STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

FILED

NOV 1 8 2002

INDIANA UTILITY
REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED, D/B/A AMERITECH INDIANA PURSUANT TO I.C. 8-1-2-61 FOR A THREE-PHASE PROCESS FOR COMMISSION REVIEW OF VARIOUS SUBMISSIONS OF AMERITECH INDIANA TO SHOW COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	}	CAUSE NO. 41657

RESPONSE OF INDIANA CLECS TO AMERITECH'S PETITION FOR RECONSIDERATION AND PETITION TO MODIFY AND STAY ORDER

AT&T Communications of Indiana, Inc. ("AT&T"), on behalf of itself and its affiliate TCG Indianapolis ("TCG"), WorldCom, Inc., and McLeodUSA, ("Indiana CLECs"), by their counsel, respectfully respond to Ameritech Indiana's "Petition for Reconsideration of Order Adopting Performance Assurance and Remedy Plan" and "Petition to Modify Order Adopting Performance Assurance and Remedy Plan by Staying Its Effective Date Pending Ruling on Petition for Reconsideration." For the reasons stated herein and in the attached affidavit of Karen W. Moore, the Indiana CLECs request that the Indiana Utility Regulatory Commission ("Commission") deny Ameritech's requested relief in its entirety.

I. ARGUMENT

Ameritech is apparently disappointed that the Commission improved the Illinois remedy plan, rather than simply rubberstamp everything that the company wanted. According to Ameritech, the Commission lacks the legal ability to order *any remedy plan whatsoever* that does not have the Company's prior "consent." Ameritech asserts that the Commission is powerless to do anything other than: (1) simply rubberstamp the original "Texas Remedy Plan" proposal; or

(2) instead adopt another remedy plan that was not even filed with the Commission *until the* day of the order that is the subject of rehearing was entered, and which was arrived at through private negotiations between Ameritech and a single CLEC in which no other CLEC participated. (Ameritech Petition for Reconsideration, p. 3).

Ameritech's position is, of course, ludicrous. First, Indiana is not the first state to reject the antiquated and toothless "Texas Remedy Plan." Indeed, over the last year, every state that has had the opportunity, including, recently, Texas itself,[1] has thrown out the "Texas Remedy Plan" because of its myriad flaws. Second, the Commission could not have adopted Ameritech's so-called "Ameritech Compromise Plan," even if the Commission liked it; the Compromise Plan did not exist during the pendency of this case, as Ameritech itself admits.[2] Unless the Commission is prescient, which even regulatory aficionados realize is impossible, one cannot help but ask how the "Ameritech Compromise Plan" could possibly have been adopted here.

Ameritech also argues that implementing the Commission's remedy plan is harmful in all sorts of ways. Attached to Ameritech's filings is an Affidavit of James D. Ehr ("Ehr Affidavit"). Mr. Ehr first claims that SBC Ameritech Indiana ("Ameritech") incurs a whole host of costs associated with implementing the Indiana Utility Regulatory Commission's ("Commission") October 16, 2002 Performance Assurance Plan. As is discussed herein, Mr. Ehr's "analysis" is bereft of any kind of supporting empirical facts. Indeed, it appears that Mr. Ehr's "analysis" is also based upon a fundamental misunderstanding of the ramifications of the Commission's Performance Assurance Plan, in light of Ameritech's own proposals in this case. Mr. Ehr also

---

[1] The Texas PUC recently made a number of changes to the "Texas" remedy plan. These changes make the Plan more robust. *See, Section 271 Compliance Monitoring of Southwestern Bell Telephone Company,* Public Utility Commission of Texas Project No. 20400 (Order, October 17, 2002).

[2] The "Ameritech Compromise Plan" was not timely filed to be considered prior to issuance of the order here. Even Ameritech acknowledges the timing. (Ameritech Petition for Reconsideration, p. 3). Ameritech claims this plan is somehow similar to its August 2, 2002 proposal, but if that were true – which no one can verify – what is left unsaid by Ameritech is its August 2, 2002 proposal was already considered by the Commission prior to reaching its

claims that the Commission's Performance Assurance Plan should have included one of two exclusions on remedy payments: the k table or another methodology proposed in the "Ameritech Compromise Plan". This contention, too, is without merit for a number of reasons, not the least of which is that Ameritech deleted the k table exclusion in its most recent proposal. Mr. Ehr's third's contention is that the Commission's Performance Assurance Plan requires Ameritech to pay more than it wants to in remedies. This position, while not surprising, is certainly not grounds for rehearing. Fourth, Ameritech does not like the fact that the Commission only adopted a portion of Ameritech's own proposal for a "Step Down Table," but had the temerity to make adjustments. Fifth, Ameritech's assertion that the Company provides 96.9% compliant service to CLECs will be shown here to be, at best, a guess of the level of service quality offered to CLECs, and, at worst, a complete misstatement. Finally, the Indiana CLECs respond to Mr. Ehr's claim that the mini-audit component of the Commission's Performance Assurance Plan will cost Ameritech over $500,000 per audit, despite the fact that the Commission adopted, virtually without change, Ameritech's own audit proposal. For the convenience of the Commission, the Indiana CLECs attach the Affidavit of Karen W. Moore, who offers factual support for this responsive pleading.

Ameritech also raises two legal arguments supporting its rehearing request. Ameritech first asserts that the Commission lacks the statutory authority to adopt a remedy plan other than one that the company likes. (Ameritech Petition for Reconsideration, pp. 12-18). Ameritech also contends that the Commission's remedy plan somehow is contrary to, and therefore preempted by federal law. (*Id.*, pp. 18-22). As is discussed in detail below, both of these contentions are (1) contrary to the Ameritech's own actions in the case below; (2) contrary to

---

final decision here.

both state and federal law; and (3) ridiculous, because if adopted, it would mean that Indiana is the only state in the country that is unable to establish a Section 271 public interest remedy plan.

A telling indicator of the merit of Ameritech's filing comes from the Company itself. On November 15, 2002, Ameritech filed its notice of appeal of the Order on Performance Assurance Plan. The Company therefore is not even bothering to wait for a decision on rehearing to appeal. Such actions are hardly a sign of confidence in the merits of Ameritech's rehearing request.

In sum, as will be discussed here, Ameritech fails to provide any convincing evidence or legal arguments justifying the relief requested, as is required in order to grant rehearing pursuant to 170 IAC 1-1.1-22.

Finally, Ameritech seeks a stay of the effective date of the Performance Assurance Plan. This proposal similarly is meritless and should be rejected.

A. Applicable Standard for Rehearing

Rehearing requests can only be granted if they meet the standards of 170 IAC 1-1.1-22. In short, a rehearing request must set forth the following:

(1) The nature and purpose of the evidence to be introduced at rehearing;

(2) The reason or reasons such new evidence was not available at the time of the hearing or could not be discovered with due diligence.

(3) A statement of how such evidence purportedly would affect the outcome of the proceeding if received into the record.

(4) A showing that such evidence will not be merely cumulative.[3]

On its face, Ameritech's Petition for Reconsideration fails to meet *any* of these standards. The Indiana CLECs recommend that the Commission carefully read Ameritech's pleading. The Commission will discover that, other than citing to this standard on the first line of the text,

Ameritech makes no effort whatsoever to show that its Petition for Reconsideration meets the requirements of the Indiana Administrative Code ("IAC").[4] Indeed, Ameritech never once bothers even to cite the requirements of the IAC (provided above) for granting rehearing.

This omission is no surprise. Even a cursory consideration of Ameritech's pleading and the affidavit show that the "new" evidence offered would not, if offered in the case below, have any impact on the decision. Moreover, much of what is proffered by Ameritech as "new" is really not particularly new at all, but a rehashing of similar contentions that had already been presented to the Commission. Indeed, it is obvious that, with one exception (the contention that the order would be too expensive to implement), the material offered is simply cumulative to earlier Ameritech assertions, and hence does not meet the standards set forth in 170 IAC 1-1.1-22 for granting rehearing.

B. Ameritech's Factual Allegations

1. THE INDIANA PERFORMANCE ASSURANCE PLAN DOES NOT IMPOSE SIGNIFICANT IMPLEMENTATION COSTS UPON AMERITECH

Ameritech claims that implementation and compliance with the Indiana Performance Assurance Plan would cost Ameritech almost $7 million a year and require 37 new employees. (Ehr Aff. ¶6, Table 1). Mr. Ehr states that this cost would occur because the company needs "to expend significant effort and expense to implement new processes, develop new systems and enhance existing new ones, and add additional staff beyond those expenses and staff already in place to support Ameritech Indiana." (Ehr Aff. ¶5). Mr. Ehr cites two supporting reasons for this purported cost:

- Data retention for three years and root cause analysis by Ameritech;[5] and

---

[3] 170 IAC 1-1.1-22(e)(1)(2000).

[4] Indeed, one can perform a search in the document to see how many times the Indiana Administrative Code is even

- Elimination of the K table exclusion on remedy payments;[6]

Mr. Ehr fails to provide any other ascertainable "evidence" supporting this outlandish claim. His affidavit contains no backup or support, and no other supporting rationale exists. Indeed, it is obvious that Mr. Ehr's incredible claim is pulled out of thin air. As the Commission is aware, Ameritech elsewhere claims that its performance measurement system is automated. The Commission previously adopted, without change, Ameritech's proposed performance measurements in this proceeding. Thus, this major part of the Company's compliance costs remains the same regardless of the remedy plan adopted. (Moore Aff. ¶¶9-11).

Mr. Ehr's assertion that the Performance Assurance Plan's requirement of a three-year data retention policy is somehow costly is particularly ludicrious. Ameritech told the Commission in Comments filed on September 12, 2002: "*SBC Ameritech is committed to retaining all data and calculation algorithms required to support auditing and CLEC reconciliation of liquidated damages and assessment remedy payments for a period of three years from the date of payment.*"[7] This is therefore Ameritech's existing policy, and certainly is not cause for any kind of increased costs, as Mr. Ehr claims. Thus, this provision in the Commission's Performance Assurance Plan also does not cause any new, increased costs to be incurred by Ameritech that were not already known. (Moore Aff. ¶12).

Ameritech's claim that performing root cause analysis to fix performance problems would somehow be costly is also misplaced. Ameritech's own proposals require it to perform

---

mentioned. The Commission will see that the only reference to the standards is, indeed, on the first line of the text.

[5] Ehr Aff. ¶5.

[6] *Id.*, ¶¶11-13.

[7] *See, Response of Ameritech Indiana to August 21, 2002 Docket Entry, SBC Ameritech Response to Question 5.b* (September 12, 2002) (emphasis added). In addition, Ameritech's most recent proposal, the "Ameritech Compromise Plan", itself allows for CLECs to request "Both Raw/Source/ Untransformed Data and Data Used Directly in Reporting Results, as Well as Data Used to Calculate and Report any Subsequent Restatement of Results". *See, Response of Ameritech Indiana to July 12, 2002 Docket Entry*, p. 21.

root cause analysis when it provides poor performance.[8] Indeed, if Ameritech is sincere about wanting to provide acceptable wholesale service, it should want to conduct such an analysis so that it can troubleshoot and fix its problems, thereby improving wholesale service quality and reducing its remedy payments. Indeed, Ms. Moore compared the Commission's root cause analysis proposal with what Ameritech proposed and concludes that they are very similar. It is therefore inexplicable that implementing something that Ameritech itself proposed would somehow be additive to normal performance measurement expenses the company incurs in all five states. (Moore Aff. ¶13).

The Commission should also reject Ameritech's claim that elimination of the k table exclusion on remedy payments also somehow contributes to this $7 million cost estimate. First, Ameritech's "Compromise Remedy Plan" itself eliminates the k table exclusion.[9] Second, Indiana is not the first state to eliminate the k table exclusion, but is the third state. Illinois and Wisconsin both eliminated the k table exclusion, and the company has never asserted anywhere else that implementation of its own proposal would cost millions in unanticipated expenses.[10] Elimination of the k table exclusion therefore does not impose any Indiana-specific implementation and compliance costs as claimed by Ameritech. (Moore Aff. ¶14).

In sum, the Commission should not give any credence to Ameritech's claim that implementing the Commission's Performance Assurance Plan will be costly. Ameritech's

---

[8] *See, Response of Ameritech Indiana to July 12, 2002 Docket Entry,* Ameritech Indiana Performance Remedy Plan, ¶8.11, p. 14.

[9] *See, Response of Ameritech Indiana to July 12, 2002 Docket Entry,* p. 2, where Ameritech states: "Our proposed compromise is to eliminate the K table . . .".

[10] *See,* Illinois Commerce Commission Docket No. 01-0120 and Public Service Commission of Wisconsin Docket No. 6720-TI-160, order dated September 25, 2001. Ameritech has appealed both of these decisions. In a narrow decision that did not address the Wisconsin Commission's authority to issue a remedy plan pursuant to Section 271and FCC precedent, the Milwaukee County Circuit Court vacated the Wisconsin plan on grounds relating to the Wisconsin Commission's authority under state law to order a remedy plan. The Wisconsin state court judge also did not reach the merits, including the k table issue. The Wisconsin Commission and several CLECs have appealed that order. Nevertheless, in both Illinois and Wisconsin, Ameritech proposes elimination of the k table in its own

contention of increased cost is meritless on the most basic level, since the matters purportedly leading to increased costs are Ameritech's own proposals that were adopted by the Commission.

2. THE COMMISSION'S PERFORMANCE REMEDY PLAN PROPERLY ELIMINATED THE K TABLE AND REJECTED AMERITECH'S EFFORT TO ADD ADDITIONAL EXCLUSIONS

Ameritech argues that the Commission improperly eliminated the k table exclusion on remedy payments. (Ehr Aff. ¶13). The Commission, of course, had considerable evidence from all of the parties showing the need to eliminate the k table exclusion. There is therefore no need to reiterate these arguments, but the Indiana CLECs note that Mr. Ehr is incorrect in insinuating that elimination of the k table somehow results in Ameritech paying remedies when it offers nondiscriminatory service. (*Id.*) Indeed, as is shown by Ms. Moore, the facts are clear and directly contrary to Mr. Ehr's comment: the k table improperly eliminated remedies that should be paid when inadequate service is being offered. Moreover, since Ameritech itself also proposed elimination of the k table, it is curious that the Company seems to oppose its own recommendation at this late date. (Moore Aff. ¶16).

Ameritech also contends that, if the k table is to be eliminated, the Commission should have inserted an additional exclusion on remedy payments that is contained in the "Compromise Remedy Plan." (Ehr Aff. ¶14). Mr. Ehr's discussion actually shows why the Commission rejected this proposal. Mr. Ehr states that this methodology literally does the same thing as the k table; it eliminates remedy payments by allowing poor service to escape notice via adding additional "wiggle room" to performance results. In other words, performance results under this proposal are "adjusted" so that poor performance would be excused if it is "close enough". Such an approach is akin to a student being allowed to "round-up" his test results from 65% to 75%, and thus go from an "F" to a "C." The Commission therefore properly rejected this new

---

various "compromise" proposals.

exclusion, as its adoption would render meaningless the decision to eliminate the k table. (Moore Aff. ¶17).

3. AMERITECH IS IN CONTROL OF ITS OWN FATE AND NEED NOT PAY A DIME IN REMEDIES IF IT OFFERS ADEQUATE SERVICE TO CLECS

One of Ameritech's main complaints about the Performance Assurance Plan is that it would require that Ameritech pay more in remedies than it wants to. (Ehr Aff. ¶¶15, 19, 20 and Table 3). Indeed, Ameritech notes that, under the Performance Assurance Plan, Ameritech's remedy payments for September, 2002 might total $548,550 for Tier 1 (to CLECs) and Tier 2 (to the State of Indiana). This compares to total payments of $102,375 under the Texas Remedy Plan and $184,150 for the "Compromise Remedy Plan."

The Commission should be wary, however, of relying completely upon Ameritech's self-reported performance results, including Ameritech's claim its performance in September, 2002 "met or exceeded the standard of comparison for 96.9% of measures subject to remedies." (Ehr. Aff. ¶19). According to BearingPoint (f/k/a "KPMG Consulting"), Ameritech's performance collection and reporting systems are inherently unreliable. BearingPoint's ongoing test of Ameritech Operational Support Systems reveals the following defects:

- Ameritech does not retain source data in its original form. This, in turn, makes it impossible to audit data, including any effort to trace errors in the reported results. More problematic is Bearing Point's observation that this failure means Ameritech may not be able to regenerate performance measurement reports as required.[11]

- Ameritech does not have adequate procedures governing performance measurement calculation and reporting. Ameritech is continually restating performance measurement results.[12]

---

[11] See BearingPoint ("BP") Exception Report 19, which is publicly available at: www.osstesting.com/Exceptions.htm.

[12] See BP Exception Report 20, which is publicly available at: www.osstesting.com/Exceptions.htm.

- Ameritech's change management process does not provide for monitoring and communicating changes made to upstream data files that impact metrics.[13]

- Ameritech's systems lack the capacity to retain data.[14] Flaws in Ameritech's systems limiting the amount of extracted data for numerous performance measurements to a file of 2 gigabytes. This limitation taints 48 performance measurements, and means performance results do not include data beyond 2 gigabytes. This capacity problem in Ameritech's systems, however, will ultimately infect **ALL** Ameritech's performance measurements, as the amount of data grows over time. Although this exception was "closed" on June 27, 2002, BearingPoint's disposition report indicates that the issue was never resolved, but instead "will be addressed through Exception Report 47, version 2".[15]

- Numerous Ameritech performance measurements lack the necessary controls and edits to ensure that the records used in the calculations of performance metrics are transferred error free. Absent such controls and edits, Ameritech cannot ensure that data errors from operational systems into the systems used to calculate performance metrics are error free.[16]

- Ameritech fails to update its performance metrics business rules accurately and on a timely basis. This failure directly harms CLECs because, as noted by BearingPoint, "[f]ailure to update Metrics Business Rules documentation in accordance with documented implementation dates and with the exact wording approved by the state commissions may inhibit the ability of a CLEC or regulator to perform timely and accurate analysis of metrics results."[17]

Indeed, these BearingPoint exceptions are consistent with Ms Moore's analysis of tech's performance reporting. For example, as part of the Michigan 271 case, Ms. Moore red Ameritech's self-reported performance results with real data and discovered that the any consistently overstated performance results.[18] (Moore Aff. ¶¶17-18).

Regardless of the accuracy of Ameritech's data, it is a statement of the obvious that tech's objective is, of course, to minimize remedy payments. Nevertheless, the amounts

---

P Exception Report 41, which is publicly available at: www.osstesting.com/Exceptions.htm.
P Exception Report 42, which is publicly available at: www.osstesting.com/Exceptions.htm..
P Exception Report 42, closure dated June 27, 2002, which is publicly available at: sstesting.com/Exceptions.htm.
P Exception Report 47, which is publicly available at: www.osstesting.com/Exceptions.htm. A second of this exception was issued on June 17, 2002.
P Exception Report 157, dated July 29, 2002, which is publicly available at: sstesting.com/Exceptions.htm.

Ameritech complains about as "excessive" are, for a company the size of Ameritech, trivial. To put some perspective on these numbers, Ameritech's own proposals (both the Texas Plan and the "Compromise Remedy Plan") call for an annual cap in remedy payments of 36% of its net return.[19] The Commission adopted Ameritech's proposal and limited remedy payments to be within this cap.[20] Based upon Ameritech Indiana's 2001 revenues, the Commission adopted an annual cap in remedy payments of $109,606,000.[21] Using Ameritech Affiant Mr. Ehr's own figures, and assuming the company does not provide substantially worse – or better – service, but keeps quality at current levels, this means Ameritech's annual payments under the Commission's Performance Assurance Plan would total $6,582,600. This amount is a small fraction (6%) of what Ameritech itself proposed as a ceiling on its payments. Such an amount hardly represents any kind of financial "strain" on the company. (Moore Aff. ¶19).

Ameritech's exaggerated claims of financial harm from the Commission's Performance Assurance Plan are even more specious when one examines the company's Indiana profits for the most recent available period (1996 – 2000), when compared to the results for other incumbent providers. Ms. Moore presents a chart, which is compiled from Ameritech's reported ARMIS data, showing that its Indiana profits are among the highest of any incumbent provider in the entire country. The Commission's Performance Assurance Plan will hardly make a dent in these "healthy" profits. (*See,* Chart immediately following Moore Aff. ¶20).

Such information is less important, however, than the essential fact that Ameritech is in complete control of its own destiny. All that Ameritech need do is improve its service quality. If that occurs, the company will not pay any remedies whatsoever. The Commission's

---

Case No. U-12320, which is attached for the reference of the Commission.

[19] *See, Response of Ameritech Indiana to July 12, 2002 Docket Entry*, Ameritech Indiana Performance Remedy Plan, p. 10.

[20] *See,* SBC Ameritech Indiana Performance Assurance and Remedy Plan, §7.2.1, p. 19.

Performance Assurance Plan provides such an incentive. Indeed, the Indiana CLECs hope and expect that Ameritech's remedy payments will decline over time as it strives to improve service quality to avoid paying remedies. CLEC are not interested in remedy payments, *per se,* and would much rather have a fair opportunity to compete for local *customers* than receive *remedy payments.* (Moore Aff. ¶21).

4. THE COMMISSION PROPERLY REJECTED ALL OF AMERITECH'S MODIFICATIONS TO THE "STEP DOWN" TABLE

Ameritech also seeks rehearing on the Commission's adoption of only a portion of Ameritech's proposed modifications to the "Step Down Table." (Ehr. Aff. ¶18). According to Ameritech, the "Step Down Table" should apply only when an individual CLEC is offered chronically inadequate wholesale services. (*Id.*). Ameritech opposes the Performance Assurance Plan's modification to Ameritech's proposal calling for all CLEC remedy payments to increase when it offers poor service for a particular measure.

The Commission's version of Ameritech's "Step Down table" is, however, good public policy. It recognizes that Ameritech's provision of poor wholesale service not only affects a particular CLEC but the entire industry. Indeed, Ameritech ignores the "flip side" to the "Step Down" table that is a huge victory for Ameritech. That is, when Ameritech offers adequate service to CLECs for a particular performance measure, payments "step down." This allows Ameritech to escape paying dramatically increased remedies when poor service is rendered in an isolated month. Given this major "win" by Ameritech, the Commission's rather minor modification to Ameritech's own proposal is certainly reasonable and does not justify granting rehearing. (Moore Aff. ¶23)

---

[21] *Id.*, Appendix 6 B

5. AMERITECH'S CLAIM THAT THE PERFORMANCE ASSURANCE PLAN'S MINI-AUDIT PROCESS WOULD REQUIRE AMERITECH TO INCUR ADDITIONAL IMPLEMENTATION COSTS IS BASELESS

Ameritech contends that implementation of the Performance Assurance Plan's "mini-audit" requirement would make Ameritech incur a per audit cost of $553,600. (Ehr Aff. ¶7 and Table 2). According to Ameritech, these costs occur because of purported additional staffing and independent auditor costs. (*Id.*).

As Ms. Moore shows in her affidavit, Ameritech's cost estimate is inaccurate. First, the mini-audit process adopted by the Commission is based upon Ameritech's own proposed mini-audit process.[22] Second, and more importantly, who pays for the mini-audit depends upon which party is at fault. Thus, if the mini-audit results in no findings by the auditor "of culpability or misfeasance on Ameritech's part," the CLEC pays. In the alternative, if Ameritech is at fault, the company pays.[23] This contrasts with Ameritech's proposal that each company pay its own expenses.[24]

Taking Ameritech at its word that it is offering adequate service to CLECs, one would expect that the Commission's mini-audit proposal is actually far less costly that Ameritech's own proposal, since audit expenses are only borne by Ameritech if there is an auditor finding of "culpability or misfeasance." Indeed, even if Ameritech offers mediocre service under the Commission's mini-audit process, the difference in cost should be a "wash." In sum, then, Ameritech's cost estimate for mini-audits is grossly overstated, and the Commission's process should prove less expensive for the company than Ameritech's own proposal. (Moore Aff. ¶25).

B. Ameritech's Legal Arguments

---

[22] *Compare*, SBC Ameritech Indiana Performance Assurance and Remedy Plan, §15.2 with *Response of Ameritech Indiana to July 12, 2002 Docket Entry*, Ameritech Indiana Performance Remedy Plan, §6.5, p. 9.
[23] SBC Ameritech Indiana Performance Assurance and Remedy Plan, §15.2.4
[24] *Response of Ameritech Indiana to July 12, 2002 Docket Entry*, Ameritech Indiana Performance Remedy Plan,

1. THE COMMISSION POSSESSES AMPLE LEGAL AUTHORITY TO IMPLEMENT AN INDIANA-SPECIFIC PERFORMANCE REMEDY PLAN FOR AMERITECH

Ameritech asserts that the Commission lacks the jurisdiction to impose an Indiana-specific performance remedy plan for Ameritech. (Ameritech Petition for Reconsideration, pp. 12-18). In support for this argument, Ameritech cites entirely to a state law provision that, it believes, ties the Commission's hands in implementing a remedy plan to which the Company's prior consent is required. (*Id.*).

Ameritech's contentions are wrong as a matter of law. First and most importantly, the Commission's Performance Assurance Plan was ordered pursuant to its jurisdiction arising under federal law, specifically Section 271 of the Act.[25] The Commission also correctly ruled that the FCC has developed a significant role for state commissions in 271 proceedings.[26]

Specifically, state commissions have an essential role as the delegated creator of the initial record upon which the FCC's review of a BOC's [Bell Operating Company] compliance with the Section 271 checklist will be based. Furthermore, "where the state has conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist, we [the FCC] may give evidence submitted by the state commission substantial weight in making our decision."[27] With respect to performance assurance plans, the FCC has stated "the existence of a satisfactory performance monitoring and enforcement mechanism is probative evidence that the BOC will continue to meet its 271 obligations after a grant of such authority."[28]

---

§6.5, p. 9.

[25] *See,* Order on Performance Assurance Plan, p. 3.

[26] *Id.*

[27] Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Services in the State of New York, CC Docket 99-295, released December 22, 1999.

[28] Joint Application by BellSouth Corporation, BellSouth Communications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA services in Georgia and Louisiana, CC Docket 02-35, released May 15, 2002 ("Georgia-Louisiana 271 Order").

Moreover, *every* state utility commission in other states for which Section 271 authority has been granted for a Bell company have established a remedy plan for the particular Bell Operating Company. The FCC stated in its decision granting Section 271 authorization to BellSouth in Georgia and Louisiana:

> We have not mandated any particular penalty structure, and we recognize different structures can be equally effective. We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We note that both the Georgia and Louisiana Commissions anticipate modifications to BellSouth's SQM from their respective pending six-month reviews. We anticipate that these state Commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect actual commercial performance in the local marketplace.[29]

Ameritech is therefore incorrect as a matter of federal law. The Commission has the same legal authority as every other state to establish a performance assurance plan.

Ameritech also contends that the Commission lacks the jurisdiction under state law to implement a performance remedy plan. Ameritech broadly states that IC §8-1-2-69 prevents the Commission from (1) establishing performance measures and the (2) requiring the payment of remedies, even if there were a finding of harm to the CLECs. (Ameritech Petition for Reconsideration, p. 13).

This argument is incorrect. First, as the Commission correctly noted in its order, and as was quoted above, the Performance Assurance arises under Section 271 of the Act. Thus, the Commission indisputably has jurisdiction to order a performance remedy plan. In addition, Ameritech's reading of state law must be incorrect, since it would lead to an absurd result. Assuming *arguendo* that Ameritech is correct and the Commission has no authority under state

---

[29] Georgia-Louisiana 271 Order, ¶294. (Footnotes omitted).

law to implement performance measurements and a remedy plan, this would mean that state law effectively is preempting federal law, and that the Commission is powerless to implement a performance assurance plan. Obviously, this interpretation is false, since it would render a nullity the entirety of the state's role delegated in Section 271 of the Act and all applicable FCC decisions.

Ameritech's contention is also false because the Commission's Performance Assurance Plan does not require Ameritech to pay anything whatsoever. If Ameritech meets the performance measurements, it pays nothing in remedies. (Moore Aff. ¶21). Thus, the Commission's remedy plan is certainly not a penalty plan.

The Performance Assurance Plan is also *per se* not violative of any provision in state law because it adopts Ameritech's own proposed annual cap on remedy payments of 36%.[30] Hence the Commission cannot impose (without further hearing) a remedy on Ameritech that is any greater than what the Company itself proposed. Therefore, it is factually impossible that the Performance Assurance Plan imposes more remedy obligations on Ameritech than what it proposed itself. The only way that the Commission's order could violate state law is if its own proposal also violates the law, which cannot be Ameritech's contention.

Ameritech is also wrong regarding application of the performance measures to calculate remedy payments. First, it was Ameritech's proposal here to use *exactly the same* performance measurements that were ultimately adopted. Hence, Ameritech seems to be arguing that its own proposal is somehow contrary to Indiana law. The Commission should reject this disingenuous claim.

Ameritech's final assertion is "the Commission has no statutory authority to impose a materially different remedy plan [than what Ameritech proposes] outside of section 271, that

imposes payments to which a party has *not* agreed". (Ameritech Petition for Reconsideration, p. 18 (emphasis in original)). This assertion is incorrect because the Commission's Plan (1) is explicitly a Section 271 Plan; (2) uses Ameritech's own proposed cap on payments, so Ameritech indeed agreed (at least until now) to the payments; and (3) is not materially different from Ameritech's various proposals, other than eliminating an exclusion on remedies called the k table. In any event, Ameritech is wrong in its analysis of the law; nothing in state or federal law ties the Commission's hands to ordering a remedy plan that Ameritech can literally "blackball." Such a power in the hands of a private party would undermine the entire regulatory process, both on a state and federal level.

2. THE COMMISSION'S PERFORMANCE ASSURANCE PLAN DOES NOT CONFLICT WITH, AND THEREFORE IS NOT PREEMPTED BY, FEDERAL LAW

Ameritech argues that the Commission lacked the authority to impose the remedy plan because the Act occupies the field and preempts the Commission's authority to regulate in this area. (Ameritech Petition for Reconsideration, pp. 18-22). Ameritech is mistaken.

The Commission indeed ordered the remedy plan to be put into effect without amending the interconnection agreements between Ameritech and its competitors. The Commission, however, also explicitly ruled:

> This Plan does not affect a LEC's ability to negotiate, pursuant to 47 U.S.C. §251 *et seq.*, the terms of an interconnection agreement, or an amendment thereto, containing or reflecting a different remedy plan or performance assurance plan, nor does this Plan affect the obligation to file such an interconnection agreement, or an amendment thereto, with the Commission pursuant to the applicable procedures.[31]

---

[30] *See*, SBC Ameritech Indiana Performance Assurance and Remedy Plan, §7.2.1, p. 19.
[31] *See*, SBC Ameritech Indiana Performance Assurance and Remedy Plan, §2.1, p. 7.

Despite this language allowing party negotiations to occur if they wish a different performance assurance plan than what was adopted here, Ameritech nonetheless argues that the Commission's action is preempted by the Act. It contends that the Commission cannot expeditiously implement the remedy plan because the Act forces the parties to "negotiate" an amendment to the interconnection agreements.

Nothing in the Act requires remedy incentive plans, like the one adopted here, to be implemented by amendments to interconnection agreements. Ameritech cites no statutory authority to support its argument. To the contrary, the Act explicitly allows pro-competitive actions by states such as that taken by the Commission.

Congress intended the Act to complement, not completely displace, states' efforts to foster local telephone competition, and it therefore enacted an express "savings clause":

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

1996 Act sec. 601(c), 110 Stats. 56, 143 (1996) (uncodified note to 47 U.S.C. sec. 152).

In addition, Section 261(b) of the Act preserves states' authority to enforce pro-competitive state regulations enacted before passage of the Act that are not inconsistent with the Act's provisions, and empowers state commissions to promulgate new regulations consistent with the Act's purpose. It provides:

> Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to [February 8, 1996], or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

47 U.S.C. § 261(b). Finally, section 261 (c) goes one step further, to preserve the states' authority to impose additional requirements to foster competition, beyond the Act's minimum requirements:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part of the [FCC]'s regulations to implement this part.

47 U.S.C. § 261(c).

Section 253 of the Act indicates that the Commission's Performance Assurance Plan is not the type of state action that Congress intended to pre-empt. That section pre-empts state law "barriers to entry" – *i.e.*, any state law that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications services." 47 U.S.C. § 253(a), (d) (emphasis added).

Thus the Act narrowly preempts only state actions contrary to its purpose of promoting competition in telecommunications services. Both the courts and the FCC consistently have recognized that the Act does not completely preempt the field of telecommunications regulations. Congress "explicitly disclaimed any intent categorically to preempt state law." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281, 288 (1987). In fact, "[t]he narrow scope of pre-emption available under [the federal Act] reflects the importance Congress attached to state ... laws in achieving [the Act's goal..." *Id.* at 282-83. *See also, Bell Atlantic Maryland v. Public Serv. Comm'n*, F.3d (4th Cir. 2001); *Texas Preemption Order*, 13 F.C.C. R. 3460, ¶¶ 51-52, *Local Competition Order*, 11 F.C.C.R. 15,499, ¶244.

Given the explicit provisions of the Act allowing state regulation, the Act does not "occupy the field" of local telecommunications regulation so as to preempt all state regulation.

A federal statute will only be held to "preempt all state law in a particular area ... where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation." *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985) (internal quotations omitted). The Supreme Court has "emphasized" that where, as here, "the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be clear and manifest." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990(internal quotations omitted).

Nor is the Commission's action preempted under the doctrine of conflict preemption. Conflict preemption requires an "irreconcilable conflict" between state and federal law. *Rice v. Norman Williams Co.*, 458 U.S.654,659 (1982). It occurs either because "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers v. Paul,*, 373 U.S. 132, 142-143 (1963), or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52,67 (1941).

As with any claim of preemption, there is a presumption against the finding of a conflict. *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992).. "The principle is thoroughly established" that the state's power "is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." *Kelly v. Washington*, 302 U.S. 1, 10 (1937) (internal quotations omitted). Moreover, the asserted conflict must be particularly "sharp ... when Congress legislates in a field which the States have traditionally occupied." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (internal

quotation omitted). The states have traditionally occupied the field of local telecommunications. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986).

The Commission's Performance Assurance Plan does not raise issues of physical impossibility or interference with Congress's purpose. It is clearly not physically impossible for Ameritech to both pay the remedies imposed and to comply with the Act. Nor does the Commission's action stand as an obstacle to Congress's stated goal of shifting monopoly markets to competition "as quickly as possible." H.R. Rep. No 104-204, at 89, 1996 U.S.C.C.A.N. at 55. To the contrary, the Commission's Order was designed to achieve the purpose of the Act – to promote local competition among telecommunications providers, and to reach that goal as quickly as possible. The streamlined remedy plan adoption process furthers the goal of both the Act and Indiana law to advance competition.

Ameritech's preemption argument creates a bizarre reading of federal law, since it presumes the Commission cannot act in a manner that is more pro-competitive than the full-blown interconnection agreement amendment process contained in the Act.[32] Under Ameritech's contorted reading of the law, Indiana law has been preempted wholesale, and no longer exists. Obviously, this statutory reading is incorrect, and is in direct conflict with Section 261(c) of the Act.

Finally, the Commission should be aware that Ameritech's argument here that the remedy plan arises from the interconnection process envisioned in the Act, and therefore is somehow preempted by federal law, is directly contrary to Ameritech's assertions in Illinois. In Illinois Commerce Commission ("ICC") Docket No. 02-0558, Ameritech contended that remedy plans ***do not*** arise under the interconnection standards contained in Sections 251 and 252 of the

---

[32] It is without dispute that making the remedy plan effective with a streamlined opt in process is more pro-competitive than allowing Ameritech to drag its feet "negotiating" interconnection agreement amendments with the

Act. Docket No. 02-0558 was a petition for approval of a voluntarily negotiated remedy plan between Ameritech and TDS Metrocom. In that proceeding, Ameritech contended that CLECs are not eligible to adopt this remedy plan pursuant to Section 252(i) because it is not an interconnection obligation under the Act.[33] Here, of course, Ameritech conveniently "forgets" its position advanced in ICC Docket No. 02-0558, and says remedy plans ***do*** arise pursuant to the Act's interconnection and arbitration standards. Evidently, then, Ameritech is arguing out of both sides of its mouth, depending upon what argument is most convenient or self-serving on a given day. The Commission should not give any credence to Ameritech's shifting arguments on this point.

C. Ameritech's Stay Request

In addition to seeking rehearing, Ameritech petitions the Commission to stay the effective date of the Order – and hence, delay implementation of the Performance Assurance Plan pending a ruling on the Company's Petition for Reconsideration. (Ameritech Petition to Stay, pp. 1-2). In support for this request, Ameritech incorporates by reference its argument made in its Petition for Reconsideration that the Commission's decision exceeded its authority under Indiana law, and is preempted under federal law. (*Id.* at p. 1). Ameritech also contends that the Performance Assurance Plan should be stayed because of its theory, which was supported by the Ehr Affidavit, that implementation costs would be in the millions of dollars. (*Id.* at pp. 1-2).

The Indiana CLECs refer the Commission to their arguments contained in this pleading and in Ms. Moore's affidavit, responding to these claims in the context of rehearing. As is

---

CLECs.

[33] *See*, ICC Docket No. 02-0558, Tr. pp. 30-31 (September 26, 2002) (administrative notice requested).

discussed elsewhere, Ameritech's arguments in support of rehearing are specious; they are equally so in the context of obtaining a stay.

Indeed, it should be noted that Ameritech's stay request does not even bother to attempt to show the company meets the standards under Indiana law to obtain a stay. The standard for obtaining a stay is quite explicit. The petitioning party must show:

1. A reasonable likelihood of success on the merits of the appeal,
2. The irreparable harm that would occur if the stay is not granted,
3. How the balance of harms between the parties favors the petitioner, and
4. That the public interest favors the granting of the stay.

See, e.g., Rees v. Panhandle Eastern Pipe Line Co. 176 Ind.App. 597, 377 N.E.2d 640 (Ind. App. 1978). Ameritech has failed to even try to assert that they meet these standards, so as a matter of law its request for a stay should be denied.[34]

II. CONCLUSION

The Commission's Performance Assurance Plan is the culmination of two years of hard work. The Commission, its staff, Ameritech, CLECs and the Office of Utility Consumer Counsel participated in numerous collaboratives, meetings, conference calls, and filed reams of comments. The Commission's Performance Assurance Plan reflects this hard work. It does not "rubberstamp" the proposal of any party, but instead carefully combines many proposals. Indeed, the party most responsible for the most important provisions in this Plan – besides the

[34] Of course, if Ameritech had attempted to show it is entitled to a stay, it would not prevail. Ameritech cannot show irreparable harm, since the Performance Assurance Plan requires monetary payments. Ameritech also cannot show a likelihood of success on the merits, as is shown in this pleading. The balancing of the harm does not favor Ameritech obtaining a stay, since staying the Order would remove any incentive for the Company to offer adequate service to CLECs. On the other hand, implementing the stay would result in relatively minor payments for

Commission and its staff, of course – is Ameritech. The Plan incorporates far more elements proposed by Ameritech than by any other party.

Ameritech's complaints about the Commission's plan fall into two broad categories. The first is Ameritech's wildly overstated implementation costs. As was discussed here and in Ms. Moore's affidavit, Ameritech's estimates are simply not credible. The second category is really nothing more that "sour grapes," because the Commission did not rubberstamp Ameritech's various proposals. Ameritech just does not like the results, even though the Commission's Performance Assurance Plan adopts more elements of Ameritech's proposal than those of other parties. That, however, does not constitute a reason to grant rehearing, and falls far short of the standards set forth in 170 IAC 1-1.1-22.

Finally, Ameritech has failed to provide any reasoning why the effective date of the Commission's decision should be delayed pending ruling upon rehearing. Ameritech simply fails to provide any reliable and accurate evidence supporting its claim that such a delay is at all necessary, much less any legal argument discussing why it has met the stringent standards for obtaining a stay.

Dated: November 18, 2002

Respectfully submitted,

AT&T COMMUNICATONS OF INDIANA, GP, AND TCG INDIANAPOLIS

By: Douglas W. Trabaris /RKJ

Its Attorney
Douglas W. Trabaris
222 W. Adams Street, Suite 1500
Chicago, IL 60606
(312) 230-2561
(312) 230-8211 (facsimile)

Ameritech, given its size and profitability. (Moore Aff. ¶¶20-21). Moreover, granting the stay would not be in the public interest, since it would have the effect of harming competition

WORLDCOM, INC.

By: Deborah Kuhn/RKJ

Its Attorney
Deborah Kuhn
205 North Michigan Avenue, Suite 1100
Chicago, Illinois 60601
(312) 260-3326
(312) 470-5571 (facsimile)

MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.

By: William A. Haas/RKJ

Its Attorney
William A. Haas
6400 C Street SW, PO Box 3177
Cedar Rapids, Iowa 52406-3177
(319) 298-7055
(319) 790-7091 (facsimile)

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED, D/B/A AMERITECH INDIANA PURSUANT TO I.C. 8-1-2-61 FOR A THREE-PHASE PROCESS FOR COMMISSION REVIEW OF VARIOUS SUBMISSIONS OF AMERITECH INDIANA TO SHOW COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	}	CAUSE NO. 41657

AFFIDAVIT OF KAREN W. MOORE

ON BEHALF OF

AT&T COMMUNICATIONS OF INDIANA, GP AND TCG INDIANAPOLIS

November 18, 2002

1. I, Karen W. Moore, submit this Affidavit on behalf of AT&T Communications of Indiana, GP and TCG Indianapolis ("AT&T").

CURRENT RESPONSIBILITIES AND BACKGROUND

2. My business address is 222 W. Adams Street, Chicago, Illinois 60606.

3. I am employed by AT&T Corp. as Manager, Performance Measures, in Local Services and Access Management. Since June, 1999, I have represented AT&T in all performance measure collaboratives in the Central Region. I negotiate performance metrics with SBC/Ameritech for inclusion in interconnection agreements. I also compare and analyze AT&T results with SBC/Ameritech's self-reported results. I manage the day-to-day relationship between AT&T and the SBC/Ameritech Account team members who support performance issues.

4. Prior to assuming my present duties, I held assignments at AT&T Corp. in Consumer Services as a Strategic Pricing Manager, in Law and Government Affairs as a Docket Manager in Illinois, and a variety of business account management positions of increasing responsibility, beginning in 1989 as Account Executive and ending as Sales Manager.

5. I am a 1986 graduate of the College of Liberal Arts at Boston University, where I received a B.A. in Psychology with a minor in Philosophy.

6. Since 1999, I have attended either in person or via telephone conference bridge, every performance measures collaborative affecting Indiana performance measures, as well as the other four SBC/Ameritech states. I provided AT&T's perspective and input on every measure discussed.

7. I have testified on performance measure issues before the Illinois Commerce Commission in Docket Nos. 01-0120, and 01-0539. I have also submitted affidavits in the

Michigan, Ohio and Wisconsin Ameritech Section 271 proceedings focusing on performance and remedy plan issues.

PURPOSE OF AFFIDAVIT

8. I address the November 4, 2002 Affidavit of James D. Ehr ("Ehr Affidavit"). I first respond to Mr. Ehr's claim that SBC Ameritech Indiana ("Ameritech") incurs a whole host of costs associated with implementing the Indiana Utility Regulatory Commission's ("Commission") October 16, 2002 Performance Assurance Plan. As I discuss below, Mr. Ehr's "analysis" is bereft of any kind of supporting empirical facts. Indeed, it appears that Mr. Ehr's "analysis" is also based upon a fundamental misunderstanding of the ramifications of the Commission's Performance Assurance Plan, in light of Ameritech's own proposals in this case. Second, I respond to Mr. Ehr's discussion of his claim that the Commission's Performance Assurance Plan should have included one of two exclusions on remedy payments: the k table or another methodology proposed in the "Ameritech Compromise Plan". Third, I respond to Mr. Ehr's discussion that the Commission's Performance Assurance Plan requires Ameritech to pay more than it wants to in remedies. Fourth, I will respond to Ameritech's rehearing request of the Commission's approval of a "Step Down Table". Fifth, I will discuss Mr. Ehr's assertion that the Company provides 96.9% compliant service to CLECs. Finally, I will respond to Mr. Ehr's claim that the mini-audit component of the Commission's Performance Assurance Plan will cost Ameritech over $500,000 per audit. As will be seen from my discussion below, I believe all of Mr. Ehr's claims are factually incorrect.

THE INDIANA PERFORMANCE ASSURANCE PLAN DOES NOT IMPOSE SIGNIFICANT IMPLEMENTATION COSTS UPON AMERITECH

9. Mr. Ehr states that implementation and compliance with the Indiana Performance Assurance Plan would cost Ameritech almost $7 million a year and require 37 new employees. (Ehr Aff. ¶6, Table 1). Mr. Ehr states that this cost would occur because the company needs "to expend significant effort and expense to implement new processes, develop new systems and enhance existing new ones, and add additional staff beyond those expenses and staff already in place to support Ameritech Indiana". (Ehr Aff. ¶5). Mr. Ehr cites these supporting reasons for this purported cost:

- Data retention for three years and root cause analysis by Ameritech;[1] and
- Elimination of the K table exclusion on remedy payments;[2]

10. Mr. Ehr fails to provide any other reason that I could ascertain supporting this incredible claim. His affidavit contains no backup, and I can see no other supporting rationale.

11. Mr. Ehr's incredible claim is pulled out of thin air. As the Commission is aware, Ameritech claims that its performance measurement system is automated. The Commission previously adopted, without change, Ameritech's proposed performance measurements in this proceeding. Thus, this major part of the Company's compliance costs is the same regardless of the remedy plan adopted.

12. Mr. Ehr's assertion that the Performance Assurance Plan's requirement of a three-year data retention policy is somehow costly is particularly ludicrous. Ameritech told the Commission in Comments filed on September 12, 2002: "SBC Ameritech is committed to retaining all data and calculation algorithms required to support auditing and CLEC reconciliation of liquidated damages and assessment remedy payments for a period of three years

---

[1] Ehr Aff. ¶5.
[2] *Id.* ¶¶11, 12

from the date of payment."[3] This is therefore Ameritech's existing policy, and certainly is not cause for any kind of increased costs, as Mr. Ehr claims.

13. I also am confused that performing root cause analysis to fix performance problems would somehow be costly. Ameritech is required by its own proposals to perform root cause analysis when poor performance is provided.[4] Indeed, Ameritech should want do such an analysis so it can fix the problems and improve service quality (and reduce remedy payments). I compared the Commission's root cause analysis proposal with what Ameritech proposed and I believe they are very similar. I am at a loss therefore to see how implementing something that Ameritech itself proposed would somehow be additive to normal performance measurement expenses the company incurs in all five states.

14. Mr. Ehr's claim that elimination of the k table exclusion on remedy payments also somehow contributes to his $7 million cost estimate is also false. First, Ameritech's "Compromise Remedy Plan" itself eliminates the k table exclusion.[5] Second, Indiana is not the first state to eliminate the k table exclusion, but is the third state. Illinois and Wisconsin both eliminated the k table exclusion, in part due to Ameritech's own touted "Compromise Remedy Plan", and the company never asserted that implementation of this would cost millions.[6] I

---

[3] *See, Response of Ameritech Indiana to August 21, 2002 Docket Entry, SBC Ameritech Response to Question 5.b* (September 12, 2002). In addition, Ameritech's most recent proposal, the "Ameritech Compromise Plan", itself allows for CLECs to request "Both Raw/Source/ Untransformed Data and Data Used Directly in Reporting Results, as Well as Data Used to Calculate and Report any Subsequent Restatement of Results". *See, Response of Ameritech Indiana to July 12, 2002 Docket Entry,* p. 21.

[4] *See, Response of Ameritech Indiana to July 12, 2002 Docket Entry,* Ameritech Indiana Performance Remedy Plan, ¶8.11, p. 14.

[5] *See, Response of Ameritech Indiana to July 12, 2002 Docket Entry,* p. 2, where Ameritech states: "Our proposed compromise is to eliminate the K table . . .".

[6] *See,* Illinois Commerce Commission Docket No. 01-0120 and Public Service Commission of Wisconsin Docket No. 6720-TI-160. Ameritech has appealed these decisions. Nevertheless, in both Illinois and Wisconsin, I am aware that Ameritech proposes elimination of the k table in its

therefore believe that elimination of the k table exclusion does not impose any Indiana-specific implementation and compliance costs as claimed by Mr. Ehr.

15. In sum, I believe Mr. Ehr's claim that implementing the Commission's Performance Assurance Plan will be costly is frankly not factually accurate.

THE COMMISSION'S PERFORMANCE REMEDY PLAN PROPERLY ELIMINATED THE K TABLE AND REJECTED AMERITECH'S EFFORT TO ADD ADDITIONAL EXCLUSIONS

16. Mr. Ehr argues that the Commission improperly eliminated the k table exclusion on remedy payments. (Ehr Aff. ¶13). The Commission had considerable evidence from all of the parties showing the need to eliminate the k table exclusion. I will not reiterate these arguments, but merely note that Mr. Ehr is incorrect in insinuating that elimination of the k table somehow results in Ameritech paying remedies when it offers nondiscriminatory service. (*Id.*) I believe the facts are clear and directly contrary to Mr. Ehr's comment: the k table improperly eliminated remedies that should have been paid when inadequate service is being offered. I also previously discussed that Ameritech itself also proposed elimination of the k table, so it is curious that the Company seems to oppose its own recommendation at this late date.

17. Mr. Ehr also contends that, if the k table is to be eliminated, the Commission should have inserted an additional exclusion on remedy payments that is contained in the "Compromise Remedy Plan". (Ehr Aff. ¶14). Mr. Ehr's discussion actually shows why the Commission rejected this proposal. Mt. Ehr states that this methodology literally does the same thing as the k table; it eliminates remedy payments by allowing poor service to escape notice via

---

own various "compromise" proposals.

adding additional "wiggle room" to performance results.[7] In other words, performance results under this proposal are "adjusted" so that poor performance would be excused if it is "close enough". Such an approach is akin to a student being allowed to "round-up" his test results from 65% to 75%, and thus go from an "F" to a "C". I believe the Commission properly rejected this exclusion, and its inclusion would render meaningless the decision to eliminate the k table.

AMERITECH IS IN CONTROL OF ITS OWN FATE AND NEED NOT PAY A DIME IN REMEDIES IF IT OFFERS ADEQUATE SERVICE TO CLECS

18. Mr. Ehr's main complaint about the Performance Assurance Plan is that it would require that Ameritech pay more in remedies than it wants to. (Ehr Aff. ¶¶15, 19, 20 and Table 3). Indeed, Mr. Ehr notes that, under the Performance Assurance Plan, Ameritech's remedy payments for September, 2002 might total $548,550 for Tier 1 (to CLECs) and Tier 2 (to the State of Indiana). This compares to total payments of $102,375 under the Texas Remedy Plan and $184,150 for the "Compromise Remedy Plan".

19. I would be remiss if I did not note that the Commission should be wary of relying completely upon Ameritech's self-reported performance results. Mr. Ehr claims that Ameritech's performance in September, 2002 "met or exceeded the standard of comparison for 96.9% of measures subject to remedies." (Ehr. Aff. ¶19).

20. According to Bearing Point (f/k/a "KPMG Consulting"), however, Ameritech's performance collecting and reporting systems are inherently unreliable. Bearing Point's ongoing test of Ameritech Operational Support Systems reveals the following defects:

- Ameritech does not retain source data in its original form. This, in turn, makes it impossible to audit data, including any effort to trace errors in the reported

[7] Of course, that is not how Mr. Ehr states it, but I recommend the Commission carefully read

results. More problematic is Bearing Point's observation that this failure means Ameritech may not be able to regenerate performance measurement reports as required.[8]

- Ameritech does not have adequate procedures governing performance measurement calculation and reporting. Ameritech is continually restating performance measurement results.[9]
- Ameritech's change management process does not provide for monitoring and communicating changes made to upstream data files that impact metrics.[10]
- Ameritech's systems lack the capacity to retain data.[11] Flaws in Ameritech's systems limiting the amount of extracted data for numerous performance measurements to a file of 2 gigabytes. This limitation taints 48 performance measurements, and means performance results do not include data beyond 2 gigabytes. This capacity problem in Ameritech's systems, however, will ultimately infect **ALL** Ameritech's performance measurements, as the amount of data grows over time. Although this exception was "closed" on June 27, 2002, Bearing Point's disposition report indicates that the issue was never resolved, but instead "will be addressed through Exception Report 47, version 2".[12]

---

aph 14 of the affidavit and compare what is stated there to my own analysis.
Bearing Point Exception Report 19, which is publicly available at:
osstesting.com/Exceptions.htm.
BP Exception Report 20, which is publicly available at:
osstesting.com/Exceptions.htm.
BP Exception Report 41, which is publicly available at:
osstesting.com/Exceptions.htm.
BP Exception Report 42, which is publicly available at:
osstesting.com/Exceptions.htm..
BP Exception Report 42, closure dated June 27, 2002, which is publicly available at:
osstesting.com/Exceptions.htm.

- Numerous Ameritech performance measurements lack the necessary controls and edits to ensure that the records used in the calculations of performance metrics are transferred error free. Absent such controls and edits, Ameritech cannot ensure that data errors from operational systems into the systems used to calculate performance metrics are error free. [13]
- Ameritech fails to update its performance metrics business rules accurately and on a timely basis. This failure directly harms CLECs because, as noted by Bearing Point, "[f]ailure to update Metrics Business Rules documentation in accordance with documented implementation dates and with the exact wording approved by the state commissions may inhibit the ability of a CLEC or regulator to perform timely and accurate analysis of metrics results."[14]

21. Bearing Point's exceptions are consistent with my own analysis of Ameritech's performance reporting. For example, as part of the Michigan 271 case, I compared Ameritech's self-reported performance results with real data and discovered that the Company consistently overstated performance results.[15]

22. Ameritech's objective is, of course, to minimize remedy payments. I would be shocked if the Company took a contrary position; it is, after all, a business. Nevertheless, the amounts Ameritech complains about as being "excessive" are, for a company the size of Ameritech, miniscule. To put some perspective on these numbers, Ameritech's own

---

BP Exception Report 47, which is publicly available at:
osstesting.com/Exceptions.htm. A second version of this exception was issued on June 17,

BP Exception Report 157, dated July 29, 2002, which is publicly available at:
osstesting.com/Exceptions.htm.
Exhibit KWM-01 from my November 5, 2002 Affidavit in Michigan Public Service
ission Cae No. U-12320, which is attached.

proposals (both the Texas Plan and the "Compromise Remedy Plan") call for an annual cap in remedy payments of 36% of its net return.[16] The Commission adopted Ameritech's proposal and limited remedy payments to be within this cap.[17] Based upon Ameritech Indiana's 2001 revenues, the Commission adopted an annual cap in remedy payments of $109,606,000.[18] Using Mr. Ehr's own figures, and assuming the company does not provide substantially worse – or better – service, but keeps quality at current levels, this means Ameritech's annual payments under the Commission's Performance Assurance Plan would total $6,582,600. This amount is a small fraction (6%) of what Ameritech itself proposed as a ceiling on its payments. Such an amount hardly represents any kind of financial "strain" on the company.

23. Ameritech's exaggerated claims of financial harm from the Commission's Performance Assurance Plan are even more specious when one examines the company's Indiana profits for the most recent available period (1996 – 2000), when compared to the results for other incumbent providers. My chart below, which is compiled from Ameritech's reported ARMIS data, shows that its Indiana profits are among the highest of any incumbent provider in the entire country. The Commission's Performance Assurance Plan will hardly make a dent in these "healthy" profits.

RETURN ON SHAREHOLDER EQUITY FOR THE TEN LARGEST STATES AND AMERITECH 1996-2000

State	Company	**1996**	**1997**	**1998**	**1999**	**2000**
CA	Pacific Bell	17.0	(0.5)	11.3	4.0	13.7
NY	Verizon	13.8	5.7	(0.7)	11.9	2.5

[16] *See, Response of Ameritech Indiana to July 12, 2002 Docket Entry*, Ameritech Indiana Performance Remedy Plan, p. 10.
[17] *See,* SBC Ameritech Indiana Performance Assurance and Remedy Plan, §7.2.1, p. 19.
[18] *Id.*, Appendix 6-B.

State	Company	1996	1997	1998	1999	2000
TX	Southwestern Bell (all states)	15.3	14.2	15.7	12.3	24.4
FL	BellSouth (all states)	17.6	17.9	21.6	22.9	22.7
PA	Verizon	15.6	10.3	12.6	16.0	13.9
IL	Ameritech	23.2	24.4	33.2	31.2	30.1
OH	Ameritech	23.7	20.4	21.0	21.9	19.3
MI	Ameritech	27.1	26.0	26.8	34.5	28.8
NJ	Verizon	17.2	16.0	16.6	17.2	20.5
VA	Verizon	12.6	16.3	28.6	31.7	30.5
IN	Ameritech	28.4	28.5	26.9	28.1	27.5
WI	Ameritech	24.0	23.6	34.6	15.4	42.2

24. Such information is less important, however, than the essential fact that Ameritech is in complete control of its own destiny. All that Ameritech need do is to improve service quality. If that occurs, the company will not pay a dime in penalties. I believe the Commission's Performance Assurance Plan provides such an incentive. I hope and expect that Ameritech's remedy payments will decline over time as it strives to improve service quality to avoid paying remedies. I cannot emphasize enough that CLEC are not interested in remedy payments, *per se,* and really would rather collect Ameritech's *customers* than receive *remedy payments.*

THE COMMISSION PROPERLY REJECTED ALL OF AMERITECH'S MODIFICATIONS TO THE "STEP DOWN" TABLE

25. Mr. Ehr also is unhappy that the Commission only adopted a portion of Ameritech's proposed modifications to the "Step Down Table". (Ehr. Aff. ¶18). According to Mr. Ehr, Ameritech proposed that the "Step Down Table" should apply only when an individual CLEC is offered chronically inadequate wholesale services. (*Id.*). Mr. Ehr does not like the Performance Assurance Plan's modification to Ameritech's proposal calling for all CLEC remedy payments to increase when poor service if offered for a particular measure.

26. I believe the Commission's compromise version of Ameritech's "Step Down table" is, frankly, a good idea. It recognizes that when Ameritech offers poor wholesale service that it not only affects a particular CLEC but the entire industry. I also note that Mr. Ehr fails to recognize the "flip side" to the "Step Down" table that is a huge victory for Ameritech. That is, when Ameritech offers adequate service to CLECs for a particular performance measure, payments "step down". This, I believe, allows Ameritech to escape paying dramatically increased remedies when poor service is rendered in an isolated month. Given this major "win" by Ameritech, I think the Commission's rather minor modification to Ameritech's own proposal is certainly not cause for alarm and does not justify rehearing being granted.

THE PERFORMANCE ASSURANCE PLAN'S MINI-AUDIT PROCESS WOULD NOT REQUIRE AMERITECH TO INCUR ANY ADDITIONAL IMPLEMENTATION COSTS

27. Mr. Ehr contends that implementation of the Performance Assurance Plan's "mini-audit" requirement would make Ameritech incur a per audit cost of $553,600. (Ehr Aff. ¶7 and Table 2). Mr. Ehr explains these costs occur because of purported additional staffing and independent auditor costs. (*Id.*).

28. Mr. Ehr's cost estimate is not accurate. First, the mini-audit process adopted by the Commission is based upon Ameritech's own proposed mini-audit process.[19] Second, and more imporant, who pays for the mini audit depends upon the results. Thus, if the mini-audit results in no findings by the auditor "of culpability or misfeasance on Ameritech's part", the CLEC pays. In the alternative, if Ameritech is at fault, the company pays.[20] This contrasts with

[19] *Compare,* SBC Ameritech Indiana Performance Assurance and Remedy Plan, §15.2 with *Response of Ameritech Indiana to July 12, 2002 Docket Entry*, Ameritech Indiana Performance Remedy Plan, §6.5, p. 9.
[20] SBC Ameritech Indiana Performance Assurance and Remedy Plan, §15.2.4

Ameritech's proposal that each company pay its own expenses.[21] Taking Ameritech at its word that it is offering adequate service to CLECs, I would expect that the Commission's mini-audit proposal is actually far less costly that Ameritech's own proposal, since costs are only borne by Ameritech if there is an auditor finding of "culpability or misfeasance". Even if Ameritech offers mediocre service under the Commission's mini-audit process, the difference in cost should be a "wash". In sum, then, Mr. Ehr's cost estimate for mini-audits is grossly overstated. Indeed, as I discuss above, I believe the Commission's process is less expensive for the company than Ameritech's own proposal

CONCLUSION

29. The Commission's Performance Assurance Plan is the culmination of two years of hard work. The Commission, its staff, Ameritech, CLECs and the Office of Utility Consumer Counsel participated in numerous collaboratives, meetings, conference calls, and filed reams of comments. The Commission's Performance Assurance Plan reflects this hard work. It does not "rubberstamp" the proposal of any party, but instead carefully combines many proposals. Indeed, the party most responsible for the most important provisions in this Plan – besides the Commission and its staff, of course – is Ameritech. The Plan incorporates far more elements proposed by Ameritech than by any other party. Ameritech's complaints about the plan fall into two broad categories. The first is Ameritech's wildly overstated implementation costs. As I discussed, Ameritech's estimates are simply not credible. The second category is what I call "sour grapes". Ameritech just does not like the results, even though the Commission's

[21] *Response of Ameritech Indiana to July 12, 2002 Docket Entry*, Ameritech Indiana Performance Remedy Plan, §6.5, p. 9.

Performance Assurance Plan adopts more elements of Ameritech's proposal than that of other parties. That, however, does not constitute a reason to grant rehearing.

30. This concludes my affidavit.

EHR ATTACHMENT A

OVERALL RESULTS FOR 3 MONTHS	ALL MEASURES		TIER 2 ONLY		TIER 1 and/or TIER 2	
	AS FILED 1	ADJUSTED 2	AS FILED 1	ADJUSTED 2	AS FILED 1	ADJUSTED 2
Number of submeasures counted	410	410	233	233	322	322
Number of submeasures met	363	331	205	165	289	232
Number of submeasures missed	47	79	28	46	33	57
Success Ratio	**88.54%**	**80.73%**	**87.98%**	**80.26%**	**89.75%**	**82.30%**

1 Assumes 2 out of 3 months met

2 Assumes 3 out of 3

EHR ATTACHMENT A1

OVERALL RESULTS FOR 3 MONTHS (incl. Geographic disaggregation)	ALL MEASURES		TIER 2 ONLY		TIER 1 and/or TIER 2	
	AS FILED 1	ADJUSTED 2	AS FILED 1	ADJUSTED 2	AS FILED 1	ADJUSTED 2
Number of submeasures counted	794	794	433	433	620	620
Number of submeasures met	750	690	399	372	580	454
Number of submeasures missed	58	104	34	61	40	75
Success Ratio	**92.70%**	**86.90%**	**92.15%**	**85.91%**	**93.55%**	**87.90%**

1 Assumes 2 out of 3 months met

2 Assumes 3 out of 3

STATE OF INDIANA
INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED, D/B/A AMERITECH INDIANA PURSUANT TO I.C.8-1-2-61 FOR A THREE PHASE PROCESS FOR COMMISSION REVIEW OF VARIOUS SUBMISSIONS OF AMERITECH INDIANA TO SHOW COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	)	CAUSE NO. 41657

AFFIDAVIT OF KAREN W. MOORE FOR AT&T COMMUNICATIONS OF INDIANA, GP AND TCG INDIANAPOLIS ("AT&T"); WORLDCOM, INC.; AND MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

I, Karen W. Moore, being duly sworn upon my oath, depose and state as follows:

1. My business address is 222 West Adams, 15th Floor, Chicago, Illinois 60606. I am employed by AT&T Corp.

2. I am familiar with the issues in the above-cited cause and have participated in the Indiana Remedy Plan Collaborative. Therefore, I have personal knowledge of the facts and issues herein.

3. For all these reasons, I affirm under the penalties of perjury that the facts stated in my affidavit attached to the reply filing of AT&T Communications of Indiana, GP and TCG Indianapolis ("AT&T"), WorldCom, Inc., and McLeodUSA Telecommunications Services, Inc. filed on November 18, 2002, are true and correct to my best information and belief.

This concludes my affidavit.

Karen W. Moore

Karen W. Moore
Manager
AT&T
222 West Adams Street, 15th Floor
Chicago, Illinois 60606

Subscribed and Sworn to before
me this 14 th day of November, 2002.

Margaret M. Plucinsky
Notary Public

OFFICIAL SEAL
MARGARET M PLUCINSKY
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES:05/12/03

CERTIFICATE OF SERVICE

I, Robert K. Johnson, certify that the attached pleadings were served on November 18, 2002 by an electronic posting to the service list in this Cause at Ameritech271@urc.state.in.us.

Robert K. Johnson
Bose McKinney & Evans
135 N. Pennsylvania St., Ste. 2700
Indianapolis, IN 46204
Tel: 317.684.5246
Rjohnson@boselaw.com