

the manner contemplated by the Code of Civil Procedure [735 ILCS 5] and the Rules of the Supreme Court of Illinois.” *Staff does not, and cannot, dispute this.*

In the Circuit Courts of the State of Illinois, a party cannot be required to create information in order to respond to discovery requests. As the Illinois Appellate Court explained in *Mendelson v. Feingold*, 69 Ill. App. 3d 227, 232, 387 N.E.2d 363, 366 (2d Dist. 1979),

None of the rules regulating discovery . . . authorize the court to require a party to provide a witness, furnish a document or fashion some object (none of which then exist) for the benefit of an adverse party. These rules are directed only towards the disclosure of that which does exist, for example, tangible things or knowledge possessed by persons.

See also, In re the Interest of R.V. et al., 288 Ill. App. 3d 860, 870, 681 N.E.2d 660, (1st Dist. 1997) (“We know of no interpretation of Rule 201 [the principal Illinois discovery rule], and appellees have cited none, which would allow the court to require a party to create documents or records for discovery”). *Staff does not, and cannot, dispute this.*

The information that Data Request 9 is asking for does not exist. *See* Affidavit of James D. Ehr, attached to Ameritech Illinois’ Response to Staff’s Motion to Compel, ¶ 5. To generate the information, a new computer program would have to be written, by an outside vendor. *Id.* ¶ 6. *Staff does not, and cannot dispute this.*

Thus, Staff concedes that (1) the discovery rules that govern in Illinois Circuit Court govern here; (2) those rules prohibit requiring a party to create information to provide in discovery; and (3) Data Request 9 asks Ameritech Illinois to create information to provide in

discovery. It necessarily follows that Staff's Motion to Compel must be denied as to Data Request 9.¹

Dated: November 4, 2002

Respectfully submitted,

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¹ The little that Staff does say about Data Request 9 (*see* Staff's Reply on Motion to Compel, at 4) is wrong. First, it is not Ameritech Illinois' burden to prove the negotiated agreement is consistent with the public interest, convenience and necessity. If Staff maintains that the agreement is inconsistent with the public interest, convenience and necessity, it is Staff's burden to prove that. That is why (among other things) an agreement is automatically deemed approved under section 252(e)(4) of the Telecommunications Act of 1996 if the Commission does not act to approve or reject it within the prescribed time. If the burden were on the parties seeking approval, the agreement would be deemed rejected if not acted upon. Staff is also incorrect in its assertion that Data Request 9 "seeks something which only Ameritech can do." Given the raw data (which Staff either has or could have asked for), Staff could cause the necessary programming to be done just as Ameritech Illinois can, and could run the numbers itself.

CERTIFICATE OF SERVICE

I certify that I caused copies of the foregoing AMERITECH ILLINOIS' SUR-REPLY IN OPPOSITION TO STAFF'S MOTION TO COMPEL to be served on the following persons via email or, if without an email address, by first class mail, proper postage prepaid from Chicago, Illinois on the 4th day of November, 2002:

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