

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Sage Telecom)	
)	
Petition for Arbitration of an Interconnection Agreement with Illinois Bell Telephone Company (SBC Illinois) under Section 252(b) of the Telecommunications Act of 1996)	03-0570
)	

REPLY BRIEF OF SAGE TELECOM, INC.

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COMES NOW Sage Telecom, Inc., by and through its attorneys Kelley Drye & Warren, LLP, pursuant to the directives of the Administrative Law Judge and 83 Ill. Admin. Code Part 261.10 et seq., and files this Reply Brief in support of the Sage Petition filed in the above captioned proceeding.

If SBC's positions in this proceeding were a house, it would be built on sand and made of glass. Its positions are just not supported by the evidence in this record and, as such, have no foundation. In a number of arguments, not only are the allegations not supported by the evidence that is in the record, but there simply is no record whatsoever to support SBC's positions. SBC's alleged "industry standards", "industry practices", "industry averages" and so forth may as well be the product of pulling arguments out of thin air, as SBC has not provided a single shred of evidentiary support for these claims. Just because SBC says that the average uncollectible for the "industry" is a certain level does not make it so. The burden is on SBC to provide the foundation for that claim either through work papers, treatises, articles or any other form of documentation. It has not done so which leaves the Commission with nothing but a self-serving,

unsupported claim that should be given no weight whatsoever. The same can be said of SBC's claim that Sage's uncollectible rate in other states is below the same alleged "industry average" for which SBC has provided no foundation. Just as above, SBC does not provide the record with any work papers or other documents to substantiate the claim. Rather, we are left to just take SBC's word on it.

Throughout this Reply Brief, Sage will continuously point out circumstances wherein SBC's claims (and Staff's adoption of those claims) has no foundation whatsoever in the actual record presented the Commission. The Commission cannot base any decision in this matter upon SBC's unsubstantiated, unsupported and unfounded assertions. While it may be a bit repetitious, the point is extremely important. If the record is not there to support the claim, no weight should be given to the claim.

Perhaps even more troubling to Sage is Staff's lock step acceptance of these mythical standards and averages. Staff does not seem troubled by the fact that its entire position that Sage should be forced to include SBC's proposed ABS Appendix in its interconnection agreement is based upon SBC's unsupported assertions that Sage's alleged uncollectible rates in other states is well below the alleged "industry average" and that SBC's ABS Appendix provides the appropriate incentive for Sage to increase its collection efforts. Staff does not even question the validity of or seek the foundation for SBC's claims in order to come to this conclusion. Rather, Staff just takes SBC at its word that the claims are correct. This lack of diligence is extremely troubling to Sage. If SBC could not provide any foundation for the assertions, then Sage must question exactly how Staff can justify any credibility given to those claims based upon the vacuum in this record. The answer, of course, is that no weight can be given any of the unsupported, unsubstantiated and unfounded assertions relied upon by either SBC or Staff.

I. THE ISSUE OF WHETHER UNREGULATED BILLING AND COLLECTION TERMS SHOULD BE INCORPORATED INTO A SECTION 252 INTERCONNECTION AGREEMENT IS NOT MOOT (SBC Brief, at pp. 5-7; Staff Brief, at p. 7-10)

In Sage's Petition for Arbitration, Sage's first issue raised was that SBC should not be able to hold up the interconnection agreement process governed by Section 251 and 252 of the Federal Communications Act ("FCA") by demanding to include language related to the unregulated billing and collection terms for Alternatively Billed Services ("ABS"). Sage Petition, at ¶ 1. Sage has explained in a number of its previous pleadings that the billing and collection services are not regulated under the FCA – the same FCA under which the interconnection agreement is governed. Both Staff and SBC allege that this issue is now moot because Sage presented the Commission with proposed language that allows for Sage to bill and collect SBC's ABS charges. SBC Brief, at p. 5-6; Staff Brief, at p. 7. In light of the clear findings of the FCC negating their argument on its merits, Staff and SBC are relegated to the position that they must muddy up the waters by claiming the issue is moot because Sage has already agreed to bill and collect on behalf of SBC for SBC's ABS charges. Such is clearly not the case.

In short, both Staff and SBC have greatly misstated Sage's position on this issue. Both Staff and SBC constantly harp and misstate Sage's position, even though Sage has clearly stated on the record exactly what its position is in this proceeding. It is important for this Commission to see through Staff's and SBC's attempts to confuse the issue by understanding that ***SAGE HAS NEVER AGREED TO INCLUDE TERMS OF BILLING AND COLLECTION IN THE AGREEMENT WITHOUT THE RELATED PROTECTIONS THAT SAGE NOT BE HELD LIABLE FOR SBC'S UNCOLLECTIBLE ABS CHARGES!*** Any argument to the contrary is

expressly counter to numerous explanations on the record so stating – and designed to confuse the Commission on a very fundamental position. Sage’s proposed Section 27.16 billing and collection language is prefaced by the Commission’s adoption of the proposed language in Section 6.3.4.1, which holds that Sage shall not be liable for any of SBC’s ABS traffic. See, e.g., Tr., at p. 325. Sage’s counsel summed up the Company’s position on the record prior to initiating the evidentiary hearings (Tr., at p. 20-22); Sage witness Timko presented the Company’s position both in prefiled testimony (Sage Ex. 2.0 at p. 1-4 (Timko Rebuttal)) and again on cross examination (Tr., at p. 324-325); and, Sage presented its positions in great detail in its Initial Brief. Notwithstanding these multiple explanations of Sage’s position on billing and collection, both Staff and SBC again attempt to misstate Sage’s position (or misguide the Commission) with their arguments. In order for the ALJ and the Commission to be clear and rebut the misstatements of SBC and Staff, Sage will again state its position with respect to including billing and collection terms in the interconnection agreement.

Sage agrees with Staff witness Mr. Zolnierек when he states that the interconnection agreement process is governed by the terms of the Federal Communications Act (“FCA”), 47 U.S.C. §§ 151 *et seq.*, and that the interconnection agreement at issue herein is subject to the terms of the FCA. Tr., at pp. 33-34. In fact, no party to this proceeding has disputed that claim. The question, then, is whether, in light of the fact that billing and collection is not regulated under the FCA, it is appropriate to include such nonregulated terms in an interconnection agreement governed by the FCA. Sage asserts that it is not, and SBC’s attempts to include such terms for billing and collection in the ABS Appendix in this context are improper.

It is undisputed that in 1986, the FCC found that “*billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the [Federal*

*Communications] Act.”*¹ The FCC went on to hold that it will not assert any ancillary jurisdiction over billing and collection services under Title I of the Federal Communications Act, as well.² Thus, for close to 18 years, the FCC has not asserted jurisdiction under the FCA for billing and collection services. Even Staff admits that Section 252, which governs this arbitration, falls under the penumbra of Title II of the FCA. *See*, Staff Brief, footnote 6; tr., at p. 33-34.

Further, as Sage explained in its Initial Brief, its position is supported by the only two state Commissions that have investigated the propriety of incorporating billing and collection terms into a Section 252 interconnection agreement. *See*, Sage Initial Brief, at pp. 13-14. In those cases, both the Michigan and Texas Commissions explicitly held that the terms of billing and collection for ABS services are not regulated and should be worked out between the parties outside the scope of a Section 252 interconnection agreement. This is completely consistent with Sage’s position in this proceeding and should guide the Commission in its decision making process on this issue.

Notwithstanding the clear lack of jurisdiction under the FCA, SBC and Staff ask this Commission to assert billing and collection terms into a Section 252 (i.e., Title II of the FCA) interconnection agreement. Pursuant to the *FCC Billing and Collections Order*, because billing and collection is an unregulated service that isn’t even subject to the scope of the FCA, there is no sustainable reason why an interconnection agreement (for which all parties agree is subject to the terms of the same FCA) should be hindered with SBC’s proposed ABS Appendix. By so

¹ *In the Matter of Detariffing of Billing and Collection Services*, FCC Docket No. 85-88, Report and Order, 102 FCC.2nd 1150, ¶ 34 (rel. January 29, 1986) (“*FCC Billing and Collections Order*”).

² *Id.*, at ¶ 37.

holding, the Commission will be completely consistent with the findings of the Michigan and Texas Commissions when they addressed this very same issue.

- A. SBC’s argument that this Commission has the authority to include billing and collection of ABS charges in an interconnection agreement as part of its regulations of UNEs is directly contradicted by SBC’s own witness. (SBC Brief, at p. 7-8)**

SBC makes a stunningly unjustified argument that the ABS traffic at issue herein is a form of telecommunications service which is carried over a UNE-P line and, as such, falls under the terms of the interconnection agreement governing unbundled network elements (“UNEs”). SBC Brief, at p. 7-8. SBC appears to be arguing that ABS services are carried via a UNE-P and that grants the Commission the authority to include billing and collection of those services carried via UNE-P in the agreement.

The argument is snuffed out, however, when the facts in the record are considered. No party will disagree with the statement that an interconnection agreement governs the terms and conditions upon which SBC will provide to Sage UNEs – including the provisioning of the UNE-P. *See*, Ex. 2 to the Petition, Article IX (Sage’s proposed terms related to provisioning of UNEs). However, that fact does not, and cannot, extend to the billing and collection related to ABS, as even SBC’s own witness Ms. Burgess has admitted that ABS services are not even a UNE!

- Q. Alternatively Billed Services are not unbundled network elements under Section 251 of the Federal Communications Act, correct?

A. That is correct.

Tr., at p. 419. If, as SBC’s own witness admits, ABS services are not a UNE and not governed by the FCA, then the billing and collection of those services certainly are not governed by the terms of the FCA. SBC’s argument is without foundation.

In light of these facts, which are unrebutted in the record, this Commission cannot hold that billing and collection for ABS services should be included in the interconnection agreement simply because Sage is a UNE-P provider.

B. The *FCC's Billing and Collections Order* is still binding on the FCA, and cannot be dismissed by the Commission as Staff and SBC would have happen. (SBC Brief, at p. 8-10; Staff Brief, at p. 10-13.)

Both SBC and Staff attempt to distinguish or discount the importance of the *FCC's Billing and Collection Order* in the Commission's review of this Petition. However, none of the arguments raised by either party warrant the Commission from ignoring the mandates contained therein. In short, billing and collection services are still an unregulated service and outside the jurisdiction of the FCA. This interconnection agreement, governed by the same FCA, should not be bogged down with SBC's proposed billing and collection terms contained in its ABS Appendix.

Again, the record just does not support Staff's and SBC's arguments. Importantly, neither Staff nor SBC cite to any state or federal order that rejects, rescinds or even reconsiders the FCC finding that billing and collections are outside of the FCA. The reason for this failure is because no such orders exists. In other words, as explained in Sage's Initial Brief, nothing has changed since the FCC initially determined that billing and collections should be unregulated service. The determination made in 1986 stands strong today and any attempt to re-regulate these services under the guise of a Section 252 interconnection agreement is wholly inappropriate. The Commission should reject SBC's proposed ABS Appendix for this reason alone.

Further, those state commissions that have investigated whether billing and collection services should be included in an interconnection agreement governed by the FCA have clearly

and unequivocally held that they should not. While this Commission is not bound by the determinations of other state commissions, it is important for the Commission to note that both the Michigan and Texas Commissions have explicitly held that billing and collection for ABS services are outside the scope of the FCA and should not be included in the interconnection agreements adopted pursuant to Section 252. *See*, Sage Initial Brief, at pp. 13-14. Importantly, those Commissions did not make any distinction between the *FCC's Billing and Collection Order's* adoption in 1986, and the amendments to the FCA that took place in 1996. It simply does not matter that the 1996 amendments took place subsequent to the adoption of the *FCC's Billing and Collections Order*.

Further, when Congress enacts legislation, it is presumed to know the law at the time and take that law into account when passing new laws. The FCC held in 1986 that billing and collection services are not regulated under the FCA. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 98 S.Ct. 866, 870; citing, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 2370, 45 L.Ed.2d 280 (1975); *581 *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366, 71 S.Ct. 337, 340, 95 L.Ed. 337 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147, 40 S.Ct. 237, 239, 64 L.Ed. 496 (1920). Congress knew that billing and collection services are not regulated under the FCA when it amended the FCA in 1996. By not incorporating any billing and collection terms into the amendments of 1996, Congress then adopted the FCC's interpretation finding that billing and collection terms are not within the scope of the FCA. If Congress intended to reinstate jurisdiction over the billing and collection services for either local or interstate traffic under the amended FCA, it could have easily done so. Importantly, Congress did not do so.

As the Texas and Michigan Commissions held, such nonregulated billing and collection services should be the subject of agreements outside the scope of the interconnection process. This Commission should hold the same and reject SBC's proposed ABS Appendix in the context of a Section 252 interconnection agreement. As indicated below, Sage has and will continue to be willing to negotiate the terms of a billing and collection agreement outside the scope of this interconnection agreement governing regulated services, just as it has done with numerous other carriers.

C. Staff's argument that nothing in Section 251 prohibits interconnection agreements from including billing and collection terms for settlement of ABS charges ignores the fact that ABS services are not even a UNE. (Staff Brief, at p. 11-13)

Staff avers that two orders, one issued by the FCC's Common Carrier Bureau (n/k/a the Wireline Competition Bureau) and the other by a federal district court in Minnesota, both support the claim that it is appropriate to include billing and collection terms like SBC's ABS Appendix in an interconnection agreement. Staff Brief, at p. 11. Staff finishes its argument by stating that nothing in Section 251 prohibits the Commission from including terms in the agreement for billing and collection services. *Id.*, at p. 13.

With respect to whether Section 251 of the FCA prohibits including billing and collection in interconnection agreements, the argument is a red herring. Whether that is so or not need not be addressed for two very simple reasons: first, as explained, ABS services are not a UNE governed by Section 251 and therefore would not be contemplated under Section 251; and, second, taken from its opposite perspective, there is nothing in Section 251 that *allows* billing and collection terms from being included in interconnection agreements – especially in light of the *FCC's Billing and Collection Order* finding these services as nonregulated under the FCA and the fact that ABS services are not a UNE governed by Section 251.

Section 251 of the FCA governs the obligations imposed on incumbent local exchange carriers, like SBC, related to provisioning of “nondiscriminatory access to network elements on an unbundled basis at any technical feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory” 47 U.S.C.A. § 251(c)(3). As SBC witness Ms. Burgess admits, however, ABS services are not a UNE governed under Section 251. Tr., at p. 419. As such, it is not relevant whether Section 251 has any express language that would prohibit an interconnection agreement from including billing and collection terms for settlement of ABS charges. Further, it is clear that the FCC has held that billing and collection services are not regulated under the FCA. Staff and SBC have not provided any sort of order that would counter this proposition. If, as the FCC has held, there is nothing in the FCA that grants it authority over billing and collection services and Congress did not override such a finding in the 1996 rewrite, then, by default, there can be nothing in Section 251 of the FCA that would somehow override that basic principal. *Lorillard*, 98 S. Ct. at 866.

Staff’s reliance on the two cases cited in its brief is also without merit. Upon review of these cases, it is clear that neither case pertains to the issue before the Commission in this case – whether it is appropriate to include nonregulated billing and collection terms like the SBC’s ABS Appendix into a regulated interconnection agreement. For instance, in the *FCC Virginia Arbitration Order*, the issue was whether it is appropriate under an interconnection agreement to include provisions related to alternative dispute resolutions (“ADR”). Staff fails to explain how the issue is even applicable to the present case, as Sage’s research does not indicate any FCC (nor the Common Carrier Bureau, for that matter) order holding that ADR is a service that is not within the scope of the FCA. It is clear, however, that the FCC has specifically held that billing and collection services are outside the scope of the FCA. *FCC Billing and Collection Order*, at ¶

34. The case is just not applicable to the situation facing the Commission, and Staff's reliance on it is not merited.

The same can be said of Staff's reliance on the US West case. This case is an appeal of the Minnesota Public Utilities Commissions determinations made in an arbitration case governed by Section 252 of the FCA. The language cited by Staff relates specifically to Count VIII of the Complaint, which the Court summarized as follows: "(8) Count VIII, the MPUC exceeded its authority under [§ 252\(b\)\(4\)\(C\) and \(c\)](#) of the Act when it imposed requirements not expressly contained in the Act or state law." *US West v. Minnesota Pub. Utils. Comm'n.*, 55 F.Supp.2d 968, 976 (D.Minn. 1999). The issue therefore was whether the Minnesota Commission was correct when it held that U.S. West must make its recording and billing services available to AWS as a UNE to facilitate AWS's collection of termination charges when a third party originates calls that transit U.S. West's network and are then terminated on AWS's network. *Id.*, at 985. The case has no bearing whatsoever on whether it is appropriate under the FCA to incorporate terms and conditions related to unregulated services.

At bottom, however, neither case is applicable to the situation before the Commission. That fact is that both cases specifically undertake an analysis under Section 251. There is no question that ABS services are not a UNE and are not governed by Section 251. As ABS services are not a UNE and not subject to the provisions of Section 251, any reliance on a case that addresses an ILEC's obligation to unbundled under Section 251 must be discounted and rejected.

- D. Despite all of the negatives associated with Sage performing billing and collection on behalf of SBC for SBC's ABS charges, Sage remains ready and willing to negotiate and enter into a billing and collection agreement with SBC outside the scope of the regulated Section 252 interconnection agreement.**

Notwithstanding the costs and difficulties detailed by Sage in its Initial Brief (pp. 12-16) and herein, Sage remains ready and willing to negotiate and enter into a billing and collection agreement with SBC outside the scope of the regulated Section 252 interconnection agreement. Sage has agreed and will continue to act as SBC's billing and collections agent for these SBC ABS charges, so long as it is clear that Sage is neither responsible nor liable for any of SBC's revenues. To be clear, Sage has always been ready and willing to proceed with such negotiations and enter a billing and collection agreement with SBC that contains mutually acceptable terms and conditions negotiated free from the regulatory regime of the Section 252 interconnection agreement process. In fact, that is just the process that Sage has followed in dozens of other agreements with carriers that bill Sage's end users directly. See, e.g., Sage Ex. 2.0P, at p. 10, Attachment B (Timko Rebuttal). It is also the exact process that the Michigan and Texas Commissions envisioned in their orders finding that billing and collections for ABS services should not be included in a Section 252 interconnection agreement. Neither Staff nor SBC has presented any reason for this Commission to find any different.

II. ABS SERVICES ARE A SERVICE OFFERED BY SBC TO THE TERMINATING CUSTOMER AND ACCEPTED BY THAT CUSTOMER. THUS, SBC DOES HAVE A RELATIONSHIP WITH THE END USER. (SBC Brief, at pp. 11-12)

SBC's entire foundation that Sage should be responsible for guaranteeing SBC's ABS revenues is based upon SBC's claim that it has no business relationship with the end use who authorized the ABS call. SBC Brief, at pp. 11-12. SBC's witness Ms. Burgess claims that SBC's own tariffs related to ABS charges do not apply when an SBC customer places an intraLATA ABS call to a Sage local exchange customer. Tr., at p. 360. Thus, in order for the Commission to adopt SBC's argument that SBC does not have a business relationship with the end user who accepted SBC's offer to complete the ABS call, the Commission must specifically

find that the end user who authorized the ABS call and is assessed the applicable ABS charges is *not* purchasing out of the SBC tariff and is *not* SBC's customer.

SBC's position puts the actual facts in this proceeding on their head, as it ignores substantial and unrebutted evidence that it is SBC, not Sage, who has the relationship with end users related to the ABS charges. An objective review of the evidence demonstrates that Sage neither has a role in the ABS service, nor even knows of the call's existence until well after the call is ended. It is clear that ABS services are not a service Sage is involved with, and should not be held accountable for SBC's charges.

At the risk of repeating itself, Sage feels it is important for the Commission to recognize that Sage has no part whatsoever in the completion of an ABS call. *See*, Sage Initial Brief, at p. 7-8. In fact, the evidence proves that it is SBC that is fully responsible for the ABS traffic, and it is SBC that should be fully responsible for the liability of those charges. SBC markets and provides the ABS service to its end users, an SBC customer chooses to make an ABS call, SBC's operators and systems process the call, SBC establishes the rates to be assessed for completion of the call, and SBC contacts the terminating customer to offer to complete the call. *Id.* Then, after the end user accepts SBC's offer to complete the ABS call, the call passed through. After the callers have finished their conversation, SBC then submits the billing data associated with that call to Sage in the form of messages on the Daily Usage Feed, which is the first opportunity for Sage to even become aware of the existence of the call. Sage has neither the ability to be consulted on whether the call should go through, or rate the call that SBC provides Sage for billing. In short, Sage has nothing to do with the ABS call other than acting as a billing agent. *Id.*

The evidence is clear and un rebutted that SBC and the terminating end user (even though that end user may use Sage as its local exchange provider) have entered into a business relationship with respect to that ABS call. The analysis really is not more complicated than whether the end user and SBC have entered into a contractual relationship for the handling of the ABS call. Based upon the evidence in this record, it is clear that there is an offer, acceptance and consideration in order to establish a contractual relationship between SBC and the party who authorizes the ABS call.

"A contract, to be valid, *must contain offer, acceptance, and consideration*; to be enforceable, the agreement must also be sufficiently definite so that its terms are reasonably certain and able to be determined." *Halloran v. Dickerson*, 287 Ill.App.3d 857, 867-68, 679 N.E.2d 774 (1997), citing *Ogle v. Hotto*, 273 Ill.App.3d 313, 319, 652 N.E.2d 815 (1995). "A contract is sufficiently definite and certain to be enforceable if the court is able from its terms and provisions to ascertain what the parties intended, under proper rules of construction and applicable principles of equity." *Halloran*, 287 Ill.App.3d at 868, 679 N.E.2d 774, citing *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill.2d 306, 314, 515 N.E.2d 61 (1987).

The syllogism is quite simple:

1. SBC contacts the end user and offers to complete the Incollect ABS call on the condition that the end user will agree to SBC's terms and pay SBC the tariffed rate for completing that ABS call;
2. The authorization to accept the call is made through SBC's operator service platform and it is SBC that receives the verification of the authorization (Tr, at pp. 370-371);
3. The end user either rejects the offer to complete the ABS call and no contract exists, or accepts SBC's offer and agrees to pay SBC the SBC-tariffed rate for completing the call (Tr., at p. 371-372);
4. There is an offer, there is acceptance of that offer, and there is consideration paid by both parties. In short, there is a contractual relationship between that end user and SBC.

These are the only elements that are required to enter into a binding contract in Illinois. *Halloran*, 287 Ill.App.3d at 867-868. Thus, the evidence demonstrates the fact that SBC and the end user who accepts SBC's offer to complete the ABS call do, in fact, have a contractual relationship. SBC's claims to the contrary are unfounded and against the evidence presented.

Importantly, Sage is not even a party to the contract nor even aware of the existence of the contract until well after execution (i.e., when Sage receives and processes the DUF records for billing). Notwithstanding Sage's lack of privity to the contract, SBC seeks to force Sage to be financially liable in its proposed ABS Appendix for the charges SBC has incurred due to its contract with the end user. This is simply inappropriate.

It would appear that Staff may be in agreement with Sage's position on this issue. In its Initial Brief, Staff argues that "it seems clear that if Sage customers authorize an ABS call, they should pay for it." Staff Brief, at p. 19. Sage agrees. It is the end user, not Sage, that entered into a contract with SBC to pay SBC in exchange for completing the ABS call. It is the end user, and not Sage, who is then responsible for making sure the contract is honored.

III. SBC'S AND STAFF'S ASSERTIONS AS TO "INDUSTRY STANDARDS", "INDUSTRY AVERAGES" AND SAGE'S UNCOLLECTIBLE RATE ARE WITHOUT A FOUNDATION IN THE RECORD AND MUST BE REJECTED BY THE COMMISSION. (SBC Brief, at p. 12-20; Staff Brief, at p. 20-22)

SBC has attempted to convince this Commission that there exists some sort of mystical "industry standard" with respect to billing and collection of ABS traffic, and that Sage is attempting to adopt policies and principals that somehow are in conflict with that "industry standard". SBC argues that Sage's position is not consistent with "standard industry practices." SBC Brief, at p. 12-16. SBC goes on to claim that it is "standard industry practice" to:

1. have the end users local exchange provider responsible to bill and collect SBC's ABS charges (SBC Brief, at p. 12);

2. have the end users local exchange provider to remit 100% of the ABS charge (*Id.*);
3. the end users local exchange provider does not have a right to recourse (*Id.*);
4. perform some type of credit check prior to providing local service (*Id.*, at p. 17);
5. place all ABS charges on a single bill, rather than two bills (*Id.*); and,
6. make follow up calls to its end users for their failure to pay SBC's ABS charges (*Id.*).

The Commission cannot place any weight behind any of these mythical “standard industry practices” to which SBC claims exist. Illinois courts have long held that a witness’s opinion testimony is only as valid as the factual reasons and bases for the opinion. *See, e.g. Hiscott v. Peters*, 324 Ill.App.3d 114, 123 754 N.E.2d 839 (2001).

the trial court is not required to blindly accept the expert’s assertion that his testimony has an adequate foundation. Rather, ***the trial court must look behind the expert’s conclusion and analyze the adequacy of the foundation.*** *Id.*, quoting, *Soto v. Gaytan*, 313 Ill.App.3d 137, 146, 728 N.E.2d 1126 (2000).

A witness’s opinions cannot be based on mere conjecture and guess. *Id.*, quoting, *Dyback v. Weber*, 114 Ill.2d 232, 244, 500 N.E.2d 8 (1986). Here, both SBC witnesses provide references to alleged industry standards. However, neither witness provides any foundation for their unsubstantiated assertions, nor any citation to any such foundation. In short, neither witness provided the foundation necessary to make the unfounded discussions related to these standards.

SBC creates these supposed “industry standards” because it knows that the actual facts in evidence simply do not supports its positions. However, the Commission cannot rely on these mythical standards as SBC has failed to provide a single piece of evidence that indicates their existence, much less their application in the UNE-P CLEC field. As this Commission is well aware, any decision reached in any proceeding before it must be based upon the evidence presented in the record. “[T]he findings of such administrative agency must be based on facts established by evidence which is introduced as such ...” *Wheeler v. County Board of School Trustess of Whiteside County*, 210 N.E.2d 609, 610 (Ill. Ct. App., 3rd Dist, 1965). As SBC has failed to provide that evidence, the Commission cannot rely upon those claims. Further, SBC

and Sage already have standard business practices that were negotiated and implemented between the parties in all ten states in which Sage currently operates. If there is any sort of business practice to which the Commission should turn for comparison, it is those standards.

A. The Commission can give no weight to SBC’s mythical “industry standards” as SBC has failed to provide any foundation for their existence, much less their application in the context of UNE-P CLECs.

As the ALJ will no doubt recall, Sage filed a Motion to Strike the portions of the pre-filed SBC witnesses testimony related to their supposed “industry standards and practices” to which they allude in their prefiled testimony. *See*, Sage Motion to Strike, filed on October 21, 2003. After oral arguments on the Motion to Strike, the ALJ denied the Motion and indicated that Sage’s concerns “really go to the weight of the testimony and not to its admissibility.” Tr., at p. 146. Now that the evidence is in, it is clear that the opinions expressed by the SBC witnesses with respect to “industry standards and practices” should be given absolutely no weight. Or, perhaps it would be more appropriate to say now that the evidence that is *not* in the record, as SBC has not provided any foundation for its claims that the alleged industry standards or practices even exist. As SBC has not provided the record upon which the Commission can find such standards and practices do exist, much less whether Sage has met them, the arguments can not be relied upon by the Commission. *Wheeler*, 210 N.E.2d at 610.

The industry standards upon which SBC relies are vague at best, and not proven at all. SBC has two witnesses that claim that the industry standards for ILECs who handle Incollect ABS calls wherein the ILEC agrees to be fully financially responsible. SBC does not provide evidence of any agreement with the other members of the “industry” that establishes that framework. SBC does not provide evidence of any industry-wide accepted standard that is codified by any national forum. SBC does not provide dates of when these “practices” evolved

or even if these “practices” are followed for any significant amounts of monies. SBC does not provide any treatise or article detailing the standards. SBC does not provide a single FCC or ICC rule, regulation, or order that incorporates such “practices”. Rather, SBC makes unsubstantiated and unfounded allegations of “industry practices” without providing any proof. The record is void of any foundation for SBC’s claims.

Again, SBC’s arguments and Staff’s adoption thereof are contradicted by the actual facts in the case. While SBC has provided no evidence of any such industry standard with respect to billing and collections, Sage certainly has presented unrebutted evidence of at least two different methodologies related to billing and collection. In fact, Sage has presented the Commission with a billing and collection agreement that SBC itself has entered into where it will bill and collect its end users on behalf of its affiliated data service providers with no liability for the charges whatsoever! Sage Ex. 2.0, Attachment A (Timko Rebuttal). Sage has also provided a number of contracts used to govern the billing and collection of for services provided by various third parties for Sage’s end users wherein the third party will directly bill the end user for the charges assessed. Sage Ex. 2.0, Attachment B (Timko Rebuttal). Neither of these types of agreements are at all consistent with SBC’s proposed ABS Appendix nor the alleged “industry standard” of which SBC claims. In absence of evidence to the contrary (which SBC has not provided), the Commission must find that the terms of the ABS Appendix are not consistent with any industry standard found in this record.

Further, it would appear that even SBC’s own witnesses are not clear on what they mean when they allege “industry standards” and “industry practices”. For instance, SBC witness Ms. Burgess admits on cross examination that she uses the phrase “industry practices” inconsistently throughout her testimony. When it suited her, Ms. Burgess used the phrase to include the ILEC

to the ILEC industry, or the ILEC to IXC industry, or even the ILEC to facilities-based CLEC industry. However, Ms. Burgess makes no attempt to explain in each reference to the supposed “industry practice” what industry to which she is actually referring.

Q. Ms. Burgess, throughout your testimony you’ve used the term industry practice, which industry are you referring to?

A. The industry made up of dial tone providers. And I qualify that with, I’m pretty sure that’s what I meant, not having looked at each and every reference.

Q. That’s my point, I guess, do you use industry practice the same in every single reference in your testimony?

A. No.

Tr., at p. 412-413. This admission makes Ms. Burgess’ testimony with respect to any industry standards or practice a moving target that is contradicted by her own statements in the record. The Commission can place no weight behind her assertions.

Sage will also note that SBC’s reliance on the Verizon decision is entirely misplaced and is easily distinguished. SBC Brief, at p. 13. The *Verizon Order*³ cited by SBC deals with a situation in which a reseller is not paying its bill for resold collect call service. In contrast, Sage is not a reseller of SBC’s ABS collect call services. Sage is a UNE-P provider that provides its own telecommunications services to its end users; Sage is not a reseller. Resellers basically take an ILEC service and resell that service as its own. Sage does not offer or market SBC-provided collect call service. For ABS-type calls in a UNE-P situation, the end user accepts responsibility to pay for an SBC-provided collect call, with Sage playing no part in the provisioning of that service. In fact, SBC witness Smith even admits the distinction when he states that the disputed ABS provisions in contention in this case are limited only to situations where Sage is leasing a switch port or UNE combinations involving unbundled local switching as UNE-P. ABS calls

³ *In the Matter of the Application by Verizon New Jersey, Inc.*, 17 FCCR 12275 (June 24, 2002).

can occur in switch-based or Resale contexts, *but the parties here only disagree with respect to ABS charges occurring in the UNE environment.*” SBC Ex. 1.0, at p. 3 (Smith Direct).

Finally, and most importantly, Sage has followed the business practices in place that were developed as a result of the *Texas Interim Order* – practices that SBC has incorporated into Accessible Letters for handling Incollect ABS calls and practices that SBC and Sage have agreed to adopt in all ten states in which Sage operates. As Sage explained in its Initial Brief, even SBC witness Smith agrees that Sage has and continues to meet the terms of the *Texas Interim Order*. See, Sage Initial Brief, at pp. 10-11. In fact, according to SBC, it is “pleased with the progress and cooperation that has been made in developing business practices with Sage in regards to ABS.” SBC Ex. 1.0, at p. 24 (Smith Direct).

B. SBC’s attempt to convince the Commission that it has accepted responsibility for billing and collecting Sage’s ABS traffic rings hollow, as the evidence demonstrates that Sage does not process any ABS traffic to SBC for billing. (SBC Brief, at p. 14-15)

SBC argues that Sage’s attempt to avoid financial responsibility for SBC’s ABS charges conflicts with SBC’s billing and collecting on behalf of SBC for Sage’s ABS traffic. This argument holds no water as the record indicates that Sage does not submit any ABS charges to SBC for billing. SBC’s argument is a pathetic attempt to make it look magnanimous, but, again the facts seem to get in the way of the fiction that SBC is writing.

The actual facts of the case, if SBC would care to review them, fail to provide any evidence that Sage even forwards any ABS traffic to SBC to bill and collect. In fact, the undisputed facts indicate that hardly any UNE-P CLECs submit ABS charges to SBC to bill and collect. As Sage demonstrated in its Initial Brief, the record proves that UNE-P CLECs only submit ****XXXXXX%**** of the ABS charges that SBC submits in a given month. Sage Brief, at p. 21. For instance, in August 2003, just in Illinois, the total ABS charges *billed to UNE-P*

carriers by SBC and for which SBC seeks to have the UNE-P carrier be financially liable was in excess of **\$XXXX**. Tr., at p. 396; Sage Cross Ex. 6P. At the same time, in August 2003, the reciprocal total ABS charges *billed to SBC by the UNE-P carriers* was just **\$XXX**! *Id.*, Sage Cross Ex. 6P. For SBC to claim that Sage should be responsible for SBC's ABS charges because SBC has magnanimously agreed to be responsible for the trickle of CLEC-submitted ABS charges is absolutely shameful.

Further, the evidence demonstrates that roughly **XX%** of the ABS traffic at issue in this proceeding is collect calls. Sage Initial Brief, at p. 22. SBC's own witness has admitted on cross examination that "between **XXX%** of those collect calls originate from an inmate facility, most of which would be SBC's ...". Tr., at pp. 380-381, 395; Sage Cross Ex. 2P. Thus, SBC's inmate facilities could be responsible for up to **XX%**⁴ of all collect calls made. *See*, Sage Initial Brief, at pp. 21-23. SBC's inmate phone division seems to be focused almost exclusively on raising revenues by offering ABS collect calls from inmate facilities. Sage has no such division that is focused to exclusively on creating ABS traffic and raising ABS revenues. Rather, Sage focuses its services to residential and small business customers in suburban and urban areas and does not focus on raising revenue through the use of ABS services to its end users. *See*, Sage Petition at ¶ 5; Sage Ex. 1.0, at p. 4-7 (Timko Direct). As demonstrated above, the imbalance between SBC's ABS charges it seeks the CLECs to be liable for verses what the CLECs submit to SBC is mind blowing. SBC's magnanimous offer to guarantee Sage's nonexistent ABS traffic should be thrown out the window.

C. SBC's and Staff's other arguments with respect to the manner in which Sage provides local exchange services and how it bills for SBC's ABS charges must be discounted as well.

⁴ **XX% x XX% = XX%**

Sage feels compelled to also rebut certain arguments raised with respect to the manner in which Sage provides its local exchange service and how it bills for SBC's ABS charges. SBC tries to make a claim that Sage's uncollectible rate would be lower if it were to institute a credit check on its local exchange customers prior to offering local exchange service. SBC Brief, at p. 17. With respect to Sage's business plan, this claim is ludicrous. Sage does not perform a credit check prior to providing local service because Sage bills its local service one month in advance for the customers' bundled service package. There is no need for a credit check, or a deposit, because the Sage services are purchased up front, prior to receiving service.

Further, as demonstrated in Sage's Initial Brief, SBC fails to explain how its proposed surcharge system would actually work in a feasible manner. Sage Initial Brief, at p. 15. Does SBC think that Sage should impose these surcharges on all of its end users and just debit those customers who might actually receive a collect call in any given month? Or, perhaps it makes more sense to SBC if Sage only impose surcharges on those customers who actually get a SBC ABS call – ignoring the fact that those are some of the same people who don't pay their ABS charges in the first place. Adding additional surcharges that won't get paid on top of the unpaid SBC ABS charges would hardly make them more likely to pay the charge, and certainly not serve as a source of additional revenue to Sage!

With respect to SBC's argument that Sage should put SBC's ABS charges on a single bill, rather than on a separate bill, SBC seems to ignore the fact that Sage implemented the two bill system pursuant to the business practices that SBC and Sage negotiated and adopted after the *Texas Interim Order*. In fact, as Sage explained in its Initial Brief, both parties have negotiated and adopted these business practices in all ten states in which Sage currently operates. It is also undisputed and SBC witness Smith acknowledges that Sage has met its obligations under the

Texas Interim Order. See, Sage Initial Brief, at pp. 10-11. Further, neither SBC nor Staff have, or can, point to a single regulation or order compelling Sage to carry these ABS charges on a single bill. The reason for that is simple – no such regulations or orders exist. SBC’s argument that Sage should carry the ABS charges on a single bill is simply not a requirement and should be discarded. If SBC wishes to amend the business practices, then SBC should contact Sage with that request and the parties should negotiate. The record, however, is void of any such request ever having been made.

Yet another claim made in SBC’s Initial Brief that must be addressed is the ridiculous claim that Sage is somehow not willing to respond to customer inquiries related to SBC’s ABS charges. SBC Initial Brief, at p. 19. SBC had to go out of its way to avoid the actual facts in evidence in order to make this unfounded and outrageous claim. The facts in evidence, as compared to the facts alleged by SBC, demonstrate how desperate SBC is in trying to make Sage out to be the “bad guy”. It is readily apparent that Sage does, in fact, respond to customer inquiries from its end users related to ABS charges. To claim otherwise is pure fabrication.

Ms. Timko testified that Sage attempts to respond to all customer complaints, but, as the charges are not Sage charges and the underlying rates being assessed are not Sage rates, it is difficult to fully respond to many customer inquiries. Sage Ex. 1.0, at p. 25 (Timko Direct). The problems come as a result of the fact that Sage has no way of responding to many inquiries about SBC’s ABS charges since all Sage does is take SBC’s rated messages, reformat them to a readable fashion to be placed onto the customer’s bill. *Id.* As such, pursuant to the business practices adopted by SBC and Sage, the parties agreed to set up a system whereby Sage would contact SBC via email with specific questions raised by the end user for which Sage was not able to respond.

Further, as the ABS charge is not Sage's revenue, but rather is SBC's revenue, Sage is not able to even make an adjustment on the bill for SBC's ABS charges. The approval for that would have to come from SBC, or Sage would be accused of improperly interfering with SBC's revenues. This is why the parties agreed to set up the business practice of having Sage contact SBC with customer inquiries for which Sage did not have the information to respond.

For SBC to allege that Sage is not willing to respond to its end user's billing inquiries is unsubstantiated and directly counter the facts in the record. It is also a very misleading statement crafted in an attempt to put Sage in bad light with the Commission on an unjustified basis. The record clearly belies SBC's misleading statements.

IV. SBC's PROPOSED ABS APPENDIX IS NEITHER FAIR NOR APPROPRIATE FOR THE COMMISSION TO ADOPT. (SBC Brief, at p. 20-27; Staff Brief, at p. 16-22)

SBC alleges in its Brief that its proposed ABS Appendix is fair and reasonable, and that Sage's objections to its terms are without merit. SBC Brief, at pp. 20, 24-27. Further, in a shockingly improper argument, Staff argues that, if Sage were to adopt the provisions of SBC's proposed ABS Appendix, Staff would have no public policy objection. Staff Brief, at p. 19.

In support of its thesis, SBC argues that:

1. ABS Services are a Sage service provided to its end users (SBC Brief, at pp. 24-26);
2. neither the Michigan or Texas Commissions have rejected the terms of the ABS Appendix (SBC Brief, at p. 25); and,
3. the \$0.05 billing and collection fee is appropriate (SBC Brief, at p. 26).

Sage notes that it has addressed each of these arguments in its Initial Brief (pp. 8-9, 13-16,) and above in this Reply Brief. Rather than waste the Commission's resources by repeating those arguments again, Sage will incorporate those arguments herein. However, certain arguments raised by SBC require specific attention.

SBC attempts to take Sage to task for the claim that the ABS Appendix has never been expressly rejected by the Michigan and Texas Commissions. SBC Initial Brief, at pp. 24-25. SBC, however, only presents half of Sage's position. The other half is the most crucial point, and Sage will present the entire argument for the Commission to review.

Again, the evidence before the Commission gets in the way of SBC's arguments. The facts in the record demonstrate that both the Texas and Michigan Commission were faced with the same basic scenario – either accept SBC's proposed ABS Appendix or find that the terms and conditions related to billing and collection for ABS services are a nonregulated service that should not be considered in the context of a Section 252 interconnection agreement. As Sage has amply shown, both the Texas and the Michigan commissions specifically rejected the ABS Appendix as proffered by SBC and held that the billing and collection terms are not regulated under the FCA and should be negotiated outside the terms of an interconnection agreement. *See*, Sage Initial Brief, at pp. 13-14. This is exactly the positions taken by Sage in this proceeding. By adopting Sage's position, the Commission will be entering an order that is in total consistency with its fellow commissions in Michigan and Texas.

Further, with respect to SBC's arguments that the \$0.05 per message fee is adequate in order to allow Sage to recoup its administrative costs associated with billing and collecting for SBC's ABS services, the evidence again belies such a claim. Sage provided this Commission with actual evidence in the record that demonstrates how inadequate the one-time, \$0.05 per message charge is in comparison with the actual costs Sage incurs as a result of billing and collecting for SBC's ABS charges. Sage Initial Brief, at p. 15-18. The evidence simply does not support SBC's argument. For instance, assuming that the Commission adopts SBC's proposed ABS Appendix and Sage is forced to guarantee SBC at least 65% of SBC's ABS revenues each

month, and further assume that the uncollectible rate is 80% as Staff and SBC allege to be the “industry average”, the net result on Sage is a guaranteed loss of **\$XX** for each SBC ABS charge for which Sage bills.

Average price per ABS call (Sage Cross Ex. 6P)	**\$X**
Sage’s maximum recourse of 35%	**\$X**
Sage’s average minimum exposure per ABS call	**\$X**
Accounting for Sage’s collection of the “industry average” of 80% (\$3.70 x 80%)	**\$X**
Net to Sage (\$2.96 - \$2.40)	**\$X**
SBC Billing and Collection Fee	\$0.05
Total difference to Sage (\$0.56 + \$0.05)	**\$X**
Sage’s cost (Sage Ex. 2.0, at p. 8 (Timko Rebuttal)	<\$1.07>
Net Loss to Sage (\$0.61 - \$1.07)	**<\$X>**

(** ** indicates Confidential material)

In addition to this loss that results if Sage is forced to accept SBC’s ABS Appendix, the evidence demonstrates that Sage will incur costs related to the receipt of SBC’s DUF files, customer inquiries, follow-up invoices and reminders of outstanding amounts due for ABS charges, tracking and reporting payments received and not received, remittance of the SBC revenues to SBC, and provisioning SBC’s TBE requests and unblocking requests. Sage initial Brief, at p. 15-16. In short, the record evidence amply demonstrates that forcing Sage to adopt SBC’s proposed ABS Appendix will insure that Sage will be forced to loose money with each and every message it bills for SBC.

A. Staff’s belief that there is no public policy objection with respect to forcing Sage to risk loosing end users to the ILEC in order to get ABS services is directly in conflict with the pro-competitive policies imposed by the Illinois Public Utilities Act. (Staff Brief, at pp. 19-22)

In support of its position that Sage should be forced to enter into SBC’s ABS Appendix as a part of the interconnection agreement process, Staff discusses what it believes to be the

benefits of Option 1 of that appendix. Under the provisions of Option 1 in Staff's own words, Sage would have to elect to "block almost all ABS calls to all of its end user customers by employing Toll Billing Exception ("TBE")." Staff Brief, at p. 17. The result of implementing SBC's proposed Option 1 within the scope of SBC's ABS Appendix is that Sage would not be able provide *any* of its end users the possibility to receive *any* ABS calls – not just SBC ABS calls. Implementing TBE in the context of SBC's proposed ABS Appendix will block all incoming ABS calls from SBC, AT&T, MCI or any other carrier. This is hardly a responsible public policy position for Staff to adopt.

In a mind boggling argument, Staff argues that "if Sage were to accept Option 1, Staff would have no public policy objection". Staff Brief, at p. 19. Staff apparently does not believe SBC when SBC witness Smith explains that "this option [Option 1] would prevent Sage from offering its end user customers a full array of telecommunications services, which they normally expect." SBC Ex. 1.0, at p. 17 (Smith Direct). Frankly, Staff's adoption of an option that even SBC admits will prevent Sage end users from receiving the full array of telecommunications services that they expect is absolutely mind blowing and causes Sage to wonder if Staff is actually considering the public policy that the General Assembly deemed appropriate in the Illinois Public Utilities Act.

The General Assembly has found that it is the public policy of the State of Illinois to foster a competitive atmosphere for local telecommunications services. In fact it is clear that the General Assembly has determined that the public policy of the State of Illinois is as follows:

- (e) it is in the immediate interest of the People of the State of Illinois for the State to exercise its rights within the new framework of federal telecommunications policy to ensure that the economic benefits of competition in all telecommunications service markets are realized as effectively as possible;
- (f) the competitive offering of all telecommunications services will increase innovation and efficiency in the provision of telecommunications services and may lead

to reduced prices for consumers, increased investment in communications infrastructure, the creation of new jobs, and the attraction of new businesses to Illinois; and
(g) protection of the public interest requires changes in the regulation of telecommunications carriers and services to ensure, to the maximum feasible extent, the reasonable and timely development of effective competition in all telecommunications markets.

220 ILCS 5/13-102(e) – (g).

Staff's position mandating that Sage's end users not be allowed to receive any ABS calls from carriers with whom Sage has already negotiated billing and collection terms runs directly counter to that public policy. That position also interferes directly with the ability of Sage and the other non-SBC carriers to contract between themselves for handling the billing and collection of ABS services.

Staff's position, taken to its logical end, would find that Staff does not have a public policy objection to forcing Sage into a position wherein it must risk losing its local service customers due to the requirement that Sage impose TBE and thereby prohibiting its end users from receiving ABS calls from any carrier, not just SBC! The record is clear that Sage has been able to come to negotiated agreements with a number of other carriers related to those carriers direct billing the end user for ABS traffic. Sage Ex. 2.0, Attachment B (Timko Rebuttal). In light of these facts, Sage avers it is a far better public policy to impose TBE to block SBC's incoming Incollect ABS traffic, but still allow Sage end users to accept ABS calls from other carriers with whom Sage has agreed to billing and collection terms.

Further, Staff argues that SBC performing direct billing for its ABS charges is not feasible and, when combined with what Staff believes to be Sage's lax collection history, will lead to the "demise of ABS service in Illinois." Staff Brief, at p. 22. As explained above, Staff's reliance on SBC's unsupported, unsubstantiated and unfounded assertion of "industry average uncollectibles" and where Sage falls in comparison thereto are completely without support in the

record and should be dismissed. SBC did not provide a single piece of evidence in the record to indicate how the so-called average is calculated, what assumptions were made, which “industries” are included in the calculation, or any work papers or other documents to support the claims that Sage does not meet the average. Without such record evidence, the claims can be given no weight. This vacuum of evidence, in combination with Staff’s opinion that it is good public policy to force Sage into a position wherein it risks losing its end user customers because SBC is unable and unwilling to do as other carriers are doing and direct bill the customer in order to collect SBC’s ABS revenues makes Sage wonder just what public policy Staff is referencing.

V. SBC PRESENTS NO VIABLE RATIONALE AS TO WHY SAGE’S PROPOSED ABS LANGUAGE (EXHIBIT 3 TO SAGE’S PETITION) IS UNREASONABLE. (SBC Brief, at pp. 27-29)

SBC argues that Sage’s proposed ABS Appendix, attached as Exhibit 3 to the Petition is not a viable option because it forces SBC to direct bill the end users in order to receive payment for its ABS charges. SBC believes that direct billing the end user will lead to confusion. Staff also argues that the direct bill option is not viable due to customer confusion. Staff Brief, at p. 19. SBC further argues that forcing it to implement direct billing will require it to implement expensive changes to its billing systems. SBC Brief, at p. 28. For the reasons discussed below, none of these arguments are supported by the record and are not viable reasons to discount the Sage proposal.

First and foremost, Sage must point out that it does not believe that it is appropriate to incorporate billing and collection terms into the interconnection agreement. That includes both the SBC proposed ABS Appendix as well as its own. This issue only comes into importance if the Commission determines that it is appropriate to include an appendix containing such billing and collection terms in the interconnection agreement. Further, Sage has stated on a number of

occasions that, if the Commission determines to include billing and collection terms in the agreement as an appendix, it would be appropriate to the Commission adopting Sage's ABS Appendix (Ex. 3 to the Petition) with the addition of SBC's "Option 1" from the revised ABS Appendix submitted into the record. Tr., at 20-22.

As to SBC's and Staff's argument that customers will face confusion resulting from receiving two bills, there is simply no empirical evidence to support the claim. Neither SBC nor Staff presented any sort of study or even an article discussing potential customer confusion. In fact, the record is void of any evidence upon which the Commission can make a finding that end users will face any uncertainty or confusion when receiving two bills. Rather, SBC and Staff simply make unsubstantiated and unfounded statements that customers will be confused. Sage agrees with the skepticism of the ALJ in his cross of SBC witness Smith when he stated that the end user is just as likely to see a separate bill from any IXC that terminates ABS traffic on the end user's line.

Q. And I will say because you mention customer confusion, Mr. Smith, that the same principle would apply it seems to me, that the customer is just as likely to get a separate bill. By "separate", I mean not from their ILEC or CLEC.

A. They may get it from the IXC, which they have direct relationship.

Q. Yeah. Or they may not because it could come from virtually any IXC from virtually anyplace and they've accepted the call, and it creates some of the same issues is all I'm saying

Tr., at pp. 235-236. Again, Sage expresses the same skepticism expressed by the ALJ in the above conversation. In light of the void in the record to support such a claim, the skepticism is well founded.

As for the argument that forcing SBC to implement direct billing will require it to implement expensive changes to its billing systems, the record is again void of any evidence to support such a claim. SBC has claimed that it will have to implement costly upgrades, but did

not provide a single document or other evidence containing any supposed costs, cost studies, or even an estimate of how much “costly” means. Again, the Commission cannot accept the unfounded and unsubstantiated claims uttered without having the evidence to back them up. In short, the Commission must reject SBC’s argument.

Further, the ALJ rightly noted in his cross of Mr. Smith that having SBC set up a direct billing system is no different than what every other carrier has had to do in order to collect their ABS revenues from end users of other carriers. The ALJ asked Mr. Smith to explain why all the other carriers who have to direct bill in order to get paid for their services are able to do so, (even though they do not provide local service to the end user), but SBC claims that it should not have to do so. Tr., at pp. 229-235. Mr. Smith’s responses are quite telling. He first claims that SBC has concerns that it does not know who the end user is and the address to send a bill. Tr., at p. 229-230. The record demonstrates, however, that such information is easily and readily available to every other carrier that direct bills by simply asking Sage to provide the billing account information. Sage Ex. 2.0P, Attachment 2 (Timko Rebuttal). SBC’s second concern is that it would have to set up an 800 number to take inquiries from Sage’s end users. Tr., at p. 230. This hardly seems too difficult a task for a phone company to figure out how to handle. Third, Mr. Smith expresses SBC’s concern that SBC would be unable to leverage payment out of Sage’s end users for their failure to pay ABS charges. “We can’t cut them off for local service.” Tr., at p. 231. Importantly, neither can Sage. The ICC’s regulations prohibit Sage from terminating local service for an end users failure to ABS charges. See, e.g., 83 Ill. Admin. Code Part 735.130 Thus, none of the concerns expressed by SBC witness Smith amounts to justification for SBC’s refusal to direct bill in order to collect its ABS revenues.

Further, the record does not provide any technical reason why SBC can't setup a direct billing system for its ABS charges. As noted by the ALJ, just the opposite is true as every other carrier can create the infrastructure to direct bill, but SBC refuses to do so. Tr., at p. 232-233. In light of the fact that SBC has specifically entered into a contract with the end user who agreed to the terms by which SBC would complete the ABS call, it would be expected that the end user would receive a direct bill from SBC for the service.

The only reason why SBC doesn't want to set up its own systems for billing is because it thinks it can force Sage to do its dirty work. SBC would rather have Sage incur the costs associated billing and collecting the ABS charges and be held liable for SBC's ABS charges. SBC, meanwhile, can go on without the worries associated with actually collecting the money. The Commission must ask itself why it is so appropriate for Sage to be forced to guarantee SBC's revenues, but not have SBC expend a single nickel in order to bill and collect its own revenues? The Commission should not allow Sage to be put in such a position.

VI. SBC'S PROPOSED RESERVATION OF RIGHTS IS SUPERFLUOUS TO THE LANGUAGE ALREADY IN THE AGREEMENT AND IMPROPERLY HAS THIS COMMISSION WAIVING ANY AUTHORITY UNDER STATE LAW TO IMPOSE UNBUNDLING REQUIREMENTS ON SBC. (SBC Brief, at pp. 30-32)

SBC argues in defense of its proposed Reservation of Rights language in its Brief, but fails to address the most important question related to the need to modify the language at all – why does SBC want to limit the application of any independent *state* authority under the interconnection agreement? Staff has still not taken a position on the issue of the Reservation of Rights language, so Sage will not address Staff on this issue.

SBC makes the point in its Brief that “SBC Illinois’ proposed intervening law language is consistent with FCC rules ...” SBC Brief, at p. 31. SBC also mentions that its “proposal in this

regard is entirely consistent with the FCC rules, quoted above.” *Id.* What Sage finds interesting is that SBC never once mentions whether its proposal is consistent with any *state* rules. Perhaps that is because SBC seeks to specifically remove itself from any application of state authority to order additional unbundling.

As Sage has explained in its Initial Brief (pp. 27-34), SBC is attempting in its reservation of rights language to limit any application of state authority to impose unbundling obligations. In its proposed language, SBC specifically limits the application of the interconnection agreement terms with respect to UNEs to only those UNEs ordered unbundled by the FCC. SBC has proposed the following language:

SBC ILLINOIS shall not be obligated to provide combinations (whether considered new or existing) or commingled arrangements involving SBC ILLINOIS network elements ***that do not constitute required UNEs under 47 U.S.C. § 251(c)(3)***

SBC Response, Attachment 1 (emphasis added). Apparently, SBC doesn’t wish to acknowledge that this Commission has independent authority under *Illinois* law to impose unbundling requirements on SBC. It is clear that this Commission does have authority under state law to order unbundling of additional network elements, which could be wiped out if the Commission should adopt SBC’s proposed language. For instance, Section 13-505.6 of the Illinois Public Utilities Act provides that the ICC may order Illinois telecommunications carriers to unbundled network elements and make those elements available to competitors “based on a determination, after notice and hearing, that additional unbundling is in the public interest and is consistent with the policy goals and other provisions of this Act.” 220 ILCS 5/13-505.6. It is also clear that SBC has the obligation under state law to provide UNE-P service to requesting carriers. 220 ILCS 5/13-801(d)(4). In short, SBC seeks to have the Commission adopt language

that will substantively have the Commission preclude itself from asserting the authority granted it under the Illinois PUA to order any unbundling requirements on SBC.

Sage will not agree to any language that limits the Commission's authority under state law to order unbundling – nor should the Commission do so.

VII. CONCLUSION

WHEREFORE, in light of the foregoing, Sage respectfully requests this Commission to enter an order consistent with the Texas and Michigan Commissions finding that “[ABS] matters over the UNE platform should be addressed in a separate billing agreement between parties and should not be incorporated into an interconnection agreement.” *Texas Revised Arbitration Order*, at p. 212. If the Commission determines otherwise, Sage requests that the Commission adopt Sage’s proposed language attached as Exhibit 2 to the Petition, which places Sage in only the role of Billing and Collection agent for SBC (Article XXVII, Section 27.16.3), and not be forced to be financially responsible for all of SBC’s and third party’s ABS charges when the end user fails to pay the charge (Article VI, Section 6.3.4.1). If the Commission determines that it is appropriate to add an appendix to the interconnection agreement, Sage respectfully urges the Commission to reject SBC’s proposed ABS Appendix for the reasons stated and adopt Sage’s proposed contract language attached as Exhibit 3 to the Petition, with the only modification being the addition of SBC’s revised “Option 1” as proposed in SBC’s Revised Ex. 1.0.

Respectfully submitted,
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By: One of Its Attorneys

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