

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

In the matter of XO Illinois, Inc. )  
Petition for Arbitration pursuant to )  
Section 252 (b) of the Telecommunications ) Docket No. 01- 0466  
Act of 1996 to establish an Interconnection )  
Agreement with Illinois Bell Telephone )  
Company d/b/a Ameritech Illinois )  
)

**AMERITECH ILLINOIS**  
**POST-HEARING REPLY BRIEF**

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## INTRODUCTION

In its opening brief, Ameritech Illinois demonstrated that its proposed reciprocal compensation rates are more faithful to the cost-based pricing requirements of the 1996 Act than its current reciprocal compensation rates, and that the benefits of adopting them would outweigh the costs. Together, XO's and Staff's opening briefs say almost nothing to contest that proposition. To the limited extent that XO and Staff do contest the bifurcated rate proposal on its merits, Ameritech Illinois responds in Section II below.

XO's urges the Commission not even to consider the merits of the bifurcated rate proposal because, XO claims, it is entitled to obtain an interconnection agreement by adopting the Focal Agreement under section 252(i) of the 1996 Act. XO now concedes, however, that the document XO would obtain by adopting what it can from the Focal Agreement is not a complete, workable interconnection agreement. To come up with a workable agreement, XO has to resort to "mak[ing] certain modifications to the Focal agreement" (XO Br. at 2) – two pages worth of modifications, in fact (*id.* at 22-24). But section 252(i) does not allow XO to adopt the Focal Agreement "with modifications." The whole point of section 252(i), as XO itself acknowledges, is that the adopting carrier must take as a package the related contract provisions that were soldered together "in the give and take of negotiations." (XO Br. at 7.) Accordingly, a requesting carrier under section 252(i) cannot take most of the package but not all and, by the same token, should not be allowed to take the existing package plus some sugar on top. XO's attempt to rescue its unworkable section 252(i) adoption by overlaying it with additional language should therefore be rejected, and the Commission should turn to Ameritech Illinois' proposed Appendix Reciprocal Compensation as the sole legitimate source of a complete agreement for the parties. *See* Section I below.

Staff devotes most of its opening brief to its proposal that the Commission require Ameritech Illinois to announce whether it is going to adopt the FCC rate caps for ISP-bound traffic. Staff fails to come to grips, however, with the insurmountable obstacles to its proposal – including, among others, the FCC’s intent that each incumbent LEC decide for itself, on its own schedule, whether to take the FCC rates, and the fact that the Commission cannot possibly act on Staff’s proposal in a way that could have any effect on the interconnection agreement that is being arbitrated in this docket. To the extent that Staff’s untenable recommendation warrants discussion beyond that in Ameritech Illinois’ opening brief, the discussion appears in Section III below.

## **ARGUMENT**

### **I. THE COMMISSION MUST CONSIDER AMERITECH ILLINOIS’ PROPOSAL.**

Ameritech Illinois has shown that the Commission is obliged to consider its proposed Appendix Reciprocal Compensation, including the bifurcated rates in that proposal, for two reasons: First, the 1996 Act provides that the State commission *shall* resolve each issue set forth in the arbitration petition and response – which in this instance includes the question whether the Appendix Reciprocal Compensation should be adopted. (AIT Br. at 18-20). Second, XO’s purported adoption of the Focal Agreement would not yield a viable contract. As a result, if Ameritech’s proposal is ignored, the parties are apt to come out of this arbitration with no contract at all. (*Id.* at 20-23). XO’s opening brief corroborates both points.

#### **A. XO’s Discussion Of The Controlling Legal Standard Confirms That Ameritech Illinois’ Proposal Must Be Considered.**

XO contends it has an absolute right to adopt the pertinent portions of the Focal Agreement, and that the Commission therefore cannot consider Ameritech Illinois’ bifurcated rate proposal in this arbitration. (XO Br. at 15.) As we showed in our opening brief, however, if

XO wanted the Commission to decide its alleged rights under section 252(i), XO shouldn't have petitioned for arbitration under section 252(b). (AIT Br. at 19-20.) Now, XO's own brief betrays the fact that this is not a proper forum for deciding XO's section 252(i) rights, let alone for deciding those rights to the exclusion of all other considerations.

Starting at page 2 of its brief, XO sets forth the "Legal Standard" for this proceeding.

XO states, correctly,

Section 252(c) of the Act requires a state commission resolving open issues through arbitration to:

- (1) ensure that such resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251;
- (2) establish any rates for interconnection, services or network elements according to subsection (d) [of Section 252].

(XO Br. at 2-3.) This controlling statute does not provide for the Commission, in "resolving open issues through arbitration," to look to section 252(i). Rather, the Commission is to look to

- (i) "the requirements of Section 251";
- (ii) "the regulations prescribed by the [FCC] pursuant to Section 251"; and
- (iii) with respect to rates, section 252(d).<sup>1</sup>

Section 252(c) does not mention section 252(i) as a source of law for decision-making in arbitrations, because arbitrations are not for determining rights under section 252(i). How, then, does XO work section 252(i) into its discussion of legal standards? Very awkwardly. XO states:

Because the resolution of the issues in this case is inextricably linked to XO's request under Section 252(i) of the Federal Act to opt into the Focal Agreement, this arbitration proceeding must resolve the scope of XO's rights set forth in that section of the Act . . . .

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<sup>1</sup> As XO notes (XO Br. at 3), there can be issues on which the arbitrator may look to substantive state law. There are no such issues in this arbitration.

(XO Br. at 3.) That, with all due respect, is verbal high jinks, not logic or law. Congress has told us, in section 252(c), what the sources of law are in an arbitration under section 252(b), and section 252(i) is not among them. XO wants this Commission to read section 252(c) to say that the arbitrator can look to section 252(i) if the proceeding arises out of a section 252(i) opt-in request, but section 252(c) cannot be read that way, because it doesn't say that. XO cannot cure its failing to initiate a proceeding in which the Commission could adjudicate its section 252(i) rights by asking the Commission to ignore the constraints Congress placed on the proceeding that XO did initiate.<sup>2</sup>

**B. XO's Concession That It Cannot Obtain A Viable Agreement By Opting Into The Focal Agreement Compels Consideration Of Ameritech Illinois' Proposal As The Only Available Route To A Workable Agreement.**

In its opening brief, Ameritech Illinois demonstrated that XO cannot obtain a viable agreement by exercising its section 252(i) rights with respect to the Focal Agreement. (AIT Br. at 20-23.) XO now concedes this by offering to fix its deficient proposal by supplementing it with ten subsections of language taken, in significantly modified form, from Ameritech's Appendix Reciprocal Compensation. (XO Br. at 22-24.) The 1996 Act, however, does not permit XO to cobble together an interconnection agreement in this way.<sup>3</sup> To show why that is so, we examine section 252(i) of the 1996 Act and the FCC's rules implementing section 252(i).

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<sup>2</sup> For further confirmation that section 252(b) arbitrations are not a forum for adjudicating section 252(i) rights, see First Report and Order (FCC 96-325), *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. Aug. 8, 1996), at ¶ 1321. There, the FCC, while "leav[ing] to the states in the first instance the details of the procedures for making agreements available" under section 252(i), makes clear that section 252(i) adoptions are not grist for the usual negotiation request/negotiation/arbitration/approval mill.

<sup>3</sup> Separate and apart from the impermissibility of the mix-and-match approach that XO now wants to take, the Commission may question whether it can entertain the eleventh hour switch in what XO is proposing. The Commission has generally been tolerant (and appropriately so, Ameritech Illinois believes) when a carrier tweaks its proposed contract language late in an arbitration in order to accommodate concerns raised by the other carrier or by Staff. The modifications that the Commission has accepted have typically been modest in scope, however, and have most often been offered at the arbitration hearing, if not earlier, so that the opposing party's witness had an

Section 252(i) provides,

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Here, then, Ameritech Illinois must make available to XO (i) any interconnection in the Focal Agreement upon the same terms and conditions as appear in the Focal Agreement for that interconnection; (ii) any service in the Focal Agreement upon the same terms and conditions as appear in the Focal Agreement for that service; and (iii) any network element in the Focal Agreement upon the same terms and conditions as appear in the Focal Agreement for that network element. The operative phrase here, as we shall see, is “upon the same terms and conditions.”

When the FCC undertook to establish regulations to implement section 252(i), some commenters advocated a rule that would have allowed the requesting carrier to adopt provisions in an existing interconnection agreement only by adopting the entire agreement. Otherwise, these commenters reasoned, incumbent carriers would not be willing to engage in meaningful negotiations, because if an incumbent gave Carrier A a concession on provision X in exchange for a concession on provision Y, the incumbent would be penalized later if Carrier B could adopt provision X from the resulting agreement but refuse to take provision Y. *See* First Report and Order (FCC 96-325), *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. Aug. 8, 1996) (“*Local Competition Order*”), at ¶¶ 1303, 1313.

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opportunity to respond. What XO is proposing here is much more extensive and comes unusually late in the process.

The FCC, however, rejected this “entire agreement” argument, and promulgated what became known as its “pick and choose” rule, 47 C.F.R. § 51.809(a):

An incumbent LEC shall make available . . . to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission . . . upon the same rates, terms, and conditions as those provided in the agreement.

At the same time, however, the FCC made clear that there is a limit on a requesting carrier’s entitlement to pick and choose under section 252(i). The “level of disaggregation” mandated by the 1996 Act, the FCC said, was the individual interconnection, service or network element arrangement. *Local Competition Order*, ¶ 1314. Thus, the FCC determined, an incumbent LEC that receives a section 252(i) request can insist that the requesting carrier take all terms in the underlying agreement that are “legitimately related” to the desired term. *Id.* ¶ 1315. In the illustration given above, for example, if carrier B wants provision X, it must also take provision Y.

The FCC’s pick and choose rule was challenged, along with other FCC rules implementing the 1996 Act, in the United States Supreme Court. The challengers contended, as they had in the FCC, that a “carrier who wants one term from an existing agreement . . . should be required to accept all the terms in the agreement.” *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 395-96 (1999). This proposition, the Supreme Court stated, “seems eminently fair.” *Id.* at 396. The Court nonetheless sustained the pick and choose rule, finding that the FCC’s interpretation of section 252(i) was correct. *Id.* In so finding, the Court attached significance to the fact that the FCC “has said an incumbent LEC can require a requesting carrier to accept all terms that it can prove are ‘legitimately related’ to the desired term. *Id.*

Thus, the law is clear: A requesting carrier under section 252(i) must take as a package all “legitimately related” contract terms; it cannot spurn unappealing parts of the package while

taking the rest. Ameritech Illinois believes there is a necessary corollary to this rule: The requesting carrier cannot add new, related, provisions to the package.

To illustrate the point, consider an application of the “legitimately related” rule that the FCC gave as an example: “[The fact] that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops.” (*Local Competition Order* ¶ 1315.) In other words, if Carrier B wants to adopt the volume discount rate from Carrier A’s contract, Carrier B cannot delete from the package the related provision that says the discount applies only when a specified number of loops are purchased. By exactly the same reasoning, Carrier B should not be able to add to the package a provision that says, for example, that all loops ordered pursuant to this arrangement will be provisioned within five days after the order is placed – and this is so *even if Carrier B would be entitled to a five-day provisioning interval, outside the section 252(i) context*. For just as Carrier A agreed to the number of loops as part of the package that included the discount rate, so too Carrier A in effect agreed to forego a five-day provisioning interval as part of that same package. And just as the law says that Carrier B cannot get the rate without taking the number of loops, so too Carrier B should not be able to get the rate and at the same time add its preferred provisioning interval.

To restate the proposition in general terms: A carrier that requests a package of contract terms under section 252(i) should not be allowed to supplement that package any more than it is allowed to subtract from it.

The discussion of section 252(i) in XO’s brief is entirely consistent with that proposition. XO says the following (with bracketed numbers inserted for later reference),

The FCC recognized that, in order to prevent discrimination in the “pick and choose” scenario, an incumbent LEC could require a requesting carrier to accept all terms that the incumbent LEC can prove are “legitimately related” to the desired term. . . . Thus, [1] where a CLEC is picking and choosing certain

individual terms or conditions from an existing interconnection agreement, an ILEC may require a CLEC to opt into additional existing terms in that same interconnection agreement in order to ensure that all related items in the give and take of negotiations were included.

. . . . XO is not asking to “pick and choose” individual terms of an existing interconnection agreement. XO is requesting the entire Focal Agreement, with the exception of the rates for ISP-bound traffic pursuant to the FCC ISP Order. [2]

[T]he [*Local Competition Order*] requires only that CLECs accept additional existing provisions, it does not provide a means by which Ameritech can delete existing provisions and force CLECs to accept new provisions. [3]

(XO Br. at 6-7) (emphasis in original).<sup>4</sup>

It is the policy articulated by XO in statement [1] that supports Ameritech Illinois’ position here. If an ILEC can require a CLEC to opt into additional existing terms “in order to ensure that all related items in the give and take of negotiations were included,” the ILEC should, for exactly the same reasons, be able to prohibit the CLEC from tacking additional, related, terms onto the underlying agreement.

As to point [2], XO *was* “requesting the entire Focal Agreement, with the exception of the rates for ISP-bound traffic pursuant to the FCC ISP Order” until it submitted its opening brief. Now, however, XO is requesting that *plus* ten additional subparagraphs. Thus, the core premise on which XO’s section 252(i) position depends is no longer true.

Finally, just as the incumbent LEC cannot force the requesting carrier under section 252(i) to accept new provisions (point [3]), so the requesting carrier cannot force the incumbent LEC to accept new provisions.

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<sup>4</sup> The purpose of the quoted discussion from XO’s brief was to refute an argument that Ameritech Illinois does not rely on in its post-hearing briefs, namely, an argument that the unavailability of the Focal provisions governing intercarrier compensation on ISP-bound traffic makes all reciprocal compensation provisions of the Focal Agreement unavailable.

In sum, this is not, after all, a case where XO is merely seeking to vindicate its purported rights under section 252(i). Instead, XO – finally recognizing that it cannot get a workable agreement by taking the portions of the Focal Agreement that are available under section 252(i) – is now making a mix-and-match request to take the available portions of the Focal Agreement and to overlay them with additional provisions that XO needs in order to yield a complete agreement. The Commission should not allow this. Instead, the only proper path by which the Commission can ensure that the parties arrive at a complete agreement is by considering, and adopting, Ameritech Illinois’ proposed Appendix Reciprocal Compensation <sup>5</sup>

## **II. THE COMMISSION SHOULD ADOPT AMERITECH ILLINOIS’ PROPOSED BIFURCATED RATES.**

Ameritech Illinois has established that its proposed bifurcated reciprocal compensation rates are more faithful to the cost-based pricing requirement of the 1996 Act than its current reciprocal compensation rates (AIT Br. at 4-8; 10-14), and that the benefits of adopting them would outweigh the costs (*id.* at 14-15). Although Staff critiqued bifurcation in its testimony, it does not do so in its opening brief. Perhaps Staff recognizes that its endorsement of bifurcation last year cannot be squared with the criticisms its witness offered this year (*id.* at 9-10), and that its speculative criticisms are feeble in any event (*id.* at 10-13).

For its part, XO offers only token resistance to the merits of the bifurcated rate proposal. First, XO, citing footnote 142 of the *ISP Compensation Remand Order*, contends that the FCC

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<sup>5</sup> XO also suggests that the Commission does not have jurisdiction “to consider Ameritech’s new rate design for ISP traffic” because the FCC ruled that State commissions have no jurisdiction to regulate ISP-bound traffic. (XO Br. at 19-20.) Ameritech Illinois is not, however, offering a “new rate design for ISP traffic.” Rather, Ameritech Illinois is proposing new reciprocal compensation rates for section 251(b)(5) (non-ISP-bound traffic). The Commission plainly has jurisdiction to consider that proposal, and the fact that new reciprocal compensation rates for 251(b)(5) traffic would become intercarrier compensation rates for ISP-bound traffic by virtue of the *ISP Compensation Remand Order* does not change that conclusion. (See AIT Br. at 15-16.)

“declined” to move to a bifurcated rate design. (XO Br. at 13.) That is incorrect. What the FCC actually said in footnote 142 was,

Some parties suggest that a bifurcated rate structure (a call set-up charge and a minute of use charge) would ensure appropriate cost recovery. *See* Sprint Remand Comments at 2-4. We seek comment on this approach in the *NPRM*.<sup>6</sup>

The FCC did not “decline” to move to a bifurcated rate design, and did not say anything disapproving about such a rate design.

XO next contends that the bifurcated rate proposal is based on costs “that have never been examined by this Commission.” (XO Br. at 16.) Put that way, the contention is just plain wrong. The record is clear that the proposed bifurcated rates are based on the same costs (and the same cost studies) as Ameritech Illinois’ current, Commission-approved reciprocal compensation rates. What XO really means is that the Commission never examined the allocation of costs in Ameritech Illinois’ cost studies as between setup and duration. Put that way, the contention misses the point. The cost studies that form the basis of Ameritech Illinois’ current, Commission-approved reciprocal compensation rates specifically identified setup costs and duration costs. And while the investigation of those cost studies may not have included explicit discussion of whether costs were properly identified as setup costs vs. duration costs, it would have been virtually impossible for those who were investigating the studies to overlook a misidentification of a setup cost as a duration cost, or vice versa. (*See* AIT Br. at 11-12.)

XO then contends that since there has been no showing that XO contributed to the economic distortions that have resulted from the current rate structure, XO is an unlikely candidate for bifurcated rates, and that Ameritech “has singled XO out.” (XO Br. at 17.)

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<sup>6</sup> The *NPRM* to which the FCC referred was the Notice of Proposed Rulemaking (FCC 01-132), *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, that the FCC released at the same time as the *ISP Compensation Remand Order*.

Ameritech has not singled XO out. The fact is that Ameritech Illinois endorses a bifurcated rate structure for all carriers in Illinois; XO just happened to come along first. And the extent to which any particular CLEC is a contributor to the economic distortions that result from the current rate structure makes no difference. The proposed bifurcated rate structure is more accurate for everyone.

**III. THE COMMISSION SHOULD NOT REQUIRE AMERITECH ILLINOIS TO DECLARE WHETHER IT WISHES TO ADOPT THE FCC'S RECIPROCAL COMPENSATION RATE CAPS.**

At hearing and then in its opening brief, Ameritech Illinois identified three reasons that the Commission should reject Staff's proposal without even reaching Staff's accusation that Ameritech is acting anti-competitively by not making some sort of binding declaration of its intentions with respect to the FCC rate caps. We address Staff's accusation in subsection D below, but first stress that Staff has said nothing to overcome any of those three obstacles to the Commission's consideration of its proposal.

**A. The Commission Cannot Properly Consider Staff's Proposal, Because It Goes Beyond The Issues Set Forth For Arbitration.**

Section 252(b)(4)(A) of the 1996 Act provides that the Commission "shall limit" its determinations in this case to the issues set forth in XO's petition and Ameritech's response. Because neither party raised the question whether Ameritech Illinois should be required to declare whether it wishes to adopt the FCC rate caps, the Commission is without jurisdiction to consider Staff's proposal in this proceeding. (*See* AIT Br. at 23-24.) Staff's opening brief does not address this point, despite the fact that Ameritech Illinois stressed it at hearing. In fact, Staff's very first sentence about its proposal betrays the fact that Staff has no answer to Ameritech's contention that this arbitration is about terms and conditions for intercarrier

compensation, not whether Ameritech should declare its intentions with respect to the FCC rate caps. Staff's sentence reads:

In order to resolve the *dispute between XO and Ameritech over terms, conditions, and rates for the exchange of traffic subject to the reciprocal compensation provisions of Section 251(b)(5) of the 1996 Act*, Staff strongly believes that this Commission should require Ameritech to immediately determine whether it wants to adopt the reciprocal compensation rate caps established by the FCC in its ISP-Bound Traffic Order. (Emphasis added.)

As that sentence reveals, the parties' dispute – the one raised in the parties' pleadings – is over terms, conditions and rates for the exchange of certain traffic. It is not about Ameritech making a declaration whether it is going to take the FCC rate caps. And Staff's suggestion that the Commission should require such a declaration *in order to resolve the parties' dispute* is baseless. The Commission readily can, and therefore must, resolve the parties' dispute without the benefit of such a declaration – as evidenced by the fact that XO and Ameritech are both advocating resolutions of the dispute that do not entail the making of such a declaration. In resolving the dispute, the Commission simply takes the circumstances as it finds them: Ameritech has not elected the FCC's rate caps (and the parties' agreement should so reflect) but may do so in the future (as the parties' agreement should also reflect).

**B. Staff's Proposal Could Not Be Considered In A Section 252(b) Arbitration Even If It Were Set Forth As An Issue In The Petition Or Response.**

The question whether Ameritech should be required to declare whether it wishes to avail itself of the FCC rate caps is not subject to arbitration for a second reason – separate and apart from the fact that neither party raised the issue in this particular arbitration: The only questions that can be addressed in any arbitration under section 252(b) of the 1996 Act are questions having to do with the parties' rights and obligations under subsection 251(b) or 251(c) of the 1996 Act. And that cannot possibly include a question about Ameritech's alleged duty to declare

whether it will take the FCC caps, because the rate caps themselves have nothing to do with section 251. (*See* AIT Br. at 24-25.)

Staff contends that sections 252(c)(1) and 252(b)(4)(C) of the Act authorize the Commission to entertain Staff's proposal in this proceeding (Staff Br. at 8-9), but that is not correct. Section 251(c) provides that in resolving the "open issues" and imposing conditions upon the parties, the Commission shall ensure that such resolution and conditions "meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." As we have shown, the FCC rate caps have nothing to do with any requirement of section 251, or with any regulation prescribed by the FCC pursuant to section 251. Rather, the FCC established the rate caps pursuant to its authority to regulate interstate traffic under section 201 of the Communications Act of 1934.

Nor does section 252(b)(4) authorize the Commission as arbitrator to entertain Staff's proposal. That provision requires the Commission to "resolve each issue set forth in the petition and the response . . . by imposing appropriate conditions *as required to implement subsection (c)* upon the parties to the agreement." (Emphasis added.) Again, Staff's proposal cannot possibly be imposed as a condition *required to implement subsection (c)*, because subsection (c) (*i.e.*, 251(c) concerns only the requirements of the 1996 Act and the FCC's regulations implementing the 1996 Act – not an FCC order regulating interstate traffic under section 201 of the Communications Act.

**C. As A Practical Matter, Staff's Proposal Is An Impossibility.**

Given the schedule for this arbitration, it would be impossible for the Commission to adopt Staff's proposal in a way that could have any effect on the content of the parties' interconnection agreement. (*See* AIT Br. at 26-27.) Staff's brief ignores this point altogether – despite the fact that Ameritech stressed it at hearing. (*See* Tr. 170, line 14, to 172, line 11.)

**D. Staff's Allegation That Ameritech Illinois Is Acting Anti-Competitively By Not Promising Never To Take The FCC Rate Caps Is False.**

The FCC left it up to each individual incumbent LEC to decide when, if ever, to avail itself of the rate caps in the *ISP Compensation Remand Order*. The FCC's order not only includes no hint that incumbent LECs must declare whether they wish to take the caps at any particular time, but also explicitly left the decision as to when (or whether) to declare its intention to implement the rate caps up to each ILEC on a state-by-state basis. (*See* AIT Br. at 27-28.) And even if that were not the case, Staff's accusation that Ameritech is acting anti-competitively by not declaring itself is unfounded.

The very first thing that Staff says in support of its position shows how far-fetched Staff's legal theory is. Staff posits, at page 5 of its opening brief, that Ameritech Illinois' conduct violates subsection 8 of Section 13-514 of the Illinois Public Utilities Act. But Ameritech's conduct cannot possibly violate subsection 8, because subsection 8 addresses violations of *existing* interconnection agreements and delays in implementing *existing* interconnection agreements, not alleged misconduct in the making of interconnection agreements. Staff itself made exactly that point just five days before it filed its opening brief. In its August 30, 2001, Response to Verified Complaint and Request for Emergency Relief in Docket No. 01-0572 (attached hereto), Staff argued (at pp. 2-3):

[Complainant] asserts that Ameritech's behavior constitutes three separate types of anti-competitive behavior under Section 13-514[, including]:

(8) violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 ["TA96"] . . . .

Staff believes that the Complainant's allegations, even taken as unrebutted, do not support [a] finding[] of anti-competitive behavior under subsection[] (8) . . . .

As Staff reads (8), the asserted violation must be to an *already existing* interconnection agreement, i.e., an “agreement entered into” under TA96. Given that [Complainant] is a recently Certified telecommunications carrier in Illinois and that this is the first interconnection agreement it has sought, there is no established agreement between Ameritech and [Complainant] that Ameritech could violate in the manner described under (8). (Emphases in original.)

Thus, Staff itself has already debunked the legal theory that it is advancing in this case.

More fundamentally, Staff’s notion that there is something untoward about Ameritech not declaring itself is baseless under any legal theory. The fact of the matter is that the FCC issued an order that allows Ameritech to avail itself of the FCC’s plan when and if Ameritech chooses to do so. As of today, Ameritech has not chosen to do so, and XO and all other interested CLECs in the State know that. What Staff wants is for Ameritech to go a step further and bind itself never to take the FCC caps. Ameritech simply does not have to do that, and there is no basis for labeling as “anti-competitive” whatever uncertainty that may add to CLEC’s business planning calculus (on top of the uncertainty already created by CLECs’ pending legal challenges to the *ISP Compensation Order*, as well as ample additional uncertainties concerning the FCC caps (*see* AIT Br. at 27-28)). Notably, XO does not seem to find Ameritech’s stance anti-competitive. XO’s obligatory endorsement of Staff’s proposal (XO Br. at 15) is lukewarm, and does not suggest in any way that XO has been aggrieved by Ameritech’s approach to the *ISP Compensation Remand Order*.<sup>7</sup>

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<sup>7</sup> Staff’s new assertion that Ameritech Illinois’ stance violates the good faith negotiation requirement of section 251(c)(1) of the 1996 Act (Staff Br. at 7) is baseless. There is a wealth of law concerning what constitutes good faith negotiation – none of it consulted by Staff, evidently – and the conduct that Staff challenges here comes nowhere close to violating any recognized standard of good faith negotiation. Moreover, one would imagine that if Ameritech had negotiated in bad faith with XO, XO would realize it. XO, however, has not accused Ameritech of falling short of its duty to negotiate in good faith and, for that matter, never even pressed Ameritech to declare itself.

**CONCLUSION**

For the reasons set forth above and in Ameritech Illinois' opening brief, the Commission should reject XO's proposed intercarrier compensation language for the parties' interconnection agreement and instead require the parties to adopt Ameritech Illinois' Appendix Reciprocal Compensation.

Dated: September 11, 2001

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Dennis G. Friedman, an attorney, hereby certify that I caused a copy of the foregoing **AMERITECH ILLINOIS' POST-HEARING REPLY BRIEF** to be delivered to each person listed below via overnight delivery on this 11th day of September, 2001.

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