

ELEMENTS OF AN EFFECTIVE SELF-EXECUTING PERFORMANCE REMEDY PLAN

WorldCom offers the following guidance on the elements of an effective enforcement plan.

1. Remedies Must Be Sufficient to Compel Compliance

As most CLEC commenters have stressed, remedies should be at sufficient levels to avoid becoming a cost of doing business. Many parties noted Chairman Michael Powell's comments regarding the FCC's limitations in setting remedies at levels high enough to motivate the ILEC to provide compliant service.¹ Given the ILECs' revenues from local operations, not to mention revenues from ILECs' bundled local toll, long distance and wireless packages, it is not surprising that they have been able to absorb the relatively small incentive amounts they have paid the CLECs and the government, while continuing to provide poor service in several states.

To counter the ILEC's costs in correcting systems and resource problems slowing market entry and their benefits of retaining profits, the New York PSC created a top down plan, where the overall remedy cap was used to set monthly amounts paid out. The results are based on CLEC aggregate performance with all monies paid to CLECs. So when there is a failure, the New York plan ensures that a large remedy is paid—with some particularly large remedies focused on past problem areas for Verizon, such as flow through, hot cuts, and in a later modification, missing notifiers. At some point, the division of these remedies based on market share may be inadequate for the harm done to

¹ WordCom Comments at p.20, footnote 45; Competitor Coalition Comments at p.13.

those CLECs with lower market share, but it is a solid approach to catching the ILEC's attention and motivating them to fix problems.

Per Occurrence plans will definitely keep pace with CLEC activity in the market, but they do not provide much incentive to rapidly resolve problems that keep CLECs from ramping up volumes. The problem may be costly to fix but when remedies are low the ILEC has less of an incentive to fix the problem. A per occurrence plan can work if supplemented with a minimum payment level and adequate per occurrence amounts-- more than the cost of the product but also large enough to reverse the ILEC's reluctance to fix a costly problem.

As with the metrics, in devising a remedy plan, the FCC can draw from state deliberations on setting remedy payments at sufficiently high levels. An Administrative Law Judge of the Illinois Commerce Commission, in a proposed decision released January 22, 2002, has agreed with IL Staff that the Texas plan level per occurrence remedies that SBC-Ameritech was adding to contracts were not providing any incentive to fix recurring problems. The IL ALJ decided to double the Tier I (remedies paid to CLECs) for individual CLEC performance failures and triple the Tier II (remedies paid to state) for aggregate CLEC performance failures.

The FCC must do more than recommend overall caps for the plan, it must ensure that the plan's steps of per occurrence and per measure payments are adequate so that the remedies could actually reach that cap if large numbers of performance metrics are being failed. WorldCom suggests that if a procedural cap (see below) is used that the per occurrence/per measure amounts be set at levels that would meet that level for if more than 20% of the same measures were missed for three months or more out of the year.

2. A Procedural Cap Not a Firm Cap Is Needed

WorldCom recommends that any annual incentives cap should be set at 44% of the ILEC's net earnings as reported in the most recent FCC's ARMIS data. There should be no monthly or per CLEC caps, which only serve to limit the effectiveness of the plans. This is approximately the level the New York plan moved to (based on 1999 ARMIS results) when \$24 million was added to the plan in response to issues with missing notifiers. The Michigan Commission adopted a 36% procedural cap, but says remedies may go higher if needed:

The Commission sees no reason to place an absolute limit on Ameritech Michigan's liability under the plan. On the other hand, it seems reasonable to provide that, at some point, the Commission should review whether ever higher liability is warranted by the circumstances and whether some further action is needed to achieve the purposes of a remedy plan. The Commission therefore concludes that Ameritech Michigan's proposal should be approved, except that the annual limit shall be a procedural limit. The Commission accepts the proposed limits, including 36% of Ameritech Michigan's net return, as reasonable points at which to conduct hearings. At the conclusion of the hearings, the Commission may order Ameritech Michigan to pay amounts above the limits. The Commission also notes that the limits do not prevent the Commission, the CLECs, the FCC, or any other party from pursuing other remedies, including seeking the revocation of Ameritech Michigan's authorization to provide in-region interLATA service.²

Kentucky and Georgia have adopted firm caps set at a 44% return on BellSouth local revenue. Massachusetts has adopted a 39% firm cap. In a recent order, the Pennsylvania PUC adopted no cap (review or otherwise) plan, but now is considering movement to a New York-style plan with a cap set at 39% of VZ-PA's net local return.

The New Jersey Board of Public Utilities recently set no cap on remedies, but unfortunately it set the base per occurrence remedy payments and multipliers for duration extremely low making even a low cap even unlikely to be reached. This is unfortunate as the plan is fairly well structured otherwise.

3. All of the Performance Measurements Are Equally Critical and No Ranking Is Necessary for Determining Remedy Amounts

WorldCom believes that assigning a priority to the UNE measurements is wrong because in some instances it implies a preference for a certain mode of entry into the local marketplace. There are many pressure points where ILECs can thwart CLECs' competitive growth, and WorldCom is concerned about focusing remedies only on one point in the process when the ILEC discrimination may have kept activities from reaching that point in the process at all. Given the breadth of the competitive landscape, WorldCom respectfully refers this Commission to a recent decision by the Michigan Commission on this matter:

“As the Michigan Commission Staff indicated in comments filed earlier in this proceeding on the subject of remedy plans, “Ameritech’s proposal to give different weights to each measurement is very subjective and controversial and there is no need to attempt to identify which measurement should be afforded more weight. Deficiencies in any area can result in a CLEC loss of customer.”³

4. Incentives Amounts Should Be Set High Enough To Ensure Good Performance and Performance Should be Detected at Both the Individual CLEC Level and the Industry Level

² In the Matter of Ameritech Michigan’s Submission on Performance Measures, Reporting, and Benchmarks, pursuant to the October 2, 1998, Case No. U-11830 Order in Case No. U-11654, issued April 17, 2001 at p. 10.

³ Ameritech Michigan’s Submission on Performance Measurements, Reporting, and Benchmarks in Case No. U-11830 Compliance with the October 2, 1998 Order in MPSC Case No. U-11654, ordered November 15, 2000 at p. 5, citing to November 24, 1998 Staff Comments in Case No. U-11830, p. 17-18.

An effective incentive plan should be comprised of two tiers. The first tier would provide payments directly to the individual CLEC for performance failures associated with performance for that CLEC. Payments would escalate based on the severity and duration of the performance failure. The second tier would provide payments to the U.S Treasury and/or state treasury and would result from discrimination against the CLEC industry as a whole, as assessed by CLEC aggregate performance.

A. Remedies Should Be Multiplied Based on Magnitude and Duration of the Failure

Many of the state plans today focus on duration of failures and ignore the magnitude of the failure. This can be unfair to both the ILEC and the CLEC. WorldCom advocates a remedy hierarchy based on the degree the desired level of performance is missed. Such a plan might have three levels of remedy multipliers or levels based on the magnitude of the miss.

An ordinary failure, which is defined as a minor miss of the performance standard should result in a sufficient enough penalty to ensure the ILEC is motivated to fix the performance problem before it becomes a more severe miss or a chronic miss. A per occurrence plan with a minimum payment of \$2000 per measure might be appropriate for such a plan.

B. A Severe Failure Should Result in An Additional Penalty Payment Beyond the Payment Amount for an Ordinary Performance Problem

When a performance on a submeasure exceeds the benchmark standard more than a moderate amount, higher incentive payments are required. Severe performance failures will likely harm CLEC customers and damage to the CLEC's reputation in the marketplace.

C. A Chronic Failure Should Result in Large Penalty Payments

A chronic failure (e.g., a failure of the same submeasure in multiple (generally three) consecutive months) has severe implications for a CLEC's ability to compete. Currently, most ILECs' results reflect numerous chronic failures on local performance measures, indicating that, six years after being put on notice that local telephone competition is the law of the land, the ILECs still have some poorly designed processes and, in all likelihood, have not applied adequate resources to fix these chronic performance failures. Failures of this nature should result in large incentive payments.

D. An Extended Chronic Failure Should Result in Even Larger Incentives Payments

In some cases, and for some submeasures, the ILEC's performance is so poor that it fails a submeasure for five of the last six months. While CLECs hope this is a rare occurrence, when it does occur, significant motivation is required in order for the ILECs to improve such performance.

Remedies should not return to base amounts after the first compliant month following the run of duration remedies. If the ILEC has provide three consecutive months of compliant services to return to the base level, the remedies after one or two

compliant months should stay at their escalated level which was obviously the level that compelled any effort toward compliance.

E. Tier II Failures Should Result in Additional Penalty Payments

Performance failures at the CLEC aggregate results in harm to the entire CLEC industry. Failures of this type should be subject to additional incentive payments, in addition to any incentive payments due for associated Tier I failures. As the harm identified by these failures can impact the entire CLEC industry's ability to thrive and can indicate that competition is being stifled, Tier II payments need to be much greater than individual payments made to CLECs at the Tier I level. These payments should be made to U.S Treasury/state government. Or they may be used to fund audits of the metrics and remedies and the hiring of any consultants by regulators to conduct remedy and metric periodic review collaboratives.

An ordinary failure, which is defined as a miss of the performance standard that is within a moderate range should result in a sufficient enough penalty to ensure the ILEC is motivated to fix the performance problem before it becomes a more severe miss or a chronic miss.

F. Exceptions to the Assessment of Incentives

WorldCom recognizes that under certain circumstances it would be inappropriate for an ILEC to pay incentives due to factors beyond its control. Yet it is impossible to know whether a failed result was within the ILEC's control or not. Thus, in an effort to reach an acceptable compromise, WorldCom agrees that for the limited conditions where failure to meet a performance standard is due to a force majeure event, the ILEC should be permitted to make a showing that it be exempt from making a penalty payment. 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 the ILEC. If one of these circumstances clearly impacts the ability of the ILEC to meet the performance standard, the ILEC should be exempt from making a payment. The ILEC should provide a reasonable explanation to the CLEC when it makes such a claim.

Other limited circumstances where an ILEC should be exempt from making a payment occur when the CLEC, its third party agent/service bureau, or its end user is the direct cause of the ILEC's performance failure. This includes instances where the CLEC's system becomes inoperable and the CLEC must send the bulk of its orders to the ILEC as manual orders. In these instances, an ILEC making such a claim would be required to provide a root cause analysis to the CLEC to substantiate its finding. WorldCom believes that the set of circumstances included in this section should be limited since the performance measurements themselves include business rules and exceptions that exclude data where the CLEC or its agent is the source of the delaying action. Beyond these cases, the ILEC should apply to the Commission for a waiver of its incentive payment obligations on a case-by-case basis.

Finally, when a "root cause analysis" negotiation between the CLEC and the ILEC to determine whether the ILEC is at fault, and thus whether payments are due to the CLEC, results in an impasse, the matter should be referred to the Commission for resolution.

5. Payment Schedule

If payments are required pursuant to a state plan, the ILEC should make them to the CLECs or to another entity 30 days after producing the performance reports upon which the payments are calculated. In many states, the 30-day payment interval is standard. For example, the performance results for orders provisioned in the month of January would be made available on the 20th of February. Payments for any performance failures would be due on the 20th of March. There should be no prerequisites for an ILEC to make payments, incentives should apply in the first month in which data is available and in which a performance failure occurred. Payments should be made in direct payments rather than credits.

6. Effective Date of the Plan

The remedy plan should take place on a date certain and not have to await incorporation into interconnection agreements, a process that ILECs can slow through trying to requirement waiver of other contractual protections or other onerous conditions. Parties would be free to agree to go beyond the remedy plan in their interconnection agreements but for the basic plan itself, inclusion would not have to await contract amendment and state approval.