

PUBLIC VERSION

**BEFORE
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company, et al.,)	
AT&T Communication of Illinois, Inc.,)	
CoreComm Illinois, Inc.,)	
MCI WorldCom Communications, Inc.,)	Case No. 00-0592
McLeodUSA Telecommunications Services, Inc.,)	
NEXTLINK Illinois, Inc.,)	
NorthPoint Communications, Inc.,)	
Rhythms Netconnections & Rhythms Links, Inc.,)	
21 st Century Telecom of Illinois, Inc.,)	
Ushman Communications, Inc., and)	
Sprint Communications Company L.P.)	
d/b/a Sprint Communications L.P.)	
)	
Joint Submission of Amended Plan of)	
Record for Operations Support Systems (“OSS”))	

AT&T’S POST-HEARING BRIEF ON REHEARING

AT&T Communications of Illinois, Inc. (“AT&T”) hereby files its post-hearing brief in this rehearing.

I. Introduction

This case is a rehearing of the Commission’s January 24, 2001 Order concerning certain loop qualification issues Covad raised in the arbitrations resulting from the SBC/Ameritech merger approval order. AT&T supports Covad’s position on these issues and believes there is no reason for the Commission to deviate from its well-reasoned decision on these issues, as delineated in its January 24th Order. In that order, the Commission directed that in the pre-ordering process Ameritech must provide information on up to ten loops and that Ameritech must verify that the requesting CLEC

is provided the same loop in ordering that it identified during pre-ordering. Ameritech has provided no reason for the Commission to deviate from this holding. Covad has again presented conclusive evidence that Ameritech keeps this information in a mechanized format in its databases. Based on this fact, Covad's request falls squarely under the FCC's definition of the types of Operational Support Systems ("OSS"), which Ameritech is legally obligated to provide CLECs. Moreover, on rehearing Covad demonstrated that the requested pre-ordering functionality is essential to level the playing field between Ameritech's data affiliate, Ameritech Advanced Data Services ("AADS"), and competitive DSL providers. Covad provided documented evidence that Ameritech has instructed its wholesale service representatives to discriminate in favor of AADS in the pre-ordering process. This additional evidence should lead the Commission to affirm its previous conclusion that Covad's request is in the public interest and will foster DSL competition in Illinois.

Finally, AT&T fundamentally disagrees with Ameritech's claim that Covad's request for additional OSS functionality must pass the "necessary and impair" test contained in the 1996 Telecommunications Act. That standard has no application in this case. Covad is not arguing that Ameritech provide a "new" network element, a request to which the necessary and impair standard might apply. Covad only seeks an additional OSS functionality that falls squarely within the FCC's definition of OSS. The Commission would be setting dangerous precedent – and would risk losing the significant ground gained by its January 24th Order – by agreeing with Ameritech that each and every CLEC request for additional OSS functionality beyond that which Ameritech

provides today must meet the necessary and impair test. In short, Ameritech's position is neither consistent with the governing law, nor is would it promote competition in Illinois.

II. Argument

A. The Commission Should Sustain its January 24th Order.

In this matter, Covad, an Illinois DSL provider and CLEC, has requested that Ameritech provide an additional pre-ordering functionality. More specifically, Covad has requested that the Commission sustain its holding that Ameritech provide Covad loop make-up information on up to ten loops for each potential customer. This additional pre-ordering information is essential for competitive DSL providers to market the wide array of DSL services they seek to provide Illinois consumers. By viewing more loops in the pre-ordering process, Covad – along with all Illinois DSL providers – can better assess what types of new and innovative DSL services they can offer and market to their potential Illinois DSL customers.

AT&T fully supports Covad's request. Covad has proven that Ameritech's back-end systems contain the information Covad requests. As such, this information fall squarely under the FCC's definition of OSS as "pre-ordering functions supported by an incumbent LEC's databases and information." 47 C.F.R. §51.319(f). *See also, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98 (rel. November 5, 1999) (In construing the definition of OSS, the FCC held that "at a minimum, incumbent LECs must provide requesting carriers the same underlying information that the incumbent LEC has in any of its own databases or other internal records.")

Ameritech will pick a loop that best supports that particular CLEC's flavor of DSL offerings and provide it information concerning that loop in the qualification process. Covad's request – to be able to seek information on up to ten loops available per customer and tag the loop it wishes to provide DSL service over – would help to put CLECs on a more even footing with AADS.

The Commission should sustain its January 24th Order.

B. The “Necessary and Impair” Test Has No Application to This Case.

As one of its bases for seeking rehearing in this matter, Ameritech argues that the Covad request for additional pre-ordering functionality must meet the so-called “necessary and impair” standard in the 1996 Telecommunications Act. 47 U.S.C. § 251(d)(2)); 47 C.F.R. § 51.317.

The necessary and impair standard has no application to this matter because Covad is not requesting a “new” network element. The necessary and impair standard, as codified in section 251(d) and FCC Rule 317, only applies to determinations of the FCC or a state commission concerning what “*network elements*” should be made available “*for purposes of section 251(c)(3)*” of the 1996 Act.³ Thus, the 1996 Act's necessary and impair standard *does not apply* if a state is considering whether to adopt: (i) additional pro-competitive “requirements” (as opposed to elements) *pursuant to* the 1996 Act, or (ii) additional pro-competitive requirements (or even network element unbundling requirements) *pursuant to* state-law authority. In the later case, the state is free to adopt any requirement that would “further competition” so long as that requirement is “not inconsistent” with the 1996 Act or the FCC's regulations. 47 U.S.C. § 261.

³ FCC Rule 317 on its face applies to state commissions “determining what network element should be made available *for purposes of section 251(c)(3) of the Act* beyond those identified [by the FCC].” 47 C.F.R. § 51.317(a)(emphasis added).

In this matter Covad is arguing that the functionality it seeks is not only consistent with the 1996 Act and the FCC's regulations, it is comprised within the FCC's definition of OSS. Covad has not requested a new "network element"; Covad is requesting a pre-ordering/OSS functionality. Indeed, both Ameritech witnesses that testified on this matter, Mr. Coelho and Mr. Hamilton, conceded that Covad is requesting an OSS pre-ordering functionality. (Tr. 1425-26, 1553). And the FCC has already found that OSS, including pre-ordering functions "supported by the incumbent LEC's databases and information" is a network element that satisfies the necessary and impair standards of the 1996 Act. 47 C.F.R. § 319(f) (emphasis added). Covad is arguing in this case that its request falls squarely within the FCC's definition of OSS. If there is not a new network element involved, the necessary and impair standard has no possible application.

Ameritech itself could not describe what "network element" Covad is requesting here. When asked what new "network element" is being requested by Covad, Ameritech's witnesses could provide no definitive answer. First, Mr. Coelho answered that the "new" network element that Covad is requesting is the "loop." (Tr. 1435-1438.) Assuredly, the loop meets the necessary and impair standard. When Mr. Coelho was found to be wholly unqualified to testify concerning the necessary and impair standard, Ameritech was allowed to call a pinch witness,⁴ Mr. Hamilton, eleven days later. Despite

⁴ In the hearing on May 11th, Ameritech witness Mr. Coelho adopted the direct testimony of Mr. Mileham and provided rebuttal testimony under his own name. After repeatedly claiming ignorance regarding the direct testimony he adopted, Covad and AT&T repeatedly moved to strike portions of Mr. Coelho's direct testimony. Although the Hearing Examiners appeared to agree that Mr. Coelho was not qualified to provide expert testimony on the issue of necessary and impair, in a wholly unprecedented move, the Examiners allowed Ameritech to provide a new witness to sponsor Mr. Mileham's direct testimony. (Tr. 1437-1438). One week later, Ameritech then provided Mr. Hamilton to adopt the direct testimony initially provided by Mr. Mileham and then adopted by Mr. Coelho. Staff, Covad and AT&T objected to this fundamentally unfair procedure and AT&T hereby requests that the Commission overrule the Examiners and strike Mr. Hamilton's testimony in its entirety. In practice, the Hearing Examiner's ruling gave Ameritech, the party seeking rehearing, a second chance to provide a witness that could provide better

the fact that the Hearing Examiners' provided Mr. Hamilton with a chance to preview the cross examination by the CLECs and staff, like Mr. Coelho, he could not identify any new "network element" that Covad is requesting. Instead, Mr. Hamilton argued that if a CLEC requested any additional OSS pre-ordering functionality beyond that provided by Ameritech today, that request would amount to a "new" network element that would have to pass the "necessary and impair" test -- unless Ameritech agreed to voluntarily provide the requested functionality. (Tr. 1556, 1721-22). When asked what standard Ameritech would apply in deciding whether to require that a CLEC request pass the necessary and impair test, Mr. Hamilton provided no clear answer, but only responded: "that's a pretty complicated question." (Tr. 1745).

Ameritech's position is untenable. Mr. Hamilton is right, Ameritech's position would impose an overly complicated, unnecessary, and highly uncertain set of hurdles to any CLEC request for additional OSS functionality. In Ameritech's view, as described by Mr. Hamilton, OSS is a static UNE and CLECs are only entitled to OSS in reference to what OSS functions Ameritech makes available today. To the contrary, nothing in the FCC's rules supports this notion. The FCC defines OSS as applying broadly to "functions supported by an incumbent LEC's databases and information." 47 C.F.R. § 51.317. Nothing in the FCC's orders "freezes" the availability of such "functions" to what is currently provided by the ILEC today. Indeed, Mr. Hamilton conceded that OSS

answers to the CLEC cross examination than witness it provided at hearing. While it appears that Mr. Mileham's absence was due to a medical problem, that does not excuse Ameritech's inability to provide a witness with knowledge on the hearing date it picked. The solution to this problem was for Ameritech to request a continuance until it could provide a knowledgeable witness, not for it to first try and provide an unqualified witness and, if that didn't work, later provide a witness that had the benefit of previewing the CLEC cross examination on his testimony. AT&T requests that the Commission reverse the Hearing Examiners' ruling and strike in total all testimony provided by Ameritech witness Mr. Hamilton concerning the necessary and impair standard. Mr. Hamilton should never have been allowed to testify in this matter. AT&T notes that the Examiners did not allow Mr. Coelho to sponsor the necessary and impair portions of Mr. Mileham's original direct testimony.

are “constantly changing and evolving things,” (Tr. 1716) yet he would deny Illinois CLECs the ability to take advantage of new, evolving OSS functions. The dangers of Ameritech’s position are clear: CLECs would be faced with the threat of “necessary and impair” litigation each and every time they request additional or modified OSS functionality.

This Commission has already rejected the notion that Ameritech’s OSS should stay stagnant. Indeed, in its merger approval order, the Commission specifically directed Ameritech to update its OSS to “industry standards.” As Ameritech itself would concede, by upgrading to industry standards Ameritech is purportedly now providing CLECs new pre-ordering and ordering functionalities not previously available. In its January 24th Order, the Commission resolved a host of OSS issues, in certain circumstances directing Ameritech to comply with the CLECs’ request that Ameritech provide “new” OSS functionality. In doing so, the Commission never applied the necessary and impair standard. And perhaps more telling, Ameritech itself never argued that these other CLEC requests for increased functionality must have first passed that test. Indeed, as Mr. Hamilton testified, Ameritech has never previously asserted that new OSS functionality must pass the necessary and impair test. (Tr. 1556). Only now, when Ameritech is faced with providing an OSS functionality that might help DSL carriers provide new and innovative services in competition with AADS, does Ameritech assert this defense.

The Commission should reject definitively Ameritech’s attempt to force CLECs to pass the necessary and impair standard each time they request additional OSS functionality. This position would only assure increased litigation and impede OSS

upgrades. The question to be posed here is whether Covad's request falls under the FCC's definition of OSS – a network element the FCC held meets the necessary and impair test -- or whether the Commission on a state law basis believes that Covad's request would "promote competition."⁵ Certainly, since this case is an extension of the Commission's merger condition requiring that Ameritech deploy OSS that would sustain a competitive market, the Commission has a clear-cut state law basis to grant Covad's request. Once the Commission determines the answer is yes to either of those questions, which it already has, it should sustain the holding in its January 24th Order.

CONCLUSION

For the reasons discussed above, the Commission should sustain its January 24, 2001 Order in this matter and deny Ameritech's request for rehearing in its entirety.

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Respectfully submitted,

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⁵ As noted, the necessary and impair standard does not apply if a state is considering whether to adopt additional pro-competitive requirements, including additional network elements, pursuant to state law. In this case, the state is free to adopt any requirement that would "further competition" so long as that requirement is "not inconsistent" with the 1996 Act of the FCC's regulations. 47 U.S.C. § 261.