

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company)	
)	
)	Docket No. 05-0697
Proposed Elimination of Wholesale)	
Performance Plan)	

**POST ARGUMENT COMMENTS OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

The Staff of the Illinois Commerce Commission ("the Staff"), respectfully submits its Post Argument Comments in the above-captioned matter.

Introduction

The issue the Commission faces in this proceeding is straightforward -- how best to reconcile the tariffing requirements of the PUA with the TA 96 arbitration procedures. Staff proposed language in its Initial Verified Comments that does precisely that.¹ Staff proposed language that would limit the tariffed plan to *only* those CLECs that have entered into interconnection agreements ("ICAs") with AT&T Illinois *and* whose ICA specifically provided for the CLEC to benefit from the tariffed Wholesale Performance Plan ("Plan"). Thus, under Staff's recommendation, a CLEC could not interfere with or avoid the federal interconnection agreement process because it already had necessarily fully engaged in the federal process.

Despite the fact that AT&T's Initial Comments were devoted entirely to concerns about bypassing the federal arbitration processes, AT&T declined Staff's invitation to craft suitable language to be included in AT&T's tariffed Plan.² Rather than working with

¹ Staff Initial Comments, at 24-26.

² AT&T Reply Comments, at 2.

Staff, AT&T, in its Reply Comments and at oral argument, now essentially argues that (1) the “federal Act preempts state-imposed tariffs in the precise ‘service quality plan’ context presented here”, and (2) that there is no need for the tariff.³ AT&T’s arguments, however, beyond being entirely inaccurate, utterly ignore, or summarily discount, both the tariffing directives of the PUA, and Staff’s proposed language. Before addressing the tariffing requirements of the PUA, Staff will provide a short overview of the Commission’s role as an administrative agency.

The Commission Cannot Ignore Clear Directives of the PUA

As a creature of statute, the Commission has no general powers except those expressly conferred by the legislature.⁴ Moreover, the Illinois Supreme Court has long held that an administrative agency can neither limit nor extend the scope of its enabling legislation.⁵ The Commission, accordingly, *must* follow and implement the PUA’s plain language irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute.⁶

Moreover, to the extent that AT&T’s arguments are construed as complaining of the PUA tariffing requirements, the Commission has repeatedly concluded that it is without authority to rule on such an issue.⁷ Rather, as Staff has pointed out on numerous occasions, in the event that AT&T believes that the legislature acted in a manner that is

³ Reply Comments, at 5.

⁴ *Business and Professional People for the Public Interest v. Ill. Commerce Comm’n*, 136 Ill. 2d 192, 244, 555 N.E.2d 693, 716-17 (Ill. 1990).

⁵ *Carpetland U.S.A. v. Ill. Dept. Employment Security*, 201 Ill. 2d 351, 397, 776 N.E.2d 166, 192 (Ill. 2002) (“An administrative agency lacks the authority to invalidate a statute on constitutional grounds or to question its validity.”).

⁶ *Citizens Util. Bd. v. Ill. Commerce Comm’n*, 275 Ill. App. 3d 329, 341-42, 655 N.E.2d 961, 969-70 (1st Dist., 1995). See also *Interim Order on Remand (Phase I)*, Filing to Implement Tariff provisions of Section 13-801 of the Public Utilities Act, ICC Docket 01-0614 (April 20, 2005).

⁷ See Order, ICC Docket No. 01-0614, Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act (June 11, 2002) (“13-801 Order”), ¶ 42.

preempted by federal law, it has a remedy available to it. 47 U.S.C. §253(d). AT&T, however, cannot hope to successfully raise a preemption argument here, in this proceeding. The Commission has no authority to declare an act of the Illinois General Assembly preempted or otherwise unconstitutional. Accordingly, the Commission cannot consider an AT&T argument that federal law preempts the application of the tariffing requirements of the PUA, even if it determined that such arguments had merit.⁸ With these fundamental administrative agency principles in mind, Staff now turns to general tariffing principles.

Tariffing Requirements are Essential

Tariffing requirements, such as the PUA's Section 13-501, are indispensable to the PUA's regulatory scheme.⁹ The Supreme Court has found tariffing requirements to be “‘*utterly central*’ to the administration of the [federal] Act.”¹⁰ Justice Scalia described tariffing requirements to lie at “the *heart* of the common-carrier section of the Communications Act [of 1934].” *MCI v. AT&T*, 512 U.S. at 229 (emphasis added).¹¹ The

⁸ See e.g., *13-801 Order (June 11, 2002)* ¶ 42.

⁹ The language requiring all carriers to tariff services offered to the public was first promulgated in 1921 (Laws 1921, p. 702), and to the best of Staff's knowledge remained essentially unchanged until 2001, when the headings were modified and subsection (b) was added. PA 92-22, eff. June 30, 2001.

¹⁰ *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 230 (1994) (“*MCI v. AT&T*”)(emphasis added).

¹¹ Tariffing requirements have long been at the heart of common carrier regulation.

“Crown monopolies were required to charge only ‘reasonable and nondiscriminatory’ rates, provided adequate service, and accept all customers on the same terms, without discrimination. In time, these principles came to extend to any firm ‘affected with a public interest’ that held itself open to the general public and purported to serve all comers. In return, common carriers enjoyed important legal privileges, most particularly limits on their liabilities – limits appropriate to a business that could not legally discriminate among those it chose to serve. America inherited these core principles from England.”

Federal Telecommunications Law, Peter W. Huber, Michael K. Kellog, and John Throne (2nd Edition) (1999), at 13-14.

Supreme Court has found that tariffing requirements are an essential keystone of common carrier¹² regulation because:

[T]his Court has repeatedly stressed that rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges: 'There is not only a relation, but an *indissoluble unity* between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination.' 'The duty to file rates with the Commission, . . . and the obligation to charge only those rates, . . . have always been considered *essential* to preventing price discrimination and stabilizing rates.'

MCI v. AT&T, 512 U.S. at 229-30 (internal citations and references omitted; emphasis added); *see also Southwestern Bell v. FCC*, 43 F.3d 1515, 1523 (App. D.C. 1995)(emphasis added)(" Without it [tariffing requirement] it would be *monumentally difficult* to enforce the requirement that rates be reasonable and nondiscriminatory ... and virtually *impossible* for the public to assert its right to challenge the lawfulness of existing or proposed rates").¹³

The Illinois PUA tariffing requirements are every bit as "essential" and "utterly central" to this Commission's duty to comply with directives of the PUA as the federal tariffing requirements are to the FCC. In addition to the policy reasons set forth above with respect to tariffs generally, sound public policy also supports continued tariffing of the Plan.

If the wholesale Quality Plan is tariffed, CLECs who have interconnection agreements with AT&T Illinois, and potential CLECs who are contemplating signing

¹² Telephone carriers are clearly common carriers. In fact, they are considered a paradigm common carriers because they are so ubiquitous, so routinized and have long been expected to serve all comers and charge similar rates for similar services. *Federal Telecommunications Law*, at 14.

¹³ Likewise, the FCC has concluded that:

There can be no question that tariffs are *essential* to the entire administrative scheme of the Act. They serve as a kind of 'tripwire' enabling the Commission to monitor the activities of carriers subject to its jurisdiction and to thereby insure that the charges, practices, classifications, and regulations of those carriers are just, reasonable, and nondiscriminatory within the meaning of Sections 201 and 202 of the Act. The importance of tariffs and the requirement that common carriers -- *all common carriers* -- *must offer all of their communications services to the public through published tariffs* is well established.

Western Union Tel. Co., 75 F.C.C.2d 461 (1980) (emphasis added).

interconnection agreements, can readily determine the Commission's view regarding the quality of service they seek to and the remedies for poor service they are also entitled to when they enter into contract negotiations for services from Level 1 carriers by consulting the tariff. Tr. 28. In addition, if the Quality of Service Plan is tariffed, CLECS and ILECS will have a greater opportunity to satisfy the extremely tight time frame for negotiation of interconnection agreements set forth in the federal scheme since having a Commission approved remedy plan publicly filed may reduce their negotiation of certain remedy plan issues to the extent there is an agreement with the Commission's conclusions.

Finally, if the wholesale plan is not tariffed, then individual CLECs will have to negotiate service quality terms and conditions with incumbent LECs, without the advantage of a publicly filed plan that has been extensively reviewed by the Commission in light of the State's concerns regarding service quality. This will disadvantage the smaller CLECs and smaller potential CLECs both in relation to the ILECs and to larger CLECS, because the smaller CLECS do not have as much time or the specialized resources required to familiarize themselves with the Illinois regulatory environment or prior CLEC negotiations as the larger CLECs or the large incumbent LECs. Tr. 29. As a result, if the wholesale remedy plan is detariffed, CLECs as a whole will be put at a bargaining disadvantage with respect to quality of service. In other words, detariffing will strengthen the incumbent's bargaining position in relationship to smaller carriers who are unfamiliar with the regulatory landscape, which has the potential of endangering the quality of service carriers provide to Illinois consumers. As the FCC expressly acknowledged, the incumbent LECs do not have a strong incentive to provide good

quality of service to CLECs or negotiate fair remedies for poor quality of service.¹⁴ If a Commission approved plan is not tariffed, then an incumbent LEC will likely be more successful in pushing CLECs into inferior remedy plans than would be the case with a Commission approved remedy plan. With the indispensable nature of tariffing requirements in mind, Staff now turns to the specific tariffing requirements of the PUA.

PUA Tariffing Requirements

As Staff pointed out in its Initial Comments (at 4-7), the Commission is required by the Illinois General Assembly's clear mandates to ensure that telecommunications carriers tariff all services offered to the public¹⁵ in Illinois. Thus, under the PUA, the Plan is a "telecommunications service" as it addresses terms and conditions of "interconnection arrangements" and it also falls within the PUA's broad definition of "rate" as it contains "rules, regulations and practices" relating to interconnection arrangements.

AT&T failed to address the Section 3-116 rate requirement of the PUA, in either its Reply comments or at the oral argument. Thus, Staff's arguments that the PMP is a "rate" under Section 3-116 and thus, is required to be tariffed under Section 13-501, remains entirely un-rebutted by AT&T.

AT&T, however, did attempt to rebut Staff's argument that the Plan is a "service" and thus required to be tariffed under Section 13-501. AT&T cites to *GlobalCom v. Illinois Commerce Comm'n*, 347 Ill. App. 3d 592 (March 11, 2004 ("GlobalCom")) to

¹⁴ *First Report and Order*, Implementation of the Local Competition Provisions in the telecommunications Act of 1996, CC Docket No. 96-98 (Rel. August 8, 1996), ¶ 10 ("Because an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market.").

¹⁵ See Section 13-509 of the PUA, which allows carriers to enter into private agreements with specific customers for competitive services that differ from the carrier's tariff offerings. 220 ILCS 5/13-509.

support its argument that it need not tariff the Wholesale Performance Plan as a service.¹⁶ The *GlobalCom* decision, however, is inapposite to the situation the Commission faces in this proceeding for the following reasons. First, the *GlobalCom* decision has nothing to do with a Wholesale Performance Plan but, rather, addresses UNEs, specifically EELs.

Second, AT&T's argument that the Plan is not a "service" presumes that the Plan is a UNE, which it is not. *GlobalCom* essentially stands for the proposition that UNEs are not a "service"; but, rather, are elements or pieces of the incumbent's network, which when combined with other elements, or put together with other elements in certain configurations, can then provide a service.¹⁷ Thus, because a Plan is not part of the ILECs network, it is simply not a UNE and citation to *GlobalCom* fails to provide AT&T support for its position that the Plan is not a "service" under Section 13-501.¹⁸ Ultimately, however, AT&T relies almost entirely on this Commission's decision in ICC Docket No. 01-0539 to support its position that it need not tariff the Plan.

The Commission's Decision in 01-0539

AT&T argues that it seeks to withdraw its Plan because *the Commission said it could* in its Order in 01-0539.¹⁹ In fact, at oral argument, AT&T claimed that the "Commission's decision was unambiguous and I think it directly addressed the exact

¹⁶ Ironically, Staff points out that AT&T itself states that it tariffs the Plan pursuant to Section 13-501. See Att. A (AT&T's Adoption Notice for all of its No. 19 tariffs). Moreover, a tariff is a statute, not a contract, and has the force and effect of a statute. *GlobalCom*, 347 Ill. App. 3d at 600, citing *Illinois Central Gulf R.R. Co. v. Sankey Brothers, Inc.*, 67 Ill. App. 3d 435, 439, 384 N.E.2d 543, 23 Ill. Dec. 749 (1978).

¹⁷ *GlobalCom*, 347 Ill App. 3d 607-608.

¹⁸ Staff, moreover, would note the irony of AT&T's citation to the *GlobalCom* decision because AT&T is not seeking to withdraw the entire tariff governing wholesale services, including UNEs, but is merely withdrawing the tariff sheets pertaining to the Wholesale Performance Plan. As noted above, *GlobalCom* addresses whether a UNE is a service. Thus, if AT&T were seeking to withdraw the tariff sheets addressing UNEs, the *GlobalCom* decision may arguably be of some support. However, because AT&T is leaving the UNEs tariffed but seeking to withdraw the tariff sheets for the Plan, *GlobalCom* is of absolutely no support to AT&T.

¹⁹ AT&T Initial Comments, at 1 (emphasis in original).

arguments that are present here in the exact context that is presented here.” Tr. 32. However, AT&T’s interpretation of the Commission’s analysis and conclusions is self-servingly misconstrued, unfounded and belied by the language of the decision itself.

AT&T’s position ignores the fact that the 01-0539 docket was a rulemaking proceeding. AT&T’s position similarly *presumes* that the Commission’s decision in 01-0539 abrogated or nullified the tariffing requirements of the PUA. The Commission’s decision in 01-0539 did no such thing.

Staff acknowledges that it argued for an explicit tariffing requirement in the Rule itself and the Commission did not impose one. It is entirely implausible, however, to jump to a conclusion that because the Commission did not impose an explicit tariffing requirement, AT&T is therefore free to ignore the tariffing requirements of the PUA.²⁰ In fact, the Commission’s decision in 01-0539 is clear that to avoid anticipated litigation it would not require an explicit tariffing requirement in the rule. The Commission clearly and accurately summarized the issue and its conclusion in finding that:

Pursuant to the reasoning in *MCI/Metro*, if a state commission permits tariffing of items that are incidental to the interconnection process, such tariffing does not conflict with TA96. However, the ruling in *MCI/Metro* also made it quite clear that if a state commission requires tariffing in a manner that circumvents the interconnection agreement process, that commission has acted in conflict with, and its action is therefore preempted by, TA96.

01-0539 Second Notice Order, at 35.

Moreover, the Commission openly acknowledged that:

We do not disagree with Staff that the crux of the recent appellate rulings regarding federal preemption is that tariffing that circumvents TA96 is the problem, not tariffing *per se*. However, it does not necessarily follow that

²⁰ Moreover, as counsel for AT&T acknowledged at the oral argument, no state or federal court has preempted the tariffing requirements of the PUA, which accordingly are clearly effective and cannot be ignored. Tr. 63.

litigation over the issue will not ensue, if we were to allow tariffing of Wholesale Service Quality Plans.

01-0539 Second Notice Order, at 38.

The Commission concluded that: “We therefore decline to require Level 1 carriers to tariff Wholesale Service Quality Plans.” *Id.* From this limited Commission conclusion, AT&T argues that it may withdraw its Wholesale Performance Plan because *the Commission said it could*.

The Commission, however, simply did not conclude that the tariffing requirements of the PUA were no longer applicable and that the *Plan* need not be tariffed, the Commission merely concluded that the *Rule* did not need to include an additional express requirement to tariff the Plan. AT&T’s argument that it need not tariff the Plan because of the Commission’s decision in 01-0539 presumes that the Commission could by rule abrogate a provision of the PUA. This it cannot do.

The Illinois Supreme court has long-held that the Commission (or any state agency) cannot promulgate a rule which would “exceed or alter its statutory power” or which is “contrary to the legislative purpose and intent of the statute.”²¹ Moreover, there is simply nothing in the Commission’s conclusion in 01-0539 that abrogates or diminishes the effectiveness of the PUA’s essential tariffing requirements.

AT&T is nonetheless requesting that the Commission adopt a position based upon a grossly over-reaching interpretation of the Commission’s holding in 01-0539 that is clearly precluded by law. In sum, the Commission can neither limit nor extend the scope of the PUA; the tariffing requirements are essential to the PUA’s overall regulatory

²¹ *People ex rel. Illinois Highway Transportation Co. v. Biggs*, 402 Ill. 401, 409 (1949); *Ruby Chevrolet, Inc. v. Department of Revenue*, 6 Ill. 2d 147, 151 (1955); *Illinois Bell Telephone Co. v. Commerce Com.* 414 Ill. 275 (1953)(“A statute which is being administered may not be altered or added to by the exercise of a power to make regulations thereunder.”).

scheme; and the Commission's decision in 01-0539 wisely did nothing to undermine the PUA's tariffing requirements. Now confronted squarely with the issue, the Commission must continue to adhere to the clear mandates of the PUA and, in this case, require AT&T to tariff the Plan.

Staff, moreover, is recommending that the Commission order AT&T to add new language to the Plan's tariff pages limiting the Plan to those CLECs that already have an approved interconnection agreement with AT&T in place and would *only* be permitted to access the Plan through its interconnection agreement with a provision that allows the CLEC to exercise that right. Consequently, under Staff's recommendation, there is clearly no issue of the PUA's tariffing requirement interfering with the negotiation procedures contained in Section 252 of the federal Act. Thus, in Staff's view, the Commission's course is clear. It must continue as it has done for over seventy five years, to enforce the tariffing requirements of the PUA. Enforcing the PUA's tariffing requirements can be readily reconciled with the federal arbitration procedures by adopting Staff's recommended language.

Respectfully submitted,

Brandy D.B. Brown
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Office of General Counsel

May 5, 2006

Staff Att. A

ILLINOIS BELL
TELEPHONE COMPANY

Ameritech
Tariff

ILL. C.C. NO. 19
PART 1 SECTION 1

PART 1 - Preface
SECTION 1 - Title Sheet and Symbols

ADOPTION NOTICE

Pursuant to Public Act 87-856, Section 13-501, 13-502, and 13-505.7, the Illinois Bell Telephone Company hereby adopts all the rates, rules and regulations set forth in Ill.C.C. No. 19 and, for the sole purpose of complying with Section 13-502 and Section 13-505.7, hereby states all services contained in this tariff, are, for present purposes, classified as "competitive" services, without prejudice to any subsequent classification or reclassification. The Company reserves the right to reclassify any portion of or all of these services in accordance with Section 13-502 thereof. (T)

Issued: January 22, 1996

Effective: January 23, 1996

By D. H. Gebhardt, Vice Pres. - Reg. Affairs
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