

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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<b>Illinois Commerce Commission</b>	)	
<b>On Its Own Motion</b>	)	
<b>-vs-</b>	)	
<b>Illinois Bell Telephone Company</b>	)	<b>Docket No. 08-0569</b>
	)	<b>(Rehearing)</b>
<b>Investigation of specified tariffs declaring certain</b>	)	
<b>services to be competitive telecommunications services</b>	)	

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**REPLY TO EXCEPTIONS ON REHEARING  
OF ILLINOIS BELL TELEPHONE COMPANY**

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**REPLY TO EXCEPTIONS ON REHEARING  
OF ILLINOIS BELL TELEPHONE COMPANY**

Illinois Bell Telephone Company (“AT&T Illinois” or the “Company”), by its attorneys, hereby submits its Reply to the Briefs on Exceptions on Rehearing filed by the Staff of the Illinois Commerce Commission (“Staff”), the Illinois Attorney General (the “Attorney General”), and the Citizens Utility Board (“CUB”).

Staff, the Attorney General, and CUB fail to present any evidence that warrants a change in the Proposed Order’s conclusion that the DSL expansion requirement should be eliminated. This requirement is not supported by any evidence in the record, is unrelated to the Commission’s reclassification decision, and is unnecessary because Internet access is broadly available in the Greater Illinois LATAs. Moreover, contrary to the Attorney General’s suggestion, removing this requirement has no effect on the reclassification of AT&T Illinois’ local exchange services as competitive.

**I. THE DSL EXPANSION REQUIREMENT IS NOT SUPPORTED BY EVIDENCE IN THE RECORD**

The purpose of this proceeding on rehearing was to give the parties an opportunity to present additional *evidence* relative to the DSL expansion requirement which the Commission imposed on AT&T Illinois in its June 11, 2009 Order, as amended on June 24, 2009 (the

“*Order*”). The Administrative Law Judge (“ALJ”) had advised the Commission that “[t]here is nothing in the record that supports imposing DSL service requirements as a condition of reclassification” and that “making the reclassification contingent on the expansion of DSL service is inconsistent with the determination that the services at issue are competitive.” (July 17, 2009, ALJ Memorandum, p. 3). Although all of the parties filed Briefs and Reply Briefs in the rehearing proceeding, no *evidence* was presented to suggest that DSL expansion is or should be a requirement for the classification or that the 99%/90% standard adopted by the Commission is necessary or appropriate. None of the parties now supporting this requirement took the opportunity to present any testimony from any witness – expert or otherwise. Instead, the gist of the arguments advanced by Staff, the Attorney General, and CUB essentially reduce to the following: (i) broadband availability is a good thing; and (2) if the Commission imposed a DSL expansion requirement in its final *Order*, it must have been necessary to its decision and the reclassification.

After fully reviewing the submissions of the parties in the reopened proceeding, the Proposed Order reached the same conclusion as the ALJ’s Memorandum: *i.e.*, “. . . the record does not contain adequate evidentiary support for imposition of [a DSL expansion] requirement.” (*Proposed Order*, p. 40). Although Staff, the Attorney General, and CUB persist in their contentions that the Commission can and should maintain this requirement in their Briefs on Exceptions, they fail to resolve the evidentiary problem. Instead, their Briefs simply recycle the same arguments which the Administrative Law Judge considered and found wanting the first time around. There is still no *evidence* to support this requirement. AT&T Illinois – like the Commission and the parties – fully supports federal and state policies promoting the availability of broadband Internet access services. However, as the Proposed Order correctly concludes:

“[T]his overarching policy goal does not warrant imposing the DSL Internet Requirement in this proceeding where the record does not contain adequate evidentiary support for imposition of this specific requirement.” (*Proposed Order*, p. 41). Accordingly, there is no basis for changing the Proposed Order’s recommendation that the DSL requirement be eliminated.

## **II. THE DSL EXPANSION REQUIREMENT IS UNRELATED TO THE COMPETITIVE CLASSIFICATION**

The *only* reason suggested by any party for mandating the expansion of AT&T Illinois’ wireline DSL service is that it is necessary to make pure-play VoIP more available to customers as a substitute for local exchange service. (Staff Br. on Exc. at 2-3; CUB Br. on Exc. at 4-5; AG Br. on Exc. at 5, 8-9). However, these arguments contradict the findings in the Commission’s *Order* and their own positions in the original proceeding. The Commission’s *Order* expressly found that the “amount or degree of VoIP competition” was “of no consequence to our determinations concerning AT&T’s package offerings or our determinations concerning its measured service offerings.” (*Order*, p. 92). The Commission found that, even without taking pure-play VoIP into account, there was ample evidence to support the competitive classification of residential local exchange service (both packages and measured service) based on the alternatives available from numerous CLECs, cable companies, and wireless providers. (*Id.*, pp. 90-94). This finding is not subject to dispute or revision in this rehearing proceeding. Therefore, there is no logical nexus between the DSL requirement and the competitive classification.

Staff asserts that the Commission did not “discount pure play VoIP as a platform able to support competitive options in the Greater Illinois MSAs.” (Staff Br. on Exc., p. 3). Instead, Staff argues that the Commission disregarded VoIP service *only* because AT&T Illinois did not establish the actual amount of pure-play VoIP competition in the Greater Illinois LATAs. (*Id.*). This oversimplifies the Commission’s *Order*. The Commission clearly *did* “discount” VoIP

service on its merits: the Commission found that the record “does not establish that VoIP is a functionally equivalent alternative offering, or that pure play VoIP offerings are reasonably available at prices, terms and conditions, comparable to [AT&T Illinois’] own measured services.” (*Order*, p. 92). This is why AT&T Illinois’ inability to quantify the current amount of pure-play VoIP competition “was ultimately of no consequence to [the Commission’s] determinations.” (*Id.*). Apparently recognizing that its current position on VoIP service does not square with the language in the Commission’s *Order*, Staff attempts to recast the *Order* as follows in its proposed Exception language:

“Next, we observe that, in rendering our decision on rehearing in this proceeding, we need to clarify certain portions of our June 11, 2009 Order. We note that Staff is correct in its understanding of our Order: while we did not take “pure-play” or “over the top” VoIP specifically into account in our technical analysis of whether more than one competitor providing the same, a similar or an equivalent service then existed in each exchange, *this does not mean it did not figure into our decisional calculus. Rather, we were effectively precluded from considering pure-play VoIP by the paucity of proof AT&T offered regarding the availability and penetration of pure play VoIP. The availability of this service would clearly have figured into our decisional calculus had AT&T submitted adequate evidence regarding it, and in our opinion the record would have greatly benefited from such evidence regarding this emerging technology.*” (Staff Br. on Exc., pp. 5-6; underscoring in original removed, emphasis added).

Staff’s rewrite is improper and should be disregarded. The Commission’s Order was clear that VoIP service in no way factored into the “decisional calculus.” No party requested rehearing, and rehearing was not granted, on this issue. It is way too late for Staff to attempt the change the Commission’s analysis of VoIP to better fit its current arguments in favor of a DSL requirement.

Furthermore, the Commission’s disregard of VoIP service was consistent with the positions taken by these parties in the original proceeding. Staff argued that pure-play VoIP service was *not* a competitive substitute *because* customers must obtain a broadband Internet connection. (*Order*, pp. 62-63). If Staff’s theory were correct, it would make no difference whether DSL service was available to 0% or 100% of the customers in the Greater Illinois

LATAs. The Attorney General similarly argued that the need for Internet access disqualified VoIP as a competitive alternative and further contended that the “service quality for VoIP calls is not comparable to the quality of Illinois Bell’s basic service.” (*Order*, p. 73). CUB filed no testimony but adopted Staff’s negative position on VoIP service in its Initial Brief. (CUB Init. Br., pp. 9-10). Having urged the Commission to reject VoIP as a competitive alternative, Staff, the Attorney General, and CUB cannot now walk away from their positions.<sup>1</sup>

Even if the Commission had not completely discounted pure-play VoIP as a competitive alternative to AT&T Illinois’ local exchange service (and, based on the record before it in the original proceeding, the Commission clearly did), the parties failed to present any evidence that the DSL Internet requirement is necessary to ensure that competition continues in the future. (Staff. Br. on Exc., pp. 3-4; CUB Br. on Exc., pp. 3-4). To substantiate such a position, the parties would have had to demonstrate that the competition that exists today from CLECs, cable and wireless providers will largely disappear and that pure-play VoIP will be the competitive replacement. No such evidence exists. In fact, all of the evidence is to the contrary. CLEC, cable and wireless market shares in Illinois have consistently and significantly increased over the last several years. (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 1153-1309; AT&T Ill. Ex. 1.1 Rev. (Wardin), lines 95-117, 273-295, 330-345, 369-391; AT&T Ill. Ex. 3.0 (W. Taylor), lines 462-510; AT&T Ill. Ex. 3.1 (W. Taylor), 284-295; AT&T Ill. Ex. 4.0 (Shooshan), lines 232-270, 445-561). There is not even a whisper of evidence that this trend will change.

In short, the Proposed Order is correct that the DSL expansion requirement conflicts with the Commission’s findings on competition.

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<sup>1</sup> The Attorney General’s position is particularly odd: the Attorney General is appealing the Commission’s decision in the MSA-1 case, *notwithstanding AT&T Illinois’ DSL commitment in that proceeding*, and is taking the position on appeal that the Commission does not have the statutory authority to approve or enforce such a commitment. (AT&T Ill. Reply Brief on Rehearing, p. 10).

### III. BROADBAND INTERNET ACCESS IS BROADLY AVAILABLE TODAY WITHIN THE GREATER ILLINOIS LATAS

All of the parties' positions reduce to the argument that broadband Internet access is important and desirable from a public policy perspective. It is impossible to disagree with that proposition – broadband access is supported by both federal and state policy. AT&T Illinois supports broadband access when deployed in a rational and economic basis and when the competitive market for broadband services is allowed to function properly. However, that does not make broadband Internet access an issue for *this proceeding*. Nor does it make AT&T Illinois the *only* provider of broadband Internet access service in the state. Nor does it provide the Commission with *carte blanche* to impose costly DSL expansion requirements on AT&T Illinois that are unrelated to the competitive classification.<sup>2</sup>

This proceeding was initiated under Section 13-502 of the Act, which sets forth the standards for a competitive classification. At no time prior to the Commission's *Order* did any party view DSL service expansion as necessary or relevant to the classification of AT&T Illinois' local exchange services in the Greater Illinois LATAs. Staff recommended that they all be classified as competitive – without regard to DSL service availability. The Attorney General and CUB recommended that local service packages be classified as competitive and measured service be classified as noncompetitive – without regard to DSL service availability. The sudden interest shown in DSL expansion by Staff, the Attorney General, and CUB on rehearing essentially comes out of nowhere.<sup>3</sup>

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<sup>2</sup> The Attorney General seems to view this requirement as a “price” that AT&T Illinois should be required to pay to obtain a competitive classification under Section 13-502. (AG Br. on Exc., pp. 5-6). Nothing in Section 13-502 permits the Commission to impose “prices” on the Company in exchange for what it is entitled to under the statute.

<sup>3</sup> Although CUB's Initial Brief in the original proceeding pointed out that AT&T Illinois had not made the same DSL commitment in the Greater Illinois LATAs that it had in MSA-1, it was presented in the context of distinguishing this proceeding from the MSA-1 proceeding – not as a formal request for imposition of such a requirement on the Company. (CUB Init. Br., p. 13).

The Attorney General asserts that AT&T Illinois' deployment of DSL service in the Greater Illinois LATAs is too low, because it is less than the DSL coverage in the Chicago LATA. (AG Br. on Exc., pp. 2-4). Thus, the Attorney General contends, the Commission was justified in requiring the expansion of DSL Internet service. (*Id.*, p. 4). The Attorney General is wrong on the policy issues and wrong on the facts. *First*, there is no evidence in this record as to what level of deployment is or should be considered "too low." It is undisputed that AT&T Illinois is in compliance with all state and federal requirements regarding broadband service. Section 13-517 of the Act provides that every ILEC which offers or provides a noncompetitive telecommunications service "shall offer or provide advanced telecommunications service to not less than 80% of its customers by January 1, 2005." 220 ILCS 5/13-517(a). AT&T Illinois offers advanced telecommunications service to more than 80% of its customers. Section 21-1101(e) of the Cable and Video Competition Law of 2007 requires AT&T Illinois, as a holder of a state-issued authorization to provide video service, to either (i) provide wireline broadband service to 90% of the households in its telecommunications service area by December 31, 2008, or (ii) pay \$15 million to the Digital Divide Elimination Infrastructure Fund. 220 ILCS 5/21-1101(e). AT&T Illinois has expanded wireline broadband service to 90% of the households in its service territory.<sup>4</sup> (Wardin Aff., ¶¶ 14-15). In compliance with a voluntary commitment made as part of the Federal Communications Commission's Order approving the AT&T/BellSouth merger, AT&T offers broadband Internet service to 100% of the residential living units in the territory served by AT&T's ILEC subsidiaries, including AT&T Illinois, using both wireline and non-wireline technologies as contemplated by that Order. *AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74,

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<sup>4</sup> *AT&T Illinois First Annual Video Service Access Report*, pp. 2-3, filed with the Clerk of the Commission on April 1, 2009, in Docket 07-0493.

*Memorandum Opinion and Order*, 22 FCC Rcd 5662, App. F (“Promoting Accessibility of Broadband Services,” ¶ 1) (2007); *Letter to Ms. Marlene Dortch, Secretary, FCC*, WC Docket No. 06-74 (Feb. 6, 2008)). There is not a shred of *evidence* in this proceeding that these federal and state standards are insufficient. The mere fact that some areas in AT&T Illinois’ service territory show greater DSL deployment than others – as the Attorney General and CUB point out – tells the Commission nothing: the General Assembly and the FCC imposed *statewide obligations*, which necessarily imply that deployment levels will not be the same in every exchange and every geographic area. (AG Br. on Exc., pp. 3-4; CUB Br. on Exc., p. 5).

*Second*, the suggestion that significant portions of the Greater Illinois LATAs are “underserved” in terms of broadband availability is simply incorrect. (CUB Br. on Exc., p. 5; AG Br. on Exc., pp. 3-4). Although the Attorney General and CUB focus obsessively and exclusively on *AT&T Illinois* and its *wireline* DSL offerings, in fact, there are numerous alternatives available to customers. (*Id.*). As noted above, *100%* of the living units in AT&T Illinois’ service territory have access to broadband Internet service, when AT&T’s satellite offerings are considered along with AT&T Illinois’ wireline service. Moreover, cable, satellite and wireless companies are major providers of broadband service. Cable companies offer cable modem Internet access services (which can also be used as a platform for pure-play VoIP) in areas covering 99% of AT&T Illinois’ access lines in the Greater Illinois LATAs. (AT&T Ill. Ex. 1.0 Rev. (Wardin), lines 1030-1031). In fact, there is at least one cable company offering cable modem service in every wire center within the Greater Illinois LATAs where AT&T Illinois has not deployed wireline broadband Internet service. (Wardin Aff., ¶ 16). Based on the availability of both its wireline service and cable modem service, AT&T Illinois estimates that *wireline* broadband service is available to approximately *90%* of residential customers in the

Greater Illinois LATAs. (Wardin Reply Aff., ¶ 4). Nowhere do the parties ever present a rationale – much less *evidence* – for finding this deployment level inadequate.

CUB argues that the DSL expansion requirement should be maintained because it is “good policy.” (CUB Br. on Exc., pp. 2, 3, 4). The mere invocation of public policy does not override the legal obligations imposed by the PUA that Commission orders be supported by “substantial evidence.” 220 ILCS 5/10-201(e)(4). CUB provided no testimony whatsoever in the original proceeding and submitted no affidavit in the rehearing proceeding. Simply asserting that affordable DSL service is important to facilitate pure-play VoIP service is not evidence – particularly when the Commission has already ruled that (i) the record does not support the consideration of pure-play VoIP service in the competitive analysis; and (ii) even without taking pure-play VoIP into account, there are more than enough competitive alternatives available from CLEC, cable and wireless providers to satisfy Section 13-502. (*Order*, pp. 90-94).

Finally, CUB attempts to gloss over the fact that the Commission did not rely in any way on AT&T Illinois’ DSL commitment in the MSA-1 reclassification proceeding. CUB argues that, although the Commission “did not explicitly approve the DSL commitments” in that docket, the Commission did determine that the Stipulation was “reasonable, in the public interest and consistent with Section 13-502(c)(5)” and supported its decision to approve the reclassification. (CUB Br. on Exc., p. 3). This is revisionist history at its worst. The Commission did more than “not explicitly” approve the DSL commitment – it “explicitly” *did not consider the DSL commitment*. *Order in Docket No. 06-0027*, adopted August 30, 2006, p. 99. The portions of the Stipulation which the Commission found reasonable and supportive of its reclassification decision were those which CUB and AT&T Illinois *had* presented for its approval (*e.g.*, the rate commitments, Safe Harbor proposals, and other consumer protections). *Id.*, pp. 96, 99-100.

#### **IV. REMOVAL OF THE DSL EXPANSION REQUIREMENT DOES NOT CHANGE THE COMPETITIVE CLASSIFICATION OF AT&T ILLINOIS' LOCAL EXCHANGE SERVICE**

In the alternative, the Attorney General suggests that – if the Commission eliminates the DSL requirement – the competitive classification of AT&T Illinois' measured service rate plan should be reversed as well. (AG Br. on Exc., pp. 8-9). The Attorney General is incorrect. The Commission's *Order* clearly and unequivocally found AT&T Illinois' local exchange service in the Greater Illinois LATAs – both packages and measured service plans – to be competitive, without regard to the availability of VoIP service. (*Order*, pp. 91-92). If VoIP service did not factor into the competitive analysis, then logically eliminating the DSL expansion obligation (which is relevant – if at all – only because it enables VoIP service) would not change the competitive analysis. In fact, the Commission found that “[e]ven more evidence of substantial competition was provided in this proceeding than in the MSA-1 Reclassification proceeding.” (*Order*, p. 94). Since the Company committed to implement the same rate transition plan and consumer safeguards in the Greater Illinois LATAs that the Commission approved in the MSA-1 proceeding, there is no basis for modifying the classification of AT&T Illinois' measured service rate plans if the DSL requirement is removed.

\* \* \*

In conclusion, the Exceptions proposed by Staff, the Attorney General, and CUB should not be adopted.

Respectfully submitted,

ILLINOIS BELL TELEPHONE COMPANY

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**CERTIFICATE OF SERVICE**

I, Louise A. Sunderland, an attorney, certify that a copy of the foregoing **REPLY TO EXCEPTIONS ON REHEARING OF ILLINOIS BELL TELEPHONE COMPANY** was served on the following parties by U.S. Mail and/or electronic transmission on November 24, 2009.

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