

**BEFORE THE
ILLINOIS COMMERCE COMMISSION**

In the Matter of:)	
)	
Petition for Arbitration of XO)	
ILLINOIS, INC. Of an Amendment to)	Docket No. 04-0371
an Interconnection Agreement with)	
SBC ILLINOIS, INC. Pursuant to)	
Section 252b) of the Communications)	
Act of 1934, as Amended)	

**THE STAFF OF THE ILLINOIS COMMERCE COMMISSION'S SUPPLEMENTAL
INITIAL BRIEF ON THE FCC'S INTERIM RULES ORDER**

Pursuant to the Administrative Law Judge's ("ALJ's") email dated August 27, 2004, the Staff of the Illinois Commerce Commission (the "Staff") provides the Commission with its Initial Brief on the effect of the FCC's Interim Order on the open issues the parties presented to the Commission for determination in this arbitration proceeding. As articulated in more detail below, the Staff recommends that the Commission proceed to a Final Arbitration Decision in this arbitration proceeding. In the alternative, the Commission, due to the unique situation it confronts in this arbitration, could choose not to take any further action and let the FCC assume jurisdiction.

The Instant Arbitration Background

On May 3, 2004, XO Illinois, Inc. ("XO") initiated this proceeding by filing its *Petition for Arbitration and Request for Waiver or Variance of Commission's Rules*. See, generally, *XO Petition*. In its *Petition*, XO sought arbitration, pursuant to Section 252(b) of the federal Telecommunications Act of 1996, 47 U.S.C. §252(b), of seven issues it asserted were outstanding between it and the Illinois Bell Telephone Company

("SBC"). See, generally, *XO Petition*. All issues relate to SBC's legal obligations under the *Triennial Review Order* and other existing federal and state laws and regulations, to provide XO with access to unbundled network elements (hereafter "UNEs"). See *XO Petition*. XO asserted that these issues are all questions of law, which the Commission could resolve without conducting evidentiary hearings. *XO Petition*, ¶18. The parties generally assented to this proposition by declining to file verified witness statements that placed any factual disputes at issue.

On June 1, 2004, SBC filed its Response to XO's Petition, which, among other things, posited an additional 14 issues for arbitration by the Commission. Pursuant to a schedule negotiated by the parties and set by the ALJ, on July 19, 2004, the parties filed their respective Initial Briefs. On August 4, 2004, the parties filed their respective Reply Briefs. On August 13, 2004, the ALJ issued a PAD. On August 20, 2004, the parties filed their respective Briefs on Exceptions.

The FCC's Interim Order

On August 21, 2003, the Federal Communications Commission issued its Triennial Review Order ("*TRO*").¹ In the *TRO*, the FCC reinterpreted the federal "impair" standard and reevaluated ILECs' obligations to provide requesting CLECs with unbundled access to certain network elements. On March 2, 2004, the D.C. Circuit Court of Appeals decided *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (DC Cir. 2004) ("*USTA II*"), which vacated and remanded several of the FCC's unbundling rules issued in the *TRO*. The FCC, in an attempt to minimize market disruption in light of the

¹ In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Service Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order on Remand on Further Notice of Proposed Rulemaking, FCC 03-36 (rel. August 21, 2003) ("*Triennial Review Order*" or "*TRO*").

D.C. Circuit Court's decision in *USTA II*, issued its *Interim Order*² to provide some interim guidance to the telecommunications market until the FCC issues permanent rules (roughly at the end of this year). *Interim Order*, ¶ 1.

In its *Interim Order*, the FCC “set forth a comprehensive twelve-month plan consisting of two phases to stabilize the market. *Id.* In the first phase, or *Interim period*, which will consist of roughly 6 months, ILECs must “continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.” *Interim Order*, at ¶ 1. In the second phase, or *Transition period*, which again will consist of roughly 6 months, ILCEs must continue to make available the above-noted UNEs to requesting CLECs but only to serve existing customers and at “moderately higher” rates. *Id.*

Regarding the FCC's Interim and Transition periods, the FCC provides in full the following guidance:

- ***Interim period:*** Until the earlier of (1) six months after Federal Register publication of this Order or (2) the effective date of the final unbundling rules adopted by the Commission in the proceeding opened by the appended *Notice*, the interim approach described above will govern. Incumbent LECs shall continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place during the interim period, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements.
- ***Transition period:*** For the six months following the interim period (that is, the six months following the expiration of the interim requirements on the

² See *Order and Notice of Proposed Rulemaking*, In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (Aug. 20, 2004) (“*Interim Order*”).

earlier of six months after Federal Register publication of this Order or the effective date of the Commission's final unbundling rules), in the absence of a Commission ruling that switching, dedicated transport, and/or enterprise market loops must be made available pursuant to section 251(c)(3) in any particular case, we propose the following requirements, designed to protect incumbent LECs' interests while also guarding against the precipitous rate increases that might otherwise result. First, in the absence of a Commission ruling that switching is subject to unbundling, an incumbent LEC shall only be required to lease the switching element to a requesting carrier in combination with shared transport and loops (*i.e.*, as a component of the "UNE platform") at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004 plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for this combination of elements plus one dollar. Second, in the absence of a Commission ruling that enterprise market loops and/or dedicated transport are subject to section 251(c)(3) unbundling in any particular case, an incumbent LEC shall only be required to lease the element at issue to a requesting carrier at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for that element on June 15, 2004, or (2) 115% of the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of this Order, for that element. With respect to all elements at issue here, this transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates. As during the interim period, carriers shall remain free to negotiate alternative arrangements (including rates) superseding our rules (and state public utility commission rates) during the transition period. Subject to the comments requested in response to the above NPRM, we intend to incorporate this second phase of the plan into our final rules.

Interim Order, at ¶ 29.

Also germane to this proceeding, is the following FCC guidance on implementing changes to existing interconnection agreements ("ICAs").

In order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements. To that end, we do not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements, but under any such presumption, the results of such proceedings must reflect the transitional structure set forth below. In no instance, however, shall the rates, terms or conditions resulting from any such proceeding take effect before the earlier of (1) Federal Register publication of this Order or (2) the effective date of our forthcoming final unbundling rules. We also hold that competitive LECs may not opt into the contract provisions "frozen" in place by this interim approach.

The fundamental thrust of the interim relief provided here is to maintain the *status quo* in certain respects without expanding unbundling beyond that which was in place on June 15, 2004. This aim would not be served by a requirement permitting new carriers to enter during the interim period.

Interim Order, at ¶ 22 (footnotes omitted; emphasis in original).

In short, the FCC's *Interim Order* implements essentially a two-prong approach to addressing the uncertainty currently pervading the telecommunications markets. *First*, it freezes the list of certain UNEs (switching,³ enterprise market loops, and dedicated transport) that ILCEs must make available to requesting CLECs, and also generally freezes the rates, terms and conditions under which ILECs must provide such UNEs (the "status quo"), as would be reflected in the ICA between XO and SBC in effect on June 15, 2004. *Interim Order*, ¶ 29.

However, there are a few exceptions to the general freeze outlined above. Material to this proceeding, for instance, this Commission's Order in ICC Docket No. 02-0864, which *raised* certain UNE rates (primarily loops), would meet the requirements of exception (3), thus allowing SBC to charge certain UNE rates not contained in the June 15, 2004 ICA between SBC and XO.⁴ In fact, these rates would necessarily be higher than the rates contained in the SBC – XO ICA effective on June 15, 2004.

It is the Staff's understanding, moreover, that the Interim period's freeze of certain UNE obligations is presumed by the FCC to occur *automatically* between the

³ Regarding the FCC's above-cited reference to "switching," the FCC further clarified that its references to "unbundled switching encompass mass market local circuit switching and all elements that must be made available when such switching is made available." *Interim Order*, ¶ 1, n. 3. Consequently, the FCC's prior determination in the *TRO* that enterprise market switching need not be unbundled, which FCC determination the *USTA II* court did not vacate, remains unaffected by the FCC's subsequent *Interim Order*.

⁴ Exception to the "Interim freeze" is permitted only to the extent that the applicable rates, terms and conditions are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening FCC order affecting specific unbundling obligations (e.g., an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) an ICC order raising the rates for network elements. *Interim Order*, ¶ 29.

parties; that is, without the need for a hearing to implement the freeze. The FCC's apparent presumption that the freeze will be "self-executing," however, appears to rest upon another presumption, which is that there exists a bright-line demarcation point (*i.e.*, June 15, 2004) between an ILECs' UNE obligations frozen by the *Interim Order* and those unaffected by the interim freeze. In the instant arbitration, however, the Commission may necessarily make determinations on a single issue containing distinct elements that could be governed by both the *Interim Order's* freeze and by un-vacated portions of the *TRO*. For example, a combination, such as UNE-P, consists of the following separate elements: a loop, switching, and shared transport. Looking just at the loop and switching, the mass-market switching would be frozen under the *Interim Order* while a mass-market loop would not be frozen and would, thus, be governed under the *TRO*. Accordingly, with no "bright-line" demarcation point to guide the Commission, it could be problematic for the Commission to determine such issues under competing and inconsistent federal rules.

Second, application of the FCC's *Interim Order* would suggest that any modifications to the XO-SBC ICA required to address the parties' respective obligations beyond the "Interim period" (and potentially, the "Transition period") should be addressed in a separate change of law proceeding to the extent allowed under the XO-SBC ICA effective on June 15, 2004. Such a change of law proceeding, the FCC appears to suggest, would be initiated solely by an ILEC request. *Interim Order*, ¶ 22 ("[W]e expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements.").

Finally, the Staff notes that the *Interim Order* becomes effective immediately upon publication in the Federal register. *Interim Order*, ¶ 47. To the best of the Staff's knowledge, the *Interim Order* has not yet been published in the Federal Register.

The Staff's Recommendation

The Staff, as noted briefly above, recommends that the Commission proceed to act on the ALJ's Proposed Arbitration Decision and issue a Final Arbitration Decision. Although a few aspects of such a Final Arbitration Decision addressing UNE issues frozen in time on June 15, 2004, would likely not be effective for long (until publication of the *Interim Order* in the Federal Register), there is now no effective *Interim Order*. Typically, the Commission would only take into account existing law in making decisions. The Interim Order, of course, is not yet effective and thus would not be existing law. The Staff, consequently, cannot recommend taking action based upon an FCC Order that is not yet in effect.

Further, although some of the issues presented to the Commission for arbitration are affected by the FCC's Interim Order, the majority are untouched by the FCC's Interim freeze. The Staff also points out that the possibility exists that the *Interim Order* may *never* be published in the Federal Register in light of the recent filing of a Writ of Mandamus. Verizon, Qwest, and USTA filed a Petition for a Writ of Mandamus To Enforce the Mandate Of This Court in the DC Circuit Court on August 23, 2004 ("BOC Petition for Mandamus")("Having tried and failed to obtain a stay of this Court's mandate that would have kept its maximum unbundling rules in place after June 15, 2004, the FCC has simply granted itself the same stay."). Due to the volatile nature of the legal environment regarding the FCC's rules at issue, the Staff is unable to predict whether

the *Interim Order* will go into effect as written.⁵ Many of the potential problems that the Commission faces in light of the FCC's recent issuance of its *Interim Order*, are related to timing, which neither the Staff nor the Commission controls due to the federal timelines under which the Commission is required to finish this arbitration. Because the Interim Order is not now effective, the Staff is compelled to recommend against taking any premature action regarding the *Interim Order* such as trying to implement the Interim Order within the timeframes of this proceeding, particularly because any such action *may* subsequently be proven to be unwarranted. Consequently, Staff recommends that the Commission proceed to a final arbitration decision without taking into account the soon to be but not yet effective Interim Order.

In the alternative, as noted above, the Commission could choose not to take any further action at all in connection with this arbitration, or at least until the Interim Order becomes effective. In choosing this alternative, it is important to point out that the Commission would not be complying with the timeframes established in the federal act. See 47 USC § 252 (B)(1). Staff recognizes that the Commission strives to comply with the federal arbitration scheme and Staff agrees that typically the Commission would and should comply with the federal timeframes. Staff makes this recommendation, however, in light of the unique situation the Commission confronts in this proceeding. The notice of yet another evolving rule change that the Commission and the parties have now received at the tail end of this arbitration proceeding has created an unprecedented degree of uncertainty, coupled with a tight time-frame under which the Commission must ordinarily act. Staff does not make this recommendation lightly and points out that

⁵ See also *Petition for Emergency Clarification and/or Errata*, In the matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (filed August 27, 2004).

if the Commission were to accept Staff's recommendation, the FCC may assume jurisdiction during the period the Commission elects not to act. See 47 USC § 252(e)(5) ("If a state commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State Commission under this section with respect to the proceeding or matter and act for the state commission."). Staff believes that it is unlikely that the FCC will assume jurisdiction in light of the evolving rule change. Even if the FCC does assume jurisdiction, Staff posits that this alternative may still be preferable because the FCC would not be restricted by the timeframes that limit the Commission's action. Moreover, the FCC would also have the benefit of an Interim order that would presumably be effective during the FCC proceeding and may be in a better position than this Commission to reconcile the Interim order with the non-vacated portions of the TRO.

WHEREFORE, for all of the reasons articulated above, the Staff of the Illinois Commerce Commission respectfully requests that one of its recommendations be adopted in this proceeding.

Respectfully submitted,

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