

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ILLINOIS BELL TELEPHONE COMPANY)	
(SBC Illinois))	
)	
Request for Special Permission to Place Into Effect)	Docket No. _____
On Less Than 45 Days Notice Revised Tariff Sheets)	
Pursuant To Section 9-201(a))	

EMERGENCY PETITION FOR SPECIAL PERMISSION

Pursuant to Section 9-201(a) of the Illinois Public Utilities Act (“PUA”), 220 ILCS 5/9-201(a), Illinois Bell Telephone Company (“SBC Illinois” or “the Company”) requests permission to place into effect on less than 45 days notice the revised tariff sheets, copies of which are attached hereto as Exhibit 1 (“Revised Tariff Sheets”).¹ The purpose of the Revised Tariff Sheets is to cancel SBC Illinois’ tariff obligations to provide unbundled switching and to carry out the FCC’s February 4, 2005 Order on Remand in *In re Unbundled Access to Network Elements* (“TRO Remand Order”), which establishes a “nationwide bar” on unbundled switching (and combinations of network elements that include switching) effective March 11, 2005. The FCC found a nationwide bar necessary because “unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.” To avoid a direct conflict with the FCC’s bar and an irreparable violation of SBC Illinois’ rights under that ruling, it is essential that the Commission grant SBC Illinois permission to cancel the tariff obligations to provide unbundled switching (and combinations that include switching) no later than March 11, 2005. A list of the affected tariff sheets is attached as Exhibit 2.

¹ The Revised Tariff Sheets are designated as follows: Ill. C.C. No. 20, Part 19, Section 1, 9th Revised Sheet No. 2, 7th Revised Sheet No. 2.1, 1st Revised Sheet No. 3.2, 1st Revised Sheet Number 4.3, and 7th Revised Sheet Number 6; Section 3, 5th Revised Sheet No. 1; Section 5, 2nd Revised Sheet No. 1; Section 7, 2nd Revised Sheet No. 1; Section 8, 2nd Revised Sheet No. 1; Section 9, 2nd Revised Sheet No. 1; Section 10, 2nd Revised Sheet No.1; Section 11, 5th Revised Sheet No. 1; Section 13, 4th Revised Sheet No. 1; Section 14, 2nd Revised Sheet No. 1; Section 15, 8th Revised Sheet No. 1; Section 17, 4th Revised Sheet No. 1; and Section 21, 9th Revised Sheet No. 1.

This Petition and the Revised Tariff Sheets are also supported by (i) the Commission's Sept. 28, 2004 Order on Reopening in Docket No. 00-0393, which held that the tariffing obligations of the Illinois PUA do not apply to unbundled access to network elements, and (ii) the Seventh Circuit's decisions in *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493 (7th Cir. 2004) and *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 442-45 (7th Cir. 2003), which held that such a tariffing requirement is contrary to and preempted by federal law.

SBC Illinois requests that the Commission permit the Company to place the revised tariff sheets in effect on March 11, 2005, the FCC's deadline. In light of the need for prompt action to meet the FCC's deadline – and the possibility that SBC Illinois would be forced to seek relief in federal court if the Commission takes no action or denies this Petition – SBC Illinois further requests that the Commission act on this Petition by February 24, 2005.

In support of this Petition, SBC Illinois further states as follows:

I. Background

1. Section 13-801 of the PUA, which became effective June 30, 2001, includes provisions related to access to unbundled network elements, among other things. On June 11, 2002, the Commission entered an Order in Docket No. 01-0614 that construed section 13-801(d)(4) to require unbundled access to certain “platforms” of network elements even if one or more of the constituent elements of those platforms did not satisfy the “necessary” and “impair” standards established by federal law. The Commission declared that section 13-801(d)(4) had relegated the federal standards to the “scrap heap of history.” The Commission then directed SBC Illinois to file compliance tariffs, including the tariffs addressed by this Petition, to implement its ruling.

2. SBC Illinois filed suit in federal court on August 22, 2002, alleging that the Commission's decision was contrary to, and preempted by, federal law. The Commission chose

not to defend its decision but instead asked the court to remand the matter. The Commission assured the court that it understood its duty “to ensure that its actions comport with federal law,” and pledged that a remand “may lead to a different reading of or a narrowing construction of Section 13-801” that would in turn “impact some or all of SBC’s claims before this Court.”

3. Several months later, on May 17, 2004, the federal court granted the Commission’s request and issued a remand order. The Commission reopened Docket No. 01-0614 on June 23, 2004. Despite representing to the Court that it would complete its reconsideration “without undue delay,” however, the Commission has not yet issued a decision; in fact, it has not even begun any proceedings with respect to the issue here, unbundled access to local switching used to serve “mass market” customers. A Proposed Order for Phase I of those proceedings (which addresses “enterprise” switching, among other matters) was issued on January 26, 2005. That Proposed Order concludes that the propriety of requiring SBC to file tariffs will not be addressed in that docket. (Proposed Order at p. 129.) On February 8, 2005, SBC Illinois filed Exceptions demonstrating that the Proposed Order’s construction of section 13-801 improperly *expands* the conflict with federal law engendered by the Commission’s initial 2002 Order. SBC Illinois’ Exceptions offer an alternative construction that is consistent with the text of section 13-801, the principles of statutory construction, and the dictates of federal law – a construction that would also allow the Commission to comply with the FCC’s March 11, 2005 ban on unbundled local switching.

4. At the time it was issued, the Order did not have immediate practical significance with respect to one of the most hotly disputed network elements: local circuit switching, an element of the so-called “UNE Platform” combination. This is because the FCC’s first attempts

at federal rules on unbundled access, like the Commission's 2002 interpretation, required incumbent carriers to provide unbundled switching.

5. Those FCC rules, however, were just as unlawful as the Commission's interpretation of section 13-801. The FCC's first two attempts to require unbundled switching were vacated by the federal courts – first by the Supreme Court, and then by the D.C. Circuit – which repudiated the approach of “blanket access” (*AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 390 (1999)) and the underlying “belief that in this area more unbundling is better” (*United States Telecom Ass'n v. FCC*, 290 F.3d 415, 422-30 (D.C. Cir. 2002) (“*USTA I*”)) as contrary to the federal Telecommunications Act of 1996, which limits unbundling to those contexts in which competitors would be “impaired” without such access. As the D.C. Circuit explained, unbundling necessitates a balance of competing interests because “[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.” *USTA I*, 290 F.3d at 425.

6. The FCC attempted to address the Supreme Court and D.C. Circuit rulings, and the Act's impairment balance, as part of its “Triennial Review” of unbundling rules. It announced new unbundling rules in February 2003, but did not issue the *Triennial Review Order* (or “*TRO*”) until several months later.² The FCC made a nationwide finding of non-impairment with respect to switching for “enterprise” customers (customers with lines equal to or above DS1, or with a large number of DS0 lines). But with respect to “mass market switching,” even though the FCC found evidence that competing carriers were not impaired in at least some areas, it decided that the evidence before it was not specific enough to determine precisely where those

² *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (F.C.C. rel. Aug. 21, 2003).

areas were. The FCC then attempted to make a provisional nationwide finding of impairment and to sub-delegate the task of assessing impairment at a more granular level to the states.

7. On March 2, 2004, the D.C. Circuit issued its decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”), which held that the FCC’s attempted delegation of unbundling authority to the state commissions was unlawful and vacated that delegation, with no remand back to the FCC. *USTA II*, 359 F.3d at 568. As the Court explained, the Act assigns to the FCC the task of determining which network elements are to be made available. *Id.* at 565-66. State commissions, meanwhile, are not free to exercise that role because they “may pursue goals inconsistent with those of the agency and the underlying statutory scheme.” *Id.* Further, the Court vacated as unlawful and remanded the FCC’s provisional findings of “impairment,” holding that those findings could not stand on their own. *Id.* at 570-71, 574-75.

8. On August 20, 2004, the FCC released an Order and Notice of Proposed Rulemaking (hereinafter the “*Interim Order*”),³ seeking comments on alternative unbundling rules that would be consistent with *USTA II*. The *Interim Order* adopted certain “interim requirements” governing the provision of mass market switching on an unbundled basis, pending the issuance of new rules. *Interim Order*, ¶¶ 1, 18-28, 47.

II. The FCC’s February 4, 2005 TRO Remand Order.

9. The FCC has now conducted a lawful analysis of “impairment” with respect to mass market switching, and it has squarely held that “[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching.” *TRO Remand Order* ¶ 5. The FCC’s rule unconditionally states that “[r]equesting carriers may not

³ 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*, 19 F.C.C. Rcd. 16,783 (rel. Aug. 20, 2004) (“*Interim Order*”).

obtain new local switching as an unbundled network element.” 47 C.F.R. § 51.319(d)(2)(iii) (Appendix B to *TRO Remand Order*).

10. The FCC reached that conclusion for two reasons. First, the FCC reviewed extensive evidence showing that “competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets.” *TRO Remand Order* ¶ 199. “Based on the evidence of deployment and use of circuit switches, packet switches, and softswitches, and changes in incumbent LEC hot cut processes,” the FCC “determine[d] not only that competitive LECs are not impaired in the deployment of switches, but that it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation.” *Id.* ¶ 204.

11. Second, above and beyond its finding of non-impairment, the FCC found – just as the D.C. Circuit had foreshadowed in *USTA I* – “that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives.” *Id.* ¶ 210. The FCC specifically singled out the UNE-P combination, finding it “clear” that “UNE-P has been a disincentive to competitive LECs’ infrastructure investment.” *Id.* ¶ 218. The FCC then “conclude[d] that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling.” *Id.* ¶ 204. As the FCC explained, such a bar is warranted “where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.” *Id.* ¶ 218.

12. The FCC recognized “the need for prompt action” to implement its directives. *Id.* ¶ 235. Accordingly, the FCC stated that “the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register” as is generally the case with federal rules. *Id.*⁴

III. Prompt Implementation Of SBC Illinois’ Revised Tariff Sheets Is Necessary To Avoid Violating The FCC’s Order.

13. The FCC’s “nationwide bar” on unbundled local switching and associated network elements and combinations (including the UNE-P) is unconditional. The conflict between that federal bar and SBC Illinois’ current switching and UNE-P tariffs, which require SBC Illinois to provide unbundled local switching and the UNE-P, is clear. And the FCC’s March 11, 2005 deadline is unambiguous – and imminent.

14. Little discussion is needed to see that the current unbundled switching and UNE-P tariffs are directly contrary to the FCC’s order. The current tariffs require SBC Illinois to provide unbundled switching, alone and in combinations (including the UNE-P). The FCC has established a “nationwide bar on such unbundling.” *TRO Remand Order* ¶ 204. That bar is unambiguous and unconditional. “An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops.” 47 C.F.R. § 51.319(d)(2)(i); *see also TRO Remand Order* ¶ 5 (“Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching.”). Likewise, the FCC’s rule commands that “[r]equesting carriers may not obtain new local switching as an unbundled

⁴ The FCC’s rules include a transition plan for existing customers served by unbundled switching, but the FCC expressly limited that transition period “to the embedded customer base,” and made clear that its transition rule “does not permit competitive LECs to add new switching UNEs.” *Id.* ¶ 5; *see also id.* ¶ 199 (“This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching.”).

network element.” 47 C.F.R. § 51.319(d)(2)(iii). Unless SBC Illinois is permitted to cancel its tariffs – in time to meet the FCC’s March 11, 2005 deadline – those tariffs will be contrary to federal law.

15. The current tariffs also require SBC Illinois to provide unbundled access to network elements, such as shared transport, that can only be provided in conjunction with switching. In the *TRO*, the FCC acknowledged that “switching and shared transport are inextricably linked,” and held that “requesting carriers are impaired without access to unbundled shared transport only to the extent that we find they are impaired without access to unbundled switching.” *Id.* The *TRO* reaches a similar result for signaling (§ 544) and for call-related databases other than the 911 and E911 databases (§ 551). Given the FCC’s bar on unbundled switching, SBC Illinois cannot be required to provide unbundled access to these “switch-related” elements. Accordingly, SBC Illinois’ Revised Tariff Sheets cancel the sheets of its existing tariffs that address those network elements.

16. Good cause exists for granting this Petition because the standard 45-day notice period would extend beyond the FCC’s March 11, 2005 nationwide deadline. Further, unless SBC Illinois’ tariff obligations to provide unbundled switching are canceled effective March 11, 2005, SBC Illinois will be placed at risk of defending against attempts to impose substantial penalties for violating state tariff obligations if it exercises its clear right under federal law to implement the FCC’s *TRO Remand Order* according to its terms and effective date.

17. Plainly, the FCC’s recognized “need for prompt action,” and its imminent effective date constitute “good cause” for permitting the Revised Tariff Sheets to go into effect on less than 45 days notice. Accordingly, SBC Illinois respectfully requests that the Commission permit the Revised Tariff Sheets proposed herein to go into effect on March 11, 2005.

18. SBC Illinois further requests that the Commission act on this petition by February 24, 2005 – to allow SBC Illinois time to seek review in federal court, if necessary, before the March 11 deadline. Absent a Commission decision on the merits by February 24, 2005, SBC Illinois will be forced to file suit and seek injunctive relief in federal court, along with such additional relief as may be appropriate. SBC Illinois hopes, however, that the Commission will appreciate the need for urgency that is clear from the FCC’s order.

IV. Continued Tariffing Is Also Inconsistent With State And Federal Law.

19. In addition to the fact that continuation of the tariffed products at issue here – unbundled local switching, related network elements, and the UNE-P – is contrary to the FCC’s order, the tariffs themselves are contrary to state and federal law. The Commission directed SBC Illinois to implement unbundled local switching and related network elements and combinations via tariffs. Since then, however, the Commission has held that UNEs “are not a ‘telecommunications service’ as that term is used in Section 13-501 of the PUA” and thus there is “no need for tariffing,” Sept. 28, 2004 Order on Reopening, Docket No. 00-0393, at 54. The Appellate Court has reached the exact same conclusion. *Globalcom, Inc. v. Illinois Commerce Comm’n*, 347 Ill. App. 3d 592, 607-08 (1st Dist. 2004). In *Globalcom*, the court squarely rejected the assertion that network elements and telecommunications services are the same thing under Illinois law. In doing so, the court stated:

[Our] determination coincides with the FCC’s finding that supplying a UNE or a combination of UNEs does not constitute the provision of a service. See *First Report and Order. Implementation of the Telecommunications Act of 1996*, 11 *F.C.C.R.* 15499, par. 358 (1996) (“when interexchange carriers purchase unbundled elements from incumbent LECs, they are not purchasing access ‘services.’ They are purchasing a different product, and that product is the right to the exclusive use of an entire element”). While the FCC’s decision is persuasive authority in itself, as SBC points out, Illinois law also defines “network elements” not as a “service,” but as a “facility or equipment used in the provision of a telecommunications service.” 220 *ILCS 5/13-216* (West 2002).

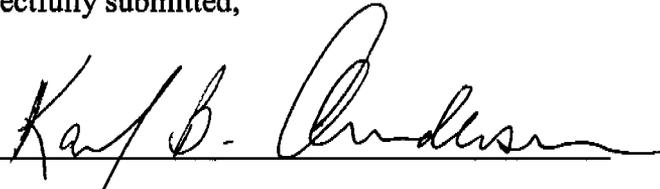
20. The existing tariffs are not only inconsistent with state law, but also with federal law, which prohibits state commissions from imposing access and interconnection obligations through state tariffs that operate outside of the interconnection agreement process set forth in section 252 of the 1996 Act. See, e.g., *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497-98 (7th Cir. 2004); *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 442-45 (7th Cir. 2003). Accord *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 343 Ill. App. 3d 249, 258 (3d Dist. 2003). The Illinois Appellate Court has confirmed these holdings in the specific context of tariffing requirements imposed on carriers subject to alternative regulation. *Illinois Bell Tel. Co. v. ICC*, 352 Ill. App. 3d 630, 638-39 (2004) (holding that tariff “subverted the negotiation and arbitration process required by section 252 of the Telecommunications Act of 1996 * * * and was therefore preempted by the federal act” and overturning the tariffing requirement “despite the broad authority that the Commission had” to modify SBC Illinois’ Alternative Regulation Plan). As the Court explained, “[n]othing in the [Public Utilities] Act, *even the independent authority for alternative regulation* found in section 13-506.1, gives the Commission the power to controvert federal law.” *Id.* at 638 (emphasis added).

CONCLUSION

21. WHEREFORE, for the reasons set forth above, SBC Illinois respectfully requests that the Commission (i) act on this Petition on or before February 24, 2005, and (ii) grant the Company permission to place the Revised Tariff Sheets shown in Exhibit 1 in effect in less than 45 days (on March 11, 2005).

Dated: February 10, 2005

Respectfully submitted,

By: 

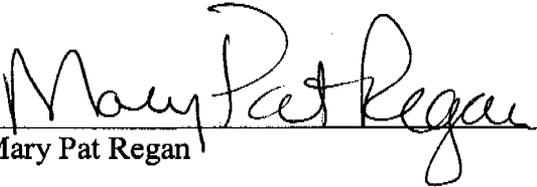
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VERIFICATION

I, Mary Pat Regan, on oath, state that I am the Vice President-Regulatory for SBC Illinois, that I have reviewed the foregoing **EMERGENCY PETITION FOR SPECIAL PERMISSION**, and that, to the best of my knowledge, information and belief, the statements contained therein are true and correct.


Mary Pat Regan

Subscribed and sworn to before
me this 10th day of February, 2005


Notary Public, State of Illinois

