at. 43-44). On this point, AT&T observes that calls to CLEC customers - such as Internet Service Providers or ISPs - tend be calls of longer duration than calls terminating to customers of ILECs like Ameritech. Applying Ameritech Illinois' bifurcated rate structure to such calls, AT&T argues, results in a smaller payment from Ameritech Illinois than using an average charge per minute. (AT&T Ex. 3.1, at 14).

2370. AT&T claims that a similar situation arises with calls involving wireless providers. According to AT&T, wireless calls are generally recognized to be of shorter duration than landline calls. Additionally, AT&T asserts, customers of wireless providers tend to disproportionately call ILEC customers over CLEC customers, because almost everyone still is a customer of the incumbent. Thus, AT&T contends, by proposing a high rate for the first minute of a call with minuscule rates for additional minutes, Ameritech collects proportionately more than do CLECs in direct violation of the reciprocal and mutual cost recovery necessary to constitute "just and reasonable" rates pursuant to section 252(d)(2). (AT&T Ex. 3.1 at 15).

2371. Rather than use the FCC's rates, AT&T argues, Ameritech Illinois returns to its bifurcated rate proposal that competitively advantages the company vis-à-vis the CLECs and refuses to allow CLECs to opt in to the reciprocal compensation provisions of any other interconnection agreements. (AT&T Ex. 3.1, at 13-15). In AT&T's view, this conduct violates Section 251(i) of the federal Act and the reciprocal compensation pricing mandates contained in section 252(d)(2) of the federal Act and, thus, is outside compliance with Checklist Item 13.

d. Staff's Issues/Position

2372. The evidence here, Staff maintains, demonstrates that Ameritech does not provide: (i) cost based reciprocal compensation rates as required by Section 252(d)(2); (ii) reciprocal compensation rates, terms, and conditions in accordance with the ISP Compensation Order; and (iii) nondiscriminatory access to reciprocal compensation rates per Section 251(c)(2) and the ISP Compensation Order. Each of these points serve to frame the issues that Staff raises relative to Checklist Item 13 compliance.

Reciprocal Compensation Rates

2373. As evidence of compliance with Section 271(c)(2)(B)(xiii), Staff observes Ameritech witness Mr. Alexander to have relied on: (1) numerous interconnection agreements" included in Attachment A to his affidavit; and (2) C.C. No. 20, Part 23, Section 2;the Ameritech End Office Integration Tariff, ILL. (Ameritech Ex. 1.0, Schedule SJA-1 at ¶116).

2374. Further, Staff notes AI witness Alexander to have testified that Ameritech's effective tariff and the cited agreements "contain reciprocal compensation rates based on costs developed pursuant to the requirements mandated by the ICC in its February 17, 1998 Order in consolidated Dockets 96-0486/96-0569." Id. According to Staff,

however, Mr. Alexander only provided a general citation to a group of 13 agreements included in Attachment A to his testimony. Nowhere, Staff claims, does he identify a single agreement that contains reciprocal compensation rates based on costs developed pursuant to the requirements mandated by the Commission in its *TELRIC Order*.

2375. Staff indicates that it reviewed the "Level 3 Agreement" referred to by Mr. Alexander in order to assess whether the reciprocal compensation rates contained therein are, as asserted, based on costs developed pursuant to the requirements mandated by the Commission in its *TELRIC Order*. On this point, it notes Staff witness Zolnierek's testimony to state that the rates contained in that agreement are "not fully consistent with the cost assumptions, rate structure and rates" that Ameritech has adopted as a result of the TELRIC Order]: (Staff Ex. 3.0 at 161). According to Staff, AI witness Alexander confirmed Dr. Zolnierek's assessment, but further indicated that "this is evidence that the negotiation/arbitration process is working as intended under the regime established by the federal Act and as required by the FCC's ISP Compensation Order." (Ameritech Ex. 1.1 at 46).

2376. Staff further notes that Mr. Alexander provided citations in his surrebuttal testimony to numerous provisions in Ameritech's agreement with "Onepoint Communciations" that it is now relying on to demonstrate compliance with specific checklist items including reciprocal compensation provisions. According to Staff, however, Mr. Alexander did not reference that portion of the agreement containing reciprocal compensation rates, Appendix Pricing, at 12 and 13, and presumably, has not submitted these rates as evidence of compliance. Ameritech Ex. 1.2, Attachment SJA-3). All of this means, according to Staff, that the only evidence (Ameritech presented to support its position of compliance, is its End Office Integration Tariff, ILL.C.C. No. 20, Part 23, Section 2. Further, Staff points to AI witness Smith's account, that:

> Section 51.709 of the FCC's rules provides that rates for the transport and termination of local traffic (i.e. reciprocal compensation) are to be "structured consistently with the manner that carriers incur those costs". The two-part rate structure is consistent with the way in which Ameritech Illinois incurs its costs.
> (Ameritech Ex. 10.1 at 11).

2377. According to Staff, this would indicate that Ameritech's tariff, which does not contain a two-part rate structure, is inconsistent with the way in which Ameritech Illinois incurs its costs and thus does not comply with the FCC's rules.

Terms and Conditions

2378. Staff notes that the FCC adopted a transitional reciprocal compensation mechanism that conditions reductions in reciprocal Compensation for ISP-bound traffic

upon similar reductions in reciprocal compensation for local traffic. ISP-Bound Traffic Order, ¶¶ 77, 89-90, 95. This scheme, Staff maintains, is designed to move intercarrier compensation for local and ISP-bound traffic toward the conditional "bill and keep" system. Additionally, Staff notes, the FCC system provides for an immediate transition to bill and keep solely for new ISP-bound traffic. Id., ¶¶ 78, 81-82.

2379. Staff further observes that while the FCC provided ILECs with an option, it did not mandate use of its revised intercarrier compensation scheme. ISP Compensation Order, ¶89. In the event an ILEC chooses not to elect the new intercarrier compensation scheme, Staff notes it would be required to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in its contracts. Id.

2380. To date, Staff notes, AI has rejected the FCC's reciprocal compensation mechanism and chosen to implement its own local and ISP-bound intercarrier compensation scheme in Illinois. AI's offering, according to Staff, does not comply with either the ISP Compensation Order or Section 271 of the 1996 Act, nor has it been submitted to the Commission for its review.

2381. Staff clarifies that it is not raising the issue of whether Ameritech pays carriers reciprocal compensation for ISP-bound traffic. Its concerns, Staff says, is with regard to Ameritech's "implementation" of the ISP Compensation Order and go directly to the carriers' ability to obtain reciprocal compensation rates, terms, and conditions for local traffic that comply with section 271, and to requesting carriers' ability to readily obtain from Ameritech access to rates, terms, and conditions that the FCC and this Commission (in implementing federal guidelines), have ordered Ameritech to provide.

2382. Staff suggests that the Commission should consider these issues from the perspective of a new entrant who has no desire to provide service to ISPs and has no customer that subscribe to ISP service. This kind of exercise, Staff maintains, will illustrate that Ameritech has used the ISP Compensation Order to escape its Section 271 "local" reciprocal compensation and "local" interconnection obligations.

Uncertainty and Time for Election

2383. Staff fully recognizes that Ameritech's failure to make an immediate election is neither a violation of the FCC's order, nor does it raise Section 271 compliance issues. The actual concern that Staff has, arises from Ameritech taking the position that, it "might" adopt the FCC solution at some undisclosed time.

2384. There is no question, Staff contends, but that CLEC business plans depend critically on the rates the carriers pay and receive for traffic exchanged with Ameritech. (Staff Ex. 3.0 at 43-45). In summarizing its ISP Compensation Order, Staff notes, the FCC highlighted that its interim regime "provides certainty to the industry

during the time that the Commission considers broader reform of intercarrier compensation mechanisms in the NPRM proceeding." ISP Compensation Order, ¶95.

2385. Staff observes that reciprocal compensation received from Ameritech constitutes a major portion of CLEC revenues in Illinois, and conversely, reciprocal compensation paid to Ameritech constitutes a major portion of CLEC expenses in Illinois. Yet, Staff argues, Ameritech has needlessly increased the amount of uncertainty for competitive carriers providing local service in Illinois. According to Staff, carriers may know what the rates are before an election, and may know the rates after an election, but they do not know when or if an election actually will be made.

2386. While Ameritech will give carriers 20 days notice, it is not at all clear to Staff, how much time Ameritech and the other carriers will require to implement the election. Nor is it at all certain, Staff argues, how Ameritech plans to implement the FCC's rate caps. The details are not included in any interconnection agreements that Staff is aware of in Illinois, and are certainly not to be found in any agreement upon which Ameritech relies to support its alleged compliance. With this additional level of uncertainty, Staff believes there to be a nontrivial probability that carriers will be unable to reach agreement on implementation and might seek dispute resolution.

2387. While Ameritech believes that it has no legal obligation to make an election because the FCC set no explicit timetable for such an election, Staff considers Ameritech to be wrong. It cites to a number of legal opinions and treatises which hold to the proposition that where an order, statute or contract imposes "a duty" or requires the performance of some action, but is silent as to when it is to be performed, a reasonable time is implied. (Citations in Staff's Initial Brief at).

2388. On this basis, Staff argues that the FCC's imposition of a "duty on ILECs to choose" whether to elect the price caps at issue here, combined with the FCC's silence on when that action should be taken, must be interpreted to require the taking of that action within a reasonable period of time. Noting that it is now been well over a year since the FCC released the ISP Compensation Order, Staff asserts that this is more than reasonable time for Ameritech to make its election.

Opt-In to Reciprocal Compensation Rates – Implicating Item 1

2389. Under Section 252(i) of the federal Act, Staff maintains, a carrier may obtain the terms and conditions of a currently approved and effective Illinois interconnection agreement between Ameritech and any other CLEC. In reviewing the ISP Compensation Order, however, Staff notes the FCC's pronouncement that "…carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic." ISP Compensation Order, ¶ 82. As such, Staff contends, the FCC explicitly restricted the limitation of opt-in rights to the rates paid for the exchange of ISP-bound traffic.

2390. According to Staff, the FCC set out the intent behind this restriction in its Order by stating, "[t]o permit a carrier to opt into a reciprocal compensation rate higher than the caps we impose here … would seriously undermine our effort to curtail regulatory arbitrage and to begin a transition from dependence on intercarrier compensation and toward greater reliance on end-user recovery." ISP Compensation Order, ¶8. Noting that Ameritech has neither elected the reciprocal compensation rate caps nor chosen not to start this transition, there is no current need in Staff's view, for this restriction in Illinois. Ameritech imposes it anyway, Staff argues, and more importantly, the FCC's restriction does not apply to local traffic, only ISP-bound traffic.

2391. In arbitrating the Ameritech/Focal Interconnection Agreement, Staff observes, this Commission required Ameritech to treat ISP-bound traffic as local traffic. (Arbitration Decision at 12, Docket 00-0027, May 8, 2000). Staff maintains that the structure that Ameritech must follow under the FCC's ISP Compensation Order mirrors the structure that this Commission ordered in the Ameritech/Focal Interconnection agreement. In other words, Staff argues, a requesting carrier should be able to obtain the Ameritech/Focal Agreement rates not only because Focal obtained those rates, but because the rates in that agreement are those required under the FCC's ISP-Bound Traffic Order.

2392. Staff claims, however, that Ameritech denies carriers both the ISP-bound traffic reciprocal compensation rates and the local reciprocal compensation rates contained in the Ameritech-Focal Agreement. It does so, Staff claims, on the premise that rates, terms, and conditions for local reciprocal compensation are "interrelated" to rates, terms, and conditions for ISP-bound reciprocal compensation such that requesting carriers may not opt-in to rates, terms, and conditions for local reciprocal compensation.

2393. Staff again emphasizes that compensation for ISP-bound traffic is not the issue in this proceeding. The issue, Staff attempts to make clear, is that Ameritech has used the ISP Compensation Order as an excuse to relieve itself from providing to requesting carriers the local reciprocal compensation rates, terms, and conditions that both this Commission and the FCC require it to provide.

2394. Staff observes that, relative to its tariffed rates, Ameritech's GIA reciprocal compensation rates increase the amount of reciprocal compensation paid for short duration calls (compensation of which Ameritech is predominately the net recipient), and reduce the amount of reciprocal compensation paid for long duration calls (compensation of which Ameritech is predominately the net payer). By moving from its tariffed rates to its GIA rates, Staff claims, Ameritech likely will reduce its net payout of reciprocal compensation to its CLEC competitors and increase the net payments it receives from wireless carriers. It appears, in Staff's view, that Ameritech Illinois has decided to adopt its own remedy to address its own concerns. And, according to Staff, it has not submitted its new reciprocal compensation rate scheme for Commission approval.

2395. Again, Staff contends, Ameritech has used the ISP Compensation Order to introduce uncertainty into CLEC business plans. And, in denying carriers existing reciprocal compensation rates, terms, and conditions, AI also denies carriers the ability to obtain entire interconnection agreements that Ameritech currently offers to other CLECs in Illinois. Such practices, Staff maintains, have impaired carriers' ability to obtain interconnection agreements with Ameritech and represent non-compliance with Checklist Item 1 of the federal Act.

2396. Checklist Item 1, Staff maintains, requires a Section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." 47 U.S.C. § 271(c)(2)(B)(i). In turn Section 251(c)(2) imposes a duty on ILECs to provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section [251] and section 252". 47 U.S.C. § 251(c)(2)(D). Further, Section 252(i) provides that an ILEC "shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

2397. According to Staff, Ameritech does not permit carriers to opt-in to reciprocal compensation provisions of existing interconnection agreements. (Staff Ex. 3.0 at 33). As a result, every new interconnection agreement between Ameritech and a LEC must be negotiated and/or arbitrated. That is, carriers may not simply adopt "off the shelf" interconnection agreements.

2398. Staff sees Ameritech to contend that CLECs may not opt into those provisions as a result of the FCC's ISP Compensation Order. (Staff Ex. 3.0 at 33). Contrary to Ameritech's contention, Staff asserts, the FCC only and explicitly restricted the limitation of opt-in rights to the rates paid for the exchange of ISP-bound traffic. ISP Traffic Order at 82. According to Staff, Ameritech improperly expands the FCC's limitation of opt-in rights on reciprocal compensation rates for ISP-bound traffic to all reciprocal compensation rates, terms, and conditions for non-ISP-bound traffic governed by Section 251(b)(5).

2399. The relationship (created by the FCC's *ISP Traffic Order)* between the rates, terms, and conditions for traffic subject to Section 251(b)(5), and those for ISP-bound traffic does not preclude carriers from opting into rates, terms, and conditions for traffic subject to Section 251(b)(5 Staff contends. In the event that Ameritech does not elect the FCC's reciprocal compensation rate caps, both traffic subject to the reciprocal compensation provisions of section 251(b)(5) and ISP-bound traffic are to be exchanged at "the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts." Id., ¶ 89. In its *Ameritech-Focal Arbitration Decision*, Staff reminds the Commission held "that ISP bound calls are local and should be due reciprocal compensation" and it set reciprocal compensation rates for ISP-bound traffic

at the rates established for local traffic. *Arbitration Decision at* 12, Docket 00-0027 (May 8, 2000).

2400. Until and unless Ameritech elects the FCC rate caps, Staff contends, it is required to maintain the same pricing regime for reciprocal compensation that this Commission has consistently maintained in Illinois. According to Staff, the rates contained in existing interconnection agreements in Illinois are consistent with the FCC's reciprocal compensation guidelines. Thus, there is no reason for Ameritech to deny carriers access to the reciprocal compensation rates, terms, and conditions found in its existing interconnection agreements.

2401. According to Staff Ameritech is currently obligated by both federal and state regulations to provide carriers access to reciprocal compensation terms and conditions consistent with those in its existing interconnection agreements. Ameritech, however, does not permit carriers to "opt-in" to terms and conditions of interconnection agreements related to reciprocal compensation as required by Section 251(i), and does not offer nondiscriminatory access to reciprocal compensation rates as required by Section 251(c)(2).

2402. The *ISP-Bound Traffic Order* itself Staff observes, does not mention a specific date or time period within which an ILEC must decide whether to elect the FCC's reciprocal compensation rate caps. Nevertheless Staff contends it clearly expected ILECs to make a choice within a reasonable time. Where an order, statute or contract imposes a duty or requires the performance of some action, but is silent as to when it is to be performed, a reasonable time is implied under general rules of construction. *See* White v. Roughton, 689 F.2d 118, 120 (7th Cir. 1982), *citing* United States v. ITT Continental Baking Co., 420 U.S. 223, 238, 43 L. Ed. 2d 148, 95 S. Ct. 926 (1975).

2403. According to Staff, the FCC's imposition of a duty on ILECs to choose whether to elect the price caps at issue in the *ISP-Bound Traffic Order*, combined with the FCC's silence on when that action should be taken, must be interpreted under applicable rules of construction to require the taking of that action within a reasonable period of time. It has been more than a year since the April 27, 2001 release of the *ISP-Bound Traffic Order*, Staff observes, and that is certainly more than reasonable time for Ameritech to make its election. It contends that Ameritech has not elected to offer to exchange all traffic subject to Section 251(b)(5) pursuant to the ISP-bound traffic rates set by the FCC, and therefore has not elected to be subject to the FCC's ISP-bound traffic rate caps.

2404. As such, Staff argues, Ameritech is required by the *ISP Compensation Order* and Commission Merger Condition 27 to offer carriers reciprocal compensation rates, terms, and conditions that match those ordered by the Commission in Ameritech's existing interconnection agreements, such as the one between Ameritech and Focal. If Ameritech were to elect the FCC rate caps, however, Ameritech would no longer be required under the *ISP Compensation Order* to offer carriers reciprocal

compensation rates, terms, and conditions that match those in existing contracts. Instead, it would then be required to offer to exchange all traffic subject to Section 251(b)(5) of the Act at the rates established for ISP-bound traffic under the FCC's rate caps.

2405. Although it has been nearly a year since the *ISP-Bound Traffic Order* was released, Ameritech (1) has not elected the FCC's reciprocal compensation rate caps contained therein and (2) still maintains the position that it may at any moment make such an election. Ameritech's actions and policies are anticompetitive and constitute violations of its duty under Section 251(c)(2) to provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory" and its duty under Section 251(c)(1) "to negotiate in good faith".

5. Reply Positions

a. Ameritech Reply Position

Abstract Issues

2406. According to AI, no one discusses, much less disputes, the only issue that matters namely that, Ameritech Illinois has entered into numerous legally binding reciprocal compensation arrangements, and those arrangements satisfy "the requirements of section 252(d)(2)." The only dispute at hand, AI asserts, concerns a subject that does not matter for purposes of the checklist, and is not even ripe for adjudication, i.e., the terms that Ameritech Illinois "offers" for *future* reciprocal compensation arrangements to implement the FCC's ISP Compensation Order.

2407. Specifically, AI notes, Staff and AT&T oppose:

(i) Ameritech Illinois' offer of bifurcated rates – a straightforward proposition in which the up-front costs of setting up a call are charged up front, while costs incurred throughout the duration of the call are charged throughout the duration of the call;

(ii) that Ameritech Illinois does not affirmatively offer to let CLECs "opt in" to other CLECs' reciprocal compensation arrangements (based on the ISP Compensation Order's express termination of such "opt ins"); and

(iii) that Ameritech Illinois has not yet affirmatively elected the optional "caps" on reciprocal compensation rates that appear in the ISP Compensation Order, but instead offers to give 20

days' notice if it makes that election in the future. Staff Br. at 41-49, 193-212; AT&T Br. at 48-50, 141-143.

2408. While the arguments would effectively suggest that the Company's offer constitutes a barrier to entry, AI observes that no such claims comes from a CLEC seeking to enter. To be sure, AI points out, the challenge is raised by Staff and by AT&T (which itself has reciprocal compensation arrangements in place that it appears perfectly happy to keep). Not only are the arguments unavailing, AI argues, but there are strong reasons why the Commission need not address them at all.

2409. First, AI notes, this Commission has held that disputes related to compensation for ISP-bound traffic fall outside its jurisdiction and within the exclusive purview of the FCC. (Order at 8, Docket 01-0427 July 24, 2002). Second, AI asserts, the FCC has held that compensation for ISP-bound traffic is irrelevant to Checklist Item 13, because the 1996 Act's provision on reciprocal compensation, i.e., section 251(b)(5), does not apply to such traffic in the first place. Georgia & Louisiana 271 Order, ¶ 272. And, taking a more general view, AI contends that the FCC has also declined to use section 271 proceedings to resolve interpretive disputes, particularly with respect to matters that are the subject of a pending rulemaking devoted to the issue. Arkansas & Missouri 271 Order, ¶ 82.

2410. According to AI, Staff suggests that the disputed provisions of the ISP Compensation Order might also affect compensation for traffic other than ISP-bound traffic. To date, AI maintains, this is not the case. Although the ISP Compensation Order (¶ 8) allows incumbents to elect "caps" on reciprocal compensation rates, Ameritech Illinois maintains that it has not yet made the election, such that it remains subject to the "state-approved or state-negotiated rates reflected in [its] contracts" and that is where the Commission must assess compliance.

2411. Likewise, AI notes, although there seems to be no dispute that the FCC's order prevents entering carriers from opting into other carriers' existing arrangements in at least some cases (the only dispute is whether there are any existing arrangements that can be opted into), that does not affect existing arrangements, nor does it affect the substantive compliance of any arrangement. It only addresses the procedure by which future arrangements are to be made.

2412. Most importantly, AI observes, although the FCC initiated a rulemaking that could extend to reciprocal compensation for *non*-ISP traffic, the pendency of that rulemaking mitigates against, not for, the consideration of new compensation rules here and now. It is on that basis, AI maintains, that Staff sought, and the Commission ordered, the dismissal of a generic proceeding on reciprocal compensation (which covered all traffic, and not just ISP-bound traffic) shortly after release of the ISP Compensation Order. See, Order at 2-3, Docket No. 00-0555; July 25, 2001.

2413. In any event, AI contends, to the extent that any CLEC wants to enter a reciprocal compensation arrangement and disagrees with Ameritech Illinois' offer, it has full opportunity to do what parties do in any other such disagreement – negotiate or seek arbitration – and the Commission can resolve any disagreement at such time. Pending negotiation or arbitration, AI notes, the CLEC can enter into an interim arrangement to receive compensation immediately. The amount of compensation would be trued up to reflect the final agreement. (Am. Ill. Ex. 1.1 at 43, 47-48).

2414. AI asserts that the Commission has not had to decide a single such dispute as of yet, even though the ISP Compensation Order has been in effect for over a year. To the contrary, it notes, several carriers have *accepted* Ameritech Illinois' offer and the Commission has approved the resulting agreements. (Am. Ill. Ex. 1.1 at 43). As such, AI contends, there simply is no basis for the contention that the Company's offer represents a barrier to entry, and no need for the Commission to address these issues in the abstract.

The Bifurcated Rate Offer

2415. AI sees AT&T to assert that Ameritech Illinois' mere *offer* of a bifurcated rate structure constitutes discrimination against CLECs that serve ISPs. (AT&T Br. at 142-143) And, in the same vein, it observes Staff to contend that "Ameritech has imposed its own self-serving reciprocal compensation rate structure on CLECs" (Staff Br. at 211).

2416. The first and dispositive rebuttal to these claims, AI asserts, is that the bifurcated rate offer is just that, an offer, being extended to carriers that seek to negotiate new or amended agreements. Thus, it asserts, Ameritech Illinois does not impose anything on anyone. Exploring the various types of scenarios, AI explains that (1) carriers that already have agreements with unitary rates can continue under their existing arrangements; (2) carriers that order from tariffs will continue to receive the tariffed unitary rates; (3) carriers agreeing to the bifurcated structure can accept Ameritech Illinois' offer and enter into a binding agreement; and (4) carriers that want new agreements but disagree with the bifurcated structure can seek negotiations or arbitration.

2417. While the ISP Compensation Order has been in effect for over a year, AI observes, the Commission has not had to decide a single challenge to its bifurcated rate offer. To the contrary, AI contends, carriers such as One Point, have accepted the offer and the Commission itself has approved the resulting agreements. (Am. Ill. Ex. 1.1 at 43).

2418. According to AI, AT&T and Staff omit much of the history behind the "ISP" reciprocal compensation issue, and distort the rest. First, neither party points out that the FCC has found that CLECs who target ISPs are not the victims of discrimination, as AT&T would suggests, but rather the beneficiaries of a regulatory arbitrage that does not warrant the protection AT&T seeks. Second, neither party points out that the

Commission has approved agreements containing the "self-serving scheme" that Staff contends has never been "submitted . . . for Commission approval." (Staff Br. at 210). AI intends to set the record straight.

2419. Consumers contract with ISPs, AI explains, to obtain access to the Internet. "Typically, when the customer wishes to interact with a person, content, or computer, the customer's computer calls a number provided by the ISP that is assigned to an ISP modem bank. The ISP modem answers the call (the familiar squelch of computers handshaking)." ISP Compensation Order, ¶ 58. The user then initiates a communication over the Internet by transmitting a command, for example, by requesting a webpage. Id. The request is forwarded to the distant computer that "hosts" that page (for example, the CNN.com website).

2420. This Commission, AI contends, ordered it to pay reciprocal compensation to AT&T (among other CLECs) for traffic initiated by Ameritech Illinois customers and forwarded to Internet destinations by ISPs that are served by the CLECs. (Am. Ill. Ex. 1.0, Sch. SJA-1, ¶ 117). While Ameritech Illinois has sought judicial review of that decision, there is no dispute that it complies with the Commission's order.

2421. On April 27, 2001, AI notes, the FCC issued its ISP Compensation Order, wherein it determined "that the [reciprocal compensation] provisions of section 251(b)(5) do not extend to ISP-bound traffic." ISP Compensation Order, ¶ 1. Indeed, the FCC found that the assessment of reciprocal compensation on such traffic was contrary not only to the text of the 1996 Act but also to its competitive purposes. In the FCC's words, AI contends, such compensation represents a "classic regulatory arbitrage" that created a "windfall" for carriers receiving such payments (Id. ¶ 21, 70).

2422. There are two reasons for this arbitrage, AI contends. First, while reciprocal compensation was founded on the assumption "that traffic back and forth on these interconnected networks would be relatively balanced," in reality "ISP modems do not generally call anyone in the exchange." Id. ¶ 21. Thus, "traffic to ISPs flows one way" and "so does money in a reciprocal compensation regime." Id. The FCC found that such "large one-way flows of cash" have "distort[ed] the development of competitive markets" and encouraged carriers to compete by shifting their costs to incumbent carriers rather than on the basis of quality and efficiency. (Id). Further, the regulatory arbitrage encouraged carriers to "target ISP customers" at the expense of other customers (such as homeowners) and this "created incentives for inefficient entry of LECs intent on serving ISPs exclusively [rather than] offering viable local telephone competition, as Congress had intended to facilitate with the 1996 Act" Id. ¶ 70, 21.

2423. One solution to the problem of imbalanced traffic, AI contends, is to establish a contingent, lower rate that applies when traffic is out of balance. Ameritech Illinois and Level 3 agreed to such an arrangement and amended their interconnection agreement to reflect it. (Am. Ill. Ex. 1.1 at 46). While Staff suggests that the amended agreement no longer matches the Commission-approved rates, there is no shortage of interconnection agreements that reflect the approved rates (as does the tariff), such that

Ameritech Illinois still meets its burden of proof. The Level 3 amendment also comports with the 1996 Act. AI contends noting that Section 251(a) upholds voluntary agreements even if their terms differ from the Act's requirements, and the FCC specifically cited the Level 3 amendment to support the elective "caps" established by the ISP Compensation Order. See Id. ¶ 85 & n.158.

2424. Another part of the arbitrage, AI asserts, was facilitated by the rate structure for reciprocal compensation. As already explained, AI notes, reciprocal compensation rates are intended to cover two different types of costs: (1) the costs of setting up a call, which are not incurred on a per-minute basis but incurred only once (at the start of the call), and (2) the costs of keeping open an existing connection, which are incurred throughout the duration of the call. But most states, including Illinois, "have adopted per minute reciprocal compensation rate structures." ISP Compensation Order ¶ 76.

2425. Because set-up costs are incurred one time per call, these were divided by the estimated average length of a call (about four minutes) to derive a flat per-minute rate. For calls of roughly that length, compensation reflects cost incurred. The per-minute rate is multiplied by four (minutes), and the result is the same as the set-up cost with which we started. But for longer calls, like those made to "surf the Web," compensation exceeds the cost incurred, because the per-minute rate is multiplied by a duration much longer than the four minutes that were divided into cost. Thus, the FCC found that "[i]t is unlikely that any minute-of-use rate that is based on average costs and depends upon demand projections will reflect the costs of any given carrier to serve any particular customer"; instead, such a structure "encourage[s] carriers to target customers that are, on average, less costly to serve, and reap a reciprocal compensation windfall." Id.

2426. The FCC, AI observes, has undertaken a comprehensive review of reciprocal compensation. Id. ¶ 6. It is actively considering a phase-out or elimination of some or all such compensation; it has also sought comment on a bifurcated rate structure (which separates the charges for call set-up and duration) as one solution to the arbitrage issues noted above. Id. ¶ 75 n.142.

2427. But, in recognizing "a need for immediate action with respect to ISP-bound traffic" AI notes that the FCC took, in part, the following actions: (i) to prevent reciprocal compensation arrangements from spreading beyond existing agreements, the FCC held that "carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic," Id. ¶ 82; and (ii) the FCC established a declining schedule of "caps" on reciprocal compensation rates, which an incumbent could elect so long as it offered to exchange non-ISP traffic at the same rate Id. ¶ 8.

2428. The caps however, AI contends, do not apply to agreements that "pre-date" the ISP Compensation Order unless an agreement, by its terms, says so (for example, by means of a change-in-law provision). Id. ¶ 82. Thus far, Ameritech Illinois

maintains, it has neither made nor refused the election. It does, however, "offer" CLECs a bifurcated rate structure in its GIA.

2429. AT&T itself admits that CLECs have rushed to sign up ISPs, and Staff similarly observes that "reciprocal compensation received from Ameritech constitutes a major portion of CLEC revenues in Illinois" but, AI notes, neither party identifies why this is so. For its part, AI contends that CLECs are obtaining a steady diet of "reciprocal compensation" that is neither reciprocal (*i.e*., most of the money goes one way, to the CLEC) nor compensatory (*i.e.*, the CLEC receives payments that greatly exceed any actual costs). In AI's view, the history and outcome of the ISP Compensation Order devastate the Staff and AT&T arguments regarding reciprocal compensation.

2430. Contrary to AT&T's view, AI explains, the bifurcated rate "offer" does not discriminate against carriers that target ISPs or other subscribers that receive a large volume of long-duration incoming calls. (AT&T Br. at 141-143). The reality is that the unitary structure in current tariffs discriminates *in favor of* carriers that target ISPs, by giving them a windfall. While a bifurcated structure might mean less money for such carriers, AI contends, that is only true because it provides for more accurate compensation.

2431. Contrary to Staff's view, AI emphasizes, the bifurcated rate offer does not represent a substantive departure from cost or from the rates approved by this Commission. The costs used for each rate component, AI contends, are the same as those approved by the Commission. The only change is that Ameritech Illinois unraveled the artificial "averaging" step used to collect one-time call set-up costs through per-minute rates. (Am. Ill. Ex. 10.1 at 10). Nor is the bifurcated rate offer inconsistent with the ISP Compensation Order, AI maintains. The FCC did not reject bifurcated rates, AI contends, much less preclude parties from agreeing to them. Indeed, AI asserts, it has sought comment on the merits of such a structure in its pending rulemaking. ISP Compensation Order, ¶ 92.

2432. The FCC, AI observes, also did not order parties to implement unitary rates. To be sure, AI contends, the FCC found the unitary system to be at the heart of the arbitrage problem it sought to address. According to AI, the FCC merely offered a system of unitary "caps" that incumbents *could* elect if they so chose; if not, the incumbent "must exchange ISP-bound traffic at the state-approved *or state-negotiated* reciprocal compensation rates reflected in their contracts." Id. ¶ 8. Ameritech Illinois does just that, and Staff's contention that the FCC ordered Ameritech Illinois to use *only* state-*approved* rates, AI asserts, ignores the FCC's endorsement of state-*negotiated* rates (Id. ¶ 8).

2433. AI notes Staff to mention, but not discuss, the Ameritech Illinois/Focal arbitration. In that cause, AI observes, the Commission ordered Ameritech Illinois to pay reciprocal compensation on ISP-bound traffic, but also recognized the evidence showing that "dramatic shifts in the utilization of the local exchange network, associated with the explosion in Internet traffic," were affecting the issue of reciprocal

compensation. Arbitration Decision at 12, Docket 00-0027, (May 8, 2000). As such, AI contends, the Commission directed Staff to initiate a generic proceeding "to further address the issue of reciprocal compensation." (Id). This proceeding i.e., Docket 00-0555, was to consider " alternatives to the current reciprocal compensation rate structure" on the grounds that "current reciprocal compensation rates are based on traditional voice call holding times," which may be shorter, on average, than for "dial-up Internet traffic routed to an ISP." Initiating Order at 1, Docket 00-0555, Aug. 7, 2000. And at that time, AI contends, Staff acknowledged that a " bifurcated rate structure is one solution the Commission may wish to explore." (See Staff Resp. to Hearing Examiner's Directive at 6, Docket 00-0555, March 19, 2001).

2434. While Docket 00-0555 was in progress, AI notes, the FCC issued its ISP Compensation Order and announced its own comprehensive rulemaking on reciprocal compensation. Shortly thereafter, AI asserts, Staff moved to dismiss Docket 00-0555 on the grounds that the FCC had pre-empted the Commission's initiative. See Staff Motion to Dismiss at 5, Docket 00-0555, (June 25, 2001). The Commission agreed, AI observes, and it recently reaffirmed that principle in declining to resolve a dispute between Essex Telecom and Gallatin River Communications regarding compensation for ISP-bound traffic. See Order at 8, Docket 01-0427, July 24, 2002 (where the Commission concludes that it is without authority to determine disputes over compensation for ISP bound calls).

2435. All in all, AI views Staff to take inconsistent positions. On the one hand, Staff seems to oppose the bifurcated rate proposal (Id. at 210); on the other hand, Staff suggests that the Commission might do away with the current unitary structure (Id. at 192). Either way, AI contends, Staff's call for a new generic ratemaking flies in the face of Staff's earlier position – and the Commission order adopting that position – that such issues belong to the FCC.

2436. Moreover, AI asserts, Staff's position on the merits (that a bifurcated rate structure is a "self-serving scheme") is contrary to the Commission's order approving such an agreement between Ameritech Illinois and One Point. It is also incorrect, AI argues, for Staff to suggest, that "Ameritech has not submitted its new reciprocal compensation scheme for Commission approval [because] it simply cannot stand up to scrutiny." Clearly, Ameritech Illinois contends, there is no secret to its offer.

The Opt-in Exemption

2437. Ameritech Illinois believes it has demonstrated that it need not permit CLECs to "opt in" to terms and provisions for reciprocal compensation in existing interconnection agreements, because the FCC has held that the Act's "opt in" provisions do not apply to terms and conditions related to compensation for ISP-bound traffic. ISP Compensation Order, ¶¶ 2, 82.

2438. To be sure, AI asserts, there is *some* limit on opt-in rights; the only question is its scope. AI notes AT&T to posits a hypothetical situation, in which Ameritech Illinois would oppose a carrier's attempt to opt into an agreement even if it

was negotiated after the ISP Compensation Order. But, according to AI, this just shows that the issue is not ripe. If and when a CLEC really wants to opt into the reciprocal compensation provision of a specific agreement, AI notes, it is free to negotiate that request with Ameritech Illinois; and, if the parties do not reach agreement the CLEC can raise the matter before the Commission. In this situation, AI contends, the Commission can resolve the matter based on facts, and not in the abstract.

The Rate Cap Election

2439. AI urges the Commission to reject out of hand AT&T's insinuation that the rate caps are "the FCC's rates" and that Ameritech Illinois has disobeyed the FCC's order by not adopting them. Staff itself acknowledge, AI asserts, that the rate caps are elective, not mandatory. See Staff Br. at 197 (stating that the FCC did not mandate the use of its revised intercarrier compensation scheme. Rather, it provided ILECs a choice of whether to elect the plan or not.")

2440. AI maintains that Staff's error lies in its view that the election period has expired and that Ameritech Illinois violates the "intent and letter" of the ISP Compensation Order simply by *offering* language that would allow Ameritech Illinois to elect the caps in the future on 20 days' notice. (Staff Br. at 175). By Staff's own admission, AI contends, its position has no support in the FCC's Order. As such, AI continues, Staff simply appliquéd a "reasonable time" limitation onto the FCC's order and then decided for itself what that time limit should be.

2441. Ameritech Illinois does not agree that it is proper for this Commission to blue-pencil time limits into the FCC's Order, or that the one year limit is viable. The FCC's Order, AI notes, sets out a three-year schedule for the caps. Further, it observes, the election generally does not begin until interconnection agreements expire. In many instances, AI contends, Staff's proposal would work out in such a way as to have the election expire before it could even be exercised. ISP Compensation Order, ¶¶ 7-8, 82.

2442. The Staff argument that the election creates "uncertainty" fares no better, AI claims. To the extent any CLEC could claim a vested right to the certainty of a regime that supports arbitrage (and that the FCC is in the process of dismantling), the FCC has already decided how that interest is to be addressed. According to the FCC, AI notes, the transitional rate caps, like the permanent rules now under development in the FCC, do not apply to existing agreements unless those agreements themselves so provide (*e.g.*, by a change-of-law provision). ISP Compensation Order, ¶ 82.

b. Staff Reply Position

2443. Staff does not dispute that Ameritech has entered into reciprocal compensation arrangements and that it is paying reciprocal compensation under those arrangements. But, Staff suggests that the information being offered by the Company does not demonstrate that the arrangements Ameritech enters into contain Section 271 compliant rates, terms, and conditions.

2444. Since the time that the FCC's ISP-Compensation Order became effective, Staff contends, Ameritech has not agreed to include the reciprocal compensation rates contained in its tariff in its interconnection agreements with CLECs and, it notes, Ameritech does not dispute this fact. It cannot be disputed, Staff asserts, because Dr. Zolnierek testified that "when XO requested these tariffed rates, Ameritech refused to

provide them, forcing XO to submit an arbitration petition to the Commission." (Staff Ex. 20.0 at 95; *see also* Staff Ex. 3.0 at 161-162).

2445. Staff challenges Ameritech's statement that it "offers CLECs an alternative rate structure through its GIA." (Ameritech IB at 180). To the extent that Ameritech does not permit carriers to adopt its current tariffed reciprocal compensation rates in their interconnection agreements, Staff maintains that it is not offering its bifurcated rate structure as an actual alternative.

2446. Ameritech has not submitted a tariff containing its bifurcated rates at the Commission, Staff contends, such that the Commission has not found its revised rates to be TELRIC compliant. Whereas Ameritech has argued that its current tariffed local reciprocal compensation rates are not TELRIC compliant, Staff notes that the Company has not sought Commission approval for rates that it considers TELRIC compliant.

Opt-In to Reciprocal Compensation Provisions

2447. Staff contends that requesting carriers cannot opt-into or obtain, without arbitration, any current interconnection agreement that includes the Company's existing tariffed local reciprocal compensation rates. (Staff Ex. 3.0 at 161-162). Staff views Ameritech to defend its actions on the basis of the FCC's determination that the Act's 'opt-in' provisions do not apply to the terms and conditions related to compensation for ISP-bound traffic." (Ameritech IB at 179, citing to ISP Compensation Order).

2448. Staff notes that the FCC limited its opt-in restriction for reciprocal compensation "**to the rates paid for the exchange of ISP-bound traffic**." ISP CompensationOrder, ¶ 82 (emphasis added). The clear implication of this language, it argues, is that the FCC was not restricting the ability of carriers to opt into reciprocal compensation rates, terms and conditions for non-ISP-bound traffic.

2449. Further, Staff observes the ISP Compensation Order to state:

> For those incumbent LECs that choose not to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. This mirroring rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic. (ISP CompensationOrder, ¶ 89 (emphasis added)).

2450. The FCC's language, Staff contends, is clear on its face. In the event that Ameritech does not elect to use the FCC's reciprocal compensation rate caps, it "must exchange ISP-bound traffic at the state-approved or state-negotiated reciprocal

compensation rates" (i.e., the rate currently contained in Ameritech's reciprocal compensation tariff). Id.,¶ 8 (emphasis added).

2451. Yet, Staff contends, these are precisely the terms XO Illinois, Inc. ("XO") requested of Ameritech and which Ameritech denied XO. According to Staff, XO attempted to opt into the Ameritech/Focal agreement, which contains reciprocal compensation rates for local traffic that match those found in Ameritech's reciprocal compensation tariff. (Staff Ex. 3.0 at 162). These were the very rates, Staff contends, that the ISP Compensation Order requires Ameritech to provide requesting carriers, i.e., rates that mirror what Ameritech has defined as its current Commission approved rates for Section 251(b)(5) traffic.

2452. Even if the opt-in restriction would apply in this situation, Staff maintains that Ameritech's attempt to negotiate terms different from those mandated by the ISP Compensation Order constitutes a clear breach of its duty to negotiate in good faith under Section 251(c)(1). See XO Arbitration Proposed Order at 4. (Staff indicates, in a footnote, that on Oct 2, 2001, the Commission granted XO's Petition to Withdraw and Terminate Docket).

2453. If Ameritech chooses not to operate under the FCC's transition plan (i.e., declines to operate under the rate caps), Staff contends, there is no support for an opt-in restriction that denies carriers the very rates the ISP Compensation Order requires Ameritech to provide. According to Staff, Ameritech has declined to invoke the rate caps, but it still invokes the opt-in restriction.

2454. In order to comply with Checklist Item 1, Staff asserts, Ameritech must offer interconnection in compliance with the requirements of Section 251(c)(2) of the 1996 Act. (47 U.S.C. § 271(c)(2)(B)(i)). Considered apart, Section 251(c)(2) requires Ameritech to provide interconnection in accordance with the provisions of Section 251 and Section 252 of the Act. (47 U.S.C. § 251(c)(2)). Still further, under the provisions of Section 251 (c)(1) Ameritech is required to negotiate agreements in good faith and, under the directives of Section 252 Ameritech is required to allow requesting carries to opt into the rates, terms and conditions of approved interconnection agreements to which it is a party. *See* 47 U.S.C. § 251(c)(1);and § 252(i).

2455. In Staff's view, Ameritech's policy of refusing to allow carriers to opt into approved interconnection agreements containing reciprocal compensation rates, terms and conditions that this Commission and the FCC require it to provide clearly constitutes non-compliance with its obligations to allow carriers to opt-in to existing agreements and negotiate in good faith pursuant to Section 251(c)(2). And, Staff continues, its policy and actions are a direct violation of the ISP Compensation Order.

Timing of Election

2456. Staff sees Ameritech to argue that the FCC left the decision as to when (or whether) to declare its intention to implement the FCC's rate caps up to each incumbent on a state-by-state basis. Ameritech further contends that the absence of any reference

to a specific date or time period in the ISP Compensation Order means that it is free at any time to change the pricing regime applicable to ISP-bound and Section 251(b)(5) traffic. This contention, Staff counters, is contrary to the law that holds: "Where an order, statute or contract imposes a duty or requires the performance of some action, but is silent as to when it is to be performed, a reasonable time is implied under general rules of construction." (Staff Br. at 51) (citations therein).

2457. Staff observes Ameritech to contend that the FCC contemplated that, incumbent LECs "would elect into the caps at different times". (Ameritech IB at 177). To support its contention, Staff notes, Ameritech relies on the fact that the "starting point" of the FCC's transitional compensation plan depends in part on the remaining life of any existing agreements and the existence of any "change of law" provisions. (Id). According to Staff, however, the FCC decision, not to have its new rate caps supercede the terms and conditions of "existing" agreements does not support Ameritech's position. In Staff's view, the FCC's deference to "existing" agreements does not address "when" an ILEC would elect the caps but rather, "how" the rate caps will be applied after an ILEC has elected the rate caps.

2458. To the extent that the FCC's deference to "existing" agreements implies anything about when an election is to be made, Staff contends, it supports the position that an election must be made within a "reasonable time" from the date of the ISP Compensation Order. According to Staff, the FCC's decision to treat agreements "existing" at the time of the ISP Compensation Order differently from agreements negotiated "after" that date suggests that the FCC considered the date of its order to be the critical for purposes of an ILECs election.

2459. Ameritech's assertion that the FCC's rate caps change over time making them more desirable for future election is, in Staff's view, a matter ill-ascribed to the FCC's intention. If anything, Staff claims, Ameritech's view is contrary to the FCC's stated objective of providing certainty pending its final resolution of this issue:

> [T]he interim regime we adopt here "provides relative certainty in the marketplace" pending further Commission action, thereby allowing carriers to develop business plans, attract capital, and make intelligent investments. ISP Compensation Order, ¶ 94.

2460. To be sure, Staff maintains, the Commission is conducting an investigation into Ameritech's compliance with the requirements of Section 271 for purposes of its consultation with the FCC, rather than serving as the ultimate decision maker on Ameritech's anticipated request for Section 271 relief. Contrary to AI's position, however, Staff contends that it is entirely proper and permissible for this Commission to advise the FCC, that :

> (i) it interprets the FCC's ISP Compensation Order to require ILECs to decide whether to elect the rate caps set forth

therein within a reasonable amount of time from the date of the FCC's order; and,

(ii) that Ameritech is not in compliance with Checklist Item 1 because its policy (asserting that it is free to elect the FCC's reciprocal compensation rate caps at any point in the future) is contrary to the ISP Compensation Order, impedes competition, and creates uncertainty in violation of Ameritech's duties ,i.e., to provide interconnection on rates, terms and conditions that are just, reasonable and non-discriminatory and to negotiate in good faith. In the end, Staff acknowledges the FCC will be the ultimate decision-maker.

2461. Staff counters Ameritech's argument that "the uncertainty is not significant" because the "rate caps are published in the FCC's order" and because Ameritech offers CLECs "a contractual provision that provides 20 days advance notice of any election." (Ameritech IB at 178). Although the rate caps are published, Staff maintains that they are merely "rate caps" such that it is not known what the actual rates will be if Ameritech makes an election. Indeed, Staff points out that Ameritech's own witness could not shed light on the actual rates that would apply if the rate caps were elected. (Tr. at 1531). Yet, the FCC has indicated that certainty is needed to allow "carriers to develop business plans, attract capital, and make intelligent investments." ISP Compensation Order, ¶ 94. In Staff's view, a notice time of 20 days is neither sufficient or reasonable for developing business plans, attracting capital, or making investment decisions.

2462. Staff notes AI to argue that uncertainty is both inherent and unavoidable under the FCC's interim regime given that it is still considering final rules whose content is uncertain for incumbents and CLECs alike. (Ameritech IB at 178). Such an argument, Staff contends, is contrary to, the FCC's pronouncement that its interim regime "provides relative certainty in the marketplace pending further Commission action" and "provides certainty to the industry during the time that the Commission considers broader reform of intercarrier compensation mechanisms in the NPRM proceeding." ISP Compensation Order, ¶¶ 94, 95.

c. AT&T Reply Position

2463. AT&T summarily agrees with Staff assertion that Ameritech's refusal to permit a CLEC to opt in to the reciprocal compensation provisions applicable to local, non-ISP bound traffic included in the Focal/Ameritech interconnection agreement, as approved by the Commission, constitutes a violation of Section 252(i) of the federal Act, the FCC's ISP Compensation Order and Ameritech's obligation to provide non-discriminatory reciprocal compensation rates, terms and conditions pursuant to Section 252(d)(2).

2464. Moreover, AT&T contends, Ameritech refusal to allow a CLEC to incorporate its tariffed reciprocal compensation rates into an interconnection agreement violates the federal Act, the ISP Compensation Order and this Commission's orders regarding reciprocal compensation for local non-ISP bound traffic. Consequently, Ameritech fails to comply with Checklist Item 13.

2465. AT&T agrees with Staff that Ameritech violates Checklist Item 1 as well as Checklist Item 13 by failing to allow CLECs to opt into the provisions of existing agreements relating to reciprocal compensation for non-ISP bound local traffic. Because of this action, AT&T contends, an Illinois CLEC cannot opt into an entire interconnection agreement in Illinois, but must negotiate and/or arbitrate a new agreement each time. Ameritech's policy in this regard, AT&T asserts, not only violates this Commission's Merger Order and Section 252(i) of the federal Act, but its reciprocal compensation rates, terms and conditions are also not nondiscriminatory as required by Section 251(b)(2) of the Act.

2466. AT&T again points out that the FCC's ISP Compensation Order did not address a CLEC's right to "opt" into reciprocal compensation provisions for local traffic. As such, it contends, that right continues to exist for agreements that preceded, as well as those that followed, the entry of the ISP Compensation Order.

2467. According to AT&T, the ISP Compensation Order simply concluded that carriers could no longer invoke section 252(i) of the federal Act to opt in to an existing interconnection agreement, i.e., one that predated its Order, "with regard to the rates paid for the exchange of ISP-bound traffic." Id. ¶82). It did nothing, AT&T claims, to limit a carrier's right to exercise Section 252(i) of the federal Act to opt in to the reciprocal compensation provisions for non-ISP bound local traffic. Given that Ameritech has not elected to opt in to the rate caps the FCC established in the *ISP Compensation Order*, AT&T considers Staff to be correct in noting that Ameritech is bound to the reciprocal compensation terms, conditions and rates established by this Commission.

2468. AT&T observes Ameritech to contend that because the same reciprocal compensation provisions in its interconnection agreements apply to both ISP-bound and non-ISP bound traffic, the FCC's conclusion that carriers cannot opt in to the existing rates for the exchange of ISP-bound traffic, insulates it from allowing CLECs to opt in to the reciprocal compensation provisions of existing interconnection agreements applicable to non-ISP bound local traffic. This is wrong, AT&T contends, because the FCC's "opt in" exemption only applies to *ISP-bound* traffic. In AT&T's view, Ameritech continues to be required to allow CLECs to opt in to the existing rates for the exchange of *non-ISP bound local traffic*.

2469. Ameritech refuses to allow CLECs to opt in to the rates for both ISP-bound and non-ISP bound traffic, AT&T contends, for the reason that the rates happen to be the same. Ameritech cannot and should not be permitted to use the fact that the rates are identical, AT&T maintains, to shield itself from its Section 252(j) obligations to allow CLECs to opt in to interconnection agreements with regard to the rates paid for the exchange of non-ISP bound local traffic. Its refusal to allow CLECs to opt in to

reciprocal compensation provisions with regard to the rates paid for the exchange of non-ISP bound local traffic, AT&T asserts, is in violation of Checklist Items 1 and 13.

2470. Because Ameritech does not allow a CLEC to opt in to reciprocal compensation provisions of existing interconnection agreements (either agreements that pre-date or post-date the ISP Compensation Order and for neither ISP-bound traffic or non-ISP bound traffic), AT&T notes that a CLEC is forced to negotiate and/or arbitrate *all* reciprocal compensation provisions. And because Ameritech has not opted in to the FCC's rate caps, it is required to comply with this Commission's orders in those negotiations and arbitrations. It does not, AT&T complains.

2471. The problem, as explained by AT&T witness Henson, is that Ameritech refuses to make the reciprocal compensation provisions adopted in the Ameritech/Focal arbitration agreement available to other carriers. Instead, AT&T asserts, Ameritech offers up a bifurcated reciprocal compensation rate structure (a charge for call set up and a charge for call duration) as set out in the GIA. (AT&T Ex. 3.1, pp. 14-15). As Mr. Henson testified, however, the Commission has not adopted this bifurcated rate structure, which AT&T asserts, is designed to disadvantage CLECs and unfairly advantage Ameritech. (Id).

2472. Ameritech does not, AT&T contends, offer the Commission-ordered single reciprocal compensation rate to any CLEC seeking to establish or re-negotiate an interconnection agreement in direct violation of the FCC's ISP Compensation Order.

d. AG Reply Position

2473. In its ISP Compensation Order, the AG notes, the FCC concluded that ISP-bound traffic, only, is not subject to section 251(b)(5) reciprocal compensation requirements. The AG considers AI to be in violation of checklist item (xiii), because of its position that all CLEC traffic, local and ISP-bound is affected, and because it does not allow carrier to use the "opt-in" provisions of section 252(i) to obtain reciprocal compensation rates for **local** traffic.

2474. According to the AG, Ameritech makes no attempt to distinguish ISP-bound from non-ISP traffic, despite that, in order to "limit disputes and avoid costly efforts to identify this traffic," the FCC adopted "a rebuttable presumption that traffic delivered to a carrier, pursuant to a particular contract, that exceeds a 3:1 ratio of termination to original traffic is ISP-bound traffic that is subject to the compensation mechanism set forth in this Order." (Id. at ¶ 79). In the AG's view, AI is using the ISP-bound exemption to nullify all carriers' reciprocal compensation opt-in rights – even those carriers that are not carrying the threshold amount of ISP-bound traffic. While the ISP Compensation Order served to exempt ISP-bound traffic from section 251(b)(5), the AG believes that the FCC was also "concerned about the superior bargaining power of incumbent LECs" when it concluded that:

> we will not allow them [ILECs] to 'pick and choose' intercarrier compensation regimes, depending in the nature

> of the traffic exchanged with another carrier. The rate caps for ISP-bound traffic that we adopt here apply, therefore, only if an incumbent LEC offers to exchange all traffic subject to 251(b)(5) at the same rate." ISP Compensation Order ¶ 89.

2475. Further, the AG notes, the FCC determined that:

> For those incumbent LECs that choose not to offer to exchange section 251(b)(5) traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic **at the state-approved or state-arbitrated rates, terms, and conditions for local voice and ISP-bound traffic**." Id. (emphasis added).

2476. In other words, the AG contends, if the rate caps do not apply, existing state rates do apply. According to the AG, AI has not chosen the rate caps that would apply to all traffic and, thus, it must continue to provide reciprocal compensation at the state approved rates found in tariffs and in interconnection agreements for **all** traffic. In the AG's view, AI's policy ignores all the work that done on tariffing reciprocal compensation and in the arbitration of interconnection agreements, on the assumption that, even in the absence of a rate cap election, AI can renegotiate reciprocal compensation from scratch for all carriers

2477. The AG notes that AI has "a standard offer for reciprocal compensation that several CLECs have adopted." (AI Initial Brief at 179). This does not, the AG claims, address the issue of AI's superior bargaining power, and whether the rates it offers are TELRIC based, or are the same for voice and for data, as the FCC requires. Further, the AG notes Staff's contentions that, the rates AI has offered change AI's "net payout" and therefore constitute a significant change in reciprocal compensation. (Staff In. Brief at 211). By insisting on new, "bifurcated" rates, the AG contends, AI is preventing carriers from adopting existing state-approved rates, in violation of the ISP Compensation Order.

2478. According to the AG, this Commission should, find that AI's policies - which do not adopt the ISP Compensation Order's rate caps, but still deny carriers the right to opt-in to state approved rates for local and for ISP-bound traffic - do not comply with Checklist Item 13.

6. Staff's Proposed Remedial Actions for Compliance

2479. Prior to giving Ameritech a positive Section 271 recommendation to the FCC, Staff urges that the Commission require Ameritech to take the following steps:

For Checklist Item 1 Compliance:

(1) permit carriers to opt-into, without the need for negotiation or arbitration, reciprocal compensation rates, terms, and conditions, and, therefore, into entire interconnection agreements, particularly when such agreements contain rates, terms, and conditions that this Commission and the FCC require Ameritech to provide.

(2) make it known that Ameritech Illinois does not plan to elect the FCC's reciprocal compensation rate caps or make an immediate election of the FCC's rate caps. Alternatively, the Commission should rule that Ameritech's decision to not offer to exchange all traffic subject to Section 251(b)(5) at the same ISP-bound traffic rates set by the FCC for more than a year following the FCC's ISP-Bound Compensation Order amounts to an election and precludes Ameritech from picking and choosing a different pricing scheme at this time.

or

alternatively, the Commission should rule that Ameritech's decision to not offer to exchange all traffic subject to Section 251(b)(5) at the same ISP-bound traffic rates set by the FCC for almost 11 months following the FCC's *ISP-Bound Traffic Order* amounts to an election and precludes Ameritech from picking and choosing a different pricing scheme at this time.

For Checklist Item 13 Compliance:

(3) to update its tariffed reciprocal compensation rates and obtain Commission approval of the updated reciprocal compensation cost studies that support these rates;

or,

alternatively, to submit state-to-state reciprocal compensation rate comparisons and any other evidence to demonstrate that its reciprocal compensation rates are in the range that can be considered by any reasonable standard within the range of TELRIC compliance.

(4) permit carriers to opt-into, without the need for negotiation or arbitration, reciprocal compensation rates, terms, and conditions for reciprocal compensation of traffic subject to Section 251(b)(5) of the federal Act in existing interconnection agreements between Ameritech and CLECs.

7. Commission Review and Conclusions

2480. We note, at the outset, that no party or Staff disputes AI's entry into agreements containing reciprocal compensation provisions. No CLEC has come forward charging AI to be in breach of its contractual obligation under an agreement. No party or Staff alleges nonpayment by Ameritech of its reciprocal compensations obligations arising out of interconnection agreements.

2481. There are, however, a number of claims suggesting that AI's non-compliance with the FCC's ISP Compensation Order precludes a satisfaction of its Checklist Item 13 obligations as well as its Checklist Item 1 obligations. In order to gain a clear perspective on the issues, we are compelled to carefully examine and construe the FCC Order that drives the instant disputes.

The ISP Compensation Order

2482. As a threshold issue, the FCC explored the question whether intercarrier compensation for ISP-bound traffic is governed by section 251 or section 201 of the federal Act. It concluded that ISP-bound traffic is not subject to reciprocal compensation obligations of section 251 (b)(5). Rather, the FCC held, intercarrier compensation for ISP-bound traffic is within the jurisdiction of the Commission [the FCC] under section 201 of the Act. On the basis of this finding, the FCC took the responsibility of establishing an appropriate, albeit interim, cost recovery mechanism for the delivery of this type of traffic.

2483. In tandem with the instant Order, the FCC noted that it was initiating a rulemaking (Unified Intercarrier Compensation NPRM) that would consider:

> whether the [FCC] should replace existing intercarrier compensation schemes with some form of what has come to be known as "bill and keep." The *NPRM* also considers modifications to existing payment regimes, in which the calling party's network pays the terminating network, that might limit the potential for market distortion.

2484. The FCC does not fully adopt a "bill and keep" regime in this Order because further inquiry is necessary (Para. 6). ("In the companion *NPRM*, we consider the desirability of adopting a uniform intercarrier compensation mechanism, applicable to all traffic exchanged among telecommunications carriers, and, in that context, we intend to examine the merits of a bill and keep regime for all types of traffic, including ISP-bound traffic." (Para. 66).. Evidence on record, however, showed the need for certain "immediate" action such that the FCC implemented an "interim recovery scheme."

2485. The FCC established an "interim" regime to govern intercarrier compensation for ISP-bound traffic until such time as it resolves the issue raised in the

intercarrier compensation NPRM. (Para. 77). According to the FCC, the interim compensation scheme applies as carriers "renegotiate" expired or expiring interconnection agreements. It does not alter existing contractual obligations except to the extent that parties are entitled to invoke contractual change-of-law provisions. (Para.82)

2486. The FCC, however, established a different rule to govern cases where carriers are not exchanging traffic pursuant to an interconnection agreement prior to adoption of this Order (where, for example, a new carrier enters the market, or where an existing carrier expands into a market it previously had not served. (Para. 81) In such instances, as of the effective date of its Order, the FCC directs that carriers shall exchange ISP-bound traffic on a bill-and-keep basis during the interim period. (Id).

2487. The FCC also made clear that its Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime it adopted. Given that the FCC is exercising its authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions would no longer have the authority to address this issue. (Para. 82).

2488. In the same vein, carriers may no longer invoke section 252 (i) to "opt" into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. (para 82) Section 252(i), the FCC explains, applies only to agreements arbitrated or approved by state commissions pursuant to section 252 – it has no application to the intercarrier compensation regime established by the FCC pursuant to sec. 202. (Para. 82).

2489. The FCC further addressed the relationship of its interim recovery scheme to Section 251 (b)(5).

2490. It would be unfair, the FCC wrote, to allow incumbent LECs to benefit from reduced rates for ISP-bound traffic (where they are the net payors) while also permitting them to exchange other traffic at state reciprocal compensation rates that are much higher than the instant caps (and where the traffic imbalance is reversed such that LECs are the payees). As such, the FCC determined that it would not allow LECs to "pick and choose" among the intercarrier compensation regimes (depending on the nature of the traffic exchanged with another carrier),

2491. In accord therewith, the FCC's Order imposes certain restrictions, as follows:

> The rate caps for ISP-bound traffic apply only if an incumbent LEC offers to exchange all traffic subject to Section 251(b)(5) at the same rate (Para. 89). (Emphasis added)

> If an ILEC wishes to continue to exchange ISP-bound traffic on a "bill and keep" basis in a state that has ordered "bill and keep", it must offer to exchange all section 251 (b)(5) traffic at that same rate (Id).
>
> For LECs that choose not to offer to exchange section 251(b)(5) traffic subject to the same rate cap we adopt for ISP-bound traffic, the FCC orders them to exchange ISP-bound traffic at - the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. Para 89. (Further, the FCC indicates that LECs may make this election on a state-by-state basis. Id. fn.179)

2492. This "mirroring" rule that the FCC thus imposes, is meant to ensure that incumbent LECs pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic. Para. 89. Indeed, the FCC saw no reason to impose different rates for ISP-bound and voice traffic.

2493. Having thus reviewed the critical aspects of the FCC's Order, we turn to the arguments set out by Staff, AT&T and Ameritech Illinois. Granted that the FCC's Order is far more lengthy and involved, we need go no further in addressing what we perceive to be the major contentions.

Election

2494. At the outset, we consider Staff's assertions of non-compliance based on AI's failure to make an election of the FCC rate caps within a "reasonable" time. We note, however, and Staff acknowledges too, that the FCC does not establish a date certain by which an ILEC need make an election. Indeed, it would not be availing to do so. Pursuant to the ISP Compensation Order, the interim compensation scheme applies as carriers "renegotiate" expired or expiring interconnection agreements. (Para.82). This pronouncement answers Staff's time frame concerns.

2495. The FCC was certainly aware of timing issues when fashioning its Order. To be sure, in setting out the directive that carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP traffic, the FCC further noted:

> In any event, our rule implementing section 252(i) requires incumbent LECs to make available [I]ndividual interconnection, service, or network element arrangements" to requesting telecommunications carriers only "for a reasonable period of time." 47 C.F.R 51.809 (c). We conclude that any "reasonable period of time" for making available rates applicable to the exchange of ISP-bound traffic expires upon the Commission's adoption in this Order

> of an intercarrier compensation mechanism for ISP-bound traffic. (fn. 155)

2496. In the end, this Commission has no authority to graft a "election" deadline onto an order it itself has not authored, and which is unsupported by a reading of the ISP order as a whole. Moreover, given that there is no formal mechanism by which an ILEC makes an election, it is difficult to understand Staff's claim that, AI has neither accepted, nor rejected, the rate caps. Further, Staff's legal proposition fails in this instance in that there is no "duty" put on AI to perform; it is merely provided with the right to exercise an option.

Certainty

2497. Whereas we see Staff to speak of the need for "certainty" the FCC fashioned its ISP Compensation Order around the concept of "expectancy." As such, the FCC believed it prudent to avoid a "flash cut" to a new compensation regime that would upset the legitimate business expectations of carriers and their customers. According to the FCC, however, the CLECs have been put on notice since the 1999 Declaratory Ruling that it might be unwise to rely on the continued receipt of reciprocal compensation for ISP-bound traffic. Thus, it notes, many have begun the process of weaning themselves from these revenues. (Para. 84).

2498. The three-year transition, the FCC announced, ensures that carriers have sufficient time to re-order their business plans and customer relationships, should they so choose, in light of its tentative conclusion that "bill and keep" is the appropriate long-term compensation regime. (Para. 83)

2499. Staff imagines that CLECs are put into the position of uncertainty by AI's failure to make an election of the FCC's interim rates. If this be the case, it is a fault of the FCC's order that we are loathe to disturb or remedy.

2500. All in all the ISP Compensation Order is what it is. We are in no position to interpret its provisions in the way Staff would propose. Nor have we been shown a single factual instance where the plain directives of the Order have been violated. The remedial actions that Staff would have us direct, are simply not supported by law.

Opt-In Requirements

2501. Staff would have us require Ameritech, apparently without regard to circumstance or the FCC's pronouncements, to permit carriers to opt-into reciprocal compensation rates, terms, and conditions in "existing" interconnection agreements. The pertinent question, which the parties do not pursue, might be whether there are any existing agreements that can be "opted into" by carriers who do not, and have no intention to, serve ISP traffic. Staff has provided no factual situation or agreement that

matches this scenario. This Commission, however, is not wont to prejudge such matters in the abstract as we are invited to do.

2502. Staff arguments wholly fail a factual context. To be sure, not one CLEC with an interest has come forward to complain of a real-life dispute related to an opt-in situation. While AT&T makes a number of contentions, it does not allege that it was improperly denied such rights in the formulation of its agreement. The XO matter to which Staff only generally refers, did not invoke Commission action and is not probative on any issue. To the extent that the Commission has approved an actual real life agreement – and AI asserts that we have – we need not and will not take a position based on an abstract proposition.

Positions in the Abstract

2503. Ameritech Illinois points out that there is no ripe issue for us to review. The Company is correct on this count. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur (1) has anticipated, or (2) at all. Texas v. United States, 523 U.S. 726 (1998). So too, it is inappropriate and contrary to the promotion of judicial and administrative economy to maintain a position based only on a theoretical issue than may never affect the appellant. A. Finkl & Sons v. ICC, 620 N.E. 2d 1141 (1st Dist. 1993); appeal denied, 624 N.E. 2d 804.

2504. The ripeness doctrine requires a court to evaluate both the fitness of the issues for decision and the hardship to the parties of withholding court consideration. As to the fitness of the issue at hand, Staff would have us find that under no circumstances whatsoever should AI be allowed to deny opt-in to any agreement under any situation. Like the Court in Texas, we do not have sufficient confidence in our powers of imagination to affirm such a negative. There is no hardship to consider, because the right to seek arbitration will put the matter squarely before this Commission. To be sure, factual development in such instance is the only way to advance our ability to deal concretely and decidedly with the issues.

2505. The FCC will have the record of this proceeding at its disposal when making an assessment of Ameritech's compliance with Section 271. With respect to the instant issues, we urge the FCC to consider whether the lack of a specific deadline by which the ILEC needs to make an "election" is a serious concern.

2506. There is no question that, as a general matter, Ameritech must permit carriers to incorporate the reciprocal compensation rates included in its Illinois tariffs into its interconnection agreements even as the parties are free to negotiate otherwise. Should the Company believe it is entitled under FCC rules to revise the reciprocal compensation rates included in its Illinois tariffs then it must follow Commission rules and regulations to enact such a change.

2507. Any disputes regarding the Company intentionally impairing or delaying a requesting carrier's ability to obtain access to rates, terms, and conditions that this

Commission and/or the FCC require will be closely examined by the Commission and dealt with in due course.

2508. On the whole, and on the basis of the relevant evidence, and there being no "factual" dispute to resolve, we find Ameritech Illinois to be compliant with the requirements of Checklist Item 13.

B. Phase II Showings.

8. Phase I Compliance Matters.

9. Phase II Evidence (Checklist Item 13).

a. SBC Illinois' Position.

2509. SBC Illinois states that, as demonstrated in Phase I, it has entered into numerous legally binding interconnection arrangements that satisfy the requirements of checklist item 13. SBC Illinois further notes that, while Staff and some CLECs disputed future reciprocal compensation arrangements in Phase I (and those disputes were resolved in favor of SBC Illinois), no party has disputed SBC Illinois' performance with respect to its existing reciprocal compensation obligations. There are no Commission-approved performance measures for this checklist item, and BearingPoint was not directed to test in this area. Thus, SBC Illinois contends that it has satisfied the requirements of checklist item 13.

b. CLECs' Position.

No CLEC addressed checklist item 13 in Phase II.

c. Staff's Position.

2510. No PMs were identified that addressed reciprocal compensation. There is no evidence indicating that SBC Illinois' reported performance relative to checklist item 13 is unsatisfactory.

d. Commission Review and Conclusion.

2511. As the Commission noted in its Phase I order (¶ 1484), "[n]o CLEC has come forward charging AI to be in breach of its contractual obligation under an agreement," and "[n]o party or Staff alleges nonpayment by Ameritech of its reciprocal compensations obligations arising out of interconnection agreements." No party has raised any such dispute in Phase II, and the Commission thus affirms its conclusion that SBC Illinois satisfies the requirements of checklist item 13.

CHECKLIST ITEM 14 – Resale

A. Phase I Analysis

1. Description of Checklist Item

2512. Section 271(c)(2)(B)(xiv) of the Act requires a 271 applicant to make telecommunications services … available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." 47 U.S.C. 271 (c)(2)(B)(xiv).

2. Standards for Review

2513. At the outset, section 251(c)(4)(A) requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. 251 (c)(4)(A). Further, section 251(c)(4)(B) prohibits "unreasonable or discriminatory conditions or limitations" on service resold under section 251(c)(4)(A). 47 U.S.C. 251(c)(4)(B). Finally, section 252(d)(3) requires state commissions to "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. 252(d)(3)

2514. In the Local Competition First Report and Order, the FCC concluded that resale restrictions generally are presumed to be unreasonable unless the LEC proves to the state commission that the restriction is reasonable and nondiscriminatory. If an incumbent LEC makes a service available only to a specific category of retail subscribers, however, a state commission may prohibit a carrier that obtains the service pursuant to section 251(c)(4)(A) from offering the service to a different category of subscribers. Where a state creates such a limitation, it must do so consistent with requirements established by the FCC.

2515. In accordance with sections 271(c)(2)(B)(ii) and 271(c)(2)(B)(xiv), a BOC must also demonstrate that it provides nondiscriminatory access to OSS for the resale of its retail telecommunications services. The obligations of section 251(c)(4), apply to

the "retail" telecommunications services offered by a BOC's advanced services affiliate. See Verizon Connecticut Order, 16 FCC Rcd 14147, 14160-63, paras. 27-33 (2001); Association of Communications Enterprises v. FCC, 235 F.3d 662 (D.C. Cir. 2001).

3. The State Perspective

2516. "Resale" is a requirement of the incumbent local exchange carrier to discount its to retail telecommunications services and sell them to competitive telecommunications carrier. The wholesale price is arrived at by determining the amount of money spent by the ILEC to provide the service at retail to customers and deducting that amount from the retail price. These retailing costs are things such as marketing, billing, and collection that would be reduced or eliminated in a purely wholesale operation.

2517. The purpose of the resale requirements is to allow competitors, who are able to provide retailing services more efficiently than the incumbent, to compete with the incumbent for the provision of those services.

2518. In September of 1995 AT&T petitioned the Commission for the creation of a wholesale service tariff. The Telecommunications Act of 1996 also required resale of the incumbent's retail telecommunications services. The Commission considered AT&T's petition and the 1996 Act in Docket 95-0458, releasing its Order in June of 1996. The Commission summarized the benefits of retail requirement as follows:

> The Commission is of the opinion that a properly established wholesale/resale market would place competitive pressure on both the incumbent LECs, as well as new entrants into the local exchange market. This pressure would be exerted in terms of price, cost, and service quality. In addition, a properly established wholesale/resale market would preserve any possible efficiencies to be gained from situations where there may be natural monopoly conditions in the underlying network of local exchange service. However, the Commission also is cognizant that new technology and innovation in the actual service provisioning will take place only as facilities based competition evolves – although pure resale competition should not be written off just because it may not be as beneficial as facilities-based competition. Wholesale/resale competition will put competitive pressure on both retail rates and quality of service. Wholesale/resale competition is also a first step in an evolving marketplace that will eventually involve more facilitates-based competition. Order at 5-6, Dockets 95-0458 and 95-0531 (consol.). (June 26, 1996)

2519. The Commission's Order includes a formula to calculate wholesale/resale rates. Ameritech set out its wholesale rates in a wholesale compliance tariff in 1996. The Commission investigated those tariffs in Docket 97-0553. (Illinois Commerce Commission On Its Own Motion v. Illinois Bell Telephone Company Investigation of certain Illinois Bell Telephone Company wholesale non- competitive tariffs, pursuant to Section 9-250 of the Public Utilities Act, Docket No. 97-0553. (Docket initiated October 10, 1997).) While testimony was taken and hearings conducted in the case, no order was ever issued in that case. The issues of 97-0553 where addressed in Docket 98-0555.

4. Evidence, Issues/Positions

a. Ameritech Showing of Compliance

2520. Testimony to support AI's position on compliance with Checklist Item 14, was provided by its witness, Scott Alexander. Ameritech Illinois maintains that it provides telecommunications services to CLECs, for resale, that are identical to the services being furnished to its own retail customers. (AI Ex. 1.0, Sch. SJA-1, para. 126). It asserts that CLECs are able to resell these services to the same customer groups and in the same manner as Ameritech Illinois. (Id). Ameritech Illinois offers wholesale discounts on promotional offerings lasting more than 90 days. (Id. para. 130). For retail services that Ameritech Illinois offers to a limited group of customers (such as grandfathered services), Ameritech Illinois explains that it allows resale to the same group of customers to which it sells the services, in accordance with 47 C.F.R. § 51.615. (AI Ex. 1.0, Sch. SJA-1, para. 131).

2521. Further, Ameritech Illinois maintains that its customer-specific contracts are available for resale to similarly situated customers without triggering termination charges or transfer fees to the end user. (Id. para. 133). According to Ameritech Illinois, it has approved wholesale rates for resold services that reflect a discount based on avoided cost. Those wholesale rates are reflected in tariffs and have been incorporated into interconnection agreements, AI contends, making them available to all CLECs. (Id. para. 128).

DSL Transport Service

2522. Ameritech Illinois explains that it does not provide xDSL service to end users. Instead, an affiliate, Ameritech Advanced Data Services, Inc. ("AADS") provides certain advanced services. According to AI, the Commission need not decide whether the Act's resale obligations apply to affiliates like AADS, because even if they do, AADS is in compliance.

2523. AI observes that the "category of services subject to the provisions of section 251(c)(4) is determined by whether those services are: (1) telecommunications services that an incumbent LEC provides (2) at retail, and (3) to subscribers who are not telecommunications carriers." Arkansas & Missouri 271 Order, para. 80. AADS

provides data transmission services like Frame Relay and ATM Cell Relay at retail, AI notes, and it makes those services available for resale at a wholesale discount. (AI Ex. 13.0 Sch. JSH-1, para. 23, 30-32).

2524. Ameritech Illinois' testimony indicates that ADS provides a wholesale service called "DSL Transport" to unaffiliated Internet Service Providers ("ISPs"), who add familiar Internet services (such as e-mail, Internet access, and personal web pages) to create a high-speed Internet access service. (AI Ex. 13.0 at 12). The FCC has held, AI points out, that wholesale DSL transport service "is a wholesale service offering…. Because that offering is not a telecommunications service sold at retail, [the BOC] is not required to offer it at a resale discount pursuant to section 251(c)(4)." Arkansas & Missouri 271 Order, para. 80. [158]

2525. Further, AI asserts, AADS provides DSL transport to an affiliated ISP known as Ameritech Interactive Media Services ("AIMS"), which offers a high-speed Internet access service to end users. Here too, AI observes, the FCC has held that section 271 does not require that the bundled Internet access service (which is an information service, not a telecommunications service) or the underlying wholesale DSL transport be made available for resale. Arkansas & Missouri 271 Order, para. 81 ("With respect to SWBT's third category of service -- its high-speed Internet access service -- we find that there is no violation of Checklist Item 14.").

2526. According to AI, the FCC found that the "regulatory treatment of the underlying transmission facilities provided by incumbent LECs to their affiliate information service providers could have far-reaching implications for a wide range of issues that would be more appropriately handled" in a separate rulemaking on broadband service, which is now ongoing. Thus, AI observes, even Staff witness Liu concedes that AADS has no obligation to resell its DSL Transport service at wholesale discount. Staff Ex. 10.0 (Liu Direct) at 36.

2527. Staff apparently seeks to circumvent this outcome by contending that AADS should be forced to sell DSL transport at retail. Those arguments AI argues, do not belong here.

Resale of Business Services to Residential Customers

2528. AI notes McLeodUSA's contention that Ameritech Illinois improperly restricts the resale of business services to residential customers. MTSI Ex. 2.0 (Heitland Direct) at 7-8. Although the FCC's rules do not prohibit business-to-residence cross-class resale (as they do in the case of residence-to-business resale), AI observes that they are not as open-ended as McLeodUSA suggests. The FCC, AI observes, has recognized that some restrictions may be appropriate where there are "volume discount

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[158] There is one exception. AADS does offer DSL Transport "RLAN" Service to business customers for a limited remote local area network ("RLAN") application (for example, universities use RLANs so that students can log in from remote locations). AADS, accordingly, offers this DSL Transport RLAN Service for resale. (AI Ex. 13.0 at 17).

and flat-rated" offerings. AI Ex. 1.1 (Alexander Rebuttal) at 48-49; First Report and Order, para. 964.

2529. No further analysis of this issue is required, AI argues, given that McLeodUSA's recently arbitrated interconnection agreement allows it to continue to resell those services which Ameritech Illinois currently provides to McLeodUSA for resale (e.g., Centrex service, which McLeodUSA has used as a cross-class resale vehicle). Arbitration Decision, Docket No. 01-0623 at 48-49. (Jan. 16, 2002). Accordingly, AI asserts, this issue is moot.

b. The Attorney Generral's Issues/Position

DSL Resale Policies

2530. The AG notes AI's witness Habeeb to assert that AI need not offer DSL for resale because it does not offer DSL to retail subscribers. Its subsidiary AADS, AI reports, offers DSL to the public. (AI Ex. 13.1 at 3; Staff Ex. 10.0 at 26) (public and proprietary).

2531. The availability and penetration of broadband Internet access, the AG contends, has been a subject of extensive public interest in Illinois. In adopting House Bill 2900, the AG observes, the Illinois General Assembly included provisions that require the dissemination of broadband technology, including DSL. As such, the AG notes, there was established the Digital Divide Elimination Infrastructure Fund (30 ILCS 105/5.545), and the Digital Divide Elimination Fund (30 ILCS 780/5-20) along with the expansion of the Community Technology Grant Program (30 ILCS 780/5-30). A payment of $30 million into each of the first two funds above was required (220 ILCS 5/13-502.5(e)) and the Public Utilities Act was further amended to provide that "every incumbent local exchange carrier ... shall offer or provide advanced telecommunications services to not less than 80% of its customers by January 1, 2005." (220 ILCS 5/13-517). The AG notes that an ILEC can seek a waiver from this latter requirement only upon a specified showing. (Id. at 13-517(b)). Clear from these statutory mandates, the AG argues, the General Assembly considers the provision of advanced telecommunications services, such as DSL, to be a retail service that should be generally available from the incumbent telephone company.

2532. In Association of Communications Enterprises v. FCC, 235 F.3d 662 (D.C.Cir. 2001) ("ASCENT v. FCC"), the AG notes, the Court squarely held that SBC/Ameritech could not escape the resale obligations in section 251(c)(4) by offering advanced services through an affiliate. The court said: "Since Congress prescribed no such affiliate structure for advanced services, we must assume that Congress did not intend for section 251(c)'s obligations to be avoided by the use of such an affiliate." 235 F.3d at 668.

2533. The ASCENT court, the AG observes, rejected the arguments in support of relieving SBC/Ameritech of its resale obligations, as follows:

> In short, the Act's structure renders implausible the notion that a wholly owned affiliate providing telecommunications services with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name of its ILEC parent, should be presumed to be exempted from the duties of that ILEC parent. Id. at 668.

2534. The Court's decision leaves no doubt, the AG contends, but that the existence of a separate affiliate is irrelevant to SBC/Ameritech's resale obligations. The AG takes the position that AI's failure to provide DSL for resale on the same terms as other retail services is a violation of the Commission's Order setting the retail/wholesale price formula, and is an attempt to circumvent sections 251(c)(4) and 252(d)(3) in a way that the Court has already rejected as unlawful and contrary to Congressional intent.

2535. The fact that broadband deployment is a matter of state public concern, the AG argues, makes AI's efforts to avoid its DSL resale obligations an issue that the People will further pursue under the public interest requirement of section 271. Regardless of whether the public interest is implicated, the AG contends, AI's failure to offer DSL for resale in accordance with the Commission's resale Order and formula shows that is has not satisfied Checklist Item 14.

c. Staff Issue/Position

Resale of DSL Services

2536. According to Staff, Ameritech Illinois has shown, in testimony, that it satisfies the requirements of Checklist Item 14 with respect to its DSL services. (AI Ex.13.1, Sched. A; Staff Ex. 10.0 at 2, 24.) Staff contends that Ameritech Illinois currently has no federal obligation to provide DSL transport to retail end users on a stand-alone basis.

Pricing

2537. Ameritech appears to meet part of its obligations under competitive Checklist Item 14, Staff contends, insofar as it applies resale discounts consistent with the Commission's Order on this issue, and provides such services subject to nonrecurring charges that are just and reasonable. (Staff Ex. 5.0 at 3.)

2538. The first question, Staff posits, is whether Ameritech properly applies resale discounts in the manner ordered by the Commission in Dockets 95-0458/95-0531. (Staff Ex. 5.0 at 14.) Next, the Commission must determine whether Ameritech offers these services subject to nonrecurring charges that are just and reasonable. (Id. at 14-15.)

2539. With respect to the first issue, when Ameritech offers a new service or changes the rate of an existing service, Staff determines whether the resale discount is

appropriately applied. (Staff Ex. 5.0 at 16.) The discount is determined based upon retail rates charged to subscribers for the telecommunications service requested, excluding the portion of those rates attributable to marketing, billing, collection, and other costs that will be avoided by selling the service at wholesale. (Staff Ex. 5.0 at 15.) In Staff's opinion, and based upon its ongoing review, Ameritech has indeed properly reflected resale discount rates in its tariffs. (Id.) Therefore, Staff suggests, Ameritech has properly determined the level of wholesale discounts. (Id.)

2540. With respect to the second issue, Staff points out that wholesale non-recurring rates were established as part of the proceeding in Docket No. 95-0458/0531. (Staff Ex. 5.0 at 16.) Since the entry of that Order, Staff observes, some of the rates have been reduced as a part of Ameritech's annual alternative regulation compliance filings. (Id.) Accordingly, Staff is of the opinion that these rates are just and reasonable. (Id.) On the whole, Staff maintains that Ameritech has properly applied discounts to its wholesale rates, and they are just and reasonable.

d. AT&T Issue/Position

2541. AT&T has not raised any issues in connection with resale but reserves its right to do so should issues arise.

5. The Reply Positions

a. Ameritech Reply Position

2542. With one minor exception, AI notes, there is no dispute as to whether it satisfies the requirements of Checklist Item 14. Neither Staff nor any CLEC raise any issue on brief with respect to this Checklist Item and, AI observes, Staff affirmatively states that "Ameritech Illinois has shown that it satisfies the requirements of Checklist Item 14 with respect to its DSL services" and with respect to its resale rates. (Staff Br. at 213-214.)

2543. AI observes, however, the AG to claim that Ameritech Illinois' affiliate AADS must provide DSL transport at a wholesale discount. (AG Br. at 21-24). According to AI, however, such claim arises from a fundamental misapprehension of the matter at hand. AI explains that DSL transport is sold to Internet Service Providers ("ISPs") and, as a matter of law, these are not "retail" sales that trigger the duty to resell the service at a wholesale discount. Arkansas & Missouri 271 Order, para. 80; (See Staff Br. at 235 (noting that "AADS does not offer DSL services to end-users directly"; AI Br. at 183-184). Accordingly, AI contends, there is no obligation under section 251(c)(4) of the Act for AADS to offer DSL transport service for resale at a wholesale discount.

2544. Further, AI observes that the ASCENT decision on which the Attorney General relies, does not factor into this analysis. AI notes that the question before the ASCENT court was whether advanced services affiliates are exempt from certain

obligations that apply to incumbent LECs. By contrast, it argues, the point here is not who provides DSL transport (Ameritech Illinois or AADS) but who obtains it (ISPs, rather than the public). Assuming arguendo, the Attorney General's premise to be that AADS does have the same resale obligations as Ameritech Illinois under Section 251(c)(4), AI maintains that AADS is in full compliance. But, AI points out, its DSL transport service is a wholesale offering, not a retail offering, and as such, it is not required to be offered at a wholesale discount. Arkansas & Missouri 271 Order, para. 80. (AI Br. at 183).

6. Staff's Proposed Remedial Actions for Checklist Compliance

None.

7. Commission Review and Conclusions

2545. On the basis of Ameritech Illinois' showing, and there being no legitimate disputes raised in respect thereto, we are compelled to find Ameritech Illinois to be in compliance with the requirements and obligations of Checklist Item 14.

2546. Certain matters raised by the AG are outside the obligations and showings under this Checklist item and thus, will be addressed in Part IV of this Order.

B. Phase II Showings.

8. All Phase II Issues (Checklist Item 14)

(None Indicated).

9. Phase II Evidence.

a) SBC Illinois' Position.

2547. SBC Illinois states that its commercial performance results, as well as the results of BearingPoint's test, demonstrate that it provides CLECs resold services in accordance with the requirements of checklist item 14. SBC Illinois states that, for several key measures, its performance for resold service was *better* than retail in every month. SBC Illinois installed

resale service faster, and with fewer missed due dates, than retail in all four main service categories (residential and business, with and without field work). (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 204 & Att. M (PMs 27 & 28).) SBC Illinois also states that, even where due dates were missed, the delays for resale were shorter than for retail. (Id. Att. M (PMs 31 & 32).) Further, SBC Illinois notes that the rate of trouble reports on new resale installations was significantly lower across the board than for its own retail services. (Id. ¶ 208 & Att. M (PM 37).)

2548. SBC Illinois states that it achieved similar success in maintenance. On average, SBC Illinois repaired resold lines more quickly than retail in every month, across every category of service. (Id. ¶ 210.) Further, the percentage of out-of-service resold lines restored within 24 hours was in parity with retail, and was consistently high (ranging from 97.7 percent to 99.5 percent). (Id. (PM 40).) The quality of work was also better than for retail, SBC Illinois states, as the rate of "repeat" trouble reports for resale was generally lower in each month than for retail. (Id. Att. M (PM 53).)

The BearingPoint Test Results

2549. BearingPoint found that SBC Illinois provides high quality service with respect to the timely issuance of resale order confirmations, resale order flowthrough, and resale line repairs. BearingPoint's transaction testing included 16 different resale scenarios, and BearingPoint also included resale bills in its billing tests. BearingPoint's review of processes and procedures included those applicable to resale. BearingPoint's findings include:

- SBC Illinois issued 98.6 percent of order confirmations within 2 hours for electronically input orders (Table 1-14), and 100 percent of order confirmations within 5 hours for manually input orders (Tables 1-15 & 1-16);

- SBC Illinois repaired resold lines quickly, with an average interval of 14.8 hours (TVV 7-5) and an on-time rate of nearly 99 percent (TVV 7-2) for resale and UNE-P repairs; further, SBC Illinois repaired 96.9 of lines within 24 hours (TVV7-4); and

- BearingPoint evaluated 82 repairs, and found that SBC Illinois accurately identified and fixed the trouble 95.1 percent of the time (TVV 7-3).

c) CLEC Positions.

We find no CLEC to have addressed this item.

d) Staff's Position.

Performance Measurement Data Analysis

2550. Checklist item 14, Staff informs, concerns resale and encompasses the following performance measures: PMs 27, 28, 29, 30, 31, 32, 33, 35, 37, 37.1, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, and 54.1. Since the checklist item focuses on resale activities, this review excludes UNE loop and port combinations where applicable. These worksheets are included in Schedule 29.02.

2551. Out of 156 resale sub-measures, Staff notes, SBC Illinois passed 92 sub-measures and failed 7 sub-measures. There were 57 sub-measures with insufficient data. Accordingly, of resale sub-measures with sufficient data to make a determination, SBC Illinois passed 92 out of 99, for a 93% pass rate.

2552. According to Staff, SBCI continues to provide sub-measure 37-1 at a rate of 50%, therefore SBC Illinois provide PM 37 in a discriminatory manner. Data reported by SBC Illinois indicates that there is a statistically higher number of trouble reports for SBC Illinois facilities provisioned to CLEC customers than there are numbers of trouble reports from SBC Illinois customers for POTS residential (PM 37-1).

2553. SBC Illinois' performance relative to checklist item 14 is unsatisfactory, based primarily on the Company's performance on PM 37 - Trouble Report Rate.

2554. Resolution of Problems with Key PM 29 – Percent of N, T, and C Orders Where Installation Was Not Completed as a Result of Company Caused Missed Due Date.

2555. This PM failure Staff explains, focuses on the Company's efforts relative to the sub-measure 29-7 for UNE-P, business fieldwork. SBCI objects to the contextual totality of this failure on two ground, that Staff rigidly assigned this failure even though three other sub-measures were passed, and that the sub-measure has a relatively low volume of transactions.[159]

2556. Staff responds that its analysis was not inappropriately rigid, since Staff was focused on SBCI's failure to meet its standard on a consistent basis over the past twelve months. However, a closer look at the most recent few months now reports that SBC Illinois passed PM 29-7 for both December 2002 (z-factor of 1.496) and January 2003 (z-factor of 1.493). ICC

[159] Ehr Rebuttal Affidavit, paragraph 67.

Staff Ex. 41.0 ¶64. Given this recently improved service, the Commission should agree with Staff, and find that PM 29 is no longer a "Key PM's Requiring Improvement".

Resolution of Problems with Key PM 35 – Percent Trouble Reports within 30 Days of Installation

2557. Staff maintains that the Company has provided sufficient evidence to demonstrate that it provides sub-measure 35-7 for UNE-P, business fieldwork, in a non-discriminatory manner. SBCI objects to the contextual totality of this failure on two grounds, that Staff rigidly assigned this failure even though three other sub-measures were passed, and that this sub-measure has relatively low transaction volumes.[160]

2558. These explanations, by themselves, were not persuasive enough to warrant a pass on this PM. However, the most recent data posted by SBCI provides a pattern of SBCI providing this sub-PM in a non-discriminatory manner. The information posted by SBC Illinois to CLEC Online on March 4, 2003 indicates that SBC Illinois passed this sub-measure for both December 2002 (z-factor of 0.329) and January 2003 (z-factor of –1.033). Given the recent system improvements made by SBCI, as well as the recently improved service, the Commission should agree with Staff, that PM 35 is no longer a "Key PM's Requiring Improvement".

Problems with Key PM 37—Number of Trouble Reports per 100 Lines

2559. SBC Illinois has exhibited significant problems with trouble reports, as indicated in PMs 37-1, 54-4, 54-6, and 54.1-4. SBCI affiant Ehr indicates that the problems associated with PMs 54-4 and 54.1-4 are related more to "disparate sample sizes" than to SBC Illinois performance problems. Ehr Affidavit, ¶212. Presumably, this same reasoning applies to sub-measure 54-6, although SBCI is silent on that sub-PM. However, this rationale does not explain the problems SBCI has been experiencing with respect to PM 37-1, since this PM reflects service quality to all residential plain old telephone service ("POTS") customers.

2560. It is also a PM in which SBC Illinois has successfully met the standard in previous months – specifically, April 2002 through September 2002. Inexplicably, SBC Illinois failed this sub-measure in October and November 2002. Trouble reports can be very problematic to a CLEC, since it means that their customer is either out of service or is having some problem with the line such as noise. In either circumstance, it is possible that customers will begin to notice that they experience more problems when they are customers of a CLEC, even though SBC Illinois is the entity responsible for the problem. ICC Staff Ex. 39.0 ¶95. On cross, Mr. Ehr indicated that he had people working on this PM, and would get Staff a response in writing. Tr. at 3012.

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[160] *Ibid*, paragraph 69.

2561. As of March 4, 2003, information posted by SBC Illinois to CLEC Online indicates that SBC Illinois' performance for sub-measures 37-1 -- trouble report rate for POTS Residential, and 37-4, regarding trouble report rate for UNE-P Business, failed in December 2002. Sub-measure 37-1 passed in December 2002 (z-factor of –0.071) but failed rather dramatically in January 2003 (z-factor of 12.747), and sub-measure failed in December 2002 (z-factor of 5.705) but passed in January 2003 (z-factor of 1.226). ICC Staff Ex. 41.0 ¶94-5. SBCI states that system improvements to address the issue are in the process of being made, however, significant failures persist. Since SBCI is unable to provide this PM in general conformance with its standard, SBC Illinois fails to provide PM 37 in a non-discriminatory manner. As such, it remains on Staff's "Key PM's Requiring Improvement" table.

e. SBC Illinois' Rebuttal Position

2562. With respect to Staff Witness McClerren's observation that SBC Illinois did not pass all the resale sub-measures relating to "Centrex with field work," SBC Illinois states that "Centrex with field work" represents a small volume of resale orders, and SBC Illinois exceeded parity in all three months in the categories that represent most of the resale order volume (residential and business POTS, with and without fieldwork, and Centrex without fieldwork). (SBC Ex. 2.1 (3/3/03 Ehr Rebuttal) ¶¶ 85-86.) SBC Illinois further explains that, with respect to the small volume of Centrex with field work orders, the shortfalls between wholesale and retail performance were small. (Id.)

2563. Staff Witness McClerren also notes that, while SBC Illinois met the parity standard for missed repair commitments for business POTS (with and without dispatch) and residential POTS with dispatch, it missed the sub-measure for residential POTS without dispatch in two months. However, SBC Illinois states" residential POTS without dispatch represents only 10% of the volume for repair commitments, and the shortfall was insignificant – SBC Illinois fell short of parity by 2 missed appointments in September and 1 in November. (Id. ¶ 87.) SBC Illinois further states that its Network organization has established additional procedures to monitor appointments, and that its performance met the parity standard in December 2002 and January 2003. (Id.)

f. SBC Illinois' Surrebuttal Position.

2564. SBC Illinois notes that Staff, in its rebuttal testimony, identifies PM 37 – Trouble Report Rate as its main concern. (Staff Ex. 41.0 (McClerren Rebuttal) ¶¶ 50-51.) SBC Illinois explains that two submeasures address the trouble report rate for resold POTS, and that, while SBC Illinois passed the submeasure relating to resold business POTS, it did not meet the benchmark in two of the three months for resold residential POTS. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) Att. M (PM 37-01 and -02).) While retail residential POTS experienced a trouble report rate of 2.29 per hundred in October 2002 and 1.65 in November, the numbers for resold residential POTS were 2.57 and 1.80, respectively.

2565. SBC Illinois states that this shortfall is not significant to overall compliance, but also explains that it has identified the installation troubles that caused the out-of-parity situation, and has implemented system enhancements to address the issue. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 88; (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal) ¶ 68.) SBC Illinois further proposes that

PM 37 be subject to the additional monitoring procedures outlined in the Surrebuttal Affidavit of James Ehr, to confirm the results of its corrective actions.

g. Commission Review and Conclusion.

2566. The Commission notes that there is little dispute about the majority of SBC Illinois' commercial performance results under this checklist item. Many measures show that the resold services that SBC Illinois provides CLECs are at least equal in quality to its own retail services, if not higher in quality. With respect to "Centrex with field work" orders and missed repair commitments for residential POTS without dispatch, the Commission concludes that the shortfalls reflected in SBC Illinois' commercial performance results were immaterial and do not affect SBC Illinois' compliance with this checklist item.

2567. The one and only "Key PM" identified by Staff here concerns PM 37-01, the trouble report rate for resold residential POTS. This measure however, we would note, is one for which SBC Illinois has successfully met the standard in previous months – specifically, in the period of April 2002 through September 2002. Inexplicably, SBC Illinois failed this sub-measure in October and November 2002 even as the shortfall in that measure was not significant (less than 0.30 reports per hundred). As of March 4, 2003, Staff generally informs, information posted by SBC Illinois to CLEC Online indicates that SBC Illinois' performance for sub-measures 37-1 -- trouble report rate for POTS Residential, and 37-4, regarding trouble report rate for UNE-P Business, failed in December 2002.

2568. On the whole and taken in a proper context of all the surrounding circumstances, we do not believe this single infirmity is significant enough to preclude a finding of compliance with Checklist Item 14. So too, we balance this evidence against SBCI's record statements indicating that system improvements to address the issue are in the process of being made. The additional monitoring of PM 37 under these system changes, as suggested by SBC Illinois shall be required and, this too, is being factored into our assessment.

2569. On the record as a whole, the Commission finds it reasonable to conclude that SBC Illinois satisfies the requirements of checklist item 14.

Reliability of SBC Illinois' Commercial Performance Data.

1. The Issue.

2570. 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.

2571. In contention and discussion, the parties focus is on three main items (i) the BearingPoint December 20, 2003 Performance Metric Report; (ii) the Ernst & Young Performance Measurement Examination (based on the March-May, 2002 period); and, (iii) the sources that offer additional assurances of reliability, i.e., the FCC-sponsored mechanisms.

2. Standards Of Review.

2572. The FCC considers performance measurement data reported by BOCs to provide valuable evidence regarding a BOC's compliance or non-compliance with individual checklist items[161].

2573. The FCC has said that the reliability of reported data is critical: the performance measures must generate results that are meaningful, accurate, and reproducible. In particular, the FCC states that the raw data underlying a performance measurement must be stored in a secure, stable, and auditable file if a remedy plan is to be accorded significant weight.[162]

2574. When addressing generalized complaints about the reliability of an applicant's performance reports, the FCC has considered the following mechanisms as providing reasonable assurance that the applicant's reports are reliable: (i) "extensive third-party auditing," (ii) the "open and collaborative nature of metric workshops," (iii) supervision by the applicable state commission, (iv) the "availability of the raw performance data" to CLECs and the applicant's "readiness to engage in data reconciliations" between its own records and those of the CLECs, and (v) the applicant's internal and external data controls. Georgia & Louisiana 271 Order, ¶ 19.

3. The State Perspective.

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[161] *Application of Verizon New York Inc. et al. for Authorization To Provide In-Region, InterLATA Services In Connecticut*, CC Docket 01-100, FCC –01-208, ¶7 (rel. July 20, 2001)("Verizon Connecticut Order").

[162] TX 271 Order ¶428.

2575. Staff informs that SBC Illinois reports 150 different performance measures on a monthly basis, that provide important statistics and results with respect to the company's performance in providing service its wholesale customers. Each performance measure reports on different aspects of SBC Illinois OSS. Each of the150 performance measures has a business rule document associated with it that defines specifically what aspect of SBC Illinois' OSS is being measured. In addition, this business rule document lists the specific data to be included as well as excluded, the levels of disaggregation (or various reporting levels for the performance measure), the calculation formula, the reporting structure (whether data for CLECs, SBC retail, or SBC affiliates is reported), whether the measure is applicable to Tier 1 or Tier 2 of the performance remedy plan and if so what level is assigned (low, medium, or high) for each remedy tier and finally indicates whether the performance measure has a parity or benchmark standard. If the measure has a benchmark standard then the specific benchmark the company is to meet is defined. All of this information is detailed in each business rule document and SBC Illinois is required to report its performance measures consistent with the business rule documents discussed with the CLEC community and approved by the Commission.

2576. Version 1.8 of the performance measurement business rules, Staff explains, is currently in effect, and SBC Illinois is required to report performance measurement data in a manner consistent with these business rules. The performance measurement data filed in this proceeding by SBC Illinois for September, October and November 2002 must reflect the performance measurements documented in SBC Illinois' tariff (Ill. C.C. No. 20, Part 2, Section 11.E). Both the BearingPoint and Ernst & Young's evaluations used this same set of Business Rules (version 1.8 or IL tariff Ill. C.C. No. 20, Part 2, Section 11.E) for purposes of their respective evaluations.

2577. As a result of continuing six-month review collaborative sessions held among SBC Illinois, the CLECs and Staff, the performances measures are subject to review and update. The implementation of the latest agreed-upon six-month review changes is scheduled for the first and second quarter of 2003[163].

[163] February 11, 2003 Tr. at 3042.

4. The Evidence, Argument, and Positions Of The Parties.

a. SBC Illinois Position and Evidentiary Case.

The Ernst & Young Audit.

2578. The public accounting firm of Ernst & Young audited SBC Illinois' commercial performance results for the months of March–May 2002, which were calculated according to the same business rules that were in effect during the September – November 2002 "study period" (analyzed in Section III). (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 218.) Using statistical sampling techniques, E&Y selected thousands of wholesale and retail transactions to determine whether SBC Illinois properly reflected, or excluded, them in its performance reports. E&Y also reviewed SBC Illinois' overall processes and procedures for performance measurement.

2579. E&Y's "Supplemental Report" (Attachment T to SBC Ex. 2.0) describes its overall methodology and audit procedures. E&Y's "Testing Universe of PMs" (Attachment U to SBC Ex. 2.0) documents the performance measures tested. E&Y's "Transaction Testing Results" (Attachment X to SBC Ex. 2.0) documents the number and kinds of transactions tested, the number of successful tests and the number of and reasons for exceptions. E&Y's report on the audit is attachment O to SBC Ex. 2.0, while its report on controls appears at Attachment S. Attachments Q and R to the 1/17/03 Affidavit of Mr. Ehr summarize SBC Illinois' responses.

Independence and Objectivity

2580. SBC Illinois states that it chose E&Y because of E&Y's extensive experience in auditing SBC's performance measurement systems and processes. For example, E&Y conducted a similar audit of Southwestern Bell Telephone Company's ("SWBT") performance measurement systems and processes for the Missouri Public Service Commission during its review of SWBT's Missouri Section 271 application, which was subsequently approved by the FCC. In addition, E&Y has been responsible for conducting the audit of SBC's compliance with the Carrier-to-Carrier Performance Plan contained in the SBC/Ameritech Merger Conditions, on behalf of the FCC, for the past three years in all thirteen SBC states: the five SWBT states, Pacific Bell (California), Nevada Bell, Southern New England Telephone (Connecticut), and the five SBC Midwest states. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 217.)

Ernst & Young's Methodology

2581. E&Y's "Scope and Approach" document explains that E&Y would be performing two attestation examination engagements in accordance with the Attestation Standards established by the American Institute of Certified Public Accountants: (1) Attestation Examination of the Accuracy and Completeness of [SBC Illinois'] Performance Measurements for the Months of March, April and May 2002; and (2) Attestation Examination of the Effectiveness of Controls over [SBC Illinois'] Process to Calculate Performance Measurements for the Months of March, April and May 2002.

2582. E&Y's evaluation covered all 150 Performance Measurements, as contained in Version 1.8 of the Business Rules. The testing approach included: (1) Documentation of the

Process and Controls to Capture, Calculate and Report Each Performance Measurement, (2) Site Visits and Testing of Processes to Capture PM Data, (3) Program Code Review – Review of the "code" in SBC Illinois' computer programs to determine business rules are appropriately applied, and (4) Transaction Testing – Statistical sampling of transactions for each performance measurement category to verify that raw data from the source systems was appropriately processed (i.e. business rules coding was appropriately applied and data is accurate) and captured in the PM reporting files (i.e. appropriately included/excluded in the PM). (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶¶ 218 – 220.)

Ernst & Young's Exceptions

2583. E&Y identified 128 exceptions in its testing. SBC Illinois presented its response to those exceptions in paragraphs 222 - 230 of the 1/17/03 Affidavit of Mr. Ehr (SBC Ex. 2.0) and in Attachment Q to that Affidavit. SBC Illinois classified the exceptions into 5 categories:

2584. Category I: Corrected, With Restatement of March-May Results. Of the exceptions identified by E&Y, 53 were reported incorrectly in the March-May audit period, but were corrected afterwards, and the March-May results were restated. Thus, SBC Illinois states, those corrections are reflected in the September-November data presented to the Commission. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 226); Attachment Q at 1-10.

2585. Category II: Corrected After May 2002, But March-May 2002 Results Not Restated. SBC Illinois states that the 51 Issues identified in Category II were also corrected, but that SBC Illinois did not restate reported results for March - May 2002. SBC Illinois addressed these issues in its opening comments (see SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶¶ 227-230 & Attachment Q) stating that these prospective corrections were implemented in time to be reflected in the September-November results presented to the Commission. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 227-228; Attachment Q at 11-23.

2586. Category III: Corrected But Not Yet Reported. SBC Illinois states that the 2 Issues identified in Category III were corrected effective with December 2002 results (reported in January 2003). SBC Illinois states that it was not able to restate results for prior months, including the months of September - November 2002. The first exception related to the fact that certain product codes were classified as "unknown" and thus not included in the results for PMs 54, 54.1, 65, and 65.1. The second exception related to retail billing errors that were corrected but not included in the retail analog results for billing accuracy; SBC Illinois states that inclusion of the errors in the retail results would only improve the "parity" between wholesale and retail. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 228; Attachment Q at 24.)

2587. Category IV: No Corrective Action Planned. SBC Illinois investigated the 7 Issues identified in Section IV and determined that they did not require any corrective action, either because they were one-time occurrences or because there was no error in the performance measure. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 229; Attachment Q at 25-27.)

2588. Category V: Corrective Action Planned, But Not Yet Implemented. SBC Illinois states that for 15 issues, corrective action to address the issue was scheduled, but was not

implemented at the time of its January 17 filing. For 12 of the 15 Issues identified, SBC Illinois states that it does not expect the change to have a material negative impact on previously reported results. For the other 3 Issues, SBC Illinois states that June through December 2002 results would be restated as soon as possible if a determination is made that the change does have a material negative impact on previously reported results. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 230; Attachment Q at 28-32.)

Interpretations of Business Rules

2589. E&Y identified several interpretations of the Business Rules made by SBC Illinois management during its day-to-day implementation. These interpretations appear and are analyzed in the Report Of Management Attachment B – Interpretations, which is Attachment R to the 1/17/03 Affidavit of Mr. Ehr (SBC Ex. 2.0). SBC Illinois states that some interpretation is inherent in the process of implementing a performance measurement that is as complex and comprehensive as that used by SBC Illinois. Further, SBC Illinois points out that the defined Business Rules are, by necessity, generic to allow changes in the actual business processes being measured while still achieving the same measurement goals. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 231.)

2590. According to SBC Illinois, the collaborative participants in the six-month review process agreed to language changes to more clearly support 32 of the 48 interpretations made by SBC Illinois and identified by E&Y. SBC Illinois determined that an additional 15 interpretations did not require any changes to current procedures or a clarification of the business rule, because the current procedure was consistent with the letter of the current business rules. For the remaining interpretation, SBC Illinois determined that it should change the reporting procedures that were in place at time of E&Y's audit (March-May 2002). The corrective action determined appropriate was implemented with June 2002 results. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 232.)

Internal Controls Report

2591. E&Y noted three issues related to controls. The first control issue identified by E&Y related to the initial implementation of the performance measures after the SBC/Ameritech merger conditions were approved. SBC Illinois states that since the initial implementation, SBC Illinois' controls have been greatly expanded and enhanced. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 235.)

2592. E&Y's second issue related to the implementation of "LASR" in April 2002. SBC Illinois implemented the "LASR" system for up-front processing of wholesale service requests, pursuant to a condition of the FCC's approval of the SBC/Ameritech merger. According to SBC Illinois, tailoring the new systems to its performance reporting systems and processes required the involvement of new staff personnel who were not previously familiar with the SBC Illinois performance measurements, performance measure reporting process, and change management control process. Since the initial implementation, SBC Illinois states, the new staff has been educated on these matters. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶¶ 236-237.)

2593. The third E&Y control issue related to controls on the manual collection and processing of data, which resulted in the need for some of the restatements E&Y noted in its audit report. SBC Illinois states that the nature of the processes being measured requires that certain activities will be performed manually. However, SBC Illinois states that it has increased its focus on manual activities in the performance measurement processes. Where efficient and economically feasible, those processes have been automated. Where they have not been automated, additional manual controls have been designed and implemented (e.g., process check sheets, multiple data input reviews, etc.). At a more global level, SBC Illinois states that it has also worked diligently to improve its controls, and to address the issues identified by E&Y. Examples of controls relating to the processing of data that have been enhanced are: (a) copying and storing input and output performance measure data files; (b) header and trailer records/Control files to ensure the correct number of records are transferred, and (c) processing performance measure data multiple times to ensure consistent results. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶¶ 238-242.)

Other Assurances of Reliability.

2594. SBC Illinois notes that it has made underlying raw data available upon CLEC request and that several CLECs have requested and received such data. SBC Illinois further states that it is obligated to conduct a data reconciliation upon request by a CLEC to address the accuracy of any reported data in comparison to the CLEC's own records and, if the issue is not resolved, submit to a mini-audit of the specific performance measure in question. However, SBC Illinois observes, not one CLEC has requested a data reconciliation or mini-audit in SBC Illinois or other SBC Midwest state. Further, SBC Illinois states that it is aware of only one formal complaint regarding the accuracy of reported performance results that has occurred in the SBC Midwest region, in Michigan. In that case, the CLEC did not make any attempt to reconcile data with SBC Michigan prior to filing the complaint. As a result of subsequent discussions with SBC Michigan, the complaint was withdrawn, with no action required or problem found regarding data accuracy. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶¶ 294-301.)

2595. With respect to internal controls, SBC Illinois states that as a result of feedback received during the BearingPoint test, it has implemented improvements to its internal controls and to its documentation of performance measurement procedures. According to SBC Illinois, some of the more significant control steps include (a) copying and storing both the input and output files for performance data; (b) using numerical control records in the header and trailer of the input and output files to ensure that all records are processed; and (c) processing data more than one time, and cross-checking the results for accuracy. (Id. ¶ 302)

BearingPoint's Performance Metric Review.

2596. SBC Illinois states that BearingPoint is continuing its review of SBC's collection, calculation, and reporting of commercial performance results. BearingPoint's Performance Metric Review ("PMR") includes 271 applicable test points. BearingPoint's Report notes that 63

PMR test points have been "Satisfied," 117 are considered "Not Satisfied," and 91 are "Indeterminate." (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 244.)

2597. SBC Illinois states that the bottom line is that there is no need for the Commission to attempt to reach a conclusion on all of the detailed PMR test criteria now, and that SBC Illinois is not asking the Commission to terminate the test. The test will still go on, and SBC Illinois will continue to work with BearingPoint to address findings as they are raised. The present inquiry concerns overall checklist compliance today. Thus, SBC Illinois states that the question now is whether BearingPoint's PMR findings thus far are sufficient to warrant a finding of *non*-compliance. SBC Illinois contends that a substantive analysis of BearingPoint's results in the context of the evidence as a whole, clearly demonstrates that the answer is no. (Id. ¶ 245)

2598. According to SBC Illinois, two of the five test domains are substantially complete. PMR 2 addresses the definitions of metrics and standards. SBC Illinois advises that BearingPoint has substantially completed its review, and has verified that SBC Illinois has implemented the performance measurement "business rules" approved by the Commission; that the business rules are published and accessible to CLECs; and that SBC Illinois' monthly performance reports are published on time and are accessible to CLECs. SBC Illinois states that it satisfied all three test criteria in this area. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶¶ 246, 256.)

2599. PMR 3 addresses "change management": the process of implementing periodic updates to performance measurement business rules. According to SBC Illinois, the test consists of two main parts: PMR "3A" addresses change management in general, while PMR "3B" tests procedures for recalculating performance remedies if the underlying results are restated. Of the 30 test criteria in this area, SBC Illinois informs, 26 have been satisfied. According to SBC Illinois, BearingPoint has determined that the metrics change management process – and the responsibilities of the parties involved – are documented, and that the process includes: (i) a well-defined procedure for managing change requests; (ii) a high-level assessment of each requested change; (iii) an analysis of the change at a business level by experts in the subject measured; (iv) formulation of a detailed technical design prior to the start of implementation work; and (v) an independent review by the performance measurement group to ensure that the technical design is consistent with the expert business assessment. (Id. ¶¶ 247, 257-261.)

2600. PMR 1 evaluates SBC's procedures for data collection and retention. Of the 126 test criteria in PMR 1, 12 are currently assessed "Satisfied", 60 are currently assessed "Not Satisfied," and 54 are considered "Indeterminate." Of the 60 "Not Satisfied" criteria, 30 relate to documentation of reporting procedures. These areas are referenced in PMR1-1 and 1-2 of the BearingPoint report. SBC Illinois states that it has enhanced the degree of documentation concerning its measurement procedures and has provided over 6,000 pages of supporting performance metrics documentation regarding those procedures to BearingPoint. Another 18 "Not Satisfied" criteria relate to performance metric controls. SBC Illinois asserts that over the past year, it has implemented numerous improvements to its internal controls, including several improvements in measurement processes that will reduce restatements. The remaining 12 "Not Satisfied" related to data retention. On October 30, 2002, SBC Illinois reported that 100 percent of the reported performance metrics, source system unique elements, and system of records are now retained in the manner specified by BearingPoint. (Id. ¶¶ 248-251, 262-271.)

2601. The remaining 54 PMR 1 test criteria, which address data processing capacity and procedures for future reports, are currently "Indeterminate": According to SBC Illinois, BearingPoint has not identified a problem, it simply has not completed its analysis. SBC Illinois states that it and BearingPoint have developed a plan to complete the PMR 1 evaluation, along with specific tasks and target dates. The current projected completion date for the evaluation is within the second quarter of 2003. (Id. ¶ 251.)

2602. PMR 4, which evaluates the accuracy and completeness of transferring data from the point of collection to the point of reporting, and then converting raw data to processed data, is not substantially complete. SBC Illinois states that over 65 percent of this test is still without comment by BearingPoint, and as a result 26 of the 40 applicable test criteria are "Indeterminate." SBC Illinois and BearingPoint have developed a detailed project plan that identifies each of the activities required to complete the PMR 4 evaluation, along with specific tasks and target dates. The projected completion date for PMR 4, SBC Illinois informs, is the second quarter of 2003. According to SBC Illinois, each of the 12 test criteria that have been classified as "Not Satisfied," is expected to be successfully resolved, and none of them reflect a material performance reporting issue. (Id. ¶¶ 252, 272-279.)

2603. PMR 5 evaluates the processes used by SBC to calculate performance results, and assesses the consistency of SBC's metric calculations to the Commission's approved business rules for each performance measure reported by SBC. Similar to PMR 4, this test is still in progress. As a result, 11 of the 72 test criteria are "Indeterminate," while 20 of the test criteria are currently assessed as "Satisfied" and 41 of the test criteria are currently assessed "Not Satisfied," based on testing of July 2002 data. SBC Illinois states that most of the issues identified by BearingPoint have been addressed in current performance reports, and none of the remaining issues are material to the analysis – that is, the overall pass/fail results. (Id. ¶¶ 253, 280-291.)

b. AT&T Position.

BearingPoint PMR Test

2604. AT&T's evidence on OSS and Performance Measurement issues is contained in the affidavit of Timothy M. Connolly.[164] As explained in AT&T's comments and the affidavits of its witnesses, the BearingPoint test results show that SBC Illinois has failed to complete a substantial portion of the PMR test. AT&T Comments, p. 2; AT&T Exh. 1.0(P), ¶ 49. Indeed, AT&T believes that SBC Illinois has conceded that the BearingPoint performance metrics review is incomplete and that it has not yet successfully satisfied the test criteria for this audit. SBC Illinois Exh. 2.0, ¶¶ 243-246. AT&T points out that BearingPoint's PMR Report notes that, during the PMR test, 116 test points were "Not Satisfied," and that 91 test points are "Indeterminate."[165] As of February 19, 2002, there are 17 open exceptions and 79 open

[164] *See* AT&T Exh. 1.0(P) (Affidavit of Timothy M. Connolly).

[165] SBC Illinois Exh. 2.0, ¶ 244.

observations in the PMR test. According to AT&T, SBC Illinois attempts to dismiss these failings and insists that "none of BearingPoint's findings thus far are sufficient to warrant a finding of *non*-compliance, or to preclude the Commission from evaluating compliance based on the totality of the information before it." [166] But, AT&T asserts that none of these contentions cannot withstand scrutiny.

2605. First and foremost, AT&T reports that the BearingPoint test has shown SBC Illinois' PMR systems to have failed major elements of the test. AT&T focuses on the PMR 1, PMR 4 and PMR5 test results.

PMR 1

2606. AT&T points to SBC Illinois' failure to satisfy the BearingPoint test elements for the PMR1 test. PMR1 is the Data Collection and Storage Verification and Validation Review[167] in which BearingPoint is:

> [T]o determine the adequacy and completeness of key policies and procedures for collecting and storing performance data. This test will also evaluate the extent to which Ameritech's operations are consistent with the policies and procedures i.e., are the policies and procedures being followed consistently.

2607. In the SBC Illinois test, the 150 performance measures are defined in 18 groups, or families that relate to functional groupings, product sets, and checklist items. AT&T Exh. 1.0(P), ¶ 51. BearingPoint organized its PMR work around the PM Group construction.

2608. For the PMR1 test, BearingPoint inspects the SBC Illinois' documentation that lays out the procedures followed, within computer-based systems and in work center operations, to collect the data from databases, repositories, source systems, and source operations for each of the performance measures. AT&T Exh. 1.0(P), ¶ 52. The documentation reviewed by BearingPoint must refer to the information management policies that the RBOC has established for securing and safeguarding the performance measures data. These two initial steps are the basis for PMR1 evaluation criterion PMR1-1, which is "Metrics data collection and storage processes have complete and up-to-date documentation." In those cases where BearingPoint was unable to obtain sufficient information from SBC or where the information was incorrect or inconsistent with other information that BearingPoint obtained, BearingPoint issued Exceptions and Observations to record those deficiencies.

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[166] *Id*. ¶ 243.

[167] MTP Version 2.0, at 23. (May 2, 2002). This document may be found at the BearingPoint web site at the following URL: http://www.osstesting.com/Documents/IL%20Docs/ ICC%20MTP%20v%202.0.pdf.

2609. As AT&T points out, two of the earliest major problems reported by BearingPoint in the Illinois test were Exceptions 19 and 20,[168] which were issued because SBC Illinois was unable to provide the policy information or produce the necessary documentation of processes and procedures for PMR1. BearingPoint posted these Exceptions in late November, 2001. AT&T Exh. 1.0(P), ¶ 53. Exception 19 challenged the adequacy of SBC's data retention policies as the necessary data was not, as a practice, adequately archived and secured such that later audits of the transactions could be performed by SBC or by a CLEC seeking to compare its raw data with that of SBC. *Id.* Exception 20 advised that performance measurement results were being calculated without the controls and procedures expected from an audit perspective. *Id.* According to AT&T, together these interdependent data requirements would, if not corrected, undermine any assumption that the relevant data was being retained reliably, accurately, and with integrity of the results published by SBC, because the data used to render the calculations could not be confirmed to be subject to adequate controls. In other words, in the case where critical inputs to a calculation process lack integrity, the outputs of the process immediately become suspect. *Id.*

2610. AT&T cautions that BearingPoint's Report on its findings of PMR1-1 results give warning to users of SBC's performance results that the results are produced haphazardly and not systematically. AT&T Exh. 1.0(P), ¶ 54. It states that the results produced for *only* 5 of the 18 PM groups *pass* the PMR1-1 test. *Id.* Moreover, while they are important to some modes of business entry, none of the groups that are currently shown as passing are directly related to competitive entry using UNE combinations like UNE-P.[169] The measure groups that reveal the extent of competition in mass markets remain unresolved for the PMR1 test, and in particular, the PMR1-1 test criteria. *Id.*

2611. The criteria BearingPoint uses to evaluate whether the "data processing and technical requirements documentation is complete and up-to-date" for each group is PMR1-2. As AT&T explains, BearingPoint has found only the Bona Fide Request measurements to be adequately documented in the critical disciplines of computer-based processing within the SBC Ameritech performance measurements processing environment. This, according to AT&T, means the system design and programming of the measurements collection steps, calculations, and application of the business rules is inadequate, incomplete, or absent.

2612. BearingPoint tests to verify that the SBC Illinois information technology and business "procedures are in place to ensure adequate capacity for processing and storing metrics data" in its test evaluation criterion PMR1-3. *Id.*, ¶ 56. According to AT&T, BearingPoint has thus far not been able to make a determination for *any* of the 18 measurement groups that the

[168] As we discuss elsewhere in this order, Exceptions 19 and 20 were the initial Exception findings identifying the substantial issues relating to data retention and other data integrity issues.

[169] Mr. Connolly reports the *passing* PM groups are: Miscellaneous Administrative, Directory Assistance/Operator Services; Coordinated Conversions, NXX, and Bona Fide Request. AT&T Exh. 1.0(P), ¶ 54.

SBC Illinois procedures are adequate. AT&T Exh. 1.0(P), ¶ 56. Without a positive test finding in this area, AT&T asserts that there is no certainty that the forecast volumes of CLEC transactions can be accommodated within the performance measurements system. *Id.* AT&T explains that if transaction volumes exceed the capacity for metrics reporting, these transactions might be lost due to their exceeding capacity, which could cause a general system failure due to the excess volumes, or could create mis-reporting of results. *Id.*

2613. AT&T also notes that an additional set of evaluation criteria for PMR1 that has shown significant weakness in the SBC Illinois test is PMR1-4 "Data processing procedures include adequate controls and edits to ensure accurate metrics calculation and reporting." AT&T Exh. 1.0(P), ¶ 57. This test poses the following question: Has SBC Illinois developed computer-based and manual processes that produce accurate and reliable results? According to AT&T, the answer requires SBC Illinois to show that the performance measurement reporting programming is done according to a design that incorporates the business rule formulae and equations necessary for each of the 150 measurements. *Id.* These test results demonstrate the extent to which the processes and procedures are sufficiently stable to produce accurate results month-after-month. The results provided in the December 20 BearingPoint report are overwhelmingly negative. All 18 PM groups have failed this test. (BearingPoint Exception 20) Of the 49 systems that BearingPoint has targeted for its review of the calculation controls and edits, a mere 5 have been shown to be competently controlled. *Id.*

2614. According to AT&T, BearingPoint's testing of its fifth PMR1 (PMR1-5) evaluation criterion has been frustrated by the absence of adequate procedures that would ensure regularly scheduled back-ups of critical data are made. AT&T Exh. 1.0(P), ¶ 58. This data security and integrity process is one that is key to the auditability of performance measures results by a Commission or by any CLEC. Only if the data is adequately protected from erasure, destruction, or corruption, can an audit or replication of previously reported results be made. All 18 PM groups have an "Indeterminate" scoring by BearingPoint for PMR1-5. *Id.*

2615. AT&T explains that the sixth area of inquiry in the PMR1 test involves the retention of transaction data according to regulatory requirements, or in the case of Illinois testing a BearingPoint-developed benchmark of 18 months is the subject of PMR1-6 testing. AT&T Exh. 1.0(P), ¶ 59. The data retention policy is the subject of PMR1-1 testing; here, as AT&T explains, BearingPoint determines whether those policies are practiced. It determines the source systems[170] and systems of record[171] for each performance measurement and tests the documentation provided by SBC Illinois to determine the extent to which that documentation provides an unambiguous depiction of the data elements that are used in calculating each

[170] "A source system refers to the initial electronic capture point of data used for performance reporting." Tr. at 2264.

[171] System of Record – "SBC Ameritech's official retention system for performance measurement-related data." Commission Phase II Exhibit 2, at p. 264.

measure. *Id.* Each data element must be shown to meet the retention period requirements to be considered sufficient for this test. In its initial testing, BearingPoint found, throughout the SBC Illinois system, no usable or reliable data retention practices and procedures. It recorded this defect in Exception 19. AT&T notes that BearingPoint has opened Exception 186 (on February 10, 2003), which provides more detailed analysis establishing SBC Illinois' failures to retain data for the appropriate regulatory time period. AT&T Exh. 1.0(P), ¶ 61; *id*, Attachment 3 (Exception Report 186, version 1, Issued February 10, 2003); AT&T Exh. 1.1, ¶¶ 11-15.

2616. In Exception 186, BearingPoint found that SBC "did not demonstrate that it retained data from certain systems consistent with regulatory requirements."[172] BearingPoint found that SBC failed to retain data from 13 source systems[173] consistent with regulatory requirements which require the retention of data "for a minimum of 24 months after the conclusion of the year in which the data was collected or 12 months after the issuance of the audit report, whichever is later."[174] The affected source systems include a number of critical systems of record such as ARIS/EXACT and ICS/DSS, which are used for pre-ordering, ordering, and provisioning functions, as well as CAMPS, CABS, RBS, DUF files, and ACIS which are used for billing functions.[175] *See* AT&T Exh. 1.1, ¶ 12.

2617. Since the issuance of the Exception, AT&T reports that during a status call, BearingPoint stated that it is continuing its evaluation and plans to release periodic updates regarding any other systems of record and reporting systems that have failed to retain data in accordance with regulatory requirements. AT&T Exh. 1.1, ¶ 13.

2618. In Exception 186, BearingPoint pointed out that SBC should have retained from its source systems all data that have been generated since January 2001.[176] However, BearingPoint found that the oldest data that SBC retained from the DUF Parity files were generated in October 2002. Similarly, the oldest data that SBC retained from the ACIS, CAMPS, and Manual-Directory Assistance Database Measures source systems were generated in January 2002, August 2002, and September 2002 respectively.[177]

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[172] *See* AT&T Exh. 1.0(P), Attachment 3 (BearingPoint Exception 186, dated February 10, 2003) at 1.

[173] AT&T notes that the 13 source systems are: ACIS; ALPSS; ARIS/EXACT; CABS; CAMPS; CC MIS Wholesale; DUF Parity File; ICS/DSS; Manual-Directory Assistance Database Measures; Manual-EBTA; Clear Close; NSDB; and RBS. AT&T Exh. 1.0(P), ¶ 61; *id*, Attachment 3 (Exception Report 186, version 1, Issued February 10, 2003);

[174] BearingPoint Exception 186.

[175] *See* id; Commission Phase II Exhibit 2, at pp. 13-15.

[176] *See* BearingPoint Exception 186, at 1.

[177] BearingPoint Exception 186 at 1.

2619. According to AT&T, the significance of Exception 186 relates to SBC Illinois' ability to provide CLECs and the Commission with the "raw" data necessary for data reconciliation or other auditing activities. AT&T Exh. 1.1, ¶ 15. According to AT&T, Exception 186 demonstrates the fragility of SBC Illinois' claims. If SBC fails to retain the raw data underlying its performance results in accordance with regulatory requirements, it is impossible for CLECs to engage in any meaningful data reconciliation. *Id.* As a result, AT&T states it is absurd for SBC Illinois to assert – as it does here – that it is fully committed to the data reconciliation process. Moreover, BearingPoint's analysis would seem to rebut SBC Illinois' claim. BearingPoint observed in assessing the impact of Exception 186, "[i]f source data is not retained, annual audits of historical data could be impeded," "[a]ttempts to trace errors in the reported results could be hindered," and SBC "may not be able to regenerate performance measurement reports as required."[178]

2620. The last series of tests in the PMR1 function is to determine whether adequate procedures are in place to prevent unauthorized access to performance measurements data to "read" the data, "write" the data, or both. What is meant by this test is that there must be procedures and controls that are defined and practiced to ensure performance reporting data is safeguarded from abuse or loss of integrity from internal or external personnel or systems. AT&T points out that in a case where controls are absent, the test results would show that the data – as reported – could be misrepresented, because it could have been changed by a system or person that is not authorized to have access to the data. AT&T Exh. 1.0(P), ¶ 62. AT&T argues that in the event access controls are insufficient to effect security of the data, BearingPoint would have a negative finding. This is exactly what has transpired: As of its December 20 report, BearingPoint has not determined that *any* of the PM groups are effectively and sufficiently safeguarded and reports all tests as Indeterminate. *Id.*

2621. As AT&T explains, each of these seven PMR 1 test criteria are interrelated with each other and with other portions of the PMR test. AT&T Exh. 1.0(P), ¶ 64. If the data collection routines are well defined and documented, there is higher likelihood that PMR1-2 tests will be satisfied, given the obvious linkage between the business function of collecting and storing the data with the technical processes that actually process and record the data. *Id.* Conversely, states AT&T, technical requirements that are not based on sound business process design will not prove adequate for establishing procedures and processes that are clearly set forth and unambiguous. *Id.*[179]

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[178] BearingPoint Exception 186 at 1.

[179] According to AT&T, this is not the only impact of improperly designed or missing technical requirements relating to data handling. For example, the issue of adequate capacity is not just a function of volume forecasts and capacity planning activities. AT&T Exh. 1.0(P), ¶ 65. A key factor in considering the amount of data that needs to be stored is a concrete definition of which data will be stored, in what format the data will be stored, by what system or systems are the data processed, and through what systems are the data transferred. *Id.* Absent such definition, which is only available from the documentation BearingPoint examines for PMR1-1 and PMR1-2 testing, the results of tests for PMR1-3

2622. AT&T provided a chart showing the interdependencies between the PMR tests. AT&T Exh. 1.0(P), ¶¶ 66-67, which we incorporate below. AT&T witness Connolly explains that, in examining the relationships between each of the PMR1 tests, he constructed the table below in a format similar to that used by BearingPoint to highlight other PMR test results in its report.[180] *Id.*, ¶ 66. As he explains, no PMR1-2 tests are successful when the PMR1-1 results are unsuccessful. According to AT&T, it is also telling that BearingPoint is continuing its evaluation of the adequacy of the capacity planning documentation and has yet to formulate its results, and the "Indeterminate" result is indicative of this ongoing analysis. *Id.* Similarly, in the PMR1-5 testing (at pages 60 through 66 of the Commission Phase II Exhibit 2, Commission Phase II Exhibit 2), BearingPoint states that it is "still assessing whether SBC Ameritech has adequate procedures for performing regularly scheduled back-ups of critical metrics data." AT&T further notes that for PMR1-7 testing (*id.,* at 85 through 90), once again, BearingPoint covers all PM Groups with the same comment: "… is still assessing whether SBC Ameritech has adequate procedures to limit read and write access to metrics data to authorized personnel."

2623. AT&T notes that for PMR1-4 and PMR1-6 testing, the relationship between them and PMR1-1 results is closer. AT&T Exh. 1.0(P), ¶ 67. AT&T finds it highly significant (and troubling) that it is almost always the case that a finding of deficiency in the PMR1-1 test is matched by similar findings of deficiency in the PMR1-4 and PMR1-6 test. *Id.*[181] The chart below displays the relationship for all criteria and measure groupings:

	Measure Group																	
Criteria	Pre-ordering	Ordering	Provisioning	Maintenance & Repair	Billing	Miscellaneous Administrative	Interconnection Trunks	Directory Assistance / Operator Services	Local Number Portability	911	Poles, Conduits and Right-of-Way	Collocation	Directory Assistance Database	Coordinated Conversions	NXX	Bona Fide Requests	Facilities Modification	Other

are likely to remain indeterminate (which, in fact, is their current status as reported by BearingPoint). *See* Commission Phase II Exhibit 2, pp. 48-54.

[180] This information includes the errata statement provided by BearingPoint that involves the results of PMR1-6L as posted on February 3, 2003.

[181] As explained by Mr. Connolly, in only 3 cases involving just 11 of the 150 measurements has BearingPoint found satisfactory results (PMR1-6 only) where the PMR1-1 and PMR1-2 results were not satisfactory. AT&T Exh. 1.0(P), ¶ 67 & n. 27. In all other cases, the pattern is clear – not satisfied process and technical documentation issues are harbingers of not satisfied scores for process controls and data retention. *Id.*

	Measure Group																	
Criteria	Pre-ordering	Ordering	Provisioning	Maintenance & Repair	Billing	Miscellaneous Administrative	Interconnection Trunks	Directory Assistance / Operator Services	Local Number Portability	911	Poles, Conduits and Right-of-Way	Collocation	Directory Assistance Database	Coordinated Conversions	NXX	Bona Fide Requests	Facilities Modification	Other
Data collection and storage process documentation	N	N	N	N	N	S	N	S	N	N	N	N	N	S	S	S	N	N
Data processing and technical requirements documentation	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	S	N	N
Capacity procedures for processing and storing	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I
Processing controls and edits	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N
Regularly scheduled back-ups of critical data	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I
Data retained per regulatory requirements	N	N	N	N	N	S	N	S	N	S	S	S	N	S	N	S	N	N
Authorized access procedures	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I	I
KEY: I = Indeterminate S = Satisfied N = Not Satisfied																		

2624. According to AT&T, the failures contained in the BearingPoint report on SBC Illinois process controls are further (and dramatically) evidenced in the frequency of restatements of performance results. AT&T Exh. 1.0, ¶ 68, 105-115. Of great concern to AT&T is the extent to which SBC Illinois has failed the PMR1-6 tests. According to AT&T, the recently-issued Exception 186 underscores this concern: "SBC Ameritech has been unable to demonstrate that certain systems of record and reporting system data have been retained consistent with regulatory requirements." The Exception details that 10 of the 18 PM Groups are imperiled by the inadequate periods for which data has been retained. AT&T Exh. 1.0(P), ¶ 68. A CLEC that requests its performance measurements data for reconciliation purposes for any of those measure groups and for any of those periods of time stands to receive an incomplete set of data. AT&T argues that the consequence will be an inability of the CLEC and SBC to arrive at a meaningful agreement on the reported results, and possibly a dispute before the Commission with inadequate data from SBC Illinois. *Id.*

PMR 4 – Data Integrity

2625. The next area that AT&T discusses is the PMR 4 test, which examines the overall integrity of SBC Illinois' PMR data. BearingPoint's PMR4 testing consists of 4 evaluation criteria which are applied for each of the 150 performance measurements and are reported on the basis of the 18 performance measure groups:

PMR4-1. Required source records are included in data used to calculate measures.

PMR4-2. Inappropriate records are not present in process data used to calculate measures.

PMR4-3. Records in processed data used to calculate measures are consistent with unprocessed data from source systems.

PMR4-4. Data fields in processed data used to calculate measures are consistent with unprocessed data from source systems.

2626. As AT&T explains, BearingPoint's four-part analysis is consistent with data integrity testing performed in other § 271 tests. AT&T Comments, p. 2; AT&T Exh. 1.0(P), ¶ 70. And as AT&T also highlights, positive test results are essential if the performance results published by SBC Illinois are to be given any credibility. *Id.* AT&T notes that the MTP guides this testing regimen by setting out three fundamental activities to be examined: (1) Transfer of data from point(s) of collection – is the process adequate to ensure that data gets transferred from its point of origin to the reporting system(s) accurately and completely; (2) Conversion of data from raw to processed form – are there adequate policies, procedures, and controls in place that ensure the data conversions result in accurate and complete data, in the required form and format; and (3) Internal controls – does SBC Illinois provide a well-defined, documented and managed system of controls for performance measurements data. MTP, at pp. 28-29.

2627. According to AT&T, the PMR4 is the test of the integrity of the system, including the data within it, from beginning to end. These test steps confirm and ensure that raw transaction data – such as CLEC LSR entries, trouble ticket dates and times, collocation requests, and trunk blocking rates – are *actually* used in the calculation of the appropriate measures. AT&T Exh. 1.0(P), ¶ 71. Put another way, these tests attempt to remove any doubt that the "raw" data that reflects the actual experience being measured (e.g., a close out code in a M&R report) are not in some manner manipulated and/or changed prior to the calculation of a performance metric results. *Id.* Negative ("not satisfied") findings are problematic, because they mean there are no assurances that the reported results are accurately based on the actual CLEC transactions (and in the case of parity measures, on the retail analog data). *Id.*

2628. Unfortunately, as AT&T notes, SBC Illinois has a poor showing for PMR4 testing. BearingPoint has issued 12 Exceptions and 18 Observations to date. AT&T Exh. 1.0(P), ¶ 72. Only a handful of these Exceptions and Observations have been resolved (*i.e.*, 5 exceptions and 12 observations). *Id.* The open Exceptions and Observations involve discrepancies that BearingPoint has found which involve 77 of the 150 SBC Illinois performance measurements. *Id.* There are 56 performance measurements involved in the unresolved PMR4 Exceptions and Observations. *Id.*

2629. According to AT&T, PMR4 is one of the (if not *the* most) disappointing aspects of SBC Illinois' performance as reported in the BearingPoint test. AT&T Exh. 1.0(P), ¶ 74. A mere two of the 72 test points have tested successful by BearingPoint to date. *Id.* Whether the result is expressed as a factor of total PMR4 test points (2.8%) or of applicable test points (5%), the result remains a dismal showing. And this poor state persists despite the fact that BearingPoint first issued notice of deficient data integrity documentation (Exception 20) in November 2001. *Id.*

2630. AT&T also explains that BearingPoint continues to evaluate all four of the PMR4 criteria for the Pre-Ordering and Maintenance & Repair groups; three of the four criteria for Ordering and Provisioning; and half of the criteria for Billing, Interconnection Trunks, Local Number Portability, Coordinated Conversions, Facilities Modification, and the Other category of measure groups. AT&T Exh. 1.0(P), ¶ 75. Only 6 of the 18 groups have been finalized for evaluation of data integrity, and the ones with the most significant impact on AT&T's UNE-P end users are found by BearingPoint to have failed 5% of the test points and remain indeterminate as to the remaining 95%. *Id.*

2631. Moreover, AT&T explains that the "not satisfied" findings by BearingPoint are not isolated to just a few measure groups; the findings impact most of the critical performance measure groups involved in local competition. The Not Satisfied criteria for PMR4 impact Ordering, Provisioning, Billing, Local Number Portability, 911, Coordinated Conversions, Bona Fide Requests, and Other measure groups. AT&T Exh. 1.0(P), ¶ 76. In 8 of the 12 Not Satisfied results, BearingPoint finds that SBC Illinois fails PMR4 Criteria 4; in three of the groups, PMR4-3 criteria are not met; and in PMR4-1, the Billing PM group fails BearingPoint's tests. *Id.* AT&T provided another chart (incorporated below), which highlights the Not Satisfied results. Importantly, as AT&T notes, none of the three tests for any of these nine measure groups have a Satisfactory test result. *Id.*

PMR4 Criteria	Measure Group								
	Pre-ordering	Ordering	Provisioning	Billing	LNP	911	Coordinated Conversions	Bona Fide Requests	Other
4-1 Required source records are included in data used to calculate measures.	I	I	I	**NS**	I	na	I	na	I
4-3 Records in processed data used to calculate measures are consistent with unprocessed data from source systems.	I	I	I	I	I	**NS**	I	**NS**	**NS**
4-4 Data fields in processed data used to calculate measures are consistent with unprocessed data from source systems.	I	**NS**	**NS**	**NS**	**NS**	**NS**	**NS**	**NS**	**NS**
KEY: I = Indeterminate NS = Not Satisfied na = Not Applicable									

2632. AT&T also notes that BearingPoint provides highly relevant additional information in its Report regarding the status of the testing for each of the PMR4 criteria. *See* Commission Phase II Exhibit 2, Table 4-23 (at pp. 182 through 186).[182] This information provides, in detail, the performance measures that are yielding "Not Satisfied" evaluation criteria for test PMR4-4 for each of the PM groups. AT&T notes that if one examines the Ordering Group, which is comprised of 18 PMs, *in every case* the CLEC Aggregate analysis of the consistency between raw data and the data used to calculate and report the results is marked "tbd". *Id.*; AT&T Exh. 1.0(P), ¶ 77. AT&T explains that this means that BearingPoint has not successfully completed its validation of the information that is defined as the means by which calculations are rendered against the source(s) of the information. *Id.* The same can be said for the 29 Provisioning and 17 Maintenance and Repair measurements. AT&T Exh. 1.0 (P), ¶ 77. BearingPoint has not been able to analyze the source data sufficiently to verify its relationship to the data used to generate the SBC IL reports for any of the 64 measures in these 3 critical PM groups. *Id.*

[182] BearingPoint sent notice of its errata sheet for page 183 of this report on February 3, 2003.

2633. According to AT&T, like the failures by SBC Illinois to satisfy the PMR 1 tests, the failures in PMR4 testing hold serious consequences for other aspects of the PMR test, and bode poorly for users of performance results information provided from the SBC Illinois PM system. AT&T Exh. 1.0(P), ¶ 78. BearingPoint has found widespread and pervasive failures in the SBC Illinois system for establishing and maintaining processes and procedures that ensure data integrity. *Id.* AT&T explains that until SBC Illinois can be shown to satisfy the PMR 4 test, the data that enters the system may be subjected to corruption as it is transformed from one system or database to another. *Id.* Moreover, according to AT&T's witnesses, the eventual residing place – the specific reporting system for each metric – may not hold a reliable and accurate depiction of the data. *Id.*

2634. For example, in the case of a trouble ticket duration, where BearingPoint has found the duration (the hours and minutes the ticket was open) in the reporting system to be different from the duration in the source system, the calculations of Mean Time To Repair are unreliable. AT&T Exh. 1.0(P), ¶ 79. Not only did BearingPoint find discrepancies in durations, it also found four other types of data in the reporting system for Performance Measure 119 "Mean Time to Repair – NXX" that were inconsistent with those in the source system.

2635. Similarly, AT&T notes, in Observation 809, which involves Performance Measure 10 "Percent Mechanized Rejects Returned within 1 hour of receipt of reject in MOR" and Performance Measure 11 "Mean Time to Return Mechanized Rejects," BearingPoint found "that 43,103 out of 107,435 mechanized reject transactions (40 percent of the total) appear to have negative durations for the July 2002 data month. AT&T Exh. 1.0(P), ¶ 80. In other words, each reject appears to have been sent to the CLEC by SBC Ameritech before it was "available" to be sent." BearingPoint succinctly noted the significance of these discrepancies:

> The data used to calculate reject timeliness measures must reflect the actual transaction time durations in order for regulators and CLECs to rely upon the published results. Inaccurate underlying data necessarily creates inaccurate and confusing results, which cannot be relied upon by regulators and CLECs. (*See* AT&T Exh. 1.0(P), Attachment 4 (Observation Report 809, at 2.))

2636. According to AT&T's analyses, nearly 20 percent of the performance measures are in question as recorded in the open PMR4 observations, and nearly 25 percent are implicated by the unresolved PMR4 Exceptions. AT&T Exh. 1.0(P), ¶ 80.[183] AT&T contends that the Commission cannot reasonably accept the assertion of SBC Illinois, as to the Not Satisfied results in PMR4 testing occasioned by unresolved Exceptions, that " … none of them reflect a

[183] According to Mr. Connolly's testimony, there were 28 PMs that are the subject of the 13 currently unresolved PMR4 Observations. The 10 unresolved PMR4 Exceptions impact 35 PMs. There are 7 PMs that are impacted by both open Exceptions and Observations.

material performance reporting issue." SBC Illinois Exh. 2.0, at ¶ 252. According to AT&T, the pervasiveness of the data integrity problems that plague SBC Illinois' metrics system inescapably undermines the quality of the reported data and the reliability of the reports in a fundamental way. AT&T Exh. 1.0(P), ¶ 80.

PMR 5 – Metric Recalculation

2637. As explained in AT&T's testimony and comments, the Master Test Plan establishes that the objective for the PMR5 test is, "to determine the accuracy of recent metrics calculations and to verify that the metrics as produced by Ameritech are consistent with its documentation and stated objectives." [184] AT&T Comments, pp. 2-3; AT&T Exh. 1.0(P), ¶ 81. According to AT&T, BearingPoint is currently using the published results of July and August 2002 activity, as reported by SBC Illinois on December 20 as the "recent" calculations of metrics. AT&T Exh. 1.0(P), ¶ 81.[185]

2638. As with the other PMR tests, BearingPoint's examination is based upon the MTP. AT&T Exh. 1.0 (P), ¶ 82. The PMR5 test "evaluates the processes used to calculate performance metrics and retail analogs. The test will rely on re-calculating metrics and retail analogs and reconciling any discrepancies to verify and validate the reporting of the metrics."[186] The methods employed by BearingPoint in this test rely on replicating the published results. BearingPoint uses the *actual* data, in this case, from the SBC Illinois systems, and then uses computer programs that incorporate the negotiated and agreed SBC Illinois Business Rules that apply to the performance metrics. AT&T Exh. 1.0(P), ¶ 82. In fact, as AT&T witness Connolly notes, the replication method used by BearingPoint is the same method that was accepted by the New York Commission Staff to attest to the adequacy of the Bell Atlantic (now Verizon) PMR system. *Id.* Mr. Connolly knows this because he represented AT&T as one of its analysts that worked closely with the test managers and Staff. *Id.*

2639. Mr. Connolly notes that a successful result is achieved when SBC Illinois' published results for the same period are the same as those calculated by BearingPoint. But as he points out, SBC Illinois has not yet completed successfully even one time period for examination. AT&T Exh. 1.0(P), ¶ 83. "The timetable for this test has slipped time and again due the inadequacies in SBC Illinois data, business rules, or other processes which have precluded BearingPoint from comparing and validating the SBC Illinois performance results." *Id*

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[184] MTP, at 29

[185] *See* Commission Phase II Exhibit 2, at p. 189.

[186] Id.

Mr. Connolly further explains:

> It is my understanding from my direct participation in the conduct of this third party test that Staff, SBC Illinois, and BearingPoint determine which target month(s) to use for replication analysis. In the early stages of the test (early in 2001), the decision was made to focus on April 2001 as the replication month. This meant that BearingPoint would go through the PMR5 steps and attempt to achieve the same results using its replication methodology as were achieved by SBC Illinois when it published April 2001 results. Based on available documentation, namely status reports published by Staff and BearingPoint, along with Observations and Exceptions, I do not believe a deferral period was added to the April data month. The efforts to replicate to April 2001 were unsuccessful. Similarly, BearingPoint's later efforts to replicate October 2001 data (begun in December 2001) were also unsuccessful. AT&T Exh. 1.0(P), ¶ 84.

2640. AT&T also points out that in its March 2002 Status Report the Commission's Staff again announced it had shifted the target month for replication activities:

> After consulting with ICC Staff, KPMG Consulting has adjusted the Metric's testing plan so that it reflects that KPMG Consulting will be attempting to replicate Ameritech's performance metrics for the months of January, February and March 2002. KPMG Consulting recommended shifting the PMR 5 – Data Replication months so that it could focus on more recent sets of metrics in its analysis. KPMG Consulting will retest issues raised through the observation and exception process for previous months. Additionally, there may be some performance metrics that KPMG Consulting will attempt to replicate April 2002 results. For example, at least one of the Billing metrics will be replicated for the month of April 2002.

2641. And In its October 2002 Report, Staff once again announced an adjustment of the date targeted for replication:

> ICC Staff, SBC Ameritech, and BearingPoint completed their work on developing a PMR 5 methodology document. During these discussions, SBC Ameritech proposed shifting the metrics replication effort for certain PM groups from January and February 2002 to July and August 2002. BearingPoint is now attempting to replicate the following ten PM groups for July and August 2002: 911, Billing, Coordinated Conversions, Local Number Portability,

Maintenance and Repair, Miscellaneous Administrative, Ordering, Other, Pre-order, and Provisioning.

2642. According to AT&T, the shifting of the target month for replication has a significant impact on BearingPoint's work in progress, causing schedules to be redrafted to add significant blocks of time to the project plans. AT&T Exh. 1.0(P), ¶ 86. Upon the decision to refocus the data month(s), BearingPoint has explained that a number of tasks are brought into play to effect the change, both at the technical level and at the level where its analysts conduct the replication tests. *Id.* BearingPoint is required to secure all of its work on the existing replication months, being sure to track the individual PM analyses that are in process separately from those that have been concluded, with either positive or negative test status. *Id.* It must make changes to its business rule software system to accommodate all changes to business rules that have been made by SBC Illinois in its production system(s). *Id.* It must acquire the new target month source and reporting system data from SBC Illinois. *Id.* It must conduct samples of the data to ensure it is complete and conforms to its testing specifications for comprehensiveness and population. *Id.* It must segregate the prior test systems and databases from the environment that it establishes for the new target month. *Id.* For those PMs where BearingPoint issued an Exception or Observation regarding its inability to replicate results, it must determine whether corrective action, if any proposed at that time, should be implemented into its own version of the business rules, or whether it is more appropriate to consider the correction in the new study period. *Id.* For measures failing replication, where corrective action has not been proposed by SBC Illinois, BearingPoint can close the earlier-period Observation and turn to the new period to attempt replication. *Id.*

2643. According to AT&T, these tasks take several weeks to accomplish, if all goes according to plan, and have taken additional time when errors are detected and rework is necessary. Thus, notes AT&T, the shifting of replication target months is not a simple program, and it is one that has been required twice in 2002, alone. From AT&T's perspective, interested parties can only hope BearingPoint succeeds with the July/August replications so that another retargeting is not required before the testing is complete. AT&T Exh. 1.0(P), ¶ 87.

2644. Like the PMR 1 and 4 test, the PMR5 test is comprised of 4 separate but highly interdependent tests that are conducted for each of the 150 measurements and are reported by BearingPoint at the PM Group level:

PMR5-1. Required metrics are included in the each of the PM Groups
PMR5-2. Metrics values agree for each of the PM Groups
PMR5-3. Calculations are consistent with the documented rules for each of the PM Groups
PMR5-4. Exclusions are consistent with the documented rules for each of the PM Groups

2645. The detailed, test-by-test and measurement group-specific test results are provided in the BearingPoint Report in Tables 5-2 through 5-5. Commission Phase II Exhibit 2, at pp. 190

through 229. According to AT&T, the summary chart reveals that SBC Illinois has succeeded only on PMR5-1, and has thus far not been able to satisfy the test criteria PMR5-2 though PMR5-4. The 54 test criteria are Not Satisfied for 40 (74%) tests, Indeterminate for 11 (20%) and Satisfied for 3 (6%), based on BearingPoint's efforts to replicate July and August, 2002 results. AT&T Exh. 1.0(P), ¶ 89.

2646. BearingPoint reports on both the January data month replication work that it has done and the July/August replications in its PMR5 summary tables. These include separate charts for each of the 4 PMR5 tests. Tables 5-6 and 5-7 are the companion results for PMR5-1 testing, and these show general success (16 out of 18) in satisfying the test criteria "Required Metrics are included in the PM Group."

2647. However, AT&T notes that Tables 5-8 and 5-9 of the same report display the results that can be compared to show July/August versus January replication results for PMR5-2 testing. As AT&T explains, because the Pre-Ordering and Other groups failed in January PMR5-1, by design, they fail the PMR5-2 standards for the same period. AT&T Exh. 1.0(P), ¶ 91. Moreover, as AT&T notes, SBC Illinois failed four more group tests in the January-based testing. *Id.* The results from July/August testing are even less promising. *Id.*

2648. The results of PMR5-3 testing are summarized in Tables 5-10 and 5-11 of the same report. As AT&T explains, the compound effect of the negative results is evident: the July/August test results show PMR5-3 failures that are directly attributed to the failures to achieve satisfactory results in the PMR5-2 tests. AT&T Exh. 1.0(P), ¶ 93.

2649. In AT&T's view, PMR 5 is infected with the same cross-functional failures exhibited in the PMR 1 and PMR 4 tests. The compounded effect of unresolved PMR1 and PMR4 test failures are part of the reason for the abject failure of SBC Illinois to satisfy PMR5 test criteria. AT&T Exh. 1.0(P), ¶ 95. According to Mr. Connolly:

> The testing science employed by BearingPoint weaves the business processes and technical implementations of performance measurements collection and reporting throughout the test family. The added dimension of PMR5 tests -- the replication of results that square with those reported by SBC Illinois -- only adds grounds for doubt about the core competence of the measurements system. *Clearly, if the reporting system content is not traceable to source data (PMR4), and where the documentation that would help to solve that puzzle is incomplete or inaccurate (PMR1), it would not be a surprise to find that the results of tandem calculations by SBC Illinois and BearingPoint through separately developed business rules programs produce different results.* AT&T Exh. 1.0(P), ¶ 95 (emphasis added).

2650. According to AT&T, the BearingPoint PMR test report is replete with demonstrations of PMs and PM Groups where the systematic breakdowns occur across all three of these PMR tests. AT&T Exh. 1.0(P), ¶ 96. There are 15 evaluation criteria for the PMR1, 4 and 5 tests, and for 9 of the PM Groups, 7 or more of them are not satisfied; only one (Bona Fide Requests) has 7 satisfied criteria. As AT&T graphically displays in one of its exhibits: *Ten of the PM Groups have but 1 Satisfied criteria.* AT&T witness Connolly provides a chart (AT&T Exh. 1.0 (P), Attachment 5), which portrays the number of criteria for each of the 18 PM Groups to indicate how many are in each of the Satisfied, Not Satisfied, Indeterminate, and Not Applicable categories.

2651. Therefore, as AT&T explains, as BearingPoint continues its testing, the extent to which SBC Illinois cooperates in proposing and implementing timely and effective solutions to PMR5 (and all other incomplete tests) issues, through process, system, and other modifications that are necessary, will determine the pace and extent of BearingPoint's progress. Without SBC Illinois' direct and committed involvement, the slow pace in resolving PMR5 issues will no doubt continue to drag out the BearingPoint testing. Of the 69 unresolved PMR5 Observations, 48 were issued prior to the BearingPoint December 20 Report, and 10 are more than 6 months old. AT&T urges the Commission to demand more dedication from SBC Illinois than it is currently exhibiting in the processing of unresolved PMR Exceptions and Observations. AT&T Exh. 1.0(P), ¶ 97.

Failure To Replicate SBC Illinois' Retail Performance Metric Data.

2652. AT&T raises an additional concern with regard to SBC Illinois' failure to satisfy the PMR 5 test (and the Master Test Plan generally). As its witness, Mr. Connolly notes in his affidavit: "Measuring the success of an ILEC's OSS against identified requirements typically begs the question of the source of the standards used to determine pass or fail." AT&T Exh. 1.0(P), ¶ 98. Thus, according to AT&T, BearingPoint recorded its test evaluation criteria pursuant to the collaboratively-developed Master Test Plan and the system of performance measurements that are the Illinois standards.[187] In contrast, and relevant to the following discussion, the criteria in the Performance Measurements system are specifically defined as parity with retail, benchmarks, or diagnostic measurements. [188]

[187] MPT, at 16.

[188] Therefore, as AT&T notes, for transaction testing to be deemed successful, BearingPoint is required to evaluate the functionality, i.e., whether the SBC Illinois OSS receives, processes, and provisions CLEC transactions according to the design of its systems. This evaluation, consistent with the MTP, includes the various methods of transaction types and the interfaces used to communicate between CLECs and SBC Illinois. The additional testing is to determine whether SBC Illinois provides the Test CLEC with service that is consistent with the standards it has agreed to meet. These tests answer the qualitative issues surrounding the functionality testing. AT&T Exh. 1.0(P), ¶ 101.

2653. But as AT&T points out, BearingPoint was hamstrung significantly in establishing the retail standards for transactions that are parity-based for its quantitative analyses because, for many measures, SBC Illinois' retail results could not be validated. AT&T Exh. 1.0(P), ¶ 100. The failures of SBC Illinois to demonstrate that it has accurately calculated the retail results is tied to the same SBC Illinois failures to satisfy the same PMR test criteria (discussed above in the sections on PMR 1, 4 and 5). According to AT&T, not only did SBC Illinois fail to accurately collect, store, calculate, and report results for wholesale processes, it also did not meet the tests for retail results. *Id.*

2654. According to AT&T, the failure of SBC Illinois to provide BearingPoint sufficient information to allow it to validate the retail data necessary for parity measurements comparisons is another critical downfall by SBC Illinois in the test. In the circumstances where retail data could not be used (because it could not be validated), BearingPoint had to design an alternative measurement to the retail standard (a retail "analog" or "surrogate"), and it did so using its professional judgment based on its experience in testing for other RBOC regions. AT&T Exh. 1.0(P), ¶ 101. It adopted retail result surrogates to determine whether the Test CLEC was receiving "adequate" service where it would otherwise have used the retail results to determine whether the Test CLEC results were consistent, i.e., at parity. *Id.*

2655. Moreover, due to SBC Illinois's insistence that test reports be produced from incomplete results, the quantitative analyses of transaction testing are based on the retail result *surrogates* and not the actual retail results for each of the months of transaction testing. AT&T Exh. 1.0(P), ¶ 102. This, AT&T argues, is a critical shortcoming. BearingPoint is required to evaluate Test CLEC results against the retail parity standard in far more cases than it indicates that it has in its report. AT&T Exh. 1.0(P), ¶ 103. The Performance Measurements system, Version 1.8 as approved by the Commission, prescribes retail parity as the standard for numerous pre-ordering, ordering, provisioning, repair, and billing measurements. (*See, e.g.,* Performance Measures 1.1, 1.2, 12, 13, 14, 17, 22, 25, 27, 28, 30, 31, 35, 37, 37.1, 38, 40-50, 59-69, etc.) In the cases where BearingPoint used a retail result surrogate, AT&T believes it should subject the Test CLEC results to the retail actual results *for the same period*, once it has verified that the retail result calculated by SBC Illinois is accurate. AT&T Exh. 1.0(P), ¶ 103. Inexplicably, according to AT&T, BearingPoint did not validate these results, so SBC Illinois's self-reported results were not verified for accuracy. *Id.* According to AT&T, there should be no reason to believe BearingPoint is unable to do this second stage testing of the qualitative aspects of transaction testing. AT&T Exh. 1.0(P), ¶ 104.[189] According to AT&T, it simply has not undertaken to do so, for unexplained reasons. Thus, AT&T request that the Commission direct SBC Illinois and BearingPoint to perform properly the retail parity analyses that have been omitted due to SBC Illinois' inability to provide valid retail data.

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[189] As Mr. Connolly explains: "In response to questions that were posed to BearingPoint in regard to actions that it was taking with Exception 132 ('SBC Ameritech in Illinois has failed to process Special Circuit trouble reports with a Mean Time To Restore (MTTR) interval at least equal to that of retail'), BearingPoint advised: 'BearingPoint does not intend to revisit its analysis unless it is directed to do so by one or more commissions and the relevant published retail results are restated for all relevant months.'" AT&T Exh. 1.0(P), ¶ 104.

Restatements

2656. AT&T also points to the number of performance measurement report *restatements* as a gauge for the reliability of SBC Illinois' performance measurement reporting systems. As AT&T notes, restatements reflects the extent to which an ILEC's noncompliance with a Business Rule has been detected by any source –including the IELC – and the ILEC has attempted to correct that error;[190] the number of *exceptions and observations* issued in testing indicates the number of times that the audit detected non-compliance with business rules through its transaction testing, process and procedure testing, and most often, performance measures auditing test processes. AT&T Exh. 1.0(P), ¶ 105.

2657. Therefore, according to AT&T, these restatements, exceptions and observations all signal instances of non-compliance. Taken together, AT&T concludes that the vast number of problems in each of these categories uncovered by the BearingPoint's testing indicate that the systems and processes used by SBC Illinois to collect, store, calculate and publish performance data are unstable, unreliable, have inadequate controls, and simply are not sufficient to produce accurate and complete reports on SBC Illinois' wholesale and retail operations. AT&T Exh. 1.0(P), ¶ 106.

2658. AT&T rejects SBC Illinois' claims and explanations for the numerous restatements that have been published. According to AT&T's witness Connolly: "[I]f the systems were programmed correctly – a task BearingPoint has been trying to address through its testing – it would be very unlikely for errors to creep into the process. " AT&T Exh. 1.0(P), ¶ 107.

2659. Indeed, AT&T, through Mr. Connolly, presented its own analysis showing the enormous numbers of restatements. AT&T Exh. 1.0(P), ¶ 108. As he explained, many times a single error will permeate the performance measure system and cause several different performance measures to be restated. AT&T Exh. 1.0(P), ¶ 110. Accordingly, to fully understand the impact of a given Restatement, AT&T states that the Commission must view the number of performance measures that had to be corrected as a result of the error that prompted the Restatement. Id.

2660. According to Mr. Connolly's analyses, restatements are occurring at an alarming rate and on a routine, monthly basis in the SBC Midwest region. He states: "It is the enormous number of these errors committed by SBC that should be of concern to the Commission. In my experience and to my knowledge, no other ILEC's performance results require the number of

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[190] *See* Georgia § 271 Order, p. 13 & n. 62.

restatements as do SBC's. Worse, as indicated by the following chart, the restatements have become more and more pervasive during the past 11 months:" [191]

	Restatements Made In								
Results Month	May	June	July	Aug	Sept	Oct	Nov	Dec	Total
March	4	7	7	7	22	62	1	21	**131**
April			49	24	37	63	1	23	**197**
May				26	40	59	9	22	**156**
June				23	40	64	2	22	**151**
July					22	70	2	36	**130**
August					1	15	2	56	**74**
September						1	0	58	**59**
October								9	**9**
Total	**4**	**7**	**56**	**80**	**162**	**334**	**16**	**247**	**907**

2661. According to AT&T, the above chart strikingly illustrates that the Commission simply cannot rely only on the three months of performance data submitted by SBC Illinois remaining stable. Indeed, it is almost certain that the September, October and November data presented by SBC Illinois will be restated in the future, and if the recent past provides any indication, will be restated multiple times with dramatic results. AT&T Exh. 1.0(P), ¶ 112.

2662. Moreover, in AT&T's view, these restatements must all must be considered "material" changes in SBC Illinois' results. Throughout the system of SBC Illinois performance measures, tolerances are provided to account for errors in data, processes, and operations. AT&T Exh. 1.0, ¶ 113. AT&T rejects SBC Illinois' suggestion that some new "materiality" standard should be used to minimize the number of restatements. According to AT&T, what should be relevant to the Commission's analysis is the sheer volume of the performance measures that have needed to be restated thus far as a result of SBC Illinois's failures to comply with the Business Rules – which numbered 907 restatements through December 2002. *Id.*

2663. Furthermore, AT&T states that "material" or not – that number of mistakes reflected in the restatements demonstrates that SBC Illinois's performance systems and processes are not performing as they should and are not subject to adequate controls. AT&T Exh. 1.0(P), ¶ 114. AT&T urges the Commission to reject SBC Illinois' contention that restatements confirm that SBC Illinois has sufficient controls in place to identify and correct errors. *Id.*. In particular, AT&T notes that several measures have been restated month-after-month. For example, the performance measures for flow through (PMs 13 and 13.1) and provisioning measures (such as PMs 27 to 33, and 37 to 50) are consistently restated. AT&T Exh. 1.0(P), ¶ 115. According to AT&T, this further evidences that SBC Illinois's performance reporting system is not under control, and is unstable.

[191] AT&T Exh. 1.0(P), ¶ 111.

The Ernst and Young Audit

2664. AT&T submits that there are multiple reasons that should cause the Commission to conclude that the E&Y audit does not demonstrate that SBC's performance data are complete, accurate and reliable. According to AT&T, any notion that the E&Y audit validates the accuracy of SBC Illinois' performance data is belied by: (1) the fundamental procedural and substantive defects in the auditing process, including the lack of any military-style testing to verify that errors in SBC's performance monitoring and reporting system were corrected; (2) E&Y's own reports which are riddled with examples of deficiencies in the data monitoring and reporting processes that have spawned inaccuracies in performance results which remain unremedied; and (3) the deficiencies in SBC's performance monitoring and reporting system that E&Y failed to detect and that BearingPoint uncovered.

The E&Y Audit Procedures Are Flawed.

2665. As explained by AT&T, during the course of its engagements, E&Y issued a series of reports and associated documents. Despite the numerous documents issued, however, AT&T submits that the E&Y audit cannot substitute the detailed, military-style process that BearingPoint is conducting. AT&T Exh. 1.0(P), ¶ 118. In fact, in nearly every material respect according to AT&T, the E&Y audit's scope and methodology[192] is not consistent with the objectives of the Commission's Merger Order or the Master Test Plan, which guide BearingPoint's activities. According to AT&T, these inconsistencies include:

2666. **Raw Data**. The E&Y audit (as well as subsequent work to verify the corrective measures SBC has taken) cannot legitimately be relied upon as proof of the accuracy of SBC's data because E&Y's audit is both procedurally and substantively flawed. AT&T Exh. 1.0(P), ¶ 119. Verification of the accuracy of reported results requires a comprehensive evaluation of all elements in the data collection, monitoring and reporting processing streams. That examination necessarily involves an assessment of the accuracy of the raw input data, as well as an assessment of a BOC's obligation to apply correctly the calculations, formulas, and exclusions in business rules governing the measures when calculating performance results. However, during its audit, E&Y *assumed* that SBC's input raw data were accurate. Starting from that basic assumption, E&Y then assessed whether, *inter alia*, SBC converted its input data into performance results that complied with the metrics business rules.

2667. **Limited Test Criteria/Temporal Scope**. The E&Y audit was otherwise limited in scope. AT&T Exh. 1.0(P), ¶ 120. It was, first of all, limited to a portion of PMR1, and PMR4 and PMR5. More importantly, E&Y tested SBC's March, April and May 2002 data, while BearingPoint is currently testing July, August and September 2002 data. To complicate and confuse matters further, SBC Illinois has submitted performance data to this Commission for

[192] SBC Illinois Exh. 2.0, Attachment N.

September, October and November, 2002. AT&T submits that it simply cannot be accepted that E&Y has conducted its audit, made its findings, ensured some corrective actions have been taken – all regarding three particular months of data – and, turning a blind eye to those months of results, implicitly endorsing a different set of data, produced by systems that have been newly implemented, using processes and procedures that have been modified. This data is un-audited by E &Y, and E&Y has in fact been careful to disclaim the ability to apply its results to months other than those it reviewed.

2668. **Materiality**. In addition, according to AT&T, the significant methodological deficiencies in E&Y's auditing activities show that SBC Illinois cannot legitimately contend that the E&Y audit confirms the validity and accuracy of its reported data. AT&T Exh. 1.0(P), ¶ 121. For example, the E&Y audit was not designed to identify and has not identified all instances in which SBC Illinois improperly implemented the business rules governing the metrics. During its testing, E&Y identified "[e]xceptions to compliance with the Business Rules" only if they were deemed "material" because they met one or both of the following two criteria:

> (a) the error, if corrected, would change the original reported performance measurement ("PM") result by five percent or more, and/or
>
> (b) the error, if corrected, would cause the PM's original reported parity attainment/failure or benchmark attainment/failure to reverse.193

2669. Because of E&Y's flawed and misguided definition of "materiality," AT&T argues, significant defects in SBC Illinois' reported data that do not meet E&Y's "materiality" test are not reported by E&Y. Under E&Y's approach, a substantial defect in SBC's data would go undetected if the volumes for the measure during the time period covered by the audit were sufficiently low that performance results would not be adversely impacted. In the case where the results for a given measure for each of the three months were equivalently affected by non-compliance of a business rule, E&Y would not consider that a material non-compliance and would not report that failure.

2670. Geographical/**Pseudo-CLEC Testing.** Furthermore, unlike the BearingPoint audit, which is Illinois-specific and uses pseudo-CLEC transactions, AT&T notes that E&Y performed its transaction testing using data culled from the five SBC Ameritech states rather than an Illinois specific test[194] and has not utilized Test CLEC activity to test the compliance

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[193] SBC Illinois Exh. 2.0, , Attachment. O, p. 1 & n. 3.

[194] Tr. at 3320.

with business rules or to develop its conclusions." AT&T Exh. 1.0(P), ¶ 122. The failure of E&Y to perform independent calculations of measures based upon Test-CLEC data is a fundamental defect in audit design because the data captured from submitting known test transactions is extremely valuable in determining data integrity – the auditor can compare its source records with those asserted by the subject to be true and accurate source records. In conducting an audit with SBC Illinois, that is exactly the first fact that a CLEC must be able to establish to go through a systematic analysis of performance measurement results.

2671. **Analytical Review.** During its audit, E&Y claims that it undertook an analysis of "volumes, fluctuations in results and reasons for parity or out-of-parity results for the period under examination."[195] However, AT&T argues that E&Y's "analytical review" was woefully inadequate. AT&T Exh. 1.0(P), ¶ 123. Essentially, E&Y discussed those issues with SBC, read the SBC response or listened to SBC's explanations and excuses for various results, and then determined if the explanation was "reasonable." No additional testing or corrective measures were required, and E&Y did not consult with any third parties for input on the "reasonableness" of SBC's explanations. In conducting its analytical review, it also did not transfer the fruits of its analysis to the transaction testing discipline. E&Y did not correlate the realities of CLEC transactions through the SBC Illinois system with the samples it used to conduct its tests. In this particular case, the sample was obviously skewed and it should have been rejected or at least supplemented with judgmental sample data.

2672. AT&T notes that Mr. Connolly has reviewed certain E&Y's "workpapers" developed in its review of SBC's compliance with the business rules that were made available to AT&T. AT&T Exh. 1.0(P), ¶ 124. As he explains, those workpapers contained records of the "analytical reviews" that E&Y describes in its Supplemental Report:[196]

> For each PM reviewed, as identified in Appendix A, E&Y conducted an analytical review to evaluate the reasonableness of reported results. This review analyzed transaction volumes, fluctuations in results, and reasons for parity or out-of-parity results for the period under examination. The procedures performed for PM recalculation testing covered Master Test Plan Sections: PMR 4 and 5.

2673. E&Y's analysis, as documented, consisted of questions raised by E&Y that were the subject of answers supplied by SBC or discussions with SBC alone. The responses were not verified by E&Y. Indeed, SBC's responses were accepted at face value. At no time, did E&Y reject an SBC response or ask further questions of SBC or of any other party.

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[195] SBC Illinois Exh. 2.0, Attachment T, at 9

[196] *Id.*

2674. **Performance Measurement Code.** AT&T also contends that E&Y's purported performance measurement code reviews are equally infirm. AT&T Exh. 1.0(P), ¶ 125. During its audit, BearingPoint programs the business rules into its computer programs that are integral to its PMR 5 (replication) testing.[197] In stark contrast, according to AT&T, during its audit, E&Y staff read the programmed instructions within SBC's software systems to determine whether they complied with the business rules. As Mr. Connolly explains:

> E&Y should have written complementary programming logic that comports with the business rules, as interpreted by E&Y, and processed the same transaction files used by SBC for calculating and posting the measures. Any differences between the two sets of results would have been revealed through this procedure. Code review -- the approach taken by E&Y -- is wholly ineffective in testing the implementation of complex programming requirements. Further, for each correction implemented, E&Y performed its code review of the particular, and limited, section of the program code provided by SBC. It did not examine the effect of new corrections on previously implemented corrections. I discuss this issue more fully below. (AT&T Exh. 1.0(P), ¶ 126.)

2675. Outdated **Source Systems.** Significantly, AT&T notes that E&Y's opinions appear to be based upon source systems that have since undergone significant changes. AT&T Exh. 1.0(P), ¶ 127. In its Supplemental Report (attached as Exhibit T to SBC Exh. 2.0), E&Y stated that it followed the following procedure for its data integrity test:

> For the PMs identified in Appendix A to the E&Y Report, E&Y validated the integrity of data used throughout the PM generation process by reviewing each of the significant applications where data originates, was stored, or was reported on PMs. For each application, E&Y identified the various transaction types and systems utilized that directly impact the reported PMs. Upon identification of transaction types, E&Y then determined how each transaction type was initiated, captured by the Company's Operations Support Systems (OSS), and processed through the Company's OSS and PM reporting systems. This process also identified where and how the Company applied the Business Rules to each transaction and which intermediate applications house specific PM information.

[197] *See* SBC Illinois Exh. 2.0, ¶ 281 (noting that BearingPoint independently replicates SBC's reported data by "using calculation programs that BearingPoint developed to recalculate SBC's unfiltered, unprocessed data, a process referred to as 'blind replication.'")

> Once the above information was obtained for each PM under review, E&Y created process flowcharts and activity dictionaries. The purpose of the process flows was to document E&Y's understanding of the data flow for each PM and each transaction type. The purpose of the activity dictionaries was to provide supplemental information regarding the process flows identifying critical controls and data inputs and outputs to each system utilized throughout the PM process. The procedures performed in developing the Process Flows and Activity Dictionaries are covered Master Test Plan Sections: PMR1 (data collection only), PMR4, and PMR5.[198]

2676. However, as AT&T points out, SBC Illinois has admitted that it has modified many portions of its performance reporting systems. AT&T Exh. 1.0(P), ¶ 128. E&Y's witnesses acknowledged the conversion of reporting functions to the DSS system. *See* Tr., at 3213. In particular, SBC has broadened the scope of its ICS/DSS data collection system functionality for pre-ordering, ordering, provisioning, and maintenance measures, which, in the past, has been primarily a system of record for data retention of GUI/Web based pre-order/order transaction data. According to AT&T, it is clear from the BearingPoint Illinois performance measurement audit that SBC is now expanding the scope and use of ICS/DSS to act as a system of record for EDI/LSOG 5 based transaction data.[199]

2677. Interpretations of Business Rules. Finally, AT&T contends that the E&Y audit is also deficient because E&Y accepted without challenge SBC's erroneous applications of the business rules. AT&T Exh. 1.0(P), ¶ 131. In this regard, in its Compliance Report, E&Y rendered the following qualified opinion regarding SBC's compliance with the business rules governing the metrics:

> In our opinion, considering the Company's interpretations of the Business Rules discussed in Attachment B of the Report of Management, and except for the material noncompliance described in Column 3 of Attachment A of the Report of Management, the Company complied, in all material respects, with the Business Rules during the Evaluation Period. Additionally, in our opinion, management's assertions, regarding the status of the Company's corrective action, except with respect to those assertions in Column 4 of Section III in Attachment A of the Report of Management, are fairly stated, in all material respects.[200]

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[198] SBC Illinois Exh. 2.0, Attachment T, pp. 4-5.

[199] *See, e.g.,* Commission Phase II Exhibit 2, at 18, 38.

[200] SBC Illinois Exh. 2.0, Attachment O, p. 1.

2678. Attachment B to the E&Y Compliance Report identifies 50 "interpretations made by management" in implementing the business rules governing the measures. *See* SBC Illinois Exh. 2.0, Attachment R. The problem with this, according to AT&T, is that E&Y blindly accepted without critique or analysis SBC's "interpretations" even though SBC's interpretations were inconsistent with the business rules governing the metrics. AT&T Exh. 1.0(P), ¶ 132.[201] Indeed, E&Y's findings relied on prospective changes to the business rules that the CLECs had not agreed to and which the Commission has not yet approved. The mere fact that E&Y accepted SBC Illinois' misguided "interpretations" of the business rules governing the measures, according to AT&T, provides further confirmation regarding the unreliability of E&Y's audit findings.

2679. In stark contrast, points out AT&T, BearingPoint has opened 14 observations covering 20 different performance measures because of SBC Illinois's failure to comply with the business rules governing the metrics. AT&T Exh. 1.0(P), ¶ 135. Remarkably, E&Y reached a contrary finding and concluded that SBC's data were fully compliant. (AT&T witness Connolly provide an exhibit identifying the 14 observations at issue. *See* AT&T Exh. 1.0(P), ¶ Attachment 6.) According to AT&T, the failure of E&Y to detect these discrepancies underscores the unreliability of the E&Y audit. Each of these observations remains unresolved because SBC has not yet implemented a corrective action plan for these measurement defects.

E&Y's Corrective Action Testing

2680. AT&T also finds fault in E&Y's activities subsequent to its audit to test SBC Illinois' corrective actions. SBC Illinois subsequently engaged E&Y to evaluate – and report on – actions that it was taking to correct the compliance defects that were found in the course of its audit. According to AT&T, however, E&Y's reviews are constrained by its methods and by SBC Illinois, as was explained in the February 2003 workshops. AT&T Exh. 1.0(P), ¶ 136. In the case of corrections that SBC Illinois was making to processes and procedures used to collect, calculate, and report results on a manual basis, E&Y was provided access to the experts who designed the corrections and who administer the SBC Illinois 271 endeavor, but were not marshaled to the field to determine the practice of those procedures.

> AT&T/E&Y Question 31 "Please explain the work function of the Company subject matter experts that E&Y interviewed in its activities involved in the corrective action reviews for revised processes.
>
> E&Y Response: E&Y met with a variety of company subject matter experts primarily in the following three areas:

[201] *See, e.g.* SBC Illinois Exh. 2.0, ¶ 2231 (noting that E&Y "did not classify these interpretations as exceptions, as the reasonableness of SBC Illinois' interpretations is something for the Commission to decide.").

> The PM process owners. These are company personnel who are responsible for the business processes to generate specific performance measures.
> The technical owners. Company representatives who are responsible for maintaining and updating computer program logic associated with the processing and reporting performance measurement data.
> And the long distance compliance group, which is company personnel with overall responsibility for the performance measures. (Tr. 3167)

2681. According to AT&T witness Connolly's review of the corrective action reports, for the corrections that were made to systems, E&Y was provided with copies of the program code that served to implement the correction. This means the E&Y technical staff of analysts and programmers obtained the revised computer code for the affected system component to review to determine whether the design and development of the computer instructions would resolve the business rule compliance problem. E&Y also obtained data files with which to determine whether the records that were previously processed incorrectly had the more appropriate outcome in the next reporting period. AT&T Exh. 1.0(P), ¶ 137.

2682. As Mr. Connolly explains, however, this approach is highly problematic. E&Y was not given access to the overall program code for the system being modified, and therefore could not determine whether the change under its review would be effective in light of other changes that had already been implemented or other changes that were being implemented simultaneously. AT&T Exh. 1.0(P), ¶ 138. Clearly, the Administrative Law Judge has detected the invalidity of this approach:

> JUDGE MORAN: If I can ask a question here. When you're testing the fix, if the fix is under a new system, you're testing in effect the new system; am I right?
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> MR. DAN DOLAN: Related to the fix only.
>
> MR. BRIAN HORST: Related to the fix, absolutely, yes.
>
> * * *
>
> MR. BRIAN HORST: Sherry, I believe your understanding is correct. What we're doing is testing the corrective action on the fix. We did not go out and do a completely new sample of the entire process testing all the business rules.

(Tr. at 3411.)

2683. Thus, as AT&T explains, because the "fix" as presented to E&Y was limited to the coded program change, its ability to determine the effect on all other processing was severely limited – by SBC Illinois design of the E&Y engagement. AT&T Exh. 1.0(P), ¶ 139. E&Y was blinded from the modules being changed and SBC Illinois gave it only limited visibility into the system corrections. *Id.* But these are not the only deficiencies noted by AT&T:

2684. **Deficiencies in Corrective Action Reports.** E&Y purportedly tested the accuracy of SBC's reported performance results for the months of March, April and May, 2002. However, in its Compliance Report, E&Y gave a highly qualified opinion.

2685. **Site Visits**. In its Supplemental Report,[202] E&Y describes its work in the field to observe SBC Illinois operations where technicians, service representatives, and other employees perform the work functions that are measured by the SBC Illinois PM system. It explains the purpose was "to document E&Y's understanding of the manual processes and procedures and to identify and document controls over these manual processes of data input. Additionally, the transaction observation data collected by E&Y during the site visit was used to validate the transaction information in the Company's front-end systems. E&Y omitted an extremely important fact that diminishes the validity of its findings of any consistency with which SBC staff actually perform these procedures according to design. E&Y was escorted to the SBC work centers and was met in each of these venues by SBC staff. The visits were not unannounced, which dramatically lessens the candor with which the work site employees would use to interact with the E&Y staff. (See responses to AT&T/E&Y Questions 106 and 107). In addition, E&Y made a single visit to the work sites and did not follow up to determine whether the processes and procedures it observed were normally practiced or whether they were polished up for the SBC auditors. (See responses to AT&T/E&Y Questions 104 and 105). It appears, that the audit team was given little free-rein to conduct its site visits, and was limited in access to those sites.

2686. Furthermore, in its Supplemental Report, E&Y advised on the even more limited access it was provided to inspect corrections to SBC Illinois processes. "E&Y validated the newly implemented processes used in the PM generation process by reviewing the revised methods and procedures for each issue and interviewing key Company subject matter experts. For each process, E&Y verified that the new procedures addressed the identified issue." (SBC Illinois Exh. 2.0, Attachment T, at 5) However, E&Y's Compliance Report identified performance data deficiencies that should have triggered visits to work sites to verify that the field procedures had been implemented, the technicians trained, and that the processes were actually used. For example, in its Compliance Report E&Y found that SBC "did not have a process in place to capture actual start times of coordinated cutovers during the Evaluation

[202] SBC Illinois Exh. 2.0, Att. T at 5

Period for the frame due time ("FDT") level of disaggregation."[203] However, E&Y did not conduct site visits at the dispatch centers or technical sites in central offices where loops are provisioned to evaluate SBC's performance in this area. E&Y should have visited the work centers that record the "actual start times" to review the methods and procedures used by technical personnel to determine the "actual start time." E&Y was not allowed to visit SBC work sites to verify that newly minted procedures to correct audit findings were appropriately implemented and institutionalized in the field.

2687. **Performance Measurement Code Reviews.** E&Y contends that it conducted code reviews to assess whether SBC resolved those audit findings which were identified in the Compliance Report that required the implementation of programming changes. E&Y states that it "reviewed the respective programming code that contained the Business Rules (exclusions, inclusions, calculation of the numerator and denominator, and disaggregation rules) within the front-end, intermediate, or reporting systems.."[204] However, E&Y's Compliance Report identified other issues that implicated programming other than the limited set examined by E&Y (*i.e.* "programming code that contained the Business Rules").[205] The programming that should have been tested to determine whether it functions properly is in the transaction processing systems, which do not contain the business rules.

2688. In that connection, SBC places its business rules programming in select systems and not throughout its OSS and legacy systems. Because these are discrete systems, the information provided from interfaces, OSS, legacy systems, and other systems must be coded properly to enable the business rule system to operate effectively. In its Compliance Report, E&Y detected deficiencies in SBC's reported results that required coding changes in business rule applications, as well as other systems embedded within the SBC system architecture.

2689. For example, in its Compliance Report E&Y reported that "[c]ertain data from one of the Company's source systems (EXACT) was improperly overlaying certain FOC data within a PM reporting system resulting in some orders being reported with longer FOC durations than actually occurred."[206] In order to resolve this problem, SBC had to take appropriate remedial action with respect to the source system (EXACT) and the Business Rule system. Because E&Y only "reviewed" the code in the Business Rule system, there is no assurance that the change was made to EXACT to prevent the data from overlaying FOC data. As a consequence, SBC's data for PM 5 ("Percent Firm Order Confirmations (FOCs) Returned Within "X" Hours") will continue to be incorrect until the EXACT changes are implemented and verified.

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[203] SBC Illinois Exh. 2.0, Att Q; Item II. 47 at 22

[204] SBC Illinois Exh. 2.0, Att. T at 6

[205] *See, e.g.*, SBC Illinois Exh. 2.0, Att Q Item II. 1 at 11

[206] *Id.*

2690. **Transaction Testing.** E&Y states that it applied "computer auditing techniques" when a mechanized system was found to be part of the correction to a business rule defect.[207] However, E&Y's report is devoid of any explanation of the techniques that E&Y purportedly used to test "the entire population of transactions to verify the code changes."[208] E&Y's claim that it tested the "entire population of transactions" -- and did not use samples of transactions for verification of code changes involving electronically calculated and reported measurements -- is not credible. It is highly questionable that E&Y would test these electronic measures using the hundreds of millions of transactions that comprise the "entire population of transactions" to verify code changes when it used a mere 8,500 transactions to conduct its entire audit -- which included all of the 149 manual and electronic measures.

2691. In discussing its mechanized measurement transaction testing, E&Y, in its Supplemental Report, simply states that it conducted queries to source data files and then compared test results to SBC reports or detail files.[209] However, E&Y's report does not reveal the number of queries or whether E&Y queried any number of transaction types, performance measurements, or types of data. E&Y merely claims that it "executed queries to the source data files."[210] Mr. Connolly concluded that E&Y's failure to explain the details of the measures it tested, the types of data it used as the basis for its testing, the test months or periods it used, the system databases it queried, and analytical methods renders it impossible to discern the bases for its conclusion that it performed transaction testing.

2692. Moreover, as AT&T points out, even the E&Y audit – with its many limitations and shortcomings -- revealed significant deficiencies in SBC's performance monitoring and reporting systems that contradict SBC's claims regarding the accuracy and reliability of its performance data. The fact that audit findings are yet to be corrected flies in the face of SBC's inference that E&Y's findings have been addressed. In Attachment Q to the Ehr Affidavit, E&Y accepts SBC's Assertion that the audit findings itemized in Sections IV, 7 Findings, and V, 15 Findings, are not corrected. Those in Section IV are being ignored by SBC "Exceptions in Which No Corrective Action Is Planned by the Company" and V "Exceptions in the Process of Being Corrected." Clearly, AT&T contends, this means there are issues of non-compliance with the Business Rules that have not been corrected by SBC Illinois.

2693. SBC notes that Attachment A to E&Y's Compliance Report identified scores of "issues" reflecting deficiencies in SBC's data requiring restatements or changes.[211] SBC

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[207] SBC Illinois Exh. 2.0, Att. T at 8

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] SBC Illinois Exh. 2.0, Attachment Q.

contends, however, that E&Y's Corrective Action Reports confirm that SBC has made great progress in resolving these issues. In fact, SBC claims that there are only three issues for which corrective action was pending and the impact of corrective action on reported results was not determined.[212] As to these three issues, SBC asserts that any "the change does have a material negative impact on previously reported results."[213] According to AT&T, SBC's arguments are devoid of merit.

2694. First, AT&T notes, E&Y's audit reports are littered with examples of deficiencies in SBC's performance data that have not been corrected. For example, in its Compliance Report, E&Y found that SBC improperly excluded orders involving projects from its performance results for Performance Measurement 91 (Percentage of LNP only Due Dates Within Industry Guidelines).[214] However, SBC admitted that, as of December 19, 2002, it "has not implemented new computer programming changes to include projects from LSOG 4," and that implementation of this coding change is expected to be implemented with February 2003 results.[215] Thus, according to AT&T, SBC's September, October and November 2002 performance results for Performance Measurement 91 must be inaccurate.

2695. Similarly, in its Compliance Report, E&Y found that SBC was not properly recording the actual start times for Performance Measurement 114 (Percentage of Premature Disconnects/Coordinated Customers) and 115 (Percentage of Ameritech Caused Delayed Coordinated Cutovers).[216] In its Corrective Actions Report, E&Y stated that, effective with September 2002 results, SBC implemented an alternative method for capturing the start times for coordinated cutovers.[217] E&Y simply ignores that SBC Illinois' methodology does not conform to the business rules governing these measures -- a deficiency that is the subject of BearingPoint's Exception 175. AT&T Exh. 1.0(P), ¶ 151. According to AT&T, the fact that E&Y failed to detect this infirmity in SBC's data is telling evidence of the inadequacy of the E&Y audit. *Id.*

2696. Finally, AT&T points out that E&Y's own reports are riddled with other examples of SBC Illinois' error-ridden performance results, including the performance data in its Application. Thus, for example, AT&T notes:

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[212] SBC Illinois Exh. 2.0, ¶ 230.

[213] *Id.*

[214] SBC Illinois Exh. 2.0, Attachment Q, Issue 10, at p. 14.

[215] *Id.*

[216] SBC Illinois Exh. 2.0, Attachment Q, Issue 47 at page 22.

[217] *Id.,* Issue 1, at pg. 1.

E&Y found that SBC inappropriately excluded LASR transactions from its performance results for numerous measures. As of January 2003, SBC had not undertaken any corrective action. Thus, SBC's performance results for these measures for September, October and November 2002 are inaccurate.[218]

E&Y admits that SBC failed to capture xDSL loops with LNP for Performance Measurements 7, 10.4, 91, 93, and MI 2. Although SBC has admitted that a coding change including xDSL loops with LNP was implemented (effective with October 2002 results) for PMs 7, 10.4 and MI 2, SBC apparently has not resolved the inaccuracies in its September 2002 data for these measures. Furthermore, although SBC claims corrective action for Performance Measurements 91 and 93 was scheduled to be implemented with its November 2002 data, SBC apparently has not addressed inaccuracies in its September and October 2002 results for these measures.[219]

E&Y found that SBC failed to exclude CLEC-caused misses in accordance with the business rules governing Performance Measurements 7.1 and 91. However, SBC does not plan to implement computer programming changes to resolve these problems until February 2003. Thus, SBC's performance results for Performance Measurements 7.1 and 91 are inaccurate.[220]

E&Y found that, instead of using the actual due date requested by the customer when reporting results for Performance Measurement 28 (Percent POTS/UNE-P Installations Completed Within the Customer's Requested Due Date), SBC used the SBC-offered due date "when the requested due date was greater than or equal to the standard offered interval."[221] Because SBC does not plan to implement corrective action until its January 2003 results, it is

[218] The measures affected by these problems are: 5, 5.2, 6, 7, 7.1, 8, 9, 10, 10.1, 10.2, 10.3, 10.4, 11, 13, and 13.1.

[219] *Id.*, Issue 2 at 11.

[220] *Id.,* Issue 2, at 28. SBC concludes that restatements are unnecessary because corrections to the data would simply improve its performance results. *Id.* AT&T asserts that these assertions are frivolous. As DOJ pointed out in its evaluation of BellSouth's *Georgia/Louisiana 271* application, such errors in reporting are probative in evaluating the reliability of reported results. DOJ *Georgia/Louisiana 271* Eval. at 34 n. 115 (noting that "BellSouth cannot ignore errors that result in reported performance being worse than actual performance," and that "metrics must neither understate nor overstate actual performance").

[221] SBC Illinois Exh. 2.0, Attachment Q, Issue 5 at pg. 29.

clear that its September, October and November 2002 data in its Application are inaccurate.

E&Y found that SBC incorrectly included in its results for Performance Measurements 28-33 "internal orders correcting the CLEC account on a partial win back."[222] Because SBC does not plan to implement a new programming code to correct these problems until its February 2003 results, the data for these measures in its Application are unreliable.

E&Y found that SBC used "the wrong field to determine the exclusion for customer-requested due dates in excess of the stated time period in the Business Rules" for Performance Measurements 43, 44, 55, 55.1, 56 and 56.1.[223] Although SBC plans to implement a new programming code with January 2003 results that ostensibly should correct these problems, the data for these measures in its Application for these are inaccurate.

E&Y found that SBC failed to capture the start time correctly when calculating results for Performance Measurements 55.1, 56 and 58.[224] Although SBC asserts that it implemented a fix for this problem effective with October 2002 data, SBC has not confirmed that it restated its September 2002 performance results for these measures.

2697. Moreover, AT&T notes that E&Y's recent report reveals other problems regarding the reliability of SBC's data. AT&T Exh. 1.0(P), ¶ 153. E&Y finds that, in calculating results for the ordering measures, SBC "excluded wholesale transactions when a field identifying the CLEC was blank."[225] In this report, E&Y stated that "[e]ffective with February 2003 results scheduled to be reported in March 2003, [SBC] will begin including records when the field identifying the CLEC was blank in results."[226] On its face, according to AT&T, E&Y's most recent report confirms that SBC has unilaterally excluded wholesale categories of orders from SBC Illinois's reported results. As a consequence, the ordering data in its application are inherently unreliable.

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[222] *Id.*, Issue 6 at 29.

[223] *Id.*, Issue 7 at 30.

[224] *Id.*, Issue 37 at 20.

[225] *Id.*, Issue 4, at pg. 29.

[226] *Id.*

2698. Similarly, AT&T explains that E&Y finds in its report that SBC Illinois has excluded weekends and holidays from the calculation of certain measures -- an exclusion that was "not specifically stated in the Business Rules."[227] *See* AT&T Exh. 1.0(P), ¶ 154. E&Y's report states that "[t]he Company plans to implement revised computer code for January 2003 results reported in February 2003 to include weekends and holidays in the PM calculation" for PMs 105 and 106 and notes that no restatements are planned for March, April, or May 2002.[228] Based upon this report, AT&T states, it would appear that SBC's prior reported results are inaccurate.

2699. E&Y in its Controls Report purportedly "assessed the effectiveness of Illinois Bell's controls over the processes used to calculate and report performance results in accordance with the Business Rules."[229] *See* AT&T Exh. 1.0(P), ¶ 155. Significantly, E&Y found that SBC lacked controls in two critical processes that are used to generate performance data:

> [C]ertain processes used to generate performance measurement, primarily related to the manual collection and processing of data and computer program coding and modifications, *did not include certain controls* to ensure the accuracy of the reported performance measurements. These control deficiencies contributed to the need to restate certain data and modify performance measurements on a prospective basis.[230]

2700. In an effort to rationalize E&Y's findings regarding the lack of controls in its performance monitoring process, SBC Illinois offers a host of excuses, according to AT&T. Specifically, SBC Illinois asserts that these defects are attributable to the following three issues: "(1) initial implementation of the performance measures in the year 2000; (2) implementation of the LASR application as part of the Plan Of Record ("POR") release in April 2002, and (3) the execution of certain manual activities required in the monthly performance measure result generation process."[231] In AT&T's view, each "excuse" is meritless.

2701. First, SBC Illinois contends that the rigorous schedule "dictated by merger stipulations and conditions" gave SBC fewer than nine months to implement the majority of its measurements.[232] However, AT&T notes that SBC Illinois is ignoring that it agreed to the

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[227] *Id.*, Issue 15, at pg. 32.

[228] *Id.*

[229] SBC Illinois Exh. 2.0, , Attachment S, p.1.

[230] *Id.* (emphasis added)

[231] SBC Illinois Exh. 2.0, ¶ 234.

[232] *Id.,* ¶ 235.

timeline for implementation of the performance measurements as part of the merger conditions. AT&T Exh. 1.0(P), ¶ 157. More fundamentally, SBC also ignores that E&Y found that *two years after* SBC's initial completion of the performance measures it was still lacking the necessary controls to assure the accuracy of reported results. *Id.*

2702. SBC Illinois also contends that implementation of the LASR interface, which was required as a result of the SBC/Ameritech merger, involved complex upgrades to SBC Illinois wholesale service request and order processing systems, which required "the involvement of new staff personnel who were not previously familiar with the SBC Illinois performance measurements, performance measure reporting process, and change management control process."[233] Once again, however, AT&T rebuts this by explaining that SBC Illinois agreed to implement uniform OSS interfaces and uniform business rules for those interfaces as a condition for Commission approval of the merger. AT&T Exh. 1.0(P), ¶ 158. SBC Illinois decided to incorporate the LASR system into the Ameritech region to meet its POR obligations, and SBC agreed to the very timetables for implementation that it now suggests were unduly onerous. *Id.*

2703. Additionally, SBC suggests that the lack of controls identified by E&Y are perfectly understandable because "[t]he nature of the processes being measured requires" manual processing.[234] Indeed, SBC claims that automated processes are not warranted "where volumes of transactions are very low."[235] However, as Mr. Connolly explains: "SBC controls the extent to which it relies upon manual processing in the collection, calculation, and reporting of results. Furthermore, despite its suggestions to the contrary, SBC relies upon manual processes for measures that involve large volumes of transactions. In its response to questions that AT&T posed during the Michigan Technical Conferences, SBC identified the measures that are manually collected, calculated, and reported. These include such measures as PM 20 (Unbillable Usage), which averaged 198 million transactions during the June to August 2002 period; PM 25 (Local Operations Center Grade of Service), which averaged more than 54 thousand transactions each month; and PM 79 (Directory Assistance Grade of Service) and PM 80 (Directory Assistance Average Speed of Answer), which both averaged in excess of 8 million transactions each month. Many of the mechanized measures involve far lower volumes than measures that are subject to manual processing." AT&T Exh. 1.0(P), ¶ 159.

2704. In all events, SBC Illinois contends that any concerns regarding the lack of controls in its performance measurement production can now be laid to rest. SBC Illinois states that it has "implemented and documented a wide range of controls," and that it is "actively investigating opportunities to implement additional controls into the metrics reporting

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[233] *Id.* ¶ 236.

[234] *Id.* ¶ 238.

[235] *Id.*

process."[236] Notably, SBC Illinois reports that it has implemented additional controls so that its performance data are processed "multiple times to ensure consistent results."[237] AT&T responds, however, that given the seemingly unending stream of restatements that SBC Illinois has made and continues to make, whatever enhanced controls it purportedly has implemented are plainly ineffective. AT&T Exh. 1.0(P), ¶ 160. Otherwise, according to AT&T, SBC Illinois assertions constitute nothing more than promises, and such promises cannot and should not serve as a suitable surrogate for empirical evidence demonstrating stability in performance results.

c. McLeodUSA/TDS MetroCom Position.

2705. McLeodUSA and TDS Metrocom state that successful completion of BearingPoint's testing and evaluation of SBC Illinois' performance metrics reporting is of great importance to CLECs. They emphasize that the BearingPoint testing and verification processes have been open, public processes conducted under the supervision of the Commission Staff and with full opportunity for CLECs to participate. They stated that the Illinois Master Test Plan was developed, and has been modified, through an open process; and that development of the performance measurements themselves was also an open, collaborative process that resulted in a set of performance measures to which SBC agreed.

2706. McLeodUSA and TDS Metrocom stated that It is critically important that confidence be established, through successful independent third-party testing of SBC's performance metrics reporting, in SBC's processes and procedures for (1) collecting and storing relevant unprocessed performance data, (2) transferring unprocessed data to systems that will calculate performance measures while maintaining the integrity of the data, (3) correctly and consistently applying Commission-approved business rules to the data to calculate performance measures, and (4) reporting the resulting performance measurement results in a timely and accurate manner. They state that without accurate and reliable performance metrics reporting by SBC, the ability of CLECs and the Commission to monitor whether SBC's wholesale service quality performance and the functional performance of its OSS are meeting established standards will be impaired and potentially rendered ineffectual. Further, without accurate and reliable performance metrics reporting by SBC, the determination of whether and to what extent payments are to be made by SBC to CLECs and the State of Illinois under the Commission-approved performance remedy plan will be adversely impacted. (MTSI-TDS Br., pp. 9-11)

2707. It is McLeodUSA and TDS Metrocom's position that the data available to date in this investigation does not establish adequate confidence in the accuracy and reliability of SBC Illinois' performance metrics reporting, particularly with respect to data collection and storage, data processing, and performance metrics calculation and reporting. They pointed out that BearingPoint's December 20, 2002 report on its evaluation of SBC's performance metrics ("BP

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[236] *Id.* ¶ 241.

[237] *Id.*

PM Report") showed that, overall, SBC Illinois has failed to satisfy more than two-thirds of the 303 total evaluation criteria applied by BearingPoint, with 64 of the evaluation criteria reported as "Satisfied", 116 reported as "Not Satisfied", 91 reported as "Indeterminate", and 32 "Not Applicable." They state that the BearingPoint results are particularly unsatisfactory with respect to PMR1 (Data Collection and Storage), PMR4 (Metrics Data Integrity), and PMR5 (Metrics Calculation and Reporting): for PMR1, only 13 evaluation criteria were "Satisfied", while 59 criteria were "Not Satisfied and 54 were "Indeterminate"; for PMR4, only 2 evaluation criteria were "Satisfied", while 12 criteria were "Not Satisfied and 26 were "Indeterminate"; and for PMR5, only 20 evaluation criteria were "Satisfied", while 41 criteria were "Not Satisfied and 11 criteria were "Indeterminate". McLeodUSA and TDS Metrocom noted that further data reported as of March 7, 2003, showed that on an overall basis, SBC Illinois has satisfied 31% of the performance metrics evaluation criteria, has been shown to not satisfy 34% of the evaluation criteria, and was still being evaluated on the remaining 35% of the criteria. McLeodUSA and TDS Metrocom also expressed concern that as of March 18, 2003, a number of important BearingPoint Exceptions relating to performance metrics were still open, including Exceptions 41, 111, 134, 174 –176 and 186. (MTSI-TDS Br., pp. 11-14)

2708. McLeodUSA and TDS Metrocom state that Commission Staff agreed with the assessment that SBC Illinois' data integrity and the accuracy and reliability of SBC Illinois' performance metrics calculations and reporting have not been sufficiently demonstrated to warrant a positive Section 271 recommendation by the Commission. They cited Staff witness Weber's conclusions that SBC Illinois' performance measurement data is neither accurate nor reliable and should not be used as evidence of compliance with the Section 271 competitive checklist, and that the BP PM Report raises serious doubts as to the integrity and accuracy of SBC Illinois' performance measurement data and SBC Illinois' ability to produce the data, particularly with respect to PMR1, PMR4 and PMR5. They pointed out that Staff witness Weber was also of the opinion that an excessive number of BearingPoint Exceptions and Observations relating to SBC Illinois' performance measurements remained open as of early March, too many for the Commission to conclude that the integrity of SBC Illinois' performance measurement data and the accuracy and reliability of SBC's performance measurement calculation and reporting has been established sufficiently to warrant Section 271 approval.

2709. McLeodUSA and TDS Metrocom note that in Staff's rebuttal affidavits, Staff continued to be of the opinion that SBC is not close to completion of the BearingPoint performance metrics review and that therefore SBC's assertions with respect to reliability and accuracy of its performance measurements are unsubstantiated; and that Staff continued to recommend that the Commission should not provide positive Section 271 approval until SBC can demonstrate its performance measurement data is reported accurately and reliably on a consistent basis and the BearingPoint review is substantially complete. (MTSI-TDS Br., pp. 14-18)

2710. McLeodUSA and TDS Metrocom conclude that they and other CLECs have placed substantial reliance on the BearingPoint independent third-party performance metrics validation process and OSS testing that has been conducted in an open, public manner

pursuant to the Illinois Master Test Plan, under the close supervision of Staff. They state that there is no justification to jump the gun and prematurely endorse SBC Illinois' Section 271 application until the integrity of SBC Illinois' performance data and the accuracy and reliability of its performance measurements calculations and reporting has been established through the independent third-party review by BearingPoint. (MTSI-TDS Br., pp. 18-19)

2711. McLeodUSA and TDS Metrocom state that, for a number of reasons, the E&Y review of certain aspects of SBC's performance metrics is not an acceptable substitute for successful completion of the BearingPoint performance metrics validation and does not provide a basis for a positive Section 271 recommendation to the FCC. They state that there is no reason for the Commission to utilize the results of a review conducted by a consultant selected solely by the auditee without any input from the Commission, rather than the results of the review conducted by the auditor that the Commission selected. They also questioned E&Y's independence since E&Y is also the principal outside financial auditor for SBC. (MTSI-TDS Br., pp. 19-20)

2712. McLeodUSA and TDS Metrocom state that the E&Y review was not conducted through an open, public process, under the supervision of the Commission Staff and with opportunity for CLECs to observe, in the manner in which the BearingPoint reviews have been conducted. They note that upon identifying an Issue in the course of its review, E&Y did not post the Issue on a website or other publicly-accessible forum, the way BearingPoint posted all of its Observations and Exceptions on the OSS testing website; that E&Y did not notify Staff or CLECs when it identified an Issue, that E&Y did not meet with Staff or CLEC representatives to discuss responses E&Y received from SBC on Issues E&Y identified, and that E&Y did not track the resolution of its Issues in a publicly-accessible forum, the way BearingPoint has done on the OSS testing website. McLeodUSA and TDS Metrocom emphasized that E&Y identified numerous issues during the course of its review which it disposed of based on input from SBC but did not identify in its reports, and which the parties only learned about through discovery. They noted that many of these issues could have had significant impacts on performance metrics, but that Staff and CLECs were not given the opportunity to review the basis on which E&Y resolved Issues, in contrast to the procedures followed in the BearingPoint review. (MTSI-TDS Br., pp. 21-23)

2713. A third reason cited by McLeodUSA and TDS Metrocom for not accepting the E&Y review as a substitute for successful completion of the BearingPoint performance metrics validation was the "materiality" test that E&Y applied to the Issues it identified. E&Y's "materiality" standard was that the Issue had to result in a reported performance measure result for a month being either (i) changed by more than 5%, or (ii) changed from "pass" to "fail" or vice versa with respect to meeting the applicable parity or benchmark standard for the month. McLeodUSA and TDS Metrocom state that the problem with this "materiality" standard is that although an error or deficiency in collecting and storing data or calculating a performance measure may have had an "immaterial" impact in the three months that E&Y examined, the same error or deficiency could have a "material" impact in another month. They state that such an impact could occur, for example, if SBC had failed to include in a performance measure calculation data for certain types of orders or transactions that

had low volumes in the months examined by E&Y, but much higher volumes in subsequent months due to growth in use of the product. They also point out that E&Y only applied its "materiality" test to each Issue on a performance measure-by-performance measure basis, even though many of the Issues it identified impacted multiple performance measures; and that where a performance measure was impacted by multiple Issues, E&Y did not evaluate the cumulative impact on the reported performance measure of all Issues that impacted that performance measure. (MTSI-TDS Br., pp. 23-24)

2714. A fourth reason cited by McLeodUSA and TDS Metrocom for not accepting the E&Y review as a substitute for successful completion of the BearingPoint performance metrics validation was that E&Y did not submit its own transactions (orders) to SBC's OSS during the course of its evaluation. They stated that this omission deprived E&Y of the ability to compare data it submitted in an order or other transaction to SBC's OSS with the data as captured, stored and transformed by SBC, and therefore to effectively test the ability of SBC's systems to accurately receive, record and pass to other systems the information received from customers in orders and other transactions. They noted that in contrast, BearingPoint established a "Test CLEC" that submitted actual transactions to SBC, which enabled BearingPoint to test SBC Illinois' data integrity by comparing data submitted by the Test CLEC into SBC's OSS to the data as recorded, stored and transformed by SBC's systems. (MTSI-TDS Br., pp. 24-25)

2715. Finally, McLeodUSA and TDS Metrocom point out that there appear to have been other scope limitations on E&Y's engagement that do not apply to BearingPoint's testing and evaluation work, as well as other differences in process and approach between BearingPoint and E&Y. (MTSI-TDS Br., p. 25)

2716. McLeodUSA and TDS Metrocom state that, in any event, the results of the E&Y review did not, contrary to SBC's assertions, provide further assurance that SBC Illinois' performance measurement results are reasonable, but rather showed serious problems with SBC's data integrity and performance measurements calculation and reporting. They noted that E&Y found 128 Exceptions, or "instances of material noncompliance with the Business Rules during the Evaluation Period", for the period it reviewed, and that these 128 Exceptions affected one or more of 113 of the overall 150 performance measures (approximately 75%). They also pointed out that the E&Y Exceptions resulted in numerous restatements of data by SBC, and that some of the Exceptions resulted in corrective actions by SBC, but that not all of the SBC corrective actions had been verified, and that for some Exceptions, no corrective action had been taken. Further, E&Y's "Controls" report to SBC management stated that "Our examination disclosed that certain processes used to generate performance measurements, primarily related to the manual collection and processing of data and computer program code and modifications, did not include certain controls to ensure the accuracy of the reported performance measurements." (MTSI-TDS Br., pp. 26-28)

2717. McLeodUSA and TDS Metrocom express particular concern about SBC Illinois' use of "Interpretations" of Commission-approved business rules in calculating performance measurement results, as disclosed by the E&Y review. E&Y reported a total of 50 such "Interpretations." E&Y noted with respect to many of these Interpretations that in the recently-completed Six-Month Review Performance Measurements Collaborative, SBC and collaborative participants reached agreement on changes to the previously-approved business rules to bring the published business rules into conformity with the way in which SBC had been interpreting the business rules. McLeodUSA and TDS Metrocom express concern about the fact that SBC Illinois was applying its own interpretations of the published business rules before getting CLECs' agreement to the interpretation or to a modification to the applicable business rules, and before filing revised business rules incorporating the interpretation with the Commission for its approval. They state that the sheer number of "interpretations" found by E&Y was a concern. (MTSI-TDS Br., pp. 27, 32-33) McLeodUSA and TDS Metrocom also stated that the disclosure, during the latter stages of Phase II, that SBC Illinois had been excluding situations in which a CLEC customer migrates to SBC from the data used to calculate the performance measure relating to provision of line loss notifications to CLECs indicated that the problem of "interpretations" by SBC Illinois continues. They stated that SBC Illinois' explanation for why it excluded CLEC-to-SBC migrations from the calculation of this performance measure was not reasonable, particularly in light of the high degree of attention that CLECs and the Commission have been giving to SBC's performance with respect to the timeliness of providing line loss notifications to CLECs. (MTSI-TDS Br., pp. 33-35)

2718. McLeodUSA and TDS Metrocom again point out that Staff agreed with their position that the E&Y reviews exposed concerns about the reliability of SBC's performance metrics. They cite Staff witness Weber's conclusions that the findings in the E&Y report presented strong evidence that SBC Illinois' performance measurement data is unreliable, and that some of the problems identified in the March – May 2002 data that E&Y reviewed may be present in the three months of results for September-November 2002 that SBC Illinois submitted as evidence of its compliance with the Section 271 competitive checklist. McLeodUSA and TDS Metrocom also noted that Staff shared their concerns about the frequency of SBC Illinois' use of "interpretations" of Commission-approved business rules, as disclosed by the E&Y reports.

2719. They pointed out that in her initial and reply affidavits, Staff witness Weber concluded that the Commission should not be convinced that SBC Illinois has addressed its performance measurement reporting control deficiencies until SBC can consistently report performance measures with accuracy and integrity on a monthly basis and an independent third party provides verification of this fact; that restatements to correct errors six months after posting the affected data are not acceptable; that the frequency of SBC Illinois' data restatements and the timing of the restatements, well after initial posting of the performance measurement data, point to the fact that inherent problems with SBC Illinois' process controls within its performance metrics organization have existed and may continue to exist; and that as a result of the accuracy and reliability problems with SBC Illinois' reported performance measurement data, a valid assessment of the three months of performance measurement data submitted by SBC Illinois as

evidence of its compliance with the Section 271 checklist could not be performed. (MTSI-TDS Br., pp. 28-32)

2720. McLeodUSA and TDS Metrocom conclude that the Phase II record demonstrate that multiple problems and unresolved issues remain with SBC Illinois' processes for collecting, storing and maintaining performance measurement data and for calculating and reporting performance measurement results based on that data; that as a result, at this time, SBC Illinois' performance measurement data cannot be relied upon to provide an accurate depiction of whether SBC's OSS is functioning properly or whether SBC Illinois is satisfying other Section 271(c)(2)(B) checklist items; that SBC's performance metrics data cannot be relied on to provide the basis for an effective performance remedy plan; and that therefore, the Commission should not provide a positive Section 271 recommendation to the FCC until SBC Illinois has successfully completed the BearingPoint performance metrics validation. (MTSI-TDS Br., pp. 35-36)

d. WorldCom's Position.

Performance Data is Unreliable.

2721. WorldCom asserts that the most fundamental reason that the Commission should refrain from advising the FCC that 271 approval is appropriate is the fact that SBC Illinois' performance data is not yet trustworthy. Both BearingPoint and Ernst & Young found substantial problems with SBC's control over the underlying data and its application of business rules to calculate performance based on the data. Many of those problems have not yet been corrected. As a result, SBC lacks the reliable data needed to demonstrate that its performance in providing wholesale service is non-discriminatory. It also lacks the measurements needed to prevent backsliding after section 271 authority is granted. WorldCom witness Ms. Lichtenberg discussed the performance data integrity deficiencies in-depth in her Initial Affidavit.[238]

2722. WorldCom witness Ms. Lichtenberg was not alone in her assessment that SBC's performance measure data integrity is deficient. Other CLECs weighed in on this issue as did the Commission Staff. In fact, based on a thorough analysis of the BearingPoint and Ernst & Young tests, Staff witness Ms. Weber concluded that SBC's performance data remains unreliable. In an affidavit summarizing the conclusions of Illinois Staff, Jeffrey Hoagg explained that Staff was unable to recommend approval of SBC's section 271 application in Illinois because of OSS deficiencies, failures of key performance metrics, and the absence of an effective performance remedy plan, as well as SBC's unreliable performance data.

2723. Moreover, WorldCom observes, BearingPoint continues to open Exceptions related to performance measure issues. On February 18, BearingPoint issued two new

[238] Lichtenberg Dir. Aff., WorldCom Ex. 3.3, ¶¶ 47-58.

exceptions based on SBC's failure to adequately document the calculation logic it uses to determine performance measurement results. Until SBC's performance reporting improves, there is no way to know whether SBC's performance is nondiscriminatory today and no way to prevent backsliding in the future. The Illinois Staff summarizes:

> The results of the reviews by BearingPoint and Ernst & Young of SBC Illinois' performance measurement data, taken together, significantly undermine the accuracy and reliability of those data. Since those 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 those data can be demonstrated to be accurate and reliable by BearingPoint (or another independent third party using a similar analysis), it cannot be relied upon to establish current or future compliance with applicable competitive checklist requirements.[239]

> WorldCom agrees with Staff's assessment and maintains that the Commission must ensure that performance measurement data are reliable. According to WorldCom, the only way to accomplish that is to withhold making a positive recommendation on SBC Illinois' 271 application unless and until the performance measurement data is tested by an independent third party, utilizing the methodology employed by BearingPoint. WorldCom urges the Commission to require BearingPoint to continue its testing until it proves that SBC's performance data is reliable.

e. Staff's Position and Recommendations

<u>BearingPoint December 20, 2003 Performance Measurement Report</u>

2724. Staff reports that BearingPoint began its investigation of SBC Illinois' performance measurements in November 2000. BearingPoint continues to issue findings on its performance metric evaluation weekly, and SBC Illinois continues to address the concerns raised by BearingPoint. According to Staff, the facts and findings presented by BearingPoint in its December 20, 2002 OSS Evaluation Project: Performance Metric Report ("Metrics Report")[240], taken alone — and without even considering the findings issued in the E&Y evaluation -- raise serious doubts as to the integrity and accuracy of SBC Illinois' performance measurement data

[239] Weber Dir. Aff. at 4.

[240] As admitted by mutual agreement of the parties during the February 5, 2003 hearing.

and SBC Illinois' ability to produce the data, which contradict the statements of Mr. Ehr. Ehr Affidavit, ¶¶214, 379.

2725. In its performance metric evaluation, Staff notes, BearingPoint evaluated 303 individual evaluation criteria. BearingPoint assigned each evaluation criteria one of four results similar to the operational test as explained earlier in my affidavit. Below in Table 2 is a high level summary of BearingPoint's results (Metrics Report at 8).

Table 2 – BearingPoint Performance Metrics Evaluation Results

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

2726. As of December 20, 2003, BearingPoint was able to report that the company satisfied 64 evaluation criteria (23.7% satisfied), did not satisfy 116 evaluation criteria (42.8% not satisfied) and are still working to determine a result for 91 evaluation criteria (33.6%). BearingPoint has also determined that 32 of the evaluation criteria are not applicable to its review, and therefore assessments for these items have not and will not be provided. In cases where evaluation criteria are not satisfied, BearingPoint's report indicates that CLECs and regulators may diminish their reliance on performance metrics as they assess the quality of the service being provided by SBC Illinois.[241] In other words, CLECs and the Commission should not rely upon these aspects of SBC Illinois' performance measurement system until they have proven to be satisfied.

2727. SBC witness Ehr states that none of BearingPoint's findings to date in its Metrics Review are sufficient enough to warrant a finding of non-compliance, or to preclude the Commission from evaluating SBC Illinois' compliance with the 14 point checklist based on the performance measure data submitted and all of the information before it. Ehr Affidavit, ¶243. Ms. Weber, however, does not concur with these statements. As indicated in Table 2 above, the totality of findings reported by BearingPoint demonstrate that we are currently precluded from assessing SBC Illinois' compliance with the Section 271 checklist based upon the September, October and November 2002 performance measurement data submitted by the company in this proceeding. Ms. Weber contends that the company has the burden to demonstrate that its performance measurement results are accurate and reliable, and it has failed to meet this burden. Mr. Ehr stated, in this proceeding, that the only way Staff would know problems exist in the underlying data or reporting of SBC Illinois' performance is through SBC Illinois' own

[241] BearingPoint Performance Metrics report at 30.

admission, or through an independent review.[242] BearingPoint is in the process of conducting its independent review and as of December 20, 2002 reported that SBC Illinois failed to satisfy 116 of the key evaluation criteria defined for the examination and was unable to provide an opinion at the time on 91 evaluation criteria. This represents over 76% of the evaluation criterion being evaluated.

Detailed BearingPoint Performance Measurement Results

2728. Table 3, below, prepared by Ms. Weber, breaks down the high-level metrics results by the individual performance measurement tests BearingPoint conducts. Ms. Weber's opinions regarding the interpretation we should give to this data is also set forth below.

Table 3 – BearingPoint Metrics Evaluation Results by Test Family

Test Family	Number of Evaluation Criteria				
	Satisfied	**Not Satisfied**	**Indeterminate**	**Not Applicable**	**Total**
PMR1	13	59	54	0	126
PMR2	3	0	0	0	3
PMR3, PMR3B	26	4	0	0	30
PMR4	2	12	26	32	72
PMR5	20	41	11	0	72

PMR1: Data Collection and Storage Verification and Validation Review

2729. BearingPoint's PMR1 review evaluates SBC Illinois' policies and practices for collecting and storing unprocessed data that resides in, and flows through, SBC Illinois' information systems, as well as processed data used in the creation of performance metrics and retail analogs.[243] It is important to ensure a company properly collects and stores its

[242] February 11, 2003 Tr. at 3097-3098.

[243] For further description of the SBC Illinois' data collection and storage business process description, test methodology, and test targets and measures please see the BearingPoint's Performance Metrics Report at 13-19.

unprocessed data or raw data, because without such data, performance measurements will not be reported accurately and complete and thorough audits cannot be conducted.

2730. BearingPoint determined SBC Illinois satisfied 12 evaluation criteria (10% Satisfied), did not satisfy 60 (48% Not Satisfied), and has not yet determined a result for the remaining 54 evaluation criteria.

2731. There are seven subtests within PMR1 that assess SBC Illinois' metrics data collection and storage processes documentation, metrics data processing and technical requirements documentation, metrics data processing and storage capacity management, metrics data processing controls, back-ups of critical metrics data, metrics data retention, and metrics data read and write access.

2732. Not one of these seven subtests have a complete set of satisfied results and two of the subtests, metrics data processing and storage capacity management, and metrics data read and write access are completely indeterminate at this time. BearingPoint has uncovered issues with respect to the completeness of metrics data collection and storage process documentation and metric data processing and technical requirements documentation. Since December 20, 2002, BearingPoint has issued additional findings that SBC Illinois' data processing procedures do not have adequate edits and controls and SBC Illinois has been unable to demonstrate that certain systems of record and/or reporting system data have been retained in compliance with regulatory requirements[244].

2733. The PMR1 data evaluation criteria are vital to SBC Illinois' performance metrics data collection and processes, if the company cannot demonstrate that it can satisfy the majority of these evaluation criteria, the findings in BearingPoint's Metrics Report raise too many questions to trust that SBC Illinois has adequate data collection and storage practices and procedures in place to be able to report its performance metrics data in an accurate and consistent manner.

PMR2: Metrics Definitions and Standards Development and Documentation Verification and Validation Review

[244] BearingPoint Exception Report 186, www.osstesting.com..

2734. BearingPoint's PMR2 review assesses SBC Illinois' policies and practices for developing, documenting and publishing metric definitions, standards and reports[245].

2735. BearingPoint's Metrics Report states that it determined the company satisfied the evaluation criteria established for the PMR2 test and that no test aspects remain. Specifically, through observations, BearingPoint was able to determine that we approved the business rules in use by SBC Illinois during test, the business rules are published through a distribution channel accessible by relevant parties, and that the performance measurement reports are published on time through a distribution channel also accessible by relevant parties.

PMR3: Metrics Change Management Verification and Validation Review

2736. BearingPoint's PMR3 review assesses SBC Illinois' overall policies and practices for managing changes to metrics and for communicating these changes to the ICC and CLECs.[246]

2737. BearingPoint reports the company satisfied 12 of the evaluation criteria and has not satisfied four evaluation criteria. The four criteria BearingPoint reports the company has failed, but which BearingPoint continues to evaluate, are PMR3-6, PMR3-7, PMR3-12 and PMR3-16. Specifically, BearingPoint has observed instances where SBC Illinois' metrics change management process does not provide for the monitoring of source systems for changes that impact metrics reporting; SBC Illinois does not comply with intervals for implementing changes to metrics business rules; SBC Illinois does not have adequately defined procedures or tools to test changes to calculation programs, processes; and systems involved in the production and reporting of performance measurements and that performance metrics changes did not follow the documented metrics change management process. These findings, in Ms. Weber's opinion, reflect grave deficiencies in key processes that a company needs to have in place to implement changes to its performance measurements without impacting the integrity or accuracy of the data being reported.

PMR3B: Performance Measurement Restatement and Remedy Recalculation Validation Review

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[245] For further description of the SBC Illinois' metrics definition and standards development business process description, test methodology, and test targets and measures please see the BearingPoint's Performance Metrics Report at 20-22.

[246] For further description of the SBC Illinois' metrics change management business process description or the specific test methodology and test targets and measures see the Metrics Report at 23-25.

2738. BearingPoint's PMR3B review assesses SBC Illinois' overall documented policies and practices for recalculating remedy payments resulting from restated performance measurements, and for communicating these changes to the Commission and CLECs. The test does not evaluate SBC Illinois' adherence to the documented policies and practices[247], and therefore only looks at written material for how the process should occur.

2739. BearingPoint's review was conducted from April through November 22, 2002 and BearingPoint determined SBC Illinois satisfied each of 14 evaluation criteria related to written documentation, policies and procedures with respect to remedy recalculations when performance measurement restatements occur.

PMR4: Metrics Data Integrity Verification and Validation Review

2740. BearingPoint's PMR4 review evaluates the overall policies and practices for processing the data used by SBC Illinois in the production of the reported performance metrics standards.[248] This review is intended to verify that SBC Illinois correctly captures data from external sources, and transfers the data from the point of collection down to the reporting system while maintaining the overall integrity of the data.

2741. For each of the 18 different groupings of SBC Illinois' 150 performance measurements ("Measure Groups"), as defined by the company (Appendix E to BearingPoint's written responses to the February 5, 2003 hearing), BearingPoint is evaluating whether or not each of the Measure Groups satisfy or meet the following four criteria: (1) required source records are included in data used to calculate measures; (2) inappropriate records are not present in processed data used to calculate measures; (3) records in processed data used to calculate measures are consistent with unprocessed data from source systems; and (4) data fields in processed data used to calculate measures are consistent with unprocessed data from source systems.[249]

2742. As of the date of the Metrics Report, BearingPoint had only been able to determine that the performance measures in the NXX Measure Group satisfy the applicable

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[247] For further description of the SBC Illinois' performance measurement restatement and remedy recalculation business process description or the specific test methodology and test targets and measures see the Metrics Report at 23-25.

[248] For further description of the SBC Illinois' metrics data integrity business process description or the specific test methodology and test targets and measures see the Metrics Report at 29-31.

[249] Metrics Report at 119.

evaluation criteria. BearingPoint has found problems with the following 8 Measure Groups; Ordering, Provisioning, Billing, 911, Coordinated Conversions, Bona Fide Requests and Other. BearingPoint, in its review, determined that it could not conduct the data integrity review for the following five Measure Groups: Miscellaneous Administrative, Directory Assistance/Operator Services, Poles, Conduits and Right-of-way, Collocations, and Directory Assistance Database. The remaining four Measure Groups are still under investigation; Pre-ordering, Provisioning, Interconnection Trunks and Facilities Modification. [250] Since the Metrics Report was published BearingPoint has issued four new findings in its review of SBC Illinois' data integrity; Exception Reports 183, 184, 185 and Observation Report 783.

2743. As Ms. Weber indicates, successful completion of this test is very important, as data integrity problems, such as missing data or incorrect transformation of data, may result in performance measurements being misstated.[251]

PMR5: Metrics Calculations and Reporting Verification and Validation Review

2744. BearingPoint's PMR5 review assesses the processes used by SBC Illinois to calculate performance measurement results and retail analogs. The test also assesses consistency between our approved metrics business rules, and the rules used by SBC Illinois to calculate the performance metrics.[252]

2745. BearingPoint, in its PMR5 evaluation determines, for each of the 18 different Measure Groups of SBC Illinois' 150 performance measurements, whether or not each Measure Group satisfies or meets the following four criteria: (1) required metrics are included in SBC Illinois performance measurement reports; (2) SBC Illinois reported and BearingPoint calculated metrics values agree; (3) SBC Illinois' implemented metrics calculations are consistent with the document metrics calculation rules; and (4) SBC Illinois implemented metrics exclusions are consistent with the documented metrics exclusion rules.[253]

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[250] Id.

[251] February 5, 2003 Tr. at X. Response to Staff Question BE/Staff M7.

[252] For further description of the SBC Illinois' metrics calculations and reporting business process description or the specific test methodology and test targets and measures please see the BearingPoint's Performance Metrics Report at 29-31.

[253] BearingPoint Metrics Report at 189.

2746. BearingPoint originally began its PMR5 review by analyzing performance measurement data reported by the company for the data month of April 2001, contrary to SBC witness Ehr's testimony that evaluation began with an evaluation of January-March 2002. Ehr Affidavit, ¶282. After working on the data reported in April 2001 for some time, BearingPoint, in discussions with SBC Illinois and Staff, decided that the evaluation ought to be moved to a more recent data month. BearingPoint's findings indicated that SBC Illinois needed to make a number of calculation changes, and modifications to correct deficiencies; SBC Illinois indicated that the results of those changes would be seen in later data months. Therefore, SBC Illinois asked BearingPoint to move its evaluation to the October 2001 data month. BearingPoint began its evaluation of the October 2001 data month and continued to uncover problems, issued Observation Reports and worked with the company to communicate the issues and questions it had. Once again, it was determined that the evaluation should be moved to a more recent data month, and January 2002 data was selected and the test continued. In the summer of 2002, the test again came to a point where such a large number of corrections and clarifications or restatements had to be made to the January 2002 data that the parties again determined to move the evaluation period to a more recent data month. SBC Illinois suggested the evaluation be moved to the July and August 2002 data months.

2747. Specifically, BearingPoint moved its PMR5 evaluation to the October 22, 2002 posting of SBC Illinois' performance measurement data for July and August 2002. In its Metrics Report, BearingPoint reported that it was able to verify SBC Illinois satisfied the four evaluation criteria for only the Bona Fide Request Measure Group for the October 22, 2002 posting of SBC Illinois' performance measurement data for July and August 2002. The NXX Measure Group was indeterminate and the remaining 15 Measure Groups contain one or more "Not Satisfied" result[254].

2748. It is clear that the PMR5, data replication, review by BearingPoint is not complete, and BearingPoint has been unable to verify that the company calculates its performance measurements correctly and in accordance with our approved business rules. BearingPoint's PMR5 review continues.

Summary of BearingPoint's Performance Metrics Results

2749. Of the five primary test families that BearingPoint conducted tests upon, SBC Illinois has only satisfied the PMR2 review. SBC Illinois has been unable to demonstrate to BearingPoint that it can satisfy the evaluation criteria with respect to its data collection and storage capabilities, its metrics change management polices and practices, its performance

[254] Id.

measurement data integrity and its ability to calculate its performance measurement results and retail analogs. The specific metrics deficiencies reported by BearingPoint which to these test aspects and the evaluation criteria BearingPoint has been unable to opine upon 26 months after beginning the evaluation of SBC Illinois' performance metrics data and reporting systems, provides, in Ms. Weber's opinion, clear indication that there is more work to be done and that at this time, we should not rely upon the performance measurement data being reported by the company.

2750. BearingPoint's most recent published Metrics project plan, which was developed in conjunction with SBC Illinois, indicates the performance measurement review is scheduled to complete in June 2003. Based upon Ms. Weber's involvement in this project, and the repeated delays that she has witnessed since its inception, she considers it unlikely that the review will be successfully completed within the June 2003 timeframe.

2751. Mr. Ehr states that SBC Illinois is not asking us to terminate the independent third party metrics review and that SBC Illinois will continue to work with BearingPoint to address findings as they are raised. Ehr Affidavit, ¶244.

2752. If the Commission elects to provide a positive Section 271 recommendation to the FCC prior to successful completion of the BearingPoint review, Ms. Weber recommends that we do so contingent upon a commitment from SBC Illinois that it will address all deficiencies raised by BearingPoint in the metrics review and commit to successfully conclude the BearingPoint metrics review no later than November 2003.

Ernst & Young Performance Measurement Examination

Background

2753. Staff notes that SBC Illinois hired Ernst & Young, LLP ("E&Y") to conduct an evaluation of its performance measurements in Illinois in late October 2002.[255] Specifically, E&Y performed an evaluation similar to aspects of BearingPoint's PMR1, PMR4 and PMR5 reviews.

[255] February 12, 2003 hearing Tr. at 3305.

2754. SBC hired E&Y to conduct a performance metrics evaluation for the state of Michigan in May 2002 and, in the hearings on February 12, 2002, E&Y indicated that much of the work it conducted under the Michigan engagement was performed on a five state basis. February 12, 2003 Tr. at 3307-3310, 3321.

2755. Ms Weber has evaluated the information provided by E&Y, and is of the opinion that findings in the E&Y report present strong evidence that SBC Illinois' performance measurement data is unreliable.

2756. In its "Scope and Approach" document, E&Y explains that SBC asked it to perform two separate examinations. Ehr Affidavit, Attachment N.

(a) Attestation Examination of the Accuracy and Completeness of SBC Ameritech's Performance Measurements for a three month period in accordance with the Business Rules ("Compliance Examination")

(b) Attestation Examination of the Effectiveness of Controls over SBC Ameritech's Process to Calculate Performance Measurements for a three month period ("Controls Examination")

2757. E&Y's evaluations looked at SBC Illinois' performance measurement data and controls for the March, April and May 2002 time period against the Business rules in accordance with SBC Illinois Tariff: ILL CC. No. 20 - Part 2 – Section 10 – Section E. Id.

2758. During Ms. Weber's analysis of E&Y's Compliance Report and Controls Report, she concluded that the E&Y and BearingPoint evaluations are quite different from one another. While, in Ms. Weber's opinion, there is overlap in the two reviews, there are aspects of each review that are not included in the other. Specifically, Ms. Weber notes that portions of BearingPoint's PMR1 test, and all of its PMR2 and PMR3 tests were not covered by E&Y's examinations. In addition, Ms. Weber notes that the methods employed by E&Y in its review to satisfy the BearingPoint PMR4 and PMR5 test parameters outlined in our approved Master Test Plan are different from BearingPoint's, and therefore cannot be considered as a replacement or substitute for the PMR4 and PMR5 tests BearingPoint is conducting.

Compliance Evaluation

2759. In its Report to Management in its Compliance Evaluation, E&Y states: "In our opinion, considering the company's interpretations of the Business Rules discussed in Attachment B of the Report of Management, and except for the material noncompliance described in Column 3 of Attachment A of the Report of Management, the company complied, in all material respects, with the Business Rules during the Evaluation Period[.]" Ehr Affidavit, Attachment P.

2760. Ms. Weber considers it vital, in order to understand precisely what E&Y is asserting with its opinion, to carefully examine the quantity and magnitude of the items that E&Y identifies as being considerations and exceptions to its opinion. Specifics regarding these matters are set forth in E&Y's findings of material noncompliance as documented in Attachment A of E&Y's report, Ehr Affidavit, Attachment Q, and the company's interpretations of the Business Rules as documented in Attachment B. Ehr Affidavit, Attachment R.

E&Y Findings of Material Noncompliance

2761. E&Y defines "Material Noncompliance" as exceptions to compliance with the Business Rules for the months of March, April and May 2002 that met either of the following criteria. Ehr Affidavit, Attachment P.

(a) The error, if corrected, would change the original reported performance measurement ("PM") result by five percent or more (or)

(b) The error, if corrected, would cause the PM's original reported parity attainment/failure or benchmark attainment/failure to reverse.

2762. The level of materiality E&Y applied was at the sub-measure level and was determined against the aggregate CLEC data[256]. E&Y did not look at the cumulative effect of exceptions on a given measure/sub-measure. February 12, 2003 Tr. at 3370.

2763. The definition E&Y provides for Material Noncompliance demonstrates, in Ms. Weber's view, that the exceptions or errors noted are material, and have a significant impact on the results presented for the data months evaluated. E&Y classified its exceptions of Material Noncompliance by the statements of SBC Illinois regarding the action taken or to be taken by the company for the exceptions in each category. Following are the five classification categories;

I. Exceptions Corrected and March, April and May 2002 Data was Restated

II. Exceptions Corrected but March, April and May 2002 Results were Not Restated

III. Exceptions Corrected but Not Yet Reported or Restated

IV. Exceptions in which No Corrective Action is Planned by the Company

V. Exceptions in the Process of being Corrected

2764. Table 4 below shows various statistics on the exceptions E&Y found by category as they relate to the 150 performance measurements that SBC Illinois reported for the E&Y evaluation time period (March-May 2002).

[256] February 12, 2003 hearing Tr. at 3369.

Table 4 – E&Y Exceptions of Material Noncompliance

	Exception Categories					
	I	**II**	**III**	**IV**	**V**	**ALL**
Number of Exceptions	53	51	2	7	15	**128**
Number of Performance Measures Impacted by one or more Exception	75	72	5	10	44	**113**
% of All Performance Measures Impacted	50%	48%	3%	7%	29%	**75%**
Number of Performance Measures Impacted by Exceptions	211	137	5	11	50	**414**
Average Number of Exceptions Per Performance Measure Impacted	4	2.7	2.5	1.6	3.3	**3.2**

2765. *E&Y Exception Category I*: E&Y identified 53 different exceptions that affected one or more of 75 performance measurements, or 50% of the performance measures reported during the time period evaluated. Ehr Affidavit, Attachment Q. On average, each performance measure affected was affected by four different exceptions. While E&Y states that it tested the accuracy of the corrective actions implemented by the company for the restated March, April and May 2002 data, there has been no assurance provided to indicate that the data months beyond May 2002 no longer contain the data inaccuracies raised by the category I exceptions. February 12, 2003 Tr. at 3385.

2766. *E&Y Exception Category II*: E&Y identified 51 category II exceptions of which none were corrected for the March, April and May 2002 data months E&Y evaluated. Ehr Affidavit, Attachment Q. Mr. Ehr, states that the issues were either related to diagnostic performance measures or that the data needed to perform the restatements was not available and therefore would not be restated for the March-May 2002 data months. Ehr Affidavit, ¶227. However, of the 51 category II exceptions, only 12 diagnostic measures were affected by one or more of these category II exceptions, and 60 out of the 127 parity and benchmark measures were affected by one or more of the category II exceptions. As noted by E&Y, 48% of SBC Illinois' performance measure data for the March, April and May 2002 time period would, if corrected, change the reported results by more than 5% in either direction, or would alter the pass/failure attainment determination. Therefore, SBC Illinois is currently reporting, and will continue to report, inaccurate performance measurement data for the March, April and May 2002 time period for 48% of all performance measures reported.

2767. Ms. Weber avers that we should disregard Mr. Ehr's statement that this proceeding's focus should only be placed upon the data presented for the September-November 2002 time period. The inaccuracies present in the March-May 2002 performance measurement data go, in Ms. Weber's opinion, directly to the heart of SBC Illinois' data accuracy and reliability problems, and are predictors of possible future problems, if not addressed. In the Department of Justice ("DOJ") showing of PM data submitted by Mr. Ehr, Ehr Affidavit, Attachment B, the company presents one year of its performance measurement results as evidence in this proceeding, and the Category II findings by E&Y show that data inaccuracies exist for almost one half of all performance measures that SBC Illinois reported for the March, April and May 2002 data months in its filing. In addition, while SBC Illinois has asserted that it has taken corrective action on each of the exceptions at some point in time after the March, April and May 2002 data months, many of the corrections E&Y reported were not made until the September, October or the November 2002 results, Attachment B to E&Y Report, and E&Y's verification of SBC Illinois' corrective action occurred for a single monthly only. In the February 12, 2003 hearings E&Y stated that it can provide no assurance that the exceptions noted do not exist in data months after the month it completed its validation. February 12, 2002 Tr. at 3385. Therefore, Ms. Weber opines that some of these exceptions may be present in the three months of results for September – November 2002 that SBC Illinois has presented as evidence of its compliance with the Section 271 competitive checklist in this proceeding.

2768. *E&Y Exception Category III*: E&Y identified two category III exceptions that affect 5 performance measures, none of which are diagnostic measures. Ehr Affidavit, Attachment Q. Specifically these exceptions impact four maintenance and repair performance measures (PM 54, 54.1, 65 and 65,1) and one billing performance measure (PM 14). These category III exceptions still exist in the performance measurement data SBC Illinois reports for the March – May 2002 (corrected but not yet reported or restated). These two exceptions may also exist in the three months of data SBC Illinois submitted in this proceeding as evidence of its compliance. Ehr Affidavit, ¶228, and SBC Illinois Performance Measurements DOJ tracking report provided as Attachment B to Mr. Ehr's affidavit. SBC Illinois has said that the exceptions will be corrected with the December 2002 performance data and data months moving forward but there has been no statement by SBC Illinois that this has in fact occurred and there has been no verification performed by an independent party. Further, during the February 12, 2003 hearings E&Y said they have not been contracted to continue their evaluation work in Illinois. Therefore it appears to Ms. Weber that there is no plan today by SBC Illinois to have an independent party verify that these exceptions have been addressed.

2769. *E&Y Exception Category IV*: E&Y identified 7 category IV exceptions that impact 10 different performance measures, Ehr Affidavit, Attachment Q, (only one of which is a diagnostic performance measure), or approximately 7% of the performance measures for which SBC Illinois is not planning to undertake any corrective actions. Ehr Affidavit, ¶229. Therefore, these exceptions are present to the extent applicable in the data SBC Illinois is reporting for March - May 2002, affecting 10 performance measures, and may also exist in the September,

October and November 2002 performance measurement data that SBC Illinois has provided in this proceeding as evidence of its compliance with the 14 point checklist.

2770. *E&Y Exception Category V*: E&Y identified 15 exceptions that affect 44 different performance measures, Ehr Affidavit, Attachment Q, or approximately 29% of the performance measures for which SBC Illinois has not yet implemented any corrective action. Ehr Affidavit, ¶230. Therefore, these category V exceptions are present in the data SBC Illinois reports for March, April and May 2002 impacting 29% of all performance measures and are most likely also present in the data reported since May 2002; which includes the three months of performance measure data submitted in this proceeding.

2771. In summary, E&Y reported that it found 128 exceptions during its review period. In Staff's analysis of the reported results, each exception affected one or more of 113 out of the 150 performance measures SBC Illinois reports on a monthly basis, or 75% of its performance measures. February 12, 2003 Tr. at 3380. The company has represented that it has addressed a portion of the deficiencies, and it appears E&Y performed limited validation for these corrections. However, assuming this to be true, the 15 exceptions in Category V that affect 29% of the performance measures, and perhaps a number of the Category 4 exceptions, nonetheless remain in the data SBC Illinois reports today. These failings are, in Ms. Weber's opinion, significant and undermine the ability for any party to properly evaluate SBC Illinois' performance measurement data submitted in this proceeding for the affected performance measures.

Company's Interpretations of Business Rules

2772. In addition to the exceptions E&Y found during its review, E&Y also reported several interpretations. Interpretations are the definitional liberties that SBC Illinois has taken with specific performance measure business rule documents. Interpretations that SBC Illinois has chosen to apply to the business rules may not be the same as Staff, the Commission or CLECs might apply in its own reading of the business rules and therefore ambiguity in what the performance measure actually reports may be in question. Given the E&Y reported interpretations, it is, in Ms. Weber's view, clear that SBC Illinois has not reported its performance results in compliance with the business rules for the performance measures at issue during the E&Y evaluation period or for the September-November 2002 data submitted by the company as evidence of compliance with Section 271 in this proceeding.

2773. While E&Y conducted its evaluation, SBC Illinois provided E&Y with the interpretations that in SBC's view, E&Y should apply to our approved business rule documents.

E&Y did not consider these interpretations provided by the company to be exceptions to compliance with the Business Rules on the part of SBC Illinois. Ms Weber states that while many of these interpretations have since been discussed in the current six-month review proceeding, it does not excuse the fact that the business rule documents were not specific enough to clearly communicate the interpretations that it asked E&Y to apply to the evaluation. In addition, Mr. Ehr's affidavit states that the reasonableness of SBC Illinois' interpretations is something the Commission should decide. Although, during the course of the review, the company did not specifically ask Staff or indeed, us, to review or approve the interpretations it provided to E&Y. Ehr Affidavit, ¶231. In the transcribed meetings, Mr. Ehr noted that a certain number of interpretations were not discussed within or during the six-month review process and SBC unilaterally decided not to make any clarifications in the business rules for these items.[257]

2774. E&Y reported a total of 50 business rule interpretations (though SBC only recognizes that 48 interpretations were applied, Ehr affidavit, ¶232) that apply to 94 separate performance measures or 63% of the performance measures SBC Illinois reports. Of the 94 performance measures that had interpretations, on average three different interpretations applied to each affected performance measure.

2775. Table 5, below, shows specific statistics on the business rule interpretations E&Y applied to its evaluation.

Table 5 – E&Y Business Rule Interpretations

Number of Business Rule Interpretations	**50**
Number of Performance Measures with One or More Interpretation	**94**
Percent of Performance Measures with One or More Interpretation	**63%**
Total Performance Measures Impacted by Interpretations	**148**
Average Number of Interpretations Per Performance Measure Impacted	**3.0**

2776. SBC Illinois states that 32 of the interpretations have been agreed upon in the most recent six-month review collaborative, and the remaining interpretations do not require any changes, because the company believes the current procedures it uses to calculate the PM is consistent with the letter of the current business rules. Ehr Affidavit, ¶232. Typically, changes to the business rules are discussed, agreed upon by participants in the six-month review collaborative, approved by us and then implemented on a prospective basis. Therefore, if the 32

[257] February 11, 2003 Tr. at 3087-3088.

interpretations were actually significant enough to require changes to the business rules, and we have not yet formally approved these changes, then they are not in effect today or for the March-May 2002 data report months. If this is the case, then Ms. Weber avers that SBC Illinois has not reported its performance results in compliance with the business rules for the performance measures at issue during the E&Y evaluation period or for the September-November 2003 data submitted by the company as evidence of compliance to the 271 checklist in this proceeding for that matter.

Controls Examination

2777. In its Controls Examination, E&Y disclosed: "Certain processes used to generate performance measurements, primarily related to the manual collection and processing of data and computer coding and modifications, did not include certain controls to ensure the accuracy of the reported performance measurements. These control deficiencies contributed to the need to restate certain data and modify certain performance measurements on a prospective basis." Ehr Affidavit, Attachment S. The two processes that E&Y disclosed that did not include controls to ensure the accuracy of the reported performance measures were:

(1) Manual Collection and Processing of Data

(2) Computer Program Coding and Modifications. Id.

2778. During the February 12, 2003 hearings, E&Y further clarified that the deficiencies noted in the Controls Report were caused by SBC Illinois' (1) initial implementation of the performance measures in the year 2000; (2) implementation of the LASR application as part of the Plan of Record (POR) relates in April 2002; and (3) the execution of certain manual activities required in the monthly performance measure result generation process.

2779. Mr. Ehr states that the control deficiency findings by E&Y have been addressed. Specifically, Mr. Ehr states that the controls have been expanded and enhanced, that new staff personnel have now been trained or that the measures impacted has such low volumes that it is not material. Ehr Affidavit, ¶¶235-239.

2780. During the hearings, E&Y indicated that to the extent the exceptions have been corrected E&Y has tested the control deficiencies and it is comfortable the controls in those areas have been implemented, but it cannot issue an opinion on the change management processes and

procedures in place of SBC Illinois because it did not perform enough reviews to render an opinion. Tr. at 3356. Additionally, E&Y stated that it did not do any control testing other than on the corrective actions implemented by the company. Tr. at 3361.

2781. During E&Y's verification work to ensure that exceptions had been fixed per the statements of SBC Illinois, E&Y found instances where the corrective action wasn't fully implemented or implemented as intended by the company. Specifically, E&Y saw these types of problems occur for its verification work for 5 exceptions that affected 10 different performance measures. February 12, 2003 Tr. at 3377. Ms. Weber notes that, if SBC Illinois' controls were solid and working effectively, these types of errors would not occur.

2782. Ms. Weber further opines that a number of Mr. Ehr's assertions that the control deficiencies have been addressed are unsupported. While controls may have been improved, Ms Weber notes that the efficacy and adequacy of such improvements are not clear. Ms. Weber is not convinced – and states that we should not be convinced -- that SBC Illinois has addressed its performance measurement reporting control deficiencies, until SBC Illinois can consistently report its performance measures with accuracy and integrity on a monthly basis and an independent third party provides verification of this fact. Restatements to correct errors <u>six months</u> after posting data are not, in Ms. Weber's estimation, acceptable. It is Ms. Weber's opinion that SBC Illinois should restate results if it finds inaccuracies, as the company has done; however, Ms. Weber also gives it as her opinion that the frequency of restatements and the timing of restatements, well after initially posting performance measure data, point to an inherent problem with SBC Illinois' process controls within its performance metrics organization.

<u>Findings with Respect to the Ernst & Young Evaluation</u>

2783. The findings of E&Y presented above from both E&Y's Compliance Report and E&Y's Control Report indicate to Ms. Weber that there continue to be serious problems with SBC Illinois' reported March-May 2002 performance measurement data (Category II and V exceptions), and there are also 15 Category V exceptions (affecting 29% of the performance measures), the company has not yet corrected that affect the September – October 2002 data months the company has submitted as evidence of compliance in this proceeding. In addition, not all business rule interpretations SBC Illinois represented to E&Y have been discussed with the six-month review collaborative and none of these interpretations have been approved by us to apply to past data months. Therefore, in Ms. Weber's view, SBC Illinois is not reporting its performance measures consistent with the business rules. Finally, E&Y pointed out several control deficiencies it uncovered during its review but there has been no verification that these control deficiencies have been thoroughly addressed. E&Y's findings lead Ms. Weber to conclude that problems remain with SBC Illinois' reported performance measurement data, and

that the data submitted by SBC Illinois as evidence of its Section 271 compliance is neither accurate nor reliable.

5. Rebuttal Positions

a. SBC Illinois Position

The Ernst & Young Audit

2784. In response to the Staff and CLEC challenges to the E&Y audit, and to update the status of corrective actions, SBC Illinois presented the rebuttal affidavit of Mr. Ehr. In addition, Attachment A to that affidavit presents an affidavit filed by Messrs. Dolan and Horst of E&Y as part of the FCC Michigan 271 proceeding, in which CLECs made similar challenges to E&Y's methodology and findings. SBC Illinois also addressed the issue in its accompanying Reply Comments.

Independence and Objectivity

2785. SBC Illinois reiterates that E&Y is an established independent accounting firm that designed its own audit program, and that the FCC has relied on E&Y's work and rejected CLECs' challenges to E&Y's findings in approving section 271 applications. Arkansas & Missouri 271 Order, ¶ 17; Kansas & Oklahoma 271 Order, ¶ 108. SBC Illinois also reiterates that the FCC has relied on E&Y to auditing compliance with the SBC/Ameritech merger conditions. The E&Y affidavit avers that "the engagement team assigned to this engagement, as well as E&Y as a firm, is independent of SBC" and that "[d]uring this engagement the Company at no time sought to limit the scope of testing deemed necessary by E&Y." (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) Attachment A, ¶ 12.) Further, SBC Illinois points out that Staff and the CLECs have had ample opportunity to review E&Y's report and methodology, ask questions of E&Y personnel under oath, and have had access to E&Y's working papers.

Audit of March-May 2002 Data

2786. SBC Illinois reiterates that the performance measures and standards (version 1.8) audited by E&Y for March-May 2002 were the same as for the September-November 2002 "study period." (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 218.) SBC Illinois states that its processes for reporting were consistent, aside from E&Y-reviewed changes made to correct exceptions. With regard to the ongoing expansion of the "DSS" system for performance reporting, SBC Illinois states that the impact of DSS was not material. Between the March-May results audited by E&Y, and the September-November results presented here, SBC Illinois represents that only 25 of the 150 performance measures were migrated to DSS. For those measures, SBC Illinois states that it ran "parallel testing" of several previous months of data under each system prior to migration to ensure that DSS reached consistent results. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 108.)

Testing Of "Raw Data" And Data Integrity

2787. Contrary to the claims that E&Y's audit did not include "raw data," or the integrity of data from its origination to its use in the reported results, the E&Y affidavit submitted by SBC Illinois states 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.) The E&Y affidavit further states that the use of a "pseudo-CLEC" to submit raw data is not a requirement of professional standards. Id. ¶ 22.

Other Challenges to E&Y's Methodology

2788. According to SBC Illinois, most of the remaining allegations boil down to the view that E&Y did not employ the exact same methodology as BearingPoint. SBC Illinois observes, however, that BearingPoint's test goes vastly beyond the scope of a normal audit, because BearingPoint is not just verifying SBC Illinois' results. Rather, BearingPoint is building an entire system of performance measurements of its own, as part of a process called "blind replication," with which BearingPoint is (i) independently re-processing the entire stream of raw commercial data for three months, (ii) generating three months of results on every one of the thousands of performance categories, and then (iii) comparing the end results to those reported by SBC Illinois. In SBC Illinois' words, BearingPoint is literally re-inventing the wheel.

2789. In sum, SBC Illinois states, E&Y determined the scope of its review in its own professional judgment, based on professional attestation standards. E&Y's FCC affidavit answers the Staff and CLEC challenges to its methodology.

Ernst & Young's Exceptions

2790. The Rebuttal Affidavit Of Mr. Ehr provides an update as to the status of the corrective actions taken to address E&Y exceptions. Of the 15 "Category V" exceptions identified as unresolved in SBC Illinois' January 17 filing, SBC Illinois states that 8 have been corrected. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 99. SBC Illinois reiterates that the remaining 7 issues are addressed in the 1/17/03 Affidavit of Mr. Ehr (SBC Ex. 2.0), and SBC Illinois observes that while Staff and the CLECs cite these issues, they do not rebut Mr. Ehr's analysis of their immateriality. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 99.

2791. SBC Illinois summarizes the issues that remain to be addressed, and their current status, in the table below:

Status of Remaining Issues from Ernst & Young Audit as of February 28, 2003			
E&Y Issue (From Attachment Q)	***Affected PM(s)s***	***Current Status of Corrective Action***	**Impact On Previously Reported Results**
Sec. V, Issue 14	104.1	Computer coding enhancements to exclude CLEC-caused delayed 911 Database record unlocks is to be implemented with February 2003 results to be reported March 20, 2003.	Corrective action will only improve results as delayed unlocks will lengthen the average time to unlock the record (the result reported fin PM 104.1). This is a diagnostic measure with no performance standard defined.
Sec. V, Issue 3	91	Computer coding enhancements to include project orders are to be implemented with February 2003 results to be reported March 20, 2003.	Analysis of project data identified that, for June through August 2002, projects excluded from the results represent 1.05% or less of orders reported, with no impact on attainment of the benchmark. No restatement of prior month's results is planned.
Sec. V, Issues 6	28, 29, 30, 31, 32, 33	Computer coding enhancements to exclude internal orders correcting the CLEC account in SBC Illinois wholesale system when the end customer transfers service to SBC Illinois are to be implemented with February 2003 results to be reported on March 20, 2003.	Analysis of ordering activity of customers migrating partial accounts to SBC Illinois indicates that less than 5% of all "winback" orders are "partial winback" orders. The impact of this small volume of orders (less than 1% of all orders reported in the results for these PMs) is not material.
Sec. V, Issue 9	96, 97	Computer coding enhancements to add logic to relate LNP and Loop orders when the related order field is not populated on the LNP order are to be implemented with February 2002 results to be reported on March 20, 2003.	This issue could result in the orders being reported in the incorrect disaggregation of these PMs. The number of orders affected is limited, both disaggregations report against the same benchmark, and all orders are included in results.
Sec. V, Issue 12	MI 14	Computer coding enhancements to report UNE-P trouble ticket completion notices provided electronically separately from Resale notices provided electronically (both are reported combined currently) is to be implemented with February 2003 results reported on March 20, 2003.	Both UNE-P and Resale trouble ticket completion notices are measured against the same standard, and all have been included in the results for the Resale electronic submeasure. Performance has been consistently above 99% sent within one hour.
Sec. V, Issue 10	WI 1	Computer coding enhancements to exclude customer-caused no access reports are to be implemented with February 2003 results to be reported on March 20, 2003.	Exclusion of customer-caused no access reports will result in improved performance once implemented.
Sec. V, Issue 11	CLEC WI 5	Computer coding enhancements to include resold specials and UNE dispatches to customer premise are to be implemented with February 2003 results to be reported on March 20, 2003.	SBC Illinois' procedures for moving the NID (assessed in PM CLEC WI 5) do not differentiate between retail and wholesale end customers. Reported results indicate no failures on the PM, and the performance is expected to continue.

Interpretations of Business Rules

2792. SBC Illinois reaffirms that its opening filing demonstrated that its interpretations were reasonable, and states that the CLECs have not put forth a substantive rebuttal to any of these explanations or showed how they affect the overall assessment of checklist compliance. SBC Illinois further states that it was appropriate for E&Y to disclose the interpretations rather than classify them as instances of non-compliance. In SBC Illinois' view, E&Y did not usurp the role of the Commission (as decision maker) or of the collaborative performance measurement review. Rather, E&Y provided information for the parties and the Commission to make an assessment.

Internal Controls Report

2793. With regard to the level of controls that were in place when the performance measures were initially implemented, SBC Illinois states that it has been up front regarding the fact that controls were less than perfect at that time. Accordingly, SBC Illinois has established processes by where the organization responsible for each processes being measured, and thereby the performance results, have been analyzing the implementation of every measurement to ensure that they the manner in which performance is assessed is in compliance with the letter and intent of the business rules. SBC Illinois states that this activity is an ongoing part of, and is governed by, the formal Change Management Guidelines that BearingPoint has been testing, and continues to test, in PMR3. (SBC Ex. 2.0 (3/3/03 Ehr Aff.) ¶¶ 102-103.)

2794. With regard to manual processing, and AT&T's suggestion that SBC Illinois "relies upon manual processes for measures that involve large volumes of transactions," SBC Illinois contends that AT&T's characterization is misleading. While noting that the processes for reporting certain high volume measures, such as PM 20 (Unbillable Usage), PM 25 (Local Operations Center Grade of Service) and PM 79 (Directory Assistance Average Speed of Answer), have a manual *component*, SBC Illinois does not agree that they are entirely manual. The measures use complex computer systems to collect, retain and report upon the activity being measured. According to SBC Illinois, the manual component of the PM reporting processes is not to collect this data (as implied by AT&T) but simply to post the calculated results to a database for web site display. (Id. ¶ 104.)

2795. SBC Illinois addresses its performance measurement change management process as part of its analysis of BearingPoint's testing. SBC Illinois states the test is substantially complete.

Other Assurances of Reliability

2796. SBC Illinois observes 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 one CLEC (AT&T) requested a data reconciliation (now in process) with respect to one measure, the results for line loss notices. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶¶ 32, 188.)

2797. With respect to internal controls, SBC Illinois states that BearingPoint's recent closing of several exceptions related to controls (Exceptions 20, 47) confirms that SBC Illinois has made improvements to internal data controls. These recent closures go far, SBC Illinois reasons, in satisfying Staff Witness Weber's concern that "until the [control] deficiencies have been addressed … this Commission should not accept the contention that SBC Illinois internal controls today provide assurance of data reliability". (Staff Ex. 1.0 (Weber Aff.) ¶ 115.)

2798. SBC Illinois adds in its comments that while BearingPoint's review of performance *measurement* is not complete, testing of actual wholesale processes and transactions is substantially complete. In SBC Illinois' view, BearingPoint's analysis corroborates SBC Illinois' performance results in two important respects. First, the successful results of its process reviews and transactions tests confirms 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. For example, when BearingPoint tested the speed with which SBC Illinois issued a firm order confirmation ("FOC"), BearingPoint used the electronic time stamps recorded by its own test interfaces. In other words, SBC Illinois says, BearingPoint was not just an independent referee who watched SBC Illinois play by the rules, but a timekeeper with its own stopwatch. SBC Illinois states that BearingPoint's recorded times and its overall test results match up favorably with those reported by SBC Illinois, and provide further assurance as to the reliability of commercial performance results.

BearingPoint's Performance Metric Review

2799. SBC Illinois provides an update as to the status of BearingPoint's PMR testing, by test domain. SBC Illinois states that the picture painted by Staff, AT&T, and WorldCom of the BearingPoint test is both inaccurate and incomplete. SBC Illinois explains that their general approach is to describe a test criterion, explain why it is important, and then say what a "Not Satisfied" score *might* mean, under a worst-case scenario (for example, what would happen if there were *no* documented procedures for performance reporting). (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 121.) That approach leaves out two critical facts, SBC Illinois states.

2800. First, SBC Illinois observes, the commenters do not adequately describe what BearingPoint's findings really *do* mean – in other words, what led BearingPoint to issue an exception. In SBC Illinois' view, many "Not Satisfied" scores do not stem from BearingPoint finding a real problem or an error in reported results, but from BearingPoint wanting to see more information before it is satisfied. Id. ¶ 123. Other test points are open because of an issue that only affects *part* of a test point and that is not material to the September–November results provided here. Id. And contrary to the CLEC suggestion that "Indeterminate" points represent an affirmative finding of failure (AT&T Ex. 1.0 (Connolly) ¶ 49), an "Indeterminate" status indicates that while BearingPoint is not done testing, there have *not* been issues associated with the test criterion. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 126.)

2801. Second, SBC Illinois states that the commenters fail to address (and in some cases ignore outright) what happened after BearingPoint issued its exception. SBC Illinois has already responded to most of the current Observations and Exceptions, and BearingPoint is in the process of re-testing. Id. ¶ 123. Since the December 20, 2002 BearingPoint Report,

BearingPoint has already closed several exceptions, and significantly narrowed others (including Exceptions 19 and 20, which the CLECs have placed at the forefront of their "data reliability" arguments in the past two years). (Id. ¶ 124.)

Collection and Storage of Data (PMR 1)

2802. This test evaluates SBC Illinois' policies and practices for the collection and storage of data. According to SBC Illinois, at the time of the December 20 Report PMR1 had 12 "Satisfied" test points, 60 "Not Satisfied" test points, and 54 test points classified as "Indeterminate." All 60 of the "Not Satisfied" test points related in one manner or another to Exception 19 (which concerned data retention) and /or Exception 20 (which concerned documentation of procedures and "restatements" of previously reported data). SBC Illinois points out that BearingPoint closed Exception 19 on February 18, 2003 after determining that SBC Illinois had made sufficient progress on the data retention issues, and it narrowed the remaining issues to those specified in Exception 186, a newly issued exception. As a result, SBC Illinois states, the closure of Exception 19 effectively moves one test point from "Not Satisfied" to "Satisfied" and two test points from "Not Satisfied" to "Indeterminate." (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 132.)

2803. On February 25, 2003, SBC Illinois informs, BearingPoint closed Exception 20 and moved the remaining open issues to two newly created exceptions, 187 and 188. According to SBC Illinois, BearingPoint's action effectively moves five test points from "Not Satisfied" to "Satisfied" and 22 test points from "Not Satisfied" to "Indeterminate". (Id. ¶ 133.)

2804. SBC Illinois states that after its December 20 Report BearingPoint completed its review of documentation relating to data retention, and reported that the documentation accurately reflects SBC Illinois' Data Retention Policies for all 150 performance measurements, and closed Exception 20. Instead of the original, broad-based exception about documentation generally, BearingPoint has completed its work on several groups of performance measures, and narrowed the scope of remaining issues to follow-up on documentation on the remaining groups. (Id. ¶ 137.)

2805. With regard to the restatement of previously reported performance results, SBC Illinois informs that BearingPoint has closed Exception 20 on this issue and in so doing BearingPoint stated in unambiguous terms that "BearingPoint is no longer using restatement frequency as a general indicator of procedural and control deficiencies." According to SBC Illinois, BearingPoint has moved all 18 test points (PMR1-4) previously scored as "Not Satisfied" for this reason to "Indeterminate" status. (Id. ¶¶ 140-141.)

2806. SBC Illinois states that AT&T's numeric count of restatements ignores their immateriality. First, SBC Illinois provides an example of a restatement. For June 2002, the original performance reports stated that the wholesale results for PM 13 (which relates to the rate of "flow through" on line sharing orders) was 98.0574 percent. On September 5, 2002, SBC Illinois restated those results and reported that the correct wholesale result was 98.0926 percent. The retail analog, approximately 97.2 percent, remained exactly the same, and SBC Illinois still passed the measure. Clearly, SBC Illinois reasons, that restatement would not have changed

anyone's mind about checklist compliance. Second, SBC Illinois considers the aggregate materiality of restatements by looking at the restatements that actually caused a particular result to change from "pass" to "fail" or vice versa. Focusing on the May-December restatements that appear on AT&T's chart, SBC Illinois states that only 0.70 percent of them actually affected the "pass" or "fail" of a measure. Finally, SBC Illinois examines the *cumulative* effect of restatements in the aggregate by considering the overall "pass rate" on performance measures. SBC Illinois presents a table showing the overall pass rate for March – September 2002 results (the months covered by AT&T's chart) on measures that are subject to "Tier 2" remedies, before and after restatements. According to SBC Illinois' analysis, even after applying *all* of the various restatements that AT&T counted, the pass rate for any month remained high, and never changed by even one percent in any month. (Id. ¶¶ 142-145.)

2807. Turning to data retention, SBC Illinois advises that on January 9th, 2003 BearingPoint provided a status report to the five state commission staffs and SBC Illinois, and confirmed that SBC Midwest's Data Retention Policies were accurate for all performance measures reported in all five states. As a result of that review, BearingPoint closed Exception 19 on February 18, 2003, and in so doing it stated that SBC Ameritech had provided data retention policy documentation for the source systems and systems of record for reported performance measurements. According to SBC Illinois, BearingPoint has verified that the retention periods are consistent with regulatory requirements in Illinois, Indiana, Michigan, Ohio and Wisconsin. BearingPoint then opened a new, more narrow exception (number 186) to address remaining issues. (Id. ¶¶ 147-149.)

2808. SBC Illinois explains that Exception 19 originally addressed data retention issues for over 60 source data systems. SBC Illinois states that BearingPoint has now validated data retention documentation for all of those systems, noting that the documentation was both complete and accurate. Thus, Exception 186 narrows the number of source data systems still under review to 9 systems. Of those 9, BearingPoint has verified that 5 systems retained data for more than one year, and that the remaining 4 have been meeting appropriate retention guidelines for at least five months. They are as follows:

Current Data Retained – Selected Systems		
System	**Oldest Data Retained**	**Number of Months Retained**
ARIS/Exact	April 2002	11 months
CAMPS	August 2002	7 months
DUF Parity File	October 2002	5 months
Manual Directory Assistance Database PMs	September 2002	6 months

2809. In other words, SBC Illinois states, with the exception of the "DUF Parity" file, SBC Illinois has been meeting data retention requirements – even at the demanding standards set by BearingPoint – during the September – November 2002 period that this Commission is reviewing for checklist compliance. (Id. ¶¶ 150-153.)

2810. Finally, with respect to AT&T's allegations about processing capacity, SBC Illinois states that it is processing today's volumes of data (which are enormous), and reporting

the results on a monthly basis. Going forward, SBC Illinois – like every other business – reviews its data processing and storage capability needs for the future, and increases capacity as needed. BearingPoint is still in the process of reviewing those procedures, thus, its test points in this area were "Indeterminate" when the Illinois report was produced. According to SBC Illinois, BearingPoint now categorizes 7 test points as "Satisfied" and 11 as "Indeterminate" for this test criterion – in other words, there are no negative findings. (Id. ¶¶ 154-156.)

Metric Definitions and Standards (PMR 2)

2811. SBC Illinois notes that no one raised an issue about this aspect of the test.

Performance Measurement Change Management (PMR 3)

2812. SBC Illinois reiterates that as of BearingPoint's December 20 Report, SBC Illinois satisfied 26 of the 30 test points, including all 14 of the test points in PMR 3B. SBC Illinois advises that since that Report, BearingPoint closed Exception 133 on February 25, 2003, satisfying an additional test point in PMR 3A (PMR 3-12). Thus, SBC Illinois summarizes, BearingPoint has already found that SBC Illinois' metrics change management process includes well-defined procedures for managing change requests, and that all critical instructions and steps in the metrics change management process are documented, including roles and responsibilities. SBC Illinois states that the remaining test points relate to two BearingPoint exceptions, and neither affects the reliability of current reports. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 159.)

2813. With respect to Exception 41, SBC Illinois states that there was only one instance where BearingPoint identified what it believed to be an issue, which was associated with the implementation of LASR and LSOG5 in the spring of 2002. SBC Illinois states that it showed BearingPoint that the change management process effectively tracked the issue and communicated it to other parties. With respect to Exception 157, SBC Illinois states that the Exception focused on SBC Illinois' implementation of the last set of revisions to its performance measurement business rules in early 2002. According to SBC Illinois, the Exception relates to two issues. First, when SBC Illinois first posted the business rules on its website, they contained typographical errors. SBC Illinois avers that the errors have long since been corrected, and going forward two employees review all changes to rules before posting those changes to the website. Second, SBC Illinois acknowledges that it did not implement all of the changes in the agreed-upon time, but upon implementation went back and retroactively restated prior months, so that all months that were supposed to be reported under the new business rules were reported under the new business rules. Thus, SBC Illinois concludes, the 2002 changes were implemented in time for the September – November 2002 performance results addressed here. (Id. ¶¶ 160-163.)

Metrics Data Integrity (PMR 4)

2814. SBC Illinois states that a substantive review of the PMR4 observations and exceptions shows that testing has made significant progress. As of February 25, 2003, SBC Illinois informs, 12 exceptions relating to Data Integrity (PMR4) had been issued by

BearingPoint. SBC Illinois elaborates that of the three exceptions cited by Staff, two (Exceptions 184 and 185) have already been closed as "Satisfied", and the last (Exception 183) is now in retest with BearingPoint. In all, SBC Illinois states, four PMR4 exceptions have been closed, and SBC Illinois has provided BearingPoint with appropriate responses to 7 others. Only one exception is pending a response (Exception 134), and that was a series of questions issued on February 21, 2003; SBC Illinois expects to respond in the normal course. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶¶ 164-167.)

2815. Of the 18 observations for PMR4, SBC Illinois advises that 8 are in Closed (Satisfied) status, meaning there is no longer an issue, and 8 observations are in Retest status, meaning that SBC Illinois has responded and BearingPoint is continuing its testing. In reality, SBC Illinois states, there are only two "open" observations for PMR4: (1) Observation 807, which was opened on February 12, 2003, and (2) Observation 638, where the most recent request for information occurred on February 20, 2003. (Id. ¶¶ 168-169.)

Metrics Calculation and Reporting(PMR 5)

2816. In all, SBC Illinois states, BearingPoint has issued only 2 Exceptions in the PMR5 section of the test. One, Exception 111, is in retest with BearingPoint. SBC Illinois states that on February 17, 2003, it updated its response to this exception and addressed each of BearingPoint's issues point by point. Meanwhile, SBC Illinois states, Exception 113 involves a disagreement on the interpretation of the business rule for Performance Measure 2 (Average Response Time for Pre-Order Interfaces). BearingPoint's perspective was that the response times should include the time for protocol translation. SBC Illinois states that the disagreement on this issue is now a moot point, as CLECs agreed in the six-month review session to implement a separate measurement category for protocol translation time. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶¶ 175-176.)

2817. According to SBC Illinois, most of the "Not Satisfied" points in PMR5 relate to Observations. In the Illinois report for PMR5, BearingPoint scored 21 "Satisfied" test points, 40 "Not Satisfied" and 11 "Indeterminate". This scoring was updated to 22 test points "Satisfied", 36 "Not Satisfied", and 14 "Indeterminate". (Id. ¶ 177.)

2818. For the individual test points, SBC Illinois states that it is satisfying PMR5-1 for all 18 measure families. For PMR5-2, "blind replication," SBC Illinois states that many issues are resolved through communication between the parties as facilitated by the Observation, Exception, and Notification Report process. For PMR 5-3 and PMR 5-4, SBC Illinois states that the scoring is affected by the fact that BearingPoint does not allow for "interpretations" of business rules. Considering only those Observations for which BearingPoint has concluded its testing, SBC Illinois states that the vast majority (21 of the 25) are simply due to business rule interpretations, which it addressed in the discussion of the E&Y audit. Of these 21 "Not Satisfied" Observations, SBC Illinois has clarified the business rule for 18, and the CLECs have agreed to the changes, which are to become effective with tariff approval by the Commission. The other 3 are pending modifications in the next six-month review. (Id. ¶¶ 180-185.)

b. AT&T Rebuttal Position.

2819. In its rebuttal affidavits,[258] AT&T again asserts that SBC Illinois has not demonstrated that its performance data are accurate, reliable, and stable, which has been a required showing in all prior approved Section 271 applications.[259] Contrary to SBC Illinois' assertions, AT&T points out that the results of the BearingPoint audit do not prove that its performance data are trustworthy. AT&T submits that the BearingPoint performance metrics audit that is currently being conducted has revealed numerous deficiencies, which show that SBC's performance monitoring and reporting systems remain rife with error. AT&T Exh. 1.1, ¶ 9. Moreover, AT&T also notes that the E&Y Third Corrective Action Report, issued on February 28, 2003, in the Michigan § 271 proceeding, confirms that SBC's data integrity issues remain unresolved. Finally, AT&T argues that, when compared to other BOCs who have sought § 271 authority, SBC Illinois' PMR results do not remotely measure up to the standards that have been used by the FCC.

New BearingPoint Exceptions

2820. AT&T also noted that although BearingPoint had, by the time of the filing of AT&T's rebuttal affidavits, closed exceptions and observations, BearingPoint has opened new exceptions and new observations, which confirmed AT&T's view that SBC Illinois' performance metric data are not accurate. In particular, AT&T discussed Exception 187 and 188.

2821. **Exception 187:** During the PMR1 test, SBC Illinois provided its technical documentation, which identifies "the systems used, the data required, and the step-by-step logic used to arrive at the published performance measurement results."[260] Although, as AT&T notes, SBC Illinois has heralded the completeness of its technical documentation and stated that it fully expects to satisfy all test criteria in the PMR1 test,[261] AT&T explains that Exception 187, which was opened February 18, 2003, demonstrates the these contentions are not supportable.

2822. SBC Illinois' unprocessed data, which are first captured in various source systems, "undergo a transformation process in which the data fields necessary for calculating

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[258] *See* AT&T Exh. 1.1 (Rebuttal Affidavit of Timothy Connolly); AT&T Exh. 3.1 (Joint Rebuttal Affidavit of Sarah DeYoung and Walter W. Willard).

[259] *Michigan 271 Order*, ¶ 204; *Connecticut 271 Order*, Attach. D., ¶ 7; *Kansas Oklahoma 271 Order*, ¶ 270; *Texas 271 Order*, ¶¶ 428-49; *New York Order*, ¶ 433.

[260] Attached to this Rebuttal Affidavit as Attachment 8 -- BearingPoint Exception 187, dated February 18, 2003 at 1.

[261] SBC Illinois Exh. 2.2, ¶¶ 134-138.

metric results are extracted and housed in repositories."[262] These data may migrate through more than one source system before reaching "the reporting systems, where the metrics calculations are done."[263] The data in these "repositories are then further manipulated to produce the metrics results."[264] AT&T notes, however, in Exception 187 BearingPoint found that SBC Illinois' technical documentation that describes this process and contains the calculation logic for its performance results is inaccurate or incomplete with respect to *13* of the 18 measurement groups affecting *55* of the 149 performance measures. AT&T Exh. 1.1, ¶ 17.[265]

2823. AT&T also rejects SBC Illinois' attempts to minimize the impact of Exception 187.[266] As AT&T notes, the performance measurements that are adversely affected by the deficiencies identified in SBC Illinois' calculation logic are neither trivial nor insignificant. Indeed, the affected performance metrics include measures that have been critical or highly probative in assessing a BOC's performance in prior 271 applications. AT&T Exh. 1.1, ¶ 18-19. For example, the FCC has repeatedly stressed the critical importance of timely status notices.[267] Similarly, the FCC has recognized that the degree to which orders flow through a BOC's systems without manual intervention is "a potential indicator of a wide range of problems that underlie a determination of whether a BOC provided nondiscriminatory access to its OSS."[268] In Exception 187, however, BearingPoint found that SBC Illinois' step-by-step logic for calculating its reported results on status notice timeliness and flow through is inaccurate and incomplete.[269]

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[262] Commission Phase II Exhibit 2, at 13.

[263] *Id.*

[264] Commission Phase II Exhibit 2, p. 13.

[265] BearingPoint Exception 187, dated February 18, 2003. The performance measurement groups and measures that BearingPoint identified are: Billing (PMs 14 and 18); Collocation (PM MI 4); Directory Assistance and Operator Services (PM 83); Directory Assistance Database (PMs 110, 111, 112, and 113); Facilities Modification (PMs CW1, CW6, CW7, CW8, CW9, and WI 9); Interconnection Trunks (PM 71); Local Number Portability (PMs 91, 92, 93, 95, 96, 97, 98, 99, 100 and 101); Maintenance and Repair (PM 54); Ordering (PMs 5, 5.2, 6, 7, 7.1, 8, 9, 10.1, 10.2, 10.3, 10.4, 11, 11.1, 11.2, 13, 13.1, and MI 2); Other (PMs CW5, MI 9, MI 12, MI 13, and MI 15); Poles, Conduits and Rights of Way (PMs 105 and 106); Pre-Order (PMs 1.1 and 4); and Provisioning (PMs 55.1, 56, and 56.1).

[266] SBC Illinois Exh. 2.2, ¶ 137.

[267] *See*, *e.g.*, *BellSouth South Carolina 271 Order,* ¶ 139, *Second BellSouth Louisiana Order*, ¶ 131. *See also Georgia/Louisiana 271 Order*, ¶ 143 (noting that "a BOC's overall ability to . . . return timely order confirmation and rejection notices" is "relevant and probative for analyzing a BOC's ability to provide access to its ordering functions in a nondiscriminatory manner") (footnote omitted); *Texas 271 Order* ¶ 179 (same).

[268] *Georgia/Louisiana 271 Order* ¶ 143; *Texas 271 Order*, ¶ 179.

[269] The ordering performance measurements which are impacted by these deficiencies in the calculation logic are: PM 5 (Percent Firm Order Confirmations Returned Within "X" Hours); PM 6 (Average Time to Return FOC); PM 7 (Percent Mechanized Completions Returned Within One Hour of Completion in

2824. Similarly, notes AT&T, the FCC has found that provisioning measures, such as those on average installation interval and percentage of due dates missed, are important "in assessing whether the incumbent LEC processes and completes orders from competing carriers in the same timeframe in which it processes and completes its own retail orders."[270] However, BearingPoint has found that SBC Illinois' documentation of its performance measurement calculation logic for several provisioning metrics is inadequate: PM 55.1 (Average Installation Interval – DSL); PM 56 (Percent Installations Completed within Customer Requested Due Date); and PM 56.1 (Percent Installations Completed Within the Customer Requested Due Date for Loop with LNP). *See* AT&T Exh. 1.1, ¶ 20.[271]

2825. Moreover, as the FCC has also held, "[t]o compete effectively in the local exchange market, competing carriers must be able to diagnose and process customer trouble complaints with the same speed and accuracy that [the BOC] diagnoses and processes complaints from its retail customers."[272] However, as AT&T again points out, BearingPoint found in Exception 187 that SBC Illinois' documentation fails to document adequately the calculation logic used to report results for Performance Measurement 54 (Failure Frequency) which measures the number of network trouble reports within a calendar month per 100 circuits. AT&T Exh. 1.1, ¶ 21.[273]

2826. As another example, AT&T argues that the FCC also has held that a BOC is "obligated to provide competing carriers with complete and accurate reports on the service usage of competing carriers' customers in substantially the same time and manner that [the BOC] provides such information to itself."[274] However, BearingPoint found in Exception 187 that SBC Illinois' technical documentation does not adequately document the calculation logic used to report performance results for PMs 14 (Billing Accuracy) and 18 (Billing Timeliness – Wholesale Bill). Thus, SBC Illinois' incomplete or inaccurate documentation of the "step-by-

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Ordering Systems); PM 8 (Average Time to Return Mechanized Completions); PM 9 (Percent Rejects); PM 10.1 (Percent Mechanized Rejects Returned Within One Hour of Receipt of Order); PM 10.2 (Percent Manual Rejects Received Electronically and Returned Within Five Hours); PM 10.4 (Percentage of Orders Given Jeopardy Notices); PM 11 (Mean Time to Return Mechanized Rejects); PM 11.1 (Mean Time to Return Manual Rejects That Are Received Via an Electronic Interface); PM 13 (Order Process Percent Flow Through); and PM 13.1 (Total Order Process Percent Flow Through).

[270] *New York 271 Order,* ¶ 195.

[271] *See* BearingPoint Exception 187, dated February 18, 2003 at 1.

[272] *New York 271 Order,* ¶ 217.

[273] BearingPoint Exception 187, dated February 18, 2003 at 1.

[274] *New York 271 Order*, ¶¶ 226.

step logic used to arrive at the published performance results" has negatively impacted numerous performance measures that are essential to competitive entry. AT&T Exh., ¶ 22.[275]

2827. Rather than consider Exception 187 a narrowing of focus, as SBC Illinois claims, AT&T emphasizes the in Exception 187, BearingPoint found that the inaccuracies in SBC Illinois' documentation "may include database queries that incorrectly document the extraction of data and calculation of performance results."[276] Given the critical importance of correct data extractions when calculating performance results, Exception 187 is a striking example of the inherent risk of relying on the performance data submitted by SBC Illinois. In assessing the impact of this exception, BearingPoint observed that "[a]ccurate documentation for calculating performance measurement results is necessary to maintain consistency in the calculation process and to enable effective management of changes to the calculations over time."[277]

2828. Moreover, AT&T also note the importance of BearingPoint continuing to analyze the sufficiency of SBC's technical documentation for other measures and will update Exception 187 accordingly. Thus, AT&T asserts that rather than a narrowing of focus, BearingPoint may be expanding the scope of investigation on this point. As AT&T witness Connolly states: "It is possible, if not probable, that as more faults are found, these deficiencies will negatively impact other areas of testing where success is dependant on first establishing the validity of technical documentation. Notably, because the PMR1 test is inextricably linked to the PMR4 (Data Integrity) and PMR5 (Metrics Replication) tests, testing failures in PMR1 that are the subject of Exception 187 could spawn test failures in or thwart the completion of the PMR4 and PMR5 tests." AT&T Exh. 1.1, ¶ 24.

2829. For example, during the PMR4 (Data Integrity) test, BearingPoint obtains from SBC Illinois "unprocessed data from the earliest electronic capture point[s]" that are identified during the PMR1 test.[278] During the data integrity phase of testing, BearingPoint assesses the completeness and accuracy of SBC Illinois' data by comparing unprocessed data with processed data and SBC's adherence to the performance measurements technical documentation, which is evaluated during the PMR1 test.[279] However, AT&T claims that SBC Illinois' inaccurate or incomplete calculation logic examined during the PMR1 test could lead to test failures or adversely affect the ability of BearingPoint to test the completeness and accuracy of SBC's data during the PMR4 test. AT&T Exh. 1.1, ¶ 25.

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[275] *See* BearingPoint Exception 187 at 1.

[276] *Id.*

[277] *Id.* at 2.

[278] Commission Phase II Exhibit 2 at 29.

[279] *Id.* at 30.

2830. Similarly, during the PMR5 (Metrics Replication) test, BearingPoint examines, *inter alia*, "the procedures necessary for the calculation of the performance measurements" which are evaluated during the PMR1 test and confirms whether the metric values that SBC Illinois has reported are accurate and consistent with the metrics business rules governing the measures.[280] AT&T asserts that because PMR1 testing is inescapably linked to PMR5 testing, it logically follows that the deficiencies in the calculation logic uncovered during the PMR1 test which are the subject of Exception 187 could result in test failures or incomplete testing during the PMR5 phase. AT&T Exh. 1.1, ¶ 26. More fundamentally, in view of the serious deficiencies in SBC's technical documentation which sets forth the calculation logic used to produce its reported results, SBC Illinois cannot legitimately contend that its performance data are accurate and "above suspicion."[281] *Id.*

2831. **Exception 188**: AT&T also draws attention to a second PMR Exception Report recently issued by BearingPoint. On February 18, 2003, BearingPoint opened Exception 188, finding that SBC Illinois' data flow diagrams (which document data flows from the Performance Measurement Reporting System to source systems) and data element maps (which document data flows from the Performance Measurement Reporting System to source systems at the field level) do "not consistently present an adequate depiction of the flow of data from the source systems to the performance measurement reporting systems for certain performance measurements."[282] In this exception, BearingPoint identified 12 measurement groups and 42 performance measurements as to which SBC's data flow documentation appears to be inaccurate.[283] The inaccuracies that BearingPoint "found in the documentation include the absence of certain intermediate systems and unclear sources of data elements."[284] Additionally, BearingPoint pointed out that it is still in the process of examining the accuracy of technical documentation for other performance measurements.

2832. Again, AT&T rejects SBC Illinois' suggestion that these exception reports should be disregarded. *See e.g.,* SBC Illinois Exh. 2.2, ¶ 133, 137. According to AT&T, in this

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[280] *Id.* at 33.

[281] *Texas 271 Order* at ¶ 429.

[282] Attached hereto this Rebuttal Affidavit as Attachment 9 -- BearingPoint Exception 188, dated February 18, 2003 at 1.

[283] The performance measurement groups and measures are: 911 (PMs 104.1, MI 6); Bona Fide Requests (PMs 120, 121); Billing (PMs 14, 19); Coordinated Conversions (PM 115.2); Directory Assistance Database (PMs 111, 113); Facilities Modification (PMs CW1, CW6, CW7, CW8, CW9); Interconnection Trunks (PM 71); Local Number Portability (PMs 91, 92, 93, 95, 99); Miscellaneous Administration (PM 25); Order (PMs 5, 5.2, 6, 7, 7.1, 8, 9, 10, 10.1, 10.2, 10.3, 10.4, 11, 11.1, 11.2, 13, 13.1, MI 2); Other (PMs MI 9, MI 13); and Pre-Order (PM 4).

[284] BearingPoint Exception 188 at 1.

testimony, SBC Illinois' witness fails to acknowledge that correct mapping of data fields is essential to consistent and accurate performance reporting. According to AT&T, SBC Illinois' data flow diagrams and data element maps are the blueprints that serve as the basis upon which SBC analysts and programmers manage the data underlying SBC Illinois' reported results. AT&T Exh. 1.1, ¶ 28. These documents also are used to effect the changes in the performance monitoring system that are necessary to correct any defects in SBC Illinois' implementation of the metrics business rules which are identified in exceptions and observations during metrics testing. When data flow diagrams and data element maps are inaccurate and incomplete, system changes will be made on the basis of incorrect specifications that can substantially increase the risk that errors and internal inconsistencies will be introduced into the changed systems. *Id.* In assessing the impact of Exception 188, BearingPoint explained that "[a]ccurate documentation, which describes the flow of performance data through SBC Ameritech's systems, is necessary to maintain consistency in the resulting calculation process and to enable effective management of changes to the data flows."[285]

2833. **Observations:** AT&T also points to a spate of recent Observations raising issues regarding SBC Illinois' PMR systems. As AT&T points out, the deficiencies in SBC's performance monitoring and reporting processes are also illustrated by the observations that have been opened during the BearingPoint Illinois test. *See* Exh. 1.1, ¶ 29-40.[286]

2834. For example, on February 17, 2003, BearingPoint opened Observation 809 in the PMR4 test (as well as the PMR5 test), finding that SBC Illinois "appears to be using inaccurate data when calculating performance results for Performance Measurement 10 (Percent Mechanized Rejects Returned Within One Hour of Receipt of Reject in MOR) and Performance Measurement 11 (Mean Time to Return Rejects).[287] In this observation, BearingPoint noted that the business rules governing the measures state that the "[t]he start time . . . is the date and time the reject is available to MOR and the end time is the date and time the reject notice is sent to the CLEC."[288] However, BearingPoint found that, with respect to 40 percent of the mechanized rejection transactions examined, SBC Illinois reported negative durations. Noting that negative durations are impossible, BearingPoint found that SBC Illinois does not appear to "maintain synchronicity between the two applicable time-stamping mechanisms."[289] BearingPoint also found that, although SBC Illinois asserted that it adjusts transactions with a negative duration by

[285] *Id.* at 2.

[286] The sixteen observations are Observations 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816 and 817. Each of these Observations was opened for Illinois and one or more of the other four SBC Midwest states. Observations 803, 807 and 808 are in the process of being closed.

[287] BearingPoint Observation 809, dated February 17, 2003.

[288] *Id.*

[289] *Id.*

using a "0" time duration, this adjustment "does not yield accurate performance measurement results [and could make] other 'positive' durations appear shorter than their actual length."[290]

2835. In the PMR4 and PMR5 tests, BearingPoint also opened Observation 810 on February 17, 2003, finding that SBC failed to adhere to the July 2002 business rules when calculating results for Performance Measurement 55.3 (Percent xDSL - Capable Loop Orders Requiring the Removal of Load Coils and/or Repeaters).[291]

2836. On February 13, 2003, BearingPoint opened a number of observations in the PMR5 test, finding that it could not replicate SBC's July 2002 performance data for: Performance Measurement 92 (Percentage of Time the Old Service Provider Releases the Subscription Prior to the Expiration of the Second 9 Hours (T2) Timer);[292] Performance Measurement 96 (Percentage Pre-Mature Disconnects for LNP Orders);[293] and Measurement 97 (Percentage of Time SBC Ameritech Applies the 10-Digit Trigger Prior to the LNP Order Due Date).[294]

2837. In three observations opened on February 27, 2003 in the PMR5 test, BearingPoint found that: (1) SBC's reported results for PM 2 (Percent Response Received Within "X" Seconds – OSS Interfaces) do not comply with July, August and September 2002 business rules because they inappropriately exclude certain weekday transactions and incorrectly include certain Saturday transactions;[295] (2) it could not replicate SBC's restated July 2002 results for PM 2 (Percent Response Received Within "X" Seconds);[296] and (3) SBC Illinois has improperly implemented the July, August and September 2002 business rules for PM CLEC WI 1 (Average Delay in Original FOCs Due Dates Due to Delay Notices (Issue F)).[297]

2838. According to AT&T, there are multiple observations associated with 104 performance measures that have repeatedly failed the PMR5 metrics replication test. AT&T

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[290] *Id.*

[291] BearingPoint Observation 810, dated February 17, 2003.

[292] BearingPoint Observation 802, dated February 13, 2003.

[293] BearingPoint Observation 805, dated February 13, 2003.

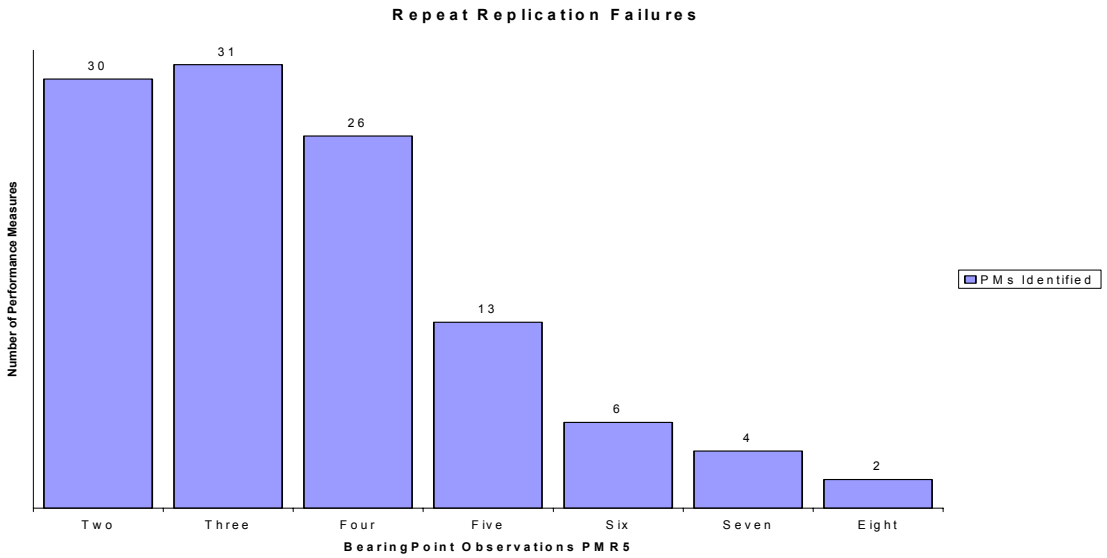
[294] BearingPoint Observation 806, dated February 13, 2003.

[295] BearingPoint Observation 811, dated February 27, 2003.

[296] BearingPoint Observation 812, dated February 27, 2003.

[297] BearingPoint Observation 813, dated February 27, 2003.

introduced the following chart (*see* AT&T Exh. 1.1, ¶ 34) to show that these repeated failures reflect SBC's demonstrated inability to generate accurate reported results for these measures:



2839. According to AT&T, as shown by this chart, the performance measurements that have suffered from multiple failures during the PMR5 test include many measures that this Commission has considered in assessing Section 271 compliance. As noted above, the FCC has examined flow through data in determining whether the BOC has provided nondiscriminatory access to its OSS. However, SBC Illinois' performance data on PMs 13 (Order Processing Percent Flow Through) and 13.1 (Total Order Process Percent Flow Through) have failed the PMR5 test multiple times.

2840. Thus, for example, in Observation 299 opened on April 3, 2002, BearingPoint found that it could not replicate SBC's October 2001 reported data for PM 13.1 (Total Order Process Percent Flow Through).[298] In Observation 488 opened on June 3, 2002, BearingPoint found that SBC failed to comply with published business rules by improperly excluding revisions to orders when calculating its PM 13.1 results for UNEs.[299] In Observation 591 opened on August 6, 2002, BearingPoint found that it could not replicate SBC's January 2002 results for PM 13.1.[300] On September 23, 2002, BearingPoint opened Observation 661, finding that SBC was improperly excluding project orders from its PM 13.1 results for January, February, and March 2002.[301] On January 16, 2003, BearingPoint found, in Observation 787, that SBC was

[298] BearingPoint Observation 299, dated April 3, 2002.

[299] BearingPoint Observation 488, dated June 3, 2002. *See also* BearingPoint Observation 488, Version 2, dated June 17, 2002.

[300] BearingPoint Observation 591, dated August 6, 2002.

[301] BearingPoint Observation 661, dated September 23, 2002. *See also* BearingPoint Observation 661, Version 2, dated November 26, 2002.

improperly "excluding orders with particular order class codes" when calculating its results for PM 13.1 for July, August, and September 2002.[302] The chronic failure of PM 13.1 to satisfy the PMR5 replication test shows that SBC Illinois' performance data are highly suspect, and any claims of compliance on this measure should not be credited.

2841. Similarly, AT&T points out, the FCC has repeatedly stressed the "critical" importance of timely jeopardy notices to CLECs so that they can inform their customers when services will not be installed on the scheduled due date and promptly reschedule the time for service installation.[303] However, SBC's performance data on PM 10.4 (Percentage of Orders Given Jeopardy Notices) have repeatedly failed the PMR5 test and have been the subject of seven observations which show the following:

- SBC's posted results for PM 10.4 do not comply with the January and February 2002 published business rules.[304]
- SBC's reported results for PM 10.4 do not comply with the January, February, and March 2002 business rules because SBC "has been incorrectly marking some unbundled loop orders as related orders, causing them to be incorrectly categorized."[305]
- SBC's reported results for PM 10.4 do not comply with the January, February, and March 2002 business rules because of transaction timestamp errors.[306]
- SBC's reported results for PM 10.4 do not comply with the January, February and March 2002 business rules because SBC captures only those "jeopardies that are issued within 24 hours of the due date for the retail analogs of this measure."[307]

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[302] BearingPoint Observation 787, dated January 16, 2003.

[303] *See*, *e.g., First Louisiana Order*, ¶ 39; *Second Louisiana Order*, ¶¶ 131,133.

[304] BearingPoint *Observation* 534, dated June 17, 2002.

[305] BearingPoint Observation 583, *dated* July 24, 2002.

[306] BearingPoint Observation 676, *dated* October 9, 2002. *See also* BearingPoint Observation 676, Version 2, dated November 21, 2002.

[307] BearingPoint *Observation* 684, dated October 23, 2002. *See also* BearingPoint Observation 684, Version 2, dated November 21, 2002.

- SBC is improperly applying exclusions when calculating its January, February, and March 2002 results of PM 10.4.[308]

- SBC is improperly applying exclusions when calculating its July, August, and September 2002 results of PM 10.4.[309]

- SBC's posted data for PM 10.4 do not comply with the July, August, and September 2002 business rules because SBC has excluded "system downtime, weekends and holidays."[310]

2842. The FCC also has examined performance data on completion notices in assessing whether the BOC has satisfied its statutory obligations.[311] However, SBC Illinois' performance data on PM 7.1 (Percent Mechanized Completions Returned Within One Day of Work Completion) have been the subject of five observations during the PMR5 metrics replication test which reveal that:

- BearingPoint could not replicate SBC's October 2001 PM 7.1 results for UNEs.[312]

- SBC does not follow the published business rules governing PM 7.1 and has improperly excluded Stand-Alone LNP Orders from the UNE disaggregation for October 2001 results.[313]

- SBC's reported results for PM 7.1 do not comply with January, February, and March 2002 published business rules because SBC has improperly excluded Stand-Alone LNP Orders from the UNE disaggregation.[314]

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[308] BearingPoint Observation 687, dated October 23, 2002. *See also* BearingPoint Observation 687, Version 2, dated November 21, 2002.

[309] BearingPoint Observation 725, dated December 3, 2002.

[310] BearingPoint Observation 756, dated December 17, 2002. *See also* BearingPoint Observation 756, Version 2, dated January 21, 2003.

[311] *See, e.g., Second Louisiana Order,* ¶ 30; *Georgia/Louisiana Order*, ¶¶ 153-154.

[312] BearingPoint Observation 297, dated April 3, 2002.

[313] BearingPoint Observation 430, dated May 2, 2002.

[314] BearingPoint Observation 493, dated June 3, 2002.

- SBC's reported results for PM 7.1 do not comply with the January, February, and March 2002 published business rules because SBC used business days instead of calendar days in its calculations.[315]

- SBC improperly includes "'CLEC-caused misses and delays'" when calculating its PM 7.1 results for July and August 2002.[316]

2843. AT&T states that other performance metrics that have repeatedly failed the PMR5 metrics replication test include: PMs 43 and 55, which measure average installation intervals; PMs 17 (Billing Completion) and 19 (Daily Usage Feed Timeliness); and PM 67 (Mean Time to Restore). In prior applications, the FCC has examined performance data on such measurements in assessing Section 271 compliance.[317] In Attachment 10 to Mr. Connolly's Rebuttal Affidavit (Exh. 1.1, Attachment 10), he includes a comprehensive list of performance measures that have repeatedly failed the PMR5 test and which have been mapped to observations discussing the deficiencies in these measures. In Attachment 11 to his Rebuttal Affidavit, he shows this same information graphically. When these exhibits are reviewed, AT&T states that the Commission will be able to see that every performance measure group has been impacted by SBC Illinois' inability to show that its performance measurement results are capable of replication. AT&T Exh. 1.1, ¶ 39. Moreover, several of the most critical measure groups (PreOrder/Order, Provisioning UNEs and M&R) represent the groups with the largest number of measures affected by this problem. *Id.*

2844. According to AT&T, these chronic failures of SBC Illinois's performance measures to satisfy PMR5 replication testing show that SBC Illinois has not met and cannot meet its burden of demonstrating that its data are accurate, complete and reliable. AT&T Exh. 1.1, ¶ 40.[318] Moreover, given the substantial problems regarding the integrity of SBC Illinois data that have been uncovered to date and the testing that remains to be completed, AT&T believes it is entirely possible that new exceptions and observations will yet be opened. *Id.*. For all of these

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[315] BearingPoint Observation 659, dated September 23, 2002.

[316] BearingPoint Observation 743, dated December 12, 2002.

[317] *See, e.g., Michigan 271 Order*, ¶ 212 (referring to performance data on average installation intervals and billing); *id.,* ¶ 221 (referring to billing and usage data); *First Louisiana 271* Order, ¶ 41 (noting that "[a] critical measure in determining whether a BOC has been providing competing carriers with nondiscriminatory access to its operational support systems is average installation intervals") (footnote omitted); New *York 271 Order*, ¶ 202 (referring to average installation intervals); *id.,* ¶ 221 (referring to mean time to restore); *id.*, ¶ 227 (referring to billing data).

[318] As of March 12, 2003, the open exceptions in the Illinois PMR test are: 41, 111, 119, 134, 157, 175 176, 179, 181, 183, 186, 187, and 188. The observations which are open as of February 28, 2003 are: 429, 461, 488, 538, 547, 570, 584, 587, 594, 613, 619, 623, 624, 625, 627, 630, 631, 633, 637, 638, 639, 643, 645, 661, 664, 676, 679, 684, 686, 687, 688, 697, 709, 710, 717, 721, 725, 727, 729, 732, 737, 738, 739, 747, 748, 749, 755, 766, 767, 768, 769, 771, 772, 776, 778, 785, 786, 787, 791, 792, 793, 794, 796, 797, 798, 800, 802, 803, 804, 805, 806, 807, 809, 810, 811, 812, 813, 814, 815, 816, 817, and 818.

reasons, AT&T contends that SBC's claims of progress in the PMR test are premature, and SBC Illinois cannot legitimately contend it has satisfied its burden of proof in this proceeding.

The E&Y Corrective Action Report

2845. In SBC Illinois' witness Ehr's rebuttal affidavit, AT&T notes that he repeats the claim made in his initial affidavit that, E&Y's audit of SBC Illinois' PMR systems provide "additional" assurances that PMR results are calculated accurately.[319] AT&T's witness Connolly explained in his initial Affidavit that SBC Illinois' arguments that the E&Y audit serves as proof that its data are accurate and reliable are belied by: (1) the fact that SBC hand-picked its financial auditor to conduct an end-run around the audit conducted by BearingPoint under a Master Test Plan that had been approved by the Commission;[320] (2) the procedural and substantive deficiencies in E&Y's audit procedures, including the lack of military-style testing to assure that SBC Illinois had taken appropriate action to correct defects in its data; (3) E&Y's own reports, which are littered with issues highlighting the unreliability of SBC Illinois' data; and (4) the defects in SBC Illinois' performance monitoring and reporting processes which BearingPoint continues to uncover and which E&Y failed to detect.

2846. Mr. Connolly goes on to note a new development that confirms the points he made in his February 20, 2003 affidavit. *See* AT&T Exh. 1.1, ¶ 67. On February 28, 2003, SBC filed with the Michigan Public Service Commission an update on the current status of the corrective action it purportedly has taken to address E&Y's findings, along with E&Y's Supplemental Report Regarding Management's Assertions dated February 28, 2003.[321] According to Mr. Connolly, E&Y's Third Corrective Action Report and SBC's update provide further confirmation that SBC's data are untrustworthy, and that its Application is premature.

2847. In its Third Corrective Action Report E&Y states that, with two exceptions, it has examined the assertions of SBC's management regarding the status of SBC's remedial steps "to

[319] SBC Illinois Exh. 2.2, ¶ 93.

[320] Mr. Ehr appears to confirm this when he states: "That is why SBC Illinois engaged E&Y to supplement the record." SBC Illinois Exh. 2.2, ¶ 118. SBC Illinois has admitted that it retained E&Y because it could not hope to satisfy the Master Test Plan requirements or BearingPoint's testing methodology in time to satisfy its own internal plans for seeking § 271 authority.

[321] *See* SBC Submission of Supplemental Ernst & Young Reports and Update on Current Status of Corrective Actions, attaching E&Y Report of Independent Accountants, dated February 28, 2003 and SBC Report of Management on Changes Implemented to the Reporting of Performance Measurements Pursuant to the Michigan Business Rules, dated February 28, 2003 ("Third Corrective Action Report"), *In the Matter, on the Commission's own Motion to Consider Ameritech Michigan's Compliance with the Competitive Checklist in Section 271 of the Telecommunications Act of 1996*. This report is available from the Michigan Commission web site at the following URL: http://www.cis.state.mi.us/mpsc/comm/271/sbc_submission_for_supp_ey_report.pdf.

address instances of material noncompliance with the Michigan Business Rules."[322] The Third Corrective Action Report discusses, *inter alia*, exceptions that ostensibly have been corrected by SBC as a result of restatements on February 5, 2003; corrective actions that SBC has implemented on January 20 or February 20, 2003; and exceptions that "are pending corrective action."[323]

2848. As AT&T explained in its February 20, 2002 comments and affidavits, because of the flawed methodology that E&Y has used to test SBC Illinois' corrective action, there is no sound basis upon which any conclusion can be reached that SBC has successfully resolved the deficiencies in its data that have been identified by E&Y.[324] Thus, according to AT&T, no comfort can or should be taken that SBC has implemented the necessary corrective steps to assure that its September-November 2002 data upon which it relies are accurate. AT&T goes on to note, however, that even assuming *arguendo* that SBC Illinois has, in fact, implemented the corrective steps it describes in its Third Corrective Action Report – and there is no reliable, verifiable proof that it has – it is particularly telling and disturbing that it has taken SBC such an extraordinarily long time to correct a *portion* of the deficiencies in its March, April and May 2002 data (which are now 10-12 months old) that E&Y documented in its October 2002 report. AT&T Exh. 1.1, ¶ 45. To make matters worse, by SBC's own admission, it still has not corrected all of the problems that E&Y has identified. *Id.*

2849. For example, AT&T points out that E&Y found that SBC failed to identify DSL transactions by geographic region as required by the business rules governing PMs 55.1, 55.3, 56, 58, 59, 60, 61, 62, 63, and 65. SBC states that it has implemented a new code to correct these problems and *plans to restate* its July through December 2002 results in the second quarter of 2003. *See* AT&T Exh. 1.1, ¶ 46. [325] Additionally, E&Y found that SBC improperly excluded wholesale transactions from its reported results for PM MI 12 (Average Time to Clear Service Order Errors). *See* AT&T Exh. 1.1, ¶ 47. SBC reports that, commencing with its January 2003 results, it starting capturing these records, and that, "[i]f possible and required, July 2002 through December 2002 results will be scheduled for restatement in the second quarter of 2003." In that connection, SBC notes that its "ability to restate is *being evaluated*."[326]

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[322] *See* Third Corrective Action Report, p. 1.

[323] *See* SBC Report of Management on Changes Implemented to the Reporting of Performance Measurements Pursuant to the Michigan Business Rules, dated February 28, 2003 at 2, Third Corrective Action Report.

[324] *See* AT&T Exhibit 1.0P, Affidavit of Timothy Connolly, ¶ 136-147.

[325] Third Corrective Action Report, Attach. A at 7, Issue IV-15.

[326] *Id.*, Issue IV-27 (emphasis added).

2850. Moreover, in the Third Corrective Action Report, SBC also admits that it has not yet completed its implementation of other remedial steps that are necessary to cure the defects in its data. Thus, SBC concedes that:

- SBC has not yet implemented the computer programming changes to include orders involving projects in its reported results for PM 91 (Percentage of LNP Only Due Dates Within Industry Guidelines);[327]

- SBC has experienced yet another delay in implementing the computer code changes to address E&Y's findings that SBC failed to exclude CLEC-caused delayed unlocks in calculating its results for PM 104.1 (Average Time It Takes to Unlock the 911 Record).[328]

- SBC plans to implement with its results reported in March 2003 a new programming code to address E&Y's finding that it "incorrectly reported internal orders impacting the CLEC portion of a partially 'won-back' account as wholesale orders during March, April and May, 2002";[329]

- With its results reported in March 2003, SBC plans to implement corrective steps to address E&Y's finding that SBC failed to report "the UNE-P level of disaggregation for electronically processed completion notices" when calculating its results for MI 14 (Percent Completion Notifications Returned Within "X" Hours of Completion of Maintenance Trouble Ticket);[330]

- SBC plans to implement computer programming changes in its February results reported in March 2003 to address E&Y's finding that customer-caused no-access reports were inappropriately included in its performance results for PM WI 1 (Percent No Access – UNE Loops Provisioning);[331]

- SBC plans to implement, effective with its February 2003 results reported in March 2003, a computer programming code to address E&Y's finding that it did not include data for UNEs and Specials when reporting its

[327] *See id.* at 9, Issue No. III-10(ii).

[328] *See id.,* Issue No. II-B-8(ii).

[329] *Id.* at 10, Issue No. IV-12.

[330] *Id.*, Issue No. IV-28.

[331] *Id.* at 11, Issue IV-30.

results for C WI 5 (Percentage of Protectors Not Removed at Technician Visit (Issue O)).[332]

2851. Furthermore, in its Third Corrective Action Report, E&Y states that it has *not* examined and, therefore, renders *no* opinion with respect to the computer program code changes SBC claims to have made to address E&Y's findings that: (1) SBC failed to capture customer-requested due dates when calculating its performance results for PM 27 (Mean Installation Interval) and 28 (Percent POTS/UNE-P Installations Completed Within the Customer Requested Due Date); and (2) SBC used the wrong field when determining the "exclusion for customer-requested due dates in excess of the stated time period" when calculating its results for PMs 43, 44, 55, 55.1, 56, and 56.1.[333] As to these issues, SBC states that it has implemented a computer code to fix these defects in the data, but that it plans to restate its July through December 2002 results in the second quarter of 2003. As AT&T witness Connolly explains, "[b]ecause E&Y has unequivocally stated that it has not undertaken any review of these assertions, the current record is bereft of any evidence confirming that these coding changes have corrected or will correct SBC's errors in calculating performance results for these provisioning measures. And, of course, it remains to be seen whether SBC's restatements accurately reflect SBC's performance." AT&T Exh. 1.1, ¶ 49.

2852. Thus, according to AT&T, by its own admission, SBC still has not resolved the deficiencies that E&Y identified during its audit and corrected all errors in its performance data. These admissions underscore that the performance data for these measures in SBC Illinois' performance metrics reports are inaccurate. AT&T Exh. 1.1, ¶ 50. AT&T contends that if and when SBC Illinois finally completes all corrective steps necessary to correct its error-ridden processes, there must, and should, be verifiable evidence that SBC Illinois' corrective action has successfully resolved the data integrity issues, and that its restated data are accurately reported. Such confirmation is absolutely essential, particularly given the considerable difficulties BearingPoint is currently experiencing in attempting to replicate SBC Illinois' restated results.

2853. Importantly, in its most recent status report, SBC also has admitted that its "final report" on the status of its corrective action will not be filed until the *second quarter of 2003*. Thus, it is clear that the deficiencies in SBC's data that E&Y identified in its albeit, flawed audit will not be resolved for some time. AT&T recommends that, given these circumstances, as well as the significant data integrity issues that BearingPoint continues to uncover, SBC cannot seriously contend (as Mr. Ehr does in his rebuttal affidavit) that the E&Y audit serves as probative evidence that the performance data upon which it relies are accurate and show checklist compliance. AT&T Exh. 1.1, ¶ 51. The procedural and substantive deficiencies in the E&Y audit, standing alone, preclude such a finding. And, in all events, even E&Y's flawed audit reveals that considerable work remains to be done before SBC can legitimately contend that its performance data are reliable.

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[332] *Id.*, Issue No. IV-31.

[333] *Id.* at 6, Issue Nos. IV-11 and IV-14(ii).

Comparison to Other BOCs

2854. In various portions of their submission to the Commission, SBC Illinois notes that its performance is either at a par or superior to that observed or shown in other BOC § 271 applications.[334] As AT&T points out in its rebuttal testimony, however, the BearingPoint PMR Report reveals that SBC Illinois satisfied only 23 *percent* and failed 43 percent of the PMR test criteria, and the remaining 34 percent of the test criteria are indeterminate. AT&T Exh. 1.1, ¶ 67.[335] According to AT&T, the open exceptions and observations in Illinois, combined with BearingPoint's PMR Report, show that SBC Illinois' performance monitoring and reporting processes have been and continue to be plagued with serious deficiencies. *Id.*

2855. According to AT&T, SBC Illinois' performance failures during BearingPoint's Illinois PMR test are substantially worse than those of BOCs that have received 271 authorization in states where BearingPoint has conducted similar PMR tests. In other states where BearingPoint has conducted similar PMR testing and the BOC has obtained 271 approval, the BOC passed over *90 percent* of the test criteria in the PMR tests. In view of the PMR test results of other BOCs that have obtained 271 approval, AT&T believes that SBC Illinois' high failure rate during the Illinois PMR test requires that the Commission must not and should not consider such poor results to be acceptable. AT&T Exh. 1.1, ¶ 68.[336] For comparison purposes, AT&T points to results from the Georgia § 271 proceeding, the subsequent "5-State BellSouth" § 271 proceeding, the Florida/Tennessee § 271 proceeding, the New Jersey § 271 proceeding, the Pennsylvania § 271 proceeding, and the Virginia § 271 proceeding. *See* AT&T Exh. 1.1, ¶¶ 70-91.

Georgia

2856. On February 14, 2002, BellSouth filed its application to provide in-region, interLATA services in Georgia in which it asserted that its performance data were accurate and reliable based upon performance metrics audits that BearingPoint conducted.[337] When BellSouth

[334] See, e.g., SBC Illinois Exh. 2.2, ¶ 27 (Mr. Ehr claims that SBC Illinois' flow-through rates were superior to that provided by other BOCs "whose section 271 applications have been approved.")

[335] *See, e.g.*, SBC Illinois Exh. 2.0., ¶ 234.

[336] Although the FCC has stated that it "cannot as a general matter insist that all audits must be completed at the time a Section 271 application is filed at the Commission," it has also explained that it "will give greater weight to evidence that has been audited." *Georgia/Louisiana 271 Order,* ¶ 19 at n. 68.

[337] BellSouth initially filed an application for 271 approval on October 2, 2001, but later withdrew that application after the Department of Justice and Commission Staff expressed concerns regarding, *inter alia*, the integrity of BellSouth's performance data.

filed its Georgia/Louisiana Section 271 application, two performance metrics audits had been completed by BearingPoint and the third metrics audit was in progress. All three audits involved an analysis of the following five Performance Metrics Review (PMR) test components: (1) PMR-1: Data Collection and Storage Verification and Validation Review; (2) PMR-2: Metrics Definitions and Implementation Verification and Validation Review; (3) PMR-3: Metrics Change Management Verification and Validation Review; (4) PMR-4: Metrics Data Integrity Verification and Validation Review; and (5) PMR-5: Metrics Calculation and Reporting Verification and Validation Review.[338] In its application, BellSouth pointed out that these five test segments (PMR1-PMR5) were relevant in assessing the reliability of its performance data.[339]

2857. The five test segments in BearingPoint's Georgia PMR test are similar to those in the Illinois BearingPoint PMR test with certain exceptions. The BearingPoint Illinois test includes test segment PMR3B which assesses SBC Illinois's "documented policies and procedures for recalculating remedy payments results for restated performance measures and for communicating these changes to the" ICC and CLECs.[340] PMR3B evaluates SBC's documentation only and does not assess the accuracy of SBC's performance remedy calculations. In contrast, in Audit III in Georgia, BearingPoint has evaluated and is continuing to evaluate the accuracy of BellSouth's performance remedy calculations.[341]

2858. Furthermore, the PMR4 (Data Integrity) and PMR5 (Metrics Replication) tests in Georgia appear to be more stringent than those in Illinois. In the Georgia audits, BellSouth was deemed to have passed PMR4 and PMR5 at the sub-metric level if 100 percent of the processed records corresponded with BearingPoint's test CLEC transactions data and the values reported by BellSouth matched exactly the values calculated by BearingPoint. In contrast, in the Illinois test, SBC can pass PMR4 if "95 percent of required records are included for each measure set evaluated in the measurement group"[342] and "95 percent of sample field values from processed CLEC aggregate data are consistent with unprocessed data from source systems for each

[338] In Audits I and II, BearingPoint also conducted a Statistical Analysis Assessment (PMR-6) in which it assessed the statistical methods and processes that BellSouth used in evaluating parity of service. *See, e.g.,* Varner Supp. Aff., ¶¶ 48, 54, *Georgia/Louisiana 271 Proceeding.* During the Statistical Analysis Assessment, BearingPoint, using statistical tests, evaluated whether BellSouth's data met the parity test. In its Application, BellSouth stated that only the first five segments of the PMR test were relevant in evaluating the accuracy of its data. Audit III included a separate analysis of the accuracy of BellSouth's performance measures calculations under the Georgia performance enforcement plan ("SEEM").

[339] Varner Supp. Aff., ¶ 48, *Georgia/Louisiana 271 Proceeding.*

[340] BearingPoint PMR Report at 26.

[341] *See*, *e.g.*, Varner Supp. Aff., ¶ 56. Audits I and II in Georgia did not evaluate the accuracy of BellSouth's SEEM calculations.

[342] *See, e.g.*, BearingPoint PMR Report at 120.

measure set evaluation in the measure group."[343] Similarly, in the Illinois test SBC can pass PMR5 if BearingPoint replicates 95 percent of the metric values within the measure group.[344]

2859. Georgia Audit I, began in October 1999, involved an analysis of BellSouth's performance data based upon all of the measurements in the performance monitoring plan adopted by the Georgia Public Service Commission ("Georgia PSC") on October 22, 1999. During Audit I and while BellSouth's Georgia/Louisiana 271 application was pending, BearingPoint found that BellSouth satisfied 415 of the 420 test criteria (*approximately 99 percent*) during Audit I.[345]

2860. In Audit II, BearingPoint validated BellSouth's 271 charts[346] "for consistency against published metrics definitions and accuracy of results replication against new data" and tested "new metrics and existing metrics with new or modified levels of disaggregation, analogs, benchmarks, business rules, data exclusions, report production processes/systems, [and] legacy source data feeds" that were implemented as a result of the Georgia PSC's June 6, 2000 Order.[347] In Audit II, which commenced in September 2000, BearingPoint executed the same test processes that were used in Audit I. When BellSouth's application was pending, Audit II closed with BearingPoint finding that BellSouth satisfied 100 percent of all test criteria.[348]

2861. Audit III commenced in March 2001. The Georgia PSC opened Audit III to evaluate BellSouth's performance data for new measures and levels of disaggregation that were approved by the Georgia PSC on January 16, 2001. During Audit III, BearingPoint also conducted and is still conducting the PMR7 test during which it is auditing BellSouth's compliance with the Georgia performance enforcement plan.

2862. When BellSouth's Georgia/Louisiana 271 application was pending, portions of the metrics test in Audit III were not complete. But in its Georgia/Louisiana 271 application,

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[343] *See, e.g.*, BearingPoint PMR Report at 122.

[344] *See, e.g.,* BearingPoint PMR Report at 195-96.

[345] *See, e.g.,* Varner Aff., ¶ 407, *Georgia/Louisiana 271 Proceeding*; Varner Supp. Aff., ¶ 49, *Georgia/Louisiana 271 Proceeding*; Varner Supp. Reply Aff., ¶ 20, *Georgia/Louisiana 271 Proceeding. See also* BellSouth GA OSS Testing Evaluation Interim Status Report, dated May 24, 2002 at 1.

[346] BellSouth's 271 charts were charts that BellSouth created for 271 purposes which provided one year's worth of data for each sub-metric reported.

[347] *See, e.g.,* Varner Aff., ¶ 90, *Florida/Tennessee 271 Proceeding* (discussing the Georgia audit).

[348] Varner Supp. Aff., ¶ 55, *Georgia/Louisiana 271 Proceeding*. *See also* BearingPoint Georgia Interim Report at 1 ("BellSouth has met and satisfied all evaluation criteria for Audit II.").

BellSouth contended that its success in passing the test criteria during Audits I and II should serve as "reasonable indicators of Audit III results."[349] Indeed, BellSouth contended that Audits I and II "standing alone should provide the Commission with a high degree of confidence that BellSouth's performance data are reliable."[350]

2863. In the *Georgia/Louisiana 271 Proceeding*, the Georgia PSC also asserted that Audits I and II were "comprehensive in scope, addressing everything from BellSouth's data collection and storage practices to data replication and data integrity,"[351] and that BearingPoint's re-examination of certain previously audited measures in Audit III "should not detract from the fact that the measure has already been audited at least once as part of the first two audits."[352] The Georgia PSC further asserted that the mere fact that BellSouth's data had been subjected to two completed audits "with relatively few open issues is strong evidence that BellSouth's performance data are accurate."[353]

2864. In its Georgia*/Louisiana 271 Order*, this Commission, citing BellSouth's testimony with approval, found that BellSouth's data were accurate based upon, *inter alia*, the "extensive third-party auditing" that had been conducted in Georgia.[354] Thus, when the FCC approved BellSouth's Georgia/Louisiana 271 application, it found that BellSouth's data were accurate based upon, *inter alia*, Audit I in which BellSouth satisfied approximately 99 percent of the test criteria and Audit II in which BellSouth satisfied 100 percent of the test criteria. In stark contrast, as noted above, when BearingPoint issued its Illinois report, SBC Illinois passed only 23 percent of the test criteria in the performance metrics audit. And the Georgia PMR4 and PMR5 tests that BellSouth passed in Audits I and II were more stringent than the comparable PMR tests in Illinois.

BellSouth Five State Application

2865. On June 20, 2002, BellSouth filed its 271 application for authority to provide in-region, interLATA services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina ("Five State Application"). No separate OSS tests were conducted in these states. In its Five State 271 application, BellSouth emphasized that its Operations Support Systems ("OSS") were regional, and that "BellSouth's data are produced by the same organization, using the same processes, computer systems/programs and the same computer programming staff to revise and

[349] *Id.*

[350] Varner Supp. Aff., ¶ 33, *Georgia Louisiana 271 Proceeding.*

[351] Georgia Public Service Commission Comments at 29, *Georgia/Louisiana 271 Proceeding.*

[352] *Id.*

[353] *Id.* at 29.

[354] *Georgia/Louisiana 271 Order* ¶ 19.

maintain the systems for the region."[355] BellSouth also contended that its data were accurate and demonstrated statutory compliance based upon, *inter alia*, the audits that were conducted in Georgia.[356]

2866. Although Georgia Audit III was still in progress at the time BellSouth filed its Five State Application, BellSouth, consistent with its arguments in the *Georgia/Louisiana Proceeding*, contended that Audits I and II "standing alone, should provide the Commission with a high degree of confidence that BellSouth's performance data are reliable."[357] It its Order on the Five State 271 Application, the FCC found that BellSouth's OSS in Georgia were "substantially the same as the OSS in each of the five states," and that BearingPoint's third-party test conducted in Georgia was relevant and would be considered in evaluating BellSouth's Five State 271 application.[358] The FCC, citing with approval BellSouth's testimony, found as it did in the *BellSouth Georgia/Louisiana Order* test that "BellSouth's performance metric data are accurate, reliable, and useful"[359] based upon, *inter alia*, "extensive third party auditing" that had been conducted. At the time the FCC approved BellSouth's Five State Application, Audits I and II had been completed, and BellSouth had passed 100 percent of the test criteria.[360]

Florida/Tennessee

2867. On September 20, 2002, BellSouth filed its Section 271 application for authority to provide in-region, interLATA services in Florida and Tennessee. In its Florida/Tennessee 271 application, BellSouth contended that the accuracy and reliability of its performance data were confirmed by: (1) Audit I in Georgia which "was closed on August 6, 2002 with all evaluation criteria satisfied;"[361] and (2) Audit II in Georgia which "was closed on April 2, 2002 with all evaluation criteria satisfied."[362] When BellSouth filed its Florida/Tennessee 271 application,

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[355] *See* Varner Aff., ¶ 60, *BellSouth Five State 271 Proceeding.*

[356] *Id.*, ¶¶ 127-159.

[357] *Id.* ¶ 130.

[358] *BellSouth Five State 271 Order*, ¶ 130.

[359] *Id.* ¶ 16.

[360] *See* BellSouth GA OSS Testing Evaluation Interim Status Report, dated September 6, 2002 at 1.

[361] Varner Reply Aff., *Florida/Tennessee 271 Proceeding*, filed November 1, 2002 ¶ 48.

[362] Id.

BearingPoint's Audit III in Georgia and separate performance metrics test in Florida were still in progress. Consistent with its approach in its Georgia/Louisiana and Five State 271 applications, BellSouth argued in the *Florida/Tennessee 271 Proceeding* that BearingPoint's completed Georgia Audits I and II which at that time had "closed with all evaluation criteria satisfied" should "standing alone . . . provide the Commission with a high degree of confidence that BellSouth's performance data are reliable."[363] The FCC, citing *inter alia,* its *Five State 271 Order* and *Georgia/Louisiana 271 Order,* as well as BellSouth's testimony in the *Florida/Tennessee 271 Proceeding,* found, once again, that BellSouth's performance data were accurate.[364]

New Jersey

2868. On March 26, 2002 Verizon New Jersey, Inc. ("Verizon") filed its Section 271 application for authority to provide in-region, interLATA services in New Jersey. In its application, Verizon contended that its data were accurate and reliable based upon the third-party test conducted by BearingPoint which included a performance metrics audit consisting of the following five test segments: PMR1 (Metrics Standards and Definitions Documentation Verification and Validation Review); PMR2 (Data Collection and Storage Verification and Validation Review); PMR3 (Metrics Calculations and Reporting Verification and Validation Review); PMR4 (Metrics Data Filtering and Integrity Verification and Validation Review); and PMR5 (Metrics Change Management Verification and Validation Review).[365] These five test segments mirror those in the BearingPoint Illinois performance measurement audit.[366]

2869. Critically, at the time of Section 271 approval, Verizon passed 100 percent of the test criteria in BearingPoint's five PMR test segments.[367] In its decision, the FCC, "noting the thoroughness and rigorousness with which KPMG conducted its military-style test . . .," saw "no need to question the reliability of the data Verizon submitted in its application."[368]

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[363] Varner Aff. ¶ 82, *Florida/Tennessee 271 Proceeding.*

[364] *See Florida/Tennessee 271 Order,* ¶ 16 n. 47 (citing initial and reply affidavits of BellSouth's witness Alphonso Varner and the Commission's *BellSouth Five State 271 Order* and *Georgia/Louisiana 271 Order*).

[365] *See* Verizon New Jersey Comments at 101, *New Jersey 271 Proceeding*; Guerard/Canny/DeVito Decl., ¶ 130, *New Jersey 271 Proceeding*; BearingPoint Verizon New Jersey Inc. OSS Evaluation Project Report, dated October 12, 2001 ("BearingPoint New Jersey Report") at 355-409.

[366] The New Jersey PMR test did not include the PMR3B segment in the Illinois test.

[367] *Id.*

[368] *New Jersey 271 Order, ¶ 89.*

Pennsylvania

2870. On June 21, 2001, Verizon Pennsylvania Inc. ("Verizon") applied for authority to provide in-region, interLATA services in Pennsylvania. In its application, Verizon argued that its performance data were accurate based upon the "extensive military-style testing" that BearingPoint conducted during the performance metrics review of its third-party test.[369] The Pennsylvania performance metrics component of BearingPoint's OSS test involved an examination of the following five test segments: PMR1 (Collection and Storage of Data Verification and Validation Review); PMR2 (Data Transformation Verification and Validation Review); PMR3 (Development and Documentation of Standards and Definitions Verification and Validation Review); PMR4 (Change Management of Standards and Definitions Verification and Validation Review); and PMR5 (Metric Replication).[370] Although the PMR test numbers in Pennsylvania differ from those in Illinois, the actual test segments are essentially the same in both tests.[371]

2871. In its final report, BearingPoint found that Verizon had implemented satisfactory procedures for collecting and storing the raw data used to calculate performance results and satisfied 100 percent of the applicable test criteria in the PMR1 test segment.[372] BearingPoint also found that Verizon satisfied 100 percent of the applicable test points in the PMR2 test segment which evaluated whether Verizon had implemented appropriate procedures to convert its raw data into reported performance results.[373] BearingPoint found that Verizon satisfied 100 percent of the applicable test criteria in the PMR3 test, which evaluated whether Verizon had implemented appropriate procedures for developing and documenting the metrics standards and definitions.[374] During the PMR4 test, which evaluated Verizon's policies and practices for implementing changes to the measurement standards, definitions, and calculations of performance results, BearingPoint found that Verizon satisfied five of eight test criteria.[375] With

[369] *See* Guerard/Canny/DeVito Decl., ¶¶ *134*-146, *Pennsylvania 271 Proceeding*.

[370] BearingPoint Pennsylvania Report at 573-666.

[371] The Pennsylvania PMR test did not include the PMR3B segment in the Illinois PMR test.

[372] BearingPoint Verizon Pennsylvania, Inc. OSS Evaluation Project Final Report, Version 2.0, dated December 22, 2000 ("BearingPoint Pennsylvania Report") at 575-589.

[373] *Id.* at [591]-617.

[374] *Id.* at [619]-627.

[375] *Id.* at [629]-649.

respect to the "81 applicable 'test points' in these four portions of BearingPoint's review, Verizon satisfied 78, or over 96 percent."[376]

2872. During the PMR5 test segment, in which BearingPoint attempted to replicate Verizon's performance results for July and September 2000,[377] Verizon satisfied 20 of 32 test criteria (approximately 63 percent).[378] Noting, *inter alia*, the deficiencies uncovered during the PMR5 (Metric Replication) test, the Pennsylvania PUC advised Verizon that a separate replication study should be conducted of Verizon's January 2001 performance data.[379] At the direction of the Pennsylvania PUC, BearingPoint conducted a standalone replication test of Verizon's January 2001 results.[380] In this separate replication test, BearingPoint successfully replicated 99 percent of the metrics values that Verizon reported.[381] After reviewing the results of BearingPoint's separate replication test, the Pennsylvania PUC found that Verizon "satisfied the open replication issue from the OSS Test."[382]

2873. Additionally, at the request of the Pennsylvania PUC, BearingPoint separately conducted three PMR tests with respect to 20 measurements, which had been added to the performance measurement plan and were not tested during BearingPoint's initial Pennsylvania OSS test. During its separate review of these 20 measurements, BearingPoint assessed Verizon's procedures for collecting and storing data, processes for converting its raw data into reported results, and documentation and development of metrics definitions and standards.[383] BearingPoint found that Verizon satisfied 100 percent of the applicable test criteria during this separate review.[384]

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[376] Guerard/Canny/DeVito Decl., ¶ 134, *Pennsylvania 271 Proceeding*.

[377] *Id.,* ¶ 141.

[378] BearingPoint Pennsylvania Report at 651-661.

[379] *See* Verizon Pennsylvania 271 Application, App. B, Tab BB-2, Letter from James L. McNulty to Verizon PA, Inc., dated January 5, 2001.

[380] *Id.*

[381] *Id.*, App. B, Tab F-3, BearingPoint's January Metrics Replication Report at 3-6.

[382] Pennsylvania PUC Consultative Report at 258, *Pennsylvania 271 Proceeding.*

[383] In its PA Metrics Differences Analysis (2001), BearingPoint reported that: (1) the PMR4 test was not used during this review because "this test is executed at the macro level, not at the individual metric level" and (2) the PMR5 test was not used because "the January PA Replication activity eliminated the need for this test." Verizon Pennsylvania 271 Application, App. B, Tab F-4, PA Metrics Differences Analysis (2001) at 1.

[384] *See* id. at 5-9.

2874. Furthermore, at the request of the Pennsylvania PUC, BearingPoint conducted a separate "Commercial Availability Review" during which BearingPoint compared performance data from January to March 2001, which were provided by the CLECs and Verizon covering 25 measurements.[385] During this review, BearingPoint determined that, "[b]ased on the data made available," there were "no instances where [a] CLEC identified discrepancies with the Verizon Pennsylvania reported values [that] could be fully substantiated" by the CLECs.[386]

2875. Thus, during BearingPoint's OSS test in Pennsylvania, Verizon satisfied 96 percent of the test criteria during the first four segments of the PMR test. Although Verizon initially passed only 63 percent of test criteria during the PMR5 (metrics replication) test, BearingPoint, at the direction of the Pennsylvania PUC, conducted a separate replication analysis of Verizon's more recent performance data and found that Verizon satisfied more than 99 percent of the applicable test points in the PMR5 test. Additionally, during its testing of new measures which had been added to the performance monitoring plan, BearingPoint found that Verizon satisfied 100 percent of the test points. Furthermore, during the separate data reconciliation tests conducted at the request of the Pennsylvania PUC, BearingPoint found no instances where discrepancies in reported results had been substantiated by CLECs. Based upon the foregoing, it is plainly evident that the meager 23 percent of PMR test criteria that SBC Illinois has passed in BearingPoint's Illinois PMR test is substantially worse than the test results in the Pennsylvania PMR test.

Virginia

2876. On August 1, 2002, Verizon filed its Section 271 application for authority to provide in-region, interLATA services in Virginia. In its application, Verizon argued that its data are accurate and reliable based upon the performance metrics review conducted by BearingPoint as part of its third-party test of Verizon's OSS.[387] The performance metrics portion of the OSS test that BearingPoint conducted in Virginia consisted of the following five test segments: PMR1 (Metrics Standards Definitions Documentation Verification and Validation Review); PMR2 (Data Collection and Storage Verification and Validation Review); PMR3 (Metrics Calculation and Reporting Verification and Validation Review); PMR4 (Metrics Data Filtering and Integrity Verification and Validation Review); and PMR5 (Metric Change Verification and Validation Review).[388] These test segments are similar to those in the Illinois

[385] See Verizon Pennsylvania 271 Application, App. B, Tab F-5, BearingPoint Commercial Availability Review Final Report – Metrics, dated May 31, 2001.

[386] *Id.* at 25.

[387] *See, e.g.,* Verizon Application at 11, 12; Guerard/Canny/DeVito Decl., *Virginia 271 Proceeding.*

[388] *See* BearingPoint Verizon Virginia Inc. OSS Evaluation Project Final Report Version 2.0, dated April 15, 2002 ("BearingPoint Virginia Report") at 421-483.

PMR test.[389] Significantly, at the time Verizon filed its Virginia 271 application, Verizon had satisfied 100 percent of the applicable test criteria in all segments of the PMR test.[390]

2877. AT&T states that as the foregoing review of other BOC PMR tests demonstrates, in those proceedings in which BearingPoint has conducted essentially the same five-segment metrics test that it is conducting in Illinois, the BOC passed well over 90 percent of the test criteria in the PMR test. In stark contrast, at the time BearingPoint issued its Illinois PMR report, SBC Illinois had satisfied only 23 percent of the test criteria. In view of the high percentage of BearingPoint PMR test criteria satisfied by other BOCs that have received Section 271 approval, the substantial deficiencies in SBC Illinois monitoring and reporting processes as reflected in BearingPoint's PMR Report and open exceptions and observations, the weight of the evidence compels the conclusion that SBC Illinois has not demonstrated the accuracy, reliability, and completeness of the performance data on which it relies.

c. Staff's Rebuttal Position and Recommendations

E&Y Audit

2878. In her initial affidavit, Ms. Weber reviewed the various ways E&Y classified its exceptions of Material Non-compliance in its Compliance Evaluation by the statements of SBC Illinois regarding the action taken or to be taken by the company for the exceptions in each category. Following are the five classification categories:

I. Exceptions Corrected and March, April and May 2002 Data was Restated

II. Exceptions Corrected but March, April and May 2002 Results were Not Restated

III. Exceptions Corrected but Not Yet Reported or Restated

IV. Exceptions in which No Corrective Action is Planned by the Company

V. Exceptions in the Process of being Corrected.

2879. Ms. Weber noted that E&Y tested the accuracy of the corrective actions implemented by the company for the restated March, April and May 2002 data but that SBC

[389] The Virginia PMR test did not include an examination of test segment PMR3B in the Illinois test.

[390] *Id.*

Illinois has provided no assurance that the data months beyond May 2002 do not contain the data inaccuracies raised by the category I exceptions. Tr. at 3385. Mr. Ehr in his reply affidavit says that Ms. Weber's statement suggests that SBC Illinois, after going to the time and effort to modify systems and procedures, would go to the effort of changing back to the old methods. Ehr Reply Affidavit, ¶95-96. This, however, is a significant mischaracterization of Ms. Weber's testimony. The company's processes and controls used to implement and manage changes to its performance measurement systems have not be proven to be effective in preventing new problems from being introduced as changes are made to the performance measure reporting system[391]. Therefore, Ms. Weber questioned whether or not data months beyond May 2002 are in fact reliable. In addition, BearingPoint's current review of the July and August 2002 data months has found data reporting inaccuracies for the same performance measures E&Y reported under Category I and Category II Exceptions[392]. Therefore, SBC has not demonstrated or proven that Ms. Weber's concerns are without merit.

2880. In her original affidavit, Ms. Weber noted that E&Y identified 15 Category V Exceptions that affected 44 different performance measures or approximately 29% of the performance measures for which SBC Illinois had not yet implemented any corrective action. Ehr Reply Affidavit, ¶97. Mr. Ehr states that Ms. Weber's determination was correct with respect to the Category V exceptions, but does not address his analysis that showed the exceptions do not affect overall checklist compliance. Ehr Reply Affidavit, ¶99. This is not correct. In Mr. Ehr's initial affidavit he states that there will be no restatement of prior months for 12 of the 15 exceptions because the company does not expect the changes to have a material negative impact on previously reported results. Ehr Initial Affidavit, ¶230. Given the Material Non-compliance definition provided by E&Y for determining an exception, Staff Ex. 31.0, ¶89, there is no way for Staff to know for certain that the Category V exceptions do not affect checklist compliance. In addition, Mr. Ehr only stated an assertion that the company does not expect the restatements will materially negatively affect the performance measures. However, he does not provide a guarantee or verification of this fact[393]. In addition, the majority of performance measures affected by the Category V exceptions are not diagnostic performance measures. Therefore, the performance measures are part of Staff's analysis of SBC Illinois' checklist compliance.

2881. Also, in response to the Category V Exceptions Mr. Ehr in his reply affidavit states that 8 of the 15 exceptions were addressed with the February 20th reporting of January 2003 results. Ehr Reply Affidavit, ¶99. Mr. Ehr, however, makes no statement as to whether or not prior data months affected (including the three months of performance data being evaluated in this proceeding) were restated. Nor does the company provide any verification or documentation from Ernst & Young in support of its assertion. For the remaining 7 exceptions

[391] ICC Staff Ex. 31, ¶108.

[392] Performance measures 7, 14, 13, 13.1 are named in BearingPoint observation reports 429, 461 and 488. These are just a few of the performance measurements that overlap.

[393] E&Y has indicated that an exception is produced when the results are altered by 5% (up or down) or the party or benchmark pass/fail attainment is changed. February 12, 2003 hearing Tr. at 3369.

not yet implemented by SBC (which affect 13 different performance measures), SBC Illinois asserts that all remaining exceptions will be fixed with the February 2003 results reported on March 20, 2003. Again, SBC fails to make an assertion or statement as to whether or not data months prior to February 2003 data that are affected (including the three months of performance data being evaluation in this proceeding) will be restated.

2882. The Company has represented that it has addressed the majority of exceptions reported by Ernst & Young for the March, April and May 2003 time period and it appears E&Y performed limited validation for most of these corrections. However, based upon the reply affidavits of SBC Illinois there is no evidence that 8 of 15 exceptions in Category V do not remain in the performance measurement data prior to January 2003 and it is clear that there are 7 exceptions that still remain in the performance measurement data posted today.[394] These failings undermine the ability of any party to properly evaluate SBC Illinois' performance measurement data submitted in this proceeding for the affected performance measures.

2883. The second area E&Y reported upon was its evaluation of the SBC Illinois performance measurement system controls. While the company's controls may have been improved since the E&Y findings were communicated, the efficacy and adequacy of such improvements are not clear. Ms. Weber is not convinced, nor in her view should we be convinced, that SBC Illinois has addressed its performance measurement reporting control deficiencies, until SBC Illinois can consistently report its performance measures with accuracy and integrity on a monthly basis and an independent third party provides verification of this fact. During the hearings E&Y stated that it did not do any control testing other than on the corrective actions implemented by the company. Tr. at 3361. In addition, restatements to correct errors six months after posting data[395] should not be deemed acceptable. The company should restate results if they find inaccuracies, as the company has done. The frequency[396] of SBC Illinois' data restatements and the timing of the restatements, well after initial posting of the performance measurement data, point to the fact that inherent problems with SBC Illinois' process controls within its performance metrics organization have existed and may continue to exist.

Additional Assurances of Reliability.

2884. In his affidavit, Staff notes, Mr. Ehr asserts that on-going supervision by the Commission, data reconciliation, access to raw data and SBC Illinois' data controls should provide additional assurances of reliability of SBC Illinois performance measurement results. Ehr Affidavit, ¶215.

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[394] Ehr Reply Affidavit, ¶113.

[395] Appendix D of BearingPoint's February 8, 2003 Written Responses to the February 5, 2003 Hearing.

[396] Id.

2885. These additional assurances of reliability, which Mr. Ehr states, do not in Ms. Weber's opinion, provide sufficient confidence that the errors and findings provided by BearingPoint and E&Y can be overlooked, or that the three months of performance measurement data submitted by SBC Illinois in this proceeding are accurate or reliable.

2886. First, Ms. Weber notes that SBC Illinois has stated that the Commission's supervision and oversight in the matter of SBC Illinois' performance data has been ongoing and extensive. Ehr Affidavit, ¶293. While oversight is ongoing, Staff's supervision cannot, in Ms. Weber's view, be characterized as extensive. Staff attends six-month review sessions and meetings, and provides direction when needed. Staff, however, does not have firsthand working knowledge of the business processes that the performance measures report on, nor do we ourselves have data that it can collect itself to determine whether SBC Illinois' performance measures are being reported accurately. Regulators in general do not have live data to make an independent evaluation as to the integrity, accuracy or completeness of the data that a utility such as SBC Illinois reports. Therefore, the ongoing independent third party reviews currently taking place, and their successful completion, are, according to Ms. Weber, crucial in providing us with the assurance that the data SBC Illinois reports on its performance is accurate and reliable.

2887. The next two items Mr. Ehr points to is the data reconciliation process and access to raw data that is available to CLECs. Mr. Ehr indicates that not one CLEC has requested data reconciliation or mini-audits from SBC Illinois despite being permitted to do so under the terms of the performance assurance plan ordered by the Commission in Docket No. 01-0120. Ehr Affidavit ¶¶297-299. Contrary to the statement of Mr. Ehr, Ms. Weber notes that the Docket No. 01-0120 performance assurance plan does <u>not</u> 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.

2888. Lastly, Mr. Ehr states that although solid to begin with, SBC Illinois' internal data controls have been further enhanced and should provide additional assurance of reliability. Ehr Affidavit, ¶292. Ms. Weber observes that the record in this proceeding does not bear out this statement. As discussed in this affidavit, both BearingPoint and E&Y have pointed out several areas of concern or failing with respect to SBC Illinois' data controls. Until the deficiencies are addressed, and the reviews are successfully completed, Ms. Weber states that we should not accept the contention that SBC Illinois internal controls today provide assurances of data reliability now or for the future.

d. Staff's Rebuttal Position and Recommendations

BearingPoint Review

2889. As SBC Illinois argues in this proceeding, and as the Michigan Commission in its Section 271 reply comments to the FCC states, the company's ongoing activity related to the verification of SBC's performance measurement need not be completed prior to Section 271 approval, as the FCC discussed in its Georgia 271 order[397]. It must be reiterated, however, that the situation in Georgia was not in any way comparable to the situation here in Illinois, inasmuch as the Georgia audit was very nearly complete. The March 7, 2003 BearingPoint performance measurement test progress report produced for the Michigan Commission (which is the most recently published performance metrics results in the Ameritech region which SBC believes is also a good indication of the progress made in Illinois[398]) reveals the following data:

BearingPoint Michigan 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

2890. This demonstrates that the company has only Satisfied 31% of the evaluation criterion, has been proven to Not Satisfy 34% of the criterion, and is still being evaluated for the remaining 35% of the evaluation criteria. These results by no means indicate the status of an evaluation that is nearly complete and is, therefore, not comparable to the situation in Georgia referred to above.

2891. Mr. Ehr in his reply affidavit says that evaluation criteria determined to be "Not Satisfied" is not an affirmative conclusion that there is a problem but rather that the test is not complete. Ehr Reply Affidavit, ¶121. Again, this is not the case. If BearingPoint has marked an evaluation criteria as Not Satisfied then it has determined a problem or problems exist, and it is an affirmative conclusion. Mr. Ehr is correct in his second statement that the test is not complete. Due to the "test until you pass" nature of the review, work to verify the satisfaction of the criterion continues until a Satisfied result is achieved or until Staff or we indicate no further testing should occur. 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 was assigned there was not sufficient information for BearingPoint to indicate if the evaluation criteria was Satisfied or Not Satisfied.

[397] James D. Her Rebuttal Affidavit, ¶118. FCC WC Docket No. 03-16, Reply Comments of the Michigan Public Service Commission at 6.

[398] James D. Ehr Rebuttal Affidavit, ¶119.

2892. Mr. Ehr in his reply affidavit indicates that the number of performance measurement restatements that SBC Illinois has made over the past year does not lend support or evidence that control problems exist. Ehr Reply Affidavit, ¶140-142. He supports his position with a quote from John Eringis of BearingPoint taken during the February 5, 2003 hearings in this proceeding. Staff agrees with Mr. Eringis' statement that restatements during the current period reflect the company's corrections of problems found by either BearingPoint or Ernst & Young. Mr. Eringis, however, states further that in general, a certain level of restatements may be suggestive of existing control problems. Therefore, restatements that occurred prior to the BearingPoint and Ernst & Young reviews and those that may appear in the future are suggestive that problems in controls may exist and should be investigated further. Moving forward, once the audits are complete, if a large number of restatements are seen it may mean that control problems within SBC's performance measurement systems exist and should be investigated further by the Commission.

2893. Mr. Ehr describes various open observations and exceptions to attempt to explain that they have already been addressed, or are not relevant or substantial enough to limit the ability of parties to rely upon SBC's performance measurement data. He also states that when an observation or exception is "Closed" that it is "Satisfied" and there is no longer an issue. Ehr Reply Affidavit, ¶169. These statements are inaccurate. BearingPoint also "closes" an observation or exception when there is nothing further for them to do (for example, because SBC refuses to fix a problem, or because the fix will not be implemented during the course of the test or for the data period in question). Therefore, a closed observation or exception does not always indicate that it was found to be problem free.

2894. To conclude, the Staff recognizes that some progress has been made with respect to the performance measurement review since the BearingPoint report was released on December 20, 2003 as SBC has argued. However, SBC's attempts to explain away the issues are not plausible, and the cumulative effect of all of the remaining deficiencies is significant[399]. At this time SBC is not close to completion of the BearingPoint performance metrics review and therefore the assertions of the company with respect to reliability and accuracy of its performance measurement data are unsubstantiated. Therefore at this time, the Staff cannot conclude that the performance measurement data is accurate or reliable given the audit perspective provided by BearingPoint.

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[399] Open performance measurement observations and exceptions applicable to Illinois as of the March 4, 2003 observation and exceptions call include 13 Exceptions: 41, 111, 134, 157, 174, 175, 176, 179, 181, 183, 186, 187, 188; and 71 Observations: 429, 461, 488, 538, 584, 587, 613, 619, 623, 624, 625, 627, 631, 633, 637, 638, 639, 643, 645, 646, 661, 664, 676, 679, 684, 686, 687, 688, 697, 709, 710, 717, 725, 729, 732, 737, 738, 739, 747, 748, 749, 750, 751, 755, 766, 767, 768, 769, 771, 778, 785, 786, 787, 791, 792, 793, 796, 797, 798, 800, 802, 803, 805, 806, 807, 809, 810, 811, 812, 813, 814. The specific exception and observation reports can be found on www.osstesting.com.

2895. The Staff again notes that, in a project management discussion the week of March 3, 2003, with both SBC Illinois and BearingPoint present, Ms. Weber was told by SBC Illinois that the earliest possible date the performance measurement review will be successfully completed is now July 31, 2003.

2896. Accordingly, the Staff recommends that we should not provide positive Section 271 approval until SBC Illinois can demonstrate its performance measurement data is reported accurately and reliably on a consistent basis and the BearingPoint review is substantially complete. If we find that SBC has met its Section 271 requirements prior to successful completion of the SBC's performance measurement review by BearingPoint, the Staff recommends that any positive endorsement by us be conditioned upon a commitment from SBC Illinois that it will address all deficiencies raised by BearingPoint in the metrics review and commit to successfully conclude the BearingPoint metrics review no later than November 2003. If SBC Illinois does not believe the November 2003 is achievable then it should provide a date it will commit to complete the BearingPoint performance metrics review in its surrebuttal filing.

Other Assurance Measures

2897. Mr. Ehr's reply affidavit continues to assert that on-going supervision by the Commission, data reconciliation, access to raw data and SBC Illinois' data controls should provide additional assurances of reliability of SBC Illinois performance measurement results. Ehr Reply Affidavit, ¶186. Staff does not see Mr. Ehr to provide any additional information regarding these points.

2898. Accordingly, these three assurances of reliability, as noted in Ms. Weber's initial affidavit, Staff Ex. 31.0, ¶111, does not inspire sufficient confidence that the errors and exceptions found by BearingPoint and E&Y regarding SBC Illinois performance measurement systems and reporting can be overlooked, or that the three months of performance measurement data submitted by SBC Illinois in this proceeding are accurate or reliable at this time.

5. The Surrebuttal Position of SBC Illinois

The Ernst & Young Audit

2899. With respect to Staff's questions about the reliability of data reported after the implementation of corrective action to address E&Y's findings, SBC Illinois stands on its demonstration that E&Y reviewed corrective actions as they were implemented, and states that it has no incentive to change procedures or reverse corrective actions. (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal) ¶ 71.)

2900. Regarding Staff's contention that there is no "guarantee" that unresolved exceptions are immaterial, SBC Illinois responds that it performed an extensive analysis of each measure (typically by using a worst-case scenario and assuming that all transactions affected by the issue were "misses"). As a result, SBC Illinois maintains that if anything it took a conservative approach. While Staff points out that E&Y classified those exceptions as "material" under its definition for testing purposes, SBC Illinois states that subsequent to the filing of the initial E&Y report, it performed additional analysis to show that the issue would not materially impact performance results even though the issue may have met E&Y's definition of material non-compliance in its audit sampling activities. (Id. ¶¶ 72-76.)

2901. SBC Illinois next responds to AT&T's view that E&Y found that "SBC failed to identify DSL transactions by geographic region as required by the business rules governing PMs 55.1, 55.3, 56, 58, 59, 60, 61, 62, 63, and 65." SBC Illinois notes that the results in the aggregate for these measures are correct and that all orders were reported and assessed against the correct standard. The *only* issue, according to SBC Illinois, is the classification by geographic area. (Id. ¶ 78.)

2902. Responding to AT&T's reference to the Third Corrective Action report for Michigan, SBC Illinois states that the six issues listed are really "non-issues" because the report simply updates the status of corrective action on issues that SBC Illinois already showed (and that E&Y attested) to be immaterial. SBC Illinois advises that the two outstanding E&Y coding issues identified by AT&T will be reviewed by E&Y. SBC Illinois notes, however, that this is simply a matter of E&Y validating corrective action that has already been taken. (Id. ¶¶ 80-81.)

The BearingPoint's Performance Metric Review.

Burden of Proof

2903. Turning first to AT&T's argument on the burden of proof, SBC Illinois states that it has never suggested that BearingPoint's PMR test is complete, or that the results of that test, standing alone, are sufficient to satisfy whatever burden of proof SBC Illinois has as a legal matter. Rather, SBC Illinois reaffirms that its position is when one considers *all* of the evidence of reliability (including the E&Y audits, and the availability of data reconciliations with CLECs), SBC Illinois has demonstrated that its reports are sufficiently reliable. Thus, SBC Illinois states, AT&T's argument is not really about the legal rules for burden of proof but is instead based on AT&T's suggestion that the Commission *ignore* the proof SBC Illinois has presented, a position SBC Illinois addresses in its analysis of the E&Y audit. (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal) ¶ 85.)

Recent "Observations"

2904. On the issue of new observations, SBC Illinois disagrees with AT&T's view that BearingPoint continues to find "systemic faults" in SBC Illinois' performance measurement reporting system. According to SBC Illinois, AT&T continues to assume that any and all published exceptions and observations are an affirmative finding of fault. SBC Illinois states that AT&T's assumption is contrary to the nature of BearingPoint's test methodology and ignores the real-world facts that underlie BearingPoint's observations. BearingPoint's

observations and exceptions do not represent a conclusion about any test. Rather, BearingPoint performs its review and if it finds a condition that *may* result in a test point failure, it issues an observation or an exception to bring the matter to the attention of SBC Illinois and the Commission. SBC Illinois is then given an opportunity to respond: in many cases, the response may be as straightforward as providing BearingPoint with additional information so that BearingPoint better understands the facts, or revising its technical documentation. (SBC Ex. 2.3 (Ehr Surrebutal) ¶¶ 86-92.)

2905. For example, SBC Illinois explains, BearingPoint's Observation 714 stated that "SBC's results for Performance Measurements 79 and 91 are not posted correctly for July, August, or September 2002." If one were to read that in isolation and consider it a final conclusion, one might think there was an actual error in the results, and according to SBC Illinois that is the kind of reading AT&T tries to foster. But BearingPoint closed this Observation on January 28, stating that it agrees with SBC Illinois' interpretation of the business rules and that its results now match those of SBC Illinois. (Id. ¶ 90.)

2906. Similarly, BearingPoint's Observation 721 stated that "SBC is improperly applying exclusions in the calculation of Performance Measurement 40 for the July, August, and September 2002 data months." But BearingPoint subsequently determined that SBC's application of state specific exclusions is correct, and it closed this Observation on March 4, 2003. (Id. ¶ 91.)

2907. SBC Illinois states that while some performance measures have had multiple observations during the ongoing "blind replication," the existence of multiple observations does not mean that there are serious problems, but reflects the normal iterative process of the test. According to SBC Illinois, the PMR5 test was constructed by BearingPoint using four independent test criteria; (1) posted values agree; (2) blind replication; (3) calculate according to the business rules; and (4) exclude according to the business rules. An observation or exception can be issued on any or all of the four criteria. In addition, nearly all of the performance measures have more than one category, and some have retail comparison data. BearingPoint evaluates each of these components independently. (Id. ¶ 94.)

2908. SBC Illinois adds that the blind replication process itself is another reason that multiple observations can be issued for the same performance measure. Given that SBC Illinois performs thousands of calculations each month, on thousands of pieces of data, to generate results in thousands of performance measurement categories, SBC Illinois states that it is not surprising that BearingPoint, as an outsider attempting to perform such a vast undertaking on its own, would generate a large number of practical questions about all the details involved. (Id. ¶ 95.)

Exception 186

2909. SBC Illinois states that AT&T mischaracterizes Exception 186, by implying that BearingPoint found all of the SBC Illinois' procedures and policies for the collection and storage of performance data to be inconsistent with regulatory requirements. To the contrary, SBC Illinois states, Exception 186 demonstrates that SBC Illinois is in substantial compliance with requirements established by BearingPoint, and has been for several months. According to SBC

Illinois, BearingPoint found that data is being retained, on a going forward basis, for all source systems. BearingPoint's Exception 186 covers the only issue remaining: namely, looking *backward* 9 systems have not retained historical data in BearingPoint's desired format for the retention period that BearingPoint has determined to be appropriate. Of the 9 systems identified in Exception 186, BearingPoint has verified that five of them retained data in the desired format for more than one year (14 to 17 months). SBC Illinois explains that the September – November 2002 data that are the focus of the Commission's present analysis have *all* source measurement data retained in the format desired by BearingPoint. (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal) ¶¶ 98-101.)

Exception 187

2910. SBC Illinois states that of the 150 total measures that SBC Illinois reports, the Exception relates to 55. Of these, SBC Illinois informs that it and BearingPoint already resolved the issues BearingPoint identified for 9 PMs. SBC Illinois further states that it has responded to BearingPoint regarding an additional 40 measures, and BearingPoint is reviewing that response. Given the successful resolution of the nine measures already reviewed by BearingPoint, SBC Illinois expects BearingPoint to find the other responses complete and adequate. SBC Illinois states that the remaining 6 PMs will be resolved in the normal course, and that the issues for these PMs are minor technical issues. (SBC Ex. 2.3 (3/17/03 Ehr Surrebutal) ¶¶ 102-105.)

Exception 188

2911. With regard to Exception 188, SBC Illinois disagrees with AT&T's view that SBC Illinois did not have enough documentation of systems and processes to do our job of reporting performance results. That is simply not true, SBC Illinois states. SBC Illinois explains that prior to BearingPoint's initial review of SBC Illinois' data flow diagrams and data element maps, SBC Illinois had sufficient documentation to perform the day-to-day functions of processing and reporting performance results. BearingPoint's testing methodology, however, is designed around 100% replication and a correspondingly detailed analysis of all of SBC's processes and systems. The documentation that BearingPoint expected to see as part of its testing methodology was far more detailed then that needed by SBC Illinois to perform the normal daily operations, so BearingPoint did not find the existing documentation had enough detail to complete its review. Hence, the Exception. (SBC Ex. 2.3 (3/17/03 Ehr Surrebutal) ¶ 100.)

2912. SBC Illinois analogizes the situation to giving someone directions in Chicago. If you have lived in Chicago for years, you do not need very detailed directions to find someone's house. If you are visiting Chicago for the first time, you would want something more detailed and precise. Similarly, documentation requirements are very much dependent on the audience. (Id. ¶ 107.)

2913. SBC Illinois states that of the 150 total measurements, Exception 188 relates to 42. SBC Illinois advises that BearingPoint and SBC Illinois have resolved BearingPoint's issues for 7 measures, that SBC Illinois has responded to BearingPoint's issues for an additional 30 measures, and that the remaining 5 PMs will be resolved in the normal course. (Id. ¶¶ 108-111.)

Michigan Commission Findings

2914. Noting that Staff to characterizes the section 271 decision by the Michigan Commission as if it had found that SBC Michigan's performance results were not reliable, SBC Illinois finds no basis for Staff's reading. After all, SBC Illinois states, the Michigan Commission has endorsed SBC Michigan's application, and in so doing it said that SBC Michigan's performance results were sufficiently reliable for that purpose. Further, the Michigan Commission stated that the reported results for the vast majority of the categories were either accurate or conservatively stated. SBC Illinois adds that BearingPoint's test is now even further along than it was at the time of the Michigan decision. Thus, SBC Illinois concludes, to the extent this Commission considers the decision of its Michigan counterpart, that precedent favors SBC Illinois, not Staff. (SBC Ex. 2.2 (3/17/03 Ehr Surrebutal) ¶¶ 113-114.)

Comparisons to BearingPoint Tests in Other Regions

2915. SBC Illinois states that AT&T's attempt to compare the current status of SBC's BearingPoint test with the results of completed tests in other states served by other BOCs is not a fair or useful comparison. At the outset, SBC Illinois states, third party test plans differ among states. More importantly, AT&T is comparing the BearingPoint test here, which is not complete, to tests that were substantially complete.

2916. SBC Illinois reiterates that it does not rely solely on the BearingPoint PMR test. Instead, SBC Illinois states, BearingPoint's PMR 2 and 3 are substantially complete, and BearingPoint's PMR 1 is partially complete. With respect to PMR4 and PMR5, and the remainder of PMR 1, SBC Illinois contends that E&Y's audit is the relevant third-party test. Thus, in comparing SBC Illinois to other BOCs, one must consider *all* third-party testing, not just BearingPoint testing. SBC Illinois demonstrates that when all third-party testing in Illinois is considered, the current overall results compare favorably to BellSouth's experience in Georgia. (SBC Ex. 2.3 (3/17/03 Ehr Surrebutal) ¶¶ 115-117.)

6. Commission Review and Conclusions.

2917. The positions set out above by the interested parties, require us to examine and address a number of different issues and sub-issues much like the matters in contention.

The Ernst & Young Audit.

Independence and Objectivity

2918. At hand there is question put by certain of the CLECs, whether E&Y is independent of SBC Illinois such that it has independently designed and executed its audit. We note at the outset, that E&Y like BearingPoint, is an established independent firm of international scope. So too, we see that, E&Y like BearingPoint, has worked with performance measurements before. It has conducted tests of compliance with the FCC's conditions for approval of the SBC/Ameritech merger, (including performance measurement and reporting obligations), and has conducted a review of performance measurement processes and controls in connection with

Southwestern Bell's section 271 applications for Arkansas and Missouri. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 217.) E&Y unequivocally and categorically states its independence from SBC Illinois. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) Attachment A, ¶ 12.)

2919. As is the case with BearingPoint, and worthy of note, the FCC has relied on E&Y's work and rejected CLECs' challenges to E&Y's findings in approving section 271 applications. See Arkansas & Missouri 271 Order, ¶ 17 (stating that, "As part of SWBT's application, Ernst & Young evaluated and validated SWBT's data collection processes for performance measures. . . . After reviewing AT&T's allegations, we find nothing sufficient to place in doubt either the correctness of the methodologies employed, or the conclusions reached in Ernst & Young's reports."); Kansas & Oklahoma 271 Order, ¶ 108 (stating that, "We conclude that SWBT, through the Ernst & Young report and other aspects of its application, provides reliable evidence that the OSS systems in Texas are relevant and should be considered in our evaluation of SWBT's OSS in Kansas and Oklahoma."). No less authority than the FCC, the Commission observes, has entrusted E&Y with auditing compliance with the SBC/Ameritech merger conditions. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 217.)

2920. The CLECs' contentions that E&Y is not objective or impartial are unsupported and unfounded. To be sure, the CLECs did not select E&Y or write its audit program,. We see that E&Y designed its own procedures, but it was based on accepted attestation principles and its extensive experience in the field. The audit was further subject to scrutiny and review. The CLECs had ample opportunity to review E&Y's report and methodology and ask questions of E&Y personnel under oath, and they had access to E&Y's working papers. We would observe that E&Y like BearingPoint fully and credibly provided answers to numerous written questions (as well as verbal follow-up questions) during the course of the workshops. Further, we observe that E&Y had identified exceptions, and the inclusion of those exceptions in its report, together with all the other evidence confirms, to this Commission, that E&Y is objective.

Audit Of March-May 2002 Data

2921. The Commission rejects AT&T's assertion that E&Y's report should be disregarded on the grounds that E&Y audited results for the months of (March-May 2002), while the Commission is analyzing checklist compliance based primarily on September-November data. We do not see the FCC to have ever required that the auditor must examine the exact same data that is submitted with a section 271 application. Indeed, such a requirement would be impossible to carry out. In the months the auditor took to complete its work on the data submitted for review, competition would continue, and new performance results would be published.

2922. The E&Y testing of data for the March-May 2002 period is deemed sufficient in our view. There is no dispute but that the performance measures and standards (version 1.8) were the same as for September-November 2002. SBC Illinois states that its processes for reporting were consistent, aside from E&Y-reviewed changes made to correct exceptions. The only allegation of any change in systems and processes relates to SBC Illinois' ongoing expansion of the "DSS" system for performance reporting. The impact of DSS, however, does not appear to be material. Between the March-May results audited by E&Y, and the September-

November results presented here, SBC Illinois has shown that only 25 of the 150 performance measures were migrated to DSS. For those measures, SBC Illinois explains, it ran "parallel testing" of several previous months of data under each system prior to migration to ensure that DSS reached consistent results. This is sufficient, in our view.

Testing Of "Raw Data" And Data Integrity

2923. 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.

Further Challenges To E&Y's Methodology

2924. For the most part, challenges to the E&Y audit focus on differences in approach, i.e., that E&Y did not employ the exact same methodology as BearingPoint. These allegations overlook the inherent difference in the scope of testing. Obviously, BearingPoint is not just verifying SBC Illinois' results, as an auditor would and as E&Y has done. Quite to the contrary, BearingPoint is building an entire system of performance measurements of its own, as part of a process called "blind replication," under which BearingPoint is: (i) independently re-processing the entire stream of raw commercial data for three months; (ii) generating three months of results on every one of the thousands of performance categories; and then, (iii) comparing the end results to those reported by SBC Illinois. Each approach in our view, has substantial, but different, value.

2925. As such, the question at hand is not whether the E&Y audit is identical to the BearingPoint test as some parties would make it be. That might be the right query only if E&Y's work were intended to outright replace that of BearingPoint. Contrary to McLeod's belief, however, the E&Y review is not a substitute, and is not held out to be a substitute, for the successful completion of the BearingPoint testing.

2926. Without question, the E&Y audit differs in methodology from the BearingPoint test. The Commission is wary of such arguments, however, for we understand that each and every of the different methodologies put before us on a variety of matters has its own virtues and drawbacks. Stated another way, E&Y is not BearingPoint , but it also does not profess to be BearingPoint. That, however, does not impinge on the value or credibility of its own and different work.

2927. As we consider the evidence, E&Y's audit is intended to supplement the present and ongoing record, so that the Commission might assess checklist compliance. E&Y determined the scope of its review based on its own professional judgment and in accord with professional attestation standards. It documented both those procedures and its reasoning, and has answered a slew of questions from CLECs and the Staff with respect to its decisions. E&Y's affidavit before the FCC further responded to the Staff and CLEC criticisms. Based on the totality of the evidence, the Commission finds that E&Y's audit is sufficient for present purposes, i.e., analysis of checklist compliance. To be sure, additional value to be gleamed from BearingPoint's approach will certainly inform the Commission's ongoing supervision of SBC Illinois, but it is not required to assess checklist compliance.

The Ernst & Young's Exceptions

2928. The Commission sees that the E&Y findings were addressed by the Company, in order to provide reasonable assurance that SBC Illinois' performance results are reliable. We note that E&Y identified a total of 128 exceptions. Of this number, we are informed, all but 17 were corrected in time for the September-November data presentation to the Commission. And, another ten (10) additional corrections were implemented during the Phase II proceedings. The remaining seven (7) issues were addressed in the 1/17/03 Affidavit of Mr. Ehr, and while Staff and the CLECs refer to these issues, we do not see them to rebut Mr. Ehr's analysis of immateriality. Further, no one shows that any of the corrective actions (particularly those implemented during or after the September – November study period on which the Commission focuses here) resulted in any significant change in SBC Illinois' reported results.

2929. For purposes of its ongoing performance reports, as well as for purposes of the Commission's ultimate report in the FCC proceedings, the Commission is made to understand that SBC Illinois will take action on the remaining E&Y exceptions. So too, E&Y will continue to verify that the corrective actions taken are appropriate.

2930. In accordance with this understanding, the Commission directs SBC Illinois to provide periodic reports as to the status of these issues to Staff, and in a manner and time concurrent with its present reporting to the Michigan Commission.

Interpretations Of Business Rules

2931. Attachment B to E&Y's report lists several "interpretations made by management" in applying the business rules for performance measurement. SBC Illinois explained its basis for each interpretation in its January 17, 2003 filing. The CLECs allege that SBC Illinois unilaterally changed the business rules, and contend that, on this basis, E&Y should have expressed a negative opinion.

2932. The FCC, we are told, has repeatedly rejected such allegations. See BellSouth Five-State 271 Order, ¶ 14 (finding performance data reliable and approving BOC application despite the AT&T complaint that "BellSouth unilaterally changed the rules by which the metrics are calculated" after the state commission had approved them); See also Georgia & Louisiana 271 Order, ¶ 17 (same).

2933. We look further into the record. There, SBC Illinois explains (in its January 17 filing), that some interpretation is inherent in applying a myriad of generic business rules to the practical operation of complex computer programs and processes. SBC Illinois demonstrates that its interpretations were reasonable, and we see no substantive rebuttal put forth to challenge any of these explanations or any showing that these interpretations affect the overall assessment of checklist compliance.

2934. To the contrary, we are told, for 32 of the 48 interpretations where SBC Illinois recommended clarifications to the business rules in the collaborative six-month review, the CLECs have apparently agreed. For another 15 interpretations, SBC Illinois made its review and determined that no clarification was necessary. For the one remaining interpretation, SBC Illinois modified its procedures to better conform to the literal business rule, and said interpretation was not applied in calculating September-November results.

2935. In its handling of this matter too, the Commission would note, E&Y's course appears reasonable. E&Y did not usurp the role of the Commission (as decision maker) or of the collaborative performance measurement review. Rather, E&Y provided information for both the parties and the Commission to make an assessment. And we find SBC Illinois to have presented an assessment that essentially remains unrebutted.

2936. All in all, the Commission finds that there is no legitimate reason to dismiss the E&Y audit or attach any less weight to its reports.

Additional Assurances of Reliability.

2937. The Commission is directed to what the FCC has identified as additional assurances of reliability arising from five separate sources:

(i) extensive third-party auditing;

(ii) the "open and collaborative nature of metric workshops;

(iii) supervision by the applicable state commission;

(iv) the availability of the raw performance data to CLECs and the applicant's "readiness to engage in data reconciliations" between its own records and those of the CLECs; and,

(v) the applicant's internal and external data controls. Georgia & Louisiana 271 Order, ¶ 19.

2938. While each individual factor, standing alone, might not provide sufficient assurance, considered collectively, evidence under these factors operates to support and corroborate the results of the E&Y audit and the completed portions of the BearingPoint test.

The Data Reconciliation Opportunity

2939. The FCC has recognized that a BOC's readiness "to engage in data reconciliations with any requesting carrier" provides valuable assurance as to the reliability of the BOC's data. Georgia & Louisiana 271 Order, ¶ 18. Further, when the state commission "has established a process for competitive LECs to bring concerns about data integrity to them," and "no competitive LEC has done so," the FCC finds the absence of CLEC action to constitute probative evidence that the applicant's data are reliable. Id.

2940. 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 observes 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.

Data Controls

2941. As a result of feedback received during the BearingPoint test, we are told, SBC Illinois has implemented improvements to its internal controls and to its already extensive documentation of performance measurement procedures. Some of the more significant control steps include (a) copying and storing both the input and output files for performance data; (b) using numerical control records in the header and trailer of the input and output files to ensure that all records are processed; and (c) processing data more than one time, and cross-checking the results for accuracy. These improvements have had concrete results; leading SBC Illinois to have made substantial progress in closing exceptions previously identified by BearingPoint.

2942. 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.

The Open Collaboratives.

2943. We see no dispute with respect to the opportunities presented by the continuously ongoing 6-month collaboratives. This forum provides participants full opportunity to review, update and revise the performance measures. Those changes or any dispute thereon are further brought to this Commission.

Commission Supervision

2944. In challenging the on-going Commission supervision assurance factor, Staff sets out the claim that regulators generally "do not have live data to make an independent evaluation as to the integrity, accuracy or completeness of the data that a utility such as SBC Illinois reports. So too, AT&T is heard to argue that validating SBC Illinois reported performance is not an undertaking that this Commission has the resources for, or is in a position to undertake. Such arguments, taken at face value, would wipe out the FCC's factor altogether. What the FCC means, in our view, is that the Commission exercises oversight over the testing, any changes under the colloboratives and other relevant matters in dispute between CLECs and the Company. Without question, this Commission is active and available and will continue in the same way for the future.

Extensive third-Party Auditing

2945. The auditing factor that the FCC deems to be significant, is well in place in Illinois. E&Y has completed its review and the Company responded. BearingPoint is still working and SBC Illinois is still responding. Here too, the Commission is keenly involved in the fine as well as the overall details of the process.

The Interim Status Of BearingPoint's Performance Metric Review.

2946. While E&Y's audit of performance results is substantially complete, we well recognize that BearingPoint's own review of SBC Illinois' performance measurements is not. It is still ongoing.

2947. As such, the present status of BearingPoint's review appears to raise two different questions. The first is essentially a procedural matter: whether the completion of BearingPoint's review is an absolute prerequisite for assessing checklist compliance. Or, in other words, does the ongoing nature of BearingPoint's review constitute an absolute bar to going forward.

2948. The FCC, in our view, has answered that question in favor of the approach advocated by SBC Illinois. The FCC has never required that all performance audits be complete at the time of an application. Instead, it has not only considered but approved section 271 applications where an audit was incomplete (Georgia & Louisiana 271 Order, ¶¶ 17, 19)) so long as there were reasonable assurances that the reported results were reliable. We see the Company to caution us in that CLECs often attempt to derail several section 271 applications on this basis, even in one state, i.e., New Jersey, where BearingPoint did complete a comprehensive audit and had no remaining exceptions. Those CLEC attempts have been uniformly unsuccessful, SBC Illinois informs, with the FCC finding sufficient assurances that the applicant's data were reliable and proceeding with its substantive assessment of the data where an audit had been done but another and different BearingPoint audit was still underway (as is the case here, and was also the case in Georgia):

- "Several commenters challenge the validity of the data provided by BellSouth. . . . We recognize that BellSouth's data continues to be

subjected to third-party audit, but we cannot as a general matter insist that all audits must be completed at the time a section 271 application is filed at the Commission." Georgia & Louisiana 271 Order, ¶¶ 17, 19.

- "AT&T and ITC DeltaCom also challenge the validity of the data provided by BellSouth. . . . As we did in the BellSouth Georgia/Louisiana Order, we find that, as a general matter, BellSouth's performance metric data are accurate, reliable, and useful." BellSouth Five-State 271 Order, ¶¶ 14, 16.

- "[W]e are unpersuaded by the arguments of AT&T, WorldCom and El Paso-PACWEST that the detailed performance data submitted by SWBT are inherently unreliable . . . . In particular, we conclude that SWBT need not undergo a comprehensive verification of its representations." Arkansas & Missouri 271 Order, ¶ 16.

2949. Thus, it appears that the issue relevant at this juncture is not the one posited by AT&T, i.e., whether SBC Illinois has satisfied the "exit criteria" for BearingPoint's test. As we see it, SBC Illinois is not asking to exit the test, and the FCC has held that completion of all pending tests is not a prerequisite for an analysis of checklist compliance.

2950. This means that, as the Company points, the real question before the Commission is substantive in nature and thus asks: whether the totality of the evidence provides the Commission with reasonable assurance that SBC Illinois' reported results are accurate, even in the absence of a completed review by BearingPoint. In other words, do the E&Y audits, taken together with other assurances of reliability, suffice for this review.

2951. We believe and here find that SBC Illinois has met its burden of proof, having shown by a preponderance, that the totality of the evidence on record provides sufficient assurance as to the reliability of its reports.

2952. The Commission's step by step analysis in the preceding sections, leads it to this ultimate determination, to wit: the E&Y audit, taken together with the additional assurances of reliability in the record and treated in the right light, provide sufficient assurance of reliability. The Commission further finds that, in accord with the FCC's pronouncements, BearingPoint's interim findings to date do not affect that conclusion.

Bearing Point

2953. SBC Illinois has addressed the current status and interim results of BearingPoint's test both in detail and in context. It demonstrates, in large part, that BearingPoint's findings, to date, are not material to the Commission's assessment of overall checklist compliance.

2954. The opposing analysis of Staff, AT&T, and WorldCom also detailed, fails to provide a whole and complete picture. Generally, the approach taken by Staff and the CLECs is to describe a test criterion, explain why it is important, and then say what a "Not Satisfied" score *might* mean, under a worst-case scenario (for example, what would happen if there were *no* documented procedures for performance reporting). Such an approach is incomplete and fails on this basis. It leaves out two critical aspects.

2955. 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.

2956. 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).

2957. On the question that bears most directly on the present analysis of checklist compliance, namely, whether reported results accurately reflect commercial activity and are calculated in accordance with the approved business rules, SBC Illinois points out that BearingPoint's testing is incomplete. In our view, however, this is not fatal. E&Y's audit, together with other assurances of reliability, provides this Commission with sufficient assurance.

"Restatements" Of Previously Reported Performance Results.

2958. The Commission considers and rejects AT&T's contention that SBC Illinois' data are unreliable based solely on the existence and number of corrections or "restatements" SBC Illinois has made to past reports. The FCC, we are shown, has repeatedly rejected such

contentions. See, e.g., New Jersey 271 Order, ¶ 90 (stating that, "We reject the arguments made by AT&T and other parties that challenge the reliability of Verizon's data on the basis of the sheer volume of the changes and corrections that Verizon made to its processes for including the relevant data."); Georgia & Louisiana 271 Order, ¶ 17 (rejecting the CLEC claims that "the pattern of restatements of the data by BellSouth and BellSouth's acknowledgements of problems with certain metrics mean that the data is not stable enough to be relied upon").

2959. Moreover, AT&T's approach appears to be inconsistent with BearingPoint's own judgment standards. At the time of its December 20 report, BearingPoint indicated that 18 test points in PMR1 were "Not Satisfied (In Retest)" due primarily to Exception 20, and in particular to the number of restatements in 2001. (SBC Ex. 1.0 (1/17/03 Ehr Aff.) ¶ 265.) Since then, however, BearingPoint has closed Exception 20 and, in so doing, it stated that "BearingPoint is no longer using restatement frequency as a general indicator of procedural and control deficiencies." (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 140.)

2960. At the February 5, 2003, workshop, Mr. Eringis of BearingPoint explained, in response to a question from Staff:

> At the time much earlier in our evaluation, we published findings describing that we thought that the level -- the degree to which restatements were occurring were suggestive that there were problems in controls and that we would pursue that further to substantiate whether that suggestion was in fact correct….At this stage of the evaluation, it's very hard for us -- if not impossible for us to use restatement activity as a proxy for making a judgment as to whether there's a problem with controls and edits because we are now at a point in the test where we actually stimulate restatements. When we find that there's a problem with the measure, the company may determine that it's going to restate. (Tr. 2237-38):

2961. The FCC, we are shown, has recognized that the existence of restatements means only that performance reporting is an "inherently complex and iterative" process, and the existence of "regular corrective activity does not demonstrate systemic infirmities as an end in itself." New Jersey 271 Order, ¶ 91. In our view, accordingly, it is not the existence or sheer number of restatements, but the material effect of same, that is key to a reasonable and responsible analysis.

2962. On this point, SBC Illinois has shown that the rate of restatements that actually changed a particular result from "pass" to "fail" in the past year was less than one percent of reported results. Indeed, of the May-December restatements that appear on AT&T's chart, the Company explains that only 0.70 percent of these actually made a difference as to whether SBC Illinois "passed" or "missed" the measure. And, the cumulative impact of all restatements has not changed the overall "pass rate" on performance measures by more than 0.9 percent in any month. In the end, we are not shown any examples of any one restatement or group of restatements that prove material enough to have made a real difference in the overall analysis.

7. Final Account and Consideration of Staff Recommendations

2963. Based on all the relevant considerations and circumstances at hand, the Commission finds the totality of the evidence to demonstrate that SBC Illinois' commercial performance results are sufficiently reliable to enable the Commission to use them in assessing checklist compliance. Continuing under our totality of the evidence standard, the Commission deems it prudent to assess certain remedial measures that Staff has proposed. According to Staff:

> 1. In the event this Commission proceeds to provide a positive Section 271 recommendation to the FCC prior to the conclusion of the BearingPoint Performance Metrics review, it should make its approval contingent upon the requirement that SBC Illinois will: (a) address all deficiencies raised by BearingPoint in the metrics review; and, (b) commit to successfully conclude the BearingPoint metrics review no later than November 2003.
>
> 2. Further, Staff recommends that the Commission condition any positive Section 271 recommendation to the FCC upon SBC Illinois' commitment to conduct a yearly audit of its performance measurement data, data collection, data retention and processing controls to demonstrate and prove that the performance measurement data remains reliable over time. Further, the Commission should approve both the auditor and audit test plan for the annual audits committed to by the company.

2964. To be sure, we reasonably expect that the BearingPoint work will continue until completed. There is no evidence presented to the contrary on this point. Indeed, this expectation has factored into our overall analysis and deterrent on this issue. Further, the Commission will vigorously pursue, examine and monitor the remaining work no different than we have done thus far.

2965. Nevertheless, and to be abundantly clear, we accept, the first of Staff's proposal as a precautionary measure, This will serve to emphasizes, and leave no doubt, that maintaining and assuring both the accuracy and reliability of SBC Illinois' performance data will continue to be a matter of critical concern to this Commission both as it concerns SBC Illinois section 271 application and, with respect to anti-backsliding purposes, i.e., the Performance Assurance Plan. We await the Company's firm commitment on the first of Staff's recommendations here adopted.

2966. While we are also accepting of Staff's audit proposal generally, we defer ruling on this recommendation to that point in this Order wherein we review the performance assurance plan. See Public Interest Part of the Order.

IV. PUBLIC INTEREST - Under Section 271(d)(3)(C)

A. Description of the Statute

2967. With respect to a Section 271 application under its review, the FCC is directed to make a finding on the concern, that:

"the requested authorization is consistent with the public interest, convenience and necessity. 47 U.S.C. Section 271 (d)

B. The Federal Standards

2968. In addition to determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the FCC to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity. According to the FCC, compliance with the competitive checklist is itself a strong indicator that long distance entry is consistent with the public interest. This approach reflects the FCC's many years of experience with the consumer benefits that flow from competition in telecommunications markets.

2969. The FCC recognizes, however, that the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. Thus, the FCC views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected.

2970. (Adapted from the New Jersey 271 Order, with most cites and footnotes omitted).

C. The State Perspective

2971. The Commission's Initiating Order for this investigation sets out the Public Interest concern in two places.

2972. At page 2, the Initiating Order recites that:

> The FCC has considered the following issues within the context of the Public Interest requirement: (1) competition in local exchange and long distance markets, (2) assurance of future compliance, and (3) CLEC claims of anticompetitive behavior, in order to determine whether the BOC has engaged in patterns of systemic discriminatory conduct that would contradict a finding that the local market will remain open after Section 271 approval. (See Section 271 orders for the following states: New York, Kansa/Oklahoma, Pennsylvania, Connecticut, and Texas). The FCC has found that satisfying the competitive checklist is a "strong indicator" that approving the requested 271 relief is consistent with the public interest. Additionally, the FCC has reviewed the sufficiency of the BOCs' performance remedy plans to provide "additional assurance that the local market will remain open after [the BOC] receives 271 authorization. The FCC has also given substantial consideration to the performance measurement results within its competitive checklist review in each proceeding to determine whether nondiscriminatory access is being provided to the competitors by the BOCs. Id. at 2

2973. Further, at page 3 of the Initiating Order, the Commission wrote:

> The Commission notes that in prior 271 Orders, the FCC has consistently made its public interest determination based on evidence provided in the competitive checklist review. The FCC has also placed special emphasis on the BOCs' performance remedy plan. 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. The Commission will also review and consider Ameritech-Illinois compliance with the competitive checklist and related public interest issues. To the extent that a particular public interest issue is unrelated to the competitive checklist, but a party believes that it is important to the development of competition in Illinois, the party is free to comment on such issue. Should the ICC find such argument important to the development of local competition, it may, at its discretion, provide consultation on this issue to the FCC. Id. at 3.

D. The Parties' General Views and Positions

2974. An investigation and review of the Section 271 performance remedy plan has not yet occurred in this docket. Likewise, OSS is not up for review and discussion. The Commission and the parties have only addressed Track A eligibility and the competitive checklist items. Nevertheless, most if not all of the parties express their views on the public interest concern and this Commission's role in that analysis which the FCC itself must perform. In this preliminary section too, the Company's compliance with Commission orders is put into issue as a factor that might be considered

1. The Attorney General's Position

2975. In general, the AG comments, use of the term "public interest" in a statute takes its meaning from the purposes of the Act of which it is a part. NAACP v. FPC, 425 U.S. 662, 669-670 (1976) (Power and Gas Acts' purpose to encourage orderly development of plentiful supplies of electricity and natural gas at just and reasonable rates. Employment practices outside scope of public interest.). The purpose of Section 271 and the Federal Act, the AG maintains, is to stimulate competition in the local telecommunications market. Sprint v. FCC, 274 F.3d 549, 555-556 (D.C. Cir. 2001)(allegations of price squeeze in local market implicated public interest and required remand).

2976. State commissions, the AG contends, have advised the FCC on matters generally related to the public interest. One of the major public interest issues that state commissions have addressed is whether a BOC will continue to provide adequate wholesale performance, once the incentive of in-region long distance is gone. But, the AG observes, state commissions have addressed more than performance assurance plans in the context of the public interest. Many have also included analyses and recommendations about whether Section 271 approval would generally serve the public interest and those states include Texas, New Jersey, Rhode Island and Massachusetts.

2977. The state commission's role under Section 271, the AG maintains, is to inform the FCC about the status of the local market and of the BOC's compliance with federal, and any consistent, state market opening efforts, required by the 14 item checklist. 47 U.S.C. § 261(c). It is for the FCC, the AG contends, to take that information and decide if it demonstrates compliance with federal law and Section 271 requirements. Despite its insistence that state law should be ignored, the AG notes Ameritech Illinois to admit that it is complying with some state law obligations, subject to its right to challenge those same state obligations.

2. Ameritech Illinois Position

2978. The public interest analysis does not appear under Section 271 (c), AI observes, but resides in subsection (d), which expressly assigns the public interact inquiry to the FCC. As such, the "public interest" test does not authorize a state Commission to create new regulations or conduct new inquiries not related to the checklist compliance provisions of the federal statute. To be sure, AI comments, the comprehensive "appendix of statutory requirements" that the FCC attaches to each of its most recent orders (summarizing its "road map" for Section 271), does not include state law compliance issues under the public interest umbrella or embrace the dictum in the Michigan 271 Order. See, for example New Jersey 271 Order at App. C, 70-71.

2979. AI sets out certain basic "public interest" principles that it believes the Commission should consider. At the outset,, AI contends, Section 271 expressly directs the FCC to consult with state commissions regarding compliance with Tracks A and B, and with the 14 checklist items. 47 U.S.C. § 271(d)(2)(B).

2980. So too, AI asserts, the public interest test is not a second chance for arguments that fail under Track A or the competitive checklist. According to AI, It would make no sense for the FCC to say that some proposal (e.g., a market share test for Section 271 approval) is a bad idea under Track A or the checklist, then turn around and deem that same proposal to be compelled by the "public interest and necessity." Compare Michigan 271 Order, 77 ("We also do not read [Track A] to require that a new entrant serve a specific market share") with New York 271 Order, 427 ("Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we have no intention of establishing one here [under the public interest test].")

2981. Further, AI contends, the public interest test is not a suggestion box for CLECs to submit any and all ideas they have for imposing new obligations on the incumbent LEC. Indeed, AI points out that Section 271(d)(4) – which immediately follows the statutory "public interest" test – commands that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(4).

2982. The FCC, AI asserts, has recognized that Section 271 proceedings are not the place to resolve "new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve per se violations of self-executing requirements of the Act." Texas 271 Order, 23. As the FCC reasoned, such an approach would be "irreconcilable with th[e] statutory scheme" because "the Section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a Section 271 application." Id. 24. One reason that such inquiries are improper is the FCC's tight time limit for reviewing applications (Id. 25), but that is not the only one. AI observes the FCC to explain that:

> Congress designed Section 271 to give the BOCs an important incentive to open their local markets to competition, and that incentive presupposes a realistic hope of attaining Section 271 authorization. That hope would largely vanish if a BOC's opponents could effectively doom any Section 271 application by freighting their comments with novel interpretive disputes and demand that authorization be denied unless each one of those disputes is resolved in the BOC's favor. Indeed, if that were the required approach, the BOCs would face enormous uncertainty about the steps they need to take to win Section 271 authorization, and they would therefore lose much of their incentive to cooperate in opening their local markets to competition in the first place. That result would disserve the public interest in greater competition in both local and long-distance markets, and it would defeat the congressional intent underlying this statutory scheme. Texas 271 Order at para 26.

2983. Finally, AI argues, it is not enough for a party to suggest certain action and claim that such action is in the public interest, simply because it is in that party's interest or otherwise warranted on the conclusory assertion that the market is not irreversibly open. The issue, AI maintains, is whether granting the BOC's application would be in the public interest, not whether adopting a particular CLEC proposal might also serve the public interest. 47 U.S.C. § 271(d)(3)(C). On that issue, AI observes, the FCC considers whether "relevant factors exist that would frustrate the congressional intent that markets be open," and whether that approval would not serve the public interest Congress expected it to serve. (New Jersey 271 Order, App. C, 71).

2984. AI sees Staff and certain CLECs to contend that Ameritech Illinois has demonstrated a pattern of regulatory non-compliance. See, e.g., Staff Br. at 217; AT&T Br. at 147. Ameritech Illinois disagrees with these parties' views, both with respect to the Company's overall compliance with Commission orders and their characterization of individual proceedings. (Am. Ill. Ex. 15.0 at 15). Ameritech Illinois takes seriously its obligations to comply with applicable state and federal requirements. Id. Moreover, AI points out, most of the "noncompliance" examples that were presented in testimony reflect disputes over legal, factual and policy issues – not actual non-compliance. Id. The arguments on brief, the Company notes, similarly serve to distort Ameritech Illinois' compliance record.

2985. Point by point, AI addresses Staff's version of the history of shared transport pointing out differences in view and overlooked fact. Ameritech Illinois does not deny that the history of shared transport has been confusing and contentious, but the facts themselves, the Company contends, do not support Staff's blanket and simplistic indictment of Ameritech Illinois' conduct over the last six years.

2986. Staff's remaining allegations of non-compliance, the Company notes, consist of CLEC complaint matters, that the Commission ultimately resolved against Ameritech Illinois. The transition to competition, it maintains, has not been and will not be without disputes. Ameritech Illinois contends that it is obligated to provide a myriad of products and services under a complex, overlapping (and occasionally conflicting) set of legal requirements. In many instances, Ameritech Illinois' observes, obligations are undefined beyond generic prohibitions against discriminatory conduct.

2987. According to AI, the U.S. Supreme Court itself has said: "It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction." AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 397 (1999). It is a fact of regulatory life AI comments, that CLECs take an aggressive view of what they are (or should be) entitled to. It is equally a fact of regulatory life that the incumbent carrier will see these issues from a more conservative perspective. The mere fact that the Commission ultimately sides with the CLECs (or Staff) on any given issue does not mean that Ameritech Illinois acted in bad faith, the Company argues, or that its actions indicate a pattern of "non-compliance." These orders are simply part of a complex patchwork of federal and state decisions that, over time, more precisely define Ameritech Illinois' obligations to its competitors.

2988. AI sees Staff to refer to the Z-Tel complaint, in which Z-Tel contended that it was not receiving line loss notifications on a timely basis. (Staff Br. at 228). Put in perspective, AI maintains that this was a systems problem that affected one OSS functionality out of hundreds. No one has ever contended that Ameritech Illinois was acting in bad faith or deliberately allowed its performance to deteriorate. Ameritech Illinois stated from the outset of the Z-Tel litigation, (and again in this proceeding) that it understood its obligation to provide these notifications on a timely basis and that it was working diligently to resolve the problem. (May 8, 2002 Order, Docket 01-0160 at 10-14; Am. Ill. Ex. 15.0 at 13; Am. Ill. Ex. 4.1 at 2-12). This is not contested in the record, nor is there any real dispute but that Ameritech Illinois has made great strides on the issue, and has kept CLECs and Staff informed of its progress.

2989. According to AI, the Commission's decision in the MCI PIC change verification complaint has no bearing on Section 271 compliance. Order, Docket 97-0540 Dec. 17, 1997. This complaint case, AI explains, is almost five years old and involved PIC changes for local toll service provided by IXCs – not local service provided by CLECs subject to the Act. In the QST docket, too, Ameritech Illinois argued that section 252(i) should not apply to interconnection agreement terms governing reciprocal compensation, in part because it would constitute bad policy to allow CLECs to opt into agreements made with other carriers that allowed those carriers to receive a windfall for ISP-related traffic. Order, Docket 98-0603, (Nov. 5, 1998) (Ill. PUC Lexis 986 at *18-*19. While the Commission disagreed with Ameritech Illinois, Ameritech Illinois' position in that docket can hardly constitute regulatory malfeasance, given that the FCC later adopted Ameritech Illinois' position in the ISP Compensation Order at 2, 82). Further, AI observes, the special construction charge docket established new policies (such as

CLEC notification processes and pricing) for the situation where Ameritech Illinois does not have facilities available. See Order, Docket 99-0593 (Aug. 15, 2000). Following all of these decisions, Ameritech Illinois duly amended its practices and Staff does not contend otherwise.

2990. Ameritech sees AT&T and Z-Tel to refer to Docket 01-0614 where the Commission ultimately resolved certain issues against the Company. (AT&T Br. at 151; Z-Tel Br. at 19-20). These issues constituted good faith disputes over the proper interpretation of a new statutory provision, i.e., Section 13-801, AI explains. The mere fact that Ameritech Illinois did not prevail in the end does not mean that the Company was guilty of "non-compliance" before the Commission even ruled. (Am. Ill. Ex. 15.0 at 16-17).

2991. Ameritech Illinois points out that it is not the only company which has been on the receiving end of negative Commission decisions. For example, the Commission recently entered an emergency order against WorldCom under Section 13-514, ordering that carrier to cease and desist slamming and misleading marketing practices. Order Granting Emergency Relief, Docket 02-0443 (July 8, 2002). Similarly, the Commission entered an order finding that AT&T violated Section 13-514 by denying both Ameritech Illinois and other carriers access to certain AT&T facilities. Order, Docket 97-0624 (Feb. 27, 1998).

2992. Given the large number of CLECs of varying capabilities and sophistication to whom Ameritech Illinois provides products and services, the extensive array of products and services which it provides, and the complex interfaces between Ameritech Illinois and the CLECs, the potential for misunderstanding and disputes is enormous. In this environment AI asserts, Staff should acknowledge the fact that there have been relatively few complaints.

2993. Ameritech Illinois' admits that its processes are not perfect and its judgments are not infallible, but contends that no telephone company in the country would meet such standards. Ameritech Illinois readily concedes that it has disagreed (sometimes strongly) with Commission decisions on specific issues and that it has used its best efforts (sometimes successfully, sometimes not) to convince the Commission to take a different approach in that or subsequent proceedings. But, these positions. AI maintains, have always been taken in good faith and in accordance with the rule of law.

2994. This Commission, AI contends, has numerous mechanisms at hand to assess and enforce compliance with state law, and no one contends that it has not made sufficient use of those means. Indeed, AI notes, the very issues raised by Staff or the intervenors are being or have been addressed by separate dockets, and any public interest at stake in those matters, is accordingly being served.

3. WorldCom's Position

2995. WorldCom agrees with Staff's position that this Commission's responsibility to consult with the FCC on 271 compliance requires that it do more than just determine whether Ameritech is in minimal, technical compliance with the fourteen checklist items. (Staff Br. at 23-24). Staff's analysis and conclusions regarding state law matters, WorldCom contends, demonstrates that the state of competition in Illinois in general, and Ameritech's compliance with Commission orders and state law in particular, cannot be ignored if the Commission is to fulfill its role consistent with federal Act the intent of the Congress and the Illinois General Assembly. WorldCom believes that the Commission must look beyond the extremely narrow and limited role that Ameritech would have the Commission play in consulting the FCC on whether the local market in Illinois is irreversibly open to competition.

2996. Its witness Campion, WorldCom claims, detailed SBC- Illinois's disregard for Commission orders with respect to establishing TELRIC pricing for UNEs and for implementing the shared transport UNE in particular. (WorldCom Ex. 6.0 at 8-13). Ms. Campion also observed that Ameritech had also failed to comply with the Commission's Order in Docket 00-0393 which had required Ameritech to file specific tariff language identified by the Commission. (WorldCom Ex. 6.1 at 8-9). Such non-compliance, WorldCom contends, was demonstrated during the cross examination of Ameritech witness Rhonda Johnson where she admitted that Ameritech removed all references to the UNE Platform or UNE-P even though those terms appeared at ten different places in the tariff language that the Commission ordered Ameritech to mirror. (Tr.863-864).

2997. WorldCom believes that Staff witness Feipel's direct testimony clearly laid out examples of Ameritech's non-compliance with competitive requirements contained in federal law, state law, FCC orders and Commission orders and showed how that non-compliance impacted on competition in the Illinois local market. WorldCom observes Mr. Feipel to have stated that, "Ameritech's continued non-compliance represents a prolonged and systemic problem that has hindered the development of a competitive telecommunications marketplace in Illinois." (Staff Ex. 2.0, p. 11).

2998. According to WorldCom, the record is replete with instances in which Ameritech has actively resisted and outright disobeyed several state law requirements. (WorldCom Ex. 6.0, pp. 9-13,15-18). WorldCom witness Campion observed, for example, that Ameritech recently was found to have engaged in activities that are per se impediments to competition in the Z-Tel complaint proceeding in Docket 02-0160, and has been found in violation of various state laws based on its anticompetitive ValueLink contracts in the ACENT complaint case in Docket 00-0024. (Worldcom Ex. 6.1 at 9-10). It is this pattern of conduct, WorldCom argues, that compels an evaluation not only of Ameritech's non-compliance with state laws and regulations, but also an evaluation of the extent to which Ameritech is complying with state laws and regulations, including Commission orders.

2999. WorldCom contends that while Ameritech was invited to demonstrate how it is complying with the Commission's special construction order in Docket 99-0539, and to demonstrate that it is not discriminating against CLECs and in favor of itself , its customers and its authorized agents in terms of the intervals in which it provisions high speed data lines, including T-1 and DS1 lines, it declined to do so. (WorldCom Ex. 6.0, pp. 20-22). Having had ample opportunity to illustrate how it complies with state regulations, WorldCom argues, it has opted to ignore those opportunities and gamble that the Commission will ignore SBC-Illinois' history of disobeying Commission orders and state laws.

3000. For all of these reasons, WorldCom believes that it is wholly appropriate, in this proceeding, to focus on the issue of Ameritech's failure to comply with Commission orders and state laws and regulations. Without considering such information, WorldCom contends, the Commission will not be prepared in its consultative role under the TA96 to provide information that the FCC believes is relevant to its evaluation of Ameritech's 271 application. To this end, the Commission should consider all of the evidence concerning Ameritech's non-compliance with Illinois laws and regulations, and also require Ameritech to demonstrate with specificity how it has complied with the Commission's directives in the special construction order in Docket 99-0593, the AADS certification order in Docket 94-0308, and Section 13-801(d)(5) maximum intervals for the provision of UNEs, and in particular the intervals for the provision of high speed data lines, including T-1 and DS1 lines. (*See* WorldCom Ex. 6.0 at 19-20). Absent such a demonstration, WorldCom argues, the Commission is left only to base its decision on the evidence that demonstrates a pattern of non-compliance and disregard for pro-competitive state regulations.

4. RCN's Position

3001. The FCC, RCN asserts, recognized the considerable importance that Congress placed on the public interest standard by noting that it was given "broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest." Michigan 271 Order at para. 383. As part of this broad authority, the FCC determined that it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act. (Id. at 385.)

3002. In the Louisiana 271 Order, RCN notes, the FCC reaffirmed that it will consider "whether approval of a Section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market." Id. para. 361. So too, RCN points out, FCC stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition." Michigan 271 Order at para 386.

3003. Indeed, RCN observes, the FCC has determined that:

> The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large). Michigan 271 Order at para. 391.

3004. This Commission, RCN asserts, is given a vital consultative role in providing recommendations to the FCC as to Ameritech's application and in developing a detailed record that the FCC will use in evaluating Ameritech's application. Before this Commission can recommend that the FCC approve Ameritech's application, it must determine if such approval would be in the public interest of the citizenry of Illinois. Central to its determination RCN asserts, is the question of whether Ameritech has made the local market in Illinois fully and irreversibly open to competition. The FCC has stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."

5. AT&T's Position

3005. The level of local competition that currently exists in Illinois, AT&T contends, is narrowly focused and uncertain. According to AT&T, the same arguments it set forth under Track A eligibility also demonstrate that Ameritech has failed to meet it burden of proving that the "local market is open and will remain so" even after Section 271 authorization is granted. See Michigan Section 271 Order.

3006. For local competition that is both sustainable and irreversible, the FCC and the state commission must assure themselves that the RBOC will continue to comply with the market-opening requirements, even after the "carrot" of 271 relief no longer exists. There is no question, AT&T maintains, but that an adequate Performance Remedy Plan is crucial to ensure that Ameritech does not "backslide" on the service quality it provides to CLECs. Another readily available way that the FCC and the state commission can alleviate any concerns about whether the RBOC will comply with the market-opening requirements of the FCC and the state commission is to examine the RBOC's history of compliance.

3007. According to AT&T, the Commission's Order on Rehearing dated September 26, 2001 in Docket 00-0393 required Ameritech to file a tariff that "mirrors"

the tariff language attached as Appendix A, as modified. On cross examination, AT&T contends Ameritech witness Johnson admitted that the tariff Ameritech actually filed differed significantly from the tariff the Commission ordered Ameritech to "mirror." Another instance of Ameritech's noncompliance, AT&T asserts, is its failure to timely comply with the FCC's and the Commission's requirement to provide interim shared transport ("ULS-IST"), the predecessor to its permanent shared transport offering. Recently, AT&T notes, Ameritech has filed tariffs in alleged compliance with the Commission's Order in Docket 01-0614 implementing the broad unbundling obligations of Section 13-801 of the Illinois Public Utilities Act, enacted into law last June. AT&T comments that it is currently engaged in the process of reviewing those tariffs.

3008. AT&T recognizes that while certain of Commission orders (with which the CLECs and Staff advocate strict compliance) impose obligations that are broader than those imposed by federal law, the bulk of them simply require Ameritech to comply with what federal law demands. AT&T further takes issue with Ameritech Illinois' statement that:

> Staff's proposed assessment of compliance with state law is unnecessary. As the discussion below and throughout this brief makes clear, this Commission has numerous other mechanisms at hand to assess and enforce compliance with state law, and no one contends that it has not made sufficient use of those means. In many cases, the very issues raised by Staff or the other intervenors are being or have been addressed by separate dockets, and any public interest involved is already being served. (Ameritech Initial Br. at 187).

3009. Contrary to AI's view, AT&T maintains that the public interest determination cannot be relegated, delegated or deferred to other state proceedings. It is a necessary prerequisite to a successful 271 application, and, AT&T argues, a BOC that repeatedly violates or persists in violating federal or state law requirements, simply cannot pass this public interest test.

3010. AT&T further believes Ameritech to have summarily disposed of several state law compliance issues posed by Staff by contending that the tariff it filed to implement the Commission's Order in Docket 01-0614 (implementing newly enacted Section 13-801 of the PUA) has essentially mooted those issues. (Am. Ill Br. at 194). To be sure, AT&T notes that on August 23, 2002, Staff and Ameritech filed a Joint Stipulation indicating that various Section 13-801 compliance issues have been resolved vis-à-vis the stipulating parties. AT&T, however, does not so readily agree that these issues are no longer relevant for Section 271 purposes. AT&T maintains that whether Ameritech's tariff complies with the order, or is useful for providing the CLEC what the Commission intended, cannot be evaluated on the basis of language alone. True compliance, AT&T contends, can only be evaluated when one attempts to order and implement the tariffed element and/or service. As such, AT&T intends to address

any noncompliance issues arising from the Commission's Order in Docket 01-0614 and the resulting tariff in Phase II of this proceeding.

6. Z-Tel's Position

3011. Z-Tel submits that Ameritech's application is contrary to the public interest for at least three reasons. First, according to Z-Tel, Ameritech has utterly failed to comply with provisions of the Illinois PUA, signed into law more than a year ago. Second, Z-Tel asserts, Ameritech's "winback" campaign, (through which it lures consumers away from CLECs and back to Ameritech), is anticompetitive and discriminatory. Third, Z-Tel contends that Ameritech's performance remedy plan cannot guarantee that poor performance will be identified or corrected because Ameritech's metrics are bad, Ameritech scores its own performance, and CLECs have no way of verifying Ameritech's data.

7. Cook County's Reply Position

3012. To the extent that state law or Commission orders are consistent with a 271 requirement, Cook County asserts, Ameritech Illinois must be in compliance with those laws and orders to meet with the 271 requirements. This proposition, it notes, was set out by Staff on brief: "To the extent that Commission Orders and state law requirements effectively mirror federal requirements, it is self evident that compliance with such laws, orders and regulations must be demonstrated for Section 271 compliance." (Staff Initial Brief at 16). Cook County agrees that Ameritech Illinois needs to comply with Commission orders and state laws that are related to the various Section 271 provisions. (Cook County Initial Brief at 6-8,10).

3013. While recognizing that the FCC seeks consultation with the state commission in respect to the competitive checklist, Cook County points out that the Commission's Initiating Order has opened this docket to consider the "public interest" provision as well. Initiating Order at 3. Sound public policy, Cook County asserts, allows and encourages such consideration.

3014. The record in this docket, Cook County maintains, demonstrates that certain corrective action must be taken by Ameritech Illinois with respect to several issues before the Commission can conclude that the "public interest" will be fully protected on grant of Section 271 approval. Cook County expresses its desire for Ameritech Illinois to meet with Staff and take the corrective action that is necessary to satisfy this public interest.

3015. Cook County supports the concept of Ameritech Illinois obtaining Section 271 approval at the earliest possible time. This, however, should not come at the expense of other carriers or Illinois consumers. Some subjects still need to be

addressed before the Commission should provide a favorable consultation to the FCC. In Cook County's view, the Commission should issue a Phase 1 A order, listing the provisions where compliance has not been shown. Further, the Commission should provide Ameritech Illinois with the opportunity to remedy the various shortcomings. Additionally, the Commission should analyze whether the market is irrevocably open to competition in Illinois. Finally, Ameritech Illinois should be required to meet the relevant Illinois state law requirements before the Commission grants its approval under the Section 271 framework.

8. Staff's Position

3016. In the FCC's review of Section 271 applications, Staff notes, it has consistently viewed regulatory compliance by the applicant as a significant indicator of whether the applicant has in fact opened its network and markets to competition. For example, back in 1997, the FCC stated that:

> Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anticompetitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority. Ameritech Michigan 271 Order, 397.

3017. Since 1997, Staff contends, the FCC has reiterated its determination that a BOC's history of regulatory compliance must be considered in assessing that BOC's Section 271 application. In the Verizon New York 271 Order, the FCC observed that:

> In this instance, we do not find that the various incidents cited by commenters constitute a pattern of discriminatory conduct that undermines our confidence that Bell Atlantic's local market is open to competition and will remain so after Bell Atlantic receives interLATA authority. Verizon New York 271 Order, 444.

3018. Likewise, in evaluating SBC's Texas 271 application, the FCC noted that:

> We have previously stated that we will not deny Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination under the Act. In this instance, we do not find that the various incidents cited by commenters constitute a pattern of discriminatory conduct that undermines our confidence that SWBT's local market is open to competition and will remain so after SWBT receives interLATA authority. SBC Texas 271 Order, 431

3019. Even more recently, in the Kansas/Oklahoma 271 proceeding, the FCC observed that:

> [With respect to regulatory compliance,] we are looking for patterns of systematic performance disparities that have resulted in competitive harm or otherwise denied competing carriers a meaningful opportunity to compete. SBC Kansas/Oklahoma 271 Order, 179

3020. It is clear from the forgoing, Staff asserts, that the FCC considers the existence of a pattern of discriminatory conduct or regulatory violations to militate against a grant of Section 271 authority. In Staff's view, Ameritech Illinois has compiled precisely such a history in its refusal to comply with this Commission's orders relating to competition.

3021. According to Staff, Ameritech's history of regulatory non-compliance is illustrated by the Commission's prolonged efforts to make shared transport available to competitors. Staff sets out its assessment of the history of shared transport in Illinois and summarizes same as follows: in its 1999 Wholesale Order, the Commission ordered Ameritech to provide shared transport and unbundled local switching, finding that it was in the public interest and would further competition. The Telecommunications Act of 1996, the FCC's First Report and Order, Third Order on Reconsideration, and UNE Remand Order, the Merger Order entered by the FCC and this Commission's Wholesale Order, the TELRIC Order, the Merger Order and the TELRIC II Order, all required Ameritech to provide shared transport and unbundled switched transport. During this time, Staff comments, the Eighth Circuit and the US Supreme Court have reviewed the FCC's rules. Ameritech's obligation to provide shared transport, has, in all cases, been sustained at every level. The point that Staff attempts to make, is that AI has only recently provided shared transport in compliance with these requirements.

3022. Staff provides other examples that, in its view, reveal a distinct pattern of regulatory non-compliance and associated discriminatory conduct. In the recent matter of Z-Tel Communications, Inc. v. Illinois Bell Telephone Company, Staff comments, the Commission found that Ameritech had impeded competition in violation of Section 13-514 of the Public Utilities Act by providing Z-Tel with line loss notifications that were

markedly inferior to those it provided its own retail arm. Order at 17 et seq., Docket 02-0160 (May 8, 2002). This enabled Ameritech "winback" personnel to attempt to recapture lost customers more quickly than a competing CLEC would be able to do so. Id. In addition, this discriminatory practice resulted in CLECs billing customers lost to Ameritech long after those customers were lost, making the competing CLECs appear to customers as unscrupulous, incompetent, or both. Id. at 16. This Commission, Staff comments, found that Ameritech knew of this problem more than one year before Z-Tel complained about it. Z-Tel Order at 18. Rather than fix the problem, Staff argues, Ameritech continued to give itself a competitive advantage.

3023. In yet another matter, Staff contends, the Commission found Ameritech to have unlawfully attempted to "win back" customers in the course of three-way PIC change verification calls, in violation of Section 13-514. Order at 25 et seq., Docket 97-0540 MCI Telecommunications Corp. v. Illinois Bell Telephone Company (December 17, 1997). Likewise, Staff asserts, the Commission found that Ameritech refused to permit a carrier to adopt another carrier's interconnection agreement in its entirety, in violation of Section 13-514 and Section 251(i) of the Telecommunications Act of 1996. Order at 32 et seq., Docket 98-0603, QST Communications Inc. v. Ameritech Illinois, (November 5, 1998). Subsequently, Staff notes, the Commission determined that Ameritech had imposed discriminatory "special construction" charges upon competitors seeking to purchase UNEs from Ameritech. Order at 255, et seq., Docket 99-0593, Illinois Commerce Commission on its Own Motion v. Illinois Bell Telephone Company: Investigation of Special Construction Charges, (August 15, 2000). All of these regulatory violations, Staff argues, are not mere allegations but findings based on evidence.

9. The Commission's Preliminary Review and Discussion

3024. Up to this point, we have set out the general positions of the parties, that for the most part urge the Commission to make a statement to the FCC on the public interest concern that the FCC alone must address. In their respective presentations, the parties suggest that one factor to be taken into account is Ameritech's compliance with this Commission's orders. It is appropriate to address these arguments at the outset and on a stand-alone basis.

Regulatory Compliance

3025. AT&T, Staff and others allege that AI did not fully comply with the Commission's orders in the past. We believe it critical at the outset to reassert just what compliance is. In looking to dictionary definitions, we see that:

> To comply is to act in accordance with another's command, request, rule, or wish. American Heritage Dictionary.

> To yield; to accommodate, or to adapt oneself to; to act in accordance with; to accept. Black's Law Dictionary

3026. Non-compliance, accordingly, and in this instance, would indicate the failure, in a material sense, to follow with the directives established in a Commission order. As such, arguments and positions presented to the Commission prior to the entry of an order are simply litigation strategy having absolutely no probative value on the issue of compliance. Interpretations of the Act are ever evolving and litigation has added to its definition. To be sure, the complexities and lack of assuredness in the Act's meaning, is well illustrated in this very proceeding, where parties have not evenly decided under which particular checklist item their issues might actually lie.

3027. We make clear, thus, that non-compliance is not to be found in advancing a particular position for litigation purposes or in the pursuit of review afforded by law.

3028. In a more factual sense, we see Staff to point out that, in the TELRIC docket, i.e., 98-0396 we ordered the Company to file tariffs and cost studies assuming a flat rate for ULS. Despite this directive, Staff continues, AI ultimately filed a usage rate (and presumably, not just as an alternative proposal). This is a troubling matter.

3029. Further, we pay mind to the FCC's finding, reported by Staff, that SBC failed to offer shared transport in the former Ameritech states in violation of the SBC/Ameritech Merger Order. While Staff does not provide all of the specifics of the matter, this finding alone disturbs us.

3030. To be sure, and in accord with Staff's recommendations, we will closely review and consider the Company's conduct prior to, and during Phase II of this proceeding, as we continue assessing the public interest concerns.

3031. The other three dockets that Staff would make much of, are but briefly mentioned. Each of these matters, we note, were resolved in years 1997, 1998, and 2000. No complaints with respect to the directives included in any of these orders are indicated.

3032. The particular tariff, said by AT&T and WorldCom to be non-compliant with our order in Docket 00-0393, is part of our Phase II assessment. While these CLECs alert us to a potential problem, the whole of the matter has not yet been considered or settled, and, as such, cannot be deemed relevant to the instant analysis. See Commission Conclusion, Checklist Item 4. (above).

3033. It is well-apparent that, there are viable measures in place to correct errant behavior. Z-Tel certainly availed itself of these processes in a recently resolved complaint. Staff itself recognizes and recommends that the Commission make clear that

it will utilize, if necessary, the following enforcement tools at its disposal whenever necessary:

- Conduct management audits pursuant to Section 8-102 of the PUA.
- Conduct tariff investigations pursuant to Section 9-250 of the PUA.
- Order refunds pursuant to Section 9-252.
- Seek mandamus or injunction under Section 13-303.
- Impose fines for general violations pursuant Section 13-305.
- Impose tariffs - Section 13-501(b).
- Impose penalties for inter-carrier complaints -Section 13-516.

3034. As such, the mechanism of state law is a viable anti-backsliding vehicle that Staff and the CLECs can use with respect to matters related to the state public interest. Our public interest inquiry, however, does not end with a mere recitation of the available enforcement tools.

E. Specific Proposals for Meeting the Public Interest

3035. To be sure, our Initiating Order made clear that where a public interest is unrelated to the competitive checklist, but a party believes that it is important to the development of competition in Illinois, the party is free to comment on the issue. In response, both Staff and other interested parties, set out a number of proposals that the public interest, in their view, requires.

3036. As we review these proposals, the Commission questions whether the underlying situation rises to the level of such "relevant factors" that would override the "strong indicator" that showing of checklist compliance brings to the public interest table. New Jersey 271 Order, 166. To the extent that any of these suggestions fall outside the federal checklist requirements we must ascertain whether they attempt to expand those requirements, raise novel issues, or fall within our sole jurisdiction.

Proposal No. 1 - State Tariffing

a. Ameritech Illinois Position

3037. It is readily apparent from the discussion of the Checklist Items, AI maintains, that the rates, terms, and conditions for virtually all of Ameritech Illinois' wholesale products and services are reflected in Commission-ordered tariffs. (Am. Ill. Ex. 15.0) at 28-29; Am. Ill. Ex. 15.1). Further, Ameritech Illinois has committed to include the handful of products that are not tariffed in its next broad-based UNE filing. (Id.) Nevertheless, Staff would have the Commission not recommend approval under Section 271 until "all telecommunications offerings provided to competing carriers" are tariffed. (Staff Ex. 1.0 at 34).

3038. According to AI, however, Staff's own witness recognized that neither Section 271 nor the provisions of section 251 that it references, mention, much less require, tariffs. See Tr. 1736 (witness stating "No, there is no express reference to tariffs."). To the contrary, AI asserts, the federal Act states a clear preference for negotiated or arbitrated agreements. As such, Section 271(c)(1)(A) expressly states that a BOC "meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252." 47 U.S.C. 271(c)(1)(A). Section 251(c)(1), likewise states that incumbents are to "negotiate . . . agreements to fulfill the duties described" in section 251(b) and (c). Id. See 251(b)(c). And, section 252 sets forth a detailed framework pursuant to which such agreements are to be reached. Id. See 252.

3039. In accord with this statutory language, AI maintains, the FCC has expressly held that an incumbent need not tariff all – or any – wholesale products for purposes of Section 271. In the Maine 271 proceedings, AT&T argued that Verizon had not proven that it provides nondiscriminatory access to UNEs because Verizon had "neither a wholesale tariff approved by the Maine Commission nor a Statement of Generally Accepted Terms (SGAT)." Maine 271 Order, 43. The FCC, however, "disagree[d] with AT&T's argument." Id. It found that "Verizon provides access to unbundled network elements pursuant to interconnection agreements" and reasoned that "this legal commitment is sufficient for our Section 271 analysis." Id.

3040. So too, AI notes, courts have found that forced tariffing is fundamentally inconsistent with and pre-empted by the 1996 Act's preference for negotiation and agreements, and the carefully detailed structure according to which agreements are to be reached. MCI Telecomms. Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157, 1177-78 (D. Or. 1999) (invalidating state-imposed tariff covering all UNEs because by "dispens[ing] with the interconnection agreement" and "allowing CLECs to order services 'off the rack' without an interconnection agreement," the State Commission had illegally "bypass[ed] the Act entirely and ignore[d] the procedures and standards that Congress had established."); Verizon North, Inc. v. Strand, 140 F. Supp. 2d 803, 809-10 (W.D. Mich. 2000) (finding state-imposed tariff invalid because it would "evade[] the exclusive process required by the 1996 Act, and effectively eliminate[] any incentive to engage in private negotiation, which is the centerpiece of the Act"). Similarly, AI observes that those SBC states that have obtained Section 271 approval have relied principally on interconnection agreements, not tariffs. (Am. Ill. Ex. 15.0 at 26).

3041. Staff's own witness, AI argues, effectively acknowledged on cross-examination that tariffing cannot be squared with the negotiated interconnection agreement model established in the federal Act. At the hearing, he agreed that "the law" to which he is referring i.e., the PUA, must be read in conjunction with federal law, which calls for carriers to negotiate interconnection agreements. As such, Staff's witness acknowledged that it is appropriate and necessary for carriers to go "off tariff" as federal law contemplates. See Tr. 1736-38 (witness agreeing that Ameritech Illinois and CLEC's may negotiate interconnection agreements which address all aspects of a wholesale offering). And, Staff's witness went on to explain that these "off tariff" arrangements would be consistent with the PUA for wholesale offerings, but only for wholesale offerings (Tr. 1742-43). The irregularity as such, AI contends, is that the tariff provisions of the PUA on which Staff would rely contain no basis for Staff's wholesale/ retail distinction. In other words, Staff's position took no account of the fact that nothing in the PUA that establishes separate tariffing requirements for wholesale services as opposed to retail services (Tr. 1743):

3042. AI notes that Staff's witness was also unable to reconcile state and federal law. Having conceded both that the ability to negotiate rates is required under the 1996 Act and that there is no basis in state law for requiring wholesale tariffs, Staff is left only with a policy preference that tariffs should be filed for wholesale products prior to negotiating rates that differ from the tariff.

b. Staff Position

3043. Staff's proposal to have Ameritech file state UNE tariffs, it contends, is supported by certain provisions of the Public Utilities Act. To begin, Section 13-203 of the PUA states as follows:

> "Telecommunications service" means the provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information, by means of electromagnetic, including light, transmission with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) used to provide such transmission and includes access and interconnection arrangements and services. 220 ILCS 5/13-203 (emphasis added)

3044. Likewise, Staff notes, Section 13-501(a) provides that:

> No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the

> service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided. The Commission may prescribe the form of such tariff and any additional data or information which shall be included therein. 220 ILCS 5/13-501(a) (emphasis added)

3045. Staff sees Ameritech to believe that the Company need not, for Section 271 approval, file tariffs pursuant to Illinois law. (Am Ill. Ex. 15.0 at 26). According to Staff, Ameritech concedes that it does not currently comply with the tariffing requirement, but assures the Commission that it will come into compliance " the next time that these tariffs are updated on an across-the-board basis[,]" (Id. at 29).

3046. While Ameritech appears to believe that tariffing is a matter totally outside the scope of the federal Act, Staff holds to a different view. In the recent case of US West v. Sprint, 275 F.3d 1241 (10th Cir.) it notes, the court upheld a Colorado Public Service decision that permitted a carrier to "opt in" to tariffed interconnection provisions. Id. at 1250-1252. The Court, Staff contends, found that such "opt in" requirements were consistent with the federal Telecommunications Act. Id. Staff notes that other federal courts have reached similar conclusions. See, e.g., MCI Telecommunications Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157 (D. Ore. 1999); Michigan Bell Telephone Co. v. Strand, 26 F. Supp. 2d 993 (W.D. Mich. 1998) (both upholding state tariffing requirements provided that such requirements do not entirely displace interconnection agreements).

3047. According to Staff, at least one carrier in this state, i.e., McLeod USA, has an agreement with Ameritech that permits it to take services at tariffed rates at its election. See WorldCom Record Data Request No. 15 (McLeod USA has such a provision in its interconnection agreement with Ameritech). As such, Staff argues, Ameritech's refusal to tariff all rates, terms, and conditions associated with its provision of interconnection, collocation and UNEs might prejudice McLeod, as well as other carriers that might have such provisions in their agreements.

3048. Staff contends to have shown that Ameritech's tariffed rates, which are Commission-approved and based on TELRIC costs are, in many cases, lower than those offered in its GIA. (Staff Ex. 22.0 at 3-4). It is unreasonable, Staff argues, to deny CLECs the opportunity to negotiate with Ameritech based on an understanding of what Ameritech's cost-based rates actually are. So too, if a CLEC cannot obtain these rates through negotiation, the Commission might impose them through the arbitration process. In either instance, Staff contends, Ameritech is obligated to have them on file.

c. Ameritech's Reply Position

3049. Ameritech Illinois reasserts that the only issues on "tariffing" of wholesale products and services presented here are relatively minor disagreements on policy.

Staff contends that all wholesale offerings must be tariffed. Virtually all of them are, Ameritech Illinois maintains, and it has committed to include the remainder in its next broad-based UNE filing, so the only difference is one of "timing" on a handful of offerings. Ameritech Illinois contends that the 1996 Act gives carriers the ability to negotiate "off tariff" and Staff agrees; the only difference is again a question of timing, in that Staff thinks that tariffs should be in place before negotiation.

3050. On brief, however, AI notes Staff's wholly unwarranted accusation that "Ameritech is – by its own admission – currently violating Section 13-501(a), and appears to have only the most desultory plans to rectify this." (Staff Br. at 234). With this charge, AI maintains, Staff is not only misstating Ameritech Illinois' position, but also glossing over the complexities of its own position on tariffing. At the hearing, AI recalls, Staff's witness had to acknowledge that "there is nothing in the PUA" as would to support Staff's allowance for off-tariff negotiations in the wholesale context. (Tr. 1743). Thus, AI views Staff's position on the timing of such negotiations (that parties should tariff first before complying with the 1996 Act) to ultimately represents a policy preference, not a rule of law. (Am. Ill. Br. at 188-190).

3051. A minor disagreement on policy preferences does not a violation of law make, nor can it be said that Ameritech Illinois is violating the PUA when "there is nothing in the PUA" to support Staff's preference. To foreclose any confusion on this point, Ameritech Illinois will reiterate just what "the law" is, in a 5-point argument:

(1) Section 271, the foundation of this proceeding, does not require tariffs or even make any reference to them; instead, it contemplates that carriers are to demonstrate compliance by means of interconnection agreements. (Am. Ill. Br. at 187-188).

(2) The FCC, has not ordered tariffing of all or any offerings; instead, it has held that tariffing is not required for purposes of Section 271. (Id. at 188).

(3) The remainder of the 1996 Act does not breathe the word "tariff"; instead, it calls for interconnection agreements, and it goes to a great deal of trouble to specify how such agreements are to be established. (Id. at 187-189).

(4) No court applying the 1996 Act has ever held the Act to require tariffing. To the contrary, courts have held that an "all-tariff, all-the-time" regime conflicts with the Act's preference for interconnection agreements. AI notes that a decision that Staff cites to support its position actually holds: "Before purchasing finished services or unbundled elements from an ILEC, each CLEC must enter into an interconnection agreement." MCI Telecommunications Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157, 1177 (D. Or. 1999). If anything, AI argues, a state commission conflicts with the Act if it "dispense[s] with the interconnection agreement altogether and is allowing CLECs to order services 'off the rack' [by tariff] without an interconnection agreement." Id.

(5) While section 13-512 of the Illinois PUA requires tariffing of "telecommunications services," it is not altogether clear whether that applies to unbundled network elements (Staff simply assumes it does): more importantly, even Staff's witness acknowledged that section 13-512 contains an implied exception that allows carriers to negotiate interconnection agreements "off tariff" pursuant to the 1996 Act.

Ameritech rests on these arguments.

Commission Review and Conclusion

3052. The federal act does not require or rely on tariffs. As such, Staff bears the burden of proof with respect to its state-based tariffing proposal. Insofar as wholesale tariffing being required under Section 5-13-501(a) of the PUA, we do not believe that Staff has provided a sufficient statutory analysis to support its position. Indeed, other than setting out the statute, there is no analysis at all.

3053. Nevertheless, the Commission concludes that tariffing of wholesale products serves the public interest insofar as state law sets out this requirement.

Proposal No. 2 - Ameritech Illinois' GIA Offer

a. Staff Position

3054. SBC has adopted a GIA available throughout its 13-state region, Staff informs, and this document (the text of which is available on Ameritech's CLEC website), contains certain Illinois-specific rates, terms and conditions. As this document is typically a starting point in the negotiation of interconnection agreements, Staff asserts, that a careful evaluation of the GIA Illinois-specific rates is warranted. On such evaluation, Staff maintains, it appears that the collocation services and prices in the GIA, as well as the uniform service ordering codes necessary to order such services, are markedly different from those set forth in the Illinois tariff. (Staff Ex. 5.0 at 10). The GIA webpage also, Staff notes, does not contain or incorporate any reference to the rates contained in Commission-approved tariffs. (Staff Ex. 22.0 at 2).

3055. In order to secure the Commission's positive consultation on Section 271 approval, Staff believes that Ameritech should reflect its Illinois tariffed collocation rates in the GIA. On surrebuttal, Staff notes that Ameritech described a change to its website in an attempt to address Staff's concerns. (Am. Ill. Ex. 1.2 at 32). Upon review, Staff has determined that the change, while an improvement over what existed previously, still does not make the path to Ameritech's collocation rates sufficiently apparent to its CLEC customers. While Ameritech technically complies with this requirement, its tariff collocation rates, which tend to be lower than rates contained in the GIA, are difficult for CLECs to find and use. The Commission should direct Ameritech to modify the webpage consistent with Staff's recommendations, or to develop some other method by

which its tariffed rates will be readily and easily available to CLECs, prior to endorsing the Company's Section 271 application.

b. Ameritech Illinois Position

3056. AI observes Staff to recommend that the Ameritech Illinois be required to offer CLECs a "Commissionized" version of its Generic Interconnection Agreement ("GIA") to initiate the negotiation process. (Staff Ex. 3.0 at 26-27; Staff Ex. 20.0 at 44-54). As an end, CLECs would then be entitled to take the agreement without negotiation or arbitration. (Id. at 47). Under such circumstances, Ameritech Illinois observes, it would have to obtain Commission approval prior to changing any rate, term or condition in this GIA. (Id. at 46). In the alternative, AI notes Staff to recommend that all wholesale products be tariffed. (Staff Ex. 20.0 49).

3057. According to AI, Staff's GIA proposal is unnecessary under its own terms. Virtually all of the Company's wholesale products are already tariffed, AI notes, and Staff does not contend otherwise. (Am. Ill. Ex. 15.0 at 28-29; Am. Ill. Ex. 15.1 at 13-14). So too, Ameritech Illinois has committed to include the few remaining products in its next broad-based UNE filing. (Id.)

3058. Staff's GIA proposal, AI argues, raises significant legal and administrative issues. At the outset, AI contends, Section 271 compliance does not have to be demonstrated through a single interconnection agreement, as Staff suggests. (Staff Ex. 20.0 at 28-29). To the contrary, Track "A" expressly states that a BOC can demonstrate that it provides the required access and interconnection pursuant to "one or more binding agreements." 47 U.S.C. § 271(c)(1)(A) (emphasis added).

3059. So too, AI asserts, a Commission-approved GIA is not required under the Act's obligation to engage in "good faith" negotiations. (Staff Ex. 20.0 at 52). In its First Report and Order (148), the FCC stated that "good faith" necessarily depends on the "subjective intent with which the person in question has acted." The FCC provided specific examples of what would constitute a per se violation, including the use of duress or misrepresentation and actions intended to block or delay negotiations so as to delay competitive entry (Id. 148,154). There is no question that Ameritech Illinois will execute the GIA with CLECs which accept its terms: CLECs have voluntarily done so, and, AI maintains, the Commission has approved the resulting agreements. (Am. Ill. Ex. 1.1 at 43; Tr. 1507, 1608-1609).

3060. Congress put forth great effort, AI maintains, to establish a framework of negotiation, arbitration and approval, and it clearly expected private parties, to negotiate the terms of interconnection in the first instance. Indeed, AI observes, the Act specifically allows parties to negotiate a voluntary agreement without regard to the Act's substantive provisions. 47 U.S.C. § 252(a)(1). It would undermine this statutory construct for the Commission to dictate the form of Ameritech Illinois' offer before either party requested Commission intervention under the Act's arbitration or approval

provisions. It would also be inconsistent with the "deregulatory national policy framework" Congress chose. H.R. Conf. Rep. No. 104-458.

3061. In AI's view, Staff's approach would delay, not expedite, the negotiation process. The GIA it maintains, is a fluid document that needs to be updated in a timely manner to reflect changes in regulatory requirements, products and policies over SBC's 13-state region. (Am. Ill. Ex. 1.1 at 12-13). Staff's proposal could work to require months of regulatory proceedings to make even minor changes. (Id). Even Staff is seen to agree that significant changes would take "much more time to implement." (Staff Ex. 20.0 at 46-47). Thus, AI contends, the GIA could remain frozen in amber for years while proposed changes work their way through the regulatory process. (Am. Ill. Ex. 1.2 at 17).

3062. Finally, AI contends, to the extent Staff's objective is to ensure that the negotiation process does not delay carrier entry into the marketplace, its proposal is unnecessary. AI points out that Congress established an exceptionally fast track for the negotiation/arbitration/approval process in section 252(b). Nor is the GIA in any way a CLEC-"unfriendly" document. AI reasserts that CLECs have willingly entered into interconnection agreements that are substantially identical to the GIA. In addition, CLECs can opt into approved agreements that contain provisions that better meet their needs. (Am. Ill. Ex. 1.1 at 7,11). AI views Staff's proposal as an extremely complex, time-consuming and paternalistic "solution" to a process that is working exactly as the 1996 Act contemplated.

Commission Review and Conclusion

3063. Staff's proposal with respect to Ameritech Illinois' GIA is both unnecessary and burdensome. It might also be viewed as interfering with the parties' negotiations. Our role is directed to the approval or the arbitration of agreements and we are assigned no duty, nor will we inject ourselves at the offerings stage. Hence, we reject Staff's proposal.

Proposal No. 3 - To Freeze or "Cap" Rates (Wholesale Products)

a. AI Position

3064. Many of the intervenors' comments on pricing, AI observes, do not contest the Commission-approved rates for unbundled access and interconnection, but simply complain that the Company might someday propose higher rates. According to AI, however, the analysis under Section 271 focuses on the rates that are in effect, not on rates that might someday be proposed.

3065. Here, AI notes Staff and WorldCom to suggest that rates be capped at current levels for five years. But, AI contends, the 1996 Act does not require that rates be fixed for any particular period of time. It does require, however, that the rates be right, i.e., based on cost. In AI's view, a cap that would preclude Ameritech Illinois from

proposing, and the Commission from considering, adjustments to rates, is contrary to the Act's mandate. To be sure, AI argues, costs inevitably change and evolve over time as new data is gathered and models are updated in the normal course of business. (Am. Ill. Ex. 10.1 at 13-14).

3066. The FCC has itself recognized that "rates may well evolve over time to reflect new information on cost inputs and changes in technology or market conditions." Massachusetts 271 Order, 36. So too, it is well-established that before any new rates go into effect, interested parties will have the opportunity to comment and the Commission will decide then, based on the evidence, whether the new rates are lawful. See Maine 271 Order ("[T]o the extent Verizon proposes a DUF rate that is excessive and non-TELRIC based, WorldCom will have an opportunity to challenge that rate at the state level."). Id at Para. 24. No intervenor, AI observes, has or can dispute the Commission's aggressive application of the FCC's TELRIC pricing rules. In AI's view, Staff's proposal essentially asks the Commission to pre-judge the outcome of a proceeding that might take place at some future date, before any evidence is received and before any proceeding is even opened.

b. Staff Position

3067. Staff recommends that the Commission decline to favorably recommend Ameritech's application unless Ameritech agrees to cap its UNE rates. (Staff Ex. 6.0 at 40-42, 44; Staff Ex. 23.0 at 21, 24.) Such a cap should remain in effect for five years, Staff contends. (Staff Ex. 23.0 at 24). This measure is necessary, Staff asserts, for several reasons.

3068. In order for a competitive market to develop in Illinois. Staff maintains that UNE rates must be stable. (Staff Ex. 23.0 at 27; AT&T Ex. 3.0 at 7-11.) As AT&T witness James F. Henson testified, it is very difficult for a competitor to make a business case in favor of large-scale entry into a market if it cannot ascertain UNE rates. (AT&T Ex. 3.0 at 7.)

3069. Staff believes Ameritech to possibly be concerned that a rate cap would result, (presumably at some point in the future), in its failure to recover its costs. But, Staff sees even Ameritech to concede that at the very least, its switching costs are declining, which in turn, and all else being equal, reduces the costs associated with providing UNE-P, as well as ULS-ST. (Tr. at 33-32). Since it is accepted that telecommunications is generally a declining cost industry, Staff contends, the effect upon Ameritech cannot be very dramatic.

c. Ameritech Illinois Reply Position

3070. All in all, Ameritech Illinois asserts the FCC evaluates checklist compliance based on existing rates, and has consistently rejected CLEC arguments about possible future rates.

3071. The mantra of "price certainty," AI argues, is used to support the intervenors' requests that the Commission affirmatively impose caps on future rates – effectively pre-judging future rate proposals. (See Staff Br. at 238; WorldCom Br. at 16-17). While discussing the certainty they crave, AI notes, the intervenors fail to mention the certainties they already have, to wit:

1. If Ameritech Illinois does propose new wholesale rates, those rates will not go into effect unless this Commission, after investigation and notice to interested parties, determines that those rates (and the supporting cost studies) comply with the federal pricing rules. As the FCC has held, it must be presumed that if Ameritech Illinois does file new cost studies, this Commission will correctly apply the FCC's rules. Texas 271 Order, 237. And Staff Witness Koch agreed at the hearing that "rates for wholesale services will not exist . . . without the underlying cost model being examined, unless the Commission permits that to happen." (Tr. 1776).

2. The 1996 Act does not say that prices must be "certain" or fixed for any particular period of time. It does say that prices are to be "based on cost." 47 U.S.C. § 252(d)(1). A cap on rates necessarily means that prices are to be held at a certain level even if Ameritech Illinois proves (and even if the Commission, absent a cap, would agree) that the existing rates are not based on cost, and are, therefore, no longer lawful.

3. Likewise, the FCC has never held that prices must be certain or fixed. To the contrary, it has acknowledged that "rates may well evolve over time to reflect new information on cost inputs and changes in technology or market conditions" and it has accordingly decided that "[n]o carrier is immune from the effect of future resolutions of disputed issues." Massachusetts 271 Order, 36.

4. The only "uncertainty" that carriers face is that they may someday be legally obligated to pay prices that are right (i.e., prices that comply with the 1996 Act and the FCC's rules), albeit different from those in effect now. There is no legal basis for precluding that result, nor is there any public interest in doing so.

3072. None of these indisputable facts AI contends, are mentioned or discussed by the intervenors. If Ameritech Illinois proposes new rates, and if those rates are too high (as the CLECs presume before even seeing them), then the Commission will reject them on the merits. Conversely, if the Commission agrees that the new rates are correct, it should accept them. In the former situation, a cap would be unnecessary; in the latter, a cap would be unlawful. Either way, the intervenors' cap proposals are improper.

Commission Review and Conclusion

3073. Certain CLECs and Staff propose that the Commission-approved rates for "unbundled access" and "interconnection" be capped at current levels for a period of five years. The action they propose has nothing to do with enforcing compliance with the correct rates but with maintaining current rates for a 5-year term in disregard of circumstance. We are wary of such a proposal in light of the familiar just and reasonable state standard and the federal law's mandate that prices be based on cost.

3074. We cannot, and will not, in the course of a section 271 compliance investigation, or on the record presented, impose the requested rate cap. To do so would be arbitrary and capricious.

3075. There are processes in place to protect the interests of all parties. In other words, there is no way that AI can unilaterally propose and put into effect its desired rates. See Maine 271 Order (noting the viability of this process). As such, if AI seeks to raise rates without good cause, it will be found out. If the evidence shows it is entitled, a finding as such will be rendered. There is no way to make a judgment now to interfere or prejudge the situation. The Commission cannot, and will not, speculate in these premises or interfere with a party's right to make its case. We flatly reject the instant proposal, further noting that the arguments on Exceptions are not persuasive.

Proposal No. 4 - Preview of Cost Models

a. AI Position

3076. Ameritech Illinois sees Staff to also propose that the Company obtain Commission approval of any changes to its cost models even before Ameritech Illinois proposes updated or new UNE rates based on the updated models. (Staff Ex. 6.0 at 43). This proposal, AI contends, would promote a significant and unnecessary increase in the time and expense associated with rate proceedings. (Am. Ill. Ex. 15.0 at 29). It would put Ameritech Illinois in the position of having to litigate two dockets in order to change or introduce a UNE rate – one proceeding to approve any new models or model changes, and a second proceeding to approve the rates. Ameritech Illinois' cost models are updated on a continuing basis, AI contends, such that it makes little sense to occupy the Commission's time (as well as that of Ameritech Illinois and interested parties) in approving these updates in the abstract. (Am. Ill. Ex. 15.0 at 30). The most

efficient approach – and the one that this Commission has long followed – is to address cost models and rates in a single proceeding.

b. Staff Position

3077. In objecting to the proposal that AI be required to submit its cost models for Commission review prior to using such models as a basis for revisions to UNE rates, Staff notes the Company to contend that this requirement would create a cumbersome procedure, and require it to litigate two dockets to revise UNE rates. Id. According to Staff, however, rejecting Ameritech's cost models, as the Commission has been compelled to do in numerous matters, is what results in additional proceedings. Staff anticipates that Ameritech will propose to introduce no fewer than six new cost models, only one of which may have been previously used in Illinois. (Staff Ex. 6.0 at 40; Tr. at 336 et seq.). It cannot be doubted Staff argues, that Ameritech's use of these new models will considerably alter the UNE rate structure. (Staff Ex. 6.0 at 40.) Moreover, the one enlightening thing that Ameritech's cost analyst was able to state regarding the new cost models was this: the LOOPCAT model resulted in rates for the loop UNE more than doubling. (Tr. at 313.)

3078. According to Staff, the evaluation of cost models is a difficult, time-consuming, and resource-intensive undertaking for the Commission Staff. (Tr. at 1808 et seq.) First, the analyst often must obtain additional computing capacity. (Id.) Second, the sensitivity of the model must be tested to determine whether changing the model's inputs will have the expected resulting output changes. (Id.). Conducting one such sensitivity run can require several hours, and a proper sensitivity analysis requires a number of such runs. (Id.) In order for the Staff to evaluate the models, the only responsible course is for Ameritech to submit them for approval, prior to submitting cost studies generated by them. As such, Staff argues, good sense and administrative economy would dictate that its recommendation be approved.

Commission Review and Conclusion

3079. Ameritech Illinois tells us that the Commission has always addressed cost models and rates in a single proceeding. Staff proposes that we change course prospectively and require Ameritech to put forth the cost models for review prior to using them for a rate matter. Staff, however, gives no reason for this novel position other than the suggestion of greater convenience based on speculation as to what Ameritech Illinois may be expected to file. This does not persuade the Commission or meet with our purposes at this point in time. If and when the situation arises, there may be a way for the Company to accommodate Staff.

Proposal No. 5 - Wholesale DSL Transport To End Users

a. Attorney General's Position

3080. According to the AG, AI admits that its affiliate, Ameritech Interactive Media Services (AIMS), offers high speed Internet access to retail customers bundled with DSL. (AI Initial Brief at 183). Relying on the Arkansas & Missouri 271 Order, the AG notes AI to further assert that the FCC does not require that the bundled Internet access service or the underlying wholesale DSL (digital subscriber line) be made available pursuant to the section 251(c)(4) resale obligation. Staff does not dispute AI's position, but argues that AI's policies bundling DSL and Internet access with voice service are contrary to the public interest and anti-competitive. (Staff Initial Brief at 215-218).

3081. In the case of the ASCENT decision, the AG notes, the court held that an ILEC could not be permitted to avoid the obligations contained in section 251(c)(4) by offering advanced services through a wholly owned affiliate. According to the AG, Ameritech Illinois' affiliate AADS (Ameritech Advanced Data Services) purchases the HFPL from AI so that it can offer data service over DSL. Then AADS sells DSL to AIMS, and to other ISPs, so it can be bundled with an internet service provider for sale to the end-user. AI claims it need not offer DSL transport on a resale basis because it does not sell DSL "at retail" as required by section 251(c)(4). The AG contends, however, that the Commission must examine the structure of AI's DSL offering to determine whether the affiliate structure unlawfully shields AI from its resale obligation, particularly when the parent company of both AI and the advanced services affiliate, offers the service to end-users. (Staff Ex. 10.0 at 26; Staff Initial Brief at 217).

3082. DSL is not offered directly to the public, the AG argues, because AI utilizes two wholly owned affiliates to shield AI from its retail customers. Nevertheless, AI advertises DSL service under its SBC/Ameritech name, provides service for DSL under that name, and AI's customer service representatives regularly discuss DSL availability with customers who call with service related questions or complaints. (Staff Ex. 10.0 at 26-27). Given the fact that SBC/Ameritech is conducting the marketing for the AIMS product, the Commission should conclude that AI's use of affiliates to provide DSL does not relieve AI of its obligation to offer DSL at wholesale rates.

3083. The AG recognizes the FCC to have held that when an ILEC sells DSL to ISPs, and not directly to the public, it is not selling the service at "retail" and therefore is not subject to the resale obligation of section 251(c)(4). In ASCENT v. FCC, 253 F.3d 29 (D.C. Cir. 2001) ("ASCENT II"), the AG observes that the Court upheld the FCC's rules which exempted DSL services sold to ISPs from the section 251(c)(4) resale obligation. According to the AG, the Court noted the difference between wholesale service to an ISP and retail service in the following example: "An ILEC may offer DSL service directly to residential and business end-users, in which event the ILEC itself performs such collateral functions as marketing, billing, and maintenance. In addition, the ILEC may offer DSL service designed specifically for ISPs (such as America Online), which package and sell the service to end-users and perform the marketing and other collateral functions." 253 F.3d at 31. The court did not address the situation where the ILEC sells the vast majority of its service to an affiliated ISP, and the ILEC presents itself to the public as available to offer DSL service.

3084. In Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission, 764 N.E.2d 734 (Ind. App. 2002), the AG notes, the state court addressed the status of DSL service offered by an Ameritech wholly owned subsidiary. There, Indiana Bell argued that DSL services should not be included in OSS testing because they are only sold at wholesale to ISPs, and are not sold in Indiana to retail end-users. 764 N.E.2d at 737.

3085. The Court, however, upheld the Indiana Utility Regulatory Commission's order that the operating support systems, or OSS, for Indiana Bell's DSL offerings be included in the Commission OSS testing and audit being conducted for section 271 purposes, stating that:

> It is undisputed that AADS is Ameritech's affiliate offering DSL service to ISPs. However, one of those ISPs is another Ameritech affiliate, AIMS. While ASCENT II holds that the discount-for-resale provision of § 251(c)(4) does not apply to an ILEC's offering of DSL service to an ISP, it did not address whether one of those ISPs could be an affiliate of the same ILEC. The purpose of the Act was to ensure that ILECs do not use their control over local exchanges to squeeze out competitors. Bell Atlantic-New Jersey, Inc. V. Tate], 962 F.Supp. 608 (D.N.J. 1997). Here, Ameritech controls the local exchange, its affiliate AADS then provides DSL services to another affiliate AIMS, which sells DSL service to the consuming public.
>
> As a result, the possibility of anticompetitive pricing for DSL services is very real. We do not imply any sinister intent on the part of Ameritech, but arguing that Ameritech can (1) make its local exchange available to its affiliate, AADS; (2) provide DSL service through AADS to ISPs, including its other affiliate, AIMS; and (3) avoid testing of its OSS to determine compliance with the checklist, is plainly contrary to Congress's intent to establish competition in the telecommunications industry. Therefore, we find no error in the IURC's order. 764 N.E.2d at 739-740.

3086. According to the AG, the same concern of anticompetitive pricing that the Indiana state court recognized, also arises in Illinois. Thus, consistent with Indiana, the AG argues, this Commission should find that the DSL service AI offers through its affiliates AADS and AIMS are sales "at retail", and thus, subject to the resale pricing obligations found in section 251(c)(4).

3087. The ASCENT II court, the AG observes, noted that DSL is retail only when the ILEC sells DSL service without collateral functions for end users, such as marketing,

billing and maintenance. Id. at 33. In AI's situation, where the majority of its DSL service is taken by its affiliate AIMS, and the public receives retail or "collateral" functions from "SBC-Ameritech," the protections against monopoly abuse that might arise when DSL is sold only to unaffiliated, wholesale ISPs vanishes, and the protections afforded by the section 251(c)(4) resale obligations should apply.

3088. Taking ASCENT and ASCENT II together, the AG urges, the Commission should find that AI cannot escape its section 251(c)(4) resale obligation by offering the vast majority of its DSL service to the public through its wholly owned affiliate, particularly when "SBC Ameritech" engages in joint marketing and performs other "collateral" functions. If AI offered its DSL service to independent ISPs, and not primarily through its sister company, the goal of furthering competition in the retail, advanced services local market would not be hindered, and the section 251(c)(4) resale requirement would not apply because the service would truly be offered on a wholesale basis only. Given the facts that exist in Illinois, and limited number of independent ISPs purchasing DSL from AI (or its affiliate AADS), the AG contends that the Commission should find that the resale obligation of section 251(c)(4) attaches, and AI should be required to offer its DLS service to CLECs according to the Commission's wholesale formula.

3089. The AG observes AI to rely on the Arkansas & Missouri 271 Order as support for its position that the FCC does not require it to offer its DSL services under the section 251(c)(4) resale obligations. That Order erroneously concludes that "neither the Act nor Commission precedent explicitly addresses the unique facts or legal issues raised in this case" and then declines to address the issue. Id. at para. 82. AI points out that the FCC observed that "Congress did not define the term at retail as used in section 251(c)(4) and the meaning of the term 'at retail' is not clear and unambiguous from the language of the [A]ct." Id. (internal quotation marks omitted). The FCC, however, did not analyze whether SBC and its affiliates were marketing or offering DSL through wholly owned affiliates in such a way that it only reached the end-user bundled with AI affiliate's ISP. Further the FCC did not mention or consider either of the ASCENT cases. See Arkansas & Missouri 271 Order, para. 78-84.

3090. According to the AG, the FCC's order should not be considered precedent in this proceeding, where the Commission is charged with verifying resale compliance, and the evidence shows that AI has used a layered affiliate structure, with only minimal service to independent ISPs, to avoid its resale obligation. Until AI offers the "AIMS" DSL service in accordance with the section 251(c)(4) resale obligations, the AG urges. this Commission should not find AI compliant with Checklist Item 14.

3091. By its Motion to cite additional authority filed on October 10, 2002, the AG draws attention to an order recently issued by the California Public Utilities Commission. According to the AG, this agency held that Section 251 (c)(4) requires Pacific Bell to make DSL service it sells to ISP available for resale.

3092. Tying into these arguments, the AG further contends that by bundling its ISP (via the AIMS affiliate), with DSL transport, together with AI voice service, the AG contends that AI has been able to shut competitors out of the retail market. The anti-competitive effects of AI's policies on the development of the advanced services and DSL market, the AG argues, demonstrate that AI is not irreversibly committed to competition in the advanced services market. It would not be in the public interest for AI to receive in-region long distance authority unless AI demonstrates its commitment to an open advanced services and DSL market by removing the bundling restrictions it currently imposes on DSL subscribers (voice and DSL).

3093. The AG notes Ameritech Illinois to contend that, "the market does not want stand-alone DSL transport." (AI Initial Brief at 200). AI argues in testimony and in its Initial Brief that consumers do not want to shop for the best service for their needs, and do not want to "give up the convenience of dealing with a single provider." Id. This argument, in the AG's view, is not convincing. According to the AG, many consumers might agree that they "gave up conveniences" when the AT&T system was broken up in 1983 and the local market was opened to competition in 1996. Yet, the federal Act is based on the premise that consumers ultimately benefit, in terms of price and innovation, when markets are open and consumers have choices. The same premise, the AG argues, applies to broadband service offerings. AI should give consumers their greatest choice for DSL transport, internet service provider, and voice provider, in order to advance the pro-competitive goals of the federal Act and this Commission. Unless AI offers DSL in a manner that allows, rather than stifles, competition, the AG contends, its entry into in-region long distance should not be found to be in the public interest.

b. Ameritech Illinois Position

3094. Under Checklist Item 14, AI maintains, it showed that Ameritech Illinois' advanced services affiliate, i.e., AADS, fully complies with FCC rules regarding resale, and that it need not offer DSL transport service for resale because that is a wholesale service. AI notes Staff to agree that AADS need not offer DSL transport for resale. In an attempt to circumvent this FCC precedent, however, AI sees Staff to set out the novel theory that AADS should be forced to sell DSL Transport to retail end users, such that AADS will thereafter be forced to offer DSL Transport service to CLECs at a wholesale discount under 47 U.S.C. § 251(c)(4). According to AI, this is clearly an unvarnished attempt to have AADS do something that the FCC expressly found it is not required to do.

3095. Even on its own perceived "public interest" grounds, AI asserts, Staff's theory fails. First, AI contends, the market does not want stand-alone DSL transport; end users buy integrated "Internet access service" from ISPs that combine high-speed transport with Internet access services. Under Staff's position, end users would buy "high-speed transport" from one provider and "Internet access" from a second provider: giving up the convenience of dealing with a single provider. As such, end users would

be required to coordinate the installation of two separate services; would receive two separate bills; and would need to contact the two separate providers to investigate and repair service problems. (Am. Ill. Ex. 13.1 at 5). Just at the time when end users are rewarding those providers who can sell simple, integrated services, AI observes, Staff would require end users to give-up that convenience when it comes to high-speed internet access. (Id. at 6).

3096. So too, AI contends, there is no evidence that Staff's proposal would make high-speed Internet access service more competitive. The market is already competitive, AI comments. Indeed, cable modem providers already offer about two-thirds of all high-speed Internet access, and the remaining one-third is offered by satellite providers, wireless technologies and DSL providers (such as AADS and Covad). (Am. Ill. Ex. 13.0 at 7). Ameritech Interactive Media Services, Inc. ("AIMS"), the Ameritech Illinois affiliate responsible for selling the integrated DSL internet access service to end users, AI observes, must already compete not only with cable modem providers but also with other ISPs using DSL transport, such as America Online, MSN, and Earthlink. (Am. Ill., Ex. 13.0 at 10-11). It defies logic to suggest that, in the name of competition, this Commission must radically restructure the competitive internet access marketplace.

3097. Further, AI contends, Staff's position is exactly the type of "novel interpretative issue" which the FCC refuses to consider in Section 271 proceedings. Arkansas & Missouri 271 Order, 82. This is particularly true in this instance, AI points out, given that broadband issues are pending in other FCC proceedings. To be sure, AI comments, the FCC is undertaking no less than four proceedings to address the structure of the Advanced Services (i.e., high-speed internet access) industry.[400] Given the extensive review at the federal level, and given that the DSL Transport services in question are interstate services, AI maintains that Staff's proposal should be disregarded.

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[400] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, GN Docket No. 00-185 and CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (rel. Mar. 15, 2002) ("Cable Modem Declaratory Ruling"); Review of Regulatory Requirements for Incumbent LEC Broadband Services; SBC Petition for Expedited Ruling That it is Non-Dominant in its Provision of Advanced Services and Forbearance From Dominant Carrier Regulation of These Services, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC-01-360, 16 FCC Rcd. 22745 (rel. Dec. 20, 2001) ("Incumbent LEC Broadband NPRM"); Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 01-361, 16 FCC Rcd. 22781 (rel. Dec. 20, 2001) ("Triennial UNE Review NPRM"); and FCC Release 02-42, In Re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings…, CC Docket Nos. 02-33, 95-20 and 98-190, 2002 FCC LEXIS 824 (rel. Feb. 15, 2002)("Broadband Internet Access NPRM").

3098. According to the Company, AADS provides DSL Transport by "sharing" lines with Ameritech Illinois. AI sees Staff, and also WorldCom, to argue that AADS should be forced to provide DSL Transport service if the end user served by that loop does not buy its voice service from Ameritech Illinois. (Staff Ex. 10.0 at 34-36; WorldCom Ex. 3.0 at 15-17). In AI's view, this it is not a legitimate 271 issue because the FCC has granted 271 relief in each of the five SWBT states without imposing the restrictions that Staff would suggest. And, AI maintains, there are good reasons why this is so.

3099. To begin with, AI notes that the FCC has consistently held that an ILEC need not provide the "HFPL" UNE when it does not also provide voice service to the end user on that same local loop. Line Sharing Order 70, 72; Texas 271 Order 324. Since there is no "HFPL" UNE available by operation of this FCC rule when the ILEC does not provide the voice service, AADS (like any other data CLEC) will be unable to provision a DSL Transport service using HFPL. To the extent Staff and WorldCom might argue that this issue should be addressed by imposing affirmative obligations on AADS rather than Ameritech Illinois, their position must likewise be rejected.

3100. In the first place, AI contends, such an argument attempts to avoid the FCC rule and suggests a collateral attack on a settled issue. Second, AADS' decision to purchase the HFPL UNE only from Ameritech Illinois and not from other CLECs is completely justified by business considerations. AI witness Habeeb testified that using a single supplier has permitted AADS to design its operation support systems and business practices to a standard platform that, in turn, makes it easier for ISPs to do business with AADS. (Am. Ill. Ex. 13.0 at 17-18). If AADS were required to modify its systems and practices to accommodate other HFPL providers, or to otherwise share a splitter with other CLECs, the Company contends, AADS' services could deteriorate and costs for both AADS and its ISPs customers would increase. (Id. at 18; Am. Ill. Ex. 13.1 at 21). Staff's proposal would require AADS to use vendors against its will and against its better business judgment. But, AI argues, AADS must be given the freedom to compete with the dominant cable modem providers without regulatory micro-management.

a. Staff Position

3101. Staff believes that it is in the public interest for the Commission to require Ameritech Illinois to offer "DSL transport" directly to end users on a stand-alone basis and to order Ameritech to eliminate the company's practice of bundling DSL and voice services. (Staff Ex. 10.0 at 34-36; Staff Ex. 24.0 at 49-53).

3102. Staff notes that Ameritech Illinois currently offers DSL services through its affiliate, Ameritech Advanced Data Service ("AADS"), which offers DSL transport services to its affiliated Internet service provider ("ISP"), Ameritech Interactive Media Services, Inc. ("AIMS"), and unaffiliated ISPs (under either Interconnection Agreements or AADS' FCC Tariff No.1). (Staff Ex. 10.0 at 26.) AADS has interconnection

agreements with ISPs, including Ameritech Illinois' affiliate, AIMS, but has no DSL wholesale customers under AADS' FCC Tariff No.1. (Id.)

3103. Although it offers other services (e.g., retail DSL to business customers, ATM, etc.), Staff contends that AADS' chief business plan is to provision DSL transport services to Ameritech Illinois' ISP, AIMS, and other unaffiliated ISPs. (Ameritech Ex. 13.1, Sched. A at 14; Staff Ex. 10.0 at 26.) ISPs (AIMS and unaffiliated ISPs) "combine" DSL transport services from AADS with their own Internet Access services or Internet related functionalities (e.g., servers, routers, web sites, etc.) in order to provision DSL Internet Access service to end-users. ISPs (or their agents) market DSL transport service to end-users as part of the DSL Internet Access package, but not on a stand-alone basis.

3104. According to Staff, SBC Ameritech, (the parent company of AADS and AIMS), serves as an agent for AIMS. (Staff Ex. 10.0 at 26). Thus, although AADS does not offer DSL services to end-users directly, its parent, SBC Ameritech, does so in its capacity as AIMS' agent. By leveraging its parent's brand name (SBC Ameritech), Staff contends, Ameritech Illinois has been playing a major role in marketing DSL to end users directly as part of its DSL Internet Access package. This is illustrated, it argues, by the series of aggressive commercial television and radio campaigns for DSL Internet services that Ameritech Illinois has launched. (Staff Ex. 10.0 at 26.)

3105. Staff explains that requiring Ameritech Illinois (through AADS) to offer DSL transport to consumers on a stand-alone basis would benefit consumers in several ways. First, it would give consumers a choice of DSL transport providers. Consumers could elect not only the ISP, but also the DSL transport provider, creating increased choices for consumers and likely at prices lower than existing prices for "combined" DSL service. (Staff Ex. 10.0 at 29-31.) At least two other incumbent LECs, Staff notes, i.e., Verizon and Qwest, offer DSL transport directly to end users on a stand-alone basis. (Staff Ex. 24.0 at 39-40.)

3106. In addition, Staff argues, requiring Ameritech Illinois to offer DSL transport on a stand-alone basis would provide additional benefits to consumers through increased competition for DSL transport. DSL transport would be subject to Section 251(c)(4)'s resale requirements and competitors could purchase DSL transport at discounted prices. Resale would help to exert more competitive pressure on DSL transport providers, which in turn would further drive down the prices of DSL transport, thereby lowering the total cost to end users for DSL Internet Access. (Staff Ex. 10.0 at 31-33).

3107. In Staff's view, Ameritech Illinois' (through AADS) self-imposed bundling practice and policy erects a barrier in the local service market and reduces a customer's willingness to switch from Ameritech Illinois' voice service to an alternative carrier's voice service. It is undisputed that Ameritech Illinois (through AADS) restricts its DSL transport offering to loops in which Ameritech Illinois provides the voice service. (Staff Ex. 24.0 at 49.) Ameritech Illinois does not provide DSL transport to a customer (or

over the customer's line) that elects a LEC other than Ameritech Illinois for voice telephone services.

3108. In other words, Staff contends, Ameritech Illinois effectively bundles its wholesale DSL transport service with its retail voice service offering. As a result, a customer currently subscribing to Ameritech Illinois' voice service and DSL Internet service would be less willing to switch to a different voice provider if the customer has a preference for Ameritech Illinois' DSL Internet service (offered through AIMS). This bundling practice, Staff claims, ties a customer's choice of voice service provider to his or her choice for DSL Internet service provider. Ameritech Illinois' role in the DSL service market makes it more difficult for CLECs to compete with it in the local voice service market. Thus, as Staff established, Ameritech Illinois' bundling practice impedes competition in the local service market and it is not in the public interest. (Staff Ex. 10.0 at 34-36.)

3109. Staff believes that there is no merit to the arguments that Ameritech advances in opposition to its proposal. For example, Staff observes that Ameritech provides no evidence to support its claim that end users do not want stand-alone DSL transport. According to Staff, Ameritech Illinois' (through AADS) failure to offer or provide DSL transport on a stand-alone basis, in and of itself, provides no support for the conclusion that end users do not want stand-alone DSL transport. Staff notes that at least two RBOCs, Verizon and Qwest, apparently disagree with Ameritech Illinois' view, as they offer stand-alone DSL transport to end users. (Staff IB at 236).

3110. Contrary to Ameritech Illinois' contention that Staff's proposal would require end users to sacrifice convenience (when it comes to high-speed Internet access) Staff's believes its proposal would provide end users with greater choice: end users could elect to obtain DSL transport and Internet Access from separate providers or elect to obtain an integrated Internet Access package from one provider. (Staff Ex. 24.0 at 45-46). In point of fact, Staff argues, an end user may find it more "convenient" to purchase DSL transport and Internet access separately, obtaining a lower total monthly charge in exchange for performing additional legwork. See Staff Ex. 10.0 at 30-32 (indicating that stand-alone DSL transport would produce lower prices for DSL than the existing exclusive DSL marketing arrangement).

3111. Staff also observes Ameritech to contend that requiring it to provide stand-alone DSL transport is "completely unnecessary" because the market is already competitive. (Ameritech IB at 200). Further, Ameritech contends that there is no evidence that requiring it to provide stand-alone DSL transport would make high-speed Internet access more competitive. (Id.) Staff explains, however, that requiring Ameritech Illinois to offer stand-alone DSL transport will help to exert more competitive pressure on DSL transport providers (as well as other broadband service providers). (Staff Ex. 10.0 at 28, 30-33; Staff Ex. 24 at 37-39, 45). Accordingly to Staff, there is no evidence that AADS prices its services at cost or is unable to sustain its prices above cost, two features indicative of a competitive market. (Staff Ex. 24.0 at 37-38).

3112. As there is no federal requirement that an ILEC provide stand-alone DSL transport, there is no interpretation of federal law needed regarding stand-alone DSL transport, in Staffs' view. The question here is whether it is in the public interest for this Commission to require Ameritech Illinois to offer stand-alone DSL transport to end users.

d. Ameritech Illinois Reply Position

3113. AI sees Staff to argue that AADS should be required to sell DSL Transport directly to end users as a retail service. (Staff Br. at 236). Staff has narrowed its position to two points. First, Staff clings to the belief that consumers can buy two services (standalone DSL Transport and Internet access) cheaper separately than in combination. (Staff Br. at 236). Staff offers absolutely no evidence to support this assertion and does nothing to rebut Ameritech Illinois' evidence that the reverse is true. (Am. Ill. Ex. 13.1 at 8-9). Among other reasons, the total cost will be lower if the services are purchased in combination because the providers will not have to duplicate overhead costs such as retail sales, marketing and distribution. (Id. at 9). In addition, wholesale DSL Transport services are sold more cheaply to ISPs, which enjoy the economies of scale associated with serving a large number of subscribers. (Id.)

3114. Moreover, AI suggests, consumers are already benefiting from the extremely competitive market for high-speed Internet access services. (Am. Ill. Ex. 13.1 at 15). There are multiple providers of the service and, cable modem providers – not DSL-based service – dominate the field with about two thirds of the market. (Am. Ill. Ex. 13.0 at 7). All providers compete fiercely for the customer's business AI asserts and offer a variety of promotions ranging from free installation, to free modems, to reduced rates for the first six months of service. (Am. Ill. Ex. 13.1 at 15). Staff is simply ignoring that "intermodal" competition.(the same oversight that led the D.C. Circuit to invalidate the FCC's Line Sharing order). (Am. Ill. Br. at 33).

3115. Staff's second argument, AI suggests, follows on the concept that "the ends justify the means." Staff argues that if AADS is required to sell DSL Transport on a retail basis, it will then be required to sell DSL Transport to its competitors at a wholesale discount and those discounts would (presumably) be passed along to the end users. (Staff Br. at 236). This is not a policy justification. It is, rather, a brazen attack on the Act's distinction between wholesale and retail services. The wholesale discount applies only to wholesale services – if an incumbent can be forced to provide wholesale services at retail, there is no need to limit the discount.

3116. As a point AI notes that: The FCC has held that DSL Transport used to access the Internet is an interstate service subject to federal jurisdiction. Memorandum Opinion and Order, In re GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, 13 F.C.C. Rcd. 22466, 1 (rel. Oct. 30, 1998) (DSL Transport service "which permits Internet Service Providers (ISPs) to provide their end users with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level"). As such, AI asserts there is a serious question whether this Commission

jurisdiction to issue orders impacting AADS' DSL Transport service – much less to order the overhaul proposed by Staff.

3117. AI notes Staff to also allege that AADS' business decision to provide DSL Transport service only when an end user is served by Ameritech Illinois voice service is contrary to the public interest, and that this "bundling" should "cease." (Staff Br. at 236-237). In AI's view, Staff is improperly using the public interest analysis to re-write the FCC's unbundling and line splitting rules. As such,, Staff is proposing that AADS be required to enter into line splitting arrangements with voice CLECs. See Id. But the FCC has held that line splitting is a purely voluntary arrangement, and that incumbents need not continue providing DSL service to end users that obtain voice service from a voice CLEC. See Line Sharing Order, 72; Line Sharing Reconsideration Order, 16, 26; Texas 271 Order ¶ 330.

3118. At the same time, AI notes, Staff is apparently proposing that the Company be required to unbundle and provide to the voice CLEC the low frequency portion of the loop while providing the high-frequency portion of that loop ("HFPL") to AADS, while Ameritech Illinois itself provides no service to the end user. The FCC has already concluded that the low frequency portion of the loop need not be unbundled (Texas 271 Order, ¶330), and that incumbent LECs need provide the HFPL only where they provide the end user's voice service (Line Sharing Order, ¶72; Line Sharing Reconsideration Order, ¶¶ 17, 26).

Commission Discussion and Conclusion

3119. While Staff and the AG's arguments may have some merit, it is not within the scope of this docket for the Commission to examine and decide such complex matters in the first instance. To be sure, Staff puts out the issue based precisely on the claim that there is no federal requirement for an ILEC to provide stand-alone transport. Clearly thus, there is no compliance issue to be addressed. What the AG and Staff seek to have the Commission here do, necessitates an adjudication of party's rights and accordingly, would require proper notice and the opportunity to be heard in that particular context.

3120. The California PUC decision, on which the AG would rely, has not been discussed or analyzed in any meaningful way. We have no particulars of the evidence in California or how the matter was decided or how the situation relates to Ameritech. It is not clear from it presentation just why the AG believes California to be good authority or any authority for that matter. The AG is certainly aware that our decisions arise from the evidence taken and considered in the right context. We cannot merely adopt conclusions of other state agencies in place of such evidence.

3121. To the extent that AI is in compliance with ASCENT I, and ASCENT II, we need not and ought not go further. In ASCENT I, the Court determined that the data affiliates of incumbent LECs are subject to all obligations of Section 251 (c) of the Act. Connecticut 271 Order. In ASCENT II, the Court upheld the FCC order which determined that the discount-for-resale provision of section 251(c)(4)(A) applies when an incumbent offers DSL services to an end-user, but not where it offers DSL services to an ISP. There is no showing of non-compliance with this authority. Furthermore, AI informs, and neither Staff nor the AG dispute, that broadband issues are being pursued by the FCC in a number of active proceedings. We might reasonably assume that the FCC is aware of the issues raised here that we are in no position to address for the first time in this type of proceeding.

Proposal No. 6 - Structural Separation.

a. Ameritech Position

3122. AI observes AT&T to contend that this Commission should require Ameritech Illinois to implement "structural separation" as a condition of a positive recommendation to the FCC. Under AT&T's proposal, the Company comments, Ameritech Illinois would need separate itself into a network company and a retail company, which would have to obtain service from the network company. The network half would at first continue serving Ameritech Illinois' existing retail customers, but it could not serve new customers, could not serve any customers who changed locations and could not introduce new services. Over time, customers would be required to elect a new retail provider (either Ameritech Illinois' retail company or a CLEC). (AT&T Ex. 2.0 at 24-25, 29-30).

3123. Structural separation, AI asserts, is not required by the FCC as a condition of Section 271 approval. In the New Jersey Section 271 proceeding, AI observes, the New Jersey Division of the Ratepayer Advocate ("NJDRA") contended – just as AT&T does here – that Verizon's application was not in the public interest absent structural separation. AI points out that the FCC rejected this proposal out-of-hand by stating:

> . . . the Act [TA96] does not require structural separation as condition to Section 271 approval, and we do not require it here. New Jersey 271 Order, ¶183.

3124. Indeed, AI asserts, structural separation is at odds with the 1996 Act. The methods Congress adopted to reach the goal of local competition are set forth in section 251 of the Act, and plainly assume that incumbent LECs such as Ameritech Illinois would act in both a wholesale and a retail capacity. Forced structural separation would interfere with the methods Congress relied upon to facilitate local competition, AI maintains, and it would be particularly out of place here. This is a proceeding to carry out the 1996 Act, AI argues, and not to discard it in favor of a regime preferred by AT&T.

3125. As a matter of state law, AI asserts, this Commission likewise does not have the authority to impose structural separation. Its powers and authority are defined by the terms of the Public Utilities Act. Business and Professional People for the Public Interest v. Commerce Comm'n, 136 Ill.2d 192, 201, 240 (1989). Under Section13-508 of the PUA, AI observes, the Commission may order a telecommunications carrier to establish a separate subsidiary for its "competitive" services, but only when it finds, after notice and hearing, that:

> (a) no less costly means is available and effective in fully and properly identifying and allocating costs between such carrier's competitive and noncompetitive telecommunications services; and
>
> (b) the incremental cost of establishing and maintaining such subsidiary would not require increases in rates or charges to levels which would effectively preclude the offer or provision of the affected competitive telecommunications service.

3126. This provision is a companion to Section 13-507, AI informs, which requires the allocation of all costs between competitive and noncompetitive services for ratemaking purposes. This purpose of the required cost allocation is to prevent the subsidy of competitive services by noncompetitive services.

3127. This Commission resolved this issue of cost allocations over a decade ago in Ameritech Illinois' 1989 rate case, the Company notes, and there is no basis on which

Section 13-508 can be invoked, even for that purpose. Order on Remand at 189-92, 199-203, Docket 89-0033 (Nov. 4, 1991). The Commission specifically rejected the use of a separate subsidiary at that time because an "available and effective" means of allocating costs had been developed. Id. at 203-204. This decision by the Commission was also affirmed on appeal, AI observes. People ex. rel. O'Malley v. Ill. Comm. Comm., 239 Ill.App.3d 368, 384-87 (2d Dist. 1993).

3128. According to AI, AT&T's structural separation proposal does not meet with any of the requirements of Section 13-508. First, AI contends, its purpose is not to separate costs between competitive and noncompetitive services. AT&T is recommending the separation of retail services (some of which are competitive and some of which are not) and network or wholesale services. (Am. Ill. Ex. 15.0 at 23). Second, AI asserts, AT&T's proposal is not designed to allocate costs at all, but to restructure the local exchange marketplace. Third, AI maintains, AT&T has not demonstrated that the methodology adopted by the Commission in Docket 89-0033 is inadequate. In fact, Ameritech Illinois has been using this methodology consistently for a decade. (Am. Ill. Ex. 15.0 at 22-23). As such, AI argues, the separate subsidiary requirement in Section 13-508 cannot be used to require structural separation.

3129. The Commission Staff came to the same conclusion, AI informs, in a Report submitted for Docket 98 NOI-1. Staff Telecommunications Division Report, Docket 98 NOI-1, February 9, 1999, at 18-19. According to AI, the Commission initiated that docket to review a petition filed by LCI International Telecom Corp. ("LCI") that requested a structural separation plan essentially identical to that proposed by AT&T here. (Am. Ill. Ex. 15.0 at 22). The Commission, AI comments, took no further action on LCI's petition following the Staff Report. Id.

3130. So too, AI contends, structural separation represents poor public policy. Ameritech Illinois explained, in Docket 98 NOI-1, that structural separation would be enormously complex to implement, would impose significant inefficiencies on the Company, would degrade the quality of both retail and wholesale services, and would be confusing to customers. Moreover, wholesale customers would see higher rates as a result of the restructuring. Ameritech Illinois' views on structural separation have not changed in the interim. (Am. Ill. Ex. 15.0 at 22). Nowhere, AI notes, does AT&T address these policy issues. For all the reasons, AI maintains that AT&T's structural separation proposal should be rejected.

b. AT&T Position

3131. AT&T takes the position that the Commission needs to continue aggressive regulatory oversight of Ameritech Illinois -- including signaling that it is prepared to require the structural separation of Ameritech Illinois' wholesale and retail operations as a predicate to any positive finding by this Commission on the "public interest" component of Section 271 even if it determines that, at a particular point in time, Ameritech Illinois appears to be in technical compliance with the specific Section 271 checklist items and the requirements of Section 801 of the Illinois Public Utilities

Act. (AT&T Ex. 2.0, at 2-3.) As such, AT&T recommends that the Commission initiate a formal evaluation of the precise form of a structural solution by requiring Ameritech Illinois to prepare and file a preliminary implementation plan in Phase II of this proceeding.

3132. This is a path to lasting local competition, AT&T maintains, that is efficient and would address Ameritech Illinois incentives, even after it is authorized to provide long distance service. By separating Ameritech's wholesale and retail operations into distinct entities – coupled with an appropriate capital structure that assures independent decisions and behavior – the Commission can create an environment where Ameritech's own commercial success depends upon its ability to offer efficient access to the existing network. With its own commercial success as stake, Ameritech is sure to comply and the benefits would extend to CLECs as well as to Ameritech's own retail operations. (AT&T Ex. 2.0, at 23.)

3133. The goal of the structural approach that AT&T recommends is to fundamentally change Ameritech's incentives so that its wholesale operation proactively seeks to offer the most efficient provisioning system, while its retail operation designs products and sets prices that accurately reflect the rates it is charged for UNE access. In simple terms, the key is to place the ILEC's retail operations in the shoes of a true CLEC – ordering UNEs, establishing customer accounts, and incurring UNE charges just like any other provider. (AT&T Ex. 2.0, at 24.) To accomplish this goal, the Commission should order Ameritech to establish (subject to rules and procedures discussed below) two distinct entities: a network company (Network Company) and a retail entity (Retail Company). The Network Company would manage the existing network, offering carriers access to its components (and combinations) as unbundled network elements. The Retail Company would compete like all other CLECs – gaining access to the existing network by leasing its components (and combinations) as well. (AT&T Ex. 2.0, at 24.)

3134. AT&T asserts that the Commission has the legal authority to require this "structural separation." The Staff's tentative conclusion in 98 NOI-1 that the Commission did not have such authority, AT&T contends, suggests, rests on a fundamental misunderstanding.

3135. AT&T notes Section 13-508 to state that the Commission is authorized to:

> … order a telecommunications carrier which offers or provides both competitive and noncompetitive telecommunications service to establish a fully separated subsidiary to provide all or part of such competitive service …

3136. According to AT&T, Ameritech Illinois provides both competitive and telecommunications services, and the Commission by the terms of this section may

require that the competitive (i.e., retail services) be offered through a separated subsidiary. Whereas the Commission must reach a number of findings concerning cost and justification, the statute on its face appears to contemplate the relief AT&T seeks here. (AT&T Ex. 2.0 at 29).

3137. A structural plan AT&T contends, must hold two key principles inviolate. First, the Retail Company must initially be established like any other CLEC – that is, without customers and dependent upon the same provisioning systems to obtain customers as any other CLEC. Second, Ameritech must "freeze" in place its retail operations – it could not initiate service to any new account, transfer service to a different location, or introduce any new service. These joint recommendations would create a process whereby all new customers and services would be served by competitive providers, including (for those customers that made it their choice), Ameritech's Retail Company, while Ameritech-ILEC would become the "Network Company" offering nondiscriminatory access to the existing network. (AT&T Ex. 2.0, at 32-33.)

3138. According to AT&T, the Network Company (i.e., Ameritech) would to continue to serve the embedded base on a transitional basis, thus providing both retail and wholesale services for a limited period of time. With natural churn, however, and as customers migrate to new services, this embedded base would grow smaller. Ultimately, the Commission might well decide to use balloting or some other "close-out" procedure to complete a full separation -- but, at least initially, it is likely that a natural market evolution should produce substantial benefits and acceptable results. During the interim, however, Ameritech would not be permitted to jointly market or otherwise offer services in partnership with the Retail Company, which must remain at arms length like all other CLECs. (AT&T Ex. 2.0, at 33-34.)

3139. The effect of AT&T's recommendation would assure that the Retail Company is established at a scale comparable to other entrants. This would make it simpler for the Retail Company to do what all other CLECs must do – establish their own infrastructure for customer care, ordering and provisioning to interface with the Network Company's operating support systems (OSS). Further, like any other CLEC, the Retail Company would be forced to earn – not inherit through a transfer -- its customers, striving to win customers as they move into the area and to attract "embedded" customers from the incumbent. As such, the Retail Company would be able to grow as fast as its management chooses (and its skills permit), with the ability to gradually adjust to a growing customer base and the complexity that would follow. (AT&T Ex. 2.0, at 34.)

3140. In short, AT&T recommends that the Commission declare that it does have the authority (subject to the findings of Section 13-508) to require the separation of Ameritech Illinois' wholesale and retail functions as part of its public interest assessment. The Commission should require Ameritech to file in Phase II, a preliminary implementation plan that would include Ameritech Illinois' claimed costs to comply with the structural regime described above. Such information, AT&T contends,

would enable the Commission to determine that (a) no less costly means is available and effective in fully and properly identifying and allocating costs between such carrier's competitive and noncompetitive telecommunications services; and (b) the incremental cost of establishing and maintaining such subsidiary would not require increases in rates or charges to levels which would effectively preclude the offer or provision of the affected competitive telecommunications service. With the full information before it, the Commission would be in a position to order structural separation under 13-508 of the Illinois PUA, or as a prerequisite to finding that Ameritech Illinois' interLATA authority is in the public interest.

Commission Review and Conclusion

3141. We reject the structural separation proposal outright. This novel issue is not so new, having been reviewed by the Commission on previous occasions.

3142. On the whole, this issue is inappropriate to the instant proceeding.

Proposal No. 7 - Waiver of Review

a. Staff Position

3143. Staff recommends that the Commission condition any endorsement of Ameritech's Section 271 application upon the Company's agreement to forgo all appeals and rehearing of the TELRIC II Order, the various Line Sharing Orders, the TELRIC 2000 Order, and the Section 13-801 Order. (Staff Ex. 6.0 at 43-44.) At the same time, Staff is fully cognizant of the fact that this is a controversial recommendation. While the Commission cannot order Ameritech Illinois to relinquish its due process rights, Staff maintains that it can certainly withhold its approval unless Ameritech's agrees to not exercise same.

3144. In Staff's view, the Company's ultimate satisfaction of the Checklist items is contingent on completion of the named proceedings. A rehearing for any of these proceedings it argues, would change the required analysis in the immediate proceeding. (Staff Ex. 6.0 at 43-44.)

3145. Staff notes Ameritech to argue that it is not required by the FCC, and it is improper, to require a 271 applicant to forego legal rights. (Staff Ex. 23.0 at 22). Staff however, sees no compelling reason why any party to this proceeding should demonstrate any particular solicitude for Ameritech's rights.

3146. According to Staff, Ameritech can agree – or not agree – to cede review of the above-named dockets. The Commission can endorse – or decline to endorse – Ameritech's Section 271 application. If Ameritech does not agree to forgo review, the Staff recommends that the Commission similarly decline to endorse Ameritech's claim that its network is open.

b. Ameritech Position

3147. AI takes issue with the proposal suggesting that this Commission require Ameritech Illinois to drop petitions for rehearing or judicial challenges to Commission decisions in certain rate proceedings. (Staff Br. at 242-44; WorldCom Br. at 17). In any event, AI notes, Staff's proposal regarding rehearings is now moot, as the Commission has already rendered final decisions on rehearing requests in the four dockets identified by Staff (Nos. 98-0396, 00-0393, 00-0700, and 01-0614). According to AI, Staff's proposal regarding judicial review was added on without evidentiary support or further argument. (Staff Br. At 243).

3148. AI notes that, although Staff claims to be "fully cognizant of the notion that this is a controversial recommendation" it cites no legal authority or precedent for its novel request. Id. There is none, AI maintains. Staff's witness even acknowledged that "it is my understanding that the Commission cannot order Ameritech Illinois to relinquish its due process rights" (Staff Ex. 6.0 44-45), and ultimately Staff acknowledges its position to be nothing more than an attack on due process. See Staff. Br. at 244 ("There is no compelling reason why any party to this proceeding should demonstrate any particular solicitude for Ameritech's rights."). Nor is there any contention that Ameritech Illinois' challenges are in any way frivolous. Indeed, Staff's concern appears to be that Ameritech Illinois might prevail, and that reduces "continuity" in the Commission's pricing decisions. (Staff Br. at 243).

3149. There is simply no legitimate basis the Company asserts, for requiring an applicant such as Ameritech Illinois to check its legal and constitutional rights at the door to in order pursue Section 271 relief. Clearly, AI argues, such a requirement would not be in the public interest. To be sure AI notes Staff's own witness acknowledged that he had not taken into account the public policy implications of Staff's proposal. (Tr. 1798-99). Staff provides no supporting analysis on brief either setting out. Its rationale is as follows:

> The recommendation is very simple, and needs little explication. Ameritech can agree – or not agree – to cede review of the above-named dockets. The Commission can endorse – or decline to endorse – Ameritech's Section 271 application. (Staff Br. at 244)

3150. While both halves of Staff's truism are correct AI sees a problem in that Staff gives no reason for linking one to the other. The Commission can rule on applications for rehearing on the merits, and it can endorse, or decline to endorse, Ameritech Illinois' application on its merits. The responsible and bottom line is that Commission decisions should and must be made on the merits – not bestowed as rewards for favors or withheld as threats at the instance of Staff or WorldCom.

3151. Ameritech Illinois fully understands that the Commission intends to strike a proper balance among competing interests on complex issues, no agency or court is

infallible. The law establishes a procedure for rehearing to give the Commission a chance to correct mistakes. The law gives parties the right to apply for rehearing so they can advise the Commission of a mistake. It is for the Commission to decide whether to grant rehearing in any particular case. (Tr. 1790). The Commission has taken advantage of the opportunities provided by law, and the arguments presented by parties, and it has granted applications for rehearing in several cases.

3152. Suspending the right of rehearing does not benefit the Commission, nor does it benefit the public. Staff's proposal ultimately means that Ameritech Illinois and the Commission would have to rely on the news media, or the good graces of Staff (which has demonstrated its opposition to the rehearing process here) or of Ameritech Illinois' opponents, to take the place of the rehearing application procedure established by law. (Tr. 1790-94). Staff's own witness was not aware of any contested case in which the Commission granted substantive rehearing (aside from the correction of clerical errors) on its own motion. (Id. at 1793).

3153. AI considers suspending the right of judicial review to be at least as improper. By terminating the right to seek rehearing, the Commission would be pre-judging the outcome of its own proceedings, and by suspending judicial review the Commission would be attempting to dictate the outcome of proceedings that are now before a court. That reverses the traditional rule of law, AI maintains, under which courts review agency action. Moreover, there are some issues the Commission does not reach, and in those circumstances judicial review represents the first real opportunity to be heard. For example, AI notes, the Commission's June 11, 2002 Order in Docket 01-0614 (at 18) expressly declined to adjudicate Ameritech Illinois' claims that certain requirements were inconsistent with and pre-empted by federal law. A lack of judicial review in such a case would deny Ameritech Illinois the right to be heard even once.

3154. There is no public interest in the "continuity" or "certainty" of an erroneous or unlawful order or in the curtailment of due process. In the final analysis, AI maintains, rehearing and judicial review benefit everyone by clarifying the law.

Commission Review and Conclusion

3155. Staff cites no law or other authority holding proper its attempt to have AI waive its rights to appeal or rehearing. In our view, this proposal fails on public policy grounds.

3156. To be sure, public policy has no precise definition and each case must be judged according to its own peculiar circumstances. Hartford v. Burns Int'l Security Services, 526 N.E. 2d 463 (1st Dist. 1988). In this instance, public policy is put into effect through the acts of the General Assembly.

3157. Section 10-201 of the PUA grants the right of judicial review to any person or corporation affected by, among other things, an order or decision of the Commission.

220 ILCS 5/10-201. The prerequisite to the exercise of this right is the filing of an application for rehearing with the Commission setting out the matters complained of. Id. According to case law, the purpose for the statutory rehearing requirement is to inform the Commission of the alleged legal and factual errors in its order. Citizens Utility Board v. ICC, 651 N. E. 2d 1089.

3158. In certain instances, and despite assertion of public policy violations, parties have been held to contract away their right to seek review on the basis of agreed-upon consideration. It is established, however, that contracts founded on immoral consideration or contrary to law are void, such that courts will not lend aid to enforce them. Sanitary Commercial Services, Inc. v. Shank, 566 N.E. 2d 1215 (Ohio Supreme Ct. 1991).

3159. Staff need recognize that this Commission can offer no consideration for AI to barter away its statutory-given rights. Certainly not the consideration Staff would suggest. While this Commission is not sitting as an adjudicatory body, it nevertheless must maintain its integrity. As such, its recommendation on the matter, no different that any decision otherwise issued, must rest on the basis of the evidence. We simply cannot bargain away the rule of law. Our recommendation on Ameritech's application will be based on the record and not on a promise that is neither valid nor enforceable nor in accord with law.

F. Disputes Driven by State Law

3160. Included also in this Part IV are a number of disputes between Staff and/or the CLECs and Ameritech arising solely on the basis of state law or otherwise outside checklist requirements. As best as we can determine, there are three such issues. One by one, we set out the arguments, showings and positions of these parties and follow along with our discussion and conclusion as to these matters.

Dispute 1 – Migration "as is" Orders

3161. As previously indicated, we consider here the issue as to whether Section 13-801(d)(6) of the PUA requires SBC-Illinois to provide a type of form or process allowing a CLEC to indicate a migration just "as is" without confirming all of the specifics of that migration.

3162. On the basis of the arguments presented, we are lead to believe that the language and intent of the Section 13-801 (d)(6) language at issue has not been previously been construed, relative to the pending assertions, in any Commission order. Thus, and in effect, AT&T is asking that we interpret the statute for the first time in this investigative proceeding (without it having set out a constructive analysis thereon).

3163. Section 13-801(d)(6) of the PUA sets out, in part, that:

> A requesting telecommunications carrier may order the network element platform *as is* for an end user that has such existing local exchange service without changing any of the features previously elected by the end user." 220 ILCS 5/13-801(d)(6) (emphasis added).

3164. The plain language of this provision, AT&T argues, means that Ameritech is required to offer carriers "the ability" to migrate customers just as is – that is migrate "without changing any of the features previously elected by the end user." (AT&T Br. on Exceptions). As we understand AT&T's complaint under the statute, there is no actual OSS functionality in place for the CLECs to simply process orders by indicating the migration should be as is, meaning that, a CLEC must specify on each order the exact type of each feature to be provisioned for a customer.

3165. In SBC-Illinois' view, Section 13-801(d)(6), does not mandate the use of any particular order form, but simply refers to the substantive provisioning of the end user's existing features. And, contrary to AT&T's assertions, the statute does not specify that CLECs need not identify the features an end user is using. SBC Illinois asserts that it satisfies the substantive requirement of Section 13-801 (d)(6) by allowing CLECs to obtain the UNE-P without changing any of the end user's features. AT&T does not and cannot dispute this matter, the Company asserts, given that there are over 335,000 UNE-P lines in Illinois. See Am. Ill. Ex. 14.0 (Heritage Rebuttal) at 26.

3166. From what appears to be a substantive directive, (in our view and without benefit of a laborious statutory assessment that this Commission should not be required to perform in such a proceeding), we see AT&T to derive the notion that there is also the requirement of a certain type of process or format. Contrary to its assertions, resort to plain language alone does not indicate the requirement for which AT&T specifically argues (as even it adds terms not visible in the statute).

3167. We are not persuaded by AT&T assertions that, SBC Illinois is statutorily "required" to develop and implement new ordering and processing capabilities that would allow AT&T to check some type of "as is" box on a UNE-P migration form, without specifying the particular services an end user is receiving. On the evidence and arguments here made, we do not find a state compliance issue to have been shown.

3168. To be sure, AT&T would want an OSS that would simply allow it to specify that the migration will be "as is" – meaning that all of the end users current features will be retained when the CLEC becomes the provider, without having to confirm each and every feature with the customer or manually read the customer's CSR. Ameritech points out that, as a matter of good business practice, the CLEC should specify the features it wishes to have included in its UNE-P arrangements, such that the CLEC knows and understand exactly what it has ordered, and to prevent any subsequent

misunderstandings over what unbundled network elements were requested and what network elements were actually being provided (and billed). We believe that such a comfirmation under the customer is also beneficial to the end-user who might not readily recall all of the features currently assigned.

3169. The reason for the Company not supporting SBC-Illinois retail to CLEC migration "as is" orders, AT&T notes, is due to the uncertainty that such a migration would not also cause a non-telecommunications service to also be migrated to the CLEC end user. According to AT&T, however, Ameritech's witness admitted that the Company had not investigated any means (OSS or otherwise) to prevent the migration of non-telecommunications services from migrating in a migration "as is" scenario. (Tr. 1282).

3170. AT&T would have the Commission use this Phase I order as the means to compel Ameritech to investigate migration "as is" in the sense of allowing the CLECs the ability to place orders using the Req. Type M, Activity W migration "as is" format. We have indicated, time and again, that the purpose of this proceeding is "not to entertain novel issues 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." See Kansas & Oklahoma 271 Order, ¶ 19 (the purpose of a section 271 proceeding is not to litigate "new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors").

3171. In any event, there is an OSS "change management" process designed to have SBC-Illinois investigate a means by which it could provision "as is" orders while excluding features (such as Linebacker) that it is not required to migrate. To have its concerns on this non-section 271 issue further explored, AT&T might well submit this issue to SBC- Illinois through the Change Management Process.

Dispute 2 - "All Equipment List" or AEL

a. Staff Position

3172. On August 15, 2002, Staff observes, the Commission issued an order in Docket 99-0615, addressing collocation matters. Order, Docket 99-0615. In this Order, Staff notes, the Commission directed the Company to post on its website information regarding the list of all compliant equipment that could be collocated in its COs (the "AEL"). Order at 17, 26. Staff sees Ameritech to assert here, that the Order requires AI to only post a list of equipment that meet AI's safety standards and not, as Staff would have it, all equipment that is "necessary" for interconnection with its network or access to its UNEs. (Am.Ill. Ex. 1.1 at 22-3; 1.2 at 25-26).

3173. Contrary to Ameritech's position, Staff contends, the Commission clearly indicates that identifying equipment satisfying safety standards is only one of the reasons forming the basis of its directive that Ameritech post on its website the list of compliant equipment at its premises. Among other reasons are the need to give CLECs the information and certainty of a complete source to consult. The Commission also concluded that, "whatever minor burden, if any, is imposed on" Ameritech in posting the AEL on its website, is outweighed by the benefits to the CLECs. Collocation Tariff Order at 17, 26.

3174. To some extent, Staff considers Ameritech to misapprehend its position. Staff is not suggesting that AI provide CLECs with a list of "all" equipment that a CLEC would need in order to collocate in its premises. Rather, Staff's position is that Ameritech list all equipment that meets safety and other considerations that Ameritech itself would impose prior to permitting collocation at its premises. Id. at 17, Docket 99-0615.

3175. Staff's concern arises from two caveats that Ameritech includes in its AEL. (Staff Ex. 21.0 at 11). First, Staff notes Ameritech to state that the AEL "includes equipment that is known to not meet the criteria to be allowable for collocation." Collocation Tariff Order at 17. Second, Staff observes Ameritech to also state "other equipment on the AEL may not have been reviewed to determine if it is allowable for collocation and may not, meet the criteria for placement for Collocators." Id. These caveats, in Staff's view, make it virtually impossible to determine which of the equipment listed on the AEL Ameritech permits to be collocated, and thus, compromises the reliability and usefulness of the listing.

3176. To the extent that Ameritech does not impose any restrictions on collocation other than on the basis of safety considerations, and provided further that Ameritech agrees to amend (or delete entirely) the two caveats referenced in its AEL to reflect this, it is Staff's position that the only issue still in dispute between the parties regarding the AEL format is that Ameritech does not specifically identify the equipment that is permitted in Illinois.

3177. Specifically, Staff maintains, the ARL format does not meet all the requirements of the Collocation Tariff Order because it is over-inclusive (in that it lists virtually all of the equipment in the SBC network, including equipment in Ameritech's COs). While the AEL identifies virtually all equipment that can be obtained in SBC's regional network, Staff maintains that it is impossible to discern which equipment can be specifically deployed in Illinois.

3178. In addition, Staff believes Ameritech to claim that it is not necessary to update its AEL. (Am. Ill. Ex. 1.1 at 22-3). In the Collocation Tariff Order, however, this Commission ordered it to update or modify its AEL either as soon as new equipment is added or on a quarterly basis. Id. As Staff testified, Ameritech does not currently comply with this requirement. Staff however, sees Ameritech to claim that this failure to

update was due to an administrative error and it promises to update quarterly for the future. (Am. Ill. Ex.1.1 at 25).

3179. This state law issue, Staff argues, is relevant to Section 271 requirements because of the importance the Commission attaches to the list as a source that CLECs could use to ascertain reliable information about compliant equipment that could be collocated with Ameritech. Although the Company has posted on its website information regarding all equipment in the SBC's central offices, i.e., SBC All Equipment List (AEL), the AEL as it currently exists, Staff maintains, is still not in compliance with Docket 99-0615. (Staff Ex. 21.0 at 9-14; Staff Ex. 4.0 at 24).

3180. In Staff's view, the Commission should continue to monitor Ameritech's compliance on this issue during Phase II of this proceeding. This will require periodic checking of the AEL as it is posted on SBC website. Staff recommends that AI's compliance with Docket 99-0615 (which requires updates either quarterly or as soon as new equipment is added) be considered in Phase II, to the extent necessary.

b. Ameritech Illinois Position

3181. According to AI, federal law requires an ILEC to provide CLECs with a list of all equipment located within a central office within 5 days of denying a collocation request based on safety standards along with an affidavit attesting that all of the equipment in that office meets or exceeds the safety standard that the ILEC contends the competitor's equipment fails to meet. Advanced Services Order at ¶36; Advanced Services Reconsideration Order at ¶57. The purpose of the FCC's requirement, AI maintains, is to ensure that the ILEC does not impose safety standards on CLECs that are more stringent than those it imposes on its own equipment. Id.

3182. In Docket 99-0615, AI notes, this Commission imposed an additional obligation on Ameritech Illinois under state law: to post a list, known as the "All Equipment List" ("AEL") of all collocation equipment which meets Ameritech Illinois' safety standards. Order at 17, Docket 99-0615. Hence, this expanded state law obligation is to maintain a list in advance of all equipment located in all of its central offices, not just after it actually denies a CLEC collocation request and not just for the office where collocation is denied.

3183. Staff does not dispute Ameritech Illinois' compliance with the federal requirement, but has two objections with respect to Ameritech Illinois' AEL. First, AI observes, Staff objects to the AEL's advisory that not all equipment on the AEL may be eligible for collocation, due to reasons other than "safety" standards. Staff takes the position that Ameritech Illinois' AEL must be a list of equipment that is compliant with all collocation requirements. (Staff Ex. 4.0 at 24-26). Here, AI contends, Staff is misinterpreting the Commission's order, i.e., the AEL requirement only addresses equipment that meets "safety" standards.

3184. The plain terms of the Order in Docket 99-0615, AI asserts, specify that the AEL is intended to provide a CLEC with a "…single, complete source to consult to determine whether equipment it wishes to collocate meets Ameritech's safety standards". Order at 17, Docket 99-0615 (emphasis added). Indeed, AI notes, one premise underlying the Commission's decision was its determination that the state AEL obligation would impose, at most, a "minor burden" on Ameritech Illinois, because the FCC's Advanced Services Order already required the preparation of such a list when collocation is denied. Id.

3185. According to AI, it would be extremely burdensome for the Company to analyze every piece of equipment in its network to determine whether it is approved for collocation, in advance of receiving a single CLEC request to collocate that equipment. Under the FCC's rules, AI maintains, these kinds of eligibility reviews are performed only in response to specific CLEC requests and the results depend, to some degree, on the specific use to which the CLEC intends to put the equipment. (Am. Ill. Ex. 1.2 at 28-29). Nothing in the Commission's Order in Docket 99-0615, AI contends, provides support for Staff's newly expanded view of its requirements.

3186. Second, AI notes, Staff objects to the fact that the AEL lists the equipment located in all of the SBC 13 states, rather than just the equipment located in Ameritech Illinois' central offices. (Staff Ex. 4.0 at 25). But the 13-state AEL is more, not less, useful to CLECs than an Illinois-specific AEL, AI comments. It provides CLECs with a broader range of equipment to consider when making determinations about safety compliance. In addition, AI maintains, many CLECs deploy equipment on a multi-state basis and the AEL enables CLECs to use the list as a reference in all of the SBC states in which they operate. (Am. Ill. Ex. 1.1 at 22-23).

3187. In any event, AI argues, Staff's view that CLECs need a complete list of all collocation-compliant equipment is misplaced. CLECs make their own equipment decisions and CLEC engineers generally know what types of equipment are suitable for collocation. They would not rely on Ameritech Illinois' AEL in the network design process. (Am. Ill. Ex. 1.2 at 29-30). Even with regard to safety standards, the importance of an AEL has declined over the last few years, because equipment manufacturers now build to the NEBS Level I Safety Standards specified by the FCC in the Advanced Services Order. Id. In short, the Company argues, Staff is attempting to impose obligations on Ameritech Illinois that go well beyond the Commission's order (and certainly well beyond what is required by federal law as well); that would be extremely burdensome to implement; and that, in the final analysis, are not required by the CLEC audience for which the AEL is apparently intended.

3188. Since there are restrictions on the CLECs' right to collocate equipment in Ameritech Illinois' central offices other than safety standards, Staff's reading of the Commission's order would require the Company to review thousands of pieces of network equipment to determine whether they meet all collocation standards. (Am. Ill. Ex. 1.2 at 28-29). This is an extremely burdensome obligation which was not imposed

on the Company by either the FCC, or under the plain terms of this Commission's order in Docket 99-0615.

3189. According to AI, Staff also suggests that the Company took the position that "it is not necessary to update the AEL." (Staff Br. at 78). Staff has misread Mr. Alexander's testimony, AI contends, for he takes no such position. The Company recognizes its obligations in this regard and will update the AEL quarterly in the future. (Am. Ill. Ex. 1.1 at 78).

c. Commission Review and Conclusion.

3190. Staff maintains in its exceptions that the AEL is a federal requirement and, as such, should be addressed under Checklist Item 1. In asserting this position, however, Staff fails to recognize that the federal AEL requirement - being that a ILEC, within 5 days of denying a collocation request, provide CLECs with a list of all equipment within a given central office - is not the matter put at issue. Rather, Staff has raised a compliance issue with respect to this Commission's expansion of that requirement in Docket 99-0615 (requiring AI to post a list of all collocation equipment that meets its safety standards in advance of a CLEC request). This is clearly a state law requirement and a state compliance issue.

3191. In Docket 99-0615, the Commission's Order imposed an obligation on AI, to wit:

> posting a compliant equipment list on its website…[for] the benefit of giving CLECs the information and certainty of having a single, complete source to consult to determine whether equipment it wishes to collocate meets Ameritech's safety standards. Order at 17, Docket 99-0615.

3192. Taking this language as a whole and in context with the rest of the Order, the Commission clearly meant to have Ameritech post a safety-compliant listing and not an all equipment listing. We further required the list to be kept current.

3193. Going to the merits, Staff's main complaint is that the AEL that AI provides, does not conform to the Commission's directives because it is over-inclusive, i.e., it identifies all equipment that can be obtained in SBC's regional network and not just Illinois equipment only.

3194. To the extent that the AEL does not comply with the Order for Docket 99-0615 it must remedy the situation or otherwise seek appropriate relief. To bring the Company into compliance with our Order, we can and do require AI to post and update as needed, a list that includes all equipment that meets its safety standards in Illinois.

3195. SBC-Illinois agrees that, under the terms of the Order. It must post safety-compliant equipment "located at its premises." According to the Company, it has done so and nowhere does Staff contend that the safety-compliant equipment located in SBC-Illinois' offices is not on the list. It does, however, put more than just Illinois specific information in the AEL on the belief that this is more useful to the CLECs. The question, however, is not whether the currently posted AEL is more useful to CLECs. Even if that is the case, our Order requires something different. We are in no position here to relieve SBC-Illinois of any of its existing obligations and even if they arise solely on the basis of state law.

3196. As SBC-Illinois well argues, nothing in our Order precludes the Company from posting more than just Illinois -specific information in the AEL. In doing so, however, AI must, in some fashion, mark off, code or otherwise note the items in such a way as to give effect to our Order. And it must update the information, as our Order requires.

3197. Staff notes that, due to an administrative error, AI failed to update the list as required. Ameritech recognizes that it failed this obligation at some point and will, it promises, make the requisite quarterly updates. Staff will monitor AI's actions and keep us informed of any failings on the matter.

Dispute 3 - Installation of Network Interface Devices (NIDs)

a. AI Position

3198. AI sees Staff to contend that Ameritech Illinois is not in compliance with the NID deployment requirements established in Dockets 86-0278 and 94-0431. AI witness Mr. Muhs testified at the hearing, Ameritech Illinois has deployed NIDs at 99 percent of customer locations. Tr. 765. Further, Ameritech Illinois is not aware of which locations may lack a NID, and absent a house-to-house search of the state Ameritech Illinois has no way of determining where the few remaining locations without a NID would be. (Tr. 765). Ameritech Illinois technicians continue to install NIDs at any customer premises where they do not find a NID. (Am. Ill. Ex. 16.0 at 7). If a NID is not in place at a customer location, Ameritech Illinois maintains that it will not charge a CLEC for the work unless the CLEC has a time and material contract with Ameritech Illinois and a CLEC wants Ameritech Illinois to perform additional maintenance work with the inside wire. (Id. at 8). In any event, the Company asserts, Ameritech Illinois filed a waiver petition with the Commission on August 27, 2002 (Docket 02-0555); seeking approval of an accelerated program to complete the installation of the few NIDs that remain.

3199. At the very least, AI contends, these facts show nearly complete compliance with the deployment requirement, and are sufficient to satisfy the federal

public interest standard. AI points out that NID is not required for the customer to have working service, nor does it affect a CLEC's ability to serve customers in the vast majority of cases. It can facilitate maintenance in some circumstances, but in the event maintenance is necessary the Ameritech Illinois technician will perform that maintenance and will install a free NID at the same time. (Id. at 7-8).

3200. If, however, Staff maintains this is insufficient to fully comply with state law, the Commission has ample authority to resolve the matter elsewhere. In fact, AI notes, the Commission is currently addressing this issue in its review of the Part 730 service quality rules, now pending in Docket 00-0596. The Commission will also be reviewing Ameritech Illinois' waiver application in Docket 02-0555.

3201. AI observes that Staff, not the CLECs, also argues that NIDs must be located externally (i.e., mounted on the exterior of the building) and that internal NIDs must be eliminated. The Commission's Third Interim Order in Docket 86-0278, however, expressly "grandfathers" all internal NIDs installed prior to the date of that order. In that proceeding, Staff proposed that existing internal NIDs remain in place. "For existing installations that already have an internally mounted demarcation, however, no further action would be required." Third Interim Order, at 2 Docket 86-0278, Sept. 30, 1987. The Commission adopted Staff's proposal, and its findings on the subject are expressly limited to the installation of external NIDS "on all new service installations" and "all old installations that do not have any type of demarcation plug and jack now." Id. at 5, 6. Staff simply ignores that ruling.

b. Staff Position

3202. Staff arguments appear under Checklist Item 2 and 4.

c. Cook County's Position

3203. Cook County notes Staff to question Ameritech Illinois' failure to take action with respect to Network Interface Devices. To be sure, Staff points to Ameritech Illinois' violation of prior Commission orders with respect to NIDs (Dockets86-0278 and 94-031) as evidence of this failure. (Staff Initial Brief at 125.) Ameritech Illinois argues in its brief that it allows non-discriminatory access to NIDs, which may be true. In the view of Cook County, however, Ameritech Illinois needs to comply with Commission orders to install NIDs and report annually on its efforts. Cook County agrees with Staff's argument that, this lack of compliance will have an adverse impact on opening the market to competition. If left unremedied, Cook County observes, it will inhibit a CLECs ability to access NIDs in a manner consistent with the FCC's requirements. (Staff Brief at 126.)

d. Commission Review and Conclusion

3204. Staff contends that AI is out of compliance with our Orders in Dockets 86-0278 and 94-0431, both requiring the installation of NIDs. The Company informs that it has filed a pleading in Docket 02-0555 to address this concern.

3205. We are told that our order in Docket 86-0278 required all ILECs to install external combination protector/demarcation interfaces for all one and two-line customers in single tenent residence and commercial building installations after September 30, 1987, and for all old installations that do not have any type of demarcation plug, by September 30, 1997. (Staff Br. on Exceptions at).

3206. Subsequently, our order in Docket 94-0431 extended the original deadline of September 30, 1997, by five years, to September 30, 2002. Prior to the expiration of this new deadline, i.e., on August 27, 2002, AI filed a Petition for Temporary and Limited Waiver alleging an inability to comply with the period set out in Docket 94-0431.

3207. Other than asserting that AI is non-compliant with the specifics of these Commission orders, Staff does not rely on any federal rules or regulations detailing installation requirements. For its part and with respect to its federal obligations, AI maintains that it provides "unbundled access to NIDs" under the terms and conditions of its interconnection agreements. Federal law, AI maintains, does not require that NIDs be installed at every one and two-line single tenant locations or that they be installed externally. Such terms, it argues, are requirements of state law via Commission order.

3208. According to AI, it has already installed NIDs in approximately 99 percent of all customer locations in its service territory. Further, it continues to install NIDs at any premises where they are lacking whenever the Company is doing on-site installation or repair work either on its own behalf or on behalf of a CLEC. So too, AI contends, it will install a NID upon a request of a customer (either end-user or CLEC) at no charge.

3209. Noting AI to admit that it is unable to meet the directives set out in the NID installation orders for Dockets 86-0278 and 94-0431, Staff contends that the Commission should completely ignore the Company's timely and formal request for a waiver currently pending in Docket 02-0555 when assessing compliance. This we cannot do.

3210. There can be no non-compliance finding in the situation where legal process is timely and properly invoked to alter the terms of an existing obligation. SBC-Illinois has taken just such action in this matter.

Dispute 4 - Power Cabling.

a. Staff Position

3211. Staff notes that on January 16, 2002, the Commission issued an Arbitration Decision pursuant to Section 252. Order, Docket 01-0623. Under Section 252, Staff maintains, Ameritech's power cabling policy for both physical and virtual collocation is not in compliance with Section 251, including the requirements of Section 251 and 47 U.S.C. § 251(c)(6). The Commission's Order, Staff contends, calls for Ameritech to provide power cabling for virtual collocation sites. Id. Therefore, Staff argues, Ameritech's existing tariff, prior to the Commission's decision, indicated that Ameritech would provide power cabling for both physical and virtual collocation.

3212. This issue relates to Ameritech's power cabling policy "in both physical and virtual collocations." Prior to the request for interconnection arbitration, initiated by McLeodUSA against Ameritech in Docket 01-0623, Ameritech's standard practice was to provide power cabling for virtual collocation sites. See Order in Docket 01-0623. In fact, the existing tariff, prior to the Commission's decision, indicated that Ameritech would provide power cabling for both physical and virtual collocation.

3213. In Docket 01-0623, Staff notes, Ameritech insisted that the CLEC should undertake to provide power cabling, not just with respect to physical collocation, but also for virtual collocation. Staff indicates that it opposed this policy position in Docket 01-0623 because such would have set the stage for a steady and gradual undermining of the Commission's method of ensuring that the virtual collocation characteristics and arrangements are specific, predictable and affordable to CLECs. In the end, Staff notes, the Commission directed that Ameritech continue to provide power cabling for virtual collocation sites. Id.

3214. While Ameritech has indicated that it would comply with the Commission's Order in Docket 01-0623, Staff believes that the Company is choosing to limit its obligations in a manner that should not be allowed because of the dangers it portends for creating a competitive marketplace. The Commission, Staff contends, should require that power cabling, especially for virtual collocation, continue to be provided by AI according to its approved tariff on the subject matter in Docket 99-0615. If Ameritech wants to change its policy, Staff contends that it must file, for Commission review, a notice of tariff change governing virtual collocation power cabling. Staff recommends that Ameritech's compliance with the power cabling be examined further during Phase II of this proceeding.

b. Ameritech Position

3215. Contrary to the assertions put forth, Ameritech Illinois maintains that its policy regarding power cabling, where the CLEC subscribes to collocation under the tariff, is fully consistent with the tariff, i.e., Ameritech Illinois provides the cabling. (Tr. 1449-1450). The policy to which Staff objects, applies only in the context of negotiated interconnection arrangements. In this regard Ameritech Illinois maintains that its expectation that CLECs will provide the power cabling is consistent with FCC requirements. According to AI, power cabling is handled in SBC's other states, including those states which have received approval of their Section 271 applications, in just this way. To the extent that McLeodUSA objects, AI notes that it has already

arbitrated this issue and prevailed. Ameritech Illinois will comply with the Commission's arbitration order and nothing further is required to meet its concerns. (Am. Ill. Ex. 1.1 at 24-25); Order at 27-28, 31, Docket 01-0623 (Jan. 16, 2002).

3216. AI notes Staff to misapprehend the Company's position. Ameritech Illinois will provide the power cabling as required by its tariff to all CLECs subscribing to collocation under tariff. (Am. Ill. Br. at 197). Therefore, contrary to Staff's suggestion, no "notice of tariff change" is required.

3217. The power cabling policy to which Staff objects only arises in the context of negotiated interconnection agreements, AI asserts. Even there, Ameritech Illinois recognizes that CLECs can opt into the McLeodUSA collocation arrangement ordered by the Commission in Docket 01-0623 under Section 252(i) of the 1996 Act. (Staff Br. at 87). In short, CLECs can avail themselves of this option if they so desire either under tariff or under the terms of the McLeodUSA agreement.

c. Commission Review and Conclusion

3218. This issue, in our view, has effectively resolved itself in the course of the arguments on brief. AI indicates that the issue first surfaced in the McLeod interconnection agreement arbitration and was ultimately resolved in favor of the CLEC. According to AI, any CLEC that desires to opt into the provision for power cabling in the Mcleod agreement may do so. We will hold Ameritech to its promise.

G. Phase I Compliance Issues Under The Public Interest.

1. SBC Illinois' Position.

3219. The Commission's Phase I Interim Order required SBC Illinois to post and update an All Equipment List ("AEL") that identifies safety-compliant equipment installed in its central offices in Illinois. SBC Illinois stated that it had posted a new list of safety-compliant equipment on its website on February 28, 2003, which is now labeled the Illinois Safety Compliant Equipment List ("ISCEL"). According to SBC Illinois, this modified list is limited to equipment that is installed in its Illinois central offices, as required by the Phase I Interim Order. SBC Illinois noted that this list also includes CLEC-owned collocation equipment, both in Illinois and in the rest of SBC's 13-state region, because the databases that contain information about CLEC collocated equipment did not permit SBC Illinois to separately identify Illinois-specific CLEC-collocated equipment. SBC Illinois further noted that this 13-state approach served to protect any CLECs that consider their equipment deployment decisions on a state-specific basis to be proprietary. SBC Illinois stated that it deems all of the listed CLEC equipment as safety

compliant for Illinois. (SBC Ex. 3.1 (Alexander Rebuttal) ¶ 19). Staff stated that SBC Illinois' actions in this regard complied with the Commission's Phase I Interim Order. (Staff Ex. 47.0 (Omoniyi Rebuttal) ¶ 10).

2. Staff's Position.

3220. In paragraph 1760 of the Phase I Interim Order the Commission required SBCI to update its "All Equipment List" in compliance with the Order in Docket 99-0615. The Commission also determined that

> [t]o bring the Company into compliance with our Order, we can and do require AI to post and update as needed, a list that includes all equipment that meets its safety standards in Illinois.
>
> Phase I Interim Order, ¶1776

3221. Additionally, the Commission noted that nothing in the 99-0615 Order precludes the Company from posting more than just Illinois specific information in the AEL. In doing so, however, SBCI must, in some fashion, mark off, code or otherwise note the items in such a way as to give effect to our Order. And it must update the information, as our Order requires. Id. ¶1778. Also, it is required to update the list either on a quarterly basis or immediately upon the addition of new equipment that can be collocated.

3222. On February 28, 2003, SBC Illinois took a number of steps to ensure compliance by posting a list that includes all equipment that meets the Company's safety standards in Illinois.[401] First, the new list posted by SBC Illinois is now labeled the Illinois Safety Compliant Equipment List (ISCEL). Second, SBC Illinois now affirms that the "modified list is limited to equipment that is installed in its Illinois central offices, as required by the Phase I Interim Order."[402] SBC Illinois also asserts that the new ISCEL "includes CLEC-owned collocation equipment, both in Illinois and in the rest of SBC's 13-state region."[403] SBC Illinois explains that "the databases that contain information about CLEC collocated equipment do not permit SBC Illinois to separately identify Illinois-specific CLEC-collocated equipment from the equipment collocated only in other states."[404] However, SBC Illinois asserted "for collocation purposes, it deems all of the listed CLEC equipment as safety compliant for Illinois."[405] Finally, SBC Illinois stated "this 13-state approach, with regards to the CLEC-equipment, serves to

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[401] Schedule 47.03, SBC's Illinois Safety Compliant Equipment List of February 28, 2003.

[402] Phase 1 Compliance Rebuttal Affidavit of Scott J. Alexander on behalf of SBC Illinois, para. 19.

[403] Id.

[404] Id.

[405] Id.

protect any CLECs that consider their equipment deployment decisions on a state-specific basis to be proprietary."[406]

3223. Based on steps taken by SBC Illinois to create the Illinois Safety Compliant Equipment List (ISCEL), an all safety-compliant equipment list, in accordance with the recently clarified requirements to post on its website a safety-compliant equipment, it is Staff's position that SBC Illinois has complied with the Phase 1 Order. This new list should allow CLECs to discern the types of safety-compliant equipment they can collocate in SBCI's premises. SBCI must, however, continue to update the list as required in the Commission's Orders in 99-0615 and in Phase I of this docket.

3. Commission Analysis And Conclusion

3224. In our Phase I Interim Order, we directed SBC Illinois to post on its website a safety-compliant all-equipment list, setting forth with specificity the equipment that CLECs will be permitted to collocate in SBC Illinois facilities. We agree with Staff that based on steps taken by SBC Illinois to create the Illinois Safety Compliant Equipment List (ISCEL) SBC Illinois has complied with the Phase 1 Order. However, as Staff's recommends, SBCI must continue to update the list as required in the Commission's Orders in 99-0615 and in Phase I of this docket.

4. Commission Review and Conclusion

3225. The Commission is of the opinion that SBC Illinois has complied with the Phase I Interim Order with regard to the AEL issue.

H. THE SECTION 271 PERFORMANCE ASSURANCE PLAN

1. Standard of Review.

3226. The FCC recognizes the public interest analysis to be an element independent of the statutory checklist that, thus, requires a stand-alone determination. In making its public interest analysis, the FCC might well consider whether it has sufficient assurance that markets will remain open after a grant of the pending BOC application. See New Jersey 271 Order, Appendix C.

3227. While there is no requirement that a BOC be subject to a post-entry performance assurance mechanism in order to gain Section 271 approval, the FCC has previously found that "the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations." Calif. 271 Order at para. 160. To this end, the FCC has identified five specific criteria as the important characteristics of an effective performance assurance plan, to wit:

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[406] Id.

(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; and,

(5) Reasonable assurances that the reported data is accurate. New York 271 Order, ¶ 433.

2. The State Perspective.

3228. In its final Order for Docket 98-0555, the Commission required SBC Illinois to implement a remedy plan (the "Texas" plan) pursuant to Condition 30 of the Commission's approval of the SBC/Ameritech merger. See Ehr Initial Affidavit; Attachment X.

3229. Pursuant to this same merger condition, SBC Illinois, Staff and interested CLECs engaged in a collaborative process to address potential changes to the Texas plan. The participants agreed to modifications of the performance measurements and standards, but were unable to reach agreement with respect to the performance remedy plan. The agreed-to performance measurements and associated business rules, along with the performance remedy plan, became effective September 12, 2000. The performance remedy plan became the subject of a separate proceeding, i.e., Docket 01-0120.

3230. On July 10, 2002, the Illinois Commission issued an order in Docket 01-0120. This order directed SBC Illinois to implement a modified plan ("0120 Plan") that retained the structure and many elements of the original Texas plan, but was also modified in several respects. See Ehr Initial Affidavit, Attach. Y. The Commission's orders in Docket 01-0120 are now pending on appeal.

3231. In its December 30, 2002 Order for Dockets 98-0252 et al., the Commission stated that the 0120 Plan would remain in effect until a wholesale service quality plan is approved for purposes of section 271. Alt Reg Order at 190, Docket 98-0252.

So too, in its Initiating Order for this docket, the Commission made clear that:

> 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 4, Docket 01-0662.

3232. At issue here and now, is the plan SBC-Illinois proposes going forward and in support of its Section 271 application. It has been commonly referred to as the 'Compromise Plan." SBC Illinois seeks to have this Commission review, test, and approve the Compromise Plan for its effectiveness under section 271. There is also on the table a proposal by Staff that it has titled as the "Hybrid Plan." See, Patrick, Staff Affidavit 39.01. So too, some of the parties, including Staff, contend that the Commission should adopt the Docket 01-0120 plan for present purposes.

3. The Evidence, Arguments, and Positions.

a. SBC Illinois Position

The Proposed "Compromise Plan."

3233. 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: 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.

3234. Further, SBC Illinois asserts that several differences from the 0120 Plan make the Compromise Plan even more "pro-CLEC." For example, one provision allows the participating CLEC to institute a "gap closure" process on measures that show shortfalls over three consecutive months. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶ 347.) In addition, the Compromise Plan contains a more stringent "step-down" provision, under which remedies escalate on a measure that shows shortfalls in consecutive months (as in the 0120 Plan). But these do not return to the normal amount until performance has shown improvement for consecutive months (in contrast to the 0120 Plan, which returns remedies to normal after the first month of compliant performance). (Id. ¶¶ 345-346.)

3235. According to SBC Illinois, the other principal difference from the 0120 Plan lies in the "base amounts" that are to be assessed on each substandard occurrence. While the 0120 Plan assesses payments at the same amount regardless of overall performance, the Compromise Plan "indexes" individual payment amounts based on overall performance. (Id. ¶¶ 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.)

3236. SBC Illinois also presented a comparative analysis of payments "pro forma" for September-November 2002 results and as would be treated under: (i) plans found sufficient by the FCC using the SWBT Texas plan as a baseline, (ii) the Compromise Plan, and (iii) the 0120 Plan.

	% of Remedied Standards Met (Aggregate of All CLECs)	"Texas" Plan	0120 Plan	Compromise Plan	Updated Compromise Plan[407]
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**
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**

[407] Corrected to reflect adjustments to "floors and ceilings" computation in subsequent testimony.

September-November 2002 Total	**93.4%**	**$983,125**	**$9,172,300**	**$3,752,365**	**$3,668,860**

3237. This analysis SBC Illinois contends, shows that the Compromise Plan would assess remedies of approximately $1.2 million in each month, or approximately four times the amount that has been found sufficient by the FCC. The current 0120 Plan, however, would require payments of over $3 million each month – over $36 million per year. Given the high level of performance achieved, SBC Illinois contends that payments under the 0120 Plan are punitive.

3238. SBC Illinois states that the latest performance data in the record of Docket 01-0120 came from December 2000, and that the Commission's decision in that case did not consider improvements in performance since then. In SBC Illinois' view, the modifications proposed in the Compromise Plan are designed to provide greater positive incentives to encourage and maintain good performance, rather than focusing only on the penalties for punishing performance shortfalls. (SBC Ex. 2.0 (1/17/03 Ehr Aff.) ¶¶ 312-314, 359.)

b. AT&T Position

3239. AT&T presented one witness on the remedy plan issue. AT&T Witness Dr. Michael Kalb testified that SBC Illinois' proposal to replace the assurance plan adopted last year in Docket 01-0120 ("01-0120 Plan") with its "Compromise" Plan is inconsistent with the Commission's performance assurance initiatives. Dr. Kalb pointed out that SBC's "Compromise" Plan is a complete rewriting of the Commission Plan, and it includes many features already specifically rejected by the Commission in Docket 01-0120. AT&T Ex. 2.0, at 3.

3240. According to Dr. Kalb, illustrative of the many anti-competitive features contained in SBC's "Compromise" proposal is the fact that the CLECs that purportedly "negotiated" the plan do not even use it, and instead are covered by the Commission Plan. Indeed, according to Dr.Kalb, no CLEC in Illinois even uses the "Compromise" Plan. This, according to Dr. Kalb, speaks volumes on the merits of this proposal.

3241. Relying upon an SBC-prepared redline comparison of the Commission Plan with the "Compromise" proposal, Dr. Kalb noted that the SBC "Compromise" Plan contains many provisions that were already specifically rejected by the Commission in Docket 01-0120. Specifically, he offers the following list:

- The Compromise Plan is a "voluntary" plan. In Docket 01-0120 the Commission rejected Ameritech's attempt to make the permanent remedy plan "voluntary", since this would strip the Commission of ultimate control over changes to the plan. The Compromise Plan allows SBC Illinois to veto changes it does not

like, in direct conflict with the Commission's Orders in ICC Docket 01-0120.[408]

- Remedy payments are called "liquidated damages". In Docket 01-0120 the Commission rejected SBC Illinois's attempt to characterize remedy payments as "liquidated damages".[409]

- The "Compromise" Plan grants SBC veto power over the auditor used for periodic audits of the performance and accuracy of the plan, whereas the Commission Remedy Plan rejected this one-sided approach, instead allowing joint selection of the auditor, with the Commission adjudicating any disputes.[410]

- As a way to increase the need for litigation, reduce self-effectuation, and limit its payments to the CLECs and the State of Illinois for poor service, SBC Illinois has changed the monthly cap on remedies from 1/6 to 1/12 of the annual cap. The Commission expressly rejected this proposal in Docket 01-0120,[411] since it encourages SBC to target specific months for offering poor service (for example, during a CLEC promotion period) as a way to harm competition.

- The "Compromise" Plan eliminates the ranking of performance measurements for purposes of assessing remedies. The 0120 ranks performance measures as "low", "medium" and "high". The Commission rejected the CLEC and Staff proposal to eliminate these rankings in Docket 01-0120.[412]

- The "Compromise" Plan's mini audit process is virtually the same as what SBC Illinois proposed in Docket 01-0120. The Commission expressly rejected SBC Illinois' proposed process that, among other things, attempted to foist payment responsibility on the CLEC unless (and until) there is a later finding of misfeasance.[413]

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[408] *See,* Tr. p. 3559

[409] *Id.,* p. 3558.

[410] *Compare* §6.4.1 of the Commission Plan with §6.6 of the "Compromise" Plan.

[411] July 10, 2002 Order, Docket 01-0120, p. 42.

[412] July 10, 2002 Order, Docket 01-0120, pp. 45-47.

[413] July 10, 2002 Order, Docket 01-0120, pp. 12-16. *Compare* §6.4.2 of the Commission Plan with §6.5 of the "Compromise" Plan.

- The Compromise Plan proposes the use of floors and ceilings for remedy payments. In Docket 01-0120 the CLECs and Staff proposed "parity with a floor", which is a similar concept, but, the Commission rejected this proposal.[414]

- The Compromise Plan proposes that the default process for remedy assessment be via bill credit. The Commission rejected SBC's similar proposal in Docket 01-0120, and ruled that payment by check shall be the preferred way unless the CLEC opts for a bill credit.[415]

- The "Compromise" Plan contains exclusions on liability rejected by the Commission in Docket 01-0120.[416]

- The "Compromise" Plan seeks to impose draconian exclusions for selected CLEC actions and allows SBC the unfettered ability to withhold payments. The Commission in Docket 01-0120 rejected a similar exclusion proposal.[417]

- The "Compromise" Plan eliminates the doubling of remedy payments required in Docket 01-0120, and lowers per occurrence and cap/measure amounts to token levels.[418]

- While it retains the Commission's elimination of the "k table" exclusion on remedy payments in the 01-0120, the "Compromise" Plan inserts an indexing scheme to limit remedy payments to individual CLECs and the State of Illinois according to SBC Illinois' overall performance. In essence, this Index Plan decelerates remedies in a manner similar to the former Texas Plan "k table" exclusion.

AT&T Ex. 2.0, pp. 7-10.

3242. By proposing a plan that contains these proposed radical revisions, Dr. Kalb believes that SBC Illinois is seeking to re-litigate the nuances as well as the broad provisions of the 01-0120 Plan. AT&T Ex. 2.0, at 10.

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[414] July 10, 2002 Order, Docket 01-0120, pp. 27-30.

[415] *Id.,* pp. 47-49.

[416] *See,* Section 7.1 of the redlined version of the "Compromise" Plan attached to Dr. Kalb's Affidavit, AT&T Exhibit No. 2.

[417] July 10, 2002 Order, Docket 01-0120, pp. 49-52.

[418] *Id.,* pp. 34-38.

3243. Using SBC-provided remedy payment information, Dr. Kalb showed that the Commission Plan (01-0120 Plan) is clearly working today. He cited SBC's self-reported performance data, and noted that SBC Illinois has been paying month-to-month less in remedies since the 01-0120 plan went into effect. He concluded that the goals of 01-0120 are being met to provide an incentive for SBC Illinois to improve its wholesale services to CLECs. AT&T Ex. 2.0, at 10.

3244. Dr. Kalb contends that SBC has three reasons for offering the "Compromise" Plan. The first is SBC's desire to reduce its Illinois remedy payments to such a low level as to constitute a mere cost of doing business. This, Dr. Kalb contended, gives SBC a green light, once it has 271 authorization, to degrade its wholesale service quality to very low levels with little risk of paying substantial remedies. The second reason is SBC's desire to strip the Commission of enforcement authority over the remedy plan by making the plan "voluntary." Providing specific evidence from Texas (where a "voluntary" plan is in place) of SBC's refusal to "consent" to Texas PUC-ordered changes, Dr. Kalb testified that the Commission was correct in Docket 01-0120 in ordering a remedy plan that was not "voluntary". Dr. Kalb presented SBC's third motivation for offering the "Compromise" plan: to reverse the Commission's decision calling payments "remedies" and to reinsert the former Texas Plan characterization of them as "liquidated damages." Dr. Kalb testified that SBC's obvious desire to ensure that its remedy plan payments cannot be used against It in any other forum was the reason for this change. Dr. Kalb concluded that SBC's motives in offering the "Compromise" Plan are improper and ultimately adversely affect CLECs, the Commission (who will lose control over the remedy plan process if the "Compromise" Plan is adopted), the State of Illinois (and its desire to support local competition), and Illinois consumers. AT&T Ex. 2.0, at 11-14.

3245. In addition to the provisions offered in the "Compromise" Plan that were already rejected by the Commission in 01-0120, Dr. Kalb highlighted a number of what he characterized as "fatal flaws" in the SBC "Compromise" Plan that would operate to limit remedies and would effectively strip the Commission of control and oversight of SBC's remedy plan. In his sequential analysis of the provisions of the "Compromise" Plan, Dr. Kalb instructed that several sections contain language that is unclear, convoluted, contradictory, vague, meaningless and/or confusing. Dr. Kalb provided many examples of "Compromise" Plan language, including language in Sections 2.0, 4.0, 4.4.1, 5.4, 5.6, 6.1, 6.3, 6.5, 7.1, 7.2, 7.3, 7.4, 7.6, 8.2, Tables 1 & 2, 8.4, 8.5, 8.6, 8.7 and 8.8 to illustrate his conclusions that the "Compromise" Plan is an open attempt by SBC to relitigate virtually all of the issues decided in 01-0120, to strip the Commission of authority, and to reduce remedy payments while allowing potential service degradation post 271. Dr. Kalb cautioned that the "Compromise" Plan is ineffective and cannot be implemented in a clear, efficient and administratively simple manner, and emphasized that the Commission Plan, which is already in place and is clearly working, should not be replaced by SBC's "Compromise" Plan. AT&T Ex. 2.0, at 14-23.

3246. In further support of his position that the 0120 Plan should not be replaced by SBC's "Compromise" Plan, Dr. Kalb explained that the 0120 Plan meets the FCC requirements for an effective remedy plan, while SBC's "Compromise" Plan does not even come close. Dr. Kalb explained how the 0120 Plan meets the FCC criteria in that its remedies are significant enough to provide appropriate incentives to SBC to meet its regulatory obligations to afford nondiscriminatory access to services and facilities. He also noted that the FCC requires that

remedy payments pursuant to such plans must be self-executing, emphasizing that the 0120 Plan meets this requirement, while SBC's "Compromise" Plan does not. Dr. Kalb articulated the FCC's goal to have remedies escalate and accelerate according to the duration and magnitude of poor performance and complemented the 0120 Plan on providing a fair framework to accomplish this goal. He highlighted how the Commission plan meets the FCC requirements that a remedy plan be simple to implement and be based on an appropriate set of measures, and showed how the SBC "Compromise" Plan would unilaterally allow SBC to create new (and generally lower) standards of performance than the approved performance measures. This occurs for two reasons. First, by inserting new exclusions on remedies, such as its "indexing" proposal, SBC creates a new (and lower) standard of performance. Second, while the Commission Plan is "appropriately disaggregated" as the FCC intended, the SBC "Compromise" Plan with its dependence on overall performance is not.

3247. Dr. Kalb also pointed out that SBC's audit proposal improperly gives SBC "veto power" over the selection of an auditor, whereas the Commission Plan confers final decision-making authority upon the Commission. Dr. Kalb noted the removal, under the "Compromise" Plan, of language included by the Commission in its plan describing the use of a "bright line" methodology for performance benchmarks. Dr. Kalb also contrasted the streamlined approach taken by the Commission in the 0120 Plan to the complicated and unworkable methodology proposed in the SBC "Compromise" Plan. Dr. Kalb concluded that the Commission Plan meets all of the necessary requirements delineated by the FCC for a Section 271 remedy plan, a standard that the SBC "Compromise" Plan fails.

3248. Dr. Kalb maintains that there is no need for a change now, and calls for the Commission to stay with the 0120 Plan, which is working well, leading to an improvement in wholesale service quality and actually reducing remedy payments.

3249.

3250. CIMCO/Forte's Position

3251. According to CIMCO/Forte, the remedy plan must assure that SBC will not backslide if the ICC provides a positive recommendation to the FCC.

3252. In the view of these CLEC's the Commission should not even be considering changes to the 01-0120 Remedy Plan. That plan was adopted last year after considerable effort on behalf of the Commission, SBC and interested parties. It cannot be discarded pm the basis of little evidence and no time to evaluate that evidence, simply because SBC claims that the 01-0120 plan is more stringent than other Bell Operating Company ("BOC") Section 271 remedy plans. CIMCO & Forte point out that, on the basis of evidence carefully considered in 01-0120, this Commission found that SBC Illinois needed incentives beyond those given by other Commission's to their BOCs. According to these CLECs, SBC has done nothing since then to show that it can be trusted to behave properly without strict incentives. The Commission was correct then, and would be correct now, if it informs SBC that Section 271 approval will be withheld unless it commits to the Docket 01-0120 remedy plan.

3253. Staff witness Ms. Patrick concluded that the "performance remedy plan offered by SBCI in this present proceeding would not sufficiently prevent backsliding in a post-271 approval environment." Ms. Patrick further recommended that the Commission condition any positive 271 recommendation on SBC's agreement to proceed with the 01-0120 Remedy Plan. Staff's conclusion was further supported by the initial remedy plan affidavits of Forte[419] and CIMCO[420].

3254. CIMCO and Forte observe that the Compromise remedy plan is significantly different from the 01-0120 remedy plan and they identify these differences:

- SBC has cut base payments by one half;
- SBC has eliminated priority levels, which may not be objectionable in itself, but unfortunately, the level of payment for all types of events and the per measure caps have been set at levels at the low end of the former payment scales, thus further minimizing the base payments;
- The "index value" component of the formula, which rewards SBC for improving overall performance, further lowers payments for individual events and for the overall cap;
- The "ceiling" festive in the plan eliminates payments where SBC's performance serving CLEC is below its performance for its own customers and affiliates if the performance exceeds an arbitrary level.

Forte and CIMCO further demonstrated that SBC's "compromise" plan would not be sufficient to compensate CLECs for poor SBC performance and would in fact encourage backsliding rather than prevent it. According to these CLECs, one of the purposes of a liquidated damages provision in a contract is to avoid the time and expense of litigating the amount of losses one party suffers when the other breaches a contract, particularly when such damages are often difficult to calculate in a precise manner. In their views, the remedy plan should offset costs CLECs incur when SBC fails to deliver the level of service to which they have previously agreed. Those costs include the salaries and benefits of personnel that must resubmit orders, follow-up with SBC on orders, track and report problems internally and to SBC, communicate with our customers on delays or generally spend time that would not have been spent if SBC had met its performance obligations. The base amounts ordered by the 01-0120 remedy plan only partially mitigate CIMCO's and Forte's costs incurred from SBC's failures. It is therefore clear, these CLEC's conclude, that the 01-0120 remedy plan base amounts should not be reduced by one-half.

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[419] Forte 1.1.

[420] CIMCO 1.1.

c. WorldCom's Position

3255. WorldCom witness Karen Kinard submitted affidavits asserting that the Commission should adopt the 01-0120 remedy plan for section 271 purposes. She contends that SBC Illinois' proposed "compromise plan" is deficient and should be rejected. WorldCom claims that SBC's proposal fails by any reasonable measure to provide a self-effectuating performance assurance plan that will ensure SBC continues to comply with the checklist and provide a minimally acceptable level of wholesale service once it is granted section 271 authority in Illinois.

3256. WorldCom notes that the Illinois Commission adopted what it believed to be an appropriate remedy plan in Docket 01-0120 after a lengthy proceeding in which SBC, CLECs, and Commission Staff had a full and fair opportunity to make their case. WorldCom contends that SBC has offered nothing in Phase II of this proceeding which would warrant the Commission adopting a different remedy plan here.

3257. Accordingly, WorldCom witness Ms. Kinard urges the Commission to require as a precondition to a positive section 271 recommendation that SBC continue to make the 01-0120 plan available and to drop all appeals of that plan. In addition, WorldCom concurs with Staff's recommendation that the 01-0120 plan should be made a part of SBC Illinois Alternative Regulation Plan.

<u>The 01-0120 Plan Was Fully Vetted And Should Not Be Tossed Aside.</u>

3258. According to WorldCom, SBC has made clear that it will not agree to abide by whatever remedy plan the Commission deems to be consistent with Section 271 of TA96. In other words, contends WorldCom, SBC will not agree to be bound by a remedy plan unless it happens to be the remedy plan that SBC endorses. If SBC's theory on the voluntary nature of its remedy plan is correct, which WorldCom submits it is not, then the Commission should question why its Staff and parties are being required to dedicate scarce resources to discuss what remedy plan is appropriate if SBC will not commit to be bound by that plan. In short, SBC Illinois apparently views any determinations that the Commission may render on the remedy plan as "suggestions" that SBC may or may not decide to implement. The Commission, WorldCom disabuse SBC Illinois of that notion.

3259. To this end, WorldCom witness Ms. Kinard urges the Commission to condition its endorsement of SBC Illinois' 271 application on SBC Illinois' withdrawal of its appeals of the 01-0120 plan. WorldCom points out that such a move is not unprecedented. To ensure that Verizon would not replace a state-ordered, self-effectuating remedy plan decisions with a "voluntary" plan with remedies that merely amount to a cost of doing business after 271 approval, the Pennsylvania Public Utility Commission did, as WorldCom proposes here, condition its 271 approval on several conditions, including Verizon's withdrawal of legal challenges to the PUC's authority to impose such a remedy plan. See Pennsylvania Public Utility Commission's June 6, 2001, consultative letter in Docket M-00001435 from its Secretary

James J. McNulty to Verizon Vice President and Counsel Julie A. Conover. See pages 3-4. Verizon sent a letter on June 7, 2001, agreeing to withdraw the appeal.

3260. WorldCom witness Karen Kinard stated her belief that all ILECs, like SBC Illinois, would only agree to a plan that has penalties they could tolerate as a cost of doing business.421 Such remedies would not be sufficient to outweigh the competitive benefits to the ILEC of letting inferior service quality for the CLEC continue, nor would such self-designed enforcement make the cost of actually investing the capital and human resources to fix the problem the best economic choice for the ILEC. Without regulatory requirements, an ILEC would not, and SBC Illinois has not here in this proceeding, proposed a strong enough self-executing enforcement plan to ensure that it treats its wholesale customers in a non-discriminatory manner. Enforcement mechanisms are rarely stiff enough if designed by those most likely to be subject to them. WorldCom witness Ms. Kinard analogized SBC's compromise plan to children sent to find switches for their own spankings returning with twigs.422

3261. Ms. Kinard pointed to decisions of the FCC, which indicated that it is a state's continuing oversight and finetuning of wholesale performance assurance plans that cinch the deal for 271 approvals rather than a specific type of plan being submitted. In approving BellSouth Corp.'s 271 applications for Florida and Tennessee, the FCC said:

> In addition, we note that both the Florida Commission and the Tennessee Authority have the ability to modify BellSouth's SEEMs [Self-Effectuating Enforcement Mechanisms]. We anticipate that the parties will continue to build on their own work and the work of other states to ensure that such measures and remedies to accurately reflect actual commercial performance in the local marketplace.[423]

3262. Many of the FCC's 271 approvals emphasize the same theme of active state and open CLEC involvement in designing an effective remedy plan, and an expectation that the state regulators would continue to monitor the plans of differing "strengths and weaknesses" that have accompanied 271 applications.

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[421] Kinard Dir. Aff., WorldCom Ex. 7.0, ¶ 13.

[422] *Id.*

[423] *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, WC Docket 02 – 307, issued December 19, 2002, Page 92, ¶ 170.

> Like the New York Commission, whose section 271 verification we also accorded substantial weight, the Texas Commission directed a lengthy, rigorous and open collaborative process with active participation by Commission staff and competitive LECs. The Texas Commission also developed a comprehensive performance measurement and remedy plan, which it continues to monitor and refine.[424]

3263. According to Ms. Kinard, in the course of several six-month reviews, the Texas PUC has taken action not only to modify the metrics used to monitor SBC-Southwestern Bell's performance since 271 approval but also to strengthen the remedy plan.

3264. WorldCom contends that, despite SBC Illinois performance measurements witness James Ehr's claims that the ICC could step in and take action (Tr. at 3574.) if it found the so-called compromise plan inadequate and in need of fine-tuning, the Commission could only make changes to the plan with SBC Illinois' approval. Otherwise, the ICC would face the same legal challenge of its authority to impose wholesale remedies as SBC Illinois already is pursuing to thwart the 01-0120 plan's most effective elements.

3265. WorldCom agrees with the Pennsylvania PUC that absent withdrawal of pending court challenges of the state commission's legal authority to impose remedies, "no PAP can be considered adequate and permanent so as to prevent backsliding."

3266. In addition, as Ms. Kinard observed, SBC witness Mr. Ehr's response to WorldCom's data request on the Illinois Commission's requirements of remedies to ensure that SBC Illinois serves its own retail customers adequately. The responses indicated that SBC Illinois was ordered to pay a $30 million remedy (as credit to customers) as incentive to improve on poor year 2000 performance in one metric area--customers who were out of service (OOS) > 24 hours. On harms done to CLECs in multiple metric areas (SBC Illinois did not provide the number of metrics missed as requested), SBC Illinois says it paid only $12.5 million in remedies for January to November 2002. (WorldCom is concerned that although the question sought a projection of the "compromise" plan that SBC Illinois instead used remedies actually paid under the original merger plan and existing plans in use.) The Illinois Commission clearly realizes that it takes a large remedy (and SBC Illinois unlikely voluntarily agreed to the level) to motivate SBC Illinois to fix one retail problem area.

3267. Ms. Kinard posited that larger amounts are arguably needed to motivate SBC Illinois to fix multiple problem areas causing inefficiencies that burden and discrimination that hinder CLECs trying to compete in the local market. In fact, one might suggest that the remedies to motivate SBC Illinois to treat its competitors fairly may need to have even more of a bite than those focused on improving treatment of its own customers so they do not move to competitors services. The 01-0120 plan of all the SBC Illinois remedy plan options, including the untried

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[424] *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company,And Southwestern Bell Communications Services, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, Order, CC Docket 00-65, issued June 30, 2000, at paragraph 11.

"compromise" plan, is the only one that appears to have adequate remedies to motivate performance improvements.

3268. According to WorldCom, notwithstanding SBC's legal challenges to the Commission's authority to require SBC to abide by a particular remedy plan, the Commission need not worry about its authority to do so if it requires SBC to commit to abide by the 01-0120 remedy plan as a pre-condition to the ICC providing a positive recommendation to the FCC with respect to SBC Illinois' 271 application. WorldCom avers that the ICC can take the approach the Colorado Public Utilities Commission did in its 271 proceeding, which was conducted by a Special Master, an expert independent economist, hired by the PUC to develop a remedy plan for the 271 proceeding. The Special Master determined, and the Colorado PUC agreed that:

> This Order is not compulsory, but rather hortatory. If Qwest implements the CPAP [Colorado PAP] by adopting the attached recommended SGAT [Statement of Generally Accepted Terms] language -- and assuming all other conditions have been met -- I will recommend to this Commission that it recommend to the FCC that Qwest's entry into the long distance market is consistent with the public interest requirement of 42 U.S.C. § 271(d)(2)(B). On the other hand, if Qwest declines to adopt this version of the CPAP, I will advise this Commission to withhold a recommendation of § 271 compliance.[425]

3269. WorldCom witness Kinard argues that no reasonable claim can be made that the compromise plan advocated by SBC Illinois in this proceeding did not stem from the rigorous kind of proceeding, including active CLEC and Commission staff input, praised by the FCC in its past 271 orders. Ms. Kinard points to the fact that the compromise agreement was negotiated on the side with only either one or two CLECs -- TDS Metrocom and Time Warner Telecom, noting that neither of these CLECs have signed onto the plan they negotiated in Illinois. Those carriers instead have opted for the 01-0120 plan, since SBC Illinois was not successful in getting it stayed pending the outcome of its legal challenge.

3270. WorldCom witness Kinard states that those CLECs have filed the plan in interconnection agreement amendments in other states, where SBC Illinois has either prevailed in attacking a state commission ordered plan through legal challenges (Wisconsin) or where SBC Illinois is currently seeking a stay of and challenging state commission ordered remedy plans (Indiana). WorldCom notes that none of these states have approved SBC Illinois' compromise plan for Section 271 purposes.

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[425] *In the Matter of the Investigation into Alternative Approaches for a Qwest Corporation Performance Assurance Plan in Colorado*, Colorado PUC Order, Decision No. R01-997-I in Docket 01I-041T, issued September 26, 2001, Paragraph 13, Page 14. Qwest agreed to file a SGAT including the remedy plan language developed by the Special Master and ordered by the PUC.

3271. In an order approving TDS's interconnection agreement amendment, the Wisconsin PSC said:

> The Commission construes the Agreement between AW [Ameritech Wisconsin] and TDS Metrocom as based solely on the needs and interests of these parties. Any other CLEC may negotiate with Ameritech for a different or better remedy plan, subject to § 252 arbitration in the event of impasse. This Commission order does not constitute a Commission adoption of any substantive term or provision of the Agreement as a policy of the Commission applicable generally to other telecommunications providers or specifically to providers seeking interconnection with AW.
>
> Furthermore, nothing herein should be construed to mean that the Commission finds the Agreement sufficient for 47 U.S.C. § 271 approval purposes. That decision will be made by the Commission in docket 6720-TI-170 at the appropriate time. Moreover, approval of the Agreement does not in any way waive the Commission's right to pursue appeals of court decisions on the remedy plan ordered in docket 6720-TI-160, or to order a different statewide remedy plan. Should the Commission prevail in court or order a different statewide remedy plan, approval of the Agreement does not preclude TDS Metrocom from exercising the change in law provisions of its interconnection agreement to pursue presumably better terms and conditions. [426]

3272. The Indiana Regulatory Utility Commission, WorldCom contends, expressed even stronger objections to the plan's intended role beyond its inclusion in Time Warner's interconnection agreement with SBC in its Discussion and Findings:

> Although we find that the proposed Amendment should be approved, as detailed below, there are some concerns to be addressed regarding the issues raised by the commenting CLECs. At the time of the CLEC filing in this Cause, Ameritech Indiana's petition for reconsideration and motion for a stay were pending. Ameritech did request the Commission to vacate the remedy plan order and chose either the Texas plan, which had already been rejected by this Commission, or the Time Warner/Ameritech proposed amendment. The Commission declined Ameritech's offers. It appears that Ameritech was attempting to persuade this Commission to impose a privately negotiated amendment on all CLECs. Notwithstanding Ameritech's assurances to the contrary, we are concerned that Ameritech may seek to impose the terms of this Time Warner amendment on its competitors in subsequent

[426] Docket 05-TI-712 Wisconsin PSC order issued January 6, 2003, regarding the Application for Approval of the First Amendment to the Interconnection Agreement Between TDS Metrocom, LLC, and Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin), at page 2.

> proceedings. However, we emphasize our statement in the December 19, 2002, Order on Stay and Reconsideration in Cause No. 41657 that Section 252(i) and 47 CFR 53.809 do not compel a CLEC to adopt pre-existing agreements.[427]
>
> Therefore, we specifically find that approval of the proposed Amendment in this Cause should have no precedential effect in Cause No. 41657. That is, Ameritech Indiana cannot take the position that our approval of this Amendment is acquiescence that a remedy plan is in place in Indiana for purposes of meeting its Section 271 obligations. In fact, we specifically find that the remedy plan as agreed to by Time Warner is inadequate to meet our guidelines or address our concerns set forth in that Cause.[428]

3273. WorldCom's Ms. Kinard submits that the Illinois Commission should not throw away its hard work on a sufficient remedy plan for the meager substitution that the compromise plan represents. The process and the outcome both embody the state regulatory oversight and CLEC involvement in developing and monitoring such plans that the FCC has endorsed in approving the wide variety of 271 remedy plans that have been filed thus far. WorldCom urges the Commission to join Indiana and Wisconsin in seeing through the sham nature of the compromise plan. In Docket 01-0120, the Commission gave SBC Illinois, CLECs and Staff a full and fair hearing. Neither SBC nor CLECs received all they desired as a result of that proceeding. The 01-0120 plan is truly a well considered remedy plan, unlike the side-deal cut between SBC Illinois and two small CLECs who were tired of waiting for SBC Illinois' litigation and delay tactics to end in the three states that attempted to improve on the original Texas plan. As Ms. Kinard notes, tellingly, those two small LECs negotiated the compromise plan but have not even elected it for their remedy plan in Illinois opting instead for the 01-0120 plan.

<u>The Docket 01-0120 Order Is Consistent With FCC Requirements.</u>

3274. WorldCom witness Ms. Kinard contends that the Commission's 01-0120 plan decidedly embodies more of the FCC's five requirements of an effective remedy plan than does the plan SBC Illinois is promoting here.

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[427] Cause No. 41657, Order on Stay and Reconsideration, issued December 19, 2002, paragraph 4 at p. 8.

[428] Cause No. 40572-INB162: Indiana Regulatory Utility Commission order, page 3, issued January 17, 2003, in Submission of Indiana Bell Telephone Company, Inc. d/b/a Ameritech Indiana for commission recognition of an amendment to an interconnection agreement arrived at through voluntary negotiations with Time Warner Telecom of Indiana.

3275. According to Ms. Kinard, the 01-0120 plan better targets remedies to the problem areas, without burdening the CLEC with escalations and dispute resolution filings to gain remedies and eventual correction of CLEC specific, metric specific performance disparities virtually ignored by SBC Illinois' substitute plan's indexing methods.

3276. Ms. Kinard avers that the third bullet point of the FCC's requirements is the weakest link for the SBC Illinois Compromise plan; it does not detect and sanction poor performance when it occurs. It only raises remedies based on statewide, aggregated results for all performance measures for which there was activity, rather than on a CLEC-by-CLEC basis, where the magnitude by which Ameritech fails to comply with any particular performance measure is taken into account when determining remedy payments. The 01-0120 remedy plan, however, does account for the harm to the individual CLEC and the magnitude of SBC Illinois' failure in terms of higher remedies for each occurrence of activity affected by the inferior process.

3277. WorldCom's Ms. Kinard observes that remedies under the SBC Illinois compromise plan do not increase with the magnitude of the performance miss, but only with the percentage of metrics missed. By focusing on the percentage of CLEC aggregate misses, Ms. Kinard complains that the plan can result in remedy payments that do not address the impact of poorer service to the individual CLEC. The result is that Ameritech can meet its aggregate performance standards (or at worst, pay penalties only at the lowest tier amounts), while simultaneously failing measures critical to a particular CLECs' business needs so miserably that the CLECs' business is irreparably harmed.

3278. In order to illustrate the problem of using aggregate CLEC results to calculate the level of remedies to be paid, Ms. Kinard assumed hypothetically that there are 250 performance measures at issue. Ms. Kinard further assumed that due to the specific focus of an individual CLEC's business, only 50 of these 250 measures are relevant to the particular CLEC. Under the SBC-AIT substitue plan, Ms. Kinard highlighted the fact that SBC Illinois could selectively fail these 50 measures and still only pay the CLEC the lowest level of remedies because the payment is based on overall, statewide, aggregate results. In other words, noted Ms. Kinard, SBC Illinois could selectively disadvantage individual competitors by failing the measures most key to those competitors' business, and still make minimal payments under the statewide, aggregated measurement of its performance. Conversely, under the remedy plan endorsed by the Commission, SBC Illinois' ability to meet or exceed the parity or benchmark of each performance measure is taken into account and countered with an attention-getting remedy amount (even for the low ranked measures in the ICC's low, medium and high ranked structure) and erases the potential for discrimination that exists under the SBC Illinois substitute plan. In addition, the remedies increase based on the reliance of CLECs on the process being measured – i.e., when the measure is failed, per occurrence remedies are paid for the volume of activity affected.

3279. Based on Ms. Kinard's analysis, it is not difficult to understand why the SBC Illinois substitute plan is inherently discriminatory. The plan, in essence, provides an avenue by which to target poor performance to achieve a goal of obtaining maximum competitive advantage coupled with minimal financial repercussions. With little effort, Ms. Kinard contends, SBC Illinois could focus its worst performance on a few measures crucial to a particular CLEC's

ability to function (e.g., those relating to UNE-P provisioning), thereby stifling competition, and still wind up making minimal Tier 1 or Tier 2 payments.

3280. WorldCom declares that, even aside from the real possibility of such calculated conduct, should SBC Illinois' unintentional performance failures fall under only a few measures, but the failure be extremely severe within those impacted measures, competitors who are tremendously reliant upon successful performance in measured areas will be disproportionately impacted by SBC Illinois' performance lapses, with little recourse and with little or no repercussion for SBC Illinois. The Commission's plan, while it did not focus on the magnitude of the performance gap, did capture the impact of an inferior process by focusing much higher per occurrence and per measure remedies on the volume of CLEC activity harmed by that process.

3281. The SBC Illinois substitute plan thus fails the nondiscrimination standard set forth in 47 U.S.C. § 252(e)(2)(A)(i), and the Commission should therefore reject the SBC Illinois proposal as an adequate anti-backsliding enforcement plan for 271 purposes.

3282. When asked about these weaknesses at the Commission's workshop on February 13, 2003, SBC witness Mr. Ehr only could point to parts of the plan that clearly fail the FCC's fourth bullet point that the anti-backsliding plan must be: "A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal."

3283. The plans provisions for a CLEC to pursue additional remedies when 20% or more of its metric activity areas are missed three months in a row is (1) too late a resolution to begin with and (2) likely to mire the CLEC in months of burdensome complaint and dispute resolution efforts. (See Remedy Plan 7.5; see also Tr., pages 3682-3688, 3691-3693). Another provision for pursuing a root cause analysis to address a failed parity or benchmark situation recurring three months in a row also would provide no enforcement of SBC Illinois' timelines for analysis let alone resolution of the problem without months of open ended escalation among higher ranking executives until the CLEC gives up or starts litigating the issue at the Commission. As WorldCom witness Ms. Kinard noted "[t]his clearly is the least self-executing remedy plan, I have ever seen submitted in 252 and 271 performance measure proceedings."429

3284. The first and fifth bullets of the FCC's criteria also are not fully met by the SBC Illinois Compromise plan. It lowers the monthly caps proposed by the 01-0120 order and it sets an additional payment limit at the CLEC's charges due SBC Illinois in the month of performance (Section 7.6). The plan does not take into account that the CLEC can be harmed by loss of continuing monthly revenue from the customer lost through poor SBC Illinois service, nor does it cover damages to the customer's business or reputation if the CLEC is sued for the consequences of this SBC-caused poor service. Although most remedies cover performance issues that increase CLEC costs and resource requirements to begin taking customer orders in the first place or to work around the SBC Illinois caused inefficiencies so it will not impact the customer, some provisioning or maintenance performance problems can cause harm beyond the

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[429] Kinard Dir. Aff., WorldCom Ex. 7.0, ¶ 35.

monthly cost of what the CLEC paid for the service to both the CLEC and the customer. SBC Illinois would probably gladly provide free bad service to the CLEC to drive away future business from that customer and others learning by word of mouth of that customer's experience in converting to a CLEC.

3285. Further, the integrity of the performance data, already highly suspect due to the findings of the BearingPoint and Ernst and Young audits requiring an outrageous number of restatements, is not likely to be adequately reviewed in the future. The SBC Illinois proffered substitute plan largely diminishes CLEC involvement in designing the audit plan. The only control at all on the audit in SBC Illinois' proposal is that it allows the commission to reject auditors SBC Illinois proposes.

3286. In addition, Section 8.11 of the substitute plan would enable SBC Illinois to decide unilaterally to off-set performance remedies due CLECs if the CLEC owes SBC Illinois any undisputed monies. While this might sound reasonable on its face, the New York and Florida Public Service Commissions have rejected similar proposals because of the complications of interpreting what's disputed in the CLEC's and ILEC's view in terms of billing issues and the intricacies of bankruptcy laws as to what is owed and what is deemed by the courts to be off-settable between the bankrupt company and vendors.

3287. In its recent order amending the New York Performance Assurance Plan, the PSC rejected Verizon's proposal for allowing such withholding of performance remedies. The New York PSC struck the proposed language on this issue, save for mentioning that Verizon could pursue commercial dispute resolution processes available to receive any monies due it. The New York PSC opined: "Judging from the comments received, it appears that issues relating to billing dispute provisions found in interconnection agreements and tariffs, together with bankruptcy rules, could introduce an unnecessary level of complexity to the PAP [Performance Assurance Plan] that could draw the Commission into ordinary commercial disputes."[430]

3288. The Florida Public Service Commission took an even stronger stance in a recent ruling on a CLEC's objections to BellSouth's actions withholding performance remedy payments to offset other monies owed it by the CLEC:

> Allowing BellSouth to offset would defeat the s e l f -effectuating nature of the Plan. The self-effectuating provision of the Plan [Order No. PSC-02-1082-FOF-TP Docket 000121A-TP] was established to provide timely incentives to correct non-compliant behavior. Allowing BellSouth to offset the amount of penalties owed or to hold amount in escrow, would diminish the effectiveness of the penalty. Moreover, a determination of the

[430] *Petition Filed by Bell Atlantic-New York for Approval of a Performance Assurance Plan and Change Control Assurance Plan*, Case 99-C-0949, filed in C 97-C-0271, issued January 22, 2003, Page 7.

appropriate amount to offset would have to be made. .[431]

3289. This off-setting provision clearly is another way that the SBC Illinois' substitute plan adds burdens on the CLEC in trying to prove that the monies it owes SBC Illinois are truly in dispute and further diminishes the self-executing nature of the remedy plan.

3290. For all of the forgoing reasons, the 01-0120 plan adopted by the Illinois Commerce Commission is the plan that the Commission should endorse for Section 271 purposes. SBC acknowledges that its wholesale performance has improved since the 01-0120 plan was implemented.

3291. According to WorldCom, the plan appears to be working and no compelling reason has been offered as to why the plan should be changed. In addition, WorldCom argues, the Commission should condition its endorsement of SBC Illinois' federal 271 application on SBC Illinois' withdrawal of its appeals of the 01-0120 plan.

d. Staff's Position

3292. In Staff's view, the SBCI plan fails to provide four of the five key elements of a remedy plan established by the FCC. According to Staff, SBC has not proven that its plan actually places $317.1 million at risk; has a reasonable structure that will detect and sanction poor performance; is properly self-executing; and, there is no assurance that the data used to calculate remedies is accurate.

Ability to Detect and Sanction Poor Performance – FCC Criterion No. 3

3293. Staff notes that the structural elements of a PAP need to be designed to detect and sanction poor performance when it occurs. New York 271 Order ¶440; Massachusetts 271 Order ¶245. The SBCI-proposed remedy plan, Staff argue, does not contain design features that meet the FCC's criteria. In particular, the plan removes the measurement weightings that were ordered by the Commission in Docket 01-0120, and that have been agreed to in subsequent 6-month reviews; the SBCI-proposed remedy plan introduces an "index value" feature that serves to mask the severity of performance failures and serves to support, rather than discourage, discriminatory behavior on the part of SBCI. Further, the SBCI-proposed remedy plan introduces a "ceilings and floors" concept which is discriminatory. It is unclear whether this

[431] *See* Florida Public Service Commission's order denying an Expedited Petition for Temporary Relief filed by BellSouth Telecommunications, Inc. ("BellSouth"), requesting that BellSouth be relieved of the requirement to make payments under its Performance Assessment Plan to Supra Telecommunications and Information Systems, Inc. ("Supra") until Supra made full and complete restitution to BellSouth and remained current in its bill payments for at least six months. *See Docket 000121A-TP, In re: Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies (BELLSOUTH TRACK), Order Denying Motion to Dismiss and Expedited Petition for Temporary Relief*, Order No. PSC-02-1082-FOF-TPI, issued August 8, 2002, pages 9-10.

feature is appropriate Staff contends, 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. Staff discusses each of these matters in detail.

Absence of Measurement Weightings

3294. Staff contends that the 01-0120 Plan maintained a weighting of performance measures that the SBCI plan would discard. According to Staff, this absence of measurement weighting results in the likelihood that SBCI will allow performance failures to persist over time, or be repeated in consecutive months. A PM weighting attributes a level of importance to the service measured by a PM, and correlates that PM to the amount of Tier 1 compensation a CLEC is to receive if SBCI fails to meet that PM's standard.432

3295. Upon its review of SBCI's performance data, Staff believes that the performance measure weightings contained in the 0120 remedy plan, (with its associated remedy levels) are working. As shown in ICC Staff Ex. 39, performance measures (PMs) that are rated as "high" display a low proportion of repeated failures in comparison with PMs that are rated as "low."

3296. In removing the PM weighting system used in the 0120 remedy plan, (which has been supported in subsequent six-month collaboratives processes), Staff maintains that the SBCI-proposed remedy plan removes a critical incentive for SBCI to address persistent performance failures. The SBCI plan uses a single-weight for all PMs that qualify for Tier 1 payments. Further, the dollar amounts called for in the Tier 1 table have amounts that are less than "low"-remedy amounts in the Commission-ordered remedy plan. (ICC Staff Ex. 39 ¶41, compared to Ehr Affidavit, Attachment Z, §8.12). Given Staff's evidence regarding the effectiveness of higher per-failure remedy amounts, the remedy amounts presented in the SBCI-proposed remedy plan seem woefully inadequate. Since the SBCI plan has dollar amounts similar to the low importance PMs in the Commission-ordered remedy plan, Staff suggests that there is a strong likelihood that under the SBCI plan, SBCI will have a high proportion of persistent failures. In Staff's view, the potential increase in persistent failures under the SBCI remedy plan makes it less likely to "detect and sanction" poor performance.

3297. According to Staff, the "step-up", or increase in remedy payments from month to month, operates in an uncertain manner in comparison to the 0120 remedy plan. ICC Staff Ex. 39.0 ¶¶42-43. The "step-up", or escalation of Tier 1 and Tier 2 payments, Staff explains, occurs when SBCI fails to meet a PM standard for repetitive months (i.e. persistent failures).433 In Staff Exhibit 39.0 ¶43, Staff explained that in looking at SBCIs performance under the 0120 remedy plan, SBCI corrected PMs with higher weightings earlier and more consistently than

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432 Staff Ex. 39.0 at ¶¶ 37-44.

433 Id. at ¶¶ \41-44.

PMs with low weightings. It is uncertain to Staff how it will motivate SBCI to correct PMs that are have persistent failures since the PMs are all of the same weight. ICC Staff Ex. 39.0 ¶43.

Index Value

3298. There are three principal reasons, Staff claims, why the index value does not detect and sanction poor performance: it introduces a real potential for discriminatory behavior; it is non-transparent and non-replicable; and, it reverses the escalation feature of the SBCI plan.

3299. According to Staff, the index value of the SBCI plan is not designed to detect and sanction individual performance failures. The index value 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 Commission-ordered remedy 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.434

3300. The way in which the index value is calculated also minimizes the importance of an individual performance failure according to Staff. 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. In Staffs view, 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 SBCI-proposed remedy plan allows SBCI to provide discriminatory service, or service that does not meet the agreed to standards, to an individual CLEC. If the calculated index value is relatively higher or lower in any given month, the remedy amount for a specific PM will vary month to month, even if it has the exact volume and severity of failure in both months. The Tier 1 payment does not really compensated 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 remedy 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.

3301. The remedy plan described in Attachment Z of Ehr's Affidavit does not accurately represent the index calculations made by SBCI in estimating the effect of their proposed remedy plan. Staff claims that it was unable to replicate the results SBCI provided in its affidavits. ICC Staff Ex. 39.0 ¶49. It was unable to replicate the index value reported by SBCI for any month of data. Staff discovered that SBCI employed a number of assumptions

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

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 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.[435] Since these assumptions are not explained in the SBCI plan, SBCI is not calculating remedies as described in the plan.

3302. Even if it could replicate SBCI's results, Staff contends that the SBCI plan is not transparent such that a CLEC can 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, Staff claims and, it can be very difficult for an outsider to replicate, since the SBCI 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.

3303. According to Staff, the index value mitigates the step-up, or escalation features, of the SBCI plan. Both the 0120 remedy plan and the SBCI-proposed remedy plan, Staff observes, 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 Staff argues, 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, Staff claims, the SBCI 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.

3304. In addition, Staff notes, SBCI caps the amount of Tier 1 payments to a CLEC at the total billed revenue the CLEC is to pay for services SBCI provides that CLEC in that month. While this cap is not a feature of the index value per se, Staff claims that the monthly billed revenue cap mitigates the effectiveness of the escalation, or step-up, features of the SBCI-proposed remedy plan. According to Staff, 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. Id. at ¶52.

3305. In Staffs view, 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, Staff concludes, the SBCI plan does not effectively detect and sanction poor performance in a manner that is suitable for Illinois.

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[435] SBCI responses to staff data requests MKP 12.1-12.3

"Ceilings and Floors"

3306. In Staff's view, the Commission should reject the "ceiling and floor" concept proposed by SBCI because it does not protect consumers. According to Staff, wholesale service quality rules should set the floor for wholesale performance, and the Commission has expressed a preference for parity over the use of benchmarks. Staff notes SBCI to state that it proposed the floors as a compromise to CLECs with SBCI to have a ceiling (Ehr Rebuttal Affidavit ¶224). Even if it is a compromise Staff believes it is contrary to federal law.

3307. According to Staff, the Commission directly addressed the issue of floors in Docket 01-0120. In that docket the Commission stated that:

> The service quality rules adopted pursuant to Section 13-712(g) should provide the floor for the service Ameritech provides to CLECs. Therefore, without a record to support a different standard and until such time as the Commission has wholesale service quality rules in place, the appropriate standard for performance measures with a retail equivalent is parity. Order, at 29 Docket 01-0120.

3308. Given that the Commission is still addressing wholesale service quality rules, and has expressed a preference for a floor being set in that context, Staff believes the matter should be developed in such proceeding. In addition, Staff notes, SBCI has provided no evidence demonstrating that the floor is appropriate, as was the Commission's concern in Docket 01-0120, or how the floor compares to the level of service consumers currently receive for those measures. In short, Staff argues, the Commission has expressed a preference for SBCI providing parity of service until this issue can be thoroughly addressed in the rulemaking.436

3309. The "new" feature SBCI introduces in its plan is the concept of a "ceiling", which calls for no liquidated damages when performance is above this ceiling performance standard, regardless of the result of a parity comparison.

3310. Staff maintains that the ceiling concept is a violation of the section 251(c)(2)(C) of the Telecommunications Act of 1996, which requires incumbent local exchange carriers (e.g. SBCI) to provide CLECs interconnection with the local exchange carrier's network at al level "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection." 47 U.S.C. §251(c)(2)(C) (emphasis added).

3311. As such, Staff argues, the "ceiling" aspect is in violation of §251(c)(2)(C) because it allows SBCI to provide service to itself or to any subsidiary or affiliate, at levels higher than it

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436 In Docket 01-0120, SBCI strenuously argued against the "floor" concept stating:

> According to Ameritech, the Commission should reject the parity with a floor proposal because it would require Ameritech to provide CLECs with superior quality service, contrary to the nondiscrimination principles of the 1996 Act. Order, Docket 01-0120 at 26.

is providing service to CLECs, without fear of liquidated damages. Staff refers to the account of its witness McClerren, to wit:

> As an example, if SBC Illinois fixed out of service conditions for CLEC customers at 95% within 24 hours, but fixed out of service conditions for its own retail customers at 99% within 24 hours, a "ceiling" of 95% within 24 hours means that SBC Illinois can provide the higher level of service to its own retail customers without fear of incurring remedies. In short, the ceilings concept sanctions SBC Illinois providing discriminatory, or inferior, service to CLECs. SBC Illinois could differentiate its product from CLECs reselling SBC Illinois service, and under this remedy plan have this discriminatory impact on CLECs. ICC Staff Ex. 29.0 ¶257.

3312. The preference for parity Staff asserts, has been a consistent theme with the Commission in respect to the provisioning of wholesale services. To adopt a ceilings and floors feature as SBC Illinois proposed would in Staffs view, be contrary to previous ICC orders and federal law. The Commission should find that the ceilings and floors provision of Section 8.5 is discriminatory, is unsupported by evidence in this docket, and therefore reduces the SBCI plan's ability to detect and sanction poor performance.

The Gap Closure Proposal

3313. Staff does support the gap closure concept, proposed by SBCI in section 8.12 of the SBCI plan, with one exception. Section 8.12 references the "floor" concept, which Staff does not support, therefore Staff recommends that if this provision is to be used in the Hybrid Plan, or in the SBCI Plan if it is found suitable for anti-backsliding purposes, then all references to the "floor" concept should be deleted.

3314. Section 8.12 provides for a resolution procedure between the interconnecting parties. 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. Given that section 8.12 also allows a gap closure process for PMs to which SBCI proposes to apply a floor, Staff recommends that language be deleted since Staff does not support the use of a floor at this time. See infra. Therefore, Staff proposes the following alternative language for Section 8.12:

> 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.

3315. Staff's proposal parallels SBC's current language, in that, if there is a failure for two consecutive months the CLEC is able to request SBC Illinois to initiate a corrective action plan, so that performance is restored to level above the standard.

Self-Executing Mechanism – FCC Criterion No.

3316. Staff notes the FCC to consider 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."437 In Staff's view, the SBCI plan is not sufficiently self-executing since the index value does not operate as described, the calculation of the index value cannot be easily replicated, would modify the current PMs without input from CLECs through the six month collaborative process, and the calculation of Tier 2 payments is not transparent.

3317. It is unclear to Staff whether the SBCI plan is self-executing since the SBCI plan set forth in Attachment Z to Ehr's Affidavit does not describe all of the steps needed to calculate remedies. Staff could not replicate the results that SBCI had provided in its affidavits. 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. These assumptions impact the calculation of the overall index value. New York Order ¶441 but are not explained in the SBCI plan. This suggests to Staff 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.

3318. Additionally, even if SBCI can operate this remedy plan, the SBCI plan cannot be easily replicated. As discussed above, 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 easily audited.

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437 New York Order ¶441.

3319. Staff notes that 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.

3320. According to Staff, 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.

Total Liability at Risk – FCC Criterion No. 1

3321. Staff notes that, in most performance assurance plans approved by the FCC, a "meaningful" level of remedies to levy, on an annual basis is equal to or greater than 36% of net return. New York 271 Order ¶436 - 36% ,and later raised to 39% of net return; Rhode Island 271 Order ¶108 n.336 -- 39%; Maine 271 Order ¶61 n. 266 -- 39%; Massachusetts 271 Order ¶241n.769 -- 39%; AR/MO 271 Order n.409 -- 36%; KS/OK 271 Order ¶274 -- 36%; Texas 271 Order ¶424 -- 36%. The multiple structural flaws that Staff has detailed contribute to its conclusion that the SBCI-proposed remedy plan does not provide a meaningful and significant incentive to comply with performance standards. In Staff's view, these structural features would prevent the Company from ever reaching the recommended total annual remedy cap.

3322. 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 0120 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. Exh 39.0 at ¶67 According to Staff, 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 ¶68.

Data Validation and Audit Procedures – FCC Criterion No. 5

3323. In Staff's views, 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 nether 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.

3324. Staff contends that 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 271 Order ¶428. Because the performance remedy plan rests entirely on the BOCs performance as captured by the measurements, the credibility of the performance data must be above suspicion. Texas 271 Order ¶428. According to Staff asurreness to this end can only be accomplished through the application of uniform mini-audit and annual audit requirements, with this 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.

Other Staff Issues:

Audits

3325. At this point, Staff asserts, SBCI has not 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. To the extent that the Commission is not inclined to provide a negative recommendation to the FCC, Staff recommends that it condition its approval on SBCI addressing all deficiencies raised by BearingPoint in the metric review, and commit to successfully resolve those deficiencies by November 2003. ICC Staff Ex. 29.0 ¶270.

3326. Staff notes SBCI to propose 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. Staff further recommends that the regional audit be rejected in favor of an annual audit.

Regional Audit

3327. According to Staff, the regional audit 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."

3328. Staff notes that 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.

3329. Annual audits, Staff claims, are needed in order to demonstrate and prove that the performance measurement data remains reliable over time. ICC Staff Ex. 29.0 ¶272.

3330. Finally, Staff asserts, the audit provisions should be uniformly applied to all remedy plans to permit both CLECs and the Commission to be able to analyze this data effectively. Therefore, Staff proposes that only one mini-audit, and one annual audit, respectively, be used for all remedy plans on a going forward basis, as it discusses below in the section entitled – "Commitments by SBC Illinois Regarding Operations of Remedy Plans in Illinois."

36 Month Review/Term of Plan

3331. A proceeding should be initiated 36 months from the date of this Order, to determine the duration of performance assurance plan(s) offered by SBCI. At this time, there are too many variables in the telecommunications market for Staff to definitively state that SBCI's performance and the market would be operating in such a competitive manner that a performance assurance plan(s) would no longer needed 4 years from now. Facts that could change over the next few years are the number of CLECs, the volume of business and transactions, consumer demands for new technology. ICC Staff Ex. 29.0 ¶265-67.

3332. Additionally, the FCC is contemplating further changes to the Telecommunications Act of 1996, that could greatly impact the number of CLECs and volume of transactions. Id. ¶266. Therefore, Staff recommends that a proceeding be initiated in the future to re-evaluate the performance measurement plan and performance remedy plans in relation to the level of service SBCI is providing, the level of competition in the marketplace and the volume of transactions that are being conducted to ensure that the Tier 1 and 2 payments do not become punitive or no longer provide sufficient incentive to motivate a certain level of performance by SBCI. Id. Since the aforementioned factors change over time, the proposed proceeding can make adjustments to the plans to account for changes in the market and ensure that there will be adequate incentive for SBCI's to provide services in a manner that does not backslide.

The Docket 01-0120 Remedy Plan

3333. All in all Staff recommends that the Commission only give a positive report to the FCC is SBCI if SBCI adopts the Commission-ordered remedy plan as the remedy plan it uses to prevent future backsliding in Illinois. In the event that, the Commission finds that the 0120 remedy plan is punitive, however, Staff proposes that its Hybrid Plan be used to prevent future backsliding by SBCI. ICC Staff Ex. 39.0 ¶¶12-13, 70-71.

3334. There is no dispute Staff claims regarding the 0120 remedy plan's, ability to meet the FCC's five key elements of a performance assurance plan.[438] Indeed, Staff contends, the basis of SBCI's argument that the Compromise plan meets 271 requirements is that it is based on the 01-0120 plan and that it is significantly more stringent than other plans approved by the FCC for purposes of section 271 approval. According to Staff, SBCI's only argument that the 0120 remedy plan should not be used is that it is punitive. As noted in ICC Staff Exhibit 39.0, the Commission-ordered remedy plan has structural features that make it more appropriate as a performance remedy plan for Section 271 purposes, and, as a result, is more stringent than the SBCI plan. ICC Staff Ex. 39.0 ¶ 70.

3335. While it is uncontested that the 0120 remedy plan meets the FCCs key elements of a remedy plan, Staff briefly summarizes why the Commission-ordered remedy plan meets FCCs key elements, and has requested that the ALJ take administrative notice of the record, transcripts, pleadings, notices, order and other documents incorporated in the record of Docket 01-120 as additional support for the Commission-ordered remedy plan. (Staff)

3336. The issue before the Commission Staff notes, is whether the remedy plans proposed by the parties will suitably prevent backsliding in a post-Section 271 approval environment and, it asserts, the 0120 remedy plan is the best plan in Illinois to accomplish that Staff's draft order details the 0120 Plans compatibility with the FCC;s criteria.

Staff's Proposed Hybrid Performance Remedy Plan

3337. In the alternative, if the Commission does not require SBCI to adopt the 0120 performance remedy plan for the purposes of its Section 271 application, Staff recommends that the Commission consider a series of modifications to the 0120 remedy plan described in this proceeding as the "Staff Hybrid plan." These modifications Staff explains, actually incorporate some of the features proposed by SBCI, and would slightly reduce the Tier 1 and 2 payments from the 0120 remedy plan. In all other respects the Staff Hybrid plan retains the features of the 0120 remedy plan that make it most suitable for meeting the FCC criteria. The Commission may elect this alternative if it believes remedy payments lower than those in the 0120 remedy plan, coupled with adopting the "gap closure" and "step-down" table from the SBCI-proposed plan, are in the public interest.

3338. According to Staff, the Hybrid plan is based on the 0120 remedy plan, with four substantial modifications. These four modifications are indicated as follows:

- Adding the provision for the "gap closure" process, as set forth in Section 8.12 of the Compromise Plan[439] (This change can be accomplished by adding the language of Section 8.12 as modified

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[438] In ¶72 of Staff Exhibit 39.0 Staff stated that it "does not believe that [the Commission-ordered remedy plan's ability to satisfy the requirements of §271] are the subject of any dispute. To the extent that this assumption is incorrect, Staff will respond in its rebuttal affidavits." SBCI never responded to this comment in its Rebuttal or Surrebuttal affidavits or Comments.

[439] Ehr Affidavit, Attachment Z at 11.

by Staff, include it as a new sub-section to Section 8 of the 0120 remedy plan).

- Adding the provision for the "Step-Down" process and associated table, as set forth in Section 8.13 and Table 4 of the performance remedy plan proposed by SBCI.[440] (This change can be accomplished by adding the language of Section 8.13 and the material that appears in Table 4 from the Compromise Plan as a new sub-section and new Table to Section 8 of the 0120 remedy plan).

- Tier 1 remedy amounts: Modify the table labeled "Payment Table for Tier-1 Measures" in the existing Docket 01-0120 Plan[441] by reducing the amounts in the rows labeled "low" and "medium" by twenty-five percent (25%).

- Tier 2 remedy amounts: Modify the table labeled "Assessment Table For Tier-2 Measures" in the existing Docket 01-0120 Plan[442] by replacing the amounts in the rows labeled "Low" with the Tier 2 remedy amounts recommended in the Compromise remedy plan, (which are $200 for the "per occurrence" measurements, and $20,000 for the "per measure/cap" measurements).

3339. Staff indicates that Schedule 39.01 of ICC Staff Exhibit 39.0, reflects its proposed changes to the existing 0120 performance remedy plan in legislative style.

3340. Since the Hybrid plan uses the 0120 remedy plan as the starting point, Staff believes it would meet the five key criteria the FCC uses to determine a plan is suitable to prevent backsliding and for the same reasons. The only factors impacted by the changes would be the total liability at risk, whether the plan is self-executing, and whether the plan detects and sanctions poor performance. Staff's Draft Order includes an assessment of its Hybrid Plan under the FCC criteria. It also provides an estimate of payments thereunder.

Comparison of Remedy Plan Estimates – September-November 2002

	Staff-Hybrid Plan		
Commission-Ordered Plan	With SBCI	Without SBCI	**Corrected**

440 Id. at 13.

441 Order, Docket 01-0120 at 15.

442 Id. at 16.

	(Docket 01-0120)	Step-Down Feature	Step-Down Feature	**SBCI-Proposed Plan**
	-1	-2	-3	-4
September Tier 1	2,438,300	1,970,972	1,916,726	1,115,002
September Tier 2	707,000	707,000	707,000	151,000
September Total	**3,145,300**	**2,677,972**	**2,623,726**	**1,266,002**
October Tier 1	2,309,000	1,865,656	1,825,030	1,018,380
October Tier 2	637,000	637,000	637,000	142,200
October Total	**2,946,000**	**2,502,656**	**2,462,030**	**1,160,580**
November Tier 1	2,520,000	2,100,251	1,986,015	1,128,078
November Tier 2	561,000	560,000	560,000	114,200
November Total	**3,081,000**	**2,660,251**	**2,546,015**	**1,242,278**
September-November Total	**9,172,300**	**7,840,879**	**7,631,771**	**3,668,860**

ICC Staff Ex. 39.0S (citing SBC Response - MKP 17 -Attachment summarized Tier 1 and Tier 2.xls)

3341. 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. 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.

4. Rebuttal Positions

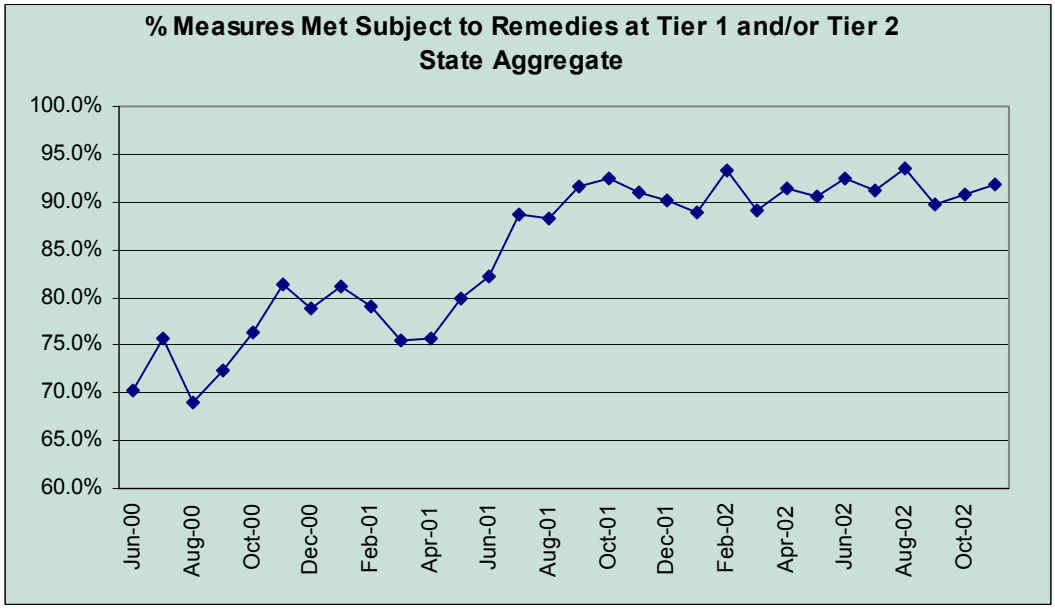
a. SBC Illinois Rebuttal

Comparison of Compromise Plan to 0120 Plan/Recent Improvements

3342. SBC Illinois observes that several commenters cite SBC Illinois' performance results for September-November 2002, and state that the results have improved because of the 0120 Plan. SBC Illinois agrees that the September-November results are good, but disagrees with their view that the 0120 Plan is the reason.

3343. In SBC Illinois' view, the basic problem with these allegations is that the various witnesses attempt to draw a conclusion about performance before and after the 0120 Plan, but in doing so, they look *only* at the results *after* the 0120 Plan took effect. That provides no basis for analysis and comparison the Company asserts. To see if the 0120 Plan has really had the effect that the witnesses describe, SBC Illinois contends, it is necessary to look at results before the plan was put in place. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 199.)

3344. SBC Illinois states that a complete analysis of performance results shows that improvements in performance occurred well before the 0120 Plan took effect, and cannot be credited to that Plan. According to SBC Illinois, performance improved from a low of 70 percent measures met in second quarter 2000 to the recent level of greater than 90 percent prior to the 0120 Remedy Plan being in effect. Indeed, SBC points out, the original Condition 30, or "Texas", remedy plan was in place during the time of this improvement. (Id. ¶ 200.)



3345. SBC Illinois states that the record of improvement is precisely why SBC Illinois is offering the Compromise Plan. The record in Docket 01-0120, it notes closed with December 2000 data. And, SBC Illinois states, the docket did not examine any subsequent improvements. Thus, in SBC Illinois' view, the Commission's order in that docket was designed for a different environment, and at a time where: (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, and (iv) overall performance was not as good as it is today. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 201.)

3346. In today's much different environment, the Company asserts, SBC Illinois is in a position where it 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. Responsibility for managing operations with regard to the wholesale performance results has been pushed to line managers in

many organizations, and proactive assessment of results to identify processes requiring improvement is now prevalent in most all wholesale functions. As a result, performance has improved, and SBC Illinois states that it is now at the point where it has shown compliance with the competitive checklist, and is planning to file a section 271 application with the FCC soon. The focus therefore, SBC Illinois argues should not be on punishment or deterrence as a way to improve performance, but on incentives to maintain good performance in a post-271 setting. (Id. ¶ 202.)

The Indexing Features of the Compromise Plan

3347. SBC Illinois disagrees with AT&T's contention that the index values in the Compromise Plan are "arbitrary." According to SBC Illinois, they are the product of negotiations between SBC Illinois and two CLECs, TDS and Time Warner. SBC Illinois states that its own business people reviewed the remedy amounts for reasonableness based on business experience. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 216.)

3348. So too, SBC Illinois disagrees with AT&T's hypothetical situation, in which SBC Illinois misses a performance measure in consecutive months, but the remedy paid for that measure decreases from one month to the next because SBC Illinois' overall performance increased by one index value (for example, the overall pass rate went from just under 92 percent to just over 92 percent). At the outset, SBC Illinois points out that AT&T's hypothetical *is* just that, a hypothetical, in that SBC Illinois' current performance level is well above the 92 percent index value. Next, SBC Illinois states that AT&T's analysis only considers the one measure. The reason remedies decreased for that one measure is because SBC Illinois achieved a better level of performance overall by passing other measures, and according to SBC Illinois that improved performance is what merits a decrease in remedies. Further, SBC Illinois states that AT&T is only looking in one direction, i.e., at the situation in which performance improves from one index value to another. SBC Illinois notes that if one were to take AT&T's hypothetical in the other direction, i.e. if SBC Illinois' overall performance *declines* from one index value to the one below it (for example, from just *over* 92 percent to just *under* 92 percent) the remedies on the hypothetical measure – and all other measures – would *increase* significantly. SBC Illinois asserts that since its performance is currently at the highest index value, and given that the Commission is looking at a remedy plan for maintaining good performance in a post-271 environment, the latter direction is the one on which the Commission should focus. (Id. ¶ 217.)

3349. Further, SBC Illinois disagrees with AT&T's suggestion that the indexing approach is an attempt to bring back the "K" table that the Commission ordered SBC Illinois to remove in Docket 01-0120. According to SBC Illinois, the two features operate in entirely different ways. The "K table" was a statistical tool for determining when to assess remedies in the first place, and provided that *no remedies at all* would be assessed on the first few statistical shortfalls (that threshold number, known as "K," was based on the number of performance tests for the CLEC). Remedies would be assessed at the usual rate after that threshold was reached. Under the K table, if SBC Illinois had 100 measures for a given CLEC, and 5 shortfalls, the remedy amount would be zero. By contrast, the index value is a tool for determining the *amount* of remedies. SBC Illinois would pay remedies for all shortfalls in any measure subject to remedies. Thus, if SBC Illinois had 100 measures for a given CLEC, and 5 shortfalls, SBC

Illinois would pay on all 5 shortfalls. SBC Illinois notes that the amount of each remedy would be less than if there were, say, 20 shortfalls, but according to SBC Illinois that is a plus: It encourages SBC Illinois to keep the number of shortfalls low. (Id. ¶¶ 218-220.)

3350. Finally, SBC Illinois contests WorldCom's hypothetical – a scheme in which SBC Illinois picks and chooses a few key measures for a particular CLEC, intentionally fails all of them, then passes other measures for other CLECs to keep its index value high. At the outsets, SBC Illinois discovers such a strategy, and WorldCom offers no evidence that SBC Illinois has ever done such a thing. Further, it would not be feasible for SBC Illinois to try, such a thing because it uses common systems and procedures for serving all CLECs. (Id. ¶ 221.)

3351. Even on its hypothetical terms, SBC Illinois asserts, Ms. Kinard's analysis is off the mark. According to SBC Illinois, Section 7.5 of the Compromise Plan specifically protects the CLEC against such a situation, by allowing it to petition the Commission for expedited resolution if its remedies are low even though its own "pass rate" is low (as would occur if SBC Illinois singled out a particular CLEC for bad performance while maintaining a high pass rate overall). Thus, SBC Illinois contends, WorldCom's only complaint is about procedure i.e., WorldCom does not want to have to initiate a proceeding or prove that its hypothetical happened. To that, SBC Illinois states that there is no remedy plan that can adjust payments automatically to address every hypothetical situation that could ever arise in the future. (Id. ¶ 222.)

The Floors and Ceilings Feature

3352. SBC Illinois disagrees with AT&T's view that the floors & ceilings feature of Compromise Plan "wildly distort[s]" the CLECs' previous "floor" proposal. According to SBC Illinois, it has simply made a one-sided offer a symmetrical deal. SBC Illinois states that, once wholesale performance reaches a high enough level, a statistical disparity between wholesale and retail makes no real difference. Further, the floors and ceilings would apply only to certain measures, to be established by collaborative agreement. (The current Plan lists the measures to which TDS and Time Warner agreed.) Even for those measures, SBC Illinois points out that parity remains the general rule: the floors and ceilings apply only at very high or very low performance situation. (Id. ¶ 225.)

Other Administrative Provisions of Compromise Plan

3353. SBC Illinois notes that the administrative provisions of the Compromise Plan that AT&T questions are in Section 7.2 (regarding the process for payments to be withheld in situations where a CLEC holds, then dumps, orders in unreasonably large batches), Section 7.3 (withholding half of remedies potentially owed when CLEC is in violation of obligations under interconnection agreement, tariff or Illinois law or the 1996 Act), Section 7.4 (establishes the monthly cap as 1/12th of the annual cap), and Section 7.6 (protects SBC Illinois from the potential incentive for CLECs to "game" the system such that revenues from payments would exceed the amounts the CLEC owes to SBC Illinois). SBC Illinois states that each of these terms are reasonable conditions, deigned to promote fair business-to-business conduct between SBC Illinois and CLECs, that are in place in remedy plans in other SBC states. Such also have been

included, in very similar form, in remedy plans deemed adequate by the FCC for purposes as an on-going incentive. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 227.)

3354. Next, SBC Illinois states that AT&T's contention that Section 5.6 of the Compromise Plan provides for payment of remedies by bill credits rather than by check, as the 0120 Plan does, is not a fair characterization on this provision. Section 5.6 clearly says that a CLEC may obtain payment by check if it wants a check. According to SBC Illinois, all the CLEC needs to do is tell us where to send the check and who to list as payee, which is done by completing a form on the CLEC Online website. (Id. ¶ 228.)

3355. SBC Illinois further contends that many of the other Compromise Plan provisions to which AT&T objects are either minor, or no different from the 0120 Plan. (Id. ¶¶ 230-232.) With regard to the statistical methodology, the only substantive difference in SBC Illinois' view is the one Mr. Ehr described at the workshop. While both plans generally test parity by comparing CLEC results to retail or affiliate analog (whichever shows better performance and thus a higher standard of comparison), the Compromise Plan would use retail results if the number of affiliate transactions is small (less than 30). SBC Illinois explains that in such cases the retail results (with more data) provide a more representative view of performance for comparison. In addition, SBC Illinois states that the impact of this requirement when tested, was an increase in total remedies and assessments paid (Tier 1 and Tier 2 combined) of $245. In other words, SBC Illinois states, the elimination of the minimum 30 transactions for the affiliate had essentially no effect on total remedies and assessments paid. (Id. ¶ 230.)

The Hybrid Plan

3356. With respect to Staff's proposed "Hybrid Plan," SBC Illinois confirms that the proposed reduction in low-priority base amounts, would reduce payments from the 0120 Plan, but still result in payments that are significantly higher than the Compromise Plan. Further, Staff's proposed reduction would be at least partially offset by their proposed modification, i.e. to add the "step down" process from the Compromise Plan. (SBC Ex. 2.2 (Ehr Rebuttal) ¶¶ 234-235.)

3357. SBC Illinois contends that the Compromise Plan already represents a middle ground. Many provisions of the Compromise Plan are identical to those adopted in Docket 01-0120, and many other provisions make the Compromise Plan more stringent. Remedies under the Compromise Plan would already be significantly higher than those under plans found sufficient by the FCC, even at today's high levels of performance. And the indexing feature of the Compromise Plan would increase payments even more were performance to decline. (Id. ¶ 236.)

The Opt-In Provision

With respect to Staff's concern that not all carriers have "opted into" the 0120 Plan, SBC Illinois states that it has already advised CLECs via accessible letter of remedy plans available in Illinois, including the 0120 Plan. SBC Illinois states that it is willing to send another accessible letter. SBC Illinois further notes that although only 21 CLECs participated in the 0120 Plan for

the month of January 2003, that plan still addresses over 77% of the CLEC lines/circuits in service, and over 87% of the orders submitted. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 238.)

The Term of the Plan

3358. SBC Illinois notes that the term of the Plan would begin if, and when, the Commission approves the proposal as consistent with section 271, and it would be effective for 48 months (or four years) from that time. Noting Staff's proposal that a review be conducted in 36 months to "address all aspects" of the remedy plan, SBC Illinois states that it is agreeable to entering negotiations in 36 months to discuss modifications, should it be determined that a plan is still needed beyond four years. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 239.)

b. AT&T Rebuttal Position

3359. In AT&T witness Dr. Kalb's reply affidavit he disagrees with the assertion that SBC's "Compromise" Plan is at all similar to the Commission Plan. Dr. Kalb noted that Mr. Ehr failed to respond to his two primary and significant criticisms of SBC's "Compromise" Plan. The first point is the voluntary nature of the "Compromise" plan, which strips the Commission of any post-271 oversight role because it gives SBC the right to withhold its consent to, and thereby block, any Commission-ordered changes. Dr. Kalb reminded the Commission that the "voluntary" feature proposed by SBC in its Compromise Plan is lifted directly from the old, highly discredited "Texas" Remedy Plan and was expressly rejected by the Commission in Docket 01-0120. (AT&T Ex. 2.1. The second issue is SBC's attempt to characterize remedies as "liquidated damages." This proposed change is another key feature of the old Texas Plan that SBC is attempting to reinsert here.

3360. In addition, Dr. Kalb noted the failure of SBC Witness Ehr to rebut Kalb's prior testimony that the Commission Plan meets the FCC criteria for a Section 271 remedy plan, whereas the "Compromise" Plan does not. According to Dr. Kalb, the absence of rebuttal on this issue by Witness Ehr is telling. Id., at 3.

3361. Dr. Kalb rebutted SBC's claim that the "Compromise" Plan was negotiated with two CLECs by noting that no Illinois CLEC uses the "Compromise" Plan (not even TDS Metrocom, the purported primary CLEC negotiator). Id.

3362. Dr. Kalb disagreed with SBC's contention that the "Compromise" Plan "better reflects the current performance environment." Dr. Kalb opined that the real point of a remedy plan is to prevent post-Section 271 backsliding, and that SBC's claimed improvement in service quality is expected in light of SBC's pending 271 proceedings. Additionally, Dr. Kalb emphasized that SBC ignores the palpable direct effect that the 01-0120 Plan (and the incentive effect provided by the pendency of the case) had on SBC's service quality. This is because of SBC's data showing that, since the plan went into effect, remedy payments have plummeted. As such, SBC claims that wholesale service quality improved without regard to the Commission Plan was adopted are based on faulty assumptions. AT&T Ex. 2.1, at 4-5.

3363. To rebut Witness Ehr's assertions that the "Compromise Plan leads to "significantly higher remedies than plans that have already been found sufficient for section 271 purposes by the FCC", and the implicit assumption by Witness Ehr that this makes the "Compromise" Plan sufficient for Section 271 purposes, Dr. Kalb emphasized his familiarity with several 271 remedy plans already approved by the FCC that are far more robust than the SBC "Compromise" Plan. These include remedy plans adopted by New York and Florida. (AT&T Ex. 2.1, at 5-6). Dr. Kalb testified that remedy payments under the (the 01-0120 Plan) have dramatically decreased after the first full month, which shows that SBC is responding to this robust plan in exactly the manner intended. The Illinois remedy payments, referenced by Dr. Kalb in Exhibit 1 to his Reply Affidavit, for the period of July 2000 through December 2002, illustrate his point, and underscore the fact that AT&T is far more interested in collecting customers than remedies. Id., at 7-8.

3364. Dr. Kalb testified that many of the purported similarities between the 0120 Plan and the "Compromise" Plan outlined in Witness Ehr's chart are either not remedy-affecting or were supplanted by other new and weakened provisions of the "Compromise" Plan. As he did in his original affidavit, Dr. Kalb pointed out what he believed were fatal defects inherent in the "Compromise" Plan, virtually all of which were rejected by the Commission in Docket 01-0120. He highlighted the systemic problems with the "voluntary" nature of the "Compromise" Plan, the new "Index" feature, the proposed changes to audit process, the use of the term "liquidated damages" to characterize remedy payments, and the "floor and ceiling" proposal. Dr. Kalb also noted that SBC Witness Ehr failed to respond to most of his prior criticisms of these systemic problems. Dr. Kalb also testified that out of eleven items listed by Witness Ehr in SBC's list of purported similarities between the Commission Plan and the "Compromise" Plan, over half are actually substantial changes. AT&T Ex. 2.1, at 9-16. According to Dr. Kalb, these changes are significant both in number and in scope, and in many places they violate the pronouncements of the Commission in Docket 01-0120. Id., at 9-16.

3365. Dr. Kalb praised Staff Witnesses Mr. McClerren and Dr. Patrick for their extensive and well-articulated criticisms of the "Compromise" Plan. AT&T Ex. 2.1, at 16). Dr. Kalb recommended that no changes be made to the existing plan, since it is working well. Nevertheless, Dr. Kalb indicated that he does not oppose Staff's minor adjustments to the existing plan. He noted that the Staff "Hybrid" Plan includes the SBC proposed "Gap Closure" procedure, the SBC step-down table, and reductions in Tier I and Tier II base remedy amounts.

c. Staff

Commitments by SBCI Illinois Regarding Operations of Remedy Plans in Illinois

3366. 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 positive recommendation 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.

3367. Currently there are five types of remedy plans that SBCI offers to carriers in Illinois – the SBC13state plan, SBC11state plan, Commission-ordered remedy plan, Covad Plan, Texas Plan – and SBCI continues to file new plans with the Commission. See Docket 03-0098 (SBCI/TDS Metrocom filed an interconnection agreement requesting the SBCI plan become effective if the Commission-ordered remedy plan is remanded, overturned or modified by the appellate court. Therefore, another modification to the SBCI plan is concurrently being proposed by SBCI and reviewed in another docket). Remedy plans need to be self-executing and not leave the door unreasonably open to litigation and appeal. New York Order, ¶433; AR/MO Order, ¶130. SBC has included in its remedy plan certain provisions that impact the administration of all remedy plans in Illinois. These provisions should not be included in only one remedy plan, but included in, or applied to, all remedy plans. These provisions relate to audits, to modifications of performance measures on a going forward basis, to the operation of opt-in procedures for remedy plans, to the method of calculating Tier 2 payments since the performance of all carriers affect the amount of Tier 2 payments, and the calculation of the procedural annual threshold. These issues can adversely impact all plans if they are not resolved in this docket, and will ultimately result in additional future litigation.

3368. Therefore, SBCI should commit to making the following modifications to all remedy plans operating in Illinois rather than limiting these changes to the plan or plans approved by the Commission in this proceeding.

5. Surrebuttal Position of SBC Illinois

Sufficiency of Compromise Plan

3369. SBC Illinois notes no dispute as to its principal argument, that the Compromise Plan leads to significantly higher remedies than plans that have already been found sufficient for section 271 purposes by the FCC. SBC Illinois discusses AT&T's contention that the plan used by SWBT in Texas, Kansas, Oklahoma, Arkansas, and Missouri is not an appropriate benchmark for section 271 purposes because the Texas Commission modified the Texas remedy plan after approval was granted.

3370. But, SBC Illinois observes, the Compromise Plan is not only more stringent than the Texas plan as it stood when the FCC reviewed it for sufficiency under section 271 (which SBC Illinois maintains is the more appropriate "benchmark" for purposes of advising the FCC on section 271) but also more rigorous than the *modified* Texas plan on which AT&T's Dr. Kalb relies. SBC Illinois explains that the Texas Commission's recent order retained the K table, but

merely modified the rules for which performance shortfalls are to be excluded. Meanwhile, SBC Illinois observes, the Compromise Plan here eliminates the K table entirely. *No* shortfalls are excluded from remedies. Given AT&T's suggestion that the modified Texas plan represents a reasonable benchmark, SBC Illinois believes AT&T to have effectively agreed that the Compromise Plan goes above, and beyond, what is sufficient for section 271. (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal) ¶¶ 119-121.)

Comparison to 0120 Plan

3371. SBC Illinois responds to AT&T's argument that "it is the height of arrogance to presume that private negotiations of SBC and two evidently disengaged parties should substitute for the Commission's reasoned judgment, reached after 17 months of testimony, hearings, and briefing in Docket 01-0120." SBC Illinois asserts that AT&T is wrong on multiple levels. First, and most importantly, SBC Illinois claims that it is not even taking the position Dr. Kalb describes; it does not intend that the Commission should accept the Compromise Plan based solely or even principally on the fact that it was reached through negotiation. Rather, it is asking the Commission to approve the Compromise Plan on its *substantive merits* – by applying its reasoned judgment to the record in this case, which, according to SBC Illinois, is indisputably more extensive and more current than the record in Docket 01-0120. The fact that the plan reflects negotiations and arm's-length agreement with two active CLECs is simply an additional fact for the Commission to consider, and contrary to Dr. Kalb's argument that negotiation and agreement are somehow *bad* things, SBC Illinois states that those facts weigh in favor of the Compromise Plan. (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal) ¶ 123.)

3372. SBC Illinois further asserts that there is no support for AT&T's attempt to diminish TDS – a party that is actively competing in Illinois and has actively participated in this docket and in Docket 01-0120 – as "evidently disengaged." So too, SBC Illinois points out that AT&T is overstating the procedure in Docket 01-0120, because AT&T's reference to "17 months of testimony, hearings, and briefing" simply measures the time in between the February 2001 initiating order and the October 2002 "order on reopening" in the docket, not the actual time of activity. More importantly, SBC Illinois asserts, the "17 months" of proceedings in Docket 01-0120 were concerned with a record that closed with December 2000 results, while the proceedings here are based on more current and relevant performance data that has been the subject of extensive analysis. Finally, SBC Illinois reiterates that it is not asking the Commission to *replace* all of the decisions that went into the 0120 Plan, or the procedure that went into that plan. Many features of the Compromise Plan are identical to the 0120 Plan, and, in particular, SBC Illinois is not asking the Commission to revisit the complex statistical issues that were presented in Docket 01-0120. (Id. ¶¶ 124-126.)

The Hybrid Plan

3373. SBC Illinois states that the results of its "pro forma" computation of payments under the "Hybrid" Plan shows that Staff's proposal would result in remedy payments of approximately $2.5-$2.7 million per month. SBC Illinois asserts that such payments would still be several times greater than the amounts deemed sufficient by the FCC, and still more than

double the payments that would be called for under the Compromise Remedy Plan. (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal) ¶¶ 131-132.)

Tier 2 Assessments

3374. In response to the ALJ's request for additional information as to "Tier 2" remedy assessments, SBC Illinois states that the proposed Compromise Plan here would retain the same treatment as exists under the 0120 Plan. (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal) ¶¶ 137-141.) To illustrate how Tier 1 and Tier 2 work, SBC Illinois considers a single measure that is subject to both Tiers (say, the rate of missed due dates on installations of unbundled loops), and assume there are three CLECs: A, B, and C. SBC Illinois states that it would measure its performance separately for each CLEC's installations, and for all three CLECs in the aggregate. SBC Illinois assumes for purposes of illustration that a rate of 5 percent or less would satisfy the applicable parity test, and that the results were as depicted in the following chart.

	CLEC A	**CLEC B**	**CLEC C**	**Aggregate**
Missed Due Dates	6	4	6	16
Total Installations	100	100	100	300
Miss Rate	6%	4%	6%	5.33%
Standard	5%	5%	5%	5%
Test Passed?	No	Yes	No	No

3375. SBC Illinois explains that it met parity for CLEC B, so no remedies would be due to B; conversely, SBC Illinois did not meet parity for A and C, so each CLEC would receive a "Tier 1" payment. Because SBC Illinois did not meet the 5% standard overall, there would also be a shortfall at the Tier 2 level. If the aggregate shortfall continues for two more consecutive months, Tier 2 payments would be due. (According to SBC Illinois, this treatment, and the three-month rule, are identical under the 0120 Plan and the Compromise Plan. SBC Illinois further notes that even under the Texas plan, no K table is applied to Tier 2.) If SBC Illinois missed parity for one CLEC but achieved parity overall (for example, if CLEC C in our illustration had no missed due dates, and the aggregate missed due dates were 10/300 or 3.33%), SBC Illinois states that the affected CLEC would still receive a payment under Tier 1, but no Tier 2 payment would be assessed. The basic idea, SBC Illinois states, is that Tier 2 applies for shortfalls that extend across time and across CLECs generally, as opposed to shortfalls that isolated to only one CLEC or one or two months.

3376. On their own, SBC Illinois states, Tier 2 assessments do not escalate for misses in consecutive months under either the 0120 Remedy Plan or the Compromise Remedy Plan. In SBC Illinois' view, Tier 2 assessments themselves are, for many PMs, a form of escalation for

Tier 1 remedy payments made to CLECs, in that they provide for extra payments on Tier 1 measures that have been missed for at least some CLECs each month during that three month period.

3377. SBC Illinois states that Tier 2 payments represent a lower percentage of the total payments under the Compromise Plan than under the 0120 Plan or the Texas plan. According to SBC Illinois, this is because many features of the Compromise Plan (for example, the elimination of the K table) are more geared toward increasing remedies to CLECs (who are most directly affected by performance shortfalls) than to the State. Further, SBC Illinois explains that the Compromise Plan contains several other features, above and beyond the 0120 Plan, that are specifically geared to address continued shortfalls and thus perform the same function as Tier 2 payments do: namely, the "gap closure" process and the more stringent rules for escalation and "step down" of remedies for continued shortfalls. (SBC Ex. 2.3 (3/3/03 Ehr Surrebuttal) ¶ 143.)

3378. That said, SBC Illinois states that the proper focus should be on remedies in total, rather than on the allocation of remedies between Tiers. According to SBC Illinois, the FCC has never held that any specific allocation is required, and in fact several Verizon plans (including the one in effect for Illinois) have no Tier 2 at all. SBC Illinois states that a dollar of remedies provides the same incentive towards good performance whether it goes to a CLEC or to the state. (Id. ¶ 144.)

Audit Requirement

3379. Addressing Staff's position on the audit provisions called for in the Compromise Remedy Plan, SBC Illinois proposes that the audit frequency would initially be eighteen months after the later 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. SBC Illinois expects an audit of the scope called for by the Compromise Plan, based on SBC's experience with performance measurement audits, to take 4-6 months to complete. If this audit were to be required annually, SBC Illinois would spend up to half of each year undergoing audits. SBC Illinois states that it proposed the eighteen-month timeframe to alleviate this burden. (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal ¶ 147.)

3380. In addition, as specified in Section 6.6, the Compromise Plan calls for a regional audit, with the auditor proposed by SBC and approved by the various commissions. SBC Illinois states that its regionwide OSS give CLECs the benefit of uniformity in providing service across states, and that the commissions in all five states can take similar advantage of regionwide systems and coordinate an efficient process. If each state required a separate audit, whether annually or some other periodic interval, of the same regional performance measurement systems and processes, SBC Midwest would be subject to five overlapping and duplicative audits. Thus, SBC Illinois concludes, Staff's proposed single-state audits would not reduce waste but create it. (Id. ¶ 148.)

6. Staff Comments

Auditing

3381. Auditing provisions are provided in every type of remedy plan currently offered in Illinois, however they are not consistent among all plans. Since some of these auditing provisions provide for audits of payments paid to more than one CLEC, there should be audit provisions that are uniformly applied to all remedy plans to permit both CLECs and the Commission to be able to analyze this data effectively. Therefore, Staff proposes that only one mini-audit, and one annual audit, respectively, be used for all remedy plans on a going forward basis.

Mini-audits

3382. 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 the 0120 plan, to all CLECs. SBCI made significant substantive changes to the mini-audit provision in the Commission ordered remedy including increasing the negotiation period before an audit can be requested, from 30 days to 45 days, and reducing the number of mini-audits a CLEC can request. According to Staff, however, SBCI did not provide any support justifying the changes, nor does it address the fact that there are numerous mini-audit provisions available to CLECs under different plans.

3383. 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 the Commission-ordered remedy plan, to all CLECs.

Annual audits

3384. Staff proposes that the Commission condition any positive recommendation to the FCC based on SBCI commitment to conduct annual audits as approved by the Commission in Docket 01-0120. Order, Docket 01-0120 at 14, and Attachment A at § 6.4.1. Staff recommended this in Docket 01-0120 because a regularly scheduled audit is needed to "test the veracity of any numbers developed as a result of the plan." Id. at 13. Furthermore, the Commission determined that, "having an audit only if an undefined 'problem' is discovered, encourages dilatory or less than forthright conduct on the part of [SBCI]." Id. at 14.

3385. The SBCI plan removes the annual audit provision from the Commission-ordered remedy plan, but SBCI provides no rationale that justifies' the provisions removal. Additionally, other remedy plans in currently effective interconnection agreements do not provide for an annual audit. The remedy plan approved in this hearing is to be used in interconnection agreements with individual CLECs. Allowing this provision in only one type of remedy plan creates confusion because it would be incorporated only in certain interconnection agreements for certain CLECs, however, the annual audit, unlike the mini-audit, is not focused on a specific CLEC. The annual audit provides the Commission and the CLECs information on how SBCI's reporting procedures and data management/handling progressed over the preceding year. Order, Docket 01-0120 at 14-15.

3386. An annual audit provision should not be included in just one type of remedy plan, but it should apply to all remedy plans, particularly in light of the fact that an annual audit provision is not performed at the request of an individual CLEC but is performed regularly on an annual basis, in order to maintain confidence in the payments that are made, and because the annual audit provides information regarding the entire market, and not just an individual CLEC. Therefore, Staff recommends that the Commission condition its positive recommendation to the FCC based on SBCI committing to conduct annual audits as approved by the Commission in Docket 01-0120.

Regional Audits

3387. Staff does not recommend approval of a regional audit as proposed by SBCI. Section 6.6 of the SBCI Plan describes a regional audit, in which it clearly states that this Commission would not be able to choose the auditor it wants, but only has a the ability to vote for an auditor. The first audit won't be conducted for eighteen months after the conclusion of the KPMG Review and it is unclear how often it will be conducted subsequent to that. ICC Staff Ex. 29.0 ¶271. Furthermore, since the regional audit is originates from a five state vote, it is unclear whether this Commission would have the audit conducted in the scope or manner of its choice. ICC Staff Ex. 41.0 ¶ 80. If this Commission were to approve a regional audit, the potential for this Commission to lose control over choosing who the auditor is, and potential for conflict with other states in choosing an auditor is too great. SBCI proposes that all five states should agree upon an auditor, or if unanimity cannot be reached, that the ICC submit to the auditor chosen by a majority of the five state commissions. This Commission has traditionally reserved its home-rule authority and should continue to do so. Id.

3388. The Commission should require SBCI to perform annual audits, since that is what the Commission approved in Docket 01-0120. Further, the annual audit approved in docket 01-1020 clearly allows for auditing of both performance measures and remedy plan payments, it is conducted annually, and the Commission has control over the choice of auditor, as well as the scope of review and audit plan approved by this Commission prior to audit inception. ICC Staff Ex. 29.0, ¶271.

Six Month Collaborative

3389. Staff recommends that the Commission condition any positive recommendation of SBCI's petition for Section 271 approval on SBCI's commitment to continue the six month collaborative process, as set forth in §6.3 of the Commission-ordered remedy plan, as long as wholesale PMs are in existence and are being reported. The FCC has recognized that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. Both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's service quality measures to come from their respective pending six-month reviews.[443] GA/LA Order, ¶294. Likewise, Staff proposes that

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[443] The GA/LA Order at ¶294 stating that the Louisiana Commission is currently conducting a seven and one-half month detailed review of the performance measurements and penalty plan. The Georgia State Commission provided for a six month review of the plan and has ordered BellSouth to file a "root cause analysis" and a corrective action plan if BellSouth fails any sub-metric twice in any 3

PMs in Illinois be kept current through two methods -- continuing the six-month collaborative process, and on its own initiative after an investigation and hearing.

3390. All of the performance remedy plans currently in effect in interconnection agreements in Illinois are based on the same 150 performance measures, or a subset thereof. Currently, the performance measurements are updated pursuant to a six month collaborative process established by the Commission in the *Merger Order*. Order, Docket 01-0120, Attachment A §6.3; Order, Docket 98-0555, Condition 30 ¶¶3, 4, 8, 9. In most circumstances it appears that the conditions in the *Merger Order* have expired, and it is unclear whether there is a mechanism in place requiring that a six-month collaborative proceeding continue, and further, there is no docket proposing or evaluating a replacement process.

3391. Generally, SBC Illinois, the CLECs and Staff all agree that the PMs should be updated through the collaborative process, and should continue to be updated in that manner. If the PMs are not updated by collaborative, Staff would expect the parties to state otherwise in its response.

3392. Therefore, Staff recommends that the Commission, as a condition of giving a positive recommendation to the FCC on SBCI's 271 application, should obtain a commitment from SBCI to continue meeting with CLECs and Staff, as set forth in §6.3 of the Commission-ordered remedy plan. Therefore, the six-month collaborative would be held six months after the conclusion of the previous six month process, and should continue for as long as wholesale PMs are in existence and are being reported.

Applicable Remedy Plans in Illinois on a Going Forward Basis

3393. Staff recommends that the Commission condition any positive recommendation of SBCI's petition for Section 271 approval on SBCI's commitment to, on a going-forward basis, make available to CLECs through its interconnection agreements and opt-in procedure only those remedy plans: found suitable to prevent backsliding in this docket; and those approved for purposes of SBCI's Alternative Regulation Plan; and those developed through arms-length negotiations between a CLEC and SBC Illinois. ICC Staff Ex. 29.0 ¶240. However, those plans developed at arms-length would be subject to Commission review through the section 252 process currently in place for reviewing and approving negotiated agreements. ICC Staff Ex. 29.0 ¶240. SBC Illinois needs to commit to make such an offering so that an anti-backsliding plan/program in Illinois can be properly implemented. Performance remedy plans effectively prevent backsliding, only if all carriers, or a majority of the carriers, take of the same 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. Id. ¶242.

3394. According to SBC Illinois witness James D. Ehr, there are currently 161 CLECs purchasing wholesale service from SBC Illinois. SBC Illinois has four remedy plans available in Illinois. The remaining 67 CLECs have no remedy plan. At the end of this proceeding, Mr. Ehr

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consecutive months. BellSouth GALA I Reply at 86-7; Georgia Commission GALA II Comments at 3, 30; Louisiana Commission GALA II Reply at 4-5; Louisiana Commission Review; Georgia Commission GALA I Comments at 15, 217; Louisiana Commission GALA I Comments at 5.

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.

3395. The Commission has exhibited a reluctance to interfere with the negotiation process between interconnecting telecommunications carriers in negotiated agreement dockets. Staff understands the Commission's concern about interfering with arms-length negotiations, however, in the interest of providing a uniform approach to preventing anti-backsliding of wholesale service in Illinois, Staff recommends that only one remedy plan be made available to CLECs – and that plan should be the remedy plan ordered by the Commission in Docket 01-0120. The benefit of having only one remedy plan is the uniformity of its application to all CLECs and knowledge of effectiveness in preventing backsliding. The analysis of the dollar amounts SBC Illinois would be paying is based on all carriers in Illinois taking of the same remedy plan. Ehr Affidavit ¶358. Therefore, the dollar amounts presented in this docket would not actually approximate what SBC Illinois would be paying if a number of remedy plans are allowed to remain in place. In effect, having numerous remedy plans dilutes the ability of the remedy plan or remedy plans approved in this docket to prevent future backsliding. Additionally, since all of the current remedy plans were not evaluated in this docket, we cannot determine the overall effectiveness all of the remedy plans would provide in preventing backsliding, since the remedy plans currently in effect in Illinois have different Tier 1 and Tier 2 payments. ICC Staff Ex 29.0 ¶238.

3396. To properly evaluate an anti-backsliding plan in Illinois, we must analyze how it would actually operate in the market. SBC Illinois has not done that. SBC Illinois' affidavits do not support the notion that numerous remedy plans would be in place in Illinois, nor does it effectively tell us how much SBC Illinois would be paying if there were numerous remedy plan in effect. Mr. Ehr's affidavit only provides dollar amount calculations if every CLEC takes of a particular remedy plan, it doesn't even provide dollar amounts it would pay based on the remedy plans currently in effect. Based on this information, the amount of remedies SBC Illinois would incur cannot be approximated. ICC Staff Ex. 29.0 ¶239.

3397. Additionally, since one-third (67/161 carriers) of all CLECs who purchase wholesale services from SBC Illinois do not have a remedy plan, 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.

3398. For the foregoing reasons, SBC Illinois needs to commit to making such an offering so that an anti-backsliding plan/program in Illinois can be properly implemented. Performance remedy plans effectively prevent backsliding, only if all carriers, or a majority of the carriers, take of the same plan. The analysis performed by SBC Illinois 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.

Opt-In

3399. Staff recommends that the Commission condition any positive recommendation of SBCI's petition for Section 271 approval on SBCI's commitment to modify the current opt-in procedures so that an anti-backsliding program can be effectively implemented in its region. Staff has three recommendations: (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, (b) 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, in this instance, 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, 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) or (b) above.

3400. The opt-in procedure approved in the 01-0120 docket is unclear and needs to be clarified, the SBCI plan does not offer an opt-in procedure despite SBCI's claims, and the opt-in approved in Docket 01-0120 may no longer exist if the 01-0120 plan is no longer offered. It is unclear whether the opt-in procedure applies to only interconnection agreements effective as of the date of the 01-0120 order, or if it applies to any existing interconnection agreement. In either case, if there is more than one remedy plan available to CLECs then they should have the option of changing plans through the opt-in procedure.

3401. SBCI claims that §5.4 provides an opt-in procedure, however, that section applies to its Tier 1 liability, it never once mentions the term "opt-in", and the language varies from what the Commission approved in Docket 01-0120, Attachment A §5.5. Finally, SBCI never supported the language changes it made to section 5.5 of the Commission-ordered remedy plan.

3402. Therefore, the Commission should decide how it wants the opt-in procedure to be implemented, and that will depend on how many plans the Commission determines are appropriate to prevent SBCI's performance from backsliding. If the Commission decides to include Staff's recommendation in the section above (Applicable Remedy Plans in Illinois on a Going Forward Basis) as a condition of its positive recommendation to the FCC, and SBCI agrees, then the only remedy plans that would be made available to CLECs on a going-forward basis are: those found suitable to prevent backsliding in this docket; those approved for purposes of SBCI's Alternative Regulation Plan; and those developed through arms-length negotiations between a CLEC and SBC Illinois. Therefore, to protect the integrity of the analysis performed in this docket, and supported by the evidence in this docket, the only remedy plans that would be available for CLECs to opt-in to are those approved in this docket as preventing backsliding, and the performance remedy plan offered under SBCI's Alternative Regulation Plan.

3403. However, in the alternative, if the Commission does not condition any positive recommendation to the FCC on Staff's recommendation in the section above (Applicable Remedy Plans in Illinois on a Going Forward Basis) then the Commission has decided that free market forces should dictate, and that all remedy plans currently in place adequately prevent backsliding, and therefore should be available to CLECs to opt-in to. Under that rationale, Staff recommends that the opt-in apply to all whatever remedy plan is in a currently effective interconnection agreement or has been approved by the Commission. This would include, 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, in this instance, 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.

3404. Staff recommends that in all cases, the opt-in procedure set forth in the Commission ordered remedy plan in docket 01-0120 should be used, as modified below:

> Any CLEC, wishing to incorporate, substitute or add a 271 approved Performance Remedy Plan, <u>or a performance remedy plan offered under SBCI's Alternative Regulation Plan</u>, 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.
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> 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.
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> Any notice required above shall be sent to SBC Illinois' regulatory offices and the Chief Clerk's Office of the Illinois Commerce Commission.
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> ICC Staff Ex. 29.0 ¶245.

3405. In addition, Staff provides a separate recommendation for all those carriers who do not have a performance remedy plan in their interconnection agreement. More than one-third (67/161 carriers) of all carriers who have interconnection agreements with SBCI do not currently have a remedy plan as part of that interconnection agreement. Since so many CLECs do not have remedy plans, Staff recommends that SBC Illinois make a Commitment to notify those CLECs and offer the remedy plan, or plans, determined to prevent backsliding in this docket, and

offered under SBCIs alternative regulation plan, to them. For an anti-backsliding plan to be effective, as many carriers as possible should partake from the plan. It is better to make the effort to have as many carrier incorporate a remedy plan in its interconnection agreement to ensure that backsliding performance will not occur. Those carriers would then have the option of either amending their interconnection agreement or opting-in to those remedy plans pursuant to the opt-in procedure above. ICC Staff Ex. 29.0 ¶246.

3406. The opt-in procedure needs to be modified as proposed by Staff, and SBCI needs to commit to such an offering, so that an anti-backsliding plan/program in Illinois can be properly implemented. Performance remedy plans effectively prevent backsliding, only if all carriers, or a majority of the carriers, take of 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. 29.0 ¶247.

Tier 2 Payments Under One Calculation

3407. Staff recommends that the Commission condition any positive recommendation of SBCI's petition for Section 271 approval on SBCI's commitment to provide only one Tier 2 calculation methodology and assessment amount table to all carriers and remedy plans. In its SBCI plan, SBCI proposes that, if there is more than one Tier 2 calculation methodology and amounts approved by the Commission, SBCI would pay Tier 2 assessments pursuant to whichever plan would result in the highest payment.[444]

3408. This proposal is insufficient, Staff claims, for four reasons: (i) SBCI is attempting to implement this proposal through one remedy plan, and it impacts all remedy plans; (ii) this proposal would allow CLECs and SBCI to use Tier 2 payments as a bargaining chip in negotiating the interconnection agreement even though Tier 2 payments, as payments to the State of Illinois, are a public right, modification of which is not within the purview of any private party; (iii) this proposal would allow SBCI to determine unilaterally the level of Tier 2 liability it owes the State of Illinois without, from an administrative point of view, an manageable way for Staff to double-check SBCI's payments; and, (iv) the other methods for calculating Tier 2 payments that are used in current interconnection agreements operating in Illinois (e.g., SBC11 state and SBC13State plans) may be faulty.

3409. Therefore, by requiring SBCI to have only one Tier 2 calculation methodology and payment amounts for all CLECs, and all remedy plans, Staff is attempting to clarify and

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

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

simplify Tier 2 administration in Illinois. SBCI is attempting to apply section 5.5 to all remedy plans without following the appropriate procedures to amend individual remedy plans. Section 5.5 states that, in the event there are two remedy plan in Illinois with a Tier 2 assessment methodology, SBCI will make pay pursuant to the methodology that would require the greater payment amount. This is inappropriate since SBCI is only proposing that this provision be included in the SBCI plan. For this provision to apply to all carriers, the current remedy plans need to be amended so that it clearly states how that remedy plan is to operate.

3410. A Tier 2 methodology set forth in one type of remedy plan, and agreed to by a couple of carriers does not bind *all* carriers to that calculation methodology, as SBCI would attempt to do in the instant case. Simple contract law would dictate that a contract agreed to by one or two parties is not binding on all third parties, without their express written agreement to those terms. The remedy plans in current interconnection agreements that lack a Tier 2 payment provision[445] either need to be amended to expressly state what Tier 2 calculation methodology is to be applied, or to incorporate that provision by reference, or the Tier 2 methodology must be imposed upon all remedy plans by a Commission order. Therefore, such a provision that affects the rights of various carriers cannot be set forth by SBCI in just one remedy plan. Remedy plans that do not provide for Tier 2 payments, clearly operate in a manner that is contradictory to the way the Commission intends a remedy plan to operate, since Tier 2 payments are clearly part and parcel of a complete remedy plan. See Order, Docket 01-0120, Attachment A (providing for both Tier 1 and Tier 2 payments); see Texas Remedy Plan (Ameritech Illinois Remedy Plan Proposal in Docket 01-0120), Attachment A, §§9.0, 11.2 et seq.; see SBCI plan (Ehr Affidavit, Attachment Z, §§ 9.0, and 11.2, et seq.) .

3411. Offering multiple Tier 2 plans to CLECs allows the CLEC and SBCI to use it as a bargaining chip. Either party could negotiate away Tier 2 payments in exchange for some benefit to themselves. For instance, CLECs could bargain to reduce SBCI's payments to the public fisc. Tier 2 payments are payments to the state which SBCI and the CLECs should not be allowed to change. Tier 2 payments represent penalty amounts that are paid to the State of Illinois for performance shortfalls that are industry-wide. The theory behind Tier 2 payments is that if the wholesale performance from SBC/Ameritech Illinois is inadequate on an industry-wide basis, remedies should be paid to provide the proper incentive to avoid such substandard performance. However, allowing the parties to negotiate changes allow them to change the amount of liability to an amount different than what the Commission has determined to be satisfactory for incenting a certain level of behavior from SBCI. Essentially, it rests complete control of how stringent a remedy plan is to be in the hands of SBCI. If SBCI thinks the plan required by the Commission is too tough, it could negotiate for a lower Tier 2 payment plan by offering the CLEC something in exchange. This would allow SBCI to completely circumvent this Commission's role and purpose in protecting the level of service quality consumers would receive.

3412. 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

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[445] The SBC11state and SBC13State remedy plans do not expressly provide that SBCI will make Tier 2 payments to the state. Tier 2 payments are only set forth in the Commission-ordered remedy plan (at §§9.0, 11.2 et seq.), and the Texas Remedy Plan (at §§9.0, 11.2 et seq.). Attachment A.

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.

3413. Additionally, neither the Texas remedy plan's, nor the SBCI plan's, Tier 2 amounts and methodology, should be used by SBCI in calculating Tier 2 payments. The Texas remedy plan's Tier 2 amounts were found by the Commission to be insufficient to provide a "meaningful incentive [to SBCI] to provide the CLECs service that is not substandard." Order, Docket 01-0120 at 38. And the SBCI plan's Tier 2 payments and calculation methodology is not sensitive to varying levels of failed performance. ICC Staff Ex. 39 ¶55. Specifically, as SBCI performance gets worse, Tier 2 payments will not increase. Id.

3414. If the Commission allows more than one assessment table and more than one method of calculating Tier 2 payments to be used in practice to prevent backsliding SBCI would be making payments in amounts other than what the evidence in this docket estimates they would pay. ICC Staff Ex. 29 ¶242. Therefore, in practice, the level of incentive the Commission views is appropriate to prevent SBCI's service from backsliding, would be different than what the Commission intends to order through this docket. Id.

3415. Finally, in its Reply Comments, it appears that SBCI proposed that it would replace §§5.6 and 5.7 of its plan with §5.5 of the Commission-ordered remedy plan. SBCI Reply Comments at 89. Assuming that SBCI meant §§5.5 and 5.6 of its plan, this proposal will not work, since SBCI is proposing to replace a paragraph that addresses Tier 2 administration, §5.5 of the SBCI plan, with a paragraph that addresses "opt-in", §5.5 of the Commission-approved remedy plan.

3416. The Tier 2 calculation methodology that should be used for all carriers should be the one in the Commission-ordered remedy plan since that is the one currently in place, and is superior to the Tier 2 methodologies in both the SBCI plan and the Staff Hybrid Plan. See ICC Staff Ex. ¶¶55 and 57 (the Staff Hybrid Plan's payments are less than the Commission-ordered remedy plan, therefore the incentive they provide is not as strong or effective as those in the Commission-ordered remedy plan). However, if the Commission finds the Tier 2 methodology in the Staff Hybrid Plan to be more suitable then that approved in the Commission-ordered remedy plan, then the Staff Hybrid plan's methodology should be used before the SBCI Plan's Tier 2 methodology and amounts. For the foregoing reasons, Staff recommends that the Commission find that only one Tier 2 calculation methodology and assessment amount table is needed to sufficiently prevent backsliding, and that SBCI should commit to applying the approved methodology and amounts to all carriers with interconnection agreements with SBCI, regardless of the remedy plan that is part of the interconnection agreement, or whether a carrier has a remedy plan in its interconnection agreement. This commitment would apply to, but not require SBCI to amend, those interconnection agreements that contain either the SBC11state or

SBC13state plan.446 Further, the Tier 2 calculation methodology and amounts that should be used for all carriers should be those set forth in the Commission-ordered remedy plan, and in the alternative, if that methodology is unsuitable, then the Tier 2 methodology and amounts in the Staff Hybrid Plan.

Setting of Annual Threshold Amounts

3417. In section 7.4 SBC Illinois proposes that it shall determine the annual thresholds. SBCI has provided no supporting testimony for this change from the Commission-ordered remedy plan. Staff objects to this proposal, and recommends that the amount of the Annual Threshold (i.e. annual cap, in the Commission-ordered remedy plan) be determined through a Commission proceeding that would allow the Commission to evaluate the information provided by SBCI and determine the 36% annual threshold. This is consistent with the Commission-ordered remedy plan (at §7.3), which requires

> The annual cap amounts will be determined by the Illinois Commerce Commission, pursuant to an annually commenced docket, based on the formula of 36% of [SBC Illinois'] net return as is set forth at ¶436 and footnote 1332 of the FCC's December 22, 1999 Memorandum Opinion and Order in CC Docket 99-295.
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> Order, Docket 01-0120, Attachment A ¶7.3.

The Commission-Ordered Remedy Plan Continued as Part of SBCI's Alternative Regulation Plan

3418. Staff recommends that the Commission order SBCI to offer to Illinois CLECs the Commission-ordered remedy plan through its Alternative Regulation Plan. See Staff Exhibits 29.0, 39.0, 41.0 and 50.0. Moreover, the Commission-ordered remedy meets the key characteristics the FCC uses to evaluate remedy plans, it clearly is the superior plan for purposes of preventing backsliding in Illinois and remains the most complete and thorough plan available.

3419. In Dockets 98-0252/98-0335/00-0764, the Commission determined that the remedy plan to be used for purposes of SBCI's alternative regulation is the remedy plan the Commission approved in Docket 01-0120 (i.e., the Commission-ordered Remedy Plan) stating that it is "the most thorough and complete plan at this time", and that it should continue to be offered to CLECs so as to provide "more certainty for competitors in the marketplace." Order, Docket Nos. 98-0252/98-0335/00-0764 at 190 (hereafter "Alt Reg Order"). However, the Commission also determined that "the 01-0120 Remedy Plan [would be] effective up to and until a wholesale performance measure plan for Section 271 purposes is approved by this Commission." Id. Thus, at the end of this proceeding it is conceivable that there may no longer be a Commission-approved plan, of any sort, being offered by SBCI.

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

3420. Therefore, Staff recommends that the Commission should continue to require SBCI to offer the Commission-ordered remedy plan as part of its alternative regulation plan, and offer it to CLECs until the conclusion of the next proceeding that is to determine the need for and appropriate duration of remedy plans in Illinois.[447] There are a number of benefits to requiring SBCI to offer the Commission-ordered remedy plan through its alternative regulation plan: it will ensure that CLECs will be able to choose the superior plan available in Illinois; it will provide consistency and certainty for telecommunications companies operating in the SBCI region; it will avoid a remedy plan gap -- in which there may be a period of time in which a Commission approved plan will not be offered to CLECs; and it avoids negative repercussions in ongoing dockets wherein the remedy plan is at issue.

3421. Requiring SBCI to offer the Commission-ordered remedy plan through its alternative regulation plan will also ensure that CLECs will be able to choose the superior plan available in Illinois. Moreover, Staff has provided compelling evidence in this proceeding that the SBCI plan does not prevent backsliding in Illinois for the following reasons: SBCI removed the performance weightings and has introduced an "index value" calculation which no longer allows the remedy plan to adequately detect and sanction poor performance (ICC Staff Ex. 39 ¶38); there are inappropriate caps on monthly payments, unlike the Commission-ordered remedy plan (ICC Staff Ex. 39 ¶52); the remedy payments are difficult for CLECs to check and replicate for itself, unlike the Commission-ordered remedy plan (ICC Staff Ex. 39 ¶61-62), the SBCI plan does not provide substantial incentive for the Company to provide wholesale service to CLECs in compliance with the PM standards, whereas the Commission-ordered remedy plan does (ICC Staff Ex. 39 ¶67-69). Therefore, the Commission-ordered remedy plan is the superior of the two plans in preventing backsliding. Furthermore, since SBCI has been offering the Commission-ordered remedy plan since August of 2002 and performance has stabilized, it is a proven commodity unlike the SBCI plan. The Commission has allowed SBCI to enter into more than one remedy plan in its interconnection agreements, and approximately 23 carriers currently operate under the Commission-ordered remedy plan. Offering the Commission-ordered remedy plan through SBCI's alternative regulation plan gives all carriers the option of choosing the superior plan offered in Illinois.

3422. Requiring SBCI to offer the Commission-ordered remedy plan through its alternative regulation plan will provide consistency and certainty for telecommunications companies operating in the SBCI region. If the Commission finds that the Commission-ordered remedy plan prevents backsliding, and SBCI submits a plan to the FCC for 271 approval that this Commission determines is not suitable for preventing backsliding, it is unclear whether SBCI would still need to offer the Commission-ordered remedy plan unless the Commission relies upon its authority under alternative regulation to order SBCI to offer such plan. At the outset of Phase 2, Staff counsel expressed concern about SBCI representations that it might not take to the FCC, as part of its 271 application, the remedy plan that the Commission determines as being

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

suitable to prevent backsliding. Tr. 2175-77. In response, SBCI counsel stated that it could not commit to taking to the FCC a remedy plan that it has not seen. Tr. 2178-79.

3423. If SBCI takes a remedy plan, other than the plan this Commission finds suitable to prevent backsliding, it is unknown what weight the FCC will give this Commission's remedy plan findings. Additionally, if SBCI takes a remedy plan to the FCC that this Commission determined was not suitable to prevent backsliding by this Commission, and the FCC approved that application, it is unclear whether SBCI would still have to offer the Commission-ordered remedy plan, or any plan this Commission determined to suitably prevent backsliding. Therefore, so that this Commission's can fulfill its desire to provide certainty in SBCI's region, the Commission should order SBCI to offer the Commission-ordered remedy plan, under state authority, as part of its alternative regulation plan.

3424. Even if the Commission finds that the SBCI plan is suitable for preventing backsliding by SBCI, the Commission should require the company to offer the Commission-ordered remedy plan as part of its alternative regulation conditions, since, as the Commission found in the Alt Reg Order, it provides "certainty for competitors in the marketplace" and it will let "competitive carriers know exactly what wholesale remedial plan is available to them at all times," and is a complete and thorough plan. Order, 98-0252/98-0335/00-0764 at 190. The Commission-ordered remedy plan should continue to be made available so that those carriers who use the Commission-ordered remedy plan can still receive the benefits of that plan, and do not need to waste time, money and effort negotiating a new remedy plan.

3425. If SBCI takes to the FCC the performance assurance plan this Commission finds acceptable in preventing backsliding but the Commission does not make it clear that SBCI is ordered to offer the plan approved in this proceeding under its alternative regulation authority, there may be circumstances that in which a gap of time could occur when the Commission approved remedy plan would not be in place in Illinois. This would occur if SBCI filed with the FCC and then withdrew the application, or if the FCC does not grant SBCI's 271 approval.

3426. Requiring SBCI to offer the Commission-ordered remedy plan through its alternative regulation plan will avoid negative repercussions on docket 01-0539. In Docket 01-0539 the Commission is creating a rule that implements carrier-to-carrier wholesale service quality rules pursuant to Section 13-712(g) of the PUA (Proposed Part 731).448 Staff's Proposed Part 731 requires all Level 1 ILECs in Illinois to have a remedy plan in place under state authority and pursuant to state guidelines. This proposed rule would require all Level 1 ILECs to have a wholesale remedy plan, including SBCI. SBCI would be considered a Level 1 carrier. The purpose of the rule is to ensure that wholesale services provided by ILECs in Illinois will be maintained at a level that provides CLECs a meaningful opportunity to compete. The instant docket, in comparison to docket 01-0539, reviews the remedy plan(s) an RBOC is to provide, and is based on federal guidelines, although the FCC recognizes that state commissions may create plans to be used for post-section 271 approval monitoring and enforcement, and those

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

plans can vary in strengths and weaknesses.449 Under the Part 731 rule Staff is currently proposing in docket 01-0539, the initial performance assurance plan that would be used for SBCI is "the most recent Pre-Rule Plan implemented by such carrier pursuant to a Commission order or, . . . the most recent Pre-Rule Plan implemented by such Carrier on a voluntary basis." Attachment B, which is Docket 01-0539, Staff Reply Brief, Attachment 1, §731.105 definition of Pre-Existing Rule sub-section b. At this time, that is the performance assurance plan approved by the Commission in Docket 01-0120. It is Staff's view that this case is not a thorough investigation of remedy plans for purposes of Part 731, for the reasons set forth in Section III above. However, if the Commission does not require SBCI to continue to offer the Commission-ordered remedy plan under SBCI's alternative regulation plan, then the plan that would be implemented for purposes of Part 731 could arguably be a remedy plan inferior to the Commission-ordered remedy plan – since Staff's affidavits demonstrates that the Commission-ordered remedy plan is superior to the SBCI plan. Therefore, the Commission should require SBCI to continue to offer the Commission-ordered remedy plan under SBCI's alternative regulation plan. The Illinois PUA allows the Commission to set criteria for an Illinois Remedy Plan that are wholly distinct and separate from the evaluation criteria used for purposes of 271. See 220 ILCS 5/13-712. For the foregoing reasons, Staff recommends that the Commission order SBCI to offer the Commission-ordered remedy plan, to CLECs, as part of its Alternative Regulation plan, until the conclusion of the next proceeding that is to determine the need for and appropriate duration of remedy plans in Illinois.

7. SBC Illinois Response to Staff Comments/Recommendations

3427. SBC Illinois, is confused about Staff's proposal. In Staff's words (at 23): "Even if the Commission finds that the SBCI plan is suitable for preventing backsliding by SBCI, the Commission should require the company to offer the Commission-ordered remedy plan [from Docket 01-0120] as part of its alternative regulation conditions." Then, the Company believes Staff to suggest, the Commission would conduct yet another proceeding on remedy plans, this time as part of a rulemaking proposed by Staff. In other words, SBC Illinois states, all the work done on "remedy plan" issues in this proceeding would be a meaningless dress rehearsal for another proceeding at some indefinite future date. SBC Illinois states there is no legal or factual basis for such a wasteful course.

3428. First, SBC Illinois asserts, there is no legal basis for Staff's proposal. To the contrary, SBC Illinois contends, Staff's proposal is directly contrary to the actual holding of the Alt Reg Order, which states that "the 01-0120 Remedy Plan [would be] effective up to and until a wholesale performance plan for Section 271 purposes is approved by this Commission." Alt Reg Order, at 190 (emphasis added). SBC Illinois points out that Staff's proposed rule under Docket 01-0539 is not a legal authority at all.

3429. 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

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449 See Pennsylvania Order, ¶¶128-129.

separate track for remedy plan issues). SBC Illinois contends that Staff and the CLECs have had more than ample opportunity to consider and 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.

3430. 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.

3431. 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.

3432. 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.

3433. 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 derides here.

Tier 2 Payments

3434. 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.

3435. 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.

Other Issues

3436. With respect to Staff's proposals on annual audits, SBC Illinois reiterates its view that regionwide audits, conducted every 18 months, would be sufficient, particularly in light of the E&Y and BearingPoint audits. SBC Illinois writes further to clarify the burden of proof, while agreeing generally that it bears the overall burden in this proceeding.

3437. Through its comments filed on _____, Staff recommends that the Commission require SBCI to commit to satisfying (as we see it) each of the following:

1. Performance Remedy Plan as Part of SBCI's Interconnection Agreements:

   SBC Illinois will make available to CLECs through its interconnection agreements, only (1) the remedy plan: found suitable in this docket to prevent backsliding, and that is approved for use pursuant to the Company's Alternative Regulation Plan; and (2) those plans developed through arms-length negotiations between a CLEC and SBC Illinois, 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:

   SBC Illinois will offer the remedy plan here approved to CLECs as part of it 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 a CLECs ability to opt-in to only two performance remedy plans – the remedy plan approved in this docket to prevent backsliding, and that is 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 require SBCI to apply the opt-in to the plans that are in existence at the commencement of this proceeding, i.e., 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 (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.

3438. The opt-in procedure to be offered CLECs is as a modified version of the opt-in procedure approved in Docket 01-0120 (§5.5), and is as follows:

> Any CLEC, wishing to incorporate, substitute or add a 271 approved Performance Remedy Plan, <u>or a performance remedy plan offered under SBCI's Alternative Regulation Plan</u>, 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.

4. Six month collaborative:

The Company will continue meeting with CLECs and Staff, (as set forth in §6.3 of the Commission-ordered remedy plan). Therefore, the six-month collaborative would be held six months after the conclusion of the previous six month process, and should continue for as long as wholesale PMs are in existence and are being reported.

5. Tier 2 administration:

SBC Illinois will provide only one Tier 2 calculation methodology and assessment amount table to all carriers and remedy plans.

6. Annual audits:

The Company will 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.

7. Mini-audits:

provide mini-audits to all CLECs, and for all remedy plans as provided in section 6.4.2 of the Commission-ordered remedy plan.

8. Determination of Annual Threshold:

The Company will agree that the amount of the Annual Threshold (i.e. annual cap, in the Commission-ordered remedy plan) be determined through a Commission proceeding that would allow the Commission to evaluate the information provided by SBCI and determine the 36% annual threshold.

3439. In Staff's view, each of 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.

3440. Regardless what plan is found to sufficiently prevent backsliding in a post-Section 271 approval environment, Staff recommends that the Commission condition a positive 271 recommendation to the FCC contingent on SBCI firm commitment to make the following changes to the way it administers remedy plans in Illinois[450]: (1) enter in to a proceeding 36 months from the issuance of this order to determine the need for, or to make adjustments to, performance assurance plans offered by SBCI based on market conditions (2) provide one type

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450 Conditioning approval of a Performance Assurance Plan is not unheard of, since Maine did such a thing. Maine Order ¶62.

of mini-audit and annual audit to all CLECs(3) allow a CLEC to opt-in to any remedy plan (4) continue participating in the six month collaborative process (5); apply only one Tier 2 calculation methodology to all remedy plans and (6) agree to a Commission proceeding, to review and approve the dollar amount equivalent of 36% of SBCI's net return of local revenue. Staff notes that SBCI proposed plan has not been approved for 271 purposes in any other state. Finally, the Commission should condition any recommendation of SBCI's petition for Section 271 approval on SBCI's commitment to offer to Illinois CLECs the Commission-ordered remedy plan for the multiple reasons set forth in Staff testimony.

8. COMMISSION ANALYSIS AND CONCLUSION

a. Introduction: Procedural Framework

3441. In Phase II of this proceeding, all participating CLECs were given the opportunity to conduct discovery, submit at least two rounds of testimonial affidavits, identify and discuss through comment and/ or brief, any issues presented by SBC Illinois' proposed plan. At the very outset, the Company conducted a walk-through of the plan for Staff and interested CLECs. So too, at the workshops, SBC-Illinois witness Ehr was available and did respond to questions either orally at the session or in writing soon thereafter. And, the Compromise Plan had been on file and available, since June, 2002.

3442. In light of the evidence showing that the Compromise Plan builds on and does not entirely displace the 0120 Plan (that was litigated by many of the same witnesses), this procedural framework provided ample opportunity for the interested parties to explore and address the proposed changes and/or refinements contained therein.

3443. The Commission has studied closely the affidavits and supporting documentation of AT&T witness Kalb, WorldCom witness Kinard, Staff witnesses Patrick and McClerren, CIMCO witness Dvorak, and SBC-Illinois witness Ehr all of whom address the remedy plan issues. We have also carefully examined the arguments in support and against the Compromise Plan as well as other remedy plan options.

b. Looking Back to the 01-0120 Plan

3444. 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 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.

3445. To be sure, 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 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 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.

3446. 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.

3447. 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.

3448. 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.

3449. Under these facts and circumstances, it behooves this Commission to focus 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 may well consider the suitability and appropriateness of a plan that will carry forward assurances of continued good performance. In other words, the anti-backsliding features of 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.

3450. 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, understandably, was not designed in this fashion. And, as SBC Illinois showed in its January 17 filing, that 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 for purposes of section 271. It is also muddles the message and suggests a level of unfairness.

3451. 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.

3452. 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.

3453. 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.

c. Assessment of the Compromise Plan

3454. At this point, the Commission addresses the particulars of the Compromise Plan that SBC Illinois proposes to help ensure that it will continue to meet its statutory obligations after section 271 approval is granted.

3455. A remedy plan exists to motivate good performance and to do so in a fair, curtain 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 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.

3456. 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.

3457. Even at that, we observe that many 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.

3458. Most the above particulars were assessed by this Commission in Docket 01-0120 and are largely being retained, if sometimes refined, under the Compromise Plan proposal. We will consider these refinements later. For the moment, however, we would observe that, against these many similarities, there are a select number of changes being proposed, to wit:

1. the indexing of payments

2. a gap closure process

3. a step up, or refinement of the escalation process

4. the removal of PM weightings.

5. use of a "floors & ceilings" standard.

3459. Notably, we find that the proposed Staff Hybrid plan would itself adopt two (2) of these newly- proposed features. i.e., gap closure and step-down. While not embracing the index feature, Staff would further adjust the payment of remedies different from what the 01-0120 plan currently requires. (And, neither AT&T witness Kalb nor WorldCom witness Kinard oppose the Hybid Plan which would graft these modifications onto the 0120 plan).

3460. In essence then, this leaves three of the modifications in the Compromise Plan in serious dispute, i.e., the removal of PM weightings; the "floors and ceilings" approach; and, the indexing performance payment feature.

(1) The "Floors and Ceilings" Concept.

3461. Section 8.4 of the Compromise Plan would provide for a "floors and ceilings" approach on certain measures. The "floor" means that if SBC Illinois performance for that CLEC is worse than that level, it will be deemed a performance shortfall even if the measure was in parity. The "ceiling" means that if SBC Illinois performance is better than that level, it will not be deemed a performance shortfall even if there is some minor disparity between wholesale and retail.

3462. We note the Company to assert that the floors and ceilings apply only to certain measures, to be established by collaborative agreement. And, even for those measures, the Company submits, the standard of comparison on these performance measures would still be parity at most levels of performance. In other words, SBC Illinois claims, the "floor" or "ceiling" benchmark comparison would apply only when service provided to the CLEC is at very high or very low levels.

3463. The Commission notes Staff to take the position that "floors and ceilings" are contrary to the parity requirements of the 1996 Act. We see no response from SBC Illinois to this criticism. Arguably, and in the abstract, it might make sense to consider that once wholesale performance reaches a high enough level, a statistical disparity between wholesale and retail makes no real difference. While this is indeed an interesting concept, it is not well developed on the instant record. To be viable for consideration, such a proposition needs to be supported by a far greater showing than what has been provided here.

3464. We are not prepared to approve such a feature in this Section 271 plan (and, importantly, we believe that removal of this feature with not interfere with the plan's overall structure). Our finding, however, is not intended to foreclose discussion during the parties collaborative sessions or in negotiations.

(2) Removal of Weightings

3465. 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.

3466. 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.

3467. 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.

(3) Indexing of Payments

3468. 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.

3469. 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.

d. Other Issues/Recommendations Raised By Staff.

(1) The Compromise Plan and Alt Reg Plan.

3470. Given our finding that the Compromise Plan is adequate, the Commission accepts Staff's proposal 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 states that: "the 01-0120 Remedy Plan [would be] effective up to and until a wholesale performance 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.

Note: Staff will explain in its exceptions if any further action is necessary in this regard.

(2) Periodic v. Annual Audits

3471. SBC Illinois' has proposed periodic audits instead of the annual audits that Staff believes 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.

3472. 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 commissions. 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.

3473. 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.

3474. 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.

3475. As such, and unless otherwise directed, the first audit will commence 16 months after the completion of the BearingPoint'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.

3476. 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.

Note: The Compromise Plan will be modified according to reflect this determination and submitted with the Company's exceptions.

(3) "Mini-Audits"

3477. SCC 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.

Note: This too, will be reflected in the modified Compromise Plan that SBC Illinois will tender with its exceptions.

(4) "Opt-in" Provision

3478. Staff Witness McClerren notes that not all CLECs have adopted the 0120 Plan, and suggests that the Commission either 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 not 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 has already advised CLECs via accessible letter of remedy plans available in Illinois, including the 0120 Plan.

3479. As we see it, SBC Illinois ha 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.

(5) Other Administrative Provisions.

3480. Staff asked the Company to discuss how Sections 5.5 and 7 of the Compromise Remedy Plan compare to the 0120 Plan. While SBC Illinois maintains that the Compromise Plan language on these sections is more appropriate, SBC Illinois is willing to modify portions of the Compromise Remedy Plan as follows:

> Sign up. SBC Illinois would be willing to incorporate Section 5.5 of the 01-0120 Plan in lieu of Sections 5.6 and 5.7 of the Compromise Plan;
>
> Exclusions. Section 7.1 of the 01-0120 Plan and the Compromise Plan each provide that SBC Illinois is excused from the payment of remedies under certain circumstances. SBC Illinois would be willing to use the language provided in Section 7.1 of the 01-0120 Plan.

3481. The Commission finds these modifications to be acceptable, and adopts them for the Compromise Plan.

Note: These will be included in the Modified Plan as well.

3482. Further, in its Comments, Staff has raised issues with respect to the uniformity of Tier II payments and

3483. We find that the responses to those Comments as filed by the Company are reasonable and show no legitimate disputes to be raised.

(6) The Term of the Compromise Plan

3484. Regarding the issue of the term of the Compromise Remedy Plan, Staff and SBC Illinois appear to be in agreement on the four-year term, with a proceeding 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.

3485. The Commission agrees, and thus finds it reasonable that a collaborative should begin 30 months into the term of the Compromise Plan.

Note: We expect to see language reflecting our finding in the Modified Compromise Plan.

(7) The Hybrid Plan.

3486. Having determined that the Compromise Plan is well-suited for purposes of section 271, the Commission is of the view that the "Hybrid Plan" which adopts certain feature of the Compromise Plan, 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.

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

3487. Having determined that the Compromise Plan withstands our initial analysis, the question continuing before this Commission is whether the Compromise 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 Compromise 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;

3488. The Commission finds that SBC Illinois' proposed Compromise 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.

3489. 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 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.

3490. 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.

3491. 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.

3492. 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.

3493. 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.

3494. 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;

3495. 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 01-0120 plan.

3496. 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.

3497. 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 are to continue via the 6-moth 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.

3498. 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.

3499.

3500. 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.

3501. 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.

3502. 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.

3503. 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.

3504. 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.

3505. 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.

3506. 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.

3507. The Commission does not believe that the FCC would requires 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.

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

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

3508. 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.

3509. 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.

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

f. Summary.

3510. On the entirety of our review and analysis, the Commission concludes that the Compromise Plan meets with, and 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.

g. Additional Observation: The 271 Remedy Plan Does Not Stand Alone.

3511. While the existence of a performance remedy plan is relevant to the FCC's "public interest" analysis, it is not the only way to assure continued BOC compliance with its legal and contractual obligations. Even if there was no performance remedy plan at all, SBC Illinois has other, significant incentives to continue to satisfy its obligations.

3512. To be sure, SBC Illinois is in the business of providing telecommunications services to all of its customers at good quality level regardless of whether they are retail or wholesale customers. It has a name, reputation, and business interest at stake.

3513. So too, it is incumbent upon SBC Illinois to fully comply with the laws and rules of the federal government regarding non-discriminatory access. These include Sections 251, 252 and 271 of the Telecommunications Act of 1996. To be sure, the FCC itself has indicated that it stands ready to exercise its various statutory enforcement powers under Section 271 (d)(6) quickly and decisively to ensure that the local market remains open. Florida and Tennessee 271 Order at para. 171.

In addition to monies put at risk under the Plan, SBC Illinois faces other consequences, under the laws of this state, if it fails to provide acceptable levels of service to competing carriers. This Commission has numerous methods to ensure that SBC Illinois complies with applicable obligations and it will not hesitate to take necessary action.

I. Outstanding Disputes From Six- Month Review.

1. The Issue.

3514. It was agreed by SBC Illinois, AT&T, and WorldCom that the Commission would be put to resolving one additional dispute in the Phase II proceeding. This is a dispute with respect to certain performance measures and on which the parties could not reach agreement during the most recent latest six -month collaborative. According to WorldCom, this proceeding presents a convenient forum wherein to have these issues resolved.

3515. The issue is whether two of the diagnostic measures, i.e., MI 12 (average time to clear services orders) and MI 13.1 (average delay days for mechanized line loss notifications) should be remedied.

2. WorldCom's Position

3516. WorldCom's witness Kinard states that remedies are required for metrics MI 12 and MI 13.1 in order to motivate improvement in two problem areas.

PM MI 12.

3517. WorldCom contends that MI 12 motivates parity in clearing orders that error out of billing. It states that CLECs need these billing and the customer service records associated with them updated regardless of what the billing cycle is, so that they own the customer right away and can provide answers about service and log in trouble reports promptly.

3518. WorldCom states that the billing completeness measurement, i. e., PM 17 does not serve the same purpose. According to WorldCom, it only operates, to the degree that matters have not gotten so bad that the charges do not show up on the next carrier bill, to make auditing easier for CLECs. While SBC Illinois has a disaggregation for customer as well as CABS bills, the customer segment does not ensure the billing errors are captured quickly enough to ensure timely update of the customers underlying carrier and confusion and errors can occur in serving that customers service question and maintenance needs without such timely updates.

3519. WorldCom agrees that, if delays on closing to billing are really bad for orders placed at the end of the billing cycle, the PM 17 metric will be missed. But, WorldCom claims, even excellent performance on this metric does not address the behavior that MI 12 is trying to motivate. SBC Illinois' affirming that all orders, including late ones are included, is not relevant to the behavior each metric is designed to motivate. One metric can be missed and not the other not. If SBC clears or errors as quickly as it clears its own, then MI 12 is not missed even if PM 17 is missed.

3520. According to WorldCom, these facts clearly show that two different behaviors are being measured and SBC has control over whether it misses none, one, or both of metrics PM 17 and PM 12. Clothing both metrics with remedies, WorldCom argues, will ensure that both are met as the CLEC requires.

PM M 13.1

3521. **Further, WorldCom asserts. remedies** should be applied at the low level to PM 13. 1. Mechanized Line Loss Report Average Delay Days, when they exceed 4 days on average.

3522. The Commission concludes that WorldCom's proposal should be adopted. Although both PM MI 13 and PM MI According to WorldCom**, the Michigan Public Service Commission's order, referred to in Ms. Kinard's rebuttal affidavit, did not make CLECs agree to remove remedies from MI 13 when it granted WorldCom's petition .**

> 13.1 relate to line loss notifiers, they do not measure the same thing. WorldCom proposes that remedies be imposed for PM MI 13.1 when the average delay is more than four days, which PM MI 13 measures the percentage of notifications returned within one business day. *Because line loss notification is so important to the development of a competitive market (due to the effect on customer relations) and because line loss*

notification has been a continuing problem, the Commission concludes that it is appropriate to impose remedies for both PM MI 13 and PM MI 13.1.[451]

3523. WorldCom urges this Commission to join the Michigan Commission in making PM MI 13.1 a remedied measure. According to WorldCom, moving the medium remedies proposed by staff, and agreed to by SBC Illinois, from MI 13 to MI 13.1 would not capture the whole picture of delays in receiving line loss reports. No more than three percent should be late at all, and those that are late should not be so late that they are beyond a 4 day average, as it makes it more likely that the CLEC will bill a departed customer and ensure that the customer will never return.

3524. WorldCom has originally proposed high remedies for both metrics but moved to accepting low remedies on MI 13 and seeking low remedies for MI 13.1 in the collaboratives. At that time, SBC Illinois' line loss performance had improved, but now that it is declining again as WorldCom witness Litchtenberg and other CLEC witnesses have noted, such that higher remedies should be imposed on MI 13 along with the need for at least low levels for MI 13.1.

3. SBC Illinois' Position.

3525. The Company recognizes WorldCom to present two proposals upon which SBC Illinois and the CLECs could not agree in the recently- completed six-month review collaborative. WorldCom Ex. 6.0 (Kinard Aff.) ¶¶ 42-51. According to SBC Illinois, these two issues have been filed as disputed items in Michigan and Ohio. Further, SBC Illinois informs, the Michigan Public Service Commission ("MPSC") has ruled on these disputes, agreeing with WorldCom that remedies should apply to PM MI 13.1, while agreeing with Michigan Bell that PM MI 12 need not be subject to remedies. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 243.)

5. PM MI 12.

3526. WorldCom's first proposal is to make PM MI 12, currently a diagnostic measure, subject to performance remedies. The Company explains that PM MI 12 assesses SBC Illinois' ability to resolve 3E service order errors that occur in the billing completion process. SBC Illinois contends that WorldCom's proposal would duplicate the existing remedy provided under PM 17.

3527. SBC Illinois states that the process measured by PM MI 12 is a subset of the billing completion process measured in PM 17 (Billing Completeness), which addresses the timeliness with which SBC Illinois processes an order for which provisioning has been completed (the start point of PM 17) to the point where the order has been updated to the account records in the billing system. According to SBC Illinois this interval, described as the period from "service order completion in the Ordering system to a bill posting in the Billing system,"

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[451] *See* MPSC Order at 4 (emphasis added).

necessarily encompasses the entire 3E error resolution process. Stated another way, the time required to resolve any erred service order is already included in the time reported in PM 17. If SBC Illinois is taking a long time to correct CLEC service orders in 3E status, performance reported on PM 17 will decline, and the likelihood of remedy payments will increase. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶ 245.)

3528. Staff apparently recognizes the duplicative nature of WorldCom's proposal, the Company notes, and has sought confirmation from the Company that PM 17 assesses the timeliness in which all service orders are posted to billing.

3529. SBC Illinois confirms that PM 17 results are not based only on those service orders that are posted on time. PM 17 assesses all wholesale service orders (except for those excluded by the PM) to determine whether or not the service order posted to billing prior to the first bill cycle for the account after completion of the service order in the ordering system. Based on that confirmation, SBC Illinois understands Staff to agree with SBC Illinois' position on PM MI 12. (SBC Ex. 2.3 (3/17/03 Ehr Surrebuttal) ¶ 152.)

PM MI 13.1

3530. According to SBC Illinois, WorldCom's second proposal seeks to attach remedies to the newly proposed and agreed-upon PM MI 13.1. SBC Illinois states that this proposal is also unreasonably duplicative and premature. According to SBC Illinois, PM MI 13.1 is a diagnostic measure that will work in conjunction with the updated and remedied PM MI 13 measure, to provide the CLECs and the Commission additional visibility into SBC Illinois's performance on Line Loss Notification timeliness. SBC Illinois explains that any delays in sending line loss notices will already be subject to remedies under PM MI 13.

3531. Further, SBC Illinois states that it has agreed to increase the remedy level from "Low" to "Medium" on PM MI 13. PM MI 13.1, meanwhile, simply assesses the number of days a line loss notice is delayed once the line loss notice is late. As such, SBC Illinois states, the line loss notice is already included as a "late" or "missed" notice in PM MI 13, and will be subject to remedies there. (SBC Ex. 2.2 (3/3/03 Ehr Rebuttal) ¶¶ 249-253.)

4. AT&T's Position.

3532. Through its witness Kalb, AT&T generally supports WorldCom's position.

5. Staff's Position.

3533. Staff notes that by letter dated February 27, 2003 WorldCom, AT&T and SBC Illinois agreed to have the Commission resolve, in this proceeding, two disputed performance measurement issues resulting from the most recent six-month collaborative.

3534. At the outset, Staff notes the Company to assert that if the instant performance measures were to be remedied, this would duplicate remedies on other measures already in

existence (MI 13 and 17 respectively). Staff further sees SBC Illinois witness Ehr to contend that, the parties in the six-month review have agreed not to apply double remedies.

3535. The Staff generally agrees with SBC Illinois' position that the parties in the six-month collaborative have agreed not to apply multiple remedies to the same OSS processes. In Staff's view, however, the specific question that needs to be determined is whether or not having remedies applied to the two performance measures in dispute would constitute double remedies on the same OSS processes.

PM MI 13.1.

3536. The Staff states that if remedies were applied to performance measure MI 13.1 that the payments would be duplicative to those associated with performance measure MI 13. Both MI 13 and MI 13.1 report on aspects of SBC Illinois' timeliness in returning line loss notifications. If a line loss notice is late, Staff explains, it will be counted as a miss under both of these performance measures.

3537. As such, in response to WorldCom's request to remedy performance measure MI 13.1, the Staff can only support the request if all parties agreed to remove remedies from MI 13. Alternatively, if WorldCom or any other CLEC would like to negotiate individually with SBC Illinois to have remedies applied to its own company performance for MI 13.1 instead of MI 13, the Staff could also support this alternative.

PM MI-12.

3538. Mr. Ehr in his reply affidavit states that performance measure MI 12 is a sub-process of the billing completion process measured in PM 17 and therefore remedies on MI 12 would be duplicative to those already being applied to performance measure 17. Ehr Reply Affidavit, ¶245. Before the offering an opinion on this disputed issue, however, SBC Illinois must answer the following question: the business rule definition for performance measure 17 states that it measures the "percent of on time service orders that post to billing within a designated interval".

3539. The Staff need clarification as to whether this means that only those service orders that are "on time" are included in measurement 17. If it does, then having remedies applied to MI 12 would not be duplicative of all records evaluated in measurement 17. If it does not, however, and SBC Illinois includes all service orders posted to billing within the reporting timeframe, regardless of whether the service orders were on time or not, Staff then would agree that remedies applied to performance measure MI 12 would be duplicative. Staff seeks clarification from SBC Illinois on this point in its surrebuttal filing scheduled for March 17.

3540. In summary, the Staff recommends that the request to have remedies assigned to MI 13.1 be denied unless all collaborative parties agree to remove remedies from MI 13. With respect to MI 12, the Staff's position on this issue depends upon SBC Illinois clarifying whether or not the billing completeness performance measure, PM 17, includes all service orders or only those that are considered to be "on time". If all service orders are included then the Staff recommends the request to have remedies assigned to MI 12 be denied. If all service orders are

not included in the billing completeness measure then the request deserves further consideration. All responses to these recommendations should be made in the surrebuttal round.

6. Commission's Analysis and Conclusion

3541. At the outset, we see that Staff has provided a clear and comprehensive explanation of the issues at hand. As such, it informs that the parties to the collaborative have indeed, and reasonably so in our view, agreed that multiple penalties do not apply to the same failed performance. (This, we would note, reflects a well-settled concept in the law).

WorldCom is seeking a change to the status quo and wants to have two performance measures, currently listed a diagnostic, made subject to remedy. As such, the question before us is whether adding penalties to the measures set out by WorldCom would amount to a doubling of remedies based on the same activity.

PM MI 13.1.

3542. Staff tells us that adding remedies to PM MI 13.1 would duplicate the remedy associated with PM MI 13. Given that both measures report on the Company's timeliness in returning line loss notifications, any miss would be counted under both of these measures. According to Staff, and we agree, one and only one of the measures needs to be remedied.

3543. To be sure, we do not know nor are we told, on what basis the Michigan concluded as it did. This Commission remains confident, however, that Staff and SBC Illinois have correctly framed the issue and the demonstration on record for this particular matter, has led us to the right decision.

PM MI 12.

3544. With respect to PM MI 12, Staff informs that this measure is a sub-set of the billing completeness process that PM 17 measures. As such, Staff notes, adding remedies to PM MI 12 would duplicate the remedy that already attaches to PM 17. To be absolutely sure of its position, Staff sought clarification from the Company as to whether, under PM 17, SBC Illinois includes all service orders posted to billing within the reporting timeframe regardless of whether or not the service orders were on time.

3545. The Company answered Staff's query confirming that PM 17 results assess all wholesale service orders posted to billing prior to the first bill cycle for the account after completion of the service order in the ordering system. Thus, PM 17 results are not based only on those service orders that post on time.

3546. This added information works itself into Staff's recommendation that the Commission deny WorldCom's request for PM MI 12 remedies. We find the recommendation reasonable.

3547. All in all, the relief sought by WorldCom and AT&T in these premises is denied on each of the two proposals.

V. COMMISSION FINDINGS ON THE SECTION 271 INVESTIGATION

3548. Here follows a listing of all of the commitments made by SBC Illinois and the directives set out by the Commission's Review in the whole of this proceeding.

3549. Note: SBC Illinois will provide such list in its Brief on Exceptions.

DATED: April 8, 2003
BRIEFS ON EXCEPTIONS DUE: April 18, 2003

Eve Moran,
Administrative Law Judge

3550. ~~On the whole of the record for this Phase I proceeding established by our Initiating Order on October 24, 2001, the Commission finds as follows:~~

~~1Ameritech Illinois satisfies Section 271 (c)(1)(A) of the Telecommunications Act of 1996.~~

~~2With respect to the provisions of Section 271 (c)(2)(B), our individual assessments as regard these many matters, indicates that:~~

~~a. Ameritech Illinois is in compliance with checklist items (iii), , , (vii), (viii) (ix), , (xi), (xii), (xiii), and (xiv). To the extent that there is no showing in Phase II, as would alter this view, the Commission is prepared to find Ameritech Illinois compliant with these requirements.~~

~~b. There are certain remedial actions deemed necessary by the Commission with respect to the satisfaction of its obligations under checklist items (i), (ii), (iv) (v) and (x). The specifics of the remedial action we find necessary, is set out under our respective conclusions for each of those sections. Ameritech's implementation of the requisite action or refusal~~

~~thereof, will factor into our final assessment of checklist items (i), (ii), (iv), (v) and (x), to be performed in Phase II of this proceeding.~~

~~c. With respect to Checklist Items (v) a definitive finding of compliance depends on confirmation that the Company's recently filed compliance tariffs meet with our division.~~

~~d. As regards Checklist (vi) there are certain issues being continued to Phase II.~~

~~3. Our review of the public interest further suggests certain remedial actions to be taken by the Company and describes the showings that we will require in the Phase II proceeding.~~

~~By Order of the Commission this 6th day of February, 2003.~~

~~(SIGNED) KEVIN K. WRIGHT~~

~~Chairman~~