

**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  
REPLY 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 incorporates by reference the briefs and comments it has previously filed in this proceeding and submits its Reply Brief on Exceptions on Remand (Phase II) in the above-captioned matter.

**Staff's Reply to the Joint CLECs' Exceptions**

To the best of Staff's knowledge, the Joint CLECs did not file any exceptions to the Administrative Law Judges' ("ALJs") Proposed Order on Remand in Phase II of this proceeding, issued on September 29, 2005 ("Proposed Order").

**Staff's Reply to SBC's Exceptions**

Although SBC takes seven distinct exceptions to the Proposed Order, SBC essentially rehashes the same arguments it made in its Opening Comments on Remand (Phase II) and Reply Comments (Phase II) and in other prior filings in this proceeding. See *e.g.*, SBC BOE (Phase II) at 4, 46-47. In the interest of

brevity, and since Staff has fully addressed these arguments elsewhere, Staff will not fully rearticulate those specific arguments again. Staff, however, has some comments in reply to SBC's Brief on Exceptions (Phase II).

SBC criticizes the Proposed Order for concluding that "the Commission is not empowered to declare portions of Section 13-801 preempted or unconstitutional." SBC BOE at 3, *quoting* Proposed Order at 6. SBC argues that, instead, it is asking for "the Commission to *avoid* preemption by *enforcing* section 13-801 and giving effect to subsection (a)." *Id* (emphasis in original).

SBC also claims that section 13-801(d)'s usage of federal standards and the term "unbundled," which is also used in the 1996 federal act, "provide [the Commission] an ample basis to read section 13-801 as requiring unbundling only where the FCC has also required it." SBC BOE at 4. SBC claims that the Proposed Order "completely ignores these two points." *Id.*, at 5. If the Commission would not ignore these two points, SBC contends, the Commission could then interpret section 13-801 in a manner that avoids preemption. *Id.*

Regarding its first point, the section 13-801(a) argument, SBC insists that:

[T]he language of section 13-801(a) does, in fact, require consistency with federal law. Recognizing the well-established supremacy of federal law in general and the specific supremacy of the FCC when it comes to matters like unbundling, the Illinois General Assembly stated at the outset of Section 13-801 that the obligations created by Section 13-801 must be "not inconsistent with" the local competition provisions of the 1996 Act and "not preempted by orders of the [FCC].

SBC BOE at 3 (citations omitted).

SBC, however, selectively quotes from section 13-801(a). SBC fails to note the critical language that the General Assembly employed in directing the

Commission “to expand upon federal law” for those carriers “under an alternative regulation plan.” Interim Order on Remand (Phase II), at 62. In this regard, the Commission recently concluded:

Section 13-801(a) states clearly that “[t]his Section provides *additional State requirements* contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission.” Therefore, the legislature expressly intended to expand upon federal law in this instance. These additional obligations were imposed upon carriers that are doing business pursuant to alternative regulation.

Interim Order on Remand (Phase II), at 62 (emphasis added).

SBC has consistently refused to even acknowledge that the general Assembly intended to impose on SBC (and any other alternative regulated carrier) “additional State requirements.” Thus, far from supporting SBC’s central argument that section 13-801 is preempted by federal law, section 13-801(a), when read in its entirety, undermines both SBC’s central argument and its subordinate argument that the Proposed Order fails to give effect to section 13-801(a).

Likewise, regarding SBC’s argument that section 13-801(d)’s usage of federal standards and the term “unbundled”, “provide[s] [the Commission] an ample basis to read section 13-801 as requiring unbundling only where the FCC has also required it.” SBC BOE at 4. This argument is essentially the same argument that the Commission has already rejected in its Interim Order on Remand (Phase II). In rejecting this SBC argument, the Commission reasoned that:

Among the specific differences between federal law and Section 13-801 is the absence of the federal “necessary and impair” test as a precondition to access network elements. On the contrary, Section 13-801(d) requires access to network elements on a bundled or unbundled basis. Moreover, under Section 13-801 network elements are defined quite broadly.

The Supreme Court’s decision in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999), which overturned the FCC’s first unbundling rules, emphasized the importance of the “necessary and impair” standard of Section 251(d)(2) as a prerequisite to requiring RBOCs to provide unbundled network elements at cost based rates. We infer that the legislature was aware of the implications of this decision when it enacted Section 13-801 in 2001. Therefore, it is unlikely that the omission of parallel limiting language in Section 13-801 was an oversight. Given this context, we interpret the absence of “necessary and impair” or any other limiting language in Section 13-801 to imply that the General Assembly intended to grant unrestricted access to network elements from Alt-Reg companies.

We disagree with SBC’s contention that Section 13-801 necessarily conflicts with and is preempted by Section 251 of TA 96 because Section 251, unlike Section 13-801, requires network elements to meet the necessary and impair test in order to be offered at TELRIC-based rates. We note that Section 271 of TA 96 delineates additional categories of network elements required to be unbundled without reference to the “necessary and impair” test. We find that Section 13-801’s unrestricted access to network elements is comparable to the absence of limiting language in Section 271 of TA 96.

Interim Order on Remand (Phase II), at 62-63.

Accordingly, regardless of the General Assembly’s use in section 13-801(d) of the term ‘unbundled’ and certain other language that is similar to language used in the federal Act, the Commission has specifically rejected this argument and found, instead, that section 13-801(d) requires SBC to provide requesting carriers access to elements on both a bundled or unbundled basis, without any “necessary and impair” limitations as is found in the federal Act. Thus, far from being a basis to limit the General Assembly’s directives in the rest

of section 13-801, as argued by SBC, sub-section 13-801(d) clearly supports the Commission conclusions in this proceeding.

As Staff has pointed out on more than one occasion in this proceeding, the choice the Commission faces is between adopting SBC's meritless position<sup>1</sup> or giving effect to the plain and unambiguous language of section 13-801. As this Commission has concluded repeatedly, it has no choice but to give effect to clear and unambiguous language found in section 13-801 "without reading into it exceptions, limitations or conditions that the legislature did not express and without resorting to other aids of statutory construction."<sup>2</sup>

As Staff noted in its Reply Comments in this proceeding, SBC has proven itself tenacious in reiterating its position. Staff Reply Comments, at 4. Although, SBC appears to acknowledge the Commission's conclusions found in prior Orders in this proceeding by stating that it "does not ask this Commission to decide the preemption questions,"<sup>3</sup> it then devotes the vast majority of its Comments requesting that the Commission do just that, determine preemption questions."<sup>4</sup> SBC accepts the Commission's reasoned conclusion that ambiguous or unclear statutory language in Section 13-801 should be interpreted, where possible, in a manner consistent with federal rules and regulations. However, SBC utterly refuses to accept the Commission's similarly reasoned conclusion (and corollary) that where the statutory language of section

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<sup>1</sup> See April 20, 2005 Order, at 61 ("[W]e reject SBC's thesis that the rules of construction allow us to reinterpret Section 13-801 at will to avoid preemption by a court").

<sup>2</sup> April 20, 2005 Order, at 61.

<sup>3</sup> SBC Initial Comments at 25 ("Of course, SBC Illinois does not ask this Commission to decide the preemption questions.").

<sup>4</sup> See *e.g.*, SBC Initial Comments at 25 ("Regrettably, the Commission's 2002 Order did *not* make every effort . . . to avoid clashing with then-existing federal law.") (emphasis in original).

13-801 is clear and unambiguous, the Commission has no choice but to give such language its clear effect. SBC, apparently, will never be satisfied that the Commission expended enough of an effort in interpreting section 13-801 until it adopts SBC's unlawful position in total and preempts the Illinois General Assembly. This, the Commission, as it has rightly and repeatedly concluded, cannot do.<sup>5</sup>

### **Conclusion**

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

Respectfully submitted,

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Matthew L. Harvey  
Michael J. Lannon  
Stefanie R. Glover  
Illinois Commerce Commission  
Office of General Counsel  
160 North LaSalle Street  
Suite C-800  
Chicago, Illinois 60601  
312 / 793-2877

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Counsel for the Staff of the  
Illinois Commerce Commission

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<sup>5</sup> See e.g., April 20, 2005, at 61 ("the Commission is not empowered to declare portions of Section 13-801 preempted or unconstitutional.").