

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

<b>BitWise Communications, Inc.</b>	)	
	)	
vs.	)	<b>No. 09-0052</b>
	)	
<b>AT&amp;T</b>	)	
	)	
<b>Complaint as to over-billing and threatened termination of service.</b>	)	

**AT&T ILLINOIS REPLY IN SUPPORT OF MOTION TO DISMISS**

Now comes Illinois Bell Telephone Company (“AT&T Illinois”), by and through its counsel, and for its reply in support of its motion to dismiss the complaint filed by BitWise Communications, Inc. (“BitWise”) states as follows:

1. AT&T Illinois filed its Motion to Dismiss on February 10, 2009. On February 24, 2009, BitWise filed its Response to Motion to Dismiss (“BitWise Response”). Also on February 24, 2009, the Staff of the Illinois Commerce Commission filed its Response to the Illinois Bell Telephone Company’s Motion to Dismiss (“Staff Response”).

2. Neither BitWise nor Staff presents a sound basis for denial of AT&T Illinois’ Motion to Dismiss. The Complaint should be dismissed because it alleges *only* a violation of 83 Ill. Adm. Code § 735 (a/k/a Part 735). Part 735 is not applicable to carrier-to-carrier relationships, which is indisputably what the relationship between AT&T Illinois and BitWise is. In the alternative, assuming that BitWise can maintain a claim under Part 735, the Commission should dismiss the Complaint to the extent it is based on invoices sent to BitWise with a due date prior to January 22, 2007, on the ground that such a claim is barred by the applicable statute of limitations.

## ARGUMENT

A. The Complaint Alleges Only A Violation Of Part 735, Which Is Inapplicable To Carrier To Carrier Relationships.

3. BitWise asserts that its Complaint is *not* based on a violation of 83 Ill. Adm. Code § 735 (a/k/a Part 735). BitWise Response at ¶ 1. Staff, on the other hand, says that BitWise’s claims are based on a violation of Part 735, *as well as* a violation of the parties’ interconnection agreement. Staff Response at ¶ 3, citing page 1 of the Complaint. Obviously, both can not be correct. In fact, neither is.

4. BitWise is wrong because on the very first page of its Formal Complaint, BitWise itself alleges that “AT&T has violated Part 735.” The information on the first page of BitWise’s complaint is clearly intended to mirror the information called for on the Commission’s pre-printed complaint form, and the statement about Part 735 corresponds to the space on the form for the complainant to identify the “specific section of the law, Commission rule(s), or utility tariffs that you think is involved with your complaint.” See the blank pre-printed complaint form attached as Exhibit A.

5. But even if BitWise were not suing under Part 735, as it claims, its Complaint would still fail. BitWise has not identified any legal basis for its Complaint other than Part 735. Section 200.170(c) of the Commission’s rules of practice requires that a complaint contain some statement of the statute, rule or order that has allegedly been violated. If BitWise is not suing under Part 735, the Commission must dismiss the Complaint for failing to comply with Section 200.170(c). *See Order, Jeffrey Mandalis Copyright MMVIII v. Commonwealth Edison Co.*, No. 08-0241 (July 30, 2008)(dismissing complaint case on the ground that the complainant failed to

allege a violation of any particular statute, rule or regulation)(attached hereto as Exhibit B.)<sup>1</sup> It is a fundamental legal principle that a Commission order can not exceed the scope of the complaint the Commission has before it. “If the ICC were permitted to enter an order that is broader than the written complaint filed in the case then it would be ruling on an issue of which the responding party had no notice and no opportunity to defend or address.” *Peoples Gas Light and Coke Co. v. Illinois Commerce Comm’n*, 221 Ill. App. 3d 1053, 1060, 583 N.E.2d 68, 72 (1st Dist. 1991); *see Alton & Southern Railroad v. Illinois Commerce Comm’n*, 316 Ill. 625, 629-30, 147 N.E. 417 (1925).

6. Staff is only partially correct in its characterization of BitWise’s Complaint. While Staff accurately observes that BitWise has alleged a violation of Part 735, it is not accurate in its assertion that BitWise has alleged a violation by AT&T Illinois of its interconnection agreement with BitWise. Nowhere in either the formal or informal complaint does BitWise state that AT&T is violating the ICA.

7. The only reasonable reading of BitWise’s Complaint is that BitWise is alleging a violation of Part 735. As set forth in the Motion to Dismiss, BitWise cannot maintain an action pursuant to Part 735 because the provisions of Part 735 apply only to a telecommunications carrier’s relationship with its end-user customers, not with other carriers. Motion to Dismiss, ¶¶ 4-8.

8. For its part, BitWise does not put up much of a fight regarding the inapplicability of Part 735 here. Instead, it primarily argues that it is not relying on Part 735, which as explained above, is not a reasonable reading of its Complaint. The only argument that BitWise puts forth about the applicability of Part 735 is that “the type of services being provided” to

---

<sup>1</sup> Counsel for BitWise is surely aware of this decision, as he represented Commonwealth Edison in its successful motion to dismiss the complaint by Jeffrey Mandalis Copyright MMVIII.

BitWise by AT&T Illinois “is a matter of proof at the evidentiary hearing.” BitWise Response at ¶ 2. But that inquiry is irrelevant to whether Part 735 applies to carrier-to-carrier relationships. BitWise certainly does not assert that it and AT&T Illinois are not both carriers. Indeed, it concedes this in its response and its Complaint. BitWise Response at ¶ 9; Complaint at 1.

9. BitWise also insists throughout its Response that it is entitled to an evidentiary hearing. BitWise Response at ¶¶ 1, 3, 5-7, 9-10. BitWise is not correct. The mere filing of a complaint does not guarantee a hearing. AT&T Illinois is entitled to dismissal if there is no set of facts that could entitle BitWise to relief. Since all BitWise has alleged is a violation of Part 735 and Part 735 does not apply to carrier to carrier relationships, there is no set of facts under which BitWise could obtain relief.

B. Staff Cannot Make the *Access Charge Order* Disappear.

10. Staff, in its Response, argues that BitWise *can* pursue a claim under Part 735. Staff argues that the Commission should disregard the authority upon which AT&T Illinois relies in its Motion to Dismiss because the authority is “a historical relic” and “something of a fossil.” Staff Response at ¶¶ 11, 14. Staff’s argument is unavailing.

11. Specifically, Staff argues that the *Access Charge Order*<sup>2</sup> should be disregarded since it dates from 1985 (*see* Staff Response at ¶ 14.) Applying that logic, the Part 735 rules, which were codified in 1983, should also be disregarded. Like the *Access Charge Order*, many aspects of the Part 735 rules “address conditions that have not existed for over a decade,” yet Staff does not propose to ignore Part 735. The fact that the *Access Charge Order* has been in place for the past 24 years does not mean it is no longer applicable; to the contrary, the fact that

---

<sup>2</sup> Final Order – Docket 83-0635, Seventeenth Interim Order – Docket 83-0142, *The Illinois Telephone Association, Inc. Petition for any necessary waiver of General Order 218 as related to Intrastate Access Charge Tariffs, et. al.*, Docket No. 83-0635, *et. al.*, 1985 WL 1094542, \*4 (Ill. Commerce Comm’n, Nov. 26, 1985). In its Motion, AT&T Illinois referred to this decision as *Illinois Telephone Association*. Staff referred to it as the *Access Charge Order*, which is how AT&T Illinois will refer to it in this reply.

the portion on which AT&T Illinois relies has not been reversed or modified by the Commission in nearly a quarter of a century makes its application all the more justified.

12. Staff's approach is inconsistent with Section 10-113(a) of the Public Utilities Act, 220 ILCS 5/10-113(a). Pursuant to that provision, before the Commission may rescind, alter or amend any rule, regulation, order or decision made by it, the Commission must provide notice to the public utility(ies) affected and provide an opportunity to be heard. Thus, the Commission would need to initiate a proceeding open to all local exchange carriers before nullifying the *Access Charge Order* or limiting the applicability of Part 735 to only certain carriers.

13. Staff's analysis also ignores that the *Access Charge Order* was a "permanent" waiver of the Part 735 rules. Such a waiver does not disappear simply through the passage of time (unlike a temporary waiver); the Commission would have to initiate a proceeding to revoke a previously granted permanent waiver. *See, e.g., Order, Petition for Variance Pursuant to Part 735 of the Commission's Rules*, Docket No. 04-0441, Ill. Commerce Comm'n February 2, 2005, at 9 (variance of retail billing requirement under Part 735 "granted on a permanent basis, to remain in effect until the Commission ceases or suspends authority for the variance in a docket initiated on its own motion or pursuant to a complaint") (attached hereto as Exhibit C.)<sup>3</sup>

14. Staff does not – and can not – point to anything in the Commission's rulings since it issued the *Access Charge Order* to support Staff's interpretation. Surely if the Commission intended its *Access Charge Order* not to apply to competitive local exchange carriers ("CLECs") – notwithstanding that they are "carriers" – it could have and would have said so in the more than ten years that CLECs have been operating in Illinois. Perhaps most importantly, Staff does not explain at all how its position in this case can be reconciled with the position Staff took in

---

<sup>3</sup> Similarly, BitWise argues that Commission orders are not entitled to *stare decisis*. BitWise Response at ¶ 9. That assertion makes no sense with regard to a Commission order granting a permanent waiver, such as the *Access Charge Order*. A waiver can only be meaningful if it is given effect in future proceedings.

Docket No. 01-0539, a post-1996 proceeding which included CLECs, when it advised the Commission that “Staff is unaware of any provisions in Code Part 735 dealing with carrier to carrier relationships.” *See* Motion to Dismiss at ¶ 8 (citing Staff Brief in Docket No. 01-0539).

15. Staff intimates that Part 735 should at least be available to “smaller [CLECs] with fewer legal resources.” Staff Response at ¶ 16. There is, of course, nothing in the *Access Charge Order*, or in any subsequent order by the Commission, to support what would constitute a significant policy change by the Commission. And Staff does not provide any hint as to which CLECs it thinks ought to be able to avail themselves of Part 735 and which should not. If such a distinction among CLECs were to be adopted, a carrier-to-carrier complaint is not the appropriate venue; an industry-wide rulemaking is.

16. Staff also suggests that the reasoning of the *Access Charge Order* should not apply because the parties disagree about whether the services at issue in this case were provided pursuant to tariff or interconnection agreement. Staff Response at ¶¶ 14-15. As discussed in AT&T Illinois’ Motion to Dismiss, the reasoning of the *Access Charge Order* applies as much to the carrier-to-carrier relationship embodied in an interconnection agreement as it does to the carrier-to-carrier relationship embodied in a tariff. Motion to Dismiss at ¶ 8. In fact, since the parties’ interconnection agreement is the product of the back-and-forth of negotiation between BitWise and AT&T Illinois, the rationale of the *Access Charge Order* is arguably more compelling when applied to interconnection agreements.

17. Staff’s reliance at Paragraph 16 of its Response on *GlobalEyes v. Omniplex* is misplaced. Staff relies on that case for the proposition that the Commission has entertained carrier complaints under Part 735. However, that docket was concluded by a settlement, and the Answer filed by Omniplex did not raise any issue regarding the applicability

of Part 735. Accordingly, the existence of the *GlobalEyes* complaint does not prove that the Commission has blessed the use of Part 735 in disputes between carriers.

C. The Statute of Limitations Bars Some of BitWise's Claims.

18. With respect to AT&T Illinois' statute of limitations argument, BitWise does not contest that its claims are governed by a two year statute of limitations. BitWise's only defense in its Response is that all of its claims satisfy the two year limitations period. BitWise Response at ¶ 8. However, BitWise does not support this assertion with a verification or affidavit. *See* 83 Ill. Admin. Code § 200.190(c) (requiring non-record material be supported by affidavit). Moreover, BitWise's unfounded assertion is inconsistent with its previous statements to the Commission. In its Response to Notice of Ruling, filed on February 6, 2008, BitWise stated that its complaint against AT&T Illinois is based on alleged overbilling "going back to 2003-2004." BitWise Response to Notice of Ruling at 1. The Commission should afford no weight to BitWise's unsupported assertions in its Response.

19. As BitWise has not disputed that 220 ILCS 5/9-252.1 provides for a two year statute of limitations commencing with the date the customer first has knowledge of the incorrect billing, and BitWise has not contested that it had knowledge of the alleged incorrect billing no later than the date that the invoices sent to it were due, any claim based on invoices dated before January 22, 2007 should be dismissed.

For the reasons set forth above and in its Motion to Dismiss, AT&T Illinois respectfully requests that the Commission dismiss the Complaint filed by BitWise in its entirety. In the alternative, AT&T Illinois respectfully requests the Commission dismiss the Complaint to the extent it is based on invoices sent to BitWise with a due date prior to January 22, 2007.

Respectfully submitted,

AT&T Illinois

By: /s/ James A. Huttenhower

James A. Huttenhower  
Illinois Bell Telephone Company  
225 W. Randolph Street, Suite 25-D  
Chicago, Illinois 60606  
312-727-1444

Michael T. Sullivan  
Mayer Brown LLP  
71 S. Wacker Drive  
Chicago, IL 60606  
(312) 782-0600

Its Attorneys

**CERTIFICATE OF SERVICE**

I, James A. Huttenhower, an attorney, hereby certify that I caused a copy of the foregoing AT&T Illinois Reply in Support of Motion to Dismiss to be served on the parties on the attached service list by U.S. Mail and/or electronic transmission on the 3<sup>rd</sup> day of March, 2009:

/s/ James A. Huttenhower  
James A. Huttenhower

## SERVICE LIST

Eve Moran  
Administrative Law Judge  
Illinois Commerce Commission  
160 N. LaSalle, Suite C-800  
Chicago, IL 60601-3104  
[emoran@icc.illinois.gov](mailto:emoran@icc.illinois.gov)

Mark L. Goldstein  
3019 Province Circle  
Mundelein IL 60060  
[mlglawoffices@aol.com](mailto:mlglawoffices@aol.com)

Matthew L. Harvey  
Office of General Counsel  
Illinois Commerce Commission  
160 N. LaSalle St., Ste. C-800  
Chicago, IL 60601-3104  
[mharvey@icc.illinois.gov](mailto:mharvey@icc.illinois.gov)

James Zolnierek, Case Manager  
Illinois Commerce Commission  
527 E. Capitol Ave.  
Springfield, IL 62701  
[jzolnier@icc.illinois.gov](mailto:jzolnier@icc.illinois.gov)

James Huttenhower  
Illinois Bell Telephone Company  
225 W. Randolph St., Ste. 25D  
Chicago, IL 60606  
[jh7452@sbc.com](mailto:jh7452@sbc.com)

Mary Pat Regan, Vice President - Regulatory  
Illinois Bell Telephone Company  
555 Cook St., Fl. 1E  
Springfield, IL 62721  
[mr1296@att.com](mailto:mr1296@att.com)

For Commission Use Only:

Case: \_\_\_\_\_

# FORMAL COMPLAINT

Illinois Commerce Commission  
527 E. Capital Avenue  
Springfield, Illinois 62701

Regarding a complaint by (Person making the complaint): \_\_\_\_\_

Against (Utility name): \_\_\_\_\_

As to (Reason for complaint) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

in \_\_\_\_\_ Illinois.

## TO THE ILLINOIS COMMERCE COMMISSION, SPRINGFIELD, ILLINOIS:

My mailing address is \_\_\_\_\_

The service address that I am complaining about is \_\_\_\_\_

My home telephone is [ ] \_\_\_\_\_

Between 8:30 A.M. and 5:00 P.M. weekdays, I can be reached at [ ] \_\_\_\_\_

My e-mail address is \_\_\_\_\_ I will accept documents by electronic means (e-mail)  Yes  No

(Full name of utility company) \_\_\_\_\_ (respondent) is a public utility and is subject to the provisions of the Illinois Public Utilities Act.

In the space below, list the specific section of the law, Commission rule(s), or utility tariffs that you think is involved with your complaint

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Have you contacted the Consumer Services Division of the Illinois Commerce Commission about your complaint?  Yes  No

Has your complaint filed with that office been closed?  Yes  No

Please state your complaint briefly. Number each of the paragraphs. Please include time period and dollar amounts involved with your complaint. Use an extra sheet of paper if needed.

Please clearly state what you want the Commission to do in this case \_\_\_\_\_

**NOTICE:** If personal information (such as a social security number or a bank account number) is contained in this complaint form or provided later in this proceeding, you should submit both a public copy and a confidential copy of the document. Any personal information contained in the public copy should be obscured or removed from the document prior to its submission to the Chief Clerk's office. Any personal information contained in the confidential copy should remain legible. If personal information is provided in your public copy, be advised that it will be available on the internet through the Commission's e-Docket website. The confidential copy of any filing you make, however, will only be available to Commission employees. If you file both a public and confidential version of a document, clearly mark them as such.

Today's Date: \_\_\_\_\_  
(Month, day, year)

Complainant's Signature: \_\_\_\_\_

If an attorney will represent you, please give the attorney's name, address, telephone number, and e-mail address.

When you finish filling out this complaint form, you need to file the original with the Commission's Chief Clerk. When filing the original complaint, be sure to include one copy of the original complaint for each utility company complained about (referred to as respondents).

**VERIFICATION**

A notary public must witness the completion of this part of the form.

\_\_\_\_\_, Complainant, first being duly sworn, say that I have read the above petition and know what it says. The contents of this petition are true to the best of my knowledge.

\_\_\_\_\_  
Complainant's Signature

Subscribed and sworn/affirmed to before me on (month, day, year) \_\_\_\_\_

\_\_\_\_\_  
Signature, Notary Public, Illinois

NOTARY SEAL

**NOTE:** Failure to answer all of the questions on this form may result in this form being returned without processing.



Complainant testified that he had not legally changed his name to Jeffery Mandalis MMVIII and he had not received a federal copyright for it. He stated that it was not his name that he was copyrighting, but what his name appears on. It is a common law copyright and is proper under the Common Law Act in Illinois. In response to the question whether he was aware that he was using a fictitious name, he replied that he was not using it as a name. (5/22/08 Tr. at 40)

Complainant testified that he has attempted to pay only Respondent and the Peoples Gas Light and Coke Company (Peoples Gas) using the credit of Jeffrey Mandalis Copyright MMVIII. He added that he pays rent to his landlord usually with a check from a currency exchange and that he recently paid his \$1400 electric bill at a currency exchange with 14 \$100-denominated federal reserve notes, which he said were not money or cash but notes for money-denominated credit. He explained that each note is commonly known as a \$100 bill, but it is not cash or dollars. They are notes for dollar-denominated credits for a credit worth one hundred dollars. (Tr. at 48-49) Complainant explained that cash only refers to gold and silver coins and that federal reserve notes are notes for dollar-denominated credits which can be obtained from banks and various other sources. (5/22/08 Tr. at 47) He stated that the government cannot require payment in gold or silver coins if a party has little green stamps on the bills. (5/22/08 Tr. at 49) Mr. Mandalis also stated that a federal reserve note is a dollar bill. (5/22/08 Tr. at 46) Complainant testified that he had not heard from Peoples Gas whether it would accept his credit as payment. (5/22/08 Tr. at 47)

Mr. Mandalis testified that his remarks at the April 22, 2008 prehearing conference were still valid statements. He acknowledged that he had stated that “Essentially, as I understand it, ComEd will debit cash and credit revenue when the bill is issued. When they receive payment, they will debit cash and then credit accounts receivable.” (4/28/08 Tr. at 7; 5/22/08 Tr. at 50) He also acknowledged that he had said, in response to an objection to the relevancy of his complaint, “Well, the relevancy of it would be that if ComEd is on the accrual basis of accounting, as it is most – as is most likely, then they accrue revenue and credited (sic) the revenue account when they billed my account and not when they received the money. So in order to do that, they had to use my equity, my credit for value, and now they’re trying to say that my credit is not value. It’s kind of a very simple issue. It’s whether or not my credit has to be accepted for value or if they can choose what method of payment they want.” (4/28/08 Tr. at 6; 5/22/08 Tr. at 51)

Mr. Mandalis testified that Respondent was currently attempting to compel him to remit the credit of the federal reserve system, a third party, yet his credit was fine when they wanted to accrue revenue. (5/22/08 Tr. at 51) He said the following remark from April 22 was also still his position: “Well, what I am saying is that they used my credit for value when they accrue revenue, when they debit accounts receivable. They’re holding that accounts receivable on their balance sheet as an asset. Then when I send them the exact same thing, they try to say my credit isn’t for value.” (4/28/08 Tr. at 9; 5/22/08 Tr. at 51-52) He testified that if Respondent refuses tender of value, the obligation is discharged and cited 810 ILCS 5/3-503 in his closing Brief as support.

(5/22/08 Tr. at 53) Mr. Mandalis concluded that it was his understanding that Respondent would not accept future payments in credits and that it would prefer payment in gold coins, federal reserve notes, or a check from Chase bank. (5/22/08 Tr. at 52-53)

### III. RESPONDENT POSITION

Respondent offered Cross Exhibit 1 into evidence, a piece of paper containing a photostat of a certified mail receipt and handwriting reading "credit only \$1097.96 without debit Jeffery Mandalis copyright MMVIII all rights reserved authorized signature 4385685034", issued by Complainant in attempted satisfaction of the amount of \$1097.96 billed by Respondent for electric service. Respondent did not present a witness.

### IV. RESPONDENT MOTION TO DISMISS

Respondent moved to dismiss this matter with prejudice on the grounds that Complainant had not shown that Respondent had in any way violated the Illinois Public Utilities Act and that there is no complaint. Complainant subsequently paid his electric bill in cash, which is commonly accepted worldwide. Respondent argued that the credit provided to Respondent shown on Respondent Cross Exhibit 1 is worth exactly as much as the paper on which it is written.

Complainant replied that if value is tendered for an obligation, Respondent is obligated to accept that value or the obligation is discharged. He argued that he tendered value at the same rate measured in ounces of gold pursuant to Public Law 93-110 of September 21, 1973 (31 USCA 412), which stipulates that the value of an ounce of gold is equal to 42 and 2/9 dollars per fine troy ounce of gold. If Respondent is holding his credit, which allows it to accrue revenue at that value in gold, then they are receiving the same value when Complainant tenders his credit in satisfaction of the amount due.

### V. COMMISSION ANALYSIS AND CONCLUSIONS

Complainant alleges that paying his electric bill with a written credit on a piece of paper gave specifically defined value to Respondent after Respondent acquired value in the form of a credit using Complainant's name. The Commission should therefore compel Respondent to accept payment in this manner since value is given for value. The Commission finds that Complainant has alleged nothing that the Commission is able to identify as a legally recognizable complaint against Respondent. Complainant does not allege a violation of any particular statute, rule or regulation by Respondent in rejecting this form of payment, and no such statutory or regulatory violation was cited to the Commission during the pendency of this proceeding. Moreover, Complainant failed to cite any legal authority or allege any legal basis that would require Respondent to accept payment in the form described in this Docket.

Pursuant to 220 ILCS 5/2-615, if a pleading is objected to by a motion to dismiss because it is substantially insufficient in law, i.e. there is no legally identifiable claim stated, the motion must specify the insufficiency. The Commission finds that Respondent has clearly identified the lack of legal sufficiency in this complaint. Respondent's counsel aptly pointed out in making the motion that Complainant has no actual complaint against Commonwealth Edison. Complainant subsequently paid his electric bill in cash, which is commonly accepted worldwide. Complainant therefore has no complaint against Commonwealth Edison and the matter should be dismissed. (5/22/08 Tr. at 57).

The Commission concludes that Complainant has failed to state a legally recognizable claim against Respondent and Respondent's motion to dismiss this complaint with prejudice should be granted.

#### V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) Respondent, Commonwealth Edison Company, is an Illinois corporation engaged in furnishing utility services in the State of Illinois and, as such, is a public utility within the meaning of Section 3-104 the Public Utilities Act (220 ILCS 5/3-104);
- (2) the Commission has jurisdiction of the parties hereto and the subject matter hereof;
- (3) Complainant, Jeffrey Mandalis Copyright MMVIII, alleges that Respondent accepted his credit for par value, established account #4385685034 and used the aforesaid credit to accrue revenue and credit its revenue account; Complainant drafted a credit for the outstanding balance on his account (\$1,097.96) and remitted said credit, which Respondent refused after having used Complainant's credit to accrue revenue;
- (4) Complainant fails to state a legally recognizable claim against the Respondent; his complaint should be dismissed with prejudice.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that the complaint filed by Jeffrey Mandalis Copyright MMVII against Commonwealth Edison Company is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 30<sup>th</sup> day of July, 2008.

(SIGNED) CHARLES E. BOX

Chairman

**STATE OF ILLINOIS**

**ILLINOIS COMMERCE COMMISSION**

**Illinois Bell Telephone Company** :  
**(SBC Illinois)** :  
 : **04-0441**  
**Petition for Variance Pursuant to Part 735** :  
**of the Commission's Rules.** :

**ORDER**

**By the Commission:**

**I. Procedural History**

On June 21, 2004, Illinois Bell Telephone Company ("SBC Illinois") filed with the Illinois Commerce Commission ("Commission") a petition seeking variance from the provisions of 83 Ill. Admin. Code Part 735.70(b)(1)(G), requiring it to provide detailed information about toll calls included on its customer bills.

Pursuant to due notice, hearings were held in this matter on July 13, August 12, and September 20, 2004, before a duly authorized Administrative Law Judge of the Commission at its offices in Chicago, Illinois. Appearances were entered by counsel on behalf of SBC Illinois and by a member of the Office of General Counsel of the Commission on behalf of the Commission Staff ("Staff"). The People of the State of Illinois ("Illinois AG") also filed a petition to intervene, which was granted on August 12, 2004.

Mr. David F. Becker, Director, Billing Product Manager for SBC Illinois, presented testimony and exhibits in support of the Petition. Ms. Joan S. Howard, a Consumer Program Analyst in the Consumer Services Division of the Commission, submitted a Verified Statement and testified on behalf of the Staff. The Illinois AG presented no witnesses. At the conclusion of the September 20 hearing, the record was marked "Heard and Taken."

SBC Illinois is a corporation organized under the laws of the State of Illinois and is a telecommunications carrier within the meaning of 220 ILCS 5/13-202. It owns and operates telecommunications facilities, and provides intrastate local exchange and intraLATA interexchange telecommunications service, in its service area within the state.

SBC Illinois is a "telephone company" under the jurisdiction of the Commission within the meaning of 83 Ill. Admin. Code Sec. 735.30 of the "Procedures Governing the Establishment of Credit, Billing, Deposits, Termination of Service and Issuance of

Telephone Directories for Local Exchange Telecommunications Carriers in the State of Illinois," 83 Ill. Admin. Code Part 735.

## **II. Parties' Positions**

### SBC Illinois' Position

SBC Illinois seeks a variance from the toll billing provisions in 83 Ill. Admin. Code Section 735.70(B)(1)(G) in order to implement a billing option under which certain customers could choose to have information about toll calls suppressed from their bills. In particular, interested residential and business customers who have purchased packages that include unlimited toll calling could elect to stop receiving detailed information about calls included in those calling packages.

Mr. Becker testified that, under the current SBC Illinois bill format, detailed information on local toll and long distance calls is presented, including the date and time of the call, the place called (the destination), the telephone number called, the length of the call in minutes, and the charge (collectively, "call detail"). Under this format, the charge for each call included as a part of an unlimited plan is shown as \$0.00 because there are no per-call charges that apply. SBC Illinois Ex. 1, Schedule 1, provides an example of the current billing format for unlimited calling plans. The current format does not designate which calls are local toll, as opposed to long distance, calls. Mr. Becker explained that, unless a customer knew the boundaries of her local toll calling area, the customer probably would be unable to determine exactly how many calls of each type she made in a given month.

Mr. Becker also testified that, under SBC Illinois' proposed billing format, customers with an unlimited calling plan who choose to have their call detail suppressed will receive, as part of their bill each month, a usage summary, giving the total number of calls made and the total number of minutes used during the preceding billing period. Only zero-rated calls (i.e., calls for which the charge is shown as \$0.00) that are part of the unlimited plan will have the call detail suppressed and be included in the summary. Local toll or long distance ("toll/LD") calls that are outside the customer's unlimited plan, such as international calls or credit card calls, will continue to be displayed on the bill with all of the detail that is displayed today. SBC Illinois Ex. 1, Schedule 2, provides an example of the billing format that SBC Illinois proposes to introduce for customers electing suppression of call detail.

Mr. Becker explained that those customers with unlimited calling plans that do not elect to suppress their toll/LD call detail will continue to receive the listing of the calls, as they do today, even though each call will be zero-rated. He also testified that a customer who chooses toll/LD suppression could change this election at any time and, on a going forward basis, receive the call detail associated with her unlimited toll/LD calls. A customer who has selected SBC Long Distance as her interexchange carrier may also ask SBC to retrieve and provide toll/LD detail for the prior 24-month period (at least) in the event she wishes to see the calls that were made in a particular month.

There would be no additional charge for requesting previous bills with toll/LD usage in detailed format, and there would be no charge for turning the detail back on at any time should the customer request it.

According to Mr. Becker, SBC developed the toll suppression option as a result of customer research it conducted throughout its service territory, including focus groups held in Chicago. This research revealed that customers prefer a bill that is simple and is as close to one page as possible. The surveyed customers indicated that, to achieve a shorter bill, they were willing to forego the call detail for calls included in an unlimited calling plan.

Mr. Becker explained that the suppression option would provide benefits both to customers and to SBC Illinois. Customers who do not want to receive their call detail would benefit because they could choose the suppression option and no longer receive the detail. SBC Illinois would benefit because having the suppression option available would allow it to produce a shorter bill and thus to satisfy customers who want such a bill.

Section 735.70(b)(1)(G) requires local carriers that include charges for toll calls on their bills to itemize those calls. The section also lists specific information about toll calls that the carriers must include, such as the date and time of the call, the length of the call, the telephone number called, and the destination called. Mr. Becker testified that a variance from Section 735.70(b)(1)(G) would be necessary for SBC Illinois to offer the suppression option because customers selecting that option would no longer receive the specified call detail information.

Mr. Becker explained that SBC had to seek a rule waiver to offer the suppression option in several other states in its service territory and that the utility commissions in those states (Kansas, Ohio, Oklahoma, and Wisconsin) had approved the waiver requests. He added that California amended its Public Utilities Code to require local exchange carriers to give customers with unlimited calling plans the option of deciding whether to receive their call detail. He also testified that Cingular Wireless currently provides its customers with unlimited calling plans the option of suppressing the itemization of calls.

SBC Illinois framed its variance request with regard to unlimited calling plans that customers purchase from SBC Illinois, including SBC Long Distance toll plans for which SBC Illinois provides billing under a Billing and Collection ("B&C") agreement. Mr. Becker stated, however, that SBC Illinois was willing to offer call detail suppression to its end-user customers who use an interexchange carrier ("IXC") other than SBC Long Distance, as long as the following conditions exist: 1) the IXC has a B&C agreement with SBC Illinois through which the IXC bills its customers; 2) the IXC offers unlimited calling plans to its customers and wants to offer those customers the option of suppressing call detail; 3) the IXC agrees to retrieve and provide, for customers who request it, past toll/LD detail for at least 24 months of previous bills; and 4) the variance

granted by the Commission is phrased broadly enough to be applicable to SBC Illinois' billing of unlimited calling plans on behalf of SBC Long Distance or any other IXC.

### Staff's Position

Ms. Howard, in her Verified Statement on behalf of Staff, testified that Staff finds many of SBC Illinois' reasons for requesting the waiver to be well founded. First, Ms. Howard emphasized that the variance is available as an *option* at the request of the SBC Illinois' local customer. Second, she noted that the waiver is applicable only to bills of SBC Illinois local customers who have purchased Unlimited Toll/LD Packages at a flat rate. Third, and critically important in the Staff's view, the SBC Illinois local customer would have the *option* to request suppression of call detail for Unlimited Toll/LD Packages and at any time, without charge, retain the *option* to change their prior request and return to receiving call detail on a going forward basis. These factors, in the Staff's view, all mitigate in favor of granting SBC Illinois' requested variance. Staff Ex. 1.0 (Howard), at 4.

Ms. Howard, however, noted that the Staff had certain concerns regarding SBC Illinois' requested variance. Due to these concerns, Staff conditioned a favorable Staff recommendation to the Commission upon SBC Illinois agreeing to the following conditions. First, in order to allow SBC Illinois' customers who purchase Unlimited Toll/LD Packages to switch from call detail suppression back to receiving call detail, and to allow customers to evaluate their telecom usage for any given month or to compare months of usage, the Staff proposed that SBC Illinois or the applicable IXC other than SBC Long Distance retain the call detail data, including usage data, for at least 24 months. See Staff Ex. 1.0 (Howard), at 4.

Second, Staff was concerned that SBC Illinois local customers that have an IXC other than SBC Long Distance would not be offered the same call detail suppression options as the end user customer that has SBC Illinois as its local carrier and SBC Long Distance as its IXC. Staff Ex. 1.0 (Howard), at 4-5. The Staff, therefore, conditioned a favorable recommendation upon a commitment by SBC Illinois to offer call detail suppression to its end-user customers that use an IXC other than SBC Long Distance. *Id.*, at 5. In addition, the call detail suppression should be the same as what SBC Illinois provides to end-user customers that have SBC Illinois as its local carrier and SBC Long Distance as its inter-exchange carrier. *Id.* Staff understood that SBC Illinois could meet this condition by notifying the IXCs with whom they have billing and collection agreements ("B&C agreements") that SBC Illinois will be offering this option to IXCs (and their end-users) that renegotiate the applicable B&C agreement, if needed. *Id.*

As noted above, in order to address the concerns of Staff, SBC Illinois agreed to Staff's proposed conditions under Staff agreed upon circumstances consequently, in light of SBC Illinois agreement with Staff's conditions, Staff recommended to the Commission that it grant the variance requested.

Staff, while noting that it does not agree with the AG that consumers will be harmed by this proposed waiver, agreed with the AG that consumers should be able to access information about local toll calls and long distance calls so they can comparison shop for phone services. Staff concluded that such information can be acquired by the consumer under Staff's proposed conditions.

#### Attorney General's Position

The AG questions whether the summary information and call detail suppression SBC Illinois requests meet its goal of simpler bills. The AG argues that call detail can be deleted from billing without harming consumers, but that SBC Illinois' proposal to delete all call detail would remove important information from consumers' bills, and prejudice their ability to understand both their bill and their telecommunications needs and options. Therefore, the AG recommends approval of the company's request only if the summary information provided is modified to better reflect the services SBC Illinois includes in its unlimited plans.

The AG recommends that, to prevent harm to consumers, SBC Illinois' variance should be allowed only if: 1) the bill displays each category of service separately (local usage, local toll [intraLATA] and long distance [interLATA]); 2) the minutes and number of calls under each category are separately displayed; and 3) the charges for each category of service are displayed alongside the itemization of the usage. The AG argues that the summary the SBC Illinois proposes does not accurately reflect the services customers are using because it combines local toll and long distance into a category named "domestic" usage, which masks the fact that two services are being provided.

The AG is concerned that in the event that consumers want to shop, compare prices, or understand their calling pattern so they can shop intelligently, the summary SBC Illinois proposes to provide is insufficient. Rather than reviewing current bills, a consumer would have to reverse its waiver request, wait for receipt of its prior usage history, or review only its prospective usage and postpone making a decision or a change. The AG suggests that changing the summary information to reflect local toll usage and long distance usage separately would resolve the problem it has identified while allowing SBC Illinois to omit the call detail for which no separate charge is incurred. Further, the AG noted that the price for the unlimited local toll and long distance calling was not clearly stated on the bill, and recommended that the cost of that unlimited usage be displayed with the summaries.

Without the modifications it suggests, the AG argues that the SBC Illinois proposal could potentially harm customers because they will lose the ability to assess their calling pattern and to make informed choices for their service. Likewise, the AG argues that the company has failed to provide evidence that the current rule is "unreasonable or unnecessarily burdensome." 83 Ill. Adm. Code 735.50(c). Finally, the AG asserts that waivers by regulatory bodies in other states are neither precedent nor

persuasive, as potential harm to Illinois consumers was not at issue in those proceedings.

### **III. Commission Analysis and Conclusions**

After reviewing SBC Illinois' proposed waiver and the conditions and modifications proposed by Staff and the AG, we conclude that the Commission must ensure that Illinois consumers have the information necessary to successfully understand and secure for themselves the full benefits of today's competitive telecommunications marketplace. Therefore, we approve SBC Illinois' proposal, with conditions and modifications as outlined below.

We agree with the modifications recommended by the Staff and accepted by SBC Illinois: 1) the call detail suppression option will be made available to any SBC Illinois local customer, regardless of the customer's IXC or toll carrier, and 2) SBC Illinois customers who have selected the call detail suppression option can at any time obtain 24 months of past call detail, at no charge, upon request.

Section 735.50 requires that the Commission, before granting a variance, consider three criteria: 1) whether the rule from which a variance is requested is mandated by statute; 2) whether anyone would be harmed by granting the variance; and 3) whether the rule from which a variance is requested is unduly burdensome.

None of the participants in this docket – SBC Illinois, Staff, or the Illinois AG – has identified any statutory requirement to present call detail on a customer's bill. The Commission also knows of no such requirement. Accordingly, the first criterion is satisfied.

The primary dispute between the parties relates to the second criterion. The AG contends that customers would be harmed under the new SBC Illinois bill format because they would not have information that might be necessary to understand their bills and to make appropriate decisions about telecommunications service. However the AG's proposed solution, providing summary information about local and long distance calling does not solve the problem. Charges are based on local toll and interlata rates based upon geographic boundaries that don't necessarily correspond to area codes or the distance between parties to the call. The call detail provided with the current bill format includes the number and destination called, but it does not designate whether a given call is local toll or long distance. (Indeed, subsection 735.70(b)(1)(G) contains no requirement that toll calls be categorized on the bill as local toll or long distance.) Thus, as Staff points out, this proceeding (a petition for a variance from an existing rule) is not the correct forum to impose new obligations on SBC not encompassed by that rule.

The record indicates that most customers would be unable to determine with certainty which of their intrastate toll calls in a given month were local toll calls versus interLATA long distance calls. As a result, to the extent that the new bill format takes

any information away from customers, providing the AG's suggested summary would not have a meaningful impact on customer decision-making.

SBC argues that suppression of call detail would be available only to customers with unlimited toll calling plans, so that only a subset of customers would be eligible for suppression if the waiver were granted. Further it points out that suppression would be optional, so that only customers with unlimited calling plans who choose not to receive the call detail would experience any effect if the waiver were granted. Moreover, any conceivable harm that a customer choosing suppression might experience would be entirely self-inflicted and reversible because a customer who had requested suppression could simply ask SBC Illinois to provide the detail from prior months or to provide the detail going forward.

The variance as proposed does not take into account that a flat-rated customer that has chosen call detail suppression may not remember or understand that the suppression is reversible and that detail information is available. Over time a customer's telephone usage pattern may change. A flat rate calling plan with summary billing that made sense initially may stop being a good idea. For this reason we find it appropriate that flat rated customers be advised in writing, prominently displayed on each bill, that he or she may obtain bill detail in writing by calling and requesting same from a designated number.

Subject to the conditions suggested by the Commission and Staff mentioned above, we find there is little likelihood that any party would be harmed if SBC Illinois offered the option of suppressing call detail. Therefore, we find that the second criterion is satisfied.

Finally, we find that Section 735.70(b)(1)(G) is burdensome, in that it precludes SBC Illinois from offering billing innovations such as the suppression of call detail. Section 735.70(b)(1)(G) assumes that a customer will be charged separately for each toll call she makes and thus might want details about each call to determine if she has been billed correctly. Now that many telecommunications carriers, including SBC Illinois, offer calling plans that include unlimited calling for a flat monthly rate, the average customer subscribing to such a plan may have little interest in details about particular calls because there is no separate charge for calls included in the plan. The code provision thus is unduly burdensome, in this particular situation, because it prevents SBC Illinois from offering the toll suppression option to interested customers. The third criterion is satisfied.

#### **IV. Findings and Ordering Paragraphs**

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

- (1) SBC Illinois is engaged in the business of rendering telecommunications service and is a telecommunications carrier as defined in Section 13-202 of the Public Utilities Act;

- (2) the Commission has jurisdiction over SBC Illinois and the subject matter of this proceeding;
- (3) the recitals of fact set forth in the prefatory portion of this order are supported by the evidence of record and are hereby adopted as findings of fact;
- (4) the provisions in 83 Ill. Admin. Code 735.70(b)(1)(G) from which variance is sought are not statutorily mandated;
- (5) no party will be injured by the granting of the variance;
- (6) the application of Section 735.70(b)(1)(G) would be unreasonable and unnecessarily burdensome in this particular situation;
- (7) the granting of a variance to allow SBC Illinois to offer suppression of toll call detail to interested residential and business customers who have unlimited toll calling plans is reasonable and consistent with the public interest in light of the following conditions;
- (8) as a condition of granting said variance SBC Illinois will be required to state prominently on each bill of a flat rated customer that has affirmatively requested call detail suppression that the customer may obtain 24 months written call detail without cost by calling a designated number;
- (9) as a further condition of granting this variance, SBC shall provide notice requesting that IXCs and toll carriers make their customers (for whom SBC provides local service) call detail information available to SBC when a customer requests call detail information;
- (10) as a further condition of granting this variance, SBC shall make the suppression option available to any of its local service customers, regardless of the customer's IXC or toll carrier, by providing notice to carriers that have entered into billing and collection agreements with SBC Illinois of the suppression option and that SBC will make available 24 months of past call detail upon request without cost to any call suppression option customer; provided the IXC or toll carrier agrees to provide, and actually does provide, such information to SBC;
- (11) approval is be granted to SBC Illinois for a variance from the provisions in 83 Ill. Admin. Code 735.70(b)(1)(G) that require itemization of toll calls for customers who have unlimited calling plans;
- (12) the variance is applicable to SBC Illinois' billing of toll calls under an unlimited toll calling plan for any interexchange carrier, pursuant to a

billing and collection agreement and subject to the conditions described herein regarding the availability of past call detail;

- (13) the variance should be granted on a permanent basis, to remain in effect until the Commission ceases or suspends authority for the variance in a docket initiated on its own motion or pursuant to a complaint;
- (14) subject to the terms and conditions of this Order, the prayer of the petition may be reasonably granted and the public will be inconvenienced thereby; and
- (15) any objections, motions or petitions filed in this proceeding, which remain undisposed of should be disposed of in a manner consistent with the ultimate conclusions herein contained.

IT IS THEREFORE ORDERED that SBC Illinois is granted a variance from the provisions in 83 Ill. Admin. Code 735.70(b)(1)(G) requiring itemization of all toll calls for all customers.

IT IS FURTHER ORDERED that the variance granted above is applicable only to business and residential customers of SBC Illinois who have subscribed to an unlimited toll calling plan and who have affirmatively requested to have their call detail suppressed.

IT IS FURTHER ORDERED that the variance is granted on a permanent basis, to remain in effect until the Commission ceases or suspends authority for the variance in a docket initiated on its own motion or pursuant to a complaint.

IT IS FURTHER ORDERED that any objections, motions, or petitions not previously disposed of are hereby disposed of consistent with the findings of this Order.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 2<sup>nd</sup> day of February, 2005.

(SIGNED) EDWARD C. HURLEY

Chairman