

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

**Z-Tel Communications, Inc.** :  
-vs- :  
**Illinois Bell Telephone Company** :  
**(Ameritech Illinois)** : **02-0160**  
: :  
**Verified Complaint and Request for** :  
**Emergency Relief Pursuant to Sections** :  
**13-514, 13-515 and 13-516 of the Illinois** :  
**Public Utilities Act.** :

**ADMINISTRATIVE LAW JUDGE'S DECISION**

By the Commission:

On February 21, 2002, Z-Tel Communications, Inc. ("Z-Tel" or "Complainant") filed a verified Complaint with the Illinois Commerce Commission ("Commission") pursuant to Sections 13-514, 13-515, 13-516, and 13-801 of the Illinois Public Utilities Act ("Act"). In its Complaint, Z-Tel alleges that Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") provides 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 Notification 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.

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. (Exhibit I to the Complaint).

Included in the Complaint was a Petition for Emergency Relief pursuant to 220 ILCS 5/13-515(e). Z-Tel requests that the Commission enter an Emergency Order prohibiting Ameritech from marketing its Winback promotional offers to Z-Tel customers until such time that Ameritech provides identical Line Loss Notification to Z-Tel that it provides to itself. Z-Tel alleges that Ameritech uses more favorable Operations Support Systems ("OSS") 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, because of the competitive advantage Ameritech gains through the defective and discriminatory Line Loss Notification, that the

emergency relief be granted. Ameritech filed its Response to Z-Tel's request for emergency relief on February 25, 2002.

### **The Petition for Emergency Relief**

According to the verified Complaint, Z-Tel is a Delaware corporation with its principal place of business in Florida. Complainant is a competitive local exchange carrier ("CLEC") certified by the Commission to provide resold and facilities-based local and interexchange telecommunications services in Illinois. Z-Tel provides primarily mass-marketed local exchange services to residential and small business customers. As of September 30, 2001, Z-Tel 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. In such circumstances, the former customers continue to receive bills from Z-Tel and also receive bills from their new provider.

Z-Tel notes that 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 it 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.

Z-Tel contends that 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.

Z-Tel alleges that 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. Z-Tel asserts that 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, Z-Tel contends, shows that Ameritech's retail operations receive Line Loss Notification that contains more detailed information than that which is provided to Z-Tel. Specifically, Z-Tel asserts that the Line Loss Notification information that Ameritech receives specifies whether the customer has switched to another carrier. Conversely, the Line Loss Notification a CLEC receives merely states that a line has been disconnected. In support of this assertion, Z-Tel cites to Ameritech's Winback material which states that "[w]e were recently notified that you switched your local telephone service from Ameritech to another company."

In addition, Z-Tel points out that 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." Z-Tel states that Ameritech's own material acknowledges that the customer elected to switch local exchange carriers voluntarily; Z-Tel contends that Ameritech's material incites 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.

### **Ameritech's Response**

Ameritech argues that Section 13-515(e) provides that the Commission may grant emergency relief if an alleged violation of Section 13-514 "has a substantial adverse effect on the ability of the complainant to provide service to customers." The complainant must demonstrate, *inter alia*, that it will suffer "irreparable harm in its ability to serve customers if emergency relief is not granted." Ameritech states that the alleged violation of the Act is Ameritech's failure to provide accurate and timely line loss notifications to Z-Tel when Ameritech's retail operations allegedly receive more reliable and current information. However, Ameritech argues that the emergency relief

requested will not improve the quality of line loss notifications nor improve Z-Tel's ability to serve its customers. Consequently, it believes that the emergency relief requested is punitive rather than remedial and is beyond the scope of emergency relief authorized under Section 13-515(e).

Ameritech denies Z-Tel's allegation that Ameritech discriminates in favor of its own retail operations. Ameritech also argues that enjoining Ameritech from conducting any Winback marketing activities would not remedy the alleged discrimination. Rather, it would result in discrimination in favor of Z-Tel. Ameritech would be prohibited from marketing to Z-Tel's customers at the same time that Z-Tel and other CLECs would continue to market to Ameritech's customers.

Ameritech asserts that Z-Tel's request for emergency relief is so overbroad that, if granted, it would violate the First Amendment. Ameritech states that its Winback marketing activities are commercial speech protected by the First Amendment, citing *U. S. West, Inc. v. Federal Communications Commission*, 182 F. 3d 1224, 1233 (10<sup>th</sup> Cir. 1999). Under the holding of that case, according to Ameritech, the Commission could impose a valid restriction on commercial speech only if it has (1) a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest. *Id.* at 1233.

Ameritech notes that in the present case, the Commission's interest is in ensuring accurate and timely line loss notifications and avoiding alleged discrimination, not in regulating commercial speech. Restricting Ameritech's Winback activities would not ensure accurate and timely line loss notifications and would discriminate against Ameritech. The relief requested by Z-Tel is far more extensive than would be necessary or permissible to serve the interest sought to be protected.

Ameritech points out that Section 13-515(e) requires that any emergency relief granted must be economically reasonable. Ameritech states that Z-Tel's complaints relate to only a small (but admittedly significant) percentage of the line loss notifications provided to Z-Tel. An Ameritech cross-functional team with representatives from Product Management, Information Technology, the Local Service Center and Account Management is working diligently to correct the processes and procedures that result in the line loss notifications that are alleged to be untimely or inaccurate. Ameritech has asked to meet with Z-Tel representatives at their earliest convenience to make sure that Z-Tel has received all of its line loss notifications for prior periods and to make sure that all of the alleged inaccuracies have been identified. Under these circumstances, Ameritech asserts, the emergency relief sought by Z-Tel, which would totally preclude Ameritech's Winback marketing activities, would not be economically reasonable.

Ameritech asserts that the Commission is already investigating Line Loss Notification issues on a generic basis in its Section 271 investigation, Docket 01-0662. Ameritech argues that docket is the appropriate forum for consideration of the issues because it will insure uniform standards applicable to all carriers. Ameritech notes that, alternatively, the specific issues related to Z-Tel may be addressed in a tightly

compressed time schedule in this docket as required by Section 13-515. The Commission could be in a position to make an informed judgment based upon record evidence on all the contested issues within as little as 75 days. Ameritech notes, on the other hand, that the Administrative Law Judge must rule on the request for emergency relief in two days, and the Commission within four days, based solely on the allegations in the verified Complaint. Ameritech states that many of those allegations are purely conclusory and not supported by evidentiary fact. Ameritech concludes that to grant emergency relief in these circumstances, with no opportunity for Ameritech to even answer, would deprive Ameritech of due process and would be unreasonable, unfair and not in the public interest.

Finally, Ameritech asserts that the three cases relied upon by Z-Tel do not support the grant of emergency relief. The two Commission cases, *CUB & MCI*, did not grant emergency relief. Rather, they were decided on the full record after evidentiary hearings and briefs, which is the procedure Ameritech contends should be followed here. Furthermore, the Commission did not totally prohibit marketing activities in those cases as Z-Tel requests here. The Commission only ordered Ameritech to correct certain marketing practices that the Commission found to be misleading. In the *AT&T* case before the FCC, the conduct sought to be enjoined, provision of long distance service by Ameritech, was illegal. Ameritech argues that in the present case, the conduct Z-Tel seeks to enjoin is not only legal but is protected commercial speech under the First Amendment.

### **Commission Analysis and Conclusion**

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 that Z-Tel must show:

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

The first prong that Z-Tel must show before this Commission can issue an Order for emergency relief is that it will likely succeed on the merits. Illinois case law articulates that a party seeking a preliminary injunction need not prove its entire case in order to obtain such 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 Complaint shows that Z-Tel has raised a fair question about the existence of its right to receive timely, accurate, reliable and non-discriminatory Line Loss Notification. In addition, Ameritech has acknowledged that there are significant problems in providing accurate, timely and reliable Line Loss Notification. Therefore, without ruling on the final merit's of Z-Tel's claim, we find that 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. v. 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 failure to enter an emergency order will irreparably harm Z-Tel. Such irreparable harm includes the damage to Z-Tel's reputation caused by instances of double billing and the loss of customers through Ameritech's alleged discriminatory use of OSS information.

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. 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, such as providing for the non-discriminatory use of information for marketing purposes, that promote and preserve competition in telecommunications services. Reducing instances of double billing that result in Complaints being filed at other government agencies also serves to promote the public interest and protect the interests of consumers.

We find that granting emergency relief and delaying Ameritech's solicitation of Z-Tel's customers for 15 days, 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, for this third prong, in showing that an order for emergency relief is in the public interest.

Based upon the above analysis, the Commission concludes that granting Z-Tel's request for emergency relief, albeit modified from Complainant's request, is appropriate. Therefore, pending the final outcome of Z-Tel's Complaint, Ameritech should be precluded from using Line Loss Notifications to market Z-Tel's customers until 15 days after Ameritech loses that customer to Z-Tel as signaled by the EDI 865 Completion notice. We believe that this interim relief will help to level the competitive use of Line Loss Notifications for marketing purposes.

With respect to Ameritech's First Amendment argument, we recognize that the First Amendment gives certain protections to commercial speech. However, the public interest in promoting competition weighs heavily in favor of this limited restriction on Ameritech's marketing practices. There exists a legitimate and well accepted state interest in promoting competition in the telecommunications industry. The emergency relief granted herein is narrowly tailored to limit the effect of Ameritech's possible discriminatory use of line loss information.

According to Ameritech, Docket 01-0662, Ameritech's Section 271 proceeding, is the appropriate place to address this issue. We note, however, that the Section 271 proceeding is still in the preliminary stages. Although Line Loss Notification may be an issue addressed in that proceeding, Z-Tel has raised issues that need to be addressed now, in this Docket.

Further, the Commission concludes that the relief granted by this Order is economically reasonable as required by 13-515(e). Ameritech contends that the relief requested by Z-Tel is not economically reasonable because it is already working to correct the problem and because of its offer to ensure that Z-Tel has received all of its line loss notifications for prior periods. However, we find that ensuring that prior notifications have been received does not help with future failures. We also note that the relief granted by this order is more limited than that requested by Z-Tel.

### **Findings and Ordering Paragraphs**

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 authorized to provide resold and facilities-based local and interexchange telecommunications throughout the state of Illinois and as such 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 is an Illinois corporation and is a wholly-owned subsidiary of Ameritech Corporation, which is a wholly-owned subsidiary of SBC Corporation. Ameritech is an incumbent local exchange carrier, authorized to provide local and intraMSA interexchange telecommunications services in Illinois within its

designated service territory and as such is a telecommunications carrier within the meaning of Section 13-202 of the Public Utilities Act;

- (3) the Commission has jurisdiction over the parties and the subject matter herein;
- (4) 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
- (5) Ameritech is ordered to not solicit Z-Tel customers through Winback mailings, telemarketing efforts, or through its channel sales representatives for 15 days from the date that an Ameritech customer switches to Z-Tel as signaled by the EDI 865 Completion Notice; this shall not prevent Ameritech from accepting new orders from Z-Tel customers.

IT IS THEREFORE ORDERED that Z-Tel Communications, Inc.'s Petition for Emergency Relief Pursuant to Section 13-515(e) of the Public Utilities Act, as modified herein, is granted.

IT IS FURTHER ORDERED that Ameritech not solicit Z-Tel customers through Winback mailings, telemarketing efforts, or through its channel sales representatives for 15 days from the date that an Ameritech customer switches to Z-Tel as signaled by the EDI 865 Completion Notice.

IT IS FURTHER ORDERED that the relief granted herein is interim and that the Commission shall conduct a hearing on the remaining allegations of the Complaint.

IT IS FURTHER ORDERED that this decision is not a final order and is not subject to the Administrative Review Law.

By Decision of the Administrative Law Judge this 26<sup>th</sup> day of February, 2002.

Leslie D. Haynes  
Administrative Law Judge