

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
vs)	
Illinois Bell Telephone Company)	Docket 06-0027
)	
Investigation of specified tariffs declaring certain)	
services to be competitive telecommunications services)	

REPLY BRIEF OF AT&T ILLINOIS

PUBLIC

Louise A. Sunderland
Karl B. Anderson
Illinois Bell Telephone Company
225 West Randolph, Floor 25D
Chicago, Illinois 60606
(312) 727-6705
(312) 727-2928

Dated: June 23, 2006

TABLE OF CONTENTS

- I. INTRODUCTION AND SUMMARY OF POSITION1**
- II. COMPETITION FOR LOCAL RESIDENTIAL SERVICES IS ROBUST AND CLAIMS OF DECLINE ARE UNSUPPORTED AND SPECULATIVE (SECTION 13-502(B)).....5**
 - A. CLEC RESIDENTIAL LINES DID NOT “DROP PRECIPITOUSLY” IN 2005, NOR IS THERE ANY EVIDENCE OF A MATERIAL DECLINE IN CLEC MARKET SHARE...6**
 - 1. Competition Did Not Decline In 20056**
 - 2. By Contrast, AT&T Illinois’ Residential Lines And Revenues Continued Their Five-Year Decline10**
 - B. THERE IS NO EVIDENCE THAT COMPETITION WILL DECREASE IN THE FUTURE12**
 - 1. The UNE-P Is Not Essential To CLEC Competition.....14**
 - 2. Alternatives To The UNE-P16**
 - a. Facilities-Based Competition16**
 - b. Local Wholesale Complete18**
 - c. UNE-L22**
 - d. Resale24**
 - C. CLECS HAVE MORE THAN AMPLE SIZE AND GEOGRAPHIC COVERAGE24**
 - D. THE E9-1-1 DATA RELIED ON BY AT&T ILLINOIS IS RELIABLE AND CONSISTENT WITH CLEC-REPORTED DATA.28**
 - E. WIRELESS AND STAND-ALONE VOIP SERVICE ARE SUBSTITUTES FOR RESIDENTIAL LOCAL EXCHANGE SERVICE.....31**
 - 1. Wireless.....31**
 - 2. VoIP.....34**
- III. RESIDENCE LOCAL EXCHANGE SERVICE IS REASONABLY AVAILABLE AT COMPARABLE RATES, TERMS AND CONDITIONS (SECTION 13-502(C)(2))36**
 - A. STAND-ALONE SERVICE36**
 - B. SERVICE PACKAGES40**
- IV. A COMPETITIVE CLASSIFICATION COMBINED WITH THE AT&T ILLINOIS/CUB JOINT PROPOSAL WILL PROMOTE COMPETITION AND IS IN THE PUBLIC INTEREST (SECTION 13-502(C)(5))48**
 - A. COMPETITION FOR AT&T ILLINOIS’ LOW USE CUSTOMERS48**
 - B. THE JOINT PROPOSAL52**

C.	RATE REBALANCING	57
V.	AT&T ILLINOIS' RETAIL RATES SATISFY SECTION 13-505.1.....	60
VI.	CONCLUSION	64

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
vs)	
Illinois Bell Telephone Company)	Docket 06-0027
)	
Investigation of specified tariffs declaring certain)	
services to be competitive telecommunications services)	

REPLY BRIEF OF AT&T ILLINOIS

Illinois Bell Telephone Company (“AT&T Illinois” or the “Company”), by its attorneys, hereby submits its Reply Brief in response to the Initial Briefs filed by the Staff of the Illinois Commerce Commission (“Staff”), the People of the State of Illinois (the “Attorney General”), the Cook County State’s Attorney’s Office (“Cook County”), the City of Chicago (“City”), and Data Net Systems, L.L.C. and TruComm Corporation jointly (“Data Net/TruComm”).

I. INTRODUCTION AND SUMMARY OF POSITION

The fundamental question in this proceeding is simple and straightforward: are there alternative providers of local exchange service throughout AT&T Illinois’ service territory in the Chicago LATA? The answer is just as simple and straightforward: indisputably *yes*. Competition is robust and pervasive. There are now over 75 traditional wireline CLECs (including cable companies), wireless carriers and VoIP providers operating in the Chicago LATA. These providers are active in all of AT&T Illinois’ exchanges, using a variety of technology platforms, and are successful. The CLEC and wireless carriers alone have captured at least 24% of AT&T Illinois’ residence access lines in the Chicago LATA. AT&T Illinois has lost more than a million lines – 30% of the lines it used to serve in this marketplace – since 2001 and these losses continue daily. Thus, consumers are demonstrating through their *actions* that

they consider these competitors to be providing functionally equivalent and completely acceptable alternatives to AT&T Illinois' local exchange service – the best evidence that could be adduced. Under any fair analysis, this marketplace is competitive.

Although there has been much “sound and fury” from the governmental intervenors and Data Net/TruComm over the state of competition, their positions ultimately reduce to gloomy predictions that, even if the marketplace is competitive *now*, it is on the verge of collapse. In their zeal to defeat this competitive classification, they cherry pick among the evidence, they provide misleading comparisons and, in some instances, they actually misstate the record. Fundamentally, their predictions are based on a highly selective view of the future in which they exaggerate every potentially negative fact and ignore every positive fact. Theirs is not a balanced or fair view of the marketplace – it is intended to advance their strategic goals in this docket and it should be viewed in that light by the Commission.

At this stage of the proceeding, the real issue is not whether competition exists but how to address the perceived lack of competition for residence customers who make little or no use of the network. This lack of interest on the part of competitors is due, in large part, to economic forces and historical ratemaking policies which have kept certain of AT&T Illinois' local exchange rates below a market level. In AT&T Illinois' view, this is not an appropriate issue under Section 13-502: the statute does not require, or even support, such a granular analysis of AT&T Illinois' customer base to support a competitive classification. This competitive classification will, in and of itself, allow AT&T Illinois to make appropriate rate changes to address the problem. However, given perceived concerns about their potential impact on customers, AT&T Illinois, CUB and Staff developed alternative proposals that will ensure a smooth transition to a more competition-friendly rate structure: *i.e.*, the AT&T Illinois/CUB

Joint Proposal, which Staff also concludes is worthy of consideration by the Commission, and Staff's rate rebalancing proposal, which was made before the Joint Proposal and remains Staff's preference.

The Joint Proposal is clearly the best, most efficient approach to this problem. It provides a four-year period over which the pricing problems which have made low use customers unattractive to competitors will be corrected in a reasonable, measured fashion. It also creates service safe harbors for those customers for whom rate increases would present difficulties and provides numerous other public interest benefits. Staff supports the Joint Proposal as a legitimate alternative to its rate rebalancing plan and acknowledges that the Joint Proposal will accomplish the same goals, but more quickly and in a manner more consistent with the market. On the other hand, rate rebalancing brings with it negative consequences that outweigh the positive benefits that Staff claims for it. Thus, although Staff still prefers rate rebalancing, an objective weighing of the two alternatives clearly favors the Joint Proposal. The Commission should approve the competitive reclassification, conditioned on AT&T Illinois' compliance with the Joint Proposal.

The governmental intervenors have contributed nothing constructive to this search for solutions – in fact, they have contributed nothing *at all*. The Attorney General, Cook County, and the City remain firmly wedded to AT&T Illinois' outmoded and now clearly dysfunctional Alternative Regulation Plan, which has been a major factor in the decline in competition for low use customers. By simply digging in their heels in opposition to the competitive classification, insisting on continuation of the Plan and objecting to every alternative proposed by others, they are ensuring that competition will *never* develop for low use customers. They refuse to accept that the world has changed and that regulatory policies need to adapt along with these changes.

The fact that the Alternative Regulation Plan worked well in the mid-1990s before local competition developed tells the Commission nothing about appropriate regulatory policies for 2006 and beyond. The Attorney General, Cook County and the City are consigning themselves to irrelevance by refusing to move beyond old paradigms.

Data Net/TruComm present a special case. It has been a mystery to AT&T Illinois why they alone, of all CLECs in Illinois, opposed this competitive classification. Any rational CLEC would welcome a more market-based approach to pricing AT&T Illinois' local exchange service. Finally, after months of litigation, Data Net/TruComm have disclosed their real agenda: they are asking this Commission to condition the competitive classification on the indefinite continuation of their preferred wholesale serving vehicle, the UNE-P. This docket is not, and should not be, a referendum on the future of the UNE-P. The era of the UNE-P is over and done with as a matter of national policy. On June 16, 2006, the D.C. Circuit Court of Appeals unequivocally affirmed the FCC's Order putting an end to the UNE-P over the last ditch round of objections by the CLECs.¹ As a result, Illinois is the only state in the country where the CLECs still have access to the UNE-P and its future in Illinois is currently the subject of ongoing litigation in federal court. Rather than allowing this process to play out, Data Net/TruComm apparently decided to try to hijack this proceeding and hold the competitive classification hostage to their private business agenda. The Commission should disregard such tactics.

Most of the issues raised by Staff and the other parties were addressed in AT&T Illinois' Initial Brief. To avoid repetition, the Company will not restate positions and arguments unless necessary to respond to these issues. Thus, failure to address every argument raised by Staff or the other parties in this Reply Brief should not be construed as agreement.

¹ *Covad Comms. Co. v. FCC*, No. 05-1095 *et al.* (D.C. Cir., June 16, 2006).

II. COMPETITION FOR LOCAL RESIDENTIAL SERVICES IS ROBUST AND CLAIMS OF DECLINE ARE UNSUPPORTED AND SPECULATIVE (SECTION 13-502(B))

As demonstrated in AT&T Illinois' Initial Brief, AT&T Illinois' basic local exchange service faces significant competition from over 75 CLECs, as well as numerous wireless and independent Voice over Internet Protocol ("VoIP") providers in the Chicago LATA. The CLEC and wireless carriers alone have captured approximately 24% of AT&T Illinois' residential access lines in the Chicago LATA. (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 554-60). And even that number understates the true extent of competition, for it does not include "usage substitution" to wireless carriers or customers that obtain service from non-CLEC VoIP providers. (*Id.*, lines 596-608, 657-59). While competitors have been garnering this 24% market share, AT&T Illinois has lost more than a million of its residential access lines in the Chicago LATA (30% of the total), and the rate of loss continues to grow. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 313-18). By any measure, AT&T Illinois faces stiff competition from numerous competing providers of basic local exchange service, more than enough to satisfy Section 13-502.

Faced with these facts, the Attorney General, Data Net, and others urge the Commission to resort to speculation. Relying on a slew of misleading figures and false comparisons, they contend that CLEC competition is in precipitous decline and that the Commission should not reclassify AT&T Illinois' services when the end of competition is so near.² The evidence refutes these "sky is falling" claims. Indeed, residential competition today is the strongest it has ever been. Competitor market share is at or near the highest level ever achieved and the predominant form of competition – facilities-based – is the most effective and enduring kind. Modes of

² AT&T Illinois notes and supports Staff's brief where it states that "Dr. Selwyn's and Mr. Gillan's bare conjecture regarding the future state of competition should play no role in the Commission's decision." (Staff Init. Br. at 63).

competition that do not rely on AT&T Illinois at all, such as cable and wireless, are strong and growing by leaps and bounds, and UNE-P, which the D.C. Circuit has found twice to be a “completely synthetic” form of competition,³ is being replaced by more innovative and effective competitive methods.

Moreover, even if CLECs have endured some short-term line loss, the only possibly relevant question here would be whether those lines returned to AT&T Illinois. They have not. AT&T Illinois continues to lose as many or more residential access lines than the CLECs, indicating that customers leaving CLECs are switching to wireless, VoIP, or other service providers. Those lines are still part of the aggregate competition that AT&T Illinois faces, and thus support reclassification. Furthermore, as Staff recognizes, the CLECs’ arguments about market share ultimately don’t mean much, for the pertinent question is the status of competition today, and “[r]egardless of which source of information is examined, multiple competitors were, as of December 2005, providing residential local exchange service . . . in every exchange in MSA-1,” thus satisfying Section 13-502(b). (Staff Init. Br. at 42). Nevertheless, because of the intervenors’ many misleading and inaccurate claims, AT&T Illinois is compelled to set the record straight in the following sections, by refuting the claims of the demise of CLEC competition.

A. CLEC RESIDENTIAL LINES DID NOT “DROP PRECIPITOUSLY” IN 2005, NOR IS THERE ANY EVIDENCE OF A MATERIAL DECLINE IN CLEC MARKET SHARE

1. Competition Did Not Decline In 2005

The Attorney General claims that the CLEC residential line market share in the Chicago LATA decreased from 28% to 17%, or perhaps as low as 13.3%, from December 2004 through September 2005. (AG Init. Br. at 8-11). That, however, compares apples to oranges to bananas,

³ *Covad Comms. Co. v. FCC*, No. 05-1095 *et al.*, slip op. at 35 (D.C. Cir., June 16, 2006), relying on *USTA I*, 209 F.3d at 424.

for all three figures come from different sources. The 28% figure comes from a Commission report on local competition in 2004; the 17% figure comes from AT&T Illinois witness Wardin's direct testimony; and the 13.3% figure comes from the data provided by CLECs to Staff in Docket 06-0028. (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 334-35, 685-89; Staff Ex. 2.0 Rev. (Zolnierek), lines 1520-25). Differences in the underlying data explain the different results. The 28% figure included pre-merger lines of AT&T Illinois, while Mr. Wardin's 17% figure did not. (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 736-44). When the pre-merger AT&T lines are removed, the Commission report's figure would have been *****BEGIN CONFIDENTIAL***** *******END CONFIDENTIAL*****, much closer to Mr. Wardin's 17%. (*Id.*, lines 741-44). The remaining 5% difference can be explained by the use of different data sources, in that the Commission report relied on CLEC-reported data whereas AT&T Illinois used its wholesale records and the E9-1-1 database. (*Id.*, lines 747-57). The data collected by the Commission for purposes of its report is likely to be more complete, and the fact that it revealed a higher CLEC market share shows the conservative nature of AT&T Illinois' 17% figure. (*Id.*, lines 755-57). Based on E9-1-1 and wholesale records data compiled using the same method used to compile such data as of September 30, 2005, the CLEC share of residential lines in the Chicago LATA at December 31, 2004 (treating pre-merger AT&T CLEC lines as AT&T Illinois') was 17.9%, compare to the 17% CLEC share of such lines at September 30, 2005.⁴

The Attorney General's alleged 13.3% market share, on the other hand, is the result of reporting (in response to a Staff data request in Docket 06-0028) from just 13 of the 78 CLECs that are active in the Chicago LATA, and thus necessarily understates the extent of competition.

⁴ As indicated in Data Net Cross Exhibit No. 4 (Response to Data Net Data Request No. 2.3), at December 31, 2004, the number of non-affiliated CLEC lines (583,366) divided by the total number of Chicago LATA wireline residential access lines (3,250,552) equals 17.9%. The total number of Chicago LATA wireline residential access lines is equal to the sum of the non-affiliated CLEC total (583,366), the pre-merger AT&T CLEC total (212,218) and the AT&T Illinois total (2,454,968).

(Staff Init. Br. at 41). And even the CLECs that reported data were undercounted. Comcast's data substantially understated its residential lines, for it excluded second lines and customers purchasing its IP-based Digital Voice Service,⁵ and the lines Staff attributed to Sprint and other carriers were significantly too low because they excluded the lines they provide to other competing carriers at wholesale. (AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 177-238). Mr. Wardin demonstrated that when one adjusted the CLEC-reported data to account for these shortcomings, the CLECs actually had *more* lines than AT&T Illinois had estimated, again proving the conservative nature of Mr. Wardin's 17% figure. (*Id.*, lines 240-75).⁶

The Attorney General similarly claims there was a steep decline in CLEC competition in the fourth quarter of 2005 (September 30 through December 31), during which CLECs lost *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** of their residential market share. (AG Init. Br. at 9). That is false. In his rebuttal testimony, Mr. Wardin updated his analysis with data through the end of 2005 and found that the CLEC residential market share as of December 31, 2005 was 16.4%, a decline of about ½ of one percent since September 2005. (AT&T Ex. 1.1 Rev. (Wardin), lines 125-26).⁷ As Mr. Wardin showed, all of that small decline came from a decrease in combined totals of UNE-P and Local Wholesale Complete ("LWC") lines, whereas CLEC facilities-based and resale lines actually increased substantially in the fourth quarter of 2005, growing by *****BEGIN CONFIDENTIAL*******

⁵ Staff agrees. (Staff Ex. 5.0 (Zolnierek), lines 114-119).

⁶ Staff similarly noted that, if Comcast's lines are excluded from the comparison between the E9-1-1 data and the CLEC-reported data, the total number of lines reported to Staff by carriers that reported information by exchange actually *exceeded* the number of lines reported by AT&T Illinois for those same carriers. (Staff Ex. 5.0 (Zolnierek), lines 123-137).

⁷ The Attorney General's *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** figure therefore does not represent a market-share loss. It most likely is intended to be a rounding up of the *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** in AT&T Ill. Ex. 1.2, lines 317-18, which shows the percentage reduction in the total number of CLEC *lines*, *not* market share, lost in the fourth quarter of 2006.

END CONFIDENTIAL, respectively.⁸ (AT&T Ill. Ex. 1.2 (Wardin), lines 317-18).

And that trend continued in the first quarter of 2006, with facilities-based CLEC lines and LWC lines growing by ***BEGIN CONFIDENTIAL*****

END CONFIDENTIAL, respectively. Compare AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 528-31 with AT&T Ill. Ex. 1.2 (Wardin), lines 317-18.⁹

In short, the fourth quarter of 2005 saw at most a ½ of one percent decline in CLEC residential market share. The decline was already on the mend in the first quarter of 2006 with the growth in CLEC facilities-based and LWC lines. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 528-31).¹⁰ As Staff recognized, the mere fact that CLEC market share declined slightly in one year is not evidence of any long-term trend. (Staff Ex. 5.0 (Zolnierrek), lines 155-163). Moreover, in the only true apples-to-apples comparison in the record, using the same methodology and sources for both 2004 and 2005, Mr. Wardin showed that for the entire year of 2005, estimated competitor market share declined only about 1%, and as of December 31, 2005 AT&T Illinois' competitors had captured about 24% of the entire residential market in the Chicago LATA. (AT&T Ill Ex. 1.1 Rev. (Wardin), lines 127-29; Data Net Cross Ex. 4 (attached to Gillan Supplemental Rebuttal testimony), responses to Data Net DR 2.3(a) and (b)). While this is technically a decline, it is hardly a steep one, nor is it proof of a trend.

⁸ The Attorney General (at 10) similarly claims that CLECs lost 34,730 lines the fourth quarter of 2005, but again, this is simply wrong. The 34,730-line figure appears to be an approximation of the reduction in the combined number of UNE-P and LWC during the fourth quarter of 2005. (See AT&T Ill. Ex. 1.2 (Wardin), lines 317-18 (showing reduction in LWC and UNE-P lines)). What the Attorney General ignores, however, is that CLECs also added a substantial number of facilities-based and resale lines in the fourth quarter of 2005, which almost entirely offset the losses. *Id.*

⁹ ***BEGIN CONFIDENTIAL*****
*****END CONFIDENTIAL***.

¹⁰ AT&T Illinois presented data on the CLEC residential market share as of March 31, 2006 in Ex. 1.5 Cor. (Wardin). That testimony was stricken. AT&T Illinois has submitted an offer of proof showing the competitive data as of March 31, 2006, which it would have placed in the record if allowed to do so, and will file a petition for interlocutory review.

2. By Contrast, AT&T Illinois' Residential Lines And Revenues Continued Their Five-Year Decline

Stepping back to look at the big picture, the alleged loss of CLEC residential access lines would be relevant only if most or all of these lines were returning to AT&T Illinois. But they are not. During 2005, a period in which CLECs other than AT&T lost approximately 80,000 lines, AT&T Illinois itself lost approximately 40,000 lines. (Tr. 575-576 (Wardin); AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 319-18). Similarly, during the fourth quarter of 2005, when the number of CLEC lines decreased by 13,683, the number of AT&T Illinois lines decreased by 12,083 (including a *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** decrease in the number of primary lines). (AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 835-843).

Accordingly, the lines lost by CLECs in 2005 have not been reverting back to AT&T Illinois. Rather, they most likely reverted to providers of cable, wireless, and VoIP services. (*Id.*) (*See, e.g.,* AT&T Ill. Ex. 1.5 Cor. (Wardin) at Tables 1-4A; Data Net Cross Ex. 8, Table 14 (showing continued wireless growth in Illinois)). This is yet more proof that the market is competitive.

The Attorney General, however, claims that AT&T Illinois' loss of residential access lines is reversing and that any line losses are more than offset by gains in the sale of DSL service. (AG Init. Br. at 17-18). As for the first claim, AT&T Illinois' number of primary residential access lines has declined substantially ever since 2001, and while the number of residential primary access lines *****BEGIN CONFIDENTIAL******* *****END CONFIDENTIAL*****, that *de minimis* increase has already been more than offset by the *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** in AT&T Illinois' primary residential access lines in the first quarter of 2006. (AT&T Ill. Ex. 1.5 Cor. (Wardin) at Table 4A). Furthermore, AT&T Illinois' total residential access lines *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** in the

first quarter of 2006, in which AT&T Illinois lost another *****BEGIN CONFIDENTIAL*****
*******END CONFIDENTIAL*****. (*Id.*,
Tables 4 & 4A). Moreover, AT&T Illinois' daily rate of loss of residential access lines *******
BEGIN CONFIDENTIAL***END CONFIDENTIAL***** from September
2005 to December 2005 and even more in the first quarter of 2006. (AT&T Ill. Ex. 1.1 Rev.
(Wardin), lines 682-87).

The Attorney General's claim that these losses are offset by the sale of DSL service on
primary lines is frivolous. Even if one accepted the Attorney General's theory, the loss of a
primary residential access line cannot be offset by the sale of DSL service, and AT&T Illinois
has lost approximately *****BEGIN CONFIDENTIAL*****END**
CONFIDENTIAL*** primary residential access lines since 2000. (AT&T Ill Ex. 1.5 Cor.
(Wardin) at Table 4A). Further, the Attorney General's claim rests on Dr. Selwyn's assertion
that AT&T Illinois' total "network connections" are increasing. (AG Init. Br. at 17-18). As
AT&T Illinois' Dr. Taylor and Mr. Wardin explained, however, counting total "network
connections" is meaningless for analyzing the state of residential *wireline* competition. DSL and
video services are provided by a separate affiliate in Illinois, so a loss of a residential access line
to them is still a loss for AT&T Illinois. (AT&T Ill. Ex. 3.1 (Taylor), lines 773-80; AT&T Ill.
Ex. 1.1 Rev. (Wardin), lines 700-03, 709-20).

The Attorney General also relies on misleading financial data to claim that AT&T Illinois
still reaps monopoly profits. (AG Init. Br. at 19-20). Yet again, the Attorney General plays fast
and loose with the numbers. For example, the Attorney General claims that from 2004 to 2005,
AT&T Illinois' "return on shareholder equity increased from 14.17% to 21.04%." (AG Init. Br.
at 19). As Mr. Wardin showed, however, those figures are not for AT&T Illinois' local

exchange services, which are the subject of this proceeding. Rather, they represent earnings for *all* of AT&T Illinois' operations, both intrastate and interstate, regulated and unregulated. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 681-84). Local service revenues account for just 39% of these total revenues. (*Id.*, lines 685-87). The Attorney General also claims that AT&T Illinois' intrastate rate of return in 2005 was 8.98%, but ignores that this reflects a *53% decrease* from the 18.96% return on intrastate plant achieved in 2001, and also ignores the *48.9% decrease* in AT&T Illinois' overall annual income from 2001 to 2005. (*Id.*, lines 695-97, 702-04 & Table 2). Remarkably, the Attorney General responds by dismissing any comparison of results from 2001 and 2005 as "irrelevant" because "the market conditions in 2001 . . . are not the same as those today." (AG Init. Br. at 20). Yes, precisely -- that is the point of this proceeding and the reason why AT&T Illinois' residential local services are properly classified as competitive in the Chicago LATA.

B. THERE IS NO EVIDENCE THAT COMPETITION WILL DECREASE IN THE FUTURE

Given that current competition is more than sufficient to justify reclassifying AT&T Illinois' residential local exchange services, the Attorney General, Data Net, and City of Chicago contend that CLEC competition is doomed for the *future* because the only legitimate competitive platform – the UNE-P – may disappear, and that reclassification must therefore be denied. (AG Init. Br. at 11-17; Data Net Init. Br. at 11-13, 18-21; City of Chicago Init. Br. at 11-12). This theory fails because it rests entirely on speculation and is in conflict with the Act. As Staff correctly points out, "[t]he Commission should not ignore the evidence regarding competitiveness of the market today in favor of speculation of what might occur in the future." (Staff Init. Br. at 60-61). To do so would be contrary to 220 ILCS 5/13-502(b), which requires the Commission to base its decision on evidence regarding the "reasonably available"

alternatives that *currently* exist for those services and not on speculation about the level of competition that may or may not exist at some unspecified time in the future. The Attorney General and Data Net try to lend credibility to their speculative arguments by calling them a “dynamic analysis,” but as Staff correctly notes, “[a]n expert’s speculation or conjecture is not made legally palatable or competent by calling it ‘dynamic.’” (Staff Init. Br. at 63). In addition, the theory that the Commission must deny reclassification because of market uncertainty would eviscerate Section 13-502. As Staff correctly points out, regulatory obligations are “never indefinitely absolutely certain” and to require such certainty “imposes a standard for evaluation that would nullify the competitive provisions of Section 13-502.” (Staff Init. Br. at 61-62).¹¹

In addition, there are many other viable competitive platforms, including CLEC use of their own facilities (or facilities leased from other CLECs) on an end-to-end basis or as part of a UNE-L strategy, Local Wholesale Complete, or resale. The intervenors also ignore other forms of competition that the Commission can and should consider, principally wireless and stand-alone VoIP, both of which are growing rapidly. If one were to speculate that the loss of UNE-P would kill traditional CLEC competition, one could just as easily predict (and with much more assurance), that cable, wireless, and stand-alone VoIP would more than make up the difference. Thus, as explained further below, the Attorney General’s and Data Net’s speculation must be rejected.

¹¹ Similarly, the Michigan Commission recently noted when removing price caps on residential service that it need not determine whether current conditions will “guarantee the indefinite existence of a competitive environment,” for its role is to “measure the data, facts, and information, and to apply such information against the statutory standard.” Order, *In the matter of SBC Michigan’s request for classification of business local exchange service as competitive pursuant to Section 208 of the Michigan Telecommunications Act*, Case Nos. U-14323 & U-14324 (Mich. Pub. Serv. Comm’n, Aug. 4, 2005) at 22-23 (“*Michigan Reclassification Order*). See also Final Decision, *In re SBC*, Docket No. 6720-TI-173, 2004 WL 1243598. at *2 (Pub. Serv. Comm’n of Wisc., June 3, 2004) (removing price caps on SBC Wisconsin’s small business services even when “[t]he market for small business services in SBC’s exchanges is in a state of flux created by legal, regulatory, and technical changes that make it difficult to predict the future conditions under which local service providers will compete”).

1. The UNE-P Is Not Essential To CLEC Competition

In Illinois, unlike the other 49 states in the union, the UNE-P remains available to CLECs pursuant to state law. *Order on Remand (Phase II)*, Docket No. 01-0614 (Nov. 22, 2005) at 12-13. Although a court challenge to that requirement is pending, the fact remains that UNE-P is available in Illinois today and constrains AT&T Illinois' ability to exercise any market power it might have in the residential retail market. Staff agrees with AT&T Illinois that the UNE-P should be considered in the Commission's competitive analysis and that it "affords providers . . . the potential to exercise considerable constraint on AT&T Illinois' overall ability to exercise any market power it might have in the residential retail market." (Staff Init. Br. at 51).¹²

The Attorney General and Data Net nevertheless speculate that if AT&T Illinois prevails on its preemption claims, and state-law UNE-P ceases to be available, residential local exchange competition will be effectively eliminated in the Chicago LATA.¹³ (AG Init. Br. at 12-17; Data Net Init. Br. at 11-13, 18-20). That argument flies in the face of the FCC's analysis of the UNE-P. After an exhaustive review and heated multi-year debate by the entire industry, the FCC held in its *TRO Remand Order* that ILECs are no longer required to provide unbundled local switching and thus also do not have to provide the UNE-P. *TRO Remand Order*, ¶¶ 5, 199, 204-09; 47 C.F.R. § 51.319(d)(2)(i) (2005). The FCC held that requiring unbundling of local switching "would impose significant costs in the form of decreased investment incentives,"

¹² Data Net spends several pages arguing about the history of the UNE-P in Illinois. (Data Net Init. Br. at 2-7). While this discussion is replete with falsehood (*e.g.*, the claim that the Commission ordered Ameritech Illinois to provide the UNE-P in 1995, which ignores that the Commission itself has held that it did *not* require the UNE-P in that order (Order, *Investigation in GTE North, Incorporated's and GTE South, Incorporated's TELRIC Cost Studies*, Docket No. 96-0503 (May 19, 1998) at 8), it is also beside the point. The issue here has nothing to do with past orders on the UNE-P or compliance with them, for there is no debate that AT&T Illinois provides the UNE-P today. It is worth noting, moreover, that the duty to provide the UNE-P has *never* been lawful, for all three FCC orders requiring unbundled local switching (and thus the UNE-P) were vacated on appeal.

¹³ The Attorney General and Data Net also seem to imply that the threatened loss of the UNE-P chills competition today. That is hard to believe. The UNE-P obligation has been in litigation, and thus subject to uncertainty, ever since it was invented by the FCC in 1996.

which is contrary to important goals of federal law. *Id.* ¶ 199; *see also Covad Comms. Co. v. FCC*, No. 05-1095 *et al.*, slip op. at 35 (D.C. Cir., June 16, 2006) (affirming FCC and reiterating court’s 2002 conclusion that the UNE-P is mere “synthetic competition”). The FCC explained that “it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation” and that significant CLEC deployment of switches has already occurred. *Id.* ¶ 204. The Attorney General and Data Net never even acknowledge, much less refute, the FCC’s analysis and holding,¹⁴ nor do they explain why surrounding states have found sufficient competition to reclassify AT&T ILEC’s residential local services as competitive even without the UNE-P. (*See* AT&T Ill. Init. Br. at 90-94).

Undaunted by the FCC’s rejection of its theory, the Attorney General argues that elimination of the UNE-P was “perhaps the primary factor” leading to AT&T’s decision to withdraw from the residential market (*id.* at 14-15). The facts show otherwise. As explained in AT&T Illinois’ Initial Brief (at 98-99) and recognized by the FCC, the pre-merger AT&T’s business decision to focus its efforts on competing in the business and enterprise markets was driven by competition from cable, wireless, and VoIP providers, and the loss of UNE-P was just one factor in the mix. (AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 865-870). Data Net similarly claims that “MCI effectively left the market” and “withdrew active pursuit of the residential market” because of the elimination of the UNE-P. (Data Net Init. Br. at 5, 11-12). But as demonstrated in AT&T Illinois’ Initial Brief, MCI has not left the market. (AT&T Init. Br. at

¹⁴ The Attorney General points out that, effective March 11, 2005, the *TRO Remand Order* allowed ILECs to increase the wholesale rate for switching by \$1.00, and argues that the 2005 data on competition does not reflect the “anti-competitive effect of this \$1 adder.” (AG Init. Br. at 12). That argument is just another collateral attack on the *TRO Remand Order*. The FCC authorized the \$1 “adder” (47 C.F.R. § 51.319(d)(2)(iii)) and, in finding that CLECs were not impaired without unbundled access to the UNE-P, necessarily found that it was not anticompetitive at all. *Covad Comms. Co.*, No. 05-1095 *et al.*, slip op. at 39 (affirming the \$1 adder because no party ever claimed it was unreasonable).

98-99). Quite the contrary, in the fourth quarter of 2005, AT&T Illinois lost more residential access lines to MCI than to any other carrier except Comcast. (Tr. 323 (Wardin)).

2. Alternatives To The UNE-P

a. Facilities-Based Competition

The FCC viewed facilities-based competition as the best “replacement” for the UNE-P (*TRO Remand Order* ¶¶ 204, 207-09), and there is certainly plenty of that in Illinois, as described in Parts IV and VII of AT&T Illinois’ Initial Brief. Data Net claims that “there has been no showing by Illinois Bell of any significant success in providing effective facilities-based competition to local residential services.” (Data Net Init. Br. at 12). This claim is nonsense. The evidence presented by AT&T Illinois shows that, as of December 31, 2005, approximately 295,574, or 59%, of CLEC residential lines were provisioned using CLEC-owned facilities, either on a UNE-L basis or on a total facility bypass basis. (AT&T Ill. Ex. 1.2 (Wardin), lines 158-167). The number of facilities-based CLEC lines increased between December 31, 2004 and December 31, 2005 (Data Net Cross Ex. 3) and increased by over 20,000 to 315,670 during the first quarter of 2006. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 528-29).

Data Net also claims (at 17) that cable providers “have shown only very limited offerings of local voice services to consumers.” (*See also* Data Net Init. Br. at 12-13). That is refuted by the facts. Comcast currently serves over *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** customer residential phone customers in at least *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** exchanges (including Chicago), an area covering *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** of AT&T Illinois’ residential access lines. (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 985-988; AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 181-183; AT&T Ill. Ex. 1.2 (Wardin), lines 122-128,

175-177; AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 380-385). Comcast currently is engaged in an intense direct mail and newspaper advertising campaign to convince customers of AT&T Illinois to switch to Comcast for home phone service, Comcast Digital Voice. (*Id.*, lines 366-378). Comcast's efforts have been successful. In each month from December 2005 through March 2006, AT&T Illinois has lost more lines to Comcast than to any other competitor. (*Id.*, lines 385-387). Without a doubt, Comcast is competing heavily and effectively with AT&T Illinois for the provision of local and long distance service packages. (*Id.*, lines 365-366; AT&T Ill. Init. Br. at 33-34).¹⁵

The Attorney General tries to discount Comcast's IP-based Digital Voice Service by asserting that it "has the limitations of a VoIP product" and that Comcast has been forced to "resort to VoIP telephone service" instead of circuit-switched service. (AG Init. Br. at 34-35). That is absurd. Unlike "stand-alone" VoIP service, Comcast's IP-based service does not rely on the Internet. It is hardly a last "resort." Even Mr. Gillan admitted that the use of cable's IP-based VoIP offering is "service-neutral to the customer" (Data Net Ex. 1.0 (Gillan) at 34-35), and Dr. Selwyn acknowledged that cable's brand of VoIP services does *not* face the same alleged "limitations" of stand-alone VoIP. (AG Ex. 1.0 (Selwyn), lines 6-10). In particular, the problems that allegedly occur as a result of asymmetric broadband connections (AG Init. Br. at 48-49) are unique to VoIP service carried over the public internet and are not applicable to the VoIP service provided by cable companies, such as Comcast, since the cable companies give priority to calls made over their own private cable networks. (AT&T Ill. Ex. 4.1 (Shooshan),

¹⁵ Data Net Cross Exhibit 3 indicates that Comcast may have experienced a slight decrease in lines between December of 2004 and December of 2005. However, that was during its period of transition from a circuit switched platform to the IP-based platform. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 345-346). The drop means little because, as explained in the text, Comcast's lines grew substantially in the first quarter of 2006, thereby making its line count higher than it was both in December of 2004 and December of 2005.

lines 436-443). Indeed, the FCC has already recognized cable's brand of VoIP service as a substitute for circuit-switched service:

[W]e find that facilities-based VoIP services clearly fall within the relevant service market for local services. Facilities-based VoIP services have many similar characteristics to traditional wireline local service. There is also significant evidence in the record indicating that mass-market subscription to cable-based VoIP continues to increase nationwide as cable operators continue to roll out these services throughout their footprints. In addition, there is documentary evidence that SBC views cable-based VoIP as its primary competitive threat in the mass market, and considers the prospect of consumer substitution to cable-based VoIP when devising its strategies and service offers. *SBC/AT&T Merger Order* ¶ 87.

Perhaps recognizing the significance of cable competition, Data Net switches gears and claims that cable companies provide the only facilities-based competition in Illinois. (Data Net Init. Br. at 12). Not so. Wireless, of course, is facilities-based competition, and it alone commands 9% or more of the residential market. Furthermore, McLeod, Mpower and others carriers provide facilities-based wireline service in Illinois, and carriers like Focal, Sprint, and Level 3 provide wholesale facilities-based service to other competitors of AT&T Illinois in the local residential market. (See AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 469-546; AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 434-40).

b. Local Wholesale Complete

Another alternative to the UNE-P is AT&T Illinois' Local Wholesale Complete service. Staff agrees that LWC is a viable alternative for CLECs and that carriers currently are "using LWC platforms to provide service to residential local exchange customers throughout MSA-1." (Staff Init. Br. at 47).¹⁶ And Staff correctly concludes that LWC-based competitors impose

¹⁶ Similarly, the Michigan Commission recognized that "a migration from UNE-P to other arrangements is currently underway" and Local Wholesale Complete "means that arrangements equivalent to UNE-P will remain available" and that "it appears more likely than not that the demise of UNE-P has not been as devastating as claimed by the Attorney General". *Michigan Reclassification Order* at 21.

constraints on AT&T Illinois' ability to exercise market power – albeit, in Staff's opinion, fewer constraints than the UNE-P because it costs slightly more. (Staff Init. Br. at 52).

Although AT&T Illinois disagrees with Staff's opinion that LWC imposes fewer constraints than the UNE-P, a debate on that point is unnecessary because Staff agrees that LWC is an actual substitute for AT&T Illinois residential local service. (*See also* Staff Init. Br. at 57 (evidence of actual substitution is paramount)). As such, it must be counted in the overall analysis of competition in the aggregate, which is what ultimately matters. (AT&T Ill. Ex. 3.1 (Taylor), lines 44-46, 188-90).¹⁷

The Attorney General and Data Net try to discount the LWC as a replacement for the UNE-P. They first contend that the LWC agreement is an “adhesion contract[.]” (AG Init. Br. at 5). That is baseless. The specific rates, terms, and conditions of each of the LWC agreements are not identical and, in fact, do reflect differences resulting from negotiations. And, even among agreements in which the base rate is the same, the terms and conditions related to other rate elements differ.¹⁸ (AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 1159-1179). CLECs knowingly

¹⁷ While one may often discuss individual competitors (*i.e.*, Sprint, McLeod, Comcast, etc) or individual types of competitors (*i.e.*, UNE-L, UNE-P, wireless, VoIP, Cable, etc.) in describing a market, the ultimate question from a competitive classification perspective is whether competition in the market *as a whole*, from *all* substitutes, will constrain AT&T Illinois' pricing, not whether an individual competitor or type of competitor would do so. *See, e.g.*, AT&T Ill. Ex. 3.1 (Taylor), lines 44-46, 188-90; *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (relevant market includes “*all products* ‘reasonably interchangeable by consumers for the same purposes’”) (emphasis added); *In re Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin*, Docket No. 6720-TI-113, 174 P.U.R.4th 43 (Pub. Serv. Comm'n of Wisc., Dec. 3, 1996) at 14 (“*Wisconsin MTS Order*”) (“It is not necessary for the Commission to precisely measure the market shares of each participant in the relevant market in order to determine whether effective competition exists. It is sufficient that the Commission have evidence in the record to assess whether competitive alternatives are available.”); U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, Issued April 2, 1992, Revised April 8, 1997, available at <http://www.usdoj.gov/atr/public/guidelines> (“*DOJ Horizontal Merger Guidelines*”), at § 1.11 (in defining a relevant product market, must examine competitive impact of substitutes “in the aggregate”).

¹⁸ For example, typically, the contracts provide for no charge on usage of up to an average of 1500 minutes of use per line per month and a usage charge rate of \$0.0015 per minute for minutes of use over 1500. Some of the agreements, however, include higher numbers of minutes of use for which no usage charge is assessed, based upon the number of local wholesale complete access lines purchased under the agreement. Some agreements charge the same rate for all types of directory assistance while other agreements have one rate for local directory assistance and another rate for all other directory assistance calls. Some contracts allow for the branding of

and voluntarily sign these commercial agreements, and they certainly would not do so if it was going to be harmful to them. (AT&T Ill. Ex. 3.1 (Taylor), lines 1180-1207). Indeed, the fact that CLECs are interested in purchasing LWC proves that it is an attractive business opportunity. *Id.*, lines 1056-1068).

The Attorney General also claims (at 14) that carriers are using LWC only as an exit strategy, but that too is refuted by the record. LWC has already been accepted by many CLECs in Illinois, *even though the UNE-P is still available*. There are currently 37 CLECs that have entered into LWC commercial agreements with AT&T Illinois: ten CLECs as of December 31, 2005, and an additional 27 CLECs during the first quarter of 2006. (AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 900-903). Local Wholesale Complete offers the equivalent of the UNE-P at a negotiated (and quite competitive) price, and CLECs would not voluntarily enter into agreements for it if they did not find it useful. (AT&T Ill. Ex. 3.1 (Taylor), lines 1183-1186). And the marketplace evidence — which matters more than all of the Attorney General’s speculation — shows that carriers do find LWC competitively viable.¹⁹ The number of lines served via LWC increased from about *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** as of September 30, 2005 to about 150,000 as of March 31, 2006. (*Compare* AT&T Ill Ex. 1.0 Rev. (Wardin), Sch. WKW-9 Rev. *with* Ex. 1.5 Cor. (Wardin), lines 530-31.

operator services and have different per call rates while other agreements do not provide for the branding of operator services. In addition, the non-price terms and conditions of the LWC agreements are not all identical to one another.

¹⁹ To provide just a few examples, Talk America discussed its commercial LWC agreement in its 10Q stating that it will “enable us to continue offering high quality telecommunications services to our customers who were served on SBC’s unbundled network elements.” (AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 988-990). In fact, the LWC platform that Talk America is using permits it to offer residential service throughout the entire Chicago LATA. *Id.* at lines 1005-1006. In addition, Sage, which has entered into a commercial agreement with AT&T Illinois for LWC (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 1090-1091), actively advertises the continued availability of its service in Illinois (AT&T Ex. 2.0 (Moore), lines 129-136). These carriers certainly do not view LWC as an “exit strategy.”

Finally, the Attorney General asserts that the price of LWC results in a price squeeze between the LWC rate and AT&T Illinois' residential retail service rates. AG Init. Br. at 28-31. Staff did not buy that argument (Staff Init. Br. at 45-47, 103-107; Staff Ex. 2.0 (Zolnierrek), lines 862-952) and neither should the Commission. AT&T Illinois disposed of the Attorney General's "price squeeze" claim in its Initial Brief (at 95-97), explaining that the Attorney General's analysis significantly overstates the costs of LWC and understates the revenues that LWC carriers will experience.²⁰

The Attorney General also argues that "[t]he sudden and substantial increase in wholesale price occasioned by the move from the UNE-P rate to the LWC rate predictably can drive small carriers out of business." (AG Init. Br. at 13). To begin with, the transition from UNE-P to LWC was anything but "sudden" – the FCC gave carriers an entire year to transition away from UNE-P arrangements. *TRO Remand Order*, ¶¶ 227-28. Moreover, the difference between the LWC rate and the UNE-P rate in the Chicago LATA is only \$4.98 on a weighted average basis. (AT&T Ill. Ex. 14.0). There simply is no evidence to support the Attorney General's claim that small carriers are being driven out of the market by the price of LWC over the UNE-P.²¹ In the only "example" it offers, the Attorney General claims that Midwestern Telecom, Inc. went into bankruptcy sometime after it accepted AT&T Illinois' UNE-P replacement product, but provides no evidence that Midwestern Telecom Inc.'s bankruptcy had anything to do with the price of

²⁰ The Attorney General also implies (at 15-16), that AT&T Illinois has somehow attempted to force a \$37 UNE-P price on CLECs, and that this shows AT&T Illinois will raise UNE-P prices if it prevails in its federal court challenge to Section 13-801. That is factually wrong and legally irrelevant. The \$37 price would apply only on a month-to-month basis and only to a carrier that failed to make any election to switch its Section 251 UNE-P customers to Section 13-801 UNE-P, an LWC contract, UNE-L or some other method of service. And the claim that "CLECs could see their prices rise even higher than the LWC rates" (AG Init. Br. at 15) is wrong, for LWC rates are contractual and fixed for a period of time. Furthermore, the FCC has already held that CLECs do not need the UNE-P, at any price, in order to compete effectively with ILECs. Thus, even if UNE-P rates were to increase (and there is no evidence that they would), that would have no bearing on local residential competition, especially for those 82% of CLEC lines (and all wireless and VoIP lines) that do not rely on the UNE-P.

²¹ Data Net asserts (at 6) that AT&T Illinois has doubled the charges for the unregulated UNE-P (*i.e.*, LWC). But that claim is based on a comparison to the UNE-P rate that existed in 2000, not the current UNE-P rate. (Data Net Ex. 2.0 (Segal), lines 390-397).

LWC. Further, there was no loss to aggregate competition, for Midwestern Telecom's lines went to another CLEC, New Millennium Telecommunications, not AT&T Illinois. (AG Ex. 2.0 (Haynes), p.5.).

c. UNE-L

Use of a CLEC's own switching with an unbundled loop ("UNE-L") is another alternative to the UNE-P and substitute for AT&T Illinois' residential local service. Staff agrees with AT&T Illinois that UNE-L providers provide a "considerable degree of constraint on AT&T Illinois' overall ability to exercise market power in the residential retail market" and that "actual provisioning levels of UNE-L based providers [is] strong evidence that AT&T Illinois has limited ability to exercise market power." (Staff Init. Br. at 53). Talk America, for example, has deployed network facilities in other markets and is successfully competing in those markets using a UNE-L strategy. (AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 991-993; AT&T Ex. 10.0 (Weber), lines 80-89). McLeod is another facilities-based carrier. It provides a wide variety of voice and data services to business and residential customers in 25 states, including Illinois. (AT&T Ex. 10.0 (Weber), lines 90-98). The fact that these carriers are actively pursuing a UNE-L strategy in certain markets, of course, supports AT&T Illinois' position that UNE-L is an effective platform for use in competing.²²

The Attorney General nevertheless argues that UNE-L is not an economical alternative for CLECs and that its witness, Mr. Selwyn, "provided a detailed explanation of the costs facing a carrier that chooses to use its own switch and only purchase UNE-L" from AT&T Illinois. (AG Init. Br. at 32). But hypothetical (and flawed) cost analyses do not trump actual market evidence of substitution. (*See* Staff Init. Br. at 57). And all Mr. Selwyn did was attach to his

²² Data Net claims (at 19) that the number of UNE-L lines went down from December of 2004 to December of 2005. But according to Data Net Cross Exhibit 3 that is not true – rather, there was a slight increase.

testimony the testimony of a pre-merger AT&T witness that was submitted to the Washington Utilities and Transportation Commission in 2003. The Attorney General's reliance on this testimony is unfounded for the reasons discussed in AT&T Illinois' Initial Brief at 99-100. The Attorney General's claims regarding the economics and feasibility of UNE-L were also refuted in the rebuttal testimony of Mr. Joseph Weber, who, unlike the Attorney General and Data Net witnesses, is a telecommunications engineer and who has over 30 years of experience in systems engineering and network planning at pre-merger AT&T and Bell Labs. (AT&T Ill. Ex. 10.0 (Weber), lines 13-18, Sch. JHW-R1 (Rev.)). Mr. Weber explained various ways of efficiently competing through a UNE-L strategy.

The Attorney General also claims that "the experience of Data Net Systems witness Martin Segal in developing a UNE-L entry model, demonstrate[s] that the Commission should not expect any meaningful residential competition to emerge based on the UNE-L." (AG Init. Br. at 32). As fully explained in AT&T Illinois' Initial Brief (at 100-102), Mr. Segal provided no details to support the claim that Data Net and nine other CLECs performed an investigation of alternative facilities to the incumbent's network and, based on that investigation, were unable to find alternative facilities to provision mass market service. Given that Mr. Segal misrepresented the content of a study that he claimed "concluded that it was not possible to successfully compete in the mass market solely on the basis of resale service" (the study said just the opposite, *see* AT&T Ill. Init. Br. at fn. 46), his claims regarding the results of his alleged UNE-L investigation are highly suspect. Further doubt is raised because at least one member of the group that supposedly could not find alternative facilities has, in fact, implemented an alternative facilities arrangement and is converting its UNE-P lines to UNE-L lines. (AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 1281-1291).

d. Resale

Finally, CLECs can compete through resale of AT&T Illinois' local service. Staff states that "evidence of actual carrier provisioning . . . does not indicate that resale is being extensively used to provide alternatives to AT&T Illinois' services." (Staff Init. Br. at 50). As previously explained, however, the Commission must consider the *aggregate* effect of competition. It cannot dismiss evidence of resale competition simply because it may not be as prevalent as other types of competition, such as competition from UNE-P and UNE-L providers. If resale providers are actually acquiring lines at current prices, they obviously would acquire more lines if AT&T Illinois raised its price to supracompetitive levels, and therefore, resale must be taken into consideration in the Commission's competitive analysis. (AT&T Ill. Ex. 3.1 (Taylor), lines 466-69, 515-556); *DOJ Horizontal Merger Guidelines* § 1.11. As explained in AT&T Illinois' testimony and Initial Brief, resale is being used by at least nine CLECs in Illinois. (AT&T Ill. Ex. 1.2 (Wardin), lines 382-434). The fact that resale has declined since 2000 is certainly attributable to the UNE-P, which provides CLECs with a substantially larger discount off retail rates and therefore higher profits. It is not because resale is not a viable option – it clearly is for many CLECs. (See AT&T Ill. Ex. 1.2 (Wardin), lines 382-434).²³

C. CLECs HAVE MORE THAN AMPLE SIZE AND GEOGRAPHIC COVERAGE

The Attorney General contends that while there may be over 75 competing carriers in the Chicago LATA, they are small and therefore pose no real competitive threat. (AG Init. Br. at 22-23). That claim has no support in Section 13-502, which does not create any minimum size

²³ Staff also asserts that "third party resale" represents only "limited" competition because the "third party supplying such service might use any number of platforms including platforms which rely on AT&T Illinois products and services mentioned above to supply these underlying services." Staff Init. Br. at 55. The "third party resale" at issue here, however, does not involve the use of AT&T Illinois' switching facilities. Rather, it involves the use by a CLEC of the switching facilities owned and provided on a wholesale basis by a third party, such as McLeod or XO Communications. (AT&T Ill. Init. Br. at 30). Thus, "third-party resale" is analogous to UNE-L, the use of which is considered by Staff as "strong evidence that AT&T Illinois has limited ability to exercise market power..." (Staff Init. Br. at 53).

requirement for competitors. Indeed, Section 13-502, and economic analysis in general, is concerned with competition in the aggregate, not with the size of individual competitors. Moreover, the competitors AT&T Illinois faces are not small-time operations. Several of them are multi-state operations with substantial expertise and financial and technical wherewithal. (See AT&T Ill. Init. Br. at 28-29 (discussing top competitors)). No one would call carriers like Comcast, RCN, Verizon/MCI, Sprint, and McLeod mere bit players, and these competitors advertise and market aggressively and effectively.

As for the geographic coverage of competitors, the Attorney General claims that the “uneven distribution” and “in some areas insignificant presence of providers of residential service” in the Chicago LATA “show that for consumers in many areas there is not a competitive market for local telephone service.” (AG Init. Br. at 23). That claim is erroneous for several reasons. The Chicago LATA as a whole is the relevant geographic market, so competition must be analyzed for the LATA as a whole; there cannot be different results for “some areas.” In addition, neither Section 13-502 nor standard economic analysis require that competition be geographically ubiquitous for a market to be competitive; it is enough if competition in the aggregate disciplines pricing in that market, even if competitors are not present in some areas.²⁴

More importantly, as a factual matter, CLECs providing residential service have extensive geographic presence in the Chicago LATA. Of the 118 exchange in the Chicago LATA, 108 (92%) are served by 10 or more CLECs, and more than half are served by at least 30 CLECs. (AT&T Ill. Init. Br. at 27). Even at the bottom end of the scale, the fewest number of

²⁴ *MCI Telecommunications. Corp. v. Ill. Comm. Comm.*, 168 Ill. App. 3d 1008, 1014 (1st Dist. 1988) (Section 13-502 does not require “absolute equality in the . . . availability” of alternative services; affirming classification as competitive where competing service available to just 70% of access lines); *SBC Comms. Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 2005 WL 3099626, at ¶ 87 (Nov. 17, 2005) (“our product market analysis does not require that all mass market consumers would be willing or able to substitute [a type of alternative service] for wireline local service, or even that it be widely available for it to be included in the relevant product market”).

CLECs providing residential service in any one exchange is four. (*Id.*) Furthermore, the average CLEC serves customers in 45 of the 118 exchanges; two CLECs serve residential customers in every exchange; three or more CLECs serve residential customers in 111 or more exchanges; and 11 CLECs each currently serve residential customers in 100 or more exchanges. (*Id.*)

The Attorney General tries to dodge these figures by focusing separately on facilities-based and UNE-P carriers. (AG Init. Br. at 24). That kind of analysis is economically irrelevant. As previously discussed, competitive analysis must look at competition in the aggregate, not on a piecemeal basis by technology. A lost residential access line is lost, and disciplines AT&T Illinois' pricing, whether it goes to a facilities-based CLEC, a UNE-P CLEC, a wireless carrier, or any other provider. Examining the geographic coverage of only one type of competitor (*e.g.*, facilities-based) ignores the coverage of all these other kinds of competition.

Furthermore, the Attorney General's claims are grossly misleading. While there are 12 (not 13) exchanges in AT&T Illinois Exhibit 15 that have no E9-1-1 listing (*see* AG Init. Br. at 24), the 108 exchanges that do have such a listing represent more than 99% of the residential lines in AT&T Illinois' service territory in the Chicago LATA. (AT&T Ill. Ex. 16.0). Thus, the coverage of facilities-based carriers is nearly ubiquitous.²⁵

The Attorney General also claims there is "disparate availability" of cable alternatives in the Chicago LATA and that this presents competitive concerns. (AG Init. Br. at 24). This claim has no support. The Attorney General relies on testimony of CUB's Anne McKibbin, but she already testified that AT&T Illinois had alleviated any concerns she may have had about CLEC

²⁵ The Attorney General also claims (at 24) that in more than half the exchanges in the Chicago LATA, facilities-based providers have "fewer than 2% of the CLEC lines." Once again, the Attorney General's numbers are wrong. Facilities-based carriers may have less than 2% of the *total* lines in many exchanges, but that is far different from having less than 2% of CLEC lines. Moreover, the important point is that facilities-based carriers have a presence in almost every exchange in the LATA and thus have access to almost every line. And when CLEC competition is examined in the aggregate, facilities-based carriers have almost 60% of all CLEC lines. (AT&T Ill. Ex. 1.2 (Wardin), lines 158-67).

coverage. (Tr. 787 (McKibbin); CUB Ex. 5.0 (McKibbin), lines 476-78). AT&T Illinois witnesses Wardin and Dr. Taylor explained that AT&T Illinois could not disaggregate its prices for different areas within the Chicago LATA more than it already does because that is unworkable for marketing, sales, and administrative purposes. (Tr. 571, 590-591 (Wardin); AT&T Ill. Ex. 3.1 (Taylor), lines 714-17). In addition, AT&T Illinois committed to discussing any proposal that would disaggregate prices with the Commission before attempting to implement such a plan. (Tr. 590-591 (Wardin)).

The Attorney General also relies on certain maps inserted into the record at the last minute, but does not explain how they match up with the prior data on cable's coverage. In any event, the vast majority of cable company lines, covering an area with over 99% of AT&T Illinois' residential lines, are cable modem ready. (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 983-98). As previously discussed, Comcast alone has ***** BEGIN CONFIDENTIAL******* *****END CONFIDENTIAL***** residential access lines in the Chicago LATA. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 380-85). These lines are in exchanges covering *****BEGIN CONFIDENTIAL*****END CONFIDENTIAL***** of AT&T Illinois' residential access lines. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 353-54; AT&T Ill. Ex. 1.2 (Wardin), lines 148-50). RCN and WOW! are also providing cable telephone service in the Chicago LATA. (*Id.*, Scheds. WKW-JPR3 and WKW-JPR4). If anything, then, cable service is available on a near-ubiquitous.

Finally, Data Net tries to discount McLeodUSA as a facilities-based competitor, asserting that it has few facilities in Chicago. (Data Net Init. Br. at 15). In fact, however, McLeod serves 51 exchanges in Chicago using its own switch, with access to 83% of AT&T Illinois' residential

access lines. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 434-37). This does not include exchanges where McLeod offers services on a platform that does not use its own switch.

In short, the facts are that facilities-based providers have broad geographic coverage, comparable service offerings to AT&T Illinois, and a large customer base that shows their offerings are attracting customers away from AT&T Illinois.

D. THE E9-1-1 DATA RELIED ON BY AT&T ILLINOIS IS RELIABLE AND CONSISTENT WITH CLEC-REPORTED DATA.

AT&T Illinois used the E9-1-1 database and its wholesale records as the sources of information regarding the level of CLEC competition that existed at the time that the tariffs classifying the residential services at issue in this case competitive were filed and which currently exists. These are the best available sources for data on the numbers, types and locations of residential lines served by competitors of AT&T Illinois. (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 391-406). The FCC, the DOJ, and state commissions have repeatedly relied on E9-1-1 data (*see* AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 571-620), and Staff has endorsed reliance on such data here and found it reliable (Staff Ex. 5.0 (Zolnierek), lines 105-106 (“E9-1-1 listings serve as a reasonable estimate of AT&T Illinois’ line counts”)).

Nevertheless, the Attorney General argues that AT&T Illinois’ use of that E9-1-1 data resulted in an overstatement of the number of residential access lines served by competitors. (AG Init. Br. at 22). The Attorney General is wrong. The evidence presented by AT&T Illinois demonstrates that the E9-1-1 database is, in fact, a reasonably accurate source for determining the number of residential lines served using CLEC-owned facilities in the Chicago LATA. (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 391-406; AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 144-301, 466-620). Because the E9-1-1 database is maintained on behalf of emergency service providers, extreme accuracy in compiling the data is required, and it is in the interest of ILECs

and CLECs alike to ensure that the data is accurately maintained. (AT&T III. Ex. 1.0 Rev. (Wardin), lines 401-406).

The Attorney General apparently would have the Commission rely solely on the number of lines reported by certain CLECs to Staff in response to a data request in Docket No. 06-0028. For example, on page 10 of its brief, the Attorney General compares what it calls “IBT data” (which is the data derived from the E9-1-1 database and wholesale records) to what it calls “the CLEC only data” (which is the data derived from the CLEC responses to Staff’s data requests). However, as Mr. Wardin demonstrated – and as Staff agrees – the CLEC-reported data significantly understates the number of lines for several reasons. Most notably, the CLEC-reported data contains information from only thirteen CLECs, thereby excluding the line counts of several carriers that provide service in the state. (AT&T III. Ex. 1.1 Rev. (Wardin), lines 163-175; Staff Ex. 5.0 (Zolnierek), lines 128-129). In addition, the number of lines reported by certain CLECs to Staff – by their own admission – did not reflect the full number of residential lines being served by those carriers. For example, a discussed above, Comcast’s response to Staff reported customers rather than line counts (which reduces the total by excluding non-primary lines) and excluded residential voice services provided using VoIP technology. (Staff Ex. 5.0 (Zolnierek), lines 114-19). Similarly, the number of lines reported to Staff by Sprint, Global Crossing, and Level 3 excluded lines that those carriers provide at wholesale for residential services by other carriers (which do not include their lines in the E9-1-1 database).²⁶

²⁶ For this reasons, the Attorney General’s argument (Init. Br. at 21) that the E9-1-1 data incorrectly includes lines reported by Global Crossing and Level 3, when those carriers reported zero retail residential lines to Staff, must be rejected.

(AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 198-222, 224-42, 514-29). It is entirely appropriate for E9-1-1 entries made on behalf of other carriers to be included in the line counts.²⁷

The Attorney General also argues (at 21) that the E9-1-1 data overstates the number of lines offered by Focal Communications, because Focal serves large apartment buildings and does not offer mass market service to residential customers. However, AT&T Illinois witness Mr. Wardin and Staff witness Dr. Zolnierek both testified that in that situation the E9-1-1 listings *should be* counted as residential because each line is going to a different residential address.

(AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 476-483; Staff Ex. 5.0 (Zolnierek), lines 265-285). Dr. Zolnierek explained:

If a CLEC captures all tenants in an apartment, by providing exclusive service to that apartment (or its owner), then it has, for competitive purposes, all of the residential tenants' lines in that apartment. The Federal Communications Commission in collecting competitive data specifically affords such lines residential status.

(Staff Ex. 5.0 (Zolnierek), lines 270-274). Dr. Zolnierek then concludes, "Mr. Gillan's example suggests the E9-1-1 based estimates might be capturing CLEC competition for residential customers that direct CLEC reporting does not." (*Id.*, lines 283-285).²⁸

In short, there is no basis for the claim that AT&T Illinois' use of the E9-1-1 database results in an overstatement of residential lines served by CLECs in the Chicago LATA. Staff agrees that AT&T Illinois line counts are accurate and establish that AT&T Illinois' reclassification of packages is appropriate: "[N]otwithstanding apparent discrepancies in the two data sources, the Staff believes that both sources – information from billing record/E9-1-1 information supplied by AT&T Illinois, and the competitive information supplied directly by

²⁷ The Attorney General asserts that its position is supported by certain maps presented by Staff at the ALJ's direction. (AG Init. Br. at 20-21). Those maps, however, were based on the data reported by CLECs to Staff. That data is incomplete for the reasons discussed above.

²⁸ Both of these are shortcomings of the CLEC data from Docket 06-0028 that Staff used for its original analysis, and that same data was used by Staff to create the maps relied on by the Attorney General.

CLECs – yield the same conclusion: that AT&T Illinois appropriately reclassified its flat rate residential local exchange service packages in MSA 1.” (Staff Init. Br. at 40).

E. WIRELESS AND STAND-ALONE VOIP SERVICE ARE SUBSTITUTES FOR RESIDENTIAL LOCAL EXCHANGE SERVICE.

1. Wireless

The Attorney General argues that AT&T Illinois has failed to meet its burden to prove that consumers are substituting wireless for wireline local exchange service because it has not submitted a cross-price elasticity study. (AG Init. Br. at 43-44). That is ridiculous. The Attorney General cites no statute or rule – nor is there one – that requires the submission of such a study. Nor is one necessary to show that customers have, in fact, cut the cord. As Dr. Taylor explained, econometric analyses have been done that demonstrate that wireline and wireless service are substitutes. (AT&T Ill. Ex. 3.1 (Taylor), lines 372-391). The undisputed evidence *already* shows actual substitution and that, as wireless prices have fallen, the demand for wireline service (both lines and usage) has fallen as well. (AT&T Ill. Ex. 3.1 (Taylor), lines 526-535; AT&T Ill. Ex. 4.0 (Shooshan), lines 805-808; AT&T Ill. Ex. 3.0 (Taylor), lines 505-524). Mr. Shooshan’s study – which goes to the heart of the matter by examining consumers’ willingness to substitute wireless for traditional wireline service – confirms this substitution. (AT&T Ill. Ex. 4.0 (Shooshan), lines 82-133, 809-810). Even the Attorney General agrees that nearly 6% of consumers have cut the cord. (AG Ex. 1.0 (Selwyn), lines 10-13; AG Init. Br. at n.30). Given that competitive analysis merely requires substitution “at the margin,” a 6% market share loss is more than sufficient to prove that wireless is a substitute for wireline residential service.

Significantly, for years the FCC has consistently concluded that wireless *is* a complete substitute for wireline service without requiring any cross-elasticity studies. As long ago as

2004, the FCC recognized the increasing prevalence of cord-cutting. (AT&T Ill. Ex. 4.1 (Shooshan), lines 268-273). And in the SBC/AT&T Merger Order in 2005, the FCC affirmatively concluded that wireless service *is* in the same product market as wireline service, stating that mobile wireless service “should be included in the local services product market when it is used as a complete substitute for all of a consumer’s voice communications needs.” (AT&T Ill. Ex. 4.0 (Shooshan), lines 574-576, n. 59).²⁹

Both Staff and the Attorney General claim that Mr. Shooshan “disavowed the results” of his survey. (Staff Init. Br. at 58-59; AG Init. Br. at 44-45). That grossly mischaracterizes his testimony. Mr. Shooshan’s survey estimates that 24% of wireless *customers* in the Chicago LATA have cut the cord – and Mr. Shooshan and AT&T Illinois stand by that result. When Mr. Shooshan stated that “nothing in my testimony – or in the survey results themselves – should be construed to mean that 24 percent of all Chicago LATA *households* have disconnected their wireline service and rely solely on their wireless phones,” (emphasis added) he was making sure that no party misconstrued the 24% figure as representing the percentage of Chicago *households* cutting the cord. That percentage was calculated by Mr. Wardin, who estimated that 9% of all households in the Chicago LATA have cut the cord. (AT&T Ill. Ex. 1.0 (Wardin), lines 343-346). Nor was there a change between Mr. Shooshan’s direct and rebuttal testimony, as these parties imply. Mr. Shooshan made the same clarifying point in both rounds of testimony. (AT&T Ill. Ex. 4.0 (Shooshan), lines 676-689; AT&T Ill. Ex. 4.1 (Shooshan), lines 702-718).

²⁹ As explained in AT&T Illinois’ Initial Brief, state commissions in Wisconsin and New York have reached the same conclusion as the FCC. Final Decision, *Petition of SBC Wisconsin for Suspension of Wisconsin Statute sec. 196.196(1) with Regard to Basic Local Exchange Service*, Docket No. 6720-TI-196 (Pub. Serv. Comm’n of Wis., Nov. 25, 2005) at 4 (“it is reasonable and in the public interest to consider wireless as a substitute for stand-alone BLES”); *Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings*, Case No. 05-C-0616 (New York Public Service Commission, April 11, 2006) at 35, 40 (“we agree . . . that bundled telecommunication services, VoIP, and wireless are all in competition with unbundled wireline services”).

Mr. Wardin explained how he arrived at the 9% figure. (AT&T Ill. Ex.1.0 (Wardin), lines 1162-1197). The FCC estimated that approximately 6% of households in the United States rely solely on wireless service for their local service (a figure that may very well understate the current percentage because it represented the percentage of households with only wireless phones in the second half of 2004).³⁰ Because that is a national figure, it was adjusted for the Chicago LATA, which is the third largest urban area in the country. The Yankee Group estimates that 10% of wireless customers nationally have “cut the cord” while 15% of wireless users have cut the cord in urban areas, indicating that urban wireless users are about 50% more likely to have cut the cord than the wireless customers generally.³¹ Thus, to estimate the percentage of households in the Chicago LATA that have “cut the cord,” Mr. Wardin appropriately increased the FCC’s 6% figure by 50% to arrive at 9%. This figure is conservative. The estimated 9% of households that do not have a landline phone assumes, based on a national urban estimate provided by the Yankee Group, that 15% of urban wireless subscribers have “cut the cord.” Mr. Shooshan’s survey, however, shows that 24% of wireless customers in the Chicago LATA have “cut the cord.” Mr. Shooshan’s survey probably reflects a more accurate estimate of the percentage of wireless users in the Chicago LATA that have “cut the cord,” because (unlike the Yankee Group survey) it is specific to the Chicago LATA. And because the percentage of wireless customers in the Chicago LATA that have “cut the cord” is probably significantly higher than 15%, the resulting percentage of households in the Chicago LATA that have “cut the cord” is likewise probably higher than 9%. Yet, to be conservative, AT&T Illinois has used the 9% figure. Other sources provide higher estimates of wireless

³⁰ *FCC Tenth Annual CMRS Competition Report*, WT Docket No. 05-71 (rel. Sept. 30, 2005), ¶ 196; AT&T Ill. Ex. 3.1 (Taylor), lines 490-495.

³¹ *Personal Wireless Calling Surpasses Wireline Calling: A wireless Substitution Update*, Yankee Group, August 2005 at p. 5.

substitution in the 9.4% -10% range. (AT&T Ill. Ex. 4.0 (Shooshan), lines 581-583). Although the Attorney General nevertheless argues that the percentage of Chicago consumers that have “cut the cord” is somewhere around 6%, that debate is largely beside the point. Whether the percentage of customers that have cut the cord is 6% or 9%, the Commission’s conclusion should be the same: consumers are substituting wireless service for wireline service.

The Attorney General argues that wireless service is not functionally equivalent to landline local telephone service because (1) it is not available to an entire household, (2) it can only function on one telephone at a time, (3) it cannot be used for automatic burglar/fire alarm monitoring applications,³² and (4) wireless phones have to be recharged. The Attorney General is grasping at straws. These minor differences hardly render wireless service a non-substitute. Substitutes do not have to be identical. (Am. Ill. Ex. 3.0 (Taylor), lines 392-393). What matters is that they provide the same or similar functionality, and that an increase in the price of one would likely induce the consumer to switch to the other provided that its price has not changed. (*Id.*, lines 432-435). This standard has been met. (*See* AT&T Ill. Init. Br. at 36-38, 43-48; AT&T Ill. Ex. 1.0 (Wardin), lines 1107-1296; AT&T Ill. Ex. 4.0 (Shooshan), lines 388-820; AT&T Ill. Ex. 3.0 (Taylor), lines 505-524). Wireline service may have a few minor advantages over wireless, and wireless service certainly has advantages over wireline, but the fact remains that substitution *is* occurring. A look at the hard facts – and a common sense look at the real world today – demonstrates that wireless service most certainly *is* a substitute for wireline.

2. VoIP

The Attorney General argues that stand-alone VoIP service (as opposed to facilities-based VoIP provided by a facilities-based carrier like Comcast) cannot be counted as a competitive substitute for basic residential local exchange service because AT&T Illinois did not

³² In fact, alarm companies *are* rolling out wireless-based services. (AT&T Ill. Ex. 4.1 (Shooshan), lines 526-537).

present specific quantities for VoIP residential lines. (AG Init. Br. at 46-47). But as a matter of economics a substitute product does not have to have any specific market share, or any market share at all. What matters is whether customers would switch to that product if the price for the target product were raised above the competitive level. (AT&T Ill Ex. 3.1 (Taylor), lines 39-44, 114-17; *DOJ Horizontal Merger Guidelines*, § 1.11). Stand-alone VoIP meets that profile.

Providers like Vonage and Skype position their service as a substitute for wireline residential service and customers are aware of its availability. (AT&T Ill. Ex. 4.1 (Shooshan), lines 385-91, 401-04). Moreover, industry analysts and observers uniformly recognize the growth of stand-alone VoIP and project its rapid growth. (AT&T Ill. Ex. 3.1 (Taylor), lines 643-70). The VoIP penetration rate is generally estimated at 4% (*id.*, line 668) and broadband access is available to nearly all residential consumers in Illinois. Other state commissions, with a similar lack of hard data about current VoIP market share, have held that VoIP service must be counted as a substitute for basic local exchange service.³³

Staff, the Attorney General and Data Net also opposed counting stand-alone VoIP service because it requires a broadband Internet connection. (Staff Init. Br. at 28-29; AG Init. Br. at 59; Data Net Init. Br. at 14). That is true, but no reason to ignore stand-alone VoIP. Broadband connections are nearly universally available in AT&T Illinois' service area in the Chicago LATA (AT&T Ill. Ex. 4.1 (Shooshan), line 384) and already in place for 1.5 million residential

³³ AT&T Ill. Init. Br. at 48-49 (quoting *Verizon New York Order*, at 34-35); Final Decision, *Petition of SBC Wisconsin for Suspension of Wisconsin Statute sec. 196.196(1) With Regard to Basic Local Exchange Service*, No. 6720-TI-196 (Pub. Serv. Comm'n of Wisc., Nov. 25, 2005) at 26 ("VoIP is in its very earliest stages, but represents a new service that functionally competes with BLES. . . . [T]he Commission concludes that VoIP, to a small degree at this point, is a reasonable technical substitute for BLES, and will grow as a form of competition to BLES in the foreseeable near term."); Order No. 508813, *Application of Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma, for the Classification of Intrastate Retail Telecommunications Services as Basket 4 Services Pursuant to OAC 165:55-66(4)*, Cause No. PUD 200500042 (Corp. Comm'n of Okla., July 28, 2005), at 40 ("VoIP providers can be and are being used interchangeably as substitutes for" retail local exchange service and "thus provide a competitive constraint" on retail local service's pricing); Iowa Code § 476.1D(1)"b" (mandating consideration of VoIP in deciding whether a service is subject to effective competition).

consumers in the Illinois (33% of the market). All such consumers could subscribe to VoIP for as little as \$10 per month (including all usage and vertical features), without having to pay anything extra for a broadband connection. (AT&T Ill Ex. 3.1 (Taylor), lines 678-84; *see also* AT&T Ill. Ex. 4.0 (Shooshan), lines 945-55 & Sch. HMS-8). Thus, there is today a ready demographic for VoIP providers and a large potential base of consumers. (AT&T Ill. Ex. 3.1 (Taylor), lines 680-81).

Staff contends that the Commission's decision in Docket No. 95-0135 precludes consideration of stand-alone VoIP. (Staff Init. Br. at 28-29). There, the Commission concluded that Bands B and C usage were not competitive because customers had to purchase adjunct equipment to obtain equivalent "1+" dialing connections (e.g., auto dialers) to the competing IXCs. The circumstances in that case have no application here. Customers are not purchasing broadband connections *in order to circumvent functional differences between AT&T Illinois' wireline service and stand-alone VoIP services*. They are purchasing broadband connections because they want high speed Internet access; the fact that these connections can then also be used to obtain very inexpensive telephone service is just a "bonus." In other words, broadband connections are not ". . . separately purchased technological devices that are required to raise the functionality of the subject service. . ." *Order in Docket Nos. 95-0135/95-0197*, adopted October 16, 1995, at 25.

III. RESIDENCE LOCAL EXCHANGE SERVICE IS REASONABLY AVAILABLE AT COMPARABLE RATES, TERMS AND CONDITIONS (SECTION 13-502(C)(2))

A. STAND-ALONE SERVICE

The parties continue to be at odds on how to define the "product market" in this proceeding. Staff, the Attorney General, Cook County and the City contend that stand-alone

(*i.e.*, measured or “à la carte”) service is a separate product market from the same service provided to customers in packages for a single fixed price. As explained at length in AT&T Illinois’ Initial Brief, this is a “tunnel vision” approach that does not comport with this Commission’s prior policies, the relevant legal standard or accepted economic definitions of a product market. (AT&T Ill. Init. Br. at 55-61).

In determining what a “service” is for purposes of this proceeding, Staff and the Attorney General begin their analyses at the wrong end of the elephant: *i.e.*, by parsing the words in the statute, rather than by identifying the *purpose* that Section 13-502(b) is trying to accomplish. (Staff Init. Br. at 18-20; AG Init. Br. at 37-38). As Staff acknowledges, the definition of the term “service” in Section 13-203 of the Act is so broad as to be useless in determining product markets under Section 13-502(b). Instead, Staff latches onto the term “tariff” in Section 13-502(a) and contends that everything that is separately tariffed must constitute a separate product market. This proves too much. AT&T Illinois’ tariffs contain literally thousands of rates and rate elements. They *cannot* all be separate product markets. In Docket No. 04-0461, the Commission rejected this kind of literalistic approach to defining the term “service” for imputation purposes and instead adopted a broad, policy-oriented approach that was informed, but not dictated, by statutory language and tariffing conventions:

“Given that Section 13-505.1 specifies that “each” competitive service must pass imputation, the Commission is called upon to define the service in each individual situation.

We see all of the parties to agree that the Commission has the authority to “define” the service for the imputation test. *The record further shows that the Commission proceeds to a determination on a case-by-case basis taking account of all of the relevant factors.* To be sure, the parties do not agree as to what constitutes the competitive service to be imputed in this instance . . .

Defining the “service” for imputation here has not been easy. We see no prior Commission orders to provide us with the right model for this instance. We have the

words of a statute, a purpose and objective, but no clear or established road map for dealing with NALs and their unique characteristics . . .” *Order in Docket No. 04-0461*, adopted June 7, 2005 at 57, 60-63 (emphasis added).

Staff witness Koch agreed during cross-examination that the term “service” has meant different things at different times, depending on the circumstances in which it is used. (Tr. 825).

Therefore, the Commission can and should similarly define “service” in this proceeding using a case-by-case analysis and taking into account all of the relevant factors.³⁴

The relevant factors in making competitive determinations under Section 13-502 support a service definition that identifies a relevant *product market*. As Dr. Taylor explained:

“[T]he statute references an individual “service” and asks whether that service, a functionally equivalent service or a substitute service is available from other suppliers. Thus, we are required to identify the services provided by other carriers that are the same as, “functionally equivalent” to or “substitutable” for each service for which AT&T Illinois is applying for reclassification as competitive. In economic terms, this requirement calls for defining the relevant *product market* in which the relevant AT&T Illinois services compete.” (AT&T Ill. Ex. 3.0 (Taylor), lines 144-149 (emphasis added); see also AG Ex. 1.0 (Selwyn), pp. 23-24).

Product markets are defined by whether services are demand substitutes for one another – not tariff rate elements. (AT&T Ill. Ex. 3.0 (Taylor), lines 195-210, 363-400). Stand-alone rate plans and package offerings *are* demand substitutes for one another; indeed, customers are switching from AT&T Illinois’ stand-alone offerings to its packages and to packages offered by competitors on a daily basis and have been doing so since 2001. (AT&T Ill. Ex. 5.1 (Panfil), lines 352-370).

The continued insistence by Staff, the Attorney General and other parties that packages and stand-alone (*i.e.*, measured) service must be treated as separate product markets elevates

³⁴ It is similarly irrelevant how packages have been treated for purposes of the Alternative Regulation Plan. (AG Init. Br. at 37-38). The purpose underlying this provision of the Plan (*i.e.*, delaying the inclusion of “new services” until the year following their introduction) is to give the Company an opportunity to collect the requisite demand data needed to incorporate it into the API and to allow rate changes if the Company has made an initial pricing error before it is subjected to price caps. Neither policy objective has anything to do with the determination of product markets.

form over substance. (Staff Init. Br. at 16-17; AG Init. Br. at 36-38; Cook County Init. Br. at 14-17; City Init. Br. at 7-8). No party disputes that stand-alone and package services provide exactly the same functionality. No party disputes that the choice between stand-alone and package service is a matter of customer preference and economics. No party disputes that package service would be a viable economic choice for many stand-alone customers. Staff acknowledged this reality as follows: “. . . [M]easured service subscribers who make a significant number of calls and/or who use vertical features will find it less expensive to subscribe to packages than to continue with stand-alone access and pay per use calling.” (Staff Init. Br. at 25). No party contends that *all* stand-alone customers are uniquely in need of regulatory protection. Nor, that they are *all* economically disadvantaged based on income. In fact, no one advocating stand-alone service as a separate product market has any idea how many low use customers there really are (*i.e.*, customers who make few calls of any kind and have no interest in features), much less how many need regulatory protection.³⁵

Staff and the other parties also persist in comparing package service prices to stand-alone service prices based on a hypothetical low-use customer who pays \$12.00 or less per month for service. (Staff Init. Br. at 25-26; AG Init. Br. at 38). Even if stand-alone service were a separate product market (which it is not), a hypothetical stand-alone customer is *not* an average stand-alone customer. This is *not* the spending level that should be compared to packages. It is undisputed in the record that the average stand-alone customer spends ***BEGIN

CONFIDENTIAL AND PROPRIETARY***END**

³⁵ Even with respect to calling patterns, Staff persists in mischaracterizing the record. It is simply not true that “. . .75% of AT&T Illinois’ measured service *subscribers* make fewer than 100 local calls per month. . .” (Staff Init. Br. at 22, emphasis added, emphasis in original deleted). Rather, 75% of AT&T Illinois’ measured service *lines* show fewer than 100 calls per month. A substantial number of these *lines* are likely to be second lines; and low use on a second line tells us nothing about whether the *subscriber* might find packages attractive. (AT&T Ill. Ex. 5.1 (Panfil), lines 224-235, 256-263). Moreover, this usage data does not indicate whether the customers with lines with few local calls subscribe to features or make long distance calls, all relevant factors in determining whether competitors’ packages would be economically attractive.

CONFIDENTIAL AND PROPRIETARY*** per month for service including local usage, features, Band C, local toll and long distance calling. (AT&T Ill. Ex. 5.1 (Panfil), lines 421-443). And this is an *average*, which means that 50% of stand-alone customers will spend more. (*Id.*, lines 466-470). Although AT&T Illinois does not dispute that there are *some* stand-alone customers who spend less than \$12.00 a month on telecommunications services, they cannot be used as a proxy for the entire universe of stand-alone customers to justify a separate product market. To do so would constitute legal error.

Finally, the Attorney General contends that Caller ID and Call Waiting cannot be classified as competitive, regardless of the Commission's final conclusion on stand-alone service generally, citing to Section 13-502.5(c). (AG Init. Br. at 39-40). As AT&T Illinois explained in its Initial Brief, the Attorney General has completely misinterpreted this section of the Act. (AT&T Ill. Init. Br. at 119-120). Section 13-502.5(c) merely exempted Caller ID and Call Waiting from the *statutory reclassification* of residence features as competitive in 2003. It says absolutely nothing about whether they can be reclassified under Section 13-502 based on an appropriate record.

B. SERVICE PACKAGES

The Attorney General claims that there are no competitor packages that are comparable to AT&T Illinois packages because the competitors' packages have a higher total price and/or include services other than basic local exchange service. (AG Init. Br. at 51-58). In other words, unless the packages are exactly identical to AT&T Illinois', the Attorney General says the Commission must discount them. The appellate court, however, has held that Section 13-502 does not require "total, complete, absolute equality in the quality, quantity, or degree of

availability of those alternatives in comparison to” the service up for reclassification. *MCI Telecomms.*, 168 Ill. App. 3d at 1014, 523 N.E.2d at 147.

The Attorney General’s theory ignores reality. The Attorney General argues that it was improper for AT&T Illinois to compare the prices of service packages offered by competitors that include long distance, as well as local, service to the prices for service bundles offered by AT&T Illinois that also include long distance, as well as local, service. (AG Init. Br. at 56-58). In the Attorney General’s make-believe world, customers would compare the tariffed price of AT&T Illinois’ local service packages *without* long distance service to the prices for “all distance” packages offered by competitors that include local *and* long distance and conclude that they have no reasonable alternative but to buy local service from AT&T Illinois. In the real world, of course, rational customers do not make such apples-to-oranges comparisons. To the contrary, customers need to make both local and long distance calls. Accordingly, in evaluating the cost of a competitor’s package that includes local and long distance service, any rational customer would look at the cost of purchasing a bundle from AT&T Illinois that includes local and long distance, or the total cost of buying local service from AT&T Illinois and buying long distance service as stand-alone services.³⁶

The Attorney General also ignores reality when it complains that differences in the number of features included in the packages offered by AT&T Illinois and its competitors “makes a direct comparison problematic.” (AG Init. Br. at 57). In the Attorney General’s make-believe world, no package offered by AT&T Illinois can be deemed competitive unless there is an identical package available from a competitor containing identical features and the same

³⁶ Contrary to the Attorney General’s assertion (Init. Br. at 56), the fact that “long distance is already a competitive service” is irrelevant. By statute, most vertical features are also competitive, and voice mail is non-regulated, yet the Attorney General does not suggest (and there is no basis for a suggestion) that it is improper to compare the prices of packages that include competitive features and/or voice mail.

number of features at exactly the same price. In the real world, companies compete by differentiating the products and services they offer as well as on the basis of price. Thus, a package offered by a competitor that includes seven features for a price that is slightly higher than the price of a package offered by AT&T Illinois that includes three or six features is a reasonably available competitive alternative even though the prices are not identical. If the Commission were to conclude otherwise, it would also have to conclude that the automobile industry is not competitive because the option packages available on competing automobiles do not contain identical combinations of options at identical prices. Such a conclusion would be nonsense.³⁷

The Attorney General's theory also ignores basic economic analysis. Products do not have to be identically priced or provide identical functions to be in the same market. The test for substitutes is "reasonable interchangeability of use," not identical pricing or attributes, and many factors can affect interchangeability of use. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-26 (1956). In this case, for example, the overall *value* proposition of a package, which may include inexpensive features and toll calling, can make it a viable substitute for measured local service and/or packages including residential local service. (AT&T Ill. Ex. 4.0 (Shooshan), lines 421-22). Indeed, variation in price and other aspects are exactly what one would expect (and consumers desire) from providers seeking to differentiate themselves in a competitive market. (AT&T Ill. Ex. 3.1 (Taylor), lines 905-06). For this reason, "[c]ourts have repeatedly rejected efforts to define markets by price variances or product quality variances. Such distinctions are

³⁷ The Attorney General also complains that tariffed and advertised prices for CLEC packages analyzed by the witnesses for Staff and AT&T Illinois did not include additional charges such as carrier common line charges, installation, service order, or other nonrecurring charges or taxes, universal service, number portability, or other such ancillary fees or charges. (AG Init. Br. at 29-30, 52). This complaint is unwarranted since additional fees and charges such as these are assessed by all carriers, including AT&T Illinois and are typically not included in the advertised price. Dr. Zolnierok and Mr. Wardin did not include additional charges of this nature in the prices of either the CLECs or AT&T Illinois in developing their price comparisons. Accordingly, these price comparisons were performed on a proper apples-to-apples basis.

economically meaningless where the differences are actually a *spectrum* of price and quality differences.” *In re Super Premium Ice Cream Distribution Antitrust Litigation*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (collecting cases); *accord*, *United States v. Continental Can Co.*, 378 U.S. 441, 453 (1964) (“that the competition here involved . . . is between products with distinctive characteristics does not automatically remove it from [the same product market]”). There are numerous examples in antitrust cases of products that are not functionally identical or equivalent and yet have been found by the courts to be sufficiently substitutable to exert competitive pressure on one another.³⁸

The Attorney General’s analysis consists of picking apart the advertised prices, promotional rates, surcharges, and various included services in competing packages, searching for a way to reject each one. (AG Init. Br. at 51-58). The record renders such an analysis unnecessary (and misleading), for the marketplace evidence shows that these are distinctions that make no difference to customers. While one might need such an analysis if there were doubt that customers substitute competitors’ packages for AT&T Illinois’ packages, the evidence of competitor market share proves that customers already do engage in substitution, and that is all that needs to be shown. Staff found this to be a “vital” point, concluding that “the Commission need not make decisions in reliance upon hypothetical, theoretical, or speculative evidence, because it has actual provisioning information that largely obviates the need for, and indeed the relevance of, such evidence. That is, the Commission need not determine whether carriers might be able to serve the market; it can now simply observe that they are indeed serving the market.” (Staff Init. Br. at 57).

A simple example shows the misleading nature of the Attorney General’s package comparisons. The Attorney General contends that Comcast’s telephone service is not

³⁸ See ABA Section of Antitrust Law, *Antitrust Law Developments*, at 500-08 (4th ed. 1997).

competitively priced, claiming that Comcast charges “\$54.95 for telephone service only.” (AG Init. Br. at 34-35). As Mr. Wardin explained, this ignores that, for Comcast’s cable television and Internet subscribers, the price of telephone service is just \$39.95 (\$44.95 if the customer has only one of cable television or Internet service). (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 395-99). Since Comcast’s Digital Voice Service includes unlimited local and long distance calling (and several features), the comparable product is not AT&T Illinois’ \$23.50 offering for local service only, but rather its All Distance Plan, which sells for \$49.95. (*Id.*, lines 393-94, 413-14 & n.5).³⁹ Thus, Comcast advertises that its price “could save more than 16% over the phone company.” (*Id.*, lines 413-14). This confirms the fact of head-to-head, package-to-package competition between Comcast and AT&T Illinois.

As another example of its misleading analysis, the Attorney General argues that Dr. Zolnierек was wrong to compare the price for Sage’s Simply Savings Plan (\$24.90 in most access areas) to the prices for AT&T Illinois’ uSelect 3 and uSelect 6 packages because the “FCC customer line charge” assessed by Sage exceeds AT&T Illinois’ end user common line (“EUCL”) charge by \$3.00. (AG Init. Br. at 53). Even with this differential, however, the overall price of the Sage plan is still \$1.00 *less* than the overall price of the uSelect 6 plan and only \$4.50 higher than the price of the uSelect 3 plan in Access Areas B and C, where *****BEGIN CONFIDENTIAL AND PROPRIETARY*****END CONFIDENTIAL AND PROPRIETARY***** of AT&T Illinois’ residential customers reside. (Staff Ex. 2.0 (Zolnierек), lines 418, 420, 438-441, 1779-1785). The price of the Sage Simply Savings Plan is accurately characterized as “comparable” to the price of AT&T Illinois’ plans, particularly given

³⁹ The Attorney General (Init. Br. at 56) notes that AT&T Illinois has previously referenced an “All Distance Select (uSelect 3)” price of \$39.99. That price is for the version of the uSelect 3 “All Distance Plan” which does not include voice mail when ordered over the Internet. The All Distance Plan price of \$49.95 applies when ordered by phone from a customer representative and includes voice mail in addition to three other features.

the fact that the Simply Savings Plan provides customers with (i) many more features than either the uSelect 3 or uSelect 6 plans, as well as a choice of the Voice Mail, Home Wire Maintenance or Privacy Package, and (ii) 100 minutes of long distance calling. (Staff Ex. 2.0 (Zolnierek), lines 1772-1777, 1870-1875).⁴⁰

The Attorney General also takes issue with Dr. Zolnierek's observation that the \$23.00 price of "Verizon's Residential RLD-4 Service Plan," which provides customers with a residential network access line, unlimited local calling and four features, is comparable to the prices charged by AT&T Illinois for its uSelect 3 and uSelect 6 packages. The Attorney General argues that this comparison should not count because "Verizon only serves *****BEGIN CONFIDENTIAL AND PROPRIETARY*****END CONFIDENTIAL AND PROPRIETARY***** lines in MSA1." (AG Init. Br. at 52, n. 38). The Attorney General has completely missed the boat. As Dr. Zolnierek made clear (Staff Ex. 2.0 (Zolnierek), p. 82, n. 112; Tr. 955-956), the package he was referring to is one provided by MCI (recently acquired by Verizon), which serves *****BEGIN CONFIDENTIAL AND PROPRIETARY*****END CONFIDENTIAL AND PROPRIETARY***** residential access lines throughout the Chicago LATA. (AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 1405-1413).

The Attorney General also argues that, in light of the price of LWC relative to UNE-P, "the Commission should expect that competitors will raise prices to ensure that they cover their wholesale costs." (AG Init. Br. at 58). There is no basis for this argument. As previously discussed, the Attorney General has grossly exaggerated the difference between the prices for LWC and UNE-P. Moreover, retail prices will be established by the competitive market for

⁴⁰ The Attorney General also suggests that the Sage package should not be considered as comparable to AT&T Illinois' packages because "Sage will only offer service to a customer who already has an IBT line." (AG Init. Br. at 54). This suggestion is a *non sequitur*, since the issue in this case is whether residential customers in the Chicago LATA, most of whom currently have an "IBT line" have reasonably available alternatives to AT&T Illinois. The services offered by Sage clearly constitute such a "reasonably available alternative."

retail residence service. Thus, a carrier's ability to increase its retail prices will be constrained by the retail prices charged by competing service providers, which include not only LWC carriers but also independent facilities-based carriers, UNE-L carriers, independent VoIP providers and wireless providers. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 524-527). There is no evidence whatsoever that carriers which switched from UNE-P to LWC raised their retail prices.

The Attorney General's analysis of the comparability of wireless and independent VoIP packages suffers from the same infirmities as its analysis of CLEC packages. For example, the Attorney General argues that the average price for wireless packages is \$35.70, which "will not constrain" AT&T Illinois' "current uSelect 3 and 6 rates." (AG Init. Br. at 58). As the Attorney General acknowledges, however, wireless plans allow customers to make local, toll, and long distance calling. (*Id.*). In addition, wireless plans typically include at no extra charge a wide range of vertical features (Caller ID, voice mail, etc.). (AT&T Ill. Ex. 4.0 (Shooshan), lines 411-450). Accordingly, a proper apples-to-apples comparison requires a comparison of the price of the wireless plans to the price of the "all-distance" versions of the uSelect 3 and 6 packages, which exceed the \$35.70 wireless average price. (See AT&T Ill. Init. Br. at 97).⁴¹ Moreover, the prices for a number of wireless plans are less than the average. For example, US Cellular offers a \$24.90 plan that includes 400 anytime local minutes, *plus* unlimited long distance and unlimited weekend minutes. (AT&T Ill. Ex. 4.1 (Shooshan), lines 97-97). This price is only \$1.40 more than the price of the local-only version of uSelect 3 and \$4.10 less than the price of the local-only version of uSelect 6. (Staff Ex. 2.0 (Zolnierek), lines 418-420, 439-441).

⁴¹ The Attorney General asserts that "wireless service is almost invariably priced on a per minute (not per call) basis." (AG Init. Br. at 58). In fact, however, the prices for most wireless plans include minutes of use up to a cap and, in addition, have "free" minutes that are not counted toward the cap (e.g., "Free Nights and Weekends", "Unlimited In-Network Calls, "Unlimited CALL ME Minutes"), while others allow unused minutes to be "rolled over" into successive months. (AT&T Ill. Ex. 4.0 (Shooshan), lines 411-450).

The Attorney General does not dispute the fact that there are numerous VoIP providers that offer service at very low prices, ranging from \$10 to \$35 for unlimited local and long distance calling and that these prices are lower than the prices charged by AT&T Illinois for comparable service bundles. (AT&T Ill. Ex. 1.0 Rev. (Wardin), Sch. WKW-6, pp. 5-7; AT&T Ill. Ex. 2.0 (Moore), lines 328-387; AT&T Ill. Ex. 4.0 (Shooshan), lines 835-837, 851-865, n. 82). The Attorney General, however, argues that the VoIP service packages should not count because, in addition to the price of VoIP itself, consumers who do not already subscribe to broadband internet service would have to purchase a broadband connection. The Attorney General asserts that when the price of the broadband connection is added to the price of the VoIP services, the total price is no longer competitive with AT&T Illinois' wireline services. (AG Init. Br. at 59).

Once again, the Attorney General's economic logic is fatally flawed. The fact that over 1.5 million households in Illinois (as of December 2004) already have a broadband connection means that for *these* consumers, the effective price of VoIP *does not* include a broadband connection. As Dr. Taylor explained, a price increase for residential local exchange service could prove unprofitable if it induced enough "marginal" customers — which need comprise only a fraction of the 33% of consumers that already have a broadband connection — to switch to VoIP. There is no guarantee that those customers who already have broadband connections will stay with AT&T Illinois for voice service — and there is certainly evidence that many have already switched to VoIP, as well as cable, competitors — so AT&T Illinois must do what it can to make its wireline services attractive to these customers and that includes ensuring that the price it charges for wireline services is competitive. (*Id.*, lines 127-131, 259-269). Accordingly,

the available VoIP service does constrain AT&T Illinois' ability to increase prices for local exchange service.

IV. A COMPETITIVE CLASSIFICATION COMBINED WITH THE AT&T ILLINOIS/CUB JOINT PROPOSAL WILL PROMOTE COMPETITION AND IS IN THE PUBLIC INTEREST (SECTION 13-502(C)(5))

A. COMPETITION FOR AT&T ILLINOIS' LOW USE CUSTOMERS

As has been typical for the Attorney General throughout this proceeding, its Initial Brief is long on the lack of competitive alternatives for low use customers but short on solutions. In fact, the Attorney General offers no solution whatsoever. As both AT&T Illinois and Staff explain in detail in their Initial Briefs, this "lock up the rate structure and throw away the key" approach is worse than useless as a policy recommendation because it perpetuates and exacerbates the root causes of the problem. (AT&T Ill. Init. Br. at 70-73; Staff Init. Br. at 88, 91-92, 95-96, 108).

The Attorney General disputes the rather obvious proposition that AT&T Illinois' stand-alone service rates are too low to attract competitors to serve low use customers. (AG Init. Br. at 63-66). *First*, the Attorney General claims that AT&T Illinois' rates cannot be too low unless they are confiscatory or below cost and that ratemaking must balance the interests of ratepayers and shareholders. The "just and reasonable" case law to which the Attorney General cites has no application to this case. The principle that the Commission must balance consumer and investor interests primarily applies to rate cases conducted under rate-of-return regulation, where a utility's overall earnings are being established. *Citizens Utility Board v. ICC*, 276 Ill. App. 3d 730, 736-737 (1st Dist. 1995). This is not a rate case, AT&T Illinois is not under rate-of-return regulation, and its rates are not subject to a traditional earnings analysis to determine whether they are just and reasonable. The Attorney General made the same "just and reasonable"

argument in the Alternative Regulation Review proceeding, and the Commission rejected it. *Order in Docket No. 98-0252/98-0335/00-0764*, adopted December 30, 2002, at 40-42.

Although the *Citizens* case extended the balancing principle to rate restructuring proceedings (*i.e.*, the Commission is required to consider customer impact), this is not such a proceeding. The Commission is not approving any rates under its Article IX authority. Moreover, the testimony filed by Staff, AT&T Illinois and CUB has provided extensive analyses of the potential impact of the Joint Proposal on consumers, which the Commission will certainly consider in making its final determination in this proceeding. Thus, even if the requirements of *Citizens* apply – which they do not – they will be met.

Second, the Attorney General suggests that the lack of competition for low use customers may mean that the cost structure of AT&T Illinois' competitors is too high, rather than that the Company's rates are too low. (AG Init. Br. at 64-65). Dr. Staranczak compared AT&T Illinois' residence network access line rates to the incremental costs of a loop approved by the Commission in Docket No. 02-0864; these costs formed the basis for the UNE-L rates paid by competitor. Based on this comparison, AT&T Illinois' retail rates *are* too low, and are even further below cost when the other charges incurred by CLECs for a complete network access line are considered.⁴²

Furthermore, contrary to the suggestion of the Attorney General, rates can be too low even if they cover other measures of incremental cost (*e.g.*, LRSIC). As Mr. Panfil explained, the Illinois version of LRSIC utilizes very aggressive input assumptions that result in costs that substantially understate AT&T Illinois' actual overall costs of operation. (AT&T Ill. Ex. 5.0 (Panfil), lines 319-339). AT&T Illinois would go bankrupt if all of its services were priced at or

⁴² Dr. Staranczak's chart is reproduced in Staff's Initial Brief. (Staff Init. Br. at 21). However, it represents only the UNE loop; it is not equivalent to a retail network access line, which also includes a switch port. An additional \$3.18 must be added to the costs in Column (4) in Table 1 to make a full comparison. (Tr. 848-850).

even slightly above LRSIC. (*Id.*, lines 323-325). The UNE rates to which Staff compared AT&T Illinois' retail network access line rates were based on TELRIC cost studies that contain somewhat more realistic assumptions for the major inputs – although they are still premised on a forward-looking, hypothetical view of a telecommunications carrier's operations that bears only the most tenuous relationship to reality. *Order in Docket No. 02-0864*, adopted June 9, 2004, at pp. 18, 58-59, 67, 76-77. Therefore, contrary to the Attorney General's claim, rates that are close to "cost" in the regulatory world are not necessarily "efficient" in the real world ; conversely, competitors whose costs are higher than what comes out of AT&T Illinois' LRSIC studies are not necessarily "inefficient." Therefore, AT&T Illinois' rates can cover "cost" but still be "too low" from a competitive policy perspective.

The Attorney General claims that this rate problem stems from the "sky high LWC rate," not from mispriced retail rates. (AG Init. Br. at 66). This is patently incorrect. The analysis performed by Staff was based on *UNE costs and rates* set by the Commission in docketed proceedings. (Staff Ex. 1.0 (Staranczak), lines 188-218). These are the costs and rates to which Dr. Selwyn and Mr. Gillan are so attached. Dr. Selwyn was the only witness recommending use of *LWC rates* to reprice AT&T Illinois' retail rates – an odd position, given the Attorney General's almost pathological aversion to network access line rate increases and the extreme rate changes that would be required under Dr. Selwyn's approach. (AG Init. Br. at 65-66).

The Attorney General contends that a 2001 report prepared by Dr. Zolnierek when he was on the FCC Staff somehow establishes that AT&T Illinois' stand-alone service rates are "efficient" and should not be changed. (AG Init. Br. at 64-65). This constitutes the worst kind of bootstrapping. This FCC report addressed CLEC entry into local markets on a *nationwide basis* in 1999. (Tr. 64-65). Based on *then* available data, Dr. Zolnierek discussed why CLEC

market shares might be lower in Chicago than in some other cities. However, it is clear from the report that Dr. Zolnierек had not performed any analysis of his own and was simply engaging in speculation. This is not “evidence” of anything. The relevant evidence is that submitted by Drs. Zolnierек and Staranczak in this proceeding reflecting current information and current analyses.

Finally, the Attorney General contends that the evidence regarding the benefits of competition have been “disappointing,” pointing to a decline in AT&T Illinois’ employees and other indicators over the last five years. (AT&T Ill. Init. Br. at 62-63). That is because the Attorney General does not understand how competitive markets work. When a company’s revenues decline *\$1.5 billion* over five years due to competition, as AT&T Illinois’ have, it is not going to dramatically increase its employee base or go on a spending binge. That way lies bankruptcy. In fact, a modest decrease in employee levels and even some curtailing of capital spending would be exactly what one would expect of a rational competitor – it is not evidence of market failure. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 767-771). Moreover, the Attorney General has its facts wrong on capital investment: AT&T Illinois invested *\$3.3 billion* in its network over the five years between 2001 and 2005, essentially the same amount it invested over the preceding five-year period (1996-2000). (*Id.*, lines 743-752). AT&T Illinois has provided exemplary service to its customers with its existing employee and plant levels, and this is undisputed in the record. (*Id.*, lines 773-785). The provision of high quality service to customers is the General Assembly’s focus in Section 13-103(a) – not statistics on a company’s internal governance. Finally, competition’s “record” in this marketplace has to be evaluated based on the expansion of service options, employment levels and network investment of *all*

providers – not just AT&T Illinois’. In short, the Attorney General is clutching at straws here, trying to find competitive problems where none exist.⁴³

B. THE JOINT PROPOSAL

Predictably, the Attorney General, Cook County and the City oppose adoption of the Joint Proposal. (AG Init. Br. at 66-78; Cook County Init. Br. at 22-23; City Init. Br. at 15-17). The Attorney General claims that the Commission, *as a matter of law*, cannot adopt the Joint Proposal, principally because of AT&T Illinois’ voluntary commitment to limit future network access line and usage rate increases over the transition period. (AG Init. Br. at 68-72). These legal arguments are baseless. AT&T Illinois agrees with the Attorney General (and Staff) that, because not all parties have signed on to the Joint Proposal, the Commission must evaluate it on its merits in light of the record evidence. (AG Init. Br. at 68; Staff Init. Br. at 87). *Business and Professional People for the Public Interest v. Comm. Comm.*, 136 Ill. 2d 192, 217 (1989) (“*BPI*”). However, contrary to the Attorney General’s assertion, *BPI* says nothing about this Commission’s ability to consider and accept AT&T Illinois’ voluntary commitments in the Joint Proposal as part of its overall decision making under Section 13-502 of the Act.

In *BPI*, the Commission was engaging in *ratemaking* under Article IX of the Public Utilities Act. That is, the Commission was establishing rates on a going-forward basis for Commonwealth Edison based on rate-of-return, revenue requirements principles. In that context, the Supreme Court stated that rates in a contested case could not be set using mechanisms that the Commission could not impose on the utility without the utility’s agreement. *Id.* at 229-230. Those mechanisms included retroactive refunds and a five-year rate moratorium.

⁴³ The Attorney General complains that prices for competitive central office features and Band C calling have increased. (AG Init. Br. at 62). These rate changes were the only *bright spots* for competitors, offsetting to a very limited degree the negative effects of the Alternative Regulation Plan on competition.

This proceeding, however, does *not* involve Article IX ratemaking. The Commission is determining the appropriate classification of services under Section 13-502 and is establishing *no rates* in that process. It is well-established that the Commission can consider voluntary rate commitments by a carrier in Section 13-502 proceedings and rely on them in its decision to classify a service as competitive. In the original proceeding reclassifying its long distance services as competitive, pre-merger AT&T volunteered to maintain statewide average rates and the Commission relied on that commitment:

“Based upon a review of the record in this proceeding, and cognizant of the goals of the new Act referred to above in part, the Commission is of the opinion that most Long Distance Service customers in Illinois have functionally equivalent or substitute service reasonably available from more than one provider as defined under the new Act. Long Distance Service, whether the same, a functional equivalent, or substitute, is being provided by other entities.

Most Illinois consumers have access to providers of alternative services through local access (dial one plus or a seven digit number). At the end of 1985, at a minimum, approximately 70% of the access lines in Illinois, could, by local access, use the services of a toll provider other than AT&T. By June, such access will be available to over three quarters of the access lines in Illinois, and by December, 1986, to at least 86% of the access lines. The record shows that at least four long distance companies in Illinois provide customers with the ability to access their service by means of 800 numbers. The Commission concludes that a majority of access line customers presently have the ability to obtain long distance service from more than one provider.

*The Commission is of the opinion that Long Distance Service should be provided under a statewide pricing schedule; calls of all AT&T Long Distance customers throughout Illinois are now, and should continue to be, priced on a uniform basis. This will ensure that all of AT&T's Long Distance Service customers will receive equal economic and technological benefits of competition.” Order in Docket No. 86-0003, adopted April 23, 1986, at 7-8.*⁴⁴

The Appellate Court noted this requirement in its opinion affirming the Commission’s decision.

MCI Telecommunications Corp. v. Ill. Comm. Comm., 168 Ill. App. 3d 1008, 1012 (1st Dist.

1988). The General Assembly codified the Commission’s authority to accept voluntary

⁴⁴ Nothing in the Public Utilities Act allows the Commission to impose a statewide rate averaging requirement any more than it allows the imposition of rate moratoria.

commitments in 2001, when it expressly allowed the Commission to consider public interest factors in deciding competitive classification cases. 220 ILCS 5/13-502(c)(5).

The Commission has routinely relied on a utility's voluntary acceptance of conditions that it could not otherwise impose in other non-ratemaking contexts. For example, in the original Alternative Regulation Plan proceeding under Section 13-506.1, AT&T Illinois made a voluntary commitment to spend \$3 billion on its network over the first five years of the Plan – a requirement which the Commission could not otherwise have imposed on the Company under the PUA. The Commission recognized this commitment in its overall evaluation of the Plan and imposed reporting requirements on AT&T Illinois to ensure that it was met. *Order in Docket Nos. 92-0448/93-0239*, adopted October 11, 1994, at 93-94, 191-192. In the SBC/Ameritech Merger proceeding, the Commission relied on a host of commitments by SBC and Ameritech that went far beyond what it could have imposed on the Company under the authority of Section 7-204 of the Act, stating as follows:

“The record in this cause, taken together with our analyses in other sections of this Order, reveals that conditions to our approval need to be imposed in order to protect the interests of the Company and its customers.

Many of these conditions are the result of commitments made by the Joint Applicants in the course of this proceeding. *While certain of these might be beyond our jurisdiction to impose, we have accepted and relied to some degree on these commitments.* Some of the other conditions arise from our reasoned judgment on how to make the Section 7-204(b) findings truly meaningful. Another condition is based on our belief that compliance with outstanding Commission Orders is so basic an interest that it can and should be addressed as part of this Order. Finally, some of the many conditions here proposed have not been adopted primarily for the reason that they either relate to matters beyond our jurisdiction or lie outside the scope of this proceeding.” *Order in Docket No. 98-0555*, adopted September 23, 1999, at 239 (emphasis added); see also *Id.* at 147, Finding (7) at 262.

The Commission went a step further and actually required the merger applicants to file a notice within seven days of the entry of the Order that these conditions had been accepted and would be “obeyed.” *Id.* at 260 (Condition (32)). In the Illinois Section 271 docket, the Commission also

accepted and relied on voluntary commitments by AT&T Illinois as part of its determination that the Company's markets were open to competition in compliance with the federal Act. *Order in Docket No. 01-0662*, adopted May 13, 2003, at 912-916. In other words, there is ample precedent that the Commission can rely on voluntary commitments in its decision making outside the Article IX ratemaking context and the *BPI* case is inapposite here.

The Attorney General makes the bizarre argument that the Joint Proposal cannot be accepted because it must be evaluated under Section 13-506.1 of the Act. (AG Init. Br. at 70-71). This argument is based on a statement by CUB witness McKibbin that the rate commitments in the Joint Proposal constituted "another form of price regulation." (*Id.* at 70). Obviously, Ms. McKibbin was speaking colloquially and meant only that price constraints – however imposed – operate to "regulate" prices in the most general sense of the word. She certainly did not intend, and could not have intended, that the Joint Proposal commitments were an "alternative form of regulation" under Section 13-506.1. Section 13-506.1 applies only to *noncompetitive services*. Under the Joint Proposal, AT&T Illinois' local exchange services in the Chicago LATA will continue to be classified as *competitive*.

The Attorney General claims that AT&T Illinois' local exchange services are not competitive because consumers have insufficient information to make informed choices. (AG Init. Br. at 73-76). It is unclear what the Attorney General expects from this marketplace. It is clear from the record that telecommunications providers are bombarding customers with media and print advertisements for their products and services and all maintain websites from which additional information can be obtained.⁴⁵ (See e.g., AT&T Ill. Ex. 2.0 (Moore), Schs. SMM 2-9). The fact that customers have to comparison shop and make judgments about the value of

⁴⁵ Whatever Dr. Selwyn's view of AT&T Illinois' website, the *Company* strives to make it as useful and accessible to customers as possible given the complexities inherent in offering multiple rate plans. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 561-583).

different offerings does not distinguish this market from any other competitive market – informed choices do not happen without consumer initiative. For example, no one doubts that the market for new cars is competitive. However, automobiles have numerous “characteristics about which consumers are in some way uncertain before purchase.” (AG Init. Br. at 76). To make an informed choice, consumers may visit websites, review automobile ratings and evaluations in *Consumer Reports* and specialty automobile publications to assess quality differences and frequency of repair issues, solicit opinions from friends and family, test drive vehicles and obtain quotes from salesmen at more than one dealer (since actual sales prices are negotiated, there is not even an easy process to obtain prices). In comparison to purchasing an automobile, choosing telecommunications services is comparatively straightforward and mistakes are easily corrected – switching from one rate plan to another or even from one carrier to another entails minimal transaction costs. The Attorney General seems to have a “rose-colored glasses” view of the availability of information in competitive markets and it should be viewed as such.⁴⁶

Given the Attorney General’s enthusiasm for customer information, its opposition to the consumer education funding component of the Joint Proposal is inexplicable. In any marketplace, more information is a good thing. The Attorney General’s attempt to disparage CUB’s ability to use the \$2.5 million effectively in its programs says more about the Attorney General than it does about CUB. (AG Init. Br. at 77). CUB has a long history of educating consumers about their options with regard to utility service and its efforts are well respected. (CUB Init. Br. at 6-7). Apparently the Attorney General’s desire to “win” in this proceeding overwhelmed considerations of comity and good judgment. Moreover, the \$2.5 million that

⁴⁶ AT&T Illinois regrets that Ms. Zolot did not find its service representatives as helpful as she had hoped. (AG Init. Br. at 74-75). However, this was one customer’s experience. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 642-647). Notably, Ms. Zolot appears to have worked out the best rate option for her.

AT&T Illinois will provide CUB under the Joint Proposal is a significant amount of funding – whether viewed on a stand-alone basis or in comparison to AT&T Illinois’ advertising budget for residential service; for example, the Company spent only *****BEGIN CONFIDENTIAL AND PROPRIETARY*****END CONFIDENTIAL AND PROPRIETARY***** statewide in 2005 to promote residential service packages. (AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 546-554).⁴⁷

Finally, the Attorney General’s preferred solution – returning AT&T Illinois’ residence services to the Alternative Regulation Plan – will do nothing to address the lack of competition for low use customers. The Attorney General actually implies that *somehow* this problem will correct itself over time:

“If the pricing protections of alternative regulation are lost before there are sufficient and viable competitive alternatives, consumers will face price increases and lose the price decreases that the alternative regulation plan captures.” (AG Init. Br. at 77, emphasis added).

And how, precisely, will the continuation of price decreases for local exchange services under the Alternative Regulation Plan attract competition? On that issue, the Attorney General is completely and resolutely silent. As both AT&T Illinois and Staff have explained at length, continuation of the *status quo* is simply not a viable policy alternative. (AT&T Ill. Init. Br. at 70-73; Staff Init. Br. at 33-38, 87-96).

C. RATE REBALANCING

Staff continues to urge that the Commission adopt its rate rebalancing proposal, while simultaneously agreeing that the Joint Proposal has much to recommend it. (Staff Init. Br. at 33-38, 81-112). AT&T Illinois appreciates Staff’s effort to fairly weigh and compare these two

⁴⁷ The Attorney General contends that the Commission does not have authority to approve this funding commitment. (AG Init. Br. at 71). AT&T Illinois and CUB are not asking the Commission to do so. (AT&T Ill. Ex. 1.4 (Wardin), lines 377-385).

alternative solutions to the low use customer problem and to provide the Commission with its assessment of where the public interest lies. However, in the final analysis, Staff's preference for rate rebalancing is not supported by the facts and its approach should not be adopted.

It is important to recognize that the Joint Proposal and rate rebalancing will have similar outcomes in terms of repricing AT&T Illinois' local exchange service. The core of Staff's proposal is to increase residence network access line rates by \$1.00 per year until retail rates exceed the TELRIC cost of a network access line. This would require a total increase in the \$5 range. (AT&T Ill. Init. Br. at 82, n. 35). In comparison, under the Joint Proposal, AT&T Illinois would be allowed to increase its residence network access line rates by up to \$1.00 per year for a three-year period ending in 2009, with no set limits thereafter. Although the mechanics of the two processes differ after the transition period of the Joint Proposal, the net rate change would likely be essentially the same: an approximately \$5.00 increase in residence network access line rates, implemented in \$1.00 increments. Thus, in terms of bottom line results, these two approaches are "six of one, half a dozen of the other."

However, where the Joint Proposal and rate rebalancing *differ*, the nod clearly goes to the Joint Proposal. The Joint Proposal can be implemented immediately; rate rebalancing on the other hand would require a painful, contentious, year (or longer) docketed proceeding at the Commission before any rate changes could even begin. The Joint Proposal operates outside of the Alternative Regulation Plan; rate rebalancing would be effected within the framework of the Plan, thus requiring the continuation of competition-killing overall rate decreases over the five-year restructure period. The Joint Proposal will infuse new revenue opportunities for competitors in the Illinois residence market; rate rebalancing will make low use residence customers more economically attractive, but will simultaneously make other residence customers

less attractive.⁴⁸ Fundamentally, CLECs will be no better off at the end of Staff's restructure than they are today and competition overall will not be enhanced. In short, Staff's evaluation of these two proposals put too much weight on the rate rebalancing side of the scale and too little on the Joint Proposal's side.

The real difference between the two proposals is – as Staff acknowledges – whether the market or the Commission will have the most impact on the final results. (Staff Init. Br. at 109-110). Under rate rebalancing, the Commission will be micromanaging all rate changes. Staff's approach may indeed be the most “conservative” approach. (Staff Init. Br. at 109). That does not make it “better” or ensure a more market-based outcome. Indeed, the Joint Proposal, with all of its rate commitments and safe harbors, could hardly be described as “radical.” Continued heavy-handed regulatory control over AT&T Illinois' local exchange service prices over another 5-7 year period is simply *not* consistent with the General Assembly's pro-competitive policies.⁴⁹ Therefore, when guided by the General Assembly's clear policy directive in Section 13-103(b) that “competition . . . should be pursued as a substitute for regulation,” the choice for the Commission between Staff's regulatory approach and the Joint Proposal's market approach is clear.

⁴⁸ Staff contends that Dr. Taylor supported reducing the mark-ups on services like usage and central office features. (Staff Init. Br. at 27). Staff is incorrect. Dr. Taylor only acknowledged what any economist would acknowledge – that, as an abstract proposition, higher mark-ups on inelastic than elastic services are consistent with economic objectives. He said nothing, however, about whether AT&T Illinois' existing usage and central office feature rates should be reduced. In fact, in testimony, he specifically stated that the mark-up on usage should *not* necessarily come down – *i.e.*, that the relative mark-ups between products are something that should ultimately be market driven. (AT&T Ill. Ex. 3.1 (Taylor), lines 1486-1497).

⁴⁹ AT&T Illinois understands that one of Staff's major reservations about the Joint Proposal is the conflict between the transitional rate increases and Staff's recommended approach to imputation. (Staff Init. Br. at 111). AT&T Illinois has been pointing out this potential problem out for months. (AT&T Ill. Ex. 1.3 (Wardin), lines 179-184; AT&T Ill. Ex. 1.4 (Wardin), lines 107-120). As discussed below, Staff has locked itself into an interpretation of Section 13-505.1 that is not required from a legal perspective and is unwise from a policy perspective. (AT&T Ill. Init. Br. at 103-113).

V. AT&T ILLINOIS' RETAIL RATES SATISFY SECTION 13-505.1

The divergent Staff and AT&T Illinois/CUB views on imputation have not narrowed any. Staff attempts to dismiss AT&T Illinois' position as being unworthy of even the slightest consideration. (Staff Init. Br. at 79-83). To the contrary, it is Staff's position that suffers from a serious case of "tunnel vision" and it should not be adopted.

First, AT&T Illinois is *not* asking the Commission to ignore its 2005 Order adopting an imputation test for business network access lines. (Staff Init. Br. at 79-80). In fact, it is AT&T Illinois' approach that follows the letter and the spirit of the 2005 Order, not Staff's. The Commission clearly found in that Order that every imputation test must be evaluated on a "*case-by-case basis*," based on the "*logic, law and realities*" of the situation. *Order in Docket No. 04-0461*, adopted June 7, 2005, at 60, 62 (emphasis added). Instead of evaluating the "logic, law and realities" of the situation relative to residence network access lines from the ground up, Staff essentially adopted the policies adopted in that Order as "*givens*":

"It is my opinion that, to the maximum extent possible, the residence NAL imputation test should be identical in form to the business NAL test, as the same rationale and purpose apply to the construction of both tests." (Staff Ex. 3.0 (Koch), lines 217-222).

This is not what the Commission decided in Docket No. 04-0461 and it should not guide the Commission's determination here.

If Staff had performed the case-by-case analysis required by the Docket No. 04-0461 Order, it would have been readily apparent that residence network access lines have unique characteristics and a unique pricing history, which clearly distinguish them from business lines for imputation purposes. AT&T Illinois readily concedes (and has routinely conceded) that central office features are optional for both residence and business customers. (Staff Init. Br. at 80). However, that fact does not answer the question whether it is *more reasonable* to consider

central office features in a residence network access line imputation analysis – when the vast majority of residence customers subscribe to them and their revenues have always played a critical role in allowing network access lines to be priced close to cost – than in a business network access line analysis. (AT&T Ill. Init. Br. at 108-112). It clearly *is*. The fact that Staff has refused to address imputation on a “case-by-case” basis does not mean that the Commission should.

Staff’s position that its exclusion of local calling revenues from the network access line test is based on a “*specific, explicit, and clear* statutory prohibition. . .” could not be more wrong. (Staff Init. Br. at 80, emphasis in original). Staff relies entirely on the one sentence in Section 13-505.1(a) that states: “[t]he portion of a service consisting of residence untimed calls shall be excluded from *the imputation test*.” (Staff Init. Br. at 81, emphasis added). However, this statutory language begs the question “*what test*”? There are *two* imputation tests at issue in this proceeding: (1) imputation testing for Bands A and B usage on a service-specific basis; and (2) imputation testing for the residence network access line.

AT&T Illinois and Staff are in complete agreement that this language controls how the first test must be conducted. The plain meaning of the exclusion in Section 13-505.1 exempts all untimed usage from having to satisfy its own imputation test: therefore, no tests are required for Bands A and B calling. (AT&T Ill. Ex. 5.1 (Panfil), lines 1133-1141; Staff Ex. 3.0 (Koch), lines 157-164). In other words, AT&T Illinois is *not* asking the Commission to ignore the provisions of Section 13-505.1, nor is it treating the exemption language as a “curious historical relic.” (Staff Init. Br. at 80). The Company has applied the exemption where required and where the General Assembly clearly intended that it apply.

AT&T Illinois and Staff part company on the second test involving residence network access lines. Imputation testing for network access lines is of very recent vintage. As the Commission explained in Docket No. 04-0461, imputation testing for the business network access line was a matter of first impression in 2005 and neither the statute nor prior Commission decisions provided any guidance:

“Defining the “service” for imputation here has not been easy. We see no prior Commission orders to provide us with the right model for this instance. We have the words of a statute, a purpose and objective, but no clear or established road map for dealing with NALs and their unique characteristics.” *Order in Docket No. 04-0461, supra*, at 62.

Clearly, if this was a novel issue for the Commission just last June, the General Assembly could not have intended that untimed usage be excluded from *network access line* imputation tests in 1992. Thus, it simply will not do for Staff to claim that the statute is absolutely clear on its face and that no application of judgment is required.

Given the ambiguity inherent in the identity of the “test” from which untimed calling is to be excluded, AT&T Illinois’ analysis of the history and purpose of Section 13-505.1 is neither “pointless” nor “futile.” (Staff Init. Br. at 81). AT&T Illinois’ analysis does not ignore the plain meaning of the statute in favor of what *AT&T Illinois* wants it to mean. (*Id.*). AT&T Illinois’ analysis looks at what the *General Assembly* wanted it to mean. The General Assembly will not thank the Commission for adopting an interpretation of Section 13-505.1 that requires immediate and substantial residence rate increases, when its objective in 1992 was to protect residence customers.

Staff claims that the General Assembly has had “several opportunities to make good the alleged ‘deficiencies’ in the statute, without doing so. . .” (Staff Init. Br. at 82). AT&T Illinois cannot imagine what those “opportunities” would have been. The Commission has never

considered how to treat untimed local calling in a network access line imputation test before. Imputation testing for *network access lines generally* was only addressed for the first time in 2005. The last time that the General Assembly enacted any material changes to Article XIII of the PUA was in 2001. Unless Staff believes that the General Assembly was clairvoyant and anticipated these issues in 2001 (issues which had not even been identified yet by Staff or incumbent carriers), then Staff's position is nonsense.

AT&T Illinois would point out here that Staff has consistently taken a very narrow, rigid approach to imputation tests for network access lines. In both Docket No. 02-0864 and Docket No. 04-0461, Staff insisted vehemently that business network access lines should be required to pass an imputation test on a stand-alone basis – *i.e.*, without considering *any* of the other revenue streams that accrue to the line. *Order in Docket No. 02-0864*, adopted June 9, 2004, at 288; *Order in Docket No. 04-0461, supra*, at 50-60. The Commission rejected Staff's position in favor of a more realistic and balanced approach. It is worth noting that Staff's recommendation in this proceeding comes back almost full circle to the position that it pursued and lost in Docket No. 04-0461.⁵⁰ It is a mystery to AT&T Illinois why Staff insists on imputation tests that require immediate and substantial rate increases and preclude the application of regulatory judgment or policy considerations. Imputation is not the only weapon in the Commission's arsenal that can be used to make carrier rates more competition-friendly. (Staff Init. Br. at 83). There are other ways to implement pro-competitive regulatory policies that allow a measured response to perceived competitive problems. In this docket, approval of the Joint Proposal is one of them. In short, Staff's approach to imputation is inappropriate, unnecessary and should not be adopted.

⁵⁰ Staff does accept inclusion of switched access revenues in the analysis, consistent with the Order in Docket No. 04-0461.

VI. CONCLUSION

In conclusion, AT&T Illinois urges the Commission to confirm that its local exchange service in the Chicago LATA is properly classified as competitive and accept the commitments of AT&T Illinois and Cub that are embodied in the Joint Proposal.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

One of Its Attorneys

Louise A. Sunderland
Karl B. Anderson
Illinois Bell Telephone Company
225 West Randolph, Floor 25D
Chicago, Illinois 60606
(312) 727-6705
(312) 727-2928

CERTIFICATE OF SERVICE

I, Louise A. Sunderland, an attorney, certify that a copy of the foregoing **REPLY BRIEF OF AT&T ILLINOIS** was served on the following parties by U.S. Mail and/or electronic transmission on June 23, 2006.

Louise A. Sunderland

SERVICE LIST FOR ICC DOCKET 06-0027

Terrance Hilliard
Administrative Law Judge
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Springfield, IL 60601
thilliard@icc.state.il.us

Michael Borovik
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Springfield, IL 60601
mborovik@icc.state.il.us

Brandy Brown
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Springfield, IL 60601
bbrown@icc.state.il.us

Phillip Casey
Sonnenschein Nath & Rosenthal
7800 Sears Tower
Chicago, IL 60606
pcasey@sonnenschein.com

Karen Coppa, Jack Pace
City of Chicago
30 North LaSalle Street, Suite 900
Chicago, IL 60602
kcoppa@cityofchicago.org
jpace@cityofchicago.org

Janice Dale, Susan L. Satter
Illinois Attorney General's Office
100 West Randolph Street, 11th Floor
Chicago, IL 60601
jdale@atg.state.il.us
ssatter@atg.state.il.us

Jessica R. Falk, Robert Kelter, Anne McKibbin, Julie
Soderna, Christopher Thomas
Citizens Utility Board
208 South LaSalle Street, Suite 1760
Chicago, IL 60604
jfalk@citizensutilityboard.org
robertkelter@citizensutilityboard.org
amckibbin@citizensutilityboard.org
jsoderna@citizensutilityboard.org
cthomas@citizensutilityboard.org

Donna Ginther
AARP
300 West Edwards Street, 3rd Floor
Springfield, IL 62704
dginther@aarp.org

Stefanie R. Glover
Office General Counsel
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Chicago, IL 60601
sglover@icc.illinois.gov

Allan Goldenberg, Mark Pera, Marie Spicuzza
Cook County State's Attorney's Office
69 W. Washington, Ste. 3130
Chicago, IL 60602
agolden@cookcountygov.com
mpera@cookcountygov.com
mspicuz@cookcountygov.com

Matthew Harvey
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Springfield, IL 60601
mharvey@icc.state.il.us

John Hester
Illinois Commerce Commission
160 North LaSalle Street, Suite C-800
Springfield, IL 60601
jhester@icc.state.il.us

David Rudd
Madison River Communications, LLC
625 South Second Street, Suite 103-D
Springfield, IL 62704
dorudd@aol.com

Michael W. Ward
Michael W. Ward, P.C.
1608 Barclay Blvd.
Buffalo Grove, IL 60089
mwward@dnsys.com