STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Cbeyond Communications, LLP,	**:**	
Global TelData II, LLC f/k/a	**:**	
Global TelData, Inc.,	**:**	
Nuvox Communications of Illinois, Inc.	**:**	
and Talk America Inc.	**:**	
-vs-	**:**	**05-0154**
Illinois Bell Telephone Company	**:**	
	:	
Verified Complaint and Petition for an	**:**	
Order for Emergency Relief pursuant	**:**	
to 220 ILCS 5/13-515(e).	**:**	
	:	
XO Illinois, Inc. and Allegiance Telecom	**:**	
of Illinois, Inc.	**:**	
-vs-	**:**	**05-0156**
Illinois Bell Telephone Company	**:**	
	:	
Complaint pursuant to 220 ILCS 5/13-515.	**:**	
	:	
McLeodUSA Telecommunications	**:**	
Services, Inc.	**:**	
-vs-	**:**	**05-0174**
Illinois Bell Telephone Company	**:**	
	:	
Verified Complaint pursuant to 220 ILCS	**:**	
5/13-515(e).	**:**	

ORDER

I. PROCEDURAL HISTORY

On March 7, 2005, Cbeyond Communications, LLP ("Cbeyond"), Global TelData, Inc. ("Global"), Nuvox Communications of Illinois, Inc. ("Nuvox"), and Talk America, Inc. ("Talk"), (collectively, "Joint Complainants"), filed their joint verified Complaint (in Docket 05-0154) against Illinois Bell Telephone Company ("SBC"), alleging that SBC is violating each of the following: its interconnection agreements ("ICAs") with each of the Joint

concerning unbundled high capacity loops. Insofar as the TRRO (and the 01-0614 Remand Order), trigger ICA change of law provisions in a manner that affects contract rights derived from 271 of the Federal Act or Section 13-801 of the PUA, negotiations pertaining to unbundled high capacity loops under Section 271 (except negotiations with Cbeyond and Nuvox[80]) and under Section 13-801 (except negotiations with Talk, Nuvox and Global[81]) should also be conducted, consistent with the discussion of those statutes below.

Additionally, SBC must comply with the self-certification provisions of paragraph 234 of the TRRO (as it has stated it will do in AL-39), and is prohibited from imposing on a CLEC any self-certification requirement that does not expressly appear in paragraph 234 or in an approved ICA with that CLEC. In the resolution of any dispute resulting from application of paragraph 234, the Commission will enforce - with respect to the composition of the CLEC's embedded customer base, the identification of non-impaired wire centers or the implementation of the TRRO's numeric thresholds for DS1 and DS3 loops where impairment exists - only those ICA provisions derived from bilateral (or, where permitted by the Commission, multilateral) negotiations and (where used) dispute resolution processes. Also, SBC is prohibited from: 1) denying new loop requests for service through impaired wire centers unless the TRRO numeric limits have been reached; 2) denying any new, add, drop, migrate or move request for service to a complaining CLEC's embedded customer; or 3) denying new, add, drop, migrate or move requests for a customer served through high capacity loops because of CLEC self-certification (unless the Commission orders otherwise). To be clear, the ruling made earlier in this order regarding ULS/UNE-P - that the embedded base consists of customers, not lines, elements, services or facilities - applies to high capacity loops as well. To the extent that SBC's ALs are inconsistent with these conclusions, they cannot be implemented or enforced.

D. UNBUNDLING UNDER SECTION 271 OF THE FEDERAL ACT

In the TRO, the FCC stated that "we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs[[82]] to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251."[83] This pronouncement was explicitly upheld on appellate review:

> The FCC reasonably concluded that checklist items four, five, six, and ten posed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundle local loops, local

[80] These CLECs and SBC are free to negotiate Section 271 issues voluntarily, however.
[81] These CLECs and SBC are free to negotiate Section 13-801 issues voluntarily, however.
[82] "BOCs" is the acronym for the former Bell Operating Companies, from which SBC is a merged entity.
[83] TRO ¶653.

> transport, local switching and call-related databases in order to enter the interLATA market[84].

It is therefore settled that Sections 271 and 251 of the Federal Act provide independent sources of authority for access to switching, loops and transport. As this Commission acknowledged in the recent XO-SBC Arbitration Order, "Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis."[85]

Accordingly, since the TRRO only determines the impairment standard in Section 251, and does not address the scope of Section 271, ILEC duties and SBC rights under the latter statute remain unchanged by the TRRO. The question, then, is whether the complaining CLECs can assert rights derived from Section 271 in these proceedings.

SBC argues that Section 271 "makes clear that the FCC, and only the FCC, has authority under [S]ection 271 to enforce that provision."[86] It follows, in SBC's view, that once an ILEC's application to provide interLATA service has been approved by the FCC, Section 271 "provides authority only to the FCC to enforce continued BOC compliance with the conditions for approval."[87] SBC is right that the FCC has exclusive authority to enforce its order approving the ILEC's application. Only the FCC can impose the remedies set forth in subsection 271(d)(6) – i.e., a corrective order, a penalty or suspension or revocation of interLATA toll authority.

However, Staff maintains that the complaining CLECs are not seeking enforcement of the FCC's Section 271 Order for SBC, but enforcement of "the parties' respective ICAs."[88] Moreover, Staff asserts, the Commission "undoubtedly…does have the authority to resolve disputes brought to it regarding ICAs, and no party disputes this authority."[89] Staff is correct on these points. In addition to fulfillment of its Section 251 compliance duties, SBC entered into ICAs in order to advance its discretionary request for interLATA authority. This included demonstrating, first to this Commission, and then to the FCC, that SBC was supplying contractual access to loops, transport and switching, under subsections 271(c)(2)(B)(iv), (v) & (vi), distinguished from the access to these unbundled elements required by Section 251 (which is separately reinforced by subsection 271(c)(2)(B)(ii)). Therefore, in any ICA in which SBC committed to furnishing those unbundled elements under Section 271 (in addition to Section 251), it took on a contractual obligation that can be asserted to this Commission. That does not entail enforcement of the FCC's 271 Order for SBC, but of the ICA provisions this

[84] United States Telecom Association v. FCC, 359 F.3d 554, 588 (DC Cir. 2004)("USTA II")
[85] XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Docket 04-0371, Amendatory Arbitration Decision, Oct. 28, 2004, at 47.
[86] SBC Init. Br. at 41.
[87] *Id.*, at 41-42.
[88] Staff Rep. Br. at 24.
[89] *Id.* The Commission's authority is derived from both the Federal Act and the PUA, including Section 13-514(8).

Commission approved, which SBC *then used as evidence*, before the FCC, of fulfillment of the Section 271 checklist.

Which, if any, of the complaining CLECs has an ICA with SBC that contains an SBC obligation to provide loops, transport and switching under Section 271? Staff contends that McLeod, the XO complainants and one of the Joint CLECs (Global) have ICAs that incorporate Section 271 rights that can be asserted to the Commission[90]. Staff avers that the other Joint CLECs have not shown that they have ICA rights with SBC that are "afforded by Section 271."[91]

Staff is certainly correct with regard to Global and XO Illinois. Both the Global/SBC ICA and the XO Illinois/SBC ICA state that: "*[t]his agreement is the exclusive arrangement under which the Parties may purchase from each other the products and services described in Sections 251 and 271 of the [Federal] Act* and, except as agreed upon in writing, neither Party shall be required to provide the other Party a product or service described in Sections 251 and 271 of the Act that is not specifically provided herein."[92] This provision not only cites Section 271 as a source for the ICA's unbundling requirements, but also makes the ICA the sole mechanism by which Section 271 UNEs can be obtained. Thus, Global and XO Illinois each have a clear contractual right to 271 UNEs (unaffected by the TRRO), have surrendered their ability to assert 271 rights outside the ICA, and have, accordingly, an irrefutable enforcement right under the contract.

Regarding XO, however, SBC argues that the pertinent UNEs are "status quo elements" within the meaning of the parties' ICA, and that SBC's obligation to provide such elements "expired" under the terms of that contract.[93] This contention fails for two reasons. First, the "status quo elements" in the ICA are "UNEs impacted by USTA II"[94] – that is, Section 251 UNEs. Section 271 UNEs were not impacted by USTA II (indeed, as quoted earlier in this Order, USTA II expressly distinguished 251 and 271 elements). Second, SBC's unbundling duties regarding "status quo elements" did not expire where "otherwise required by Applicable Law."[95] The ICA defines "Applicable Law" as "all laws, statutes…orders...of any Governmental Authority that apply to the Parties or the subject matter of the Agreement or this Amendment."[96] Even without the express inclusion of Section 271 into the contract, as quoted in the preceding paragraph, Section 271 falls within this expansive definition of "Applicable Law." Consequently, whether or not the pertinent UNEs are status quo elements with the meaning of the contract, XO's Section 271 right to those elements did not expire.

[90] *Id.*, 23-28.
[91] *Id.*, 27.
[92] Joint Complainants Ex. 4.3, sec. 29.20; XO Ex. 2.5, sub-ex. F, Sec. 29.20 (emphasis added).
[93] SBC Pet. Rev. at 22.
[94] XO Ex. 2.5, sub-ex. K, sec. 1.3.
[95] *Id.*, sec. 1.3.3.
[96] *Id.*, sec. 2.2.

SBC asserts in its Petition for Review, for the first time in this proceeding, that Allegiance is not governed by the TRO Amendment to the XO ICA[97]. XO objects to this allegation as untimely, and also responds that Allegiance and SBC "have signed a name change amendment, and the Parties will terminate the Allegiance agreement soon."[98] The absence of an evidentiary record precludes a factual finding by the Commission (assuming this case is even an appropriate forum for making such a finding) respecting Allegiance's status as a merged entity or the viability of its pre-merger contracts. All the Commission can determine here is that if the XO TRO Amendment governs SBC's dealings with the Allegiance, then the conclusions of the preceding paragraph apply.

Moreover, even when viewed apart from the TRO-related amendments to XO's ICA, several provisions in the pertinent text in the Allegiance/SBC ICA would incorporate Section 271. First: "Unless otherwise provided by Applicable Law, this Agreement shall be governed by and construed in accordance with the [Federal] Act, the FCC Rules and Regulations interpreting the Act and other applicable federal law."[99] Second, in the UNE Appendix: SBC's "provision of UNEs identified in this Agreement is subject to the provision of the Federal Act, including *but not limited to*, Section 251(d)."[100]

Third, the UNE Appendix also states that SBC will provide CLECs, pursuant to both Section 251 and Section 271, with "nondiscriminatory access to UNEs…[o]nly to the extent that these elements are required by the 'necessary' and 'impair' standard of the [Federal] Act, Section 251(d) and/or in accordance with state law."[101] As discussed above, the necessary and impair standard is associated only with Section 251 UNEs (pursuant to subsection 251(d), as applied to subsection 251(c)(3)). But the foregoing ICA text also refers to the necessary and impair standard in the Federal Act *apart from* Section 251. Since there is none, the text can be construed to include Section 271 (based on the rationale that the contract would not impose a standard that cannot be met) or exclude it (based on the rationale that the contract intended exclusion where the impairment standard does not expressly apply). Because it refers to *both* the Federal Act and Section 251, the intention of the text is ambiguous. The Commission concludes, on balance, that the provision of 271 UNEs is contemplated by the quoted text, principally because SBC's nondiscrimination duty under subsection 271(d)(2)(B)(ii) is cited as a predicate for SBC's unbundling obligations. Since Section 251 has its own nondiscrimination requirement (in subsection 251(c)(3)), the parties' reference to

[97] SBC Pet. Rev. at 24.
[98] XO Resp. Pet. Rev. at 23.
[99] XO Ex. 2.5, sub-ex. E, sec. 22.1. SBC objects that this provision, and others cited, do not expressly mention Section 271. *E.g.*, SBC Pet. Rev. at 20. SBC could have refused to include, in its ICAs, references to entire comprehensive statutes or general bodies of law (*e.g.*, "applicable law"), in order to avoid application of specific provisions within those greater categories. However, contracting parties make pragmatic judgments about the risks and benefits of broad language and sometimes prefer the flexibility (along with the exposure) that such language affords. That was presumably the case here.
[100] McLeod Ex. 5, sec. 20.1, (emphasis added) opted into by Allegiance. XO Rep. Br. at 15.
[101] McLeod Ex. 5, sec. 2.2 & 2.2.9.

subsection 271(d)(2)(B)(ii) would be superfluous unless Section 271 unbundling duties were included within section 2.2 of the Appendix.

As noted, the foregoing quoted language also appears in the McLeod/SBC ICA. Therefore, McLeod's right to Section 271 UNEs is similarly grounded in, and can be enforced through, its ICA.

The Talk/SBC ICA contains language identical to the language in the Allegiance and McLeod ICAs, quoted above (that is, the "not limited to" provision[102], the exclusive source provision[103] and the nondiscriminatory provision of UNEs requirement[104]). All three appear in the ICA's UNE Appendix. However, there is also text in the ICA, under the heading "Unbundled Network Elements – Sections [sic] 251(c)(3)," that states: "[SBC] will provide CLEC access to [UNEs] for the provision of telecommunications services as required by sections 251 and 252 of the [Federal] Act and in the appendices hereto."[105] But that language does not exclude 271 UNEs and this Order construes the UNE Appendix, which is more specific to the provision of UNEs, to include 271 UNEs in the contract.

The Cbeyond/SBC ICA and Nuvox/SBC ICA do not demonstrate that either CLEC has a contractual right to Section 271 elements. Section 1.1.1 of the Cbeyond/SBC ICA's General Terms and Conditions says that the ICA's UNE provisions appear in Article 9 of the agreement. Article 9 is entitled "Access to Unbundled Network Elements – Section 251(c)(3)."[106] The Nuvox/SBC ICA also has an Article 9, entitled "Unbundled Access – Section 251(c)(3)." Nothing in either Cbeyond's or Nuvox's Article 9, including their general provisions, suggests that Cbeyond's or Nuvox's rights under Section 271 are incorporated into their respective ICAs.

This does not mean, of course, that Cbeyond and Nuvox lack UNE rights under Section 271. It means that such rights were not incorporated into those CLECs' ICAs, which the Commission has the authority to enforce. However, the CLECs retain statutory rights that are enforceable *outside* of the ICAs. But that enforcement must be sought exclusively from the FCC, under subsection 271(d)(6) of the Federal Act, in the form of redress for violating the FCC Order granting interLATA authority to SBC. (Alternatively, the CLECs can request negotiations to incorporate 271 rights in their ICAs.)

Therefore, SBC must continue providing Section 271 unbundled loops, transport and switching to XO, McLeod, Global and Talk (but not Cbeyond and Nuvox) under the terms of their respective ICAs, unless and until those ICAs are amended to terminate SBC's Section 271 obligations. Such Section 271 UNEs must be priced under "the just, reasonable, and nondiscriminatory rate standard of Sections 201 and 202 [of the

[102] Joint CLEC Ex. 3.4, sec. 18.1.
[103] *Id.*, sec. 1.5
[104] *Id.*, sec. 2.2 & 2.2.9.
[105] Joint CLEC Ex. 3.3, sec. 46.7.11.1.
[106] Joint CLEC Ex's. 1.2 (Nuvox) & 2.2 (Cbeyond).

Federal Act]," as the FCC has mandated[107]. Since the parties' ICAs all require Section 251 TELRIC pricing, they will need to be amended - to the extent SBC has been relieved of the Section 251 pricing obligation - to provide for Section 271 pricing (and, for that matter, Section 13-801 pricing)[108]. Until those amendments are approved, SBC should collect the TRRO-mandated transition rates for ULS/UNE-P and (where no impairment is present) for loops and transport. SBC does not have to provide combined UNEs under Section 271, but must continue to do so where Section 251 access is still required, where Section 13-801 allows CLECs to demand combinations, and where an ICA authorizes combinations.

E. STATE UNBUNDLING UNDER SECTION 13-801

Section 13-801 establishes state unbundling requirements for Illinois. That section permits, for any affected telecommunications carrier, unbundling obligations that are equivalent to the obligations under Section 251 of the Federal Act. However, for carriers subject to alternative regulation plans under the PUA - as SBC is - Section 13-801 allows "requirements or obligations…that exceed or are more stringent than those obligations imposed by Section 251…and regulations promulgated thereunder."[109] Accordingly, this Commission determined in a 2002 Order that, for alternatively regulated carriers, Section 13-801 unbundling need not be predicated on Section 251-like finding of necessity and impairment[110]. Just weeks ago, on remand of that Order, the Commission confirmed its conclusion: "Among the specific differences between federal law and Section 13-801 is the absence of the federal 'necessary and impair' test as a precondition to access network elements."[111]

Therefore, so long as the Commission's Orders in Docket 01-0614 remain in effect, Illinois' unbundling requirements under Section 13-801 are unaffected by the FCC's findings in the TRRO concerning necessity and impairment. The Commission's

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[107] TRO ¶663.

[108] SBC has argued throughout this proceeding that the CLECs have no 271 rights in their ICAs because there are no 271 prices in those contracts. E.g., SBC Pet. Rev. at 23-24. However, there has been no reason for 271 pricing, since SBC was supplying UNEs under the ICAs at lower Section 251 TELRIC prices. The relevant issue has been whether a CLEC has preserved 271 *rights* in its ICA, in order to negotiate 271 prices after a change of law that ended 251 pricing.

[109] The full text of subsection 13-801(a) is as follows: "This Section provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission. A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall not be subject to the provisions of this Section, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 and regulations promulgated thereunder."

[110] Illinois Bell Telephone Co., Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act, Docket 01-0614, Order, June 11, 2002.

[111] Illinois Bell Telephone Co., Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act, Docket 01-0614, Order on Remand (Phase I), April 20, 2005, at 62 ("01-0614 Remand Order").

negotiations take place consistent with the FCC's directive to monitor the negotiation process and ensure that the parties do not engage in unnecessary delay. The ALJ may provide status reports to the Commission as necessary regarding the progress of these negotiations. The Commission may require the parties to show cause if they fail to meet the October 21, 2005 deadline.

V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Joint Complainants, XO and McLeod are entities that own or control, for public use in Illinois, property or equipment for the provision of telecommunications services in Illinois and, as such, are telecommunications carriers within the meaning of §13-202 of the PUA

(2) SBC is an Illinois corporation that owns or controls, for public use in Illinois, property or equipment for the provision of telecommunications services in Illinois and, as such, is a telecommunications carrier within the meaning of §13-202 of the PUA;

(3) the Commission has jurisdiction of the parties hereto and the subject matter hereof;

(4) the recitals of fact and conclusions and conclusions of law reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and conclusions of law;

(5) the remedies described in Section IV.H of this Order should be adopted, and made mandatory, as specifically set forth above;

(6) the Amendatory Orders for Emergency Relief entered in each of these combined dockets should remain in effect;

(7) any objections, motions or petitions filed in this proceeding which remain undisposed of should be disposed of in a manner consistent with the ultimate conclusions herein contained.

IT IS THEREFORE ORDERED that pursuant to §13-514 of the PUA, the remedies described in Section IV.H of this Order are adopted, and made mandatory, as specifically set forth in this Order.

IT IS FURTHER ORDERED that the Amendatory Orders for Emergency Relief entered in each of these combined dockets shall remain in effect.

IT IS FURTHER ORDERED that any objections, motions or petitions not previously disposed of are hereby disposed of consistent with the findings of this Order.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, and unless reviewed by the Commission under Section 13-515(d)(8) of the Public Utilities Act, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 2nd day of June, 2005.

(SIGNED) EDWARD C. HURLEY

Chairman