

JOINT CLECS’ MOTION TO STRIKE AND RESPONSE TO SBC-AMERITECH APPLICATION FOR CLARIFICATION AND REHEARING OF ORDER ON REHEARING

AT&T Communications of Illinois, Inc.; Covad Communications Company; Rhythms Links, Inc.; Sprint Communications Company L.P. d/b/a Sprint Communications L.P.; and WorldCom, Inc. (collectively, “Joint CLECs”), by their attorneys, move to strike SBC-Ameritech’s Application or, in the alternative, request that the Commission deny the Application. SBC-Ameritech’s Application for Rehearing of Order on Rehearing presents nothing new, and as its title reveals, SBC-Ameritech is improperly requesting that the Commission grant rehearing of a rehearing order. While SBC-Ameritech may wish that portions of the Order could be altered, it is barred from presenting its Application for Rehearing here. Because Illinois law prohibits rehearing on rehearing, Ameritech’s Application must be stricken or, in the alternative, denied.

In the event that the Commission grants SBC-Ameritech’s application for rehearing, the Joint CLECs request that the Commission give them the same opportunity and grant their petition for rehearing. The issues on which Joint CLECs request rehearing are outlined in Appendix A.

INTRODUCTION

Still not satisfied with the Commission’s Order, SBC-Ameritech again trots out the familiar threat – it might not deploy Project Pronto unless the Commission acquiesces to its unreasonable and repeated demands.. Ameritech’s Application must be seen for what it is: an empty threat. While SBC-Ameritech continues to blame the Commission’s Order for its slow DSL deployment, it tells industry analysts a very different story. . For example, , SBC-Ameritech recently told analysts that it had already deployed Project Pronto to over 60% of its customers. Second, SBC-Ameritech can, and has, deployed DSL even where no Project Pronto facilities

exist. In fact, SBC-Ameritech told analysts that the rollout delay would impact less than 10% of its “addressable market.” Third, despite SBC-Ameritech’s rhetoric, the Project Pronto slowdown has nothing to do with any Commission decision. SBC-Ameritech told analysts that the national economic downturn was the primary reason for the deployment delay . The Commission should reject SBC-Ameritech’s rhetoric as the Illinois legislature did when it enacted Section 5/13-517, requiring SBC-Ameritech to deploy DSL to at least 80% of its customers. Contrary to SBC-Ameritech’s repeated assertions, the Commission’s Order does not justify or explain SBC-Ameritech’s slow DSL deployment. Regardless of SBC-Ameritech’s rhetoric, the Commission should not waiver from or alter its September 26, 2001 Order on Rehearing which ensures that CLECs have unbundled access to the Project Pronto network. Only if Project Pronto components are available as UNEs will CLECs be able to use the full features and functionality of the public network to provide competitive alternatives, consistent with the directives of the Telecommunications Act of 1996.

ARGUMENT

SBC-Ameritech’s Application demonstrates that SBC-Ameritech will continue to raise the same unfounded issues over and over until barred by this Commission. To that end, it has filed an Application for Rehearing of Order on Rehearing, seeking to relitigate the exact same issues that have already been heard and decided four times before. Perhaps not surprisingly, SBC-Ameritech views this Application as an opportunity to reexamine any and all issues not resolved its favor, regardless of whether its request is procedurally proper. SBC-Ameritech seeks rehearing not only on issues examined during this rehearing; it seeks rehearing on issues that the Commission *denied rehearing on* April 2001. *See Ameritech Application at 14, fn. 14* (“Ameritech . . . incorporates by reference all of the arguments in its April 13, 2001 Application

for Rehearing in this case on which rehearing was denied.”) *Ameritech Application* at 21-22. In other words, SBC-Ameritech now seeks rehearing on issues that *it was barred from raising* in this phase of this proceeding.

SBC-Ameritech’s Application for Rehearing of Order on Rehearing must be denied for two reasons. First, Illinois law does not permit any carrier to seek multiple rehearings. Second, even if SBC-Ameritech’s Application were procedurally proper (which it is not), SBC-Ameritech’s Application must be denied as it presents nothing new for the Commission to consider.

SBC-Ameritech’s newly minted “Application for Clarification” must also be denied. By styling it a request for clarification, Ameritech cloaks its request for rehearing on such issues as pricing and line card deployment. SBC-Ameritech does not seek to “clarify” the Commission’s Order on these issues; it seeks to alter them completely. As discussed below, SBC-Ameritech’s request must be denied.

I. SBC-AMERITECH’S APPLICATION VIOLATES STATE LAW.

A. Illinois Law Bars SBC-Ameritech’s Application for Rehearing.

SBC-Ameritech again seeks rehearing. While SBC-Ameritech may understandably desire a rehearing on rehearing, its request is completely unsupported by state law. Illinois provides that “**Only one rehearing shall be granted by the Commission.** . . . “ 220 ILCS 5/10-113 (emphasis added). The Commission granted Ameritech’s request for rehearing in April 2001. It cannot grant it again. Because Illinois law bars the Commission from granting a second rehearing application, the Commission must strike the Application

Styling the Application as one for “Clarification” does not make the Application any less improper. Allowing a party to circumvent the law against multiple rehearings by changing the

name of its pleading would render that law meaningless. Furthermore, SBC-Ameritech admits that its Application is actually an application for rehearing:

Although the requested clarifications have, for the sake of discussion, been separated from other issues on which Ameritech Illinois is seeking rehearing, Ameritech Illinois states that it is seeking rehearing on all of the issues raised in this pleading and therefore reserves the right to appeal any of those issues on which its request is denied. (Application at 2 n.3) (emphasis added).

Thus, Illinois law bars the Application and the Commission must grant Joint CLECs' Motion to Strike. In the event the Motion is not granted, Joint CLECs request interlocutory review and oral argument.

B. SBC-Ameritech's Application Must Be Stricken As It Merely Rehashes SBC-Ameritech's Previous Arguments.

In addition to being legally impermissible, SBC-Ameritech's Application is deficient because it is nothing more than a regurgitation of the same claims and arguments it has made over and over in this case. Nothing has changed that would cause the Commission to reverse its previous decisions and SBC-Ameritech presents no new evidence or changed circumstances -- it simply reiterates the same old arguments. The law does not permit a party or the Commission to ignore parties' due process rights through repeated relitigation of the exact same issues and the same evidence until satisfied with the result. Yet this is exactly what SBC-Ameritech seeks to do. For example, SBC-Ameritech complains about deploying line cards upon a CLEC's request. *See* Application at 11. However, it made the same argument in its original Application for Rehearing, its Initial Brief on Rehearing and its Rehearing Reply Brief. *Id.* SBC-Ameritech also opposes the timetable for deploying new line cards. *See* Application at 9. But SBC-Ameritech acknowledges that it made this same argument in its Surreply Exceptions. *Id.* This rehash of old arguments highlights the frivolous nature of SBC-Ameritech's Application. It is an abuse of

process and waste of the Commission's time to permit SBC-Ameritech to litigate these issues ad nauseum. Similarly, SBC-Ameritech seeks repeated bites at the apple on the following issues:

?? In its argument against reference to Texas contract terms, SBC-Ameritech relies upon the arguments it made previously in its Reply Brief on Exceptions and Surreply Exceptions. *See* Application at 13 n.13.

?? Its claims of violations of state, federal and constitutional law rest on arguments made in its original (April 13, 2001) Application for Rehearing and its Initial Brief on Rehearing. *See* Application at 14 n.14, & 17 .

?? SBC-Ameritech reargues its argument that the Broadband Service is not a UNE from its SBC-Ameritech's Initial Brief on Rehearing and its Rehearing Brief on Exceptions. *See* Application at 17 n.18.

?? SBC-Ameritech repeats its assertions about packet switching mirror the assertions from its original Application for Rehearing, Initial Brief on Rehearing, Brief on Exceptions and Rehearing Brief on Exceptions. *See* Application at 17 n.19, & 18.

?? SBC-Ameritech repeats its argument about the application of the FCC's impairment test from its Initial Brief, Reply Brief, Brief on Exceptions, original Application for Rehearing, Initial Brief on Rehearing, and Rehearing Brief on Exceptions. *See* Application at 20, 21 n.23.

?? As to its claim that the Commission is impermissibly using a tariff proceeding to impose unbundling duties, SBC-Ameritech acknowledges that it has made that argument "throughout this proceeding" and has previously filed "lengthy discussions of federal preemption principles." *See* Application at 21-22. In fact, SBC-Ameritech has argued this issue in every one of its briefs. *Id.* at 22. Perhaps more importantly, the Commission has previously denied

rehearing on this precise issue in April 2001. Yet, the denial of rehearing once is apparently not enough to deter SBC-Ameritech.

?? SBC-Ameritech's assertion that the Commission does not have the authority to issue tariffs repeats its argument from its Surreply Exceptions. *See* Application at 24. Joint CLECs also note that SBC-Ameritech fails to cite to the new law, 220 ILCS 5/13-501(b), that expressly permits the Commission to issue tariffs.

?? SBC-Ameritech's complaints about the charges for the HFPL UNE, OSS modifications and manual loop qualifications parrot the complaints made in its Initial Brief, Reply Brief, Brief on Exceptions, original Application for Rehearing, Initial Brief on Rehearing, and Rehearing Brief on Exceptions. *See* Application at 25 n.28, 26 n.30, 28 n.33, 29, 30 n.35, 31 n.38, 32.

SBC-Ameritech has repeatedly presented its claims and arguments. SBC-Ameritech initially presented these same arguments to the Commission more than 18 months ago during the Covad-Rhythms line sharing arbitration in Docket Nos. 00-0312/00-0313. It also had multiple opportunities to present its arguments during this rehearing, including an opportunity to file a surreply on exceptions brief. The Commission cannot permit SBC-Ameritech to put forward these worn-out claims over and over again. If SBC-Ameritech obtains a rehearing on these issues again, it will forestall even further the competitive DSL options for Illinois consumers.

SBC-Ameritech presents nothing that would warrant this outcome. The Commission has rejected these arguments *repeatedly* and SBC-Ameritech has offered nothing to warrant a

reversal.**II. SBC-AMERITECH'S APPLICATION FOR CLARIFICATION MUST BE**

DENIED. As discussed above, SBC-Ameritech's Application for Clarification masks its request for rehearing on all these issues. While Joint CLECs do not believe that the Commission should even consider SBC-Ameritech's Application, in the event that the Commission consider

SBC-Ameritech's claims, Joint CLECS reiterate and incorporate by reference its briefs in this proceeding. Two issues raised by SBC-Ameritech, however, warrant further discussion.

A. The Commission's Order Regarding Interim Broadband UNE Pricing Does Not Violate the Law.

SBC-Ameritech again criticizes the interim pricing established by this Commission in its Order. Application at 4. In essence, SBC-Ameritech claims that the Commission cannot adopt any interim pricing other than the Broadband Service prices proposed by SBC-Ameritech. To the contrary, the Commission has the authority under state law to establish an interim tariff and interim pricing. 220 ILCS 13.501(b). There is no requirement under state law that the Commission adopt SBC-Ameritech's proposed pricing.

Moreover, SBC-Ameritech cannot claim any harm from the interim pricing established by this Commission. While SBC-Ameritech asserts that "the fact that the prices would be subject to true-up does not save them," (Ameritech Application at 16, fn. 17) true-ups are commonly used by this Commission to balance the need for competitive entry and proper cost recovery by SBC-Ameritech. For example, the Commission ordered Ameritech to tariff different interim conditioning rates in Docket No. 99-0593 than those proposed by SBC-Ameritech. The Commission observed that the true-up mechanism adequately protected SBC-Ameritech. This case is no different. Accordingly, the Commission should deny SBC-Ameritech's request that it alter the interim pricing for the Broadband UNE.

B. The Commission's Order Regarding Line Card Deployment Is Appropriate and Supported by the Record.

SBC-Ameritech complains that the Section 9.5 of Appendix A requirement that Ameritech deploy new line cards should be replaced with a requirement that the CLECs request new line cards through the "Special Request Process" contained in the Broadband Services Agreement.

Application at 9. Joint CLECs object to this request for several reasons. The Special Request Process from the Broadband Services Agreement has no evidentiary support in the record and it is an additional delaying obstacle for Joint CLECs to attempt to navigate in any attempt to providing a service different from SBC-Ameritech or its affiliate's retail service.

Joint CLECs object to SBC-Ameritech's proposed change to Section 9.5 because the Special Request Process from the Broadband Services Agreement because the Special Request Process from the Broadband Services Agreement has no record support. Ameritech never introduced the Broadband Services Agreement in the Rehearing phase of this docket. A version of the Agreement was appended to witness Carol Chapman's testimony in the original case, but the Commission rejected it and ordered Ameritech to completely unbundled Project Pronto.

While Joint CLECs disagree with the Commission's decision to order an end to end UNE only as a result of the rehearing process, the special request process from the Broadband Services Agreement never was not part of the record on rehearing. Nobody, in fact, knows what it is. Questions arise such as: Which Broadband Services Agreement is the process taken from, the one appended to Ms. Chapman's testimony or one that Ameritech has released more recently? How long will it take for Ameritech to respond to a CLEC request for a new line card? How much will Ameritech charge CLECs for Ameritech to determine if it will provide a new line card? How much will Ameritech charge for the new line card? Which party, Ameritech or the CLEC, has the burden to show technical and economic feasibility? In sum, there are a number of unanswered questions about the Special Request Process. The Commission should not only reject. Ameritech's proposal to inject it into Section 9.5, but the Commission should also delete it from the tariff language in Section 7.7.2. There is no record evidence to support its inclusion.

Next, the undefined special request process can only delay CLECs' ability to deploy new line cards. The ability to use different line cards to provide different types of DSL service that are technically feasible to deploy is key to Joint CLECs in developing offerings competitive to SBC-Ameritech's offering. The Commission in its Order on Rehearing already recognized that CLECs need to have the ability to differentiate their service. "We remain convinced that, unless and until requesting carriers have meaningful access to the Project Pronto architecture for the use of line cards that will provision the various types of services they wish to provide, they will indeed be impaired in providing those services." Order on Rehearing, p. 36. This rationale led the Commission to adopt a thirty day window for SBC-Ameritech to deploy commercially available line cards requested to be deployed by CLECs. Order on Rehearing, Appendix A, Section 9.5. While the Joint CLECs object to the Commission's decision to let Ameritech to object to a request for a commercially available line card based on economic feasibility reasons, at least this process puts the burden on Ameritech to demonstrate directly to the Commission that a line card is not technically or economically feasible to deploy. Resort to an undefined Special Request Process to implement this important aspect of the Commission's Order on Rehearing can only lead to confusion and delay.

Moreover, Ameritech's complaints that it needs more than thirty days to deploy a new line card ring hollow. First, the line card must be a commercially deployed line card. The record is full of evidence demonstrating that SBC-Ameritech works closely with its manufacturer, Alcatel, in deploying features for NGDLCs. As the Commission is well aware, SBC-Ameritech even convinced Alcatel's CTO to testify in this case. SBC-Ameritech also contributed significantly to many other decisions related to Alcatel's software releases. Moreover,

SBC-Ameritech will have the opportunity to explain to the Commission according to the Section 9.5 why it has not deployed a commercially released line card if it deems it to be technically or economically infeasible. In short, the 30 day window is necessary to keep

SBC-Ameritech from stretching out the deployment of a new line card process to the same degree that it has delayed deployment of Project Pronto in Illinois. An item as important as the deployment of new commercially available line cards should not be left to the vagaries of Ameritech's undefined special request process.

CONCLUSION

For the foregoing reasons, Joint CLECs respectfully request that the Commission strike SBC-Ameritech's Application in its entirety. In the event that the Administrative Law Judge rejects Joint CLECs' Motion, Joint CLECs respectfully request interlocutory review and oral argument. In the event that the Commission denies Joint CLECs' Motion and considers the Application, the Commission should deny the Application in its entirety. Should the Commission grant rehearing to SBC-Ameritech, Joint CLECs request equal treatment and, like SBC-Ameritech, request rehearing on the issues outlined in Appendix A.

Dated: October 26, 2001

Respectfully submitted,

John F. Dunn
AT&T Law Dept.
222 W. Adams
Suite 1500
Chicago, IL 60606-5307
(312) 230-2637
(312) 977-9457 (fax)
e-mail: johnfdunn@lga.att.com

Stephen P. Bowen
Anita Taff-Rice
Bowen Law Group
4 Embarcadero Center, Suite 1170
San Francisco, California 94111
(415) 394-7500
(415) 394-7505 (fax)
e-mail: stephenbowen@earthlink.net
anitataffrice@earthlink.net

Ken Schiffman
Sprint Communications L.P.
8140 Ward Parkway, 5E
Kansas City, MO 64114
Ph: 913.624.6839
Fax: 913.624.5504
e-mail: kenneth.schiffman@mail.sprint.com

Darrell Townsley
WorldCom, Inc.
205 N. Michigan Ave., Suite 3700
Chicago, IL 60601
(312) 260-3533
(312) 470-5571 (fax)
email: darrell.townsley@wcom.com

Felicia Franco-Feinberg
Covad Communications Company
227 West Monroe 20th Floor
Chicago, Illinois 60606
e-mail: ffranco@covad.com

APPENDIX A

The Joint CLECs seek rehearing on the following issues. Each issue has been thoroughly briefed and supported with record evidence in the prior phases of this proceeding, as well as in Docket No. 00-0312/0313. Therefore, the Joint CLECs will not reiterate their entire previous briefing and evidence here, but rather identify it and incorporate it by reference.

First, the Joint CLECs seek rehearing of the portion of the Commission's Order denying CLECs access to Project Pronto components as UNEs, either individually or in combination and denying CLECs the ability to collocate line cards in the NGDLC equipment located in remote terminals. Second, the Joint CLECs seek rehearing of the portion of the Commission's Order denying CLECs direct access to SBC-Ameritech's OSS data and functionality.

The Commission's Order ignores the clear weight of evidence in this proceeding on these issues and reverses, without basis in the record, the decision the Commission has reached three times before granting CLECs access to Project Pronto components as UNEs, allowing collocation of CLEC line cards, and allowing CLECs direct access to SBC-Ameritech's OSS data and functionality.

Finally, the Joint CLECs seek clarification and/or rehearing on SBC-Ameritech's "cost study" alleging costs that could arise from the unbundling of Project Pronto. The evidence presented in this proceeding thoroughly discredited the "cost study" and the Joint CLECs seek a ruling from the Commission that SBC-Ameritech's cost study is without merit and fails to

support SBC-Ameritech’s assertions that unbundling Project Pronto will cost hundreds of millions of dollars.

REHEARING ISSUE	BRIEF SECTION
<p>1. Access to Project Pronto components as UNES</p> <p>Federal and state law require unbundling of Project Pronto Components</p> <p>SBC-Ameritech initially intended to offer Project Pronto components as UNES</p> <p>SBC-Ameritech’s threat not to deploy Project Pronto if it must be unbundled are not credible because Project Pronto will pay for itself through network efficiencies</p> <p>SBC-Ameritech’s threat not to deploy Project Pronto if it must be unbundled are not credible because SBC-Ameritech will derive significant revenues from its platform of the future</p> <p>SBC-Ameritech’s threat not to deploy Project Pronto if it must be unbundled are not credible because Project Pronto is required to respond to competition from other technologies</p> <p>SBC-Ameritech’s threat not to deploy Project Pronto if it must be unbundled are not credible because SBC-Ameritech must deploy Project Pronto to comply economically with 220 ILCS § 5/13-517(a)</p> <p>SBC-Ameritech’s threat not to deploy Project Pronto if it must be unbundled are not credible because SBC-Ameritech continues to deploy most components of Project Pronto</p> <p>SBC-Ameritech improperly uses a “snapshot” rather than a “movie” view of technology to hide the technological developments that make CLEC line card collocation technically and economically feasible</p> <p>SBC-Ameritech denied the plain meaning of its internal documents to mislead the Commission into believing unbundling of Project Pronto is not technically feasible</p> <p>SBC-Ameritech’s claims of technical infeasibility were disproven</p>	<p>Sections III, IV, V</p> <p>Pages 28-72</p> <p>Pages 74-77</p> <p>Pages 77-79</p> <p>Pages 79-81</p> <p>Pages 81-82</p> <p>Pages 82-83</p> <p>Pages 83-84</p> <p>Pages 85-86</p> <p>Pages 86-87</p> <p>Pages 96-101</p>
<p>2. Collocation of Line Cards</p> <p>SBC-Ameritech improperly uses a “snapshot” rather than a</p>	<p>Section V</p>

<p>“movie” view of technology to hide the technological developments that make CLEC line card collocation technically and economically feasible</p> <p>SBC-Ameritech denied the plain meaning of its internal documents to mislead the Commission into believing unbundling of Project Pronto is not technically feasible</p> <p>SBC-Ameritech’s claims of capacity constraints ignore changes that are imminent that eliminate alleged costs</p> <p>SBC-Ameritech’s claims of technical infeasibility were disproven</p>	<p>Pages 85-86</p> <p>Pages 86-87</p> <p>Pages 87-96</p> <p>Pages 96-101</p>
<p>3. SBC-Ameritech “Costs” for Unbundling Project Pronto</p> <p>“Loss of control,” not cost is the reason SBC-Ameritech is refusing to unbundle Project Pronto</p> <p>SBC-Ameritech’s claims of capacity constraints ignore changes that are imminent that eliminate alleged costs</p> <p>SBC-Ameritech used only worst case assumptions in its cost analysis</p> <p>SBC-Ameritech cost assumptions are fundamentally flawed</p> <p>Use of TELRIC costing principles for Project Pronto UNEs ensures proper cost recovery for SBC-Ameritech</p> <p>SBC-Ameritech failed to prove there will be substantial OSS costs to support CLEC collocated line cards</p>	<p>Section V</p> <p>Pages 84-85</p> <p>Pages 87-96</p> <p>Page 102</p> <p>Pages 103-111</p> <p>Pages 111-116</p> <p>Pages 116-117</p>
<p>4. Direct Access to SBC-Ameritech OSS data and functionality</p> <p>SBC-Ameritech redefined “OSS” in order to deny CLECs access to OSS data and functionality</p> <p>SBC-Ameritech employees have access to OSS information that CLECs do not have</p> <p>SBC-Ameritech employees have access to OSS functionality that is denied to CLECs</p> <p>SBC-Ameritech employees have direct access to backend systems and databases that is denied to CLECs</p> <p>Direct access eliminates time lag and expense that CLECs suffer by receiving OSS data through gateways</p> <p>SBC-Ameritech failed to prove CLEC direct access would harm its OSS or customer privacy</p>	<p>Section VI</p> <p>Pages 118-122</p> <p>Pages 122-126</p> <p>Pages 126-130</p> <p>Pages 130-131</p> <p>Pages 131-132</p> <p>Pages 132-137</p>