

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

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

**SUR-REBUTTAL COMMENTS (PHASE II) OF SBC ILLINOIS**

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## INTRODUCTION

Illinois Bell Telephone Company (“SBC Illinois”) respectfully submits its sur-rebuttal comments and supporting affidavits in Phase II of this proceeding.

## DISCUSSION

### I. SBC ILLINOIS’ COMMERCIAL PERFORMANCE RESULTS ARE RELIABLE.

As in the preceding round of comments, the principal issue is not about what the totality of the evidence means; rather, the opposing comments contend that the Commission should ignore much of the evidence before it. Their underlying theory is that SBC Illinois’ commercial performance results (which the FCC considers the “most probative” evidence of checklist compliance) should be ignored as unreliable, based on the fact that BearingPoint’s review of performance measurements is not complete. Staff lists a demonstration of data reliability as one of its five pre-requisites for a finding of checklist compliance. The sur-rebuttal affidavit of Mr. Ehr (¶¶ 69-117) provides further response to those contentions, and demonstrates that the totality of the evidence (including the results of the E&Y audit, and the current status of BearingPoint’s Performance Measurement Review) provides sufficient assurance that SBC Illinois’ commercial performance results are reliable. See also 1/17/03 Ehr Aff. ¶¶ 214-302; 3/3/03 Ehr Rebuttal Aff. ¶¶ 90-189.

In addressing the issue of reliability, the Commission should keep in mind that the ultimate issue here is checklist compliance, and the question for present purposes is whether SBC Illinois’ results are sufficiently reliable to be considered as evidence of compliance. The Commission should accordingly reject AT&T’s attempts to recast and thus confuse the issue.

First, contrary to AT&T's suggestion, the question here is *not* whether SBC Illinois has completely satisfied the "exit criteria" for all parts of the BearingPoint OSS test – because SBC Illinois is not asking to exit the test. Rather, it is asking the Commission to assess checklist compliance, and in that regard the FCC has held that such an assessment can take place even if performance measurement audits are still ongoing, as long as there are sufficient other assurances of reliability. Georgia & Louisiana 271 Order, ¶¶ 17, 19 ("We recognize that BellSouth's data continues to be subjected to third-party audit, but we cannot as a general matter insist that all audits must be completed at the time a section 271 application is filed at the Commission."). The totality of the evidence, including the results of the E&Y audit, provide exactly the assurance that the FCC requires.

Second, the issue here is not about who bears the burden of proof, nor does SBC Illinois seek to shift the burden of proof to the opposing commenters as AT&T contends. Rather, SBC Illinois has satisfied its burden of proof, by supplementing the record with additional evidence that its reported results are reliable. Ehr Sur-rebuttal Aff. ¶ 85. AT&T's argument is not really about who bears the burden of proof, either on the threshold issue of data reliability or on the ultimate issue of checklist compliance. Rather, AT&T's position is founded on its view that the Commission should ignore the proof presented by SBC Illinois on those issues: i.e., that the Commission should ignore both (i) SBC Illinois' commercial performance reports and (ii) the results of E&Y's audit. As Mr. Ehr demonstrates, AT&T's position (and the similar allegations of other CLECs and of Staff) are wrong.

## **II. SBC ILLINOIS HAS DEMONSTRATED COMPLIANCE WITH THE COMPETITIVE CHECKLIST**

SBC Illinois and Staff are the only commenters that undertook any meaningful substantive analysis of SBC Illinois commercial performance results. There is substantial agreement as to what the results mean:

- Staff does not dispute SBC Illinois' compliance with 10 of the 14 checklist items.
- Staff's remaining concerns are with Checklist Items 2 (unbundled access), 4 (loops), 7 (911) and 14 (resale).
- Even on those four remaining checklist items, Staff's concerns are focused on a few measurements (and usually on a single product or service category within those measurements), which it has summarized on a list of 17 "Key PMs Requiring Improvement."

The sur-rebuttal affidavit of Mr. Ehr (¶¶ 15-68) responds in detail to each measure on Staff's list, and Attachment 3 to these comments summarizes those responses. At a high level, 9 of the shortfalls cited by Staff are insignificant and do not warrant further action by SBC Illinois; in fact, on two measures SBC Illinois' performance satisfied Staff's own numeric guidelines (i.e. that a measure is "passed" if SBC Illinois meets the standard in two out of three months) and Staff has provided no qualitative reason for departing from its own guidelines. SBC Illinois has already taken corrective action to address the remaining measures; although SBC Illinois maintains that the shortfalls cited by Staff are not material to overall checklist compliance, SBC Illinois here proposes a plan for additional, focused monitoring (above and beyond the normal working of SBC Illinois' monthly reporting and performance remedy plan) to enable Staff to assess the results of SBC Illinois' actions. Ehr Sur-rebuttal Aff. ¶ 14.

With respect to issues from Phase I of this proceeding, Staff presents a list of unresolved issues, and states that their resolution should be required as a condition of a favorable recommendation. Attachment 1 to these comments summarizes SBC Illinois' response on each issue.

**A. Checklist Item 2: Access to Unbundled Network Elements.**

**1. Non-Discriminatory Access to OSS**

With respect to commercial performance results, Staff's remaining concerns are with the results for Performance Measures related to the timeliness of order completion notices (PM 7.1), and order rejection notices (10.1, 10.2, and 10.3), and to the percentage of orders posted for wholesale billing within a 30-day cycle. As demonstrated in the sur-rebuttal affidavit of Mr. Ehr (¶¶ 18-23, 43-47), SBC Illinois' performance on these measures is sufficient, and the shortfalls cited by Staff are not material to overall checklist compliance.

In addition to its analysis of performance results, Staff provides a list of "OSS Deficiencies" and states that corrective action should be a pre-requisite for a favorable recommendation. Attachment 2 to these comments summarizes SBC Illinois' response on each issue.

Further, the sur-rebuttal affidavits of Mr. Silver and Mr. Brown, and the joint sur-rebuttal affidavit of Mr. Cottrell and Ms. Kagan, addresses CLEC allegations of erroneous billing. The separate sur-rebuttal affidavit of Mr. Cottrell addresses other issues relating to electronic OSS (including BearingPoint's OSS testing, allegations that orders are improperly rejected, and issues related to line loss notices), while the sur-rebuttal affidavit of Mr. Brown addresses issues related to manual OSS processes and resources.

## **2. UNE Combinations**

Staff's sole issue with respect to commercial performance results for UNE combinations relates to the rate of trouble reports on UNE platforms for business customers (PM 37-04), which was slightly higher than the retail analog. (By contrast, the rate of troubles on residential UNE platforms, PM 37-03, was significantly lower than retail throughout the three-month study period.) While the differences cited by Staff are not material to overall compliance, a systems enhancement to address the issue is in place, and SBC Illinois includes this measure in its proposal for additional monitoring going forward. Ehr Sur-rebuttal Aff. ¶ 68.

## **3. Pricing**

The sur-rebuttal affidavits of Mr. Wardin and Mr. Silver address the few remaining "Phase I compliance" issues related to prices and rate applicability. In the sur-rebuttal affidavit of Mr. Silver, SBC Illinois commits to propose amendments to its EEL tariff, and include the EEL and UNE-P rate element matrices in SBC's CLEC Online Handbook in response to Staff Witness Zolnierrek. The sur-rebuttal affidavit of Mr. Alexander agrees with Staff's recommendation regarding the general "opt-in" policies and practices described in Mr. Alexander's Compliance Affidavit, and Rebuttal Affidavit, including the posting of language describing SBC Illinois' policies to the CLEC Online website.

### **B. Checklist Item 4: Unbundled Local Loops.**

The sur-rebuttal affidavit of Ms. Chapman addresses "line splitting" and demonstrates that SBC Illinois has made all required showings with respect to these issues. With respect to SBC Illinois' commercial performance, Staff's remaining issues here are with the results for measures of timeliness of installation (PMs 55, 56, and 62),

installation trouble reports (PM 59), trouble reports (PM 65) and the timeliness of repair (PMs 66 and 67), and facilities modification (PM CLEC WI 6). Mr. Ehr's sur-rebuttal affidavit demonstrates that (i) the shortfalls cited by Staff for PMs 56, 62 and CLEC WI 6 are insignificant and do not warrant further action, (ii) SBC Illinois has already taken action to address the shortfalls on PMs 55, 56, 65, 66, and 67, and will agree to include the affected categories of these measures in its plan for additional monitoring with Staff. Ehr Sur-rebuttal Aff. ¶¶ 50-64.

**C. Checklist Item 7: Nondiscriminatory Access to 911, E911, Directory Assistance, and Operator Call Completion Services.**

There is no dispute as to operator services or directory assistance, and Staff's expert has reiterated his conclusion that SBC Illinois is in compliance: "I stand by my initial conclusion, which is that SBC Illinois' performance results with respect to these checklist items are satisfactory for the purpose of fulfilling the requirements of Section 271." Staff Ex. 45.0 (Light), ¶ 2. As to 911 access, there is no dispute as to public safety: namely, that SBC Illinois processes 911 updates well within the 24-hour standard set by the industry. The sole remaining issue relates to the fact that in two of the three study period months, SBC Illinois took approximately 20 minutes longer on average to process CLEC updates than its own updates. No one contends that the difference has had any material impact on the market or on overall compliance. Staff acknowledges SBC Illinois' explanation that the difference stems at least partly from CLEC errors for which SBC Illinois is not responsible, but states that SBC Illinois has not provided information as to steps it has taken to help CLECs prevent errors. However, SBC Illinois provided detailed information on that subject in the rebuttal affidavit of Mr. Valentine, and Staff does not respond or acknowledge that filing.

**D. Checklist Item 14: Resale.**

Staff's sole remaining issue with respect to Resale relates to the rate of trouble reports on residential POTS lines (PM 37-01). In two of the three months, the rate of trouble reports in that category was slightly higher than retail. However, the overall rates for wholesale and retail were both low, and the differences between the two were small. Thus, the shortfall cited by Staff is not material to overall compliance. Nevertheless, SBC Illinois proposes additional monitoring for this measure. Ehr Sur-rebuttal Aff. ¶ 68.

**III. THE COMMISSION SHOULD APPROVE SBC ILLINOIS' COMPROMISE REMEDY PLAN AS SUFFICIENT FOR SECTION 271.**

The sur-rebuttal affidavit of Mr. Ehr addresses comments on SBC Illinois' proposed remedy plan ("Compromise Plan"), and reaffirms SBC Illinois' central points. First, the Compromise Plan is even more stringent than plans found sufficient by the FCC for purposes of section 271 – indeed, it is more stringent than the modified remedy plan adopted by the Texas commission after section 271 approval in that state, which AT&T (Kalb Rebuttal Aff. ¶ 17) now represents as a "robust" benchmark for remedy plans. Ehr Sur-rebuttal Aff. ¶¶ 119-121. Even at today's high levels of performance, the Compromise Plan would lead to remedy payments approximately four times greater than plans found sufficient by the FCC – and if SBC Illinois' performance were to decrease or "backslide," the Compromise Plan's "indexing" feature would lead to even higher remedies across the board. Id. ¶ 130.

Second, continuation of the plan adopted by the Commission in Docket No. 01-0120 (the "0120 Plan") would be inappropriate. That plan was based on performance results for late 2000, and it does not reflect operational improvements since then. Ehr

Sur-rebuttal Aff. ¶ 122. As a result, the 0120 Plan would punish SBC Illinois for its current good performance – with monthly “remedies” of approximately \$3.6 million, over 9 times the amounts found sufficient by the FCC. Id.

Mr. Ehr also rebuts AT&T’s mischaracterization of the basis on which SBC Illinois is offering the Compromise Plan. According to AT&T, “it is the height of arrogance to presume that private negotiations of SBC and two evidently disengaged parties should substitute for the Commission’s reasoned judgment, reached after 17 months of testimony, hearings, and briefing in Docket No. 01-0120.” AT&T Kalb Rebuttal Aff. ¶ 10. Aside from the fact that the proceedings in this very docket show that TDS is certainly not “disengaged,” SBC Illinois is not even taking the position AT&T describes as the “height of arrogance.” Ehr Sur-rebuttal Aff. ¶¶ 123-126. SBC Illinois does not contend that the Commission should accept the Compromise Plan based solely, or even principally, on the fact that it was reached through negotiation. Id. ¶ 123. Rather, SBC Illinois is asking the Commission to approve the Compromise Plan on its substantive merits – by applying its reasoned judgment to the record in this case, which is indisputably more extensive and more current than the record in Docket No. 01-0120. Id. The fact that the plan reflects negotiations and arm’s-length agreement with two active CLECs is simply an additional fact for the Commission to consider. Contrary to AT&T’s argument that things like negotiation, agreement, “voluntary” undertakings and liquidated damages are somehow *bad*, those facts weigh in favor of the Compromise Plan. Id. Moreover, SBC Illinois is not asking the Commission to *replace* all of the decisions that went into the 0120 Plan, or the procedure that went into that plan. Id. ¶ 126. Many features of the Compromise Plan are identical to the 0120 Plan – in

particular, SBC Illinois is not asking the Commission to revisit the complex statistical issues that were presented in Docket No. 01-0120. The Compromise Plan is instead intended to correct the 0120 Plan's most punitive features.

In addition, Mr. Ehr's sur-rebuttal affidavit answers the Administrative Law Judge's questions regarding "Tier 2" payments (id. ¶¶ 137-144), and provides a further response to Staff's proposed "Hybrid" plan (id. ¶¶ 131-132). Mr. Ehr demonstrates that while Staff's proposal would reduce payments somewhat (and while its attempt to at least consider revisions to the 0120 Plan is appreciated), the proposed "Hybrid" retains the 0120 Plan's punitive character. Id. ¶¶ 131-132. Staff's proposed plan would still yield "remedies" of approximately \$2.5-2.7 million per month, more than double those under the Compromise Plan, and several times more than the amounts previously found sufficient by the FCC for purposes of section 271.

#### **IV. RESPONSE TO STAFF'S PROPOSED PRE-REQUISITES FOR FAVORABLE RECOMMENDATION**

Staff Witness Hoagg (Ex. 40.0, ¶ 9), proposes 5 pre-requisites for a favorable section 271 recommendation. As described above, SBC Illinois' response to Staff's first proposal (remedial actions to achieve compliance with the Commission's Phase I Interim Order) is summarized at Attachment 1 to these comments. SBC Illinois' response to Staff's second proposal (remedial action to correct alleged OSS deficiencies) is summarized at Attachment 2. Staff's concerns with respect to the reliability of performance measurement results are addressed in Section I above, and in the affidavits of Mr. Ehr.

Staff's fourth proposal is that SBC Illinois provide bi-monthly progress reports to the Commission. SBC Illinois agrees to provide the Commission with bi-monthly

updates on its progress toward meeting all the remaining requirements identified in the Commission's Phase II Order, with one exception. The one exception deals with the Michigan improvement plans identified in Mr. Cottrell's surrebuttal affidavit. On those specific initiatives, SBC Illinois proposes that it update the Commission at the same frequency and at the same time it updates the Michigan Commission. This will ensure that the Commission receives the latest information at the same time the Michigan Commission receives its information, while reducing administrative burden and avoiding confusion.

Staff next proposes that SBC Illinois participate in a collaborative composed of Staff, the Company and all interested parties, to facilitate and monitor SBC's progress toward eliminating deficiencies in performance reports. Staff's proposed industry collaboratives are unnecessary. Of course, SBC Illinois is always willing to work closely with Staff and expects that it would do so in this case, and that it would provide information to, and obtain guidance from, Staff.

Finally, Staff proposes that the Commission's Phase II order specifically state that any failure by SBC Illinois to fully satisfy its obligations under the order would entitle the Commission to seek civil penalties under Section 13-305 of the PUA and to inform the FCC of the issue. This proposal is unnecessary, injudicious, and inappropriate; unnecessary because the Commission's enforcement authority is neither expanded nor contracted by any words it may put in its Phase 2 order, injudicious because the Commission should not pre-judge or speculate about the actions it may take in the future, and inappropriate because this proceeding is not a rulemaking but an assessment of compliance, on which the Commission is to advise the FCC.



## CONCLUSION

For the reasons set forth above and in the accompanying sur-rebuttal affidavits, and in SBC Illinois' filings of January 17, 2003 and March 3, 2003, SBC Illinois respectfully requests that the Commission enter an order recommending a finding that SBC Illinois has satisfied the requirements of the competitive checklist, and enter an order approving SBC Illinois' proposed Compromise Plan as consistent with section 271.

Respectfully submitted,

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