

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

**MCImetro Access Transmission Services LLC,)
MCI WorldCom Communications, Inc., and)
Intermedia Communications LLC)
)
Petition for Arbitration of Interconnection)
Rates, Terms and Conditions and Related)
Arrangements with Illinois Bell Telephone)
Company pursuant to Section 252(b) of the)
Telecommunications Act of 1996)**

Docket No. 04-0469

**Petitioners' Emergency Motion to Strike or,
In the Alternative, Extend Filing Date for Certain
Rebuttal Testimony, and Request for Expedited Ruling**

Petitioners, MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc. and Intermedia Communications LLC (collectively referred to as "MCI"), pursuant to section 200.190 of the Commission's Rules of Practice, 83 Illinois Admin. Code § 200.190, hereby submit their Emergency Motion to Strike or, in the Alternative, Extend Filing Date for Certain Rebuttal Testimony, and Request for Expedited Ruling ("Motion"). In support of this Motion, MCI states as follows:

I. BACKGROUND

On July 16, 2004, MCI filed a Petition for Arbitration of an interconnection agreement with Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC Illinois"). In conjunction with the Petition, MCI filed a proposed interconnection agreement, including the General Terms and Conditions ("GT&Cs"), as well as thirty-three appendices, and twenty-five "decision point lists" ("DPLs"). In the DPLs, MCI identified the issues in dispute between MCI and SBC Illinois (collectively, the "Parties"), the contract language implicated by each dispute

and each Parties' summary position in support of its proposed version of the relevant contract language.

Each of the DPLs MCI filed with the Petition relates to a single topic, *e.g.*, UNEs, Line Sharing, *etc.*, and with the exception of the DPLs pertaining to Price List (*i.e.*, Price Schedule), Reciprocal Compensation and xDSL, each of DPLs was jointly negotiated by the Parties and filed as an agreed joint DPL. Thus, for example, prior to filing the agreed joint UNE DPL, the Parties negotiated the terms of the Lawful UNE Appendix; reached agreement on a significant percentage of the language included in that appendix; with respect to language on which they could not agree, jointly framed approximately eighty-three issues to present for resolution by the Commission (where the Parties could not agree on the manner in which to frame an issue, they agreed to provide the Commission with separate issue statements); and collaboratively prepared an agreed UNE DPL setting forth their jointly framed disputed issues, identifying relevant contract language and summarizing their positions regarding the appropriate resolution of their disputes.

The collaborative process in which the Parties negotiated specific contract language and upon which the agreed joint DPLs are based consumed significant resources in terms of time and effort and involved innumerable compromises intended to reduce the number of disputed issues to be presented to the Commission.

After filing the Petition, in accordance with representations the Parties made to the Administrative Law Judges ("ALJs"), the Parties continued their efforts to reduce the number of disputed issues that had resulted from the Parties' negotiation of specific contract language. As a result of their efforts, the Parties successfully resolved approximately sixty-six formerly disputed issues before MCI filed its direct testimony, which was filed on August 4, 2004 and which

addresses all of the issues that remained open as of the August 4 filing date. Following MCI's August 4 filing, the Parties resumed their efforts to resolve disputed issues that had resulted from the Parties' negotiation of specific contract language and successfully compromised and resolved another twenty-three formerly disputed issues.

Consistent with the directives of the ALJs and MCI's understanding, all of the issues that have been resolved since MCI filed the Petition were identified in the revised DPLs SBC Illinois filed in conjunction with its August 10, 2004 response to the Petition ("Response"). The resolved issues also are listed in Attachment A to SBC Illinois' Response.¹

Surprisingly, in view of the Parties' diligent and on-going efforts to reduce the number of disputed issues, SBC Illinois included with its filing substantial amounts of entirely new contract language that MCI had never before seen nor negotiated and inserted a number of broad and very significant new issues in the revised DPLs filed with its Response – without any legitimate basis for doing so – thereby expanding the number of disputed issues ostensibly before the Commission and greatly expanding the scope of this proceeding. The new issues SBC Illinois improperly seeks to add to this Docket principally relate to the Lawful UNE Appendix and currently are included in the revised UNE DPL SBC Illinois filed August 16, 2004.

The new UNE-related issues proposed by SBC Illinois were never negotiated by the Parties. Further, they directly conflict with the UNE-related agreements and compromises previously reached by the Parties and reflected in their agreed joint UNE DPL. Further still,

¹ Although the parties have resolved Issues UNE 3, Price Schedule 3B and Price Schedule 4B, these issues are not included in Attachment A to SBC Illinois' Response. They are, however, properly reflected as resolved in the revised DPLs. In addition, on Friday, August 13, 2004, the Parties resolved Issues Line Sharing 8, Line Splitting 2, LIDB 11, NIM 23 and UNE 69.

MCI had no opportunity to file direct testimony in relation to the proposed new issues because its testimony was filed before SBC Illinois presented them to MCI.²

In addition, SBC Illinois, ignoring the unnecessary burden that would result, failed to provide MCI with a list of its proposed new issues. However, based on MCI's summary review of the August 10 revised DPLs, they appear to be those issues described as "SBC UNE 1" through "SBC UNE 5" and non-UNE-related issues identified as "SBC CNAM 1", "SBC LIDB 1" and "SBC 800 Database 1". Like the UNE DPL, the CNAM, LIDB and 800 Database DPLs were agreed joint DPLs. Therefore, SBC should be precluded from modifying them by adding new issues. Further, to the extent that SBC Illinois has "modified its contract proposals since MCI filed the Petition", *see* SBC Illinois' Response at p. 6, the Commission should require SBC Illinois to remove its modifications from the affected Appendices and/or DPLs. This Docket should proceed, if at all, on the issues on which the Parties agreed to present to the Commission for resolution.

For these reasons and for the reasons set forth below, the inclusion in this Docket of SBC Illinois' proposed new issues (those that are UNE-related as well as those that are not) would be manifestly unfair and would severely prejudice MCI. Further, there is no just reason SBC Illinois should be permitted to blithely disregard and ignore agreements into which it voluntarily entered simply because it has had a change of heart or has thought better of them. Thus, the Commission should strike SBC Illinois' proposed new issues.

² As explained in the Petition, MCI and SBC Illinois did not reach agreement on disputed issues relating to Price Schedule, Reciprocal Compensation and xDSL. Accordingly, the DPLs MCI filed with respect to these three topics did not necessarily include all of the issues SBC Illinois would have included. Thus, in the Petition, MCI indicated that SBC Illinois likely would assert any necessary additional issues regarding these three topics in its response to the Petition. *See* Petition at p. 12. MCI did not, as SBC Illinois now implies, anticipate or agree that SBC Illinois' Response properly could include new, non-negotiated issues relating to agreed joint DPLs. *See* SBC Illinois' Response at pp. 3-8.

In view of the fact that SBC Illinois is required to file testimony on its proposed new issues on August 17, 2004 and the fact that MCI is required to file its rebuttal testimony on August 24, 2004, MCI requests that the Commission expedite briefing on this Motion so that the ALJs may issue a ruling on an expedited basis, which could help to limit the resources that will have to be expended by the Parties, Staff and the Commission on issues not properly part of this proceeding. Further, in the event the Commission declines to strike SBC Illinois' newly proposed issues, MCI requests an additional week following the ALJs' ruling on this Motion in which to file rebuttal testimony regarding those new issues that relate to previously agreed joint DPLs, particularly those included in the August 10, 2004 revised UNE DPL.

II. ARGUMENT

A. **This Proceeding Should Be Stayed Pending The FCC's Issuance of Final Rules Regarding UNEs**

The new UNE-related issues being proposed by SBC Illinois relate to the March 2, 2004 decision in *United States Telecom Assoc. v. FCC*, 359 F.3d 554 (D.C. 2004) ("*USTA II*"), where the court vacated existing FCC rules on some UNEs and remanded the case to the FCC to issue new unbundling rules consistent with the court's order. (The FCC has voted on but not yet issued interim rules implementing *USTA II* and FCC Chairman Powell has indicated he intends for the FCC to issue final rules in response to the *USTA II* remand to be adopted by year-end.) Although the Parties took *USTA II* into account when negotiating the Lawful UNE Appendix and agreed joint UNE DPL MCI filed on July 16, 2004, it now is clear that SBC Illinois changed its position with respect to *USTA II* and contractual language related to it after the Petition was filed.

Less than one week before August 4, 2004, the date MCI filed its direct testimony, SBC Illinois' attorneys advised MCI that SBC Illinois planned to substantially modify its UNE-related

contract language. SBC Illinois' attorneys represented that while they did not have authority to agree to an extension of the schedule in the arbitration, they could see if their client would be willing to agree to modify the arbitration schedule slightly, ostensibly to allow MCI to review SBC Illinois' newly proposed language and alter its testimony to account for SBC Illinois' newly proposed language. Significantly, however, prior to the time that MCI filed its testimony, SBC Illinois did not provide MCI with its modified language. SBC Illinois also failed to orally discuss the nature of its planned modifications with MCI prior to the time that MCI was required to file its testimony. Thus, when SBC Illinois suggested that it might be able to agree to modify the arbitration schedule – something which SBC Illinois' attorneys stated they did not have authority to do despite the opposite impression left by SBC Illinois' Response to the Petition – purportedly to provide MCI with additional time to consider SBC Illinois' future revised UNE proposals and modify its testimony accordingly, MCI had no reason to agree to such delay. MCI had no basis on which to determine whether SBC Illinois' future modifications would alter its position. MCI had no reason to believe that SBC Illinois properly could unilaterally insert its future modified language into this proceeding. MCI had no idea when SBC planned to provide its modified contract language and DPLs for MCI's review. And MCI had no basis on which to believe that upon reviewing the modified proposals, the appropriate next step would be to revise its testimony, as opposed to entering into negotiations with SBC Illinois regarding the modified contractual language, which is the process that normally precedes the presentation of disputed issues to the Commission. Thus, in the vacuum in which SBC Illinois presented its so-called standstill proposal – a proposal SBC Illinois' attorneys had no authority to make – MCI had no choice but to reject it.

Now, of course, MCI has seen SBC Illinois' proposed new UNE-related contract language and issues. Based on MCI's review of these matters and based on SBC Illinois' apparent intent to cease providing MCI critical UNEs as soon as possible, MCI believes that the appropriate and most reasonable manner in which to proceed would be for the Parties to agree to withdraw the Petition and await the FCC's issuance of final UNE rules. This makes sense because SBC Illinois' interpretation of *USTA II* is erroneous. But even more important, and SBC Illinois does not dispute this fact, the FCC plans to issue interim UNE rules very soon, and shortly thereafter, it will issue final UNE rules. The manner in which to implement those final rules that will outline SBC Illinois' obligations pursuant to federal law is the matter to which the Parties, Staff and the Commission should devote their limited resources. Indeed, if SBC's contention that "SBC Illinois regrets MCI's apparent decision to take an adversarial approach to SBC Illinois' attempt to keep pace with current law while affording MCI an appropriate opportunity to respond" is true, then SBC shouldn't have a problem agreeing to withdraw this arbitration and waiting for final FCC rules that the Parties can then review and negotiate contractual language to implement. To the extent that there are disputes about such language, that would be the appropriate time to re-launch the arbitration and resolve issues in an efficient manner that truly allows all parties to keep pace with current law in a manner consistent with the negotiations/arbitration framework of the Telecommunications Act of 1996. For these reasons, the Petition should be withdrawn to allow the Parties to accomplish what SBC Illinois' Response to the Petition claims that SBC Illinois is interested in accomplishing.

MCI, however, is not suggesting that there be an open-ended hiatus. Rather, MCI proposes a method that will ensure that the Parties' disputes are presented to the Commission in a timely fashion once SBC Illinois' federal obligations are known and the Parties' disputes

concerning language to implement those obligations have been negotiated and are clear. To this end, MCI proposes to withdraw the Petition and represents that it will agree to re-start negotiations for an interconnection agreement on or about September 1, 2004. By so doing, the window for arbitrating the existing disputes would open in January 2005 and close in February 2005. By that time, it is very likely that the FCC's final UNE rules will be available, which will permit the Parties, Staff and the Commission to arbitrate current federal obligation issues rather than issues which could be stale before the Commission even enters an order in this case. Indeed, MCI raised the possibility of extending the time for arbitration in a call with SBC last Friday morning, August 13, 2004, but SBC Illinois' attorney, after consulting with an SBC executive in Texas (Mr. Michael Auinbauh, SBC Assistant Vice President of Marketing Management), indicated that SBC Illinois could not agree to an extension of the current arbitration schedule. Nevertheless, MCI provides this detailed proposal again so that SBC Illinois can respond to it in writing.

In the event SBC Illinois will not agree to the foregoing proposal, notwithstanding its claimed desire to "keep pace with current law", SBC Illinois' Response at p. 9, the Commission should strike SBC Illinois' untimely new issues for the reasons set forth below.

B. The Commission Should Strike SBC Illinois' Newly Proposed UNE-Related Issues

In a blatantly disingenuous attempt to justify its proposed unilateral insertion of new, non-negotiated UNE-related issues into this Docket – issues that conflict with the Parties' prior agreements – SBC Illinois explains that it proposed new UNE-related issues due to the June 15, 2004 issuance of the mandate in *USTA II*, which SBC Illinois claims "eliminated certain federal unbundling obligations". See SBC Illinois' Response at pp. 6-7. SBC Illinois' explanation

regarding its proposals is belied by the history of the Parties' negotiations regarding UNE-related issues, and SBC Illinois' characterization of the effect of *USTA II* is clearly erroneous.

1. *USTA II* does not relieve SBC Illinois of any of its federal unbundling obligations.

Contrary to SBC Illinois' contention, *USTA II* did not "eliminate" federal unbundling obligations. Rather, *USTA II* vacated then-existing FCC rules on some UNEs and remanded the case to the FCC to issue new unbundling rules consistent with the court's order. (As previously noted, the FCC has not yet issued rules implementing *USTA II*.) Meanwhile, there has been no change to the core requirement of the Federal Telecommunications Act of 1996, 47 U.S.C.A. § 251, *i.e.*, pursuant to federal law, SBC Illinois continues to be obligated to provide network elements without which CLECs' ability to provide local service is impaired.

Significantly, with respect to existing UNEs, there has never been a finding of no impairment by any regulatory agency or court. Premised on its conclusion that *delegation* of UNE determination to the states was invalid, the *USTA II* court only reversed certain of the FCC's unbundling rules and remanded the issue to the FCC for it to develop new rules in light of the order. Nowhere did the court invalidate unbundling rules on *substantive* grounds. Nowhere did the court find that the CLECs were not impaired without particular network elements. Thus, it is possible that the FCC could find, consistent with the *USTA I* and *USTA II* decisions, that existing UNEs should remain as UNEs.³

In sum, while the federal UNE rules are now again before the FCC for review, the federal UNEs themselves have never been invalidated or otherwise removed as UNEs. Thus, SBC

³ The FCC could implement the relevant court decisions by removing unbundling obligations entirely; or, it could effectively reaffirm prior unbundling obligations or it could establish unbundling obligations somewhere in between. All that is known at this point is that the FCC will establish new permanent unbundling rules, and that the FCC Chairman has pledged to do so quickly.

Illinois continues to be obligated to provide UNEs pursuant to federal law and to provide network elements pursuant to state law.

2. SBC Illinois took *USTA II* into account prior to reaching agreement with MCI on the Lawful UNE Appendix and agreed joint UNE DPL MCI filed on July 16, 2004.

SBC Illinois' attempt to explain its proposal to insert new, non-negotiated UNE-related issues into this Docket on the basis of the issuance of the mandate in *USTA II* is plainly disingenuous. The decision in *USTA II* was handed down on March 2, 2004, fifteen weeks before the mandate issued and more than nineteen weeks before the Petition was filed. All of the Parties' negotiations regarding UNE-related issues and all of their agreements on language to be included in the UNE appendix and on disputed UNE-issues (*i.e.*, those included in the agreed joint UNE DPL MCI filed with the July 16, 2004 Petition) were conducted and reached ***after*** *USTA II* was decided, ***not before*** as SBC Illinois falsely asserts. See Attachment 1 - Affidavit of Kathy Jespersen, Senior Manager in Carrier Agreements Division of MCI, Inc. Moreover, as reflected in the Parties' joint DPL, the Parties expressly took *USTA II* into account during their negotiations regarding UNE-related issues, with SBC Illinois expressly qualifying its proposals by noting that they depended on the *issuance of the mandate in USTA II*. See Attachment 2 - Joint UNE DPL filed July 16, 2004 at *e.g.* UNE Issue 11. Thus, during the Parties' negotiations, SBC Illinois proposed UNE-related terms reflecting the manner in which it believed *USTA II* should be implemented. Accordingly, the June 2004 issuance of the mandate in *USTA II* does not even arguably justify SBC Illinois' untimely attempt to insert new, non-negotiated UNE issues into this Docket. SBC Illinois' new proposals are nothing more than SBC Illinois' attempt to insert in this Docket what apparently constitutes its newly conceived interpretation of *USTA*

II. The Commission should not countenance this maneuver and should strike SBC Illinois' newly proposed issues.

3. SBC Illinois waived its right to assert new positions based on *USTA II*.

The Commission also should strike SBC Illinois' newly proposed UNE-related issues because SBC Illinois waived its right to assert such issues. As set forth above, *USTA II* was handed down well *before* the Parties' negotiated, compromised and reached agreement on the UNE-related disputes they would jointly present to this Commission. In negotiating, compromising and reaching agreement on those issues, both MCI and SBC Illinois expressly took *USTA II* into account. Thus, with respect to UNE-related issues, SBC Illinois agreed to the non-disputed language it did and agreed to the presentation of the disputed issues included in the agreed joint UNE DPL in light of its alleged "*USTA II* rights". Accordingly, to the extent that SBC Illinois can be said to have compromised its perceived "*USTA II* rights", it did so knowingly and intentionally. As a consequence, SBC Illinois waived its right to assert perceived "*USTA II* rights" that are not reflected in the agreements it reached with MCI. *See Hamilton v. Williams*, 214 Ill.App.3d 230, 241-42, 573 N.E.2d 1276, 1283-84 (2d Dist. 1991). The fact that SBC Illinois may now regret making the agreements it did does not mean that SBC Illinois may simply act as if it did not make them. *See* SBC Illinois' Response at p. 7. Therefore, in view of the Parties' prior agreements, the Commission should find that SBC Illinois waived its right to assert any of the alleged "*USTA II* rights" it claims are not reflected in the language of the Parties' agreed Lawful UNE Appendix and their agreed joint UNE DPL. Based on such finding, the Commission should strike SBC Illinois' proposed new UNE-related issues.

4. SBC Illinois should be estopped from evading its prior agreements.

In view of the benefit SBC Illinois gained as a result of its prior agreements and in view of MCI's detrimental reliance on the representations SBC Illinois made during the Parties' UNE-related negotiations, SBC Illinois should be estopped from evading the UNE-related issues the Parties agreed to present to the Commission for resolution in this Docket. In negotiating UNE issues with SBC Illinois, MCI compromised certain of its rights in order to reach agreements with SBC Illinois. In doing so, MCI relied, to its detriment, on SBC Illinois' representations regarding relevant issues and committed to forego its right to dispute certain issues. As a result, the UNE Appendix MCI filed with the Petition includes language that does not fully preserve and protect MCI's rights. After exacting concessions from MCI and gaining the benefit of certain MCI compromises, SBC should not be permitted to arbitrate new issues that are inconsistent with the Parties' prior agreements. Instead, SBC Illinois should be estopped from unilaterally altering the basis on which the Parties agreed to present UNE-related issues to the Commission. *See Department of Transportation v. Coe*, 112 Ill.App.3d 506, 509, 445 N.E.2d 506, 508 (4th Dist. 1983); *Geddes v. Mill Creek Country Club*, 196 Ill.2d 302, 313-14, 751 N.E.2d 1150, 1157 (2001).

5. SBC Illinois' proposed new UNE-related contract language contravenes state law.

As explained above, SBC Illinois' proposed new UNE-related language is inconsistent with existing federal law. In addition, it directly contravenes applicable state law. The UNES SBC Illinois seeks to withhold from MCI are UNES, or "network elements", that SBC Illinois is required to provide to MCI at cost-base rates pursuant to Section 13-801 of the Illinois Public Utilities Act, 220 ILCS 5/13-801, as previously interpreted by this Commission. *See e.g., AT&T*

Communications of Illinois, Inc., TCG Illinois and TCG Chicago, Docket No. 03-0239, Order dated August 26, 2003 and *Illinois Bell Telephone Company Filing to Implement tariff provisions related to Section 13-801 of the Public Utilities Act*, Docket 01-0614, Order dated June 11, 2002. Accordingly, SBC Illinois' proposed new issues should be summarily rejected and stricken from this proceeding.

Further, as initially set forth, in the event the Commission does not strike SBC Illinois' improper new issues, the Commission should extend the date by which MCI must file rebuttal testimony with respect to these issues to August 31, 2004.

C. SBC Illinois also should be precluded from modifying other aspects of the Parties' agreed appendices and/or DPLs.

As demonstrated above, this proceeding should go forward, if at all, on the terms to which the Parties agreed before the Petition was filed. Accordingly, the Commission should require SBC Illinois to remove any and all modifications it made to previously agreed appendices and/or DPLs, subject to the exception applicable to the Price Schedule, Reciprocal Compensation and xDSL DPLs. *See* fn. 2. First and foremost, SBC Illinois' modifications, such as those made in conjunction with Issue Resale 1, serve to materially alter the issues that the parties had previously agreed were in dispute.

Secondly, SBC failed to in any way identify its purported "modifications". Thus, to rebut any modified issues, MCI first would have to identify them by comparing each and every revised appendix and DPL to the appendices and DPLs filed with the Petition. In light of the tight schedule adopted in this case, MCI should not be required to perform such a time consuming and unnecessary task. Accordingly, in the event SBC Illinois' improper modifications of agreed

terms and issues are not stricken, the Commission should order SBC Illinois to immediately identify any and all modifications that it made.

WHEREFORE, MCImetro Access Transmission Services LLC, MCI WorldCom Communications, Inc. and Intermedia Communications LLC, respectfully request that the Commission:

1. Direct SBC Illinois to respond, in writing, to MCI's proposal to withdraw the Petition on or before 12:00 PM August 17, 2004 (prior to the time by which SBC Illinois must file its testimony).

In the event SBC Illinois does not agree to withdraw the Petition:

2. Strike the new UNE-related issues that SBC Illinois improperly included in the revised DPLs and related appendices;
3. Strike the non-UNE-related new issues that SBC Illinois improperly included in the revised DPLS and related appendices;
4. Strike SBC Illinois' "modifications" to the agreed Appendices and DPLs MCI filed with the Petition; and
5. Enter an expedited briefing schedule for this Motion, requiring SBC Illinois to file its response by 12:00 PM August 18, 2004 and MCI to file its reply by 12:00 PM August 20, 2004, thus enabling the ALJs to rule on this Motion on or before the morning of August 24, 2004 (prior to the time MCI is required to file its rebuttal testimony).

Further, in the event the Commission does not strike SBC Illinois' newly proposed UNE-related issues, MCI requests that the Commission:

6. Extend the date by which MCI must file rebuttal testimony with respect to those issues to August 31, 2004.

Finally, Petitioners request that the Commission:

7. Grant Petitioners such other relief as the Commission deems just and proper.

Dated: August 16, 2004

Respectfully submitted,

MCIMETRO ACCESS TRANSMISSION
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STATE OF ILLINOIS)
) SS
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VERIFICATION

Kathy Jespersen, on oath, deposes and states that she is Senior Manager in Carrier Agreements Division of MCI, Inc., that she is authorized to make this verification; that she has read the foregoing "Petitioners' Emergency Motion to Strike or, In the Alternative, Extend Filing Date for Certain Rebuttal Testimony, and Request for Expedited Ruling, and Request for Expedited Ruling" and is familiar with the contents thereof; and that the facts set forth in the foregoing Motion are true and correct to the best of her knowledge and belief.



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Subscribe and sworn to before me
this 16th day of August, 2004.



NOTARY PUBLIC

