

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	
Implementation of the Federal	:	ICC Docket No. 03-0593
Communications Commission’s	:	
Triennial Review Order with	:	
respect to a Batch Cut Migration	:	
Process	:	

MOTION FOR AN EMERGENCY STATUS HEARING

The Staff of the Illinois Commerce Commission (“Staff”), pursuant to Section 200.190 of the Rules of Practice before the Illinois Commerce Commission (“Commission”), 83 Ill. Admin. Code 200.190, requests that the Administrative Law Judge (“ALJ”) set an emergency status hearing for the purpose of (a) determining whether any party is requesting the Commission to determine that it need not analyze whether a batch hot cut process is necessary under the factors set forth by the FCC in its *Triennial Review Order* if an ILEC is not challenging the FCC’s national impairment finding for mass market switching (the “Potential Legal Issue”), (b) terminating the briefing schedule if no party is requesting the Commission to determine the Potential Legal Issue in the uncontested track of this docket, and (c) modifying the briefing schedule if any party is requesting the Commission to determine the Potential Legal Issue in the uncontested track of this docket. In support of this motion, Staff states as follows:

1. In its initiating order for this docket¹ the Commission indicated that the purpose of this proceeding was “to establish batch hot cut processes for ILECs as required by the FCC or, alternatively, determine whether a batch process is unnecessary in specific markets.” *Batch Hot Cut Initiating Order* at 7. With respect to potential determinations that a batch process is unnecessary, the Commission established a notice procedure by which it would be determined whether there were any ILEC assertions that a batch hot cut process was unnecessary that were uncontested by CLECs (“Uncontested No Batch Claims”). *Batch Cut Initiating Order* at 7-8. With respect to Uncontested No Batch Claims, the Commission established a process whereby (i) the ILECs with such claims would “have the burden of submitting *prima facie* evidence in the form of testimony sufficient to allow the Commission to make the detailed findings required by the FCC in accordance with 47 C.F.R. § 51.319(d)(2)(ii)(B)[,]” and (ii) the Commission, subject to a review of the “sufficiency of the evidence submitted[,]” would enter “an order containing the findings required by the FCC” *Batch Cut Initiating Order* at 8.

2. As noted in the Initial Brief Of The Staff Of The Illinois Commerce Commission Regarding The Scope Of The Commission’s Batch Cut Impairment Analysis (“Staff IB”), witnesses for two ILECs with Uncontested No Batch Claims (Verizon and Citizens) made assertions regarding the Potential Legal Issue discussed above (although no motion or other pleading requesting the Commission to consider the Potential Legal Issue was ever filed). See Staff IB at 6-7. Staff filed testimony pointing out for the record that Staff disagreed with the assertions made by Verizon and Citizens,

¹ *Illinois Commerce Commission On Its Own Motion: Implementation of the Federal Communications Commission’s Triennial Review Order with respect to a Batch Cut Process*, Docket No. 03-0593, September 30, 2003, (“*Batch Cut Initiating Order*”).

but not addressing those assertions on the merits because the Potential Legal Issue was not a proper subject for testimony. See Staff IB at 7. Ultimately, evidence was submitted for each Uncontested No Batch Claim supporting a finding that such claims satisfied, based on present conditions, the criteria established by the FCC in its *Triennial Review Order*. See Staff IB at 14-15.

3. Although the testimony of Verizon and Citizens put everyone on notice that they were not waiving their position regarding the Potential Legal Issue, it did not appear as if any party was requesting the Commission to modify the procedure established in its *Batch Cut Initiating Order* or to rule on the Potential Legal Issue. That state of affairs ostensibly changed at the very end of the December 18, 2003, hearing to admit into evidence all testimony in this proceeding when counsel for McLeodUSA and TDS MetroCom (collectively referred to herein as “McLeodUSA”) questioned the status of the Potential Legal Issue. See Tr.² at 179-181. Counsel for McLeodUSA and counsel for Verizon (in response to McLeodUSA’s inquiry) expressed a desire to brief the Potential Legal Issue. *Id.* Counsel for McLeodUSA described the question to be briefed as follows: should determination of “whether Verizon is required to offer a batch hot cut process [be] based on the four criteria outlined by staff in their testimony or just based on the fact that Verizon continues to offer mass-market switching.” Tr. at 180. A schedule was established providing for simultaneous initial briefs on January 13, 2004 and simultaneous reply briefs on January 27, 2004. Tr. at 189-190.

4. Other than Staff, the only other parties to file an initial brief on January 13, 2004, were McLeodUSA (“McLeodUSA IB”) and Verizon (“Verizon IB”). To Staff’s

² A corrected transcript of the December 18, 2003, hearing was filed in this docket on e-docket on January 13, 2004. Staff is not aware of any changes to the transcript other than to the page numbers. All cites in this motion to the transcript of the December 18, 2003, hearing are to the corrected transcript.

surprise, the party at whose instance a briefing schedule for the Potential Legal Issue was established recommended in its initial brief “that the Commission need not and should not resolve this issue in the ‘uncontested’ track of this docket . . . [because, *inter alia*,] based on the record compiled in this phase of the case, it is unnecessary for the Commission to address this issue in order to conclude that the ILECs under review in the ‘uncontested’ track are not required to offer a batch hot cut process at this time” McLeodUSA IB at 1 (emphasis in original). McLeodUSA’s position is virtually identical to the alternative recommendation of Staff. See Staff IB at 14-15. Staff has never affirmatively sought to have the Potential Legal Issue addressed and resolved by the Commission, and this recommendation was made in the alternative only because it appeared -- based on statements at the December 18, 2003, hearing -- that one or more parties were affirmatively raising the Potential Legal Issue and seeking a Commission ruling on that issue.

5. The initial brief of Verizon initially establishes that its initial brief is being filed in response to McLeodUSA’s request to brief the Potential Legal Issue. See Verizon IB at 1. Verizon’s initial brief is less than three pages long and, with all due respect, is essentially a restatement of the assertions contained in Verizon’s testimony rather than a detailed statement of the analysis supporting its position. Given that Verizon has never affirmatively asked the Commission to rule on the Potential Legal Issue, it is hard to fault Verizon’s terse treatment of the issue raised in brief at the instance of another party. Moreover, Verizon’s initial brief never affirmatively requests a ruling from the Commission on the Potential Legal Issue. Indeed, while explicitly not waiving its legal opinion that the Commission need not address the FCC’s criteria for

Verizon, Verizon itself points out that its addressed and satisfies the FCC criteria. Verizon IB at 2-3. One could infer from the explicit and implicit positions taken in the initial briefs that all parties may be in agreement that the “uncontested” track of this docket can proceed without the Commission addressing the Potential Legal Issue. Nor does any party appear to contest the ability of any party to “not waive” or “preserve” its position on this issue in the “contested” track of this docket or in other proceedings.

6. While all parties may be in agreement as to how the “uncontested” track of this proceeding can and should proceed, more is needed for the Commission to be able to reach that conclusion. Given McLeodUSA’s statement that the Potential Legal Issue may arise in the contested track of this case, SBC Illinois (the only ILEC involved in the contested track of this docket) may feel compelled to file a reply brief to get its position of record (assuming McLeodUSA is correct that SBC will raise this issue) and preserve or litigate its position. Staff also anticipates that Verizon will file a significantly more detailed reply brief (given that Staff fully briefed the Potential Legal Issue). If this occurs, Staff is very concerned that it will be in the position of not having had an opportunity to brief the detailed legal arguments that appear likely to be made for the first time in reply briefs.

7. For these reasons, Staff recommends that the ALJ schedule an emergency status hearing on or about Tuesday, January 20, 2004, to determine whether any party is requesting the Commission to determine the Potential Legal Issue in the uncontested track of this docket. If any party confirms that they are seeking such determination, then Staff requests that the briefing schedule be modified to add an additional round of supplemental briefs so that Staff and other parties will have a fair

opportunity to respond to the arguments that are raised in the reply briefs. If no party seeks a determination of the Potential Legal Issue by the Commission in the uncontested track, then the current briefing schedule should be terminated based on a finding that the Potential Legal Issue is not an issue in the uncontested track of this docket and with no party having waived its position on this issue. Such action will avoid unnecessarily wasting the resources of the parties, the Staff and the Commission on an issue that no party seems to require the Commission to address at this time.

WHEREFORE, for all the foregoing reasons, Staff requests that the ALJ set an emergency status hearing for the purposes described above.

Respectfully submitted,

Carmen L. Fosco
Matthew L. Harvey
Michael J. Lannon
Eric M. Madiar
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

*Counsel for the Staff of the
Illinois Commerce Commission*

January 16, 2004