STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

SBC Communications Inc.,	)	
SBC Delaware Inc.,	)	
Ameritech Corporation,	)	
Illinois Bell Telephone Company d/b/a Ameritech	)	
Illinois, and Ameritech Illinois Metro, Inc.	)	
	)	
Joint Application for Approval of the	)	ICC Docket No. 98-0555
Reorganization of Illinois Bell Telephone	)	
Company d/b/a Ameritech Illinois, and the	)	
Reorganization of Ameritech Illinois Metro, Inc.	)	
in Accordance with Section 7-204 of the Public	)	
Utilities Act and for All Other Appropriate Relief	)	

AT&T PROPOSED ORDER ON REOPENING

[The following Proposed Order addresses those issues upon which AT&T took a position on Re-Opening. In the interest of brevity, AT&T has not summarized the positions of other parties and Staff, which are set forth in their testimony, briefs and proposed orders.]

By the Commission:

I. INTRODUCTION

A. Procedural History – Addendum on Re-Opening

The Commission held Oral Arguments on the proposed merger on April 29, 30 and May 3 and 4, 1999. Thereafter, the Commission addressed the proposed merger at a series of Commission Pre-Bench and Open Meetings. At the Open Meeting on Wednesday, June 2, 1999, a majority of the Commissioners expressed the view that the record was "appallingly vague," in particular, as to how the proposed merger would not significantly adversely affect competition in the Illinois local exchange market.

By letter dated June 4, 1999, Chairman Mathias notified the Hearing Examiners, and through them the parties, that he was interested in reviewing an amended petition from the Joint applicants. The Chairman in the June 4th letter pointed out that the Public

Utilities Act requires the ICC to reach determinations regarding such issues as "the proposed reorganization's *effects upon competition* . . .and possible *conditions* to the merger." It stated the Commission's "intention" was "to have the parties create a focused, detail-oriented process which exacts definite information and possible conditions which would ameliorate . . .concerns regarding the local exchange market in Illinois. This process must lead to specific conclusions, timetables and *enforcement mechanisms* that allow the Commissioners to reach a well-reasoned conclusion in this matter."

The Joint Applicants responded, on June 7, 1999, by filing a "memorandum" that the Joint Applicants specifically stated was not evidence. Following a further Open Meeting of the Commission, on June 8, in which a majority of the Commission indicated that the June 7th submission would not be treated as part of the record in this proceeding, the Joint Applicants, on June 10, submitted a Motion for Leave to File an Amended Petition; Motion to Re-Open the Record; Motion for the Commission to Set an Expedited Schedule. On June 10, 1999, the Joint Applicants also filed an Amended Joint Petition, which contained an exhibit entitled Summary of Additional Commitments By Joint Applicants (Ex. 5) and their June 7 responses and additional commitments (Ex. 6) and a Motion to Reopen the Record. On June 15, 1999, the Commission granted Joint Applicants' Motion for Leave to File an Amended Joint Application and Motion to Re-Open the Record. The Commission, however, denied Joint Applicants Motion to Set an Expedited Schedule. That same day, the Chairman issued a letter that reiterated his previously articulated concerns regarding competition in the local exchange market and included specific questions (Attachment 1-A) he had regarding the Joint Applicants June 7 additional commitments (Ex. 6 to the Joint Applicants' Amended Petition).

On June 16, 1999, the Joint Applicants filed Direct Testimony on Reopening. On June 18, 1999, the Joint Applicants filed a Memorandum entitled Joint Applicants' Response to Attachment 1-A of the Chairman's June 15 letter. Along with the Joint Applicants' Memorandum, the Joint Applicants also responded to Attachment 1-A of the Chairman's June 15 letter by filing Supplemental Direct Testimony on Reopening.

On June 21, a pre-hearing conference was held and a schedule was set. The Evidentiary Hearings were scheduled on July 13-15; Post Hearing Briefs were scheduled on July 21, 1999; Proposed Hearing Examiners' Proposed Order was scheduled on July 27, 1999; and Exceptions were scheduled on July 30, 1999.

On July 6, 1999, Staff and Intervenors filed Testimony on Reopening. On July 9, 1999, Joint Applicants filed Rebuttal Testimony on Reopening. That same day, July 9, 1999, the Chairman issued a letter requesting that all parties to the proceeding include proposed draft orders along with their Post Hearing Initial Briefs. The Chairman also attached a list of questions (Attachment A-2) seeking clarification on a number of issues in light of the Ex Parte filing from the Joint Applicants filed on July 1, 1999, at the FCC, which contained certain voluntary commitments relating to the proposed reorganization. The Chairman invited the parties to respond to Attachment 2-A during cross-examination at the Evidentiary Hearings.

Evidentiary Hearings were held on July 13-15, 1999. At the conclusion of the July 15 evidentiary hearing, the record was again marked "Heard and Taken."

I. IN GENERAL

AT&T Position

AT&T contends that Joint Applicants' submission fails to address or to repond to the questions and concerns posed by the Commission in re-opening the record in this proceeding. AT&T contends that the Joint Applicants have failed to provide the Commission with specific, definite information requested in the Chairman's letters of June 4 and June 15. Instead of specific timetables and enforcement mechanisms, Joint Applicants propose a series of collaborative processes and ultimately further arbitrations and complaint proceedings. Many of Joint Applicants' "commitments" are nothing more than a promise to do what they are already required under the law to do or are laced with equivocation and caveats. In fact, the Joint Applicant's Amended petition along with the accompanying "new commitments," particularly viewed in light of the Proposed FCC Conditions, have only added to the massive confusion and uncertainty surrounding the Joint Applicants' various versions of their commitments. In sum, AT&T contends that the Joint Applicants' proposals will not ameliorate the competitive harms of the merger and in fact the result would adversely affect competition in the local exchange market in Illinois. Consequently, the application should be rejected; at a minimum it should not be approved with the conditions Joint Applicants have crafted.

In support of its position, AT&T offered the testimony of Joseph Gillan, a former economist on the Staff of the Illinois Commerce Commission and currently a private consultant specializing in telecommunications, and Steven E. Turner, who heads his own telecommunications and financial consulting firm based in Garland, Texas.

Mr. Gillan testified that the Joint Applicants have failed to provide the Commission additional details, definitive information or meaningful conditions and enforcement mechanisms sufficient to ameliorate the proposed merger's negative impact on competition. Mr. Gillan noted that many of the Joint Applicants' new "commitments," in particular, the so-called "interconnection commitments," circle back to create the same problem that they were intended to address – the need to engage in burdensome litigation before appropriate interconnection arrangements can be instituted. Overall, Mr. Gillan characterized Joint Applicants' proposed "commitments" as "rainbow conditions": That is, they look attractive from a distance, but upon closer examination they either shift into the distance or disappear altogether. AT&T Ex. 1.2 (Gillan DOR), at 4. He pointed out that the very fact that SBC has proposed "concessions/commitments" of such an illusory nature suggests a strategic attitude that should concern the Commission in and of itself, wholly aside from the substantive questions that the testimony raises. Mr. Gillan testified that the void in substance beneath the surface of Joint Applicants' proposed commitments raise a question as to whether SBC did not understand how little lay beneath the surface,

or whether it believed the Commission would not look; in either event, the answer is troubling. AT&T Ex. 1.2 (Gillan DOR), at 5.

Finally, Mr. Gillan notes that if the Commission was looking for "focused, detail-oriented" concessions that would result in "specific timetables" and effective "enforcement mechanisms," it will be disappointed again as Joint Applicants' testimony offers "concessions that aren't concessions" and "enforcement that is not enforcement." AT&T Ex. 1.2 (Gillan DOR), at 9.

AT&T further contends that the manner in which Joint Applicants have treated the Proposed FCC Conditions is improper and misleading and, ultimately, undermines the Commission's record in this case. The Proposed FCC Conditions, AT&T recalled, were made public on Friday, July 2, just before the July 4th holiday weekend. AT&T asserts that it was immediately obvious upon review of that document that it was different from, but that it overlapped in many areas with, the proposals the Joint Applicants have put forward in this case. Moreover, by their terms as well as by their very nature as generic (as well as in some instances state-specific) undertakings, it was and is obvious that the Proposed FCC Conditions, if adopted by that Commission would have far-reaching impacts on the conduct of the Joint Applicants in Illinois.

Consequently, a number of Intervenors moved to require Joint Applicants to put those Proposed FCC Conditions in the record here, allow Intervenors an opportunity for discovery, and have Joint Applicants explain the relationship between those undertakings and the Illinois proposed conditions. Joint Applicants opposed the motion, and it was subsequently denied. Accordingly, AT&T noted that Intervenors filed their testimony on re-opening on the basis solely of the Illinois record. Subsequently, in their rebuttal filing, Joint Applicants included the Proposed FCC Conditions, although they purported not to rely upon them for purposes of the Commission's deliberations under Illinois law.

AT&T asserts that the result is untenable. First, Intervenors have not had an adequate opportunity, consistent with procedural due process, to "confront" the Proposed FCC Conditions, to conduct discovery in an effort to understand them and their relationship to the Illinois proposed conditions, and to present testimony to the Commission. Notwithstanding Joint Applicants' denial that they were relying on the Proposed FCC Conditions for purposes of this record, as the subsequent hearings have shown it is not possible to delineate their undertakings in Illinois without resort to the FCC document. Without the FCC document and an explanation of it in the record and a meaningful opportunity to conduct discovery on it, Intervenors' direct testimony in this case was foreclosed from addressing the Proposed FCC Conditions in due fashion.

The problem, AT&T contended, is not limited to the shortcomings, from a procedural due process standpoint, in the manner in which the Proposed FCC Conditions have been injected into this record. AT&T explained that it is unclear, as became manifest at the hearings, in many respects just how the FCC and Illinois-proposed conditions are interrelated and just what are the contours of Joint Applicants' undertakings in Illinois.

On this record, AT&T pointed out, the Commission does not and cannot know what it is dealing with.

Cross-examination of Joint Applicant witnesses on the Proposed FCC Conditions revealed that Joint Applicants at best have not thought through these issues; at worst, they are attempting to effect a regulatory "sleight of hand" designed to conceal the true scope of their commitments and to mislead the Commission and the parties. AT&T noted, for example, that in their Illinois testimony Joint Applicants make much of their commitment to offer shared transport as well as their commitment to offer end-to-end UNE combinations, the so-called UNE Platform. No limitations are attached to that offer in their Illinois testimony. The Proposed FCC Conditions, however, provide for something described ambiguously as a "promotional" UNE Platform, to be offered to residential customers only, subject to a ceiling or cap of 302,000 customers in Illinois, and only available for a "window" of three years. AT&T pointedly noted that there is not a word about these limitations – not the cap, not the residential limitation and not the offer "window" – in Joint Applicants' Direct or Rebuttal testimony on re-opening. Further, AT&T noted that when first asked about whether the federal cap applies to the offering in Illinois, SBC's principal witness stated that it does not: In fact, Mr. Kahan repeated that testimony the second time he was asked about it; and the third time. It was only on redirect that he did an about face.

AT&T reasoned that this example demonstrates that Joint Applicants' blithe assertion that Illinois will enjoy "the best of both worlds" is, quite simply, dangerously misleading. In instances where (as with the UNE platform) the federal undertaking is more limited or narrow than the state "commitment," there necessarily will be serious question(s) over just what is the scope of Joint Applicants commitment. And Joint Applicants will be left with the ability unilaterally to import the federal limitations and caveats into Illinois.

AT&T provided a number of other examples to demonstrate its point that Joint Applicants' witnesses were either not frank or were not knowledgeable or confused about their own conditions – particularly at the federal level. For instance, AT&T points out that the Joint Applicants, in their Rebuttal on Re-Opening Testimony, claim that the FCC and Illinois conditions are "complementary and nothing proposed at the FCC takes away from the benefits" of the Illinois commitments. JAs Ex. 1.5 (Kahan ROR), at 26. However, the Proposed FCC Conditions are *not complementary* and by their terms parties must choose either/or: "affected parties shall not have a right to invoke the relevant terms of these [FCC] Conditions in a given state if they have invoked a substantially related condition imposed on the merger under state law." Proposed FCC Conditions at ¶ 69.

Similarly, AT&T notes that the Joint Applicants claimed that the FCC and Illinois proceedings are "separate and distinct." JAs Ex. 1.5 (Kahan ROR), at 25. Yet, at the hearing, Mr. Kahan testified that if the FCC adopts the Proposed Conditions, the FCC Order will have provisions that are directly applicable to Illinois. Tr. (Kahan) at 1903.

AT&T asserts that the Joint Applicants clearly have no notion of what the effect of the FCC commitments will be in Illinois. AT&T noted that had SBC and Ameritech not attempted to cut secret deals making inconsistent state and federal "commitments," the Commission, the Staff, and the intervening parties might not now be facing this dilemma. Now, however, it is unfair, AT&T asserts, to expect Intervenors, the Staff and the Commission to sort out the relationship between the Illinois and the Proposed FCC Conditions when Joint Applicants are unable to do so themselves.

AT&T contends that the Proposed FCC Conditions also impose a slew of restrictions on the availability of the UNE-P and discounts on loops and resale services that are discriminatory and in violation of the Act's nondiscrimination provisions, as well as clear FCC rules and Orders interpreting those provisions. *See* 47 U.S.C. §§ 251(c)(3), 251(c)(4), and 252(i); 47 C.F.R. §§ 51.303(c), 51.313(a), 51.603(a), and 51.809(a); First Report and Order, ¶¶ 859-62.

AT&T points out that SBC/Ameritech Proposed Merger Conditions purport to permit, and even require, discrimination among carriers and customers. For example, combinations of network elements would be available to serve some residential customers, but not others because of an artificial cap. Proposed FCC Conditions, ¶ 49. Combinations of network elements would be available to serve some residential customers, but not business customers. Proposed FCC Conditions, ¶ 48. The price of unbundled loops used to serve some residential customers would be higher than the price of unbundled loops used to serve other residential customers because of the cap on the unbundled loop discount and the unavailability of the discount to customers served through the UNE-P. Proposed FCC Conditions, ¶ 46(e) & (g). Because the loop discount is only available to residential customer, the price of unbundled loops used to serve business customers would be higher than the price of unbundled loops used to serve some residential customers. Because of the discount does not apply to loops used to provide advanced services, the price of unbundled loops used to provide advanced services would be higher than the price of those same unbundled loops when used to provide traditional voice services. Proposed FCC Conditions, ¶ 46(e).

AT&T notes that it is not surprising that SBC and Ameritech would seek the right to discriminate in providing service. Such a capability would enable them to place limits on entry, and to skew their offerings in those directions that pose the least competitive threat to their monopolies – as they have here. The discriminatory loop discounts and the other provisions would be distorting the market to create incentives for a particular facilities-based entry strategy, and particular entrants, Joint Applicants would have chosen to favor. Adoption of these conditions would represent a radical, unexplained, and wholly unwarranted departure from foundational regulatory principles under the Act: to provide competing carriers the right to choose the form of entry that makes sense to them (e.g. resale, UNE combinations, facilities), and the right to compete against each other on equal footing no matter the entry form chosen. They would, moreover, be inconsistent with this Commission's pricing policies going back before TA 96 and the TELRIC proceedings to

the Customers' First Case, ICC Docket Nos. 94-0096/0117/0146 consol. (April 7, 1995), at 38-39, 40.

II. ISSUE –BY –ISSUE ANALYSIS

[This section is organized generally according to the issue areas on Attachment A to the letter of June 4, 1999 from Chairman Mathias to the Hearing Examiners]

COMPETITION

1. An explanation of whether SBC is or is not an "actual potential competitor" in Illinois, as the term has been used throughout this proceeding;

Analysis and Conclusion

In the initial round of this proceeding, SBC took the position that it was not an actual potential competitor to Ameritech in the Illinois local exchange market. Staff and Intervenors disputed that position. As part of the reopener portion of this docket, we asked SBC to provide more information regarding its status as an actual potential competitor.

Before we begin our actual potential competition analysis, we must place it in the proper context. Section 7-204(b)(6) requires us to make a finding as to whether this merger is "likely to have a significant adverse effect on competition." We are not required to use the actual potential competition test, which is an antitrust doctrine, to make this determination. *See* SBC/Ameritech Ex. 4.0 at 8 (Harris Direct) ("It is my understanding that the Illinois statute does not require this Commission to apply the DOJ Merger Guidelines."). The FCC has stated on several occasions that the actual potential competition test is not dispositive in merger cases. Rather, it is an ancillary test, used to confirm an administrative agency's own, independent findings. *See In re Transfer of Control Applications of TCI and AT&T,* FCC No. 99-24, MO&O ¶ 14 (Feb. 18, 1999) (FCC's analysis is not "limited by traditional antitrust principles." In the telecommunications industry, "competition is shaped not only by antitrust rules, but by the regulatory policies that govern the interactions of firms."); *In re Transfer of Control Application of WorldCom and MCI,* FCC No. 98-225, MO&O ¶¶ 12-14 (Sept. 14, 1998) (While the FCC's "analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them. . . . [I]t is possible that the antitrust agencies might well approve a merger that does not decrease the current level of competition but that does impede the development of future competition."); *In re Transfer of Control Application of Nynex and Bell Atlantic,* FCC File No. NSD-L-96-10, MO&O ¶ 32 (Aug. 14, 1997) ("Commission analysis of the effect of the transfer on competition is informed by antitrust principles, but not limited by antitrust laws."); *Id.* ¶ 68 (FCC will not apply Merger Guidelines potential competition provisions "mechanistically to the novel features of telecommunications markets . . ."); *Id.* ¶ 136, 143.

We concur with the FCC's treatment of the DOJ Merger Guidelines. The Guidelines are a valuable analytical tool but they are not the only tool or even the primary tool.[1]

Because we were not satisfied with the initial record on the potential competition issue (as well as other issues), Joint Applicants reopened the record. Section 7-204(d) permits us to extend our merger review 90 days to consider amendments to Applicants' filing. Our Rules contemplate the possibility of reopening the record to consider "additional evidence and an explanation why such evidence was not previously adduced." 83 Ill. Admin. Code § 200.870.

The problem here is that there has been no amendment to the Joint Application nor has any new evidence on this issue been offered. Mr. Kahan testified that he was unaware of any new facts on the topic of actual potential competition in his reopener testimony. Tr. at 1848. Neither are we.

Therefore, we conclude that SBC is an actual potential competitor to Ameritech and that SBC's elimination as a competitor will likely have a significant adverse impact on competition in the Illinois local exchange market.

INTERCONNECTION

2. The manner, necessary actions and timetable by which the Joint Applicants would provide to CLECs in Illinois services, facilities or interconnection agreements which SBC has made available to CLECs in its other service territories;

11. The manner, necessary actions and timetable by which the Joint Applicants would incorporate incident-based, liquidated damages provisions into interconnection agreements in Illinois;

AT&T's Position

AT&T witness Mr. Gillan pointed out that the Joint Applicants Interconnection commitments should be designed to speed entry and reduce costs by eliminating unnecessary arbitration/litigation that has frustrated and delayed competition. The commitments as outlined by Joint Applicants, however, will have the opposite effect – they will retard entry by increasing litigation and, thus, further delay competition. AT&T Ex. 1.2 (Gillan DOR), at 7.

Joint Applicants' proposals lays out two commitments intended to address two separate types of interconnection provisions. Mr. Gillan testified that neither proposal, however, amounts to more than an agreement to do what SBC agrees to do. AT&T Ex. 1.2 (Gillan DOR), at 10.

[1] AT&T does not repeat here the potential competition analysis contained in its initial Proposed Order and in its first round of briefs. Instead, AT&T focuses on the reopener portion of this proceeding.

Joint Applicants' Interconnection Commitment A

Mr. Gillan pointed out that with respect to provisions that exist in agreements where the Joint Applicants provide service as ILECs, the Joint Applicants commit to extend these same terms (except for price) to Illinois – but only if the Joint Applicants had (1) voluntarily agreed to the provision initially, and (2) the Joint Applicants believe the provision is not otherwise contrary to state law or policy. AT&T Ex. 1.2 (Gillan DOR), at 10-11.

Mr. Gillan testified that the Commission should not expect Joint Applicants' Commitment A to improve competitive conditions in Illinois. He noted that there are two significant limitations to this commitment that render its value meaningless. AT&T Ex. 1.2 (Gillan DOR), at 11.

First, the commitment only involves provisions that SBC has voluntarily agreed to in other states. He noted that provisions that actually promote competition, however, are typically the result of arbitrations (either in the initial round or, if overlooked, in the second round). Effective provisions tend to be contentious provisions. This "commitment" essentially leaves the CLEC in the same position as it started – relying on SBC's management (and its decisions as to what to agree to) as the initial arbiter of its opportunity for interconnection. To obtain anything else under SBC's commitment requires arbitration – but then, the CLEC could have arbitrated to begin with. AT&T Ex. 1.2 (Gillan DOR), at 11-12.

Second, Mr. Gillan pointed out that SBC proposes additional interpretative limitations that are as important for their effect on the negotiation/arbitration process as they are for (whatever) their substantive definition is ultimately determined to be. Specifically, he noted that the Joint Applicants will not offer in Illinois any provision if, *in Joint Applicants' judgment,* there are state-specific reasons in Illinois which would make such offerings technically infeasible or unlawful/contrary to State policy. AT&T Ex. 1.2 (Gillan DOR), at 12.

Mr. Gillan found it useful to reduce SBC's Interconnection Commitment A to its elemental components. First, he noted that SBC begins with only that universe of interconnection provisions that SBC already agrees with. SBC then reserves the right to deny an entrant in Illinois access to even this list, if SBC decides that a provision is inappropriate to Illinois. While the entrant has the recourse to challenge SBC's view in an arbitration proceeding, that process negates the very point of a commitment that should be designed to expedite the importation of provisions that are favorable to competition to Illinois. AT&T Ex. 1.2 (Gillan DOR), at 13.

Mr. Gillan pointed out that if Joint Applicants had wished to design a commitment that would accelerate the process while still addressing SBC's stated concerns, they could have provided that Joint Applicants would provide CLECs in Illinois the same services, facilities or interconnection agreements/arrangements (except as to price) that any SBC

ILEC affiliate has voluntarily negotiated, or has been ordered to provide under an arbitration in another state. To the extent that SBC believed that a particular provision or agreement is not technically feasible in Illinois (or would be contrary to Illinois law or policy), SBC properly would bear the burden of proving with clear and convincing evidence that it should be relieved of the inappropriate obligation. For instance, within a set time (e.g., 30 days) of the approval of any future interconnection agreement/arrangement containing a provision that SBC believes is inappropriate for Illinois, SBC could request a waiver, accompanied by any evidence or testimony in support of its contention. Absent the grant of an exemption, however, the provision should apply automatically. Furthermore, the Joint Applicants should provide the service or facility at issue during the pendency of all rehearings and appeals, instead of delaying until their final appeal is resolved. AT&T Ex. 1.2 (Gillan DOR), at 14-15. Mr. Gillan testified that, contrary to the contentions of Joint Applicants, the Illinois Commission would not be abrogating its role to other commissions, but would simply be establishing its primary stated policy to promote local competition in Illinois. SBC would remain free to argue that a certain provision or arrangement is inappropriate, but it could not use the process to delay or impose costs on its competitors. AT&T Ex. 1.2 (Gillan DOR), at 15.

Joint Applicants Interconnection Commitment B

Regarding Joint Applicants Interconnection Commitment B (i.e., to offer in Illinois only the same agreements/arrangements that SBC as a CLEC affirmatively requests in other states), Mr. Gillan testified that this commitment is also an unreasonable limitation. Mr. Gillan noted that the Joint Applicants' proposal would not even include the agreements/arrangements that the Joint Applicants expect to use in their out-of-region entry. The Joint Applicants acknowledge that they will most likely adopt a preexisting agreement, yet they specifically exclude extending the terms to Illinois of any agreement that they obtain in this manner. AT&T Ex. 1.2 (Gillan DOR), at 15-16.

Mr. Gillan pointed out that the most competitively significant provisions from another state will have already been arbitrated by another entrant. Mr. Gillan noted that even this self-executing caveat – a caveat that would effectively eliminate the entire universe of potential agreements that any entrant would want extended to Illinois -- is not the final limitation that SBC would place on its "commitment." Mr. Gillan explained that SBC is not even agreeing to offer in Illinois a provision that it has uniquely requested but, rather, is only agreeing to either offer the provision or assume the burden of proving why such a form of interconnection arrangement or "capability" should not be implemented in Illinois. AT&T Ex. 1.2 (Gillan DOR), at 16-17.

Mr. Gillan testified that aside from technical legal questions over the "burden of proof," this "commitment" is not any different than the status quo. He noted that an entrant would raise this issue in arbitration, and that SBC would try to explain it away. There is no improvement in competitive conditions, no simplification of the request/arbitration process, and no real change in SBC's incentive to balance its out-of-

region entry with an obligation to open the market here. AT&T Ex. 1.2 (Gillan DOR), at 17.

Mr. Gillan testified that the Joint Applicants have also placed additional caveats on this "commitment." He noted that although it is difficult to be certain, it appears that in Exhibit 6 to the Amended Petition, the Joint Application added another critical limitation as to whether a provision that its obtains as a CLEC would be offered in Illinois. This limitation is a determination of whether a UNE, service or interconnection arrangement is "technically feasible" or whether the requesting CLEC is "similarly situated" and that such determination will include consideration of regulatory, network, and market circumstances surrounding the request of SBC/Ameritech's CLEC and the request made of SBC/Ameritech's incumbent LEC, including but not limited to network architecture, OSS, and universal service reform. AT&T Ex. 1.2 (Gillan DOR), at 17-18.

Mr. Gillan pointed out that SBC never explains how either technical feasibility – or any legitimate consideration of "similarly situated" – would appropriately comprise regulatory factors, market circumstances or universal service reform. All that can be reasonably concluded from this "commitment," he noted, is that any arrangement that can successfully navigate each of these proposed filters is not likely to present much of a threat to Ameritech's continued dominance in Illinois. AT&T Ex. 1.2 (Gillan DOR), at 18.

Mr. Gillan testified that a provision that would have more value to the competitive processwould have been to require that any UNEs, services, facilities, or interconnection arrangements contained in an interconnection agreement signed by a CLEC affiliate of SBC/Ameritech with an incumbent LEC to be offered (except as to price) in Illinois. Further, he opined that other CLECs should be able to adopt this agreement using the Most Favored Nations process, as they could with any other agreement. AT&T Ex. 1.2 (Gillan DOR), at 19.

Moreover, Mr. Gillan thought it unreasonable to exclude price-related terms on such a blanket basis. Mr. Gillan noted that although SBC legitimately points out that many cost-related factors are state-specific and, as a result, it may not be appropriate to blindly import to Illinois prices established in other jurisdictions, the validity of SBC's observation is not without limit. Mr. Gillan pointed out that although certain cost-factors are state-specific (for instance, the particular configuration of the network in a particular state), there are many cost-factors (such as the cost of network equipment) that are not. AT&T Ex. 1.2 (Gillan DOR), at 20. He stated that the important point is that while the consequence of lower input costs (i.e., lower prices) may not be portable between states, the lower input values themselves should be. That is, he explained, as other jurisdictions update cost models to reflect more current technology prices, the Commission could require that SBC file with the Commission the lowest input values used by any Commission for comparable equipment. AT&T Ex. 1.2 (Gillan DOR), at 20.

Commission Analysis and Conclusions

In response to the Commission's June 4 questions regarding interconnection, Joint Applicants proposed Interconnection Commitments A, B, C and D. SBC/Ameritech Ex. 1.3 (Kahan DOR) at 6-15. Interconnection Commitment A concerns UNEs, services, facilities or interconnection agreements that SBC provides in its current region, which will be made available in Illinois. Interconnection Commitment D concerns provisions SBC obtains out-of-region, which will be made available in Illinois. Interconnection Commitment B concerns the implementation of these commitments. Interconnection Commitment C is a commitment to make publicly available in Illinois interconnection agreements from other states. We do not discuss Commitment C in detail because these interconnection agreements are already publicly available pursuant to Section 252 of the federal Telecommunications Act. 47 U.S.C. § 252(h).

In addition to the Illinois Commitments, there are interconnection commitments in the Proposed FCC Conditions. (Schedule 1 to SBC/Ameritech Ex. 1.5 (Kahan ROR.) Paragraph 51 of the Proposed FCC Conditions concerns out-of-region agreements and corresponds to Illinois Interconnection Commitment D. Paragraph 52 of the Proposed FCC Conditions concerns in-region agreements and corresponds to Illinois Interconnection Commitment A. Although there are similarities between the federal and Illinois interconnection commitments, they are not entirely consistent.

The purpose of the commitments should be to promote competition. More specifically, Staff and Intervenors have identified numerous and grave problems associated with allowing two regional monopolies to combine into a large supra-regional monopoly. We share these concerns. We concur in the FCC's assessment of the singular problems arising from monopoly mergers:

> Merger with a potential competitor acquires special significance when one of the firms is a monopolist. . . . When one of the merging firms is a monopolist and the other is a potential entrant into the same market in which the monopolist has its power, anticompetitive concerns are much more realistic. . . . As a general matter, a monopolist's acquisition of a 'likely' entrant into the market in which monopoly power is held is presumptively anticompetitive. . . . Even if [the potential entrant] seems clearly to be one of several firms which are "equally probable" potential entrants, it is important to preserve all those significant possibilities of eroding the monopoly, and to prevent possible reinforcement of the monopolist's position via the assets acquired (paragraphing omitted.).

BA/Nynex Order ¶ 66 n. 155 *citing* 3 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 170d at 134-36 (rev. ed. 1996).

Accordingly, as the FCC did in the Bell Atlantic/Nynex case, we look to conditions to see if the anticompetitive effects of this merger can be remedied. In

determining the efficacy of the proposed conditions, we look to whether they: (1) are substantive or illusory; (2) add value to the market-opening process or simply maintain the status quo; (3) are clear and straightforward or ambiguous and riddled with exceptions; and (4) are enforceable.

Interconnection Commitments

Joint Applicants commit to making available in Illinois the UNEs, services, facilities and interconnection arrangements that they already provide CLECs in SBC's current territory. They also commit to making available in Illinois the interconnection provisions they obtain out of region as a CLEC. However, these commitments fail all prongs of the four-factor test described above.

First, these are not substantive commitments. They do nothing to avoid or even limit arbitration over interconnection issues. Because CLECs already have the right to arbitrate, the interconnection commitments are illusory.

Second, the commitments simply maintain the status quo. Today, without these commitments, a CLEC can request any interconnection commitment it wants from SBC and Ameritech. If the parties cannot reach agreement, the issue is arbitrated. These interconnection commitments do nothing to change that current state of affairs. It is useful to consider the particulars that are lacking here. SBC could have tendered a list of interconnection provisions that it would make available (automatically) in Illinois after the merger closed. It could have established interim prices. It could have designed the commitments to streamline the interconnection negotiation process and to avoid arbitration. The proposed commitments contain none of those features.

Third, the interconnection commitments are ambiguous and so laden with limitations that they are rendered useless. For example, the commitments conflict with their federal counterparts. Despite Joint Applicants' assurances, we do not see how inconsistent orders from this Commission and the FCC will work – even in theory. In practice, the inconsistencies and ambiguities will simply lead to more arbitration. Furthermore, the exceptions to these commitments are simply unacceptable. The interconnection commitments are limited to: (1) provisions voluntarily agreed-to by SBC (in-region) or negotiated/arbitrated (out-of-region); (2) CLECs "similarly situated" to SBC's CLEC (out-of-region); (3) provisions that are "technically feasible;" (4) "technically feasible" and "similarly situated" are dependent upon "regulatory, network and market circumstances," as well as "network architecture, OSS and universal service reform;" (5) CLECs must agree to "all reasonably related terms and conditions;" and (6) there is no pricing for any new provisions. There are many other exceptions, but this abbreviated list illustrates the point that the merits, if any, of these commitments are negated by the exceptions.

Moreover, there are no penalties or enforcement mechanisms. Thus, if Joint Applicants fail to comply with these commitments, nothing happens. A CLEC's only recourse is arbitration, which is no different than today's situation.

Finally, we find that it is impossible to "fix" these conditions. Had they been presented earlier in the proceeding, it may have been possible to modify them to make them procompetitive. Likewise, had they not been internally inconsistent, ambiguous and riddled with exceptions, it might have been possible to fashion conditions that would satisfy Section 7-204(f). However, Joint Applicants chose to file what they did when they did and it is not possible to resolve the problems associated with these conditions – nor is it the Commission's responsibility.

SHARED TRANSPORT AND OPERATIONS SUPPORT SERVICE (OSS)

3. The manner, necessary actions and timetable by which the Joint Applicants would provide "shared transport" as recommended by the Commission Staff in this proceeding. Further, until the "Illinois version" of shared transport is offered, when the Commission can expect the implementation of shared transport in the same manner as SBC has provided in Texas, and the manner, necessary actions and timetable by which this will be accomplished;

4. **Implementation timetables regarding integration of Joint Applicants OSS processes;**

5. A timeframe for the Commission to expect deployment of either application-to-application OSS interfaces which support pre-ordering; ordering; provisioning; maintenance, repair, and billing of resold services; unbundled network elements and combinations thereof, which would include support of graphical user interfaces. Alternatively, when Ameritech Illinois would offer CLECs direct access to its service order processing systems.

6. Provision of local switching in a commercially feasible manner, including customized routing of operator services and directory assistance.

AT&T's Position on Shared Transport, Local Switching and Related OSS

Mr. Turner testified that the unbundled network elements (UNEs) of Shared Transport – also referred to as Common Transport – and Local Switching are essential components of the "UNE Platform" or combination of unbundled network elements provided for in AT&T's Commission-approved Interconnection Agreement with Ameritech. Mr. Turner pointed out that Ameritech has adamantly refused to provide Shared Transport, despite the FCC's and this Commission's repeated orders to do so. Moreover, Mr. Turner noted that Ameritech's refusal to provide Shared Transport has amounted to a refusal to provide the UNE Platform. AT&T Ex. 6.0 (Turner DOR), at 2-3.

Mr. Turner defined Shared Transport as an unbundled network element consisting of the same interoffice transport facilities used by Ameritech to transport the calls made by its own local exchange customers. As such, Shared Transport is a common interoffice

transmission path between Ameritech switches**.** Mr. Turner explained that CLECs can use the Shared Transport UNE in conjunction with the Unbundled Local Switching element to transport local calls dialed by the Local Switching element to their destination over Ameritech's Shared Transport network. With Shared Transport, CLECs can utilize Ameritech's common transport network between an Ameritech tandem and an Ameritech end office. Mr. Turner pointed out that Shared Transport has been designated by the FCC as an unbundled network element. The FCC has ordered Ameritech to provide it both in its First Report and Order dated August 8, 1996, and in its Third Order on Reconsideration dated August 17, 1997. This Commission also ordered Ameritech to provide Shared Transport as defined by the FCC in its Order dated February 17, 1998 in ICC Docket Nos. 96-0486/0569. AT&T Ex. 6.0 (Turner DOR), at 3.

Mr. Turner explained that absent the ability to share the in-place interoffice transport facilities, CLECs would need to build or purchase dedicated interoffice transport facilities that essentially duplicate the existing facilities of the incumbent to provide call routing for their local service customers. He noted that this would be prohibitively expensive and wholly unnecessary, since the existing facilities have sufficient capacity to transport current traffic volumes. Moreover, he pointed out that for Ameritech to implement such an arrangement would require incredibly complicated customized routing that would be prohibitively expensive and technically daunting for CLECs and Ameritech to implement. AT&T Ex. 6.0 (Turner DOR), at 3-4.

Mr. Turner described the Platform as an end-to-end combination of network elements that permits a CLEC to offer a full range of telecommunications services to end users and other carriers. He explained that the Platform consists of the Network Interface Device, Unbundled Loop, Local Switching, Shared (*i.e.*, Common) Transport, Signaling and Call-Related Databases, Tandem Switching and Ameritech-provided Operator Services and Directory Assistance. AT&T Ex. 6.0 (Turner DOR), at 4.

Mr. Turner testified that Ameritech has not provided the Platform in Illinois. He explained that because Shared Transport is an essential element of the Platform, Ameritech does not offer the Platform as long as it refuses to provide CLECs with the Shared Transport element. AT&T Ex. 6.0 (Turner DOR), at 4.

Mr. Turner testified that Ameritech has adamantly resisted providing Shared Transport and the Platform in a series of regulatory and appellate proceedings dating back to the fall of 1996. With respect to the "interim solution" for shared transport that Joint Applicants have not proposed, Mr.Turner testified that he found it galling for Joint Applicants to present as a "creative" solution today the exact same proposal that AT&T made to Ameritech nearly two years ago. He explained that AT&T and Ameritech in the summer of 1997 discussed many of the issues identified in Mr. Appenzeller's testimony and AT&T devised a proposal – dubbed "Rough Justice" – that was identical to Ameritech's current "interim solution." Mr. Turner noted that Ameritech even included that proposal in its testimony to the FCC in connection with its Section 271 Application in Michigan. Clearly, he noted, Ameritech could have implemented this solution nearly two

years ago. Instead, Ameritech chose to manipulate the legal process, at great expense and loss of time to all concerned, in a calculated effort to avoid its legal obligations. Accordingly, Mr. Turner asserted that Ameritech's "interim solution" merely confirms that it has been playing a series of semantics games with the Commission and with CLECs over Shared Transport. AT&T Ex. 6.0 (Turner DOR), at 7-8.

Further, Mr. Turner testified that the "interim solution" veils what in reality is a set of problems associated not with Shared Transport but with implementing the Unbundled Local Switching element. He explained that in 1996, Southwestern Bell, while negotiating access to unbundled elements for its region, determined that it would provide Common Transport (*i.e.*, Shared Transport in Illinois) without dispute. He noted that it was not until the middle of 1997 that Southwestern Bell notified AT&T that it would require the implementation of an AIN solution to solve at least three implementation problems associated with the Unbundled Local Switching (not Shared Transport) element. The AIN "solution" has absolutely nothing to do with the Shared Transport unbundled element, however. In light of the above, Mr. Turner contended that Ameritech's eleventh-hour offer of the AIN solution as the permanent means to provide access to the Shared Transport element is simply its effort to "spin" once again why it has not provided access to this unbundled element up to this point. AT&T Ex. 6.0 (Turner DOR), at 9-10.

Moreover, Mr. Turner testified that the "interim solution," which AT&T developed two years ago, is practically useless in today's circumstances. Without the ability to order the UNE Platform electronically, it might as well not be available at all from the standpoint of a CLEC desiring to serve mass-market customers. Mr. Turner explained that Joint Applicants are saying it will be months before they will have settled on the ordering and other OSS systems that they will implement in the wake of the merger – and these are the systems to which CLECs will have to design and build their systems in order to be able to pass orders electronically to the ILEC. He pointed out that Joint Applicants are, in effect, proposing that CLECs develop complicated and costly systems that are temporary and would soon have to be replaced when the permanent systems become available. Mr. Turner noted that since SBC has indicated that Southwestern Bell will eventually implement its systems in Illinois, the only prudent course of action would be for CLECs in Illinois to develop interfaces to Southwestern Bell's systems if the merger is to be approved. Mr. Turner pointed out that, to date, AT&T has invested tens of millions of dollars and more than two years of effort to establish system interfaces with Southwestern Bell. At its peak, AT&T had over 200 people working on programming and system design efforts to ensure that AT&T systems properly interfaced with Southwestern Bell's systems. In light of the above, Mr. Turner concluded that Joint Applicants' interim solution is a hollow, if not disingenuous, proposal. AT&T Ex. 6.0 (Turner DOR), at 10-11.

Addressing the Joint Applicants "long term" solution, Mr. Turner testified that the "long-term" solution must be assessed in the context of the necessary OSS and other systems development work that must be accomplished both by SBC/Ameritech and CLECs in order to support the ordering of the Platform. Mr. Turner explained that unless

the UNE Platform can be ordered efficiently and reliably (and electronically), it cannot be used by CLECs to serve their customers. Accordingly, the Joint Applicants' "long-term" solution for the UNE Platform is inextricably linked to systems issues. AT&T Ex. 6.0 (Turner DOR), at 11-12.

Mr. Turner testified that Joint Applicants are asking the Commission to approve the merger in part based on Ameritech's promise to stop violating its legal obligations. Moreover, Mr. Turner pointed out that there is nothing in Ameritech's three-year campaign of litigation, stone-walling, and semantics games to inspire confidence that Ameritech post-merger would actually do what it now says it will do. AT&T Ex. 6.0 (Turner DOR), at 12.

In this regard, Mr. Turner pointed out that Joint Applicants commitments to provide Shared Transport will evaporate if and when they can be avoided through further resort to the legal process. In this connection, Mr. Turner found it startling that Ameritech continues to claim that no CLEC has requested Unbundled Local Switching. Mr. Turner noted that Ameritech is persisting in playing a semantics game. For Ameritech, "unbundled" means "physically separate," but that is an argument that has been rejected by the FCC, by this Commission, and now by the Supreme Court. Mr. Turner pointed out the fact that AT&T and other CLECs have requested Local Switching as part of the UNE Platform, only to confirm through rejected orders that Ameritech will not provide it. For Ameritech to persist in such misleading claims calls into question the bona fides of what they are proposing to the Commission in this docket. AT&T Ex. 6.0 (Turner DOR), at 11-12.

Mr. Turner testified that the ultimate issue is the manner in which the ILEC and CLECs will work to develop and implement adequate (*i.e.*, at parity with the ILEC's) and reliable operations support systems ("OSS") needed to support the UNE-Platform for the provision of competitive local exchange service. He noted that given that Mr. Viveros' own timeline is two years, it is important to know beforehand whether the system interfaces would be established to Ameritech or Southwestern Bell's systems. Moreover, because Mr. Viveros indicated that Southwestern Bell integrates its acquisitions into Southwestern Bell's systems environment, Mr. Turner testified that the only prudent course of action would be for CLECs in Illinois to develop interfaces to Southwestern Bell's systems in the event the merger were approved. AT&T Ex. 6.0 (Turner DOR), at 14-15.

Mr. Turner pointed out that AT&T and other CLECs have already developed systems that are interoperable with the SBC systems, software, and business rules. Since several CLECs are near entering the market in Texas with a product offering using the UNE-Platform, under the scenario in which the merger were to proceed, the same systems interfaces should be available in Illinois under the same terms and conditions. AT&T Ex. 6.0 (Turner DOR), at 16.

Further, Mr. Turner asserted that it is vital for SBC to have its systems that are interconnected with CLEC systems integrated into Ameritech's systems in a definite period of time. If not, he pointed out that CLECs may build the interface to Southwestern Bell's systems but not have flow-through capability into Ameritech's region due to SBC not completing its own integration with Ameritech. Specifically, the SBC systems that the CLECs will develop interfaces for must be able to interface with Ameritech's provisioning, maintenance, and billing systems in the Ameritech territory so that orders/requests that are sent electronically to the SBC systems are properly implemented in the Ameritech provisioning and maintenance systems. AT&T Ex. 6.0 (Turner DOR), at 16-17.

Mr. Turner testified that adequate testing of OSS systems will be necessary in any event. He noted that when CLECs develop their interface into the SBC gateway systems – systems that permit many different CLECs to interconnect with SBC and the subtending back-office systems – there would still be a need to ensure that orders and requests flow from these gateways into the actual Ameritech systems that perform the work or hold the information. As such, despite the fact that system interfaces developed by Southwestern Bell in Texas will already be in use, there would still be a need to test the flow-through of orders into Ameritech's back-office systems and ensure that the system interfaces are capable of handling the types and volumes of orders that would be anticipated. The OSS test must be end-to-end, and thoroughly test pre-ordering, ordering, provisioning, maintenance and repair, and billing, including the integration of pre-ordering and ordering. Mr. Turner stated that the FCC's orders have required proof of access to these functions, all of which are imperative for full-scale commercial operation by competitors. Moreover, and following this OSS testing, volume stress testing appropriate to the market should be required over multiple days. Stress testing should occur at commercial volumes, as determined by the expected future demand in a competitive local market. Mr. Turner also emphasized that this volume testing would become even more important if Southwestern Bell incorporates more of its territories into a single systems environment. AT&T Ex. 6.0 (Turner DOR), at 17-18.

Mr. Turner testified that it is vital that a truly independent, technically-skilled third party be engaged to design the testing, conduct it, monitor the results, oversee corrections and retest, and report on the test. Mr. Turner offered that the third-party test entity should act as a "pseudo CLEC" in the sense that it creates and transmits the kinds of orders (known as "order scenarios") to be expected from the CLEC community. Importantly, he noted that independent third party testing can expedite the identification and resolution of problems with SBC/Ameritech's OSS, without being sidetracked into the kind of "finger pointing" that can otherwise arise. More specifically, Mr. Turner asserted that the third party should develop a test plan that would clearly define the scope and methodology of the test, and the entry and exit criteria.

Mr. Turner took issue with Mr. Viveros' position that that testing should not be done. Rather than testing, Mr. Viveros thought that the CLECs should simply send orders to Ameritech. Mr. Turner testified that this position showed little no regard for the value that should be placed on the end user customers in Illinois. He noted that for CLECs to

simply send orders to Ameritech would place the service of those customers at risk. He also pointed out that this type of testing would not fully exercise in a disciplined way the variety of order scenarios for which the system interfaces would be developed. Finally, Mr. Turner noted that simply sending orders to Ameritech without any assurance that its systems are volume tested would be irresponsible of all parties. Mr. Turner concluded that it is essential that comprehensive third party testing be done prior to sending orders that would impact the service of customers in Illinois. AT&T Ex. 6.0 (Turner DOR), at 20-21.

Mr. Turner also disputed Mr. Viveros' position that no penalties should apply. In light of the fact that SBC and Ameritech would be solely responsible for building to the interface standards already agreed to in the Southwestern Bell territory, Mr. Turner stressed that if delays occurred or if the SBC/Ameritech combined entity did not meet its commitments, penalties would be appropriate, indeed essential. Mr. Turner pointed out that the Bell Atlantic/NYNEX merger is particularly telling in this regard. He explained that one of the conditions established by the FCC in permitting that merger to go through was for there to be a single systems interface for CLECs across the 18 state region of the combined entity. However, this has still not been done. Consequently, Mr. Turner asserted that penalties would be the only viable means to put "teeth" into this requirement. AT&T Ex. 6.0 (Turner DOR), at 21.

Commission Analysis and Conclusions on Shared Transport and Related OSS

We find today, as we have found before, that Shared Transport is a prerequisite to any near term broad-based local service competition. Because Shared Transport is an essential element of the Platform, Ameritech cannot provide the Platform as long as it refuses to provide CLECs with the Shared Transport element. Given the record before us, we are compelled to agree with AT&T and others that Ameritech's history of refusing to provide Shared Transport and the Platform, in contravention of this Commission's and the FCC's orders, is nothing short of appalling. Ameritech's conduct has frustrated this Commission and CLECs alike. Indeed, the lack of local competition in Illinois can be traced in large measure to Ameritech's three-year campaign to avoid providing Shared Transport and the Platform. For this reason, we posed specific questions to Joint Applicants seeking specific and unqualified responses as to the "manner, necessary actions and timetable" by which Joint Applicants would provide Shared Transport and Unbundled Local Switching in Illinois. Joint Applicants' response, while perhaps superficially appealing, contains significant conditions and caveats that seriously undermine their proposal.

Joint Applicants present us with a Hobson's choice. On the one hand, Joint Applicants effectively are asking the Commission to approve the merger in part based on Ameritech's promise to stop violating its legal obligations. As hollow as that gesture is, there is little in this record and nothing in Ameritech's three-year campaign of litigation, stonewalling, and semantics games to inspire confidence that Ameritech post-merger

would actually do what it now says it will do. Indeed, the testimony at the Hearing on Re-Opening confirms that Joint Applicants will not hesitate to resort to well-worn tactics to avoid providing Shared Transport. Tr. (Appenzeller), at 2369-71.

On the other hand, even when stripped of their caveats, Joint Applicants' "interim" and "long-term" solutions to Shared Transport depend upon substantial OSS developments over the next two to three years. Neither of the above options is attractive to us or to CLECs. Neither is a firm, timely, and unqualified solution to a problem of Ameritech's own making. Indeed, Ameritech's claims regarding the need for a short-term and long-term solution to implement Shared Transport are a diversion from the real issue before us. We agree with AT&T that the "interim solution" veils what in reality is a set of problems associated not with Shared Transport but with implementing the Unbundled Local Switching element. Ameritech can and should provide access to Shared Transport now.

Even under the most favorable light, Joint Applicants' so-called commitment to provide Shared Transport and Unbundled Local Switching in Illinois fails to create any pro-competitive benefit. Their proposal is nothing more than a stop-gap that applies only until the FCC issues a decision in the *UNE Remand Proceeding*. If the FCC re-affirms the need for local switching and transport as unbundled network elements, then Joint Applicants will be bound to follow that determination, and the commitment will provide no additional benefit. If, on the other hand, the FCC finds that either "local switching or transport is not a UNE nationally or in specific geographic areas" (¶ 41), then the commitment disappears (*id.*), and it no longer provides any benefit whatsoever. As a result, Joint Applicants' Shared Transport commitment in Illinois and at the FCC (Condition VIII) is essentially meaningless. Ameritech long ago should have joined all other incumbent LECs and agreed to provide Shared Transport – its refusal was frivolous, and indeed in defiance of binding orders by federal courts, and numerous regulatory bodies, including the FCC and this Commission. Joint Applicants' merger condition would effectively reward them with merger approval for finally discarding – on an interim basis that arises only under a particular set of circumstances – Ameritech's campaign against Shared Transport.

Moreover, and in all events, Joint Applicants' offer of Shared Transport in the proposed Illinois and FCC merger conditions would not provide pro-competitive benefits because competitive LECs could not readily use it in the form that Joint Applicants are prepared to offer it. As with any network element, to use Shared Transport competitive LECs must have the ability to order it via nondiscriminatory access to OSS. As part of its refusal over the past three years to provide Shared Transport, Ameritech has never developed the appropriate OSS to order Shared Transport in conjunction with other network elements. We will not reward such conduct by approving a condition that provides for the long overdue Shared Transport to be phased in over a two to three-year period, and then only upon the resolution of complicated and contentious OSS issues. We reject Joint Applicants' Shared Transport condition.

AT&T's Position on New OSS Systems

AT&T contends that what Joint Applicants have provided in response to the Commission's request for specific and detailed information are vague and indefinite promises about OSS. Consequently, AT&T asserts that the Commission still has no idea what system changes and OSS enhancements Joint Applicants will actually make, much less even propose to make, in Illinois. Joint Applicants offer only future promises to discuss and negotiate with CLECs on these issues five to six months after the merger closes.

The cross-examination of Mr. Viveros, SBC's OSS witness, AT&T points out only served to highlight the vagueness of Joint Applicant's OSS "commitment." Mr. Viveros conceded that Joint Applicant's FCC commitment to deploy "uniform" application-to-application and graphical user interfaces subsumed their Illinois OSS commitments. Tr. (Viveros), at 2171. Moreover, when asked whether Joint Applicant's commitment to deploy "uniform" application-to-application interfaces meant that the same interfaces would be deployed throughout SBC/Ameritech's region, Mr. Viveros coyly answered "not necessarily." Tr. (Viveros), at 2157. Similarly, when asked whether that meant that SBC/Ameritech would deploy the same version of a particular interface and whether the commitment to implement "uniform" business rules would be the same throughout the 13-state region, Mr. Viveros carefully hedged his answers, twice repeating "not necessarily." Tr. (Viveros), at 2158-58.

AT&T opined that what the Commission should take from these non-answers is that Joint Applicant's OSS commitments do "not necessarily" amount to anything. Mr. Viveros' non-committal answers give Joint Applicants unfettered "wiggle" room for the future in defining what they have, or have not, committed to in relation to developing and deploying new OSS interfaces in Illinois. Indeed, AT&T noted that there is nothing on the record to indicate that Joint Applicants have committed to changing the status quo in any way in regard to Ameritech's OSS systems.

Although, the Joint Applicants attempt to blame the vagueness of their OSS commitments on their alleged inability to conduct post-merger planning (SBC/Ameritech Ex. 7.2 (Viveros DOR), at 2), the Commission, AT&T contends, should lend little credence to this self-imposed excuse. Indeed, AT&T pointed out that the record established that while SBC/Ameritech were negotiating their OSS commitments at the FCC – and before their testimony was filed in the Illinois re-opening case – not less than three meetings have taken place between SBC and Ameritech personnel regarding Ameritech's OSS systems. Cross Ex. B; Tr. 2165-2168. SBC's OSS witness Mr. Viveros was present at those meetings and admitted that he used them to attain "a much better understanding of what systems Ameritech currently offers its CLEC customers." Tr. (Viveros), at 2167-68.

AT&T contends that not only are Joint Applicant's OSS promises vague, but they are illusory. They are based on the wholly unrealistic presumption that in just two months

(one month under the Proposed FCC Conditions) SBC/Ameritech can come to an amicable agreement with Illinois CLECs regarding a complete revamp of Ameritech's OSS interfaces and corresponding business rules. AT&T explained that any dispute between Ameritech and the CLECs automatically triggers (under their proposal) an open-ended arbitration process that would indefinitely delay all of Joint Applicant's commitments to deploy even those systems or rules that CLECs and Joint Applicants may have agreed on in the collaborative.

AT&T contends that Joint Applicant's schedule for developing and deploying OSS changes is too long and subject to the likelihood of substantial delays which could preclude them from ever being achieved. The two-year time – including the 18 month deployment and development Phase III – is itself is too long. AT&T notes that in Ohio Joint Applicants have committed to implement all OSS improvements resulting from the merger within six months of merger closing. Ohio Stipulation and Recommendation, Section IV.A.3. Joint Applicants have given no excuse why it should take them so long to implement such OSS improvements in Illinois.

Moreover, AT&T pointed out that the already elongated two-year period is applicable if and only if all of the CLECs participating in either the FCC or ICC collaborative workshops fully acquiesce within one or two months in all aspects of whatever implementation plans proposed by Joint Applicants. If all CLECs do not so acquiesce, AT&T explained that the plan is subject to arbitration that is unlimited in duration and virtually certain to delay substantially the deployment of the application-to-application interfaces. Obviously, SBC has a strong incentive, and absolute unilateral ability, to take a "take it or arbitrate it" position and thereby force these federal and state collaboratives to submission or the delays of arbitration.

AT&T contends that the schedule is as grossly unfair to CLECs as it is unrealistic. AT&T explained that In Phase I, Joint Applicants are given five months to develop a proposal for deploying application-to-application OSS interfaces, while CLECs, on the other hand, are allowed only 2 months in the Illinois Phase II to review all the details of Joint Applicants proposals in regard to: (1) changes in OSS interfaces (2) business rules regarding those interfaces (3) a change management process regarding those interfaces and (4) the schedule for deployment of those interfaces and business rules. AT&T opined that two months is far too short for meaningful CLEC analysis of Joint Applicant's proposed plans, much less for CLECs and Joint Applicants to discuss potential solutions to open issues that might arise in those collaboratives. AT&T also pointed out that Illinois CLECs have engaged in negotiations pertaining to the implementation of EDI version 7.0 for more than a year with Ameritech, and have been discussing the implementation of EDI 10.0 since November of 1998. Moroever, AT&T noted that Joint Applicants admit that "[t]he collaborative process in Texas lasted approximately nine months." SBC/Ameritech Ex. 10.0 (Dysert DOR), at 6. In California, the collaborative process took approximately seven months to come to a conclusion. Tr. (Viveros), at 2178-79. And neither of those collaboratives concerned wholesale changes in the underlying BOC's OSS interfaces and business rules.

AT&T pointed out that the consequence of not accepting Joint Applicants' proposed plan in full within two months, on the other hand, is a delay in the deployment of OSS interfaces and business rules through an arbitration process which is unbounded in duration. The indefinite nature of this process could easily extend for many months or even (with possible appeals) years – well past the 3-year sunset date on which the Proposed FCC Conditions cease to be effective and binding on Joint Applicants.

AT&T noted that while Joint Applicant's readily agree that their Illinois OSS commitments are subsumed within the FCC OSS commitment to implement "uniform" interfaces and business rules (Tr. (Viveros), at 2172), and that the FCC and Illinois OSS collaboratives will address identical issues during similar timeframes, Joint Applicants offer no explanation regarding how these two commitments, or how these overlapping collaboratives, would possibly function. AT&T pointed out that Joint Applicants fail to explain what would happen if the FCC collaborative and the Illinois collaborative – or, more likely, the arbitration decisions resulting therefrom – result in differing conclusions. While Joint Applicants admit that there is a "potential" for inconsistent results, Joint Applicants offer vague and unenforceable suggestions of a "coming together" of regulatory entities to "agree on some sort of single adhesive process, rather than manage these processes independent of one another." Tr. (Viveros), at 2184-85. Joint Applicants fail to explain how this unprecedented convergence would take place.

In fact, AT&T pointed out that the FCC and the ICC are not the only entities that affect Joint Applicant's OSS commitment. When totaled, there are no less than eight collaboratives taking place all in or around the same time: (1) Three collaboratives at the FCC dealing with "uniform" interfaces, business rules, and access to xDSL systems; (2) Three collaboratives in Illinois, one dealing with interfaces and business rules, another dealing with performance measures and liquidated damages; and a third with interconnection; (3) And two collaboratives in Ohio, one dealing with OSS interface changes and the other dealing with performance measures and remedies. AT&T explained that since all these collaboratives take place concurrently and deal with the same issues, it would be difficult enough for entities the size of AT&T, MCI and Sprint to be able to staff and juggle them effectively; certainly smaller Illinois CLECs will have even less ability to do so. And the state commissions and FCC have similar staffing and financial constraints. AT&T contended that these overlapping collaboratives raise the likelihood of a "collaborative train wreck" which would make an open-ended arbitration all the more likely.

AT&T contends that Joint Applicants' all-purpose answer to OSS issues is to place them in collaborative processes, but it is clear that that is simply a device to avoid having to commit to any substantive plan for OSS harmonization and improvement while getting this merger approved. And given the overall three-year time frame in which OSS "commitments" will be in effect, there is a strong potential that they will never come about in the first instance. AT&T urges the Commission looks behind all the paper promises of future proposals and processes, where it will find no OSS improvements are specified at

all, much less improvements that are enforceable or that a CLEC could use to develop a business plan for market entry.

Commission Analysis and Conclusion on New OSS Systems

While we sought specific and detailed information from Joint Applicants regarding their plans to deploy application-to-application interfaces in Illinois, or otherwise change Ameritech's OSS systems, Joint Applicants have unfortunately provided vague and indefinite promises that give us little to no information regarding what OSS changes Joint Applicants propose to make, or the timeframes in which the Joint Applicants propose to make such OSS changes.

First, Joint Applicants have failed to provide any detail regarding what OSS enhancements Joint Applicants will actually make, or even propose to make, post merger. While Joint Applicants agree that their Illinois OSS commitment are subsumed within the FCC OSS commitment to implement "uniform" interfaces and business rules (Tr. (Viveros), at 2172), Joint Applicants have failed to give any information regarding what this commitment actually means. Joint Applicants' witness Mr. Viveros repeatedly answered "not necessarily" when asked whether that commitment means that SBC/Ameritech will provide the same OSS interfaces and business rules throughout their 13-state region or whether Joint Applicants will deploy the same version of EDI, the electronic interface for pre-ordering and ordering UNEs. Based on this information, the Commission frankly is left without any commitment regarding what OSS changes, if any, Joint Applicants will make to Ameritech's systems.

We note that SBC has had well over a year to conduct an analysis of Ameritech's systems and, at the very least, give some indication regarding what OSS enhancements it plans to make post-merger. But the record demonstrated that SBC and Ameritech did not conduct any meetings to discuss these OSS issues until May of 1999. The Commission questions why SBC/Ameritech waited to the last minute before attempting to develop some plan regarding what OSS enhancements they will make post-merger.

Second, Joint Applicants have failed to provide any realistic timeframe for implementing these still unknown OSS changes. On the whole, Joint Applicant's proposed timeframes are based on the wholly unrealistic presumption that in just two months in Illinois (and one month at the FCC) Joint Applicants can come to an amicable agreement with Illinois CLECs regarding a complete revamp of Ameritech's OSS interfaces, business rules, and change management process. Any dispute triggers open-ended arbitration, which puts on hold any Joint Applicants obligation to begin deployment of any OSS interface, business rule, or change management process. This is true even if some agreement is reached between Joint Applicants and Illinois CLECs. We find that this two month time period is especially unrealistic in light of the fact that the Texas and California collaboratives took seven to nine months. We also find that the extremely short time frames will increase the probability that SBC/Ameritech will take a "take it or arbitrate it" position in those shotgun collaboratives.

We also believe this proposed schedule is unfair to Illinois CLECs. While CLECs have only two months to negotiate concerning Joint Applicant's plans, in Phase I, Joint Applicants are given five months to develop a proposal for developing application-to-application OSS interfaces. It is unclear why Joint Applicants need five months when they have already begun meetings regarding those interfaces. We note that in Ohio Joint Applicants have committed to presenting a plan on all post-merger OSS changes within two months of merger closing (and implementing those changes within six months). Since Joint Applicants have committed to implementing "uniform" interfaces and business rules throughout their 13-state region, it is safe to assume that the plans they share in Ohio in two months will the substantially similar to those shared in Illinois in five months.

Finally, we find that Joint Applicants' OSS commitments have become even more vague and ambiguous based on the Proposed FCC Conditions. While the Illinois and FCC OSS commitments overlap and the FCC and Illinois collaboratives will take place during similar timeframes, Joint Applicants have offered no plausible explanation regarding how these two commitments will work in tandem. Most importantly, Joint Applicants have failed to explain how they can commit to implement uniform interfaces and business rules at the FCC, while at the same time they allegedly will be pursuing separate agreements in Illinois regarding OSS enhancements and interfaces. In total, there will be no less than eight collaboratives taking place in Illinois, at the FCC, and in Ohio regarding the same issues and during overlapping timeframes.

In conclusion, we find that Joint Applicants' OSS commitments are lacking in substance, and only place those OSS issues in a open-ended and undefined collaborative processes.

NATIONAL LOCAL SUBSIDIARY

9. A clear explanation of the National Local Subsidiary, as used in this docket, and the impact that this subsidiary would have on retail rates. Explain what happens to AI's retail rates should the applicants transfer the top-revenue customers to this subsidiary for telecommunications services. Explain what the revenue impact would be for Ameritech Illinois if the top customers are shifted to the National Local Subsidiary. Explain if the National Local Subsidiary would provide local service for its customers in Illinois. Explain whether the National Local Subsidiary would be certified as a CLEC in Illinois. Explain whether the National Local Subsidiary would be treated as any other CLEC would be treated in its interactions with AI.

AT&T's Position

Mr. Gillan testified that a principal reason for the merger is Joint Applicants' National Local Strategy, which would be implemented via the National Local Subsidiary (NatLoCo). Mr. Gillan testified that the merger would establish NatLoCo as a company serving nearly 40% of the nation's multi-line business market within its franchise footprint. Understanding how NatLoCo intends to leverage its exchange footprint against rivals is

the single most important competitive issue of the merger. Creating a massive footprint of incumbent facilities is the reason for the merger – and is also the reason the merger poses a threat to competition. Mr. Gillan explained that by capturing more of a customer's locations within the footprint of its affiliated ILECs, SBC can then bundle these services together in a package that only an equally large ILEC could match. He testified that the only way to lessen the potential harm to competition from this strategy would be through conditions that: (1) reduce the market power of the combined entity, and (2) prevent the combined entity from leveraging the market power that remains. AT&T Ex. 1.2 (Gillan DOR), at 6-7.

Mr. Gillan framed the fundamental questions as follows: What will be the relationship between Ameritech-Illinois (SBC's ILEC) and NatLoCo (SBC's "CLEC")? Does Ameritech-Illinois intend to treat NatLoCo like any other CLEC? Or, will Ameritech-Illinois discriminate in favor NatLoCo, thereby enabling SBC to bundle monopoly (i.e., within franchise) services with competitive (i.e., beyond franchise) services into a single package that only another massive ILEC can match? AT&T Ex. 1.2 (Gillan DOR), at 21-22.

Mr. Gillan testified that the Joint Applicants apparently envision an arrangement whereby Ameritech-Illinois would offer and provide local service in Illinois, while NatLoCo would have some role in "coordinating" the services of SBC's ILEC affiliates to give the impression of a single provider. In effect, Mr. Gillan explained that Ameritech-Illinois would evidently become the Illinois arm of SBC's National Local Strategy. Moreover, Mr. Gillan noted that NatLoCo would have the appearance of competing in Illinois, without any formal legal standing. AT&T Ex. 1.2 (Gillan DOR), at 23, *citing* SBC/Ameritech Exhibit 1.3 (Kahan DOR), at 21 and Direct Testimony of Thomas Reiman at 25, Indiana Utility Regulatory Commission Cause No. 41255.

Mr. Gillan testified that the Joint Applicants indicate that they have no intention to treat NatLoCo like any other CLEC. Mr. Gillan noted that NatLoCo will not operate as a CLEC in Illinois at all – and, therefore, will not have to overcome the barriers that Ameritech throws in the way of legitimate entrants trying to buy network elements and/or interconnection as arm's length competitors. Instead, NatLoCo will work "cooperatively" with Ameritech-Illinois in some vague and undisclosed manner. Mr. Gillan observed that the Joint Applicants' never suggest (and, when pressed, deny) that services/facilities provided by Ameritech-Illinois to NatLoCo would be available to other CLECs in any manner. AT&T Ex. 1.2 (Gillan DOR), at 24, *citing* SBC/Ameritech Exhibit 1.3 (Kahan DOR), at 20-21.

Mr. Gillan testified that the Company has made clear that whatever the relationship between Ameritech-Illinois and NatLoCo, it has no obligation to extend similar – much less, nondiscriminatory – treatment to other competitors. AT&T Ex. 1.2 (Gillan DOR), at 25, *citing* SBC Ameritech Response to AT&T Request 1-20(b). Moreover, Mr. Gillan noted that general questions concerning the relationship between Ameritech-Illinois and NatLoCo were met with stonewalling by Ameritech. *See* AT&T Ex. 1.2 (Gillan DOR), at

24, Attachment 1.2.2, SBC-Ameritech's response to AT&T 1-19. Mr. Gillan testified that SBC-Ameritech's response to AT&T 1-19 is particularly important because that request essentially sought detailed answers to the same question posed by the Commission – exactly how will Ameritech-Illinois provide service to NatLoCo, and will it treat all CLECs the same? He pointed out that, even at this late date, the Joint Applicants' response to AT&T 1-19 demonstrates that they would rather deflect questions than defend their intention. AT&T Ex. 1.2 (Gillan DOR), at 26.

Mr. Gillan testified that, aside from Ameritech-Illinois' intention to provide (some undisclosed mix of) services/facilities/marketing to NatLoCo that it will not make available to other CLECs, there is also the issue as to what NatLoCo will pay Ameritech-Illinois for these services/functions that only it can obtain. With respect to this concern, the Joint Applicants' offer vague, empty responses to pointed questions. For instance, when pressed for details regarding the governing rules on dealings between Ameritech Illinois and the NatLoCo, the Joint Applicants responded weakly that "presumeably 47 CFR § 32.27 and § 64.901 and any other applicable affiliate rules" would govern. AT&T Ex. 1.2 (Gillan DOR), at 26, *citing* SBC Ameritech Response to AT&T 1-20(c). Mr. Gillan was troubled by Joint Applicants response because the Joint Applicants apparently cannot now bring themselves to agree that any specific rule would unambiguously apply. Further, although the Joint Applicants assert that any cost allocation would be subject to review by this Commission, they did not cite a single Illinois rule that would be within the Commission's jurisdiction. Both rules they offer – which don't even apply to the problem at hand – are federal, and not state, rules. AT&T Ex. 1.2 (Gillan DOR), at 28.

Mr. Gillan testified that the Joint Applicants did not directly answer the Commission's question as to "whether the National Local Subsidiary would be treated as any other CLEC would be treated in its interactions with Ameritech-Illinois." But, he pointed out, through inference and discovery the answer becomes clear -- Ameritech-Illinois will not treat NatLoCo like other CLECs. Mr. Gillan contended that although SBC tried to soften the harshness of this answer with vague references to "cost allocation and affiliate transaction rules," none of the cited rules would ensure that Ameritech-Illinois would treat NatLoCo like any other CLEC. AT&T Ex. 1.2 (Gillan DOR), at 30.

Mr. Gillan asserted that if there is to be a NatLoCo, then it is critical that other CLECs have an opportunity to compete with it on a level playing field. This means that NatLoCo should not be allowed to create national local packages in "cooperative partnership" with its ILEC affiliates. He testified that NatLoCo, like any other CLEC, should be required to overcome the same entry barriers (such as primitive OSS and efforts to limit the availability of UNEs) that its ILEC affiliates impose on every other market participant. AT&T Ex. 1.2 (Gillan DOR), at 31.

Mr. Gillan testified that in order to assure that Ameritech Illinois treats NatLoCo like any other CLEC it would be necessary, first, to bar NatLoCo from including, in any national bundle that it offers, any service offered by Ameritech-Illinois. Mr. Gillan asserted that the only way that Ameritech-Illinois can treat NatLoCo like other CLECs is if

NatLoCo offers services in Illinois as a separate entity, and subject to rules which recognize the unique problems that arise when a CLEC is a wholly-owned affiliate of an ILEC. He explained that the key problem stems from a single, undisputed fact that must be recognized in every Commission policy that addresses Ameritech-Illinois' relationship to NatLoCo: Because these companies have the same stockholder, the price that NatLoCo pays to Ameritech-Illinois for services/facilities is irrelevant to its economic behavior. All that matters is the cost that Ameritech-Illinois incurs. Mr. Gillan explained that this means that the most important restriction that can govern Ameritech-Illinois' relationship to NatLoCo is that NatLoCo be permitted to buy from Ameritech-Illinois only those services/facilities that are: (1) available to any other CLEC, and (2) are priced at rates based on economic cost. AT&T Ex. 1.2 (Gillan DOR), at 32.

Mr. Gillan testified that it is important that the price of any service/facility that Ameritech-Illinois provides to NatLoCo must be cost-based because NatLoCo and Ameritech-Illinois are owned by the same entity. Consequently, the price that NatLoCo pays Ameritech-Illinois is nothing more than shifting dollars from one entity to another. Mr. Gillan explained that NatLoCo's "cost" for services/facilities purchased from Ameritech-Illinois becomes Ameritech-Illinois' revenues. When costs/revenues are consolidated to determine SBC's earnings, the transaction "nets out" with no effect on corporate profits. AT&T Ex. 1.2 (Gillan DOR), at 32-33.

Mr. Gillan pointed out that the Joint Applicants agree that they will compete based on the combined effect on Ameritech-Illinois and NatLoCo, that it will be the consolidated return from a customer that will determine their competitive behavior. He noted that the principal implication is that the Commission must always require that whatever service/facility Ameritech-Illinois provides to NatLoCo, the facility must be priced at its forward-looking economic cost and be available to other CLECs on identical terms and conditions (including ordering and provisioning using the same OSS). Other approaches will simply fail. AT&T Ex. 1.2 (Gillan DOR), at 33-34.

Mr. Gillan similarly noted that "allocation" rules that allegedly divide costs between Ameritech-Illinois and NatLoCo provide the illusion of protection without the effect. Moreover, he found this approach is even more troubling because it implies both that the transaction is not cost-based and the service/facility will not be available to other CLECs. Mr. Gillan also asserted that the Commission must prohibit NatLoCo from simply "reselling" Ameritech-Illinois' services because service-resale is inherently discriminatory and favors an affiliate of an ILEC such as NatLoCo. AT&T Ex. 1.2 (Gillan DOR), at 34-35.

Mr. Gillan testified that service-resale by an ILEC's affiliate uniquely advantages the affiliate and is inherently discriminatory. He explained that a wholly-owned affiliate like NatLoCo is able to use resale within the franchise of its affiliated ILEC because none of the financial and market constraints that would affect a legitimate entrant apply. AT&T Ex. 1.2 (Gillan DOR), at 35.

For instance, Mr. Gillan explained that under service resale, Ameritech-Illinois would continue to receive access revenues for each of NatLoCo's customers. In effect, NatLoCo would be nothing more than an uncompensated marketing agent for Ameritech-Illinois' access service. Mr. Gillan noted that while this relationship would be acceptable to NatLoCo, no independent CLEC could succeed in such a role. Mr. Gillan pointed out that access revenues would figure prominently in the consolidated return enjoyed by NatLoCo and Ameritech-Illinois, but would figure just as prominently as an actual cost for any CLEC that provided both local and long distance service. AT&T Ex. 1.2 (Gillan DOR), at 35-36.

Furthermore, Mr. Gillan pointed out that the defining constraint of resale is that the CLEC-reseller can only offer services that are identical to those of the incumbent. This limitation, however, could actually work to NatLoCo's advantage. He explained that far from being concerned with an inability to establish a unique product, NatLoCo would want customers to perceive it as the incumbent – the goal would be to trade Ameritech-Illinois' monopoly legacy and reputation. Because of the inherent limitations of service resale, virtually every major carrier that has tried to compete using service resale -- at least, every unaffiliated carrier -- has terminated its resale activity. AT&T Ex. 1.2 (Gillan DOR), at 36.

Mr. Gillan emphasized that competition would be harmed if SBC were allowed to bundle monopoly and competitive services across its vast post-merger footprint – a footprint that no other carrier comes close to replicating. He explained that whether the harm is achieved by bundling NatLoCo's services with those of Ameritech-Illinois – or by NatLoCo reselling the same Ameritech-Illinois service – the result would be a crowding out of legitimate competitors that have no base of incumbent customers to leverage. AT&T Ex. 1.2 (Gillan DOR), at 36.

Commission Analysis and Conclusions

The National Local Subsidiary and its relationship to Ameritech in Illinois raise substantial competitive issues in this proceeding. The intent of the Telecommunications Act is to require that incumbent local exchange carriers such as Ameritech-Illinois provide other competitive carriers the opportunity to use the exchange network on an arms-length, nondiscriminatory basis so that the advantage of the incumbent's inherited network and market position can be eroded over time. At the same time, one of the stated reasons for this merger is to position SBC to compete for the "national local business" customer by offering a package of services across a number of states. Although some locations will be areas where NatLoCo will be operating as an entrant unaffiliated with the incumbent LEC, in other locations – in particular, Ameritech's franchise territory in Illinois – an SBC affiliate would already be present in the form of the incumbent local carrier.

Accordingly, on re-opening the Joint Applicants were asked to address issues concerning the relationship between the incumbent Illinois LEC and NatLoCo. In particular, Joint Applicants were asked "whether the National Local Subsidiary would be

treated as any other CLEC would be treated in its interactions with Ameritech-Illinois." The response of Joint Applicants is short on specifics, but on the information provided it appears that the Joint Applicants envision an arrangement whereby Ameritech Illinois would offer and provide local service in Illinois, while NatLoCo would have some role in "coordinating" the services of SBC's ILEC affiliates to give the impression of a single national provider. It appears, in other words, that Ameritech-Illinois would become the Illinois arm of SBC's National Local Strategy. Consequently, although NatLoCo would not have any formal legal standing or presence in Illinois, at least initially, it would nevertheless in effect be competing in Illinois through the efforts of Ameritech Illinois.

Joint Applicants now indicate, moreover, that they do not intend to treat NatLoCo like any other CLEC. Instead, NatLoCo will work "cooperatively" with Ameritech-Illinois in some manner that Joint Applicants have refused to describe. Joint Applicants are clear, however, that services/facilities provided by Ameritech-Illinois to NatLoCo would not be available to other CLECs in *any* manner.

Ameritech-Illinois' intention to provide some undisclosed mix of services/facilities/marketing to NatLoCo that it will not make available to other CLECs, raises the further issue as to what NatLoCo will *pay* Ameritech-Illinois for these services/functions. With respect to this concern, the Joint Applicants' state only that such dealings will be controlled by federal and state affiliate transaction and cost allocation rules. But affiliate transaction rules govern transfers of assets between regulated and unregulated affiliates, and we do not understand Joint Applicants to be saying that assets will be transferred from Ameritech Illinois to NatLoCo. Cost allocation rules are only meaningful if one (or both) of the affiliates are subject to a form of regulation where the cost-allocation has a price and profit implication, which is not the case here because Ameritech-Illinois is subject to price-cap regulation under its Alt Reg plan. There is no reason to expect that *any* form of cost-allocation can prevent competitors from being disadvantaged by NatLoCo's special relationship with Ameritech Illinois. In all events, Joint Applicants have not begun to clarify the nature of this relationship or explain why it would not disadvantage non-affiliate competitors.

Appropriate limitations on NatLoCo would include a prohibition on its including, in any national bundle, any service offered by Ameritech-Illinois. The only way that Ameritech-Illinois could treat NatLoCo like other CLECs would be if NatLoCo offered services in Illinois as a separate entity, and subject to rules which recognize the *unique* problems that arise when a CLEC is a wholly-owned affiliate of an ILEC. NatLoCo should be permitted to buy from Ameritech-Illinois *only* those services/facilities that are: (1) available to any other CLEC, and (2) are priced at rates based on economic cost. Finally, NatLoCo would have to be prohibited from simply "reselling" Ameritech-Illinois' services because service-resale is *inherently* discriminatory and favors an affiliate of an ILEC such as NatLoCo. A wholly-owned affiliate like NatLoCo is able to use resale within the franchise of its affiliated ILEC because none of the financial and market constraints that would affect a legitimate entrant apply. For instance, under service resale, Ameritech-Illinois would continue to receive access revenues for each of NatLoCo's

customers; in effect, NatLoCo would be nothing more than an uncompensated marketing agent for Ameritech-Illinois' access service. This relationship would be acceptable to NatLoCo, but only to NatLoCo.

Competition would be harmed if SBC is allowed to bundle monopoly and competitive services across a vast post-merger footprint – a footprint that no other carrier can come close to replicating. Whether the harm is achieved by *bundling* NatLoCo's services with those of Ameritech-Illinois – or by NatLoCo *reselling* the same Ameritech-Illinois service – the result would be a crowding out of legitimate competitors that have no base of incumbent customers to leverage. This, in short, is a palpable danger posed by this proposed merger, and the answer given by Joint Applicants to the Commission's question is both inadequate and unacceptable.

ENFORCEMENT

12. Reasonable and effective enforcement mechanisms for any condition imposed, including appropriate penalties, economic or otherwise;

13. The manner, necessary actions and timetable by which the Joint Applicants would create detailed performance monitoring reports to compare the provision of the following services to CLECs with internal performance standards: network performance, Operations Support Systems (OSS) and customer (i.e. CLEC) service.

AT&T's Position

Mr. Gillan testified that the Joint Applicants have failed to propose an enforcement process that can be expected to reduce litigation, speed entry or otherwise streamline the process. Mr. Gillan contended that the so-called interconnection commitments by the Joint Applicants are virtually worthless as a means to reduce litigation and speed entry. He noted that the problem that these commitments should address is the delay and cost of the arbitration process; the solution proposed by the Joint Applicants, however, is essentially the same arbitration process, with its attendant cost and delay. AT&T Ex. 1.2 (Gillan DOR), at 37.

Mr. Gillan observed that the Joint Applicants have fundamentally agreed only to "talk about" creating an automated enforcement mechanism that relies on liquidated damages tied to specific performance measures and benchmarks in future collaborative workshops and hearings. He noted that although preferable to refusing to "talk about it," there has been no real change in either the manner, or the incentives, of the discussion that is likely to occur. AT&T Ex. 1.2 (Gillan DOR), at 38.

Mr. Gillan asserted that the principal barrier to local competition has been a recalcitrant ILEC. After the merger, the fundamental circumstance that will change is that the ILEC will be larger, Illinois will be proportionally smaller (to the combined entity), and the true headquarters more distant. Against this backdrop, Mr. Gillan opined that a "commitment" to "talk about a commitment" is of limited value, at best, and it stands in

stark contrast to what the Commission has requested. AT&T Ex. 1.2 (Gillan DOR), at 38.

Mr. Gillan stated that it is useful to remember that the Commission is reviewing this merger because SBC prefers to adopt the role of incumbent rather than compete as an entrant. He noted that SBC could have come to Illinois with the commercial incentive to tear down Ameritech's entry barriers. Instead, Mr. Gillan testified, because SBC would rather become the incumbent, the Commission's only hope with the merger would be to use regulatory tools and meaningful conditions to try and achieve the same result. AT&T Ex. 1.2 (Gillan DOR), at 38.

Mr. Gillan testified that the Commission should view with great skepticism (and attribute little real usefulness to) the enforcement mechanisms that the Joint Applicants have offered. He asserted that either the conditions to be enforced themselves have little substance (how, for example, do you enforce a commitment as heavily caveated as the Joint Applicants' interconnection commitments?), or the Joint Applicants' commitment is only to create an enforcement mechanism in the future. AT&T Ex. 1.2 (Gillan DOR), at 38-39.

As an example, Mr. Gillan noted the inherent problems associated with how the Commission would "enforce" the Joint Applicants' commitments to implement "shared transport" with a goal of meaningful competition. He pointed out that the fundamental reason CLECs seek shared transport is to be able to offer broad-scale, mass-market services using the UNE-Platform. As explained by AT&T witness Turner, implementing shared transport in the timeframes now agreed to by the Joint Applicants will have very little real impact in the market. Mr. Gillan explained that this is because the OSS needed to process and provision commercial volumes of orders will not be in place until much later. AT&T Ex. 1.2 (Gillan DOR), at 39.

Mr. Gillan pointed out that the central goal of an enforcement mechanism should be to make sure that market conditions change from what they are, to what they can be. While the Joint Applicants have proposed a specific commitment and timetable for shared transport, he noted that they they have made no similar commitment to the underlying OSS that would make the shared transport "concession" significant. Consequently, Mr. Gillan pointed out that there is no enforcement mechanism to achieve the intent of shared transport, because there is no real timetable and commitment to make the shared transport commitment competitively significant. AT&T Ex. 1.2 (Gillan DOR), at 39-40.

Mr. Gillan observed that in the absence of incident-based, liquidated damages, the Commission should not expect any less need for regulatory intervention in the future. Mr. Gillan testified that the unfortunate fact is that many of the Joint Applicants' commitments are little more than promises to do what they are legally obligated to do, tied to enforcement mechanisms that are already available: arbitrations, complaints, litigation, etc…. Mr. Gillan asserted that the favored enforcement mechanism in the Joint Applicants' proposal remains the status quo. AT&T Ex. 1.2 (Gillan DOR), at 40.

Mr. Gillan recounted the old political saying that half a loaf is better than none. The same, however, cannot be said for scissors – a half a scissors simply will not get the job done. Mr. Gillan termed the Joint Applicants' approach to enforcement a "half-a-scissors solution." Shared transport is offered under defined timelines -- but the OSS to make it commercially meaningful are not. Joint Applicants commit to implementing specific performance measures -- but only measures that they choose, and agree only "to talk about" the benchmarks and penalties that will make the measures relevant. Joint Applicants' promise they will extend to Illinois interconnection provisions from other states to avoid unnecessary arbitrations – but the commitment is so laden with restrictions/limitations that arbitrations are all but inevitable. Absent is the full pair of scissors – i.e., a matched commitment and enforcement mechanism that will automatically improve competitive results.

More specifically, AT&T contends that Joint Applicants' commitments regarding implementing 79 of the 122 agreed to Texas performance measures and benchmarks and the Texas liquidated damage plan concerning those standards/benchmarks are appallingly vague. AT&T points out that Joint Applicants failed to list 43 of the 79 performance measures and benchmarks they will implement in Illinois within 300 days. AT&T asserts that Joint Applicants' ambiguity in this regard is suspect since their testimony discusses at length the criteria they used for choosing the specific number 79. Yet, they repeatedly claimed that they could not name them, other than to say that 36 of the 79 measures/benchmarks will include those agreed to at the FCC. SBC/Ameritech Ex. 10.0, p. 7; Tr. 2278-80. Joint Applicants are silent on the identity of the remaining 43. Again, AT&T notes that Joint Applicants have carefully couched their "commitment" in a manner that makes it impossible for the Commission, or Illinois CLECs, to know what it actually is. And again, Joint Applicants have given themselves plausible deniability in regard to what they have, or have not, committed to in Illinois.

Moreover, AT&T contends that Joint Applicants have failed to make any firm commitment to implement any performance measures/benchmarks beyond the 79. Joint Applicants have specifically committed to implementing only those Texas measures/benchmarks (beyond the 79) that SBC/Ameritech believe are "technically and economically" feasible in Illinois. SBC/Ameritech Ex. 10.0, at 3-7. True to form, SBC/Ameritech have conveniently failed to conduct any analysis regarding which of the 122 Texas measurements/benchmarks are technically and economically feasible in Illinois. Tr. 2313-14. Any assessment of technical or economic feasibility would be left to SBC, with a disputing CLEC's only remedy an open-ended arbitration. Tr. 2315-16. In reality, therefore, Joint Applicants have not committed to implementing even one of the Texas measurements/benchmarks beyond the presently undefined 79.

Further, AT&T contends that the existence of a federal performance parity plan that only requires implementation of 36 of the 122 Texas measurements/benchmarks raises the possibility that Joint Applicants will attempt to use that national plan as an excuse (perhaps couched in terms of "technical or economic" infeasibility) for not implementing

additional measurements/benchmarks in Illinois beyond the 79. AT&T points out that the Joint Applicants have already begun to apply that pressure on other states. Ameritech Michigan has asked the Michigan Public Service Commission (MPSC) to reconsider its order requiring performance measurements and to defer application of any requirements that "conflict with the performance measurements adopted, or to be adopted," in this proceeding based on its representation that the MPSC's measurements would require Ameritech "to devote significant resources to implementing processes that would not survive FCC action." Ameritech Michigan's Petition for Rehearing or Clarification, MPSC Case No. U-11654, U-11830, at 5-6 (Mich. PSC June 28, 1999). AT&T notes that Ameritech's excuse for noncompliance in Michigan sounds dangerously similar to an argument that the existence of the FCC plans makes implementation of the Michigan plan economically infeasible. Ameritech's filing, coupled with Joint Applicants' well-caveated commitments, raise the likelihood that Joint Applicants will attempt to misuse the Proposed FCC Conditions to substantiate a claim that it is "technically or economically" infeasible to implement any standard/benchmarks beyond the 79 in Illinois.

AT&T notes that Joint Applicants have also failed to give any indication concerning how long they will make these performance measures/benchmarks and liquidated damages available to Illinois CLECs. AT&T pointed out that SBC witness Mr. Dysert indicated that those terms would be available for three years, but beyond that he stated on cross examination that "a lot of things could happen." Tr. (Dysert), at 2278, 2308-2309. Presumably, indicating that if a CLEC wished to keep those terms and conditions in future interconnection agreements, the CLEC would be forced to negotiate and/or arbitrate with SBC/Ameritech. Tr. (Dysert), at 2278, 2308-09. Moreover, AT&T observed that this is especially troublesome since performance measurements/benchmarks with automatic liquidated damages will become all the more important if Joint Applicants obtain 271 relief during this three-year period.

AT&T asserts that beyond than their vagueness, Joint Applicants' commitments regarding performance measures and liquidated damages are otherwise flawed. AT&T provided a brief summary of those flaws, which it believes must be addressed prior to their approval by this Commission in this docket or in a follow-up collaborative. In fact, AT&T asserts that the enormity of these flaws raise the likelihood that the collaboratives will result in protracted arbitration.

In short, AT&T points out that all that this Commission knows for sure is that Joint Applicants have committed to making available the 36 performance measures/benchmarks that they have agreed to make available at the FCC. The Commission still does not know what other 43 performance benchmarks/measures Joint Applicants will make available in Illinois. Because of Joint Applicants' caveat of "technical or economic" feasibility, the Commission has no assurance that Joint Applicants will provide more than 79 of those 122 Texas performance measures/benchmarks. While the Joint Applicants have committed to making the Texas liquidated damages plan available in Illinois, they have failed to indicate how long Illinois CLECs could take advantage of this offer. And, as noted, that plan has numerous flaws that must be fixed in

the collaborative process. AT&T contends that Joint Applicants' paper promises in regard to performance measures and liquidated damages are, once again, couched with caveats, ambiguities and shortcomings that make Joint Applicants' purported "promises" nothing more than a promise of future arbitration to the detriment of Illinois consumers.

Commission Analysis and Conclusion

Like the OSS commitments, we find Joint Applicants' commitments in regard to performance measures and liquidated damages appallingly vague. What we find most disturbing is that Joint Applicants have left unidentified 43 of the 79 performance measures that they have agreed to import from Texas within 300 days of merger closing. This fact alone makes it impossible for the Commission to determine the benefit of this commitment. We find this lack of information peculiar since Joint Applicants have been able to describe those 79 measures/benchmarks with extreme particularity, even going so far as to claim they will include the "majority" of measurements recommended by the DOJ. Again, we believe this ambiguity reduces any potential benefit from this commitment. Joint Applicants have provided no reason why they are unable to list the remaining 43.

We believe Joint Applicants have also failed to make any concrete commitment to implement any performance measures/benchmarks beyond these undefined 79. Joint Applicants have committed to only implement those Texas measures/benchmarks that are "technically and economically" feasible in Illinois. Unfortunately, Joint Applicants have again failed to conduct any analysis to determine which performance measures/benchmarks are feasible to implement in Illinois. Unfortunately, if there is any dispute between Joint Applicants and CLECs regarding whether certain Texas measures/benchmarks are technically feasible in Illinois, like so many of Joint Applicants commitments, the only remedy is open-ended arbitration. In reality, therefore, we find that Joint Applicants have not committed to implementing one of the Texas measurements/benchmarks beyond the undefined 79.

We find Joint Applicants' commitment additionally vague in that they have failed to give any indication how long these performance measures/benchmarks and liquidated damages provisions will be available to Illinois CLECs. We find this ambiguity especially troublesome since we view the existence of automatic liquidated damages essential if and when Joint Applicants receive 271 relief.

We are also troubled by the fact that the Texas performance measures and liquidated damage plans have various flaws that make it perhaps an acceptable starting point for a collaborative process, but certainly not a plan that this Commission could rely on to approve this merger. For example, the Texas performance measurement plan uses fixed benchmarks where parity is available. The plan classifies essential OSS pre-ordering and ordering measurements as "low" or "none" for liquidated damages purposes, meaning that Joint Applicants would pay either the lowest per-occurrence penalty or no penalty at all. We are also not convinced that an absolute cap of $90 million is appropriate,

especially where the triggering of that cap could negate a CLEC's right to all contractual damages from Joint Applicants. Finally, we note our concern that the Texas plan includes an overly broad limitation of liability provision that could negate the benefit of having automatic liquidated damages at all. For example, the record established that SBC could avoid payment by simply claiming that a CLEC's orders constituting "bad faith dumping" or "unreasonable failure to forecast." This limitation is not in the FCC plan. These problems make it all the more likely that Joint Applicants' commitment will result in protracted arbitration and litigation.

In conclusion, we find Joint Applicants' commitments in regard to performance measures and liquidated damages unfortunately vague and undefined. We simply cannot approve a merger based on a performance measure plan when we do not yet know what those measurements actually are; and we simply cannot approve a merger based on a liquidated damages plan when we do not know the length of that plan and we otherwise have serious questions regarding many of its terms. We find that Joint Applicants' commitments in regard to performance measures and liquidated damages suffer from the same failure as so many of their commitments: they are so ambiguous and vague that they make open-ended arbitration the likely result.

III. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Illinois Bell Telephone Company, d/b/a Ameritech Illinois, and SBC Communications, Inc., SBC Delaware Inc., are telecommunications carriers as defined by the Illinois Public Utilities Act;

(2) the Commission has jurisdiction over the parties and the subject matter of this proceeding pursuant to the Illinois Public Utilities Act;

(3) this proceeding was initiated on July 24, 1998, by the filing of a Joint Application for Approval of the Reorganization of Illinois Bell Telephone Company d/b/a Ameritech Illinois and the Reorganization of Ameritech Illinois Metro, Inc. in accordance with Section 7-204 of the Public Utilities Act and for all other appropriate relief ("Joint Application") with the Illinois Commerce Commission ("Commission) by SBC Communications, Inc., SBC Delaware Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech and Ameritech Illinois Metro, Inc. (hereafter "Joint Applicants");

(4) the Commission finds that the merger would create an incumbent local exchange company with strengthened incentives and enhanced ability to resist market-opening initiatives;

(5) the Commission finds that the merger would lead to a 2-RBOC local exchange industry on a national scale and would result in an attendant increase in barriers to entering local exchange markets;

(6) the Commission finds that the merger also eliminates SBC as one of Ameritech's strongest and most likely competitors;

(7) the Commission finds that the merger, by reducing the number of incumbents, reduces the Commission's ability to "benchmark" and verify the validity of the Illinois incumbent's tactics against those of other RBOCs;

(8) the Commission finds that any benefits to Illinois arising from the National-Local strategy and its corollary "retaliatory entry" theory are too tenuous and illusory to be given any weight;

(9) the Commission finds, in light of the above findings, that the proposed merger will have a significant adverse effect on competition within local exchange markets in Illinois and that it therefore fails to meet the requirements of Section 7-204(b)(6) of the Public Utilities Act;

(10) the Commission finds that Joint Applicants have not proposed conditions or commitments that would prevent or adequately ameliorate the merger's significant adverse effect on competition; and

(11) the Commission finds that Joint Applicants' supplementary conditions or commitments are appallingly vague and will not ameliorate the competitive harms of the merger and, in fact, the result would be adverse to competition in the Illinois local exchange market.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that:

(1) (1) The Joint Applicant's Application for Approval of the Reorganization of Illinois Bell Telephone Company d/b/a Ameritech Illinois and the Reorganization of Ameritech Illinois Metro, Inc. in accordance with Section 7-204 of the Public Utilities Act and for all other appropriate relief is DENIED.

IT IS FURTHER ORDERED that any materials submitted in this proceeding for which proprietary treatment was requested shall be accorded proprietary treatment.

IT IS FURTHER ORDERED that any petitions, objections or motions made in this proceeding and not otherwise specifically disposed of herein are hereby disposed of in a manner consistent with the conclusions contained herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED: August __, 1999

Hearing Examiner