

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company,)	
AT&T Communications of Illinois, Inc.)	
TCG Illinois, TCG Chicago, TCG St. Louis)	
CoreComm Illinois, Inc., WorldCom, Inc.)	
McLeodUSA Telecommunications Services, Inc.)	
XO Illinois, Inc., Northpoint Communications, Inc.)	
Rhythms Netconnection and Rhythms Links, Inc.)	
Sprint Communications L.P., Focal)	Docket No. 01-0120
Communications Corporation of Illinois, and)	On Second Remand
Gabriel Communications of Illinois, Inc.)	
)	
Petition for Resolution of Disputed Issues)	
Pursuant to Condition (30) of the)	
SBC/Ameritech Merger Order)	

**MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.'S
INITIAL BRIEF**

PUBLIC VERSION

William A. Haas
Vice President and Associate General Counsel
McLeodUSA Incorporated
6400 C Street SW, PO Box 3177
Cedar Rapids, IA 52406-3177
(319)790-7295
whaas@mcleodusa.com

Owen E. MacBride
Elizabeth A. Blackwood
6600 Sears Tower
Chicago, IL 60606
(312) 258-5680
(312) 258-5773
omacbride@schiffhardin.com
eblackwood@schiffhardin.com

Counsel for
McLeodUSA Telecommunications Services, Inc.

March 28, 2005

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SUMMARY OF ARGUMENT	2
III.	STATEMENT OF FACTS	5
A.	History of the Development, Adoption and Extension of the 01-0120 Remedy Plan	5
1.	Original Proceedings in Docket 01-0120 and the Adoption of the 01-0120 Remedy Plan.....	5
2.	Order on Reopening.....	9
3.	First Appeal and Appellate Court Decision	10
4.	Proceedings on Remand from the First Appellate Court Decision.....	12
5.	Second Appeal and Second Appellate Court Decision.....	13
6.	Extension of the 01-0120 Remedy Plan in the IBT Alt Reg case.....	15
7.	Replacement of the 01-0120 Remedy Plan in the Section 271 Case	16
B.	Evidence Supporting the Commission’s Decision to Continue the 01-0120 Remedy Plan in Effect Beyond October 8, 2002.....	20
1.	Evidence Provided in Docket 01-0120 Prior to the Commission’s Order on Reopening	20
2.	Evidence Provided in the IBT Alt Reg Case Prior to the Commission’s Order on Reopening.....	23
3.	Retrospective Evidence on the Adequacy of IBT’s Wholesale Service Quality Performance During the October-December 2002 Period	25
4.	Retrospective Evidence on the Sufficiency of IBT’s Incentives to Provide High Quality Wholesale Service During the October- December 2002 Period.....	28
a.	Desire to be Recognized as a High Quality Service Provider.....	29
b.	Possibility that CLECs Could File Complaints Against IBT Over Inadequate Service Quality	33
c.	Existence of Other Remedy Plans.....	36
d.	Desire to Obtain Section 271 Approval.....	37
5.	Staff Recommendation that the Commission Should Reaffirm its Decision in the Order on Reopening to Maintain the 01-0120 Remedy Plan in Effect After October 8, 2002.....	39

IV.	ARGUMENT	42
A.	The Appellate Court Has Ruled That the Commission Had the Authority Under Section 10-113(a) of the Public Utilities Act to Extend the Remedy Plan Beyond October 8, 2002	42
B.	The Commission Had and Continues to Have Sufficient Factual Basis for Maintaining the 01-0120 Remedy Plan in Effect Beyond October 8, 2002	48
1.	The Commission Had Sufficient Factual Basis at the Time of the Order on Reopening to Support the Determination That the 01-0120 Remedy Plan Should Be Maintained in Effect Beyond October 8, 2002.....	48
2.	IBT’s Hindsight-Based Arguments that the Commission Should Now Conclude that the 01-0120 Remedy Plan Should Not Have Been in Effect Between October 8 and December 30, 2002, Are Without Merit and Should Be Rejected	57
a.	Wholesale Service Quality in the Fourth Quarter of 2002	58
b.	Other Incentives IBT Contends it Had to Provide Good Quality Wholesale Service if the 01-0120 Remedy Plan Were Not in Effect During the Fourth Quarter 2002.....	61
V.	THE ALJ ERRONEOUSLY EXCLUDED PORTIONS OF THE TESTIMONY AND EXHIBITS OF MCLEODUSA WITNESS JULIA REDMAN-CARTER.....	64
A.	The Excluded Testimony and Exhibits Are Admissible To Prove The Truth of the Matter Contained Therein.....	66
B.	The Commission’s Rules of Practice and the Illinois Administrative Procedure Act Permit the Admission of the Excluded Testimony and Exhibits Even If They Are Hearsay	67
C.	The Commission’s Rules of Practice Allow the Commission to Take Administrative Notice of the Excluded Testimony and Exhibits and Thereby Include Them in the Record	69
D.	The Excluded Testimony and Exhibits are Admissible To Show Information That Was Available to the Commission in October 2002 When It Decided the 01-0120 Remedy Plan Should Be Extended Beyond October 8, 2002.....	71
E.	McLeodUSA Exhibits 2.3 (Cox), 2.4 (McClerren) and 2.5 (McClerren) Should Be Admitted Even if the Other Excluded Exhibits Are Not Admitted	72
F.	Page 21, Line 483 Through Page 24, Line 553 of Ms. Redman-Carter’s Testimony Discusses Testimony Filed Earlier in This Docket and Should Be Admitted Into the Record	73
G.	IBT Would Not Be Prejudiced By the Admission of the Excluded Testimony and Exhibits	74

VI. CONCLUSION..... 76

I. INTRODUCTION

This is the initial brief of McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”) in this remand proceeding. This proceeding is on remand from a decision of the Third District Appellate Court issued August 31, 2005. The holding of the Appellate Court in that was as follows:

An examination of our opinion in Illinois Bell I establishes that we did not reverse on the basis that the Commission could not extend the remedy plan beyond October 8, 2002. On the contrary, we cited section 10-113(a) of the Utilities Act as providing that the Commission may “at any time * * * rescind, alter or amend any rule, regulation, order or decision made by it.” Illinois Bell I, 343 Ill. App. 3d 249, 259, 797 N.E.2d 716, 725, *quoting* 220 ILCS 5/10-113(a) (West 2000). Indeed, we held that the Commission had amended its order, albeit improperly: “Finally, we hold that the order on reopening amended the Commission’s July 10, 2002, final order * * * . By failing to notify and provide Ameritech an opportunity to be heard regarding this amendment, the Commission violated Ameritech’s due process rights.” Illinois Bell I, 343 Ill. App. 3d at 260, 797 N.E. 2d at 725 (emphasis added). Accordingly, when this court remanded the cause to the Commission to “afford Ameritech due process” we intended for the missing elements required by section 10-113(a) – notice and an opportunity to be heard – to occur. The Commission’s decision on remand not to amend its July 10 order ignores the fact that it had already been amended, with the result being that Ameritech continued to make the payments required by the remedy plan. The proper procedure on remand was to allow, as provided by section 10-113(a), an “opportunity to be heard as provided in the case of complaints” (220 ILCS 5/10-113(a) (West 2000)). We held, therefore, that the Commission erred in not holding a hearing for the purpose of deciding whether or not the remedy plan should have been extended beyond October 8, 2002. (Slip op., pp. 9-10; emphasis in original.)

The Court’s direction to the Commission on remand was:

We reverse the Commission’s order on remand in docket 01-0120 and remand with directions to conduct a hearing and determine whether the remedy plan should have been extended beyond October 8, 2002, through December 30, 2002. (*Id.*, p. 16.)

In its December 30, 2002 Order in Dockets 98-0252, 98-0335 & 00-0764 (Cons.) (the “IBT Alt Reg case”), the Commission had concluded that the wholesale performance remedy plan adopted by the Commission in its July 10, 2002 Order in this docket (the “01-0120 Remedy Plan”) should be incorporated into IBT’s alternative regulation plan and continued into effect

until the Commission adopted a different wholesale remedy plan for IBT for anti-backsliding purposes under Section 271 of the Telecommunications Act, in the Commission's investigation of IBT's compliance with the requirements of Section 271. The Appellate Court affirmed this determination.¹

Therefore, the issue to be decided by the Commission in this remand proceeding is whether the 01-0120 Remedy Plan, which the Commission's October 1, 2002 Order on Reopening extended beyond October 8, 2002, should in fact have been extended beyond October 8, 2002, through December 30, 2002. For the reasons stated in this brief, the answer is "yes".

II. SUMMARY OF ARGUMENT

As found by the Appellate Court in the two previous appeals in this case, in its October 1, 2002 Order on Reopening in this docket, the Commission amended prior orders so as to continue the 01-0120 Remedy Plan in effect beyond the expiration date of merger Condition 30, October 8, 2002. The Appellate Court also held that the Commission had the authority, pursuant to §10-113(a) of the Public Utilities Act ("PUA"), 220 ILCS 5/10-113(a), to amend its prior orders so as to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002. The Appellate Court's decisions on this point were correct as a matter of statutory construction, and are supported by precedent. More importantly, the Appellate Court's holdings that the Commission had the authority pursuant to § 10-113(a) to issue the Order on Reopening which amended prior orders with respect to the expiration date of the remedy plan adopted in this docket, so as to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002, are the law of the case and are binding on the Commission.

¹*Illinois Bell Tel. Co. v. Commerce Commission*, 352 Ill. App. 3d 630 (3d Dist. 2004).

The only issue left for the Commission to decide in this remand proceeding, therefore, is whether the Commission had an adequate basis for its decision, in the Order on Reopening, that the 01-0120 Remedy Plan should be continued in effect after October 8, 2002. The answer to that question is yes, for numerous reasons. First, in the initial proceedings in this case, testimony was presented recommending that the wholesale remedy plan adopted in this case should be continued in effect beyond the expiration date of merger Condition 30, and demonstrating why this action was necessary. This testimony, standing alone, provides a sufficient evidentiary basis for the Order on Reopening.

Second, at the time of the Order on Reopening, the circumstances warranted continuing the 01-0120 Remedy Plan in effect. The Commission had just completed a lengthy evidentiary proceeding in which it concluded that the wholesale remedy plan then being offered by IBT, the “Texas Plan”, was inadequate, did not provide IBT adequate incentives to improve its wholesale service quality or adequate compensation to CLECs, in the form of remedy payments, for IBT’s wholesale service quality shortfalls, and needed to be replaced by the 01-0120 Remedy Plan. Further, IBT had not yet demonstrated that it had attained and maintained a level of wholesale service quality sufficient to meet Section 271 requirements. The Commission had, appropriately, just recently rejected two proposals by IBT to continue the Texas Plan in effect after October 8, 2002. Thus, circumstances at the time of the Order on Reopening justified the Commission’s action in directing that the 01-0120 Remedy Plan remain in effect.

Third, at the time of the Order on Reopening, the Commission’s review of IBT’s alternative regulation plan was also pending for decision. In that case, CLECs and Commission Staff had also recommended that the Commission should direct that the wholesale remedy plan adopted in Docket 01-0120 continue in effect beyond the expiration date of merger Condition 30,

by incorporating it into IBT's alternative regulation plan. In its December 30, 2002 final Order in the alternative regulation proceeding, the Commission found that the 01-0120 Remedy Plan needed to remain in effect until the completion of IBT's Section 271 proceeding (Docket 01-0662), and that doing so was important to the continued development of the competitive telecommunications market. On appeal, the Appellate Court held that there was substantial evidence to support the Commission's decision. The same evidence that supported the Commission's conclusion in the alternative regulation proceeding to continue the 01-0120 Remedy Plan in effect was also available to and under consideration by the Commission at the time it issued the Order on Reopening in this case. It provided additional contemporaneous support for the Commission's decision in the Order on Reopening to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002.

In this remand proceeding, IBT has offered hindsight-based arguments as to why the Commission should now reverse its decision in the Order on Reopening and unwind history by ruling that the 01-0120 Remedy Plan should not have been in effect during the period from October 8, 2002 to December 30, 2002. However, the evidence demonstrates that IBT's arguments do not warrant the action it recommends. IBT argues that it in fact provided satisfactory wholesale service quality during the fourth quarter of 2002, but this outcome was not known at the time of the Order on Reopening and could not have been known until after the period in question. Further, it was necessary for IBT to demonstrate a sustained period of providing satisfactory quality wholesale service before the Commission would have reason to conclude that the 01-0120 Remedy Plan was no longer necessary. Even if the fourth quarter of 2002 was that period, this would only warrant replacing the 01-0120 Remedy Plan with a different plan *after* that period, which in fact is what the Commission did in its May 2003

decision in IBT's Section 271 case. Additionally, the 01-0120 Remedy Plan was in fact in place during the fourth quarter of 2002 and applicable to a significant majority of the CLEC lines in service during that period; it therefore provided a significant financial incentive to IBT to improve its wholesale service quality and to maintain it at acceptable levels. The Commission can have no way of knowing whether IBT would have provided the same level of wholesale service quality in the October-December 2002 period had the 01-0120 Remedy Plan not been in effect during that period. Finally, IBT also argues that it had other, sufficient incentives in place during the fourth quarter of 2002 to provide satisfactory wholesale service quality, but the evidence shows that these other incentives do not provide the same level of incentives for good quality wholesale service as did the 01-0120 Remedy Plan, nor the same level of compensation to CLECs for wholesale service quality shortfalls. These other incentives were not sufficient to warrant a conclusion that the 01-0120 Remedy Plan was not needed during this period.

In this remand proceeding, it is the unequivocal recommendation of the Commission Staff (as it was in the original proceedings in this docket and in the IBT alternative regulation proceeding) that the 01-0120 Remedy Plan needed to continue in effect after October 8, 2002, and should be found to have been appropriately maintained in effect during the period from October 8 to December 30, 2002. The Commission should issue an order on remand consistent with the Staff recommendation, thereby confirming its decision in the Order on Reopening.

III. STATEMENT OF FACTS

A. History of the Development, Adoption and Extension of the 01-0120 Remedy Plan

1. Original Proceedings in Docket 01-0120 and the Adoption of the 01-0120 Remedy Plan

As the result of the Commission's Order in Docket 98-0555 approving the merger of SBC Communications and Ameritech, Illinois Bell Telephone Company ("IBT") was required

pursuant to “Condition 30” of that Order to implement a wholesale performance measurement and remedy plan for the period through October 8, 2002.² (McLeodUSA Ex. 2.0, p. 2.) Initially, IBT placed into effect a wholesale remedy plan referred to as the Texas Plan. (*Id.*, p. 4) In the same time frame, negotiations commenced between IBT and competitive local exchange carriers (“CLECs”), including McLeodUSA, on the terms of a wholesale performance measurement and remedy plan. (*Id.*) IBT and the participating CLECs were able to reach substantial agreement on the “performance measurement” aspect of the plan but not on the “remedy” portion of the plan. (*Id.*) As a result, Docket 01-0120 was initiated in February 2001 for the purpose of resolving the disputed issues concerning the terms of the wholesale performance measurement and remedy plan. (*Id.*) The initial proceedings in this Docket resulted in the Commission’s adoption, in its July 10, 2002 Order in this case, of the 01-0120 Remedy Plan. (*Id.*, p. 2.)

During the initial proceedings in this case, evidence was presented on the need to continue the wholesale remedy plan that would be adopted in this Docket beyond October 8, 2002. Rod Cox of McLeodUSA testified that the Commission should require that the remedy plan it approved in this docket should not expire when merger Condition 30 expires. (CLEC Ex. 5, p. 20.) Sam McClerren of the Commission Staff testified that the wholesale remedy plan should continue in effect for as long as IBT has an alternative regulation plan and as long as it is necessary for the Commission to ascertain that IBT is unable to provide discriminatory service to CLECs. (Staff Ex. 1.00, pp. 8-9.)

An Administrative Law Judges’ Proposed Order was issued in the initial proceedings in this docket on January 22, 2002. The Proposed Order recommended adoption of a wholesale

²During the time periods discussed in this brief, and in materials quoted herein, IBT has been referred to as Ameritech, Ameritech Illinois, Illinois Bell, SBC, SBC Illinois and AT&T Illinois. The acronym “IBT” will be used herein unless a different term is used in quoted material.

remedy plan that differed from IBT's Texas Plan in certain respects, most notably in the elimination of the "K-Table". (Administrative Law Judges' Proposed Order, p. 21; McLeodUSA Ex. 2.0, p. 7.) Thereafter, on June 7, 2002, IBT filed a "Motion to Abate, or in the Alternative to Defer Decision", in which IBT requested that the Commission abate this proceedings or defer a decision on adoption of a remedy plan. IBT's argument was based on the fact that the Commission's investigation into whether IBT met the requirements of Section 271 of the Telecommunications Act to receive authority to provide in-region long distance services, Docket 01-0662, was then in progress and would also result in adoption of a wholesale performance remedy plan that IBT would be proposing in that docket.³ IBT also stated in its Motion to Abate that to eliminate the possibility that there would be a "gap" in wholesale remedies between October 8, 2002 and the adoption of a wholesale performance remedy plan in Docket 01-0662, IBT would continue the Texas Plan in effect beyond October 8, 2002, until a wholesale performance remedy plan was adopted in Docket 01-0662. However, the Commission denied IBT's Motion to Abate on July 10, 2002. (McLeodUSA Ex. 2.0, pp. 7-8; Docket 01-0120, Notice of Commission Action dated July 10, 2002.)

The Commission issued its Order in this docket adopting the 01-0120 Remedy Plan on July 10, 2002. The 01-0120 Remedy Plan differed in several respects from IBT's Texas Plan. In the July 10, 2002 Order, the Commission stated that merger Condition 30 in the Docket 98-0555 Order, which had required IBT to implement a wholesale performance remedy plan, would expire on October 8, 2002. (July 10, 2002 Order, p. 20.) However, the Commission also stated:

³The Commission initiated Docket 01-0662 by an Order Initiating Investigation issued October 24, 2001. The Commission stated in its initiating order that it would "fully investigate the performance remedy plan to ensure that the local market remains open to competition and to guard against backsliding following 271 approval." (Docket 01-0662, Order Initiating Investigation, Oct. 24, 2001, p. 3; *see* McLeodUSA Ex. 2.0, pp. 6-7.)

We conclude, therefore, that unless otherwise directed by the Commission, the Remedy Plan adopted pursuant to this Order shall serve as the basis for the aforementioned “performance remedy plan” referenced by Ameritech for Section 271 approval purposes. The Commission does not believe it is in either its own interest or any of the parties’ interest to re-litigate the nuances of the Remedy Plan in the current Section 271 proceeding. Therefore, the Commission wishes to clarify that any future reference (in either concurrent or prospective dockets before the Commission) to a Remedy Plan in place in Illinois, either voluntarily or pursuant to Commission Order, shall mean the Remedy Plan adopted pursuant to this Order. (*Id.* p. 20.)

The July 10, 2002 Order specified that IBT should file a tariff incorporating the 01-0120 Remedy Plan adopted by the Order, and that the 01-0120 Remedy Plan would be incorporated into each currently effective interconnection agreement between IBT and CLECs as an amendment, effective 20 days after a CLEC “opted in” to the 01-0120 Remedy Plan.⁴ (July 10, 2002 Order, pp. 17-19.)

On August 9, 2002, IBT filed an application for rehearing of the July 10, 2002 Order. IBT took issue with the above-quoted language in the July 10, 2002 Order that, according to IBT, had the effect of specifying that the 01-0120 Remedy Plan would continue in effect beyond October 8, 2002. (Application for Rehearing of Ameritech Illinois, p. 3; McLeodUSA Ex. 2.0, pp. 8-9.) IBT also stated that to ensure there would be no “gap” in wholesale remedy plans, it would continue the Texas Plan in effect until the Commission completed its review of the wholesale performance remedy plan IBT had proposed in the Section 271 investigation, Docket 01-0662. (Application for Rehearing of Ameritech Illinois, p. 3; McLeodUSA Ex. 2.0, pp. 8-9.) The Commission denied IBT’s Application for Rehearing on August 27, 2002. (Docket 01-0120, Notice of Commission Action dated August 27, 2002.)

⁴Appendix A to the July 10, 2002 Order was the complete text of the 01-0120 Remedy Plan as adopted and approved by the Commission.

2. Order on Reopening

On August 9, 2002, IBT filed its tariff incorporating the 01-0120 Remedy Plan, as directed by the July 10, 2002 Order. The tariff contained language in a footnote stating that it would expire on October 8, 2002. Thereafter, on October 1, 2002, the Commission issued an Order on Reopening in which the Commission directed that this footnote be removed from IBT's tariff. In the Order on Reopening, the Commission took note of a letter dated August 9, 2002, from the President of IBT to the Commissioners, which stated in part:

Ameritech Illinois recognizes that there may be concerns about what remedy plan will apply after October 8. In its Application for Rehearing [of the July 10, 2002 Order], Ameritech Illinois is committing to make the original Condition 30 remedy plan available on an interim basis until the conclusion of the Section 271 proceeding (Docket 01-0662). This letter makes clear our commitment to continue the original plan and the fact that this commitment ensures that there will be no "gap" between October 9, 2002, and the conclusion of Docket 01-0662. (Order on Reopening, p. 2.)⁵

The Commission then stated with respect to the expiration of the 01-0120 Remedy Plan:

This Commission has no concerns about what remedy plan will apply after October 8, 2002. In response to the Joint Petition of Ameritech Illinois and a number of [CLECs], this Commission held evidentiary hearings, considered legal argument, and laid out with precision, in its Order of July 10, 2002, the tariffed remedy plan Ameritech Illinois was to file. The Order did not provide for any sunset or automatic termination for that tariffed remedy plan; it simply ordered Ameritech Illinois to "file a tariff to reflect the revisions to the Plan that are reflected in this Order." (*Id.*, p. 3.)

In addition, the Commission stated as follows in the Order on Reopening with respect to the expiration of the performance remedy plan for those CLECs that obtained wholesale services and facilities from IBT pursuant to interconnection agreements rather than pursuant to tariff:

Staff also recommends that, in the context of imposing the deletion of Footnote 1 from the August 9 filing, the Commission clarify that the Commission-ordered

⁵As noted in the description of IBT's Application for Rehearing of the July 10, 2002 Order, above, the "original Condition 30 remedy plan" which IBT committed to keep in effect after October 8, 2002, was IBT's Texas Plan.

§10-113(a) of the PUA and due process before changing the duration of the remedy plan in the Order on Reopening; and (4) the Commission was estopped to alter the terms of merger Condition 30, and could not impose a different condition on the merger after the merger had already been approved and effectuated.⁷ Additionally, IBT argued that the Commission had no authority to require it to file a tariff by which IBT would make the remedy plan available to CLECs that do not have interconnection agreements with IBT.⁸

The Appellate Court issued its decision on August 29, 2003. *Illinois Bell Telephone Co. v. Commerce Commission*, 343 Ill. App. 3d 249 (3d Dist. 2003). The Court agreed with IBT that the Commission had exceeded its authority by directing IBT to make the wholesale remedy plan available pursuant to tariff to CLECs who obtained wholesale services and facilities from IBT without having an interconnection agreement. (*Id.*, pp. 256-58.)

With respect to the extension of the remedy plan, the Court ruled that the Commission had violated IBT's due process rights by issuing the Order on Reopening that amended the conclusion stated in the July 10, 2002 Order as to the termination date of the remedy plan, without giving IBT notice and opportunity to be heard. The Court stated:

Moreover, we agree with [IBT] that the Commission violated due process by failing to give notice regarding the order on rehearing. Section 10-113(a) of the Public Utilities Act (220 ILCS 5/10-113(a) (West 2000)) states:

Anything in this Act to the contrary notwithstanding, the Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case

⁷See Pre-Hearing Memorandum of McLeodUSA et al, p. 3 ("CLEC Prehearing Memorandum"), and pp. 9-18 of the Brief of Petitioner (IBT) in this appeal, Appendix 1 to the CLEC Prehearing Memorandum.

⁸IBT also appealed two of the conclusions in the July 10, 2002 Order with respect to components of the 01-0120 Remedy Plan, specifically, the decision not to include the K-Table in the 01-0120 Remedy Plan and the doubling of remedies. The Appellate Court affirmed the Commission's Order with respect to both of these determination. 343 Ill. App. 3d at 254-55, 260.

of complaints, rescind, alter or amend any rule, regulation, order or decision made by it. (220 ILCS 5/10-113(a) (West 2000).

This court has held that section 10-113:

[M]akes clear that the Commission's power to rescind, alter, or amend its own order can only be exercised after providing notice by means of a written complaint setting forth an alleged violation of the Act, order or rule of the Commission that is filed with the Commission. [Citation.] Further, an opportunity to be heard must be provided by holding a hearing at a fixed time and place* * *. *Quantum Pipeline Co., v. Illinois Commerce Comm'n*, 304 Ill. App. 3d 310, 319, 709 N.E. 2d 950 (1999).

Failure by the Commission to follow the statutory notice procedures and right to be heard as set forth in section 10-113 violates a party's procedural due process rights. *Quantum Pipeline Co.*, 304 Ill. App. 3d 310.

The July 10, 2001, order of the Commission stated the remedy plan ended on October 8, 2002. The October 1, 2002, order on reopening deleted the October 8, 2002, remedy plan sunset date contained in Ameritech's tariff. Not only did the Commission fail to notify Ameritech of any hearing or proceeding upon which the order on reopening was granted, it also summarily denied Ameritech's application for rehearing on the order on reopening. Clearly, the Commission's actions violated Ameritech's due process rights. (343 Ill. App. 3d at 259.)

In the "Conclusion" section of its opinion, the Court stated:

[W]e hold that the order on reopening amended the Commission's July 10, 2002, final order which found there was no legal basis to extend the remedy plan past October 8, 2002. By failing to notify and provide Ameritech an opportunity to be heard regarding this amendment, the Commission violated Ameritech's due process rights. We therefore affirm part of the Commission's order, reverse part of the Commission's order and remand this cause to the Illinois Commerce Commission with directions to enter an order consistent with this opinion and afford petitioner due process. (343 Ill. App. 3d at 260.)

4. Proceedings on Remand from the First Appellate Court Decision

Following the first Appellate Court opinion, this case returned to the Commission on remand. The ALJs requested and received briefs from the parties on the procedure that should

be followed on remand, but did not receive any evidence.⁹ Instead, an Order on Remand was issued on May 11, 2004, without evidentiary hearings having been held in the remand proceeding. The Order on Remand stated that the Commission “decline[d] to extend” the 01-0120 Remedy Plan beyond October 8, 2002, based on the following reasoning:

The Court found that the Order on Reopening was improper because it departed from our previous decision that Condition 30 and the tariffed Remedy Plan expired on October 8, 2002 and because it denied SBC due process by failing to give notice to SBC before amending it pursuant to 220 ILCS 5/10-113. Accordingly, the July 10, 2002 Order stands, as well as the expiration date for Condition 30, the Remedy Plan, and the tariffed Remedy Plan on October 8, 2002. At this late date, the Commission declines to extend the deadline given the passage of time, the legally valid July 10, 2002 Order, and the resolution of Remedy Plan issues in later Commission orders. Based on our decision not to amend the July 10, 2002 Order, the issue is moot and, therefore, no hearing is necessary. (Order on Remand, p. 8.)

5. Second Appeal and Second Appellate Court Decision

McLeodUSA appealed the Order on Remand to the Third District Appellate Court. In its decision issued August 31, 2005, the Court stated that the controlling issue on appeal was whether the Commission’s Order on Remand complied with the Court’s mandate in its decision in the first appeal. On that question, the Court ruled as follows:

An examination of our opinion in Illinois Bell I establishes that we did not reverse on the basis that the Commission could not extend the remedy plan beyond October 8, 2002. On the contrary, we cited section 10-113(a) of the Utilities Act as providing the Commission with the power to “at any time * * * rescind, alter or amend any rule, regulation, order or decision made by it.” Illinois

⁹The CLECs participating in the remand proceeding, including McLeodUSA, advocated in their briefs that the Commission should take administrative notice of and consider evidence that had been submitted in Dockets 98-0252, 98-0335 & 00-0764 (Cons.) (the “IBT Alt Reg case”) on the subject of whether IBT’s wholesale performance remedy plan should continue in effect beyond October 8, 2002. (Initial Br. on Remand of AT&T Communications of Illinois, et al, pp. 2-3, 5-9; Reply Brief on Remand of AT&T Communications of Illinois, et al., pp. 7-8.) As discussed below, in its final Order issued December 30, 2002, in the IBT Alt Reg case, the Commission ordered that the 01-0120 Remedy Plan should be incorporated into IBT’s alternative regulation plan, until such time as a different wholesale remedy plan was adopted by the Commission in the Section 271 proceeding, Docket 01-0662.

Bell I, 343 Ill. App. 3d at 259, 797 N.E.2d at 725, quoting 220 ILCS 5/10-113(a) (West 2000). Indeed, we held that the Commission had amended its order, albeit improperly: “Finally, we hold that the order on reopening amended the Commission’s July 10, 2002, final order * * * . By failing to notify and provide [Illinois Bell] an opportunity to be heard regarding this amendment, the Commission violated [Illinois Bell’s] due process rights.” (Emphasis added.) Illinois Bell I, 343 Ill. App. 3d at 260, 797 N.E. 2d at 725. Accordingly, when this court remanded the cause to the Commission to “afford [Illinois Bell] due process” we intended for the missing elements required by section 10-113(a) – notice and an opportunity to be heard – to occur. The Commission’s decision on remand not to amend its July 10 order ignores the fact that it had already been amended, with the result being that Illinois Bell continued to make the payments required by the remedy plan. The proper procedure on remand was to allow, as provided by section 10-113(a), an “opportunity to be heard as provided in the case of complaints” (220 ILCS 5/10-113(a) (West 2000)). We held, therefore, that the Commission erred in not holding a hearing for the purpose of deciding whether or not the remedy plan should have been extended beyond October 8, 2002. (Slip op., pp. 10-11; emphasis in original.)

The Court stated that “our determinations that the Commission’s order on remand did not comply with our mandate is dispositive of the issue presented here.” (Slip Op., p. 11.) However, the Court also addressed the Commission’s conclusions in the Order on Remand that the Order on Reopening had been “void” and “a nullity,” stating:

[I]n this case the Commission had personal jurisdiction over Illinois Bell as well as subject matter jurisdiction . . . The Commission also clearly had the authority to issue the order on reopening pursuant to section 10-113(a) of the Utilities Act. Accordingly, the failure to abide by the statutory requirement of notice and an opportunity to be heard rendered the order voidable, not void. (*Id.*, p. 13)

Finally, the Court ruled that “[t]he issue concerning whether the remedy plan should have been extended beyond October 8, 200, is not moot”, because, although resolution of individual payment disputes between IBT and CLECs was beyond the scope of the proceeding, IBT had made substantial payments to CLECs pursuant to the 01-0120 Remedy Plan in respect of the period October 8 through December 30, 2002 and had subsequently sought return of those payments, and the legality of those payments therefore was not a moot issue. (*Id.*, pp. 14-15.)

The overall conclusion and direction in the Appellate Court's August 31, 2005

decision was:

We reverse the Commission's order on remand in docket 01-0120 and remand with directions to conduct a hearing and determine whether the remedy plan should have been extended beyond October 8, 2002, through December 30, 2002. (*Id.*, p. 16.)

6. Extension of the 01-0120 Remedy Plan in the IBT Alt Reg case

In addition to being an issue in this docket that was first raised in the initial proceedings herein conducted in 2001-2002, the continuation of the 01-0120 Remedy Plan was also an issue in the IBT Alt Reg case. Testimony was submitted during the IBT Alt Reg case by Commission Staff and CLEC witnesses explaining why there was a need to continue a wholesale performance remedy plan for IBT in effect beyond October 8, 2002, by incorporating the wholesale performance remedy plan as part of IBT's alternative regulation plan.¹⁰ The Commission agreed with this recommendation in its December 30, 2002 Order in the IBT Alt Reg case, reaching the following conclusion:

The Commission has consistently maintained that the lack of competitive pressure on Ameritech has been a long-standing problem. In fact, throughout this Order, the Commission has often cited lack of competitive pressure as the primary reason why the intended benefits of the [Alt Reg] Plan have not been fully realized by Ameritech customers. Moreover, these benefits will never be achieved if a properly functioning wholesale market fails to develop. The Commission, therefore, views it imperative to the public interest as well as the success of alternative regulation that Ameritech provide quality wholesale service. More importantly, the Commission fails to see how this goal can be realized absent a sufficient wholesale performance remedy plan in place. While Ameritech correctly argues that wholesale service quality can and is being

¹⁰This evidence is summarized in the Appellate Court's decision in IBT's appeal of the Commission's December 30, 2002 final Order in the IBT Alt Reg case. *Illinois Bell Tel. Co. v. Commerce Commission*, 352 Ill. App. 3d 630, 640-41 (3d Dist. 2004). (See Section III.B.2 below.) Related arguments made by the parties on this issue in their briefs are summarized at pages 205-207 of the Commission's December 30, 2002 final Order in the IBT Alt Reg case. (Page references in this brief to the final Order in the IBT Alt Reg case are to the Order as posted in e-docket for Docket 00-0764.)

addressed in other proceedings, the Commission finds that more certainty for competitors in the marketplace is necessary at this time. It is imperative that competitive carriers know exactly what wholesale remedial plan is available to them at all times. Perhaps nothing is more detrimental to developing competition than uncertainty in the telecommunications marketplace. The Commission, therefore, will take the opportunity to address this uncertainty in this proceeding. The Commission adopts a modified version of Staff's recommendation to incorporate the wholesale performance measures and remedy plan that was adopted in Docket 01-0120 (the "01-0120 Remedy Plan"). As explained above, while the Commission disagrees that the 01-0120 Remedy Plan should remain in effect as long as Ameritech Illinois has an alternative regulation plan, the Commission views the 01-0120 Remedy Plan to be the most thorough and complete alternative at this time. As a result, the Commission deems the 01-0120 Remedy Plan effective up to and until a wholesale performance measure plan for Section 271 purposes is approved by this Commission. (Order in IBT Alt Reg case, Dec. 30, 2002, p. 209.)

IBT appealed the above determination to the Third District Appellate Court, but the Court affirmed the Commission's decision to continue the 01-0120 Remedy Plan until IBT's Section 271 proceeding was completed and a different wholesale remedy plan was adopted in that case. *Illinois Bell Tel. Co. v. Commerce Commission*, 352 Ill. App. 3d 630 (3d Dist. 2004). The Court concluded, among other things, that the Commission's conclusion to continue the 01-0120 Remedy Plan in effect was supported by substantial evidence. (*Id.* at 639-41.)

7. Replacement of the 01-0120 Remedy Plan in the Section 271 Case

In its investigation of IBT's compliance with the requirements of Section 271 of the Telecommunications Act, in Docket 01-0662, the Commission investigated, among other things, IBT's compliance with the "competitive checklist" requirements of Section 271(c) of the Telecommunications Act, including IBT's ability to meet or exceed, on a consistent basis, wholesale performance measures relating to its Operations Support Systems ("OSS") in accordance with the Illinois Master Test Plan, and IBT's ability to collect, maintain and report,

on a reliable basis, performance metrics data on wholesale service quality.¹¹ (McLeodUSA Ex. 2.0, p. 25.) The evaluations of IBT's OSS and of IBT's ability to reliably collect, maintain and report wholesale performance data were being performed by an independent third party reviewer, BearingPoint. (*Id.*, p. 25.)

The BearingPoint testing program began in the first half of 2001, was still in progress in the second half of 2002 and was finally completed in 2003. (Tr. 133-34.) The BearingPoint testing program evaluated whether IBT was properly retaining wholesale performance measurement data and calculating the wholesale performance measurement results. (Tr. 134.) With respect to IBT's OSS, the BearingPoint testing program tested the processes and systems that IBT had in place for providing service to CLECs, such as processes and systems for ordering, provisioning and maintenance. (Tr. 134-35.) The objective of the BearingPoint testing of IBT's OSS was to identify any deficiencies in IBT's OSS processes and systems and have IBT correct those deficiencies so that the Commission ultimately could be confident that the processes and systems IBT had in place were providing adequate service to CLECs to ensure that CLECs could obtain wholesale services and products from IBT without discrimination. (Tr. 135.) However, as of the fourth quarter of 2002, IBT had not yet succeeded in demonstrating that it fulfilled all the requirements of the Section 271 competitive checklist, that its OSS had achieved the performance levels specified by the Illinois Master Test Plan, or that IBT could collect, maintain and report wholesale performance metrics data on a reliable basis. (McLeodUSA Ex. 2.0, pp. 25-26, 30.)

The Commission completed its Section 271 investigation for IBT during the first half of 2003 and issued its final Order on Investigation in Docket 01-0662 on May 13, 2003. The

¹¹Section 271(c) "competitive checklist" item 2 addresses whether a Bell operating company is providing CLECs with nondiscriminatory access to its OSS. (Tr. 130-31.)

Commission's analysis of whether IBT's wholesale service quality had achieved a level of performance sufficient to satisfy the Section 271 "competitive checklist" requirements relating to providing non-discriminatory access to its OSS was based on wholesale performance measurement data for the three month period of September through November 2002. (McLeodUSA Ex. 2.8, p. 10; Tr. 130-31.) IBT submitted the performance measurement data for September-November 2002 to the Commission on January 17, 2003 (McLeodUSA Ex. 2.8, p. 10; Tr. 131-32), and the data was evaluated during the remainder of the Section 271 proceeding. Whether IBT's OSS systems and processes for the ordering, provisioning, maintenance and repair and billing functions had demonstrated the necessary levels of performance were subject to considerable criticism by Commission Staff and CLECs. (*See* McLeodUSA Ex. 2.0, pp. 26-27; Docket 01-0662, Final Order on Investigation, May 13, 2003, pp. 262-350.)

In its May 13, 2003 final Order on Investigation in Docket 01-0662, the Commission concluded that it would provide a favorable recommendation to the FCC with respect to IBT's application for authority to provide in-region long distance services. The Commission's conclusion was conditioned on IBT's acceptance of a number of commitments for future actions addressed to potential areas of weakness in its wholesale service quality performance. (McLeodUSA Ex. 2.8, pp. 7-8.) These included the following commitments: to adopt a Line Loss Notification Improvement Plan; to adopt a Specialized UNE Circuit Repair Coding Accuracy Plan; to correct UNE-P billing errors; to improve its contract management process; to implement a Bill Auditability Dispute Resolution Plan; and to implement a Change Management Improvement Plan. Additionally, the Commission directed IBT to address its deficiencies with respect to timeliness of Service Order Completion responses, accuracy of updates to Customer Service Records, and accuracy of close-out coding on end-to-end trouble faults. The

Commission also required IBT to improve its performance on performance measures 7.1, 13, 17, MI-2 and MI-14.¹² (Docket 01-0662, Final Order on Investigation, May 13, 2003, pp. 352-359.)

In its May 13, 2003 final Order in Docket 01-0662, the Commission also adopted a modified wholesale performance remedy plan for IBT (the “Section 271 Remedy Plan”), thereby effectively ending the 01-0120 Remedy Plan. The Section 271 Remedy Plan incorporated many of the components of the 01-0120 Remedy Plan, and also introduced some additional incentives not present in the 01-0120 Remedy Plan. (McLeodUSA Ex. 2.8, p. 11.) The Commission stated, “we would not intend to disregard the 01-0120 plan altogether and start on a whole new slate even as the plan we consider here must undoubtedly satisfy a new set of standards.” (Docket 01-0662, Final Order on Investigation, May 13, 2003, p. 891.)

Features of the 01-0120 Remedy Plan that were retained in the Section 271 Remedy Plan included the exclusion of the K-Table, use of a “bright line” test for benchmark assessment, annual cap amounts on remedies at thresholds set at FCC-approved levels, and a number of other components. (*Id.*) The Commission noted that most of these provisions had been evaluated in Docket 01-0120 and were being retained in the Section 271 Remedy Plan. (*Id.*) The principal changes from the 01-120 Remedy Plan reflected in the Section 271 Remedy Plan were the indexing of payments, inclusion of a “gap closure” process, a step-up or refinement of the escalation process, and the removal of performance measurement weightings.¹³ (*Id.*, pp. 891-94.) The Commission concluded that “[o]verall the basic structural elements of the Compromise Plan [i.e., the Section 271 Remedy Plan] are the same as the 0120 plan . . . [m]ost of the modifications

¹²Appendix A to the Commission’s May 13, 2003 Final Order on Investigation in Docket 01-0662 sets forth a complete list of IBT’s commitments on which the Commission’s Order in the Section 271 case were conditioned.

¹³The gap closure process and the refinement of the escalation process were agreed to or accepted by Staff and the CLECs. (*Id.*, p. 892.)

ordered in Docket 01-0120 and retained here concern the numbers that go into the remedy calculations, not the structure of the plan or the steps involved in calculating remedies.” (*Id.*, p. 903.) Overall, the Section 271 Plan adopted by the Commission in its May 2003 final Order in Docket 01-0662 for anti-backsliding purposes was closer to the 01-0120 Remedy Plan than it was to IBT’s Texas Plan. (McLeodUSA Ex. 2.8, p. 11.)

B. Evidence Supporting the Commission’s Decision to Continue the 01-0120 Remedy Plan in Effect Beyond October 8, 2002

1. Evidence Provided in Docket 01-0120 Prior to the Commission’s Order on Reopening

During the initial proceedings in this docket, testimony was submitted concerning the need for the Commission to continue the wholesale performance remedy plan to be adopted in this docket in effect beyond October 8, 2002. Specifically, Rod Cox, Senior Manager of Performance and Compliance at McLeodUSA, and Sam McClerren of the Commission Staff, testified on this topic. Mr. Cox explained how CLECs are harmed in the competitive marketplace when IBT provides inadequate wholesale service (even when that service is on a par with the service IBT provides to its own retail operations), including: the CLEC is delayed in receiving revenue from its customers; the CLEC must incur additional personnel and customer service costs; the CLEC is exposed to potential liability to its customers; and the CLEC’s reputation in the competitive market can be damaged. (CLEC Ex. 5, pp. 6-10.) He explained that without an effective wholesale performance remedy plan, CLECs paid 100% of wholesale rates to IBT but received far less than 100% access to IBT’s systems and facilities. (*Id.*, p. 6.)

Mr. Cox testified that an effective wholesale remedy plan that included both “parity” requirements and minimum wholesale performance requirements was critical to fostering

competition in Illinois.¹⁴ (*Id.*, p. 20.) He stated that the Commission should clearly indicate that the remedy plan that would be approved in this docket would not expire when merger Condition 30 expired. (*Id.*) Mr. Cox described McLeodUSA's experience with an ILEC in another region, which had demonstrated that when the ILEC's poor wholesale service quality performance results in remedy payments directly to CLECs, the ILEC's service quality performance was much better than in periods in which the ILEC did not have this incentive. (*Id.*, pp. 20-21.)

Staff witness Mr. McClerren testified that this case would determine how quickly competition develops in the telecommunications markets in Illinois. He stated that competition depends in no small part on the successful provisioning of wholesale service quality, and that successful provisioning of wholesale service quality requires appropriate and meaningful remedies in the event of non-performance. (Staff Ex. 1.00, p. 2.) Mr. McClerren recommended that the wholesale performance measures established in this docket should survive the expiration of merger Condition 30. (*Id.*, p. 8.) He stated that the Commission should order that the wholesale service quality remedy plan continue after October 2002, and that the remedy plan should remain in effect as long as IBT has an alternative regulation plan and as long as it is necessary for the Commission to ascertain that IBT is unable to provide discriminatory service to CLECs.¹⁵ (Staff Ex. 1.00, pp. 8-9.)

Other witnesses appearing on behalf of CLECs in the original hearings in this docket testified in support of adoption of a wholesale performance remedy plan proposed by the CLECs

¹⁴“Parity” refers to a requirement that the ILEC provide the same quality of wholesale service to CLECs (as measured by the various performance measurements) as it provides to its own retail operations. (CLEC Ex. 5, p. 6.)

¹⁵In his testimony in this second remand proceeding, Staff witness Mr. McClerren stated that, notwithstanding the passage of time and changing circumstances in the telecommunications industry, his recommendation to the Commission remains that the wholesale remedy plan in effect after October 8, 2002, should be the Docket 01-0120 Remedy Plan. (Staff Ex. A, p. 8.)

and in opposition to continuation of IBT's Texas Plan. These witnesses included Karen Moore (CLEC Ex. 1 and 2), Michael Kalb (CLEC Ex. 3 and 4) and John Jackson (CLEC Ex. 6), as well as Mr. Cox. These witnesses testified to the reasons the CLEC-proposed remedy plan was superior to IBT's Texas Plan in terms of providing adequate incentives to IBT to provide acceptable quality wholesale service to CLECs, and adequate compensation to CLECs if IBT provided wholesale service quality that was below specified benchmark levels. A particular focus of these witnesses testimonies was the use of the "K-Table" in IBT's Texas Plan and the need to exclude the K-Table from the remedy plan to be adopted in this proceeding. (See, e.g., CLEC Ex. 1., pp. 14-20; CLEC Ex. 3, pp. 4-11, 21-38; CLEC Ex. 6, pp. 1-2, 23-24.) Dr. Kalb testified that "the Texas Remedy Plan used today by Ameritech – and the minimal remedies paid under that plan – has done absolutely nothing to incent the company to provide adequate wholesale service in Illinois." (CLEC Ex. 3, p. 7.) Ms. Moore testified that:

[T]he Texas Remedy plan does not provide Ameritech with enough incentive, based on the structure and the schedule of payments and, more importantly, based on actual experience with the Texas Plan, to provide the CLECs with service in sufficient quality to allow competition to develop in Illinois. The Texas Plan improperly provides layer-upon-layer of complicated safeguards that are all intended on assuring that Ameritech will not pay penalties even when its service falls below agreed-to standards – which is exactly what has happened. (CLEC Ex. 1, p. 21.)

Ms. Moore explained that "Ameritech has avoided paying a significant amount of penalties by using the 'k table' exclusion in the Texas remedy plan."¹⁶ (*Id.*, p. 22.)

¹⁶As noted earlier, the Commission concluded in its July 10, 2002 Order that the K-Table should not be included in the 01-0120 Remedy Plan, and the Appellate Court affirmed that determination.

2. Evidence Provided in the IBT Alt Reg Case Prior to the Commission's Order on Reopening

Prior to the issuance of the Order on Reopening in this docket, the issue of whether the wholesale performance remedy plan adopted in this docket should continue in effect beyond October 8, 2002, was also the subject of testimony and briefing in the IBT Alt Reg case. Specifically, testimony was presented by witnesses in the IBT Alt Reg case concerning the quality of IBT's retail and wholesale services and whether a wholesale performance measurement and remedy plan should be incorporated as part of IBT's alternative regulation plan. The testimony addressed whether the wholesale performance remedy plan that would be adopted in this proceeding (Docket 01-0120) should continue in effect after October 8, 2002. (McLeodUSA Ex. 2.0, p. 5.) As described in Section III.A.6 above, the Commission, in its order in the IBT Alt Reg case, concluded that the 01-0120 Remedy Plan should be incorporated as part of IBT's alternative regulation plan. In its decision in IBT's subsequent appeal of that Order, the Appellate Court summarized the testimony on this issue as follows:

The Commission heard testimony from a number of staff members, competitors and observers of the telecommunications industry who concluded that a continuing wholesale performance remedy plan was needed to ensure the development of competition. Commission staff member Sam McClerren, who has over 16 years' experience in the telecommunications industry, testified that the ability of CLECs to provide quality service to their retail customers was dependent in large part on the quality of the wholesale services they purchased from SBC Illinois. He stated that SBC Illinois must be provided with the proper incentive to provide adequate wholesale service quality if real competition is to be possible. McClerren testified that the continuation of the Condition 30 wholesale performance plan would provide that incentive.

Charlotte Terkeurst, a telecommunications industry consultant, testified on behalf of the Illinois Attorney General, the Cook County State's Attorney's office, the Citizens Utility Board, and the City of Chicago. She presented evidence of SBC Illinois' poor service quality. She also testified that pure price cap regulation, the type of regulation that SBC Illinois was subject to under the Alt Reg Plan, creates an incentive for telecommunications carriers to allow their service quality to degrade as they cut costs and maximize profits. Finally, Terkeurst recommended that service quality measures should be made a part of

the Alt Reg Plan to ensure that SBC Illinois provided the best possible service to both retail and wholesale customers.

The views of these two witnesses were supported by representatives of two of the respondent CLECs. McLeodUSA's Rod Cox and AT&T's Cate Hegstrom echoed the above concerns and recommendations. The only response from SBC Illinois on the issue was a recommendation that it would be more appropriate to deal with wholesale service quality in another proceeding

. . . At least four witnesses with significant experience in telecommunications testified about the wholesale service quality issues that existed and how a continuing remedy plan would help address those issues. The Commission heard testimony that SBC Illinois was not adequately providing wholesale service to the CLECs that had joined the marketplace since the original 1994 Alt Reg Plan. These competing carriers were therefore having difficulty providing quality service to their own customers. This situation impaired competition and, ultimately, the quality of telecommunications service provided to all. Finally, a number of witnesses testified that continuing the Condition 30 remedy plan as a component of the Alt Reg Plan would provide SBC Illinois with the incentive to improve its service. (*Illinois Bell Tel. Co. v. Commerce Commission*, 352 Ill. App. 3d 630, 640-41 (3d Dist. 2004).)

In briefs that were filed in the IBT Alt Reg case, several parties advocated that the wholesale performance remedy plan should be incorporated into IBT's alternative regulation plan so that the remedy plan would continue in effect beyond October 8, 2002. (McLeodUSA Ex. 2.0, p. 5.) The "Hearing Examiner's Proposed Order" in the IBT Alt Reg case was issued on May 22, 2001. It did not provide for incorporation of a wholesale performance remedy plan into IBT's alternative regulation plan. (*Id.*) In briefs on exceptions to the Proposed Order, filed during June 2001, several parties, including Commission Staff, took exception to this omission and urged the Commission, in its final order in the IBT Alt Reg case, to incorporate the wholesale performance remedy plan that would be adopted in Docket 01-0120 as part of IBT's alternative regulation plan and thereby to continue the remedy plan in effect. (*Id.*)

Thus, at the time the Commission issued the Order on Reopening in this docket, in which it continued the 01-0120 Remedy Plan in effect beyond October 8, 2002, the issue of whether the

01-0120 Remedy Plan should be incorporated into IBT's alternative regulation plan and thereby continued in effect after October 8, 2002, was before the Commission for consideration in the evidence, briefs and briefs on exceptions in the IBT Alt Reg case as it considered the Proposed Order in that case and what modifications, if any, to make in its final Order. (See "Timeline of Consideration of the Need for a Wholesale Remedy Plan After October 8, 2002 in ICC Proceedings," McLeodUSA Ex. 2.1.)

3. Retrospective Evidence on the Adequacy of IBT's Wholesale Service Quality Performance During the October-December 2002 Period

In this second remand proceeding, IBT witness James Ehr testified that IBT provided very good wholesale quality service to Illinois CLECs during the October-December 2002 period. (AT&T Ill. Ex. 104.0, pp. 9-10.) He stated that in this three-month period, IBT met the applicable standard for, on average, 91.1% of the performance measures subject to remedies on an aggregate basis where there were sufficient data to perform an aggregate test.¹⁷ (*Id.*) He also noted that in its May 13, 2003 final Order in Docket 01-0662, the Commission had concluded, based on review of IBT performance data for the three-month period September-November 2002, that IBT was providing non-discriminatory service to CLECs, its wholesale performance had improved to a significant and sustained level, the Commission could recommend that the FCC approve IBT's Section 271 application, and the 01-0120 Remedy Plan could be replaced. (*Id.*, pp. 11-12.) He stated that IBT's wholesale service quality performance continued at high levels after 2002.¹⁸ (*Id.*, pp. 12-13.)

¹⁷By "aggregate test" Mr. Ehr meant the aggregate performance result for all CLECs doing business in the state, as opposed to looking at the performance results for individual companies. (Tr. 141.)

¹⁸Mr. Ehr's testimony did not report the number of performance measures that were missed each month, the actual results by performance measure, the extent by which performance measures

McLeodUSA witness Julia Redman-Carter testified that even though IBT's wholesale service quality performance during the fourth quarter of 2002 may have been determined in hindsight to be satisfactory, this was not known until after the end of that period. (McLeodUSA Ex. 2.0, p. 25.) She noted that at the end of the fourth quarter of 2002, the Commission, in its December 30, 2002 final Order in the IBT Alt Reg case, concluded that the 01-0120 Remedy Plan should continue in effect into 2003, until such time as an alternative wholesale performance remedy plan was approved in Docket 01-0662 for Section 271 purposes. (*Id.*, p. 29.)

Ms. Redman-Carter stated that the Commission did not decide that IBT could move from the 01-0120 Remedy Plan to a different wholesale remedy plan for Section 271 anti-backsliding purposes until after the Commission determined, in May 2003, that IBT had demonstrated a sustained period of satisfactory wholesale service quality performance that indicated compliance with the Section 271 competitive checklist requirements, including the OSS criteria. (McLeodUSA Ex. 2.8, p. 7.) That this was the Commission's approach was also demonstrated by the Commission's December 30, 2002 Order in the IBT Alt Reg case, where the Commission determined the 01-0120 Remedy Plan should continue in effect until the Commission could complete its Section 271 investigation and determine that it was appropriate to allow IBT to move to a different wholesale remedy plan for Section 271 purposes. (*Id.*) Finally, Ms. Redman-Carter noted that even in the May 2003 Order in Docket 01-0662, the Commission's determinations were conditioned on IBT's acceptance of a number of commitments for future

were missed, or any information on the relative significance of the performance measures that were missed. (Tr. 111-112.)

actions addressed to potential areas of weakness in its wholesale service quality performance.¹⁹
(*Id.*, pp. 7-8.)

Ms. Redman-Carter testified that some of the performance measure benchmarks that IBT failed to meet for one or more months during the September-December 2002 period were among the most impacting measures to CLECs in terms of their ability to provide good retail service quality to their customers and to compete for retail customers on a neutral basis with IBT's retail operations. (*Id.*, p. 9.) McLeodUSA witness Patty Lynott reviewed the performance measures for which IBT failed to meet the benchmark specified by the remedy plan during one or more of the four months of September-December 2002.²⁰ (McLeodUSA Ex. 4.0.) She identified a number of the missed performance measures that were particularly significant in terms of the impact on the service quality that McLeodUSA is able to provide to its own retail customers, on McLeodUSA's ability to compete with IBT for retail customers, and on the impacts to McLeodUSA of subpar wholesale service quality in the areas covered by these performance measures. (*Id.*, p. 2.) Ms. Lynott detailed the impacts on CLECs such as McLeodUSA of IBT's failure to meet the specified performance levels for these measures pursuant to the wholesale performance plan. These impacts included delays in completing retail customer orders and initiating the customer's service; degradations or interruptions in the service received by the CLEC's customer; delays in receipt of revenue by the CLEC from, and the possibility of having to issue a credit to, its customer; additional costs incurred by the CLEC to address the source of the delay with IBT in processing the order or installing service to the retail customer; additional

¹⁹The commitments that the Commission required of IBT as conditions to the final Order in Docket 01-0662 were summarized in Section III.A.7, above.

²⁰This four month period encompassed (i) the three month period used by IBT for its performance data in the Section 271 investigation (September-November 2002) and (ii) the three month period that is the focus of this proceeding (October-December 2002).

costs incurred by the CLEC on customer care activities; issuance of erroneous bills to the CLEC's customer; and the possibility that the CLEC's retail customer will cancel its order or switch its service back to another provider because it perceives the CLEC as providing inferior or inadequate quality service.²¹ (*Id.*, pp. 2-11.)

McLeodUSA witness Ms. Redman-Carter emphasized that even accepting IBT's performance measurement results for the months of October-December 2002 as satisfactory, nonetheless it was appropriate to require IBT to demonstrate a sustained period of several months of satisfactory wholesale service quality under the 01-0120 Remedy Plan before that remedy plan was terminated and IBT was allowed to move to a modified remedy plan for Section 271 anti-backsliding purposes. (McLeodUSA Ex. 2.8, p. 10.) That is what transpired in the Commission's Section 271 investigation, Docket 01-0662. (*Id.*, pp. 10-11.)

4. Retrospective Evidence on the Sufficiency of IBT's Incentives to Provide High Quality Wholesale Service During the October-December 2002 Period

IBT witness Mr. Ehr testified that even if the 01-0120 Remedy Plan were not in effect during the October-December 2002 period, IBT had other, sufficient incentives during that period to provide high quality wholesale service. (AT&T Ill. Ex. 104.0, p. 4.) First, he stated that IBT always seeks to provide high quality service to all customers so that it can be recognized as a quality telecommunications service provider. (*Id.*) Second, he stated that there was the possibility that any CLEC that believed it was receiving poor service might file a complaint with the Commission. (*Id.*) Third, he stated that IBT had other remedy plans in effect

²¹Several of the missed performance measures that Ms. Lynott identified as particularly impactful were among the performance measures for which IBT was required to improve its performance as one of the conditions to the Commission's final Order in the Section 271 case, including Performance Measures 7.1, 13, 17 and MI-2. (Docket 01-0662, Final Order on Investigation, May 13, 2003, p. 359.)

during the October-December 2002 period, and the desire to avoid payments to CLECs and the State under those plans provided incentives to maintain good performance. (*Id.*, p. 5.) Fourth, he stated that during the October-December 2002 time period, IBT was actively pursuing its application to provide long-distance service under Section 271, this Commission's investigation into IBT's Section 271 compliance was in progress, IBT was getting ready to submit performance data to the Commission, and IBT's OSS, performance measurement reporting and performance measurement results were being assessed by independent third-party experts, including BearingPoint and Ernst & Young, all of which placed focus on IBT's performance measurements and results during this time period.²² (*Id.*)

The following subsections summarize the testimony by CLEC and Commission Staff witnesses concerning the four incentives cited by Mr. Ehr.

a. Desire to be Recognized as a High Quality Service Provider

McLeodUSA witness Ms. Redman-Carter testified with respect to the first incentive cited by Mr. Ehr that IBT's service quality has varied widely over time and has been a point of serious contention by CLECs in several proceedings before the Commission. She stated that if the Commission had believed that IBT's desire to be known as a high quality service provider were sufficient incentive to drive IBT to provide good quality, parity wholesale service to CLECs on a consistent basis, the Commission would not have required IBT to adopt a wholesale performance remedy plan in the first place. (McLeodUSA Ex. 2.8, pp. 1-2.)

²²BearingPoint had been retained by the Commission. Ernst & Young was retained by IBT to perform separate assessments of IBT's OSS and performance measurement reporting, due to IBT's concerns over the length of time it was taking IBT to pass the BearingPoint "test till pass" testing program. (Tr. 136-137.)

McLeodUSA witness August Ankum testified that economic theory does not support the proposition that it is always in the interest of a vertically integrated firm such as IBT to provide high quality service to competitors. (McLeodUSA Ex. 3.0, p. 6.) He stated that, to the contrary, there are ample reasons to believe that IBT has incentives to provide, at least occasionally, subpar wholesale service to its competitors (the CLECs). In particular, the CLECs' competitive success or failure may directly or indirectly impact IBT's own retail sales and profits.²³ (*Id.*) He explained that if unchecked, degradation of wholesale service quality would be a means for IBT to disadvantage its CLEC competitors and win back customers that would otherwise maintain their service with a retail competitor. (*Id.*, pp. 6-7.) Dr. Ankum pointed out that as early as its *Local Competition Order*, the FCC noted that “[g]iven that the incumbent LEC will be providing interconnection to its competitors pursuant to the purpose of the 1996 Act, the LEC has an incentive to discriminate against its competitors by providing them less favorable terms and conditions of interconnection than it provides itself.”²⁴ (*Id.*, p. 7.)

Dr. Ankum testified that in connection with his testimony in a Michigan Public Service Commission proceeding concerning the wholesale performance remedy plan to be applicable to IBT's Michigan affiliate (“SBC Michigan”), he had compared SBC Michigan's wholesale service quality performance with respect to performance measures that were subject to remedy payments for failure to meet specified benchmarks, to SBC Michigan's performance with respect

²³“Subpar” service refers to service that is either below the benchmarks that have been established for minimally-acceptable service quality, inferior to the quality of service that IBT provides to its own retail operations, or both. (McLeodUSA Ex. 3.0, p. 6.)

²⁴*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15616-775 (1996), ¶ 218.

to performance measures that were not subject to remedy payments.²⁵ (McLeodUSA Ex.3.0, p. 8.) This data, which covered a 21-month period, showed that (i) SBC Michigan’s performance level on measures that are subject to remedy payments was better than its performance level on measures that were not subject to remedy payments; and (ii) the general trend in the performance measures that are subject to remedy payments was in the direction of improved performance over time while the general trend for measures that are not subject to remedy payments was to worsening performance over time. (*Id.*) He stated that this data showed that where SBC is not faced with a direct financial consequence for failing to meet established wholesale service quality benchmarks, the weakening of the financial incentives is likely to result in deteriorated performance. (*Id.*, pp. 8-9.)

Additionally, Dr. Ankum testified that he had also compared SBC Michigan’s wholesale service quality performance during a period in which SBC Michigan was subject to a remedy plan that *included* the “K-Table” to its performance during a period in which SBC Michigan was subject to a remedy plan that *excluded* the “K-Table”.²⁶ (McLeodUSA Ex. 3.0, pp. 9-10.) This comparison covered a 24 month period. (*Id.*) The comparison showed that in general, SBC Michigan’s average wholesale service quality performance during the months the K-Table was included in its wholesale remedy plan was worse than its performance during the period when the K-Table was not included in the remedy plan. (*Id.*, p. 10.) Further, a regression analysis on

²⁵Dr. Ankum noted that this comparison of performance results for SBC Michigan was relevant to this proceeding because, as IBT witness Mr. Ehr had testified, SBC Michigan uses the same regional systems and processes as IBT uses. (McLeodUSA Ex. 3.0, p. 4, citing AT&T Ill. Ex. 104.0, p. 7.)

²⁶The K-Table is a mechanism that effectively reduces the amount of an ILEC’s remedy payments for a given level of below-benchmark performance. (McLeodUSA Ex. 3.0, p. 10.) As Dr. Ankum explained, the K-Table is a statistical device that allows SBC a number of “free passes” on performance measures it fails, that would normally result in penalties. (Tr. 102.)

the data for these periods showed a statistically-significant impact of the presence of the K-Table on SBC Michigan's wholesale service quality results, specifically, that SBC Michigan would have a higher percentage of "missed" performance measures when the K-Table was included in its wholesale remedy plan. (*Id.*, pp. 10-12.) In other words, the results of the regression analysis showed that the wholesale service quality level would be worse when the K-Table, which reduces the amount of remedy payments that the ILEC must make to CLECs for below-benchmark performance on the performance measures, is included in the wholesale remedy plan. (*Id.*, p. 12.) As Dr. Ankum explained, the econometric analysis demonstrated that SBC's performance improves when the financial incentives are made more severe (i.e., when the remedy plan does not include the K-Table and the penalties are increased). (Tr. 105-106.)

Dr. Ankum concluded that these empirical analyses supported the notions that (i) the presence of monetary incentives such as remedy payments, and (ii) a remedy plan that provides for higher levels of remedy payments for a given level of subpar wholesale service quality, encourage IBT to provide a higher level of service quality than when these incentives are not present (a situation that in turn would likely result in deteriorated wholesale service quality performance). (McLeodUSA Ex. 3.0, p. 12.) He stated that this information tended to disprove the assertion of IBT witness Mr. Ehr that the 01-0120 Remedy Plan did not need to be in effect during the October-December 2002 period because IBT had sufficient other incentives to provide high quality wholesale service. (*Id.*, p. 13.)

Staff witness Mr. McClerren testified that IBT's wholesale service quality would not have improved as much as it improved prior to the completion of the Section 271 proceeding without the clear economic signal provided by the 01-0120 Remedy Plan. (Staff Ex. A, p. 12.) He testified that the remedy payments provided for by the 01-0120 Remedy Plan provided a

significant economic incentive for IBT to devote the necessary resources to solve its wholesale service quality problem. (*Id.*) He stated that he did not believe the Commission ever intended for there to be no wholesale remedy plan in effect for the October-December 2002 period. (*Id.*) In his rebuttal testimony Mr. McClerren reiterated his disagreement with IBT witness Mr. Ehr's position that the level of remedy payments provided for by the 01-0120 Remedy Plan during the October-December 2002 period was not a cause for IBT's wholesale performance improvement during this period. (Staff Ex. C, pp. 2-3.) He stated that Mr. Ehr's contention that the monetary incentives in place under the 01-0120 Remedy Plan were not relevant to IBT's efforts at improving service quality had no support. (*Id.*, p. 2.)

b. Possibility that CLECs Could File Complaints Against IBT Over Inadequate Service Quality

With respect to the second incentive which IBT witness Mr. Ehr testified IBT had to provide good quality wholesale service during the October-December 2002 period, McLeodUSA witness Redman-Carter responded that from the CLEC's perspective, the ability to file a complaint against IBT for providing inadequate or discriminatory wholesale service is a decidedly inferior alternative, and in fact is not a realistic alternative, to a wholesale remedy plan. (McLeodUSA Ex. 2.8, p. 2.) She pointed out that a wholesale performance remedy plan provides an established set of benchmarks for performance measures that are important to the quality of service the CLEC provides to its retail customers and to its ability to compete with IBT. (*Id.*) A remedy plan also provides for self-effectuating remedy payments in the nature of liquidated damages for IBT's failure to meet the established benchmarks, in accordance with formulas established in the remedy plan. (*Id.*, pp. 2-3.) In contrast, complaint proceedings involve high transaction costs, distract management's attention, can take a long time to complete, are unlikely to provide immediate relief for the conduct of which the CLEC is complaining, and

do not provide certainty of recovery of any damages, loss or competitive harm that the CLEC has suffered due to IBT's inadequate wholesale service quality. (*Id.*, p. 3.)

Ms. Redman-Carter testified that relying on the complaint process to resolve wholesale service quality disputes would be an administrative nightmare, and that CLECs would be reluctant to file complaints over wholesale service quality issues and incur the time, management attention and internal and external resource costs necessary to prosecute complaints with no guarantee of recovery of damages or reimbursement of litigation costs. (McLeodUSA Ex. 2.8, p. 3.) Further, IBT would be well aware of the significant costs and other disincentives for CLECs to pursue frequent complaint actions regarding IBT's wholesale service quality performance, and would consider this in analyzing the costs of providing different levels of wholesale service. (*Id.*) In contrast, a self-executing wholesale performance remedy plan eliminates this calculation by providing a relatively constant financial incentive to provide wholesale services at the standard of service quality defined by the remedy plan's performance measures. (*Id.*)

Ms. Redman-Carter concluded that it does not seem reasonable that the possibility that CLECs will file complaints would generate the same incentive to IBT to provide wholesale service to CLECs at specified performance levels that an established wholesale remedy plan provides. (*Id.*, pp. 3-4.) It also does not seem reasonable to conclude that the occasional and sporadic imposition of monetary awards by the Commission in response to successful complaints filed by CLECs would provide the same level of incentive to IBT to provide good quality wholesale service, as would an established remedy plan that can result in the obligation to make payments to CLECs and the State in each month in which IBT's wholesale service quality falls below established benchmarks. (*Id.*)

McLeodUSA witness Dr. Ankum also disagreed with Mr. Ehr's testimony that the possibility that CLECs would file complaints over wholesale service quality provided an incentive to IBT to provide good quality wholesale service that would warrant there being no wholesale remedy plan. (McLeodUSA Ex. 3.0, pp. 13-14.) He stated that as a practical matter, the complaint process is no substitute for a remedy plan and should not be expected to discipline IBT's service quality performance in the same manner. (*Id.*, p. 14.) A remedy plan sets specific targets for performance and identifies metrics against which the ILEC's performance will be evaluated on a monthly or other regular, periodic basis, and is a much more streamlined process than a complaint process in which an "appropriate" level of wholesale performance would be one of the issues to be litigated. (*Id.*) Further, the payments under a remedy plan are typically intended as proxies for liquidated damages that will compensate CLECs in instances where the ILEC fails to perform in accordance with the pre-specified performance measurement benchmarks. (*Id.*) By contrast, actual damages can be very difficult to establish in a complaint case, involving substantial amounts of data and involved computations that can be expected to be contested by the ILEC every step of the way. (*Id.*, pp. 14-15.) Additionally, a regulatory commission may not be empowered to award money damages to a complainant in the same manner as a court of law could. (*Id.*, p. 15.) He summarized that while a remedy plan provides a relatively cost efficient method of tracking IBT's performance and entails known standards and payments, a complaint process is costly, complex and offers much uncertainty to the CLEC. (*Id.*) Dr. Ankum testified that for all the reasons that the use of the complaint process is cumbersome and unattractive to a CLEC, one would expect an ILEC to be aware that the complaint process would be invoked infrequently by CLECs. (*Id.*) He concluded that the

complaint process does not provide the same incentives as a wholesale performance remedy plan for high quality wholesale service, and is not a substitute for a remedy plan. (*Id.*)

c. Existence of Other Remedy Plans

With respect to the third incentive cited by IBT witness Mr. Ehr, McLeodUSA witness Ms. Redman-Carter testified that while IBT had other remedy plans in effect for some CLECs in Illinois during the October-December 2002 period, the 01-0120 Remedy Plan provided for a greater likelihood of remedy payments for a given set of performance metrics than did other remedy plans under consideration. (McLeodUSA Ex. 2.8, pp. 4-5.) Specifically, the 01-0120 Remedy Plan eliminated the K-Table that was included in IBT's "Texas" Plan, and also provided for a doubling of the remedy payments. (*Id.*) As summarized in Section III.B.4.a above, McLeodUSA witness Dr. Ankum testified that wholesale service quality performance was improved when specific financial penalties for subpar performance were in place. According to Dr. Ankum, wholesale service quality was worse during periods when a remedy plan that included the K-Table was in effect than during periods when a remedy plan that excluded the K-Table was in effect. As also summarized in Section III.B.4.a above, Staff witness Mr. McClerren testified that the stronger financial incentives provided by the 01-0120 Remedy Plan contributed to IBT's improved wholesale service quality during the period that remedy plan was in effect.

Additionally, as stated in Section III.A.2 above, during the October-December 2002 period, approximately **BEGIN CONFIDENTIAL XXXX END CONFIDENTIAL** of the total CLEC access lines utilizing IBT's wholesale services were served by CLECs that were participating in the 01-0120 Remedy Plan.²⁷ (See Staff Ex. C, p. 5.) Stated differently, at most

²⁷The Commission stated in its final Order in Docket 01-0662 that "According to SBC, a number of carriers have opted into the 0120 Plan, and the bulk of wholesale business volume is

BEGIN CONFIDENTIAL XXX END CONFIDENTIAL of the total CLEC access lines utilizing IBT's wholesale services were served by CLECs that were participating in remedy plans other than the 01-0120 Remedy Plan. In fact, the percentage just cited is overstated, because during the October-December 2002 period there were approximately 70 CLECs who were participating in no remedy plan. (McLeodUSA Ex. 2.8, pp. 5-6.)

d. Desire to Obtain Section 271 Approval

The final incentive cited by Mr. Ehr was that during the fourth quarter of 2002 IBT was seeking to obtain a favorable Section 271 recommendation from the Commission, and knew it would need to demonstrate good wholesale service quality performance to obtain this result. However, this incentive had been present since at least the first half of 2001, when the BearingPoint testing of IBT's OSS and performance measurements was initiated, yet as of the fourth quarter of 2002, despite the presence of this incentive for at least 18 months, IBT had not yet succeeded in demonstrating sufficiently good wholesale service quality to terminate the BearingPoint testing or to have brought the Commission's Section 271 investigation to a favorable conclusion. (McLeodUSA Ex. 2.0, pp. 25-26; Tr. 133-34.) In fact, as noted in Section III.A.7 above, the adequacy of IBT's wholesale service quality as of the fourth quarter of 2002 was still a point of serious contention by Commission Staff and CLECs. Further, despite the presence of the "Section 271" incentive, and some improvement in IBT's wholesale service quality performance since 2000-2001, the Commission (i) in June 2002 rejected IBT's proposal to abate Docket 01-0120 and continue the Texas Plan in effect, (ii) in July 2002 ordered the adoption of the 01-0120 Remedy Plan to replace the Texas Plan, (iii) in October 2002 rejected IBT's renewed proposal to keep the Texas Plan in effect, and (iv) in December 2002, determined

attributable to carriers that have adopted the Plan." (Docket 01-0662, Final Order on Investigation, May 13, 2003, ¶896; McLeodUSA Ex. 2.8, p. 6.)

that the 01-0120 Remedy Plan should be continued in effect as part of IBT's alternative regulation plan.

McLeodUSA witness Dr. Ankum testified that while the desire to obtain Section 271 approval provided an incentive to IBT to improve wholesale service quality performance, it was not a sufficient incentive to warrant having no wholesale remedy plan in effect for a period of time during which Section 271 authority was being sought. (Tr. 113.) He pointed out that the remedy plan embodied a number of components that the Section 271 approval process does not provide. (Tr. 114.) First, the remedy plan provided explicit penalties for subpar performance, which in the period October-December 2002 were significant under the 01-0120 Remedy Plan. (*Id.*) Such penalties will motivate the ILEC into improving its performance. The Section 271 process does not include such a component (Tr. 114-15.) Further, the remedy plan provided direct financial incentives to IBT on a monthly basis, whereas the Section 271 approval process was a long-term, drawn-out process that lacked the immediacy of the remedy plan. (Tr. 116-17.) Additionally, the remedy plan provides compensation to the CLECs in the form of liquidated damages, explicitly recognizing that when IBT misses performance measures, the CLECs are harmed, and making the CLECs whole for IBT's subpar performance. The Section 271 approval process does not provide for any compensation to CLECs. (Tr. 115-16.)

Finally, with respect to all the incentives identified by Mr. Ehr, McLeodUSA witness Ms. Redman-Carter pointed out that during the fourth quarter of 2002, the 01-0120 Remedy Plan was in fact in effect and IBT was making remedy payments to CLECs and the State of Illinois based on the performance remedy provisions of the 01-0120 Remedy Plan. (McLeodUSA Ex. 2.8, p. 8.) There is no way for the Commission to determine in hindsight if IBT's wholesale service quality would have been as good as it was in the fourth quarter of 2002 if IBT had not in fact

been operating under the 01-0120 Remedy Plan during that period. (McLeodUSA Ex. 2.0, p. 28; McLeodUSA Ex. 2.8, p. 8.) Since IBT was making remedy payments to CLECs and the State in accordance with the 01-0120 Remedy Plan during the October-December 2002 period (and for the first several months of 2003), it is reasonable to conclude that the 01-0120 Remedy Plan strongly incentivized IBT to provide good quality wholesale service. (McLeodUSA Ex. 2.0, pp. 28-29.)

Similarly, Staff witness Mr. McClerren testified that having the 01-0120 Remedy Plan in effect for the period of October-December 2002 provided a “strong economic incentive” to IBT “to improve wholesale service quality” and was effective in sending economic signals to IBT during this period. (Staff Ex. C, pp. 10-12.) He stated that the 01-0120 Remedy Plan provided a strong economic signal that the Commission was serious about wholesale service quality, thereby fostering telecommunications competition, and provided a significant economic incentive for IBT to devote the necessary resources to solve its wholesale service quality problem. (*Id.*, p. 12.) Mr. McClerren stated that it would be difficult to conclude that IBT’s management would not have been motivated by the levels of remedy payments that IBT was making under the 01-0120 Remedy Plan to seek to minimize IBT’s costs, by striving to improve IBT’s wholesale service quality performance. (*Id.*, pp. 2-4.)

5. Staff Recommendation that the Commission Should Reaffirm its Decision in the Order on Reopening to Maintain the 01-0120 Remedy Plan in Effect After October 8, 2002

Staff witness Mr. McClerren, who testified in both the original proceedings in this docket and in the IBT Alt Reg case that the Commission should continue the 01-0120 Remedy Plan in effect beyond October 8, 2002, also testified in this remand proceeding that the Commission should reaffirm its decision in the Order on Reopening that the 01-0120 Remedy Plan should remain in effect after October 8, 2002. (Staff Ex. C, pp. 4, 19; Staff Ex. 1.00, pp. 8-9; Tr. 421-

22.) He explained that the Commission's decision in the Order on Reopening comported with his recommendation to the Commission that it would be a grievous mistake to allow a "gap period" where either no remedy plan existed to protect competition or an inferior plan existed. (Staff Ex. C, pp. 4-5.) He stated that the passage of time and the changing circumstances in the telecommunications industry had not changed his recommendation that the wholesale remedy plan in effect after October 8, 2002 should be the 01-0120 Remedy Plan. (*Id.*, p. 8.)

Mr. McClerren noted that at the time of the Order on Reopening, the Commission had just gone through an extensive proceeding in this docket dedicated exclusively to which wholesale performance remedy plan should be used. (*Id.*, pp. 5-9.) The proceeding had a full and complete hearing and briefing process and resulted in the selection of the 01-0120 Remedy Plan. (*Id.*, pp. 8-9.) He testified that he believed the Commission intended for the 01-0120 Remedy Plan to remain in effect until IBT's Section 271 proceeding was completed, and that the Commission did not intend for there to be no remedy plan for the period October 8, 2002 through December 30, 2002. (*Id.*, pp. 9, 12.) He stated that in the midst of all the market-opening events occurring during this period, the Commission would not have found that there should not be a remedy plan for this period. (*Id.*, pp. 12-13.) He pointed out that IBT itself realized that there should be a wholesale remedy plan in place after October 8, 2002 and that its Section 271 application would not be successful without an effective wholesale remedy plan in place. (*Id.*, p. 13.) Accordingly, IBT offered to the Commission to keep the Texas Plan in effect as an alternative to the 01-0120 Remedy Plan. (*Id.*) However, the Commission rejected this offer because it had just found the Texas Plan to be inadequate in this case. (*Id.*) Mr. McClerren stated that "it is inconceivable to me that any regulatory body would have found that a wholesale performance plan and associated remedy plan were not crucial elements for validating and

ensuring telecommunications market competitiveness in the period prior to the sufficient development of a competitive market.” (*Id.*, p. 14.)

Mr. McClerren testified that the Commission’s December 30, 2002 decision in the IBT Alt Reg case demonstrated that the Commission intended to have the 01-0120 Remedy Plan in effect during the period between October 8, 2002 and the completion of IBT’s Section 271 proceeding, and that the Commission in fact believed it had already resolved this issue. (Staff Ex. C, p. 14.) He noted that the Commission stated in that Order that it “views it imperative to the public interest . . . that Ameritech provide quality wholesale service” and that it “fails to see how this goal can be realized absent a sufficient wholesale performance remedy plan in place.” (*Id.*, p. 15.) The Commission went on to state that it “views the 01-0120 Remedy Plan to be the most thorough and complete alternative at this time” and that it “deems the 01-0120 Remedy Plan effective up to and until a wholesale performance measure plan for Section 271 purposes is approved by this Commission.” (*Id.*, pp. 14-16.) Mr. McClerren stated that the Commission’s decision in its December 30, 2002 Order in the IBT Alt Reg case showed that the Commission had not changed its position on the appropriateness of the 01-0120 Remedy Plan during the period of October 8 through December 30, 2002. (*Id.*, p. 15.) He pointed out that there was nothing about the period from October 8 to December 30 that was different from the periods immediately preceding or following it, no legitimate argument that a “gap period” without the 01-0120 Remedy Plan would be helpful to the competitive market, and no policy or other reason to argue that the Commission should not have extended the 01-0120 Remedy Plan to cover this period. (*Id.*, pp. 15-16.)

As discussed in Section III.B.4 above, Mr. McClerren also testified that having the 01-0120 Remedy Plan in effect for the period of October-December 2002 provided a strong and

effective economic incentive to IBT to improve its wholesale service quality during this period and to devote the necessary resources to solve its wholesale service quality problem. (Staff Ex. C, pp. 10-12.) He noted that the results of the remedy plan during this period showed that IBT's service quality was not meeting its agreed upon performance measures and was significantly underperforming. (*Id.*, pp. 10-11.) Moreover, he also addressed the fact that the required remedy payments under the 01-0120 Remedy Plan gave IBT a clear economic signal that its wholesale service needed to improve, which it ultimately did. Mr. McClerren stated that the Commission's conclusion in its May 13, 2003 Order in Docket 01-0662 that IBT's markets had become irrevocably competitive were a direct result of the continuous maintenance of the 01-0120 Remedy Plan during the previous periods. (*Id.*, p. 14.) He noted that the Commission determined in both the IBT Alt Reg case and the IBT Section 271 proceeding that the 01-0120 Remedy Plan provided sufficient incentives for IBT to improve its service quality. (*Id.*, p. 10.)

IV. ARGUMENT

A. The Appellate Court Has Ruled That the Commission Had the Authority Under Section 10-113(a) of the Public Utilities Act to Extend the Remedy Plan Beyond October 8, 2002

The Appellate Court has made it clear in its decisions in the two appeals in this proceeding that the Commission had the authority to issue an order continuing the remedy plan it adopted in this docket in effect beyond October 8, 2002, even though such an order would rescind or amend a previous order in which the Commission concluded that the remedy plan would terminate on October 30, 2002. The source of that authority is §10-113(a) of the PUA (220 ILCS 5/10-113(a)).

As described in Section III.A.3 above, in IBT's appeal from the July 10, 2002 Order and the Order on Reopening, IBT argued that the Commission had no authority to continue the remedy plan in effect beyond October 8, 2002, because such an extension would violate the

terms of merger Condition 30 and would be an arbitrary and capricious departure from prior orders, and that the Commission was estopped to change the terms of merger Condition 30. The Appellate Court was well aware that IBT was making these arguments. In its decision, the Court noted that:

The merger order contained language noting that “[e]xcept where other termination dates are specifically established, all conditions set out below shall cease to be effective and shall no longer be binding in any respect three years after the Merger Closing Date.” At issue in this appeal is Condition 30, titled “Performance Measuring, Benchmarks and Liquidated Damages,” which did not specifically establish an alternative closing date. (343 Ill App. 3d at 251.)

Further, in the section of its opinion captioned “Commission’s Authority”, the Court noted IBT’s argument that “Petitioner contends that the Commission lacked the authority to force it to file a tariff extending Condition 30 past the three-year duration contained within the merger approval order.” (*Id.* at 255.) Additionally, the Court noted that the Order on Reopening, which required that IBT continue to make the remedy plan available beyond October 8, 2002, amended the Commission’s determination in the July 10, 2002 Order that the remedy plan would terminate on October 8, 2002. The Court then quoted from §10-113(a):

Anything in this Act to the contrary notwithstanding, the Commission may at any time, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, decision or order made by it. (343 Ill. App. 3d at 259.)

The Court therefore concluded that the Commission had violated IBT’s due process rights (and the express terms of §10-113(a)) by issuing the Order on Reopening, which amended the July 10, 2002 Order, without providing notice and an opportunity to be heard concerning the amendment. (*Id.* at 259-60.)

By relying on §10-113(a) as the basis for its decision on this issue, the Court indicated that the Commission had the statutory authority to amend its prior orders so as to extend the

remedy plan beyond October 8, 2002, but that the Commission had failed to exercise that authority in a proper manner, in that the Commission had failed to give notice and opportunity for hearing before issuing the Order on Reopening. If the Court had agreed with IBT's arguments that the Commission had *no authority* to alter the terms of merger Condition 30, or was estopped from altering the terms of the merger Order, there would have been no need for the Court to remand the case to the Commission with directions to hold a hearing.

The Appellate Court's decision in the second appeal in this case expressly confirmed that the Court had ruled in the first appeal that the Commission *had the authority* to amend its prior orders establishing a termination date for the 01-0120 Remedy Plan, so as to continue the remedy plan in effect beyond October 8, 2002. The Court stated in its August 31, 2005 decision:

An examination of our opinion in Illinois Bell I *establishes that we did not reverse on the basis that the Commission could not extend the remedy plan beyond October 8, 2002. On the contrary, we cited section 10-113(a) of the Utilities Act as providing the Commission with the power to "at any time * * * rescind, alter or amend any rule, regulation, order or decision made by it."* (Slip op., p. 10) (emphasis added.)

Further confirming that the Court had ruled in the first appeal that the Commission had authority under §10-113(a) to issue an order amending its prior orders so as to continue the remedy plan in effect beyond October 8, 2002, the Court, in the portion of its decision in which it pointed out that the Order on Remand had incorrectly concluded that the Order on Reopening was "void", stated as follows:

Just as in Newkirk and Illini Coach, in this case the Commission had personal jurisdiction over Illinois Bell *as well as subject matter jurisdiction*. See Newkirk, 109 Ill. 2d at 36, 484 N.E.2d at 324 (subject matter jurisdiction is power to hear and determine causes of the general class of cases to which particular case belongs). *The Commission also clearly had the authority to issue the order on reopening pursuant to section 10-113(a) of the Utilities Act.* (Slip op., p. 13) (emphasis supplied.)

As the Commission Staff pointed out in its Prehearing Memorandum in this remand proceeding, the Appellate Court's decision that the Commission had the authority pursuant to §10-113 to issue the Order on Reopening amending its prior orders and continuing the 01-0120 Remedy Plan in effect beyond October 8, 2002, is law of the case and is binding on the Commission.²⁸

As the Court stated in its decision in the first appeal, the Order on Reopening amended the July 2002 Order, in which the Commission had stated that the remedy plan it was approving would expire on October 8, 2002. The Order on Reopening also had the effect of amending the terms of the order in Docket 98-0555, the SBC-Ameritech merger proceeding. However, the order in Docket 98-0555 was issued pursuant to §7-204 of the PUA (220 ILCS 5/7-204).²⁹ Thus, the Docket 98-0555 order, like any order issued by the Commission under a provision of the PUA, is subject to the Commission's authority expressly embodied in §10-113(a) to "at any time . . . rescind, alter or amend any rule, regulation, order or decision made by it." Section 10-113(a) exempts no section of the PUA from the authority it invests in the Commission. Rather, §10-113(a) states that the Commission may "rescind, alter or amend **any** rule, regulation, order or decision made by it" (emphasis added).³⁰ That the power given to the Commission in §10-113(a)

²⁸Prehearing Memorandum of the Staff of the Illinois Commerce Commission, pp. 6-7, 13, citing *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d 291, 312-313 (1981). As Staff pointed out, the Commission's Order on Remand from the first Appellate Court decision in this docket recognized this legal principle, as did IBT in its pleadings filed in the first remand proceeding. (Staff Prehearing Memorandum, p. 6.)

²⁹Section 7-204(f) states that "[i]n approving any proposed reorganization pursuant to this Section the Commission may impose such terms, conditions or requirements as, in its judgment, are necessary to protect the interests of the public utility and its customers." 220 ILCS 5/7-204(f).

³⁰The language of §10-113(a) also indicates that an order rescinding, altering or amending a prior order would have prospective application only ("Any order rescinding, altering, or amending a prior rule, regulation, order or decision shall, when served upon the public utility affected, have

to rescind, alter or amend prior orders applies to all orders of the Commission has been confirmed by the courts. *Union Electric Co. v. Commerce Commission*, 39 Ill. 2d 386, 392 (1968); *People ex rel. Ill. Highway Transp. Co. v. Biggs*, 402 Ill 401, 410 (1949); *Black Hawk Motor Transit Co. v. Commerce Commission*, 398 Ill 542, 553 (1947); *Quantum Pipeline Co. v. Commerce Commission*, 304 Ill. App. 3d 310, 318 (3d Dist. 1999.)³¹

Section 10-113 and the two Appellate Court decisions in this case make it clear that the Commission has the authority to continue the remedy plan in effect beyond October 8, 2002, even if that action alters or amends prior orders of the Commission. Additionally, it must be recognized that the Commission could continue the *01-0120 Remedy Plan* in effect beyond October 8, 2002, without extending merger Condition 30. Indeed, the Order on Reopening did not state that the Commission was continuing Condition 30 in effect. Rather, it simply directed that the remedy plan adopted in Docket 01-0120 should continue in effect beyond October 8, until modified by further Commission action.

Although the Commission's authority under §10-113(a) to modify prior orders so as to extend the 01-0120 Remedy Plan is sufficient authority for its actions and has been confirmed by the Appellate Court, there is a separate source of authority for the Commission's action. The Commission has authority under the Telecommunications Act to consider and prescribe generally applicable or "generic" terms and conditions for interconnection agreements in a single proceeding rather than considering and adjudicating such terms in numerous individual ILEC-CLEC proceedings. 47 U.S.C. §252(g). Indeed, that was exactly what the Commission did in

the same effect as is herein provided for original rules, regulations, orders or decisions.") Here, the Order on Reopening was issued prior to the October 8, 2002 remedy plan termination date it was amending and only affected the prospective operation of the remedy plan.

³¹Several of these cases construed former §67 of the PUA (ch. 111-2/3), which contained the provisions currently in 220 ILCS 5/10-113(a) prior to the reorganization of the Illinois statutes.

IBT's last TELRIC rate case for unbundled network elements ("UNE"), Docket 02-0864. Although the case was nominally initiated by a tariff filing by IBT and suspension by the Commission pursuant to §9-201 of the PUA, it was recognized in the final order in that docket that the statutory basis for the case, in which the Commission established new rates for various UNEs provided by IBT to CLECs, was as a generic proceeding under §252 of the Telecommunications Act. IBT and the CLECs were then expected to incorporate the new prices established by the Docket 02-0864 Order into their individual interconnection agreements in accordance with the terms of those agreements. (*See* Order in Docket 02-0864 (June 9, 2004), pp. 289-94.)

Here, the Commission's July 10, 2002 Order established a new wholesale performance remedy plan (supplanting the Texas Plan that IBT had previously placed into effect), and directed that "[t]he Performance Remedy Plan in this Docket . . . shall be incorporated into all currently effective Interconnection Agreements in the form of an Amendment to the Interconnection Agreement." (July 10, 2002 Order, p. 18.) The Order on Reopening determined that the 01-0120 Remedy Plan would continue to be available past October 8, 2002, and for the indefinite future until modified in accordance with applicable law, to CLECs whose rights to the remedy plan are based on interconnection agreements with IBT. As it did in setting new UNE rates of general applicability in Docket 02-0864, the Commission had authority to establish a generally-applicable performance remedy plan and to specify that it would continue to be available after October 8, 2002 to CLECs having interconnection agreements with IBT.

For these reasons, the Commission had the *authority* to issue its Order on Reopening maintaining the 01-0120 Remedy Plan in effect beyond October 8, 2002.

B. The Commission Had and Continues to Have Sufficient Factual Basis for Maintaining the 01-0120 Remedy Plan in Effect Beyond October 8, 2002

The Appellate Court, in its August 31, 2005 decision, remanded this case to the Commission for the purpose of “conduct[ing] a hearing and determine[ing] whether the remedy plan should have been extended beyond October 8, 2002.” (Slip op., p. 16.) Since the Court has made it clear that (1) in the Order on Reopening the Commission in fact extended the 01-0120 Remedy Plan beyond October 8, 2002, and (2) the Commission had the authority to amend its prior orders so as to extend the duration of the 01-0120 Remedy Plan, the focus in this remand proceeding must be on whether the Commission had an adequate factual basis to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002. The answer is yes.

1. The Commission Had Sufficient Factual Basis at the Time of the Order on Reopening to Support the Determination That the 01-0120 Remedy Plan Should Be Maintained in Effect Beyond October 8, 2002

At the time the Commission issued the Order on Reopening, a sufficient factual record existed in this docket to support the determination to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002. As summarized in Section III.B.1 above, witnesses testified in the original proceedings in this docket that the wholesale remedy plan developed and adopted in this case needed to be continued in effect beyond the expiration date of merger Condition 30. Rod Cox of McLeodUSA testified about how CLECs are harmed competitively without an effective wholesale performance remedy plan, and that an effective wholesale remedy plan was critical to fostering competition in Illinois. He recommended that the Commission determine in this case that the remedy plan that would be approved in this docket would not expire when merger Condition 30 expired. (CLEC Ex. 5, pp. 6-10, 20-21.) Commission Staff witness Sam McClerren testified that telecommunications competition depended on the successful

provisioning of wholesale service quality, and that successful provisioning of wholesale service quality requires appropriate and meaningful remedies in the event of non-performance. (Staff Ex. 1.00, p. 2.) Mr. McClerren recommended that the wholesale performance measures established in this docket should survive the expiration of merger Condition 30, that the Commission should order that the wholesale service quality remedy plan it established in this case should continue after October 2002, and that this remedy plan should remain in effect as long as IBT has an alternative regulation plan and as long as it is necessary for the Commission to ascertain that IBT is unable to provide discriminatory service to CLECs.³² (*Id.*, pp. 8-9.)

At the time of the Order on Reopening, the Commission also had evidentiary support for the need for the specific remedy plan adopted in this docket to continue in effect beyond October 8, 2002. IBT had initially implemented merger Condition 30 by placing the “Texas” remedy plan into effect in Illinois. (McLeodUSA Ex. 2.0, p. 4.) In the initial proceedings in this docket, the Commission conducted an extensive investigation into the components of an appropriate wholesale performance remedy plan. CLECs, through expert testimony, presented and supported adoption of a different remedy plan and also focused on inadequacies in IBT’s Texas Plan, most notably the inclusion of the K-Table in the Texas Plan. (*See* discussion in Section III.B.1 above.) In its July 10, 2002 Order in this docket, the Commission did not adopt the CLECs’ proposed wholesale remedy plan, but it did adopt a remedy plan that differed significantly from the Texas

³²Ultimately, the Commission did not fully accept Mr. McClerren’s recommendation as it concluded that the 01-0120 Remedy Plan could be replaced by a different remedy plan for Section 271 anti-backsliding purposes at the conclusion of IBT’s Section 271 proceeding. Nevertheless, Mr. McClerren’s testimony, as well as Mr. Cox’s testimony, in the original proceedings in this docket provide contemporaneous evidentiary support for the Commission’s decision in the Order on Reopening to require IBT to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002.

Plan, most notably in the removal of the K-Table and the increase of the remedy amounts. (*See* July 10, 2002 Order, pp. 23-25, 35-38.)

The Appellate Court, in the first appeal in this case, affirmed both of these determinations. 343 Ill. App. 3d 249, 254-55. The Court concluded that “there was ample evidence in the record to support the Commission’s decision to eliminate the k-table and impose a standard 5% error rate to compensate for random variation.” (*Id.* at 255.) The Court also noted the evidence before the Commission that “performance deficiencies existed in ‘nearly half’ of the measured categories for a three-month period” (*id.*) and that “the assessments against Ameritech called for in the Texas remedy plan did not influence Ameritech’s behavior whatsoever.” (*Id.* at 254.) Further, the Court noted the Commission’s findings that “the Ameritech Plan will not provide sufficient incentives for Ameritech to improve its service” and that “the current system is not working and something must be done to give Ameritech meaningful incentive to provide the CLECs with service that is not substandard.” (*Id.*) The Court therefore concluded that “there is ample evidence in the record to support the Commission’s finding that increased remedies were necessary to ensure that Ameritech would meet an acceptable level of performance standards and that the increases are not punitive in nature.” (*Id.* at 255.)

Thus, the Commission, after extensive hearings, had found the Texas Plan clearly inadequate and in need of replacement by the 01-0120 Remedy Plan in order to provide sufficient incentives to IBT to improve its wholesale service quality performance to acceptable levels and to provide adequate compensation to CLECs for IBT’s failure to meet wholesale service quality benchmarks. As of October 1, 2002, however – less than three months after it had made these determinations – the Commission was faced with a situation in which the 01-

0120 Remedy Plan could cease to be operative and IBT and CLECs would revert to the Texas Plan, which the Commission had just found to be inadequate. (Staff Ex. C, pp. 8-9, 13; McLeodUSA Ex. 2.0, p. 28.) This situation was brought to the Commission's attention by the September 30, 2002 Staff report that resulted in the Order on Reopening,³³ but the Commission had also been made aware of this situation by IBT's Motion to Abate and by IBT's Application for Rehearing of the July 10, 2002 Order (*see* §III.A.1 above) as well as by the letter dated August 9, 2002 from IBT to the Commissioners (see Order on Reopening, pp. 2-3 and §III.A.2 above), in each of which IBT committed to keep the Texas Plan in effect from October 8, 2002 until the conclusion of IBT's Section 271 proceeding.

Further, at that point in time the Commission had no evidence or information before it to suggest that the unsatisfactory wholesale service quality performance, which had led the Commission to conclude the Texas Plan was inadequate and needed to be replaced by the 01-0120 Remedy Plan, had been alleviated. To the contrary, the Commission's investigation of IBT's compliance with the requirements of Section 271 was approaching its first anniversary and was not near completion, with no definitive end in sight.³⁴ The BearingPoint third-party evaluations of IBT's performance measurements and OSS were also ongoing with no definitive termination date. IBT had not yet succeeded in demonstrating, to the extent necessary to obtain a favorable Section 271 recommendation from the Commission, that it fulfilled all the requirements of the Section 271 competitive checklist, that its OSS had achieved the performance levels specified by the Illinois Master Test Plan, or even that it could collect, maintain and report wholesale performance metrics data on a reliable basis. (McLeodUSA Ex.

³³See Order on Reopening, p. 2.

³⁴Docket 01-0662 had been initiated on October 24, 2001.

2.0, pp. 26-27, 30.) IBT had not yet submitted to the Commission its three months of wholesale performance data on which it hoped to base its demonstration that its OSS satisfied the requirements of Section 271(c), and it was not to make that submission until January 2003. (McLeodUSA Ex. 2.8, p. 10.) Thus, as of October 1, 2002, the Commission had not yet concluded that IBT satisfied the Section 271 competitive checklist with respect to its OSS functions. (McLeodUSA Ex. 2.0, p. 30.)

In fact, one of the premises of IBT's Motion to Abate or in the Alternative to Defer Decision filed in this docket on June 7, 2002 was that IBT's wholesale service quality had improved significantly, to the point that it was not necessary to adopt a new remedy plan in this case and that the Texas Plan could be continued in effect until the completion of the Section 271 proceeding, at which time a new remedy plan presumably would be adopted. (McLeodUSA Ex. 2.0, p. 27; *see* §III.A.1 above.) The Commission denied the Motion to Abate on July 10, 2002, the same date that it issued its Order adopting the Docket 01-0120 Remedy Plan, so obviously the Commission did not find a basis to conclude that IBT's wholesale service quality had improved sufficiently to warrant simply continuing the Texas Plan rather than adopting the 01-0120 Remedy Plan. (*Id.*) Similarly, on August 27, 2002, the Commission denied IBT's Application for Rehearing of the July 10, 2002 Order, in which the IBT had again offered to continue the Texas Plan in effect until the completion of the Section 271 proceeding. (*Id.* at 28.)

In short, as of October 2002 IBT had not yet demonstrated to the Commission that its wholesale service quality had improved to the point where the 01-0120 Remedy Plan could be terminated. (McLeodUSA Ex. 2.0, p. 27.) The Commission had recently concluded based on a full hearing and briefing process in this case that the Texas Plan provided inadequate incentives to IBT and needed to be replaced with the 01-0120 Remedy Plan. The Commission had also

recently twice rejected the IBT position that it was sufficient to simply continue the Texas Plan in effect until the conclusion of the Section 271 proceedings. In light of all these circumstances, it was reasonable for the Commission to conclude, as of October 1, 2002, that it needed to direct that the 01-0120 Remedy Plan should continue in effect after October 8, 2002. (*Id.*, p. 31.) As McLeodUSA witness Ms. Redman-Carter testified in this proceeding:

[T]he Commission rejected the Texas Plan in favor of the 01-0120 Remedy Plan in its final Order in Docket 01-0120. Having made that decision in its July 10, 2002 Order, it was reasonable for the Commission, when faced with a gap period with no wholesale performance measurement and remedy plan in effect, to conclude that the 01-0120 Remedy Plan should be in effect during the gap period, rather than the Texas Plan. (McLeodUSA Ex. 2.0, p. 28.)

Finally, the Commission also had support for its determination to continue the 01-0120 Remedy Plan in effect after October 8, 2002, in the record that had been compiled on this topic in the IBT Alt Reg case. As described in Sections III.A.6 and III.B.2 above, during the evidentiary proceedings conducted in the IBT Alt Reg Case – which were concluded prior to October 1, 2002 – as well as in briefs filed in that case, also prior to October 1, 2002, a number of consumer and CLEC parties, and Commission Staff, presented evidence and argument concerning the need for an effective wholesale performance remedy plan and the need to continue the performance remedy plan that would be adopted in Docket 01-0120 in effect after October 8, 2002. These witnesses included, among others, Staff witness McClerren, who testified that the ability of CLECs to provide quality service to their retail customers was dependent in large part on the quality of the wholesale services they purchased from IBT; that IBT must be provided with the proper incentive to provide adequate wholesale service quality if real competition were to be possible; and that continuation of the remedy plan beyond the expiration of merger Condition 30 would provide that incentive. (*See* Section III.B.2 above.)

The Commission in fact took the action recommended by these witnesses (and their sponsoring parties) in its December 30, 2002 final Order in the IBT Alt Reg Case, where it determined that an effective wholesale performance remedy plan was important to the development of a competitive telecommunications market and that the 01-0120 Remedy Plan should be incorporated into the alternative regulation plan until such time as the Section 271 investigation for IBT was completed. In that Order – which was based on a record and briefing compiled and completed prior to October 2002 – the Commission found “the 01-0120 Remedy Plan to be the most thorough and complete alternative at this time.” Further, the Appellate Court, based on the evidence referred to above and summarized in Section III.B.2 of this Brief, held that the Commission’s decision to continue the 01-0120 Remedy Plan in effect as part of the alternative regulation plan was supported by substantial evidence. (352 Ill. App. 3d 630, 639-41.) Certainly, if this evidence was sufficient to support the Commission’s decision on December 30, 2002, to continue the 01-0120 Remedy Plan in effect, it also supports the Commission’s decision on October 1, 2002 to continue the 01-0120 Remedy Plan in effect from October 8, 2002 to (as it turned out) December 30, 2002.

In fact, McLeodUSA submits that the Commission’s decision to continue the 01-0120 Remedy Plan in effect after October 8, 2002, until IBT’s Section 271 proceeding was concluded and a replacement remedy plan was adopted in that case, actually reflected (despite the summary nature of the Order on Reopening) a well-conceived plan that the wholesale remedy plan adopted in this docket should remain in effect until IBT’s Section 271 proceeding was completed, IBT had demonstrated that it provided non-discriminatory access to its OSS and that its local markets were irrevocably open to competition, and the Commission therefore had grounds to authorize movement to a different wholesale remedy plan for “anti-backsliding” purposes. As described

above, in its July 10, 2002 Order in this docket in which it adopted the 01-0120 Remedy Plan, the Commission found IBT's Texas Plan to be inadequate, and also stated:

We conclude, therefore, that unless otherwise directed by the Commission, the Remedy Plan adopted pursuant to this Order shall serve as the basis for the aforementioned "performance remedy plan" referenced by Ameritech for Section 271 approval purposes. The Commission does not believe it is in either its own interest or any of the parties' interest to re-litigate the nuances of the Remedy Plan in the current Section 271 proceeding. Therefore, the Commission wishes to clarify that any future reference (in either concurrent or prospective dockets before the Commission) to a Remedy Plan in Illinois, either voluntarily or pursuant to Commission Order, shall mean the Remedy Plan adopted pursuant to this Order. (Docket 01-0120, July 10, 2002 order, p. 20.)

This statement from the July 10, 2002 Order is perfectly consistent with the Commission's statements in the Order on Reopening that:

This Commission has no concerns about what remedy plan will apply after October 8, 2002. In response to the Joint Petition of Ameritech Illinois and a number of [CLECs], this Commission held evidentiary hearings, considered legal argument, and laid out with precision, in its Order of July 10, 2002, the tariffed remedy plan Ameritech Illinois was to file. The Order did not provide for any sunset or automatic termination for that tariffed remedy plan; it simply ordered Ameritech Illinois to "file a tariff to reflect the revisions to the Plan that are reflected in this Order. (Order on Reopening, p. 3.)

And that:

Staff also recommends that . . . the Commission clarify that the Commission-ordered remedy plan will be available past October 8, 2002, and for the indefinite future until modified in accordance with applicable law, to telecommunications carriers whose legal right to the remedy plan is based on interconnection agreements with Ameritech Illinois, in lieu of or in addition to the tariffed remedy plan. The Commission accepts this Staff recommendation. (*Id.*, p. 3 n.1.)

The Commission's decision in its December 30, 2002 final Order in the IBT Alt Reg case – based on a record compiled prior to October 2002³⁵ -- to continue the 01-0120 Remedy Plan in effect until a new remedy plan was adopted at the conclusion of the Section 271 case, is also consistent with the above-quoted statements. It is not known why the final Order in the IBT Alt

³⁵See the timeline of events provided in McLeodUSA Exhibit 2.1.

Reg case was not issued until December 2002, even though the case was ripe for issuance of a final Order by no later than February 2002 (McLeodUSA Ex. 2.0, pp. 10, 29). Nonetheless, it would seem apparent from the chronology of the Commission's consideration of remedy plan issues that it would have reached the same conclusion and taken the same action had it issued its final Order in the IBT Alt Reg case three months earlier – which is when it issued its Order on Reopening in this case directing that the 01-0120 Remedy Plan should remain in effect. As McLeodUSA witness Ms. Redman-Carter testified in this remand proceeding, “[t]he need for the 01-0120 Remedy Plan did not end in October 2002 and then reappear at the end [of] December 2002.” (McLeodUSA Ex. 2.0, p. 29.) Similarly, Staff witness Mr. McClerren testified that there was nothing about the period from October 8 to December 30, 2002, that was different from the period immediately preceding or following it. (Staff Ex. A, p. 15.)

As Staff witness Mr. McClerren, who was involved in the original proceedings in this case, the IBT Alt Reg Case and the Section 271 case, testified in this remand proceeding:

- Q. Do you believe the Commission intended that, after all of the effort expended by the parties in Docket 01-0120, the remedy plan would only be in effect for a little more than 2 months?
- A. No, I believe the Commission intended this remedy plan to remain in effect until the Section 271 proceeding was completed. (Staff Ex. A, p. 9.)

Mr. McClerren also testified in this remand proceeding:

- Q. Do you believe the Commission ever intended for there to be no remedy plan for the time period October 8, 2002, through December 30, 2002?
- A. Absolutely not. The Commission was following both federal and state direction to nurture a competitive telecommunications environment. A great deal of effort was expended at both the state and federal levels to ascertain that SBC Illinois provided competitors non-discriminatory service . . . I do not believe that in the midst of all the market opening events, the ICC would have found that there should not be a remedy plan

for the time period October 8, 2002, through December 30, 2002.³⁶ (*Id.*, pp. 12-13) (emphasis added.)

At the time of the Order on Reopening, the Commission had a strong basis in the evidence presented in this case and the overall circumstances surrounding IBT's wholesale service quality, the state of development of the competitive telecommunications market and the state of IBT's efforts to demonstrate that it met Section 271(c) "competitive checklist" requirements, to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002. The Commission should confirm its decision to do so in its order in this remand proceeding.

2. IBT's Hindsight-Based Arguments that the Commission Should Now Conclude that the 01-0120 Remedy Plan Should Not Have Been in Effect Between October 8 and December 30, 2002, Are Without Merit and Should Be Rejected

Rather than addressing the facts that supported the Commission's decision to maintain the 01-0120 Remedy Plan in effect beyond October 8, 2002, at the time that decision was made (October 1, 2002), IBT's argued in this remand proceeding that because its wholesale service quality turned out to be at acceptable levels (according to IBT) during the fourth quarter of 2002, there was in fact no need to have maintained the 01-0120 Remedy Plan in effect during that period. IBT also argued that the 01-0120 Remedy Plan was not needed during the fourth quarter of 2002 because IBT had sufficient other incentives to provide good quality wholesale service. The evidence in this remand proceeding as well as consideration of the contemporaneous circumstances, all as summarized in Section III.B. 3 and 4 above, demonstrate that IBT's

³⁶Of course, IBT offered to continue the Texas Plan in effect after October 8, 2002, until a replacement remedy plan was adopted at the conclusion of the Section 271 proceeding. However, as Mr. McClerren and Ms. Redman-Carter testified, since the Commission had just found the Texas Plan to be inadequate based on a lengthy evidentiary proceeding, this alternative was unacceptable and was appropriately and reasonably rejected by the Commission. (Staff Ex. A, p. 13; McLeodUSA Ex. 2.0, p. 28.)

arguments do not provide a basis for overturning the Commission's October 2002 decision to continue the 01-0120 Remedy Plan in effect.

a. Wholesale Service Quality in the Fourth Quarter of 2002

There are at least three fundamental problems with IBT's argument based on the level of wholesale service quality it provided during the fourth quarter of 2002. The **first** problem is that even if IBT's wholesale service quality performance for the fourth quarter of 2002 were ultimately determined to be satisfactory, this would not have been known until after the end of that period. (McLeodUSA Ex. 2.0, p. 25.) In fact, IBT submitted wholesale performance data for the months of September-October 2002 to the Commission for evaluation in the Section 271 case, Docket 01-0662, but it did not make this submission until January 17, 2003. (McLeodUSA Ex. 2.8, p. 10.) The Commission did not even make the determination that IBT had shown it had reached a sufficient level of wholesale service quality to warrant a favorable Section 271 recommendation until May 2003. (McLeodUSA Ex. 2.0, p. 26; McLeodUSA Ex. 2.8, pp. 7-8) Further, in July 2002 and August 2002 the Commission rejected IBT's suggestions that its wholesale service quality had improved sufficiently that the Texas remedy plan could simply be continued; and at the end of the fourth quarter 2002, the Commission concluded in its final Order in the IBT Alt Reg case that the 01-0120 Remedy Plan needed to *remain in effect* until the Section 271 case was completed and a new remedy plan was adopted for IBT was Section 271 purposes.

Indeed, in the first half of 2003, the parties, including Staff, were still arguing in Docket 01-0662 over whether IBT's wholesale service quality performance had achieved acceptable performance levels, particularly with respect to the OSS functions of ordering, provisioning, maintenance and repair, and billing. (McLeodUSA Ex. 2.0, p. 26.) For example, on February

21, 2003, Commission Staff witnesses filed affidavits in Docket 01-0662 stating (among other things) that (1) IBT's OSS, as reported by BearingPoint in its independent third party review, were not sufficient with respect to the ordering, provisioning, and maintenance and repair functions; (2) significant areas of wholesale performance improvement were still required by IBT; (3) IBT's performance measurement data, as evaluated by BearingPoint, was not sufficiently reliable and did not adequately demonstrate that IBT had satisfied all requirements of the Section 271 checklist; and (4) the Commission could not be assured that IBT's performance on key measurements would not "backslide" if IBT were granted Section 271 approval. (*Id.*) CLECs made similar points in affidavits and comments filed in Docket 01-0662 at that time. (*Id.*, pp. 27, 30.)

In short, as of October 2002, the Commission had nothing before it on which it could have based a determination that IBT's wholesale service quality had improved to the point that the 01-0120 Remedy Plan was no longer needed and that IBT could revert to the Texas Plan (or to no wholesale remedy plan). It was not until well into 2003 that the Commission had a basis to make such a determination. The Commission's "real time" actions in rejecting at least two attempts by IBT to revert to the Texas Plan, and in incorporating the 01-0120 Remedy Plan into IBT's alternative regulation plan, bear this out.

The **second** problem with IBT's argument is that given its previous wholesale service quality problems (and its difficulty over an extended period in passing the BearingPoint testing program), it was appropriate for the Commission to require IBT to *demonstrate* a sustained period of acceptable wholesale service quality performance before the Commission determined that the 01-0120 Remedy Plan was no longer necessary and a different wholesale remedy plan could be adopted. That is, IBT should not have been allowed to move from the 01-0120 Remedy

Plan to a different wholesale remedy plan until *after* it had demonstrated a sustained period of satisfactory wholesale service quality performance under the 01-0120 Remedy Plan. (McLeodUSA Ex. 2.8, pp. 6-7.) Accepting for purposes of this discussion that IBT's performance for the period of September–November 2002 – the period for which IBT chose to submit wholesale performance data to the Commission in Docket 01-0662 to attempt to show that it met the service quality requirements of Section 271(c) – did in fact demonstrate an acceptable level of wholesale service quality,³⁷ this does not provide a basis to conclude that the 01-0120 Remedy Plan was no longer needed and should have been discontinued in October 2002. Rather, it supports the conclusion that the 01-0120 Remedy Plan could be replaced by a different wholesale remedy plan *after* the period, and *after* the Commission had examined the data to arrive at the conclusion that IBT's wholesale service quality had improved to an acceptable level and stayed at that level for a sustained period of time.

This in fact was how the Commission, in Docket 01-0662, approached IBT's proposal to move to a different wholesale remedy plan, and its analysis of IBT's compliance with the Section 271 OSS and wholesale service quality requirements, in Docket 01-0662. That is, the Commission did not decide that IBT could move from the 01-0120 Remedy Plan to a different wholesale remedy plan until *after* the Commission determined that IBT had demonstrated a sustained period of satisfactory wholesale service quality performance that indicated compliance with the Section 271(c) competitive checklist requirements, including the OSS criterion.

³⁷As described in Section III.B.3, McLeodUSA disputes that IBT's wholesale service quality had reached and maintained acceptable levels by the fourth quarter of 2002. McLeodUSA also disputed this in Docket 01-0662 with respect to a number of aspects of wholesale service quality. As described in Section III.A.7 above, even the Commission's conclusion in its May 2003 Order in Docket 01-0662 that the 01-0120 Remedy Plan could be replaced was subject to numerous conditions requiring IBT to take further actions to improve its wholesale service quality in particular areas.

(McLeodUSA Ex. 2.8, p. 7.) That determination was not made by the Commission until May 2003. (*Id.*)

The **third** problem with IBT's argument is that the 01-0120 Remedy Plan was in fact in effect during the fourth quarter of 2002, and was applicable to CLECs serving approximately **BEGIN CONFIDENTIAL XXXX END CONFIDENTIAL** of the total CLEC access lines utilizing IBT's wholesale services during that period. (Staff Ex. C, p. 5.) IBT made significant remedy payments to CLECs and the State of Illinois under the terms of the 01-0120 Remedy Plan during this period, which provided a clear economic signal to IBT that its wholesale service quality performance needed to improve. (Staff Ex. A, pp. 11-12.) There is no way for the Commission to determine in hindsight if IBT's wholesale service quality performance would have been at the level it was at in the fourth quarter of 2002 if IBT had not been operating under the 01-0120 Remedy Plan during that period. (McLeodUSA Ex. 2.0, p. 28; McLeodUSA Ex. 2.8, p. 8.) In fact, given that IBT was making remedy payments in accordance with the 01-0120 Remedy Plan throughout this period, it is reasonable to conclude that the 01-0120 Remedy Plan strongly incentivized IBT to provide good quality wholesale service. (McLeodUSA Ex. 2.0, pp. 28-29.) This is not only McLeodUSA's view; it is also the conclusion reached by an unbiased observer, Mr. McClerren of the Commission Staff. He testified that the 01-0120 Remedy Plan provided economic signals that motivated IBT to improve its wholesale service. (Staff Ex. A, pp. 11-12; Staff Ex. C, pp. 2-4, 6.)

b. Other Incentives IBT Contends it Had to Provide Good Quality Wholesale Service if the 01-0120 Remedy Plan Were Not in Effect During the Fourth Quarter 2002

IBT witness Mr. Ehr contended that even if the 01-0120 Remedy Plan were not in effect during the October-December 2002 period, IBT had other, sufficient incentives during that time to provide high quality wholesale service. (AT&T Ill. Ex. 104.0, p. 4.) The incentives he

claimed were the following: (1) IBT always seeks to provide high quality service so it can be recognized as a quality telecommunications provider; (2) IBT faced the possibility that any CLEC that thought it was receiving poor service could file a complaint; (3) IBT had other remedy plans in effect during the fourth quarter 2002 and the desire to avoid remedy payments under those plans provided incentives for good performance; and (4) during the fourth quarter 2002 IBT was motivated by the desire to obtain Section 271 authority. (*Id.*, pp. 4-5.) Like IBT's arguments about its wholesale quality in the fourth quarter 2002, evaluating the actual strength of these incentives is a hypothetical exercise, because IBT was in fact subject to the 01-0120 Remedy Plan during the fourth quarter of 2002 with respect to a very substantial portion of its CLEC lines in service. (Staff Ex. C, p. 5; McLeodUSA Ex. 2.8, pp. 5-6.)

In any event, McLeodUSA submits that the evidence pertaining to the impacts and sufficiency of these other incentives, as summarized in Section III.B.4 above, demonstrates that the four incentives testified to by Mr. Ehr are by no means sufficient to warrant the Commission reversing its decision in the Order on Reopening and concluding now that the 01-0120 Remedy Plan did not need to be in effect during the October-December 2002 period. To recapitulate:

- There is substantial evidence that wholesale service quality improves when IBT (or any ILEC) is subject to specific economic consequences for failing to meet specified performance benchmarks, and that the incentives for maintaining and improving wholesale service quality are greater when those economic consequences are greater. (*See* Section III.B.4.a above.) Further, the argument that the desire to be known as a good quality service provider obviates the need for a wholesale remedy plan is not supported by economic theory (*see id.*) or, perhaps more importantly, by common sense, which the Commission is not required to set aside while considering IBT's argument.
- The evidence shows that from the CLEC's perspective, having the ability to file a complaint over poor wholesale service quality is no substitute for an effective wholesale remedy plan. (*See* Section III.B.4.b above.) The complaint process is an unattractive option because it involves high administrative and management costs, can be lengthy, can present difficult issues of proof of monetary harm, and provides no certainty of recovery. In contrast, a wholesale remedy plan provides

witness Mr. McClerren stated, the 01-0120 Remedy Plan “presented a more significant economic incentive to SBC Illinois than other remedy plans offered to CLECs for wholesale services.” (Staff Ex. C, p. 6.)

- Finally, while the objective of obtaining Section 271 authority does provide some incentive towards better quality wholesale service, it is by no means a sufficient incentive to warrant doing without a wholesale remedy plan. The remedy plan provides explicit financial penalties (outbound payments) for subpar performance; the Section 271 process does not. The remedy plan provides explicit financial incentives to IBT on a monthly basis, while Section 271 approval is a long-term process that lacks the immediacy of the remedy plan. Further, the remedy plan provides compensation to CLECs in the form of liquidated damages, thereby explicitly recognizing that when IBT misses performance measures, the CLECs are harmed, and making the CLECs whole for IBT’s subpar performance. The Section 271 approval process does not provide for any compensation to CLECs. (See Section III.B.4.d above.)

Additionally, despite (or regardless of) the presence of these other incentives cited by Mr. Ehr, the Commission, at the end of the fourth quarter of 2002, decided in its final Order in the IBT Alt Reg case that the 01-0120 Remedy Plan needed to *continue in effect* until IBT had actually *obtained* a favorable Section 271 recommendation from the Commission.

For all these reasons, which were fully articulated in the record – and for the reason that it is impossible for the Commission to in fact know if the incentives cited by Mr. Ehr would have been sufficient to incent IBT to a satisfactory level of wholesale service quality in the fourth quarter of 2002 had the 01-0120 Remedy Plan not been in effect – the incentives cited by IBT are not sufficient to warrant the Commission reversing its decision in the Order on Reopening and concluding now that the 01-0120 Remedy Plan did not need to be in effect during the October-December 2002 period.

V. THE ALJ ERRONEOUSLY EXCLUDED PORTIONS OF THE TESTIMONY AND EXHIBITS OF MCLEODUSA WITNESS JULIA REDMAN-CARTER

McLeodUSA witness Julia Redman-Carter testified in this remand proceeding at the February 23, 2006 hearing. At the conclusion of her testimony, Ms. Redman-Carter’s prepared

testimony and accompanying exhibits were offered into evidence. No party objected to the admission of Ms. Redman-Carter's prepared testimony and exhibits, and counsel for IBT affirmatively stated "no objection." (Tr. 384.) However, despite the fact that no party had objected to the admission of Ms. Redman-Carter's prepared testimony and exhibits, the ALJ, on her own initiative, refused to admit portions of Ms. Redman-Carter's prepared direct testimony (McLeodUSA Ex. 2.0) and McLeodUSA Exhibits 2.2 through 2.7. The portion of the prepared testimony that was stricken was McLeodUSA Exhibit 2.0, page 11, line 238, through page 24, line 553. The excluded McLeodUSA Exhibits 2.2-2.7 contained pertinent excerpts from (and, in some cases, the entirety of) the prepared testimonies in the IBT Alt Reg case of Government and Consumer Intervenors witness Charlotte TerKeurst (Ex. 2.2), McLeodUSA witness Rod Cox (Ex. 2.3), Staff witness Sam McClerren (direct (Ex. 2.4) and rebuttal (Ex. 2.5)), AT&T witness Cate Conway Hegstrom³⁹ (Ex. 2.6), and IBT witness J. Thomas O'Brien (Ex. 2.7). These testimonies from the IBT Alt Reg case addressed the need to incorporate a wholesale performance remedy plan into IBT's alternative regulation plan and to continue the remedy plan in effect after the expiration of merger Condition 30 in October 2002. The excluded portions of Ms. Redman-Carter's direct testimony (i) described the subject matter of, and quoted from, the testimony that was provided in McLeodUSA Exhibits 2.2 through 2.7 (page 11, line 226 – page 19, line 434); (ii) summarized the positions taken by Staff, AT&T and McLeodUSA on this topic in their post-hearing briefs in the IBT Alt Reg case (page 19, line 435 – page 20, line 464); (iii) summarized the Commission's conclusion on this topic in its final Order in the IBT Alt Reg case (page 20, line 465 – page 21, line 482); and (iv) summarized testimony given in the initial hearings in this docket by various witnesses, including Mr. Cox, Mr. McClerren, Ms. Moore, Dr.

³⁹In this discussion, AT&T refers to the entity that operated as a CLEC in Illinois prior to the 2005 merger of SBC Communications and AT&T Corp.

Kalb and Dr. Jackson (*see* Section III.B.1 above) as to why IBT’s “Texas” remedy plan was inadequate, why a new wholesale remedy plan needed to be adopted in this docket, and why the wholesale remedy plan being adopted in this case needed to continue in effect after October 8, 2002 (page 21, line 483 – page 24, line 553).

The ALJ excluded this testimony on her own initiative, even though no party objected to the admission of any portion of Ms. Redman-Carter’s testimony and exhibits when offered into evidence. (Tr. 384.) The ALJ expressed several reasons over the course of a lengthy discussion as to why she had “a problem with” (Tr. 384) the testimony and exhibits she struck. However, her principal reasons seemed to be (i) the testimony was double hearsay (*see* Tr. 394-395) and (ii) this evidence was not needed in the record because the ALJ believed that the Commission’s final Order in the IBT Alt Reg case, and the Appellate Court opinion in IBT’s appeal of that Order,⁴⁰ contained adequate summaries of the testimony and positions from the IBT Alt Reg case that could be cited for briefing purposes in this case. (Tr. 387.)

For the reasons set forth below, the ALJ’s ruling was erroneous. The Commission should overturn this evidentiary ruling, should direct that the excluded testimony and exhibits be admitted into the record, and should take the portions of Ms. Redman-Carter’s direct testimony and her exhibits that were stricken by the ALJ into account in reaching its determination in this proceeding.⁴¹

A. The Excluded Testimony and Exhibits Are Admissible To Prove The Truth of the Matter Contained Therein.

The portions of Ms. Redman-Carter’s direct testimony, and McLeodUSA Exhibits 2.2-2.7, that the ALJ excluded from the record (despite the lack of objection from any party) are

⁴⁰*Illinois Bell Tel. Co. v. Commerce Commission*, 352 Ill. App. 3d 630, 640-41 (3d Dist. 2004).

⁴¹An offer of proof of the excluded testimony and exhibits was made at the hearing. (Tr. 398.)

admissible to prove the matter contained therein. McLeodUSA Exhibits 2.2-2.7 consisted of opinion testimony from the IBT Alt Reg case as to why the performance remedy plan adopted in Docket 01-0120 should be incorporated into IBT's Alt Reg plan and should continue beyond the expiration date of merger Condition 30. The admissibility of this testimony is supported by the fact that this exact same testimony was relied upon by the Commission in its December 30, 2002 Order in the IBT Alt Reg case. In that case, the Commission concluded that the 01-0120 Remedy Plan should continue in effect (even though the expiration date of Condition 30 had passed), as part of IBT's alternative regulation plan, until a different wholesale performance remedy plan was adopted in the Section 271 proceeding. Further, as discussed in Sections III.A.6 and III.B.2 above, the Appellate Court, in IBT's appeal of the December 30, 2002, order, held that the testimony contained in McLeodUSA Exhibits 2.2-2.7 was substantial evidence that supported the Commission's decision to continue the 01-0120 Remedy Plan in effect.⁴² Since the issue the Commission decided in its December 30, 2002 Order in the IBT Alt Reg case is the same issue being litigated in this proceeding – namely, whether the 01-0120 Remedy Plan should have continued in effect after the expiration date of merger Condition 30 – and the Commission has already relied on this testimony to reach a decision that the 01-0120 Remedy Plan should continue in effect after the Condition 30 expiration date -- this testimony should be included in the record in this case.

B. The Commission's Rules of Practice and the Illinois Administrative Procedure Act Permit the Admission of the Excluded Testimony and Exhibits Even If They Are Hearsay.

Even if the excluded testimony and exhibits are regarded as hearsay, as the ALJ stated, they can be admitted pursuant to Section 200.610(c) of the Commission's Rules of Practice (83

⁴²*Illinois Bell Tel. Co. v. Commerce Commission*, 352 Ill. App. 3d 630, 640 (3d Dist. 2004).

Ill. Adm. Code §200.610(c)), which states that evidence not otherwise admissible under the rules of evidence applicable in the circuit court “may be admitted if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.” This provision is not just a creation of the Commission; rather, it tracks the language of Section 10-40 of the Illinois Administrative Procedure Act (“IAPA”), 5 ILCS 100/10-40, which states that evidence not admissible under the rules of evidence as applied in the circuit courts “may be admitted (except where precluded by statute) if it is of a type commonly relied on by reasonably prudent men in the conduct of their affairs.”⁴³ Thus, the General Assembly has made the judgment that such evidence is admissible in administrative proceedings in Illinois.

In *Metro Utility v. Commerce Comm’n*, 193 Ill. App. 3d 178, 184-185 (2d Dist. 1990), the Appellate Court stated that Section 10-40 of the IAPA creates an exception to the rule against admission of hearsay, where the hearsay is reliable. The Court affirmed the Commission’s admission of hearsay evidence (information obtained by a Staff member from an employee of another agency and cited in his testimony to support his position), where the Commission had concluded that the information obtained from the other agency could be relied on by reasonably prudent persons.

There can be no question that the evidence the ALJ excluded in this case satisfies the requirements of Section 200.610(c) of the Rules of Practice and Section 10-40 of the IAPA. As described above, this evidence has *already* been relied on by the Commission in the IBT Alt Reg case to decide essentially the same question presented in this case, and the Commission’s reliance was upheld by the Appellate Court. Further, no party objected to the admission of this

⁴³Further, Section 10-101 of the PUA (220 ILCS 5/10-101) states that in the conduct of all investigations, inquiries and hearings before the Commission, the provisions of the IAPA shall be applicable and the Commission’s rules shall be consistent therewith.

evidence, and there was no question raised as to the authenticity of the testimony contained in McLeodUSA Exhibits 2.2-2.7.⁴⁴

C. The Commission’s Rules of Practice Allow the Commission to Take Administrative Notice of the Excluded Testimony and Exhibits and Thereby Include Them in the Record.

These excluded testimony and exhibits can also be admitted into the record by the Commission taking administrative notice of them. Under Section 200.640(a)(2) of the Commission’s Rules of Practice, administrative notice may be taken of “transcripts, exhibits, pleadings or any other matter contained in the record of other docketed Commission proceedings.” Under Section 200.700 of the Commission’s Rules of Practice, the “record in Commission proceedings” may include matters of which notice is taken. While McLeodUSA acknowledges that Section 200.640(b) of the Rules of Practice states that “[r]equests for administrative notice of transcripts, exhibits or pleadings . . . contained in the record of other docketed Commission proceedings are discouraged,” nonetheless this testimony from the IBT Alt Reg case is directly relevant to the issue in this case for the reasons described earlier, and in fact was *relied on* by the Commission in the IBT Alt Reg case to decide the same issue. If the testimony and exhibits that were excluded in this case cannot be admitted under Section 200.640(a) of the Rules of Practice, there will *never* be testimony or exhibits from one

⁴⁴McLeodUSA acknowledges that the stricken portions of Ms. Redman-Carter’s testimony in which she summarized and quoted from the IBT Alt Reg case testimony that was provided as Exhibits 2.2-2.7 was itself hearsay. However, since the full texts of the testimonies she summarized and quoted were provided in McLeodUSA Exhibits 2.2-2.7, the fact that Ms. Redman-Carter’s testimony summarizing those exhibits was hearsay does not warrant exclusion of her testimony – any inaccuracies or incompleteness in her summaries and discussion of the testimony can be addressed by comparison to the actual IBT Alt Reg case testimony included in McLeodUSA Exhibits 2.2-2.7, and could have been exposed through cross-examination, had any party elected to cross Ms. Redman-Carter on this topic.

Commission proceeding that can be admitted in a second proceeding, and this provision of Section 200.640(a) ought to be expunged.⁴⁵

In excluding McLeodUSA Exhibits 2.2-2.7, the ALJ stated that she was not “supposed to” take “judicial notice . . . of facts that are not commonly known or readily verifiable from sources of indisputable accuracy when you can’t cross-examine the author.” (Tr. 385.) To support this proposition, she cited *Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529, 541-42 (1st Dist. 2003). However, this case fails to support the ALJ’s ruling, and is readily distinguishable. *Cook County Board of Review* was an appeal from a decision of the Property Tax Appeal Board (“PTAB”) in which the PTAB, after the close of the administrative hearing, had taken official notice of sales ratio studies generated by the Department of Revenue. (*Id.* at 541.) These studies were not offered by any of the parties to the PTAB proceeding, but the PTAB used the studies to support its final decision. (*Id.* at 541-542.) The Appellate Court ruled that the Department of Revenue’s sales ratio studies were outside of the PTAB’s “specialized knowledge or expertise.” *Id.* at 541, *citing* 86 Ill. Adm. Code 1910.90(i).

Here, in contrast (i) the evidence in question was offered by a party to the case, (ii) notice that the evidence would be offered was given at the outset of the case (in the CLEC Prehearing Memorandum) and it was then presented in direct testimony, thereby providing an opportunity

⁴⁵Having administrative notice taken of the exhibits from the IBT Alt Reg case is not an idea that McLeodUSA cooked up after the ALJ excluded these exhibits. In the CLEC Pre-Hearing Memorandum that was filed at the outset of this remand proceeding, McLeodUSA and the other CLECs included copies of the testimony that was later submitted as McLeodUSA Exhibits 2.2-2.6, summarized this testimony, and stated that it planned to offer copies of this testimony into evidence in this case, either as attachments to its witness’s testimony or through a motion to take administrative notice pursuant to 83 Ill. Adm. Code § 200.640. McLeodUSA also pointed out that in the first remand proceeding in this docket, it had advocated taking administrative notice of the evidence from the IBT Alt Reg case on the need for the 01-0120 Remedy Plan to continue in effect after October 8, 2002. (CLEC Pre-Hearing Memorandum, pp. 21-22.)

for rebuttal, and (iii) the evidence was not obtained from another agency, but is from the record of this same agency, in a proceeding in which it was offered on the same issue, relied on by the Commission to decide that issue, and held by the Appellate Court to constitute substantial evidence to sustain the Commission's decision. The evidence in question here was certainly *within* the Commission's "specialized knowledge or expertise. Moreover, there is no question as to the source or accuracy of McLeodUSA Exhibits 2.2-2.7; and since they were offered in the IBT Alt Reg case, to which IBT was a party, on the same issue for which they are offered in this case, IBT had full and fair opportunity in that case to cross-examine the witnesses whose testimony comprises McLeodUSA Exhibit 2.2-2.6. Finally, in this case there is a regulation of the Commission that expressly allows taking notice of the evidence in question and including it in the record of this case. By her ruling, the ALJ -- whose authority to preside over this case comes from the Commission -- essentially stated that she is free to disregard the Commission's Rules of Practice.

D. The Excluded Testimony and Exhibits are Admissible To Show Information That Was Available to the Commission in October 2002 When It Decided the 01-0120 Remedy Plan Should Be Extended Beyond October 8, 2002.

There is a second purpose for admitting the excluded testimony and exhibits, even if they are not admitted for the truth of the matter contained therein (i.e., the need to continue the wholesale remedy plan adopted in this docket in effect beyond October 8, 2002). That purpose is to show the information that was available to the Commission in October 2002, when it decided that the 01-0120 Remedy Plan should continue in effect beyond October 8, 2002. This point is discussed in more detail in Section IV.B.1 above, where we point out that at the time the Commission issued the Order on Reopening in this docket extending the 01-0120 Remedy Plan beyond October 8, 2002, it also had before it for decision the same issue in the IBT Alt Reg case,

including the evidence from that docket on this issue, the parties' briefs, the ALJ's Proposed Order and the parties' briefs on exceptions. The testimony from the IBT Alt Reg case on the need to continue the remedy plan adopted in this docket in effect beyond October 8, 2002 was information that was available to the Commission, when it issued the Order on Reopening herein, to support a decision to continue the 01-0120 Remedy Plan in effect. Further, as pointed out earlier, the Commission relied on this evidence for exactly this purpose in its December 2002 Order in the IBT Alt Reg case. Admitting the excluded testimony and exhibits for this purpose obviates the "hearsay" concern expressed by the ALJ because the testimony and exhibits would be admitted not for the truth of the matter contained in them but rather to show what information was available to the Commission on the remedy plan issue, and under consideration, at the time it issued the Order on Reopening.⁴⁶

E. McLeodUSA Exhibits 2.3 (Cox), 2.4 (McClerren) and 2.5 (McClerren) Should Be Admitted Even if the Other Excluded Exhibits Are Not Admitted.

McLeodUSA Exhibits 2.3 (the testimony of McLeodUSA witness Rod Cox in the IBT Alt Reg case), 2.4 (the direct testimony of Staff witness Sam McClerren in the IBT Alt Reg case) and 2.5 (the rebuttal testimony of Mr. McClerren in the IBT Alt Reg case) should be admitted even if McLeodUSA Exhibits 2.6 and 2.7 are not admitted. Mr. Cox's testimony from the IBT Alt Reg case should be admitted because, in that case, he acted as McLeodUSA's representative. McLeodUSA should be entitled to use Mr. Cox's testimony from the IBT Alt Reg case to demonstrate that in that case, McLeodUSA advocated the ongoing need for a wholesale performance remedy plan and the need to continue the remedy plan that would be adopted in Docket 01-0120 in effect after the expiration date of merger Condition 30. McLeodUSA

⁴⁶As shown in Sections V.A. B and C above, the hearsay concern is not a valid basis for excluding the testimony and exhibits in question from the record.

Exhibits 2.4 and 2.5 constitute Mr. McClerren's testimony from the Alt Reg case on the same issue that is involved in the instant proceeding, and should be admitted because he is a witness in the instant proceeding. In fact, when Mr. McClerren testified at the hearing in this case, he ratified that he had given testimony in the IBT Alt Reg case that was consistent with his recommendation in Docket 01-0120 that the 01-0120 Remedy Plan needed to, and should, be continued in effect beyond October 8, 2002. (Tr. 420-22.) Further, any party was free to cross-examine Mr. McClerren on any perceived inconsistencies between his position in this case and his position in the IBT Alt Reg case (although no party availed itself of the opportunity.)

F. Page 21, Line 483 Through Page 24, Line 553 of Ms. Redman-Carter's Testimony Discusses Testimony Filed Earlier in This Docket and Should Be Admitted Into the Record

Even if none of the other portions of Ms. Redman-Carter's direct testimony that were excluded by the ALJ are admitted into the record, page 21, line 483 through page 24, line 553 should be admitted. In this portion of her direct testimony, Ms. Redman-Carter simply summarizes the testimony of several witnesses that was given *in the initial proceedings in this docket* on the issues of what wholesale remedy plan should be adopted in this docket and of continuing the remedy plan that would be adopted in this docket in effect beyond October 8, 2002. All of the prior testimony she described in this part of her testimony was admitted into the record in the original hearings in this docket. As Ms. Redman-Carter attempted to explain at lines 547-553 (also stricken), these testimonies show that prior to October 1, 2002 (the date of the Order on Reopening), evidence and information was presented to the Commission which would support conclusions that (1) there was a need for a wholesale performance remedy plan for IBT to be in effect after October 8, 2002, and (2) if a wholesale remedy plan were to be in effect for IBT after October 8, 2002, that plan should be the 01-0120 Remedy Plan.

It is quite common in Commission proceedings for a witness to refer to, cite, describe and discuss the testimony of other witnesses in the same docket, in support of the first witness's position. That was all that Ms. Redman-Carter was doing at lines 483-553 of her direct testimony in this remand proceeding. Further, this docket is now in its third "round", and it was appropriate for Ms. Redman-Carter to attempt to summarize testimony previously presented in this docket on the specific issue in this second remand proceeding, as part of recounting the overall story of what has transpired in this docket on the issue of continuing the remedy plan beyond October 8, 2002. Finally, hearsay should not be a concern with respect to this portion of Ms. Redman-Carter's testimony, because the prior testimony she summarizes and discusses has already been admitted into the record and the opportunity was provided to cross-examine those witnesses. Therefore, even if none of the other portions of Ms. Redman-Carter's direct testimony that were excluded by the ALJ are admitted into the record, page 21, line 483 through page 24, line 553 should be admitted.

G. IBT Would Not Be Prejudiced By the Admission of the Excluded Testimony and Exhibits.

As noted previously, IBT – the party adverse to McLeodUSA in this remand proceeding – did not object to the admission of any portion of Ms. Redman-Carter's testimony and exhibits, and in fact IBT's counsel affirmatively stated "no objection" when asked by the ALJ. (Tr. 384.) In any event, admission of the excluded testimony and exhibits of Ms. Redman-Carter is not unfair or prejudicial to IBT, for two reasons (in addition to IBT's affirmative non-objection). First, this testimony was offered (and admitted) in the IBT Alt Reg case for the same purpose and on the same issue that it is being offered in this case, namely, to show that the remedy plan adopted in Docket 01-0120 should remain in effect beyond the expiration date of merger Condition 30. On this issue, IBT had the opportunity to present rebuttal testimony to these

witnesses and to cross-examine them in the Alt Reg case. In fact, McLeodUSA's Exhibit 2.7 is IBT's own rebuttal testimony on the issue from the Alt Reg case.⁴⁷

Second, the testimony from the IBT Alt Reg case that constituted McLeodUSA Exhibits 2.2-2.6 was submitted as part of McLeodUSA's direct testimony filing in this remand proceeding; and even before that was referred to in the CLEC Prehearing Memorandum (in a section captioned "Evidence That Joint CLECs Will Submit in This Remand Proceeding), with copies attached to the CLEC Prehearing Memorandum. Thus, IBT had notice and a full opportunity to present rebuttal in this proceeding to this evidence. Indeed, IBT witness Mr. Ehr, in his rebuttal testimony, did attempt to rebut this evidence.⁴⁸ (AT&T Ex. 104.1C, pp. 2-3.) IBT had, and took, the opportunity to present rebuttal testimony stating why it believes the testimony from the IBT Alt Reg case does not provide good reason for the Commission to determine that the 01-0120 Remedy Plan should be continued in effect beyond October 8, 2002. Therefore, IBT would not be prejudiced by the admission of the portions of Ms. Redman-Carter's direct testimony or McLeodUSA Exhibits 2.2-2.7 that the ALJ excluded from the record.

⁴⁷McLeodUSA believes that McLeodUSA Exhibits 2.2-2.7 comprise all of the pre-filed testimony of Staff, intervenor and IBT witnesses from the IBT Alt Reg case on the issue of whether the wholesale remedy plan adopted in Docket 01-0120 should be continued in effect beyond October 8, 2002. However, if IBT had wished to offer into the record of this proceeding any other testimony from the IBT Alt Reg case on this issue, or any transcripts from that case of cross-examination of any of the witnesses whose testimony was included in McLeodUSA Exhibits 2.2-2.7, McLeodUSA would not object to their inclusion.

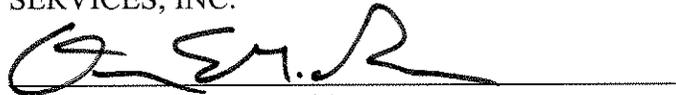
⁴⁸After striking the portions of Ms. Redman-Carter's testimony and exhibits at issue here, the ALJ also struck the portions of Mr. Ehr's testimony that responded to it. (Tr. 411-415.) If the excluded testimony and exhibits of Ms. Redman-Carter are admitted into the record, the stricken portion of Mr. Ehr's rebuttal testimony should also be admitted.

VI. CONCLUSION

The Commission should issue an order in this remand proceeding confirming its decision in the October 1, 2002, Order on Reopening that the 01-0120 Remedy Plan should continue in effect after October 8, 2002, until December 30, 2002.

Respectfully submitted,

MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC.



William A. Haas
Vice President and Associate General Counsel
McLeodUSA Incorporated
6400 C Street SW, PO Box 3177
Cedar Rapids, IA 52406-3177
(319)790-7295
whaas@mcleodusa.com

Owen E. MacBride
Elizabeth A. Blackwood
6600 Sears Tower
Chicago, IL 60606
(312) 258-5680
(312) 258-5773
omacbride@schiffhardin.com
eblackwood@schiffhardin.com

Its Attorneys