

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

SBC ILLINOIS' RESPONSE TO STAFF COMMENTS ON REMEDY PLAN

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INTRODUCTION

Notwithstanding its three-months-running protestation that it has not had time to adequately address “remedy plan” issues, Staff has filed its fifth submission on the subject (not counting its over 50 data requests, its “comparison chart” on remedy plans, and the various filings of CLECs aligned with Staff’s position). Some of Staff’s latest comments simply repeat arguments that were already raised in prior testimony. SBC Illinois responds briefly below to facilitate the Commission’s review of these issues. See Section IV *infra*. Staff’s underlying theme – that it has not had sufficient time to address the remedy plan here – is also *déjà vu*, as the Commission saw the same arguments at length (and in equally vehement tones) when it set the schedule for Phase II. SBC Illinois demonstrates in Section I.B below that the latest incarnation of Staff’s argument has no more basis than its predecessors.

The remainder of Staff’s comments are primarily devoted to three new arguments. First, Staff proposes that the Commission (i) retain the plan ordered in Docket No. 01-0120 under cover of the Alternative Regulation plan even if it finds SBC Illinois’ proposed Compromise Plan here to be adequate, and then (ii) revisit the “remedy plan” issue again in a proceeding that does not even exist except in Staff’s proposed “Part 731” rule (a proposal that the Commission has not yet adopted, but that is currently pending in Docket No. 01-0539). In other words, Staff’s view is that the Commission should nullify in advance its own order in this docket, and turn the entire proceeding on remedy plans here into a rehearsal for yet another remedy plan proceeding. Staff’s proposal has no basis in law, has no basis in fact, is contrary to the plain language of the Commission’s order in the Alternative Regulation docket, and is

contrary to Staff's own constantly-voiced objections to "re-litigation" of Commission remedy plan decisions. See Section I infra.

Second, Staff disagrees with SBC Illinois' proposal to make Tier 2 remedy payments to the State at the highest level specified by any remedy plan in effect. Staff has no substantive disagreement with SBC Illinois; rather, Staff thinks it would be difficult to "verify" which plan is used for Tier 2 remedies. Staff's concern is easily addressed, as SBC Illinois can provide that information in its monthly reports. Under the Compromise Plan, the detailed computation would be verified in the normal course just as all other detailed computations of remedies: by means of a periodic independent audit. See Section II infra.

Third, Staff discusses the burden of proof in this proceeding. While SBC Illinois does bear the burden of proof on its section 271 application (a burden SBC Illinois has met), and while SBC Illinois has presented ample proof in support of its proposed Compromise Plan, SBC Illinois clarifies the legal principles below. See Section III infra.

DISCUSSION

I. THE COMMISSION SHOULD REJECT STAFF'S ATTEMPT TO NULLIFY CONSIDERATION OF THE COMPROMISE PLAN

Staff's latest proposal seeks to pre-empt a potential Commission decision approving the Compromise Plan. Staff's proposal is couched in a series of "what if" propositions designed to obscure its real core – which Staff puts off until its last "what if."

What if the Commission reviews the evidence and argument, and decides that SBC Illinois' proposed Compromise Plan is reasonable and sufficient for purposes of section 271? Staff proposes that such a decision would mean nothing. 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 No. 01-0120] as part of its alternative regulation conditions.” Then, the Commission would conduct yet another proceeding on remedy plans, this time as part of a rulemaking proposed by Staff. In other words, all the work done on “remedy plan” issues in this proceeding – all of SBC Illinois’ work in developing and demonstrating the sufficiency of the Compromise Plan, all the reams of electronic spreadsheets SBC Illinois provided in response to Staff’s highly detailed data requests, all the time devoted to conducting an informal “walk-through” prior to the workshop and answering questions at the workshop, all of the testimony and comments filed, and all of the Commission efforts to analyze the evidence, all of it – would be nothing but a dress rehearsal for yet another proceeding.

What is the basis for such a wasteful course? As demonstrated below, there is none. The Commission should reject Staff’s proposal.

A. Staff’s Proposal Has No Legal Basis, And Is Contrary To The Alt Reg Order

There is no legal basis for Staff’s proposal. The only legal authority Staff cites is the Commission’s order in Docket Nos. 98-0252, 98-0335, and 00-0764 (“Alt Reg Order”), from which Staff selectively cites Commission statements on the benefits of certainty. But Staff’s proposal is directly contrary to the actual holding of the Alt Reg Order. That Order 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 Commission did not say that the 0120 Plan would be effective “even after, and irrespective of whether, a

wholesale performance plan for Section 271 purposes is approved by this Commission,” as Staff proposes now. Staff is simply trying to rewrite the Alt Reg Order after the fact – and after the time for seeking rehearing of that order has long since past.

The other “authority” cited by Staff is not a legal authority at all. It is a rule proposed by Staff that is now pending in Docket No. 01-0539. The short answer is that this is not Docket No. 01-0539, and there is no rule and no Commission order (or even a proposed order) in that docket. The longer answer is that even the rule proposed by Staff does not and should not affect the Commission’s decision here.

In Docket No. 01-0539, Staff proposed a set of performance “rules” that purportedly applied to all carriers but was really designed to single out SBC Illinois alone, and to extend the duration of the 0120 Plan. Staff proposed to establish a special class of “Level 1” carriers consisting only of those carriers with 400,000 lines or more – a figure chosen to include SBC Illinois and Verizon and to exclude other carriers.¹ For those “Level 1” carriers, Staff’s proposed minimum service quality standards would not apply; rather, each carrier would be subject to a “Preexisting Plan,” which Staff defines as “the most recent Pre-Rule Plan implemented by such carrier pursuant to a Commission order or . . . on a voluntary basis.” Staff Comments, at 24. If the Commission approves SBC Illinois’ proposed Compromise Plan here, as SBC Illinois has shown it should, the Compromise Plan would logically apply for purposes of

¹ The only other carrier that would qualify as a Level 1 Carrier under Staff’s Proposed Rule would be Verizon. Verizon has also implemented a performance assurance plan (as a condition of the Commission’s approval of the Bell Atlantic/ GTE merger that created Verizon) but the term of that plan is indefinite, so Staff’s proposed language about expiration would appear to have no practical bearing on Verizon. Rather, it is directed solely to the extension of the 0120 Plan for SBC Illinois.

Staff's Proposed Rule. If Staff has concerns about the impact of this proceeding on Docket No. 01-0539, then the simple and sensible course is to address them in Docket No. 01-0539 after an order has been entered here.

B. Staff Had Adequate Time To Address The Compromise Plan.

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. The Commission heard the same argument when it established the schedule for Phase II, and it rejected that argument (along with Staff's proposed separate track for remedy plan issues). The Commission was right.

Contrary to the latest round of complaints, Staff and the CLECs have had more than ample opportunity to consider and address SBC Illinois' proposal. Consider just these proceedings for starters:

- Within two weeks of SBC Illinois' initial filing, Staff generated and submitted to the ALJ a summary "chart" of its responses.
- Staff issued 57 data requests (55 to SBC Illinois, and 2 to TDS) on the Compromise Plan. There is no dispute that SBC Illinois answered them all.
- In response to one data request, SBC Illinois provided – within a week of Staff's request – eight spreadsheets showing the step-by-step calculation of remedies under both the Compromise Plan and the 0120 Plan for three months' worth of performance data.
- SBC Illinois conducted a live "walk-through" of the Compromise Plan for Staff's witnesses during the February 2003 workshops.
- SBC Illinois witness, Mr. Ehr, was subject to two rounds of further questioning (one by Staff, one by the CLECs) at the workshops.

- SBC Illinois provided responses to 14 hearing-room data requests by AT&T.
- Staff then filed two rounds of testimony by two witnesses, along with its latest comments.
- Two CLEC witnesses (AT&T Witness Kalb and WorldCom Witness Kinard) filed two rounds of testimony each, supporting Staff's views, and two other CLECs (Forte and CIMCO) filed two rounds of comments.

In all, then, there were 11 pieces of testimony, over 70 data requests, a walk-through, two rounds of live testimony, and six sets of comments – not to mention the extensive testimony by all parties on the related issues of SBC Illinois' wholesale performance and the reliability of SBC Illinois' performance data. And that is just in this latest phase of the proceeding alone. Before this phase began, Staff and the CLECs already had ample knowledge of SBC Illinois' proposal:

- The CLECs participated in much of the negotiations which led to development of the Compromise Plan.
- Staff's own attorney acknowledged at a status hearing that she had attended some of those negotiations.
- 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.

Notably, Staff has not identified a single piece of evidence that it wanted to present but for the alleged press of time. Rather, its argument is based on vague allegations that Staff "compromised its work product," and was "required by expediency to limit its scope of analysis." Staff Comments, at 5. But the only specific

“compromises” Staff points out are legal arguments Staff thought about but decided to forego. In this regard, Staff points out a few administrative provisions of the Compromise Plan that differ from the 0120 Plan. But those differences have been evident for months.

The bulk of Staff’s argument consists of a superficial comparison of the “three-month schedule” here against the “fifteen month schedule” in Docket No. 01-0120. Staff’s comparison suffers from multiple errors, and serves only to demonstrate the lack of any substantive support for Staff’s “lack of time” theory.

First, the premise of Staff’s comparison is incorrect. There was simply no need to duplicate the schedule of Docket No. 01-0120. Much of the Compromise Plan (including, most notably, its methodology for statistical analysis) is substantially identical to the 0120 Plan. Moreover, in Docket No. 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 Staff’s proposal; here, by contrast, the CLECs are aligned with Staff. Finally, Staff’s witnesses participated in Docket No. 01-0120 (as did AT&T Witness Kalb), so much of the general “learning curve” occurred before this docket started.

Second, Staff’s comparison of time is misleading. On the one hand, for this docket, 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. Furthermore, Staff was put on notice that the remedy plan issues would be included in

Phase II at the end of December when the Commission adopted the Alt Reg Order. In contrast, Staff overstates the time for Docket No. 01-0120, by including all 15 months from the February 2001 initiating order to the Commission's July 2002 final order in that docket. In actuality, Staff had two rounds of testimony in Docket No. 01-0120 (just as it did here), and the time between the March 2001 filing of remedy plan proposals to the Staff's final round of testimony in August 2001 was only five months.

Third, any shortage of time here is a problem entirely of Staff's own making. As noted above, SBC Illinois first filed its Compromise Plan on June 28, 2002, nearly nine months ago. The parties would have had ample time to conduct proceedings on a "more reasonable schedule" had Phase 1B started then, as SBC Illinois proposed. Staff could have spent those months analyzing and responding to the merits of the plan, but did not. Rather, Staff moved to dismiss consideration of remedy plans entirely, a course that SBC Illinois warned would leave Staff without a backup plan in the event that the remedy plan issue needed to be revisited in this proceeding. Staff's strategy ultimately backfired. Staff cannot complain now that the bed it made for itself is short-sheeted.

Fourth, Staff's very proposal effectively concedes that the time for consideration of remedy plan issues here is sufficient. As noted above, Staff proposes that the Commission hold another proceeding on remedy plans under "Part 731" in lieu of the one already conducted here. Staff proposes that its 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. Staff Comments, Attachment B (Proposed Rule) § 731.210. (Notably, Staff makes no

mention of this part of its proposal in its comments; one has to sift through Staff's attachment to find it.) Nor is there any basis for Staff's assertion (at 24) that this proceeding "is not a thorough investigation of remedy plans for purposes of Part 731" – in fact, this proceeding is at least as thorough as the one contemplated by Staff "for purposes of Part 731."

II. STAFF'S PROPOSAL TO RETROACTIVELY AMEND TIER 2 PAYMENTS UNDER OTHER REMEDY PLANS IS UNNECESSARY.

Staff's discourse on Tier 2 payments serves only to obfuscate the real substance of the Compromise Plan – and the lack of any real dispute – on the issue. As Staff points out, there is more than one remedy plan in Illinois. In addition to the 0120 Plan, some carriers have agreed to the "11-State" plan (which SBC Illinois was required to offer pursuant to the FCC's conditions for merger approval)², one carrier has agreed to the "Covad plan," and some carriers still retain the "Texas plan" that the Commission ordered as a condition of merger approval in 1999. Given that private agreements between carriers are at the heart of the 1996 Act, this result is neither unlawful nor surprising. The consequence of freedom of choice is that some parties will choose differently than others. Rigid, procrustean dictates may provide the tidy appearance of order and uniformity, but they have their own disadvantages.

Staff points out that the various remedy plans might have different methods for calculating "Tier 2" payments to the State, but the Compromise Plan already provides an impossible-to-reject solution. SBC Illinois proposes that each month it will pay Tier 2

² The 11-State plan is identical to the 13-State plan, with only a change in name. Thus, Staff's portrayal of the two plans as separate and different is erroneous.

payments under whatever methodology yields the highest result. Thus, 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. Even if SBC Illinois could persuade a CLEC to go along with such a "bargain," and then persuade the Commission to approve the resulting interconnection agreement or amendment, the agreement would have no practical effect. So long as some other carrier was subject to plan that called for higher Tier 2 payments, that plan would be the basis for calculating amounts due to the State. 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. 3/17/03 Ehr Surrebuttal Aff. ¶ 137.

The same reasoning refutes Staff's suggestion (at 17) that "if the Commission allows . . . more than one method of calculating Tier 2 payments . . . SBCI would be making payments in amounts other than what the evidence in this docket estimates they would pay." If the other Tier 2 methods result in amounts that are lower than the Compromise Plan at issue here, the Compromise Plan would control and the amounts would be exactly what the Commission intended. True, if the other methods yield higher Tier 2 payments, SBC Illinois would be making payments that differ from the Compromise Plan. However, SBC Illinois doubts that the State would object to receiving payments that are higher than the approved amounts.

Staff's remaining objections to the Compromise Plan on this issue are trivial. First, Staff contends that CLECs that remain under some other plan would not be "bound" by the Compromise Plan's language on Tier 2. But that is of no consequence. The only parties that matter are SBC Illinois (which would be paying Tier 2

assessments) and the State (which would be receiving them). SBC Illinois would be bound by the Compromise Plan. Thus, there would be no need for the administrative nightmare of going back and rewriting every other CLEC's agreement as Staff suggests.³

Second, Staff contends that it would be impossible to “verify” Tier 2 payments in any given month, because of the different possible methods under which they could have been calculated. That concern is hardly insurmountable. SBC Illinois already reports Tier 2 assessments on its website. It would be a simple matter to add a statement as to which methodology yielded the highest payment amount (and was thus used). SBC Illinois would be willing to provide details of calculations under competing methodologies so that Staff could verify that SBC Illinois did choose the highest one. And the Compromise Plan already contains an audit procedure that could be used to verify Tier 2 calculations.

Finally, Staff makes an erroneous assertion about the merits of the proposed Tier 2 provisions of the Compromise Plan. Staff contends (at 17) that under the Compromise Plan “as SBCI performance gets worse, Tier 2 payments will not increase.” That is untrue, and highly misleading. Tier 2 payments will increase as SBCI performance gets worse – each Tier 2 measure “missed” will generate another payment. What Staff means is that the amount of each payment will not increase – in

³ Similarly, there is no need to rewrite every other remedy plan to include provisions for a periodic audit, or for a “six-month review.” The Compromise Plan would already require SBC Illinois to do both, whether or not every single CLEC in the state agrees. See Section IV infra for further discussion of the audit and six-month review issues.

other words, that Tier 2 payments would not be “indexed” to overall performance the way Tier 1 payments would be. But that is equally true of the 0120 Plan, which does not index payments for Tier 1 or Tier 2.

III. THE BURDEN OF PROOF.

Staff correctly points out that SBC Illinois, as the prospective section 271 applicant, bears the burden of proof in this section 271 proceeding. SBC Illinois has presented ample proof that its Compromise Plan is more than sufficient for purposes of section 271.

SBC Illinois does wish to clarify, however, the applicable legal standard for how the “remedy plan” fits in this proceeding. As Staff points out, section 271 does not require a remedy plan at all; in other words, the remedy plan is not, in and of itself, a requirement on which the applicant must present proof. Rather, the existence and terms of a remedy plan are pieces of evidence the applicant can submit as proof on a larger issue: that is, whether the applicant will continue to meet its section 271 obligations after section 271 approval is granted. This assurance of continued compliance is relevant to the FCC’s decision that long-distance entry would be consistent with the public interest. New York 271 Order, ¶ 429. The FCC has repeatedly stated that a remedy plan is not the only assurance of future compliance. Thus, a plan should not be evaluated as if it is the only evidence on that issue:

We also believe that it is important to evaluate the benefits of these reporting and enforcement mechanisms in the context of other regulatory and legal processes that provide additional positive incentives to Bell Atlantic. It is not necessary that the state mechanisms alone provide full protection against potential anti-competitive behavior by the incumbent. Most significantly, we recognize that the Commission’s enforcement authority under section 271(d)(6) already provides incentives for Bell Atlantic to ensure continuing compliance with its section 271 obligations.

Id. ¶ 430. Accordingly, the FCC has disagreed with the notion “that liability under the Plan must be sufficient, standing alone, to completely counterbalance Bell Atlantic's incentive to discriminate” because performance assurance plans “do not represent the only means of ensuring that Bell Atlantic continues to provide nondiscriminatory service to competing carriers.” Id. ¶ 435.

IV. STAFF’S OTHER COMMENTS.

A. Audit Provisions

1. Annual Audit

Staff’s suggestion that the Compromise Plan “removes the annual audit provision from the Commission-ordered remedy plan” (Staff Comments at 10) makes it sound as though SBC Illinois is planning to do away with audits and engage in “dilatatory or less than forthright conduct” (id.). That is not at all true. SBC Illinois still intends to go through a regular audit and verification. The only differences from the 0120 Plan are that SBC Illinois proposes (i) that audits commence every 18 months, rather than annually, and (ii) that audits be coordinated on a region-wide basis. Given (i) that SBC Illinois has already undergone one comprehensive audit, with another nearing completion, (ii) that time and burden are involved in an audit, and (iii) that a regionwide audit would allow all commissions to benefit from the efficiencies that SBC Midwest’s regionwide processes permit, those proposals are reasonable. See 3/17/03 Ehr Surrebuttal Aff. ¶¶ 147-148 .

2. Mini-Audit

In response to Staff’s comparison of the differences between the “mini-audit” provisions of the Compromise Plan and 0120 Plan, SBC Illinois states that it is willing to modify the Compromise Plan and to use the language of the 0120 Plan on this subject.

B. Six-month Review

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

C. Annual Threshold

Here too, Staff's comments make much ado about nothing. There is no difference between the Compromise Plan and the 0120 Plan as to the annual "threshold" amount that would trigger a Commission proceeding to investigate SBC Illinois' performance: The amount is to be calculated as 36 percent of net return, applying a formula approved by the FCC to publicly-reported ARMIS data. The only difference is the 0120 Plan calls for a special docketed proceeding to calculate the threshold amount, while the Compromise Plan calls for SBC Illinois to do the calculation. To the extent Staff's concern is with verification, the calculation is based on public data and easy to verify; further, both periodic audits and mini-audits would be in place to handle verification.

CONCLUSION

For the reasons set forth above, in the Draft Proposed Order submitted on this date, and in SBC Illinois' filings of January 17, 2003, March 3, 2003, and March 17, 2003, SBC Illinois respectfully requests that the Commission enter an order approving SBC Illinois' proposed Compromise Plan as consistent with section 271.

Respectfully submitted,

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