STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company (SBC Illinois) and Sage Telecom, Inc.	:	
	:	**04-0380**
Joint Petition for Approval of the First Amendment to the Interconnection Agreement dated April 30, 2004 pursuant to 47 U.S.C. §252.	:	

ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

By the Commission:

I. PROCEDURAL HISTORY

On May 6, 2004, pursuant to 83 Illinois Administrative Code Part 763, Illinois Bell Telephone Company ("SBC Illinois") and Sage Telecom, Inc. ("Sage"), (collectively "Joint Petitioners") filed a joint petition for approval of the First Amendment to the Interconnection Agreement dated April 30, 2004, under Section 252 of the Telecommunications Act of 1996 (47 U.S.C. §§ 151 et seq.) ("the Act"). The Agreement was submitted with the petition. A statement in support of the petition was filed along with verifications sworn to by Eddie A. Reed on behalf of SBC Illinois and by Robert W. McCausland on behalf of Sage, stating that the facts contained in the petition are true and correct to the best of their knowledge, information, and belief.

Pursuant to notice as required by law and the rules and regulations of the Commission, a Status session was held in this matter on June 7, 2004. SBC Illinois, Sage, and Commission Staff appeared by counsel. Petitions for Leave to Intervene filed by AT&T Communications of Illinois, Inc. ("AT&T") and MCI, Inc. ("MCI") were granted. Staff stated that it had not yet filed a Verified Statement in this docket. On June 14, Staff filed the Verified Statement of Dr. James Zolnierek of the Commission's Telecommunications Division. The Parties filed replies (AT&T and MCI filed a joint reply to Staff's Verified Statement and joint Exceptions to the Proposed Order; they are identified herein as AT&T/MCI). This matter came on for hearing before a duly authorized Administrative Law Judge of the Commission at its offices in Chicago, Illinois, on June 25, 2004. SBC Illinois, Sage, AT&T, MCI, and Staff appeared. Dr. Zolnierek testified on behalf of the Verified Statement, which was admitted into evidence, and 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, as well as amendments to those agreements. SBC Illinois and Sage have negotiated such an Amendment to their 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. This provision further states "[n]o State court shall have jurisdiction to review the action of a State Commission in approving or rejecting an agreement under this section". Section 252(e)(5) provides for preemption by the Federal Communications Commission if a State Commission fails to carry out its responsibility, and Section 252(e)(6) provides that any party aggrieved by a State Commission's determination on a negotiated agreement may bring an action in the appropriate Federal District Court.

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

In the Amendment to the underlying Agreement, Sage waives the right to use SBC Illinois unbundled local switching and shared transport through July 31, 2011. Sage further agrees to pay the sum of $20.00 for unbundled two-wire analog loops supplied by SBC Illinois through July 31, 2011, and waives the right to commingle SBC Illinois products. The Amendment provides for reciprocal compensation on a bill-and-keep basis and also references a Local Wholesale Complete Agreement ("LWC Agreement") not filed with the Commission. The Amendment does not modify or extend the Effective Date or Term of the underlying Agreement, but is coterminous with it. All other terms and conditions of the underlying Agreement shall remain unchanged and in full force and effect.

IV. POSITIONS OF THE PARTIES

A. Staff's Position

Staff said in its Verified Statement that it was unable to offer an opinion regarding the rates, terms, and conditions of the LWC Agreement because it had not been submitted to the Commission for approval. Staff added that they did not know the extent to which, if at all, the LWC Agreement and the Amendment were interrelated, and therefore could not form an opinion as to whether the Amendment is discriminatory or contrary to the public interest under Section 252(e)(2).

Staff noted that the Federal Communications Commission ("FCC") has encouraged commercial negotiations of the type manifested by the LWC Agreement in this docket. It explained that the FCC considers it desirable to end eight years of litigation regarding the implementation of Sections 251 and 252; the FCC also considers it important to return certainty to the wholesale telecommunications market; it recognizes that disruptions in the wholesale market would similarly disrupt the retail market; and the 60 days authorized by the USTA II[1] decision for the FCC to develop new rules is inadequate.

Staff concluded that, since the requisite findings necessary for approval of the Amendment cannot be based upon the filing, the proper course would be for the Commission to decline to act and allow the Amendment to go into effect 90 days after filing, pursuant to Section 252(e)(4). It explained that the Commission would not be required to make findings of fact or conclusions of law regarding the LWC Agreement, nor would it have to offer an opinion whether the LWC Agreement complies with applicable federal or state law. Moreover, the Commission would be able to take such investigative or enforcement measures as it determines are warranted, as the law requires, or as public interest demands, in the event that Joint Petitioners' failure to seek approval of the LWC Agreement violates state or federal law.

Testimony of Dr. Zolnierek

Dr. Zolnierek acknowledged that in his Verified Statement he defined discrimination as giving preferential treatment to a requesting carrier to the detriment of a carrier not a party to the agreement. He testified that he did not include in his Verified Statement the language "In previous dockets, Staff has taken the position that in order to determine if a Negotiated Agreement is discriminatory, the Commission should determine if all similarly situated carriers are allowed to purchase the service under the same terms and conditions as provided in the agreement", because it was not an appropriate standard.

Dr. Zolnierek testified that he could not offer an opinion whether the Amendment was discriminatory, because he did not know the terms of the LWC Agreement. He said he was aware that the LWC Agreement had not been submitted to the Commission for

[1] United States Telecom Association v. F.C.C., 359 F.3d 554 (D.C. Cir. 2004) ("USTA II")

review and was not available to other carriers in Illinois, but it was his belief that it was not at issue in this proceeding. Dr. Zolnierek explained that the Amendment as filed in this docket was not discriminatory or contrary to the public interest, because carriers could pick and choose from it whatever terms they desired, just as they had from prior Amendments.

B. SBC Illinois' Position

SBC Illinois said the FCC had determined that customer interests would best be served by incumbent and competitive local exchange carriers ("ILECs" and "CLECs") engaging in good-faith negotiations to arrive at commercially acceptable arrangements that would provide a substitute for unbundled network elements ("UNE" or "UNE-P"). SBC Illinois and Sage have entered into a private LWC Agreement for a market-based substitute for UNE-P. Some of the products and services to be provided under the agreement relate to the implementation of Section 251 obligations, however, other products and services do not. These other items were negotiated on a strictly voluntary basis, precisely as the FCC encouraged. SBC Illinois and Sage recognize that terms of the agreement pertaining to obligations under Section 251 must be filed with the Commission, but there is no requirement to seek approval of any non-251 arrangements in the agreement. Such a requirement would expand the scope of Section 252 without legal support and run counter to the spirit of voluntary commercial negotiations.

SBC Illinois added that if voluntary commercial negotiations are subjected to regulatory approval or modification, carrier incentive to negotiate could diminish. Commercial negotiations may contain the type of business information a carrier would not ordinarily reveal to a competitor. Requiring disclosure could cause parties to either avoid terms that might reveal sensitive data or to risk disclosure. Neither case is likely to result in productive negotiations. Also, if state commissions require parties to change the terms of an agreement as a condition for approval, parties could not be confident that tradeoffs made during negotiations will be preserved, and they will be less likely to negotiate at all. Moreover, the agreement in this docket is region-wide, not state specific, meaning that it is based on a balance of interests across several states. Invalidation in a single state could disrupt the entire agreement. Even if a commercial agreement is approved in fact, contentious proceedings could undermine such benefits as the elimination of regulatory uncertainty and regulatory costs.

Another SBC Illinois concern is the possibility that other CLECs could choose parts of an agreement that do not implement a Section 251 obligation. The negotiation process involves a certain amount of give-and-take and parties strike a balance between the two. An ILEC would not be inclined to offer something in one negotiation that could be taken away during a subsequent negotiation. Likewise, no CLEC would make a concession for a favorable term if another CLEC could obtain the same term without the concession. Permitting such choices to non-251 obligations would eviscerate the give-and-take process so essential to negotiations. The Commission can prevent all of the above by recognizing that an agreement or portion thereof that does

not purport to implement Section 251 obligations is not subject to Section 252 requirements, including the filing requirement of 252(e)(1).

SBC Illinois also argued that under Section 252(a), when an ILEC receives a request for interconnection pursuant to Section 251, it may negotiate and enter into an agreement with the requesting carrier without regard to the standards set forth in Section 251(b) and (c). It also requires any such agreement to be submitted to the State commission. SBC Illinois contends that this means the only agreement that must be filed is the one triggered by a CLEC request for interconnection pursuant to Section 251. If a CLEC does not request a negotiation for interconnection under Section 251, any resulting agreement is not subject to Section 252 requirements. SBC Illinois concedes that an agreement that purports to address rates, terms, and conditions by which parties will fulfill obligations under the agreement to provide interconnection under Section 251 must be filed. However, a commercial agreement for products and services not clearly covered by Section 251 is not required by Section 252 to be filed.

SBC Illinois asserted that Section 251(c)(1) provides additional support for the contention that Section 252(a) requires the filing only of those rates, terms, and conditions under which the parties address their Section 251(b) and (c) obligations. Section 251(c)(1) provides that ILECs must negotiate under Section 252 "…the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this subsection." It explained that if a particular element need no longer be unbundled under Section 251(d)(2), an ILEC had no duty to negotiate under Section 251(c)(1) and an agreement resulting from such negotiations is beyond the Section 252 filing requirements. SBC Illinois further asserted that interpreting Section 252(a)(1) in this manner was also consistent with the purpose of the Telecom Act of 1996, suggesting that there is no reason why services not subject to negotiation under Section 251(c)(1) would be subject to state Commission review.

SBC Illinois added that this interpretation of Section 252(a)(1) is also consistent with the most favored nation ("MFN") provisions of Section 252(i). Section 252(i) requires only that ILECs make available any interconnection element provided under an agreement approved under Section 252 upon the same terms and conditions as provided in the agreement. As long as an ILEC files the rates, terms, and conditions negotiated to provide interconnection required by Section 251, the ILEC will ensure that CLECs are able to exercise their MFN rights. SBC Illinois also said that the FCC determined that only those agreements containing ongoing obligations relating to Section 251(b) and (c) must be filed under 252(a)(1).

SBC Illinois further asserted that the LWC Agreement contains the parties' business plans and strategies, disclosure of which could cause both parties irreparable harm. Disclosure would also have a chilling effect on commercial negotiations. SBC Illinois stated that it has petitioned the FCC for a declaratory ruling holding that commercial agreements that do not implement the requirements of Section 251 are not required to be filed for approval with state commissions under Section 252(e).

SBC Illinois took issue with AT&T/MCI's characterization of the $20.00 loop rate as exorbitant, in comparison to Commission approved loop rates. It further objected to the suggestion that Sage's acceptance of the rate was a trade-off for more favorable pricing on a UNE-P replacement. AT&T/MCI contend that Sage, as a UNE-P provider, will never have to pay the exorbitant rate, while other carriers who are not UNE-P providers and cannot pay the $20.00 rate will not be able to take advantage of the low UNE-P replacement pricing. SBC Illinois counters that the flaw in the argument is to assume that the $20.00 rate is too high. This rate is aimed largely at suburban and rural areas, where the loop rate is typically higher than in urban areas. The LWC Agreement is also a seven-year contract. A consistent loop rate is more advantageous to SBC Illinois and Sage than a constantly changing UNE-P rate. Moreover, AT&T/MCI provided no evidence that the $20.00 rate is more than Sage would have paid if it had gambled on regulated rates over a seven-year period.

SBC Illinois also characterized as fanciful the AT&T/MCI notion that, because SBC Illinois has granted Sage certain discounts under the LWC Agreement, it discriminates against other potential wholesale providers and is contrary to the public interest in encouraging facilities-based competition. SBC Illinois countered that agreements between wholesalers and retailers in any industry will preclude business opportunities for other wholesalers. In addition, AT&T/MCI have striven to preserve UNE-P as the preferred mode of entry to the market and to that end have opposed facilities-based competition.

C. Sage's Position

Sage argued that the USTA II decision vacated the FCC rules that cover UNE-P services, and thereby placed in jeopardy the network platform Sage used exclusively to serve its customers. Without a substitute for UNE-P similar to the one contained in the LWC Agreement, Sage cannot continue to serve its customers. Sage added that the USTA II ruling also generated additional urgency to Sage's efforts to exit the UNE-P regime by negotiating a mutually agreeable private agreement that enables Sage to compete on a sustainable basis. Further, the FCC declared that ILECs and CLECs could best serve the interests of customers by engaging in good-faith negotiations to conclude agreements to provide substitutes for UNEs. The Amendment between SBC Illinois and Sage provides for such substitutes. Sage also agreed with Staff that the LWC Agreement is wholly separate from the Amendment and should be brought before the Commission in a separate docket. Sage argued that the LWC Agreement does not pertain to obligations under Section 251 and does not, therefore, need to be filed.

Sage stated that while AT&T/MCI do not suggest that the Amendment is inconsistent with the criteria of Section 252(e), they object to the LWC Agreement, which is not before the Commission. Sage noted that AT&T/MCI considers a $20.00 fee for an analog loop to be unreasonably high and asserts that it must be a payback for some undisclosed favorable treatment. Sage countered that since the analog loop rate covers 13 states, it cannot be viewed as solely an Illinois rate. Sage explained that its business model in each state is directed primarily at rural and suburban venues, where

loop rates are usually higher than in urban centers. Also, the term of the Amendment is seven years, giving Sage a stable, predictable rate in a region where UNE rates are constantly evolving. Sage concluded that AT&T/MCI offered no evidence to prove that the $20.00 fee is higher than Sage would have had to pay if it relied on regulated rates for the next seven years.

Sage further disputed AT&T/MCI's claim that portions of the Amendment beneficial to Sage are hidden in the LWC Agreement, while terms other CLECs will find objectionable are in the publicly available Amendment. Sage stated that AT&T/MCI pointed to nothing in the LWC Agreement that favors Sage. Sage also contested AT&T/MCI's argument that they are being denied opt-in rights, because AT&T/MCI made it clear they do not intend to opt-in. Under such circumstances, they cannot be discriminated against.

D. AT&T/MCI's Position

AT&T/MCI regards the LWC Agreement to be discriminatory, because it mandates that Sage use it to fulfill all of its wholesale requirements for wireline local exchange service for the seven-year term of the Agreement. Sage must pay penalties if it fails to purchase at least 450,000 lines in a month and use the LWC Agreement to meet 95% of its local needs. SBC Illinois considers this to be ordinary volume and term discount, but AT&T/MCI explained that the discounts are based not on commitments to volume, but on Sage's commitment not to deal with competitors. Any other CLEC committing to the same or a greater line level, but desiring to serve customers using its own switch, could not obtain the discount. The volume and term inducements bind the CLEC to SBC Illinois for all services if it wants the discount. Discrimination occurs between CLECs who can make the commitment and those who cannot.

AT&T/MCI also considers the LWC Agreement to discriminate against facilities-based carriers who provide wholesale services to companies like Sage. Agreements that give preferential treatment to resellers who refuse to deal with facilities-based competitors discriminate against such competitors by denying them access to the reseller. AT&T/MCI said that the LWC Agreement also seeks to shield interconnection agreements from the opt-in provisions of Section 252(i). The LWC Agreement declares that it is not subject to Section 251 or Section 252 and is invalid if disclosed to other carriers. Key provisions of the LWC Agreement are not contained in the Amendment and other competitors have no opportunity to obtain the same deal on the same terms a required by the opt-in provision. Each effect of the Agreement described above was precisely what Section 251(a)(1) was designed to prevent. AT&T/MCI asserted that for many of the same reasons, the LWC Agreement is contrary to the public interest. It added that attempting to preserve SBC Illinois' monopoly and chill facilities-based competition is also contrary to the public interest. Increased investment in facilities creates jobs and strengthens the economy, and fosters greater competition, which results in consumer savings.

AT&T/MCI insisted that Sage would not have agreed to the $20.00 monthly recurring 2-wire analog loop rate in the Amendment unless there was a reciprocal financial benefit in the LWC Agreement. This rate is exorbitantly higher than the current monthly loop rates of $2.59, $7.07, and $11.40 for Illinois Access Areas A, B, and C. AT&T/MCI reasoned that because Sage has committed not to purchase stand-alone UNE loops, they have little to fear from this rate. It is more likely that including this rate in the Amendment would allow SBC Illinois to disseminate the $20.00 rate publicly and to continue to discourage facilities-based competition.

AT&T/MCI noted that in Minnesota and Arizona, Qwest Communications International ("Qwest") filed part of its agreements with two CLECs as amendments. The amendments created a new wholesale product called UNE-Star and disclosed the prices the CLECs had to pay for the new product. What the Amendments did not disclose was that Qwest and the CLECs had entered into secret agreements that refunded some or all of the up-front payments required of the CLECs in the Amendments and provided substantial price discounts to the CLECs that materially changed the prices shown in the Amendments. AT&T/MCI expressed its concern that similar terms may well exist in the LWC Agreement in this docket. It argued that filing the entire agreement is the first step in enabling the Commission to guard against its anticompetitive effects, and allowing the Commission to make an informed decision regarding discrimination and the public interest. AT&T/MCI added that state commissions in Indiana, Michigan, and Texas have directed SBC Illinois and Sage to file the LWC Agreement in its entirety, while commissions in Kansas, Missouri, and Ohio have issued "show cause" orders directing SBC Illinois and Sage to explain why they should not do so.

AT&T/MCI agreed with Dr. Zolnierek that because the entire Amendment had not been submitted, it was not possible to determine if it was discriminatory or contrary to the public interest. They disagreed, however, with Dr. Zolnierek's conclusion that the Commission should take no action on the Amendment and let it become operative as a matter of law. That would effectively delegate the Commission's authority under the Telecommunications Act of 1996 (47 U.S.C. §151 et seq.) to SBC Illinois and Sage, and ignore the possibility that an Amendment that is discriminatory or contrary to the public interest could go into effect without review.

AT&T/MCI said that the Commission should consider four options regarding the Amendment: it can approve the Amendment without determining if it is discriminatory or contrary to the public interest; it can fail to act and let the Amendment take effect by operation of law; it can reject the Amendment on the grounds that SBC Illinois and Sage have failed to provide sufficient data to determine if it meets the criteria of Section 252(e)(2); or it can declare that the review period set by Section 252(e)(4) does not begin to run until the Amendment is submitted in its entirety. AT&T/MCI conclude that the proper course for the Commission to follow in this docket is either to reject the Amendment for failure to satisfy Section 252(e)(2) criteria or to declare that the 90-day period for approval does not begin to run until the entire Amendment is submitted for review.

E. Attorney General's Position

The Attorney General ("AG") stated that it is undisputed that SBC Illinois and Sage are required under Section 252(a)(1) of the 1996 Telecom Act to submit their Amendment to the Commission for approval. In this matter, implementation of the Amendment is conditional upon implementation of the LWC Agreement. By failing to submit the LWC Agreement, they have violated Section 252(a) requirements and the Amendment should be rejected as incomplete and contrary to the public interest.

The AG also relied upon Part 763.120(b) to support its contention that SBC Illinois and Sage are required to submit all relevant documents for Commission consideration. Since the LWC Agreement is not included in the filing, it does not conform to Commission requirements and precludes effective review. The Commission should reject the Amendment since it is not in the public interest to approve an Amendment without knowing its contents.

The AG noted the action of the Indiana Commission in declaring that the 90-day period for approval was not triggered until the entire Amendment was filed. It also cited the conduct of state commissions in Ohio and Michigan, each of which found that the filing by SBC Illinois and Sage was incomplete and therefore prevented a determination of whether the Amendment was discriminatory or contrary to the public interest. The Michigan Commission required disclosure of the full content of any understandings, oral agreements, or side agreements that bear on the Amendment. The AG further stated that the Texas state commission reviewed the entire agreement *in camera* and ordered SBC Illinois and Sage to file the complete agreement for public review.

The AG argued that Staff's recommendation to allow the Amendment to go into effect by letting the 90-day period run would constitute an unlawful abdication of the Commission's duty to enforce Section 252. The better course would be to reject the filing as incomplete and therefore contrary to the public interest. This would prevent the Amendment from becoming effective until all related documents are before the Commission for proper review of Section 252(e) criteria.

The AG further argued that at no time did the FCC suggest that private commercial agreements were immune from Section 252 requirements. By encouraging parties to arrive at commercially negotiated rates for access, the FCC recommended nothing more than that parties continue to function under the 1996 Telecom Act. Section 251(a)(1) authorizes voluntary negotiations that can conclude in agreements without regard to an ILECs statutory interconnection obligations. The AG interpreted this to mean that even voluntary agreements that may not conform to Section 251 obligations must be filed with the state commission under Section 252(e)(1) for review. Nothing issued by the FCC could be construed as giving parties permission to ignore the mandates of Section 252 or the role of state commissions in guarding against discrimination and protecting the public interest.

V. COMMISSION ANALYSIS AND CONCLUSIONS

SBC Illinois and Sage maintain that the LWC Agreement entered into between them, and referenced in the Amendment to the underlying agreement submitted for approval in this docket, is a private commercial agreement that does not have to be filed with the Commission for approval under Section 252(e)(1). Staff took no position as to whether Section 252(e)(1) requires production of the LWC Agreement, stating only that it could not form an opinion whether the Amendment was discriminatory or contrary to the public interest, because it did not know how, if at all, the two were interrelated. The other parties to this docket voiced strong opposition to approval of the Amendment, absent filing the LWC Agreement.

After reviewing the terms of the Amendment, the Commission rejects the position of SBC Illinois and Sage concerning the relationship of the LWC Agreement to Sections 251 and 252. SBC Illinois characterized the LWC Agreement as a "non-251 arrangement," yet the Amendment itself is null and void in any jurisdiction where the LWC Agreement is declared inoperative. The assertion of SBC Illinois and Sage that the LWC Agreement is merely a private commercial agreement that incurs no Section 251(b) and (c) obligations is untenable in this context. The LWC Agreement clearly does not exist in a vacuum. It is an integral part of the Amendment and is inseparable from it. For that reason it is subject to the obligations of Section 251(b) and (c) and must be filed pursuant to Section 252(e)(1).

SBC Illinois' concern that other CLEC's may select parts of an agreement that do not implement a Section 251 obligation is moot, since we regard the LWC Agreement to fall under Section 251. Additionally, we reject SBC Illinois' argument that if a CLEC does not request a negotiation for interconnection under Section 251, any resulting agreement is not subject to Section 252 requirements. We neither give credence to SBC Illinois' contention that a negotiated item that is no longer considered unbundled under Section 251(d)(2) relieves an ILEC of its duty to negotiate under Section 251(c)(1), nor are we disposed to consider the LWC Agreement outside the scope of Section 252(a). All of these points are predicated upon the position of SBC Illinois and Sage that the LWC Agreement is a "non-251 arrangement." The Commission does not consider the LWC Agreement to be any such thing. It is inextricably bound up with the Amendment, implements Section 251(b) and (c) obligations, and is therefore subject to the filing requirements of Section 252(e).

A. Discrimination

Discrimination is defined in other Negotiated Agreement cases as giving preferential treatment to a requesting carrier to the detriment of another carrier not a party to the agreement. Similarly situated carriers should be allowed to purchase services under the same terms and conditions as provided in the LWC Agreement. SBC Illinois and Sage do not dispute that the LWC Agreement requires Sage to purchase at least 450,000 lines per month and use the LWC Agreement to meet 95% of its local needs in order to enjoy discounts. Yet the terms are not offered on an "either-

or" basis. The other carrier must meet both conditions. Thus, a carrier using its own facilities, even when committed to the same line level, would be allowed to serve only 5% of its customers in order to obtain the discount. This we regard as discriminatory, as well as contrary to the goal of fostering facilities-based competition.

The Commission also believes that the Amendment subverts the opt-in provisions of Section 252(i) and is discriminatory for that reason as well. The Amendment declares itself void if the LWC Agreement becomes inoperative. In our view, such a situation obviously would at least discourage, if not actually prevent, a carrier from opting into the Amendment. Moreover, common sense would dictate to any carrier that it could not opt-in to an agreement without a thorough analysis of all of the terms and conditions of that agreement. Without full disclosure of the entire LWC Agreement, a carrier would again be at least discouraged, if not actually prevented, from opting in to the Amendment. We regard these consequences to be in direct contravention of the provisions of Sections 251 and 252 designed to promote and encourage competition.

We place little stock in AT&T/MCI's assertion that by charging Sage a $20.00 monthly recurring 2-wire analog loop rate, Sage is not only the beneficiary of some financial quid pro quo, but will not be subject to the rate, which will then be foisted upon the public to discourage facilities-based competition. AT&T/MCI offered no evidence of any financial benefit on Sage's behalf. We grant that the possibility of such a deal being buried in the LWC Agreement may be plausible, but it is still speculation on AT&T/MCI's part and a suggestion to which we cannot give substance. Also speculative is the claim that the $20.00 rate will be disseminated publicly. AT&T characterized it as more likely, but again failed to submit evidence in support. On such a record, we are compelled to dismiss these claims as unsubstantiated.

B. Public Interest, Convenience and Necessity

The Commission regards an Amendment found to be discriminatory to also be contrary to the public interest. We noted above that the discriminatory aspects of the Amendment and the LWC Agreement run counter to the ideal of achieving true competition in the telecommunications industry. This is clearly not in the public interest. We also heed the words of the Attorney General that it is not in the public interest to approve an agreement without knowing its contents. We add that it would be a dereliction of duty on our part to approve the Amendment under these circumstances. The Commission would consider the failure to provide a complete analysis of the entire Amendment to constitute an abdication of its responsibility to safeguard the public interest. The proper course is to withhold approval of the Amendment until such time as all of the data is produced for a full evaluation of its impact upon the public.

We are not persuaded by the circumstances of this docket that subjecting private commercial agreements to regulatory approval would have a chilling effect on carrier incentive to negotiate. Telecommunications carriers have been negotiating agreements with SBC and other ILECs for years and sensitive information has always been

protected. The Commission is fully capable of providing the same protection in future dockets. Nor are we convinced that because the Amendment is a region-wide document, invalidation in one state could disrupt its effect entirely. The Amendment states that if the LWC Agreement is invalidated in one state, the Amendment is nullified in that state. Nothing suggests that such nullification would disrupt the Amendment region-wide.

The Commission is at a loss to understand Staff's rationale for suggesting that the Amendment go into effect by operation of law. It is readily apparent that we would not have to make findings of fact and conclusions of law regarding the LWC Agreement, or offer an opinion regarding its compliance with applicable laws and regulations. But even if we agree that our right to take investigative action or pursue enforcement measures concerning the LWC Agreement is preserved in the event that Joint Petitioners' failure to seek approval of it runs counter to the law, the effect of such action is unclear. Allowing the Amendment to take effect as Staff suggests would grant validity to the LWC Agreement, the contents of which are not known. What steps the Commission should take regarding the Amendment if it were to subsequently determine that the LWC Agreement violates federal or state law is uncharted territory. What we are left with is our previous determination that approval would perpetrate upon the public an Amendment that is discriminatory and contrary to the public interest. For these reasons, we reject Staff's suggestion.

The failure of SBC Illinois and Sage to provide the LWC Agreement renders the Commission unable to approve the Amendment in this docket. We note SBC Illinois' representations that disclosure would include a substantial volume of sensitive data that would require proprietary treatment. The Commission has accorded such treatment to sensitive data in prior cases and would be amenable to a motion for the same protection in any future docket, if SBC and Sage should choose to produce the entire Amendment.

C. AT&T/MCI's Motion to Produce the LWC Agreement

AT&T/MCI motioned under 83 Ill. Adm. Code 763.120(b) for SBC Illinois to produce all documents, data compilations, and written information in the possession of the party relevant to issue of whether the Amendment discriminates against a carrier not a party and whether implementation of the Amendment would be contrary to the public interest. Part 763.120 (b). states:

> b) A copy of, or a description by category and location of, all documents, data compilations, and written information in the possession, custody, or control of the party that are relevant to the issues of whether:
>
> 1) the agreement, or any portion thereof, discriminates against a carrier not a party to the agreement; and

2) implementation of the agreement, or any portion thereof, would be inconsistent with the public interest.

AT&T/MCI argued that other agreements may accompany the LWC Agreement and would be relevant to the Commission in its decision whether to approve the Amendment. Moreover, the Commission should require SBC Illinois and Sage to submit for review the entire LWC Agreement, including any understandings, or oral or side agreements, that bear on the Amendment since the Amendment is only a small part of the entire agreement. It asserted that the LWC Agreement is part of the total Agreement between SBC Illinois and Sage, and failure to provide it is contrary to the provisions of Sections 251 and 252.

AT&T/MCI further argued that this rule is designed to ensure that the Commission and interested parties have all of the data necessary to decide to approve or reject a negotiated agreement within the 90-day period set by Section 252(e)(4). The Commission cannot make a determination regarding discrimination or consistency with the public interest unless the totality of the terms and conditions of the Amendment are submitted to it. SBC Illinois and Sage should not be allowed to let the seven page Amendment constitute the only portion of the Agreement subject to Sections 251 and 252, while the approximately 90-page LWC Agreement remains exempt from disclosure as a private contract.

SBC Illinois responded that it had already produced all documents so required under Sections 251 and 252.

The issue we have dealt with in this docket is whether the submitted Amendment is either discriminatory or contrary to the public interest. We have concluded above that it is both. It is our position that parties to a negotiated agreement or an amendment are jointly responsible to determine what documents they need to file in order to obtain Commission approval. It is not, therefore, the Commission's function to provide advice to these parties as to what they need to submit to obtain approval. It is not the Commission's responsibility to provide legal counsel to parties to negotiated agreements and amendments thereto. Granting AT&T/MCI's motion would be tantamount to placing us in the position of legal adviser to SBC Illinois and Sage in this matter. We will not assume that role. For that reason, the Commission denies AT&T/MCI's motion to produce the LWC Agreement.

VI. FINDINGS AND CONCLUSIONS

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

(1) SBC Illinois and Sage are telecommunications carriers as defined in Section 13-202 of the Act;

(2) SBC Illinois and Sage have entered into an Amendment to an Interconnection Agreement dated April 30, 2004, which has been submitted to the Commission for approval under Section 252(e) of the Telecommunications Act of 1996;

(3) 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;

(4) the Amendment to the Interconnection Agreement discriminates against a telecommunications carrier not a party to the Amendment;

(5) the Amendment to the Interconnection Agreement is contrary to the public interest, convenience and necessity;

(6) the Amendment should not be approved.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the Amendment to the Interconnection Agreement dated April 30, 2004, between SBC Illinois and Sage is not approved.

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

DATED: July 1, 2004
BRIEFS ON EXCEPTIONS DUE: July 7, 2004
REPLY BRIEFS ON EXCEPTIONS DUE: July 13, 2004

John T. Riley,
Administrative Law Judge