STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**)**	
On Its Own Motion	**)**	
	)	**Docket No. 01-0539**
Implementation of Section 13-712(g)	**)**	
of the Public Utilities Act	**)**	

BRIEF IN REPLY TO EXCEPTIONS OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., NUVOX COMMUNICATIONS OF ILLINOIS, INC., RCN TELECOM SERVICES OF ILLINOIS, LLC AND TDS METROCOM, LLC

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I. Introduction

This Brief in Reply to Exceptions is submitted by McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), Nuvox Communications of Illinois, Inc. ("Nuvox"), RCN Telecom Services of Illinois, LLC ("RCN"), and TDS Metrocom, LLC. ("TDS Metrocom"). McLeodUSA, Nuvox, RCN and TDS Metrocom are competitive local exchange carriers ("CLECs") that provide local exchange service in areas of Illinois also served by incumbent local exchange carriers ("ILECs") using (at least in part) network elements and other wholesale services provided by ILECs. McLeodUSA, Nuvox, RCN and TDS Metrocom are responding to certain exceptions to the Administrative Law Judge's ("ALJ") Proposed Order ("PO") that were submitted in the briefs on exceptions ("BOE") filed by SBC Illinois and by Verizon North, Inc. and Verizon South, Inc. ("Verizon").[1]

II. Response to Exceptions of SBC Illinois and Verizon

A. Separate Provisions of the Rule for Level 1 Carriers/Limitation to "Basic Local Exchange Services"

SBC Illinois argues that, due at least in part to the Commission's adoption of a performance measurement and remedy plan for SBC Illinois in Docket 01-0662, there is no need to have separate provisions in 83 Illinois Administrative Code Part 731 ("Part 731" or "Rule") for Level 1 Carriers (which SBC characterizes as applicable to SBC Illinois only). (SBC BOE, pp. 5-13) Verizon argues that Part 731 should contain only one set of performance standards

[1]The failure of McLeodUSA, Nuvox, RCN and TDS Metrocom to respond to any other exceptions to the PO filed by any party should not be construed as agreement with those exceptions. However, McLeodUSA, Nuvox, RCN and TDS Metrocom note that since at present we are not operating in the territories of any Level 2 carriers (as defined in the proposed Rule), and are not using wholesale services obtained from any Level 2 carriers to serve our retail customers, we are not responding to the exceptions of Citizens Telecommunications Company of Illinois, a Level 2 carrier.

applicable to all carriers. (Verizon BOE, pp. 27-29) The Commission should reject both of these exceptions.

McLeodUSA, Nuvox, RCN and TDS Metrocom do not disagree with SBC Illinois to the extent that SBC states that the performance remedy plan approved by the Commission in Docket 01-0662 as SBC's anti-backsliding plan for purposes of compliance with the requirements for authorization to provide long distance service under 47 U.S.C. §271 should be SBC's initial wholesale service quality plan under Part 731. However, we dispute SBC's contention in Section I.C of its BOE (pp. 8-13) that the Rule should not contain separate provisions for "Level 1" carriers. Contrary to SBC's contention, the adoption of the "Section 271" performance measurement and remedy plan for SBC does not render "unnecessary" or inappropriate the provisions of the proposed Rule for Level 1 Carriers.

The issue of whether it is lawful and appropriate to have different provisions in the Rule applicable to different "levels" of telecommunications carriers, as proposed by Staff, was extensively briefed by the parties. The ALJ correctly determined that the structure of Staff's proposed Rule, with different requirements for different levels of carriers, is both lawful and appropriate. The adoption by the Commission of a performance remedy plan for SBC for Section 271 compliance purposes, subsequent to the close of the record and completion of briefing in this docket, should not alter the conclusion reached in the Proposed Order.[2]

The General Assembly, in Section 13-712(g) of the Public Utilities Act ("PUA"), 220 ILCS 5/13-712(g), which provides the statutory basis for this rulemaking and for the proposed

[2]Indeed, the adoption of the Section 271 performance remedy plan in the Commission's May 13, 2003 final order in Docket 01-0662 does not really present a new or changed circumstance, since the Commission had previously (in July 2002) adopted a performance remedy plan for SBC Illinois in Docket 01-0120, and prior to that SBC was operating under a performance remedy plan to which it had committed in Docket 98-0555.

Rule, directed that "The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules." This simple directive gave the Commission a broad range of discretion to accomplish this delegated task. The General Assembly gave the Commission this directive and authority in Section 13-712(g) without the level of detail and prescription imposed in many other sections of Article 13 of the PUA, and indeed in many of the provision added to Article 13 in 2001 via Public Act 92-22.

An express statutory grant of authority to an administrative agency also includes the authority to do what is reasonably necessary to accomplish the legislature's objective; reasonable discretion is afforded administrative agencies so that they can accomplish in detail what is legislatively authorized in general terms. See, e.g., Lake County Board of Review v. Property Tax Appeal Board, 119 Ill. 2d 419, 427-28 (1998); Abbott Laboratories, Inc. v. Commerce Commission, 289 Ill. App. 3d 705, 712 (1st Dist. 1997). As the Supreme Court stated in Lake County, "The legislature may establish broad guidelines, and the details of application of these principles to specific instances may then be determined by an administrative body." 119 Ill. 2d at 427. See also City of Chicago v. Commerce Commission, 294 Ill. App. 3d 129, 136-37 (1st Dist. 1997) (administrative agency's authority can arise either from the express language of the statute or by fair implication and intendment from the express provisions of the statute as an incident to achieving the objectives for which the agency was created). Application of these principles is especially appropriate in the case of a broad statutory grant of authority to this Commission, whose determinations on matters within its expertise are afforded deference because "It has long been established that in matters relating to services and rates of utilities technical data and expert opinion, as well as complex technological and scientific data, make it essential that the matter be considered by a tribunal that is itself capable of passing upon complex data." Village of Apple River v. Commerce Commission, 18 Ill. 2d 518, 523 (1960). Thus, as a matter of law, Section 13-712(g) gives the Commission adequate authority and discretion to establish different wholesale service quality requirements for different levels or categories of telecommunications carriers.

Similarly unavailing are SBC's and Verizon's argument that the proposed Rule, in establishing different requirements for different "levels" of carriers, exceeded the Commission's authority because the General Assembly, in Section 13-712(g), only authorized the Commission to establish a set of minimum legal standards, applicable to all carriers, relating to "basic local exchange service." (SBC BOE, pp. 9-10; Verizon BOE, pp. 5-9) As shown at pages 16-19 of our BOE and pages 2-8 of our Reply Brief in this docket, the proper statutory construction of Section 13-712(g) is that it is **not** limited to "basic local exchange services." SBC and Verizon argue that because the title of §13-712 is "Basic local exchange service quality; customer credits", the General Assembly must have intended to limit the wholesale service quality rules to be promulgated under subsection (g) to wholesale services used to provide basic local exchange services. However, it is well-established that the title or heading of a statutory provision is only a short-hand reference to the general subject matter involved in the statutory section and cannot limit the plain meaning of the text. Michigan Ave. Nat. Bank v. County of Cook, 191 Ill. 2d 493, 506 (2000). Section 13-712(g) plainly and explicitly directs the Commission to "establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules", and imposes no limitations on or exclusions from this broad grant of authority. As the United States Supreme Court stated in Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co., 331 U.S. 519, 528-29, 67 S. Ct. 1387, 1392 (1947):

> That the heading of §17 [of the Interstate Commerce Act] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact.

> That heading is but a short-hand reference to the general subject matter involved. While accurately referring to the subjects of Commission procedure and organization, it neglects to reveal that §17 also deals with judicial review of administrative orders and with intervention by employee representatives. But headings and titles are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have lead to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text.

More generally, SBC and Verizon argue that because other subsections of Section 13-712 refer to "basic local exchange services", subsection (g) must also be construed to be applicable to "basic local exchange services." (SBC BOE, pp. 9-10; Verizon BOE, p. 2) What is more significant to the construction of subsection (g), however, is that unlike the other subsections of Section 13-712, subsection (g) makes **no reference** to "basic local exchange services." It is well established that by using certain language in one section and different language in another section, the legislature indicates that different results are intended.[3]

In terms of there being a basis in evidence and policy considerations for establishing different wholesale service quality requirements for different levels or categories of carriers in the Rule, the division of local exchange carriers ("LECs") into four "levels" in the proposed Rule, with "Level 1" requirements applying to carriers serving more than 400,000 lines, is well supported both by the record and by Commission precedent. As shown at pages 7-9 and 35-36

[3]See, e.g., In re K.C., 186 Ill. 2d 542, 549-50 (1999); Collins v. Board of Trustees of Firemen's Annuity & Benefit Fund, 155 Ill. 2d 103, 113 (1993); Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 100 (1964); Dana Tank Container, Inc. v. Human Rights Comm., 292 Ill. App. 3d 1022, 1026 (1st Dist. 1997); Bembenek v. Chicago Park Dist., 279 Ill. App. 3d 930, 933 (1st Dist. 1996); Siciliano v. Village of Westchester Firefighters' Pension Fund, 202 Ill. App. 3d 964, 967 (1st Dist. 1990) (stating that where a particular provision appears in a statute, the failure to include that same requirement in another section of the statute will not be deemed to have been inadvertent).

of Staff's Initial Brief and at pages 4-9 of our Initial Brief, the determination to create four levels of LECs, and the specific requirements (or exemptions) provided for each level, were based on a thorough analysis and well-articulated set of factors, presented by Staff witness Sam McClerren, that provide sound evidentiary and policy bases for the four levels of LECs and the specific wholesale service quality requirements that would be applicable at each level.[4] Mr. McClerren, who has extensive experience with service quality programs and performance remedy plans, provided an extensive and persuasive explanation of the basis for the separation of LECs into four "tiers" for purposes of the Part 731 Rule. (Staff Ex. 1.0, pp. 6-7, 14-17) He explained that the four-tier approach was justified based on considerations of, among other factors, reasonableness, administrative ease, logical designation and purchasing carrier requests. (Id., pp. 15-17) Among the considerations he cited were the following:

> [I]t would have been illogical and unreasonable to develop a rule that treated all carriers the same. First, the level of competitive entry and provision of wholesale services varies significantly among ILECs and even more so between ILECs and CLECs. For those carriers with very limited provisioning of wholesale services, the benefit of maintaining and reporting detailed and sophisticated performance measures and disaggregations is likely to be outweighed by the cost of maintaining and reporting such data. On the other hand, for carriers with significant wholesale activity the benefit of maintaining and reporting detailed and sophisticated performance measures and disaggregations is likely to outweigh the related costs. Second, the level of automated versus manual OSS systems, as well as the procedures and methods for provisioning wholesale services, varies significantly among carriers. Thus, even if all other factors were equal, it would be virtually impossible to incorporate in a rule a single set of wholesale service quality standards to apply to all carriers. Staff's multi-level approach addressed these issues by requiring Level 1 carriers to file a company specific Wholesale Service Quality Plan and setting forth the parameters and requirements for such a plan . . . . (Staff Ex. 1.0, pp. 15-16)

> [I]t is appropriate that a larger carrier (i.e., more access lines) should provide more detail regarding wholesale performance than a carrier with relatively few access

[4] CLEC witnesses provided additional evidentiary and policy support for the multi-level structure of the proposed Rule, particularly the "Level 1" requirements for the State's two dominant ILECs, SBC Illinois and Verizon. See AT&T Ex. 1.0, pp. 3-5; AT&T Ex. 1.1, pp. 2-5, 9-11; WorldCom Ex. 1.1, pp. 3, 4.

> lines. Larger carriers typically operate in markets that provide more competitive opportunities, which means they have more competitors seeking access to their facilities. It also means that a larger carrier has more resources available to both develop and maintain a wholesale service quality plan and associated remedy plan relative to a smaller carrier which might not have the personnel or demand to support a statistically valid plan. (Id., p. 17)

As Mr. McClerren noted in this connection specifically with respect to SBC Illinois:

> Ameritech currently controls approximately 80 percent of the access lines in Illinois and accounts for virtually all of the wholesale services provisioned in Illinois. As the leading provider of wholesale services in Illinois, Ameritech has developed extensive systems, both electronic and manual, to provision wholesale services and monitor its performance in provisioning such services. On the other hand, the demand for and provisioning of wholesale services in the service territories of smaller carriers is nowhere near the level in Ameritech's territory, and the systems used to provision those wholesale services are often manual and in any event far less sophisticated than Ameritech's systems. In my opinion, a rule containing a single set of performance measures and standards that would be workable for small ILECs would be inadequate for a larger carrier such as Ameritech. Conversely, a rule containing a single set of performance measures and standards that would be appropriate for a carrier such as Ameritech would likely be unduly burdensome and unworkable for smaller carriers. (Staff Ex. 7.0 Amended, pp. 5-6)

Further, as detailed at page 39 of Staff's Initial Brief and pages 7-9 of AT&T's Initial Brief (as well as in Mr. McClerren's testimony, see Staff Ex. 7.0 Amended, p. 10), the Commission has in numerous previous cases adopted administrative rules or orders that categorize utilities or carriers by size or other distinguishing characteristic, and adopted differing requirements applicable to the various categories of utilities or carriers. Thus, the adoption by the Commission, in response to a broad legislative grant of authority, of a rule or order that divides utilities or carriers into categories and implements different requirements for each category, is an established practice, and one that would be presumed to be known to the General Assembly in enacting a broad grant of statutory authority to the Commission such as §13-712(g). In enacting statutory amendments, the General Assembly is presumed to know the existing conditions, including the body of law existing in administrative regulations.[5]

Finally, SBC is also incorrect in its argument that the Rule is inconsistent with Section 13-712(g) insofar as it calls for payments to be made directly to the State of Illinois.[6] (SBC BOE, pp. 11-12) Without any support, SBC baldly and incorrectly asserts that the phrase "remedies to ensure enforcement" of the carrier to carrier wholesale service quality rules must be limited to payments that compensate a wholesale customer for the harm suffered by service quality shortfalls. (Id., p. 12) To the contrary, "remedies *to ensure enforcement*" established by the Commission can appropriately include, *as a deterrent*, imposing on the violator the obligation to do more that just make the victim whole for actual damage suffered. See Abbott Laboratories, Inc. v. Commerce Commission, 289 Ill. App. 3d 705, 712-13 (1st Dist. 1997); Peoples Gas, Light & Coke Co. v. Commerce Commission, 175 Ill. App. 3d 39, 52 (1st Dist. 1988). Requiring payments to the State is an appropriate exercise of the Commission's discretion under its Section 13-712(g) grant of authority because it provides an additional deterrent to non-compliance (or, stated differently, a strengthened incentive to compliance with the wholesale service quality standards) without "over-compensating" the carrier impacted by the service quality violations.

Further, transcending the interests of the individual wholesale customer, there is a much broader public interest in having LECs (particularly large ILECs who benefit from long-established state-franchised monopolies) provide adequate carrier to carrier wholesale service

[5]See, e.g., Krebs v. Board of Trustees of Teachers' Retirement System, 410 Ill. 435, 441 (1951); Jacobson v. General Finance Corp., 227 Ill. App. 3d 1089, 1098 (2d Dist. 1992); Citizens Utilities Co. v. Pollution Control Board, 133 Ill. App. 3d 406, 409 (3d Dist. 1985).

[6]As SBC Illinois acknowledges (SBC BOE, p. 12), the performance remedy plan approved in Docket 01-0662 calls for SBC to make payments directly to the State ("Tier 2" payments).

that will foster the development of a competitive telecommunications market for Illinois consumers. Finally, at the time Section 13-712(g) was enacted, SBC Ameritech was operating under a performance remedy plan that included payments to the State for service quality violations, which, again, is a condition the General Assembly is presumed to have been aware of in directing the Commission, in Section 13-712(g), to establish "remedies to ensure enforcement" of the wholesale service quality rules.

For the foregoing reasons, SBC's proposed modifications to the Proposed Order and to the Rule set forth at pages 11-13 of SBC's BOE, and Verizon's proposed modifications under "Exception No. 3" of Exhibit A to its BOE, should be rejected.[7]

B. Applicability of the Rule to Wholesale Special Access Services

For the reasons set forth in Section II.A above, SBC Illinois' argument in Section III of its BOE and Verizon's argument in Section II.A.1 of its BOE that inclusion of wholesale special access services is beyond the scope of the wholesale service quality rules authorized by Section 13-712(g) of the PUA should also be rejected. SBC's and Verizon's arguments to exclude wholesale special access services from the Rule are dependent on their erroneous statutory argument that the scope of the rules authorized by Section 13-712(g) is limited to wholesale services used to provide basic local exchange services. The special access services in question are provided by one carrier to another, on a wholesale basis, and are used by the purchasing carrier to serve its own retail telecommunications customers. Inclusion of service quality requirements in the Rule for wholesale special access services is plainly within the scope of the

[7]McLeodUSA, Nuvox, RCN and TDS Metrocom do not, however, take issue with SBC's proposed changes to the Proposed Order and the Rule at pages 14-16 of the SBC BOE, for the purpose of making the final Order and the Rule consistent with the Order in Docket 01-0662.

authority granted to the Commission in §13-712(g) to "establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules."

McLeodUSA, Nuvox, RCN and TDS Metrocom take no position with respect to SBC Illinois' and Verizon's exceptions to the specific, substantive provisions of the proposed Rules concerning wholesale service quality standards for special access services. However, if the Commission were to conclude that service quality requirements for wholesale special access services should not be included in Part 731, that determination should be made expressly with respect to, and based on the merits of including or excluding, wholesale special access services in the Rule. It should not be made on the basis of a broad and legally incorrect conclusion (such as SBC proposes at pages 22 and 23 of its BOE) that the scope of the rules authorized by Section 13-712(g) is limited to wholesale services used to provide basic local exchange services. See Section IV of the BOE of McLeodUSA, Nuvox, RCN and TDS Metrocom.

C. "Strengthening" of Provisions Relating to Level 4 Carriers

1. $25 Per Occurrence Credits/Payments for Noncompliance with Level 4 Performance Standards

McLeodUSA, Nuvox, RCN and TDS Metrocom showed in Section II of our BOE that the provisions of the proposed Rule imposing performance standards on Level 4 carriers (i.e., on CLECs) with respect to customer service records ("CSR"), unbundled loop returns ("ULR") and loss notifications ("LN"), and penalties for noncompliance, should be deleted. Should the Commission not delete these provisions from the proposed Rule, it must nevertheless reject SBC Illinois' argument that the credits/payments for failure to provide CSRs, ULR or LNs within the specified time frames should be $25 per occurrence. (SBC BOE, pp. 25-29) Simply put, there is absolutely no record support for this proposal, and SBC has not even attempted to cite any --

other than to cite to Verizon's briefs to note that Verizon has taken a similar position[8]. Staff, though its witness, proposed remedies of $1 per occurrence for violating the performance measures for CSRs, ULRs and LNs, and no party presented any testimony supporting any different remedy amount. (See proposed Section 731.805 in Attachment 7.1 to Staff Ex. 7.0.) SBC presented a witness, Ms. Spieckerman, who specifically addressed the issue of including in the Rule performance measures for Level 4 carriers for CSR and ULRs, but presented no evidence supporting a different remedy level than what Staff recommended.

SBC's attempts to avoid the lack of any evidentiary support for its eleventh-hour proposal by analogizing to other payment or credit amounts provided for in other subsections of Section 13-712 must also be rejected. (SBC BOE, pp. 26-27) The General Assembly (in response, it should be noted, to SBC's own retail service quality meltdown of 2000) chose to prescribe, in other subsections of Section 13-712, specific credit or payment amounts that the Commission's rules should provide that retail customers should receive for violations of the specific retail service quality standards addressed in those <u>other</u> subsections. The General Assembly did not provide for any specific credits or remedy payment amounts for any wholesale service quality violations in Section 13-712(g). That determination was left to the exercise of the Commission's authority under the authority granted in Section 13-712(g). However, the Commission's exercise of its discretion must be based on the record, and there is no record evidence to support SBC's proposal for credits/payments of $25 per occurrence relating to the proposed wholesale service quality standards for CSRs, ULRs and LNs.

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[8]Verizon, in "Exception No. 6" set forth in Exhibit A to its BOE, shows proposed revisions to Section 731.815 of the proposed Rule to increase the remedies for noncompliance of the Level 4 carrier performance standards for CSR, ULR and LN to $25. However, in the text of its BOE, Verizon provides no specific justification for or argument in support of these changes, other than (apparently) its general argument that the same wholesale service quality requirements should apply to all LECs.

2. Level 4 Performance Standard for Local Number Portability

SBC Illinois' proposal to add a performance standard for Level 4 carriers for local number portability ("LNP") (SBC BOE, pp. 29-31) should also be rejected. As noted above and discussed at length in our BOE, the Level 4 performance standards for CSR, ULR and LNs that the ALJ included in the proposed Rule should be deleted. In addition to the reasons already presented as to why the Rule should not include Level 4 performance standards for any of these three activities, the record does not support the need for a Level 4 performance standard for LNP. Staff witness Alcinda Jackson, a Consumer Policy Analyst in the Commission's Consumer Services Division, specifically considered SBC's proposal for a Level 4 standard for LNP, but concluded that "Staff is not currently aware of any issues with the LNP" and that "Ameritech . . . does not provide any proof that the LNP is a problem."[9] (Staff Ex. 11, p. 16) As SBC itself appears to acknowledge (SBC BOE, p. 29), the testimony of its witness, Ms. Spieckerman, on this topic was merely anecdotal. SBC Illinois' arguments as to the need for a Level 4 performance standard for LNP are theoretical at best. The ALJ correctly decided that a need for a Level 4 performance standards for LNP was not established by the evidence, and thus correctly did not include one in the proposed Rule. The Commission should reach the same conclusion.

D. SBC's Objection to Section 731.900 of the Proposed Rule

SBC contends that Section 731.900 of the proposed Rule, which would require a wholesale service provider to provide 35 days written notice to the affected carrier before terminating, discontinuing or abandoning wholesale service, should be deleted. (SBC BOE, pp.

[9]SBC mischaracterizes Staff witness Jackson's testimony in its BOE. SBC states that Ms. Jackson "was not aware of a significant, existing problem" with LNP. (SBC BOE, p. 29) In fact, as her testimony quoted above shows, Ms. Jackson testified that Staff was unaware of *any* issues with LNP. Further, as Ms. Jackson also pointed out in the testimony quoted above, SBC, the proponent of this proposal, offered no proof that LNP is a problem.

34-38) SBC's objection should be rejected. SBC contends that Section 731.900 is "beyond the scope of this proceeding", because it does not address wholesale service quality or the quality and performance of a carrier's wholesale offerings, but rather relates only to credit and collection issues. (Id., pp. 34-35) However, from the perspective of CLECs (the principal purchasers of wholesale telecommunications services), nothing could be a more significant component of wholesale service quality than the notice the wholesale provider must give before terminating service. Further, SBC's argument that with respect to retail telecommunications services, the Commission has a separate rule (Code Part 735) governing credit and collection policies (Id., p. 35), is hardly persuasive authority that Part 731 cannot include a provision on notice of termination of wholesale service.

Moreover, Section 731.900 does not relate solely to credit and collection issues, as SBC contends; rather, disputes between wholesale service providers and their customers that result in the wholesale provider threatening to terminate service could arise from a wide variety of causes, not just from the failure of the customer to make timely payment of an invoice.[10] Further, to the extent SBC is worried about the impact of Section 731.900 on its credit and collection activities (SBC BOE, pp. 35-36), nothing in proposed Section 731.900 prevents a wholesale provider from negotiating other commercially reasonable deposit and credit terms with its wholesale customers to protect its interests in this regard. Lastly, SBC's tariff that requires SBC to give a wholesale customer at least 10 business days notice before service is discontinued (SBC BOE, p. 35), falls far short of being sufficient to satisfy the concerns that led Staff to propose Section 731.900 – namely, that the wholesale provider give its customer sufficient notice of discontinuance of service to enable the wholesale customer to comply with the requirements of Section 13-406 of

[10]See our Reply Brief, p. 19, and the Initial Brief of Focal Communications Corp. on this topic.

the PUA (220 ILCS 5/13-406) to give its own retail customers at least 30 days notice of termination of service.

E. Verizon's Exception to the Requirement That a Level 1 Carrier's Wholesale Service Quality Plan Must Be Tariffed

Verizon takes exception to the provision of the proposed Rule that requires that a Level 1 carrier's wholesale service quality plan to be tariffed. (See Verizon BOE, pp. 21-27, and "Exception 1" in Exhibit A to Verizon's BOE) However, Verizon's argument that a wholesale service quality plan is not a "telecommunications service" as defined in §13-203 of the PUA (Verizon BOE, pp. 21-22) is misplaced. What is controlling here is §13-501(a) of the PUA (220 ILCS 5/13-501(a)), which Verizon fails to mention. Section 13-501(a) states:

> No telecommunications carrier shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates *and other charges, terms and conditions of service*, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided. The Commission may prescribe the form of such tariff and any additional data or information which shall be included therein. (emphasis added)

This provision, of course, is consistent with the more general requirement of §9-104 (220 ILCS 5/9-104) that:

> No public utility shall undertake to perform any service or to furnish any product or commodity unless the rates and other charges and classifications, rules and regulations relating thereto, applicable to such service, product or commodity, have been filed and published in accordance with the provisions of this Act.

A LEC's wholesale service quality plan may not be a rate or charge for the carrier's wholesale services (see Verizon BOE, pp. 24-25, and Exception No. 1 in Exhibit A to Verizon's BOE), but is certainly contains "terms and conditions" of, and "rules and regulations relating" to, the carrier's wholesale services.

In "Exception No. 1" in Exhibit A to its BOE, Verizon proposes to revise Section 731.205 of the proposed Rule to eliminate the tariffing requirement and replace it with a requirement that Level 1 carriers be required to submit their wholesale service quality plans to the Manager of the Telecommunications Division every two years, or whenever the carrier amends the plan. While McLeodUSA, Nuvox, RCN and TDS Metrocom do not disagree that there may be a reasonable alternative to the tariffing requirement, the alternative proposed by Verizon in its Exception No. 1 is not acceptable. From our perspective as CLECs, the critical requirements are (1) that the wholesale service quality plan be an enforceable, legal obligation of the carrier, and (2) that there be an established, predictable procedure for the periodic review of plans and for review of proposed plan amendments and revisions. Verizon's proposed requirement for submission of plans and amendments thereto to the Manager of the Telecommunication Division would not satisfy either objective, and is simply inadequate. The first objective *would* be satisfied, however, by requiring the Level 1 carrier to file a petition with the Commission every two years seeking extension (or modification) of its existing wholesale service quality plan, as well as at any other time that the carrier wishes to implement a revision to its plan; and specifying that any revisions become effective only after approval by the Commission in an order. With respect to the second objective, the provisions of the proposed Rule regarding filing requirements and the scheduling of any proceeding to review proposed revisions to a plan would be applicable to petitions filed by a Level 1 carrier. (See §731.205, 731.210, 731.220, 731.230 and 731.505 of the proposed Rule.)

III. <u>Conclusion</u>

For the reasons set forth in our Brief on Exceptions and in this Brief in Reply to Exceptions, McLeodUSA Telecommunications Services, Inc., Nuvox Communications of Illinois, Inc., RCN Telecom Services of Illinois, LLC and TDS Metrocom, LLC respectfully request that the Commission revise the Proposed Order, and the proposed Part 731 Rule, in accordance with our exceptions thereto, and reject the exceptions of SBC Illinois and Verizon as discussed herein.

Respectfully submitted,

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