

D.P.U. 96-73/74, 96-75, 96-80/81, 96-83, 96-94 (Phase 3-B)

Consolidated Petitions of New England Telephone and Telegraph Company d/b/a NYNEX, Teleport Communications Group, Inc., Brooks Fiber Communications, AT&T Communications of New England, Inc., MCI Communications Company, and Sprint Communications Company, L.P., pursuant to Section 252(b) of the Telecommunications Act of 1996, for arbitration of interconnection agreements between NYNEX and the aforementioned companies.

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I. INTRODUCTION

This is an arbitration proceeding being held pursuant to the Telecommunications Act of 1996 ("the Act"). On December 4, 1996, the Department of Public Utilities ("Department") issued an order ("Phase 3 Order") which set forth our rulings with regard to various issues surrounding the interconnection agreements to be entered into by New England Telephone and Telegraph Company, d/b/a NYNEX ("NYNEX") and the competitive local exchange carriers ("CLECs") in this consolidated arbitration proceeding. On February 5, 1997, the Department issued a second order ("Phase 3-A Order") denying a motion for reconsideration from MCI Telecommunications Corporation ("MCI") on the issue of liquidated damages.

A portion of the Phase 3 Order dealt with the determination of performance standards to be met by NYNEX in providing services to the CLECs. Examples of such services include connecting customers to resold services, like local exchange service; responding to repair calls; and processing of unbundled network elements ("UNEs"). The Department found that NYNEX should provide services to the CLECs at parity with services it provides to itself and that the level of service NYNEX provides to itself today should be the base-line level of performance it is required to provide in the future to the CLECs. This standard was termed the "no-change-in-parity" standard. We also found that two levels of performance should be measured by NYNEX. One, "the internal process standard," would ensure that there is parity with regard to NYNEX's own internal processes in handling CLEC requests for service. The second metric, "the retail process standard," would ensure that there is parity in the delivery of service to the retail customer. In addition, we found that NYNEX should report on the level of

service NYNEX currently achieves in its internal processes with respect to its 100 largest business customers and compare that service level with that offered the CLECs. Phase 3 Order at 20-24.

Another portion of the Phase 3 Order dealt with the remedies that would be available to the CLECs if NYNEX fails to meet the performance standards that have been established. We found that liquidated damages should be available to carriers in the event NYNEX fails to achieve parity. Noting that the record in the Phase 3 proceeding did not provide support for a particular level of liquidated damages, we directed the parties to reconvene negotiations to determine an appropriate level of liquidated damages, and if they were unable to reach an agreement, to petition the arbitrator to determine appropriate levels based on a more complete record. Id. at 27.

On February 25, 1997, the parties to this proceeding reported back to the arbitrator, Paul F. Levy, that agreement on these issues could not be reached, and he established a procedural schedule for the Department's resolution of them (Tr. 12, at 61-65). On March 11, 1997, NYNEX submitted its proposal on performance standards and liquidated damages. On March 24, 1997, Teleport Communications Group, Inc. ("TCG") submitted a reply to NYNEX's proposal. On March 25, 1997, AT&T Communications of New England, Inc. ("AT&T") submitted its response to NYNEX's filing and offered an alternative proposal. On March 25 and March 26, 1997, MCI filed testimony on these topics. On March 28, 1997, NYNEX supplemented its March 11 filing with the actual performance data it proposed to utilize in calculating liquidated damages.

At a hearing held on March 31, 1996, several witnesses testified: Julie A. Canny, managing director - operation support and implementation of legal requirements from NYNEX; Kevin Moss, manager in MCI's local markets division, and Michelle Berkowitz, associate commercial counsel from MCI; Paul Kouroupas, attorney, and John F. Kelley, director of operations, from TCG; and Eileen M. Halloren, vendor management official from AT&T. NYNEX was permitted to file supplemental testimony in response to the other parties' proposals on April 14, 1997, and an additional hearing was held on April 23, 1997, at which time further testimony was received from Ms. Canny, Ms. Halloren, and Gregory E. Knight, reporting and measurements program coordinator for local markets for MCI.

At the April 23 hearing, the arbitrator asked the parties to brief the following issues:

(1) Measurement. What measures should form the basis for the parity standard adopted by the Department? What standards should be adopted for those measures? Over what time periods and intervals should the measures be reviewed to determine compliance with those performance standards? What is the level of performance that NYNEX is providing today?

(2) Principles. What principles should be applied in establishing the level of liquidated damages? Should the Department consider the harm done to CLECs by NYNEX's failure to meet performance standards, and if so, how should it evaluate or quantify that harm? How should the Department consider and evaluate the incentive value of liquidated damages? Should CLECs have remedies beyond liquidated damages for NYNEX's failure to meet performance standards set by the Department? If so, what should those remedies be?

(3) Application of principles. Based on the principles set forth, what dollar amounts of

liquidated damages are appropriate for NYNEX's failure to meet the various standards adopted by the Department?

Briefs were filed by TCG on May 13 and by AT&T and MCI on May 14. ACC National Telecom Corporation ("ANTC"), which was granted an opportunity to participate in this proceeding, in parallel to a separate ANTC/NYNEX interconnection dispute, also filed a brief on May 14. NYNEX filed a reply brief on May 28. TCG filed a reply brief on June 3, the other three CLECs filed their reply briefs on June 4, and NYNEX submitted a reply letter on June 9.

Except as certain general principles may be enunciated herein, this Order does not address the internal process standards envisioned in the Phase 3 Order because NYNEX's filing on those measures has been scheduled to be submitted after this order is issued. Those metrics will be addressed in a subsequent order.

II. MEASUREMENT

A. Introduction

The standard we have adopted in the Phase 3 Order—no change in parity—clearly envisions that NYNEX is required to provide service at the same level it offers to its own customers. In this sense, the debate is over what the basis for the standard should be. However, the standard raises several sets of questions, including the key question of what is to be measured. NYNEX has offered its proposal of the service functions to be measured. The carriers have offered a number of functions. In some cases NYNEX has agreed, in some it may have agreed in principle but states that it does not currently collect data on its performance

of those functions (even for its own customers), and in some it disagrees altogether. Beyond resolving this issue, we also need to determine, for those functions chosen as indicative of parity, what values are to be measured and reported.

B. Requirement to Collect Data

Before turning to the many specific issues raised by the parties, we address a threshold question. NYNEX has argued that it currently does not collect data on several types of service functions that the CLECs argue are important to their competitive interests. In a number of instances, it asserts that it should not have a requirement to collect data for others that it does not collect for itself. For example, NYNEX does not collect data on billing accuracy. Instead it relies on customer complaints to bring billing errors to its attention (Tr. 14, at 88-89).

AT&T, however, states that NYNEX should be required, in this and other areas, to develop a measuring and reporting capability. AT&T notes that problems in any of the areas it seeks to measure can have significant damaging effects on the emergence of competition and that measuring performance in each of these areas is a critical step in first evaluating and then achieving service parity (AT&T Initial Brief at 6, 9). MCI, too, argues that, where historical data do not exist on business processes it deems important, NYNEX should be required to begin compiling data (MCI Initial Brief at 5). ANTC also supports this position (ANTC Initial Brief at 7-8, ANTC Reply Brief at 2-4).

As noted in the Phase 3 Order, the Department is not averse to requiring NYNEX to produce metrics for functions deemed important to the purposes of the Act, but we are also mindful of the administrative burdens and costs that such requirements can impose on NYNEX.

Although NYNEX is in the unique position of being the incumbent local exchange carrier, we do not believe that, in this context, it is the intent of the Act to create requirements for it that are not necessary to demonstrate parity. As a general matter, we will not order NYNEX to collect data on service functions that it does not currently collect to measure performance to its own customers, unless it has been demonstrated in this record that there is reason to believe that there is something inherent in the provision of those services to the CLECs' customers that can be distinguished from the provision of those services to NYNEX's own customers.

The billing accuracy issue is a case in point. NYNEX currently bills its customers without undertaking an analysis of billing accuracy. With the advent of local exchange competition, NYNEX will be providing the CLECs the exact same type of billing information (i.e., collected and processed by the same switching equipment). As noted by Ms. Canny, "the switch doesn't differentiate" (Tr. 14, at 89). Hence, there is no reason to believe that there will be a difference in the degree of billing accuracy to the CLECs' customers. The Department understands that the CLECs want their customers to have accurate bills, and that those carriers might have a commercial interest in having an assessment of what percentage of bills are likely to be inaccurate in any given month. However, in the absence of a determination that this information is essential to ensure parity, the CLECs' desire for this information does not provide sufficient reason for the Department to order NYNEX to collect it.

We now turn to the specifics of the NYNEX proposal and the CLECs' responses to it. We first address resale, then UNEs, and then other services.

C. Resale

1. NYNEX Proposals

NYNEX has proposed to measure its performance in the resale arena in two major product categories, POTS (plain old telephone service) and Specials (DS0, DS1, DS3, and other special services), and compare its performance for all of its Massachusetts customers, its 100 largest Massachusetts customers, those of each CLEC, and those of all CLECs combined. Within each product category, it proposes to measure two segments of service, provisioning and maintenance. Within each segment of service, it proposes a number of metrics. For provisioning of POTS service, these include:

- @ the percentage of appointments completed within five days for residence customers;
- @ the percentage of appointments completed within five days for business customers;
- @ the percentage of appointments missed, both for those requiring dispatch of a service technician and for those not requiring dispatch;
- @ the percentage of appointments completed in one business day, both for dispatch and non-dispatch;
- @ the percentage of appointments completed in two business days, both for dispatch and non-dispatch;
- @ the percentage of appointments completed in three business days, both for dispatch and non-dispatch;
- @ the percentage of appointments completed in four business days, for dispatch and non-dispatch combined;
- @ the percentage of appointments completed in five business days, for dispatch and non-dispatch combined;
- @ the percentage of appointments completed in six business days, for dispatch and non-dispatch combined;
- @ the percentage of customers who report installation troubles within seven days after installation; and
- @ the percentage of customers who report installation troubles within thirty days after installation.

NYNEX also proposes to report on, but not be measured by, the number of installation orders, the average provisioning interval in business days, and the percentage of missed appointments where the customer was at fault.

For maintenance of POTS service, NYNEX proposed to measure the following items:

- @ the percentage of missed appointments;
- @ the percentage of lines out of service for over four hours;
- @ the percentage of lines out of service for over 12 hours;
- @ the percentage of lines out of service for over 24 hours;
- @ the percentage of lines cleared within 24 hours; and
- @ the percentage of repeat trouble reports within 30 days.

NYNEX also proposes to report on, but not be measured by, the total number of troubles reported, the customer trouble report rate, the mean time to repair, the percentage of troubles that are related to customer premises equipment, the percentage of subsequent trouble reports, the percentage of no-trouble-found incidents, and the percentage of visits where no access was available to the customer's premises.

For provision and maintenance of special services, NYNEX proposes virtually identical measures, although there is no breakdown between business and residential service since most special services are ordered by business customers.

Finally, for all measurements, NYNEX proposes that its reports be audited annually by an independent third party and that the results of the audit be provided to the Department and to every carrier with an interconnection agreement.

2. Analysis and Findings

The CLECs have made a number of proposals with regard to performance measures for resold services, which we will describe and review here. Some of these proposals also relate to UNEs. To the extent they do, the conclusions reached herein should also be deemed as applying to UNEs. Furthermore, those NYNEX proposals that are not discussed in this section or elsewhere in this order should be deemed as approved.

MCI proposes that a measure be used to report on NYNEX's performance in meeting installation orders on time. It would measure the percentage of orders processed for a requested due date that is equal to or greater than the standard interval, by service and by product (MCI Initial Brief, Attachment A at 4). As noted above, NYNEX has proposed to measure the percentage of orders missed for groups of products. It asserts that because of the multitude of products and services provided for its own end users and for resale, specific product performance comparisons are not practical. It states that sample sizes would be too small, in many instances, to determine parity (Exhibit NYNEX LD-4, Attachment B at 1).

We agree with NYNEX that its proposed completion intervals for the range of products offered will provide a good gauge of whether parity is being achieved. The multitude of products offered by NYNEX to its customers and through resale—both today and as that mix changes over time—would make a more discrete listing of installation measurement unworkable and not meaningful.

AT&T and MCI propose that there should be a standard for order accuracy, which would measure the accuracy and completeness of the NYNEX provisioning service by comparing what was ordered with what was completed. The measurement associated with this function would be the percentage of provisioning orders completed without error (AT&T Initial Brief, Attachment A at 4; MCI Initial Brief, Attachment A at 6). NYNEX responds that it can measure order accuracy only from the perspective of troubles reported after an order has been completed. Hence, it has proposed that the percentage of installation troubles reported after seven and 30 days be used to measure performance (Exhibit NYNEX LD-4, Attachment A at

3).

This dispute is analogous to the billing issue raised above. We can understand why AT&T and MCI might have a commercial interest in the measures they propose, but the data that support those measures are not collected by NYNEX. NYNEX has proposed an alternative measure of installation quality that it uses for its own customers. That measure, in our view, is a reasonable one to assure parity in the quality of installations between NYNEX's customers and the CLECs' customers, and we will accept it.

AT&T proposes that the Department should set a standard for the timing of receipt of order status reports, both for provisioning and repair. This standard would measure the response time from the time an order is sent until a status report is received, indicating that the order has been completed (AT&T Initial Brief, Attachment A at 4, 7). MCI joins in this proposal (MCI Initial Brief, Attachment A at 6). NYNEX responds that it does not send completion notices to its own retail channels. Each completion is indicated on the technician's contemporaneous log and can be accessed by a query to the customer service record. NYNEX states that it does not have the ability to measure the timeliness of this recordkeeping. Its technicians enter status reports on their work throughout the day, and the data is used to measure their productivity (Exhibit NYNEX LD-4, Attachment A at 3).

This dispute is again analogous to the one raised above, and we find that NYNEX should not be required to maintain the records requested by the CLECs. They will have access to customer service records comparable to NYNEX's. They will be able to query, without charge, the customer information system to determine the status of provisioning and repair

orders (Tr. 14, at 74-76, 82-83). In this regard, they have parity with NYNEX. Further, NYNEX has proposed a variety of metrics that, among other things, will enable AT&T and MCI to compare the percentage of installations achieved within a given number of days, and repairs that are achieved within a given number of hours. These metrics should provide a sufficient indication of parity in the provisioning and maintenance of these services.

AT&T and MCI propose a more discrete measurement of time to restore service than does NYNEX. NYNEX has proposed to report on repair intervals of four, 12, and 24 hours. The two CLECs recommend intervals of four, eight, and 16 hours where dispatch is required; two, three, and four hours where dispatch is not required; and 24 hours for all troubles. NYNEX indicates that it does maintain records that could be used to reflect the more discrete periods (Exhibit NYNEX LD-4, Attachment A at 5). Accordingly, since the CLECs indicate that these intervals would be more useful to them and since there is no incremental cost in providing them, we will require those intervals to be used as the performance measures.

AT&T also proposes that the mean time to repair be used as a metric (AT&T Initial Brief, Attachment A at 6). While NYNEX has indicated that it will maintain records on the mean time to repair service and that it will report these data, it suggests that this metric not be used as a measure of parity. This is a potential "belt and suspenders" issue. The Department wants to have sufficient measures in place to ensure parity, but we do not want to overburden the parity-recording system with measures that duplicate or overlap and measure essentially the same functions. Here, while the interval measures offer some protection to the CLECs that parity is being achieved, they do not cover the full range of time periods for restoration of

service. Accordingly, we direct that the mean time to repair be included as a performance measure. Adding the mean time will cover the full range of time periods.

AT&T has proposed that NYNEX report on the percentage of installation troubles and the percentage of repeat troubles, using a 60-day interval as a performance measure (AT&T Initial Brief, Attachment A at 6). NYNEX indicates that it measures these items using a 30-day interval and proposes this interval for its performance measurement (Exhibit NYNEX LD-4, Attachment A at 6). This 30-day period is also supported by MCI, although it asks for a breakdown by service and by product (MCI Initial Brief, Attachment A at 6). NYNEX states that it does not maintain full product detail in repair data bases. We find no reason for NYNEX to change its measurement interval for these items, and we do not find a persuasive reason for it to begin to maintain the detailed product information requested by MCI. Thus, we conclude that the NYNEX proposals offer adequate measures for installation and repeat troubles.

AT&T suggests that the time to restore service as compared to the time estimated to the customer should be used as a performance measure. It suggests the metric for this item should be the percentage of appointments met. NYNEX agrees and has proposed such a metric, noting that its performance in 1996 was 25.17 percent (NYNEX Exhibit LD-4, Attachment A at 6).

AT&T would like to ensure that it receives timely notice if a NYNEX repair crew will miss a repair visit. NYNEX states that it has issued methods and procedures to require notification calls to all customers one hour prior to a missed appointment for repair (NYNEX

Exhibit LD-4, Attachment A at 6). AT&T advocates a measurement that would indicate the percentage of missed notifications. We understand that AT&T's request would provide a variant on the variety of other measurements with regard to missed appointments, but we find that such a measure is effectively redundant given the other measures we are adopting.

Finally, we address a general issue raised by AT&T, that NYNEX's proposal inappropriately aggregates measurements for the purposes of determining parity in a way that allows NYNEX to hide a lack of parity with regard to particular services (AT&T Initial Brief at 6-7). NYNEX responds that both its and AT&T's proposals assemble services into groupings for reporting purposes. Using resold services as an example, it argues that its proposed six categories, while different from AT&T's proposed six categories, encompass all of the services in the AT&T proposal but enable it to compare like-to-like services better and to ensure correct sample sizes (NYNEX Initial Brief at 12).

There are many possible ways to disaggregate NYNEX's services for purposes of reporting parity. We understand why AT&T might prefer to have different groupings, but there is nothing unreasonable about NYNEX's proposal. As noted by Ms. Canny, the groupings proposed by NYNEX are based on how NYNEX assesses the services today for itself (Tr. 13, at 140). Accordingly, we will accept them for purposes of reporting. The question of which measures should serve as triggers for liquidated damages is a different issue, however, and we discuss that below.

D. Unbundled Network Elements

1. NYNEX Proposals

As in the case of resale, NYNEX has proposed to measure its performance in the UNEs arena in two major product categories, POTS (dial tone services) and Specials, and to compare its performance for all of its Massachusetts customers, its 100 largest Massachusetts customers, those of each CLEC, and those of all CLECs combined. Within each product category, it proposes to measure two segments of service, provisioning and maintenance. Within each segment of service, it proposes a number of metrics. For provisioning of POTS service, these include:

- @ the percentage of appointments completed in one business day, both for dispatch and non-dispatch;
- @ the percentage of appointments completed in two business days, both for dispatch and non-dispatch;
- @ the percentage of appointments completed in three business days, both for dispatch and non-dispatch;
- @ the percentage of appointments completed in four business days, for dispatch and non-dispatch combined;
- @ the percentage of appointments completed in five business days, for dispatch and non-dispatch combined;
- @ the percentage of appointments completed in six business days, for dispatch and non-dispatch combined;
- @ the percentage of missed appointments, both for dispatch and non-dispatch;
- @ the percentage of customers who report installation troubles within seven days after installation; and
- @ the percentage of customers who report installation troubles within thirty days after installation.

NYNEX also proposes to report on, but not be measured by, the number of installation orders, the average provisioning interval in business days, and the percentage of missed appointments where the customer was at fault.

For maintenance of POTS service, NYNEX proposed to measure the following items:

- @ the percentage of missed appointments;
- @ the mean time to repair loop trouble;

- @ the mean time to repair central office trouble;
- @ the percentage of UNEs out of service for over four hours;
- @ the percentage of UNEs out of service for over 12 hours;
- @ the percentage of UNEs out of service for over 24 hours;
- @ the percentage of UNEs cleared within 24 hours; and
- @ the percentage of repeat trouble reports within 30 days.

NYNEX also proposes to report on, but not be measured by, the percentage of troubles that are related to customer premises equipment, the percentage of subsequent trouble reports, the percentage of no-trouble-found incidents, and the percentage of visits where no access was available to the customer's premises.

For provision of special services UNEs, NYNEX proposes the following:

- @ the percentage completed within five days, both for dispatch and non-dispatch;
- @ the percentage of missed appointments, both for dispatch and non-dispatch; and
- @ the percentage of customers who report installation troubles within thirty days after installation.

NYNEX also proposes to report on, but not be measured by, the number of installation orders, the average installation interval in business days, and the percentage of appointments missed because of customer actions.

For the maintenance of special services UNEs, NYNEX proposes the following:

- @ the mean time to repair;
- @ the percentage of UNEs out of service for over four hours;
- @ the percentage of UNEs out of service for over 24 hours; and
- @ the percentage of repeat trouble reports within 30 days.

NYNEX also proposes to report on, but not be measured by, the percentage of troubles that are related to customer premises equipment, the percentage of subsequent trouble reports, the percentage of no-trouble-found incidents, and the percentage of visits where no access was available to the customer's premises.

Finally, as in the case of resale, NYNEX proposes that its reports for all measurements be audited annually by an independent third party and that the results of the audit be provided to the Department and to every carrier with an interconnection agreement.

2. Analysis and Findings

The CLECs have made a number of proposals with regard to performance standards for the provisioning and maintenance of UNEs. Many of those proposals parallel those made for resale, and we will not address them again, as the directives we have issued above will apply to the UNEs as well. The other proposals made by the parties are not relevant to parity. For example, AT&T has proposed that there be an absolute standard of 100% for the percentage of UNE orders completed on the due date (AT&T Initial Brief, Exhibit A at 2). This is not a parity standard that compares NYNEX's own performance with that to a CLEC; it is an absolute standard. Therefore, we will not adopt it or other similarly stated proposals.

E. Other Services

The CLECs have proposed that a number of additional services be monitored for performance to ensure parity. The categories include billing, operator and directory assistance ("O&DA"), and network performance. We have dealt with the billing issue above and need not repeat that discussion here.

In the O&DA arena, AT&T has requested that NYNEX report on answer time for calls to NYNEX operators. NYNEX responds that its operator platforms do not separately and discretely process the traffic of individual carriers. Therefore, it argues, all carriers receive the same level of service, making separate reports by carrier unnecessary to ensure that parity is

being achieved. Given these facts, we agree with NYNEX that there appears to be no reason to maintain the records sought by AT&T for O&DA service.

Both AT&T and ANTC have requested measurements of network reliability, availability, and blockage (AT&T Initial Brief at 6; ANTC Initial Brief at 9). NYNEX argues that such measurements do not go to the issue of parity but seek to identify the level of service inherent in NYNEX's network which is common to all users. It states that the Phase 3 Order does not require that NYNEX create measurements for activities that cannot operationally be separated by carrier and for which all carriers will receive the same level of service (NYNEX Initial Brief at 14, 12). We have discussed this general issue above (see, supra, Section II.B). For the reasons set forth by NYNEX, we agree with NYNEX that these measurements have not been shown to be necessary to establish that parity is being met and accordingly will not require them.

III. PRINCIPLES

A. Introduction

This section focuses on the principles that are to apply in establishing the level of liquidated damages. In its initial filing, NYNEX suggested that an enforceable liquidated damages clause should meet three criteria: (1) the actual injury or damages caused by the breach must be difficult to estimate accurately; (2) the parties must intend to provide for damages rather than a penalty; and (3) the stipulated sum must be a reasonable estimate of probable loss. In making this suggestion, NYNEX relied on rules relating to liquidated damages in contract law (NYNEX Exhibit LD-1 at 10-11). We review here whether this is a

reasonable statement of the standards we should apply. The competing carriers have suggested that an alternative standard is appropriate in this case because this is not a typical contract, in that NYNEX may have an incentive to provide poor service to its competitors who, to a certain extent, have limited options for obtaining that service. They argue that this is unlike most contract situations, in which the provider generally has a commercial incentive to provide very high levels of service to its customers.

The arbitrator asked the parties to address another issue with regard to principles: whether the liquidated damages provision of the contract should be the sole remedy available to the carriers for substandard performance by NYNEX. That is, should the interconnection agreement provide that NYNEX should also be subject to consequential damages in a court of law for failure to meet the parity standard? If so, does such a provision affect the principles that should be used in the design of the liquidated damages? A subsidiary question is whether any liquidated damages which have been collected mitigate or offset any ultimate damage amounts found by a court.

B. Positions of the Parties

1. AT&T

AT&T asserts that the basic principle of breach of contract damages is that the injured party should recover damages sufficient to put it in as good a position as it would have been if the other party had fully performed. It argues that the wronged party should receive the benefit of its bargain. AT&T notes that if NYNEX does not meet the parity standard, CLECs can be harmed by being less successful in attracting and keeping local exchange customers. Admitting

that quantification of like damage is difficult in these early days of local exchange competition, AT&T posits several principles that should govern the assessment of the level of damages that should be included in the interconnection agreements.

First, says AT&T, the damage amounts must be sufficiently high that they are not viewed by NYNEX merely as a cost of business that NYNEX feels comfortable paying to prevent competitors from making inroads into the local service market. Second, the specific monetary remedies provided in the interconnection agreement for liquidated damages should not be the sole damage remedy available. AT&T argues that the ability to seek more significant damages should be preserved, although it agrees that the contractual damages should be treated as an offset to any such damages awarded. Third, there should also be a remedial plan requirement imposed for failure to meet parity of service standards. Such a plan would assure that NYNEX would make efforts to bring CLEC service up to parity with the service NYNEX provides to itself and its customers. In making this suggestion, AT&T suggests that this requirement of remedying a failure to achieve service parity is more likely to achieve parity than any damage system that can be developed (AT&T Initial Brief at 10-12).

2. MCI

MCI argues that an interconnection agreement between NYNEX and a CLEC is not analogous to an ordinary commercial contract. In such a contract, where a supplier is competing to provide service to a buyer, there are natural incentives in place for the supplier to provide the best possible service, and liquidated damages are used simply to avoid litigation and the costs of litigation. Here, argues MCI, NYNEX has no natural incentive to provide a

CLEC with high quality service and may in fact be driven by an incentive to provide it with substandard service. Therefore, says MCI, liquidated damages are not appropriate, but if the Department orders their inclusion in the interconnection agreement, the CLECs should be free to seek consequential damages for breach of parity in a court of law (MCI Initial Brief at 10-11). On the other hand, MCI is willing to forego certain consequential damages — excluding willful misconduct or gross negligence or repeated breach of the material terms of the agreement — if its proposed system of credits is adopted by the Department (*id.* at 8).¹

3. TCG

TCG also disagrees with NYNEX over the appropriate meaning of the term "liquidated damages" in the context of the interconnection agreements. It argues that the Uniform Commercial Code's standards for liquidated damages, cited by NYNEX, should not bind the Department in this instance. Like AT&T and MCI, TCG argues that an alternative standard is appropriate given that an interconnection agreement is not a typical contract. It suggests that the damage methodology selected should meet the standard proposed by NYNEX in its initial filing, *i.e.*, to give NYNEX a "monetary incentive to ensure parity and to provide good service, while simultaneously supplying a certain, timely payment to carriers for possible damages incurred" (TCG Brief at 2-3).

¹ Notwithstanding the Phase 3 Order and the Phase 3-A Order, MCI has declined, here and in the early phase of this proceeding, to equate its system of credits to liquidated damages, presumably because it argues for the right to seek consequential damages, as well. However, the two issues may be considered separately. Therefore, we will view MCI's credit proposal as analogous to liquidated damages and discuss its proposal in this context.

4. NYNEX

NYNEX agrees that the interconnection agreements arbitrated by the Department are not classic forms of contractual relationship entered into by parties in a normal commercial setting. It points out, however, that the Act ensures that there will be pervasive regulatory oversight at both the federal and state levels of this relationship. Accordingly, states NYNEX, the liquidated damages provisions of the agreements should be viewed as an incentive to complement the Department's enforcement powers. The payment, it asserts, should be viewed in relation to the entire regulatory framework in which the interconnection agreements are being fashioned and implemented (NYNEX Initial Brief at 16-17).

Further, according to NYNEX, carriers are not entitled to damages, except in the event of willful misconduct, because of the limitations of liability that apply to regulated telecommunications service. These limitations, state NYNEX, do not permit customers to seek damages beyond a waiver of the proportionate charge to the customer for the period of service during which service quality standards were not met.² NYNEX provides a number of legal citations in support of this premise and notes, in particular, the Department's findings in D.P.U. 91-30-LL (1994) (*id.* at 17-19). The company argues that the public policy rationale for these previous rulings remains in force today, that opening NYNEX to consequential damages would subject it to large and uncertain levels of liability. Thus, it asserts, consideration of the

² Section 1.4.3.A in Part A of NYNEX's Massachusetts Tariff No. 10 states in part that NYNEX's liability shall in no event exceed an amount equivalent to the proportionate charge to the customer for the period of service in which a mistake, omission, interruption, delay, error, or defect in transmission, or failure or defect in facilities, occurs.

payments mandated by the Department in this proceeding should not be used to expand greatly the liability of NYNEX. The goal, rather, should be to provide a reasonable incentive for the company to meet the no-change-in-parity standard (*id.* at 20).

C. Analysis and Findings

An interconnection agreement is not a typical commercial contract. It is the embodiment of federal law and regulation that requires an incumbent local exchange carrier to provide services to its competitors. Unlike normal commercial arrangements, where the supplier has financial incentives to maintain high levels of service quality to its customers, here the supplier has the opposite incentives. It has an underlying commercial interest in slowing down the loss of its market share to its wholesale customers. We dealt with this issue at length in the Phase 3 Order, where we found that, in this context, liquidated damages can be a useful tool to help ensure service parity to the CLECs.

We accept the overall principle proposed by NYNEX, that liquidated damages should provide NYNEX with monetary incentive to ensure parity and to provide good service, while simultaneously supplying a certain, timely payment to carriers for possible damages incurred (NYNEX Exhibit LD-1, at 12). We agree with AT&T, however, that an accompanying principle must be that the damage amounts be sufficiently high that they are not viewed by NYNEX merely as a cost of business that NYNEX feels comfortable paying to prevent competitors from making inroads into the local service market. Given the large stakes in the local exchange market, the potential for liquidated damages must be sufficiently large that they are not viewed as a minor annoyance in the pursuit of less than adequate service to the CLECs.

We also agree with the CLECs that the specific monetary remedies provided in the interconnection agreement for liquidated damages should not be the sole damage remedy available. Liquidated damages are meant to provide a fast, efficient method for compensation, but there may be instances where consequential damages are appropriate as well, and the contract should provide that a court of law may be brought in to rule on such disputes. We have directed the inclusion of a liquidated damages provision here for a specific public policy purpose, to help ensure that the no-change-in-parity standard is met, and we trust that the measures we have chosen and the financial remedies we establish will help accomplish this end. However, we have determined below that such payments are not to be based on the possible damage suffered by the CLECs. Rather, we have based them on providing a sufficient financial incentive to NYNEX. As noted by TCG and others, the history of limitations of consequential damages for regulated utilities in Massachusetts cited by NYNEX are not relevant to the issue at hand. Those limitations, included in most carriers' public tariffs, are integrally tied to the provision of tariffed services to the public, and are not related to the inter-carrier parity question raised by the interconnection agreements (TCG Reply Brief at 2-3). As AT&T notes, given the impossibility of estimating precisely the damages flowing from NYNEX's failure to provide service parity to CLECs, it would be unfair to allow NYNEX to liquidate its damage liability completely (AT&T Initial Brief at 11). Accordingly, we find that the interconnection agreements should provide for both liquidated damages and the ability to seek consequential damages for failure to meet parity and that the contractual damages be treated as

an offset to any such consequential damages awarded.³ With respect to disputes arising out of the performance standards adopted here, we note that the Department should not be considered by the parties as the first forum for resolution. The Department's current dispute resolution process, adopted in Local Competition, D.P.U. 94-185 (1996), is not specifically designed to resolve contract disputes that may arise from interconnection agreements. However, interconnection agreements have been drafted in such a way as to anticipate disputes and address those situations. Therefore, parties should look first to the agreements themselves to address disputes and then only to the Department if the agreement is silent.

Finally, while we find intriguing AT&T's suggestion that there should also be a remedial plan requirement imposed for failure to meet parity of service standards, we conclude, as a matter of principle, that such a requirement should not be necessary if we adhere to the principles we have just adopted. If NYNEX has proper financial incentives to meet parity requirements, an additional administrative procedure should not be necessary. We believe, in relying on this record to set liquidated damages levels, that we will provide sufficient financial incentives to NYNEX to maintain parity. The parties retain their rights, however, to petition the Department for relief in the future if this turns out not to be the case.

IV. APPLICATION OF PRINCIPLES

³ We explicitly do not address the issue of whether the CLECs should have a right to seek consequential damages for reasons other than a failure to meet parity. That issue has not been presented to the Department for arbitration (AT&T Reply Brief at 8). The instant issue, however, is clearly before us, and its resolution does not, contrary to NYNEX's argument, prejudice or undermine other aspects of the limitation of liability question (NYNEX Reply Letter at 3).

A. Introduction

This section covers the topic of how the chosen principles should be applied to develop the specific monetary amounts that will be paid by NYNEX for failing to meet the parity standard. The arbitrator properly made clear to the parties that, in arguing the level of damages that are appropriate for failure to meet the parity standard, carriers may not and should not take into account their desire that they want to achieve a higher level of service than that offered by NYNEX to its own customers. Liquidated damages are for a failure by NYNEX to meet the parity standard, not for a failure to meet another absolute standard that might be desirable to the carriers. To the extent carriers rely on NYNEX for the delivery of services, the carriers will have to adapt their own commercial practices, including their relationships with their customers. As noted in the introduction, that issue was clearly and completely covered in the Phase 3 Order and will not be reopened here.⁴ In the Phase 3 Order, the Department specifically rejected an absolute standard beyond the "no-change-in-parity test". Phase 3 Order at 23-24.

B. Form of Payments

NYNEX has proposed two forms of payments, incident-based payments for failure to meet certain appointments, and performance payments for failure to meet parity over a stated period of time (NYNEX Exhibit LD-1, at 12-14). TCG, too, endorses these forms of payments. TCG views the incident credits as mirror images of the credits it would issue its

⁴ For example, this is not the forum to address the point raised by AT&T that customers are entitled to better service than what NYNEX has been providing (AT&T Initial Brief at 10).

own customers as a result of NYNEX's failure to perform a specific function in a timely or quality manner. Performance credits, in contrast, would apply to NYNEX's consistent failure to provide quality service over time as determined by the performance reports (TCG Initial Brief at 4-5). Likewise, ANTC, MCI and AT&T suggest that these two types of payments are appropriate.

We conclude that incident payments and performance payments are useful companion tools to help ensure that parity is achieved. While performance payments will help ensure that general levels of parity are achieved, incident payments will reinforce these global measures by helping to ensure that CLEC customers receive a level of service at parity on a day-to-day basis. Accordingly, incident credits will be imposed for NYNEX's failure to perform a specific function in a timely manner. Performance credits will be imposed for NYNEX's failure to meet given performance standards over a given time period.

C. Incident Payments

NYNEX has proposed a schedule of increasing payments for missed appointments. The first missed appointment would result in a payment of 25 percent of the associated non-recurring charge ("NRC"), the second payment would impose an additional payment equal to 35 percent of the NRC, and a third missed appointment would result in a payment of the remaining 40 percent of the NRC. In each instance in which a resold service or UNE is out of service for over 24 hours, NYNEX would pay the CLEC 1/30th of the applicable recurring charge (NYNEX Exhibit LD-1 at 12).

The other carriers all assert that these incident payments are too low, stating that they do

not provide sufficient monetary incentive to NYNEX for good performance to CLEC customers. See, for example, MCI Exhibit LD-4, at 4. AT&T proposes that a missed installation result in liquidated damages equal to the total NRC, and it proposes that liquidated damages for poor maintenance should exceed one day's worth of the monthly recurring charge (AT&T Exhibit LD-1, at 11). TCG proposes that the NRC be waived for failure to meet a first appointment, that 150 percent of the NRC be credited for missing a second appointment, and that 200 percent of the NRC be credited for failure to meet a third appointment (TCG Exhibit LD-1, at Exhibit 1). Likewise, MCI cites interconnection agreements from Iowa and Minnesota, in which a missed commitment to a customer generates a waiver of the NRC and one month's recurring charge for the applicable service or element (MCI Initial Brief at Attachment C).

In reply, NYNEX asserts that the level of payments it proposes is reasonable and appropriate because it will provide NYNEX with an ongoing incentive to perform every installation and repair in a timely manner and because it is linked to the charges that customers pay for service. NYNEX also points out that the incident-based payments are in addition to the performance credits that would be imposed if there is an on-going failure to meet parity standards. Thus, under its proposal, individual customers could receive credits even if the overall parity standard is being met. It further notes that the amounts it proposes for incident payments exceed the payments NYNEX would make to its own customers for failure to meet appointments, giving it an extra incentive to give priority to the CLEC customer (NYNEX Initial Brief at 23-25).

Our goal, as noted above, is to choose a level of incident payments that are sufficiently high that they are not viewed by NYNEX merely as a cost of business that NYNEX feels comfortable paying to prevent competitors from making inroads into the local service market.⁵ NYNEX is correct to note that the incident payments can come into play even if the company is satisfying the overall parity standard, but they play an important role in helping to ensure that, on a day-to-day basis, NYNEX is not tempted to engage in behavior that stifles competition by giving bad service to a customer that is of particular importance to a CLEC or by choosing to devote scarce resources to its own customer before that of a CLEC. In this regard, we note that the mere existence of an incident payment is a strong step in the right direction, for it provides the NYNEX foreman or service technician with an incentive to give equal priority to the CLEC customer, since there is no such credit for NYNEX's own customers (Tr 13, at 29-30). Ms. Canny persuasively described the thought process that would face a NYNEX foreman, given this payment system, and made a strong case that parity would be served by such a system. She further noted that the imposition of the credit would mean that NYNEX would expend greater costs in meeting the service call than it would recover from the CLEC (Tr. 13, at 52-54).

⁵ We are also aware that the CLECs have argued that the NYNEX proposals do not sufficiently compensate them for the damages they will suffer if they lose customers. See, for example, AT&T Initial Brief at 14. There is, however, no evidence in the record to establish the level of such damages. It is the CLECs, not NYNEX, who would have such information in their possession, and they did not offer it in this case. See, for example, Tr. 13, at 170-173, 196-198. Accordingly, our discussions and conclusions herein must rely on the principle we have enunciated above, that the level of liquidated damages provides sufficient monetary incentive to NYNEX to achieve service parity.

In light of these two factors, (1) that the incident payments are additive to overall payments for failing to meet parity and (2) that the incident payments provide NYNEX with a day-to-day incentive to give priority to CLEC customers over NYNEX customers, we find that NYNEX's proposed incident payments are reasonable. The CLECs' proposals are overly punitive in this context. They go beyond the level needed to ensure parity. In addition, they could possibly force NYNEX to favor CLEC customers over its own customers. In reaching this conclusion, we recognize that the CLECs' proposals may, in part, reflect their own practices in offering rebates to customers for missed appointments. TCG states, for example: "Incident credits are designed to compensate TCG for the credits it must issue to its own customers as a result of NYNEX's failure to perform a specific function in a timely or quality manner," (TCG Exhibit LD-1, at 5). There is, however, no requirement that NYNEX's payments mirror the payments or credits that CLECs choose to offer their own customers. The incident payments we impose here are meant to serve the goal of parity, not the marketing choices made by the CLECs.

D. Performance Payments

1. Introduction

Under NYNEX's proposal, monthly comparability measurement reports would be used to determine when a deviation from parity persists over an annual review period. Performance payments would be assessed in such instances, and the level of payments would increase with the amount of deviation between the quality of service provided to a CLEC and the service quality provided to NYNEX's own end-user customers. For example, the parity standard for

missed appointments for dispatched POTS appointments would be 19.7 percent, the rate experienced by NYNEX customers in 1996. If the rate for a given CLEC's customers was higher than this in the reporting period, NYNEX would provide an additional rebate per line for all customers with missed installation appointments (Tr. 13, at 33). The rebate for a 20.0 percent missed appointment rate would be \$15 per line, growing to \$65 per line for a missed appointment rate of 25.0 percent (NYNEX Exhibit LD-2). Even if NYNEX's performance to its own customers deteriorated, the historical level of service would be used to measure parity, in accord with the no-change-in-parity standard.

The NYNEX proposal raises a number of issues which have been discussed by the other parties. One topic is the relevant performance review period. A second is the choice of parity measurements that are to be subject to automatic payments. The third is the level of payments that should be assessed.

Before turning to these areas of disagreement, we first note that there is no disagreement with NYNEX's proposal that all measurements be audited annually by an independent third party and that the results of the audit be provided to the Department and to every carrier with an interconnection agreement. In light of the importance of satisfying all parties that the information collected be as accurate as possible, we adopt this proposal.

2. Performance Review Period

As noted, NYNEX has proposed an annual review period. AT&T argues that measuring parity on an annual basis is inadequate, and that a year of discriminatory service provision could effectively block entry by competitors. It argues that remedies should be

invoked no less often than every quarter to be meaningful (AT&T Initial Brief at 14-15). MCI points out that there is especially a concern during the "critical ramp-up period" to competition, and it argues that the use of a monthly period for parity determination is reasonable, noting that NYNEX will be preparing monthly reports in any event (MCI Initial Brief at 5-6). ANTC suggests that parity should be measured on a quarterly basis, noting that a twelve-month period would put a CLEC at risk because it would have to wait a year to react and recover from disparate treatment. This would especially be a problem, notes ANTC, during the first few months that are so crucial to a new entrant (ANTC Initial Brief at 11).

In response, NYNEX maintains that the argument that performance payments should be based on monthly deviations ignores the need to consider reasonable data sizes and avoid transient short-term shifts in performance. It argues that seasonal variations and deviations occurring because of occasional or localized situations should not result in parity violations if, over the course of a year, performance parity is achieved (NYNEX Initial Brief at 26).

We find that the arguments of the CLECs have merit. We need a system that is especially alert to a failure to achieve parity during the early months of competition. It is during this period that CLECs will begin their intensive marketing programs and where disparities in treatment of customers can have the most detrimental effect on the introduction of competition. A year is too long to wait to measure and respond to such disparate treatment. NYNEX will be collecting and reporting data on a monthly basis. The use of a quarterly performance period will provide a sufficient amount of data to smooth out statistical anomalies

of the sort mentioned by NYNEX.⁶ Accordingly, we will set a quarterly performance period, and any payments due from NYNEX will be credited to the CLECs within 30 days of the end of the quarter.

3. Measurements Covered

NYNEX has proposed that payments be made for seven measurements, although it will collect and report data on more than these. The seven it has proposed, with the proposed parity performance level, are:

- @ POTS (residential and business combined) missed appointments, with dispatched orders. 1996 rate = 19.7%.
- @ POTS (residential and business combined) missed appointments, with non-dispatched orders. 1996 rate = 0.35%.
- @ Complex (over 2 lines per order) missed appointments. 1996 rate = 8.2%.
- @ POTS service orders completed within 5 days, with dispatched orders. 1996 rate = 62.34%.
- @ POTS service orders completed within 5 days, with non-dispatched orders. 1996 rate = 88.78%.
- @ POTS out of service for over 24 hours. 1996 rate = 56%.
- @ Special services mean time to repair. March 1996 through March 1997 rate = 9 hours and 20 minutes (NYNEX Exhibit LD-2).

NYNEX is also planning to propose a number of performance measurements for UNEs, and it will offer those in its later filing. We will address those in the review of that filing.

The CLECs generally argue that there should be more performance measurements that are subject to parity payments. For example, AT&T states that NYNEX's proposal would

⁶ Further, we note in passing that we see no a priori reason for seasonal variations to affect parity. Presumably snow, rain, ice, and wind will affect service without prejudice, i.e., whether a customer is served by NYNEX or a CLEC.

leave it with no incentive to comply with other measurements and no remedy for the CLECs even if NYNEX falls far short of compliance with regard to other standards (AT&T Initial Brief at 12).

NYNEX argues that many of the elements have limited sample sizes and disaggregated data often measure essentially the same service element. It gives the example that it will provide reports for installation completion percentages within two, three, four, five and six days; and it states that payments for deviations for each of the measurements would double-count the same parity violation (NYNEX Initial Brief at 26).

We agree in part and disagree in part with NYNEX on this latter point. We do not want to impose performance payments in a manner that would double-count the same parity violation, but we do need to hold NYNEX accountable for some degree of differential performance within the more aggregated measures it has proposed. For example, there is a compelling pro-competition reason to hold NYNEX accountable for meeting parity on provisioning appointments for residence customers and business customers separately, as opposed to NYNEX's proposal to join them together. The other parties have likewise correctly noted that NYNEX has omitted performance payments on some other measures that have substantial value in ensuring that parity is maintained. We therefore conclude that a greater level of disaggregation is required to ensure that, within and across a wider variety of market segments, parity is being measured and, if not met, will result in financial losses to NYNEX.

We do not, however, find a compelling reason for all of the other measures proposed by the CLECs. Since NYNEX will be providing reports on all of the measures, we will, over

time, be able to analyze whether many more disaggregated performance payment measures are needed. An example is the number of troubles reported per 100 lines per month, which both AT&T and NYNEX agree should be measured and reported. While AT&T appears to propose that this metric be used to determine liquidated damages, NYNEX states that it has informational value only and should not be used to set damages. We do not see a purpose in using this metric for liquidated damages, as it represents a composite of many factors that are dealt with more specifically in other measures.

Accordingly, upon review of the testimony and comments offered by the parties, we have used our best judgment to determine which measures should be subject to performance payments. We believe that the measures we have chosen will not suffer from too small a sample size, but AT&T has a worthy suggestion which we will adopt. If there are fewer than 10 in a sample size for a given measure in a given performance review period, damage payments will not be assessed for that period. In addition, based on the record in this proceeding, none of these measures requires additional data collection by NYNEX. NYNEX is directed, however, to disaggregate the data it has to establish the performance rate for each measure (adopted below) and to file a compliance filing with those figures and supporting information.

To be clear, we also adopt NYNEX's proposal that it report data on both the measures that are subject to performance payments and the ones that it has proposed to be presented for informational purposes. If, after at least six months of experience, there is an indication that more or fewer measures are necessary to support the parity standard, either as informational

items or as measures subject to performance payments, parties may petition the Department to that effect. However, the Department will only consider changes to the standards adopted here if parties can show compelling reason why such changes are necessary.

For provisioning of POTS service, the following measures will be subject to performance payments. Next to each measure, we have given the performance standard that is indicated in this record. Where no standard is given, or where we may have misinterpreted the record, NYNEX is directed to provide the appropriate figure in its compliance filing.

- @ The percentage of appointments missed, residence and business combined, for those requiring dispatch. 1996 rate = 19.7% (NYNEX Exhibit LD-4, Attachment A at 1).
- @ The percentage of appointments missed, residence and business combined, for those not requiring dispatch. 1996 rate = 0.35% (NYNEX Exhibit LD-4, Attachment A at 1).
- @ The percentage of complex (over two lines per order) appointments missed. 1996 rate = 8.2% (NYNEX Exhibit LD-2, Attachment II, at 2).
- @ The percentage of appointments completed in one business day for residence customers, for non-dispatch. 1996 rate to be supplied by NYNEX.
- @ The percentage of appointments completed in three business days for residence customers, for dispatch. 1996 rate to be supplied by NYNEX.
- @ The percentage of appointments completed in one business day for business customers, for non-dispatch. 1996 rate to be supplied by NYNEX.
- @ The percentage of appointments completed in three business days for business customers, for dispatch. 1996 rate to be supplied by NYNEX.
- @ The percentage of appointments completed within five days, residence and business

combined, for dispatch. 1996 rate = 62.34%.

@ The percentage of appointments completed within five days, residence and business combined, for non-dispatch. 1996 rate = 88.78%

@ The percentage of customers who report installation troubles within seven days after installation, residence and business combined. 1996 rate to be supplied by NYNEX.

@ The percentage of customers who report installation troubles within thirty days after installation, residence and business combined. 1996 rate = 5.3% (NYNEX Exhibit LD-4, Attachment A at 6).

For maintenance of POTS service, the following measures will be subject to performance payments. As above, next to each measure we have given the performance standard that is indicated in this record. Where no standard is given, or where we may have misinterpreted the record, NYNEX is directed to provide the appropriate figure in its compliance filing.

@ The mean time to repair, residence and business combined. March 1996 through March 1997 rate = 9 hours and 20 minutes.

@ The percentage of missed appointments, residence and business combined. 1996 rate = 25.17% (NYNEX Exhibit LD-4, Attachment B at 6).

@ The percentage of lines out of service restored in eight hours, residence and business combined, for dispatch. 1996 rate = 17.4% (NYNEX Exhibit LD-4, Attachment A at 5).

@ The percentage of lines out of service restored in two hours, residence and business combined, for non-dispatch. 1996 = 14.7% (NYNEX Exhibit LD-4, Attachment A at

5).

@ The percentage of lines out of service restored in 24 hours, residence and business combined. 1996 rate = 57.66% (NYNEX Exhibit LD-4, Attachment A at 5).

@ The percentage of repeat trouble reports within 30 days, residence and business combined. 1996 rate = 12.0% (NYNEX Exhibit LD-4, Attachment A at 6).

For special services and interconnection trunks, performance rates have not been given by NYNEX in most cases. We adopt the following items as being subject to performance payments and direct NYNEX to file performance rates with its compliance filing. For provision of special services:

- @ The percentage of appointments missed, for those requiring dispatch;
- @ The percentage of appointments missed, for those not requiring dispatch;
- @ The percentage of appointments completed in one business day, for non-dispatch;
- @ The percentage of appointments completed in three business days, for dispatch;
- @ The percentage of customers who report installation troubles within seven days after installation; and
- @ The percentage of customers who report installation troubles within thirty days after installation.

For maintenance of special services:

- @ The mean time to repair;
- @ The percentage of missed appointments;
- @ The percentage of lines out of service for over eight hours, for dispatch;
- @ The percentage of lines out of service for over two hours, for non-dispatch;
- @ The percentage of lines cleared within 24 hours; and
- @ The percentage of repeat trouble reports within 30 days.

For provisioning of interconnection trunks:

- @ The percentage of missed appointments;
- @ The percentage of installation troubles within 30 days.

For maintenance of interconnection trunks:

- @ The mean time to repair;
- @ The percentage out of service for over two hours;
- @ The percentage out of service for over four hours;

- @ The percentage out of service for over twelve hours;
- @ The percentage out of service for over 24 hours;
- @ The percentage of repeat trouble reports within 30 days.

4. Payment Schedule

As noted, NYNEX has proposed an increasing payment schedule for increasing levels of deviation from parity. The CLECs generally argue that the proposed amounts are too low. AT&T proposes a credit based on a percentage of the total local services bill to the CLEC. This amount, says AT&T, is designed to provide some compensation for the greater damages it asserts AT&T will suffer because of the loss of customers likely to occur if NYNEX fails to provide parity of service in critical areas. The company suggests that the percentage of total bill credit should vary with the volume of CLEC business. When volume is small, the credit would be a higher percentage, five percent, to provide a strong financial incentive to NYNEX to achieve parity. As CLEC volume increases, the percentage credited would drop, but never below one percent (AT&T Initial Brief at 16-17). TCG proposes a credit equal to a percentage of all monthly recurring charges for the affected service, plus an additional payment if there are more than four consecutive months of substandard performance. Thus, at one month of substandard performance, there would be a credit of 20 percent of all monthly recurring charges for the affected service. At five months of substandard performance, NYNEX would issue the CLEC a credit of 100 percent of all monthly recurring charges for the affected service, plus \$250,000 (TCG Initial Brief at Exhibit 1, at 2). ANTC proposes that NYNEX would rebate to the affected CLEC a pro rata portion of the payments made by that CLEC (ANTC Initial Brief at 16).

NYNEX responds that these arguments do not address the Department's objective in ordering payments and are totally unsupported by the record. It asserts that the purpose of the automatic payments is to complement the Department's ability to enforce the parity standard through a self-enforcement mechanism. It states that the damages proposed by the CLECs conflict with the limitations of liability imposed on regulated services (NYNEX Initial Brief at 26-27).

As we have noted above in our discussion of incident payments, there is no record evidence that quantifies the CLECs' contentions about the damage they will suffer if parity is not achieved, whether generally or with respect to any of the specific measures discussed. As in the case of incident payments, our conclusions herein rely on the principle we have enunciated, that the level of liquidated damages should provide sufficient monetary incentive to NYNEX to achieve service parity.

NYNEX proposes payments of \$15 to \$65 per line for all customers with missed appointments during the performance review period when any performance measure is not met.⁷ Contrary to the assertions of the CLECs, this is not an insignificant amount of money. Depending on the payment imposed and the type of customer, the fee can equal or exceed one month's recurring charge for POTS service. Based on the 1996 rates of missed appointments, a CLEC would receive a rebate for over 20 percent of the number of customers who requested installations. This could generate a significant rebate, and if other parity measures are not met

⁷ In the case of failure to meet the mean-time-to-repair parity measurement, the amount is assessed for each line out of service in excess of 24 hours.

during the same period, the total rebate could grow quite large. (Recall, too, that this payment would be in addition to the incident based payments that would be equal to a portion of the NRC multiplied by the affected number of customers.) Because we have established a quarterly performance review period, there is the potential that NYNEX would have to make such payments four times per year. We conclude that the potential sums involved in such payments provide sufficient incentive to NYNEX to maintain parity, and we therefore accept NYNEX's proposed performance payment schedule.

Because we have required additional measures subject to performance payments beyond those suggested by NYNEX, we will need to develop a performance payment schedule for each of these additional measures. We find that NYNEX's performance payment schedule for the measures it has presented is reasonable, and we adopt that approach for the additional measures we are adopting (Tr. 13, at 88-89). Therefore, we direct the company, in its compliance filing, to offer similar schedules for the additional measures. The per line rebate will range from \$15 to \$65, and NYNEX will provide a reasonable set of "break-points" for the imposition of each level of payment.

A different level of payments, however, is appropriate for failure to meet parity with regard to provisioning and maintaining interconnection trunks. Each such trunk has important commercial value, and we therefore need to provide NYNEX with a greater incentive to meet parity for these measures. We believe that the determination of this amount should bear some rational relationship to the per line payments used by NYNEX in its proposal. One approach might be to multiply the per line rebates proposed by NYNEX for the other measures by the

number of simultaneous messages that can be delivered on a given type of trunk. This amount would then be credited for each trunk that was, for example, out of service for over 24 hours, or for each trunk for which an installation appointment was missed. However, no evidence has been offered on this point, and we are reluctant to establish a dollar figure on the basis of a less than complete record. (For example, the rather linear methodology just outlined does not reflect how traffic theory is used to determine the required number of redundant trunks along a given route, and so it might overstate the appropriate credit.) NYNEX is therefore directed to propose an associated performance payment schedule for interconnection trunks in its compliance filing, along with the associated support for this calculation.

V. ORDER

After due notice, hearing and consideration, it is

ORDERED: That the issues under consideration in this Phase 3-B Order be determined as set forth above; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a NYNEX file a proposal for internal process standards within 21 days of the date of this Order; and it is

FURTHER ORDERED: That New England Telephone and Telegraph Company d/b/a NYNEX make a compliance filing on the issues decided herein within 21 days of the date of this Order.

By Order of the Department,

John B. Howe, Chairman

Janet Gail Besser, Commissioner