

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

APPLICATION FOR REHEARING OF SBC ILLINOIS

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APPLICATION FOR REHEARING OF SBC ILLINOIS

Illinois Bell Telephone Company (“SBC Illinois” or the “Company”) hereby requests that the Commission grant rehearing of the Arbitration Decision dated September 9, 2004 (the “Order”) for the purpose of reconsidering and amending the Order to correct certain errors.

I. INTRODUCTION AND SUMMARY

The narrow purpose of this Section 252 arbitration proceeding was to resolve disputes between SBC Illinois and XO Communications (“XO”) over how the parties’ existing interconnection agreement (“ICA”) should be amended to reflect “changes-in-law” resulting from the FCC’s *Triennial Review Order*¹ and the D.C. Circuit Court of Appeals decision on appeal of the *TRO* in *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

For the most part, the Order properly limits its findings and correctly resolves those specific issues. However, in other significant ways the Order is flawed and needs to be corrected. First, the Order exceeds the proper scope of this Section 252 arbitration on both procedural and substantive grounds in connection with Section 271 of the 1996 Act and Section 13-801 of the Illinois Public Utilities Act. Second, the Order seriously misinterprets and

¹ *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand (rel. Aug. 21, 2003).

misapplies the FCC's August 20, 2004 Order and Notice of Rulemaking. Finally, the Order also misinterprets and misapplies the *TRO* and *USTA II* on three significant issues. The Commission should grant rehearing and modify its Order to correct these errors as discussed below.

As an initial matter, the Order strays far beyond the proper scope of this proceeding by including erroneous conclusions of law related to SBC Illinois' alleged unbundling obligations under Section 271 of the 1996 Act and Section 13-801 of the Illinois Public Utilities Act. Early on in this proceeding the Commission ruled that the "change of law" issues considered here would be limited to those that arise from the *TRO* and *USTA II*. Any issues based on changes in law that pre-dated *TRO* would be excluded. Despite that sensible limitation, the Commission ignored its own ruling, without warning or explanation, and required SBC Illinois to provide unbundled network elements pursuant to state law and Section 271 which pre-date the *TRO* by more than two years. These issues, therefore, should never have been included in this arbitration. Moreover, the Commission should not address these issues here because the FCC is evaluating the Section 271 issue in its pending *USTA II* remand rulemaking proceeding and the Commission is addressing Section 13-801 issues in its pending 01-0614 Remand proceeding. The Commission, therefore, should wait until these proceeding are completed rather than risk reaching a legally questionable and potentially inconsistent result here. Looking beyond these procedural considerations, the Commission erroneously applied the law when it concluded that it can rule on Section 271 issues in a federal arbitration under Section 252. These proceedings are limited to obligations arising under Section 251(b) and (c). There was no voluntary negotiation of state law or Section 271 UNE obligations that would circumvent this well-established limitation.

Second, apart from these Section 271 and Section 13-801 errors, the Order (pp. 95-96) also contains errors in its holding regarding the impact of the FCC's August 20, 2004 Order and Notice of Rulemaking (hereinafter the "*Status Quo Order*").² First, the Order erred by holding that any elimination of the FCC's "interim requirements" for the unbundling of mass market switching, dedicated transport and enterprise loops (including as a result of the expiration of the six-month "interim requirements" period or an FCC finding of non-impairment) can be reflected in the ICA only through a future application of the ICA's "change-of-law" processes. *Order* at 95-96. In so holding, the Order completely and inappropriately disregards the FCC's ruling in the *Status Quo Order* that ILECs are entitled to enter into contract amendments *now* that "presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport," so that at the end of the six month interim period there will be a "speedy transition" if the FCC's "final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order." *Status Quo Order*, ¶¶ 22, 23.

In addition, the Order incorrectly requires that the amendments to the ICA incorporate the FCC's proposed requirements for a six month "transition period" to follow the six month period during which the "interim requirements" are in effect. This decision is in error because the "Transition Period" proposal is just that – a proposal. For this reason, the *Status Quo Order's* Ordering Paragraph, which directs that the "interim requirements" "shall become effective immediately upon publication in the Federal Register", says nothing about the proposed "transition period". *Status Quo Order* at 47. Thus, in the FCC's own words, the "transition

² Order and Notice of Proposed Rulemaking, *In re Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338 (FCC rel. Aug. 20, 2004). In its Supplemental briefs, SBC Illinois referred to the Order as the *Interim Order*.

period” proposal “*has no legal force whatsoever.*” FCC Mandamus Brief at 8, n. 2 (emphasis added) (Attachment A).

In a Supplemental Brief and in a Reply Brief filed by SBC Illinois at the ALJ’s request on September 3 and 5, 2004, respectively, SBC Illinois explained the impact of the *Status Quo Order* and described with specificity the ICA amendments that should be adopted consistent with the *Status Quo Order*. The Order, unfortunately, completely failed to take SBC Illinois’ comments into account. The Commission should rectify that failure and require the adoption of SBC Illinois’ proposed contract amendments which are set forth again in Section III(C) of this Application for Rehearing.

Finally, the Commission should amend the Order to correct other mistakes resulting from misinterpretations of the *TRO*, *USTA II* and the *Status Quo Order*. First, the Commission should remove its conclusion that *USTA II* did not vacate the FCC’s unbundling rules for “enterprise” loops. *Order* at 72, n. 53. That conclusion is based on a misinterpretation of *USTA II* and is directly contrary to the FCC’s assumption that *USTA II* did vacate the *TRO*’s enterprise loop unbundling rules. *Status Quo Order*, ¶ 1, n. 2. Second, the Commission should correct two misstatements regarding the applicability of the *TRO*’s collocation requirement for high capacity EELs. The Order (p. 72) incorrectly interprets the *TRO*’s requirement. In addition, the Order (p. 72) erroneously concludes that the effectiveness of the collocation requirement has been stayed by the *Status Quo Order*. This conclusion is not only wrong; it is directly contrary to the Order’s correct conclusion that “every provision” of the *TRO*’s mandatory eligibility criteria for high capacity EELs (of which the collocation requirement is one) should be incorporated in the amended ICA. *Order* at 34-35. Third, the Order inexplicably excluded from the list of *TRO*-

Consistent with the nomenclature adopted by the Commission, SBC Illinois will refer to the FCC’s Order herein as the “*Status Quo Order*.”

declassified network elements, Call-related Databases and SS7 when not used with unbundled local switching for mass market customers.

II. THE COMMISSION SHOULD ELIMINATE FROM ITS ORDER ANY OBLIGATION TO PROVIDE UNES UNDER STATE LAW OR SECTION 271

The Order concludes that the Amendment should include language that requires SBC Illinois to provide UNEs under state law and Section 271. Order at 48-49. The Commission should revise the Order to eliminate any obligation to provide such UNEs for two reasons. First, each issue is beyond the well-defined scope of this proceeding and there are on-going proceedings elsewhere that address these very issues. Second, the Order misconstrues the applicable legal standards. Either ground is sufficient reason to grant the relief requested by SBC Illinois, so if the Commission agrees with SBC Illinois on the first point, it need not reach the second point at all.

A. THE SCOPE OF THIS PROCEEDING IS NARROWLY TAILORED TO INCORPORATE CHANGES FROM THE TRO AND USTAI -- NOTHING ELSE

This is an arbitration proceeding to craft an *amendment* to an existing interconnection agreement³ for the limited purpose of incorporating the results of the *TRO* and, by extension, *USTA II*. Early on in the case, in a ruling on SBC's Motion to Dismiss, the Commission established that the scope of the proceeding was very narrow. The Commission found that proceeding was initiated by XO "for the sole purpose of amending the parties' ICA to incorporate changes necessitated by the *TRO*". ALJ's Ruling of June 3, 2004 at 7. The Commission further found that "it follows that XO cannot now obtain arbitration from this Commission for obligations that "predate" the *TRO* and "pre-existed" before its issuance. The Commission has no jurisdiction to arbitrate matters that lie outside the boundaries of XO's

negotiation request.” *Id.* Thus, based on its own request for negotiations, XO established a narrow scope for this proceeding that only includes changes necessary to incorporate any change to obligations created by the *TRO* or *USTA II*. The Commission conclusively determined it “has no jurisdiction to arbitrate matters that lie outside the boundaries” of that request. *Id.*

The Order, however, does just that. It directs SBC Illinois to include language in several places in the Amendment that would require SBC Illinois to provide UNEs “to the extent required by 47 CFR 51.319(a)(2), Section 271 of the Act and state law”. Order at 67. *See also* Order at 47-48. This simply cannot be squared with the fact that the *TRO* does not create any new obligations under Section 271 or state law. Granted, the *TRO* discusses Section 271 obligations, *TRO* ¶¶ 653-667, but this is largely a repetition of the obligation that the Commission first established in its *UNE Remand Order* in 1999.⁴ There, the FCC held that BOCs have obligations under Section 271 -- separate from Section 251 obligations -- to provide access to UNEs.⁵ This is precisely the obligation XO seeks to include in the Amendment. Since that obligation dates from at least 1999 and substantially “pre-dates” the *TRO*, it is well beyond the scope of this proceeding as established in the ALJ Ruling of June 3, 2004. For this simple reason, nothing dealing with Section 271 unbundling obligations should have been addressed in the Order since the *TRO* made no changes in law in connection with Section 271.

Similarly, Section 13-801 of the PUA “pre-dates” the *TRO* and “pre-existed” before its issuance (to use the terms of the ALJ Ruling of June 3, 2004). Section 13-801 was effective on June 30, 2001 -- more than two (2) years before the *TRO* release date of August 21, 2003. Given

³ The existing interconnection agreement between XO and SBC Illinois (“Agreement”) was entered into on August 19, 2000. The initial term expired in August, 2003, after which The Agreement was extended for two additional one year terms. The second extension expires in August, 2005.

⁴ At paragraph 651 of the *TRO*, the FCC explains that “The Commission first noted its conclusion in the *UNE Remand Order* that BOCs must continue to provide access to those network elements described in checklist items 4-6 and 10, even if such access is not mandated under Section 251 (and checklist item 2)”.

⁵ *UNE Remand Order* at 468-473.

this huge gap of time, it is impossible for XO's new language regarding state law obligations to fall within the narrow scope of this proceeding. The language regarding state law obligations should never have been part of this proceeding and should not have been addressed in the Order. This is especially so since the ICA being amended *nowhere* requires SBC Illinois to provide unbundled network elements under state law. Accordingly, the Order is not just modifying an existing obligation in the ICA - it is grafting on an entirely new obligation.

The Commission should remedy both of these defects in an Order on Reconsideration simply by holding that state law and Section 271 are beyond the scope of this proceeding. XO would not be prejudiced by such a ruling because it would be getting precisely what it asked for - a determination of the impact of *TRO* and *USTA II*, not a change of law process that covers *pre-existing* obligations. As the Commission already found, XO expressly disavowed any interest in litigating pre-existing obligation and narrowly tailored its negotiation request to achieve that result. In the same vein, the public interest would not be harmed by deferring judgment on the 271 issue. This issue is squarely teed-up before the FCC in *BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket 04-245 (filed July 1, 2004), which is now also before the FCC as part of its pending rulemaking. (See *Status Quo Order* at note 38.) There, Bell South petitioned the Commission to assert exclusion jurisdiction over the enforcement of Section 271 and to preempt a state commission ruling asserting jurisdiction. As we discuss below, enforcement of Section 271 is solely a matter for the FCC. The prudent course is for this Commission to defer any decision on whether Section 271 obligations can be determined by state commissions in a Section 252 arbitration. Once the FCC decides this threshold question, the parties will be bound by the FCC's ruling and the Commission can -- indeed must -- act in conformance with that ruling.

Similarly, the Commission need not address the issue of state law obligations here because that is squarely before this Commission in the 01-0614 Remand Proceeding. There, the Commission is addressing the impact of the *TRO* and *USTA II* on its decision in Docket 01-0614 in which the Commission construed state law unbundling obligations under Section 13-801.⁶

In sum, the Order unnecessarily grafts new requirements onto the ICA that are simply not necessary to implement *TRO* or *USTA II* and it should be revised to remedy these defects.

B. SECTION 271 UNBUNDLING OBLIGATIONS ARE NOT SUBJECT TO MANDATORY ARBITRATION UNDER SECTION 252

If the Commission nonetheless believes it must address Section 271 obligations in this docket, then it must still revise the Order to correct a serious legal error because the Order incorrectly concludes that the Commission may interpret and apply Section 271 obligations in a federal arbitration under Section 252. Section 271 confers no such authority. Rather, Section 271 makes clear that the FCC, and *only* the FCC, has authority under Section 271 to enforce that

⁶ In dicta (Order at 49-50) the Commission suggests that it is free to ignore current federal law in an arbitration proceeding:

Moreover, for purposes of the ICA, our presently effective rulings must be taken at face value. Although SBC may believe that we have required unbundling under Section 13-801 (including TELRIC-priced unbundling) that exceeds what Section 251 would allow, that belief is irrelevant at present. Similarly irrelevant is the argument that our rulings are inconsistent with Section 261(c) of the Federal Act, which would contravene Section 13-801. Our currently viable unbundling rulings were based on our judgment that they are consistent with Section 261(c). Such judgment would have to be overturned on appeal or preempted through Section 253(d), not collaterally challenged in arbitration (or worse, unilaterally by SBC, within the context of the ICA). Put simply, our unbundling mandates are effective today, and unless or until they are altered (whether by us or by superior authority) they must be incorporated in the parties' ICA. Future unbundling developments should be accommodated through change-of-law provisions.

This paragraph should be deleted because it has no bearing on the outcome of this case (the Order does not expand any state law obligation) and because it is contrary to law. It is well-settled that a federal court reviewing a state commission decision under the 1996 Act, such as the Commission decision in this arbitration, must "ensure that the interconnection agreements comply with the current FCC regulations, regardless of whether those regulations were in effect when the [state commission] approved the agreements". *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 388 (7th Cir. 2004). Accordingly, it is both legally wrong and factually inaccurate to say -- as the Order does -- that any inconsistency between state and federal law is "irrelevant" and that unlawful rulings cannot be "collaterally challenged in arbitration" but must instead be blindly adhered to even if they are clearly wrong. These problems can be eliminated by deleting this dicta from the Order and deferring the Section 13-801 considerations to the 01-0614 remand proceeding.

provision. A Section 271 application is submitted *to the FCC* (47 U.S.C. § 271(d)(1)) and approval is granted *by the FCC* (*id.* § 271(d)(3)). During the application process, Section 271 does not set forth *any* state commission role or authority other than as a consultant to the FCC. *Id.* § 271(d)(2)(B). A state commission may not “parley its limited role in issuing a recommendation under section 271” to impose substantive requirements under the guise of section 271 authority. *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm’n*, 359 F.3d 493, 497 (7th Cir. 2004). Once an application is approved – as SBC’s application has been approved -- Section 271 provides authority *only to the FCC* to enforce continued BOC compliance with the conditions for approval. 47 U.S.C. § 271(d)(6). There is no provision in Section 271 providing any role to state commissions – not even a consultative role – with respect to the ongoing obligations of the BOCs once they have received approval.

The Order appears to accept this reasoning because it looks elsewhere to find authority to address Section 271 obligations. The purported authority found by the Commission, however, does not exist in this case. The Commission relies on Section 252(a)(1) of the Act, which permits parties “to ‘negotiate and enter into a binding contract...*without regard to the standards set forth in subsections (b) and (c) of Section 251*’” (Order at 65), but this does not confer on a state commission the ability to arbitrate *any* issues. An arbitration proceeding is entirely a creation of federal statute, and the state commission conducting such an arbitration is only empowered to act within the limits of authority granted by Sections 252(a) and (b). Under Section 252(b)(1), an ILEC’s *obligation* to negotiate issues extends only to the obligations under Section 251(b) that all local exchange carriers have with respect to resale, number portability, dialing parity, access to rights of way, and reciprocal compensation, and the obligations under Section 251(c) that apply only to incumbent local exchange carriers, i.e., the duty to negotiate

and to provide interconnection, access to UNEs, resale, notice of changes and collocation. Matters that extend beyond these specific statutory obligations -- like Section 271 obligations -- are not subject to mandatory *negotiations* under Section 252(a), and therefore are not be subject to mandatory *arbitration* under Section 252(b).

Recognizing this limitation, the Order merely states that “although SBC *had* to negotiate the subsection 251(b) items if XO so requested, the parties *could* negotiate anything pertaining to their interconnection, including the impact of the *TRO* on obligations arising under Section 271”. Order at 65. The Order relies on several assumptions here, none of which are correct.

First, it assumes that there were negotiations *prior to* the date XO filed its arbitration petition on May 3, 2004. In fact, there were none. As XO states in its Petition, “[o]ther than exchanging a few letters and proposed amendments, the parties have not engaged in direct negotiations with each other.” Petition at 6; Order at 3. Since there were no direct negotiations, SBC Illinois and XO did not voluntarily negotiate the issue of Section 271 obligations at all, and could not have done so.

Second, the Order assumes that XO can unilaterally inject an issue into the proceeding and that such issue thereby becomes “voluntary” and subject to arbitration. Obviously, this cannot be the law. If it were, either party could make any issue subject to arbitration merely by unilaterally raising the issue in negotiations -- regardless of whether the other party agrees to make that issue part of the formal negotiations process or not. The Order (p. 65) relies on *Coserv Limited Liability Corp. v Southwestern Bell Telephone Co.*, 350 F.2d 482 (5th Cir.2003), but *Coserve* does not give a state commission *carte blanche* to include non-251(b) and (c) requirements in an ICA when one party attempts to unilaterally raise an issue. Rather it holds that an issue outside the scope of Sections 251 (b) and (c) is only arbitrable if it is a “mutually

agreed upon subject of voluntary negotiations”. *Id.* at 488. As the Eleventh Circuit found in *MCI Telecomms Corp. v. Bell South Telecomms, Inc.*, 298 F.3d 1269 (11th Cir. 2002), a rule that required arbitration of “any issue raised by the moving party” would be “contrary to the scheme and text of th[e] statute which lists only a limited number of issues on which incumbents are mandated to negotiate.” 298 F.3d at 1274.

Third, the Order assumes that SBC Illinois agreed to formally negotiate its Section 271 obligation to provide UNEs. It did not, and nothing in the record of this proceeding establishes that it did. To the contrary, SBC Illinois’ position in this proceeding is that the Amendment should not include any language that refers to SBC Illinois’ obligation to provide unbundled network elements under Section 271.

The Commission’s back-up position on its authority to resolve Section 271 issues is also legally wrong and should be revised. The Order asserts that it can address Section 271 obligations under Section 251(c)(3) because the latter provision requires an ILEC to provide access to UNEs on “just, reasonable and nondiscriminatory” terms, because this standard also appears in Sections 201 and 202, and because these two sections “apply to the rates, terms and conditions for Section 271 UNEs”. Order at 66. The argument appears to be that because Section 251(c)(3) has a “just and reasonable” standard that is similar to the standard that applies to Section 271 UNEs, that somehow shoehorns Section 271 obligations under Section 251(c)(3). This makes no sense. The *TRO* explicitly rejected ILEC arguments that 271 obligations were no different than 251 obligations and instead held that these sections “establish independent obligations” and “operate independently”. *TRO* ¶¶ 653, 655. The fact that Section 251(c)(3) and Section 271 are similar in some respects does not mean that Section 271 obligations are subsumed within Section 251.

In sum, the portions of the Order that refer to Section 271 obligations at the following pages should be deleted: pages 47-48 (Issue SBC-1 & SBC/XO 1a); pages 65-67 (Issue SBC - 46); page 82 (Issue SBC-9); page 87 (Issue SBC-10) and page 94 (Issue SBC-14). In its place, the Commission should insert revised language that makes it clear that the Amendment need not address the issue of SBC's obligation to provide UNEs under Section 271.

III. THE ORDER DOES NOT CORRECTLY INCORPORATE THE REQUIREMENTS OF THE FCC'S STATUS QUO ORDER

In *USTA II*, the D.C. Circuit overturned and vacated the rules adopted by the FCC in the *TRO* requiring the unbundling for mass market switching, high capacity (or "enterprise") loops (DS1, DS3 and dark fiber loops) and dedicated transport (DS1, DS3 and dark fiber). In the *Status Quo Order*, the FCC began the process of promulgating new unbundling rules to be consistent with *USTA II*. In addition, the *Status Quo Order* adopted certain interim requirements which require SBC Illinois to continue, for a limited time, to provide XO unbundled access to mass market switching, high-capacity loops, and dedicated transport "under the same rates, terms and conditions that applied under their interconnection agreement[] as of June 15, 2004" (the "Interim Requirements"). *Interim Order*, ¶¶ 1, 21. In particular, "[t]hese rates terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the [FCC] or six months after Federal Register publication of this Order." *Id.*⁷ The *Status Quo Order* also proposed (but did *not* adopt) requirements for an additional six months "Transition Period" that would take effect once the FCC issues permanent rules. *Id.* ¶ 29.

⁷ Three exceptions apply: where the June 15, 2004 rates, terms or conditions are 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) a state public utility commission order raising the rates for network elements." *Interim Order*, ¶¶ 1, 21.

A. THE ORDER ERRED BY REQUIRING INCORPORATION OF THE PROPOSED TRANSITION PERIOD RULES

The Order (at 95) requires that the amendments to the ICA incorporate not only the Interim Requirements, which will be in effect for no longer than six months, but also the FCC's proposed "Transition Period" requirements. This decision is clear error and must be reversed. As yet there are *no* requirements, and *no* FCC-prescribed regulations, for the post-interim transitional period. Rather, the FCC indicated that it was *considering* adoption of the second six-month transition plan outlined in the *Interim Order*. Accordingly, the FCC stated, "[f]or the six months following the interim period . . . we *propose*" – not adopt – "the following requirements," and "[s]ubject to the comments requested in response to the above NPRM, we *intend* to incorporate" – not have already incorporated – "this second phase of the plan into our final rules" – not into its interim rules. *Interim Order*, ¶ 29 (emphases added). And in the "Notice of Proposed Rulemaking" section of the *Interim Order*, the FCC requested comments on the "second six-month phase." *Id.*, ¶ 10. In other words, the second six-month transition plan at this time is only an FCC proposal, not an FCC requirement.⁸

The *Status Quo Order's* structure and ordering clauses confirm this conclusion. The "Order" portion of the *Status Quo Order*, Section IV, segregates the proposed "Twelve Month Plan" (Section IV.B, ¶¶ 29-30) from the "Interim Requirements" (Section IV.A, ¶¶ 18-28) and the ordering paragraphs at the end of the *Status Quo Order* state that only "the interim requirements set forth herein shall become effective immediately upon publication in the Federal Register," while saying nothing about the proposed "Twelve Month [transition] Plan." *Interim Order*, ¶ 47. *See id.* Section IV.A ("Interim Requirements") (describing only the initial six month phase). Likewise, the synopsis of the *Interim Order* that was published in the Federal

Register is divided into two sections: “1. Interim Requirements” and “2. Transition Plan.” And the Ordering Clause states that “the interim requirements” - not the “transition plan” - “shall be effective immediately upon publication.” Thus, the FCC’s brief in opposition to the pending mandamus petition before the D.C. Circuit agrees that the FCC’s proposal for the six months following the interim period has ‘*no legal force whatsoever*’ but is instead “a proposal that the [FCC] may or may not adopt when it issues final rules.” FCC Mandamus Br. at 8, n. 2 (emphasis added).

B. THE ORDER IMPROPERLY PRESUMES THAT THE FCC WILL REQUIRE THE UNBUNDLING OF MASS MARKET SWITCHING, DEDICATED TRANSPORT AND ENTERPRISE LOOPS

The Order (at 95-96) holds that any modification to the ICA required to reflect the elimination of SBC’s unbundling obligations with respect to mass market switching, dedicated transport and enterprise loops beyond the six month Interim Requirements period must be addressed in a future change-of-law proceeding. This decision is incorrect as a matter of law because the relevant “change-in-law” events (i.e., *USTA II*’s vacatur of the FCC rules requiring the unbundling of these network elements and the FCC’s adoption of the Interim Requirements) have already occurred and should be accounted for now. By their own terms, the Interim Requirements expire on “the earlier of the effective date of final unbundling rules promulgated by the [FCC] or six months after Federal Register publication of this Order.” Accordingly, any amendment to the ICA to incorporate the Interim Requirements must also provide that those requirements expire on “the earlier of the effective date of final unbundling rules promulgated by the [FCC] or six months after Federal Register publication of this Order.”

⁸ SBC Illinois will, of course, comply with any FCC transition requirements if any such effective requirements are ultimately adopted.

Contrary to the Order's assumption, therefore, when the Interim Requirements for the unbundling of mass market switching dedicated transport and enterprise loops are eliminated as a result of the expiration of the six months interim period or an FCC finding of non-impairment, whichever is earlier, that will *not* be a change-of-law event. Rather, there would be a change-of-law event if the FCC, at the conclusion of its pending rulemaking, were to find impairment and require unbundling of one or more of these network elements. The Order holds the opposite, thereby improperly treating what was intended by the FCC to be an *interim* measure to maintain the status quo pending the adoption of new rules consistent with the decision in *USTA II*, as *permanent* unbundling rules that will remain in effect for an indefinite period of time.

The Order's ruling in this regard is directly contrary to the FCC's intent, as expressed in paragraphs 22 and 23 of the *Status Quo Order*. There, the FCC stated that "[i]n order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport," ILECs may immediately enter into contract amendments that "presum[e] an ultimate [FCC] holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements." *Id.* ¶ 22. The FCC's intent was to obviate the need for even more contract modifications processes at the end of the interim period, and instead allow new contract requirements to "take effect quickly if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order." *Id.* ¶ 23. This is the key aspect of the *Status Quo Order* on which the FCC expressly relied to defend the Interim Requirements as being " 'reasonably calculated' to further the implementation of the [*USTA II*] Court's mandate." FCC Mandamus Br. at 11. By holding that the expiration of the Interim Requirements must be addressed through future change-of-law processes, the Order contravenes the *USTA II*

mandate because it would effectively require that SBC Illinois continue for an indefinite period of time to provide XO with access to network elements for which there are no lawful unbundling rules.

The Order does not even mention paragraphs 22 and 23 of the *Status Quo Order*, much less provide a cogent explanation for the Commission's failure to make the presumption which those paragraphs allow, i.e., an "ultimate [FCC] holding relieving" SBC Illinois of its unbundling obligations with respect to the network elements which are the subject of the *Status Quo Order*. This is precisely the type of change-of-law proceeding in which it is appropriate for the Commission to make such a presumption. As the Order correctly states, this is a proceeding to implement changes in law resulting from the *TRO*, as modified by the D.C. District Court's decision in *USTA II. Order* at 54. Moreover, as the ALJ recognized, in denying XO's request to strike SBC's proposals based on *USTA II*, there is no "practical distinction between consideration of *USTA II* in its own right and consideration of the *TRO* as modified by the *USTA II*." ALJ's Ruling at 2 (June 24, 2004).

Thus, as the ALJ correctly recognized, but for the *Status Quo Order*, it would have been necessary to include in the Order in this case "rulings based on the conclusion that ILECs do *not* have to offer [mass market] switching and [dedicated] transport" – rulings consistent with and dictated by, *USTA II*'s vacatur of the FCC's rules requiring the unbundling of those network elements. ALJ Memorandum To The Commission, p. 2 (Aug. 28, 2004) (emphasis in original).⁹ It is improper for the Commission to rely on the *Status Quo Order* as a basis for requiring the continued provision of network elements that were declassified by *USTA II* and, at the same time, reject the *Status Quo Order*'s method for ensuring that a removal of those requirements

⁹ As will be discussed in Section IV of this Application for Rehearing, *USTA II* also vacated the FCC's rules requiring the unbundling of enterprise loops.

“take[s] effect quickly if [the FCC’s] final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place six months after Federal Register publication of this Order.” *Status Quo Order* at ¶ 23.

C. THE ORDER SHOULD BE MODIFIED TO INCLUDE PROPER DIRECTIONS FOR AMENDING THE ICA TO REFLECT THE IMPACT OF *USTA II* AND THE INTERIM REQUIREMENT

For the reasons discussed above, and in accordance with the *Status Quo Order*, the Commission should modify the Order to require that the parties’ contract amendment provides that:

- (1) SBC Illinois will continue to provide XO unbundled access to mass market switching, high-capacity loops (DS1, DS3, and dark fiber loops), and dedicated transport (DS1, DS3, and dark fiber transport) at the same rates, terms, and conditions that were in place under the parties’ existing agreement as of June 15, 2004, “[u]ntil the earlier of (1) six months after Federal Register publication of [the *Status Quo Order*] or (2) the effective date of the final unbundling rules adopted by the [FCC] in the proceeding opened by the [Notice appended to the *Status Quo Order*]” (*Id.* ¶ 29);
- (2) During that period, the June 15, 2004 rates, terms, and conditions for mass market switching, high-capacity loops (DS1, DS3, and dark fiber loops) and dedicated transport (DS1, DS3, and dark fiber transport) “shall remain in place . . . except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening [FCC] order affecting specific unbundling obligations (*e.g.*, and 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” (*Id.*);
- (3) Upon the earlier of six months after Federal Register publication of the *Status Quo Order* or the effective date of final FCC unbundling rules, SBC Illinois will be required to provide unbundled access to mass market switching, high-capacity loops (DS1, DS3, and dark fiber loops), and dedicated transport (DS1, DS3, and dark fiber transport) only to the extent that the FCC has issued a “ruling that switching, dedicated transport, and/or enterprise market loops must be made available pursuant to section 251(c)(3)” (*Id.*);
- (4) To the extent the FCC has not issued any such ruling, SBC Illinois shall no longer be required to provide unbundled access to mass market switching, high-capacity loops, and dedicated transport; and with respect to the embedded customer base the parties shall comply with applicable FCC requirements, if any; and

(5) Thereafter, “[SBC Illinois] shall be required to offer on an unbundled basis *only* those UNEs set forth in [the FCC’s] final unbundling rules, and subject to the terms and conditions set forth therein.” *Id.* ¶ 29 (emphasis added).¹⁰

IV. THE ORDER INCORRECTLY CONCLUDES THAT THE *TRO*’S UNBUNDLING RULES FOR HIGH CAPACITY LOOPS WERE NOT VACATED BY *USTA II* -- THEY WERE

The Order incorrectly concludes that *USTA II* did not vacate the *TRO*’s high capacity, or “enterprise,” loop unbundling rules. *Order* at 72, n. 53. This conclusion is directly contrary to the FCC’s assumption in its *Status Quo Order* that *USTA II* did vacate the *TRO*’s enterprise market loop unbundling rules. *Status Quo Order*, ¶ 1, n. 2. Indeed, the FCC’s assumption was the predicate for its holding that, in change-of-law proceedings such as this one, state commissions may “presume the absence of unbundling requirements for . . . enterprise loops.” *Status Quo Order*, ¶ 23.

Moreover, the FCC’s assumption is clearly correct. In its “Conclusion,” the D.C. Circuit stated that “[w]e vacate the Commission’s subdelegation to state commissions of decision-making authority over impairment determinations *So ordered.*” *USTA II*, 359 F.3d at 594-95. The FCC’s high-capacity loop rules constitute one of the FCC’s subdelegated impairment determinations, and those rules were thus vacated.

The Order states that the “rejection of subdelegation did not, by itself, overturn the FCC’s national impairment findings.” *Order* at 72, n. 53. The Order, however, ignores the fact that the Court lumped the FCC’s findings for “DS1, DS3, and dark fiber” together, including both high-capacity loops and dedicated transport, and addressed both under the hybrid moniker “high-

¹⁰ On October 4, 2004, SBC Illinois filed a Complaint to initiate change-of-law proceedings with respect to existing ICAs between SBC Illinois and a number of CLECs, including XO, in accordance with paragraph 22 of the *Status Quo Order*. The only reason that SBC Illinois named XO as a respondent was because of the Commission’s failure to properly treat this case as a paragraph 22 change-of-law proceeding. If the Commission modifies its Order and directs that the ICA be amended in accordance with the above recommendations, XO can be dismissed as a respondent to SBC Illinois’ October 4, 2004 Complaint.

capacity dedicated transport.” *Id.* at 573. Notwithstanding the D.C. Circuit’s reference to dedicated transport, it is apparent that its holding applies equally to high-capacity loops. The D.C. Circuit flatly held that “the Commission may not subdelegate its § 251(d) authority to state commissions.” *Id.* at 574. Thus, the Court held, “[w]e therefore vacate the national impairment findings with respect to DS1, DS3, and dark fiber and remand to the Commission to implement a lawful scheme.” *Id.* The FCC’s “national impairment findings with respect to DS1, DS3, and dark fiber,” of course, include both its high-capacity loop and dedicated transport rules. Moreover, the Court included within its discussion of high-capacity facilities “transmission facilities dedicated to a single customer,” which is how the FCC defines a “loop.” *See* 359 F.3d at 573; 47 C.F.R. § 51.319(a).

Moreover, any suggestion that the FCC’s high-capacity loop rules were somehow unaffected by *USTA II* simply makes no sense. The D.C. Circuit held that the FCC may not subdelegate its authority under section 251(d) to state commissions, and expressly vacated such subdelegations. The suggestion that this ruling could somehow apply only to the FCC’s trigger and potential deployment rules for mass market switching and dedicated transport, but not its identically-structured trigger and potential deployment rules for high-capacity loops, defies common sense. The FCC made clear that its high-capacity loop rules “delegate to states a fact-finding role to identify where competing carriers are not impaired without unbundled high-capacity loops” (*TRO*, ¶ 328), just as its dedicated transport rules “delegate to states a fact-finding role to identify where competing carriers are not impaired without unbundled transport” (*Id.*, ¶ 394), and just as its mass market switching rules “delegate[] a role to state commissions in identifying impairment for unbundled circuit switching” (*Id.*, ¶ 534).

Finally, the Commission's actions in other proceedings demonstrate that it clearly understands that the FCC's high-capacity loop rules were vacated by *USTA II*. The Commission has effectively suspended its nine-month high-capacity loop and dedicated transport proceeding (Docket No. 03-0396) well beyond the FCC's nine-month deadline (which lapsed on July 2, 2004), and no CLEC has since petitioned the Commission to resume or complete that proceeding. The Proposed Order's recommended conclusion here is squarely at odds with the Commission's own actions in Docket No. 03-0396.

V. THE ORDER'S CONCLUSIONS REGARDING THE COLLOCATION REQUIREMENTS FOR EELS ARE INCONSISTENT WITH THE *TRO* AND THE *STATUS QUO ORDER*

The Order makes two mistakes in discussing the *TRO*'s collocation requirements for EELs. First, the Order incorrectly suggests that collocation at any location "within the pertinent LATA" will meet the EEL collocation requirement. *Order* at 12. As Staff correctly noted in its Brief on Exceptions (pp. 5-6), the *TRO* is far more specific; it requires that each EEL circuit "must terminate into a collocation governed by section 251(c)(b) at an incumbent LEC central office within the same LATA as the customer premises [served by the EEL circuit]." *TRO* at ¶ 597. Thus, to be eligible to purchase an EEL circuit that terminates in a particular SBC Illinois central office, XO must collocate in that central office. XO's collocation arrangement at some other central office in the same LATA could not serve to meet the *TRO*'s collocation requirement for that EEL. *Id.*; Staff Br. on Exc. at 5-6. This conclusion is supported by the *TRO*'s statement that the "collocation criterion serves as an easily verifiable test that the [EEL] circuit terminating at the collocation arrangement carries local voice traffic." *TRO* at ¶ 604. This test cannot be met by the mere existence of a collocation arrangement at a central office

other than the one where the EEL circuit terminates, even if that arrangement happens to be in the same LATA.

Second, the Order erroneously concludes, based on a misreading of the *Status Quo Order*, that “it cannot alter any existing terms and conditions in the SBC/XO ICA pertaining to collocation.” *Order* at 72. The *TRO*’s EEL collocation requirement is one of the mandatory eligibility criteria for high capacity EELs set forth in FCC Rule 51.318 and upheld by *USTA II*, 352 F.3d at 592-93. The *Status Quo Order* did not suspend the effectiveness of those mandatory eligibility criteria. Moreover, the Order’s conclusions that the ICA cannot be modified to reflect the *TRO*’s EELs collocation requirements is internally inconsistent with the Order’s conclusion that the “ICA should either incorporate [FCC Rule 51.318] in its entirety, or spell out all of its provisions in the amended ICA. In either case, every provision should govern the parties’ conduct.” *Order* at 34-35. “Every provision” of Rule 51.318 includes the EELs collocation requirement. 47 C.F.R. § 51.318(c).

VI. THE ORDER IMPROPERLY EXCLUDES CALL-RELATED DATABASES AND SS7 FROM THE LIST OF DECLASSIFIED UNES

SBC Illinois’ proposed Section 1.3.1.1 lists all of the “declassified” UNEs , i.e., those UNEs that no longer must be offered after *TRO*. (*See* SBC Issue 2). The Order (at 54) agrees that the “declassified” UNEs should be identified and incorporated into the ICA:

The FCC has already identified them. They can be incorporated by simply listing them in the parties’ amendment as elements that will not be unbundled (or TELRIC priced). Indeed, one of the apparent purposes of this arbitration was to reflect such “declassification” in the ICA.

The Order gets it right in holding that “declassified” UNEs should be identified and listed in the Amendment. The Order gets it wrong, however, by excluding from the list Call-Related

Databases and SS7 signaling not used with SBC Illinois' unbundled local switching for mass market customers. (Section 1.3.1.1, subsections x and xi).

There is no dispute that Call-Related Databases and SS7 signaling are conclusively declassified in the *TRO* when they are not used with SBC's unbundled local switching. The FCC found that "competitive carriers that deploy their own switches are not impaired in any market without access to incumbent LEC call-related databases".¹¹ *TRO* ¶ 551. The same rule applies to access to the SS7 network: "[W]e do not require incumbent LECs to continue offering access to signaling as a UNE under Section 251(C)(3) of the Act". *TRO* at ¶544. Moreover, as the Order correctly recognizes, local switching used for enterprise customers was also declassified. Accordingly, SBC Illinois' section 1.3.1.1 correctly included Call-Related Databases and SS7 not used with unbundled local switching for mass market customers.

The Order nonetheless ignores this clear precedent and *excludes* Call-Related Databases and SS7 from the list of "declassified" UNEs. Its reason for doing so is that:

... we have not determined that SBC Illinois is free of unbundling obligations regarding certain enumerated items in Section 1.3.1.1 (e.g., subsections (x), (xi))...

Order at 55. This is no reason to reject the FCC's declassification of these UNEs. It is the FCC, not the state commissions, that determines the scope of unbundling requirements under federal law and the FCC has clearly done so with respect to Call-Related Databases and SS7. Because the purpose of this proceeding was to implement changes-of-law resulting from *TRO*, and because the *TRO* indisputably declassified Call-Related Databases and SS7 except when used in connection with unbundled local switching for mass market customers, there is no basis for their exclusion from SBC Illinois' list of *TRO*-declassified elements. A state commission cannot

¹¹ Call-related databases are the Line Information Database ("LIDB"), the Caller-ID With Name ("CNAM") database, the Toll Free Calling (i.e., 800, 888) database, the Local Number Portability ("LNP") database and the Advanced Intelligent Network ("AIN") database. Not included is the 911 and E911 databases.

second-guess or overrule the FCC on these determinations.¹² For these reasons, the Order should be revised to include within the list of declassified UNEs in Section 1.3.1.1 Call-Related Databases and SS7, when not used with SBC Illinois' unbundled local switching for mass market customers.

VII. CONCLUSION

For all the reasons discussed herein, the Commission should grant rehearing and modify its Order to correct the errors discussed above.

Respectfully submitted,

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¹² To the extent the quoted language refers to the Commission's application of state law in Section 13-801, that too is an insufficient basis to exclude the UNEs from the declassified list. Nothing in the Commission's Order in Docket 01-0614 addresses Call-Related Databases or SS7 as UNEs under state law. Given the Commission's directive to apply "presently existing state authority and regulatory decisions" (Order at 49), the Commission must recognize that there is no state law obligation to provide Call-Related Databases or SS7 as UNEs. In any event, for the reasons discussed in Section II, above, amendments to reflect the application of state law are beyond the scope of this proceeding.

CERTIFICATE OF SERVICE

I, Mark R. Ortlieb, an attorney, certify that a copy of the foregoing **APPLICATION FOR REHEARING OF SBC ILLINOIS** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on October 8, 2004.

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