

The Appellate Court's mandate is reason enough to obey the Court's opinion. It is worth noting, however, that the Court had good reason to remind the Commission of the "violation" requirement. At the end of the day, the Commission must provide a substantive legal basis for its actions, whether those actions are taken in an original order or in a reconsideration order. If a "violation" of *some* law were not required to reconsider a prior decision, the Commission would have *unlimited* authority to take *any* action it wanted in a reconsideration order, even if there was no legal authority to take that action in an original order – a result that would nullify the Public Utilities Act and the Commission's status as a being whose powers are limited by its authorizing statutes.

2. The Proposed Order's Discussion As To The Order On Reopening Applies To Staff, Not AT&T Illinois.

In its opening brief, Staff argued that the October 1, 2002 Order on Reopening already provided AT&T Illinois sufficient "notice" for purposes of Section 10-113(a), based on Staff's assertion that "the appropriate alleged 'wrong' – for due process and Section 10-108 purposes – is SBC's effort, as part of its 01-0120 compliance tariff filing, to effectuate . . . a remedy plan expiration date of October 8, 2002." Staff Opening Br. at 21; see also Staff Prehearing Mem. at 11. AT&T Illinois responded that the Appellate Court had the Order on Reopening before it, and clearly did not find that Order to have provided the requisite notice. In fact, the Court held that the Commission *failed* to provide the notice required by Section 10-113(a), and then went to the trouble of spelling out the statutory requirements for notice for use in the remand. *Illinois Bell I*, 343 Ill. App. 3d at 259.

The Proposed Order states (at 19) that "the propriety of the Order on Reopening is no longer an issue" and that the Appellate Court's decision "cannot be re-litigated." That conclusion is absolutely correct – but its discussion reads as though AT&T Illinois alone raised

the issue. In fact, Staff argued that the Order on Reopening *was* proper, and AT&T Illinois simply refuted that view based on the same conclusion that the Proposed Order recommends. The Commission should correct that discussion.

3. Suggested Changes To Proposed Order

The third full paragraph on page 19 should be revised as follows:

~~SBC Staff suggests that the Order on Reopening provided AT&T Illinois notice for purposes of Section 10-113(a). (Staff Init. Posttrial Brief at 21.) did not provide it with “sufficient notice of the Commission’s action.” (SBC Init. Posttrial Brief at 19).~~ However, the propriety of the Order on Reopening is no longer an issue. In *McLeodUSA*, the Appellate Court ruled that “[T]he failure to abide by the statutory requirement of notice and an opportunity to be heard rendered the order voidable. . . .” (*McLeodUSA*, No. 3-04-0594, at 13). That ruling is now the law of the case. Since the Appellate Court has decided this issue, it cannot be re-litigated. (*Tenner*, 206 Ill. 2d at 395-96).

C. Given The Proposed Order’s Correct Conclusion That The Commission Should Not Reopen The Merger Deadline, The Proposed Order Should Not Have Considered, Much Less Rejected, AT&T Illinois’ Estoppel Argument.

1. Discussion.

McLeodUSA suggested that the Commission go back and reopen the 1999 merger docket that originally established Condition 30 and its three-year term – even though the merger had already been consummated. AT&T Illinois accordingly demonstrated that any attempt to change the conditions of merger approval after the fact would be barred by the merger statute, and by the doctrine of estoppel.

The Proposed Order (at 22) correctly rejects *McLeodUSA*’s suggestion and declines to reopen the merger docket. That conclusion moots AT&T Illinois’ estoppel defense, which simply provided an alternative ground on which the Commission could reach the same end result that the ALJ correctly recommends: namely, that the merger docket and merger order be left intact. Nonetheless, the Proposed Order goes on to address AT&T Illinois’ estoppel defense. AT&T Illinois disagrees with the Proposed Order’s discussion, but the more fundamental

problem is that the discussion is unnecessary and inappropriate given that the Proposed Order rejected the CLEC claim to which the estoppel defense was directed. Accordingly, the Commission should uphold the Proposed Order's recommendation to not reopen the merger docket, and delete the Proposed Order's discussion of estoppel as moot.

2. Suggested Changes To Proposed Order

The Analysis and Conclusions in section C)2. of the Proposed Order (page 16) should be deleted and replaced with the following:

As noted in Section C)4. below, the Commission rejects McLeodUSA's suggestion to reopen the merger docket. As AT&T Illinois' estoppel argument simply offers an alternative ground on which the Commission could refuse to reopen the merger docket, it has been rendered moot. Accordingly, the Commission does not reach AT&T Illinois' argument.

III. Over And Above The Absence Of Legal Authority, The 01-0120 Plan Should Not Be Extended.

Given that the Commission is a being of legal authority, the lack of a statutory basis to impose the 01-0120 Plan for the October – December 2002 period is in and of itself conclusive. Therefore, the Commission need not address the question whether the Plan should be extended for that period. The Proposed Order not only errs by considering the question in the first place, but also commits several fundamental errors in its answer.

A. The Proposed Order's Recommendations Are Directly Contrary To The Commission's Holdings In Docket No. 01-0662.

1. Discussion.

First and foremost, the Proposed Order's recommendations cannot be squared with the Commission's own holdings in Docket No. 01-0662. As the Commission stated there, the 01-0120 Plan was founded on performance data and testimony from late 2000, when "comprehensive performance measures and standards had only recently been introduced," when

“post-merger . . . enhancements” to AT&T Illinois’ wholesale systems and processes “were still under development,” when “the third-party . . . test” of those systems and processes “was just getting started,” and when AT&T Illinois’ rate of compliance with performance standards ranged from “75 to 80% compliance.” *Section 271 Order*, ¶¶ 3482-3483. In Docket No. 01-0662, though, the Commission conducted an exhaustive review of performance from the fall of 2002 – the same period that is at issue now.³ Staff and various CLECs vigorously contended that the Commission should continue to impose the 01-0120 Plan. The Commission squarely rejected those arguments, concluded that “wholesale performance has improved to a significant and sustained level” of “90 and 93% compliance in the fall of year 2002,” and determined that the 01-0120 Plan was no longer appropriate. *Id.* ¶ 3483. In the Commission’s words, “that plan would require [AT&T] Illinois to make ‘remedy’ payments of approximately \$3 million each month . . . despite good performance,” a result that “muddles the message and suggests a level of unfairness.” *Id.* ¶ 3486. In short, the 01-0120 Plan was “a product of its time and circumstance,” and by late 2002, the period that is at issue now, the time and circumstances were “much changed.” *Id.* ¶¶ 3481, 3483.

The record in Docket No. 01-0662 was indisputably vast, and the Commission’s analysis was undeniably thorough. Over 20 parties intervened in the docket, including CLECs, carrier associations, and government entities (*id.* ¶ 6); approximately 90 witnesses testified (*id.* ¶¶ 9, 19-34); and the Commission’s final order comprises over 900 pages. The Commission conducted an in-depth analysis of three months’ of the results of AT&T Illinois’ numerous performance

³ The Commission’s investigation focused on data for two of the exact three months at issue here – October and November 2002 – as well as the immediately preceding month of September 2002. AT&T Ex. 104.0 (Ehr Direct) at 5 lines 92-94; *Section 271 Order*, ¶¶ 17, 3252. The Commission also reviewed December 2002 data on several specific issues, including the remedy plan assessment. See, *e.g.*, *id.* ¶¶ 1158, 3360.

measurements, going item by item through the 14-point competitive checklist. It noted that AT&T Illinois satisfied the bulk of its performance standards and that the few misses were isolated (occurring in only one month), immaterial (*i.e.*, barely short of standard, and/or affecting only small volumes of activity), or resolved. See, *e.g.*, *id.* ¶¶ 362, 363, 1338, 1343, 1871.

More importantly, the Commission's Order in Docket No. 01-0662 was absolutely right. As described above, shortly after the Commission issued that Order, the FCC agreed with the Commission's analysis and granted AT&T Illinois' Section 271 application to provide long-distance service. After that date, AT&T Illinois' wholesale performance continued to improve. AT&T Ex. 104.0 (Ehr Direct) at 12-13 lines 214-233; see also *id.* at 10 (table showing results).

Nevertheless, the Proposed Order recommends that the 01-0120 Plan should be imposed on performance results that do not support that plan – and that cannot support the plan, based on the Commission's analysis in Docket No. 01-0662. The Proposed Order's attempts to rationalize such a diametrically different result are without merit.

a. The Commission has already conclusively rejected the Proposed Order's theory that the 01-0120 Plan *caused* the improved performance that the Commission saw in late 2002. In Docket No. 01-0662, "certain parties suggest[ed] that improvements in the Company's performance are attributable to the 01-0120 plan" just as the Proposed Order does here. *Section 271 Order*, ¶ 3487. But the Commission rightly held that "the record shows otherwise." *Id.* AT&T Illinois' improvements began well before the implementation of the 01-0120 Plan in September 2002, and they continued long after the plan was replaced in July 2003. AT&T Ex. 104.0 (Ehr Direct) at 12-13 lines 214-233; see also *id.* at 10 (table showing results). Indeed, AT&T Illinois' performance under the Section 271 plan has been better than ever. *Id.* at 13 lines 233-234; see also *id.* at 10 (table). Thus, the Commission quite correctly concluded that AT&T

Illinois' "improvements in performance occurred before the 01-0120 Plan took effect, and, as such, cannot be credited to that plan." *Section 271 Order*, ¶ 3487.

The following chart summarizes the overall performance results.

MONTH	% MET⁴	COMMISSION-APPROVED PLAN
January 2002	88.8	Merger Plan
February 2002	93.3	Merger Plan
March 2002	89.1	Merger Plan
April 2002	91.5	Merger Plan
May 2002	90.5	Merger Plan
June 2002	92.5	Merger Plan
July 2002	91.1	Merger Plan
August 2002	93.0	Merger Plan
September 2002	89.8	01-0120 Plan
October 2002	90.7	Currently at issue
November 2002	91.8	Currently at issue
December 2002	90.1	Currently at issue
January 2003	85.1	01-0120 Plan
February 2003	88.0	01-0120 Plan
March 2003	90.1	01-0120 Plan
April 2003	89.9	01-0120 Plan
May 2003	88.8	01-0120 Plan
June 2003	88.2	01-0120 Plan
July 2003	92.4	Section 271 Plan
August 2003	88.7	Section 271 Plan
September 2003	93.0	Section 271 Plan
October 2003 (271 approval)	93.5	Section 271 Plan
November 2003	94.4	Section 271 Plan
December 2003	94.2	Section 271 Plan

⁴ Percentage met, of measures subject to remedies under applicable remedy plan. The data in this chart are taken from AT&T Ex. 104.0 (Ehr Direct) at 10.

The Proposed Order (at 38) even acknowledges that “a different conclusion was reached in SBC’s Section 271 docket.” It contends that AT&T Illinois’ performance improved because Docket No. 01-0120 was being litigated, and suggests that the pendency of the 01-0120 litigation was not “brought to the Commission’s attention in that [Section 271] docket.” Proposed Order at 38. The fact that the 01-0120 case was pending before the 01-0120 Plan was implemented was a matter of public record, and the argument that the Proposed Order makes now – that the pendency of litigation drove AT&T Illinois’ improvements – *was* brought to the Commission’s attention in Docket No. 01-0662. The Commission’s own order in that Docket recites the testimony of a CLEC witness, Dr. Kalb, who argued that “the incentive effect provided by the pendency of the case” led to AT&T Illinois’ improvements. *Section 271 Order*, ¶ 3399. That argument did not change the Commission’s mind then, and cannot change it now. Moreover, the Proposed Order rests on the untenable premise that the mere possibility that remedy payments *might* increase by some unspecified amount at some unspecified time would affect AT&T Illinois’ performance even though the actual payment of money did not. That premise is refuted by the uncontroverted fact that AT&T Illinois’ performance improved even after the 01-0120 Plan was terminated (and long after the 01-0120 *Docket* was closed).

b. The Proposed Order similarly deviates from the Commission’s *Section 271 Order* by contending (at 36) that “the large amounts of 01-0120 Remedy Plan payments” support the 01-0120 Plan. The large amount of payments assessed under the 01-0120 Plan does not mean that those payments were *justified*. Rather, as the Commission has held, it only means that the 01-0120 Plan was requiring “‘remedy’ payments of approximately \$3 million each month . . .

despite good performance,” a result that “muddles the message and suggests a level of unfairness.” *Section 271 Order*, ¶ 3486.

c. The Proposed Order next errs in stating (at 38) that “even with these substantial improvements” in performance that the Commission acknowledged in Docket No. 01-0662, “this Commission did not find [AT&T Illinois’] wholesale service quality to be so satisfactory that no remedy plan was needed.” The issue here, however, is not whether “no remedy plan was needed” in late 2002. At the time, AT&T Illinois was perfectly willing to enter into an agreement with any CLEC to pay remedies under either (i) the Compromise Plan that it reached with TDS (which the Commission subsequently adopted, with modifications to which AT&T Illinois did not object, as the Section 271 Plan), (ii) a generic regional plan established under the FCC merger conditions, or (iii) the original Merger Plan (which has been deemed sufficient by the FCC). AT&T Ex. 104.0 (Ehr Direct) at 8 lines 153-163. Indeed, AT&T Illinois provided notice of its Compromise Plan in this very docket. Aug. 26, 2002 Notice of Agreement. In the October – December 2002 period, over 65 CLECs received payments pursuant to one of those plans. AT&T Ex. 104.0 (Ehr Direct) at 8 lines 155-163. Moreover, AT&T Illinois was willing to enter into a “fallback” arrangement, under which a CLEC could obtain payments under the 01-0120 Plan, with the Compromise Plan to be used if the Commission’s order extending the plan was reversed in Court (as it was). Feb. 17 Tr. 139-140, 207 (Ehr). AT&T Illinois *did* enter into just such an arrangement, with TDS. *Id.* at 137-40.

The dispute here, then, is not whether there should be “no” remedy plan for October – December 2002, but whether the Commission should impose *the 01-0120 Plan*. That is an issue that the Commission confronted and decided in Docket No. 01-0662. It held that by late 2002,

AT&T Illinois' performance had improved to the point where the 01-0120 Plan was inappropriate.⁵ The Commission was right, and it should not alter that decision now.

d. The Proposed Order then states (at 38) that there had been no "sustained period of conduct" by October – December 2002 to warrant the replacement of the 01-0120 Plan. Again, that recommendation is contrary to the *Section 271 Order*. As described above, the Commission held that the imposition of the 01-0120 Plan was inappropriate for late 2002. To the extent a "sustained period of conduct" was required (the Proposed Order does not cite any such requirement in the *Section 271 Order*) the Commission necessarily must have found it to have been satisfied.

2. Suggested Changes To Proposed Order

Section c)6., titled "Whether there are Factual Bases for Extending the 01-0120 Remedy Plan," should be deleted in its entirety if the Commission adopts the Exceptions presented in Section II above. Alternatively, the Commission should delete the "Analysis and Conclusions" of Section c)6. (beginning at page 36) and replace it with the following:

Even if the Commission had legal authority to impose the 01-0120 Remedy Plan, we find that the imposition of the plan would be inappropriate for the period at issue here, October – December 2002. The Commission has already thoroughly reviewed AT&T Illinois' wholesale performance for late 2002 in Docket No. 01-0662, and concluded that the continued imposition of the 01-0120 Plan would be inappropriate in light of AT&T Illinois' improvements. No party has presented any reason to change that conclusion here, and we accordingly reaffirm it.

⁵ Similarly, the fact that some "performance requirements" were identified (and resolved) in the Commission's Section 271 Order (Proposed Order at 38) does not support the imposition of the 01-0120 Plan. The Commission was aware of these issues, but nonetheless concluded that the 01-0120 Plan was no longer appropriate. The fact that such issues were identified and corrected in the Section 271 proceeding only confirms that there were ample alternative incentives, outside of the remedy plan, to spur improved performance, an issue addressed in Section III.C below.

B. The Commission Should Not Adopt The Proposed Order’s Unwarranted Personal References To AT&T Illinois’ Witness.

1. Discussion

In an attempt to rationalize its departure from the Commission’s *Section 271 Order*, the Proposed Order makes improper personal references to AT&T Illinois’ witness, James Ehr. Mr. Ehr is AT&T Illinois’ Director of Performance Measures. Proposed Order at 6. He is responsible for “the processes and systems used by” AT&T Illinois and its Midwest affiliates “to measure and report on [wholesale] performance”; he has participated as AT&T Midwest’s “representative in numerous collaborative workshops on performance measurements”; with state commissions and competing carriers throughout the SBC Midwest region; and he has testified in numerous proceedings regarding performance measurement and remedy plans. AT&T Ex. 104.0 (Ehr Direct) at 1 lines 7-17. Most notably, he was AT&T Illinois’ lead witness with respect to wholesale performance and remedy plans in Docket No. 01-0662. The Commission’s Final Order in that proceeding references his testimony approximately 400 times. *E.g.*, *Section 271 Order*, ¶¶ 137, 935, 939, 1850, 2095, 2744. In particular, the Commission credited AT&T Illinois’ recommendations with respect to replacing the 01-0120 Plan, which were supported by Mr. Ehr’s testimony. Compare *id.* ¶¶ 3380, 3382-83 (citing Ehr rebuttal testimony that demonstrated that improvements in performance made 01-0120 Plan inappropriate) with *id.* ¶¶ 3482-83 (agreeing that improved performance rendered 01-0120 Plan inappropriate).

Thus, it is quite improper for the Proposed Order to suggest that the Commission reach a different conclusion here than in Docket No. 01-0662 because of “a lack of credible evidence on the part of a key SBC witness” and that “Mr. Ehr[] was not credible” in this docket. Mr. Ehr *was* a key SBC witness in the Section 271 proceeding too, and his core conclusions here – that AT&T Illinois’ performance had improved by late 2002, and that the imposition of the 01-0120 Plan

would be inappropriate for that period (*Section 271 Order* ¶¶ 3382-83) – are supported by the Commission’s own conclusions in the *Section 271 Order* (*id.* ¶¶ 3482-83). Even if the Commission could change its conclusions – and as the preceding section shows, there is no support for such a change – it cannot call Mr. Ehr “incredible” (Proposed Order at 37) for reaching conclusions *that the Commission itself reached, based in significant part on the same witness’ testimony*, in an exhaustive proceeding.

a. The Proposed Order’s specific criticisms of Mr. Ehr are equally unfounded: On Mr. Ehr’s core conclusions – that AT&T Illinois’ wholesale performance had improved by late 2002, such that imposition of the 01-0120 Plan was not warranted by AT&T Illinois’ results – the Proposed Order states (at 26) that Mr. Ehr “provided few specifics—*i.e.*, who at SBC did what to improve wholesale performance, or why, when or how.” But the Commission has already *held* that AT&T Illinois’ wholesale performance had improved to the extent that the 01-0120 Plan was not warranted. The Commission’s Order provides ample “specifics” as to how AT&T Illinois achieved that improvement: *e.g.* AT&T Illinois “(i) completed implementation of the Illinois OSS merger commitments; (ii) nearly completed the operational aspects of the [independent test of operations support systems]; and, (iii) developed experience in, and process for, better tracking and improving performance” with the responsibility for wholesale performance operations delegated to line managers and with “proactive assessment of results.” *Section 271 Order*, ¶ 3484. More important is the Commission’s holding that performance *did* improve and that the results in late 2002 no longer supported imposition of the 01-0120 Plan. Mr. Ehr should not be criticized for citing the Commission’s *Section 271 Order* rather than relitigating it.

b. The Proposed Order (at 26) then misreads Mr. Ehr's testimony, stating that his testimony "essentially" said that "SBC personnel did not care whether SBC provided substandard service, resulting in remedy plan payments" and that "SBC personnel needed another motivation to provide service that was not substandard--Section 271 approval." The Proposed Order's use of "essentially" means that in reality there is no such statement in Mr. Ehr's testimony. Far from saying that AT&T Illinois did not care about remedy plan payments, Mr. Ehr testified that management was "concerned"; however, because the ample incentive of Section 271 approval (among others) was already in place, the *added* threat of punitive remedy plan payments was unnecessary. In Mr. Ehr's actual words, "the quality of service that [AT&T] Illinois provided to CLECs for the period of October through December 2002 was high, and I will explain the factors that were present at that time [which included but were not limited to the Section 271 investigation] that provided sufficient incentive for [AT&T] Illinois to continue providing that high level of service, even if the 01-0120 Plan were not in place." AT&T Ex. 104.0 (Ehr Direct) at 3-4 lines 61-64.

The Proposed Order similarly mischaracterizes Mr. Ehr's testimony when it asserts (at 7) that he testified that "SBC did not make an effort to provide better service due to the 01-0120 Remedy Plan." See also *id.* at 26, 28, 29. First, Mr. Ehr was asked to discuss the period before the 01-0120 Plan was implemented, where AT&T Illinois did not fully "understand the impact that it might have." Feb. 17 Tr. 154. As the cited transcript pages make clear (Feb. 17 Tr. 155-56), Mr. Ehr's testimony was that AT&T Illinois *did* make an effort to provide better service, but that those efforts were driven by other factors rather than the 01-0120 Plan: namely (i) "the desire to improve on performance that's not meeting standards," (ii) the "271 proceeding," and (iii) to address issues raised by BearingPoint (the independent third party who tested AT&T

Illinois' wholesale systems). As he stated, “[w]e’re making changes from a normal course of business to improve service” and “[i]t isn’t the remedy plan that was being taken down and driving those changes at that time.” *Id.* at 156. That testimony is fully consistent with the Commission’s own holding that AT&T Illinois’ improvements in performance “cannot be credited” to the 01-0120 Plan. *Section 271 Order*, ¶ 3487.

c. The Proposed Order is quite wrong to suggest (at 37) that “[e]xcept for Mr. Ehr’s incredible testimony, there is no evidence indicating that [AT&T Illinois’] improved performance was not due to the 01-0120 Remedy Plan.” For starters, the answer is no longer a matter of first impression on which new evidence was required. Rather, as noted above, the Commission itself has held that AT&T Illinois performance results “viewed over an extended period show that [AT&T] Illinois improvements in performance occurred before the 0120 plan took effect and . . . cannot be credited to that plan.” *Section 271 Order*, ¶ 3487 (emphasis added). Moreover, Mr. Ehr provided ample evidence to support his testimony and confirm the Commission’s conclusion, showing that AT&T Illinois’ performance results improved before the 01-0120 Plan began and continued to improve well after the 01-0120 Plan ended. AT&T Ex. 104.0 (Ehr Direct) at 12-13 lines 216-234.

d. In his direct testimony, Mr. Ehr truthfully stated that AT&T Illinois offered other remedy plans in the October – December 2002 period, that several CLECs had adopted one of those other plans, and that 12.5 percent of CLECs were under the 01-0120 Plan. AT&T Ex. 104.0 (Ehr Direct) at 8 lines 172-177. The Proposed Order suggests (at 13) that Mr. Ehr offered this testimony to make it “appear that the 01-0120 Remedy Plan had little impact on the quality of service.” Again, the Proposed Order is misreading Mr. Ehr’s testimony. Mr. Ehr discussed other remedy plans to show that there *were* other remedy plans available, and that a significant

number of CLECs had chosen those plans, giving AT&T Illinois another incentive to maintain service quality. AT&T Ex. 104.0 (Ehr Direct) at 8 lines 154-166. In a separate section of his testimony, Mr. Ehr testified that the 01-0120 Plan did not cause AT&T Illinois' improvement in performance, but that conclusion was clearly not based on either the number or percentage of CLECs under the 01-0120 Plan; rather, as described above, it is based on the Commission's own holding in the *Section 271 Order*, confirmed by Mr. Ehr's analysis of performance results. *Id.* at 12-13 lines 216-234.

e. The Proposed Order also misreads Mr. Ehr's testimony regarding the impact of those other remedy plans. Mr. Ehr testified that those plans – among other incentives – provided sufficient incentive for AT&T Illinois to maintain its already-good performance in late 2002. According to the Proposed Order, his testimony “defie[d] logic” because payments under the 01-0120 Plan were greater than those other plans. But Mr. Ehr never said that those other plans resulted in more payments or more incentives than the 01-0120 Plan, only that they provided *an* incentive which, combined with other incentives like the goal of obtaining Section 271 approval, was a *sufficient* incentive for quality service in light of AT&T Illinois' improvements in performance. Similarly, Mr. Ehr never testified that the 01-0120 Plan provided “no” incentive, or less incentive than other plans with lower payments, and in suggesting that such a conclusion “defies logic” the Proposed Order is attacking a statement that Mr. Ehr never made. True, the 01-0120 Plan resulted in more payments than others, but the question here is whether those payments were necessary or even appropriate based on AT&T Illinois' performance at the time – and the Commission has already decided they were not. Section III.A *infra*.

f. Finally, the Proposed Order raises a post-hearing foundation objection, asserting (at 13) that Mr. Ehr “was responsible for overseeing the measuring and reporting of SBC's

wholesale performance” and was not qualified to testify about the service he reported. Mr. Ehr is no mere bookkeeper. He participates in the collaborative discussions by which performance measures and remedies are created and revised, he oversees the actual implementation of those measures and remedies. AT&T Ex. 104.0 (Ehr Direct) at 1 lines 7-17. He also interacts with the managers that are responsible for the operations he reports: In his own words, “in my job, I’m involved in working all the way out to the people that are in the operational organizations . . . to work with them, to make sure that they understand at the management levels the impact” of the results he reports. Feb. 17 Tr. 155-56. He is therefore qualified to talk about the meaning of the measures he helped design and produce, and to make recommendations as to the appropriate remedy plan that he is responsible for implementing. Indeed, he testified on those very subjects in Docket No. 01-0662, and the Commission accepted his testimony. *Section 271 Order*, ¶¶ 3382-83, 3482-83. Here too, no party objected to Mr. Ehr’s foundation to analyze performance results or to make recommendations on the remedy plan. Foundation issues must be raised at trial in order to give the party an opportunity to lay any additional foundation desired while the witness is on the stand. *People v. Taylor*, 357 Ill. App. 3d 220, 227 (5th Dist. 2005).⁶

On a more general level, it would be inappropriate for the Commission to make such personal references to a witness. Witnesses expend considerable time and effort to prepare and review testimony, and to prepare for and attend hearings (and in Mr. Ehr’s case, collaborative workshops). Whichever side the Commission may agree with in a particular matter, the witnesses on both sides are part of the process by which the Commission reaches an answer. In large part, the testimony they give is driven by the questions they are asked, which is in turn

⁶ The Proposed Order’s citation to *Fraley v. City of Elgin*, 251 Ill. App. 3d 72, 76-77 (2d Dist. 2003) is inapposite. *Fraley* dealt with the standards for reviewing the allegations of a complaint, not the foundation of a witness’s testimony. Moreover, as shown above, the sufficiency of Mr. Ehr’s foundation was unchallenged.

driven by the questioning party's view of what is relevant. To the extent any party or ALJ questions the foundation for any particular testimony, they are free to either ask questions or object to the testimony, at which time the party and the witness can provide the information requested. To the extent the Commission deems that a party had a duty to provide some information and did not, it should simply say that its decision is based on the lack of that evidence, without making a personal comment as to the witness.

2. Suggested Changes To Proposed Order

- a. Section b)2. of the Proposed Order (p. 13) should be deleted in its entirety.
- b. The first full paragraph on page 7 should be revised to conform with the cited

transcript as follows:

Mr. Ehr testified that SBC's efforts to provide better service were not driven by the 01-0120 Plan but by the ongoing "271 proceeding." to "improve service" and issues identified by BearingPoint in its third-party test. Tr. 156. According to Mr. Ehr, "the 01-0120 Plan was not the cause of SBC Illinois' improved performance. Rather, those improvements began well before the implementation of the 01-0120 Plan in September 2002, and they continued long after the plan was replaced in July 2003 by the Section 271 remedy plan approved in Docket No. 01-0662." SBC did not make an effort to provide better service due to the 01-0120 Remedy Plan. (Tr. 155-57). According to Mr. Ehr, the 01-0120 Remedy Plan did not cause SBC to provide service to its competitors that was not substandard. (SBC. Ex. 104.0 at 12).

- c. Paragraphs 2-4 of page 26 (beginning "As has previously been discussed" and ending "SBC's competitors") should be deleted in their entirety.
- d. The second sentence of paragraph 2, page 27 (reading "As was stated earlier, SBC's witness, Mr. Ehr, is not credible.") should be deleted.
- e. The last two sentences and the accompanying citation in the first paragraph of the "Analysis and Conclusions" on page 27 (beginning "While Mr. Ehr testified" and ending "2d Dist. 1993") should be deleted, and the paragraph that follows those sentences

(beginning “Also, as was stated just previously” and ending “to its competitors”) should be deleted.

f. The first four paragraphs of the Analysis and Conclusions beginning on page 29 (beginning “According to Mr. Ehr” and ending “*Id.* at 3-4”) should be deleted.

g. The last sentence of the third paragraph of page 37 (beginning “Except for Mr. Ehr’s incredible testimony” and ending “Plan”) should be deleted.

h. The second full paragraph on page 38 (beginning “Additionally” and ending “admissible”) should be deleted.

C. Given The Incentives Already In Place For AT&T Illinois To Maintain Good Performance, There Was No Need For The Added Spur Of The 01-0120 Plan.

1. In The October – December 2002 Period, AT&T Illinois’ Desire To Enter The Long-Distance Market Was A Powerful Incentive.

The principal rationale for a remedy plan is that it gives the incumbent an incentive to provide good quality service. See, e.g., *Section 271 Order*, ¶ 3243 (listing “meaningful . . . incentive to comply” as FCC’s first factor in assessing remedy plan). The 01-0120 Plan, in particular, was intended to “spur[] improvement” in performance. *Id.* ¶ 3482. Its record was founded on performance data for “the latter part of year 2000,” when AT&T Illinois’ performance was at “75 to 80 percent compliance.” *Id.* ¶ 3483. There is no basis for that rationale here. First, by definition, incentives can only motivate *future* performance. Here, Staff and the CLECs are seeking to retroactively impose the Plan solely for *past* performance (i.e. October - December 2002). There is *no* incentive plan in the world that could affect *past* performance, because no one can change the past.

Second, any rationale of “spurring improvement” was no longer in place as of the fall of 2002. By that time, AT&T Illinois’ performance had already improved – so much so, that when

the Commission reviewed performance data for September through November 2002, it concluded that the 01-0120 plan was no longer appropriate, held that AT&T Illinois provided nondiscriminatory access to its operations support systems, and decided to endorse AT&T Illinois' application to provide long-distance service under Section 271. As the Commission recognized, AT&T Illinois had "(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." *Section 271 Order*, ¶ 3484. As a result of these efforts, the environment was "much changed" from the one that led the Commission to impose the 01-0120 Plan. *Id.* ¶ 3483. Reviewing "a more extensive but equally telling set of data," the Commission found that "[t]he undisputed evidence shows that since the latter part of year 2002, i.e., the record period for Docket 01-0120, and up to this date, wholesale performance has improved to a significant and sustained level and there are no indications that it will not stay on track." *Id.* Overall, AT&T Illinois' "performance has improved from 75 to 80% compliance in the fall of year 2000 to 90 and 93% compliance in the fall of year 2002." *Id.* Indeed, the Commission held in Docket No. 01-0662 that in that environment the plan would create the *wrong* incentives by assessing payments of approximately \$3 million per month "despite good performance," a result that "muddles the message and suggests a level of unfairness." *Section 271 Order*, ¶ 3486.

Imposition of the 01-0120 Plan as an "incentive" would be particularly inappropriate for the October – December 2002 period that is at issue here. Over and above the Commission's own holding that performance had already improved and was set to stay on track, AT&T Illinois was at that time subject to an extremely powerful incentive to maintain good performance: namely, it was actively pursuing its application to provide long-distance service under Section

271. AT&T Ex. 104.0 (Ehr Direct) at 5 lines 88-90. At that precise time, this Commission's investigation into Section 271 compliance was in progress, and its analysis of wholesale performance was about to begin. *Id.* lines 90-92. Thus, AT&T Illinois was actively preparing to submit three months of performance results from the end of 2002 – the same period that is at issue here – as the key period for the Commission to review. *Id.* at 6 lines 125-127. Further, AT&T Illinois was working with independent third party experts in their assessments of its operations support systems, performance measurement reporting and results. *Id.* at 5 lines 94-96. The BearingPoint tests of OSS and Performance Measurement were ongoing, and Ernst & Young was conducting its performance measurement audit during those months. *Id.* lines 96-98. In short, there was an intense focus on performance measurements and results at this time. *Id.* lines 98-99.

Indisputably, the ability to offer long-distance service was a matter of enormous importance to AT&T Illinois. *Id.* at 7 lines 134-135. McLeodUSA's own witness, Dr. Ankum, recognized that "the 271 approval process included significant 'structural' changes to SBC systems" and that the desire to obtain Section 271 approval represents a "distinct incentive" for improved performance. Feb. 17 Tr. 112-113; AT&T Cross Ex. 101 at 19. Likewise, Staff Witness McClerren pointed out that the Section 271 test of operations support systems *alone* cost AT&T Illinois over \$60 million – twenty times the monthly remedies under the 01-0120 Plan. Staff Ex. A (McClerren Direct) at 12-13.

It is equally undisputed that good wholesale performance was essential to securing a positive recommendation from the Commission and a positive result from the FCC (AT&T Ex. 104.0 (Ehr Direct) at 7-8 lines 136-151, 12 lines 214-220) – a point driven home by the Commission's exhaustive analysis in Docket No. 01-0662. In light of the critical stage of AT&T

Illinois Section 271 efforts at the time, coupled with other incentives for good performance (such as the desire to be recognized as a quality service provider and the desire to avoid CLEC complaints, AT&T Ex. 104.0 (Ehr Direct) at 4 (lines 76-78 and 80-82) & 5 (lines 84-86)), it is simply untenable to suggest that the expiration of the 01-0120 Plan would lead AT&T Illinois – after working for over a year to improve wholesale performance – to abruptly reverse course and *degrade* performance in the fall of 2002, when its wholesale operations were under the scrutiny of the Commission and third-party experts, and when it was on the very threshold of applying for and receiving long-distance approval.

2. The Proposed Order Fails To Consider AT&T Illinois' Incentives As A Whole.

The Proposed Order's principal error is that it addresses each incentive individually, and in the abstract, without considering them as a whole and in the context of the real-world performance results. Consider, as the leading example, the Proposed Order's discussion of the incentives to obtain Section 271 approval. The Proposed Order agrees with McLeodUSA Witness Dr. Ankum that "the desire to obtain Section 271 approval could provide *an* incentive for SBC to improve its wholesale service quality" but contends that it "was not a sufficient incentive to warrant having no remedy plan in place." Proposed Order at 25. But, as described above, there *were* other remedy plans in place, along with other incentives to maintain service quality. The real question is whether those incentives, *combined*, would be sufficient to counteract the theory that an incumbent "is not economically motivated to provide services to its competitors that are not substandard."

They are sufficient – and the first proof comes from Dr. Ankum, the very witness on which the Proposed Order relies. Dr. Ankum performed a statistical analysis of Michigan data from 2003-2005 – *after* the Section 271 investigation in an attempt to correlate a reduction in

remedies (due to a change in the remedy plan in that state) with a reduction in service quality.⁷ He did *not* conclude that a reduction in remedies would affect service quality *while a Section 271 investigation was pending*. In fact, he purposely chose not to even try reaching, much less supporting, such a conclusion. His Michigan analysis *excluded* data for the period in which AT&T Michigan's Section 271 application was pending, and for all time periods prior to Section 271 approval, on the ground that the desire to obtain Section 271 approval represented a "distinct incentive" for improved performance, separate and apart from the remedy plan. Feb. 17 Tr. 73, 112-113; AT&T Cross Ex. 101 at 19.

Even in a post-section 271 environment, the statistical analysis has no real probative value. Dr. Ankum's own Michigan testimony acknowledged that the difference in performance with and without the "k table" was "relatively modest" and further recognized that a correlation between two variables "does not necessarily imply that one variable causes the other." Feb. 17 Tr. 87-88; AT&T Cross Ex. 101 at 26 & n.28. He accordingly was unable to conclude that AT&T Michigan intentionally responded to weakened incentives with inferior performance. Feb. 17 Tr. 87-88; AT&T Cross Ex. 101 at 26.

⁷ The "k table" is a statistical tool used in assessing performance results. It included a step that excluded some performance shortfalls from the remedy payments, on the ground that some shortfalls are expected due to random variation rather than any underlying disparity. Dr. Ankum compared Michigan results with and without that exclusion. In Illinois, however, neither the 0120 plan nor the Section 271 plan contains such an exclusion.

Dr. Ankum also sought to compare results for performance measures that are subject to remedies against the results for performance measures that are not subject to remedies. The differences were insignificant (see AT&T Cross Ex. 103), and Dr. Ankum failed to account for the fact that some performance measures are not subject to remedies for the simple reason that the parties agreed they are not representative of AT&T Illinois performance; they are simply calculated for informational purposes. Feb. 17 Tr. 95-97. More fundamentally, Dr. Ankum's analysis of post-Section 271 results for Michigan has no bearing on this proceeding, which concerns *pre*-Section 271 performance for Illinois.

Most importantly, the data for *Illinois*, in the *pre*-Section 271 period at issue here, show that there is no correlation between remedy amounts and performance results. First, performance improved under the original Merger Plan, and did not change upon implementation of the 01-0120 plan in September 2002 (AT&T Ex. 104.0 (Ehr Direct) at 12 lines 229-231) – contrary to Dr. Ankum’s view, which suggests that a more stringent plan causes or correlates with better performance. Second, performance remained at high levels even after the 01-0120 Plan was terminated and replaced with the less draconian Section 271 plan; in fact, AT&T Illinois’ performance *improved* (AT&T Ex. 104.0 (Ehr Direct) at 12-13 lines 231-234), a result that again refutes Dr. Ankum’s economic theory.

3. Suggested Changes To Proposed Order

Section c)5. of the Proposed Order should be deleted in its entirety if the Commission adopts the exception noted in Section II above. Alternatively, the individual Analysis and Conclusion sections appearing on pages 25-27, 27-28, 28-29, and 29-30 should be deleted, and replaced with a single overall Analysis and Conclusion at the end of section c)5, reading as follows.

While the parties dispute some of the individual incentives that AT&T Illinois had to maintain the good performance the Commission found in Docket No. 01-0662, the Commission focuses on the incentives as a whole and their impact on performance results. To take the most prominent example, the pendency of the Commission’s indepth Section 271 investigation – coupled with other incentives such as the desire to avoid complaint proceedings – was indisputably a significant incentive to maintain performance. AT&T Illinois presented performance data from both before and after the 01-0120 Plan, showing that its improvements in performance began well before the Plan took effect and continued after the Plan was replaced. The Commission has also held that AT&T Illinois’ improved performance in late 2002 cannot be credited to that plan. Clearly, then, there were other incentives at work and the results show those positive incentives as a whole outweighed the negative incentives alleged by the CLECs and Staff. Accordingly, the Commission finds that the 01-0120 Plan, as a further incentive, was no longer needed for that limited period of time.

D. There Is No Record Evidence To Support The Proposed Order's Assertion That Missing A Performance Standard "Caused" Harm.

1. There Is No Proof Of Actual Damage Or Causation.

Finally, there is no evidentiary basis for the Proposed Order's recommendation (at 36) that the 01-0120 Plan "allows CLECs compensation for the harm caused by the substandard service they received from SBC."

a. The assertion of "substandard service" is contrary to the Commission's prior conclusion in the *Section 271 Order*: that in late 2002 AT&T Illinois' service quality had improved to the point where the 01-0120 Plan was no longer appropriate. See Section II.A *infra*. The Proposed Order is apparently using "substandard" service as a shorthand for the fact that AT&T Illinois met almost all, but not 100 percent, of its numerous performance standards. But there is no legal authority that requires AT&T Illinois to process every single CLEC request perfectly, or to satisfy every single one of the thousands of performance tests each month.⁸ Thus, the 01-0120 Plan expressly provides that CLECs may not use the existence of the plan or AT&T Illinois' payments under Tier 1 or 2 "as evidence that [AT&T Illinois] has . . . violated any state or federal law or regulation," and that AT&T Illinois' performance "may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation." July 10, 2002 Order, Attach. A § 6.2.⁹ The question, then, is not whether performance was

⁸ Nor could there be, as the 1996 Act requires only that AT&T Illinois provide nondiscriminatory service. 47 U.S.C. § 251(c)(2)(B)-(C), (c)(3), (c)(4)(B), (c)(6). Moreover, a perfection standard would be inherently unfair, as the statistical tests on which the 01-0120 plan was based erroneously indicate a "failed" result 5 percent of the time, *by design*.

⁹ To be sure, performance results may be used as evidence in assessing compliance with the nondiscrimination requirements of the 1996 Act (*id.*), but the Commission already conducted that assessment in Docket No. 01-0662 and concluded that AT&T Illinois satisfied the Act's requirements.

perfect but whether the minority of shortfalls were sufficient to warrant the 01-0120 Plan. The answer, from the *Section 271 Order*, is no. Section II.A. *infra*.

b. In addition, the record does not support *actual* “harm,” much less that such harm was “caused by” any shortfall in any performance measurement. The Proposed Order itself says only that a CLEC “may be required to deal with angry customers, refunds to customers, delays in payments, [and] losses of manpower” not that any of those events actually occurred or were actually caused by AT&T Illinois. Equally invalid is the Proposed Order’s assertion that the remedy *payments* made by AT&T Illinois to two CLECs (CIMCO and Forte) under the Order on Reopening “fortif[y]” its recommendation. But those CLECs did not even look at the underlying performance results (or transactions) to determine whether those payments were actually tied to any real-world damage. Feb. 17 Tr. 218-219 (Dvorak); Feb. 23 Tr. 295-297 (Waterloo). It is sheer boot-strapping to suggest that the fact of payment under a reversed Commission order justifies the Order. The purpose of this remand is to determine whether or not the 01-0120 Plan *should* have been extended for October – December 2002, and whether AT&T Illinois *should* have made the payments required under that plan. The mere fact that payments were made – as a result of the Commission’s subsequently-reversed Order on Reopening – does not establish that damages occurred or that those payments were legally justified.¹⁰ The 01-0120 Plan itself precludes such an approach, as it prevents CLECs from using plan payments as evidence of liability. July 10, 2002 Order, Attach. A § 6.2.

c. The carriers’ allegations are similarly unconnected to performance results. Indeed, Forte’s witness openly acknowledged at the hearing that his company’s complaints were

¹⁰ Indeed, on one occasion the actual performance results for one measure showed that AT&T Illinois *satisfied* the applicable standard, and AT&T Illinois announced to CLECs that its previously reported “misses” for that measure were incorrect. See AT&T Cross Exs. 107-108; Feb. 23 Tr. 307-308, 311-312.

not captured in the performance measurements underlying the 01-0120 Plan, stating that those measures did not “give a good description” of Forte’s issues. Feb. 23 Tr. 318-319 (Waterloo). To take the leading example, Forte’s principal complaint relates to the fact that a subset of non-standard orders – under which Forte sought to restore service to customers it had previously suspended – were mistakenly rejected and returned to Forte in the spring of 2002. In October 2002, Forte informed Mr. Christensen of AT&T Illinois, who investigated and corrected the error promptly after being informed of the issue. AT&T Ex. 106 (Christensen Rebuttal) at 14 lines 333-341. There is no performance measure or remedy for “incorrect rejections” – the only remedy applies where the rejection is not returned to the CLEC for resubmission – so the extension of the remedy plan would not result in any payment to Forte for the matter. AT&T Ex. 104.1 (Ehr Rebuttal) at 10-11 lines 218-228. If anything, the fact that AT&T Illinois took corrective action even though no remedy payment was at issue shows that the 01-0120 Plan was not necessary.

CIMCO, meanwhile, complained that “hundreds of orders” were delayed, but the actual performance data show that AT&T Illinois met over *** ** of due dates for CIMCO for the October – December 2002 period, completing *** ** orders with only *** ** due dates missed due to an AT&T Illinois cause. AT&T Ex. 104.1C (Ehr Rebuttal) at 9-10 lines 201-205. Even for those few missed due dates, almost all were not subject to remedies because AT&T Illinois still met the applicable parity test. Of those *** ** orders, only *** ** missed due dates resulted in a performance shortfall and remedies. *Id.* at 10 lines 205-206.

Equally meritless is CIMCO’s complaint that shortfalls in “provisioning accuracy” led customers to complain about installations. AT&T Illinois has a performance measure specifically designed to track customer complaints: Performance Measure 35, which tracks the

number of installations for which a “trouble report” is received within 30 days. AT&T Ex. 104.1 (Ehr Rebuttal) at 7 lines 141-146. For October – December 2002, AT&T Illinois filled ***
*** installation orders for CIMCO, and only *** *** percent of those orders received a
trouble report in the 30-day period. *Id.* at 8 lines 158-167. Of those trouble reports, only ***
*** -- or *** *** -- related to tests where parity was not met and
remedies would have been paid. *Id.*

The “provisioning accuracy” measure to which CIMCO referred (PM 12) does not measure customer complaints or trouble reports, but simply measured whether the product and service identifiers on the internal AT&T Illinois service order matched the products and services ordered by the CLEC. AT&T Ex. 104.1 (Ehr Rebuttal) at 6 lines 125-133. Due to difficulties with the measurement calculation at that time, there were occasions where AT&T Illinois’ performance measurement systems did not compare the proper version of the CLEC’s request to the proper version of the AT&T Illinois internal service order, creating an apparent “mismatch” where in reality there was none. *Id.* at 6-7 lines 133-137. The performance “misses” on this measure were overstated, and do not tie to any customer impact. *Id.* at 7 lines 137-139. Thus, both this Commission and the FCC have recognized that installation trouble reports are more probative of actual customer impact. *Section 271 Order*, ¶ 959 (“The principal measure of [provisioning] reliability is the rate of ‘trouble’ reported within 30 days of installation (also known as ‘installation trouble reports’), which the FCC has found probative”); *In re Joint Application by SBC Communications Inc., et al.*, 18 F.C.C. Rcd. 21,543, ¶ 100 (2003) (approving Section 271 application for Illinois and rejecting Forte complaint on accuracy of provisioning completion notices on the ground that AT&T “consistently achieves parity for PM 35, which captures the percentage of trouble reports filed within a 30-day period”); *In re Application by*

Bell Atlantic New York, 15 F.C.C. Rcd. 3953, ¶ 174 (1999) (approving Section 271 application for New York, finding that incumbent’s “service order accuracy metric is flawed,” and concluding that “very low levels of reported installation troubles” demonstrate accurate provisioning); *id.* ¶ 183 (concluding that incumbent’s “very low levels of reported installation troubles” demonstrate accurate provisioning and “disregard[ing] . . . low reported performance for service order accuracy”).

d. McLeodUSA fared no better. Its direct testimony simply reported the proceedings in the Alternative Regulation Docket, without any independent analysis. That docket did not analyze performance for the fall of 2002; in fact, the testimony in that proceeding was filed in late 2000 and early 2001. On rebuttal, McLeodUSA selected a few performance measurements based on the criterion that the applicable standard was “missed” in one or more of the sub-measurement categories in one or more of the months from September – December 2002. Feb. 23 Tr. 340-341 (Lynott). But McLeodUSA did not provide any concrete evidence to show that any of these shortfalls actually had any impact.

Why is some proof of causation and harm essential? Consider Firm Order Confirmations, a notice that AT&T Illinois sends upon receiving a CLEC order to confirm that it has received and is processing the order. Feb. 23 Tr. 337-338 (Lynott); *id.* at 297 (Waterloo). The applicable performance measure (PM 5) assesses whether AT&T Illinois issued 95 percent of FOCs within a given time frame expressed in hours. There are 54 categories for this measure. Feb. 23 Tr. 339; AT&T Cross Ex. 109 at 3-5. Overall, AT&T Illinois met or exceeded the applicable standard in 25 out of the 29 categories with reported data in October, 23 out of 28

categories in November, and 22 out of 27 categories in December.¹¹ The mere fact that AT&T Illinois missed the standard in a handful of categories says nothing about any actual impact: after all, a “miss” would occur if AT&T Illinois issued 94.99999 percent of the FOCs on time, and if the rest were only a millisecond late. See Feb. 23 Tr. 297-298 (Waterloo). McLeodUSA presented no *analysis* of the misses – or any other performance category it presented – to show whether there was any real-world impact.¹²

e. Finally, the Proposed Order (at 7) misreads Mr. Ehr’s testimony in suggesting that he “acknowledged that remedy plan payments are compensation for the harm that results from SBC providing substandard service to its competitors. (Tr. 165-66).” The actual transcript shows that Mr. Ehr did not agree that any harm *has* resulted from performance shortfalls in late 2002, or that imposition of the 01-0120 Plan was appropriate to compensate for such harm. He only acknowledged the possibility that harm “may have occurred.” Feb. 17 Tr. 166.

2. Suggested Changes To Proposed Order

The discussion at issue appears in Section c)6. of the Proposed Order (at 36). That section should be deleted in its entirety if the Commission adopts the exception noted in Section II above. Alternatively, AT&T Illinois has already proposed deletion and replacement of Section c)6. in Section II.A of this brief. Based on the Exception here alone, the final sentence of the first paragraph of the Analysis and Conclusion on page 36 (beginning “Further, this allows”)

¹¹ The applicable data for October and November appear on AT&T Cross Ex. 109 at 3-5; December data are shown on AT&T Cross Ex. 110 at 3-5. The result for each month’s comparison of actual data against the standard is displayed under the column titled “Result” for each month; a “yes” in that column indicates that the standard was met. Feb. 23 Tr. 349 (Lynott).

¹² In the same vein, McLeodUSA’s Dr. Ankum posed a hypothetical in which a CLEC *might* be damaged by a late installation if that installation was a “test run” for a new, important customer. Feb. 17 Tr. 108-109. On cross, however, Dr. Ankum admitted that he did not conduct any analysis to determine whether that hypothetical scenario had in fact occurred: in fact, he had not looked at the facts and circumstances of *any* order AT&T Illinois processed during the October – December 2002 period. *Id.* at 119.

should be deleted, along with the second, third and fourth paragraphs of that Analysis and Conclusion. In addition, the second sentence of the fifth full paragraph of page 7, beginning, “He acknowledged” should be deleted.

E. The Proposed Order Improperly Attempts To Dismiss The Elements Of Damages And Causation As A “Tort Law Argument.”

1. Discussion

By way of introducing and framing its response to the CLECs’ claims of compensation, AT&T Illinois’ brief noted that imposing “compensation” from one party to another would require (i) some legal liability owed, (ii) some actual damage to be compensated, and (iii) some causal connection between the paying party and the damage. The Proposed Order dismisses AT&T Illinois’ statement as a “tort law argument” and states that “[t]here is no need to prove ‘actual damages’ here.” But as discussed in the preceding section, the Proposed Order asserts that there *has* been damage and causation, when it states that the Plan “allows CLECs compensation for the *harm caused* by the substandard service they received from SBC.” Given that recommendation, the legal question facing the Commission is not one of tort law but administrative law: namely, whether there is “substantial evidence” to support the adoption of that recommendation, as is required by 220 ILCS 5/10-201(e)(iv). Thus, if the Commission deems there is substantial evidence of harm and causation (as shown above, it should not), it should revise the Proposed Order to specify the evidence of harm and causation on which it relies, and delete the discussion of tort law as unnecessary.

In addition, the Proposed Order is incorrect in stating (at 40) that the 01-0120 Plan “is a contract, which sets forth, with particularity what will occur when SBC provides substandard service.” The very reason for this proceeding is that the “contract” – Condition 30 of the merger

– expired on October 8, 2002. The question here is whether the plan is to be imposed on AT&T Illinois for the October – December 2002 period, *without* its consent.

2. Suggested Changes To Proposed Order.

Section c)7, which appears on pages 39 and 40, should be deleted in its entirety.

IV. The Commission Should Clarify The Proposed Order’s Statements Regarding The Contents Of A Brief.

A. Discussion

The ALJ directed the parties to include a “Statement of Fact” in their opening briefs. The opening brief filed by CIMCO and Forte did not comply. The Proposed Order points this fact out, but does not take action. AT&T Illinois does not take exception to the Proposed Order in that respect.

However, the Proposed Order goes on to say (at 12) that “[a]ll parties are advised that, in the future, such an omission could result in a brief being stricken.” That language could be construed to mean that a statement of fact will now be required in all opening briefs in all proceedings. Of course, such a requirement would require a revision to the Commission’s Rules of Practice, which do not require a statement of facts and are not the subject of this proceeding,¹³ and AT&T Illinois does not believe the ALJ intended such a result. Rather, the Proposed Order more likely intended “such an omission” to mean the omission of a statement of fact where the ALJ has specifically requested such a statement. The Commission and the ALJ should clarify the Proposed Order.

¹³ The Commission’s rule on Briefs, 83 Ill. Adm. Code § 200.800, does not require a Statement of Fact.

B. Suggested Changes To Proposed Order

AT&T Illinois requests that Section b.) 1. of the Proposed Order, which appears on page 12, be revised as follows:

This Commission notes that the posttrial brief filed by CIMCO and Forte did not include a statement of facts. The Administrative Law Judge specifically required the parties to include statements of facts in their briefs. Indeed, a statement of fact is a rudimentary and customary part of a brief. (*See, e.g.*, S. Ct. Rule 341). It also is an important aid to the development of a party's position. All parties are advised that, in the future, such as the omission of a statement of fact, where the Administrative Law Judge has instructed the parties to include such a statement in their briefs, could result in a brief being stricken.

CONCLUSION

For the reasons set forth above, AT&T Illinois respectfully requests that the Commission grant AT&T Illinois' exceptions, revise the Proposed Order in the manner described above, and decline to extend the duration of the 01-0120 Plan to the October 8, 2002 – December 30, 2002 period at issue here.

July 24, 2006

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CERTIFICATE OF SERVICE

I, Nancy J. Hertel, an attorney, certify that a copy of the foregoing AT&T ILLINOIS' VERIFIED MOTION FOR LEAVE TO FILE INSTANTER AND EXCEPTIONS BRIEF ON SECOND REMAND (PUBLIC VERSION) was served on the following parties by regular U.S. Mail and/or electronic transmission on July 24, 2006.



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