

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

| | | |
|--------------------------------------------------------|---|--------------------|
| Illinois Bell Telephone Company, |) | |
| AT&T Communications of Illinois, Inc., |) | |
| TCG Illinois, TCG Chicago, TCG St. Louis, |) | |
| WorldCom, Inc., |) | |
| McLeodUSA Telecommunications Services, Inc., |) | |
| XO Illinois, Inc., |) | |
| NorthPoint Communications, Inc., |) | |
| Rhythms Netconnection and Rhythms Links, Inc., |) | |
| Sprint Communications L.P., |) | No. 01-0120 |
| Focal Communications Corporation of Illinois, |) | |
| and |) | |
| Gabriel Communications of Illinois Inc. |) | |
| |) | |
| |) | |
| Petition for Resolution of Disputed Issues |) | |
| Pursuant to Condition (30) of the SBC/Ameritech |) | |
| Merger Order. |) | |

**AMERITECH ILLINOIS' APPLICATION FOR REHEARING OF
THE ORDER ON REOPENING**

TABLE OF CONTENTS

| | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| INTRODUCTION | 1 |
| BACKGROUND | 2 |
| DISCUSSION | 6 |
| A. The Order On Reopening Is An Unsupported, Arbitrary And Capricious Departure From The Commission’s Prior Conclusion That “The Only Conclusion That Can Be Reached” Is That The Remedy Plan Expires On October 8, 2002..... | 8 |
| B. The Order On Reopening Is Void Because The Commission Did Not Follow The Procedures Mandated By The PUA | 9 |
| C. The Commission Was Without Jurisdiction To Enter The Order On Reopening | 10 |
| D. The Commission Is Estopped From Altering The Term Of Condition 30 | 11 |
| E. The Order On Reopening Impermissibly Conflicts With The Process Of Negotiation And Arbitration Established By The Federal Telecommunications Act Of 1996 | 13 |
| CONCLUSION..... | 16 |

APPLICATION FOR REHEARING OF AMERITECH ILLINOIS

Illinois Bell Telephone Company (“Ameritech Illinois”), by and through its attorneys, respectfully submits its Application for Rehearing of the Commission’s October 1, 2002 Order on Reopening in Docket No. 01-0120.

INTRODUCTION

On October 1, 2002 the Commission issued an order that had no legal basis. The Order on Reopening seeks to unilaterally alter a merger condition by deleting its expiration date three years after the merger was consummated and only a week before the condition was set to expire. It holds that Ameritech Illinois was in “material non-compliance” with the Commission’s order of July 10, 2002 because Ameritech Illinois included language in its implementing tariff that reflected the expiration date. The Commission reopened the docket and entered its Order on Reopening without providing any rational explanation for its action and without giving Ameritech Illinois prior notice or an opportunity to be heard.

In its July 10, 2002 final order in this docket, the Commission held, based on the plain language of its 1999 order approving the SBC/Ameritech merger, that “[t]he only conclusion that can be reached is that Condition 30, and consequently the Remedy Plan, expires in three years” – on October 8, 2002, three years after the closing date of the merger. July 10, 2002 Order at 20. The Commission also properly concluded that “no party has given us a legal basis for extending the deadlines included in the *Merger Order*.” *Id.* Thus, when Ameritech Illinois filed a compliance tariff to implement the July 10, 2002 Order, Ameritech Illinois included a footnote that said that the Condition 30 Remedy Plan expires on October 8, 2002.

On October 1, 2002, only a week before Condition 30’s three-year term expired, the Commission re-opened this docket and entered an order. The Order on Reopening told the Chief Clerk and Ameritech Illinois to strike the termination date from Ameritech Illinois’

implementing tariff. Thus, even though this docket, by its plain terms, was initiated “pursuant to Condition 30 of the SBC/Ameritech Merger Order,” the Order on Reopening purports to alter one of the most fundamental aspects of that condition, namely its duration. And even though the stated purpose of the Order on Reopening was to enforce the Commission’s “final” order of July 10, 2002 in this docket, the Order on Reopening nullifies that order’s finding that Condition 30 and the remedy plan expire on October 8, 2002.

The arbitrary and capricious result of the Order on Reopening is compounded by the improper procedure by which it was reached. The Commission issued the Order on Reopening without prior notice and opportunity for hearing, violating both Section 10-113(a) of the Illinois Public Utilities Act (“PUA”) (220 ILCS 5/10-113(a)), and Ameritech Illinois’ constitutional due process rights. Moreover, the Commission was without jurisdiction to enter the Order on Reopening in the first place, because its final order of July 10, 2002 was before (and therefore subject to the exclusive jurisdiction of) the Illinois Appellate Court. Further, the Commission is estopped from extending Condition 30 indefinitely, after Ameritech Illinois consummated the merger and implemented that condition. Finally, the Order on Reopening violates *federal* procedure as well, because it purports to decide matters concerning interconnection agreements outside the negotiation, arbitration, and approval process mandated by the Telecommunications Act of 1996.

For all these reasons, Ameritech Illinois respectfully asks that the Commission grant rehearing and rescind the Order on Reopening.

BACKGROUND

This docket was instituted to resolve disputed issues concerning Condition 30 of the Commission’s approval of the SBC/Ameritech merger. Pursuant to Condition 30, the Commission conditioned its approval upon Ameritech Illinois’ agreement to implement the

performance measurements, standards, and remedies used by Southwestern Bell Telephone (“SWBT”) in Texas. Specifically, Condition 30 required Ameritech Illinois to review and implement, to the extent feasible, the “performance measurements and related standards/benchmarks that SBC has agreed to implement in Texas as a result of the Texas collaborative process.” Sept. 23, 1999 Order, Docket No. 98-0555 (“*Merger Order*”), at 256. Condition 30 also required Ameritech Illinois to review and implement “the remedies agreed to in the Texas collaborative process” (*id.*), consisting of “liquidated damages” payable to CLECs and “assessments” payable to the State (*see, e.g., id.* at 210-11).

The *Merger Order* directed Ameritech Illinois and the other parties to the merger to evidence, in a written filing, their assent to the merger conditions. SBC and Ameritech accepted the merger conditions and consummated the merger, and Ameritech Illinois implemented the Texas performance measurements, standards and remedies.

Condition 30 also directed Ameritech Illinois to participate in collaborative discussions regarding “any additions, deletions, or changes to the performance measurements, standards/benchmarks, and remedies that are implemented by SBC/Ameritech in Illinois.” *Merger Order* at 260. The parties reached agreement on performance measurements and standards/benchmarks, but were unable to agree on remedies. The CLECs sought to replace the SWBT remedy plan with an entirely different one of their own creation.

One of the most fundamental elements of Condition 30 – and, for that matter, of any right or obligation – is its duration. That term was established by the 1999 *Merger Order*, in which the Commission unambiguously stated (at 237) that *all* conditions “shall cease to be effective and shall no longer be binding in any respect three years after the Merger Closing Date,” unless some different term was “specifically established” in that order. During the merger proceedings,

Staff and the CLECs argued that the remedy plan should have an indefinite life. However, the Commission did not accept their proposal. Condition 30 did not “specifically establish[]” a termination date other than the general three-year term specified by the *Merger Order* and thus, pursuant to the plain language of the *Merger Order*, it was to expire on October 8, 2002 (three years after the merger closing date).

Nevertheless, the CLECs and the Commission’s Staff argued again, this time in Docket No. 01-0120, that the Condition 30 Remedy Plan should continue beyond October 8, 2002. On January 22, 2002, the Administrative Law Judges filed a Proposed Order. With regard to the duration of the plan, the Proposed Order recommended that the Commission reject the position of Staff and the CLECs and hold that the plan would expire on October 8, 2002, just as the Commission had specified in the *Merger Order*.¹ Staff and the CLECs filed exceptions to that aspect of the Proposed Order (among others), but the Commission issued an Order dated July 10, 2002, in which it rejected their arguments (at 20):

The only conclusion that can be reached is that Condition 30, and consequently the Remedy Plan, expires in three years. . . . [N]o party has given us a legal basis for extending the deadlines included in the *Merger Order*. We are therefore left with the conclusion that the Remedy Plan, as a condition to merger approval, expires in three years from the merger closing date, or October 2002.

A group of CLECs sought rehearing. The Commission again rejected their arguments, and denied rehearing by order of July 24, 2002.²

¹ With regard to the substantive provisions of the plan, the Proposed Order recommended that the Commission reject the CLECs’ proposed remedy plan but that it modify the method of assessing and calculating remedies under the existing plan.

² The Commission also denied an application for rehearing filed by Ameritech Illinois. On July 24, 2002, the Commission issued an Amendatory Order, which deleted a single sentence from the July 10, 2002 Order.

On September 26, 2002, Ameritech Illinois filed a Petition for Review of certain aspects of the Commission's July 10, 2002 Order with the Illinois Appellate Court, Third District (Case No. 3-02-0738). Pending such review, Ameritech Illinois filed a tariff to implement the July 10, 2002 Order. That tariff contained a footnote (footnote 1) that stated, just as the Commission had held in its July 10, 2002 Order: "Pursuant to Condition 30 of the SBC/Ameritech Merger Order, Docket 98-0555 (the '*Merger Order*'), this Remedy Plan tariff expires on October 8, 2002." *See* Order on Reopening at 2.

Staff then filed a memorandum regarding Ameritech Illinois' tariff on September 30, 2002, in which it objected solely to the statement regarding the Plan's expiration that appeared in footnote 1. The Commission did not provide Ameritech Illinois notice or an opportunity to be heard with respect to Staff's objection. It did not hear new evidence or argument. Instead, on October 1, 2002 (the day after Staff's memorandum), the Commission voted to issue an "Order on Reopening" in which it adopted Staff's proposal. The Order on Reopening stated (at 3) that the July 10, 2002 Order "did not provide for any sunset or automatic termination for that tariffed remedy plan." Notwithstanding the Commission's conclusion, in the July 10, 2002 Order, that "no party has given us a legal basis for extending the deadlines included in the Merger Order," the Order on Reopening stated (at 3 & n.1) that the plan "will apply after October 8, 2002" and "will be available past October 8, 2002 and for the indefinite future until modified in accordance with applicable law." Finally, the Commission inexplicably asserted that "the filing was in material non-compliance with the Commission's order" and ordered it stricken.³ *Id.* at 4.

³ The Order on Reopening (at 4) directed the Chief Clerk to immediately rewrite Ameritech Illinois' Condition 30 Remedy Plan tariff by striking footnote 1, and required Ameritech Illinois to then submit a new tariff page consistent with the Chief Clerk's edits.

DISCUSSION

The Order on Reopening purports to address the duration of Condition 30 of the *Merger Order*, under which Ameritech Illinois implemented the performance “remedy plan” used by its affiliate (SWBT) in Texas. But the duration of that plan had long since been established by the plain terms of the *Merger Order*, which states (at 237):

Except where other termination dates are specifically established, all conditions set out below shall cease to be effective and shall no longer be binding in any respect three years after the Merger Closing Date.

The *Merger Order* does not “specifically establish” any other termination date for the Remedy Plan. To the contrary, during the merger proceedings the parties and the Commission were fully aware of the Plan’s limited duration. At the time, Ameritech Illinois made clear that the remedy plan it offered was among the conditions that were subject to the general “three-year timeline for the Illinois commitments.” *Merger Order*, at 235.⁴ Staff, meanwhile, argued for “an ongoing performance assurance program” that would “not be subject to arbitrary termination” – an argument acknowledged in the *Merger Order* (at 214) and in the July 10, 2002 Order here (at 20). AT&T sought the same condition. *See Merger Order*, at 217.

Plainly, the Commission did not agree with Staff or AT&T, as it did not reject Ameritech Illinois’ offer or “specifically establish[]” the unlimited term that AT&T and Staff requested for Condition 30. Thus, by the unambiguous terms of the *Merger Order*, the Remedy Plan “shall cease to be effective and shall no longer be binding in any respect” on October 8, 2002, three years after the Merger Closing Date of October 8, 1999.

⁴ In comparing the Condition 30 Remedy Plan with a similar plan then under consideration (and later adopted) by the FCC, the Commission in the *Merger Order* clearly understood that Ameritech Illinois was offering each plan for three years: “[W]hile the three-year clock begins to run for the FCC performance plan only after nine months, the three-year timeline for the Illinois commitments begins at closing. In essence, the Illinois Commitment will begin one month later and end nine months earlier than the federal proposal.” *Merger Order*, at 235 (emphasis added).

Moreover, Condition 32 directed the Joint Applicants that sought approval of the merger (SBC, Ameritech, and Ameritech Illinois) to “notify the Commission . . . that the terms, conditions, and requirements set out above are accepted” within 7 days of its order. The Joint Applicants filed that acceptance and consummated the merger with the Commission’s approval. Ameritech Illinois then implemented the performance standards and remedy plan, an undertaking that required the creation of a joint SWBT/Ameritech task force and several months of effort. Ameritech Illinois documented implementation in a compliance filing dated August 11, 2000.

The July 10, 2002 Order recognized the plain meaning of the *Merger Order*. As the Commission reasoned, “Condition 30 contains no other specifically established termination. The *only conclusion that can be reached* is that Condition 30, and consequently the Remedy Plan, expires in three years.” July 10, 2002 Order at 20 (emphasis added). The Commission further held that “no party has given us a legal basis for extending the deadlines included in the *Merger Order*.” Indeed, the Commission pointed out that Staff had proposed an indefinite term for the Remedy Plan “in the merger proceeding,” but “[n]otably, the Commission did not adopt Staff’s recommendation to make the plan ongoing.” *Id.* Thus, while the Order on Reopening purports to enforce the July 10, 2002 Order, the Order in fact does exactly what the July 10, 2002 Order found there was no legal basis to do – extend the deadlines included in the *Merger Order*.

Government agencies are not free to condition approval of private action on certain commitments – as the Commission did with respect to the SBC/Ameritech merger – only to unilaterally alter the conditions after the conditions have been accepted, approval has been given, and the private parties have taken action. This Commission, like any government agency, is a creature of law and it is bound by the rule of law. There are several rules of law that preclude the Commission from unilaterally altering the term of Condition 30 as the Order on Reopening does.

A. The Order On Reopening Is An Unsupported, Arbitrary And Capricious Departure From The Commission’s Prior Conclusion That “The Only Conclusion That Can Be Reached” Is That The Remedy Plan Expires On October 8, 2002.

Fundamental principles of reasoned decision-making – principles that cabin the powers of all administrative agencies – bar the Commission’s action. The 1999 *Merger Order* considered the duration of the merger conditions and decided that they would last for three years, and the Commission’s July 10, 2002 Order here upheld that termination date and found there was no legal basis to extend it. The Order on Reopening now seeks to eliminate the deadline and extend Condition 30’s termination date indefinitely, without a rational, lawful basis. The Order on Reopening is therefore contrary to law, and arbitrary and capricious.

When the Commission departs from a prior decision, the Commission must “articulate a reasoned basis for its sudden departure.” *Citizens Utility Bd. v. Illinois Commerce Comm’n*, 166 Ill.2d 111, 132, 651 N.E.2d 1089, 1100 (Ill. 1995). In the July 10, 2002 Order (at 20), the Commission stated that “the only conclusion that can be reached” is that “Condition 30, and consequently the Remedy Plan, expire in three years” after the merger closing date. The Commission departed from that decision when it announced on reopening that the July 10, 2002 Order “did not provide for any sunset or automatic termination” and said that “the Commission-ordered remedy plan will be available past October 8, 2002, and for the indefinite future.” Order on Reopening at 3 & n.1. The Commission has not articulated a rational basis to depart from its ruling that Condition 30, and the associated Remedy Plan, expire on October 8, 2002.

The Commission’s departure from its prior holding, made without any reasoned basis, is unlawful. *See Commonwealth Edison Co. v. Illinois Commerce Comm’n*, 180 Ill. App. 3d 899, 909, 536 N.E.2d 724, 730 (1st Dist. 1989) (holding a Commission order “arbitrary and unlawful” where “the Commission radically altered its past practice . . . without notice to interested parties,

a hearing, or any readily apparent reason”). The Commission effectively rescinded its repeated ruling that the Condition 30 Remedy Plan expires on October 8, 2002. But before the Commission could “lawfully rescind” that ruling,

it was necessary that it made a finding of facts different from the findings of facts on which the original order was entered, and that the facts as found in the original order were erroneous, or that, since the entry thereof, conditions had changed to such an extent that the facts and conditions as they existed at the time of the rescinding order were different, or that a mistake as to the law had been made, and enter findings of facts applicable to the then conditions.

Central Northwest Business Men’s Ass’n v. Illinois Commerce Comm’n, 337 Ill. 149, 158, 168 N.E. 890, 894 (Ill. 1929). The Commission made no such findings in its Order on Reopening and thus could not lawfully negate the July 10, 2002 Order.

The Commission’s arbitrary reversal also violates Ameritech Illinois’ due process rights. “To ensure a party receives due process, ‘[a]n agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.’” *General Service Employees Union v. Illinois Educational Labor Relations Bd.*, 285 Ill. App. 3d 507, 515, 673 N.E.2d 1084, 1090 (1st Dist. 1996) (quoting *Dehainaut v. Pena*, 32 F.3d 1066, 1074 (7th Cir. 1994)). The Order on Reopening does not meet this standard.

B. The Order On Reopening Is Void Because The Commission Did Not Follow The Procedures Mandated By The PUA.

As described in the preceding section, the Order on Reopening altered the Commission’s *Merger Order*, and its July 10, 2002 Order in Docket No. 01-0120, by negating the Commission’s conclusion that Condition 30 expires on October 8, 2002. In so doing, the Commission did not comply with Section 10-113(a) of the PUA, which requires the Commission to provide “notice to the public utility affected,” and an “opportunity to be heard as provided in the case of complaints” before it alters its prior decisions. 220 ILCS 5/10-113(a).

The Commission “derives its power from the [PUA] and has no authority except such as is thereby expressly conferred upon it.” *Black Hawk Motor Transit Co. v. Illinois Commerce Comm’n*, 398 Ill. 542, 552, 76 N.E.2d 478, 484 (Ill. 1947). “Where statutory requirements are not followed as to notice, hearing, the presentation of evidence and finding of fact, the Commission loses its jurisdiction to act and any order entered by the Commission under such circumstances is void.” *Commonwealth Edison Co. v. Illinois Commerce Comm’n*, 180 Ill. App. 3d 899, 909, 536 N.E.2d 724, 731 (1st Dist. 1989) (emphasis added). Because the Commission did not provide Ameritech Illinois notice and an opportunity to be heard before entering the Order on Reopening, that order violates Section 10-113(a) and is void for lack of jurisdiction. Moreover, the Appellate Court has held that the notice and hearing required by Section 10-113(a) are precisely what is required under the Due Process Clause. *Quantum Pipeline Co. v. Illinois Commerce Comm’n*, 304 Ill. App. 3d 310, 317-319, 709 N.E.2d 950, 955 (3d Dist. 1999).

C. The Commission Was Without Jurisdiction To Enter The Order On Reopening.

On September 26, 2002, after rehearing of the Commission’s July 10, 2002 Order was denied, Ameritech Illinois filed a Notice of Appeal with the Commission and a Petition for Review with the Illinois Appellate Court, Third District, pursuant to Section 10-201 of the PUA. That case is now pending as Case No. 3-02-0738. The filing of the Petition for Review deprived the Commission of jurisdiction to alter its July 10, 2002 Order:

[T]he filing of a petition for review in [the Appellate Court] functions as a notice of appeal and causes the jurisdiction of the appellate court to attach instantaneously, depriving the administrative agency of jurisdiction to modify its judgment. Thus, once a petition for review has been duly filed, the administrative agency is restrained from taking any action which would change or modify the decision or its scope and from taking any action which would have the effect of interfering with the review of the decision.

Waste Management of Illinois, Inc. v. Illinois Pollution Control Bd., 201 Ill. App. 3d 614, 621, 558 N.E.2d 1295, 1299-1300 (1st Dist. 1990), *rev'd on other grounds*, 145 Ill.2d 345, 585 N.E.2d 606 (Ill. 1992). *See also Citizens Utility Bd. v. Illinois Commerce Comm'n*, 276 Ill. App. 3d 730, 749, 658 N.E.2d 1194 (1st Dist. 1995) (“This court’s power to decide appeals [under Section 10-201 of the PUA] precludes the Commission from entering any order which would effectively interfere with this court’s review of the order from which the appeal is taken.”).

Plainly, the Commission’s Order on Reopening would “change or modify the decision [in Docket No. 01-0120] or its scope.” As described above, the *Merger Order* established that Condition 30 would expire on October 8, 2002. The July 10, 2002 Order upheld that date. The Order on Reopening nullifies that conclusion by stating that there is no “sunset or automatic termination” date for the plan, and by declaring that the Condition 30 Remedy Plan will be available past October 8, 2002.

D. The Commission Is Estopped From Altering The Term Of Condition 30.

The Commission is estopped from altering the term of the merger condition as the Order on Reopening seeks to do. The doctrine of estoppel operates against public bodies where there is “an affirmative act on the part of the public entity and the inducement of a substantial reliance by the affirmative act.” *Gersch v. Illinois Dept. of Professional Regulation*, 308 Ill. App. 3d 649, 660, 720 N.E.2d 672, 681 (1st Dist. 1999). One paradigm in which the doctrine applies is the situation presented here: where an agency approves action by a private party, then tries to change the rules after the private party has taken the action and incurred expense in reliance on the agency’s approval.⁵

⁵ In *Drury Displays, Inc. v. Brown*, 306 Ill. App. 3d 1160, 715 N.E.2d 1230 (5th Dist. 1999), for example, a property owner sought approval from the Department of Transportation to place an outdoor billboard on its property. The Department granted approval, and the property owner accordingly removed the building that had stood on the

(cont’d)

The same reasoning applies here. The Commission’s 1999 order approving the merger was an affirmative act sufficient to induce the Joint Applicants to accept the merger conditions, consummate the merger, and then implement the conditions, including Condition 30. The Commission affirmatively stated that it would approve the SBC/Ameritech merger provided that the Applicants agreed to several merger conditions for a limited duration (*e.g.*, that Ameritech Illinois agree to implement Condition 30 for a term of three years). In reliance on that order, the Joint Applicants filed notice of their acceptance, and then went ahead with the merger of two multistate, multi-billion dollar telephone companies and the implementation of Condition 30 – at considerable expense. Plainly, the duration of the merger conditions was a critical factor in that decision – just as important as the duration of a mortgage is to a homeowner, or the duration of a license is to a business owner. After representing, in the *Merger Order*, that merger approval required Ameritech Illinois to implement Condition 30 for a limited term of three years, the Commission is not free to unilaterally alter that term. *See Hickey v. Illinois Central R.R. Co.*, 35 Ill. 2d 427, 448-49 (1966) (estoppel will apply against the State (and its agencies) when there have been “positive acts by [State] officials which may have induced the action of the adverse party under circumstances where it would be inequitable to permit [that party] to stultify itself by retracting what its officers had previously done”); *People v. Hill*, 75 Ill. App. 2d 69, 75, 221 N.E.2d 40, 44 (1st Dist. 1966) (holding that estoppel operated where “it was the affirmative

(... cont’d)

property and raised the billboard. Months later, the Department decided that the billboard was unlawful and ordered the property owner to take it down. The trial court issued a writ of mandamus enjoining the Department’s action, and the Appellate Court affirmed. As the court explained, the Department’s previous orders granting the requested permit were sufficient to induce the plaintiff to take action in reliance on those orders. The court found that the plaintiff, by spending approximately \$50,000 to demolish the existing building and construct the billboard, incurred substantial expense in reliance on the Department’s action, and accordingly “would suffer a substantial loss if the permits were not reissued.” As a result, the Department was estopped from changing its position.

action by the public authorities . . . that caused plaintiff to change its position by making great expenditures which would not have been made but for the affirmative action”).

The statutory mandate of the Public Utilities Act compels the same straightforward result. By extending the duration of Condition 30, the Commission in essence created a new merger condition – that Ameritech Illinois implement a remedy plan that would take effect October 8, 2002 – almost three years after the merger closed. But Section 7-204(f) (under which the Commission imposed Condition 30 in the *Merger Order*) governs *when* the Commission may impose merger conditions. That section authorizes the Commission to impose “terms, conditions or requirements” *only* “[i]n approving any proposed reorganization pursuant to this Section.” Section 7-204 by its plain terms applies only when a proposed reorganization is pending. It precludes the Commission from imposing new conditions after a reorganization has been consummated.

E. The Order On Reopening Impermissibly Conflicts With The Process Of Negotiation And Arbitration Established By The Federal Telecommunications Act Of 1996.

To the extent that the Order on Reopening purports to make the Remedy Plan “available past October 8, 2002, and for the indefinite future” to CLECs “whose legal right to the remedy plan is based on interconnection agreements with Ameritech Illinois” (Order on Reopening at 3 n.1), it is inconsistent with, and preempted by, federal law.

The Commission lacks authority to confer interconnection rights on CLECs – and to impose interconnection burdens on Ameritech Illinois – outside of the exclusive, Congressionally-mandated process set forth in section 252 of the 1996 Act. That process requires negotiation, arbitration (if necessary), approval, and federal court review of the terms and conditions of the parties’ interconnection agreements. Section 252(a)(1) further states that interconnection agreements are the “binding” statements of the parties’ rights and obligations.

Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc., 128 F. Supp. 2d 1043, 1054 (E.D. Mich. 2001) (“Under the Act, interconnection agreements are binding documents”), *appeal docketed*, No. 01-1312 (6th Cir. argued Sept. 18, 2002). Any attempt to supplement or supplant the terms of a section 252 agreement – as the Order on Reopening does with respect to the availability of the Remedy Plan – must take place pursuant to the procedures established by Congress in section 252, including the opt-in mechanism created in section 252(i).

A recent decision by the United States District Court for the Western District of Wisconsin, *Wisconsin Bell, Inc. v. Bie*, No. 01-C-0690-C, Opinion and Order at 10-18 (W.D. Wis. Sept. 26, 2002) (Attachment 1 hereto), is illustrative. In *Wisconsin Bell*, the Wisconsin Commission had ordered Ameritech Wisconsin to tariff certain UNE combinations. In setting aside the Commission’s tariffing requirement as preempted by the 1996 Act, the district court noted that, in the Act, “Congress gave sweeping authority to the federal government to regulate telecommunications.” *Id.* at 11. The court further observed that “Congress spoke directly to the issue of gaining access to network elements by enacting § 252, a detailed procedure for reaching agreements for the sale of network elements, services and interconnection.” *Id.* at 12. And, the court acknowledged the well-established principle that “[e]ven if a state-imposed tariff furthers competition, as the commission’s action seems to do, it may be preempted ‘if it interferes with the *methods* by which the federal statute was designed to reach [its] goal.’” *Id.* (emphasis in original) (citing, *inter alia*, *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88 (1992)).

Applying that principle, the Wisconsin district court concluded that the Wisconsin Commission’s tariff order interfered with Congress’s prescribed methods because it “requires [Ameritech] to sell certain combinations of network elements using a procedure that allows an

entrant to bypass the Telecommunications Act's provisions for negotiation by opting for the tariff, at least as to the two combinations covered by the decision." *Wisconsin Bell*, slip op. at 12. The court rejected the Commission's reasoning that it could require tariffs for certain services as long as those "services together cannot create a complete regime of state-ordered tariffed interconnection offerings that bypass §§ 251 and 252 altogether." *Id.* As the court explained, although the Wisconsin Commission "did not impose a tariff requirement that covered all network elements, services or interconnections but limited the requirement to only two network combinations * * * the net effect is the same." *Id.* at 13. In short, the court found that the Commission's tariffing requirement "interferes with the incumbent's ability to invoke the interconnection agreement procedures in situations in which the entrant opts for the state-imposed tariff" and held that the "decision impos[ing] a tariff that the entrant may select unilaterally in lieu of the interconnection agreement process * * * is inconsistent with § 252 of the Telecommunications Act." Slip op. at 17.

Notably, in concluding that "the commission's tariffing requirement is inconsistent with and preempted by" the 1996 Act (slip op. at 17), the Wisconsin district court relied on the prior holdings of other federal courts, which have refused to allow carriers or state commissions to circumvent the Congressionally-mandated procedures set forth in section 252 for entering into interconnection rights and obligations. *See, e.g., Verizon North, Inc. v. Strand*, 140 F. Supp. 2d 803, 809-10 (W.D. Mich. 2001), *appeal docketed*, No. 01-1013 (6th Cir. argued June 20, 2002); *Michigan Bell*, 128 F. Supp. 2d at 1054-57; *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 (D. Or. 1999). To the extent that the Commission sought to allow CLECs to avail themselves of the Remedy Plan without regard to the provisions of their interconnection agreements with Ameritech Illinois, and without regard to the interconnection

agreement process mandated by the 1996 Act, that action is preempted. To remedy this particular violation of federal law, the Commission should grant Ameritech Illinois' motion for rehearing with respect to Footnote 1 of the Order on Reopening and vacate that footnote, or at least clarify that the Order on Reopening has no such effect.

CONCLUSION

For all the reasons set forth herein, Ameritech Illinois respectfully requests that the Commission grant rehearing and rescind the Order on Reopening.



Theodore A. Livingston
John E. Muench
Demetrios G. Metropoulos
Mayer, Brown, Rowe & Maw
190 South LaSalle Street
Chicago, IL 60603
(312) 782-0600

Nancy J. Hertel
Ameritech
225 West Randolph St., Floor 25
Chicago, IL 60606
(312) 727-4517