

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Joint Petition for Arbitration Pursuant to :
Condition 29 of the SBC/Ameritech :
Merger Regarding Operation Support :
Systems and Ameritech's Plan of : Docket No. 00-0592
Record :

**BRIEF IN REPLY TO EXCEPTIONS
OF THE
STAFF OF THE
ILLINOIS COMMERCE COMMISSION**

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I. INTRODUCTION

The Staff of the Illinois Commerce Commission (hereinafter "Staff"), pursuant to Section 200.830 of the Rules of Practice before the Illinois Commerce Commission, 83 Ill. Admin. Code 200.830, submits its Brief in Reply to Exceptions. Staff has addressed most of the points raised in the briefs on exceptions of the parties in its own brief on exceptions and so, in the interest of brevity, will not reiterate those points again. While Staff will comment on several specific points raised in all the briefs on exceptions, the absence of a response in this reply brief should not be construed to mean that Staff concurs with those positions; rather, it means that Staff has adequately described its position in its brief on exceptions or that Staff believes no further comment is necessary.

II. REPLY TO EXCEPTIONS

With respect to the Hearing Examiner's Proposed Order entered on November 9, 2000 in connection with the above captioned matter (hereinafter "HEPO"), the Staff replies to the briefs on exceptions submitted by the other parties to the proceeding, as follows:

Issue 2

Joint Testing

Reply Number 1: The HEPO incorrectly concludes that AI should make non-monitored testing available for only 10% of the testing period.

AT&T, CoreComm Illinois, Inc. and WorldCom, Inc. (collectively referred to herein as "AT&T") in their Joint Brief on Exceptions that the HEPO erroneously accepted AI's proposal to make non-monitored joint testing available for only 10% of the testing period. AT&T BOE at 4-8. The CLECs further argue that there is no record evidence which justifies AI's refusal to make monitored and non-monitored joint testing available at all times. Id.

Staff is generally sympathetic to the concerns raised by the CLECs regarding non-monitored joint testing. Staff urges the Commission to clarify that the (10%) constraint on non-monitored joint testing should not apply to the future joint testing environment. The concept of limiting non-monitored joint testing has always been discussed by the parties in the context of the current test environment and not the future joint testing environment. In fact, AI has consistently promised that the new test environment will be state of the art.

Staff does not believe it is appropriate for Ameritech Illinois (hereinafter referred to as "AI") to unilaterally place a limitation on CLECs making only (10)% of transactions non-

monitored. Any such limitation on the percentage of non-monitored transactions that will be allowed must be negotiated by AI and the CLECs prior to the actual testing period.

Consequently, Staff wishes to clarify its position on this matter. Staff agrees with the CLECs that it is critical for the CLECs to have access to a testing environment that mirrors production in order for them to gain results that are accurate and reliable. Allowing AI to engage in monitoring during testing does not mirror the production environment. Consequently, Staff believes that CLECs should be able to request a higher or lower percentage of non-monitored transactions via the negotiation process. Contrary to AI's position, such negotiations should take place outside the time-consuming Change Management Process ("CMP") and should occur prior to the CLEC entering the actual joint testing environment. Accordingly, Staff recommends that the following modifications be made to the HEPO at page 29-30:

The final CLEC request, which is beyond a mere language revision, has to do with the amount of monitoring AI will do of test transactions. AT&T states in its final comments that monitoring has the possibility of skewing CLEC results in testing. (AT&T Final Comments, p.19). The results that the CLECs believe would be skewed are when they are testing the length of time required for certain OSS functions. AT&T states "When conducting testing, the CLEC may well wish to gain some indication of the processing intervals that might result in production." Another concern of CLECs is that by stopping the orders for monitoring, the CLECs are not able to test flow through.

AI has offered to allow non-monitored testing to occur during a limited period of time. This period of time will not exceed 10% of the total testing time. CLECs believe that AI's offer is inadequate to meet CLEC needs. CLECs fear having to cram all the test transactions that they want non-monitored into a short time frame and that this cramming would not mirror production. CLECs are also concerned that AI has not identified when this window of non-monitoring will occur.

The Commission believes that for many CLECs, monitoring will be beneficial. Ms. Cullen stated at the hearing in response to question by the Hearing Examiner that the monitoring "does help to speed the process along, especially for a start up CLEC who this is like their first attempt at building these interfaces." (Tr. p. 682). AI, in their initial comments stated that the monitoring "offers Ameritech Illinois testing staff the ability to respond more quickly to CLEC questions or issues as well as to offer consulting or input on alternative approaches." (AI Initial Comments, p. 16). In addition, monitoring will allow AI to identify and resolve problems more quickly.

~~As for the more experienced or sophisticated users that do not want monitoring, AI will offer a window of time in which monitoring will not take place. The proposed window is for 10% of the test period but, CLECs can request a higher or lower percentage of time through the CMP. The Commission believes that this is a reasonable offer. This is based on the CLEC's inability to point at any real problem with monitoring except that when they test for timing of OSS processes, the time will be longer. In our view, the window of non-monitoring should allow CLECs to adequately measure the intervals of OSS functions. The exact percentage of time for which monitoring will not take place during the test period should be subject to negotiations, outside the CMP, between AI and the CLEC requesting a greater period of non-monitoring. In addition, the Commission orders that all such negotiations occur prior to the start of the joint testing environment for a given release. Finally, constraints on non-monitored joint testing should not apply to either the existing or future joint testing environment unless CLECs request monitoring during negotiations prior to testing. The Commission also finds the CLEC fear about flow-through testing unfounded as Ms. Cullen stated at the hearing that monitoring "stops the process, but it does not manipulate or change what's going to happen with that LSR." (Tr. 682)~~

Issue 4

Change Management Process – Outstanding Issue Solution

Reply-Number 2: The HEPO erred in its conclusion that Robert's Rules of Order apply and are determinative of the question of what constitutes a quorum for purposes of OIS voting. AT&T and McLeodUSA persuasively argue (and Robert's Rules agrees) that the Commission should adopt an OIS vote quorum measure of the qualified CLECs participating in that vote. An OIS vote would be decided by the majority of the CLECs participating.

Staff stands by the comments submitted in its Brief On Exceptions, and in the Brief On Exceptions filed by AT&T, and jointly by McLeodUSA Telecommunications Services,

Inc., Birch Telecom of the Great Lakes, Inc. and NEXTLINK Illinois, Inc., d/b/a XO Illinois, Inc. (collectively referred to herein as “McLeodUSA”).¹ As McLeodUSA and AT&T noted in their respective Briefs On Exceptions, the HEPO’s assumption that Robert’s Rules of Order is a mandatory beginning point is erroneous. McLeodUSA BOE at 16-17; AT&T BOE at 12. The Rules apply where they actually have been adopted; in the absence of adoption, no party should be put to the burden of proving the Rules are inapposite. That the HEPO improperly placed this onus on the CLECs and Staff is one reason the HEPO needs to be amended prior to adoption by the Commission as indicated in the BOEs.

Moreover, as both AT&T and McLeodUSA argued in their Briefs On Exceptions, the HEPO’s reading of the Rules’ quorum requirements is flawed. AT&T BOE at 10-15; McLeodUSA BOE at 17-20. The Rules do not identify only a single way of determining a quorum. Rather, the Rules clearly support a quorum measure as argued for in this proceeding by the CLECs and Staff. The HEPO narrowly focuses on the legislative requirement of a quorum as being the majority of a body’s members. In doing so, the HEPO ignored its own recognition of the legitimacy of the CLEC position that the quorum consist of qualified CLECs attending each OIS vote: the HEPO noted that “many small organizations specify that a quorum is the largest number of people who can be relied upon to attend.” HEPO at 39. However, this latter point was not missed by the CLECs, as

¹ Staff and the other parties have been notified by AI that there has been significant movement towards settlement of the OIS voting issue on the SBC 13-state level. This may have a significant impact on the way the Commission ultimately decides the OIS voting issue for Illinois. However, the Commission can only address the positions and statements that are currently of record. As long as there is nothing of record regarding this purported change the Commission’s deliberations cannot be affected by any such development. AI has indicated that it is seeking to pull this issue “off the table” by verifying an agreement. AI also has informed the parties that it may delay its RBOE on Issue 4. Staff reserves the right to respond to any new positions AI may submit, whether in its RBOE or some other document.

they correctly pointed out that the Rules recognize that groups and associations other than legislative bodies require different definitions of a quorum. A legislature, which has authority delegated to it as a single body, and a group of individual CLECs whose interests in each question are individual and varied, should not operate under the same strictures. The CLECs note that Robert's Rules recognizes that one measure appropriate for such CLEC OIS meetings is "the number present at the time, as they constitute the membership at that time." McLeodUSA BOE at 18-19. In a comment apposite to the current debate, the Rules caution that care should be taken in amending a quorum requirement, for "if the rule is struck out first, then the quorum instantly becomes a majority of all the members, so that in many societies it would be nearly impracticable to secure a quorum to adopt a new rule." Robert's Rules of Order Revised, Section XI, Par. 64. This is the same impracticability that the Staff and CLECs maintain is inherent in AI's quorum proposal.

In Staff's Brief On Exceptions it was argued that the HEPO improperly relied on Robert's Rules of Order to reject positions espoused by the CLECs and Staff. After considering the Briefs On Exceptions submitted by AT&T and McLeodUSA, as discussed above, Staff modifies its position on this issue. Staff continues to believe that the HEPO's imposition of Robert's Rules was inappropriate. However, in the event that the Commission elects to apply Robert's Rules, Staff believes that the alternative quorum measures identified by the CLECs in their Briefs On Exceptions be supported. In other words, the Commission should determine that the quorum for an OIS vote should be the number of CLECs participating in the vote; and, the outcome of the vote is determined by a majority of those participating in the vote.

Issue 6

OSS System Interface Availability

Reply Number 3: Staff continues to decline to recommend that AI implement, at this time, 24 x 7 availability of OSS system interfaces (with a couple hours of downtime for maintenance). Staff does support advance monthly reporting of network maintenance and repair intervals. Staff continues to advise the Commission that each party has the burden of persuading the Commission that their respective proposals are reasonable but, if one party has the greater access to evidence, such party has the burden of proof.

With respect to this Issue 6, AT&T argues that AI did not provide sufficient evidence that implementation of a 24 x 7 availability of OSS system interfaces would be cost prohibitive in light of customer demand. AT&T BOE at 16. While recognizing that AI provided verified witness testimony at hearing that such availability was not possible due to the age and configuration of AI's equipment, AT&T did not find such statements to be substantiated. AT&T BOE at 16-17. AT&T relies upon the practices of other incumbent local exchange carriers "...similar in size to Ameritech..." as support for its contention that 24 x 7 availability is practical and feasible despite the fact that the record indicates that such incumbent local exchange carriers may possess newer and more technically advanced systems than AI's systems. AI Final Comments at 25-27.

Staff believes that AI has met its burden of proof, and the record so indicates, that it would be very expensive for AI to provide 24 x 7 availability and, therefore, Staff declines to recommend to the Commission that it order AI to overhaul its systems, at this time, in order to provide such availability. Tr. at 228-237; Amended AI Response to Staff Data Request 6-3.04. Instead, Staff continues to recommend a substantial increase in the hours of availability currently provided by AI as a more balanced approach to respond to the

CLECs' concerns and demonstrated need for additional hours of availability. Staff Final Comments (Corrected) at 32-38.

With respect to this Issue 6, McLeodUSA requests certain clarifications to the HEPO, including a clarification as to AI's monthly reporting requirements for its systems' maintenance and repair intervals. McLeodUSA BOE at 31. As a result, McLeodUSA suggests the following language be added to the HEPO:

AI shall establish a regular maintenance and repair interval for all days of a month and post it on its website as an accessible letter. The posting will be provided on the first working day of each month for the following month (i.e., AI should post June 2001 network maintenance times on May1, 2001).

McLeodUSA BOE at 35.

Since Staff recommended monthly reporting with respect to maintenance and repair downtime in its Final Comments, Staff supports McLeodUSA's proposed language set forth above. Staff Final Comments (Corrected) at 38.

Finally, in Section II of its BOE, McLeodUSA argues that AI has the burden of proof in this proceeding. McLeodUSA BOE at 4-6. With respect to this Issue 6, Staff argued in its BOE that AI has the burden of proof because of its superior access to information regarding the operation and capability of its systems but that in general, each petitioner has the burden of proving the reasonableness of its proposals. Staff BOE at 19-20. McLeodUSA claims that AI has the burden of proving that its proposals set forth in the Plan of Record ("POR") are just and reasonable. Id.

In support of its position, McLeodUSA points to a series of cases in which the Commission investigates whether the terms and conditions under which a carrier provisions a telecommunications service are just and reasonable. McLeodUSA BOE at 5-

6. In such Commission investigation cases, the utility has the burden of proving that the term or condition of service under investigation is just and reasonable. Id.

This arbitration proceeding can be easily differentiated from such investigation cases. In general, the burden of going forward with the evidence (burden of production) in investigation and tariff cases is on the public utility. CIPS v. Illinois Commerce Commission, 5 Ill. 2d 195, 206-207 (1995).² In this proceeding, the Commission is not using its investigative powers rather, the Commission is arbitrating these issues that AI and the CLECs have been unable to resolve by collaborative effort. Merger Order at 253-255. As a condition to the SBC/AI merger, the Commission provided an arbitration process whereby the parties could jointly petition the Commission to resolve any remaining disputes. Id. Since the party bringing the action to the Commission has the ultimate burden of persuasion, the CLEC argument, therefore, is true, only as far as it goes.³

As a petitioner in this proceeding, AI does have the burden of proving that its proposals in the POR are just and reasonable. Furthermore, Staff agrees that requiring Staff or the CLECs to prove the unreasonableness of such proposals is "...no substitute for requiring proof of reasonableness." McLeodUSA BOE at 6 (citing Citizens Utility Board v. Commerce Commission, 276 Ill.App. 3d 730, 747 (1st Dist. 1995)). Nevertheless, in this joint petition, the CLECs also have the burden of proving that their proposals are just and reasonable in light of their competitive needs. As set forth above and as Staff discussed in it Brief on Exceptions, the petitioner has the burden of proving its case. Staff BOE at 19-

² One exception to this general rule is when the Commission accuses a regulated entity of wrongdoing, especially if seeking a penalty, then the Commission is under the burden of producing the evidence which leads to the accusation. 220 ILCS 5/10-110; 5 ILCS 100/10-55(a).

20. It necessarily follows that in a joint petition, each of the petitioners would have the burden of proof (a/k/a burden of persuasion) with respect to their respective proposals. One exception to this rule would be where one petitioner has exclusive access to relevant evidence. See, Staff BOE at 20.

Issue 13

Relaxed Customer Service Record Address Validation

Reply Number 4: AI improperly posits the implementation of relaxed address validation in February as an “acceleration.” Given the repeated delays already imposed by AI, implementation should be made no later than December 31, 2000. There is harm to the CLECs by delayed implementation of relaxed address validation.

Staff and the CLECs asked that relaxed address validation be implemented in December 2000. The HEPO proposes that relaxed address validation be implemented by than February, 2001. In its Brief On Exceptions, AI states that the HEPO directs AI to implement lite validation one month in advance of the date proposed by AI and that early implementation would not bring significant benefits, but that “acceleration” would be harmful. AI BOE at 21-22.

There are two points to be made in rebuttal of this position. First, the February, 2001 date is not an “acceleration.” As noted in Staff’s Final Comments, AI originally suggested that relaxed address validation would be implemented in September 2000. Staff Final Comments at 51. AI then changed the committed delivery date to December 2000. Then, again, without any substantive support, AI delayed the implementation date of

³ Chicago’s Eastern Illinois Railway Co. v. Illinois Commerce Commission, 333 Ill. 215, 217 (1928). A party has met its burden of persuasion if it proves, by substantial evidence, based upon the entire record of evidence, the allegations of fact which support its request or complaint. 220 ILCS 5/10-201 (e) (iv) A.

lite address validation to March 2001. It is rather disingenuous for AI to state, after repeated delays for which it is responsible, to state that the February date constitutes an “acceleration.” Even with the Commission ordering AI to implement relaxed address validation by December 31, 2000, this could not possibly be properly characterized as anything other than a unilateral delay by AI.

Second, AI’s assertion that there is no real harm in this delay is self-serving and off the mark. We are not looking at just one month, as posited by AI. As noted above, this delay began in September 2000. The delay from September to March 2001 is six months long. Harm to competition has resulted each time AI has sought to delay – and actually delayed – the implementation of relaxed address validation. Harm to the CLECs can only be gauged by the CLECs themselves but from their testimony in this proceeding, it is clear that they believe that their businesses have been adversely impacted by the delayed implementation of this functionality. Covad and Rhythms Links Final Comments at 7.

As previously noted in Staff’s Final Comments, the CLECs claim a 30 to 40 per cent order rejection rate due to address-related errors. Staff Final Comments at 50. Covad believes that the error rate would be reduced to below 5 per cent after the implementation of Lite Validation. AI does not dispute that the rejection rate will be reduced through the use of Lite Validation. The CLECs note that the cost to them of the continued higher rate of rejection of service orders includes additional time to implement orders, additional time and employee time reviewing the rejections and resubmitting the orders, and poorer service for their end customer. These effects are exacerbated by the possibility of repeated rejections of orders.

There has been harm to competition by AI's history of delays. There will be further harm in AI's proposed additional delay in implementing relaxed address validation. The Commission should order AI to implement relaxed address validation no later than December 31, 2000.

Issue 18
Flow Through

Reply Number 5: McLeodUSA overstates the degree of Staff's acceptance of the CLEC position in this case. Also, Staff is willing to accept the more aggressive collaborative schedule proposed by AT&T Communications.

While Staff agrees in large part with the CLEC position on the issue of flow-through, the Brief on Exceptions of McLeodUSA overstates the degree of Staff's agreement with those positions.

One of the McLeodUSA positions in this case is that "[a]ll CLEC orders, regardless of service platform should flow through." McLeodUSA BOE at 55 (Emphasis added). McLeodUSA further states that "[t]he Commission must adopt the position of Staff and the CLECs, which requires, in relevant part, the elimination of 50% of exceptions to flow through over the next twelve months." McLeodUSA BOE at 56 (emphasis added). McLeodUSA overstates Staff's agreement with its position.

A more accurate description of Staff's position on this issue is that AI should be required to substantially reduce the flow-through exceptions for unbundled element orders or other products within twelve months after the order in this arbitration is approved, but that AT&T's proposal that exceptions to flow-through for unbundled elements or other products be reduced by 50% within twelve months should not be adopted. Staff Final Comments at

63. Rather, Staff argued that the determination as to what percentage of flow-through exceptions would constitute a substantial reduction should be made only after reviewing the information required of AI pursuant to Staff's recommendations. Id. Staff further argued that, regardless of the rate of reduction ordered by the Commission, the overall goal should be to achieve substantial and continuous progress over time in flow-through capability so as to accomplish, to the extent practical, relative parity between CLEC and internal AI orders. Id. Staff was, however, concerned by the apparent lack of CLEC input into AI's decision-making process regarding the elimination of exceptions to flow-through.

Clearly, while Staff agrees in large part with the CLEC position in this case, Staff remains opposed to the portion of the CLEC position which calls for the elimination of all exceptions to flow-through regardless of the effect of such elimination on AI's capability of providing access to its ordering functions. Staff reasserts that the Commission's purpose in adopting Condition 29 was to facilitate the improvement of the OSS systems and interfaces available to CLECs in Illinois. Merger Order at 253. Thus, rather than adopting a hard and fast rule regarding 100% long term and 50% near term elimination of flow-through exceptions, Staff continues to believe that the determination as to what percentage of flow-through exceptions would constitute a substantial reduction should be made only after reviewing the information required of AI pursuant to Staff's recommendations.

Also filing a joint brief on exceptions regarding the issue of flow-through is AT&T. The gist of the AT&T position is that, fairly consistent with the criticism offered by Staff in its Brief on Exceptions, the HEPO should be revised to provide a more defined collaborative process. AT&T BOE at 31-34. The essence of AT&T's proposal is that following the April 15, 2000 deadline established by the HEPO for AI to file a complete list of exceptions, the

envisioned collaborative process should be subject to appropriate deadlines. This proposal is in line with, although slightly accelerated from the process envisioned by Staff in its Brief on Exceptions. For example, while Staff envisioned a May 15, 2000 deadline for CLECs to provide, in writing, their priorities in relation to flow-through, AT&T's position calls for an April 25, 2000 deadline. Since it is the CLECs who are affected by the truncated response time, Staff has no objection to the adoption of AT&T's position.

AT&T next calls for a 30 day limitation on the subsequent collaborative process whereas Staff proposed a one month time frame. Staff obviously has no objection to the adoption of AT&T's virtually identical proposal. AT&T's proposal also envisions the delivery to CLECs and Commission Staff of a final report due to be filed within 10 days after the conclusion of the collaborative session. AT&T BOE at 31. This would happen approximately on June 5, 2000. Ostensibly, the monthly reports following the June 5, 2000 report would contain current and updated lists identifying the exceptions AI intends to remove on a date certain as well as a listing of the exceptions already eliminated. Staff has no objection to this turn-around time proposed by AT&T.

Finally, AT&T argues that it should be allowed a fourteen day time period to comment on AI's final report and would require the Commission to resolve any remaining unresolved issues. AT&T BOE at 31. Assuming there is a further right of Staff, AI and others to take part in this resolution process, Staff supports its adoption.

Issue(s) 29/31

DSL Loop Qualification

Reply Number 6: The HEPO correctly finds that AI's systems are able to provide to CLECs loop make-up information for up to ten (10) loops and appropriately directs AI to begin providing such information by March 2001.

In its Brief on Exceptions, AI takes exception with the HEPO's requirement that it make loop makeup information for up to ten (10) different loops available to CLECs by March 2001. AI BOE at 24. Specifically, AI's exception is based on the following two grounds: (1) developing a process which would provide such makeup information would require an entirely new use of AI's systems which were not designed for the task; and (2) the March 2001 date imposed in the HEPO is not a realistic or reasonable deadline for AI to develop a mechanism which would provide the CLECs with the information they have requested. AI BOE at 24-27.

Staff disagrees on both counts and urges the Commission to reject AI's exception to the HEPO's findings on loop make-up information. AI's given reasons for its exception lack merit and are not supported by the evidentiary record in this proceeding. AI argues that its systems are not currently designed to provide this information. The fact of the matter is that AI currently has the ability to determine the optimal loop for each individual CLEC request. Tr. at 826. AI's systems currently access the detailed information regarding spare loops electronically. AI simply needs to alter the way in which it looks at and evaluates the information regarding spare loops. As the process currently exists, when AI returns the optimal loop, it provides the CLEC with approximately forty (40) different attributes for that particular loop. Staff's position is that these same attributes (and possibly more if needed by the CLECs) should be returned for up to ten (10) loops.

As argued in Staff's BOE, the HEPO correctly found that "CLECs should have the ability to select a loop based on the types of service offerings they wish to make available to their end-users without having to disclose to AI the type of service they will be providing." HEPO at 78. In other words, AI should not be making decisions as to what loops best suit a CLEC's customer – such decisions are best determined by the CLEC.

Moreover, AI's contention that the March 2001 date is unreasonable remains unpersuasive. AI simply has not provided a sufficient explanation as to why or how the March 2001 date is unrealistic. AI BOE at 23-26. Staff suspects the reason AI has not done so is because there is no support for its position in the evidentiary record.

In short, AI's explanation that loop make-up information is unnecessary and that AI's systems are not designed to provide such information should be given no weight by the Commission. Moreover, AI has failed to sufficiently explain why the March 2001 date for providing loop make-up information to CLECs is unrealistic. AI's entire exception, therefore, must be rejected and the HEPO's language regarding this issue should remain unchanged.

Issue 46

Hot Cuts: Coordinated Process and Procedures

Reply Number 7: With respect to a DT/ANI test performed on DD-2, Staff disagrees with AI's proposed timeframes for delivering notice to a CLEC of a failure of such test. Staff accepts the view of both AI and the CLECs that the HEPO's requirement that the CLECs respond to any such notification of a failure of a DT/ANI test on DD-2 within 30 minutes is unnecessary and overly stringent.

AT&T objects to the HEPO's requirement that a CLEC notify AI whether the due date of a Hot Cut will be postponed within 30 minutes after AI notifies the CLEC of the failure of a DT/ANI test performed by AI on DD-2 (two days before the due date of the Hot Cut). AT&T BOE at 38-40. AT&T bases its objection on two grounds.

First, AT&T points out that the 30 minute notice requirement, as it is currently applied, relates only to DT/ANI tests performed on DD-1 (the day before the due date of the Hot Cut) and, furthermore, is only appropriately applied when such tests are performed on DD-1. AT&T BOE at 39. AT&T argues that such notice requirement is an expedited procedure devised to ensure that a postponement decision is made, as expeditiously as possible so as to avoid unnecessary service interruptions on the scheduled due date. Id. Furthermore, with respect to a notice of a failed test received on DD-2, there is no need to apply an expedited notice procedure that results in a decision being made on DD-2 since there is no concern on DD-2 that service interruptions will occur.⁴

Second, AT&T argues that such notice requirement would actually hinder a CLEC's ability to fix the problem causing the failure of the DT/ANI test because the CLEC would have to resolve the problem within 30 minutes after being notified of the test's failure, in

order to provide the required postponement notice. Moreover, AT&T argues that the purpose of performing the DT/ANI test on DD-2 was to give the CLECs additional time to resolve failures. AT&T BOE at 39. The additional time for corrections of problems, which is provided by having the test results on DD-2, is curtailed to 30 minutes if the notice requirement applies to tests performed on DD-2. AT&T suggests that “[t]he parties should be allowed to negotiate proper notice procedures consistent with the presumption the DT/ANI test is conducted on DD-2”. AT&T BOE at 40.

Staff agrees that the above-described 30 minute notice requirement unnecessarily curtails a CLEC’s ability to correct any failures of a DT/ANI test performed on DD-2. Since there is no danger of service interruptions occurring on DD-2 and since the public interest is best served if commitments for scheduled Hot Cuts can be met rather than postponed, Staff supports the application of the HEPO’s 30 minute notice requirement **only if** the DT/ANI test is performed on DD-1.⁵ If, however, the test is performed on DD-2 (and notice of failure is delivered on DD-2), Staff suggests that the CLEC be permitted to try to resolve the problem on DD-2 but, nevertheless, be required to notify AI of its decision regarding postponement on DD-1. Staff further suggests that this decision be made, and that AI be notified, no later than 10:00 am on DD-1. This deadline would allow the CLEC a couple of hours in the morning of DD-1 to resolve the problem (which couple of hours may be particularly necessary if notice of the failed test is delivered to the CLEC in the evening of DD-2) while still allowing sufficient time on DD-1 for the CLEC and AI to postpone the Hot Cut and avoid service interruptions on the due date.

⁴ AI apparently agrees with AT&T since, in its exception to this issue, it permits the CLEC to give notice concerning postponement of the due date “....at any time before the due date arrives.” AI BOE at 30.

AI objects to the requirement in the HEPO that AI be required to notify CLECs of the results of a DT/ANI test performed on DD-2 within one hour after its performance. AI argues that since an AI technician would typically “be given a workload requiring him to perform several tests (and other activities) in a row,.. it would be highly inefficient and disruptive if the technician had to interrupt the flow of work to individually report every DT/ANI test that reveals a problem.” AI BOE at 29. AI proposes that (1) if a DT/ANI test is performed on DD-2 before noon, it will notify the CLEC of any failed results by the close of business on DD-2 and (2) if a DT/ANI test is performed on DD-2 after noon, it will notify the CLEC of any failed results by 10:00 am on DD-1. AI BOE at 30. Nevertheless, AI agrees to continue to provide one-hour notice of test results if the DT/ANI test is performed on the due date. Id.

First, Staff points out that AI’s proposed language would only require AI to notify CLECs of failed tests. So as to ensure that CLECs will follow up with AI if they do not receive any notice from AI concerning test results (which failure to receive notice might be an error and not a positive result), Staff believes that the results of a test should be given to CLECs in all cases, whether the results were negative or positive. Second, Staff is not convinced by AI’s argument that the imposition of a one-hour notice requirement with respect to test results would create inefficiencies in the performance of the tests. Rather, Staff believes that in this age of electronic/ cellular communication, it may actually be more efficient for AI’s technicians to report on test results shortly after performance of the tests rather than waiting until the end of their shift. Furthermore, since the goal of performing the

⁵ A CLEC can elect to have the DT/ANI test performed on DD-1. This may be necessary if, for instance, the CLEC cannot perform its provisioning work in time to permit the test to be performed on DD-2.

DT/ANI test on DD-2 is to give additional time to the CLECS to correct problems, it is reasonable to require AI to provide notice as soon as practical. A one-hour notice requirement does not appear to be unreasonable and, moreover, is clearly possible since AI is currently satisfying such requirement with respect to tests performed on the due date.

In accordance with the above, Staff proposes that the following paragraph of the Analysis and Conclusion section of the HEPO be revised as follows:

In an attempt to satisfy the concerns of all parties, therefore, AI will perform the test 48 hours in advance as standard practice. If, however, a CLEC is unable to perform its provisioning work in that time frame, it must inform AI and request that the testing be delayed. Moreover, if the testing is delayed at the request of the CLEC and is therefore performed on DD-1 or the due date, once the testing is completed, AI will continue to notify the CLEC of the results within one hour after performance of the test and allow the CLEC 30 minutes to decide whether the due date should be pushed back. If however the testing is performed on DD-2 in accordance with this order, AI shall provide notice to the CLEC of the results of the test within one hour after performance of the test, but in no event later than one hour after the close of business on DD-2, and the CLEC shall notify AI no later than 10 am on DD-1 as to its decision as to whether or not to postpone the due date.

Issue 73 (A)

UNE-P Ordering, Billing

Reply Number 8: Staff maintains that the issue of whether AI is obligated to offer UNE-P is outside of the scope of this docket.

AT&T, WorldCom, and CoreComm assert in the AT&T BOE that the HEPO errs by ruling that the issue of whether AI is obligated to offer UNE-P to CLECs seeking to provision new or second lines is outside the scope of this docket, a conclusion that they consider to have been made “cavalierly and incorrectly[.]” See AT&T BOE at 42.

Staff disagrees. The issue of whether AI should be compelled to provide UNE-P to CLECs seeking to provision new or second lines, while clearly a significant matter, is emphatically not a matter which falls within the scope of this proceeding.

The CLECs' argument that the issue is within the scope of this docket can be reduced to four contentions. First, they argue that an AI document introduced into evidence in this proceeding, having to do with order types and ordering requirements for its Combined Platform (UNE-P) Offering, refers to new line orders, and orders for new customers. This, the CLECs assert, is an admission by AI against its own interest, and demonstrates that AI considers the UNE-P issue to be properly within this docket.⁶ AT&T BOE at 44.

The CLECs appear to be asserting that, because AI produced a document which used the phrases "new order" and "add/delete a telephone line[,]" it concedes that the UNE-P question is properly an OSS issue. See, AT&T BOE at 43. There are distinct flaws in this reasoning. While this document may be probative of AI's understanding of whether it should properly offer UNE-P to CLECs which wish to provision new or additional lines, it is not at all probative of whether the UNE-P issue should be adjudicated in this docket. This document does not bring the UNE-P issue within the scope of this proceeding.

⁶ The doctrine of admission against interest is an exception to the general hearsay rule which permits introduction into evidence of out-of-court declarations by party opponents that would otherwise constitute hearsay. See Superior Structures Co. v. City of Sesser, 277 Ill. App. 3d 653, 660 N.E.2d 1362 (5th Dist. 1996) (relevant admissions against interest by a party opponent are admissible as an exception to the hearsay rule). Since no one has asserted that the document is inadmissible as hearsay, it is not clear why the CLECs raise this argument. In any case, the admission against interest must be relevant and it is not relevant in this proceeding. Id.

Even assuming that all parties freely acceded to the proposition that the issue of UNE-P for new and second lines was within the scope of this proceeding, such an agreement would not make it so. The Commission, not the parties, sets the scope of this proceeding. As has been demonstrated, the Commission determined the scope of this proceeding, ruling that Phase 2 of this proceeding properly included within its scope “[a]ny issue related to OSS systems and or OSS processes[.]” Illinois Commerce Commission on its Own Motion: Approval of the Plan of record required by Condition 29 of Docket 98-0555, ICC Docket No. 00-0271, *Final Order* at 6. (April 5, 2000).

Second, the CLECs assert that the scope provision specifically referred to above, which permits arbitration of “[a]ny issue related to OSS systems and or OSS processes[.]” permits consideration of the UNE-P issue here. However, this is simply incorrect. As the Staff has noted, and as the HEPO properly finds, the scope of this proceeding has common-sense limits. This proceeding is limited to the resolution of OSS issues, and does not encompass every grievance which might conceivably be raised regarding AI’s wholesale telecommunications offerings and which can be tangentially related to OSS issues. Were this not the case, the docket’s scope would expand to include virtually any wholesale telecommunications dispute which could possibly be brought before the Commission.

Although it can be argued that any matter currently at issue in the telecommunications arena does implicate in some modest way OSS systems or processes, common sense dictates that these tangential issues cannot be addressed by the Commission in the context of an expedited OSS docket. Accordingly, the HEPO is correct, and the CLECs’ arguments should be rejected. A line must be drawn between

OSS issues, and all others, if this docket is to remain manageable and logically coherent. The HEPO correctly draws that line to exclude the UNE-P issue.

Thirdly, the CLECs argue that the HEPO erroneously “ignore[s] record evidence concerning this issue's import not only from an ordering perspective, but also from a competitive prospective.” AT&T BOE at 45. The CLECs submit that this is improper because (1) the Illinois General Assembly has adopted a policy of promoting competition in local telecommunications markets; (2) there is, to date, little such competition in Illinois; and (3) a UNE-P offering which permits CLECs to provision new and second lines is a necessary prerequisite to such competition. AT&T BOE at 45-46.

While the goal of promoting competition is relevant to considering OSS issues, such goal does not ,in and of itself, expand the scope of this proceeding to any method of achieving that goal. Evidence and argument is relevant only if it tends to make the existence of a fact of consequence to the determination of the matter more probable than it would be without the evidence. People v. Bocclair, 129 Ill. App. 3d 458, 477 (1989). The ultimate facts of consequence in this matter are *what OSS practices and procedures AI should implement*, not *what products it should be compelled to offer*.

As has been noted, the CLECs attempt to show a nexus between OSS procedures and AI's obligations to provide UNE-P to CLECs for provisioning of new and second lines, by reference to the AI ordering guide discussed above. As has been further noted, this nexus is tenuous, and should not be afforded any weight. Accordingly, evidence and argument regarding what products AI should be compelled to offer is plainly irrelevant to this proceeding, and need not be considered by the Commission.

Moreover, the Commission is perfectly aware of the General Assembly's stated legislative policies intended to promote competition in all intrastate telecommunications markets. This docket is an example of the Commission's awareness of, and concern for, the development of competition. However, all competitive issues cannot be resolved in this docket. When stating its legislative findings and goals to which the CLECs refer in the Brief on Exceptions, the General Assembly did not indicate that it intended for the Commission to ignore orderly administrative procedures and long-standing legal doctrines. The fact that the policy of this state favors competition does not require the Commission to resolve all competitive issues in the same proceeding.

The CLECs state that the HEPO ignores record evidence regarding the importance of UNE-P, which is true. Indeed, all of what the CLECS assert regarding UNE-P may well be true. However, the utility of UNE-P, is irrelevant to the current proceeding, which concerns OSS – and nothing else. It cannot be stressed enough that this docket is not concerned with which products or services AI must offer to CLECs, but rather the mechanisms it must use to permit CLECs to avail themselves of whatever products it ultimately is required to offer. Accordingly, the HEPO would only have erred if it had taken notice of clearly irrelevant evidence regarding UNE-P for new and second lines.

The CLECs' final contention is that the HEPO ignored AI's description of its UNE platform tariff, which, again, the CLECs contend supports the notion that AI considers itself obligated to offer UNE-P to provision new and second lines. AT&T BOE at 46. In addition, and related to the prior assertion, the CLECs contend that the HEPO ignores extensive arguments demonstrating that AI is obligated to offer UNE-P to CLECs seeking to serve new and second lines. Id.

In furtherance of this argument, the CLECs refer to awards issued in arbitration proceedings undertaken before the Indiana Utility Regulatory Commission and Wisconsin Public Service Commission which, they assert, stand for the proposition that ILECs are obligated to offer UNE-P for provisioning of new and second lines. AT&T BOE at 48-9. Pursuant to each of these awards, it appears⁷ that ILECs were required to offer CLECs new UNE combinations. Id.

These two arbitration matters, however, have no relevance here. The Staff agrees with the uncontroversial assertion that state Commissions have the authority to require the unbundling of additional elements. However, the fact remains that state Commissions should, can, and routinely do refrain from determining matters not properly within the scope of proceedings before them, even where, all else being equal, they have the authority to determine such matters. The HEPO correctly refrains from doing so in this case.

Again, the CLECs' arguments regarding why AI must offer UNE-P to CLECs to serve new and second lines *may* be well-taken and meritorious. However, the HEPO properly did not reach the merits of this argument, for all of the reasons stated above. In this case, the CLECs have made their arguments regarding UNE-P in the wrong proceeding – a proceeding concerned with OSS practices and procedures. Accordingly, this argument should be rejected as well.

In summary, the CLECs have attempted to use this OSS arbitration as a vehicle to obtain a ruling that they are entitled to use AI's UNE-P offering to provision new and second lines. The HEPO correctly did not reach the merits of this contention, as it correctly

⁷ The Staff was unable to obtain copies of these arbitration awards either through the Lexis® database, or the websites of the respective state Commissions. For purposes of this proceeding, the Staff accepts the

determined that such an assertion, however correct it might be in substance, was not properly within the scope of this proceeding, as the Commission defined that scope. This conclusion is correct, and the Commission should adopt it.

Issue 94

Dark Fiber/Copper Inquiry Process

Reply Number 9: The current record does not contain sufficient evidence on which the Commission can judge the reasonableness of requiring AI to mechanize its dark fiber inventory nor does it support a hard and fast 24 hour response time for dark fiber inquiries.

21st Century Telecommunications of Illinois (21st Century”) argues that regardless of whether information concerning dark fiber is available in AI’s electronic data bases, it should be made available in electronic data bases and that the Commission should also require a 24 hour response interval. 21st Century BOE at 1. For their part, Covad Communications Company and Rhythms Links, Inc. (collectively “Covad”) join in 21st Century’s discussion of this issue. Covad BOE at 37. Covad also sets out the competitive ramifications of rejecting its position, namely, that the delay inherent in the current process puts CLECs at a competitive disadvantage to AI since AI has this information readily available to itself. Covad BOE at 36.

Staff is generally sympathetic to the concerns raised by Covad and 21st Century. In fact, Staff agrees that, to the extent AI has information available to itself which it is offering to CLECs on less than equal basis, AI is failing to meet its obligation to answer dark fiber inquiries on a non-discriminatory basis. Covad BOE at 36. In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of

CLEC’s representation that these two awards required ILECs to combine new elements.

1996, CC Docket No. 96-98, 15 FCC Rec'd 3696, 1999 Lexis 5663, 18 Comm. Reg. (P&F) 888, ¶ 429 (rel. November 5, 1999) ("UNE Remand Order"). In addition, Staff believes that, as a general matter of efficiency in providing service, AI should keep its records in an electronic form. See Staff BOE at 54 ("since the information being tracked, i.e. the capacity and location of dark fiber, will possibly change with every order or with new fiber deployment, it is more important than ever to stay abreast of, and electronically document, all changes occurring to the network."). Where Staff parts Company with Covad and 21st Century is in their proposal that AI mechanize its facility inventory records "as soon as possible, but no later than March 31, 2001[,] and also in their proposal that the Commission completely reject AI's proposed response times in favor of a strict 24 hour response time. 21st Century BOE at 1.

With regard to mechanization, given AI's acknowledgement that it is necessary to the efficient operation of its network and for meeting service requests for AI to know what equipment, including cable, it has out in the field (Tr. at 1086-87) and 21st Century's explanation of the importance of this preordering functionality to its business goals (21st Century Initial Comments at 1), the Commission should, at the least, require AI to institute new practices to ensure that the paper records of the Central Offices are accurate and up to date. Staff also believes that CLECs and AI personnel should have equal access to AI's records in any case. With regard to ordering the creation of a mechanized data base by March of 2001, Staff continues, however, to believe that the current record does not contain sufficient evidence on which the Commission can judge the reasonableness of requiring AI to mechanize its dark fiber inventory.

As argued in Staff's BOE, the current level of expressed interest by CLECs in exploring AI's dark fiber inventory should not be the relevant measure of benefit to be employed in balancing the need to impose the costs of mechanization on AI against the benefits to AI and the CLECs. Staff BOE at 53-54. Rather, Staff submitted that the instant record does not contain sufficient evidence of the costs of mechanization to allow a comparison of current or potential future demand for the information. Notwithstanding the above, nothing in the 21st Century's or Covad's exceptions undermines Staff's position that the Commission should reject the call for a relatively immediate imposition of a dark fiber inventory mechanization in favor of Staff's proposal for the development and filing of a plan for mechanization which would contain sufficient information for the Commission to make an informed choice.

With regard to the issue of whether or not to impose a hard and fast 24 hour response time for dark fiber inquiries, Staff is in agreement with the HEPO, 21st Century and Covad that AI's current response time to dark fiber requests is unacceptable. HEPO p. 107, Covad BOE at 36, 21st Century BOE at 1, Staff BOE at 55. For the most part, however, Staff believes the issue is one of equality of treatment of CLECs vis-a-vis internal AI personnel requests, i.e. AI should respond to CLEC requests for dark fiber location information in the same time periods as it provides the information to its own personnel. Staff BOE at 55.

With regard to 21st Century's call for a hard and fast 24 hour response period, Staff submits that such a proposal is at odds with the testimony of its own witness in the case. Although the record supports the conclusion that dark fiber inquiries regarding fiber between central offices or from a central office to a customer location could realistically be

answered in 24 hours, the 24 hour figure appears to assume no site visit would be necessary. Tr. at 1148-1150. 21st Century's witness indicated that requests for facilities from 21st Century are generally for facilities between offices where AI probably maintains the most accurate records, however, in instances where a site visit to a manhole is required, 24 hours may be too short a response period and that an estimate for such a request might be 3 days. Tr. at 1151-52.

As Staff has noted in its Brief on Exceptions, the evidence in this proceeding supports the conclusion that the appropriate response time to a dark fiber inquiry varies depending on the nature of the inquiry, most specifically whether a site visit is necessary, which in turn appears to be dependant on whether the request concerns fiber locations between central offices. Staff BOE at 57. Accordingly, the record in this case does not support the conclusion that 24 hours is a reasonable response time in all instances. Rather, whether a response time to a CLEC request is reasonable and non-discriminatory is a function of the amount of work needed to be done to answer it and the degree to which the company's response time coincides with its internal response to similar inquiries. With this in mind, Staff continues to believe AI should be held to the maximum response times as set out in the HEPO while providing non-discriminatory responses to CLECs within those maximum ranges. For example, under circumstances where there are more than 5 inquiries posed by a CLEC, such inquiries do not require site visits, the company's records are accurate, and the company would answer such inquiries from an internal source in one day, the appropriate time to answer should be one day and not ten. As another example, if 4, 5 or 6 requests are made which would require site visits but which AI would answer internally in 3 days, the company should answer the request in 3 days.

The lack of information in the record concerning the company's internal responses to dark fiber requests makes it difficult to come up with a hard and fast minimum such as that suggested by 21st Century and Covad. Accordingly, Staff believes the Commission should require AI to file a detailed plan for mechanization as detailed in Staff's BOE which plan would contain sufficient information including verification of the company's internal response time for the Commission to craft a more permanent solution to the dark fiber inquiry problem.

With the foregoing in mind, Staff urges the Commission to reject 21st Century's and Covad's call for the immediate mechanization of AI's dark fiber inventory and its call for a hard and fast 24 hour inquiry response time in favor of Staff's proposal for maxim, though non-discriminatory dark fiber inquiry response times. Staff BOE at 59-60.

III. CONCLUSION

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein and in Staff's Brief in Reply to Exceptions dated December 11, 2000.

Respectfully Submitted:

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