with, and that's always helpful. Surprise is not any  
24 lawyer's favorite thing.

25 There was one other matter that was added rather late