

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company :
(SBC Illinois) and TDS Metrocom, LLC :
: :
Approval of the Fourth Amendment to : **03-0098**
the Interconnection Agreement dated :
February 10, 2003, pursuant to :
47 U.S.C. §§ 252 (a)(1) and 252(e). :

ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

I. PROCEDURAL HISTORY

On February 11, 2003, pursuant to 83 Illinois Administrative Code Part 763, Illinois Bell Telephone Company (SBC Illinois) ("SBC") and TDS Metrocom, LLC ("TDS") (collectively "Joint Petitioners") filed a joint request for approval of the Fourth Amendment ("Amendment") to the Interconnection Agreement ("Agreement") dated February 10, 2003, under Sections 252(a)(1) and (e) of the Telecommunications Act of 1996 (47 U.S.C. 151, et seq.) ("Act"). The Amendment was submitted with the request. A statement in support of the request was filed along with verifications sworn to by James Ehr, Director of Performance Measures for SBC, and Peter R. Healy, Manager of Competitive Local Exchange Carrier ("CLEC") External Relations for TDS, stating that the facts contained in the request for approval are true and correct.

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, this matter came on for hearing before a duly authorized Administrative Law Judge of the Commission at its offices in Chicago, Illinois, on April 16 and 17, 2003. Staff filed the Verified Statement of A. Olusanjo Omoniyi, Policy Analyst in the Commission's Telecommunications Division, which was admitted into evidence. Also admitted into evidence were the Joint Petitioners' Exhibits 1 and 2. At the April 17, 2003, hearing, the record was marked "Heard and Taken."

II. SECTION 252 OF THE TELECOMMUNICATIONS ACT

Section 252(a)(1) of the Act allows parties to enter into negotiated agreements regarding requests for interconnection, services or network elements. SBC and TDS have

negotiated an Amendment to such an Agreement and submitted it for approval in this proceeding.

Section 252(e)(1) of the Act provides, in part, that "[a]ny interconnection agreement adopted by negotiation ... shall be submitted for approval to the State Commission." This Section further provides that a State Commission to which such an agreement is submitted "shall approve or reject the agreement, with written findings as to any deficiencies." Section 252(e)(2) provides that the State Commission may only reject the negotiated agreement if it finds that "the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement" or that "the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity." Section 252(e)(4) provides that the agreement shall be deemed approved if the State Commission fails to act within 90 days after submission by the parties.

Section 252(h) requires a State Commission to make a copy of each agreement approved under subsection (3) "available for public inspection and copying within 10 days after the agreement or statement is approved."

Section 252(i) requires a local exchange carrier to "make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

III. THE AGREEMENT

The instant agreement between SBC and TDS is the Fourth Amendment to the Agreement between the parties. The Amendment adopts the Performance Remedy Plan ordered by the ICC in its July 10, 2002 Order in Docket 01-0120 ("01-0120 Plan"). The Amendment states that in "the event that that ICC's orders in Docket 01-0120 or any of the laws, regulations or Commission orders that were the basis or rationale for such orders in Docket 01-1020, are invalidated, modified, or stayed by any action of any state or federal regulatory or legislative body, or court of competent jurisdiction," this Amendment adds a new Appendix Performance Measurements to the underlying Agreement entitled the Illinois Compromise Performance Remedy Plan ("Compromise Plan"). The Compromise Plan sets new terms and conditions under which SBC will report performance to TDS and compare that performance to SBC's own performance ("parity"), benchmark criteria, or both, whichever is applicable. The Compromise Plan further provides for enforcement through liquidated damages and assessments in the event of specified performance shortfalls.

The Compromise Plan will be retroactively applied to the first day that the Fourth Amendment became effective and payments made or owed pursuant to the 01-0120 Plan will be trued-up or trued-down as appropriate.

The Compromise Plan contains provisions for payment to TDS in the event of performance shortfalls, Tier 1 payments. It also contains provisions for the payment to the State of Illinois in the event of performance shortfalls for the aggregate of all CLECs, Tier 2 payments. The Compromise Plan states that if there are multiple Remedy Plans in place in Illinois, then the plan with the highest calculated Tier 2 payments will control.

Moreover, this Amendment states that, if any provision in the underlying Agreement conflicts with this Amendment, the language of the Amendment shall prevail. All other terms and conditions of the underlying Agreement shall remain unchanged and in full force and effect, and such terms are thereby incorporated by reference and the parties thereby reaffirm the terms and provisions thereof. The underlying Agreement establishes key provisions regarding the financial and operational terms including, but not limited to, the physical interconnection between SBC and TDS' networks on access to rights of way and databases; unbundled access to SBC's network elements, including SBC operations support systems functions; collocation; number portability; resale; and a variety of other business relationships.

IV. STAFF'S POSITION

Applying the standards contained in Section 252(e)(2)(A), Staff recommends that the Commission reject the Agreement. Addressing the first issue, whether this Agreement is discriminatory, Staff maintains that this Agreement is not discriminatory because similarly situated carriers may enter into essentially the same contract.

The second issue, whether the Agreement is in the public interest, Staff believes is not satisfied. In general, the prices contained in the Agreement are, in Staff's opinion, appropriately priced. The Fourth Amendment to the Agreement, however, Staff asserts is contrary to the public interest. The Amendment states that the 01-0120 Plan will be the remedy plan between the parties, unless it is invalidated, and then the Compromise Plan will control. The parties also agreed that the Compromise Plan would be retroactively applied and there would be either a true-up or true-down of all payments made. Staff states that given the Commission's willingness to allow parties to negotiate their Tier 1 payments, it does not object to the treatment of Tier 1 payments in the Amendment.

With respect to Tier 2 payments, Staff maintains that the Amendment does not specify how parties will calculate Tier 2 assessments under the Compromise Plan. Additionally, Staff is concerned that the parties are unclear as to the method that will be employed to either true-up or true-down Tier 2 payments. Staff also asserts that SBC and an individual CLEC may not negotiate Tier 2 payments for all CLECs.

V. SBC'S POSITION

SBC provided a verified response in support of the negotiated agreement and in response to Mr. Omoniyi's verified statement. SBC asserts that the Amendment was the

result of negotiations and that Staff has failed to show to the Amendment is inconsistent with the public interest as required by 47 U.S.C. § 252(e)(2).

SBC asserts that the Compromise Plan does not supplant the 01-0120 Plan's Tier 2 payment structure. SBC notes that Section 5.5 of the Compromise Plan establishes that in the event the Commission has approved multiple remedy plans, SBC will make only one Tier 2 payment and that will be the payment calculated to be the highest under any of the approved remedy plans.

According to SBC, the method for calculating Tier 2 payments in the Compromise Plan is not imprecise. SBC maintains that the two plans contain similar provisions regarding the statistical test used to evaluate compliance with particular performance standards. SBC also asserts that Staff failed to support its argument that the Compromise Plan is imprecise because one plan uses a statistical analytical approach, while the other describes an open-ended approach.

In response to Staff's statement that the Amendment does not specify how a true-up or true-down would be handled, SBC points out Section 8.10 of the Compromise Plan that deals with underpayment and overpayments by SBC.

SBC argues that, pursuant to Section 252(a)(1), a state commission cannot limit the content of an interconnection agreement by declaring that there are certain topics about which the parties cannot negotiate.

VI. COMMISSION ANALYSIS AND CONCLUSION

Pursuant to Section 252(e)(2), there are limited reasons for which the Commission may reject a negotiated agreement, such as the instant Amendment to the Joint Petitioners' Agreement. The Amendment adopts the Remedy Plan approved by the Commission in Docket 01-0120. In the event that the 01-0120 Plan is invalidated, it will be replaced with the Compromise Plan.

The Commission has previously allowed parties to negotiate Tier 1 payments. We will not, therefore, reject this Amendment because the Joint Petitioners have negotiated different Tier 1 payments than those contained in the 01-0120 Plan. Staff notes, however, that this is the first instance where SBC and a CLEC have negotiated Tier 2 payments.

The first issue to address is Staff's argument that the Compromise Plan's Tier 2 calculation is imprecise. In the verified statement of Mr. Omoniyi, Staff identifies two reasons for finding the calculation of Tier 2 remedies imprecise. He states that the Joint Petitioners "agreed on an open-ended approach of using non-compliant data for three consecutive months for the aggregate of all CLECs using a "bright line test" rather than the statistical analytical approach mandated by the Commission in Docket 01-1020. 30 individual data points, instead of the as low as 10 data points of the July 10th Order Performance Remedy Plan, are needed to make the assessments." SBC, in its response

argues that there is no imprecision in the Compromise Plan and that it contains similar provisions to the 01-0120 Plan. Rather than defending its previous statements, Staff, in its verified reply, questions the meaning of the term "aggregate performance for all CLECs that are operating in Illinois." The Commission sees no obvious imprecision in that statement and without further analysis or explanation, the Commission is reluctant to find a negotiated agreement imprecise.

The Compromise Plan provides that SBC is required to pay the highest Tier 2 assessment among agreements, regardless of what a CLEC and SBC have negotiated in an individual negotiated agreement. A number of agreements contain the 01-0120 Plan and, therefore, Tier 2 payments will continue to be calculated under the 01-0120 Plan until all those agreements have expired (unless of course a CLEC manages to negotiate for higher Tier 2 payments than those contained in the 01-0120 Plan).

Ignoring the possible outcomes of Docket 01-0662, the Commission cannot say that the Compromise Plan is contrary to the public interest. We find that it is actually in the public interest to have a plan in place that calls for SBC to pay the highest calculated Tier 2 payment. If for some reason Tier 2 payments calculated under the Compromise Plan are higher, it would be in the public's interest to require SBC to pay that higher amount in hopes of improved performance from SBC.

The likely scenario is that Tier 2 payments will continue to be made pursuant to the 01-0120 Plan until all agreements containing that plan have expired or the 01-0120 Plan has been invalidated. In either case, if there were not a backup plan, SBC would not be required to make Tier 2 payments at all. The Commission sees no harm to the public in allowing SBC and TDS to negotiate an agreement that calls for SBC to pay the highest Tier 2 payments. If at some later date the Commission approves a remedy plan with higher Tier 2 payments, according to the Compromise Plan, SBC would be required to pay those Tier 2 payments

The Commission is concerned, however, with the current Section 2.1 of the Appendix. According to Section 2.1 of the Appendix if any of a number of events take place, the 01-0120 Plan will be replaced by the Compromise Plan. The relevant portion of this Section states the following:

In such event, the effective date of the Illinois Compromise Remedy Plan shall be made retroactive to the effective date the amendment that incorporated this Appendix (or the effective date of the Agreement if this Appendix is part of the original filed Interconnection Agreement). Consistent with this retroactive effective date, all payments made or owed pursuant to the Docket 01-0120 Performance Remedy Plan will be trued-up or trued-down as appropriate. (Section 2.1 of Appendix Performance Measurements).

If the 01-0120 Plan is invalidated for any of the reasons listed in the Amendment, the Joint Petitioners are free to negotiate between themselves how over- or under-payments will be handled for Tier 1 payments. TDS and SBC are not free to negotiate how overpayments on the part of SBC will be handled for the State of Illinois and the entire CLEC community. ~~This is not in the public interest. For this reason, the Commission does not approve this Amendment.~~ ~~For this reason, the Commission does not approve this Amendment.~~ In order to obtain Commission approval, Section 2.1 of the Amendment needs to be rewritten to exclude Tier 2 payments from a true-down due to SBC overpayment. If the 01-0120 Plan is invalidated, any claims will need to be pursued through a different process than a negotiated interconnection agreement.

In their Joint Exceptions, SBC and TDS stated that they were willing to revise the last sentence of Section 2.1 of the Amendment (quoted above) to clarify that it only addressed true-up or true-down of Tier 1 payments. The Commission finds that, with this revision, the Amendment is consistent with the public interest. To implement the Amendment, however, the Commission will require SBC to submit a corrected version of the Amendment, reflecting the revision, within five days of approval.

VII. 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) SBC and TDS are telecommunications carriers as defined in Section 13-202 of the Public Utilities Act;
- (2) SBC and TDS have entered into a Fourth Amendment to an Agreement, which has been submitted to the Commission for approval under Section 252(e) of the Telecommunications Act of 1996;
- (3) the Commission has jurisdiction over the parties hereto and the subject matter hereof;
- (4) the recitals of fact and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact;
- (5) the Amendment does not discriminate against a telecommunications carrier not a party to the Amendment;
- (6) ~~t~~he ~~Amendment~~ ~~greement~~ is not contrary to ~~in~~ the public interest, for the reasons stated d above;
- (7) in order to ensure that the implementation of the Amendment is in the public interest, SBC should implement the Amendment by filing, with the Chief

Clerk of the Commission, a version of the Amendment reflecting the revision discussed in the prefatory portion of this Order, within five days of approval by the Commission; the Chief Clerk should place the revised Amendment on the Commission's web site under "Interconnection Agreements";

- (8) SBC should also place replacement sheets, referencing the Amendment, in its tariffs at the following location: Ill.C.C. No. 21, Section 19.15;
- (9) the Amendment~~greement~~ should ~~not~~ be approved as hereinafter set forth;
- (10) ~~dis~~approval of the Amendment~~greement~~ does not have any precedential effect on any future negotiated agreements or Commission Orders.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Amendment~~greement~~, between Illinois Bell Telephone Company (SBC Illinois) and TDS Metrocom, LLC, is ~~not~~ approved pursuant to Section 252(e) of the Telecommunications Act of 1996.

IT IS FURTHER ORDERED that this Order is final; it is not subject to the Administrative Review Law.

~~ORDER DATED:~~ _____ ~~April 28, 2003~~

~~BRIEFS ON EXCEPTIONS DUE:~~ _____ ~~April 30, 2003~~

Leslie Haynes
Administrative Law Judge