

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

<b>Illinois Commerce Commission</b>	)	
<b>On Its Own Motion</b>	)	
<b>Implementation of Section 13-712(g)</b>	)	<b>Docket No. 01-0539</b>
<b>of the Public Utilities Act</b>	)	

**REPLY BRIEF OF AT&T**

Pursuant to the briefing schedule in this proceeding, AT&T Communications of Illinois, Inc., TCG Chicago, TCG Illinois, and TCG St. Louis (collectively called “AT&T”), submit their post-hearing reply brief.

**INTRODUCTION**

As predicted in AT&T’s initial brief, the parties in this case are divided in two broad camps. The first camp, which comprises all parties save one, generally support the Staff proposed rule.<sup>1</sup> The second camp is Ameritech, which proceeds on its lonely quest to mechanically saddle all carriers with identical wholesale service quality plans, despite the Illinois Public Utilities Act’s (“Act”) recognition of their different market positions and legal responsibilities.

AT&T reiterates that the Commission should adopt the Staff proposal as its final rule. While AT&T proposes a few changes, it is clear Staff’s proposal is certainly the fairest and most balanced proposal.

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<sup>1</sup> Verizon generally supports the Staff proposal, describing the proposal as “in many respects reasonable”. Verizon Brief, p. 1. Verizon does recommend a number of changes, including forcing CLECs to be subject to the same performance standards as Level 2 carriers (mid-sized ILECs). Id., pp. 25-27.

Because AT&T supports the Staff proposal, this brief will only rebut a few major criticisms made by other parties. In order to maintain brevity, AT&T will not reiterate its legal arguments and listing of past Commission rules in support of the Staff proposal. AT&T refers the Commission to its initial brief.

The points addressed here are: (1) the Commission should reject Ameritech's proposal to impose the same wholesale remedy plan on all carriers; (2) the Commission should retain the key provision in the Staff proposal incorporating by reference in the Part 731 rules the permanent Ameritech remedy plan, which is also to be used for Section 271 compliance purposes, that was ordered in Docket No. 01-0120; (3) the Commission should not require hearings each time a carrier is found to flunk the rules in order to levy remedies; (4) Ameritech's proposal to allow it to decide whether to comply with the rules or not is unworkable and unenforceable; (5) Competitive Local Exchange Carriers ("CLECs") should not be subject to the same wholesale remedy plan requirements as medium-sized incumbent local exchange carriers ("ILECs"); (6) remedy plans should be tariffed; and (7) the rules should not be artificially limited to basic local exchange services.

## ARGUMENT

### **I. THE COMMISSION SHOULD REJECT AMERITECH'S PROPOSAL SEEKING MECHANICAL IMPOSITION OF IDENTICAL WHOLESALE SERVICE QUALITY REQUIREMENTS ON ALL TELECOMMUNICATIONS CARRIERS**

The most specious proposal made in this proceeding is Ameritech's request that all carriers, regardless of size, position in the market, and business, should be forced to adhere to the same performance remedy plan. Ameritech's proposal, frankly, is little

more than an attempt to inject mischief in this case, and certainly is not worthy of an serious consideration, as the record plainly shows.

First, as AT&T discussed in its initial brief, both the Act and federal law impose remarkably different legal responsibilities on telecommunications carriers.<sup>2</sup> Ameritech ignores the law's recognition that Ameritech is frankly a very different carrier than a CLEC or small ILEC.

Second, Ameritech's proposal ignores business reality, whatever the legal requirements. The two largest ILECs in this state are Ameritech and Verizon. Indeed, these two carriers are the nation's largest telephone companies, each with operations in many states. It is in the serving areas of these two companies that CLECs are most likely to enter, and indeed are competing today. Any rule adopted here should therefore incent both Ameritech and Verizon to offer adequate wholesale service quality to CLECs. Ameritech's proposal purposefully ignores this reality.

Third, Ameritech's proposal ignores the big difference between it and Level 2 carriers, which are ILECs such as Citizens and Illinois Consolidated Telephone Company. Level 2 carriers serve a small fraction of the access lines possessed by Ameritech and Verizon. Level 2 carriers do not currently have the levels of competitive entry that Ameritech has, given the size and rural characteristics of their serving areas. Certainly, there is no valid factual or public policy aim calling for Level 2 carriers to be automatically subject to the same requirements as Level 1 carriers, as Ameritech proposes.

Fourth, Ameritech's proposal ignores the real difference between it and CLECs. Unlike Ameritech, CLECs are not subject to the gambit of unbundling and other

regulatory requirements in the Act, for the simple reason that they are not bottleneck monopolists formerly possessing 100-year protected monopolies. CLECs are therefore not ILECs, and there is no reason to support Ameritech's proposal to treat that company the same as CLECs.<sup>3</sup>

Indeed, Ameritech's proposal is really nothing more than offering a "lowest common denominator" that would apply to all carriers, and only serves its interest to slow competitive entry. Ameritech's anti-competitive intent is self evident, as their proposal would subject CLECs to rules that are utterly meaningless given their market position and lack of wholesale service offerings. This is because CLECs would still have to extend precious resources to abide by these rules. Thus, the proposal seeks to divert scarce CLEC resources to completely unnecessary rule compliance activities.

Ameritech's proposal also will provide no incentive to Ameritech to improve its poor wholesale service quality,<sup>4</sup> to the detriment of competition and is directly inconsistent with its existing remedy plan. This is because the remedies and standards proposed by Ameritech are a fraction of what the carrier is subject today under the permanent remedy plan adopted in Docket No. 01-0120. Add that on to Ameritech's proposal for the plan to not be self-executing, and this means the plan would have no positive impact on Ameritech's wholesale service quality.

Indeed, the evidence in this case shows that CLECs are not, today, wholesale providers. For example, AT&T does not offer wholesale services such as UNEs – other than activities associated with switching customers -- to Ameritech. Indeed, AT&T has

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<sup>2</sup> See, AT&T Brief, pp. 3-6.

<sup>3</sup> Reply Testimony of AT&T Witness Karen W. Moore, p. 4.

<sup>4</sup> For a discussion of Ameritech's service quality, see Order, Docket No. 01-0120, at p. 8, where the Commission discussed Ameritech's "abysmal" service quality.

never even had a request for a UNE or any other similar services. The reason is simple: AT&T and other CLECs do not possess a bottleneck monopoly over any portion of the local exchange market.

Interestingly, Ameritech's own testimony defeats its proposal. The only "services" Ameritech can point to that are purportedly offered by CLECs are where the company successfully wins back a customer. (Ameritech Witness Spieckerman Direct, p. 3). In only these two limited circumstances (provision of customer service records and firm order confirmations) can Ameritech even assert it purportedly needs some sort of wholesale service quality plan.<sup>5</sup>

This stands in stark contrast to the wholesale services CLECs obtain from Ameritech. Both Ameritech and Verizon have over 100 performance measurements, as well as many submeasures, addressing the numerous wholesale services that both companies provide to CLECs.<sup>6</sup>

Another reason supporting the Staff's proposal for using different requirements for different kinds of companies is creating the right kind of incentive for the two companies providing the lion's share of wholesale services in Illinois: Ameritech and Verizon. The rule should incent the ILECs – and Ameritech in particular -- to improve their levels of service. Ameritech's proposal seeks ludicrously low remedies that would never incent the company to offer adequate service to CLECs. For example, Ameritech proposes remedies of \$1 for failures when "there is no charge for the covered service". If there is a charge associated with the service, Ameritech offers a remedy of 20% of the nonrecurring charge or, in some instances, that amount for each business day of delay.

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<sup>5</sup> Reply Testimony of AT&T Witness Moore, p. 5.

(*See, Ameritech Ex. 1.2, p. 10*). This contrasts with the remedy plan contained in the order in Docket No. 01-0120, which seeks much more substantial remedies for Ameritech's failure to offer adequate services to CLECs. Obviously, Ameritech's proposal seeking nominal remedies would do nothing to incent the company to offer adequate service to CLECs, and indeed is a green light to discriminate.<sup>7</sup>

Ameritech's proposal seeking mechanical imposition of the same wholesale service quality plan on all carriers should be rejected. The law, public policy goals and the evidence in this case do not support Ameritech's proposal.

## **II. THE PART 731 RULE SHOULD INCLUDE THE STAFF PROPOSAL TO INCORPORATE BY REFERENCE THE PERMANENT AMERITECH REMEDY PLAN ADOPTED IN DOCKET NO. 01-0120**

One of the best features in Staff's proposal is the flexible nature of the remedy plan for Level 1 carriers. By incorporating by reference the existing, or if expired, the most recent, remedy plan of Verizon and Ameritech, the rule allows for use of plans that are tailored to these carriers' particular wholesale service issues and existing performance measurements. The Commission should reject Ameritech's proposal to ignore its existing remedy plan recently ordered in Docket No. 01-0120, and instead use yet another plan for purposes of the rule.

Indeed, given the scarce resources of the Commission, its staff, and the parties, using a preexisting plan for Level 1 carriers is only prudent. Significant effort by the Level I carrier, staff, and the CLECs have gone into developing performance measures

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<sup>6</sup> *See, e.g.*, Ameritech Witness Ehr Direct Testimony, p. 5, where he states: "Ameritech Illinois reports performance on approximately 150 measures, which are divided into well over a thousand categories".

<sup>7</sup> Reply Testimony of AT&T Witness Moore, p. 8.

and remedy plan in Docket No. 01-0120 and in the many collaboratives preceding that docket.

Ameritech contends that the Commission should ignore the Ameritech remedy plan ordered in Docket No. 01-0120 and instead use a rule that is, as is discussed above, utterly inadequate, to apply to all carriers, including Level 1 providers. That position is ludicrous on its face, and Ameritech's contentions in support are frivolous.

Ameritech argues that an "expired plan" cannot be the basis of its wholesale service quality plan. (Ameritech Brief, pp. 5-10). Whatever the merit of this position, it is now moot. Ameritech's permanent performance remedy plan recently adopted in Docket No. 01-0120 did not expire on October 8, 2002. Indeed, the Commission has ruled that the plan adopted in Docket No. 01-0120 is, indeed, to be the company's performance plan well beyond October 8, 2002, both for Section 271 purposes and, indeed, for all other applications as well.<sup>8</sup>

Tellingly, Ameritech's proposal is not supported by any other party, including Staff and this state's second largest ILEC, Verizon.<sup>9</sup> Every single party other than Ameritech supports Staff's proposal that the most recently ordered remedy plans for the state's two largest carriers, Ameritech and Verizon, should be incorporated by reference into the Part 731 rule.

### **III. HEARINGS SHOULD NOT BE REQUIRED TO DETERMINE REMEDY PAYMENTS**

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<sup>8</sup> See, e.g., Order, Docket No. 01-0120 (July 10, 2002) at pp. 20-21, as clarified by the Amendatory Order (July 24, 2002); see, also Order on Reopening, Docket No. 01-0120 at p. 3, where the Commission clarified that Ameritech's wholesale services remedy plan adopted in that case does not expire on October 8, 2002.

<sup>9</sup> See, e.g., Direct Testimony of Verizon witness Agro at pp. 2 and 11, supporting use of that company's existing remedy plan for purposes of the rule.

Ameritech contends that the rule should not provide for automatic payments of remedies when Ameritech fails to meet its performance measures. (Ameritech Brief, pp. 10-12). Instead, Ameritech proposes that the Commission should conduct hearings prior to ordering payment of remedies. Ameritech's proposal, if adopted, would negate the whole purpose underlying the rules. The whole purpose of having remedy plan rules is to *avoid* conducting hearings each and every time ILECs fail to provide adequate wholesale services to CLECs. The rules establish the standard, and also provide the remedy payment for failure to meet the standard. That is the whole reason for rules in the first place. They are indeed intended to be self-executing. Ameritech's proposal would force hearings each and every time it flunks the rules. This would literally mean there could be dozens of such cases going on at any given time, which would require more resources than the Commission and the CLECs possess. The real purpose for Ameritech's proposal is obvious: to make it so difficult to obtain remedies (in particular the nominal remedies proposed by Ameritech) so as to discourage CLECs from ever seeking enforcement. This would, in turn, incent Ameritech to offer poor wholesale service to CLECs, since it knows no CLEC has the resources to constantly litigate for the right to obtain remedies.<sup>10</sup>

Ameritech's contention that the Act requires hearings every time remedies are to be paid is wrong. The Act provides in numerous provisions that hearings are required for various things.<sup>11</sup> Here, however, Section 13-712(g) of the Act is silent as to requiring hearings. This is significant, in that if the General Assembly had wished hearings to occur as a prerequisite to imposing remedies, it would have so required.

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<sup>10</sup> Reply Testimony of AT&T Witness Moore, pp. 15-16.

<sup>11</sup> *See, e.g.*, 220 ILCS 5/13-304, where civil penalties may be assessed "only after notice and opportunity to be heard"; 220 ILCS 5/13-506.1, where alternative regulation for telecommunications carriers may only occur "after notice and hearing".

Ameritech's argument therefore lacks supporting public policy grounds and is also inconsistent with the words of the Act. The rules certainly should not contain a hearing requirement. Ameritech's hearing proposal should therefore be rejected.

**IV. AMERITECH'S PROPOSAL TO ALLOW IT THE ABILITY TO REPLACE THE PART 731 RULES WITH A "VOLUNTARY" PLAN IS UNWORKABLE AND UNENFORCEABLE**

If the legal and policy reasons were not enough to highlight the many defects in Ameritech's proposal, the unrebutted evidence in this case reveals that a key provision in Ameritech's plan is unworkable and unenforceable. This evidence is not AT&T's, but comes from Ameritech's own witness.

Ameritech's proposal (Section 731.400) calls for "voluntary" plans to be used in lieu of the rules. That is, if a remedy plan for Ameritech existed that was "voluntary", then Ameritech could seek use of the "voluntary" plan rather than the rules via the waiver process. Ameritech Witness Eric Panfil testified that the company's proposal lacked any kind of process for determining how "voluntary" plans should be used instead of the rules. (Tr., p. 727). Ameritech's proposal does not provide for what kind of factual material should be filed in such a waiver proceeding. (Id.). Ameritech's proposal also lacks any kind of process for notifying interested parties (such as its wholesale customers) that it is seeking adoption of a "voluntary" plan rather than the rule. (Tr., pp. 732-733). Ameritech's proposal also does not provide for the standards and methodologies Ameritech would use in deciding whether to use the rule or a "voluntary" plan. (Id. at 727-732).

Equally problematic is the whole nature of Ameritech's proposal. Essentially, Ameritech seeks to have a rule in place that lets a private party seek use of a remedy plan

it likes (which is what a “voluntary” plan is, after all) rather than a rule it does not necessarily “like”, or worse, an “involuntary” remedy plan it really, really hates. Indeed, Ameritech’s witness testified that under its proposed rule the “involuntary” remedy plan recently adopted in Docket No. 01-0120 would not be in effect. (Tr., pp. 730-731).

In essence, Ameritech seeks to end run the Commission’s order in Docket No. 01-0120. Obviously, Ameritech’s proposal, if taken seriously, creates the real danger of Ameritech trying to get a rule in place that will conflict with the Commission’s decision in Docket No. 01-0120. Ameritech’s proposal should therefore be rejected.

**V. CLECS SHOULD NOT AUTOMATICALLY BE SUBJECT TO THE SAME WHOLESALE REQUIREMENTS AS LEVEL 2 CARRIERS**

Verizon proposes that CLECs (Level 4 carriers) should automatically be subject to the same wholesale service rules as Level 2 carriers. (Verizon Brief, pp. 25-26).

Verizon does not present any kind of support for its proposal other than contending that the record does not support use of a separate Level 4 classification. Verizon ignores the evidence. Both AT&T Witness Moore and McLeodUSA/TDS Metrocom witness Cox testified that classifying CLECs in the same fashion as Level 2 ILECs does not accomplish any kind of valid public policy goal.<sup>12</sup>

Indeed, there is no compelling business reason to impose Level 2 requirements on CLECs, since they do not provide wholesale services, as was discussed earlier in this brief.<sup>13</sup> AT&T refers specifically to Mr. Cox’s testimony, where he cogently explains:

Since CLECs, unlike Level 1 and Level 2 Carriers (which are ILECs) have not enjoyed the benefits of many decades of state mandated monopoly protection, and are in fact engaged in the difficult task of competing with those ILECs, there is no

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<sup>12</sup> Reply Testimony of AT&T Witness Moore, p. 19.

<sup>13</sup> See, Pages 4-5, *supra*.

compelling reason to subject a CLEC to regulation of any wholesale service it may voluntarily choose to provide. If a purchasing carrier is dissatisfied with the wholesale service provided by a CLEC, the carrier will virtually always have at least one other option: it can obtain the service from the ILEC. Of course where an ILEC is providing the wholesale service it is usually doing so under compulsion of Section 251 of the Telecommunications Act, and the purchasing carrier usually has no other choice, which creates the entirely logical (and absolutely essential) need for regulation of the ILEC's quality of wholesale service. This is in stark contrast to a situation in which a CLEC voluntarily seeks to offer wholesale services to another carrier. The two carriers are able to negotiate a contract for such services, which may include service level agreements.<sup>14</sup>

There is no valid reason – legal, policy or factual -- to impose Level 2 performance measurements and remedies on CLECs. Verizon's proposal should be rejected.

## **VI. REMEDY PLANS SHOULD BE TARIFFED**

Verizon opposes the Staff's proposed Part 731.200 rule that remedy plans be tariffed. (Verizon Brief, pp. 13-22). In the alternative, if the plans are to be tariffed, Verizon wants the rule to allow for carriers to seek a waiver. (Id., pp. 23-24). AT&T supports Staff's tariffing requirement. Having the detailed remedy plans for Level 1 carriers contained in a tariff provides an excellent reference point to any new CLECs entering the market, and also allows the Commission to carefully monitor the plans, including efforts to change their terms. AT&T does not, however, oppose allowing carriers to seek a waiver of the tariffing requirement, so long as the Commission first allows interested parties an opportunity to participate in such a proceeding.

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<sup>14</sup> Direct Testimony of McLeodUSA/TDS Metrocom Witness Rod Cox, pp. 6-7.

## VII. THE RULES SHOULD APPLY TO ALL ILEC WHOLESALe SERVICES

Ameritech, Verizon and Citizens argue that wholesale service quality rules should only apply to services that are used to provide basic local exchange services. (Ameritech Brief, p. 10; Verizon Brief, pp. 5-7; Citizens Brief, pp. 10-11). These carriers contend that selected portions of Section 13-712 hamstring the Commission's efforts to promulgate rules governing the provision of all ILEC-provided wholesale telecommunications services.

The ILECs are wrong. Section 13-712 does not exist in a vacuum. Section 13-801 explicitly confers jurisdiction upon the Commission to require that ILECs "shall provide a requesting telecommunications carrier with interconnection, collocation, network elements, and access to operations support systems on just, reasonable, and nondiscriminatory rates, terms and conditions to enable the provision of *any and all existing and new* telecommunications services within the LATA, including, but not limited to, local exchange and exchange access."<sup>15</sup>

The Commission has interpreted Section 13-801 and the other pro-competitive provisions of the Act to require Ameritech to unbundle and provide a broad array of wholesale services that allow CLECs to provide other than basic local exchange services. For example, the Commission recently ruled that Ameritech is required to provide a whole array of network elements that allow for the provision of numerous advanced services.<sup>16</sup> The Commission specifically included line splitting in the list of UNEs. Line splitting allows CLECs to offer both competitive basic local exchange service and

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<sup>15</sup> 220 ILCS 5/13-801(a), (emphasis supplied). *See, also*, Brief of AT&T, pp. 3-6.

<sup>16</sup> *See*, Order, Docket No. 01-0614, pp. 30-33 (June 11, 2002).

competitive advanced DSL services. As part of requiring this functionality, the Commission also mandated certain provisioning intervals for this offering.<sup>17</sup>

Ameritech's restrictive reading of Section 13-712 also is directly contrary to basic rules of statutory construction, as Staff explains in its Brief.<sup>18</sup>

Indeed, the ILEC proposal to limit the rule to basic local exchange services, while seemingly minor, if adopted would gut the entire rule. This is because wholesale services provided from one carrier to another are not basic local exchange telecommunications services. They are a broad range of wholesale services that allow the CLEC to provide telecommunications services to its customers. The Part 731 rule governs the *wholesale* services provided by ILECs to CLECs, and not the resultant *retail* services the CLECs offer to end users.<sup>19</sup>

AT&T agrees with the Staff's policy analysis that carriers purchasing wholesale services need wholesale service quality measurements and associated remedies to apply to more than just basic local exchange services. As Staff correctly stated: "The point here is that to restrict the wholesale measures to basic local exchange service would be to eliminate a range of services needed by many CLECs to foster and protect competition. Such a construction of Section 13-712 is contrary to the pro-competitive goals of HB 2900, of which Section 13-712 was a part."<sup>20</sup>

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<sup>17</sup> *Id.*, pp. 167-168.

<sup>18</sup> Brief of Staff, p. 37.

<sup>19</sup> Reply Testimony of AT&T Witness Moore, pp. 20-21. Verizon also proposes that the definition of carrier-to-carrier wholesale service quality limit the rule's applicability to CLEC resold or "repackaged" services. This unduly limits the rule. CLECs obtain numerous wholesale services from ILECs that are not then provided in turn as resold or repackaged services. An example is loops. Many CLECs obtain loops from Verizon and other ILECs, but then use their own switching to offer the resultant facilities-based service. Verizon's proposed change seems to take such wholesale services outside the ambit of the rules. Hence, Verizon's proposed definitional change should be rejected. (*Id.* at p. 21).

<sup>20</sup> Staff Brief, pp. 37-38.

Indeed, the pro-competitive goals of Illinois law mandate the need to reject the ILEC proposal. This is because of the unspoken reason the ILECs propose this change: to further their strategy to eliminate DSL competition. The FCC is conducting a proceeding into whether SBC, Verizon and other incumbent providers can refuse to provide competitors with the “broadband UNE” and other transmission facilities that are generally required to offer competing telecommunications and information services. SBC and other ILECs seek to prevent CLECs from using the high frequency portion of loops to offer second and third voice lines as well as data transmission services, effectively re-monopolizing the DSL market, as well as eliminating the ability of ISPs to obtain service from anyone other than SBC. (See, SBC Comments and Reply Comments, FCC Docket Nos. 02-33, 95-20, and 98-10). Eliminating a wholesale service plan requirement for the provision of these services would allow the ILECs to discriminate in the provision of these services, which supports their FCC agenda to eliminate consumer choice of DSL service providers.

The Commission should not inadvertently be a party to the insidious ILEC remonopolization scheme. The rules should therefore not limit their applicability to basic local exchange services, and should retain the language proposed by the Staff.

### **CONCLUSION**

The Commission should adopt the Staff’s proposed wholesale service quality rules with the modifications proposed by AT&T.

Respectfully submitted,

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