

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
	)	
-vs-	)	Docket No. 06-0027
	)	
Illinois Bell Telephone Company	)	
	)	
Investigation of specified tariffs declaring	)	
certain services to be competitive	)	
telecommunications services	)	

ILLINOIS COMMERCE COMMISSION STAFF'S  
RESPONSE TO THE ILLINOIS ATTORNEY GENERAL'S  
MOTION FOR RELEASE OF AGGREGATE INFORMATION  
TO THE PUBLIC RECORD

NOW COMES the Staff of the Illinois Commerce Commission (hereafter "the Staff"), by and through its counsel, pursuant to Rule of Practice 200.190, and in response to the Illinois Attorney General's Motion for Release of Aggregate Information to the Public Record, states as follows:

1. On March 15, 2006, the Attorney General (hereafter "AG") circulated a letter that solicited parties' agreement to the proposition that certain purportedly aggregated data contained in testimony pre-filed in this proceeding was improperly designated "confidential and proprietary," as that term is defined in the Protective Order entered by the Administrative Law Judge in this proceeding on [date]. See AG Motion, *generally*. Included in the AG's request was purportedly aggregated data contained in the Direct Testimony of Staff witness Dr. James Zolnierek. AG Motion, ¶¶1-2. The Staff responded to this request in a timely manner on March 23, 2006, objecting to the AG's proposal on several independent bases. Attorney General's Motion, ¶6.

2. More specifically, the Staff advised the AG that it could not agree to the Attorney general's proposal because, *inter alia*:

- A. By the specific terms of the Protective Order, the Staff is neither bound by the Protective Order, subject to the Protective Order, nor is it a signatory to [whatever it's called]. Accordingly, the Attorney General cannot invoke the Protective Order as against the Staff in the manner it proposes;
- B. The Staff is not a "producing party" as that term is defined in the Protective Order, and accordingly the Protective Order cannot be invoked as a basis to compel the Staff to alter any of its designations;
- C. Staff members who improperly disclose confidential or proprietary information are subject to criminal prosecution under Section 5-108 of the Public Utilities Act, and as such Staff's designation of data as proprietary or confidential is done with the utmost circumspection, and is therefore not subject to second-guessing by parties;
- D. The Attorney General's assertion that disclosure of aggregated data in general, and the aggregated data at issue here in particular, cannot possibly result in carrier-specific data becoming of public record, is questionable, and one upon which the Staff is disinclined to accept without reservation, in light of its particularly exigent legal obligations regarding confidentiality.

See AG Motion, Attachment C

3. The Staff advised the AG that: "For the reasons stated above, Staff objects to the disclosure of the confidential data identified in its Direct Testimony and referred to in your letter." AG Motion, Attachment C. The Staff further advised the AG that it offered no opinion on whether the AG should or might make the aggregated data in AG witness Dr. Lee L. Selwyn's testimony public. Id.

4. On March 27, 2006, the AG filed its *Motion*, seeking an order seeking release of the data at issue into the public record. See, *generally*, AG

Motion. The AG claims that this is authorized by Paragraph 13 of the Protective Order. AG Motion, ¶4.

5. The AG's bases for its Motion are those stated in its letter: namely, that the Commission routinely makes aggregated carrier data public in its Annual reports to the General Assembly pursuant to Section 13-407 of the Public Utilities Act, 220 ILCS 5/13-407; that the data which the AG seeks to have made public is of a similar nature; that the level of aggregation of the data in this proceeding is such as would prevent the extrapolation of carrier-specific information; and that the Public Utilities Act provides for evidence to be a matter of public record. AG Motion, ¶¶12-19. The AG suggests that its Motion "incorporates the expressed concerns of Staff[.]" Motion, ¶4.

6. In fact, the AG's Motion neither "incorporates the expressed concerns of Staff", nor possesses merit as to the Staff testimony that it seeks to make public. Accordingly, the AG's Motion should be denied with respect to Staff's testimony, and the Staff so requests.

7. First, as the Staff made clear to the AG in its responsive letter, Staff is not a party to, or bound by, the Protective Order. See AG Motion, Attachment

C. The Protective Order specifically provides that:

Commission Staff personnel (including but not limited to Commission officers, employees and retained experts) are governed by Sections 220 ILCS 5/4-404 and 5-108 regarding the disclosure of confidential information or documents and **are not subject to this Order** except that (i) Staff shall be allowed to disclose "Confidential" or "Confidential & Proprietary" information to persons granted access to Confidential or Confidential & Proprietary information in accordance with the terms and provisions of this Order and (ii) all pleadings or testimony by Staff shall be filed and distributed in accordance with the terms and provisions of this

**Order. Other than as set forth in the preceding sentence, Staff is not subject to the terms and provisions of this Order including, but not limited to, the terms and provisions set forth in Paragraphs 5, 6 and 12, above.**

Protective Order, ¶20 (emphasis added)

8. Accordingly, the AG's attempt to invoke the Protective Order as a basis for the Commission making public aggregated data in Staff's testimony is simply futile. The Staff cannot be held to the terms of an order that does not, by the specific terms of that order, bind it.

9. Second, and related, the reason that the Staff is not subject to the Protective Order is clearly set forth in the Order. Specifically, Staff is "governed by Sections 220 ILCS 5/4-404 and 5-108 regarding the disclosure of confidential information or documents[.]" Protective Order, ¶20. Section 5-108 of the Public Utilities Act, as the Staff noted in its response to the AG's request, provides that a Staff member who discloses confidential information is subject to criminal prosecution as a Class A misdemeanor. 220 ILCS 5/5-108. Class A misdemeanors are punishable by imprisonment for a period of up to 364 days; 730 ILCS 5/5-8-3(a)(1); and a fine of up to \$2,500 (or the amount specified in the statute describing the specific offense, whichever is greater). 730 ILCS 5/5-9-1(a)(2). As such, the Staff is required to, and is, very circumspect about the disclosure of such information, and its determinations regarding what information is confidential in its evidentiary submissions are simply not subject to being second-guessed by the AG under the Protective Order.

10. The Staff is relieved of this criminal liability for disclosure only if, and only to the extent that such disclosure "may be authorized by the

Commission or by a circuit court[.]” 220 ILCS 5/5-108. The AG, however, does not in its Motion, seek Commission or Circuit Court approval for its proposal; rather it seeks an order from the Administrative Law Judge under the Protective Order. Accordingly, the Staff has no assurance that it will not be subject to criminal liability under the statute in the event that the AG’s motion is granted. The Staff notes that the submission of its Annual Report to the General Assembly, upon which the AG relies as authority for the proposition that disclosure of aggregated carrier information is routine and proper, is specifically authorized and approved each year by the Commission.

12. The AG suggests that its Motion satisfies the Staff concerns regarding the level of data aggregation that is required to assuredly prevent extrapolation of carrier-specific data from what has been publicly disclosed. That Staff cannot say that the AG has not done so. However, the Staff’s other concerns warrant denial of the motion without reference to the AG’s attempts to satisfy Staff’s concerns regarding aggregation.

13. Further, the AG purports to “add” certain additional aggregate data contained in the rebuttal testimony of its witness Dr. Selwyn to its Motion, without first seeking the agreement to such designation from the parties and Staff, as the Protective Order requires. Accordingly, the AG’s Motion is premature with respect to that data.

14. The Staff notes that the AG is free to seek whatever treatment it wishes for aggregate data contained in its own testimony (to the extent that such aggregate data is not a mere recitation of data compiled by Staff and designated

as “Confidential and Proprietary” by Staff in Staff’s evidentiary submissions). The Staff has offered no opinion regarding the AG’s testimony.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be granted in their entirety, consistent with the arguments set forth herein.

Respectfully submitted,  
Illinois Commerce Commission

By: /s/ \_\_\_\_\_

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