STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	)	
	)	
Filing to implement tariff provisions	)	Docket No. 01-0614
related to Section 13-801 of the Public	)	
Utilities Act	)	

SBC ILLINOIS' OPENING COMMENTS ON REMAND (PHASE II)

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INTRODUCTION

The Commission requested remand from the federal district court and reopened this docket to consider changes in federal law since its initial Order in this docket, which was entered June 11, 2002, and the impact of those developments on SBC Illinois' wholesale obligations. This Phase II of the proceeding centers on the February 4, 2005 *TRO Remand Order*, in which the FCC issued new rules with respect to unbundled access for (i) local switching used to serve "mass market" customers, (ii) enterprise market loops (DS1, DS3, and dark fiber), and (iii) dedicated transport (DS1, DS3, and dark fiber). The ALJ had stayed remand proceedings on these three network element types pending the issuance of the FCC rules.

Those FCC rules are definitive and emphatic. Consider, for starters, local switching and the UNE Platform ("UNE-P"), a combination that includes local switching. "Requesting carriers *may not obtain* new local switching as an unbundled network element" (47 C.F.R. § 51.319(d)(2)(iii)) at all, whether it be used to serve mass market *or* enterprise customers. In the FCC's words, its rule establishes a "nationwide bar" on unbundled switching and the UNE-P. *TRO Remand Order* ¶ 204. The FCC found that such a bar was necessary because the "UNE-P has been a disincentive to competitive LECs' infrastructure investment" (*id*. ¶ 218) and because "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives" (*id*. ¶ 210). Further unbundling, the FCC concluded, "would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition." *Id*. ¶ 218. The FCC has similarly ruled that "[r]equesting carriers may not obtain" dark fiber loops "in any instance," and "may not obtain" DS1 or DS3 loops or dedicated transport in or between certain wire centers. Section I *infra*.

As a result, the Commission's choice here is stark: should it construe section 13-801 to honor the FCC's "nationwide bar," protect investment and foster facilities-based competition, or

should it instead try to destroy the "nationwide bar" and impose unbundling requirements that the FCC has found to be harmful and destructive? It is quite clear where the latter course would lead: a return trip to federal court to enforce the Supremacy Clause of the U.S. Constitution and resolve the conflict in favor of federal law. As the FCC has held, its "prerogatives with regard to local competition supersede state jurisdiction over these matters" and any "[s]tate requirements that impose on [incumbents] a requirement to unbundle" where the FCC has rejected unbundling "are inconsistent with and substantially prevent the implementation of the Act and the Commission's federal unbundling rules and policies." *In re Bellsouth Telecomms., Inc.*, No. WC 03-251, 2005 WL 704118, ¶¶ 1, 22, 27 (FCC March 25, 2005) ("*FCC Preemption Ruling*"). In reaching that conclusion, the FCC reminded that it had "determined *not to permit* competing carriers unbundled access to mass market circuit switching, the critical element defining UNE-P" and admonished that state-imposed requirements in the platform context "will soon become moot." *Id*. ¶ 18.

In this proceeding, SBC Illinois does not ask the Commission to decide the preemption question; that issue is before the federal district court. Rather, the issue here is whether the General Assembly permitted the Commission to act consistently with federal law – or whether it has forced the Commission to flout federal law. Below, SBC Illinois shows why the first course – consistency rather than disobedience – is compelled not only by federal law but also by section 13-801. Section 13-801(a) expressly states the overriding command that the statutory requirements (including those set forth in subsection (d)) must be "*not* inconsistent with" the federal Act's local competition provisions, and "*not* preempted by" the FCC's orders. To confirm that mandate, subsection (d) repeatedly uses the federal term-of-art "unbundled" and tracks FCC rules. Further, even if the statute were *silent*, the rules of statutory construction

compel the Commission to construe statutes consistently with federal law unless the legislature expressly says otherwise. Here, the legislature has *not* commanded the Commission to flout the FCC's orders. The statute can – and therefore must – be construed in accordance with federal law. Section II *infra*.

SBC Illinois recognizes that the Commission's Phase I Order nonetheless construed section 13-801 to require unbundling of all "network elements" even where contrary to federal law. As SBC Illinois shows below (and as SBC Illinois demonstrated in its Exceptions to the Phase I Order when it was proposed) that construction is not only unnecessary but also affirmatively contrary to the plain language of section 13-801 (which states that its requirements are *not* preempted by federal law) and the Commission's duty to construe statutes to reach a lawful, sustainable result where possible. Moreover, the Phase I Order did not have the benefit of the FCC's categorical pronouncements on federal law, national policy, and the limitations on state authority in the *TRO Remand Order* and *FCC Preemption Ruling*. Those FCC holdings give the Commission one last chance to turn aside from its unnecessary confrontation with federal law. SBC Illinois urges the Commission to take advantage of that opportunity.

As in Phase I, SBC Illinois provides a brief "Background" summarizing the development of federal law, focusing on the area of unbundled access. Section I of the ensuing Discussion provides a detailed description of the development and current state of federal unbundling law on an element-by-element basis. Section II demonstrates that state law permits – and indeed requires – that the Commission revise its interpretation of Section 13-801 to comport with federal law. Section III addresses the Commission's interim order for Phase I. Section IV applies the principles discussed in the preceding Sections to the specific federal requirements discussed in Section I.

BACKGROUND

Section 251(c)(3) of the federal Telecommunications Act of 1996 ("1996 Act" or "Act") requires an incumbent LEC to provide competitors with access to certain "network elements" – pieces of the incumbent's network – on an "unbundled basis" to enable them to provide competing telecommunications services. 47 U.S.C. § 251(c)(3). It mandates that "the Commission shall consider, at a minimum, whether (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).[1] These requirements are often referred to as the "necessary" and "impair" standards.

The FCC's first two attempts at unbundling rules required incumbent LECs to provide unbundled access (with some limited exceptions) to the network elements at issue here: mass market switching, DS1/DS3/dark fiber loops, and DS1/DS3/dark fiber dedicated transport. Each time, those rules were vacated – 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 Act. As the D.C. Circuit explained, the unbundling analysis 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." *Id*.

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[1] All emphases in quoted material have been added unless otherwise indicated.

The FCC issued the *Triennial Review Order* ("*TRO*") in August 2003.[2] Among other network elements, the *TRO* and its accompanying rules addressed (1) circuit switching, (2) "high-capacity" loops (loops with transmission capacities of "DS1" or above); and (3) "dedicated transport." The detailed rules for these and other elements are described below. At a high level, the FCC made a nationwide finding of *non*-impairment for each element in some situations, including: (1) switching for "enterprise" customers (customers with lines equal to or above DS1, or with a large number of DS0 lines), and (2) high-capacity loops and dedicated transport at capacities of "OCn" or above. In other situations, the FCC found evidence that competing carriers were not impaired in at least some areas, but decided that the evidence before it was not specific enough to determine precisely where those areas were. For those situations – namely, (i) "mass market switching" for customers with one or a small number of DS0 lines, and (ii) loops and dedicated transport at the DS1, DS3, and dark fiber capacities – the FCC made a provisional nationwide finding of impairment and attempted to sub-delegate the task of assessing impairment at a more granular level to the states.

Once again, the D.C. Circuit vacated the FCC's attempt to require unbundling for those network elements. *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). The D.C. Circuit held that the FCC's attempted delegation of authority to the state commissions was unlawful and vacated that delegation, with no remand back to the FCC: "We therefore vacate, as an unlawful subdelegation of the [FCC's] § 251(d)(2) responsibilities, those portions of the [*TRO*] that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements." *USTA II*, 359 F.3d at 568. Further,

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[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).

the Court vacated as unlawful and remanded to the FCC the FCC's national findings of "impairment," holding that those findings could not stand on their own. *Id.* at 570-71, 574-75.

The FCC issued its order on remand from the D.C. Circuit in February 2005. *TRO Remand Order*, 2005 WL 289015 (FCC Feb. 4, 2005).[3] In that order, the FCC 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 accompanying rule unconditionally states that "[r]equesting carriers may not obtain new local switching as an unbundled network element." 47 C.F.R. § 51.319(d)(2)(iii) (App. B to *TRO Remand Order*). In the FCC's words, its rule establishes a "nationwide bar" on unbundled switching and the UNE Platform ("UNE-P"), a combination of unbundled network elements that consists of switching, a loop, and shared transport. *TRO Remand Order* ¶ 204.

The FCC adopted similar bars for certain high-capacity loops and dedicated transport arrangements and for dark fiber. The details of these FCC rules are described below. In broad terms, the FCC held there was no impairment and thus no unbundling for all dark fiber loops. The FCC also held there was no impairment for DS1 and DS3 loops and transport, and dark fiber transport, in two contexts: (i) in or between wire centers that meet certain FCC criteria (based on the number of business lines, and the number of competing carriers that have extended their fiber networks into collocation arrangements at incumbent central offices), and (ii) at quantities that exceed certain volume caps.

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[3] Certain aspects of the FCC's rules are the subject of appeals by incumbent and competing LECs, which have been consolidated before the D.C. Circuit. The purpose of this Phase of the proceeding is, of course, to construe *state* law in light of the *TRO Remand Order*. Accordingly, in filing these comments SBC Illinois is not waiving any federal challenges it may have to the FCC's order and implementing rules.

DISCUSSION

I. CHANGES IN FEDERAL LAW

A. Mass Market Switching

As noted above, the *TRO* distinguished between local switching used to serve "enterprise" customers and switching used to serve "mass market" customers. For enterprise switching, the FCC "establish[ed] a national finding that competitors are not impaired with respect to DS1 enterprise customers that are served using loops at the DS1 capacity and above." *TRO* ¶ 451; see also 47 C.F.R. § 51.319(d)(3) (rule providing that "[a]n 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 DS1 capacity and above loops" absent FCC waiver).

For the mass market, the FCC recognized that competing carriers had installed a significant number of their own switches, particularly in dense metropolitan areas. *TRO* ¶ 436. Accordingly, the FCC acknowledged that competing carriers "may not be impaired without access to unbundled switching in * * * specific markets." *Id*. ¶ 473. However, the *TRO* did not make a final determination of impairment or non-impairment for any particular geographic area. Nor did it define the boundaries of the geographic markets to be reviewed. Rather, it made a provisional nationwide finding of "impairment," and attempted to delegate the remaining tasks – the initial "market definition" and the ultimate assessment of impairment for each market – to the states. *TRO* ¶¶ 458-463.

In *USTA II*, the D.C. Circuit held that the FCC's attempted delegation of 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. Further, the Court vacated as unlawful and remanded to the FCC the

FCC's provisional finding of mass market switching "impairment," holding that such a finding could not stand on its own. *Id.* at 570-71.

On remand, the FCC finally completed a lawful impairment analysis and 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) just as it had previously held that competing carriers are not entitled to unbundled enterprise switching. As a result, there is no longer a different result for enterprise and mass market switching: under federal law, there is no unbundled access for either. The FCC rule unconditionally states that "[r]equesting carriers *may not obtain* new local switching as an unbundled network element." 47 C.F.R. § 51.319(d)(2)(iii) (App. B to *TRO Remand Order*).

The FCC reached this conclusion for two reasons. First, it 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 that evidence, 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.

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 Platform" or "UNE-P" – a combination of network elements that includes local switching, shared transport, and a local loop

– 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.

The FCC recognized "the need for prompt action" to implement its directives. *Id*. ¶ 235. Thus, it stated, "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*.

The FCC's rules include a transition plan for the embedded base of unbundled switching and UNE-P arrangements that were obtained prior to the March 11, 2005 effective date of the *TRO Remand Order*. The Commission is addressing the implementation of the federal transition plan in Docket No. 05-0442. The present Docket, however, is concerned with the scope of unbundling going forward. On that score, federal law emphatically commands: "Requesting carriers *may not obtain* new local switching as an unbundled network element." 47 C.F.R. § 51.319(d)(2)(iii). Thus, the FCC expressly limited the 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.").

As a result of the FCC's "nationwide bar" on unbundled switching, SBC Illinois' obligations, as reflected in its current wholesale tariffs, deviate from the requirements of federal law. SBC Illinois' tariffs currently require SBC Illinois to provide unbundled access to

switching (and to combinations that include switching, including the UNE-P). *See* Tariff 20, Part 19, §§ 3, 15, & 21. The FCC, however, has placed a "nationwide bar on such unbundling," and its rule states that requesting carriers "may not obtain" unbundled local switching.

B. High-Capacity Loops and Dedicated Transport

The *TRO*'s analysis of DS1, DS3, and dark fiber loops and transport was analogous to its approach to mass market switching. As with switching, the FCC recognized that there has been substantial competitive deployment of high-capacity transport and loop facilities – a result presaged by *USTA I*, which recognized that fiber transport "is significantly deployed on a competitive basis." 290 F.3d at 422. With respect to transport, the *TRO* acknowledged that "competing carriers have deployed significant amounts of fiber transport facilities to serve local markets * * * [and] much of this deployment has occurred in more densely populated areas." *TRO* ¶ 378. Competitors had deployed over 184,000 route miles of fiber nationwide, and in the 25 largest metropolitan areas, carriers had built transport facilities providing competitive access to 61% of the ILECs' lines. *Id*. Further, the FCC recognized that "fiber transport facilities have been deployed by firms other than incumbent LECs with the intention of solely or partially providing wholesale transport capacity as well as dark fiber transport to other carriers." *Id*. ¶ 379. Hence, the FCC concluded that "particularly in dense urban areas, alternative transport facilities are readily available." *Id*. ¶ 387. Similarly, with respect to high-capacity loops, the FCC recognized that "competitive LECs have deployed fiber that enables them to reach customers entirely over their own loop facilities" and "competitors have built fiber loops to buildings that carry a significant portion of the traffic in certain [Metropolitan Statistical Areas]." *TRO* ¶ 298.

The FCC defined the "market" for assessing transport and loops to be a specific point-to-point transmission route: either between incumbent LEC switches (for transport) or between a

switch and a customer location (for loops). While recognizing the extent of competitive deployment, the FCC decided that the record before it did not sufficiently reveal the locations of such deployment to identify specific markets in which CLECs were or were not impaired. *Id*. ¶¶ 314 (dark fiber loops), 321-22 (DS3 loops), 327 (DS1 loops), 384 (dark fiber transport), 386-87 (DS3 transport), 392 (DS1 transport). Thus, as with mass market switching, the FCC made a provisional finding of impairment nationwide, and attempted to enlist the states in applying the impairment analysis at a more granular level. *Id*. ¶¶ 202 (loops), 359 (transport).

On appeal, the FCC's approach for high-capacity loops and transport met the same fate as its analogous (and equally unlawful) approach to mass market switching. As with switching, the D.C. Circuit held that "the Commission may not delegate its § 251(d) authority to state commissions." *USTA II*, 359 F.3d at 574. Moreover, the court vacated the FCC's provisional finding of impairment, holding that "as with mass market switching, the Order itself suggests that the Commission doubts a national impairment finding is justified on this record." *Id*. Further, the court rejected the FCC's market definition, explaining that the FCC's attempt to define the market as a specific point-to-point transmission route improperly "ignore[d] facilities deployment along similar routes." *Id*. at 575.[4]

On remand, the FCC assessed impairment for DS1, DS3, and dark fiber loops and dedicated transport. For loops, the FCC considered deployment at the "wire center" level, as opposed to its previous building-by-building test. *TRO Remand Order* ¶ 155.[5] For dedicated

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[4] Competing LECs have contended that the D.C. Circuit vacated only the FCC's rules on dedicated transport, without even addressing the analogous rules on high-capacity loops (even those rules had also been appealed). Any dispute on that point is, however, academic, as the FCC has issued new rules for high-capacity loops.

[5] The FCC defined a "wire center" as "any incumbent LEC switching office that terminates and aggregates loop facilities." *TRO Remand Order* ¶ 87 n.251. As discussed below, the FCC's rules for dedicated transport also consider incumbent LEC switching offices that have no line-

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transport, the FCC focused on routes between the incumbent's wire centers. *Id*. ¶ 79. The results of that assessment are described below.

1. Loops

As noted above, the *TRO* recognized that competing LECs have deployed a significant amount of high-capacity fiber loops, particularly in certain metropolitan areas, but did not assess impairment in any particular area. *TRO* ¶ 298. On remand, the FCC again recognized that self-deployment of loops is possible and in many cases has already occurred, particularly in dense urban areas. As the FCC acknowledged, "economies of scale in deployment can accrue when carriers construct loops to locations that are geographically close to the transport network," especially "in urban areas where the concentration of potential customer locations – and thus of revenue opportunities – is very dense." *TRO Remand Order* ¶ 154.

a. Dark Fiber Loops

"With respect to dark fiber loops," the FCC "eliminate[d] unbundling on a nationwide basis" on the ground "that requesting carriers are not impaired without access to unbundled dark fiber loops in any instance." *TRO Remand Order* ¶¶ 5, 166. The FCC found that any potential "barriers to entry relating to the deployment of dark fiber loops can be overcome through self-deployment of lit facilities at the OCn level" at which the FCC had previously found non-impairment. *Id*. ¶ 182. "Carriers seeking to use dark fiber – which is generally lit at capacities of two DS3s or above – are therefore likely able to self-deploy." *Id*. And to the extent a carrier seeks loops at capacities below OCn – such as DS1 or a single DS3 – "such facilities remain available to requesting carriers" either through self-deployment or competing wholesalers (in

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side function, such as "tandem" facilities, and incumbent LEC switches that terminate loops that are "reverse collocated" in non-incumbent LEC collocation hotels. *Id*.

those wire centers where the FCC deemed such alternatives to be feasible) or "on an unbundled basis" in wire centers where the FCC found impairment. *Id*. ¶ 184.

Further, the FCC held "that a bar on dark fiber loop unbundling is reasonable to ensure appropriate deployment incentives." *Id*. The FCC recognized that "an overly broad dark fiber unbundling regime would undermine deployment, pushing competitors to use incumbent-owned fiber rather than building their own alternatives where it is economic to do so." *Id*. Accordingly, the FCC's rule states that "[r]equesting carriers may not obtain new dark fiber loops as unbundled network elements." 47 C.F.R. § 51.319(a)(6)(ii).

b. DS3 Loops

Geographic Limitations. For DS3 loops, the FCC determined "that carriers are able to self-deploy or to use competitive DS3 loop facilities in large metropolitan areas where buildings are either directly connected to a competitive fiber ring, or likely would require the construction of only a short lateral from a nearby splice point where buildings are either directly connected to the fiber rings, or lie in narrow geographic corridors close to these rings." *TRO Remand Order* ¶ 154. Thus, the FCC deemed that competing carriers are not impaired in dense wire centers, such as urban areas, with high-capacity customers. In an attempt to identify these areas of non-impairment (and to address the D.C. Circuit's holding that an impairment analysis must address not only the specific points at which deployment has already occurred, but also the possibility of future deployment at similar locations), the FCC rule employs two objective criteria:

(1) the number of business lines in the wire center (which corresponds to the number and density of potential high-capacity customers) and

(2) the number of "fiber-based collocators": competing carriers that have obtained collocation space at the incumbent's central office and then extended their fiber networks into that space.[6]

The FCC chose these criteria because they "correlate to the evidence of actual DS3 loop deployment in our record" and "indicate when a particular building is likely to fall within the central business district, and thus close to competitive fiber rings" where competitors can and typically do construct stand-alone DS3 loops. *TRO Remand Order* ¶ 167.

The FCC's non-impairment threshold for DS3 loops "does not unbundle DS3 loops in any building served by a wire center with at least 38,000 business lines and four fiber-based collocators" and "denies unbundling of DS3 loops" in wire centers that meet or exceed both objective criteria. *Id*. ¶ 174. The FCC "selected these thresholds because we find they indicate fiber deployment and revenue opportunities sufficient to render competitive deployment of DS3 loops economic." *Id*. The FCC's rule categorically states that "[o]nce a wire center exceeds both of these thresholds, *no further DS3 loop unbundling* will be required in that wire center." 47 C.F.R. § 51.319(a)(5)(i).

Limitations On Quantity. Separate and apart from these geographic limitations on DS3 loops, the FCC set a numeric cap on the number of DS3 loops that a given CLEC could acquire at a building even in a wire center that qualifies for unbundling. Under the FCC's rule, a "requesting telecommunications carrier may obtain a maximum of a single unbundled DS3 loop to any single building in which DS3 loops are available as unbundled loops." *Id*. § 51.319(a)(5)(ii). The FCC chose to "limit the number of unbundled DS3s that a competitive

[6] The FCC "define[d] fiber-based collocation as a competitive carrier collocation arrangement, with active power supply, that has a non-incumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center." *TRO Remand Order* ¶ 102.

LEC can obtain at each building to a single DS3 to encourage facilities-based deployment when such competitive deployment is economic." *TRO Remand Order* ¶ 177. This cap replaces the previous two-DS3 cap that had been established in the *TRO*.

c. DS1 Loops

Geographic Limitations. For lower-capacity customers at the DS1 level, the FCC determined that carriers could economically deploy their own facilities (or use facilities obtained from a competing wholesale provider) "in multi-tenant buildings because the incremental costs of providing channelized capacity over a higher-capacity fiber loops are minimal when one or more other customers in a building are already served by competitive fiber of sufficient capacity, or the likelihood of capturing customers at higher capacity justifies deployment of facilities that can be channelized to the DS1 level." *Id*. ¶ 154. As with DS3 loops, the FCC set numeric non-impairment thresholds based on the number of business lines and fiber-based collocators in a given wire center, to identify the dense business districts where DS1 loops can be deployed. The only difference is that the DS1 thresholds are somewhat higher. Specifically, the FCC held there is "no impairment for DS1-capacity loops * * * in those wire center service areas with 60,000 business lines and four fiber-based collocators." *Id*. ¶ 179. The FCC explained that "[t]hese wire centers comprise a select group likely to be characterized by the most competitive deployment and the greatest revenue opportunities." *Id*. As with DS3 loops, "[o]nce a wire center exceeds both of these thresholds, no further DS1 loop unbundling will be required in that wire center." 47 C.F.R. § 51.319(a)(4)(i).

Limitations On Quantity. "As with DS3 loops," the FCC "establish[ed] a cap of ten DS1 loops that each carrier may obtain to a building." *TRO Remand Order* ¶ 182. The FCC based this cap on evidence showing "a competitor serving a building at the ten DS1 capacity level or higher would find it economic to purchase a single DS3 loop" (either as a UNE or from a

competing provider) "rather than purchasing individual DS1 loops." *Id*. "We therefore do not believe," the FCC concluded, "that it would be appropriate to allow requesting carriers to obtain unbundled access to that many DS1 loops." *Id*.

d. Summary

As with unbundled switching, the *TRO Remand Order* resulted in significant changes to the federal rules on unbundling for high-capacity loops. There are several areas in which SBC Illinois' current obligations, as reflected in its tariffs, deviate from federal law:

(1) SBC Illinois' current tariff requires unbundled dark fiber loops. *See* Tariff 20, Part 19 § 18. The FCC has established a "bar on dark fiber loop unbundling" (*TRO Remand Order* ¶ 184) under which "[r]equesting carriers may not obtain new dark fiber loops as unbundled network elements" (47 C.F.R. § 51.319(a)(6)(ii)).

(2) SBC Illinois' current tariff includes unbundled access to DS1 and DS3 loops without regard to the geographic area in which they are located. *See* Tariff 20, Part 19 § 12 (transport); see also *id*. § 20 (EELs). Under the *TRO*, however, there is "no further [DS1 or DS3] loop unbundling" in wire centers that meet or exceed the FCC's objective thresholds based on the number of business lines and fiber-based collocators. 47 C.F.R. § 51.319(a)(4)(i), (5)(i).

(3) Under the current tariff, SBC Illinois offers DS1 and DS3 loops without a numeric limitation. *See* Tariff 20, Part 19, § 2 (loops); see also *id*. § 20 (EELs). By contrast, the *TRO Remand Order* limits the amount of DS1 and DS3 loops even if and when unbundling is required: a requesting carrier may not obtain more than one unbundled DS3 loop, or more than 10 DS1 loops, at any single customer location.

2. Dedicated Transport

Similar to the rules for DS1 and DS3 loops, the FCC's rules for dedicated transport define non-impairment based on two objective criteria: the number of business lines and the number of fiber-based collocators. The FCC established these criteria based on "evidence of actual deployment" to define routes "where "revenue opportunities are or could be sufficient to justify competitive LEC deployment" without need for unbundling. *TRO Remand Order* ¶ 87. It

reasoned that "[f]iber-based collocation * * * very clearly indicates the presence of competitive transport facilities in that wire center and signals that significant revenues are available from customers served by that wire center sufficient to justify the deployment of transport facilities." *Id*. ¶ 103. Similarly, the FCC explained that the number of business lines reveals "[w]ire centers that possess a high level of demand for telecommunications services" and that accordingly "are most likely to attract and support competing carrier transmission facilities that duplicate the incumbent LEC's network." *Id*.

While both the loop and transport tests employ the same criteria (and also use the same numeric thresholds) there are two differences between those tests. First, because the FCC defined the "market" for transport to be a route *between* wire centers (as opposed to the single wire center that serves as the market for loops), the test for non-impairment in the transport context considers *two* wire centers rather than one. Second, the numeric tests for transport are *dis*junctive rather than *con*junctive: that is, the wire centers at issue need only satisfy *one* objective threshold (business lines *or* collocators) for transport, not both as is the case with loops. *TRO Remand Order* ¶¶ 94, 168. This is due to the FCC's view that the deployment of loops occurs where there are revenue opportunities (which can be shown either by business lines or collocators) *and* the presence of fiber transport facilities or "rings" nearby (as shown by fiber-based collocation), while the deployment of the fiber transport facilities themselves depends only on the available revenue opportunities (which may be evidenced either by the number of business lines or the number of collocators). *Id*.

To provide a convenient shorthand for the non-impairment thresholds, the FCC's rules "classify all incumbent LEC wire centers into three tiers based on indicia of the potential revenues and suitability for competitive transport deployment." *Id*. ¶ 111. The three tiers are:

- **Tier 1.** "Tier 1 wire centers are those with the highest likelihood for actual and potential competitive deployment." *TRO Remand Order* ¶ 111. They are defined as those wire centers "with four or more fiber-based collocations or with 38,000 or more business lines" or "incumbent LEC switching locations that have no line-side facilities" (i.e. tandem offices). *Id*. ¶ 112. The latter category is included because "these locations * * * are points of traffic aggregation in the incumbent LECs' networks where competitive LECs are most able to access the revenues sufficient to justify transport deployment. *Id*.
- **Tier 2.** "Tier 2 wire centers," which "also show a very significant but lesser likelihood of actual and potential competitive deployment" are those "with three or more fiber-based collocations or with 24,000 or greater business lines." *Id*. ¶¶ 111, 118.
- **Tier 3** consists of all wire centers that do not fall into Tiers 1 or 2 above. *Id*. ¶ 123.

a. DS3 and Dark Fiber Transport

Geographic Limitations. The non-impairment tests for dark fiber and DS3 transport are identical. For DS3 transport, "requesting carriers are not impaired without access to unbundled DS3 transport on routes connecting wire centers where both of the wire centers are either Tier 1 or Tier 2 wire centers." *TRO Remand Order* ¶ 129. In other words, "incumbent LECs are obligated to provide unbundled DS3 transport" only where the applicable route "originates or terminates in any Tier 3 wire center." *Id*. As the FCC explained, "[t]he significant revenue opportunities at both ends of such routes make it highly likely that competing carriers have deployed or can deploy in an economic manner transport to link such wire centers." *Id*. ¶ 130. The applicable rule mandates that for those routes "[w]here incumbent LECs are not required to provide unbundled DS3 transport" pursuant to the FCC's thresholds, "requesting carriers may not obtain new DS3 transport as unbundled network elements." 47 C.F.R. § 51.319(e)(2)(iii)(C).

Likewise, the FCC held "that competing carriers are not impaired without access to unbundled dark fiber transport on routes connecting wire centers where both of the wire centers are classified as either a Tier 1 or Tier 2 wire center." *TRO Remand Order* ¶ 133. The FCC's reasoning was the same as for DS3 transport: "competitive transport facilities have been or can be deployed between such wire centers." *Id*.

Limitations On Quantity. The above-referenced geographic limits are designed to identify those wire centers where the volume of traffic and the associated revenue opportunities are significant enough to support self-deployment. The FCC recognized that a carrier might also find such volume and revenue opportunities in other geographic markets – as evidenced by the volume of unbundled transport it seeks. Accordingly, the FCC "establish[ed] a limitation of 12 DS3s per carrier for any route" as "a safeguard to limit access to a carrier that has attained a significant scale on such a route indicating that more than sufficient potential revenues exist to justify deployment." *Id*. ¶ 131; *see also* 47 C.F.R. § 51.319(e)(2)(iii)(B) (setting 12 DS3s as the "maximum" that a carrier "may obtain" on any route).

b. DS1 Transport

Geographic Limitations. For DS1 transport, the FCC held that "incumbent LECs * * * are not obligated to provide unbundled DS1 transport on routes connecting two Tier 1 wire centers." *Id*. ¶ 126. The FCC reached this conclusion because the "very significant competitive facilities presence or potential" between two Tier 1 offices makes it likely "that alternative transport services exist, or could exist, and will likely provide a wholesale alternative to the incumbent LEC's transport facilities." *Id*. ¶ 127. "Even in the absence of a wholesale alternative," the FCC found, "the presence of such a sufficient number of competitive facilities will protect the interests of end-users." *Id*.

Limitations On Quantity. On any route where DS1 transport is available (namely, where one or both wire centers falls into Tier 2 or 3) the FCC's rule sets a "maximum of ten unbundled DS1 dedicated transport circuits" that a requesting carrier may obtain. 47 C.F.R. § 51.319(3)(2)(ii)(B). The FCC based this evidence showing "that it is efficient for a carrier to aggregate traffic at approximately 10 DS1s * * * * such that it effectively could use a DS3 facility." *TRO Remand Order* If there is no impairment (and no unbundling) for DS3 transport facilities in that wire center, the carrier can deploy its own facilities or obtain them from an alternative wholesale provider. Alternatively, if federal law does permit unbundled DS3 dedicated transport on that route, it is more efficient for the carrier to obtain unbundled transport at that DS3 level rather than racking up an inefficiently large number of DS1s.

c. Summary

As with unbundled switching, the *TRO Remand Order* resulted in significant changes to the federal rules on unbundling for high-capacity loops. There are several areas in which SBC Illinois' current obligations, as reflected in its tariffs, deviate from federal law:

(1) SBC Illinois' current tariff includes unbundled access to DS1, DS3, and dark fiber transport without regard to the geographic area in which they are located. *See* Tariff 20, Part 19 § 12 (transport); see also *id*. § 20 (EELs). Under federal law, however, "requesting carriers may not obtain" unbundled DS1, DS3, or dark fiber transport on routes that meet or exceed the FCC's objective thresholds based on the number of business lines and fiber-based collocators at each end. 47 C.F.R. § 51.319(e)(2)(ii)(C), (iii)(C), (iv)(B).

(3) Under the current tariff, SBC Illinois offers DS1 and DS3 transport without a numeric limitation. *See* Tariff 20, Part 19, § 2 (loops), § 12 (transport); see also *id*. § 20 (EELs). By contrast, the *TRO Remand Order* limits the amount of DS1 and DS3 transport circuits even if and when unbundling is required: a requesting carrier may not obtain more than 12 unbundled DS3 circuits, or more than 10 DS1 circuits, on any single customer location. 47 C.F.R. § 51.319(e)(2)(ii)(B), (iii)(B).

C. Permissible And Impermissible Uses Of Unbundled Access

Section 251(c)(3) states that a requesting carrier may use unbundled access "for the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). In the *TRO*, the FCC interpreted the unbundling obligations of section 251(c)(3) to apply only where the requesting carrier used the UNE to provide "qualifying services," which the FCC defined as "those telecommunications services that competitors provide in direct competition with the incumbent LECs' core services." *TRO* ¶ 139. Under this approach, for example, a CLEC could not use an EEL solely to provide long-distance service. On appeal, the D.C. Circuit disagreed with the FCC's view that the statute contained such a limitation, but suggested that the FCC could support the same result if it found that CLECs were not impaired in the provision of a particular service. *USTA II*, 359 F.3d at 592. The court reasoned that "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic." *Id*. And it identified long-distance and wireless services – which the FCC had already and repeatedly deemed competitive – as obvious candidates for such a conclusion. *Id.*

On remand, the FCC took the D.C. Circuit's invitation and issued a rule that "prohibit[s] the use of UNEs exclusively for the provision of telecommunications services in the mobile wireless and long distance markets." *TRO Remand Order* ¶ 5; *see also id*. ¶ 29 (stating that new standards "prohibit requesting carriers from obtaining UNEs exclusively to provide service in end-user markets that already are competitive without UNEs" and "foreclose unbundling exclusively to provide services in markets that already are sufficiently competitive"). Following the court's lead, the FCC explained that "competition has evolved without [unbundled] access"

in those markets, and therefore "we are unable to justify imposing the costs of mandatory unbundling to promote competition." *Id*. ¶ 34.

The FCC's rule thus mandates that "[a] requesting telecommunications carrier may not access an unbundled network element for the exclusive provision of mobile wireless services or interexchange services." 47 U.S.C. § 51.309(b). The FCC's prohibition applies only to "the exclusive provision" of wireless and long-distance services. *Id*. Thus, to the extent that a requesting carrier uses a UNE to provide some other, permitted telecommunications service, it "may provide any telecommunications services," including long-distance and wireless service, over that same UNE. *Id*. § 51.309(d).

II. APPLICABLE CANONS OF STATUTORY CONSTRUCTION PERMIT – INDEED, REQUIRE – THE COMMISSION TO REVISE ITS PRIOR ORDER TO REFLECT AN INTERPRETATION OF SECTION 13-801 THAT COMPORTS WITH FEDERAL LAW.

Section I has set forth the FCC's most recent and conclusive statements of federal unbundling law. The question before the Commission is whether section 13-801 permits the Commission to act in a manner consistent with that federal law – or whether it compels the Commission to attempt to frustrate federal law. The purpose of this remand is, of course, to avoid the latter course if at all possible so that the Commission can fulfill its "obligation to ensure that its actions comport with federal law." ICC Reply at 4.. In requesting remand, the Commission itself recognized that the FCC has:

- "limited state commissions' ability to impose unbundling requirements that exceed the federal unbundling requirements under both delegated federal authority and independent state law";
- "indicated, however, that states do not have plenary authority under federal law to create, modify, or eliminate unbundling obligations"; and

- stated that exercise of state law authority "is limited to state unbundling actions that are consistent with the requirements of section 251 *and* do not 'substantially prevent' the implementation of the federal regime" set forth in the *TRO*.

ICC Mem. at 10 (citing, *TRO* ¶¶ 187-195); see also *id*. at 5.

The *TRO Remand Order* has made those limitations even more dramatic. In the FCC's own words, federal law has placed a "nationwide bar" on unbundled switching and the UNE-P. The *TRO Remand Order* is just as emphatic that requesting carriers "may not obtain" (i) dark fiber loops, (ii) DS1 and DS3 transport in or between wire centers that satisfy the FCC's criteria, or (iii) DS1 and DS3 loops or transport in quantities that exceed the FCC's caps. And it squarely "prohibit[s]" CLECs from using UNEs exclusively to provide long-distance or wireless service.

Plainly, a nationwide bar *is* "nationwide" – thereby covering Illinois – and a "bar" against contrary state action. And even though no further explication is necessary, the FCC provided it in its subsequent *FCC Preemption Ruling*. There, the FCC preempted state commission orders that failed to conform to federal rules and instead required an incumbent carrier (BellSouth) to unbundle a network element even though the FCC had held "that incumbent LECs have no obligation under the [FCC]'s rules to provide" unbundled access. *FCC Preemption Ruling*, ¶ 5. The network element at issue there was the "low frequency portion of a loop" ("LFPL"), the line that runs from a customer's home or business to the telephone company's switch. In the FCC's words, the state orders "require[d] an incumbent LEC to provide unbundled access to * * * an element that the [FCC] expressly declined to unbundle." *Id*. ¶ 25.

The FCC held "that the state rulings * * * are inconsistent with and substantially prevent the implementation of federal unbundling rules and policies developed by the [FCC]." *Id*. ¶ 17. As the FCC explained, the 1996 Act "establishes – and courts have confirmed – the primacy of federal authority with regard to several of the local competition provisions in the 1996 Act" so

that the FCC's "prerogatives with regard to local competition supersede state jurisdiction over these matters." *Id*. ¶ 22 (citing *AT&T Corp*., 525 U.S. at 379 n.6). "Accordingly, the reach of the states' authority with regard to local competition is governed principally by federal law." *Id*. ¶ 23. "State requirements that impose on [incumbents] a requirement to unbundle the LFPL do exactly what the [FCC] expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B)." *Id*. ¶ 27.

In reaching that decision, the FCC applied settled principles of federal preemption. The FCC reasoned that "section 251(d)(3) of the Act independently establishes a standard very similar to the judicial conflict preemption doctrine." *Id*. ¶ 19. Further, the FCC recognized that "the Supreme Court has repeatedly recognized that federal agencies have very broad conflict preemption authority, regardless of whether there is an express preemption provision in the statute." *Id*.

Perhaps even more tellingly for purposes of the present Phase of the proceedings, the FCC also found it "[s]ignificant" that "the state decisions we address in this Order arise primarily or exclusively in the context of competing carriers" using the "UNE Platform" or "UNE-P," the combination of network elements at issue here. *Id*. ¶ 18. The FCC referenced its *TRO Remand Order*, in which it "determined *not to permit* competing carriers unbundled access to mass market circuit switching, the critical element defining UNE-P." *Id*. "Therefore," the FCC admonished, "many of the questions resolved here will soon become moot" (*id*.) because the FCC has placed a "nationwide bar" on unbundled switching and UNE-P arrangements, and has established a 12-month transition plan to phase out UNE-P arrangements that were provided before the FCC's March 11, 2005 bar date (*id*. n.53). Thus, the FCC recognized that state

requirements in the UNE-P context, like the 2002 order in this docket, are likewise subject to the nationwide bar.

SBC Illinois' preemption challenge to the 2002 order is now before the federal district court. Given the emphatic nature of the FCC's nationwide bar, it is not surprising that the court has already stated that the likelihood of success on the merits of the preemption issue favors SBC Illinois. SBC Illinois has accordingly filed a motion for partial summary judgment, challenging the 2002 order as it pertains to unbundled switching and the UNE-P.

Of course, SBC Illinois does not ask this Commission to decide the preemption question. The Commission has made clear that it will not adjudicate challenges to the constitutionality of Illinois statutes, and the preemption issue is already before the federal district court. Rather, the question for the Commission in this Phase of the proceedings is whether the Illinois General Assembly permitted the Commission to act consistently with federal law – or whether it has compelled a pointless conflict that must inevitably be won by federal law. The answer comes from section 13-801(a), which directs the Commission to avoid actions that would be "inconsistent with" the local competition provisions of the 1996 Act or "preempted by orders of the [FCC]."

Regrettably, the Commission's 2002 Order did *not* make every effort to comply with that instruction or to construe section 13-801 to avoid clashing with then-existing federal law. To the contrary, in many instances where the statute was susceptible to more than one construction, the Order adopted a construction that creates the very constitutional doubts that this Commission has a duty to avoid. For example, while the 1996 Act and FCC regulations allow competitors to lease certain elements of SBC Illinois' telephone network only if the competitors ability to compete would be "impaired" without access to such elements (see 47 U.S.C. §§ 251(c)(3),

(d)(2); *TRO* ¶ 234), the Order construed section 13-801(d)(4) of the Illinois Act to require SBC Illinois to provide "a network elements platform consisting solely of combined network elements of the incumbent local exchange carrier to provide end to end telecommunications service" *without regard to* whether those network elements satisfy the federal "impairment" standard. Order ¶¶ 75-76. In this and other respects, the ICC construed the Illinois Act to relegate federal unbundling law "to the scrap heap of time." *Id*. ¶ 75.

In reconsidering its prior Order in light of the *TRO Remand Order*, SBC Illinois respectfully urges the Commission to faithfully discharge its obligation to construe section 13-801 in a fashion that avoids placing state unbundling obligations in tension with federal law – as would occur if the Commission were to impose a state unbundling obligation that deviates from the bars erected by the FCC. SBC Illinois also submits that application of several other long established principles of statutory construction should lead the Commission to reinterpret various aspects of its prior Order.

A. Section 13-801 Expressly Mandates That Its Requirements Be Consistent With Federal Law And Not Preempted By FCC Orders.

Why should the Commission construe section 13-801 in a manner that upholds the FCC's nationwide bars? The first reason is that the General Assembly expressly instructed the Commission to do so. Section 13-801(a) states that the statutory obligations must be "*not* inconsistent with" the local competition provisions of the 1996 Act and "*not* preempted by orders of the [FCC]." The *FCC Preemption Ruling* (¶ 17) makes clear that state UNE-P requirements *would* be inconsistent with the Act and preempted by the FCC's orders because they are inconsistent with and substantially prevent the implementation of the FCC's unbundling rules and policies. Therefore, such requirements are also inconsistent with the express mandate of section 13-801(a).

Section 13-801(a) expressly references "section 261(c) of the Telecommunications Act of 1996," which directs in turn that state requirements must not be "inconsistent with this part or the [FCC]'s regulations to implement this part" (47 U.S.C. § 261(c)). The "part" referenced in section 261(c) is the Act's provisions on local competition, which begin with section 251 – the statute that includes the "necessary" and "impair" requirements (section 251(d)(2)). Thus, the FCC's "regulations to implement this part" include the *TRO Remand Order*.[7] Indeed, the *TRO* (¶ 192) cited the "general restraints on state actions found in sections 261(b) and (c) of the Act" – the same provisions incorporated by the General Assembly in section 13-801(a) – to support its conclusion that states are *not* free to "impose any unbundling framework they deem proper under state law, without regard to the federal regime." That is the very command the Commission promised to heed on remand.

Driving the point home, section 13-801 repeatedly references the federal term of art "unbundled," references the Commission itself has found to incorporate the limiting standard of impairment that goes along with that term. Even the Commission's initial Order in this docket recognized that subsections (d)(1) and (d)(3) reference "unbundled" network elements, thereby incorporating federal law. The Commission reiterated that holding in the arbitration between AT&T and SBC Illinois in 2003. There, it explained that "UNEs are those network elements that the FCC or the Commission has ordered ILECs to 'unbundle' consistent with Section 251(c)(3) of TA96" – which in turn references the impairment standard of section 251(d)(2). Aug. 24, 2003 Arbitration Decision, Docket No. 03-0239, at 41. The Commission recognized that

[7] The federal courts have rigorously enforced section 261(c)'s mandate. *Wisconsin Bell*, 340 F.3d at 443; *Michigan Bell*, No. 04-60128 (SBC Phase I Exceptions Br. Attach. D), at 13 (under section 261(c), state commission may act "only if its action is not contrary to federal law"; thus, state requirements that "are at odds" with federal unbundling law are invalid).

"unbundled" network elements are a term of art rooted in section 251, and held that conclusion to be "consistent with Section 13-801 of the Act." *Id*.

Moreover, sections 13-801(d)(1)-(3) track almost verbatim the federal rules regarding UNEs and UNE combinations, as illustrated by the table below:

FCC Rule 315	Section 13-801(d)
(a): "An incumbent LEC shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine such network elements in order to provide a telecommunications service." 47 C.F.R. 51.315(a)	(d)(1): "An incumbent local exchange carrier shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine those network elements to provide a telecommunications service."
(b): "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. 51.315(b)	(d)(2): "An incumbent local exchange carrier shall not separate network elements that are currently combined, except at the explicit direction of the requesting carrier."
(c): "Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network [subject to certain conditions]." 47 C.F.R. 51.315(c)	(d)(3): "Upon request, an incumbent local exchange carrier shall combine any sequence of unbundled network elements that it ordinarily combines for itself."

As the Commission recognized in its prior Order, sections 13-801(d)(1)-(3) limit an incumbent carrier's sharing obligations to "unbundled" network elements. Likewise, the FCC has never interpreted its almost identical rules to require incumbent carriers to provide existing combinations that include network elements that are not required to be unbundled. By tracking the FCC's rules on combinations in section 13-801(d)(1)-(d)(3) – and then reiterating in section 13-801(a) that the state requirements are to be consistent with and *not* preempted by FCC orders

– the General Assembly made quite clear that the Commission is not to disregard or nullify the FCC's unbundling rules. *See Harrisonville Tel. Co. v. ICC*, 212 Ill. 2d 237 (2004).

Just as section 13-801 tracks FCC rules and expressly directs that its requirements be consistent with FCC orders, the statute in *Harrisonville* (section 13-301) expressly "provide[d] that the ICC should track the FCC definition of supported services" in establishing a universal service fund. 212 Ill. 2d at 251. But even though the FCC had held that voice grade access is a supported service, and that all lines with voice grade access should receive universal service support, the Commission ruled that the fund would only support primary or single residential and business lines. The Appellate Court rejected the Commission's attempt to deviate from federal law. As the Court explained, "[i]t is incongruous to suggest that the legislature wanted the ICC to follow the FCC's words but not its deeds and to provide purportedly 'universal service' support with limitations." *Id*. Thus, the Commission's construction of state law "violated the [Public Utilities] Act." *Id*.

Here, too, the legislature has clearly told the Commission to follow the FCC's words – and to adopt requirements that are not preempted by FCC orders. As in *Harrisonville*, it would be incongruous to suggest that the legislature wanted the Commission to flout the FCC's most recent order, which is founded on the FCC's clear holding that unbundled access in the absence of impairment would be harmful to competition and to national policy.

B. Over And Above The Express Command Of Section 13-801(a), It Is The Commission's Duty To Construe Statutes Consistently With Federal Law Wherever Possible.

As the preceding section makes clear, the statute tells the Commission to obey federal law and the FCC's orders many times and in many different ways. Even if any ambiguity remained, the only lawful inference is that the statute must be construed in accordance with federal law. The legislature cannot be presumed to *disobey* federal law but to follow it. It is a

cardinal principle of statutory construction that "a statute will be interpreted so as to avoid a construction which would raise doubts as to its validity." *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 363 (1986); see also *Continental Illinois Nat'l Bank & Trust v. Illinois State Toll Highway Comm'n*, 42 Ill. 2d 385, 389 (1969) ("It is our duty to construe acts of the legislature so as to affirm their constitutionality and validity, if it can reasonably be done"); *Newland v. Marsh*, 19 Ill. 376, 1857 WL 5725, at *8 (1857) ("Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give to it the force of law, such construction will be adopted by the courts"); *Northwest Airlines, Inc. v. Department of Revenue*, 295 Ill. App. 3d 889, 893 (1st Dist. 1998) ("an interpretation which renders a statute unconstitutional or otherwise invalid should be discarded").

Nothing in section 13-801(d) *prohibits* the Commission from also obeying federal law with respect to which network elements are to be unbundled. To the contrary, the statute (i) expressly states that its requirements are to be "not inconsistent" with the federal Act's local competition provisions and the associated FCC orders, (ii) repeatedly references the federal term "unbundled," and (iii) tracks FCC rules. The principles of statutory construction thus compel the conclusion that the FCC's unbundling determinations govern under section 13-801.

C. The Commission's Prior Order Also Erred By Interpreting Section 13-801(d)(4) In A Manner Contrary To The Remainder Of The Statute.

As described above, the Commission's prior Order correctly limited subsections 13-801(d)(1)-(d)(3) to incorporate the "unbundled network elements" set forth by federal law, but then construed section 13-801(d)(4) to impose an obligation to provide access to certain "platforms: without regard to whether those combinations consist entirely of *unbundled* network elements. Order ¶ 77. In so doing, the Commission ignored the common thread that runs through sections 13-801(d)(1)-(4), viewing section 13-801(d)(4) in isolation and wholly apart

from the "unbundled" tether set forth in the statutory text of sections 13-801(d)(1) and (3). By reading section 13-801(d)(4) to impose additional requirements on incumbent carriers that are inconsistent with the obligations set forth in the immediately preceding subsections, the Commission sidestepped multiple rules of statutory construction.

The Illinois Supreme Court "has long held that sections of the same statute should be considered to be *in pari materia*, and that each section should be construed with every other part or section so as to produce a harmonious whole." *Sulser v. Country Mut. Ins. Co.*, 147 Ill. 2d 548, 555 (1992); see also *Mann v. Board of Education of Non-High School Dist. No. 216*, 406 Ill. 224, 230 (1950) ("sections of the same statute should be construed as being consistent rather than inconsistent and should be interpreted as being *in pari materia*"); *Dornfield v. Julian*, 104 Ill. 2d 261, 267 (1984) (statutes are to be construed "to avoid creating an unnecessary inconsistency in the law"). "In construing statutes, courts must not be guided by a single sentence or by an isolated provision but should consider each provision in conjunction with every other provision of the statute in light of its purposes." *In re Consensual Overhear*, 323 Ill. App. 3d 236, 240 (2d Dist. 2001). Moreover, as noted in Section II.B above, courts are obliged to avoid constructions of a statute that "would raise a substantial question as to its constitutionality." *People v. Williams*, 119 Ill. 2d 24, 27 (1987).

Both of these principles must be upheld by construing all of the subsections of section 13-801(d) that deal with network elements only to require combinations – including the platform – consisting entirely of *unbundled* network elements. As the language of section 13-801(d)(1)-(3) makes clear, those subsections address an incumbent carrier's obligations to its competitors: "an incumbent carrier shall provide" (220 ILCS 5/13-801(d)(1)), "an incumbent local exchange carrier shall not separate" (220 ILCS 5/13-801(d)(2)), "an incumbent local exchange carrier shall

combine" (220 ILCS 5/13-801(d)(3)). Together, those sections deal with both "existing" and "new" combinations. And, most significantly for present purposes, the combinations that must be "provide[d]" and/or "combine[d]" by incumbent carriers subject to sections 13-801(d)(1)-(3) must consist entirely of "unbundled" network elements. 220 ILCS 5/13-801(d)(1) ("[a]n incumbent local exchange carrier shall provide *unbundled* network elements") (emphasis added); 220 ILCS 5/13-801(d)(3) ("an incumbent local exchange carrier shall combine any sequence of *unbundled* network elements that it ordinarily combines for itself") (emphasis added).

Section 13-801(d)(4) simply addresses the *use* (not the scope) of a particular category of UNE combinations – the end-to-end "platform." Because the General Assembly defined such a "platform" to consist "solely of combined network elements," it should be read as being coextensive with the existing combinations that an incumbent carrier must provide and cannot separate pursuant to sections 13-801(d)(1)-(3). And because all combinations required under sections 13-801(d)(1)-(3) consist entirely of *unbundled* network elements, it was unnecessary – and even would have been redundant – for the General Assembly to have included the word "unbundled" as a modifier of "network elements platform" in section 13-801(d)(4).[8]

By construing section 13-801(d)(4) in that fashion, the Commission would bring the Commission's Order in line with federal law and with the express mandate of section 13-801(a),

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[8] This conclusion is buttressed by section 13-801(d)(2), which also does not include the term "unbundled." Because section 13-801(d)(2) simply forbids an incumbent carrier from separating elements that it has a duty to combine, the outer bounds of the obligation imposed by that provision are established by the incumbent's duties in sections 13-801(d)(1) and (d)(3) to provide and to combine only *unbundled* network elements. Thus, the almost identically worded FCC Rule 51.315(b) – which also does not contain the word "unbundled" – has never been construed to allow CLECs access to existing combinations of network elements that do not consist entirely of unbundled network elements. The absence of the term "unbundled" from section 13-801(d)(4) similarly should not be read to create an internal inconsistency in an otherwise coherent (and constitutional) regime.

thereby avoiding the specter of preemption under the Supremacy Clause. And, more fundamentally, the Commission would avoid placing in fundamental tension two provisions – sections 13-801(d)(3) and (4) – that are inextricably intertwined in the General Assembly's overall scheme of telecommunications law. Under the prior construction, the legislature took great pains to say in section 13-801(d)(3) that SBC Illinois need only provide combinations consisting entirely of *unbundled* network elements, only to turn around in section 13-801(d)(4) and say "never mind" with respect to one category of combinations – namely, the end-to-end platform. Because that reading placed two related sections at odds with each other – with the latter essentially nullifying the former – it was not a rational construction of section 801 even apart from the conflict with federal law. It is axiomatic that statutes are to be read "to produce a harmonious whole" (*Sulser*, 147 Ill. 2d at 555), not an internally inconsistent collection of random legislative pronouncements. For that reason alone, the Commission's prior construction should be discarded. And if that were not enough, the Supremacy Clause issues raised by that construction – redoubled by the statute's express command that its requirements be "not inconsistent" and "not preempted by" federal law – provide the *coup de grace*.

III. THE COMMISSION SHOULD TURN AWAY FROM THE UNLAWFUL COURSE CHARTED BY THE PHASE I INTERIM ORDER.

As the preceding section demonstrates, it is possible and therefore necessary to construe section 13-801 in a manner consistent with federal law. The Commission's Interim Order for Phase I, however, attempted to take a different course. The Phase I Order correctly appreciates (at 119) that any conflict between section 13-801 and federal law would have to be resolved by the federal courts – in favor of federal law. But it errs in asserting that section 13-801 makes such conflicts unavoidable and in leaving them for the federal district court. As shown above,

the statute can instead be construed consistently with federal law.[9] The Phase I Order errs in several respects:

A. First, contrary to the Phase I Order's bottom-line conclusion, the plain language of section 13-801 does not require a collision with federal law. The Phase I Order looks at the introductory paragraph of section 13-801(d) in isolation, and decides that the absence of the exact words "necessary" and "impair" means that the General Assembly intended to flout the will of Congress. That inference, however, fails to read the statute as a whole, and is directly contrary to the plain text of section 13-801(a), which states that the statutory obligations must be "*not* inconsistent with" the local competition provisions of the 1996 Act and "*not* preempted by orders of the [FCC]." This clear expression of legislative intent is confirmed by the fact that the provisions of section 13-801 that specifically address an ILEC's obligations to provide access to UNEs – subsections 13-801(d)(1), (2) and (3) – track parallel provisions of the rules that the FCC adopted to implement section 251.

The Phase I Order notes the prefatory language regarding "additional obligations" that appears in section 13-801(a), but incorrectly reads them as an instruction to *eviscerate* federal law. To the contrary, the very sentence cited by the Phase I Order goes on to state the overriding principle that the statute and its "additional obligations" must be "not inconsistent" with the 1996 Act and "not preempted by [FCC] orders." The Phase I Order's reading of section 13-801 looks only at the language on "additional obligations" while failing to carry out the accompanying admonition that such obligations be "not inconsistent" with federal law.

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[9] The Phase I order is an interim order. To the extent the Commission agrees in Phase II with SBC Illinois' analysis of section 13-801 here, it should solicit comments from the parties as to the impact of that decision on the Phase I interim order.

Even taken by itself, the statute's reference to "additional obligations" does not mean that the legislature intended to clash with federal law on the precise issue here: which network elements are to be unbundled. Much of section 13-801 does not even deal with unbundled access; even where it does, most of its requirements do not address (and are accordingly do not expand) the scope of unbundling. Instead, the bulk of section 13-801(d) deals with other issues, such as performance standards and intervals (see 220 ILCS 5/13-801(d)(5)-(6)) and the recovery of special construction costs (see 220 ILCS 5/13-801(d)(3)).

B. Second, even if section 13-801 were *silent* regarding the General Assembly's intent to follow federal policy, the principles of statutory construction compel the inference that the statute *follows* federal law. The Phase I Order itself recognizes (at 62) that the Commission has "latitude" to "make appropriate changes to achieve consistency with federal law" if a conflict is ambiguous or nonexistent. But it failed to make full use of that latitude. Instead, it draws the inference that the statute violates federal law – an inference that is directly contrary to the one the Commission is supposed to draw from uncertainty.

C. Third, further confirmation that the Phase I Order's construction of section 13-801 is *not* inevitable is that the Commission itself has reached different interpretations. The Commission's first review of section 13-801 came in the Part 790 rulemaking (Docket No. 99-0511), in which the Commission expressly "endeavored to ensure that the new Part 790 is consistent with [Public Act] 02-0022," which includes section 13-801. Mar. 27, 2002 *Order*, Docket No. 99-0511, at 1, *modified in part*, *Second Notice Order* (Jan. 23, 2003). The resulting rule (Section 790.320, titled "Access to Unbundled Network Elements") limits the scope of unbundled access to (i) UNEs required by FCC rules, and (ii) other UNEs that must be unbundled "consistent with the Federal Act, the Act and decisions of the federal courts and the

FCC." The Commission further held that "delineating specific UNEs involves a detailed process geared toward satisfying the requirements of TA96." *Id*. at 125.

Even the Commission's initial Order in this docket recognized that subsections (d)(1) and (d)(3) reference "unbundled" network elements, references the Order correctly deemed to *incorporate* federal law. The Order went astray when it turned to subsection (d)(4), which addresses the *uses* that competing carriers may make of certain "platforms" of network elements. That subsection does not include the word "unbundled"; and that single absence led the initial Order to deem that in the platform context the Illinois Act had relegated federal law, and the limiting standard of impairment, "to the scrap heap of time" (*id*. ¶ 75), a conclusion that SBC Illinois refuted in Section II *supra*.

The Phase I Order here is not a defense of the Commission's prior construction but a dramatic departure that the Phase I Order inexplicably fails to even acknowledge, much less justify. The Phase I Order disregards subsections (d)(1)-(d)(4), and ignores entirely the statutory references to "unbundled" that the Commission deemed controlling in 2002. Instead, it turns to the introductory sentence of 801(d), and declares that the absence of the exact words "necessary" and "impair" there meant that the General Assembly intended to destroy those federal standards. That departure proceeds far beyond the "platform" context addressed in the Commission's initial Order, and thus carves a much deeper gulf between state and federal law. Under the Phase I Order's novel reading, the General Assembly intended to nullify the federal impairment standard not only in subsection 13-801(d)(4) (with respect to the "platform" combinations described in that subsection) but also in subsections 13-801(d), (d)(1), (d)(2), and (d)(3) (where the Commission previously found the word "unbundled" to incorporate rather than eviscerate the federal impairment standard).

At a minimum, the sea change in the Commission's construction of section 13-801(d) demonstrates a lack of clarity in the statutory language – one that must be resolved in favor of federal law and not against it as the Phase I Order suggests. More fundamentally, though, the interim construction of section 13-801(d) leads to a result that conflicts with federal law – and defeats the purpose of the federal court's remand. The Phase I Order does not help the Commission to *avoid* or at least *minimize* its predecessor's inconsistency with federal law – the duty the Commission undertook on remand – but *expands* the conflict with federal law. While the federal court may not have anticipated a particular result on remand, it is fair to say that the court expected the Commission to make a serious effort to reach "a different conclusion that may resolve some or all of SBC's claims." SBC Exceptions Br. Attach. C at 1. After all, the Commission received a remand based on its own frank recognition that the *TRO* "limited state commissions' ability to impose unbundling requirements that exceed the federal unbundling requirements under both delegated federal authority and independent state law" and "directed states to review their existing state requirements and conform those rules and decisions to the FCC's new rules." SBC Exceptions Br. Attach. A at 5. In seeking remand, the Commission assured the Court that it understood its duty "to ensure that its actions comport with federal law." SBC Exceptions Br. Attach. B at 4. In granting the Commission's request, the court most certainly did not expect the Commission to add *new* conflicts with federal law to those that already were present.

E. While the Phase I Order correctly recognizes the conflict between state-law unbundling and the impairment standard of federal law, it improperly suggests (at 62-64) that the Commission could avoid the conflict by simply affixing a different price tag on top – that is,

ordering state-law unbundling at a price other than the federal "TELRIC" price. That theory has no support in federal law.

First, the proposed pricing fiction is simply a product of the Phase I Order's attempt to use section 271 of the federal Act as a refuge from section 251 – a theory that fails to provide any refuge at all. *See* Section III.F *infra*. In addition to the Phase I Order's inability to demonstrate real compliance with section 271, its pricing theory still does not resolve the conflict between state and federal law that it purports to address. The federal "necessary" and "impair" requirements of section 251 are not limited to TELRIC or even to price; rather, the plain text of the statute provides that those requirements are "access standards" to be used in determining "what network elements should be made available for purposes of subsection [251](c)(3)." 47 U.S.C. § 251(d)(2). Likewise, section 251(c)(3) does not merely govern price but "access," and the "terms and conditions" of that access. Price is an important component of access, but it cannot even be considered until the underlying obligation to provide access is established in the first place. A change in price alone does not fix a deviation from the federal law on "access."

And at bottom, it cannot be true that a mere difference in price would allow a state to eviscerate the federal "necessary" and "impair" requirements; otherwise, a state could order the same blanket access regime that federal law has rejected by merely raising the price a smidgen above TELRIC. Plainly, such an approach would improperly elevate form over substance.

The *TRO Remand Order* that triggered this phase of the proceedings only redoubles these principles. It imposes a "nationwide bar" on new orders for unbundled switching and the UNE-P, and similar bars on unbundled access for certain other network elements and contexts. Parties are given a limited time (for switching, one year) to negotiate a transition for the "embedded base" of prior UNEs to an alternative arrangement – one that would clearly be governed by the

going market rate for such arrangements. Pending these alternative arrangements, the FCC's rules establish a transitional rate. Clearly, the FCC's rules do not leave room for states to set their own prices for access, either during the transitional period (when the FCC's transition rates apply absent a negotiated agreement) or after that period ends (when unbundled access is to be terminated and where rates, terms, and conditions for wholesale services are to be governed by private commercial agreements). That would not just place an improper state thumb on the scales of private negotiations, but destroy the FCC's carefully-construed transition rules.

F. 1. For some network elements, the Phase I Order tries to sidestep section 251, asserting that unbundling would be consistent with section 271 of the federal Act. The Phase I Order's resort to section 271 finds no support in section 13-801. In referencing federal law, section 13-801(a) mandates consistency with section *251*, not section 271. The statute plainly provides that its requirements are to be "not inconsistent with section 261(c) of the [1996] Act" (220 ILCS 5/13-801(a)) which in turn requires state-law obligations to be consistent "with *this part* or the [FCC]'s regulations to implement this part" (47 U.S.C. § 261(d)). "This part" – the part that contains section 261(c) – is Part II, "Development of Competitive Markets." The first provision and centerpiece of "this Part" is section 251. The last provision is section 261. By contrast, section 271 appears in a different Part – Part III, "Special Provisions Concerning Bell Operating Companies" – and is thus *not* incorporated or referenced by section 13-801.

2. Moreover, turning to section 271 does not *save* the Phase I Order; it simply creates *more* conflicts. Most fundamentally, Section 271 is a federal statute, authored by the same Congress that established the impairment standard and administered by the same federal agency that has authority to decide which network elements are to be unbundled. The standards

the FCC applies under section 271 are dictated by federal law, not state law. The constitutional considerations of preemption that must guide *this* Commission's interpretation of a state statute are not applicable to the FCC's interpretation of a *federal* statute. Federal law vests unbundling decisions in the FCC under *both* sections 251 and 271.

Section 271 leaves no decision making role for this Commission. Congress granted "sole authority to the [FCC] to administer * * * section 271" and intended that the FCC exercise "exclusive authority * * * over the section 271 process." *InterLATA Boundary Order*, 14 FCC Rcd. 14392, ¶¶ 17-18 (1999). Section 271 makes clear that the FCC, and *only* the FCC, has authority under section 271 to enforce that provision. A section 271 application is submitted *to the FCC* (47 U.S.C. § 271(d)(1)) and approval is granted *by the FCC* (*id.* § 271(d)(3)). During the application process, section 271 does not set forth *any* state commission role or authority other than as a consultant to the FCC. *Id.* § 271(d)(2)(B). A state commission may not "parley its limited role in issuing a recommendation under section 271" to impose substantive requirements under the guise of section 271 authority. *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004). Once an application is approved – as SBC Illinois' application has been approved – section 271 provides authority *only to the FCC* to enforce continued BOC compliance with the conditions for approval. 47 U.S.C. § 271(d)(6). There is no provision in section 271 providing any role to state commissions – not even a consultative role – with respect to the ongoing obligations of the BOCs once they have received approval.

Since the Phase I Order, the Commission itself recognized its inability to enforce section 271, in Docket Nos. 05-0154 *et al*., going so far as to declare that "SBC is right that the FCC has exclusive authority to enforce its order approving the ILEC's application." June 2, 2005 Order,

Docket Nos. 05-0154 *et al.* (consol.), at 24.[10] Two federal courts have reached the same conclusion in the UNE-P context. The court in *BellSouth Comms. Inc. v. Mississippi Public Service Comm'n*, -- F. Supp. 2d --, 2005 WL 1076643, *5 (S.D. Miss. 2005), enjoined a state commission order that had prevented BellSouth from rejecting new UNE-P orders pending ICA negotiations, holding that "even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC." Similarly, the Court in *BellSouth Telecommunications, Inc. v. Cinergy Comms. Co.*, No. 3:05-CV-16-JMH, slip op. at 12 (E.D. Ky. Apr. 22, 2005) (Ex. A hereto) held that "[t]he enforcement authority for § 271 unbundling duties lies with the FCC."

3. Next, the Phase I Order fails to comply with section 271's pricing regime, acknowledging that state-law prices may differ from section 271 and offering only the vague hope that those differences might not be "substantial." There is no basis for such speculation, as the Commission has yet to establish prices or even to articulate the principles on which prices would be based. But no matter what principles or prices the Commission might develop in the future, a state-regulated rate cannot comply with the federal pricing standards of sections 201 and 202. To the contrary, the FCC has held that sections 201 and 202 require nothing more than that "the market price should prevail" – "*as opposed* to a regulated rate" of the type that the Commission would impose under section 13-801. *UNE Remand Order*, 15 F.C.C. Rcd. 3696, ¶ 473 (1999) (emphasis added). The FCC has also stated that a BOC may satisfy section 271's

[10] Although the Commission correctly appreciated its lack of jurisdiction over section 271, it decided that certain carriers' interconnection agreements with SBC Illinois incorporated section 271's access requirements, and it has asserted jurisdiction to establish prices for access. SBC Illinois strongly disagrees with those decisions (among other errors in that order), and sought rehearing. *This* docket, however, is not a proceeding to interpret specific interconnection agreements but a generic proceeding to construe section 13-801. Accordingly, the specific contractual analyses in Docket No. 05-0154 *et al.* have no bearing here. Instead, what matters is the Commission's (correct) generic holding that is has no jurisdiction over section 271.

pricing requirements simply by showing that the rate is consistent with those in "arms-length agreements with other, similarly situated purchasing carriers" or is "at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff." *TRO* ¶ 664. This principle applies with particular force to unbundled switching and the other elements addressed by the *TRO Remand Order*: The FCC has held that "[r]equesting carriers *may not obtain* new local switching as an unbundled network element" (47 C.F.R. § 51.319(d)(2)(iii)) except pursuant to an arm's-length private agreement (*TRO Remand Order* ¶¶ 199, 215, 225). Similar bars apply to dark fiber loops and to certain DS1 and DS3 loops and transport facilities. In each case, the FCC has established transitional prices for the embedded base. The Phase I Order does not mention these principles, and cannot possibly demonstrate consistency with them.

4. In addition, section 271 deals only with individual network elements, and has no place for combinations of network elements. Instead, section 271 specifically calls for checklist items to be provided *apart* from other items or services. For example, checklist item (vi) states that "[l]ocal switching" is to be "unbundled from transport, local loop transmission, or other services." 47 U.S.C. § 271(c)(2)(B)(vi). Enforcing the plain language of the statute, the FCC (which has exclusive jurisdiction to enforce the statute) has squarely rejected CLEC attempts "to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251." *TRO* ¶ 655 n.1989. As the FCC explained, "[u]nlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of 'combining' and * * * do not refer back to the combination requirement set forth in section 251(c)(3)." *Id*. The Phase I Order, however, requires SBC Illinois to provide combinations and even to do the work of combining, again conflicting with federal law.

5. Finally, federal law mandates that the FCC "*shall* forbear from applying any regulation or any provision of this chapter" – including section 271 – if it finds that certain conditions have been satisfied. 47 U.S.C. § 160(a) (emphasis added). Forbearance is required if continued enforcement "is not necessary" to protect consumers or to regulate charges and other terms, and if forbearance "is consistent with the public interest." *Id*. If "forbearance will promote competition among telecommunications providers, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id*. § 160(b). Once the FCC grants forbearance, that decision is binding on the states. The statute expressly commands that "[a] State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying." *Id*. § 160(e).

The situation presented here – where the FCC has determined that competitors have ample alternatives to unbundling and are not "impaired" without unbundled access – is a textbook scenario for forbearance. After all, if competing carriers can deploy facilities themselves or obtain them from other providers, regulation is not necessary to protect consumers or maintain reasonable charges and terms. And by encouraging competitors to deploy their own facilities or pursue wholesale alternatives, while relieving incumbents of access obligations, forbearance promotes investment by incumbents and entrants alike, thereby serving the public interest. Thus, it should come as no surprise that the FCC has already forborne "from enforcing the requirements of section 271 * * * with regard to the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order*." *In re Petitions for Forbearance*, 19 F.C.C. Rcd. 21,496, ¶ 1 (2004).[11]

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[11] "These elements are fiber-to-the-home loops (FTTH loops), fiber-to-the-curb loops (FTTC loops), the packetized functionality of hybrid loops, and packet switching (collectively, broadband elements)." *Id*.

The Phase I Order's construction of section 13-801, however, does not include a "forbearance" provision, and thus would apparently attempt to nullify SBC Illinois' right to forbearance. If SBC Illinois is relieved of its obligations under section 271, yet still required to unbundle pursuant to state law, its right to seek forbearance (and any FCC grant of forbearance) would be meaningless. Plainly, such a result cannot be sustained, as it would both conflict with and frustrate the implementation of the federal forbearance statute. Thus, federal law expressly forbids such a course, prohibiting state commissions from enforcing requirements that the FCC has determined to forbear from applying. 47 U.S.C. § 160(e). The Commission cannot invoke section 271 while nullifying the forbearance statute that comes with section 271.

IV. APPLICATION OF ABOVE PRINCIPLES TO SPECIFIC FEDERAL UNBUNDLING RULES.

A. Switching

Since the Commission entered its initial Order in this docket, there have been several changes to federal law that affect an incumbent carrier's obligations to provide local switching and related network elements. In the *TRO*, the FCC held that there is no unbundling obligation for "enterprise" switching. And the *TRO Remand Order* placed a "nationwide bar" on unbundled local switching and the UNE-P, leaving no unbundling requirement in place.

As noted above, the obligations imposed under section 13-801(d)(3) are limited to "unbundled network elements." On that score, there is no need for the Commission to reconstrue that section in order to come into compliance with federal law. Instead, the Commission simply must engage in a straightforward application of its 2002 order to the new developments in federal law and revise its prior Order accordingly. In so doing, the Commission should make clear in its final disposition of this remand proceeding that SBC Illinois no longer has an obligation to provide combinations that include local switching ports.

As for section 13-801(d)(4), the Commission need only reconstrue that section to be consistent with its previous holding as to the remaining subsections of section 13-801, and to apply only to "platforms" that include "unbundled network elements" as determined by the FCC. Clearly, the UNE-P and other platforms that include local switching would not fall in that permitted category. The FCC has held that the UNE-Platform has been harmful to national policy, has barred new UNE-P arrangements, and has expressly declared that state UNE-P requirements will soon be rendered "moot."

Finally, the Phase I Interim Order construes section 13-801(d) to require unbundled access to enterprise switching, based in part on the Commission's view that section 13-801 does not distinguish between enterprise and mass market customers. After the *TRO Remand Order*, however, federal law does not draw a distinction between enterprise and mass market switching either. Unbundled access is not permitted in either context. Thus, the only remaining issue is whether the Commission will hold to its (erroneous) attempt to create needless conflict with federal law. Given the FCC's emphatic bar on local switching, the Commission should take this opportunity to comport with federal law, as it undertook to do on remand and as section 13-801(a) and the principles of statutory construction require it to do now.

B. High-Capacity Loops And Dedicated Transport

As with switching, the Commission need only follow section 13-801(a)'s mandate that state requirements be consistent with federal law, follow its 2002 holding that section 13-801(d)(3) applies only to unbundled network elements as determined under federal law, and construe section 13-801(d)(4) consistently with section 13-801(d)(3).

The Commission has already held in the Phase I Order that the federal eligibility criteria for high-capacity EELs (a combination that includes loops and transport) apply under state law. The Phase I Order (at 100) "agrees with SBC and Staff that the FCC's eligibility criteria * * *

govern" under section 13-801, even though section 13-801 does not list those criteria in so many words. Rather, the Commission correctly reasoned, it suffices that "[s]ection 13-801 does not *prohibit* a reassessment of our earlier position." *Id*.

Similarly, nothing in section 13-801(d) *prohibits* the Commission from also obeying federal law with respect to which loops and transport facilities are to be unbundled. The most the Phase I Order can say is that the legislature was silent – and as shown above, even that is incorrect, for the statute (i) expressly states that its requirements are to be "not inconsistent" with the federal Act's local competition provisions and the associated FCC orders, (ii) repeatedly references the federal term "unbundled," and (iii) tracks FCC rules. The principles of statutory construction – and the Phase I Order's own reasoning on eligibility criteria – compel the conclusion that the FCC's unbundling determinations govern under section 13-801 just as strongly as the FCC's eligibility rules.

C. Permissible And Impermissible Uses Of Unbundled Network Elements

The statutory mandate that the Commission follow federal law applies equally to the *uses* of unbundled access as well as to its scope. The FCC has prohibited carriers from using UNEs exclusively to provide long-distance or wireless service. Section 13-801(d) can easily be construed in a manner consistent with the FCC's prohibition.

As noted above, section 13-801(d)(4) addresses the permissible uses of existing "platforms." It provides that a requesting carrier may use the platform "for the provision of existing and new local exchange, interexchange that includes local, local toll, and intraLATA toll, and exchange access telecommunications services *within the LATA*." Nowhere does the statute license carriers to use UNEs for the provision of wireless service – in fact, wireless service is not even mentioned. As for interexchange service, the statute does not say that UNEs may be used exclusively to provide such service. To the contrary, interexchange service is only

referenced in conjunction with local exchange and exchange access service – exactly where it is permitted by federal law. Moreover, the statute expressly states that permissible uses must remain "within the LATA," thereby precluding interLATA services. In short, nothing in the statute prevents the Commission from observing the federal prohibition on the use of UNEs for long-distance and wireless services.

CONCLUSION

For the reasons set forth above, SBC Illinois respectfully requests that the Commission modify its initial Order and SBC Illinois' current wholesale obligations, as currently reflected in its tariffs, and state that:

(1) SBC Illinois need not provide unbundled access to local switching or combinations that include local switching (such as the UNE-P), in light of the FCC's nationwide bar on unbundled local switching.

(2) To the extent unbundled loops and transport are to be provided, unbundling does not apply to dark fiber loops, or combinations including dark fiber loops, in light of the FCC's bar on new dark fiber loop unbundling.

(3) To the extent that unbundled DS1 or DS3 loops or transport are to be provided, a requesting carrier may not obtain such loops or transport in geographic areas that satisfy the FCC's objective non-impairment criteria;

(4) To the extent that unbundled DS1 or DS3 loops or transport are to be provided, a requesting carrier may not obtain more than one unbundled DS3 loop or more than 10 unbundled DS1 loops at any single customer location, and it may not obtain more than 12 DS3s' or more than 10 DS1s' worth of dedicated capacity along any particular route.

(5) To the extent that unbundled access to switching, loops and transport is to be allowed, a carrier may not use such access exclusively for the provision of interexchange or wireless service.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **SBC ILLINOIS' OPENING COMMENTS ON REMAND (PHASE II)** was served on the parties on the attached service list by U.S. Mail and/or electronic transmission on July 21, 2005.

_____

Karl B. Anderson

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