

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company,)
AT&T Communications of Illinois, Inc.)
TCG Illinois, TCG Chicago, TCG St. Louis)
CoreComm Illinois, Inc., WorldCom, Inc.)
McLeodUSA Telecommunications Services, Inc.)
XO Illinois, Inc., Northpoint Communications, Inc.)
Rhythms Netconnection and Rhythms Links, Inc.)
Sprint Communications L.P., Focal)
Communications Corporation of Illinois, and)
Gabriel Communications of Illinois, Inc.)
)
Petition for Resolution of Disputed Issues)
Pursuant to Condition (30) of the)
SBC/Ameritech Merger Order)

Docket No. 01-0120

DIRECT TESTIMONY OF

MICHAEL KALB, PH.D.

ON BEHALF OF

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

AT&T COMMUNICATIONS OF ILLINOIS, INC.

CORECOMM ILLINOIS, INC.

FOCAL COMMUNICATIONS CORPORATION

MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

TCG CHICAGO, TCG ILLINOIS, TCG ST. LOUIS

TIME WARNER TELECOM OF ILLINOIS, LLC.

WORLDCOM, INC.

AND

XO ILLINOIS, INC.

July 13, 2001

OFFICIAL FILE

DOCKET NO. 01-0120

Exhibit No. 3

Witness

Date 8/15/01 Reporter [Signature]

1 Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

2 A. My name is Michael Kalb. My business address is AT&T Corp., 295 N. Maple
3 Avenue, Basking Ridge, New Jersey.

4 Q. PLEASE DESCRIBE YOUR EDUCATIONAL AND PROFESSIONAL
5 BACKGROUND.

6 A. I received a Bachelor of Science degree in Physics in 1969 from the Cooper
7 Union. In 1971 I received a Master of Philosophy degree in Physics and in 1974
8 a Ph.D. in Physics, both from the Yale University. I spent the next five years as a
9 Chaim Weitzman Fellow at Yale University and the Center for Theoretical
10 Physics at the Massachusetts Institute of Technology.

11
12 I was first employed by AT&T in 1979. At that time, I joined Bell Laboratories
13 as a Member of Technical Staff evaluating the performance of voice and data
14 communications systems on telephone networks. This led to numerous published
15 and proprietary works describing quantitative models of performance based on
16 laboratory and live Network studies. In 1986, I was promoted to Distinguished
17 Member of Technical Staff after beginning the systematic formulation of relevant
18 domestic and international performance parameters and standards for voice and
19 data. In 1994 I was elected Vice-Chair of T1A1.7, the working group responsible
20 for standardization of performance of voice and data communications on North
21 American telephone networks. My work in this domestic standards body
22 culminated with the production of a ratified technical report on the performance
23 of unbundled loops, as mandated by the Telecommunications Act of 1996. Also,

1 during this period, I consulted frequently with the Law and Government Affairs
2 area of AT&T in the formulation of the LCUG Service Quality Measurements
3 ("SQMs"). In 1999, I moved to the Law and Government Affairs area of AT&T
4 where I continue to apply my performance expertise to problems associated with
5 the Telecommunications Act of 1996.

6
7 In my current position as policy analyst at AT&T, one of my responsibilities is to
8 identify and promote AT&T's position on the need for adequate, self-executing
9 performance remedies. In that role, I have been directly involved in the
10 development of AT&T's policy on this subject, represented AT&T in numerous
11 LCUG meetings, participated in state workshops relating to performance
12 measurements and consequences, and have met with the Commission and the
13 Department of Justice to provide AT&T's input on a variety of topics relating to
14 performance measurement and incentives. I have represented AT&T and other
15 CLECs in several regulatory proceedings concerning the appropriate statistical
16 methodology to use in an effective performance measures methodology. I have
17 met with the FCC on this issue and have participated in state regulatory
18 workshops and meetings here in Illinois, as well as in Indiana, Michigan,
19 Wisconsin, California, New York, Texas, Florida, Georgia, Louisiana, Vermont,
20 Connecticut, Massachusetts, New Jersey, Nevada, and Colorado.

21 **Q. FOR WHOM ARE YOU TESTIFYING?**

22 A. Although I am employed by AT&T, I am also testifying on behalf of the
23 Association of Competitive Telecommunications Enterprises, CoreComm Illinois,
24 Inc., Focal Communications Corporation, McLeodUSA Telecommunications

1 Services, Inc., Time Warner Telecom of Illinois, LLC., WorldCom, Inc., and XO
2 Illinois, Inc. Please note that specific instances impacting AT&T that I discuss
3 are, of course, based upon my own personal experiences.

4 **Q. PLEASE SUMMARIZE YOUR TESTIMONY.**

5 A. I describe why the remedy plan proposed by the CLECs is the appropriate plan for
6 the Commission to adopt. My testimony addresses the self-executing remedies
7 that are critical to ensuring that CLECs receive the level of service required by
8 established performance standards. In addition, my testimony describes the
9 statistical methodology for use in comparing SBC/Ameritech's performance for
10 itself and its affiliates to the performance it provides to CLECs. The statistical
11 methodology supports the Joint Illinois CLEC Remedy Plan. I will next critique
12 the Texas Remedy Plan presented by Ameritech. The final portion of my
13 testimony will address the calculation of remedies using proxy information under
14 the Joint CLEC Remedy Plan as well as the Texas Plan.

15
16 Ms. Karen W. Moore will also present testimony. Ms. Moore will discuss key
17 elements of the Joint CLEC Remedy Plan and AT&T's experiences operating in
18 Illinois under the Texas Plan, which I understand is in effect as a result of an
19 SBC/Ameritech merger proceeding commitment. She will also explore
20 Ameritech's actions in response to the remedy plan order recently issued by the
21 Michigan Public Service Commission as well as SBC's similar actions on the
22 issue in Texas.

23

1 **I. PUBLIC POLICY CONSIDERATIONS AND BACKGROUND**

2

3 **Q. WHAT DO YOU MEAN BY SELF-EXECUTING PERFORMANCE**
4 **REMEDIES?**

5 A. Remedies are monetary and non-monetary consequences assessed against
6 SBC/Ameritech for not meeting the established performance standards. Self
7 executing means that the remedies are automatically triggered upon an objective
8 demonstration that SBC/Ameritech has failed to provide service at the level
9 required.

10 **Q. WHY IS THERE A NEED FOR A REMEDY PLAN?**

11 A. There must be a plan in place to assure swift and appropriate action if a Regional
12 Bell Operating Company ("RBOC"), like SBC/Ameritech, does not provide
13 access to services and facilities in a nondiscriminatory manner.¹
14 Nondiscriminatory access to services and facilities must be evident in
15 SBC/Ameritech's performance in order for SBC/Ameritech to show that its
16 markets are irreversibly open to competition.

17

18 The Federal Communications Commission ("FCC") has confirmed that the
19 RBOCs' performance for CLECs will continue to be evaluated in determining

20

¹ See, e.g., 47 U.S.C. §251 c (2) c and (d).

1 whether markets are irretrievably open to competition.² The CLECs believe that
2 self-executing remedies are needed to enforce the federal and state market
3 opening policies and are not solely designed to prevent Section 271 backsliding.

4 **Q. WHY ARE REMEDIES IMPORTANT TO LOCAL COMPETITION?**

5 A. Performance standards and measurements are critical to ensuring that CLECs are
6 receiving the same level of service from SBC/Ameritech that SBC/Ameritech
7 provides to itself or to its affiliates. SBC/Ameritech is in a unique position as
8 both the main supplier and main competitor of CLECs. As such, SBC/Ameritech
9 has the capability to seriously affect a CLEC's ability to enter the local market
10 and successfully serve customers. This is evident since CLECs are experiencing
11 the effects of SBC/Ameritech's poor service in every state throughout its region,
12 including Illinois, where CLECs are attempting to grow a competitive industry for
13 providing local service to residential customers and businesses.
14 Having sufficient, clearly defined, and disaggregated measures and corresponding
15 standards is only a beginning to ensuring that CLECs are receiving adequate
16 service from SBC/Ameritech. If there is no incentive for SBC/Ameritech to abide
17 by the performance standards, then those standards are useless. The remedies
18 provide the incentive for SBC/Ameritech to comply. Remedies must be
19 significant enough so that it is more beneficial for SBC/Ameritech to comply with

² See, In the Matter of: Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York (the "BA-NY Order"), CC Docket No. 99-295, Rel. December 22, 1999, Para. 8, in which the FCC reaffirmed that the adoption of a performance measures system that includes a "strong financial incentive for postentry compliance with the section 271 checklist" is particularly important in opening local markets to competition consistent with the Telecommunications Act of 1996.

1 the standards than to pay the penalties for non-compliance. In essence
2 SBC/Ameritech has much to gain by continuing to provide poor service to
3 CLECs. In providing service to CLECs, SBC/Ameritech is essentially in the
4 awkward position of helping a competitor take a customer. Therefore, a remedy
5 structure must be established which makes it more economical for
6 SBC/Ameritech to cooperate and provide adequate service than to discriminate
7 against competing providers to the detriment of local competition. If such
8 discrimination is neither prevented nor discouraged, SBC/Ameritech will hold
9 onto its customer base and local monopoly power.

10 **Q. IS THERE A REMEDY PLAN IN EFFECT TODAY IN ILLINOIS THAT**
11 **INCENTS AMERITECH TO PROVIDE ADEQUATE WHOLESALE**
12 **SERVICES TO CLECS?**

13 A. No. As is discussed in more detail in the testimony of Karen W. Moore, the
14 Texas Remedy Plan used today by Ameritech-- and the minimal remedies paid
15 under that plan -- has done absolutely nothing to incent the company to provide
16 adequate wholesale services in Illinois. The experiences of the CLECs over the
17 number of months the Texas Remedy Plan has been in effect in Illinois is one of
18 the reasons why the CLECs propose a new plan.

19
20 **II. THE JOINT CLEC REMEDY PLAN**

21
22 **Q. DO THE CLECS HAVE A JOINT PROPOSAL FOR PERFORMANCE**
23 **REMEDIES IN ILLINOIS?**

1 A. Yes. That proposal is Attachment A to my testimony. It was previously filed in
2 this case on March 12, 2001. The Joint CLEC Remedy Plan is being sponsored
3 by a broad coalition of Illinois CLECs: the Association of Communications
4 Enterprises (“ASCENT”, f/k/a the Telecommunications Resellers Association);
5 AT&T, CoreComm Illinois, Inc., McLeodUSA, Rhythms Links, Inc., WorldCom,
6 XO Communications, and presented the Joint CLEC Remedy Plan in Illinois.
7 CLECs not actively participating in this proceeding, such as TDS Metrocom and
8 Time Warner Telecom also assisted in crafting the Joint CLEC Plan

9 **Q. WHAT PRINCIPLES SHOULD COMPRISE THE FOUNDATION OF AN**
10 **EFFECTIVE REMEDIES PLAN?**

11 A. There are several principles that should guide the analysis of whether a remedy
12 plan is sufficient. Those principles are:
13 1. Remedies must be significant enough to incent SBC/Ameritech to meet its
14 regulatory obligations to provide nondiscriminatory access to services and
15 facilities. The CLECs’ plan provides for remedies for poor performance that
16 increase with the level of CLEC activity. The CLECs’ plan is “scalable”
17 according to the size of the market in the state. Under the CLECs’ plan, the more
18 harm that is done to competition, the greater the remedy payment. The CLECs’
19 plan potentially generates remedies for all measures, with the exception of certain
20 agreed diagnostic measurements. For diagnostic measurements, I recommend
21 that, where for a particular measure SBC/Ameritech’s performance is substandard
22 for six consecutive months, that the measurement automatically become eligible
23 for remedies.

- 1 2. Remedies must be self-executing. CLECs should not be required to undergo
2 costly and time-consuming litigation when the performance measurements system
3 shows discrimination. The FCC has stated that an effective enforcement plan
4 shall “have a self-executing mechanism that does not leave the door open
5 unreasonably to litigation and appeal.” See BA-NY Order, at para. 433.
- 6 3. To incent nondiscriminatory performance, remedies should escalate and indeed
7 accelerate according to the duration and magnitude of poor performance.
- 8 4. The remedies plan should be structured so that it is simple to implement and
9 administer. This is especially important in light of the complexity of
10 SBC/Ameritech’s Texas-like proposal. Ms. Karen Moore will provide testimony
11 on the structure of the plan.
- 12 5. The remedies plan should be based on an appropriate set of measures. There
13 should be a comprehensive set of comparative measures in appropriate activity
14 areas to show a customer’s true experience when SBC/Ameritech delivers
15 services, facilities, and support. If key activity areas (e.g., hot cuts, lost orders,
16 etc.) are not captured with a measure, important and often customer-affecting
17 performance problems go unaddressed.
- 18 6. The measures should be appropriately disaggregated. If measurement results are
19 aggregated at too high a level, SBC/Ameritech can mask discriminatory
20 performance. The disaggregation should be discrete enough to show performance
21 results based upon dimensions such as products (e.g., UNEs, resale, xDSL, etc.)
22 and geography (e.g., dense urban commercial area, sparsely populated rural area,

1 rapidly growing suburban areas, etc.). Disaggregation should proceed until like
2 to-like comparisons can be made.

3 7. The structure of a remedies plan should be based on a verified (audited) system
4 with verifiable data and processes. There should be a thorough audit of the
5 performance measurements system by a recognized neutral party who utilizes a
6 disclosed and industry-reviewed methodology before it is officially implemented
7 for the industry. For example, there should be a validation of SBC/Ameritech's
8 processes and systems used for data collection, reporting, storage, and retrieval.
9 An effective plan should provide reasonable assurances that the reported data is
10 accurate. See BA-NY Order, at para.433.³

11 8. An appropriate statistical methodology should be in place. CLECs recommend a
12 methodology based on the modified z statistic and type 1/type 2 error balancing
13 critical values.⁴ It is important to use appropriate statistical procedures to do the
14 comparisons because the performance results for many measures may exhibit
15 unavoidable random variation. A statistical approach accounts for this random
16 variation while controlling the risk of reaching an incorrect conclusion about
17 discrimination as is explained later in my testimony.

18 **Q. WHY IS A STATISTICAL TEST NECESSARY?**

19 A. Once an appropriate basis for comparison-- which includes the measurements,
20 their definitions, their measurement apparatus, etc. -- has been established, a tool
21 is needed to determine quantitatively whether SBC/Ameritech has provided

³ It is my understanding that the Illinois Master Test Plan provides for such an audit.

⁴ See BA-NY Order, Appendix B at para. 1; Statistical Techniques For The Analysis And Comparison Of Performance Measurement Data. Submitted to Louisiana Public Service Department (LPSC) Docket U-22252 Subdocket C].

1 nondiscriminatory treatment. Merely reporting averages of performance
2 measurements alone, without further analysis, does not indicate whether
3 differences in performance results reflect discrimination. In fact, averages may
4 even mask discrimination. The FCC supported the use of statistical comparisons
5 in its recent Bell Atlantic and SBC Orders. See In the Matter of Application of
6 Bell Atlantic for Provision of In-Region InterLATA Services In New York, CC
7 Docket No. 99-295 (December 23, 1999), Appendix B, where it stated:

8 When making a parity comparison, statistical analysis is a useful
9 tool to take into account random variations in the metrics. In the
10 Second Louisiana Order, we encouraged BOCs to submit data
11 allowing us to determine if any detected difference between the
12 wholesale and retail metrics is statistically significant.

13
14 A statistical test should be applied only to those measures for which there are
15 retail analogs. Regardless of which parity measure is under consideration, there
16 must be a pre-established comparison process to assure that the levels of
17 performance both for an individual CLEC, and the CLECs as a group, are at least
18 equal in quality to SBC/Ameritech's performance for its own retail service
19 operation or that of SBC/Ameritech's affiliates and subsidiaries. This comparison
20 process for parity measures is completed through the use of a statistical test. This
21 Commission should require SBC/Ameritech to apply statistical testing to all
22 performance results for parity measures and report the conclusions. Merely ruling
23 that SBC/Ameritech should apply statistical testing is not enough, because the
24 Texas Remedy Plan also has a statistical basis. Indeed, it is the poor coupling of
25 statistical testing and a "per occurrence" remedy, as the SBC Texas Plan provides,
26 that makes the remedy provisions little guard against anticompetitive behavior.

1 SBC/Ameritech also should be required to provide sufficient underlying detail for
2 benchmark measures to permit CLECs to determine how many individual data
3 points failed to achieve the identified benchmark level of performance. However,
4 the use of statistical testing is inappropriate for the class of measures held to
5 benchmark standards.

6 **Q. WHY IS STATISTICAL TESTING INAPPROPRIATE FOR**
7 **BENCHMARK PERFORMANCE MEASURES?**

8 A. Applying statistics to benchmarks renders the actual benchmarks meaningless.
9 This is because statistical testing of benchmarks establishes a “zone of
10 forgiveness” on top of that already implicitly included in the benchmark.
11 Benchmarks are rarely set at 100% compliance, but usually at a lower number.
12 This lower number allows for a certain level of forgiveness, since it is not
13 reasonable to assume perfection.

14
15 The statistical loophole, however, gives Ameritech an extra buffer in meeting a
16 benchmark, particularly for small sample sizes, since the standard now allows
17 deviation from the benchmark. The Texas plan is the only remedy plan that I am
18 aware of that inappropriately applies statistics to benchmarks.

19 **Q. WHAT STATISTICAL METHODOLOGY DO THE CLECS**
20 **RECOMMEND?**

21 A. The statistical methodology recommended by the CLECs is based on use of the
22 modified z statistic and a critical value that balances type 1 and type 2 error
23 probabilities. The methodology is described in two papers attached to this

1 testimony as Attachment B.⁵ For each parity submeasurement (a disaggregated
2 measure), the difference between SBC/Ameritech's performance for its retail
3 operation or that of its affiliates and the performance it provides for a given CLEC
4 is converted to a value of the modified z statistic. Out-of-parity performance
5 declaration occurs when the z-value exceeds the balancing critical value. Both
6 statistics are easily and quickly calculated from the performance submeasure's
7 data points.⁶ Values of the modified z statistic that are less than the critical value
8 are taken to be indications of discrimination.

9
10 The CLECs and SBC/Ameritech have not agreed on a methodology for
11 determining the critical value. Whereas SBC/Ameritech chooses a fixed critical
12 value for all submeasures, the CLECs propose an error balancing methodology
13 which takes into account sample size and a level of measured failure that is
14 considered material by the parties. The CLECs recommend that the parameter
15 describing materiality, the number "delta" that is required in this calculation, be
16 given the value of 0.25.⁷

17 **Q. IS THE STATISTICAL METHODOLOGY RECOMMENDED BY CLECS**
18 **COMPLETE IN ITS DEVELOPMENT?**

⁵ See Attachment B, "Statistical Tests for Local Service Parity", Version 1.0, February 6, 1998, Local Competition Users Group.

⁶ In addition, the "pooled Z" formula is recommended for sample sizes with less than 30 data points. In this case the statistical methodology again requires that a critical value (depending on the numbers of observations) be chosen.

⁷ The methodology can accommodate a fixed critical value if the commission so chooses. In that (inappropriate) case I recommend that the critical value be taken as -1.04, since this value is an approximation to what the full "balancing" calculation would give.

1 A. Yes. The statistical methodology is incorporated into the Joint CLEC Remedy
2 Plan.

3 **Q. DO OTHER STATES USE THE STATISTICAL METHODOLOGY**
4 **PRESENTED IN THE JOINT CLEC REMEDY PLAN?**

5 A. Yes. The appropriateness of the methodology has been validated as part of the
6 Louisiana and Georgia proceedings addressing service quality performance
7 measurements for BellSouth, a Regional Bell Operating Company (like
8 SBC/Ameritech). In fact BellSouth supports the methodology throughout its
9 footprint. Recently, the California Commission recognized that the balancing
10 methodology had the most desirable properties of all those it analyzed.
11 Furthermore the California Commission implied that a balancing methodology
12 should be adopted in the final plan for that state. The methodology is also under
13 discussion and review in other regions and states nationally including Vermont,
14 New Jersey, Indiana, and Wisconsin.

15 **Q. DESCRIBE THE STATISTICAL METHODOLOGY ISSUES THAT**
16 **WERE CONSIDERED IN THE ANALYSIS OF DATA IN THE ONGOING**
17 **PERFORMANCE MEASURES PROCEEDING IN LOUISIANA.**

18 A. The Louisiana Public Service Commission included language in an August 31,
19 1998 order in Docket No. U-22252-C requiring BellSouth to give CLECs access
20 to raw data that underlies BellSouth's reports.⁸ In that proceeding, AT&T
21 entered into a protective agreement with BellSouth so that AT&T's statistician
22 could receive at least some of BellSouth's performance data and work with it for

⁸ Order, In re: BellSouth Telecommunications, Inc., Service Quality Performance Measurements, Docket No. U-22252, Subdocket C, August 31, 1998.

1 analyzing the proper working of the statistical test.⁹ The ability to look at the data
2 and analyze it is critical to determining the appropriate statistical test. One cannot
3 be assured that the data characteristics are properly accounted for in the statistical
4 methodology unless one can observe the data and how it behaves over time. The
5 Louisiana Public Service Commission's order provided the opportunity to
6 actually see raw data and, thereby, confirm and refine the statistical methodology.
7 Several issues were considered in the CLECs' analysis of the data, including
8 whether the modified z statistic, as explained in the LCUG paper, was feasible
9 (considering this was the first opportunity to apply the modified z statistic to
10 actual data), whether the modified z statistic properly handled small sample sizes,
11 whether the results of the modified z statistic methodology differed from the
12 results BellSouth obtained using its "jackknife" method (a test statistic originally
13 proposed by BellSouth in Louisiana which they eventually abandoned), and if
14 those results differed, why they did. The original LCUG proposal did not address
15 the aggregation issue, but the AT&T statistician proposed a way of aggregating
16 modified Z from the cell level for comparison with BellSouth's then proposed
17 "jackknife" method.

18 **Q. WHAT CONCLUSIONS WERE REACHED AFTER ANALYZING THE**
19 **DATA?**

20 A. AT&T analyzed the raw data which confirmed the following: (1) the modified z
21 statistic is an effective component of the methodology for parity determinations;

⁹ BellSouth provided some of its raw data associated with four measures it includes in its SQM. The measures for which AT&T's statistician received some raw data were: Order Completion Interval, Maintenance Average Duration, Missed Repair Appointments, and Missed Installation Appointments.

1 (2) there were some issues to resolve with handling small sample sizes; and (3)
2 the method based on LCUG's modified z statistic and BellSouth's "jackknife"
3 method produced different results.

4 **Q. WHAT WERE THE ADDITIONAL PRIMARY CONCLUSIONS THAT**
5 **WERE REACHED AFTER ANALYZING THE DATA?**

6 A. BellSouth's statisticians concluded through the work they did in the Louisiana
7 proceeding that in performing permutation calculations for small samples, it is not
8 necessary to use the LCUG formula. That formula can be replaced by the simpler
9 and faster "pooled Z" formula, if desired. The statisticians also concluded that
10 aggregation of results from many small cells into a single overall statistic raises
11 several new problems that had not been addressed in the LCUG paper given that
12 results for modified z were assessed at the submeasure level without considering
13 the need for aggregation of several cells into a single overall statistic. The
14 statisticians also concluded that the method they developed for balancing the
15 critical value is an efficient and quantitative means of establishing a critical value.

16 **Q. WHY IS THE CRITICAL VALUE IMPORTANT?**

17 A. The critical value is the value of the modified z statistic which signals whether
18 parity or out-of-parity exists.

19 **Q. WHAT CRITICAL VALUE DO THE CLECS RECOMMEND?**

20 A. The CLECs recommend as the critical value what the "balancing" approach would
21 give with a delta equal to 0.25. The critical value is simply calculated from the
22 CLEC sample size, the Ameritech sample size and delta.

23

1 Q. **WHAT IS A TYPE 1 ERROR?**

2 A. This is an error of test declaration that may occur due to random variation that
3 indicates that SBC/Ameritech is favoring its retail operations, when in fact, it is
4 not.

5 Q. **WHAT IS A TYPE 2 ERROR?**

6 A. This is an error of test declaration that may occur due to random variation that
7 indicates that SBC/Ameritech is not favoring its retail operations, when in fact, it
8 is.

9 Q. **IS THE DEVELOPMENT OF THE BALANCING CRITICAL VALUE**
10 **COMPLETE?**

11 A. Yes. However, the CLECs and SBC/Ameritech disagree on the principles
12 underlying the approach to balancing Type 1 and Type 2 errors. SBC/Ameritech
13 favors a fixed critical value approach that is more appropriate for controlled
14 experimentation as opposed to the observational data collection technique that
15 characterizes the adopted performance measures in Illinois. In addition, the
16 SBC/Ameritech fixed critical value approach does not choose an alternative
17 hypothesis leading to the appropriate value of the "delta" parameter that specifies
18 the degree of non-compliance that is judged to be serious. The BalancingCritical
19 Value development is completed with the choice of the value of parameter "delta"
20 which in turn defines the materiality associated with the test.

21

1 Q. IS THE DECISION ABOUT THE VALUE OF THE PARAMETER DELTA
2 REQUIRED BEFORE IMPLEMENTING THE CLECS' CURRENT
3 STATISTICAL METHODOLOGY?

4 A. No. The CLECs methodology can use -1.04 as the critical value. It is at -1.04
5 that the probability of Type 1 or Type 2 Errors are approximately balanced.

6 Q. WHY HAS THE DETERMINATION OF THE STATISTICAL
7 METHODOLOGY NOT BEEN RESOLVED?

8 A. There is silence from SBC/Ameritech on whether balancing should be done and
9 on the formulas to be used. The parties also do not yet agree on what is the value
10 of the parameter "delta" which defines the degree of violation of parity at which
11 the balancing should occur. Resolution of this question cannot be based solely on
12 a technical analysis. Ideally, this decision should be based on business judgment,
13 namely by consideration of how large a violation of parity must be before it is
14 "important." The parameter "delta" measures the size of the violation. The larger
15 the delta we choose, the larger the difference between retail and wholesale
16 performance that is considered material. Once delta is chosen, the formula makes
17 proper allowance for the effect of CLEC and SBC/Ameritech sample sizes. A
18 larger delta implies a stronger signal before test failure for all degrees of
19 violations. In other words, when delta is large, the balancing occurs at a more
20 extreme degree of violation. The CLECs want a smaller delta because CLECs
21 believe it is important to be able to detect a small but meaningful degree of
22 violation, if it occurs.

23

1 Q. WHERE DO YOU BELIEVE THE DELTA FOR THE CRITICAL VALUE
2 SHOULD BE SET?

3 A. The CLECs propose that this Commission adopt 0.25 as the parameter delta
4 value. To understand the implications of this and other choices, consider what, for
5 example, a delta value of 1.0 implies for how many customers receive bad
6 service. Consider the level of service that SBC/Ameritech provides for the 1% of
7 its own customers that receive the worst service. Then, if we assume the
8 observations are approximately normally distributed, a violation with the delta
9 equal to 1.0 means that 9.2% of CLEC customers will get service this bad, (*i.e.*
10 the CLEC poor service rate is more than nine times the SBC/Ameritech rate).
11 Similar results will be obtained if we assume other distribution shapes other than
12 normal. On the other hand, with delta set equal to 0.25, 1.8% of CLEC customers
13 receive service this bad-still nearly twice the SBC/Ameritech rate but far more
14 reasonable and fairer than the result with delta set equal to 1.0.¹⁰
15 As another example consider a measure that is expressed as a percentage, for
16 which SBC/Ameritech consistently achieves 90%. Then a delta equal to 1.0
17 corresponds to making the CLEC proportion 46.4%, while a delta equal to 0.25
18 corresponds to 81.3%. Similarly, if the SBC/Ameritech proportion is 99%, with a
19 delta equal to 1.0 the CLEC alternative is 68.1%, while with a delta equal to 0.25
20 it is 95%. Since they allow far too many more CLEC customers to receive
21 inferior service than ILEC customers, the delta alternatives greater than 0.25 are
22 much too lenient.

¹⁰ I have also performed an arcsine square root transformation to stabilize the variance.

1 **Q. WHAT DO CLECS RECOMMEND THAT THIS COMMISSION ORDER**
2 **CONCERNING THE STATISTICAL METHODOLOGY?**

3 A. There are two things that should be included in the Commission's order. First, the
4 CLECs propose that this Commission order the modified z and balancing critical
5 values as the basis of the statistical methodology for parity/disparity declarations.
6 Second, CLECs propose that this Commission order the parameter delta value be
7 set at 0.25 so that the companies may incorporate it into the CLECs' statistical
8 methodology. In the absence of these recommended actions, the commission
9 should order the use of -1.04 as a fixed critical value that approximates the
10 balanced result.

11 **Q. WHEN THE DELTA VALUE IS ORDERED, WILL CLECS BE**
12 **SATISFIED THAT THE RECOMMENDED STATISTICAL**
13 **METHODOLOGY WILL ACCURATELY EVALUATE**
14 **SBC/AMERITECH'S PERFORMANCE?**

15 A. This is not a perfect statistical methodology. We do not believe a perfect
16 methodology for this purpose can be created. However, this methodology will
17 detect discrimination when the delta value for balancing the Type 1 and Type 2
18 errors is properly set. We expect to monitor how the methodology works in
19 "production mode," when very large amounts of data are being analyzed. An
20 AT&T's statistician will monitor how the methodology works after
21 implementation and will make recommendations for improvements, if necessary,
22 just as was done in the Louisiana proceeding when the opportunity to observe
23 actual data was presented.

1 Q. DOES THE JOINT CLEC PLAN CALL FOR “PARITY WITH A
2 FLOOR”?

3 A. Yes. An integral part of the Joint CLEC Plan is “parity with a floor”. That
4 portion of the proposal is explained in the testimony of Rod Cox.

5

6 III. CRITIQUE OF THE TEXAS REMEDY PLAN

7

8 Q. HOW WAS THE TEXAS REMEDY PLAN DEVELOPED?

9 A. I participated in the Texas “process” leading up to the acceptance of the Texas
10 Remedy Plan by the Texas PUC. Key aspects of the Texas Remedy Plan were
11 developed as the results of private meetings between former Texas PUC
12 Chairman Wood and SBC. CLECs were excluded from these vital meetings.
13 Once Chairman Wood and SBC agreed on the provisions, CLECs were allowed to
14 comment upon the proposal. Given the fact that SBC and Chairman Wood had
15 already apparently agreed to the Texas Remedy Plan, substantive CLEC concerns
16 were rejected.¹¹ Indeed, the CLECs never even had the opportunity to propose
17 an alternative to the Remedy Plan. Thus, the CLECs were forced to use the Texas
18 Remedy Plan.

19

¹¹ The only meaningful input by CLECs, ironically, was when the CLECs were forced to categorize what performance measurement should be afforded “low,” “medium,” and “high” priority for penalties. This is ironic, because the CLECs opposed in Texas – as they do here – the use of such an arbitrary and anti-competitive classification. By categorizing performance measurements as high, medium, and low priority, SBC/Ameritech effectively is choosing which CLEC entry strategies should be “favored” in terms of obtaining remedies. This prioritization allows Ameritech to target for discrimination particular CLEC business plans.

1 Q. **WHAT ARE THE MOST PROBLEMATIC ASPECTS OF THE TEXAS**
2 **REMEDY PLAN?**

3 A. While there are a number of problems with the Texas Remedy Plan, the aspects
4 that render the plan to be almost completely useless for guarding against
5 discriminatory service to CLECs are:

- 6 • The incentives created by the plan will not prove significant in practice.
7 However high Ameritech might lift the total cap on liability, which is itself
8 unjustified, the per occurrence structure of the plan and the dollar sanctions
9 provided by the plan will be very unlikely lead to meaningful deterrence or
10 compensation, even for serious discriminatory conduct.
11
- 12 • The plan leaves the door open too wide to litigation, offering open-ended
13 grounds for excusing reported violations that will invite Ameritech's
14 resistance to payment of liquidated damages or assessments, at substantial
15 cost and delay to CLECs.
16
- 17 • The plan's structure includes statistical methods and tests that create too much
18 risk that discriminatory or substandard performance will not result in a
19 reported violation and thus go without sanction. Most significant here, the
20 Texas plan adds an arbitrary layer of forgiveness by applying a statistically
21 unjustified version of the z-test to measures for which the performance
22 standard is a fixed benchmark.
23
- 24 • The plan concentrates too narrowly on controlling the statistical errors that
25 negatively affect Ameritech and ignores completely the frequently much
26 larger statistical errors that harm the CLEC potential to become viable
27 competitors.
28

29 Q. **SHOULD THE COMMISSION APPROVE THE TEXAS REMEDY PLAN**
30 **BECAUSE THE TEXAS, OKLAHOMA AND KANSAS PUCS ACCEPTED**
31 **A SIMILAR PLAN?**

32 A. No. I have heard Ameritech argue in Indiana, Michigan and Wisconsin, and
33 expect a similar contention here that, because a similar (but, interestingly, not
34 identical) plan was approved by the Texas, Oklahoma and Kansas PUCs and the
35 FCC, that this somehow translates into the need to rubber stamp this proposal in

1 Illinois. I urge the Commission to conduct an independent examination of both
2 the Joint CLEC Illinois Remedy Plan and the Texas Remedy Plan because since
3 the Texas plan approval, more measurement data has come to light and the
4 appropriate, accurate quantitative methods are now more apparent.¹²

5 **Q. WAS THE SBC TEXAS REMEDY PLAN THE FIRST ONE APPROVED**
6 **BY A STATE UTILITY COMMISSION?**

7 A. No. The first state utility commission remedy plan of which I am aware is the one
8 adopted by the New York Public Service Commission in Bell Atlantic-New
9 York's application for long distance authorization. Just as the Texas PUC – at the
10 urging of SBC, I might note – accepted a plan very different from the New York
11 Remedy Plan, the Commission has the clear ability to reject the Texas Remedy
12 Plan and adopt another more suitable proposal, such as the Joint CLEC Plan.

13 **Q. DOES THE TEXAS REMEDY PLAN PUT \$361 MILLION “AT RISK”?**

14 A. Ameritech is likely going to argue here, as it already has done in Indiana,
15 Michigan and Wisconsin, that the Texas Plan puts 36% of its Illinois net revenue,
16 or \$361 million, “at risk”. The self-protection mechanisms in the Texas Remedy
17 Plan make it virtually impossible for Ameritech Illinois, even if it continues to
18 provide poor service, to be at risk for more than a small fraction of \$361 million.
19 Indeed, Ameritech Illinois's exposure to financial consequences under the Texas
20 Remedy Plan is too limited to deter even egregious discriminatory and anti
21 competitive conduct. This is not a mere conjecture, given the meager remedies

¹² Michigan recently approved a remedy plan for Ameritech that adopts certain aspects of the Texas Plan but made a number of improvements. *See, Order, Michigan Public Service Commission Case No. U-11830 (April 17, 2001).*

1 paid to date in Illinois, as is discussed by Ms. Moore, and also the minimal
2 remedies potentially due under the proxy analysis I discuss later in this testimony.

3 **Q. WHY DO YOU BELIEVE THAT AMERITECH ILLINOISS EXPOSURE**
4 **TO FINANCIAL CONSEQUENCES UNDER THE TEXAS REMEDY**
5 **PLAN IS TOO LIMITED TO DETER DISCRIMINATORY AND ANTI-**
6 **COMPETITIVE CONDUCT?**

7 A. Several features of the Texas plan restrict Ameritech's exposure to compensatory
8 damages and penalties to a level that cannot be expected to deter conduct that is
9 discriminatory or denies CLECs a meaningful opportunity to compete. Those
10 same limitations mean that the plan cannot be expected to compensate adequately
11 CLECs who are injured by such conduct. While we take exception to the annual
12 cap on liability, our primary concern is with other features of the plan that make it
13 extremely unlikely that Ameritech ever will approach that cap. As the FCC has
14 said, "it is important to assess whether liability under an enforcement
15 mechanism . . . would actually accrue at meaningful and significant levels when
16 performance standards are missed. Indeed, an overall liability amount would be
17 meaningless if there is no likelihood that payments would approach this amount,
18 even in instances of widespread performance failure." *Bell Atlantic New York* ¶
19 437.

20 The Texas plan fails this test in many ways. Some examples are: by calculating
21 damages and penalties based on volume of CLEC transactions ("per occurrence"),
22 by classifying important measures as "low" so that very small damages
23 multipliers apply, by placing low caps on other important measures where

1 Ameritech has had historically poor performance, and by deferring Tier 2
2 penalties until Ameritech has reported performance failure for CLECs in the
3 aggregate (average) for three consecutive months, the Texas plan will allow
4 serious performance failures to go without serious sanction. I will review below
5 the factors that unduly weaken the incentives provided under the Texas plan.

6 **Q. DOES THE TEXAS PLANS "PER OCCURANCE" APPROACH TO**
7 **CALCULATING REMEDIES PROVIDE A DETERENCE TO**
8 **DISCRMINATION WHEN TRANSACTION VOLUMES ARE SMALL?**

9 A. No. The plan does not provide adequate damages or penalties for performance
10 measurements involving small transaction volumes. Because the plan calculates
11 both damages and assessments predominantly on a "per occurrence" basis, it
12 necessarily produces limited sanctions at low volumes. Even if the plan's per
13 occurrence multipliers were set at reasonably compensatory levels for liquidated
14 damages purposes – and at \$25 to \$150 they are not – those same multipliers will
15 have little deterrent effect so long as they are being multiplied against only
16 dozens, or even hundreds of transactions. Nor does the prospect of Tier 2
17 assessments at a maximum of \$ 500 per occurrence offer significant deterrent
18 effect, where CLEC volumes remain in the hundreds across a major metropolitan
19 area and where inferior wholesale support might afford Ameritech a significant
20 competitive advantage in an emerging service, such as xDSL. Under the Texas
21 plan, discriminatory performance that will likely thwart competitors in a startup
22 mode for new services (e.g., advanced services) will expose Ameritech to little
23 liability.

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The plan's "per occurrence" approach does not mean that sanctions will apply to each CLEC transaction in which Ameritech missed the parity or benchmark requirement. When Ameritech's monthly performance on a measure shows that Ameritech was sufficiently out of parity or off of the benchmark to yield a zscore worse than the critical z-value, the Texas plan uses a formula to determine how many "occurrences" will be used to calculate liquidated damages (the same formula applies in calculating Tier 2 assessments after three months of consecutive violation for all CLECs). Ameritech first calculates the performance level that would have yielded a zscore equal to the critical value (i.e., what is the worst performance Ameritech could have had that month on that measure and still achieve a passing score on the z-test). The difference between Ameritech's actual reported performance for the CLEC and this minimum required performance level is compared, and expressed as a percentage of the minimum required performance level. That percentage is then multiplied by the number of CLEC observations reported by Ameritech under the measure during the month to determine the number of "occurrences" on which damages or assessments will be based.

To illustrate, assume Ameritech reported a 1.5 day interval for itself and a 3.0 day interval for a CLEC on an average installation interval measure, where Ameritech had provisioned 100 units for the CLEC during the month. Assume that the z-test showed that these results represented a parity violation, and that the worst performance by Ameritech that would have passed the z-test on that month's data

1 was an average interval of 2.0 (i.e., an average of 2.0 for the CLEC, compared to
2 1.5 for Ameritech, would have produced a z-score equal to the critical z value).
3 Ameritech's actual reported performance for the CLEC (3.0) exceeded this
4 minimum required performance level (2.0) by 50%. Multiplying 50% times the
5 100 units provisioned for the CLEC that month under that measure, Ameritech
6 would pay damages based on 50 "occurrences." Only the transactions reported
7 for the CLEC within the specific geographic and product classification where the
8 performance violation occurred are used in calculating the "occurrences." Under
9 this example, even if Ameritech installed every CLEC order in 3 days, where 2
10 was required to meet the statistical parity test, Ameritech would pay damages
11 based on only half of those transactions.

12
13 Under the plan, damages are determined by multiplying the number of
14 occurrences, calculated as described above, by a fixed amount. The plan includes
15 a table of these multipliers, which range from \$ 25 to \$ 150 per occurrence in the
16 first month of violation, to a maximum of \$ 400 to \$ 800 per occurrence in the
17 sixth consecutive month of violation and thereafter. Within a given month, the
18 multiplier chosen depends on whether the measure is classified for Tier 1
19 purposes as "high," "medium," or "low."

20
21 Also any actual occurrences of poor performance that happened in a measure that
22 happened to pass the parity test (perhaps even by random variation) will remain
23 unremedied. Thus, the measures are each effectively capped in their ability to

1 generate remedies. Even so, some of these per “occurrence” measures have
2 additional even smaller caps applied. Indeed, there are some measures that are
3 not remedied on a per “occurrence” basis in the Texas Plan. They are immediately
4 capped as soon as they fail. There is no provision in the Texas Plan for increasing
5 consequences as a function of severity for those measures.

6 **Q. DID THE TEXAS PUC ALLOW CLECS AN OPPORTUNITY TO**
7 **PRESENT EVIDENCE ON WHAT LIKELY DAMAGES A CLEC WOULD**
8 **INCUR FOR DISCRIMINATORY TREATMENT?**

9 A. No. The multipliers set in the liquidated damages table were adopted by the
10 Texas PUC without any collection of evidence, much less an evidentiary hearing
11 and fact finding, regarding the damages that a CLEC is likely to sustain from SBC
12 performance violations on various measures. Liquidated damages of \$25 will not
13 compensate a CLEC for late-provided loop qualification information if the CLEC
14 loses an xDSL customer as a result. Even liquidated damages of \$150 are
15 dubious compensation, if a missed due date has that same result. Certainly these
16 liquidated damages multipliers do not account for the consequential damage to
17 CLECs whose entry into a developing market, such as the markets for advanced
18 services, is thwarted or retarded by discriminatory wholesale support.

19
20 Regardless of the adequacy of these multipliers for compensatory purposes, they
21 are inadequate to serve as serious consequences for noncompliance. If the
22 provision calls for payments that do not reach a reasonable forecast of just
23 compensation, it may be deemed an unenforceable penalty. Because SBC has

1 chosen a per occurrence approach, the Texas plan's liquidated damages
2 provisions (Tier 1) almost by definition cannot provide the type of penalty that
3 would suffice to deter Ameritech from providing inferior or inadequate wholesale
4 support, particularly in Illinois. Thus the need for a separate (Tier 2) consequence
5 structure under the plan.

6 **Q. DOES TIER 2 FILL THE GAP IN THE PLAN'S DETERRENT IMPACT?**

7 A. No. Tier 2 does not fill the gap in the plan's deterrent impact. First, no Tier 2
8 penalty applies until after Ameritech reports three consecutive months of failure
9 on a measure. This fact represents a serious flaw in the Texas plan, particularly as
10 it applies to nascent services, because, so far as the plan is concerned, Ameritech
11 can respond to an emerging CLEC service with two months of discriminatory
12 wholesale support and face no penalty. By the time Tier 2 penalties come into
13 play, the damage to CLECs' nascent services may have been done.

14
15 Further, Tier 2 assessments are based on the same purportedly compensatory
16 multipliers used in the liquidated damages table for violations that extend into a
17 third month. This amount would be paid to the state, over and above liquidated
18 damages paid to CLECs for those same violations. However, as long as total
19 CLEC transactions are in the hundreds on a statewide basis, which may be the
20 case for some time while a new service develops, particularly if CLECs have
21 difficulty obtaining the required wholesale support, Tier 2 threatens Ameritech
22 with assessments of no more than a few hundred thousand dollars to protect a
23 statewide competitive advantage. Indeed, for measures that are subject to a cap,

1 such as interconnection trunk blockage, the plan sets the maximum assessment for
2 sustained discriminatory performance against CLECs as a whole at the
3 ludicrously low level of \$75,000.

4
5 Moreover, not all the measures get into Tier 2, only a subset deemed by
6 Ameritech to be critical. This means that there are holes in the ability of the Texas
7 Tier 2 to apply consequences for discrimination. Furthermore the three month
8 requirement effectively reduces the chance of random variation type 1 errors to
9 zero, while still allowing type 2 errors of virtually any magnitude.

10
11 The few exceptions for which the plan sets sanctions on a “per measure” basis,
12 e.g., collocation, do not adequately address the lack of incentives provided under
13 the plan as it applies to measures where CLEC observations are reported in small
14 volumes. Also it does not increase with severity. Not a single provisioning,
15 maintenance, or ordering measure is subject to a per measure assessment under
16 the plan. [Only caps are set!] Without a broader set of minimum per measure
17 sanctions, there is no basis for concluding that the Texas plan will act as a real
18 deterrent to performance failures by Ameritech in the nascent stages of
19 competition over a new service or with a new upstart.

20 **Q. DOES THE TEXAS REMEDY PLAN'S CLASSIFICATION OF**
21 **MEASUREMENTS FURTHER WEAKEN ITS DETERRENT EFFECT?**

22 A. Yes. The weaknesses of the per occurrence structure in the Texas plan are
23 aggravated by the way in which it classifies measures into tiers and subtiers. As

1 explained earlier, Tier 1 measures are subject to liquidated damages; Tier 2
2 measures, largely a subset of Tier 1, are subject to assessments to the state
3 treasury. Tier 1 and Tier 2 measures are further separated into high, medium, and
4 low categories with separate damages and assessment quantities applicable to
5 each sub-tier. For example, if Ameritech fails to meet the parity criterion for the
6 flow-through measure for a CLEC, a Tier 1 Low¹³ measure, Ameritech is to pay
7 \$25 for each “occurrence,” with the number of occurrences calculated as
8 described above. If, by contrast, Ameritech fails to provision a category of
9 unbundled network elements within the benchmark interval established by the
10 Texas PUC, a Tier 1 High measure, Ameritech is to pay the CLEC \$150 for each
11 occurrence.

12 **Q. DO THE CLECS SUPPORT THE TEXAS PLANS PRIORITIZATION OF**
13 **PERFORMANCE MEASUREMENTS INTO “LOW”, “MEDIUM” AND**
14 **“HIGH” FOR OBTAINING REMEDIES?**

15 A. Perhaps the most dubious set of classifications in the Texas plan are the sub
16 classification of Tier 1 and Tier 2 measures into “High,” “Medium,” and “Low”
17 categories, which govern the size of per occurrence damages or assessment
18 associated with each measure. As a result of the arbitrary sub-classification of
19 measures into Low, Medium, and High categories, however, the compensation
20 available to the CLEC, and the risk of sanctions faced by Ameritech, differs
21 greatly, depending on whether the performance failure is captured as a flow
22 through failure or a provisioning failure. I believe it is entirely inappropriate to

¹³ I use the Texas PUC's categorization of measures into low, medium and high priorities for illustrative purposes.

1 arbitrarily characterize measurements into such categories, since each CLEC has
2 its own business plan. For example, whereas a CLEC planning to use a facilities
3 based entry strategy may believe performance measurements related to
4 Ameritech's provision of UNE-P are "low" priority, a carrier that almost
5 exclusively relies on using Ameritech's UNEs would consider UNE-P to be
6 "high" priority. Moreover, by categorizing performance measurements as high,
7 medium and low priority, Ameritech is, effectively, choosing which CLEC entry
8 strategies should be "favored" in terms of obtaining remedies. Obviously, such an
9 anti-competitive and unduly discriminatory plan should be rejected.

10

11 **Q. WILL THE TEXAS REMEDY PLAN BE SELF-EXECUTING?**

12 A. No. To advance the public interest, the incumbent LEC needs to commit itself to
13 self-enforcement mechanisms that are "automatically triggered" by
14 noncompliance with applicable performance standards, "without resort to lengthy
15 regulatory or judicial intervention." Otherwise, local exchange competition may
16 be delayed while new entrants are required to "engage in protracted and
17 contentious legal proceedings to enforce their contractual and statutory rights to
18 obtain necessary inputs from the incumbent."¹⁴ The Texas plan leaves Illinois
19 CLECs facing the likely prospect of protracted and contentious legal proceedings,
20 merely to realize the meager damages and assessments offered by the plan.

21

22 Under the Texas Remedy Plan, Ameritech has no liability for damages or
23 assessments to the extent that its noncompliance with a performance measurement

1 is the result of non-Ameritech problems associated with third-party systems or
2 equipment, which could not have been avoided by Ameritech in the exercise of
3 reasonable diligence.

4
5 Given Ameritech's widespread reliance on systems and equipment that have been
6 designed, manufactured, and/or service by third parties, this added ground has the
7 potential to turn every instance of reported noncompliance into a negligence issue
8 – i.e., could Ameritech have avoided the parity or benchmark failure by
9 exercising reasonable care (reasonable diligence). Given Ameritech's propensity
10 to find an excuse for every reported violation so long as it does not find itself
11 required to confess intentional discrimination, there is every likelihood that
12 Ameritech will invoke this provision with frequency, if only to defer the
13 realization of liquidated damages liability and discourage CLECs from attempting
14 to collect it. This term alone has the potential to eviscerate self-enforcement
15 from the plan, and it forecloses any conclusion that the Texas plan provides for
16 damages and assessments that are “automatically triggered,” “without resort to
17 lengthy regulatory or judicial intervention.”

18
19 The Texas plan also excuses Ameritech from paying liquidated damages or
20 assessments for reported noncompliance that is “the result of an act or omission
21 by a CLEC that is in bad faith.” Fewer phrases have proved more pregnant with
22 litigation than “bad faith.” The Texas plan offers examples of “bad faith,” such as
23 a CLEC's unreasonable failure to provide forecasts to Ameritech, that threaten to

¹⁴ FCC, *Second BellSouth Louisiana Order* at ¶ 364.

1 equate that term with simple negligence. Again, this excuse is wholly unjustified
2 in the context of the Texas plan, which separately protects Ameritech to the extent
3 that reported noncompliance results from CLEC acts or omissions in breach of
4 contract or that are otherwise unlawful. Adding the “bad faith” excuse will do
5 nothing other than foster disputes and create the opportunity for Ameritech to
6 claim “bad faith dumping” or “unreasonable failure to forecast” whenever new
7 CLEC products, geographical expansions, or increasing CLEC volumes tax
8 Ameritech’s systems.

9 **Q. WHAT IS THE K TABLE EXCLUSION IN THE TEXAS REMEDY**
10 **PLAN?**

11 A. The K table exclusion allows Ameritech to forego paying damages on a certain
12 number of failed measurements each month, and it therefore excuses many
13 serious Ameritech performance violations. That the K table is an exclusion on the
14 payment of remedies is acknowledged by Ameritech. Indeed, Section 11.1.1, p.
15 13. of the Texas Plan that was filed here is entitled: “Application of K Value
16 Exclusions”.

17

1 Q. HAS THE K TABLE HELPED SOUTHWESTERN BELL TELEPHONE
2 COMPANY ("SWBT") EVADE PAYING REMEDIES IN TEXAS?

3 A. Recent data from Texas, where the Texas Plan has been in operation for a number
4 of months, shows the K table has allowed Ameritech's affiliate, SWBT, to reduce
5 its rightful remedy payments by 60%. Today the K table alone is operating to
6 dilute the exposure that SWBT faces under the plan to levels that may be accepted
7 as a cost of doing business, rather than at a level that incents better wholesale
8 performance.

9

10 Texas data submitted by SWBT in the spring of this year in response to a data
11 request from Texas PUC staff confirm that over the last nine months, the K table
12 has operated to excuse over 40% of SWBT's reported parity and benchmark
13 violations. As a result, SWBT has been excused from paying \$3,531,750 in Tier
14 1 liquidated damages. SWBT paid only \$2,311,925 in Tier 1 damages over that
15 same period. In other words, the K table has saved SWBT from more than 60%
16 of the liquidated damages that otherwise would have been payable under the
17 plan.¹⁵

18

19 SWBT's letter also confirms that the K table is operating to excuse performance
20 violations that would result in relatively higher dollar sanctions, and leaving

¹⁵ Texas PUC Project No. 20400, Letter from Cynthia F. Malone, SBWT, to Nara Srinivasa and Donna Geiger, staff of the Public Utility Commission of Texas at 2 (May 1, 2001); *See, also*, my affidavit filed on May 17, 2001 Michigan Public Service Commission Case No. U-11830, where this is also discussed.

1 SWBT to pay damages on violations that result in lower sanctions. This can be
2 seen from the fact that, again based on June 2000 through February 2001 reported
3 performance, the K table excused SWBT from making payments for 1823 PM
4 violations, while SWBT reports actually paying damages for 2607 violations.
5 Thus, the K table excused SWBT from paying damages on 40% of the measures
6 where it reported a parity or benchmark violation, but saved SWBT 60% of the
7 damages it would have been required to pay if damages applied to all violations.
8 The higher percentage of avoided damages payments (60%) is possible only if the
9 1823 violations that were excused had a higher liquidated damages value than the
10 2607 violations for which SWBT says it actually paid damages.

11
12 The specific explanation for this disparity, based on SWBT's K Value Letter,
13 appears to be that SWBT is reporting violations on Tier 1 low measures that are
14 sufficiently extreme that they would require payment of higher damages, under
15 the plan's per occurrence formula, than some of SWBT's Tier 1 medium or high
16 violations. (The plan provides for the K table to excuse performance violations
17 on all Tier 1 low measures first, regardless of degree or the potential damages
18 payable, before excusing any Tier 1 medium violations.) Indeed, in each of the
19 past 5 months, SWBT has avoided more damages payments on Tier 1 low
20 measures than it paid on Tier 1 high, medium, and low measures combined. (*E.g.*
21 November 2000 – SWBT avoided \$ 475,100 in Tier 1 damages for low measures,
22 while paying \$ 330,125 for high, medium, and low measures combined. SWBT
23 K Value Letter at 2.

1 Q. **DID AMERITECH DEVELOP THE K TABLE?**

2 A. No. Ironically, the K table was originally proposed by some CLECs but for a
3 completely different reason than its current use by Ameritech. Its purpose, as
4 originally contemplated by the CLECs, is to show how many submeasures would
5 fail due to random variation if and only if Ameritech were providing parity
6 service for all measures. As evidenced by the high measure failure rate, the
7 severity of failures, and the chronic nature of those failures, the fact is that
8 Ameritech is not providing parity service and therefore the assumptions that go
9 into the table have not been satisfied. Since Ameritech is not providing parity
10 service, the K-table mistakenly forgives legitimately failed submeasures that
11 display discrimination. The net result is that more remedy dollars are mitigated
12 than should be.

13 Q. **WHAT DO YOU CONCLUDE ABOUT THE K TABLE?**

14 A. I submit that, given the magnitude of damages and quantity of violations being
15 excused, the K table certainly should not be part of the remedy plan adopted in
16 Illinois. The issue is not, as Ameritech Illinois would have it, CLECs trying to
17 create a revenue stream out of liquidated damages. Rather, the K table, having
18 reduced SWBT's Texas payable liquidated damages over the last 9 months from
19

1 \$5,843,675 to \$2,311,925, is operating to limit SWBT's liquidated damages
2 exposure to nothing more than a cost of doing business.¹⁶

3

4 **V. CALCULATION OF REMEDIES UNDER THE JOINT CLEC REMEDY**
5 **PLAN**

6

7 **Q. PLEASE EXPLAIN HOW YOU CALCULATE REMEDIES UNDER THE**
8 **CLEC PLAN.**

9 A. AT&T originally sought "real" CLEC Illinois performance data to calculate
10 remedies under the Joint CLEC and Texas remedy plans. In an effort to reach a
11 compromise, both AT&T and Ameritech, after long negotiations, developed a
12 proxy. The data derived under the proxy is explained in "Methodology for
13 Simulating CLEC and Ameritech Data" Attachment B, attached.

14 Subsequent to reaching agreement on the proxy, AT&T and Ameritech both
15 calculated remedies under the two plans, using (1) parity measurements, (2)
16 benchmark measures, and (3) those measures that are "parity with a floor"
17 measurements.

18 **Q. HOW ARE REMEDIES CALCULATED UNDER AMERITECH'S TEXAS**
19 **PLAN?**

¹⁶ Speaking of his own agency's enforcement, FCC Chairman Powell himself has said that the fines ILECs face "are too low to be an effective deterrent for a billion-dollar company." Indeed, the Wall Street Journal recently observed that, the \$ 23.3 million in fines paid by SBC for violations of the Ameritech merger conditions could have been earned back by the company in 27 hours and that "[s]tate regulators have commensurately low fines." "The Big Telecom Disconnect: Everyone's Got a Solution For Industry's Woes," Wall Street Journal, B1 (May 3, 2001).