STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	:	
	:	Docket No. 08-0280
Filing to withdraw unbundled network	:	
elements from the tariffs.	:	
(Tariffs filed on March 14, 2008)	:	

INITIAL COMMENTS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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The Staff of the Illinois Commerce Commission (hereafter "the Staff"), for its Initial Comments in the above-captioned proceeding, states as follows;

I. Procedural Background

This proceeding was initiated as a result of the Illinois Bell Telephone Company's (hereafter "AT&T") March 14, 2008 filing that withdrew all tariffs for the unbundled network elements (hereafter "UNEs") it is currently required to provide under state and federal law. Joint Stipulation, ¶8 and Ex. 4. On April 23, 2008, the Commission suspended the filing and ordered this investigation. Suspension Order. On May 14, 2008, the Administrative Law Judge convened a status conference in the matter, in the course of which it was determined that: (a) the matter would proceed by the filing of simultaneous comments and reply comments; (b) the parties would file a Joint Stipulation to such factual matters as they deemed necessary to comprise an adequate record for decision in the proceeding; and (c) the Staff would file its Tariff Review Memorandum. Tr. at 3-19. The parties thereafter filed a Joint Stipulation, and the Staff filed its Tariff Review Memorandum.

II. Underlying UNE Requirements

The requirement that incumbent local exchange carries (hereafter "ILECs"), of which AT&T is one, provide UNEs to requesting carriers is to be found in several statutory provisions. The first of these, Section 251(c)(3) of the federal Telecommunications Act of 1996, which imposes upon ILECs:

> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and

> nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 [of the Act]. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.
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> 47 U.S.C. §251(c)(3)

The Federal Communications Commission (hereafter "FCC") has from time to time reviewed the question of precisely which UNEs that ILECs must provide. *See, e.g., First Report And Order*, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, FCC No. 96-325, CC Docket No. 96-98; CC Docket No. 95-185, 11 FCC Rcd 15499; 1996 FCC LEXIS 4312; 4 Comm. Reg. (P & F) 1 (August 8, 1996) (hereafter "Local Competition Order"). On November 5, 1999, the FCC released its *UNE Remand Order*, which promulgated rules designating the UNEs that ILECs would be required to provide. *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, FCC 99-238, CC Docket No. 96-98, 15 FCC Rcd 3696; 1999 FCC Lexis 5663; 18 Comm. Reg. (P & F) 888 (November 5, 1999 Released) (hereafter "UNE Remand Order"). In the *UNE Remand Order*, the FCC authorized state Commissions to add elements to the list of elements required to be unbundled, provided that the unbundling of such elements can be accomplished in compliance with sections 252(d)(3)(B) and (C) of the Act, 47 U.S.C. §252(b)(3)(B), (C). UNE Remand Order, ¶153. The FCC stated that it expected to reexamine the national list of elements every three years. UNE Remand Order, ¶151.

In June 2001, the Illinois General Assembly enacted Section 13-801 of the Illinois Public Utilities Act. Section 13-801, which the General Assembly specifically intended to

"provide[] additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996 [fn] and not preempted by order of the [FCC]." 220 ILCS 5/13-801(a)(footnote omitted). Section 13-801's requirements additional to federal law apply exclusively to carriers subject to alternative regulation under Section 13-505.6. Id. AT&T is such a carrier. See *Final Commission Order*, Illinois Bell Telephone Company: Petition to Regulate Rates and Charges of Noncompetitive Services Under an Alternative Form of Regulation, ICC Docket Nos. 92-0448/93-0239 (Consol.), October 11, 1994 (hereafter "Alt. Reg. Order").

Section 13-801 further provides, in relevant part, that:

> An [ILEC] shall provide a requesting telecommunications carrier with … network elements … on just, reasonable, and nondiscriminatory rates, terms, and conditions to enable the provision of any and all existing and new telecommunications services within the LATA, including, but not limited to, local exchange and exchange access.

220 ILCS 5/13-801(a)

More specifically, Section 13-801(d) requires ILECs to provide unbundled network elements as follows:

> The [ILEC] 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.
>
> > (1) An [ILEC] shall provide unbundled network elements in a manner that allows requesting telecommunications carriers to combine those network elements to provide a telecommunications service.
> >
> > (2) An [ILEC] shall not separate network elements that are currently combined, except at the explicit direction of the requesting carrier.
> >
> > (3) Upon request, an [ILEC] shall combine any sequence of unbundled network elements that it ordinarily combines for itself, including but not limited to, unbundled network elements identified

> in The Draft of the Proposed Ameritech Illinois 271 Amendment (I2A) found in Schedule SJA-4 attached to Exhibit 3.1 filed by Illinois Bell Telephone Company on or about March 28, 2001 with the Illinois Commerce Commission under Illinois Commerce Commission Docket Number 00-0700. The Commission shall determine those network elements the [ILEC] ordinarily combines for itself if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act. The [ILEC] shall be entitled to recover from the requesting telecommunications carrier any just and reasonable special construction costs incurred in combining such unbundled network elements (i) if such costs are not already included in the established price of providing the network elements, (ii) if the incumbent local exchange carrier charges such costs to its retail telecommunications end users, and (iii) if fully disclosed in advance to the requesting telecommunications carrier. The Commission shall determine whether the [ILEC] is entitled to any special construction costs if there is a dispute between the incumbent local exchange carrier and the requesting telecommunications carrier under this subdivision of this Section of this Act.
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> (4) A telecommunications carrier may use a network elements platform consisting solely of combined network elements of the [ILEC] to provide end to end telecommunications service 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 to its end users or payphone service providers without the requesting telecommunications carrier's provision or use of any other facilities or functionalities.
>
> …
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> 220 ILCS 5/13-801(d)

III. Legal Developments

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.

As noted above, Section 13-801 states, in relevant part, that it:

> [P]rovides 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.
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> 220 ILCS 5/13-801(a)

Section 13-801 further provides, with respect to its application, as follows:

> A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act … shall not be subject to the provisions of this Section, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 … and regulations promulgated thereunder.
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> Id.

AT&T is subject to alternative regulation under Section 13-506.1 of the Public Utilities Act. See *Order*, Illinois Bell Telephone Company: Petition to Regulate Rates and Charges of Noncompetitive Services Under an Alternative Form of Regulation, ICC Docket Nos. 92-0448/93-0239 (Consol.), October 11, 1994 (hereafter "Alt. Reg. Order"); *Order*, Illinois Bell Telephone Company: Application for review of alternative regulation plan / Illinois Bell Telephone Company: Petition to Rebalance Illinois Bell Telephone Company's Carrier Access and Network Access Line Rates / Citizens Utility Board and the People of the State of Illinois v. Illinois Bell Telephone Company: Verified Complaint for a Reduction in Illinois Bell Telephone Company's Rates and Other Relief, ICC Docket No. 98-0252/0335; 00-0764 (consol.) (December 30, 2002) (hereafter "Alt Reg Review Order"). Accordingly, under Section 13-801, AT&T is subject to such "additional State requirements" as the Commission might prescribe, as well as FCC requirements.

In September 2001, AT&T[1] filed a tariff in purported compliance with Section 13-801, which the Commission suspended on September 26, 2001. Advice No. 7555. Numerous parties intervened in the subsequent tariff review proceeding; hearings were duly held, and evidence taken and argument heard; and on June 11, 2002, the Commission entered its Order in the proceeding. *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").

In the *Section 13-801 Order*, the Commission directed AT&T to provide certain UNEs in addition to those required under FCC rules, in light of the fact that Section 13-801 does not contain the impairment requirement found in Section251(d)(2)(B) of the federal Act. *See, e.g., Order*, ¶¶73-83, 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"). The Commission instructed AT&T to file tariffs consistent with the Commission's Order. Section 13-801 Order, ¶609.

Thereafter, the Federal Communications Commission entered its Triennial Review Order, which promulgated rules significantly altering incumbent local exchange carriers' (hereafter "ILECs") obligations with respect to the offering on an unbundled basis of network elements. See *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers / Implementation of the Local

[1] AT&T was then doing business as Ameritech Illinois, but has subsequently assumed the business name "AT&T Illinois."

Competition Provisions of the Telecommunications Act of 1996 / Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC No. 03-36, CC Docket Nos. 96-98, 98-147, 01-338 (August 21, 2003) (hereafter "Triennial Review Order" or "TRO")[2]. Among other things, the FCC determined in the TRO that:

> [S]tate authority preserved by section 251(d)(3) 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 regulatory regime. [fn] We disagree with those commenters that maintain that, because we have permitted states to add UNEs to our national list in the past, we cannot limit their ability to continue to do so. [fn] Their argument ignores the clear directives Congress provided in the 1996 Act. Section 251(d)(3) preserves states' authority to impose unbundling obligations but only if their action is consistent with the Act and does not substantially prevent the implementation of our federal regime. Their argument also ignores the fact that prior Commission actions clearly had preemptive effect; as noted above, in the *UNE Remand Order*, the Commission prohibited the states from removing UNEs from the federally mandated list.
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> TRO, ¶192 (footnotes omitted)

The FCC further noted that: "state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not 'substantially prevent' its implementation[.]" TRO, ¶194. Accordingly, the FCC found that "It will be necessary for the subject states to amend their rules and to alter their decisions to conform to our rules[,]", TRO, ¶195. In so finding, however, the FCC determined that:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act. We likewise do not agree with those that argue

[2] An industry association of ILECs, the United States Telecom Association, appealed the Triennial Review Order, and on March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit rendered a decision that vacated several of the rules promulgated by the Triennial Review Order. *See* U.S. Telecom Ass'n v. FCC, 359 F.3d 554; 2004 U.S. App. Lexis 3960 (D.C. Cir. 2004) (hereafter "USTA II"). The rules vacated, however, were not those at issue here.

> that the states may impose any unbundling framework they deem proper under state law, without regard to the federal regime. These commenters overlook the specific restraints on state action taken pursuant to state law embodied in section 251(d)(3), and the general restraints on state actions found in sections 261(b) and (c) of the Act. Their arguments similarly ignore long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy. Under these principles, states would be precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in this Order.
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> TRO, ¶192 (footnotes omitted)

Based in part on the TRO's determination that state and federal principles must be rendered consistent, AT&T brought action in federal court seeking, *inter alia*, to enjoin the Commission from enforcing Section 13-801. The most recent of these resulted in the injunction that is attached as Exhibit 2 to the Joint Stipulation in this proceeding.

IV. Summary of the Staff's Position

The Commission should find that AT&T is not authorized to withdraw its UNE tariffs. AT&T remains obliged to offer UNEs as a matter of both state and federal law. UNEs are "telecommunications services" within the meaning of the Public Utilities Act, and as a result, must be tariffed subject to Section 13-502(a) of the Act. The January 38, 2008, injunction entered by the U.S. District Court for the Northern District of Illinois, Stipulation, ¶3 and Ex. 2, does not enjoin the Commission from requiring AT&T to tariff any UNEs to which the Injunction does not apply. Further, various federal Court decisions – Wisconsin Bell v. Bie, and related decisions – do not prohibit tariffing of UNEs. Neither the Illinois Appellate Court's decision in Illinois Bell Tel. Co. v.

GlobalCom, nor the Commission's Final Order on Reopening in Docket No. 00-0393 provide authority for withdrawal of the tariffs. Finally, AT&T cannot reserve the right to withdraw the tariffs, because it has no such right to begin with.

V. The Public Utilities Act Requires that UNEs Be Tariffed

The initial matter at issue in this proceeding is whether UNEs are "telecommunications services" within the meaning of Section 13-203 of the Illinois Public Utilities Act. Assuming this to be the case, UNEs must, as a state law matter, be tariffed under Section 13-512(a) of the Act. 220 ILCS 5/13-502(a). Pursuant to Section 13-502(a), telecommunications services must be tariffed. 220 ILCS 5/13-502(a). UNEs are indeed telecommunications services under the Illinois Public Utilities Act.

A cardinal rule of statutory construction is the rule that provides, when terms used in a statute are defined in the statute, those definitions govern, and statutory terms must be construed according to the statutory definitions. Robbins v. Bd. of Trustees of Carbondale Police Pension Fund, 177 Ill. 2d 533, 540; 687 N.E. 2d 39 (1997). Accordingly, in determining whether UNEs are a telecommunications service within the meaning of the Public Utilities Act, a detailed review of the statutory definitions of various terms used in the Act is warranted.

Section 13-203 of the Act defines "telecommunications service" to mean:

> [T]he provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information, by means of electromagnetic, including light, transmission with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) used to provide such transmission and also includes access and interconnection arrangements and services.

220 ILCS 5/13-203

The definition includes “access and interconnection arrangements and services[.]” UNEs, whether offered pursuant to federal requirements or Section 13-801, fall squarely into the category of “access and interconnection arrangements and services”. To the extent that there is any question regarding this, the definition of ”service” set forth in Section 3-115 of the Act resolves it. Section 3-115 provides that:

> **"Service" is used in its broadest and most inclusive sense**, and includes not only the use or accommodation afforded consumers or patrons, but also **any product or commodity furnished by any public utility and the plant, equipment, apparatus, appliances, property and facilities employed by, or in connection with, any public utility in performing any service** or in furnishing any product or commodity and devoted to the purposes in which such public utility is engaged and to the use and accommodation of the public.

220 ILCS 5/3-115 (emphasis added)

That a UNE is an “access or interconnection service” under this definition is undeniable. Without a doubt, UNEs are to be found among “the plant, equipment, apparatus, appliances, property and facilities employed by, or in connection with, [AT&T] in performing any service or in furnishing any product or commodity and devoted to the purposes in which [it] is engaged[.]” As an ILEC, AT&T is, as a matter of both federal and state law, engaged in, and in the business of, providing plant, equipment, apparatus and facilities to its competitors, which include UNEs. One need not - although the Commission must - resort to the “broadest and most inclusive” construction of “access or interconnection service” to reach this result.

The statutory definition of “network element” does not, as might be suggested, militate against UNEs being defined as “telecommunications services” within the

meaning of Section 13-203. First, Section 13-203 contains a list of exclusions from the statutory definition, including customer premises equipment, answering and paging services, and community antenna television service (i.e., cable TV). 220 ILCS 5/13-203(a)-(c). Network elements are not specifically excluded from the definition. Id. It is a well-established tenet of statutory construction – *exclusio unius est exclusion alterius* - that where specific reference is made to certain things, acts or classes of persons in a statute, all other things, acts or classes of persons should be deemed excluded. *See, e.g.,* County of Cook v. Ill. State Local Labor Relations Bd., 144 Ill. 2d 326, 336; 579 N.E.2d 866, 871; 1991 Ill. Lexis 85 at 15; 162 Ill. Dec. 52 (1991); Winn v. Mitsubishi Motor Mfg., 308 Ill. App. 3d 1054, 1060; 721 N.E.2d 819, 823; 1999 Ill. App. Lexis 842 at 12-13; 242 Ill. Dec. 540 (4th Dist. 1999). UNEs are specifically not enumerated among the exclusions from the definition of "telecommunications service", and it should therefore be assumed that the General Assembly did not intend to exclude them.

Likewise, the definition of "network element" contained in the Public Utilities Act provides no support for the notion that UNEs are not telecommunications services within the meaning of Section 13-203. Section 13-216 defines a "network element" 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.
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> 220 ILCS 5/13-216

VI. The January 28, 2008 Injunction Does Not Enjoin the Commission From Tariffing All UNEs, But Rather Only Those Section 13-801 UNEs Specifically Enumerated

The U.S. District Court decision in Illinois Bell Telephone Co. v. Hurley, *et al.*, 05 CV 1149 (January 28, 2008), is far more limited in its scope than AT&T suggests. Its specific terms are as follows:

> Specifically, the ICC is hereby enjoined from enforcing § 13-801, any ICC order implementing § 13-801, or any tariff implementing such ICC order or § 13-801, to the extent they purport to require AT&T Illinois to:
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> 1. "unbundl[e] . . . local circuit switching, switching-related elements, OCn-level loops, [OCn-level] dedicated transport, dark fiber loops, entrance facilities, [or] feeder subloops";
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> 2. unbundle DS1 or DS3 loops, or DS1, DS3, or dark fiber dedicated transport either (i) in or between wire centers that the ICC, the FCC, or a court of competent jurisdiction has determined to satisfy the applicable federal non-impairment criteria set forth in 47 C.F.R.§ 51.319(a)(4), (a)(5), or (e)(2), including the wire centers designated as nonimpaired pursuant to the WCDO; or (ii) at quantities exceeding the applicable federal limits set forth in 47 C.F.R. § 51.319(a)(4), (a)(5), or (e)(2);
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> 3. "furnish CLECs [competing local exchange carriers] with preexisting combinations of network elements" that include any one or more of the network elements or items described in sub-paragraphs 12(a), (b), (c) or (d), or "combine [such] network elements for CLECs";
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> 4. "unbundle splitters";
>
> 5. provide "terminating access" on an unbundled basis or unbundle the "terminating switch."
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> *See* Stipulation, Ex. 2 at 6

Federal Rule of Civil Procedure 65(d), governing the issuance of injunctions in federal courts, and pursuant to which the January 28, 2008 injunction was entered, provides that: "Every order granting an injunction … must … state its terms specifically; and … describe in reasonable detail … the act or acts restrained[.]" F.R. Civ. P.

65(d)(1)(B)-(C). The requirement that an injunction be specific in its terms is not only a technical requirement; it is also a requirement of basic fairness, in light of the judicial sanctions that can attach to a party's failure to comply with an injunction. Schmidt v. Lessard, 414 U.S. 473, 476; 94 S. Ct. 713, 715; 38 L. Ed. 2d 661, 664-65; 1974 U.S. Lexis 40 (1974); vacated on other grounds, 421 U.S. 957; 95 S. Ct. 1943; 44 L. Ed. 2d 445; 1975 U.S. Lexis 1535 (1975).

The Staff does not suggest that the January 28 injunction is in any way imprecise. However, the injunction's precision is exactly why it does not prohibit the Commission from requiring the tariffing of those UNEs not enumerated in the injunction.

The injunction prohibits the Commission from enforcing Section 13-801 requirements to the extent Section 13-801 is read to require AT&T to offer specific enumerated elements and services, which are specifically enumerated in the injunction. However, the injunction must be read with reference to Rule 65. Under Rule 65, an injunction describes the acts enjoined – in this case the requirement that AT&T provide certain UNEs under the authority of Section 13-801. By definition, and based on principles of fundamental fairness, the injunction does not as a matter of law act to enjoin the Commission from enforcing Section 13-801 generally, rather it enjoins those acts specifically described within its four corners, and does not enjoin other acts. In short, the Commission is not, without more, enjoined from enforcing Section 13-801 to the extent that it requires AT&T to provide elements, services, or arrangements not specifically enumerated in the January 28 injunction.

As such, the January 28, 2008 injunction does not enjoin the tariffing of those elements, services or arrangements not enumerated.

VII. The GlobalCom Decision Does Not Provide Authority for Withdrawal of UNE tariffs

AT&T next argues the Illinois Appellate Court's decision in GlobalCom, Inc. v. Commerce Comm'n, *et al.*, 347 Ill. App. 3d 592; 806 N.E.2d 1194; 2004 Ill. App. Lexis 232; 282 Ill. Dec. 606 (1st Dist. 2004) amounts to a finding that UNEs are not telecommunications services as a matter of state law, and thus are not subject to tariffing. This however is not the case.

The court did not reach such a decision, and any such decision would be directly contrary to the plain language of Section 13-203 of the PUA. What the GlobalCom court was called upon to decide was whether the conversion of a special access circuit to an enhanced extended link (hereafter "EEL") constituted a "termination of service" under AT&T's special access tariff, such that termination penalties contained in the tariff should apply. GlobalCom, 347 Ill. App. 3d at 607; 806 N.E.2d at 1205; 2004 Ill. App. Lexis 232 at 30-31. The court found was that "termination of … tariffed service is, by definition, 'termination of service' for purposes of [a] tariff." GlobalCom at 608; 806 N.E.2d at 1206; 2004 Ill. App. Lexis 232 at 32.

To the extent that the GlobalCom court stated that UNEs were not services as a matter of Illinois statute, GlobalCom at 608; 806 N.E.2d at 1206; 2004 Ill. App. Lexis 232 at 32, it is clearly dicta, which, moreover: (a) is unnecessary to resolve the issue before the court; and (b) indicates that the court was not fully advised regarding Illinois statutory definitions. This throwaway statement should be disregarded.

VIII. The Bie Decision and Related Federal Court Decisions do Not Prohibit State Requirements that UNEs be Tariffed

AT&T similarly misreads and misapplies the decision of the U.S. Court of Appeals for the 7th Circuit decision in Wisconsin Bell Telephone Co. v. Bie, 340 F.3d 441; 2003 U.S. App. Lexis 16514; 29 Comm. Reg. (P & F) 1203 (7th Cir. 2003). This case (and similar cases), does not prohibit states from requiring ILECs to tariff UNE offerings under all circumstances. Rather, this case (and similar cases) prohibit state Commissions from requiring ILECs to offer tariffed UNEs to carriers which either: (i) do not have interconnection agreements; or (ii) are not entitled under existing interconnection agreements to take tariffed UNEs. In fact, Bie and its progeny stand for the proposition that a CLEC must enter into an interconnection agreement prior to obtaining UNEs, whether from a state tariff or pursuant to the terms of the ICA.

As an initial matter, the federal Act does not generally preempt state tariff regimes. *See, e.g.,* Michigan Bell Tel. Co. v. MCIMetro Access Transmission Serv., Inc., 323 F.3d 348, 358-60; 2003 U.S. App. Lexis 4083 at 22-30; 2003 FED App. 0073P at 14-18; 28 Comm. Reg. (P & F) 810 (6th Cir. 2003); U.S. West Communications, Inc. v. Sprint Communications Co., 275 F.3d 1241, 1249-53; 2002 U.S. App. Lexis 94 at 18-31(10th Cir. 2002); Michigan Bell Tel. Co. v. Strand, 26 F.Supp.2d 993, 1000-01; 1998 U.S. Dist. Lexis 18144 at 18-23 (W.D. Mich. 1998); *see also* Illinois Bell Telephone Co. v. Commerce Comm'n, 343 Ill. App. 3d 249, 257; 797 N.E.2d 716, 723; 2003 Ill. App. Lexis 1101 at 16-18; 278 Ill. Dec. 121 (3rd Dist. 2003).

Instead, courts have found to be inconsistent with the Act those state commission-imposed tariffs that "completely displace the existing interconnection agreements between the parties," "make unnecessary future interconnection

agreements between other parties," and that mandate the availability of ILEC services to the new entrant in lieu of negotiating interconnection agreements. *See, e.g.*, Bie, 340 F.3d at 442-45; 2003 U.S. App. Lexis 16514 at 1-10; Verizon North, Inc. v. Strand, 309 F.3d 935, 939-40, 942 n.4; 2002 U.S. App. Lexis 23135 at 7-14; 2002 FED App. at 5-9; 32 Comm. Reg. (P & F) 392 (6th Cir. 2002); MCI Telecomm. Corp. v. GTE Northwest, Inc., 41 F. Supp.2d 1157, 1178; 1999 U.S. Dist. Lexis 3129 at 56-57 (D. Or. 1999). Similarly, Verizon North, Inc. v. Strand, 367 F.3d 577; 2004 U.S. App. Lexis 8331; 2004 FED App. 0123P (6th Cir. 2004), involves a state commission order approving a competitive LEC's tariff that precluded the ILEC from negotiating and engaging in the Section 252 interconnection process for the purpose of reaching an interconnection agreement under the Act. Verizon North, 367 F.3d at 578; 2004 U.S. App. Lexis 8331 at 3; 2004 FED App. 0123P at 3. These cases are wholly distinguishable from the instant matter.

Bie involved an order by the Wisconsin commission requiring Wisconsin Bell to file tariffs setting forth the price and other terms under which CLECs could interconnect with Wisconsin Bell's network without negotiating individual interconnection agreements. Bie, 340 F.3d at 442; 2003 U.S. App. Lexis 16514 at 2. The Seventh Circuit addressed the question of whether the Wisconsin commission may "impose[] a tariff that an entrant may select in lieu of negotiating" an interconnection agreement. Wisconsin Bell, Inc. v. Bie, No. 01 C 0690, 2002 U.S. Dist. Lexis at 2 (W.D. Wis., Sept. 26, 2002)) and "create an alternative method by which a competitor can obtain interconnection rights". Bie, 340 F.3d at 442; 2003 U.S. App. Lexis 16514 at 2. The court held that the Wisconsin commission "requirement *has* to interfere with the [Act's]

procedures" establishing the ILEC's federal right to have CLECs negotiate an interconnection agreement. Id. at 444; 2003 U.S. App. Lexis 16514 at 8 (emphasis in original).

In the matter that gave rise to the Bie decision, the Wisconsin Public Utilities Commission had sought to "requir[e] one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price, so that [future] bargaining begins from there." Bie, 340 F.3d at 444; 2003 U.S. App. Lexis 16514 at 8. The court indicated that the tariffing requirement imposed on the ILEC "'short circuits' negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement." Id. at 445; 2003 U.S. App. Lexis 16514 at 8. Thus, Bie recognizes that the Act gives the ILEC the right to insist that interconnection rights be made available through interconnection agreements established under the Act's procedures. Bie thus holds that state requirements are inconsistent with Section 252's procedures when the state forces the ILEC to permit CLECs to take, *inter alia*, UNEs from tariff, thereby creating a means by which CLECs may bypass Section 252's procedures of negotiation and arbitration to establish interconnection agreements.[3]

[3] Likewise, in Illinois Bell Telephone Co. v. ICC, 343 Ill. App. 3d 249; 797 N.E.2d 716; 2003 Ill. App. Lexis 1101; 278 Ill. Dec. 121 (3d Dist. 2003), the Illinois Appellate Court found unlawful an ICC requirement that permitted CLECs without interconnection agreements with the ILEC, Illinois Bell, to "opt in" to the ILEC's tariffed remedy plan. Id. at 256-58; 797 N.E.2d at 723-24; 2003 Ill. App. Lexis 1101 at 15-17. There, the court determined that the ICC had ordered Illinois Bell to make its tariffed remedy plan available to CLECs that did not have interconnection agreements with the company. Id. The court held that the ICC's "opt-in" requirement in its order "bypass[ed] the process set forth in section 252" and, therefore, conflicted with federal law. Id. at 257-58; 797 N.E.2d at 723-24; 2003 Ill. App. Lexis 1101 at 17-18. In Illinois Bell Telephone Co. v. Wright, 2004 U.S. Dist Lexis 16757 (N.D. Ill. Aug. 23, 2004), appeal filed in Nos. 04-3433 & 04-3448) (7th Cir.), the district court invalidated an ICC order requiring that Illinois Bell make certain modifications to its tariff. The court held that requiring such modifications was inconsistent with Sections 251 and 252 of the Act and, therefore, preempted. Id.

In Indiana Bell Tel. Co. v. McCarty, 359 F.3d 493; 2004 U.S. App. Lexis 3669; 31 Comm. Reg. (P & F) 1195 (7th Cir. 2004) the Seventh Circuit followed Bie and invalidated an Indiana Utility Regulatory Commission order that imposed a "stand alone" obligation on the ILEC "independent of the Section 251/252 interconnection process." McCarty, 359 F.3d at 496; 2004 U.S. App. Lexis 3669 at 7.

As the Seventh Circuit made clear, McCarty arose in a unique procedural posture. McCarty, 359 F.3d at 494-95; 2004 U.S. App. Lexis 3669 at 1-3. Under Section 271 of the Act, ILECs were barred from providing long distance services until such time as the FCC granted applications for such authority, based on a determination that the ILEC seeking relief under Section 271 had opened its network to competitors. 47 U.S.C. §271(a), (c). Under Section 271, the only role of state commissions was to make recommendations to the FCC on whether particular applications did or did not satisfy the requirements of Section 271. 47 U.S.C. § 271(d)(2)(B).

In McCarty, in an attempt to persuade the Indiana Public Utilities Commission to support its long distance application, Indiana Bell committed to the condition that it would adhere to particular performance plan that it drafted and submitted to the Indiana commission. McCarty, 359 F.3d at 496; 2004 U.S. App. Lexis 3669 at 5-7. The Indiana commission, however, regarded the plan as insufficient, and modified the plan so that it increased Indiana Bell's obligations and ordered Indiana Bell to treat the plan as "an alternative means of obtaining interconnection" that would be available to all carriers, including those without interconnection agreements. McCarty, 359 F.3d at 497-98; 2004 U.S. App. Lexis 3669 at 11-12; *see also* Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n, 2003 U.S. Dist. Lexis 6452 at 12-14 (S.D. Ind., March 11, 2003). The court

held that this requirement was preempted by the Act's procedural requirements under Bie. McCarty, 359 F.3d at 496-97; 2004 U.S. App. Lexis 3669 at 5-7. The court further held that the Indiana commission could not "parlay its limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service." Id. at 497; 2004 U.S. App. Lexis 3669 at 10.

In Verizon North, the issue was whether the federal Act preempted a state commission order requiring Verizon North, an ILEC, to pay termination costs based on a tariff unilaterally filed by a new entrant. The court held such a requirement was indeed preempted.

In Verizon North, a competitor to ILEC Verizon North, Coast to Coast Telecommunications, filed a tariff with the Michigan Public Service Commission, purporting to establish a rate for reciprocal compensation applicable to certain traffic originating from Verizon North's customers and terminating on Coast's network. Verizon North, 367 F.3d at 578; 2004 U.S. App. Lexis 8331 at 3-7; 2004 FED App. 0123P at 3-6. Reciprocal compensation is one of the matters regarding which carriers have a duty under the Act to resolve by agreement arrived at through negotiation or arbitration, or other arrangement. 47 U.S.C. §§251(b)(5); 252(a)(1), (b)(1), (b)(4), (c)(2). The FCC had previously established extremely specific pricing rules for reciprocal compensation. 47 C.F.R. §§51.705, 51.707, 51.709, 51.711, 51.713. Verizon North disputed the validity of the tariff and charges and Coast to Coast asked the Michigan commission to resolve the dispute. Verizon North, 367 F.3d at 578; 2004 U.S. App. Lexis 8331 at 5-6; 2004 FED App. 0123P at 5. The Michigan commission did so by

approving the tariff and requiring Verizon North to pay Coast the disputed sums. Id. at 579-80; 2004 U.S. App. Lexis 8331 at 6-8; 2004 FED App. 0123P at 5. Verizon North brought an action in federal court, wherein the District Court vacated the Michigan commission's order, finding that Coast's tariff conflicted with the Section 252 negotiation and arbitration process. Id. at 580; 2004 U.S. App. Lexis 8331 at 5-6; 2004 FED App. 0123P at 5.

On appeal, the Sixth Circuit affirmed the District Court and held the order unlawful because it permitted the Michigan commission to bypass the Act's negotiation and arbitration procedures. Verizon North at 584-85; 2004 U.S. App. Lexis 8331 at 522-23; 2004 FED App. 0123P at 14. The court observed that there was no interconnection agreement, no request for negotiations by Coast to Coast, and no state-administered arbitration between the parties in the event negotiation failed to produce an agreement. Id. at 584; 2004 U.S. App. Lexis 8331 at 21-22; 2004 FED App. 0123P at 14. The court noted that Section 252 requires the competitor to initiate the bidding and the Michigan commission's order "was faulty because it forced the [ILEC] to commence the negotiation process" and "completely removes the [ILEC] from the negotiation process." Id. at 585; 2004 U.S. App. Lexis 8331 at 24; 2004 FED App. 0123P at 15. By forcing the ILEC to accept the competitor's rate, the Michigan order "completely obviates the need for negotiations by allowing the competitor to establish its own rate without any interaction between the incumbent and the competitor." Id. Thus, although the particular circumstances in Verizon North involved a competitor's tariff, the court's focus was on the ILEC's right not to be compelled to bypass the Section 252 interconnection procedures.

Here, the tariffing regime does no injustice to the federal scheme. There is nothing in tariffs that requires AT&T to offer tariffed UNEs or other interconnection arrangement to CLECs that have not negotiated ICAs with AT&T. Indeed, the Commission has ruled that only those carriers that have entered into ICAs with AT&T that incorporate the right to take UNEs under tariffs – as opposed to the far larger universe of carriers which have entered into ICAs with AT&T – are permitted to take UNEs under such tariffs. *Final Order* at 32-33, Cbeyond Communications, LLP, Global TelData II, LLC f/k/a Global TelData, Inc., Nuvox Communications of Illinois, Inc. and Talk America Inc. -vs- Illinois Bell Telephone Company: Verified Complaint and Petition for an Order for Emergency Relief pursuant to 220 ILCS 5/13-515(e) XO Illinois, Inc. and Allegiance Telecom of Illinois, Inc. -vs- Illinois Bell Telephone Company: Complaint pursuant to 220 ILCS 5/13-515 / McLeodUSA Telecommunications Services, Inc. -vs- Illinois Bell Telephone Company: Verified Complaint pursuant to 220 ILCS 5/13-515(e), ICC Docket Nos. 05-0154 / 05-0156 / 05-0174 (June 2, 2005); *aff'd*, Illinois Bell Tel. Co. v. Commerce Comm'n, No 04-05-697 (4th Dist. July 27, 2006).

With respect to Section 13-801, the Commission's view, throughout the period during which Section 13-801, has been in force and effect is a carrier must have entered into an ICA with AT&T before it can obtain Section 13-801 UNEs. CLECs with ICAs or amendments thereto dated after the effective date of Section 13-801 – June 30, 2001, *see* P.A. 92-22 – have always been prohibited from purchasing from Section 13-801 tariffs as a matter of right, as opposed to under the terms of an ICA. Section 13-801 Order, ¶¶592-596.

Consequently, the tariffing regime is not contrary to federal law, in that it absolutely does not frustrate the federal scheme of negotiating ICAs, does not require ILECs to initiate the negotiation process in a manner contrary to statute, or otherwise affect negotiations as mandated under the federal Act.

IX. Reservation of Rights Language Contained in AT&T UNE Tariffs Does Not Authorize it to Withdraw UNE Tariffs

AT&T's reliance upon reservations of rights language in its UNE tariffs also is misplaced. Such tariff language, standing alone, can not and does not inoculate the Company from complying with laws and regulations of the state.

AT&T's reservation of rights, pursuant to which it purports to be authorized to withdraw its UNE tariffs, is based on the authority of the Bie decision. However, as noted above, the Bie decision affords no such authority. Further, as also noted above, AT&T is obliged by state law to tariff UNEs. Accordingly, it is "reserving" a right it does not have.

X. The Commission's *Final Order on Rehearing* in Docket No. 03-0393 Provides No Authority for Withdrawal of Tariffs

IBT's reference to the Commission's findings in its *Final Order on Rehearing* in Docket No. 00-0393 offers no support for the instant filing. In that decision the Commission stated "[IBT] is authorized to withdraw the tariffs as relevant to our decision in these premises". The Commission thus specifically limited its determinations in that proceeding to certain broadband related UNEs.

Reference to the Commission's *Final Order on Reopening* in Docket No. 00-0393 confirms this. As the Commission noted in its *Final Order on Reopening*: "It is

undisputed that the Commission based its determination as to the unbundling of the Pronto UNE and the HFPL on its interpretation of federal law as it existed at that time." *Final Order on Reopening* at 44, Illinois Bell Telephone Company: Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, ICC Docket No. 00-0393 (March 28, 2002) (hereafter "Final Order on Reopening"). The Commission's decision to require AT&T to offer an end-to-end Project Pronto UNE was, as the Commission acknowledged in the *Final Order on Reopening*, "based … [up]on the packet switching rules and impairment test set out in the FCC's UNE Remand Order[,]" as well as upon the authority of the FCC's *Line Sharing Order*.[4] Id. at 44-45, 50. However, the Commission found that the TRO's requirement that states reconcile state-mandated UNE offerings with federal requirements effectively precluded the Commission from continuing to require AT&T to offer an end-to-end Project Pronto UNE, since the FCC rules as amended did not require, and indeed appeared to specifically prohibit, such an offering. Final Order on Reopening at 45-46.

With respect to Section 13-801, the Commission noted that:

> Both Staff and SBCI assert that Section 13-801 is not properly at hand in this proceeding, because the Order on Reopening limits the Commission's scope of review in this proceeding to the laws on which it based its decisions in the three existing orders. We agree.

Id. at 50

[4] *Third Report and Order in CC Docket 98-147 and Fourth Report and Order in CC Docket 96-98*, In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 99-355 (rel. Dec. 9, 1999) ("Line Sharing Order"); *Third Report and Order on Reconsideration in CC Docket 98-147 and Fourth Report and Order on Reconsideration in CC Docket No. 96-98*, In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 01-26 (rel. Jan. 19, 2001) ("Line Sharing Reconsideration Order").

Accordingly, the Commission declined to rule on the applicability of Section 13-801 to the issues before it in the *Final Order on Reopening*, noting that in its prior orders in the proceeding, it had likewise declined to rule on the applicability of Section 13-801. Id. at 51.

This being the case, the *Final Order on Reopening* stands for little more than the proposition that AT&T was not obliged to file tariffs for a service – the end-to-end Project Pronto UNE – that it was as of the effective date of the Order, no longer obliged to offer. In contrast, AT&T remains obliged to offer other UNEs pursuant to both federal law and Section 13-801. The Commission's *Final Order on Reopening* is therefore entirely inapplicable.

Accordingly, for the reasons stated above, the Commission should find that AT&T cannot withdraw its UNE tariffs.

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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