

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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Illinois Bell Telephone Company	)	
	)	
vs.	)	
	)	
1-800 Reconex, Inc., et. al.	)	Docket 04-0606
Complaint pursuant to Section 10-108 of	)	
the Illinois Public Utilities Act 220 ILCS	)	
5/10-108 and 83 Illinois Administrative	)	
Code 200.170	)	

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**AMENDED MOTION TO DISMISS COMPLAINT  
AS TO RESPONDENT XO ILLINOIS, INC.**

Pursuant to 83 Admin Code 200.190, XO Illinois, Inc. (“XO”), through its attorneys, hereby files this Amended Motion to Dismiss Illinois Bell Telephone Company’s (“SBC Illinois” or “SBC”) Complaint as to respondent XO.<sup>1</sup> On October 4, 2004, SBC filed the complaint initiating this proceeding against the majority of competitive local exchange carriers (“CLECs”) in the State of Illinois, alleging that “SBC Illinois and these CLECs have disputes pursuant to their Interconnection Agreements and SBC Illinois seeks resolution of these disputes by the Commission.” SBC Complaint at 3. On October 18, 2004 a pre-hearing status meeting was held wherein discussion regarding deficiencies in SBC’s Complaint were highlighted. The ALJ in this case ordered that SBC re-file its Complaint and provide proper notice to the parties. On October 22, 2004, SBC filed an amended complaint alleging a similar, although not

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<sup>1</sup> XO filed a Motion to Dismiss this docket on October 14, 2004. Although the ALJ established a schedule under which SBC should have responded to that motion within seven (7) days, SBC chose not to respond. XO is filing this Amended Motion under the assumption that SBC assumes that it did not need to respond to XO’s initial motion because that motion was directed at the original Complaint.

identical, cause of action. SBC alleges: “For almost a year, SBC Illinois has attempted to engage the CLECs on an individual basis to amend their interconnection agreements pursuant to the change in law provisions in those agreements, but without success. At best, the current situation between SBC Illinois and the CLEC Parties can be characterized as "impasse." SBC Complaint at para. 6.

SBC’s allegations are a complete misstatement of the facts with regards to XO, which engaged SBC in discussions to amend the parties’ interconnection agreement (“ICA”) and eventually litigated a Section 252 Arbitration proceeding against SBC. *XO Illinois, Inc., Petition for Arbitration*, ICC Docket 04-0371 (September 9, 2004) (“*XO/SBC Arbitration Decision*”). SBC’s Complaint should therefore be dismissed as to XO.<sup>2</sup>

SBC claims the purpose of the complaint is to “ensure that its existing section 252 interconnection agreements...conform to governing law, as directed by the FCC in its *Triennial Review Order* and its recent *Interim Order*.” SBC Complaint at para. 5. The complaint is unnecessary and inappropriate with respect to XO because this Commission considered similar SBC arguments and offered XO and SBC specific guidance to incorporate the *TRO*, *USTA II* and the *Interim Order* into the parties’ ICA. *XO/SBC Arbitration Decision* at 6.

With the recent *XO/SBC Arbitration Decision* and the continuing process to develop conforming language, SBC’s allegation that it has attempted, without success, to conform agreements to governing law simply is untrue with regards to XO. The Commission stated in the *XO/SBC Arbitration Decision* “our findings and conclusions in this Decision have incorporated the fact that portions of the TRO have been reversed or

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<sup>2</sup> Additionally, XO agrees with and supports the arguments contained in the Joint Motion to Dismiss being filed this day by AT&T et. al. As demonstrated in that motion, SBC’s complaint has serious jurisdictional deficiencies that should result in it being dismissed as to all CLECs.

vacated. Accordingly, we have given effect to those elements of the TRO that have not been vacated, and not given effect to vacated elements.” *Id.* at 93. Additionally, the FCC’s Interim Rules were incorporated in the arbitration. The Supplemental Briefs and Reply Briefs filed from August 31 through September 7, 2004, by SBC, XO and Staff directly addressed the impact of the FCC’s Interim Rules. Acknowledging those arguments, the *XO/SBC Arbitration Decision* referred to the *Interim Order* (called the “*Status Quo Order*” in the *XO/SBC Arbitration Decision*) and the interim rules it established in several locations: p. 2, 6, 43, 48, 52, 54, 55, 72, 81, 82, 92-95. In fact, the *XO/SBC Arbitration Decision* contains an entire section addressing the impact of the *Interim Order* on the parties’ interconnection agreement. *XO/SBC Arbitration Decision* at 94-96. Introducing that section, the Commission stated: “In addition to its specific impact on certain issues in this arbitration, the Status Quo Order is also generally applicable to the parties and must be reflected in their ICA.” *XO/SBC Arbitration Decision* at 94.

SBC and XO are in the process of developing the TRO Amendment language that conforms to the *XO/SBC Arbitration Decision*. SBC prepared the first draft of the conforming language and presented it to XO on October 1, 2004. The language SBC drafted in response to the Commission’s decision included, in its entirety, the language SBC proposes in the attachment to SBC’s complaint. This was the first time SBC had shared this language with XO. SBC and XO are currently in twice weekly discussions to resolve any conforming language issues. SBC’s allegations, with regards to XO, are simply untrue.

The relief SBC seeks in its complaint consists of directing CLECs to incorporate an amendment to conform agreements to governing law. However, XO, SBC, Staff and the Commission have all addressed these arguments and considered the impact of the current governing law on XO's ICA. The repetition of these issues before the Commission with respect to XO would require examining the same documents, the *TRO* and the *Interim Order*, and their impact on the same ICA; this process has already consumed months of the parties' and the Commission's time in a full blown docket. SBC has not demonstrated any reason to replicate that process in this complaint proceeding. SBC should abide by the PUA and address any issues it allegedly has with XO in the proper forum, ICC Docket 04-0371. It is improper for SBC to forum shop in the hope of avoiding a lawful ICC decision.

On October 28, 2004, the Commission denied SBC's application for rehearing in docket number 04-0371. The interconnection amendments, including the same type of provision SBC seeks in this case, is subject to a final lawful order of the ICC. SBC is blatantly trampling on the Commission's Order and risks sanctions and penalties for violating the ICC's clear directive.

Additionally, XO has learned that SBC recently removed several competitive carriers from this case simply because they were engaged in negotiations or arbitrations with SBC. Given that XO, has without question, been involved in negotiations and arbitration with this ILEC, SBC should immediately drop XO as a party to this case.

SBC states:

XO Illinois is named as a party despite Docket 04-0371 (the XO/SBC Illinois Arbitration) because XO is pursuing at least two different interconnection arrangements and it is not clear which of these two arrangements will ultimately be agreed upon, or whether XO will proposed

some other arrangement. Because the situation is very fluid, XO is an appropriate party to this proceeding.<sup>3</sup>

SBC is incorrect and fails to cite any authority that would allow it to violate a lawful Commission order while simultaneously invoking protracted and unnecessary litigation. Simply because SBC is allegedly confused about what the status of the law is or what XO's rights are is an insufficient reason to initiate yet "another" proceeding and unnecessarily waste the Commission's time and resources. Without belaboring the point, but in order to clarify this issue for the ALJ, XO and SBC have an existing agreement that is about to expire. After the failure of discussions regarding an amendment to incorporate changes resulting from the *Triennial Review Order*, XO filed a proceeding with this Commission under Section 252 of the federal Act. The ICC has now completed its review of the XO/SBC arbitration and the parties are developing conforming language that complies with the final order issued September 9, 2004 (an Amendatory Order was issued on October 28, 2004).<sup>4</sup> Pursuant to the Amendatory Order, that conforming language will address the *Triennial Review Order*, *USTA II* and the *Status Quo Order*.

Meanwhile, because its underlying agreement was expiring, XO notified SBC five months ago that it would opt into a new primary agreement. Significantly, SBC has acknowledged that fact and agreed to provide the underlying agreement. The parties are currently negotiating how to address the *Triennial Review Order*, *USTA II* and the *Status Quo Order* in that new agreement. SBC has no right to file a complaint against XO, essentially amounting to a third challenge, in an attempt to get around its lawfully

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<sup>3</sup> SBC Amended Complaint, footnote 3, page 5.

<sup>4</sup> On October 28, 2004, the ICC denied SBC's Rehearing Petition and with it any argument SBC may have improperly relied upon for not providing XO the right to continued access to UNEs.

mandated obligation under the Commission's Amendatory Order in Docket 04-0371 and its obligation to negotiate in good faith with XO on its new underlying agreement. The only thing that is fluid is SBC's continual attempts to ignore the law and this Commission's Orders to make unbundled services available to competitors.

Finally, XO requests that the Commission order SBC to reimburse XO for the costs it has incurred in replying to SBC's needless inclusion of XO in its docket 04-0606 complaint. The Public Utilities Act ensures that "The Commission shall award damages, attorney's fees, and costs to any telecommunications carrier that was subjected to a violation of Section 13-514." Section 13-516(a)(3) of the PUA (220 ILCS 5/13-516(a)(3)). Section 13-514 of the PUA (220 ILCS 5/13-514), "Prohibited Actions of Telecommunications Carriers", provides that the following actions, among others, are considered "per se impediments to the development of competition":

- (8) violating the terms of . . . an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to consumers. . .
  
- (12) violating an order of the Commission regarding matters between telecommunications carriers.

By filing its complaint and amended complaint without following the change of law and dispute resolution provisions of its interconnection agreement with XO, SBC has violated Section 13-514(8). SBC could not reasonably argue that its violation was not entered into knowingly, as the parties have only recently completed an arbitration proceeding.<sup>5</sup> By filing the Complaint, SBC has forced XO to incur legal and regulatory

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<sup>5</sup> Further, counsel for XO contacted SBC on October 15, 2004 in order to have XO removed from the complaint. Although similarly situated CLECs have been removed by SBC, SBC has refused to remove XO from its Complaint.

costs and other expenses necessary to respond to SBC's cause of action. The Commission's arbitration decision has bound the parties to adhere to the agreement and SBC has also violated that order (a violation of Section 13-514(12)). Therefore, XO requests an order directing SBC to reimburse XO for its legal fees and expenses incurred in responding to SBC's Complaint and Amended Complaint.

WHEREFORE, for the reasons stated above, the Commission should dismiss the complaint as to XO Illinois, Inc. and order SBC to reimburse XO for the legal fees and costs that it was incurred in responding to SBC's complaint and amended complaint.

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Thomas H. Rowland  
Stephen J. Moore  
Kevin D. Rhoda  
Rowland & Moore LLP  
Suite 400  
200 West Superior Street  
Chicago, Illinois 60610

*Counsel for XO Illinois, Inc.*

## CERTIFICATE OF SERVICE

I, Kevin D. Rhoda, do hereby certify that I have, on this 1<sup>st</sup> day of November 2004 caused to be served upon the following individuals, by e-mail, a copy of the foregoing Amended Motion to Dismiss of XO Illinois, Inc. in Docket 04-0606.

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Kevin D. Rhoda  
Rowland & Moore LLP

*Counsel for XO Illinois, Inc.*

## **Service List**

Houssam Abdallah  
President/CEO  
Global Connection Inc. of America  
3957 Pleasantdale Rd.  
Atlanta, GA 30340

E-Mail: [abriggs@globalc-inc.com](mailto:abriggs@globalc-inc.com)

Susan Andrews  
Lightspeed Telecom, LLC  
123 East Main St.  
Salem, IL 62881

E-Mail: [sandrews@ussonet.net](mailto:sandrews@ussonet.net)

Caressa D. Bennet  
Atty. for SNG Communications, L.L.C.  
Bennet & Bennet, PLLC  
10 G St., N.E., Ste. 710  
Washington, DC 20002

E-Mail: [cbennet@bennetlaw.com](mailto:cbennet@bennetlaw.com)

James F. Booth  
Vice President, Legal  
OnFiber Communications, Inc.  
7887 E. Belleview Ave., Ste. 820  
Engelwood, CO 80111

E-Mail: [jim.booth@onfiber.com](mailto:jim.booth@onfiber.com)

John L. Brandt Jr.  
Vice President  
Ameritel Illinois, Inc.  
1307 Central Ave.  
Hot Springs, AR 71901

E-Mail: [jbrandt@ameritelusa.com](mailto:jbrandt@ameritelusa.com)

James W. Broemmer Jr  
Adams TelSystems, Inc.  
PO Box 128  
Golden, IL 62339

E-Mail: [jimbroemmer@adams.net](mailto:jimbroemmer@adams.net)

Jenna Brown  
QuantumShift Communications, Inc.  
12647 Alcosta Blvd., Ste. 470  
San Ramon, CA 94583

E-Mail: [jbrown@quantumshift.com](mailto:jbrown@quantumshift.com)

Matthew Brown  
Poltel, LLC  
CLEC Strategies  
3934 Eden Roc Circle E.  
Tampa, FL 33634

E-Mail: [brown@jacod.com](mailto:brown@jacod.com)

Robert A. Bye  
Corp. Counsel  
Cinergy Communications Company  
8829 Bond St.  
Overland Park, KS 66214-1707

E-Mail: [bye@cinergycom.com](mailto:bye@cinergycom.com)

Anthony J. Candelario  
Corporate Counsel  
Kentucky Data Link, Inc.  
d/b/a Cinergy Networks  
8829 Bond St.  
Overland Park, KS 66214

E-Mail: [tonyc@kdlinc.com](mailto:tonyc@kdlinc.com)

Jodi J. Caro  
General Counsel  
Looking Glass Networks, Inc.  
1111 W. 22nd St., Ste. 600  
Oak Brook, IL 60523

E-Mail: [jodi.caro@lglass.net](mailto:jodi.caro@lglass.net)

Kap S. Chang  
Think 12 Corporation  
d/b/a Hello Depot  
1530 Barclay Blvd.  
Buffalo Grove, IL 60089

E-Mail: [kap.chang@hellodepot.com](mailto:kap.chang@hellodepot.com)

Carrie L. Cox  
Director  
Legal and Regulatory Affairs  
charter Fiberlink-Illinois, LLC  
12405 Powerscourt Dr.  
St. Louis, MO 63131

E-Mail: [ccox1@chartercom.com](mailto:ccox1@chartercom.com)

Patrick D. Crocker  
Atty. for American Farm Bureau, Inc.  
Farm Bureau® Connection sm, The  
Early, Lennon, Crocker & Bartosiewicz, P.L.C.

900 Comerica Bldg.  
Kalamazoo, MI 49007-4752

E-Mail: [pcrocker@earlylennon.com](mailto:pcrocker@earlylennon.com)

Matt C. Deering  
Atty. for AccuTel of Texas, Inc.  
d/b/a 1-800-4-A-PHONE  
Meyer Capel, a Professional Corporation  
306 W. Church St.  
PO Box 6750  
Champaign, IL 61826-6750

E-Mail: [mdeering@meyercafel.com](mailto:mdeering@meyercafel.com)

Jon Dickey  
General Manager, Regulatory  
Rockford Office  
US Xchange of Illinois, L.L.C.  
d/b/a Choice One d/b/a Choice One  
Communications  
124 N. Water St., Ste. 303  
Rockford, IL 61107

E-Mail:  
[rkfdsalesadmin@choiceonecom.com](mailto:rkfdsalesadmin@choiceonecom.com)

Cathy Ekern  
Talk America Inc.  
Technologies Management, Inc.  
PO Drawer 200  
Winter Park, FL 32790-0200

E-Mail: [cekern@tminc.com](mailto:cekern@tminc.com)

Steven Fenker  
Nexus Communications, Inc.  
3629 Cleveland Ave., Ste. C  
Columbus, OH 43224-7168

E-Mail: [sfenker1@earthlink.net](mailto:sfenker1@earthlink.net)

Ronald W. Gavillet  
Neutral Tandem-Illinois, LLC  
2 N. LaSalle St., Ste. 1615  
Chicago, IL 60602

E-Mail: [rgavillet@neutraltandem.com](mailto:rgavillet@neutraltandem.com)

Karen E. Gillespie  
Consultant for Respondents  
Technologies Management Inc.  
PO Drawer 200  
Winter Park, FL 32790-0200

Becky Gipson  
Director  
Regulatory Affairs  
Excel Telecommunications, Inc.  
1600 Viceroy Dr.  
Dallas, TX 75235

E-Mail: [regulatoryaffairs@vartec.net](mailto:regulatoryaffairs@vartec.net)

John Gomoll  
TCG Chicago and TCG Illinois  
AT&T Communications of Illinois, Inc.  
222 W. Adams, Ste. 1500  
Chicago, IL 60606

E-Mail: [gomolj@att.com](mailto:gomolj@att.com)

Thad Goretski  
CIMCO Communications, Inc.  
1901 S. Meyers Rd., Ste. 700  
Oakbrook Terrace, IL 60181

E-Mail: [puc@cimco.net](mailto:puc@cimco.net)

Robert T. Hale Jr.  
President  
Granite Telecommunications, LLC  
234 Copeland St.  
Quincy, MA 02169

E-Mail: [rhale@granitenet.com](mailto:rhale@granitenet.com)

Robert T. Hale Jr.  
President  
Granite Telecommunications, LLC  
234 Copeland St.  
Quincy, MA 02169

E-Mail: [rhale@granitenet.com](mailto:rhale@granitenet.com)

Rowena Hardin  
NOS Communications, Inc.  
d/b/a Internatinal Plus Activated  
d/b/a 011 Communications Activated  
d/b/a The Internet Business Association  
4380 Boulder Hwy.  
Las Vegas, NV 89121-3002

E-Mail: [rhardin@nos.com](mailto:rhardin@nos.com)

Kristina D. Harris  
President  
Ascendtel, LLC  
524 15th St.  
Moline, IL 61265

E-Mail: [kris@netexpress.net](mailto:kris@netexpress.net)

Todd Hayes  
President  
King City Telephone, LLC  
d/b/a Southern Illinois Communications  
4123 S. 10th, Ste. 408  
Mt. Vernon, IL 62864

E-Mail: [thayes@siclink.com](mailto:thayes@siclink.com)

Jeff Hoagg  
Case Manager  
Illinois Commerce Commission  
527 E. Capitol Ave.  
Springfield, IL 62701

E-Mail: [jhoagg@icc.state.il.us](mailto:jhoagg@icc.state.il.us)

Samantha Holbrook  
Global NAPs Illinois, Inc.  
89 Access Rd., Ste. B  
Norwood, MA 02062

E-Mail: [sholbrook@gnaps.com](mailto:sholbrook@gnaps.com)

Jerry E. Holt  
President  
Regulatory Affairs  
Midwestern Telecommunications, Inc.  
65 E. 16th St.  
Chicago Heights, IL 60411

E-Mail: [jerry.holt@midwestern.net](mailto:jerry.holt@midwestern.net)

Kathy L. Hough  
WilTel Communications, LLC  
One Technology Ctr., TC-15L  
Tulsa, OK 74103

E-Mail: [kathy.hough@wiltel.com](mailto:kathy.hough@wiltel.com)

Paul B. Hudson  
Atty. for Respondents  
Swidler Berlin Shereff Friedman, LLP  
3000 K St., NW, Ste. 300  
Washington, DC 20007-5116

E-Mail: [pbhudson@swidlaw.com](mailto:pbhudson@swidlaw.com)

Rhonda J. Johnson  
Vice President  
Regulatory

Illinois Bell Telephone Company  
555 Cook St., Fl. 1E  
Springfield, IL 62721

E-Mail: [rj1852@sbc.com](mailto:rj1852@sbc.com)

Trey Judy  
Director, Regulatory Affairs  
Madison River Communications, LLC  
d/b/a Gallatin River Integrated Communications  
Solutions  
103 S. Fifth St.  
PO Box 430  
Mebane, NC 27302

E-Mail: [judyt@madisonriver.net](mailto:judyt@madisonriver.net)

James Keller  
Delta Communications, LLC  
d/b/a Clearwave Communications  
404 Seright St.  
Harrisburg, IL 62946

E-Mail: [jkeller@yourclearwave.com](mailto:jkeller@yourclearwave.com)

Anthony R. Kitchens  
KBS Computer Services, Inc.  
418 Highland Rd.  
Matteson, IL 60443-1376

E-Mail: [tonyk@kbscomputerservices.com](mailto:tonyk@kbscomputerservices.com)

Julius S. Kole  
Attorney at Law  
Royal Phone Company LLC  
750 W. Lake Cook Rd., Ste. 135  
Buffalo Grove, IL 60089

Gene E. Lane Jr.  
Line 1 Communications, LLC  
d/b/a Direct Line Communications  
3020 Roswell Rd., N.E., Ste. 200  
Marietta, GA 30062-4987

E-Mail: [getskip@earthlink.net](mailto:getskip@earthlink.net)

Nelson Lopez  
President  
PersonalOffice, Inc.  
251 Milwaukee Ave., Ste. 2012  
Buffalo Grove, IL 60089-2829

E-Mail: [nlopez@personaloffice.com](mailto:nlopez@personaloffice.com)

John R. Losch  
Manager  
Allure Communications, LLC  
209 Main St., Ste. 200  
Mt. Prospect, IL 60056

E-Mail: [jlosch@allurecom.com](mailto:jlosch@allurecom.com)

Owen E. MacBride  
Atty. for Respondents  
Schiff Hardin & Waite  
6600 Sears Tower  
Chicago, IL 60606

E-Mail: [omacbride@schiffhardin.com](mailto:omacbride@schiffhardin.com)

Linda Manske  
US Xchange of Illinois, L.L.C.  
d/b/a Choice One d/b/a Choice One  
Communications  
56 Grandville Ave., S.W.  
Grand Rapids, MI 49503

E-Mail: [lmanske@choiceonecom.com](mailto:lmanske@choiceonecom.com)

Jonathan S. Marashlian  
Regulatory Counsel for BitWise  
Communications, Inc.  
The Helein Law Group, P.C.  
8180 Greensboro Dr., Ste. 700  
McLean, VA 22102

E-Mail: [jsm@thlglaw.com](mailto:jsm@thlglaw.com)

J. Paul Masters  
President  
Ernest Communications, Inc.  
5275 Triangle Pkwy., Ste. 150  
Norcross, GA 30092

E-Mail: [pmasters@ernestgroup.com](mailto:pmasters@ernestgroup.com)

Michael McAlister  
Navigator Telecommunications, LLC  
8525 Riverwood Park Dr.  
PO Box 13860  
North Little Rock, AR 72113-0860

E-Mail: [mike@navtel.com](mailto:mike@navtel.com)

Brad McAllister  
Director of Operations  
DLS Communications Services, Inc.  
950 Oak St.  
Lake in the Hills, IL 60156

E-Mail: [bmcallister@noc.dls.net](mailto:bmcallister@noc.dls.net)

M. Gavin McCarty  
Globalcom Inc.  
333 W. Wacker Dr., Ste. 1500  
Chicago, IL 60606

E-Mail: [gmccarty@global-com.com](mailto:gmccarty@global-com.com)

Becki Merkel  
McLeodUSA Telecommunications Services, Inc.  
6400 C St. SW  
PO Box 3177  
Cedar Rapids, IA 52406

E-Mail: [bmerkel@mcleodusa.com](mailto:bmerkel@mcleodusa.com)

Mickey Moon  
Director of Legal & Regulatory Affairs  
Citynet Illinois, LLC  
2 W. Second St., Ste. 1600  
Tulsa, OK 74103-3123

E-Mail: [mickey.moon@citynet.net](mailto:mickey.moon@citynet.net)

Kit Morris  
AccuTel of Texas, Inc.  
d/b/a 1-800-4-A-PHONE  
7900 John W. Carpenter Fwy.  
Dallas, TX 75244

E-Mail: [kitm@accutel.net](mailto:kitm@accutel.net)

Donald Offringa  
US Signal Company, L.L.C. d/b/a RVP Fiber  
Company  
20 Monroe Ave., N.W., Ste. 450  
Grand Rapids, MI 49503

E-Mail: [doffringa@rvpdevelopment.com](mailto:doffringa@rvpdevelopment.com)

Mark Ortlieb  
Illinois Bell Telephone Company  
25D  
225 W. Randolph  
Chicago, IL 60606

E-Mail: [mo2753@sbc.com](mailto:mo2753@sbc.com)

Kevin Osterbur  
IlliCom Telecommunications, Inc.  
330 W. Ottawa Rd.  
PO Box 328

Paxton, IL 60957

E-Mail: [kevin@illicom.net](mailto:kevin@illicom.net)

Joshua A. Ploude  
Pacific Centrex Services  
6855 Tujunga Ave.  
N. Hollywood, CA 91605

E-Mail: [joshp@pcs1.net](mailto:joshp@pcs1.net)

Document Processor  
C T Corporation System  
208 S. LaSalle St.  
Chicago, IL 60604

Document Processor  
Illinois Corporation Service Company  
801 Adlai Stevenson Dr.  
Springfield, IL 62703

Document Processor  
TCS Corporate Services Inc.  
118 W. Edwards St., Ste. 200  
Springfield, IL 62704

Document Processor  
National Registered Agents Inc.  
200 W. Adams St., Ste. 2007  
Chicago, IL 60606-5230

Document Processor  
Prentice Hall Corporation  
33 N. LaSalle St., Ste. 1925  
Chicago, IL 60602-2607

Document Processor  
Corporation Service Company  
422 N. Northwest Hwy., Ste. 150  
Park Ridge, IL 60068

E-Mail: [info@cgtco.com](mailto:info@cgtco.com)

Document Processor  
Faxxon Legal Information Services Inc.  
2501 Chatham Rd., Ste. 110  
Springfield, IL 62704-7100

E-Mail: [dweber@faxxon.com](mailto:dweber@faxxon.com)

Document Processor  
Manager  
Regulatory Compliance  
Intrado Inc.  
1601 Dry Creek Dr.

Longmont, CO 80503

E-Mail: [regulatory@intrado.com](mailto:regulatory@intrado.com)

Document Processor  
Attn: Legal Department  
Bullseye Telecom, Inc.  
25900 Greenfield Rd., Ste. 330  
Oak Park, MI 48237

E-Mail: [regulatory@bullseyetelecom.com](mailto:regulatory@bullseyetelecom.com)

Glenn E. Rauh  
MTCO Communications, Inc.  
200 Riverfront Dr.  
Marseilles, IL 61341

E-Mail: [grauh@mtco.com](mailto:grauh@mtco.com)

Teresa S. Reff  
Senior Financial Analyst  
Regulatory Affairs  
Global Crossing Local Services, Inc.  
1080 Pittsford Victor Rd.  
Pittsford, NY 14534

E-Mail: [teresa.reff@globalcrossing.com](mailto:teresa.reff@globalcrossing.com)

Judith A. Riley  
Consultant for Respondents  
Telecom Professionals  
2912 Lakeside Dr., Ste. 100  
Oklahoma City, OK 73120

E-Mail: [jriley@telecompliance.net](mailto:jriley@telecompliance.net)

Robert Rogers Sr.  
Norlight Telecommunications, Inc.  
13935 Bishops Dr.  
Brookfield, IL 53005

E-Mail: [rer@norlight.com](mailto:rer@norlight.com)

David O. Rudd  
Director, State Government Relations  
Madison River Communications, LLC  
d/b/a Gallatin River Integrated Communications  
Solutions  
625 S. Second St., Ste. 103-D  
Springfield, IL 62704

E-Mail: [dorudd@aol.com](mailto:dorudd@aol.com)

Robert Sakota  
AboveNet Communications, Inc.  
360 Hamilton Blvd.  
White Plains, NY 10601

Richard Schmidt  
Home TeleNetworks, Inc.  
501 N. Douglas St.  
St. Jacob, IL 62281

E-Mail: [rwschmidt@hometel.com](mailto:rwschmidt@hometel.com)

Kurt Scholle  
Manager  
Novacon LLC  
1895 Rohlwing Rd., Ste. C  
Rolling Meadows, IL 60008-4803

E-Mail: [kscholle@novacon.net](mailto:kscholle@novacon.net)

Bryan I. Schwartz  
Equivoice, L.L.C.  
2 N. LaSalle St., 13th Fl.  
Chicago, IL 60602

E-Mail: [bschwartz@lplegal.com](mailto:bschwartz@lplegal.com)

Jamison Shefts  
Access2Go, Inc.  
4609 N. Prospect Rd.  
Peoria Heights, IL 61616

E-Mail: [jshefts@acc2go.com](mailto:jshefts@acc2go.com)

Michael B. Shuler  
BITWISE Communications, Inc.  
682 High Point Ln.  
East Peoria, IL 61611-9329

E-Mail: [mike@bwsys.net](mailto:mike@bwsys.net)

Kristin U. Shulman  
Executive Directory - Regulatory Affairs  
Allegiance Telecom of Illinois, Inc.  
XO Communications, Inc.  
810 Jorie Blvd., Ste. 200  
Oak Brook, IL 60523

E-Mail: [kris.shulman@xo.com](mailto:kris.shulman@xo.com)

Kristin Smith  
Senior Attorney  
Qwest Communications Corporation  
Qwest Interprise America, Inc.  
1801 California St., 49th Fl.

Denver, CO 80202

E-Mail: [kristin.smith@qwest.com](mailto:kristin.smith@qwest.com)

Kristen M. Smoot  
Director Regulatory Affairs  
RCN Telecom Services of Illinois, LLC  
350 N. Orleans St., Ste. 600  
Chicago, IL 60652-1509

E-Mail: [kristen.smoot@rcn.net](mailto:kristen.smoot@rcn.net)

James S. Smutniak  
Midwest Telecom of America, Inc.  
1030 N. State #31-C  
Chicago, IL 60610

E-Mail: [jim@midwesttele.com](mailto:jim@midwesttele.com)

David Starr  
Regulatory Compliance  
Allegiance Telecom of Illinois, Inc.  
9201 N. Central Expy.  
Dallas, TX 75231

E-Mail: [david.starr@algx.com](mailto:david.starr@algx.com)

Louise A. Sunderland  
Illinois Bell Telephone Company  
Floor 25D  
225 W. Randolph Street  
Chicago, IL 60601

E-Mail: [ls2927@sbc.com](mailto:ls2927@sbc.com)

Charles Swetland  
President  
Swetland Internet, Inc.  
RR # 3, Box 866  
Vandalia, IL 62471

E-Mail: [sales@swetland.net](mailto:sales@swetland.net)

Gerald J. Taylor  
SNG Communications, L.L.C.  
1720 Fifth Ave.  
Moline, IL 61265

E-Mail: [gjtaylor@qconline.com](mailto:gjtaylor@qconline.com)

Amy L. Thrasher  
Globalcom Inc.  
Technologies Management, Inc.  
PO Drawer 200

Winter Park, FL 32790-0200

E-Mail: [athrasher@tminc.com](mailto:athrasher@tminc.com)

Darrell Townsley  
Intermedia Communications Inc.  
MCI WorldCom Communications, Inc.  
MCImetro Access Transmission Services, Inc.  
205 N. Michigan Ave., 11th Fl.  
Chicago, IL 60601

E-Mail: [darrell.townsley@mci.com](mailto:darrell.townsley@mci.com)

Mike Underdown  
Citynet Illinois, LLC  
3724 Saratoga Ave.  
Downers Grove, IL 60515

E-Mail: [mike.underdown@citynet.net](mailto:mike.underdown@citynet.net)

Alex Valencia  
Vice President  
Regulatory Affairs  
Preferred Carrier Services, Inc.  
14681 Midway Rd., Ste. 105  
Addison, TX 75001

E-Mail: [alex.valencia@phonesforall.com](mailto:alex.valencia@phonesforall.com)

Nancy Wells  
AT&T Communications of Illinois, Inc.  
620 S. 5th St.  
Springfield, IL 62703

E-Mail: [njwells@att.com](mailto:njwells@att.com)

Don Winton  
Global Teldata, Inc.  
4646 N. Ravenswood  
Chicago, IL 60640

E-Mail: [dwinton2020@aol.com](mailto:dwinton2020@aol.com)

Casey Wojciechowski  
General Manager  
American Farm Bureau, Inc.  
Farm Bureau® Connection sm, The  
1501 E. Woodfield Rd., Ste. 300W  
Schaumburg, IL 60173-5422

E-Mail: [casey@fbinc.com](mailto:casey@fbinc.com)

Marc Wolens  
Essex Telcom, Inc.

2 E. 3rd St.  
Sterling, IL 61081

E-Mail: [mw@essex1.com](mailto:mw@essex1.com)

Richard Wolfe  
Director, Government Affairs  
Comcast Phone of Illinois, LLC  
d/b/a Comcast Digital Phone  
29777 Telegraph Rd.  
Southfield, MI 48034

E-Mail: [richard\\_wolfe@cable.comcast.com](mailto:richard_wolfe@cable.comcast.com)

Grant Wuller  
President  
Peak Communications, Inc.  
6400 W. Main St., Ste. 1A  
Belleville, IL 62223

E-Mail: [gwuller@peaknet.net](mailto:gwuller@peaknet.net)

Robert Zabel  
Grid 4 Communications, Inc.  
1239 Cherry St.  
Winnetka, IL 60093

E-Mail: [mthopkins@grid4.com](mailto:mthopkins@grid4.com)

Russ Zuckerman  
Sr. Vice President  
Mpower Communications Corp.  
d/b/a Mpower Communications of Illinois  
175 Sully's Tr., Ste. 300  
Pittsford, NY 14534

E-Mail: [rzuckerman@mpowercom.com](mailto:rzuckerman@mpowercom.com)