

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company)
)
)
Proposed Elimination of Wholesale)
Performance Plan)

Docket No. 05-0697

STAFF'S SURREPLY TO AT&T'S REPLY BRIEF ON EXCEPTIONS

Summary of Response

AT&T contends that the Proposed Order does not invalidate or abrogate the tariffing requirements of the PUA but merely is "simply giving each statutory provision a reasonable construction and one that is consistent with federal law." See Proposed Order at 20; see also AT&T RBOE at 18. Moreover, AT&T argues that Staff's statutory interpretation would create an inconsistency between the federal interconnection agreement process and the state tariffing statutes. ("Staff's proposed construction would render the tariffing statutes unconstitutional and invalid, and accordingly must be discarded."); AT&T RBOE at 16 ("statutes are to be construed '*to avoid* creating an unnecessary inconsistency in the law.'")(emphasis added). Both the Proposed Order and AT&T, however, disregard the fact that their statutory interpretation arguments create the inconsistency with federal law and, worse yet, resolve it by arguing that the Commission has the discretion to invalidate state tariffing requirements.

The language of Section 13-712(g) is straightforward and reads in its entirety as follows:

The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

220 ILCS 5/13-712(g). Noticeably absent from Section 712(g) is any reference to the tariffing provisions of the PUA. Likewise, the PUA tariffing provisions do not address wholesale service quality plans but they do require rates to be tariffed. As Staff has pointed out in numerous filings, the plan is clearly a “rate” and both the Commission and AT&T appear to agree.¹ Yet, AT&T would have the Commission *avoid* an inconsistency with federal law that does not exist if the tariff itself eliminates any potential inconsistency and, in the process, abrogate or ignore the mandatory, clear and certain tariffing directives of the PUA.

The Illinois Supreme Court has long held that a statute should be interpreted so as to avoid a construction which would raise doubts as to its validity. See *e.g.*, *Illinois v. Alvarado*, 93 Ill. 2d 155, 161-62 (1982) (“*Alverado*”), *citing Morton Grove Park District v. American National Bank & Trust Co.*, 78 Ill. 2d 353, 363(1980). The Commission and courts construe acts of the legislature so as to affirm their constitutionality and validity, if it can be reasonably done, and further if their construction is doubtful, the doubt will be decided in favor of the validity of the law challenged. *Alverado*, 93 Ill. 2d at 161-62, *citing Continental Illinois National Bank & Trust Co. v. Illinois State Toll Highway Com.*, 42 Ill. 2d 385, 389 (1969); *Illinois Crime Investigating Com. v. Buccieri*, 36 Ill. 2d 556, 561 (1967). Both the Proposed Order and AT&T, consequently, would turn the

¹ See AT&T RBOE at 23.

canons of statutory construction on their head by disregarding the fact that their statutory interpretation arguments create the inconsistency with federal law and, worse yet, resolve this supposed inconsistency between Section 712(g) and the tariffing provisions of the PUA by arguing that the Commission has the authority to invalidate or ignore the PUA's unambiguous tariffing requirements.

In addition, both the Proposed Order and AT&T fundamentally misunderstand Staff's position that it is the tariff as written (if left available to any CLEC without regard to whether they negotiated an appropriate interconnection agreement that permits purchasing out of the tariff) that creates the alleged inconsistency with federal law, not the state tariffing requirements.² Both the Proposed Order and AT&T appear to assume that the tariff *must permit* CLECs who have not negotiated interconnection agreements pursuant to federal law to buy out of it. This is not the case. In fact, this Commission has recognized in previous cases that the tariff itself can be modified to eliminate this very same potential inconsistency with federal law that the Proposed Order and AT&T raise throughout this proceeding. In the past, the Commission has simply amended the tariff itself to eliminate any potential inconsistency thereby avoiding the drastic measure of rejecting tariffing per se.

For example, in AT&T tariff ILL.C.C. No. 20, Part 19, Section 15, 7th Revised Sheet No. 3, the following language was included:

The following tariffs contain rates approved by the Illinois Commerce Commission as being compliant with the TELRIC requirements of the Telecommunications Act of 1996 and the directives of the Federal Communications Commission. Consistent

² See AT&T RBOE at 20 (Exception 4) and at 25.

with the negotiation process required by the Telecommunications Act of 1996, the tariffs are only available to carriers that enter into an interconnection agreement with SBC or those carriers that currently have an interconnection agreement with SBC, depending on the provisions contained therein.^{1/}

^{1/} This paragraph is included, as written, per the ICC's Order dated June 9, 2004, in Ill. C.C. Docket No. 02-0864.

See also AT&T tariff sheets ILL.C.C. No. 20, Part 19, Section 15, 7th

Revised Sheet No. 5, which include the following language:

Unless otherwise provided in an interconnection agreement or amendment thereto between the Company and a telecommunications carrier which is dated after June 30, 2001, telecommunications carriers that already have an interconnection agreement with the Company pursuant to Section 252 of the Telecommunications Act of 1996 shall be permitted to subscribe to Pre-Existing and New UNE-P under this tariff. If a telecommunications carrier with an interconnection agreement is permitted to purchase a combination of unbundled network elements under this Section 15, that telecommunications carrier shall submit written notice to the Company if it decides to purchase from this tariff, with the notice specifying this particular tariff. This tariff is non-severable and indivisible. Following the Company's receipt of such a written notice, this tariff (including its rates) shall apply on a prospective basis only, and apply in accordance with its terms to UNE-Ps already being purchased and those subsequently purchased by the telecommunications carrier, beginning 5 business days after the Company's receipt of the notice. An eligible telecommunications carrier that has previously provided notice of its decision to purchase under this Section 15 may change that direction upon subsequent written notice to the Company of that change, which notice shall be provided, and shall be subsequently and prospectively effective, in the same manner as described above.

See *generally* Order, ICC Docket No. 01-0614, filing to implement tariff provisions related to Section 13-801 (June 11, 2002).

These are but *examples* of where the Commission imposed language similar to language that Staff is proposing in this proceeding, which preserves

consistency with the federal negotiation and arbitration process and the PUA's clear tariffing requirements.

The Proposed Order, however, concludes:

At best, a fix of the tariff in these premises will bring about no benefit. At worst, however, the modified tariff will invite actions that intrude upon, or seek to undermine, the federal contractual route. On the basis of this simple balancing and the unnecessary complications we might best avoid, the Commission rejects the modifying language that Staff urges upon the tariff at hand.

Proposed Order at 24.

The Commission, of course, as demonstrated in the two examples noted above, does not appear to share the concerns the Proposed Order raises. The Commission's additional language precludes circumvention of the federal negotiation and arbitration processes, is indeed *beneficial* and does not "intrude upon . . . the federal contractual route" as the Proposed Order would suggest otherwise; in fact, the language noted above demonstrates that Staff's proposed language in this proceeding is entirely consistent with the federal negotiation process as well as the prior practice of this Commission and will dissuade the very actions the Proposed Order argues it will "invite"..

Neither AT&T nor the Proposed Order cite to any case law that would prohibit the Commission from adding tariff language that would eliminate any possible inconsistency with federal law. Instead of simply adding clarifying language to the tariff, AT&T and the Proposed Order seek "to avoid creating an unnecessary inconsistency in the law" by arguing that the Commission should interpret 13-712(g) and the statutory tariffing requirements to reject tariffs in the specific service quality plan context, thereby invalidating the statutory tariffing

requirements in that context. Even if the Commission was granted such discretion by the General Assembly, and Staff sees nothing in the statutory language which supports such an interpretation, there is no potential for a federal conflict because Staff's proposed language ensures that there will be no inconsistency between tariffing the Plan and federal law.

Under Staff's recommendation, only a CLEC who had negotiated an interconnection agreement that permitted the purchase of the plan under the tariff could actually do so. A CLEC could not interfere with or avoid the federal interconnection agreement process because it already had necessarily *fully engaged* in the federal process. Thus, the tariff at issue in this proceeding, with the addition of Staff's proposed language, simply removes any reason for the faulty statutory interpretation analysis, which AT&T claims is needed *to avoid* rendering the tariffing statutes "unconstitutional and invalid." AT&T RBOE at 18. In short, with Staff's language incorporated in the tariff, there is simply no inconsistency with federal law.

AT&T's Statutory Interpretation Argument

AT&T states that the Proposed Order "is fully aware that 'the Commission cannot invalidate a statute' and it does not do such a thing." AT&T RBOE at 16. Staff agrees that the Commission cannot invalidate a statute. That is *precisely* why Staff is in this proceeding. However, AT&T's statutory interpretation of Section 712(g) and the tariffing requirements as a whole would indeed invalidate the clear and certain statutory tariffing requirements (even if it does so under the guise of "statutory interpretation") and would do so needlessly because, as

discussed above, Staff's proposed tariff language removes any argument that the tariff would be inconsistent with federal law.

Further, AT&T argues that the legislature granted the Commission, by directing the Commission in Section 13-712(g) to establish and implement wholesale service quality rules and remedies, the discretion to adopt "an alternative implementation mechanism instead of forced tariffs." AT&T RBOE at 17. AT&T argues that the directive of Section 13-712(g) and the general tariffing requirements, taken together, give the Commission the "...discretion to *reject* tariffs in the specific service quality context governed by Section 13-712(g)" (emphasis added by AT&T). AT&T RBOE at 17. AT&T's argument that the legislature gave the Commission the discretion in a rulemaking to reject statutory tariffing requirements ignores the well established canon that the Commission cannot by rule invalidate a statute. *Ruby Chevrolet, Inc. v. Dept. of Revenue*, 6 Ill. 2d 147 (1955).

In Staff's view, there is nothing in Section 13-712(g), and certainly nothing in the statutory tariffing requirements themselves, that would support the statutory interpretation of AT&T and the Proposed Order. As noted above, the language of Section 13-712(g) is straightforward and reads in its entirety as follows:

The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules.

220 ILCS 5/13-712(g).

The General Assembly clearly directed the Commission to establish wholesale service quality *rules*. This language in 13-712(g) does not grant the Commission authority to ignore, or effectively invalidate, other provisions of the PUA that contain mandatory, clear and certain provisions addressing different subject matter. *Compare with AT&T RBOE* at 17 (“[Section 712(g)] preserves the Commission’s discretion to reject tariffs in the specific service quality plan context governed by Section 13-712(g).”). No reasonable statutory construction argument can be maintained that would interpret a legislative directive to establish service quality rules as a grant of discretion that would allow the Commission to establish rules that reject the PUA’s tariffing requirements or establish an *alternative* mechanism to required tariffing. The most that can be argued is that the Commission has the discretion to implement an *additional* notification mechanism, one that does not eliminate tariffing but works in conjunction with it.

Moreover, it is well established that, as a creature of statute, the Commission has no general powers except those expressly conferred by the legislature. *Business and Professional People for the Public Interest v. Ill. Commerce Comm’n*, 136 Ill. 2d 192, 244, 555 N.E.2d 693, 716-17 (Ill. 1990). In addition, the Illinois Supreme Court has long held that an administrative agency can neither limit nor extend the scope of its enabling legislation. *Carpetland U.S.A. v. Ill. Dept. Employment Security*, 201 Ill. 2d 351, 397, 776 N.E.2d 166, 192 (Ill. 2002) (“An administrative agency lacks the authority to invalidate a statute on constitutional grounds or to question its validity.”). The Commission,

accordingly, *must* follow and implement the PUA's plain language irrespective of its opinion regarding the desirability of the results surrounding the operation of the statute. *Citizens Util. Bd. v. Ill. Commerce Comm'n*, 275 Ill. App. 3d 329, 341-42, 655 N.E.2d 961, 969-70 (1st Dist., 1995). See also *Interim Order on Remand (Phase I)*, Filing to Implement Tariff provisions of Section 13-801 of the Public Utilities Act, ICC Docket 01-0614 (April 20, 2005).

The Illinois Supreme court "has consistently held, that, inasmuch as an administrative agency is a creature of statute, any power or authority claimed by it must find its source with the provisions of the statute by which it is created." *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill. 2d 108 (1976); *Chicago Division of the Horseman's Benevolent & Protective Ass'n v. Illinois Racing Board*, 53 Ill. 2d 16, 19 (1972). Moreover, the Illinois Supreme Court has long held that "[a] statute which is being administered may not be altered or added to by the exercise of a power to make regulations thereunder. *Ruby Chevrolet, Inc. v. Dept. of Revenue*, 6 Ill. 2d 147 (1955), citing to *Illinois Bell Tel. Co. v. Commerce Comm'n*, 414 Ill. 275 (1953).

Accordingly, any legislative directive requiring the Commission to adopt and implement wholesale service quality rules derived from Section 13-712(g) cannot provide the Commission the authority to *trump* clear mandatory directives of the PUA, unless the legislature clearly stated that the Commission was being given that authority. *Illinois Consol. Tel. Co. v. Illinois Commerce Com.*, 95 Ill. 2d 142, 152 (Ill. 1983)(citing to *Shepherd v. Merit Systems Protection Board* (D.C. Cir. 1981), 652 F.2d 1040, 1043 ("An agency's interpretation of its enabling

statute and regulations are usually entitled to deference, although agency action that is inconsistent with the statute or regulations must be overturned”). Nothing in Section 13-712(g) provides the Commission with such permission.

AT&T argues that “the Illinois Supreme court “has long held that sections of the same statute should be considered to be *in pari materia*, and that each section should be construed with every other part or section so as to produce a harmonious whole.” AT&T RBOE at 16, *citing Sulser v. Country Mut. Ins. Co.*, 147 Ill. 2d 548, 55 (1992); *see also Dornfield v. Julian*, 104 Ill. 2d 261, 267 (1984) (“Statutes are to be construed ‘to avoid creating an unnecessary inconsistency in the law”). Staff agrees but points out that this rule of statutory construction supports Staff’s interpretation, not AT&T’s. For instance, in *Sulser v. Country Mut. Ins. Co.*, 147 Ill. 2d 548(1992), the court was construing two different provisions of the Illinois Insurance Code addressing the same subject matter, in this case, worker’s compensation benefits . The *Sulser* court “read[] the two provisions together, noting that neither provision prohibit[ed] deductions for workers’ compensation benefits, and construing the intent of the legislature to be the same in enacting each provision.” *Sulser*, 147 Ill. 2d at 558. The court construed the provisions to produce a “harmonious whole,” wherein neither provision was ignored or abrogated. *Id.* Likewise, in *Dornfield v. Julian*, 104 Ill. 2d 261, 267 (1984), the court construed two competing provisions, each addressing certain statute of limitations, and construed them in manner to produce a harmonious whole by “avoid[ing] creating an unnecessary inconsistency in the law.” AT&T’s statutory interpretation, on the other hand,

abrogates the tariffing requirements and this is inconsistent with reviewing each section of the same statute to “produce a harmonious whole.”

The unnecessary “inconsistency in the law” is not, as AT&T argues, potential inconsistencies of PUA tariffing requirements with federal law (and there are none – see above), but rather an inconsistency of the Plan’s tariff language with federal law that is easily remedied by correcting the tariff with Staff’s proposed language. Thus, Staff agrees with AT&T’s summary of the statutory construction principle that sections of the PUA (same statute), if ambiguous, “should be considered to be *in pari materia*, and that each section should be construed with every other part or section so as to produce a harmonious whole.” Consequently, applying the principle in this proper manner requires the Commission to construe Section 13-712(g) with the tariffing provisions of the PUA (the same statute) so as to adhere to the tariffing requirements, not to eliminate them as AT&T’s application would do. Staff’s proposed revision to the tariffing language itself avoids any fears of inconsistency between the statutory provisions and federal law.

The provisions of the PUA that require the Plan to be tariffed are mandatory, clear and certain. See Section 13-501(a) (“No telecommunications carrier *shall* offer or provide telecommunications service *unless and until a tariff is filed* with the Commission . . .”); Section 5/3-116 (“‘Rate’ includes *every* individual or joint rate, fare, toll, charge, rental . . . and *any rule regulation, charge, practice or contract relating thereto.*”); Section 9-102 (“*Every* public utility *shall file* . . . schedules showing *all rates* and other charges, . . .”); Section 9-104

("No public utility shall undertake to perform *any* service . . . *unless and until* the rates and other charges . . . have been published in accordance with the provisions of the Act."). AT&T has never argued and does not now argue any ambiguity in the tariffing requirements noted above.

The cardinal rule of statutory construction is to determine and give effect to the legislature's intent. *Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 195 (1992). *Sulser v. Country Mutual Ins. Co.*, 147 Ill. 2d 548, 555 (1992). Where the statutory language is clear and unambiguous, the plain language as written must be given effect without reading into it exceptions, limitations or conditions that the legislature did not express and without resorting to other aids of statutory construction. *Davis v. Toshiba Machine Co.*, 186 Ill. 2d 181, 184-85, 710 N.E.2d 399 (1999); *Philip v. Daley*, 339 Ill. App. 3d 274, 280, 790 N.E.2d 961, 965-66 (2nd Dist. 2003) ("when a statute is unambiguous, it must be applied without resort to further aids of construction, and there is no need to rely upon an [administrative] agency's interpretation"). Moreover, the interpretation of a statute by means of construction aids to divine the intent of the legislature is only necessary if the language of the statute is ambiguous. *In re Consolidated Objections to Tax Levies of School Dist. No. 205*, 193 Ill. 2d 490 (2000). Where the language of a statute is plain and unambiguous there is no occasion for construction to ascertain the meaning of a statute, although the language may be considered unwise and to impair seriously the statute as a whole. *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141 (1997). As the U.S. Supreme Court has explained: "[I]n interpreting a statute a court should always

turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: `judicial inquiry is complete.' " *Id.*

The plain and unambiguous language of the tariffing provisions of the PUA clearly requires tariffing in this context. Similarly, the plain language of Section 13-712 (g) requires the Commission to develop wholesale service quality rules and remedies. There is nothing in the plain language of either section, read together or separately, that would permit the Commission to eliminate statutory tariffing requirements. AT&T's statutory interpretation fails at the outset because it ignores the plain language of the statute.

AT&T correctly cites to the statutory construction rule that instructs that "statutes are to be construed 'to avoid creating an unnecessary inconsistency in the law,'" (AT&T RBOE at 16) but misapplies this rule. As the Commission stated in its *01-0539 Order*:

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

01-0539 Order, at 35, *citing* to *Michigan Bell Tel. Co. v. MCI/Metro Access Transmission Co.*, 323 F.3d 348 (6th Cir. 2003) ("Mi Bell v. MCIMetro").

Further, as the Commission's *01-0539 Order* recognizes,

In *MCI/Metro*, however, the parties had already negotiated an interconnection agreement. The Court ruled that a decision made by the Michigan Public Service Commission (the “MPSC”) allowing MCI/Metro to submit resale orders to an ILEC in a manner that conformed with an ILEC’s tariff, but did not conform with the parties’ interconnection agreement, did not conflict with TA96. The Court stated that the parties in question had already complied with TA96 by engaging in the negotiation and review process, as they had a pre-existing interconnection agreement. It concluded that employing a different method, allowable under state law, to transmit resale orders, did not eviscerate the agreement. In so ruling, the Court reasoned that: “This case is not one where competing carriers were attempting to bypass the negotiation process that creates interconnection agreements.” (*MCI/Metro*, 323 F.3d at 360).

01-0539 Order at 34-35.

Indeed, there is no inconsistency between the state tariffing laws and Section 712(g), or between the state and federal law if the tariff itself is correctly worded to be consistent with federal law. Moreover, there is nothing novel about the Commission ensuring that tariffing language is consistent with state and federal law and ordering appropriate language to be included. See e.g., AT&T tariff ILL.C.C. No. 20, Part 19, Section 15, 7th Revised Sheet No. 3, noted above.

Further, AT&T’s statutory interpretation violates the cardinal rule of statutory construction that AT&T itself cites, which is to determine and give effect to the legislature’s intent. See e.g., *Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 195 (1992). *Sulser v. Country Mutual Ins. Co.*, 147 Ill. 2d 548, 555 (1992). Despite its claims, AT&T’s argument does not properly recognize the Commission’s responsibilities and commitments, as a creature of statute, to the laws of the state of Illinois and the General Assembly. As such, the Commission owes fidelity *first and foremost* to the plain language of its enabling statute, the PUA, *not* to whether such fidelity will “creat[e] an unnecessary inconsistency in

law”, AT&T RBOE at 16, an inconsistency that Staff points out does not, in fact, exist.

Any threat of inconsistency with federal law, only becomes a factor (or an aid in statutory construction) when the Commission is confronted with an *ambiguous* statutory provision. In interpreting the language of a statute, the primary goal of the courts and this Commission is to ascertain and give effect to the intention of the legislature. *Barnett v. Zion Park District*, 171 Ill. 2d 378, 388, 216 Ill. Dec. 550, 665 N.E.2d 808 (1996). The Commission must seek the legislative intent primarily from the language used in the statute. *Yang v. City of Chicago*, 195 Ill. 2d 96, 103, 253 Ill. Dec. 418, 745 N.E.2d 541 (2001); *Barnett*, 171 Ill. 2d at 388. Where the language of the statute is unambiguous, the only legitimate function of the Commission is to enforce the law as enacted by the legislature. *Henrich v. Libertyville High School*, 186 Ill. 2d 381, 391, 238 Ill. Dec. 576, 712 N.E.2d 298 (1998); *Certain Taxpayers v. Sheahan*, 45 Ill. 2d 75, 84, 256 N.E.2d 758 (1970). There is no rule of statutory construction which authorizes this court to declare that the legislature did not mean what the plain language of the statute says. *Henrich*, 186 Ill. 2d at 391; *Illinois Power Co. v. Mahin*, 72 Ill. 2d at 189, 194 (1978). As Staff has noted repeatedly, there is no ambiguity in either the clear tariffing provisions of the PUA or in Section 712(g) and AT&T has never argued that any such ambiguity exists. As such, AT&T cannot now impose an interpretation of a statute that would create such an inconsistency with another statute or federal law.

Staff has argued throughout this proceeding that there is no reason to interpret the Commission's *01-0539 Order* in a manner that ignores, or effectively invalidates, the mandatory, clear and certain language of the tariffing provisions of the PUA and this position remains the same whether the Proposed Order invalidates the tariffing requirements outright or, as AT&T now argues, relies upon a statutory interpretation argument that in effect does the same thing. Section 712(g) must be considered *in pari materia* with the tariffing requirements of the PUA. To give effect to all state statutory requirements, Section 712(g) cannot be read to trump Section 13-501(a) and other provisions of the PUA that clearly and explicitly require tariffing of wholesale service quality plans – particularly when nothing in Section 712(g) precludes or even addresses the tariffing of wholesale service quality plans.

Commission's Rulemaking Authority

AT&T argues that Section 13-712(g) “preserves the Commission’s discretion to reject tariffs in the specific service quality plan context governed by Section 13-712(g).” AT&T RBOE at 17. Staff agrees that Section 13-712(g) requires the Commission to adopt rules and that those rules may and perhaps should go beyond a “word for word” recitation of the statute but any such rulemaking authority is still constrained by law. As noted above, the Illinois Supreme Court has long held that “[a] statute which is being administered may not be altered or added to by the exercise of a power to make regulations thereunder. *Ruby Chevrolet, Inc. v. Dept. of Revenue*, 6 Ill. 2d 147 (1955), *citing to Illinois Bell Tel. Co. v. Commerce Comm’n*, 414 Ill. 275 (1953). Fundamental

principles of statutory construction also support the proposition that the Commission may not expand its authority beyond the mandatory, clear and certain limitations of the PUA's tariffing requirements.

AT&T states that “[w]hen the General assembly took up that specific subject [wholesale service quality], it did *not* set up a mandatory tariffing regime.” AT&T RBOE at 17. This is certainly true. It is also equally true that a mandatory, clear and certain tariffing regime has been in place since at least 1921 and that the General Assembly need not repeat every statutory requirement in every new legislation in order for those requirements to remain in effect. As AT&T points out, “the Illinois Supreme court “has long held that sections of the same statute should be considered to be *in pari materia*, and that each section should be construed with every other part or section so as to produce a harmonious whole.” AT&T RBOE at 16, *citing Sulser v. Country Mut. Ins. Co.*, 147 Ill. 2d 548, 55 (1992). Construing the statutory sections together so that they produce a harmonious whole would require tariffing of the wholesale service quality plan because there is no inconsistency between tariffing and rules establishing such plans. Because the General Assembly did not repeat long established tariffing requirements in Section 13-712(g), is hardly support for finding that those requirements were overturned by the legislature or that the Commission was given the discretion to ignore the clear and certain mandatory tariffing regime already in place.

A corollary fundamental canon of statutory construction is that a statute is generally not to be construed to effect a change in the settled law of the state

unless its terms *clearly require* such a construction. *In re May 1991 Will Co. Grand Jury*, 152 Ill. 2d 381 (1992); *Ranquist v. Stackler*, 55 Ill. App. 3d 545 (1st Dist. 1977). See also *State of Illinois v. Bernette*, 30 Ill. 2d 359, 374 (1964) (“It is axiomatic that, generally, a statute should not be construed to effect a change in the settled law of the State unless its terms clearly require such a construction, (*Sternberg Dredging Co. v. Sternberg's Estate*, 10 Ill.2d 328).”). In fact, “...a statute that remains unaltered through successive sessions of the General Assembly over a period of years indicates legislative acquiescence in a contemporary and continuous administrative interpretation.” *Southwestern Bell Mobile Sys. v. Department of Revenue*, 314 Ill. App. 3d 583, 589 (Ill. App. Ct. 2000), *citing to People ex rel. Spiegel v. Lyons*, 1 Ill. 2d 409, 415, 115 N.E.2d 895, 898 (1953).

The tariffing provisions of the PUA have been settled law in Illinois since at least 1921 and there is nothing in Section 712(g), or in any attendant rulemaking authority, which directs the Commission to ignore, or effectively invalidate, the mandatory, clear and certain tariffing provisions of the PUA. Section 13-712(g) does not reference any of the tariffing requirements of the PUA, let alone excepting to any of the tariffing requirements. As noted above, it is clear that a court must construe a statute as it is, and may not supply omissions, remedy defects, or add exceptions and limitations to the statute’s application, regardless of its opinion regarding the desirability of the results of the statute’s operation. *Adelman*, 215 Ill. App. 3d at 568. The Commission simply may not expand its statutory authority beyond the clear limits of the PUA, even through any

rulemaking authority. See e.g., *Ruby Chevrolet, Inc. v. Dept. of Revenue*, 6 Ill. 2d 147 (1955); *Aurora East Public School Dist No. 131 v. Cronin*, 92 Ill. App. 3d 1010, 1376 (2nd dist. 1981) (“[W]here an administrative agency promulgates rules which are beyond the scope of its legislative grant of authority, such rules are invalid.”); *Schalz v. McHenry Co. Sheriff’s Dept.*, 135 Ill. App. 3d 657, 659 (“Administrative rules and regulations must be authorized by statute, and the statute may not be altered or added to by the making of administrative rules and regulations thereunder.”). Both AT&T and the proposed Order’s theory of statutory interpretation would have the Commission, through a grant of rulemaking authority to implement Rule 731, “altering” the tariffing requirements of the PUA by adopting an alternative implementation mechanism when the language simply does not exist in the tariffing provisions or in Section 13-712(g), which would allow the Commission authority to reject the tariffing of the Plan.

Moreover, if the General Assembly, in promulgating Section 13-712, had *intended* to allow the Commission to “reject” tariffing, the General Assembly could have simply stated so. A fundamental principle of statutory construction embodied in the maxim *expressio unius exclusio alterius* is that when a statute enumerates exceptions to it, this maxim prohibits reading into the statute other exceptions. See e.g., *State v. Mikusch*, 138 Ill. 2d 242, 248 (1990) (“It is further presumed that the legislature will not enact a law which completely contradicts a prior statute without an express repeal of it []. * * * A construction, if possible, of the two statutes which allows both to stand will be favored.”); *Weast Const. Co., v. Industrial Comm’n*, 102 Ill. 2d 337, 340 (1984) (“Another established rule of

statutory construction holds that the expression of certain exceptions in a statute will be construed as an exclusion of all others.”). For example, in Section 13-509, the General Assembly allowed for contracts that contain rates different than the rates tariffed to be included in commercial agreements and which rates do not need to be tariffed for service agreements with consumers for provision of competitive telecommunications services. Section 13-509 provides, in relevant part, the following:

Agreements for provisions of competitive telecommunications services *differing from tariffs*. A telecommunications carrier *may* negotiate with customers or prospective customers to provide competitive telecommunications service, and in so doing, may offer or agree to provide such service on such terms and for such rates or charges as are reasonable, *without regard to any tariffs* it may have filed with the Commission with respect to such services.

220 ILCS 5/13-509 (emphasis added).

Thus, the General Assembly, having expressed an exception to Section 13-501(a) in Section 13-509 cannot be presumed to intend other exceptions, such as are offered by AT&T in connection with Section 13-712(g), that are not expressly stated. Section 13-712(g) contains no such language which would allow the Commission to reject tariffing. It is simply not there. As noted above, it is clear that the Commission “must construe the statute as it is and may *not*, under the guise of *construction*, *supply* omissions, remedy defects, annex new provisions, substitute different provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of the language employed in the statute. *Toys “R” US v. Adelman*, 215 Ill. App. 3d 561, 568 (3rd Dist. 1991) (emphasis added), *citing Belfield v. Coop* (1956), 8 Ill.

2d 293, 134 N.E.2d 249; *People v. McCoy* (1975), 29 Ill. App. 3d 601, 332 N.E.2d 690, *aff'd* (1976), 63 Ill. 2d 40, 344 N.E.2d 436; 34 Ill. L. & Prac. Statutes § 102 (1958).

Whether The Specific Trumps The General

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). In support of these conclusions, AT&T argues, “Thus, “[w]here there are two statutory provisions, one of which is general and designed to apply to cases generally, and the other is particular and relates to only one subject, the particular provision must prevail.” AT&T RBOE at 18, *citing Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 195 (1992) (“*Hernon*”). Again, this is true as far as it goes, but it is not applicable in this context. The statutory tariffing requirements and the Section 13-712(g) direction to adopt wholesale service quality rules and remedies deal with entirely different subject matters and are not a general requirement juxtaposed against a specific requirement dealing with the same subject matter as are the cases cited by AT&T.

Here, the tariffing provisions of the PUA address tariffing. Section 13-712(g), as AT&T notes, does *not* address tariffing. Section 13-712(g) addresses wholesale service quality rules, which the tariffing provisions do not address. The case that AT&T cites for support makes clear the following: the guideline that the specific trumps the general is *only* applicable where the two competing

provisions address the *same* subject matter and the two competing provisions are *inconsistent*.

In *Hernon*, the court was faced with two competing, yet inconsistent, statutory provisions addressing the same subject matter – the statute of limitations on when an action can be brought that is covered by both the Structural Work Act and under common law theories of negligence in personal injury cases. *Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190, 192-96. The court found that the specific (section 13-214(a)'s four year limitation) took precedent over the general (section 13-202's two year limitation). *Id.* Because this proceeding has no issue of competing yet distinct provisions addressing the same subject matter inconsistently, the specific trumps the general doctrine is not applicable. Moreover, as Staff has pointed out above, where the language of a statute is plain and unambiguous there is no occasion for construction to ascertain the meaning of a statute, although the language may be considered unwise and to impair seriously the statute as a whole. *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141 (1997).

Finally, the General Assembly recently considered legislation that would have resulted in what AT&T's statutory interpretation argument seeks to achieve in this proceeding. In the "2005 Telecom Rewrite" bill, the general assembly considered S. B. 1700. The proposed bill attempted to detariff wholesale service quality plans, which is clear by looking at the proposed language to be added to the existing provision of Section 13-712(g), easily identified by the underline:

(g) The Commission shall establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure

enforcement of the rules. * * * Any carrier-to-carrier rules developed by the Commission pursuant to this subsection shall: (1) not exceed the duties imposed on telecommunications carriers pursuant to Section 251 of the federal Telecommunications Act of 1996 and regulations promulgated thereunder or any amendments and successors thereof; (2) * * *

SB 1700 at 60-61 (italics added).³

S.B. 1700's proposed changes to Section 712(g)(1), would have, had the General Assembly adopted it, removed tariffing requirements such as AT&T's current obligation to tariff the Plan. The General Assembly, of course, rejected the proposed 2005 Telecom Rewrite (SB 1700). Staff, accordingly, must enforce the currently effective tariffing provisions of the PUA and Section 712(g) and not the rejected provisions reflected in S.B. 1700.

Consequently, for all the reasons articulated above, the Commission has no authority to ignore, invalidate, or *reject* tariffing or *trump* the clear, mandatory directives of the PUA's tariffing requirements. In addition, the statutory interpretation identified by the Proposed Order and expanded upon in AT&T's RBOE is inconsistent with rules of statutory construction, and most notably, inconsistent with the state's tariffing requirements. Section 13-712(g) simply

³ See also the 2005 Telecom Rewrite proposal provisions addressing Section 13-501(a), which are as follows:

Sec. 13-501. Tariff; filing.

(a) No telecommunications carrier shall offer or provide telecommunications service to a residential end user unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service shall be offered or provided. * * * A telecommunications carrier that offers or provides a telecommunications service to business end users may file a tariff with the Commission that describes the nature of the service, applicable rates and other charges, terms and conditions of service, and the exchange, exchanges or other geographical area or areas in which the service will be offered or provided. S.B. 1700 at 25 (italics added).

does not provide the Commission with any discretion to trump, or effectively invalidate, other mandatory, clear and certain provisions of the PUA.

Conclusion

The above discussion addresses only some of the problems associated with the Section 13-712(g) position. There are others, but the point is that the Commission has no authority, through a rulemaking or otherwise, to trump mandatory, clear and certain directives of the PUA.

Respectfully submitted,

/s/ _____

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