

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

SBC COMMUNICATIONS INC.,  
SBC DELAWARE INC.  
AMERITECH CORPORATION,  
ILLINOIS BELL TELEPHONE COMPANY  
d/b/a AMERITECH ILLINOIS, and  
AMERITECH ILLINOIS METRO, INC.

RECEIVED  
APR 20 1999  
FCC MAIL ROOM

Docket No. 98-0555

Joint Application for approval of the reorganization of Illinois Bell Telephone Company d/b/a Ameritech Illinois, and the reorganization of Ameritech Illinois Metro, Inc. in accordance with Section 7-204 of The Public Utilities Act and for all other appropriate relief.

BRIEF ON EXCEPTIONS  
OF THE  
PEOPLE OF COOK COUNTY

**RICHARD A. DEVINE**  
State's Attorney of Cook County

ADAM BOTTNER  
Supervisor  
MARIE D. SPICUZZA  
Deputy Supervisor  
ALLAN GOLDENBERG  
DAVID L. HEATON  
Assistant State's Attorneys  
Environment and Energy Division  
69 West Washington Suite 700  
Chicago, Illinois 60602  
(312) 603-8600

April 14, 1999

ORAL ARGUMENT REQUESTED

## TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SUMMARY OF COOK COUNTY'S POSITION	3
III.	EXCEPTIONS	6
A.	<b>THE HEPO INCORRECTLY CONCLUDES THAT THE RECORD DEMONSTRATES THAT THE JOINT APPLICANTS HAVE PROVEN THAT THE PROPOSED MERGER MEETS THE REQUIREMENTS OF SECTION 7-204(b) OF THE PUBLIC UTILITIES ACT</b>	6
1.	<b>The HEPO incorrectly concludes that the merger does not diminish the Utility's ability to provide adequate, reliable, efficient, safe and least-cost telecommunications services in Illinois. Section 7-204(b)(1); HEPO at 10-12.</b>	6
i.	<b>Service Quality and Network Investment</b>	8
ii.	<b>Job Creation and Retention</b>	11
iii.	<b>Risks of the National Local Strategy</b>	12
iv.	<b>The Experience in California Subsequent to SBC's Acquisition of Pacific Telesis Demonstrates That Service Quality and Employment Levels in Illinois Will Be Diminished</b>	13
v.	<b>Marketing Practices</b>	15
2.	<b>The HEPO incorrectly determines that the proposed merger presents no concerns about the improper subsidization or cost allocations. Sections 7-204(b)(2) and (3); HEPO at 15-16</b>	18
3.	<b>The HEPO fails to examine the pattern of noncompliance with Commission Orders. Section 7-204(b)(5); HEPO at 24-25</b>	20

4.	The HEPO incorrectly concludes that the merger is not likely to have a significant adverse effect on competition in Illinois. Section 7-204(b)(6); HEPO at 43.	23
5.	The HEPO incorrectly concludes that the merger is not likely to result in any adverse rate impacts on retail customers. Section 7-204(b)(7); HEPO at 49.	33
B.	<b>IN THE ALTERNATIVE, IF THE COMMISSION PERMITS THE MERGER, IT MUST, FIRST, ALLOCATE SAVINGS TO RATEPAYERS, AND SECOND, CONDITION ITS APPROVAL ON MITIGATION OF RISK AND ADVERSE CONSUMER AND COMPETITIVE IMPACT</b>	36
6.	The HEPO violates the Public Utilities Act by failing to allocate savings prior to approval of the Reorganization. Section 7-204(c); HEPO at 63-66.	36
7.	The HEPO incorrectly fails to address the proposed conditions raised by Staff and Intervenors. Section 7-204(f); HEPO at 68.	43
IV.	<b>CONCLUSION</b>	54

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

SBC COMMUNICATIONS INC.,  
SBC DELAWARE INC.  
AMERITECH CORPORATION,  
ILLINOIS BELL TELEPHONE COMPANY  
d/b/a AMERITECH ILLINOIS, and  
AMERITECH ILLINOIS METRO, INC.

Docket No. 98-0555

Joint Application for approval of the reorganization of Illinois Bell Telephone Company d/b/a Ameritech Illinois, and the reorganization of Ameritech Illinois Metro, Inc. in accordance with Section 7-204 of The Public Utilities Act and for all other appropriate relief.

**BRIEF ON EXCEPTIONS OF THE PEOPLE OF COOK COUNTY**

The People of Cook County ("Cook County") *ex rel.* RICHARD A. DEVINE, State's Attorney of Cook County, hereby file this Brief on Exceptions pursuant to Section 200.830 of the Rules of Practice of the Illinois Commerce Commission ("ICC" or "the Commission").  
83 Ill. Admin. Code Section 200.830.

**I. INTRODUCTION**

Cook County excepts to the following erroneous factual and legal conclusions contained in the Hearing Examiners' Proposed Order (HEPO). As previously argued in our briefs, the record in this case demonstrates that the Joint Applicants have failed to prove that the proposed merger meets the requirements of Section 7-204 of the Public Utilities Act ("Act"). Cook County Initial Brief at 8. Therefore, the application, as currently filed should be rejected.

The Commission is faced with a historic choice to be made in this docket. The nature

and scope of this merger is unprecedented in telecommunications here in Illinois. This merger will forever change the dynamics of local competition here in Illinois. The adverse effects on competition have been discussed at length in the brief of almost every party to this docket. There is almost universal agreement that the merger will adversely effect competition in Illinois. The concerns with respect to service quality are also considerable. Cook County's Initial brief discusses the various service quality issues at length. Initial Brief at 9. Additionally, the effects on rates and price structure in Illinois need to be addressed in this docket.

The HEPO fails to address the concerns behind the various provisions of the statute. The Commission has a responsibility and a unique opportunity to protect Illinois ratepayers. Nothing could be more devastating to Illinois ratepayers than the premature abandonment of meaningful and appropriate regulation to the so called "competitive marketplace." This would be inappropriate at a time when meaningful price constraining competition truly does not yet exist in many areas like residential service.

Section 7-204 and the Public Utilities Act provides the Commission with a variety of tools to protect ratepayers. The Commission must resist the temptation of avoiding various issues in this docket, just because the issue may be or is the subject of another pending proceeding. To the extent that the issue is raised by 7-204 or other relevant Section of the Act in this proceeding, it must be resolved in this docket and not future dockets.

In the alternative, should the Commission ultimately decide to approve the merger with conditions, the conditions proposed by the HEPO are inadequate to protect the public interest. The Commission needs to condition its approval on the mitigation of the area of risk and

adverse consumer/competitive impacts through the imposition of safeguards. Cook County Initial Brief at 7.

## II. SUMMARY OF COOK COUNTY'S POSITION

The proposed merger fails to meet Section 7-204 of the Public Utilities Act ("Act") and therefore should be denied. As discussed in our briefs, the Joint Applicants failed to satisfy almost all the Sections of the Act and therefore the Commission should deny the merger, or, if the Commission approves the merger, should impose meaningful conditions.

**7-204(b)(1) the proposed reorganization will not diminish the utility's ability to provide adequate, reliable, efficient, safe and least-cost public utility service;**

The record demonstrates that:

- the proposed acquisition would threaten service quality through diversion of Illinois Bell managers and crafts personnel and other Illinois Bell resources and capital for reassignment to out-of-region National-Local Strategy and other ventures.

**7-204(b)(2) the proposed reorganization will not result in the unjustified subsidization of non-utility activities by the utility or its customers;**

The record demonstrates that:

- the proposed acquisition will force captive customers of Illinois Bell noncompetitive services to subsidize out-of-region SBC competitive ventures, including its ambitious "National-Local Strategy".
- SBC will raid Illinois Bell management and other experienced personnel recruited and trained with funds provided by customers of noncompetitive services for reassignment in out-of-region National-Local Strategy and other competitive ventures.

**7-204(b)(3) costs and facilities are fairly and reasonably allocated between utility and non-utility activities in such a manner that the Commission may identify those costs and facilities which are properly included by the utility for ratemaking purposes;**

The record demonstrates that:

- unless the merged company files updated cost studies there is no assurance that ratepayers are not unfairly subsidizing non-utility activities including the financially risky "National-Local Strategy".
- unless Staff has access to accounts, books, records, personnel and audit work papers there is no assurance that costs are properly allocated between utility and non-utility activities.

**7-204(b)(5) the utility will remain subject to all applicable laws, regulations, rules, decisions and policies governing the regulation of Illinois public utilities;**

The record demonstrates:

- a continuing pattern of noncompliance with federal and state commission decisions by both Ameritech and SBC.

**7-204(b)(6) the proposed reorganization is not likely to have a significant adverse effect on competition in those markets over which the Commission has jurisdiction;**

The record demonstrates that:

- the proposed acquisition will eliminate SBC as an actual potential competitor in the Illinois local telephone service market.
- the proposed acquisition will fortify the Illinois local service market against significant competition by other service providers.
- the proposed acquisition will retard and diminish the development of actual and effective competition in the Illinois local service market.

**7-204(b)(7) the proposed reorganization is not likely to result in any adverse rate impacts on retail customers.**

The record demonstrates that:

- SBC/Ameritech assurances that the residential rate freeze prevents increases in rates are useless due to the expiration of the residential rate freeze in the Alternative Regulation Order in ICC Docket Nos. 92-0448/93-0239 at 64.
- the proposed acquisition will place significant upward pressure on prices for Illinois Bell noncompetitive services as a consequence of the \$47 billion in premium over the regulatory-basis book value of Illinois Bell's intrastate operations that SBC will be paying as part of the \$62 billion acquisition cost of Ameritech.
- the Joint Applicants' intend to reclassify all services as competitive within three years and immediately raise rates despite the lack of effective price constraining competition.

For these reasons, the Commission should find that the merger will not serve the public interest, reject the Application and not permit the proposed merger.

If, however, the Commission determines that it will permit SBC to acquire Illinois Bell, the HEPO needs to be rewritten and conditions imposed on the merger. The Commission must condition its approval on mitigation of the areas of risk and adverse consumer/competitive impacts through the imposition of safeguards.

Further, the HEPO only partially ruled on the allocation of the savings. HEPO at 73. The Commission must: rule on the allocation of the savings in this docket; and impose conditions that protect the interests of the public utility and its customers.

### III. EXCEPTIONS

#### A. THE RECORD DEMONSTRATES THAT THE JOINT APPLICANTS HAVE FAILED TO PROVE THAT THE PROPOSED MERGER MEETS THE REQUIREMENTS OF SECTION 7-204(b) OF THE PUBLIC UTILITIES ACT

The HEPO incorrectly concludes that the proposed reorganization complies with Section 7-204 of the Act. As discussed in our initial brief, the evidence demonstrates that the proposed reorganization violates the following subsections of 7-204(b), as well as other sections of the Act. Contrary to the findings in the HEPO, the record compels a finding that the reorganization will adversely affect the utility's ability to perform its duties under the Act, and therefore, the Commission should not approve this merger.

1. **The HEPO incorrectly concludes that the merger does not diminish the Utility's ability to provide adequate, reliable, efficient, safe and least-cost telecommunications services in Illinois. Section 7-204(b)(1); HEPO at 10-12.**

**Section 7-204(b)(1) the proposed reorganization will not diminish the utility's ability to provide adequate, reliable, efficient, safe and least-cost public utility service**

The HEPO fails to address a variety of service quality and related concerns. It is critical that the Commission address the various service quality concerns in a meaningful way in this docket. For example, the record demonstrates that Ameritech has missed the out of service over 24 hours standard for the past four years. GCI Ex. 2.0 at 40 (TerKeurst); Tr. at 815-16. While the HEPO acknowledges this fact, it does not go far enough to remedy the problem. Current penalties have yet to remedy the problem. Allowing AI 21 days to come up with a plan and the issuing of a rule to show cause in 98-0252 does not solve the problem. HEPO at 72-73. Solving the OOS>24 problem is something that the Company should have done previously, the penalties should be increased in this docket to a level that would bring about compliance. The SQI penalty

should be doubled each time it is missed so that Ameritech Illinois no longer views missing benchmarks as a cost of doing business. Initial Brief at 61. The evidence in this docket demonstrates that Ameritech is out of compliance with a significant service quality benchmark, therefore the Commission should take action in this docket to remedy the existing problem. The Commission's analysis should not be conducted in a vacuum. The HEPO should take into account that if Ameritech has missed a set service quality benchmark for four years, it is providing unreliable service pre-merger and should be required to be in compliance pre-merger. This issue should not be postponed to some future proceeding.

Further, the Commission needs to insure that service quality does not deteriorate. The record demonstrates that the proposed merger would cause service quality to deteriorate due to reductions in network investment, maintenance budgets, and personnel levels. GCI Ex. 2.0 at 11 (TerKeurst). SBC needs to recoup the \$13.2 billion premium it paid for Ameritech stock. While the HEPO notes that service quality be evaluated on a factual basis, there is nothing speculative about the enormous strain that financing the National Local Strategy ("NLS") would impose on Ameritech Illinois' revenue and investment funds and would result in a deteriorating infrastructure in Illinois.

The HEPO also fails to adopt Staff's proposal with respect to Staff's concerns with respect to 9-1-1. HEPO at 10. The 9-1-1 system is critical to public safety in Illinois. The HEPO should be revised to incorporate the restrictions that Staff has suggested with respect to 9-1-1.

The HEPO needs to provide additional conditions to prevent the deterioration of service quality as a result of the relocation of the best and brightest Ameritech Illinois managerial talent and other personnel outside of Illinois to support the National Local Strategy.

The record in this case raised some serious concerns with respect to marketing practices. The HEPO indicated that concerns in this area were misplaced. HEPO at 11. However, this ignores the credible concerns raised by Ms. TerKeurst, as well as evidence of the California complaints. Cook County Initial Brief at 20-22. If the Commission decides to approve the merger, the order should include a substantial penalty for misleading marketing practices to act as a deterrent to importing these practices into Illinois.

### **Proposed Changes to the HEPO at 10-12.**

#### **Commission Analysis and Conclusion**

Section 7-204(b)(1) requires the Commission to determine whether the proposed reorganization will "diminish [Ameritech Illinois'] ability to provide adequate, reliable, efficient, safe and least-cost" service in Illinois. At the outset, it must be noted that the statute calls for a consideration of whether the impact of the reorganization will be to diminish service quality, not whether the merger will enhance service quality. Furthermore, the statute contemplates that the Commission will evaluate the impact on a factual basis. ~~The following~~ ~~There must be~~ concrete evidence demonstrates that the reorganization would diminish service quality, and is not mere speculation or concerns as to what may possibly come to pass, ~~for the Commission to find that a~~ ~~diminishment would occur.~~

The proposed reorganization would threaten service quality by diverting Illinois Bell investment capital, managers, personnel and other Illinois Bell resources from Illinois for reassignment to support the out-of-region National-Local Strategy and other ventures. Further, the importation of unduly aggressive marketing tactics used by SBC may further threaten Ameritech Illinois employees' ability to provide essential customer service functions such as promptly answering billing, repair, and service calls and fully informing customers about basic telephone service.

#### **i. Service Quality and Network Investment**

It is essential that Ameritech Illinois make the investments needed to maintain the quality of basic exchange services in Illinois and to upgrade the basic network infrastructure throughout its service territory so that all customers have access to a reasonable array of new products and quality services. The record demonstrates that Ameritech has missed the out of service over 24 hours standard for the past four years. GCI Ex. 2.0 at 40 (TerKeurst); Tr. at 815-16. Further, the record demonstrates that the proposed merger would cause service quality to deteriorate due to reductions in network investment, maintenance budgets, and personnel levels. GCI Ex. 2.0 at 11

(TerKeurst). SBC needs to recoup the \$13.2 billion premium it paid for Ameritech stock. Additionally, the enormous strain that financing the National Local Strategy ("NLS") would impose on Ameritech Illinois' revenue and investment funds would result in a deteriorating infrastructure here in Illinois.

Ameritech witness, Mr. Gebhardt, told the Commission that Ameritech will maintain network investment at its present level. SBC-Ameritech Ex. 3.0 at 7 (Gebhardt). Letter from Edward E. Whitacre, Jr. to Richard C. Notebaert (May 10, 1998). Applicants even assert that the merger would result in more advanced network infrastructure. SBC-Ameritech Ex. 3.0 at 38 (Gebhardt). GCI Ex. 2.0 at 12 (TerKeurst).<sup>1</sup> However, despite these representations, there is no guarantee that these expenditures will be used appropriately in Illinois. SBC has no substantive information about how Ameritech would maintain quality of service for its customers post-merger. GCI Ex. 2.0 at 11 (TerKeurst). Maintaining a high level of service quality in Illinois while simultaneously supporting the National Local Strategy ("NLS") is an enormous challenge. Given that the commitment to network investment is expiring in October 1999, there is no guarantee that this investment will continue, and given the competing demands from the National Local Strategy, the investment will diminish.<sup>2</sup>

Staff witness, Mr. Gasparin, notes that currently Illinois is on the cutting edge of communications advancement. Staff Ex. 5.0 at 9-10 (Gasparin). For example, all 1100 central offices ("COs") in Illinois utilize digital technology, while the 1997 ARMIS data shows that SBC still operates with antiquated, analog switches. Id. Mr. Gasparin is concerned that SBC will not continue to maintain the high level of advancement we have enjoyed in Illinois because SBC will divert Illinois resources to replace out-dated facilities in its home-region. Id.

Given SBC's risky expansion plans and the company's incentive to update its old facilities, SBC will neglect Illinois networks. Staff Ex. 5.0 at 9 (Gasparin). In an attempt by the merged entity to maintain overall cash flow in the face of large capital investments elsewhere in its thirteen state footprint, Illinois service will suffer. Id. Such a concern is even more acute for areas in Illinois facing the least amount of competitive pressures.

The Commission must ensure that proper safeguards exist to prevent a utility from skimping on investment in infrastructure especially in areas where natural competitive forces are

---

<sup>1</sup> Citing SBC Response to ICC Staff data request CJ 2.01.

<sup>2</sup> According to the alternative regulation plan currently in effect, Ameritech Illinois is committed to invest \$3 billion in its intrastate network spread over five years. GCI Ex. 2.0 at 12 (TerKeurst). Ameritech Illinois files annual infrastructure investment reports with the Commission detailing projects and amounts invested in new technology in the prior year and providing the current year's budget. Id. Order at 64, ICC Docket Nos. 92-0448/93-0239 (Consol.).

not in place to provide protection through the market. The Commission does not accept Ameritech's assertion that tracking by individual products and services on a geographic basis cannot be done "except in certain rare circumstances where the investment is single-product related." SBC-Ameritech Ex. 3.1 at 107 (Gebhardt). Although Ameritech claims "the costs of tracking and reporting those expenditures on a geographic basis would exceed the informational value," Ameritech fails to explain or quantify those alleged costs. Id. The Commission should give no weight to Ameritech's claim absent any quantification of the alleged burdens.

Similarly, Mr. Kahan provides only self serving testimony that service quality in Illinois will not be diminished as a result of the merger. SBC-Ameritech Ex. 1.1 at 11 (Kahan). Absent a Commission mandate, SBC will change its priorities for network investment. Network investment for large corporate customers does not translate into improved residential service.

As discussed below, there is little similarity between the California and Illinois mergers. Second, if SBC is serious about adequately investing in Illinois post-merger, then it should have no problem agreeing to a Commission imposed condition on investments. Mr. Gebhardt's and Mr. Kahan's assertions are contradicted by the testimony of SBC's other witness, Dr. Harris. Far from believing it "inconceivable," Dr. Harris warns of one particular scenario that could lead to reduced network investments in Illinois:

For example, to reduce costs beyond what could be achieved by merger efficiencies, Ameritech likely would be pressured to significantly reduce the number of employees throughout the organization. This could have the undesired effect of constraining service quality in order to constrain costs or reducing Ameritech's incentives to invest in Illinois.

SBC-Ameritech Ex. 4.1 at 47 (Harris) (emphasis added), GCI Ex. 2.1 at 8 (TerKeurst). While Dr. Harris posits that investment constraints could arise if the Commission requires merger synergies to be shared with customers, the point is that outside financial pressures arising from SBC's NLS would further diminish SBC's incentive to invest in Illinois where Ameritech already enjoys monopoly status and CLEC penetration is very low. Specifically, Mr. Kahan admits the NLS would entail "billions of dollars of new spending." SBC-Ameritech Ex. 1.1 at 57 (Kahan). For SBC to meet its obligations to its shareholders, SBC would clearly need to recoup these enormous costs in some way. Mr. Kahan's statements to the FCC corroborate this assertion:

... SBC will experience significant earnings dilution and increased risks as a result of the start-up costs and losses during earlier years of the National-Local Strategy. This dilution cannot be borne by SBC alone. By spreading that dilution and risk across a broader base of shareholders, the combined SBC/Ameritech can continue to provide investors with appropriate returns

notwithstanding the costly National-Local Strategy. . . .

Indeed, the business plan contemplates having a cumulative negative cash flow for nearly ten years. The remaining business operations of the new SBC must carry these negative cash flows. . . . Again, SBC on a stand-alone basis could not reasonably accept those short-term and medium-term losses, particularly given the rapidly changing nature of the industry that makes more distant gains less certain. GCI Ex. 1.0 at 55 (Selwyn)(emphasis added).<sup>3</sup>

By SBC's own admission, even with potential increased revenues gained from expansion, SBC expects negative cumulative cash flows for nearly ten years. GCI Ex. 1.0 at 57 (Selwyn). Therefore to recoup these billions of dollars, skimping on infrastructure investments in Illinois is a probable solution. Another solution is increased rates in Illinois. Again, by SBC's own admission, it needs the Ameritech acquisition to provide a core revenue base for the NLS, and in the case of Illinois, that core revenue base will come from extensive noncompetitive services that Illinois Bell will continue to provide and dominate within its operating areas. Id. at 56. Whether SBC's solution is reduced network investments in Illinois, higher rates, or a combination of both, Illinois consumers lose out. Therefore, the inevitable result of the proposed merger is to diminish the utility's ability to provide adequate, reliable, efficient, safe, and least-cost telecommunications service in Illinois.

**ii. Job Creation and Retention**

It is essential that Ameritech Illinois retain highly effective, experienced managers and other personnel to maintain the quality of basic exchange services throughout its service territory. The proposed merger will result in a relocation of the best and the brightest Ameritech Illinois managerial talent as well as other personnel outside Illinois to support SBC's National Local Strategy. This will lead to service quality deterioration in Illinois as lesser-qualified personnel would be left to attend to business in Ameritech Illinois' home region. Given the lack of competition here in Illinois contrasted to the huge barriers SBC would face out-of-region, common business sense dictates SBC would use its best personnel to staff its risky and ambitious NLS. Further, the NLS will result in the transfer of employees trained with ratepayer resources.

SBC claims that employment levels in Ameritech's region will not be reduced due to the merger and, in fact, claims that it expects the number of employees in Ameritech's region to increase. GCI Ex. 2.0 at 14-15 (TerKeurst).<sup>4</sup> Mr. Kahan says that Ameritech will continue to be operated "to the fullest extent possible" by the current management team. Id. at 14-15. However,

---

<sup>3</sup> Citing Kahan, FCC Affidavit at par. 79-80, (*emphasis added*)

<sup>4</sup> citing May 10th Letter from Edward E. Whitacre Jr.

SBC offers no explanation whatsoever as to what that “extent” might be. This is not evidence that adequate, reliable, least cost public utility service will be maintained.

Notwithstanding Mr. Kahan’s “assurances,” the reality is that SBC, in its efforts to cut costs in Illinois, may: reduce employee levels below those needed to maintain adequate service quality; relocate management out-of-state; redeploy the most experienced and valuable employees to its out-of-region expansion efforts; and redirect the employee count away from maintenance of high quality telecommunications services to activities the sole aim of which is enhancing profitability. GCI Ex. 2.0 at 15 (TerKeurst). In fact, SBC has admitted that it will rely on the merger to staff its expansion plans:

[T]he merger creates a much deeper pool of management and employee talent that is essential to carrying out this National-Local strategy. The necessity for extraordinary management and employee depth is particularly compelling when you consider the training and hiring demands that will be placed on a company to generate over 8,000 broadly dispersed, highly skilled jobs on such a rapid basis. . . .

. . . Even with Ameritech, we will be challenged to meet the personnel requirements of the strategy . . . It has generally been our experience that *staffing new ventures with a significant number of existing managers is preferable to relying extensively on newly hired managers.*

GCI Ex. 2.0 at 15-16.<sup>5</sup>

In the face of the business realities Mr. Kahan describes, Ms. Jennings disagrees with the suggestion that Ameritech Illinois stands to lose its best and brightest corporate talent to the NLS. SBC/Ameritech Ex. 5.1 at 10 (Jennings). Given the considerable risks involved in launching the National Local Strategy, and how much SBC has invested in the success of the NLS, contrasted to limited risks involved in maintaining Ameritech’s customer base here in Illinois, it becomes clear that SBC will have a powerful incentive to raid the best and brightest of Ameritech corporate talent to man the NLS.

### iii. Risks of the National Local Strategy

Mr. Kahan claims that the NLS is a direct result of SBC and Ameritech’s judgment that the two monopolies must merge and become a national and global provider of telecommunications services to thrive in the new telecommunications industry. SBC Ameritech

---

<sup>5</sup> Citing Kahan, FCC Affidavit at 28-29 (*emphasis added*).

Ex. 1.0 at 6 (Kahan). Mr. Kahan claims that neither company could successfully launch the NLS on its own and that is one of the main reasons for merging. Id. at 5-7. Thus SBC claims that the only way to “withstand the competitive onslaught each faces in-region” is to combine strengths and embark on the NLS. Id. Thus by SBC’s own admission, the success of the NLS is essential to its long-term survival. Mr. Kahan also admits that the NLS will entail billions of dollars in new spending. SBC-Ameritech Ex. 1.1 at 57 (Kahan). This coupled with the fact that SBC is already paying a \$13.2 billion premium over the market value of Ameritech demonstrates the astronomical financial pressures that the plan imposes on SBC. GCI Ex. 1.0 at 9 (Selwyn). It is no surprise that SBC and Ameritech project negative cumulative cash-flows and earnings for a decade as a result of this project. Id.

SBC has represented to the FCC that it will staff its National Local Strategy from Ameritech. GCI Ex. 1.0 at 62-63.<sup>6</sup> SBC’s staffing guidelines indicate that SBC, like any effective business organization, it places the best qualified people in new positions as well as in incumbent positions. Moreover, especially for new, high profile positions, employee qualifications are paramount in the SBC organization. Tr. 649-50; See Proprietary Cross Ex. 41 at SBCAMIL 023817, 023838, 023823. Considering that the NLS will create new managerial positions in the top thirty U.S. markets where SBC will encounter fierce competition from other RBOCs, such positions will be high-profile with fertile opportunities for advancement. Therefore, common business sense as well as SBC policy indicate that SBC would likely staff its National Local Strategy with the best and the brightest managers and employees available. Based on SBC’s preference for staffing new ventures “with a significant number of existing managers” rather than relying on newly hired management, it is likely that Ameritech Illinois will lose many of its experienced, corporate managers and personnel, which in turn, will lead to diminished service in violation of the Act.

**iv. The Experience in California Subsequent to SBC’s Acquisition of Pacific Telesis Demonstrates that Service Quality and Employment Levels in Illinois Will Be Diminished**

SBC witnesses, Mr. Kahan and Ms. Jennings point to experience in California subsequent to SBC acquiring Pacific Telesis Group attempting to alleviate any Commission concern that service quality and employment levels will be adversely affected by the instant acquisition. Subsequent to the Pac Tel/ SBC merger, the record demonstrates that large numbers of employees previously devoted to customer service shifted their focus to sales. First, the employment increases in California reported by SBC occurred disproportionately in the unregulated, competitive side of PacTel’s businesses, not in the regulated, local exchange company. Second, even if the Commission believes that an adequate level of service quality in California has been maintained since the SBC/PacTel merger, the dynamics surrounding that acquisition and the instant one are so drastically different that one cannot expect similar

---

<sup>6</sup> Citing Kahan (SBC) FCC Affidavit at Para. 78.

performance here in Illinois. Therefore the Commission rejects SBC's arguments about California.

Mr. Kahan reports that the company's overall employment in California and Nevada is up 2200 from April 1, 1997 to August 14, 1998. SBC-Ameritech Ex. 1.0 at 20 (Kahan, revised). While these numbers represent an overall increase of 4.3%, the growth is spread unevenly among subsidiaries, with the basic service operations getting the short end of the stick. GCI Ex. 2.0 at 16 (TerKeurst). As of August 14, 1998, employment by PacBell, the local exchange company in California, had increased by only 205 jobs since the merger, which is less than 0.5 percent of its total employee level. Id. More importantly, the vast majority of these increases were in the competitive services end of PTG's business, not in the regulated end of the business. Id. Specifically, almost 60% of the reported increases were in Pacific Bell Mobile (1300). Id. Ms. Jennings, while not denying the accuracy of Ms. Terkeurst's figures, responded to these facts by stating that the number of network service employees and customer service representatives at PacBell had increased by 1485 as of August 14, 1998. SBC Ameritech Ex. 5.1 at 11 (Jennings).<sup>7</sup>

While PacBell has added a small number of positions, as of August 14, 1998, more than 825 PacBell positions have been shifted to a focus on sales and marketing, resulting in a reduction in the network operations workforce. GCI Ex. 2.0 at 17 (TerKeurst).<sup>8</sup> This shift in allocation of human resources from network service positions to sales and marketing positions, is corroborated by PacBell President and CEO, Edwin A. Mueller's statements:

Let me clarify this point . . . our guidance with regard to force levels at Pacific remains consistent with what we've told you in the past. *What we're doing is redirecting our force increases to bring on more people who can help us generate . . . sales while we're reducing back-room operations.*

GCI Ex. 2.0 at 17 (TerKeurst).<sup>9</sup> While a corporation has a duty to its shareholders to generate profits, that should not come at the cost of a deterioration in service quality for Illinois consumers. A business plan that favors reducing "back-room operations" while increasing the force of telemarketers and sales personnel is not one that promises that quality, basic telecommunications service will be maintained.

---

<sup>7</sup> The "1485" figure was updated to 1848 during cross examination of Ms. Jennings. Tr. at 628.

<sup>8</sup> The "825" figure was updated to 915 during cross examination of Ms. Jennings. Tr. at 628.

<sup>9</sup> *The Opportunity at Pacific Bell*, Presentation by Edward A. Mueller, New York Analyst Conference at 4, 8, 10 (June 23, 1998)(*emphasis added*).

The pattern in California is the pattern the Commission should expect in Illinois leading to diminished service quality in violation of the Act and the merger should therefore be denied. However, even if the Commission were to accept that basic, regulated, telecommunications service quality has been maintained in California, the results of the proposed merger in Illinois would be far different. The dynamics of the PacTel acquisition were so dramatically different from the instant merger that the experience in California is not at all instructive of what we can expect in Illinois. First, the size of PacTel at the time SBC acquired it was smaller than Ameritech's current size, the acquiree in the instant merger. Prior to the merger, PacTel's region covered only two states, while Ameritech's region covers five states. PacTel owned 15.8 million access lines prior to the merger, while Ameritech owns more than 20.5 million access lines prior to the announcement of the instant merger.<sup>10</sup>

Second, SBC was not burdened with the enormous financial pressures associated with the Ameritech acquisition when it acquired Pacific Telesis. Specifically, SBC did not pay a mammoth \$13.2 billion premium to acquire PacTel. GCI Ex. 1.0 at 9 (Selwyn). More importantly, at the time of the PacTel merger, SBC had no plans to launch a risky, out-of-region venture into the top thirty U.S. markets. Tr. at 639-40. In other words, it had no plans to launch the National Local Strategy. Id. Without repeating the numerous risks and financial pressures that the NLS will impose on SBC, the fact that SBC was not burdened with these enormous pressures when it acquired PacTel demonstrates that any SBC performance regarding increased capital investments or increased staffing subsequent to the PacTel merger cannot be expected to be duplicated in Illinois. Nor can SBC's previous level of investment and employment increases be expected to continue in California. Indeed, Ms. Jennings made no promise that the number of Ameritech Illinois employees relocated outside Illinois post-merger would not exceed the number of Pactel employees relocated outside California as a result of that merger. Tr. 638-39.

Given the huge burdens the NLS would impose on SBC's finances and employee resources, massive relocation of Ameritech Illinois personnel is all too probable. The inevitable result is deterioration in service quality if the Commission were to approve the merger. Therefore, the Commission rejects SBC's contention that its performance here in Illinois post-merger would not prove worse than its already dubious track record in California absent strict service quality conditions.

**v. Marketing Practices**

Ms. TerKeurst raises serious concerns that some of what SBC perceives as "best

---

<sup>10</sup> *In the Matter of the Joint Application of Pacific Telesis Group and SBC Communications, Inc. for SBC to Control Pacific Bell Which Will Occur Indirectly as a Result of Telesis' Merger With a Wholly Owned Subsidiary of SBC, SBC Communications Inc., 177 P.U.R. 4<sup>th</sup> 462 at \*18, 1997 Cal. PUC LEXIS 629 \*18 (March 31, 1997); Attachment to SBC-Ameritech Ex. 2.0, 1997 Ameritech Annual Report at 15.*

practices” will lead to overly aggressive marketing tactics being adopted in Illinois. GCI Ex. 2.0 at 30 (TerKeurst). Some of these practices are misleading in that certain optional products and services are held out as basic services and customers purchase such items based on mistaken information. Id. at 30, 31. Ms. TerKeurst is not alone in her concern over SBC’s overly aggressive marketing practices. Several complaints and other filings regarding PacBell’s marketing practices have been registered with the California Public Utilities Commission (CPUC) since SBC acquired Pacific Telesis. Id.<sup>11</sup> All these complaints make similar allegations: For example, Pacific Bell’s practices of having optional feature packages with “basic” in the brand name is confusing to customers and likely results in customers purchasing more or higher-priced products than a consumer truly wants. GCI Ex. 2.0 at 31 (TerKeurst). Moreover, Pacific Bell offers only the highest-priced inside wiring plans to customers without informing customers that they can obtain inside wire services elsewhere. Id.

The inside wiring practice case illustrates Pac Bell’s aggressive marketing practices. Pacific Bell combines the residential inside wire maintenance plan which carries a regulated price of \$0.60 per month with an unregulated, optional service. Id. at 32. The combined package is offered for \$2.25 per month, with no mention that the inside wire portion, by far the most valuable portion of the package, is available for one-fourth of the combined price. Id. Further, representatives do not inquire whether the customer rents, and do not inform the customer that California law makes landlords responsible for inside wiring in rental situations. The inequitable result is that a larger percentage of renters subscribe to the inside wire maintenance program than do homeowners, even though renters do not need the service at all. Id.

One report by the California Public Utilities Commission (“CPUC”) states, for example, that PacBell directs its service representatives to offer a \$12.95 package of optional features under the brand name, “Basic Saver Pac,” before attempting to sell customers individual features included in the package. Cross Ex. 12 at p. 8, Tr. at 748. On cross examination, Charles H. Smith, President of Pacific Bell Network Services, disagreed that this was the practice employed by PacBell service representatives. Tr. at 748-50. However, it became clear upon questioning by Examiner Goldstein, that Mr. Smith had no basis to disagree with this report by the CPUC because he had never listened to customer service calls since the merger. Tr. at 753. Mr. Smith then admitted that he was unaware of what text PacBell service representatives use when they

---

<sup>11</sup> The Utility Consumers’ Action Network v. Pacific Bell, C. 98-04-004; Greenlining Institute and Latino Issues Forum v. Pacific Bell, C.98-06-003; The Utility Consumers’ Action Network v. Pacific Bell, C.98-06-027; Motion of the Office of Ratepayers Advocates for Authorization to Publicly Release Its Report on Pacific Bell’s Handling of Residential Service Ordering (filed on June 4, 1998 in I.90-02-047); Telecommunications International Union, California Local 103, International Federation of Professional and Technical Engineers, AFL-CIO (TIU), on Behalf of TIU Members, as Consumers of Pacific Bell Services and Employees Responsible for Customer Service, v. Pacific Bell, Pacific Telesis, and Southwestern Bell Communications (C.98-06-049).

actually receive calls from customers. Tr. at 753-54. The Commission finds that diminished service quality will result from this pattern of marketing abuse and therefore should not approve this merger.

Such unfair and time-consuming sales techniques could negatively affect Ameritech Illinois' ability to provide essential customer service functions such as promptly answering customer billing, repair, and service calls and fully informing customers about basic telephone service. GCI Ex. 2.0 at 33. The cases pending in California are but one indication of the additional workload the Commission may expect as a result of the proposed merger absent strict conditions that would mitigate the negative effects of SBC's unfair and unduly aggressive marketing practices.

The Commission finds that the proposed reorganization will ~~not~~ diminish the Company's ability to provide adequate, reliable, efficient, safe and least-cost telecommunication services in Illinois, ~~and that the~~ Joint Applicants' commitment to meet certain conditions as a part of this proceeding, as well as the conditions which we will impose will ensure that the merger does not ~~diminish~~ insure AI's ability to provide adequate, reliable and efficient service.

~~There is no credible evidence that the merger would result in a reduction in service quality for Ameritech Illinois 9-1-1 service. No network incompatibility problems for 9-1-1 service have been identified. The service will continue to operate on its network as it exists. On the other hand, its performance on OOS>24 remains an issue of great concern to us. Illinois customers need to be protected from AI's failure to correct the OOS>24 problems which have persisted over the last four years. In a subsequent portion of this Order, we will prescribe the standards we expect AI to meet and the penalties that AI will incur for not doing so.~~

~~While Ameritech Illinois' acquisition of the Sprint/Centel Metro assets is different from this proposed reorganization, we again state that we will assess penalties in the event the merger does lead to a diminution of service quality.~~

~~There is no evidence that AI will offer lesser quality service to small business and residential customers than to large business customers. Basically, it could not do so without violating its statutory duty to offer nondiscriminatory service to all customers. The goal is to provide superior service to all classes of customers. We believe that Staff's assertions about SBC's reasons for abandoning out-of-region local exchange entry via Cellular One are taken out of context and are not relevant to SBC's and AI's demonstrated commitment to serving all of their customers as an ILEC. In addition, the Commission's regulatory authority is more than adequate to address any shortfalls that might surface in this area in the future. Nevertheless, Joint Applicant's have agreed to work with Staff in order to fashion a commitment which addresses Staff's concerns in this matter and we urge that this cooperative effort be undertaken.~~

~~Staff's and others' concerns about potential deceptive marketing practices are also misplaced. Here, too, there is no reason to assume SBC or AI will violate Illinois law or~~

~~Commission regulations and engage in such practices. If SBC or AI engage in any deceptive practices, we will penalize them.~~

~~The desire of several parties to require improved services for Ameritech Illinois' disabled and poor customers does not relate to any potential diminishment of service quality, rather it relates to requested enhancements, so that desire does not relate to the statutory requirement under Section 7-204(b)(1). It is noteworthy, however, that SBC has committed to use TRI to help develop better service for AI's disabled customers. This commitment offers substantial benefits to Illinois customers that will result directly from this merger.~~

~~There is no factual foundation for several Intervenor's concerns regarding a possible reduction in the Company's infrastructure investment or depletion of its resources and personnel as a result of the Strategy. SBC historically has made and continues to make strong commitments relating to its in-region network investment. The economies of scale presented by the proposed merger, along with new hires, should enable the post-merger SBC to staff its National-Local endeavors. Concerns and speculation are not enough for the Commission to find that a diminishment in Ameritech Illinois' service quality would occur. However, we do require AI, or the merged company to, at a minimum, go forward with its proposed five-year infrastructure network modernization program of \$3.0 billion.~~

~~Finally, we will not revisit the price cap formula or the alternative regulation rules for AI. The least-cost language of Section 7-204 (b)(1) was not intended to address or require any particular "price/cost relationship" for a telecommunications carrier, like AI, operating under a price cap plan, and was not intended as a mechanism to reopen any price cap plan dockets as part of the review of a proposed reorganization. There is no evidence that the proposed reorganization would result in its provision of telecommunication services at anything other than "least-cost," when that term is applied in the context of a price-cap regulated telecommunications carrier.~~

The Commission finds that the proposed reorganization would threaten service quality by diverting Illinois Bell investment capital, managers, personnel and other Illinois Bell resources from Illinois for reassignment to support the out-of-region National-Local Strategy and other ventures. Further, the importation of unduly aggressive marketing tactics used by SBC may further threaten Ameritech Illinois employees' ability to provide essential customer service functions such as promptly answering billing, repair, and service calls and fully informing customers about basic telephone service.

2. **The HEPO incorrectly determines that the proposed merger presents no concerns about the improper subsidization or cost allocations under Sections 7-204(b)(2) and (3). HEPO at 15-16.**

**7-204(b)(2) the proposed reorganization will not result in the unjustified**

**subsidization of non-utility activities by the utility or its customers;**

- 7-204(b)(3) costs and facilities are fairly and reasonably allocated between utility and non-utility activities in such a manner that the Commission may identify those costs and facilities which are properly included by the utility for ratemaking purposes;**

Following the merger, Illinois will represent only 12% of the new SBC's ILEC operations, and will be required to compete for capital with twelve other SBC ILEC states, with SBC's National-Local Strategy operations, its wireless business, and various international and other ventures. GCI Ex. 1 at 14 (Selwyn). The HEPO fails to note that the removal of capital and managerial talent, paid for by Illinois ratepayers will result in the unjustified illegal subsidization of non-utility activities by the utility in violation of the Act. 220 ILCS 5/7-204(b)(2). The HEPO also does not adequately ensure that the proposed acquisition will not force captive customers of Illinois Bell noncompetitive services to subsidize out-of-region SBC competitive ventures, including its ambitious "National-Local Strategy". The following language should be inserted into the HEPO.

**Proposed Changes to the HEPO at 15-19.**

Following the merger, Illinois will represent only 12% of the new SBC's ILEC operations, and will be required to compete for capital with twelve other SBC ILEC states, with SBC's National-Local Strategy operations, its wireless business, and various international and other ventures. GCI Ex. 1 at 14 (Selwyn). SBC has stated its plan to raid Ameritech managerial talent to support its National-Local Strategy, citing that specific capability as one of the reasons why the merger is a necessary precondition for its National-Local Strategy. The Commission finds that the removal of capital and managerial talent, paid for by Illinois ratepayers will result in the unjustified illegal subsidization of non-utility activities by the utility in violation of the Act. 220 ILCS 5/7-204(b)(2).

The Commission finds that the proposed reliance upon post merger SBC ILEC core revenues to buttress the National Local strategy violates both the Section 254(k) of the Federal Telecommunications Act because "a telecommunications carrier may not use services that are

not competitive to subsidize services that are subject to competition.” and Section 7-204(b)(2) of the Public Utilities Act requiring the Commission to determine that “the reorganization will not result in the unjustified subsidization of non-utility activities.” GCI Ex. 1.0 at 61 (Selwyn); 47 U.S.C.S. § 254(k); 220 ILCS 7-204(b)(2). SBC plans to flow revenues from its core services to make up the ten years’ worth of losses it expect to sustain from the National Local Strategy. Id. Additionally, SBC intends to exploit and raid assets and other resources of Illinois Bell acquired and funded through revenues from its noncompetitive services. Id. at 61-62<sup>12</sup> Both Mr. Kahan and Dr. Carlton indicate that SBC will staff its National Local Strategy from Ameritech. Id. at 62-63. Recruitment and training of ILEC management personnel is costly and time consuming, the costs of which have been funded by the revenues from core monopoly services. GCI Ex. 1.0 at 63 (Selwyn). Allowing the nonregulated CLEC affiliates comprising the National-Local Strategy to raid ILEC managerial resources constitutes cross subsidization that is not permitted by federal or state law.

The Commission finds that the large commitment of capital and other resources will increase the overall portfolio risk of a merged SBC/Ameritech. Capital costs are allocated among the various SBC ILECs on an average basis rather than in relation to the specific risks peculiar to each line of business. An increase in Illinois Bell’s cost of capital due to the inclusion of the highly risky National-Local Strategy could cause Illinois Bell to report poorer financial performance overall as part of an attempt to revise the price cap plan. Id. at 64-65. In adopting price cap regulation in its 1994 ruling, the Commission expressly linked its review of the price cap plan to IBT’s performance and earnings over the initial five-year period. Therefore, the inclusion of the high-risk National-Local Strategy in the IBT cost of capital could eventually, if not immediately, translate directly into higher rates for IBT services. Id.

Further, the Commission finds that cross subsidization is also impermissible under Section 254(k) of the federal Telecommunications Act of 1996. 47 U.S.C.S. § 254(k). By failing to allocate to Illinois Bell ratepayers the merger savings and an offset that corresponds with the reduction in Illinois Bell’s regulated costs that support competitive activities, Illinois Bell is permitted to earn excessive profits which can be used to finance the money losing National Local Strategy for up to ten years. This type of cross subsidy is expressly prohibited under Section 254(k). GCI Ex. 1.0 at 76 (Selwyn).

**3. The HEPO fails to examine the pattern of noncompliance with Commission Orders. Section 7-204(b)(5); HEPO at 24-25**

**7-204(b)(5) the utility will remain subject to all applicable laws, regulations, rules, decisions and policies governing the regulation of Illinois public utilities;**

---

<sup>12</sup> Citing Kahan (SBC) FCC Affidavit at Para. 78.

The HEPO interprets Section 7-204(b)(5) too narrowly. While noting the arguments raised in Cook County's Initial Brief, the HEPO fails to address the ultimate argument that there is an Ameritech pattern of noncompliance with Commission orders, and there is also a pattern of SBC challenging regulatory authority. Cook County Initial Brief at 25-27. Yet, despite this pattern of noncompliance, the HEPO concludes that the Commission will have all "the same enforcement tools and authority with respect to Ameritech Illinois after the merger as before the merger." HEPO at 25.

For example, Ameritech has in the past not complied and offered common transport to new local exchange carriers. Ameritech should be ordered to be in compliance with the Commission's previous order with respect to common transport before the merger is approved. For the HEPO to rule that Ameritech is subject to all applicable laws, regulations, rules, decisions and policies and yet have Ameritech not be complying with an order does not meet the spirit of this provision. The Act should be read more broadly than the HEPO and be held to require that the utility will remain subject to all applicable laws, regulations, rules, decisions and policies governing the regulation of Illinois public utilities. Further the HEPO needs to address the fact that the evidence demonstrates a clear pattern of noncompliance by SBC and Ameritech with Commission Orders.

**Proposed Changes to the HEPO at 24-25.**

**Commission Analysis and Conclusion**

While the Act requires that the utility will remain subject to all applicable laws, regulations, rules, decisions and policies governing the regulation of Illinois public utilities, the Commission finds that the evidence demonstrates a clear pattern of noncompliance by SBC and Ameritech with Commission Orders. Following is a sample of that noncompliance. An example of a utility's failing to follow applicable law until ordered to do so can be offered than

SBC Ameritech's argument that Section 7-204(c) does not apply to this case, or SBC's argument that the savings provision under California law did not apply. Tr. 510. The statute is clear on its face yet the utility flaunts the clear language of the statute to avoid giving ratepayers their due. Both the Commission, the FCC, and the United States Court of Appeals for the Eighth Circuit have directed Ameritech to offer common transport to new local exchange carriers. ICC Staff Ex. 5.0 at 4 (Gasparin).<sup>13</sup> The record demonstrates that Ameritech is currently defying these directives and not offering the service. Staff witness Marshall also testified that Ameritech failed to comply with Commission Orders regarding Bands B and C business rates and operator assistance/credit card charges, and reciprocal compensation. ICC Staff Ex. 1.0 at 17-18; ICC Docket Nos. 95-0584; 97-0404; 97-0519; 97-0525. Given this pattern of noncompliance, the Commission finds that future behavior will not be different, and therefore, does not approve this merger.

The record is also replete with examples of SBC's actions to undermine the authority of regulators. ICC Staff Ex. 3.0 at 17-20 (Yow); AARP Exs. 1.0 at 29-31; 2.0 at 3 (Cooper).<sup>14</sup> SBC refused to comply with the Texas Public Utility Commission order to provide physical and virtual collocation arrangements. Id. SWBT was ordered to file and revise its proposed physical collocation tariff three different times. AARP Exs. 1.0 at 30, 2.0 at 2-3 (Cooper).

In addition to the evidence demonstrating regulatory noncompliance, as Mr. Kahan testified, SBC's headquarters in San Antonio, Texas will be dictating the general corporate goals, commitments and business principles that Ameritech Illinois managers will have to follow. Given the evidence of regulatory noncompliance, the Commission finds that this merger will make continued effective regulation of an out-of-state headquartered monopoly nearly impossible.

Further, while compliance with Section 271 of the Telecommunications Act of 1996 is voluntary, both SBC's and Ameritech's actions are consistent with an obstructionist litigious posture. SBC unsuccessfully challenged Section 271 of the Telecommunications Act. *SBC Communications, Inc., et al. v. FCC, et al.*, 981 F. Supp. 996 (5<sup>th</sup> Cir. 1998), (cert. denied) U.S. ;1999 U.S. LEXIS 735; 142 L. Ed. 2d 788; 67 U.S.L.W. 3458. Ameritech has continually contested Section 271 of the Telecommunications Act of 1996. AARP Ex. 2.0 at 3-6 (Cooper). Whenever Ameritech disagrees with the FCC or the state PUC, it insists that

---

<sup>13</sup> Citing ICC Docket No. 96-0486/96-0569 Consol. at 104-107; ICC Docket No. 96-0404 at 58; FCC Third Order on Reconsideration - August 18, 1997; *Southwestern Bell v. FCC*, 153 F.3d 597 (8<sup>th</sup> Cir. August 1998).

<sup>14</sup> Citing Investigation of Southwestern Bell Telephone Company's Entry into the InterLATA Telecommunications Market, Public Utility Commission of Texas, Project No. 16251, April 1, 1998, pp. 11-12; The Commission should also consider the evidence of SBC's inflexible and restrictive interpretations of the interconnection agreements with parties.

regulators reconsider their position. Id. Three years after the Telecommunications Act of 1996 was passed, Ameritech is still debating the framework of Section 271. Id.

~~Section 7-204(b)(5) asks only whether "the utility" (in this case, Ameritech Illinois) will "remain subject to" all "applicable law, regulations, rules, decisions, and policies governing the regulation of Illinois public utilities." The apparent intent of this provision is to ensure that the reorganization does not have the effect of somehow sheltering a utility's regulated activity from scrutiny (e.g., by somehow shifting regulated functions to an unregulated affiliate). Thus, in prior cases we have applied this provision very literally, asking simply whether "the Commission's jurisdiction will . . . be impacted by the proposed merger" and whether the utility "will continue to be regulated by the Commission in the same manner and to the same extent it is regulated today." (Previous Joint Applicant citations deleted).~~

~~We see no reason to deviate from that approach here. The Joint Applicants have stated—and Staff has agreed and no Intervenor has argued otherwise—that AI will remain fully subject to the jurisdiction of the Commission and to all laws to the same extent after the merger as before the merger; that is, its regulatory status will remain unchanged. That is all Section 7-204(b)(5) requires.~~

~~The arguments of Staff and Intervenor do not convince us to change our past practice or to read Section 7-204(b)(5) as authorizing some speculative inquiry into the Commission's post-merger ability to regulate the merged entity. We will have all the same enforcement tools and authority with respect to Ameritech Illinois after the merger as before the merger. Thus, concerns about the Commission's and Staff's "ability" to regulate are merely conjectural, except that we will require the merged company to comply with all of our current Orders as outlined by the Staff herein. Based on the foregoing, we find that Section 7-204(b)(5) has been satisfied.~~

**4. The HEPO incorrectly concludes that the merger is not likely to have a significant adverse effect on competition in Illinois. Section 7-204(b)(6); HEPO at 43.**

**7-204(b)(6) the proposed reorganization is not likely to have a significant adverse effect on competition in those markets over which the Commission has jurisdiction;**

In our initial brief we address some of the significant adverse effects on competition.

Cook County Initial Brief at 28-43. Virtually every party to this case with the exception to the Joint Applicants, presented testimony showing the significant adverse effects on competition.

The conclusion reached in the HEPO ignores that substantial and persuasive body of testimony.

**Proposed Changes to the HEPO at 41-43.**

Commission Analysis and Conclusion

The Commission finds that contrary to Joint Applicants' representations, the merger would lead both to diminished actual and potential competition in Illinois and in the Ameritech region generally by removing SBC as a potential entrant and by fortifying the merged company's ability to protect its entrenched position of market dominance against competitive inroads. ICC Staff Exs. 3.0 at 13 (Yow), 4.0 at 1-42 (Graves), 5.0 at 4 (Gasparin), 8.0 at 17-24 (McClerren); AARP Ex. 1.0 at 4-6, 11-43 (Cooper); GCI Ex. 2.0 at 52-58 (TerKeurst). According to Dr. Hunt, the path without the merger will lead to more competition than the path with the merger. Tr. 1703-04. The record demonstrates the abysmal state of residential and small business competition. And, as Mr. Kahan conceded, the state of competition for the average residential or small business customer is not expected to change as a result of this merger. Tr. 505.

The Commission finds the following statements from both SBC and Ameritech witnesses should be given far more weight by the Hearing Examiners than the self serving testimony. First, SBC witness Mr. Kahan stated in his FCC affidavit that SBC's National and global ambitions" phase "really began in earnest during the fall of 1997 after events in the industry compelled SBC to more aggressively seek to become a national, and ultimately an international, enterprise in order to remain a viable contender for the many growth opportunities which we anticipated." Kahan (SBC), FCC Affidavit at Paras. 4, 10; GCI Ex. 1.0 at 17-18 (Selwyn). Mr. Kahan's sworn FCC statement demonstrates SBC's intent to become a national and international provider.

Moreover, Mr. Kahan's FCC affidavit is also consistent with his October 1996 testimony before the California PUC that the Company would consider *de novo* entry in Chicago (where SBC already has "existing brand name, infrastructure, and customer base") GCI Ex. 1.0 at 30-31(Selwyn).<sup>15</sup> These statements of intent combined with the facts concerning SBC's resources demonstrate that SBC is a potential actual competitor of Ameritech. GCI Ex. 1.0 at 22-23 (Selwyn). Second, Ameritech witness Mr. Gebhardt admitted that SBC was a potential Ameritech competitor until merger talks began with SBC in February 1998. Tr. 934.

The above statements are far more credible and reliable than self serving pre-filed testimony made for the express purpose of demonstrating that the proposed reorganization is

---

<sup>15</sup> Citing Cal. PUC A.96-02-028, Rebuttal Testimony of James S. Kahan (SBC) at 3.

not likely to have a significant adverse effect on competition in those markets over which the Commission has jurisdiction as required by the Act. 220 ILCS 5/2-204(b)(6). Both as a result of geographic proximity and a national market entry strategy, SBC is the RBOC that would be most likely to attempt a *de novo* entry into the Illinois local exchange market absent its takeover of Ameritech. GCI Ex. 1.0 at 27 (Selwyn). SBC's extensive cellular presence in the Chicago MSA, coupled with the large number of national and multinational corporations that are headquartered in the Chicago area and Chicago's status as the nation's "second city" strip SBC's claimed lack of interest in Chicago of all credibility. GCI Ex. 1.0 at 27(Selwyn); ICC Staff Ex. 4.01 at 7.

Not only are the above statements, the national market entry strategy, and the geographic proximity persuasive evidence that SBC is an actual potential competitor of Ameritech, SBC applied for and was issued a certificate of local exchange authority in Illinois. GCI Ex. 1.1, Appendix 2 (Selwyn).<sup>16</sup> As early as 1995, SBC had plans to enter Ameritech's market. Therefore, the Commission gives little weight to Applicants' testimony indicating a convenient change of mind regarding planned market entry because this testimony was created expressly for the purpose of merger approval.

The Department of Justice and Federal Trade Commission 1992 Horizontal Merger guidelines and the April 8, 1997 revisions provide a useful framework for analyzing competition. However, the standard that is controlling in Illinois is set out in 7-204(b)(6) of the Act. Even the FCC *In the Applications of NYNEX Corporation Transferor, - and - Bell Atlantic Corporation Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 1997 FCC LEXIS 4349, FCC 97-286 (Adopted August 14, 1997) noted the novel features of the telecommunications market:

"We therefore see no reason to apply mechanically the 1984 Merger Guidelines' provisions on potential competition to the novel features of telecommunications markets, and will evaluate the number of most significant market participants and the competitive effects of mergers among them, even where three other potential competitors with equivalent competitive capabilities to the merger parties remain." Id. at Para. 68.

Also, the FCC in the opinion and order *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications*.

---

<sup>16</sup> SBMS Illinois Services, Inc. Application for a Certificate of Local Exchange Service Authority and Certificate of Service Authority to Resell Local and IntraMSA Interexchange Telecommunications Services Within Those Portions of Market Service Area 1, ICC Docket 95-0347, filed July 21, 1995, Granted 12/29/95, Expanded 5/21/97; ICC Staff Ex. 4.0 at 27-28 (Graves).

Inc., Transferor To AT&T Corp., Transferee., Memorandum Opinion and Order, FCC 99-24, CS Docket No. 98-178 (Adopted: February 17, 1999, Released: February 18, 1999) states:

This analysis must include, among other things, consideration of the possible competitive effects of the transfer. [footnote omitted] Our public interest analysis is not, however, limited by traditional antitrust principles. [footnote omitted] In the telecommunications and cable industries for which we have statutory responsibility, as in most others, competition is shaped not only by antitrust rules, but by the regulatory policies that govern the interactions of firms inside the industries. An antitrust analysis -- such as that undertaken by the Department of Justice in this case -- focuses solely on whether a proposed merger will harm competition. Our public interest analysis, however, also encompasses the broad aims of the Communications Act... Id. at Para. 14.

However, in Illinois the Commission is applying the standards set out in the Public Utilities Act and leaving it to the DOJ and FCC to address the Federal standards. The Illinois Commission's analysis in this case will encompass the broad aims of the Illinois Public Utilities Act. The Commission here in Illinois adopts its own framework to examine whether the proposed reorganization is likely to have a significant adverse effect on competition. As the evidence shows and the analysis in this brief highlights, the Commission finds that this merger is likely to have a significant adverse effect on competition and deny the merger.

As discussed below, the record demonstrates that SBC is an "actual potential competitor in the Ameritech region". "An actual potential competitor is a firm that does not currently compete in the relevant market but would enter sometime in the near future, either independently or in combination with another entity." 1997 Cal. PUC LEXIS 629.\*86: 177 P.U.R. 462<sup>17</sup> The record in the instant case is clear that SBC would enter the Ameritech market in the near future. The Applicants' claims that neither SBC nor Ameritech had any plans to offer local wireline exchange service in the other's home region are not credible. Applicants' claim that if and only if the merger is permitted to go forward will they pursue a National-Local Strategy in which the post-merger SBC will enter and offer local wireline exchange service in each of the top 30 US markets outside of the 13-state SBC/Pacific/SNET/Ameritech region; and that this National-Local Strategy will in turn stimulate other RBOCs to enter and offer local services within the SBC/Pacific/SNET/Ameritech footprint is speculative and entitled to little weight. ICC Staff Ex. 4.01 at 5-6.

SBC's evidence that it had no plans to compete in the Ameritech region is also entitled

---

<sup>17</sup> Re Pacific Telesis Group, Joint applicant: SBC Communications, Inc.; Decision No. 97-03-067, Application No. 96-04-038 (California Public Utilities Commission, March 31, 1997).

to little weight. For the same reasons that Ameritech is such an ideal partner for the National Local Strategy, if the merger were not approved, SBC would find an alternate way to enter Ameritech's service territory on its own. As Mr. Kahan conceded, SBC does not intend to remain a regional provider. Tr. 556-57.

The Commission finds that by taking SBC out of contention, as the merger would do, a uniquely qualified actual potential competitor to Ameritech's Illinois local service monopoly disappears. GCI Ex. 1.0 at 23 (Selwyn); ICC Staff Ex. 9.0 at 23 (Hunt). The record demonstrates that only SBC, through its established cellular presence, has a national/global focus, the financial resources, and the pool of managers with specific experience in the local telephone business, coupled with an existing customer base in the Chicago area. Id. at 22-23. Only the RBOCs, as they presently exist, are uniquely positioned to bootstrap their monopoly local service relationship with national companies headquartered or otherwise maintaining telecom-intensive operations within the RBOC region into out-of-region markets. Id. at 24. No other provider - not "AT&T/Teleport/TCL, MCI/WorldCom/MFS/Brooks Fiber/UUNet, Sprint/France Telecom/Deutsche Telekom [or any] other global competitors" possess a special near-monopoly relationship with large national/multinational customers. Id. None of these firms presently provide any consequential quantity of local exchange service anywhere in the United States. Id.

The impact of combining two RBOCs and the subsequent effects on competition must be examined notwithstanding the Joint Applicants' claim that the combination of SBC/Pacific/SNET and Ameritech monopolies will not increase their market power overall. The FCC's reasoning in the *Bell Atlantic/Nynex* decision is directly applicable to the instant case and provides additional justification for disapproving this merger.<sup>18</sup> While the FCC granted the application in the *Bell Atlantic/Nynex* case, it noted that:

Granting this application subject to conditions does not mean that applicants will always be able to propose pro-competitive public interest commitments that will offset potential harm to competition. Id. at 19993. ... A merger that in the relevant markets, eliminated a competitor with even greater assets and capabilities than [sic] Bell Atlantic would present even greater competitive concerns. Id. at 19993-94.

The SBC/ Ameritech merger is exactly such a case where SBC is a competitor with greater assets and capabilities. SBC is the third largest local exchange carrier in the United States and

---

<sup>18</sup> *In the Applications of NYNEX Corporation Transferor, - and - Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 1997 FCC LEXIS 4349, FCC 97-286 (Adopted August 14, 1997)

the ninth largest in the world.<sup>19</sup> No amount of pro-competitive public interest commitments will offset potential harm to competition in the instant case.

Further the FCC stated:

We also note that we are concerned about the impact of the declining number of large incumbent LECs on this Commission's ability to carry out properly its responsibilities to ensure just and reasonable rates, to constrain market power in the absence of competition, and to ensure the fair development of competition that can lead to deregulation. During the transition to competition it is critical that the Commission be able effectively to establish and enforce its pro-competitive rules and policies. As diversity among carriers declines, both this Commission and state commissions may lose the ability to compare performance between similar carriers that have made different management or strategic choices. We often rely, for example, on cross-carrier comparisons as strong evidence as to technical feasibility or reasonableness. The Bell Companies, being of similar size, history, and regional concentration have, to date, been useful benchmarks for assessing each other's performance. Reducing the number of Bell Companies makes it easier to coordinate actions among them, and increases the relative weight of each company's actions on average performance. Because we approve this merger with conditions, thereby reducing the number of independently controlled large incumbent LECs, *future applicants bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity.* Id. at 19994. (emphasis added)

The concerns raised by the FCC in *Bell Atlantic/NYNEX* are applicable to the SBC/Ameritech merger. The Commission finds that the combination of the two RBOCs in the instant case will have a significant adverse effect on competition in Illinois.

Further, the Commission finds that in the nearly fifteen years since the break-up of the former Bell System and the nearly three years since the enactment of the 1996 federal legislation, none of the regional Bells has taken any significant steps at entering local exchange markets outside of each Bell's home region. GCI Ex. 1.0 at 25 (Selwyn). It is only through SBC's near monopoly status with large national/multi-national customers that it believes its

---

<sup>19</sup> GCI Ex. 1.0 at 24; 1998 Fortune 500 and 1998 Fortune Global 500, <http://www.pathfinder.com/fortune/>.

National Local Strategy will succeed. A total of 129 Fortune 500 companies have headquarters in SBC's eight home-state region. Id. at 23-24. If the merger is allowed, the number of Fortune 500 companies in SBC's thirteen state region increases to 224. Id. at 23. This statistic alone should confirm that RBOCs, particularly the third largest RBOC in the United States, and the ninth largest in the world, is uniquely situated to bootstrap their monopoly local service relationship with national companies headquartered or otherwise maintaining telecom-intensive operations within the RBOC region into out-of-region markets.

The Commission has weighed the merger's effect on competition carefully in light of the current state of competition. Extending Ameritech or SBC's near monopoly status with business customers will further harm the already dismal state of competition for all customers. Despite the Applicants' citation of statistics to prove rapidly growing competition, the only accurate statistics the Commission should examine are the penetration results presented by Mr. Kahan. Again, as Dr. Selwyn testified, "... counting up all of the lemonade stands in the country teaches nothing about the comparative total retail market share of these (perhaps tens of thousands of) pre-teen enterprises relative to that of one Walmart." GCI Ex. 1.0 at 43 (Selwyn). According to Mr. Kahan, only slightly over 1% of the 32 million plus access lines being furnished by SBC represent facilities-based CLEC services. Id. at 39. Mr. Kahan identified a total of 1,017,883 CLEC lines across the seven state SBC operating territory. Of this amount, only 367,921 lines, or slightly over 1% are facilities based CLECs. The remaining 649,962 CLEC lines are identified by Mr. Kahan as resold SBC services. Id. SBC continues to furnish the 649,962 resold CLEC lines and they cannot be excluded from the near 99% market share that SBC continues to hold. Id. at 40.

In addition to dismal competition results, the Commission has also considered that SBC has not yet demonstrated compliance with the competitive checklist contained in Section 271 of the Telecommunications Act of 1996 in any state in SBC's current region. In addition to this failure to demonstrate concrete evidence of actual competition, the Commission should also consider SBC's unsuccessful litigation efforts to invalidate Section 271. The dismal competitive market share results, SBC's failure to demonstrate compliance with Section 271, and its efforts to invalidate Section 271 provide ample evidence that this is not a monopoly committed to competition. This Commission considers SBC's failed attempts at 271 compliance at the FCC, as well as in Texas and in California as concrete evidence of bad behavior in the marketplace, and behavior that is not acceptable in Illinois.<sup>20</sup> Based upon this

---

<sup>20</sup> GCI Exs. 1.0 at 45-49 (Selwyn), and 2.0 at 48-51 (TerKeurst), citing:

Application of SBC Communications Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region, InterLATA Services in Oklahoma, CC Docket No. 97-121, *Memorandum Opinion and Order*, FCC 97-228, released June 26, 1997 ("Oklahoma Order") at para. 17.

evidence. the Commission finds that the merger is more than likely to have a significant adverse effect on competition.

SBC/Ameritech witnesses Kahan, Harris, and Gebhardt fail to acknowledge that the average residential and small business customer currently have a lack of meaningful residential service options and will continue to have a lack of service options after the merger. Ameritech's recent pattern of reclassifying small business services and increasing rates, for some services as much as 60%<sup>21</sup> demonstrates little fear of marketplace retribution. The path without the merger will provide more meaningful options for competition than the path with the merger.

Without the merger, a company like SBC would be a meaningful potential competitor in the Chicago market. The fact that they claim to have no current plans to do that, needs to be weighed against the evidence and the reasonable inferences from the evidence. SBC is a major competitor in the Chicago Cellular Market through its Cellular One subsidiary. Business survival and common sense lead one to the inescapable conclusion that SBC will not ignore the major business customers in the Chicago market with or without the merger.

~~Section 7-204(b)(6) requires the Commission to ascertain that the merger "is not likely to have a significant adverse effect on competition in those markets over which the Commission has jurisdiction." We have jurisdiction over three markets — local exchange, intraMSA toll, and interMSA toll — to the extent these markets affect intrastate communications in Illinois. This is not the appropriate forum for determining the extent, if any, of our jurisdiction over cellular service competition in Illinois, and even if it were, there is no credible evidence that such competition would be affected adversely by the proposed reorganization, given that one of the overlapping cellular properties in Illinois will be divested. However, we find that Staff's proposal that Joint Applicants be required to send notice to customers of the divested cellular~~

---

Public Utility Commission of Texas Project No. 16251, *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Order No 25, June 1, 1998, Attachment 1 (Commission Recommendation), at 2.

On March 31, 1998, SBC-Pacific Bell filed a draft application with the California Public Utilities Commission to become a long distance provider pursuant to Section 271 of the Telecommunications Act of 1996. The *Final Staff Report* represents the conclusions of the California PUC Telecommunications Division staff regarding SBC-Pacific's application.

<sup>21</sup> GCI Ex. 1.1 at Appendix 1, Attachment 2; Illinois Commerce Commission Telecommunications Division Staff Report on Service Reclassification.

~~affiliate at least 30 days before sale of the affiliate to be reasonable. We see no reason why it would delay consummation of the merger.~~

~~Before examining the three relevant markets, we again note that the merger is to take place at the holding company level, and there is no evidence that it would affect Ameritech Illinois. AI still would be subject to this Commission's jurisdiction; it still would be bound by agreements it entered into and tariffs it filed before the merger; and it would still be subject to the market-opening initiatives that this Commission and the FCC have pronounced during the past few years. We also agree with Joint Applicants that geographic extension mergers -- like that at issue here -- do not ordinarily impact local competition. After the merger, AI would control the same share of the Illinois local market that it does now. Without increased market control, it is difficult to discern how actual competitors in Illinois would be harmed by the merger.~~

~~As for the different markets over which the Commission has jurisdiction, we agree with Staff and Joint Applicants that the merger would not affect the Illinois interMSA market adversely. We agree with Staff that the proposed merger would not impact adversely the number of buyers and sellers of interMSA toll services; the standardization of those services; the ability to enter the interMSA toll market; or the amount of information available to buyers and sellers.~~

~~As stated, Section 7-204(b)(6) requires this Commission to address the effect the merger would have on competition. In order to gauge competition, we believe that we must look at current and future competition. Joint Applicants propose that we use the Guidelines to determine the adverse effect, if any, the merger would have on potential competition. Staff and Cook County agree that it would be reasonable for us to use these Guidelines in our determination. We concur and will use these Guidelines as a starting point to determine the effect, if any, the merger would have on potential competition, but we will not give them conclusive effect.~~

~~We have several reasons for using the Guidelines. First, they have been used by the FCC and other state commissions to analyze ILEC mergers. See, e.g., Bell Atlantic/NYNEX Order at ¶37; California SBC/PacTel Order at 41-42. Second, there is no reason they should not be applied to this merger; indeed, they have been applied to nearly identical mergers. Id. Third, neither Staff nor Intervenor have proposed a suitable alternative. The "perfectly competitive" model proposed by Staff is not a tool for analyzing the effect mergers have on competition, much less competition for local telecommunications service.~~

~~Under the Guidelines, a showing of an adverse effect from a merger or acquisition on potential competition requires all of the following elements: (1) the merger eliminates a firm that had a high probability of entering the market as a new competitor; (2) the merger eliminates a firm that is one of only a few firms that are uniquely situated to enter the industry in the future; and (3) the merger eliminates a firm whose entry would have a substantial deconcentrating effect. (Gilbert Surrebutal at 12-13). In conducting this analysis, probable entry means entry in the "near future," and not simply at any foreseeable point in time. See, e.g., 79 Op. Cal. Atty. Gen. 301, 1996 Cal. AG LEXIS, at \*44-45 (1996). For the purposes of our analysis, we will use a~~

~~three to five year future time period as the so-called near future.~~

~~Applying the Guidelines to the facts in this case, we conclude that the merger would not affect potential competition in Illinois adversely. Looking at the first guideline, we are of the opinion that SBC is a likely potential entrant in Illinois. While SBC does not currently have any business plan to offer local wireline communication service in Illinois, and despite its executives testifying that it had no plans to enter Illinois local markets in the near future, as a major telecommunications carrier desiring to implement its NLS to provide "one-stop shopping," or end-to-end service, SBC would still have to offer local service in Illinois. It is important to note that the relevant inquiry is whether SBC "would" compete with Ameritech Illinois in the near future, not -- as Intervenor and Staff argue -- whether SBC "could" compete for Illinois local service. See, e.g., Tenneco v. F.T.C., 689 F.2d 346 (2d Cir. 1982); New England Tel. & Tel. Co. d/b/a NYNEX, Joint Petitioners: NYNEX Corp.; Bell Atlantic Corp., 175 P.U.R.4th 504 (1997). SBC would have to compete in the near future. In addition, such factors such as SBC's geographic proximity, physical assets, and cellular experience in Illinois are relevant.~~

~~Under the second guideline, SBC is one of only a few major potential competitors of Ameritech Illinois. AI would have at least six other major competitors (AT&T, MCI, Sprint, Bell Atlantic, U S West and BellSouth) after the merger. Currently, the telecommunication carrier Intervenor in this docket are certificated to provide local service. In addition, there are numerous other certificated local carriers, both facilities and non-facilities based.~~

~~As to the third guideline, there is no evidence that SBC would have more impact on Illinois local service than firms like AT&T, MCI or Sprint, which are already providing local service. Over the past three years, we have certificated many carriers providing switched and resold local services, yet this record indicates that there have been few inroads made to the Company's monopoly of the local market. Based on the evidence, we conclude that even SBC's entry into the local service market would not have a substantial deconcentrating effect. Thus, the merger would have no significant adverse effect -- as that term is used in Section 7-204(b)(6) -- on potential competition in the Illinois telecommunications markets.~~

~~We further find that there is no credible evidence that the merger would increase Ameritech's incentive or ability to discriminate against CLECs. Such arguments are speculative and, if such conduct occurs, it can be dealt with in separate proceedings. See, e.g., SBC/PacTel Order at || 53.~~

~~In sum, we find that the merger is not likely to have a significant adverse effect on competition in Illinois. As a result of this finding, there is no need for us to address the proposed "conditions" raised by Staff and Intervenor, as those conditions are unnecessary and should not be adopted. In any event, even assuming that we had the authority to do so in this docket, this is not the appropriate forum to address common transport, the Section 271 checklist, or structural separation.~~

5. The HEPO incorrectly concludes that the merger is not likely to result in any adverse rate impacts on retail customers. HEPO at 49.

7-204(b)(7) the proposed reorganization is not likely to result in any adverse rate impacts on retail customers.

The HEPO contends that the premium or NLS would not impact the merged entity's revenues, expenses, or earnings post-merger. HEPO at 49. This analysis does not provide for how the company would recover that premium in the future. Cook County Initial Brief at 43-47. Further, as Staff witness Marshall testified, the Commission's alternative regulation plan did not contemplate or provide a mechanism to deal with such a significant change in the Company's cost of providing service. Cook County Initial Brief at 45.

#### **Proposed Changes at 49-50.**

The Commission finds that the record indicates that the proposed reorganization is likely to result in adverse rate impacts on retail customers due to: (a) the need for SBC to recover the enormous \$13.2 acquisition premium it will be paying to Ameritech shareholders; (b) the need to financially support the merged companies' National Local Strategy that SBC readily concedes will generate a negative cash flow for approximately ten years; (c) the substantial additional risks that the merged company will be taking on in pursuing its National-Local Strategy, which could impair [SBC's] ability to raise necessary capital on reasonable terms or to maintain a reasonable capital structure; and (d) the reduced level of potential competition that the post-merger Illinois Bell will confront within its core local service market. GCI Ex. 1.0 at 53-61 (Selwyn). Further, the evidence demonstrates a continued reclassification of noncompetitive services as competitive prior to effective price constraining competition.

SBC will need to generate additional revenues from Illinois consumers in all market segments in which it does not face price-constraining competition. GCI Ex. 1.0 at 53 (Selwyn). Allocating the premium paid to acquire Ameritech<sup>22</sup> over book value specifically to Illinois Bell, SBC would need to recover \$19.7 billion in overall investment in Illinois Bell. Ameritech's net investment in Illinois Bell is about \$5.5 billion. SBC will have invested an

---

<sup>22</sup> SBC paid \$13.2 billion over the pre-announcement market value of Ameritech stock, and \$47 billion over the net book value of Ameritech's assets to acquire Ameritech. GCI Ex. 1.0 at 53.

additional \$14.2 billion that it will need to recover from its Illinois operations. Id. Illinois Bell would be expected to generate \$1.7 billion in additional annual intrastate pre-tax earnings for a period of ten years to offset the \$6.7 billion intrastate portion of the total \$14.2 billion in premium over book value that SBC will pay to acquire Illinois Bell. GCI Ex. 1.0 at 54 (Selwyn). Recovering this additional \$1.7 billion in annual pre-tax earnings implies a significant overall increase in Illinois Bell intrastate revenues relative to the current levels adjusted for the effects of the 1998 price cap adjustment. Id. at 54.

Further, Mr. Kahan stated that SBC will use revenues derived from its core SBC/Pacific/SNET/Ameritech in region core noncompetitive service markets to finance and support the National Local Strategy and other out of region competitive ventures. Id. at 55.<sup>23</sup> By SBC's own admission, it needs the Ameritech acquisition to provide a core revenue base for the National Local Strategy, and in Illinois, that core revenue base is the extensive residential and small business noncompetitive services that Illinois Bell will continue to provide and dominate. Id. at 56.

Under Illinois Bell's current price cap mechanism, the annual price change is determined by offsetting the annual change in the fixed-weight Gross Domestic Product Price Index by 4.3%, the "X-factor" that is intended to reflect productivity growth and a persistently slower-than-inflation growth in the Company's input prices. GCI Ex. 1.0. at 56 (Selwyn); Order at 36-38, ICC Docket Nos. 92-0448/93-0239 ("Alternative Regulation Order"). No other state in which SBC currently operates applies an offset factor as high as 4.3% in its incentive regulation system. As Mr. Gebhardt confirmed, SBC is likely to seek a significant decrease in, or outright elimination of, the offset factor. GCI Ex. 1.0 at 56; Tr. 865. Since the price cap system went into effect, Illinois Bell rates for noncompetitive services have decreased by between 1.38% and 2.44% in each year since 1994, resulting in a cumulative net decrease in Illinois Bell rates of more than a quarter of a billion dollars. Id. at 57. Elimination of the 4.3% X-factor from the price cap formula would produce rate increases over the next five years of roughly \$300 million; retaining the offset at its present level would result in more than \$200 million in additional rate reductions relative to present levels. Elimination of the X-factor could take over one-half billion dollars out of the Illinois economy for the National Local Strategy. Id.

Additionally, as Staff witness Marshall testified, the Commission's alternative regulatory plan did not contemplate or provide a mechanism to deal with such a significant change in the company's cost of providing service. ICC Staff witness Ex. 1.0 at 18 (Marshall). Staff witness Topozada-Yow confirms that when the Commission developed the price cap index applicable to Ameritech Illinois' noncompetitive services in the Plan, the Commission did not take the merger into account. ICC Staff Ex. 3.0 at 23-25 (Topozada-Yow). Because the alternative regulatory plan does not provide a mechanism to deal with a

---

<sup>23</sup> Citing Kahan (SBC) FCC Affidavit at Paras. 79-80.

significant change in the company's cost of providing service, without an immediate review of the plan, approval of this merger could result in rates that are not fair, just, or reasonable in violation of the Public Utility Act. 220 ILCS 5/13-506.1(b)(2).

Additionally, SBC can obtain rate increases through tariff filings in noncompetitive services as well as through higher rates for services that are reclassified as "competitive" but for which the Company would retain substantial market power. GCI Ex. 1.0 at 57 (Selwyn). IntraLATA toll continues to face only limited actual competition despite reclassification in 1996. Id.; Cross Ex. 43. SBC has submitted a number of applications and miscellaneous tariff filings to the California PUC seeking increases in rates since the merger. GCI Ex. 1.0 at 57-60 (Selwyn); Cross Exs. 44-46.

Moreover, in its pending price cap filing, Pacific/SBC proposes significant changes to its current regulatory framework to allow SBC upward pricing flexibility for services not currently subject to competitive pressure. In this application Pacific/SBC requests the elimination of "the remaining vestiges of earning/rate of return regulation ... including the earnings sharing mechanism, the rate of return earnings cap and floor, the 'benchmark' and 'market-based' rates of return, and the 'trigger' mechanism. GCI Ex. 1.0 at 60 (Selwyn).<sup>24</sup> If approved, these requests will eradicate ratepayer protection included in the current regulatory framework designed to ensure rate stability. Id. at 60. Additionally, Pacific/SBC requests upward pricing flexibility for services not subject to meaningful competition. Notwithstanding Mr. Kahan's discredited testimony that there will be no adverse rate impacts, the Commission should rely on SBC's actions in California, expect the same pattern here in Illinois, and therefore should find that this merger is likely to result in adverse retail impacts on retail customers.

---

<sup>24</sup> Citing *Application of pacific Bell for a Third Triennial Review of the Regulatory Framework in Decision 89-10-031*, February 2, 1998 at 4.

- B. IN THE ALTERNATIVE, IF THE COMMISSION PERMITS THE MERGER, IT MUST, FIRST, ALLOCATE SAVINGS TO RATEPAYERS, AND SECOND, CONDITION ITS APPROVAL ON MITIGATION OF RISK AND ADVERSE CONSUMER AND COMPETITIVE IMPACT<sup>25</sup>**
- 6. The HEPO violates the Public Utilities Act by failing to allocate savings prior to approval of the Reorganization. Section 7-204(c); HEPO at 63-66.**

The HEPO correctly concludes that Section 7-204(c) applies to this transaction. The HEPO also determined that 100% of the net merger savings be allocated to consumers. However, the HEPO then unjustifiably rewards the Joint Applicants with 50% of the savings if the company is in full compliance with the conditions. The Joint applicants would then be getting rewarded for doing what the law already requires that they do. Ratepayers are entitled to 100% of the net merger savings.

The HEPO also fails to completely rule on the allocation of the savings as it neglects to set a dollar amount on the savings. As discussed at length in our initial brief, the Public Utilities Act in Section 7-204(c) provides that the Commission shall not approve a reorganization without ruling on the allocation of any savings resulting from the proposed reorganization. The plain meaning of the statute is clear. The Commission cannot approve the reorganization without ruling on the allocation of any savings resulting from the proposed reorganization. It would be unfair for shareholders to know up front what they will gain by the transaction and for consumers to have to wait. As the statute makes very clear -- the Commission *shall not* approve a reorganization without ruling on the allocation of the savings.

---

<sup>25</sup> Exceptions 6 and 7 are provided as an alternative argument in the event the Commission approves the merger. Cook County does not waive any arguments previously raised in its briefs that Joint Applicants have failed to meet the requirements of Section 7-204 of the Public Utilities Act.

Section 7-204(c).

As discussed in our brief -- Dr. Selwyn describes in his testimony various calculations and states:

The rate decrease, on a pre-tax basis, would then be \$343-million. This amount should be applied to all noncompetitive IBT services, including wholesale, access, UNEs, transport and termination, in a manner that fairly apportions the merger synergies across all noncompetitive services and avoids the creation of a price squeeze between IBT retail services and services furnished to competitive carriers. GCI Ex. 1.0 at 91 (Selwyn).

The HEPO should adopt Dr. Selwyn's approach as a logical and fair framework to determine the savings in this transaction. The premium paid by SBC for Ameritech leads one to conclude that the parties calculated that the deal was worth about \$13.2 billion to its shareholders. GCI Ex. 1.0 at 78, 86 (Selwyn). Salomon Smith Barney determined that the total synergies of the deal were approximately \$16-19 billion. GCI Ex. 1.0 at 78,85-87 (Selwyn). Citing SBC Ameritech Joint Proxy Statement.

The HEPO appears to adopt the approach to savings testified to by Staff. Witness Ms. Toppozada-Yow proposed the use of actual synergy benefits in calculating the amount to flow through to Illinois ratepayers. ICC Staff Ex. 3.00 at 26-27 (Toppozada-Yow). However, as we noted in our initial brief and as pointed out in Dr. Selwyn's rebuttal testimony, there are problems with Staff's time frame in calculating the synergies:

this abbreviated time frame is simply insufficient for determining the true effect that this merger will have upon the new Company's costs. I understand that Ms. Yow recommends that none of these implementation costs should be recovered by the Applicants, but this caveat fails to correct for the gross

understatement of synergy benefits that Ms. Yow's brief and early data collection period will promote. GCI Exhibit 1.1 at 62 (Selwyn).

The risk in the approach in the HEPO is that consumers may not receive their proper award of savings under the Act. A possible alternative approach would be a hybrid of the approach Dr. Selwyn's testified to and Staff's approach presented by Ms. Topozada-Yow. In this hybrid approach, the Commission would use current information and fix a minimum flow through amount modeled on Dr. Selwyn's approach as required by the Act in this Docket. One of the potential drawbacks to using Dr. Selwyn's approach is that parties to a transaction of this nature tend to be conservative in their synergy and related projections. This could result in consumers receiving less savings than the law entitles them to. One way to cure this would be to make Dr. Selwyn's number the minimum savings amount. The Commission could then supplement this with Staff's approach and offset their numbers with the savings amount described in Dr. Selwyn's testimony. The Commission would then adjust the annual savings amount and award ratepayers the higher of the two amounts.

SBC and Ameritech were able to calculate what the deal was worth for each Company and its shareholders. Section 7-204(c) of the Act requires that the Commission do the same for ratepayers. It is what is fair and what the law requires. The HEPO should order that \$343 Million be flowed through to ratepayers. The record in this case, and the reasonable inferences therefrom, show this to be best approach at accomplishing what is required under 7-204(c).

**Proposed Changes to the HEPO at 63-66.**

If the Commission decides to approve the merger, then the Commission must rule on

the allocation of any savings resulting from the proposed reorganization. The Commission should order that \$343 Million be flowed through to ratepayers. The record in this case, and the reasonable inferences therefrom, show this to be best approach at accomplishing what is required under 7-204(c).

The Public Utilities Act in Section 7-204(c) provides that the Commission shall not approve a reorganization without ruling on the allocation of any savings resulting from the proposed reorganization. However, petitioners in their Joint Application for reorganization contend that Section 7-204(c) is not applicable to this merger.<sup>26</sup> Joint Application at 12-13. They also contend in testimony that: "Even if it does apply, the Companies believe that, as a matter of policy, the Commission should not allocate any estimated savings to ratepayers;..." SBC Ameritech Ex. 3.1 at 53 (Gebhardt).<sup>27</sup>

The plain meaning of the statute is clear. The Commission cannot approve the reorganization without ruling on the allocation of any savings resulting from the proposed reorganization. Without a ruling on the allocation of the savings, the merger cannot be approved. The fundamental principal of statutory construction is to ascertain and give effect to the intention of the legislature. *Varelis v. Northwestern Memorial Hospital*, 167 Ill.2d 449, 454, 212 Ill.Dec. 652, 657 N.E.2d 997 (1995). Because the language used by the legislature is the best indication of legislative intent, courts look first to the words of the statute. (Citation omitted) *In re Application of the County Collector of DuPage County for Judgment for Delinquent Taxes for the Year 1992*, 181 Ill.2d 237, 244, 692 N.E.2d 264 (1998). Where an enactment is clear and unambiguous, as this one is, a court is not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations or conditions that the legislature did not express. (Citation omitted) *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill.2d 76, 81, 630 N.E.2d 820, 822, (1994). See also: *The Department of Public Aid ex Rel. Lindy Davis, now by marriage, Lindy*

---

<sup>26</sup>This in contrast with the position taken by Illinois Bell Telephone Company in *Illinois Bell Telephone Company d/b/a Ameritech Illinois and Ameritech Illinois Metro, Inc. Joint Petition for Approval of Merger, Discontinuance of Service, Transfer or Issuance of Certificate of Service Authority, and Other Related Relief*, 97-0675, Illinois Commerce Commission, 1998 Ill. PUC LEXIS 760 (August 26, 1998). In that order the Commission "... (15) with respect to Section 7-204(c), we accept Ameritech Illinois' proposals to account for any savings that may result as a result of the merger in future filings under its Alternative Regulation plan and not to seek recover of the costs associated with the merger;..." (id at 32)

<sup>27</sup>Despite SBC's challenge to the applicability of the ratepayer benefit Section in the Pactel merger, the California Public Utilities Commission awarded economic benefits in their Opinion. *Re Pacific Telesis Group, Joint applicant: SBC Communications, Inc.*, Decision No. 97-03-067, Application No. 96-04-038, 1197 Cal. PUC LEXIS 629, 177 P.U.R. 4<sup>th</sup> 462 (March 31, 1997).

Eddy, Appellee, v. Jesse Brewer, 183 Ill. 2d 540; 702 N.E.2d 563 (1998). Section 7-204(c) of the Act is clear and applies to this merger.

The Commission adopts the approach described by Dr. Selwyn in his testimony recommending that \$343 million dollars a year should be flowed through to customers of Illinois Bell's non competitive services for a period of ten years. The rate decrease, on a pre-tax basis, would be \$343-million. The Commission adopts Dr. Selwyn's approach to calculating the savings and utilize Staff's approach to allocating the savings to ratepayers.

The Commission adopt Dr. Selwyn's approach as a logical and fair framework to determine the savings in this transaction. The premium paid by SBC for Ameritech leads one to conclude that the parties calculated that the deal was worth about \$13.2 billion to its shareholders. GCI Ex. 1.0 at 78, 86 (Selwyn). Salomon Smith Barney determined that the total synergies of the deal were approximately \$16-19 billion. GCI Ex. 1.0 at 78.85-87 (Selwyn). Citing SBC Ameritech Joint Proxy Statement. As Dr. Selwyn noted in his direct testimony, the National-Local strategy and other new competitive ventures were not considered by Salomon Smith Barney when its total synergies were estimates. Therefore, Dr. Selwyn's recommendation is a conservative amount. GCI Ex. 1.0 at 90, footnote 26 (Selwyn). Selwyn's analysis clearly shows that the savings numbers suggested by Dr. Kahan should be rejected.

Mr. Kahan's Reply affidavits filed in the FCC proceeding provide further support that the synergy estimates are real, accurate and expected and for using Dr. Selwyn's premium methodology. GCI Ex. 1.1 at 58 (Selwyn). The testimony states:

In justifying the significant size of the premium over market value to be paid by SBC for Ameritech, Mr. Kahan states: The merger will indeed allow us to realize significant in-region savings unrelated to the National-Local Strategy, but *the aggregate value of those savings approximately equals the premium paid to Ameritech's shareholders when they exchange their stock for the new SBC stock.* (fn. 107 Kahan (SBC), FCC Reply Affidavit at ¶ 20, Emphasis supplied.) GCI Ex. 1.1 at 58 (Selwyn).

The Joint Applicant's argument is: (1) the statute does not apply; (2) if the Commission holds the statute applies then we should not use estimated savings; and (3) the savings amount to \$31 million. First, Applicants have proposed ridiculously low savings numbers. The result of what they are asking the Commission to do is to tell ratepayers that they get nothing now or the check is in the mail. This is incorrect as a matter of law. Further, this is unacceptable as a matter of sound public policy. SBC and Ameritech were able to calculate what the deal was worth for each Company and its shareholders. Section 7-204(c) of the Act requires that the Commission do the same for ratepayers. It is what is fair and what the law requires.

Joint applicants argue in their petition that Section 7-204(c) of the Act is intended to apply to rate of return regulated companies and is therefore not applicable to this merger. Joint Application at 12. However, the plain language of the Section provides no such qualification. They have yet to provide any persuasive evidence that the Section should be interpreted in that manner. Therefore the Commission rejects their interpretation.

Mr. Gebhardt concedes that price cap companies are not specifically excluded from Section 7-204(c) yet asserts that as a matter of policy price cap companies should be excluded. SBC Ameritech Ex. 3.2 at 37 (Gebhardt). The Commission finds that as a matter of policy if the legislature sought to exclude price caps as a matter of law, it could have done so in the Public Utilities Act. The plain language of this statute should be applied if this merger is approved, and the Commission should allocate savings resulting from this merger.

In light of the above statute, the Commission must determine the amount of the savings and its allocation. The Statute also allows the commission to consider the recovery of costs. Given the lack of the clear record as to the costs incurred in the proposed merger, the Commission denies applicants the recovery of any costs.

The Commission finds that SBC calculations and analysis of savings are flawed and should not be adopted by the Commission. Mr. Kahan contends that the net present value of synergy savings in Illinois would be \$31 million. SBC Ameritech Ex. 1.0 at 73-74 (Kahan). The Commission rejects Mr. Kahan's calculation. As pointed out by Dr. Selwyn in his direct testimony there are "serious concerns about the unrealistically small "cost savings" figure that Mr. Kahan has presented. GCI Ex. 1.0 at 80 (Selwyn). Further, Mr. Kahan's calculation only includes the initial three years following the closing date of the transaction. GCI Ex. 1.0 at 81 (Selwyn). This is an unrealistic time line given the lack of meaningful local competition.

Dr. Selwyn correctly notes that "synergies realized by the combined SBC/Ameritech will undoubtedly extend beyond the 2003 horizon set by the Applicants, and limiting the amount of savings to be flowed to Illinois customers based on the unrealistic expectation that all services will be competitive by that time presents a serious flaw in SBC's calculation. GCI Ex. 1.0 at 81-82 (Selwyn). Another flaw in Mr. Kahan's approach is that his -- number is limited entirely to expense savings, and gives no weight whatsoever to other synergy benefits, such as the increased productivity of Illinois Bell's network due to the various revenue enhancement marketing initiatives that SBC plans to pursue, or to the allocation of certain Illinois Bell costs to nonregulated SBC affiliates as a consequence of the transfer of certain of Illinois Bell's assets and other resources (including its best practices, brand identification, experienced and highly trained managers and other employees, cash flow, customer base, and other valuable resources) to affiliates, as is specifically required by Section 7-204(b)(3). GCI Ex. 1.0 at 82 (Selwyn).

And, further, Mr. Kahan also offset the first three years of savings with the entirety of the merger implementation costs. GCI Ex. 1.0 at 82 (Selwyn). As shown in Dr. Selwyn's testimony, Kahan's approach to the numbers is flawed and should be rejected by the Commission.

The Commission finds that Mr. Gebhardt's argument that implementing an annual \$343-million reduction in rates would be devastating should not be given any weight because it is misleading. Mr. Gebhardt claims that because Ameritech Illinois' 1997 operating income for its entire intrastate operations was only \$366 million on a post tax basis, a \$343 million rate reduction would leave Ameritech with only \$150 million in operation income. Gebhardt workpapers SBC Ameritech Ex. 3.1 at 1; GCI Ex. 1.0 at 63-64 (Selwyn). However, this is not the proper context in which to view the numbers. As pointed out by Dr. Selwyn in his rebuttal -- "Mr. Gebhardt is making an inconsistent and unfair comparison between present, premerger Illinois Bell earnings and the post-merger allocation of benefits to Illinois Bell ratepayers." GCI Ex. 1.1 at 63 (Selwyn). However, as noted by Dr. Selwyn, "If on the other hand, the post-merger SBC assigns to Illinois Bell less than its proportionate share of the merger savings, then Mr. Gebhardt's concern may be well-taken." Id. at 64.

With respect to how the savings should be allocated to ratepayers, the Commission adopts the framework proposed by the Commission staff. The merger related synergies should be divided as discussed in Staff witness Toppozada-Yow's direct, later modified in her rebuttal. ICC Staff Exs. 3.00 at 28-29 and 3.01 at 36-46 (Toppozada-Yow). Further, the Commission finds that "Ameritech Illinois should not be allowed to structure rate reductions to its strategic benefit." GCI Ex. 2.0 at 76 (TerKeurst).

[The following language is included as an alternative approach should the Commission reject Dr. Selwyn's calculations.] The Commission believes that Illinois consumers being given the allocation of savings required by statute. It would be unfair for shareholders to know up front what they will gain by the transaction and for consumers to have to wait. As Mr. Kahan conceded, tracking actual merger savings becomes more difficult the further away from the date the merger occurs. Tr. 513. Illinois law requires the Commission to rule on the allocation of any savings resulting from the proposed reorganization.

The Commission adopts a modified version of Staff's proposal due to the problems with Staff's time frame in calculating the synergies. Staff witness Ms. Toppozada-Yow proposes the use of actual synergy benefits in calculating the amount to flow through to Illinois ratepayers. ICC Staff Ex. 3.00 at 26-27 (Toppozada-Yow).

this abbreviated time frame is simply insufficient for determining the true effect that this merger will have upon the new Company's costs. I understand that Ms. Yow recommends that none of these implementation costs should be recovered by the

Applicants, but this caveat fails to correct for the gross understatement of synergy benefits that Ms. Yow's brief and early data collection period will promote. GCI Exhibit 1.1 at 62 (Selwyn).

The risk in this approach is that consumers may not receive their proper award of savings under the Act. Therefore, in the alternative, if Staff's approach described by Ms. Topozada-Yow is adopted, the Commission sets minimum standards to insure that savings are in fact flowed through to ratepayers.

The Commission finds a hybrid of the approach Dr. Selwyn's testified to and Staff's approach presented by Ms. Topozada-Yow is appropriate in allocating savings to ratepayers. In this hybrid approach, the Commission uses current information to fix a minimum flow through amount of \$343 million dollars a year for a period of ten years, modeled on Dr. Selwyn's approach as required by the Act in this Docket. One of the potential drawbacks to using Dr. Selwyn's approach is that parties to a transaction of this nature tend to be conservative in their synergy and related projections. This could result in consumers receiving less savings than the law entitles them to. The Commission finds that one way to cure this would be to make Dr. Selwyn's number the minimum savings amount. The Commission finds that Dr. Selwyn's number be supplemented with Staff's approach. The Commission would then adjust the annual savings amount and award ratepayers the higher of the two amounts.

With respect to how the savings should be allocated to ratepayers, the Commission adopts the framework proposed by the Commission staff. The merger related synergies should be divided as discussed in Staff witness Topozada-Yow's direct, later modified in her rebuttal. ICC Staff Exs. 3.00 at 28-29 and 3.01 at 36-46 (Topozada-Yow). Further, the Commission finds that "Ameritech Illinois should not be allowed to structure rate reductions to its strategic benefit." GCI Ex. 2.0 at 76 (TerKeurst).

- 7. The HEPO incorrectly fails to address the proposed conditions raised by Staff and Intervenor. Section 7-204(f); HEPO at 43.**

The HEPO incompletely addresses the conditions proposed by Staff and Intervenor.

**Proposed Changes to the HEPO at 68.**

#### Commission Analysis and Conclusion

In order to protect the interests of the public utility and its customers, the Commission will impose significant and comprehensive conditions on this merger. Ameritech Illinois shall demonstrate compliance with Section 271 of the Telecommunications Act of 1996 prior to the merger. Further, Ameritech Illinois shall subject to Commission approval establish a

timetable for FCC submission and compliance. There shall be substantial and automatic monthly penalties imposed for failure to remedy in a timely fashion any deficiencies found by the FCC and failure to make a timely submission to the FCC. Applicants shall demonstrate compliance with Section 251 and 252 of the 1996 Act.

With respect to best Practices the Joint Applicants shall identify and adopt "best practices" for interactions with CLEC customers. In the area of competition, the term "best practices" should be interpreted to mean the practice that best opens up markets to competition and best removes entry barriers.

The Joint Applicants shall identify and adopt "best practices" for interactions with CLEC customers. "In the area of competition, the term "best practices" should be interpreted to mean the practice that best opens up markets to competition and best removes entry barriers."

The Joint Applicants shall prepare an annual merger report, where Ameritech Illinois will identify any proposed "best practices" the adoption of which by SBC or its affiliates would affect the provisioning of intrastate telecommunications service in Illinois. Such reports will include how each identified "best practice" would affect costs, revenues, employment, service quality, marketing, competition and CLECs, and the ability of the Commission to monitor and regulate intrastate telecommunications services. Ameritech Illinois will explain how SBC is identifying "best practices," the results of any "best practices," and how they will be maintained over time.

Ameritech account managers who work with Illinois CLECs shall remain in Illinois, and that they shall retain their current level of decision-making authority.

Ameritech Illinois shall not be allowed to change any of its competitive policies or practices without first obtaining agreement from the affected CLECs. If an agreement is not reached, then approval by the Commission shall be obtained.

A self-enforcement mechanism should be included in interconnection agreements. This would help ensure that Ameritech Illinois meets reasonable service expectations in dealing with CLECs.

Any multi-state "deals" that SBC may propose shall be nondiscriminatory.

Cost studies and pricing for CLEC and wholesale services shall be modified to maintain the cost-based pricing required by the 1996 Act and the Commissions's policies.

The AG, Cook County, CUB, Staff and certain other Intervenors urge us to impose conditions on the approval of the merger, and each of them has set out a number of different proposals. The Joint Applicants, on the other hand, argue that no conditions are warranted in this situation.

Section 7-204(f) of the Act specifically provides that in approving a proposed reorganization, the Commission may "impose such terms, conditions or requirements as, in its judgment, are necessary to protect the interests of the public utility and its customers." Our authority to impose conditions is simply beyond question. There is, however, some disagreement among the parties as to the type of conditions that we are empowered to impose.

For their part, the Joint Applicants claim that our authority to set conditions in this matter must be defined and circumscribed by the other provisions of Section 7-204. Specifically, they contend that the conditions must be limited to those necessary to make the required findings under Section 7-204 (b). Staff and Intervenors, such as the AG and CUB, and Cook County argue that our authority is much broader, allowing us to impose any conditions that reasonably relate to the "public Interest". We find ~~each of these positions to be somewhat lacking; that if the Commission approves the merger, conditions are necessary to protect the interests of the public utility and its customers.~~

In our examination of Section 7-204(b), we find that the first sentence flatly states that "no reorganization shall take place without prior Commission approval." This provision grants jurisdiction to the Commission over the proposed reorganization. The paragraph continues with the requirement that a "hearing" be conducted pursuant to proper notice. *Id.* This Part envisions the creation of a tested evidentiary record. In the remaining portions of subsection (b) we are both restrained from approving a reorganization that "will adversely affect the utility's ability to perform its duties under this Act," and informed of seven specific findings that we "must" make in the course of its review. *Id.*

In all of Section 7-204(b) there is no language or other expression from the General Assembly, however, which limits the Commission from making additional findings if they are supported by the record. On this basis, we view the findings that we are specifically required to make under Section 7-204(b) to be the minimum findings. We believe as a matter of both law and common sense that additional findings certainly can and will be made in Section 7-204 proceedings. It is these additional findings which, being based on evidence, constitute a reasonable and rational source for the establishment of conditions. We further note that these findings may or may not relate directly to the specific findings that we are statutorily required to make.

The case law tells us that there is little difference between the interests of the public utility and its customers. *People v. Phelps*, 67 Ill.3d 976, 385 N.E. 2d 738 (5th Dist. 1978). To this end, a common sense reading of the entirety of Section 7-204 indicates to us that while the legislature outlined the most obvious interests needing protection in subsection (b), it could not anticipate all of what the evidence would show in any particular proceeding. We view the conditioning authority granted us under Section 7-204(f) as a means to address and protect the utility and its customers in ways not envisioned in subsection (b) but made apparent in the course of the proceeding.