ICC Docket 05-0763

Brief on Exceptions
AT&T Illinois

Attachment 2

b.) what remedies are reasonable?

AT&T complains that XO's proposed 10-day period for converting wholesale services to UNEs is arbitrary and unsupported by record evidence establishing its reasonableness. AT&T Init. Br. at 11. As the party affirmatively proposing language in this proceeding, XO bears the burden of proving that its language is reasonable. Just as a plaintiff in an administrative proceeding holds the burden of proof and will be denied relief it he fails to sustain that burden, *Miller v. Hill*, 337 Ill.App.3d 210, 785 N.E.2d 532, 539 (2003), and just as a complainant in a rate case before the Commission has the burden of proof to show the unreasonableness or discriminatory nature of a rate (*Champaign County Telephone Co. v. Illinois Commerce Commission*, 37 Ill.2d 312, 226 N.E.2d 849, 853 (1967), so too does a proponent of language in an arbitration proceeding hold the burden of proving that its proposed language is reasonable. This is particularly so because the language proposed by a party inevitably creates or eliminates legal rights and has very real consequences for the losing party. These consequences cannot be imposed by the Commission without requiring the proponent of those legal obligations to meet the burden of proving, through admissible evidence, that the requested obligations are reasonable. ~~There is a disingenuous element to this argument. XO's 10-day proposal was known to AT&T before and during this proceeding. AT&T, along with XO, elected to waive evidentiary hearings and submit a stipulated factual record in this case. AT&T was free to offer evidence refuting the reasonableness of the 10-day period. It remained silent, which not only left XO's 10-day proposal unscathed, but provided no evidentiary support for AT&T's charge that the 10-day interval is "absurdly short." *Id*. At the same time, AT&T is correct that~~ XO did not supply direct evidence of the reasonableness of its proposal, and for this reason alone its 10-day period is rejected.

AT&T objects to any requirement to convert wholesale services to UNEs, but argues that if there must be such language, it cannot reasonably be required to perform the conversions in just 10 days and should be given 90 days. In AT&T's view, a 90 day window would permit the work to be performed in the normal course of its business and would not prejudice XO because, under the PDAP's language, XO receives retroactive credits up until the date of conversion. AT&T also points out that there is a great discrepancy between the period of time allowed to CLECs for the transition away from affected UNEs (12-18 months) and the period of time given to AT&T Illinois to transition back to those same UNEs (15 days). The proposed modification makes sense and is adopted. We acknowledge that a 10-day conversion requirement is not supported by the record and that XO Is not prejudiced if AT&T takes up to 90 days for this purpose.

~~Nonetheless, although they have presented an evidentiary vacuum on this point, the parties have asked the Commission to resolve their dispute. We will give them a determination, extending the conversion period to 15 days. XO's contractual right to recoup the price differential will apply during that extended period (or until conversion is completed, whichever ends first), as it would have during the proposed 10-day period.~~

~~Additionally, the Commission finds that the parties freely waived their opportunity and right to offer direct evidence on this point.~~

Concerning the time period for which AT&T will owe reimbursement, XO's proposed text describes "the entire period during which the wire center was inappropriately classified as non-impaired or the date of installation, whichever is shorter." The "date of installation" is a single date, not a definable period of time. The Commission assumes XO intended to define a time period, but it did not do so. For clarity, this must be corrected.

Finally, AT&T explains that if the Commission decides to require retroactive credits, the PDAP should be revised to place a one year "cap" on any such credits. This one year cap is reasonable and is adopted. First, and most important, this cap will provide further incentive for XO to promptly self-certify in response to any future AT&T wire center designation so that the dispute can be expeditiously resolved by the Commission. Since any dispute brought to the Commission should be resolved in far less than one year (see section 4.1.3, obligating AT&T to file a dispute resolution petition with the state Commission within sixty days of a self-certification and to request expedited resolution). the one year cap is objectively reasonable. Second, the one year cap will reduce the administrative burden placed on the Commission and the parties in the event any retroactive credits are called for under the provision. The Commission can well imagine the administrative problems caused by having to determine (or reconstruct) all of the moves, adds and changes extending back over several years. Finally, the one year cap will limit AT&T's financial exposure to provide unlimited retroactive credits that could otherwise accumulate over many years. In summary, the one year cap balances the Commission's interest in providing some type of retroactive credit in the situation posited by XO, in retaining appropriate incentives to encourage XO to use the self-certification process to bring disputes to the Commission for resolution and in streamlining the administration of the wire center non-impairment process.

c.) approved provision

The Commission concludes that the parties must include the following language in their Illinois TRRO Attachment[1]:

> Section 4.1.6. In the event SBC error(s) caused a wire center to be deemed non-impaired (that is, the wire center would be deemed impaired but for those errors), SBC will promptly provide CLEC and the Commission notice of the error and will reclassify the wire center as impaired. When a

[1] Our approved text uses "SBC" rather than "AT&T" to be consistent with the other provisions in the Illinois TRRO Attachment. The parties are free to replace SBC with AT&T before submitting their ICA amendment for approval.

wire center designated as non-impaired by SBC is reclassified as impaired due to an error in SBC's classification, CLEC may submit orders to return facilities transitioned to other SBC wholesale facilities back to UNE facilities. SBC shall perform such conversions within ninety (90)~~fifteen (15)~~ days. Insofar as CLEC has not self-certified its entitlement to UNE facilities at the pertinent wire center, AT&T will credit CLEC the difference between the wholesale price paid and the applicable UNE price for the entire period during which the wire center was inappropriately classified as non-impaired or the period between the date of installation and the date of conversion (whichever is shorter), less any period during which CLEC's self-certification applied, and will credit all records change charges CLEC paid SBC for all UNEs transitioned due to SBC's erroneous wire center classification. Such credits shall be placed on CLEC's invoice within two (2) billing cycles. SBC's responsibility for retroactive credits under this provision shall be limited to the period covering one (1) year prior to the date CLEC submits its order to return the facilities transitioned to other SBC wholesale facilities back to UNE facilities.