

**BEFORE  
THE ILLINOIS COMMERCE COMMISSION**

Z-TEL COMMUNICATIONS, INC.	)	
	)	
<i>Complainant,</i>	)	
	)	
vs.	)	Docket No.
	)	
ILLINOIS BELL TELEPHONE COMPANY,	)	
d/b/a AMERITECH ILLINOIS,	)	
	)	
<i>Respondent.</i>	)	

**DRAFT INTERIM ORDER GRANTING EMERGENCY RELIEF**

On February 21, 2002, Z-Tel Communications, Inc. (hereinafter referred to as "Z-Tel ") filed with this Commission a verified Complaint pursuant to Sections 13-514, 13-515, 13-516, and 13-801 of the Illinois Public Utilities Act (220 ILCS 5/13-514, 5/13-515, 5/13-516, and 13-801). In the Complaint, Z-Tel alleges that Ameritech provide untimely, inaccurate, unreliable and discriminatory notice to Z-Tel when a Z-Tel customer migrates to an alternative local exchange carrier. This Notice is referred to as "Line Loss Notification". Z-Tel alleges that this lack of reliable Line Loss Notice is a per se impediment to competition in violation of Sections 13-514 and 13-801 of the Act, as well as a breach of the Interconnection Agreement between Z-Tel and Ameritech.

Included in the Complaint filing was a Petition for an Order for Emergency Relief Pursuant to 220 ILCS 5/13-515(e). Z-Tel requests this Commission enter an Order granting it emergency relief. Z-Tel requests that the Commission enter an Emergency Order prohibiting Ameritech from marketing its Winback promotional offers to Z-Tel customers. Z-Tel alleges that Ameritech uses more favorable Operations Service Support information, and more specifically Line Loss Notification, to trigger a Winback promotional offering to customers that have left Ameritech and subscribed to Z-Tel's local service offering. Z-Tel requests that, because of the defective and discriminatory Line Loss Notification that, Ameritech has a competitive advantage in soliciting Z-Tel's customers.

According to the record, ZTel Communications, Inc. is a Delaware corporation with its principal place of business at 601 S. Harbour Island Boulevard, Tampa, Florida. The Company is a competitive local exchange carrier ("CLEC") certified by the Illinois Commerce Commission to provide resold and facilities-based local and interexchange telecommunications services in Illinois. Z-Tel Communications provides primarily mass-marketed local exchange services to residential and small business customers. As of September 30, 2001, ZTel was providing integrated local, long distance and enhanced

services to approximately 260,000 customers in 35 states, including more than 15,000 customers in Illinois.

When a customer places an order to subscribe to Z-Tel's services, a Z-Tel customer service representative accepts the order, pulls the Customer Service Record (CSR) from Ameritech, creates a Local Service Request (LSR), and submits the LSR to Ameritech to provision the line. Z-Tel's systems then use the customer information to bill its local exchange services. Z-Tel's systems will bill customers at regular intervals until Z-Tel receives a notification from Ameritech that the Z-Tel customer has switched to an alternative local exchange carrier. When a customer leaves Z-Tel, Ameritech notifies Z-Tel through a "Line Loss Notification" or an Ameritech "836 Loss Notification" report. Ameritech sends the Line Loss Notification electronically through Z-Tel's EDI operations support systems interface. Z-Tel uses Issue Number 7 EDI Interface for its EDI interconnection with Ameritech. Unless Z-Tel receives accurate, timely and reliable Line Loss Notification, Z-Tel is unaware when its customers have migrated to another local exchange carrier, and Z-Tel will bill customers that have terminated Z-Tel's services. In such circumstances, the former customers continue to receive bills from Z-Tel and also receive bills from their new providers.

According to Z-Tel, Ameritech has provided Line Loss Notification to Z-Tel that is inaccurate, untimely and unreliable. In May 2001, Z-Tel identified two primary problems with Ameritech's Line Loss Notification. The Line Loss Notices contained not just telephone numbers ("ANI's") that were coded as "D" or disconnected, but also contained ANI's with N (new), S (suspended), and C (change) codes. In December 2001, 36% of the ANI's reported on Ameritech's Line Loss Notifications were designated as "D" orders, 63% as "N" orders (+ 1% as other). Ameritech never provided process documentation that clearly indicated which codes should be processed as line loss. In May 2001 Ameritech was sending Z-Tel line loss data on an average of 12 days after the customer was migrated to another local exchange carrier. In December 2001, only 73% of the Line Loss Notifications were received within one day of a customer terminating their local exchange service. 8% were received after 4+ days.

Ameritech has admitted that there are significant problems in the way it delivers Line Loss Notification to CLECs that use either the Issue Number 7 EDI Interface (used by Z-Tel) and the LSOG 4 EDI Interface (used by other CLECs.) There is a defect in reporting Line Loss to CLECs when a customer has a partial migration to another local exchange carrier. For example, if a customer has 4 lines, and migrate 2 of those lines to Ameritech, Line Loss Notification is not always given, and/or Line Loss Notification may be given for all 4 lines. Also, Ameritech will submit reports to CLECs that identify a lost line as a "D" (for disconnect.) However, Ameritech's Line Loss Reports have also improperly contained other codes, such as "N" and "C", instead of "D". These other codes cannot be processed by CLECs to identify lost lines.

Ameritech's failure to deliver accurate, Line Loss Notification has caused Z-Tel to send inaccurate bills to its former customers, which leads to complaints by customers to the FCC, the Illinois Commerce Commission, and/or the Better Business Bureau. Since April

2001, Z-Tel has received notice of 15 double billing complaints from the Illinois Commerce Commission, two from the Attorney General, six from the Better Business Bureau, and four from the FCC. Z-Tel has processed another 56 complaints internally.

At the same time that Ameritech delivers untimely and inaccurate Line Loss Notification to Z-Tel, Ameritech is able to accurately and in a timely manner, notify its retail marketing operations when an Ameritech customer migrates to Z-Tel. Ameritech does not use the Issue Number 7 EDI Interface nor does it use the LSOG 4 to provision Ameritech's retail lines. Consequently, Ameritech is not using the same systems that Z-Tel is required to use to receive Line Loss Notification.

Each time an Ameritech customer migrates to Z-Tel, Ameritech solicits that customer attempting to "Winback" that customer by providing incentives and promotional discounts. Ameritech sends "Winback" promotional discount and marketing material to Z-Tel customers (that switch from Ameritech) within 5 days of terminating Ameritech's service. Ameritech does not solicit customers who move, suspend their local exchange service, or disconnect local service for some reason other than switching to a CLEC. Ameritech's Winback material acknowledges that Ameritech's retail operations receive Line Loss Notification more favorable than the information provided to Z-Tel. Ameritech's Winback material states that "[w]e were recently notified that you switched your local telephone service from Ameritech to another company."

In addition, in the second sentence of Ameritech's Winback material, Ameritech asks "[i]f your service has been switched without your knowledge or consent please contact us immediately at 1-888-729-1416." Ameritech's own material acknowledges that the customer elected to switch local exchange carriers voluntarily; Ameritech's material appears to incite the customer to claim that he or she was slammed.

Z-Tel alleges that Ameritech's conduct in providing inaccurate, untimely, and unreliable Line Loss Notification to Z-Tel, while at the same time providing Line Loss Notification to its retail marketing division when customers actually switch to Z-Tel, is an anticompetitive double-whammy committed against Z-Tel. Ameritech is able to focus its marketing efforts to immediately try to Winback customers that switch to Z-Tel, while at the same time causing Z-Tel to wrongfully double-bill former customers.

On February 19, 2002, Z-Tel sent to Ameritech a request that Ameritech cure, within 48 hours, its alleged wrongful conduct. This letter was sent pursuant to the requirements of Section 13-515(c). On February 21, 2002, Ameritech responded.

Ameritech claims that . . .

The issue before this Commission under the Request for Emergency Relief is whether the Complainant has met its burden for Emergency Relief under Section 13-515(e) of the PUA. Section 13-515(e) of the PUA provides:

## Section 13-515(e) Emergency Relief

Section 13-515(e) of the PUA grants this Commission with the authority to provide emergency relief to parties, without an evidentiary hearing, if the party requesting relief meets certain statutory requirements. Section 13-515(e) reads as follows:

(e) If the alleged violation has a substantial adverse effect on the ability of the complainant to provide service to customers, the complainant may include in its complaint a request for an order for emergency relief. The Commission, acting through its designated hearing examiner or arbitrator, shall act upon such a request within 2 business days of the filing of the complaint. An order for emergency relief may be granted, without an evidentiary hearing, upon a verified factual showing that the party seeking relief will likely succeed on the merits, that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and that the order is in the public interest. An order for emergency relief shall include a finding that the requirements of this subsection have been fulfilled and shall specify the directives that must be fulfilled by the respondent and deadlines for meeting those directives. The decision of the hearing examiner or arbitrator to grant or deny emergency relief shall be considered an order of the Commission unless the Commission enters its own order within 2 calendar days of the decision of the hearing examiner or arbitrator. The order for emergency relief may require the responding party to act or refrain from acting so as to protect the provision of competitive service offerings to customers. Any action required by an emergency relief order must be technically feasible and economically reasonable and the respondent must be given a reasonable period of time to comply with the order.

In order for this Commission to enter an emergency order under Section 13-515(e) of the PUA, the party seeking relief must show that: (1) it will likely succeed on the merits; (2) that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted; and (3) that the order is in the public interest.

Under Section 13-515(e), the first prong that a complainant must show before this Commission can issue an Order for emergency relief is that the complainant is likely to succeed on the merits. Illinois case law clearly articulates that a party seeking preliminary injunctions need not prove its entire case in order to obtain an injunction. A party seeking a preliminary injunction or a temporary restraining order is not required to make a case which would entitle him to relief on the merits. "Instead, he is required only to show that he raises a 'fair question' about the existence of that right and that the trial court should preserve the status quo until the case can be decided on its merits." *C.D. Peters Co. v. Tri-City Regional Port District*, 281 Ill.App.3d 41, 47, 216 Ill.Dec. 876, 880, 666 N.E.2d 44, 48 (Ill.App. 5 Dist., 1996).

We find that the evidence presented to the Commission shows that ZTel has raised a fair question about the existence of its right to receive timely, accurate, reliable and nondiscriminatory Line Loss Notification. Consequently, we further find, without

ruling on the final merits of Z-Tel's claim, that Z-Tel has a likelihood of success on the merits.

Ameritech has an obligation under Sections 13-514 and 13-801 of the Illinois Public Utilities Act, and Article 9 of the Interconnection Agreement between Ameritech and Z-Tel to provide nondiscriminatory Line Loss Notification. Ameritech has acknowledged that Ameritech is providing inaccurate, untimely and unreliable Line Loss Notification, and we find that this Line Loss Notice is provided in a discriminatory manner. Z-Tel has shown it will likely be successful on the merits of its Complaint.

The second prong we must analyze in a Section 13-515(e) request for emergency relief is whether the complainant will suffer irreparable harm in the absence of the requested relief. Irreparable harm does not mean that harm is beyond the possibility of repair or beyond compensation in damages. *Prentice Medical Corp. f. Todd*, 145 Ill.App.3d 692, 701, 99 Ill.Dec. 309, 316, 495 N.E.2d 1044, 1051 (Ill.App. 1 Dist., 1986) *Rehearing denied*. The concept of irreparable harm denotes transgressions of a continuing nature such as constant breach of a contract resulting in damage to the good will of a business which would be incalculable or loss of competitive position. *Id.*; quoting, *Sports Unlimited, Inc. v. Scotch & Sirloin*, 58 Ill.App.3d 579, 583, 16 Ill.Dec. 141, 374 N.E.2d 916 (1978) and *Cross Wood Products, Inc. v. Suter*, 97 Ill.App.3d 282, 286, 52 Ill.Dec. 744, 422 N.E.2d 953 (1981) ("A species of very real but intangible harm not readily subject to measurement by any certain pecuniary standard."). Further, it is well settled that prolonged interruptions in the continuity of business relationships can cause irreparable damages for which no compensation would be adequate. *Prentice*, 145 Ill.App.3d at 700; quoting, *Wolf v. Waldron*, 51 Ill.App.3d 239, 243, 9 Ill.Dec. 346, 366 N.E.2d 603 (1977).

We find that Z-Tel has sustained its burden in showing that it will sustain irreparable harm should we not issue emergency relief. Z-Tel has requested that the Commission enter an order enjoining Ameritech from soliciting Z-Tel customers with Winback marketing material until such that Ameritech provides identical Line Loss Notification that Ameritech provides to its own retail operations. The Commission has in the past considered the anticompetitive nature of Ameritech's marketing practices. In *CUB v. Illinois Bell Telephone Company*, the Illinois Commerce Commission held that "misleading marketing practices constitute unjust and unreasonable practices within the meaning of Sections 8-501 and 9-250 of the Illinois Public Utilities Act." *CUB v. Illinois Bell Telephone Company*, ICC Docket No. 00-0043, Order, January 24, 2001. The Commission also held that anticompetitive marketing practices would violate Section 13-514 of the Illinois Public Utilities Act, particularly where the marketing is combined with actions that impede competition. *Id.*, p. 7-8. In *MCI Telecommunications Corp v. Illinois Bell Telephone Company*, ICC Docket No. 96-0075 & 96-0084 (consol.) (1996), we held that Ameritech's marketing scheme prior to intraMSA presubscription was "misleading" and anticompetitive. *Id.*, Order p., 6-7. The Commission enjoined Ameritech from engaging in the marketing practices which the Commission held were violations of Sections 13-505.2 of the Act. *Id.* Ordering Provisions ¶ 6.

The FCC has also enjoined marketing practices that it found to be anticompetitive. In *the matter of AT&T, et al. v. Ameritech Corporation and Qwest Corporation*, 13 FCC Rcd 14508; 1998 FCC LEXIS 3252; 12 Comm. Reg. (P & F) 837, *Memorandum Opinion and Order*, Rel. June 30, 1998, the Federal Communications Commission enjoined Ameritech from engaging in marketing efforts that allegedly violated the Federal Communications Act. There, Ameritech and Qwest engaged in a joint marketing campaign that allegedly allowed Ameritech and Qwest to jointly market intraLATA and interLATA services to residential and small business customers. The FCC enjoined Ameritech from “enrolling additional customers under its ‘teaming’ agreement with Qwest Communications Corporation (Qwest), and refrain from further marketing and promoting of the ‘CompleteAccess’ program under such agreement, pending a final determination by the Commission of the lawfulness of that agreement.” *AT&T v. Ameritech*, ¶ 1.

As we have held in this case, the FCC held that AT&T’s complaint has raised sufficient allegations to warrant an injunction, and that AT&T would likely suffer irreparable harm if Ameritech were permitted to engage in marketing that was founded on violations of the Federal Communications Act. *Id.*, ¶¶ 15-22.

Failure to enter an emergency order will irreparably harm Z-Tel. Without an emergency Order from the Commission prohibiting Ameritech from soliciting Z-Tel customers with Winback marketing offers, the Commission preserves the status quo, and puts Ameritech and Z-Tel on equal footing. Until such time that Ameritech provides identical Line Loss Notification to Z-Tel that Ameritech provides to itself, Ameritech will be precluded from using Line Loss Notices to market Z-Tel’s customers. Z-Tel has shown that failure by the Commission to enter an emergency order will irreparably harm its ability to serve its customers, Z-Tel.

The third and final prong a complainant must show in order to receive emergency relief under Section 13-515(e) is that the order is in the public interest. The General Assembly has decided that it is in the immediate interest of the people of the State of Illinois that the economic benefits of competition in all telecommunications service markets are realized as effectively as possible. 220 ILCS 5/13-102(f). Further, the General Assembly found that it is the policy of the State of Illinois that the implementation and enforcement of policies that promote effective and sustained competition in all telecommunications service markets should be encouraged. 220 ILCS 5/13-103(f). Clearly, the public interest calls for policies and actions that promote and preserve competition in telecommunications services.

We find that granting emergency relief and precluding Ameritech from soliciting Z-Tel customers, will enhance local competition and provide a benefit to the public. This is the overriding goal articulated by the General Assembly, and we will not prevent that goal from implementation by allowing Ameritech to provide faulty Line Loss Notice to Z-Tel, while at the same time using more favorable Line Loss information to market to Z-Tel’s customers. Thus, Z-Tel has sustained its burden in showing that an order with emergency relief is in the public interest.

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) Z-Tel is a Delaware corporation and is authorized to provide resold and facilities-based local and interexchange telecommunications services in Illinois throughout the state of Illinois and is a telecommunications carrier within the meaning of Section 13-202 of the Public Utilities Act;
- (2) Illinois Bell Telephone Company, d/b/a Ameritech Illinois ("Ameritech") is an Illinois corporation and is a wholly-owned subsidiary of Ameritech Corporation, headquartered in Chicago, which is a wholly-owned subsidiary of SBC Corporation, headquartered in San Antonio, Texas. Ameritech is an incumbent local exchange carrier ("ILEC"), authorized to provide local and intraMSA interexchange telecommunications services in Illinois within its designated service territory;
- (3) The Commission has jurisdiction over the parties and the subject matter herein;
- (4) Ameritech's failure to provide accurate, timely and reliable Line Loss Notice is a violation of Sections 13-514 and 13-801 of the Illinois Public Utilities Act;
- (5) Z-Tel has shown a likelihood of success on the merits of its Complaint, that it would suffer irreparable harm in the absence of emergency relief, and that granting its request for emergency relief pursuant to Section 13-515(e) is in the public interest; and,
- (6) Ameritech is ordered to not solicit any Z-Tel customers until such time that Ameritech provides identical Line Loss Notice to Z-Tel that it provides to itself. This shall not prevent Ameritech from accepting new orders from Z-Tel customers. However, Ameritech shall not solicit Z-Tel customers through Winback mailings, telemarketing efforts, or through its channel sales representatives.

IT IS THEREFORE ORDERED that Z-Tel's Petition for an Order for Emergency Relief Pursuant to Section 13-515(e) of the Public Utilities Act is granted.

IT IS FURTHER ORDERED Ameritech is ordered to not solicit any Z-Tel customers until such time that Ameritech provides identical Line Loss Notice to Z-Tel that it provides to itself.

IT IS FURTHER ORDERED that the Commission shall conduct and hearing on the remaining allegations of the Complaint.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 (220 ILCS 5/10-113) of the Public Utilities Act and 83 Ill. Adm. Part 200.880, this Order is not final and is not subject to the Administrative Review Law.

By Order of the Commission this \_\_\_\_\_ day of February, 2002.

(SIGNED) RICHARD MAIHAS

Chairman

(SEAL)