

**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)	

**AT&T ILLINOIS' PETITION FOR INTERLOCUTORY REVIEW
OF RULING STRIKING REBUTTAL TESTIMONY**

Pursuant to 200 Ill. Adm. Code § 200.520, Illinois Bell Telephone Company (“AT&T Illinois”) seeks interlocutory review of the Administrative Law Judge’s June 5, 2006 ruling excluding certain rebuttal testimony by AT&T Illinois.

In testimony submitted on May 24, 2006 and purportedly addressing the Joint Proposal of AT&T Illinois and CUB to resolve some issues in the case, the Attorney General and Data Net/Tru Comm (“Data Net”) alleged that competition for residential local exchange services “is in broad retreat” and that AT&T Illinois’ residential local exchange services therefore should not be reclassified as competitive. In rebuttal to that testimony, AT&T Illinois submitted data (the “2006 data”) showing that competition in residential local exchange services had, in fact, increased in the first quarter of 2006; that to the extent certain types of CLEC platforms (such as the UNE-P) were losing lines, those losses were more than offset by gains from other platforms (such as facilities-based lines); and that any lost CLEC lines were not returning to AT&T Illinois. Even though the Attorney General and Data Net had opened the door to such rebuttal, the ALJ excluded certain of the 2006 data and AT&T Illinois’ testimony discussing that data. (The stricken testimony and exhibits are in AT&T Illinois’ June 6, 2006 Offer of Proof, a copy of which is attached hereto as Appendix A). Having succeeded in excluding the 2006 data, the

Attorney General and Data Net then submitted post-hearing briefs that relied almost exclusively on that theory that residential competition is in precipitous decline – as if the 2006 data did not exist.

The Commission should reject such gamesmanship. The data AT&T Illinois submitted in rebuttal responds to assertions in the testimony of the Attorney General and Data Net, is relevant to the issues in this case, and would not require any further rounds of testimony or discovery. Nor would any party be unfairly prejudiced by admitting the testimony. Indeed, the Attorney General *asked* AT&T Illinois for this very 2006 data in discovery and received it *prior to* submitting their testimony on the Joint Proposal, yet deliberately ignored it in that testimony because it did not support their theory. Thus, the only prejudice here is to the Commission’s ability to make a decision based on all the relevant facts.

Furthermore, certain evidence regarding 2006 data was not subject to the motion to strike and, therefore, was not stricken. Thus, the record shows that the number of residential access lines served by facilities-based CLECs in the Chicago LATA increased from 295,544 as of December 31, 2005 to 315,670 as of March 31, 2006. (AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 784-861, 821-833, Sch. WKW-R2; AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 528-529). The record also shows that the number of residential access lines served by CLECs using the Local Wholesale Complete (“LWC”) platform increased from 110,691 as of December 31, 2005 to 151,479 as of March 31, 2006. (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 891-915; AT&T Ill. Ex. 1.5 Cor. (Wardin), lines 527-531).¹ The evidence that was stricken shows the total number of CLEC lines (including UNE-P and resale, as well as lines served using CLEC-owned facilities and LWC) as of March 31, 2006 and, therefore, also shows the overall net change in CLEC lines

¹ AT&T Illinois discussed the evidence regarding the number of facilities-based and LWC-based CLEC lines as of March 31, 2006 in its Initial Brief (p. 91). Neither the Attorney General nor Data Net (which declined to file a Reply Brief) took issue with this 2006 data.

from December 31, 2005 to March 31, 2006. This information should be included in the record to give the Commission a complete picture of the current state of competition.

The 2006 data that was stricken from the record is not necessary to reject the intervenors' theory that competition is dying or to approve AT&T Illinois' reclassification of its services. As discussed in AT&T Illinois' Initial Brief and Reply Brief, the record as it stands already compels both those results. That fact, however, should not prevent the Commission from ensuring that it has the most complete record before it on which to base its decision. AT&T Illinois' rebuttal testimony on the 2006 data should therefore be admitted so that the Commission has *all* of the relevant competitive data before it.

BACKGROUND

This case involves reclassification of various AT&T Illinois services as competitive under 220 ILCS 5/13-502. AT&T filed tariffs reclassifying these services as competitive on November 10, 2005 and the Commission opened this investigation of the classification. One of the issues is the extent of competition for AT&T Illinois' residential local exchange service, from CLECs and other entities, such as wireless carriers and Voice over Internet Protocol ("VoIP") providers. In the direct testimony of Mr. Karl Wardin, AT&T Illinois provided data from its wholesale service records and the E9-1-1 database showing the amount of CLEC competition as of September 30, 2005, which was the most recent data available at the time (and provides the data closest in time to AT&T Illinois' classification of the service as competitive), as well as other data showing the amount of competition as of September 30, 2005.

Staff and various intervenors then conducted discovery. Staff asked AT&T Illinois to provide the same type of competition data it had provided as of September 30, 2005, drawn from the same sources in the same way, to show the results as of December 31, 2005. *See* Staff Ex.

2.0 (Zolnierek) (discussing response to Staff data request JZ-2.01). AT&T Illinois provided this data. Data Net also asked AT&T Illinois to provide the same type of competition data, drawn from the same sources in the same way, to show the results as of December 31, 2004. AT&T Illinois provided the data. *See* Data Net Cross Exs. 3 & 4 (responses to Data Net discovery requests). AT&T Illinois, Staff, and intervenors such as the Attorney General and Data Net then discussed the various data as of different dates in their rebuttal and surrebuttal testimony and at the evidentiary hearings in April 2006.

After the evidentiary hearings, AT&T Illinois and CUB submitted a Joint Proposal in hopes of resolving some of the disputed issues in the case. The ALJ then scheduled dates for testimony from all parties to discuss the Joint Proposal. In preparing for its round of testimony, the Attorney General, on May 12, 2006, asked AT&T Illinois to provide the same type of competition data it had provided for December 2004, September 2005, and December 2005, drawn from the same sources in the same way, to show the results as of April 30, 2006 or the most recent data available. Attorney General Data Requests 10.1 & 10.2. AT&T Illinois served responses to these requests on both the Attorney General and Data Net on May 19, 2006. In the responses, AT&T Illinois provided the most recent data available (through March 31, 2006), drawn from the same sources and in the same manner as the prior data it had supplied. *See* AT&T Illinois Responses to Attorney General Data Requests 10.1 & 10.2²; Tr. 1049-50. As discussed below, this data showed that the overall net number of competitor lines had increased during the first quarter of 2006, thus further refuting the claim that competition is in decline.

In their testimony on the Joint Proposal on May 24, 2006, however, Attorney General witness Dr. Selwyn and Data Net witness Mr. Gillan ignored this most recent data, and instead

² The responses to Attorney General Data Requests (with attachments omitted) are included in Appendix B. The data included in the attachment to the responses to the Attorney General Data Requests is included in Schedule WKW- JPR1, which is part of the Offer of Proof.

argued that competition for residential local exchange customers is (allegedly) in decline. For example, in their testimony Mr. Gillan and Dr. Selwyn asserted as follows:

- “The evidence demonstrates that widespread residential competition *was* emerging in the Chicago MSA,” but now “Local competition for residential customers in the Chicago MSA *is* in broad retreat.” Data Net Ex. 5.0 (Gillan), lines 64-65, 67-68 (second emphasis added). To support his “broad retreat” claim, Mr. Gillan cited and attached Data Net Cross Exhibits 3, 3A, 4, and 4A, which showed CLEC competition data as of December 31, 2004 and December 31, 2005.
- “So *today*, . . . real competition remains as elusive as ever.” AG Ex. 3.0 (Selwyn), p. 30 lines 5-8 (emphasis added).
- “[M]eaningful *and independent* competition . . . simply does not exist *at this time*” and “reclassification of residential services in MSA-1 to the ‘competitive’ category is premature.” *Id.*, p. 46 lines 6-10 (second emphasis added).

AT&T Illinois responded to these claims in Mr. Wardin’s rebuttal testimony on the Joint Proposal (AT&T Ill. Ex 1.5). Specifically, Mr. Wardin included the 2006 data the Attorney General had requested and that was in the possession of Dr. Selwyn and Mr. Gillan when they prepared their testimony on the Joint Proposal. AT&T Ill. Ex. 1.5 (Offer of Proof), pp. 7-10 & Scheds. WKW-JPR1, WKW-JPR2. The first part of the stricken testimony (Offer of Proof, page 7, lines 148-166, Sch. WKW-JPR1) stated as follows:

- Q. Mr. Gillan asserts that “local competition for residential customers in the Chicago LATA is in broad retreat.” (Data Net Ex. 5.0, lines 67-71). Do you agree?**
- A. . . . In response to a data request from the Attorney General, served on AT&T Illinois after the filing of the Joint Proposal, I updated Schedules WKW-R1 and WKW-R2 based on data as of March 31, 2006, the most recent date for which complete data was available. That response is attached to this testimony as Schedule WKW-JPR1. This data demonstrates that, far from being in “retreat,” CLEC competition for residential local exchange service increased in the first quarter of 2006. In particular, between December 31, 2005 and March 31, 2006, the number of residential access lines served by CLECs increased by over 12,000, from 502,454 (as shown in Schedule WKW-R1) to 514,998 (as shown in Schedule WKW-JPR1). During the same period, the number of residential access lines served by AT&T Illinois decreased by over 18,000 lines. As a result, the

CLEC share of residential access lines in the Chicago LATA was approximately 16.9%, up from 16.4% as of December 31, 2005, while the combined CLEC and wireless share increased from 23.9% to 24.4%.

At the evidentiary hearing on the Joint Proposal, Data Net moved to strike portions of Mr. Wardin's rebuttal testimony and data on CLEC growth during the first quarter of 2006. The ALJ granted this motion. Tr. 1054. This ruling opened the door for the Attorney General and Data Net to center their post-hearing briefs on the theory that competition was in broad and continuing decline. For example, the Attorney General asserted that residential service competition has "plummeted over the last year." "is in 'broad retreat,'" "has dropped precipitously," is on a "steep downward trend," and is in "unequivocal and steep decline." AG Init. Br. at 4, 8, 10; AG Reply Br. at 2. As previously discussed, the record contains evidence regarding the growth in the number of CLEC facilities-based and LWC lines during first quarter of 2006 to which neither Data Net nor the Attorney General objected. Nonetheless, the Attorney General has the temerity to claim that the alleged decline in CLEC competition "is not speculation. This is fact." AG Reply Br. at 2. While that claim is already soundly refuted by the existing record, the Attorney General could not even have attempted such distortion were it not for the striking of the 2006 data which shows that on an overall basis, including UNE-P and resale, the number of CLEC-served residential access lines in the Chicago LATA grew in the first quarter of 2006.

The second part of the stricken testimony (Offer of Proof, p. 8, lines 185-213, Sch. WKW-JPR2) discussed an analysis performed by Mr. Wardin, based in part on the 2006 data, which demonstrates that the reduction in the number of CLEC lines in the 15-month period between December 31, 2004 and March 31, 2006 reflects residential customers moving *not* to AT&T Illinois but to alternative technologies, such as wireless and VoIP, to meet their local

voice communications needs. This analysis also supported AT&T Illinois' estimate of wireless carriers' share of the residential local exchange market in the Chicago LATA. This analysis was further rebuttal to the assertions of Data Net and the Attorney General made in their May 24, 2006 testimony and post-hearing briefs that residential competition within the Chicago LATA is in "broad retreat."

ARGUMENT

The decision to strike portions of AT&T Illinois' rebuttal testimony on the 2006 data should be reversed. The testimony and data are undeniably relevant and directly responsive to claims made in the intervenors' testimony regarding the Joint Proposal. That is all the law requires. Moreover, striking the testimony leaved the record incomplete and has paved the way for the Attorney General's and Data Net's gamesmanship and misleading briefs.

I. The 2006 Data is Relevant and Directly Responsive to Intervenors' Testimony.

In reviewing whether a service should be reclassified as competitive under Section 13-502, the Commission is allowed to consider many factors, most of which relate to the extent and strength of competition in the relevant service. AT&T Illinois presented data with its direct testimony showing the extent and strength of CLEC competition in residential local exchange service as of September 30, 2005. *See* AT&T Ill. Ex. 1.0 (Wardin). While the Commission's decision ought to be based on that data, the fact is that, throughout the course of this proceeding, data from various other points in time (December 31, 2004 and December 31, 2005) have been admitted and debated at the behest of other parties. This is in keeping with the Commission's traditional practice of admitting all relevant evidence unless it would be unduly prejudicial, in order to ensure that there is a complete record. The same approach should apply to the 2006 data.

There can be no dispute that the 2006 data is relevant. The data relates to the amount and type of competition for residential local exchange service in the Chicago LATA, and is exactly the same kind of data, drawn from the same sources and in the same manner, on CLEC access lines, that was admitted into the record to show results as of December 31, 2004, September 30, 2005, and December 31, 2005. No one has ever disputed the relevance of such data.

The 2006 data also is undeniably proper rebuttal. The Attorney General's and Data Net's testimony on the Joint Proposal asserts that competition "*is*" in broad retreat and that AT&T Illinois faces no meaningful competition "*today*." *See supra*. They filed that testimony on May 24, 2006. AT&T Illinois simply responded with the most recent data available, showing that the overall net number of competitor lines grew in the first quarter of 2006. AT&T Ill. Ex. 1.5 (Offer of Proof) (Wardin), pp. 7-10 & Scheds. WKW-JPR1, WKW-JPR2. That is classic rebuttal. To exclude it is to treat AT&T Illinois differently than the intervenors, whose unqualified claims about the decline of competition remain in the record and form the core of their theory of the case. Such a result promotes gamesmanship rather than the compilation of a complete record.

II. The Asserted Bases for Excluding the 2006 Data are Inconsistent With the Record and Sound Policy.

Data Net did not raise its motion to strike until the day of the hearing on the Joint Proposal. Tr. 1038. After hearing oral argument on the motion, and expressing some concern that the motion had not been put into writing, the ALJ excluded the 2006 data on the grounds that "the data changes every day and if we're going to call an end to this, we have to have an end to it"; that "Mr. Gillan's testimony from the getgo was that in his opinion, the competitive market is in broad retreat and I don't think that comment in his rebuttal is anything new"; and that the "very comprehensive data" submitted by AT&T Illinois should be excluded because "we

haven't given the other side time, essentially, to respond to it." Tr. 1054. These policy-based (rather than legal) grounds do not outweigh the longstanding Commission policy in favor of admitting legitimate rebuttal to ensure a complete record.

First, AT&T Illinois acknowledges that the data changes every day. However, Data Net and the Attorney General asserted as *fact* that CLEC competition was dead or in decline as of May 24, 2006. AT&T Illinois merely responded with the most recent competition data available, which disproved that claim. If the ALJ were concerned about changing data, Data Net and the Attorney General could have been ordered to restrict their testimony on the Joint Proposal within the scope of the Joint Proposal. Instead, however, the Attorney General and Data Net were allowed to argue that competition is weak and declining. Excluding rebuttal to that claim merely creates an incomplete record.

Second, regardless of whether Mr. Gillan's claim that competition is "in broad retreat" was "anything new," the fact is that he made the claim in testimony on the Joint Proposal, knowing that more recent data was available and that AT&T Illinois had a rebuttal round coming. This opened the door for AT&T Illinois to rebut it. Moreover, nothing about the 2006 data was "unduly repetitious" so as to justify striking it. *See* 83 Ill. Adm. Code 200.610(a). To the contrary, the 2006 data was new and had never previously been available for any round of AT&T Illinois testimony.

Third, the idea that Data Net and the Attorney General needed extra time to evaluate and respond to the 2006 data in Mr. Wardin's rebuttal testimony is unsupported. Data Net and the Attorney General had the 2006 data before they even filed their own testimony on the Joint Proposal and must be presumed to have evaluated it before filing their testimony. The 2006 data also was obtained from the same sources and in the same manner as all the other competitive

data previously admitted into the record (Tr. 1050), and Data Net and the Attorney General had already completed all the discovery they had on those sources and AT&T's methodology in prior stages of the case. The Attorney General asked a few questions about the data sources (AG DR 1.2 and 1.3, 7.1, and 7.2)³ and Data Net asked none.⁴ Furthermore, AT&T Illinois' rebuttal testimony on the Joint Proposal was the last scheduled round of testimony. *That* is the point in a case where an ALJ can legitimately "call an end" to back and forth submissions, not before. Assertions in the final round testimony are tested via cross-examination, and Data Net and the Attorney General both had the opportunity to cross-examine AT&T Illinois' Mr. Wardin on the 2006 data at the June 5, 2006 hearing.

CONCLUSION

In short, the 2006 data and related testimony submitted by AT&T Illinois in Mr. Wardin's rebuttal testimony on the Joint Proposal, as set forth in AT&T Illinois' Offer of Proof, is relevant and directly responsive to the intervenor testimony it was addressing. Striking such testimony defeats the goal of gathering a complete record. The Commission should therefore reverse the ALJ's ruling and admit the testimony and exhibits included in AT&T Illinois' Offer of Proof.

³ The requests and responses to these data requests (with attachments thereto omitted) are attached as Appendix C.

⁴ Furthermore, the Attorney General and Data Net had the 2006 data for over two weeks prior to the hearing on June 5, 2006. If they had any vital questions regarding that data, they had an opportunity for further discovery prior to the hearing.

Respectfully submitted,

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VERIFICATION

I, Karl B. Anderson, on oath, state that I am Senior Counsel-Legal Regulatory for AT&T Illinois, that I have reviewed the foregoing **AT&T ILLINOIS' PETITION FOR INTERLOCUTORY REVIEW OF RULING STRIKING REBUTTAL TESTIMONY**, and that, to the best of my knowledge, information and belief, the statements contained therein are true and correct.


Karl B. Anderson

Subscribed and sworn to before
me this 26 day of June, 2006


Notary Public, State of Illinois



CERTIFICATE OF SERVICE

I, Karl B. Anderson, an attorney, certify that a copy of the foregoing **PETITION FOR INTERLOCUTORY REVIEW OF RUIING STRIKING REBUTTAL TESTIMONY** was served on the following parties by U.S. Mail and/or electronic transmission on June 26, 2006.

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