STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

SBC Communications, Inc.,	**)**	
SBC Delaware, Inc.,	**)**	
Ameritech Corporation,	**)**	
Illinois Bell Telephone Company	**)**	
d/b/a Ameritech Illinois, and	**)**	
Ameritech Illinois Metro, Inc.	**)**	
	)	
	)	**ICC Docket No. 98-0555**
	)	
Joint Application for approval of the	**)**	
reorganization of Illinois Bell Telephone	**)**	
Company d/b/a Ameritech Illinois, and the	**)**	
reorganization of Ameritech Illinois Metro,	**)**	
Inc. in accordance with Section 7-204 of the	**)**	
Public Utilities Act and for all other	**)**	
appropriate relief.	**)**	

BRIEF ON RE-OPENING OF THE STAFF OF THE
ILLINOIS COMMERCE COMMISSION

PUBLIC VERSION

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July 28, 1999

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I. INTRODUCTION

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and for its Brief on Re-opening, states as follows:

STATEMENT OF THE CASE AND ITS PROCEDURAL HISTORY

On Thursday, June 10, 1999, SBC and Ameritech (the "Joint Applicants") filed three motions with the Illinois Commerce Commission (the "Commission") in the matter of the reorganization between SBC and Ameritech. These three motions included a "Motion for Leave to File an Amended Joint Application," a "Motion to Re-Open the Record," and a "Motion for the Commission to Set an Expedited Schedule." As part of their amended filing, the Joint Applicants moved to submit additional record evidence.

The additional record evidence was filed in response to the issues raised by the Commission in Attachment A to Chairman Mathias' June 4, 1999, letter to the Hearing Examiners assigned to the instant proceeding, as well as those issues raised in the Chairman's June 15, 1999, correspondence. Specifically, the Joint Applicants included an Exhibit 5 and 6 in their June 10, 1999 filing. Exhibit 5 is entitled "Summary of Additional Commitments By Joint Applicants", while Exhibit 6 is entitled "Joint Applicants' Response to Commission's June 4 List of Issues and Joint Applicants' Additional Commitments."

Furthermore, on July 1, 1999, the Federal Communications Commission (FCC) received an *ex parte* filing from the Joint Applicants containing certain voluntary commitments relating to the proposed reorganization. Although the ICC and FCC have differing statutory authority over transactions such as this, the ICC's and the FCC's

goals concerning the fostering of competition in the local exchange marketplace appear to be quite similar. On July 9, 1999, the Chairman issued a letter to the Hearing Examiners expressing his desire to understand whether provisions under consideration in Illinois would be conflicted by the voluntary commitments made to the FCC by the Joint Applicants. The Joint Applicants were directed to respond to the Chairman's inquires during the evidentiary hearings held July 13-15, 1999.

The Joint Applicants filed Direct Testimony on Re-opening on June 17, 1999, and Supplemental Direct Testimony on Re-opening on June 18, 1999. Staff and intervenors filed responsive testimony on July 2, 1999, and the Joint Applicants filed Rebuttal Testimony on Re-opening on July 9, 1999. At the conclusion of the July 15, 1999, evidentiary hearing, the record in this reopened proceeding was marked "Heard and Taken. The Hearing Examiners set a briefing schedule wherein the parties would file Briefs on Re-opening on July 28, 1999.

II. SUMMARY OF STAFF'S POSITION

Staff's comments in this pleading are limited to the issues addressed during reopening. Upon review of the record in this re-opened proceeding, Staff concludes that the Joint Applicants have been generally responsive to the Commission's inquiries addressing the following issues: interconnection (pricing and technical feasibility), shared transport, OSS, unbundling and the National Local Strategy. Furthermore, Staff supports the positions taken by the Joint Applicants during re-opening addressing the issues of shared transport and OSS. However, Staff notes that while there are conditions that can be placed on the proposed merger to satisfy some of the

requirements of Section 7-204, Staff maintains the position there are no conditions that will mitigate the significant adverse impact on local exchange competition that will occur as a result of the proposed merger.

To the extent the Commission disagrees with Staff's assessment, and concludes that the merger should be approved, Staff urges the Commission to adopt all of Staff's previously recommended conditions, those conditions that may be ordered by the FCC in its review of the merger, as well as the conditions recommended herein.

III. ISSUES

1. COMPETITION

An explanation of whether SBC is or is not an "actual potential competitor" in Illinois, as the term has been used throughout this proceeding.

a. SBC is an actual potential competitor in Illinois.

The Actual Potential Competition Doctrine[1] holds that a proposed merger is anticompetitive when the following five elements are satisfied:

- The relevant market is concentrated;
- The acquiring firm is seeking to enter the market through the acquisition of the market's dominant firm;
- The acquiring firm would likely enter the market either through de novo expansion or a toe-hold acquisition in the near future in the absence of the merger;
- Such competitive entry would likely deconcentrate the market or lead to other procompetitive effects; and
- An insufficient number of similarly situated alternative entrants exist.

[1] Staff identified two significant adverse effects that SBC's acquisition is likely to have on competition other than the elimination of an actual potential competitor. These two adverse effects are (1) inhibiting the market's transition from regulation to competition by significantly increasing Ameritech Illinois' ability to retain its dominant market position, and (2) increasing the market's barriers to entry. Staff's lack of discussion of these two adverse effects on competition herein merely reflects the fact that the Commission's question is limited to whether SBC is an actual potential competitor in Illinois. Staff's position on the other two adverse effects on competition has not changed on re-opening.

See, United States v. Marine Bancorporation, 418 U.S. 602, 630, 633 (1974); Tenneco, Inc. v. F.T.C., 689 F.2d 346, 352 (2nd Cir. 1982); Republic of Tx. Corp. v. Board of Governors, 649 F.2d 1026, 1044 (5th Cir. 1981); United States v. Siemens Corp., 621 F.2d 499, 505 (2nd Cir. 1980).

Staff discussed this doctrine in Staff's previously filed briefs in this proceeding and refers the Commission back to Staff's previously addressed aspects of this doctrine when possible and appropriate. See, Staff Initial Brief at 19-24, 53-71; Staff Reply Brief at 40-69; Staff Brief on Exceptions at 110-129; Staff Reply Brief on Exceptions at 2-28. As a result, Staff limits this portion of Staff's Brief on Re-Opening to performing two functions. First, Staff addresses new evidence (or the lack thereof) on re-opening and the manner in which such new evidence relates to the doctrine's elements. Second, Staff clarifies any issues which may be misperceived because of the manner in which the Joint Applicants have framed such issues. Staff performs these two functions as they relate to each of the doctrine's five elements.

i. The Illinois local exchange market is concentrated.

Ameritech Illinois controls in excess of 95% of the market in Ameritech Illinois' service territory. ICC Staff Ex. 9.01 at 12-13; ICC Staff Ex. 4.0 at 18, att. 1; ICC Staff Ex. 4.01 at 12. The Joint Applicants have failed to provide any evidence which would rebut this prong of the doctrine. Instead, since the first closing of the record, the Joint Applicants have advanced two theories which attempt to create a perception of non-concentration. Neither of the Joint Applicants' theories accomplish the task of turning such attempted perception into reality.

First, the Joint Applicants implicitly attempt to expand the market's definitional scope[2], thereby decreasing the market's degree of concentration. For example, SBC witness Mr. Kahan refers to a "waive of consolidation and merger activity" in the telecommunications industry. See, SBC-Ameritech Ex. 1.3 at 5. In fact, on re-opening Mr. Kahan provides a detailed chart of such consolidation activity. See, Id. at att. 2. Mr. Kahan's "waive of consolidation" refers to agreements, wherein usually at least one of the agreeing companies operates in a market outside of the Illinois local exchange market. Specifically, the majority of the agreements involve companies that provide interexchange, wireless, cable, software, paging, and computer services. Also, many of the agreements involve companies which operate outside of Illinois, including companies based in foreign markets.

Agreements among such companies are irrelevant to the Commission analysis. As the Joint Applicants advocated in their Initial Brief, "[t]he first step in an analysis of a merger's competitive effects under Section 7-204(b)(6) is to define the 'relevant markets' in which those effects are to be evaluated." Joint Applicants Initial Brief at 33. The relevant market is defined by services which are "reasonably interchangeable by consumers for the same purposes." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956). The rationale is that a dominant firm will not be able to exercise market power by restricting output and raising prices if consumers are able to substitute the firm's product for a different good. See, 1992 Horizontal Merger Guidelines at Sec.

[2] Markets are defined both by their geographic and product scopes. A firm's share of a given market becomes smaller in relation to the whole when the market is expanded to include more geographic or product markets. Also, a given market's level of concentration decreases as the market's scope is expanded because a larger number of firms will compete and have market share within the scope of the expanded market definition.

1.11 (defining the relevant market based on a test of whether a firm would exercise market power if the firm were the only producer of the good). In regards to Mr. Kahan's list of agreements, it is clear that consumers of local wireline telephone service can not substitute interexchange, wireless[3], cable[4], software, paging or computer services for such local wireline service. Also, it is clear that a consumer of local telephone service in Illinois can not substitute local service in Michigan for such local service in Illinois. See, Joint Applicants' Initial Brief at 34 (emphasizing to the Commission that "local exchange markets are local (not regional, national, or international)"). Accordingly, the Commission must disregard as irrelevant to the market those agreements identified by the Joint Applicants which are beyond the relevant market, i.e., the Illinois local exchange market. Ironically, exclusion of such deals leaves only two relevant agreements which are the proposed SBC/Ameritech and Bell Atlantic/GTE mergers.

Second, the Joint Applicants attempt to discredit the validity of Staff's market share calculations. Staff initially calculated the market's degree of concentration based on carriers' access lines. The Joint Applicants' claim that Staff's calculation fails to account for significant amounts of CLEC market share because access line calculations do not account for CLEC service which bypasses the ILEC network ("bypass service").

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[3] While an argument can be made that wireless service is a substitute for wireline service, the experts who have provided testimony in this proceeding have all agreed that certain characteristics of wireless service, including price, prevent wireless from being a substitute for wireline service at this time.

[4] Cable is not a substitute for local wireline service because cable telephone service is not currently offered within the market. The need to limit the market's definition to current markets lies in the fact that nobody can foresee which alternative offerings will develop in the future. Predicted offerings could fail to develop because of technological or cost problems; or, such predicted offerings could end up being a less significance than anticipated because of price or a failure to stimulate consumer demand. ICC Staff Ex. 9.01 at 16-17 (recommending that the Commission evaluate AT&T's statements of a future offering of telephony over cable in this light); see also, 79 Op. Att'y Gen. 301, 316 n. 95-96 (1996)(United States Attorney General's office stating that "no one currently knows which system or systems will be technologically and financially viable in the foreseeable future" and that "confident predictions about the future availability or unavailability of telecommunications products are routinely proven incorrect").

See e.g., Oral Argument Tr. at 445-446 (Ameritech counsel Mr. Welsh making this argument). A market share calculation on revenues would include bypass service. ICC Staff Ex. 4.01 at 11-12. Nonetheless, the Joint Applicants do not provide the Commission with a market share calculation based on revenues.[5] Instead, the Joint Applicants merely argue that such a calculation would reveal CLEC presence at substantially greater levels. In effect, the Joint Applicants' tactic would result in a record devoid of a market share calculation based on revenues and the Commission being forced to rely on the Joint Applicants' unsubstantiated statements.

However, the Joint Applicants' argument misses the fact that Staff provided the Commission with a market share calculation based on carriers' revenues. Staff witness Mr. Graves testified that a market share calculation based on revenues reveals that ILECs control XXXXX of the local exchange market on a national basis. ICC Staff Ex. 4.01 at 12 (providing revenue calculation as of March, 1998). Notably, the market share calculation based on carriers' revenues is substantially identical to the market share calculation based on carriers' access line counts, clearly establishing that Staff's market share calculation based on access lines is credible. Accordingly, the evidence of record establishes that the market is concentrated, thereby satisfying the doctrine's first element.

ii. SBC is seeking to enter the market through the acquisition of the market's dominant firm, Ameritech Illinois.

[5] Specifically, after criticizing Staff's market share calculations because those calculations were based on access lines, Ameritech witness Mr. Gebhardt provides a market share calculation from Ameritech's information which itself is based on access lines. SBC-Ameritech Ex. 3.1 at 19-21, sch. 2. Notably, Ameritech's access line calculation shows CLEC presence as constituting only XXXX of the market.

Ameritech Illinois is the market's dominant firm because Ameritech Illinois controls at least 95% of the relevant market. See, ICC Staff Ex. 9.01 at 12-13; ICC Staff Ex. 4.0 at 18, att. 1; ICC Staff Ex. 4.01 at 12.

iii. SBC would likely enter the market either through de novo expansion or a toe-hold acquisition in the near future in the absence of the proposed acquisition.

On re-opening, the Joint Applicants failed to present objective evidence that SBC would not enter the Illinois market in the absence of acquisition. Instead, the Joint Applicants continue to urge the Commission to rely solely on subjective evidence in the form of (1) statements by SBC's internal managers that SBC will not enter the Illinois market in the absence of the proposed merger, and (2) an alleged[6] lack of SBC documented plans for entry into Illinois through a means other than acquisition. See e.g., SBC-Ameritech Ex. 1.3 at 4. Such subjective evidence is unreliable and should not form the basis of the Commission's decision. See, Staff Reply Brief on Exceptions at 10-18 (citing Areeda and Turner, Antitrust Law, para. 1121b2 at 103-04; para. 1121b4 at 104); Staff Initial Brief at 66-67 (citing United States v. Falstaff Brewing Corp., 410 U.S. 526, 534, n. 13 (1973)(J. Marshall, concurring)). The Hearing Examiners appropriately discredited the Joint Applicants' subjective evidence to find that SBC would have to compete in Illinois in the near future in the absence of acquisition. See, PEPO at 61. The Commission should follow the Hearing Examiners' lead on this issue.

[6] On re-opening, Staff introduced evidence of internal SBC documents which establish alternative entry plans, thereby contradicting SBC's claim that no documents supporting alternative entry plans exist. See infra, this part.

Contrary to the Joint Applicants' tactic, Staff has focused on enormous amounts of objective evidence which establishes a high probability that SBC would enter the Illinois market in the absence of acquisition.[7] Staff respectfully refers the Commission to Staff's previous filings for a complete review of the evidence that Staff submitted on this issue during the main portion of this proceeding, which includes the appropriate time frame for the Commission analysis of this issue. See, Staff Reply Brief on Exceptions at 9-32; Staff Reply Brief at 44-57; see also, ICC Staff Ex. 9.01 at 21-26 (Staff witness Dr. Hunt providing a brief summary of evidence on this issue in testimony on reopening). Moreover, on re-opening Staff has provided substantial new evidence that SBC would be highly likely to enter the market in the absence of acquisition. This portion of Staff's Brief on Re-Opening discusses the new evidence.

First, SBC's own internal documents establish SBC's plan for cellular entry into Illinois.
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XXXXXXXXXXXXXXX In general, expansion strategies tend to be cost intensive during the beginning years of expansion when large facilities and marketing costs are

[7] This objective evidence satisfies the following factors considered by courts and economists on the issue of likelihood of entry: (1) Feasible alternatives means to entry other than acquisition of the market's dominant firm exists, (2) the acquiring firm has the financial capability to enter through such alternative means, (3) the acquiring firm has an interest in market expansion, (4) the acquiring firm has an incentive to enter, and (5) the acquiring firm's incentive to enter the relevant market is generally greater than the firm's incentive to undertake other expansion strategies. See, Marine Bancorp., 418 U.S. at 633; Mercantile Tx., 638 F.2d 1255, 1269-70 (5th Cir. 1981); Areeda and Turner, Antitrust Law, 1121b4 at 105-106, 1121c at 108, 112c4 at 110-113, 1121c5 at 113; FCC BA/NYNEX Order at para. 58-94.

incurred to build network facilities and brand name reputation. But, once those costs have begun to accomplish their intended tasks, revenues generally begin to offset costs and eventually overtake such costs.

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This scenario, which SBC's internal financial plans prove SBC's cellular expansion would follow, also disproves SBC's argument that SBC's Rochester Trial indicated cellular expansion would be unprofitable. SBC's basis for such an argument is the fact that SBC's Rochester Trial did not turn a profit. However, SBC's Rochester trial only lasted for one year. The losses during the first year is not a significant occurrence in light of SBC's previously developed XXXXXXXXXXXXXXXXXXXXXX which proves that SBC did not anticipate profits until XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXX. Further, SBC met SBC's own pre-established expansion targets during SBC's one year Rochester Trial. SBC's ability to attain pre-set goals in the Rochester Trial shows that SBC would have continued to meet projections, including the attainment of profits XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, if SBC undertook cellular expansion.[8]

In addition to SBC's internal financial plans, SBC has internal Marketing Research and Analysis Reports which show XXXXXXXXXXXXXXXXXXXXXXXXXX

[8] As Staff previously noted, SBC would also begin reaping profits sooner in Illinois than in Rochester because Illinois' wholesale discount rates are substantially larger than Rochester's discount rates. See,

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Also, new evidence shows that bundling services for cellular customrs is necessary to reduce churn of cellular customers and increase revenues in the cellular business. The evidence is again derived from SBC's internal documents, namely

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Staff Initial Brief at 20 (citing Tr. at 1677-78 (Staff witness Mr. Graves testifying that Illinois' discount

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. Id. at 6 (citing SBCAMIL 011956-011970). XXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX. Such a market condition means that firms have to work harder to compete for customers, either by providing superior services or through superior price offerings.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXX SBC's intended business strategy has been proven successful in the market. AllTel reduced the churn rate of AllTel's cellular customers from 2% down to .1% by bundling wireless service with local wireline service. ICC Staff Ex. 4.02 at 7. In fact, it is reported that bundling services can reduce churn by as much as 50%. Id. (citing Levine, Shira, Billing with an Attitude, America's Network, No. 2 Vol. 102, pg. 78 (Jan. 15, 1998). A 50% reduction of Cellular One's churn rate would amount to SBC preserving XXXXXXXXXXXX in revenues per year.[9] Accordingly, SBC's internal documents recognize that SBC needs to expand cellular service to

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rates range from 5% to 68% whereas Rochesters' rates are merely 5% to 17.8%)).

[9] This assumes that the average monthly revenue per customer is approximately $50. See, Joint Applicant's Ex. 1.0, att. 3 at 58. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. This figure does not include any revenue enhancements from selling other wireline services.

include wireline service as a defensive strategy, i.e., to prevent the loss of current customers, as well as an expansion strategy.

The evidence of SBC's cellular expansion plans proves that SBC had a successful alternative entry strategy into Illinois in place which SBC abandoned in favor of acquisition. On re-opening, Staff witness Mr. Graves prepared a timeline of the evidence of SBC's cellular expansion steps. ICC Staff Ex. 4.02 at att. 1. The timeline shows that SBC advanced the cellular expansion strategy up until SBC decided to acquire the Illinois market by purchasing Ameritech. Indeed, the timeline shows that the last public activity in which SBC engaged to advance the cellular strategy occurred four days before SBC began talks to acquire Ameritech.[10]

Not only does this new evidence establish the existence of SBC's alternative entry plans; but, this new evidence contradicts SBC's claims that cellular expansion is not feasible. In fact, SBC's infeasibility argument conflicts with the consent decree which SBC and Ameritech entered into with the Department of Justice. In particular, the Department of Justice required Ameritech to sell Ameritech's wireless operations in the St. Louis areas because the DOJ found that a third party could pursue a cellular expansion strategy to compete with the Joint Applicants in St. Louis' local exchange market. See, Proposed Final Judgment, United States v. SBC Communications, Inc., 1:99CV00715 at 4 (D.D.C. filed Mar. 23, 1999); Department of Justice Press Release of Mar. 23, 1999, at 2 (stating that requiring Ameritech to divest of cellular properties in St. Louis will "help ensure that a purchaser of the divested Ameritech cellular systems

[10] In fact, SBC appears to be keeping cellular expansion options open as Cellular One's Central Illinois web site told the public, up until October of 1998, that Cellular One has authority to provide wireline service. ICC Staff Ex. 4.0 at 29, att. 2.

in the St. Louis area would have the ability to pursue a local exchange entry strategy in SBC's local service area, such as that Ameritech had planned before the merger").

Even leaving aside cellular entry, new evidence establishes that SBC has positioned itself to enter Illinois independently though another alternative means. Williams Communications ("Williams") owns a national, interstate fiber-optic network which transmits both voice and data traffic. ICC Staff Ex. 4.02 at 11. Williams also has an agreement with Metromedia Fiber Network, Inc. through which Williams has access to intra-city fiber networks in the nation's top cities, including Chicago. Tr. at 2052-53. SBC has the right to acquire up to 10% of Williams' common stock at the time of Williams' initial public offering as well as a right acquire a seat on William's board of directors when SBC obtains Section 271 approval. Tr. at 1915-1916, 2052-53.

SBC's investment in Williams represents a strategic position for SBC to advance into the Illinois market. In fact, the investment demonstrates that SBC is positioning itself to provide bundled services on a national basis, including the Chicago market. Prior to SBC's investment in Williams, SBC had built out a significant data network in SBC's major in-region markets. ICC Staff Ex. 4.02 at 10 (citing SBC Investor Briefing: The Dynamics of Data, No. 204 at 4-5 (Nov. 10, 1998)). In SBC's Investor Briefing, SBC stated:

> SBC's parallel data network features 275 ATM switches and 800 frame relay switches. The switches are in place in all of SBC's major markets, matching reach and switching capabilities of any competitor. By comparison, five CLECs – Teleport, Intermedia, ICG Communications, NEXTLINK and GST Communications report having 124 switches in their combined national networks to handle both voice and data traffic.

Id. Further, SBC stated:

> Over the past several years SBC's network investment priorities have focused on construction of fast fiber backbone network, capable of connecting voice, ATM and frame relay switches in providing customers high-speed access to SBC's network. These investment decisions have created a backbone network that is over 98 percent digital and 80 to 90 percent fiber depending on geographic region. It includes more than 2.3 million miles of fiber strands, matching the reach of any competitor. In comparison, six CLECs – including Teleport, NEXTLINK, GST Telecommunications, ICG Communications, e.spire and Intermedia – have 1.1 million miles of fiber strands in their combined national networks, most outside SBC's territories.

Id. As SBC's self-built fiber network does not extent out-of-region, SBC's agreement with Williams provides SBC with access to a fiber network in out-of-region markets, including Chicago, and the means to provide bundled services to customers on a national basis.

Accordingly, SBC is in a position to pursue a national, bundled services strategy in the absence of SBC's proposed acquisition. In fact, Williams has announced that its strategic agreement with SBC will result in Williams and SBC marketing integrated offerings across the nation. In a February 8, 1999, press release, Williams stated that the joint alliance will provide the following benefits:

- SBC cost-efficient access to Williams' national long distance voice and data network.
- Integrated product and technical development and marketing, offering competitively priced and differentiated voice and data products that meet the growing demands of SBC's customers.
- The creation of a powerful, national sales channel as SBC and Williams, through its communications solutions unit, market each others' services. Williams Communications Solutions eventually will be able to sell SBC branded data and Internet product offerings and long distance products nationwide.
- Nationwide services via Williams Communications Solutions' technical and physical presence in SBC's out of region markets as it implements its strategy to move from a regional to a national scope. As the industry's largest independent distributor and integrator of business communications solutions with its 6,400 employees, 120 offices and more

> than 100,000 customer sites, Williams Communications Solutions will leverage its North American presence to partner with SBC as it enters new out of region markets.

Id. at 11-12 (citing Williams Communications Press Release, Williams Communications Forms Unique Alliance with SBC, (Feb. 8, 1999)).

SBC has further advanced its strategy to become a national provider of bundled services by entering into an agreement with Concentric Network Corporation ("Concentric"). Concentric provides internet-based business data services. SBC holds an ownership interest in the form of 4% of Concentric's stock along with an option to increase that ownership interest by another 4.5%. ICC Staff Ex. 4.02 at 12. SBC's stock ownership is part of an agreement to integrate Concentric's leading edge, Internet based business data service technology into SBC's growing portfolio of data capabilities. Id.

SBC's activities which position SBC to be a national provider of unbundled services are not surprising. As discussed in Staff's previous filings, strong incentives exist for SBC to implement a national, bundled services strategy. See, Staff Reply Brief on Exceptions at 21-25 (explaining that such expansion by SBC would give SBC the opportunity to compete for Ameritech Illinois' top corporate customers who produce approximately 18% of Ameritech Illinois' revenues and to protect SBC's own in-region large corporate customers who provide SBC with comparable sources of revenue). The market for local services alone in Ameritech territory produced approximately $7 billion in revenue in 1998[11], 18% of which is $1.26 billion. Significantly, SBC's profits

[11] Ameritech's 1998 Revenues were $17.1 billion, 41% of which Ameritech derived from local service. 41% of 17.1 billion is $7,011,000; and 18% of $7,011,000 is $1,261,980. ICC Staff Ex. 4.02 att. 5

from serving such customers bundled services would increase multiple times when the profits from data or long distance services are added.

Finally, SBC owns 19.9%, with a warrant to increase ownership by another 10%, of OnePoint Communications ("OnePoint") which is a CLEC operating within Chicago. Tr. at 2015. OnePoint provides bundled cable television and telephone services to customers in multi-dwelling units and, as of the first quarter of 1999, had a total of 20,755 subscribers in five markets, including Chicago. Moreover, OnePoint's subscriber growth rate is incredibly high, at 22% per quarter. ICC Staff Ex. 4.02 at 9 (citing SBC Response to Data Request R CLG-001, SBCAMIL 02667). SBC's investment in OnePoint establishes that SBC is interested in Chicago's residential market and that SBC has a toe-hold basis to enter that market. Notably, SBC will likely eliminate its ownership interest in OnePoint if SBC is allowed to acquire Ameritech because SBC would not compete against itself.

The Joint Applicants' only response to this new evidence was an attempted to reduce the significance of SBC's agreements with and ownership holdings in OnePoint, Williams and Concentric.[12] The Joint Applicants' merely claimed that the evidence was insignificant based on an allegation that SBC does not control the companies with which SBC has agreements and ownership interests. SBC-Ameritech Ex. 1.5 at 3. However, the Joint Applicants' allegations of a lack of control are belied by the Joint Applicants' own expert witness, Dr. Harris. Dr. Harris testified under oath to the Commission that as little as a 10% equity ownership is a "significant equity ownership" which creates a "strong alliance." Tr. at 1281-82. Dr. Harris emphasized the import of

the phrase “strong alliance” as meaning that such ownership creates much more than a mere “joint venture” or “loose strategic alliance.” Id.

Indeed, evidence of SBC’s own past experiences with similar alliances proves that SBC, itself, considers such alliances strong competitive partners. SBC routinely advances the competitive positions of such companies by providing those companies with consulting services in the areas of marketing, engineering and management training. ICC Staff Ex. 4.02 at 13 (Staff witness Mr. Graves reporting that SBC has provided two companies in which SBC has less than a 10% equity interest with such services in the past). Further, as explained by Mr. Graves during the evidentiary hearings, SBC’s position as a significant shareholder in those companies provides SBC with the ability to influence those companies’ directions in the same way that SBC works to satisfy its own owners/shareholders. Tr. at 2841. Accordingly, the Commission should disregard this allegation by the Joint Applicants as unsubstantiated and contrary to the evidence of record, including the testimony of the Joint Applicants’ own expert witness.

In summation, Staff provided a significant analysis of this issue during the main portion of this proceeding. Staff’s analysis focused on SBC’s alternative expansion options, and Staff’s economic analysis demonstrated that SBC’s best options for expansion are either (1) the pursuit of bundled services to large corporate customers which would have to take place on a national basis, or (2) the provisioning of landline service to cellular customers to increase cellular customer retention and maximize customer value which, again, would expand SBC into Illinois. The evidence provided

[12] The Joint Applicants did not even respond to the new evidence regarding SBC’s internal documents

by Staff upon re-opening serves to significantly bolster Staff's previous analysis and clearly shows that not only would SBC likely enter Illinois in the absence of SBC's proposed acquisition of Ameritech; but, SBC has already positioned itself to undertake expansion strategies into Illinois. SBC's self-serving declarations do nothing to offset this evidence. As such, SBC has clearly failed its burden of proof on this issue and the Commission should find this prong of the doctrine satisfied.

iv. SBC's competitive entry would likely deconcentrate the market or lead to other procompetitive effects.

New entrants into highly concentrated markets wherein incumbent firms have market power will not usually be able to instantaneously enter or expand to overtake a large portion of the market. Nonetheless, such new entrants have positive effects on competition within the market if the new entrants decrease the incumbent, dominant firm's market share to virtually any degree or merely shake-up the market to engender competitive motion. Accordingly, a firm's entry is significant if the firm acquires even a minor share of the market or engenders competitive motion. Mercantile Tx., 638 F.2d at 1270; BOC Int'l., 557 F.2d at 27; FCC BA/NYNEX Order at para. 139.

In order to provide the Commission with a sort of guide to the degree of entry which constitutes a significant impact, reference to the Department of Justice's Merger Guidelines is useful. Pursuant to the DOJ's Merger Guidelines, an impact is significant if entry would lessen the market's level of concentration, as measured by the Herfindale-Hirschman Index, by at least 100 points or even by as little as 50 points in

for cellular expansion.

the absence of other mitigating factors[13]. DOJ Merger Guidelines at Sec. 3.11, 4.133. Record evidence regarding SBC's cellular expansion entry levels in Rochester and SBC's anticipated out-of-region entry through SBC's National-Local Strategy evidence that SBC's likely alternative means of entering Illinois would definitely satisfy the DOJ Merger Guidelines' definition of significant. Staff provided an analysis of the manner in which SBC's entry would satisfy the DOJ Merger Guidelines' levels in Staff's Brief on Exceptions. Accordingly, Staff respectfully refers the Commission thereto. See, Staff Brief on Exceptions at 119-127.

However, as stated above, new evidence establishes that XXX of Cellular One's residential customers and XXX of Cellular One's business customers would definitely switch to Cellular One's wireline service if SBC undertook SBC's previously planned cellular expansion. ICC Staff Ex. 4.02 at 4-5. Such penetration rates would equate with SBC acquiring approximately XXXXXXXXXXXXXXXXXX wireline customers.[14] These penetration rates are clearly within the range considered as significant by the DOJ Merger Guidelines, as the rates are far in excess of the approximately 20,000 customers needed for a 50 point decrease in the market's HHI and the approximately

[13] The mitigating factors identified by the DOJ Merger Guidelines are Changing Market Conditions, Financial Conditions in Relevant Market, Special Factors Affecting Foreign Firms, Ease of Entry, Product Differentiation, Ability of Small or Fringe Sellers to Increase Sales, Conduct of Firms in the Market, and Efficiencies. DOJ Merger Guidelines at Sec. 3.2, 3.3, 3.4, 3.5. The Joint Applicants have not established the existence of any of these mitigating factors. In fact, the Joint Applicants have not even addressed the issue of mitigating factors. Accordingly, no evidence exists from which the Commission could conclude that mitigating factors offset a change in the HHI. Moreover, even if such mitigating factors did exist, the evidence presented by Staff in this section clearly indicates that the change in the HHI from SBC's independent entry would be substantially greater than 100 points, which is the degree of change at which even the DOJ disregards mitigating factors. See, DOJ Merger Guidelines at 3.11.

[14] The record establishes that Cellular One has in excess of XXXXXXXXXXX customers in Illinois. ICC Staff Ex. 4.00 at 36. However, the information does not break Cellular One's customers down into business and residential categories, thereby preventing an exact calculation of SBC's minimum penetration rates based on this new evidence. The approximation is based on a XXXXXXXXXXX calculation of Cellular One's total customers.

40,000 customers needed for a 100 point decrease in the market's HHI. See, Staff Brief on Exceptions at 124 (calculating the number of customers SBC must win to decrease the market's level of concentration by the 50 to 100 HHI points considered significant by the DOJ Merger Guidelines).

v. An insufficient number of alternative entrants exists.

In this portion of Staff's Brief on Re-Opening, two tasks are undertaken. First, the manner in which the Commission should approach this issue is clarified along with the evidence which supports this issue. Second, new evidence which the Joint Applicants introduced of alternative entrants' alleged competitive abilities is shown to be insufficient to prevent the satisfaction of this prong of the doctrine.

The question which the Commission needs to consider under this prong of the doctrine is whether a sufficient number of alternative entrants exists such that the entry of alternative firms is likely to deconcentrate the Illinois local exchange market, thereby removing the need for SBC's independent entry to help transition the market from concentration to competition. To answer this question, the Commission should consider two issues. First, how many entrants are needed to transition the market from concentration to competition. Second, do the identified alternative entrants have the same or comparable advantages, i.e., ability and incentive, to enter the market.

In terms of the first issue, the Commission should retain all possible entrants, including SBC, as means of transitioning the Illinois local exchange market to competition. The rationale which supports this conclusion is that new entrants into highly concentrated markets are not likely to have the ability to overcome the dominant

firm's market power in order to obtain large market shares. Accordingly, it is only through a combination of a number of entrants that the combined new entrants' share of the market will expand to decrease the incumbent's market power. The higher the degree of a given market's concentration, the greater the number of new entrants that are required to transition the market from concentration to competition. Accordingly, in highly concentrated markets, all possible entrants to the market must be preserved. See, FCC BA/NYNEX Order at para. 65-66, n. 155 (citing 3 Antitrust Law. para. 170d at 134-146).

Contrary to this accepted rationale, the Joint Applicants want the Commission to restrain the required number of possible entrants for the Illinois local exchange market to a strict number from the DOJ Merger Guidelines. Staff has explained the inappropriateness of the Joint Applicants' position in prior pleadings. See e.g., Staff Initial Brief at 37-38.

In terms of the second question, the question becomes largely irrelevant when one concludes that it is necessary to preserve all possible entrants. Nonetheless, to complete the analysis, one must look at incentive and ability separately. Most telecommunications carriers have an incentive to enter the Illinois local exchange market because of the market's large profit potential. See, Staff Reply Brief at 67. However, very few carriers have the ability to enter the market, much less abilities which compare with those of SBC. See, Id. at 61-67; Staff Brief on Exceptions at 115-119.

The manner in which firms' incentives and abilities to enter markets inter-relate is easily seen from a review of the Illinois' local exchange market's competitive

characteristics. To date, the Commission has certificated a large number of CLECs; but, only a very small number of those CLECs have actually entered the market. ICC Staff Ex. 4.00 at 16 (Staff witness Mr. Graves reporting that only 22 CLECs - a mere 13 of which are facilities based carriers - have entered the market even though the Commission has certificated more than 200 CLECs). This fact demonstrates that carriers want to enter the market but do not have the ability to enter the market. Also, of the firms that have entered the market, those firms have been unable to expand their market share beyond small, niche service. Again, this fact represents the firms' incentives to enter the market but inability to expand within the market.

In terms of either of these scenarios, claims that carriers have merely decided not to pursue competitive entry or further competitive expansion are poor explanations. Such claims are belied by the following set of related facts: firms are driven by desires to make profits, firms will attempt to enter markets where profits are derivable, and profits are derivable from serving the local exchange market beyond mere niche service to the large corporate customer segment[15]. Accordingly, the more likely explanation is that those providers face a number of barriers which inhibit their entry or the expansion of their service offerings. See, ICC Staff Ex. 9.0 at 17 (Staff witness Dr. Hunt stating his opinion that barriers to entry have prevented more effective and substantial competitive entry).

[15] As stated throughout this proceeding, the large corporate customer segment is an attractive segment because it represents approximately 18% of the business' revenues even though the segment's customer base is relatively small. However, that fact does not negate the profitability of the market's other customer segments. Rather, the other customer segments constitute 82% of the market's profits and, as such, are clearly attractive market segments for firms to serve.

The entirety of the market barriers which new entrants face has not been identified; but, several significant barriers are known. First, to the extent that incumbent carriers are in non-compliance with the market opening provisions of the federal Telecommunications Act of 1996, then the barriers to entry which those statutory provisions are designed to address continue to exist. Second, in order to expand into the mass market, new firms need to (1) develop technical, operational, financial and marketing skills, (2) develop a brand name, (3) develop a reputation for quality service, and (4) overcome resistance of the incumbent firm. See, FCC BA/NYNEX Order at para. 6 (identifying these barriers to entry and expansion). Undoubtedly, an enormous amount of capital is required to overcome the identified barriers to entry.

SBC is well ahead of alternative entrants in SBC's ability to overcome these identified barriers. First, SBC has the necessary technical, operational, financial and marketing skills. SBC has derived these skills from SBC's experience as a local exchange provider. SBC learned how to adapt those skills to a CLEC operation during SBC's Rochester trial. See, Cross Ex. 37 (SBC personnel admitting that the trial allowed SBC to learn how to compete as a CLEC); see also, ICC Staff exhibit 4.02 att. 5 (demonstrating that SBC has clear advantages in revenue base, employee base, and equipment deployment over other CLECs in Illinois).

Second, SBC has an established brand name both as an incumbent local exchange provider and as a cellular service provider. Along with SBC's established brand names, SBC has a reputation for providing quality service. The new evidence which Staff has provided on re-opening regarding SBC's internal customer surveys

prove that SBC has overcome these barriers with the majority of SBC's substantial cellular customer base in Illinois. ICC Staff Ex. 4.02 at 4-6.

Third, SBC has a greater ability to overcome ILEC resistance. SBC's greater ability is the result of SBC's ability to utilize its own ILEC experience to identify CLEC needs and to successfully get those needs met. Further, SBC's ability to successfully negotiate the fulfillment of such needs also means that SBC will less likely to be forced into (expensive and lengthy) arbitration and litigation to get needs met.

But, most importantly, SBC has access to significantly larger amounts of capital than most alternative entrants. SBC's access to capital would allow SBC to overcome any of the identified barriers to the extent that SBC has not already overcome such barriers. Accordingly, the financial differences between SBC and many other identified alternative entrants is important.[16] On re-opening, Staff witness Mr. Graves has provided a chart which compares the financial strength of many alternative entrants to that of SBC and Ameritech.[17] See, ICC Staff Ex. 4.02 at 14, att. 5. Leaving out for the moment the other RBOCs, i.e., Bell Atlantic, Bell South, and U.S. West, and large interexchange carriers, i.e., AT&T, MCI and Sprint, no other identified alternative entrants even come close to having the financial strength of Ameritech. This disparity becomes even more disconcerting when Ameritech's and SBC's financial resources are combined. Accordingly, alternative entrants will have a difficult time expanding their market shares in the absence of SBC's proposed acquisition of Ameritech; but, those

[16] See, ICC Staff Exhibit 4.01 at 14 (providing bond ratings of SBC versus other CLECs).
[17] By financial strength and resources, Staff is referring to each company's yearly profits and revenues which represent the relative amounts of capital which each company will have available to achieve competitive advantages.

carriers will have an even harder time if SBC is allowed to consummate the proposed acquisition.

In terms of the four remaining RBOCs (including SBC) besides Ameritech, each one would likely have the financial resources to compete with Ameritech in the absence of the merger. However, when Ameritech's financial resources are combined with those of SBC, then the only other RBOC which will have similar financial resources will be a combined Bell Atlantic/GTE. ICC Staff Ex. 9.0 at 23-24. Accordingly, without SBC's proposed acquisition, the Commission is looking at four possible RBOC competitors to Ameritech; but, with SBC's proposed acquisition, the number of likely RBOC competitors is decreased to one.

Finally, turning to the large interexchange carriers, those entrants also have access to capital, national brand names and reputations for the provision of quality service. However, none of those carriers, except Sprint, have the experience of an incumbent local exchange carrier. Further, to date, none of those three carriers have been able to effectively enter the market beyond providing niche service. ICC Staff Ex. 9.0 at 24, 67-73. Accordingly, the Commission should not rely on those carriers as a means of deconcentrating the local exchange market.

Upon re-opening, the Joint Applicants have attempted to increase the significance of one of the three interexchange carriers, namely AT&T, as an alternative provider. The Joint Applicants have repeatedly pointed out that AT&T is positioning itself to expand its share of the market by providing service over cable. Joint Applicants' Response to Commission's June 4 List of Issues at 6. The Commission

should decline to follow the Joint Applicants' advice to rely on AT&T to bring competition to the market for two reasons.

First, no company, including AT&T, has yet to role out service over cable in large scale. Staff witness Dr. Hunt testified regarding this issue on re-opening as follows:

> At present, it is unclear whether local exchange telephone service can be successfully provided in large scale over existing cable networks. To date, a few small cable companies offer basic exchange telephony services over cable networks and some large cable companies (including TCI) have run a few experiments. However, not all of the experiments have been successful and no large cable company has rolled out a competitive local exchange telephone service over a cable network to serve hundreds of thousands or millions of customers. Accordingly, AT&T and its merger partners have many hurdles to jump before they can offer competitive local exchange service, not the least of which are consumer acceptance and considerable upgrades to the cable network. AT&T/TCI/MediaOne may or may not be successful in those efforts.
>
> Some probability exists that AT&T has solved the technological problems; that it can offer the services at prices acceptable to consumers; that it has a marketing plan that can successfully attract consumers; and that the array of services are those actually wanted by consumers. I place this probability around 25 to 30 percent. … [E]ven if they are successful, a full roll out of local exchange telephone service is likely to be more than three to five years in the future and, thus, not germane to the current case.

ICC Staff Ex. 9.01 at 16-17.

Accordingly, any future provisioning of such service within the Illinois market is speculative and should not be relied upon by the Commission to defeat the establishment of this prong of the doctrine. The inappropriateness of relying on a new, currently unavailable technology was recognized by the United States Attorney General's office during its evaluation of the SBC/Pacific Telesis merger. See, 79 Op.

Att'y Gen. 301, 316 n. 95-96 (1996). The Attorney General explained the rationale for focusing solely on currently available products as follows:

> [N]o one currently knows which system or systems will be technologically and financially viable in the foreseeable future. … Thus, confident predictions about the future availability or unavailability of telecommunications products are routinely proven incorrect.

Id. (internal citations omitted).

Second, it is inappropriate to rely solely on AT&T to deconcentrate the market. As discussed above, a single competitor is not sufficient to develop competition within a market. For instance, if AT&T is successful in deploying local exchange service over cable and prices and quality which is acceptable to consumers, then AT&T would become a first tier competitor to Ameritech Illinois. ICC Staff Ex. 9.01 at 17 (Staff witness Dr. Hunt acknowledging this fact). However, AT&T would have to win close to 25% of the market to transition the market out of a de facto monopoly. See, ICC Staff Ex. 9.0 at 9 (Staff witness Dr. Hunt explaining that de facto monopolies exist when one firm controls 75% or more of the market, thereby necessitating the acquisition of at least 25% of the market by CLECs to transition the market out of a de facto monopoly). Even if AT&T did win a sufficient market share to transition the market out of the market's current de facto monopoly status, the market would merely have been transitioned to a highly concentrated oligopoly. Id. at 10 (Dr. Hunt stating that markets in which three to four large firms control up to 85% of the market are classified as highly concentrated oligopolies). Generally, the same problems are encountered in highly concentrated oligopolies as in de facto monopolies. Id. at 11 (Dr. Hunt

explaining that "[u]nder normal conditions, price and industry behavior in a highly concentrated oligopoly will approximate that of a pure monopolist").

Overall, an insufficient number of alternative competitors exists. Accordingly, the Joint Applicants have also failed their burden of proof on this issue. The Commission should find that this prong of the doctrine is satisfied.

b. The Commission should not rely on the DOJ's decision not to challenge the proposed acquisition as an indication that SBC is not an actual potential competitor in Illinois.

The Joint Applicants continue to encourage the Commission to defer the Commission's authority on this issue to the DOJ. See, Joint Applicants' Response to Commission's June 4 List of Issues at 1-2. As stated in Staff's previous filings, the DOJ operates under entirely separate statutory authority and within the confines of a different statutory standard. The Commission must perform the duties imposed by the Illinois General Assembly and complete an independent analysis of this issue, specifically as it relates to Illinois. See, Staff Reply Brief at 13-16.

Moreover, the evidence on re-opening proves that claims regarding the DOJ's finding on the actual potential competition issue amount to complete speculation. No public document mentions any analysis by the DOJ of whether SBC is an actual potential competitor in Illinois. Accordingly, nobody besides the DOJ knows whether the DOJ undertook an actual potential competition analysis specific to Illinois or, if so, what the DOJ concluded at the end of such an analysis.

Further, other equally plausible explanations for the DOJ's decision than those advanced by the Joint Applicants exist. For instance, the DOJ could have decided not

to challenged the merger based on a number of offsetting factors. First, thirty markets outside of Illinois are likely to experience increased competition as a result of the merger. Second, Ameritech Illinois' market power, i.e., ability to undertake and sustain price increases, is currently controlled through regulation. See, Tr. at 2132-2135 (SBC-Ameritech witness Dr. Gilbert admitting that the DOJ can exercise prosecutorial discretion not to challenge a given merger based on such offsetting factors).

However, contrary to the DOJ's perspective for review, the Commission is under a much stricter standard. In particular, the Commission must only consider the proposed merger's likely effect on Illinois markets. Further, the Commission does not have the authority to engage in any offsetting balancing test. See, 220 ILCS 5/7-204(b)(6)(requiring the Commission to withhold approval if a significant adverse effect on competition in Illinois is established). Finally, reliance on regulation to curb Ameritech Illinois' market power is clearly against Illinois' telecommunications policy to transition the market away from regulation and toward competition. See, Staff Initial Brief at 45-51. Accordingly, the Commission should disregard the Joint Applicants' attempt to place reliance on the DOJ's actions.

c. The Joint Applicants' commitments fail to mitigate the significant adverse effects that the proposed acquisition is likely to have on competition in the Illinois local exchange market.

The Joint Applicants have provided the Commission with certain commitments on re-opening which are allegedly designed to alleviate any concerns which surround SBC's proposed acquisition of Ameritech. While some of the Joint Applicants' commitments constitute a movement in the right direction, the commitments fail to

mitigate the significant adverse effects that SBC's proposed acquisition is likely to have on competition in the local exchange market.[18] In fact, as discussed by Staff throughout the course of this proceeding, conditions do not exist which can alleviate the adverse effects that SBC's proposed acquisition is likely to have on competition in the local exchange market. See e.g., Staff Reply Brief at 73-75.

Further, the Joint Applicants' commitments are designed to use regulation to prevent a combined SBC/Ameritech from taking advantage of its market power. As such, the commitments constitute another example of the manner in which approval of SBC's proposed acquisition will be a choice for regulation over competition. Accordingly, Staff's position under Section 7-204(b)(6) remains the same despite the Joint Applicants' commitments.

2. INTERCONNECTION

The manner, necessary actions and timetable by which the Joint Applicants would provide to CLECs in Illinois services, facilities or interconnection agreements which SBC has made available to CLECs in its other service territories;

- **a) On p.8 of Exhibit 6, Applicants "generally commit" for a period not to exceed three years (with no set timetable for implementation because no post-merger planning has occurred) to provide services, facilities or interconnection agreements/arrangements to CLECs in Illinois as have been made available in other SBC service territories. However, the Applicants subject this commitment to four conditions, which raise the following questions:**
  - **i) The Applicants except from this commitment UNEs (Unbundled Network Elements), services, facilities or interconnection agreements/ arrangements which are imposed as a result of arbitration. What reasons do the Applicants have for excepting arbitrated agreements?**

[18] To the extent that Staff has any comments on the Joint Applicants' specific commitments, those comments are provided in the portions of this brief where Staff addresses those commitments on an individual basis.

SBC/Ameritech witness Kahan testified in response to this inquiry that the limitations included in the commitments reflect the Joint Applicants recognition of the differences in the law and telecommunications policies in the 50 different states and the District of Columbia. SBC/Ameritech Ex. 1.3, p. 12. Mr. Kahan also noted that due to these differences, it would be unfair to the Joint Applicants and to the Commission to simply import every term and condition of an interconnection agreement into Illinois without regard to its context, source or implication. Id. He further noted that any commitment that would impose on SBC an obligation to offer in Illinois a term or condition of interconnection based on a term or condition that was ordered in another state would provide undue authority to the commissions of other states. Id., pp. 12-13. Finally, Mr. Kahan averred that if SBC were obligated to offer terms and conditions into Illinois based on the fact they were ordered by other state commissions, Illinois would be waiving its rights to make its own legal and policy determinations on such issues.

The Joint Applicants answer was responsive to the Commission's inquiry. As noted in ICC Staff Ex. 4.02, p. 18, Staff does not oppose the Joint Applicants' position that state specific pricing should not be incorporated into Illinois. Staff witness Graves noted that this Commission has undertaken extensive proceedings to develop the appropriate prices for UNEs and wholesale services within Illinois pursuant to the requirements of the Illinois Public Utility Act and the federal Telecommunications Act of 1996. Id. He reasoned that it is appropriate for the Commission's pricing decisions to govern interconnection agreements within Illinois. Id. In addition, Staff supports the Joint Applicants' condition that importation must be in accordance with Illinois state law and policy.

ii) The "AT&T Interconnection Agreement" appears to be an integral part of SBC's 271 application in Texas. Is this interconnection agreement excepted from this commitment?

The Joint Applicants excepted this agreement because it was an arbitrated agreement which was the result of two arbitration agreements. SBC/Ameritech Ex. 10.1, pp. 2-3. However, the Joint Applicants noted that if the Commission were to find that the offering in Illinois of the so-called Proposed Interconnection Agreement from Texas would result in this Commission's support for Ameritech Illinois' 271 application, Joint Applicants would be willing to do so.

For Staff's response to this issue, see (i) above

iii**) The Applicants except from this commitment UNEs, services, facilities or interconnection agreements/arrangements which are technically infeasible. By what process and using what standards is the Commission to resolve technically infeasible claims by the Applicants which are disputed by competitors? If a claim of technical infeasibility is made by the Joint Applicants and the Commission finds otherwise, by what process is the issue definitively resolved? Please clarify.**

In responding to (a)(iii), the Joint Applicants testified that technical feasibility would have the same meaning as reflected in the Telecommunications Act of 1996, 47 U.S.C. § 251(b)(2); see also 47 CFR § 51.5. SBC/Ameritech Ex. 1.3 at 14; SBC/Ameritech Ex. 10.1, pp. 3-5. SBC/Ameritech witness Kahan testified that the Joint Applicants included a limitation based on technical feasibility in recognition of the fact that the legacy systems in different states have different capabilities. Id. He further testified that it would be impossible for the Joint applicants to identify on a prospective

basis what the limitations might be or what impact they may have on novel types of interconnection agreements. Id. Finally, SBC/Ameritech witness Kahan recognized that fact that the Joint Applicants would bear the burden of demonstrating technical infeasibility when and if such issues arise. Id.

In response, Staff witness Gasparin testified that the Joint Applicants answer was responsive to Issue 2(a)(iii). ICC Staff Ex. 5.02 at 4. He further testified that if the Joint Applicants claim that a service or facility is not available due to technical constraints, he would recommend that a process be developed which would allow the Commission, as well as the requesting carrier(s), to verify the validity of such a claim. Specifically, if the Joint Applicants claim that a particular service cannot be provided in Illinois due to technical constraints, the Joint Applicants should file with the Chief Clerk a verified statement identifying the service that cannot be provided and providing a brief description of why the service is technically infeasible. This document should also be provided to the requesting carrier(s) on the same date it is filed with the Chief Clerk. The Joint Applicants should then provide a report to this Commission, as well as the carriers who have requested the service, within four (4) weeks of the filing of the verified statement. The report should detail the various technical constrains and also provide an explanation of each constraint. If either the Commission or the affected carrier disputes the claim of the Joint Applicant regarding the technical feasibility, either party may request an investigation of the matter via a docketed proceeding.

The Commission should adopt Staff's recommendations on this issue in its final order.

a) **What pricing methodology do the Applicants propose apply**

in Illinois for such UNEs, services, facilities or interconnection agreements/arrangements? Does the Applicants' commitment contemplate the ability for CLECs to utilize an optional plan for paydown of non-recurring charges and installment payment plan for collocation and other substantial non-recurring costs incurred as a result of entering into interconnection agreements?

The Joint Applicants note in their response that in the first instance, the issue of price should be addressed in interconnection agreements and that they fully expect this Commission, in any arbitration proceeding, would apply the forward looking pricing rules established by the federal Telecommunications Act of 1996. SBC/Ameritech Ex. 11.1, pp. 2-4. The Joint Applicants further note that the federal Telecommunications Act of 1996 and the FCC rules contemplate that the pricing-related requirements of the Act will be implemented and applied on a state-by-state basis, and because costs vary by state. Id.

With respect to the issue of optional payment plans for non-recurring charges for CLECs, the Joint Applicants commit to the plan outlined in the Ohio merger stipulation. Id.

Staff does not oppose the Joint Applicants position on state specific pricing.

b) On p. 9 of Exhibit 6 under Commitment B, the Applicants commit to a workshop or collaborative process to compare items not available in Illinois which are available in other SBC service territories. What is the Commission's role in this process? Have the applicants made a commitment to take action with this information? What is the end goal of this process? Please clarify.

Joint Applicants, in their Response to the Commission's June 15th letter state that they hoped the Commission Staff would actively participate in every collaborative

process and would act as a facilitator in the process. SBC/Ameritech 10.1, pp. at 5-7. The Joint Applicants did not propose a specific role in any collaborative process for the Commission because the Joint Applicants believed it would be presumptuous on their part to do so. Id., at 7. The Joint Applicants note that the Commission need not play an active role in the process unless and until a Section 252 arbitration is brought before them. Id.

Staff concludes that the Joint Applicants' proposal contains no new information.

c) On p. 9 of Exhibit 6 under Commitment C, the Applicants commit to provide to the Commission copies of interconnection agreements from other states. What Commission action did the Applicants envisage as part of this process, and is public disclosure of all interconnection agreements the contemplated goal of this commitment? If not, why not?

The Joint Applicants responded to this inquiry by stating that the purpose of this commitment is simply to make information conveniently available to the Commission and interested parties. SBC/Ameritech Ex. 11.1, pp. 4-5. They further note that this commitment would provide the Commission and Staff with the ability to obtain information that might be useful to them during the collaborative process and/or thereafter to monitor Joint Applicants' continued compliance with the possible condition of offering, in Illinois, agreements from other states. Id. While noting that the goal of this commitment is disclosure, the Joint Applicants aver that the Commission could expand the aforementioned goal to public disclosure by establishing a repository—similar to the existing repository if in-state interconnection agreements—in this state for all of Joint Applicants' interconnection agreements so that those agreements would be

available for review to all CLECs operating in Illinois, as well as to the public at large. Id.

As a prefatory matter, Staff notes that this commitment is unique to the Ameritech states and was not included in the Joint Applicants' proposed conditions submitted to the FCC. During reopening, Staff witness Graves testified that the Joint Applicants' commitment may increase the types of arrangements/agreements available to CLECs within Illinois. ICC Staff Ex. 4.02, p. 17. However, he also testified to the fact that it was not possible, at this time, for Staff to comment on the utility of the commitment since Staff had not reviewed the agreements. Id.

> **d) On p. 9 of Exhibit 6 under Commitment C, the Applicants commit to provide to the Commission copies of interconnection agreements from other states. If "winback" marketing provisions by the ILEC are prohibited in other interconnection agreements, do the Applicants endorse their prohibition in Illinois? If prohibitions on "winback" marketing provisions are not in other interconnection agreements, should their prohibition be considered by the Commission? If so, in what manner? If not, why not?**

In their response, the Joint Applicants state that they are not aware of any "winback" provisions or prohibitions in their interconnection agreements. SBC/Ameritech Ex. 11.1, pp. 5-6. They also note that "winback" is a pro-competitive practice and therefore, goes to the essence of competition. According to the Joint Applicants', such prohibitions to either party to an interconnection agreement would be inappropriate. Id.

Staff took no position on this commitment.

e) On p. 9 of Exhibit 6 under Commitment C, the Applicants state that if they obtain UNEs, services, facilities or interconnection agreements in the capacity of a CLEC, that "they would have the burden in Illinois of proving why a form of interconnection arrangement or 'capability' should not be implemented in Illinois." Please clarify this statement.

In their response, the Joint Applicants note that the presumption created by Commitment D, not C as set forth in the question, is that where the Joint Applicants' CLEC affiliate negotiates (or obtains via arbitration) novel interconnection terms in SBC/Ameritech's out-of-region states, Ameritech Illinois will be presumed to have to provide such arrangements to CLECs in Illinois. SBC/Ameritech Ex. 1.4, pp. 5-6. They further note that if Ameritech Illinois took the position that the requested arrangement was not technically feasible, Ameritech Illinois, not the requesting CLEC, would have the burden of establishing that infeasibility to the Commission in the event of an arbitration. Id.

See Staff's response to Issue 2(a)(iii), supra.

f) On p. 9 of Exhibit 6 under Commitment D, the Applicants commit to provide access to the interconnection agreement of their CLEC affiliate under 47 U.S.C. § 252 if such interconnection agreement is obtained through arbitration. What is the likelihood that such agreement will be obtained through arbitration? Further, if such interconnection agreement is not obtained through arbitration, does this commitment apply? Further, why would the Applicants propose that "the same terms (exclusive of price)" would apply? Does the "exclusive of price" distinction violate the Illinois Public Utilities Act or the Telecommunications Act of 1996 or this Commission's stated pro-competitive policies?

In its response, the Joint Applicants state that they cannot predict the likelihood that its CLEC affiliate may obtain an interconnection agreement via arbitration or

negotiation. SBC/Ameritech Ex. 1.4, pp. 6-7. They note that the purpose of this commitment is to give CLECs in Illinois the advantage of obtaining novel interconnection agreements that this Commission has never had an opportunity to consider. Id.

They further note that the exclusion of any pricing terms simply recognizes the fact that pricing in Illinois is dictated by this Commission's TELRIC pricing rules, that costs vary by state, and that importing inconsistent provisions or policies would create unnecessary conflicts. Id. The Joint Applicants finally note that this exclusion would violate the Public Utility Act but, in fact, is consistent with the requirements of the federal Telecommunications Act of 1996.

Staff took no position on this issue. Furthermore, Staff cannot evaluate the propriety or legality of an "exclusive of price" distinction in the abstract.

g) On p. 9 of Exhibit 6 under Commitment D, the Applicants commit to provide access to the interconnection agreement of their CLEC affiliate under 47 U.S.C. § 252 if such interconnection agreement is obtained through arbitration. Do the Applicants contemplate that their CLEC affiliate will utilize UNEs or resold service to provide service to customers? Are there positive or negative competitive implications for the local exchange market which underlie the use of UNEs by the Applicants' CLEC affiliate?

SBC/Ameritech witness Kahan has testified that the Joint Applicants' CLEC affiliate will utilize UNEs and resold service and any other lawful means to enter markets and provide service out of region, including utilizing its own facilities. SBC/Ameritech Ex. 1.4, p. 7. Joint Applicants also state that the implications of the CLEC affiliates use of any lawful means of entry, including

UNEs, is no different from the use of UNEs by any other CLEC. Id.

Staff took no position on this issue.

h) On p. 9 of Exhibit 6 under Commitment D, the Applicants state that their CLEC affiliate's interconnection agreement will be made available to "similarly situated" CLECs. By what process and using what standards is the Commission to determine if a CLEC is "similarly situated?"

The Joint Applicants define similarly situated CLECs as CLECs seeking to obtain interconnection agreements containing the same volume, term and area of service commitments and the same terms and conditions concerning any relevant issues such as signaling requirements and interconnection agreements as the Joint Applicants' CLEC affiliate's interconnection agreement. SBC/Ameritech Ex. 11.1, p. 6. According to the Joint Applicants', if there is a dispute in determining if a CLEC is similarly situated, it would come to the Commission in the form of an arbitration or a complaint. Id.

Staff witness Graves noted that the Joint Applicants' similarly situated exception goes beyond any exception allowed by Section 252(i) and that the FCC had addressed and rejected allegations by incumbent carriers that Section 252(I) requires requesting CLECs to be similarly situated. ICC Staff Ex. 4.02, p. 20. Mr. Graves concluded that SBC's expanded exceptions would mean that CLECs in Illinois would not obtain the same benefits from SBC's provision within Illinois of the arrangements/agreements negotiated by SBC/s CLEC out-of-region as if SBC's CLEC negotiated those same arrangements/agreements within Illinois and CLECs were able to opt into those agreements within Illinois

pursuant to Section 252(i). Id.

He also noted that SBC's open list of considerations for the determination of "similarly situated" carriers will provide SBC with a means of delaying CLEC adoption of arrangements within Illinois. Id. Mr. Graves opined that SBC's unilaterally mandated exceptions to Commitment "D" will necessitate CLECs to undertake lengthy dispute resolutions prior to implementation, thereby, inhibiting the pro-competitive benefits that would otherwise accrue within the Illinois local exchange market if SBC had negotiated the arrangements/agreements within Illinois as a CLEC. Under the latter scenario, the arrangements/agreements would be automatically available to all other CLECs within Illinois pursuant to Section 252(i). Id., p. 21.

With respect to commitment "C", Staff witness Graves opined that under this commitment, the Joint Applicants will only provide SBC's out-of-region interconnection agreements (whether negotiated as an ILEC or a CLEC) to the ICC upon request. Id., p. 22. Commitment "C" means that SBC's out-of-region arrangements/agreements will not be available to CLECs in an efficient manner. Unless the ICC requests each and every one of SBC's out-of-region arrangements on an ongoing basis, those arrangements will be filed across the nation, in up to 49 other state commission offices. Id. Mr. Graves testified that under the Joint Applicants' proposal CLECs would have to peruse the filing in each state commission's office to determine which arrangements/agreements may be available in Illinois. Id. This type of action should not be condoned by the Commission.

i) What are the specific enforcement mechanisms which would be used by the Commission in the event of non-compliance with the commitments made by the Applicants?

See Section 12, *infra*, for a discussion of enforcement-related issues

3. SHARED TRANSPORT

The manner, necessary actions and timetable by which the Joint Applicants would provide "shared transport" as recommended by the Commission Staff in this proceeding. Further, until the "Illinois version" of shared transport is offered, when the Commission can expect the implementation of shared transport in the same manner as SBC has provided in Texas, and the manner, necessary actions and timetable by which this will be accomplished;

a) The positions stated by the Applicants appear to be a shift from stances originally taken on this matter. However, comments by the intervening parties in this docket will be most helpful in determining the merit of the Applicants' commitments.

b) Is it correct to say that the Applicants will not provide any version of shared transport in Illinois, regardless of the outcome of this proceeding, if the FCC or the courts rule that shared transport is not a UNE?

c) **What are the specific enforcement mechanisms which would be used by the Commission in the event of non-compliance with the commitments made by the Applicants?**

<u>Sub-issues (a) and (b)</u>

Staff believes the proposals set forth in the testimony submitted by SBC/Ameritech witness Terry D. Appenzeller (SBC/Ameritech Illinois Ex. 12.0) are responsive to issue 3 raised by Chairman Mathias in his June 4th correspondence, as well the additional items included in the June 15th correspondence.

In this reopened proceeding, there were three versions of common transport addressed by the parties. The three versions were: a) the ICC/FCC version (requires common transport on a stand-alone basis); b) the SBC/Texas "interim solution"

(requires the use of originating and terminating factors and a settlement procedure to allocate appropriate access charge revenues) and; c) the SBC/Texas "long term solution" (requires the use of AIN network architecture in a manner different than that utilized by Ameritech Illinois today).

SBC/Ameritech witness Appenzeller testified that the Joint Applicants would implement a form of shared transport in Illinois within 30 days of the merger closing date. SBC/Ameritech Ex. 12.0, pp. 3-4; SBC/Ameritech Ex. 12.1, p. 2. Mr. Appenzeller referred to this form of shared transport as an "interim solution". The "interim" solution avoids or addresses each of the technical and network issues that Ameritech Illinois identified in its TELRIC tariff filing for shared transport. SBC/Ameritech Ex. 12.0, pp. 7-8.

Mr. Appenzeller further stated that within one year of the merger closing, the Joint Applicants will implement and offer in Illinois the same version of shared transport that has been implemented by SBC in Texas. The Texas version utilizes the Advanced Intelligent Network facilities to perform 10 digit number inquiries. Mr. Appenzeller referred to this solution as the "long term solution". SBC/Ameritech Illinois Ex.12.0, pp. 3 & 4. Currently, Ameritech Illinois utilizes AIN in a manner different than that of SBC. Tr. at 2412. As noted above, the Company's commitment to provide an "interim" shared transport solution followed by a "long-term solution" is responsive to the issues raised by the Chairman.

While recognizing that the commitments made by the Joint Applicants were responsive to the Chairman's inquiries, Staff witness Gasparin reiterated his position that the Joint Applicants should continue to explore the feasibility surrounding the

technical feasibility of offering common transport as an unbundled network element on a stand alone basis. ICC Staff Ex. 5.02 at 2. Mr. Gasparin averred that both this Commission and the FCC have ordered Ameritech to provide common transport on unbundled network basis. While acknowledging that the FCC's rules requiring the offering of common transport were vacated by the U.S. Supreme Court , Mr. Gasparin testified that the Commission's order was still in effect. Id.

Although Mr. Appenzeller testified that there are technical difficulties in the provisioning of this service and that the service cannot be provided at this time, Mr. Gasparin recommended that the Joint Applicants continue to explore the technical feasibility regarding the unbundling of common transport and to provide a semi-annual report to this Commission and other interested parties which delineate their activities in exploring solutions to the common transport unbundling issue. He noted that a similar commitment had been made in Texas as shown in the "Joint Applicants' Response to Commission's June 4 List Of Issues And Joint Applicants' Additional Commitments" - in Attachment 3.1 entitled "Local Switching/Shared Transport Texas" at 1.3.1 page 1.

In his rebuttal testimony, SBC/Ameritech witness Appenzeller testified that the Joint Applicants would be willing to keep reviewing the issue and report to Staff as soon as any change in facts occur, or at least on an annual basis. SBC/Ameritech Ex. 12.1 at 13. During the evidentiary hearing, SBC/Ameritech witness Appenzeller agreed with Staff's recommendation to provide the aforementioned report on a semi-annual instead of on an annual basis. Tr. at 2411. Therefore, Staff recommends that the commitments made by the Joint Applicants relative to this issue be adopted by the Commission and be included in the final order.

2. Sub-issue (c) Specific Enforcement Mechanisms

See Section 12, *infra*, for a discussion of enforcement related issues.

OPERATIONS SUPPORT SERVICES (OSS)

4. Implementation timetables regarding integration of Joint Applicants OSS processes

a) On p. 17 of Exhibit 6, the Applicants state their willingness "to commit to the following timetables and milestones regarding integration of OSS processes in Illinois." In the very next line of the document, Applicants state that "there is no single timetable for integration of Ameritech's and SBC's OSS" and that systems will be considered on a case-by-case basis. What specific commitment are the Applicants making here? Do the Phase 1, 2 and 3 commitments cover all (100%) OSS of both SBC and Ameritech which the Applicants currently deploy or plan to deploy? Or, do these OSS commitments only cover certain aspects of Applicants' OSS? What aspects of Ameritech Illinois' OSS do the Applicants envisage will be covered by this 3 phase process?

b) Will the interfaces employed by the Applicants comply with the latest industry standards/guidelines developed under the auspices of the Alliance for Telecommunications Industry Solutions ("ATIS")?

c) What are the specific enforcement mechanisms which would be used by the Commission in the event of non-compliance with the commitments made by the Applicants? Should the Commission engage in third-party or carrier-to-carrier testing of OSS to ensure compliance by the Applicants? If so, who should the Commission engage to perform such (third-party or carrier-to-carrier) testing? If there should not be third-party or carrier-to-carrier testing, why not?

5. A timeframe for the Commission to expect deployment of either application-to-application OSS interfaces which support pre-ordering; ordering; provisioning; maintenance, repair, and billing of resold services; unbundled network elements and combinations thereof, which would include support of graphical user interfaces. Alternatively, when Ameritech Illinois would offer CLECs direct access to its service order processing systems.

Staff's Response to Issues 4(a)(b) and 5

a. Introduction

The Joint Applicants were generally responsive to the Commission's questions regarding OSS. As Staff indicated in its Direct Testimony on the Re-Opening, the Joint Applicants' OSS proposal has the potential to eventually provide CLECs with parity service since the proposal allows for Commission oversight of the collaborative process. The three major areas of inquiry upon which the Commission's questions focused were: (1) implementation timetables for integration of Joint Applicants' respective OSS processes; (2) CLEC involvement and the accompanying dispute resolution mechanisms; and, (3) the appropriateness of third party OSS testing. Each of these issues will be specifically addressed in turn.

b. Implementation Timetables

The Joint Applicants have generally committed to implementing a plan for improving the OSS systems and interfaces available to CLECs in Illinois. The Joint Applicants plan to carry out the deployment of "application to application" interfaces as well as "graphical user interfaces" in three distinct phases.[19] Phase 1 will generally involve the Joint Applicants evaluating and assessing their respective OSS systems and coming up with a single unified system to offer the CLECs. Phase 2 calls upon the Joint Applicants to obtain collaborative agreement with CLECs on OSS processes. Phase 3 will require the Joint Applicants to develop and deploy OSS systems consistent with the agreement reached with CLECs during the previous phase. According to the Joint Applicants, their proposal takes into account the latest versions

available for implementation as well as any known time frames for release of the next version of industry accepted standards. The Joint Applicants also indicated that Phases 1, 2, and 3 are meant to cover all OSS functions.[20]

c. Collaborative Process & Dispute Resolution

As indicated in its Direct Testimony on Re-Opening (at page 4), Staff was concerned with certain aspects of the dispute resolution mechanisms proposed by the Joint Applicants. Under their proposal, any disputes that arose during Phase 2 and Phase 3 of the collaborative process would be addressed through an independent third party arbitrator with expenses being shared equally by the Joint Applicants and the CLECs.

Staff raised the concern that arbitration costs might deter smaller CLECs from raising important issues during the collaborative process that might lead to a dispute. As a result, Staff recommended that the Commission serve as a final arbiter to any disputes arising under the collaborative process. Staff reasoned that the Commission, as opposed to an independent third party neutral, was the entity best able to resolve both policy and technical matters impacting telecommunications operations in Illinois. More importantly, Staff pointed out that with the Commission as final arbiter, any associated arbitration expenses would be kept at a minimum for all involved parties.

The Joint Applicants responded to Staff's concerns in their Rebuttal Testimony. According to JA witness Mr. Viveros, "SBC is not in any way opposed to the involvement of the ICC. . . . . If the Commission prefers to keep that arbitration

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[19] See Joint Applicant Direct Testimony on Re-Opening (SBC-Ameritch Exhibit 7.2 at 5-6) for more specific details regarding timetables and timeframes for the three phase plan.

[20] OSS generally encompasses five main functions: (1) pre-ordering; (2) ordering; (3) provisioning;

within the Commission, SBC has no objection." SBC/Ameritech Exhibit 7.3 at 2. Staff respectfully requests that the Commission hold the Joint Applicants to this particular commitment.

d. OSS Independent Third Party Testing

The Joint Applicants contend that neither third party review nor carrier-to-carrier testing is required to ensure compliance under their OSS proposal. They argue that the CLECs have an appropriate remedy for ensuring compliance under the proposal - should any CLEC believe that the Joint Applicants have failed to implement what was agreed upon during the collaborative process, then arbitration before the Commission serves as an appropriate dispute resolution mechanism, thereby, obviating the need for third party testing.

As suggested in its pre-filed testimony, Staff does not believe that independent third party testing is necessary in this instance to ensure that Joint Applicants OSS is fully functional. Staff's underlying reasoning is twofold. First, the fact that the Commission itself would serve as arbitrator of disputes during the OSS collaborative process obviates the need for third party testing. As an active participant in the process, the Commission would be fully informed of all disputed issues while it timely resolves all such issues as they arise. Second, there is a danger in waiting until the end of the two year process to institute a third party review since such a delay may easily result in a backlog of unresolved issues.

Staff readily acknowledges that its OSS testing recommendation in this docket differs from the one made in another telecommunications merger case involving GTE

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(4) maintenance and repair; and, (5) billing.

and Bell Atlantic (Docket #98-0866). As Staff explained on re-direct during the evidentiary hearing, there is a perfectly reasonable explanation for the different recommendations. Tr. at 2615-2616. Although Staff did initially recommend the utilization of third party review in the GTE/Bell Atlantic proceeding, that recommendation was based on the fact that GTE supplied Staff with inadequate information regarding the status of its OSS. In the sur-rebuttal phase of that proceeding, however, the carriers countered with an alternative proposal which is very similar to the one the Joint Applicants have made in this proceeding (ie. providing for specific benchmark, penalties, timelines). Subsequently, Staff revised its position regarding the necessity of third party review.

In short, Staff believes the Joint Applicants OSS proposal allows for Staff involvement in the collaborative process as well as very detailed benchmarks which will enable the Commission to closely monitor the Joint Applicants' OSS performance. In the event the Joint Applicants' OSS fail to meet their OSS commitments, they will incur penalties up to $90 million annually. This combination of CLEC collaboration, Commission oversight, and strict penalty enforcement reduces the need for independent third party review. To the extent, however, that Staff determines the collaborative process is not working as anticipated under the JAs proposal, Staff would not hesitate to recommend the Commission institute independent third party testing in the future.

Finally, under Illinois law, the Commission is legally restricted from awarding state contracts for professional services absent a competitive bidding process. *See* 30

ILCS 500/35-30 (West's Supp. 1998).[21] As a result, Staff takes exception with MCI's recommendation that, should the Commission decide to order third party testing, a specific firm (such as KPMG) be named to conduct such testing.

Staff's Response to Issue 4(c) and Issue 13

1. Overview

In response to the Commission's inquiries, the Joint Applicants proposed to implement a comprehensive set of performance measures and benchmarks with associated liquidated damages and other payments. The Joint Applicants are committing to a timeline that, within 300 days after the merger closing or April 1, 2000, will implement at least 79 of the 105 performance measurements and related standards/benchmarks. In the event that timeline is not satisfied, the Joint Applicants are willing to pay a $30 million fine. SBC/Ameritech Ex. 10.0 at 8.

The Joint Applicants offered the Texas plan for incident-based liquidated damages provisions. They commit to making the same provisions available to CLECs in Illinois for all new interconnection agreements while also amending all existing Ameritech Illinois interconnection agreements upon CLEC request.

The Joint Applicants propose a statistically significant test designed to certify that parity is being provided to CLECs. Under the proposal, the Joint Applicants pay liquidated damages to CLECs in the event parity is not being provided. The specific dollar amount of liquidated damages (Tier 1) payable to CLECs will depend upon the severity of the failure (designated as high, medium, or low). Assessments (Tier 2) are

[21] *30 ILCS 500/35-30(a)* provides: " All state contracts for professional and artistic services, except as provided in this Section, shall be awarded using the competitive request for proposal process outlined in this Section." It is important to note that there are various exceptions to this requirement depending

also identified as high, medium, or low. The plan has certain penalty payment exclusions including but not limited to: a *Force Majeure* clause, performance failure by a CLEC, or problems with third party equipment. The Joint Applicants will carry the burden of proving that noncompliance with a certain performance measurement should be appropriately excused.

2. Illinois Liquidated Damages Cap

On the re-opening in this proceeding, Joint Applicant witness William Dysart addressed how the federal performance plan may or may not overlap with the commitments made by the Joint Applicants here in Illinois. In general, the FCC performance plan closely mirrors the liquidated damages remedy plan commitments made in Illinois.

The Joint Applicants have basically used the liquidated damages program offered in Texas as a baseline for both their respective federal and Illinois commitments. SBC-Ameritech Ex. 10.0, Attachment 2. The Joint Applicants commit to, within 300 days after merger closing, implement in Illinois at least 79 of the 122 benchmarks identified under the Texas plan. The number of measurements selected (79) was arrived at by determining which of the total (105) measurements could be implemented in an expedited manner.

For the CLECs operating in Illinois, payments would be made to such CLECs up to the Illinois cap. An issue arose as to what exactly the appropriate cap amount should be in Illinois. Initially, Staff was under the assumption that the Illinois cap would mirror the Texas cap (i.e., $120 million). ICC Staff Ex. 8.02, p. 24. In rebuttal

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on the type of contract and the amount. *See* 30 ILCS 500/35-35.

testimony, the Joint Applicants asserted that $120 million was not the appropriate cap figure for Illinois. According to the Joint Applicants, a smaller cap would be more appropriate for Illinois based on the number of access lines in Illinois as compared to Texas. The Joint Applicants further felt that the exact amount was an issue best determined via the collaborative process. SBC-Ameritech Ex. 10.1, p. 6.

During the evidentiary hearing, however, JA witness William Dysart proposed that the Illinois cap be approximately set at $90 million. This figure is based on the relative number of access lines in Texas (approximately 9.3 million) and Illinois (approximately 6.9 million). Tr. at 2268-2269. Staff avers that the proposed $90 million Tier 1 and Tier 2 liquidated damages Illinois cap is a fair amount under a pure access line comparison between Texas and Illinois.[22]

In short, Staff believes the Joint Applicants' performance plan is viable as long as the Commission is deemed the final arbitrator of any disputes arising from the plan. Moreover, Staff's belief is further predicated on the Joint Applicants' concession that application of these assessments and damages is <u>not</u> intended to foreclose other non-contractual legal and regulatory claims and remedies available to a CLEC. Any specific enforcement mechanisms established via these conditions should <u>not</u> abrogate, supercede, limit or otherwise replace the Commission's enforcement powers.

[22] The formula used to calculate the respective correlation between the Texas and Illinois caps is as follows: 8.11 (ILL - Year 1) / 10.93 (TEX - Year 1) = 0.74199 (this figure represents the fact that Illinois has approximately 74% the number of access lines of Texas). .74199 x 120 = 89.0393412624 (this figure represents roughly what the Illinois penalty cap should be if based on an access line comparison with Texas).

UNBUNDLING

6. The Commission asked the Joint Applicants to address the provision of local switching in a commercially feasible manner, including customized routing of operator services and directory assistance.

The Provision of Unbundled Local Switching

The Joint Applicants response to this question is set forth on pages 19-24 of Exhibit 6 which is attached to the Amended Joint Application. The Joint Applicants claim that Ameritech Illinois is in full compliance with any requirements to provide local switching in a commercially feasible manner, including customized routing of operator services and directory assistance. Id., p. 19. The Joint Applicants' response also discusses the current switching elements that are available to CLECs on a unbundled basis as well as its operational readiness to provide unbundled local switching. The Joint Applicants further state that Ameritech Illinois has not received a single order for unbundled local switching at this time. Id.

Staff believes the Joint Applicants' answer is responsive to the Chairman's inquiry. Staff also anticipates that with the provisioning of shared transport, as discussed in Section 3 above, CLECs will begin ordering unbundled switching. ICC Staff Ex. 5.02 at 4.

7. The provision of telecommunications services on a wholesale level, including but not limited to providing the unbundled network platform without operator services and directory assistance; customized routing of all categories of traffic; volume discounts; competitive classifications of services in the ICC number 19, part 22, tariff; appropriate charges to be applied when a customer converts to a reseller on an "as is" basis; branding of resold OS/DA services; 911 services; and access to Advanced Intelligent Network triggers.

1. Unbundling Issues (Excluding Advance Intelligent Network)

The Joint Applicants noted that the vast majority of the issues listed in the Chairman's correspondence have already been the subject of an investigation in Docket 97-0553, a pending proceeding initiated by the Commission to address issues relative to Ameritech Illinois' noncompetitive wholesale tariffs. Amended Joint Application, Exhibit 6, p. 25; SBC/Ameritech Ex. 3.3, p. 2.

Staff witness Graves agreed that the unbundling issues identified in the Commission's question have been addressed in other proceedings and listed the issues in ICC Staff Ex. 4.02, p. 15. Mr. Graves also noted that the parties had determined that insufficient information existed at the time of the filing of the testimony to address the appropriateness of Ameritech Illinois' failure to offer mediated or unmediated access to AIN triggers. Id.

Mr. Graves further testified that Staff had identified problems with Ameritech Illinois' method of unbundling and re-branding of OS/DA services, and Ameritech Illinois' unilateral imposition of excessive restrictions on the aggregation of services. In order to provide the Commission with a complete understanding of these issues, Staff witness Graves attached Staff's Initial and Reply Brief from ICC Docket No. 97-0553 as Attachments 5 and 6, respectively, to ICC Staff Ex. 4.02

2. Access to Advanced Intelligent Network Triggers

As noted above, the Joint Applicants claimed that the vast majority of the issues listed in the Chairman's correspondence had already been the subject of an investigation in Docket 97-0553. Amended Joint Application, Exhibit 6, p. 25.

Staff witness Gasparin tacitly agreed with the response of the Joint Applicants. He further testified that Staff had held workshops regarding access to AIN triggers and

would continue to monitor the national and industry forums which will set the standards for interconnection to the incumbents network. ICC Staff Ex. 5.02 at 4. A major concern of Staff regarding access to the triggers is the security to the incumbents network and protection of proprietary data of the other competitive providers who may supply AIN services. Staff is supportive of allowing competitors to provision AIN type services on a fully competitive basis which would allow for future access to these triggers once the security and protection criteria are established. Mr. Gasparin testified that Staff would continue to monitor the progress of the national and industry forums to assure that the goals of this Commission are met. Id.

8. Merger Costs and Savings

Provide a total and complete breakdown detailing the Joint Applicants' estimates of the costs and savings associated with this merger. Explain the methodology and assumptions used to arrive at the estimates for overall Ameritech savings, Ameritech Illinois savings, and SBC savings. Explain how these savings are spread between the Ameritech states. Explain the methodology and assumptions used to arrive at the estimates for overall Ameritech costs, Ameritech Illinois costs, and SBC costs. Explain methodology used to calculate the total estimated costs of this merger, including a breakdown of the component figures which add up to total estimate of costs.

Staff believes that the Joint Applicants have not provided any new information related to this issue. Staff's position regarding the allocation of savings and the recovery of costs, therefore, has not changed.

As discussed in Staff's Initial and Reply Briefs, Staff contends that the portion of merger savings allocable to Illinois regulated operations should flow to Ameritech Illinois' customers. As Staff witness Yow previously testified, such an allocation of both enhanced revenues and merger savings would result in Illinois ratepayers receiving approximately 6% of the total anticipated merger synergies. Staff also maintains that

use of actual savings is preferable to the use of estimated savings. Staff and Ameritech Illinois have agreed upon a mechanism whereby actual savings would be reflected in Ameritech Illinois' annual price adjustment filing under its alternative regulatory plan.

a. The Use of Actual Data is Preferable to the Use of Estimates

From Ameritech Illinois' perspective the use of actual data is preferable because projected savings may not be realized. Staff agrees that the use of actual data is preferable since it would provide a more accurate result than the use of estimates. In this case, SBC and Ameritech have provided only high level estimates with no detailed support. Staff witness Marshall testified that such data is much less reliable than budgeted data or forecasted data based upon a substantive business plan. ICC Staff Ex. 1.02 at 27-28.

Staff notes that the Joint Applicants have strong incentives to underestimate the savings which will actually occur. Initially, a conservative approach to estimating merger savings is dictated by the necessity of obtaining the endorsement of financial advisors and approval of shareholders. Additionally, company management would very much like to report to shareholders and the financial community that the actual savings achieved were greater than the estimated savings. For example, in the SBC/PacTel merger, projected savings were underestimated by approximately 100%. Id.

Ameritech Illinois is uniquely situated for the utilization of actual savings data because of the annual price adjustments that it must file in accordance with its alternative regulation plan, while rate of return regulated companies generally experience a greater regulatory lag. To the extent that the Commission orders savings

to be shared with ratepayers, Ameritech Illinois and Staff have agreed upon the appropriate mechanism for reflecting such savings in annual price cap filings. Id.

b. The Joint Applicant Have not Provided Additional Detail Regarding Merger Related Savings

As noted above, the Joint Applicants have provided no additional data regarding savings in response to the Commission's request. This is evidenced by SBC/Ameritech Exhibit 3.3, Schedule 1 which provides references to the record evidence for each step in the Joint Applicants calculation of merger savings.

Staff attempted to obtain additional detail supporting the Joint Applicants' estimate of savings**.** Initially Staff requested account specific information in data requests JRM 1.02 and JRM 1.03. The Joint Applicants responded that no data was available by USOA account level. In the re-opened case, Staff again requested that supporting data be provided in the greatest level of detail available. The Joint Applicants again provided no more detailed information. However, the Joint Applicants noted that their estimates were done at a macroeconomic level and did not include any state specific analyses of either savings or the costs to achieve those savings. The Joint Applicants have also agreed to track actual costs and savings following the close of the merger. ICC Staff Ex. 1.02, Attachment A.

c. The Joint Applicants have not provided additional detail regarding merger related costs as requested by the Commission

The Joint Applicants have not provided additional detail regarding merger related costs as requested by the Commission. Staff's position regarding merger related costs is fully discussed in its initial and reply briefs. In summary, Staff believes that the Commission should determine the specific types of costs that may be

recovered from ratepayers. The Commission should allow recovery of the reasonable costs that are directly associated with utility operations. In this case, the Joint Applicants have not identified or quantified those costs separately in their calculation of merger synergies. Identification and quantification of these specific costs is required in order for the Commission to determine the reasonableness of costs to be recovered from ratepayers. Staff believes that no cost should be netted from savings prior to a determination that such cost is reasonable and should be recovered from rate payers. ICC Staff Ex. 1.02 at 29-30.

The Commission has previously disallowed such costs as corporate aircraft, shareholder lawsuits and contingency funds and has limited the amount of severance costs that can be recovered from ratepayers in evaluating the reasonableness of merger related costs and savings. Central Telephone Company of Illinois ("Centel"), Ill. C.C. Docket 93-0252, pp. 7-14. The Commission should also consider whether employee bonuses related solely to the closing of the merger should be recovered from ratepayers and, if so, a reasonable amount for such bonuses. The use of this data and other actual data will allow the Commission to evaluate the reasonableness of merger costs prior to their recovery through rates. Id.

Ameritech witness Gebhardt provides limited additional information in his testimony by identifying specific cost groups which are included in the Joint Applicants calculation of costs of achieving merger savings. These cost groups are systems modifications, real estate, relocations costs, and severance packages. SBC/Ameritech Ex. 3.3, p. 13. The Joint Applicants were unable to quantify the costs associated with each of these categories or to differentiate between expenses and capital costs. ICC

Staff Ex. 1.02, Attachment A. In response to data request JRM 2.04, Ameritech provided copies of its severance plan associated with this merger and also its severance plan absent a merger. Id.

The severance plan associated with a merger is significantly more generous than the severance plan absent a merger. The severance plan associated with a merger is also significantly more generous than the amount (limited to no more than one years salary per employee) allowed in the Centel/Sprint merger referenced above. For example, an Ameritech employee with 25 years of service will receive two full years salary with the second years salary grossed up for taxes in the event of a merger, but would receive a maximum of 58% of one years salary not grossed up for taxes absent a merger. As a result, absent detailed cost information it is not possible to calculate a proposed adjustment to the costs provided by the Joint Applicants. Id.

d. The estimated, annual, ongoing cost savings calculated by the Joint Applicants is $90 million per year

The estimated, annual, ongoing cost savings calculated by the Joint Applicants is $90 million per year, as shown at page 11 of SBC/Ameritech exhibit 3.3. The $31 million net present value recommended by Mr. Gebhardt at pages 14-16 of his testimony on re-opening should not be used to allocate merger savings to ratepayers for several reasons. First, as stated above, the use of actual data is preferable. In the event that an estimate is used, no net present value calculation is necessary since Ameritech adjusts its rates annually.

Staff also disagrees with the use of a three year limit on consideration of merger costs and savings based upon a premise that the market will be fully competitive within

three years. Staff believes that Ameritech Illinois will still offer non-competitive services at the end of three years. Staff notes that in the event that the market does become fully competitive within the three year time frame, adoption of Staff's interim methodology will not harm Ameritech Illinois because its alternative regulation plan will cease. However, limiting consideration of costs and savings to a three year time period will cause an adverse rate impact on customers if the market does not become fully competitive in that time frame. ICC Staff Ex. 1.02 at 31-31.

In analyzing the proposed merger, the Joint Applicants calculated synergies through the year 2010 which continue to increase in each year. ICC Staff Exhibit 1.02, Attachment B, Proprietary. Staff believes that use of a three year time frame is not equitable because all of the one-time costs of achieving on-going economies occur within the first three years. To the extent that these costs are determined to be reasonable, they should be amortized over the same ten year period during which synergies are expected to be realized, absent the detailed cost information necessary to determine a reasonable recovery period for each specific type of cost. Id.

The Joint Applicants oppose the use of a ten year amortization period and confuse this proposal with the annual adjustment for merger related costs and savings that the Joint Applicants and Staff have agreed to. Staff notes that the use of actual data will allow the Commission to determine the reasonableness of both the amount and the type of each cost and to set reasonable recovery periods. Staff's proposed ten year amortization of merger related costs should be made if a net present value calculation is done. Id.

9. NATIONAL LOCAL SUBSIDARY

A clear explanation of the National Local Subsidiary, as used in this docket, and the impact that this subsidiary would have on retail rates. Explain what happens to AI's retail rates should the applicants transfer the top-revenue customers to this subsidiary for telecommunications services. Explain what the revenue impact would be for Ameritech Illinois if the top customers are shifted to the National Local Subsidiary. Explain if the National Local Subsidiary would provide local service for its customers in Illinois. Explain whether the National Local Subsidiary would be certified as a CLEC in Illinois. Explain whether the National Local Subsidiary would be treated as any other CLEC would be treated in its interactions with AI.

The Joint Applicants responded to this issue on pages 28-31 of Exhibit 6 attached to the Amended Joint Application. The Joint Applicants aver that a) the National Local subsidiary was not the subject of this docket; b) Staff first raised the issue during oral argument; and c) Staff never mentioned the issue once in hearings, in its voluminous post-hearing briefs, in its voluminous briefs on exception or in either of its proposed orders. Amended Joint Application, Exhibit 6, p. 28

Staff witness Graves testified that the Joint Applicants' answer to the Commission's question was responsive although he disagreed with significant portions of the Joint Applicants' response and noted that the Joint Applicants commitment on this issue failed to remedy Staff's concerns. ICC Staff Ex. 4.02, p. 23. In response to the Joint Applicants' allegation that the National-Local subsidiary should not be an issue in this proceeding, Staff witness Graves noted that the National-Local subsidiary was relevant to the Commission's inquiries to the extent is creates possible: subsidization of non-utility activity (subsection 7-204(b)(2)), the misallocation of costs and facilities (subsection(b)(3)), or causes any adverse rate impacts (sub-section(b)(7)). Id.

In response to the allegation that Staff did not raise the issue until oral argument,

Staff witness Graves testified that the issue of the National-Local subsidiary arose when certain parties, other than Staff, elicited testimony from SBC witness Mr. Kahan on the issue at the evidentiary hearing. However, Staff's decision not to question Mr. Kahan on this issue was necessitated by the course of the proceeding. Id. at 23-24.

Mr. Graves further noted that all parties to the proceeding, including Staff, were limited in their cross-examination times because of a perception that the hearing would not be completed within the allotted timeframe without the imposition of such limitations. Since SBC/Ameritech witness Kahan had been questioned on the issue of the National-Local subsidiary by other parties prior to Staff's questioning (Staff was the last party to question Mr. Kahan in Illinois), it was appropriate for Staff to choose to concentrate on other issues. Id. at 24. Staff should not be faulted for this decision. Notably, the limitation on parties' times to question Mr. Kahan resulted in AT&T moving to admit Mr. Kahan's Ohio testimony into the record. The Commission granted AT&T's motion. Further, after Mr. Kahan's testimony identified this issue as a concern for Staff, Staff did not delay until oral argument to bring this important issue to the Commission's attention. Staff addressed the National-Local subsidiary issue its Reply Brief at pages 34-35 filed in this proceeding. It was the Joint Applicants, not Staff, who failed to address the issue until oral argument. Id.

The Joint Applicants also testified that the National-Local subsidiary will not operate directly in Illinois for the foreseeable future and that they intend to pursue the primary piece of the national-Local strategy through a newly formed subsidiary.

SBC/Ameritech Ex. 1.3, p. 18.

In response, Staff witness Graves testified that the Joint Applicants may wish for their National Local customers to be served through one of its strategic partners such as Williams Communication or Concentric Communications rather than establishing a separate subsidiary. ICC Staff Ex. 4.02, p. 24. He further testified that if the Joint Applicants wished to serve National Local customers itself, it would have to utilize a separate subsidiary in incumbent markets because SBC will only be able to provide in-region, inter-LATA telecommunications services (once section 271 relief is granted by the FCC) through a separate affiliate. See, 47 U.S.C. Sec. 272(a)(1)(A), (2)(B). The Joint Applicants concede this fact. Amended Joint Application, Ex. 6 at 28 n. 24; SBC-Ameritech Ex. 1.3 at 18.

The Joint Applicants also made a commitment that until January 1, 2001, they would pursue the National-Local strategy in-region, including within Illinois, by having the National-Local subsidiary subcontract with Ameritech Illinois to provide local exchange service to the National-Local subsidiary's accounts within Illinois. SBC-Ameritech Ex. 1.3 at 19-20. During the rebuttal phase of the proceeding, SBC/Ameritech witness Kahan extended the commitment until January 1, 2003, allegedly in an attempt to address Staff's concerns. SBC/Ameritech Ex. 1.5, p. 9.

While Staff acknowledges the Joint Applicants' change in its commitment, Staff still has concerns regarding this issue. One such concern is that a combined SBC/Ameritech would be able to exercise considerable market power even through an affiliate. This market power could be utilized to cross subsidize non-utility activity, misallocate costs, and possibly cause adverse rate impact to captive customers. It is

far from certain that sufficient competition to restrain SBC/Ameritech's market power will develop by January 1, 2003. In order to guard against SBC/Ameritech utilizing its market power in a non-competitive manner the Commission could either: (1) review the status of competition in 2003 and decide at that point whether of the National Local affiliate can enter as a CLEC in Illinois or (2) restrict the entry National Local affiliate until SBC/Ameritech holds less than a 50% market share of the local market in Illinois.

10. SECTION 251

A clear demonstration in the record regarding compliance with Section 251 of the Telecommunications Act of 1996 in Illinois. If there is not compliance, a clear explanation why compliance is not feasible. Also, the Joint Applicants should immediately establish, upon an amended filing, a collaborative process to address any concerns raised by Staff regarding compliance with this section.

The Joint Applicants responded to this inquiry by arguing that Ameritech Illinois has a solid record of compliance with Section 251, has fully satisfied the 251 obligations and, has been an industry leader in doing so. SBC/Ameritech Ex. 12.0, pp. 24. p. 31. The Joint Applicants further commit to meet with Staff within 30 days of the merger closing to address any current issues Staff may have regarding Section 251. Amended Joint Application, Exhibit 6, at 32. In addition, the Joint Applicants have committed to meet with Staff on a quarterly basis to address any Section 251 concerns that may arise over time. Id.

Staff took no position on this issue during re-opening.

ENFORCEMENT

11. The manner, necessary actions and timetable by which the Joint Applicants would incorporate incident-based, liquidated damages provisions into interconnection agreements in Illinois;

a) On p. 32 of Exhibit 6, the Applicants refer to their willingness to discuss with the Commission mechanisms currently contemplated by the Applicants and the FCC with regard to incident-based, liquidated damages provisions. Applicants should address such developments in filings with the Commission in this proceeding.

b) On pp. 33-37 of Exhibit 6, the Applicants have incorporated a recommended course of action with regard to performance measures, benchmarks and remedies similar to that reached in the stipulated agreement with the Public Utilities Commission of Ohio. How have the Applicants addressed the Commission's desires (as expressed in Attachment A, Item 11) for the incorporation of incident-based, liquidated damages provisions into interconnection agreements in Illinois with this proposal?

See, Staff's response to Question 13, *infra*, for a discussion of this issue.

c) Under the proposal on pp. 33-37 of Exhibit 6, the Applicants propose a solution to the issue of technical infeasibility. By what process is the Commission supposed to resolve technically infeasible claims by the Applicants which are disputed by competitors? If a claim of technical infeasibility is made by the Joint Applicants and the Commission finds otherwise, by what process is the issue definitively resolved? Please clarify.

See, Section 2(a)(iii), *supra*, for a discussion of this issue.

a) On p. 34 of Exhibit 6 under commitment 6, why have the Applicants proposed implementation of "79 of 105 performance measurements and related standards/benchmarks?" Aside from being the same number in the Ohio stipulated agreement and approximately 75% compliance, how was this number determined? Why do the Applicants feel this level of compliance is appropriate?

See, Staff's response to Question 13, *infra*, for a discussion of this issue.

b) On p. 34 of Exhibit 6 under commitment 6, why have the

Applicants proposed a payment of $20 million? Aside from being the same payment in the Ohio stipulated agreement, how was this number determined? Why do the Applicants feel this payment is appropriate? Have the Applicants alternatively considered the posting of a "performance bond" or some other form of enforcement mechanism to be used in the event of non-compliance with this or any other commitment?

SBC/Ameritech witness Dysart addressed this issue in his supplemental testimony on re-opening and stated that the figure of $20 million was a negotiated sum in Ohio after a long process of "give and take" reflecting the input of various parties to that negotiation, including consumer groups and certain CLECs. SBC/Ameritech Ex. 10.1, p. 9. Dysart further stated that the $20 million figure was intended to create an appropriate penalty to ensure Joint Applicants' compliance or, in the alternative, adequate remedies to both CLECs and the State if the Joint Applicants could not meet their commitments. Id., pp. 9-10. The amount computed by the Joint Applicants for purposes of its Illinois commitment is $30 million. This amount reflects the sizing calculation (based upon access lines) performed by SBC/Ameritech witness Gebhardt in SBC/Ameritech Ex. 3.3, p. 15. Id., p. 10.

Staff took no position on this issue during re-opening.

12. Reasonable and effective enforcement mechanisms for any condition imposed, including appropriate penalties, economic or otherwise;

a) For any and all proposed commitments made by the Applicants throughout their June 10, 1999 filing, what are the specific enforcement mechanisms which would be used by the Commission in the event of non-compliance with such commitments?

In response to the issue of enforcement, the Joint Applicants have incorporated their June 4, 1999, responses to issues 4 through 11 and note that there is an Illinois

statute relating to enforcement (Section 13-515). Amended Joint Application, Exhibit 6 at 12. The Joint Applicants note that the aforementioned statute provides for fines not to exceed $30,000 a day. Id. The Joint Applicants further note that any aspect of an enforcement mechanism must include a recognition of their due process rights and the ability to show cause why a penalty should not be imposed. Id.

Staff avers that the Joint Applicants reliance on Section 13-515 as a specific enforcement mechanism in the event of non-compliance with this commitment is misplaced in light of the language contained in sub section (b) of Section 13-515. Subsection (b) of 13-515 reads as follows:

> "The provisions of this Section **shall not apply to an allegation of a violation of item (8) of Section 13-514** by a Bell operating company, as defined in Section 3 of the federal Telecommunications Act of 1996, **unless and until such company or its affiliate is authorized to provide inter-LATA services under Section 271(d) of the federal telecommunications Act of 1996**; provided, however, that a complaint setting forth a separate independent basis for a violation of Section 13-514 may proceed under this Section notwithstanding that the alleged acts or omissions may also constitute a violation of item (8) of Section 13-514. (emphasis added).

220 ILCS 5/13-515.

Whereas item 8 of Section 13-514 reads as follows:

> **"violating the terms of or unreasonably delaying implementation of an interconnection agreement** entered into pursuant to Section 252 of the federal telecommunications Act of 1996 in a manner that unreasonably delays or impedes the availability of telecommunications services to consumers." (emphasis added)

220 ILCS 5/13-514(8)

SBC/Ameritech witness Appenzeller testified that since none of Ameritech Illinois' interconnection agreements currently requires "interim" or long-term shared transport , as defined in SBC/Ameritech Ex. 12.01, CLECs will need to amend their existing interconnection agreements or enter new ones to include

terms and conditions for shared transport. SBC/Ameritech Ex. 12.1 at 2. However, if CLECs can only obtain the Joint Applicants' commitment to provide shared transport via their interconnection agreements and a dispute ensues from an interconnection agreement, there can be no enforcement under this section since the language of Section 13-515(b) exempts its application to Ameritech Illinois, as a Bell operating company, absent 271 relief. The Joint Applicants reliance on this Section as an enforcement tool is a red herring designed to obfuscate the facts and mislead the Commission. In light of this fact, Staff recommends that the Joint Applicants misplaced reliance on Section 13-515 be ignored by the Commission.

13. The manner, necessary actions and timetable by which the Joint Applicants would create detailed performance monitoring reports to compare the provision of the following services to CLECs with internal performance standards: network performance, Operations Support Systems (OSS) and customer (i.e. CLEC) service.

a) On p. 36 of Exhibit 6 under commitment 10, the Applicants describe a report to the Commission Staff regarding transactions "affecting Illinois CLECs relative to their provision of service to end users in Illinois." It is unclear whether or not this report is intended to be responsive to Item 13 of the original Attachment A. If commitment 10 is the Applicants response to Item 13 from Attachment A, does this report meet the expressed goal of comparing service received by CLECs from the Applicants to service received by the Applicants as they provision it to themselves? What is the form of such reports as proposed by the Applicants? Please clarify. Additionally, how is the Commission to determine the "economic or technical" feasibility of these reports as discussed by the Applicants? Do the Applicants propose to determine this? If so, what remedy does the Commission have available if a CLEC demonstrates otherwise to the Commission in a formal proceeding?

See, Section 4(c) above for Staff's response to this inquiry.

14. July 1, 1999 FCC Ex Parte FILING

A. Commission's Questions

1. In Section I of SBC/Ameritech's July 1 FCC Ex Parte filing, SBC/Ameritech have committed to the FCC to implement a "Federal Performance Parity Plan" ("FCC performance plan") upon consummation of the transaction. If the FCC were to adopt the voluntary commitments of SBC/Ameritech, how would the FCC performance plan affect the commitments reflected in SBC/Ameritech's testimony on re-opening to implement certain OSS and facilities performance measurements ("Illinois plan")? If the FCC were to adopt the voluntary commitments of SBC/Ameritech, what overlap, if any, would there be in terms of benchmarks, liquidated damages payments, and compliance oversight between the Illinois and FCC performance plans? Also, please explain why the proposed FCC performance plan would extend for three years, while the Illinois plan as proposed extends for only 300 days.

During the evidentiary hearing held on July 14, 1999, SBC/Ameritech witness Dysart addressed this issue. He testified that the FCC performance plan closely mirrors the liquidated damages remedy plan included as part of the commitments made to Illinois in the text of his direct testimony as well as Attachment 2 of his direct testimony. Tr. p, 2267. Mr. Dysart noted that Attachment 2 to SBC/Ameritech Ex. 10.0 describes the liquidated damages provisions that have been offered in Texas. SBC has committed to implement similar provisions in all new interconnection agreements in Illinois and in any existing interconnection agreements upon request by the CLEC. Tr., pp. 2267-2268. Dysart also noted that under the FCC performance plan, as it impacts the Illinois commitments, payments would be made under the Illinois commitments, assuming the ICC includes it as proposed in its final order. Id.

Mr. Dysart testified that for CLECs operating in Illinois, payments would first be made to the CLECs under the Illinois plan up to the Illinois cap, and then be made to

the CLECs under the FCC performance plan up to the Tier 1 federal cap, if it exceeds the Illinois cap. Id. If the state plan requires assessments to the state—as the Illinois commitments would—then, similarly, payments would be made to a public interest fund designated by the State of Illinois under the state plan up to the Illinois cap, and then to the federal public interest fund up to the Tier 2 federal cap to the extent it exceeds the Illinois cap.

Under the Joint Applicants' proposal, a CLEC could pursue any penalties available to them under the Illinois-ordered conditions to the full extent of those penalties. If the penalties available to the CLECs in Illinois are less than what the CLEC would be entitled to in Illinois as a result of the FCC conditions, the CLEC would be entitled to pursue its FCC remedy for any overage. Tr. p. 2269.

With respect to the issue of overlap, Mr. Dysart testified that if the FCC adopted SBC/Ameritech's proposal as submitted, and the ICC adopted the Joint Applicants' commitments, there would be a great deal of overlap in the substance of the federal and state benchmarks. Tr., 2269-2270. He noted that the 20 federal benchmarks are designed to capture the most crucial (from a customer perspective) of the 122 Texas benchmarks. If the ICC adopts the 122 benchmarks consistent with the Joint Applicants' commitment, the ICC will be adopting the substance of the 20 federal benchmarks. Alternatively, if the ICC were simply to adopt the 20 federal benchmarks, the overlap would be exact. Id.

Mr. Dysart also testified that a comparison of the proposed FCC performance plan's three-year time line and the Illinois 300-day time line is not really appropriate. Id. He noted that the three-year period referenced in the FCC proposal is a period of

time beginning nine months after the merger closing during which the FCC performance plan will be in force. Id. The 300 days in the Joint Applicants' Illinois commitments is the period of time during which Ameritech Illinois will implement at least 79 of the 122 benchmarks the Joint Applicants have committed to. Tr., pp. 2270-2271.

Mr. Dysart testified that it would be more appropriate to compare the 300 days after closing, wherein the Joint Applicants have to come into substantial compliance with the benchmarks in Illinois, with the nine months that SBC/Ameritech have to come into substantial compliance with the FCC performance plan. Tr., p. 2271. Similarly, while the three-year clock begins to run for the FCC performance plan only after nine months, the three-year time line for Illinois commitments begins at closing. Id. He testified, that, in essence, the Illinois commitment will begin one month later and end nine months earlier than the federal proposal. Mr. Dysart concluded by noting that during both the first one month and the last nine months, CLECs will have full access to the FCC penalties. Id.

2. In Attachment A to SBC/Ameritech's July 1 FCC Ex Parte filing, SBC/Ameritech commit to provide the FCC and CLECs with certain forms of performance measurement results, on a quarterly basis, cataloging SBC/Ameritech's provision of service to the aggregate of all CLECs in each of SBC/Ameritech's states. If the FCC were to adopt the voluntary commitments of SBC/Ameritech, would the Illinois Commerce Commission have equal access to this data? If not, why not?

In response to this question, SBC/Ameritech witness Dysart testified that the Joint Applicants will make the same data available to the ICC by providing the ICC with access to the same Internet web site accessed by the FCC. Tr., p. 2271.

3. In Section III of SBC/Ameritech's July 1 FCC Ex Parte filing, SBC/Ameritech have committed to the FCC to implement an OSS Process Improvement Plan (the "FCC OSS plan"). This 3 phase FCC OSS plan seems to closely mirror the commitments reflected in SBC/Ameritech's testimony on re-opening. Further, the FCC OSS plan calls for a "single workshop" to work collaboratively with CLECs under the ultimate direction of the Chief of the Common Carrier Bureau of the FCC. If the FCC were to adopt the voluntary commitments of SBC/Ameritech, how would the FCC OSS plan overlap with the proposal put forth here in Illinois? If the FCC were to adopt the voluntary commitments of SBC/Ameritech, do SBC/Ameritech envision that the FCC OSS plan is controlling over Illinois or takes the place of the commitments reflected in their testimony on re-opening? Please explain.

SBC/Ameritech witness Viveros addressed this issue during the evidentiary hearing held on July 13, 1999. In response, the Joint Applicants state that if the FCC's proposal is not adopted, the commitments made for the Illinois collaborative process would remain in place and they would control. Tr., p. 2183. However, if the FCC does adopt the SBC/Ameritech proposals as they were submitted, and the ICC adopts the Joint Applicants' commitments, there would definitely be an overlap between the collaborative process pursued by the FCC and the ICC. Tr., 2183-2184.

With respect to the differences between the two commitments, Mr. Viveros testified that the FCC proposal addresses OSS for the newly formed 13 state territory whereas the commitment in Illinois would be specific to Illinois. Tr., p. 2184. While noting the similarity between the two commitments, Mr. Viveros testified that he didn't believe the FCC OSS would be controlling over the Illinois process. Id. In conclusion, Mr. Viveros testified that there may need to be some reconciler once the FCC and ICC orders come out whereas the appropriate regulatory entities would come together and agree on some sort of single adhesive process, rather than manage the processes independent of one another. Id.

4. In Section VIII of SBC/Ameritech's July 1 FCC Ex Parte filing, SBC/Ameritech have committed to implementing shared transport in current Ameritech states. Is this proposal to the FCC the same as the commitments reflected in SBC/Ameritech's testimony on re-opening regarding shared transport? Please explain.

SBC/Ameritech witness Appenzeller responded to this question during the evidentiary hearing held on July 14, 1999. In their response, the Joint Applicants state that the two commitments are the same except for a minor difference in timing. Tr., pp. 2360-2361. Mr. Appenzeller testified that specifically, the shared transport commitment as proposed to the FCC calls for the offering of interim shared transport no later than the time of merger closing, while the shared transport commitment in Illinois calls for the offering of that product within 30 days of the merger closing. Id., p. 2361. He further testified that if the FCC proposal is adopted by the FCC, the same timetable would apply in Illinois. Id. Mr. Appenzeller also pointed out that in Illinois, the Joint Applicants have made no commitment to provide the UNE platform to customers, whereas, at the FCC, the Joint Applicants have proposed to make the UNE platform available to residential customers within 30 days after the merger closing subject to certain terms and volume limits. Id. In conclusion, Mr. Appenzeller stated that if the UNE proposal is adopted by the FCC, it would apply in Illinois.

5. In Section XXV of SBC/Ameritech's July 1 FCC Ex Parte filing, SBC/Ameritech have stated that if conditions imposed in connection with the merger under state law grant "similar rights" against SBC/Ameritech to the conditions volunteered to the FCC, affected parties shall not have a right to invoke overlapping aspects of federal and state conditions. If the FCC were to adopt the voluntary commitments of SBC/Ameritech, please explain the legal and practical implications of this statement as they relate to the commitments reflected in SBC/Ameritech's testimony on re-opening.

SBC/Ameritech witness Kahan addressed this question during the evidentiary hearing held on July 13, 1999. In response, Mr. Kahan referenced paragraph 69 of the proposed FCC conditions attached to his rebuttal testimony on re-opening as Schedule 1. SBC/Ameritech Ex. 1.5, Schedule 1. The intent of the Joint Applicants response is to simply ensure that the commitments they have made to states like Illinois are complementary to and not cumulative of conditions that have been proposed by the FCC and to the FCC. Tr., p. 1846. Mr. Kahan further testified that if the ICC were to adopt an FCC condition as offered in his rebuttal testimony, the ICC-ordered conditions would be counted as part of, and not in addition to, the FCC condition. Id., pp. 1846-1847.

B. Staff Response

During the rebuttal phase of this re-opened proceeding, SBC/Ameritech witness Kahan testified that although the Joint Applicants' do not feel that it is necessary for the ICC to adopt the FCC proposed conditions since they will automatically apply in Illinois if they are adopted by the FCC, SBC and Ameritech would, nevertheless, not object if this Commission wanted to take the substantive provisions of the FCC order, Sections 1-6, 8, 9, 11-15, 17-20, 24 and incorporate them within this Commission's final order, as long as the terms and conditions are not modified in any material way except to make them Illinois-specific. SBC/Ameritech Ex. 1.5, p. 28. Kahan added the caveat that the SBC and Ameritech Boards of Directors would have to consider and make a final evaluation of the total package of conditions which this Commission ultimately orders. Id. SBC/Ameritech witness Kahan concluded his discussion of the FCC

conditions by noting that whatever this Commission decides to do, it is important that it take into account the total package of conditions, including any conditions that deal with merger savings, and the economic impacts of the conditions on SBC and Ameritech. Id.

The conditions enumerated by SBC/Ameritech witness are related to the following issues: Section 1-Federal Performance Parity Plan; Section 2-Collocation Compliance Plan; Section 3- OSS: Enhancements and Additional Interfaces; Section 4-OSS: Waiver of Charges; Section 5-OSS: Assistance for Small CLECs; Section 6-xDSL and Advanced Services Deployment; Section 8-Shared Transport; Section 9-Offering of UNEs; Section 11-Carrier-to-Carrier Promotions; Section 12-Alternative Dispute Resolution; Section 13-Most-Favored-Nation Provisions for Out-of-Region and In-Region Arrangements; Section 14-Regional Interconnection and Resale Agreements; Section 15-Additional Service Quality Reporting; Section 17-ARMIS Reporting; Section 18-Access to Cabling in Multi-Dwelling Unit Premises ("MDUs") and Multi-Tenant Business Premises; Section 19-InterLATA Pricing; Section 20-Enhanced Lifeline Plans; and Section 24-Sunset Provisions.

Based on the language contained in the Proposed Conditions for FCC Order Approving SBC/Ameritech Merger and the testimony proferred by SBC/Ameritech witness Kahan, it would appear that if the proposed conditions are approved by the FCC, some of them will automatically be imported into Illinois. To the extent that there might be some alterations to the list of proposed conditions during the FCC's review of the proposed merger, Staff recommends that the Commission revisit its final order in this proceeding at the appropriate time, if necessary, to ensure consistency between

the FCC order and the ICC order. Staff's recommendation is predicated on both the FCC and the ICC conditionally approving the merger.

15. Miscellaneous Issues

In it response to the Chairman, the Joint Applicants listed additional commitments. SBC/Ameritech Ex. 1.3 at 26-33. They include (a) the Illinois headquarters commitment, (b) Ameritech Illinois Employee Commitment, (c) Consumer Education Fund ("CEF") Commitment, (d) Community Technology Fund ("CTF") Commitment, (e) Charitable Contributions Commitment, and (f) ADSL Deployment.

First, Staff notes that commitments (a) Illinois headquarters, (b) Illinois employees, (e) charitable contributions, and (f) non-discriminatory ADSL deployment do not represent any change from the status quo. These commitments merely maintain, for a limited period, Ameritech practices that would also continue absent any merger. These commitments, therefore, do not represent any increased benefit to consumers. Although witness Kahan states that these commitments have an economic cost he responded to Staff data requests that no calculation of costs associated with these commitments has been made. ICC Staff Ex. 1.02 at 31. In addition, the Joint Applicants do not request any netting of the costs of commitments (a) through (f) from the savings allocated to ratepayers if the savings allocation in the post exceptions proposed order ("PEPO") is adopted. ICC Staff Ex. 1.02, Attachment A.

Commitments (c) CEF and (d) CTF establish new funds for special interest groups. Staff Witness Jackson further examined the Joint Applicants' commitments on the CEF and CTF and concluded that the commitments are vague and raise many issues. The Joint Applicants did not address Staff Witness Jackson's concerns, but

stated that their commitments establish a framework to develop answers to implementation. SBC/Ameritech Ex. 1.5 at 21. The Joint Applicants further stated that they do not object to the Commission delineating the role that it envisions for itself and its Staff. Id. at 22.

From a rate making perspective, it is inappropriate and discriminatory for ratepayers to bear the cost of supporting programs for special interest groups. Therefore, none of the costs associated with these programs should be netted against the merger savings which flow to ratepayers, regardless of the level of savings that are allocated to customers. Staff does not oppose the establishment of these funds so long as the entire cost is borne by shareholders. ICC Staff Ex. 1.02 at 31.

Neighborhood Learning Networks and DSSA's Proposal

During the cross-examination of Mr. Samuelson, the Hearing Examiner asked Mr. Samuelson to provide some more information on the E-rate. Tr. at 2740. Staff would like to explain what the E-rate is and what the Commission has done to implement the rate in Illinois.

On May 8, 1997 the Federal Communications Commission ("FCC") issued it s Report and Order, FCC Order No. 97-157 ("Order") implementing key portions of Section 254 of the Telecommunications Act of 1996 ("Act"), which addresses universal service. In the Act, Congress directed the FCC and state commission to take steps necessary to establish support mechanisms to ensure the delivery of affordable telecommunications service to all Americans, including low income consumers, eligible schools and libraries and rural health care providers. The FCC's Order identifies the services to be support by the federal universal service funding and the funding

mechanisms.

In Docket 97-0350, the Commission adopted an emergency rule which allowed discount levels specified in 47 C.F.R. 54.505 to become effective July 17, 1997. The discount levels apply to intrastate telecommunications services to schools and libraries eligible for universal service discounts pursuant to 47 C.F.R. 54.501. Therefore, Illinois schools and libraries are eligible to receive federal funding from the universal service fund. This funding is often referred to as the E-rate.

The FCC's Order specifies that all telecommunication providers will pay into the universal service fund, and from that fund, monies for the various universal service programs such as schools and libraries will be distributed to those states who participate. In addition to the emergency rule for schools and libraries, the Commission also designated Eligible Telecommunications providers who are eligible to receive federal matching support for the services they provide to low-income consumers through the lifeline and link-up program.

If the Commission decides to accept the Joint Applicants conditions that create an Illinois CTF, the Commission should implement those funds in a way to compliment the already existing federal and state universal service programs.

IV. CONCLUSION

WHEREFORE, for all the reasons set forth herein, Staff's proposals and recommendations should be adopted *in toto*.

Respectfully submitted

Illinois Commerce Commission Staff

By:
One of its attorneys

Dated: July 28, 1999

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