

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>XO Illinois, Inc.</b>	)	
	)	
vs.	)	<b>ICC Docket No. 01-0843</b>
	)	
<b>AT&amp;T Communications of Illinois, Inc. and AT&amp;T Corporation.</b>	)	
	)	
<b>In the Matter of a Complaint Pursuant to 220 ILCS 5/13-515</b>	)	

**REPLY OF AT&T**

AT&T Communications of Illinois, Inc. and AT&T Corp. (collectively "AT&T") hereby reply to the Response of XO Illinois, Inc. to AT&T's Motion To Dismiss, filed January 9, 2002 in this proceeding.

**Introduction**

In its Response, XO refers to proceedings in various other jurisdictions and levels serious charges against AT&T and its purported conduct and motives. A motion to dismiss is not the occasion to argue the facts or merits of the underlying case, however, and AT&T has refrained from doing so here. Instead AT&T in the Motion accepted the allegations of the Complaint as true for purposes of argument and showed that XO has failed to establish any basis for this Commission to assert jurisdiction over XO's demand for payment from AT&T.

Nothing in its Response to the Motion rehabilitates XO's position. XO essentially reiterates the assertions of its Complaint at greater length, but without additional

substance. Its assertions do not change the statute, however, and cutting through the various charges and the arguments it makes, XO has simply failed to explicate a valid basis in Article IX or in Article 13 of the Public Utilities Act (“PUA”) for this Commission to entertain XO’s action to recover some \$500,000 from AT&T. And its contention that by asserting an affirmative defense (relating to XO’s intrastate access charges) AT&T has somehow conceded jurisdiction is patently erroneous.

### **Count I**

XO argues that AT&T’s contention as to Article IX, the basis for Count I, “must be considered in light of [AT&T’s] actions across the country.” Response, p. 2. It proceeds to give an account of litigation elsewhere, stating that the present action is an Illinois version of such other battles. Nothing in XO’s rendition brings this action within any relevant provision of Article IX of the PUA, however. XO fails to cite to a single applicable<sup>1</sup> provision of Article IX that authorizes this Commission to render a \$500,000 judgment against AT&T and in favor of XO in the circumstances.

XO further argues that by raising its Fifth Affirmative Defense, included with the Answer, AT&T has conceded jurisdiction over XO’s complaint. That assertion cannot be correct. First of all, AT&T’s contention is that the Commission lacks subject matter jurisdiction over the Complaint. Subject matter jurisdiction, of course, cannot be “waived” or even actively conferred by the parties on a court or on this commission (and AT&T’s answer additionally preserves lack of jurisdiction as a defense). Moreover, in

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<sup>1</sup> As explained in AT&T’s motion, Section 13-101 of the Public Utilities Act (“PUA”) limits the applicability of Article IX to carriers providing only competitive services (like AT&T and XO) to sections 9-222.1, 9-222.2, 9-250 and 9-252.1. To the extent the complaint purports to arise under other sections of Article IX, those provisions cannot offer a lawful basis for asserting Commission jurisdiction, since they do not apply.

conventional litigation AT&T would have filed its jurisdictional motion first, and only in the event that motion were denied would it have filed an answer and affirmative defenses; Section 13-515 requires, however, that “[a]n answer and any other responsive pleading to the complaint” be filed simultaneously and initially, a requirement evidently designed to avoid the delay entailed in first filing and gaining a ruling upon a motion to dismiss. But logically the Hearing Examiner will take up the motion initially, and only if that motion is denied will proceedings go forward on the Complaint and Answer (and affirmative defenses). The filing of an answer and defenses cannot operate as concession of anything in the circumstances.

Further, it is noteworthy that XO’s own arguments support the position that the proper forum for this dispute is a civil action, not before the Commission. XO cites, for example, the prohibition against retroactive ratemaking and the filed rate doctrine in support of its position on the merits.<sup>2</sup> But again it has failed to point to any applicable provision of Article IX whatsoever that supports its claim that the Commission has authority to render the monetary award it seeks. And ironically the doctrines it does cite, if XO is correct, would support jurisdiction in a civil forum; indeed, this was the basis for the Court in *MCI Telecommunications Corp. v. Ameri-Tel, Inc.*, 852 F. Supp. 659 (N.D. Ill. 1994) declining to refer the case to the Commission (based on primary jurisdiction) and instead awarding a monetary judgment in favor of MCI. In short, the fact that XO and AT&T are both carriers, or competitors, or that the dispute “could have customer-effecting (SIC) consequences” (Response, at 6) is simply not enough to confer

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<sup>2</sup> Ironically, XO cites Section 9-240 of the PUA, 220 ILCS 5/9-240, which does not apply to carriers providing only competitive services. See footnote 1, supra.

jurisdiction over this dispute on the Commission under Article IX, and Count I accordingly should be dismissed.

## **Count Two**

XO in its Response has nothing new to say on Count Two, its claim under Section 13-514 of the PUA. It repeats its conclusory allegation that AT&T has violated Section 514(2), yet XO has not and cannot articulate any manner in which AT&T has “unreasonably impaired” the “speed,” or the “quality,” or the “efficiency” of any “services used by another telecommunications carrier.” Similarly, it has not alleged any manner or any in which AT&T has acted such as to have a “substantial adverse effect” on XO’s ability to provide service to its customers. Section 13-514(6). If XO’s claim is that by withholding payment AT&T has jeopardized or impaired XO’s ability to provide service, it should simply say so; it has studiously avoided going that far, however, for the obvious reason that it is not the case – as confirmed by XO’s failure to invoke the expedited relief provisions of Section 515(e).<sup>3</sup>

Finally, XO reiterates the argument that its “discrimination” claim falls within Section 514’s “other actions which impede competition. . .” clause. But again, if XO’s underlying position is meritorious, it properly has recourse through a civil action for monetary payment, as the MCI case cited above and numerous others demonstrate. The fact that AT&T may be withholding disputed access charges from XO but not from other carriers merely reflects a dispute over entitlement to those moneys. XO’s “discrimination” charges do not provide any valid basis for a Section 13-514 claim that AT&T is in any manner impeding the development of competition in the CLEC market.

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<sup>3</sup> This is not to concede that such an allegation, without more (i.e., some claimed competitive motivation and impact), would suffice to state a claim under Section 13-514.

## Conclusion

WHEREFORE, for the foregoing reasons and those set forth in AT&T's Motion, the Complaint of XO should be dismissed in its entirety.

Respectfully submitted,

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