

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

AFFIDAVIT OF

MICHAEL KALB, PH.D.

ON BEHALF OF

**AT&T COMMUNICATIONS OF ILLINOIS, INC., TCG CHICAGO,
TCG ILLINOIS AND TCG ST. LOUIS**

PHASE II - AT&T EX. 2.0

February 21, 2003

I. INTRODUCTION

1. My name is Michael Kalb. My business address is AT&T Corp., One AT&T Way, Bedminster, New Jersey.
2. I received a Bachelor of Science degree in Physics in 1969 from the Cooper Union. In 1971 I received a Master of Philosophy degree in Physics and in 1974 a Ph.D. in Physics, both from the Yale University. I spent the next five years as a Chaim Weitzman Fellow at Yale University and the Center for Theoretical Physics at the Massachusetts Institute of Technology.
3. AT&T first employed me in 1979. At that time, I joined Bell Laboratories as a Member of Technical Staff evaluating the performance of voice and data communications systems on telephone networks. This led to numerous published and proprietary works describing quantitative models of performance based on laboratory and live network studies. In 1986, I was promoted to Distinguished Member of Technical Staff after beginning the systematic formulation of relevant domestic and international performance parameters and standards for voice and data. In 1994 I was elected Vice-Chair of T1A1.7, the working group responsible for standardization of performance of voice and data communications on North American telephone networks. After leading this body to numerous voice and modem performance standards on public and private networks, my work culminated with the production of a ratified technical report on the performance of unbundled loops, as mandated by the Telecommunications Act of 1996 (the "1996 Act"). Also, during this period, I consulted frequently with the Law and

Government Affairs area of AT&T in the formulation of the LCUG Service Quality Measurements (“SQMs”). In 1999, I moved to the Law and Government Affairs area of AT&T where I continue to apply my performance expertise to problems associated with the Telecommunications Act of 1996.

4. In my current position as policy analyst at AT&T, one of my responsibilities is to identify and promote CLECs’ and AT&T’s position on the need for adequate, self-executing performance remedies. In that role, I have been directly involved in the development of AT&T’s policy on this subject, represented AT&T in numerous LCUG meetings, participated in state workshops relating to performance measurements and consequences, and have met with the Federal Commerce Commission (“FCC”) and the Department of Justice to provide AT&T’s input on a variety of topics relating to performance measurement and incentives. I have represented AT&T and other CLECs in several regulatory proceedings concerning the appropriate statistical methodology to use in an effective performance measures methodology. I have met with the FCC on this issue and in current proceedings including the Triennial UNE Review, UNE Performance Measure NPRM, and Special Access NPRM. Furthermore, I participated in state regulatory workshops and meetings in Illinois, as well as in Indiana, Michigan, Wisconsin, Texas, California, Nevada, New York, New Jersey, Massachusetts, Vermont, New Hampshire, Rhode Island, Maine, Connecticut, District of Columbia, Virginia, Florida, Georgia, Louisiana, Washington, Oregon, and Colorado.

II. PURPOSE OF AFFIDAVIT AND SUMMARY OF CONCLUSIONS

5. In my affidavit I discuss SBC Illinois' proposal to replace the Illinois Commerce Commission-ordered performance assurance plan adopted last year in Docket No. 01-0120 ("Commission Plan" or "01-0120 Plan") with the (ironically named)¹ "Compromise" Plan. As I show here, the "Compromise" Plan is a complete rewriting of the Commission Plan, including many features specifically rejected by the Commission in Docket No. 01-0120. In addition, the "Compromise" Plan contains numerous and significant provisions that were not approved by – and in many cases previously rejected by – the Illinois Commerce Commission ("Commission") when it adopted the Commission Plan, the purpose of which are to allow SBC Illinois to pay less in remedies to CLECs and the State of Illinois when SBC is providing demonstrably poor wholesale service. In addition, I will briefly offer additional specific criticisms of the "Compromise" Plan. Finally, I will discuss why the Commission Plan meets the FCC's requirements for a performance assurance plan and the "Compromise" Plan does not.
6. This docket is the Commission's fourth foray into the remedy plan issue. The other three dockets are ICC Docket No. 01-0120, where the Commission adopted a permanent remedy plan for SBC Illinois, Docket Nos. 98-0252/0335, SBC

¹ The "Compromise" Plan was purportedly negotiated between a small CLEC, TDS MetroComm, and SBC. Not surprisingly, given the ineffective nature of the "Compromise" Plan, even TDS does not use this plan, and instead operates under the Commission 01-0120 Plan. Tr. p. 3580. Indeed, no Illinois CLECs use the "Compromise" Plan. *Id.*

Illinois's alternative regulation docket, where the 01-0120 Plan was made a commitment for SBC Illinois to obtain relaxed regulation, and Docket No. 01-0539, the Part 731 rulemaking where a remedy plan rule is being adopted for SBC and other incumbent providers.

III. SBC'S "COMPROMISE" PLAN IS A COMPLETE RE-WRITE OF THE COMMISSION PLAN AND SHOULD BE REJECTED

7. Unlike the three prior cases where this issue previously was examined, this proceeding is operating under a severely constrained time frame with no evidentiary hearings.² I believe the issue being examined here is very narrow, however, so the severely constrained time frame is not a major impediment to reaching a decision on a remedy plan that meets Section 271 requirements so long as the focus of this proceeding is not expanded beyond the Commission-established parameters.

8. In Docket No. 01-0120 the Commission ruled:

We note, however, that Ameritech's quest for Section 271 approval has begun and, in its Initial Brief in this docket, it stated that in the Section 271 proceeding it "will present its performance assurance plan to the Commission, and its proposal for continuing that plan beyond the termination date of Condition 30, and the Commission can review the plan as part of its overall assessment of compliance with the competitive checklist of section 271." (Ameritech Initial Brief at 67). In its Brief on Exceptions, Staff raises the concern that in a Section 271 proceeding, the Commission will not have the authority to impose on

² Workshops have instead been held in this phase of the case.

Ameritech the Remedy Plan that the Commission prefers to be in place. 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 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.* Therefore, the Commission wishes to clarify that any future reference (in either concurrent or prospective dockets 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.³

The Commission has therefore set the parameters for its examination here so that little more than tweaking of the 01-0120 Plan is supposed to occur.

9. Despite the Commission’s clear pronouncement, however, SBC Illinois has decided to completely re-write the Commission Plan, incorporating many proposals *already rejected by the Commission in Docket No. 01-0120*. Indeed, it is clear that SBC Illinois views this proceeding as another bite at the apple in its quest to eliminate the Commission Plan and replace it with an ineffective proposal. SBC Illinois has made no bones about its goal: replacing the Commission Plan with the “Compromise” Plan, while at the same time still offering *yet other* remedy plans, including the old discredited Texas Plan that,

³ Docket No. 01-0120 Remedy Plan Order, pp. 20-21 (emphasis supplied). On July 24, 2002, the Commission entered an Amendatory Order in this docket that deleted what had been the first sentence on page 21 of the Remedy Plan Order. The quote cited here is from the Commission’s Remedy Plan Order, as amended. The Amendatory Order refers to the first sentence on page 22 of the Remedy Plan Order, but ordering paragraph (3) of the Amendatory Order makes clear that the sentence to be deleted was the first sentence on page 21 of the Remedy Plan Order.

recently, has been supplanted in Texas.⁴ Indeed, a document prepared and distributed by SBC Illinois shows just how radically SBC Illinois is seeking to change the Commission Plan. Even a “lay” observer casually leafing through this document will readily see the “Compromise” Plan bears little resemblance to the Commission Plan. I attach this redline, which I obtained from SBC Illinois, as Exhibit 1.⁵

10. I have reviewed the “Compromise” Plan. My review of the “Compromise” Plan reveals the proposal could not be more different than the Commission Plan in all key respects. I also have a few general observations regarding SBC Illinois’ deeply flawed proposal. I will provide more detailed information later in my affidavit fleshing these points out:

- The plan is ill conceived and flawed with many inconsistencies.
- The plan contains anomalous provisions that reduce remedies when performance gets worse.
- The plan has strong potential and incentive for SBC Illinois to discriminate against individual CLECs and services.
- The plan represents a major change and departure from the 01-0120 plan, and in many respects is worse than SBC Illinois’ discredited “Texas” Remedy Plan that was rejected in Docket No. 01-0120.
- The plan represents a considerably more complicated structure than the Commission’s 01-0120 plan.
- The structure of the plan attempts to reinstate many provisions explicitly rejected by the Commission in Docket No. 01-0120.
- The concept of liquidated damages and assessments as SBC understands and defines them is inconsistent with the usual meaning and application of those terms.

⁴ See Response of SBC Illinois to Staff Data Request SDR-10.0; see, also, Order No. 45, Texas PUC Project No. 20400, where a number of remedy increasing improvements were made to the old Texas Remedy Plan.

⁵ The underlying document is the Commission Plan. SBC Illinois marked deletions by ~~strike-outs~~, and additions were underlined.

- The plan is “voluntary”, which means SBC Illinois can unilaterally veto any changes the Commission may make to the plan on a going forward basis.

11. As I briefly mentioned above, the “Compromise” Plan contains many provisions already specifically rejected by the Commission in Docket No. 01-0120. Among the most notable provisions the Commission has previously rejected are:

- The Compromise Plan is a “voluntary” plan. In Docket No. 01-0120 the Commission rejected Ameritech’s attempt to make the permanent remedy plan “voluntary”, since this would strip the Commission of ultimate control over changes to the plan. The Compromise Plan allows SBC Illinois to veto changes it does not like, in direct conflict with the Commission’s Orders in ICC Docket No. 01-0120.⁶
- Remedy payments are called “liquidated damages”. In Docket No. 01-0120 the Commission rejected SBC Illinois’s attempt to call remedy payments “liquidated damages”.⁷
- The “Compromise” Plan grants SBC veto power over the auditor used for periodic audits of the performance and accuracy of the plan, whereas the Commission Remedy Plan rejected this one-sided approach, allowing joint selection of the auditor, with the Commission adjudicating any disputes.⁸

⁶ See, Tr. p. 3559

⁷ *Id.*, p. 3558.

⁸ Compare §6.4.1 of the Commission Plan with §6.6 of the “Compromise” Plan.

- As a way to increase the need for litigation, reduce self-effectuation, and limit its payments to the CLECs and the State of Illinois for poor service, SBC Illinois has changed the monthly cap on remedies from 1/6 to 1/12 of the annual cap. The Commission expressly rejected this proposal in Docket No. 01-0120,⁹ since it encourages SBC to target specific months for offering poor service (for example, during a CLEC promotion period) as a way to harm competition.
- The “Compromise” Plan eliminates ranking of performance measurements for purposes of assessing remedies. The Commission Plan ranks performance measures as “low”, “medium” and “high”. The Commission rejected the CLEC and Staff proposal to eliminate these rankings in Docket No. 01-0120.¹⁰
- The “Compromise” Plan’s mini audit process is virtually the same as what SBC Illinois proposed in Docket No. 01-0120. The Commission expressly rejected SBC Illinois’ proposed process, which, among other things, attempted to foist payment responsibility on the CLEC unless (and until) there is a later finding of misfeasance.¹¹
- The Compromise Plan proposes the use of floors and ceilings for remedy payments. In Docket No. 01-0120 the CLECs and Staff proposed “parity

⁹ July 10, 2002 Order, Docket No. 01-0120, p. 42.

¹⁰ July 10, 2002 Order, Docket No. 01-0120, pp. 45-47.

¹¹ July 10, 2002 Order, Docket No. 01-0120, pp. 12-16. Compare §6.4.2 of the Commission Plan with §6.5 of the “Compromise” Plan.

with a floor”, which is a similar concept.¹² The Commission rejected this proposal.¹³

- The Compromise Plan proposes that the default process for remedy assessment be via bill credit. The Commission rejected SBC’s similar proposal in Docket No. 01-0120, and ruled that payment by check shall be the preferred way unless the CLEC opts for a bill credit.¹⁴
- The “Compromise” Plan contains exclusions on liability rejected by the Commission in Docket No. 01-0120.¹⁵
- The “Compromise” Plan seeks to impose draconian exclusions for selected CLEC actions and allows SBC the unfettered ability to withhold payments. The Commission in Docket No. 01-0120 rejected a similar exclusion proposal.¹⁶
- The “Compromise” Plan eliminates the doubling of remedy payments required in Docket No. 01-0120, and lowers per occurrence and cap/measure amounts to token levels.¹⁷
- While retaining the Commission’s elimination of the infamous “k table” exclusion on remedy payments in the 01-0120, the “Compromise” Plan inserts an Index Plan to limit remedy payments to *individual CLECs and*

¹² Although one can argue for implementation of a floor on the basis of the public interest, the same argument does not apply for a ceiling.

¹³ July 10, 2002 Order, Docket No. 01-0120, pp. 27-30.

¹⁴ *Id.*, pp. 47-49.

¹⁵ *See*, Section 7.1 of the redlined version of the “Compromise” Plan attached to my Affidavit.

¹⁶ July 10, 2002 Order, Docket No. 01-0120, pp. 49-52.

¹⁷ *Id.*, pp. 34-38.

the State of Illinois according to SBC Illinois' *overall* performance. In essence, this Index Plan decelerates remedies in a manner similar to the old Texas Plan "k table" exclusion.¹⁸

12. As my listing above shows, these myriad key proposed changes to the Commission Plan literally re-write the Commission Plan in effect today. By proposing an entirely new plan here containing these proposed radical revisions, SBC Illinois seeks to re-litigate the nuances as well as the broad provisions of the 01-0120 Plan – an exercise the Commission has already directed shall not occur.
13. If tentatively one believes SBC Illinois' self-reported performance data,¹⁹ the Docket No. 01-0120 Plan is clearly working today. According to SBC Illinois, since the Docket No. 01-0120 Plan went into effect for September 2002 wholesale transactions, its wholesale service quality has improved, with overall passing results increasing from 89% to 92%.²⁰ Indeed, SBC Illinois has been paying, month to month, less in remedies since the 01-0120 plan went into effect.²¹ This decline in payments has been steep, showing that the 01-0120 Plan is accomplishing exactly what it is supposed to do; provide an incentive to SBC Illinois to improve its wholesale service to CLECs.²²

¹⁸ See, Tables 1 and 2 in the "Compromise" Plan.

¹⁹ I am taking SBC Illinois' assertions regarding its performance at face value, as I have not independently verified this data. I refer the Commission to Mr. Connolly's affidavit, which is being filed on the same day, for a discussion on the reliability and accuracy of SBC Illinois' data.

²⁰ Tr., pp. 3564-5 and 3568-9.

²¹ Tr., p. 2990.

²² SBC Illinois paid \$3,365,153 and \$1,182,441 in remedies for the months of October and November 2002, respectively. *Id.*

14. Given the success of the 01-0120 Plan, it is clear to me that the Compromise Plan exists for three reasons, the first reason being the most obvious: to reduce SBC Illinois' remedy payments to such a low level as to constitute merely a cost of doing business. This, in turn, will allow SBC to degrade its wholesale service quality to very low levels with little risk of paying substantial remedies. I refer the Commission to ¶¶ 358 and 361 in Mr. Ehr's January 17, 2003 Affidavit, where SBC Illinois' desire to pay less in remedies than under the existing plan is made clear.²³
15. Additional confirmation that one of the three key reasons SBC Illinois seeks to replace the Commission Plan with the "Compromise" Plan to reduce remedy payments comes from the Company itself. SBC Illinois plans to replace the 01-0120 Plan with the "Compromise" Plan, and has no intention of replacing the various other remedy plans (all of which provide for nominal levels of remedy payments).²⁴
16. SBC Illinois' scheme to reduce remedy payments to nominal levels also adversely affects the State of Illinois. Under the Commission Plan, payments of Tier 2

²³ Note that the Commission Plan already achieves the effect of reducing remedies for overall performance improvement by *removing* remedies for successful individual measure performance. There is no need for an additional and superfluous "indexing" mechanism to further reduce remedies in order to incent SBC Illinois' "appropriate" performance. The Commission should be aware that Mr. Ehr's comparison in this section of his Affidavit of the "Compromise" and Commission Plans to the former Texas Remedy Plan is misleading, as the Texas PUC in its latest incarnation has enhanced that plan to increase remedies.

²⁴ The other remedy plans offered by SBC Illinois are the Covad Plan, the 11/13 State Plan, and the "Texas" Plan. Tr. p. 2987-88. *See, also*, Response of SBC Illinois to Staff Data Request SDR 10.0.

remedies are made to the State. These remedies are paid because SBC Illinois providing poor wholesale service not only affects the CLECs (to whom Tier 1 payments go) but also adversely affects the State of Illinois' strong public interest in supporting local competition. Under the "Compromise" Plan, however, Tier 2 payments plummet far more than Tier 1 remedies. SBC Illinois' Tier 2 remedy payments for the months of September through November under the Commission plan are \$842,400, \$774,100, and \$605,000, respectively. Payments for these three months under the "Compromise" Plan would be between 50% and 87% *less*, depending upon which and how many Tier 2 measures failed performance standards.

17. The second primary reason the "Compromise" Plan exists is to ensure that SBC Illinois, and not the Commission, will have control over the Plan. The "Compromise" Plan, unlike the Commission Plan, is "voluntary", with all changes requiring SBC's "consent".²⁵ This is a key component of Ameritech's proposal. With this provision, SBC Illinois can literally blackball any changes it does not like, whether made by the CLECs or, more importantly, by the Commission itself. In other states where the plans are "voluntary", SBC literally uses this provision to prevent any changes to the plan to which it does not consent from ever going into effect. For example, recently the Public Utility Commission of Texas ("Texas PUC") made a number of improvements to that state's remedy

²⁵ *See, e.g.*, §6.4 of the "Compromise" Plan, where SBC requires that any changes to the plan are by "mutual agreement of the parties". This means SBC can veto any changes to which it does not "agree."

plan. The plan used in Texas is a “voluntary” plan. SBC’s Texas affiliate, Southwestern Bell Telephone Company (“SWBT”), sought rehearing of the Texas PUC’s decision, stating:

With respect to the performance remedy plan matters for which SWBT seeks reconsideration, this pleading serves as notice, pursuant to § 6.4 in Attachment 17 of the Texas 271 Interconnection Agreement (T2A),²⁶ that SWBT does not agree to those changes to the performance remedy plan. To the extent that the Commission does not reconsider the performance remedy plan modifications addressed in this motion, SWBT will weigh its options with regards to its rights under § 6.4 and will proceed accordingly.²⁷

This is the future envisioned by SBC Illinois if its “voluntary” plan is adopted: SBC Illinois will literally be the “keeper” in charge of the remedy plan and any changes to it; relegating the Commission to the role of being powerless to do anything unless it has SBC Illinois’ “agreement.”

18. SBC Illinois’s third motivation for presenting the “Compromise” Plan is its use of the term “liquidated damages” to describe payments. As I briefly mentioned above, the Commission has already rejected this proposal in Docket No. 01-0120. The Commission’s decision eliminated a major problem by taking out this term; all that SBC Illinois seeks to do is to ensure that its payments cannot be used

²⁶ Section 6.4 of Appendix 17 to the T2A states in pertinent part: “Any changes to the existing performance measures and this remedy plan shall be by mutual agreement of the parties”

²⁷ See, Southwestern Bell Telephone Company, L.P. D/B/A Southwestern Bell Telephone Company Motion for Reconsideration and Clarification of Order No. 45, p. 3, Texas PUC Project No. 20400 (November 1, 2002).

against them in any other forum, such as anti-trust litigation. While I am not an attorney, it is clear to me that if SBC Illinois offers really poor wholesale service to CLECs compared to what it provides to itself and its affiliates, this indeed is something that should be of interest in an anti-trust proceeding as well as other forums, including administrative proceedings.

19. I urge the Commission to recognize SBC Illinois' "Compromise" Plan for what it is: an attempt to relitigate the nuances of the remedy plan ordered in Docket No. 01-0120. Docket No. 01-0120 was a seventeen-month long proceeding that comprehensively addressed remedy plans. This expedited proceeding is certainly not the appropriate place for such a blatant attempt to seek untimely rehearing of and to reverse a Commission decision that is operating effectively and smoothly today.

IV. THE "COMPROMISE" PLAN CONTAINS NUMEROUS FATAL FLAWS

20. I discussed above the many differences between the "Compromise" and Commission plans. Below I critique a number of the specific provisions in the "Compromise" Plan, showing how the Plan would operate to limit remedies and would effectively strip the Commission of control and oversight of SBC's remedy plan. I will discuss the provisions sequentially, not necessarily in order of importance. In addition, I describe below how the untested "Compromise" Plan is not a self-effectuating plan (a necessary FCC criterion), and thus should not be

adopted by the Commission for any purposes, and it certainly should not replace the 01-0120 Plan.

21. Section 2.0 of the “Compromise” Plan contains language about the number of data points that is confused and convoluted. It appears that liability-reducing modifications have been made from the 01-0120 plan. The tables in the 01-0120 plan should be used without modification.
22. Section 4.0 of SBC Illinois’ proposal is not clear: who has 30 data points or more- CLEC, ILEC, both, sum? One might assume from the context of the statement that the 30 data points are SBC orders, but the plain language is ambiguous and could lead to unintended consequences, such as requiring CLECs to supply data points; an obligation they do not possess today. As written, then, this section renders the Plan completely unusable.
23. Section 4.4.1 of the “Compromise” Plan is not clear. The words do not say anything meaningful. Hence, this section renders the Plan unusable.
24. Section 4.0 on non-statistical benchmark testing contained in the 01-0120 Plan has disappeared and does not reappear anywhere else in the SBC proposal. This provision is a key element of the Commission’s Plan. Its omission renders the “Compromise” Plan unusable.
25. Section 5.4 requiring that SBC Illinois “not unduly delay filing” of the Plan as an interconnection agreement amendment is unduly vague and confers unfettered discretion upon SBC to decide when delay is “undue.” It is my understanding

SBC Illinois has agreed to replace this language with a specific 10-day filing requirement, but I will reserve judgment until I see it in writing.²⁸

26. Section 5.6 of SBC's proposal requires that the CLECs must take active steps to receive remedies in cash rather than credits. This is directly contrary to and in conflict with Section 5.2 of the Commission Plan.
27. The bulk of Section 6.1 contradicts the first sentence. By definition, liquidated damages are foreclosing in nature. However, this sentence seems to say the opposite. SBC is trying to get out of labeling the remedies "penalties" and, thus, evidence of illegal behavior (Although in section 5.0 SBC calls the remedies "penalties"). This change is obviously designed to protect SBC Illinois in any future litigation, including antitrust suits. The language is, frankly, confusing and renders any reasonable interpretation of the plan mere guesswork.
28. Section 6.3 is a new provision about double payment. It is unclear how duplicative payments would be defined or assessed. Clearly different measures may be used in the Service Quality Rules or even in the Part 731 rules. Furthermore, the standards may be different. There is a real danger that SBC will interpret this vague provision in such a way as to underpay remedies to the CLECs and the State of Illinois that it would otherwise be obligated to remit consistent with the intent of the provision.
29. As I discussed previously, Section 6.5 of the Compromise Plan creates a one-sided mini audit process as opposed to the fair one in use today in the

²⁸ See, SBC Illinois Response Number 7 to February 13, 2003 Workshop questions.

Commission Plan. Similarly, SBC has emasculated the annual audit requirement contained in Section 6.4.1 of the Commission Plan and replaced it with Section 6.6, where SBC extends the term between audits and makes them regional rather than Illinois-specific. These two steps will likely obscure SBC's true performance and will take control away from the Commission, as I also previously discussed regarding the selection of the auditor.

30. As I mentioned earlier, Section 7.1 of the "Compromise" Plan resurrects the infamous "Texas" Plan exclusions that the Commission either substantially modified or eliminated after careful consideration and evaluation in Docket No. 01-0120.
31. More egregiously, new Section 7.2 confers upon SBC Illinois the unfettered discretion to unilaterally withhold half of all remedies if it decides the CLEC is "unreasonably holding" or "dumping" orders. This mischievous provision is vague and again allows SBC to define in real-time that a CLEC has caused the problem. There is no clear definition of "dumping" or "unreasonable," etc. In the current market, many business procedures, such as large orders after a major promotion begins, could be unreasonably interpreted as CLEC "dumping." For example, how would a process for a mass conversion from UNE-P to UNE-L be viewed?
32. Section 7.3 of the "Compromise" Plan needlessly complicates and severely limits the self-effectuating nature of the plan. It also allows SBC Illinois to unreasonably withhold remedies indefinitely, even if the Commission finds

against it in dispute resolution. This is because SBC Illinois proposes to only pay remedy amounts due “within 30 days of a final, non-appealable resolution.”

According to SBC Illinois, this language means: “To the extent either party appeals from the Commission’s decision, under section 7.3 the remaining disputed amount need not be paid until all appeals have been exhausted.”²⁹ Given SBC’s astoundingly litigious nature, this provision is a green light for SBC to concoct needless disputes as a way to avoid paying remedies to CLECs, with the secure knowledge that even if it loses before the Commission it can withhold paying until the tedious and lengthy appellate process is exhausted, which can take years.

33. SBC has rewritten Section 7.4 to make the monthly caps equal to 1/12 of the yearly cap. As I discussed earlier, the monthly cap under the 01-0120 plan is 1/6 of the annual cap. Thus, the procedural cap is reached when SBC pays half the remedies that are required today. This, in turn, is an invitation to a needless proceeding to determine if SBC needs to pay more in remedies when it is already providing demonstratively poor service. The rewriting of this section allows SBC to force procedural complications sooner than the 01-0120 plan and therefore degrades the self-effectuating aspects of the plan.³⁰

²⁹ SBC Illinois Response Number 9 to February 13, 2003 Workshop questions.

³⁰ Moreover, SBC Illinois’ proposed language allows it to hold onto CLEC remedies until the decision is final and all appeals are exhausted, even if the Commission finds such monies must be paid. *See*, §7.3 of the “Compromise” Plan, discussed in ¶ 32 of my Affidavit.

34. New Section 7.6 is an “escape from liability” clause. Will the sum of all CLEC bills even get close to the 36% of ARMIS number? The answer is clearly no. This provision exists to limit payments to the larger CLECs for a particular month. Thus, for example, where a CLEC runs a major promotion for a limited time and successfully obtains numerous orders, this allows SBC to target this CLEC for poor wholesale service, secure in the knowledge that its remedy payments will be small. The CLEC then would be forced to litigate this issue. Even if the CLEC prevails, since restitution will not occur until “all appeals are exhausted”,³¹ this rewards SBC for offering poor wholesale service as a way to harm competition.
35. Section 8.2 and new accompanying tables 1 and 2 are really a blatant attempt to limit payments when poor wholesale service is offered. This change would serve to allow more “gaming” of the plan. SBC needs to be responsible on a sub-measure basis, and there is no call for reducing payments for failed measures if other measures pass. My specific criticisms of these new tables follow:
- The amounts and Index Value (“IV”) breakpoints in Tables 1 and 2 for Tier I are completely arbitrary. They were agreed upon by limited negotiations between SBC and two selected CLECs, neither of which uses this Plan in Illinois. These tables have no basis in any factual analysis, and only exist to limit remedy payments.
 - The purpose of these tables (to reduce remedy payments) is clear when one compares the remedy payment amounts to those of the 01-0120 Plan. For example, in the first 12 month section of Table 1, if a measure has failed for two months, none of the per occurrence amounts, (\$50, \$70, \$90, \$125, and \$175), regardless of the IV, are as large as the Medium

³¹ See, §7.3 of the “Compromise” Plan.

priority amount (\$300) of the 01-0120 Plan. The SBC proposal amounts are in fact closer to the Low priority amount (\$100) of the 01-0120 Plan. Further in Table 1, if a measure has failed 5 consecutive months, none of the per occurrence amounts (\$300, \$350, \$400, \$600, and \$800), regardless of the IV, are as large as the Medium priority amount (\$1000) of the 01-0120 plan. In fact, if the IV is as low as 74%, the per occurrence amount is never more than the Low priority amount (\$600) of the 01-0120 plan. Even more limiting results apply for the second and third years and per measure/caps of the SBC proposal. This reduction of liability is baseless and reduces SBC's incentive to perform appropriately for its wholesale customers.

- Tier 2 remedies payable to the State of Illinois are even more dramatically affected by the tables. Tier 2 assessments in the SBC proposal are reduced to \$200 per occurrence from \$1000, \$600, and \$400 for High, Medium, and Low priorities of the 01-0120 Plan. This constitutes a baseless reduction in remedy payments of at least 50%. Furthermore, the per measure/cap becomes \$20,000 in the SBC proposal. This contrasts with the Commission Plan, which has \$150,000, \$60,000, and \$40,000 for High, Medium, and Low priorities. This is a reduction from the 01-0120 Tier 2 High amount of 87%! There is no merit and little incentive to perform under SBC's Compromise proposal. Furthermore, negotiating this with (two) CLECs (who don't even use this Plan in Illinois) alone is inappropriate. Moreover, the Commission Staff, which represents the State of Illinois and its consumers, should have input for any Tier 2 changes.
- The combination of unmerited reductions of amounts, and further reduction by IV, even further reductions by year of plan, and decimation of Tier 2 payments to the State from the Commission Plan is clearly intended to transform the Remedy Plan into a simple cost of doing business, and thus encourage, not prevent, SBC to offer poor wholesale service to CLECs as a means to harm competition.
- The IV structure produces numerous anomalies in the SBC proposed plan operation. For example, a very small improvement in overall performance, even when service remains at very low levels, can cause a reduction in the per occurrence or per measure/cap amounts for a chronically failing submeasure. Appropriate performance for this submeasure may be critical to a particular CLEC's business plan. For example, in Table 1, consider SBC "improving" after six months of poor service from an IV of overall performance of 73% to one of 74%. This is not a substantial improvement,

and according to SBC “would be of a major concern”.³² Yet, in this circumstance, the payment would *be reduced* from \$900 to \$800.³³ A similar illogical result occurs for the per measure cap contained in Table 2. There, assuming all facts the same as I discuss immediately above, if a measure had failed for the two previous months and would have required a \$75,000 payment in the third month under the Commission Plan, the SBC plan *reduces* the remedy payment to \$45,000! This makes no sense and, besides being clearly non-incenting, conspicuously allows for gaming by SBC.

- The Commission Plan reduces remedies to zero as the overall percentage of passing submeasures goes to 100%. The SBC proposal reduces remedies much faster as the overall percentage of passing submeasures improves toward 100%. This structure is reminiscent of the infamous k-table exclusion of the Texas plan which, as I discussed earlier, has already been rejected by the Commission. That k-table also caused the remedies to reduce much more quickly as the number of failed measures decreased than under the remedy payment structure adopted and approved by the Commission in ICC Docket No. 01-0120. Therefore, the IV structure is nothing more than a method to subvert the Commission’s Order in Docket No. 01-0120 and reinsert a new, clandestine form of the k-table.

36. Section 8.4’s discussion of the IV mechanism as contained in Tables 1 and 2 is in fact inconsistent with the table themselves. The second and third sections of each table seem to indicate that the amounts are automatically further reduced in each subsequent 12-month period. Section 8.4 has a much more complex description of this reduction that yet again hinges on SBC’s overall performance. Furthermore, there is no explanation or derivation of how SBC arrived at the critical 92%

³² In response to a question whether he agrees that 74 percent is lousy service, SBC witness Ehr stated: “I would think that 74% of our measures being met would be of major concern”. Tr. p. 3656.

³³ *Id.*

overall performance level that is key to this provision for even further remedy reduction in the second and third sections of each table.³⁴

37. As I discussed earlier, Section 8.5 appears to be a wildly contorted version of the Staff and CLEC proposal for parity with a floor, which the Commission rejected in Docket No. 01-0120.³⁵ The version of parity with a floor appearing in the “Compromise” Plan is wildly distorted, of course, as the Staff and CLECs only proposed a floor on service quality in Docket No. 01-0120, and certainly did not advocate any sort of ceiling. Having a ceiling on liability invites SBC to subtly offer worse service to CLECs than to itself or its affiliates, subverting the whole reason for parity measures in the first place. In addition, adding this element to the plan injects yet another layer of complexity on the plan for no good reason.³⁶
38. The proof of compliance concept contained in Sections 8.6 and 8.7 is problematic (and inconsistent with the Commission Plan, which contained no such concept) because it does not kick-in until the third month of non-compliance, and it flattens out after the sixth month of non-compliance. There are also very rapid step-downs at times when they are not warranted.

³⁴ This 92% critical value is in addition to the 92% “IV.” As each IV changes *each month* you move up and down *within each section* of the tables. Provision 8.4 causes you to move *between the sections* of the tables *each 12 months*.

³⁵ As I advocated in Docket No. 01-0120, performance floors protect the public interest by fostering performance above a minimum level. I am not, however, proposing that the Commission adopt parity with a floor here since that would constitute a substantial change to the Docket No. 01-0120 Plan.

³⁶ Other provisions reflect this concept, such as §§11.1 and 11.3 of the “Compromise” Plan. My criticisms therefore apply to these other sections, as well.

39. Section 8.8 exists because of SBC's penchant for continuously restating performance results due to its poor operational support systems, as Mr. Connolly discusses. Obviously such a provision should not be allowed, and would only encourage SBC to continuously restate results with no meaningful penalty. Rather than drafting such an exclusion, it would be a better use of SBC's considerable resources to fix its systems so it does not need to perform obfuscating restatements of results.
40. My discussion of the myriad defects in the "Compromise" Plan is certainly not intended as comprehensive. The severely compressed nature of this case (as opposed to the fully developed record in Docket No. 01-0120 supporting the Commission Plan) prevents a detailed analysis. Nevertheless, as can be seen from the above, the misnamed "Compromise" Plan is ineffective and cannot be implemented in a clear, efficient and administratively simple manner.

V. THE COMMISSION PLAN MEETS THE FCC'S REQUIREMENTS FOR AN EFFECTIVE REMEDY PLAN, WHEREAS THE "COMPROMISE" PLAN DOES NOT

41. There are several principles that should guide the analysis of whether a remedy plan is sufficient to meet the FCC's Section 271 standards for an effective remedy plan. As I discuss below, the Commission Plan meets these standards; the "Compromise" Plan does not even come close.

42. Remedies must be significant enough to provide SBC with appropriate incentives to meet its regulatory obligations to afford nondiscriminatory access to services and facilities. The Commission Plan provides for remedies for poor performance that increase with the level of CLEC activity. The Docket No. 01-0120 Plan is “scalable” according to the size of the market in the state. Under the Commission’s Plan, the more harm that is done to competition, the greater the remedy payment. The Commission Plan potentially generates remedies for all measures, with the exception of certain agreed to diagnostic measurements. Indeed, the Commission Plan is successfully operating today and, according to SBC’s self-reported results, is causing wholesale service quality to improve, with payments declining over time. The meager remedies in the “Compromise” Plan, on the other hand, would constitute a mere cost of doing business for SBC. They would not provide any incentive whatsoever to improve wholesale service quality.
43. Remedies must be self-executing. CLECs should not be required to undergo costly and time-consuming litigation when the performance measurements system shows discrimination. The FCC has stated that an effective enforcement plan shall “have a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal.” See BA-NY Order, at para. 433. The Commission Plan, which has been in operation for months, is indeed self-executing. The untested “Compromise” Plan, which is not even being used by the CLEC (TDS MetroCom) that purportedly negotiated its terms, is not self-executing. It contains numerous exclusions on payments, needless levels of

complexity, confers unfettered control on any changes to SBC and is, frankly, unworkable. Indeed, as I discussed previously, the “Compromise” Plan is not self-executing.

44. To support nondiscriminatory performance, remedies should escalate and indeed accelerate according to the duration and magnitude of poor performance. The Commission Plan provides a fair framework to accomplish this aim. In fact, the Commission Plan is operating today with this very incentive in place. In contrast, the “Compromise” Plan allows for exclusions upon exclusions, and a step down payment process (Tables 1 and 2) that reduces remedy payments when demonstrably poor wholesale service is being offered.
45. The remedy plan should be structured so that it is simple to implement and administer. The Commission Plan is in operation today, and it has been remarkably simple to use. The Commission should be commended for its smooth execution of this Plan. The untested “Compromise” Plan, however, is probably one of the most complex remedy plan ever devised, as discussed above.
46. The remedy plan should be based on an appropriate set of measures. There should be a comprehensive set of comparative measures in appropriate activity areas to show a customer’s true experience when SBC/Ameritech delivers services, facilities, and support. If key activity areas (e.g., hot cuts, lost orders, etc.) are not captured with a measure, important and often customer-affecting performance problems go unaddressed. The Commission Plan uses the agreed performance measures. The implementation of the Commission Plan and the

performance measures have occurred simply and effectively. On the other hand, the “Compromise” Plan contains new exclusions on performance payments that effectively amend the agreed performance measures without the agreement of the CLECs. For example, Tables 1 and 2 create essentially new overall performance benchmarks *on top of* the levels of those contained in the agreed measures. In addition, the performance floor and ceiling concept similarly creates new performance benchmarks. Thus, the “Compromise” Plan is not based upon an appropriate set of measures, and would unilaterally allow SBC to create new (and generally lower) standards of performance.

47. The performance measures should be appropriately disaggregated. If measurement results are aggregated at too high a level, SBC/Ameritech can mask discriminatory performance. The disaggregation should be discrete enough to show performance results based upon dimensions such as products (e.g., UNEs, resale, xDSL, etc.) and geography (e.g., dense urban commercial area, sparsely populated rural area, rapidly growing suburban areas, etc.). Disaggregation should proceed until like-to-like comparisons can be made. As I discussed above, the Commission Plan contains the correct disaggregations, using the agreed performance measures. On the other hand, the “Compromise” Plan essentially concocts a reaggregation of measures by indexing remedies to overall performance, again without the agreement of the CLECs.
48. The structure of a remedy plan should be based on a verified (audited) system with verifiable data and processes. There should be a thorough audit of the

performance measurements system by a recognized neutral party who utilizes a disclosed and industry-reviewed methodology before it is officially implemented for the industry. For example, there should be a validation of SBC's processes and systems used for data collection, reporting, storage, and retrieval. An effective plan should provide reasonable assurances that the reported data is accurate. See BA-NY Order, at para.433. The Commission Plan contains such an auditing system. The "Compromise" Plan, as I discussed above, strips the Commission of its oversight and authority over the Plan, allowing SBC unfettered discretion to veto any auditor, and to run up CLEC costs by requiring up-front payments for audits.

49. An appropriate statistical methodology should be in place. It is important to use appropriate statistical procedures to perform the comparisons because the performance results for many measures may exhibit unavoidable random variation. A statistical approach accounts for this random variation while controlling the risk of reaching an incorrect conclusion about discrimination. The Commission Plan uses a streamlined, "bright line" approach as the statistical method of analyzing benchmark performance. It is successfully employed today, with positive results. The "Compromise" Plan removes this language. The "Compromise" Plan uses a complex, veiled, and Commission-rejected statistical methodology to limit payments. Indeed, its provisions (including Tables 1 and 2; the step up and step down provisions; and the floor/ceiling proposal) constitute perhaps the most complex approach of any remedy plan anywhere. A reasonable

statistical analysis of SBC's proposal would be prohibitively time-consuming and, ultimately, unenlightening.

50. In sum, the Commission Plan is a proven success that meets all necessary requirements for a Section 271 remedy plan. The untested and unworkable "Compromise" Plan fails to meet each and every one of the FCC's requirements, and certainly should not form the basis for any positive Section 271 recommendation to the FCC.

VI. CONCLUSION

51. The "Compromise" Plan is a complete re-writing of the Commission Plan, including numerous proposals that were rejected in Docket No. 01-0120. SBC is thus seeking a relitigation of the nuances of the Commission Plan, which is directly contrary to the Commission's explicit direction in Docket No. 01-0120. The reasons for SBC Illinois offering the "Compromise" Plan are obvious: (1) to reduce SBC Illinois' remedy payments to a level where they are a cost of doing business; (2) to strip the Commission of future oversight and control over the plan by requiring SBC's "agreement" before any changes can be implemented; and (3) designating payments as "liquidated damages" to limit its exposure for its own potentially anticompetitive actions. Most importantly, however, is the lack of any need for a change now. According to SBC Illinois' self-reported data, the Commission Plan is working well, its wholesale service quality is improving and

its remedy payments are plummeting. Finally, the Commission Plan demonstratively meets the FCC's tests for a remedy plan, whereas the untested "Compromise" Plan does not.

52. The many defects in the "Compromise" plan plainly demonstrate why no other state has adopted this ineffective proposal as the Section 271 remedy plan.³⁷ I therefore recommend that the Commission retain the 01-0120 Plan and affirmatively find that it meets the public interest test for purposes of Section 271.
53. This concludes my affidavit.

³⁷ Indiana, Michigan and Wisconsin all conducted remedy plan proceedings. All of these states adopted state-specific remedy plans, as did Illinois in Docket No. 01-0120. Despite three CLEC requests to conduct a similar proceeding, the Ohio Commission decided to not have any input from parties other than SBC. Thus, Ohio stands alone in not even considering adoption of a state-specific remedy plan, and instead inexplicably retains SBC's original and highly discredited (including by this Commission) "Texas" Remedy Plan...