

POINTS AND AUTHORITIES

	<u>PAGE</u>
INTRODUCTION	1
ARGUMENT	2
I. THE COMMISSION LACKED AUTHORITY TO UNILATERALLY EXTEND THE TERM OF THE MERGER CONDITION.....	2
A. The Commission Correctly Acknowledges That The Remedy Plan Expired On October 8, 2002, But Its Order Incorrectly Refused To Abide By That Principle.....	2
B. The CLECs’ Claim That The Remedy Plan Did Not Expire On October 8, 2002 Is Without Merit.....	5
C. The Commission’s Issuance Of Another Order Purporting To Extend The Duration Of The Remedy Plan Does Not Moot Ameritech Illinois’ Appeal.	7
<i>County of Los Angeles v. Dais</i> , 440 U.S. 625 (1979)	8
<i>Independent Coin Payphone Ass’n v. Illinois Commerce Comm’n</i> , 170 Ill. App. 3d 958, 524 N.E.2d 980 (1 st Dist. 1988).....	8
<i>Brown v. Murphy</i> , 278 Ill. App. 3d 981, 664 N.E.2d 186 (1 st Dist. 1996).....	9
<i>In re Scaria</i> , 21 Ill. App. 3d 889, 316 N.E.2d 153 (1st Dist. 1974).....	9
<i>Celtronix Telemetry, Inc. v. Federal Communications Comm’n</i> , 272 F.3d 585 (D.C. Cir. 2001)	9
D. The Order On Reopening Impermissibly Conflicts With The Process Of Negotiation And Arbitration Established By The Federal Telecommunications Act Of 1996.....	10
<i>Pacific Bell v. Pac-West Telecomm.</i> , No. 01-17161, 2003 WL 1792957 (9th Cir. Apr. 7, 2003)	10, 15-16
<i>Indiana Bell Tel. Co. v. Indiana Utility Regulatory Comm’n.</i> , No. 1:02-CV-1772-LJM-WTL (S.D. Ind. Mar. 11, 2003)	10-14
<i>Verizon North, Inc. v. Strand</i> , 309 F.3d 935 (6th Cir. 2002)	11, 15
<i>MCI Telecomms. Corp. v. GTE Northwest, Inc.</i> , 41 F. Supp. 2d 1157 (D. Or. 1999)	11

POINTS AND AUTHORITIES
(cont'd)

PAGE

47 U.S.C. §251(d)(3)	12
47 U.S.C. §261	12
47 U.S.C. §252(e)(3).....	12
<i>Geier v. American Honda Motor Co.</i> , 529 U.S. 861 (2002).....	12
<i>Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge</i> , 403 U.S. 274 (1971).....	13
<i>Crosby v. National Foreign Trade Council</i> , 530 U.S. 363 (2000)	13
<i>Wisconsin Bell, Inc. v. Bie</i> , No. 01-C-0690-C, Opinion and Order (W.D. Wis. Sept. 26, 2002)	13-14
<i>Michigan Bell Tel. Co. v. MCImetro Access Transmission Servs.</i> , 2003 WL 909978 (6th Cir. Mar. 10, 2003)	14
<i>Darrah v. City of Oak Park</i> , 255 F.3d 301 (6th Cir. 2001)	15
II. THE COMMISSION'S UNSUPPORTED DOUBLING OF LIQUIDATED DAMAGE AND ASSESSMENT AMOUNTS IS ARBITRARY AND CAPRICIOUS.	16
<i>In re Joint Application by SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Kansas & Oklahoma</i> , 16 F.C.C. Rcd. 6237 (2001).....	16
<i>Wallace v. Prudential Ins. Co. of America</i> , 12 Ill. App. 3d 623, 299 N.E.2d 344 (5th Dist. 1973)	17
III. THE COMMISSION ERRED IN DELETING THE "K TABLE," WHICH WAS DESIGNED TO PREVENT THE IMPOSITION OF REMEDIES BASED SOLELY ON RANDOM VARIATION	18
CONCLUSION.....	20

INTRODUCTION

In the orders under review, the Illinois Commerce Commission (“Commission”) addressed a “remedy plan” of automatic payments to be made by Ameritech Illinois to competing local exchange carriers (“CLECs”) and to the State in the event Ameritech Illinois did not meet specified “performance standards.” The plan was established as Condition 30 of its approval of the SBC/Ameritech merger in 1999. The principal issue on appeal relates to the duration of that plan. In its opening brief, Ameritech Illinois demonstrated that Condition 30 and the associated remedy plan expired on October 8, 2002, and that the Commission acted improperly when it attempted to extend the duration of the remedy plan beyond its term.

The Commission acknowledges that the Plan should indeed have expired on October 8, 2002, and recognizes that it had no authority to extend the term of the Plan. Thus, its brief constructs the theory that the Commission did not extend the term of the Remedy Plan at all. This is certainly news to Ameritech Illinois, which tried to terminate the Plan only to hear the Commission reject its efforts, force it to file a new tariff with no expiration date, and say that the Remedy Plan “will apply after October 8, 2002” even for CLECs whose participation in the plan was not by tariff but by interconnection agreement. As shown below, the pretense advanced by the Commission’s brief finds no support in the Commission’s actions, and it is the Commission’s actions – not its *post hoc* exercise in denial – that are under review. *See* Section I.A. *infra*.

The CLECs, meanwhile, take the exact opposite approach. They acknowledge what Ameritech Illinois has shown and what a straightforward review of the proceedings compels – that the Commission did indeed order Ameritech Illinois to extend the term of the Plan. Their argument is that the extension was lawful, but they fail to provide a legal basis for such an

extension. The CLECs' failure should come as no surprise, as even the Commission does not contend there is a legal basis for such an extension. *See* Section I.B *infra*.

The Commission's modifications to the substantive provisions of the Remedy Plan are as baseless as its attempt to extend the Plan's duration. Here, too, the Appellees try to recast the Commission's orders, contending that the appeal concerns complex issues of disputed fact. In reality, however, this appeal concerns two pure questions of law, based on undisputed fact: (1) whether "remedy" payments should be required without *any* evidence or estimate of damage (Section II *infra*), and (2) whether such payments should be required where there has been complete *compliance* with the Commission's merger order (Section III *infra*). On both issues, the answer is no, and the Commission's orders should be reversed.

ARGUMENT

IV. THE COMMISSION LACKED AUTHORITY TO UNILATERALLY EXTEND THE TERM OF THE MERGER CONDITION.

A. The Commission Correctly Acknowledges That The Remedy Plan Expired On October 8, 2002, But Its Order Incorrectly Refused To Abide By That Principle.

The Commission's 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. Ameritech Illinois demonstrated that the order did not "specifically establish[]" a termination date other than the general three-year term. Ameritech Br. Section I. Thus, pursuant to the plain language of the *Merger Order* (Sep. App. SA 30), the Plan was to "cease to be effective and [would] no longer be binding in any respect three years after the Merger Closing Date," that is, on October 8, 2002. In its July 10 Order, the Commission agreed – in fact, it said Ameritech Illinois' conclusion was the "only conclusion that can be reached" from reading the merger

order. App. A 23. And in its brief here, the Commission again agrees (at 11) that “the Company was no longer obligated under the terms of the Merger Order to adhere to the Remedy Plan, but, rather, could terminate it at its discretion.”

The problem, however, is what happened in between the Commission’s July 2002 order and its April 2003 brief. Ameritech Illinois tried to “terminate [the ‘Remedy Plan’] at its discretion,” just as the Commission suggests, and it filed a tariff in August 2002 stating that the Plan would cease on October 8. App. A 97. But at the time, the Commission did not adhere to its view that “the Company was no longer obligated . . . to adhere to the Remedy Plan.” Instead, the Commission re-opened the docket, ordered Ameritech Illinois to file a new tariff without a termination date, and said that its July 10 Order “did not provide for any sunset or automatic termination for that tariffed remedy plan.” App. A 98.

How does the Commission try to square its action then (the extension of the Remedy Plan’s term in October 2002) with its words now (that the Remedy Plan expired in October 2002)? Plainly, there is no way to reconcile them in substance, and the Commission makes no attempt to do so. Rather, in its brief, the Commission suggests that, instead of filing one tariff that said “this tariff expires on October 8, 2002,” Ameritech Illinois should have filed two tariffs: (a) a tariff without any expiration date, followed by (b) a tariff filing on or after October 8, 2002, saying “the Plan has expired.”

The “two tariff” theory in the Commission’s brief breaks down because it does not reflect what the Commission actually did. The Commission did not articulate the “two tariff” theory at *any* time during the proceedings below, much less in the October 1, 2002 Order on Reopening that purported to extend the term of the Remedy Plan. If it had, Ameritech Illinois would likely have filed the second tariff, the plan would no longer have been in effect and this appeal might

not have been necessary. But instead, the Order on Reopening said that Ameritech Illinois' tariff filing – which, in substance, complied with the Commission's agreement that the plan expired on October 8, 2002 – was in “material non-compliance” with the Commission's July 10 order. App. A 99. It said that the Commission “has no concerns” that the Remedy Plan it imposed “will apply after October 8, 2002.” App. A 98. Further, the Commission did *not* limit its edict to Ameritech Illinois' tariff – the only subject that would be addressed by an order propounding a two-tariff format. Rather, the Commission also extended the duration of the plan for those carriers who did not use the tariff but had adopted the Remedy Plan by contract. *See* Section I.D *infra*.

Even with respect to tariffing, the Commission told Ameritech Illinois to file a Remedy Plan tariff “in compliance with this Order on Reopening” (that is, without an expiration date) *on October 8, 2002* – the very day that the Commission now says that Ameritech Illinois was entitled to file a tariff *withdrawing the plan entirely*. *See* App. A 100 (ordering Ameritech Illinois to submit tariff “no later than seven days after the date of this [October 1] Order on Reopening”). In other words, the Commission's two-tariff theory means that the Commission ordered Ameritech Illinois to file a tariff without an expiration date on October 8, 2002, but then – without saying so – authorized Ameritech Illinois to turn around and file a second, nullifying tariff immediately thereafter. Thus, the Commission's suggestion (at 9) that *Ameritech Illinois* is somehow responsible for the continuation of a Plan that the *Commission* ordered – despite the fact that the Commission expressly rebuffed Ameritech Illinois' effort to terminate the Plan – boils down to the view that Ameritech Illinois should not have taken seriously the express mandates of the Commission's order, but instead should have discerned and then acted upon the Commission's unspoken invitation to withdraw the Plan.

At any rate, the events that *did* transpire after the Order on Reopening belie the Commission's two-tariff theory. Ameritech Illinois petitioned the Commission for rehearing. Instead of telling Ameritech Illinois that it was free to withdraw the Plan – a straightforward course that would have obviated these petitions – the Commission denied rehearing without explanation, and thus without articulating its two-tariff theory. App. A 101. And in addition, as the Appellees' briefs make clear, the Commission issued another order on December 30, 2002, in which it again ordered that the term of the Remedy Plan be extended – months after the date the Commission now acknowledges Ameritech Illinois was “no longer obligated” to adhere to the Plan.¹

The disconnect between the “two-tariff theory” of the Commission's brief and the actual Commission action it attempts to defend is in part a function of the improper procedure by which the Commission acted. As Ameritech Illinois showed in its opening brief, the Commission entered the October 1, 2002 Order on Reopening immediately after receiving a memorandum from its staff, without giving Ameritech Illinois prior notice or an opportunity for hearing. Had the Commission followed those procedures – as the mandate of Section 10-113(a) of the Public Utilities Act and the dictates of due process required it to do – it might very well have informed Ameritech Illinois of the two-tariff theory. It did not, and it is improper for the Commission to defend an after-the-fact reconstruction rather than its actual orders.

B. The CLECs' Claim That The Remedy Plan Did Not Expire On October 8, 2002 Is Without Merit.

The CLECs, meanwhile, take a diametrically different approach from that of the Commission. They acknowledge that the Commission really did extend the term of the Remedy

¹ The CLECs contend that the December 30 order moots Ameritech Illinois' appeal from the Commission's prior orders. As shown in Section I.D *infra*, the CLECs' theory lacks merit.

Plan. Their contention is that the extension was justified, under the guise of some “Illinois law” other than the merger order. In effect, they contend that after evidence and briefing were complete the Commission transformed a docket that had expressly been established for purposes of carrying out the merger order into a docket on some amorphous other body of law.

It is curious that the CLECs would take such a position here. Certainly, they *asked* the Commission to extend the term of the Remedy Plan indefinitely, but the conclusive rejoinder to that view comes from the Commission itself. The Commission rejected the CLECs’ view in the 1999 *Merger Order* (Ameritech Br. at 6), rejected it again in the July 2002 order under review (App. A 23), denied the CLECs’ application for rehearing of that order (App. A 79), and does not accept the CLECs’ revisionism now. The Commission here admits that the Remedy Plan did expire on October 8, 2002. And its July 10 order expressly – and rightly – held that “no party has given us a legal basis for extending the deadlines included in the Merger Order” (C 2925; App. A 23). The CLECs are simply taking an argument the Commission rejected below, and attempting to use that argument to rationalize the Commission’s actions after the fact.² The CLECs’ only reference to “Illinois law” is a citation to the statute on tariff procedure, and as shown in the preceding section the substance of the Commission’s action is not justified as a matter of tariff procedure.

² The Commission’s admission here also refutes the CLEC view (at 2) that the *Merger Order*’s mere reference to “Illinois law” in 1999 somehow extended the term of the Remedy Plan beyond the three-year expiration of the merger conditions. Plainly, the generic reference to Illinois law does not nullify the *Merger Order*’s specific language regarding the term of the Plan. The *Merger Order* expressly stated that the three-year term controlled all merger conditions unless another term was “specifically established,” and thereby precludes the CLECs’ attempt to manufacture an extension based on Delphic inference.

The rest of the CLECs' argument is devoted to a red herring: whether the Commission first decided to extend the term of the Remedy Plan in the July 10, 2002 Order or in the October 1, 2002 Order on Reopening. As Ameritech Illinois showed in its opening brief (at 21-23), the question has no ultimate significance to this appeal, because *both* orders have been appealed and both are before this Court in this consolidated appeal. Extending the term of the Condition 30 Plan was unlawful, irrespective of which date the Commission first ordered the extension and which order or orders should be reversed as a housekeeping matter. Nevertheless, Ameritech Illinois showed that the October 1 Order was the one that actually sought to extend the Plan's term – and to confirm that point, the Court need look no further than the Commission's own emphatic agreement (at 20) that “**The July 10 Order Did Not Extend The Duration Of Condition 30**” (emphasis in original) coupled with the CLECs' own urging (at 17) that the Court defer to the Commission's interpretation of its own orders.³

C. **The Commission's Issuance Of Another Order Purporting To Extend The Duration Of The Remedy Plan Does Not Moot Ameritech Illinois' Appeal.**

On December 30, 2002, after Ameritech Illinois appealed the Commission orders below, the Commission entered an order in a different docket that again purported to extend the term of the Remedy Plan, this time by transplanting it into Ameritech Illinois' plan for “alternative regulation.” Understandably, Ameritech Illinois appealed the Commission's December 30 Order, and that appeal has been assigned Case No. 3-03-0207.

³ By contrast, the July 10 Order merely suggested that the Condition 30 Plan would serve as the basis for a subsequent plan to be adopted for purposes of section 271 of the Telecommunications Act of 1996. App. A 23. While Ameritech Illinois appealed from the Commission's order, and cited the Commission's dictum as one possible ground for appeal, that action was taken as a precautionary measure. Plainly, the July 10 Order did not extend outright the duration of the Condition 30 Plan – the Commission's brief makes clear that it did not grant such an extension, and at the time the CLECs sought rehearing for that very reason (C2990).

The CLECs nonetheless contend (at 36-37) that the December 30 Order renders the present appeal moot. “The burden of demonstrating mootness ‘is a heavy one.’” *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Here the CLECs do not present the typical claim of mootness, where intervening events have “irreversibly eradicated the effects of the alleged violation,” *id.*, or “dissipate[d] the controversy on which the litigation was founded.” *Independent Coin Payphone Ass’n v. Illinois Commerce Comm’n*, 170 Ill. App. 3d 958, 960, 524 N.E.2d 980, 981 (1st Dist. 1988). Quite the contrary: The CLECs claim that this appeal is moot because the Commission has *compounded* the controversy by *repeating* its unlawful action. Their contention lacks merit.

“An issue on appeal relating to orders of the Illinois Commerce Commission become[s] moot when events occur which make it impossible for the reviewing court to grant effective relief.” *Independent Coin*, 170 Ill. App. 3d at 960, 524 N.E.2d at 981. That is not the case here. This appeal concerns the Commission’s extending the term of the merger condition and associated remedy plan beyond its expiration of October 8, 2002. The Commission’s subsequent order did not issue until December 30, 2002. Thus, the Commission action challenged here is the only one that governs payments associated with the period from October 8 to December 30, 2002, and at a minimum this appeal is necessary to consider the legality of those payments. Whether or not the Court can free Ameritech Illinois from the Commission’s subsequent order, covering the period after December 30, 2002, the Court can grant effective relief at the very least by declaring the imposition of the Plan to be unlawful from October 8 to December 30, 2002. The Court should reject the CLECs’ self-serving assertion that the payments Ameritech Illinois was forced to make related to the October 8- December 30, 2002 period are now utterly insulated from judicial review.

Moreover, the mootness doctrine is inapplicable “where there are collateral legal consequences which survive the expiration of the orders under review.” *Brown v. Murphy*, 278 Ill. App. 3d 981, 988, 664 N.E.2d 186, 192 (1st Dist. 1996) (quoting *In re Scaria*, 21 Ill. App. 3d 889, 893-94, 316 N.E.2d 153 (1st Dist. 1974)). As stated above, one “collateral legal consequence” of the Commission action under review here that survives the December 30 Order is that Ameritech Illinois was unlawfully required to make payments pursuant to the Plan in the period preceding the December 30 Order.

More significantly, the Commission orders under review here were not retracted by the December 30 Order. Even if Ameritech Illinois prevails in its challenge to the December 30 Order, dismissal of the present appeal as moot would allow the Commission’s action here to continue in force -- insulated from judicial review. That is a significant “collateral legal consequence” indeed. “Otherwise, a party requiring victory on two fronts in two fora could easily lose his chance for review on the first claim to be put forward for adjudication . . . , thus destroying his chance of prevailing, regardless of the merits.” *Celtronix Telemetry, Inc. v. Federal Communications Comm’n*, 272 F.3d 585, 587-88 (D.C. Cir. 2001).

This latter consequence illustrates the more fundamental defect of the CLECs’ mootness argument. Under the CLECs’ theory, an agency could evade judicial review of its order indefinitely, by simply reissuing a new redundant “back-up” order every so often and then seeking dismissal of the appeal from the preceding order on mootness grounds. The right of judicial review would become a pointless exercise, akin to chasing a dollar bill on a string. Not surprisingly, the Court’s precedent on mootness does not support such an absurd result.

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

In the Telecommunications Act of 1996 (“the Act”) Congress chose a de-regulatory framework, by which the Act’s obligations would be implemented through interconnection agreements between competing carriers. Section 252 establishes a detailed procedure for creating such agreements through negotiation, arbitration, approval and federal judicial review, and section 252(a)(1) makes the resulting agreements the “binding” statement of each carrier’s rights and obligations. The Commission, however, bypassed the interconnection agreement process entirely and stated that the Condition 30 “Remedy Plan” would be effective after October 8, 2002, based on (i) the Commission’s edict that the Plan would continue in effect for CLECs who had adopted it in their interconnection agreements (even though Ameritech Illinois’ obligation to pay remedies had expired), and also (ii) the Commission-ordered tariff. In its opening brief (at 18-21), Ameritech Illinois demonstrated that the Commission’s evasion of the Act is contrary to federal law, and showed that several courts had reached the same conclusion in similar cases. The U.S. Court of Appeals for the Ninth Circuit has since agreed. *Pacific Bell v. Pac-West Telecomm.*, No. 01-17161, 2003 WL 1792957, at *9-*10 (9th Cir. Apr. 7, 2003) (holding that state commission’s “resort to its general rule-making authority under California law to issue a generic order applicable to all interconnection agreements between telecommunications companies in California is precluded by §252”).

And in a decision issued after Ameritech Illinois’ opening brief, a federal district court applied those very cases to the precise issue here, and held that the Act’s interconnection procedures *do* indeed preempt a state “remedy plan” order, just as Ameritech Illinois has shown. *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Comm’n.*, No. 1:02-CV-1772-LJM-WTL

(S.D. Ind. Mar. 11, 2003) (“*Indiana Bell*,” Supp. Sep. App. SSA1). In *Indiana Bell*, the court enjoined enforcement of Indiana commission orders that imposed a “remedy plan” of the commission’s own making, exactly as the Commission attempted to do here. There, as here, the commission “made the Remedy Plan ‘available to CLECs as a stand-alone document, independent of the Section 251/252 interconnection agreement process.’” Supp. Sep. App. SSA 15.

As the court recognized, “[s]ections 251 and 252 of the Act detail the methods by which Congress directed ‘interconnection agreements’ would be reached by CLECs and incumbent local exchange carriers such as Ameritech to define their respective rights and obligations.” *Id.* The court further held that “service quality certainly is an element” of the interconnection obligations governed by the Act. *Id.* at 16. Accordingly, it concluded that the state commission, by attempting to impose a remedy plan outside of the Act’s interconnection agreement process “has bypassed Congress’ chosen process for establishing terms and conditions of Ameritech’s relationship with CLECs regarding interconnection and access.” *Id.* at 22 (citing *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940-41 (6th Cir. 2002) and *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 (D. Or. 1999), which Ameritech Illinois cited in its opening brief). Because the state commission imposed the remedy plan through a process “completely apart from the specific procedures set forth in Section 252,” the court held that the commission’s orders were “inconsistent with and preempted by Sections 251 and 252 of the Act.” Supp. Sep. App. SSA 24-25.

Indiana Bell demonstrates that the pre-emption principles and authorities cited by Ameritech Illinois apply with full force to the present case. *Indiana Bell* also confronts and refutes the other arguments presented by the CLECs here:

1. The CLECs contend (at 28-29, 31) that the 1996 Act’s “savings clauses” operate to insulate the Commission’s action even though it deviates from the Act’s procedure. The problem with that theory is that the various savings clauses protect only actions that are *consistent* with the Act, not actions that conflict with the Act. See 47 U.S.C. §251(d)(3) (savings clause applies only to state regulation that “is consistent with the requirements of this section” and “does not substantially prevent implementation of the requirements of this section”); *id.* §261(b) (savings clause applies to regulations only “if such regulations are not inconsistent with the requirements of this part”); *id.* §261(c) (savings clause applies only “as long as the State’s requirements are not inconsistent with this part”). As *Indiana Bell* recognized, the savings clause of “[s]ection 261 of the Act operates to save *consistent* state regulations, not *all* state regulations.” Supp. Sep. App. SSA 20. And, as several courts have held, state regulations that circumvent the Act’s procedure are not consistent with the Act. Ameritech Br. at 18-21. Accordingly, just as the Supreme Court has held that a “saving clause . . . does *not* bar the ordinary working of conflict pre-emption principles” (*Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2002) (original emphasis)), *Indiana Bell* holds that “the savings clause does not provide license to use state law in any manner the [commission] chooses.” Supp. Sep. App. SSA 20.⁴ *Accord Pacific Bell*, 2003 WL 1792957 at *10 (“reject[ing] any suggestion” that the Act’s savings clauses “support the CPUC’s resort to its general rule-making authority to adopt the generic orders at issue”).

⁴ The CLECs’ citation to the savings clause of 47 U.S.C. §252(e)(3) (which their brief mis-cites as section 251(e)(3), is even further afield. By its plain terms, section 252(e)(3) applies only to actions taken by a state commission “in its review of an [interconnection] agreement,” not to generic state orders that expressly circumvent the interconnection agreement process.

Indisputably, the Commission did not adhere to the procedure of negotiation, arbitration, approval and federal judicial review established by the 1996 Act. The CLECs nonetheless contend (at 31) that the Commission’s plan is “consistent” with the Act because it advances Congress’s “pro-competitive” ends. That contention avoids the real issue. The question here is not whether performance standards or a “remedy plan” would conflict with the substantive *ends* of the 1996 Act. Rather, the issue here is whether the *means* the Commission sought to employ – and its failure to use the means Congress required to be employed – are inconsistent with the Act’s procedural requirements. The Supreme Court has held that “[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.” *Amalgamated Ass’n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971). Thus, the Court has made exceedingly clear that state regulation cannot be justified on the theory that it purports to promote the same substantive policy (here, advancing competition) as a federal law covering the same subject. See, e.g., *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 (2000) (holding that state law is preempted where the federal government has adopted specific procedures, because “[t]he fact of a common end hardly neutralizes conflicting means”). *Accord Wisconsin Bell, Inc. v. Bie*, No. 01-C-0690-C, Opinion and Order at 12 (W.D. Wis. Sept. 26, 2002) (“*Bie*”), Sep. App. SA 66.

2. *Indiana Bell* similarly rejects the Carriers’ contention that the Commission’s intrusion here was “limited” and does not replace an entire interconnection agreement. The Commission’s regime of automatic payments tied to 150 performance standards covering all manner of interconnection services for all CLECs is hardly “limited,” and *Indiana Bell* recognized that such a regime “most certainly does define the business relationship between Ameritech and the CLECs, regarding interconnection and nondiscriminatory access to network

elements.” and is clearly among the matters governed by the interconnection agreement process (Supp. Sep. App. SSA 16).

Similarly, the U.S. District Court for the Western District of Wisconsin rejected the same “limited intrusion” theory in *Bie*. There, the Commission had ordered Ameritech Wisconsin to tariff two “combinations” of network elements, bypassing the Act’s interconnection agreement process. The Commission argued that it “did not impose a tariff requirement that covered all possible network elements, services or interconnections but limited the requirement to only two network combinations.” Sep. App. SA 67. As the court recognized, however, “the net effect is the same. By forcing the incumbent to file a tariff that any entrant can select unilaterally without having to negotiate an interconnection agreement, the commission has imposed a requirement that circumvents the interconnection agreement process prescribed under §252.” *Id.* at SA 67-68.

3. The Appellees’ reliance on *Michigan Bell Tel. Co. v. MCI Metro Access Transmission Servs.*, 2003 WL 909978 (6th Cir. Mar. 10, 2003) is misplaced in several important respects. Most significantly, *Michigan Bell* involved the right of the Commission to enforce *pre-existing* obligations after the parties had “complied with the Act by engaging in the negotiation and review process” under section 252. 2003 WL 909978, at *9-*11. Here, by contrast, the Commission was not enforcing a preexisting obligation – indeed, the Commission admits that Ameritech Illinois’ obligations under Condition 30 expired on October 8, 2002. Rather, the Commission imposed a new automatic-payment requirement in a generic proceeding outside of the section 252 process altogether. Nor was the Commission’s action limited to a tariff, as the Commission admits (at 17) that it also addressed “telecommunications carriers whose legal right to the Remedy Plan is based on interconnection agreements.”

In addition, the *Michigan Bell* panel's preemption discussion directly conflicts with *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002). *Verizon* regarded "the detailed procedural scheme" in §252 as an "exclusive process required" for implementing the Act's local competition provisions that is "not to be evaded by state rule-making" through tariffs. 309 F.3d at 940-41. The *Michigan Bell* panel, however, concluded that the §252 process "is not the only way for the Commission to order and regulate telecommunications" and thus upheld "a tariff system alongside the agreements negotiated under the Act." 2003 WL 909978, at *9-*10. Ameritech Michigan has sought rehearing en banc to resolve this intra-circuit conflict, and the Sixth Circuit has exercised its discretion to order further briefing on the issue. Supp. Sep. App. SSA 28. In the meantime, the *Verizon* decision controls. *Darrah v. City of Oak Park*, 255 F.3d 301, 310 (6th Cir. 2001) ("when a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case").

4. The Commission, meanwhile, tries a non sequitur. It contends that it did not modify any interconnection agreements all, but simply "clarified" that the Remedy Plan would remain in effect after October 8, 2002 for CLECs that had entered into the plan. The problem, though, is that the Commission's "clarification" was done without regard to the actual contract terms that it purported to clarify. Indeed, neither the Commission's orders nor its present brief cite even one contractual provision, much less show that it supports the Commission's "clarification" that Ameritech Illinois agreed to pay remedies pursuant to the Commission's plan after the October 2002 expiration of that plan. Nor could such an allegation be plausible: after all, the Commission itself admits that Ameritech Illinois was under no obligation to maintain the Remedy Plan after October 8, 2002. Thus, here as in *Pacific Bell* the Commission "promulgat[ed] a generic order binding on existing interconnection agreements without reference

to a specific agreement or agreements,” and thus “acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or, at the very least, it acted arbitrarily and capriciously in purporting to interpret ‘standard’ interconnection agreements.” *Pacific Bell*, 2003 WL 1792957 at *8.

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

The Remedy Plan computes payments by multiplying a “base” amount by the number of “occurrences” of substandard performance; for example, the number of missed installation due dates that exceeded the number allowed by the applicable performance standard. C 844-845. Ameritech Illinois proposed to use the same “base amounts” that had been approved by state regulatory commissions, and found sufficient by the FCC, for use by Ameritech Illinois’ affiliates. *See, e.g., In re Joint Application by SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Kansas & Oklahoma*, 16 F.C.C. Rcd. 6237, ¶¶ 269-278 (2001). The CLECs, and the Commission’s Staff, argued that the base amounts should be increased. The Commission, however, found that there was *no* evidence as to the existence or amount of damage; to the contrary, “[t]he CLECs admit that no attempt has been made to calculate the amount necessary to compensate them adequately for poor performance.” C 2941-42; App. A 39-A 40. Nevertheless, the Commission then directed that all payment amounts be doubled.

As Ameritech Illinois showed in its opening brief (at 25-28), the Commission’s decision was arbitrary, capricious, and contrary to the *Merger Order*. The Appellees contend that this issue is one of fact, and argue that the Commission had sufficient evidence on which to base its decision. But *none* of the evidence cited by the Appellees goes to the issue that matters: the existence or amount of damage. The only evidence that Appellees cite goes to a different question: whether doubling payment amounts would deter shortfalls in wholesale performance.

As a result, the issue before the Court is one of law: whether the Commission was free to force Ameritech Illinois to pay “remedies” that, by the Commission’s own admission, bore absolutely no relation to the alleged damages they were supposed to compensate. The answer to that question is no, because the *Merger Order* repeatedly refers to remedies as “liquidated damages,” because the services addressed by the Remedy Plan are performed by Ameritech Illinois pursuant to contracts or “interconnection agreements” with CLECs, and because of the long-settled rule that contracting parties are entitled only to compensatory damages. *Wallace v. Prudential Ins. Co. of America*, 12 Ill. App. 3d 623, 629, 299 N.E.2d 344, 348 (5th Dist. 1973).⁵

The Appellees respond by mischaracterizing Ameritech Illinois’ position. The Commission accuses Ameritech Illinois of arguing that “it must agree with the provisions of the Commission’s order in this proceeding, before it is required to comply with them.” The Carriers make a similar charge (at 19 n.7). That is not at all what Ameritech Illinois contends here, and it is noteworthy that neither the Commission nor the CLECs quote any of Ameritech Illinois’ briefs here or below for their characterization.⁶ Of course, Ameritech Illinois is entitled to offer or agree to a payment amount (as it did), and had the Commission adopted that amount Ameritech

⁵ The Commission contends that liquidated damages are inapposite because its plan was not entered by consent, but imposed by the government. The Commission is overlooking two critical facts. First, the obligations the Commission purported to enforce *are* governed by contracts – namely, the interconnection agreements mandated by the 1996 Act. It is entirely fitting that “remedies” for those obligations be assessed against a contractual standard. That the Commission circumvented the de-regulatory framework of the 1996 Act and imposed its plan outside of an interconnection agreement does not mean that the standard is no longer valid – all it means is that there is another basis on which the Commission’s order must be overturned. *See* Section I.D *supra*.

⁶ The most the Commission can offer is that the CLECs have *argued* that *affiliates* have taken such a position in proceedings *other* than this one. *See* also CLEC Br. at 19 n.7. Given the CLECs’ mischaracterization here, their characterization of out-of-state proceedings is suspect, but more to the point such arguments are irrelevant.

Illinois would have been required to comply so long as the underlying Condition 30 obligation lasted. But while agreement would be *sufficient* to require compliance, Ameritech Illinois does not contend here that such agreement was *necessary*. The Commission's doubling of payment amounts is invalid, not because it lacks Ameritech Illinois' approval, but because it lacks evidentiary support from *any* estimate of damage and is therefore punitive and inconsistent with the *Merger Order* that established the underlying obligation to make automatic payments.

VI. THE COMMISSION ERRED IN DELETING THE "K TABLE," WHICH WAS DESIGNED TO PREVENT THE IMPOSITION OF REMEDIES BASED SOLELY ON RANDOM VARIATION.

The original Remedy Plan contained a "K table" that was designed to address the risk of random variation in performance results. The Commission ordered that the table be deleted.

1. The Commission tries to portray the issue as a complex, technical question on which the Commission weighed conflicting testimony. But Ameritech Illinois' appeal here does not require the Court to weigh conflicting testimony or to delve into the technical details of statistical science. Rather, the appeal is based on the following straightforward facts, as to which there was no dispute (Ameritech Br. at 31-33):

- Each of the statistical tests that the Commission's Plan uses to assess payments are designed for 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 based solely on random variation, even if wholesale and retail processes were identical.
- The Remedy Plan requires Ameritech Illinois to perform thousands of such tests each month.

- Given the 5 percent error rate, the individual tests would on average lead to the assessment of hundreds of erroneous remedies every month based solely on random variation *even if Ameritech Illinois fully complied with the Merger Order*.

The only issue, then, is whether the imposition of hundreds of erroneous “remedies” each month is lawful or consistent with the Commission’s *Merger Order*. It is neither. The *Merger Order* expressly states that “Our interest is not to penalize the company but rather to have compliance with our order.” Sep. App. SA 22 (*Merger Order*, at 225). The payment of erroneous “remedies” even where there has been “compliance with our order” constitutes a penalty in the purest sense, and is therefore contrary to the *Merger Order*.

2. The CLECs, meanwhile, point out (at 45) that Ameritech Illinois reached agreement with one of their number on a compromise remedy plan that (among other things) did not include a “K table,” and that Ameritech Illinois asked the Commission to consider that plan as an alternative to the plan it imposed below. Contrary to the CLECs’ suggestion, however, that offer does not mean that Ameritech Illinois agrees with the Commission’s plan or its deletion of the K table. An offer of compromise is just that: an offer of compromise. The compromise plan’s statistical methodology was just one feature of an integrated plan that shared some features with the plan imposed by the Commission, but differed in other respects. The Commission did not accept Ameritech Illinois’ offer (although a similar offer is pending before the Commission now) and it is improper for the CLECs to attempt to parse one feature of an unaccepted offer and attempt to bind Ameritech Illinois to that feature in isolation.

CONCLUSION

For the reasons set forth above and in its opening brief, 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: April 24, 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

CERTIFICATE OF MAILING

I, Demetrios G. Metropoulos, an attorney, hereby certify that I caused the original and nine copies of the Reply Brief of Petitioner to be sent via U.S. Express Mail overnight delivery on April 24, 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 April 24, 2003, addressed to each person listed on the attached service list.

Demetrios G. Metropoulos