Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of GTE Corporation, Transferor, And Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License	CC Docket No. 98-184

PETITION FOR RECONSIDERATION

ATTACHMENT B

Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996; Petition filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan, in 97-C-0271

CASE 97-C-0271; CASE 99-C-0949

New York Public Service Commission

1999 N.Y. PUC LEXIS 455

November 3, 1999

PANEL: [*1] COMMISSIONERS PRESENT: Maureen O. Helmer, Chairman; Thomas J. Dunleavy; James D. Bennett; Leonard A. Weiss; Neal N. Galvin

OPINION: At a session of the Public Service Commission held in the City of Albany on October 27, 1999

ORDER ADOPTING THE AMENDED PERFORMANCE ASSURANCE PLAN AND AMENDED CHANGE CONTROL PLAN

(Issued and Effective November 3, 1999)

BY THE COMMISSION:

On August 30, 1999, a Notice of Proposed Rulemaking (NPRM) was issued concerning a petition by New York Telephone Company d/b/a Bell Atlantic-New York (BA-NY) for approval of its Performance Assurance Plan and Change Control Assurance Plan, which are designed to assure that BA-NY provides just and reasonable wholesale service to its competitors. BA-NY agreed to place at risk $ 160 million and with doubling provisions the amount could have reached a maximum of $ 235 million. We invited comments on the NPRM to be filed by October 1, 1999 with BA-NY having until October 8, 1999 to file and serve reply comments. n1 On September 24, 1999, BA-NY submitted amendments to its Performance Assurance Plan and its Change Control Assurance Plan wherein BA-NY agreed to place an additional $ 34 million at risk which, with doubling provisions, [*2] brings the plans' total to approximately $ 269 million. BA-NY also agreed to more stringent standards for hot cut and flow through provisions and to the reallocation of the dollars at risk to performance areas deemed critical during the course of each year.

-----------------Footnotes-----------------

n1 Although public comments would have been considered on the Petition if filed by October 25, 1999 pursuant to the State Administrative Procedure Act, no comments were filed.

----------------End Footnotes----------------

In response to a request from the Attorney General to extend the time for comments, Acting Secretary Debra Renner issued a letter/notice to all parties continuing to urge an early response, but extending the comment period to October 4, 1999 with BA-NY to reply by October 8, 1999. In response to the Notices that were issued, comments on BA-NY's proposed plans were received from AT&T Communications of New York, Inc. (AT&T), MCI WorldCom, Inc. (MCI), NEXTLINK, New York, Inc. (NEXTLINK), RCN Telecom Services of New York, Inc. (RCN), the Department of Law (DOL), the Consumer Protection Board (CPB) [*3] and the Competitive Telecommunications Association (CompTel). BA-NY filed reply comments on October 8, 1999. No further comments pursuant to the State Administrative Procedure Act were received.

In this Order, we adopt the Amended Performance Assurance Plan (PAP) and the Amended Change Control Assurance Plan (CCAP), a component of the PAP, with the modifications and clarifications described below. We also deny AT&T's proposal to have its Performance Incentive Plan replace BA-NY's Amended Performance Assurance Plan.

PERFORMANCE ASSURANCE AND CHANGE CONTROL ASSURANCE PLANS

Plan Components

The Performance Assurance Plan comprises four components:

1. The Mode of Entry component measures BA-NY's performance, on an industry-wide basis, with respect to each of the methods by which competitors can enter the local exchange market.

2. The Critical Measures component measures BA-NY's performance in the areas that collectively are most important to competition.

3. The Change Control Assurance Plan contains measures to assess BA-NY's performance in implementing changes to its operations support systems, or OSS.

4. Special Provisions attach market adjustments to specific performance [*4] areas.

In the Mode of Entry component, BA-NY's performance is measured on a market-wide basis, with respect to each of four modes of entry:

1. Purchases of unbundled network elements.

2. Resale.

3. Facilities-based interconnection.

4. Collocation. n2

Each mode of entry is assessed through a group of metrics n3 related to it. Substandard performance in any mode would result in "market adjustments", i.e., bill credits, to competitors purchasing those types of services from BA-NY. n4 $ 75 million per year is at risk under this component of the Plan and would be doubled if substandard performance is at a level worse than the mid-point of the market adjustment range for three consecutive months. n5

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n2 While collocation is not necessarily a method of entry, it was separated for measurement and market adjustment purposes.

n3 The metrics have been established by the Commission as part of the carrier-to-carrier service quality proceeding, Case 97-C-0139.

n4 Market adjustments will be returned to CLECs based on lines in service, minutes of use or collocation cages due.

n5 The market adjustment amounts incurred for those three months will double, and all Mode of Entry market adjustments incurred in future months will also be doubled, until BA-NY's performance improves to one-fourth of the market adjustment range.

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In the Critical Measures component, BA-NY's performance will be measured by 11 specific metric categories, with substandard performance under any one category or sub-category triggering a market adjustment. Unlike the Mode of Entry component, however, the market adjustments will inure solely to the benefit of those competitors that received substandard performance in the subject month. The Critical Measures component also places $ 75 million per year at risk.

The Change Control component measures BA-NY's performance on several metrics related solely to the company's performance in implementing OSS upgrades. Substandard performance under these metrics will result in market adjustments to all CLECs. Under this component, $ 10 million is at risk annually, plus an additional $ 15 million, if needed, from unused funds in the Mode of Entry component.

The Special Provisions n6 add specific incentives in flow through, order processing, and hot cuts. BA-NY must achieve at least one of two flow through targets, or pay market adjustments of $ 2.5 million quarterly. For orders, BA-NY must provide at least 90% of Local Service Request (LSR) confirmations and rejections on time, in each of four [*6] categories, or pay $ 500,000 per month for each one missed. Those CLECs that received untimely LSR responses will share in the market adjustment. An additional $ 24 million per year is at stake to ensure that hot cuts are completed timely and accurately. Should BA-NY fail to achieve the hot cut targets established, it will incur up to $ 2 million per month in market adjustments payable to CLECs who received service below the target levels.

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n6 More specifically described infra, p. 9.

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Market Adjustment Scale

BA-NY had originally proposed that the maximum bill credits be at -.772, -.729, -1.167 and -1.6 for the UNE, Resale, Interconnection and Collocation Modes of Entry, respectively, and that the bill credits for the Mode of Entry start at 10% of the monthly maximum for the first increment on the market adjustment scale. The NPRM proposed more stringent maximum bill credits at performance scores of -.67, -.67, -1 and -1.2 respectively. The NPRM also proposed that 20% of the maximum monthly adjustment should [*7] be levied at the first increment on the scale to deter BA-NY from entering into the market adjustment range at all. In its September 24, 1999 petition, BA-NY incorporated the above-referenced NPRM proposals.

Monthly Market Adjustment Mechanism Mode of Entry

On the 25th of each month, BA-NY files and distributes its PAP performance report for the preceding month. In each Mode of Entry category metrics have assigned weights relative to their importance in keeping the Mode of Entry open to competition. Each metric is scored as "0" (parity met), "-1" (parity in question), or "-2" (out of parity) and then multiplied by the metric's relative weight.

The weighted scores are totaled, and if the market adjustment scale threshold is exceeded, a market adjustment is triggered. The market adjustments work on a linear scale, with an increasing level of payment for poorer performance, beginning with an initial increment of 20% of the maximum monthly dollar amount. In addition, each UNE and Resale Mode of Entry is evaluated to determine whether failures in domain performance would automatically trigger an overall market adjustment. n7

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n7 See Domain Clustering, infra, p. 7.

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Critical Measures

There are eleven critical measures focused on performance in specific areas and with respect to individual CLECs. Because there is no overall aggregation of critical measures, performance below a specific level in any one of these individual measures will produce a market adjustment.

BA-NY's performance will first be analyzed on an industry-wide basis for each measure. If BA-NY's score indicates that a market adjustment is due, only those CLECs receiving sub-par service will receive the adjustment. If no market adjustment is due based on the industry-wide analysis, BA-NY's performance to each individual CLEC will be evaluated to assess possible targeted discrimination. If an individual CLEC receives sub-par service for two consecutive months, that CLEC receives a market adjustment, even if BA-NY's performance is satisfactory to the industry as a whole.

Change Control

BA-NY's change control performance is measured with four specific measures, each of which can trigger a market adjustment payable to the industry as a whole. The Change Control plan differs from the Mode of Entry and Critical Measure components in that there is no limit to the monthly market [*9] adjustments, although there is an annual limit. n8

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n8 As discussed above, the Commission may order reallocations of the market adjustments.

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MODIFICATIONS TO THE PERFORMANCE ASSURANCE PLAN

The NPRM recommended modifications to the original PAP filed on July 16, 1999. By Amended Petition filed on September 24, 1999, BA-NY incorporated the recommended modifications to the PAP and also proposed special provisions to enhance the PAP. BA-NY's proposed enhancements, which we find acceptable, are summarized below.

Reallocation of Bill Credits

The Amended PAP and CCAP would allow the Commission to reallocate the dollars at risk among any of the provisions in the PAP and CCAP. This can be done by Commission order on 15 days notice to BA-NY before the beginning of any month the reallocation is to take place. $ 194 million in funds are available for shifting to areas deemed critical during the course of the year. n9

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n9 The funds consist of:

$ 75 million - Mode of Entry
$ 75 million - Critical Measures
$ 34 million - Special Provisions
$ 10 million - CCAP

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Domain Clustering

The Mode of Entry (MOE) metrics for Resale and Unbundled Network Elements (UNE) are divided into four major domains (Pre-Order, Order, Provisioning, and Maintenance). If 75% of the weight of any of the domains is tripped, an overlay rule will be applied to guard against a continued concentration of failures within domains. The score used to calculate the market adjustment will be the greater of the total weighted score for the MOE or the overlay score. The overlay score is calculated by applying the percentage of weight tripped in the domain to the difference of the maximum market adjustment score and minimum market adjustment score and adding the result to the minimum score. If more than one domain trips the overlay rule, the highest percentage of the domains will be used. In addition, if the pre-order response time metrics (1-01 through 1-06) are all tripped at the -2 level, the overlay rule will be applied using 75% in the calculation.

Hot Cuts

The company has recommended that the definition for metric PR-4-06 (Missed Appointment - % On Time Performance - Hot Cut) be modified. Under this definition, a missed appointment would be recorded in PR-4-06 [*11] whenever BA-NY fails to notify a CLEC of the absence of dial tone or does not conduct the facilities check for the Integrated Digital Loop Carrier by 2:30 P.M. eastern time, two days before the due date (DD-2), and as a result the CLEC supplements the order. If BA-NY fails to provide this notice, and the loop is installed on time, no miss would be recorded. The company has also replaced metric PR-6-02

(% Installation Troubles within 7 days - Loops) with PR-6-02 (% Installation Troubles within 7 days - Hot Cut Loops) as a Mode of Entry metric.

The PAP proposes that the standard for PR-6-02 be 2%; a -1 is levied if the trouble report rate is more than 2% and a -2 if the rate is above 3%. These standards are accepted.

The critical measure for hot cut performance has also been modified to include two hot cut measures (i.e., On-Time Performance and % troubles within 7 days). In this measure, there is no allocation of available dollars between sub-metrics as in the other critical measures. For example, if one metric warrants a market adjustment, the market adjustment percentage is applied to all the dollars available for the measure. In the case where both measures warrant a market adjustment, [*12] the greater of the two percentages will be used to calculate the market adjustment.

Digital Line Service

When developed in the Carrier-to-Carrier proceeding, BA-NY proposes that at least two measures, one for timeliness and one for installation quality, be incorporated as a Critical Measure. BA-NY would then recommend that another Critical Measure be deleted to retain the same total number of Critical Measures. These issues are being examined by the parties and resolution is expected in December, 1999.

New Provisions

UNE - Flow Through

If metric OR-5-01 (Flow Through - Total) reports less than 80%, or OR-5-03 (Flow Through - Achieved) reports less than 95% on a quarterly basis, then a market adjustment of $ 2.5 million would be distributed to all CLECs purchasing UNEs.

UNE - Non-Flow Through

To ensure that BA-NY remains committed to processing orders manually, four non-flow through metrics are targeted for specific market adjustments.

OR-1-04 % On Time LSRC<10 lines (Electronic)-POTS

OR-1-04 % On Time LSRC>=10 lines (Electronic)-POTS

OR-2-04 % On Time Reject LSRC<10 lines (Electronic)-POTS

OR-2-04 % On Time Reject LSRC>=10 lines (Electronic)-POTS

If any of the [*13] above metrics report less than 90% in any month, a market adjustment of $ 500,000 for each metric missed will be distributed to CLECs based on lines in service. If these adjustments are paid, they would be funded from unused plan monies from the first six months. Thus, this provision exposes BA-NY to up to $ 24 million of additional risk.

UNE - Hot Cut Performance

Two hot cut metrics would be targeted for additional market adjustments, PR-4-06 % On Time Performance - Hot Cut and PR-6-02 % Installation Troubles within 7 days - Hot Cut Loops. Market adjustments, beyond those required in Mode of Entry or Critical Measures, would be made if either of two events occur:

1. If for any two consecutive months either PR-4-06 fails to achieve 90% or PR-6-02 has more than 3% installation troubles, BA-NY will distribute $ 1 million under the Critical Measures (PAP, Appendix F) aggregate rule. No market adjustments will be paid under this provision if both measures are passed in the same month.

2. If for any one month, PR-4-06 fails to achieve 85% or PR-6-02 has more than 4% trouble reports, BA-NY will distribute $ 2 million for that month under the Critical Measures aggregate rule.
[*14]

Waiver Provision

BA-NY would be allowed to file for waivers of service results for absolute service quality measures that are influenced by events outside BA-NY's control. The waiver provision is similar to the process used in the Performance Regulatory Plan.

COMMENTS

PAP Implementation

AT&T maintains that the PAP is premature because performance measurements are still being developed and refined in the Carrier-to-Carrier proceeding and that the measurements system that underlies the PAP has not yet been validated. AT&T points to the level of disaggregation that is needed to provide meaningful and accurate performance measurements as an issue yet to be fully resolved. Comptel believes the PAP should be fully-operational and effective immediately after the order approving the plan is issued to assure that the market is irreversibly open prior to obtaining Section 271 authority.

BA-NY points out that the plans are derived from Carrier-to-Carrier Guidelines developed over years of collaboration, staff analyses, and Commission orders and that more than 500 measures are incorporated into the Guidelines. BA-NY also notes that the plans' metrics can be modified and monies [*15] may be shifted to different metrics at any time by Commission action.

Discussion

The PAP is not a static document, as shown in its provisions and as referenced by BA-NY in its Reply. The fact that some measures may not be finalized does not preclude adoption of the Plan or imply that it cannot perform as intended. The Plan is a living document which may undergo changes as experience is gained; no sufficient reason has been proffered to delay implementation.

Comptel's proposal to have the PAP effective at the issuance of the order is not appropriate. The PAP provides an effective mechanism to ensure the quality of BA-NY's performance, if and when, the company receives authority to enter the long distance market.

PAP Complexity

AT&T complains that the PAP is too complex, with the structure virtually impossible to understand or describe. And, AT&T states, the situation has been exacerbated with the addition of "special provisions" and domain clustering to the PAP. AT&T asserts that ". . . BA-NY has stacked the deck to disadvantage CLECs and make it highly unlikely that it will ever be responsible for significant consequences for discriminating behavior."

The PAP and the CCAP [*16] are complex, replies BA-NY, in order to meet the complex nature of the market. BA-NY maintains that the plans are designed to protect the competitive process and the needs of individual CLECs. The plans, BA-NY goes on to state, require a balanced approach to achieve the intended dual purposes.

Discussion

While the plans are complex, they offer a carefully crafted and comprehensive process to assess BA-NY's wholesale service performance and provide CLECs with remedial relief in the event of substandard quality. They are essentially self-executing with some latitude for modification (for example, reallocation of funds) at the Commission's discretion.

Discrimination Concerns

MCI contends that the PAP allows BA-NY to engage in targeted discrimination. RCN suggests that it might be cheaper for BA-NY to pay penalties on the various "sub caps" of the PAP rather than to correct problems. MCI argues that the PAP's aggregated MOE performance scores may mask possible discrimination to individual CLECs, and that the MOE aggregation allows good performance on some metrics to offset damaging performance on others. AT&T argues that its proposed incentive plan is superior since "all measures [*17] are taken into account in determining the consequences of poor performance, and poor performance on any metric leads to clear and immediate consequences." MCI believes that "Per measure remedies with escalating amounts for the magnitude and duration of the specific miss are also more effective in focusing attention on fixing problem areas."

BA-NY replies that "it is unreasonable to require BA-NY's plan to consider every possible degree of service rendered" and that "detection of violations is not impeded by aggregation of performance scores." BA-NY notes that the fund reallocation provision in the amended plan virtually eliminates the CLECs' "caps within caps" concerns. CPB agrees that the fund reallocation provision adequately strengthens financial incentives to guard against targeted discrimination. BA-NY reiterates that the amended plan contains both MOE and critical measures provisions, including the Individual Rule Critical Measure Provision, n10 that addresses the CLECs' concerns regarding the PAP's ability to detect and prevent targeted discrimination.

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n10 Any CLEC that receives Sub-Standard Performance for two consecutive months would receive bill credits for that two month period, notwithstanding that all CLECs on average may have received satisfactory performance during that time. Also see PAP, p. 10, fn. 12.

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Discussion

The Mode of Entry portion of the PAP measures numerous aspects of BA-NY's wholesale performance and provides for market adjustments that escalate as performance deteriorates. Contrary to MCI's assertion, good performance on some measures does not offset poor performance on other measures. Moreover, the plan's maximum market adjustment is imposed at a much lower average performance level than if the market adjustment were assessed on a per measure basis. For example, the maximum adjustment under a per measure scheme would occur when all metrics receive a minus two score. The maximum PAP Mode of Entry category scores are incurred if less than half of the metrics receive a minus two score (when the average score is minus .67). Because they apply to each CLEC, the critical measures and the fund reallocation provision provide sufficient protection against possible BA-NY attempts to engage in targeted discrimination. In addition, MCI's argument fails to recognize that aggregation of individual CLEC performance scores into an overall weighted MOE category ("X" score) provides a larger sample and raises confidence levels for given levels of sub-par performance.

Metrics [*19] and Metric Definitions

MCI claims that including all the metrics adopted in the Carrier-to-Carrier proceeding and adding new ones to the plan as they are developed would significantly increase the effectiveness of the plan. By not selecting all the metrics, MCI contends, BA-NY may slow competition by targeting poor service to the unselected metrics. Further, MCI claims some definitions are incomplete and points out that metric PO-1-01 (Customer Service Record [CSR]), does not include time to return a parsed or fielded CSR.

Discussion

In the July Carrier-to-Carrier compliance filing, there are 152 metrics, many of which are subdivided into market and product type. In just the Ordering domain, 35 metrics are listed and are reported in 129 sub-metrics. Using all of them is unnecessary. Many metrics are interrelated, in that poor performance shows up in a number of metrics. Targeting one metric without affecting another would be extremely difficult. For this reason, all the metrics in the Carrier-to-Carrier Guidelines are not needed in the PAP. The metrics selected represent the more important functions of each domain to the competitive market and allow the dollars available for [*20] market adjustment to be allocated over a smaller number of metrics so as to produce a meaningful market adjustment for failed metrics. Once the PAP is in effect, market conditions will be examined to determine whether metrics should be added or deleted.

Statistical Methods and the PAP's MOE Scoring Rules

MCI argues that the PAP contains "layer upon layer of forgiveness for random error." MCI contends that the Z tests performed for the individual metric comparisons already take random variation into account. Setting a minimum MOE threshold score of less than zero amounts to double counting of random variation in MCI's view. MCI argues that "there is an entire array of weighted performance scores that correspond to a 95% cut off point." Also, AT&T submits that the PAP fails to balance type 1 and type 2 errors. n11

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n11 A type 1 error is a finding that discrimination exists when in fact there is none. A type 2 error is not detecting discrimination when in fact it has occurred.

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BA-NY replies that these issues were [*21] already addressed in earlier comments and rejected by the NPRM. It explains that the PAP does not hold BA-NY responsible for random variation. According to BA-NY, the PAP distinguishes between random variation in performance and systematic variation. BA-NY contends that the threshold minimum X MOE score does not reflect a double counting of random variation. BA-NY explains that the overall MOE X scores are developed using a two-stage process. Stage 1 involves individual statistical scores for each metric having a 95% confidence level. Stage 2 is an aggregation across metric scores to produce an overall MOE score. BA-NY takes issue with MCI's position that seven metric failures in a MOE category is significant. In BA-NY's view, a 62 metric MOE category could produce 12 or 13 metrics that appeared to be out of compliance due to random variation, given the error probabilities utilized in the PAP for determining any of the 62 individual metric scores.

Discussion

The PAP was designed, consistent with the Prefiling Statement objective, to produce minimum MOE X scores that provide a 95% level of confidence that BA-NY will not be unfairly held accountable for substandard scores that result [*22] from random variation. MCI's arguments concerning the possibility of double counting of sampling error are rejected. MCI's comments do not recognize how the weighted density functions that characterize the random behavior of each individual metric relate to the distribution of the total performance score.

MCI characterizes the current method used to produce the 95th percentile deadband score as being somewhat indeterminate. However, the relevance of MCI's argument is questionable. Although MCI's comments take issue with the fact that the same MOE aggregate score could result from a number of different combinations of metric failures, this "block" nature of the behavior of MOE category scores results in the deadband encompassing the 95th percentile of the total score distribution. The PAP reflects the fact that the estimated deadband boundary is a practical way to deal with the complexities of the scoring system. Barring a superior methodology to calculate the deadband, the existing approximation will be adopted. We reserve the right to revisit the MOE deadband calculation at the one-year re-opener.

AT&T's argument that the PAP fails to balance type 1 and type 2 error is off point. [*23] The objective of the PAP's statistical framework was to not hold BA-NY responsible for random variation given that the company is not rewarded for its good service. The argument that type 1 and type 2 errors should be balanced fails to recognize that the minus one score cutoff levels of the plan provide added protection against type 2 error. In addition, it fails to recognize the difficulties associated with developing practical scoring mechanisms. To reasonably figure out how these error types balance, it would be necessary to know the average degree to which parity was not provided. However, if this information existed, there would be no need to do a test for lack of parity.

Dollars at Risk

The CLECs claim that the PAP's market adjustment provisions are inadequate and that the overall amount at risk is too low to be effective. The DOL states that the liability should be equal to the profit of the local market. MCI and

AT&T claim that the expected benefits of BA-NY's discrimination are greater than the cost of non-compliance with the PAP.

BA-NY replies that the CLECs have incorrectly performed the cost benefit analysis. BA-NY argues, that once the correct parameters are input [*24] into MCI's optimal penalty calculation, it would indicate that the $ 269 million at risk in the PAP are more than adequate to ensure non-discriminatory performance. BA-NY contends that the $ 400 to $ 500 million advocated by AT&T, the $ 618 million claimed appropriate by MCI and the $ 500 million suggested by DOL for PAP annual liabilities are excessive. BA-NY argues that the $ 70 million in retail customer rebates paid out in the first year of its PRP were more than adequate to engender substantial service quality improvements.

Discussion

The studies provided by commentors to support the claim that the risk liability should be higher are flawed. The DOL's rationale overstates the liability by assuming the potential benefits BA-NY could reap in a closed market are equal to 100% of the intrastate market. Under the MCI and AT&T studies, for example, we find a more realistic benchmark for risk liability to be the profit associated with the market share that BA-NY would retain through discrimination. Thus, the potential benefit of unacceptable service, and therefore, the appropriate level of risk liability needed to affect BA-NY's behavior, is substantially less than that put forth [*25] by DOL.

Both MCI WorldCom and AT&T attempt to quantify the potential benefit to BA-NY by measuring the profit BA-NY would retain by forestalling market share loss through discrimination. However, their methodology is flawed. First, both assume that poor performance in year one will result in ongoing benefits for at least ten years. It has not been demonstrated that poor service in year one that is corrected would cause irreversible and cumulative damage in the following years. Second, both also assume that the Commission will only detect violations of our standards 50% of the time, an unlikely circumstance. Staff will continue to replicate the performance reports to Carrier-to-Carrier Guidelines and participate in the review of BA-NY reporting and operating systems. We further expect each CLEC will be able to detect violations by comparing the CLEC-specific data supplied by BA-NY to each CLEC's own recorded performance results.

Finally, commentors arguing for more dollars ignore that the plan provides an early warning system which triggers market adjustments before BA-NY reaches a clear out of parity level. They also ignore that the plan gives the Commission a great deal of flexibility [*26] to move dollars between provisions on short notice. The dollars at risk in the PAP are substantial and should deter BA-NY's incentive to provide discriminatory service.

Bill Credits

AT&T argues that bill credits not paid immediately substantially dilutes the PAP's protection. MCI wants the method of distribution for bill credits clarified. It also argues that credits should only go to harmed CLECs and uses performance failure in the CCAP as an example.

In response to MCI, BA-NY clarifies the distribution of bill credits by agreeing that they can be applied to any type of bill regardless of service. BA-NY claims that MCI does not provide sufficient cause to deviate from the PAP's MOE and critical measure philosophy for bill credits.

Discussion

AT&T's suggestion of having immediate financial payments ignores that time is necessary to allow for reporting and verifying data and bill credits. BA-NY's clarification regarding bill credits is acceptable, but BA-NY must also issue checks in lieu of outstanding bill credits to CLECs that discontinue taking service from BA-NY. MCI presents no new arguments for having MOE credits flow to harmed CLECs and has not provided sufficient [*27] cause to change the market adjustment payment procedures in either the MOE or CCAP.

Reallocation Provision

MCI finds the reallocation provision to be confusing and subject to interpretation. It seeks clarification on the effect reallocation would have on monthly caps, annual caps and doubling provisions found in MOE. MCI proposes that the Commission be able to reallocate monies for the previous month.

Discussion

Reallocation provides a broad range of flexibility giving the Commission the ability to address a fast changing market. An obvious implication of this flexibility is moving money between provisions that have caps. This naturally means monthly caps will change based on the new allocation of dollars. Additionally, money moved into provisions where there is a doubling rule may even further change a cap. Reallocation will be based on staff's recommendation and implemented only after a Commission order. The provision may be used to support new products, to address chronic service problems, or for other appropriate concerns.

The proposal to reallocate retroactively does not provide an incentive to correct service performance, it is punitive in nature and contrary to the [*28] intended use of the provision.

Special Provisions

Domain Clustering Rule

Both CPB and the DOL support the domain overlay concept but their comments suggest a need to clarify the pre-order metrics overlay. DOL wants to clarify that if metrics PR-1-01 through PR-1-06 failed, the overlay would be invoked. CPB believes the Domain Clustering Rule only applies when all pre-order metrics fail.

AT&T argues that the Domain Clustering Rule does not provide meaningful protection, because the level of failure needed to invoke the rule is too high. Instead, AT&T recommends the Commission should apply the rule when a significant portion of the domain metrics fail. BA-NY simply argues that the rule increases the possibility that a credit will be made.

Discussion

DOL's observation in its comments is correct, the failure of pre-order domain metrics PR-1-01 through PR-1-06 (50% of the weight of the domain) would invoke the rule's 75% overlay. This clarification disposes of CPB's concern.

The Domain Clustering Rule provides significant protection. It provides disincentives to selectively target a function in order to hinder competition. For example, if the response times in the UNE Pre-order [*29] domain failed, but all other metrics passed, the Mode of Entry score would be -.131 without the clustering provision and no market adjustment would be made.

Under the Domain Clustering Rule a score of -.5501 would be overlaid and a market adjustment of $ 2.96 million would be called for (See PAP Appendix A, p. 10).

Flow Through/Hot Cuts

DOL recognizes the need for additional dollars to be applied in these areas but continues to assert that the dollars are inadequate as compared to the value of the service. It further believes the provisions are not a good substitute to actually making service improvements and that the standards should be raised to the Carrier-to-Carrier guidelines.

CPB supports the need to provide dollar incentives to these areas that it considers important and difficult to improve.

MCI and AT&T contend the standards applied to the special provisions should be the Carrier-to-Carrier standards.

BA-NY counters the arguments that standards are lower than Carrier-to-Carrier by pointing out that all the measures in the special provisions, n12 except flow through, use the Carrier-to-Carrier standards in the PAP. Further, the special provisions are an extra layer of [*30] protection, and in the case of hot cuts, the measure is strengthened by classifying more situations as a miss by BA-NY.

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n12 BA-NY proposed in its July PAP filing to include the flow through achieved metric in the MOE at the Carrier-to-Carrier standard when the Commission completes review of the issue.

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Discussion

The special provisions are important measures and provide an additional level of incentives to ensure adequate service. The provisions are, in effect, a response to commentors proposals to have a - 3 performance score in the mode of entry for egregious service.

Quality Assurance Program

The DOL and AT&T complain of BA-NY's continued proposal in the amended PAP to develop a Quality Assurance Program (QAP), within 90 days of the issuance of an order. The commentors believe that such internal performance measurement capability should be in place before the PAP is approved.

BA-NY states that there is no requirement that the Quality Assurance Program be in place before the PAP is approved, pointing out [*31] that nearly two months would be available for approval of an acceptable program prior to the FCC's deadline for the 271 application. Additionally, the company maintains that it will comply with the tentative filing requirement and file a QAP within ten days of the order.

Discussion

The NPRM states, in pertinent part: "BA-NY should immediately begin preparation of its QAP plans. We intend to order that QAP plans for the first year of BA-NY's operation in the long distance market must be filed within ten days of the issuance of the order in this matter."

BA-NY's proposal, at PAP p. 15, to provide a QAP within 90 days of the issuance of the order approving the PAP, obviously merited the commentors concern. Because BA-NY now has stated that it will file a QAP to address activities in all domains within 10 days of issuance of this order, this issue is resolved.

Waiver Provisions

DOL argues that the waiver provisions in the PAP should be modified to require challenged bill credits to be placed in an interest bearing escrow account until all waiver deliberations and appeals are completed. DOL also suggests that BA-NY be ordered to compensate CLECs for any costs CLECs incur in successfully [*32] opposing a waiver request by BA-NY.

CPB suggests that the definition of "other events beyond BA-NY's control" in the PAP should be consistent with the definition found in the end-user service quality standards.

Discussion

DOL's proposal to hold CLECs harmless for costs incurred in opposing waiver requests by BA-NY will not be allowed. Staff will thoroughly assess each waiver request in any event. Of course, CLECs will benefit from receiving the bill credits that BA-NY otherwise would have had waived. Compensating the CLECs for lost interest while an unsuccessful waiver is under review is consistent with the treatment of monies that are deferred before eventually being returned to retail customers and will be allowed. However, requiring BA-NY to place those monies in a separate escrow account is an unnecessary administrative expense and will be rejected. CPB's concern about defining "other events beyond BA-NY's control" for the PAP is unwarranted. The Commission's evaluation of BA-NY's waiver request for wholesale performance will be consistent with the waiver request review applied for BA-NY's retail performance.

BA-NY proposes that it be allowed to seek waiver relief on three [*33] grounds - clustering of data, CLEC behavior and extraordinary events beyond its control which affect its ability to satisfy those measures with absolute standards. While we approve the company's right to seek such relief, it is with the proviso that resolution of a waiver exception request must occur prior to the scheduled payment period. To facilitate a timely resolution, a petition seeking a waiver shall be filed within 45 days of the last day of the month in which the challenged event occurred. CLECs will have 10 days to serve and file replies to BA-NY requested exceptions.

We note that waiver relief is intended for limited, extraordinary circumstances. BA-NY must act judiciously in its exercise of the waiver provisions.

Independent Audits

The DOL regards the provision for an independent audit to be "extremely vague" and suggests that clarifications and definitions of terms be more fully explained. For example, it is unclear what "material errors" would occasion the cost of an audit to be placed on BA-NY rather than the CLEC. DOL would also have Staff review a CLEC's outside audit request to determine whether there is substantial evidence to justify such an audit.

BA-NY indicates [*34] that the DOL proposals would increase regulation and regulatory control contrary to the intent of the Telecommunications Act that a competitive marketplace be developed. However, BA-NY does suggest in a footnote at page 21 of its Reply, that the definition of "(a) 'material error' would be any error that changes the amount of the bill credits by 5%."

Discussion

It will not be Staff's responsibility to determine if an independent audit is justified. However, Staff will be available to review data and propose possible resolutions before a matter is presented to an independent auditor. The audit conditions are reasonably clear. An aggrieved CLEC's responsibility for the cost of the audit will depend upon whether the results would increase its market adjustment. BA-NY's proposed definition for "material error" is not accepted.

We recognize that BA-NY's reporting obligations are comprehensive and subject to change which may answer, in part, some reporting deficiencies. Staff will continue to work with BA-NY to develop consistent, accurate and complete statistical reports in order to establish an acceptable level of confidence before Staff's replication efforts end. Although replication [*35] will continue for six months after the Plan's effective date, that effort may be extended, as necessary, until our requirements for quality reporting from BA-NY are satisfied.

Carrier-to-Carrier Pending Issues
Cageless Collocation

CompTel refers to the provisions regarding collocation as applying only to physical and virtual collocation with no reference being made to cageless collocation arrangements.

BA-NY asserts in a footnote at page 17 of its Reply that "the Amended P.A.P. collocation measures encompass cageless collocation."

Discussion

Although Comptel's observation is correct, cageless collocation terms and conditions were only recently addressed in an order. n13 While the Carrier to Carrier group has not, as yet, developed separate performance standards for cageless collocation, when such standards are developed, the measures may be incorporated into the PAP. It remains to be seen whether additional measures will be required, or whether a definitional change will allow the existing collocation measures to encompass cageless collocation.

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n13 Case Nos. 99-C-0715 and 95-C-0657, Order Directing Tariff Revisions (issued August 31, 1999).

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[*36]

M&R Response Time Metrics

The standards BA-NY proposes for metrics MR-1-01, 03, 04 and 06 (Average Response Time) in the MOE are currently being reviewed by the Commission and a decision will be made before BA-NY's entry into the interLATA market. The standards will be incorporated into the PAP. However, whatever standard is endorsed, the weight of 1 for the metric makes it nearly valueless. The weights for the M&R response time metrics will be raised to five.

Alternative Performance Plans

AT&T faults the PAP's measurement system as having "been recognized by the Commission to be unverified." AT&T also argues that the PAP is "far too complex." The CLECs characterize the penalty that BA-NY would be subject to if BA-NY were currently operating under the PAP as being inadequate. AT&T contends that no statistical or other basis for the weighting and averaging of performance scores is offered in the PAP. AT&T contends that the PAP contains no provisions that result in "greater consequences when the degree of performance failure is greater." AT&T argues that this deficiency of the PAP would be corrected if the PAP were to give extra weight to Z scores below -3. MCI faults the [*37] PAP for using "arbitrary" competitive significance weights for MOE scoring. AT&T argues that its alternative Performance Incentive Plan (PIP) would be superior to the PAP. MCI concurs that AT&T's two tier remedy proposal would be acceptable.

BA-NY replies that the NPRM did not encompass the provisions of the PIP, and that the Commission cannot adopt the PIP without further rulemaking. BA-NY argues that the PIP is inferior to the PAP, because the PIP penalties might be offset by those due under interconnection agreements. BA-NY also faults the PIP for not including change control metrics and for being unclear as to which of the panoply of overlapping carrier-to-carrier metrics would be used. Finally, BA-NY notes that the PAP has been under rigorous review for more than six months, and it is not clear what infirmities would be discovered if a similar review were performed on the AT&T plan.

Discussion

AT&T's criticism of the PAP's measurements system as being unverified has no basis. Both KPMG and Staff have examined the company's measurement practices and extensively replicated the PAP's measurements. In addition, the reasonableness of the metric measurements are continually reviewed [*38] and discussed by the Carrier-to-Carrier collaborative. Moreover, the auditing provisions in the PAP and BA-NY's reporting requirements allow CLECs to compare their own data to BA-NY's results.

The complexity of the PAP is in line with performance-based contracts entered into in many unregulated industries. The program is complex enough to address the myriad issues found important from the CLECs' point of view. If anything, the alternative PIP plan is too shortsighted and simplistic. For example, AT&T argues that the penalty that BA-NY would be subject to if currently operating under the PAP would be inadequate. However, those penalty amounts were generated by Staff and BA-NY as part of their "beta testing" of the workings of the PAP. AT&T provides no indication of what the likely penalty amounts might be if BA-NY were currently operating under the PIP. The PIP is completely untested. Much of the complexity of the PAP has arisen due to concerns identified during the testing/ implementation phase of the PAP, since its initial framework was agreed to in the Prefiling Statement a year and a half ago.

Commentors contend that the PAP does not account for the differences in the severity [*39] of poor performance. They propose alternative scores for differences in parity that are detected with more than a 95% level of confidence. Z scores of less than -1.645, such as Z's of -3, are unwarranted. The PAP starts statistical penalties at the first monthly instance of a Z score of -.8225. The PAP opts for an early warning system rather than waiting until problems get more severe. The PIP does not begin penalties until the first monthly occurrence of a Z score below -1.645. The PAP identifies differences in performance where differences are most relevant, that is, at the onset of inferior service. The PAP incents BA-NY to improve performance before it deteriorates to being measurable at the 95% confidence level. The PIP potentially focuses on differences in performance beyond the point at which competitively significant damages may already have been done. Scores below -1.645 have twice the negative consequences as scores between -.8225 and -1.645 in the PAP. It is unreasonable to wait until a 99.9% level of certainty as AT&T's PIP would do when the PAP provides the maximum negative score at a 95% level of confidence. The PAP recognizes that scores between -.8225 and -1.645 warrant [*40] market adjustments.

The weights need not have been developed using statistical methodologies. Section II(C)(1) of the PAP indicates that the MOE weights are ". . . based upon the importance of the metric in determining whether that MOE is open to competition." One of the inherent underpinnings of the PAP is that it is not solely a statistical model of performance parity. The weighting scheme recognizes the underlying competitive significance of each of the 122 metrics relied upon in the plan. The PAP weighting scheme considers what is important from an engineering and economic standpoint and is based on substantial input from CLECs.

Miscellaneous Matters

OR-5-03 % Flow Through Achieved

The review of the Flow Through Achieved metric will be complete before entry into the interLATA market. It is appropriate at this time to insert the Flow Through Achieved metric back into the PAP Mode of Entry as promised by

BA-NY. The PAP standard will be set at the Carrier-to-Carrier guidelines level for -1 and at five percentage points less for -2, in accord with our 5% usual practice for absolute measures.

Monthly Reports

BA-NY must continue to provide to each CLEC by the 25th of [*41] each month a report on that CLEC's activity for the past month. Further, in order for CLECs to perform self audits, BA-NY will provide to each CLEC in a usable format the underlying data used to calculate BA-NY's performance for that CLEC. Such reports must also be filed with Department Staff. Filing the reports with Staff will also confirm that the reports are going out in a timely fashion.

Change Control Assurance Plan

With the exception of allocation of additional monies, the DOL and AT&T comments regarding the CCAP have been addressed in the NPRM and remain unpersuasive. The allocation of an additional $ 15 million in potential bill credits, as established in the CCAP, is an appropriate application of the funds available and will not be disturbed. The CCAP will allow close monitoring of the change control process to ensure that BA-NY will provide adequate notice, promote coordination and disclose the information necessary to implement changes.

Performance Payments

CompTel and DOL expressed concern that the bill credits occasioned by BA-NY's not complying with the Commission's performance standards not be passed through to ratepayers or to competitors for UNEs, interconnection, [*42] collocation or services purchased for resale. As CompTel correctly points out, such credits would then merely be a cost of doing business. BA-NY understands that such a result is not within the contemplation of this Commission, but just to be clear, BA-NY will be specifically prohibited from recovering revenue losses attributable to the remedial performance credits given in connection with the Amended Performance Assurance Plan and the Amended Change Control Assurance Plan.

Annual Review

The Plan makes provision for an annual review and updates and lists six categories for consideration at such review. While these categories appear to include most topics that may come up for consideration, the annual review will not be subject to limitation, and therefore, any topic legitimately related to the Plan may be reviewed. All disputes will be resolved by the Commission. Nothing in the Performance Assurance Plan can or will diminish Commission jurisdiction over BA-NY service.

CONCLUSION

The Performance Assurance Plan holds BA-NY, in a public forum, to 122 standards that collectively require the company to achieve excellent wholesale service quality. This Plan exceeds the Section [*43] 271 checklist requirements. The value of "X", an overlay process which addresses CLEC concerns about the failure or near failure of an entire domain, substantial market adjustments for performance below the primary PAP targets, the ability to reallocate the monthly distribution of bill credits, and other aspects of the Plan should encourage BA-NY to offer quality wholesale service.

BA-NY has responded appropriately to concerns presented by the CLECs and the tentative conclusions reached in the NPRM by submitting its Amended Performance Assurance Plan and Amended Change Control Assurance Plan. Providing for reallocation of up to $ 194 million in credits among the PAP and CCAP, as necessary to address critical areas, allows the Commission flexibility to ensure that potential loopholes may be closed rapidly and pointedly. $ 34 million per year in additional monies have been made available for the "Special Provisions" section which would include flow through and hot cut performance, measures that are significant indicators of BA-NY's performance. These amendments together with other changes recounted above substantially increase the effectiveness of the Plans.

BA-NY has made substantial [*44] commitments in resources and is risking significant monies in potential bill credits to provide the basic assurance that the local telecommunications market remains open after the company obtains long distance approval. These Plans, as modified, are designed to appropriately redress discrimination, may be regularly modified to reallocate bill credits and may be amended to close potential loopholes. The Plans will be approved.

The Commission orders:

1. The terms of the Performance Assurance Plan and Change Control Assurance Plan with the clarifications and understandings described in this Order are adopted and shall be effective immediately upon grant of interLATA authority by the Federal Communications Commission to Bell Atlantic-New York pursuant to *47 U.S.C. § 271.*

2. Within 10 days of the issuance of this Order, Bell Atlantic-New York shall file 15 copies of its Quality Assurance Plan for its first year of operation in the long distance market with Debra Renner, Acting Secretary, Three Empire State Plaza, Albany, New York 12223-1350. Parties should be served by U.S. Mail and by E-mail using the Case 97-C-0271, Active Party List, and the proposed Quality Assurance Plan should [*45] be posted to the company's website. Parties will have 10 days to file and serve comments. Fifteen copies should be filed with the Acting Secretary.

3. These proceedings are continued.

By the Commission