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Illinois Commerce Commission)
On its Own Motion)
Investigation concerning Illinois Bell)
Telephone Company's compliance with)
Section 271 of the Telecommunications)
Act of 1996.)

ICC Docket No. 01-0662

**JOINT PETITION FOR INTERLOCUTORY REVIEW OF THE HEARING
EXAMINER'S RULING ON APRIL 17, 2003, OR,
ALTERNATIVELY, MOTION TO REOPEN THE RECORD TO RECEIVE
ADDITIONAL INFORMATION**

AT&T Communications of Illinois, Inc. ("AT&T"), McLeodUSA
Telecommunications Services, Inc. ("McLeodUSA"), TDS Metrocom, LLC ("TDS
Metrocom"), and WorldCom, Inc. (collectively, "Joint CLECs") respectfully request that
the Commission review and reverse, pursuant to Section 200.520 of Part 83 of the Illinois
Administrative Code, the April 17, 2003 ruling by the Administrative Law Judge denying
Joint CLECS' Emergency Motion For Suspension Of The Schedule Or, In The
Alternative, For Additional Time For Filing Exceptions ("Emergency Motion").
Alternatively, Joint CLECs respectfully request that the Commission reopen the record in
this case pursuant to Section 200.870 of Part 83 of the Illinois Administrative Code for
the purpose of receiving additional evidence.

Joint CLECs' Petition is filed, in part, in response to the Administrative Law
Judge's explanation to the Commission at the May 6 and 7, 2003 open meetings as to
why the problems that caused SBC to withdraw its Michigan Section 271 application at
the FCC purportedly are not present in Illinois. During these sessions, the ALJ has

explained to the Commission that the issues that required withdrawal of the Michigan application were unlikely to impact a similar application by SBC Illinois. Although the Joint CLECs certainly disagree with these statements, what is most unfortunate about the ALJ's account to the Commission, however, is that the Joint CLECs previously sought to suspend the schedule in this docket in light of the Michigan Section 271 withdrawal in order specifically to allow, among other things, for a review of what problems caused the withdrawal and whether those problems exist in Illinois – but the ALJ *denied that request*. Because this request was denied, the record remained closed to the submission of any further information on these very important points (*i.e.*, the several issues identified by FCC Chairman Powell that would have prevented approval of the Michigan application). Thus, nothing the ALJ told the Commission on these topics on May 6 and 7 could have been based on any evidence of record in this case.

Further, the Joint CLECs dispute the ALJ's assertion that the only problem that caused the Michigan 271 withdrawal was the CABS billing problem for UNE-P.¹ The Joint CLECs believe that the wholesale billing problems that proved problematic for SBC in its Michigan FCC proceeding are part of the same host of wholesale billing problems that CLECs have specifically brought to the Commission's attention, in the record, in this case. Moreover, there may be additional problems beyond wholesale billing (including the reliability of SBC's performance metrics data, and SBC's ability to process CLEC line splitting orders, to name just a few, which are also major issues in this docket) that required SBC to withdraw its Michigan FCC application just three weeks ago.

¹ At the May 6 pre-bench session, the ALJ also told the Commission that no CLEC raised the CABS billing issue in this docket. However, as was recognized by Commissioner Wright at the May 7 bench session, and as further detailed below, this information was incorrect.

Therefore, the Commission must reverse the ALJ's ruling, and reset the schedule in this case to allow introduction of evidence and/or comments on the issues that required SBC to withdraw its § 271 application for Michigan before the FCC.

In further support of their Petition, Joint CLECs state as follows:

1. The Commission established an aggressive schedule in this case primarily in response to SBC Illinois' desire to track the 90-day § 271 proceeding then pending at the FCC for the state of Michigan (FCC docket WC 03-16). The schedule was predicated upon SBC Illinois' belief that by April 16, 2003, the FCC would have ruled favorably on that application, thus allowing a similar application to be filed with the FCC for Illinois.

2. SBC did not receive a favorable ruling from the FCC on April 16, 2003, as it had anticipated. Instead, on that date SBC withdrew its application² because there were several issues that would have prevented FCC approval of the application, including at least one issue dealing with CLEC wholesale billing. Confirming this, the statement issued by FCC Chairman Powell clearly notes that several *issues* would have prevented the approval of SBC's application in Michigan, one of which related to wholesale billing:

Ultimately, the outstanding *issues* that prevented approval were very narrow, but nonetheless important. Perhaps the most troubling of these issues relates to billing. Despite extensive examination of the record supporting these applications, questions remain regarding whether SBC is currently providing wholesale billing functions for competitive LECs in a manner that meets the requirements of our existing precedent.

See Statement of Chairman Powell, Docket WC 03-16, p. 1 (April 16, 2003) (emphasis added), attached hereto as Exhibit B. As Chairman Powell's statement indicates, there were other problems with SBC's application in addition to wholesale billing, which he described as the "most troubling" of the outstanding issues. Thus, while one of the "most

² SBC's withdrawal letter is attached hereto as Exhibit A.

troubling” issue confronting SBC on April 16 clearly related to its CABS wholesale billing systems, other issues raised in the Michigan §271 proceeding would also have prevented approval.

3. In an order issued the same day, the FCC terminated the Michigan case, indicating that “SBC when it re-files its application for Michigan, it will provide ‘additional information, as well as updated information necessary to demonstrate [SBC’s] continued compliance with the requirements of section 271.’” A copy of the FCC’s order terminating docket WC 03-16 is attached hereto as Exhibit C.

4. Joint CLECs filed their Emergency Motion on April 17, 2003, the day after the FCC terminated the Michigan § 271 case, seeking additional time in this docket to consider the impact of this withdrawal, particularly in light of the recently issued 870 page Hearing Examiners Proposed Order. *See* Emergency Motion, ¶ 2, attached hereto as Exhibit D.

5. In its response to the Emergency Motion, SBC Illinois argued that the withdrawal of the Michigan FCC application was based on “limited procedural grounds” questions – a claim belied by Chairman Powell’s statement and the subsequent FCC Order calling for additional information on refiling of the application. SBC Illinois’ Opposition To Joint CLECS’ Emergency Motion, ¶ 2, attached hereto as Exhibit E. On the “UNE-P CABS reconciliation issue” that had served as one predicate for the termination of the Michigan FCC case, SBC Illinois stated that it “should not impact the schedule in this proceeding.” *Id.*, ¶ 3. SBC Illinois’ argued that the UNE-P CABS reconciliation was a “one-time event, it is now complete, and it has nothing to do with the ability of the CABS billing system to accurately and timely bill CLECs for the UNE-P.”

Id. SBC did not verify its response. Nor did SBC cite to any of the affidavits or other sworn material filed in this docket to support its assertion that the CABS reconciliation issues that had required withdrawal of its Michigan application were inapplicable to Illinois.

6. SBC Illinois also argued that the “details and need for this [CABS] reconciliation were fully disclosed to the CLECs (and Staff) through calls, business-to-business discussions, and accessible letters.” Similarly, SBC Illinois did not verify this statement, nor does its response cite to any of its affidavits or other sworn materials filed in this docket. SBC Illinois’ Opposition To Joint CLECS’ Emergency Motion, ¶ 4.

7. Finally, SBC Illinois stated in its response: “Notably, the CLECs did not raise the CABS reconciliation billing issues in their Phase II affidavits in this proceeding, notwithstanding the fact that they were fully aware of them.” *Id.*

8. As explained below, SBC Illinois’ response to the Emergency Motion was manifestly erroneous and misleading, and it most certainly misinformed the ALJ, which may have, in part, caused her to erroneously deny the Joint CLECs’ Emergency Motion.

9. The ALJ heard the Joint CLECs’ Emergency Motion on April 17, 2003. During the hearing on the Emergency Motion, counsel for SBC Illinois conceded that the predicate for the compressed schedule in this case no longer existed:

Yes, it is true that at the time we set this schedule back in January we were hoping and expecting to have a positive FCC recommendation this week. Tr. 3907.

10. Notwithstanding this admission, and apparently misled by SBC Illinois’ written submission, the ALJ denied CLECs’ Emergency Motion. In particular, the ALJ

noted that she did not believe that the withdrawal of the Michigan application was significant or had any impact on this case:

Further, I do not believe that whatever happened with this Michigan filing is an intervening circumstance of such value or weight in this proceeding that it would call for disruption of the schedule. Tr. 3909.

11. Joint CLECs submit that this ruling is clearly erroneous. The ALJ never investigated, and therefore was completely unaware of, the specific grounds that required withdrawal of SBC's Michigan application. Indeed, had the ALJ granted Joint CLECs' Emergency Motion, one of the benefits would have been that additional time could have been incorporated into the schedule of this case for the Commission to receive evidence on this point. Moreover, and contrary to SBC Illinois' misleading statements to the ALJ – and as the Commission has now recognized -- CLECs submitted sworn testimony in this docket *raising the exact issue* that was before the FCC regarding the CABS reconciliation and subsequent data reconciliation (the so-called “data bash”). Moreover, similar to the activities that have taken place at the FCC, Joint CLECs have raised in this case several of the same “other issues” that have been identified as preventing approval of the Michigan application. These issues relate *inter alia* to other problems with SBC Illinois' wholesale billing, the integrity and reliability of SBC Illinois' performance measurement data, and its ability to provide nondiscriminatory access to unbundled network elements and other services.

12. Had the ALJ correctly ruled on Joint CLECs' Emergency Motion, SBC Illinois would have had an opportunity to supplement the record on these issues, in order to explain the activities it presumably is undertaking to correct such matters as its wholesale billing and data integrity problems. As it now stands, however, the record –

and the Proposed Order now before the Commission for consideration – contains no information describing SBC’s most recent efforts regarding these problems. SBC Illinois has submitted *no* evidence in this docket since the withdrawal of the Michigan application that would give any indication that deficiencies in SBC’s wholesale billing (or its performance metrics data integrity problems, to name another issue) that made FCC approval of the Michigan application problematic have been satisfactorily addressed.

13. As noted above, the FCC’s order terminating the SBC Michigan §271 case indicated that SBC had agreed to submit “additional information” explaining this matter to the FCC. Indeed, Chairman Powell’s statement issued at the time of SBC’s withdrawal of its application indicated that the billing issues were “outstanding” – *i.e.*, unresolved – and would have “prevented approval” at the time of the Michigan application’s consideration – *i.e.*, April 16, 2003. *See* Statement of Chairman Powell, Exhibit B hereto, pp. 1-2. SBC Illinois has submitted no evidence or information in this proceeding subsequent to April 16, 2003, explaining why the issues that would have “prevented approval” of the Michigan application would not prevent approval of a similar application submitted to the FCC for Illinois. Indeed, the “draft application” to the FCC that SBC Illinois has submitted in this proceeding is in all material respects highly similar, if not identical, to the application SBC Michigan submitted to the FCC in January – and subsequently withdrew in the face of certain rejection by the FCC.

14. Furthermore, SBC Illinois was wrong to claim before the ALJ that parties had not identified the billing irregularities that had arisen as a result of SBC’s UNE-P/CABS billing conversion project, and the subsequent data reconciliation activities

undertaken by SBC to correct errors that had occurred as result of this conversion. For example, AT&T raised this issue in the Rebuttal Affidavit of its witness Shannie Marin. *See* AT&T Exh. 5.0, attached hereto as Exhibit F. In her affidavit filed on March 12, 2003 – more than a month prior to SBC’s withdrawal of the Michigan application – Ms. Marin stated at that time:

SBC stated that it was comparing its CABS UNE-P records to its ACIS records used for provisioning to determine if its CABS UNE-P records were accurate and conformed to the information in the ACIS system. The “data bash” demonstrated pervasive problems with SBC’s wholesale billing, however. I have raised these same billing problems at the FCC in conjunction with SBC Michigan’s pending 271 proceeding. (AT&T Ex. 5.0, Rebuttal Affidavit of Shannie Marin, ¶ 3, attached hereto as Exhibit F.)

15. In an attachment to Ms. Marin’s rebuttal affidavit, she provides the same declaration filed with the FCC on the CABS billing issues. In particular, Ms. Marin explains that much of the “history” surrounding SBC’s faulty data reconciliation efforts occurred *in January and February* of this year. *See* Attachment 1 to AT&T Exh. 5.0, attached hereto as Exhibit G, ¶¶ 13-24. Ms. Marin’s FCC declaration indicates that – as of March 2003 – AT&T and other CLECs were for the first time gaining disclosure from SBC of thousands of instances of incorrectly billed accounts as a result of SBC’s faulty CABS reconciliation efforts.

16. Moreover, it remains highly controverted whether SBC Illinois has “passed” the billing tests that BearingPoint subjected the company to in its third-party OSS test. As Staff witness Ms. Webber, the Commission’s project manager for the BearingPoint testing, pointed out in her testimony:

[C]ontrary to SBC Illinois’ statements that the billing systems, processes and procedures were the subject of a comprehensive independent third-party review that SBC Illinois passed with flying colors, ... I have to respectfully disagree. The

BearingPoint review had limited coverage to the array of billing functions SBC Illinois provides. Staff Exh. 43.0, ¶ 25.

17. Joint CLECs also dispute SBC's assertions that the only wholesale billing problem that necessitated withdrawal of the Michigan Section 271 application at the FCC was the UNE-P billing problem discussed above. Absolutely nothing has been issued by the FCC that would substantiate SBC's assertions. To the contrary, SBC's assertions are contradicted by Chairman Powell's statement that there were "outstanding issues", that "the most troubling of these issues relates to billing", and that "questions remain regarding whether SBC is currently providing wholesale billing functions for competitive LECs in a manner that meets the requirements of our existing precedent".

18. Rather, Joint CLECs believe that it is the entire plethora of wholesale billing problems that parties have raised in this case that have proved problematic for SBC in its Michigan FCC proceeding.³ Parties have raised these same issues in their filings in the SBC Michigan Section 271 proceeding. Further, as the Commission is doubtless aware, the U.S. Department of Justice, in the Michigan Section 271 proceeding at the FCC, cited unresolved wholesale billing problems as one of the reasons that it could not support SBC Michigan's Section 271 application. *See* Evaluation of the United States Department of Justice, filed in WC Docket No. 03-16 (Feb. 26, 2003, attached hereto as Exhibit H. Joint CLECs believe that these systemic wholesale billing deficiencies remain essentially uninvestigated and are unlikely to have been addressed in any verifiable manner. It is paramount for the Commission to reopen this record in order

³ *See, e.g.*, Initial Phase 2 Comments of McLeodUSA Telecommunications Services, Inc. ["MTSI"] and TDS Metrocom, LLC ["TDS"], pp. 24-26; Phase 2 Rebuttal Comments of MTSI and TDS; MTSI-TDS Exhibit 6.0; MTSI-TDS Exhibit 6.1; WorldCom Ex. 3.3, par. 7-16; WorldCom Ex. 3.4, par. 4-17.

to fully investigate the extent of these wholesale billing problems and determine whether they have been resolved – for Illinois *as well as* Michigan.

19. Moreover, Joint CLECs believe that the “outstanding issues” that resulted in withdrawal of SBC’s Michigan 271 application at the FCC were not limited to wholesale billing issues. Indeed, in a letter filed just days before its withdrawal of the Michigan application, SBC President William M. Daley conceded that there remained other critical issues that prevented approval of the application, which were not directly attributable to wholesale billing concerns. *See* April 11, 2003 Letter from W. Daley to FCC Commissioners, p. 1, attached hereto as Exhibit I. Mr. Daley admitted in his letter that the “BearingPoint replication test of performance measurements is not yet complete...” and that this remained a critical issue in the case. There is nothing to suggest that the ALJ considered the failure of SBC to complete the BearingPoint testing of performance measurement functions and processes to be a critical matter that must be re-investigated in light of SBC’s acknowledgement that the FCC considered this a critical flaw in the Michigan application.⁴ In fact, the ALJ made absolutely no mention of this issue in her discussions of the Michigan §271 withdrawal at the May 6 and 7 Commission meetings. Indeed, as was pointed out in several parties’ exceptions to the ALJ’s Proposed Order, the ALJ accepted (with only a sentence or two of explanation) the Ernst & Young audit as sufficient (a conclusion the FCC has not yet reached with respect to Michigan).

⁴ Importantly, the Daley letter states several times SBC’s belief that its OSSs and, particularly, its billing systems, are regional and have been subject to testing in several states. *See* Exhibit I hereto. This point failed to dissuade the FCC from its position. Thus, to the extent that the FCC has rejected an application based upon the performance of SBC Michigan’s billing systems, SBC should not be able to claim (with out any particularized support or evidence) that its Illinois systems are should be regarded differently.

17. It is equally clear that the ALJ did not have the time or means to review Ms. Marin's FCC declaration, Staff's testimony, or the other materials that would have given a sufficient picture of the wholesale billing and other issues that arose in Michigan and would undoubtedly affect an Illinois application to the FCC.⁵ The Commission now is in the position of not knowing – via the evidentiary record – any more than it knew on the date SBC withdrew its Michigan application. It has been presented with a record (and now a proposed order) that cannot be based on any evidence that post-dates SBC's withdrawal of its deficient Michigan application. The Commission lacks any means whatsoever to determine whether an Illinois application – based on the same information that SBC used to support its ill-fated Michigan application – would have any greater chance of success at the FCC.

18. For this reason, the Commission must reverse the ALJ's April 17, 2003 ruling to deny Joint CLECs' request to "suspend" the schedule. Obviously, Joint CLECs no longer seek additional time to prepare exceptions to the then pending ALJ's Proposed Order, which was the alternative request in the Emergency Motion. Joint CLECs' principal request then – and now – was to allow an opportunity to consider the impact of the FCC's termination of the Michigan § 271 process. The Commission should now grant that request, and should grant the Joint CLECs' request to reopen the record in order to address the deficiencies in SBC Illinois' 271 case leading to its withdrawal in Michigan, and the additional information SBC intends to supply to the FCC showing that it has addressed those deficiencies – for both Illinois and Michigan.

⁵ Notably, other than the text supplied by parties in their proposed orders describing their positions in this case, the ALJ's proposed order does not reference or discuss Ms. Marin's testimony or the UNE-P/CABS data reconciliation or SBC's data bash, or propose any analysis or Commission conclusions on these subjects.

19. Alternatively, the Commission should schedule additional hearings in this case to refresh the record regarding the status of SBC's efforts to resolve the problems that forced it to withdraw its Michigan application. The Commission's rules allow:

After the record in a proceeding has been marked "heard and taken" but before issuance of a final order by the Commission, the Hearing Examiner may, on application by staff or any party, on his or her own motion or when directed by the Commission, hold additional hearings. Such application shall state the reasons therefor, including material changes of fact or of law, and shall contain a brief statement of proposed additional evidence and an explanation why such evidence was not previously adduced. Unless directed by the Commission, the holding of additional hearings under this Section shall be subject to the prior approval of the Chief Hearing Examiner. 83 Ill. Admin. Code § 200.870.

20. It is incontrovertible that the withdrawal of the Michigan § 271 application by SBC was a material change of fact as it relates to this proceeding. As noted above, this case was scheduled based upon an understanding that the Michigan application would be subject to approval by April 16, 2003. Without agreeing with SBC's grounds for the compressed schedule in this case, SBC's withdrawal of the application materially changes the basis for the timeframe within which this case must be completed. More importantly, the withdrawal of the Michigan application establishes the obvious need to adduce new evidence in this case regarding the issues that prevented approval of that application, and whether these issues exist and are being addressed for Illinois.

WHEREFORE, Joint CLECs respectfully request that the Commission grant their request for interlocutory review of the Administrative Law Judge's April 17, 2003, denial of the Joint CLECs' Emergency Motion, and suspend the current schedule in this case for a sufficient time period to allow SBC Illinois to submit affirmative evidence regarding the resolution of the issues that required withdrawal of the Michigan § 271 application, and for other parties to submit responsive evidence. Alternatively, Joint CLECs

respectfully request that the Commission schedule for the same purpose noted above additional hearings pursuant to 83 Ill. Admin. Code § 200.870.

Respectfully submitted,

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