



POINTS AND AUTHORITIES

	<u>PAGE</u>
INTRODUCTION .....	1
20 ILCS 5/10-113(a).....	2
STATEMENT OF ISSUES PRESENTED FOR REVIEW .....	3
STATEMENT OF JURISDICTION.....	4
220 ILCS 5/10-201 .....	4
Supreme Court Rule 335.....	4
STATEMENT OF FACTS .....	4
I.    THE SBC/AMERITECH MERGER AND CONDITION 30 .....	4
II.   THE COMMISSION’S “FINAL” ORDER OF JULY 10, 2002 .....	7
III.  THE COMMISSION’S OCTOBER 1, 2002 ORDER ON REOPENING .....	8
ARGUMENT .....	9
I.    THE COMMISSION LACKED AUTHORITY TO UNILATERALLY EXTEND THE TERM OF THE Merger Condition .....	9
A.    The Order On Reopening Is An Unsupported, Arbitrary And Capricious Departure From The Commission’s Prior Conclusion That “The Only Conclusion That Can Be Reached” Is That The Remedy Plan Expires On October 8, 2002 .....	12
<i>Citizens Utility Bd. v. Illinois Commerce Comm’n</i> , 166 Ill. 2d 111, 651 N.E.2d 1089 (Ill. 1995).....	12
<i>Commonwealth Edison Co. v. Illinois Commerce Comm’n</i> , 180 Ill. App. 3d 899, 536 N.E.2d 724 (1st Dist. 1989) .....	3
<i>Central Northwest Business Men’s Ass’n v. Illinois Commerce           Comm’n</i> , 337 Ill. 149, 168 N.E. 890 (Ill. 1929).....	13
<i>General Service Employees Union v. Illinois Educational Labor Relations           Bd.</i> , 285 Ill. App. 3d 507, 673 N.E.2d 1084 (1st Dist. 1996) .....	13
<i>Dehainaut v. Pena</i> , 32 F.3d 1066 (7th Cir. 1994).....	13

POINTS AND AUTHORITIES (continued)

	<u>PAGE</u>
B. The Order On Reopening Is Void Because The Commission Did Not Follow The Procedures Mandated By The PUA And By Due Process.....	14
220 ILCS 5/10-113(a).....	14-15
<i>Black Hawk Motor Transit Co. v. Illinois Commerce Comm’n</i> , 398 Ill. 542, 76 N.E.2d 478 (Ill. 1947).....	15
<i>Commonwealth Edison Co. v. Illinois Commerce Comm’n</i> , 180 Ill. App. 3d 899, 536 N.E.2d 724 (1st Dist. 1989) .....	15
<i>Quantum Pipeline Co. v. Illinois Commerce Comm’n</i> , 304 Ill. App. 3d 310, 709 N.E.2d 950 (3d Dist. 1999).....	15-16
C. The Commission Is Estopped From Altering The Term Of Condition 30 .....	16
<i>Gersch v. Illinois Dept. of Professional Regulation</i> , 308 Ill. App. 3d 649, 720 N.E.2d 672 (1st Dist. 1999) .....	16
<i>Drury Displays, Inc. v. Brown</i> , 306 Ill. App. 3d 1160, 715 N.E.2d 1230 (5th Dist. 1999) .....	16
<i>Hickey v. Illinois Central R.R. Co.</i> , 35 Ill. 2d 427, 220 N.E.2d 415 (1966).....	17
<i>People v. Hill</i> , 75 Ill. App. 2d 69, 221 N.E.2d 40 (1st Dist. 1966).....	17
220 ILCS 7-204(f).....	17-18
D. The Order On Reopening Impermissibly Conflicts With The Process Of Negotiation And Arbitration Established By The Federal Telecommunications Act Of 1996 .....	18
47 U.S.C. § 252(a)(1).....	18
<i>Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc.</i> , 128 F. Supp. 2d 1043 (E.D. Mich. 2001), <i>appeal docketed</i> , No. 01-1312 (6th Cir. argued Sept. 18, 2002).....	18-19, 20

POINTS AND AUTHORITIES (continued)

	<u>PAGE</u>
<i>Wisconsin Bell, Inc. v. Bie</i> , No. 01-C-0690-C, Opinion and Order (W.D. Wis. Sept. 26, 2002).....	19-20
<i>Gade v. National Solid Wastes Management Ass’n</i> , 505 U.S. 88 (1992).....	19
<i>Verizon North, Inc. v. Strand</i> , 309 F.3d 935 (6th Cir. 2002) .....	20
<i>MCI Telecomms. Corp. v. GTE Northwest, Inc.</i> , 41 F. Supp. 2d 1157 (D. Or. 1999).....	20
E. Even If The July 10 Order Could Be Construed As Extending The Duration Of Condition 30, It Too Would Be Unlawful.....	21
<b>II. THE COMMISSION’S UNSUPPORTED DOUBLING OF LIQUIDATED DAMAGE AND ASSESSMENT AMOUNTS IS ARBITRARY AND CAPRICIOUS .....</b>	<b>23</b>
A. Background.....	23
B. Discussion.....	25
1. Tier 1 Liquidated Damages.....	25
<i>Bauer v. Sawyer</i> , 8 Ill. 2d 351, 134 N.E.2d 329 (1956).....	25
2. Tier 2 Assessments .....	26
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998).....	27
<i>People v. 1991 Chevrolet Camaro, VIN 1GFP23E9ML117842</i> , 251 Ill. App. 3d 382, 620 N.E.2d 563 (2d Dist. 1993) .....	27
<i>Wisconsin Bell, Inc. v. Public Service Comm’n of Wisconsin</i> , Case No. 01-CCV-011200 (Wis. Circuit Court, July 31, 2002).....	27-28
<b>III. THE COMMISSION ERRED IN DELETING THE “K TABLE,” WHICH WAS DESIGNED TO PREVENT THE IMPOSITION OF REMEDIES BASED SOLELY ON RANDOM VARIATION .....</b>	<b>28</b>
A. Background.....	28

POINTS AND AUTHORITIES (continued)

	<u>PAGE</u>
<i>In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, 15 F.C.C. Rcd. 75 (Dec. 27, 1999)</i> .....	29-30
B. Discussion .....	33
CONCLUSION .....	35

## INTRODUCTION

This appeal presents an agency decision that exemplifies the terms “arbitrary and capricious” and illustrates why the law provides for judicial review of agency decisions. On October 1, 2002, the Illinois Commerce Commission issued an order that – by the Commission’s own admission – had no legal basis. That Order unilaterally altered a condition for the Commission’s approval of the 1999 SBC/Ameritech merger by deleting its expiration date: three years after the merger was consummated, three months after the Commission confirmed that the condition would expire in three months, and only a week before the condition was set to expire. It held that Ameritech Illinois was in “material non-compliance” with a previous Commission order of July 10, 2002 – simply because Ameritech Illinois included language in its implementing tariff that reflected the expiration date that the Commission itself had upheld in that July 10 order. The Commission reopened the docket and entered an Order on Reopening without providing any rational explanation for its action and without even giving Ameritech Illinois prior notice or an opportunity to be heard.

How did this happen? As Condition 30 of the Commission’s approval of the SBC/Ameritech merger in 1999, the Commission directed Ameritech Illinois to implement a “remedy plan”: a scheme of liquidated damages and automatic payments to be made by Ameritech Illinois to competing carriers and to the state in the event Ameritech Illinois’ performance of services for its competitors fell short of certain standards. In a “final” order entered July 10, 2002, the Commission ordered Ameritech Illinois to modify the plan in several respects (two of which are challenged below). C 2903; App. A 1. At the same time, the Commission also held, based on the plain language of its 1999 order approving the SBC/Ameritech merger, that “[t]he only conclusion that can be reached is that Condition 30, and

consequently the Remedy Plan, expires in three years” – on October 8, 2002, three years after the closing date of the merger. C 2925; App. A 23 (July 10, 2002 Order, at 20). The Commission also properly concluded that “no party has given us a legal basis for extending the deadlines included in the *Merger Order*.” *Id.* Thus, when Ameritech Illinois filed a compliance tariff to implement the July 10, 2002 Order, Ameritech Illinois included a footnote that said *exactly* what the Commission found in that order – that the Condition 30 Remedy Plan would expire on October 8, 2002.

On October 1, 2002, only a week before Condition 30’s three-year term expired, the Commission re-opened the docket without prior notice and entered an order. Supp. R. C 1; App. A 96. The Order on Reopening told the Chief Clerk and Ameritech Illinois to strike the termination date, which had been specified by the 1999 merger order and reaffirmed in the Commission’s July 10, 2002 Order, from Ameritech Illinois’ implementing tariff. Thus, even though the Commission had originally opened the docket “pursuant to Condition 30 of the SBC/Ameritech Merger Order,” the Order on Reopening purports to nullify one of the most fundamental aspects of that condition, namely its duration. And even though the stated purpose of the Order on Reopening was to enforce the Commission’s “final” order of July 10, 2002 in that docket, the Order on Reopening nullifies that order’s express finding (upheld on rehearing) that Condition 30 and the remedy plan were to expire on October 8, 2002.

The arbitrary and capricious result of the Order on Reopening is compounded by the improper procedure by which it was reached. The Commission issued the Order on Reopening without prior notice and without opportunity for hearing. The Order on Reopening thus violated Section 10-113(a) of the Illinois Public Utilities Act (“PUA”) (220 ILCS 5/10-113(a)), and deprived Ameritech Illinois of its constitutional due process rights. Further, the Commission is

estopped from extending Condition 30 indefinitely, after Ameritech Illinois consummated the merger and implemented that condition. Finally, the Order on Reopening violates *federal* procedure as well, because it purports to decide matters concerning interconnection agreements between Ameritech Illinois and its competitors outside the negotiation, arbitration, and approval process mandated by the federal Telecommunications Act of 1996.

By extending the duration of the Condition 30 remedy plan, the Commission also compounded the substantive errors it made in its July 10 Order modifying the plan. In the July 10 Order the Commission ordered Ameritech Illinois to double “remedy” payments – even though the Commission acknowledged that such doubling was not supported by any evidence or estimate or even a “sketchy outline” of damage. C 2942; App. A 40. Second, the Commission ordered Ameritech Illinois to modify the statistical methodology used to determine whether remedy payments are due, in a way that virtually guarantees that numerous “remedies” will be paid even if Ameritech Illinois performs perfectly.

For all these reasons, Ameritech Illinois respectfully requests that the Court reverse the July 10, 2002 Final Order and the October 1, 2002 Order on Reopening in ICC Docket No. 01-0120.

#### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

I. Whether the Commission’s decision to unilaterally strike the October 8, 2002 expiration date of Condition 30 was arbitrary, capricious, and contrary to law.

II. Whether the Commission erred by arbitrarily doubling liquidated damage and assessment amounts under the Condition 30 “remedy plan,” where there was no evidence to connect its order to any estimate of damage.

III. Whether the Commission erred by deleting the “K table,” a statistical mechanism designed to prevent the imposition of “remedies” based solely on random variation.

## STATEMENT OF JURISDICTION

This Court has jurisdiction over the Commission's decisions pursuant to 220 ILCS 5/10-201 and Supreme Court Rule 335.

## STATEMENT OF FACTS

### IV. **THE SBC/AMERITECH MERGER AND CONDITION 30**

On July 24, 1998, Ameritech Illinois (along with its parent, Ameritech Corporation, and other companies) filed a Joint Application seeking Illinois Commerce Commission approval of a reorganization that would result from the proposed merger between Ameritech Corporation and SBC Communications Inc. On September 23, 1999, the Commission approved the application, subject to the Joint Applicants' agreement to implement certain conditions. Order, Ill. C.C. Docket No. 98-0555 (Sept. 23, 1999) ("*Merger Order*": Sep. App. SA 1). One such condition, Condition 30, required Ameritech Illinois to review and implement, to the extent feasible, a set of performance measurements, standards, and remedies that SBC had agreed to implement in Texas. Sep. App. SA 47 (*Merger Order*, at 260).

The *performance measures* referenced by Condition 30 summarize the results of certain wholesale operations (such as the time to install service) that Ameritech Illinois performs for competing local telephone companies pursuant to "interconnection agreements" established by negotiation and arbitration under the federal Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* Performance data are generally broken down, or disaggregated, into separate measurement categories for each applicable product or service (*e.g.*, resale, unbundled loops), customer type (*e.g.*, residential, business), and certain other characteristics to provide a more meaningful comparison. C 835. There are approximately 150 performance measurements, divided into more than 3,000 categories. *Id.*

The data in these performance measures are typically compared against *standards*, or target levels. *Id.* Many of the wholesale functions measured correspond to an analogous function in Ameritech Illinois' retail operations. *Id.* In those cases, the retail outcome is the standard level for wholesale performance; in other words, the standard is "parity" between wholesale and retail. C 835-836. Where there is no meaningful retail analog, a pre-set wholesale "benchmark" has been established. C 836.

This appeal focuses on the "remedy plan": a system of self-executing "liquidated damages" to be paid by Ameritech Illinois to competing carriers, and "assessments" to be paid to the State of Illinois, in the event performance does not meet the above standards. C 837. The Commission's *Merger Order* explained, in referring to these liquidated damages and assessments: "Our goal is to ensure that any conditions imposed in this Order are not illusory, but rather specific and enforceable, and that enforcement measures are adequate to ensure full compliance with the conditions. The Texas plan, in principle, and the related commitments serve to achieve these goals." Sep. App. SA 21 (*Merger Order*, at 224). At the same time, the Commission made clear what its goals did *not* include: "Our interest is not to penalize the company but rather to have compliance with our order." Sep. App. SA 22 (*Merger Order*, at 225).

As part of Condition 30, the Commission also directed Ameritech Illinois to participate in collaborative discussions with competing local exchange carriers ("CLECs") regarding "any additions, deletions, or changes to the performance measurements, standards/benchmarks, and remedies that are implemented by SBC/Ameritech in Illinois." Sep. App. SA 51 (*Merger Order*, at 264). The Commission stated that "[i]f a dispute over any such addition, deletion, or change cannot be resolved through the collaborative process, any participant may ask the Commission to

resolve such dispute.” *Id.* The Commission further held that “[t]he participant proposing the addition, deletion, or change retains the burden of proving that such addition, deletion, or change should be adopted in Illinois.” *Id.*

Ameritech Illinois’ principal challenge on appeal concerns one of the most fundamental elements of Condition 30 (and, for that matter, of any right or obligation): its duration. The 1999 *Merger Order* provided (at 243) that *all* conditions “shall cease to be effective and shall no longer be binding in any respect three years after the Merger Closing Date,” unless some different term was “specifically established” in that order. Sep. App. SA 30. During the proceedings that led to the 1999 *Merger Order*, the Commission’s Staff, along with AT&T (a CLEC), contended that the remedy plan should have an indefinite term. Sep. App. SA 15, 18 (*Merger Order*, at 218, 221). Nonetheless, Condition 30 did not “specifically establish[]” a termination date other than the general three-year term specified by the *Merger Order* and thus, pursuant to the plain language of the *Merger Order* (Sep. App. SA 30), it was to expire on October 8, 2002 (three years after the merger closing date).

The *Merger Order* directed Ameritech Illinois and the other parties to the merger to evidence, in a written filing, their assent to the merger conditions. SBC and Ameritech accepted the merger conditions and consummated the merger. The companies then formed a joint task force to implement the merger condition, and Ameritech Illinois implemented the Texas performance measurements, standards and remedies effective with July 2000 data. C 837.

#### V. THE COMMISSION’S “FINAL” ORDER OF JULY 10, 2002

Pursuant to Condition 30, Ameritech Illinois then participated in collaborative proceedings to discuss proposed changes to the performance measurements, standards, and remedies. The parties reached agreement on performance measures and standards (C 837), but were unable to agree on remedies, as the CLECs sought to replace the Texas remedy plan with

an entirely different one of their own creation. C 48. The CLECs and the Commission's Staff also argued, as they had in the 1999 merger proceedings, that the Condition 30 Remedy Plan should continue beyond October 8, 2002. C 1226-27, C 1288-89.

The Commission opened Docket No. 01-0120, whose title proclaimed its purpose to resolve "Disputed Issues Pursuant to Condition (30) of the SBC/Ameritech Merger Order." On July 10, 2002, the Commission entered a Final Order. C 2903; App. A 1. With regard to the duration of the plan, the July 10 Order rejected the position of Staff and the CLECs and held that the plan would expire on October 8, 2002, just as the Commission had specified in the *Merger Order* (C 2925; App. A 23):

The only conclusion that can be reached is that Condition 30, and consequently the Remedy Plan, expires in three years. . . . [N]o party has given us a legal basis for extending the deadlines included in the *Merger Order*. We are therefore left with the conclusion that the Remedy Plan, as a condition to merger approval, expires in three years from the merger closing date, or October 2002.

A group of CLECs sought rehearing (C 2990), and the Commission again rejected their arguments and denied rehearing by order of August 27, 2002. C 3166; App. A 79.

With regard to the substantive provisions of the plan, the July 10 Order rejected the CLECs' proposed remedy plan but modified substantially the method of assessing and calculating remedies under the original plan. Ameritech Illinois challenges two of those modifications, and those are discussed under Sections II and III of the Argument. Ameritech Illinois petitioned for rehearing. C 3005. The Commission denied rehearing on August 27, 2002. C 3166; App. A 79. On September 26, 2002, Ameritech Illinois filed a Petition for Review of the Commission's July 10 Order with this Court (Case No. 3-02-0738). C 3176; App. A 82.

## VI. THE COMMISSION'S OCTOBER 1, 2002 ORDER ON REOPENING.

Pending judicial review, Ameritech Illinois filed a tariff to implement the July 10, 2002 Order. That tariff contained a footnote (footnote 1) that stated, just as the Commission had held in its July 10 Order: "Pursuant to Condition 30 of the SBC/Ameritech Merger Order, Docket 98-0555 (the '*Merger Order*'), this Remedy Plan tariff expires on October 8, 2002." *See* Supp. R. C 2; App. A 97.

The Commission's Staff then filed a memorandum regarding Ameritech Illinois' tariff on September 30, 2002, in which it objected solely to the statement regarding the plan's expiration that appeared in footnote 1. Supp. R C 6, C 9. The Commission did not provide Ameritech Illinois notice or an opportunity to be heard with respect to Staff's objection. It did not hear new evidence or argument. Instead, on October 1, 2002 (the day after Staff's memorandum), the Commission summarily voted to issue an "Order on Reopening" in which it adopted Staff's proposal. Supp. R. C1; App. A 1. Ignoring the July 10 Order's holding that "[t]he only conclusion that can be reached is that Condition 30, and consequently the Remedy Plan, expires in three years" (C 2925; App. A 23) the Order on Reopening stated (Supp. R C 3; App. A 98) that the July 10 Order "did not provide for any sunset or automatic termination for that tariffed remedy plan." Ignoring its own categorical conclusion, in the July 10 Order, that "no party has given us a legal basis for extending the deadlines included in the Merger Order" (C 2925; App. A 23), in its Order on Reopening the Commission stated (Supp. R. C 3 & n.1; App. A 98) that the plan "will apply after October 8, 2002" and "will be available past October 8, 2002 and for the indefinite future until modified in accordance with applicable law." Finally, even though Ameritech Illinois' implementing tariff had specified the precise termination date that the Commission had established in the 1999 *Merger Order* and reiterated in the July 10 Order, the

Commission asserted that “the filing was in material non-compliance with the Commission’s order” and ordered it stricken.<sup>1</sup> Supp. R. C 4; App. A 99.

Ameritech Illinois applied for rehearing of the Order on Reopening. Supp. R. C 18. By a 3-2 vote, the Commission denied the application (Supp. R. C 168; App. A 101), and Ameritech Illinois appealed to this Court (Case No. 3-02-0920; App. A 104). On December 9, 2002, this Court granted Ameritech Illinois’ motion to consolidate its appeals from the July 10 Final Order and the October 1 Order on Reopening.

### ARGUMENT

#### **VII. THE COMMISSION LACKED AUTHORITY TO UNILATERALLY EXTEND THE TERM OF THE MERGER CONDITION.**

The Order on Reopening purported to address the duration of Condition 30 of the 1999 *Merger Order*, under which Ameritech Illinois implemented the performance “remedy plan” used by its post-merger affiliate Southwestern Bell in Texas. But the duration of that plan had long since been established by the plain terms of the *Merger Order*, which states (Sep. App. SA 30):

Except where other termination dates are specifically established, all conditions set out below shall cease to be effective and shall no longer be binding in any respect three years after the Merger Closing Date.

The *Merger Order* does not “specifically establish” any other termination date for the Remedy Plan. To the contrary, during the merger proceedings the parties and the Commission were fully aware of the Plan’s limited duration. At the time, Ameritech Illinois made clear that the remedy plan it offered was among the conditions that were subject to the general “three-year timeline for

---

<sup>1</sup> The Order on Reopening directed the Chief Clerk to immediately rewrite Ameritech Illinois’ Condition 30 Remedy Plan tariff by striking footnote 1, and required Ameritech Illinois to then submit a new tariff page consistent with the Chief Clerk’s edits. Sup. R. C4; App. A 99.

the Illinois commitments.” Sep. App. SA 29d (*Merger Order*, at 239).<sup>2</sup> The Commission’s Staff, meanwhile, argued for “an ongoing performance assurance program” that would “not be subject to arbitrary termination” – an argument acknowledged in the *Merger Order* (Sep. App. SA 15) and in the July 10, 2002 Order here (App. A 23). AT&T sought the same condition. Sep. App. SA 18 (*Merger Order*, at 221).

The Commission rejected the positions advanced by Staff and AT&T; that is, it did not “specifically establish” the unlimited term that AT&T and Staff requested for Condition 30. Thus, by the unambiguous terms of the *Merger Order*, the Remedy Plan was to “cease to be effective” and would “no longer be binding in any respect” on October 8, 2002, three years after the Merger Closing Date of October 8, 1999.

Condition 32 directed the Joint Applicants that sought approval of the merger to “notify the Commission . . . that the terms, conditions, and requirements set out above are accepted” within 7 days of its order. Sep. App. SA 51. The Joint Applicants filed that acceptance, and consummated the merger with the Commission’s approval. Ameritech Illinois then implemented the performance standards and remedy plan, an undertaking that required the creation of a joint SWBT/Ameritech task force and several months of effort. Sep. App. SA 47; C 837.

The July 10, 2002 Order recognized the plain meaning of the *Merger Order*. As the Commission reasoned, “Condition 30 contains no other specifically established termination. The *only conclusion that can be reached* is that Condition 30, and consequently the Remedy Plan,

---

<sup>2</sup> In comparing the Condition 30 remedy plan with a similar plan then under consideration (and later adopted) by the FCC, the Commission in the *Merger Order* clearly understood that Ameritech Illinois was offering each plan for three years: “[W]hile the three-year clock begins to run for the FCC performance plan only after nine months, the three-year timeline for the Illinois commitments begins at closing. In essence, the Illinois Commitment will begin one month later *and end nine months earlier* than the federal proposal.” Sep. App. SA 29d (emphasis added).

expires in three years.” C 2925; App. A 23 (emphasis added). The Commission further held that “no party has given us a legal basis for extending the deadlines included in the *Merger Order*.”

*Id.* Indeed, the Commission pointed out that Staff had proposed an indefinite term for the remedy plan “in the merger proceeding,” but “[n]otably, the Commission did not adopt Staff’s recommendation to make the plan ongoing.” *Id.*

Thus, while the Order on Reopening purported to enforce the July 10 Order, it in fact does exactly what the July 10 Order found there was no legal basis to do – extend the deadlines included in the *Merger Order*. The Commission did not suddenly discover a legal basis for such action – because there is none. Instead, the Commission simply ignored the “only conclusion that can be reached” – that “Condition 30, and consequently the Remedy Plan, expires in three years.” App. A 23.

Government agencies are not free to condition approval of private action on specific actions – as the Commission did with respect to the SBC/Ameritech merger – only to unilaterally alter the conditions after the conditions have been accepted, approval has been given, and the private parties have taken action. Nor can an agency declare that altering a merger condition has “no . . . legal basis” today and then alter the condition tomorrow. This Commission, like any government agency, is a creature of law and it is bound by the rule of law. There are several rules of law that preclude the Commission from unilaterally altering the term of Condition 30.

**A. The Order On Reopening Is An Unsupported, Arbitrary And Capricious Departure From The Commission’s Prior Conclusion That “The Only Conclusion That Can Be Reached” Is That The Remedy Plan Expires On October 8, 2002.**

Fundamental principles of reasoned decision-making – principles that cabin the powers of all administrative agencies – bar the Commission’s action. In the 1999 *Merger Order* the Commission considered the duration of the merger conditions and decided that they would last

for three years, and the Commission's July 10, 2002 Order upheld that termination date and found there was no legal basis to extend it. In the Order on Reopening, the Commission sought to eliminate the deadline and extend Condition 30's termination date indefinitely, but it did not even purport to identify a rational, lawful basis for extending the remedy plan beyond October 8, 2002. The Order on Reopening is therefore not just *admittedly* contrary to law, but also – because of its lack of reasoned decision-making – arbitrary and capricious.

When the Commission departs from a prior decision, the Commission must “articulate a reasoned basis for its sudden departure.” *Citizens Utility Bd. v. Illinois Commerce Comm'n*, 166 Ill. 2d 111, 132, 651 N.E.2d 1089, 1100 (Ill. 1995). In the July 10 Order, the Commission categorically declared that “the only conclusion that can be reached” is that “Condition 30, and consequently the Remedy Plan, expire in three years” after the merger closing date. C 2925; App. A 23. (July 10, 2002 Order at 20). The Commission clearly departed from that decision when it announced on reopening – without reasoning or analysis – that the July 10 Order “did not provide for any sunset or automatic termination” and said that “the Commission-ordered remedy plan will be available past October 8, 2002, and for the indefinite future.” Supp. R. C 3 & n.1; App. A 98. The Commission did not articulate *any* basis (let alone a rational basis) to depart from its ruling that the only possible conclusion was that Condition 30, and the associated Remedy Plan, expire on October 8, 2002. To the contrary, the Commission simply ignored its prior holding and reached the very conclusion that it had held could not lawfully be reached.

The Commission's departure from its prior holding, made without any reasoned basis, is unlawful. *See Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 180 Ill. App. 3d 899, 909, 536 N.E.2d 724, 730 (1st Dist. 1989) (holding a Commission order “arbitrary and unlawful” where “the Commission radically altered its past practice . . . without notice to interested parties,

a hearing, or any readily apparent reason”). The Commission effectively rescinded its repeated ruling that the Condition 30 Remedy Plan expires on October 8, 2002. But before the Commission could “lawfully rescind” that ruling,

it was necessary that it made a finding of facts different from the findings of facts on which the original order was entered, and that the facts as found in the original order were erroneous, or that, since the entry thereof, conditions had changed to such an extent that the facts and conditions as they existed at the time of the rescinding order were different, or that a mistake as to the law had been made, and enter findings of facts applicable to the then conditions.

*Central Northwest Business Men’s Ass’n v. Illinois Commerce Comm’n*, 337 Ill. 149, 158, 168 N.E. 890, 894 (Ill. 1929). The Commission made no such findings in its Order on Reopening (and legally could not have made such findings without prior notice and hearing), and thus could not lawfully negate the July 10, 2002 Order.

The Commission’s arbitrary reversal also violated Ameritech Illinois’ due process rights. “To ensure a party receives due process, ‘[a]n agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.’” *General Service Employees Union v. Illinois Educational Labor Relations Bd.*, 285 Ill. App. 3d 507, 515, 673 N.E.2d 1084, 1090 (1st Dist. 1996) (quoting *Dehainaut v. Pena*, 32 F.3d 1066, 1074 (7th Cir. 1994)). The Order on Reopening presents a textbook example of an order that “casually ignored” the Commission’s prior conclusions – in fact, the Commission acted as if its ruling that “Condition 30, and consequently the Remedy Plan, expires in three years” did not exist. The Order on Reopening was entered without notice, without hearings, without new evidence, without new findings, without any change in law, and without reasoned analysis, and it was without the bounds of the law.<sup>3</sup>

---

<sup>3</sup> The Commission’s conclusion that footnote 1 of Ameritech Illinois’ compliance tariff did not comply with the July 10, 2002 Order is equally arbitrary and capricious. In the July 10, 2002  
(cont’d)

**B. The Order On Reopening Is Void Because The Commission Did Not Follow The Procedures Mandated By The PUA And By Due Process.**

As described in the preceding section, the Order on Reopening altered the Commission's 1999 *Merger Order*, and its July 10 Order, by negating the Commission's conclusion that Condition 30 would expire on October 8, 2002. That alteration was not supported by any articulated basis, and it was not preceded by the notice and hearing that are required by law. The Commission did not provide any notice to Ameritech Illinois or any opportunity to be heard before altering the *Merger Order* and the July 10, 2002 Order. Rather, the Commission simply entered the Order on Reopening the day after a request by the Staff. In so doing, the Commission did not comply with section 10-113(a) of the PUA, which requires the Commission to provide "notice to the public utility affected," and an "opportunity to be heard as provided in the case of complaints" before it alters its prior decisions. 220 ILCS 5/10-113(a).

The notice and hearing requirements of Section 10-113(a) are not optional; they are mandatory, and indeed jurisdictional. The Commission "derives its power from the [PUA] and has no authority except such as is thereby expressly conferred upon it." *Black Hawk Motor Transit Co. v. Illinois Commerce Comm'n*, 398 Ill. 542, 552, 76 N.E.2d 478, 484 (Ill. 1947).

"Where statutory requirements are not followed as to notice, hearing, the presentation of

---

(... cont'd)

Order (C 2925-26; App. A 23-A 24), the Commission concluded "that the Remedy Plan, as a condition to merger approval, expires in three years from the merger closing date, or October 2002," and "decline[d] . . . to extend Condition 30 beyond the expiration date provided for in the *Merger Order*." In the "Findings and Ordering Paragraphs," the Commission held that "the directives set out above on each of the disputed matters are reasonable and should be followed." C 2959; App. A 57. Footnote 1 of Ameritech Illinois' compliance tariff plainly "followed" the Commission's "directive" that "Condition 30, and consequently the Remedy Plan, expires in three years." It is arbitrary and capricious for the Commission to find that a tariff that says *exactly* what the Commission *expressly* concluded somehow constitutes "non-compliance" with the Commission's order.

evidence and finding of fact, the Commission *loses its jurisdiction to act* and any order entered by the Commission under such circumstances is void.” *Commonwealth Edison Co. v. Illinois Commerce Comm’n*, 180 Ill. App. 3d 899, 909, 536 N.E.2d 724, 731 (1st Dist. 1989) (emphasis added). Because the Commission did not provide Ameritech Illinois notice and an opportunity to be heard before entering the Order on Reopening, that order violates Section 10-113(a) and is void for lack of jurisdiction.

Moreover, statutory requirements of notice and hearing like those embodied in Section 10-113 are enacted for a reason: to ensure the protection of constitutional rights of due process. “Notice is a fundamental requirement of due process because a party must be aware of the state action in order to effectively contest it.” *Quantum Pipeline Co. v. Illinois Commerce Comm’n*, 304 Ill. App. 3d 310, 317-319, 709 N.E.2d 950, 955-956 (3d Dist. 1999). Thus, this Court has held that the notice and hearing required by Section 10-113(a) are precisely what is required under the Due Process Clause. *Id.* at 319, 709 N.E.2d at 956.

Ameritech Illinois has a constitutionally protected interest in the limited duration of Condition 30: That is the termination date established by the *Merger Order*, and the limitation of the obligation that Ameritech Illinois accepted when it proceeded with the merger. The failure to provide the notice and hearing mandated by Section 10-113(a) is not only a statutory violation, but a constitutional one as well. *See Quantum Pipeline*, 304 Ill. App. 3d at 318-319, 709 N.E.2d at 956.

**C. The Commission Is Estopped From Altering The Term Of Condition 30.**

The preceding sections demonstrate that the Commission acted without jurisdiction, without due process, and without a reasoned basis for its action in entering the Order on Reopening. The substance of that action was also improper, because the Commission was estopped from altering the term of the merger condition.

The doctrine of estoppel operates against public bodies where there is “an affirmative act on the part of the public entity and the inducement of a substantial reliance by the affirmative act.” *Gersch v. Illinois Dept. of Professional Regulation*, 308 Ill. App. 3d 649, 660, 720 N.E.2d 672, 681 (1st Dist. 1999). One paradigm in which the doctrine applies is the situation presented here: where an agency approves action by a private party, then tries to change the rules after the private party has taken the action and incurred expense in reliance on the agency’s approval.<sup>4</sup>

That paradigm applies here. The Commission’s 1999 order approving the merger was an affirmative act sufficient to induce the Joint Applicants to accept the merger conditions, consummate the merger, and then implement the conditions, including Condition 30. The Commission affirmatively stated that it would approve the SBC/Ameritech merger provided that the Applicants agreed to several merger conditions for a limited duration (*e.g.*, that Ameritech Illinois agree to implement Condition 30 for a term of three years). In reliance on that order, the Joint Applicants filed notice of their acceptance, and then went ahead with the merger of two multistate, multi-billion dollar telephone companies and the implementation of Condition 30. Plainly, the duration of the merger conditions was a critical factor in that decision – just as important as the duration of a mortgage is to a homeowner, or the duration of a license is to a

---

<sup>4</sup> In *Drury Displays, Inc. v. Brown*, 306 Ill. App. 3d 1160, 715 N.E.2d 1230 (5th Dist. 1999), for example, a property owner sought approval from the Department of Transportation to place an outdoor billboard on its property. The Department granted approval, and the property owner accordingly removed the building that had stood on the property and raised the billboard. Months later, the Department decided that the billboard was unlawful and ordered the property owner to take it down. The trial court issued a writ of mandamus enjoining the Department’s action, and the Appellate Court affirmed. As the court explained, the Department’s previous orders granting the requested permit were sufficient to induce the plaintiff to take action in reliance on those orders. The court found that the plaintiff, by spending approximately \$50,000 to demolish the existing building and construct the billboard, incurred substantial expense in reliance on the Department’s action, and accordingly would suffer a substantial loss if the permits were not reissued. As a result, the Department was estopped from changing its position.

business owner. After representing, in the *Merger Order*, that merger approval required Ameritech Illinois to implement Condition 30 for a limited term of three years, the Commission is not free to unilaterally alter that term. *See also Hickey v. Illinois Central R.R. Co.*, 35 Ill. 2d 427, 448-49, 220 N.E.2d 415, 426 (1966) (estoppel will apply against the State (and its agencies) when there have been “positive acts by [State] officials which may have induced the action of the adverse party under circumstances where it would be inequitable to permit [that party] to stultify itself by retracting what its officers had previously done.”); *People v. Hill*, 75 Ill. App. 2d 69, 75, 221 N.E.2d 40, 44 (1st Dist. 1966) (holding that estoppel operated where “it was the affirmative action by the public authorities . . . that caused plaintiff to change its position by making great expenditures which would not have been made but for the affirmative action”).

The statutory mandate of the Public Utilities Act compels the same straightforward result. By extending the duration of Condition 30, the Commission in essence created a new merger condition – that Ameritech Illinois implement a remedy plan that would take effect October 8, 2002 – almost three years after the merger closed. But Section 7-204(f) (under which the Commission imposed Condition 30 in the *Merger Order*) governs *when* the Commission may impose merger conditions. That section authorizes the Commission to impose “terms, conditions or requirements” *only* “[i]n approving any proposed reorganization pursuant to this Section.” 220 ILCS 7-204(f). Section 7-204 by its plain terms applies only when a proposed reorganization is pending. It precludes the Commission from imposing new conditions after a reorganization has been consummated.

**D. The Order On Reopening Impermissibly Conflicts With The Process Of Negotiation And Arbitration Established By The Federal Telecommunications Act Of 1996.**

As demonstrated above, there is no legal basis for the Commission’s action extending the Remedy Plan past October 8. Moreover, to the extent that the Order on Reopening purports to

make the Remedy Plan “available past October 8, 2002, and for the indefinite future” to CLECs “whose legal right to the remedy plan is based on interconnection agreements with Ameritech Illinois” (Supp. R. C 3 & n.1; App. A 98), it is inconsistent with, and preempted by, federal law.

The Commission lacks authority to confer interconnection rights on CLECs – and to impose interconnection burdens on Ameritech Illinois – outside of the exclusive, Congressionally-mandated process set forth in section 252 of the 1996 Act. That process requires negotiation, arbitration (if necessary), approval, and federal court review of the terms and conditions of the parties’ interconnection agreements. Section 252(a)(1) further states that interconnection agreements are the “binding” statements of the parties’ rights and obligations. 47 U.S.C. § 252(a)(1); *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc.*, 128 F. Supp. 2d 1043, 1054 (E.D. Mich. 2001) (“Under the Act, interconnection agreements are binding documents”), *appeal docketed*, No. 01-1312 (6th Cir. argued Sept. 18, 2002). Any attempt to supplement or supplant the terms of a section 252 agreement between Ameritech Illinois and a competitor – as the Order on Reopening does with respect to the availability of the Remedy Plan – must take place pursuant to the procedures established by Congress in section 252.

A recent decision by the United States District Court for the Western District of Wisconsin, *Wisconsin Bell, Inc. v. Bie*, No. 01-C-0690-C, Opinion and Order at 10-18 (W.D. Wis. Sept. 26, 2002) (Sep. App. SA 55), is illustrative. In *Wisconsin Bell*, the Public Service Commission of Wisconsin (“PSCW”) ordered Ameritech Wisconsin to tariff certain UNE combinations. In setting aside the PSCW’s tariffing requirement as preempted by the 1996 Act, the district court noted that, in the Act, “Congress gave sweeping authority to the federal government to regulate telecommunications.” Sep. App. SA 65 (slip op. at 11). The court

further observed that “Congress spoke directly to the issue of gaining access to network elements by enacting § 252, a detailed procedure for reaching agreements for the sale of network elements, services and interconnection.” Sep. App. SA 66 (slip op. at 12). And, the court acknowledged the well established principle that “[e]ven if a state-imposed tariff furthers competition, as the commission’s action seems to do, it may be preempted ‘if it interferes with the *methods* by which the federal statute was designed to reach [its] goal.’” *Id.* (emphasis in original) (citing, *inter alia*, *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88 (1992)).

Applying that principle, the district court concluded that the PSCW’s tariff order interfered with Congress’s prescribed methods because it “requires [Ameritech] to sell certain combinations of network elements using a procedure that allows an entrant to bypass the Telecommunications Act’s provisions for negotiation by opting for the tariff, at least as to the two combinations covered by the decision.” Sep. App. SA 66 (*Wisconsin Bell*, slip op. at 12). The court rejected the PSCW’s reasoning that it could require tariffs for certain services as long as those “services together cannot create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether.” *Id.* As the court explained, although the PSCW “did not impose a tariff requirement that covered all network elements, services or interconnections but limited the requirement to only two network combinations \* \* \* the net effect is the same.” Sep. App. SA 67 (slip op. at 13). In short, the court found that the PSCW’s tariffing requirement “interferes with the incumbent’s ability to invoke the interconnection agreement procedures in situations in which the entrant opts for the state-imposed tariff” and held that the “decision impos[ing] a tariff that the entrant may select

unilaterally in lieu of the interconnection agreement process \* \* \* is inconsistent with § 252 of the Telecommunications Act.” Sep. App. SA 71 (slip op. at 17).

In concluding that “the commission’s tariffing requirement is inconsistent with and preempted by” the 1996 Act (*id.*), the Wisconsin district court relied on the prior holdings of other federal courts, which uniformly have refused to allow carriers or state commissions to circumvent the Congressionally-mandated procedures set forth in section 252 for entering into interconnection rights and obligations. *See, e.g., Verizon North, Inc. v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002) (holding state commission order invalid because it “completely bypasses and ignores the detailed process for interconnection set out by Congress in the [1996 Act], under which competing telecommunications providers can gain access to incumbents’ services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review”); *Michigan Bell*, 128 F. Supp. 2d at 1054-57; *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 (D. Or. 1999). To the extent that the Commission’s Order on Reopening would allow CLECs to avail themselves of the Remedy Plan without regard to the provisions of their interconnection agreements with Ameritech Illinois, and without regard to the interconnection agreement process mandated by the 1996 Act, that action is preempted.

**E. Even If The July 10 Order Could Be Construed As Extending The Duration Of Condition 30, It Too Would Be Unlawful.**

The appellees here argued below that the July 10 Order had already extended the expiration date of the Remedy Plan and that the Order on Reopening merely followed suit. But while the Order on Reopening purports to enforce the July 10 Order, it in fact does not do so. After all, the July 10 Order declared that “[t]he only conclusion that can be reached is that

Condition 30, and consequently the Remedy Plan, expires in three years” (C 2925; App. A 23), a conclusion that the Order on Reopening simply ignored when it stated that the July 10 Order “did not provide for any sunset or automatic termination for that tariffed remedy plan.” Supp. R. C 3; App. A 98. It would be difficult to draw a more clear conflict than that.

But there is no need for the Court to decide which order was the first to take the improper step of extending the duration of Condition 30 and the Remedy Plan, because both orders are before this Court. Even assuming for the sake of argument that the July 10 Order did extend the Remedy Plan, and that the October 1 Order on Reopening simply enforced the July 10 Order, that just means that *both* orders are invalid, and that the Court has *more* grounds to reverse the July 10 Order (over and above the grounds presented in Sections II and III below, which address that Order’s modifications to the substantive mechanisms of the Remedy Plan).

First, the appellees’ reading of the July 10 Order would make it invalid as an arbitrary and capricious departure from the 1999 *Merger Order* setting October 8, 2002 as the expiration date for Condition 30. The July 10 Order provided no basis for such a departure: To the contrary, it expressly held that “no party has given us a legal basis for extending the deadlines included in the *Merger Order*” and that “[t]he only conclusion that can be reached is that Condition 30, and consequently the Remedy Plan, expires in three years.” C 2925; App. A 23. The Commission did not provide any basis for extending the remedy plan under any other legal authority,<sup>5</sup> and in any event the Commission’s proceedings were conducted “pursuant to

---

<sup>5</sup> The only other legal authority even mentioned by the Commission was section 271 of the federal Telecommunications Act of 1996, which states the requirements a Bell Operating Company must fulfill in order to obtain permission from the Federal Communications Commission to provide certain long-distance services. The Commission did not, however, state that section 271 gave it authority to impose a remedy plan; to the contrary, the July 10 Order

(cont’d)

Condition (30) of the SBC/Ameritech Merger Order,” not pursuant to some other body of law. Thus, the appellees’ theory means that at the culmination of a docket conducted pursuant to Condition 30 of the *Merger Order*, the Commission changed horses and made the momentous decision to impose a substantial requirement upon Ameritech Illinois under some other body of law without actually saying so, without identifying the legal basis for such a requirement, and without providing any reasoning or explanation for that requirement.

Second, as shown in Section I.C above, the Commission was estopped from extending the three-year term for Condition 30 set forth in the 1999 *Merger Order* once Ameritech Illinois accepted and implemented the condition. That time had passed long before July of 2002. It does not matter whether the Commission first tried to alter the condition in July 2002 or October 2002; the important point is that it did try to alter the condition, long after it had been accepted and implemented.

Third, as shown in Section I.D above, the federal 1996 Act precluded the Commission from allowing CLECs to avail themselves of the Remedy Plan without regard to the provisions of their interconnection agreements with Ameritech Illinois. It matters not whether the Commission first tried to take this action in July 2002 or October 2002 (although the latter order is the only one that specifically states that the Remedy Plan would automatically be available beyond October 8, 2002 to CLECs with interconnection agreements). The 1996 Act, and its process of negotiation and arbitration, were in place long before either date.

#### **VIII. THE COMMISSION’S UNSUPPORTED DOUBLING OF LIQUIDATED DAMAGE AND ASSESSMENT AMOUNTS IS ARBITRARY AND CAPRICIOUS**

---

(... cont’d)

acknowledges that section 271 did *not* provide such authority, because the Commission’s role under section 271 is strictly to advise the FCC. C 2925; App. A 23.

A. **Background.**

In addition to its improper attempt to nullify the termination date of the Remedy Plan, the Commission ordered Ameritech Illinois to make several modifications to the Plan's substantive terms for assessing and calculating automatic remedies. Ameritech Illinois challenges two of these modifications here. The first challenge relates to the *amount* of remedies to be assessed; the second issue (relating to *when* remedies are to be assessed) is discussed in Section III below.

The Remedy Plan divides performance measures and the associated remedies into two tiers. C 844. For "Tier 1" measures, Ameritech Illinois calculates its performance with respect to each individual CLEC that has adopted the Plan, using a statistical test described in Section III below. To the extent performance for any given CLEC falls short under this statistical methodology, the Plan calls for Ameritech Illinois to pay "liquidated damages" to that CLEC. *Id.* For "Tier 2" measures, Ameritech Illinois calculates its performance with respect to all CLECs in the aggregate; to the extent its performance falls short, the Plan requires Ameritech Illinois to pay "assessments" to the State Treasury. *Id.*

Under each tier, most remedies are assessed by multiplying a "base" amount by the number of "occurrences": that is, the number of individual transactions that caused Ameritech Illinois to "miss" the applicable performance standard. C 844-845. The base amount increases with the measure's priority, designated as "High," "Medium," or "Low." C 847-848. The base amount also increases with the duration of the shortfall – that is, if Ameritech Illinois missed the same performance measure for that CLEC in the previous month or months. C 847. Section 8.2 of the Remedy Plan contains a table that lays out the base amounts for each priority and for duration of disparity.

To illustrate, assume that Ameritech Illinois missed the standard for Performance Measure 58, which calculates the percentage of missed due dates on installations of "loops," a

facility that Ameritech Illinois provides to competitors for use in providing local phone service. Assume further that Ameritech Illinois missed 17 more due dates than was allowed by the applicable performance standard; thus, there were 17 “occurrences” of substandard performance. Finally, assume that this is the first month of disparity – that is, that Ameritech Illinois passed the test for this measure in the preceding month.

The critical step is to determine the “base” remedy amount to be paid for each of the 17 occurrences. Under the original Remedy Plan (that is, prior to the modifications imposed by the Commission’s July 10 Order), one would turn to the “Liquidated Damages Table” that appears at page 10 of the Plan (C 880). Performance Measure 58 is a “high” priority measure, so one would choose the row on the Table marked “High.” Because this was the first month of disparity, one would then choose the column marked “Month 1.” The base amount for a high priority measure in Month 1 is \$150. Thus, the original Remedy Plan would take the 17 occurrences and multiply them by the base amount of \$150, for a payment of \$2,550. C 847.

The July 10 Order retained this basic methodology, and even kept the table – but it doubled all the “base” payment amounts. C 2942-43; App. A 40-A 41. To continue the illustration above, the amount of remedies for Performance Measure 58 would take the same 17 occurrences but multiply them by a new base amount of \$300 (twice the original base amount of \$150), for a payment of \$5,100.

## **B. Discussion.**

The basis for Ameritech Illinois’ appeal here is straightforward: The Commission’s doubling of “remedies” is arbitrary and does not have evidentiary support. Indeed, the July 10 Order itself acknowledged the lack of evidence to support the multipliers.

### **1. Tier 1 Liquidated Damages**

The Commission's 1999 *Merger Order* established clear principles for calculating remedies. With respect to Tier 1 payments to CLECs, the *Merger Order* repeatedly, and quite properly, referred to such payments as liquidated damages. Sep. App. SA 6-7, 11, 15, 17, 19, 21, 22. It is a well-established principle of law that a liquidated damages provision must not be penal, but must instead be a reasonable forecast of, or just compensation for, the harm that is caused by a breach. *Bauer v. Sawyer*, 8 Ill. 2d 351, 359, 134 N.E.2d 329, 333 (1956). Similarly, the *Merger Order* states the Commission's intent was not to "penalize the Company." Sep. App. SA 22.

The July 10 Order correctly acknowledged that there was no evidence or even a contention that doubling the remedy amounts would bear any relation to the damages they are supposed to compensate – indeed, the July 10 Order found that "[t]he CLECs admit that no attempt has been made to calculate the amount necessary to compensate them adequately for poor performance," and chastised the CLECs for not providing a "sketchy outline" of damages. C 2941-42; App. A 39-A 40. Notwithstanding the acknowledged lack of evidence, the July 10 Order directed that Tier 1 payments be doubled. The Order made no attempt to reconcile its holding with the law of liquidated damages – notwithstanding the *Merger Order's* repeated invocation of the term. Quite the contrary: The July 10 Order dismissed the concept of liquidated damages as a "misnomer" (C 2942; App. A 37) and whitewashed those words from the Plan, replacing them with the word "payments." Changing the standards set by the *Merger Order* – and leaving in their place a vanilla term like "payments" that sets *no* standards – does not cure the lack of evidence, but simply highlights it.

The July 10 Order thus does not support its finding with evidence that fits the governing legal standard, but instead seeks to disavow any standard. That is contrary both to fundamental

principles of agency decision-making and to the *Merger Order*, which states that “[t]he participant proposing the addition, deletion, or change” to the original remedy plan “retains the burden of proving that such addition, deletion, or change should be adopted in Illinois.” Sep. App. SA 51.

Moreover, by attempting to delete the rules of liquidated damages that were incorporated by the *Merger Order*, the July 10 Order is also invalid as an improper post hoc alteration of the *Merger Order*. The *Merger Order* refers to Tier 1 payments as “liquidated damages” not once, not twice, but over 30 times. See Sep. App. SA 6-7, 11, 13, 15, 17, 18, 19, 21, 22, 47. Those references were not a “misnomer” but intentional. They reflect the *Merger Order*’s underlying philosophy “not to penalize the company.” Sep. App. SA 22. The reference to liquidated damages also squares with the fact that the relationship between CLECs and Ameritech Illinois is a contractual one, as a CLEC receives services pursuant to an interconnection agreement.

## 2. Tier 2 Assessments.

The July 10 Order’s analysis of Tier 2 payments to the State is equally erroneous. The Order simply ignores the question whether doubling Tier 2 payments would make them “regulatory fines or forfeitures.” But that is the controlling question. Fines and forfeitures are compulsory payments imposed by the government “as punishment for some offense.” *United States v. Bajakajian*, 524 U.S. 321, 327 (1998); see also *People v. 1991 Chevrolet Camaro, VIN 1GFP23E9ML117842*, 251 Ill. App. 3d 382, 388, 620 N.E.2d 563, 567 (2d Dist. 1993) (“[F]orfeitures comprise a type of punishment”). Tier 2 payments under the Remedy Plan are not compulsory, but the result of an obligation that Ameritech Illinois voluntarily undertook as a condition of merger approval. They are not assessed because of an offense; to the contrary, the Remedy Plan expressly states that Ameritech Illinois’ performance under the plan is not “an admission of liability or culpability for a violation of any state or federal law or regulation.” C

2966; App. A 64; C 875. And Tier 2 payments are not “punishment,” as the merger agreement that formed the backbone of the Commission’s proceeding expressly disclaimed any intent to “penalize the Company.” Sep. App. SA 22. As with Tier 1 payments, then, the Commission effectively demonstrated its departure from the *Merger Order*’s standards by disavowing them.

A similar detour from remedial to punitive principles was found invalid in *Wisconsin Bell, Inc. v. Public Service Comm’n of Wisconsin*, Case No. 01-CCV-011200 (July 31, 2002) (Sep. App. SA 73) (“*Wisconsin Remedy Plan Decision*”). There, as here, the Public Service Commission of Wisconsin (“PSCW”) ordered Ameritech Wisconsin to implement a remedy plan that was substantially different from the Texas model. There, as here, the PSCW ordered Ameritech Wisconsin to substantially increase remedy payments, without any evidence tying its directives to any measure of damage or reasonable compensation.<sup>6</sup> As here, the state commission’s authority was limited to remedial as opposed to punitive measures: here, the limitation was mandated by the *Merger Order*, while in Wisconsin the limitation comes from statute. Sep. App. SA 93 (slip op. at 21) (holding that “the Commission is authorized to pursue remedial relief but cannot impose a penalty”).

The court concluded that the PSCW exceeded its authority in imposing the plan. As it reasoned, “[t]here is no evidence in the record that reflects that the Commission attempted to estimate the damages caused by Ameritech not complying with the plan.” Sep. App. SA 89 (slip op. at 17). Rather, “[t]he entire focus was upon a monetary inducement to comply with the plan, not damages arising from noncompliance.” *Id.* As a result, the Court held that the commission’s

---

<sup>6</sup> The Wisconsin commission also ordered Wisconsin Bell to eliminate the “K” table (a statistical tool described in Section III below) just as the Commission did here.

decision “imposes a penalty upon Ameritech for failing to comply with the plan’s specifications.” Sep. App. SA 90 (slip op. at 18).

The same reasoning applies here. As in the *Wisconsin Remedy Plan Decision*, there is no record to support the doubling of remedy amounts, and “[t]here is no evidence in the record that reflects that the Commission attempted to estimate the damages caused by Ameritech not complying with the plan.” Sep. App. SA 89 (slip op. at 17). Rather, “[t]he entire focus was upon a monetary inducement to comply with the plan, not damages arising from noncompliance.” *Id.* As a result, the Commission’s decision “imposes a penalty” that is directly contrary to the remedial principles underlying the *Merger Order* and inherent in the term “remedy plan.”

**IX. THE COMMISSION ERRED IN DELETING THE “K TABLE,” WHICH WAS DESIGNED TO PREVENT THE IMPOSITION OF REMEDIES BASED SOLELY ON RANDOM VARIATION.**

**A. Background.**

In addition to modifying the method for calculating the amount of remedies, the Commission fundamentally and improperly changed the method for determining when remedies should be assessed. The central problem in this regard is to ensure that remedies are assessed for real shortfalls in performance, rather than the random variation that is part of everyday life.

C 892. On average, we expect a perfectly fair coin flip will come up heads 50 percent of the time and tails the other 50 percent, but the individual flips generally do not go “heads, tails, heads, tails, heads, tails.” Thus, flipping a fair coin 50 times does not usually yield exactly 25 heads and 25 tails (in fact, the probability of that result is only 11 percent). C 914.

The same variation affects wholesale and retail performance. In a given month, Ameritech Illinois might install a certain type of service in 3 days on average. Not every such installation, however, will take exactly three days. Some installations will take a little less than

three days, others a little more – not because of any wrongdoing or discrimination by Ameritech Illinois or anyone else, but because of slight differences in random factors like weather (*i.e.* the repair work might take longer in cold or rain) or traffic (*i.e.* it might take a few minutes longer for the technician to arrive at the site due to the timing of traffic lights), or other differences in the work, such as the nature of the installation required. *See* C 894. So if one were to look at the time for a single installation, or compute the average for a sample of installations taken from the total, it would likely be somewhat different from the overall average. *Id.* Thus, even if wholesale transactions follow the exact same process, through the exact same systems, and receive the same level of attention and effort from Ameritech Illinois as their retail counterparts, the time required for any one order or group of orders (wholesale or retail) is likely to be different. *Id.* As the FCC has acknowledged:

We note that random variation is inherent in the incumbent LEC's process of providing interconnection and access to unbundled network elements. Our concern is primarily that the process that the incumbent LEC employs be nondiscriminatory. Thus, the incumbent LEC could have a provisioning process that is identical in its ability to provide the same function to retail customers and to competitive LECs, but because of random factors outside the control of the BOC, the average completed interval could vary for retail customers and competitive LECs from month to month, such that for one particular month, the metric for competitors would show a longer average interval than would the metric for Bell Atlantic's retail customers. Thus, metric results showing weaker performance to competitors could be due to random variation in the measures, even though the process is inherently nondiscriminatory.

*In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 F.C.C. Rcd. 75, App. B, ¶ 2 (Dec. 27, 1999) (“*New York 271 Order*”: Sep. App. SA 100).

Over the long run, one would expect these differences to even out, but remedies are assessed on subsets of performance data (for a given CLEC, in a given month) and they go only one way (to the CLECs); Ameritech Illinois does not receive a remedy or even a credit if wholesale performance is *better* than the standard. C 1083.

Statistical analysis provides a scientific method for analyzing the many thousands of monthly performance results to assess whether they show some real disparity in performance, as opposed to mere random variation. C 892-893. In the FCC's words, "the use of statistical analysis to take into account random variation in the [performance] metrics is desirable" and "[s]tatistical tests can be used as a tool in determining whether a difference in the measured values of two metrics means that the metrics probably measure two different processes, or instead that the two measurements are likely to have been produced by the same process." Sep. App. SA 100-SA 101 (*New York 271 Order*, App. B, ¶¶ 2-3).

The two basic principles underlying the original Remedy Plan are common sense:

1. It is more likely that there is an underlying disparity if there is a large gap between wholesale performance and the applicable standard than if there is a small difference. C 896-897. If retail performance is three days, one would be more confident that there is a true disparity if wholesale performance is 30 days than if wholesale performance is 3.0000000001 days.

2. It is more likely that there is an underlying disparity if a large number of performance tests show a significant shortfall, rather than a scattered few. C 897. If there are 6,000 performance tests a month, one would be more confident that there is some disparity if there are 5,999 apparent failures than if there is only one.

Statistical science is the method by which one applies these two common-sense principles to performance results and decides whether the number and size of differences are large enough to warrant a remedy. C 899. Under the original Remedy Plan, Ameritech Illinois would look at each individual performance test, measure the size of the difference between wholesale performance and the applicable standard (using a common measure known as a “z-statistic”), and compare that difference to a “critical value.” The “critical value” was set so that if the difference between wholesale and retail performance was higher than that value, one would have 95 percent “confidence” that there is some underlying disparity. C 897. Conversely, each individual test had a 5 percent risk of “false failure” or “Type I error” – in other words, on average 5 percent of the tests would show a disparity in performance results even if wholesale and retail processes were identical.

Because the individual tests had a 5 percent rate of “false alarms” built in, the original Remedy Plan took a second step that considered all the performance tests for that CLEC in the aggregate. Under the original plan, Ameritech Illinois would take the number of individual tests where the “z” value exceeded the critical value, and compare that number of tests to a threshold known as “K.” C 897-898, C 908-909.

The “critical” value of  $z$  and the threshold value of  $K$  were determined from the number of performance tests for a given CLEC in a given month, using the laws of probability and standard statistical equations. Section 9.3 of the original Remedy Plan (C 881) contained a table showing the specified values for  $z$  and  $K$  for the various possible numbers of performance tests. The table itself (which became known as the “K table”) was developed by AT&T (also a party to the proceedings below), which correctly recognized the risk of a large number of errors if multiple tests are performed. AT&T proposed the use of a K table in an FCC proceeding on

performance measurement, and as AT&T's Dr. Mallows pointed out at the time, "[i]f we apply a large number, several hundred perhaps, of tests of individual performance measurement comparisons, each test having a Type I error rate of 5%, then we would expect, on average, about 5% of these tests to indicate non-compliance even when the ILEC is actually fully in compliance." C 975. Similarly, at the hearing before the Commission WorldCom's Dr. Jackson correctly saw the same issue (ICC Tr. 193):

Let's suppose we undertake a hundred trials. We do a hundred tests of those submeasures . . . . If Ameritech provided service that was in complete parity to all 100 submeasures, the question arises how many of those submeasures do we think would be rejected in the statistical test simply by chance. That's the question that relates to random variation.

The "K table" is the solution that statistical science uses to hold the risk of Type I error at the desired level, here 5 percent. As AT&T's Dr. Mallows stated, "[w]e need to derive some threshold number of failed parity tests such that if more than this number are observed to fail, then non-compliance can be deduced." C 975-976. The value of K for any given number of tests conducted, was calculated to determine the "threshold number of tests . . . in such a way as to control the probability of an overall, or aggregate, Type I error at 5%." *Id.* At the hearing, WorldCom's Dr. Jackson echoed AT&T's analysis (ICC Tr. 193-94):

What the K table does is it gives us a number, K, that says we could expect . . . no more than eight [of 100] statistical tests could be rejected with a 95 percent probability of being correct. In other words, we could reject all eight physical tests and still possibly be in and be 95 percent sure we were in parity. If we reject more than that, we would be at least 95 percent sure that parity service wasn't being provided.

The original Remedy Plan applied the K table in a straightforward manner. Given the large number of performance tests that are conducted each month, one would expect a large number of these tests "to indicate non-compliance even when the ILEC is actually fully in

compliance.” C 975. The Remedy Plan did not assess remedies on the first “K” apparent failures. Remedies were instead assessed only on shortfalls after the K threshold is reached.

The Commission retained the first step in the Plan’s statistical methodology (the individual statistical “z” tests), but stopped in midstream. It ordered Ameritech Illinois to delete the “K” table for analyzing results in the aggregate. C 2929; App. A 27.

## **B. Discussion**

The key to this issue is that the Court not lose sight of the straightforward – and indisputable – reasons that the K table exists and must be retained. The objective of the Remedy Plan was to encourage Ameritech Illinois to strive for “compliance with the Commission’s order.” Sep. App. SA 22. If Ameritech Illinois *does* reach perfect parity, but the K table is removed as the Commission ordered, the Remedy Plan would assess hundreds of erroneous remedies every month based solely on random variation – due to the large number of performance tests and the built-in 5 percent Type I error rate. C 1101-1102, C1111-1112. It goes without saying that the goal should be to reward full compliance, not punish it.

Granted, the day of perfect parity has not yet arrived – although Ameritech Illinois made strides in improved performance. C 1078-1079; ICC Tr. 370. But the solution to that is the one the Remedy Plan already employed – to levy a remedy on those test failures that exceed K, and to hold out the carrot that remedies will be reduced to near zero when perfect parity does arrive. Elimination of that step would assure that the arrival of perfect parity will lead only to continued payment of unwarranted penalties – hardly the proper incentive and hardly consistent with the *Merger Order’s* non-punitive principles.

The main basis for the Commission’s deletion of the K table is that the CLECs would receive more money without it. The July 10 Order (C 2929; App. A 27) describes the table as a “forgiveness factor” that reduces the amount of remedies paid. But the question here is not

whether elimination of the K table would mean more money in remedies; the question is whether the additional remedies would be warranted. The July 10 Order implicitly assumes that Ameritech Illinois has performed poorly (and the CLECs deserve a remedy), whenever the first-stage (individual measure) statistical test is not passed. Under that view, any reduction in remedies would be a “forgiveness.” The problem is that the individual statistical tests are not always right when they indicate poor performance: in fact, they are designed to achieve only 95 percent confidence, so on average they will indicate “failure” based solely on random error 5 percent of the time even where no real performance failure has occurred. The K table does not “forgive” remedies that are otherwise warranted; it prevents the imposition of remedies that are not warranted. CLECs do not *deserve* erroneous remedies in the first place, and the fact that Ameritech Illinois does not have to pay such erroneous remedies under the existing Plan means only that the Plan more accurately reflects actual performance (rather than random variation).

### **CONCLUSION**

For the reasons set forth above, Ameritech Illinois respectfully requests that the Court reverse the Commission’s July 10, 2002 Order and October 1, 2002 Order on Reopening in ICC Docket No. 01-0120.

DATED: January 30, 2003

AMERITECH ILLINOIS

By: \_\_\_\_\_  
One of its attorneys

Theodore A. Livingston  
John E. Muench  
Demetrios G. Metropoulos  
Mayer, Brown, Rowe & Maw  
190 South LaSalle Street  
Chicago, Illinois 60603  
(312) 782-0600

April J. Rodewald  
Nancy J. Hertel  
Ameritech Corporation  
225 West Randolph Street  
Chicago, Illinois 60606  
(312) 727-2727

**TABLE OF CONTENTS OF THE APPENDIX**

1. Final Order of the Illinois Commerce Commission (July 10, 2002) .....A 1

2. Amendatory Order (July 24, 2002) .....A 77

3. Certificate of Commission Action (August 27, 2002).....A 79

4. Petition for Review .....A 82

5. Notice of Appeal.....A 89

6. Order on Reopening (October 1, 2002) .....A 96

7. Certificate of Commission Action (November 20, 2002).....A 101

8. Petition for Review .....A 104

9. Notice of Appeal.....A 110

10. Table of Contents of the Record on Appeal.....A 116

**CERTIFICATE OF MAILING**

I, Demetrios G. Metropoulos, an attorney, hereby certify that I caused the original and nine copies of the Brief of Petitioner to be sent via U.S. Express Mail overnight delivery on January 30, 2003 addressed to:

Gist Fleshman  
Clerk of the Court  
Appellate Court of Illinois  
Third District  
1004 Columbus Street  
Ottawa, Illinois 61350

I also caused three copies of the Brief of Petitioner to be deposited in the mail, postage prepaid, at 190 South LaSalle Street, Chicago, Illinois, 60603, before 5:00 p.m. on January 30, 2003, addressed to each person listed on the attached service list.

\_\_\_\_\_  
Demetrios G. Metropoulos