

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company, :  
 : Docket No. 01-0614  
Filing to Implement Tariff Provisions :  
Related to Section 13-801 of the Public :  
Utilities Act :

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**STAFF OF THE ILLINOIS COMMERCE COMMISSION'S  
INITIAL COMMENTS ON REMAND (Phase II)**

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The Staff of the Illinois Commerce Commission ("the Staff"), by and through its counsel, and pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Initial Comments on Remand (Phase II) in the above-captioned matter.

**I. Introduction**

On June 30, 2001, Public Act 92-22 went into effect. P.A. 92-22, Section 99. Among other things, Public Act 92-22 added new Section 13-801 to the Illinois Public Utilities Act. Id., Section 5. Section 13-801, in part, requires SBC to provide requesting carriers certain network elements. On August 21, 2003, the FCC released its *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers / In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 / Deployment of Wireline Services Offering Advanced TelecommunicatioNs Capability*, FCC No. 03-36, CC Docket Nos. 01-338, 96-98, 98-147 (rel. August

1, 2003) (“TRO”), which modified the FCC’s rules requiring an incumbent local exchange carrier (“ILEC”) to provide certain unbundled network elements to a requesting carrier. On January 28, 2004, the D.C. Circuit Court of Appeals issued its decision in *United States Telecom Ass’n v. Federal Communications Comm’n*, 359 F.3d 554 (March 2, 2004) (“USTA II”), which reviewed the FCC’s TRO Order and overruled certain conclusions the FCC had reached under faulty “impairment” analyses. The USTA II court remanded the TRO back to the FCC with directives on how to address these issues.

On February 4, 2005, in response to the issues raised by the USTA II court, the FCC released its *Order on Remand, In the Matter of Unbundled Access to Network Elements / Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC No. 04-290, WC Docket No. 04-313, CC Docket No. 01-338 (“TRRO”). On April 20, 2005, the Commission issued its *Interim Order on Remand (Phase I)* in the instant proceeding. Because the parties were unable to brief the issues the Commission addressed in the *Interim Order on Remand (Phase I)* in light of the FCC’s most recent directives regarding ILEC unbundling requirements contained in the TRRO, this round of Comments was scheduled by the administrative law judge on June 30, 2005. Tr. 1040. Finally, Staff also points out that SBC filed a petition at the US District Court for the Northern District of Illinois seeking sections of 13-801 relevant to this

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<sup>1</sup> Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614 (April 20, 2005) (emphasis added)(“*Interim Order on Remand (Phase II)*”).

proceeding declared preempted by federal law but that court has yet to issue its opinion.

## **II. Mass Market Switching**

In its *TRRO*, the FCC found “that competitive LECs are not impaired in the deployment of switches, [and] that it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation.” *TRRO*, ¶204. This constitutes a departure from the FCC’s previous ruling, in its *TRO*, that impairment existed with respect to switching for the purpose of serving mass market customers, until such time as the appropriate state Commission determined it did not. *TRO*, ¶¶459-527; see also 47 C.F.R. §51.319(d). Since the Commission based its *Interim Order on Remand (Phase I)* on the *TRO*, additional analysis is required to determine what, if any changes can or must be made to the *Section 13-801 Order*.

In its *Interim Order on Remand (Phase I)*, the Commission determined that:

Applying our analysis of Section 13-801 to the specifics of the provisioning of unbundled local switching for enterprise customers begins with stating the relevant facts. First, Section 13-801(d) requires that SBC “shall provide to any requesting telecommunications carrier, for the provision of an existing or a new telecommunications service, nondiscriminatory access to network elements on any unbundled or bundled basis, as requested, at any technically feasible point on just, reasonable, and nondiscriminatory rates, terms, and conditions.” The General Assembly defined network elements as “a facility or equipment used in the provision of a telecommunications service. The term also includes features, functions, and capabilities that are provided by means of the facility or equipment, including, but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other

provision of a telecommunications service.” **That unbundled local switching is a facility or equipment used in the provision of a telecommunications service is not disputed. Hence, according to Section 13-801(d), SBC is required to provide unbundled local switching.**

Because the FCC, in its TRO, and therefore after the enactment of Section 13- 801, created a distinction between unbundled local switching for “mass market” customers and “enterprise” customers, it begs the question of whether the requirements of Section 13-801 are inconsistent with the federal requirements. **The plain language of Section 13-801 makes it obvious that the General Assembly did not contemplate a distinction between providing service to business customers and residential customers in regard to SBC’s obligation to provide network elements.** We note that the General Assembly was aware of the distinction between business customers and residential customers because it declared services to business customers as competitive in the same piece of legislation. **However, in Section 13-801, it did not make any attempts to differentiate between services provided to business customers and services provided to residential customers.** Because the legislature did not create such an explicit distinction, we are reluctant to engraft one onto the statute.

As explained in the preceding section of this Order, we do not believe that the FCC’s finding that SBC is no longer required to provide unbundled local switching for enterprise customers at TELRIC prices pursuant to federal Section 251 is inconsistent with Section 13-801’s requirement to provide such switching at non-TELRIC, just and reasonable cost-based rates. Section 13-801 does not require the provision of unbundled local switching to enterprise customers at TELRIC rates. We find that providing unbundled local switching to enterprise customers at non-TELRIC, just and reasonable cost-based rates is required by Section 13-801 and, we believe, not inconsistent with federal requirements.

*Interim Order on Remand (Phase I) at 68-69.*

In summary, the Commission determined that: (a) Section 13-801 requires carriers subject to that section to provide access to network elements, as defined; (b) unbundled local switching is a network element; and (c) the General

Assembly placed no limitation upon what sort of customers (i.e., enterprise or mass market) that a CLEC might serve using such network elements.

This analysis is borne out by the Commission's ruling in its Consolidated Complaint Order, CBeyond Communications, LLP, et al., v. Illinois Bell Telephone Company: Verified Complaints and Petitions for Orders for Emergency Relief pursuant to 220 ILCS 5/13-515(e), ICC Docket Nos. 05-0154, 05-0165, 05-0174 (consol.) (June 2, 2005) (hereafter "Consolidated Complaint Order"). There, the Commission noted that, "[a]lthough the present case concerns mass market switching, while the [*Interim Order on Remand (Phase I)*] addressed switching for large-enterprise customers," the same logic employed by the *Interim Order on Remand (Phase I)* with respect to enterprise switching was applicable to mass market switching; "[It is our] more general conclusion that the absence of 'limiting language' in Section 13-801 'impl[ies] that the General Assembly intended to grant *unrestricted access to network elements* from Alt-Reg companies.' " Consolidated Complaint Order at 29-30, *citing Interim Order on Remand (Phase I)* at 62.

Under the circumstances, the Staff sees no reason in law or logic to depart from the conclusion that "unbundled local switching is a facility or equipment used in the provision of a telecommunications service ... [and that therefore] according to Section 13-801(d), SBC is required to provide unbundled local switching." *Id.* The logic the Commission employed in the *Interim Order on Remand (Phase I)* and the *Consolidated Complaint Order* remains effective; as there is no dispute that ULS is a facility or type of equipment (or, in this case,

both) used to provide a telecommunications service, SBC remains required to provide unbundled local switching for mass-market customers for the same reasons that the Commission determined in the *Interim Order on Remand (Phase I)* that SBC was required to provide it for enterprise customers: the plain language of Section 13-801 requires it.

### **III. High Cap Loops and Transport**

#### **A. The FCC On High Capacity Loops**

In its *TRRO*, the FCC “revisit[ed]” its rules on high capacity loops<sup>2</sup>, with the exception of OCn capacity level loops. See *TRRO*, ¶ 149 (“At the outset, we note that the *USTA II* court did not disturb our conclusions regarding either DS0 or OCn loops.”). In its *TRO*, the FCC had found that CLECs “were impaired without access to DS1, DS3, . . ., subject to state commission implementation of ‘triggers’ principally measuring the availability of actual alternatives or the feasibility of constructing such alternatives to a particular customer location, which could show that a competitor was not impaired without unbundled access to incumbent LEC facilities.”<sup>3</sup> *TRO* ¶¶ 311-42.

In its *TRRO*, the FCC altered its impairment decision regarding DS1 and DS3 Loops and found the following:

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<sup>2</sup> The FCC, in its *TRRO*, noted that there was an apparent issue over whether the D.C. Circuit had even addressed its prior determinations in its *TRO* regarding high-capacity loops. See *TRRO*, at ¶ 148 (“the D.C. Circuit did not make a formal pronouncement regarding the status of the [FCC’s] findings [in the *TRO*] with respect to high-capacity loops”).

<sup>3</sup> The *TRO* established two types of triggers to evaluate impairment of high-capacity loops: (1) a two wholesaler trigger (for DS1 and DS3 loops); and (2) a two self-provisioner trigger (for DS3 and dark fiber loops). *TRO*, ¶¶311-342.

- *DS3 Loops.* We find that requesting carriers are impaired without access to DS3-capacity loops at any location within the service area of an incumbent LEC wire center containing fewer than 38,000 business lines or fewer than four fiber-based collocators. Thus, requesting carriers are not impaired without access to DS3-capacity loops at any location within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators.
- *DS1 Loops.* We find that requesting carriers are impaired without access to DS1-capacity loops at any location within the service area of an incumbent LEC wire center containing fewer than 60,000 business lines or fewer than four fiber-based collocators. Thus, requesting carriers are not impaired without access to DS1-capacity loops at any location within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators.

*TRRO* ¶¶ 146, 149-194.

Since the Commission based its findings and conclusions in the *Interim Order on Remand (Phase I)* on the *TRO*, and not on the *TRRO*, additional analysis is required to determine what, if any changes can or must be made to the *Interim Order on Remand (Phase I)* due to the FCC's reassessment of its position in the *TRRO* on high capacity loops.

#### **B. The ICC's Prior Conclusions In This Proceeding Regarding High Capacity Loops**

Although the Commission did not directly address DS1 and DS3 Loops in its *Interim Order on Remand (Phase I)* or in its *Section 13-801 Order*<sup>4</sup>, it did address OCn capacity levels and whether DS3 loops or transport should be capped. Regarding whether to impose a "Cap" on the number of DS3 loops or

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<sup>4</sup> See *Order, Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act*, ICC Docket No. 01-0614 (June 11, 2002) ("*Section 13-801 Order*").

Transport facilities, the Commission, in its *Interim Order on Remand (Phase I)*, concluded that:

While we agree with the CLECs that Section 13-801 does not contain a restriction to limit the number of DS3 loops and transport facilities, we do not intend to overturn the federal caps established in the TRO. Analogous to our discussion regarding unbundled local switching for enterprise customers, we will not require SBC to provide DS3 loops and transport facilities above the federal caps at TELRIC rates. The federal limitation established in the TRO has no corresponding provision in the Section 13-801. Thus, we have no authority to create one on our own. Instead we find that loops provided by SBC beyond the federal requirement should be provided at non-TELRIC just and reasonable cost-based rates.

*Interim Order on Remand (Phase I)*, at 93-94.

Clearly, in light of the fact that the FCC's *TRO* DS3 loops and transport cap has been abandoned by the FCC in its *TRRO*, the above-quoted conclusion in the Commission's *Interim Order on Remand (Phase I)* should also be modified as the federal law assumptions underlying the Commission's Orders in this proceeding are not the same as when those orders were issued.

Regarding OCn capacity level loops and transport, the Commission made the following determination in its *Interim Order on Remand (Phase I)*:

Here again, the FCC modified the ILECs' unbundling obligations after Section 13-801 became law. In this case, the FCC no longer requires ILECs to sell unbundled access to OCn-level loops and transport facilities pursuant to federal Section 251 at TELRIC prices. Section 13-801, however, does not contain such a capacity restriction for loops and transport facilities. In line with our discussions above, we view Illinois law to require SBC to provide OCn-level loops and transport facilities at non-TELRIC, just and reasonable, cost-based rates pursuant to Section 13-801(g).

*Interim Order on Remand (Phase I)*, at 92.

Because the FCC found that the “USTA II court did not disturb [its] conclusions regarding either DS0 or OCn loops” (*TRRO*, at ¶ 149), in Staff’s view, the above-quoted conclusion of the Commission regarding OCn loops need not be modified due to the issuance of the FCC’s *TRRO*. In any case, as noted above, the Commission has concluded “that the absence of ‘limiting language’ in Section 13-801 ‘impl[ies] that the General Assembly intended to grant *unrestricted access to network elements* from Alt-Reg companies.’” Consolidated Complaint Order at 29-30, *citing* Interim Order on Remand (Phase I) at 62.

### **C. The FCC On High Capacity Transport**

In *USTA II*, the D.C. Circuit remanded the *TRO*’s findings of nationwide impairment for DS1 and DS3 transport. See *TRRO*, ¶ 68. In its *TRRO*, the FCC dutifully modified its impairment analysis and made the following conclusions:

- *DS1 Transport.* We find that competing carriers are impaired without access to DS1 transport on all routes for which at least one end-point of the route is a wire center containing fewer than 38,000 business lines and fewer than four fiber-based collocators. Thus, competing carriers are not impaired without access to DS1 transport on routes connecting a pair of wire centers, each of which contains at least four fiber-based collocators *or* 38,000 or more business lines.
- *DS3 Transport.* We find that competing carriers are impaired without access to DS3 transport on all routes for which at least one end-point of the route is a wire center containing fewer than 24,000 business lines and fewer than three fiber-based collocators. Thus, competing carriers are not impaired without access to DS3 transport on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines.

*TRRO*, at ¶¶ 66, 69-135.

Since the Commission based its findings and conclusions in the *Interim Order on Remand (Phase I)* on the *TRO*, and not on the *TRRO*, additional analysis is required to determine what, if any changes can or must be made to the *Interim Order on Remand (Phase I)* due to the FCC's reassessment of its position in the *TRRO* regarding high capacity transport.

#### **D. The ICC's Prior Conclusions In This Proceeding Regarding High Capacity Transport**

The Commission, to date, has addressed both high capacity loops and transport collectively. Consequently, the Commission's conclusions on high capacity transport are included in the section above where Staff quoted relevant portions of the Commission's *Interim Order on Remand (Phase I)* regarding high capacity loops.

#### **E. Staff Recommendations On High Capacity Loops And Transport**

As noted elsewhere, carriers subject to Section 13-801 must "provide to any requesting ... carrier, for the provision of ... telecommunications service, nondiscriminatory access network elements on any bundled or unbundled basis, ... at any technically feasible point[.]" 220 ILCS 5/13-801(d). As further noted, a network element is defined by statute as "a facility or equipment used in provision of a telecommunications service." 220 ILCS 5/13-216.

Given this, the Staff is of the opinion that Section 13-801(d) obliges SBC to unbundle high capacity loops and transport facilities independent of federal law. High capacity loops and transport are, unquestionably, a "facility or

equipment used<sup>5</sup> in provision of a telecommunications service.” This being the case, SBC is obligated to offer unbundled access under Section 13-801(d). This is true because, as the Commission found in its *Section 13-801 Order*, and reaffirmed in its *Interim Order on Remand (Phase I)*, the General Assembly did not intend to require, and did not require, a “necessary or impair” analysis before SBC is required to offer unbundled access to an element under Section 13-801. *Interim Order on Remand (Phase I)* at 62, *Section 13-801 Order*, ¶¶76, 82. Accordingly, the FCC’s findings that competitors are not impaired without access to high capacity loops and transport are irrelevant to the Commission’s consideration. Further supporting this conclusion is the Commission’s recent ruling “that the absence of ‘limiting language’ in Section 13-801 ‘impl[ies] that the General Assembly intended to grant *unrestricted access to network elements* from Alt-Reg companies.’ ” Consolidated Complaint Order at 29-30, *citing Interim Order on Remand (Phase I)* at 62.

Staff, accordingly, recommends that the Commission follow the same reasoning it employed its *Interim Order on Remand (Phase I)* and its *Consolidated Complaint Order*, and find, regarding DS3 Loops, that where requesting carriers are not impaired without access to DS3-capacity loops at any location within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators, DS3 capacity loops should be provided by SBC to requesting carriers at non-TELRIC just and reasonable cost-based rates.

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<sup>5</sup> Staff takes the view that the word “used” should, in this context, be read as “normally used” or “capable of being used”, rather than “currently being used.”

Likewise, regarding DS1 capacity loops, Staff recommends that that the Commission follow the same reasoning it employed its *Interim Order on Remand (Phase I)* and find that where requesting carriers are not impaired without access to DS1-capacity loops at any location within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators, DS3 capacity loops should be provided by SBC to requesting carriers at non-TELRIC just and reasonable cost-based rates.

Similarly, regarding DS3 capacity transport, Staff recommends that that the Commission follow the same reasoning it employed its *Interim Order on Remand (Phase I)* and find that where requesting carriers are not impaired without access to DS3 transport on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines, DS3 capacity transport should be provided by SBC to requesting carriers at non-TELRIC just and reasonable cost-based rates.

Likewise, regarding DS1 capacity transport, Staff recommends that that the Commission follow the same reasoning it employed its *Interim Order on Remand (Phase I)* and find that where requesting carriers are not impaired without access to DS1 transport on routes connecting a pair of wire centers, each of which contains at least four fiber-based collocators or 38,000 or more business lines, DS1 capacity transport should be provided by SBC to requesting carriers at non-TELRIC just and reasonable cost-based rates.

#### IV. Dark Fiber Loops and Transport

“Dark fiber” is “[u]nused fiber [optic strands] through which no light is transmitted[,] or installed fiber optic cable not carrying a signal.” 233 H. Newton, Newton’s Telecom Dictionary (16<sup>th</sup> ed. 2000); see also TRO, ¶381 (“Dark fiber is unactivated fiber optic cable, deployed by a carrier, that has not been activated through connections to optronics that light it, and thereby render it capable of carrying communications”). The person or entity leasing or purchasing the dark fiber is generally expected to add the optical devices (optronics) necessary to render it usable for provision of telecommunications. 233 Newton’s Telecom Dictionary.

In its *TRO*, the FCC determined that “requesting carriers are impaired at most [enterprise] customer locations without access to dark fiber loops.” TRO, ¶311. The FCC further concluded that “carriers are impaired without access to unbundled dark fiber transport.” Id., ¶381. The FCC, however, reversed this conclusion with respect to dark fiber loops in its *TRRO*, finding that competitors are not in fact impaired without such access. TRRO, ¶¶182. Likewise, the FCC found 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 ...[.]” Id., ¶133. Accordingly, the federal law assumptions underlying the Commission’s Orders in this proceeding are not the same as when those orders were issued.

The Commission’s *Section 13-801 Order* made no reference to dark fiber. See Order, Illinois Bell Telephone Company: Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614

(June 11, 2002) (hereafter “Section 13-801 Order”). Likewise, the Commission did not consider the question of dark fiber in its *Interim Order on Remand (Phase I)*, although SBC made certain arguments regarding dark fiber. Interim Order on Remand (Phase I) at 91-92. Accordingly, the Commission’s consideration of this issue appears, to some degree at least, to be *de novo*<sup>6</sup>.

As noted elsewhere, carriers subject to Section 13-801 must “provide to any requesting ... carrier, for the provision of ... telecommunications service, nondiscriminatory access network elements on any bundled or unbundled basis, ... at any technically feasible point[.]” 220 ILCS 5/13-801(d). As further noted, a network element is defined by statute as “a facility or equipment used in provision of a telecommunications service.” 220 ILCS 5/13-216.

Given this, the Staff is of the opinion that Section 13-801(d) obliges SBC to unbundle dark fiber loops and transport facilities independent of federal law. Dark fiber is, unquestionably, a “facility or equipment used in provision of a telecommunications service.” This being the case, SBC is obligated to offer unbundled access under Section 13-801(d). This is true because, as the Commission found in its *Section 13-801 Order*, and reaffirmed in its *Interim Order on Remand (Phase I)*, the General Assembly did not intend to require, and did not require, a “necessary or impair” analysis before SBC is required to offer unbundled access to an element under Section 13-801. Interim Order on Remand (Phase I) at 62, Section 13-801 Order, ¶¶76, 82. Accordingly, the FCC’s

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<sup>6</sup> Dark fiber loops appear to the Staff to be a sub-species of high-capacity loops, and dark fiber transport likewise appears to be a subset of dedicated transport. To that extent, the Staff agrees that the Commission has to some degree considered these issues. Further, to the extent the Commission considers dark fiber to be a subset of high capacity loops or dedicated transport, the Staff’s Comments with respect to those issues should apply.

findings that competitors are not impaired without access to dark fiber are irrelevant to the Commission's consideration. Again, as the Commission noted in its *Consolidated Complaint Order*, "the absence of 'limiting language' in Section 13-801 'impl[ies] that the General Assembly intended to grant *unrestricted access to network elements* from Alt-Reg companies.' " Consolidated Complaint Order at 29-30, *citing* Interim Order on Remand (Phase I) at 62.

As is the case with other such elements, dark fiber provided pursuant to Section 13-801 and independent of federal rules is not subject to TELRIC pricing. See Interim Order on Remand (Phase I) at 94 ("[High-capacity] loops provided by SBC beyond the federal requirement should be provided at non-TELRIC just and reasonable cost-based rates").

## **V. Conclusion**

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

Respectfully submitted,

/s/ \_\_\_\_\_

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