

Docket No: 01-0662
Bench Date: 1/23/03
Deadline: N/A

MEMORANDUM

TO: The Commission

FROM: Eve Moran, Administrative Law Judge

DATE: January 22, 2003

SUBJECT: Illinois Commerce Commission,
On Its Own Motion

Investigation concerning Illinois Bell Telephone Company's compliance with Section 271 of the Telecommunications Act of 1996.

RECOMMENDATION: Deny the Petition for Interlocutory Review; Deny the Motion in Limine.

Filed in this proceeding officially on January 21, 2003, and now pending before this Commission is an Emergency Petition for Interlocutory Review of Administrative Law Judge's Ruling on Remedy Plan Issues and Motion in Limine.

With this filing, AT&T, TCG Chicago, TCG Illinois, TCG St. Louis, McLeodUSA Telecommunications Services, Inc, and WorldCom, Inc (the "Petitioners/Movants") seek expedited interlocutory review of a certain ALJ Ruling that issued on January 16, 2003. As an adjunct thereto, these parties also request a ruling in limine such as would preclude SBC Illinois from proposing or presenting evidence for the adoption of any remedy plan other than the Condition 30 remedy decided for Docket 01-0120.

Responses to the instant Petition and the Motion in Limine were filed, on an expedited schedule, by SBC Illinois, Staff of the Commission and a group of CLECs. The Petitioners/Movants also filed a Reply. All pertinent matters therein are being discussed in this account.

The assertion of a need for expedited action by the Commission is indeed accurate and is being treated here accordingly.

The Petition

In the most general sense, the Petitioners/Movants complain that the ALJ's ruling "attempts to divine the nuances of phrases used by the Commission" in its orders for Docket 01-0120 and, more recently, its order for Docket 92-0252. (Petition at 5, 6). They do not, however, identify a single, specific error in the ALJ Ruling's account of the language in these orders or the construction that ties together all of the Commission's work.

To be sure, the ALJ's ruling adds no new words to any of the relevant Commission orders. Nor does it ignore or take away any words or phrases. This ruling takes the language as is, and read as a whole, finds a certain consistency throughout (including the language of the Initiating Order for this docket). Notably, the end that the Petitioners/Movants themselves seek out, would require much of the language in these orders to be ignored. This, however, would not square with the established rules of construction.

The remaining arguments are no better. At page 6, for example, the Petitioners/Movants confuse matters of substance with matters of process in their attempt to question the consistency of the ALJ's approach. (Petition at 6, fn.7). To be sure, the language in the Initiating Order for the instant docket, which specifies that the Commission "will fully investigate the performance plan" in this proceeding, sets out the "substance" of what is to be examined. (Initiating Order at 3). On the other hand, the announcement that the Commission will hold "evidentiary hearings" is a matter of process, i.e., the means by which the substantive issues will be explored. (Id. at 2). In any event, the Petitioners/Movants are well aware that the ALJ requested leave from the Commission to explore different means by which to move forward the Phase II proceeding for this docket and is not imposing a schedule prior to obtaining Commission approval.

The arguments further indicate that the Petitioners/Movants had a full and fair opportunity to make a record and present their position in the Condition 30 docket. (Petition at 7). It appears, thus, that they are concerned with having such opportunity in this proceeding. These concerns are valid and comport with this Commission's intent to develop a complete factual record in this proceeding. They are, however, premature.

The ALJ's ruling does not address such matters and indeed could not because, at the insistence of certain parties, no schedule on the remedy plan issue was discussed. What was indicated at the discussions, is the likelihood that the remedy plan AI intends to propose for Section 271 purposes is not completely different from the Condition 30 plan and quite similar to another plan of which most parties are aware.

The Responses

SBC-Illinois:

In its Response, SBC-Illinois indicates that much of the work effort involved in Docket 01-0120 is actually reflected in the Compromise Plan it would offer for Section 271 purposes. It identifies several of the more complex issues that, according to SBC-Illinois, need not be addressed given that the Compromise Plan already complies with what the Commission's Docket 01-0120 order decided in these respects. Back in June of 2002, SBC-Illinois points out, it circulated pre-filed testimony describing the Compromise Plan. While there are some differences to be addressed, the parties are not, by any means, starting from "scratch".

While not directed to the correctness of the ALJ's ruling, these assertions by SBC-Illinois are meaningful in countering the concerns and misconceptions of certain parties regarding the re-litigation of a whole new plan.

Staff:

In its response, Staff questions the ALJ's reading of the Alt Reg order, and suggests its own interpretation of the language at hand. Simply because Staff chooses to view the Commission's pronouncements differently, however, does not suffice to establish error in the ALJ's ruling. Moreover, Staff's preferred construction effectively requires a re-write of the language at hand. The ALJ ruling does not take this improper approach – it follows the plain and unadulterated language in the Commission's orders.

Here too, Staff complains of timelines in the schedule for Phase II, based on its mistaken belief that all the nuances of a remedy plan need be re-litigated anew. As indicated in SBC-Illinois' response and other representations by the Company, such is not the case.

If the remedy plan is a Phase II issue for this proceeding, Staff suggests that the Commission provide written direction taking account of the comments it sets out in paragraphs 6-9 of its response. These matters, and perhaps others, should be considered by the parties and addressed in the first instance by the ALJ and, as even Staff admits, only after the Commission rules in denial of the instant Petition. Thus, these comments are premature.

The CLECs:

The response filed by Cimco Communications, Inc, Forte Communications, Inc, and Globalcom, Inc. (the "CLECs"), takes issue with the ALJ Ruling's interpretation of the Commission's orders. In support of their

position, however, the CLECs refer only to certain select passages in the orders for Docket 01-0120. This leaves their analysis wholly incomplete and in error.

To be sure, the CLECs flood their response with various unexplained and unexamined references to case law. Such authority, however, appears out of context and is irrelevant to the only matter at hand, i.e., the correctness of the ALJ's ruling. The only relevant authority on this issue is case law addressing matters of statutory construction. None is cited.

Finally too, the CLECs complain of the tightness of the Phase II schedule, as is, without adding what they perceive to be a "new" and "unknown" remedy plan. Here, the assumptions underlying their argument, are incorrect.

The Reply

Arguments set out in the Reply filed by the Petitioners/Movants do not remedy the insufficiency of their initial pleading. At best, they raise an emotional argument taking no account of the order language that has informed the ALJ's ruling. Further, the Reply addresses arguments set out in SBC-Illinois' response that do not, in any way, form the basis of the ALJ's ruling. Lastly, the Petitioners/Movants turn again to the schedule for Phase II, setting out arguments to be raised and addressed at a status conference. Scheduling matters were in no way discussed or settled by the ALJ Ruling that is at issue here.

The Recommendation

All in all, the scheduling concerns suggested by the Petitioners/Movants and certain of the respondents, will be addressed by the ALJ at another status conference and, thus, should not serve to distract the Commission from the actual issue before it at this juncture.

In the final analysis, there being no showing that the ALJ Ruling is wrong on either the facts or the law, the Petition for Interlocutory Review of said ruling should be denied.

The Motion in Limine.

(Note: To be considered only if the Petition for Interlocutory Review is granted).

If, as the ALJ recommends, the Petition is denied, the Motion in Limine accordingly, must also be denied.

Even if the Commission decides otherwise, however, the motion in limine should still be denied as being overly broad and for reason that this is a matter for the trial court, i.e., the ALJ to decide.

The instant Motion in Limine asks the Commission to rule that SBC Illinois (and any other party) be precluded from proposing, or presenting evidence in support of a remedy plan in this docket that differs from the Condition 30 remedy plan adopted in Docket 01-0120.

A motion in limine is a request to exclude certain evidence (usually prejudicial to the moving party) before it is introduced. When ruling on such an exceptional motion, the court must be certain that it will not unduly restrict the opposing party's presentation of its case. See People v. Clark, 472 N.E.2d 814 (1st Dist. 1984); Lundell v. Citrano, 472 N.E. 2d 541 (1st Dist. 1984). This is, in all respects, a matter for the trial court.

SBC- Illinois correctly points out that motions on evidentiary matters are directed, in the first instance, to the ALJ. As such, and in this instance, an ALJ ruling on a motion in limine is to be guided by Commission's ruling on the pending Petition for Interlocutory Review. That sets the scope for the ALJ's authority which, if imprudently exercised, is open to review.

Assuming arguendo that the Commission grants the Petition, it still should not enter a ruling in limine. Such a ruling would be overly broad. As seen in the Petitioner/Movants Reply, as well as in SBC-Illinois' response, there would be need to have the parameters of such a ruling clearly and fairly worked out.

It is respectfully recommended that the Motion in Limine be denied.

EM:jt