

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

STAFF'S REPLY TO SBC ILLINOIS REGARDING STAFF'S MOTION TO TAKE
ADMINISTRATIVE NOTICE OF THE RECORD IN DOCKET 01-0120 AND
TO SBC ILLINOIS' OPPOSITION TO STAFF'S PROPOSED REVISION
TO ICC STAFF EXHIBIT 41.0

NOW COMES the Staff of the Illinois Commerce Commission (hereafter "Staff") by and through its counsel, pursuant to Section 200.190 of the Rules of Practice before the Commission, 83 Ill. Admin. Code 200.190, and files this Reply to SBC Illinois' (hereafter "SBCI") *Response of SBC Illinois to Staff's Motion to Take Administrative Notice of the Record of Docket No. 01-0120 and SBC Illinois' Motion in Opposition to Staff's Proposed Revisions to Exhibit 41.0*. In reply thereof, Staff states the following:

A. Staff's Motion to Take Administrative Notice of the Record of Docket No. 01-0120

1. One of the issues in this proceeding is whether the remedy plan approved by the Commission in Docket 01-0120 ("Commission-ordered remedy plan") would satisfactorily prevent SBCI from backsliding on its wholesale performance in Illinois.

The Commission thoroughly reviewed that plan in Docket 01-0120, and stated 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 Ameritech 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.

Order, Docket 01-0120 at 20 (emphasis added).

2. In the Order for Docket 98-0252/98-0335/00-0764 (“Alt. Reg. Order”), it appears the Commission slightly modified its position regarding the duration the Commission-ordered remedy plan would be in effect. Alt. Reg. Order at 190 (“[T]he Commission deems the 01-0120 remedy plan effective up to and until a wholesale performance measure plan for Section 271 purposes is approved by the Commission.”). Taking the 01-0120 Order and the *Alt. Reg. Order* together, it appears that the Commission has expressed a preference that the Commission-ordered remedy plan be used as the basis for a performance assurance plan approved for purposes of Section 271 approval and, if the Commission-ordered remedy plan was to be used for purposes of preventing future backsliding, that the duration of that plan needs to be determined in this docket. Since the Commission expressed a preference for using the Commission-ordered remedy plan as the basis for an anti-backsliding plan, and the “nuances” of the Remedy Plan were not be re-litigated in this docket, the affidavits of Staff and other parties compared the SBCI-proposed remedy plan to the Commission-ordered remedy plan to demonstrate the inadequacies of the SBCI-proposed remedy plan. See generally, Patrick Affidavit; Patrick Rebuttal Affidavit at ¶¶13-17 (summarizing argument from initial affidavit); see generally, Kalb Affidavit; see generally, Kalb Reply Affidavit

¶¶20-42; see generally, Kinard Affidavit; see generally, Kinard Rebuttal Affidavit ¶¶21-27. The inadequacies of the SBCI-proposed remedy plan demonstrate that the Commission-ordered remedy plan is the better plan for purposes of preventing future backsliding. Given the nature and extent of the comparison of the two plans by all parties in this docket, the information contained in the 0-0120 record is relevant and Staff's request should be granted. In the alternative and, at a minimum, the testimony admitted into evidence the filed briefs from Docket 01-0120, and the orders should be admitted in to the record in this docket.

3. SBCI argues that they would be prejudiced since they would not be given an opportunity to respond, and provide rebuttal evidence. SBCI Response at ¶3. This is not an issue since Staff's motion to take administrative notice of the filings and order in Docket 01-0120 is intended to complement and support the numerous arguments already made regarding the Commission-ordered 01-0120 remedy plan. The Commission-ordered remedy plan was not attached as an exhibit to any party's affidavit (although AT&T did attach a red-line comparison of the Commission-ordered remedy plan to the SBCI-proposed remedy plan, and SBCI attached an incorrect version of the Commission-ordered remedy plan as Exhibit Z to Ehr's Affidavit). Moreover, since it is being used to complement and support the existing arguments, no new arguments are being made based on this evidence. Further, at this stage in docket 01-0120 SBCI (f/k/a Ameritech Illinois) has already had its opportunity to respond to all arguments made within that docket.

4. Finally, this motion was not ruled upon in the Administrative Law Judges ("ALJ's") decision on January 16, 2003. The prior motion to take administrative notice

of the record in docket 01-0120 was made as part of Staff's Motion to Dismiss Phase 1B Phase of this proceeding. There, the ALJ ruled as follows:

Due to the passage of time, and the progress of this investigation, Phase IB is hereby dismissed but with the understanding that the performance plan issue is being merged into the Phase II proceeding. All other requested relief in the pending Staff motion is denied.

ALJ Ruling, Docket 01-0662 at 4 (January 16, 2003).

Although the ALJ Ruling contained a general denial of all other requested relief, the motion to take administrative notice was never discussed or analyzed. Given that the ALJ Ruling decided that there would be further litigation regarding the appropriate 271 remedy plan, the ALJ presumably believed at that time that it would be premature to grant Staff's motion to take administrative notice (depending on what was introduced in Phase II). As discussed above, since the parties relied heavily on the Commission-ordered remedy plan, it is now appropriate to take administrative notice of the filings in that proceeding.

B. Staff's Correction to Exhibit 41.0

1. SBCI states that it would be unfairly prejudiced by Staff's correction to two tables, in ICC Staff Exhibit 41.0, that summarize the "Key PMs (performance measures) Requiring Improvement." Staff disagrees. SBCI is not unfairly prejudiced since Staff addressed each issue in its rebuttal affidavits, and SBCI affiant Ehr addressed both PMs in his Surrebuttal. Staff's correction has been made to ensure that no inconsistency exists between Staff's previously filed affidavits, and that the PMs SBCI needs to improve are clearly identified and summarized for the Commission. This

correction does not raise any new issues or arguments.

2. Staff has revised the tables in paragraphs 12 and 77 -- titled: *SBC Illinois' Key PM's Requiring Improvement*. These changes are necessary so that the tables accurately summarize Staff's position regarding Performance Measurements, and so that Exhibit 41.0 matches the recommendations in Staff's Rebuttal Affidavits -- Exhibits 44.0 and 43.0. The revision adds two PMs and removes two PMs from the described tables. In exhibits 43.0 and 44.0, the affiants state that PMs 13 and 65.1 are Key PMs, and support the need for those PMs to be listed in the tables in exhibit 41. Additionally, PMs 56 and 62, which were noted as Key PMs in Staff's initial affidavits, were found to be satisfactory in Staff's Rebuttal Affidavits, however they were still included in the table as Key PMs. Therefore, the corrected tables in Exhibit 41.0 removes PMs 56 and 62 from, and add PMs 13 and 65.1 to, the Key PMs tables in paragraphs 12 and 77.

3. It was Staff's intent that each of these PMs that were identified by a Staff affiant as a failure, were to be listed as PMs in the tables in Staff Exhibit 41.0 – *SBC Illinois' Key PM's Requiring Improvement*.

PM 13

4. Staff Affiant Weber stated that PM 13 failed in paragraphs 128 and 132 of her initial Affidavit and paragraphs 56-60 of her Rebuttal Affidavit. In her rebuttal affidavit she made the following arguments:

56. For PM 13, order process percent flow through, Mr. Ehr states that the measure is a classic example of a measure that must be viewed in the context of related measures. Ehr Reply Affidavit, ¶26. I agree with this and therefore believe it is important to look at the diagnostic results for performance measure 13.1, Total Order Process Percent Flow Through along with the results for PM 13.

57. First, if we look closely at the results for PM 13, which has six sub-measures (with data) that are disaggregated by product type, the company failed to achieve the 2 out of 3 month standard for 4 of the 6 disaggregations. In a study of the data for December 2002 and January 2003 the company continued to fail to meet the standards for 4 out the 6 sub-measures (UNE-P, Resale, LSNP and UNE-Loops). Mr. Ehr further states in his reply affidavit that the parity standard, which is applied for all but one of the disaggregations, requires comparison of dissimilar processes and therefore the “apples-to-oranges” comparison means one should take the parity results with a grain of salt. Ehr Reply Affidavit, ¶27. If this was the case why didn’t the company in the latest six-month review session suggest to do away with the parity comparison and ask that benchmark standards be applied. Absent a change in the business rules the company is required to meet the parity requirement and benchmark requirements established and they clearly are not meeting these for PM 13.
58. If we look the company’s performance reported in PM 13.1, which is the companion performance measure to PM 13, as Mr. Ehr suggested be done, the company has decreased its total order process percent flow through for three of the six disaggregations over the past year. This means that the company on a whole is flowing through fewer orders for UNE Loops, Resale and LNP now than it did 12 months ago. In addition the total percent flow through statistics for Resale are in the low 60% range, UNE loop in the high 60% range, LNP in the 30% range and LSNP floating between 15-30%. CPO is doing much better at 80% and line sharing is at the high 80% mark. The total percent flow through rates the company is currently reporting are not impressive, therefore it is all that more important for the product categories the company communicates to the CLECs that are supposed to flow through actually do. Regardless of Mr. Ehr’s remarks excusing the company’s performance for PM 13 my review of its companion measure PM 13.1 indicates that my original conclusion that the company fails to perform with respect to PM 13 remains unchanged.
59. It appears that the company’s performance with respect to performance measure MI 13, percent mechanized line loss notifications returned within one day of work completion, has improved in the data reported for December 2002 and January 2003. However, as I stated in my initial affidavit, the measure as currently defined does not accurately reflect the company’s performance in delivering line loss notices to

CLECs, ICC Staff Ex. 31.0 ¶15, therefore this data can not be proof of the company's commitment to deliver accurate or timely line loss notices. In addition, the company has failed to include in performance measure MI 13 any line loss notices generated in winback situations (when SBC takes a customer that had previously left and gone to another local carrier back as a customer)¹. It is my understanding that the majority of CLEC losses are due to winback situations by SBC and SBC does not currently report these line loss notices as part of MI 13. Therefore, I repeat that data reported for MI 13 by the company cannot be used to support its position that the company is sending timely or accurate line loss notices. Corrections to MI 13 are not planned to be implemented by the company until April 20, 2003.

Summary of Performance Measure Results (3 Months) Analysis

60. I have modified conclusions reached in my initial affidavit based upon comments filed by SBC Illinois on March 3, 2003. For the 17 pre-order and order performance measures applicable to checklist (ii), according to the statistical guidelines and additional analysis I provide in my initial and reply affidavits, the company passed 9 of the performance measures (PM 1.1, 1.2, 2, 4, 5, 7, 10, 11.2 and 12) and failed the remaining 8 performance measures all of which are ordering performance measures (PM 7.1, 10.1, 10.2, 10.3, 10.4, 11.1, 13, MI 13). It is my opinion that the three months of performance measurement data provided by the company in support of checklist (ii) does not demonstrate that, with respect to the ordering performance measures, SBC Illinois is providing non-discriminatory service to the CLECS. SBC Illinois should be required to correct the deficiencies associated with the ordering performance measures prior to receiving a positive Section 271 recommendation from this Commission. If the Commission elects to provide a positive recommendation to the FCC, regardless of SBC Illinois' failure to meet key performance measures related to checklist (ii) then the Commission should (a) require the company to identify the steps it will take to remedy its current unsatisfactory performance with respect to the ordering performance measurements and (b) require the company to demonstrate substantially improved performance by November 2002 or face additional penalties.

1.

¹ FCC Docket No. 03-16. AT&T Filing, Joint Reply Declaration of Karen W. Moore, Timothy M. Connolly, and Sharon E. Norris on Behalf of AT&T Corp., March 4, 2003.

5. SBCI Affiant Ehr acknowledges and responds to each of Ms. Weber's arguments, in paragraphs 24-29 of his surrebuttal Affidavit:

24. I agree with Staff that the measure for flow-through is not a "Key PM Requiring Improvement." As I said in my previous affidavits, flow-through only reflects one step in the overall ordering and provisioning process, and SBC Illinois' flow-through performance has been good, albeit short of the artificial "parity" standard that is used in the business rules. I would like to clarify one point raised by Staff Witness Weber, and further discuss PM 13 and current performance.
25. As Ms. Weber notes, there are two measures for flow-through. PM 13 measures flow-through as a percentage of orders that are designed or "eligible" to flow through. Not all orders are designed to flow-through; by design, some orders (such as complex orders) are designed to require manual intervention. PM 13 shows whether the orders that are designed to flow through are, in fact, flowing through as intended. The FCC refers to this measure as "achieved" flow-through, and it has said that this is the "primary" measure of flow-through that it considers. *New Jersey 271 Order*, ¶ 32 ("We generally find the achieved flow-through measure is the most indicative of the BOC's ability to electronically process orders."). As I showed in my previous affidavits, the rates of achieved flow-through are well above 90 percent, and higher than in successful section 271 applications by other BOCs.
26. PM 13.1, meanwhile, measures flow-through as a percentage of *all* orders, even those that are not designed to flow through. By definition, the percentage is lower than the result for achieved flow-through, PM 13 -- not because the systems are not working, but because CLECs are submitting orders that are designed to "fall out" and that the CLECs know will fall out. The systems *are* working as designed and submitting those orders for manual intervention. Still, SBC Illinois' results on this measure were high (consistently above eighty percent for the highest volume category, UNE-P, and consistently above 76% across all categories combined). More importantly, the proper context for flow-through is to look at the end results that really matter (processing and filling orders).

27. While the performance on PM 13 is as good or better than other ILECs at the time of their Section 271 approvals, SBC Illinois did not meet the “parity” standard, not because an OSS problem, but because the parity comparison is not at all precise. While Resale and UNE-P are “like” retail products, the processing of these types of requests are not the same. The retail process begins with the manual entry of information used for service order creation. Wholesale requests, however, arrive in the form of a mechanical Local Service Request submitted via an interface, which SBC Illinois then translates into a service order. In mechanically processing these requests, an issue might arise (for example, in checking for telephone numbers, analyzing pending orders, or verifying feature availability) that requires manual intervention and resolution. Thus, the order does not flow through. Plainly, if SBC Illinois were to ignore these types of issues and just flow the order downstream, then the CLEC’s end user customer could be negatively impacted, either by not getting the service they ordered, or not getting service at all.
28. In addition to the above, some of the product and service categories in this measure have no comparable analog on the retail side. Number Portability, Number Portability with Loop, and Advanced Services (ie. DSL Broadband) are much more complicated types of orders than a retail residence or business POTs type of service.
29. While SBC Illinois has maintained strong flow through performance, it has also met the requirements of the 24 Month Performance Plan negotiated with the CLECs. Along with the Plan of Record implementation, SBC Illinois implemented nine enhancements during 2002, which added additional flow through capabilities. This year there are plans for at least eight more enhancements. SBC Illinois remains committed to increasing overall flowthrough (as measured in PM 13.1) and maintaining the current high levels of flow-through for orders that are designed to (as measured in PM 13). SBC Illinois is working, and will continue to work, through the collaborative process, to address the issue of “apples-to-oranges” parity comparisons on PM 13.

Ehr Surrebuttal Affidavit ¶¶24-29.

6. Despite Mr. Ehr’s reliance on the tables in question in making his

assertion, in paragraph 24 of his surrebuttal, that he agrees “with Staff that the measure for flow-through is not a ‘Key PM Requiring Improvement’”, he was still aware of Ms. Weber’s arguments since he responded to them. Due to the volume of information being processed in this case it appears that Mr. Ehr overlooked Ms. Weber’s recommendation, in paragraph 60, that PM 13 is a PM that SBCI needs to improve. However, the SBCI’s real complaint is that it did not have proper notice and the ability to respond. As is clearly indicated above, Staff’s argument was clearly set forth in Ms. Weber’s rebuttal (although not reflected in the tables of Mr. McClarren) and SBCI responded to those arguments. Furthermore, it is unclear what else SBCI would have argued.

7. Thus, it is clear, from the above excerpts from Mr. Ehr’s surrebuttal and Ms. Weber’s rebuttal that he was aware of Staff’s arguments regarding PM13, and was aware that Staff found SBCI to be providing PM 13 in a discriminatory manner and that PM 13 required correction. Therefore, SBCI has not been prejudiced, since it had notice of the arguments, an opportunity to respond, and did respond.

PM 65.1

8. Staff Affiant Zolnierrek stated in paragraph 78 of his Initial Affidavit that PM 56.1 “is not provided at parity as indicated by the fact that the Company is not meeting parity criteria with respect to . . . 65.1-03 (*Trouble Report Rate Net of Installation and Repeat Reports – DSL – Linesharing*)”. In paragraph 11 of his Rebuttal Affidavit Mr. Zolnierrek states:

11. For example, Mr. Ehr does not address the root cause of the Company’s failure to meet parity standards with respect to submeasures 65-03 and 65.1-03. Absent any identifiable

cause of these failures, it is unclear how the steps the Company has taken will remedy the problems indicated by these measures.

ICC Staff Exhibit 44.0 ¶11 (emphasis added).

And in paragraph 17 Mr. Zolnierek summarizes his position that PM 65.1 is still at issue:

Summary and Recommendation

17 As a prerequisite to a positive consultation with the FCC regarding whether the Company is provisioning its DSL loops with linesharing in accordance with the requirements of Section 271(c)(2)(B)(iv), I continue to recommend that the Company take corrective action to ensure that it is providing loop quality and maintenance and repair of DSL loops with linesharing at parity. The Company should in its surrebuttal affidavits: (1) thoroughly and completely explain why it failed parity criteria for submeasures 59-03, 65-03, 65.1-03, 67-03, 67-18, and 66-03, (2) thoroughly and completely explain how the steps the Company has taken to address maintenance and repair performance will result in the Company meeting the applicable parity standards, (3) provide a detailed timetable for implementation of its remedial actions, and (4) commit to reporting to the Commission on the progress it has made in meeting parity standards until such time as the Company demonstrates that it has corrected the problems identified above.

ICC Staff Exhibit 44.0 ¶17 (emphasis added).

9. In paragraph 55 of SBCI Affiant Ehr's surrebuttal affidavit he states "SBC Illinois Network Organization has advised me that those additional activities [referring to steps SBCI has taken to address maintenance and repair of DSL Lineshare Loops, as set forth in ¶50 of SBCI Affiant Ehr's Rebuttal Affidavit] have been undertaken to address performance issues on PMs 59, 65, 65.1, 66, 67 and 69. This measure would be subject to the proposal for additional monitoring by the SBC Illinois Network Staff and the ICC Staff that I outlined above." The additional monitoring outlined above is

discussed in ¶¶13-14 of Ehr's Surrebuttal Affidavit.

10. SBCI is not prejudiced by the corrections to the tables in paragraphs 12 and 77 of ICC Staff Exhibit 41.0, since Staff's arguments were clearly set forth in its affidavits, and SBCI replied to those arguments. Furthermore, the corrected tables reflect the PMs that Staff recommends to the Commission to be corrected prior to giving a positive recommendation to the FCC.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that the Administrative Law Judge take Administrative Notice of the entire Record in Docket 01-0120, or in the alternative the testimony, briefs and order, only, and grant Staff's request to correct ICC Staff Exhibit 41.0.

Respectfully Submitted,

Carmen L. Fosco
Matthew L. Harvey
Sean R. Brady
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
312 / 793-2877

April 1, 2003

Counsel for the Staff of the
Illinois Commerce Commission