

**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	:	

**BRIEF ON EXCEPTION OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

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**BRIEF ON EXCEPTIONS OF THE STAFF
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Now comes the Staff of the Illinois Commerce Commission ("Staff"), by its undersigned attorneys, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830) respectfully submits this Brief on Exceptions to the Administrative Law Judge's Proposed Final Order On Investigation issued on April 8, 2003 ("Proposed Order" or "ALJPO").

I. INTRODUCTION

As set forth in more detail below, Staff takes exception to a number of the findings and conclusions reached by the Administrative Law Judge ("ALJ") in the Proposed Order.

A. Staff's Primary Recommendation

The Commission determined at the conclusion of Phase I of this docket that SBC Illinois complies with items (iii), (vii), (viii), (ix), (xi), (xii) and (xiv) of the 14-Point Competitive Checklist (subject to demonstration of compliance with specific

performance items in Phase 2 of this docket and not including performance measure results).¹

Staff's analysis of SBC Illinois' Phase 2 affidavits and supporting exhibits indicates that the Company now has satisfied a number of additional requirements for Section 271 approval including checklist items (i),(v),(viii) and (xiii).

However, Staff's analysis in Phase 2 also reveals that a number of deficiencies remain. Given the totality of the deficiencies remaining at this stage of the proceeding, Staff cannot endorse a positive Section 271 recommendation. In order to achieve a positive recommendation for Section 271 approval, SBC must remedy remaining deficiencies in a number of areas. SBC must::

- A. Take further remedial actions to achieve compliance with the Commission's Phase I Interim Order;
- B. Remedy certain remaining deficiencies in its OSS;
- C. Remedy the accuracy and reliability problems with its commercial performance data and demonstrate the issues no longer exist;
- D. Improve its performance on a number of critical performance metrics (improving the service it provides CLECs);
- E. Adopt and implement an effective performance remedy plan.

The specific deficiencies that SBC must address in each of these of these areas are briefly summarized as follows:

1. SBCI's Compliance With the Requirements of the Phase I Interim Order

SBC Illinois' March 3, 2003 rebuttal filings addressed and resolved several areas of non-compliance with the Commission's Phase I Interim Order that were outstanding

¹ The finding that SBC Illinois has satisfied Checklist items (iii), (vii), (viii), (ix), (xi), (xii) and (xiv) specifically is subject to a showing otherwise in Phase II of this docket. *Phase I Interim Order on*

prior to the filing of such affidavits. Among the resolved items are: CNAM database query rates (and procedures that previously had caused technical problems); dark fiber rates (with one exception); rate true-up language for various tariffs; required compliance with Commission Orders in Docket No. 00-0393 and (with one exception) Docket No. 01-0614. Items that SBC has resolved, based on its subsequent representations, and provided that it meets commitments detailed in its rebuttal affidavits (and summarized in the appropriate schedules attached to the rebuttal affidavit of Staff witness Jeff Hoagg) are: requirements for clarity in the application of rates for common UNE combinations; and incorporation of UNE rates and terms into interconnection agreements.

Several areas of noncompliance with the Phase I Interim Order remain. These include: implementation of changes to line loss performance measures; demonstration of acceptable performance on line loss notification performance measures; compliance with the “minimal service disruption” line splitting requirement from Docket No. 01-0614; rates for sub-loop line connections and dark fiber (mileage) that pass a “zone of reasonableness” test; and sufficient demonstration of non-discriminatory process for provisioning of enhanced extended loops.

2. SBCI’s Operational Support Systems (OSS)

SBC Illinois’ OSS, as reported by BearingPoint during its independent third party review is still not sufficient with respect to Ordering and the timeliness of service order completion (SOC) responses; Provisioning and the accuracy of updates to customer service records or CSRs; and Maintenance and Repair and the accuracy of close out coding on end-to-end trouble faults.

Investigation (“Phase I Interim Order”), February 6, 2003, ¶1804.

In addition the Company has not adequately demonstrated that the billing issues proven to exist in this proceeding have been cared for. It is necessary for the Company to address these billing deficiencies and demonstrated that the issues have resolved and will not be repeated. For this Commission to find that SBC provides wholesale billing functions in a non-discriminatory manner the Company must provide evidence and support that the billing concerns proven to exist during this proceeding have been fully resolved.

3. Accuracy and Reliability of SBC's Performance Measurement Data

The findings of the BearingPoint and Ernst & Young performance metrics reviews significantly undermine the accuracy and reliability of SBC Illinois' commercial performance data. In addition, since the Company's commercial performance data serve as inputs to any performance remedy plan used to prevent future "backsliding", the efficacy of any such plan is seriously compromised unless these deficiencies are resolved. Moreover, until SBC can demonstrate the data to be accurate and reliable and provide verification of that fact (through completion of the BearingPoint performance metrics review or at a minimum by BearingPoint's verification that all concerns raised to date have been addressed by the Company), such data cannot be relied upon to establish current or future compliance with the Section 271 competitive checklist.

4. SBC Illinois' Performance Measure Results

SBC Illinois has not yet adequately demonstrated that it provides wholesale service to CLECs in a non-discriminatory manner. SBC Illinois passed 70.1% of the performance measures at the PM level, and 87.2% at the sub-measure level. Staff identified 17 significant performance measures for which SBC Illinois is not providing

adequate wholesale service. Based primarily on these 17 performance measures, SBC Illinois has not yet met requirements for Checklist Items 2, 4, 7, and 14.

SBC Illinois'			
Key PM's Requiring Improvement			
PM Number	PM Description	ICC Staff Exh. Citations	Checklist Item #
7.1	Percent mechanized completions returned within one day	31 & 43	2
10.1	Percent mechanized rejects returned within one hour.	31 & 43	2
10.2	Percent manual rejects received electronically and returned with 5 hrs	31 & 43	2
10.3	Percent manual rejects received manually and returned with 5 hrs	31 & 43	2
13	Percent of orders from receipt to distribution that progress mechanically through to the company provisioning systems(flow through).	31 & 43	2
17	Percent of on-time service orders in both ACIS and CABS that post within a 30-day billing cycle	30 & 42	2
37	The number of trouble reports per 100 lines	29 & 41	14
55	Average Installation Interval for N,T and C orders	32 & 44	4
59	Percent network trouble reports within 30 days of installation	32 & 44	4
65	Trouble Report Rate per 100 UNEs	32 & 44	4
65.1	Trouble Report Rate Net of Installation & Repeat Reports	32 & 44	4
66	Percent Missed Repair Commitments	32 & 44	4
67	Mean Time to Restore	32 & 44	4
104	Average time required to update 911 database (facilities based carrier)	36 & 48	7
MI-2	Percent of orders given jeopardy notices within 24 hours of the due date	29 & 41	2
MI-14	Percent completion notifications returned within "X" hours of completion of maintenance	29 & 41	2
C WI-6	Percent form A received with the interval ordered by the Commission	32 & 44	4

The two disputes arising from the last six-month review collaborative (which the parties agreed to resolve in this proceeding) that requested remedies be applied to performance measure MI 13.1 and MI 12 should be denied.

5. SBC's Anti-Backsliding Plan (Performance Remedy Plan)

SBC Illinois' proposed remedy plan would not adequately prevent backsliding in a post-Section 271 environment. SBC should be required to adopt the Commission-ordered remedy plan from ICC Docket No. 01-0120 for purposes of this Section 271 application. In the event the Commission determines not to require the Docket 01-0120 plan for Section 271 purposes, the Commission should require SBC Illinois to adopt the Staff "hybrid plan."

B. Staff's Alternative Recommendation

Staff continues to believe that the above-described deficiencies constitute non-compliance with the requirements for Section 271 approval, and should result in a negative recommendation from the Commission until such deficiencies are remedied. Current compliance cannot be demonstrated by commitments to comply in the future. However, if the Commission finds, notwithstanding Staff's recommendation, that SBC has met all Section 271 requirements, Staff would urge that the Commission grant only a conditional endorsement of SBC's Section 271 application subject to the following requirements:

1. SBC Illinois must commit to complete all remedial actions necessary to achieve compliance with the Commission's Phase I Interim Order.
2. SBC Illinois must commit to abide by a Commission formulated plan and timetable to remedy each OSS and performance measurement

deficiency that remains unresolved no later than November 30, 2003 (These actions would be verified by an independent third party)..

3. SBC Illinois must commit to report to the Commission bi-monthly on progress toward meeting all remaining requirements.²
4. SBC Illinois must commit to participate in a collaborative composed of Staff, the Company and all interested parties, to facilitate and monitor SBCI's progress toward eliminating the significant deficiencies regarding 3-Month PM data results (as outlined by Staff in initial Phase II affidavits).

Finally, any grant of a conditional endorsement of SBC's application also should specify that if SBC Illinois fails to fully satisfy these commitments, the Commission would be entitled to:

- 1) Commence an action that could result in imposition of civil penalties, as set forth in Sec. 13-305 of the Illinois Public Utilities Act for failure to comply with the Commission's Final Order in this proceeding; and
- 2) Inform the FCC of such deficiencies or non-performance for possible action pursuant to Sect. 271(d)(6) of the 1996 Telecommunications Act.³

In the event SBC Illinois were unwilling or unable to make the above commitments, Staff recommends that the Commission decline to endorse SBC Illinois' Section 271 application.

² This reporting obligation would commence upon issuance of the Commission's Phase 2 Order and continue through the November 30, 2003 deadline.

³ Section 271(d)(6) is entitled "Enforcement of Conditions" and provides as follows:

(A) COMMISSION AUTHORITY.--If at any time after the approval of an application under paragraph (3), the Commission [FCC] determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

- (i) issue an order to such company to correct the deficiency;
- (ii) impose a penalty on such company pursuant to title V; or
- (iii) suspend or revoke such approval.

(B) RECEIPT AND REVIEW OF COMPLAINTS.--The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the

II. EXCEPTIONS RELATED TO COMPLIANCE WITH REQUIREMENTS OF PHASE I INTERIM ORDER

Excep. No. 1: Checklist Item 2 - Tariff and Interconnection Agreement Opt-In

Although Staff agrees with the conclusion reached in the Proposed Order on this issue, the Proposed Order did not adopt Staff's proposed Commission Conclusion language. So as to avoid any confusion, Staff's proposes that the position reflected in Staff's brief and Staff's Draft Proposed Order be incorporated into the summary of Staff's final recommendation.

For the reasons stated above, the Staff recommends that the Proposed Order be amended as follows:

799. Considering the arguments made by Mr. Alexander in his rebuttal affidavit, Staff ~~now recommends~~ that the Commission find that the Company's proposal to post its opt-in policies on its CLEC Online website comports with the directives in the Commission's Interim Order. ICC Staff Ex. 44.0 at ¶ 29. However, to ensure that Staff's recommendation and the Commission's decision is informed, Staff also recommended that the Company submit in its surrebuttal affidavits the proposed language it intends to make available to CLECs on the Company's CLEC Online website. Provided this language clearly and accurately explains the opt-in policies articulated by Mr. Alexander in this proceeding, Staff recommended that the Commission consider this issue resolved through implementation of the Company's proposal. Id. In its brief and draft proposed order, Staff indicates that the Company has agreed to post and maintain a statement explaining its opt-in policies to its CLEC Online website, which will provide the Commission and CLECs a vehicle to monitor the Company's opt-in policies and address any 271 compliance issues that may arise regarding these policies. Surrebuttal Phase 1 Compliance Affidavit of Scott J. Alexander on Behalf of SBC Illinois 5. Staff further recommends, based upon the Company's undertaking to post and maintain a statement explaining its opt-in policies, that we consider this issue satisfactorily resolved.

Commission shall act on such complaint within 90 days.

Excep. No. 2: Line Loss Notifications

Paragraph 1314 of the *Phase II Proposed Order* provides that:

So too, although not required for 271 compliance, we note favorably, that the Company has committed to an improvement program which should result in continued overall improvements to this process and we make clear that, unless otherwise directed, the Company will provide bi-monthly updates to the Commission outlining its activity and its progress in implementing the Line Loss Plan of record as finalized by the Michigan Commission. Our Staff will monitor and keep us informed of the situation. It is on the basis of our total account of the matter that we find the Company's line loss notification procedures to comply with section 271 requirements.

NOTE: Staff should explain in its exceptions, if and how its outstanding Phase I compliance recommendations for LNN remain viable (both in relationship to the Michigan Plan and to the Sec. 271 Performance Plan discussed below).

Phase II Proposed Order, ¶1314 (emphasis in original)

The *Proposed Order's* confidence in the Line Loss Plan (as finalized by the Michigan Commission) is measured by its request that Staff confirm that all of Staff's proposed commitments are embodied within the Line Loss Plan. Regrettably, not all of the Staff's Phase I compliance recommendations are included in the Line Loss Plan. As a result, Staff's proposed changes to paragraph 1314 of the Proposed Order, set forth in this Brief on Exceptions, respond to the Proposed Order's request for additional information by identifying those commitments that must be made in addition to those embodied in the Line Loss Plan.

At the time of filing of this Brief on Exceptions, SBC Illinois has not yet complied with all of the commitments Staff determined to be important to both the Commission's ongoing monitoring of the line loss notification situation and its duty to provide continued incentive to the company to meet its committed performance levels. In Phase I of this proceeding, the Commission found Staff's recommendations to be reasonable, and in

this phase of the proceeding, the Proposed Order identifies line loss notification as a major issue of discussion. Further, the company, in prior filings in this proceeding, agreed to implement these items. Although Staff agrees with the *Proposed Order* that the company's stated commitment to an improvement program with respect to Line Loss notifications should result in continued overall improvements to this process, Staff points out that this improvement program does not by itself provide sufficient evidence that the company is capable of providing effective line loss notifications without the addition of certain other commitments proposed by Staff in this proceeding.

Also, Staff points out to the Commission, that the U.S. Department of Justice has expressed grave concerns about essentially the same functionality in Michigan:

CLEC commenters vigorously argue that SBC's performance in issuing line loss notifications has been incomplete, untimely, and unreliable. The issue was similarly argued before the Michigan PSC, which noted the progress in this area made by SBC. Nevertheless, the Michigan PSC noted SBC's history of problems in this area. Until more experience is gained, the Michigan PSC observed, it cannot "assume that a trouble free environment will now exist." The Michigan PSC responded to this uncertainty by requiring SBC to submit a plan that identifies a series of specific improvement measures.

The Department shares the Michigan PSC's concerns, and believes that the Commission should carefully examine SBC's final improvement plan. Precise delivery of line loss notifications is vital for a healthy competitive environment in Michigan. Line loss notifications inform a CLEC when its customers have left for other carriers, either other CLECs or SBC. Unless timely notifications are sent, the CLEC must assume that it still provides service to the customers in question. It will thus bill its now former customers for time in which it had been replaced. The new carriers will also bill the same customers for the service they actually provide, and the customers will be double-billed. The customers naturally will blame the former carrier. Such double-billing, as the Michigan PSC observes, "may have serious negative effects on the reputations of . . . competitive providers." CLECs also consume resources investigating and fixing these avoidable problems.

In their Comments, CLECs report a long list of problems, past and present, related to line loss notifications. These problems include missing

notifications, notifications lacking conversion dates, notifications omitting the disconnected telephone number, and unreadable notifications. The problems associated with SBC's line loss notification system a system common throughout the Ameritech region were also the subject of a litigated finding in an action brought by Z-Tel at the Illinois Commerce Commission. The Illinois Commerce Commission found that "Ameritech has unreasonably impaired the speed, quality, or efficiency of services used by Z-Tel through the provisioning of late and inaccurate" line loss notifications, and that these actions "have had an adverse effect on the ability of Z-Tel to provide service to its customers."

Although the Illinois Commerce Commission has lifted its order for emergency relief, based on SBC's plan to fix its systems, the possibility that these problems may recur warrants this Commission's serious attention. The Michigan CLECs allege in this proceeding that they have continued to encounter problems with line loss notification virtually until the present moment. **SBC has made progress in this area, but it has not established a suitable level of performance. To do so, SBC must introduce further evidence sufficient to show that it is currently capable of providing effective wholesale support in this area.**

See Evaluation of The United States Department of Justice, Section IV(A) In the Matter of Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Michigan, FCC WC Docket No. 03-16 (February 26, 2003) (emphasis added).

The Department of Justice's findings, issued after evidence was taken in this Phase, support the *Proposed Order's* request that Staff supplement the commitments made in the company's Line Loss Plan with Staff's proposed commitments that are not incorporated in the company's plan. Moreover, as the *Phase II Proposed Order* correctly notes, CLECs have experienced defective line loss notifications as recently as March of this year. Phase II Proposed Order, ¶1313.

Therefore, Staff respectfully requests that the following additional line loss commitments by the company be included in the order.

Consistent with the above, the Staff recommends that the *Phase II Proposed Order* be amended as follows, at paragraph 1314:

So too, although not required for 271 compliance, we note favorably, that the Company has committed to a line loss improvement program which should result in continued overall improvements to this process and we make clear that, unless otherwise directed, the Company will provide bi-monthly updates to the Commission outlining its activity and its progress in implementing the Line Loss Improvement Plan of record as finalized by the Michigan Commission. Our Staff will monitor and keep us informed of the situation. It is on the basis of our total account of the matter that we find the Company's line loss notification procedures together with SBC's implementation of the additional commitments proposed by Staff to comply with section 271 requirements.

~~NOTE: Staff should explain in its exceptions, if and how its outstanding Phase I compliance recommendations for LNN remain viable (both in relationship to the Michigan Plan and to the Sec. 271 Performance Plan discussed below).~~

We are of the view, and find, that notwithstanding the company's efforts in this regard, the problem of defective line loss notification persists. We further find that implementation of the Staff's proposed measures to remedy and monitor this problem is, in addition to the company's proposed Line Loss Plan, both necessary and appropriate. Accordingly, we require the company to make the following commitments:

a) SBC will make line loss performance measure MI 13, a remedied performance measure. If tiers are applicable to the performance remedy plan then the measure will have a medium weight for both tier 1 and tier 2 payments or comparable remedy level;

b) SBC will implement all changes to performance measures MI 13 and MI 13.1 agreed upon in the last performance measurement six month review session including the clarification that all line loss notices generated due to SBC Illinois winback scenarios are included in the MI 13 and MI 13.1 performance measurements;

c) SBC is to file revised tariff pages with the Commission for the changes it will make to performance measure MI 13 and MI 13.1 based upon this Order and the company's commitments in this order such that the effective date of the tariff coincides with the implementation date of the performance measurement changes;

d) SBC Illinois is to closely monitor the line loss notifications it provides to CLECs until SBC Illinois provides six months of line loss

notifications without any new problems being uncovered and without any of the existing or prior problems from re-emerging.

Excep. No. 3: Timing Of Tariffing of Rates Determined To Be Reasonable

Paragraph 865 of the Phase II Proposed Order provides that:

With respect to pricing, the Commission is also satisfied that SBC Illinois' and Staff's proposals and conclusions are reasonable on the issues that have been agreed upon. SBC Illinois is hereby directed to file the rate changes it has proposed, to the extent that such tariffs have not been filed already.

The Staff concurs in this finding. However, it seems proper to require SBC to file such tariffs – which are, after all, required by law – by a date certain. The Staff is of the opinion that 45 days is more than sufficient.

Accordingly, the Staff recommends that Paragraph 865 be amended as follows:

With respect to pricing, the Commission is also satisfied that SBC Illinois' and Staff's proposals and conclusions are reasonable on the issues that have been agreed upon. SBC Illinois is hereby directed to file the rate changes it has proposed, to the extent that such tariffs have not been filed already, within 45 days of entry of this order.

Excep. No. 4: UNE Sub-Loops And Dark Fiber Mileage Pricing Issues

Paragraphs 866 and 867 of the Phase II Proposed Order state that:

866. The one pricing issue that remains in dispute between SBC Illinois and Staff involve line connection charges for UNE sub-loops and dark fiber mileage. Having reviewed the evidence on this matter, the Commission is of the opinion that Staff has taken too narrow an approach in evaluating these rates under a zone of reasonableness test. It was never our intention to require that SBC Illinois' rates be lower than those of every comparable company. As such, and in our view, SBC Illinois has demonstrated, successfully, that the proposed and/or effective rates are reasonable in relation to those of one or more companies that might appropriately be compared to SBC Illinois.

867. In addition, given the background information SBC Illinois has provided with respect to the process used in Michigan to set line connection rates for UNE sub-loops, the Commission sees there to be a legitimate and open question as to whether this approach is [sic] valid in terms of Illinois (unless and until shown to be justified in an appropriate cost proceeding where the issues here raised would be addressed on a complete factual record). At the moment, these underlying issues would skew the analysis. In the sum of our review, and final analysis, the Commission finds that SBC Illinois' proposed line connection charges for UNE sub-loops and its existing dark fiber mileage rates are reasonable for purposes of this proceeding and compliant with the FCC's standards for interim rates.

Phase II Proposed Order, ¶¶ 866-867

These conclusions are erroneous. First, Staff has not, in any sense, taken too narrow of an approach in its evaluation of SBC Illinois' zone of reasonableness for UNE sub-loops, line connection charges and dark fiber mileage. Staff identified a state – Michigan – in which approved TELRIC based rates were considerably lower than those in Illinois. SBC Illinois line connection rates are between 906% and 1,080% higher than in Michigan; SBC Illinois dark fiber mileage rates are 1,385% higher than in Michigan. As Michigan is a former Ameritech state with a UNE pricing structure that closely matches that of Illinois, Michigan rates provide a better basis for comparison than Texas or California rates. Further, SBC presented the rates for these various elements in Michigan as part of its zone of reasonableness analysis. It was not until Staff identified the mismatch between Illinois and Michigan rates for these elements that SBC attempted to argue that they are not appropriate.

Second, the standard established by the last sentence of paragraph 868 for the evaluation of zone of reasonableness is inherently flawed. The last sentence of the paragraph concludes that SBC Illinois has shown that “...rates are reasonable in relation to those of one or more companies that might appropriately be compared to

SBC Illinois.” Phase II Proposed Order, ¶866 (emphasis added). By incorporation of this term, the standard has been lowered to the point where it is virtually meaningless. Under the *Phase II Proposed Order* standard, it only needs to be shown that there is a company with a rate roughly comparable to that of SBC Illinois. Nowhere in this standard is there reference to the notion that the proxy company’s rates might be based on very different cost characteristics or rate design. Indeed, nowhere in this standard is there mention that the comparable rate must even be TELRIC compliant.

Further, the standard is watered down by the qualification that the analysis only be performed for a company that “might appropriately be compared to SBC Illinois.” By using the word “might”, the Proposed Order is indicating that it isn’t entirely necessary for the analysis to be performed with a comparable company. By applying such a meager standard, the zone of reasonableness analysis provides no assurance that interim rates are reasonable even on an interim basis.

In addition, the *Phase II Proposed Order’s* characterization of certain information provided by SBC Illinois regarding Michigan line connection rates in Paragraph 867 is simply inaccurate, verging on egregious. Paragraph 867, as written, appears to concur with SBC Illinois’ that the Michigan line connection rates may have been set inappropriately, with respect to Illinois. The *Phase II Proposed Order* makes no similar inquiry into the California rates that it seeks to use for purposes of the “zone of reasonableness” analysis. In doing so, of course, it ignores the fact that both Illinois and Michigan are – unlike California – former Ameritech states with similar cost structures, and presumably with rates set using similar models and inputs. Staff points out the fact that the Illinois rates are significantly higher than that of a comparable state,

whose rates have been determined to be TELRIC compliant. By dismissing the evidence presented by Staff, the *Phase II Proposed Order* is ignoring the fact that there are potential flaws in the Illinois rates.

Staff proposes changes to Paragraphs 866 and 867 in order to establish a more reasonable standard for the zone of reasonableness test. In effect, the revised language allows for vast differences in rates between comparable states to be a basis of evaluation. In doing so, the vast differences in line connection and dark fiber mileage rates between Illinois and Michigan are taken into account. The proposed language is as follows, beginning at Paragraph 866:

866. The one pricing issue that remains in dispute between SBC Illinois and Staff involve line connection charges for UNE sub-loops and dark fiber mileage. Having reviewed the evidence on this matter, the Commission is of the opinion that ~~Staff has taken too narrow an approach in evaluating these rates~~ fail under a zone of reasonableness test. It was never our intention to require that SBC Illinois' rates be lower than those of every comparable company. ~~However As such, and in our view, SBC Illinois Staff~~ has demonstrated, successfully, that the ~~proposed and/or effective interim rates in question~~ are not reasonable in relation to those of ~~one or more companies that might appropriately be compared to SBC Illinois the company whose rate design is most similar to that of SBC Illinois.~~

867. In addition, ~~given~~ the background information SBC Illinois has provided with to respect the process used in Michigan to set line connection rates for UNE sub-loops is immaterial to the question at hand. ~~the Commission sees there to be a legitimate and open question as to whether this approach as valid in terms of Illinois (unless and until shown to be justified in an appropriate cost proceeding where the issues here raised would be addressed on a complete factual record). At the moment, these~~ The underlying issues SBC has with its Michigan rates are not germane with respect to a zone of reasonableness analysis would skew the analysis. The Michigan PUC has spoken on the issue, and has set rates that it feels are TELRIC compliant. In comparing the two states, the fact that the rates have been determined to be TELROC compliant is all that is important. In the sum of our review, and final analysis, the Commission finds that SBC Illinois' proposed line connection charges for UNE sub-loops and its existing dark fiber mileage rates are not reasonable

for purposes of this proceeding and noncompliant with the FCC's standards for interim rates.

Excep. No. 5: Line Splitting And End User Service Disruption

Paragraph 968 of the Commission's *Phase I Interim Order* provides that:

Our concerns with respect to the satisfaction of Checklist Item 4 are centered on certain line splitting matters discussed above and on the compliance tariff for Dockets 00-0393 and 01-0164. We expect the company to address these concerns to our satisfaction in Phase II together with a showing on resolution of the "hot cuts" issue.

Phase I Interim Order, ¶968

The Commission's requirement of full compliance with its Docket No. 01-0614 Order (as a condition for endorsement of SBC's Section 271 application) is made even more explicit in Paragraph 950 of the *Phase I Interim Order*:

To the extent that the Compliance tariff for Docket 01-0164 meets with our Order, and there is no showing to the contrary, the Company will be found to satisfy this state law requirement, leading in part, to a favorable recommendation on Checklist Item 4. In other words, we await confirmation of the correctness of the compliance tariff for Docket 01-0614 in Phase II.

Phase I Interim Order, ¶950

Staff has demonstrated that compliance with the Commission's Docket No. 01-0614 Order requires that SBC Illinois' tariffs:

- a) permit appropriate cross connects between any UNE-P combination and the facilities of any collocated carrier;
- b) provide for the use by CLECs (for line splitting purposes) of existing SBC splitters; and
- c) provide for the most efficient processes and mechanisms feasible (consistent with safety and reliability considerations) in order to minimize any technically unavoidable service disruptions in CLEC line splitting arrangements.

Staff Ex. 28.0, ¶¶27 - 31

SBC has complied with Docket No. 01-0614 requirements (a) and (b) above. However, with respect to item (c), SBC Illinois has not demonstrated that its tariff provides for “the most efficient processes and mechanisms feasible (consistent with safety and reliability considerations) in order to minimize any technically unavoidable service disruptions in CLEC line splitting arrangements. “

Consistent with the Commission’s directives as set forth in its *Phase I Interim Order*, Staff recommended that the Commission decline to endorse SBC Illinois’ Section 271 application unless the Company demonstrates that this requirement has been met.

The *Phase II Proposed Order* contains the following determination with respect to the issue of “no service disruption” in line splitting arrangements:

With respect to the third issue, not only do we find that Staff’s proposal is not properly a Phase I compliance issue, but also conclude that it is not a requirement of our Order in Docket 01-0614.

Phase II Proposed Order, ¶1705

The *Phase II Proposed Order* errs in both conclusions. First, the Commission itself determined that this state law requirement is indeed a Phase I Compliance issue.

As the Commission’s Phase I Interim Order clearly stated:

To the extent that the Compliance tariff for Docket 01-0164 meets with our Order...the Company will be found to satisfy this state law requirement, leading in part, to a favorable recommendation on Checklist Item 4...we await confirmation of the correctness of the compliance tariff for Docket 01-0614 in Phase II.

Phase I Interim Order, ¶950

In other words, the *Phase II Proposed Order’s* finding is directly contrary to the Commission’s own determination in Phase I. Moreover, even if this issue is considered as a state law requirement in the category of public interest issues, the Commission

made clear that SBC must demonstrate full compliance with the Docket No. 01-0614 Order.

The *Phase II Proposed Order* likewise errs in concluding that the Commission's Docket No. 01-0614 Order does not require minimization of "...service disruptions in CLEC line splitting arrangements". This error appears to stem from a fundamental misreading of the Commission's Docket 01-0614 Order. The *Phase II Proposed Order's* rejection of Staff's position hinges on the following single piece of "evidence" submitted by SBC Illinois:

SBCI refers us to the last three sentences of paragraph 556 of the Order in Docket 01-0614 state that the requirement to provision a network element platform without any disruption to an end user's service applies in the case of the UNE-P and EEL sections of SBC Illinois' tariff. It does not, as Staff would contend, have anything to do with SBC Illinois' provision of the UNEs necessary to support line splitting. For these reasons, we agree with SBC Illinois that there is no requirement for it to make the demonstration proposed by Staff and we further find that there are no unresolved Phase I compliance issues in this area. [Emphasis added]

Phase II Proposed Order, ¶1705.

The *Phase II Proposed Order* accepts SBC Illinois' contention that these three sentences actually stand for the proposition that the Commission's "no disruption" requirement applies only to UNE- P and EELs, and does not encompass line splitting. This is demonstrably false.

First, it is instructive to read that paragraph more fully to appreciate the context, rather than rely on SBC Illinois' overly selective attention to only the last three sentences:

...we find Staff's proposed tariff language relating to provisioning intervals under Section 13-801(d)(6) to be the only language consistent with the full intent of the legislature by incorporating the legislature's term "network element platform." However, Staff's proposal needs to be modified because Staff's language only appears in the UNE-P section of

Ameritech's tariff, and could be construed to only apply to UNE-P. **Such a construction would be improper because the statutory provisioning interval also applies to as is conversions of EELs, point-to-point circuits, and UNE-P with line splitting.** Thus, Staff's proposed language should also be included in the EELs section of the tariff. We also note that the final line of the first paragraph of Section 13- 801(d)(6) provides that "[t]he incumbent local exchange carrier shall provide the requested network element platform without any disruption to the end user's services." **We have already discussed the necessity of provisioning the network elements platform without any disruption to the end user in connection with our discussion of line splitting, and do not repeat that discussion here.** However, this requirement should be reflected in the tariff language for the UNE-P and EELs sections of Ameritech's tariff.

Order, Docket No. 01-0614, ¶556 (Emphasis added).

Thus, in addition to making clear that the “no disruption” requirement applies to UNE-P and EELs, the Commission refers to its previous Docket 01-0614 determinations concerning this requirement in connection with line splitting. The Commission could have meant nothing else when it noted that “the statutory provisioning interval also applies to as is conversions of EELs, point-to-point circuits, and **UNE-P with line splitting.**” Order, Docket No. 01-0614, ¶556 (Emphasis added). As will be seen, the Commission indeed determined that this requirement applies to line splitting arrangements.

The *Phase II Proposed Order* may have concluded otherwise due to a mistaken understanding that the “network elements platform” refers solely to the UNE-P. This may have been the case prior to enactment of Section 13-801 of the PUA, 220 ILCS 5/13-801, and issuance of the Commission’s Docket No. 01-0614 Order, implementing that statutory provision; however, it no longer is the case in Illinois. As the Commission determined in its Docket No. 01-0614 Order:

In our view, the description of the network elements platform in Section 13-801(d)(4) relegates the concept of unbundling in the platform context to the scrap heap of time.

[W]e further conclude that the legislature has rejected the Commission's previous definition of the "platform" as what has come to be known as the "UNE-P," which consists of an unbundled loop, switching functionality and shared transport. In our view, if the legislature had intended us to retain the status quo, it would have defined the platform as we have previously defined the UNE-P. The fact that it did not indicates to us its displeasure with the definition we previously adopted and the pace of competitive entry in the various markets for telephony that has resulted.

Order, Docket No. 01-0614, ¶¶75, 77

The Commission's Order then makes clear that line spitting arrangements are indeed to be considered platforms:

[W]e conclude that the network platform, as defined by the legislature in the new enactments, contemplates Ameritech's provision of splitters and the line splitting arrangement as contemplated by the Joint CLECs.

Order, Docket No. 01-0614, ¶83.

If even the slightest ambiguity remains concerning whether line splitting arrangements are subject to the Commission's "no disruption" requirement, it is removed by the Commission's further explication of the matter in the Docket No. 01-0614 Order:

[T]he network elements platform must be transferred, if so requested, with all current end user features in place, and without any disruption to the end user's services...[.] ...[A] requesting telecommunications carrier that seeks to provide the customer the same feature as the customer was receiving must be entitled to the use of an existing splitter if the end user's features are to remain intact. This is especially so given the legislature's requirement that the requesting carrier be provided the platform "without any disruption to the end user's services.

Order, Docket No. 01-0614, ¶80.

In summary, SBC Illinois now must file tariff revisions enabling line splitting without disruption to the end user's services. As the Commission itself has determined,

failure to do so to its satisfaction would result in a negative Commission recommendation concerning SBC Illinois' Section 271 application. The *Phase II Proposed Order* errs, and must be amended.

Consistent with the arguments set forth above, the Staff recommends the following amendments to the *Phase II Proposed Order*, at Paragraphs 1697 and 1704:

~~1697. Based on the record, we find that SBC Illinois has not made all of the requisite showings as directed by the Phase I Order. We are particularly persuaded by the fact that SBC Illinois uses the same line sharing/line splitting processes used in California which were reviewed by the FCC in the California 271 Application and found to comply with Section 271 requirements.~~

~~1704. As an initial matter, we agree with SBC Illinois that the three issues at hand, as set out by Staff, are not properly Phase I compliance issues at all. We note that Staff did not raise any of these issues in its Phase I briefs and, accordingly, none of these issues were flowed into the Phase I Order as compliance issues for SBC Illinois to address. Nonetheless, we are made to understand that SBC Illinois has demonstrated compliance with the first two Staff proposals, such that those issues are satisfactory closed.~~

~~1705. With respect to the third issue line splitting, not only do we find that Staff's proposal is not properly a Phase I compliance issue, but and also conclude that it is not assuredly a requirement of our Order in Docket 01-0614. While SBCI refers us to the last three sentences of paragraph 556 of the Order in Docket 01-0614, which state that the requirement to provision a network element platform without any disruption to an end user's service applies in the case of the UNE-P and EEL sections of SBC Illinois' tariff, SBCI's argument is wholly disingenuous. It does not, as Staff would contend, have anything to do with SBC Illinois' provision of the UNEs necessary to support line splitting. For these reasons, we agree with SBC Illinois that there is no requirement for it to make the demonstration proposed by Staff and we further find that there are no unresolved Phase I compliance issues in this area. We note that it is clear from both Section 13-801 of the Public Utilities Act, and our Order in Docket No. 01-0614, that "the network platform, as defined by the legislature in the new enactments, contemplates Ameritech's provision of splitters and the line splitting arrangement[.]" Order, Docket No. 01-0614, ¶183. It is further evident that "the network elements platform must be transferred, if so requested, with all current end user features in place, and without any disruption to the end user's service[.]" Id., ¶180. Accordingly,~~

we find that SBC Illinois has failed to comply with our Phase I Interim Order in this respect.

~~1706. We agree with SBC Illinois that there is no present legal obligation for it to provide two distinct arrangements – line sharing and line splitting – in parity with one another. Staff points to no authority for its position. That was not ever an issue in the 01-0614 Docket, such that our Order in that docket provides no support for Staff’s argument. To the extent Staff hinges its argument on a general nondiscrimination theory, this is neither the right place nor the right time to impose what would, by all accounts, be a new obligation on the Company. As we established, early on and many times over, in the Phase I proceeding, Ithis is not an occasion to have the Commission entertain novel issues or to impose new obligations. Rather, it is a proceeding to assess access the Company’s compliance with existing FCC obligations. Further, the Company has persuaded us that there are significant operational differences between line sharing and line splitting which would prevent us from imposing the type of parity obligations Staff desires.~~

1707. For this ~~these~~ reasons, we decline to require anything further of the Company on this issue. Nonetheless, we note in the section above that the Company has proposed tariff language that would establish some degree of comparability between the Company’s provisioning of the UNEs necessary to support a line splitting arrangement on the one hand, and the Company’s provisioning of HPFL necessary to share a line sharing arrangement, on the other hand. Whereas this proposal is not mandated in order to establish the Company’s compliance with Checklist Item 4, we see the benefit in the Company’s proposal and we hereby direct the Company to file this tariff modification within 30 days of the date of this Order, to be effective on one day’s notice.

III. EXCEPTIONS RELATED TO SBC ILLINOIS’ OPERATIONAL SUPPORT SYSTEMS

Excep. No. 6: Billing – The BearingPoint Review And Other Billing Concerns

Paragraph 1320 of the Phase II Proposed Order provides that:

The Commission notes, at the outset, that all aspects of SBC Illinois’ billing systems were thoroughly reviewed by BearingPoint and virtually all of the billing tests have been resolved satisfactorily. Given that the BearingPoint Master Test Plan was adopted by this very Commission, with input from Staff and the CLECs, and that the BearingPoint test process was heavily monitored by those same parties, the Commission undoubtedly and reasonably attached a substantial weight to the positive overall BearingPoint results. These results, in our view, support a positive overall Section 271 conclusion with respect to Billing. Other evidence and

concerns appear of record, however, and must be considered by the Commission in determining whether further improvement need to be made in these premises.

Phase II Proposed Order, ¶1320.

This paragraph of the *Proposed Order* contains some grave misstatements that must be corrected and most likely will impact other aspects of the Commission's analysis and conclusion paragraphs.

First, the initial conclusion of the paragraph, which states that all aspects of SBC Illinois' billing systems were thoroughly reviewed by BearingPoint, is incorrect. As stated in Ms. Weber's testimony, and as summarized in the Proposed Order at paragraph 1123, not all aspects of SBC Illinois' billing systems were reviewed by BearingPoint.

The Staff notes that the fact that BearingPoint's test have not revealed a deficiency with SBC Illinois' OSS does not mean that the OSS is free of problems, deficiencies, or other impediments to proper functioning. BearingPoint's review of each evaluation criteria was conducted during defined time periods and the scope of BearingPoint's evaluation did not cover all aspects of SBC Illinois' OSS or all business processes that support its OSS.⁴

Phase II Proposed Order, ¶1123.

The footnote to this paragraph provides as follow:

For example as BearingPoint responded during the February 5, 2003 hearing it did not perform any volume or functional testing on the LSOG5 version of the Company's EDI or CORBA application to application interfaces nor did it perform any actual tests of the Company's bill reconciliation process (BearingPoint response to Staff hearing questions BE/Staff 7, 8).

Phase II Proposed Order, ¶1123, footnote 107.

⁴ For example as BearingPoint responded during the February 5, 2003 hearing it did not perform any volume or functional testing on the LSOG5 version of the Company's EDI or CORBA application to application interfaces nor did it perform any actual tests of the Company's bill reconciliation process (BearingPoint response to Staff hearing questions BE/Staff 7, 8).

In addition to the bill reconciliation process, as noted in the footnote, the following additional billing processes also were not tested, as revealed by BearingPoint's responses to Staff's hearing questions (Transcript at 2355-2356);

- (1) the timeliness of DUF records return process,
- (2) the timeliness of the DUF return status mechanism,
- (3) the prioritization of calls for billing support,
- (4) the completeness and accuracy of debit and credit adjustments , and
- (5) the completeness and accuracy of late charges

Also, it is generally known that the BearingPoint billing tests were not considered to be blind (SBC knew the identify of the test CLEC while the tests were conducted). In addition, the billing tests were conducted on clean customer accounts and the billing CLEC had a single interconnection agreement that had no amendments or rate changes throughout the course of the test. In other words, the tests that were conducted by Bearing Point represented the simplest possible fact situation, a new customer account and a single, un-amended CLEC interconnection agreement.

These facts clearly prove that the initial conclusion stated in paragraph 1320 of the proposed order, that all aspects of SBC Illinois' billing systems were thoroughly reviewed by BearingPoint, is false. Further this point should not and can not be the evidentiary support for the Commission's finding with respect to the sufficiency of all SBC Illinois billing functions as they apply to checklist item (ii).

With respect to SBC's billing OSS, the *Proposed Order* itself correctly notes that the evidence in the record of this proceeding indicates that billing errors and other problems have occurred and persist. Paragraphs 1321-1333 of the *Proposed Order*

discuss the Commission's analysis and conclusions for various aspects of SBC Illinois' billing OSS as raised by the parties. The *Proposed Order's* analysis and conclusion for almost all of the additional billing aspects raised by the parties finds that issues and problems persist and generally note the concern of the Commission with respect to these problems. In almost every one of the 12 paragraphs that discuss the other billing issues raised, the Commission has noted that problems exist and has required remedial actions of SBC. Notwithstanding the evidence of persistent errors and problems in various billing aspects of SBC's OSS, the *Proposed Order* fails to give sufficient weight to these issues.

Further, in the April 16, 2003 statement of FCC Chairman Michael Powell on the withdrawal of SBC's 271 application for Michigan, Mr Powell stated that outstanding issues prevented the FCC's approval. He specifically mentioned that one of the items preventing approval relates to billing and the determination of whether SBC is currently providing wholesale billing functions for competitive LECs in a manner that meets the requirements of the existing proceeding. While the factual records in the FCC MI 271 proceeding and this proceeding are not identical, they are similar, and as noted by the *Proposed Order*, the company's Line Loss Plan, is the same plan, as the one finalized by the Michigan Commission. Consequently, this finding by the FCC is directly applicable to the issues being discussed in Illinois and should be noted and considered in this proceeding.

Given that the Commission can no longer base checklist compliance for OSS billing upon the fact that BearingPoint tested "all" billing functionality, that the Commission as presented in the proposed order has found great concern with the

multitude of billing issues raised in this proceeding, that the Commission has required various remedial actions and demonstrations of the Company with respect to billing issues, and the FCC's statements that billing issues remain in the FCC MI 271 proceeding and are a barrier to granting Section 271 approval, Staff believes that this Commission has no other reasonable option but to find SBC Illinois not in compliance with Section 271 for checklist item (ii) as it relates to billing OSS functionality. Accordingly, Staff requests that paragraph 1320 be replaced as follows.

~~The Commission notes, at the outset, that all only certain aspects of SBC Illinois' billing systems were thoroughly reviewed by BearingPoint and that these billing tests have been completed and have shown positive results. and virtually all of the billing tests have been resolved satisfactorily. Given that the BearingPoint Master Test Plan was adopted by this very Commission, with input from Staff and the CLECs, and that the BearingPoint test process was heavily monitored by those same parties, While the Commission undoubtedly and reasonably attached a substantial weight to the positive overall BearingPoint results they are not the only aspect of the issue to be given weight in the Commission's decision. The parties have raised many serious billing issues in this proceeding and the Company has not provided sufficient evidence that these issues, many of which the Company admits exist, have been resolved or addressed. Therefore, this Commission cannot These results, in our view, support a positive overall Section 271 conclusion with respect to Billing OSS functionality or for checklist (ii). Other evidence and concerns appear of record, however, and must be considered by the Commission in determining whether further improvement need to be made in these premises.~~

Likewise, paragraph 1326 and 1333 need to be modified to reflect the that the *Proposed Order's* finding that the company has not adequately demonstrated that the issues with its billing OSS that have been found to exist have been cared for. The company must address the billing deficiencies revealed in this proceeding prior to this Commission being able to find that SBC Illinois currently provides wholesale billing functions in a non-discriminatory manner.

Paragraph 1326 should be modified as follows.

With respect to the other billing accuracy issues raised by the CLECs, the Commission ~~fails to find~~ there are any Section 271 compliance problems. Billing issues associated with the Line Loss Notices should be resolved, given the extensive progress made on line loss notices as developed on record and what we perceive as the Company's resolve to see this through. However, other billing issues remain which are of concern to this Commission and as specified in this order which the Company must address and demonstrate that the issues no longer exist before this Commission is able to provide a positive section 271 recommendation with respect to SBC Illinois billing OSS or checklist item (ii) ~~The remaining billing issues, largely raised by TDS, would appear to be isolated instances. Many, we are told, resulted from one-time conversion projects and many others do not even appear to have affected CLECs in Illinois. As, and even more importantly, we see that most of the billing situations TDS complains of occurred in the past and have been resolved. Overall, we find no current compliance issues that needs to be addressed.~~

In addition, for the reasons stated above, Paragraph 1333 must also be modified as follows:

~~With these is additional road maps for demonstrating compliance effort and reporting commitments by the Company, the Commission believes that the Company will soon be able to satisfy the billing deficiencies noted. the CLECs concerns will be satisfied. However, at this time it further leaves the Commission unable to find that, on the totality of the facts and circumstances, SBC Illinois is benefit of Section 271 approval on this function.~~

Excep. No. 7: Overview and Account of Staff's Recommendations

Staff's position remains that SBC Illinois should have to provide independent third party verification that the areas of its OSS found to be not satisfied by BearingPoint have indeed been satisfied prior to the Commission providing a positive Section 271 recommendation to the FCC. In addition the billing concerns noted in the order must be address prior to positive approval, therefore given the analysis and conclusions

regarding OSS in the *Proposed Order* the following paragraphs must be modified to reflect this decision of the Commission.

Paragraph 1345 should be modified as follows.

In quick review, we see that ~~all~~many of the applicable OSS test criteria either have passed the BearingPoint testing process or are being aggressively pursued. However, our assessment of the company's commercial performance shows deficiencies and its billing OSS requires further improvements. appropriate and responsible response. Taken collectively, i.e., the OSS testing results, ~~and commercial data in Illinois, and the current OSS billing deficiencies taken together with the Company's commitment to the completion of testing and the implementaionimplementation of improvement plans,~~ clearly do not support a favorable recommendation to the FCC.

Paragraph 1346 also requires modifications.

The evidence further shows that many of the allegations set out by the CLECs ~~were and are quickly~~ have not all been resolved on a business-to-business basis between the parties. This showing is highly important. ~~Given the complexity of the systems, there will inevitably always be some operational issues that the parties will need to work out.~~ The remedial actions already soon to be undertaken by the Company serve to demonstrate its continuing commitment to providing nondiscriminatory access to OSS. However, at this time, and give this Commission does not have confidence in all aspects of the company's OSS its final assessment. ~~In that final analysis, in order for it we are strongly moving to provide a finding of checklist item 2 compliance.~~

Excep. No. 8: Other Clarifications

Staff notes that, in several cases, the Phase II *Proposed Order* requires that some clarification be made to certain commitments of the company. The Staff requests that these clarifications be incorporated in the *Proposed Order* so as to more clearly state the specific commitments being requested of the company. The requested clarifications are as follows:

Paragraph 1328 of the *Phase II Proposed Order* should be modified as follows to require that the frequency of SBC's reporting should be the same as ultimately determined in Michigan.

That said, on the whole of the record before us, the Commission believes that the **Bill Auditability and Dispute Resolution Plan** on record (and that is being implemented in Michigan) is likely to be of benefit to Illinois CLECs. Therefore, the Commission accepts SBC Illinois' commitment to implement the same improvements in Illinois and to file the same progress reports here that are to be filed in Michigan and at the same frequency. (Emphasis in original).

Further Paragraph 1332 should be clarified to specify the amount of time the company has to meet the commitments provided.

As already indicated, SBC Illinois will put into effect, for Illinois, the **Billing Auditability and Dispute Resolution Plan** of record in this proceeding in the manner finalized by the Michigan Commission. To the extent, however, that any CLEC in Illinois did not participate in the Michigan collaboratives on that Plan, SBC-Illinois will accept and further consider that CLEC's input and/or any of our Staff's proposals, on the need to expand the scope or detail of said Auditability Plan. Further, the Company will file a report to this Commission outlining the basis for rejecting or accepting any and all of those recommendations. In that report, it will identify specific dates and timelines for implementing any new corrective tasks. SBC is to seek input from parties within 30 days of the order and is to file the report outlining the basis for rejecting or accepting the parties' recommendations within 60 days. (Emphasis in original).

Staff notes, for the Commission's information only, that, subsequent to the issuance of the Proposed Order, SBC has satisfied BearingPoint evaluation criterion TVV1-4 and PPR13-4. The satisfaction of these criterion is not in the record of this proceeding and therefore Staff will not correct paragraph 1342 of the Proposed Order by referencing extraneous information, however, Staff notes that this correction is not necessary because the process and procedures that are in place will sufficiently address any and all such subsequent corrections.

III. EXCEPTIONS RELATED TO PERFORMANCE

Excep. No. 9: Checklist Item 4

A. Justification for FMOD Form A Recommendation (CLEC WI 6)

The Proposed Order indicates the shortfall in the Company's provision of FMOD Form A's, as measured by performance submeasure CLEC WI 6-02, is "not material to checklist compliance." Proposed Order at ¶ 1836. This finding is supported by two observations: that "SBC Illinois has demonstrated that it provides more than 97% of Form As to CLECs within the due date and "that only a small percentage of such orders require facilities modification." Proposed Order at ¶ 1836. Neither observation supports the conclusion that the Company's failure to meet performance standards for performance submeasure CLEC WI 6-02 are not material to checklist compliance.

The observation that SBC Illinois has demonstrated that it provides more than 97% of Form As to CLECs within due dates presumably relies on the statement made by SBC Illinois Witness Ehr that "...as a whole, and considering all product categories in the aggregate, SBC Illinois issued over 97 percent of Form As within the specified interval..." Phase II Surrebuttal Affidavit of James D. Ehr at ¶ 63. However, the Company has indicated that this measure was incorrectly calculated for October and November of 2002. *Id.* at ¶ 65. Therefore, the 97% figure is based on erroneous calculations.

Furthermore, the 97% figure is calculated across all product categories. The fact that the Company is able to return FMOD Form As on time for other product classes does not negate the fact that it has been unable to meet benchmarks with respect to Stand Alone DSL Loops. Based on the information submitted by the Company, the Company fails to meet benchmark standards in at least two of three months between

September and October of 2002 with respect to performance submeasure CLEC WI 6-02 and therefore passes less than 90% of submeasures with respect to measure CLEC WI 6. Thus, this measure fails the same “Staff’s general guidelines” that the Proposed Order rigidly applies with respect to PM 55. See Proposed Order at ¶ 1834. While Staff does not advocate a rigid application of its general guidelines, it further does not advocate an ad hoc and unjustified disregard for these guidelines. As noted in the Proposed Order, Dr. Zolnierek explained why, separate and apart from the fact that the Company has failed to meet the Staff’s general guidelines, that the Company’s performance failure with respect to performance submeasure CLEC WI 6-02 is material to checklist compliance. Proposed Order at ¶ 1727.

The Proposed Order dismisses the possibility that the Company’s performance failure is material because “...only a small percentage of such orders require facilities modification....” By definition, however, the FMOD process will be invoked in only a small percentage of cases. Thus, this fact is an insufficient reason to look past the Company’s FMOD performance. In fact, despite the fact that the FMOD process is invoked in only a small percentage of cases, the FMOD Form A response interval was an interval ordered by this Commission. See ICC Staff Ex. 32.0 at ¶ 39. Staff does not presume that the Commission ordered response intervals for a process that is invoked infrequently with the intent that they be ignored because the process is invoked in only a small percentage of cases.

According to the information submitted by the Company in this proceeding, the Company failed to meet benchmark performance for performance submeasure CLEC WI 6-02 for October and November of 2002. When this fact was identified by Staff, the

Company revised its calculation methodology to exclude virtually all observations formerly included in the calculation of the submeasure. SBC Illinois failed to thoroughly and completely explain why the PM C WI 6-02 measurements submitted in Attachments A and B to Mr. Ehr's initial affidavit were improperly calculated, failed to thoroughly and completely explain how the Company's revised calculation methodology corrects the October and November 2002 provisioning problems and more accurately comports with the Company's business rules, and has failed to provide recalculated September, October, and November 2002 performance data to demonstrate that recalculated C WI 6-02 PMs demonstrate that the Company is meeting the benchmark for this measure. The Commission should conclude that these deficiencies in the Company's filing are material to checklist compliance and must be remedied.

B. The Proposed Order's Statement of Staff's Position, Guidelines And Presentation Is In Error

The proposed order states as follows: "With respect to PMs 55, 56, and 62, the Commission disagrees with Staff that SBC Illinois' performance results evidence a shortfall in performance." Proposed Order at ¶ 1834. The Proposed Order errs in identifying PMs 56 and 62 as performance results that Staff identifies as evidencing a shortfall in performance. Based on September 2002 – November 2002 information for PMs 56 and 62, SBC Illinois' performance results evidenced a shortfall in performance. However, as noted by Dr. Zolnierek "the Company has passed all parity tests for these measures in both December 2002 and January 2003." ICC Staff Ex. 44.0 at 13. Thus, Staff did not, as the Proposed Order implies, recommend any remedial action with respect to PMs 56 and 62.

The Proposed Order also errs in determining that “...it would appear that SBC Illinois’ performance satisfied Staff’s general guideline...” Proposed Order at ¶ 1834. The Company failed to satisfy PM 55-01.3, one of only six submeasures containing data within PM 55, in one of two months for which activity occurred. Thus, according to the general guidelines explained by Staff Witness Staranczak, PM 55 fails Staff’s general guidelines. See ICC Staff Ex. 30.0 at ¶ 11. Furthermore, examining more recent information, the Company performance has worsened. For example, the Company failed to meet applicable standards for submeasures 55-01.1 and 55-01.3 in two of three months for the November 2002 – January 2003 period.

The Proposed Order also states that Staff did not present “...any evidence showing one-month disparities in performance to be significant.” Proposed Order at ¶ 1834. This statement is incorrect. Dr. Zolnierek identified large disparities in provisioning installation intervals, explained why the lax standard reflected in the calculation of PM 55 means that failures indicate very significant performance problems, and explained why any shortfall in provisioning of basic voice grade loops is significant, a point that that this Commission should conclude is self-evident. ICC Staff Ex. 32.0 at ¶¶ 81, 82, and 93.

The Company has failed PM 55 and its performance relative to the relevant standards has, according to the most recent data in evidence, worsened over time. It is essential, if competitors are to have the opportunity to compete for local telephone customers in Illinois using stand alone voice grade loops, that SBC Illinois’ performance in installing and servicing voice grade loops not impair or impede the ability of competitors to compete. The Commission should find the Company’s performance

shortfall in this area a significant performance disparity and take steps to ensure that it is corrected going forward.

C. Provisioning of DSL Loops with Linesharing

Despite the fact that PMs 59, 65, 65.1 66, and 67 indicate that the Company is systematically failing to meet applicable standards for maintenance and repair of DSL loops with linesharing and the further fact that the Company has found it necessary to take corrective action with respect to these measures, the Proposed Order finds that the failures with respect to these measures were “not material.” Proposed Order at ¶ 1835. The Proposed Order offers only two points in support of this finding: (1) that the Company has overall performed successfully and (2) that the Commission expects the Company to commit to correcting its performance within a reasonable time. Proposed Order at ¶ 1835. Therefore, the conclusion that the Company has overall performed successfully is based on an incorrect assessment of the evidence. Discounting further evidence of failure based on this assessment reflects a form of flawed circular reasoning. That is, the Proposed Order finds that individual problems are to be ignored because there are few overall problems and that there are few overall problems because the individual problems can be ignored. Furthermore, requiring the Company to commit to correcting these problems in a reasonable time is evidence that these are meaningful problems not that they are not meaningful problems.

The evidence in this proceeding indicates that the Company has a problem servicing and repairing its DSL loops with linesharing. The Company itself recognizes these problems and has taken steps to correct them. The Commission should ensure that these corrective steps are sufficient and that these problems are remedied in an expedient fashion.

D. The Proposed Order's Analysis Of Compliance With Checklist Item 4 Should Be Revised To Match The Evidence

In addition to the errors described above, the Proposed Orders analysis of SBC Illinois compliance with Checklist Item 4 is inconsistent with the evidence presented in this proceeding. Specifically, the Proposed Order is inconsistent with the detailed analysis conducted by Staff of the various loops offered by SBC Illinois. Accordingly, the Proposed Order's conclusions should be revised as indicated below.

E. Proposed Replacement Provisions

For the reasons stated above, the Staff recommends that the Proposed Order be amended as follows:

Overall Analysis of Checklist Item 4 Compliance

~~1838.1832. Although the The FCC has recognized that a shortfall in any particular measure will not, in and of itself, dictate a finding of non-compliance, the FCC's prior rulings do not suggest that individual performance deficiencies are to be disregarded. In this spirit, we take account of any disparity in performance in light of all of the surrounding facts and circumstances. This includes, but is not limited to, the length, breadth and depth of the disparity and the associated volume; factors outside the Company's control that caused or contributed to the shortcomings; as well as noting any signs as would indicate that the performance discrepancy is symptomatic of a greater problem or will lead to a graver situation. In other words, the Commission's assessment in these premises is based on all relevant factors that a prudent trier of fact would consider reasonable in the matter. We find, as explained in more detail below, that the record in this case establishes the existence of significant and material performance deficiencies that must be remedied before we would be prepared to give a positive consultation to the FCC on SBC Illinois' compliance with Checklist Item 4.~~

~~1839. On this basis, the Commission concludes that SBC Illinois' performance results demonstrate that it provides nondiscriminatory access to unbundled loops in accordance with the requirements of checklist item 4. Overall, the Commission notes, SBC Illinois passed 140 of the 151 unbundled local loop sub-measures in at least two of the three months (and, in most cases all~~

three months) of the study period. ~~See (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 100.)~~ The few disparities were generally minor and, we would observe, in many instances the volume of affected transactions was low. Further, we are told that SBC Illinois has already taken many steps to improve its performance, and those improvements will be verified through our adoption of SBC Illinois' proposal for the further monitoring of certain PMs.

~~1840. With respect to PMs 55, 56, and 62, the Commission disagrees with Staff that SBC Illinois' performance results evidence a shortfall in performance. For those categories that had sufficient volume in the three months, however, SBC Illinois met the applicable standard in at least two of the three months. Thus, it would appear that SBC Illinois' performance satisfied Staff's general guidelines, and neither Staff nor the CLECs presented any evidence showing the one-month disparities in performance to be significant. With respect to PM 62, the Commission accepts SBC Illinois' un rebutted explanation that the results for November 2002 did not reflect poor performance, but were caused by a single bookkeeping entry. This is a circumstance that needs be considered.~~

~~1841. Although SBC Illinois did not meet certain sub-measures in PMs 59, 65, 66, and 67 related to line sharing, the Commission notes that, when viewed in the overall context of successful performance, the differences were not material. It is important too, that SBC Illinois has taken several steps to address the pertinent performance issues. We expect that the Company will commit to correcting its performance and within a reasonable time. On the basis of such commitment and subject to the additional monitoring of these PMs as proposed by SBC Illinois, the performance issues noted by Staff do not affect SBC Illinois' overall showing of checklist compliance.~~

~~1842. Finally, the Commission notes Staff's concerns with respect to CLEC WI 6, which addresses SBC Illinois' provision of "Form As" where facilities modifications are required. As we see it, SBC Illinois demonstrated that it provides more than 97% of Form As to CLECs within the due date. Although Staff singles out SBC Illinois' performance with respect to standalone xDSL loop orders, when viewed in context and as a whole, the Commission notes that only a small percentage of such orders require facilities modification such that the shortfall in performance is not material to checklist compliance.~~

~~1843. We will have our Staff continue monitoring and checking for improvements with respect to all matters indicated above in the coming months, unless and until, otherwise directed. On the whole and including this direction, the Commission believes it reasonable to find and, here does find, that SBC Illinois satisfies the requirements of checklist item 4.~~

Unbundled Stand-Alone DSL Loops

1839. With respect to unbundled local loops – stand-alone DSL loops, the PM data submitted by the company indicates that it meets

benchmarks for installation timeliness, installation quality, and post installation maintenance and repair when installing stand-alone DSL loops.

1840. SBC Illinois is not, however, meeting FMOD process benchmarks including those measured by submeasure C WI 6 – 02, which addresses SBC Illinois’ provision of “Form As” where facilities modifications are required. As we see it, SBC Illinois has failed to thoroughly and completely explain why the PM C WI 6-02 measurements submitted in Attachments A and B to Mr. Ehr’s initial affidavit were improperly calculated, has failed to thoroughly and completely explain how the Company’s revised calculation methodology corrects the problem and more accurately comports with the Company’s business rules, and has failed to provide recalculated September, October, and November 2002 performance data to show that recalculated C WI 6-02 PMs demonstrate that the Company is meeting the benchmark for this measure.

1841. The Staff has recommended that we direct SBC Illinois to remedy this defect by requiring the Company to send FMOD Form A notifications on time. Moreover, avers the Staff, the Company should explain why this problem is occurring and demonstrate that proper steps have been taken to ensure that the problem is corrected on a going forward basis. The Staff recommends that these measures be implemented as a prerequisite to a positive consultation with the FCC regarding whether the Company is provisioning its stand-alone DSL loops in accordance with the requirements of Section 271(c)(2)(B)(iv).

1842. We concur with Staff’s analysis as supported by the record, and direct the Company to undertake these measures.

Unbundled DSL Loops With Linesharing

1843. With respect to unbundled local loops – DSL loops with linesharing, the PM data submitted by the company indicates that the Company meets parity criteria for installation timeliness when installing DSL loops with linesharing.

1844. Installation quality and repair and maintenance of installed DSL loops with linesharing, however, is not provided at parity as indicated by the fact that the company is not meeting parity criteria with respect to submeasures 59-03, 65-03, 65.1-03, 67-03, 67-18, and 66-03.

1845. The Staff recommends that, 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), we should require the company to provide DSL with linesharing loop quality and maintenance and repair service to CLECs that is at least as good as the loop quality and maintenance and repair

service the Company provides to it's affiliate. Further Staff recommends that the company explain why these problems are occurring and demonstrate that proper steps have been taken to ensure that these problems are corrected on a going forward basis.

1846. We concur, and direct the company to undertake these measures.

Unbundled Voice Grade Loops

1847. With respect to unbundled local loops – unbundled voice grade loops, the PM data submitted by the company indicates that the company is not always meeting parity criteria for installation timeliness when installing voice grade loops. For the three months ending in November of 2002, the company failed to meet parity criteria for PMs 55-01.1, 55-01.2, and 55-01.3 three out of the eight times parity criteria were evaluated. Furthermore, recent performance data indicate that the Company's performance problems with respect to measures 55-01.1, 55-01.2, and 55-01.3 have continued, with the Company failing parity tests with respect to measure 55-01.2 in December 2002 and failing parity tests with respect to measure 55-01.1 in January 2003.

1848. We address the Company's provisioning of unbundled voice grade loops, unbundled BRI loops, and unbundled DS1 loops requiring complex facilities modifications below under unbundled DS1 loops.

1849. The Staff recommends that, as a prerequisite to a positive consultation with the FCC regarding whether the company is provisioning its voice grade loop service in accordance with the requirements of Section 271(c)(2)(B)(iv), we should require the company to correct the voice grade loop provisioning problems identified above, in particular the disparity in average installation intervals and missed customer requested due dates. Moreover, the Staff recommends that the company should explain why these problem are occurring and demonstrate that proper steps have been taken to ensure that these problem are corrected and will not recur on a going forward basis.

1850. Again, we adopt the Staff's recommendation and direct the company to implement the measures described above.

Unbundled BRI (digital) Loops (Excluding BRI Loop Orders Requiring Complex Facilities Modifications)

1851. The evidence submitted in this proceeding shows that the Company is provisioning it's standard BRI Loop service in accordance with the requirements of Section 271(c)(2)(B)(iv) of the Telecommunications

Act of 1996 ("1996 Act"). We address the Company's provisioning of BRI loop orders requiring complex modification below..

Unbundled DS1 Loops

1852. With respect to unbundled DS1 loops, the PM data submitted by the company indicates that the Company is providing service at parity with respect to installation timeliness, installation quality, and repair and maintenance service.

1853. As noted above, Staff observed that the only anomaly in the information is the extremely large delays to CLEC customers resulting from Company caused missed due dates in November 2002. SBC Illinois witness Mr. Ehr explained that this problem resulted from problems with a single order which was delayed for about 230 days and agreed to research the problem with this order and explain the cause. As noted above, the Company has also experienced problems in connection with its provisioning of voice grade loops and BRI loops requiring complex facilities modifications.

1854. Staff observed in its final analysis that although the Company has missed a high percentage of FMOD due dates in the past year and has of late continued with respect to some sub-measures to miss a high percentage of due dates, the Company has not failed any parity tests for the most recent three months of performance measurement data. Thus, Staff modified its recommendation with respect to the Company's performance as measured by PM C WI 11. Specifically, Staff now recommends that the Commission find that the Company is meeting FMOD due dates for voice-grade loops, BRI loops, and DS1 loops in accordance with the requirements of Section 271(c)(2)(B)(iv). Although we are concerned with the Company's past provisioning difficulties, we concur with Staff that the Company's current provisioning of voice-grade loops, BRI loops, and DS1 loops requiring complex facilities modifications is in accordance with the requirements of Section 271(c)(2)(B)(iv).

Excep. No. 10: Checklist Item 4 – EEL Performance Measurement

In the Interim Order in the instant proceeding the Commission found as follows:

Staff would indicate that AI lacks provisioning intervals for UNE combinations. Performance issues, as such, were deferred to Phase 1 (B) and are premature for discussion here. Nevertheless, we see Ameritech to comment that its existing tariff contains standards and measures, including installation intervals for UNE combinations. Staff might examine Tariff No. 20, Part 2, Sec. 10, Sheets 101-140.1 to ascertain if it satisfies

Staff's concern. Ameritech further indicates that parties are supplementing measures in the current "six month review" but does not inform the Commission when this event is expected to conclude. We will need this information in order to make an informed final decision on this issue. The Proposed Order makes note of Staff's recommendation regarding the EEL Performance Measurement.

Interim Order at ¶ 751. Despite this statement by the Commission, the Proposed Order makes no final decision on this issue. Staff has presented undisputed testimony that the Company's EEL performance measurements are deficient and should be corrected. See Proposed Order at ¶ 809. Therefore, Staff recommends that appropriate ordering language be added to the Proposed Order.

For the reasons stated above, the Staff recommends that the Proposed Order be amended to add the following language after what is currently paragraph 868:

EEL Performance Measurement

869. It appears from the record in Phase II of this proceeding that SBC Illinois cannot supply enhanced extended loop ("EEL") provisioning information separately from stand-alone loop provisioning information. Accordingly, it is impossible to verify whether the company has measured provisioning of all EELs it has provided to CLECs, or to verify that the company has provided EELs in a manner that will not impair or impede CLEC's ability to use EELs to compete in Illinois.

870. SBC Illinois recently proposed tariff changes that will remedy this problem. It appears to us, however, that these changes are deficient. Because SBC Illinois' proposed EELs measurements do not account for its own EEL certification process, they do not effectively measure the company's performance in providing EELs.

871. The Staff proposes that, in order to ensure that SBC Illinois is effectively measuring its performance in providing EELs in Illinois, it must specifically account for its conversion certification process and any similar certification processes applied to new EELs in its performance measurement system. The Staff further recommends that SBC Illinois be required to explain in its rebuttal affidavits how it will address this problem so that Staff and Interveners can evaluate the company's proposed remedy and make an informed recommendation to the Commission.

872. The timely and effective provisioning of EELs is an important matter, and likely to become more so in the event that the Federal Communications Commission alters significantly an ILEC's obligation to provide unbundled local switching where EELs are available. As such, we share Staff's concerns and find merit in its recommendations. Accordingly, in order to receive a positive consultation from the Commission with respect to Checklist Item 4, SBC Illinois must add an additional diagnostic measurement that measures the duration of its certification process, that must be approved by Staff, to its performance measurements.

Excep. No. 11: Key PM – 37-4: The Proposed Order Fails to Account for Staff's Position

Staff takes exception with the Proposed Order's conclusion for PM37-4, as stated in paragraph 1353, since it failed to account for Staff's position.

Paragraph 1353 provides as follows:

The Commission would note that SBC Illinois' failure to meet a handful of sub-measures relating to business UNE-P with fieldwork orders is not significant overall. According to reasonable analysis standards, as guides the whole of our work, checklist compliance cannot be assessed simply and only by focusing on the few sub-measures that show a shortfall. Here, SBC Illinois' performance results show that it provides CLECs service that is better than parity for more than 99% of UNE-P service orders. Further, there is no useful purpose to simply point out or dwell on a performance shortfall, without also examining, in full, the extent or impact of the shortfall. A failing in and of itself tells nothing, it must be considered in light of all related and relevant facts and circumstances.

Staff disagrees with this conclusion, noting that UNE trouble reports are both significant and cover all UNE customers. Further Staff has considered all related facts and circumstances, and those facts demonstrate that significant failures persist. SBC Illinois performance on Submeasure 37-4 is significant because it means that UNE customers incur a statistically significant higher number of trouble reports (i.e., out of service, noise on the line) than customers served by SBC Illinois.

The track record for submeasure 37-4 indicates that it failed two of the three months reviewed, and the most recent information in this docket, based on data posted to SBC Illinois' website on or prior to March 4, 2003, indicates SBC Illinois' performance for submeasure 37-4 failed in December 2002. ICC Staff Exhibit 41.0 ¶¶69-70. Regardless of SBCI's promise to address the issue, a pattern of failures persist. SBCI is unable to provide this PM in general conformance with the standard. Furthermore, SBCI says the failures were immaterial since they were close. This only leaves us at the top of a slippery slope; either they meet the standard or they don't. Staff set its standards for reviewing PMs and if the facts demonstrate that SBCI has not met the standard, Staff urges this Commission to find non-compliance, regardless how close. Standards are set for a reason, and SBC Illinois has failed to meet those standards – repeatedly. Therefore, the Commission should amend its finding and find that SBCI fails to provide PM 37 in a non-discriminatory manner. Furthermore, since this submeasure is both significant to customer service and pertains to all UNE services, it is a significant Key PM Requiring Improvement (and included in Staff's Key PM Table).

Furthermore, it appears that the 99% passage rate relied upon in paragraph 1393 is misapplied, since the only 99% in the record for this PM relates to the volume of orders handled by three of the UNE-P categories.

Accordingly, Staff does not concur that the impact of PM 37-4 is insignificant overall, and believes the Commission should find that SBC Illinois does not provide PM 37-4 in a non-discriminatory manner. Further, the Commission should then also find that SBC Illinois has not yet adequately demonstrated that it meets Checklist Item 4. This supports Staff's position that the Commission should not provide a positive 271

recommendation to the Federal Communications Commission (“FCC”) with respect to Checklist Item 4. Therefore, Staff recommends adding and deleting the following language from paragraph 1353:

1353. The Commission would note that SBC Illinois’ failure to meet a handful of sub-measures relating to business UNE-P with fieldwork orders is ~~not~~ significant overall. According to reasonable analysis standards, as guides the whole of our work, checklist compliance cannot be assessed simply and only by focusing on the few sub-measures that show a shortfall. Here, SBC Illinois’ performance results show that it fails to provides CLECs service that is better than parity for better than two of three months, and the pattern continues beyond the three months reviewed in this proceeding more than 99% of UNE P service orders. Further, the Commission understands that UNE trouble report rate is very important, and impacts all UNE customers. ~~is no useful purpose to simply point out or dwell on a performance shortfall, without also examining, in full, the extent or impact of the shortfall. ThisA failureing in and of itself tells nothing, it must has been determinedbe considered in light of all related and relevant facts and circumstances. In addition, we find that SBCI fails to provide PM 37-4 in a non-discriminatory manner, which supports the finding that SBC Illinois has not yet adequately demonstrated that it meets Checklist Item 2.~~

If the Commission elects to provide a positive recommendation to the FCC, regardless of SBC Illinois’ failure to meet key PMs -- then the Commission should condition its approval on SBCI agreeing to (1) to identify the steps it will take to remedy the unsatisfactory performance for this PM and (2) require the Company to demonstrate substantially improved performance by November 2003 or face additional penalties. Therefore, in support of our alternative position, Staff recommends that the Commission find the failure to be material, and to add the following language to the end of paragraph 1353, as it is set forth above:

The Commission’s positive recommendation to the FCC will be conditioned on SBCI agreeing to (1) identify the steps it will take to remedy its current unsatisfactory performance on PM 37; (2) and demonstrate substantially improved performance on PM 37 by November 2003 or face additional penalties.

Excep. No. 12: Key PM – 7.1: The Proposed Order Is Unclear on Course of Action to Follow

Paragraph 1148 identifies the deficiency in SBCIs operations related to PM7.1, but it leaves unresolved the course of action required.

Paragraph 1148 states: “[I]t appears SBC Illinois is currently working to correct these deficiencies [related to PM 7.1] but, as one can see from the most available data on this matter (i.e., December 2002, January 2003), the company has not satisfied this deficiency.” Since the Commission has found SBCI to provide PM7.1 in a discriminatory manner, Staff recommends the Commission should find that SBC Illinois has not yet adequately demonstrated that it meets Checklist Item 2. Therefore, this supports Staff’s position that the Commission should not provide a positive 271 recommendation to the Federal Communications Commission (“FCC”). Therefore, Staff recommends adding and deleting language in paragraph 1344, and adding and deleting the following language to paragraph 1148:

1148. The Staff also reiterates that BearingPoint in its December 20, 2003 Report found that the company failed in its performance of PM 7.1 (evaluation criteria TVV1-28), with respect to the Test CLEC data and continues to fail as of today. It appears SBC Illinois is currently working to correct these deficiencies but, as one can see from the most available data on this matter (i.e., December 2002, January 2003), the company has not satisfied this deficiency. This failure has been determined in light of all related and relevant facts and circumstances, and accordingly this PM will be added to the list of Key PMs requiring Improvement provided in our overall conclusion.

Excep. No. 13: Key PMs – 10.1, 10.2 and 10.3: The Proposed Order Is Unclear on Course of Action to Follow

Paragraph 1151 identifies the deficiency in SBCIs operations related to PMs 10.1, 10.2 and 10.3, however, it leaves unresolved the course of action required.

Paragraph 1151 states, “The Staff is of the opinion that the company should be required to address these deficiencies, as CLECs require timely notification of errors on their orders in order to be able to provide efficient and timely service to their customers.”

Staff recommends the Commission should find that SBCI provides PM 7.1 in a discriminatory manner, and that this failure supports a finding that SBCI fails to meet Checklist Item 2. This supports Staff’s position that the Commission should not provide a positive 271 recommendation to the Federal Communications Commission (“FCC”). Therefore, Staff recommends adding and deleting language in paragraph 1344, and adding the following language to paragraph 1151:

1151. As Ms. Weber noted in her original affidavit PM 10.1, 10.2 and 10.3 all report on percent of reject messages returned within X hours from receipt of the order. 10.1 specifically captures mechanized rejects, PM 10.2 captures manual rejects received electronically and 10.3 reports manual rejects received manually. The company has failed to meet the 97% benchmark consistently for PM 10.2 and 10.3 and has problems off and on with 10.1. The Staff is of the opinion that the company should be required to address these deficiencies, as CLECs require timely notification of errors on their orders in order to be able to provide efficient and timely service to their customers. We agree with Staff since the Company has failed to meet 97% benchmark consistently for PM 10.2 and 10.3, and has frequent problems with 10.1. Thereby giving rise to our concern, and which we find needs to be improve. This failure has been determined in light of all related and relevant facts and circumstances, and accordingly this PM will be added to the list of Key PMs requiring Improvement provided in our overall conclusion.

Excep. No. 14: Key PM - 13: Proposed Order Omitted a Ruling on PM 13

The Proposed Order failed to expressly rule upon PM 13. Staff has provided sufficient facts and analysis on PM 13 to demonstrate that PM 13 demonstrates the company is providing service in a discriminatory manner. ICC Staff Ex. 31.0 at ¶15. Staff recommends the Commission should find that SBCI provides PM 13 in a discriminatory manner, and that this failure along with the other key performance measures supports a finding that SBCI fails to meet Checklist Item 2. This supports Staff's position that the Commission should not provide a positive 271 recommendation to the Federal Communications Commission ("FCC"). Therefore, Staff recommends adding Staff recommends adding and deleting language in paragraph 1344, and adding a new paragraph to the proposed order after paragraph 1311:

1312. Staff has presented sufficient evidence to show that SBCI does not provide PM 13 in a non-discriminatory manner. Staff's review of the company's PM data shows that it failed to achieve the 2 out of 3 month standard for 4 of the 6 disaggregations. Further in the review of data for December 2002 and January 2003 the company continued to fail to meet the standards for the 4 sub measures (UNE-P, Resale, LSNP and UNE Loops). Therefore, Staff asserts this is a key performance measure requiring improvement. As suggested by SBCI, looking at the company's performance in a related PM, 13.1 helps to provide information about the measure in question. Looking at PM 13.1, the companion performance measure to PM 13, 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. Thereby giving rise to our concern, and which we find needs to be improved. This failure has been determined in light of all related and relevant facts and circumstances, and accordingly this PM is being added to the list of Key PMs requiring Improvement provided in our overall conclusion.

Excep. No. 15: Key PM – 17: Proposed Order Is Unclear on Course of Action to Follow

Paragraph 1330 identifies the deficiency in SBCI's operations related to PM 17, however, it leaves unresolved the course of action required.

Paragraph 1330 states, “[a]s such, Staff recommends that we have SBC Illinois identify the steps that it will take to correct its unsatisfactory performance with respect to PM17 - billing timeliness, implement such plan and demonstrate substantially improved performance six months hence. This recommendation is reasonable in our view and we direct the Company to comply in all particulars.”

Accordingly, it is Staff's understanding that the ALJ concurs with Staff's recommendation. However, Staff recommends the Commission find that SBCI provides PM 17 in a discriminatory manner, and that this failure supports a finding that SBCI fails to meet Checklist Item 2. This supports Staff's position that the Commission should not provide a positive 271 recommendation to the Federal Communications Commission (“FCC”). Therefore, Staff recommends adding and deleting language in paragraph 1344 and adding the following language to paragraph 1330:

1330. For its part, Staff reports that SBC's performance measures with respect to billing are generally satisfactory. There is, however, one exception noted by Staff as significant, i.e., PM17 - timeliness. SBC consistently gives its affiliate more timely bills than it gives the CLECs. According to Staff, this appears to have been a persistent problem over the last year with not much improvement over that time period. As such, Staff recommends that we have SBC Illinois identify the steps that it will take to correct its unsatisfactory performance with respect to PM17 - billing timeliness, implement such plan and demonstrate substantially improved performance six months hence. This recommendation is reasonable in our view and we direct the Company to comply in all particulars. This failure has been determined in light of all related and relevant facts and circumstances, and accordingly this PM will be added to the list of Key PMs requiring Improvement provided in our overall conclusion.

Excep. No. 16: Key PM – MI-2: SBCI Fails to meet the Standard for PM MI-2

Staff takes exception to the Proposed Order’s conclusion for PM MI-2, as stated in paragraphs 1163 and 1344, since they contradict each other and overlook Staff’s position. At paragraph 1163, the Proposed Order states, “As of March 5, 2003, there was no information posted by SBC Illinois to the CLEC Online web site pertaining to SBC Illinois’ performance relative to PM MI 2. Accordingly, the Commission agrees with Staff that this PM continue to remain a “Key PM’s for Improvement.” In contradiction to paragraph 1163, paragraph 1344 states “PM MI-2, shows disparity that is not significant in relation to the substance of the measure.”

The Proposed Order does not state the manner in which the disparity was not significant. As Staff stated in response to SBC Illinois’ statement that PM MI 2 is being changed in the collaborative, SBC Illinois’ performance on PM MI 2 would not appear to be resolved by the simple adoption of a 5% benchmark, given that SBC Illinois would need to meet or exceed the standard for more than 95% of the occurrences.⁵ ICC Staff Affidavit 41.0, ¶74.

Consequently Staff recommends the Commission find that SBC Illinois does not provide PM MI-2 in a non-discriminatory manner. This failure, supports the overall argument for the Commission to find that SBC Illinois has not yet adequately demonstrated that it meets Checklist Item 2. Therefore, SBC Illinois should not be

⁵ There are three exclusions added to PM MI 2’s new business rule in Version 1.9. However, there is no evidence in this proceeding that those exclusions would drive the table’s percentages up to 95%. Further, as previously indicated, it remains Staff’s position that revisions to Version 1.8 of the business rule should not be addressed in this proceeding.

provided a positive 271 recommendation from the ICC to the Federal Communications Commission (“FCC”).

Therefore, Staff recommends adding and deleting language in paragraph 1344, as set forth in a section below, and in paragraph 1163, set forth immediately below:

1163. SBC Illinois’ performance on PM MI 2 would not appear to be resolved by the simple adoption of a benchmark, given that SBC Illinois would need to meet or exceed the standard for more than 95% of the occurrences.⁶ As of March 5, 2003, there was no information posted by SBC Illinois to the CLEC Online web site pertaining to SBC Illinois’ performance relative to PM MI 2. This failure has been determined in light of all related and relevant facts and circumstances, and accordingly this PM will be added to the list of Key PMs requiring Improvement provided in our overall conclusion.

Excep. No. 17: Key PM – MI-14: SBCI Fails to meet the Standard for PM MI-14

Staff takes exception to the Proposed Order’s conclusion for PM MI-14, as stated in paragraphs 1165 and 1344, since they contradict each other and overlook Staff’s position.

At paragraph 1165, the proposed order states, “Since there has been no definitive action to affirm SBCI’s statement the Commission agrees with Staff that PM MI 14 remains an issue and should be listed as a “Key PM’s for Improvement.” In contradiction to paragraph 1165, paragraph 1344 states

“Finally, we are told, SBC Illinois implemented as of February 1, 2003, a new process to benefit MI-14. Taking full and complete note of the deficiencies Staff would point out, we are satisfied nonetheless by the Company’s explanations and actions in each of these matters.”

⁶ There are three exclusions added to PM MI 2’s new business rule in Version 1.9. However, there is no evidence in this proceeding that those exclusions would drive the table’s percentages up to 95%. Further, as previously indicated, it remains Staff’s position that revisions to Version 1.8 of the business rule should not be addressed in this proceeding.

The Proposed Order does not state the manner in which the disparity was not significant. As Staff stated “Mr. Ehr indicates that the PM business rule has been changed from a fax process to a web site posting process. As of March 5, 2003, SBC Illinois has not updated its information posted to the CLEC Online web site regarding its performance relative to PM MI 14.” ICC Staff Affidavit 41.0, ¶76.

Consequently Staff recommends the Commission find that SBC Illinois does not provide PM MI-14 in a non-discriminatory manner. This failure, supports the overall argument for the Commission to find that SBC Illinois has not yet adequately demonstrated that it meets Checklist Item 2. Therefore, SBC Illinois should not be provided a positive 271 recommendation from the ICC to the Federal Communications Commission (“FCC”). Therefore, Staff recommends adding and deleting language in paragraph 1344, as set forth in a section below, and in paragraph 1165, set forth immediately below:

1165. Since there has been no definitive action to affirm SBCI’s statement the Commission agrees with Staff that PM MI 14 remains an issue. This failure has been determined in light of all related and relevant facts and circumstances, and accordingly this PM will be added to the list of Key PMs requiring Improvement provided in our overall conclusion, and should be listed as a “Key PM’s for Improvement.

Excep. No. 18: Key PM – 104:

The Proposed Order finds that SBCI in compliance with checklist item #7 and PM 104 without addressing Staff’s response why those two reasons are flawed. See Proposed Order ¶¶2068. Further, staff wants to clarify that if a new PM standard is developed for PM 104, that it be approved by the CLECs who participate in the six month collaborative. Id. ¶2071. Staff’s recommendation was intended that either SBCI

implement changes so that it can update the 911 database in parity, or develop a standard that would be approved by CLECs in the six month collaborative process. Overall, however, the weight of the evidence shows that SBCI is not in compliance with PM 104, and creating a benchmark for PM 104 is contrary to the Telecommunications Act of 1996, and allows for discriminatory behavior by SBCI.

The Proposed Order is contrary to the Merger Order, and the Telecommunications Act of 1996 by allowing SBCI to set a standard without CLEC approval, that could then allow SBCI to process CLEC updates at a different rate than what they process their own – hence discriminatory behavior. SBCI states that there is a discrepancy in the time it processes CLEC updates because (1) the CLEC files generally contain more errors than SBC files (and errors require additional processing time) and (2) that CLECs submit nearly four times as many 911 update files as submitted by SBC (which results in a greater probability for CLECs to experience a wait situation while in the processing queue). Proposed Order ¶2053. Staff responded by stating that if SBCI was processing them updates the same, or together, the average delays for SBC and the CLECs updates would be the same. What it shows is that SBCI provides preferential treatment to itself. SBCI has the burden to prove that it does not afford itself preferential treatment and it failed to show it. Further, the number of errors is so great (as demonstrated by the z-statistic) that it shows that the procedures SBCI has put in place to correct errors is not working. This does not obviate the fact that SBCI is not implementing procedures that enables it to pass PM 104. Therefore, since SBCI has acknowledged that it does not meet the standard for PM 104 (Proposed Order ¶2053), is operating by a standard that is not set in the business rules, has not

taken steps to reduce the number of errors in CLEC requests and it has not proven that it provides 911 updates for CLEC requests in the same time and manner in which it provides updates to its own requests. Therefore, SBCI provides discriminatory service, and is in violation of Checklist Item No. 7.

Turning to Staff's second point, paragraph 2071 needs to be clarified so that if the parties decide that benchmark PM is appropriate, that that standard then be reviewed and approved by CLECs through the six month collaborative process. Section 251(c)(2) of the Telecommunications Act of 1996 requires an ILEC to provide CLEC access "that is at least equal in quality to that provided by the local exchange carrier to itself." When the Commission ordered PMs to be established through the *Merger Order* it furthered federal law by requiring "all performance measure must be based on comparison to performance that the Joint Applicants [SBCI] provide to their own operations and/or subsidiaries." Merger Order at 221. A benchmark was only to be established in the absence of a retail analog. Id. at 221. Hence the Commission has expressed a preference for performance to be measured by parity and not benchmarks. PMs are changed through the six month collaborative process. This gives CLECs the ability to change add, or remove PMs, as well as change the actual standard. It gives them the opportunity to agree to waive their right to parity. Requiring SBCI to change a parity PM to a benchmark negates the CLECs ability to waive that right. Hence, Staff propose that the requirement be changed, such that SBCI should meet with the parties in this docket to agree upon a benchmark for PM 104, and then that standard be submitted to the six month collaborative for approval. Otherwise, SBCI should be

required to provide PM 104 to CLECs in a time and manner that is equal to what they provide themselves.

Finally, paragraph 2071 appears to require monitoring and reporting on a new standard beyond what is normally done. Staff does not foresee that any changes would raise a question of safety, therefore, Staff suggests that the monitoring and reporting, beyond what is normally done for PMs, is not required.

Consequently Staff recommends the Commission find that SBC Illinois does not provide PM 104 in a non-discriminatory manner, and that this failure, supports the overall argument for the Commission to find that SBC Illinois has not yet adequately demonstrated that it meets Checklist Item 4. Therefore, SBC Illinois should not be provided a positive 271 recommendation from the ICC to the Federal Communications Commission (“FCC”). Accordingly, Staff recommends adding and deleting the following language in paragraphs 1836, as set forth immediately below:

911 and E911

2068. Under checklist item 7, SBC Illinois must provide competitors “access to its 911 and E911 services in the same manner that a BOC obtains such access, *i.e.*, at parity,” and must “maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers.” California 271 Order, ¶ 57 (quoting Michigan 271 Order, ¶ 256). SBC Illinois’ commercial performance results show that SBC Illinois clears 911 database errors faster for CLECs than for its own retail operations. While SBC Illinois ~~doesid~~ not update 911 entries for CLECs ~~quite~~ as quickly as it ~~doesid~~ its own entries, further the Commission ~~does not~~ accepts SBC Illinois’ explanation (two separate outside factors) for the minor shortfall, and further notes that no CLEC has shown that the shortfall had any competitive impact. We find it particularly persuasive SBCI has not taken steps to reduce the number of errors in CLEC requests, in light of its duty to work with CLECs in providing interconnection to its system. We find that the number of errors is so large that the steps SBCI has taken to reduce errors is ineffective. We cannot allow SBCI to blame the CLECs for a problem, when SBCI bears a substantial burden in initiating a correction. Furthermore, SBCI has not proven that it would provide 911

updates for CLEC requests in the same time and manner in which it provides updates to its own requests, without the error. Staff's colorful analogy is incomplete (considers only one of the factors) and is, therefore, unpersuasive. So too, SBC Illinois has shown the ways it works to minimize the factor of CLEC errors. For its part, Staff points out that the Company has the ability to meet 104 as it has demonstrated so in the past. The totality of the evidence, thus, leads the Commission to conclude that SBC Illinois does not satisfy the requirements of checklist item 7 with respect to 911 and E911.

2069. Apart from being a matter of Section 271 compliance, we recognize that an efficient 9-1-1 emergency response system is vital to public safety. Indeed, the General Assembly has charged us with establishing technical standards for 9-1-1 systems. We thus review and consider SBC Illinois' compliance in light of these concerns, since it provides this service in compliance with national standards. However, we note that national standards of safety are not at issue here, it is the level of service that allows for competition.

2070. The Commission would agree that SBC Illinois' processing of CLEC 911 updates meets public health and safety concerns, on the showing that SBC Illinois processes such updates well within the 24-hour standard established by the National Emergency Number Association. This, however, we are told, is not near to being reflected as the current standard for PM 104.

2071. In this proceeding, the Commission has been afforded the unique opportunity of viewing, the performance measures that we approve, in a wholly different setting. To this end, we see Staff to indirectly, if not directly, acknowledge that the current PM 104 may be neither reasonable nor workable. As such, we take account of Staff's recommendations and require that SBC Illinois commit to pursuing and exploring, together with Staff and the CLECs, a more reasonable and workable PM standard for the updating of 9-1-1 database files to propose in the next upcoming six month collaborative. ~~Upon our approval and the implementation of such standard, Staff will monitor and report on the results.~~

If the Commission elects to provide a positive recommendation to the FCC, regardless of SBC Illinois' failure to meet key PMs -- then the Commission should condition its approval on SBCI agreeing to (1) to identify the steps it will take to remedy the unsatisfactory performance for this PM (2) and require the Company to demonstrate substantially improved performance by November 2003, or face additional penalties.

Therefore, in support of our alternative position, Staff recommends that the Commission find the failure to be material, and to add the following language to the end of paragraph 2071, as it is set forth above:

The Commission's positive recommendation to the FCC will be conditioned on SBCI agreeing to (1) identify the steps it will take to remedy its current unsatisfactory performance on PM 104; (2) and demonstrate substantially improved performance on the said PM by November 2003, or face additional penalties.

Excep. No. 19: Update Paragraph 1343 to Identify All Key PMs in Checklist Item #2

Paragraph 1343 identifies the Checklist Item 2 PMs that are out of compliance. Staff has made arguments in this brief that SBC Illinois has failed to meet specific Key PMs. To the extent those argument are accepted, paragraph 1343 needs to be revised to note those PMs. There are 8 Key PMs in Checklist Item #2, see Staff Exhibit 41.0 ¶12, or Staff's Draft Order at 10 (since it provides the corollary Checklist Item #) therefore Staff proposes the following modification to paragraph 1343 to identify for those PMs:

1343. In looking to the performance measure analysis, we see Staff to conclude that ~~out of 67 measures, the Company failed passed all~~ but eight (8) key performance measures. Those listed as deficient by Staff are: PMs 7.1; 10.1; 10.2; 10.3; ~~10.4; 11.1; 13, 17 MI 2 and MI 14.~~ ~~13~~

Excep. No. 20: Update Paragraph 1344 to Identify All Key PMs in Checklist Item #2

Paragraph 1343 discusses why all of the PMs that require improvements are not material enough to warrant a finding that SBCI did not meet Checklist Item #2. Staff takes exception to these findings since Staff presented sufficient information to show

that the 8 PMs warrant finding Checklist Item 2 out of compliance. As the FCC has acknowledged “[u]ltimately the determination of whether a BOC’s performance is consistent with the statutory requirements is a contextual decision based on the totality of the circumstances. Where a statistically significant difference exists” is where the fight lies. Kansas/Oklahoma Order ¶31. Along those lines, the fact that there are 8 PMs with statistically significant problems speaks volumes unto itself. Staff’s analysis provides sufficient proof that there is a problem related to Checklist Item #2 issues, and SBCI’s rebuttals to Staff’s arguments can’t keep pace.

Consequently Staff recommends the Commission find that SBC Illinois does not provide Checklist Item 2 services in a non-discriminatory manner. This failure, supports the overall argument for the Commission to find that SBC Illinois has not yet adequately demonstrated that it meets Checklist Item 2. Therefore, SBC Illinois should not be provided a positive 271 recommendation from the ICC to the Federal Communications Commission (“FCC”).

Accordingly Staff recommends adding and deleting the following language to paragraphs 1344:

~~1344. On the record, we see that the Company has committed to improving PM 7.1, and the disparity in performance is not significant in our view. So too, we are told, BearingPoint will test under those improvements. We further understand that the standard for PM 10.1 has been revised and, SBC Illinois would have met the revised standard. With respect to PMs 10.2 and 10.3 too, the standard has been revised such that the Company would have met the new standard. In our further review of PMs 10.1, 10.2, 10.3, we also find the difference between standard and performance for these measures to be immaterial to checklist compliance. (We have already considered PM 17 in our Billing function review above). PM MI 2, shows disparity that is not significant in relation to the substance of the measure. Finally, we are told, SBC Illinois implemented as of~~

February 1, 2003, a new process to benefit MI-14. ~~Taking full and complete note of the deficiencies Staff would point out, we are satisfied nonetheless by the Company's explanations and actions in each of these matters.~~ Staff has indicated that there are 8 Key PMs for Improvement impacting Checklist Item 2, and we have no reason to doubt Staff's statement that these 8 key PMs could have a significant negative impact on the competitive telecommunications market in Illinois. We note that, while the Company indicates it plans to address many of these key PMs, we believe it is appropriate that the Company's plans for all 8 key PMs identified by Staff relative to Checklist Item 2 are reviewed, that those plans are successfully implemented, and that the implementation is verified by an independent third party.

If the Commission elects to provide a positive recommendation to the FCC, regardless of SBC Illinois' failure to meet key PMs -- then the Commission should condition its approval on SBCI agreeing to (1) to identify the steps it will take to remedy the unsatisfactory performance for this PM (2) and require the Company to demonstrate substantially improved performance by November 2003, or face additional penalties. Therefore, in support of our alternative position, Staff recommends that the Commission find the failure to be material, and to add language to the end of paragraph 1344, as it is set forth above:

The Commission's positive recommendation to the FCC will be conditioned on SBCI agreeing to (1) identify the steps it will take to remedy its current unsatisfactory performance on PMs 7.1, 10.1, 10.2, 10.3, 13, 17, MI-2 and MI-14; (2) and demonstrate substantially improved performance on the said PMs by November 2003, or face additional penalties.

Excep. No. 21: Key PM – CLEC WI-6:

Starting at paragraph 1836 the proposed order states,

1836. Finally, the Commission notes Staff's concerns with respect to CLEC WI-6, which addresses SBC Illinois' provision of "Form As" where facilities modifications are required. As we see it, SBC Illinois demonstrated that it provides more than 97% of Form As to CLECs within the due date. Although Staff singles out SBC Illinois' performance with

respect to standalone xDSL loop orders, when viewed in context and as a whole, the Commission notes that only a small percentage of such orders require facilities modification such that the shortfall in performance is not material to checklist compliance.

We will have our Staff continue monitoring and checking for improvements with respect to all matters indicated above in the coming months, unless and until, otherwise directed. On the whole and including this direction, the Commission believes it reasonable to find and, here does find, that SBC Illinois satisfies the requirements of checklist item 4.

Staff requests that the proposed order be amended at paragraph 1836 because notifications related to stand-alone DSL orders must be sent in a timely manner.

Consequently Staff recommends the Commission find that SBC Illinois does not provide PM CLEC WI-6 in a non-discriminatory manner. This failure, supports the overall argument for the Commission to find that SBC Illinois has not yet adequately demonstrated that it meets Checklist Item 4. Therefore, SBC Illinois should not be provided a positive 271 recommendation from the ICC to the Federal Communications Commission ("FCC"). Accordingly, Staff recommends adding and deleting the following language in paragraph 1836, as set forth immediately below:

1836. Finally, the Commission notes Staff's concerns with respect to CLEC WI-6, which addresses SBC Illinois' provision of "Form As" where facilities modifications are required. ~~As we see it, SBC Illinois demonstrated that it provides more than 97% of Form As to CLECs within the due date. Although Staff singles out SBC Illinois' performance with respect to standalone xDSL loop orders, when viewed in context and as a whole, the Commission notes that only a small percentage of such orders require facilities modification such that the shortfall in performance is not material to checklist compliance.~~ For PM C WI 6, the Commission directs the Company to (1) identify the steps it will take to remedy its current unsatisfactory performance on PM C WI 6 (2) demonstrate substantially improved performance on PM C WI 6 by November 2003 or face additional penalties." This failure has been determined in light of all related and relevant facts and circumstances, and accordingly this PM will be added to the list of Key PMs requiring Improvement provided in our overall conclusion.

If the Commission elects to provide a positive recommendation to the FCC, regardless of SBC Illinois' failure to meet key PMs -- then the Commission should condition its approval on SBCI agreeing to (1) to identify the steps it will take to remedy the unsatisfactory performance for this PM (2) and require the Company to demonstrate substantially improved performance by November 2003, or face additional penalties. Therefore, in support of our alternative position, Staff recommends that the Commission find the failure to be material, and to add the following language to the end of paragraph 1836, as it is set forth above:

The Commission's positive recommendation to the FCC will be conditioned on SBCI agreeing to (1) identify the steps it will take to remedy its current unsatisfactory performance on PM WI-6; (2) and demonstrate substantially improved performance on WI-6 by November 2003, or face additional penalties.

IV. EXCEPTIONS RELATED TO ACCURACY AND RELIABILITY OF SBC ILLINOIS PERFORMANCE MEASURE DATA

Excep. No. 22: The Issue

Paragraph 2554 of the *Phase II Proposed Order* provides as follows:

In support of its Section 271 application, SBC Illinois has submitted three consecutive months (September, October, November 2002) of commercial performance data results in this proceeding (Ehr Affidavit, Attachment A) to demonstrate that the level of service SBC Illinois provides to its wholesale customers or Illinois CLECs is nondiscriminatory. Ehr Affidavit, ¶6. Staff and certain of the CLECs contend that this evidence is unreliable.

Phase II Proposed Order, ¶2554

This paragraph of the Proposed Order is in error because fails to state the pertinent issue correctly. In particular, it fails to note that the question of performance measurement data reliability affects not only whether SBC's commercial performance

constitutes adequate evidence of compliance in this proceeding, but also affects the ability of the Commission to monitor and ensure that SBC Illinois will not backslide in its performance once the FCC grants Section 271 approval. In other words, the question of whether the SBC Illinois' performance measure data is reliable bears on both the current question of whether SBC has satisfied this checklist requirement, and on the prospective question of whether the Commission will be able to satisfy itself on an ongoing basis that the company is providing adequate OSS to its wholesale customers. This consideration is an important one and is discussed at length in the parties' affidavits and briefs and should be adequately described in the *Proposed Order* and given due weight by the Commission.

Consistent with this, the Staff recommends that paragraph 2554 of the *Phase II Proposed Order* which summarizes the relevant issues be amended as follows:

In support of its Section 271 application, SBC Illinois has submitted three consecutive months (September, October, November 2002) of commercial performance data results in this proceeding (Ehr Affidavit, Attachment A) to demonstrate that the level of service SBC Illinois provides to its wholesale customers or Illinois CLECs is nondiscriminatory. Ehr Affidavit, ¶16. Staff and certain of the CLECs contend that this evidence is unreliable. In addition the Company has represented that the commercial performance data it reports on a monthly basis will be used as the means by which CLECs and the Commission will be able to monitor and ensure that SBC Illinois' performance will not backslide and or diminish once the company is granted 271 approval. In response, Staff and certain CLECs contend that the performance data reported by the company is not reliable and cannot be used as an assurance the company will not backslide in its performance.

Excep. No. 23: Testing of "Raw Data" and Data Integrity

Paragraph 2907 of the Phase II Proposed Order states that:

The claim that E&Y's audit did not include "raw data," or track the integrity of data from its origination to its use in the reported results, appears

contrary to the E&Y affidavit submitted by SBC Illinois stating that “E&Y examined underlying raw data” as part of the basis for its examination report. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) Attachment A, ¶ 19.) So too, E&Y explains that the use of a “pseudo-CLEC” to submit raw data is not a requirement of professional standards. (*Id.* ¶ 22.) Further, the Commission notes that BearingPoint submitted “pseudo-CLEC” transactions as part of its operational test, and that the test results show SBC Illinois’ OSS to have successfully processed those transactions. Given that BearingPoint has itself tested the link from CLEC submission to SBC Illinois’ systems, it seems reasonable that E&Y’s testing of the process from SBC Illinois’ receipt of raw data through the generation of performance reports provides sufficient assurance.

Phase II Proposed Order, ¶2907

The analysis presented in this paragraph of the *Proposed Order* is not entirely accurate and, as a result, does not support the *Proposed Order’s* conclusions. It is generally true that the use of a “pseudo-CLEC” to submit raw data is not required by professional standards when conducting an audit. This fact, however, does not in any way mitigate the deficiencies BearingPoint has found during its data integrity review when tracing pseudo-CLEC orders it entered through SBC Illinois’ operational and performance measurement reporting systems. Because E&Y, in contrast to BearingPoint, employed no such test method, E&Y cannot therefore state authoritatively that it has verified that the problems – again, problems identified by BearingPoint in the course of conduct its review of this method – do not exist. E&Y’s analysis did not examine this aspect of SBC’s process and therefore cannot verify the existence of these problems. So, in essence, E&Y’s analysis, on this point, is irrelevant. Furthermore, the evidence provided by BearingPoint on this point confirms that the problems do exist. SBC’s position appears to be that, when offered a choice between a thorough audit that discovers problems, and a less thorough one that does not, the Commission should rely

only upon the latter. This position should be rejected simply because the E&Y analysis does not provide any analysis to counter the BearingPoint test.

In addition, the *Phase II Proposed Order* incorrectly bases its conclusion on an inaccurate link between the various tests conducted by BearingPoint and E&Y. The Proposed Order concludes that since BearingPoint is testing the line from CLEC submission to SBC Illinois' systems, it is therefore likely that E&Y's testing of the data integrity process provides sufficient assurance of reliability. This conclusion is in error. BearingPoint has found, and continues to find, actual problems in the reliability of SBC's performance data. BearingPoint has shown that records it submitted on behalf of the pseudo CLEC have not in several instances appeared in SBC Illinois performance measurement data. This is a situation that E&Y would not have been able to observe, witness or uncover in the way in which it conducted its data integrity evaluation. Therefore, the analysis and conclusion drawn on this subject is flawed. Regardless of the Commission's final determination in this area it has a responsibility to accurately represent the facts in evidence regarding the methods of audit being conducted by both E&Y and BearingPoint.

In order to accurately reflect the methodologies of the audits conducted by E&Y and BearingPoint, Staff points out that the following language must be inserted in paragraph 2907 and its ultimate conclusion must be revised as follows.

The claim that E&Y's audit did not include "raw data," or track the integrity of data from its origination to its use in the reported results, appears contrary to the E&Y affidavit submitted by SBC Illinois stating that "E&Y examined underlying raw data" as part of the basis for its examination report. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) Attachment A, ¶ 19.) E&Y examined that the data captured in SBC Illinois' source systems is accurately transferred down to its performance reporting systems. While So-tøø, E&Y is correct in its explains explanation that the

~~use of a “pseudo-CLEC” to submit raw data is not a requirement of professional standards-, this is still a component of BearingPoint’s data integrity review that was not examined as part of the E&Y review. (Id. ¶ 22.) Further, However, the Commission notes that BearingPoint submitted “pseudo-CLEC” transactions as part of its operational test, and that the operational test results show SBC Illinois’ OSS to have successfully processed those transactions. Given that BearingPoint has itself tested the has uncovered problems in the portion of its data integrity review that E&Y did not examine (verification that the link from CLEC submission down to SBC Illinois’ performance measurement systems is intact), and BearingPoint has not yet verified that the company has addressed the problems, the Commission finds that this as an major gap in the company’s case. The E&Y review does not provide any evidence to counter the problems found in the BearingPoint test.seems reasonable that E&Y’s testing of the process from SBC Illinois’ receipt of raw data repositories through the generation of performance reports provides sufficient assurance for this Commission.~~

At a minimum, even if the Commission chooses to dismiss the concern proven to exist in the integrity of SBC Illinois’ commercial performance data, this paragraph still requires clarification as to the methodology of the E&Y and BearingPoint audits and Staff proposes that the following language be inserted in paragraph 2907.

The claim that E&Y’s audit did not include “raw data,” or track the integrity of data from its origination to its use in the reported results, appears contrary to the E&Y affidavit submitted by SBC Illinois stating that “E&Y examined underlying raw data” as part of the basis for its examination report. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) Attachment A, ¶ 19.) E&Y examined that the data captured in SBC Illinois’ source systems is accurately transferred down to is performance reporting systems. While So too, E&Y is correct in its explains explanation that the use of a “pseudo-CLEC” to submit raw data is not a requirement of professional standards-, this is still a component of BearingPoint’s data integrity review that was not examined as part of the E&Y review. (Id. ¶ 22.) Further, However, the Commission notes that BearingPoint submitted “pseudo-CLEC” transactions as part of its operational test, and that the operational test results show SBC Illinois’ OSS to have successfully processed those transactions. Given that BearingPoint has itself tested the has uncovered problems in the portion of its data integrity review that E&Y did not examine (verification that the link from CLEC submission down to SBC Illinois’ performance measurement systems is intact), it seems reasonable that E&Y’s testing of the process from SBC Illinois’ receipt of raw data repositories through the generation of performance reports provides sufficient assurance for this Commission.

Excep. No. 24: Performance Measurement Data Reconciliation

Paragraphs 2924 provides as follows:

Since the implementation of Merger Condition 30 in 2000, we are told, SBC Illinois has provided each participating CLEC with monthly reports of wholesale performance, showing results for that CLEC and for CLECs in the aggregate along with the appropriate retail analogs and benchmarks. Further, SBC Illinois has made the underlying raw data available upon request, and several CLECs have requested and received such data. Yet notwithstanding their present assertions that SBC Illinois' performance reports are unreliable, we would observe [sic] that not one CLEC requested a data reconciliation or mini-audit in any one of the Ameritech states until SBC Illinois noted that fact in its January 17 filing, after which time one CLEC i.e., AT&T, requested a data reconciliation (now in process) with respect to one measure; the results for line loss notices. We see no evidence to show otherwise.

Phase II Proposed Order, ¶2924

This paragraph is incorrect in that it ignores evidence to the contrary as to the availability of mini-audits. As the Staff noted in its evidence in this proceeding:

Contrary to the statement of Mr. Ehr, **the 01-0120 performance assurance plan does not allow for mini-audits to occur while a review or audit -- like the one being conducted by BearingPoint -- is ongoing.** Specifically, the language in Section 6.4.2 of the 01-0120 Remedy plan, which is currently in effect, states that mini-audits may not be performed, conducted or requested while the OSS third-party test, or an Annual Audit is being conducted. Ehr Affidavit, Attachment Y at 9.

Staff Ex. 31.0 (emphasis added)

In other words, the *Phase II Proposed Order* chastises CLECs – and rejects their, and the Staff's, position – for failure to do request a mini-audit that they were not permitted to do. This “due diligence” requirement is simply improper, and the Commission should reject it.

Consistent with the above, the Staff recommends that the following paragraph be inserted as a replacement for paragraph 2924 to correct this oversight:

Since the implementation of Merger Condition 30 in 2000, we are told, SBC Illinois has provided each participating CLEC with monthly reports of wholesale performance, showing results for that CLEC and for CLECs in the aggregate along with the appropriate retail analogs and benchmarks. Further, SBC Illinois has made the underlying raw data available upon request, and several CLECs have requested and received such data. Yet notwithstanding their present assertions that SBC Illinois' performance reports are unreliable, we would observe that not one CLEC requested a data reconciliation or ~~mini-audit~~ in any one of the Ameritech states until SBC Illinois noted that fact in its January 17 filing, after which time one CLEC i.e., AT&T, requested a data reconciliation (now in process) with respect to one measure; the results for line loss notices. We see no evidence to show otherwise.

Excep. No. 25: Performance Measurement Data Controls

Paragraph 2926 of the Phase II Proposed Order Provides that:

Further, we believe [sic] that BearingPoint's testing of actual wholesale processes and transactions can be viewed to corroborate SBC Illinois' performance results in two important respects. First, the successful results of its process reviews and transactions tests suggest the overall conclusion that SBC Illinois provides access to CLECs in a nondiscriminatory fashion. Second, the detailed results of BearingPoint's transactions tests include BearingPoint's own, independent measurements of performance. As such, BearingPoint's recorded times and its overall test results match up favorably with those reported by SBC Illinois, to provide further assurance on the reliability of SBC's results.

Phase II Proposed Order, ¶2926

In fact, the BearingPoint results do no such thing. The mere fact that BearingPoint has successfully concluded the majority of (but not all of) its operational testing provides no evidence that the company has adequate data controls in place to consistently capture, collect and report its performance measurement data. The performance *measurement* systems are at the tail end of the operational systems and therefore success in processing a record *operationally* is of little value in assessing the way in which the performance metrics reporting systems capture and report on the data.

No direct correlation whatever can be made between these processes. The *Proposed Order's* overstatement of the correlation between these processes might be best illustrated by the fact that just because a person can go to their local hardware store and purchase a shovel, that does not mean that the inventory record will accurately reflect that the purchase occurred or that there is one less shovel remaining in the store.

Accordingly, this paragraph should be deleted in its entirety as the facts stated – even if true – do not support the position that the performance metrics data controls of the company are adequate and have been proven to produce reliable results.

Consistent with this, the Staff recommends that paragraph 2926 be deleted and the *Phase II Proposed Order* be amended as follows:

~~———— Further, we believes that BearingPoint's testing of actual wholesale processes and transactions can be viewed to corroborate SBC Illinois' performance results in two important respects. First, the successful results of its process reviews and transactions tests suggest the overall conclusion that SBC Illinois provides access to CLECs in a nondiscriminatory fashion. Second, the detailed results of BearingPoint's transactions tests include BearingPoint's own, independent measurements of performance. As such, BearingPoint's recorded times and its overall test results match up favorably with those reported by SBC Illinois, to provide further assurance on the reliability of SBC's results.~~

Excep. No. 26: Incorrect Assessment of BearingPoint's Conclusions

Paragraphs 2939 and 2940 of the *Phase II Proposed Order* provide that

At the outset, there is lacking an adequate description as to what BearingPoint's findings really *do* mean, i.e., what has led BearingPoint to issue an exception. Many "Not Satisfied" scores, we see the Company to explain, do not stem from BearingPoint finding a real problem or an error in reported results, but simply arise from BearingPoint wanting to see additional information before it is satisfied. Other test points too, we understand, are open because of an issue that only affects *part* of a test point and that is not necessarily material to the September–November results provided here. We see SBC Illinois to explain that, contrary to the CLEC suggestion that "Indeterminate" points represent an affirmative

finding of failure, an “Indeterminate” status indicates that while BearingPoint is not done testing, there have *not* been issues associated with the test criterion.

Further, we see little or no attempt by Staff and the CLECs to address events after BearingPoint issued its exception. SBC Illinois, however, tells us that it has already responded to most of the current Observations and Exceptions, and that BearingPoint is in the process of re-testing. Subsequent to its December 20, 2002 Report, the Company asserts, BearingPoint has already closed several exceptions, and significantly narrowed others. As a result of SBC Illinois’ efforts and BearingPoint’s review, the BearingPoint February 28, 2003 status report for Indiana (where it is conducting a parallel test) shows that 21 test criteria that had been scored “Not Satisfied” as of the December 20 Report are now “Satisfied,” and another 9 criteria have moved from “Not Satisfied” to “Indeterminate” (testing continues, but with no identified issues)

Phase II Proposed Order, ¶¶2939, 2940

Contrary to the *Proposed Order’s* findings, when Bearing Point determines an evaluation criteria to be “Not Satisfied” this is indeed an affirmative conclusion that there is a problem. Staff Ex. 43, ¶30. If BearingPoint has marked an evaluation criteria as “Not Satisfied”, then it has determined a problem or problems exists, and it is an affirmative conclusion that the company does not meet the evaluation criteria. Id. The Proposed Order assumes that because the test is not complete that this lack of completion provides no evidence one way or another regarding the evaluation criterion. This is incorrect. While it is correct that the test is not complete, this is entirely due to the “test until pass” nature of the review, since work to verify the satisfaction of the evaluation criterion continues until a Satisfied result is achieved or until Staff or the Commission indicates no further testing should occur. If BearingPoint has found an evaluation criteria to be Not Satisfied, the Commission must view this as a failure until SBC corrects the failure and BearingPoint has verified the correction. Consequently, a “Not Satisfied” finding equals failure, pure and simple. Until the third party can verify the

company has addressed the concerns or findings that resulted in the Not Satisfied finding the evaluation criteria will remain Not Satisfied.

Evaluation criteria with indeterminate results, on the other hand, are those for which work is continuing and at the point in time the indeterminate result is assigned there was not sufficient information for BearingPoint to indicate if the evaluation criteria has in fact Satisfied or Not Satisfied the criterion. Therefore indeterminate results do not provide evidence in either direction, positively or negatively.

Therefore, paragraph 2939 should be stricken from the order and replaced as suggested below.

With respect to Paragraph 2940, the *Phase II Proposed Order's* conclusions succeed in not only being incorrect, but also are internally inconsistent and contradictory. The conclusion that there was "little or no attempt by Staff and the CLECs to address events after BearingPoint issued its exception" is amply refuted by paragraphs 2873-2880 of the *Phase II Proposed Order* itself. There, the *Phase II Proposed Order* recognizes the undoubted fact that Staff responded to precisely these issues. In those paragraphs, the *Phase II Proposed Order* recited Staff's analysis of the overall progress made in the BearingPoint performance metrics test since the December 20, 2002 report was issued. While the results from both December 20, 2002 and March 7, 2003 were set forth in the recitation of Staff's position at Paragraph 2873 of the *Phase II Proposed Order* and results from February 28, 2003 were provided in SBC's recitation, they are nonetheless set forth here as well for the Commission's benefit.

BearingPoint IL Performance Metrics Evaluation Results (December 20, 2002)

Test Family	Number of Evaluation Criteria				
	Satisfied	Not Satisfied	Indeterminate	Not Applicable	Total
Performance Metrics Reporting (All 5 tests)	64	116	91	32	303

BearingPoint IN Performance Metrics Evaluation Results (February 28, 2003)

Test Family	Number of Evaluation Criteria				
	Satisfied	Not Satisfied	Indeterminate	Not Applicable	Total
Performance Metrics Reporting (All 5 tests)	84	86	100	32	302

BearingPoint MI Performance Metrics Evaluation Results (March 7, 2003)

Test Family	Number of Evaluation Criteria				
	Satisfied	Not Satisfied	Indeterminate	Not Applicable	Total
Performance Metrics Reporting (All 5 tests)	83	93	94	32	302

As Staff has stated in this record, these results show that SBC was unable to demonstrate significantly improved results in the time period between December 20, 2002 and March 7, 2003. The company still failed to perform adequately in 93 evaluation areas, while satisfying an additional 19 items. These results demonstrate that, while SBC is making modest progress, there is still no basis for a conclusion that there are not significant problems present. The *Phase II Proposed Order's* conclusion

correctly recites the number of criteria that moved to the satisfied and indeterminate evaluation criteria since the February 28, 2003 metrics report presented by SBC in this proceeding, but that is the only statement of fact appearing in Paragraph 2940. Not only does the *Phase II Proposed Order* incorrectly state that Staff did not respond to these matters; it also fails to present the most recent summarized findings (March 7, 2003 results in table above) of the BearingPoint performance metrics test results and instead presents only incremental data from February 28, 2003– results that the Staff did in fact present and analyze⁷. As of March 7, 2003, the company was found to be failing more than 30% of the performance measure evaluation criteria⁸. While it is correct that the BearingPoint test is not complete Staff believes this fact to be significant since there are substantial areas of marked failure by the company. The fact that the test is not complete does not negate or diminish the failure of the company to satisfy evaluation criteria. In addition, the mere fact that E&Y did not disclose or reveal the same issues as BearingPoint does not mean that the BearingPoint results do not show problems or errors with SBC Illinois performance measurements.

In summary, the *Phase II Proposed Order's* conclusions in paragraphs 2939 and 2940 are incorrect in very nearly every way. The overall results of BearingPoint's findings are not stated; Staff's analysis is ignored and Staff is chastised for not presenting an analysis that it did indeed present. In addition SBC's continuing failure to satisfy a substantial number (approximately 30%) of the performance metric

⁷ Instead of basing its conclusions on March 7, 2003 results from Illinois, the *Phase II Proposed Order* quite inexplicably based its conclusions on February 28, 2003 results from Indiana. *Phase II Proposed Order*, ¶2940.

⁸ As of April 8, 2003 an updated report for the BearingPoint performance metrics evaluation for Illinois was released. It reported that 107 evaluation criteria were Satisfied, 87 were Not Satisfied, 77

evaluation criteria is glossed over and is not identified in the Proposed Order's findings. The Commission should soundly reject these findings.

In keeping with the arguments set forth above, the Staff recommends that paragraphs 2939 and 2940 be stricken in their entirety, and replaced as follows:

Notwithstanding SBC's representations to the contrary, there is little question regarding the meaning of BearingPoint's performance metrics findings. When Bearing Point determines an evaluation criteria to be "Not Satisfied" it is indeed an affirmative conclusion that a problem or problems exists. Staff Ex. 43.0, ¶30. If BearingPoint has determined an evaluation criteria to be "Not Satisfied", then it has definitively found a problem or problems exists, and it is an *affirmative* conclusion that the company does not meet the evaluation criteria. Id. While it is correct that the test is not complete, this is entirely due to the "test until pass" nature of the review, since work to verify the satisfaction of the evaluation criterion continues until a Satisfied result is achieved or until Staff or the Commission indicates no further testing should occur. If BearingPoint has found an evaluation criteria to be Not Satisfied, the Commission must view this as a failure until SBC corrects the failure and BearingPoint has verified the correction. Thus, for purposes of this Order, a "Not Satisfied" finding at this time equals failure, pure and simple. Until the third party can verify the company has addressed the concerns or findings that resulted in the Not Satisfied finding the evaluation criteria will remain Not Satisfied.

We further conclude that, while the company was able to take steps to close certain matters between December 20, 2002 and March 7, 2003, the company still failed 30% of the performance metrics evaluation criteria on the latter date. The testing paradigm we adopted is "test until pass". We see no reason to depart from this method at this time. Based upon this standard – known to SBC at the outset – the company's ability to demonstrate that its commercial performance data results are accurate and reliable falls well short of satisfactory in our view.

were Indeterminate and 32 were Not Applicable. These results represents a Not Satisfied rate of 28.7% for the performance metrics review.

V. EXCEPTIONS RELATED TO PERFORMANCE ASSURANCE PLAN AND REMEDY PLAN ISSUES

Excep. No. 27: Standard of Review for Performance Assurance Plans

The standard of review set forth in both the Performance Assurance Plan (“PAP”) section (¶¶ 3213-3214) and in paragraphs 30 to 34 of the Proposed Order do not fully set forth the parties burden of proof, nor the Commission’s charge in evaluating remedy plans. In its Comments, Staff set forth the Standard of Review for PAP’s (Staff Comments at 6-8), and therefore recommends that language be inserted in to the Proposed Order. Further, no party challenged Staff’s statements, in fact SBCI agreed with Staff’s statement regarding the Burden of Proof, but clarified that section 271 does not require a remedy plan. SBCI Response to Staff’s Comments on the Remedy Plan at 12.

The Initiating Order has limited the scope of this proceeding to a review of SBCI’s system operations, and PAP, and not to adjudicate matters, but encourages working with SBCI, and CLECs to “bring about any necessary changes or improvements.” Initiating Order at 3. With respect to PAPs, SBCI seems to interpret this proceeding to be an overall Commission approval of a PAP that appears to SBC to have significance beyond the scope of this proceeding. It is not an approval of that nature nor does it have significance of that kind. As it relates to PAPs, this proceeding is intended to review the plans presented by the parties and determine which plans prevent future backsliding of wholesale performance, as measured by the FCC’s five key elements, so that the Commission can provide the FCC with the consultation required under 47 U.S.C §271.

Since the Proposed Order does not fully set forth the burden of proof or the standard of review for PAPs, Staff, therefore, recommends the Proposed Order be modified to include the following paragraphs at the noted paragraph numbers:

3214. 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.

3215. Since SBCI is proposing changes to a remedy plan approved by the Commission, the burden of proving that changes are necessary to the 0120 plan rests with SBCI. This is supported by the initiating order, is in line with the Commission’s order in Docket 01-0120 and consistent with Commission practice. In the initiating order, the 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. Placing the burden upon SBCI 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 0120 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).

3216. 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 0120 Plan. Accordingly, SBCI bears the burden of proving that its plan meets the 271 anti-backsliding criteria.

3217. The scope of this review is such that we are able to properly discharge our role as consultant to the FCC regarding 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. New Jersey Order, ¶177; New York Order, ¶433; Texas Order, ¶423; Pennsylvania Order, ¶¶128-129. It is presumed that each state 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, states:

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.

Initiating Order at 3.

3218. Therefore, this proceeding is to choose the plan, or plans, that are suitable for preventing backsliding in a post-section 271 approval environment.

3219. 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., 0120 Plan), and its alternative recommendation – the Staff Hybrid Plan – is the 01-0120 remedy plan with slight modifications (See Staff Ex. 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.

Excep. No. 28: Dollar Amounts From Remedy Plans Not at Issue in This Case should be Removed from Table in Paragraph 3223

In paragraph 3223, a table presents dollar amounts for four remedy plans, the Texas Remedy Plan, the 0120 Plan, the Compromise Plan and the Updated Compromise Plan. The column reflecting dollar amounts related to the Texas Remedy Plan should be deleted since SBCI has withdrawn that plan from consideration; therefore it is no longer relevant. The column reflecting estimated dollar amounts paid under the heading “Compromise Plan “ should be deleted since this reflects a mistaken calculation by SBCI. ICC Staff Ex. 39.0S ¶3, Ex. 50.0 ¶11. Since this set of numbers

was calculated incorrectly, and essentially present an inflated estimate of the impact of the Compromise Plan, it is not relevant to this proceeding, except to show that the SBC Compromise Plan may not operate properly. Consequently, the footnote explaining the correction is also amended.

Accordingly, Staff recommends the two columns be deleted from the table in paragraph 3223, since they present dollar amounts that are not relevant to this case:

	% of Remedied Standards Met (Aggregate of All CLECs)	“Texas” Plan	0120 Plan	Compromise Plan	<u>Corrected Updated Compromise Plan</u>⁹
September 2002 Tier 1		\$ 34,200	\$2,438,300	\$1,151,970	\$1,115,002
September 2002 Tier 2		\$251,500	\$ 707,000	\$ 142,200	\$ 151,000
September 2002 Total	89.8%	\$285,700	\$3,145,300	\$1,294,170	\$1,266,002
October 2001 Tier 1		\$ 91,050	\$2,309,000	\$1,046,785	\$1,018,380
October 2002 Tier 2		\$204,600	\$ 637,000	\$ 142,200	\$ 142,200
October 2002 Total	90.7%	\$295,650	\$2,946,000	\$1,188,985	\$1,160,580

⁹ Corrected to reflect revised calculation of SBCI-proposed remedy plan, including ceilings and floors, as proposed, and monthly billed revenue caps on Tier 1 remedies. ~~adjustments to “floors and ceilings” computation in subsequent testimony.~~

November 2002 Tier 1		\$207,775	\$2,520,000	\$1,156,800	\$1,128,078
November 2002 Tier 2		\$194,000	\$ 561,000	\$ 114,200	\$ 114,200
November 2002 Total	91.8%	\$401,775	\$3,081,000	\$1,271,000	\$1,242,278
September-November 2002 Total	93.4%	\$983,125	\$9,172,300	\$3,752,365	\$3,668,860

Excep. No. 29: The Proposed Order Incorrectly States that the 0120 Plan Contains “Liquidated Damages”

In paragraph 3220 the Proposed order incorrectly states – “like the 0120 Plan, the Compromise Plan consists of two ‘tiers’ of remedies: Tier 1 ‘liquidated damages’ paid to CLECs, and Tier 2 ‘assessments’ paid to the State.” The 0120 plan did not designate Tier 1 payments as liquidated damages, but simply as “Tier 1 payments.” In Docket 01-0120 the Commission held that “We agree with Staff that the term ‘liquidated damages’ is a misnomer. . . . Therefore, the law governing liquidated damages, while not controlling, can provide meaningful guidelines for the issues here.” Order, Docket 01-0120 at 37. The Proposed Order should be amended so that it correctly reflects the Commission’s determination in Docket 01-0120. Therefore, Staff recommends the Proposed Order be modified to include the following paragraphs at the noted paragraph numbers:

3220. In its January 17, 2003 filing for Phase II, SBC Illinois details the development and principal features of its proposed Compromise Plan. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶¶ 302-363.) SBC Illinois states that two CLECs, TDS and Time Warner, have agreed to the Plan, and that interconnection agreement amendments reflecting the Compromise Plan

have been approved by the state commissions of Wisconsin and Ohio. According to SBC Illinois, the Compromise Plan retains the same basic structure, and many of the same elements, as the Plan ordered by the Commission in Docket 01-0120 (“0120 Plan”):

- Like the 0120 Plan, the Compromise Plan is based on the same performance measures and standards to which the CLECs agreed in collaborative sessions, and the same measures and standards analyzed above.
- Like the 0120 Plan, periodic updates to the measures and standards are to be made through collaborative “six-month reviews.
- Like the 0120 Plan, the Compromise Plan consists of two ‘tiers’ of remedies. However, unlike the 0120 plan, the Compromise Plan designates these tiers as follows: Tier 1 ‘payments’ paid to CLECs, and Tier 2 ‘assessments’ paid to the State. ~~Tier 1 ‘liquidated damages’ paid to CLECs, and Tier 2 ‘assessments’ paid to the State.~~
- Like the 0120 Plan, the Compromise Plan uses statistical analysis to determine when remedies are to be paid by identifying whether the size and number of performance shortfalls are significant, or instead are small enough that they can be attributed to the random variation inherent in actual wholesale and retail performance. The statistical methods in the Compromise Plan are virtually identical to the methodology set forth in the 0120 Plan (including the deletion of the “K table”).
- Like the 0120 Plan, remedies are calculated by multiplying (i) the number of substandard transactions, or “occurrences”, within the applicable performance measure, by (ii) a “base” liquidated damage or assessment amount.
- So too, the formula for determining the number of occurrences under the Compromise Plan is identical to the formula used in the 0120 Plan.

Excep. No. 30: Introduction to Staff’s Position Regarding Performance Assurance Plans

Staff takes exception to the brief introduction to its position. The introduction to Staff’s Position, as set forth only in paragraph 3279, neither fully nor accurately

summarizes Staff's position. Therefore, Staff recommends the following language be inserted to replace paragraph 3279:

3279. In summary, Staff recommends the 0120 Plan be used for purposes of preventing backsliding, finds the Compromise Plan would not sufficiently prevent backsliding, and in the alternative proposed the use of a Hybrid Plan and that SBCI Commit to provide certain functions to all CLECS and all remedy plans. Staff's case is that the Compromise Plan would fail to prevent backsliding in a post-271 approval environment; that the plan introduces changes to the 0120 Plan that negatively impact findings regarding issues that were fully litigated in that docket; that the Compromise Plan introduces many language changes that are unsupported by their affidavits; and introduces other changes, in particular a new "index" value, that severely weaken the enforcement nature of the 0120 Plan. Accordingly, Staff introduced a "Staff Hybrid" plan for the Commission's consideration. Staff is not opposed to all aspects of the proposed Compromise plan. The benefits of the Hybrid Plan is that it accepts changes from the Compromise Plan that Staff supports, and provides an opportunity for the Commission to review modifications to the "base remedy" structure imposed in the commission-ordered remedy plan.

3280. Among the issues that were fully litigated in Docket 01-0120, which are changed in the proposed Compromise Plan, are the following: performance measurement weightings; performance measurement definitions; Tier 1 and Tier 2 remedy tables; test methodologies and treatment of small samples; and term of the plan. These improvements were made to the Texas Plan in Docket 01-0120, therefore, the 0120 Plan is sufficient to prevent backsliding and should be used for purposes of SBCI 271 application. Staff strongly recommends against changing these functions, which this Commission just ruled upon last July, and opposes the revisions of these features as proposed in the Compromise Plan.

3281. Further, the proposed Compromise Plan includes multiple significant wording changes that are not introduced, explained, or supported in the affidavits of the SBCI witnesses. Lacking any significant support, Staff opposes the significant wording changes made to the 0120 Plan.

3282. Staff is particularly opposed, however, to the introduction of new features regarding the calculation of remedies that severely weaken the enforcement nature of the 0120 Plan. These features are the removal of performance measure weightings, and the introduction of the index value.

3283. SBCI currently makes five remedy plans available to CLECs 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. These Commitments are to operate differently than the Conditions Staff requests SBCI to agree to regarding Phase 1 compliance issues and Key PMs. These Commitments 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.

3285. Accordingly, we now turn to Staff's analysis regarding the harmful impact of three of the SBCI proposed changes to the Commission-ordered remedy plan – removal of measure weightings; introduction of the index value; changes to PM definitions through “ceilings and floors” introduction, and other issues.

Excep. No. 31: Staff Rebuttal was Omitted

Staff takes exception to the omission of rebuttal information related to changes SBCI made to sections 5.5, 6 and 7 of the 0120 Plan, in transforming it in to the Compromise Plan. The Commission Analysis and Conclusion section addressed these issues. Therefore, Staff's rebuttal needs to be added to the Order to ensure its position is clearly stated.

Therefore, Staff recommends that Staff's rebuttal position be added to the Proposed Order at the following paragraph numbers:

Staff Rebuttal

3353.a. In its rebuttal affidavits, Staff emphasized that their recommendations were unchanged, and re-iterated their key objections to the SBCI-proposed remedy plan.

3353.b. In particular, Staff noted that its criticisms of the "key features" of the SBCI-proposed plan went un-rebutted; that is, SBCI never provided any direct rebuttal of Staff's critiques of the mitigating features of the SBCI-proposed remedy plan, such as Staff's objections to the introduction of the index value, the removal of the performance measure weightings, the flattened escalation feature, etc. While SBCI may be able to extol their plan, they have failed to directly rebut Staff's critiques, and are apparently unable to find flaws in Staff's analysis of their remedy plan.

3353.c. Further, in Staff's rebuttal affidavits, the following language changes were reviewed. At Staff's request, SBCI presented information about two of their language changes: the need for a change in selection of test methodologies for small samples, and support for the numerous changes made to Sections 5.5, 6, and 7 of the 01-0120 plan.

3353.d. Regarding SBCI's proposal to change how performance tests are performed for small-sample situations,¹⁰ SBCI's rebuttal affidavits represented that the change requested by SBCI has "essentially no effect" on total remedies and assessments paid.¹¹ Given that the change requested by SBCI would reverse the Commission's order for SBCI to always compare the performance provided to CLECs to both SBCI retail and affiliate performance, the Company's evidence that the change is meaningless is not persuasive.¹²

3353.e. The second request, for support for the elaborate changes to Sections 5.5, 6, and 7 of the Commission-ordered remedy plan,¹³ led to a

¹⁰ Staff Ex. 39.0 at ¶ 64

¹¹ Ehr Rebuttal Affidavit at ¶ 230

¹² Order, Docket 01-0120 at 29-30; See also 47 U.S.C. §251(c)(2)(C) for statutory language regarding performance comparisons made to both retail and affiliate data

¹³ Staff Ex. 39.0 at ¶ 65

similar conclusion. The Reply Comments filed by SBCI on March 3, 2003, include an offer to change limited portions of the SBCI-proposed remedy plan.¹⁴ However, the Company has not explained what changes they are seeking to these sections from the Commission-ordered remedy plan, which govern such issues as how CLECs adopt a performance remedy plan and conditions for exclusions and limitations of liability. During the rebuttal phase, offered to place the language of Section 5.5 from the Commission-ordered remedy plan “in lieu of” Section 5.6 and a non-existent Section 5.7 of the SBCI-proposed remedy plan. This offer appears faulty on its face, since the version of the SBCI-proposed remedy plan filed with SBCI witness Ehr's initial affidavit does not include a Section 5.7.¹⁵ Further, in addressing changes to Section 6 of the Commission-ordered plan, SBCI has offered to substitute a narrow provision regarding audits, contained in Section 6.4.1 of the Commission-ordered plan, for language contained in Section 6.1 of the SBCI-proposed remedy plan. Again, this offer appears to be faulty on its face, as Section 6.1 of the SBCI-proposed remedy plan does not address audits by the Company. It is unclear what effect SBCI's new proposal would have on Section 6 of the SBCI-proposed remedy plan. Finally, in addressing changes to Section 7 of the Commission-ordered plan, SBCI has offered to replace only Section 7.1 of the SBCI-proposed remedy plan with the language from Section 7.1 of the Commission-ordered plan. In its reply comments, SBCI is silent regarding the remaining sub-sections, 7 in all, of Section 7 of the SBCI-proposed remedy plan. When given the opportunity to explain and support the changes the Company seeks to specific sections of the Commission-ordered remedy plan, they have dis-regarded that opportunity and have instead introduced additional changes to the SBCI-proposed remedy plan. These additional changes proffered by SBCI do not improve the SBCI-proposed plan such that it would be able to meet the 271 criteria to prevent backsliding. The best means available to the Commission to preserve the opt-in provisions, exclusions and limitations on liability that were thoroughly reviewed, litigated, and explained in the Commission's order is to reject the performance remedy plan offered by SBCI, and require that the Company adopt the Commission-ordered remedy plan for purposes of its Section 271 application.

¹⁴ SBCI Reply Comments at 89-90

¹⁵ Attachment Z to Affidavit of James Ehr on Behalf of SBC Illinois (“Ehr Affidavit”), at 4-5

Excep. No. 32: Paragraphs 3366 to 3413 need to be moved to Paragraph 3356

The Commitments Staff set forth in its Comments, are presented in paragraphs 3353 to 3355, and 3366 to 3413. The second half of the Commitments need to be moved up to paragraph 3356, so as to keep the arguments together.

Excep. No. 33: Staff's Arguments in Support of the 0120 Plan were Omitted

The Proposed Order does not completely state Staff's entire position regarding the 0120 Plans ability to prevent future backsliding. The Proposed Order only reflects the first 4 paragraphs, of 12, in which Staff demonstrates how the 0120 Plan meets the five criteria the FCC uses to evaluate whether a remedy plan will prevent future backsliding. This information is supported by the record, and to ensure that Staff's complete argument is provided it recommends that the remaining paragraphs be inserted in to the Proposed Order.

Accordingly, Staff recommends the following paragraphs be added to the Proposed Order:

3324. Total Liability at Risk: Staff asserts that in order for a remedy plan to provide sufficient incentive for anti-backsliding purposes, the FCC has established a "meaningful" level of remedies to levy, on an annual basis, if the parity of service standard is not met;¹⁶ according to the FCC, and as used in Docket 01-0120, that level would be at least 36% of net return.¹⁷ The 0120 Plan employs remedy amounts that are demonstrably effective.¹⁸ Staff also notes that CLEC intervenors indicate that the remedy levels provided in the 0120 Plan barely compensate them for the significant costs they encounter when SBCI fails to provide service that meets the agreed-upon standards.¹⁹ More important, these CLEC affiants

¹⁶ New York Order, ¶435.

¹⁷ New York Order, ¶ 436

¹⁸ ICC Staff EX. 50.0 ¶16.

¹⁹ Affidavit of Forte Communications, Inc., at 3-4; Affidavit of CIMCO Communications at 3-5

indicate that they would greatly prefer to receive good service than remedy payments.²⁰ Finally, Staff's review of the effectiveness of the 0120 Plan's remedy structure has largely gone un-rebutted.

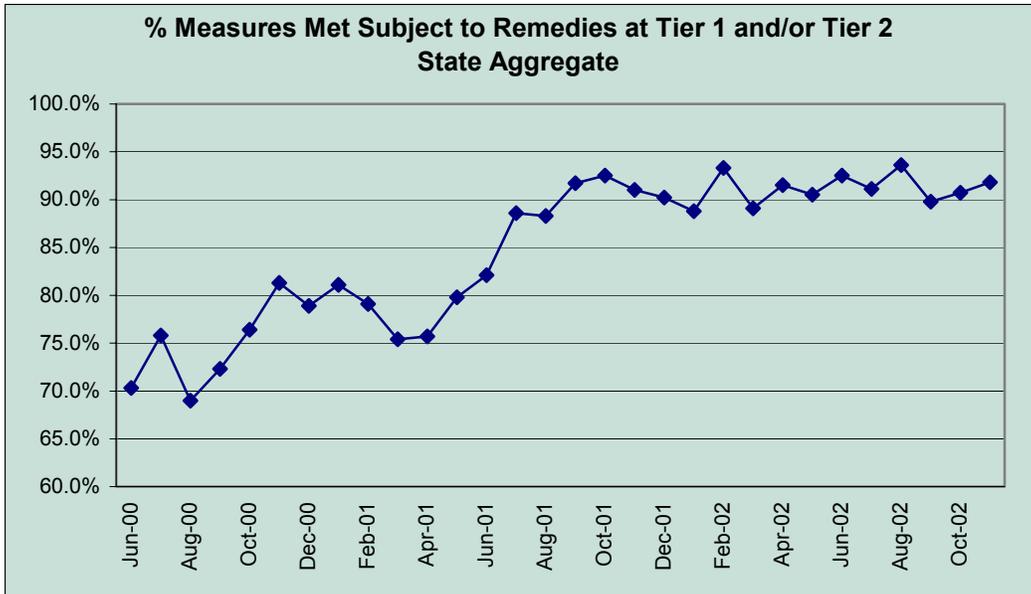
3325. SBCI argues that the 0120 Plan requires them to pay an amount out of proportion with the level of service they are providing. The Company dislikes the plan because it results in remedy payments that are higher than they wish to pay. The Company has demonstrated that it can comply with the 0120 Plan. Staff argues that, if the Company wishes to lower its remedy payments the 0120 Plan offers a means for achieving that goal. Under the 0120 Plan, remedy payments are reduced as SBCI provides better wholesale service. ICC Staff Ex. 50.0 ¶17. Finally, the issue doesn't need to be addressed at this time, since the Illinois Appellate Court is reviewing the Order in Docket 01-0120 to determine whether the record supports the increase in Tier 1 and Tier 2 payments as ordered by the Commission.²¹

3326. Staff responds that in making that the payments under 0120 are entirely reasonable. In reviewing the Commission's decision in 01-0120, under the 0120 Plan SBCI's annual payment would be approximately 50% of the \$317 million dollar (See Order, Docket 01-0120 at 36; Dr. Patrick Direct Testimony, Docket 01-0120, at 68-69) annual threshold if SBCI meets approximately 80% of its performance measures (SBCI affiant Ehr's Surrebuttal ¶127) for a whole year, and its annual payment would be between 8% and 11% of the \$317 million, if SBCI meets approximately 90% of its performance measures for an entire year. See Ehr Surrebuttal Affidavit, ¶141.

3327. Looking at the table provided in paragraph 127 of Mr. Ehr's Surrebuttal, it shows that from October to December 2000 SBCI met approximately 76% to 81% of its performance measurements, and from October to December 2002 SBCI met approximately 90% to 92% of its performance measurements.

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²¹

Forte Communications Affidavit at 4, CIMCO Affidavit at 7
Ameritech Illinois Petition for Review, Docket 01-0120 at 2 (dated September 26, 2002).



SBCI affiant Ehr's Surrebuttal ¶127.

In Docket 01-0120 Staff proposed that both Tier 1 and Tier 2 payments be tripled, and under that proposal SBCI would pay approximately \$160 million (approximately one-half of the \$317 million annual threshold) for an entire year if it provided service similar to what it provided from October to December of 2000 --- 79% compliance. See Order, Docket 01-0120 at 36; Dr. Patrick Direct Testimony, Docket 01-0120, at 68-69. Whereas, in this docket, from October to December 2002, SBCI would pay approximately \$9.2 million, or \$36.8 million (11.35% of \$317.1 million) annually if it provides service similar to what it provided from October to December 2002 – 91% compliance. See Ehr Surrebuttal Affidavit, ¶141.

Illinois

Tier 1 and Tier 2 Payments

	Amount of Payments		
Month	Tier 1	Tier 2	Total
Oct-02	\$3,321,000	\$774,100	\$4,095,100
Nov-02	\$1,182,441	\$605,000	\$1,787,441
Dec-02	\$1,069,970	\$564,000	\$1,633,970
	\$5,573,411	\$1,943,100	\$5,884,175

ICC Staff Exhibit 29.0, Attachment 29.03.

Looking at actual payments from October to December 2002, SBCI pays even less for providing 91% compliance. SBCI's current payments under the Commission-ordered remedy plan average approximately \$2 million per month (ICC Staff Ex. 29.0, Attachment 29.03), for 91% performance; therefore, SBCI would only pay approximately \$24 million per year, which is around 7.5% of the \$317 million annual threshold (36% of net return of local revenue).

3328. Performance Measurements and Standards: Staff's position is that this is not an issue, since no party raised it, and it was generally agreed upon by the parties during discussions in Phase 1 that the current PMs and standards in the tariffed business rules are adequate for detecting and correcting any degradation of SBCI service in the Illinois market. However, since it is part and parcel of a Performance Assurance Plan and is reviewed by the FCC in its application, Staff recommends that the Commission find it acceptable. In addition, Staff has proposed that the six month collaborative process will continue so that PMs and the business rules will be updated at periodic intervals. Staff Comments at 11-13.

3329. Structure That Detects and Sanctions Poor Performance: In evaluating whether a plan is sufficient for anti-backsliding purposes, the FCC considers whether the plan appears "reasonably designed to detect and sanction poor performance when it occurs."²² Staff asserts that the

²²

New York Order ¶440.

0120 Plan includes several features that enables it to detect and sanction poor performance, and does so better than the Compromise Plan. Staff states that the 0120 Plan includes:

(a) PM weightings, which attribute a level of importance to the service measured by a PM and correlates to the amount of Tier 1 compensation a CLEC is to receive if SBCI fails to meet that PM's standard;²³

(b) Effective "step-up" or escalation of Tier 1 and Tier 2 payments when SBCI fails to meet a PM standard for repetitive months (i.e. persistent failures);²⁴

(c) Methodology for determining failures and calculating remedies that is straightforward, and transparent;²⁵

3330. Most important, the 0120 Plan is designed to detect and sanction poor performance *when it occurs*, as opposed to the Compromise Plan which obfuscates the severity of an individual failure with its misplaced emphasis on "over all" performance. Staff Exhibit 39.0 at ¶¶46-48. The 0120 Plan emphasizes the assessment of service for each CLEC, for each occurrence of service provision.²⁶ In other words, the 0120 Plan assesses Tier 1 payments on the importance of each individual failure, and does not mask the payment based on the overall level of performance SBCI provides to all carriers, such as the SBCI plan. Therefore, the 0120 Plan meets the FCC criteria in a manner that is superior to the Compromise plan.²⁷

3331. *Self-executing Mechanism*²⁸: Staff asserts that the 0120 Plan is reasonably self-executing, since SBCI has been complying with the 0120 Plan, as noted by Mr. Ehr during the transcribed workshops.²⁹ The 0120 Plan meets this aspect of the FCC criteria since it has been in operation since September of 2002.³⁰

²³ Staff Ex. 39.0 at ¶¶ 37-44.

²⁴ Id. at ¶¶41-44.

²⁵ Id. at ¶¶45-50.

²⁶ Id. at ¶¶46-48.

²⁷ Id.

²⁸ New York Order ¶441.

²⁹ See Staff Ex. 39.0 at ¶64.

³⁰ Id. at ¶ 59-65.

3332. Data Validation and Audit Procedure:³¹ As discussed in the Performance Measurement section of this Order, and within this Section above, Staff does not consider SBCI's to have proven that its PM data is accurate or reliable, and therefore should not be relied upon by this Commission until the issues above are resolved, and recommends it be corrected prior to giving a positive recommendation to the FCC.

3333. However, the procedures that the Commission approved in the 0120 Plan will ensure that the data is valid in an ongoing basis. The 0120 Plan requires mini-audits and annual audits. SBCI has been able to perform these, and no party has challenged the ability of these audit mechanisms to ensure that both performance measurement data, and the performance remedy payments will be valid on a going-forward basis.

Excep. No. 34: Staff Arguments in Support of Staff's Hybrid Plan were Omitted

The Proposed Order does not reflect Staff's entire position regarding the Hybrid Plans ability to prevent future backsliding. The Proposed Order omitted the last two parts of Staff's position, in which Staff demonstrates how the Hybrid Plan meets the five criteria the FCC uses to evaluate whether a remedy plan will prevent future backsliding. Specifically, the Proposed Order omitted Staff's position on the Hybrid Plan's ability to detect and sanction poor performance, and that it is self-executing. These facts are supported by the record, and to ensure that Staff's complete argument is provided it recommends that the remaining paragraphs be inserted in to the Proposed Order. Accordingly, Staff recommends the following paragraphs be added to the Proposed Order:

3328. Staff does not believe its Hybrid Plan to be punitive. For 90% performance, SBCI would only pay approximately \$24 million per year, which is considerably less than \$317 million, or 36% of its net return.

³¹ New York Order ¶442. The FCC seeks to determine whether the PM data is valid and whether procedures have been set in place to check the data on an ongoing basis.

Given such a low payment, and since the Hybrid plan payments are estimated to be less than the 0120 plan, it also is not punitive.

3329. Ability to Detect and Sanction Poor Performance: In creating the Hybrid Plan, the only change to the 0120 Plan that Staff proposed that would affect the plan's ability to detect and sanction poor performance are the addition of the "gap closure concept" and the "step down" concept. Staff anticipates that both features would enhance the 0120 Plan's capability to detect and sanction performance. Staff Ex. 39.0 at ¶ 56.

3330. The "step down" concept allows the Tier 1 payments to be set at higher amounts when a persistent PM failure is followed by a month or more of service that meets the agreed-to standard, followed by a month of service that fails to meet the agreed-to standard. Currently, under the 0120 Plan, if a persistent PM failure is followed by a month of service that meets the agreed-to standard, if that PM is failed again in the future, remedy levels at the "first" month, or minimum level, of performance failure are used. Using the "step-down" concept, Tier 1 payments for persistently failed PMs would be calculated using a persistent month's remedy levels even if persistent failure is interrupted by a month (or, in some cases, more) of performance that met agreed-to standards. This gives SBCI credit for addressing performance issues, as it has requested, and at the same time provides an added incentive to institute lasting corrective actions. Ehr Affidavit ¶346.

3331. Staff supports the "gap closure" concept as modified above. Staff Ex. 39.0 at ¶ 56. The "gap closure" concept as presented in the SBCI-proposed remedy plan includes a one-sentence reference to the "floor" concept, which Staff does not support, therefore Staff recommends that it be deleted when used in the Hybrid Plan. However, the Gap Closure Plan provides for a resolution procedure between the interconnecting parties that incorporates a measure of "root-cause" analysis. Staff views such a procedure as being a good business practice since it allows parties to identify service problems and develop a plan to address those service problems. ICC Staff Ex. 29.0 ¶261. Therefore, Staff proposes the following language for its use in the Hybrid Plan:

If performance for any sub-measure fails to meet the standard of performance (parity or benchmark) defined in Appendix One for three consecutive months, SBC Illinois will, at request of the CLEC, initiate a "gap closure" effort. For a

measure to which a floor applies. “g”Gap closure” can be initiated when SBC Illinois fails to meet a performance measure standard is below the floor for two consecutive months. The “gap closure” effort will (1) identify the root cause for the failure to meet the performance standard, and (2) develop an action plan to improve performance to a level where it is meeting the standard of performance. Documentation of the root cause and the action plan to address it will be provided to the CLEC requesting “gap closure” within 30 days of CLEC request. If requesting CLEC assesses the action plan as inadequate, the issue will be escalated to senior management responsible for the CLEC account and the operational area(s) impacted. A response will be provided to CLEC senior management within 10 business days of receipt of the escalation from the CLEC. ICC Staff Ex. 29.0 ¶261.

3332. *Self-Executing Mechanism*: The FCC considers a remedy plan as being reasonably self-executing if it does not contain provisions that could effectively “destroy the self-executing aspect of the plan and open the door to extensive delay and litigation.”³² Staff argues that SBCI has been complying with the 0120 Plan, as noted by Mr. Ehr during the transcribed workshops.³³ Furthermore, Staff’s modifications are concepts proposed by SBCI, and therefore should be able to be executed by SBCI. In addition, Staff did not take issue with these concepts causing extensive delay or litigation. Since SBCI has been able to implement the 0120 Plan and the Hybrid Plan is the 0120 Plan with the few changes noted above, the Hybrid Plan naturally meets this aspect of the FCC criteria.³⁴

Excep. No. 35: The Payments Under the 01-0120 Plan are Reasonable and the 0120 Plan Meets the FCC Criteria to Determine Whether a Remedy Plan Prevents Backsliding

The Proposed Order dismisses the 0120 Plan because the Compromise Plan is better suited to “our current objectives” because it ties SBCI’s payments to its overall performance, and that the 0120 Plan requires payments that are too large in light of

³² New York Order ¶441.

³³ See Staff Ex. 39.0 at ¶64.

SBCI's current performance. Proposed Order ¶¶3432 -37. This rationale is flawed for two reasons. First, the Order fails to consider Staff's contention that the index value, which ties SBCI's payments to its overall performance, contains fundamental flaws. Second, there is no evidence in this proceeding that the payments under the 0120 Plan are excessive, in fact, Staff contends that they are reasonable and have stabilized performance levels. Despite that topic, the foremost evaluation before this Commission is to determine and approve the plan, or plans, that are suitable for preventing future backsliding, and no party argues that the 0120 Plan will not prevent future backsliding.

In evaluating the 0120 Plan the Proposed Order sidesteps the basis of this investigation -- to provide consultation to the FCC on which remedy plans are sufficient in preventing backsliding by SBCI in a post-271 approval environment – and rules in favor of SBCI based on an issue that is not relevant to protecting against backsliding. No party requested that the 0120 Plan *not* be used for purpose of 271 approval, much less argue that the 0120 Plan did not prevent backsliding. Nowhere in the Proposed Order, or in its affidavits or comments, does SBCI challenge the 0120 Plan's ability to prevent backsliding performance. SBCI simply asserts that the 0120 Plan requires payments that are too high, was based on data that is no longer timely, that its systems have been improved and operates adequately. SBCI never argues, and the evidence it adduces, does not support a finding that the 0120 Plan does not preventing backsliding. Nevertheless, the Proposed Order finds in favor of SBCI based on one petition – “it [SBCI] is asking this Commission to approve the Compromise Plan on its substantive merits – by applying its reasoned judgment to the record in this case, which according

³⁴ Id. at ¶¶59-65.

to SBC Illinois, is indisputably more extensive and more current than the record in Docket 01-0120.” Proposed Order ¶¶3358. This statement is incorrect. The record in this proceeding regarding the remedy plan is not more extensive than the record in Docket 01-0120, due to the exceedingly short timeframes established for this proceeding, as Staff has pointed out in any number of its pleadings, and while it may be more current, its lack of depth belies any benefit that may have been gained by its currency. Moreover, SBCI has not addressed the heart of the issue before the Commission as it relates to the 0120 Plan – does the Compromise Plan prevent backsliding?

In support of its finding that the 0120 Plans payments are too large the Proposed Order finds that the Commission, in its 01-0120 Order, was “obviously and rightfully concerned as much with improving performance by *punitive* means than with incurring continued performance growth or assuring compliant behavior.” The Proposed Order also asserts that the 0120 Plan was developed in response to a “certain select set of data” (Proposed Order ¶¶3432), that SBCI’s performance has improved and therefore does not warrant such high remedy payments (Proposed Order ¶¶3433-35), and that the 0120 Plan payments are nine times more than what the FCC has approved sufficient for purpose of preventing backsliding (Proposed Order ¶¶3437).

In response to these statements, Staff notes the following. First, the Proposed Order misconstrues the nature of incentives. Incentives remain in place in order to assure compliant behavior until the behavior is entrenched enough (either by systemic or other market changes) that the incentives can be released without backsliding. The duration of the remedy plan addresses this issue, not the amount of the incentives. If

SBCI's performance has improved, that is an indication that the incentives are achieving the desired goal. In addition, any level of incentive becomes punitive if the company fails to perform, and rightly so. While it is certainly true that the goal of the Commission in creating incentives is not to punish but to assure compliant behavior, if the company fails to comply then the incentives act as a punishment. Furthermore, the only time the level of incentives can be too high is in the event the ability of the company to perform is outside of its control. All of the proposed plans provide for exemptions (so called "force majeure" clauses) for failure to perform so this argument is irrelevant. To the extent Tier 1 payments do not contain any incentives for SBC's performance but are merely compensation to the CLECs, then, in that case, Tier 1 payments can be too high if they overcompensate the CLEC. SBC has provided no evidence in this proceeding that Tier 1 overcompensates CLECS. Tier 2 payments, and any other incentives incorporated within Tier 1, can never be too high because the company can always comply in order to avoid paying them. By contrast, incentives can be too low and, as a result, permit the company to make the business decision that it is cheaper to pay them than comply. Moreover, the payments that result from the 0120 Plan are reasonable regardless of the level of performance SBCI provides. The Commission determined the payment levels to be reasonable in Docket 01-0120, and continues to support that position in its arguments before the Illinois Appellate Court. Both in the 01-0120 Order, and as supported in its Brief filed with the Appellate Court, the Commission finds that the payments under 01-0120 "provide a reasonable incentive for Ameritech to provide service that is not substandard to the CLECs." Order, Docket 01-0120 at 36; ICC Brief to the Illinois Appellate Court, Third District, at 26-27 (filed April 11, 2003). In fact, at no

point in the 01-0120 Order does the Commission identify these payments as being introduced for the purposes of punishment; only SBCI argues that point. Therefore, it is inconsistent with the Commission's position in the Appellate Court, and inappropriate, for the Proposed Order to state in paragraphs 3432, 3436, and 3438, that the payments in the 0120 Plan were established for the purpose of punishing the carrier rather than providing incentives for compliance.

Furthermore, comparing the 0120 Plan's payments to other plans approved by the FCC, is a poor yardstick by which to determine that the plan is out-of-step with SBCI's current performance. See Proposed Order ¶ 3437. The fact that the 0120 Plan may result in SBCI paying nine times more than the "Texas" plan is irrelevant to an analysis as to what incentives are necessary in the Illinois market; moreover, the Company offered that plan for consideration in Phase 1 of this proceeding, and subsequently withdrew it from consideration. If SBCI is no longer proposing the merger-order plan, then any arguments comparing the SBCI Compromise plan to remedy plans that are similar to the Texas plan are irrelevant. See Staff Ex. 50, ¶ 12. Further, the Commission has already reviewed that plan, and its review was complete in Docket 01-0120. The plan SBCI proposed in the 01-0120 docket was approved by the FCC for Southwestern Bell Telephone Company's 271 application in Texas (Ameritech Initial Brief, Docket 01-0120 at 1), and in a fully litigated hearing in Docket 01-0120, the Commission found the information presented sufficient to find that doubling the payments SBCI made under the Texas Plan is reasonable and is needed to provide sufficient incentive to SBCI on a going-forward basis. Order, Docket 01-0120, at 35-37. Additionally, the FCC has stated in prior orders that states may create plans for post-

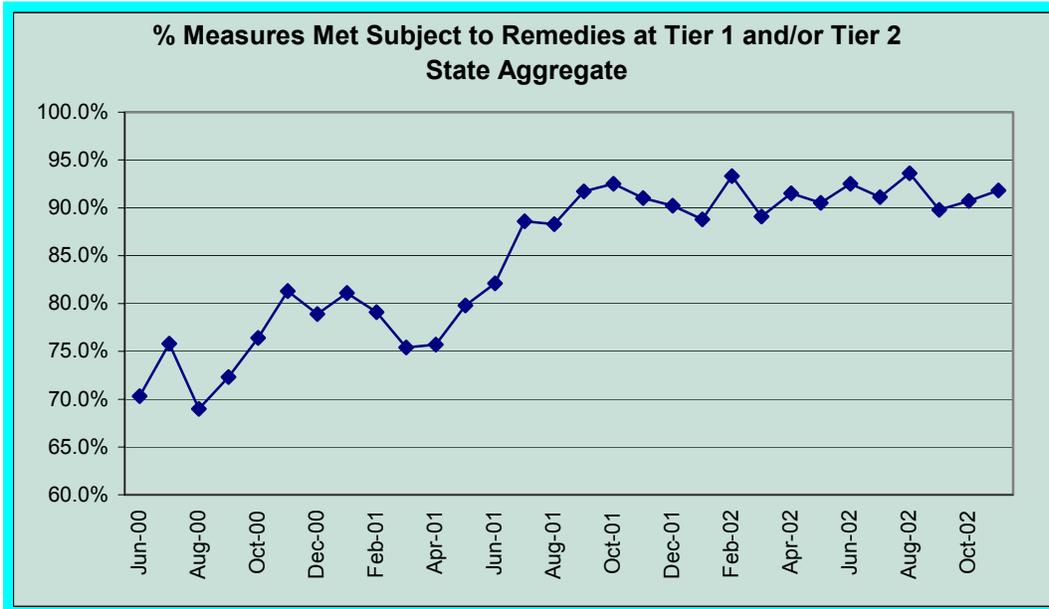
section 271 approval monitoring and enforcement that can vary in strengths and weaknesses. See New Jersey Order, ¶¶177; New York Order, ¶¶433; Texas Order, ¶¶423; Pennsylvania Order, ¶¶128-129.

Staff witness Dr. Melanie Patrick testified that [a]ccording to the FCC, a “meaningful” level of incentives would be 36% of net return (see New York Order, CC Docket No. 99-295, FCC 99-404, ¶¶436; see also Order, Docket 01-0120 at 40; Dr. Patrick Direct Testimony, Docket 01-0120, at 57) which is approximately \$317.1 million for SBCI. Under the proposed Texas Plan, Dr. Patrick testified that it would be “unlikely” that SBC would ever meet the FCC’s annual cap. Dr. Patrick Direct Testimony, Docket 01-0120 at 60. Even under Staff’s proposal to triple Tier 1 and Tier 2 payments, Dr. Patrick testified that the annual payment amounts would still fall far short of the total annual FCC cap. Id., at 68. Based, in large part, upon SBCI’s record of substandard service, the Commission agreed with Dr. Patrick and concluded that the Tier 1 and Tier 2 payments did not provide sufficient incentive to SBCI to improve its wholesale service and ordered that both the Tier 1 and Tier 2 payments be increased only by a factor of 2. Order, Docket 01-0120, at 37-38.

In making that determination the Commission’s was reasonable. In reviewing the evidence regarding payments SBCI would make under the 0120 Plan – SBCI’s annual payment would be approximately 50% of the \$317 million dollar threshold if it meets approximately 80% of its performance measures for a whole year, and its annual payment would be between 8% and 11% of the \$317 million, if SBCI meets approximately 90% of its performance measures for an entire year.

Looking at the table provided in paragraph 127 of Mr. Ehr's Surrebuttal, it shows that from October to December 2000 (the months evaluated in Docket 01-0120) SBCI met approximately 76% to 81% of its performance measurements, and from October to December 2002 SBCI met approximately 90% to 92% of its performance measurements. The evidence presented by SBCI demonstrates the success of the 01-0120 plan: that its structure provides appropriate incentives for improving SBCI's wholesale performances. A particular merit of the Commission-ordered remedy plan is that the remedy calculation appropriately emphasizes the assessment of service for each CLEC, for each occurrence of service provision. That is, the Commission-ordered remedy plan is fairly simple to administer. Once service has been provided and measured, SBCI assesses whether the performance met or failed the established standard. If the performance provided to the CLEC failed to meet the established standard, then SBCI would use Section 8.0 of the Commission-ordered remedy plan to calculate the applicable Tier 1 remedy. In this straightforward determination of performance assessment and remedy calculation, the Commission-ordered remedy plan accurately detects discriminatory behavior, and provides a simple methodology for

calculating remedies.



SBCI affiant Ehr's Surrebuttal ¶127.

In Docket 01-0120 Staff proposed that both Tier 1 and Tier 2 payments be tripled, and under that proposal SBCI would pay approximately \$160 million for an entire year if it provided service similar to what it provided from October to December of 2000 -- 79% compliance. See Order, Docket 01-0120 at 36; Dr. Patrick Direct Testimony, Docket 01-0120, at 68-69. Whereas, in this docket, from October to December 2002, SBCI provided a table, in Mr. Ehr's Surrebuttal, showing SBCI would pay approximately \$9.2 million, or \$36.8 million (11.35% of \$317.1 million) annually if it provides service similar to what it provided from October to December 2002 -- 91% compliance. See Ehr Surrebuttal Affidavit, ¶141. Comparing that to actual payments, SBCI pays even less for providing 91% compliance. SBCI's actual payments under the current five types of remedy plans it has in effect, averages just under \$2 million per month (ICC Staff Ex. 29.0, Attachment 29.03), for 91% performance; therefore, SBCI would only pay less

than \$24 million per year, which is around 7.5% of the \$317 million annual threshold (36% of net return of local revenue).

Illinois

Tier 1 and Tier 2 Payments

Month	Amount of Payments		
	Tier 1	Tier 2	Total
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	\$5,573,411	\$1,943,100	\$5,884,175

ICC Staff Exhibit 29.0, Attachment 29.03.

One cannot find the payments under the 0120 Plan to be too high, if SBCI is required to pay a little less than 50% of the annual threshold when it provides unacceptable service – 80% -- and it is unclear at what level of service it would be providing when it pays \$317 million. Paying just under 50% of the meaningful level of incentive, for providing service that was found substandard, and paying an amount between 7.5% and 11% of the meaningful level of incentive, for providing adequate service, leads to only one conclusion -- the 0120 Plan payments are more than reasonable. In addition, our level of meaningful incentive is lower than some states. Rhode Island³⁵, Maine³⁶, Massachusetts³⁷, Florida³⁸, Vermont³⁹, New Hampshire and

³⁵ Rhode Island Order ¶108 n.336.

³⁶ Maine Order ¶61 n. 266.

³⁷ Massachusetts Order ¶241 n.769.

³⁸ Florida Order ¶169, n.612.

³⁹ Vermont Order ¶74, n.259.

Delaware⁴⁰ have set their annual caps, which is the same as the meaningful level of incentive, at 39% of net return of local revenue; 3% more than what this Commission has required in the 0120 Plan. Georgia set their annual cap even higher -- 44% of net return of local revenues.⁴¹

Accordingly, Staff recommends that the Commission amend the Proposed Order regarding the 0120 Plan, and find that it is suitable to prevent SBCI's wholesale performance from future backsliding. Finally, there is no reason both plans could not be found suitable for preventing future backsliding, since SBCI currently offers 5 remedy plans to CLECs in Illinois. Therefore, Staff proposes the following language be inserted in place of paragraphs 3431 to 3440:

~~3431. We see a number of opposing parties to argue that there is no reason for the Commission to look at anything other than the 0120 Plan. To make their point, these commenters tend to emphasize exaggerate the differences between the Compromise Plan and the 0120 Plan. The record shows, however, that the basic structure and many key elements of the Compromise Plan are identical to the 0120 Plan. The Compromise Plan is in no way a "complete re-write," or rejection of the 0120 plan and many of the wording changes cited by the CLECs are not materially significant. To be sure, the Compromise Plan differs from the 0120 Plan in some important respects, but the greater evidence of record provides ample reason for the Commission to consider the Compromise Plan.~~

~~3432. To be sure, the The 01-0120 Plan, like any other plan, is a product of its time and circumstance. It was adopted in a proceeding where the data at hand and in consideration, (October-December, 2000), showed highly unacceptable performance. Faced with such a showing, the Commission was obviously and rightfully concerned as much with improving performance and by punitive means than with incenting continued performance growth or assuring compliant behavior. See Order, Docket 01-0120 at 36, 38, 40-42.(July 10, 2002). In other words, we~~

⁴⁰ New Hampshire/Delaware Order ¶¶169, n.580.

⁴¹ GA/LA Order ¶¶296.

~~responded to a certain select set of data. In so doing, it may have evolved that, under the resultant 01-0120 plan, even relatively good performance was doomed to be sanctioned harshly.~~

3433. We recognize that the 0120 Plan was designed in, under and for, a different set of circumstances. In that old and much different environment, we are reminded that: (i) comprehensive performance measures and standards had only recently been introduced, (ii) post-merger OSS enhancements (such as the implementation of version 4 of the Local Service Ordering Guide) were still under development, (iii) the third-party OSS test was just getting started. These factors, SBC Illinois contends, all contributed to overall performance being far less good than it is today. Responsibly, the Commission's focus at the time was on spurring improvement. As the graph in paragraph 3332, SBCI's performance has improved from the 75 to 80% compliance it was achieving in the Fall of 2000 to 90% to 93% compliance in Fall of 2002.

~~3434. We acknowledge, as indeed we must, that the environment in which we are analyzing SBC Illinois' Compromise Plan is much changed. Today, we observe a more extensive but equally telling set of data. The undisputed evidence shows that since the latter part of year 2000, i.e., the record period for Docket 01-0120, and up to this date, wholesale performance has improved to a significant and sustained level and there are no indications that it will not stay on track.~~

~~3435. Under present circumstances too, SBC Illinois would have us note that the Company has: (i) completed implementation of the Illinois OSS merger commitments; (ii) nearly completed the operational aspects of the OSS test; and, (iii) developed experience in, and processes for, better tracking and improving performance. According to SBC Illinois, responsibility for managing operations with regard to the wholesale performance results has been delegated to line managers in many organizations, and proactive assessment of results is now prevalent in most all wholesale functions. With performance much improved, the Company informs, SBC Illinois is now at the point where it has demonstrated compliance with the competitive checklist, and~~

is approaching the threshold of filing a section 271 application with the FCC.

3435. In light of these changes in conditions SBCI argues that the payments under the 0120 Plan are too high, if not punitive, since it was created when service was at unacceptable levels, and it has implemented changes, as discussed above. Under these facts and circumstances, it behooves this Commission to focus on whether the level of payments under the 0120 Plan are achieving the goal of providing adequate incentives for SBCI to achieve the level of performance necessary to sustain competition in Illinois before we analyze whether the 0120 Plan meets the FCC's anti-backsliding criteria.

3436. In making that determination the Commission was more than reasonable. In reviewing the evidence regarding payments SBCI would make under the 0120 Plan – SBCI's annual payment would be approximately 50% of the \$317 million dollar threshold if it meets approximately 80% of its performance measures for a whole year, and its annual payment would be between 8% and 11% of the \$317 million, if SBCI meets approximately 90% of its performance measures for an entire year. In Docket 01-0120 Staff proposed that both Tier 1 and Tier 2 payments be tripled, and under that proposal SBCI would pay approximately \$160 million for an entire year if it provided service similar to what it provided from October to December of 2000 --- 79% compliance. See Order, Docket 01-0120 at 36; Dr. Patrick Direct Testimony, Docket 01-0120, at 68-69. Whereas, in this docket, from October to December 2002, SBCI would pay approximately \$9.2 million, or \$36.8 million (11.35% of \$317.1 million) annually if it provides service similar to what it provided from October to December 2002 – 91% compliance. See Ehr Surrebuttal Affidavit, ¶141. Looking at actual payments, SBCI pays even less for providing 91% compliance. SBCI's current payments under the 0120 Plan average approximately \$2 million per month (ICC Staff Ex. 29.0, Attachment 29.03), for 91% performance; therefore, SBCI would only pay approximately \$24 million per year, which is around 7.5% of the \$317 million annual threshold (36% of net return of local revenue).

3437. Paying just under 50% of the meaningful level of incentive, for providing service that was found substandard, and paying an amount between 7.5% and 11% of the meaningful level of incentive, for providing adequate service, leads to only one conclusion -- the 0120 Plan payments are more than reasonable. In addition, our level of meaningful incentive is lower than some states. Rhode Island⁴², Maine⁴³, Massachusetts⁴⁴,

⁴² Rhode Island Order ¶108 n.336.

Florida⁴⁵, Vermont⁴⁶, New Hampshire and Delaware⁴⁷ have set their annual caps, which is the same as the meaningful level of incentive, at 39% of net return of local revenue; 3% more than what this Commission has required in the 0120 Plan. Georgia set their annual cap at 44% of net return of local revenues.⁴⁸

3438. Looking at the table provided in paragraph 127 of Mr. Ehr's Surrebuttal, it shows that from October to December 2000 SBCI met approximately 76% to 81% of its performance measurements, and from October to December 2002 SBCI met approximately 90% to 92% of its performance measurements.

3439. less on punishment or deterrence as a way to trigger improved performance, and onto the right set of incentives to maintain good performance in a post-271 setting. In light of such evidence, the Commission finds that the payment structure of the 0120 Plan is may well consider the suitability reasonable and appropriate. In Docket 01-0120 we found that service that complied with less than 80% of the PMs was unacceptable, and we set the payment levels at an amount we found would incent behavior, yet not quite at the 36% of net return. The remedy amounts then rapidly decrease to only requiring SBCI to pay approximately \$2.5 million, or less than 1% of the annual threshold, for service that is just above 90% compliant. We find the change of payments, and the amounts paid, when SBCI provides approximately 80% service and approximately 90% service to be reasonable and fair. These level of payments of a plan that will carry forward assurances of continued good performance. In other words, the anti-backsliding features of the 0120 Plan seem reasonable and fair and assure us that SBCI's performance will not backslide. a remedy plan become the major and most decisive concern, at this juncture. In other words, the anti-backsliding operation of a remedy plan has become a decisive factor for our concern at this juncture.

~~3440. As a general observation, and overall, the Compromise Plan appears better suited to our current objectives, precisely because it considers and is tied overall performance. The 0120 Plan,~~

43 Maine Order ¶¶61 n. 266.
44 Massachusetts Order ¶¶241 n.769.
45 Florida Order ¶¶169, n.612.
46 Vermont Order ¶¶74, n.259.
47 New Hampshire/Delaware Order ¶¶169, n.580.
48 GA/LA Order ¶¶296.

~~understandably, was not designed in this fashion. And, as SBC Illinois points outshowed in its January 17 filing, that the 0120 Plan would require SBC Illinois to make “remedy” payments of approximately \$3 million each month, or \$36 million annually, despite good performance. That amount is over nine times the amount of payments that would have been found sufficient by the FCC when it found the Texas plan to be adequate for purposes of section 271. As discussed above, this does not concern us, when compared to the total liability at risk of approximately \$317.1 million, it totals less than 1% per month. It is also muddles the message and suggests a level of unfairness.~~

~~3438. We further keep in mind that a remedy plan is not and should not be the sole incentive for a BOC to achieve and maintain good performance. As such, its design should be less focused on punitive aspects and geared more toward incenting and recognizing good performance while at the same time working to prevent and/or correct any backsliding behaviors.~~

~~3439. Whereas certain parties suggest that improvements in the Company’s performance are attributable to the 01-0120 plan, the record shows otherwise. The performance results of record, viewed over an extended period show that SBC Illinois’ improvements in performance occurred before the 0120 plan took effect, and, as such, cannot be credited to that plan. If anything, SBC Illinois points out, the 01-0120 is now penalizing the Company despite its having achieved good performance.~~

~~3440. We see no party to disagree with SBC Illinois’ showing and assertions of well-improved performance. That record of improvement is sound reason why SBC Illinois is offering, and the Commission is prepared to consider, the Compromise Plan. To be sure, the FCC has recognized that the development and implementation of performance measures and appropriate penalties is an evolutionary process that requires changes to both measures and remedies over time. Florida and Tennessee 271 Order at 170. In the view of this Commission, that time is now upon us.~~

The 0120 Compromise Plan’s Satisfaction of the FCC Standards.

3441. Having determined that the 0120Compromise Plan withstands our initial analysis, the question continuing before this Commission is whether the 0120Compromise Plan satisfies the key elements for section 271performance assurance plans as articulated by the FCC. New York 271 Order, ¶ 433. We now turn our efforts to a review of the 0120Compromise Plan with respect to these five elements.

FCC Element No. 1: Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;

3442. The Commission finds that ~~SBC Illinois' proposed~~ Compromise 0120 Plan provides a meaningful incentive for SBC Illinois to provide wholesale service to its competitors at the levels required by the performance measures. It is designed to assess remedies where there is sufficient evidence of a disparity between wholesale performance and the applicable standard, to increase payments as performance worsens, and to reduce payments as performance improves. That provides the proper incentive to maintain a high level of performance and to institute improvements should performance fall below the agreed-upon standards.

3443. The original Texas Plan, we are told, set a cap on annual remedies at \$90 million, pursuant to the Commission's order approving the SBC/Ameritech merger. Order at 221, Docket 98-0555. ~~Under t~~The 0120 Plan, that cap was converted that cap into a "procedural threshold" set at 36% of Net Return, using the same formula used in New YorkSWBT uses to calculating the annual caps for Texas, Kansas, Oklahoma, Arkansas, and Missouri. The threshold is to be recalculated annually using publicly available FCC ARMIS reporting data. If the cap is reached, the Commission would institute proceedings to determine the appropriate action. See Attachment Y, Section 7.3.

3444. The ~~Compromise~~ 0120 Plan uses ~~at the same~~ "procedural threshold," ~~calculated the same way, as the~~ 0120 Plan. that The "proceeding" triggered a proceeding when payments by reaching the threshold. The proceeding would be expected to determine if the threshold has been reached due to inadequate service provided by SBC Illinois,

or due to deficiencies within the remedy plan itself that cause inappropriate remedy amounts to be paid given the level of service provided by SBC Illinois to CLECs. In the situation where it is determined that the cap has been reached due to inadequate performance by SBC Illinois, additional remedies could be assessed over and above the threshold amount (as opposed to a “hard” cap that limits the total remedies). Likewise, if the remedy cap has been reached while service provided to CLECs by SBC Illinois has been adequate, the Commission can modify the remedy plan to provide for remedy payments that are more appropriate for SBC Illinois’ level of performance. The initial potential financial exposure to SBC Illinois (up to 36 percent of net return) is clearly significant, and it has been found by the FCC to be meaningful. Texas 271 Order, ¶ 424; Kansas & Oklahoma 271 Order, ¶ 274; Arkansas & Missouri 271 Order, ¶ 130.

~~3445. The Compromise Plan, like the 0120 Plan, contains a two- tiered payment structure. Under the plan, Tier 2 liquidated damages¹ payments are paid to the CLECs. Tier 2 assessments are paid to the State.~~

~~3446. The Compromise Plan goes further than some other plans found meaningful by the FCC. Indeed, as we see it, the Compromise Plan has several “performance correcting/sustaining” aspects not found in either the Texas Plan or the 01-0120 Plan.~~

~~3447. First, the Compromise Plan will “index” liquidated damages amounts so that remedies for individual performance shortfalls increase if overall performance worsens. Second, the Compromise Plan gives CLECs the opportunity to request a “gap closure” process to address any persistent shortfalls in performance. Third, the Compromise Plan would continue to “escalate” remedy amounts if a performance standard is missed in consecutive months (as appears to be standard). But here, unlike the Texas Plan or the 0120 Plan, it will also keep the remedy amounts at an escalated level until the applicable standard is met for three months. Finally, the cap on remedy payments has been changed from a “hard” cap to a procedural threshold, calling for a Commission proceeding to be initiated if SBC Illinois’ remedy payments exceed the threshold.~~

3446. All of this, in our view, provides just the type of “meaningful incentive” that the FCC requires.

FCC Element No. 2: Clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;

3449. The agreed-upon measurements track performance for a full range of services. The agreed upon PMs and standards in the tariffed business rules are adequate for detecting and correcting and degradation of SBCI service in the Illinois market. ~~There is no change to the measures or standards as between the Compromise Plan and the 01-0120 plan.~~

3450. There is no dispute regarding the performance measures and standards included in 0120SBC Illinois’ Compromise Plan. These measures and standards, and the rules for calculating them, were defined by agreements reached after extensive negotiations with CLECs in performance measurement collaboratives throughout the region.

3451. Established by mutual agreement in collaborative sessions, they were modified by mutual agreement in subsequent “six-month review” sessions. ~~Just as in the 01-0120 plan,~~ Periodic updates to the measures and standards will occur ~~are to continue~~ via the 6-month review collaborative processes. See Section 6.3. (And, when disputes arise, there is an open path to the Commission. For example, we will be reviewing two disputed issues from the current review in another section of this order).

FCC Element No. 3 - a reasonable structure that is designed to detect and sanction poor performance when it occurs.

3452. The ~~Compromise~~0120 Plan is designed to: (1) assess remedies where there is sufficient evidence of a disparity between wholesale performance and the applicable

standard; (2) to increase payments as performance worsens; and (3) to reduce payments as performance improves. This is, in our view, the right structure.

3453. Overall, the basic structural elements of the Compromise 0120 Plan ~~are~~ is the same as the ~~0120 Plan~~, which ~~in turn used the same~~ structure approved by the FCC in the Texas 271 Order (¶ 426), the Kansas & Oklahoma 271 Order (¶ 276) and the Arkansas & Missouri 271 Order (¶¶ 129-130). Most of the modifications ordered in Docket 01-0120 ~~and retained here~~ concern the numbers that go into the remedy calculations, not the structure of the plan or the steps involved in calculating remedies.

3454. The basic operational scheme remains the same: Each month SBC Illinois' actual performance is mathematically determined for each individual performance measurement result. Each of these results is then compared to an objective standard for that measurement, using accepted statistical techniques. If the comparison shows that SBC Illinois did not provide the required level of service, remedy payments will be calculated pursuant to the methodology detailed in the performance remedy plan.

3455. ~~As under t~~The 0120 plan, the Compromise Plan uses statistical analysis, for parity measures, and direct comparison, for benchmark measures, to determine when remedies are to be paid by identifying whether the size and number of performance shortfalls are significant, or small enough so as to be attributed to the random variation inherent in actual wholesale and retail performance.

3456. The 0120 Plan includes several features that more than adequately detect and sanction poor performance by SBCI, including:

(a) PM weightings, which attributes a level of importance to the service measured by a PM and correlates to the amount of Tier 1 compensation a CLEC is to receive if SBCI fails to meet that PM's standard;⁴⁹

⁴⁹

Staff Ex. 39.0 at ¶¶ 37-44.

(b) Effective “step-up” or escalation of Tier 1 and Tier 2 payments when SBCI fails to meet a PM standard for repetitive months (i.e. persistent failures).⁵⁰

(c) Methodology for determining failures and calculating remedies that is straightforward, and transparent;⁵¹

Most important, the 0120 Plan is designed to detect and sanction poor performance *when it occurs*. The 0120 Plan emphasizes the assessment of service for each CLEC, for each occurrence of service provision.⁵² In other words, the 0120 Plan assesses Tier 1 payments on the importance of each individual failure, and does not mask the payment based on the overall level of performance SBCI provides to all carriers, such as the SBCI plan. Therefore, the 0120 Plan meets the FCC criteria in a manner that is superior to the SBCI-proposed remedy plan.⁵³

~~statistical methods in the Compromise 0120 Plan, while virtually identical to the methodology set out in the 0120 plan, contains two minor changes. First, the Compromise Plan recognizes that there is no need to perform a statistical “permutation test” (comparing wholesale and retail results) in instances where both results are perfect (here, no shortfall could have occurred). Second, in situations where wholesale is performance is being compared to both retail and affiliate results, but the number of affiliate transaction is small, i.e., less than 30, the retail result, being more representative, will be used. These refinements are reasonable, in the view of this Commission.~~

~~3457. The 0120 plan, we previously adopted, assesses payments at a set amount without reference to overall performance. The Compromise plan operates to “index” payments expressly on the basis of overall performance. In short, if the overall “pass rate” on a performance measure is at a sufficiently high level, the individual base amount is reduced. On balance, if the overall “pass rate” falls within a lower level, the base amount increases. The lowest base amount applies where the Company meets or exceeds 92 on its performance tests. The base amounts increase progressively as performance pass rate falls to the 86-92~~

⁵⁰ Id. at ¶¶ 41-44.

⁵¹ Id. at ¶¶45-50.

⁵² Id. at ¶¶46-48.

⁵³ Id.

~~percent level; the 80-86 percent level; the 74-80 percent level, and below the 74 percent level. (The record suggests that the base amount at the lowest performance level, i.e., below 74 percent is approximately 4.25 times that of the base amount indicated at the highest performance level, i.e., 92 percent and above).~~

FCC Element No. 4: A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal.

~~3457. Under the Compromise Plan, no different than The 0120 plan, payment occurs automatically without any CLEC initiative or Commission action. So too, payments are delivered via check or credit depending on CLEC notice. The payments are undertaken on a voluntary basis and directly relate to objective, agreed-upon measurements.~~

3458. There is also an expedited procedure provided for that allows the Commission to waive remedies if it finds that a particular performance shortfall was caused by some factor outside the control of SBC Illinois (for example, a CLEC error, or a natural disaster). The Commission approved that very concept for the 0120 plan, and the FCC has found such a procedure to be sufficiently self-executing for purposes of Characteristic No. 4. Texas 271 Order, ¶ 427; Kansas & Oklahoma 271 Order, ¶ 277; Arkansas & Missouri 271 Order, ¶¶ 129-130.

~~3459. The Commission does not believe that the FCC would require every single aspect of a remedy plan to be self-executing. Indeed, it is inconceivable that such a plan exists or could ever be developed. To be sure, the Commission disagrees with the suggestion that the Compromise Plan is made any less “self-executing” simply because it requires CLECs to submit payment information if they desire payment by check. To be sure, payments under the Compromise Plan would still be automatic; the Compromise Plan merely requires the CLEC to specify in advance where it wishes to receive a check if it desires to be paid by that method. It would be unreasonable to require anything less.~~

3460. On the whole, we view the ~~Compromise~~ 0120 plan, to satisfy this FCC criterion.

FCC Element No. 5: Reasonable assurances that the reported data is accurate.

3461. SBC Illinois performance measurements have been audited, and are also being assessed as part of BearingPoint's ongoing third-party OSS testing. For audits going forward, ~~SBC has proposed a comprehensive regional the 0120 Plan provides for annual audits~~ audit to be conducted ~~126~~ months after either adoption of the remedy plan or completion of the current BearingPoint audit. ~~We have modified this provision as earlier discussed, to initiate audit 16 months after completion of BearingPoint's audit.~~ As importantly, the 0120 Compromise Plan includes a provision for CLECs to request an independent "mini-audit" to address disputes on specific measurements or results.

3462. The 0120 Plan had also provided for CLEC-initiated audits for measures specified by the CLEC where the CLEC and SBC Illinois could not reconcile reported results and the CLEC decided to have a third-party conduct and assessment of SBC Illinois' reporting of the specified measure(s). ~~SBC Illinois' Comments of March 25, 2003 state that it will agree to the language of the 0120 Plan on this issue just as Staff recommends. We accept this adjustment and will hold SBC Illinois to this commitment.~~

3463. All of the above, we believe, meets with the FCC's concerns.

Summary

3464. On the entirety of our review and analysis, the Commission concludes that the 0120 Plan meets with, and will serve, the public interest. Our recommendation on SBC Illinois' Section 271 application, in this regard, is expressly conditioned on SBCI's acceptance and referral of this plan to the FCC as herein modified. Further, it shall be designated

and known hereafter as the Commission Approved Section 271 Plan.

Excep. No. 36: Language in Paragraph 3442 Undercuts Past Commission Order

Paragraph 3442 states that “the Commission is free from the shackles of the Merger Order and the stale evidence that supported the 01-0120 plan.” Although it is correct in stating that this proceeding is not guided by the Merger Orders requirements, the Proposed Order does not account for the minimum standards that provide a guide in this proceeding – the guidelines the FCC uses to determine that a remedy plan would prevent future backsliding by a RBOC. Additionally, to describe previous Commission Orders as acting as a “shackle” undercuts the Commissions commitment to its own Orders.

Therefore, Staff proposes the following language be deleted and added to paragraph 3442:

3442. A remedy plan exists to motivate good performance and to do so in a fair, ~~cu~~ertain and expedient fashion. All of this requires a delicate balancing among a plan’s many features. In our consideration of the proposed Compromise Plan, the Commission is guided by the FCC’s guidelines in determining whether a performance assurance plan will prevent future backsliding by a regional bell operating company, that each state is to determine what performance measurements and remedies that will protect its wholesale market from ILEC backsliding. See New Jersey Order, ¶177; New York Order, ¶433; Texas Order, ¶423; Pennsylvania Order, ¶¶128-129. Performance assurance 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 ~~guided by the initiating order and free from the shackles of the Merger Order and the stale evidence that supported the 01-0120 plan. Nevertheless, we would not intend to disregard the 01-0120 plan altogether and start on a whole new slate even as the plan we consider here serves a new set of purposes. Our analysis shows we need not fear such a thing.~~

Excep. No. 37: Changes to Proposed Order to support its Rationale that the Compromise Plan is Related to the 01-0120 Order

In paragraphs 3442 to 3444, the Proposed Order sets the groundwork for finding that the Compromise Plan is actually based on the 0120 Plan, as required by the Commission in Docket 01-0120 (Order at 20). Staff recommends that the actual requirement from the 01-0120 Order be set forth, prior to the comparison. Paragraph 3444 lists functions that are in both the Compromise Plan and in the 0120 Plan to demonstrate their similarity, however, seven of the items in the list involve functions of the Compromise Plan that were changed and now vary from the 0120 Plan. Therefore, although the functions are present in both remedy plans, language should be added to the Proposed Order that states that the Compromise Plan changed some functions, and those changes are at issue in this docket.

Therefore Staff propose that the following additions and deletions be made to paragraphs 3443 and 3444:

3443. Many of the same features of the 01-0120 plan appear in the Compromise plan. To be sure, there are also some differences. In assessing the suitability of the plan as an anti-backsliding initiative, however, we cannot and will not let either similarities or differences between the proposed plan and any other plan, dictate the end result. Put another way, our assessment must be, and will be, made on the Compromise plan as a whole.

3444. Even at that, we observe that many features~~operatives~~ retained in the Compromise Plan, and based on the 01-0120 plan, include the following:

- (1) exclusion of the K Table;
- (2) benchmark assessment stays at the bright-line test;
- (3) a provision for comprehensive audits;

- (4) a provision for mini-audits;
- (5) comparison to both retail and affiliate (with the better of the two controlling on assessment);
- (6) annual cap amounts as thresholds set at FCC approved levels;
- (7) waiver situations identified by a standard and afforded review,
- (8) CLEC form of payment, i.e., by check or credit;
- (9) small sample permutation tests;
- (10) recognized and established statistical analyses.

We note however, that although the foregoing features, or functions, are in both the Compromise Plan and the 0120 Plan, the Compromise Plan has changed them from how they operate in the 0120 Plan, with respect to items 3, 4, 5, 6, 7, 8 and 9 above. These changes are now at issue in this docket.

Excep. No. 38: Paragraph 3446 is not relevant to Deciding Whether the Compromise Plan is suitable to Prevent Backsliding

In paragraph 3446 the Proposed Order notes that Staff proposed a hybrid plan that uses some functions of the Compromise Plan. This has no bearing on whether the Compromise Plan is suitable for preventing backsliding. Therefore, this paragraph should be deleted, or included in the discussion of the Hybrid Plan.

Excep. No. 39: SBCI Did not Meet Its Burden of Proof -- Demonstrating that its Changes to the 0120 Plan were Warranted

In its Comments Staff discussed the Burden of Proof SBCI had in making changes to the 0120 Plan, however the Proposed Order failed to address this point. In reviewing SBCI's affidavits, it fails to support its changes and therefore fails to meet its burden. In failing to meet its burden, the Proposed Order cannot find that the

Compromise Plan adds features that make it better suited to prevent backsliding than the 0102 Plan.

In the 01-0120 Order the Commission stated that “any future reference (in either current 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.” Order, Docket 01-0120 at 20. Since the 0120 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. Further, SBCI carries the burden of proving that the Compromise Plan will “ensure that the local market remains open to competition and to guard against backsliding following 271 approval.” Initiating Order at 3. To that end the FCC has identified five specific criteria the FCC uses to review performance assurance plans (PAP) to see whether it is likely to perform as promised and likely to provide incentives that are sufficient to foster post-entry checklist compliance. New York Order ¶433. SBCI must prove that Compromise Plan has these key elements:

1. potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
2. clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
3. a reasonable structure that is designed to detect and sanction poor performance when it occurs;
4. a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal;

5. reasonable assurances that the reported data is accurate, through audits and data validation.

New York Order, ¶433; AR/MO Order ¶130.

As Staff discusses in the sections below, SBCI has not met those two burdens in arguing that the Compromise Plan meets the 271 criteria..

In addition, SBCI has made numerous unsupported and unjustified changes to the plan, and which due to the short timeframe 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. In addition Staff identified at least six issues that it was unable to address, and which SBCI never provided an explanation for its change from the 0120 Plan. Therefore, the scope of this review, due to the schedule, has been limited to a review strictly for purposes of consultation with the FCC and nothing more. It would be improper, and imprudent to state that the Compromise Plan is a Commission approved plan due to the limitations of this case. Staff Comments at 3.

Accordingly Staff recommends that language regarding the parties ability to analyze the plan in this case was limited. Therefore, Staff recommends that the following paragraph be inserted at the paragraph number noted:

3446a. Due to timing requirements of filing with the FCC the schedule in this docket was set on a fast-track. In its Comments, Staff expressed concern over this matter, and stated that its review was limited to issues impacting the Compromise Plan's ability to prevent backsliding, and for no other purpose, such as for use as a state approved wholesale service quality plan. We agree with Staff, that this case is limited to an analysis to determine if the Plans brought before this Commission prevent backsliding, and for no other purpose. This position is consistent with the Initiating Order, in which we stated that this investigation was to "determine whether we believe [SBCI] has satisfied the requirements of Section 271 for purposes of our consultation with the FCC. The Commission will work with [SBCI], the CLECs, Staff and other interested parties to bring about any necessary changes or improvements." Initiating Order at 3. The Compromise Plan does not fall within the scope of what we envision as a necessary change or improvement so that they can gain 271 approval.

3446b. SBCI points out the enormous amount of analysis, exhibits, manpower and effort that went in to this docket, however that does not obviate the fact that some issues could not be addressed in this short timeframe. Indeed, a much more in depth analysis was performed in the 01-0120 docket, and that depth could not be replicated under the timeframes established in this proceeding. Furthermore, SBC's argument does not address the purpose of this docket, which is to provide an analysis of the remedy plan's effectiveness to prevent backsliding in preparation for a consultation with the FCC and not a forum for approving a remedy plan. Furthermore, it does not attack the purpose of this docket, which is an analysis to prepare for a consultation with the FCC and not a forum for approving a remedy plan.

Excep. No. 40: The Compromise Plan Does not Properly Detect and Sanction Poor Performance

The Proposed Order reviewed the PM weightings and indexing of payments and found them to be appropriate and satisfactory. Staff takes exceptions to these findings.

A. PM Weightings

Staff takes exception to the finding in paragraphs 3452 to 3454, since the Proposed Order does not properly characterize our contentions, and provides no rationale that refutes Staff's arguments. In a cursory statement in paragraph 3454 the Proposed Order states that the Compromise Plan has beneficial features, but does not explain how those beneficial features outweigh the concerns expressed by Staff. The Proposed Order acknowledges that Staff addressed the individual problems of the removal of the PM weightings and how it impacts the over all operation of the Compromise Plan, and addresses none of Staff's concerns, but simply states that the PM weightings should remain because the overall plan is satisfactory – this ignores Staff's presentation in toto. The conclusion stated in paragraph 3454 of the Proposed Order completely sidesteps Staff's showing that SBCI's behavior is impacted by the weighting of the PM, that there is significant concern for future discriminatory impact to CLECs, and that it undermines the purpose of the six month collaborative process by allowing SBCI to make changes to the performance measures without CLEC approval.

Based on Staff's review of PM weightings, it found that SBCI was motivated to correct PMs with a High PM weighting, more quickly than they fix PMs with low weightings. ICC Staff Ex. 39.0 ¶43. Ten to twelve percent of PMs with a Low PM weighting are "persistent failures", or continuing for a number of months. Staff's concern is that there is a strong likelihood that removal of the PM weighting system will allow failures to persist or increase, thereby increasing the discriminatory treatment to all CLECs after SBCI has received 271 approval. The reason there could be an increase, is that the Compromise Plan uses a single-weight for all PMs that are used for Tier 1 payments, and the dollar amounts paid under the Compromise Plan are less than

the dollar amounts for Low PMs in the 0120 Plan. ICC Staff Ex. 39 ¶41. The Low payments under the 0120 Plan range from \$50 to \$800, and the payments under the Compromise Plan range from \$35 to \$900.

0120 PLAN -- PAYMENT TABLE FOR TIER-1 MEASURES

Per occurrence Measurement Group	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6 and each following month
High	\$300	\$500	\$1000	\$1200	\$1400	\$1600
Medium	\$150	\$300	\$600	\$800	\$1000	\$1200
Low	\$50	\$100	\$200	\$400	\$600	\$800

If all the PMs in the Compromise Plan that are used for Tier 1 payments essentially now have a Low PM weighting, and SBCI does not improve on its 10-12% persistent failure rate, the overall number of PMs that persistently fail will increase. Therefore, the likelihood that there will be an overall increase in discriminatory treatment towards CLECs is significant. See generally ICC Staff Ex. 39.0 ¶43.

In comparison, less than 3% of PMs with High PM weightings have persistent failures. Therefore, the importance of motivating SBCI to reduce its number of persistent failures is important and therefore it is important to maintain PM weightings. ICC Staff Exhibit 39.0 ¶42-43.

SBCI offered no response to Staff arguments, except surprise. See Her Surrebuttal ¶226.

Additionally, weightings for each PM are contained in the business rules, and changes to the business rules are made in conjunction with CLECs through the six month collaborative process. See Staff Exhibit 39.0 ¶44. As noted earlier, the current PM weighting process has been supported in six-month collaborative meetings held

since the Docket 01-0120 ruling. The Commission should not allow SBCI to circumvent CLECs rights in the six month collaborative process by using this Compromise Plan. Staff points out that since the Compromise Plan essentially does away with PM weightings it changes the business rules without gaining unanimous CLEC approval in the six month collaborative approval. Since changes to the business rules must be approved by the CLECs, it is unclear whether the Compromise Plan can even be used without first approval by the CLECs in the collaborative process. Staff strongly urges the Commission to allow PMs to be set by market forces – allowing CLECs and SBCI to negotiate changes.

Since SBCI has provided no countervailing evidence to Staff's argument, it has failed in carrying its burden of proof, and rebutting Staff's argument. Accordingly, Staff recommends that the Proposed Order be revised to account for Staff's arguments, and find that the lack of PM weightings causes a substantial likelihood that there will be increased persistent failures under the Compromise Plan, and increased likelihood that CLECs will receive discriminatory service under the Compromise Plan. Consequently, the Compromise Plan does not adequately detect and sanction poor performance, but is likely to allow poor performance to increase. Therefore, Staff proposes the following replacement language for the Proposed Order:

b. Removal of Weightings

3452. Staff discusses how the lack of PM weightings has impacted SBCI's behavior, such that there is significant concern for future discriminatory impact to CLECs. Further, Staff points out that allowing SBCI to not have PM weightings undermines the purpose of the six month collaborative process because it allows SBCI to make changes to the business rules and performance measures without CLEC approval through the six month collaborative process. We see Staff to object to the Compromise Plan's removal of weightings, primarily on the basis that, despite much objection, this Commission included such weightings in our

0120 Order. Staff's objection, we would note, relies on treating this feature on a stand-alone basis.

3453. In Staff's testimony it showed that PM weightings work to motivate SBCI to correct problems, since the data it reviewed showed that SBCI corrected PMs with High PM weighting more quickly than PMs with Low PM weighting. ICC Staff Ex. 39.0 ¶43. Ten to twelve percent of PMs with a Low PM weighting are "persistent failures", or continuing for a number of months. Staff expressed concern that there is a strong likelihood that removal of the PM weighting system will allow failures to persist or increase, thereby increasing SBCI's discriminatory treatment to all CLECs after SBCI has received 271 approval. Staff explained that an increase could happen because the Compromise Plan uses a single-weight for all PMs that are used for Tier 1 payments, and the dollar amounts paid under the Compromise Plan are less than the dollar amounts for Low PMs in the 0120 Plan. ICC Staff Ex. 39 ¶41. The Low payments under the 0120 Plan range from \$50 to \$800, and the payments under the Compromise Plan range from \$35 to \$900. If all the PMs in the Compromise Plan That are used for Tier 1 payments essentially now have a Low PM weighting, and SBCI does not improve on its 10-12% persistent failure rate, the overall number of PMs that persistently fail will increase. Therefore, the likelihood there will be an overall increase in discriminatory treatment towards CLECs is significant. See generally ICC Staff Ex. 39.0 ¶43. To be sure, however, when assessing FCC criterion No. 3 as a whole, Staff itself considered several features as relevant to that standard, i.e., weighting, indexing, gap closure. We would add the step up/step down escalations to that mix.

3454. Significantly SBCI did not respond to Staff's contention that higher remedy amounts provide substantial incentive to SBCI to provide non-discriminatory service. Taking the Compromise Plan as a whole, and with what we see are more beneficial added features, we are not concerned any longer with retaining the weightings feature. We would note that this is just as the Staff and the CLECs advocated in Docket 0120, and there is no demonstration on record to indicate that weightings are appropriate for the Compromise Plan.

3455. Additionally, weightings for each PM are contained in the business rules, and changes to the business rules are made in conjunction with CLECs through the six month collaborative process. See Staff Exhibit 39.0 ¶44. Staff points out that since the Compromise Plan essentially does away with PM weightings it changes the business rules without having to go through the six month collaborative process and obtain unanimous consent of the CLECs. Since changes to the business rules must be approved by the CLECs, it is unclear whether the Compromise Plan can even be used without first approval by the CLECs in the collaborative process.

3456. Given the likelihood of the lack of PM weightings will have on SBCI's performance, and that this action could amount to an end run around the CLECs input through the collaborative process, the Commission agrees that this would lead to increased discriminatory treatment, and reduced detection and sanctioning of poor performance.

B. Index Value

Staff takes exception to the findings in paragraphs 3455 and 3456, since the Proposed Order provides no rationale refuting Staff's position. The Proposed Order, at a high level, states how the uniqueness of the Compromise Plan, in conjunction with all of the other features of the plan will "assess, motivate, sustain" and correct performance. The Proposed Order does not explain what features it is referring to, or relying upon, nor does it provide rationale regarding how these features refute Staff's argument that the index value introduces a real potential for discriminatory behavior, allows the Compromise Plan to be non-transparent and non-replicable, at times allows remedy payments for persistent failures to decrease, and reduces SBCI payments over time. ICC Staff Ex. 39.0 ¶¶47-53; Proposed Order ¶¶ 3285-92. The Proposed Order also ignores the fact that SBCI did not accurately calculate the remedy amounts in this proceeding, giving rise to the question as to whether the Compromise Plan is reliable. ICC Staff Ex. 39.0 ¶49; Proposed Order ¶3288.

The most objectionable aspect of the index value is that it takes the focus away from assessing whether each provision of wholesale service by SBCI meets or fails the service standard established for that performance measurement. A particular merit of the 0120 Plan is that the remedy calculation appropriately emphasizes the assessment of service for each CLEC, for each occurrence of service provision. That is, the 0120

Plan is fairly simple to administer. Once service has been provided and measured, SBCI assesses whether the performance met or failed the established standard. If the performance provided to the CLEC failed to meet the established standard, then SBCI would use Section 8.0 of the 0120 Plan to calculate the applicable Tier 1 remedy. In this straightforward determination of performance assessment and remedy calculation, the 0120 Plan accurately detects discriminatory behavior, and provides a simple methodology for calculating remedies.

In Staff's testimony, affiant Dr. Patrick provided the following example, to provide an analogy of the index value calculation, introduced by SBCI, to the assessment of educational performance. ICC Staff Ex. 39.0 ¶48. Suppose that a particular school district was interested in determining how well its teachers were performing in delivering their primary product, classroom instruction. A current trend, encouraged by recent federal legislation, employs the tool of standardized testing for all students. If the district focused on average student test results measured at the level of each school, we can imagine that some schools may do better, and some schools may do worse. However, such a school-level average measure would very likely mask wide disparity present at the classroom level. As specified, above, the question at hand addresses teacher performance in delivering classroom instruction, an aggregate performance measure would lead the district to mistakenly identify all teachers within a high-performing school as good teachers, and all teachers at a poorly performing school as poor teachers. In a similar way, the SBCI-proposed remedy plan would lead to low remedy calculations to address potentially severe service failures, simply because the index value introduces

an inappropriate aggregate assessment that serves to take our attention away from possibly severe CLEC-level performance problems. Id.

The index value also minimizes the importance of individual failures, and is an additional step in calculating the remedy amount, beyond simply assessing whether SBCI provisioning met or failed to meet the established standard for an individual CLEC (as is done in the 0120 Plan). So too, the index value requires a separate calculation of the company's "overall" performance, in the previous month, towards all CLECs. Once that index value is complete, a particular occurrence of SBCI's failure to provide service that meets the established standard could result in larger or smaller remedy calculations, because the index value then governs whether higher or lower remedy amounts should be applied.⁵⁴

The way in which the index value is calculated also minimizes the importance of an individual performance failure, and allows for discriminatory service to a CLEC. SBCI selects the per-occurrence, or per-measure, dollar amount based on its index value calculation, which captures the overall performance SBCI provided all CLECs in the previous month. The index value governs whether a higher or lower remedy amount is to be paid for an individual performance failure. The index value serves to take attention away from possibly severe performance failures at the CLEC level. ICC Staff Ex. 39.0 ¶¶47-48. By focusing on such aggregate measure of "overall" performance, the Compromise Plan allows SBCI to provide discriminatory service, or service that does not meet the agreed to standards, to an individual CLEC. The remedy amount for a specific PM will vary month to month if the calculated index value is

⁵⁴ Attachment Z to Ehr Affidavit at 9; Ehr Affidavit, ¶ 326

relatively higher or lower in the preceding month, even if it has the exact volume and severity of failure in both months. Id. In that situation, the Tier 1 payment does not really compensate the CLEC for the severity or importance of the failure, but compensates the CLEC based on SBCI's overall performance to all CLEC in the previous month. In comparison, the 0120 Plan uses existing performance measure weights, which appear in the business rules and are reviewed by SBCI, the CLEC community, and Staff in an ongoing six-month review process, and then assigns higher or lower remedy amounts according to previously agreed-to standards that determine a measure's relative importance.

The index calculations are not described correctly in the Compromise Plan. The Compromise Plan does not operate the way it is set forth in Attachment Z because a number of assumptions that SBCI makes are not described. In double checking some of SBCI's calculations, Staff was unable to replicate the results SBCI provided in its affidavits. ICC Staff Ex. 39.0 ¶49. Specifically, Staff was unable to replicate the index value reported by SBCI for any month of data. Staff discovered that SBCI employed a number of assumptions about the inclusion or exclusion of various performance measure results, and treatment of Tier 1 and Tier 2 results, that are not enumerated or explained in the Compromise Plan, or in the Company's affidavits. Further, SBCI applies different assumptions to PMs that require multiple tests (e.g., PM 2 and PM 5). These assumptions impact the calculation of the overall index value.⁵⁵ Since these assumptions are not explained in the Compromise Plan, SBCI is not calculating

⁵⁵ SBCI responses to staff data requests MKP 12.1-12.3

remedies as described in the plan. Additionally SBCI does not respond to this contention, nor does it plan to amend the Compromise Plan.

Even if it could replicate SBCI's results, the Compromise Plan is not transparent , meaning, a CLEC can not easily estimate the remedy payment it is owed. ICC Staff Ex. 39.0 ¶50. The calculation of the index value is entirely in the hands of SBCI, and, it can be very difficult for an outsider to replicate, since the Compromise Plan has no fewer than 12 rows of potential remedy amounts, each row containing six different remedy amounts. Therefore, a CLEC needs to know how SBCI performed in relation to all CLECs in the previous month, which is information CLECs currently cannot access. Id.

The index value mitigates the step-up, or escalation features, of the 0120 Plan. Both the 0120 Plan and the Compromise plan include escalation, or “step-up” features, that increase Tier 1 remedy amounts as per-CLEC failures persist. The escalation factor (increase in the amount SBCI would pay for each consecutive month it misses a PM) is only effective if the index value is the same for many months. As noted by SBCI, a remedy payment amount can be lowered by fluctuations in the index value. For example, a PM failure that has persisted for five months can have a lower associated remedy amount than a four-month failure by virtue of the index value improving. In practice, the Compromise Plan allows SBCI to pay lower remedy amounts for persistent failures to a carrier, which would minimize the incentive for the Company to provide service that meets the established standards. Id. at ¶51.

The index value has a “Cheshire Cat” effect. That is, the remedy amounts decrease each year, as if the passage of time alone releases SBCI from its obligations to provide wholesale service that meets established standards. Table 1 of the SBCI-

proposed remedy plan includes several “panels,” each with a label indicating that a new set of remedy payments should be in effect with each passing year. ICC Staff Ex. 39.0 ¶¶53. For all these reasons, the SBCI introduction of the index value will undermine the plan’s ability to guard against backsliding in a post-271 approval environment, and the index value should be rejected by the Commission.

SBCI provided no rebuttal to any of Staff’s arguments above, therefore it has failed to meet its burden to show that the index value undermines the Compromise Plan’s ability to prevent backsliding. Therefore, Staff provides the following language additions and deletions to paragraphs 3455 and 3456:

c. Indexing of Payments

3455. SBCI proposes to change the 0120 Plan’s payment table and uses an index value. The Compromise Plan “indexes” individual payment amounts based on overall performance. (SBC Ex. 2.0 (Ehr Initial Affidavit) ¶¶349-352.) In other words, if the overall “pass rate” on performance measures reaches a sufficiently high level, the individual base amounts are reduced; conversely, the base amounts increase if the overall “pass rate” on performance standards falls below specified “index” rates. (Id.) The lowest base amount applies where SBC Illinois meets or exceeds 92 percent of its performance tests. (Id. ¶ 350.) The base amounts are progressively higher when the pass rate is 86-92 percent, 80-86 percent, 74-80 percent, and below 74 percent. (Id.) Roughly, base amounts at the lowest level of performance (below 74 percent) are approximately 4.25 times the base amounts at the highest level (92 percent and above). (Id.) By virtue of the indexing feature, the incentive amounts under the Compromise Plan are tied to performance. To be sure, this is a performance plan and, in our view, the indexing feature taken together with all the new and added features (not at all disputed), makes the Compromise Plan uniquely set up to assess, motivate, sustain, and, when necessary, correct performance. Nothing of record persuades us otherwise.

3456. Staff contend the index value undermines the Compromise Plan’s ability to prevent backsliding, thereby preventing the Compromise Plan from being able to sufficiently detect and sanction poor performance. The

Staff affiant Dr. Patrick explained in her initial affidavit how function of the index value introduces a real potential for discriminatory behavior, how it is non-transparent, that, at times, it allows remedy payments for persistent failures to decrease, and that per-occurrence liability amounts are reduced at the 13th and 25th month of operation, regardless of SBCI's performance. ICC Staff Ex. 39.0 ¶¶47-53. Furthermore, when Staff attempted to double-check the accuracy of SBCI's remedy calculations under the Compromise Plan, Staff would not reproduce the results that SBCI filed as evidence in this proceeding, thereby raising the question -- Is the Compromise Plan reliable? ICC Staff Ex. 39.0 ¶49. Further, Staff contend that the most objectionable aspect of the index value is that it takes the focus away from assessing whether each provision of wholesale service by SBCI meets or fails the service standard established for that performance measurement. In the final analysis, the Commission finds that Compromise Plan, being largely based on the 0120 plan, adds features that are favorable to a remedy plan's purposes.

3457. SBCI provided no rebuttal to any of Staff's arguments. Therefore it failed to carry its burden of proving to this Commission that the changes it proposes to the 0120 Plan are reasonable. Furthermore, it fails to prove to us that the Compromise Plan meets or exceeds the FCC criteria regarding PAPs, such that the plan is suitable to prevent backsliding. It is particularly concerning to the Commission that SBCI made errors in calculating the remedy payments, that the Compromise Plan does not accurately reflect how the plan actually operates, and that it takes the focus away from the individual provision of service when assessing a remedy payment; payments are no longer based on the service to the individual CLEC based on that particular PM, but hides the performance to one CLEC based on its performance to all carriers. In practice, this allows SBCI to pay lower remedy payments for persistent failures, thereby minimizing the incentive for SBCI to meet the standards and prevent backsliding. Therefore, we find that the index value may not work properly, thereby keeping the Compromise Plan from properly assessing remedies, and if it does work, it does not sanction the actual performance provided a CLEC, but allows payments to be reduced in multiple ways – by covering up poor performance on an individual PM with good overall performance, and by reducing the per-occurrence payment amounts every 12 months, regardless of its performance.

C. Impact of the Cap on Tier 1 Payments

The Proposed Order did not consider the impact the Tier 1 caps have on the Compromise Plans over all payout. This argument was set out in Staff's initial affidavit

and was included in ¶3291 of the Proposed Order, but not addressed in the Conclusion and Analysis Section.

SBCI caps the amount of Tier 1 payments a CLEC can receive in a month, thereby reducing its overall liability under the Compromise Plan. Section 7.6 of the Compromise Plan, caps the monthly Tier 1 payment to a CLEC at an amount equal to the total billed revenue the CLEC is to pay for services SBCI provides that CLEC in that month. The monthly billed revenue cap mitigates the effectiveness of the escalation, or step-up, features of the Compromise Plan. The impact of the billed revenue cap permits SBCI to allow service to any one CLEC to degrade, and then say, don't worry, your upcoming month's bill is "on us." As a result, remedy payments will not be reliably scaled to the severity of the failure. They might be scaled to volume of service, but a likely impact is that a CLEC's customer losses would be reflected in a reduction of future service orders. ICC Staff Ex. 39.0, at ¶52.

SBCI did not respond to this argument.

Staff recommends that the Proposed Order add language finding that the caps improperly inhibit payments under the remedy plan, since it prohibits the payments from reasonably compensating a CLEC for the poor service it receives.

d. Cap on Tier 1 Payments

3457. Section 7.6 of the Compromise Plan, caps the monthly Tier 1 payment to a CLEC at an amount equal to the total billed revenue the CLEC is to pay for services SBCI provides that CLEC in that month. SBCI caps the amount of Tier 1 payments a CLEC can receive in a month, thereby reducing its overall liability under the Compromise Plan. Furthermore, the monthly billed revenue cap mitigates the effectiveness of the escalation, or step-up, features of the Compromise Plan. The impact of the billed revenue cap permits SBCI to allow service to any one CLEC to degrade, and then say, don't worry, your upcoming month's bill is "on us." ICC Staff Ex. 39.0, at ¶52. As a result, remedy payments will not be reliably scaled to the severity of the failure. They might be scaled to

volume of service, but a likely impact is that a CLEC's customer losses would be reflected in a reduction of future service orders. Id. Therefore, we find that the monthly caps on Tier payments improperly inhibit the incentive Tier 1 payments provide SBCI under the remedy plan, since it prohibits the payments from reasonably compensating a CLEC for the poor service it receives.

D. Compromise Plan's Satisfaction of the FCC Standards

Staff takes exception to the Proposed Order's finding that the Compromise Plan meets the FCC's criteria for determining whether a remedy plan will prevent future backsliding in paragraphs 3474 to 3498. The Proposed Order fails to consider Staff's point in determining that the Compromise Plan meets the FCC's criteria.

Rather than restate all of Staff's arguments, for the reasons set forth above and in Staff's affidavits, and included in the Proposed Order, Staff recommends that the Commission find that the Compromise Plan does not meet the FCC's criteria:

4. The Compromise Plan's Satisfaction of the FCC Standards.

3474. Having determined that the changes SBCI has made to the 0120 Plan, to transform it into the Compromise Plan, are unsatisfactory~~Compromise Plan withstands our initial analysis,~~ the question continuing before this Commission is whether the Compromise Plan satisfies the key elements for section 271 performance assurance plans as articulated by the FCC. New York 271 Order, ¶ 433. We now turn our efforts to a review of the Compromise Plan with respect to these five elements.

3475. FCC Element No. 1: Potential liability that ~~provides a meaningful~~ and significant incentive to comply with the designated performance standards;

3476. The Commission finds that SBC Illinois' proposed Compromise Plan does not provides a meaningful incentive for SBC Illinois to provide wholesale service to its competitors at the levels required by the

performance measures. It is designed to assess remedies where there is sufficient evidence of a disparity between wholesale performance and the applicable standard, to increase payments as performance worsens, and to reduce payments as performance improves. The multiple structural flaws detailed above contribute to Staff's conclusion that the SBCI-proposed remedy plan does not provide a meaningful and significant incentive to comply with performance standards. These structural features seem designed to prevent the Company from ever reaching the recommended total annual remedy cap. By removing performance weightings, changing the escalation or "step-up" features, and reducing remedy amounts, the SBCI-proposed plan is expected to result in lower total remedies paid to CLECs, in Tier 1 remedies, and the state, in Tier 2 remedies than what would be paid under the Commission-ordered remedy plan. In particular, by removing performance measure weightings and their associated remedy amounts for Tier 2 measures, the SBCI-proposed remedy would fail to distinguish and effectively sanction very serious, system-affecting Tier 2 performance failures. ICC Staff Ex 39.0 at ¶167. The index value in the SBCI-proposed plan introduces an unnecessary level of complication that will result in performance failures that are sometimes accompanied by very low remedy payments, and sometimes accompanied by slightly higher remedy payments. ICC Staff Ex. 39.0 at ¶168. That provides the proper incentive to maintain a high level of performance and to institute improvements should performance fall below the agreed-upon standards.

3477. The original Texas Plan, we are told, set a cap on annual remedies at \$90 million, pursuant to the Commission's order approving the SBC/Ameritech merger. Order at 221, Docket 98-0555. Under the 0120 Plan, that cap was converted into a "procedural threshold" set at 36% of Net Return, using the same formula SWBT uses to calculating the annual caps for New YorkTexas, Kansas, Oklahoma, Arkansas, and Missouri. The threshold is to be recalculated annually using publicly available FCC ARMIS reporting data. If the cap is reached, the Commission would institute proceedings to determine the appropriate action. See Attachment Y, Section 7.3.

~~3478. The Compromise Plan uses the same "procedural threshold," calculated the same way, as the 0120 Plan. The "proceeding" triggered by reaching the threshold would be expected to determine if the threshold has been reached due to inadequate service provided by SBC Illinois, or due to deficiencies within the remedy plan itself that cause inappropriate remedy amounts to be paid given the level of service provided by SBC Illinois to CLECs. In the situation where it is determined that the cap has~~

~~been reached due to inadequate performance by SBC Illinois, additional remedies could be assessed over and above the threshold amount (as opposed to a “hard” cap that limits the total remedies). Likewise, if the remedy cap has been reached while service provided to CLECs by SBC Illinois has been adequate, the Commission can modify the remedy plan to provide for remedy payments that are more appropriate for SBC Illinois’ level of performance. The initial potential financial exposure to SBC Illinois (up to 36 percent of net return) is clearly significant, and it has been found by the FCC to be meaningful. Texas 271 Order, ¶ 424; Kansas & Oklahoma 271 Order, ¶ 274; Arkansas & Missouri 271 Order, ¶ 130.~~

~~3479. The Compromise Plan, like the 0120 Plan, contains a two-tiered payment structure. Under the plan, Tier 2 liquidated damages are paid to the CLECs. Tier 2 assessments are paid to the State.~~

~~3480. The Compromise Plan goes further than some other plans found meaningful by the FCC. Indeed, as we see it, the Compromise Plan has several “performance correcting/sustaining” aspects not found in either the Texas Plan or the 01-0120Plan.~~

~~3481. First, the Compromise Plan will “index” liquidated damages amounts so that remedies for individual performance shortfalls increase if overall performance worsens. Second, the Compromise Plan gives CLECs the opportunity to request a “gap closure” process to address any persistent shortfalls in performance. Third, the Compromise Plan would continue to “escalate” remedy amounts if a performance standard is missed in consecutive months (as appears to be standard). But here, unlike the Texas Plan or the 0120 Plan, it will also keep the remedy amounts at an escalated level until the applicable standard is met for three months. Finally, the cap on remedy payments has been changed from a “hard” cap to a procedural threshold, calling for a Commission proceeding to be initiated if SBC Illinois’ remedy payments exceed the threshold.~~

~~3482. All of this, in our view, provides just the type of “meaningful incentive” that the FCC requires.~~

FCC Element No. 2: Clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;

3483. The agreed-upon measurements track performance for a full range of services. There is no change to the measures or standards as between the Compromise Plan and the 0120 plan.

3484. There is no dispute regarding the performance measures and standards included in SBC Illinois' Compromise Plan. These measures and standards, and the rules for calculating them, were defined by agreements reached after extensive negotiations with CLECs in performance measurement collaboratives throughout the region.

3485. Established by mutual agreement in collaborative sessions, they were modified by mutual agreement in subsequent "six-month review" sessions. Just as in the 0120 Plan, periodic updates to the measures and standards are to continue via the 6-month review collaboratives. See Section 6.3. (And, when disputes arise, there is an open path to the Commission. For example, we will be reviewing two disputed issues from the current review in another section of this order).

FCC Element No. 3 - a reasonable structure that is designed to detect and sanction poor performance when it occurs.

3486. The Compromise Plan is designed to: (1) assess remedies where there is sufficient evidence of a disparity between wholesale performance and the applicable standard; (2) to increase payments as performance worsens; and (3) to reduce payments as performance improves. ~~This is, in our view, the right structure.~~

3487. The Compromise Plan does not contain design features that meet the FCC's criteria in this regard. In particular, the plan removes the measurement weightings that were ordered by the Commission in Docket No. 01-0120, and which would increase the likelihood that persistent PM

failures would occur and consequently increased discriminatory service to CLECs. ICC Staff Ex. 39.0 ¶42-43.

3488. SBCI made errors in calculating the remedy payments, that the Compromise Plan does not accurately reflect how the plan actually operates (Id. at ¶49), it takes the focus away from the individual PM when assessing a remedy payment (Id. at ¶47-48); payments are no longer based on the service to the individual CLEC based on that particular PM, but hides the performance to one CLEC based on its performance to all carriers (Id. at ¶48). In practice, this allows SBCI to pay lower remedy payments for persistent failures, thereby minimizing the incentive for SBCI to meet the standards and prevent backsliding. Id. at ¶51. Overall, the basic structural elements of the Compromise Plan are the same as the 0120 Plan, which in turn used the same structure approved by the FCC in the Texas 271 Order (¶ 426), the Kansas & Oklahoma 271 Order (¶ 276) and the Arkansas & Missouri 271 Order (¶¶ 129-130). Most of the modifications ordered in Docket 01-0120 and retained here concern the numbers that go into the remedy calculations, not the structure of the plan or the steps involved in calculating remedies.

3489. It has installed a monthly cap on Tier 1 payments to CLECs, equal to the monthly amount the CLEC pays SBCI for services. ICC Staff Ex. 39.0 ¶52. The basic operational scheme remains the same: Each month SBC Illinois' actual performance is mathematically determined for each individual performance measurement result. Each of these results is then compared to an objective standard for that measurement, using accepted statistical techniques. If the comparison shows that SBC Illinois did not provide the required level of service, remedy payments will be calculated pursuant to the methodology detailed in the performance remedy plan.

3490. Further, the SBCI-proposed remedy plan introduces a "ceilings and floors" concept which is discriminatory. It is unclear whether the floors are appropriate since it is unsupported by evidence and in the absence of evidence supporting a change in standards the Commission has in previous dockets expressed a preference for wholesale service being provided at parity. ICC Staff Ex. 29.0 at 250-259. As under the 0120 plan, the Compromise Plan uses statistical analysis to determine when remedies are to be paid by identifying whether the size and number of performance shortfalls are significant, or small enough so as to be attributed to the random variation inherent in actual wholesale and retail performance.

~~3491. The statistical methods in the Compromise Plan, while virtually identical to the methodology set out in the 0120 plan, contains two minor changes. First, the Compromise Plan recognizes that there is no need to perform a statistical “permutation test” (comparing wholesale and retail results) in instances where both results are perfect (here, no shortfall could have occurred). Second, in situations where wholesale is performance is being compared to both retail and affiliate results, but the number of affiliate transaction is small, i.e., less than 30, the retail result, being more representative, will be used. These refinements are reasonable, in the view of this Commission.~~

~~3492. The 0120 plan, we previously adopted, assesses payments at a set amount without reference to overall performance. The Compromise plan operates to “index” payments expressly on the basis of overall performance. In short, if the overall “pass rate” on a performance measure is at a sufficiently high level, the individual base amount is reduced. On balance, if the overall “pass rate” falls within a lower level, the base amount increases. The lowest base amount applies where the Company meets or exceeds 92 on its performance tests. The base amounts increase progressively as performance pass rate falls to the 86-92 percent level; the 80-86percent level; the 74-80 percent level, and below the 74 percent level. (The record suggests that the base amount at the lowest performance level, i.e., below 74 percent is approximately 4.25 times that of the base amount indicated at the highest performance level, i.e., 92 percent and above).~~

FCC Element No. 4: A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal.

3493. Staff asserts that the SBCI plan in Attachment Z to Ehr’s Affidavit does not describe all of the steps needed to calculate remedies. Furthermore, when Staff attempted to replicate the results that SBCI had provided in its affidavits, Staff could not. ICC Staff Ex. 39.0 ¶61. It was later determined that the reason Staff could not duplicate the results was because SBCI employed a number of assumptions about the inclusion or exclusion of various performance measure results, and treatment of Tier 1 and Tier 2 results, that are not enumerated or explained in the SBCI plan.

or in their affidavits. Id. These assumptions impact the calculation of the overall index value.⁵⁶ Since these assumptions are not explained in the SBCI plan, SBCI is not calculating remedies as described in the plan. Furthermore, these difficulties suggest that the plan is not self executing since it appears that SBCI has not yet finished developing the remedy plan it is proposing, or cannot properly operate it at this time. ICC Staff Ex. 39.0 ¶¶61. Under the Compromise Plan, no different than the 0120 plan, payment occurs automatically without any CLEC initiative or Commission action. So too, payments are delivered via check or credit depending on CLEC notice. The payments are undertaken on a voluntary basis and directly relate to objective, agreed upon measurements.

3494. Additionally, even if SBCI can operate this remedy plan, the SBCI plan cannot be easily replicated. As discussed in paragraphs 49 and 50 of Staff Ex. 39.0, the SBCI plan determines the amount to be paid per failure using the index value, and the index value is based on the level of service SBCI provided all CLECs in the previous month. ICC Staff Ex. 39.0 ¶¶50, 62. Therefore, the SBCI plan is not transparent and easy for CLECs to double-check outside of an audit. Id. There is also an expedited procedure provided for that allows the Commission to waive remedies if it finds that a particular performance shortfall was caused by some factor outside the control of SBC Illinois (for example, a CLEC error, or a natural disaster). The Commission approved that very concept for the 0120 plan, and the FCC has found such a procedure to be sufficiently self-executing for purposes of Characteristic No. 4. Texas 271 Order, ¶ 427; Kansas & Oklahoma 271 Order, ¶ 277; Arkansas & Missouri 271 Order, ¶¶ 129-130.

3495. The ceilings and floors concept proposed by SBCI has not been approved by CLECs through the six month collaborative process. The ceiling and floor concept sets new standards by which a CLEC is compensated. ICC Staff Ex. 29.0 ¶251. The typical procedure by which changes to a PM, such as setting a new standard, is made is through the six month collaborative process so that it reflects input from all CLECs and Staff. Finding that a plan with the ceilings and floors concept prevents backsliding would override the six month collaborative' processes function of establishing PM definitions, which Staff does not recommend. ICC Staff Ex. 39.0 ¶60. The Commission does not believe that the FCC would require every single aspect of a remedy plan to be self-executing. Indeed, it is inconceivable that such a plan exists or could ever be developed. To be sure, the Commission disagrees with the suggestion

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~~that the Compromise Plan is made any less “self executing” simply because it requires CLECs to submit payment information if they desire payment by check. To be sure, payments under the Compromise Plan would still be automatic; the Compromise Plan merely requires the CLEC to specify in advance where it wishes to receive a check if it desires to be paid by that method. It would be unreasonable to require anything less.~~

~~On the whole, we view the Compromise plan, to satisfy this FCC criterion.~~

3495a. Finally, the calculation of Tier 2 payments is not transparent if there are two remedy plans with Tier 2 calculation methodologies and amounts. Section 5.5 of the SBCI plan states that SBCI will make Tier 2 payments based on the Tier 2 calculation methodology that would require the greater payment. Ehr Affidavit, Attachment Z §5.5. The gives SBCI the option of choosing which plan it is to pay under, and makes it impossible for the Staff and for CLECs to double-check the amounts of Tier 2 payments it is to make. Therefore, the SBCI plan is not transparent and easily auditable, therefore leading to the potential for future litigation to resolve disputes. Staff Comments §V.D.

On the whole we do not view the Compromise Plan to satisfy this criterion.

FCC Element No. 5: Reasonable assurances that the reported data is accurate.

Data Validation

3496. SBC has not provided an assurance that the data used to calculate remedies is accurate. Performance remedy plans need mechanisms that allow for the review and monitoring of data, so that Staff and CLECs know that the information will be reported in a consistent and reliable manner. SBCI’s PM data is neither accurate nor reliable, and the audit mechanisms it has proposed, and currently implements through existing interconnection agreements, are inconsistent and do not allow for meaningful discovery of inaccuracies and unreliability. The reliability of reported data is critical: the PMs must generate results that are meaningful, accurate, and

reproducible. In particular, the raw data underlying a PM must be stored in a secure, stable, and auditable file if we are to accord a remedy plan significant weight. Texas Order ¶428. Because the performance remedy plan rests entirely on the RBOCs performance as captured by the measurements, therefore the credibility of the performance data must be above suspicion. Texas Order ¶428. This can only be accomplished through the application of uniform mini-audit and annual audit requirements, and the Commission retaining its authority to select, prior to the commencement of an audit -- the auditor, the scope of review of the audit, and the audit plan. ICC Staff Ex. ¶271. SBC Illinois performance measurements have been audited, and are also being assessed as part of BearingPoint's ongoing third party OSS testing. For audits going forward, SBC has proposed a comprehensive regional audit to be conducted 16 months after either adoption of the remedy plan or completion of the current BearingPoint audit. We have modified this provision as earlier discussed, to initiate audit 16 months after completion of BearingPoint's audit. As importantly, the Compromise Plan includes a provision for CLECs to request an independent "mini-audit" to address disputes on specific measurements or results.

3497. In order for us to rely upon any performance measurement plan and anti-backsliding plan, we must, in have confidence in the integrity and accuracy of SBC Illinois' performance measurement data that are the inputs to these plans. In its Bell Atlantic New York 271 Order, The FCC stated that one important characteristic of an anti-backsliding plan is that there must be reasonable assurances that the BOC reported performance measurement data is accurate.⁵⁷ Ms. Weber assures us that the efficacy of these plans is seriously undermined if the inputs are unreliable. Ms. Weber states that the facts presented in her affidavit regarding SBC Illinois' performance measurement data clearly demonstrate that the data inputs to be used in any anti-backsliding plan, are unreliable at this point in time. ICC Staff Exhibit 31.0, ¶118. Therefore, until SBC Illinois has proven that its performance measurement data is accurate, Ms. Weber states that we cannot rely upon the data to demonstrate or ensure future compliance by the company. The 0120 Plan had also provided for CLEC-initiated audits for measures specified by the CLEC where the CLEC and SBC Illinois could not reconcile reported results and the CLEC decided to have a third-party conduct and assessment of SBC Illinois' reporting of the specified measure(s). SBC Illinois' Comments of March 25, 2003 state that it will agree to the language of the 0120 Plan on this issue just as Staff recommends. We accept this adjustment and will hold SBC Illinois to this commitment.

⁵⁷ Bell Atlantic New York Order, ¶433.

3498. The facts presented in Ms. Weber's initial affidavit and reply affidavit regarding SBC Illinois' performance measurement data demonstrate that the data inputs to be used in any anti-backsliding plan, are unreliable at this point in time. Therefore, until SBC Illinois can prove that its performance measurement data is accurate and reliable, she opines that we should not use the data with confidence to demonstrate or ensure future Section 271 compliance by the company.

Audits

3499. SBCI proposes that a CLEC can check the reliability and accuracy of data through a mini-audit (Ehr Affidavit, Attachment Z §6.5), and that state commissions can check the reliability and accuracy of data through a regional audit (Id. §6.6). Staff finds that both methodologies are faulty, and recommends that only one mini-audit be provided to all CLECs, and that be the mini-audit approved in Docket 01-0120 (see *supra*, Commitments by SBC Illinois, regarding mini-audits), that the regional audit be rejected in favor of an annual audit.

3500. SBCI proposed changing the mini-audit since it is unfair and unreasonable. Ehr Surrebuttal Affidavit ¶229. This issue was addressed and resolved by the Commission in docket 01-0120. Order, Docket 01-0120 at 14,15. If SBCI wants to challenge the reasonableness of that decision it should have included that issue in its petition for rehearing, that it filed on August 9, 2002, and which was denied on August 27, 2002.

3501. The regional audit proposed by SBCI is limited and inhibits this Commission's authority to choose an auditor. The regional audit is limited since it only allows for an audit of the PM data but not the calculation of remedy plan payments. Remedy plan payments should be audited so that Staff and CLECs know that the payment calculations are correct. SBCI states that section 6.6 incorporates an audit of remedy calculations, however, remedy calculations are different than an audit of the remedy payments. Ehr Surrebuttal ¶146. If that is what is intended, then the language of section 6.6 should be changed to accurately reflect an audit of the "calculation of remedy payments."

3502. The regional audit does not clearly state how it will conduct a uniform five-state audit, and still provide this Commission all of the information in the format it needs. ICC Staff Ex. 39.0 ¶271. Additionally, the method proposed for choosing the auditor compromises this Commission's authority to select the auditor for this state, since SBCI proposes that the auditor be chosen by majority vote of all five states. Id. This Commission should be able to choose the auditor used to evaluate SBCI's performance and remedy payment calculations, and have the scope of review and audit plan approved by this Commission prior to the commencement of the audit. Id.

3503. Annual audits are needed as a way to demonstrate and prove that the performance measurement data remains reliable over time. ICC Staff Ex. 29.0 ¶272.

3504. All but one of the FCC criterion of the above, we believe the Compromise Plan fails, meets with the FCC's concerns.

Summary.

~~3498505. On the entirety of our review and analysis, the Commission concludes that the Compromise Plan does not meets the FCC criteria for anti-backsliding plan, with, and Additionally, it does not appear to operate in will serve, the public interest. Our recommendation on SBC Illinois' Section 271 application, in this regard, is expressly conditioned on SBC's acceptance and referral of this plan to the FCC as herein modified. Further, it shall be designated and known hereafter as the Commission Approved Section 271 Plan.~~

Excep. No. 41: Staff's Proposal was to Implement the 0120 Plan through the Alternative Regulation Plan – Not the Plan Approved in This Proceeding

Paragraph 3457 of the Proposed Order states that it “accepts Staff’s proposal to the extent that it asks that the Compromise Plan be continued through and under the Alternative Regulation Plan.” Proposed Order 3457. This finding misinterprets Staff’s

Proposal, and provides no rationale for rejecting Staff's proposal. Therefore, Staff recommends that this section be revised.

Staff proposed that the 0120 Plan, otherwise referenced as the 0120 Plan be offered to CLEC through SBCI's Alternative Regulation Plan. Staff did not recommend, as it appears Staff's recommendation was construed, that the Commission order the performance remedy plan, or plans, approved in this docket to be offered in SBCI's Alternative Regulation Plan. The Proposed Order has set forth Staff's arguments on this issue in paragraphs 3405 to 3413, and Staff reiterates those same points. Staff's position on this point is set forth in paragraph 3411 states "Even if the Commission finds that the Compromise Plan is suitable for preventing backsliding by SBCI, the Commission should require the company to offer the 0120 Plan as part of its alternative regulation plan . . ."

Additionally, the Proposed Order provides no rationale for rejecting Staff's proposal. The only responses to Staff's argument are that SBCI interpreted our proposal to intend there to be "yet another proceeding on remedy plans, this time as part of a rulemaking proposed by Staff," (Proposed Order 3414), that Staff's proposal is contrary to the holding of the Alternative Regulation Order (Proposed Order 3415), and that our principle reason for nullifying a Commission Order here is its view that the proceedings here were not long enough to be adequate" (Id. at 3416).

Staff contends that SBCI is wrong in each of its arguments. First, Staff did not intend there to be another proceeding. In the Alternative Regulation Order the Commission found that it had sufficient authority to require SBCI to offer a wholesale service remedy plan, and its authority has not changed since the issuance of that Order.

Since the Commission ordered the 0120 Plan be used to protect wholesale service under its state authority pursuant to 220 ILCS 5/13-506.1, Staff is now urging it to extend the period of time it is to be offered -- until the next proceeding that is to determine the need for and appropriate duration of remedy plans in Illinois.” Proposed Order 3407.

Second, SBCI argues that Staff’s proposal is contrary to the holding of the Alternative Regulation Order that limits the duration of the 0120 Plan. As set forth in paragraphs 3409-10, that in the course of this proceeding (and subsequent to the Alternative Regulation Order), SBCI stated that it may, or *may not*, take to the FCC the performance assurance plan the Commission approves in this proceeding. Tr. 2175-77. If that occurs there is no guarantee that there will be a Commission approved remedy plan being offered to CLECs. Therefore, Staff recommended to the Commission that the 0120 Plan continue to be offered through the Alternative Regulation Plan so that certainty can be provided to this market. And this is still an issue despite the Proposed Order finding the Compromise Plan as being suitable to prevent backsliding. It is still an issue because the Proposed Order has changed the Compromise Plan, and it is still unclear whether SBCI will agree to that change, as well as the other Commitments Staff has requested -- changes to the auditing procedures, offer to CLECs only the remedy plans approved in this proceeding, continue to participate in the six month collaborative process for as long as wholesale PMs are in existence, and that the Commission determines the annual threshold dollar amount. Since it is still unclear whether SBCI will agree to the changes to the Compromise Plan, the Commitments requested by Staff,

and any other changes that are made as a result of this round of briefing, the Commission does not know what plan SBCI will take to the FCC.

Accordingly, and for the foregoing reasons, Staff recommends that the Commission revise the finding in paragraph 3457 to state the 0120 Plan should continue to be offered through SBCI's Alternative Regulation Plan until the next hearing that is ordered as part of this docket, that is to address and revise remedy plans in the future. This should be accomplished by re-opening the 98-0252/98-0335/00-0764 Docket, and amending the SBCI Alternative Regulation Order. Therefore, Staff proposes that paragraph 3457 be amended as follows:

~~3457. Given SBCI's statements that it cannot commit to taking to the FCC the performance remedy plan that is approved in this proceeding, and it is still unclear at this time if SBCI will commit to the changes determined necessary by the Commission in this proceeding, Given our finding that the Compromise Plan is adequate, the Commission accepts Staff's proposal that SBCI be ordered to continue offering the 0120 Plan through SBCI's Alternative Regulation Plan. The Commission finds it necessary to ensure certainty in the telecommunications market in Illinois, especially in light of SBCI's lack of commitment to comply with the findings of this Order as it relates to performance assurance plans. To accomplish this, Staff is ordered to file a report re-opening the 98-0252/98-0335/00-0764 Docket, and provide language amending the SBCI Alternative Regulation Order in compliance with this Order to the extent that it asks that the Compromise Plan be continued through and under the Alternative Regulation Plan. Our final Order in that docket clearly stated that: "the 01-0120 Remedy Plan [would be] effective up to an until a wholesale performance remedy plan for Section 271 purposes is approved by this Commission." Alt Reg Order, at 190 (emphasis added). The Compromise Plan is now the approved Section 271 Plan and will be known and referenced by such terms.~~

Excep. No. 42: Paragraphs 3416 to 3420 Should Be Deleted

The Proposed Order has included an SBCI argument that was not used by SBCI to rebut Staff's argument to include the 0120 Plan in SBCI's Alternative Regulation Plan,

and therefore should be deleted. Paragraphs 3416 to 3420 are arguments that SBCI provided in response to Staff's Comments. See SBCI Response to Staff Comments on Remedy Plan, at 5-9. Specifically they responded to the Scope of Review section in Staff's Comments, that addresses the short timeframe of this docket and the impact it had on Staff's work product. Staff Comments at 5. Paragraphs 3416 to 3420 walk us through the enormity of the documents filed in this phase, draws a comparison to the timeline followed in the 01-0120 docket, blames Staff for the scheduling problems in this docket without providing factual support, and also confuses Staff's explanation of the impacts and relationship of this remedy plan decision to the wholesale performance remedy plan that would be put in place as part of Code Part 731 as a proposal to have a "new proceeding" to address remedy plans.⁵⁸ None of these items are related to Staff's proposal to have the 0120 Plan continue as part of SBCI's Alternative Regulation Plan. Furthermore, the issue they are in response to – the impact of the short timeframe of this docket – are not discussed in the Proposed Order.

Accordingly, and for the foregoing reasons, Staff recommends that paragraphs 3416 to 3420 should be deleted. Therefore, Staff proposes that paragraph 3457 be amended as follows:

~~3416. Second, SBC Illinois notes that Staff's principal argument in favor of nullifying a Commission order here is its view that the proceedings here were not long enough to be adequate. According to SBC Illinois the Commission heard the same argument when it established the schedule for Phase II, and it rejected that argument (along with Staff's proposed separate track for remedy plan issues). SBC Illinois contends that Staff and the GLECs have had more than ample opportunity to consider and~~

⁵⁸ Staff is not recommending in this proceeding that another remedy plan proceeding should be held, Staff was informing the Commission as to the status of the Part 731 rulemaking and its impact and relationship to this docket.

~~address SBC Illinois' proposal. First, SBC Illinois points out that in the current phase of the proceedings, there have been 11 pieces of testimony, nearly 70 data requests, a live walk-through, two rounds of live testimony, and six sets of comments. SBC Illinois further asserts that before this phase began, Staff and the CLECs already had ample knowledge of SBC Illinois' proposal, through participation in much of the negotiations in which SBC Illinois developed the Compromise Plan. SBC Illinois also reminds that on June 28, 2002, SBC Illinois filed a remedy plan proposal that was substantially identical to the Compromise Plan now before the Commission, along with supporting testimony.~~

~~3417. SBC Illinois notes that Staff's comparison of the "three-month schedule" here against the "fifteen-month schedule" in Docket 01-0120 suffers from multiple errors. First, SBC Illinois states that the premise of Staff's comparison is incorrect, in that there is simply no need to duplicate the schedule of Docket 01-0120. SBC Illinois explains that much of the Compromise Plan (including, most notably, its methodology for statistical analysis) is substantially identical to the 0120 Plan. Moreover, in Docket 01-0120 the parties had to devote time and effort to evaluating a CLEC proposal that was radically different from the existing remedy plan and from the Staff proposal: Here, by contrast, the CLECs are aligned with Staff. Finally, Staff's witnesses participated in Docket 01-0120 (as did AT&T Witness Kalb), so much of the general "learning curve" occurred before this docket started.~~

~~3418. Second, SBC Illinois states that Staff's comparison of time is misleading. For this docket, SBC Illinois notes that Staff apparently counts only the time from SBC Illinois' initial Phase II filing on January 17 to the scheduled proposed order in April — a count that understates the actual time for analysis, as it does not include the information Staff obtained and the time Staff had to analyze the Compromise Plan before SBC Illinois' Phase II filing. By contrast, SBC Illinois maintains, Staff overstates the time for Docket 01-0120, by including all 15 months from the February 2001 initiating order to the Commission's July 2002 final order in that docket.~~

~~3419. Third, SBC Illinois contends that any shortage of time here is a problem entirely of Staff's own making, because SBC Illinois first filed its Compromise Plan on June 28, 2002, nearly nine months ago.~~

~~3420. Fourth, SBC Illinois points out that Staff's very proposal concedes that the time for consideration of remedy plan issues here is sufficient. Staff's proposed new proceeding would be scheduled "so that a Proposed Order is presented to the Commission by the Administrative Law Judge no later than 3 months after the date of the Carrier's filing" — a period that is essentially identical to the time frame that Staff desires here.~~

Excep. No. 43: Term of the Remedy Plan

Staff wishes to clarify that it does not agree with the four-year term. Staff recommended that a proceeding commence 36 months from the date of this Order to determine the need for future remedy plans. The problem with the Proposed Orders finding, which Staff attempted to avoid when framing its position, is that it causes the "clock" to run against Staff. Staff is not certain that the proceeding will begin at its designated time, or, more importantly, that it will conclude when the proceeding is to be completed, or within the 48 month period. It is then possible that if the proceeding is not completed by the 48 month, there could be a period of no approved remedy plans. Staff does not want to incur the lone burden of ascertaining that the proceeding is completed before 48 months, and requests that the ALJ either omit any reference to 48 months or dictate that the proceeding will be completed prior to the four year interval. Staff reiterates what it had proposed, that the remedy plans approved in this proceeding continue in place until the conclusion of the next proceeding that is to re-evaluate and adjust the remedy plans, and that, alternatively, the ALJ could simply leave off the reference to four years and replace it with a definitive commencement date of 36, or 30, months, but not provide a four year "drop dead" date.

Staff also recommends that the Conclusion also recognize Staff's proposal that the performance measurement plan also be reviewed at that time.

Additionally, the Commission Conclusion and Analysis lacks support for establishing the set timeframe. Therefore, Staff recommends that the Commission rely upon Staff's analysis as set forth in paragraphs 3318 and 3319 of the Proposed Order.

Accordingly, Staff recommends that the language in paragraphs 3471 and 3472 be amended to allow for a future proceeding to evaluate the level of competition in the market at that time, the level of service SBCI is providing, the level of transactions, and any factor materially impacting the development of a performance assurance plan so as to ensure that the plan, or plans, do not become either too punitive, or so weak as to provide no incentive to SBCI. See Proposed Order ¶¶3318 and 3319. Therefore, Staff proposes the following language additions and deletions for paragraphs 3471 and 3472:

At paragraph 3471, the proposed order states:

3471. Regarding the issue of the term of the approved Performance Assurance Compromise Remedy Plan (which includes both the Performance Remedy Plans and Performance Measurements), Staff recommends that a proceeding commence approximately 30 to 36 months from the date of this order, and that the plans approved in this order be reviewed at that time and remain in place until the conclusion of that proceeding. That proceeding is to evaluate the level of competition in the market at that time, the level of service SBCI is providing, the level of transactions, and any factor materially impacting the development of a performance assurance plan so as to ensure that the plan, or plans, do not become either too punitive, or so weak as to provide no incentive to SBCI, and Whereas SBC Illinois appear to be in agreement on the proposes a four-year term, with a proceeding commencing after a period of three years into the term to evaluate the need for and terms of a plan going forward. The only variation is that SBC Illinois contemplates that the "proceeding" envisioned by Staff would be preceded by collaboration and negotiation to come to agreement on, or at least streamline, the issues. This collaboration and negotiation would take place prior to whatever proceeding is

deemed necessary, and would serve to focus that proceeding on the issues that really need to be worked out through that process. Staff objects to the idea of having a fixed date of expiration for the remedy plans in light of SBCI's proposal to have a period of negotiation and collaboration to streamline issues. Negotiations and collaborations allow for the possibility of a proceeding never commencing and possibly not completing within the 48 month period proposed by SBCI.

3472. The Commission agrees with Staff that a fixed date of termination is not wise, and thus finds it reasonable that a proceeding ~~collaborative~~ should begin approximately 30 to 360 months from the date of this order, and that SBCI shall commit to continue offering the remedy plans approved in this docket until the conclusion of that proceeding shall into the term of the Compromise Plan.

Excep. No. 44: The Hybrid Plan

Staff's primary position in this case was that the Commission should approve the 0120 Plan, however if the Commission was not going to approve the 0120 Plan, it should approve the Hybrid Plan. Ergo, our exceptions are also framed in the alternative. If the Proposed is to accept either the Compromise Plan and/or the 0120 Plan Staff has some minor adjustments to the current findings. In the alternative, Staff still supports the Hybrid Plan as a viable alternative to the 0120 Plan, and it does meet the FCC's 5 key criteria used to determine whether a remedy plan will prevent backsliding.

Turning to our primary position – Staff takes exception to the Proposed Order's language in paragraph 3473, for three reasons: (1) the Proposed Order does not explain what it means by “does not go far enough”, and it fails to provide rationale for why the Hybrid Plan “does not go far enough; (2) Staff did not propose the Hybrid Plan

because it thought the Hybrid Plan was superior to the 0120 Plan, in fact it just the opposite; (3) it is not unduly punitive.

The Proposed Order fails to consider Staff's arguments in support of the Hybrid Plan; demonstrating that it meets all five elements of the FCC's criteria. Staff's Draft Order pages 176 to 180 clearly explain how the Hybrid Plan satisfies the five key elements of the FCC's criteria. One reason may have been, as Staff points out in the section entitled "Staff Arguments in Support of Staff's Hybrid Plan were Omitted" a goodly portion of Staff's argument had been omitted from the Proposed Order. Without regurgitating that information, combining that information with what is in the Proposed Order, sufficiently demonstrates that the Hybrid Plan would meet the FCC's criteria.

In paragraph 3473 the Proposed Order states "[I]mplicitly, if not explicitly, Staff's Hybrid proposal recognizes, that the 0120 plan can and should be improved. It also recognizes, at least in part, that the Compromise Plan moves in that direction." These statements should be deleted since they misconstrue Staff's position on offering the Hybrid Plan. The Hybrid Plan was a counter to the Compromise Plan, with the biggest benefit being that the changes to that plan would be limited to a limited number of beneficial features contained in the Compromise Plan, without taking all of the small language changes that were unsupported by SBCI testimony. As a counterbalance, Staff also lowered the payments, so that it would be more attractive to both the Commission and SBCI, to the extent the Commission felt that the 0120 Payments were too high. The changes were never made strictly for purposes of improving the 0120 Plan, and that is evident from the fact that the 0120 Plan remained our primary position. If we felt that the Hybrid Plan was a better plan, or would better prevent backsliding,

Staff would have proposed that as our primary proposal. Hence, the statement in the Proposed Order is based on mere speculation, and as discussed above – wrongly founded. Therefore they should both be removed.

Additionally, the Hybrid Plan is not unduly punitive. The Proposed Order makes this conclusion but provides no support, for its assertion. As discussed above in the section entitled – “The Payments Under the 01-0120 Plan are Reasonable and the 0120 Plan Meets the FCC Criteria to Determine Whether a Remedy Plan Prevents Backsliding”, Staff explains that the payments required under the 0120 Plan are not punitive since SBCI pays approximate 8% to 11% of the annual threshold when it provides service that is 90% compliant, and pays in the 40% to 50% range of the annual threshold when it provides service that is considered unacceptable – 80% compliance. The 0120 Plan is not unreasonable, much less punitive, and since the payments of the Hybrid Plan are approximately 1/3 less than the 0120 Plan, they are not punitive.

Accordingly, Staff recommends the language in paragraph 3473 be amended as follows:

3473. Having determined that the ~~0120 Compromise~~ Plan is well-suited for purposes of section 271, the Commission is of the view that the “Hybrid Plan” which ~~modifies the 0120 Plan by adding~~adopts certain features of the Compromise Plan that Staff found non-objectionable. Although the Hybrid plan has accepted the step down feature and the gap closure process, which do enhance the operation of that plan, we find that the payment structure of the 0120 Plan is the most important feature to motivate and incent SBCI to prevent backsliding. The payment structure of the 0120 Plan, we find is reasonable, and is a little higher than the Hybrid Plan pay structure, and therefore we will not approve the Hybrid Plan for purposes of 271 approval. However, that does not mean that we find this plan completely unacceptable that it could be reviewed again in some other docket, and considered differently given the condition of the market at that time., but does not go far enough in our view, need not be considered further. Implicitly, if not explicitly, Staff’s Hybrid proposal recognizes that the 0120 plan can and should be improved. It also

~~recognizes, at least in part, that the Compromise Plan moves in that direction. We might also generally observe that it is unduly punitive in the current environment. The “Hybrid” would lead to payments far greater than those found sufficient by the FCC, and more than double those under the Compromise Plan.~~

Turning to our alternative position, if the Hybrid Plan were to be used, it is certainly more than suitable to prevent backsliding. Tracing its roots, shows it is once removed from the Texas Plan, approved by the FCC for SWBT’s 271 application. Order, Docket 01-0120 at 2. Since the Texas Plan was approved by the FCC, and the 0102 Plan and the Hybrid Plans only contain improvements, it undoubtedly is satisfactory for anti-backsliding purposes.

Excep. No. 45: Including Staff’s Commitments in the Compromise Plan Limits Their Application only to that Remedy Plan and Does not Make Them Commitments That Apply to All Remedy Plans

The Proposed Order requires SBCI to include language in SBCI’s Compromise Plan reflecting those Staff Commitments that were approved. That course of action is insufficient, as Staff understands the way this remedy plan is to be made available to CLECs. Although these Commitments can be stated in the Compromise Plan, it does not accomplish Staff’s intended purpose.

It Appears that the Proposed Order failed to recognize the distinction Staff was making between Commitments and making changes to a remedy plan. The Commitments relate to the overall administration of all of the remedy plans SBCI offers – SBC11STATE, SBC13STATE, Texas Plan, Covad Plan, 0120 Plan etc. The Compromise Plan is only one of those plans. If the Commitments are stated in that plan it only applies to those CLECs who take of that plan. Therefore, these Commitments

need to be stated in the Order so that it affects all remedy plans, and not just the Compromise Plan. Staff recommends that the Order be revised to state that, in addition to including these Commitments in the Compromise Plan, that the Order include a section stating that SBCI needs to comply with the approved Commitments. These Commitments are needed so that the administration of all SBCI remedy plans are consistent.

Additionally, Staff recommends that all of its Commitments be added to the Proposed Order, and the rationale for each are addressed individually in this brief.

Accordingly, Staff recommends the following Commitments be added to the Proposed Order. Note that there is alternative language provide in item (3) below, which is contingent on the Commission's findings on that issue. Staff recommends the following language be added to the end of the Performance Assurance Plan Section:

COMMITMENTS

3502. In addition, the Commission requires SBCI to comply with the following Commitments to ensure that remedy plans operate in an efficient manner and to reduce potential future litigation. These Commitments apply to all remedy plans and all CLECs, and not just a remedy plan. Due to the breadth and importance of these Commitments, we find that SBCI must to be comply with them for this Commission to have sufficient assurance that the performance reporting and enforcement mechanisms put in place for SBCI will efficiently prevent future backsliding, prevent unreasonable litigation, and improve the performance assurance plans ability to prevent backsliding. The record in this case, taken together with our analysis, reveals that these Commitments need to be agreed to, and complied with, by SBCI, in order to ensure that the PAP, in part with the remedy plans in operation in current interconnection agreements in Illinois, will adequately prevent future backsliding. We require SBCI to:

1. *Performance Remedy Plan on a Going Forward Basis:* make available to CLECs through its interconnection agreements, only those remedy plans: (1) found suitable in this docket to prevent backsliding; (2) that is approved for use pursuant to SBCI's Alternative Regulation Plan; and (3) those developed through arms-length negotiations between a CLEC and SBC Illinois.

Additionally, SBC Illinois shall send a written notice via U.S. mail to all CLECs who have an interconnection agreement with SBCI but who do not have a remedy plan, and notify them of the remedy plan, or plans, determined to prevent backsliding in this docket, to those CLECs who do not have a remedy plan, and the ability to opt-in to a remedy plan in compliance with this order. Those plans developed at arms-length will be subject to Commission review through the section 252 process currently in place for reviewing and approving negotiated agreements.

2. *Performance Remedy Plan as Part of SBCI's Alternative Regulation Plan:* offer the 0120 Plan to CLECs as part of SBCI's Alternative Regulation Plan, until the conclusion of the next proceeding (which is to commence thirty-six months from the date of this order) that is to determine the need for and appropriate duration of remedy plans in Illinois.

3. *Opt-In Procedure:* limit CLECs ability to opt-in to only two performance remedy plans – the remedy plan approved in this docket to prevent backsliding, and the 0120 Plan as approved for use pursuant to SBCI's Alternative Regulation Plan. ***In the alternative, if the Commission does not agree with Staff's recommendation in the preceding section, then it should insert the following language:*** SBCI shall make available to CLECs to opt-in to the plans that are in existence at the commencement of this proceeding -- which are the remedy plan approved in Docket 01-0120, the 11-State remedy plan, the 13-state remedy plan, the original merger remedy plan (Texas Plan), or the Covad remedy plan. CLECs preferring to continue with their current remedy plans, such as the remedy plan developed in Docket 01-0120, are allowed to continue with those existing remedy plans until they either renegotiate a new remedy plan, or the term of the current interconnection agreement expires. (ICC Staff Ex. 29.0 ¶244). Finally, SBCI shall notify all carriers who do not have a performance remedy plan in their interconnection agreement, that it has the option of opting in to the remedy plans as approved above.

The following language should be included with either Staff's primary recommendation, or its alternative recommendation: Further, the opt-in procedure to be offered CLECs is as follows:

Any CLEC, wishing to incorporate, substitute or add a 271 approved Performance Remedy Plan, or the 0120 Plan offered under SBCI's Alternative Regulation Plan, to its existing interconnection agreement, or a new interconnection agreement, must notify SBC Illinois and the Commission, in writing, of its intent to "opt-in" to a remedy plan. The CLECs "opt-in" becomes effective 20 days from the date of filing said written notice with the Commission, and it supersedes the Performance Remedy Plan previously in effect for that CLEC, if any. Payments shall be calculated in accordance with the Plan beginning with the first full calendar month following the effective date of the "opt-in." An opt-in shall be followed with an Amendment to the Interconnection Agreement filed with the Commission.

Any CLEC that adopts a remedy plan by purchasing out of a tariff, must notify SBC Illinois and the Commission, in writing, of its intent to adopt a tariffed remedy plan.

Any notice required above shall be sent to SBC Illinois' regulatory offices and the Chief Clerk's Office of the Illinois Commerce Commission.

Additionally, SBC Illinois shall send a written notice via U.S. mail to all CLECs who have an interconnection agreement with SBCI but who do not have a remedy plan, and notify them of the remedy plan, or plans, determined to prevent backsliding in this docket, to those CLECs who do not have a remedy plan, and the ability to opt-in to a remedy plan in compliance with this order.

4. *Six month collaborative:* continue meeting with CLECs and Staff, as set forth in §6.3 of the 0120 Plan. Section 6.3 states the following -- therefore, every six months, CLEC may participate with SBCI, other CLECs and Commission representatives to review the performance measures to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity

standards; and whether to move a classification of a measure to High, Medium, or Low, Diagnostic, Tier-1 or Tier-2. The criteria for reclassification of a measure shall be whether the service is nascent or any other evidence establishing that the performance measure at issue is significantly inaccurate or changed from that reflected in the current Remedy Plan. Criteria for review of performance measures, other than for possible reclassification, shall be whether there exists an omission or failure, to capture intended performance, and whether there is duplication of another measurement. Performance measures for 911 may be examined at any six-month review to determine whether they should be reclassified. Any changes to existing performance measures and this Plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration. The current measurements and benchmarks will be in effect until modified hereunder or expiration of the interconnection agreement. 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.

5. Tier 2 administration: provide only one Tier 2 calculation methodology and assessment amount table to all carriers and remedy plans. To ensure that Staff would be able to identify what Tier 2 calculation methodology was used that month, SBC Illinois states that it would be a simple matter for it to add a statement as to which methodology yielded the highest payment amount (and was thus used). Further, SBC Illinois states its willingness to provide details of calculations under competing methodologies so that Staff could verify that SBC Illinois did choose the highest one.

6. Annual audits: conduct annual audits as approved by the Commission in Docket 01-0120, Attachment A §6.4.1, and apply it to all remedy plans, and all CLECs.

Ameritech will participate in a comprehensive annual audit of its reporting procedures and reportable data. Ameritech will include all systems, processes and procedures associated with the production and reporting of performance measurement results. A third-party auditor will perform this audit. Ameritech and the CLECs will jointly select the third-party auditor. If the parties

cannot agree on the auditor, the auditors selected by each party will jointly determine the auditor. Costs for these annual audits will be fully borne by Ameritech.

The comprehensive Annual Audits will be conducted every twelve (12) months, with the first such audit commencing twelve (12) months after the conclusion of the KPMG LSS Test's metric replication. Upon completion, Ameritech shall submit its annual comprehensive audit to the Commission and the CLECS participating in this Remedy Plan.

7. *Mini-audits:* provide mini-audits to all CLECs, and for all remedy plans as provided in section 6.4.2 of the 0120 Plan.

In addition to an annual audit, CLEC may request mini-audits of individual performance measures/submeasures during the year. When a CLEC has reason to believe the data collected for a measure are flawed or the reporting criteria for the measure are not being adhered to, it can request that a mini-audit be performed on the specific measure/submeasure upon written request, which will include the designation of a CLEC representative to engage in discussions with Ameritech about the requested mini-audit. If, thirty (30) days after the CLEC's written request, the CLEC believes that the issue has not been resolved to its satisfaction, the CLEC can commence the mini-audit, after providing Ameritech with written notice five (5) days in advance. Each CLEC is limited to auditing three (3) single measures/submeasures during the audit year. The audit year shall commence with the start of the KPMG OSS test. **Mini-audits may not be performed, conducted or requested while the OSS third-party test, or an Annual Audit is being conducted.**

Mini-audits will be of all systems, processes and procedures associated with the production and reporting of performance measurement results for the audited measure/submeasure. Mini-audits will include two (2) months of data, and all parties agree that raw data supporting the performance measurement results will be made available, on a monthly basis, to the CLECs.

A third-party auditor, selected by the same method as described above, will conduct the mini-audits. The responsibility for paying the costs of such audits shall be wholly dependent on the result of the audit. A CLEC initiating a mini-audit that finds no culpability or misfeasance on Ameritech's part shall be fully responsible for bearing the cost of the mini-audit. In those instances where a CLEC requests a mini-audit which results in a finding that Ameritech has materially misreported or misrepresented data, or, Ameritech is found to have non-compliant procedures, Ameritech should bear responsibility for full payment of the costs of the mini-audit. Ameritech is deemed to be materially at fault when a reported successful measure changes as a consequence of the audit to a missed measure, or, when there is an increase in the ranking of the measure as a result of the audit, i.e., from low to medium or from medium to high, as a result of a material misreport or misrepresentation. Each party to the mini-audit shall bear its own internal costs, regardless of which party ultimately bears the cost of the third-party auditor.

Each mini-audit shall be submitted to the CLEC involved and to the Commission as a proprietary document. Ameritech will notify all CLECs of any mini-audit requests, on a monthly basis, within forty-five (45) days of the date of a mini-audit request.

All written notices pursuant to this provision include e-mail.

8. *Determination of Annual Threshold:* that the amount of the Annual Threshold (i.e. annual cap, in the 0120 Plan) shall be determined by the Commission, pursuant to an annually commenced docket, based on the formula of 36% of SBC Illinois' net return as is set forth in ¶436 and footnote 1332 of the FCC December 22, 199 Memorandum Opinion and Order in CC Docket No. 99-295, the New York 271 Order. The annual threshold shall be calculated on the first business day of the calendar year that updated ARMIS data is made publicly available. For purposes of applying the cap, the calendar year shall apply. SBCI shall be responsible for petitioning the Commission for this proceeding.

3503. The above conditions need to be complied with for SBCI to receive a positive recommendation from the Commission on its 271 application to the FCC.

Excep. No. 46: Periodic v. Annual Audits

The Proposed Order seemingly takes a combination of both Staff's and SBCI's position on this issue and has created its own compromise audit provision, and it overlooks Staff's proposal that SBCI commit to offering this to all carriers and all remedy plans. Staff recommends that its position replace the Proposed Order's determination since SBCI has not met its burden of proving why the 0120 Plan should be changed to allow for anything but an annual audit, that the Commission approved of the annual audits in July 2002, not even one year ago. Additionally, the Proposed Order does not definitively define the timing of the audits or the scope of the audits, but instead leaves these decisions seemingly to some other proceeding, which only allows for unwanted delay.

Given that the Commission, in 01-0120 stated that the 0120 Plan was to be used by SBCI for purpose of section 271 approval, and SBCI has proposed changes, SBCI has the burden of proving that changing the annual audit provision of the 0120 Plan is warranted, and SBCI has not met that burden. At a high level, SBCI proposes that a comprehensive audit, similar in scope to what is required under the 0120 Plan, would occur eighteen months after the approval of the BearingPoint audit, and future audits would occur as deemed necessary by the Commission. As simple as this recommendation seems, Staff pointed out numerous problems that went un rebutted by SBCI, and unacknowledged by the Proposed Order.

The key question on this issue is authority – who is controlling this audit, SBCI or the Commission? The Proposed Order leaves all control with SBCI and what authority it does grant the Commission is not clearly defined, as suggested by Staff.

The Compromise Plan proposes a regional audit, however, a regional audit is limited in scope and inhibits this Commission's authority to choose an auditor. The regional audit does not clearly state how a uniform five-state audit will be conducted, and still provide this Commission all of the information in the format it needs. ICC Staff Ex. 39.0 ¶271. Additionally, the Compromise Plan compromises this Commission's authority to select the auditor for this state, since SBCI proposes that the auditor be chosen by majority vote of all five states (which is not stated in the remedy plan). Id. This Commission should be able to choose the auditor used to evaluate SBCI's performance and remedy payment calculations, and be able to define the scope of the audit and the audit plan prior to the commencement of the audit. Id. It is unclear how this Commission would be able to do that if four other state Commissions do not agree with what this Commission wants audited. This will cause the regional state commission's to try work together and reach agreement on the scope of audit and audit plan and timing of the audit, and inevitably, there will be disagreement among the state commissions, which will cause delay of the audit and waste of Commission resources. Both to SBCI's benefit and not the public.

The Proposed Order set the initial audit at sixteen months after the completion of BearingPoint's work (Proposed Order ¶3462), however there is no rationale for this proposed period, and SBCI provides no rationale for the eighteen month period it has set. The only argument SBCI offers is that an audit takes 4-6 months to complete, and

if audits were to be conducted annually then one-half their time would be spent conducting audits. Ehr Surrebuttal ¶147. Nothing in this proceeding alters the Commissions finding in July of last year, in which it found that the annual audit is appropriate:

The Commission agrees with Staff and the CLECS that the Remedy Plan should require annual audits of the performance measurement data collection, computing and reporting processes, to be conducted by an independent auditor. To rule otherwise would be to ignore the human element, which can be fraught with error, in the compilation of statistics.

Order, Docket 01-0120 at 14.

The Proposed Order finds that the issue of a regional audit is better decided “at a point closer in time to the event.” Proposed Order ¶3462. Waiting until a point “closer in time” to the inception of the first audit to determine whether it is a regional effort or not is inappropriate. The state’s purchasing requirements require a certain amount of time to administer (approximately two to four months) – to account for the requests for proposal, bids, auditor selection, and contract administration. For the Proposed Order to not clearly require, at this point in time, that the auditor will be selected by this Commission has two negative consequences. First, it will cause delays above and beyond the time required to handle contract administration, and to coordinate and negotiate an auditor, the scope of the audit and the audit plan with four other states, because it requires the Commission to decide whether or not it should be involved in a regionwide or Illinois only audit. Second, the Proposed Order is unclear as to the method the Commission is to use in determining whether it will join a regionwide audit or pursue a local audit. It is likely that the five state commission negotiations will be the same as defaulting into a process whereby the Company will end up selecting its own

auditor and calling it a “regional effort.” In short, putting off the decision on how audits are to be performed only adds further confusion and delay to the process, such that there will be no time to both select an auditor and audit the records in any sort of reasonable and set timeframe.

SBCI argues that it should not be punished for having a regionwide OSS, but that the Commission can coordinate with other Commission’s to create an efficient process. Ehr Surrebuttal Affidavit ¶148. Again, this only creates more work for Staff and the Commission, and possible delays to the implementation of an audit. SBCI, in effect, is asking the state Commissions to assume its burden of having a regionwide OSS system. ICC Staff Exhibit 41.0 ¶¶79-81.

The Proposed Order is willing to reconsider all aspects of the remedy plan in approximately 30 months (paragraphs 3471 and 3472), and in light of the Proposed Order, *Staff revises its position*, such that it suggests that the audit interval also be reviewed at that time to make changes based on the performance up to that time. Additionally, as discussed above, the Proposed Order’s request for SBCI’s to include its commitment to provide mini-audits in compliance with this Proposed Order in its Compromise Plan is insufficient. The revised language that requires SBCI to comply with this Commitment is provided above in item (6) of the section titled -- “Including Staff’s Commitments in the Compromise Plan Limits Their Application only to that Remedy Plan and Does not Make Them Commitments That Apply to All Remedy Plans.” *Staff has made one revision to this recommendation* from what it included in its Draft Order, it included the language from §6.4.1 of the 0120 Plan as opposed to just a

reference. This seems appropriate to include in the Order, if the 0120 Plan is not going to be an attachment to this Order.

Finally, Staff recommended in its Comments that the annual audit provision should be uniformly applied to all remedy plans to permit both CLECs and the Commission to be able to analyze this data effectively. SBCI's response on this issue was simply to summarize its position and state that it will engage in audits. SBC Illinois Response to staff Comments on Remedy Plan at 13. The Proposed Order failed to address this point. Therefore, Staff proposes that SBCI commit to only one annual audit provision for all remedy plans, and all CLECs, on a going forward basis, as discussed below in the section entitled – *“Including Staff’s Commitments in the Compromise Plan Limits Their Application only to that Remedy Plan and Does not Make Them Commitments that Apply to All Remedy Plans.”*

Accordingly, Staff recommends the Commission

3458. SBC Illinois’ has proposed that the 0120 Plan be amended so that periodic audits are performed instead of the annual audits that the Commission approved in Docket 01-0120. Staff believes the annual audits are beneficial, that a regional audit inhibits the Commission’s ability to choose the auditor and scope of the audit, that the conditions have not changed since we released the 01-0120 Order, and that SBCI has not proved that changes to the annual audit provision are warranted to be necessary. As it stands, the Compromise Plan specifies that the initial audit would begin 18 months after the latter date of approval of the Compromise Remedy Plan or the conclusion of the BearingPoint PMR test. Beyond that, periodic audits would be scheduled as deemed necessary by the Commission. Given that SBC Illinois has already undergone one audit (by E&Y) and is now undergoing another audit by BearingPoint, SBC Illinois contends that its 18-month proposal is reasonable. Additionally, SBC states that audits take 4-6 months and in an annual process it would spend half of its year performing audits if an annual plan is used.

3459. Staff ~~further~~ takes issue with SBC Illinois' proposal that audits be conducted on a regional basis, with the auditor proposed by SBC and approved by the various state commissions. Under the Compromise Plan, the state commission's determine the auditor by voting. Therefore, the Commission would need to coordinate the scope of the audit and the audit plan and timing of the vote with the other state commission in this region. Additionally, it is unclear as to how the scope of the audit and the audit plan would be determined under the Compromise Plan. Staff asserts that the Commission would waste time negotiating and coordinating with others state commissions, and in the end the Commission may still not receive the information it needs to properly review SBCI's performance. Bottom line, Staff is concerned that the Compromise Plans audit provision requires the Commission to give control of the way the audit is to be conducted to other Commissions, and to SBCI, whereas the 0120 Plan's annual audit firmly rests control with the Commission. Staff argues that Commission control of the way the audit is conducted clearly outweighs SBCI's efficiency argument.

3460. The Company maintains that SBC Midwest's region-wide OSS and performance measures give CLECs the benefit of uniformity in providing service across states. The commissions in all five SBC Midwest states, it suggests, can take similar advantage of these region-wide measures and systems and coordinate an efficient process.

~~3460. Taking full account of all the arguments on this issue, and the importance of the matter, the Commission has developed its own resolution to the disputes at hand.~~

3461. In the 0120 plan, to be sure, the need for annual audits was deemed necessary given the record of blemished performance. Here, however, it is well understood that Bearing-Point is still at work, and will continue its work, until finished. On balance, the Commission needs to maintain confidence both for itself and in and among the CLECs for the future.

3462. As such, and unless otherwise directed, the first audit will commence ~~46~~12 months after the completion of the BearingPoint's work. The Commission reiterates what it stated in Docket 01-0120, that data validity is critical to the successful operation of a competitive telecommunications market, and wishes to select the auditor, as well as define the scope of the audit and audit plan. The Commission directs Staff to initiate an auditor selection process that will assess performance measurement data, data collection, data retention and processing controls to demonstrate and prove that the performance measurement data remains reliable over time. This selection process should be begin at such a time that will allow state purchasing requirements to be satisfied prior to the end of the 12 month period after Bearing Point's work. The question as to whether a "regional audit" would be appropriate, is a matter better raised and considered at a point closer in time to the event. It, thus, remains open.

3463. Subsequent audits will occur on an annual basis. This time interval will be reviewed in the proceeding that re-evaluates the remedy plan, approximately 30 to 36 months from the date of this Order. A determination as to the time for a subsequent audit, will depend on the outcome of that first audit, among other factors, and is subject to the Commission's discretion to be exercised at such time.

Excep. No. 47: Mini-Audits

The Commission's finding regarding the mini-audit provision finds that there is no dispute, however it is still unclear to Staff that SBCI has agreed to Staff's proposal since it only agreed to part of Staff's recommendation.

Staff recommended that only one type of mini-audit be used for all remedy plans and all CLECs. Staff Comments at 8-9. SBCI agreed to use the "mini-audit" set forth in the 0120 Plan, but only in relation to the Compromise Plan. SBCI was silent about applying the provision to all carriers and all five of the remedy plans it offers, as Staff had proposed. See SBCI Response to Staff Comments on the Remedy Plan at 13. As

discussed in Staff's Comments, the remedy plans that provide for mini-audits provide for different mini-audit, to make them all consistent on a going forward basis, and prevent confusion for CLECs, Staff recommends that SBC only provide one type of mini-audit to all CLECs for all remedy plans and that is the mini-audit set forth in section 6.4.2 of the 0120 Plan. Staff Comments at 8-9.

Additionally, as discussed above, the Proposed Order's request for SBCI's to include its commitment to provide mini-audits in compliance with this Proposed Order in its Compromise Plan is insufficient. The revised language that requires SBCI to comply with this Commitment is provided above in item (7) of the section titled -- "Including Staff's Commitments in the Compromise Plan Limits Their Application only to that Remedy Plan and Does not Make Them Commitments That Apply to All Remedy Plans." *Staff has made one revision to this recommendation* from what it included in its Draft Order, it included the language from §6.4.2 of the 0120 Plan as opposed to just a reference. This seems appropriate to include in the Order, if the 0120 Plan is not going to be an attachment to this Order.

Accordingly, Staff recommends that paragraph 3464 be modified as follows:

3464. Staff recommends that the Commission condition any positive recommendation of SBCI's petition for Section 271 approval on SBCI's commitment to offer the "mini-audit" provision set forth in section 6.4.2 of the 0120 Plan, to all CLECs and for all remedy plans. We agree with Staff since the Compromise Plan would introduce a third mini-audit procedure available to CLECs in at least three different remedy plans. This Commission evaluated mini-audits in Docket 01-0120 and established a mini-audit procedure in the 0120 Plan. We find that this lack of uniformity in mini-auditing provisions could have a negative impact on competition since the audit varies from what his Commission specifically approved in Docket 01-0120. Therefore, SBCI shall commit to offering the "mini-audit" provision set forth in section 6.4.2 of the 0120 Plan, to all CLECs and for all remedy plans, and expressly include it in the remedy plan approved in this proceeding. ~~SCBC Illinois' Response to Staff's comments and~~

~~concerns indicates that the “mini-audit” language of the 0120 Plan is acceptable to SBC Illinois, and the Commission adopts this revision to the Compromise Plan. Thus, this dispute is wholly resolved and the Commission concurs in that resolution.~~

Excep. No. 48: “Opt-in” Provision

The Proposed Order misstates Staff’s position regarding the opt-in provision in paragraph 3465, and finds in favor of SBCI without supporting its finding or providing rationale as to why it denied Staff’s proposal.

Staff’s position was accurately reflected in paragraph 3386, and with language provided in paragraph 3391. SBCI’s response, and the Proposed Order, only addressed one of Staff’s recommendations regarding the opt-in process that should be made available to CLECs on a going forward basis. Staff had a three prong proposal, with an alternative: (a) that the opt-in procedure be limited to a 271 approved Performance Remedy Plan, or a performance remedy plan offered under SBCI’s Alternative Regulation Plan if the Commission agrees with Staff’s proposal in the section above (Applicable Remedy Plans in Illinois on a Going Forward Basis); in the alternative, if the Commission does not agree with Staff’s recommendation in the preceding section, then the opt-in would apply to, but not be limited to, the 01-0120 remedy plan, the 11-State remedy plan, the 13-state remedy plan, the original merger remedy plan, or the Covad remedy plan. Staff also recommends, (b) that CLECs preferring to continue with their current remedy plans, such as the remedy plan developed in Docket 01-0120, should be allowed to continue with those existing remedy plans (ICC Staff Ex. 29.0 ¶244); finally, (c) Staff recommends that SBCI notify all of the carriers who do not have a performance remedy plan in their interconnection agreement

that they have the option of opting in to the remedy plans as approved in (a) above. See Staff Comments at ¶¶243-48.

Staff recommends this approach so that CLECs would overall have an ease of access to the anti-backsliding remedy plan, or remedy plans. If all carriers were limited to just the anti-backsliding plan then the calculations performed in the docket would more accurately reflect the approved plans impact on SBCI. ICC Staff Ex. 29.0 at ¶247.

SBCI's response to Staff's proposal was that it would send an accessible letter to CLECs notifying them of remedy plans available in Illinois. Ehr Rebuttal ¶238.

SBCI's recommendation is unacceptable since an accessible letter is a notice posted to SBCI's website. Therefore, unless a CLEC locates the website, has a password to access the website and can locate the accessible letter, then it is notified of the remedy plans available in Illinois. Just about the only time that would happen is if the CLEC already knew about the accessible letter and where it was on SBCI's website. Staff does not find this offer acceptable, and neither should the Commission. The Commission should require SBCI to send a letter via U.S. mail to each of the CLECs who have an interconnection agreement with SBCI that does not contain a remedy plan.

SBCI failed to respond to the remainder of Staff's proposal.

Additionally, as discussed above, the Proposed Order's request for SBCI's to include its commitment to provide mini-audits in compliance with this Proposed Order in its Compromise Plan is insufficient. The revised language that requires SBCI to comply with this Commitment is provided above in item (3) of the section titled -- "Including Staff's Commitments in the Compromise Plan Limits Their Application only to that

Remedy Plan and Does not Make Them Commitments That Apply to All Remedy Plans.”

Accordingly Staff recommends that the Commission modify paragraph 3465 of the Proposed Order as follows:

3465. Staff witness McClerren notes that not all CLECs have adopted the 0120 Plan, and suggests that the best way to prevent backsliding and to ensure that what happens in the marketplace most closely approximates what was evaluated in this docket in terms of dollar impacts on SBCI, that SBCI commit to limit opt-ins to (a) 271 approved Performance Remedy Plan, or a performance remedy plan offered under SBCI’s Alternative Regulation Plan, or in the alternative, that a CLEC would be able to opt-in to the remedy plans SBCI makes available as identified in this proceeding, which are the 0120 Plan, the 11-State remedy plan, the 13-state remedy plan, the original merger remedy plan, or the Covad remedy plan, and the plan approved in this proceeding. Staff also recommends, (b) that CLECs preferring to continue with their current remedy plans, such as the remedy plan developed in Docket 01-0120, should be allowed to continue with those existing remedy plans (ICC Staff Ex. 29.0 ¶244); finally, (c) Staff recommends that SBCI notify all of the carriers who do not have a performance remedy plan in their interconnection agreement that they have the option of opting in to the remedy plans identified in (a) above. Commission require a uniform plan or require SBC Illinois to provide further information to CLECs regarding their options. SBC Illinois maintains that this issue is not nearly as significant as Staff portrays it. According to SBC, while a number of carriers have opted into the 0120 Plan, the bulk of wholesale business volume is attributable to carriers that have adopted that plan. At any rate, SBC Illinois claims that it has already advised CLECs via accessible letter of remedy plans available in Illinois, including the 0120 Plan.

3466. As we see it, SBC Illinois has indicated its willingness to send another accessible letter advising CLECs of the adoption of the Section 271 Plan, and the Commission finds this to meet with our purposes. In addition, to ensure that the plan, or plans, found to be suitable in preventing backsliding are widely implemented, SBCI should commit to only allowing CLECs to opt-in to the plan, or plans, approved in this proceeding, and the performance remedy plan offered under SBCI’s Alternative Regulation Plan. This will ensure that over time the greatest number of CLECs will take of the plan approved in this proceeding and therefore the remedy amounts SBCI would pay would most closely resemble the dollar amounts provided in this proceeding. Finally, CLECs preferring to continue with their current remedy plans, such as the 0120

Plan, should be allowed to continue with that existing remedy plan until they either renegotiate a new remedy plan, or the term of the current interconnection agreement expires. Additionally, the following language, as proposed by Staff in paragraph 245 of ICC Staff Ex. 29.0, shall be added to the remedy plan approved in this proceeding, and is the procedure SBCI is to commit to for all carriers who interconnect with it:

Any CLEC, wishing to incorporate, substitute or add a 271 approved Performance Remedy Plan, or a performance remedy plan offered under SBCI's Alternative Regulation Plan, to its existing interconnection agreement, or a new interconnection agreement, must notify SBC Illinois and the Commission, in writing, of its intent to "opt-in" to a remedy plan. The CLECs "opt-in" becomes effective 20 days from the date of filing said written notice with the Commission, and it supersedes the Performance Remedy Plan previously in effect for that CLEC, if any. Payments shall be calculated in accordance with the Plan beginning with the first full calendar month following the effective date of the "opt-in." An opt-in shall be followed with an Amendment to the Interconnection Agreement filed with the Commission.

Any CLEC that adopts a remedy plan by purchasing out of a tariff, must notify SBC Illinois and the Commission, in writing, of its intent to adopt a tariffed remedy plan.

Any notice required above shall be sent to SBC Illinois' regulatory offices and the Chief Clerk's Office of the Illinois Commerce Commission.

Excep. No. 49: Tier 2 Administration

The Proposed Order found that SBCI's resolution to Staff's concern regarding the use of multiple Tier 2 plans as sufficient (Proposed Order ¶¶3469-70), and did not provide an explanation or rationale as to why SBCI's recommendations satisfied the four problems raised by Staff (Id. ¶¶33395 et seq.). In fact, SBCI's responses did not resolve any of the problems identified by Staff, therefore Staff recommends that the Commission include as a Commitment, within the Final Order, that SBCI only use one Tier 2 remedy calculation for all remedy plan calculations.

Section 5.5 states the following:

To the extent that there are one or more other Commission approved remedy plans in effect that also require SBC Illinois to make Tier 2 assessments to the State (as opposed to, or in addition to, Tier 1 payments to a CLEC or CLECs), 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.

Currently, there are three Tier 2 calculation methodologies – the Texas Plan, 0120 Plan and the Compromise Plan. Additionally, the SBC11STATE and SBC13STATE remedy plans do not include a Tier 2 payment calculation.

In Staff's Comments we noted that the language in section 5.5 of the Compromise Plan is insufficient for four reasons: (i) in violation of the principles of contract and administrative law, SBCI is attempting to implement a Tier 2 calculation methodology that is contained in one remedy plan upon 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, and 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, a manageable way for Staff to double-check SBCI's payments; and, (iv) the way SBCI claims other remedy plans (e.g., SBC11state and SBC13State plans) incorporate Tier 2 payments is faulty.

By requiring SBCI to use only one Tier 2 calculation methodology for all CLECs, and all remedy plans, Staff is attempting to clarify and simplify Tier 2 administration in Illinois. Staff is trying to reduce the burden upon SBCI, so one must ask themselves --

why wouldn't SBCI want to the same thing? why wouldn't they want to reduce the burden on itself and only apply one Tier 2 calculation methodology? what benefit is it to SBCI? The only apparent benefit is that it creates more work for Staff to track the payments, and it removes control from the Commission in ensuring that the remedy plans in Illinois operate in a manner that serve as a proper incentive to SBCI.

SBCI is attempting to apply the Tier 2 methodology in the Compromise Plan to all carriers, whereas contract law and, dictate that the only parties bound to a condition of a contract are those that are party to the contract. The regulatory procedure for an interconnection agreement requires that if a carrier wants to do business with SBCI it needs to have an interconnection agreement. 47 U.S.C. §252(e)(1); see 83 Ill. Adm. Code Part 763.100. Just like any other contract, a remedy plan sets forth the terms and conditions under which the two companies are to conduct business. Therefore, when a carrier enters into an interconnection agreement with SBCI and decides to use the Compromise Plan as its remedy plan, that CLEC is subject to the provisions in that plan, and not other plans. However in effect, that decision also binds the State to the Tier 2 payments included in that plan. Therefore, the Tier 2 calculation methodology need to be agreed to and applied separate from any one remedy plan.

SBCI's response to this argument was that

"[a]ccording to SBC Illinois, Tier 2 payments are calculated based on the aggregate results for all CLECs regardless of what plan they use for their own Tier 1 remedies. Because SBC Illinois would be bound by the Compromise Plan, it contends there would be no need for administrative nightmare of going back and rewriting every other CLECs agreement as Staff suggests."

See SBCI Response to Staff Comments on the Remedy Plan at 10; Proposed Order ¶13421.

Just because SBCI says it is so, or that SBCI states that it currently administers Tier 2 payments that way, does not make that action right. SBCI may make Tier 2 payments to the state for all carriers based on the 0120 Plan's Tier 2 calculation methodology, but that is not the effect the 01-0120 Order has now that SBCI offers more than one remedy plan to CLECs, and there is more than one Tier 2 calculation methodology.

Simple contract law dictates that a contract agreed to by 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 provision⁵⁹ 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. Staff recommends the latter. Therefore, a provision in the Compromise Plan cannot affect the contractual provisions of various carrier's interconnection agreements if those interconnection agreements do not incorporate the Compromise Plan. In addition, SBCI offers at least two remedy plans that do not expressly provide for Tier 2 payments. These types of remedy plans 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,

⁵⁹ 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 0120 Plan (at §§9.0, 11.2 et seq.), and the Texas Remedy Plan (at §§9.0, 11.2 et seq.). Attachment A.

11.2 et seq.; see Compromise Plan (Ehr Affidavit, Attachment Z, §§ 9.0, and 11.2, et seq.) .

SBCI proposes that all carriers be subject to the Tier 2 calculation methodology, as stated in section 5.5 of the Compromise Plan. As stated above, a provision in one remedy plan cannot be used to bind all other remedy plans and carriers. The Commission has authority to order such an action, and Staff recommends that the Commission require SBCI to comply with a Commitment that it operate only one tier 2 calculation methodology for all CLECs.

We are examining information to assess AI's compliance with existing obligations – not to entertain novel issues or reconsider settled decisions or to impose new obligations. The latter would be most inappropriate given that this proceeding is not set up to adjudicate the rights of any parties.

First Interim Order, ¶18.

Therefore, since this is not an adjudication of rights, the Commission must rely upon SBCI's Commitment to offer only one Tier 2 calculation methodology.

Moreover, SBCI's 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, and modification of which is not within the purview of any private party. Since the Tier 2 calculation methodology is part of the Compromise Plan, and not applied to all remedy plans, either party to the interconnection agreement negotiation could negotiate away Tier 2 payments in exchange for 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 SBCI to operate at a certain level of performance. 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.

SBCI responded to this argument by stating:

With respect to Staff's observation that the various remedy plans might have different methods for calculating "Tier 2" payments to the State, SBC Illinois states that the Compromise Plan already provides a reasonable solution: SBC Illinois proposes that each month it will pay Tier 2 payments under whatever methodology yields the highest result. Thus, SBC Illinois reasons, there is no possible foundation for Staff's speculation that carriers will use Tier 2 as a "bargaining chip" and negotiate plans that result in lower Tier 2 payments. Proposed Order ¶¶3421.

Again, this argument rests on the false assumption that somehow after this proceeding there is authority to apply this Tier 2 calculation methodology to all carriers.

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 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. ICC Staff Ex. 29.0 ¶¶242.

SBCI's response was that

Staff's concern about "verifying" Tier 2 payments in any given month, is hardly insurmountable. SBC Illinois states that it already reports Tier 2 assessments on its website, and that it would be a simple matter to add a statement as to which methodology yielded the highest payment amount (and was thus used). Further, SBC Illinois states its willingness to provide details of calculations under competing methodologies so that Staff could verify that SBC Illinois did choose the highest one. Finally, SBC Illinois points out that the Compromise Plan already contains an audit procedure that could be used to verify Tier 2 calculations. Proposed Order ¶¶3422.

While Staff finds the actions to be of some benefit, it is limited. It does not eliminate Staff's concern about proper administration of these payments and still places a large administrative burden upon Staff to diligently track and follow SBCI's operations is too great. See generally, Staff Comments at 16-17. Given the limited benefit, these measures provide Staff in its role in monitoring and tracking remedy payments and remedy plans, *Staff has revised its Commitment on this point, as set forth above*, to include the actions offered by SBCI's.

Additionally, neither the Texas remedy plan's, nor the Compromise 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 Compromise Plan's

Tier 2 payments and calculation methodology is not sensitive to varying levels of failed performance. ICC Staff Ex. 39 ¶¶55. Specifically, as SBCI performance gets worse, Tier 2 payments will not increase. Id. SBCI did not respond to this argument.

The most important aspect of Staff's proposal is that only one Tier 2 calculation methodology be used. Staff recommends that the Tier 2 calculation methodology in the 0120 Plan be used since that is the one currently in place, and is superior to the Tier 2 methodologies in both the Compromise Plan, the Hybrid Plan and the Texas Plan. See ICC Staff Ex. ¶¶55 and 57 (the Staff Hybrid Plan's payments are less than the 0120 Plan, therefore the incentive they provide is not as strong or effective as those in the 0120 Plan). However, as an amendment to its previous position, as ***an alternative***, if the Commission finds another Tier 2 methodology that is better than the methodology in the 0120 Plan or is more suitable to preventing backsliding, then the Commission should have SBCI commit to that methodology.

As a related matter, and as discussed above, the Proposed Order's request for SBCI to include its commitment to provide mini-audits in compliance with this Proposed Order in its Compromise Plan is insufficient.

Accordingly, 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 the Order should require SBCI to 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. This Commitment would not raise the problems Staff identified above since the Commitment is to the State of Illinois through this order, and not executed through an interconnection agreement.⁶⁰ Further, Staff recommends that the Tier 2 calculation methodology from the 0120 Plan be used for all carriers, and in the alternative, if that methodology is unsuitable, then the Tier 2 methodology that the Commission finds that is better than the methodology set forth in the 0120 Plan, or more suitable to preventing backsliding. The revised language that requires SBCI to comply with this Commitment is provided above in item (5) of the section titled -- “Including Staff’s Commitments in the Compromise Plan Limits Their Application only to that Remedy Plan and Does not Make Them Commitments That Apply to All Remedy Plans.” Therefore, Staff proposes the following changes to the Proposed Order to bring it in line with Staff’s position above:

Tier 2 Administration

3469. Further, in its Comments, Staff has raised issues with respect to the uniformity of Tier 2 payments as SBCI had proposed them in section 5.5 of the Compromise plan and in the way they currently administer them. Staff argues that SBCI’s Tier 2 administration is faulty in four respects: for four reasons: (i) in violation of the principles of contract and administrative law, SBCI is attempting to implement a Tier 2 calculation methodology that is contained in one remedy plan upon 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, and 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, a manageable way for Staff to double-check SBCI’s payments; and, (iv) the

⁶⁰ Staff has recommended that the Commission should approve the Tier 2 methodology and amounts set forth in the 0120 Plan, since the Compromise 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. ICC Staff EX. 39 ¶¶57 and 74.

way SBCI claims other remedy plans (e.g., SBC11state and SBC13State plans) incorporate Tier 2 payments is faulty, and

3470. We find that the responses to those Comments as filed by the Company are reasonable and show no legitimate disputes to be raised. SBCI responded as follows to Staffs arguments on these four points:

With respect to Staff's observation that the various remedy plans might have different methods for calculating "Tier 2" payments to the State, SBC Illinois states that the Compromise Plan already provides a reasonable solution: SBC Illinois proposes that each month it will pay Tier 2 payments under whatever methodology yields the highest result. Thus, SBC Illinois reasons, there is no possible foundation for Staff's speculation that carriers will use Tier 2 as a "bargaining chip" and negotiate plans that result in lower Tier 2 payments. According to SBC Illinois, Tier 2 payments are calculated based on the aggregate results for all CLECs, regardless of what plan they use for their own Tier 1 remedies. (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal) ¶ 137. Because SBC Illinois would be bound by the Compromise Plan, it contends there would be no need for the administrative nightmare of going back and rewriting every other CLEC's agreement as Staff suggests.

Second, SBC Illinois states that Staff's concern about "verifying" Tier 2 payments in any given month, is hardly insurmountable. SBC Illinois states that it already reports Tier 2 assessments on its website, and that it would be a simple matter to add a statement as to which methodology yielded the highest payment amount (and was thus used). Further, SBC Illinois states its willingness to provide details of calculations under competing methodologies so that Staff could verify that SBC Illinois did choose the highest one. Finally, SBC Illinois points out that the Compromise Plan already contains an audit procedure that could be used to verify Tier 2 calculations.

3471. We are not convinced by SBCI's proposal to pay the higher of multiple Tier 2 remedy plans, or that a statement in the Compromise Plan is a sufficient Commitment on how it will administer Tier 2 payments.

Providing multiple Tier 2 calculation methodologies is a burden to both administer and to validate. Staff is our administrative arm that would be coordinating the validation of these payments, and we defer to their concern about the burden it places upon our resources to administer. Additionally, the method in which we approve of the Tier 2 operations is significant. We urge SBCI to have consistency in its remedy plans. They are contracts, that do reflect their obligation to both the CLEC and its obligation to the State. In terms of SBCI's obligations to the State, we prefer to clearly state the Commitment we require to administer Tier 2 payments in this Order, since the Compromise Plan is not a binding agreement between SBCI and this Commission. Further, this is only a consultation, and limited to a review of the Compromise Plan's ability to prevent backsliding.

3472. Therefore, we choose to state in this Order that SBCI is required to comply with a Commitment to calculate Tier 2 payments based on the operation of all CLECs that have an interconnection agreement with it, regardless whether that CLEC has a remedy plan or not. We do not find this an onerous burden, since we understand SBCI to claim that it already calculates Tier 2 payments based on all CLECs. See SBCI Response to Staff Comments on the Remedy Plan at 10; Proposed Order ¶3421. The Tier 2 calculation methodology to be used is the one approved in Docket 01-0120. We acknowledge that SBCI has taken appeal of the Tier 2 payment levels of the 0120 Plan. We maintain that the Tier 2 calculation methodology and payments level in the 0120 Plan are fair, and reasonable. However, in the off-chance, that the Illinois Appellate Court finds that those payment levels were not based on sufficient evidence, or are arbitrary and capricious, and does not grant us the opportunity to revise or correct the Tier 2 payment levels, we will then amend this Commitment and put in place another Tier 2 calculation methodology and payment table. As we determined in Docket 01-0120, and in this docket, Tier 2 payments are an integral part of an overall performance remedy plan and need to be in place, with a Tier 1 payment scheme, for there to be sufficient incentive, or sufficient level of liability placed at risk to motivate SBCI to prevent backsliding. Without a Tier 2 payment, it is doubtful that a PAP even prevents backsliding.

Excep. No. 50: Commitments Not Addressed in Conclusion

The Proposed Order does not make a final determination on three of the eight Commitments proposed by Staff. Omitted from the Proposed Order was a finding regarding SBCI's Commitment to continue to be involved in the six-month collaborative

process, SBCI's commitment to offer anti-backsliding remedy plans on a going forward basis, and SBCI's Commitment to allow the Commission to determine the annual thresholds. These items will be addressed in order below.

A. Six-Month Collaborative

Paragraphs 3376 to 3379 of the Proposed Order summarize Staff's position regarding its proposal that SBCI Commit to participating in six month collaborative process. However, the Proposed Order fails to rule on this issue.

SBCI responded to this in its Response by stating:

As with periodic audits, staff's discussion of the "six-month" review and update of performance measures might lead one to think that SBC Illinois proposes doing away with such a review. Nothing of the sort. Section 6.4 of the Compromise Plan expressly states that "[e]very six months, CLEC may participate with SBC Illinois, other CLECs, and Commission representatives to review the performance measures." That language is identical to Section 6.3 of the 0120 Plan, so SBC Illinois has already satisfied Staff's proposal that the Commission "obtain a commitment from SBCI to continue meeting with CLECS and Staff, as set forth in § 6.3 of the [0120] plan."

SBC Illinois Response to Staff Comments on Remedy Plan, at 14.

On the contrary, this does not satisfy Staff's request, since, as stated above, inserting this statement in the Compromise Plan is not a Commitment that applies to all remedy plans but only Compromise Plan. Since it appears from SBCI's affable response that it intends to make such a Commitment, this Commitment should then also be added to the Proposed Order. *Staff has made one revision to this recommendation* from what it included in its Draft Order, it included the language from §6.3 of the 0120 Plan as opposed to just a reference. This seems appropriate to include in the Order, if

the 0120 Plan is not going to be an attachment to this Order. The revised language for the Proposed Order is provided above in item (4) of the section titled -- “Including Staff’s Commitments in the Compromise Plan Limits Their Application only to that Remedy Plan and Does not Make Them Commitments That Apply to All Remedy Plans.”

B. Remedy Plans on A Going Forward Basis

Paragraphs 3380 to 3385 of the Proposed Order summarize Staff’s position and support for its proposal that SBCI commit to providing only those plans found suitable to prevent backsliding in this docket, and those approved for purposes of SBCI’s Alternative Regulation Plan, and those plans developed through arms length negotiations between a CLEC and SBC Illinois⁶¹. ICC Staff Ex. 29.0 ¶¶240. However, the Proposed Order fails to rule on this issue.

Staff omitted one of the sub-commitments related to this issue, and that was:

Staff recommends that SBC Illinois be required to make a commitment to notify and offer the remedy plan, or plans, determined to prevent backsliding in this docket, to those CLECs who do not have a remedy plan. Those carriers would then have the option of either amending their interconnection agreement or opting-in to those remedy plans.

ICC Staff Ex. 29.0 ¶¶241.

As Staff witness McClerren stated in ICC Staff Exhibit 29 ¶¶236, currently SBCI makes five plans available to CLECs and the number of CLECs using each remedy plan:

50 - 11-state/13-state plan

23 - CLECs have opted in to the 01-0120 plan

⁶¹ Those plans developed through arms length negotiations would be subject to Commission review

20 - Original merger remedy plan

1 - Covad Plan

In addition, only 67 of 161 CLECs actually have remedy plans in their interconnection agreements. Therefore, there really is not one remedy plan that is being used to ensure that SBCI's performance will not backslide but 5 plans. The approval of the remedy plan in this docket is based on all carriers taking of one remedy plan. For the remedy plans to prevent backsliding all carriers need to have a remedy plan, and the total liability, or incentive, SBCI would incur would most accurately reflect the data in ICC Staff Ex. 39.0S (Proposed Order ¶¶3327) if all carriers had the same remedy plan. ICC Staff Ex. 29.0 ¶238. Therefore, those carriers who do not have remedy plans need to be contacted and given the option to opt-in to a remedy plan.

Therefore, Staff's amended recommendation is as follows:

SBC Illinois will make available to CLECs through its interconnection agreements only (1) the remedy plan found suitable in this docket to prevent backsliding; (2) the plan that is approved for use pursuant to SBCI's Alternative Regulation Plan; (3) those developed through arms-length negotiations between a CLEC and SBC Illinois, and (4) Staff recommends that SBC Illinois be required to make a commitment to notify and offer the remedy plan, or plans, determined to prevent backsliding in this docket, to those CLECs who do not have a remedy plan. Those carriers would then have the option of either amending their interconnection agreement or opting-in to those remedy plans. However, those plans developed at arms-length will be subject to Commission review through the section 252 process currently in place for reviewing and approving negotiated agreements.

SBCI's response to Staff's proposal was that it has sent an accessible letter to CLECs notifying them of remedy plans available in Illinois, that it would be willing to "discuss implementing as its sole remedy plan for Illinois the plan approved by the Commission

through the section 252 process.

for Verizon, so that there would truly be a single plan for CLECs to participate in for the State of Illinois, regardless of the ILEC”, and that approximately 87% of the orders it processes are from CLECs that are under the 0120 Plan and therefore there is no need for a remedy plan to apply to all CLECs. Ehr Rebuttal ¶238.

Addressing these points in order, an accessible letter is a notice posted to SBCI’s website. Therefore, unless a CLEC goes to the website, has a password to access the website and can locate the accessible letter, then it is notified of the remedy plans available in Illinois. The only time that would happen is if the CLEC already knew about the accessible letter and where it was. Staff does not find this offer acceptable, and neither should the Commission. The Commission should require SBCI to send a letter via U.S. mail to each of the CLECs who have an interconnection agreement with SBCI that does not contain a remedy plan.

Regarding SBCI’s suggestion that it discuss with Staff the using the remedy plan that Verizon is currently using, Staff is under the belief the reference to Verizon was an error. ICC Staff Ex. 41.0 ¶83. SBCI affiant Her did not take advantage of his surrebuttal to correct this statement.

Regarding SBCI’s approximately 87% of the orders it processes are from CLECs that are under the 0120 Plan, the volume of orders being under one plan does not address Staff’s concern. For the evidence presented in this docket to fairly represent the total liability that SBCI would incur for providing a certain level of service, in this case approximately 90% compliance, all carriers, or a majority of carriers, need to have the same plan. The analysis performed in this docket, of the dollar amounts used to incent SBC Illinois’ behavior is based on the dollar amounts paid when all carriers would

take of one plan. Therefore, the more carriers who are on one plan, the more accurate the analysis performed herein, and therefore the greater the likelihood that the level of incentive this Commission deems appropriate to prevent backsliding will be put in place. ICC Staff Ex. 41.0 ¶84.

Accordingly, Staff recommends that the Proposed Order require SBCI to comply with this Commitment. The revised language for the Proposed Order is provided above in item (1) of the section titled -- "Including Staff's Commitments in the Compromise Plan Limits Their Application only to that Remedy Plan and Does not Make Them Commitments That Apply to All Remedy Plans." Additionally, in summarizing Staff's position, the Proposed Order omitted evidence presented by Staff that is critical to Staff's argument on this matter. Staff relied upon it in its affidavits and above, therefore, Staff recommends the paragraph 3381, in Staff's Position statement, be amended to include this information:

3381. According to SBC Illinois witness James D. Ehr, there are currently 161 CLECs purchasing wholesale service from SBC Illinois. SBC Illinois has ~~four~~five remedy plans available in Illinois. Following is a description of the ~~four~~five plans, and the number of CLECs using each remedy plan:

50 - 11-state/13-state plan

23 - CLECs have opted in to the 01-0120 plan

20 - Original merger remedy plan

1 - Covad Plan

Id. ¶236.

The remaining 67 CLECs have no remedy plan. At the end of this proceeding, Mr. Ehr indicated that it would be speculation as to how many remedy plans would be in effect due to differences in negotiations. Mr. Ehr indicated SBC Illinois anticipated that there should be one state sponsored remedy plan. Id. ¶237.

C. Annual Threshold Amounts

Paragraph 3404 of the Proposed Order summarizes Staff's position regarding its proposal that the Commission, and not SBCI, determine the annual threshold amount. However, the Proposed Order fails to offer a ruling on this issue. Therefore, Staff provides language directing SBCI to comply with this Commitment.

Staff presented this issue in its Comments. In SBCI's Response to Staff's Comments it stated the following:

There is no difference between the Compromise Plan and the 0120 Plan as to the annual "threshold" amount that would trigger a Commission proceeding to investigate SBC Illinois performance. The amount is to be calculated as 36 percent of net return, applying a formula approved by the FCC to publicly-reported ARMIS data. The only difference is the 0120 Plan calls for a special docketed proceeding to calculate the threshold amount, while the Compromise Plan calls for SBC Illinois to do the calculation. To the extent Staff's concern is with verification, the calculation is based on public data and easy to verify; further both periodic audits and mini-audits would be in place to handle verification.

SBCI's Response to Staff's Comments on Remedy Plan at 14.

First, this argument belies Staff's point in requesting that the Order require SBCI to comply with this Commitment. As stated in Staff's Comments, and in paragraphs 3353 and 3354 of the Proposed Order, the 36% is a figure that impacts all remedy plans, however, the only methodology for determining and approving that amount is in the Compromise Plan or the 0120 Plan. It is inappropriate for a provision that affects every carrier and every remedy plan to only be included in one remedy plan. Therefore, rather than amending all remedy plans so they are consistent, Staff recommends that the Order require SBCI to comply with this Commitment for all remedy plans an all carriers.

Additionally, SBCI has changed the operation of the approval of the annual threshold. Under the Compromise Plan there is no Commission review, whereas the 0120 Plan provides for Commission review. SBCI's proposal has the Commission chasing down the information, public or not, whereas this burden should be placed on the company since it is information about its revenues. Staff agrees that the only difference is that the 0120 Plan requires a proceeding whereas the Compromise Plan requires SBCI to perform the calculation. The methodology set forth in the 0120 Plan should be approved since, as a government agency operating under public scrutiny, it brings the information before the Commission for formal review and approval, as opposed to the informal behind-the-scenes process proffered by SBCI. Additionally, it shouldn't cause a great burden since it simply is a check on a calculation and the sources from which the figures originate, it is an issue that could more than likely be handled through a paper hearing.

Staff makes one revision to its position, it recommends that SBCI be made responsible for petitioning the Commission for this annual proceeding.

Accordingly, Staff recommends that the Proposed Order require SBCI to comply with this Commitment. *Staff has made one revision to this recommendation* from what it included in its Draft Order, it included the language from §7.3 of the 0120 Plan as opposed to just a reference. This seems appropriate to include in the Order, if the 0120 Plan is not going to be an attachment to this Order. The revised language for the Proposed Order is provided above in item (8) of the section titled -- "Including Staff's Commitments in the Compromise Plan Limits Their Application only to that Remedy Plan and Does not Make Them Commitments That Apply to All Remedy Plans."

VI. GENERAL AND MISCELLANEOUS EXCEPTIONS

Excep. No. 51: BOE Organizational Issues

Staff requests that Paragraph 1111 be deleted, inasmuch as it constitutes a request by Staff for SBC to take an action by or on a date in the past.

Staff further requests that the topic heading labeled “Additional Assurance of Reliability” and the five paragraphs after the header, currently found at Paragraphs 2868-2872 should be deleted from that location and inserted after Paragraph 2767. These paragraphs represent Staff’s initial position, but are currently recited under Staff’s rebuttal position.

The Staff further requests that the topic heading labeled “C. Staff’s Rebuttal Position and Recommendations”, currently set forth just prior to the BearingPoint Review header prior to Paragraph 2873 be deleted, inasmuch as it is redundant; the header already exists earlier in the document.

The Staff further requests that the topic heading labeled, “Other Assurance Measures”, located prior to Paragraph 2881, should be replaced with the header title “Additional Assurances of Reliability” which in the Staff’s view more accurately describes the topic.

Excep. No. 52: Additions To Phase II Proposed Order

Staff notes that, in several cases, the Phase II Proposed Order omits – in a manner that Staff concludes is likely inadvertent – certain portions of Staff’s recitation of its position. The Staff requests that these be reincorporated so as to more accurately represent the Staff’s position. The requested additions are as follows:

After Paragraph 2867 of the *Phase II Proposed Order*, the following should be inserted.

Also, Ms. Weber understands it to be the case that as a result of the latest six-month review collaborative session that SBC Illinois represented in the hearings that two-thirds to 75% of the performances measures will be affected when the six-month review changes are implemented. The implementation of these agreed-upon six-month review changes is scheduled for the first and second quarter of 2003. This means the performance measures and business rules being evaluated, as evidence of compliance in this proceeding will soon be changing. Ms. Weber considers this to be an area of great concern, since SBC Illinois has not proven that its procedures and controls in place to make changes to performance measures will ensure that additional data reliability concerns will not be introduced when the six-month review changes are implemented by SBC Illinois.

See Staff Draft Proposed Order at 19.

After Paragraph 2882 of the *Phase II Proposed Order*, the following should be inserted.

The current findings or results of the BearingPoint and Ernst & Young reviews conducted of SBC Illinois' performance measurement data indicate that the three months of commercial performance data results submitted by SBC Illinois in this proceeding, cannot be relied upon. Therefore, Ms. Weber avers that the performance measure data submitted by SBC Illinois in this proceeding should not be given significant weight as evidence of it compliance with the Section 271 14 point checklist. Further, in Ms. Weber's opinion, the additional assurances of performance measurement data reliability provided by SBC Illinois affiant Ehr do not adequately explain away the inaccuracies that currently exist in SBC Illinois' performance measurement data.

Id.

Finally, the following sentences should be added to the end of paragraph 1090 of the Proposed Order.

Ms. Weber notes that, merely because BearingPoint's test did not reveal a deficiency, it does not mean that SBC's OSS is free of problems, deficiencies, or other impediments to proper functioning. BearingPoint's review of each evaluation criteria was conducted during defined time periods, and the scope of BearingPoint's evaluation did not cover all

aspects of SBC Illinois' OSS or all business processes that support its OSS.

Staff Draft Proposed Order at 74-75.

The appropriate footnote, at the end of this section of text, should read: "For example as BearingPoint responded during the February 5, 2003 hearing it did not perform any volume or functional testing on the LSOG5 version of the Company's EDI or CORBA application to application interfaces nor did it perform any actual tests of the Company's bill reconciliation process." *Citing BearingPoint response to Staff hearing questions BE/Staff 7, 8.*

Excep. No. 53: Formatting Issues

Staff noted a number of formatting issues in the Proposed Order. Many of the issues have been corrected in Staff's Proposed Post Exceptions Proposed Order. However, the major formatting issues are identified below for the benefit of the ALJ and the Commission.

A. Table of Contents

The Proposed Order originally sent to the parties did not contain a Table of Contents, although a Table of Contents and revised Table of Contents were later sent to the parties under a separate notice. The Proposed Order is extremely large, and it is virtually impossible to navigate through the Proposed Order without an accurate Table of Contents. Staff recommends that the Table of Contents be incorporated into the Proposed Order. Staff further recommends using each Checklist Item as a separate heading, with the Phase I Analysis and Phase II Review of each Checklist Item assigned separate sub-headings. These changes are reflected in Staff's Proposed Post

Exceptions Proposed Order. Staff has incorporated most but not all of the exceptions language contained in this Brief on Exceptions into Staff's Proposed Post Exceptions Proposed Order. Staff intends to file a Proposed Post Exceptions Proposed Order that contains all exception language on Tuesday, April 22, 2002.

B. Footnote References

A number of footnote references are not formatted as footnotes. Examples of this formatting issue can be found in paragraph 337 of the ALJPO which contains the numbers "17" and "18", which are actually footnote references. Staff has corrected the footnote formatting issues it was able to identify in Staff's Proposed Post Exceptions Proposed Order.

C. General Formatting Problems

There were a number of general formatting issues such as paragraphs that should have been numbered or indented, but were not. These general formatting issues have been corrected (where found or observed) in Staff's Proposed Post Exceptions Proposed Order.

VII. CONCLUSION

WHEREFORE, for all the reasons set forth herein, the Staff of the Illinois Commerce Commission respectfully requests that the Administrative Law Judge's Proposed Order be modified in the manner stated above.

Respectfully submitted,

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