

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Consolidated Communication Consultant :
 Services, Inc. for the Chicago Housing :
 Authority :
 -v6- : 99-0429
 Illinois Bell Telephone Company :
 Complaint as to overbilling on Centrex :
 contract in Chicago, Illinois. :

HEARING EXAMINER'S PROPOSED ORDER

By the Commission:

I. PROCEDURAL HISTORY

On August 25, 1999, Consolidated Communication Consulting Services, Inc. ("Consolidated"), on behalf of the Chicago Housing Authority ("CHA" or "Complainant"), filed a Complaint against Illinois Bell Telephone Company, d/b/a Ameritech, Illinois ("Ameritech" or "Respondent"), alleging "overbilling" for Centrex services procured by CHA from Ameritech pursuant to a contract between the parties. CHA requests a refund of "mileage charges" (minus a specified offset) associated with certain Centrex lines provided pursuant to the contract over a 57-month period. CHA also requests a refund of applicable taxes and an award of interest, pursuant to 83 Ill. Adm. Code Sec. 735.70(h)(1)&(2).

An evidentiary hearing was conducted by a duly authorized Hearing Examiner in the offices of the Commission in Chicago, Illinois on May 2, 2000. Both parties were represented by counsel. CHA presented testimony by Yvonne Coutes, a telecommunications manager for CHA, and Thomas M. Pollina, a consultant with Consolidated. Ameritech presented the testimony of Paul Palley, an Ameritech account service administrator, and Anthony Karigan, an Ameritech account manager with responsibility for the CHA account. At the conclusion of that hearing, the record was closed and marked "heard and taken."

II. EVIDENCE AND POSITIONS OF THE PARTIES

Under tariffs filed with the Commission by Ameritech, centrex service is "a local exchange telecommunications service, provided by a telecommunications system

¹ CHA is the real party in interest in this docket. Consolidated is a consultant hired by CHA; its rights and obligations are not involved here. Accordingly, all references to "Complainant" pertain solely to CHA.

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located in a telephone company central office, which controls the switching of: [a] Calls from the exchange network to the Centrex lines, [b] Calls from the Centrex lines to the exchange network, [c] "Intercommunicating calls between Ameritech Centrex lines." Ill.C.C. No.19, Part 5, Section 1² (entered into evidence as Complainant's Exh. 4). Intercommunicating ("intercom") calls are placed from one line within a customer's Centrex system to another line in that system. The calling party enjoys the convenience of initiating an intercom call by dialing only the last four digits of the called party's assigned line number, rather than the larger number of digits that would be required for a call utilizing the public exchange network.

Complainant and Respondent executed a document entitled "Agreement For Ameritech Centrex Service between Ameritech And the Chicago Housing Authority" ("Contract") on June 30, 1994. Amer. Exh. 3, Sch. 1. The Contract contemplates "activation of 1,035 Centrex voice lines" and a charge of \$6.50 for each additional Centrex voice line. *Id.*, at 2-3. Ameritech states that the number of Centrex voice lines activated during the time period relevant to this proceeding grew to approximately 2000. Amer. Exh. 1.0, at 4. CHA estimates that the correct number of lines is approximately 2200. CHA Exh. 2, at 3:

CHA's Centrex is furnished through a switch in Ameritech's Calumet central office. Ameritech Exh. 3, at 4. The Contract provides that "channel" charges (generally referred to by the parties as "mileage" charges) shall apply to any Centrex line physically located outside the boundaries served by the Calumet office. *Id.*, Sch. 1, para. 4.3. The mileage charge is a predetermined monthly per-line charge, Tr. 84 (Palley), and does not vary with usage. *Id.* 85 (Palley). Ameritech maintains that mileage charges compensate Ameritech "for transporting calls to and from the many CHA offices served by other switches [i.e., offices other than Calumet]." Ameritech Exh. 3, at 4.

The CHA contends that 360 of the lines provided under the Contract³ were unable to receive intercom calls from other stations on CHA's Centrex system. Ameritech states that CHA witness Coutee "first raised the subject at a meeting in the fall of 1998." Ameritech Exh. 3, at 5. Thereafter, by letter dated November 12, 1998, Consolidated (on behalf of CHA) identified "more than 500" Centrex lines which could not receive intercom calls from other Centrex stations. *Id.* As a result of a subsequent Ameritech investigation, Ameritech determined that 360 Centrex stations "were not correctly build into the Centrex dialing plan." *Id.*, at 7. Ameritech thus confirmed that those lines could initiate, but not receive, intercom calls. *Id.*, 7-8. Ameritech resolved the problem as of March 8, 1999, by making changes "to translation tables programmed into the switch." *Id.*, at 8.

As a result of the foregoing, Ameritech issued a \$2694.11 credit to CHA's account in June, 1999. *Id.*, at 10. Ameritech witness Palley explains that this amount

² Since the Contract was executed, this tariff was moved from Ill.C.C. No. 20. Ameritech Reply Brief, at 4, fn. 3.

³ Telephone numbers 791-4600 through 4919, 667-7630 through 7639, and 667-6540 through 6569.

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was determined by calculating the minutes of use (17,075.2) for calls initiated within the CHA's Centrex system and terminated at the adversely affected Centrex stations during a sample month (February, 1999). *Id.* Ameritech believes that those minutes represent the average monthly inbound usage that would have been diverted from the 360 affected stations to the public exchange network because four-digit dialing could not be accomplished through CHA's Centrex. Those minutes were multiplied by the applicable per-minute usage charge (1.19 cents) for CHA's Band A calls over the public network⁴, yielding a monthly usage of \$203. *Id.*, at 11. That result (rounded down to \$200) was then multiplied by twelve, representing the number of months for which Ameritech was willing to assume responsibility. This, in Ameritech's view, adequately compensates CHA for the additional monthly charges CHA incurred because of the Centrex dialing problem discussed above.

The CHA does not agree that the refunded amount is adequate compensation for the inability to use intercom calling to reach the 360 numbers described above. In CHA's view, intercom dialing is the defining attribute of Centrex service. CHA Exh. 3, at 2. When that attribute is unavailable on a given line, CHA believes that the remaining service is equivalent to "plain old telephone" business service. *Id.* Since an ordinary business line would not incur the mileage charges imposed under the Centrex Contract here, CHA avers that Ameritech should refund those charges.

While the Complaint specifically requests refund of mileage charges only, CHA's calculations also include a per-line refund of \$5.50, which is equivalent to the amount for an additional Centrex line under the subparagraph 3.1.2 of the Contract. Since the CHA's core claim is that a Centrex line without inbound intercom calling is not, in essence, a Centrex line, it apparently believes that the cost of a Centrex line - which CHA quantifies by using the cost of an additional Centrex line - should be refunded along with mileage charges (minus the offset for an ordinary business line). In sum, CHA's proposed refund is the difference between the price of a Centrex line under the Contract and the price of an ordinary business line under Ameritech's tariffs.

Moreover, CHA contends that the refunded amount should cover 57 months of service, beginning from the effective date of the Contract⁵ and extending through March, 1999, when the dialing problem was rectified. This is consistent with CHA's assumption that the affected lines were not, at any time between the inception of the Contract and March, 1999, properly programmed to receive incoming intercom calls.

Accordingly, CHA's per-month refund formula for each affected Centrex line is as follows: mileage charges plus Centrex line charge (\$5.50) plus taxes paid and interest (estimated by CHA at an annual average of 5.5% during the years for which

⁴ Each call was handled as a Band A call because it utilized the configuration of the CHA Centrex, which regards calls between Centrex stations as originating and terminating in the Calumet central office. Ameritech Exh. 1.0, at 10-11.

⁵ Although the effective date of the contract was June 30, 1994, CHA requests refund for mileage charges from June 1, 1994. CHA Exh. 2, at 3. Moreover, the Complaint asserts that mileage charges "were assessed and paid on these lines since 9/25/94." Complaint, at 2. CHA does not address these inconsistencies.

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CHA requests refund, compounded monthly; Ameritech Exh. 2, at 4), minus Ameritech's tariffed rate for an ordinary business line, multiplied by 57 months. CHA calculates that the monthly yield from this formula is \$4,682.63⁶, Complaint, at 2, while the total yield is \$305,623.07. CHA Exh. 2, at 3.

Ameritech responds that the "channels" associated with mileage charges allow all of the elements of Centrex service - not just inbound intercom calling - to be provided as if they originated and terminated in the same central office. Since these "channels" functioned continuously during the time period relevant here, Ameritech argues that a refund of all mileage charges would be an inappropriate remedy for the unavailability of inbound intercom calling during that time. Ameritech Init. Brief, at 10.

With respect to the \$5.50/month Centrex line charge, Ameritech points out that a portion of that charge recovers the end user common line charge ("EUCL") required by the Federal Communications Commission. *Id.*, at 9. Consequently, Ameritech asserts, the EUCL portion of the Centrex line charge is unrelated to the availability of inbound intercom calling and should not be refunded. Ameritech acknowledges that the remainder of the Centrex line charge (calculated by Ameritech at \$1.47/month) recovers, among other things, the cost of intercom dialing. *Id.* Ameritech states that a proposed refund of that remainder was "used in negotiations with the CHA" prior to the filing of the instant Complaint. *Id.*, at 8; Tr. 94-95 (Palley).

Ameritech also objects to a refund covering 57 monthly billing periods. Ameritech notes that CHA provided formal notice of the intercom calling service deficiency in the fall of 1998, and has no direct proof that the problem arose prior to that period. *Id.*, at 7. Ameritech emphasizes that CHA, as the Complainant in this proceeding, bears the burden of proving its case. *Id.* Additionally, Ameritech avers that 220 ILCS 5/9-252 imposes a two-year statute of limitations on complaints like this one, and that, therefore, events occurring prior to August 25, 1997 are not cognizable under this Commission's complaint jurisdiction. *Id.*, at 6.

III. ANALYSIS

A. The Duration of Respondent's Responsibility.

The evidence described in the preceding section of this Order demonstrates that Ameritech has assumed responsibility for the unavailability of inbound intercom calling to 360 lines on the CHA Centrex system. Ameritech took on the duty and cost of correcting those service deficiencies. It also issued a billing credit for one year's estimated additional usage charges, calculated forward from a date approximately nine months prior to receipt of notice from CHA. The principle remaining conflicts between the parties concern, first, whether Ameritech should bear responsibility for a

⁶ In the Complaint, this monthly number is characterized as "[e]xcluding taxes and interest." Complaint, at 2. However, CHA appears to describe the number elsewhere as *inclusive* of interest. Ameritech Exh. 2, at 4. CHA does not explain this inconsistency, nor does it state why it omitted taxes from its calculations.

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longer time period and, second, the proper quantification of that responsibility. We will address the duration of Ameritech's responsibility first.

As noted above, Ameritech asserts two defenses to the imposition of responsibility for more than the one-year period for which it credited CHA's account. First, Ameritech argues that CHA has failed to meet the burden of proving that the incoming dialing problem existed prior to the fall of 1998. Second, it asserts that the limitations provision in Section 9-252 of the Public Utilities Act ("Act") precludes the Commission from awarding refunds for alleged service deficiencies occurring before the date two years prior to the filing of the Complaint.

1. Burden of Proof

With respect to burden of proof, Ameritech cites Champaign County Telephone Co. v. Illinois Commerce Commission, 37 Ill.2d 312, 226 N.E.2d 849 (1967) and City of Chicago v. Illinois Commerce Commission, 13 Ill.2d 607, 150 N.E.2d 776 (1958) to establish the principle that a complainant must prove its case. While that principle is correct, it is broader than, and not dispositive of, the issue actually presented here. The term "burden of proof" encompasses two concepts - the burden of persuasion and the burden of producing evidence. Board of Trade v. Dow Jones & Co., Inc., 108 Ill.App. 3d 681, 429 N.E.2d 526, 64 Ill.Dec. 275 (1982), *aff'd* 92 Ill.2d. 109, 456 N.E.2d 84, 74 Ill.Dec. 582 (1983). The former concept pertains to the ultimate burden of persuading the tribunal that the necessary elements of a claim have been proven. *Id.* That burden is assigned at the beginning of a dispute and does not shift during the course of the proceeding. *Id.* The Commission agrees with Ameritech that CHA, as the complaining party, has the burden of persuasion here regarding the necessary elements of its claim.

In contrast, the burden of producing evidence can shift between the parties as the case proceeds, depending on the nature of specific evidence and the issue it addresses. *Id.* Thus, there are circumstances under which the party with the burden of persuasion will not have the burden of production with respect to certain evidence. "[A]lthough the burden of proof usually rests with the party making the affirmative pleading, such burden may be placed upon the opposing party in instances where such party has knowledge of the subject matter at issue which is not available to the party making the allegation." Southwest Federal Savings & Loan Association v. The Cosmopolitan National Bank, 23 Ill.App.2d 174, 181, 161 N.E.2d 697, 701 (1959). "The burden of producing evidence, chiefly, if not entirely, within the control of an adverse party, rests upon such party if he would deny the existence of claimed facts." *Id.*

The particular issue here is the determination of when the 360 lines - and each of them - were first unable to accommodate inbound intercom calling. Ameritech witness Palley states that the 360 pertinent stations "were not correctly built into the Centrex dialing plan." Ameritech Exh. 3, at 7 (emphasis added). The Commission can

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construe this statement as an admission that the service deficiencies existed from the effective date of the Contract; at the very least, the statement permits that inference.

As an alternative explanation, Mr. Palley speculates that "[c]hanges to the translation tables at any time after installation, even by activity in the switch unrelated to this customer, could result in errors affecting the customer's four-digit intercom dialing feature." *Id.* During cross-examination, he added: "Now how that happened, or how it could happen, I imagine human error, possibly somebody working on an unrelated order deleted them by mistake. It's really impossible to say..." Tr. 70.

Ameritech's own testimony thus indicates that the pertinent tables in Ameritech's switch were apparently wrongly programmed by Ameritech initially, but could have been erroneously altered by Ameritech later, and that it is "impossible" to conclusively determine which of these explanations - or any explanation - is correct. Therefore, under the principles discussed above, the burden of producing additional evidence on this issue has shifted to Ameritech. Ameritech had responsibility for the most likely causes of the dialing problem. Any additional pertinent evidence is "chiefly, if not entirely, within the control of" Ameritech. Centrex service is provided from Ameritech's own central office through Ameritech's switch; it is not owned, provisioned or controlled by CHA, and its service elements are not physically located on CHA premises or accessible to CHA personnel. Under the Contract, Ameritech is the party obligated to furnish "switching service supported by the appropriate equipment, materials, accessories, software, firmware, engineering, installation and maintenance services." Ameritech Exh. 3, Sch. 1, para. 1.1. As the owner of the relevant equipment and systems, as the service and maintenance provider under the Contract, and as the apparent causative agent of the subject programming error, Ameritech had the burden to produce facts negating CHA's unfavorable inferences.

Ameritech does offer testimony intended to support a contrary inference. First, Mr. Palley opines that "[i]t is very unlikely that the problem existed for a substantial period of time prior to [notification from CHA]. The problem would be relatively obvious to users, since they wouldn't be able to intercom dial the affected lines." *Id.*, at 8. The Commission disagrees. While an employee would likely notice a dialing problem with *their own phone*, he or she would not as likely perceive or report a problem affecting *another employee's phone*. Indeed, the calling employee might not perceive that a problem exists, but that the system, as procured by CHA, simply did not include intercom dialing to all stations.

Alternatively, the calling party could assume that the inability to complete an intra-agency call with four digits indicated a problem in Respondent's network or in the calling employee's own phone. However, the latter problem could be perceived as an anomaly, since that employee could reach the great majority of other stations on CHA's Centrex system dialing with four digits, and could reach an affected station with seven digits. Moreover, the employee placing a four-digit call to an affected station would receive no explanation as to why the call could not be completed. Rather, the

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employee would hear a "generic intercept recording," Tr. 92 (Palley), which would give the caller no insight regarding the cause of the problem.

Additionally, Ameritech's own testimony establishes that CHA stations utilize customer premises equipment that facilitates call completion with fewer than seven digits. Ameritech Exh. 3, at 9. Mr. Palley describes an example in which a CHA private business exchange ("PBX") inserted a prefix, thereby obviating the need to dial a called party's full seven-digit number. *Id.* Wherever such circumstances were present in CHA's facilities, an employee could complete a call to an affected station with four digits (plus "9," to access the public network), because the PBX would supply the prefix. That employee would perceive no problem with the called party's line.

Also, CHA witness Pollina testifies that some CHA personnel "didn't understand the very nature of Centrex," Tr. 25, and, therefore, did not understand that intercom calling was available within the agency's system. Tr. 26. While the Commission might prefer that both CHA and Ameritech would have more effectively educated end-users regarding the features of Centrex, Mr. Pollina's testimony nonetheless undermines Ameritech's inference that the inbound intercom dialing problem could not have gone unnoticed.

Second, Ameritech presents a hypothesis intended to suggest an alternative explanation for the cause of the inbound intercom dialing deficiency. "[CHA's] PBXs use routing tables, similar to the translation tables in Ameritech Illinois' switches, to process outgoing calls...[E]rrors in the dialing plan programmed into the customer's PBX equipment can cause problems similar to those experienced by the CHA." Ameritech Exh. 3, at 9. In effect, this hypothesis suggests that CHA caused the problem itself and could have done so at any time prior to CHA's notice to Ameritech in the fall of 1998. The Commission rejects this hypothesis for several reasons.

First, the hypothesis, by its terms, applies to *outgoing* calls. Ameritech has identified the problem here as affecting inbound intercom calling to 360 lines, not outbound calling from the remainder of CHA's other 2000 (or 2200, per CHA's estimate) stations. Indeed, if we adopted Ameritech's alternative hypothesis, Ameritech's liability for refunds would include all lines other than the 360 that are the subject of the Complaint.

Second, Ameritech has already determined that the service deficiencies were attributable to errors in the translation tables programmed into Ameritech's switch, errors which, Ameritech states, were "built into" CHA's Centrex dialing plan. Ameritech's alternative hypothesis is contradicted by that determination.

Third, the alternative hypothesis is belied by Ameritech's conduct prior to commencement of this Complaint proceeding. As already stated, Ameritech assumed the duty of correcting the service deficiencies, as well as the responsibility of monetary compensation. If Ameritech had genuinely believed that CHA (or anyone else) caused

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those deficiencies, it could have invoked the clear exculpatory provisions in the Contract.

Ameritech's repair obligation does not include damage, defects, malfunctions, service degradations or failures caused by Customer or third party's abuse, intentional misuse, unauthorized use or negligent acts or omissions....

Ameritech Exh. 3, Sch. 1, p. 7, para. 5.0 (emphasis added).

Excused Performance

Ameritech shall not be liable in any way for any delay or any failure of performance of the Centrex Service provided pursuant to this Agreement or for any delay, loss, damage or expenses due to any of the following:

(b) Any wrongful or negligent act or omission of Customer or its employees, agents, subcontractors or affiliates;...

Id., p. 7-8, para. 11.0 (emphasis added).

In sum, the Commission concludes from all of the foregoing, that the inability to receive inbound intercom calling at 360 stations on the CHA Centrex system is attributable to programming errors in Ameritech's switch that occurred on or about the effective date of the Contract between the parties. This conclusion is supported by the preponderance of the evidence presented by the parties, while Ameritech's contrary inferences are not. Accordingly, properly calculated refunds should be granted for a period commencing on June 30, 1994 and ending on March 8, 1999.

cf. p. 14
= March 12

2. Does Section 9-252 or Section 9-252.1 Govern the Complaint?

CHA asserts that this action is governed by Section 9-252.1 of the Act⁷, while Ameritech contends that Section 9-252 applies. Their disagreement is essentially strategic. Ameritech believes that the limitations provision in Section 9-252 will truncate the time period for which it has liability exposure. CHA believes that the limitations proven in Section 9-252.1 extends that exposure back to the effective date of the Contract.

⁷ In the Complaint, CHA identifies 83 Ill. Adm. Code 735.70(h) as the pertinent provision in this proceeding. That administrative regulation applies only to telecommunications utilities and generally tracks the language of Section 9-252.1.

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The pertinent language of Section 9-252 states:

When complaint is made to the Commission concerning the rate or charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

All complaints for the recovery of damages shall be filed with the Commission within 2 years from the time the produce [sic], commodity or service as to which complaint is made was furnished or performed....

Section 9-252 would control this case if the gravamen of the Complaint were that Ameritech has "charged an excessive...amount for its...[Centrex] service⁸." Under that circumstance, Ameritech believes, CHA "cannot lawfully be awarded a refund for service prior to August 25, 1997 [the date commencing the two-year period immediately prior to the filing of the Complaint]." Ameritech Init. Brief, at 6.

Section 9-252.1 provides that:

When a customer pays a bill as submitted by a public utility and the billing is later found to be incorrect due to an error either in charging more than the published rate or in measuring the quantity or volume of service provided, the utility shall refund the overcharge with interest from the date of overpayment at the legal rate or at a rate prescribed by rule of the Commission. Refunds and interest for such overcharges may be paid by the utility without the need for a hearing and order of the Commission. Any complaint relating to an incorrect billing must be filed with the Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing.

Section 9-252.1 would apply here if the essence of the Complaint were that CHA's bills for Centrex service were "incorrect due to an error...in measuring the quantity or

⁸ We drop "unjustly discriminatory" from our analysis at this point because it is neither alleged by CHA nor consistent with the facts proven by record evidence.

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volume of [Centrex] service provided⁹." In that case - and if CHA acquired its knowledge of the incorrect billing around the time it notified Ameritech of the problem in fall, 1998 - then all of Ameritech's purported overbilling, dating back to June, 1994, was brought before this Commission in a timely Complaint filed in August, 1999.

Ameritech takes the position that Section 9-252.1 addresses billing errors, while "[o]ther complaints, including complaints regarding service issues, are governed by Section 9-252 of the Act." Ameritech Reply Brief, at 11. "[T]his case does not involve billing errors; it involves a service problem" (identified by Ameritech as the "programming error in the central office switch, which prevented Centrex intercom calls from being completed"). *Id.*

Ameritech's distinction is not explicitly supported by the text of the statutes. Section 9-252 does not, on its face, mention "service issues." Similarly, Section 9-252.1 does not mention "billing errors," but rather, "error[s]...in measuring the quantity...of service provided..." Section 9-252.1 thus reaches beyond the mere presentation of an incorrect bill to address errors by the systems, equipment and personnel that monitor and quantify services provided. Consequently, Ameritech's asserted distinction does not address the relevant difference between the statutes. Moreover, even if the statutes contained the language suggested by Ameritech, the outcome would not necessarily be the one Ameritech would prefer. While the wrong alleged here can be fairly characterized, as it is by Ameritech, as the failure to provide a service, it can also be validly characterized as billing for a service not provided.

Neither party here has cited a judicial decision expressly addressing the demarcation between Sections 9-252 and 9-252.1, and our own research has also uncovered no such precedent. Accordingly, the Commission will determine legislative intent from the text and history of the two sections. Initially, we note that there is an overlap in the language of the statutes¹⁰, since an incorrect billing that increases the charges imposed on a complainant is a specific example of the broader concept of an "excessive charge." Further, all but the final sentence of the text of Section 9-252.1 was formerly part of Section 9-252. Through P.A. 88-323, the Legislature removed that language and placed it in then-new Section 9-252.1, effective January 1, 1994. At the same time, the Legislature added the knowledge-of-the-complainant limitations provision that now appears in Section 9-252.1. That limitations provision, which contrasts with the date-of-service standard in the limitations provision in Section 9-252, is the principal distinction between the two sections.¹¹ Consequently, it appears that Section 9-252.1 represents a "carving-out" by the Legislature of certain categories of excessive charges for separate statute of limitations treatment. The Commission's

⁹We drop "charging more than the published rate" from our analysis here because it is neither alleged by CHA nor consistent with the facts proven by record evidence.

¹⁰The general rule is that "[w]hen two statutes of limitation arguably apply to the same cause of action, the one which more specifically relates to the action must be applied." Haddad's of Illinois v. Credit Union 1, 286 Ill.App. 3d, 1069, 678 N.E.2d 322, 324, 222 Ill.Dec. 710, 712 (1997).

¹¹Another important distinction is that Section 9-252.1 contemplates refunds and interest without filing a complaint.

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task, therefore, is to determine whether the instant claim is among the kind that the Legislature carved out for the knowledge-of-the-complainant statute of limitations.

In the Commission's view, the limitations provision in Section 9-252.1 is intended for incorrect billing resulting from internal, non-public errors with respect to the measurement of service provided¹². In such cases, the customer's obligation to come forward with a refund claim does not commence until the customer has knowledge of the error. Valid claims are thus preserved until the customer has a fair opportunity to act. Applying that principle to the instant Complaint, the Commission concludes that billings for an undelivered component of Centrex service, as a result of an error undetected by the provider and the customer, provide the basis for a claim that Section 9-252.1 was intended to govern.

The Commission notes that our analysis assumes a construction of the phrase "quantity or volume of service provided" in Section 9-252.1 that comports with contemporary conditions in the industries we regulate. This language, which formerly appeared in Section 9-252 and its predecessor statute,¹³ was originally selected at a time when local telephone utilities principally sold message units and electric utilities principally sold kilowatt hours. Now, Ameritech and others provide a considerable array of telecommunications service packages that, like Centrex, consist of several discrete services. Accordingly, we hold that the "quantity...of service provided" now additionally pertains to the individual components of a packaged service, as it has heretofore pertained to the units of a single measured service.

The foregoing analysis is implicitly supported by the ruling in Village of Evergreen Park v. Commonwealth Edison Company, 296 Ill.App.3d 810, 695 N.E.2d 1339, 231 Ill.Dec. 220 (1998), cited in CHA's Reply Brief, at 4. In that case, plaintiff asserted that defendant utility continued to collect charges for municipal street lights that had been removed from service. Contrary to CHA's suggestion, that case did not explicitly address the distinction between Sections 9-252 and 9-252.1. However, although the court discussed both statutes, it cited Section 9-252.1, not Section 9-252, to sustain its ruling that the complaint belonged before this Commission rather than the judiciary. The instant Complaint is analogous to Village of Evergreen Park, in that both involve billings for services not actually provided.

Having stated the foregoing, the Commission finds that even if the Complaint were governed by Section 9-252, the "continuing violation doctrine" would still permit us to consider alleged service deficiencies dating back to the effective date of the Contract in 1994. The Commission adopted the continuing violation doctrine in Time Warner Cable v. Commonwealth Edison Company, Ill.C.C. Docket 99-0388. In that proceeding, complainant alleged that respondent had used an incorrect factor for

¹²The Commission does not mean to suggest that a service measurement error must be non-public in order for the knowledge-of-the-complainant limitations provision of Section 9-252.1 to apply. Our intention is solely to identify the general intention underlying the Legislature's decision to delete language from Section 9-252, move it to a new Section 9-252.1, and create a different limitations standard for matters governed by the new section.

¹³ Ill.Rev.Stat. 1983, Ch. 111 2/3, para. 76.

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calculating the electricity consumed by respondent's transformers and, as a result, had imposed overcharges for approximately six years. Respondent moved to dismiss the complaint as untimely (with respect to the first four years of alleged overcharges). The Hearing Examiner granted respondent's motion and complainant sought interlocutory review, urging the Commission to adopt the "continuing violation doctrine." At the bench session on December 21, 1999, the Commission granted complainant's request.

Under the continuing violation doctrine, the statute of limitations does not begin to run until the date of the last in a series of related wrongs. Field v. First National Bank of Harrisburg, 249 Ill.App.3d, 619 N.E.2d 1296, 189 Ill.Dec. 247 (1993). Here, Ameritech presented a series of monthly billings for the full range of features described in the Contract, without actually providing one of those features for 360 lines. In each month, the same feature (intercom dialing) was unavailable for the same apparent reason (a programming error in Ameritech's switch). These are the sort of circumstances to which the continuing violation doctrine applies. Consequently, the limitations period under Section 9-252 would not begin until Ameritech presented its last erroneous billing (presumably in February or March, 1999). CHA's August, 1999 Complaint was, therefore, timely filed under Section 9-252¹⁴.

For all of the foregoing reasons, the Commission concludes that the Complaint is governed by the limitations provision of Section 9-252.1 and was timely filed under that section. The Commission also concludes that if the Complaint were instead governed by Section 9-252, it would still be timely filed because the continuing violation doctrine regards the pertinent events here as having concluded on the last date of alleged violation.

B. Remedy

In view of our determinations that Ameritech's responsibility for the inbound intercom dialing deficiency at 360 CHA Centrex lines extends back to the effective date of the Contract, and that no limitations provision precludes a refund of any overcharges paid during that time period, the Commission must fashion a remedy that is appropriate and lawful within the terms of Section 9-252.1¹⁵. That is, we must quantify the relevant overcharges.

As discussed in Section II of this Order, CHA contends that a proper refund would include channel charges and Centrex line charges. CHA's theory is that

¹⁴ Under Section 9-252.1, the continuing violation doctrine leads to the same result. As already noted, the limitations period under that section begins to run when a complainant acquires knowledge of the alleged wrong. Whether CHA first acquired knowledge in November, 1998 (when it notified Ameritech of dialing deficiencies), or in March, 1999 (when Ameritech's investigation confirmed those deficiencies), the Complaint was timely filed in August, 1999, and the continuing violation doctrine allows us to consider all of the allegedly erroneous monthly billings.

¹⁵ The Commission notes that our analysis and conclusions regarding remedy would not materially differ if the Complaint were governed by Section 9-252.

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intercom dialing is the essential feature of Centrex, and that "[w]ithout the intercom feature, there is no Centrex service." CHA Init. Brief, at 7. Since the service received during the relevant time period here was not Centrex, and since CHA incurred channel and line charges only in connection with Centrex, CHA insists that those charges constitute the overcharges subject to refund. In support of this argument, CHA emphasizes that Centrex is offered under Ameritech's tariffs only as a "complete service," and that intercom dialing could not, therefore, have been purchased without channel and line charges. *Id.*

As also discussed in Section II, above, Ameritech counters that Centrex is a service with multiple features, some of which are "not available on ordinary business lines" or "available only at an additional charge." Ameritech Init. Brief, at 10. In Ameritech's view, this demonstrates that Centrex is more than the intercom dialing feature. Since there is no allegation or evidence that any feature other than inbound intercom dialing was deficient, Ameritech argues that no additional refunds are warranted.

As for channel charges, Ameritech stresses that these are fixed charges that recover the cost of routing CHA's calls through a single central office, while the cost of intercom dialing is recovered by (but is less than half of) the Centrex line charge. Thus, Ameritech believes, channel charges recapture value that is distinct from intercom dialing.

Ameritech also maintains that even if CHA's demand for mileage charges and lines charges were theoretically valid, CHA has understated the cost of an ordinary business line (which CHA has offered as an offset against its refund demand)¹⁶. Ameritech Init. Brief, at 11. Additionally, Ameritech argues, CHA has failed to subtract from its refund calculation the EUCL portion of the Centrex line charge, although the EUCL is an FCC-imposed charge unrelated to Centrex. Ameritech also asserts that CHA has not factored into its offset the increased cost of Bands B and C usage that CHA would have incurred with an ordinary business line.¹⁷ *Id.*

¹⁶Ameritech supports this argument with extra-record material (Ameritech tariffs) appended to its Initial Brief. Ameritech was aware of the basis for CHA's calculations prior to the evidentiary hearings in this docket and could have offered responsive evidence for the record but did not do so. The Commission recognizes that the tariffs are on file with us and we do not doubt their veracity. That is not the point, however. Because the material was not properly offered for the record, CHA did not have the opportunity to present its own case, including other evidence, in response to that material. Accordingly, Ameritech's request for administrative notice is denied and the appended material will not be considered.

¹⁷Ameritech did not introduce this point in its testimony or support it with record evidence. In turn, CHA's attempted refutation is supported by extra-record materials (a portion of an "Ameritech Usage Service Agreement Between Ameritech and Chicago Housing Authority") appended to CHA's Reply Brief. While the Commission believes that the lower cost of Band A usage, as compared to Bands B and C usage, is a fact that may be inferred from the record, there is no record evidence to establish the magnitude of that differential (much less a precise quantification) for Ameritech. With regard to CHA's responsive extra-record evidence, it could have been offered at hearing and will not be considered now.

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The Commission concurs with Ameritech that a refund of mileage charges would be a disproportionate remedy for the unavailability of inbound intercom dialing. Through the Centrex "channels" established under the Contract, the 360 affected stations received the benefit of completing all outbound intercom calls with four-digit dialing (except calls to other affected stations). Additionally, the Commission agrees that the portion of the Centrex line charge that recovers the EUCL should be excluded from any refund, since CHA would have paid the EUCL associated with an ordinary business line. Therefore, neither the channel charge nor the entire Centrex line charge appropriately represents the overcharges paid by CHA.

Nevertheless, for two reasons, the Commission concludes that CHA is entitled to a refund of more than the additional usage charges incurred as a result of the unavailability of inbound intercom dialing. First, the value of each Centrex feature is not equivalent to the value of every other feature. While intercom dialing does not represent the full value of the Centrex package, it is the feature that essentially distinguishes Centrex from a collection of ordinary business lines. Second, the unavailability of intercom dialing to certain stations degraded the entire Centrex system. All employees using the 2000 (or 2200) lines on the system were inconvenienced by the unavailability of intercom dialing to the 360 affected stations, (and, whenever the calling party "gave up" in frustration, both the calling and called parties were inconvenienced). The efficiency and productivity of complainant's entire enterprise was thereby diminished. Accordingly, some portion of the amount paid by CHA for its Centrex system during the relevant time period constitutes an overcharge.

However, CHA has focused its case solely on a full refund of channel and line charges. Consequently, it has offered no other theory or evidence for quantifying, first, the overcharges associated with the loss of inbound intercom dialing to the affected stations and, second, the impaired outbound intercom dialing from all stations. The only record evidence quantifying the overcharges for intercom dialing comes from Ameritech, which identifies the portion of the monthly Centrex line charge (\$1.47) that recovers the cost of that feature¹⁸. Given the state of the record, the Commission concludes that this amount (\$1.47 per month per line) represents the best available quantification of the overcharges here.

Therefore, we will require Ameritech to refund \$1.47 per month, from July 1, 1994 to and including March 12, 1999 (a total of 56.4 months), for each of the 360 affected lines. Ameritech shall also refund all taxes applied each month to the base amount of \$1.47. In addition, pursuant to the authority of Section 9-252.1, we will require Ameritech to add interest in the refund, to be compounded monthly. Since the statute authorizes interest "from the date of overpayment," interest should be calculated on the cumulative overcharge in each relevant month, rather than

¹⁸ Ameritech witness Palley states in oral testimony that the amount was \$1.57. Tr. 94. However, a CHA response to an Ameritech data request contains the \$1.47 figure, Ameritech Exh. 2 (responses "K" and "L" to Ameritech data request 1), which Ameritech cites in its Initial Brief and which CHA does not dispute in its Reply Brief. The Commission will use \$1.47 for the purposes of this Order.

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beginning with the total 56.4-month overcharge. Interest shall be applied until the date of refund.

Pursuant to 83 Ill. Adm. Code 735.70(h)(2), the applicable rate of interest "shall be the rate of interest as established by the Commission to be paid on deposits in Section 735.120(h)(1) of this Part." Under the latter regulation, the applicable interest rate "will be the same as the rate existing for one year United States treasury bills at that point in time when the determination of the interest rate is made by the Commission [rounded to the nearest half of a percent]." The following interest rates were established by the Commission: for 1994, 3.5%; for 1995, 6.5 %; for 1996, 5.5%; for 1997, 5.5%; for 1998, 5.5%; for 1999, 4.5%; for 2000, 5.5%; and, for 2001, 6.0%. Accordingly, we hereby require to apply the foregoing interest rates to the monthly balances accrued in each corresponding calendar year.

Consistent with 83 Ill. Adm. Code 735.70(h)(3), the refund shall be accomplished by a single billing credit or, if requested by CHA, by check, within sixty days of the entry of this Order or sixty days of the conclusion of any appeal thereof (whichever is later). To be clear, the foregoing refund is in addition to, and not to be offset by, any other refund made by Ameritech to CHA as a result of the subject matter of the instant docket.

IV. COMMISSION FINDINGS AND ORDERING PARAGRAPHS

The Commission, having reviewed the evidence of record and being fully advised in the premises, is of the opinion and finds by a preponderance of the evidence that:

- (1) Respondent, Illinois Bell Telephone Company, d/b/a Ameritech Illinois, is an Illinois corporation engaged in furnishing telephone service in the State of Illinois, and as such, is a telecommunications service, within the meaning of Section 13-202 of the Public Utility Act;
- (2) the Commission has jurisdiction over the parties and the subject matter herein;
- (3) Complainant and Respondent entered into a contract under which Respondent would provide Centrex service to Respondent, including intercommunications calling among all service lines provided under the contract;
- (4) Respondent failed to furnish inbound intercommunications calling for 360 service lines provided under the contract during the time period commencing on June 30, 1994 and ending on March 12, 1999;
- (5) Respondent bears full responsibility for the failure to furnish intercommunications calling, as described in the preceding Finding;

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- (6) As a result of Respondent's failure to furnish intercommunications calling as described in Finding (4), above, Complainant was overcharged in the amount of \$1.47 for each line and during each month described in Finding (4);
- (7) Respondent should refund to Complainant an amount equal to \$1.47 for each month and each service line described in Finding (4), above; in addition, Respondent should refund to Complainant an amount equal to all taxes previously paid by Complainant to Respondent for each line and during each month described in Finding (4), but only to the extent such taxes are attributable to the amount of \$1.47 described in the preceding Finding; in addition, Respondent should include in such refund interest at the rates set forth in the prefatory portion of this Order, compounded monthly, on the cumulative overcharge (including taxes) in each month described in Finding (4), above, and in each subsequent month until such refund is paid; such refund shall be paid by Respondent to Complainant within sixty days of the entry of this Order or within sixty days of the completion of any judicial review of this Order, whichever is later; such refund shall be accomplished by a single credit applied to Complainant's bill for services provided by Respondent, or, if requested by Complainant, by check;
- (8) the refund described in this Finding should be in addition to, and not offset by, any other refund or credit provided by Respondent to Complainant.

IT IS THEREFORE ORDERED that Respondent should refund to Complainant an amount equal to \$1.47 for each month and each service line described in Finding (4), above.

IT IS FURTHER ORDERED that Respondent should refund to Complainant an amount equal to all taxes previously paid by Complainant to Respondent for each line and during each month described in Finding (4), above, but only to the extent such taxes are attributable to the amount of \$1.47.

IT IS FURTHER ORDERED that Respondent should include in such refund interest at the rates set forth in the prefatory portion of this Order, compounded monthly, on the cumulative overcharge (including taxes) in each month described in Finding (4), above, and in each subsequent month until such refund is paid.

IT IS FURTHER ORDERED that such refund shall be paid by Respondent to Complainant within sixty days of the entry of this Order or within sixty days of the completion of any judicial review of this Order, whichever is later.

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IT IS FURTHER ORDERED that such refund shall be accomplished by a single credit applied to Complainant's bill for services provided by Respondent, or, if requested by Complainant, by check.

IT IS FURTHER ORDERED THAT this Order is final; it is not subject to the provisions of the Administrative Review Law.

DATED:
BRIEFS ON EXCEPTIONS DUE:
REPLY BRIEFS ON EXCEPTIONS DUE:

December 20, 2000
January 10, 2001
January 24, 2001

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- 2/16

David Gilbert
Hearing Examiner