

**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
REPLY BRIEF**

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I. INTRODUCTION

This is the Reply Brief of McLeodUSA Telecommunications Services, Inc. (“McLeodUSA”). McLeodUSA is responding to the initial brief of Illinois Bell Telephone Company (“IBT”). IBT’s argument that the Commission had no authority to extend the wholesale performance remedy plan adopted in the original proceedings in this docket (the “01-0120 Remedy Plan”) beyond October 8, 2002, as the Commission in fact did in its October 1, 2002 Order on Reopening, is wrong, and has already been rejected by the Appellate Court in two separate decisions. (*See* McLeodUSA’s Initial Brief (“Init. Br.”), pp. 42-46.) Indeed, given the history of this proceeding, it is not open to the Commission to reach a different conclusion than the Appellate Court on this point, on which the Appellate Court’s rulings are law of the case. The Appellate Court undoubtedly would be perplexed if it were to be presented by another order of the Commission concluding that the Commission lacked legal authority to alter or amend earlier orders so as to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002.

IBT’s argument that the 01-0120 Remedy Plan should not be “retroactively reinstated” (which is a mischaracterization, since the 01-0120 Remedy Plan was in fact in effect during the October-December 2002 period and beyond) is entirely hindsight based, and fails to address whether the Commission had appropriate bases *at the time of the Order on Reopening* to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002. (*See* McLeodUSA Init. Br., pp. 48-57.) IBT has now been given, in accordance with the Appellate Court’s directive, the opportunity to present evidence it was not allowed to present at the time of the Order on Reopening to show why the 01-0120 Remedy Plan should not be extended, but IBT essentially failed to present such evidence. In any event, as McLeodUSA demonstrated in its Initial Brief, IBT’s hindsight-based arguments do not provide a basis for the Commission to now decide that

the 01-0120 Remedy Plan should not have been in effect for the October-December 2002 period. (See McLeodUSA Init. Br., pp. 57-64.)

Accordingly, as recommended by Commission Staff as well as by McLeodUSA and other parties, 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, to December 30, 2002.

II. RESPONSE TO IBT'S STATEMENT OF FACTS

For the most part, McLeodUSA does not take issue with the statements in the "Statement of Facts" section of IBT's Initial Brief (pp. 5-14), although the Statement of Facts in McLeodUSA's Initial Brief (pp. 5-42) is considerably more complete. However, McLeodUSA wishes to make clear that the use of the term "retroactively reinstated" in the statement at page 13 of IBT's Initial Brief describing McLeodUSA's position in the first remand proceeding in this docket is merely IBT's characterization, with which McLeodUSA disagrees. For example, here is the "Conclusion" from the joint Initial Brief on Remand of McLeodUSA and several other competitive local exchange carriers ("CLECs") in the first remand proceeding:

With respect to the issue of extension of the expiration date of the 01-0120 Remedy Plan beyond October 8, 2002, the ALJs and the Commission should conduct this remand proceeding in a manner that provides SBC due process in the resolution of this issue, in accordance with the recommendations of AT&T, MCI and McLeodUSA in this brief. At a minimum, the Commission must address the extension of the 01-0120 Remedy Plan from October 8, 2002 to December 30, 2002, the date when the Commission issued its Alt Reg Order incorporating the 01-0120 Remedy Plan into SBC's Alt Reg Plan. AT&T, MCI and McLeodUSA are confident that after considering the evidence compiled on this issue in this docket and the Alt Reg Docket, and any additional evidence submitted on remand, the Commission will conclude that the 01-0120 Remedy Plan should be extended beyond October 8, 2002.¹

¹Initial Brief on Remand of AT&T Communications of Illinois, Inc., TCG Illinois, TCG Chicago, TCG St. Louis, McLeodUSA Telecommunications Services, Inc. and Worldcom, Inc. d/b/a MCI, Jan. 14, 2004, pp. 14-15.

Review of McLeodUSA's pleadings in the first remand proceeding shows that McLeodUSA's position there was consistent with its position in this second remand proceeding (as discussed in detail in our Initial Brief): that at the time the Commission issued the October 1, 2002 Order on Reopening continuing the 01-0120 Remedy Plan in effect beyond October 8, 2002, it had an ample factual basis for that action. Further, as will be discussed in Section III.C below, IBT is incorrect in its characterization that as a result of the Appellate Court decisions in this case, the 01-0120 Remedy Plan was not in effect during the October-December 2002 period and would now have to be "retroactively reinstated" by the Commission.

III. AS THE APPELLATE COURT HAS HELD, THE COMMISSION HAD AUTHORITY UNDER SECTION 10-113(a) TO CONTINUE THE 01-0120 REMEDY PLAN BEYOND OCTOBER 8, 2002

A. Section 10-113(a) Is All the Authority the Commission Needed to Continue the 01-0120 Remedy Plan By Amending Its Prior Orders

McLeodUSA demonstrated at pages 42-47 of its Initial Brief that Section 10-113(a) of the Public Utilities Act ("PUA"), 220 ILCS 5/10-113(a), gave the Commission the authority to extend the 01-0120 Remedy Plan in effect beyond October 8, 2002, by amending prior orders which had provided that the requirements of merger Condition 30 would expire on that date, and that the Appellate Court has so held in the two appeals in this docket. Thus, as both Staff and McLeodUSA have pointed out, this is the law of the case for this proceeding. IBT's continued effort to construe these two Appellate Court decisions as having not held that Section 10-113(a) gave the Commission authority to continue the 01-0120 Remedy Plan in effect – including IBT's new-found "procedural" versus "substantive" distinction -- is unequivocally at odds with the Court's express ruling and must be rejected.

IBT has already argued to the Appellate Court that the Commission had no "substantive" authority to extend the 01-0120 Remedy Plan beyond October 8, 2002 – and lost. Specifically

(as discussed at pages 42-43 of McLeodUSA’s Initial Brief), in the first appeal IBT argued that the Commission had no authority to continue the 01-0120 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 30.² The Appellate Court did not agree with these arguments. As the Court made clear in its decision in the second appeal, “[a]n 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.”³ If the Appellate Court *had* agreed with IBT’s arguments that the Commission had no authority to continue the 01-0120 Remedy Plan in effect beyond the original expiration date of merger Condition 30, we would not be in this proceeding today – because the Court would simply have *reversed* the Commission’s Order on Reopening. That is, if the Court had agreed with IBT’s arguments that the Commission had no “substantive” authority to continue the 01-0120 Remedy Plan in effect, the Court would have had *no reason* to remand the case to the Commission, because the Commission would not have had the authority to do anything in the remand proceeding. In short, the Court would have found the Order on Reopening “void” – which this Commission (in the first Order on Remand) interpreted the Court as having ruled, but which the Court made clear, in its decision in the second appeal, it had not. (*See* McLeodUSA Init. Br., pp. 14, 44.)

Rather -- contrary to IBT’s arguments both then and now -- the Appellate Court in its decision in the first appeal held that Section 10-113(a) gave the Commission the authority to

²Appendix 1 to McLeodUSA’s Pre-Hearing Memorandum in this second remand proceeding consists of pages from IBT’s brief in the Appellate Court in the first appeal, so that the Commission can see that IBT in fact made these arguments in that appeal.

³*McLeodUSA Telecommunications Services, Inc. v. Commerce Commission*, Aug. 31, 2005, Slip opinion (“Slip op.”), p. 10 (“*McLeodUSA v. Commerce Commission*”).

continue the 01-0120 Remedy Plan in effect beyond October 8, 2002, by amending the terms of its prior orders that had created the October 8, 2002 expiration date in the first place.⁴ In its decision in the second appeal, the Appellate Court – in clear language that IBT studiously avoids mentioning in its Initial Brief⁵ – expressly confirmed that it 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 that remedy plan in effect beyond the originally-established termination date. The Court began its decision in the second appeal by describing its decision in the first appeal:

The basis for our ruling was that, *while the Commission had the authority to alter or amend its order pursuant to section 10-113(a) of the Public Utilities Act* [citations omitted], Illinois Bell’s right to procedural due process had been violated by the Commission’s failure to provide notice and a right to be heard. (*McLeodUSA. v. Commerce Commission*, Slip op., p. 2) (emphasis added).

Later in its decision, the Court (as noted above) stated:

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.” (*Id.*, p. 10) (emphasis added.)

⁴Of course, the error the Commission committed in the Order on Reopening, as the Appellate Court held, was that it failed to give IBT adequate notice of its intended actions and an opportunity to be heard as to why the terms of the prior orders should not be amended and the remedy plan should not thereby be extended beyond the originally-stated expiration date. McLeodUSA agrees that in its first decision the Appellate Court did not “endors[e] an extension” (IBT Init. Br., p. 18), but the Court’s decision in the first appeal was not based on the Commission lacking authority to extend the 01-0120 Remedy Plan. As noted above, if the Court had concluded the Commission lacked “substantive” authority to extend the 01-0120 Remedy Plan, it would not have remanded the case to the Commission for further proceedings; instead it would have just reversed outright.

⁵See, e.g., IBT’s Initial Brief at pp. 13-14 and 18-20.

Still later in its decision, the Court reiterated: “The Commission also clearly had the authority to issue the order on reopening pursuant to section 10--113(a) of the Utilities Act.” (*Id.*, p. 13.)

IBT’s “procedural-substantive” distinction has no basis in either of the Appellate Court’s decisions. IBT cites 343 Ill. App. 3d at 259 (the first decision) and page 11 of the slip opinion in *McLeodUSA v. Commerce Commission* (the second decision) (IBT Init. Br., p. 19), but there is nothing at the cited pages to support IBT’s argument that the Court did not decide that the Commission had “substantive” authority to continue the 01-0120 Remedy Plan in effect. In fact, all the Appellate Court stated at 343 Ill. App. 3d 259 was that IBT’s procedural due process rights had been violated by not giving notice and holding a hearing prior to issuing the Order on Reopening; and all the Court stated at page 11 of *McLeodUSA v. Commerce Commission* was that “the proper procedure on remand” was to hold a hearing and that the Commission erred by not holding a hearing for the purpose of deciding whether or not the remedy plan should have been extended beyond October 8, 2002. Nothing in the Court’s discussion at either of the places cited by IBT detracts from the Court’s clear holdings that the Commission had the authority to modify or amend prior orders so as to extend the 01-0120 Remedy Plan beyond the originally-established expiration date.

In any event, Section 10-113(a) *does* give the Commission the authority to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002, by modifying or amending the prior orders that had established that expiration date. The original source of the October 8, 2002 expiration date was the Commission’s Order in Docket 98-0555, which was issued pursuant to Section 7-204 of the PUA (220 ILCS 5/7-204). The Commission there decided that IBT should be required to place into effect a wholesale performance remedy plan (the terms of which were to be decided in a proceeding before the Commission if IBT and CLECs could not agree on those

terms), which was to expire three years after the date of that order (i.e., October 8, 2002). The Commission chose three years based on the facts and circumstances available to it at the time. However, the power granted to the Commission in Section 10-113(a) to (upon proper notice and opportunity for hearing) rescind, alter or amend a prior order encompasses *all* orders issued by the Commission under *any* section of the PUA. Section 10-113(a) states without qualification that the Commission may “rescind, alter or amend *any* rule, regulation, order, or decision made by it” (emphasis added).⁶ The Section further states that “Any order rescinding, altering, or amending a prior rule, regulation, order or decision shall, when served upon the public utility affected, *have the same effect as* herein provided for original rules, regulations, orders or decisions.” (emphasis supplied.)

The General Assembly could, of course, by specific provision in an individual section of the PUA that authorizes the Commission to issue orders on a particular topic, exempt orders issued pursuant to that section from subsequent rescission, alteration or amendment pursuant to Section 10-113(a). However, the General Assembly has not done so in Section 7-204.⁷ IBT asserts that under Section 7-204(f), the Commission may impose “terms, conditions or requirements” *only* “[i]n approving any proposed reorganization pursuant to this Section” (IBT Init. Br., p. 17), but the word “only” is supplied by IBT and is not found in the statute. In any

⁶This has been recognized by the courts. *See, e.g., Black Hawk Motor Transit Co. v. Commerce Commission*, 398 Ill 542, 553 (1947) (noting that the power of rescission, alteration or amendment granted in Section 10-113 “applies to any rule, regulation, order or decision of the commission . . .”); *Quantum Pipeline Co. v. Commerce Commission*, 304 Ill. App. 3d 310, 318 (3d Dist. 1999) (“In section 10-113, the Commission is granted the power of rescission, alteration or amendment to any rule, regulation, order or decision of the Commission . . .”).

⁷Section 7-204 was very significantly amended by the General Assembly in 1997, in P.A. 90-561, effective December 16, 1997, and Section 10-113 was amended in the same Public Act. The General Assembly had the opportunity to amend Section 7-204 in 1997 to exempt it from the Commission’s authority under Section 10-113(a) to rescind, alter or amend prior orders, but did not to so.

event, the statutory language quoted by IBT falls far short of exempting orders issued pursuant to Section 7-204 from the broad authority conferred on the Commission by Section 10-113(a) to “rescind, alter or amend *any* rule, regulation, order, or decision made by it” (emphasis added).

Further, review of other cases in which the Commission’s powers under Section 10-113(a) have come into play shows that it is not simply a “procedural” section, and that the Commission does not require a separate basis of “substantive” authority to rescind, alter or amend, pursuant to Section 10-113(a), an order previously issued under another section of the PUA. For example, in the following cases, the Commission had issued orders that the court found rescinded, altered or amended previously-issued orders that had granted certificates of public convenience and necessity to utilities or carriers: *Union Electric Co. v. Commerce Commission*, 39 Ill. 2d 386 (1968); *Black Hawk Motor Transit Co. v. Commerce Commission*, 398 Ill 542 (1947); and *Quantum Pipeline Co. v. Commerce Commission*, 304 Ill. App. 3d 310 (3d Dist. 1999). These cases presented situations comparable to the situation IBT claims exist in this case, in that in these prior cases the utility had proceeded to make investments in property, plant and equipment to serve the public in the area covered by, or otherwise to exercise the authority granted by, its certificate, or had acquired a property right in the certificate⁸; whereas here IBT claims that its parent proceeded with a major business transaction in reliance on the three-year expiration date of merger Condition 30.⁹

In each of these cases, the Court indicated that the action taken by the Commission constituted a rescission, alteration or amendment of the prior certificate order and was subject to

⁸See, e.g., *Quantum Pipeline*, 304 Ill. App. 3d at 317 (carrier had acquired a property right to build a pipeline when the Commission had issued its order granting a certificate).

⁹As discussed in Section III.B below, IBT’s contention is not credible and has not been supported by evidence in this proceeding.

the requirements of Section 10-113(a) (or its predecessor, Section 67 of chapter 111-2/3) so that notice and opportunity for hearing was required. In none of these cases did the Court hold that the Commission needed a separate basis of “substantive” authority to rescind, alter or amend its prior certificate order. The courts in these cases *did* point out that the Commission needed a substantive factual *basis* to rescind, alter or amend its prior certificate order. (*See, e.g., Union Elec. Co.*, 39 Ill. 2d at 395; *Black Hawk Motor Transit*, 398 Ill. at 562.) In the context of the instant proceeding, that is the factual part of the case (addressed in Section IV.B of McLeodUSA’s Initial Brief and Section IV of this reply brief, below), and it is what the Appellate Court remanded this case for the Commission to determine, after notice and opportunity for hearing. As shown in Section IV.B of McLeodUSA’s Initial Brief, the Commission had at the time of issuing the Order on Reopening, and continues to have, a sufficient substantive, factual basis for continuing the 01-0120 Remedy Plan in effect for a limited period beyond the originally-specified termination date of merger Condition 30.

Finally, IBT has cited no legal authority, from either the PUA or case law, for its theory that Section 10-113(a) gives the Commission only “procedural” authority to rescind, alter or amend a prior order, and that the Commission must also have a separate source of “substantive” authority to rescind, alter or amend a prior order. Therefore, consistent with the two previous Appellate Court rulings in this case, the Commission must reject IBT’s argument.

B. IBT’s Estoppel Theory Has Already Failed in the Appellate Court and Must Be Rejected in This Proceeding

IBT contends that extension of the 01-0120 Remedy Plan beyond October 8, 2002 is barred by the doctrine of estoppel. (IBT Init. Br., pp. 17-18.) IBT made the same argument to the Appellate Court in the first appeal in this case and the Appellate Court ignored it. In fact, the argument at pages 17-18 of IBT’s Initial Brief is taken fairly directly from IBT’s initial brief to

the Appellate Court in the first appeal.¹⁰ Since the Appellate Court has already rejected IBT's estoppel argument, the Commission must reject it here as well.¹¹

In any event, IBT's estoppel argument is without merit. It is well-established that application of estoppel against the government is not favored. *Village of Wadsworth v. Kerton*, 311 Ill. App. 3d 829, 837 (2d Dist. 2000). Principles of estoppel apply to governmental bodies performing government functions (as the Commission did here, and as opposed to proprietary functions) only rarely (*City of Quincy v. Sturhahn*, 18 Ill. 2d 604, 614 (1960)), and only in "extraordinary or compelling circumstances" (*Monat v. County of Cook*, 322 Ill. App. 3d 499, 509 (1st Dist. 2001)), where to do so would not defeat the operation of public policy. *Metropolitan Water Reclamation Dist. of Greater Chicago v. Civil Serv. Bd.*, 291 Ill. App. 3d 488, 493 (1st Dist. 1997); *Lindahl v. City of Des Plaines*, 210 Ill. App. 3d 281, 295 (1st Dist. 1991). This is true even if a party has relied to its detriment on a government decision (which, as shown immediately below, IBT has not demonstrated it did). *Communications & Cable of Chicago v. Dep't of Revenue of Chicago*, 275 Ill. App. 3d 680, 688 (1st Dist. 1995). Additionally, the party seeking to assert equitable estoppel against a governmental entity must show that the entity made a misrepresentation with knowledge that the misrepresentation was untrue. *Community Landfill Co. v. Pollution Cont. Bd.*, 331 Ill. App. 3d, 1056, 1062 (3d Dist.

¹⁰See Appendix 1 to the Pre-Hearing Memorandum of McLeodUSA et al. in this remand proceeding, which contained excerpts from IBT's initial brief in the first appeal. See also McLeodUSA Init. Br., pp. 10-11 and 42-43. IBT also made the same estoppel argument in its appeal of the Commission's December 30, 2002 Order in Dockets 98-0252, 98-0335 & 00-0764 (Cons.) (the "IBT Alt Reg case") (see Appendix 2 to the Pre-Hearing Memorandum of McLeodUSA et al., which contains excerpts from IBT's initial brief in its appeal of the Order in the IBT Alt Reg case). The Appellate Court did not accept IBT's estoppel argument in that case, either.

¹¹IBT did not mention the "estoppel" argument in its prehearing memorandum in this remand proceeding; therefore, McLeodUSA did not know to address this argument in its initial brief.

2002); *Medical Disposal Services, Inc. v. Environmental Prot. Agency*, 286 Ill. App. 3d 562, 570 (1st Dist. 1996). IBT has not even alleged that this occurred in the instant case.

Further, in this case, even if principles of estoppel arguably applied in theory, IBT has failed to present evidence to show that it in fact is entitled to the benefit of estoppel. Estoppel is an equitable defense which must be supported by facts; a party seeking to claim estoppel has the burden of proving its elements by clear and convincing evidence. *Rothers Const., Inc. v. Centurion Indus., Inc.*, 337 Ill. App. 3d 629, 641 (4th Dist. 2003); *Community Landfill Co.*, 331 Ill. App. 3d at 1062 (plaintiff failed to support sufficient evidence of its claim of detrimental reliance); *Gersch v. Department of Prof. Regulation*, 308 Ill. App. 3d 649, 660 (1st Dist. 1999) (plaintiff failed to present evidence showing he detrimentally relied on the Department's erroneous instructions);¹² *Metromedia, Inc. v. Kramer*, 152 Ill. App. 3d 459, 468 (1st Dist. 1987) (plaintiff failed to present evidence of substantial loss due to its reliance on the government action); *LaSalle Nat. Bank & Trust Co. v. City of Chicago*, 128 Ill. App. 3d 656, 662-64 (1st Dist. 1984) (plaintiff failed to show any affirmative representations by City that permit would never be revoked or that it expended substantial sums in reliance on the City's action).

IBT has not made the requisite evidentiary showing here. Certainly, IBT has not presented any evidence to show that in either the Docket 98-0555 Order or the July 10, 2002 Order in this docket, the Commission misrepresented a material fact knowing at the time that it was untrue. Further, IBT makes the unsubstantiated assertion that its parent SBC Communications was "induced" to consummate the merger with Ameritech in 1999 by the Commission's action of limiting the term of merger Condition 30 to three years (IBT Init. Br., p. 17), and that consummation of the merger was an action "which would not have been made but

¹²In *Gersch*, which is cited by IBT at page 17 of its Initial Brief, the court did not find that estoppel applied against the government defendant.

for” the Commission’s limitation of Condition 30 to three years. (*Id.*, p. 18.) In other words, IBT is claiming that SBC and Ameritech *would not* have carried out the merger had the Commission specified Condition 30 would expire in, say, four years, or if SBC and Ameritech had known in 1999 that the wholesale remedy plan resulting from Condition 30 might be extended by an additional three months or even nine months.¹³ IBT has not provided any record citations for this contention, and it did not support this contention with any evidence. Mr. Ehr, IBT’s only witness, did not so testify; and in any event, given his position in the organization, he would not have been a competent or credible witness on this point. Similarly, IBT presented no evidence to support its conclusory allegation that in proceeding with the merger it “ma[de] great expenditures which would not have been made but for the affirmative action” of the Commission in limiting merger Condition 30 to three years. (IBT Init. Br., p. 18.)¹⁴

In fact, IBT’s contention is unbelievable on its face. Can the Commission envision any witness from SBC Communications at an appropriate level of authority testifying under oath that he or she never would have gone forward with the Ameritech merger if the duration of merger Condition 30 had been specified as 3.5 or four years in Docket 98-0555, or if he or she had known at the time that the wholesale remedy plan resulting from Condition 30 could be continued in effect for three months or nine months beyond the termination date specified in the Docket 98-0555 Order? Of course not. Moreover, any contention by IBT that it and its parent

¹³The effect of the Order on Reopening and the December 30, 2002 Order in the IBT Alt Reg case was to extend the expiration of the wholesale remedy plan resulting from merger Condition 30 by a total of approximately eight months, i.e., until implementation of the Commission’s May 13, 2003 final Order on Investigation in Docket 01-0662.

¹⁴Any claim by IBT that it was entitled to and did rely on the “certainty” of Condition 30 is further belied by the fact that IBT and its parent “accepted” the Docket 98-0555 merger Order and proceeded with the merger *without knowing the terms of the wholesale remedy plan that would ultimately result from Condition 30*. Those terms were not definitively established until after completion of this docket, which was a process provided for in the merger Order.

did not understand that IBT would not be subject to a wholesale remedy plan after October 8, 2002 would be similarly incredible. To the contrary, IBT and its parent had to have known that, at a minimum, IBT would be subject to a wholesale remedy plan until it successfully demonstrated to the Commission that IBT had satisfied the requirements for a favorable Section 271 recommendation (including a demonstration that IBT provided CLECs with non-discriminatory access to its Operations Support Systems (“OSS”)), and thereafter to a Section 271 “anti-backsliding” wholesale remedy plan.¹⁵ Indeed, on two occasions in this case IBT explicitly recognized that there could not be a “gap” period with no wholesale remedy plan, and offered to continue the “Texas” remedy plan in effect after October 8, 2002.¹⁶ (*See McLeodUSA Init. Br.*, pp. 7-8.) Further, IBT is charged with knowledge of the law, including Section 10-113.

Moreover, IBT’s contention that merger Condition 30 “induced” IBT’s parent to enter into the merger (*IBT Init. Br.*, pp. 17, 18) incorrectly characterizes Condition 30 and the consummation of the merger as a private transaction between the Commission and IBT and its parent. The Commission approved the proposed merger, but imposed conditions under Section 7-204(f), including Condition 30, to protect the interests of IBT’s customers (which include the CLECs) and the public, which is what Section 7-204(f) gave the Commission authority to do.¹⁷

¹⁵The Commission, on the other hand, would not have known at the time that as of October 2002, IBT would still be struggling to show that it met the Section 271(c) competitive checklist requirements and to show that it provided non-discriminatory wholesale service to CLECs in accordance with the agreed performance measures and benchmarks; or that that only remedy plan IBT was offering to continue in effect was the failed and rejected Texas Plan.

¹⁶The Commission, of course, rejected these proposals, since it had just found after extensive hearings culminating in its July 10, 2002 Order in this docket that the Texas Plan was inadequate. (*See McLeodUSA Init. Br.*, pp. 40-41, 50-53.) Indeed, as the Commission stated in the Order in Reopening, IBT was “attempt[ing] to revert to the remedy plan the Commission explicitly rejected on the basis of the hearings in this case.” (Order on Reopening, p. 3.)

¹⁷Section 7-204(f) states: “In approving any proposed reorganization pursuant to this Section the Commission may impose such terms, conditions or requirements as, in its judgment, are

Contrary to IBT's characterization, this is not an "inducement". To now conclude that the Commission is precluded from altering a condition imposed under Section 7-204(f) in order to protect the interests of IBT's customers and the public would defeat the operation of public policy, and therefore would violate one of the criteria for application of equitable estoppel against the government.

Further, the "notice of their acceptance" that the merger applicants filed after issuance of the Docket 98-0555 Order (IBT Init. Br., p. 18) was not the consummation of a contract with the Commission as IBT implies. Rather, it was necessary that the merger parties state that they would abide by the conditions in the Docket 98-0555 Order in order to be authorized by the Commission to proceed to close the merger transaction. Nor has the Commission been unjustly enriched by the fact that IBT's parent company proceeded to consummate the merger. Finally, IBT has cited nothing to show that the Commission would lose (or that IBT could have had any reasonable expectation the Commission would lose or forego) its authority to take actions to protect the interests of the public and of IBT's customers after October 8, 2002.

Estoppel is appropriate against the government only where it is necessary to prevent fraud or injustice. *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410, 431 (1996); *City of Quincy v. Sturhahn*, 18 Ill. 2d 604, 614 (1960); *W.L. Miller Co. v. Zehnder*, 315 Ill. App. 3d 799, 806 (4th Dist. 2000). IBT has not shown that there was any fraud, and has not presented evidence demonstrating that its legitimate expectations have been upset or that it relied to its detriment on the original term of merger Condition 30 by proceeding with the merger. The circumstances of

necessary to protect the interests of the public utility and its customers." Thus, in imposing conditions to its approval of a merger, the Commission is protecting the interests of the public and of the applicant's customers, not entering into a deal with the merger parties, as IBT seeks to characterize it.

this case simply do not present a “compelling” or “extraordinary” case that would justify estoppel against the Commission. *Monat v. County of Cook*, 322 Ill. App. 3d at 509.¹⁸

C. The 01-0120 Remedy Plan Was Lawfully in Effect from October 8, 2002 to December 30, 2002; the Commission Does Not Have to “Retroactively Reinstate” the 01-0120 Remedy Plan in this Remand Proceeding

In its decision in the second appeal in this proceeding, the Appellate Court clearly stated that the October 1, 2002 Order on Reopening *had extended* the 01-0120 Remedy Plan beyond October 8, 2002:

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. (*McLeodUSA v. Commerce Commission*, Slip op., pp. 10-11) (emphasis in original.)

In the above discussion, the Court was addressing the fact that the Commission, in the first remand proceeding, failed to consider whether the 01-0120 Remedy Plan should be extended because the Commission had believed, erroneously, that the first Appellate Court decision had rendered the Order on Reopening void and a nullity. (*Id.* at pp. 6-7, 10-11.)

Nonetheless, IBT contends that the effect of the Appellate Court’s reversal of the Order on Reopening in the first appeal was to somehow vacate the effectiveness of the 01-0120 Remedy Plan for the October-December 2002 period, so that the Commission would now have to retroactively reinstate it. (IBT Init. Br., pp. 4, 19.) IBT is incorrect. As the Appellate Court

¹⁸In the principal case cited by IBT, *Hickey v. Illinois Cent. R.R.*, 35 Ill. 2d 427 (1966) (IBT Init. Br., p. 18), the State and City were estopped to assert title in land granted to the railroad over 50 years earlier, where throughout that period the governmental entities had consistently disclaimed any interest in the land and acted as though it were owned in fee by the railroad, and the railroad had entered into other agreements premised on its fee title. In the other case cited by IBT, *People v. Hill*, 75 Ill. App. 2d 69, 75 (1st Dist. 1966) (IBT Init. Br., p. 18), the evidence showed that officials of the defendant village knowingly induced plaintiff to make substantial investments in acquiring property for redevelopment, which was to the benefit of the village, where village officials represented that the property would be rezoned but then failed to do so. (75 Ill. App. 2d at 75-76.)

stated in the second appeal in this case, “[t]he Commission clearly had the authority to issue the order on reopening pursuant to section 10-113(a);”¹⁹ this would be true even accepting IBT’s “procedural-substantive” distinction concerning Section 10-113(a). The Court further stated that the Order on Reopening was only voidable, not “void”. (*Id.*) Moreover, the Order on Reopening was not stayed pending appeal and thus was lawfully in effect during the October-December 2002 period (and was complied with by both IBT and the CLECs participating in it).²⁰ *See, e.g., Illinois Consolidated Tel. Co. v. Aircall Comms., Inc.*, 101 Ill.App.3d 767, 769 (4th Dist. 1981).²¹ The Appellate Court decisions have not changed the fact that the 01-0120 Remedy Plan was lawfully in effect during the October-December 2002 period. Only a decision by the Commission in this remand proceeding that it should not have extended the duration of the 01-0120 Remedy Plan beyond October 8, 2002, will cause the remedy plan to have not been in effect for the October-December 2002 period.²²

¹⁹*McLeodUSA v. Commerce Commission*, Slip op., p. 13.

²⁰The Commission denied IBT’s motion for a stay pending its appeal of the Order on Reopening (Docket 01-0120, Notice of Commission Action dated December 5, 2002), and IBT did not seek a stay pending appeal from the Appellate Court as it was entitled to pursuant to Supreme Court Rule 335(g) and Section 10-204 of the PUA (220 ILCS 5/10-204).

²¹In that case, the Court stated: “It is admitted here that no stay was ever sought. Therefore, the Commission’s order awarding a certificate to Aircall *remained in force* until the decision of the circuit court on December 15, 1980. As has been indicated, that decision reversed the Commission’s order. *At that juncture* the Commission’s order necessarily expired and the reversal order of the circuit court stood in its stead.” (*Id.*, p. 769 (emphasis supplied).) In the instant case, as of the date of the first Appellate Court decision (August 29, 2003), the 01-0120 Remedy Plan had already been replaced by the wholesale remedy plan adopted by the Commission in its May 13, 2003 final Order on Investigation in the Section 271 proceeding, Docket 01-0662.

²²As noted earlier, McLeodUSA agrees that the Appellate Court did not “endorse” the extension of the 01-0120 Remedy Plan (IBT Init. Br., p. 19), i.e., the Appellate Court did not conclude that the 01-0120 Remedy Plan *should* have been extended beyond October 8, 2002. That is what the Commission is supposed to determine on remand based on notice and opportunity for hearing.

In any event, IBT's argument that the Commission would have to now retroactively reinstate the 01-0120 Remedy Plan is just a bootstrapping effort in support of IBT's attempts to get the Commission to base its decision in this remand proceeding on hindsight-based, after-the-fact information, such as the Commission's comments in the May 13, 2003 final Order in Docket 01-0662. However, that would go beyond curing the error the Appellate Court found the Commission committed in issuing the Order on Reopening. Although the Commission had the authority to issue the Order on Reopening, it erred by failing to give IBT notice and opportunity for hearing prior to issuing the Order on Reopening which amended the expiration date of the 01-0120 Remedy Plan. *Illinois Bell Tel. Co. v. Commerce Commission*, 343 Ill App. 3d 249, 259-60; *McLeodUSA v. Commerce Commission*, Slip op., pp. 2, 10. Therefore, what IBT is entitled to in this remand proceeding is an opportunity to present evidence that it could have presented *at the time of* the October 1, 2002 Order on Reopening had it been given the opportunity to do so.

Obviously, on or about October 1, 2002, IBT could not have presented evidence of its actual wholesale service quality results for the months of October-December 2002; or of its three months (September-November 2002) of wholesale performance data that it did not submit to the Commission until January 17, 2003 (*McLeodUSA Ex. 2.8*, p. 10; Tr. 31-32); or of statements by the Commission in its Order issued on May 13, 2003 in Docket 01-0662. Yet this is the principal evidence on which IBT has relied in this remand proceeding.

D. Extension of the 01-0120 Remedy Plan for CLECs That Do Not Have Interconnection Agreements with IBT

At pages 15-16 of its Initial Brief, IBT argues that, based on the Appellate Court's decision in the first appeal in this docket, the Commission cannot require IBT to make the 01-

However, this is not the same thing as concluding that the Appellate Court had vacated the effectiveness of the 01-0120 Remedy Plan for the October-December 2002 period.

0120 Remedy Plan available for the October-December 2002 period for CLECs that do not have interconnection agreements with IBT. McLeodUSA does not dispute this point, and, based on the Appellate Court decision in the first appeal, did not even consider it a point that needed to be discussed in this remand proceeding. Should the Commission decide to address this topic in its order in this remand proceeding, McLeodUSA agrees that the correct formulation is the language used in the Commission's April 20, 2005 Order on Remand in the IBT Alt Reg case (quoted at page 15 of IBT's Initial Brief): "The 01-0120 Remedy Plan . . . shall not be available . . . to CLECs that do not have interconnection agreements with [AT&T Illinois]."

McLeodUSA does not, however, agree with IBT's statement at page 15 of its Initial Brief that "[t]he Commission has no legal authority to extend the 0120 plan for CLECs that do not have a right to remedies under an interconnection agreement with AT&T Illinois." That statement is not a correct characterization of, and goes beyond, the Appellate Court's rulings on this point in the first appeal from this docket²³ and in the appeal of the December 30, 2002 Order in the IBT Alt Reg case.²⁴ The Appellate Court's specific holding on this point in the first appeal in this docket was: "We find that the Commission had no authority to allow CLECs that 'do not have an Interconnection Agreement with Ameritech' to 'have the benefit of the Remedy Plan.'" (343 Ill. App. 3d at 260.) The language used by the Commission in its Order on Remand in the IBT Alt Reg case (quoted above) correctly implements the Appellate Court's rulings on this point. Further, with respect to any CLEC that has (or had during the relevant time period) an interconnection agreement with IBT, Attachment A to the Commission's July 10, 2002 Order was a complete interconnection agreement amendment comprising the terms of the 01-0120 Plan

²³*Illinois Bell Tel. Co. v. Commerce Commission*, 343 Ill. App. 3d 249, 257-58, 260 (3d Dist. 2003).

²⁴*Illinois Bell Tel. Co. v. Commerce Commission*, 352 Ill. App. 3d 630 (3d Dist. 2004).

as adopted by the Commission in that Order. The Commission's Order directed that the 01-0120 Remedy Plan "shall be incorporated into all currently effective Interconnection Agreements in the form of an Amendment to the Interconnection Agreement," with the 01-0120 Remedy Plan to be effective for a CLEC on the date the CLEC submitted an "opt-in" notice to IBT as specified in the Order. (July 10, 2002 Order, p. 18.)

Finally, McLeodUSA notes that the inclusion in the order in this remand proceeding of a finding that "the 01-0120 Remedy Plan shall not be available to CLECs that do not have interconnection agreements with IBT" does not address the question of whether IBT is entitled to recovery of remedy payments it made pursuant to the 01-0120 Remedy Plan during the October-December 2002 period to a CLEC that did not have an interconnection agreement with IBT but rather took the 01-0120 Remedy Plan pursuant to tariff. The disposition of such payments is a matter to be resolved in individual dispute resolution proceedings between IBT and the CLEC, and is outside the scope of this remand proceeding. (*See McLeodUSA v. Commerce Commission*, Slip op., p. 15.)

IV. THE COMMISSION HAD AND CONTINUES TO HAVE SUFFICIENT FACTUAL BASIS FOR MAINTAINING THE 01-0120 REMEDY PLAN IN EFFECT BEYOND OCTOBER 8, 2002; IBT's ARGUMENTS TO THE CONTRARY ARE UNPERSUASIVE AND SHOULD BE REJECTED.

IBT argues that the Commission should not extend the 01-0120 Remedy Plan "as a matter of policy." (IBT Init. Br., p. 20.) Except for two dismissive sentences at page 30 of its Initial Brief, IBT fails to address any of the factual information and circumstances that were available to and confronted the Commission as of the entry of the Order on Reopening on October 1, 2002. As McLeodUSA showed in its Initial Brief, at the time it issued the Order on Reopening, the Commission had an adequate and appropriate factual and policy basis to determine to continue the 01-0120 Remedy Plan in effect beyond October 8, 2002. (*See*

McLeodUSA Init. Br., pp. 48-57.) Having now been given the opportunity to present evidence in accordance with the Appellate Court's decision and Section 10-113(a), IBT has utterly failed to present evidence to show that the Commission lacked an adequate and appropriate factual and policy basis to continue the 01-0120 Remedy Plan in effect at the time it issued the Order on Reopening, or to present any countervailing evidence that the Commission could have considered at that time. Instead, IBT relies virtually entirely on information that it could not have presented in a hearing at the time of issuance of the Order on Reopening, and that the Commission could not have known at that time. (*See* IBT Init. Br., pp. 20-34.) As discussed earlier in this Reply Brief, presentation of such evidence goes beyond what is necessary to remedy the deprivation of procedural due process rights that IBT experienced when the Commission failed to give IBT an opportunity to be heard prior to issuing the Order on Reopening on October 1, 2002. In any event, and more importantly, the arguments and information that IBT presents at pages 20-34 of its Initial Brief fall far short of demonstrating that the Commission should not confirm its decision in the Order on Reopening to continue the 01-0120 Remedy Plan in effect beyond October 1, 2002.

A. Wholesale Service Performance in the Fall of 2002

IBT claims that there was no need to continue the 01-0120 Remedy Plan in effect beyond October 2002 because (i) IBT's wholesale service quality was at acceptable levels during the fourth quarter of 2002, and therefore IBT no longer needed the incentive provided by the remedy plan; and (ii) the Commission found in its May 13, 2003 final Order in Docket 01-0662, based on consideration of IBT's wholesale performance data for the period September-November 2002, that IBT had satisfied the Section 271 OSS requirements and that the 01-0120 Remedy Plan could be replaced by the Section 271 remedy plan adopted by the Commission. (IBT Init.

Br., pp. 21-23, 26.) None of these arguments support a conclusion that the Commission should not have continued the 01-0120 Remedy Plan in effect for the fourth quarter of 2002.

As noted above and in McLeodUSA's Initial Brief, the facts relied on by IBT were not known to the Commission on October 1, 2002 and could not have been known until after the period at issue in this proceeding. Further, no matter how much IBT now brags about improvements in its wholesale service quality from 2000 to 2002, the fact is that as of October 1, 2002, IBT had not yet achieved three months of wholesale service quality performance that IBT believed were sufficiently good to submit to the Commission to demonstrate IBT's compliance with Section 271(c) OSS and other competitive checklist requirements. The period that IBT ultimately chose for that purpose was September-November 2002, and IBT did not submit that performance data to the Commission until January 2003. (McLeodUSA Ex. 2.8, p. 10; Tr. 130-31.) None of the findings from the May 2003 Order in Docket 01-0662 that IBT cites were made, or could have been made, until *after* IBT had achieved what it believed to be three months of satisfactory wholesale service quality performance and submitted the data for that period to the Commission, and the Commission had the opportunity to evaluate that data. Thus, as of October 1, 2002, the Commission had no basis before it on which it could conclude that IBT's wholesale service quality had improved to a point that the 01-0120 Remedy Plan was no longer necessary or could be replaced with a different plan.

In fact, shortly before October 1, 2002, the Commission had *rejected* a similar argument by IBT that adoption of a wholesale performance remedy plan in this docket was not necessary because IBT's wholesale service quality performance had improved significantly since December 2000. In IBT's "Motion to Abate or, In the Alternative, to Defer Decision", IBT argued that the Commission should abate this proceeding, and continue the Texas remedy plan in

effect, in light of “ongoing improvements in Ameritech Illinois’s wholesale performance since December 2000, which confirm the effectiveness of the existing remedy plan.”²⁵ The Commission *denied* IBT’s Motion to Abate on July 10, 2002,²⁶ and on the same date it issued its Order adopting the 01-0120 Remedy Plan to *replace* the Texas Plan.

Moreover, since much of IBT’s argument in this proceeding is based on statements in the Commission’s May 2003 Order in Docket 01-0662 (i.e., subsequent to the period at issue herein), it is fair game to again point out that in its Order issued in the IBT Alt Reg case on December 30, 2002 – at the end of the period at issue in this case – the Commission determined that it was necessary to the continued development of the competitive telecommunications market in Illinois that the 01-0120 Remedy Plan be continued in effect *until* the Commission determined that IBT had satisfied the requirements of Section 271. (*See* McLeodUSA Init. Br., pp. 15-16, citing the December 30, 2002 Order in the IBT Alt Reg case, p. 209.)

IBT’s single-minded emphasis on the fact that during the period at issue it met the specified performance benchmark on an aggregate basis for at least 90% of the performance measures subject to remedy in each month masks the deficiencies that continued to exist in IBT’s wholesale service quality during this period. First, the only basis offered by IBT for considering meeting the benchmarks for 90% of the performance measures on an aggregate basis to constitute good quality wholesale service is that it is IBT’s internal standard. (*See* AT&T Ill. Ex. 1.0, p. 11: “Internally, we strive to achieve (and exceed) the 90 percent compliance level.”) In contrast, as of October 1, 2002, and throughout the fourth quarter of 2002, IBT had not succeeded in successfully completing the BearingPoint third-party testing of IBT’s OSS.

²⁵IBT’s Motion to Abate or, In the Alternative, to Defer Decision, Filed June 7, 2002, pp. 1-2.

²⁶Notice of Commission Action dated July 10, 2002.

(McLeodUSA Ex. 2.0, pp. 25-26, 30.) Moreover, from the CLEC's perspective, unless a CLEC receives wholesale service at or above the specified service quality benchmarks for all the performance measures, it is not receiving the agreed-to level of service quality in connection with the UNEs and other wholesale products and services it is purchasing from IBT; therefore, the CLEC should receive remedy payments to compensate it for not receiving the wholesale service quality it paid for.

Further, IBT's focus on the fact that it met the benchmarks for about 91% of the performance measures on an aggregate basis during the period in question ignores the fact that IBT was continuing to *miss* benchmarks for performance measures that were important to service quality. Over an extended period, IBT missed the benchmarks for about the same number of performance measures each month, and the numbers of missed performance measures were far from inconsequential. For example, in January 2001, IBT missed the benchmarks for 45 performance measures that were subject to remedies, and in January 2002 IBT missed the benchmarks for 42 performance measures. In comparison, for the months of September 2002 through January 2003 -- a period in which, IBT contends, its wholesale service quality had greatly improved -- IBT missed the benchmarks for the following numbers of performance measures subject to remedies: September 2002, 36; October 2002, 33; November 2002, 29; December 2002, 31; and January 2003, 48.²⁷ Thus, as of the last quarter of 2002 and into early 2003, IBT was continuing to *miss* a significant number of performance measures each month.

McLeodUSA witness Patty Lynott analyzed the performance measures that IBT *missed* during one or more months of the September-December 2002 period. She identified those

²⁷These numbers are taken from McLeodUSA Cross Exhibit 1 as the difference between "Total Counted" and "Number Met". The "Total Counted" shown for each month is the total number of performance measures for which an aggregate result could be calculated. (Tr. 145-47.)

missed performance measures that were particularly service-impacting to CLECs, and described the negative impact of missing these performance measures on CLECs such as McLeodUSA, in terms of the CLEC's ability to provide good quality service to its retail customers and to compete effectively with IBT. (McLeodUSA Ex. 4.0, p. 2.) Ms. Lynott's analysis showed that there continued to be significant deficiencies in IBT's wholesale service quality in the fourth quarter of 2002.²⁸ The significant *missed* performance measures during this period that Ms. Lynott identified included performance measures affecting (1) the speed at which IBT processed CLEC orders for wholesale products and services (McLeodUSA Ex. 4.0, pp. 2-3); (2) the number of CLEC orders which IBT notified CLECs it would not be able to meet by the specified due date (*id.*, pp. 3-4, 10-11); (3) the percent of CLEC orders that failed to "flow through" IBT's mechanized ordering systems and thereby required manual processing (*id.*, pp. 4-5, 10); (4) wholesale billing accuracy and completeness (*id.*, p. 5); (5) the percent of installations completed by IBT by the due date requested by the CLEC's customer and, more generally, the average amount of time required by IBT to complete installations of UNEs (*id.*, pp. 5-6, 8); (6) trouble report rates on IBT-supplied facilities and missed IBT repair commitments (*id.*, pp. 6-9); and (7) the time required for IBT to update the 911 and Directory Assistance data bases (*id.*, pp. 9-10). The impacts to the CLEC (and its retail customers) of IBT's failure to meet the performance benchmarks for these measures, as identified by Ms. Lynott, included the following:

- extension of the time required to provision and install service to the CLEC's customer;
- potential effects on the continuity of the customer's telephone service;

²⁸Commission Staff witnesses, in testimony filed in Docket 01-0662 in February 2003, also demonstrated, based on their review of IBT's three months of wholesale performance data, that there continued to be significant deficiencies in IBT's wholesale service quality during the latter half of 2002. (See McLeodUSA Ex. 2.0, pp. 26-27.)

- expenditure of additional resources and costs by the CLEC to try to resolve the problem with IBT and/or expedite the order;
- expenditure of additional resources and costs by the CLEC to contact its customer and explain the delay in installing or repairing service, and on other customer care activities;
- increased possibility that errors will occur in processing the CLEC's orders because they must be handled manually by IBT;
- delay in receipt of revenues by the CLEC from its customer;
- delay or other impact to the CLEC's billing of its customers while it awaits receipt of correct billing information from IBT;
- degradation and possible interruption of the service provided to existing CLEC customers;
- possible need for the CLEC to give its customer bill credits due to delays in installing and provisioning service, or due to service interruptions;
- customer blames the CLEC for the service delay or other service quality problem he/she is experiencing; and
- customer may decide to switch to another service provider. (McLeodUSA Ex. 4.0, pp. 2-11.)

IBT's focus on the percent of performance measures for which it met the benchmark, and the arguments in its Initial Brief, totally fail to address the deficiencies in IBT's wholesale service quality manifested by the performance measures that IBT *missed*.²⁹

B. May 2003 Order in Docket 01-0662

Turning to the May 2003 Order in Docket 01-0662, the Commission's endorsement of IBT's wholesale service quality performance for September-November 2002 in that Order was

²⁹According to information presented by IBT in Docket 01-0662, even based on the Section 271 remedy plan it proposed in that case, IBT would have paid substantial Tier 1 remedies to CLECs for September-October 2002, totaling approximately \$3.26 million. (See table in ¶ 3552 of the May 13, 2003 Order in Docket 01-0662.)

not as ringing as IBT attempts to portray. Nor are the statements in the Docket 01-0662 Order apposite to the issue in this proceeding. First, IBT's reliance on partial quotations from ¶ 3484 (IBT Init. Br., p. 22) is misleading. Here is the full text of ¶ 3484:

3484. Under present circumstances too, *SBC Illinois would have us note* that the Company has: (i) completed implementation of the Illinois OSS merger commitments; (ii) nearly completed the operational aspects of the OSS test; and, (iii) developed experience in, and processes for, better tracking and improving performance. *According to SBC Illinois*, responsibility for managing operations with regard to the wholesale performance results has been delegated to line managers in many organizations, and proactive assessment of results is now prevalent in most all wholesale functions. With performance much improved, *the Company informs*, SBC Illinois is now at the point where it has demonstrated compliance with the competitive checklist, and is approaching the threshold of filing a section 271 application with the FCC.³⁰

In other words, ¶ 3484 was a statement of IBT's arguments, not conclusions by the Commission, as IBT attempts to suggest by its use of partial quotations from this paragraph.

Second, the context of the statements from the Docket 01-0662 Order cited by IBT was the issue of whether the 01-0120 Remedy Plan should be continued in effect beyond May 2003, i.e., whether the 01-0120 Remedy plan should be continued as IBT's Section 271 anti-backsliding plan, after the Commission had determined that IBT had demonstrated compliance with Section 271 requirements, or whether it should instead be replaced by a different plan. *See, e.g.*, ¶3248 (“*At issue here and now*, is the plan SBC-Illinois proposes *going forward*”); ¶ 3480 (“We see a number of opposing parties to argue that there is no reason for the Commission to look at anything other than the 0120 Plan”); ¶ 3485 (“it behooves this Commission to focus less on punishment or deterrence as a way to trigger improved performance, and onto the right set of incentives to maintain good performance *in a post-271 setting* . . . the anti-backsliding features of a remedy plan become the major and most decisive concern, *at this juncture*”); ¶ 3486 (“the

³⁰Docket 01-0662, Final Order on Investigation (May 13, 2003), ¶ 3484 (emphasis added).

Compromise Plan appears better-suited to our *current* objectives”) (emphases supplied). The Commission was evaluating whether, as of May 2003, IBT’s wholesale service quality performance, and its OSS and other systems, processes and procedures for providing wholesale service, had been shown to be sufficiently good that the 01-0120 Remedy Plan could be replaced with a different wholesale remedy plan going forward. The Commission was *not* determining whether the 01-0120 Remedy Plan could have been replaced in October 2002. Similarly, the Commission was evaluating in May 2003 whether the 01-0120 Remedy Plan should be continued or could be *replaced* by a different plan. That is far different from determining if the 01-0120 Remedy Plan could be discontinued and replaced by *no* other wholesale remedy plan.³¹ (This latter point is discussed in greater detail below.)

Third, the Commission’s conclusion in its May 2003 Order in Docket 01-0662 that IBT could move to a different wholesale remedy plan, was accompanied by imposition of significant continuing requirements on IBT that were addressed to specific remaining deficiencies in IBT’s wholesale service quality performance. (McLeodUSA Ex. 2.8, pp. 7-8.) The requirements that the Commission imposed on IBT in the May 2003 Order directed towards improving specific wholesale service quality deficiencies included:

- adoption of a line loss notification improvement plan (Docket 01-662 Order, pp. 352-53);
- adoption of a specialized UNE circuit repair coding accuracy plan (*Id.*, pp. 353-54);
- correction of UNE-P billing errors (*Id.*, pp. 354-55);

³¹Further, as noted in McLeodUSA’s Initial Brief and earlier in this Reply Brief, in July 2002 and December 2002, as well as in the Order on Reopening, the Commission rejected proposals by IBT that the 01-0120 Remedy Plan not be adopted, or not continued, and that the Texas Plan be continued in its stead.

- making improvements to IBT’s contracts management process (*Id.*, pp. 355-56);
- implementation of a wholesale bill audibility dispute resolution plan (*Id.*, p. 356);
- implementation of a change management improvement plan (*Id.*, p. 358);
- correction of 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 (*Id.*, p. 359); and
- improvement of IBT’s performance on specific performance measures including PMs 7.1, 13, 17, MI-2 and MI-4 (*Id.*)³²

In short, even five months after the end of the period at issue in this proceeding, the Commission still found specific, continuing areas of deficiencies in IBT’s wholesale service quality which necessitated that the Commission impose specific requirements for improvements in these areas as a condition to the Commission granting IBT a favorable recommendation with respect to its application for Section 271 authority from the FCC.

Fourth, in Docket 01-0662, the Commission did not determine that the 01-0120 Remedy Plan could be eliminated and replaced with *no* remedy plan (which would be the impact of adopting IBT’s position in this proceeding with respect to the October-December 2002 period), but rather that the 01-0120 Remedy Plan could be replaced by a *different* wholesale remedy plan. (McLeodUSA Ex. 2.8, pp. 10-11.) Further, the wholesale remedy plan that the Commission adopted in its May 2003 Order in Docket 01-0662 for Section 271 anti-backsliding purposes was not significantly different from the 01-0120 Remedy Plan. In reaching its decision on the wholesale remedy plan in Docket 01-0662, the Commission found that the remedy plan it adopted for Section 271 purposes (referred to in that order as the “Compromise Plan”) was

³²Appendix A to the May 13, 2003 Order in Docket 01-0662 sets forth the complete listing of ongoing requirements imposed on IBT by the Commission in that Order.

derived from, and very similar to, the 01-0120 Remedy Plan. (*Id.*, p. 11.) The Commission repeatedly emphasized this point in its May 2003 Order in Docket 01-0662:

Overall, the basic structural elements of the Compromise Plan are the same as the 0120 plan . . . Most of the modifications 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. (¶ 3547.)

The Compromise Plan, like the 0120 Plan, contains a two-tiered payment structure. (¶ 3539.)

As under the 0120 plan, the Compromise Plan uses statistical analyses to determine when remedies are to be paid by identifying whether the size and number of performance shortfalls are significant, or small enough so as to be attributed to the random variation inherent in actual wholesale and retail performance. (¶ 3549) . . . The statistical methods in the Compromise Plan, while virtually identical to the methodology set out in the 0120 plan, contains two minor changes. (¶ 3550.)

[T]he Compromise Plan builds on and does not entirely displace the 0120 Plan. (¶ 3478.)

The record shows, however, that the basic structure and many key elements of the Compromise Plan are identical to the 0120 Plan. The Compromise Plan is in no way a “complete re-write” or rejection of the 0120 plan. (¶ 3480.)

Many of the same features of the 0120 plan appear in the Compromise plan. (¶ 3491) . . . [W]e observe that many features retained in the Compromise Plan, and based on the 01-0120 plan, include the following:

- (1) exclusion of the K Table;
- (2) benchmark assessment stays at the bright line test;
- (3) a provision for comprehensive audits;
- (4) a provision for mini-audits;
- (5) comparison to both retail and affiliate (with the better of the two controlling on assessment);
- (6) annual cap amounts as thresholds set at FCC approved level;
- (7) waiver situations identified by a standard and afforded review;

- (8) CLEC form of payment, i.e., by check or credit;
- (9) small sample permutation tests;
- (10) recognized and established statistical analyses. (¶ 3492.)

In fact, in its Order in Docket 01-0662, the Commission noted only five changes to the 01-0120 Remedy Plan that were being proposed in the Compromise Plan. (*Id.*, ¶ 3493.) Of these five changes, two (the “gap closure process” and the “step-down”, or refinement of the escalation process³³) were agreed to, while three were contested by one or more parties. (*Id.*, ¶¶ 3494-3495.) A third change, the use of a “floors and ceilings” standard (proposed by IBT) was not adopted by the Commission. (*Id.*, ¶¶ 3496-3499.) Thus, there were only two contested changes from the 01-0120 Remedy Plan that the Commission adopted for purposes of the Compromise Plan. (*Id.*, ¶¶ 3500-3507.)

The overall point here is that in its May 2003 Order in Docket 01-0662, the Commission was *not* addressing the issue presented in this proceeding, which is whether the 01-0120 Remedy Plan should be continued in effect for a specific period, or eliminated and replaced by *no* plan during that period. Rather, the Commission decided in that Order that the 01-0120 Remedy Plan should be discontinued but should be replaced by a wholesale remedy plan that (as the above quotes from the May 2003 Order amply demonstrate) was not significantly different from the 01-0120 Remedy Plan. That is a far different question from the one presented in this proceeding, and the difference renders IBT’s heavy reliance on the Docket 01-0662 Order in this case both inapposite and unpersuasive.

Moreover, even if one views the issue in the Order on Reopening as being whether the 01-0120 Remedy Plan should be continued, or should be discontinued and replaced by the Texas

³³IBT described the “gap closure” and “step down” provisions as more “pro CLEC” than the 01-0120 Remedy Plan. (*See* May 13, 2003 Order in Docket 01-0662, ¶ 3250.)

Plan (*see* Order on Reopening, pp. 2-3), the Order in Docket 01-0662 supports continuing the 01-0120 Remedy Plan rather than reverting to the Texas Plan. That is because the most significant difference between the 01-0120 Remedy Plan and the Texas Plan – inclusion of the K-Table – was continued in the Compromise Plan adopted in Docket 01-0662.³⁴ (*See* ¶ 3492 of the Order in Docket 01-0662, quoted above.) In this critical respect (and a number of others), the wholesale remedy plan the Commission adopted in the May 2003 order was much closer to the 01-0120 Remedy Plan than it was to the Texas remedy plan. (McLeodUSA Ex. 2.8, p. 11.)

In any event, McLeodUSA reiterates that even accepting IBT’s arguments that its wholesale service quality performance had reached acceptable levels by the fourth quarter of 2002, and that the Commission so found in its May 2003 Order in Docket 01-0662, a decision that the 01-0120 Remedy Plan should have been terminated as of October 8, 2002 still would not be warranted. That is because, given IBT’s history of wholesale service quality problems (as well as its inability over an extended period of time to pass the BearingPoint third-party testing program (*see* McLeodUSA Init. Br., pp. 51-52)), 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 could be replaced with a different wholesale remedy plan. That is, IBT should not have been allowed to move from the 01-0120 Remedy Plan to a different remedy plan until *after* IBT had demonstrated to the Commission a sustained period of satisfactory wholesale service quality under the 01-0120 Remedy Plan. (McLeodUSA Ex. 2.8, pp. 6-7.)

³⁴IBT acknowledges this at page 27, n. 7 of its Initial Brief. However, IBT fails to recognize the more significant fact for purposes of this proceeding, namely, that the Texas Plan, which IBT offered to the Commission to keep in effect after October 8, 2002, *does* include the K-Table.

Accepting for purposes of this discussion that IBT's performance for the September-November 2002 period – which IBT used as its three months of wholesale performance data in Docket 01-0662 – did in fact demonstrate an acceptable level of wholesale service quality for a sustained period, 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, at most it supports the conclusion that the 01-0120 Remedy Plan could be replaced by a different wholesale remedy plan *after* the period in which IBT demonstrated a sustained level of satisfactory wholesale service quality performance, and *after* the Commission had examined the data for this period and determined that IBT's wholesale service quality had improved to and been maintained at an acceptable level for a sustained period of time. This in fact is the evaluation the Commission made and the conclusion it reached in its May 2003 Order in Docket 01-0662. (*See* McLeodUSA Init. Br., pp. 60-61.)

C. IBT's Other Incentives

IBT witness Mr. Ehr argued that IBT had four separate incentives to provide good quality wholesale service quality which rendered continuation of the 01-0120 Remedy Plan unnecessary in the fourth quarter of 2002. (*See* McLeodUSA Init. Br., pp. 28-29.) In its Initial Brief, IBT relies only half-heartedly on three of those incentives, devoting only one sentence to each of them. (IBT Init. Br., p. 24.) IBT devotes more attention to the fourth claimed incentive, which was that in the fourth quarter of 2002, IBT was striving to obtain a favorable Section 271 recommendation from the Commission. (*Id.*, pp. 24-27.) In any event, all of IBT's "other incentives" have been comprehensively addressed in McLeodUSA's Initial Brief and shown not

to support IBT's position that it was unnecessary to continue the 01-0120 Remedy Plan in effect during the fourth quarter of 2002.³⁵ (*See* McLeodUSA Init. Br., pp. 29-39, 61-64.)

IBT points out that in the Michigan case in which Dr. Ankum developed the statistical analyses he presented in this case (summarized in McLeodUSA Init. Br., pp. 30-32), he testified that the Section 271 approval process included significant structural changes to SBC systems and that the desire to obtain Section 271 approval represented a distinct incentive for improved performance. (IBT Init. Br., pp. 25, 27.) IBT fails to mention that Dr. Ankum testified in *this* case that the desire to obtain Section 271 approval 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. Dr. Ankum identified a number of components embodied in a wholesale remedy plan that the Section 271 approval process does not provide, including among others explicit penalties for subpar performance that will motivate the ILEC into improving or maintaining its performance; and direct financial incentives on a monthly basis. (*See* McLeodUSA Init. Br., p. 38.) Neither of these incentives are provided by the Section 271 process, which for IBT was a long, drawn-out process that lacked the immediate impact provided by the *monthly* determination of wholesale performance results and possible incurrence of remedy payment obligations embodied in the 01-0120 Remedy Plan. (*See id.*, pp. 38, 64.)

IBT argues that given the "critical stage" of its Section 271 efforts in the latter part of 2002, it would make no sense to conclude that if the 01-0120 Remedy Plan were terminated, IBT would abruptly reverse course and allow its wholesale service quality performance to deteriorate. (IBT Init. Br., pp. 25-26.) However, in addition to the Order on Reopening, the Commission has

³⁵As shown therein, Commission Staff witness Mr. McClerren as well as McLeodUSA witnesses Ms. Redman-Carter and Dr. Ankum demonstrated that IBT's "other incentives" arguments are unpersuasive and do not support its position.

already (and in real time) twice rejected a similar argument by IBT: once in denying IBT's Motion to Abate or, In the Alternative, to Defer Decision in this docket (which was premised on the purported improvement in IBT's wholesale service quality performance and on the status of its Section 271 proceeding); and again in the December 30, 2002 final Order in the IBT Alt Reg case, in which the Commission determined that it was important to the continuing development of the competitive telecommunications markets that the 01-0120 Remedy Plan remain in effect *until* the Commission concluded its Section 271 proceeding and determined that IBT had satisfied the requirements for a favorable Section 271 recommendation to the FCC. (*See McLeodUSA Init. Br.*, pp. 7, 15-16, 41.)

At pages 26-27 of its Initial Brief, IBT briefly criticizes Dr. Ankum's statistical analysis, which showed (1) a statistically-significant improvement in the wholesale service quality performance of IBT's sister ILEC SBC Michigan during periods when SBC Michigan was subject to a remedy plan that *excluded* the K-Table (as did the 01-0120 Remedy Plan), as compared to periods when SBC Michigan was subject to a remedy plan that *included* the K-Table (as did the Texas Plan); and (2) a statistically-significant improvement in SBC Michigan's wholesale service quality performance when it was subject to remedy payments as compared to when it was not subject to remedy payments. (*See McLeodUSA Init. Br.*, pp. 30-32, 36.) IBT criticizes Dr. Ankum's analysis because he analyzed only SBC Michigan data and did not analyze any Illinois data. (*IBT Init. Br.*, p. 27.) This criticism is invalid because it was IBT witness Mr. Ehr's testimony in this proceeding which recognized that SBC Michigan's wholesale service quality performance experience would be relevant to this Illinois proceeding. (*See McLeodUSA Ex. 3.0*, pp. 3-4). As Dr. Ankum pointed out:

As Mr. Ehr indicates in his Direct Testimony, SBC generally uses the same operational support systems and processes for its operating companies in the SBC

Midwest region, so that information on the wholesale service quality performance of SBC Michigan can be relevant to the evaluation of whether SBC Illinois needs a wholesale performance remedy plan. Mr. Ehr states at page 7 of his testimony:

The Phase 2 performance assessment was already underway in Michigan. On October 21, 2002, we submitted performance data for the June – August 2002 period for the Michigan commission to review. *SBC Michigan uses the same regional systems and processes as SBC Illinois does.* (Emphasis added.) (McLeodUSA Ex. 3.0, p. 4.)

IBT's criticism of Dr. Ankum's analysis that it used SBC Michigan data entirely for the period after SBC Michigan had obtained Section 271 approval must also be rejected. To accept IBT's criticism would be to accept that after obtaining Section 271 approval, SBC's operating companies eased up on their efforts to provide good quality wholesale service. Among other things, this would be inconsistent with IBT's assertion that it always seeks to provide high quality service to all of its customers, including CLECs, so that it can be recognized as a high quality telecommunications service provider. (IBT Init. Br., p. 24.) Further, because the purpose of Dr. Ankum's statistical analysis was to determine (1) if IBT's wholesale service quality performance was better when it was subject to remedy payments for subpar performance than when it was not (he found that it was) and (2) if IBT's wholesale service quality performance was better when it was subject to a remedy plan that did not incorporate the K-Table than when it was subject to a remedy plan that did incorporate the K-Table (again, he found that it was), it would have been improper statistical analysis to include in the analysis performance data from both periods preceding Section 271 approval and following Section 271 approval.³⁶ In short, IBT's criticism that Dr. Ankum's statistical analysis was based on data from a time period after

³⁶See pp. 18-19 of Dr. Ankum's testimony in Michigan Public Service Commission ("MPSC") Case No. U-11830, which is AT&T Cross Ex. 101 in this proceeding. As discussed above, Dr. Ankum recognized that the desire to obtain Section 271 approval would be an incentive to provide good quality wholesale service, but would not be a sufficient incentive to warrant having no wholesale performance remedy plan in place.

SBC Michigan had obtained Section 271 approval, whereas this case pertains to a time period before IBT obtained Section 271 approval, in no way detracts from the robustness of Dr. Ankum's statistical analysis nor to its relevance to the issues in this case.

Although IBT criticized Dr. Ankum's statistical analyses in various respects, principally based on issues that were debated in the MPSC case in which he originally prepared and presented these analyses (*see* IBT Init. Br., p. 27, n. 7 & 8), McLeodUSA calls to the Administrative Law Judge's attention that on April 10, 2006, her counterpart presiding over MPSC Case No. U-11830, ALJ Sharon L. Feldman, issued a Proposed Decision in which she concluded that Dr. Ankum's statistical analyses were valid and persuasive:

Based on the testimony of the witnesses, I find that Dr. Ankum has presented persuasive evidence that AT&T Michigan's performance as captured by the performance measure tests does respond to incentives in the remedy plan, and that the company's performance is worse for measures that are not subject to remedy. I also conclude that Dr. Ankum's quantitative analysis provides probative evidence that AT&T Michigan responds to such incentives. Acknowledging the statistically significant correlation Dr. Ankum established between AT&T Michigan's performance level and the elimination of the K table does not prove that elimination of the K table caused such an effect, it is nonetheless persuasive evidence that AT&T Michigan responds to incentives.³⁷

D. Compensation Component of the 01-0120 Remedy Plan

IBT contends that Staff and CLECs have argued that if the Commission determines the 01-0120 Remedy Plan should not have been extended for the period October-December 2002, CLECs will not have been compensated for damages they suffered during that period due to IBT's failure to meet wholesale performance standards. IBT argues, however, that the CLECs have failed to demonstrate that they were actually damaged by IBT's service quality during this period. (IBT Init. Br., pp. 28-34.) While such an argument may have been made by other parties,

³⁷*In the matter of SBC Michigan f/k/a Ameritech Michigan, submission on performance measures, reporting, and benchmarks, pursuant to the October 2, 1998 order in Case No. U-11654, Case No. U-11830, Proposal for Decision, April 10, 2006, p. 77.*

it was not made by McLeodUSA's witnesses. Indeed, such an argument would be inconsistent with McLeodUSA's principal position that the Commission should make its decision in this remand proceeding based on information that was available to it when it issued the October 1, 2002 Order on Reopening, or that IBT could have presented had it been given an opportunity for hearing at that time. Moreover, there is no need for a CLEC to prove actual damages, since one of the purposes of a wholesale performance remedy plan is to establish remedies in the nature of liquidated damages for subpar service quality performance, thereby eliminating the need to identify and quantify actual damages for individual violations of the service quality standards.³⁸ (See McLeodUSA Ex. 2.8, pp. 2-3; McLeodUSA Ex. 3.0, pp. 14-15; Tr. 147-50 (Ehr).)

IBT apparently construed the purpose of McLeodUSA witness Ms. Lynott's testimony (McLeodUSA Exhibit 4.0) to be to show that McLeodUSA suffered specific damages as a result of IBT missing various performance measure benchmarks during the September-December 2002 period, for which it should be compensated. (See IBT Init. Br., pp. 30-31.) Although Ms. Lynott's testimony does support such a determination, that was not the purpose for which it was offered. Rather, as shown in Section IV.A of this Reply Brief, above, Ms. Lynott's analysis was presented to show that even though IBT met the specified benchmarks for (on average) approximately 91% of the performance measures subject to remedy during the last three months of 2002, IBT also missed the benchmarks during this period on performance measures that are important to the quality of service CLECs are able to provide to their customers and to their

³⁸As discussed elsewhere in McLeodUSA's Initial Brief and this Reply Brief, however, it is McLeodUSA's position, and we believe that of Staff, that as of October 1, 2002, the Commission had ample basis to conclude that it could not let the 01-0120 Remedy Plan expire and accept IBT's proposal to continue the Texas Plan in effect as the remedy plan offering until IBT's Section 271 proceeding was completed – particularly given that the Commission had just rejected the Texas Plan as inadequate based on extensive hearings. (See Order on Reopening, p. 3.) That also was essentially the determination the Commission made in its December 30, 2002 Order in the IBT Alt Reg case.

ability to compete with IBT for retail customers. Thus, IBT's wholesale service quality during this period was not as satisfactory as IBT portrays it.

Although this portion of IBT's Initial Brief is something of a straw man from McLeodUSA's perspective, the Commission should reject IBT's argument that it had other, adequate wholesale remedy plans available to CLECs during the fourth quarter of 2002. (*See* IBT Init. Br., pp. 28-29.) IBT cites three plans: the Texas Plan (i.e., the "original Merger Plan"), a generic regional plan established under the FCC's merger conditions, and a "compromise plan" that IBT entered into with one CLEC, TDS Metrocom (the "TDS Plan"). (*Id.*, p. 28.) The Texas Plan obviously was not an adequate substitute for the 01-0120 Remedy Plan; the Commission so determined in adopting the 01-0120 Remedy Plan in its July 10, 2002 Order to replace the Texas Plan, in issuing the Order on Reopening, and by its determination in its December 30, 2002 Order in the IBT Alt Reg case to incorporate the 01-0120 Remedy Plan into IBT's alternative regulation plan until the conclusion of the Section 271 proceeding. The components of the "generic regional plan" have not been presented by IBT in this record, and there is no basis for concluding that it would have been an adequate replacement for the 01-0120 Remedy Plan.

Finally, as a practical matter, the TDS Plan was not available to other CLECs during the fourth quarter of 2002. The TDS Plan was approved by the Commission as an amendment to the interconnection agreement between IBT and TDS in Docket 03-0098. This docket was initiated by the filing of a petition on February 11, 2003, after the period at issue in this proceeding (*see* Order in Docket 03-0098, issued May 7, 2003, p. 1), and it was approved by the Commission by Order issued on May 7, 2003. As pointed out by IBT, the TDS Plan provided that the 01-0120 Remedy Plan would be applicable to TDS but that if the Commission's order approving the 01-0120 Remedy Plan were reversed, the TDS Plan would then become applicable. However, the

terms of the interconnection agreement amendment (as quoted in the Commission's Order in Docket 03-0098) expressly provided that the replacement plan would be retroactive to the effective date of the amendment – which turned out to be May 7, 2003. (See Order in Docket 03-0098, pp. 5-6.) In short, the TDS Plan would not have been an effective or available alternative to CLECs during the October-December 2002 period.³⁹

V. CONCLUSION

For the reasons set forth in McLeodUSA's Initial Brief and in this Reply Brief, 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,

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³⁹The Order in Docket 03-0098 shows other reasons why the TDS Plan, considered in real time, would not have been a reasonable option for other CLECs. Staff actually objected to approval of the interconnection agreement amendment as not being in the public interest (Order in Docket 03-0098, p. 3), and the Commission, in its Order, required that the terms of the amendment be modified (which IBT and TDS Metrocom accepted) in order to be in the public interest. (*Id.*, pp. 5-6) In other words, a CLEC considering entering into an interconnection agreement amendment during the fourth quarter of 2002 to adopt the TDS Plan would have faced uncertainty as to whether it would be approved in its original form.