

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>Illinois Bell Telephone Company</b>	)	
	)	<b>Docket No. 05-0697</b>
	)	
<b>Proposed Elimination of Wholesale</b>	)	
<b>Performance Plan (Tariffs filed September</b>	)	
<b>19, 2005)</b>	)	

**REPLY BRIEF ON EXCEPTIONS OF AT&T ILLINOIS**

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## INTRODUCTION

Based on a thoughtful 25-page analysis of precedent, evidence, and argument, the Proposed Order in this proceeding recommends that the Commission carry out the same, straightforward conclusion that it reached in its comprehensive rulemaking on wholesale service quality plans, Docket No. 01-0539. There, the Commission squarely said: “We therefore decline to require Level 1 carriers” – a classification that consists of AT&T Illinois and Verizon – “to tariff Wholesale Service Quality Plans.” May 26, 2004 Second Notice Order, Docket No. 01-0539, at 38. As the Commission explained, “tariffing cannot be used to replace negotiated interconnection agreements” that federal law requires between AT&T Illinois and competing carriers. *Id.* at 35. Staff wanted the Commission to reach the opposite result and require tariffing, and it made the exact same statutory arguments it makes here. But the Commission emphatically rejected Staff’s position, stating that “Staff has not espoused any fact or law indicating that the use of tariffs . . . will be a more effective procedure.” *Id.* at 38.

The Commission was right, and the appellate courts, federal *and* state, have reached the same conclusion. The Illinois Appellate Court has held – twice – that the Commission cannot force AT&T Illinois to tariff a service quality plan for the benefit of carriers without interconnection agreements, because such a regime “bypass[es]” and “subvert[s]” the federal procedure for forming those agreements. Likewise, the Seventh Circuit has held that state commissions may not impose tariffs as a means to “enable would-be entrants to bypass the federally ordained procedure.” *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. 2003). The court subsequently reaffirmed that holding in the exact same “service quality plan” context presented here, stating that the imposition of such a plan outside of an agreement “interferes . . . dramatically, with the process for interconnection agreements that is prescribed by federal law.” *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm’n*, 359 F.3d 493, 497 (7th Cir. 2004).

*No* party appealed the Commission's holding in Docket No. 01-0539 that service quality plans need not be tariffed. Competing carriers have had nearly two years to negotiate interconnection agreements or amendments to include wholesale service quality plans if they so desired. Accordingly, AT&T Illinois now seeks to do what the Commission said that AT&T Illinois could do: withdraw the tariff reflecting its wholesale service quality plan, while leaving that plan in place for carriers who participate in that plan through interconnection agreements as federal law requires them to do. So the question addressed by the Proposed Order is quite simple: are the decisions of the Commission and the courts to be carried out in the real world?

Staff seeks to prevent the Commission from carrying out those decisions. Notwithstanding the orders of the Commission and the courts, and notwithstanding the fact that *no* competing carrier (and indeed, *no* private party) objected to the withdrawal of the tariff, Staff still opposes withdrawal. The Proposed Order lays out the applicable precedent, carefully considers each of Staff's legal and policy arguments, and thoroughly explains why each argument should be rejected. It devotes 18 pages to analyzing the parties' positions, and another 7 pages to explaining the ALJ's recommendations: an exemplary and painstakingly thoughtful approach given that this case presents a single, pure question of law that the Commission has already decided.

Staff's apparent strategy is to manufacture as many possible exceptions as it can imagine (an even dozen), and embellish them with the most colorful and serious-sounding adjectives it can find, in the hope that it might confuse the Commission about an eminently simple and already-answered issue of law. None of Staff's contrived exceptions has any merit. To summarize the leading examples:

- The Proposed Order is hardly “vague” or “arbitrary” (Staff Exc. at 6). It recommends the exact same conclusion that the Commission did in Docket No. 01-0539, and it explains in great detail why. Indeed, Staff itself has no real problem understanding the Proposed Order’s reasoning – as evidenced by the fact that Staff takes exception to most every word in that analysis. Staff’s real problem is that it *disagrees* with the Proposed Order’s reasoning, not that it cannot understand, and Staff’s disagreements lack merit.
- The Commission’s decision in Docket No. 01-0539 is no “phantom conclusion” (Staff Exc. at 5). It clearly states, in black and white, the dispositive conclusion: “We therefore decline to require Level 1 carriers [including AT&T Illinois] to tariff Wholesale Service Quality Plans.” It squarely rejects Staff’s attempts to require a tariff, stating that “Staff has not espoused any fact or law indicating that the use of tariffs . . . will be a more effective procedure.” And it quite clearly embraces interconnection agreements, backed by an informational filing procedure, as an alternative to tariffing. The only way that decision would be a “phantom” is under *Staff’s* theory that the decision has no real-world significance. Staff wants the Commission to say “We require AT&T Illinois to tariff wholesale service quality plans,” but that is obviously contrary to what the Commission has already said – “We therefore *decline to* require [AT&T Illinois] to tariff Wholesale Service Quality Plans.”
- The Proposed Order does not “preempt” any Illinois statutory provisions on tariffs (Staff Exc. at 12). It simply construes those general provisions in a manner consistent with the statute that specifically governs wholesale service quality plans (which does not require tariffing, as the Commission held in Docket No. 01-0539) and in accordance with federal

law – as the Commission must do under the well-established rule that statutes are to be construed to avoid unlawful results wherever possible.

AT&T Illinois addresses each of Staff's exceptions below. Throughout, however, the Commission should not take Staff's bait or be distracted from the elementary reason why it should adopt the Proposed Order: The Proposed Order simply recommends that the Commission reach the same conclusion that it and the courts have already reached on numerous occasions. The Commission was right then, and it would be right to adopt the Proposed Order now.

### **BACKGROUND**

This is not the first time that the Commission has considered imposing a tariff with respect to AT&T Illinois' service quality plan – and as noted above, that question has already been resolved in AT&T Illinois' favor many times. The Proposed Order (at 19) is founded on “the prior determinations of this Commission” and the “stream of federal court pronouncements” on the plan. Staff's exceptions ignore them – in fact, Staff blatantly contends (without any explanation) that the “history of the Plan . . . is absolutely immaterial” to the Commission's decision about the plan. Staff Exc. at 36. But history is obviously material to evaluating the Proposed Order, because the Proposed Order is based on that history. A review of the history of the service quality plan and the applicable precedents is therefore in order.

#### **I. THE FEDERAL TELECOMMUNICATIONS ACT OF 1996**

As an “incumbent” local exchange carrier, AT&T Illinois performs certain wholesale services for competing local carriers under the federal Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (“1996 Act” or “Act”). The Act's obligations are implemented through “interconnection agreements” between incumbent and competing carriers. *Wisconsin Bell*, 340 F.3d at 442. This “federally ordained procedure” (*id.* at 445) consists of what the Appellate Court has described as a “very specific” process for negotiation, arbitration, and approval of

agreements. *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 343 Ill. App. 3d 249, 256 (3d Dist. 2003) (“*Illinois Bell I*”).

A competing carrier initiates the federal process by requesting interconnection with an incumbent (like AT&T Illinois). 47 U.S.C. § 252(a). Such a request triggers a statutory period (see *id.* §§ 252(a)-(b)) during which the parties are to “negotiate in good faith the terms and conditions” of an agreement. *Id.* § 251(c)(1). If the parties cannot reach agreement, either party may, during a specific time period, ask the appropriate state commission to arbitrate any “open issues.” *Id.* § 252(b). The Act provides specific arbitration guidelines. *Id.* §§ 252(b)-(d).

Following the negotiation and, if necessary, arbitration processes, the parties submit to the state commission for approval any agreement that they reach. 47 U.S.C. § 252(e)(1). The Act authorizes the commission to “approve or reject the agreement” (*id.* § 252(e)(1)), and provides specific “grounds for rejection” which vary depending on whether the agreement (or portion thereof) was adopted by negotiation or arbitration (*id.* § 252(e)(2)). At the conclusion of the negotiation, arbitration, and approval process, the Act provides for federal court review to ensure that the agreement “meets the requirements of” sections 251 and 252. *Id.* § 252(e)(6).

## **II. AT&T ILLINOIS’ SERVICE QUALITY PLAN**

### **A. The 1999 SBC/Ameritech Merger Order (Docket No. 98-0555)**

AT&T Illinois implemented a wholesale service quality plan as Condition 30 of the Commission’s approval of the merger between SBC and Ameritech in 1999. “Notably, there was no tariffing requirement added to the plan” in that order, as the Proposed Order here notes (at 3) and as Staff does not dispute. Instead, several carriers entered into interconnection agreements or amendments to obtain performance reports and remedy payments under the plan.

**B. The Commission's Attempt To Require Tariffing (Docket No. 01-0120)**

Pursuant to Condition 30, AT&T Illinois participated in negotiations to discuss with competing carriers possible changes to the performance measurements, standards, and remedies. The parties agreed on performance measures and standards, but were unable to agree on remedies. The Commission established Docket No. 01-0120 to resolve these disputes, and issued an Order dated July 10, 2002.

A key disputed issue related to the manner in which the remedy plan was to be implemented. The Commission acknowledged that “[c]urrently, the Performance Remedy Plan is implemented when a [carrier] and [AT&T Illinois] execute a separate Amendment to an Interconnection Agreement.” *Id.* at 16. AT&T Illinois maintained “that the current procedure should remain in place.” *Id.* The Commission, however, directed AT&T Illinois to file a tariff reflecting the modified remedy plan. *Id.* at 18. Its express purpose was to “ensure that those carriers that do not have an Interconnection Agreement with [AT&T Illinois] will have the benefit of the Remedy Plan.” *Id.* The Commission then reopened Docket No. 01-0120 on October 1, 2002 and issued an Order on Reopening that directed AT&T Illinois to delete the October 2002 expiration date from the tariff. Oct. 1, 2002 Order on Reopening, Docket No. 01-0120, at 3. AT&T Illinois sought judicial review of the Commission's orders.

On August 29, 2003, the Appellate Court issued its decision in *Illinois Bell I*, 343 Ill. App. 3d 249. The Court held that the Commission-imposed tariff was contrary to federal law. In the Court's words, “the order of the Commission in the case at bar has the . . . effect of bypassing the process set forth in section 252 of the [1996] Act” because the Commission purported to “ensure[] that those carriers that do not have an Interconnection Agreement with [AT&T Illinois] will have the benefit of the Remedy Plan.” *Id.* at 258. Thus, the Court agreed with AT&T Illinois that the tariff was unlawful due to the “actual conflict between what has been ordered by

the Commission and the process prescribed by federal law to create interconnection agreements.”  
*Id.* at 257.<sup>1</sup>

**C. The Commission’s Second Attempt To Order Tariffing (Docket Nos. 98-0252  
*et al.*)**

While *Illinois Bell I* was pending before the Appellate Court, the Commission issued another order extending the duration of the tariffed remedy plan on December 30, 2002 in a separate proceeding, in which it was considering AT&T Illinois’ plan for Alternative Regulation. The Commission’s Alternative Regulation Order “incorporate[d]” on an interim basis “the wholesale performance measures and remedy plan that w[ere] adopted in Docket 01-0120” which the Commission labeled the “01-0120 Remedy Plan.” Dec. 30, 2002 Order, Docket Nos. 98-0252, 98-0335, and 00-0764 (consol.) at 190. AT&T Illinois sought judicial review.

As noted above, the Appellate Court held in *Illinois Bell I* that the tariff that the Commission imposed in Docket No. 01-0120 was contrary to and preempted by federal law. On September 17, 2004, the Appellate Court reached the same conclusion in its review of the Alternative Regulation Order. *Illinois Bell Tel. Co. v. Illinois Commerce Comm’n*, 352 Ill. App. 3d 630 (3d Dist. 2004) (“*Illinois Bell II*”). As in *Illinois Bell I*, the Court held that the Commission-ordered tariff “subverted the negotiation and arbitration process required by section 252 of the Telecommunications Act of 1996 . . . and was therefore preempted by the federal act.” *Id.* at 638. The Court reiterated that holding, and admonished that “[n]othing in the [Illinois

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<sup>1</sup> In addition to holding that the Commission unlawfully expanded the *scope* of the plan by tariff, the Court held that the Commission “impermissibly expanded [the] duration” of the remedy plan by reopening the docket to remove the October 8, 2002 expiration date without giving AT&T Illinois notice or an opportunity to be heard. *Id.* at 258. The Commission is now conducting proceedings in Docket No. 01-0120 to determine whether to extend the plan for the period between October 8, 2002 (the expiration of Condition 30) and December 30, 2002 (the date of the Alternative Regulation Order discussed below).

Public Utilities] Act, even the independent authority for alternative regulation found in section 13-506.1, gives the Commission the power to controvert federal law.” *Id.*

**D. Termination Of The 01-0120 Plan And Adoption Of The “Section 271 Plan” (Docket No. 01-0662)**

As noted above, the Commission ordered in December 2002 that the 01-0120 Plan be incorporated into the new Alternative Regulation Plan. The Commission, however, rejected the proposal of Staff and the CLECs to extend the 01-0120 Plan indefinitely. Instead, recognizing that wholesale performance issues were also the subject of other proceedings (most notably the Commission’s then-pending investigation of compliance with Section 271 of the Telecommunications Act of 1996), the Commission stated that the 01-0120 Plan would only be “effective up to and until a wholesale performance measure plan for Section 271 purposes is approved by this Commission.” Dec. 30, 2002 Order, Docket Nos. 98-0252, 98-0335, and 00-0764 (consol.) at 190.

On May 13, 2003, the Commission approved a modified plan for Section 271 purposes in Docket No. 01-0662, in connection with its comprehensive analysis of AT&T Illinois’ wholesale performance. After ordering AT&T Illinois to make several modifications to its proposed replacement remedy plan, the Commission approved the plan, as modified, stating that the plan “is now the approved Section 271 Plan and will be known and referenced by such terms.” May 13, 2003 Final Order, Docket No. 01-0662, ¶ 3508. As the Commission explained, further continuation of the “01-0120 Plan” was not warranted in light of AT&T Illinois’ improved performance. *Id.* ¶¶ 3482-3483.

In accordance with the Commission’s orders in the Alternative Regulation and Section 271 dockets, AT&T Illinois implemented the Section 271 Plan. As the Commission did not address or terminate the tariff requirements of its previous orders, and as AT&T Illinois’ appeals

from those orders were still pending at the time, AT&T Illinois filed a compliance tariff. (As AT&T Illinois noted in its post-hearing brief, AT&T Illinois' tariff sheets included a reservation of rights to challenge the tariffing requirement as preempted.)

**E. THE COMMISSION'S REJECTION OF FURTHER TARIFFING REQUIREMENTS (DOCKET NO. 01-0539)**

Subsection 13-712(g) of the Public Utilities Act requires that the Commission "establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules." 220 ILCS 5/13-712(g). On August 8, 2001, the Commission opened Docket No. 01-0539 and commenced a rulemaking under Part 731 of the Administrative Code to implement that statute. Numerous parties, including Allegiance, MCI, McLeodUSA, RCN, TDS, Verizon, and XO, participated in that rulemaking. After 18 months of proceedings, the Commission issued a First Notice Order on January 7, 2004, informing interested parties of the Rule it planned to adopt. The Commission issued a Second Notice Order on May 26, 2004. The Commission issued a Final Order adopting the Rule on August 24, 2004.

The Rule adopted by the Commission recognizes that carriers like AT&T Illinois already had service quality plans in place. The Rule defines a qualifying "preexisting plan" as a "plan implemented by or for a carrier prior to September 1, 2004 that contains one or more of the components required for a wholesale service quality plan as set forth in Section 731.305." 83 Ill. Adm. Code § 731.105. Before September 15, 2004, a carrier's pre-existing plan served as its service quality plan for purposes of the Rule. *Id.* § 731.230(a). After that date, a carrier was to file a proposed plan, but it could satisfy the Rule by "fil[ing] a submission to the Manager of the Telecommunications Division, in the form of a verified statement establishing that it proposes to maintain its existing plan in effect, without any additions, deletions, or modifications." *Id.* § 731.205(a).

As in Docket No. 01-0120, one issue in the proceedings was the manner by which the service quality plan would be implemented. Staff proposed “that the Rule must require Level 1 carriers” – a classification established by the Rule that includes AT&T Illinois – “to tariff their Wholesale Service Quality Plans.” May 26, 2004 Second Notice Order, Docket No. 01-0539, at 29.<sup>2</sup> AT&T Illinois and Verizon opposed a tariffing requirement, and Verizon proposed an alternative procedure by which it and AT&T Illinois would file copies of their service quality plan with the Commission, without a tariff requirement. *Id.* at 32-34. McLeodUSA agreed that “using the alternative procedure, as opposed to tariffing, was a prudent decision” in light of “recent court decisions” that “may call into question the authority of state commissions to require” a tariff. *Id.* at 31.

The Commission first recognized that “[t]he federal cases cited by [AT&T Illinois] make it clear that tariffing cannot be used to replace negotiated interconnection agreements.” *Id.* at 35. The Commission also appreciated “[t]he reasonableness of this congressional mandate” by observing that “[t]he negotiation process allows parties to debate their special needs . . . and . . . to enunciate their needs and concerns through a legally binding obligation – the contract.” *Id.* “Thus, when a tariff supplants a negotiated agreement, the use of the tariff has been held to violate [the 1996 Act].” *Id.* The Commission accordingly held that “requiring Wholesale Service Quality Plans to be tariffed supplants the interconnection agreement process.” *Id.*

Moreover, the Commission noted that “Staff proffer[ed] no real benefit from tariffing the Plans.” *Id.* at 38. In the Commission’s words, “neither Staff nor Metrocom [a CLEC proponent

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<sup>2</sup> The Rule defines “Level 1” carriers to include “LECs . . . that provide wholesale service and have a preexisting plan; or . . . LECs . . . that have obligations pursuant to section 251(c) of the federal Telecommunications Act, with 400,000 or more subscriber access lines in service.” 83 Ill. Adm. Code § 731.110(a). There is no dispute that AT&T Illinois is a “Level 1” carrier; in fact, AT&T Illinois and Verizon are the only two carriers in Illinois that fall within this category.

of tariffs] have advanced one fact or law indicating that the procedure in the Rule is inadequate.” *Id.* “Also, Staff has not espoused any fact or law indicating that the use of tariffs, instead of the procedure advanced, will be a more effective procedure.” *Id.* The legal infirmities of Staff’s tariff proposal, coupled with the lack of any “fact or law” to support tariffing, led the Commission to conclude: “We therefore decline to require Level 1 carriers to tariff Wholesale Service Quality Plans.” *Id.*

None of the parties challenged the Commissions’ rejection of a tariff requirement. No party sought rehearing of the Commission’s decision on tariffing. And no party sought judicial review of the Commission’s decision on that basis.<sup>3</sup>

### **III. THE PRESENT PROCEEDING**

On September 15, 2004, AT&T Illinois filed its wholesale service quality plan with the Commission pursuant to the Part 731 Rule (“Part 731 Plan”). The Part 731 Plan has been on file for nearly 21 months, and the Commission’s holding in Docket No. 01-0539 that service quality plans need not be tariffed has been in place for nearly two years. And since it implemented the service quality plan after the SBC/Ameritech merger, AT&T Illinois has offered a standard contract appendix on Performance Measures, which incorporates by reference the current service quality plan, for carriers wishing to include such a plan in their interconnection agreements. Over 50 carriers have included such an appendix in their agreements, either as part of a new agreement or as an amendment to an existing agreement. AT&T Verified Comments at 13.

Accordingly, AT&T Illinois filed proposed tariff sheets to withdraw its wholesale “service quality plan” tariff effective November 3, 2005. (The actual tariff sheets were filed on September 19.) No competing carrier opposed the filing. The Commission opened this docket

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<sup>3</sup> AT&T Illinois and Verizon appealed the Commission’s decision on an entirely separate issue: namely, whether the service quality plan was to include requirements for special access services. The Appellate Court, Fourth District, affirmed the Commission’s order.

to investigate AT&T Illinois' proposal due to an objection by Staff. Pursuant to an agreed schedule, Staff and AT&T Illinois submitted two rounds of verified comments apiece. Also with the parties' agreement, the ALJ then conducted a hearing at which Staff and AT&T Illinois presented oral argument. Afterwards, Staff and AT&T Illinois submitted another round of briefs.

## **DISCUSSION**

### **I. THE PROPOSED ORDER CLEARLY AND FULLY STATES ITS REASONING (STAFF EXCEPTION 1).**

Staff's first exception contends that the Proposed Order is an "ipse dixit" that "provides little direction as to the rationale behind its conclusion" and "falls, far, far short" of the requirement that it set forth the grounds on which the Commission will act. Staff Exc. at 6. Staff's assertion falls apart as soon as one reads the Proposed Order, which quite clearly states and explains its rationale at great length. The Proposed Order first analyzes in depth the Commission's decision in Docket No. 01-0539, in which the Commission "declined to require [AT&T Illinois] to tariff the Wholesale Plan," concluded "that tariffing in this instance would supplant the federal interconnection agreement process" and "found that Staff had not espoused any fact or law to indicate that the use of tariffs . . . would be any more effective" than the alternative filing procedure that the Commission chose instead. Proposed Order at 19. The Proposed Order then:

- carefully addresses and rejects Staff's statutory arguments, with a two-page analysis that achieves "a reasonable construction" and construes the general tariffing provisions cited by Staff in conjunction with the more specific provisions on wholesale service quality and with federal law (*id.* at 19-20);

- addresses and rejects each of Staff's policy arguments over another two pages, finding that Staff's arguments have "no factual basis whatsoever" and are *contrary* to the policy interest of "free and unencumbered negotiations" (*id.* at 21-22);
- considers and rejects Staff's proposed tariff modification, on the grounds that it would "engender more confusion," "open the door to more disputes" and thereby "drain the time and resources of the parties, the courts, and this Commission" (*id.* at 22-24);
- Determines that the two-year passage of time following the Commission's order in Docket No. 01-0539 has been "long enough to have allowed a transition from tariffs to the federally mandated vehicle of a negotiated interconnection agreement." *Id.* at 24.

Only after this 7-page analysis does the Proposed Order recommend that AT&T Illinois be authorized to withdraw the tariff.

The Proposed Order's analysis more than satisfies the legal requirements of a reasoned decision under the Public Utilities Act: that the Commission's findings "need only be specific enough to permit an intelligent review of its decision." *United Cities Gas Co. v. ICC*, 235 Ill. App. 3d 577, 586 (4th Dist. 1992). Indeed, the Proposed Order does much more than is necessary: It expressly addresses each Staff argument at length, even though "the Commission is not required to make a finding on each evidentiary claim." *Id.*

Apparently, Staff recognizes that the Proposed Order satisfies state law, because its exception does not even cite a single Illinois statute or case on this issue, relying instead on federal cases involving federal agencies (even though Staff's position on the merits is founded on the theory that the Commission should apply Staff's view of Illinois law even if it conflicts with federal law). Staff Exc. at 6. Staff's attempted resort to federal law, however, does not help its cause. To the contrary, Staff's own case makes clear that "[a]n agency may articulate the basis

of its order by reference to other decisions” just as the Proposed Order has done here. *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973). In other words, it would have been sufficient for the Proposed Order to have said “We approve AT&T Illinois’ request for the reasons stated in Docket No. 01-0539,” and the Proposed Order has done much more.

The remainder of Staff’s argument makes clear that its real complaint is that it understands the Proposed Order’s reasoning quite well, and simply disagrees with that reasoning. In this vein, Staff complains that the Proposed Order should have agreed with Staff’s view that it has “preempted” the statutory provisions on tariffing and then issued advisory opinions on how the asserted “preemption” would affect other tariffs that are not before the Commission. Staff Exc. at 10. But the Proposed Order does not preempt any statutory provisions; it simply construes them in conjunction with the more specific provisions on wholesale service quality and with federal law. Proposed Order at 20. As shown in Section II, the Proposed Order’s approach is fully consistent with the settled rules of statutory construction; for purposes of Exception 1, though, it is sufficient that the Proposed Order fully articulated its approach and reasoning. There is no rule that requires the Commission to accept *Staff’s* views in every case. Likewise, there is no rule that requires the Commission to address tariffs that are not before it and might never come before it. The Commission need only decide the case and tariff that are before it now.

Equally invalid is Staff’s theory that the Commission’s unambiguous holding in Docket No. 01-0539 – “We . . . decline to require Level 1 carriers to tariff Wholesale Service Quality Plans – is somehow a “phantom conclusion” that the Proposed Order should have ignored. Contrary to Staff’s assertion (at 4), the statutory provisions on tariffing did come “into play” in

that proceeding – in fact, Staff put them there. The Commission’s Order acknowledges that “Staff propose[d] that the Rule must require Level 1 carriers to tariff their Wholesale Service Quality Plans” and that “Staff cite[d] Section 13-501(a) of the Act” in support of that proposal. May 26, 2004 Second Notice Order, Docket No. 01-0539, at 29. The Commission clearly rejected Staff’s position, because “requiring Wholesale Service Quality Plans to be tariffed supplants the interconnection agreement process.” *Id.* at 35. In so doing, it thrice rejected Staff’s arguments, holding that (i) “Staff proffers no real benefit from tariffing the Plans”, (ii) “neither Staff nor Metrocom have advanced one fact *or law* indicating that the procedure in the Rule is inadequate” and (iii) that “Staff has not espoused any fact or law” to support tariffing as opposed to that alternative procedure. *Id.* at 38. Moreover, the Commission quite clearly adopted “an alternative to tariffing” submitted by Verizon. *Id.* at 32.

If the Commission was really *preserving* some statutory tariffing regime, as Staff suggests, it would not have gone to the trouble of considering, modifying, and then adopting Verizon’s proposed “alternative to tariffing.” Further, Staff’s arguments regarding Section 13-501(a) were squarely before the Commission. Far from endorsing those statutory arguments, the Commission expressly said there was not “any fact or law” supporting Staff’s position.

Finally, Staff goes nowhere with its “self-evident” assertion that “Docket No. 01-0539 was a rulemaking.” Staff Exc. at 4. Yes, it was, but the Commission’s decisions in rulemaking proceedings are every bit as serious and every bit as binding as its decisions in other proceedings, and the Commission had the exact same responsibility there to correctly construe and adhere to its governing statutes. In fact, as the Proposed Order points out (at 20), the rulemaking in Docket No. 01-0539 was an industrywide proceeding that involved “numerous parties” who “voiced their beliefs and tested each other’s positions.” Staff may disagree with the

result the Commission reached, but it is hardly “arbitrary” for the Commission to reach the same result here that it reached in Docket No. 01-0539.

**II. THE PROPOSED ORDER DOES NOT “PREEMPT” ANY STATUTE (STAFF EXCEPTIONS 2, 4, 5, AND 6).**

**A. Exception 2**

Staff Exception 2 attacks a straw man in asserting (at 12) that the Commission “has no authority to preempt a clear directive of the [Public Utilities Act].” The Proposed Order is fully aware that “the Commission cannot invalidate a statute” and it does not do such a thing.

Proposed Order at 20. Rather, it is equally well established that the Commission *does* have authority to *construe* statutory provisions in making decisions and determinations within its jurisdiction. See, e.g., *Geneva Community Unit Sch. Dist. No. 304 v. Property Tax Appeal Bd.*, 296 Ill. App. 3d 630, 633 (2d Dist. 1998). The Proposed Order simply carries out the Commission’s power – and responsibility – “to interpret a law” as a whole, “giving each statutory provision a reasonable construction and one that is consistent with federal law.” Proposed Order at 20.

The Proposed Order’s analysis is consistent with – indeed, compelled by – settled principles of statutory construction. First, the Proposed Order correctly declines to read the general tariff provisions cited by Staff in isolation, and instead reads them in conjunction with the PUA’s specific and more recent provision on wholesale service quality plans, Section 13-712(g). The Illinois Supreme Court “has long held that sections of the same statute should be considered to be *in pari materia*, and that each section should be construed with every other part or section so as to produce a harmonious whole.” *Sulser v. Country Mut. Ins. Co.*, 147 Ill. 2d 548, 555 (1992); see also *Dornfield v. Julian*, 104 Ill. 2d 261, 267 (1984) (statutes are to be construed “to avoid creating an unnecessary inconsistency in the law”).

The tariffing provisions cited by Staff set forth general obligations to tariff “services” but none of them mentions “wholesale service quality plans.” Section 13-712(g), by contrast, is specifically directed to wholesale service quality, taking “a direct approach to performance.” Proposed Order at 20. When the General Assembly took up that specific subject, it did *not* set up a mandatory tariffing regime. It simply asked the Commission to “establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules” (220 ILCS 5/13-712(g)) without specifying the mechanism by which the rules would be “establish[ed]” or “implement[ed].” Thus, the General Assembly “left the particulars of establishing and ‘implementing’ [rules] to the Commission.” Proposed Order at 20. In Docket No. 01-0539, the Commission exercised that discretion by adopting an alternative implementation mechanism (namely, the negotiation of interconnection agreements, informed by public submission of the Commission-approved service quality plan) instead of forced tariffs.

Staff, however, contends that the PUA’s general provisions on tariffing leave the Commission *no* discretion, and require tariffing of wholesale service quality plans. That view “creat[es] an unnecessary inconsistency” between the tariffing provisions and the discretion afforded the Commission in the service quality plan context. *Dornfield*, 104 Ill. 2d at 267. In fact, it would render the statutory discretion meaningless and superfluous. By law, the Commission must avoid such a result and must instead achieve a “harmonious whole” (*Sulser*, 147 Ill. 2d at 555) that preserves the Commission’s discretion to *reject* tariffs in the specific service quality plan context governed by Section 13-712(g).

To achieve a lawful result, the rules of statutory construction dictate that the specific provision on service quality, which does not require tariffing, must prevail. “It is . . . a fundamental rule of statutory construction that where there exists a general statutory provision

and a specific statutory provision . . . the specific provision controls and should be applied.” *Knolls Condominium Ass’n v. Harms*, 202 Ill. 2d 450, 459 (2002); see also *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) (“[I]t is a commonplace of statutory construction that the specific controls the general,” a “canon” that is “particularly pertinent” where the general statute “is a relic” enacted long before the specific provision). Thus, “[w]here there are two statutory provisions, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one subject, the particular provision must prevail.” *Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 195 (1992). That is exactly the result that the Proposed Order recommends.

The Proposed Order is also correct to construe the statutory scheme in a manner consistent with federal law. That approach is compelled by the rule that “a statute will be interpreted so as to avoid a construction which would raise doubts as to its validity.” *Harris v. Manor Healthcare Corp.*, 111 Ill. 2d 350, 363 (1986); see also *Continental Illinois Nat’l Bank & Trust v. Illinois State Toll Highway Comm’n*, 42 Ill. 2d 385, 389 (1969) (“It is our duty to construe acts of the legislature so as to affirm their constitutionality and validity, if it can reasonably be done”); *Newland v. Marsh*, 19 Ill. 376, 1857 WL 5725, at \*8 (1857) (“Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution, and give to it the force of law, such construction will be adopted by the courts”); *Northwest Airlines, Inc. v. Department of Revenue*, 295 Ill. App. 3d 889, 893 (1st Dist. 1998) (“an interpretation which renders a statute unconstitutional or otherwise invalid should be discarded”).

Staff’s proposed construction *would* render the tariffing statutes unconstitutional and invalid, and accordingly must be discarded. It is fundamental to our system of government that where state and federal law clash, state law must give way under the Supremacy Clause of the

federal Constitution. See, e.g., *Wisconsin Bell*, 340 F.3d at 443 (conflict between state law and the 1996 Act presents a “a clear case for invoking the federal Constitution’s supremacy clause to resolve the conflict in favor of federal law”). The Commission’s Order in Docket No. 01-0539 correctly appreciates (at 35) that “requiring Wholesale Service Quality Plans to be tariffed” would conflict with federal law because it “supplants the interconnection agreement process” established by federal law. Likewise, the Appellate Court has held – twice – that the Commission’s previous attempts to impose wholesale service quality tariffs on AT&T Illinois were unconstitutional, as they “bypass[ed]” and “subvert[ed]” the federal process. *Illinois Bell I*, 343 Ill. App. 3d at 258, 260; *Illinois Bell II*, 352 Ill. App. 3d at 638. The Seventh Circuit has agreed – also in the exact same wholesale service quality context presented here – that a commission-imposed tariff “interferes . . . dramatically, with the process for interconnection agreements that is prescribed by federal law.” *Indiana Bell*, 359 F.3d at 497. In the Appellate Court’s words, “[n]othing in the [Public Utilities] Act . . . gives the Commission the power to controvert federal law” (*Illinois Bell II*, 352 Ill. App. 3d at 638) and the Proposed Order correctly construes the Act to avoid that unlawful result.<sup>4</sup>

The Commission has upheld the same principle in other contexts as well. In its order on reopening in Docket No. 00-0393, the Commission rejected a tariffing requirement for AT&T Illinois’ wholesale obligations with respect to broadband unbundling. There, as in Docket No. 01-0539, the Commission recognized that federal law “provides the machinery for encouraging interconnection and that involves the negotiation of an interconnection agreement.” Sept. 28,

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<sup>4</sup> Staff tries to wave off these repeated holdings with the euphemism that tariffing presents a “potential federal preemption problem.” Staff Exc. at 18. The multiple court decisions make clear that Staff’s preemption problem is *guaranteed*, not merely potential. *Illinois Bell I* and *II* concerned a predecessor to the exact same tariff at issue here, and *Indiana Bell* arose in the precise context of a wholesale service quality plan.

2004 Order on Reopening, Docket 00-0393, at 55. As in Docket No. 01-0539, the Commission held that a tariffing requirement “would interfere with the procedures established by the Federal Act” and would be “unlikely to survive preemption.” *Id.* at 56.

Finally, Staff’s argument under Exception 2 is based on an egregious mischaracterization of the law. Staff contends (at 13) that “tariffing requirements . . . are indispensable to the PUA’s statutory scheme.” Staff does not cite any cases decided under the PUA to support this point; rather, it cites federal case law that was decided *before* the Telecommunications Act of 1996. Staff is apparently trying to create the impression that tariffing requirements are essential to federal law, but that is obviously untrue. Tariffing requirements are not “essential” to the only federal law at issue here – namely, the local competition provisions of the 1996 Act. In fact, the courts have held that commission-imposed tariffs in the service quality plan context are *antithetical* to the federal Act.

**B. Exception 4**

As the preceding discussion shows, the Proposed Order’s construction of the Public Utilities Act is in full accord with the principles of statutory construction. There is no basis for Staff’s *ipse dixit* that “there is simply *no* construction of any of the PUA’s tariffing provisions in either the *01-0539 Order* or in the *Proposed Order*.” Staff Exc. at 22. Likewise, the above-cited state and federal court decisions invalidating tariff requirements in the exact service quality context presented here refute Staff’s suggestion that the Commission can adopt Staff’s position “without concern of running afoul of federal preemption.” *Id.*

**C. Exception 5**

As the preceding discussion makes clear, the Proposed Order’s dispositive conclusion is that the specific statutory provision governing wholesale service quality, Section 13-712(g), does not require tariffing – a conclusion compelled by the Commission’s Order in Docket No. 01-

0539. As a result, that provision controls the general statutory provisions with regard to tariffing “services” even if those provisions extend to wholesale service quality plans.

Staff’s Exception 5 contends that AT&T Illinois argued, and the Proposed Order found, that the plan is an unbundled network element (“UNE”) rather than a service. At the outset, it bears noting that Staff’s Exception has no impact on the bottom line result. As noted above, even if the plan is a “service” within the meaning of the PUA’s tariffing provisions, the Commission still has discretion not to require tariffing based on the PUA’s specific provision on wholesale service quality plans – discretion it has already exercised in Docket No. 01-0539.

Even on its irrelevant terms, the premise of Staff’s Exception 5 is incorrect. AT&T Illinois did not argue that the plan is a UNE, and the Proposed Order does not make such a finding. Rather, the Proposed Order simply draws an analogy to UNEs, stating (at 20) that the plan “is not a service in much the same way that UNEs are not a service.” Staff itself invited that analogy. In its initial comments, Staff made a point of contending that tariffing the proposed plan would be desirable because the plan includes performance standards for UNEs, such as “UNE-P, UNE Loops, and DSL capable loops.” Staff Initial Comments at 10. Staff stressed “[t]he importance of . . . UNE Loops” – in fact, that was the only aspect of the plan that Staff discussed in any depth. *Id.* In so doing, Staff made the patently erroneous suggestion that loops and other UNEs are “services.” *Id.* (referencing “services, such as UNE Loops,” and “wholesale services such as resale, UNE-P, UNE Loops, and DSL capable loops”). In its reply comments, AT&T Illinois simply pointed out the undisputed fact that loops and other UNEs are not services, and noted that Staff’s emphasis on UNEs was inappropriate given that UNEs (and any terms related thereto) are clearly not services and clearly not subject to tariffing. Staff now concedes that UNEs are not services and are not subject to tariffing, as it must, given the Appellate Court’s

holding in *Globalcom v. ICC*, 347 Ill. App. 3d 592 (2004). Given Staff's own emphasis on the service quality plan's standards for UNEs, Staff is in no position to contend that "the *Globalcom* decision has nothing to do with a Wholesale Performance Plan." Staff Exc. at 23. The Commission should accordingly reject Staff's Exception 5.

**D. Exception 6**

Staff's Exception 6 first reiterates the erroneous view that the Commission somehow did not mean what it said in Docket No. 01-0539. Here, Staff opposes the Proposed Order's statement (at 19-20) that "the Commission has already considered the provisions of Section 13-501 and 13-116 that Staff argues for here, and found that tariffing of the Plan is not required." Plainly, the Commission *did* find that tariffing of the Plan is not required. There is no other way to read the Commission's holding, "[w]e decline to require [AT&T Illinois] to tariff Wholesale Service Quality Plans." Plainly, the Commission *did* consider Section 13-501 and 13-116 – as shown above, Staff asserted those very provisions in Docket No. 01-0539, and the Commission's Order cites and quotes those exact provisions as part of Staff's position. The Commission rejected Staff's position, holding that Staff had not "espoused any fact or law" to support its proposal, and adopted an alternative to tariffing. Staff's exception here boils down to the untenable view that the Commission did not really consider the arguments that its Order recites, simply because it did not recite each of Staff's statutory citations *again* in its "Commission Analysis and Conclusion." Having summarized Staff's position and rejected it as a whole, the Commission was under no obligation to repeat every Staff citation or go through every nuance of Staff's argument.

Staff then misses the boat in contending (at 25) that the Proposed Order should have addressed Staff's theory that the wholesale service quality plan is a "rate" that qualifies for tariffing under Section 13-116. There was no need for the Proposed Order to address an issue

that has absolutely no impact on the end result. Even if the plan is a “rate” at some indirect level, the General Assembly addressed wholesale service quality plans directly and specifically in a separate provision, Section 13-712(g). That provision, as the Commission has already decided, does *not* require tariffing, and by law it trumps the general statement in Section 13-116 even if it did apply.

**III. THE PROPOSED ORDER CORRECTLY REJECTS STAFF’S PROPOSED TARIFF MODIFICATION (STAFF EXCEPTIONS 3 AND 7)**

Staff acknowledges that “[a] tariff that permits carriers without interconnection agreements or carriers that have agreed to different plans in their interconnection agreements to take out of this tariff would *interfere* with the federal negotiation and arbitration process.” Staff Exc. at 19. Staff thus agrees that the existing tariff cannot stand as is, but contends that the Commission should adopt Staff’s proposed modification to solve the problem. The Proposed Order correctly rejects Staff’s proposal on multiple grounds.

First, and most fundamentally, the Commission already implemented a solution to the preemption problem in Docket No. 01-0539. It construed the PUA to not require AT&T Illinois to tariff its wholesale service quality plan, and it adopted an alternative: carriers learn about the Commission-approved plan through an informational submission by AT&T Illinois to the Manager of the Telecommunications Division, and if they decide they want the plan they can then implement that plan (or some other agreed-upon plan) through interconnection agreements. The system works (as evidenced by the numerous carriers whose agreements include the Commission-approved plan, AT&T Verified Comments at 13). There is absolutely no evidence of any problem with the system adopted by the Commission in Docket No. 01-0539 – in fact, no competing carrier has challenged the proposed withdrawal of the tariff. Thus, there is absolutely no basis for junking the approved system, imposing a tariff, and risking the conflict with federal

law that the Commission avoided, all based on Staff's assertion that it has come up with language that it *thinks* will satisfy the courts.

Second, Staff's proposal carries absolutely no benefit. Assume that Staff's proposed language actually accomplishes Staff's expressed intent, and that carriers can obtain the plan only if they have an interconnection agreement that gives them that exact plan. If so, the tariff would have absolutely no legal effect, because it would simply repeat what is already in the carrier's interconnection agreement. As the Proposed Order correctly reasons (at 23), that would not be a tariff at all but an informational document, like a newspaper. There is no need to maintain a tariff whose sole purpose would be to inform carriers of the plan approved by the Commission, because carriers already have ample notice of that plan. Pursuant to the Commission's orders in Docket No. 01-0539 and the rule adopted in that proceeding, AT&T Illinois has submitted its wholesale service quality plan to the Manager of the Telecommunications Division – a procedure that the Commission has already deemed sufficient. Just as the Commission recognized in Docket No. 01-0539, "Staff has not espoused any fact or law indicating that the use of tariffs . . . will be a more effective procedure" than the current rule.

Moreover, carriers have ample additional sources from which to learn about the Commission-approved plan. AT&T Illinois' website for CLECs has an entire section devoted to wholesale performance, in which AT&T Illinois advises CLECs of the Commission-approved plan and gives them a link to access a copy of the plan. AT&T Verified Reply Comments at 3, 7-8. AT&T Illinois' standard contract offer reflects the Commission-approved plan, and its negotiators offer the Commission-approved plan whenever a carrier asks about or expresses interest in a service quality plan. *Id.* at 3, 8. Further, the Commission's service quality orders are a matter of public record. Given these multiple disclosures, it is not surprising that Staff has

not provided any evidence that any carrier has had any problem locating the Commission-approved plan, and no carrier has objected to the withdrawal of the tariff.

But, Staff contends, its modified tariff would still have legal effect and “would be binding upon any who sought to buy out of the tariff.” Staff Exc. at 26. In what circumstances? Staff doesn’t say. Staff’s proposed tariff language doesn’t help: it simply says that it is limited to carriers that “are permitted to exercise their rights to the Plan tariff provisions in accordance with the terms and conditions of their interconnection agreements” Staff Exc. at 17. That merely begs the questions of what “rights” the carriers have and which carriers can “exercise” those rights “in accordance with” their interconnection agreements. And that brings us to yet another reason to reject Staff’s modified tariff: that it would “engender more confusion,” “open the door to more disputes” and thereby “drain the time and resources of the parties, the courts, and this Commission” (Proposed Order at 23) until everyone figured out when it applies.

Consider a carrier that has negotiated and signed an interconnection agreement that does not contain or reference the service quality plan approved by the Commission: perhaps the carrier has agreed to some other plan, or decided to dispense with a service quality plan altogether. That is, of course, the carrier’s choice. But let’s say that one of these carriers – or more – experiences buyer’s remorse and decides that it likes the Commission-approved plan better after all. The proposed tariff would give that carrier or carriers a vehicle to “pick and choose” that plan without having to negotiate an amendment to its interconnection agreement (a course that would require it to negotiate compensation to AT&T Illinois for changing the deal). The carrier would simply state that it wants to “exercise” its “rights” under the tariff, and then manufacture some argument as to how that exercise would be “in accordance” with its agreement. For example, it might allege that the agreement does not expressly preclude the

exercise of tariff rights, or that some generic language on tariffs or governing law affirmatively authorizes such exercise. Perhaps Staff intended to exclude a carrier in that situation, but vindicating that intent would require the undesirable prospect of dispute, litigation before the Commission and the courts, and the costs and uncertainties that litigation engenders.

The Commission need look no further than recent history to see that the above scenario is not “perilously speculative” as Staff suggests (at 29), but concrete. In Docket No. 99-0379, MCI argued that it could invoke a tariff to place certain service orders by facsimile, even though its interconnection agreement quite clearly stated – at MCI’s insistence – that all orders were to be placed electronically, and even though AT&T Illinois had devoted considerable resources for its part to the development of electronic ordering systems. The Commission quite properly rejected MCI’s claim, but MCI challenged that decision in both federal and state court. Ultimately, the Illinois Appellate Court upheld the Commission’s interpretation of the parties’ contract. AT&T Opening Comments Attach. 4. All told, it took *six years* for the Commission and AT&T Illinois to achieve the result that had been clearly set forth in the parties’ agreement all along. The Proposed Order correctly rejects Staff’s invitation to repeat that ordeal.

**A. Exception 3**

Staff first criticizes the Proposed Order for not “recogniz[ing] the obvious benefits of Staff’s proposal.” Staff Exc. at 18. As shown above, the Proposed Order correctly finds (at 24) that Staff’s proposal “will bring about no benefit.” The only benefit Staff offers now is Staff’s belief that its modified language *might* satisfy the courts – but the Commission has already adopted a solution to that issue in Docket No. 01-0539, and Staff does not provide any evidence (or even claim) that its proposed tariff is better in any respect.<sup>5</sup>

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<sup>5</sup> Staff also complains (at 27) that the Proposed Order “summarily dismissed” the other benefits of tariffing that it alleged in its comments. The Proposed Order (at 21-22) correctly

Instead of responding to the Proposed Order’s reasoning, Staff tries to mischaracterize AT&T Illinois’ position. Contrary to Staff’s assertion, AT&T Illinois did *not* “acknowledge[] that Staff’s proposed language” modifying the tariff “adequately addresses any potential federal preemption problem.” Staff Exc. at 18. Rather, AT&T simply pointed out that *Staff* recognized the tariff could not stand as written and that *Staff* thereby acknowledged there was a “federal preemption problem.” AT&T Illinois never acknowledged that Staff’s modification solved the problem. To the contrary, AT&T Illinois said that Staff’s proposal was “still unnecessary, unworkable, and contrary to the Commission’s prior holding” in Docket No. 01-0539. AT&T Verified Reply Comments at 2. AT&T clearly explained the tariff would “simply invite[] future harm and uncertainty in carrier relations [*e]ven as modified*” (*id.* at 13) and quite plainly said that it “cannot conceive of any meaningful alternative that would not also bypass interconnection agreements and invite disputes” (*id.* at 14-15). Staff is simply trying to put words in AT&T Illinois’ mouth – and ignoring the words AT&T Illinois really said.

Staff argues that AT&T Illinois “was not very helpful” because it did not suggest alternative language to save Staff’s proposal. Staff. Exc. at 18. But AT&T Illinois noted that it could not conceive of any alternative language that would have any benefit or prevent any of the problems demonstrated above. As the Proposed Order correctly notes, either the tariff has legal effect or it doesn’t: if it has no legal effect, it is of no value, but if it has independent legal effect it will invite carriers to try to leave their interconnection agreements and go to where the grass

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rejects each of those assertions, with a detailed explanation each time. For example, Staff presented absolutely zero evidence to support its contention that absent a tariff AT&T Illinois might “withhold information about the plan” to prolong contract negotiations; by contrast, AT&T Illinois noted that the “Plan is on file with the Commission” pursuant to the procedure adopted in Docket No. 01-0539, and presented ample evidence that it “provides the notice required by rule and much more” through “website postings and other contacts.” Staff does not contest the Proposed Order’s reasoning on any of these items.

seems greener. AT&T Illinois is under no obligation to help salvage the unsalvageable dilemma inherent in Staff's proposal, particularly given that the Commission has already adopted a solution in Docket No. 01-0539.

**B. Exception 7**

Staff's Exception 7 first takes issue with the Proposed Order's reasoning that a tariff that *only* provides information – as Staff's modified tariff proposal would do *if* it truly applied only to carriers whose interconnection agreements already include the exact same plan that is recited in the tariff – would “offer[] no benefit.” Proposed Order at 23. Staff misses the point in protesting that all “[t]ariffs are informational.” Staff Exc. at 26. True, tariffs do provide information, but the Proposed Order recognizes (at 23) that is not the *only* thing they do; they are also legally binding documents like statutes (as Staff admitted at the hearing, Mar. 30 Tr. 34). Any informational benefit has already been achieved by the alternative filing procedure that the Commission adopted in lieu of tariffing in Docket No. 01-0539, a point that Staff did not dispute in that proceeding and does not dispute here.

Meanwhile, to the extent Staff's tariff would also be legally binding on AT&T Illinois – and Staff appears to suggest that it would – it would not be a benefit but a detriment. As described above, such a tariff could serve only to entice carriers that do *not* have the plan in their interconnection agreements to try obtaining that plan through the tariff (just as the tariff on fax ordering enticed MCI to try evading its contractual bar on such orders in the above-described Docket No. 99-0379). Staff contends that “there is no evidence to support such a notion” but that is the only possible effect – because if carriers dutifully stand by their contracts as they are supposed to do, the tariff would do nothing and serve no purpose. Moreover, the six-year MCI proceeding provides ample real-world evidence of the notion and of its undesirable effects. Staff's assertion that the *end result* – that MCI was barred from invoking the tariff – accords with

its *intended result* here does not help Staff's position. The real point is that it took six years, substantial public and private resources, plus the uncertainties of litigation to achieve that result in the MCI proceeding. Having seen the end to that ordeal just last year, the Commission should not invite a reprise here, and it should not "applaud[]"any CLECs who wish to use the legal system in that manner. Staff Exc. at 29.<sup>6</sup>

Staff is also off base in contending that the Court's order in MCI's state appeal is "not precedential" and "may not be cited." Staff Exc. at 28-29 & n.28. The Proposed Order does not cite the Appellate Court's *decision* as precedent. Instead, the salient points are (i) the fact that the dispute arose in the first place, which demonstrates that carriers will attempt to invoke a tariff if it is available, even if such action is inconsistent with their interconnection agreements, and (ii) the length of the proceedings it took to resolve the dispute, which demonstrates why the Commission should avoid laying the ground for carriers to file similar cases.<sup>7</sup>

#### **IV. STAFF'S REMAINING EXCEPTIONS ALSO LACK MERIT (STAFF EXCEPTIONS 8-12)**

##### **A. Exception 8**

Staff's Exception 8 professes that "Staff is bewildered" by the Proposed Order's holding that a party to an interconnection agreement "should be limited to a single source of legal rights." Staff Exc. at 31. There is nothing novel about the principle that a CLEC should have an

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<sup>6</sup> Staff is similarly incorrect in arguing (at 30) that the Proposed Order assumes that AT&T Illinois is "incompetent" and "not capable of negotiating appropriate contract language to protect its interests." Not at all. AT&T Illinois negotiated protective contract language and won the MCI proceedings. The problem is that enforcing the appropriate language and defeating MCI's challenge consumed years of time and resources – not just those of AT&T Illinois, but also the time and resources of the Commission and the courts. The Proposed Order's intent is not to "interven[e] on AT&T's future behalf" but to intervene on behalf of the public interest in protecting contracts and avoiding unnecessary litigation.

<sup>7</sup> Shortly before the filing date of this reply, Staff filed a motion to strike portions of AT&T Illinois' Verified Reply Comments (which were filed over four months ago) on the same ground. The motion is baseless, and AT&T Illinois intends to file a separate response.

interconnection agreement (after all, that is a conclusion that this Commission and the courts all share) or that it should be bound by the agreement that it signed, with respect to the matters governed by that agreement. Indeed, Staff itself purports to endorse the same axioms in contending that its proposed tariff would apply only to carriers that were entitled to the same plan by virtue of their interconnection agreements. The fact that Staff now challenges the primacy of interconnection agreements only undermines Staff's proposal.

Whatever metaphysical rights a party might have, and whatever the ultimate source may be (*e.g.* the 1996 Act or an FCC rule), when it comes to the matters addressed by the 1996 Act those rights must be carried out through interconnection agreements. Staff's examples simply prove the Proposed Order's conclusion and rebut Staff's own opposition. Consider Staff's discussion of "change of law provisions." Staff Exc. at 31. While an interconnection agreement may reference or incorporate changes in some law outside the contract, that does not mean that such law is an independent or legally binding source of rights that operates outside the agreement. Quite the contrary: it means that the interconnection agreement is the real embodiment of the parties' rights, and that the "law" is simply a part of that agreement. Thus, when AT&T Illinois asked the Commission to enforce the change-of-law provisions *in* its interconnection agreements, it simply enforced the rights that are embodied in the interconnection agreements in which those provisions appear. And while the Commission's decision in Docket Nos. 05-0154 *et al.* contains dictum suggesting that CLECs may have statutory "rights" under section 271 of the federal Act or section 13-801 of the PUA, it refused to grant any award to those CLECs that it determined

did not have the right to such an order under their interconnection agreements. June 2, 2005 Order, Docket Nos. 05-0154 *et al.*, at 27-28, 32-33.<sup>8</sup>

**B. Exception 9**

Staff Exception 9 begins by challenging the Commission's Order in Docket No. 01-0539, contending that it "stand[s] for unlawful Commission Actions" and thereby dropping Staff's façade that the Commission's Order in that proceeding somehow did not decide the matter presented here. As described above, the Commission's Order and the Proposed Order that follows its holding are both lawful and fully consistent with governing statutes.

From there, Staff resorts to another gross mischaracterization of AT&T Illinois' position. Staff contends (at 33) that "AT&T attacked Staff for not appealing the *01-0539 Order*." Staff does not quote or cite the alleged attack, because AT&T Illinois did not make it. Rather, AT&T Illinois pointed out that no *party* appealed the Commission's order – in particular, not one CLEC appealed, even though CLECs would be the supposed beneficiaries of Staff's proposed tariff. AT&T Verified Comments at 2, 12. Likewise, not one CLEC even intervened in this proceeding, even though the CLEC community had notice of AT&T Illinois' filing. The Proposed Order correctly recognizes these facts to be "highly persuasive evidence" that Staff's tariff has no real benefit: a view that Staff concedes (at 33) by saying that the proceeding "did not concern an issue that hit the CLECS in the wallet." Staff's rationalization that CLECs have "ever increasingly scarce resources" is simply a theory that Staff "speculatei[d]." *Id.* There is no

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<sup>8</sup> AT&T Illinois disagrees with the Commission's separate determination that some CLECs' interconnection agreements *did* include rights from section 271 and section 13-801, and has sought judicial review. While AT&T Illinois and the Commission may have disagreed in that proceeding as to what "rights" are included in specific contracts, the important point for present purposes is that the Commission's order did not attempt to enforce rights that are *not* included in those contracts.

evidence to support Staff's view; to the contrary, the costs of intervention would be *de minimis*, and CLECs have demonstrated that they are no wallflowers when it comes to litigation.

### C. Exception 10

Staff contends (at 34) that the Proposed Order “inappropriately assigns Staff the burden of proof.” However, the words “burden of proof” do not appear anywhere in the Proposed Order. That’s because Staff’s discussion of “proof” is entirely out of place. *With Staff’s agreement*, the dispute in this proceeding was submitted to the ALJ as a pure question of law, without any fact issues on which “proof” would be required or a burden of proof assigned. See Proposed Order at 1 (parties agreed that cross-examination was not necessary, and hearing consisted of oral argument), 19 (“There are, as we see it, no facts in dispute”).

The proposed language challenged by Staff simply reflects the legal requirement that the Commission cannot modify its ruling in Docket No. 01-0539 without “a showing of change in the law, fact, or circumstance.” Proposed Order at 19. The Proposed Order correctly states the law. If “there are no findings that there were any errors of law or fact in the [original] order, or that facts or circumstances have changed . . . . the Commission [i]s without authority to effectively rescind” its prior orders. *Union Elec. Co. v. Illinois Commerce Comm’n*, 39 Ill. 2d 386, 395 (1968) (reversing order that had tried to rescind prior order granting certificate). Staff is completely wrong to suggest (at 34) that this principle “applies only if a party seeks to open a closed case” (although in effect, Staff *is* trying to re-open a closed case, Docket No. 01-0539, at any rate). Rather, the same principle applies in the precise context asserted by Staff (at 34), where the Commission tries to “amend one of its [past] orders” under 220 ILCS 5/10-113. *Union Electric*, which held that the Commission is “without authority to effectively rescind” a decision without a change of law or fact, or a finding of factual or legal error, was decided under

the predecessor to Section 10-113, which contains the exact same language as the language quoted by Staff. 39 Ill. 2d at 391 (quoting Ill. Rev. Stat.1965, chap. 111 2/3, ¶ 71, § 67).

**D. Exception 11**

Staff Exception 11 contests the Proposed Order’s ultimate conclusion that AT&T Illinois need not tariff the plan, but offers no new argument. It is simply a rehash of Staff’s other exceptions, and it should be rejected for the reasons set forth above.

**E. Exception 12**

Staff contends that the Proposed Order’s summary of Staff’s position “omits important arguments Staff made” but fails to identify those arguments. Staff Exc. at 36. Instead, Staff simply seeks to replace the proposed summary with one of its own making. The Commission should reject this exception out of hand.

Similarly, the Commission should reject Staff’s argument that the Proposed Order’s recitation of the history of AT&T Illinois’ service quality plan “is absolutely immaterial to the Commission’s resolution of the issue before it.” Staff Exc. at 36. The entire thrust of AT&T Illinois’ proposed withdrawal and of the Proposed Decision is to carry out history (namely, the Commission’s decision in Docket No. 01-0539, and the Appellate Court decisions invalidating predecessor service quality tariffs). In this case, history is not only material but dispositive, and the Commission is certainly not free to ignore it.

As for Staff’s view that the Proposed Order’s recitation is “characterized in a biased manner” – a curious complaint given the unusually strident tone of Staff’s own exceptions brief – Staff does not point to any specific language or explain why that language is “biased.” Staff Exc. at 36. That the history of the tariff would “lead the reader to only one inevitable conclusion” (*id.*) means only that the history is accurate and that the Proposed Order’s conclusion *is* inevitable.

## CONCLUSION

The Proposed Order faithfully carries out the Commission's decision in Docket No. 01-0539. In taking exception to the ALJ's recommendation, Staff is merely seeking to relitigate a question it has already lost and to force a conflict with federal law that the Commission need not fight and cannot win. The Commission should adopt the Proposed Order.

Dated: June 14, 2006

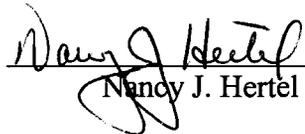
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**CERTIFICATE OF SERVICE**

I, Nancy J. Hertel, an attorney, certify that a copy of the foregoing **REPLY BRIEF ON EXCEPTIONS OF AT&T ILLINOIS** was served on the following parties by U.S. Mail and/or electronic transmission on June 14, 2006.

  
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