STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	)	
	)	
Investigation Concerning Illinois Bell Telephone	)	Docket No. 01-0662
Company's compliance with Section 271 of the	)	
Telecommunications Act of 1996	)	

COMMENTS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

DATED: March 17, 2003

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In setting the schedule for this proceeding it is Staff's understanding that a party could raise legal issues in a brief/comment at a time that would allow SBC Illinois ("SBCI") an opportunity to respond. In keeping with that understanding, Staff of the Illinois Commerce Commission respectfully submits these Comments in Phase 2 of this proceeding, with the understanding that SBCI would be able to respond on March 25, 2003.

These Comments are principally limited to the following performance assurance plan issues: SBCI's burden of proof regarding proposed changes to the performance remedy plan approved by the Commission in docket 01-0120 (hereafter "Commission-ordered remedy plan"); administrative problems caused by SBCI's proposed remedy plan and its application to other remedy plans in Illinois; the limited nature of Staff's evaluation of the SBCI plan due to the shortened timeframe established in this docket; and the relationship between this docket and Docket 98-0252/98-0335/00-0764 and Staff's resulting recommendations.

I. BURDEN OF PROOF - ASSURANCE OF FUTURE COMPLIANCE

SBC has the burden of proof to demonstrate that the performance monitoring and enforcement mechanisms in place in Illinois will provide a strong assurance that the local market will remain open after it receives 271 approval by the FCC. See, New York Order ¶429. Essentially, SBCI must demonstrate that the local market is "fully and irreversibly open." Id. With respect to this demonstration, the FCC has stated that it "strongly encourages state performance monitoring and post-entry enforcement, [however it has] never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval." Id. The FCC has, however stated that the fact the Regional Bell Operating Company ("BOC") will be subject to performance monitoring and enforcement mechanisms would constitute probative evidence that the BOC will continue to meet its section 271 obligations and that its entry would be consistent with the public interest." Id. Each state and its state commission must then set in place performance monitoring and enforcement mechanisms that are reasonable and suitable for that state.

II. BURDEN OF PROOF- CHANGES TO THE COMMISSION'S APPROVED PLAN

Because SBCI is proposing changes to a remedy plan approved by the Commission, Staff posits that the burden of proving that these changes are necessary rests with SBCI. In the initiating order Commission stated ". . . the Administrative Law Judge shall set the procedural schedule for this proceeding, consistent with the above directive, with Ameritech Illinois [SBC Illinois] bearing the burden of proof." Initiating Order, at 4.

This is in line with the Commission's findings in Docket 01-0120, Illinois law and Commission practice. In docket 01-0120 the Commission stated that:

> We conclude, therefore, that unless otherwise directed by the Commission, the Remedy Plan adopted pursuant to this Order shall serve as the basis for the aforementioned "performance assurance plan" referenced by [SBC Illinois] for Section 271 approval purposes. The Commission does not believe it is in either its own interest or any of the parties' interest to re-litigate the nuances of the Remedy Plan in the current Section 271 proceeding. Therefore, the Commission wishes to clarify that any future reference (in either current or prospective docket before the Commission) to a Remedy Plan in place in Illinois, either voluntarily or pursuant to Commission Order, shall mean the Remedy Plan adopted pursuant to this Order."

Order, Docket 01-0120 at 20.

Since the Commission-ordered remedy plan was to serve as the basis for the performance remedy plan, SBCI carries the burden of justifying the need for substantive changes to that plan. In addition, the Illinois Supreme Court has gone so far as to state "courts have **uniformly** imposed on administrative agencies the customary common-law rule that the moving party has the burden of proof." Scott v. Dept. of Commerce and Community Affairs, 84 Ill. 2d 42, 53; 416 N.E.2d 1082 (1981) (emphasis added).

This is entirely consistent with Commission practice. In Commission proceedings, parties seeking relief must demonstrate that they are entitled to the relief sought. *See* Chicago and Eastern Illinois Ry. Co. v. Road Dist. No. 10, 353 Ill. 160, 166 (1933) (stating the burden is on the petitioner to show, by a preponderance of the evidence, that it is entitled to the relief sought). SBCI is the party seeking relief here, and has proposed numerous changes to the Commission-ordered remedy plan. Accordingly, SBCI bears the burden of proving that its plan meets the 271 anti-backsliding criteria.

III. SCOPE OF REVIEW

This proceeding was initiated by the Commission in order for it to properly discharge its role as consultant to the FCC on matter related to SBCI's compliance with Section 271 of the Telecommunications Act of 1996. As the FCC has stated in prior orders, states may create plans to be used for post-section 271 approval monitoring and enforcement, and those plans can vary in strengths and weaknesses.[1] New Jersey Order, ¶177; New York Order, ¶433; Texas Order, ¶423. It is presumed that each state

[1] See Pennsylvania Order, ¶¶128-129.

has found that its state plan contains sufficient performance measurements and remedies that in that state commission's assessment protects its wholesale market from ILEC backsliding. See id. These plans are intended to discourage anti-competitive behavior on the part of the ILEC by setting damages and penalties at a level above the simple cost of doing business. New York Order ¶¶433, 435-37; Texas Order ¶423; KS/OK Order ¶273. The initiating order in this proceeding, with respect to performance assurance plans, stated:

> This Commission will fully investigate the performance remedy plan to ensure that the local market remains open to competition and to guard against backsliding following 271 approval. Therefore, this proceeding is to choose the plan, or plans, that are suitable for preventing backsliding in a post-section 271 approval environment.

Therefore, this proceeding is to choose the plan, or plans, that are suitable for preventing backsliding in a post-section 271 approval environment.

Both Staff and SBCI, have submitted, for review in this proceeding, performance assurance plans that are intended to prevent future backsliding of SBCI's wholesale performance. The analysis provided in this docket is only for purposes of providing the Commission sufficient information to make a recommendation to the FCC on each plans ability to meet the 271 performance assurance plan criteria. Staff's primary recommendation is the remedy plan approved in docket 01-0120 (i.e., Commission-ordered remedy plan), and its alternative recommendation – the Staff Hybrid Plan – is the 01-0120 remedy plan with slight modifications (See Staff Exh. 39.0 ¶74). Whereas, SBCI has proposed a performance remedy plan, which has numerous *unsupported* changes to the remedy plan approved in Docket 01-0120. All of the legal and administrative issues arising from these changes could not adequately be addressed in this docket.

Staff points out that due to the expedited nature of this Phase II, Staff has been required by expediency to limit its scope of analysis to those issues that impact the five key components of evaluating a remedy plan, and has compromised its work product, by reducing the level of detail it would typically provide to the Commission in a proceeding of this nature conducted under a more reasonable schedule. Staff notes that this Phase II proceeding was conducted under a three-month schedule which is significantly shorter than the approximate fifteen month schedule of the 01-0120 proceeding, or even an expedited timeline of six-months. Staff also points out that the expedited nature of this Phase II is due chiefly to SBCI's stated intention to file its Section 271 petition with the FCC in mid-to-late April 2003.

An example of the legal and administrative issues that have not been sufficiently supported by SBCI, and which Staff has not been able to pursue to its satisfaction are:

- whether Tier 1 remedy payments can be considered "liquidated damages" (as provided in §6.1 of the SBCI plan), in contradiction to the Commission order in Docket 0-0120;
- what rationale or justification does SBCI rely upon to support its numerous changes to section 7 of the Commission-ordered remedy plan;
- whether it is permissible and under what authority SBCI relies upon in proposing Sections §§7.1, 7.5, 7.8 of the SBCI plan;
- pursuant to what legal guidelines or rules is the Commission to conduct the requested *expedited hearings*, as provided in §§7.1, 7.5, 7.8, etc. of the SBCI plan;
- how section 7.4, of the SBCI plan will operate in practice considering it appears to permit SBCI to increase unilaterally the monthly threshold amount by the amount of the unpaid portion of the previous month's threshold, given also the lack of evidentiary support by SBCI regarding the necessity for this provision, and whether this provision is reasonable;
- how section 7.4, of the SBCI plan will operate in practice considering it appears to permit SBCI to pay Tier 1 payments based upon an inexact statement that – "Tier 1 liquidated damages shall be paid first on a pro rata basis to CLECs and any remainder within the annual threshold shall be paid as a Tier 2 assessment",

given also the lack of evidentiary support by SBCI regarding the necessity for this provision, and whether this provision is;

- whether §5.4 of the SBCI plan actually allows for “opt-in” in the same manner as §5.5 of the Commission-ordered remedy plan, since it does not have the same language, it does not refer to “opt-in”, and it specifically addresses SBCI’s liability for Tier 1 payments.

IV RESPONSE TO SBC ILLINOIS REPLY COMMENTS

In its Reply Comments, SBCI states that it would be willing to modify sections 5.6, 5.7, 6.1 and 7.1 of the SBCI plan, and in its place adopt some of the language from the Commission-ordered plan. Overall, these changes do not change Staff’s objections to the SBCI plan, since they do not directly address major failings of the SBCI plan (as discussed in Staff Exhibits 29, ¶¶ 235-72, and 39 ¶¶ 29-69). Staff responds in detail to SBCI’s proposals in ¶9 of Staff Exhibit 50. Therefore, Staff still recommends that the Commission find that the SBCI plan does not adequately prevent backsliding.

V. COMMITMENTS BY SBCI ILLINOIS REGARDING OPERATIONS OF REMEDY PLANS IN ILLINOIS

Since SBCI offers a number of remedy plans to carriers in Illinois, there are certain functions related to the administration of all of these remedy plans that could adversely impact the use of remedy plans by CLECs. Staff recommends that the Commission condition its approval of SBCI’s petition for Section 271 approval on SBCI’s commitment to comply with the recommendations stated below so as to prevent an adverse impact on the administration of remedy plans.

Currently there are five types of remedy plans that SBCI offers to carriers in Illinois – the SBC13state plan, SBC11state plan, Commission-ordered remedy plan, Covad Plan, Texas Plan – and SBCI continues to file new plans with the Commission.

See Docket 03-0098 (SBCI/TDS Metrocom filed an interconnection agreement requesting the SBCI plan become effective if the Commission-ordered remedy plan is remanded, overturned or modified by the appellate court. Therefore, another modification to the SBCI plan is concurrently being proposed by SBCI and reviewed in another docket). Remedy plans need to be self-executing and not leave the door unreasonably open to litigation and appeal. New York Order, ¶433; AR/MO Order, ¶130. SBC has included in its remedy plan certain provisions that impact the administration of all remedy plans in Illinois. These provisions should not be included in only one remedy plan, but included in, or applied to, all remedy plans. These provisions relate to audits, to modifications of performance measures on a going forward basis, to the operation of opt-in procedures for remedy plans, to the method of calculating Tier 2 payments since the performance of all carriers affect the amount of Tier 2 payments, and the calculation of the procedural annual threshold. These issues can adversely impact all plans if they are not resolved in this docket, and will ultimately result in additional future litigation.

Therefore, SBCI should commit to making the following modifications to all remedy plans operating in Illinois rather than limiting these changes to the plan or plans approved by the Commission in this proceeding.

A. Auditing

Auditing provisions are provided in every type of remedy plan currently offered in Illinois, however they are not consistent among all plans. Since some of these auditing provisions provide for audits of payments paid to more than one CLEC, there should be audit provisions that are uniformly applied to all remedy plans to permit both CLECs and the Commission to be able to analyze this data effectively. Therefore, Staff proposes that only one mini-audit, and one annual audit, respectively, be used for all remedy plans on a going forward basis.

1. Mini-audits

Staff recommends that the Commission condition its approval of SBCI's petition for Section 271 approval on SBCI's commitment to offer the mini-audit provision set forth in the Commission-ordered remedy plan, to all CLECs. SBCI made significant substantive changes to the mini-audit provision in the Commission ordered remedy including increasing the negotiation period before an audit can be requested, from 30 days to 45 days, and reducing the number of mini-audits a CLEC can request. See underscored text in table below. These are significant changes to the Commission-ordered remedy plan's mini-audit provision, however SBCI did not provide any support justifying the changes, nor does it address the fact that there are numerous mini-audit provisions available to CLECs, as demonstrated in the Table below:

SBCI plan, §6.5:	**SBC11State plan/SBC13State plan[2]:**	**Commission-ordered remedy plan, §6.4.2:**
independent audit to resolve issues regarding accuracy or integrity of data	independent audit to resolve issues regarding accuracy and integrity of data collected, generated, and reported	mini-audit of systems, processes and procedures associated with the production and reporting of PM results, it is based on 2 months of data, using raw data, and is to be made available to CLECs
<u>CLEC and SBCI are to attempt to resolve issues for 45 days before CLEC can request audit</u>	CLEC and SBCI are to attempt to resolve issue for 30 days before CLEC granted ability to request mini-audit	CLEC and SBCI are to attempt to resolve issues for 30 days before CLEC can request a mini-audit
<u>CLEC can only request 1 audit per 4 months</u>	CLEC can only request audits for 3 measures/submeasures during the year	CLEC can only request audits for 3 single measures/submeasures during audit year
<u>CLEC cannot request the same PM to be audited more than once in 12 month period</u>	*NO COMPARABLE PROVISION*	*NO COMPARABLE PROVISION*
NO COMPARABLE PROVISION	Up to 3 mini-audits can be conducted simultaneously for all CLECs	*NO COMPARABLE PROVISION*
Audit conducted at CLEC expense, and CLEC will be reimbursed if audit affirms there is a problem	Audit conducted at CLEC expense, and CLEC will be reimbursed if audit affirms SBC materially misrepresented misreports or misrepresents data or has non-compliant procedures	payment for audit is dependent on outcome – SBC pays if it materially misrepresents or misreports data or has non-compliant procedures, and when SBCI is found non-culpable, or misfeasance is not found, then cost borne by CLEC
SBCI will inform all CLECs of any problem identified during audit via Accessible letter.	*NO COMPARABLE PROVISION*	*NO COMPARABLE PROVISION*
NO COMPARABLE PROVISION	*NO COMPARABLE PROVISION*	SBC to notify all CLECs of a mini-audit request

[2] Information from SBC11State Plan from – Royal Phone Co. LLC/SBCI Interconnection Agreement §11; SBC13State Plan -- Teligent Services, Inc./SBCI Interconnection Agreement §12.

Because these changes are unsupported and because a lack of uniformity in auditing provisions has a negative impact on the Commission's ability to ensure that anti-backsliding provisions in remedy plans are properly implemented by SBCI, Staff recommends that the Commission condition its approval of SBCI's petition for Section 271 approval on SBCI's commitment to offer the mini-audit provision set forth in the Commission-ordered remedy plan, to all CLECs.

2. Annual audits

Staff proposes that the Commission condition its positive recommendation to the FCC based on SBCI commitment to conduct annual audits as approved by the Commission in Docket 01-0120. Order, Docket 01-0120 at 14, and Attachment A at § 6.4.1. Staff recommended this in Docket 01-0120 because a regularly scheduled audit is needed to "test the veracity of any numbers developed as a result of the plan." Id. at 13. Furthermore, the Commission determined that, "having an audit only if an undefined 'problem' is discovered, encourages dilatory or less than forthright conduct on the part of [SBCI]." Id. at 14.

The SBCI plan removes the annual audit provision from the Commission-ordered remedy plan, but SBCI provides no rationale that justifies' the provisions removal. Additionally, other remedy plans in currently effective interconnection agreements do not provide for an annual audit. The remedy plan approved in this hearing is to be used in interconnection agreements with individual CLECs. Allowing this provision in only one type of remedy plan creates confusion because it would be incorporated only in certain interconnection agreements for certain CLECs, however, the annual audit, unlike the mini-audit, is not focused on a specific CLEC. The annual audit provides the

Commission and the CLECs information on how SBCI's reporting procedures and data management/handling progressed over the preceding year. Order, Docket 01-0120 at 14-15.

An annual audit provision should not be included in just one type of remedy plan, but it should apply to all remedy plans, particularly in light of the fact that an annual audit provision is not performed at the request of an individual CLEC but is performed regularly on an annual basis, in order to maintain confidence in the payments that are made, and because the annual audit provides information regarding the entire market, and not just an individual CLEC. Therefore, Staff recommends that the Commission condition its positive recommendation to the FCC based on SBCI committing to conduct annual audits as approved by the Commission in Docket 01-0120.

3. Regional audits

Staff does not recommend approval of a regional audit for the reasons set forth in Staff Exhibit 29.0 ¶271, and Staff Exhibit 41 ¶¶79-80.

B. Six month collaborative

Staff recommends that the Commission condition its approval of SBCI's petition for Section 271 approval on SBCI's commitment to continue the six month collaborative process, as set forth in §6.3 of the Commission-ordered remedy plan, as long as wholesale PMs are in existence and are being reported. The FCC has recognized that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. Both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's service quality measures to come from their respective pending six-month reviews.[3] GA/LA Order, ¶294. Likewise, Staff proposes that PMs in Illinois be kept current through two methods -- continuing the six-month collaborative process, and on its own initiative after an investigation and hearing.

All of the performance remedy plans currently in effect in interconnection agreements in Illinois are based on the same 150 performance measures, or a subset thereof. Currently, the performance measurements are updated pursuant to a six month collaborative process established by the Commission in the *Merger Order*. Order, Docket 01-0120, Attachment A §6.3; Order, Docket 98-0555, Condition 30 ¶¶3, 4, 8, 9. In most circumstances it appears that the conditions in the *Merger Order* have expired, and it is unclear whether there is a mechanism in place requiring that a six-month collaborative proceeding continue, and further, there is no docket proposing or evaluating a replacement process.

Generally, SBC Illinois, the CLECs and Staff all agree that the PMs should be updated through the collaborative process, and should continue to be updated in that manner. If the PMs are not updated by collaborative, Staff would expect the parties to state otherwise in its response.

Therefore, Staff recommends that the Commission, as a condition of giving a positive recommendation to the FCC on SBCI's 271 application, should obtain a commitment from SBCI to continue meeting with CLECs and Staff, as set forth in §6.3

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3 The GA/LA Order at ¶294 stating that the Louisiana Commission is currently conducting a seven and one-half month detailed review of the performance measurements and penalty plan. The Georgia State Commission provided for a six month review of the plan and has ordered BellSouth to file a "root cause analysis" and a corrective action plan if BellSouth fails any sub-metric twice in any 3 consecutive months. BellSouth GALA I Reply at 86-7; Georgia Commission GALA II Comments at 3, 30; Louisiana Commission GALA II Reply at 4-5; Louisiana Commission Review; Georgia Commission GALA I Comments at 15, 217; Louisiana Commission GALA I Comments at 5.

of the Commission-ordered remedy plan. Therefore, the six-month collaborative would be held six months after the conclusion of the previous six month process, and should continue for as long as wholesale PMs are in existence and are being reported.

C. Opt-In

Staff recommends that the Commission condition its approval of SBCI's petition for Section 271 approval on SBCI's commitment to include, in the remedy plan, or remedy plans, recommended in this proceeding, an opt-in provision to permit any CLEC to opt-in to such plans pursuant to the procedure described below (which is based on the 01-0120 opt-in procedure). In addition, the 271 recommended plan, or plans, should be offered by SBC Illinois as a starting point for all new interconnection negotiations, and that CLECs be allowed to opt-in at anytime to such plan or plans. See Staff Exhibit 29.0 at ¶¶243-248.

Staff recommends that if the Commission chooses not to give a negative recommendation to the FCC, that it condition its positive recommendation on SBC Illinois making a commitment to comply with the proposals set forth in Staff Exhibit 29.0 at ¶¶243-248.

D. There Should Be Only One method for calculating Tier 2 Payments for All Carriers

Staff recommends that the Commission condition its approval of SBCI's petition for Section 271 approval on SBCI's commitment to provide only one Tier 2 calculation methodology and assessment amount table to all carriers and remedy plans. In its SBCI plan, SBCI proposes that, if there is more than one Tier 2 calculation methodology and amounts approved by the Commission, SBCI would pay Tier 2 assessments pursuant to whichever plan would result in the highest payment.[4] This proposal is insufficient for four reasons: (i) SBCI is attempting to implement this proposal through one remedy plan, and it impacts all remedy plans; (ii) this proposal allows CLECs and SBCI to use Tier 2 payments as a bargaining chip in negotiating the interconnection agreement even though Tier 2 payments, as payments to the State of Illinois, are a public right, modification of which is not within the purview of any private party; (iii) this proposal allows SBCI to determine unilaterally the level of Tier 2 liability it owes the State of Illinois without, from an administrative point of view, an manageable way for Staff to double-check SBCI's payments; and, (iv) the other methods for calculating Tier 2 payments that are used in current interconnection agreements operating in Illinois (e.g., SBC11state and SBC13State plans) may be faulty. Therefore, by requiring SBCI to have only one Tier 2 calculation methodology and payment amounts for all CLECs, and all remedy plans, Staff is attempting to clarify and simplify Tier 2 administration in Illinois.SBCI is attempting to apply section 5.5 to all remedy plans without following the appropriate procedures to amend individual remedy plans. Section 5.5 states that, in the event there are two remedy plan in Illinois with a Tier 2 assessment methodology, SBCI will make pay pursuant to the methodology that would require the greater payment amount. This is inappropriate since SBCI is only proposing that this provision

[4] In section 5.5 of the SBCI plan, SBCI proposes that

> To the extent that there are one or more other Commission-approved remedy plan(s) in effect that also require SBC Illinois to make Tier 2 assessments to the State, SBC Illinois will be liable for a single Tier 2 assessment for the applicable time period, which payment to the State shall be equal to either the Tier 2 assessment under such other plan(s) or the Tier 2 assessments payable under this plan, whichever is greater. Ehr Affidavit, Attachment Z §5.5.

be included in the SBCI plan. For this provision to apply to all carriers, the current remedy plans need to be amended so that it clearly states how that remedy plan is to operate. ATier 2 methodology set forth in one type of remedy plan, and agreed to by a couple of carriers does not bind *all* carriers to that calculation methodology, as SBCI would attempt to do in the instant case. Simple contract law would dictate that a contract agreed to by one or two parties is not binding on all third parties, without their express written agreement to those terms. The remedy plans in current interconnection agreements that lack a Tier 2 payment provision[5] either need to be amended to expressly state what Tier 2 calculation methodology is to be applied, or to incorporate that provision by reference, or the Tier 2 methodology must be imposed upon all remedy plans by a Commission order. Therefore, such a provision that affects the rights of various carriers cannot be set forth by SBCI in just one remedy plan. Remedy plans that do not provide for Tier 2 payments, clearly operate in a manner that is contradictory to the way the Commission intends a remedy plan to operate, since Tier 2 payments are clearly part and parcel of a complete remedy plan. See Order, Docket 01-0120, Attachment A (providing for both Tier 1 and Tier 2 payments); see Texas Remedy Plan (Ameritech Illinois Remedy Plan Proposal in Docket 01-0120), Attachment **A**, §§9.0, 11.2 et seq.; see SBCI plan (Ehr Affidavit, Attachment Z, §§ 9.0, and 11.2, et seq.) .

Offering multiple Tier 2 plans to CLECs allows the CLEC and SBCI to use it as a bargaining chip. Either party could negotiate away Tier 2 payments in exchange for

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[5] The SBC11state and SBC13State remedy plans do not expressly provide that SBCI will make Tier 2 payments to the state. Tier 2 payments are only set forth in the Commission-ordered remedy plan (at

some benefit to themselves. For instance, CLECs could bargain to reduce SBCI's payments to the public fisc. Tier 2 payments are payments to the state which SBCI and the CLECs should not be allowed to change. Tier 2 payments represent penalty amounts that are paid to the State of Illinois for performance shortfalls that are industry-wide. The theory behind Tier 2 payments is that if the wholesale performance from SBC/Ameritech Illinois is inadequate on an industry-wide basis, remedies should be paid to provide the proper incentive to avoid such substandard performance. However, allowing the parties to negotiate changes allow them to change the amount of liability to an amount different than what the Commission has determined to be satisfactory for incenting a certain level of behavior from SBCI. Essentially, it rests complete control of how stringent a remedy plan is to be in the hands of SBCI. If SBCI thinks the plan required by the Commission is too tough, it could negotiate for a lower Tier 2 payment plan by offering the CLEC something in exchange. This would allow SBCI to completely circumvent this Commission's role and purpose in protecting the level of service quality consumers would receive.

An additional problem with SBCI's proposal in §5.5 is that it would allow SBCI to determine which Tier 2 calculation methodology would be used to calculate the Tier 2 payments for that month. Under SBCI's proposal, Staff has no manageable way of administratively verifying that the SBCI Tier 2 payments are accurate, since Staff would not know which Tier 2 calculation methodology SBCI used, nor would Staff know whether every carrier was subject to the same Tier 2 calculation methodology or even if the correct Tier 2 methodology had been applied to a carrier, since there would be

§§9.0, 11.2 et seq.), and the Texas Remedy Plan (at §§9.0, 11.2 et seq.). Attachment A.

multiple Tier 2 methodologies operating in Illinois. Therefore, this would inhibit Staff's ability to ensure the payments are correct, and it would not provide the incentive to SBCI that are to be approved in this docket. Staff Exh. 29.0 ¶242.

Additionally, neither the Texas remedy plan's, nor the SBCI plan's, Tier 2 amounts and methodology, should be used by SBCI in calculating Tier 2 payments. The Texas remedy plan's Tier 2 amounts were found by the Commission to be insufficient to provide a "meaningful incentive [to SBCI] to provide the CLECs service that is not substandard." Order, Docket 01-0120 at 38. And the SBCI plan's Tier 2 payments and calculation methodology is not sensitive to varying levels of failed performance. Staff Exh. 39 ¶55. Specifically, as SBCI performance gets worse, Tier 2 payments will not increase. Id.

If the Commission allows more than one assessment table and more than one method of calculating Tier 2 payments to be used in practice to prevent backsliding SBCI would be making payments in amounts other than what the evidence in this docket estimates they would pay. Staff Exh. 29 ¶242. Therefore, in practice, the level of incentive the Commission views is appropriate to prevent SBCI's service from backsliding, would be different than what the Commission intends to order through this docket. Id.

Finally, in its Reply Comments, it appears that SBCI proposed that it would replace §§5.6 and 5.7 of its plan with §5.5 of the Commission-ordered remedy plan. SBCI Reply Comments at 89. Assuming that SBCI meant §§5.5 and 5.6 of its plan, this proposal will not work, since SBCI is proposing to replace a paragraph that addresses Tier 2 administration, §5.5 of the SBCI plan, with a paragraph that addresses "opt-in",

§5.5 of the Commission-approved remedy plan.

The Tier 2 calculation methodology that should be used for all carriers should be the one in the Commission-ordered remedy plan since that is the one currently in place, and is superior to the Tier 2 methodologies in both the SBCI plan and the Staff Hybrid Plan. See Staff Exh. ¶¶55 and 57 (the Staff Hybrid Plan's payments are less than the Commission-ordered remedy plan, therefore the incentive they provide is not as strong or effective as those in the Commission-ordered remedy plan). However, if the Commission finds the Tier 2 methodology in the Staff Hybrid Plan to be more suitable then that approved in the Commission-ordered remedy plan, then the Staff Hybrid plan's methodology should be used before the SBCI Plan's Tier 2 methodology and amounts. For the foregoing reasons, Staff recommends that the Commission find that only one Tier 2 calculation methodology and assessment amount table is needed to sufficiently prevent backsliding, and that SBCI should commit to applying the approved methodology and amounts to all carriers with interconnection agreements with SBCI, regardless of the remedy plan that is part of the interconnection agreement, or whether a carrier has a remedy plan in its interconnection agreement. This commitment would apply to, but not require SBCI to amend, those interconnection agreements that contain either the SBC11state or SBC13state plan.[6] Further, the Tier 2 calculation methodology and amounts that should be used for all carriers should be those set forth in the Commission-ordered remedy plan, and in the alternative, if that methodology is unsuitable, then the Tier 2 methodology and amounts in the Staff Hybrid Plan.

[6] Staff has recommended that the Commission should approve the Tier 2 methodology and amounts set forth in the Commission-ordered remedy plan, since the SBCI plans calculation methodology is not sensitive to varying levels of performance. In the alternative, Staff proposes that the Tier 2 methodology could be the one set forth in Staff's Hybrid plan. Staff Exh. 39 ¶¶57 and 74.

E. Annual Threshold Amounts Should be Determined by the Commission, and not SBCI

In section 7.4 SBC Illinois proposes that it shall determine the annual thresholds. SBCI has provided no supporting testimony for this change from the Commission-ordered remedy plan. Staff objects to this proposal, and recommends that the amount of the Annual Threshold (i.e. annual cap, in the Commission-ordered remedy plan) be determined through a Commission proceeding that would allow the Commission to evaluate the information provided by SBCI and determine the 36% annual threshold. This is consistent with the Commission-ordered remedy plan (at §7.3), which requires

> The annual cap amounts will be determined by the Illinois Commerce Commission, pursuant to an annually commenced docket, based on the formula of 36% of [SBC Illinois'] net return as is set forth at ¶436 and footnote 1332 of the FCC's December 22, 1999 Memorandum Opinion and Order in CC Docket No. 99-295.
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> Order, Docket 01-0120, Attachment A ¶7.3

VI. THE COMMISSION-ORDERED REMEDY PLAN SHOULD CONTINUE AS PART OF SBCI'S ALTERNATIVE REGULATION PLAN

Staff recommends that the Commission condition its approval of SBCI's petition for Section 271 approval on SBCI's commitment to offer to Illinois CLECs the Commission-ordered remedy plan for the multiple reasons set forth in Staff testimony. See Staff Exhibits 29.0, 39.0, 41.0 and 50.0. Moreover, the Commission-ordered remedy meets the key characteristics the FCC uses to evaluate remedy plans, it clearly is the superior plan for purposes of preventing backsliding in Illinois and remains the most complete and thorough plan available.

In Dockets 98-0252/98-0335/00-0764, the Commission determined that the remedy plan to be used for purposes of SBCI's alternative regulation is the remedy plan the Commission approved in Docket 01-0120 (i.e., the Commission-ordered Remedy Plan) stating that it is "the most thorough and complete plan at this time", and that it should continue to be offered to CLECs so as to provide "more certainty for competitors in the marketplace." Order, Docket Nos. 98-0252/98-0335/00-0764 at 190 (hereafter "Alt Reg Order"). However, the Commission also determined that "the 01-0120 Remedy Plan [would be] effective up to and until a wholesale performance measure plan for Section 271 purposes is approved by this Commission." Id. Thus, at the end of this proceeding it is conceivable that there may no longer be a Commission-approved plan, of any sort, being offered by SBCI.

Therefore, Staff recommends that the Commission should continue to require SBCI to offer the Commission-ordered remedy plan as part of its alternative regulation plan, and offer it to CLECs until the conclusion of the next proceeding that is to determine the need for and appropriate duration of remedy plans in Illinois.[7] There are a number of benefits to requiring SBCI to offer the Commission-ordered remedy plan through its alternative regulation plan: it will ensure that CLECs will be able to choose the superior plan available in Illinois; it will provide consistency and certainty for telecommunications companies operating in the SBCI region; it will avoid a remedy plan

[7] Staff has proposed that a proceeding commence in thirty-six months to reevaluate remedy plans in light of the condition of the market at that time. Staff Exh. 29.0 ¶268. It appears that SBCI agrees with Staff's proposal in SBCI Affiant Ehr's Rebuttal Affidavit ¶238 – "Staff Witness McClerren proposes that a review be conducted in 36 months to "address all aspects" of the remedy plan. SBC is agreeable to entering negotiations in 36 months to discuss modifications, should it be determined that a plan is still needed beyond four years."

gap -- in which there may be a period of time in which a Commission approved plan will not be offered to CLECs; and it avoids negative repercussions in ongoing dockets wherein the remedy plan is at issue.

Requiring SBCI to offer the Commission-ordered remedy plan through its alternative regulation plan will also ensure that CLECs will be able to choose the superior plan available in Illinois. Moreover, Staff has provided compelling evidence in this proceeding that the SBCI plan is not the best plan for preventing backsliding in Illinois for the following reasons: SBCI removed the performance weightings and has introduced an "index value" calculation which no longer allows the remedy plan to adequately detect and sanction poor performance (Exh. 39 ¶38); there are inappropriate caps on monthly payments, unlike the Commission-ordered remedy plan (Exh. 39 ¶52); the remedy payments are difficult for CLECs to check and replicate for itself, unlike the Commission-ordered remedy plan (Exh. 39 ¶61-62), the SBCI plan does not provide substantial incentive for the Company to provide wholesale service to CLECs in compliance with the PM standards, whereas the Commission-ordered remedy plan does (Exh. 39 ¶67-69). Therefore, the Commission-ordered remedy plan is the superior of the two plans in preventing backsliding. Furthermore, since SBCI has been offering the Commission-ordered remedy plan since August of 2002 and performance has stabilized, it is a proven commodity unlike the SBCI plan. The Commission has allowed SBCI to enter into more than one remedy plan in its interconnection agreements, and approximately 23 carriers currently operate under the Commission-ordered remedy plan. Offering the Commission-ordered remedy plan through SBCI's alternative regulation plan gives all carriers the option of choosing the superior plan offered in

Illinois.

Requiring SBCI to offer the Commission-ordered remedy plan through its alternative regulation plan will provide consistency and certainty for telecommunications companies operating in the SBCI region. If the Commission finds that the Commission-ordered remedy plan prevents backsliding, and SBCI submits a plan to the FCC for 271 approval that this Commission determines is not suitable for preventing backsliding, it is unclear whether SBCI would still need to offer the Commission-ordered remedy plan unless the Commission relies upon its authority under alternative regulation to order SBCI to offer such plan. At the outset of Phase 2, Staff counsel expressed concern about SBCI representations that it might not take to the FCC, as part of its 271 application, the remedy plan that the Commission determines as being suitable to prevent backsliding. Tr. 2175-77. In response, SBCI counsel stated that it could not commit to taking to the FCC a remedy plan that it has not seen. Tr. 2178-79.

If SBCI takes a remedy plan, other than the plan this Commission finds suitable to prevent backsliding, it is unknown what weight the FCC will give this Commission's remedy plan findings. Additionally, if SBCI takes a remedy plan to the FCC that this Commission determined was not suitable to prevent backsliding by this Commission, and the FCC approved that application, it is unclear whether SBCI would still have to offer the Commission-ordered remedy plan, or any plan this Commission determined to suitably prevent backsliding. Therefore, so that this Commission's can fulfill its desire to provide certainty in SBCI's region, the Commission should order SBCI to offer the Commission-ordered remedy plan, under state authority, as part of its alternative regulation plan.

Even if the Commission finds that the SBCI plan is suitable for preventing backsliding by SBCI, the Commission should require the company to offer the Commission-ordered remedy plan as part of its alternative regulation conditions, since, as the Commission found in the *Alt Reg Order*, it provides "certainty for competitors in the marketplace" and it will let "competitive carriers know exactly what wholesale remedial plan is available to them at all times," and is a complete and thorough plan. Order, 98-0252/98-0335/00-0764 at 190. The Commission-ordered remedy plan should continue to be made available so that those carriers who use the Commission-ordered remedy plan can still receive the benefits of that plan, and do not need to waste time, money and effort negotiating a new remedy plan.

If SBCI takes to the FCC the performance assurance plan this Commission finds acceptable in preventing backsliding but the Commission does not make it clear that SBCI is ordered to offer the plan approved in this proceeding under its alternative regulation authority, there may be circumstances that in which a gap of time could occur when the Commission approved remedy plan would not be in place in Illinois. This would occur if SBCI filed with the FCC and then withdrew the application, or if the FCC does not grant SBCI's 271 approval.

Requiring SBCI to offer the Commission-ordered remedy plan through its alternative regulation plan will avoid negative repercussions on docket 01-0539. In Docket 01-0539 the Commission is creating a rule that implements carrier-to-carrier wholesale service quality rules pursuant to Section 13-712(g) of the PUA (Proposed Part 731).[8] Staff's Proposed Part 731 requires all Level 1 ILECs in Illinois to have a

[8] Reply briefs were filed, in Docket 01-0539, on October 21, 2003, and a Proposed Order is still pending.

remedy plan in place under state authority and pursuant to state guidelines. This proposed rule would require all Level 1 ILECs to have a wholesale remedy plan, including SBCI. SBCI would be considered a Level 1 carrier. The purpose of the rule is to ensure that wholesale services provided by ILECs in Illinois will be maintained at a level that provides CLECs a meaningful opportunity to compete. The instant docket, in comparison to docket 01-0539, reviews the remedy plan(s) an RBOC is to provide, and is based on federal guidelines, although the FCC recognizes that state commissions may create plans to be used for post-section 271 approval monitoring and enforcement, and those plans can vary in strengths and weaknesses.[9] Under the Part 731 rule Staff is currently proposing in docket 01-0539, the initial performance assurance plan that would be used for SBCI is "the most recent Pre-Rule Plan implemented by such carrier pursuant to a Commission order or, . . . the most recent Pre-Rule Plan implemented by such Carrier on a voluntary basis." Attachment B, which is Docket 01-0539, Staff Reply Brief, Attachment 1, §731.105 definition of Pre-Existing Rule sub-section b. At this time, that is the performance assurance plan approved by the Commission in Docket 01-0120. It is Staff's view that this case is not a thorough investigation of remedy plans for purposes of Part 731, for the reasons set forth in Section III above. However, if the Commission does not require SBCI to continue to offer the Commission-ordered remedy plan under SBCI's alternative regulation plan, then the plan that would be implemented for purposes of Part 731 could arguably be a remedy plan inferior to the Commission-ordered remedy plan – since Staff's affidavits demonstrates that the Commission-ordered remedy plan is superior to the SBCI plan. Therefore, the

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[9] <u>See</u> Pennsylvania Order, ¶¶128-129.

Commission should require SBCI to continue to offer the Commission-ordered remedy plan under SBCI's alternative regulation plan. The Illinois PUA allows the Commission to set criteria for an Illinois Remedy Plan that are wholly distinct and separate from the evaluation criteria used for purposes of 271. See 220 ILCS 5/13-712. For the foregoing reasons, Staff recommends that the Commission order SBCI to offer the Commission-ordered remedy plan to CLECs until the conclusion of the next proceeding that is to determine the need for and appropriate duration of remedy plans in Illinois.

VII. CONCLUSION

These comments are limited to performance assurance plan issues, therefore, for the reasons set forth above and in its affidavits that were filed on February 21, 2003 and March 12, 2003, Staff respectfully requests that the Commission find the SBCI does not prevent backsliding, and that the Commission-ordered remedy plan prevents backsliding, and in the alternative, that the Staff Hybrid plan prevents backsliding.

Respectfully submitted,

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