

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

**MOTION OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION FOR
LEAVE TO FILE *INSTANTER* A SURREPLY TO AT&T'S REPLY BRIEF ON
EXCEPTIONS**

Now comes the Staff of the Illinois Commerce Commission ("Staff"), by its undersigned attorneys, and pursuant to Section 200.190 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.190) respectfully submits this Motion for Leave to Address (see attached Staff Surreply) statutory interpretation and construction arguments and citations to case law not previously made in the record or in the Proposed Order, or at the very least significantly expanded in the Reply Brief on Exceptions ("RBOE") of Illinois Bell Telephone Company ("AT&T"). AT&T RBOE at 17 (the Commission has the "discretion to reject tariffs in the specific service quality plan context governed by Section 13-712(g).").

The Commission's rules of procedure provide parties an opportunity to address any perceived errors in a Proposed Order in a Brief on Exceptions, which can then be addressed by other parties in a Reply Brief on Exceptions. See Section 200.830 (83 Ill. Admin. Code §200.830). AT&T chose not to file a BOE and, instead, filed an RBOE , responsive to Staff's concerns that the Proposed Order either did not clearly identify a legal basis for its finding. In providing its response to Staff in its RBOE, AT&T has set forth argument and

case law that Staff has not had an opportunity to respond to for the record. Absent a reply by Staff to this authority and argument, the Commission would be left with an inadequate record, particularly in light of the fact that, as both AT&T and the Proposed Order have noted, Staff is the only other party in this proceeding.

Moreover, it is particularly important that Staff be given this opportunity to respond to this argument and case law because AT&T's RBOE has provided clarification, as Staff understands it, that the Commission clearly has no authority to preempt or invalidate the PUA's tariffing requirements and, further, that the Commission did not do so in the Proposed Order or, presumably, in the 01-0539 rulemaking. AT&T RBOE at 16 ("The Proposed Order is fully aware that 'the Commission cannot invalidate a statute' and it does not do such a thing."). In its BOE, Staff raised serious concerns that the basis for the Proposed Order's findings may have been a needless and inappropriate invalidation or preemption of the tariffing statute of the PUA and any clarification of the Proposed Order in AT&T's RBOE that addresses these concerns is, in Staff's view, significantly responsive and an appropriate aid to the record.

AT&T's RBOE response to Staff's concerns is, to Staff's understanding, to identify and elaborate upon the Proposed Order's suggestion¹ that its finding is

¹ The Proposed Order, at 20, states:
Notably too, by enacting Section 13-712, the General Assembly took a direct approach to performance and it left the particulars of establishing and 'implementing' carrier to carrier wholesale service quality' to the Commission. 220 ILCS 5/13-712. In the rulemaking called for under this very statute, and mindful of the federally ordained negotiation process, it was our reasoned decision to not require tariffing of the plan.

While Staff is correct in asserting that the Commission cannot invalidate a statute, we do have the power, and indeed the responsibility to interpret a law in light of

based upon a statutory interpretation of the PUA's tariffing provisions of Sections 13-501(a), 13-116, presumably as well Sections 9-102², 9-104,³ and the specific statutory grant to the Commission of rulemaking authority under Section 712(g) "in light of the times, circumstances and other relevant provisions." Proposed Order at 20. AT&T posits that the Proposed Order interprets the law "as a whole, 'giving each statutory provision a reasonable construction and one that is consistent with federal law.'" AT&T RBOE at 16, *citing* the Proposed Order at 20. Thus, AT&T argues that the Proposed Order does not invalidate statutory tariffing requirements. Rather, according to AT&T, the Proposed Order "interprets" both the statutory tariffing requirements and Section 712(g) of the PUA to find a legislative intent of the General Assembly in Section 712(g) to give the Commission the authority to adopt an "alternative implementation mechanism" to tariffing, thus "reject[ing] tariffs in the specific service quality plan context governed by Section 13-712(g)." AT&T RBOE at 17.

The Proposed Order generally alludes to Section 13-712 of the PUA, and a statutory interpretation of this Section taken together with the tariffing provisions of the PUA, but offers no elaboration as to why this "holistic" interpretation, or Section 712(g) itself provides a legal basis for a finding that the Plan need not be tariffed.⁴ The statutory interpretation argument articulated by AT&T in its RBOE (at 16-20) provides this elaboration of the Proposed Order's

the times, circumstances, and other relevant provisions. By what we say today and what we said in Docket 01-0539, the Commission is simply giving each statutory provision a reasonable construction and one that is consistent with federal law. In doing so, we reaffirm that tariffing does not apply to the wholesale plan. "

² This proceeding is a rate suspension and investigation under Section 9-201 of the PUA. See Suspension Order at 2.

³ See Staff Initial Comments, at 6-7.

⁴ See footnote 3 above.

general reference to Section 13-712 and its method of statutory interpretation that was not included in the Proposed Order (or in any of AT&T's prior filings). It is not clear to Staff whether or not the Proposed Order, when making general statements as to its method of statutory interpretation and alluding generally to Section 13-712, intended to rely on an argument comparable or identical to that articulated by AT&T, which argument relies upon subsection 712(g). As matters currently stand, however, AT&T's legal argument is the only one articulated in the record and, thereby offers the sole explanation on record for the legal significance of the Section 13-712 statements included in the Proposed Order. Because AT&T "fleshed out" this statutory interpretation argument for the first time in its RBOE, citing numerous case authorities never before appearing in the record, and Staff has had no opportunity to respond in a manner that would produce a full and sufficient record on these matters, Staff requests an opportunity to do so now.

Staff also finds that AT&T's statutory interpretation is untenable and posits that since it is offered as the legal foundation for the Proposed Order's holding, Staff ought to be afforded the opportunity to rebut it. The plain meaning of Section 712(g) does not support a grant of discretion to the Commission which would permit the Commission to invalidate the statutory tariffing requirements. Because AT&T agrees that the Commission has no authority to invalidate the state tariffing requirements (RBOE at 16), any argument that the legislature gave the Commission the discretion to invalidate or "reject tariffs in the specific service quality plan context governed by Section 13-712(g)" (RBOE at 17) must be

reviewed with caution and must start with the statutory language itself. See e.g., *Illinois Power Co. v. Mahin*, 72 Ill. 2d 189, 194 (1978) (“There is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute imports.”). The plain language of the tariffing provisions of the PUA and Section 712(g) are not inconsistent with each other or federal law and none of the language in these sections gives the Commission the discretion to invalidate the other. Consequently, the plain meaning of these statutory provisions does not support a rejection of tariffing. Staff should be permitted to rebut this erroneous argument for the sake of the record.

AT&T argues that the General Assembly, in taking up the specific subject of wholesale service quality in Section 13-712(g) without “set[ting] up a mandatory tariffing regime in Section 13-712(g), gave the Commission the discretion to adopt “an alternative implementation mechanism...instead of forced tariffs”. AT&T RBOE at 17. (“Commission’s discretion to *reject* tariffs in the specific service quality context governed by Section 13-712(g) (emphasis added by AT&T”). AT&T, moreover, states that, “[Section 13-712(g)], as the Commission has already decided, does not require tariffing, and by law it *trumps* the general statement in Section 13-116 even if it did apply.” AT&T RBOE, at 23 (emphasis added). AT&T further states that, “Staff’s proposed construction would render the tariffing statutes unconstitutional and invalid, and accordingly must be discarded.” AT&T RBOE at 18. Staff should be allowed an opportunity to respond to AT&T’s statutory construction argument that more specific

provisions of the PUA *trump* the general provisions of the PUA. AT&T RBOE at 18, *citing Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 195 (1992). The Section 712(g) statutory interpretation argument, and the case law AT&T cites for support, should be fully engaged by both Staff and AT&T and appear in the record if that record is to be complete.

AT&T also appears to have clarified certain matters in its RBOE that may or may not have been at issue in this proceeding. For example, it appears to Staff, based upon its reading of AT&T's RBOE, that the issues of whether the Plan falls under the directives of Section 13-501(a) (as a "service") and Section 13-116 (as a "rate") are removed since AT&T appears to have agreed with Staff that the plan is a rate and perhaps also a service.⁵ Because this proceeding is a rate suspension and investigation, agreement that the wholesale service quality plan is at the very least a rate is essential to the understanding of this proceeding. Also, and of the *utmost* importance to Staff, the integrity of the PUA'S tariffing requirements (Sections 13-501(a), 13-116, 9-102 and 9-104), *appear* to remain entirely intact because AT&T seems to now restrict its argument to the statutory interpretation of Section 13-712(g) and the PUA's tariffing requirements, resulting in what it argues is the Commission's discretion to trump clear directives of the PUA.⁶ AT&T RBOE at 23 ("[Section 712(g)], as

⁵ AT&T RBOE at 23 ("Even if the plan is a "rate" at some indirect level, the General Assembly addressed wholesale service quality plans directly and specifically in a separate provision, Section 13-712(g)."). It would also seem that the same logic would equally apply to whether the Plan is a service. AT&T, moreover, has never argued (beyond the sentence quoted above) that the Plan is not a rate. This is not surprising as this proceeding was initiated by the Commission as a rate suspension and investigation under 9-201. See Initiating Order at 2.

⁶ See AT&T RBOE at 17("The tariffing provisions cited by Staff set forth general obligations to tariff "services" but none of them mentions "wholesale service quality plans." Section 13-

the Commission has already decided, does not require tariffing, and by law it trumps the general statement in Section 13-116 even if it did apply.”). On a related matter, it is Staff’s understanding, that AT&T is not arguing anything like ambiguity in the tariffing provisions.

The relevant and foundational issue remaining is whether the rulemaking authority granted the Commission in Section 13-712(g) is, or could be, broad enough to *trump* the clear directives of the tariffing requirements of the PUA. Thus, fundamental principles of fairness and due process would seem to require that both parties be provided an opportunity to fully engage this new, or significantly expanded, line of argument, and its attendant new case law authority.

Staff’s request is not unusual and has been granted before by this Commission. In fact, as one example only, in a different proceeding (Docket 00-0393) where Staff had introduced new tariff language in its RBOE, AT&T (then Ameritech) argued that it should be afforded an opportunity to respond and demonstrate why Staff’s proposed language should not be adopted. The Commission agreed with AT&T and provided all the parties an opportunity to address the tariff language Staff first proposed in its RBOE. *Illinois Bell Telephone Company: Proposed Implementation of High Frequency Portion of the Loop (HFPL)/Line Sharing Service*, Docket No. 00-0393, 2001 Ill. PUC LEXIS 916, at *81-*84 (Order entered Sept. 26, 2001). As this example demonstrates, the Commission has the discretion to permit additional argument when doing so

712(g), by contrast, is specifically directed to wholesale service quality, taking "a direct approach to performance.")

will provide a more full and complete record and, in fact, has allowed parties to reply to new argument contained in an RBOE. This is certainly the case here. Staff, accordingly, respectfully submits that the Commission would be best served by providing both Staff and AT&T an opportunity to fully engage in the expanded Section 712(g) argument before the Commission makes its determinations in this proceeding.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that it be granted leave to address the expanded Section 712(g) arguments and new case authorities AT&T cites to in its RBOE.

Respectfully submitted,

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