Agenda Date: 10/12/01
Agenda Item: 4B

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

TELECOMMUNICATIONS

IN THE MATTER OF THE INVESTIGATION REGARDING LOCAL EXCHANGE COMPETITION FOR TELECOMMUNICATIONS SERVICES	)	ORDER APPROVING INCENTIVE PLAN DOCKET NO. TX95120631
IN THE MATTER OF THE BOARD'S INVESTIGATION REGARDING THE STATUS OF LOCAL EXCHANGE COMPETITION IN NEW JERSEY	)	DOCKET NO. TX98010010

(SERVICE LIST ATTACHED)

BY THE BOARD:

Background

As part of its investigation into the Status of Local Competition, the New Jersey Board of Public Utilities (Board) established service quality measurements and standards with respect to services provided by Verizon New Jersey (VNJ) to other interconnecting telecommunications carriers. The Telecommunications Act of 1996, P.L. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. §§151 et seq.)(Act), and its implementing regulations, require VNJ (formerly known as Bell Atlantic-New Jersey, Inc.) to provide non-discriminatory access to interconnection, unbundled network elements and resale to new marketplace entrants that is at least equal in quality to that provided by the incumbent local exchange carrier (ILEC), in this instance, VNJ, to itself. 47 U.S.C.A. §§251(c)(2)-(4); 47 C.F.R. §§51.201 et seq.; see also First Report and Order, I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, (August 8, 1996) ¶¶ 224, 313, 970. The Federal Communications Commission (FCC) has recognized that such non-discriminatory support for competitive local exchange carriers (CLECs) is critical to the ultimate development of local competition. First Report and Order, ¶315.

Performance measurements and the data produced from these measurements provide evidence from which CLECs and state commissions can determine whether an ILEC is providing CLECs with support that is at least equivalent to the quality of support it provides to its own retail operation in accordance with its statutory obligations. That equivalence means providing operations support systems (OSS) functions[1] in "substantially the same time and

[1] The FCC has defined OSS as the "various systems, databases, and personnel used by incumbent LECs to provide service to their customers, and consistently has found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful

manner" as those used by VNJ for its own customers or, where there is no retail analog, access sufficient to allow an efficient competitor a "meaningful opportunity to compete." Memorandum Opinion and Order, In the Matter of Application of Bell South Corp., et al., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, FCC 98-271 (October 13, 1998), ¶ 87. The appropriate level of performance also has been characterized as "parity." The term "parity" indicates non-discrimination measured by providing the same service as retail analogs, where they exist, or compliance with a benchmark standard where no retail analog is available. In addition, performance measurements and standards are necessary not only to verify that an ILEC currently is not discriminating against CLECs, but also to ensure that an ILEC will remain compliant with the Act in the future.

The Carrier-to-Carrier Guidelines (Guidelines), which were adopted by the Board by Order dated November 9, 2001 in these Dockets, is a detailed document setting forth the specific functions to be performed and measured by VNJ, the specific data to be gathered and the specific standard to be applied for each function and measurement. The Guidelines are organized into 8 general categories intended to cover essential services and related activities that VNJ will be providing to its wholesale telecommunications carrier customers in connection with the leasing of unbundled network elements, and the sale for resale of its telecommunications services. The 8 categories of activity are as follows:

(1) Pre-ordering (PO);
(2) Ordering (OR);
(3) Provisioning (PR);
(4) Maintenance and Repair (MR);
(5) Network Performance (NP);
(6) Billing (BI);
(7) Operator Services and Databases (OD); and
(8) General (GE).

Pre-ordering functions refer generally to customer representatives determining which end user service features are available to the wholesale customer, what new phone numbers to assign the customer and on what day a customer's new line can be installed.

Ordering functions refer generally to sending the wholesale customer order to the location or system at which it is processed.

Provisioning functions refer generally to sending a confirmation message that the order is in the correct format and has been accepted.

Maintenance and Repair systems transmit trouble tickets from the wholesale customer service representative to the technicians who perform the maintenance.

Network Performance functions refer generally to ensuring that blocking does not occur on trunks, thereby preventing calls from being connected, and to collocation performance.

local competition". I/M/O Application of Verizon New England Inc., et.al., for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, FCC 01-130 (April 16, 2001) at ¶43.

> Billing functions refer generally to creating wholesale customer bills of record, tabulation of charges, preparation of bills for transmittal and ensuring that bills are complete, timely and accurate.
>
> Operator Services and Databases refer generally to the timeliness in which calls to operators are answered and the timeliness and accuracy of updating databases used to provide operator services.
>
> General refers to the non-discriminatory treatment of directory listings and activities relating to poles, conduits and rights-of-way.

For each listed activity, the functions to be measured are defined and the data to be collected is identified. Also, a standard for each function is specified either as an "absolute" measure (e.g., the number of seconds to perform an activity, or number of days or hours a function is available) or as "parity." Parity is the most commonly specified standard because, as explained above, it is the essential legal requirement that VNJ must satisfy for many of its obligations under the Telecommunications Act of 1996. Absolute standards are specified in cases where, at this time, Board Staff and AT&T Communications of NJ, L.P (AT&T), Verizon New Jersey Inc. (VNJ), XO Communications f/k/a Nextlink (XO), the Division of the Ratepayer Advocate (RPA or Advocate), Sprint Communications Company (Sprint), Cablevision-Lightpath (CLI), MCI WorldCom (WorldCom) and the New Jersey Cable Telecommunications Association (CTA) (collectively, the Parties) have been unable to identify a comparable function that VNJ performs for itself or because VNJ currently cannot provide data comparing its performance for other carriers to performance for itself.

Many measurements in the Guidelines are broken down into sub-metrics and are further disaggregated by product and geography. For example, Metric PR-4 – Missed Appointments, measures the percentage of orders that are completed after the commitment date. PR-4 contains 15 sub-metrics measuring, for example, the percentage of missed appointments due to VNJ reasons, percentage missed due to customer reasons, percentage missed due to CLEC reasons, etc. In addition, results for the sub-metrics are disaggregated for specific products such as UNE Plain Old Telephone Service (POTS), UNE 2 Wire Digital service, UNE 2 Wire xDSL, etc. This disaggregation results in 362 data sets being collected, calculated and reported for this one measurement.

Before addressing the process and procedures to be implemented herein, the Board notes that, in July 1998, the Board released the results of an investigation into the status of local competition. See Status of Local Telephone Competition: Report and Action Plan, In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX98010010 (July 1998) (hereinafter, Local Competition Report). In the Action Plan portion of the Local Competition Report, the Board directed that a Staff Technical Solutions Facilitation Team (TSFT) meet with industry representatives and other interested parties to informally address, and hopefully resolve, various issues. Local Competition Report at 104. Thereafter, the Board released an Order in which it determined that it has the authority under State law to order self-executing performance measurement remedies, and directed its Staff to propose appropriate performance remedies. See Order, In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services, et al, Docket Nos. TX95120631 et al (October 22, 1998). Following a lengthy series of TSFT meetings aimed at resolving performance standards and measures, on May 25, 2000, the Board adopted New Jersey Carrier-to-Carrier Guidelines, Performance Standards and Reports. See Order, In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications

Services, Docket No. TX98010010 (July 13, 2000). Thereafter, the TSFT continued to meet in order to attempt to reach consensus on self-executing performance remedies for inadequate Verizon performance.

Procedural History

As noted above, at its May 25, 2000 agenda meeting, the Board approved the Guidelines proposed by Staff and directed the TSFT to reconvene immediately to address the issue of self-executing remedies designed to promote compliance with those Guidelines.

On June 12, 2000, the TSFT reconvened with representatives from Staff, AT&T, VNJ, XO, the Advocate, Sprint, CLI, WorldCom and CTA. At this meeting, VNJ submitted, for consideration by the industry, a presentation of its incentive proposal that, according to VNJ, mirrored the incentive plan that is in effect in New York. AT&T also gave an oral presentation of its proposal. At that meeting, Staff created a schedule for proposals, comments and briefs as follows:

June 16, 2000	Formal Proposals Due
June 30, 2000	Comments Due
July 24, 2000	Briefs Due
August 7, 2000	Reply Briefs Due.

On June 16, 2000, AT&T, VNJ, Sprint, CLI and WorldCom filed various forms of incentive proposals for the TSFT's consideration. In accordance with the above referenced schedule, by letters dated June 30, 2000, AT&T, VNJ, CLI, WorldCom, the Advocate and Sprint filed formal comments on the various proposals submitted. On July 24 and August 7, 2000, respectively, the above-mentioned parties filed briefs and reply briefs.

VNJ, by letter dated August 18, 2000, and in response to the comments of the participating parties, filed a revised incentive plan for New Jersey that was different from the original proposal filed on June 16, 2000. Upon review of the various proposals, Staff, utilizing the VNJ August 18, 2000 filing as a foundation, formulated a separate incentive plan (Staff Proposal) that was subsequently proposed to the industry on October 3, 2000. Staff established the following schedule for consideration of the Staff Proposal:

October 10, 2000	Clarification Questions Due
October 17, 2000	Staff Responses to Questions
October 17, 2000	VNJ to Submit List of Metrics to be Excluded
November 2, 2000	Comments on Staff Proposal
November 2, 2000	TSFT Meeting to Discuss Exclusions

Pursuant to the above listed schedule, AT&T and WorldCom requested clarification of various points within the Staff Proposal that Staff responded to on October 17, 2000. By letter dated October 16, 2000, VNJ submitted a comprehensive matrix detailing the metrics previously approved by the Board and a designation of whether each metric should be included or excluded and, if excluded, the reason for this treatment. According to VNJ, the metrics that should be excluded either are duplicative of another metric or do not have a standard associated with the metric.

Parties' Positions

AT&T

AT&T indicated that the Staff Proposal for a VNJ Incentive Plan is a well-intentioned, meaningful effort at correcting the numerous deficiencies contained in the VNJ incentive plan upon which it was based. AT&T stated that the Staff Proposal appropriately requires that it be effective upon Board approval, remedies be paid timely, remedies escalate as the severity of the harm escalates and that remedies apply to incomplete and late filed performance reports. However, AT&T believed that, in other respects, the Staff Proposal does not go far enough to protect competition and prevent backsliding by VNJ. Specifically, as explained in detail below, AT&T contended that the Staff Proposal includes, inter alia. the following: (1) an inappropriate remedies cap; (2) the incorrect balancing of possible errors in establishing the appropriate statistical methodology; (3) the absence of a two-tier structure; (4) the reliance on per unit remedies; and (5) the incorrect method for measuring the severity of missing a performance metric.

A. Use Of Per Unit Remedies

AT&T asserted that the use of per unit remedies, as set forth in the Staff Proposal, is inadequate to protect competition. According to AT&T, with per unit remedies, VNJ's liability to CLECs (and their services) that are either just starting up or have a small customer base is unreasonably reduced because the number of units is small.

B. The Statistical Methodology For Parity Measurements

AT&T stated that the Staff Proposal imposes financial consequences for discriminatory conduct for parity measurements, but only if VNJ's disparate treatment of CLECs is so severe that it is statistically significant at the 95% confidence level. AT&T asserted that, by establishing a confidence level of 95%, Staff has minimized Type I error [2] and therefore, has minimized the possibility of an error being made against VNJ. However, as AT&T explained in its Performance Incentive Plan Proposal at pp. 8-9, the higher the confidence level that VNJ has discriminated, the greater likelihood of a Type II error. AT&T asserted that the failure to properly balance Type I and Type II error is a serious defect in the plan, which could be rectified by incorporating the modifications it proposed.

AT&T agreed with Staff that the modified z-score[3] should be used to determine compliance with parity standards. However, AT&T believed that the Staff Proposal does not use the correct

[2] A Type I error is defined as an erroneous conclusion drawn from ILEC performance data that performance is "bad" when it is actually "good." A Type II error is defined as an erroneous conclusion drawn from ILEC performance data that performance is "good," when it is actually "bad." The former error adversely impacts ILECs and the latter adversely impacts CLECs." Unfortunately, reducing the likelihood of one type of error increases the likelihood of the other type of error occurring. Thus, the best means to create and equitable outcome for all parties is to balance the Type I and Type II error.

critical value as a touchstone upon which to test the modified z-score, and AT&T stated that the appropriate critical value or balance point is, as VNJ also pointed out, a function of the size of the CLEC data set (assuming the VNJ data set is very large) and the extent to which the means for the two data sets differ. According to AT&T, VNJ's plan (upon which the Staff Proposal is modeled) recognizes the existence and importance of Type I errors, but ignores Type II error for various reasons. AT&T asserted that Staff erroneously believes this is uncontested. AT&T asserted that, in response to concerns expressed by regulatory bodies and other interested parties, it has improved upon the statistical methodology previously described in its July 24, 2000 Brief.

C. Increase Consequences as the Confidence in a "Non-Parity" Conclusion Increases

AT&T argued that the Staff Proposal also should be modified to provide for higher amounts of monetary consequences as the confidence in the "non-parity" conclusion, relative to the balancing critical value, increases as measured by the z-score. This is justified because (all other factors held constant) as the difference in the mean performance for the CLEC compared to the ILEC becomes larger, the absolute value of the modified z-statistic also becomes larger for the sample in the time period of interest. Furthermore, if scaled by the balancing critical value, AT&T asserts that the use of the modified z-score as a measure of failure severity is explicitly independent of CLEC and ILEC sample sizes. AT&T asserts that this is statistically proper and thus, it is appropriate that the performance consequence should escalate based upon the calculated value of the modified z-statistic.

D. Benchmark Metrics

AT&T observed that the Staff Proposal does not account for critical differences with respect to missing benchmark metrics. AT&T explained that a benchmark of 99% that is missed by 5% is an extremely severe miss, whereas a 5% miss of a 90% benchmark is less severe, since it applies to a less well-controlled process. AT&T asserted that the Staff's plan makes no such distinction. According to AT&T, a potential impact of this shortcoming is that service to a CLEC could deteriorate to extremely poor levels without any meaningful penalty, while VNJ could continue to provide excellent service to its own retail customers. AT&T suggested that the Staff Proposal be modified to account for these differences.

E. The Use of The Hyper-Geometric Distribution Function For Small Sample Sizes

AT&T noted that, in its proposal, Staff recommended the use of the hyper-geometric distribution function rather than a permutation analysis when the sample size is less than 20, and that Staff relied on collaborative meetings in New York to support this methodology. AT&T does not take issue with the conclusion discussed during the TSFT meetings that there is general agreement that the use of the hyper-geometric distribution for measures expressed as proportions and ratios is equivalent to doing permutation testing. For small sample sizes, the use of the correctly calculated hyper-geometric distribution is appropriate.

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[3] The term "modified z-score" is defined to mean the computation in which the CLEC mean is to be subtracted from the ILEC mean. Thus, a negative z-statistic critical value presumes that worse performance exists when the CLEC mean becomes larger than the ILEC mean. For example, worse performance exists when the order completion interval for the CLEC exceeds that for the ILEC. Thus, a negative z-statistic critical value is appropriate. On the other hand, for a metric like "% completed within x days", worse performance for the CLEC occurs when the metric result is smaller for the CLEC vis-a-vis the ILEC. In this case, a positive z-statistic critical value is appropriate.

AT&T stated that, contrary to the suggestion that this issue has been resolved in New York, the New York collaborative participants, including the New York Public Service Commission staff, continue to work through various issues related to this methodology. AT&T also asserted that an agreement has not been reached that the Microsoft Excel software can perform these calculations correctly and, indeed, the most recent New York draft on this method omits any reference to Excel. According to AT&T, there is evidence that other technical issues remain to be resolved in the New York collaborative with regard to the use of this methodology. AT&T asserted, therefore, that further discussion on this matter is warranted before it is adopted.

F. Small Sample Size For Benchmark Measurements

AT&T averred that, without explanation, the Staff Proposal excuses poor performance where the minimum sample size is less than 20. AT&T argued that this is inconsistent with sound public policy. AT&T asserted that the minimum sample size for benchmark measurements should be one. AT&T stated that there is no basis to make benchmark measurements comparable to parity metrics. AT&T asserted that the importance of modifying Staff's proposed rule is evident. As an example, AT&T stated that in NP-2 (Collocation), a CLEC could submit nine collocation applications in a month to start up service to nine exchanges, serving thousands of end users, and if one application is late, VNJ gains a competitive advantage in that market by delaying a competitor that intends to serve that market. AT&T asserted that similar problems would be created for billing metrics that rely on benchmark standards. AT&T stated, as an example, that timeliness of bill is a benchmark metric, but if the sample size is only one then no remedy may apply.

G. Accounting For Ongoing Poor Performance By VNJ

AT&T noted that the three-tier "severity of the miss" structure proposed by the Staff, consisting of "minor," "moderate" and "major" categories, and the separate escalation of remedies for ongoing discriminatory performance does not provide an adequate incentive to VNJ to correct continuing and worsening poor performance toward CLECs. AT&T noted that, under Staff's proposal, if VNJ's performance is substantially worse then the threshold set for the "major" category, VNJ is not subjected to any increased incentive to fix the problem, no matter how much worse the discrimination gets. AT&T suggested that in situations where VNJ's performance is so poor as to fall into this category, the incentive plan should be structured so that VNJ is not benefited from a delay in fixing the problem while CLECs increasingly are harmed in the marketplace.

AT&T mentioned that there may be situations where VNJ's poor performance continues for months because VNJ benefits from delaying or simply is unresponsive or ineffective in fixing the problem, while its competitors' ability to compete is constrained. AT&T commented that the CLECs also will be compelled to make refunds to customers immediately even though CLECs must wait until they get their credit from VNJ. AT&T argued that Staff's "duration of the miss" proposal appropriately escalates the amount of the remedy as the poor performance persists for consecutive months, but does not fully address the problem.

H. The Amount of The Remedies Cap

AT&T argued that, while the Staff Proposal increases the amount of the remedies cap from VNJ's low proposal, it also contains an absolute cap on the amount of remedies VNJ faces while leaving the harm VNJ can inflict on new entrants uncapped. AT&T asserted that this inequity is bad public policy. AT&T repeated the arguments contained in its June 30, 2000 comments as to why the Board should reject an absolute cap. AT&T asserted that the cap, as proposed by VNJ and Staff, is inconsistent with the FCC's New York 271 decision, and inconsistent with the Board's existing policy and rules regarding service performance or other harmful actions, e.g., slamming. AT&T argued that the Board has never adopted rules that placed a cap on the amount that can be levied against a carrier, regardless of the number of customers impacted.

AT&T asserted that a cap allows VNJ to calculate precisely how much it might pay to continue its monopoly. AT&T argued that adoption of such a cap sets a new and dangerous precedent for the Board. AT&T stated that it is unaware of any circumstances where the Board has capped the total liability of a utility for discriminatory performance or bad acts before the performance or bad act has occurred. Such an approach, AT&T contended, would be inconsistent with the Board's goal of having the service standards satisfied. AT&T asserted that non-discriminatory wholesale service from VNJ will not be accomplished under VNJ's capped plan, as modified by Staff in its plan.

I. A Two-Tier Remedy Structure

AT&T contended that the Staff Proposal is deficient because it only included a single tier remedy structure to address the consequences of non-compliant performance delivered to an individual CLEC. AT&T asserted that a second tier that addresses the consequences for non-compliant performance delivered to the CLEC industry as a whole is necessary. AT&T contended that the $3 million fine levied against Verizon New York following its OSS service crisis last winter was in the nature of such a payment in that the $3 million fine was paid to the US Treasury, not to CLECs. AT&T contended that, while Tier I provides non-exclusive liquidated damages payable to individual CLECs, Tier II remedies, by contrast, would incorporate what can be characterized as regulatory incentives that are necessary when VNJ's performance affects the competitive market -- and consumers -- as a whole.

AT&T argued that the total amount of Tier I payments (which are only an estimate of the CLECs' actual damages) may fail to provide VNJ with sufficient incentives to take the actions necessary to eliminate its monopoly. Rather, AT&T asserted, VNJ may decide to treat such payments as the price for retaining its monopoly and voluntarily incur them as a cost of doing business. AT&T argued the harm that results when VNJ provides discriminatory support to the CLEC industry in the aggregate has a major impact not only on CLECs, but also on the operation of the competitive marketplace in general, directly affecting all New Jersey consumers of telecommunications services. AT&T asserted that it is appropriate to establish incentives to prevent this type of harm from occurring (or continuing), and that both Tier I and Tier II are necessary and complementary elements of an effective system of consequences. Together, AT&T contended, the two tiers would work in tandem to achieve the goals of the 1996 Act.

AT&T argued that the applicability of Tier II consequences should be determined using the aggregated VNJ performance data for all CLECs within a particular sub-measurement result and disaggregation.[4] AT&T contended that, because Tier II consequences reflect harm to the

[4] AT&T recommended that each occurrence should count equally in this calculation. According to AT&T, the results for individual CLECs should not be averaged together; but, rather, the performance for all CLECs should be pooled for each sub-measurement result. AT&T stated that the pooled data effectively creates a "super CLEC" for the purposes of determining Tier II consequences.

public interest in a competitive marketplace, payments under Tier II, unlike Tier I payments, should be paid to a public fund identified by the Board, and used for competitively neutral public purposes.

J. The Billing Credit Mechanism

AT&T continued to oppose the use of billing credits as the means by which VNJ would pay any remedies under an incentive plan. AT&T contended that bill credits are not the most effective means of providing an incentive for non-discriminatory service. According to AT&T, the provision of bill credits instead of cash payments creates a timing difference between the time of the poor performance and the time of the payment of penalties for that performance. AT&T alleged that this difference diminishes the incentive value of the payments. AT&T also asserted that credits are difficult to administer and may require special rules for situations where the credits exceed the charges.

According to AT&T, in order to provide a meaningful incentive to VNJ, the consequences of poor performance should be as immediate as possible. AT&T argued that, if bill credits are to be used, they should be paid within 25 days after the close of the month in which the poor performance took place. AT&T also argued that, at a minimum, CLECs should be entitled to interest, at a business rate, on the credit amounts calculated from the month in which the discriminatory service occurred.

Furthermore, AT&T argued that the billing credit/payment process should be clarified to require that VNJ provide the calculation underlying the remedy calculation. AT&T argued that as part of this calculation, VNJ should be required to include the sub-metrics or metrics missed, the severity of the miss, the duration of the miss, the calculation of the remedy amount for each miss, and the total remedy amount.

K. Ongoing Review Of The Metrics To Respond To Marketplace Realities And Changes In Technology

AT&T opined that the Staff Proposal is deficient because of the lack of any express mechanism to update and revise the monitored measures and remedies. AT&T argued that performance measures are constantly being supplemented, revised and enhanced by state regulatory bodies because the performance measures reflect a constantly changing industry. AT&T asserted, for example, that metrics need to be developed to measure VNJ's performance in the processes and procedures that must be established for line sharing. AT&T suggested that where the services that the performance metrics measures are constantly evolving, so must the performance metrics and remedies themselves.

L. Reporting Remedies

AT&T asserted that the Staff Proposal properly contains financial consequences for inaccurate reporting, but requested that the proposal be clarified to specify that remedies apply when VNJ has not reported for all entities and for all metrics and sub-metrics. AT&T argued that there should be an affirmative obligation for VNJ to disclose errors on any reports. AT&T suggested that, in light of VNJ's horrendous reporting efforts over the past months, it is reasonable to treat the failure to report as a failure of the metric. AT&T stated that the incentive plan should also define what constitutes late reports and recommended that the reports delivered after 5:00 pm on the due date be considered late.

M. Separate And Independent Change Control Assurance Plan Remedies

AT&T explained that a separate and independent Change Control Assurance Plan, with its own remedies, was adopted in New York and Massachusetts and also is appropriate in New Jersey. AT&T argued that VNJ's adherence to change control processes and rules is essential to the emergence of, and critical to the continuation of, a competitive local market. AT&T expressed its view that, when VNJ fails to follow change control processes, VNJ is not harmed, but CLECs may be unable to process orders, including repairs, or serve customers in the manner that customers expect. AT&T contended that VNJ's failure to follow change control processes increases CLECs' costs because CLECs must devote additional resources to play "catch-up" with changes that VNJ has implemented. Under VNJ's Incentive Plan as modified by Staff, AT&T alleged VNJ would face no penalties if it did not follow the proper change control procedures.

Cablevision-Lightpath-NJ, Inc.

CLI participated in the TSFT concerning the Guidelines and commented that Staff's efforts towards formulating a reasonable remedies and incentive plan have been substantial. CLI noted that Staff's Proposal is a significant improvement upon the deficient proposals of VNJ. Although CLI generally supports Staff's Proposal, CLI asserted that certain elements of the Proposal need to be clarified or reformulated to ensure that VNJ will have an incentive to provide adequate levels of service to CLECs. CLI suggested that: (1) the dollar values of Staff's "per unit" remedies for "minor," "moderate" and "major" performance failures, while an improvement over VNJ's Revised Proposal, are still too low to ensure that VNJ will comply with the Board's performance standards; (2) in light of the large number of performance metrics that have small sample sizes, VNJ performance failures on absolute standards should not be excused under the Staff Proposal for sample sizes of ten (10) or less; (3) remedies and incentive provisions in interconnection agreements are necessary to accommodate CLEC-specific needs, and are thus a necessary component of a complete remedies and incentive plan; and (4) the New Jersey remedies and incentive plan should become effective upon the Board's adoption of the plan. CLI argued that the plan should not be contingent on VNJ's possible application and authorization to provide long distance services in New Jersey.

A. The Level of Per Unit Remedies for Minor, Moderate and Major Performance Failures

CLI argued that per unit remedy payments for minor, moderate and major performance failures under the Staff Proposal are too low to ensure that VNJ will have the incentive to comply with the Board's performance standards. CLI noted that the Staff Proposal provides for per unit remedy payments of only $25, $50 and $75 for minor, moderate and major performance failures, respectively. CLI stated that higher remedy payments are necessary to ensure that VNJ has the incentive to provide adequate performance. CLI explained that the Staff Proposal's per unit remedy payments are substantially less than the amounts voluntarily agreed to by Verizon in New York. CLI pointed out that the Board adopted the performance standards and remedies contained in the Lightpath-Verizon New York Agreement on an interim basis as the governing performance standards and remedies in CLI's interconnection agreement with VNJ.[5]

[5]Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996, dated October 13, 1998, by and between Bell Atlantic - New Jersey, Inc. and Cablevision-Lightpath - NJ, Inc.; Order Approving Interconnection Agreement, Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Bell Atlantic, Docket No. TO98060343, (Sept. 17, 1998).

CLI asserted that, while the Staff Proposal provides for three (3) degrees of performance failure severity, i.e., minor, moderate, and major, the CLI-Verizon New York Agreement, on the other hand, provides for eleven (11) degrees of performance failures. CLI contended that applying three (3) degrees of performance failures to the range of remedy payments under the NJ Agreement and the CLI-Verizon New York Agreement would yield the following per unit remedy payments:

Minor	$300
Moderate	$600
Major	$900.

Accordingly, CLI suggested that the Proposal be modified to provide for per unit remedy payments of $300 for minor failures, $600 for moderate failures, and $900 for major failures. CLI stated that experience has shown that these voluntarily negotiated amounts are reasonable and appropriate.

B. Performance Failures on Absolute Metrics For Sample Sizes of Ten (10) or Less

CLI stated that the Staff Proposal for performance metrics with absolute standards, if a sample size is less than twenty (20), is simply a modification of VNJ's Revised Proposal.[6] CLI asserted that excusing performance failures on absolute metrics in this fashion significantly dilutes the absolute performance standards adopted by the Board, particularly with respect to sample sizes of ten (10) or less. CLI agreed with AT&T that as many as 60-70% of the measured sub-metrics involve data sets of fewer than ten (10).[7] CLI pointed out that many of the sub-metrics have an absolute performance standard of 95%, and under the Staff Proposal, VNJ's performance could drop far below 95% without any remedy.

CLI recommended that Staff's Proposal should be modified to clarify that performance failures by VNJ on absolute performance benchmarks will not be excused when there are data samples of ten (10) or less. For sample sizes of eleven (11) through nineteen (19), CLI stated that one (1) miss could be excused; two (2) misses could be considered "moderate;" and three or more (3+) misses could be considered "major."

C. The Board's Generic Incentive Plan and Incentive Provisions in Interconnection Agreements

CLI contended the Board's generic performance standards and remedies should neither replace performance standards and remedies contained in existing interconnection agreements nor preclude carriers from seeking carrier-specific standards and remedies as part of their interconnection agreements. CLI argued that facilities-based CLECs may need to incorporate limited sets of customized performance standards and remedies into their interconnection agreements with VNJ to meet their specific needs. CLI explained that these agreements might include incident-based damages that eliminate the need for complicated, resource-intensive

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[6] See VNJ Revised Proposal at 7 ("[i]f the CLEC sample size for a measure is fewer than 10 for a given month, performance will not be evaluated for that month. If the CLEC sample size for a measure is 10 or more, but less than 20, fewer than 2 misses will not generate any bill credits, 2 misses will be considered a miss at a 'Moderate' level, and 3 or more misses will be considered a miss at the 'Major' level").

[7] AT&T Proposal at 10.

performance tracking and statistical analyses. CLI argued that the Board cannot, in a generic proceeding such as this, anticipate all of the carrier-specific issues that frequently arise in connection with carrier-specific interconnection negotiations. CLI noted that the FCC has observed that these carrier-specific arrangements are important to the continuing development of competition in New Jersey.[8]

D. The New Jersey Remedies and Incentive Plan Should Take Effect Immediately

CLI asserted that the New Jersey remedies and incentive plan should take effect immediately upon the Board's adoption of the plan. CLI disputed VNJ's proposal that the remedies and incentive plan should not take effect until "VNJ's entry into the long distance market in New Jersey."[9] CLI contended all other parties to this proceeding agree that the remedies and incentive plan adopted by the Board should take effect immediately, irrespective of VNJ's authority to provide long distance services in New Jersey.[10] CLI argued that VNJ should prove its compliance with rigorous performance standards and accompanying remedies before consideration is given to any application by VNJ to provide in-region, interLATA service in New Jersey. CLI claimed that local competition in New Jersey depends on CLEC confidence that they will receive good performance from VNJ and be compensated fairly if VNJ provides sub-standard performance.

MCIWorldCom

WorldCom commented that an effective remedies proposal must have consequences that are severe enough to deter misconduct rather than merely being a cost of doing business. WorldCom suggested that only through such stringent remedies would VNJ have adequate incentives to modify its behavior and strive toward compliance. WorldCom indicated that, while Staff's Proposal appears to be a step in the right direction, it is incomplete and therefore difficult to comment on at this time. WorldCom noted that it has yet to be determined which measures from the New Jersey Carrier-to-Carrier Guidelines will be included in the incentive plan. WorldCom also expressed its view that the Staff Proposal does not explicitly state for each measure whether incentive credits will be computed on a "per unit" basis or a "per measure" basis or both. Without these critical details, WorldCom insisted, it is impossible to comment on the Staff Proposal. WorldCom reserved the right to file additional comments on the Staff Proposal once these details are determined.

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[8]See Memorandum Opinion and Order, In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York, CC Docket No. 99-295, FCC 99-404, 15 FCC Rcd 3953, at ¶ 430 (1999) ("NY 271 Order") (recognizing that interconnection agreements make it unnecessary for "state mechanisms alone [to] provide full protection against potential anti-competitive behavior by the incumbent" and recognizing that "Bell Atlantic may be subject to payment of liquidated damages through many of its individual interconnection agreements with competitive carriers").

[9]VNJ Revised Proposal at 2.

[10]See, e.g., AT&T Comments at 28-29 (the 1996 Act does not postpone VNJ's obligation to provide non-discriminatory service under the Act until VNJ seeks and obtains Section 271 authority); WorldCom Comments at 10-11 (adequate remedies are needed to open up local markets before Section 271 authorization can be granted); Ratepayer Advocate Comments at 2-3 (the 1996 Act requires that VNJ provide non-discriminatory service as a pre-condition to Section 271 approval); Sprint Comments at 5 (VNJ should not be granted Section 271 relief until performance reporting demonstrates sustained, complaint performance).

WorldCom expressed its concern with the structure and incentive levels proposed by Staff. While the Staff Proposal is a significant fixed cap of $350 million, WorldCom argued that there should be no caps adopted by the Board in its Incentive Plan, and argued that the per occurrence remedies in the Staff Proposal are extremely low.

WorldCom requested that the Board allow per measure incentives in addition to per occurrence incentives in situations of sustained and/or severe poor performance by VNJ. WorldCom stated its belief that, even if set at levels significantly higher then the New Jersey proposal, per occurrence remedy plans alone are inadequate to deter poor performance by the incumbent. WorldCom argued that per occurrence plans may work when robust competition has already developed and few new products are coming to market.

WorldCom expressed support for a combined per occurrence and per measure approach for opening new markets to competition and ensuring that CLECs' new market entry activities or launches of new service offerings are not crushed at introduction with no substantial financial risk to VNJ. WorldCom further asserted that per occurrence remedies may be reasonable for first time, low level misses, but once misses extend into the second, third or fourth month, then per measure remedies should be invoked in addition to per occurrence incentives.

WorldCom also requested that the Board consider requiring VNJ, once it has missed a standard and is paying a higher incentive due to the miss, to show compliance with the standard for three consecutive months before it is allowed to return to normal incentive levels. In addition, WorldCom argued that, if non-compliance with the same standard occurs again, the Board should require VNJ to illustrate compliance with the standard for six consecutive months before a return to first month incentive levels can occur. WorldCom asserted that these requirements will provide VNJ with the incentive to remedy existing performance problems.

WorldCom also proposed that, since the reliable operation of CLEC interfaces with VNJ's Operation Support Systems is crucial to the development of competition, the Board should adopt the NY Change Control Assurance Plan. WorldCom also contended the Board should adopt the Flow Through Special Measures provision created in New York, in order to provide a significant incentive to outweigh the costs and competitive advantages of not fixing the underlying operational problems. Finally, according to WorldCom, the Board should also reserve 5% of the proposed annual cap for additional special measures incentives to address weak areas in VNJ performance highlighted by the Third Party OSS test, which is ongoing in New Jersey. WorldCom expressed its belief that all of these adjustments to the Staff Proposal would render the incentive plan more effective and help to ensure reliable OSS, which is critical to the development of effective and sustainable competition in the local exchange market.

Finally, WorldCom asserted that the Staff Proposal should be clarified to provide that the incentive plan takes effect as soon as the Board adopts it. WorldCom claimed that the Staff Proposal should be modified to reflect that the incentive plan will not supersede remedies available in interconnection agreements that relate to different products and activities than those covered by the metrics contained in the incentive plan. WorldCom argued that parties should be allowed to negotiate additional measures and remedies in their contracts, but contract inclusion should not be necessary to gain coverage and receive performance reporting under the incentive plan. WorldCom asserted that the Board should review the incentive plan and the measures in a formal proceeding annually, and should retain control in order to increase remedies, if necessary, to gain compliance in the interim in problematic performance areas.

Verizon New Jersey Inc.

VNJ noted that the Staff Proposal provides for incentive payments that grossly exceed amounts that the FCC has determined are sufficient to protect competition. VNJ noted that to avoid huge payments under the Staff Proposal, which are further inflated by the use of a flawed statistical methodology, VNJ would be required to provide service to CLECs that is substantially better than the service that it provides to its retail customers. VNJ argued that this is inconsistent with the Act. In addition, VNJ contended that these excessive payments are in the nature of fines or damages that are not within the Board's authority to order.

VNJ claimed the excessive payments provided by the Staff Proposal create perverse incentives that are contrary to the public interest. VNJ asserted that under the Staff Proposal it would be required to over-invest in its wholesale services by "gold-plating" its wholesale systems to avoid harsh payments. VNJ contended that the prospect of large payments would create incentives for CLECs to enter the market to gain payments, or to engage in conduct designed to cause VNJ to fail to meet performance standards, rather than to provide consumers with a competitive alternative for local exchange service.

According to VNJ, the Staff Proposal is also flawed because it would require payments to an unidentified "state fund" for performance reports that are late or incomplete, and for failures to provide CLECs with access to "detailed underlying data." According to VNJ, no statutory authority is given for these payments, and the amounts of the payments far exceed fines established by the legislature for failure to comply with Board requirements. VNJ also stated that the Staff Proposal fails to define the underlying data to which VNJ must provide access.

VNJ also criticized the Staff Proposal because it contains a vague and arbitrary requirement that VNJ share the expense of annual audits that may be requested by "authorized providers", does not state the reasons for which an audit may be requested, and does not relieve VNJ of sharing the costs of an audit that does not result in revised performance reports and additional incentive payments.

A. The Amount of Incentive Payments Compared to The Amounts That The FCC Has Determined

VNJ stated that the cap of $350 million in penalties provided by the Staff Proposal is grossly excessive. In contrast to the $350 million in the Staff Proposal, VNJ asserted that the $55.7 million cap in its proposal was the same amount approved by the FCC as "sufficient to discourage the merged firm of Bell Atlantic and GTE from providing substandard service to competitors, and should be adopted.[11]

Moreover, VNJ contended that the New Jersey cap of $350 million would be more than two and one-half times the amount at risk under performance plans approved by the FCC for New York and Texas. VNJ noted that the FCC commended the New York Performance Assurance Plan (the New York Plan) because it established "potential liability that provides a meaningful and

[11] See Memorandum Opinion and Order, 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, FCC 00-221 (June 16, 2000), n. 630 and Attachment A-6.

significant incentive to comply with the designated performance standards."[12] According to VNJ, the FCC concluded that the amount at risk under the New York Plan represented 36% of the former Bell Atlantic New York's net revenue derived from local exchange service, as measured by Automated Reporting Management Information System reports, and that the amount at risk was substantial and appropriate to deter the company from providing discriminatory service. VNJ explained that the corresponding calculation for New Jersey would result in a cap of $134 million, less than one-half of the $350 million proposed by Staff. VNJ asserted that the amount of the Staff Proposal cap is therefore, unnecessary to protect competition.

B. The Legality of The Cap And Monthly Payments In The Staff Proposal

Application of the Staff Proposal, VNJ argued, would result in arbitrary and excessive payments in violation of both federal and State law. VNJ explained that this is a direct result of the large cap and excessive monthly payments for "minor, "moderate" and "major" deviations from performance standards, which include an exorbitant multiplier for continuing sub-standard service. In addition, VNJ claimed these excessive payments exacerbate the problem of Type I error that would require VNJ to make incentive payments even if it provides wholesale service at parity with retail.[13] VNJ insisted that, as a result, to avoid excessive payments under the Staff Proposal, VNJ would be required to provide wholesale service that is better than the service it provides to its retail customers. The Staff Proposal is therefore, in VNJ's opinion, inconsistent with the "plain meaning" of the Act.

VNJ asserted that the amounts of the cap and monthly payments in the Staff Proposal are arbitrary and unlawful under State law. VNJ argued that the Board has limited legal authority to order incentive payments, and there is no authority to award damages in the Board's enabling legislation or implementing regulations. VNJ noted that both the Board and the courts have held that the Board lacks authority to award damages.[14] VNJ also argued that the Board's statutory authority to impose fines is limited to the authority granted by the Legislature. VNJ contended that, although the Board has concluded "it has authority under State law to order self-executing performance measurement remedies,"[15] VNJ explained that the excessive payments that would be required under the Staff Proposal constitute damages and penalties, which are beyond the authority of the Board to order.

C. Incentives Created by the Cap And Monthly Payments In The Staff Proposal

VNJ argued that the purpose of a performance incentive plan is neither to punish VNJ nor to provide damage awards to CLECs, but rather to create incentives for VNJ to meet the performance standards stated in the Guidelines. VNJ argued that setting payments at levels

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[12] See NY 271 Order at ¶ 433.

[13] VNJ argued that, because the Staff Proposal uses a confidence level of 95%, there is a 5% probability of a determination that VNJ has failed to provide service at parity when, in fact, the parity standard has been met. See VNJ Brief at 10-11.

[14] In support of this argument, VNJ cited to the following: Muise v. GPU, Inc., 322 N.J. Super. 140 (App. Div. 2000); Slowinski v. Public Service Electric and Gas Co., OAL Docket No. PUC 305-92, Docket No. EC91111716U (May 21, 1993).

[15] See Order, dated October 22, 1998, in Docket Nos. TX95120631, TO96070519, TO98010035, and TO98060343, page 1.

that are higher than necessary will result in perverse incentives that will thwart competition and ultimately harm consumers because such measures would lead eventually to higher costs without commensurate benefit to customers.

In addition to creating perverse incentives for wasteful over-investment, VNJ asserted that excessive penalties create opportunities for inefficient behavior and “gaming” by competitors. VNJ argued that a CLEC that is otherwise unable to compete could enter the market solely because it expects to be subsidized by excessively high performance incentive payments, or could deliberately request services in a particular way, or services that are particularly difficult to provide, in order to collect incentive payments. VNJ stated that this has already become a problem in New York.

D. The Impact of The Staff Proposal on VNJ’s Wholesale Systems

VNJ argued that the Staff Proposal creates perverse incentives for behavior that is contrary to the public interest and the development of local competition. VNJ contended that the Staff Proposal would force it to shift a disproportionate share of its personnel and resources to its wholesale systems in an effort to avoid incentive payments, and would result in wholesale service that is better than -- rather than at parity with -- its retail service. VNJ argued that such “gold-plating” is economically inefficient, and therefore contrary to the public interest.

VNJ also asserted that under the Staff Proposal, CLECs will have less incentive to work with VNJ to prevent operational problems, and the prospect of large payments will discourage the prompt reporting of troubles. Moreover, VNJ claimed that the windfall provided by the Staff Proposal discouraged CLECs from investing in their own systems and facilities, and therefore, directly conflicted with the Board’s objectives to encourage the development of local competition and protect the public interest.

E. The Staff Proposal’s Statistical Methodology

VNJ stated its belief that the Staff Proposal would result in payments even if wholesale service were provided at parity with retail service. VNJ contended that the amount of Type I error payments would be inflated by the excessive per unit and per measure incentive amounts, and the high multiplier applied for continuing sub-standard performance. VNJ argued that Type I errors would be further increased by the failure of the Staff Proposal to include the “K” Factor offset feature of the VNJ Plan, and to apply permutation testing to sample sizes of more than 20 but less than 30.

VNJ stated that its Plan provided a “K” Factor offset to address the problem of the high number of Type I errors. VNJ explained that for each month, the number of parity metrics “missed” would be calculated for each CLEC. VNJ stated that the “missed” metrics would be listed based on the magnitude of the miss, and a pre-determined number (K) of metrics with the smallest deviations would be excluded from the calculation of incentive payments. According to VNJ, “K” thus indicates the number of “allowable misses” to offset the Type I error inherent in the statistical testing process, and is determined based upon calculations of the number of Type I errors that can be expected even if VNJ is providing service at parity, and varies with the number of metrics for which there is measured performance for each CLEC.
VNJ argued that, while the “K” Factor offset does not entirely eliminate Type I error, it would reduce the Type I error payments that would result under the Staff Proposal.

VNJ also suggested that Type I error payments would be further reduced -- and greater accuracy in the calculation of incentive payments would be achieved -- by modifying the Staff Proposal so that the hyper-geometric formula is used to determine whether parity has been met for parity metrics with sample sizes less than 30. VNJ explained that the modified z test, and the z-score that is its output, are statistical tools used to determine whether an observed difference between two sets of data is the result of chance. VNJ stated its belief that it would improve accuracy of incentive payment calculations to apply the hyper-geometric formula to sample sizes less than 30, rather than 20 as provided by the Staff Proposal.

F. The Staff Proposal's Requirement Of Payments To A "State Fund"

As described by VNJ, the Staff Proposal provides for payments to an unspecified "state fund" in the amounts of $5,000 per day for performance reports not available by the due date; $1,000 per day for reports that are incomplete or are revised after the due date; and $1,000 per day "[i]f a CLEC cannot access its detailed data underlying VNJ's performance reports due to failures under the control of VNJ." VNJ claimed that these provisions are inconsistent with State law, and that the provision regarding "underlying data" is so vague that it is not clear what obligations Staff seeks to impose on VNJ.

VNJ argued that the Staff Proposal should be modified to eliminate these payments. Citing N.J.S.A. 48:2-42, VNJ contended that the Staff Proposal does not specify what "state fund" these payments would be made to, and the payments are clearly in the nature of fines, which the Board does not have the authority to impose. According to VNJ, the Board's authority to impose fines is limited to the imposition of penalties of $100 per day for the failure to comply with a Board order.

In addition, VNJ asserted these provisions are fatally flawed because they fail to define VNJ's obligations regarding what underlying data must be provided. VNJ argued that, under the Staff Proposal, severe financial penalties would be imposed if VNJ failed to guess what "underlying data" is required.

G. The Staff Proposal's Audit Requirements

The Staff Proposal would require VNJ to pay for a third-party audit of the incentive plan on the first year anniversary of the incentive plan, and annual audits thereafter upon request by any authorized provider, with associated expenses to be shared among the participants to the audit. VNJ suggested that the Staff Proposal be modified so that the first audit is required to begin one year after the effective date of the incentive plan adopted by the Board. According to VNJ the first audit will be more valuable if it is based on a full year of experience under the plan. VNJ also recommended that the audit provision be modified to specify that only CLECs receiving performance reports may request an audit. VNJ also suggested that the parties must work in good faith with Staff to develop reasonable limitations on the scope of any audit and that VNJ should not be required to share in the cost of an audit that does not result in revisions to performance reports that require VNJ to make additional incentive payments. VNJ stated that these modifications are necessary to clarify the meaning of the audit provision, and to prevent abuses of the audit process.

Motion

By letter dated August 31, 2001, AT&T filed a letter motion requesting that the Board adopt a performance remedies plan that is based on the existing New York Plan in order to expedite the establishment of a performance incentive plan for Verizon New Jersey. Also, AT&T requested the Board direct the TSFT to reconvene the collaborative workshops in order to update and refresh the record, and to consider customizing and scaling the New York Plan for use in New Jersey. AT&T argued that the New York Plan specifically addressed flow through measures for unbundled network elements and there is data available to determine its effectiveness. According to AT&T, similarly based on its experience with local competition the New York Public Service Commission improved the financial component of the New York Plan's remedies and incentives, although the dollar figures there remain too low. AT&T also recommended the New York Plan because it established an improved audit trail mechanism by requiring Verizon to identify both the payments it makes to individual CLECs and the aggregate remedies payments that it makes to all CLECs for each metric that it fails.

By letter dated September 10, 2001, VNJ responded to the letter motion of AT&T. VNJ strongly opposed AT&T's motion to adopt a wholesale performance remedies plan that is based on the existing New York Plan and to reconvene the collaborative workshops to consider "customizing and scaling the New York Plan for use in New Jersey." VNJ noted that the Staff Proposal is the culmination of months of work by Staff and the parties, beginning as soon as the Board adopted performance measurements and standards in May 2000. According to VNJ, when it originally proposed a plan based on the New York Plan, the proposal met with vigorous opposition from both the parties and Staff, and was criticized as too complex, and difficult to administer. VNJ noted that based on an extensive record, Staff developed its proposal as a "compromise proposal[16]," to which VNJ objected for various reasons, including the excessive payments it provides for, and filed comments proposing certain modifications.

VNJ argued that with the modifications proposed by VNJ, the Staff Proposal is superior to the New York Plan and effectively addresses concerns expressed by Staff and the parties in the TSFT process. VNJ asserted, that the Staff Proposal is far easier to understand and simpler to administer than is the New York Plan. VNJ contended that the New York Plan requires the determination and analysis of several different segments – "modes of entry," "critical measures," and "special provisions," and that administering the New York Plan requires an examination of the "caps within caps" for different segments, and includes a complicated scoring method. VNJ argued that the Staff Proposal provides greater accessibility and more obvious predictability, and will therefore require less intervention from the Board and provide clearer guidance to VNJ in improving its service.

VNJ also argued that the Staff Proposal reflects the actual performance provided to individual CLECs, and is thus fairer to all market participants, whereas, with the New York Plan, a set amount of dollars is available for remedy payments, and these dollars are then parsed out to CLECs based on market share. VNJ claimed that by looking only at market share, the New York Plan ensures that larger CLECs, such as AT&T, receive the largest share of the payments, regardless of whether or not they received the greatest harm captured by a particular measurement "miss."

VNJ also asserted that the Staff Proposal is more sensitive to changes in performance than is the New York Plan. VNJ noted that the Staff Proposal determines incentive payments by the amount by which the standard is missed, the volume of activity, and the number of consecutive months that VNJ does not satisfy a particular metric. VNJ asserted that, as opposed to the New

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[16] Letter to All Interested Parties, from Anthony Centrella, Director, Division of Telecommunications, dated October 3, 2000.

York Plan, the Staff Proposal places more dollars at risk precisely where each CLEC has the greatest volume of activity and where service has not met the established standard.

VNJ also argued that the Staff Proposal is more accurate and statistically valid in evaluating performance than the New York Plan. VNJ commented that, for parity metrics, the New York Plan requires that incentive payments be based on the z-statistic or the confidence of the "miss", while the Staff Proposal bases the payment on the actual difference between the performance standard and the level of performance provided by VNJ to the CLEC. VNJ applauded the Staff Proposal for its use of actual performance data to determine the severity of a "miss."

VNJ argued that the Staff Proposal offers major improvements over the New York Plan, and it would be pointless and wasteful of Staff and the parties in this proceeding to re-initiate the collaborative process for the purpose of considering, for a second time, whether and how the New York Plan should be applied in New Jersey.

By letter dated September 20, 2001, WorldCom agreed with AT&T's request for an updated remedies plan, however, WorldCom opposed the re-opening of this docket. WorldCom asserted that the adoption and implementation of a remedies plan continues to be one of the critical steps that the Board must take in order to open the local exchange market in New Jersey to competition. WorldCom argued that the record already compiled in this proceeding is sufficient to address the concerns raised by AT&T, and reopening this proceeding would further delay the Board's decision. WorldCom urged the Board to issue a remedies plan decision as soon as possible.

Discussion and Findings

Based on the comments and arguments expressed by the parties, and the Board's review of Staff's Proposal and recommendations, the Board DENIES AT&T's motion and APPROVES the Incentive Plan proposed by Staff, with certain modifications and clarifications. As an initial matter, however, the Board will address VNJ's argument that the Board exceeds its authority in adopting this incentive plan. The Board does not consider the approval of this incentive plan to be the creation or imposition of penalties on VNJ that exceed those provided for by N.J.S.A. 48:2-42 for violation of a Board order. The Board notes that this plan chiefly provides for payments to VNJ's wholesale customers. It is a means of assuring that VNJ provides services to its wholesale end user customers in a non-discriminatory manner as required by the Telecommunications Act of 1996. State law also requires such behavior by VNJ. In N.J.S.A. 48:2-21.16a(2), the Legislature declared that it is the policy of the State of New Jersey to "[e]nsure that customers pay only reasonable charges for local exchange telecommunications services, which shall be available on a non-discriminatory basis." On the wholesale level, CLEC customers of VNJ are also entitled to pay only reasonable charges for VNJ's services to them. The incentive plan is chiefly a mechanism to reimburse CLECs, through bill credits, for inadequate VNJ service, thus assuring that VNJ does not receive payment from CLECs for services not properly rendered. In effect, the incentive plan helps to ensure that VNJ's wholesale customers pay only reasonable charges.

Moreover, it is unquestioned that the Board has the authority to require public utilities to provide safe, adequate and proper service. N.J.S.A. 48:2-23. The Board may also require a public utility to maintain its property and equipment in such condition as to enable it to provide such service. Ibid. The incentive plan is an important means by which this Board can assure VNJ's competitors that each will receive the level of wholesale service necessary for them to meet the retail service needs of their end user customers.

It is also recognized that the Board was intended by the Legislature to have the widest range of regulatory powers over public utilities, and that the provisions of Title 48 are to be construed liberally, and the powers of the Board read broadly. Bergen County v. Dept. of Public Utilities, 117 N.J. Super. 304, 312 (App. Div. 1971).

Finally, the Board notes that VNJ itself, in another context, has voiced approval of enforcement mechanisms used to ensure compliance with established performance standards. In VNJ's application to the Board for findings that it meets the requirements of Section 271 of the Act, VNJ has expressly stated that it "supports the adoption of the Staff Proposal … with the modifications described in comments" filed by VNJ[17]. VNJ's voluntary participation in the lengthy TSFT process that eventually led to the adoption of the incentive plan, as well as its express support for the Staff Proposal, is wholly inconsistent with its arguments addressing the Board's authority. In the more than two years since the Board first determined that it had authority under State law to order self-executing performance measurement remedies by its Order dated October 22, 1998 in I/M/O the Investigation Regarding Local Exchange Competition for Telecommunications Services, et al., Docket Nos. TX95120631, TO96070519, TO98010035, and TO98060343, VNJ has not appealed the October 22, 1998 Order, or in any material way challenged the Board's authority to adopt an incentive plan. Rather, to its credit, VNJ has cooperatively participated with the Board and the telecommunications industry in the development of the incentive plan. At this juncture, there can be no argument that the incentive plan is approved pursuant to the legitimate authority of the Board.

With regard to AT&T's motion that the Board adopt an incentive plan based upon the New York Plan, the Board notes that the Incentive Plan based upon the Staff Proposal is a comprehensive plan that establishes appropriate financial incentives for VNJ, an audit mechanism for the Board and the CLEC community to avail itself of, and encompasses an extensive number of metrics that, for the most part, have been agreed to by the interested parties'. The Incentive Plan, as adopted herein, is fully worthy of Board adoption. Moreover, were the Board to now consider a plan based upon the New York Plan, the efforts of Staff and the parties to create the plan the Board now adopts would have been wasted. Accordingly, the Board DENIES the motion by AT&T.

I. Remedies Cap

With regard to arguments about a cap on VNJ's exposure in the incentive plan, the Board believes that, in order to facilitate widespread competition in the telecommunications industry within the State of New Jersey, all new entrants require a certain level of assurance regarding the necessary performance by their wholesale supplier and direct competitor, VNJ. The Board is convinced that by instituting a cap, such as the $350 million first proposed by Staff, on any remedies assessed to VNJ, new entrants will not receive the assurance necessary to convince them that entry into the New Jersey marketplace, and the establishment of customer confidence in the provision of service by the new entrants, will not be impeded by VNJ's performances on the wholesale level. The Board agrees with AT&T that the potential harm to CLECs, that could be caused by inferior VNJ wholesale services is unlimited. Performance by VNJ that disrupts

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[17] See I/M/O the Consultative Report on the Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-Region, InterLATA Service in New Jersey, Docket No. TO01090541, Exhibit VNJ-1, Measurements Declaration, at 4-5.

the relationship between an end user and its CLEC provider can, as much as poor performance by a CLEC itself, lead to customer loss, impairment of CLEC reputation, and, ultimately, to the withdrawal of the CLEC from the marketplace, and could have a chilling effect on prospective new entrants. Having carefully considered the matter, the Board strongly believes that only an incentive plan without a cap is a sufficiently powerful incentive to foster competition in New Jersey. Therefore, the Board FINDS that it is in the public interest to have an incentive plan that has no absolute cap. Nevertheless, the Board, in order to protect VNJ's interest in not paying excessive penalties, agrees that it is appropriate to establish a mechanism whereby VNJ may, at its discretion, request that the Board commence a proceeding to show why VNJ should not have to provide credits in excess of an aggregate of $25.0 million for any single month.

II. Frequency/Severity

Within the Staff Proposal, the issues of severity and frequency were addressed by having escalating amounts for the severity of a performance failure and a multiplier for failures that persist for consecutive reporting periods. The Staff Proposal established categories for the severity of a miss as "minor", "moderate" or "major" based on the calculation of each specific metric. For these violations, the Staff Proposal established incentive amounts of $25, $50 and $75 respectively for the severity of the miss. In addition, to address the frequency of persistent violations, the Staff Proposal incorporated a multiplier effect for consecutive months of poor performance. Specifically, for persistent violations lasting two (2) consecutive months, three (3) consecutive months and four (4) or more consecutive months, the multiplier is 2x, 3x or 5x, respectively.

Commenters suggested that the level of incentive for the severity of a performance failure was inadequate, and was set at a level that VNJ could absorb as a cost of doing business, thereby, stifling competition. The Board is persuaded that incentive amounts in the Staff Proposal are inadequate. The Board particularly notes that in New York, Verizon voluntarily agreed to per unit remedies of $300, $600 and $900, depending on the severity of the miss, amounts more than 10 times the Staff-proposed amounts. Therefore, the Board FINDS that severity levels of $35, $75 and $150 for minor, moderate and major performance violations, respectively, are the appropriate severity levels to be included in this incentive plan, and they are HEREBY ADOPTED. Although the Board believes that the proposed frequency multipliers are adequate for consecutive reporting period failures, VNJ shall be required, in addition, to calculate and remit any remedy at the 3x multiple where performance for any three months in a six-month period is sub-standard. In addition, if this situation occurs, VNJ must provide performance at an acceptable level for three consecutive months prior to reverting to the lower multiples.

III. Metrics Included

By letter dated October 16, 2000, VNJ submitted a list of metrics that specified those that VNJ believed should be excluded from any remedies proposal due to various reasons. On November 2, 2000, representatives from VNJ, AT&T, MCI WorldCom, CLI and Staff met to discuss these exclusions. While there was consensus on most aspects of the exclusion list, the Parties suggested that certain metrics would be more appropriate in place of the recommendation of VNJ. Based on the consensus and discussion at this meeting, the Board HEREBY ADOPTS Appendix A to the Incentive Plan in order to clearly delineate each metric included in the plan, and whether the associated remedy would be applicable on a "per unit' or "per measure" basis.

IV. Additional Provisions

The Board also FINDS that certain additional provisions are necessary to establish required levels of incentives for VNJ performance related to VNJ's reporting to CLECs and the Board regarding its performance. These provisions establish parameters for the following: (a) late performance reports; (b) incomplete or revised reports and/or reports found to require revision; (c) the inability of a CLEC to access requested detailed data; and (d) audits. In addition, the Board FINDS that it is appropriate that the incentive plan approved herein, along with the Carrier-to-Carrier Guidelines previously adopted, shall supersede the service quality performance provisions in existing arbitrated interconnection agreements that are in effect as of the date of the adoption of this plan. The Board agrees with WorldCom that this Incentive Plan shall apply to and serve to guide the relationship between VNJ and any entity receiving wholesale services from VNJ, regardless of its formal inclusion in an interconnection agreement between VNJ and its wholesale customer. Because VNJ's obligation to provide access to unbundled network elements and its operations support systems in a non-discriminatory manner is a discrete and current obligation that is separate and apart from, and necessarily precedes, its opportunity to enter into the interLATA marketplace in New Jersey, the Board believes it is not appropriate to make this incentive plan effective only at such time as when VNJ receives long distance approval from the FCC.

Accordingly, the Board HEREBY ADOPTS the attached Incentive Plan proposal in its entirety, incorporating the standards therein and terms thereof into this Order as if they were set forth at length herein effective on November 1, 2001.

Finally, while the Board anticipates that it will, after review of sufficient actual New Jersey specific data, undertake a comprehensive review of the Guidelines and associated Incentive Plan to determine whether modifications are necessary, the standards and remedies hereby established serve as a final document applicable to VNJ's wholesale services to all authorized CLECs operating within the State of New Jersey. In addition, the Board HEREBY DIRECTS VNJ to submit detailed monthly reports and calculations utilized to determine the level of incentives for each affected CLEC separately and on an aggregate basis for the entire CLEC community within ten (10) business days from the filing of each month's performance report.

DATED: 01/10/02

BOARD OF PUBLIC UTILITIES
BY:

(signed)
CONNIE O. HUGHES
PRESIDENT

(signed)
FREDERICK F. BUTLER
COMMISSIONER

(signed)
CAROL J. MURPHY
COMMISSIONER

ATTEST:

(signed)
HENRY M. OGDEN
ACTING BOARD SECRETARY