

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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

**SBC ILLINOIS’ REPLY TO STAFF’S AND UCS’S
RESPONSES TO RENEWED MOTION TO STRIKE**

Illinois Bell Telephone Company d/b/a SBC Illinois (“SBC Illinois”), by its attorneys, hereby files its Reply to Staff’s and UCS’s Responses to SBC Illinois’ Renewed Motion to Strike (“Renewed Motion”). For the reasons explained below and in SBC Illinois’ Renewed Motion, the Commission should strike from UCS’s Joint Statement of Craig Foster and Chris Surdenik:

- All testimony relating to the interconnection agreement negotiations between UCS and SBC Illinois.¹ It is axiomatic that admission of evidence concerning SBC Illinois’ representations in settlement negotiations with UCS would circumscribe its willingness to explore settlement with other CLECs in the future. For that precise reason, Staff itself asserts that ““case law and public policy require”” that testimony regarding settlement negotiations be stricken. Staff Response, at 11.² And, contrary to UCS’s claims, the policy favoring unrestrained settlement negotiations does not vanish simply because the negotiations are conducted under Section 252 of the Telecommunications Act of 1996 (“1996 Act”).
- All testimony regarding the issue of 18/6 billing. As Staff states in its Response, the 18/6 billing issue was not raised in UCS’s Petition for Arbitration. Staff Response, at 12-13. Rather, UCS proposed new contract language concerning 18/6 billing in its testimony – language that did not appear in UCS’s Petition or the redlined contract attached to its

¹ Attachment A to SBC Illinois’ Renewed Motion specifically sets forth the portions of UCS’s testimony that should be stricken.

² In Staff’s Response to SBC Illinois’ Renewed Motion filed on February 24, 2004, Staff stated that it would stand on its Response filed February 2, 2004. Accordingly, citations to “Staff’s Response” pertain to Staff’s February 2 filing.

Petition. As a matter of law, the Commission can only consider issues that are set forth in the Petition or any Response thereto. 47 U.S.C. § 252(b)(4)(A); *see also* 83 Ill. Admin. Code § 761.110(b) (incorporating the requirements of Section 252(b)(2) into the Commission’s arbitration rules.) Moreover, UCS’s attempts to bypass the arbitration procedural rules by claiming that the 18/6 billing issue is relevant to Issue #1 and that UCS was precluded from raising the 18/6 billing issue in its Petition have no merit and should be rejected.

- All testimony concerning SBC Illinois’ compliance with the Illinois Public Utilities Act (“Illinois PUA”). The Commission must adopt proposed language that comports with the law, and that language will become part of the contract regardless of whether SBC Illinois was or was not in compliance with the Illinois PUA in the past. Therefore, UCS’s testimony concerning SBC Illinois’ compliance with the Illinois PUA is wholly irrelevant to the issues to be decided by the Commission in this arbitration and should be stricken.

I. UCS’S TESTIMONY CONCERNING SETTLEMENT NEGOTIATIONS WITH SBC ILLINOIS IS INAPPROPRIATE AND SHOULD BE STRICKEN.³

Commission Staff agrees with SBC Illinois that, as a general rule “both case law and public policy require” that evidence concerning settlement negotiations is inadmissible. Staff Response, at 11; Renewed Motion, at 3 (citing *Garcez v. Michel*, 282 Ill. App. 3d 346, 348-49, 668 N.E.2d 194, 196 (Ill. App. 1996) (“matters concerning settlement and negotiations are not admissible.”); *Barkei v. Delnor Hospital*, 176 Ill. App. 3d 681, 531 N.E.2d 413 (Ill. App. 1988); and *Schnuck Markets, Inc. v. Soffer*, 213 Ill. App. 3d 957, 572 N.E.2d 1169 (Ill. App. 1991)). The obvious purpose of the rule excluding evidence of settlement negotiations is to protect the important public policy interest of encouraging litigants to settle issues before trial. *Garcez*, 282 Ill. App. 3d at 349. That policy is applicable not only to civil litigation negotiations, but also to Section 252 negotiations, because under the 1996 Act, ILECs such as SBC Illinois are required to negotiate with CLECs in the effort to resolve issues in order to avoid litigating those issues under a Section 252(b) arbitration. For this reason, Staff has in the past taken the position

³ On March 1, 2004 UCS filed a Motion to Strike SBC Illinois’ testimony, which contains a request to strike SBC Illinois’ testimony that, in UCS’s view, contains inappropriate negotiation evidence, in the event the Commission strikes UCS’s testimony concerning negotiations. UCS also raises this issue in its Response (at 7). SBC Illinois will respond to UCS’s allegations in its Response to UCS’s Motion to Strike.

(advocated by SBC Illinois here) that in Section 252(b) arbitrations, evidence concerning negotiations should be excluded, because admission of such evidence could have “a ‘chilling effect’ on parties’ willingness to explore settlements in off-the-record settings” and has argued that “the constraint against revealing settlement negotiations [] should extend to all filings and submissions, and not just to testimony.”⁴

A. There Is No Legitimate Basis For Distinguishing Section 252 Negotiations From Settlement Negotiations In Other Proceedings.

UCS asserts that the rule prohibiting admission of evidence concerning settlement negotiations does not apply in this proceeding because, in UCS’s view, “Section 252 negotiations are different from settlement negotiations in civil cases and cannot be readily analogized to settlement negotiations.” UCS Response, at 3. UCS is wrong, for several reasons.

First, in support of its position, UCS selectively quotes paragraph 134 of the FCC’s *First Report and Order*,⁵ which states, in part, that “the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation.” UCS Response, at 3. That quote, referenced in underline below, appears in the following passage:

Because the new entrant’s objective is to obtain the services and access to facilities from the incumbent that the entrant needs to compete in the incumbent’s market, the negotiation process contemplated by the 1996 Act bears little resemblance to a typical commercial negotiation. Indeed, the entrant has nothing that the incumbent needs to compete with the entrant, and has little to offer the incumbent in a negotiation. Consequently, the 1996 Act provides that, if the parties fail to reach agreement on all issues, either party may seek arbitration before a state commission. The state commission will arbitrate individual issues specified by the parties, or conceivably may be asked to arbitrate the entire

⁴ Renewed Response, at 4 (quoting Staff Response to Motion to Strike, Docket No. 01-0466, at 2 (filed Aug. 16, 2001)).

⁵ *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 (rel. Aug. 8, 1996) (“*First Report and Order*”).

agreement. In the event that a state commission must act as the arbitrator, it will need to ensure that the arbitrated agreement is consistent with the Commission's rules. In reviewing arbitrated and negotiated agreements, the state commission may ensure that such agreements are consistent with applicable state requirements.

First Report and Order, ¶ 134. It is apparent that UCS's quote, read in context, has nothing to do with whether it is appropriate to allow evidence of settlement negotiations in a Section 252 arbitration proceeding. However, more importantly, paragraph 134 of the *First Report and Order* supports SBC Illinois' position that evidence of the settlement negotiations with UCS is inadmissible. As explained by the FCC, state commissions will arbitrate individual issues (or in some cases, the entire interconnection agreement) under Section 252(b) to the extent the parties are unable to resolve those issues in negotiation under Section 252(a). Consequently, Section 252 negotiations are exactly the type of settlement negotiations to which the rule applies, because they represent the parties' attempt to resolve issues in order to – using UCS's terms – “avoid the expense and distraction of a lawsuit” (UCS Response, at 4) or in this case, arbitration.

Second, there is no basis for UCS's argument that Section 252 settlement negotiations are distinguishable from typical civil settlement negotiations (and hence, not subject to the rule excluding settlement negotiation evidence) because UCS was required to state the parties' positions under Section 252(b)(2)(A) of the 1996 Act. UCS Response, at 3-4. As an initial matter, it is important to note that Staff correctly points out in its Response that “there is a difference between stating an opposing party's position on an issue and non-admissible testimony regarding settlement discussions.” Staff Response, at 11. In other words, the arbitration petitioner can state a party's position without any discussion of the settlement negotiations. But UCS necessarily (and incorrectly) assumes that its statement of SBC Illinois' positions in its Petition *requires* it to include a discussion of the settlement negotiations between

SBC Illinois and UCS in its Petition and testimony. *See* UCS Response, at 4 (The requirement to state the parties’ positions in the Petition “will of course require a discussion in the Petition, and hence testimony, of positions taken during negotiations.”)⁶ If UCS’s assumption were correct (which it is not) parties would file testimony concerning Section 252 negotiations in arbitration proceedings before the Commission all the time. However, they do not. In fact, testimony concerning such settlement negotiations is rare, which is why motions to strike testimony concerning settlement negotiations are filed in very few arbitration proceedings. For example, in the last three multi-issue arbitrations to which SBC Illinois has been a party,⁷ the parties were all able to sufficiently apprise the Commission of SBC Illinois’ positions on the arbitration issues without inappropriately discussing the underlying settlement negotiations.

In its Response, UCS further misrepresents the Commission’s Order from the AT&T Arbitration in Docket No. 03-0239 as an instance where “the Commission previously recognized evidence of negotiations.” UCS Response, at 4 (citing Docket No. 03-0239, 2003 WL 22518548, at *92). UCS fails – understandably – to provide a direct quote, but what UCS is presumably referring to in support of its position is the following statement by the Commission:

Reflecting further negotiation between AT&T and SBC, in his reply testimony Mr. Rhinehart stated that the parties have reached agreement that Article 21 will apply to ULS-ST traffic.

⁶ UCS’s contention that the requirement to state SBC Illinois’ position necessarily requires a discussion of settlement negotiations in the Petition “and hence testimony” also appears to ignore the basic distinction between pleadings (*i.e.* the arbitration petition) and evidence (*i.e.* testimony). Indeed, even if a statement of the parties’ positions in the Petition required a discussion of negotiations in order to define the arbitration issues, which it does not, that would in no way change the rule that *evidence* (presented through testimony) of settlement negotiations is inadmissible, because a petition for arbitration is a pleading; it is not evidence.

⁷ *See* Docket No. 03-0239 (AT&T Arbitration); Docket No. 01-0338 (TDS Arbitration); and Docket No. 01-0623 (McLeod Arbitration).

2003 WL 22518548, at *92. UCS's reliance on this passage is obviously misplaced, because the underlying policy concern regarding the admission of testimony concerning settlement negotiations is not implicated when a witness testifies that the parties have *agreed* on a particular issue, and that issue no longer requires resolution by the Commission.

Finally, as explained above, the rule that evidence concerning settlement negotiations is inadmissible is well-settled in Illinois. Therefore, in order to accept UCS's contention that Section 252(b)(2)(A) renders UCS's testimony about the parties' negotiations admissible, one must conclude that Congress, in enacting Section 252(b)(2)(A), affirmatively intended to override the Illinois rule (not to mention the same rule as it exists throughout the Nation) – and that Congress intended to take this dramatic step without expressly saying that it was doing so. There is no basis in the 1996 Act, or in its legislative history or anywhere else, for attributing that intent to Congress, particularly when, as explained above, the Section 252(b)(2)(A) requirement that the petitioner set forth the parties' positions is most naturally read as not having that effect.

Third, UCS asserts that the rule excluding settlement negotiations as evidence does not apply to Section 252 arbitrations because “the parties are *required* to participate in negotiations.” UCS Response, at 5 (emphasis original). UCS's argument makes no sense. While UCS is correct that the 1996 Act requires carriers to negotiate, that has nothing to do with whether the parties' negotiations would be constrained if they knew that everything they said during their negotiations could ultimately be used as evidence in the ensuing arbitration. Indeed, if incumbent LECs knew that everything they said during negotiations could become part of the arbitration record, incumbent LECs might well limit themselves to making offers and counteroffers during the negotiations, with a minimum of the open discussion that tends to promote issue resolution. Of course, such result would be counterproductive to the Section 252

negotiations process, the purpose of which is to resolve issues so that the parties – and more importantly the Commission – do not have to expend the resources to litigate those issues in arbitration. In addition, UCS’s basis for distinguishing Section 252 negotiations from other civil proceedings on the ground that Section 252 negotiations are *required* must fail because courts may also require parties to civil litigation to negotiate in effort to reach settlement. *See e.g.* U.S. Dist. Ct. (C.D. Ill.) Rule 16.1(B) (presiding judge can order parties to submit to settlement negotiations if a case may be resolved by settlement); U.S. Dist. Ct. (N.D. Ill.) Pretrial Proc. Rule 5 (“parties are directed to undertake a good faith effort to settle that includes a thorough exploration of the prospects of settlement.”); U.S. Dist. Ct. (S.D. Ill.) Rule 16.3(a) (“parties shall use an early neutral evaluation in the form of a settlement conference in all civil cases . . .”); and Ill. Cir. Ct. Cook County Rule 10.8 (Tax Objection Proceedings), § 2-125: Efforts to Limit Discovery and Aid Settlement (“Prior to the date set for the disclosure of opinion witnesses . . . the parties shall confer regarding the possibility of settlement.”) UCS of course does not, and cannot, contend that the rule concerning the inadmissibility of negotiation evidence does not apply in civil proceedings where the court can require the parties to engage in settlement negotiations.

Fourth, UCS asserts that para. 149 of the *First Report and Order* supports its position that Section 252 negotiations should be considered in this arbitration. Not so; once again, UCS selectively quotes the FCC’s language. Paragraph 149 of the *First Report and Order* discusses the parties’ duty to negotiate in good faith, and the remedy created in the arbitration process for breach of that duty. The full sentence from which UCS quotes states: “The likelihood that the arbitrator will review the positions taken by the parties during negotiations should discourage parties from refusing unreasonably to provide relevant information to each other or to delay

negotiations.” (UCS’s quoted language reflected in underlined font). When read in context, it is clear that the language UCS quotes is irrelevant to the issue of whether evidence of settlement negotiations should be excluded. Indeed, paragraph 149 concerns a party’s breach of the duty of good faith negotiation, in which case the arbitrator presumably would review the positions taken by the parties in negotiation in order to determine whether the breach in fact occurred. However, UCS does not allege in its Petition that SBC Illinois breached its duty to negotiate in good faith. Moreover, even if UCS did claim that SBC Illinois breached that duty, and the arbitrator was required to review the parties’ positions in order to determine whether a breach occurred, that does not mean that the arbitrator would be required to review “the evidentiary material SBC’s motion seeks to exclude” (UCS Response, at 5) because there is a distinction (as recognized by Commission Staff) between the party’s position and inadmissible evidence concerning settlement negotiations.

Finally, UCS’s contention that evidence concerning settlement negotiations should be admitted because “there is no determination of liability in 251/252 cases” has no merit. UCS Response, at 5. In particular, UCS claims that “in the typical civil case an admission during settlement discussions could be damaging . . . and there are good reasons not to chill the litigants in their settlement discussions.” *Id.* However, as explained above, and as acknowledged by Staff in its Response to the Renewed Motion and in its Response to the Motion to Strike in Docket No. 01-0466,⁸ these concerns are equally applicable in Section 252 arbitrations. Accordingly, UCS’s position should be rejected.

⁸ See *supra*, note 4.

B. UCS Fails To Demonstrate That The Testimony That SBC Illinois Seeks To Strike Is Subject To The “Exception” For Incidental Facts Elicited During Negotiations.

UCS asserts that, even where evidence of settlement negotiations is inadmissible, certain portions of UCS’s testimony that SBC Illinois seeks to strike are subject to an exception that purportedly “carves[s] out evidence of facts elicited during settlement negotiations.” UCS Response, at 6. As an initial matter, it is important to note that neither of the cases cited by UCS in support of its position actually applies the exception cited by UCS, and thus, neither case lends support to UCS’s claim that certain portions of its testimony constitute evidence of “other facts” elicited during settlement negotiations that are admissible. In fact, both of the cases cited by UCS held that testimony regarding settlement negotiations was inadmissible. *See Weheimer v. UNR Indus., Inc.*, 213 Ill.App.3d 6, 20; 572 N.E.2d 320, 331 (4th Dist. 1991) (Court found reversible error in denial of motion for mistrial, stating “[i]t is manifest that plaintiff’s counsel’s question directed to a witness . . . violated the well-settled rule on inadmissibility of settlement negotiations.”) and *In re Marriage of Passiales*, 144 Ill.App.3d 629, 640; 494 N.E.2d 541, 550 (1st Dist. 1986) (Court did not abuse discretion in refusing to admit evidence concerning settlement negotiations.)

To the extent that the exception cited by UCS does apply, UCS has the burden to show which testimony “should be admitted [under the exception] regardless of the fate of the other UCS testimony.” UCS Response, at 6. UCS, however, cites only a few examples of testimony that purportedly fall within the exception, and fails to show how that testimony constitutes “other facts elicited incidentally during settlement negotiations.” *Passiales*, 494 N.E.2d at 550. For example, UCS cites “Joint Statement at 30:1-4; 40, n.59” as testimony that should be admitted, but fails to even describe what that testimony is or how it is an exception to the rule. UCS further identifies “Joint Statement, at 17:17 to 21:2; 95:11-20” as testimony regarding 18/6

billing, but does not explain how facts related to 18/6 billing somehow constitute “incidental” facts elicited during negotiations, except to say that such facts were obtained only through “protracted investigation and negotiation.” UCS Response, at 6. UCS’s statement in this regard is meaningless, since *all* of the facts contained in UCS’s testimony presumably were obtained through UCS’s investigation and negotiation with SBC Illinois. Moreover, UCS itself concedes in the Affidavit of Craig Foster that 18/6 billing was a topic of pre-petition negotiations with SBC Illinois. UCS Response, Exhibit B, at ¶ 6. Thus, it is difficult to see how any facts related to 18/6 billing were “incidental” to the negotiations. Finally, the portions of UCS’s testimony that SBC Illinois seeks to strike (and that UCS claims should be admitted under the exception) do not merely discuss *facts*; rather they discuss the parties’ “give and take” negotiations regarding the settlement of 18/6 billing and other issues. And this is the exact type of evidence that is appropriately excluded under the rule barring admission of evidence concerning settlement negotiations. *See Passiales*, 144 Ill.App.3d at 640; 494 N.E.2d at 550-51 (evidence concerning party’s failure to go along with settlement was not an incidental fact, rather it was inadmissible evidence relating to negotiation.)

C. SBC Illinois’ Assertion That Messrs. Foster And Surdenik Are Incompetent To Testify As To The Pre-Petition Negotiations Was Based 100% On Representations Made By UCS In Its Verified Joint Statement.

UCS goes to great lengths in its Response to rebut SBC Illinois’ assertion that Messrs. Foster and Surdenik are incompetent to testify as to the pre-petition negotiations. UCS Response, at 7-10, and Exhibit B (Foster Affidavit). UCS also makes the following jab at SBC Illinois: “It is not surprising that SBC did not verify [their] factual assertion in its brief . . . because it is flatly false.” A careful review of SBC Illinois’ Renewed Motion, however, would have clued UCS into the fact that SBC Illinois’ position *was based entirely on UCS’s own*

factual representations made in its verified Joint Statement sponsored by Ronald Lambert, Craig Foster, and Chris Surdenik. See Renewed Motion, at 5-6.

To be clear, SBC Illinois' position in the Renewed Motion was based on the following. UCS initially filed testimony jointly sponsored by Ronald Lambert, Craig Foster, and Chris Surdenik ("Original Joint Statement."). On February 6, 2004 the Circuit Court of Cook County disqualified Mr. Lambert from participating in this proceeding and required UCS to withdraw the Original Joint Statement and resubmit substitute testimony. *See* Consent Injunction Order (attached to Renewed Motion). On that same day, UCS submitted the Joint Statement of Craig Foster and Chris Surdenik ("New Joint Statement"). Under the terms of paragraph 1 of the Consent Injunction Order, the New Joint Statement should have reflected UCS's testimony without Mr. Lambert's input. Interestingly, however, the New Joint Statement is *virtually identical* to the Original Joint Statement, except for the extraction of references to Mr. Lambert. *See* Attached Exhibit A (redline comparison of New Joint Statement to Original Joint Statement). In the Original Joint Statement, testimony concerning pre-petition negotiations was sponsored solely by Mr. Lambert, and testimony concerning post-petition negotiations was sponsored by Mr. Foster. Renewed Motion, at 5-6. However, in the New Joint Statement, Mr. Foster is now presented as the sponsor of both the pre and post-petition negotiations. Renewed Motion, at 5-6.

The logical conclusion that flows from UCS's representations in the Original Joint Statement is that Mr. Foster is not competent to testify as to the pre-petition negotiations. Therefore, the only way SBC Illinois could have erred in its argument was in assuming (based on UCS's verification) that the statements in the Original Joint Statement were true, accurate, and complete.

II. UCS'S TESTIMONY REGARDING 18/6 BILLING SHOULD BE STRICKEN.

Staff agrees with SBC Illinois that UCS's testimony regarding 18/6 billing "attempt[s] to raise a new issue not raised in [the] petition for Arbitration" and thus, should be stricken because the Commission must limit its consideration to the issues set forth in the Petition and any response thereto. Staff Response, at 12. UCS, however, attempts to circumvent this rule by arguing (1) that 18/6 billing is not a new issue because it is relevant to Issue #1, and (2) arguing that UCS did not have adequate information regarding 18/6 billing in order to include it as an issue in the Petition. Both arguments are baseless and should be rejected.

First and foremost, it is important to keep in mind that the issues to be arbitrated in this proceeding are defined by the parties' competing contract language. On December 18, 2003, UCS filed its Petition and attached redline contract document, which reflected UCS's proposed contract language. But nowhere in those documents does UCS propose language regarding 18/6 billing. Therefore, UCS's proposal of 18/6 billing language in its testimony amounts to nothing more than a belated attempt to add a new issue to this arbitration – pure and simple.

Nevertheless, UCS contends that its proposed language regarding 18/6 billing should be considered because it is purportedly relevant to Issue # 1 concerning definition of resale services. UCS Response, at 10. However, whether the 18/6 billing issue is or is not "relevant" to Issue #1 makes no difference. For example, it is clear from UCS's Petition and testimony that Issues #2, #3, and #4 are also relevant to Issue #1. But nonetheless, those are separate issues because they all pertain to different provisions of the agreement proposed by UCS. Therefore, UCS's argument that the Commission should consider its proposed 18/6 billing language solely because it may be "relevant" to Issue #1 is baseless and should be rejected.

UCS also contends that it did not include the 18/6 billing issue in the Petition because SBC Illinois allegedly represented to UCS in pre-petition negotiations that 18/6 billing was only

available in tariffs that specifically referenced 18/6 billing and some ICBs. UCS Response, at 12. In addition, UCS alleges that SBC Illinois “blocked” UCS’s attempt to gather information regarding 18/6 billing through discovery. For these reasons, UCS asserts that it should be allowed to bypass the rule that requires it to raise all of its issues in the Petition, and inject the new 18/6 billing issue into this arbitration. UCS’s argument should be rejected for three reasons. *First*, UCS itself concedes that 18/6 billing has been a common topic of discussions between itself and SBC Illinois for years. For example, in his Affidavit, Craig Foster states that UCS “repeatedly” discussed this topic with SBC Illinois. UCS Response, Exhibit B, ¶ 6. Moreover, in UCS’s New Joint Statement, Messrs. Foster and Surdenik state that UCS raised the 18/6 billing issue with SBC Illinois “at various times during 2000 and 2001,” “in December 2002,” and “[o]n and August 4, 2004 conference call.” UCS Joint Statement, at 16:11, 16:16 and 17:5. Given the fact that the UCS and SBC Illinois frequently discussed the provision of 18/6 billing, it is hard to believe that UCS could not have raised the issue in its Petition in some form if it wanted to. *Second*, even if SBC Illinois did represent to UCS that 18/6 billing was available in tariffs only where specifically referenced (as UCS claims), the fact that SBC Illinois allegedly said that 18/6 billing was not available beyond those instances would in no way preclude UCS from raising the issue in its Petition and seeking 18/6 billing in other instances as well. Indeed, UCS’s Petition is chock-full of requests that SBC Illinois provide UCS with something more than what SBC Illinois either currently provides or is required to provide. *See e.g.* UCS Issues 10, 12, 14, 15, and 18. And *third*, UCS’s contention that it could not have raised the 18/6 billing issue in its Petition because SBC Illinois did not (in UCS’s view) adequately respond to discovery requests must fail for the simple reason that UCS’s discovery was served *with the*

Petition. Therefore, any responses SBC Illinois would have provided regarding the 18/6 billing issue would necessarily have been provided *after* UCS filed its *Petition*.

In short, UCS could have raised the issue of 18/6 billing in its *Petition* if it wanted to. But, for whatever reason UCS did not, and the blame for UCS's failure in this respect can be placed on no other party but UCS. Accordingly, the Commission should deny UCS's request to circumvent the arbitration procedure rules in order to cure its failure.

III. THE COMMISSION SHOULD STRIKE UCS'S TESTIMONY CONCERNING SBC ILLINOIS' COMPLIANCE WITH THE ILLINOIS PUA.

UCS asserts that "Evidence of SBC's compliance with the PUA is directly relevant to this matter because, at the end of the day, the arbitrated agreement the Commission approves must comply with federal and state law, including the PUA." UCS Response, at 13; *see also* Staff Response, at 14. Even if one accepts UCS's contention that the Commission must adopt an interconnection agreement that complies with both the 1996 Act and the Illinois PUA, evidence regarding SBC Illinois' past compliance with the Illinois PUA has absolutely no relevance to the Commission's ultimate decision in this proceeding, *i.e.* the terms and conditions on which SBC Illinois will resell service to UCS in the future. Indeed, whether the parties' proposed contract language is or is not consistent with the requirements of the Illinois PUA has nothing to do with whether SBC Illinois is or is not already in compliance with the Illinois PUA. Moreover, if UCS's irrelevant testimony is not stricken, the parties will be forced spend time during the hearing and in post-hearing briefs arguing over what SBC Illinois did or did not do in the past *and* whether what SBC Illinois did or did not do did or did not comply with the Illinois PUA. In short, the Commission would be forced to conduct a mini-trial on issues that are completely irrelevant to this arbitration and that are more properly considered in complaint-type proceedings.

IV. UCS’S CONTENTION THAT CERTAIN FACTUAL ASSERTIONS IN THE RENEWED MOTION MUST BE VERIFIED SHOULD BE REJECTED.

UCS contends that the Commission should strike certain factual assertions contained in SBC Illinois’ Renewed Motion because, in UCS’s view, those assertions must be verified. UCS’s contention is utterly absurd, because each of the statements UCS seeks to strike (reflected in **yellow highlight** on Exhibit A to UCS’s Response) reflects facts taken from the Circuit Court of Cook County’s Consent Injunction Order (which was attached to SBC Illinois’ Renewed Motion) or UCS’s *own* statements contained in its *verified* Original Joint Statement. Certainly, SBC Illinois is not required to verify facts contained in a court order, nor is it required to verify UCS’s own factual statements that were (1) already verified by UCS and (2) not within the personal knowledge of anyone at SBC Illinois.

V. CONCLUSION

Based on the foregoing, and for the reasons explained in SBC Illinois’ Renewed Motion, the Commission should grant SBC Illinois’ Renewed Motion to Strike.

Dated: March 4, 2004

Respectfully submitted,

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