STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	)	
	)	
vs	)	**Docket No. 05-0713**
	)	
King City Telephone, LLC d/b/a Southern Illinois	)	
Communications and Royal Phone Company LLC	)	
	)	
Complaint Pursuant to Section 10-108 of the Illinois	)	
Public Utilities Act and 83 Ill. Admin. Code 200.170	)	

REPLY BRIEF ON EXCEPTIONS OF AT&T ILLINOIS

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REPLY BRIEF ON EXCEPTIONS OF AT&T ILLINOIS

Illinois Bell Telephone Company ("AT&T Illinois" or "the Company") hereby replies to the Brief on Exceptions of Royal Phone Company ("Royal"). In its Brief on Exceptions, Royal argues that the Administrative Law Judge's Proposed Order ("Proposed Order") erred in directing Royal to execute an amendment to its interconnection agreement with AT&T Illinois (the "Agreement") that incorporates the new UNE rates approved in Docket 02-0864 effective beginning June 24, 2004. For the reasons discussed herein, Royal's exceptions are without merit.

I. THE PROPOSED ORDER CORRECTLY FOUND THAT ROYAL HAS A CONTRACTUAL OBLIGATION TO AMEND THE AGREEMENT TO INCORPORATE THE 02-0864 RATES EFFECTIVE BEGINNING JUNE 25, 2004

Royal does not dispute the need to amend the Agreement to incorporate the UNE rates established in Docket 02-0864. Royal, however, asserts that these rates should not become effective prior to March 2005, the date on which AT&T Illinois sent Royal a proposed amendment for incorporating the new rates. In support of this argument, Royal relies on the Agreement's Intervening Law provision (Section 21), a provision that applies, in general, to

judicial, legislative or administrative actions which have the effect of "invalidating, modifying or staying" the Agreement's "rates, terms and conditions or the laws and regulations that were the basis or rationale for such rates, terms and conditions." Royal argues that Section 21 has a "notice provision" which prohibits any amendment governed by that Section from becoming effective prior to the date that either Party makes a "written request" for such an amendment. Royal Br. on Exc. at 2.

As the Proposed Order (at 12-13) correctly found, however, the contract provision that governs the specific situation at issue in this case, is *not* the general Intervening Law provision. Rather, the controlling provisions are the "Successor Rate" provisions of Section 2.11.3 of the General Terms and Conditions ("GTC") and Appendix Pricing Section 1.6. Royal argues that the Intervening Law provision applies because "the term 'successor rate' is not a defined term in the ICA." Royal Br. on Exc. at 3. This argument is frivolous. It is clear from the plain language of the "Successor Rate" provisions that they apply in the specific situation where the Commission establishes "successor rates," i.e., new UNE rates to replace (or "succeed") rates that "have been established by the . . . Commission in cost proceedings or dockets initiated under or pursuant to the [Telecommunications Act of 1996]." Jt. Ex. 2, § 2.11.3; Jt. Ex. 3, § 1.6. That is precisely the situation here: the Order in Docket 02-0864 approved new "successor rates" for certain unbundled network elements available under the ICA (namely unbundled loops) that had been established by the Commission in previous cost proceedings initiated under the 1996 Act.[1] In this situation, the Successor Rate provisions state that "*the Parties agree* to amend this

[1] The recurring rates for unbundled loops were established in *Investigation into forward looking cost studies and rates of Ameritech Illinois for interconnection, network elements, transport and termination of traffic*, Dockets 96-0486/96-0569 (Consol.), Order (Feb. 17, 1998). The nonrecurring line connection and loop service order charges were established in *Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/96-0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues*, Docket 98-0396, *Order* (Oct. 16, 2001).

Agreement to incorporate such new rates, prices and charges with such rates, prices and charges *to be effective as of the date specified in such order or docket (including giving effect to any retroactive application if so ordered).*" *Id*. (emphasis added).

Thus, pursuant to the Successor Rate provisions of GTC Section 2.11.3 and Appendix Pricing Section 1.6, "the Parties agree[d] to amend" their Agreement "to incorporate" the new UNE rates established in Docket 02-0864 "to be effective as of the date specified" in the Order in that docket. As discussed in AT&T Illinois' Initial Brief (at 8) and the Proposed Order found, the specified effective date was June 25, 2004. As the Proposed Order also found (at 14), the agreement of the parties, as memorialized in the Successor Rate provisions, is not conditioned upon one party providing the other with a "written request" or a proposed amendment. AT&T Ill. Init. Br. at 8-9. Accordingly, the Proposed Order (*Id*.) correctly concluded that the fact that AT&T Illinois did not send Royal a proposed amendment until March 2005 does not in any way excuse Royal from complying with its express agreement under GTC Section 2.11.3 and Appendix Pricing Section 1.6 to amend the Agreement to incorporate the new rates established in Docket 02-0864 "to be effective as of the date specified" in the Order in that docket, i.e., June 25, 2004.

As the Proposed Order (at 13) correctly finds, its decision is supported by the well-established rule that "where a contract contains general and specific terms, the specific terms control." *Order*, Docket 05-0171 at 7 citing *Grevas v. United States Fidelity & Guar. Co.*, 152 Ill. 2d 407, 411 (1992); *see also Lima Lake Drainage Dist. V. Hunt Drainage Dist.*, 204 Ill. App. 3d 521, 526 (3rd Dist. 1990) ("[W]here one intention is expressed in one clause of an instrument and a different, conflicting intention appears in another clause of the same instrument, effect should be given to the clause which is more specific, and the general clause should be subjected

to such modification or qualification as the specific clause makes necessary"). If, as Royal proposed, the Intervening Law provision is interpreted as making the effective date for new rates established in proceedings such as Docket 02-0864 the date of a "written request by either Party," that interpretation would be in direct conflict with GTC Section 2.11.3 and Appendix Pricing Section 1.6, which provide that the effective date shall be the date specified by the Commission in its order establishing the new rates. In this case, the "specific terms" of the Successor Rate provisions "control." *Grevas v. United States Fidelity & Guar. Co., supra*.

Furthermore, as the Proposed Order (at 13-14) properly found, even if the effective date specified by the Intervening Law provision, as interpreted by Royal, were determined to trump the effective date specified by GTC Section 2.11.3, it cannot, by express agreement of the parties, trump Appendix Pricing Section 1.6. Under the heading "Conflicts in Provisions," GTC Section 2.6.2 provides that "[i]f any definitions, terms or conditions in any Appendix, Attachment, Exhibit, Schedule or Addenda differ from those contained in the main body of this Agreement, those definitions, terms or conditions will supersede those contained in the main body of this Agreement, but only in regard to the services or activities listed in that particular Appendix, Attachment, Exhibit, Schedule or Addenda." Jt. Ex. 2, § 2.6.2. Thus, to the extent that the Intervening Law provision (which is included in the "main body" of the Agreement) is interpreted to make the effective date of new rates the date of a "written request" to incorporate those rates into the Agreement, that provision is expressly "superseded" by Appendix Pricing Section 1.6, which makes the effective date for new rates the "date specified" in the Order establishing those rates, which in this case was June 25, 2004. Jt. Ex. 3, § 1.6.

In addition, to the extent that the Intervening Law provision is deemed to apply to the specific situation at issue here, that provision can, and should, be interpreted to avoid a conflict

with the express language of GTC Section 2.11.3 and Appendix Pricing Section 1.6. The Intervening Law provision states that the "rates, terms and/or conditions" affected by a change of law "shall be immediately . . . modified . . . *consistent* with the action of the legislative body, court, or regulatory agency upon written request of either Party." To be "consistent" with the Order in Docket 02-0864, the new rates established in that Order should be made effective on that June 25, 2004, the effective date specified in that Order. Accordingly, if the Intervening Law provision is deemed to apply here, Royal had an obligation, upon the written request of AT&T Illinois, to agree to "immediately" incorporate the rates established in Docket 02-0864 with such rates to become effective as of June 25, 2004.

Contrary to Royal's assertion (Br. on Exc. at 2), the Proposed Order's interpretation of the Agreement is fully supported by the Commission's final Order in Docket 05-0171. That case involved the interconnection agreement between AT&T Illinois and Forte Communications, Inc. ("Forte"). Because the Royal/AT&T Illinois and Forte/AT&T Illinois agreements both represent "opt-ins" to the interconnection agreement between AT&T Illinois and McLeodUSA Telecommunications Services, Inc.,[2] the provisions of the Royal and Forte Agreements (including the Successor Rate provisions, GTC Section 2.11.3 and Appendix Pricing Section 1.6 and the Intervening Law provision, GTC Section 21) are *identical* to one another. In Docket 05-0171, the Commission held that the contract provisions specifically governing the incorporation of rates established in Docket 02-0864 are GTC Section 2.11.3 and Appendix Pricing Section 1.6. In construing those provisions, the Commission did not find that the rates should become effective as of July 16, 2004, the date that AT&T Illinois sent Forte a formal notice and proposed pricing agreement. Rather, the Commission concluded that "[i]t is clear from the specific terms

[2] See *Order*, Docket 04-0018 at 2 (March 30, 2004) (approving Forte/AT&T Illinois' agreement) and *Order*, Docket 03-0063 at 2 (March 26, 2003) (approving Royal/AT&T Illinois' agreement).

of the contract, that the parties agreed to amend their contract to incorporate new rates with an effective date the same as that contained in the Commission's Order, i.e., June 25, 2004." *Order*, Docket 05-0171 at 7 (Nov. 17, 2005). Because the contractual provision of the Royal and Forte agreements are identical to one another, the Commission's finding in Docket 05-0171 applies equally to this case.

Royal argues that the Order in Docket 02-0864 "did not establish a date for implementation of ICA rates" and, therefore, "does not support the Proposed Order's finding that ICA rates were to be effective as of June 24, 2004." Royal Br. on Exc. at 3, 4. This argument is the same as the one that Forte made, and the Commission rejected, in Docket 05-0171. The Proposed Order properly rejected it again in this case.

In support of its argument, Royal asserts that the Commission in Docket 02-0864 declined to adopt AT&T Illinois' proposal to include language in the Order in that case explicitly requiring that "amendments to the ICAs to reflect the approved changes in UNE rates be filed with the Commission within 30 days of the Order, with such rate to become effective on the same date that the compliance tariff becomes effective." Royal Br. on Exc. at 3. Royal's argument fails to recognize that the Joint CLECs in Docket 02-0864 opposed AT&T Illinois' proposed language on the grounds that it was *unnecessary*:

> Since (as SBC notes) virtually all existing interconnection agreements have provisions that specify how newly-approved rates are to be taken into effect for purposes of the agreement, the rates approved by the Order in this docket can be implemented according to the terms of the agreements, and no separate directives from the Commission on this score are required in the final Order.[3]

Consistent with the position of the Joint CLECs, the Commission decided not to include in its Order in Docket 02-0864 a "separate directive" governing incorporation of the new rates into all

[3] *Brief in Reply to Exceptions of AT&T Communications of Illinois, Inc., CIMCO Communications, Inc., Forte Communications, Inc., MCI, Inc., McLeodUSA Telecommunications Services, Inc., RCN Telecom Service of Illinois, LLC, TDS Metrocom, LLC and XO Illinois, Inc.*, Docket 02-0864, at 80 (May 24, 2004).

ICAs. Instead, the Commission recognized that such rates should be "incorporated into the current interconnection agreements depending on the change of law provisions therein." *Order*, Docket 02-0864, at 293 (June 9, 2004).

As previously discussed, in Docket 05-0171, the Commission held that the applicable "change of law provisions" of the Forte/AT&T Illinois Agreement, which are identical to those of the Royal/AT&T Illinois Agreement, are the Successor Rate provisions, which provide that new rates are to become effective on the effective date "specified by the order" approving those new rates. The Commission further held that, for purposes of the Successor Rate provisions, the effective date "specified" by the Order in Docket 02-0864 is June 25, 2004. This same holding must also apply to the identically worded Successor Rate provisions of the Royal/AT&T Illinois Agreement.

II. THE PROPOSED ORDER CORRECTLY FINDS THAT THERE IS NOTHING "UNFAIR" ABOUT REQUIRING ROYAL TO COMPLY WITH ITS CONTRACTUAL OBLIGATIONS

Royal argues that as a matter of "fundamental fairness," AT&T Illinois should be equitably estopped from enforcing its contractual rights under the Successor Rate provisions and incorporating amended rates prior to March of 2005. Royal Br. on Exc. at 2, 3, 9. The Commission, however, cannot consider this argument because it has no equitable powers. *Fountain Water District v. Illinois Commerce Commission*, 291 Ill. App. 3d 696 (1st Dist. 1997) (finding that the Commission could not consider an equitable estoppel claim). Thus, Royal's equitable estoppel claim must be rejected out of hand.

In any event, as the Proposed Order properly concluded, there is nothing unfair or inequitable about requiring Royal to pay the UNE rates established in Docket 02-0864 effective beginning June 25, 2004. As demonstrated above, Royal has *already* agreed, pursuant to the

Successor Rate provisions of the Agreement, to incorporate the rates established in Docket 02-0864 effective beginning June 25, 2004, the effective date specified by the Commission, and that agreement was not conditioned upon the receipt from AT&T Illinois of an official Notice and proposed amendment within any prescribed period of time. There is nothing "unfair" about requiring Royal to abide by that agreement. Moreover, the Commission is bound to enforce Royal's obligations under the Agreement, which the Commission approved, whether or not it deems the outcome of that enforcement to be "fair" in this particular instance.

Furthermore, Royal has failed to establish the required elements for a claim of estoppel because it has failed to demonstrate that AT&T Illinois engaged in improper or negligent conduct, or that Royal reasonably relied on such conduct to its detriment. Royal claims that it "expected *negotiations* prior to any amendment" to incorporate the rates established in Docket 02-0864 and that it was "unaware why AT&T Illinois had not proposed an amendment" prior to March 2005. Royal Br. on Exc. at 4) (emphasis in original). Royal does *not*, however, dispute the Proposed Order's finding that Royal was "aware of the outcome" of the Order in Docket 02-0864 "prior to receiving the formal notice and proposed amendment from AT&T Illinois." Prop. Order at 14. Thus, there is no basis whatsoever for Royal's suggestion that, unlike other CLECs, Royal was not "able to consult [its] ICA[ ] and take the necessary steps to adjust [its]rates to reflect new, higher costs." Royal Br. on Exc. at 3. Royal was (or would have been if it had bothered to "consult" its Agreement) aware of the Successor Rate provisions of its Agreement and, therefore, also aware that the rates established in Docket 02-0864 should be incorporated into the Agreement effective beginning June 25, 2004. If Royal had deemed it necessary to increase the rates that it charges end users to recover increased UNE costs resulting from Docket

02-0864, there was nothing stopping it from doing so before the increased UNE rates were formally incorporated into the Agreement by an amendment.

Moreover, as the Proposed Order (at 14) finds, nothing in the applicable Successor Rate provisions that required AT&T Illinois (rather than Royal) to initiate the amendment process for incorporating new Commission-approved rates pursuant to the Successor Rate provisions. Thus, nothing prevented Royal from initiating the amendment process before March 24, 2005. Royal's conscious decision to wait for AT&T Illinois to make the first move cannot now be used to justify Royal's attempt to abrogate its agreement under the Successor Rate provisions to incorporate the new rates into the Agreement effective beginning June 25, 2004. Even if the contractual onus was on AT&T Illinois to initiate the amendment process (and it was not), the mere fact that AT&T Illinois sent a proposed amendment to Royal in March of 2005, rather than July of 2004, cannot give rise to a claim of estoppel. "The mere passage of time without action by one party does not itself bring [the estoppel] doctrine into effect." *Wilson v. Illinois Benedictine College*, 112 Ill. App. 3d 932, 939 (2nd Dist. 1983).

Royal's claim that it is being "punished" by the Proposed Order for AT&T Illinois' "mistake" (Br. on Exc. at 3) makes no sense. The Proposed Order simply ensures enforcement of Royal's contractual obligation to pay rates designed to recover AT&T Illinois' TELRIC costs, as determined by the Commission in Docket 02-0864, effective beginning on the effective date specified by the Commission, i.e., June 25, 2004. Royal does not explain how it was harmed in any way by AT&T Illinois' inadvertent delay in sending Royal a proposed Pricing Amendment. In fact, as a result of that delay, the date on which Royal is required to pay the amounts owed under the new UNE rates was also delayed. Since AT&T Illinois will not be able to assess Royal interest charges on the unpaid balance for the period of time prior to the effectiveness of a

conforming pricing amendment, Royal has benefited (and, until a pricing amendment becomes effective, will continue to benefit) from the delay in amending the Agreement.

Finally, Royal argues that the Proposed Order will cause adverse "consequences" because "any number of judicial, regulatory or legislative actions could arguably require an amendment to the parties' interconnection agreement" and "until one party notifies the other of a change in law event and the intent to modify the agreement, there is no way to predict which actions result in amendments." Royal Br. on Exc. at 2. The Proposed Order (at 14) properly rejected this argument. Contrary to Royal's insinuation, the Proposed Order does *not* determine that all "judicial, regulatory or legislative actions" requiring amendment to an interconnection agreement are to be given retroactive application. Rather, the Proposed Order only addresses the effective date for new Commission-approved rates in the specific circumstances covered by the Successor Rate provisions (GTC Section 2.11.3 and Appendix Pricing Section 1.6). In those circumstances, the parties created certainty by agreeing that the new rates will become effective on the date "specified" in the Order establishing those rates, which in the case of the rates established in Docket 02-0864 is June 25, 2004. A Commission decision to enforce that agreement in this case will not in any way constitute a precedent for the effective date of "judicial, regulatory or legislative actions" which are not governed by the Successor Rate provisions.

III. CONCLUSION

For all the reasons discussed herein, Royal's exceptions should be rejected and the Proposed Order should be affirmed.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

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CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **REPLY BRIEF ON EXCEPTIONS OF AT&T ILLINOIS** was served on the following parties by U.S. Mail and/or electronic transmission on June 2, 2006.

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