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Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, FCC No. 04-290, WC Docket No. 04-0313, CC Docket No. 01-338 (Adopted: December 15, 2004; Released: February 4, 2005) (hereafter “TRRO”). The *TRRO* significantly altered the federal obligations pursuant to which incumbent local exchange carriers are required to provide network elements to competitors on an unbundled basis. See, *generally*, TRRO. More specifically, the *TRRO* determined that, as a matter of federal law, CLECs are no longer impaired without unbundled access to, and ILECs are no longer required to provide, on an unbundled basis, the following elements: unbundled local switching to serve mass market customers, see TRRO, ¶¶204-228; DS-3 capacity loops in certain buildings in certain markets, see TRRO, ¶¶149-198; and dedicated inter-office transport between certain wire centers. See TRRO, ¶¶69-145.

The FCC determined that these changes in the federal unbundling scheme were to be implemented by establishing transition periods for each element, during which CLECs are to migrate existing customers from UNEs to other services. TRRO, ¶¶143, 196, 223.

The FCC stated, with regard to mass market local circuit switching, in its “Executive Summary” of the TRRO findings:

Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs. During the transition period, competitive carriers will retain access to the UNE platform (*i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport) at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004,

plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar. *TRRO*, ¶ 5.

Similar language was used, in this “Executive Summary” portion of the *TRRO*, to describe changes to requirements for high-capacity loops and dedicated transport. *TRRO*, ¶ 5.

The FCC went on to determine that these changes in the federal unbundling scheme were not to be self-effectuating, or immediately implemented, and therefore implemented transition periods for each element, during which CLECs are to migrate existing customers from UNEs to other services. *TRRO*, ¶¶ 143, 196, 223. The FCC further determined that its findings in the *TRRO* were most properly implemented through incorporation into interconnection agreements (hereafter “ICAs”) currently existing between individual ILECs and CLECs. See, generally, *TRRO*, ¶¶ 143, 196, 223, 233-34.

Paragraphs 233 and 234 of the *TRRO* provide as follows:

We expect that incumbent LECs and competing carriers will implement the Commission’s findings as directed by section 252 of the Act. [fn] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. [fn] We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. [fn] We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon

objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market. [fn] We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3). [fn] Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. [fn] In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority. [fn]

TRRO, ¶¶233-34 (footnotes omitted)

On or about February 10, and 11, 2005, SBC Communications (hereafter “SBC”), the parent company of the Illinois Bell Telephone Company (hereafter “SBC Illinois”) issued certain so-called “Accessible Letters”, which purported to give CLECs notice of newly available offerings, or changed terms and conditions affecting existing SBC offerings. SBC Accessible Letters CLECALL05-016 through CLECALL05-020. These Accessible Letters stated, in very general summary, that CLECs were no longer authorized to order for certain classifications of customers, and SBC would reject all such orders of, the following elements: UNE-P, unbundled local switching, unbundled high capacity loops and transport, notwithstanding the terms of a CLEC’s ICA with SBC. Id.

On March 7, 2005, Cbeyond Communications, LLP, Global TelData, Inc., Nuvox Communications of Illinois, Inc., and Talk America, Inc. (hereafter

“Cbeyond complainants”), filed their joint verified Complaint against SBC Illinois, alleging that SBC Illinois, by virtue of its policies and practices in seeking to implement the *TRRO*, is in violation of each of the following: its ICAs with each of the Complainants; its Illinois intrastate tariffs; Section 13-801 of Illinois Public Utilities Act; the Commission’s Order in Docket 01-0614; the FCC’s SBC/Ameritech Merger Order; provisions of the *TRRO*; and Section 13-514 of the Public Utilities Act. See *Joint Complaint and Petition for an Order for Emergency Relief Pursuant to 220 ILCS 5/13-515(e), Cbeyond Communications, LLP, Global TelData II, LLC f/k/a Global TelData, Inc., Nuvox Communications of Illinois, Inc. and Talk America Inc. v. Illinois Bell Telephone Company*, ICC Docket No. 05-0154. The Cbeyond complainants contend that SBC Illinois has violated these various orders and statutes by issuing one or more of the Accessible Letters described above. Id.

Also on March 7, 2005, XO Illinois, Inc., and Allegiance Telecom of Illinois, Inc. (hereafter “XO complainants”) filed their joint verified Complaint against SBC Illinois, alleging that SBC Illinois is by virtue of its policies and practices in seeking to implement the *TRRO*, in violation of its obligations under each of the following: 47 USC §252, 47 C.F.R § 51.809(A), Article IX of the Public Utilities Act and 220 ILCS 5/13-514(1),(2), (4),(5), (6), (8), (11), and (12). See *Verified Complaint, XO Illinois, Inc. and Allegiance Telecom of Illinois, Inc. v. Illinois Bell Telephone Company: Complaint pursuant to 220 ILCS 5/13-515*, ICC Docket No. 05-0154. Further, the XO complainants allege that SBC Illinois has "knowingly" impeded competition as that term is used in 220 ILCS 5/13-514. Id. The XO

complainants also allege that SBC Illinois has unbundling obligations under Section 13-801 of the Illinois Act and under Section 271 of the Federal Act that must be considered when determining if SBC may stop offering a UNE. Id.

On March 14, 2005, McLeodUSA Telecommunications Services, Inc. (hereafter "McLeod") filed its verified Complaint against SBC Illinois, alleging that SBC Illinois is, by virtue of its policies and practices in seeking to implement the *TRRO*, in violation of Section 13-514 of the Public Utilities Act, Section 252 of the Federal Telecommunications Act of 1996 and its ICA with McLeod. *Verified Complaint and Request for Emergency Relief pursuant to 220 ILCS 5/13-515(e), McLeodUSA Telecommunications Services, Inc. v. Illinois Bell Telephone Company*, ICC Docket No. 05-0174. McLeod asserts that the parties' ICA contains change of law provisions that, in McLeod's view, SBC Illinois has violated by unilaterally implementing its views of its obligations in light of the *TRRO*. Id. McLeod contends that SBC has violated these statutes by issuing one or more of the Accessible Letters described above. Id.

On March 9, 2005, the Administrative Law Judge assigned to the in the Cbeyond case granted certain emergency relief, aimed, other than certain pricing issues, essentially at preserving the *status quo ante*. See ALJ's Order Granting Emergency Relief, ICC Docket No. 05-0154 (March 9, 2005). Likewise, on the same date, the Administrative Law Judge assigned to the XO case granted emergency relief on terms very similar to those obtaining in the Cbeyond case, again aimed, other than certain pricing issues, essentially at preserving the *status quo ante*. See ALJ's Order Granting Emergency Relief, ICC Docket No.

05-0156 (March 9, 2005). Finally, on March 16, 2005, the Administrative Law Judge assigned to the McLeod case granted emergency relief, on somewhat different terms. See ALJ's Order Granting Emergency Relief, ICC Docket No. 05-0174 (March 16, 2005).

On March 17, 2005, the Staff made a Motion to Consolidate the three proceedings, asserting that the three proceedings shared similar questions of law and fact within the meaning of Section 200.600 of the Rules of Practice before the Illinois Commerce Commission, 83 Ill. Admin. Code §200.600, such that consolidation was warranted. See Motion to Consolidate. The matters were thereafter consolidated.

On March 23, 2005, the Commission entered an Amendatory Order that somewhat altered the emergency relief previously granted. See Amendatory Orders. The Amendatory Orders essentially added a Findings and Ordering paragraph (No. 8) that states: "SBC is not required under Section 252 of the federal Telecommunications Act to provide new UNE-P to customers who are not, as of March 10, 2005, part of the CLECs' customer base."

On April 11, 2005, an evidentiary hearing was convened, and evidence adduced and testimony taken.

## **II. Relevant Statutes and Regulations**

Certain of the complainants allege that SBC Illinois has violated Section 252 of the federal telecommunications Act of 1996, which provides in relevant part that:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 [47 USCS § 251], an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 [47 USCS § 251(b), (c)]. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], shall be submitted to the State commission under subsection (e) of this section.

47 U.S.C. §252(a)(1)

The complainants allege that SBC Illinois has committed acts in violation of Section 13-514 of the Public Utilities Act, 220 ILCS 5/13-514 which provides in relevant part as follows:

A telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. The following prohibited actions are considered per se impediments to the development of competition; however, the Commission is not limited in any manner to these enumerated impediments and may consider other actions which impede competition to be prohibited:

(1) unreasonably refusing or delaying interconnections or collocation or providing inferior connections to another telecommunications carrier;

(2) unreasonably impairing the speed, quality, or efficiency of services used by another telecommunications carrier;

...

(4) unreasonably delaying access in connecting another telecommunications carrier to the local exchange network whose product or service requires novel or specialized access requirements;

(5) unreasonably refusing or delaying access by any person to another telecommunications carrier;

(6) unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers;

...

(8) violating the terms of or unreasonably delaying implementation 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;

...

(10) unreasonably failing to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier in a manner consistent with the Commission's or Federal Communications Commission's orders or rules requiring such offerings;

(11) violating the obligations of Section 13-801; and

(12) violating an order of the Commission regarding matters between telecommunications carriers.

220 ILCS 5/13-514(1, 2, 4-6, 8, 10-12)

Certain of the complainants allege that SBC has violated Section 51.809 of the FCC's rules. Section 51.809 provides, in relevant part, that:

An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

47 C.F.R. §51.809(a)

The complainants seek relief under Section 13-515 of the Public Utilities Act, 220 ILCS 5/13-515, which provides in relevant part as follows

(a) The following expedited procedures shall be used to enforce the provisions of Section 13-514 of this Act. However, the Commission, the complainant, and the respondent may mutually agree to adjust the procedures established in this Section.

...

(c) No complaint may be filed under this Section until the complainant has first notified the respondent of the alleged violation and offered the respondent 48 hours to correct the situation. Provision of notice and the opportunity to correct the situation creates a rebuttable presumption of knowledge under Section 13-514. After the filing of a complaint under this Section, the parties may agree to follow the mediation process under Section 10-101.1 of this Act. The time periods specified in subdivision (d)(7) of this Section shall be tolled during the time spent in mediation under Section 10-101.1.

(d) A telecommunications carrier may file a complaint with the Commission alleging a violation of Section 13-514 in accordance with this subsection[.]

...

(e) If the alleged violation has a substantial adverse effect on the ability of the complainant to provide service to customers, the complainant may include in its complaint a request for an order for emergency relief. The Commission, acting through its designated hearing examiner or arbitrator, shall act upon such a request within 2 business days of the filing of the complaint. An order for emergency relief may be granted, without an evidentiary hearing, upon a verified factual showing that the party seeking relief will likely succeed on the merits, that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and that the order is in the public interest. An order for emergency relief shall include a finding that the requirements of this subsection have been fulfilled and shall specify the directives that must be fulfilled by the respondent and deadlines for meeting those directives. The decision of the hearing examiner or arbitrator to grant or deny emergency relief shall be considered an order of the

Commission unless the Commission enters its own order within 2 calendar days of the decision of the hearing examiner or arbitrator. The order for emergency relief may require the responding party to act or refrain from acting so as to protect the provision of competitive service offerings to customers. Any action required by an emergency relief order must be technically feasible and economically reasonable and the respondent must be given a reasonable period of time to comply with the order.

....

220 ILCS 5/13-515(a), (c), (d), (e)

### **III. Legal Standards**

#### **A. Burden of Proof**

The party seeking relief generally bears the burden of proof. People v. Orth, 124 Ill. 2d 326, 337; 530 N.E.2d 210, 216; 1988 Ill. Lexis 134 at 16; 125 Ill. Dec. 182 (1988). The term “burden of proof” includes the burden of going forward with the evidence, and the burden of persuading the trier of fact. People v. Ziltz, 98 Ill. 2d 38, 43; 455 N.E.2d 70, 72; 1983 Ill. Lexis 453 at 6; 74 Ill. Dec. 40 (1983). The burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief. Ambrose v. Thornton Twp. School Trustees, 274 Ill. App. 3d 676, 680; 654 N.E.2d 545, 549; 1995 Ill. App. Lexis 614 at 7; 211 Ill. Dec. 83 (1<sup>st</sup> Dist 1995), *app. den.*, 164 Ill. 2d 557 (1995); Chicago Board of Trade v. Dow Jones & Co., 108 Ill. App. 3d 681, 686; 439 N.E.2d 526, 530; 1982 Ill. App. Lexis 2193 at 8-9; 64 Ill. Dec. 275 (1<sup>st</sup> Dist. 1982). Accordingly, the various complainants bear the burden of proof in this proceeding.

## **B. The Standards Established in Section 13-514**

Section 13-514 of the Public Utilities Act, upon which the complainants rely, and pursuant to which, as noted above, they have sought relief, provides in relevant part that “[a] telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market.” 220 ILCS 5/13-514. Likewise, Section 13-514 proscribes twelve individual acts or practices as “*per se* impediments to competition.” *Id.* As such, it is necessary to define “knowing” and “*per se*”. Likewise, since a complainant seeking to demonstrate that another carrier committed one of the enumerated violations must, in some cases, show that the carrier’s actions were “unreasonable”, some attempt will have to be made to address that unpromising term.

With respect to what constitutes “knowing” conduct, and without suggesting criminal conduct by any party, the Criminal Code of 1961 provides useful guidance.

Section 4-5 of the Criminal Code of 1961 provides that:

A person knows, or acts knowingly or with knowledge of:

(a) The nature or attendant circumstances of his conduct, described by the statute defining the offense, when he is consciously aware that his conduct is of such nature or that such circumstances exist. Knowledge of a material fact includes awareness of the substantial probability that such fact exists.

(b) The result of his conduct, described by the statute defining the offense, when he is consciously aware that such result is practically certain to be caused by his conduct.

Conduct performed knowingly or with knowledge is performed wilfully, within the meaning of a statute using the latter term, unless the statute clearly requires another meaning.

One Illinois court has explicated this definition somewhat. In People v. Robie, 92 Ill. App. 3d 1059, 1062; 416 N.E.2d 754, 756; 1981 Ill. App. Lexis 2041 at 5-6; 48 Ill. Dec. 481 (5<sup>th</sup> Dist. 1981), the court observed that:

“‘Knowingly’ is used to describe the mental state ‘in which a person, **while not having an actual intent to accomplish a specific wrongful purpose**, is consciously aware of the nature of his conduct or of the result which will (or which is practically certain to) be caused, or of the circumstances under which he acts, as described by the statute defining the offense.’” (emphasis added)

It is reasonable to use a similar definition here.

The definition of “per se” is, perhaps, somewhat more elusive. In Illinois, only one court has spoken to the issue of what the phrase “per se”, standing alone, might mean. In Blake v. Homewood-Flossmoor Multiple Listing Service, 36 Ill. App. 3d 730, 738; 345 N.E.2d 18, 25; 1976 Ill. App. Lexis 2079 at 18; 1976-1 Trade Cases (CCH) P60, 861 (1<sup>st</sup> Dist. 1976), the court noted that:

*Per se* violations have been defined by the Federal courts [in the context of antitrust law] to be:

"[C]ertain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal **without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.**" Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 549, 78 S. Ct. 514, 518 (emphasis added)

This definition seems apposite here. It is clear, therefore, that, to the extent a telecommunications carrier commits an act enumerated in Section 13-

514(1-12), no showing of damages or harm is required, and their justification as reasonable business practices is irrelevant.

Finally, this matter requires that the parties, Staff, and the ALJ grapple with the concept of what, in this context, constitutes “unreasonable” conduct. Black’s Law Dictionary defines “unreasonable” as, inter alia, “not reasonable (not a helpful way to define the term)”, immoderate [or] exorbitant”; “capricious, arbitrary [or] confiscatory.” 1379 H.C. Black, Black’s Law Dictionary (5<sup>th</sup> Ed. 1979). This appears to be an area in which the Commission and ALJ might safely exercise discretion.

#### **IV. Argument**

The question before this Commission is, essentially, what effect the TRRO had on the CLEC complainants’ ability to operate under the terms of their various interconnection agreements. The answer to this question should be found, therefore, by looking to both the interconnection agreements themselves and the clear findings of the FCC in the TRRO. However, the requirements of the TRRO are less lucid than either side to this debate would allow.

SBC argues that parts of the UNE framework that the FCC established in the TRRO are, by the clear and unambiguous terms of the TRRO, to be given effect immediately, without the need for modification of existing interconnection agreements, while other parts of that regimen are to be given effect through amendments to interconnection agreements. See SBC Response In Opposition to Motion for Emergency Relief (“SBC Response”), at 8. Critically, SBC contends that the TRRO does not allow CLECs to obtain, after March 11, new unbundled

access to network elements for which the TRRO found there is no impairment. SBC Response, at 9.

SBC further suggests that the CLEC complainants have erroneously applied the TRRO's transitional plan for "embedded" customers to new orders or customers. *Id.*, at 8, 4. According to SBC, it is required to negotiate the implementation of the TRRO's rule changes under an ICA's change of law provision solely for embedded customers during a twelve month transition period. It has no such obligation for new customers and in fact is barred from doing so.

SBC argues that because the TRO Remand order was explicit in outlining a transition period for the embedded base, the lack of an explicit outline for addressing "new adds" during the re-negotiation period should be interpreted as "establish[ing] an unconditional 'nationwide bar' *without* a transition period." *Id.* at 14. SBC, throughout its argument, refers to the order as "self-effectuating" and reiterates its position that the TRRO's establishes a "nationwide bar" as of March 11, 2005.

SBC's argument that the TRRO is "self-effectuating" is rendered somewhat less persuasive by the fact that the "self-effectuating" language from the TRRO refers to the impairment test further outlined in the order: "We believe that the impairment framework we adopt is self-effectuating, forward-looking, and consistent with technology trends that are reshaping the industry." *TRRO*, ¶3. To be sure, the *TRRO* has unequivocally found that there is, as a matter of law, no impairment for carriers without access to unbundled switching. Therefore, SBC's argument that there is "nothing to negotiate" with regard to the provision of

UNE-P, if not entirely accurate, is a concise statement of its duties under Section 251 after the TRRO: SBC has no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. *TRRO*, ¶5. Such a clear articulation of the limits of SBC's obligations under federal law has undoubtedly left very little room for negotiation. However, it does not follow from that SBC's current agreements to the contrary are immediately voided by the TRRO.

What such an unequivocal statement regarding lack of impairment *does* mean, to both SBC and the CLEC complainants, is that negotiations under the relevant change of law provisions should be rather succinct. Therefore, to the extent that this Commission finds that negotiation is required pursuant to both the TRRO and the relevant ICA provisions, Staff is of the opinion that such negotiation could have been completed by the May 23 deadline established for the completion of the present proceedings, if the parties had worked towards that end since February when the TRRO was issued.

The Complainants in this consolidated case argue that SBC's issuance of the Accessible Letters constitutes a unilateral action by SBC that is unsupported by the decision in the TRRO. This contention is met by SBC's citation of the "nationwide bar" referenced in the TRRO and language from the Order which states that "transition plans apply only to the embedded customer base and do not permit competitive LECs to add new [declassified UNEs]. . . " See *TRRO*, ¶5.

**A. The FCC Did Not, in its TRRO, Unilaterally Modify Interconnection Agreements**

The threshold question in this proceeding is whether the FCC, through the *TRRO*, unilaterally and summarily amended each interconnection agreement to incorporate the provisions of the *TRRO*. As noted above, the answer to this question is far from clear. Paragraph 233 of the *TRRO* provides, in relevant part, that:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. [fn] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. [fn] We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. [fn] We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

TRRO, ¶233

Based upon the foregoing, Staff posits that the *TRRO* is best interpreted as requiring implementation by negotiation of the change of law provisions of existing interconnection agreements. First, the FCC does not appear to intend the *TRRO* to be self effectuating; instead, it directs carriers to "implement [the *TRRO*] as directed by section 252 of the [federal Telecommunications] Act [of 1996.]" Section 252 of the federal Telecommunications Act of 1996 is devoted exclusively to, and is indeed specifically entitled, "Procedure for Negotiation, Arbitration, and Approval of [Interconnection] Agreements." 47 U.S.C. §252. Accordingly, the FCC has clearly directed carriers to invoke negotiation, and if necessary, mediation and arbitration procedures, to implement the *TRRO*. To the

extent this is unclear, the FCC determines that: “the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.” TRRO, ¶233. The FCC’s only caveats to this direction are that (a) undue delay in implementing the *TRRO* through negotiation is strongly discouraged; and (b) state Commissions are encouraged to monitor the process to prevent such delay. If the FCC had intended to unilaterally modify existing interconnection agreements, it presumably would have so stated.

This conclusion is borne out by the FCC directions to carriers regarding the implementation of the first *Triennial Review Order*. See *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers / Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 / Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC No. 03-36, CC Docket Nos. 01-338 / 96-98 / 98-147 (Adopted: February 20, 2003 Released: August 21, 2003) (hereafter “Triennial Review Order” or “TRO”). There, the FCC specifically recognized “that many of our decisions in this Order will not be self-executing. Indeed, under the statutory construct of the Act, the unbundling provisions of section 251 are implemented to a large extent through interconnection agreements between individual carriers[.]” TRO, ¶700. The FCC held that:

Thus, to the extent our decision in this Order changes carriers’ obligations under section 251, we decline the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay

associated with renegotiation of contract provisions. [fn] **Permitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252.**

*Id.*, ¶701 (emphasis added); see also *Verizon North, Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) (“private negotiation . . . is the centerpiece of the Act”).

It is clear that, had the FCC intended in the *TRRO* to “override the section 252 process and unilaterally change all interconnection agreement”, it would have stated that it intended that the *TRRO* do so.<sup>1</sup> Moreover, had the FCC intended to unilaterally change provisions contained in carriers ICAs, one *potential* avenue for the FCC to do so would have been to employ the Sierra-Mobile doctrine. The Sierra-Mobile doctrine would allow the FCC, under strictly limited circumstances, to revise the terms of a contract between two carriers. To do so, however, the FCC would need to find that the contract’s terms would “adversely affect the public interest.” See e.g., *In the Matter of IDB Mobile Communications v. COMSAT*, 16 FCC Rcd 11474; 2001 FCC LEXIS 2860, at \*11480-81 (Rel. May 24, 2001) (“[P]rivate economic harm, standing alone, lacks the substantial and clear detriment to the *public* interest required by the Sierra-Mobile doctrine.”)(emphasis in original). Clearly, in the *TRRO*, the FCC did not make the requisite findings that the terms of any individual interconnection agreements were sufficiently “adverse to the public interest” and it did not attempt to employ the Sierra-Mobile doctrine. Instead of either clearly stating an

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<sup>1</sup> In fact, albeit in a slightly different context, SBC would appear to have acknowledged that the FCC is precluded from overriding the Section 252 process and unilaterally implementing terms in ICAs to implement its UNE rule changes. See Brief of Plaintiff-Appellee, at 14, *Wisconsin Bell v. Bie*, 340 F.3d 441 (7<sup>th</sup> Cir. 2003) (Nos. 02-3854, 02-3896 cons.) (“Section 252(a)(1) further states that interconnection agreements are the ‘binding’ – and only - statements of the parties’ rights and obligations. [Citations omitted.] Any attempt to impose interconnection obligations must take place pursuant to the procedures established by Congress in section 252 . . .”).

intent to unilaterally change provisions contained in ICAs and/or invoking the Sierra-Mobile doctrine to accomplish the same, the FCC directed the parties to *utilize* the Section 252 process, precisely as it did in the *TRO*. Thus, it must be concluded that the *TRRO* does not unilaterally amend interconnection agreements.

**B. The Individual CLECs' Interconnection Agreements Permit Summary Implementation Of The TRRO In Some Cases**

However, this is not the end of the inquiry. While the *TRRO* does not, without more, amend interconnection agreements, it is possible that the interconnection agreements themselves permit this. It is, after all, well established that Section 252 permits carriers to “enter into a binding agreement ... without regard to the standards set forth in subsections (b) and (c) of section 251[,]”, 47 U.S.C. §251(a)(1), which is another way of saying that carriers can waive rights afforded them by Section 251(b-c), such as, for example, the right to UNEs (Section 251(c)(3)) or reciprocal compensation (Section 251(b)(5)) in order to obtain other concessions in negotiation. One such concession might well be the right to immediately incorporate changes of law, such as the *TRRO*, into the interconnection agreement. In consequence, each interconnection agreement at issue here must be reviewed with some care.

**1. The Cbeyond-SBC Illinois Interconnection Agreement Does Not Permit Immediate Implementation**

The Cbeyond-SBC Illinois interconnection agreement provides, in relevant part, that:

In the event of any legally binding ... federal ... regulatory action... that revises, reverses, modifies or clarifies the meaning of the [federal Telecommunications] Act ... or any of said rules, regulations, orders, or judicial decisions that were the basis of negotiations for this Agreement, or which otherwise affect any of the provisions set forth in this Agreement (individually and collectively a “Change in Law”), **the Parties shall renegotiate the affected provisions in this Agreement in good faith and amend this Agreement to reflect such Change in Law.** (See Attachment B, emphasis added.)

Clearly, therefore, pursuant to the Cbeyond-SBC Illinois ICA, the parties are obligated to negotiate regarding the effect of the TRRO, and neither party can unilaterally implement it.

## **2. The Global TelData - SBC Illinois Interconnection Agreement Does Not Permit Immediate Implementation**

The Global TelData – SBC Illinois interconnection agreement provides, in relevant part, that:

In the event of any ... regulatory ... order, rule or regulation or other legal action that revises or reverses the Act, the FCC’s First Report and Order in CC Docket Nos. 96-98 and 95-185 or any applicable Commission order purporting to apply the provisions of the Act (individually and collectively, an “Amendment to the Act”), **either Party may by providing written notice to the other Party require that the affected provisions be renegotiated in good faith and this Agreement be amended accordingly to reflect the pricing, terms and conditions of each such Amendment to the Act relating to any of the provisions in this Agreement.** If any such amendment to this Agreement affects any rates or charges of the services provided hereunder, such amendment shall be retroactively effective if so determined by the Commission and each Party reserves its rights and remedies with respect to the collection of such rates or charges; including the right to seek a surcharge before the applicable regulatory authority. (See Attachment B, emphasis added.)

Clearly, therefore, pursuant to the Global TelData – SBC Illinois ICA, the parties are obligated to negotiate regarding the effect of the TRRO, and neither party can unilaterally implement it.

### 3. Nuvox

The Nuvox – SBC Illinois ICA provides, in relevant part, that:

**29.3 Amendment or Other Changes to the Act; Reservation of Rights.** The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date. In the event of any amendment of the Act, or any final and nonappealable legislative, regulatory, judicial order, rule or regulation or other legal action that revises or reverses the Act, the FCC's First Report and Order in CC Docket Nos. 96- 98 and 95-185 or any applicable Commission order or arbitration award purporting to apply the provisions of the Act (individually and collectively, an “**Amendment to the Act**”), either Party may by providing written notice to the other Party require that the affected provisions be renegotiated in good faith and this Agreement be amended accordingly to reflect the pricing, terms and conditions of each such Amendment to the Act relating to any of the provisions in this Agreement. If any such amendment to this Agreement affects any rates or charges of the services provided hereunder, each Party reserves its rights and remedies with respect to the collection of such rates or charges on a retroactive basis; including the right to seek a surcharge before the applicable regulatory authority.

**29.4 Regulatory Changes.** If any final and nonappealable legislative, regulatory, judicial or other legal action (other than an Amendment to the Act, which is provided for in **Section 29.3**) materially affects the ability of a Party to perform any material obligation under this Agreement, a Party may, on thirty (30) days' written notice (delivered not later than thirty (30) days following the date on which such action has become legally binding and has otherwise become final and nonappealable), require that the affected provision(s) be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new provision(s) as may be required; provided that such affected provisions shall not affect the validity of the remainder of this Agreement. (See Attachment B)

Thus, under the Nuvox-SBC Illinois ICA, once the TRRO is “final and nonappealable” either party may request negotiations to incorporate into the ICA the changes required by the TRRO.

#### **4. The Talk America - SBC Illinois Interconnection Agreement and McLeodUSA - SBC Illinois Interconnection Agreement Both Permit Immediate Implementation**

It appears to the Staff that the Talk America – SBC Illinois ICA and the McLeod USA - SBC Illinois ICA contain identical provision regarding the implementation of changes of law. The two agreements provide, in relevant part, that:

In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in the Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent jurisdiction ... **the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party.** In such event, the Parties shall expend diligent efforts to arrive at an agreement regarding the appropriate conforming modifications to the Agreement. (See Attachment B, emphasis added.)

In consequence, to the extent that the federal unbundling rules that the TRRO altered formed “the basis or rationale” for the portion(s) of the agreements that require SBC to provide the UNEs in question here, it appears to the Staff that the *TRRO* is self-effectuating in the context of the Talk America – SBC Illinois and McLeod USA – SBC Illinois ICAs.

## 5. The XO Complainants' Interconnection Agreements With SBC Illinois Both Permit Immediate Implementation

It appears to the Staff that the ICAs between the XO complainants and SBC Illinois contain identical change of law provisions, an unsurprising outcome in the light of the XO complainants' common ownership. The provisions in question read, in relevant part, as follows:

In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in the Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent ... **the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party.** In such event, the Parties shall expend diligent efforts to arrive at an agreement regarding the appropriate conforming modifications to the Agreement. (See Attachment B, emphasis added.)

In consequence, it appears to the Staff that, to the extent that the federal unbundling rules that the TRRO altered formed "the basis or rationale" for the portion(s) of the agreements that require SBC to provide the UNEs in question here, the *TRRO* is self-effectuating in the context of the XO – SBC Illinois and Allegiance – SBC Illinois ICAs.

In summary, it is the Staff's conclusion that, to the extent that the new federal unbundling rules in the *TRRO* formed "the basis or rationale" for the portion(s) of the agreements that require SBC to provide the UNEs in question here, SBC has the right under its ICAs with XO, allegiance, Talk America and McLeod USA to seek "immediate invalidation" of any provision not in

conformance with the TRRO, and the right to have such invalidation take effect “immediately”, with the parties having the subsequent obligation to draft a conforming amendment. It is not, however, clear to the Staff whether federal unbundling rules, state unbundling requirements established in Section 13-801 of the Public Utilities Act and the Commission’s section 13-801 Order, or some other source altogether, provide the “the basis or rationale” for the portion(s) of the agreements that require SBC to provide the UNEs in question. The Staff requests that the parties clarify this point in their Reply Briefs.

**C. SBC’s Conduct In Issuing The Accessible Letters Constitutes A Violation Of Section 13-514 As To Certain Complainants, But Does Not Constitute A Violation Of Section 13-514 As To Others**

As an initial matter, the Staff notes that there can be little dispute here that SBC acted knowingly when it issued the Accessible Letters. While SBC may have had no actual intent to commit a wrongful act, it certainly was aware of the nature of its conduct and the likely result, thus satisfying the standard.

As is readily apparent from the discussion above, SBC’s conduct in issuing the accessible letters has a different and distinct legal effect depending upon which CLEC is considered. (See SBC Accessible Letters, Attachment A.) For example, issuing the accessible letters appears, at least initially, not to constitute a violation of Section 13-514(8) (breach of existing ICA) with respect to the XO complainants, McLeodUSA, and Talk America (assuming, for the sake of argument, that the accessible letter is found to constitute a written request for

immediate invalidation of the terms of these ICAs altered by the *TRRO*). Conversely, issuance of the accessible letters appears to constitute a violation of Section 13-514(8) with respect to Cbeyond and Global TelData. Accordingly, it is essentially impossible to make general assertions regarding the legal effect of SBC's conduct.

Further, it is crucial to remember that this proceeding is not a general Commission investigation. It was initiated by complaints brought by specific carriers alleging specific wrongdoing by SBC directed to those carriers. SBC's conduct must be evaluated for lawfulness based upon the complaining CLEC to which such conduct was directed, and upon the obligations that SBC had to that party under the ICA in existence between it and that party. Perhaps needless to say, SBC's conduct must also be evaluated in the light of each individual CLEC's complaint against it.

That said, the various CLECs allege that SBC's conduct violated their respective rights in generally similar ways, such as permits discussing the issues generically.

### **1. Violation of Interconnection Agreements and Section 13-514(8)**

All of the complainants allege that SBC, by issuing the accessible letters, violated their respective ICAs, and by extension Section 13-514(8). As noted above, it appears that SBC, by issuing the Accessible Letters, which indicated that SBC would unilateral action with respect to *TRRO* implementation,

anticipatorily breached<sup>2</sup> terms of its ICAs with Cbeyond and Global TelData, in further violation of Section 13-514(8), but likely did not violate the terms of its ICAs with Talk America, McLeod and the XO complaints, presuming that the federal law and FCC unbundling regulations “were the basis or rationale for [the] rates, terms and/or conditions in the Agreement[s.]” (See Attachment A.) If it is the case that SBC obligations under Section 13-801 of the Illinois Public Utilities Act constituted such a basis or rationale, the analysis would be no different, but the result would, inasmuch as automatic implementation would be without force or effect; even immediate implementation of the *TRRO* would not condition a contractual obligation founded on Section 13-801 to provide UNEs.

In the case of the TalkAmerica – SBC ICA, it appears that SBC’s unbundling obligations derive solely from federal sources.<sup>3</sup> The Agreement specifically provides that:

This Agreement is the arrangement under which the Parties may purchase from each other the products and services described in Section 251 of the Act and obtain approval of such arrangement under Section 252 of the Act. Except as agreed upon in writing, neither Party shall be required to provide the other Party a function, facility, product, service or arrangement described in the Act that is not expressly provided herein.

Joint Complainants’ Ex. 3.3, Section 43.1 at 91

Accordingly, it appears that SBC Illinois is within its rights in seeking immediate implementation of the *TRRO* as against Talk America.

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<sup>2</sup> In Illinois, an anticipatory breach occurs only when a party makes a clear and unequivocal statement of his intention to break the contract before full performance is due. See e.g., *CL Maddox v. Coalfield Servs.*, 51 F.3d 76, 81 (7<sup>th</sup> Cir. 1995).

<sup>3</sup> As XO and Allegiance did not place all of their interconnection agreement(s) with SBC into evidence, other portions may contain provisions that invoke other legal sources.

In the case of the XO / Allegiance – SBC ICA, it appears that SBC’s unbundling obligations derive solely from federal sources.<sup>4</sup> The ICA provides that:

This Agreement is intended to describe and enable specific Interconnection and compensation arrangements between the Parties. This Agreement is the arrangement under which the Parties may purchase from each other the products and services described in Section 251 of the Act and obtain approval of such arrangement under Section 252 of the Act. Except as agreed upon in writing, neither Party shall be required to provide the other Party a function, facility, product, service or arrangement described in the Act that is not expressly provided herein.

XO / Allegiance Ex. E, Section 43.1

Accordingly, it appears that SBC Illinois is within its rights in seeking immediate implementation of the TRRO as against XO and Allegiance.

In the case of the McLeodUSA – SBC ICA, it appears that SBC’s unbundling obligations derive from both federal and state sources. Appendix UNE to the McLeodUSA – SBC ICA demonstrates that the Commission’s Section 13-801 Order forms a significant basis or rationale for SBC Illinois’ unbundling obligations. See McLeodUSA Ex. 3, Section 2.9.1, providing that:

SBC-IL shall not require CLEC to submit a BFR to gain access to UNEs available under the interim tariff filed by Ameritech Illinois in Docket No. 01-0614, which shall be superceded by the finally approved tariff ordered by the Commission in that docket.

Further, McLeod is permitted by the terms of its ICA to purchase interconnection and wholesale services from SBC Illinois intrastate tariffs. *Id.*, Section 5.7.2. It is clear, therefore, that immediate implementation of the TRRO as against McLeod, while within SBC Illinois’ rights, is without effect to the extent that the ICA

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<sup>4</sup> Again, the TalkAmerica-SBC Illinois interconnections agreement may invoke other sources of law, but the Staff has not been able to conclusively determine that this is the case.

requires SBC to provide the same UNEs pursuant to the Commission's *Section 13-801 Order* and under intrastate tariff, which – as noted below – are still in effect.

It is worthy of note that SBC Illinois appears to have remediated its conduct prior to March 11, 2005, and agreed to negotiate with complainants. Accordingly, the violation appears to have been *de minimus*. Nonetheless, this is, as noted above, a *per se* impediment to competition, and damages need not be shown. Moreover, unlike several other *per se* impediments to competition within the meaning of Section 13-514, a violation of the terms and conditions of an ICA need not be “unreasonable” to contravene Section 13-514(8). See 220 ILCS 5/13-514, 13-514(8).

## **2. Violations of Section 13-801 / Section 13-801 Order / Section 13-514(11)**

All of the complainants assert that SBC violated Section 13-801, the Commission's *Section 13-801 Order*, and, by extension, Section 13-514(11). (See Attachment C.) This is a somewhat more difficult question.

As an initial matter, and as Staff noted above, a carrier in conduct that impedes competition *per se*, in violation of Section 13-514, when it “violat[es] the obligations of Section 13-801[.]” 220 ILCS 5/13-514, 13-514(11). To the extent that SBC withdrew UNEs it was required to offer pursuant to Section 13-801, it would very clearly be in violation of Section 13-801, the Commission's *Section 13-801 Order*, and Section 13-514(11) and 13-514(12).

It is not, however, clear to the Staff that SBC did so. SBC Illinois sought, on February 10, 2005, special permission to withdraw tariffs which, *inter alia*, memorialize its Section 13-801 obligations; the Commission denied such permission. ICC Docket No. 05-0085. Thereupon, SBC Illinois filed suit against the Commission in the U.S. District Court for the Northern District of Illinois, seeking to temporarily restrain the Commission from enforcing Section 13-801 and any intrastate tariffs memorializing Section 13-801 obligations in excess of federal obligations; this relief was denied as well. SBC Illinois has not unilaterally withdrawn the tariffs memorializing its Section 13-801 obligations, or – as far as the Staff knows, at least – failed to honor them. Whether or not any of the complainant CLECs has attempted to incorporate in its interconnection agreement, by a change of law amendment or otherwise, a Section 13-801 basis to obtain the UNEs that SBC is now no longer obligated to provide under the TRRO, is not clear from the complaints filed in this proceeding. It is also not clear from those complaints if any attempt to do so has met with resistance or denial by SBC. In other words, SBC Illinois has, as nearly as the Staff can determine, not yet committed any violation of this nature. If any complainant is aware of circumstances calling this conclusion into question, it should advise the Commission thereof.

### **3. Violation Of Intrastate Tariffs**

All complainants allege that, by issuing the Accessible Letters, SBC violated its intrastate tariffs. (See Attachment C.) This appears, however, not to be the case.

As noted above, there is no evidence whatever that SBC has not honored its intrastate tariffs. Moreover, it is not clear to the Staff – and no complainant appears to have alleged – that any complainant is permitted to take services from an intrastate tariff in derogation of, or in addition to, their respective ICAs. There are two, and only two, groups that can be aggrieved by the failure of a carrier to provide service pursuant to the terms and conditions of an effective tariff. These are: (1) the class of persons or entities authorized to take service pursuant to the tariff; and (2) the Commission. Since this is not a general Commission investigation, and since the complainants other than McLeodUSA are not, or at least have failed to allege that they are, entitled to take service pursuant to tariff in derogation of, or in addition to, their respective ICAs, it does not appear to the Staff that a violation of this nature can be found.

McLeodUSA appears to be authorized under its ICA with SBC Illinois to take certain services pursuant to tariffed rates. See McLeod Ex. 3, Section 5.7. Moreover, as noted above, McLeod is permitted by the terms of its ICA to purchase interconnection and wholesale services from SBC Illinois intrastate tariffs. Id., Section 5.7.2. However, as noted above, SBC's intrastate tariffs remain in effect.

#### **4. Violation Of Section 271 Order / Merger Order**

All of the complainants allege that, by issuing the Accessible Letters, SBC violated its obligations under its Section 271 Order, and its Merger Order. (See Attachment C.)

Several complainants appear to have incorporated merger provisions or appendices into their ICAs with SBC Illinois. See, e.g., McLeodUSA Ex. 3, Section 45.1, *et seq.*, and Exhibit 4 (Appendix UNE) Joint Complainants Ex. 3.3, Section 45.1, *et seq.*, Joint Complainants Ex. 4.3, Section 25.7, XO / Allegiance Ex. E, Section 25.7. Accordingly, these carriers may have a cognizable claim.

Cbeyond and Nuvox appear to have no merger appendices or amendments, and appear therefore to lack a cognizable claim under the rubric of the merger terms and conditions.

With respect to Section 271, the XO complainants, XO / Allegiance Ex. E, Section 29.20, and Global TelData, Joint Complainants Ex. 4.3, Section 29.20, are parties to ICAs with SBC Illinois that state:

This Agreement is the exclusive arrangement under which the Parties may purchase from each other the products and services described in Sections 251 and 271 of Act and, except as agreed upon in writing, neither Party shall be required to provide the other Party a product or service described in Sections 251 and 271 of the Act that is not specifically provided herein.

Accordingly, these parties have at least stated a claim.

The Nuvox – SBC Illinois and TalkAmerica – SBC Illinois ICAs appear to make only passing references to Section 271. The Cbeyond SBC Illinois ICA appears to have no such references. The Staff, however, reserves comment on this issue until it reviews the parties' Initial Briefs in this proceeding.

## **5. Violation of Section 13-514 / Knowingly Impeding Development Of Competition**

All of the complainants argue that SBC has, through the issuance of the Accessible Letters, knowingly impeded the development of competition. (See Attachment C.)

The Staff is unable to determine specifically how or why the complainants consider this very general allegation to be the case, but notes, again, that the complainants have the burden of proving that SBC has, through its Accessible Letters, knowingly impeded the development of competition.

**6. Violation Of Section 13-514(1) / Unreasonably Refusing Or Delaying Interconnection Or Collocation**

The complainants allege that SBC has unreasonably refused or delayed interconnection or collocation. (See Attachment C.) It is not clear how this could possibly be the case with respect to interconnection, as all of the complainants allege, in considerable detail, the existence of ICAs with SBC. Likewise, the Accessible Letters appear unrelated to collocation in any way the Staff can determine.

**7. Violation of Section 13-514(2) / Unreasonably Impairing Speed, Quality, Or Efficiency Of Services**

The complainants allege that SBC unreasonably impaired the speed, quality or efficiency of services used by them, in violation of Section 13-514(2). (See Attachment C.)

This appears to Staff to prohibit attempts to diminish the quality of services available to a competitor, rather than increase the price of such services. Assuming this reading to be correct, the Staff is of the opinion that SBC's

issuance of Accessible Letters stating that it would no longer offer UNE-P or unbundled local switching does not constitute a violation of this Section, since there are several methods whereby a CLEC might serve a customer as speedily, efficiently, and with service of equal quality, without UNE-P, such as resale, or the purchase of unbundled local switching from a third party. That these methods may not be “economically or competitively viable”, see, e.g., McLeod USA Ex. 1.0 at 7, is not relevant to their speed, efficiency (in a technical sense), or quality.

At least one complainant asserts that it is “axiomatic” that such a violation would lie, see Global TelData Ex. 1.0 at 9, but this assertion is offered in lieu of actual evidence of any sort. The Staff does not consider this to rise to the level of meeting the burden of proof.

This analysis, however, may not apply to high capacity loops, as available alternatives appear to be potentially less readily available or of diminished quality. The Staff notes that McLeodUSA offers evidence that: “a few of the wire centers listed by SBC as no longer meeting the *TRRO* impairment criteria in fact do meet those criteria...[.]” McLeodUSA Ex. 1.0 at 6-7. It appears possible, therefore, that McLeodUSA may be able to articulate a cognizable claim with respect to this issue, although it is not clear to the Staff at this time that McLeod has done so.

The XO complainants assert that they would likewise be denied service of equal quality, efficiency or speed were SBC to deny them access to high capacity loops. XO / Allegiance Ex. 1.0 at 10. This, however, is little more than a

conclusory allegation, which does not state in any detail how such impairment might exist.

**7. Violation of Section 13-514(4) / Unreasonably Delaying Access To Network For Carrier Providing Novel Or Specialized Products. Section 13-514(1-2), (4-6), (8), (11), and (12)**

This allegation is made by the XO complainants and McLeodUSA. (See Attachment C.) The XO complainants do not, however, state what, if any, “novel or specialized products” they supply (other than the statement that Allegiance supplies some undifferentiated sort of “data services”, XO Allegiance Ex. 1.0 at 2), nor do they suggest how SBC has impaired their ability to provide them. See, *generally*, XO / Allegiance Ex. 1.0. Accordingly, it does not appear to the Staff that XO has met, or indeed made any attempt to meet, its burden here.

McLeod describes the services it provides in somewhat more detail. See, *generally*, McLeodUSA Ex. 1.0. It appears possible, therefore, that McLeodUSA may be able to articulate a cognizable claim with respect to this issue, although it is not clear to the Staff at this time that McLeod has done so.

**8. Violation of Section 13-514(5) / Refusing Or Delaying Access**

The complainants allege that, by issuing the Accessible Letters, SBC is guilty of unreasonably refusing or delaying access by any person to them. (See Attachment C.)

This statutory enactment is not, in Staff’s opinion, a triumph of legislative drafting. However, Staff is of the opinion that the conduct this provision intends to

proscribe is that of unreasonably preventing customers from switching from one carrier to another. Assuming this to be a correct reading, it is not clear how SBC's conduct here could be seen in any light to violate this subsection.

### **9. Violation of Section 13-514(6) / Substantial Adverse Effect On Ability To Serve**

The complainants allege that, by issuing the Accessible Letters, SBC has unreasonably acted or failed to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers. (See Attachment C.)

As noted above, the complainants other than Global TelData, McLeod and Cbeyond are in a difficult position in light of the fact that their ICAs (1) permit immediate implementation of the *TRRO*; and (2) do not appear to permit them to invoke state law to obtain the UNEs in question. While it might be argued that the issuance of the Accessible Letters did indeed adversely affect these carriers' ability to serve their customers, it is not clear that this was unreasonable, inasmuch as invocation of a contractual right seems to the Staff to be eminently reasonable, provided that the right is to a lawful purpose.<sup>5</sup>

Global TelData and Cbeyond have a cognizable claim here, although, as noted above, the violation is *de minimus*.

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<sup>5</sup> It is well established that contracts requiring the performance of an act that violates a statute are void and unenforceable, where a penalty attaches to the violation of the statute. Broverman v. City of Taylorville, 64 Ill. App. 3d 522, 526-27 (5<sup>th</sup> Dist. 1978). The same is true of contracts that violate public policy. Marvin N. Benn and Assoc. v. Nelsen Steel & Wire, Inc., 107 Ill. App. 2d 442, 446 (1<sup>st</sup> Dist. 1982). The best evidence of what constitutes public policy is, perhaps obviously, a statute. Id. Here, no such violation can be alleged, to the Staff's knowledge.

## **10. Violation of Section 13-514(10) / Failure To Make Network Elements Available**

The complainants allege that SBC, by issuing the Accessible Letters, has unreasonably failed to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to them in a manner consistent with the Commission's or Federal Communications Commission's orders or rules requiring such offerings. (See Attachment C.)

Regarding this subsection, the Staff begins from the premise that it is only “unreasonable” for a carrier to fail or refuse to offer network elements to another carrier if one is obliged to offer that carrier the requested network element or elements in the first place. Thus, if an ICA specifically does not require the provision of an element, or – as here, in the case of several of the complainants – absolutely permits immediate implementation of regulatory changes determining that elements need no longer be offered, it is not unreasonable to decline to offer such an element. It would, likewise, not be unreasonable to fail to offer elements available pursuant to tariff if the requesting carrier had no right to take under a tariff.

Thus, it appears that Global TelData and Cbeyond have a cognizable claim here, although, as noted above, the violation is *de minimus*.

## **VII. CONCLUSION**

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

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