

DT 01-006

VERIZON NEW HAMPSHIRE

Petition to Approve Carrier to Carrier Performance Guidelines  
and Performance Assessment Plan

Order Regarding Metrics and Plan

O R D E R    N O. 23,940

March 29, 2002

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I.	PROCEDURAL HISTORY	

Verizon New Hampshire (Verizon or Verizon-NH) filed its original Petition for Approval of Proposed Carrier to Carrier (C2C) Guidelines with the Commission on October 19, 2000, and filed a revised version of the proposed C2C Guidelines (commonly referred to as metrics) on April 27, 2001. At a duly noticed prehearing conference on June 4, 2001, AT&T Communications of New England, Inc. (AT&T) and Sprint Communications Company, L.P. (Sprint) appeared. The Office of the Consumer Advocate participated on behalf of residential ratepayers. The parties and Staff agreed and recommended to the Commission that because the resolution of this docket does not turn on factual questions, hearings would be legislative style rather than adjudicative. The parties and Staff also agreed that the scope of the C2C metrics docket would include consideration of (1) what metrics pertain and (2) what performance measurement plan should be adopted by the Commission to measure Verizon's compliance with the metrics to ensure Verizon's quality of wholesale service.

The Commission approved the parties' recommendation as to format, scope and schedule in its Order No. 23,723. The Commission granted the intervention requests of AT&T and Sprint, and approved the parties' recommendation that all CLECs should be contacted and encouraged to participate in the

initial technical session, regardless of whether they wished to participate in the docket as full parties. Subsequent changes to the procedural schedule occurred with the Commission's approval. The docket proceeded along the two avenues of inquiry; metrics and performance plan.

On June 6, 2001, the Commission notified all approved New Hampshire competitive local exchange carriers, encouraging them to participate in technical discussions. Network Plus, Inc. (Network Plus), PaeTec Communications, Inc. (Paetec), Freedom Ring Communications, L.L.C. d/b/a BayRing Communications (BayRing), and Conversent Communications of New Hampshire (Conversent) requested intervention and were granted leave for late intervention by the Commission by letter dated July 13, 2001. On August 8, 2001, Lightship Telecom L.L.C. (Lightship) sought late intervention. On September 19, 2001, Dieca Communications, Inc. d/b/a Covad Communications Company (Covad) sought late intervention. On October 2, 2001, Destek and the New Hampshire ISP Association (NHISPA) sought late intervenor status. While the Commission granted Destek and NHISPA intervenor status, Lightship's and Covad's requests were not acted upon. No party objected to the interventions and Lightship and Covad participated. By this Order we explicitly grant intervenor status to Lightship and Covad.

Network Plus and BayRing (hereinafter referred to as Joint CLECs) participated fully in the proceeding. Conversent participated through the filing of its letter comments on October 31, 2001, while PaeTec and Lightship participated as observers only.

Numerous technical sessions regarding the metrics were held at the Commission offices, with notice to all parties, although some parties chose not to participate except in the final hearing. Paetec filed written comments on June 27, 2001, regarding performance metrics for intrastate and interstate special access services.

In the course of the technical sessions, the participants agreed that the metrics adopted by the New York Public Service Commission (NYPSA) should apply in New Hampshire, that certain additional metrics specific to New Hampshire would apply as well, and that Verizon-NH would provide some reports regarding special access that would not be considered official metrics. The agreement was reported to the Commission at the hearing on November 27, 2001. Further negotiations occurred among the participants and a written Stipulation was filed with the Commission on February 13, 2002. Despite the verbal agreement at the time of the hearing, the filed Stipulation was signed only by Verizon, Network Plus, and Staff. AT&T filed a letter

dated February 20, 2002, opposing one clause of the Stipulation. On February 22, 2002, Verizon submitted a letter objecting to Commission consideration of AT&T's opposition to the clause. The OCA filed a letter on February 21, 2002, indicating its reason for not signing the stipulation.

On July 31, 2001, Verizon-NH submitted its proposed performance measurement plan, the Performance Assurance Plan (NHPAP), and presented a technical workshop to explain it on August 3, 2001. On August 13, 2001, AT&T submitted its proposed performance measurement plan, the Performance Incentive Plan (PIP) and presented a technical workshop to explain it on August 30, 2001. On October 8, 2001, Staff submitted its proposed performance measurement plan, the Performance Assurance Plan Alternative (PAPA), and presented a technical explanation on October 9, 2001. The Parties and Staff exchanged discovery on all three plans.

Written comments on the plans were filed on October 31, 2001, and reply comments on November 7, 2001. After a settlement conference proved unproductive on November 13, 2001, the matter came before the Commission for hearing on November 27, 2001. At the Commission's direction, on December 7, 2001, the Parties and Staff submitted briefs on the issue of the Commission's authority to order a performance

measurement plan other than the one proposed by Verizon.

On March 1, 2002, the Commission deliberated issues in this docket and Dockets DT 01-151 and DT 01-206. Verizon submitted a letter to the Commission on March 15, 2002 commenting on the Commission's deliberations in this docket and DT 01-151. On March 18, 2002, the Commission notified the parties in this docket and DT 01-151 of Verizon's March 15 letter and gave parties the opportunity to respond by March 22, 2002.

## **II. BACKGROUND INFORMATION**

The Telecommunications Act of 1996 (TAct) requires an incumbent local exchange carrier (ILEC) like Verizon-NH to demonstrate to the Federal Communications Commission (FCC) that its local markets are open to competition in order to obtain permission to enter the long distance market pursuant to §271 of the TAct. *See, e.g., In the Matter of the Application by Bell Atlantic New York Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Report and Order, CC Docket No. 99-295, FCC 99-404, ¶ 3 (December 29, 1999). The FCC has determined that the fact that an ILEC will be subject to performance monitoring and enforcement mechanisms constitutes probative evidence that the carrier will continue to meet its

§271 obligations and that entry is consistent with the public interest. *Id.*, at ¶ 431. In all §271 applications thus far granted by the FCC, the applicant was subject to a self-executing enforcement plan administered by the relevant state commission to protect against backsliding.

The self-executing enforcement plans are based upon metrics. The word "metrics" here is a term of art used to refer to the measurements of the quality or timeliness of Verizon's performance of individual tasks undertaken to enable interconnection between itself and other carriers, and the numerical standards for performance of such tasks to which those measurements are compared. Metrics are thus measures of Verizon-NH's performance in specific interactions with competitive local exchange carriers (CLECs), *e.g.*, the amount of time Verizon-NH takes to respond to a query about DS-1 availability.

In New York, pursuant to a negotiated process involving an industry-wide working group and various regulatory agencies and interested parties (collectively the New York Carrier Working Group), the NYPSC approved approximately 800 performance metrics (the NYPSC-approved metrics). Verizon-NH submitted the NYPSC-approved metrics for approval in New Hampshire. Verizon-NH also submitted for approval a version



of the PAP approved by the NYPSC, which contains performance penalties for approximately 200 of the NYPSC-approved metrics.

### III. DESCRIPTION OF PLANS

#### A. Verizon-NH's NHPAP

Verizon-NH filed its proposed NHPAP on July 31, 2001. The NHPAP divides possible penalties into four segments: Mode of Entry (MOE), Critical Measures, Special Provisions, and a separate Change Control Assurance Plan (CCAP). NHPAP, at 2. Under each of the categories, Verizon-NH proposes to provide bill credits to any CLEC that has experienced substandard performance in the event that Verizon-NH's performance drops below the levels set out in the plan's Bill Credit Tables, Appendix A, using statistical tests explained in various appendices to the NHPAP. *Id.*, at 2-4, 10.

The MOE segment measures the overall level of service on an industry-wide basis for each mode by which carriers can enter the local exchange market under the TAct, *i.e.*, resale, unbundled network elements, interconnection trunks, and DSL. *Id.*, at 2. Any bill credits generated in any of these modes would be allocated to competitors purchasing that type of service.

Total potential bill credits set out in the NHPAP under the MOE segment are \$1.355 million in any one year (\$112,900 in any month) for resellers, \$6.1 million in any one year (\$508,000 in any month) for UNE-based competitors, \$1.355

million in any one year (\$112,900 in any month) for DSL-based CLECs, and \$1.355 million in any one year (\$112,900 in any month) for CLECs purchasing interconnecting trunks. Appendix A, p. 9. The total MOE segment penalties that can be awarded are \$10.16 million in any given year. The NHPAP provides for a doubling of MOE incentive credit payments when Verizon's performance falls below a specified threshold for three consecutive months. If doubling occurs, the total MOE segment penalties can be as high as \$20.32 million in any given year.

The Critical Measures component measures performance in 12 areas Verizon-NH considers critical to the provision of quality wholesale service. The measures in 11 of these areas are a subset of the measures in the MOE segment. The Critical Measures segment also reviews one measure, Collocation, that is not in the MOE. Unlike the MOE evaluation, in which bill credits apply only when the score for the entire category is sub-standard, the Critical Measures segment applies bill credits when the score for the single measure is below the threshold. The NHPAP specifies a particular dollar amount for each Critical Measure. Under the Critical Measures component, additional bill credits would be provided for substandard performance on the more than 50 particular measures in the Critical Measures group. NHPAP, at 12 and Appendix B. Total

dollars at risk for Critical Measures would be \$915,000 per month, or a possible \$10.980 million in any given year.

Appendix B, Table B-1.

The NHPAP's third evaluation process looks at the Special Provisions that are aimed at issues of particular importance in the first years after Verizon-NH entry into the long distance market: UNE Flow Through, UNE Order Confirmations, processing and reject notices, Hot Cut Loops, and Electronic Data Interface (EDI). NHPAP, at 14. Total dollars at risk in any one year are \$1.36 million for substandard Flow Through performance, \$3.25 million for substandard Hot Cut performance, and \$2.43 million per year for substandard EDI performance. *Id.*, at 5.

The Change Control Assurance Plan (CCAP) is designed to measure Verizon-NH's performance in implementing revisions to Operations Support System (OSS) interfaces and to business rules that affect CLECs. The change control process is common to carriers operating in New Hampshire and New York. Under the CCAP, \$1.36 million in bill credits would be available to all CLECs in New Hampshire for unsatisfactory performance on four change control metrics.

Thus, under the plan, Verizon asserts that a total of \$39.70 million (\$38.34 million for NHPAP and \$1.36 million for

CCAP) would be at risk in any year. This amount represents approximately 36% of Verizon-NH's annual net operating revenues.

Verizon-NH's NHPAP uses statistical methods as one means to determine if parity exists between Verizon-NH's wholesale and retail performance. For measures where parity is the standard, and a sufficient sample size exists ( $n \geq 30$  for measured variables, and a statistical measure for counted variables), performance is expressed in terms of the ratio of the difference in retail and wholesale performance (the numerator) to the result of a statistical function based on the retail performance (the denominator). Appendix D at 1. This relationship (a modified "Z" statistic when the variables are counted, and a modified "t" statistic when the variables are measured) is then compared to standard Z or t values representing the various confidence levels associated with the determination that the difference in performance is not simply random variance (assuming a normal distribution).

For each metric, if the score is equal to or below -1.645, the NHPAP records the result as a determination that the wholesale performance is worse than the retail performance, to a 95% confidence level. Such a result is then given a Performance Score of -2 (parity missed). NHPAP, at 9. If the result falls between -0.8225 and -1.645, the result is given a Performance Score of -1 (parity in question). Any result better than the value of -0.8225 is recorded as a

neutral value, 0.<sup>1</sup> For -1 scores, if performance is met for the next two months, the score reverts to 0. Exh. 1, p. 9. Bill credits in the MOE segment are computed and applied within 30 days after the close of the second month after the month in question, so that improvements in performance for a metric with a -1 score can be reflected in revised scoring for that measure for the month in question.

In the case of measures with an absolute standard of performance, the NHPAP determines the Performance Score using a prescribed range of Z and t outcomes for the applicable measures. *Id.* The results are weighted and then summed. If the Aggregate Total Performance Score for any given Mode of Entry is better than the minimum threshold allowable for the applicable MOE, pursuant to the Bill Credit Tables in Appendix A, no bill credits will be due to CLECs that received the particular MOE services in that month.

The Bill Credit Tables in Appendix A for MOE performance scores show a different range for Resale (ranges from -0.16922 to a maximum credit Performance Score of  $X = -0.67000$ ), UNES (ranges from -0.17129 to a maximum credit Performance Score of  $X =$

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<sup>1</sup> For report rate measures, regardless of Z or t score, if the absolute difference is below 0.1%, the performance score is 0 (acceptable). Appendix E, p. 1 n. 2.

-0.67000), Interconnection Trunks (ranges from -0.31909 to a maximum credit Performance Score of  $X = -1.0000$ ), and DSL (ranges from - 0.19705 to a maximum credit Performance Score of  $X = -0.67000$ ). The maximum (worst) credit Performance Score represents the point at which the entire monthly cap for that measure is awarded.

The performance score determines the remedies paid, except if a grouping of measures (a domain) misses its threshold. In that case, a "domain clustering rule" is applied, which increases the penalties. In addition, as noted above, if the performance score exceeds the midpoint of the range of scores for three consecutive months for MOEs, penalties double.

NHPAP has a "caps-within-caps" structure, whereby under the overall limitation of the maximum penalty to 36% of net income, penalties are also capped monthly (at 1/12 of the annual cap), and the monthly cap is further subdivided. The monthly cap is divided between MOE measures, Critical Measures, Special Measures and the separate CCAP. Each of these is further subdivided. The Critical Measures penalties are segregated (and capped within those categories), and the Special Provisions cap is also subdivided into four separate cap subsegments. There are a total of seventeen subsegments



that are separately capped within the overall cap. Exh. 2. The NHPAP allows the Commission to reallocate the monthly distribution of bill credits between and among any provisions of the Plan and the CCAP, upon 15 days advance notice to Verizon-NH via Commission Order. NHPAP, at 11.

Verizon-NH proposes a series of steps to be taken to develop a score in the cases where the sample size is too small for the modified Z or t test described above to be valid. Appendix D, pp. 2-3.

Verizon-NH also proposes a set of actions it can take to challenge a poor score before the Commission when it believes that the score is the result of "clustering" of data. Verizon-NH describes clustering as the situation that arises when individual items are clustered together as a result of a single event. These situations, according to the NHPAP description, violate the assumption that underlies the statistical test of performance set out in the NHPAP, namely, that each item of performance is independent from all other items of performance. *Id.*, at 3. Verizon-NH sets out specific exception claim procedures for cable-driven failures, single facility failures, and single day events. *Id.*, at 4-5. Verizon-NH also provides an exemption from penalties for cases when it claims that performance has been affected by unusual

CLEC behavior. *Id.* at 5.

Verizon sets out in its NHPAP a plan for reporting results and adjusting metrics in the future.

**B. AT&T's PIP**

AT&T presented a performance plan that shares many fundamental characteristics with the Verizon-NH NHPAP, but differs from it in significant ways. AT&T calls its approach the Performance Incentive Plan, or PIP. Like the NHPAP, the PIP focuses attention on a subset of the metrics, and compares Verizon-NH performance on those metrics against a standard of parity, or against a standard of compliance with benchmarks, depending on whether the metric involves items that can be compared against Verizon-NH retail performance, or must be compared against absolute values. Like the NHPAP, the PIP uses modified Z and t tests to evaluate statistically the likelihood that differences in performance for parity measures between the metrics and the standard (where the metrics show substandard performance) are due to Verizon-NH discriminatory behavior, as opposed to being the product of chance variation in the data. The PIP similarly uses a permutation method to develop critical values for small sample size cases.

There are several differences between the NHPAP and the PIP. The PIP focuses on 27 metrics selected for performance penalty treatment by the Local Competition Users Group (LCUG), a cooperative effort of AT&T, MCI, Sprint, LCI and WorldCom, CLECs who have joined together to develop standards for the

entry of CLECs into the local exchange markets. The value of the penalty for any failure is determined by a formula that allocates an assumed maximum penalty set at 39% of Verizon-NH's net income for any given month, based in part on the assumed relative market shares of Verizon-NH and the CLECs as a group. Chronic or severe failures are assigned higher penalties.

Significantly, unlike the NHPAP, the total dollar value of penalties that can accrue in a given month under the PIP is not capped at a particular percent of Verizon-NH net earnings. AT&T allows for what it calls a "procedural cap." Under this device, Verizon-NH would have the ability to seek relief from additional penalties once the sum of the penalties in any given month exceeds 39% of the allocated net income for that month, but it would not have a guarantee of relief. PIP, at 22.

The PIP differs from the NHPAP also in that it uses different critical values for comparing Verizon-NH's wholesale performance against retail analogs. The PIP uses simple yes/no bright line tests, rather than statistical tests, for adherence to benchmark metrics. Where parity is the issue, the PIP statistical tests use critical values that reflect a balancing of the risk of Type I and Type II error. As the

NHPAP and the PIP use these terms in the analysis, Type I error is the risk that a result showing Verizon-NH to have failed to provide adequate service is erroneous, and that the difference between the metric and the standard is due to random variation. Type II error is the opposite risk - the risk that the result shows Verizon-NH to have provided adequate service, whereas in fact service was below the standard.

The PIP differs from the NHPAP also in that the trigger point for the application of penalties is lower (as a result of the balancing critical value) and the ramp-up to the maximum penalty for any given metric is quadratic, not linear (starting slower but increasing more rapidly as performance scores worsen). The PIP also differs from the NHPAP in that it does not use weighting of the performance scores to further differentiate between levels of importance of performance on various metrics. Also, the PIP has what AT&T calls a Tier I and Tier II structure. Tier I is intended to measure Verizon-NH performance with regard to individual CLEC customers, and penalties are awarded to the affected CLECs, in effect as liquidated damages. Tier II is intended to measure the impact of Verizon-NH's performance on the competitiveness of the market overall, and penalties would be based on the aggregate

data for all CLECs within a particular submeasure result and disaggregation. PIP, at 18. Penalties would be paid as regulatory fines, to a "public fund identified by the Commission and may be used for competitively neutral public purposes." *Id.*, footnote omitted.

Other key differences include the proposal that remedies under the PIP would not offset remedies available to the CLECs under their interconnection agreements, if any; penalties would be paid to the CLECs by check, rather than as credits against the bills; and exclusions from the incentives are minimized and limited. The PIP also contains differences in reporting and other procedural requirements compared to the NHPAP. The AT&T plan imposes penalties on Verizon's late, incomplete, or revised performance reports.

### **C. Staff PAP Alternative**

The Staff offered a third approach, which incorporates significant differences from either the NHPAP or the PIP. It is based on the proposition that, if parity exists, half the time the CLEC services should be equal to or better than the average ILEC retail service, and the other half of the time services to CLECs should be poorer in quality than retail service.

The PAPA shares with NHPAP and PIP the use of C2C metrics

to assess parity, although it uses a different statistical approach related to the initial proposition of the definition of parity. Under the PAPA, the mean (or median) performance for CLEC services is compared to the mean (or median) performance for Verizon-NH retail, over time. Metrics are compared against the 50-50 standard over time, until sufficient data are collected to establish whether parity exists or not to a high confidence level. Failures are rated -1, and satisfactory performance is rated 0. The desired confidence level can also be achieved by comparing a subset of metrics within one month's activities, using a cumulative probability distribution to ensure that Type I error is sufficiently well reduced.

For counted metrics<sup>2</sup> with benchmark standards, the PAPA adopts the PIP's "bright line" approach. For counted metrics with parity the PAPA uses the ILEC retail failure rate, the CLEC sample size, and the CLEC number of failures in a binomial test, to develop a pass/fail result to a 50% confidence level or higher. To achieve this confidence, the split between success and failure may need to be set at a

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<sup>2</sup> Counted metrics are those that are expressed in a percentage that is compared to Verizon-NH's percentage, e.g., percent of missed appointments. (Measured metrics are those that are expressed in concrete terms, e.g., amount of time to respond to a CLEC.)

different breakpoint than 50-50. In this case, the breakpoint is chosen so as to minimize Type I error (that is, it favors the ILEC).

Thus, for each month and for each type of metric, the PAPA establishes a test for whether parity or the minimum standard is met. For metrics with parity, the comparison is either median to median or rate to rate. For metrics with minimum standards, the comparison is CLEC median against the standard, or CLEC rate against the rate standard. For each individual metric the test by itself is either 50-50, or slightly in favor of the ILEC (where necessary to meet confidence level requirements). Each metric in each month is thus scored either 0 or -1. The distribution of 0s and -1s is reviewed to assess whether a pattern of discriminatory behavior on the part of the ILEC is present. To make this assessment statistically powerful, it must be applied to many metrics over several months. PAPA, at 15. When this is done, and the number of metrics assessed is large, the Type I error can be reduced to 0.1% or less. *Id.*, at 16.

After assessing the presence or absence of parity based on all metrics for all CLECs for 10 months, the next step under the PAPA would be to apply the same test to the metrics gathered under each MOE for all CLECs for 10 months. Then the



PAPA would apply the test to all active metrics CLEC by CLEC, still using a 99.9% confidence level.

Finally, the test is done at a more detailed level in two ways. First, persistence is assessed by testing each metric for the 10-month period at both aggregate CLEC and CLEC-specific levels, at an 8 out of 10 critical value level. Pervasiveness is then tested by assessing all metrics in each MOE for the current month, at both CLEC aggregate and individual CLEC levels, to a 95% confidence level.

Like the PIP and by contrast to the NHPAP, the PAPA does not weight the results of individual metrics. Like NHPAP and PIP, PAPA calculates a self-executing financial consequence when discriminatory behavior is detected. Level 1 would provide self-executing penalties for individual CLECs for all metrics and aggregate CLECs for each MOE, looking back over the most recent 10 months. Level 1 could conceivably require the payment of 1/12 the annual cap in any given month, and is tested to the 99.9% confidence level. Level 2 would provide penalties associated with individual CLECs and individual metrics over time, and aggregate CLECs and individual metrics over time, using a 95% confidence level. Level 2 penalties would not be self-executing. Rather, penalties under this section would be assessed by reallocating penalties between

and among provisions of the NHPAP and the CCAP. For extreme violations, a separate penalty of \$10,000 for each violation would be assessed in any given month.

The PAPA, like the PIP, would distribute penalty payments via check, rather than as bill credits per the NHPAP. The PAPA would require Verizon-NH to file with its NHPAP report a complete internal distribution list of the NHPAP report, and requires the filing of a written action plan in the event of a serious failure. The PAPA could stand on its own or be applied as an overlay to the NHPAP. Staff proposed the latter with various changes to the NHPAP, discussed below in Parties' Positions.

#### **D. Metrics Stipulation**

The Stipulation recommends that the Commission (1) adopt the NYPSC-approved metrics as dated November 21, 2001, subject to an on-going amendment process, and (2) adopt certain New Hampshire-specific metrics that are not currently contained in the NYPSC-approved metrics (collectively, the New Hampshire C2C Metrics). The on-going amendment process affects all of the New Hampshire C2C Metrics, both the NYPSC-approved metrics and the New Hampshire-specific metrics.

The on-going amendment process occurs, via NYPSC approval of amendments to the NYPSC-approved metrics, after

Verizon-New York files a compliance filing with the NYPSC reflecting the final order of the NYPSC. To the extent that the amendments approved by the NYPSC reflect "consensus items<sup>3</sup>," those items will become effective in New Hampshire immediately upon filing in New Hampshire.

To the extent that the amendments approved by the NYPSC reflect "non-consensus" items submitted by the New York Carrier Working Group to the NYPSC, Verizon will begin reporting data on those items in New Hampshire. Upon written request by any Party or Staff within 30 days after the filing in New Hampshire, the Commission shall determine whether to adopt, reject, or modify the non-consensus items that the NYPSC considered and approved. To the extent that amendments approved by the NYPSC affect any of the New Hampshire-specific metrics, those amendments shall be treated as "non-consensus" items as just detailed. Verizon-NH will file a revised New Hampshire Metrics consistent with the Commission's decision regarding such non-consensus items.

Pursuant to the Stipulation, Verizon-NH will file reports regarding performance for intra- and inter-state special

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<sup>3</sup> "Consensus items" are those amendments approved by the NYPSC that were supported by consensus agreement of the New York Carrier Working Group. "Non-consensus items" are amendments on which the New York Carrier Working Group did not reach consensus agreement to support.

access services in New Hampshire for aggregate wholesale performance. Verizon-NH will concurrently provide these reports to the Parties. In addition, for the first three months it files aggregate wholesale performance reports, Verizon-NH will electronically provide the Commission with the raw data from which the ordering, provisioning, and maintenance portions of the aggregate reports were generated. Subsequently, Verizon-NH will retain the raw data for four years after the close of each reporting month, for examination by the Commission on request.

To each CLEC that has made a prior written request to its Verizon-NH account manager, Verizon-NH will provide a monthly wholesale performance report relating to that CLECs's activities, and, on specific request, the CLEC-specific raw data from which the wholesale ordering, provisioning and maintenance portions of the CLEC-specific report were generated. Verizon-NH will provide the CLEC-specific reports to the Commission when requested, to be maintained confidentially when submitted pursuant to RSA 378:43.

#### **IV. POSITIONS OF THE PARTIES AND STAFF**

##### **A. Verizon**

###### **1. C2C Metrics**

Verizon-NH supports the Stipulation agreed upon with

Network Plus and Staff and submitted to the Commission on February 13, 2002. Verizon responded to AT&T's post-hearing letter that argued against increasing the standard for UNE order flow-through up to the current New York standard over three years. According to Verizon, the AT&T letter is untimely and reverses AT&T's position in support of the stipulation at hearing. For AT&T to present post-hearing arguments contrary to its representations on the record will hinder the Commission's ability to manage dockets and is contrary to the interests of justice, states Verizon. Verizon points out that the flow-through metric criticized by AT&T did not exist in Verizon's initial filing and was added, as part of the negotiations among parties, as a concession by Verizon.

## **2. Performance Plan**

Verizon-NH urges the Commission to adopt its New Hampshire PAP. The metrics, according to Verizon, cover every significant aspect of the services Verizon-NH provides to CLECs: Pre-ordering, Ordering, Provisioning, Maintenance and Repair, Network Performance, Collocation, and Billing; and the financial incentives are high enough to provide strong reasons for Verizon-NH to provide quality services to CLECs.

Verizon-NH argues that the Commission should adopt its NHPAP because the NYPSC and the Massachusetts Department of

Telecommunications and Energy (DTE) have done so and the FCC approved identical plans in those states' §271 proceedings. According to Verizon, there is no reason for the Commission to depart from the precedent. Verizon notes that the FCC held that the PAP meets the public interest requirements of §271(d)(3)(C) of the TAct by four characteristics. According to the FCC's New York *§271 Approval Order*, the NYPAP includes (a) measures that are comprehensive in scope in monitoring wholesale performance, (b) meaningful and significant liability to prevent backsliding in wholesale service levels after entry into the long distance market, (c) methodologies designed to detect and sanction poor performance, and (d) a self-executing mechanism for bill credit distribution to CLECs.

Verizon-NH argues that the NHPAP uses accepted statistical methodologies to assure that parity of service performance is achieved: the NHPAP provides a 95% level of confidence in its selection of critical values in a one-tailed modified Z or t statistic. Furthermore, according to Verizon, a "conditional" miss (-1 score) determined at the 79% confidence level triggers penalties if the metric is missed again in one of the two subsequent months after the month the conditional miss occurred. Verizon argues that the NHPAP

deals with Type I statistical errors<sup>4</sup>, which can occur when using the modified Z statistic, by utilizing a "minimum performance score" in the MOE evaluation. It also deals with the problem of small sample size, Verizon-NH asserts.

Verizon-NH cites its experience in New York as support for a claim that the plan works in practice by allowing for adjustments to focus attention on particularly troublesome areas. In particular, Verizon-NH points to a 2001 study by the Telecommunications Action and Research Center (TRAC). According to Verizon-NH, the TRAC study shows that competition in New York is strong a year after Verizon's entry into the long distance market, which, Verizon-NH argues, is attributable to the PAP's effectiveness.

Verizon states that its proposed penalty cap, 36% of the jurisdictional net income, should be approved. Verizon notes that this percentage was approved by both the NYPSC and the FCC, but was later increased to 39% in New York after difficulties were encountered regarding lost automatic order notifiers. Verizon-NH argues against increasing the NHPAP cap to 39% (as Staff and other Parties recommend) on the ground that the lost automatic order notifier problem does not exist

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<sup>4</sup> Type I errors would incorrectly penalize Verizon by awarding financial awards to CLECs. Type II errors would incorrectly penalize CLECs by not awarding such penalties.

in New Hampshire. In its Comments filed on December 5, 2001, Verizon argues strenuously against Staff's recommendation to change the MOE thresholds as set forth in the Minimum and Maximum Bill Credit Tables in Appendix A of the NHPAP. Staff's recommended changes are not calculated correctly, Verizon claims, but it cannot identify the errors in computation without scrutinizing the mathematical model used by the Staff consultant. According to Verizon, the NYPAP minimum and maximum thresholds, established using statistics in a complex mathematical model developed by the staff of the NYPSC, were computed correctly.

Verizon-NH urges the Commission to reject AT&T's Performance Incentive Plan (PIP) as economically irrational on the grounds that the penalties exceed the amount necessary to cause Verizon-NH to provide nondiscriminatory service to CLECs. Verizon-NH further argues that the PIP's statistical methodology is not well-founded. Verizon argues that the effect of the allegedly excessive penalties would cause Verizon-NH to over-invest in wholesale service systems and under-invest in retail service, thus creating anti-consumer consequences in order to avoid the overly punitive penalties.

Verizon further argues that AT&T's attempt to balance Type I and Type II statistical error rather than using the



NHPAP's critical values for Z-scores would result in a volatile Type I error rate, meaning that Verizon-NH would not receive the clear signals necessary to effectively maintain or improve OSS. The statistical error balancing advocated by AT&T, according to Verizon, is an unnecessary and unproven approach that fails to deal with small sample size issues. As a result, Verizon avers, the AT&T PIP could result in similarly situated CLECs receiving different incentive payments. Moreover, Verizon-NH claims that AT&T has not demonstrated that Type II error harms CLECs.

Verizon-NH also objects to the AT&T plan because it imposes penalties on paperwork, *i.e.*, on Verizon's late, incomplete, or revised performance reports. According to Verizon, the penalties are not focused on performance, are unnecessary, and counterproductive. The PIP does not identify the metrics to which it would apply, Verizon-NH complains. Thus, the PIP may apply to many overlapping metrics, penalizing Verizon-NH multiple times. In addition, Verizon-NH claims that the PIP's lack of a pre-set overall cap on Verizon's liability exposes Verizon-NH customers to possible service disruptions.

Verizon-NH also opposes Staff's proposed Performance Assurance Plan Alternative (PAPA). According to Verizon, the

PAPA is unnecessary, unclear, and adds a layer of complexity that is burdensome and costly. The PAPA contains nothing uniquely "New Hampshire" that is not covered in the NHPAP, Verizon-NH states.

Verizon claims that the PAPA fails to bring simplicity to the measurement plan, and its penalties are triggered long after the penalties in the PAP are triggered, and thus the PAPA fails to provide additional or early-warning-type performance assurance. In addition, Verizon-NH criticizes the PAPA for having no mechanism for scaling the penalty level to the amount by which a metric is missed. In contrast, Verizon-NH avers, the NHPAP provides constant incentives to move towards the metric, as penalties decrease when standards are missed by less.

In response to criticisms levied against the NHPAP, Verizon-NH makes several arguments, as follows: (1) Unless credits levied under the NHPAP offset negotiated remedy payments in interconnection agreements, CLECs will receive an unjustified windfall and over-deterrence will bring anti-consumer consequences. (2) Using the New York flow-through rate metric would reflect an incorrect assumption that New Hampshire CLECs' activity is UNE-P based. (3) The NHPAP's table for developing critical values where sample size is

small is appropriate. (4) An automatic audit may waste time and resources whereas an annual audit at the Commission's discretion relinquishes no opportunity for evaluation. (5) Cash payments rather than bill credits are administratively inefficient and could unjustly enrich CLECs whose account with Verizon-NH is not current, whereas bill credits have not been shown to be ineffective. (6) The Joint CLECs' argument that remedies/penalties should match the magnitude of alleged harm is untenable, according to Verizon-NH, because the severity of violations would have to account for many violations that have no discernible commercial consequences, and there is no way of measuring the alleged harm effectively within a self-executing plan. (7) The Joint CLECs' argument for internal allocation of remedies also requires a fundamental restructuring of the PAP, for which the Joint CLECs do not provide any clear instruction.

### **3. Jurisdiction**

Verizon-NH asserts that the Commission has no jurisdiction to impose a performance plan of its own design, as the Commission only has the powers the legislature has delegated to it in RSA 365, *et seq.* According to Verizon, the Commission's authority to investigate pricing and quality of service is broad but its authority to assess penalties or

order reparations is delegated and limited by statute. *State of New Hampshire v. New Hampshire Gas & Electric Company*, 86 NH 16 (1932). Further, avers Verizon, the Commission's general supervisory powers over utilities do not confer general jurisdiction to establish penalties: "[T]he import of the words was only to establish incidental authority to reinforce the specific powers mentioned." *Id.* at 32.

Verizon-NH avers that the Commission's authority to impose penalties associated with failing to meet performance standards established pursuant to RSA 370:2 is restricted to violations relative to gas pipelines, pursuant to RSA 374:7-a.

Furthermore, Verizon argues that two other statutes that confer more general authority to assess penalties do not authorize the Commission to adopt an automatic penalty-assessment mechanism like the performance plans proposed in this docket. RSA 365:41, according to Verizon-NH, is limited to the situation in which a utility either takes an action without first obtaining required Commission approval or fails to take action in compliance with a specific Commission directive. RSA 365:41 would not pertain to a self-executing, automatic penalty plan, in Verizon-NH's view. In addition, RSA 365:41 directs that penalties be paid to the State

treasurer, not to CLECs.

As for reparations, Verizon-NH points out that RSA 365:29 merely grants the Commission authority to order refunds of unjust or illegal service rates, after separate hearing and investigation. That statutory provision would not apply to the self-executing performance plans proposed in this docket. Verizon-NH concludes that the Commission has no authority to impose a performance plan; it may only approve or reject Verizon-NH's PAP as proposed.

**B. AT&T**

**1. C2C Metrics**

AT&T is not a signatory to the Stipulation submitted to the Commission on February 13, 2002. By letter dated February 20, 2002, AT&T indicated that it has abstained from signing because it objects to section 2(d). Section 2(d) proposes an amendment to metrics OR-5-01 and OR-5-03 to reflect an increase of the UNE order flow-through standard, up to the current New York rate, phased-in over an 18-month period. The Stipulation refers to the phased-in increase as a "ramp-up." AT&T states that recent examination of Verizon's flow-through performance data for the period of August through December 2001 demonstrates that Verizon is currently capable of meeting the metric proposed for first quarter 2003. AT&T therefore

argues that no ramp-up is necessary. According to AT&T, the ramp-up will present Verizon an opportunity to provide lower quality service in New Hampshire without incurring any penalties. AT&T does not object to any other part of the Stipulation.

## **2. Performance Plan**

AT&T claims that its PIP, adopted along with the Staff's PAPA, would provide the most effective tool for monitoring Verizon's performance and best serve the competitive marketplace in New Hampshire. According to AT&T, the PIP is the only plan that balances both Type I and Type II statistical error, reducing the likelihood of error both "for" and "against" both CLECs and Verizon. AT&T also states that the PIP is also the only plan with two tiers of compensation, one to compensate for harm to CLECs and one to compensate for harm to the public interest and the overall industry. AT&T notes that Tier II is phased out when markets are demonstrably open, and the amounts of the penalties are related to severity. These attributes correct the flaws of the Verizon-NH PAP, according to AT&T, by assuring prompt enforcement of appropriate consequences without the delays of an adjudication and appeals process, and by including incentives high enough to exceed the benefits Verizon-NH might derive by inhibiting

competition.

AT&T recommends that the PAPA, as proposed by Staff, be used as an overlay to the PIP, as an alternative or a supplement to its Tier II. In AT&T's view, Tier I is better designed than the NHPAP to provide appropriate compensation to individual CLECS and to deal with small sample sizes. Therefore, AT&T avers, the PIP is the better base for the PAPA overlay.

AT&T recommends that the Commission make some changes in the PAPA. AT&T Initial Comments at 17 *ff.* First, the amount of penalties levied as a result of PAPA analysis should be in addition to any amount payable under the PIP or NHPAP analysis. Second, the amount should be based on a requirement for at least a 95% binomial probability, such that the amount payable should be more than 1/12 of the annual amount, to prevent irreparable damage to the CLEC market in the 12 months otherwise needed to reach the full penalty. AT&T provided a binomial distribution probability chart of the fraction of the annual cap that should be imposed after 2, 4 and 6 months, with a proposed accelerated ramp-up to full penalties. Verizon-NH would be liable for the total annual amount if it fails any PAPA component in any 6 months of a twelve-month period. Under the Staff's proposed PAPA, according to AT&T,

Verizon-NH would have to fail every month in a twelve-month period before being liable for the entire annual amount. AT&T believes that in order to effectively prevent discriminatory behavior that would have devastating effects on CLECs, Verizon-NH should risk the entire amount. Otherwise, it avers, a "pay to play" mentality will prevail.

In addition to implementation of the PAPA, AT&T proposes that Verizon-NH should be subject to financial consequences for failing to provide timely, complete, and accurate performance reports to CLECs. AT&T's proposal would impose a \$5,000 penalty payable to a state fund for every day past the due date for such reports, a \$1,000 penalty for every day elapsed between the due date and the date such reports are provided in accurate and complete form, and \$1,000 for every day a CLEC is denied access to its detailed data underlying Verizon's reports. Further, AT&T proposes that interest should accrue for every day that Verizon's payment is later than the 15<sup>th</sup> business day following the due date of the data and reports.

AT&T argues against Verizon's NHPAP, declaring that it is too complicated and arcane to understand and that its complexity is crafted so as to prevent it from being a real deterrent to discriminatory performance. AT&T objects to the



NHPAP's "caps-within-caps" structure. According to AT&T, this system limits liability enough to make any penalties a mere cost of doing business rather than a deterrent. Accordingly, AT&T views the NHPAP as a "pay to play" proposal whereby Verizon pays some significant but bearable financial burden in exchange for entry into a significantly lucrative market.

AT&T argues against any absolute caps and proposes only a "procedural cap," if any cap is adopted. A procedural cap is simply a point at which a regulatory investigative procedure is triggered, in this case at the time a set amount of penalties is incurred. After the procedural cap is triggered, penalties would continue to be incurred but an investigation would go forward to determine the reasons for the failing performance. AT&T argues that absolute caps allow Verizon-NH to evaluate the cost of retaining market-share, permitting discriminatory performance at an identified price, encouraging "pay to play."

According to AT&T, Verizon-NH's use of statistics ensures that the penalties will be merely a business expense by combining all performance data before performing the modified Z test, thus "averaging out" the harm done to individual CLECs. In addition, AT&T claims that the scoring methodology does not take into account the severity of the failure

experienced but only provides an additional weighting factor. Another statistical problem alleged by AT&T is the NHPAP's requirement of a 95% confidence level no matter what the sample size, controlling for Type I error without correcting for Type II error at all. AT&T avers that small sample size is not accommodated for by the NHPAP with permutation testing. Further, AT&T claims, the NHPAP treats benchmark measures statistically rather than as bright-line measures. Benchmark measures are standards that provide a yes/no result, rather than a statistical indication. By combining benchmark results with statistical results when evaluating performance across an entire MOE, the significance of failed benchmarks is reduced. AT&T claims this gives Verizon-NH room to fail those measures without incurring financial liability.

AT&T takes issue with the NHPAP's complex payment structure, arguing that not only is true compensation impossible, but the use of delayed bill credits, as much as five months after the failure, are difficult for small CLECs to track. Furthermore, bill credits are of no use to a CLEC that has been forced from the market altogether. AT&T also argues that the NHPAP payment structure is insensitive to severity of failure.

AT&T also objects to other aspects of the NHPAP's

structure as supporting Verizon's continued monopolist position in the New Hampshire market. Verizon's NHPAP weights various measures based on New York state experience rather than New Hampshire's and enables Verizon-NH to manipulate the market to its own benefit, according to AT&T. Furthermore, the NHPAP only compensates for CLEC harm and not for harm to the public interest and the industry as a whole. AT&T asserts that another tier of penalties, like the PIP's Tier II, should be assessed in order to provide incentive for Verizon-NH to provide more than barely adequate service and in order to maximize the potential for market expansion in New Hampshire.

### **3. Jurisdiction**

AT&T avers that the Commission has authority to impose a remedy plan by virtue of its role as intermediary between utilities and ratepayers, its interest in fostering competition, and its responsibility to protect the public interest. AT&T argues that the imposition of a remedy plan can occur either via RSA 365:41 or by common law.

RSA 365:41 provides authority for the imposition of penalties up to \$25,000 for violation of Commission requirements. According to AT&T this statute should be applied to each specific benchmark or parity standard contained in a performance plan. Alternatively, the Commission

could interpret the amounts to be paid as a remedy paid to rectify harm incurred by CLECs, end-users, and the public interest when Verizon fails to provide the necessary quality of wholesale service.

**C. Joint CLECs**

**1. C2C Metrics**

Network Plus supports the Stipulation agreed upon by the Parties and Staff and submitted to the Commission on February 13, 2002. BayRing did not sign but does not oppose the Stipulation.

**2. Performance Plan**

The Joint CLECs urge the Commission to adopt the Verizon-PAP as adopted in New York and Massachusetts, supplemented by adopting Staff's PAPA as an overlay. The Joint CLECs argue that NHPAP represents a diluted PAP that will not provide an adequate defense against backsliding by Verizon-NH once it obtains §271 approval in New Hampshire. According to the Joint CLECs, the diluted PAP does not provide enough disincentive against discriminatory behavior, with the result that the increased profits obtainable from discriminatory behavior will be more attractive to Verizon than the opportunity to avoid penalties, thus making the penalties just a "cost of doing business."

The Joint CLECs object to six changes that Verizon has included in the NHPAP that differ from the New York PAP and the Massachusetts PAP. (1) In their November 6, 2001 reply comments, the Joint CLECs object to Verizon's NHPAP cap being set at 36% of net local revenues rather than the 39% currently set in New York and Massachusetts. According to the Joint CLECs, Verizon-NH has provided no evidence that a deviation is warranted. (2) The Joint CLECs objected to Verizon-NH's reduction from 95% to 90% for the Achieved Order Flow-Through standard and Verizon's reduction from 80% to 60% for the Total Order Flow-Through standard. Verizon-NH's proposed reduction was rejected by the Pennsylvania Administrative Law Judge, according to the Joint CLECs, and the Commission should also reject it. The standard is weaker than the standard for UNE-P, and therefore unfairly penalizes facilities based CLECs, the Joint CLECs argued. (3) Verizon's NHPAP Allowable Miss Table should be revised to match the same table in the New York PAP, so that a 95% benchmark is applied to sample sizes of less than 10 and less than 20. The proposed NHPAP uses a 90% benchmark for sample sizes of less than 10, which, in the Joint CLECs' view, unnecessarily dilutes the standard. This dilution also was recently rejected by the ALJ in Pennsylvania. (4) The Joint CLECs argue that, similar to the

New York and Massachusetts PAPs, the NHPAP should include a requirement of an annual independent audit of Verizon's PAP results, reporting, and data. (5) Penalties levied pursuant to the NHPAP, the Joint CLECs urge, should not negate remedies provisions in individual interconnection agreements. The NHPAP should include language to that effect, as well as language permitting individual interconnection agreement remedies to be renegotiated as the agreements expire, consistent with the NYPSC's 271 Order. (6) Finally, the Joint CLECs object to Verizon-NH's revision of the New York PAP's scoring methodology. The proposed NHPAP contains a "modified Z statistic" without justification. Again, the Joint CLECs state that this revision was rejected by the Pennsylvania ALJ.

In addition to reinstating the above six terms from the New York PAP, the Joint CLECs argue for additional revisions to the NHPAP that are not based upon the New York PAP. The Joint CLECs agree with Staff that remedies should be paid in the form of checks rather than bill credits. They argue that such payment will improve the ability to connect remedies with particular performance failures, thus improving overall review of Verizon's performance.

As outlined in Exhibit 9, the Joint CLECs also request that the Commission include in the NHPAP the additional

metrics that Verizon agreed to in the Stipulation, as outlined in Exhibit 9. For instance, because of recent billing problems and the crucial part that accurate bills play in CLEC viability, the billing metrics, BI 3-04 and BI 3-05, should be included in the NHPAP as Critical Measures, with financial penalty amounts assigned. The Joint CLECs request the same treatment for Special Access metrics, OR-2-06 DSO and DS1, and request that OR-206 DSO and DSI also be added to the Special Provisions section of the NHPAP. The Joint CLECs recommend reductions to the amount assigned to PR 4-05 in order to fund the penalties.

Recognizing that the NHPAP would not provide remediation for egregious performance failures affecting only one CLEC,<sup>5</sup> the Joint CLECs request that the Commission modify the NHPAP so as to offer financial remedies for severe individual failures. Finally, the Joint CLECs request that the NHPAP's segregated internal allocation of funding caps be modified so that the funds in one segment could be tapped to augment the remedies in another segment when necessary.

In order to foster competition in New Hampshire, the Joint CLECs reason that the remedies paid out under a performance plan should cost Verizon-NH far more than the profits it could reap from competing in a discriminatory manner. The amount Verizon pays in penalties in New York and Massachusetts does not appear sufficient to change performance, given that Verizon's performance in New York has improved by only 20% after a year and that Verizon consistently misses the same measures in Massachusetts. According to the Joint CLECs, Verizon's performance history in these neighboring states indicate that the penalties must be significantly increased in order to be effective.

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<sup>5</sup> Such as the Exeter Hospital situation in which the hospital was without incoming phone service for 14 hours.



The Joint CLECs aver that Staff's PAPA, applied as an overlay to the New York PAP, will add the sufficient monetary disincentives to impel improved performance. The PAPA appropriately exposes Verizon to the full amount that Verizon has heretofore claimed to be risking. The Joint CLECs support an application of the PAPA with a 50-50 pay-out to the CLECs and the Department of Resources and Economic Development (DRED).

The Joint CLECs contend that a problem, that was first raised in PaeTec's written comments, remains to be solved. PaeTec urged the Commission to include remedies for deficient performance in provisioning both intrastate and interstate special access services. PaeTec specifically recommended the remedies adopted by the NYPSC in its Special Access Services Order.<sup>6</sup> The NYPSC Special Access Services Order revised Verizon-NY's warranty tariff to apply credits for missed installation commitments to competitive carriers, a revision PaeTec and the Joint CLECs argue should be included in the

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<sup>6</sup> *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York; Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company*, Case Nos. 00-C-2051, 92-C-0665, Opinion No. 01-1 (N.Y.P.S.C. June 15, 2001).

NHPAP.<sup>7</sup>

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<sup>7</sup> The Special Access Order adopted three new metrics relating to wholesale ordering and provisioning of special access services; the credits are applied when Verizon misses those metrics.

### **3. Jurisdiction**

The Joint CLECs did not file comments on the subject of jurisdiction.

#### **D. OCA**

##### **1. C2C Metrics**

The OCA is not a signatory to the Stipulation agreed upon by the Parties and Staff and submitted to the Commission on February 13, 2002. The OCA opines that the metrics are inadequate to discern anti-competitive behavior on the part of Verizon.

##### **2. Performance Plan**

The OCA supports the Staff's PAPA as having the best chance of actually changing Verizon's behavior if lack of parity is shown. However, the OCA argues that only CLECs should receive payments of penalty amounts because the CLECs are the parties injured by discriminatory behavior. The OCA objects to diverting Verizon penalty funds to the DRED for use in improving access to broadband in rural areas. However, the OCA also states that designating specific allocations or percentages of PAPA penalty funds for such purposes would be possible.

In its brief on jurisdiction, the OCA discusses different characterizations of incentive payments. If the payments are

treated as penalties under RSA 365:43, the payments would be made to the state treasurer and used as the state directs. If the payments are treated as reparation, they would go to CLECs directly. The OCA argues that all forfeitures beyond the actual administrative costs should be treated as adjustments to rates and turned over to the injured parties, the CLECs who have lost business, profits, or gone out of business due to Verizon's failure to comply.

### **3. Jurisdiction**

The OCA argues that the Commission has jurisdiction under the TAct to consider and order C2C metrics and an enforcement plan. According to the OCA, the Commission's authority is expressly preserved by §§251-254 of the TAct charging states with the responsibility to prescribe and enforce regulations not inconsistent with the TAct and to provide CLECs with competitively neutral access to ILEC networks. The OCA points out that the FCC, as part of its §271 application analysis of the public interest, will consider whether a state has put an enforcement plan in place. Further, the FCC has supplied explicit guidance as to the appropriate elements of an enforcement plan.

According to the OCA, the New Hampshire statutory grant of plenary power to regulate utilities includes general

supervisory powers, RSA 374:3, a duty to keep informed regarding the management and operations of utilities, RSA 374:4, the power to investigate rates and terms of utility offerings, 363:22 and 365:1-3, as well as the express power to establish alternative processes for streamlined review and decision, 365:8. The combination of these powers, together with statutes on fines, grants the Commission authority to regulate Verizon's dealings with CLECs, providing a solid basis for reviewing and approving metrics and an enforcement plan.

The OCA points out that the Commission may request the Attorney General to enforce a Commission order, RSA 374:41, and may order a utility to pay reparation to a party injured by an unjust rate, fare or charge, RSA 365:29. In addition, the Commission may impose penalties for violations of law or Commission order, RSA 374:41 and 42. According to the OCA, the penalties are limited to \$25,000 forfeiture per incident under 374:41 and \$10,000 per incident per day under 374:42. The Attorney General's office is authorized to bring an action on behalf of the State to collect the penalties if a party fails to pay them, RSA 365:43.

In addition to the statutory authority, the OCA argues that an enforcement plan can be characterized as simply

billing adjustments between Verizon-NH and the CLECs. In that light, the Commission has unlimited authority to formulate the methodology and calculate the amount of adjustment, unlike the statutory scheme. If the enforcement plan were considered to be reparations ordered by the Commission, the amounts would likewise be unrestricted.

The OCA suggests that Verizon should waive any possible jurisdictional challenges to the enforcement plans as a prerequisite to any positive §271 approval recommendation to the FCC. Otherwise, the OCA foresees delay and expense, detrimental to competition in New Hampshire, arising from the litigation surrounding enforcement of the plan.

#### **E. Staff**

##### **1. C2C Metrics**

Staff supports the Stipulation agreed upon by the Parties and Staff and submitted to the Commission on February 13, 2002, as discussed above.

##### **2. Performance Plan**

Staff proposes certain changes to Verizon's proposed NHPAP and, as well, Staff proposes the PAP Alternative (PAPA), a supplemental plan to overlay on Verizon's NHPAP. Staff recommends overlay on the NHPAP, not the AT&T PIP because, in Staff's opinion, the PIP requires an initial assumption,

intended to avoid Type II statistical errors, that is not based on any theoretical foundation. Furthermore, Staff believes that the PIP is far too complicated for understanding by the affected parties. Therefore, Staff recommends that the PAPA should overlay an amended NHPAP.

Whether or not the Commission adopts the PAPA, Staff asserts that the Commission should adopt the NHPAP with certain changes. All penalties, Staff argues, should be distributed in cash rather than in billing credits. Cash payments would more effectively modify Verizon-NH's behavior and would contribute to the diminution of the "pay to play" outlook. As another way to ensure that Verizon-NH perceives the effects of its behavior, Staff recommends that Verizon-NH should provide the Commission with its plan of action for correcting the problems that resulted in payments. Staff also recommends that a sum of \$10,000 should be allocated from any monthly payments and placed in a fund to pay for independent auditing of the implementation of any enforcement plan.

The NHPAP, Staff argues, should have an annual cap of 39%, the same as New York, and should adjust the allocation of cap amounts to MOEs based upon New Hampshire demographics. New Hampshire demographics should also be reflected in the weights the NHPAP assigns to metrics. Staff further argues

that the NHPAP test for -1 violations should be made backward-looking instead of forward-looking so that historical performance from preceding months can be examined to ascertain the level of NHPAP violation immediately. This would allow the penalty to be imposed immediately, rather than waiting two additional months.

In addition to the above changes recommended regarding the manner in which the NHPAP is implemented, Staff argues that the Bill Credit Tables in Appendix A of the NHPAP should be revised in order to create a compliance-based, rather than remedy-based plan. Appendix A contains tables laying out the minimum and maximum values that establish the incremental levels of penalties, thus converting performance scores into financial penalties.

Staff explains the conversion occurs as follows. Depending on the degree of disparity between service to CLECs and retail customers (or between service to CLECs and the benchmark), under the NHPAP MOE segment, each metric is scored, a 0, -1, or -2. After a weighting process based on the relative importance of each metric, and a computation to arrive at a Total Aggregated Performance Score for the entire MOE, a zero score represents compliance across the entire MOE and a -2 represents failure at the 95% confidence level across



the entire MOE. At the point the NHPAP determines 95% confidence that parity does not exist across the entire MOE, Verizon's NHPAP imposes a penalty of 20% of the total amount of financial penalty allocated to a particular MOE (the MOE cap). The 95% confidence point is the "minimum threshold," the performance score that starts penalties in the MOE. The NHPAP then determines twenty equal incremental bands of increasing poor performance; at the twentieth increment, the NHPAP imposes a penalty of the entire MOE cap.

According to Staff, the "minimum threshold" used in Verizon's NHPAP is set slightly high. Staff sets the minimum threshold for protecting Verizon from Type I error by determining what proportion of metrics are likely to fail when parity exists and computing the expected Performance Score these metrics would produce. Rather than the 5% point used by Verizon (which equates to -0.16922 for Resale, -0.17129 for UNE, -0.31909 for Trunks, and -0.19705 for DSL), Staff declares that the minimum threshold should be -0.154 for each MOE. Any score worse than -0.154, according to Staff, is worse than one would expect if parity existed, whether scoring against a statistical parity measure or a bright-line benchmark.

Furthermore, Staff argues that the point at which

Verizon's NHPAP imposes the maximum penalty, the entire amount allocated to the particular MOE, is set well beyond the point where lack of overall parity can be declared with near certainty, thus ensuring that CLECs will suffer extreme discriminatory harm long before any cap is reached. Staff argues that the effect is to insulate Verizon from the financial responsibility it claims to assume. Staff proposes to compress the conversion tables to create a stronger incentive for compliant behavior by Verizon, thus protecting the competitive marketplace in New Hampshire. The rationale Staff utilizes has the virtue of being statistically valid, Staff asserts, and is otherwise not dissimilar to Verizon's. The major difference is that Staff's proposal sets the maximum threshold first, the point at which non-parity is certain and the full cap should be assessed. Staff then works back, in decreasing equal-sized increments, to reach the statistically valid minimum threshold.

In support of its recommendation that the Commission should adopt the PAPA as an overlay to an amended NHPAP, the Staff identified the PAPA's two-fold objectives: to be understandable by all parties and to induce compliance by Verizon-NH. In achieving those objectives, the PAPA deals with the problem of small sample size in rural New Hampshire

by looking at Verizon-NH's monthly performance, not in the single month, but at each current month and the prior nine months as a rolling average. Staff argues that such an approach is possible because Verizon has been reporting C2C data to the Commission since March 2001. As a result, Staff argues the PAPA's determinations are more reliable than those of either the NHPAP or the PIP.

The PAPA's basic premise is that parity exists between Verizon-NH and CLEC service when, half of the time, Verizon-NH's average performance of service to CLECs for each metric is above Verizon-NH's average performance to itself, and half of the time, Verizon-NH's average performance to CLECs for each metric is below its average performance to itself. Each metric is either a measured metric or a counted metric. Measured metrics have a specific, defined value, *e.g.*, number of missed appointments<sup>8</sup>. They are compared against the Verizon-NH retail analog or against a benchmark standard. Counted metrics are those that are expressed in a percentage that is compared to Verizon-NH's percentage, *e.g.*, percent of on-time delivery.

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<sup>8</sup> As proposed in the PAPA, measured metrics are compared against the median rather than the average (mean) performance, in order to avoid the consequences of skewed distribution, but, Staff conceded, the comparison could be made against the mean for all metrics if the Commission so ruled.

The PAPA records a score of zero (0) when Verizon-NH service to CLECs is equal to or better than Verizon-NH retail service, and a score of minus one (-1) when it is worse. This scoring convention is used for service to individual CLECs and for all CLECs in the aggregate, for individual metrics, for all metrics in the aggregate, and all metrics within each of Verizon-NH's MOEs. Thus, Staff argues, the PAPA measures parity by the distribution of 0's and -1's demonstrating discriminatory behavior. A demonstration of discriminatory behavior relating to only one metric among 200 would not create a convincing demonstration of discrimination. Therefore, relatively small penalties are associated with each individual violation. If a discriminatory pattern emerges in the aggregate evaluations, the presence of discrimination can be confidently declared. At that point, according to Staff, serious financial penalties are justified.

The PAPA provides a number of opportunities to examine Verizon-NH's behavior toward CLECs. The PAPA takes a general view of all 200 metrics for all CLECs aggregated, down to a view of each MOE for all CLECs aggregated, then a view of each MOE for each CLEC, then a very focused view of each metric for the aggregate CLECs and for each CLEC. The PAPA also tests for pervasiveness, according to Staff.

Staff argues that the 10-month time period allows Verizon-NH to identify the service areas that require attention in order to avoid the serious penalties that would otherwise eventuate. The result, in Staff's opinion, would be that competition could grow in New Hampshire.

Staff's PAPA is self-executing, according to Staff; it automatically assesses penalties up to the full 1/12 of the cap when discriminatory behavior is demonstrated from testing the (1) aggregated metrics for the aggregated CLECs, (2) the MOE metrics for the aggregated CLECs, and (3) the aggregated metrics for individual CLECs. These three tests comprise Level 1 of the PAPA.

Level 2 of the PAPA tests for each metric separately. Penalties for discriminatory behavior demonstrated by these Level 2 tests will only be assessed at the Commission's discretion, as authorized under provision II.B.2 of the NHPAP (which permits reallocation of the monthly bill credits among provisions).

Staff asserts further that the PAPA penalties should be distributed as follows: first, for extreme violations, pay to CLECs the amounts necessary; second, for violations identified in individual CLEC data, the amount necessary to pay individual CLECs a *pro rata* share based on the proportion of

CLEC activity within that specific metric; and third, the remainder of the \$3.1 million cap divided 30% to CLECs pursuant to the PAP method and 70% to a fund set up by DRED to be available for advanced services deployment to rural New Hampshire.

### **3. Jurisdiction**

Staff argues that the Commission has specific statutory authority to impose a performance plan, pursuant to RSAs 370:2, 374:7-a, and 365:41. The Commission's authority includes ability to order service quality standards such as the metrics. Failure to meet the service quality standards may be penalized by amounts over and above the amounts proposed by the NHPAP and the PAPA. The penalty amounts would be recovered, pursuant to RSA 365:41, by actions brought by the state Attorney General and paid to the state treasurer. Staff argues that the Commission has jurisdiction to order a self-executing performance plan contained in a PAP and the PAPA by operation of the legal doctrine of judicial estoppel. Verizon itself requests the Commission to approve a performance plan in order to obtain approval of its §271 application from the FCC. According to Staff, Verizon's submission of a PAP for approval or disapproval by the Commission implies Verizon's acquiescence to the Commission's

authority to enforce the plan up to the penalty limits of the plan submitted. Therefore, since the structure of the PAPA does not contemplate penalties above the limits contemplated by Verizon's proposed NHPAP, Staff concludes that Verizon is estopped from contesting the Commission's jurisdiction to impose the PAPA.

For support of its jurisdictional argument, Staff refers to the actions of the Pennsylvania Public Utilities Commission (PAPUC) during its consideration of Verizon's §271 application. The PAPUC made a positive recommendation to the FCC of Verizon PA's §271 contingent on withdrawal of the company's legal challenge to PAPUC authority. Verizon PA withdrew its challenge. Staff states that the situations are "virtually the same" and that the FCC recognized that Verizon was effectively estopped from challenging the PAPUC's authority in the future.

The Staff also argues that the principles of statutory construction compel a conclusion that the Commission has authority to impose a performance plan. According to Staff, without that authority, the overall purpose of the Telecommunications Act of 1996 would be obstructed. Staff argues that would be an illogical result, nullifying the will of the legislature, and that pursuant to tenets of statutory

construction as applied in New Hampshire case law, a different result must be construed, *i.e.*, that authority must be implied.

## **V. COMMISSION ANALYSIS**

### **A. Metrics**

As Staff notes, RSA 370:2 authorizes the Commission to:

ascertain, determine and fix adequate and serviceable standards for the measurement of quality, ... or other conditions pertaining to the performing of its service, or to the furnishing of its product or commodity, by any public utility, and to prescribe reasonable regulations for examination and testing of such service, product or commodity, and for the measurement thereof.

Metrics, as understood in the carrier to carrier context, are measures of the quality of service performed by Verizon for its wholesale customers, the CLECs, together with "reasonable regulations" for the examination, testing and measurement of such quality of service.

The approach taken by all the parties to this docket, as articulated at the pre-hearing conference and throughout the course of this proceeding, was to begin by adopting the New York metrics and then consider certain New Hampshire-specific metrics. At hearing on November 27, 2001, the Parties and Staff represented that they had reached an agreement regarding metrics, not yet reduced to writing, and that metrics would not be contested at hearing. The Stipulation, filed February



13, 2002, and signed by Verizon, Network Plus, and Staff represents a partial consensus among the active participants as to what New Hampshire-specific metrics should be added to the New York metrics. Two of the five active participants, the OCA and AT&T, chose not to sign the Stipulation. We must consider the reasons for those choices, as reflected in the record.

By letter filed February 20, 2002, the OCA explained that it decided not to sign the Stipulation because, although it is good "as far as it goes," the Stipulation does not include metrics to adequately measure many subtle and harmful anti-competitive practices. The OCA stated that its decision not to sign was based on information learned in the course of another docket, DT 01-151. The OCA presented no alternative or additions to the metrics produced by the Stipulation and did not indicate opposition to the Stipulation "as far as it goes."

AT&T's decision not to sign the Stipulation hinges on one clause. By letter dated February 20, 2002, AT&T objects to Section 2(d), Section 2(d) reads, in full:

The Parties agree that it is appropriate to add certain metrics to the NY C2C Guidelines or to modify certain metrics currently contained in the NY C2C Guidelines, such additions or modifications to be applicable only in New Hampshire. The Parties

have agreed to these additions and modifications in New Hampshire as a negotiated compromise. Adoption of these additions and modifications does not imply that the additions or changes are appropriate anywhere except in New Hampshire, and all parties reserve all rights with respect to the adoption of these additions and modification in other states. Pursuant to this paragraph, Attachment B reflects the following additions and modifications to the NY C2C Guidelines:

Amend metrics OR-5-01 and OR-5-03 to reflect a ramp-up of the UNE flow-through rate, as follows:

<b>Calendar Quarter</b>	<b>OR-5-01 Total Flow- Through (%)</b>	<b>OR-5-03 Achieved Flow- Through (%)</b>
4 <sup>th</sup> Q 2001	65	90
1 <sup>st</sup> Q 2002	68	92
2 <sup>nd</sup> Q 2002	70	93
3 <sup>rd</sup> Q 2002	73	94
4 <sup>th</sup> Q 2002	78	95
1 <sup>st</sup> Q 2003	80	95

We find that the ramp-up period does not appear overly long, and the second quarter of the period is about to elapse. Other than a conclusory reference to data filed with the Commission, which no other participant has had opportunity to challenge or explain, AT&T provided no evidence to substantiate its claim that Verizon is already meeting the highest standard. We do not, on the basis of the record before us, find support for immediately imposing the 80% and 95% metrics, rather than permitting the ramp-up to continue.

The OCA's February statement indicates discomfort with the extent of the metrics, implying that additional metrics may be warranted. We acknowledge that measuring wholesale performance is a complex and difficult process. As is anticipated in the Stipulation, we and other state commissions continue to refine the process. Accordingly, in the absence of any articulated proposed additions and given the support of both Network Plus, a CLEC, and the Commission Staff, we consider the metrics contained in the Stipulation as filed to be reasonable for use in measuring Verizon's wholesale performance and we find that approving the metrics Stipulation is in the public interest.

**B. Authority to Order Performance Plan**

Although an approved performance plan is not required specifically by §271, the FCC recently explained that a state commission's approval and active oversight of a performance monitoring and enforcement mechanism provides evidence that adequate incentives exist to foster post-entry checklist compliance. *Application of Verizon Pennsylvania Inc. to Provide In-Region, InterLATA Services in Pennsylvania*, FCC 01-269, CC Docket No. 01-138, ¶¶127-129 (issued September 19, 2001). Verizon filed its proposed C2C guidelines and its NHPAP as part of its efforts to meet the requirements of §271

of the TAct in order to obtain authorization to provide in-region interLATA service. In its brief on the issue of jurisdiction, Verizon states that it voluntarily submitted its NHPAP as "a self-executing enforcement mechanism to assure its ongoing compliance with the Telecommunications Act of 1996 following authorization to provide interLATA services in New Hampshire." In effect, Verizon seeks approval of an enforcement plan to show the FCC its readiness for §271 approval.

Verizon claims that the Commission has no authority to make significant changes to the filing that expand the risk of or amount of penalties beyond that which Verizon itself is willing to incur. Verizon Brief at p. 5. On the other hand, Staff, AT&T, and the OCA assert on various theories that the Commission possesses authority to impose and enforce a performance plan of our own design and to assign penalties for the public interest. We must confront the issue of our authority before proceeding to analyze the merits of any of the proposed performance plans. As we noted in our recent Order No. 23,734 (June 28, 2001) in Docket No. DE 01-023, *Complaint of Guillemette*, citing *Appeal of Public Service Co. of New Hampshire*, 122 NH 1062, 1066 (1982), it is a matter of long-established New Hampshire law that the Commission "is

endowed with only the powers and authority which are expressly granted or fairly implied by statute." Further, our "generalized powers of supervision" over utilities are not a source of additional authority. *Id.* Power and authority that is not granted is withheld. *State v. New Hampshire Gas & Electric Company*, 86 NH 16, 163 A 724 (1932). Hence, the scope of our authority to, in the first instance or independently, create and enforce a plan containing self-executing penalties paid to CLECs must be found in or implied by New Hampshire statutes. On the other hand, we find no statutory obstacle to accepting a proposal from Verizon that we independently lack authority to require. It is thus important to distinguish between plans that we can require and plans that we can approve or allow.

RSA Chapter 365 expressly grants the Commission a number of powers to investigate a utility's performance in relation to its customers, and to take specific actions against the utility for inadequate service and for violations of laws or Commission orders. For example, RSA 365:29 in conjunction with RSA 378:10 grants the Commission authority to order a utility to pay refunds to prevent unreasonable prejudice or disadvantage to customers, *Granite State Transmission, Inc. v. State*, 150 NH 454, 202 A2d 236 (1964); and RSA 365:41-43

grants the Commission authority to determine that a utility is subject to civil penalties for violations of public utility laws, rules or orders.

In *Guillemette*, we reviewed the parameters of authority provided under RSAs 365:1, 365:2, 365:3, and 365:41. In that case, a customer sought compensation for alleged harm to home appliances caused by voltage fluctuations. In our order defining the scope of our investigation in that case, we concluded that we lacked authority to award an individual utility customer civil damages for harm caused when a utility has supplied deficient quality service. *Id.* at 11-12. Our reparations authority under RSA 365:29, we noted, is limited to ordering return of payments made within the preceding two years. *Id.* at 11. In *Guillemette*, we also affirmed our statutory authority to hold a utility responsible to pay civil forfeitures pursuant to RSA 365:41. *Id.* at 18-19. In the case of penalties assessed under RSA 365:41, the payments are made, not to the customer, but to the general fund ("state treasurer").

Applying the above tenets to the instant case, we can readily observe that the Commission possesses authority to order reparations in the form of bill refunds for substandard wholesale service, up to the full value of bill payments made

by the affected CLECs to Verizon over the preceding two years. RSA 365:29.

To the extent that payments to CLECs under the PAP, PIP or PAPA do not exceed the payments made by such CLECs in the preceding two years, we possess the statutory authority to enforce disgorgement by Verizon of such payments. *Id.* Further, under RSA 365:3, we note that it would be possible to accept a self-enforcing, future-looking performance assurance plan, if proposed voluntarily by Verizon to settle present and potential future claims of substandard service. That is, a formal hearing is not required by the statute as a precondition to assessing bill refunds, at least where Verizon has voluntarily accepted the plan set out to trigger responsibility for such refunds.

To the extent a performance assurance plan contemplates payments to CLECs in amounts above their bill payments to Verizon over the preceding two years, there appears to be no express statutory authority to require such compensation. However, we believe RSA 365:3 permits us to accept a voluntary proposal by Verizon to pay CLECs beyond the level of their recent billings. Further, so long as such a voluntary filing is in the form of a tariff, it would have the force and effect of law. *Appeal of Pennichuck Water Works*, 120 N.H. 562, 566

(1980). However, because we believe our authority is limited to approving a voluntary reparation plan, we find that we are unable to require Verizon to make substantive changes to its proposal.

Our statutory authority to order penalties for violations of law, rules or orders permits us to order payment of the forfeiture to the state treasurer, and to no other payee. RSA 365:41. Apart from that authority and our authority to order reparation under RSA 365:29, no other statutory authority exists to require that payments for substandard performance be made to a payee such as DRED.

### **C. Standard of Approval**

In its Comments in this docket, Verizon cites the decision of the FCC in the *New York § 271 Approval Order*, concerning the elements of a performance plan likely to foster post-entry checklist compliance. We agree the FCC has identified the key aspects required in a successful performance plan:

- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- a self-executing mechanism that does not leave the



- door open unreasonably to litigation and appeal; reasonable assurances that the reported data is accurate.

*Id.* at ¶ 433.

We agree with AT&T as to the proper purposes of a performance assurance plan: assuring prompt enforcement of appropriate consequences without the delays of an adjudication and appeals process, and including incentives high enough to exceed the benefits Verizon-NH might derive by inhibiting competition. All the plans presented to us distinguish between harm to the CLECs affected by poor performance and harm to the public interest generally from the resulting stifling of competition. Such distinctions should be preserved in any plan we approve.

In addition, we find that any performance assurance plan, in order to meet the standards for wholesale service in New Hampshire, and to prevent backsliding after Section 271 approval is granted, must take a multi-faceted approach to defining substandard performance and assessing penalties, both from measure to measure and for any given measure or set of measures over time. A multi-faceted plan of standards and penalties is necessary to prevent the ILEC from achieving parity on certain metrics, at the expense of effort needed to achieve or maintain parity on other metrics, and then shifting

performance efforts in the event performance standards are shifted to address the area of poor performance. Plans must also ensure that performance problems that are likely to adversely impact competition are addressed sufficiently early and with high enough penalties to inhibit patterns of non-compliance.

No plan for statistically measuring Verizon's wholesale performance is perfect. As explained by Staff's consultant Plager, statistical assessment of competition substitutes observations of the ILEC's business processes for observations of actual market share, so statistical significance is used only as a surrogate for the ultimate fact in question: impact on competitors and on competition in New Hampshire. It is with this understanding in mind that we review the plans offered by the parties.

#### **D. Staff and Intervenor Proposed Plans**

We look first at the proposed PIP, offered by AT&T. The PIP is built on the framework of the PAP, and shares many elements. The chief difference between the PIP and the PAP is the proposed use of a different statistical measure of the confidence at which parity is declared. The PIP proposes to "balance" Type I and Type II statistical error. While this approach has some intuitive appeal as a way of equalizing the

risk that either the CLECs or Verizon will be deprived of a benefit (parity treatment or freedom from unfounded penalties), it creates instability in the determination of Type I error. On the record presented we cannot approve the PIP.

Similarly, we will not substitute the PAPA for the NHPAP. We reject the PAPA as a stand-alone process as it does not have the PAP's track record, the PAP's monthly penalty approach, and the NHPAP's ability to identify lack of statistical parity in a few metrics in a particular month and provide financial penalties for individual violations. Nevertheless, in the discussion below we note that certain beneficial aspects of the PAPA can and should be implemented alongside Verizon's proposed wholesale performance assurance program.

#### **E. The NHPAP**

After reviewing the voluminous record in this case and recent rulings by the FCC regarding performance plans and §271 applications, we are persuaded that, when considered in the context of the exercise of our broader authority to further define and penalize violations of performance standards, the NHPAP, with certain evolutionary adjustments, is in the public interest. Furthermore, we find that creating a performance

plan based on Verizon's proposed NHPAP has the advantage of avoiding protracted litigation over the extent of our authority, which potentially could delay the implementation of any performance plan.

The NHPAP, with its four MOE categories, combined with Special Protections and Critical Measures provisions, provides a useful organizing principle for beginning the complex performance assurance task. Staff correctly notes that the NHPAP suffers from a level of complexity that raises questions about whether managers can understand what is expected of them and respond with sufficient focus to avert substandard performance. We note that, in New York, the repeated triggering of low levels of penalties for certain metrics has not thus far led to adequate improvement in performance. Staff Comments on MOE Threshold, at 2. Further, as noted below, the level of penalties Verizon would likely ever pay is actually much lower than the level of penalties to which Verizon claims it is exposed.

Despite these drawbacks, there is merit to allowing Verizon to implement the NHPAP. The NHPAP is identical to the NYPAP and the Massachusetts PAP, so Verizon will be able to draw on the experience it has gained implementing it in those states. The CLECs also have come to understand the workings

of the PAP, as evidenced by AT&T's withdrawal of its own PIP and support for a PAP structure in Virginia recently. See, *AT&T Communications of Virginia, Inc.'s Proposed Performance Assurance Plan*, Establishment of a Collaborative Committee to Investigate Market Opening Measures, Virginia S.C.C. Case No. PUC00026 (August 8, 2001). Thus, the level of convolution in the determination of sub-parity performance and associated penalties does not render the NHPAP unworkable. Further, if the NHPAP is augmented by the principles of the PAPA approach and the Staff Appendix A, the combined effect would provide sufficient and graduated penalties over time that are needed to prevent chronic substandard performance on any given set of metrics.

In addition, the parties proposed certain enhancements to the NHPAP. To the extent such changes are advisable, they should be viewed in light of the FCC's recognition that:

... states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement...[and] development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time.

*Application of Verizon Pennsylvania Inc. to Provide In-Region, InterLATA Services in Pennsylvania* (Pennsylvania §271 Order) FCC 01-269, CC Docket No. 01-138 (issued September 19, 2001), paragraph 128.

In this context, we expect that Verizon will agree to

evolutionary improvements identified below with respect to its NHPAP, as it has in sister states, to better serve the goals of the TAct and the interests of New Hampshire telecommunications customers.

AT&T, the Joint CLECs and Staff each proposed revisions to the NHPAP, which we now address. AT&T recommended additional daily penalties for Verizon's failure to make timely and accurate reports. While we find that penalties for late reporting could enhance our ability to implement the performance plan, we decline to accept ATT's specific proposal. However, we inform Verizon that the timely performance of its obligations under the NHPAP is hereby ordered and will be strictly enforced.

The Joint CLECs join with AT&T to recommend that the penalty cap in the NHPAP be increased from 36% to 39% as in New York. While the specific event that triggered the increase in penalties has not occurred in New Hampshire, neither had it occurred in Massachusetts when Massachusetts adopted the same overall penalty cap. As New Hampshire is a smaller market, and a smaller part of the overall Verizon operations, there is reason for concern that performance may be allowed to slip further with respect to competitors in our state, as opposed to states with large urban markets such as

Massachusetts and New York. By the same token, a penalty of 39% of New Hampshire net income is a significantly smaller portion of Verizon's overall net income than a corresponding percentage penalty in Massachusetts and other New England states. Accordingly, we expect that Verizon will concede that the penalty cap should be at least as high as it has been in Massachusetts and other New England states and we will so order as an appropriate evolutionary change to the filing.

Joint CLECs also ask that Verizon's NHPAP Allowable Miss Table be revised to match the same table in the New York PAP, so that a 95% benchmark is applied to sample sizes of less than 10 and less than 20. The proposed NHPAP uses a 90% benchmark for sample sizes of less than 10, which, in the Joint CLECs' view, unnecessarily dilutes the standard. We find it unnecessary to modify the benchmark because we believe that the 90% confidence level for sample sizes below 10, and 95% for sample sizes below 20 reasonably does not hold Verizon to a standard of absolute perfection.

The Joint CLECs join Staff in recommending that penalties be paid in cash rather than credits. Verizon has agreed to a revision of this provision in Vermont and the DOJ has recommended that the FCC adopt the revised PAP for Vermont as part of its §271 review. Given Verizon's acquiescence to

making cash payments in Vermont, until Verizon can uniquely identify on wholesale bills a credit attributable to a PAP payment, we find it reasonable to require such an evolutionary change to the NHPAP. Accordingly, until it can uniquely identify credits attributable to a NHPAP payment on wholesale bills, we will require Verizon-NH to make such payments to individual CLECs by check to the extent that the NHPAP payment exceeds the unpaid portion of the CLEC's current bill (including any arrearage). We also note that the NHPAP, at page 20, provides for payment by check to CLECs that discontinue taking service from Verizon-NH and have no outstanding bill balance.

The Joint CLECs recommend revising the NHPAP to include penalties for Verizon's failure to meet the billing and special access metrics agreed on in the Stipulation. We find such revisions unnecessary in light of the conditions we have advised Verizon that we will require as a condition of a positive recommendation to the FCC for Verizon's §271 approval.

The Joint CLECs recommend a mandatory annual audit of the NHPAP process. Staff also recommends that \$10,000 should be allocated from any monthly payments and placed in a fund to pay for such audits. We are convinced that periodic audits



would be wise. We also find that we possess adequate statutory authority to require Verizon to fund such an audit, see RSA 365:37, and therefore we do not need to set aside funds from PAP or PAPA to provide for an audit. We find it unnecessary to establish an audit schedule at this time, but will conduct audits as we deem necessary.

Penalties levied pursuant to the NHPAP, the Joint CLECs urge, should not negate remedies provisions in individual interconnection agreements. The NHPAP should include language to that effect, as well as language permitting individual interconnection agreement remedies to be renegotiated as the agreements expire, consistent with the NYPSC's 271 Order. We agree with Joint CLECs that the NHPAP and any penalties assessed under our separate authority under RSA 365:41 should not be netted against contractually-mandated payments under Verizon's interconnection agreements.

The Joint CLECs also object to Verizon-NH's revision of the New York PAP's scoring methodology. The Joint CLECs assert that the proposed NHPAP contains a "modified Z statistic" without justification. Again, the Joint CLECs state that this revision was rejected by the Pennsylvania ALJ. We have reviewed the statistical arguments made by the Joint CLECs, and the evidence provided by witnesses for Verizon,

AT&T and Staff, and have determined that the "modified Z statistic" is appropriate for use in identifying degrees of sub-par performance at various confidence levels.

Finally, Staff has proposed that the conditional miss scores (-1) be revised based on a look back to the previous two months, rather than waiting for the two-month delay that is provided in the Verizon NHPAP. Verizon has agreed to this change in Vermont in connection with its Section 271 filing relating to that state. We believe that Verizon should adopt the same approach in New Hampshire, and that this revision is an evolutionary change.

**F. Overlays: Appendix A and the PAPA**

AT&T recommends that penalties higher than those set out in the NHPAP be assessed for poor performance, in order to account for harm to the public interest. Staff implicitly argues for a similar increase in the ramp-up of penalties, at least in the MOE segments, in its proposed changes to Appendix A of the NHPAP (the scale of performance scores and associated penalties for MOE performance).

We agree with AT&T that if the NHPAP were an exclusive remedy, the level of penalties to which Verizon is exposed would not likely incent parity performance, but would leave wholesale customers in New Hampshire at risk of "pay to play" performance on the part of Verizon. Verizon's scale of graduated levels of confidence of sub-parity performance and associated graduate penalties starts at the 95% confidence level, as does Staff's Appendix A.<sup>9</sup> In Verizon's case, however, the maximum penalty is not reached until the confidence of sub-parity performance reaches well over 99.999%. In Staff's Appendix A, the maximum penalty is reached by the time confidence of lack of parity reaches 97.5%

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<sup>9</sup> Staff and Verizon disagree slightly on the calculation of the level of sub-parity performance scores that is associated with a 95% confidence level of lack of parity. That disagreement is not important to the discussion of the difference in the two versions of Appendix A.

in the case of resale, and between 98% and 99.99% in the case of UNEs, interconnection and DSL.

The goal of a PAP is to assure parity performance. For regulatory purposes, it is not necessary to go beyond the confidence level corresponding to a virtual certainty of lack of parity. Verizon's proposal is analogous to the extreme confidence levels demanded in determining the allowable variance in voltage for a delicate electronic machine, for example. In such a situation, confidence to "five 9s" may be required, because it is known for a fact that the machine will not tolerate greater variance in voltage. In the case of a determination whether parity exists in performance, over a range of 50 or more individual metrics with different weights, common sense advises that once we are 99.0% sure parity has been missed, we are as sure as we ever can be or need to be that parity has been missed; we have no reasonable doubt.

If the purpose of setting a confidence level associated with the maximum level of penalties is to set the upper end of the range of confidence at virtual certainty, then Staff's approach more closely achieves this result. In effect, Verizon's scaling results in a range of penalties up to roughly half those that could conceivably be imposed under Staff's Appendix A. Said another way, while nominally putting

\$10.6 million at risk under the MOE segment of Verizon's NHPAP, Verizon's proposal in practice would likely put only about half that amount at risk.<sup>10</sup> Thus, Verizon's claim that \$10.6 million is enough exposure to create an incentive to achieve MOE parity would not settle the issue of whether the NHPAP will create that incentive, even if it were true. That is, we would still have to determine whether, absent Staff's Appendix A, the NHPAP would provide adequate MOE incentives.

Verizon itself points us to the standard we should use to determine whether a penalty scheme will be sufficient to incent the parity we require between wholesale and retail performance. Verizon cites the maximum penalty a number of times to reassure the Commission that it is exposed to sufficient risk to incent parity performance. However, its MOE penalty scale significantly reduces Verizon's risk of reaching this maximum. We are persuaded by Staff, the Joint CLECs, AT&T and the OCA that the financial risk that Verizon will incur under the NHPAP is not, by itself, enough to incent parity, given the small size of Verizon-NH when compared to Verizon corporate, where staffing and expenditure decisions are made. Graduating the penalties between the minimum at 95%

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<sup>10</sup> Note that these penalty caps assume Verizon's proposed overall cap of 36%, not the 39% cap we approve above.

confidence, and the maximum at 99.0% confidence, would ensure that the maximum penalty is achieved by the time sufficient failure on sufficient metrics exists to be virtually certain that Verizon is providing substandard performance.

In addition, we find that the PAPA's ability to identify patterns of behavior in advance, giving notice to the ILEC that certain business practices must change in order to avoid penalties for discrimination, is a valuable addition to the protections afforded to the nascent competitive market in New Hampshire. The PAPA also allows us to examine the combination of performance variables (CLECs, MOEs, metrics and time) from a variety of perspectives, so that concentrations of poor performance can be spotted and penalized. We consider the PAPA's tracking of performance over time and through a series of filters an enhancement to our oversight ability, and particularly useful in our small state. We are persuaded that the usefulness of the PAPA information will augment the NHPAP to assure Verizon's wholesale service quality without triggering the so-called "pay to play" aspect that would be extremely detrimental during this precarious transition from a monopoly to a competitive environment in New Hampshire.

### **G. Process for Augmenting NHPAP**

Having addressed the merits of the three performance plans, we consider further the question raised as to our authority to impose any plan without Verizon's acquiescence. Verizon claims that the Commission has no authority to expand the risk beyond what Verizon itself is willing to incur. Staff, AT&T, and the OCA assert that we have authority to impose and enforce a performance plan that we find reasonable, and to assign penalties for the public interest. The real extent of our authority lies somewhere in between. We cannot order, although we may accept, a performance plan that involves payments to customers beyond their billings for the last two years. For this reason, we are limited to Verizon's voluntary NHPAP filing, subject to evolutionary changes addressed above, for authority to direct payments in the amounts suggested by Verizon to CLECs harmed by Verizon's subparity performance.

As Verizon conceded in its comments during the hearing on its section 271 filing, its proposed performance assurance plan "does not reduce the Commission's authority in any way. So, whatever other authority the Commission has, it would retain. The PAP does not take away from the Commission's authority." Transcript, DT 01-151, February 6, 2002, p. 67.

Accordingly, we have the authority, under RSA 365:41, to find Verizon in violation of our orders if it fails to meet the requirements embodied in the non-evolutionary changes we adopt herein, specifically the Staff Appendix A and the PAPA 10-month review. Our authority to exact civil penalties is limited to \$25,000 per violation, and payments must be made to the state treasurer, so no single proposal advanced by any party for additional penalties beyond the NHPAP can be implemented exactly as proposed.

To address the need for swifter recognition of the maximum probability of substandard performance (the Appendix A issue), and for recognition of the pattern of repeated violations over time (the PAPA issue), we will need to fashion a set of standards and associated violations that fit within the parameters of our authority under RSA 365:41. The definition of violations and penalties under RSA 365:41 was not explored fully on the record of this docket. While several parties alluded to our authority under RSA 365:41 and AT&T suggested that RSA 365:41 should be applied to each specific benchmark or parity standard contained in a performance plan, no party set out a complete proposal for definitions of violations and associated penalties that was cast in the framework of the statute.



Accordingly, we go no further in this Order than to suggest how such violations might be defined, and how penalties might be assessed, consistent with our findings that Staff Appendix A and the PAPA should be reflected in Verizon's performance assurance scheme in order to ensure that the plan adequately addresses the scope of possible forfeitures, and the variable combinations of metric failures that can indicate lack of parity.

With respect to the Appendix A issue, one possible approach would be to determine that between 95% minimum confidence of non-parity and 99.0% virtual certainty of non-parity, each equal increment of increased probability of non-parity<sup>11</sup> shall constitute a separate violation of our standards of performance in providing service to CLECs. For each of these, a civil penalty of \$25,000 would then be assessed, less the amount already paid by Verizon to CLECs under the NHPAP. Consistent with our determination that Verizon's NHPAP in theory provides for an adequate level of potential penalties, however, such civil penalties in the aggregate would not exceed the cap for each MOE. With respect to the PAPA issue, once parity were determined to the appropriate Level 1

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<sup>11</sup> Which, we note, are associated with ever-increasing numbers, severities, or weightings of failure to meet the metrics to which Verizon has agreed.

or Level 2 confidence level, each failed metric beyond the cut-off level of parity in metrics (typically 50%, but a larger amount in smaller sample sizes) could constitute one violation, subject to a per-violation penalty of \$25,000, up to an overall cap as proposed in the PAPA.

To create a process that is as self-executing as the law and due process will allow under RSA 365:41, for each of the violations determined under Staff Appendix A and the PAPA, we could employ the following process: Once Staff had reviewed the monthly NHPAP reports, and determined that a violation had occurred, it would forward a notice of violation and proposed penalty to Verizon, with the workpapers showing the violation and the associated penalty, based on Verizon's filed performance scores. Verizon would have an opportunity to contest the finding of a violation (as in the case of reporting errors, violation calculation errors, penalty calculation errors), and to request a hearing if evidence is required to resolve an outstanding dispute as to the violation and the penalty. Should Verizon have no basis to contest the proposed penalty upon notice of violation, or decline to appeal the determination of the penalty after unsuccessfully contesting the penalty, it would pay the civil penalty directly to the state treasurer. Should Verizon fail to pay

the penalty, the matter would be referred to the Attorney General for enforcement as provided in RSA 365:43 and 44.

Because this process was not considered by the parties during the hearings on this docket, we will not impose it without further proceedings, to give all affected parties the opportunity to comment on it. We will open a docket for this purpose, and solicit comment on the proper definitions of violations, the proper forfeitures to be associated with each such violation, the process for determining violations and assessing forfeitures, and similar details of implementation under RSA 365:41. Verizon will have an opportunity to explore further the statistical errors it claims were present in the Staff Appendix A tables. We consider that our specific approach to exercising our authority to reflect the Appendix A and PAPA standards and associated penalties will benefit from the input of the parties to this docket, and other interested parties.

#### **H. CONCLUSION**

As noted above, a successful performance plan must satisfy five key aspects. As filed, the Verizon NHPAP, in isolation, would not meet all five requirements. However, when adjusted to incorporate evolutionary adjustments and considered within the context of our traditional authority as

exercised by implementing the Appendix A penalty overlay and the PAPA penalty overlay, the NHPAP does constitute a satisfactory performance plan.

First, the combination of NHPAP and our traditional authority subjects Verizon to "potential liability that provides a meaningful and significant incentive to comply with the designated performance standards." *New York §271 Approval Order*, at ¶433. The increase in maximum overall liability from 36% of net income to 39% of net income, consistent with the evolution of the PAP in Massachusetts and New York, and the prospect of additional penalties for violations of parity under the Appendix A and PAPA overlays, should expose Verizon to a sufficient potential liability to incent parity in performance.

Second, the metrics we approve in the Stipulation are "clearly articulated, pre-determined measures . . . which encompass a comprehensive range of carrier to carrier performance." *Id.* Further, the NHPAP and the two overlays set out "clearly articulated, pre-determined . . . standards against which such measures will be evaluated." *Id.*

Third, the NHPAP, when considered within the context of our traditional authority, creates "a reasonable structure that is designed to detect and sanction poor performance when

it occurs." *Id.* The detection of poor performance is assured by the reporting of performance scores, both under the NHPAP scheme, and under the PAPA overlay. The PAPA overlay looks at the same data as the NHPAP through five different filters, using the assumption that parity is missed when half the metrics are missed and half the metrics are met or exceeded. This alternative screen of performance allows the Commission to detect poor performance over time and across many combinations of measures. As for sanctions when poor performance occurs, the NHPAP standing alone does not sufficiently sanction poor performance. This problem is addressed by the Appendix A overlay. Similarly, the PAPA overlay addresses the need to provide sanctions for poor performance that persists over time and appears in various potential combinations of metrics, MOEs and affected CLECs.

Fourth, both the NHPAP and the Appendix A and PAPA overlays have self-executing elements. The NHPAP is almost entirely self-executing, by design. Only when Verizon questions certain penalty levels under the Exceptions and Waiver Process are penalties withheld once the performance scores fall within the levels triggering required penalties. The record here does not reveal that the Exceptions and Waiver Process has been used to vitiate the self-executing aspect of

the PAP in other states. The Appendix A and PAPA overlay violations and penalties will be determined through comparison of performance scores (already computed for the NHPAP) to the standards set out in the Appendix A and PAPA overlays as defined further in the proceeding to follow. There should be no contested facts to adjudicate in applying such penalties, as the violations and penalties will be based on performance scores that are computed by Verizon based on its own data. Potential penalties should be pre-determined, making the computation of the appropriate penalty a straightforward calculation. Verizon or any other party may contest a notice of proposed violation on grounds we cannot now anticipate, and litigation might ensue. In such a case, the voluntary self-executing portion of the performance plan (the NHPAP portion) will still meet the fourth condition, in that it "does not leave the door open unreasonably to litigation and appeal." *Id.*

Finally, the NHPAP and the overlays provide "reasonable assurances that the reported data is accurate," *id.*, because the Commission possesses the statutory authority to order audits, and we plan to audit frequently enough and in sufficient detail to determine the accuracy of Verizon's reported data.

Taken together, the NHPAP as amended consistent with this order, the Appendix A overlay, the PAPA overlay, and our penalty and audit authority, should provide reasonable assurances that Verizon wholesale service will not deteriorate in the event Verizon obtains Section 271 authority.

**Based upon the foregoing, it is hereby**

**ORDERED,** that the Verizon NHPAP is approved, subject to the conditions set forth in this Order; and it is

**FURTHER ORDERED,** that a docket shall be opened to define the violations and associated penalties to be used in enforcing the standards set out in Staff Appendix A and the PAPA, as described above.

By order of the Public Utilities Commission of New Hampshire this twenty-ninth day of March, 2002.

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Thomas B. Getz  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Debra A. Howland  
Executive Director & Secretary