

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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

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**STAFF OF THE ILLINOIS COMMERCE COMMISSION REPLY TO AT&T'S  
OPPOSITION TO STAFF MOTION FOR LEAVE TO FILE SURREPLY**

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As Staff noted in its Motion for Leave to file Surreply, the Commission's rules of procedure provide parties an opportunity to address any perceived errors in a Proposed Order in a Brief on Exceptions ("BOE"), which can then be addressed by other parties in a Reply Brief on Exceptions ("RBOE"). See Section 200.830 (83 Ill. Admin. Code §200.830). AT&T did not to file a BOE but, instead, filed an RBOE. 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.

AT&T argues that Staff had an opportunity to respond to AT&T's argument first advanced in its RBOE. AT&T Opposition at 2. Staff disagrees. First, Staff has no scheduled opportunity to respond to AT&T's RBOE. Second, AT&T acknowledges that it provided new "legal citations to show that the Proposed Order's analysis is fully consistent with the rules of statutory construction." *Id.* Further, Staff pointed out in its Motion for Leave that the Proposed Order only

generally alluded to Section 13-712, 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. Staff Motion For Leave, at 2-3. AT&T’s RBOE filled in some, but only some, of the blanks.

Contrary to the impression that may be left by certain statements in AT&T’s Opposition, AT&T has not “maintained” a statutory construction argument before its introduction in AT&T’s RBOE. AT&T Opposition at 4 (“Here by contrast, AT&T Illinois’ exceptions brief<sup>1</sup> is fully consistent with the Proposed Order, and with the positions AT&T has maintained throughout this proceeding.”). The statutory interpretation argument articulated by AT&T in its RBOE (at 16-20) is new to AT&T’s pleadings and provides, for the *first time*, an expanded elaboration of the Proposed Order’s general reference to Section 13-712 and its method of statutory interpretation that was not included in the Proposed Order and not included in any of AT&T’s prior filings or mentioned by AT&T at the oral argument. In fact, prior to filing its RBOE, AT&T had primarily advanced preemption arguments and insisted that the Commission had already decided the issue in 01-0539.<sup>2</sup> Thus, AT&T’s statutory construction argument, far from being

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<sup>1</sup> Apparently, AT&T is describing its RBOE as an “exceptions brief.” The reader should not be confused by this terminology into thinking that AT&T filed a BOE. AT&T did not file a BOE but only an RBOE. If AT&T had filed a BOE, Staff could have responded to AT&T’s statutory construction argument in Staff’s RBOE and would have had no reason to file the Motion for Leave to File a Surreply.

<sup>2</sup> See AT&T Initial Comments at 2 (“a tariffing requirement ‘would interfere with the procedures established by the Federal Act’ and would be ‘unlikely to survive preemption’”); AT&T Reply Comments at 4 (“‘requiring wholesale service quality plans to be tariffed supplants the interconnection agreement process’ prescribed by federal law.”); Oral Argument Tr. at 14 (“Based upon Staff’s proposed modification of the tariff, it appears that they agree with us, that such carriers should not be able to invoke a tariff because that would be inconsistent with their binding

fully consistent with the positions AT&T has maintained throughout this proceeding, was *not* articulated by AT&T until its RBOE. This statutory interpretation argument can only be said to be consistent with AT&T's position because it achieves the same result desired by AT&T throughout this proceeding, but in no way can this consistency of desired result be reasonably construed as a denial of its "newness" to this proceeding.

The expanded elaboration of the Proposed Order's general reference to Section 13-712 contained in AT&T's RBOE is new as is the roughly eleven legal citations<sup>3</sup> AT&T cites for support of its statutory interpretation position, which citations AT&T appears to acknowledge are new.<sup>4</sup> AT&T incorrectly downplays the newness of this statutory construction argument only hinted at in the Proposed Order and argues that Staff should have anticipated this elaborate fleshing out of the Proposed Order by AT&T in its RBOE. AT&T Opposition at 3. Consequently, AT&T argues that Staff, after anticipating this yet to be articulated argument, should then have responded in Staff's BOE to this argument. This is absurd and would result in a ridiculous inefficiency if every party was charged with anticipating every possible argument of the other party before they were articulated. While Staff did respond to the Proposed Order's interpretation in light

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legal contract."); AT&T Post Argument Brief at 2 ("if the Commission was really preserving some statutory tariffing regime, it would not have gone to the trouble of considering, modifying, and then adopting Verizon's proposed 'alternative to tariffing.'").

<sup>3</sup> *Atchinson, Topeka & Santa Fe Ry. V. Wichita Bd. of Trade*, 412 U.S. 800 (1973); *Geneva Community Unit Sch. Dist. No. 304 v. Property Tax Appeal Bd.*, 296 Ill. App. 3d 630 (2d dist. 1998); *Sulser v. Country Mut. Ins. Co.*, 147 Ill. 2d 548 (1992); *Dornfield v. Julian*, 104 Ill. 2d 261 (1984); *Knolls Condominium Ass'n v. Harms*, 202 Ill. 2d 450 (2002); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill. 2d 190 (1992); *Continental Illinois Nat'l Bank & Trust v. Illinois State Toll Highway Comm'n*, 42 Ill. 2d 385 (1969); *Newland v. Marsh*, 19 Ill. 376, 1857 WL 5725 (1857); and *Northwest Airlines, Inc. v. Department of Revenue*, 295 Ill. App. 3d 889 (1<sup>st</sup> Dist. 1998).

<sup>4</sup> AT&T Opposition at 3.

of “the times and circumstances”,<sup>5</sup> Staff is under no obligation to anticipate the elaborate additional argument made by AT&T, nor is it even a reasonable possibility in light of the fact that AT&T *misapplied* rules of statutory construction. Staff would not anticipate that the Proposed Order intended to engage in AT&T’s misdirected application of statutory construction rules.

Further, it is also not correct to argue, as AT&T apparently does, that Staff misread the Proposed Order because it did not anticipate the elaborate application of statutory principles of AT&T appearing for the first time in its RBOE. See, AT&T Opposition at 3 (“At bottom, then, Staff’s Motion proceeds from the palpably false premise that a party can misread a Proposed Order in its Exceptions, then get a second bite at the apple to attack what the Proposed Order really said once that party’s misreading is corrected.”) In Staff’s view, it is not at all clear from the Proposed Order what steps the Proposed Order took in interpreting the statutes to reach its result of eliminating the tariffing requirement. Staff BOE at 15-16. AT&T has provided its thoughts as to what the Proposed Order meant to say, but did not say. Staff is not asking for a “second bite” but for the first and only opportunity to rebut AT&T’s version. But clearly, the Proposed Order did not provide the elaborate statutory construction argument AT&T set forth in its RBOE. *Id.* Consequently, Staff should be given the opportunity to

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<sup>5</sup> See Staff BOE at 15-16. (“Staff does not understand what authority the *Proposed Order* relies on for its conclusion that the Commission has the authority to ‘interpret a law in light of the times [and] circumstances.’ Staff agrees that the Commission needs to interpret directives of the PUA in accord with other directives of the PUA. Staff is unaware, however, of any authority that allows the Commission to invalidate or ignore a clear directive of the PUA because of the ‘times and circumstances.’ The *Proposed Order* offers no support for such a novel statutory construction theory.”).

rebut AT&T's statutory interpretation argument for the new argument that it clearly is.

Not only is AT&T's expanded statutory interpretation theory new but it is *fundamental* to the Proposed Order's disposition of this matter and *erroneous*. As Staff noted in its Motion for Leave, AT&T's statutory interpretation is untenable. Since this statutory interpretation argument is offered as the legal foundation for the Proposed Order's holding, it is fundamental to the case and Staff ought to be afforded the opportunity to rebut it. AT&T raises the concern that if Staff's request were granted, "...then the Commission will see a Surreply in every exceptions briefing in every proceeding." AT&T Opposition at 3. This is simply untrue. First, rarely is something new discussed for the first time in an RBOE. Second, even in those cases where new arguments and caselaw are raised in an RBOE, as in this proceeding, the Commission need not exercise its discretion to permit additional briefing in connection with collateral issues or minor points. In this case, however, the new statutory interpretation argument is *pivotal* to the holding and as such, it deserves rebuttal whereas other more extraneous but new arguments in other cases may not.

Moreover, the statutory interpretation argument is erroneous and the record must be corrected to rebut it. The plain meaning of Section 712(g) does not support a "*carte blanche*" grant of discretion to the Commission which would permit the Commission to invalidate the statutory tariffing requirements via this statutory construction. 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. The plain language of the tariffing provisions of the PUA and Section 712(g) are not inconsistent with each other or federal law, as AT&T would have the Commission believe, and none of the language in these sections gives the Commission the authority to invalidate the other. Consequently, the plain meaning of these statutory provisions does not support a rejection of tariffing. Because the Proposed Order indicates an intention to *hinge* its ruling on authority that the Commission does not have to invalidate or ignore a clear, mandatory directive of the PUA, Staff should be allowed to respond to AT&T’s selective and erroneous statutory interpretation arguments for the sake of the record.

In its Opposition, AT&T notes that “....Staff’s proposed surreply *agrees* with the principles of statutory construction on which the Proposed order rests” and that these principles are “...hardly a ‘new’ argument....” AT&T Opposition at 3 (emphasis in original). AT&T’s statements are misleading. While Staff agrees that the rules of statutory construction alluded to in the Proposed Order and cited in full for the first time in AT&T’s RBOE are in fact rules of statutory construction, they are *not correctly applied* and in the case of the rule to construe statutes in a manner consistent with federal law, *not appropriately applied at all* to this situation since the statutes being interpreted are not inconsistent with federal law, only AT&T’s tariff language is inconsistent with federal law. Consequently, Staff

does *not* agree with the statutory *interpretation* upon which the Proposed Order rests, although Staff recognizes that AT&T has cited legitimate principles of statutory construction even though it has misunderstood and misapplied them, as Staff discusses more fully in its Surreply.<sup>6</sup>

Further, as Staff noted in its Motion for Leave (at 4), 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.

AT&T also argues, as it *has* consistently maintained, that the Commission already decided this issue in its *01-0539 Order*. See e.g., AT&T Initial Comments at 1 (“There is a simple reason why AT&T Illinois seeks to withdraw the tariff: *Because this Commission said it could.*”) (emphasis in original). This is also clearly inaccurate but Staff has had the opportunity to rebut this argument in the scheduled pleadings and would not need to take the opportunity to do so again except that AT&T is raising this argument for the first time as “proof” as to why its RBOE's statutory interpretation argument is not new. In essence, AT&T argues that many of the issues discussed in this rate suspension and

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<sup>6</sup> In another example of erroneous interpretation on the part of AT&T, AT&T states in connection with Staff's recognition of established statutory principles that “[They] appreciate the apparent flattery that Staff deemed AT&T Illinois' reply to be effective...” AT&T Opposition at 3. Nothing in Staff's pleadings could reasonably imply flattery of AT&T's position, nor would a careful reader infer such a construction.

investigation proceeding were also briefed in the 01-0539 proceeding. Therefore, AT&T argues, Staff has had its opportunity to respond to them. AT&T Opposition at 4-6.

There are several errors in this argument. First, the statutory interpretation argument set forth in AT&T's RBOE was never before raised in 01-0539 so no party had the opportunity to respond to it in that docket, including Staff.

Second, Staff agrees that preemption issues and tariffing issues were indeed discussed in 01-0539 but Staff notes that this Commission sought to suspend and investigate the withdrawal of the remedy plan from the tariff, which is a strong indication that the Commission did not believe that its order in 01-0539 foreclosed the opportunity to discuss whether a withdrawal of the tariff was appropriate. The Commission concluded in its Suspension Order in this proceeding that AT&T's Plan is at minimum a "rate."<sup>7</sup> Suspension Order at 2. The Commission also concluded that "the Commission should, without answer or other formal pleadings, enter upon a hearing concerning the propriety of the proposed elimination of the wholesale performance plan". Suspension Order at 1. If the Commission had already decided this issue in 01-0539, as AT&T maintains, it appears to Staff that one would then logically also presume that the Commission intended to waste the scarce resources of everyone here at the Commission and the resources (although hardly scarce as illustrated by the

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<sup>7</sup> AT&T has never contested this Commission's finding but simply ignores the fact that rates must be tariffed under Sections 5/3-116 and 9-102 of the PUA. Staff Initial Comments at 5-6. AT&T has failed to, even once, attempt to address this issue. Consequently, the record is completely void of any reasoning or rationale as to why AT&T need not tariff the Plan as a rate.

number of outside counsel on the service list) of AT&T. Staff does not think that wasting resources was quite what the Commission had in mind when it issued its Suspension Order. Third, AT&T argues that 01-0539 decided this issue in their favor but Staff has pointed out in its pleadings in this proceeding that the better interpretation of the 01-0539 order is that the Commission avoided requiring tariffing in the rule because it relied upon the governing tariffing statute remaining in effect. In that way, the Commission avoided litigation of the rule and avoided invalidating the PUA's tariffing requirements. AT&T's argument that the issue of whether the Plan need be tariffed under the PUA was already decided in 01-0539 is thus utterly belied by the conclusions the Commission reached in its Suspension Order in *this* proceeding.<sup>8</sup>

Third, AT&T's argument is circular. You have to accept that AT&T'S interpretation of the 01-0539 order is correct in order to even argue that this issue has already been decided in that docket. You also then have to assume the Commission brought this proceeding in error. Finally, you have to ignore the fact that the statutory interpretation argument Staff seeks to address was not discussed at all in Docket 01-0539 and is new to this proceeding because it was alluded to for the first time in the Proposed Order and significantly expanded in AT&T's RBOE.

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<sup>8</sup> AT&T argues that Staff's position in this docket is a "...collateral attack on the Commission's Order in Docket No. 01-0539..." AT&T Opposition at 5. AT&T's argument assumes that its interpretation of the Commission's order in 01-0539 is the correct interpretation. As stated above, Staff obviously disagrees. But even assuming *arguendo* that AT&T's interpretation is correct, under AT&T's theory, presumably, then the Commission's Suspension Order in this proceeding would also be, in essence, a collateral attack on the Commission's own 01-0539 Order. See AT&T Opposition at 5. However, the Commission, of course, is provided express authority in the PUA to "rescind, alter or amend any rule regulation, order or decision made by it" to correct legal error. 220 ILCS 5/10-113.

AT&T also responds to a point Staff made in its Surreply regarding the 2005 Telecom Rewrite proposal, S.B. 1700. See Staff Surreply at 22-23. Namely, Staff pointed out that the legislature rejected proposed amendments to Section 13-712(g) that would have provided the Commission with the authority to reject tariffing in the wholesale remedy plan context. The legislature's rejection supported Staff's view that the legislature did not give the Commission discretion to reject tariffing in Section 13-712(g). AT&T posits that "Staff's new argument would only hurt Staff's cause on the tariffing issue." AT&T Opposition at 5. Staff disagrees.

AT&T's argument again assumes erroneously that the legislature adopted AT&T's interpretation of 01-0539. As Staff has argued in its Surreply, AT&T's interpretation would have the Commission exceed its authority and overturn longstanding tariffing requirements, albeit under the guise of statutory interpretation rather than outright invalidation. More likely, the General Assembly saw the requirements of 01-0539 as supplemental to the PUA's longstanding tariffing requirements. This is the better view because the General Assembly had no reason to believe that the Commission would unlawfully go beyond its authority to promulgate rules that establish and implement wholesale remedy plans by invalidating the tariffing statute it is charged to enforce.

S.B. 1700 does not demonstrate, as AT&T would lead one to believe, that the General Assembly saw no need to amend the PUA because the Commission had already invalidated the tariffing requirements in ICC Docket No. 01-0539 (which the Commission clearly did not and could not lawfully do). Rather, what

S.B. 1700 does demonstrate is that the sponsors of SB 1700 *knew* that the Commission's Order in 01-0539 did *not*, in fact, relieve AT&T from tariffing the Plan and, for that matter, any of the other wholesale services that the sponsors of S.B. 1700 sought to have removed.

Finally, AT&T notes that “[t]he time limit for the Commission's consideration of AT&T Illinois' tariff withdrawal filing is near.” AT&T Opposition at 6. This accurate statement appears to also be an argument for why Staff's request to clarify the record by having the opportunity to rebut new caselaw and argument should be denied. In light of the somewhat limited remaining time, Staff for its part would have no objection to the record reflecting everything that has been filed to date, including the admission into the record of Staff's Motion for Leave, Staff's Surreply, AT&T's Opposition and this Reply to AT&T's Opposition. If, however, AT&T would like to address issues it did not in its Opposition, Staff would suggest a truncated briefing schedule.

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,

/s/ \_\_\_\_\_

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