

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

United Communications Systems, Inc.	)	
d/b/a Call One	)	
	)	
Petition for Arbitration of an	)	
Interconnection Agreement with	)	
Illinois Bell Telephone Company	)	ICC Docket No. 03-0772
d/b/a SBC Illinois Pursuant to Section	)	
252(b) of the Telecommunications	)	
Act of 1996	)	

**NOTICE OF FILING**

Please take notice that on March 1, 2004, the undersigned filed United Communications Systems, Inc.'s Motion to Strike.

  
\_\_\_\_\_  
Brendan J. Healey, an attorney  
for United Communications Systems, Inc.

Bruce N. Menkes  
Brendan J. Healey  
Mandell Menkes & Surdyk, LLC  
333 West Wacker Drive, Suite 300  
Chicago, Illinois 60606  
(312) 251-1000  
Fax: (312) 251-1010  
[bmenkes@mms-law.net](mailto:bmenkes@mms-law.net)  
[bhealey@mms-law.net](mailto:bhealey@mms-law.net)  
Counsel for United Communications  
Systems, Inc.

Eric J. Branfman  
Edward W. Kirsch  
Swidler Berlin Shereff Friedman, LLP  
The Washington Harbour  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
(202) 424-7500  
Fax: (202) 424-7643  
[ejbranfman@swidlaw.com](mailto:ejbranfman@swidlaw.com)  
[ewkirsch@swidlaw.com](mailto:ewkirsch@swidlaw.com)  
Counsel for United Communications Systems,  
Inc.

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

United Communications Systems, Inc.	)	
	)	
Petition for Arbitration of an	)	
Interconnection Agreement with	)	Docket No. 03-0772
Illinois Bell Telephone Company	)	
d/b/a SBC Illinois Pursuant to Section	)	
252(b) of the Telecommunications	)	
Act of 1996	)	

**UNITED COMMUNICATIONS SYSTEMS, INC.'S  
MOTION TO STRIKE**

Negotiated Request:	August 31, 2003
135 <sup>th</sup> Day Thereafter:	January 13, 2004
160 <sup>th</sup> Day Thereafter:	February 7, 2004
9 Months Thereafter:	June 1, 2004

Bruce N. Menkes  
Brendan J. Healey  
Mandell Menkes & Surdyk, LLC  
333 West Wacker Drive, Suite 300  
Chicago, Illinois 60606  
(312) 251-1000  
Fax: (312) 251-1010  
[bmenkes@mms-law.net](mailto:bmenkes@mms-law.net)  
[bhealey@mms-law.net](mailto:bhealey@mms-law.net)

Eric J. Branfman  
Edward W. Kirsch  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, NW, Suite 300  
Washington, DC 20007  
(202) 424-7877  
Fax: (202) 424-7645  
[ejbranfman@swidlaw.com](mailto:ejbranfman@swidlaw.com)  
[ewkirsch@swidlaw.com](mailto:ewkirsch@swidlaw.com)

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

United Communications Systems, Inc.	)	
	)	
Petition for Arbitration of an	)	
Interconnection Agreement with	)	Docket No. 03-0772
Illinois Bell Telephone Company	)	
d/b/a SBC Illinois Pursuant to Section	)	
252(b) of the Telecommunications	)	
Act of 1996	)	

**UNITED COMMUNICATIONS SYSTEMS, INC.’S  
MOTION TO STRIKE AND INCORPORATED BRIEF IN SUPPORT**

United Communications Systems, Inc. (“UCS”) respectfully submits this motion to strike and incorporated brief in support pursuant to 83 Illinois Admin. Code Section 200.190 to strike portions of Illinois Bell Telephone Company’s d/b/a SBC Illinois (“SBC’s”) Direct Testimony (“Testimony”) filed on February 13, 2004, that address UCS’ issues 1 through 32 for the reason that this testimony does not “constitut[e] respondent’s support for its response,” as required by 83 Illinois Admin. Code Section 761.110(e). UCS moves to strike the Testimony and SBC’s Response to Petition because they are not verified. Further, UCS moves to strike SBC testimony on matters that SBC characterized as irrelevant when it refused to respond to UCS’ discovery requests. Obviously, if SBC is correct that these matters are irrelevant, its testimony is also irrelevant, and must be stricken. UCS also moves to strike as irrelevant, improper and inadmissible the 15 new issues raised in SBC’s Response filed by SBC in this proceeding on January 29, 2004, and the related portions of SBC’s Testimony because these issues were never disclosed to UCS or discussed during the statutory negotiation period nor prior to the filing of

UCS' Petition in violation of SBC's duty to negotiate in good faith. Finally, UCS conditionally moves to strike portions of SBC's testimony concerning interconnection negotiations between SBC and UCS. UCS believes that such testimony is proper; however, SBC has moved to strike UCS' testimony on this subject. If the Commission strikes any of UCS' testimony on these grounds, it should strike SBC's testimony regarding negotiations for the same reasons.

In support of its motion, UCS states as follows:

### **BACKGROUND**

As recently described by the Supreme Court, the Telecommunications Act of 1996<sup>1</sup> ("1996 Act") is "intended to eliminate the monopolies enjoyed by the inheritors of AT&T's local franchises [including SBC]; this objective was considered both an end in itself and an important step toward the Act's other goals of boosting competition in broader markets."<sup>2</sup> Section 251(c) of the Act accordingly imposes pro-competitive obligations on Incumbent Local Exchange Carriers ("ILECs") that do not apply to other carriers including, but not limited to, the "duty to offer for resale at a wholesale rates any telecommunications service" that the ILEC provides at retail on a nondiscriminatory basis.<sup>3</sup> Thus, as noted by the Supreme Court, when analyzing the requirements of the 1996 Act, one must bear in mind that it "proceeds on the understanding that incumbent monopolists and contending competitors are unequal" as a result of decades of monopolistic control of the local market by ILECs.<sup>4</sup>

---

<sup>1</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* UCS refers to amended Communications Act of 1934 as the "Act."

<sup>2</sup> *Verizon Communications, Inc., v. Federal Communications Comm'n*, 122 S.Ct. 1646, 1654 (2002).

<sup>3</sup> 47 U.S.C. § 251(c)(4).

<sup>4</sup> *Verizon Communications*, 122 S.Ct. at 1654, 1684.

In order to establish an interconnection agreement that “fulfill[s] the duties” described in Section 251(b) that apply to all LECs and those obligations of Section 251(c) that apply only to ILECs, Section 251(c)(1) of the Act imposes upon ILECs the “duty to negotiate in good faith.”<sup>5</sup> Recognizing that because competitive LECs have “little to offer the incumbent,” an ILEC “is likely to have scant, if any, economic incentive to reach agreement,”<sup>6</sup> the FCC established national rules that establish a minimum set of standards regarding the duty to negotiate in good faith. Under the FCC’s national rules, the duty to negotiate in good faith is breached, if a Party, among other things: (1) intentionally delays negotiations or resolution of disputes, or (2) refuses to provide information necessary to reach agreement.<sup>7</sup>

Section 252 of the Act, in turn, sets forth a negotiation and arbitration process for establishing such an interconnection agreement that includes a timeline for specific events. Specifically, Section 252(a) of the Act requires an ILEC to commence negotiating an interconnection agreement “[u]pon receiving a request for interconnection, services, or network elements” from a requesting telecommunications carrier. Section 252(b)(1) of the Act establishes a statutory negotiation period of between 135 and 160 days for the Parties to attempt to resolve disputed issues without Commission intervention. After the conclusion of the statutory negotiation period, either party may petition the Commission to arbitrate “any open issues.”<sup>8</sup>

---

<sup>5</sup> 47 U.S.C. § 251(c)(1).

<sup>6</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 F.C.C.R. 15,499, at ¶ 141 (1996) (“*Local Competition Order*”).

<sup>7</sup> 47 C.F.R. § 51.301. FCC rule 51.301 provides a non-exhaustive list of eight (8) specific practices that constitute a breach of the duty to negotiate in good faith.

<sup>8</sup> 47 U.S.C. § 251(b)(1).

As contemplated by Section 252 of the Act, UCS requested on July 12, 2003 that SBC engage in good faith negotiations to enter into an interconnection agreement.<sup>9</sup> During the statutory negotiations period, the Parties participated in at least eight multi-person telephone negotiation sessions or face-to-face meetings, and many one-on-one follow-up discussions. After many of these sessions, UCS provided SBC with a revised draft agreement reflecting these negotiations. During the negotiation period, SBC promised repeatedly that it would provide more acceptable negotiating positions regarding Individual Case Basis Contracts (“ICBs”) and other key issues in the near future, and possibly prior to the next negotiation session. On December 18, 2003, UCS timely filed its Petition for Arbitration. UCS’ Petition raised 32 issues that had been identified during the 160-day statutory negotiation period. As required by Section 252(b)(2) and Section 761.110(b) of Title 83 of the Illinois Administrative Code, UCS’ Petition incorporated statements summarizing its best understanding as to SBC’s negotiating positions as they stood on December 18<sup>th</sup> to the extent that SBC had taken a position at that time. After the filing of the Petition, the Parties agreed to two “lock down” periods to pursue further negotiations of the unresolved issues. At approximately 4:05 p.m. on the final day of the first lock-down period, and 29 days after the filing of the Petition, SBC e-mailed a new redline of the Parties’ Interconnection Agreement that for the first time raised 15 new issues. Because the first lock-down was virtually over and SBC had said that its negotiators were not available, these issues were not discussed. The second lock-down broke down without substantive discussion of any issues. Thus, the Parties never negotiated or discussed the new positions and terms raised by SBC for the first time in its e-mail. On January 29, 2003 SBC filed its Response to UCS’

---

<sup>9</sup> July 12, 2003 is a stipulated date for purposes of the calculation of deadlines pursuant to 47 U.S.C. § 252. The UCS letter requesting negotiations was actually sent at an earlier date.

Petition. In its Response, SBC expressly chose not to address a single one of the 32 issues raised by UCS' Petition, stating that: "SBC Illinois will not undertake to set forth its positions regarding the issues raised by UCS' Petition in this Response, because that is not the purpose of a response to a petition under the 1996 Act."<sup>10</sup> On February 6, 2004, UCS filed the Joint Verified Statement of Craig Foster and Chris Surdenik. On February 13, 2004, SBC filed the Direct Testimony of Roman A. Smith, Anne M. Warren, and Anthony M. Cohen.

## **ARGUMENT**

### **I. Because SBC's Testimony And Response to Petition Are Unverified, They Must Be Stricken**

SBC did not verify its Testimony or Response to Petition. Under the Commission's rules, "[t]he factual assertions contained in all documents shall be verified by the filing party before a notary public." 83 Ill. Admin. Code § 761.130(b); *see also* 83 Ill. Admin. Code § 761.110(e) ("*Verified* responses and *verified* written statements and exhibits constituting respondent's support for its response shall be filed no more than 25 days after the filing of the petition for arbitration.") (emphasis added). Because SBC refused to comply with the rules, its Testimony and Response to Petition should be stricken.

### **II. The Commission Should Strike SBC's Testimony Addressing Issues Raised by UCS that SBC Avoided Discussing in its Response**

UCS respectfully moves that the Commission strike the SBC testimony set forth in Appendix A for the reason that it does not "constitute[e] respondent's support for its response," as required by 83 Illinois Admin. Code Section 761.110(e). The sole rule authorizing SBC to file "testimony" in this proceeding is § 761.110(e) of Title 83 of the Illinois Administrative Code, which provides that "Verified responses and verified written statements and exhibits

---

<sup>10</sup> SBC's Response, at 3 (January 29, 2004).

*constituting respondent's support for its response* shall be filed no more than 25 days after the filing of the petition for arbitration.”<sup>11</sup> The portions of SBC's Testimony listed in Appendix A must be stricken because they utterly fail to comply with the rule's requirement that such testimony must constitute “respondent's support for its response.” The rule simply does not permit a respondent to submit testimony unless the testimony constitutes “support for its response.” Since SBC's Response explicitly disavowed addressing UCS Issues 1-32, the rule precludes SBC from offering testimony addressing UCS Issues 1-32.

SBC's Response was filed on January 29, 2004, more than two weeks before SBC's Testimony. SBC expressly chose in its Response not to address the 32 Issues raised by UCS' Petition, stating that: “SBC Illinois will not undertake to set forth its positions regarding the issues raised by UCS' Petition in this Response, because that is not the purpose of a response to a petition under the 1996 Act.”

This statement is completely disingenuous and an obvious stalling tactic. If setting forth a respondent's positions regarding the issues raised in the Petition “is not the purpose of a response to a petition under the 1996 Act,” then why is it that of the 13 arbitration petitions filed with the Commission against SBC since January 1, 2000 to which SBC filed Responses, in every one but this one, SBC's response set forth SBC's position regarding the issues raised in the Petition?<sup>12</sup> Indeed, in the XO arbitration, SBC argued that it is “harmless” for an arbitration

---

<sup>11</sup> (Emphasis added.) What SBC has designated as “direct testimony” is what the rule describes as “verified written statements.”

<sup>12</sup> The other 12 arbitration petitions are listed in Appendix B hereto.

petition to describe respondent's position inaccurately, because "respondent sets forth its actual position in its response."<sup>13</sup>

Thus, SBC has thus picked this arbitration to make a sudden and novel claim that it had the right, contrary to Rule 716.110(e), to withhold its position on the Petitioner's issues in its Response, and yet file Testimony on those issues. It should be obvious that concealing its position for the 15 days between the filing of its Response and the filing of its Testimony was part of SBC's long-standing course of conduct of presenting UCS with a series of bogus positions until forced to state its true and complete position on the record.

Contrary to SBC's obligation under 47 U.S.C. § 251(c)(1) to "negotiate in good faith," in an interconnection negotiation under Section 252, the positions in SBC's Testimony and the positions that SBC took during the approximately five months of pre-petition negotiations and even during the negotiations that went on during between the filing of the Petition and the filing of SBC's Testimony in many respects bear little relationship to each other. From the day the Petition was filed, SBC has assiduously avoided stating its position on the record. Consistent with the Commission's Rules, UCS served discovery to ascertain SBC's position on its issues—which was necessary because SBC had refused to state a position during the negotiations as to many of the issues, and had changed its position repeatedly as to many others. SBC refused to answer, stating that it would set forth its position in SBC's yet-to-be-filed Response (which in fact did not contain such position), SBC's yet-to-be filed testimony, and yet-to-be filed "other submissions" in the proceeding. This made it impossible for UCS to address those hidden SBC

---

<sup>13</sup> Ameritech Illinois Response to Motion to Strike and Motion to Strike, at 5, *In the Matter of XO Illinois, Inc. Petition for Arbitration under Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a/Ameritech Illinois* (filed August 15, 2001).

positions in UCS' testimony, which pursuant to the Commission's schedule, was to be filed seven days *after* SBC's discovery responses. In its Response, SBC continued with its game of "hide the ball," declining to state its position as to *any* of the 32 Issues raised in UCS' Petition, thereby keeping UCS and the Commission in the dark as to SBC's position until the latest possible moment.

Rule 761.110(e) serves a salutary purpose in that it limits a respondent's testimony to material that "supports" its Response, thereby preventing the very type of evasion engaged in by SBC: If a Respondent wants to offer testimony regarding an issue, it must at a minimum address that issue in its Response; otherwise, the testimony could not possibly "support" the Response. SBC is correct that it need not file a Response, if it chooses not to do so, and prefers to conceal its position as to the Issues raised in the Petition from the Commission and the Petitioner. But under the Commission's Rules, that concealment comes at a price: Since Rule 761.110(e) limits a Respondent to filing testimony that "supports" its Response, the price that a Respondent must pay is that it may not submit testimony addressing matters that it chose not to address in its Response. While the price that SBC may have to pay for its persistent game of "hide the ball" is high, SBC is not new to arbitrating under the Commission's Rules, and has demonstrated in at least 12 consecutive Responses (prior to this one) that it is capable of addressing in its Response those issues as to which it intends to offer testimony. SBC's purposeful and unique attempted evasion in this case of its duty to address in its Response the issues it intends to address in its Testimony should be sanctioned by the striking of the Testimony that goes to UCS Issues 1-32, none of which were discussed in its Response.

### **III. The Commission Should Strike SBC's Testimony Regarding Matters on Which SBC Refused to Respond to Discovery on Grounds of Relevance**

The Commission's Rules of Practice provide that "irrelevant, immaterial, or unduly repetitious evidence shall be excluded." 83 Ill. Admin. Code § 200.610(a). In at least one instance, SBC refused to provide discovery requested by UCS on the basis that the matters as to which UCS sought discovery are irrelevant, yet offered testimony on the same matters. Obviously, if SBC is correct that these matters are irrelevant, its testimony is also irrelevant, and must be stricken.

In the testimony of SBC witness Cohen at lines 204-22, SBC attempts to show that the avoided cost discount of 4.60% advocated by Mr. Cohen for new ICB contracts is reasonable by comparing the rate SBC proposes here with the avoided cost discounts that were approved for such contracts in Michigan, Kansas, and Texas. In Table 1 of Mr. Cohen's testimony, SBC presents a chart of the ICB avoided cost discounts adopted in those three states, and in footnotes 8, 9, and 10, SBC cites to specific dockets in which the commissions in those three states assertedly established the ICB avoided cost discounts reflected in Table 1.

In the testimony phase of the case, SBC evidently believes that the results of its avoided cost studies for Michigan, Kansas, and Texas are relevant. Yet, when UCS asked for copies of such studies and supporting documentation and information about those studies (as well as any similar studies in SBC's other nine states) in Document Request No. 5 and Interrogatory No. 5, SBC responded by stating that it "objects to this request to the extent that it requests information for states other than Illinois." Moreover, in opposing UCS' Motion to Compel, SBC sarcastically stated as follows: "Really? All thirteen SBC states? . . . Any and all state commission dockets, cost studies and methodologies?" Given that SBC has offered into evidence the results of three hand-picked studies from other states that it claims support its position, but has withheld the studies themselves, as well as the supporting documentation and

the studies from other states, one is tempted to respond to SBC's sarcasm in kind: "No. SBC should be permitted to cherry-pick the studies that it believes help its case, providing the final results but withholding the supporting documentation that would enable UCS and the Commission to compare those studies with SBC's Illinois study, and withholding the results from the other nine states that it does not believe help SBC's position."<sup>14</sup>

In all seriousness, it should be self-evident that SBC cannot have it both ways. SBC's refusal to produce the studies themselves, as well as the supporting documentation, and its refusal to provide even the results from the other nine states, estops SBC from offering into evidence the results of the studies that it believes to be helpful to its case. This testimony should accordingly be stricken.

#### **IV. The Commission Should Strike SBC's 15 New Issues Because They Reflect SBC's Breach of the Duty to Negotiate in Good Faith**

SBC asserted in its Response that UCS' Petition "does not accurately reflect SBC Illinois' positions on the vast majority of the issues to be arbitrated in this proceeding" and raised fifteen new issues of its own.<sup>15</sup> SBC's assertion is disingenuous and misleading because SBC never provided its new negotiation positions and redlined contract language relied upon in its Response to UCS during the statutory negotiation period and prior to UCS' filing of its Petition, as required by the Act. SBC withheld these negotiation positions and contract language from UCS until after UCS filed its Petition for arbitration. In fact, these new SBC positions were not provided to UCS until a January 16, 2004 email that was received after completion of all

---

<sup>14</sup> SBC did produce a few pages relating to its Michigan study but produced nothing from Kansas, Texas, or the other nine SBC states.

<sup>15</sup> SBC's Response, at 1.

substantive settlement discussions and some 29 days after the end of the statutory negotiations period.<sup>16</sup>

The 15 completely new issues raised by SBC for the first time approximately 29 days after the conclusion of the statutory negotiation period should be stricken because SBC violated its obligation to negotiate in good faith by failing to raise these issues during the 135 to 160 day statutory negotiation period as mandated by Section 251(c)(1) of the Act, the FCC's implementing orders and FCC and this Commission's rules.

Section 251(c)(1) of the Act requires the Parties to negotiate “*in good faith* in accordance with section 252 the *particular* terms and conditions of agreements to fulfill the duties of [Sections 251(b) and (c) of the Act].”<sup>17</sup> Section 251(c)(1) requires the Parties to negotiate the “particular terms and conditions” proposed by each Party and their specific positions during the statutory negotiation period (*i.e.*, from the date the ILEC receives the request for negotiation for a period of 135 to 160 days after which time either Party may file a Petition for arbitration). The duty to negotiate in good faith necessarily requires that the Parties actually disclose their positions and proposed terms to each other to avoid needless delay and so that at a minimum all disputed issues can be identified and potentially resolved during the statutory negotiation period. Confirming this, in the *Local Competition Order*, the FCC noted that:

parties seeking to avoid a legitimate accusation of breach of the duty of good faith in negotiation will work to provide their negotiating adversary all relevant information - - given that section 252(b)(4)(B) authorizes the state commission to require the parties ‘to provide such information as may be necessary for the state commission to reach a decision on the unresolved issues’ . . . The likelihood that an arbitrator will review the positions taken by the parties during negotiations also

---

<sup>16</sup> The email that transmitted the new positions emphasized that SBC is “reviewing” the positions “at the same time as you” so SBC reserves its rights to change these positions.

<sup>17</sup> 47 U.S.C. § 251(c)(1) (emphasis added).

should discourage parties from refusing unreasonably to provide relevant information to each other or to delay negotiations.<sup>18</sup>

Thus, the *Local Competition Order* provides that in order “to avoid a legitimate accusation of breach of the duty of good faith in negotiation,” the Parties must work to “provide their negotiating adversary all relevant information,” which necessarily includes the Party’s proposed terms and positions taken during negotiations.<sup>19</sup> The Parties’ proposed terms and positions fall within the ambit of the information required to be disclosed to meet the “good faith” duty because absent this information, meaningful negotiations are not possible. The Act makes it clear that the Parties are required to provide their proposed terms and positions on the issues during the statutory negotiation period: otherwise the Petitioner would be wholly unable to set forth “the position of each of the parties with respect to the [unresolved] issues” at the “same time as it submits the petition” as required by Section 252(b)(2)(A) of the Act.<sup>20</sup>

The FCC’s rules implementing the statutory duty to negotiate in good faith are even more explicit that the Parties may not delay negotiations by failing to provide their proposed terms and negotiating positions to the requesting carrier during the statutory negotiation period. Specifically, FCC Rule 301 provides that:

the following actions or practices, among others, violate the duty to negotiate in good faith: . . . (6) intentionally obstructing or delaying negotiations or resolutions of disputes; . . . (8) Refusing to provide information necessary to reach agreement.<sup>21</sup>

---

<sup>18</sup> *Local Competition Order*, at ¶ 149.

<sup>19</sup> *Id.*, at ¶¶ 149, 155 (It is “Congress’ intention for parties to use the voluntary negotiation process, if possible, to reach agreements.”).

<sup>20</sup> 47 U.S.C. § 251(b)(2)(A).

<sup>21</sup> 47 C.F.R. § 51.301.

SBC breached its duty to negotiate in good faith by refusing to provide “all relevant information,” which necessarily includes its proposed terms and negotiating positions on its 15 new issues during the statutory negotiating period. SBC’s deliberate efforts to “hide the ball” by not revealing the positions during the 160 day negotiating period and beyond, not only unreasonably delayed the negotiations but also completely precluded negotiation during the prescribed negotiation period of the 15 new issues raised by SBC in its Response.

Consistent with Sections 251(c)(1), 252(a)(1) and 252(b)(1) and (2) of the Act, this Commission’s rules also require the Parties to set forth their positions and proposed terms and negotiate disputed terms in good faith during the statutory negotiation period. Specifically, Section 761.110(b) provides that:

The Party petitioning the Commission shall, *at the same time* as it submits the petition, provide the Commission with all relevant documentation concerning: 1) The unresolved issues; 2) The *position of each of the parties* with respect to those issues; and 3) Any other issue *discussed* and resolved by the parties.<sup>22</sup>

The Commission’s rules thus clearly require the Parties to convey their negotiating positions to each other and actively negotiate these positions *prior to* the commencement of the arbitration. Otherwise, it would be impossible for the Petitioner to provide the position of each party relevant to the unresolved issues “at the same time as it submits the petition.” If permitted, SBC’s approach of withholding these 15 issues until 29 days after the Petition was filed would unreasonably delay and undermine the statutory negotiation process. SBC evidently determined not to negotiate its 15 new issues during the statutory negotiation period and should be precluded from now benefiting from its delaying tactic. Accordingly, the Commission should strike these

---

<sup>22</sup> 83 Ill. Admin. Code § 761.110(b) (emphasis added).

15 issues and SBC's testimony in support of these issues, consisting of Roman A. Smith testimony, lines 1999 to 2319.

At least one other state commission has granted a Motion to Strike for the same ILEC breach of the duty to negotiate in good faith. For example, the Arkansas Public Service Commission ("PSC") dismissed two issues raised for the first time by SBC in its response to Alltel Communications, Inc.'s petition for arbitration because neither of the new issues were raised during the statutory negotiation period. The Arkansas PSC underscored that pursuant to the Act:

the issues raised in the petition for arbitration and the response must be unresolved issues which have actually been negotiated by the parties prior to submission for arbitration. Neither party may raise new issues in an arbitration which have not been the subject of negotiation.<sup>23</sup>

Because SBC deliberately concealed its positions on these issues to delay the negotiations, the Commission should follow the precedent and grant UCS' Motion to Strike the 15 new issues raised in SBC's Response that were never negotiated by the Parties.

**V. The Commission Should Strike SBC's Testimony Regarding The Negotiations, If It Strikes UCS' Testimony On The Same Matters**

In its Renewed Motion to Strike, filed February 10, 2004, SBC has taken the unreasonable position that portions of UCS' Joint Testimony regarding "the interconnection agreement negotiations between UCS and SBC Illinois, including various positions and arguments the parties allegedly made in those negotiation[s] . . . [are] irrelevant, improper, and inadmissible."<sup>24</sup> Notwithstanding this assertion, SBC has included extensive evidence regarding

---

<sup>23</sup> *In the Matter of Alltel Communications, Inc.'s Petition for Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-015-U, Order No. 7, 1999 Ark. PUC LEXIS 335, at \*4 (Ark. PSC March 1, 1999) (emphasis added).

<sup>24</sup> SBC's Renewed Motion To Strike, at 3 (filed Feb. 10, 2004).

these same negotiations in its own Testimony. For example, SBC witness Roman A. Smith testifies at length regarding the content of the Parties' negotiations in, at a minimum, the following lines of his Direct Testimony: 54-56, 787-89, 799-800, 927-28, 1354-55, 1367-70, 1715-16, 1770-72, 2011-13.<sup>25</sup> It would be patently unfair and a violation of due process to strike UCS' version of these events (the negotiations) while admitting SBC's version of the same events. Effectively, such an outcome would permit the Administrative Law Judge to hear only one side of the negotiations story.

Further, while moving to strike large portions of the testimony of Mr. Foster and Mr. Surdenik on the grounds that they were not present at the negotiations about which they have submitted testimony, SBC has submitted the testimony of Mr. Smith regarding negotiations in which he did not participate.<sup>26</sup> For example, Mr. Smith states with regard to a service agreement issue that "SBC Illinois has never advanced such a position."<sup>27</sup> Mr. Smith could not possibly have first-hand knowledge of this because, unlike Mr. Foster who attended nearly all of them, Mr. Smith was not present at "any of the in-person, pre-petition negotiations," and to the best of UCS' knowledge did not participate in any of the pre-petition conference calls.<sup>28</sup> Mr. Foster, on the other hand, was deeply involved in the pre-petition negotiation sessions with SBC.

Accordingly, although UCS believes that its testimony regarding the negotiations should be admitted, UCS conditionally cross-moves to strike this type of testimony as provided by SBC.

---

<sup>25</sup> This list of affected lines of Mr. Smith's testimony is intended to be illustrative and not all inclusive. *See, e.g.,* Direct Testimony of Roman A. Smith On Behalf of SBC Illinois, Exhibit 1.00, at lines 54-56, 787-89, 799-800, 927-28, 1354-55, 1367-70, 1715-16, 1770-72, 2011-13 (Feb. 13, 2004) ("Smith Testimony").

<sup>26</sup> SBC's Renewed Motion To Strike, at 5-6.

<sup>27</sup> Smith Testimony, at 1715-16.

<sup>28</sup> Mr. Foster was never informed that Mr. Smith was participating in any of the pre-petition conference. *See, Foster Affidavit*, submitted with UCS' Opposition to SBC's Motion to Strike, February 26, 2004, at ¶ 4.

SBC cannot have it both ways. If testimony regarding the course and content of the negotiations is somehow not admissible when submitted by UCS, then similar testimony describing these matters submitted by SBC is also inadmissible on the same grounds. If testimony regarding negotiations at which the witness was not present is inadmissible when offered by UCS, then testimony regarding negotiations at which the witness was not present is inadmissible when offered by SBC. Disparate treatment of the Parties would be unfair.

### CONCLUSION

For the reasons set forth herein as well as in the accompanying motion and attached appendices, UCS requests that SBC's Response to the Petition and its Testimony be stricken because the Response and Testimony are not verified. In addition, UCS requests that the 15 new issues raised by SBC in its Response and the portions of its Testimony related to these issues and the 32 issues raised by UCS be stricken. UCS also requests that SBC testimony on matters that SBC characterized as irrelevant when it responded to UCS' discovery requests, as described in Section II, above, be stricken. Finally, UCS requests that if the Commission strikes any UCS testimony regarding negotiations, it strike SBC's testimony regarding negotiations, as well.

Respectfully submitted,  
**UNITED COMMUNICATIONS  
SYSTEMS, INC.**

By: Brendan J. Healey

Bruce N. Menkes  
Brendan J. Healey  
Mandell Menkes & Surdyk, LLC  
333 West Wacker Drive, Suite 300  
Chicago, Illinois 60606  
312/251-1003 (Tel.)  
312/251-1010 (Fax)  
e-mail: bmenkes@mms-law.net  
bhealey@mms-law.net

Dated: March 1, 2004

Eric J. Branfman  
Edward W. Kirsch  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, NW, Suite 300  
Washington, DC 20007  
202/424-7877 (Tel.)  
202/424-7645 (Fax)  
e-mail: [ejbranfman@swidlaw.com](mailto:ejbranfman@swidlaw.com)  
[ewkirsch@swidlaw.com](mailto:ewkirsch@swidlaw.com)

## APPENDIX A

**Roman A. Smith** (SBC Illinois Exhibit 1.00)

Lines 37 (starting with “UCS”) through 39 (ending with “address”)

Lines 40-1987

**Anne M. Warren** (SBC Illinois Exhibit 2.00)

All testimony

**Anthony M. Cohen** (SBC Illinois Exhibit 3.00)

All testimony

## APPENDIX B

<i>AT&amp;T Communications of Illinois, Inc., TCG Illinois and TCG Chicago: Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (SBC Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 03-0239 (ICC Apr. 11, 2003).</i>
<i>Global NAP's Inc.: Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company (Ameritech Illinois), Docket No. 01-0786 (ICC Nov. 30, 2001).</i>
<i>McLeodUSA Telecommunications Services, Inc.: Petition for Arbitration of Interconnection Rates Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (Ameritech Illinois) pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 01-0623 (ICC Sept. 28, 2001).</i>
<i>Sage Telecom, Inc.: Petition for Arbitration of an Interconnection Agreement with Illinois Bell Telephone Company (SBC Illinois) under Section 252(b) of the Telecommunications Act of 1996, Docket No. 03-0570 (ICC Sept. 17, 2003).</i>
<i>TDS Metrocom, Inc.: Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company (Ameritech Illinois) Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 01-0338 (ICC Apr. 20, 2001).</i>
<i>XO Illinois, Inc.: Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Illinois Bell Telephone Company, Docket No. 01-0466 (ICC June 25, 2001).</i>
<i>Verizon Wireless: Petition of Verizon Wireless for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, Docket No. 01-0007 (ICC Jan. 8, 2001).</i>
<i>SCC Communications Corp.: Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications Inc., Docket No. 00-0769 (ICC Dec. 5, 2000).</i>
<i>Level 3 Communications, Inc.: Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, Docket No. 00-0332 (ICC May 8, 2000).</i>
<i>Covad Communications: Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, Docket No. 00-0312 (ICC Apr. 26, 2000).</i>
<i>Rhythms Links, Inc.: Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues, Docket No. 00-0313 (ICC Apr. 26, 2000).</i>
<i>Focal Communications Corporation of Illinois: Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, Docket No. 00-0027 (ICC Jan. 13, 2000).</i>



## CERTIFICATE OF SERVICE

This is to certify that I have this date served a true and correct copy of the within and foregoing United Communications Systems, Inc.'s Motion to Strike, by electronic mail to the following:

Glennon P. Dolan  
Administrative Law Judge  
Illinois Commerce Commission  
160 North LaSalle Street, Suite C-800  
Chicago, Illinois 60601-3104  
[gdolan@icc.state.il.us](mailto:gdolan@icc.state.il.us)  
(also by hand delivery)

Michael J. Lannon  
Brandy D.B. Brown  
Office of General Counsel  
Illinois Commerce Commission  
160 North LaSalle Street, Suite C-800  
Chicago, Illinois 60601-3104  
[mlannon@icc.state.il.us](mailto:mlannon@icc.state.il.us)  
[bbrown@icc.state.il.us](mailto:bbrown@icc.state.il.us)

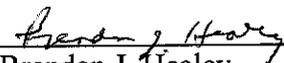
Torsten Clausen  
Case Staff  
Illinois Commerce Commission  
527 East Capitol Avenue  
Springfield, Illinois 62701  
[tclausen@icc.state.il.us](mailto:tclausen@icc.state.il.us)

Jeff Hoagg  
Case Manager  
Illinois Commerce Commission  
527 East Capitol Avenue  
Springfield, Illinois 62701  
[jhoagg@icc.state.il.us](mailto:jhoagg@icc.state.il.us)

Nancy J. Hertel  
Mark R. Ortlieb  
Illinois Bell Telephone Company  
225 West Randolph Street, Floor 25D  
Chicago, Illinois 60606  
(312) 727-2415  
(312) 727-4517  
Fax: (312) 845-8979  
[nancy.j.hertel@ameritech.com](mailto:nancy.j.hertel@ameritech.com)  
[mo2753@sbc.com](mailto:mo2753@sbc.com)

Theodore A. Livingston, Jr.  
Dennis G. Friedman  
Angela O'Brien  
Mayer, Brown, Rowe & Maw LLP  
190 S. LaSalle Street  
Chicago, Illinois 60603  
(312) 782-0600  
Fax: (312) 701-7711  
[tlivingston@mayerbrownrowe.com](mailto:tlivingston@mayerbrownrowe.com)  
[dfriedman@mayerbrownrowe.com](mailto:dfriedman@mayerbrownrowe.com)  
[aobrien@mayerbrownrowe.com](mailto:aobrien@mayerbrownrowe.com)

This 1st day of March, 2004.

  
Brendan J. Healey