STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CBEYOND COMMUNICATIONS, LLC	)	
	)	
-VS-	)	
	)	**Docket No. 10-0188**
ILLINOIS BELL TELEPHONE COMPANY D/B/A	)	
AT&T ILLINOIS	)	
	)	
FORMAL COMPLAINT AND REQUEST FOR	)	
DECLARATORY RULING PURSUANT TO SECTIONS	)	
13-515 AND 10-108 OF THE ILLINOIS PUBLIC	)	
UTILITIES ACT	)	

RESPONSE IN OPPOSITION
TO ILLINOIS BELL TELEPHONE COMPANY'S MOTION TO DISMISS CBEYOND COMMUNICATIONS, LLC'S FORMAL COMPLAINT AND REQUEST FOR DECLARATORY RULING

Cbeyond Communications, LLC ("Cbeyond"), by its attorneys Kelley Drye & Warren, LLP, hereby submits its Response In Opposition To Illinois Bell Telephone Company's Motion To Dismiss Cbeyond's Formal Complaint And Request For Declaratory Ruling ("Motion To Dismiss") and respectfully requests that the Illinois Commerce Commission ("Commission") deny Illinois Bell's Motion To Dismiss for the following reasons:

INTRODUCTION

AT&T's motion to dismiss must be denied because it is grounded on the false assumption that an Enhanced Extended Link ("EEL") constitutes a single Unbundled Network Element ("UNE") provisioned to Cbeyond which must be installed and uninstalled as a single UNE.[1] This premise underlying AT&T's defense to this complaint has been rejected by the FCC. In the *Triennial Review Order*, the FCC rejected ILEC claims that an EEL is a single provisioned UNE, and mandated that LECs provision loop and transport separately to form EEL combinations:

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[1] AT&T's Motion claims that "[o]ne of the UNEs that AT&T Illinois provides pursuant to the ICA is the UNE DS1 loop/DS1 transport Enhanced Extended Link ('EEL')." AT&T Motion at 2.

> "our rules currently require incumbent LECs to make UNE combinations, including loop-transport combinations, available in all areas where the underlying UNEs are available and in all instances where the requesting carrier meets the eligibility requirements. We decline to designate EELs as additional UNEs for which an impairment analysis is necessary. Instead, we continue to view EELs as UNE combinations consisting of unbundled loops and unbundled transport (with or without multiplexing capabilities). Pursuant to the statute, requesting carriers are entitled to nondiscriminatory access to UNE combinations on just, reasonable, and nondiscriminatory rates, terms and conditions . . . our rules do not permit incumbent LECs to impose additional conditions or limitations upon obtaining access to EELs and other UNE combinations . . . ."

TRO at ¶ 575[2]; *see also, In re XO Illinois, Inc.*, Arbitration Decision, ICC Case No. 04-0371 (Oct. 28, 2004), 2004 WL 3050537, fn. 54, "[a] dark fiber EEL is simply a combination of separate elements, as described by the FCC." Notwithstanding the FCC's mandate that AT&T provision EELs as separate UNEs (a loop UNE and a transport UNE), AT&T requires Cbeyond to pay for changes to EEL combinations as if the EEL is a single provisioned UNE. AT&T's verified answer confirms that Cbeyond has requested that Illinois Bell merely cross connect an existing DS1 UNE loop to new transport facilities, but that Illinois Bell has refused to process Cbeyond's requests to make these changes. Verified Answer at ¶¶ 25, 26. Illinois Bell further admits that, despite Cbeyond's request to not make a change in the DS1 loop when a change in the transport UNE is all that is requested, Illinois Bell "imposes several separate nonrecurring charges to disconnect and reinstall the UNE Loop. . . . " Verified Answer at ¶ 36. Illinois Bell's conduct is unlawful, a violation of state and federal law, and a breach of the parties' interconnection agreement and – most importantly here – properly plead.

Illinois Bell <u>*refuses to process*</u> orders to modify transport unless it receives disconnection and re-provision orders for each of the UNEs that comprise the EEL. Complaint, ¶¶ 25, 26. However, there is no provision of the parties' Interconnection Agreement that allows AT&T to

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[2] *Triennial Review Order* ("*TRO*"), 18 FCC Rcd. 16978, ¶ 575 (August 21, 2003).

impose this requirement on Cbeyond; Illinois Bell imposes the loop-disconnection requirement on Cbeyond, and Cbeyond has submitted loop disconnection order only under protest. Complaint ¶ 26. While Illinois Bell claims that it may impose the requirement on Cbeyond, the only clause that Illinois Bell identifies to support its position in Section 9.3.3.4, which provides that "[f]or a new UNE combination listed on Table 1, CLEC shall issue appropriate service requests." *See Illinois B ell* Motion at p. 3, *citing* § 9.3.3.4 of the UNE Appendix, attached as Exh. C to Illinois Bell's Motion. The question, then, in this proceeding is whether it is "appropriate" for Illinois Bell to require the disconnection and reinstallation of a UNE provisioned loop, when Cbeyond ***only*** requests a change in the UNE transport.

The Complaint further alleges that even when Illinois Bell inappropriately requires Cbeyond to submit loop disconnect and reinstallation order, Illinois Bell doesn't actually do any work on the loop, yet charges Cbeyond TELRIC rates approved by the Commission for those instances where the work is actually required, and performed. Complaint, ¶ 33. Illinois Bell's Motion To Dismiss doesn't defend its practice of charging Cbeyond for physical work that isn't required, and which Illinois Bell doesn't perform. Instead, Illinois Bell attempts to confuse the Commission's focus by claiming that Cbeyond fails to state a claim upon which relief can be granted, or by claiming that the Commission has no authority to examine Illinois Bell's unfair practice. Illinois Bell's practice of charging Cbeyond for work it does not perform is unjust, unreasonable, and discriminatory to Cbeyond. This practice is not authorized by the parties' interconnection agreement or by any state or federal rules or regulations, is contrary to Illinois Bell's prior practice with Cbeyond, and appears aimed at unduly restricting Cbeyond's ability to utilize competitive carriers' transport services. As demonstrated below, each of Illinois Bell's arguments are meritless. Illinois Bell's Motion To Dismiss should be rejected.

STANDARD OF REVIEW

Illinois Bell's fleeting reference to dismissal standards in its Motion To Dismiss is telling.[3] "A motion to dismiss … challenges the legal sufficiency of a complaint by alleging defects on its face." *Iseberg v. Gross*, 366 Ill. App. 3d 857, 860 (1st Dist. 2006), *citing City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). In reviewing the sufficiency of a complaint, the Commission must accept as true all well-pled facts, and draw all reasonable inferences in favor of plaintiffs. *See Iseberg*, 366 Ill. App. 3d at 860, citing *Brewster v. Rush-Presbyterian- St. Luke's Medical Center*, 361 Ill. App. 3d 32, 35 (1st Dist. 2005). "The complaint is to be construed liberally and should only be dismissed when it appears that plaintiff could not recover under any set of facts." *Elson v. State Farm fire & Cas. Co.*, 295 Ill. App. 3d 1, 5 (1st Dist. 1998); *Fitzgerald v. Chicago*, 72 Ill. 2d 179, 187 (1978).[4]

ARGUMENT

Ignoring these standards and its own practice of charging for work that is neither authorized, nor performed, Illinois Bell argues that Cbeyond's formal complaint should be dismissed either because the parties' interconnection agreement "preempts" the Commission's authority and state law, or because Cbeyond's complaint purportedly fails to allege facts sufficient to state a claim. Each of Illinois Bell's arguments are deficient. Therefore, the Commission should deny Illinois Bell's Motion To Dismiss in its entirety.

I. Cbeyond States A Claim For Breach Of The Parties' Interconnection Agreement. (Count IV).

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[3] Illinois Bell's Motion to Dismiss is a "hybrid" motion to dismiss, in that it attacks both the legal sufficiency of the complaint, and argues other affirmative matter that purportedly warrant dismissal. *See e.g. Schlenz v. Castle*, 132 Ill. App. 3d 993 (2nd Dist., 1985.) This practice is not favored because there are different standards that apply to motions challenging whether sufficient facts are pled, versus motions that raise other affirmative matter. *Id.*

[4] And, amendment of the complaint is favored over dismissal on the pleadings.

Illinois Bell argues that Count IV does not state a claim "because it does not identify any contract provisions that AT&T is alleged to have breached or explain how AT&T Illinois' charges or practices breach those provisions. Motion To Dismiss at 6. Not only is Illinois Bell's argument meritless, affirmative statements in its Motion to Dismiss make matters worse for Illinois Bell.

Cbeyond specifically alleges that Illinois Bell's action to unlawfully tether a loop disconnect order when Cbeyond only requests a change to a transport UNE is a breach of Sections 9.1.1 and 9.1.3 of the parties' ICA. Complaint ¶ 31, 44, 46.[5] Section 9.1.3 requires that Illinois Bell "price each UNE separately" and prohibits Illinois Bell from requiring Cbeyond "to purchase any Unbundled Network Element in conjunction with any other service or element." Ex. A, § 9.1.3. It is a breach of the interconnection agreement for Illinois Bell to compel Cbeyond to submit loop disconnect orders when Cbeyond only requests a change in the transport UNE. Section 9.1.1 also requires Illinois Bell to "provide nondiscriminatory access to UNEs at rates in accordance with the Federal Telecommunications Act of 1996, applicable FCC orders, rules and regulations and applicable state statutes, orders, rule and regulations." Ex. A, § 9.1.1. As noted above, it is a violation of the *TRO*, and § 9.1.1 for Illinois Bell to compel Cbeyond to make a change to the UNE Loop when Cbeyond only requests a change to the transport UNE. *TRO* at ¶ 575.

Illinois Bell only refers to Paragraph 81 to claim that the Complaint fails to identify the section of the parties' agreement that has been breached, intentionally ignoring paragraph 80 which incorporates Paragraph 31. See Complaint, ¶80. Moreover, Cbeyond's pleading more than satisfies the Illinois pleading standard to withstand a motion to dismiss, which merely

[5] The sentence at the end of paragraph 31 is quoted from Section 9.1.3 of the parties' ICA.

requires a complaint to "allege facts sufficient to indicate the terms of the contract claims to have been breach." *Nielsen v. United Services Automobile Association*, 244 Ill. App. 3d 658, 662 (2d Dist. 1993); *accord OnTap Premium Quality Waters, Inc. v. Bank of Northern Illinois*, 262 Ill. App. 3d 254, 258-59 (2d Dist. 1994) ("plaintiff must have alleged the existence of a contract, performance of all contractual conditions, facts of defendant's breach, and the existence of damages as a consequence thereof"). Thus, in *Nielson*, the court held that a cause of action for breach of contract is sufficient where the complaint pleads facts sufficient to identify the terms of the contract at issue or the contractual duty upon which the claim was made. *Nielson*, 244 Ill. App. 3d at 662. Here, as described above, Cbeyond has alleged provisions of the agreement that Illinois Bell has breached and has alleged the facts upon which its claims are made. Therefore, Illinois Bell's premise that it "has not been apprised of the contract provision it allegedly violated" is flatly false.

More significantly, Illinois Bell's motion makes it clear that Illinois Bell fully intends to violate federal law and the parties' Interconnection Agreement. First, Illinois Bell argues that "the 'rearrangement of an EEL – or the 'cross-connect' of a loop to a different transport – is not a product or service available to Cbeyond under the terms of the ICA." Illinois Bell Motion to Dismiss at 3. In support, Illinois Bell argues pointedly that there are no authorized charges under the parties' pricing schedule that would permit Illinois Bell to perform these services. *Id.* However, Illinois Bell's argument makes Cbeyond's point – the ICA requires Illinois Bell to connect an existing loop UNE provisioned to Cbeyond with alternative transport "obtained at wholesale from SBC . . . or third parties." *TRO/TRRO Amendment*, §§ 5.2, Ex. B The ICA even cites as an example, "SBC will, upon request, connect loops [or an EEL] leased or owned by CLEC to a third-party's collocation arrangement . . .." *TRO/TRRO Amendment*, § 5.3, Ex. B.

Notwithstanding, Illinois Bell's Motion admits that there have been no prices determined by the Commission for this service, and that the parties' ICA does not contain a provision that permits Illinois Bell to impose any charges. Motion to Dismiss at 3. Illinois Bell's argument is actually what Cbeyond alleges in the Complaint. Complaint, ¶¶ 22, 37, 38, 40, 41, 42, 43, 44, 53, 54,

Second, Illinois Bell claims that § 9.3.3.4 of the parties' ICA imposes an "ICA-mandated process . . . for switching from a DS1 EEL to a new serving arrangement: (a) ordering a disconnection of an existing DS1 EEL; and (b) ordering the new serving arrangement using the DS1 loop, pursuant to Section 9.3.3.4 of the ICA's UNE Appendix." Illinois Bell Motion at 7. Illinois Bell's claim that Section 9.3.3.4 actually permits it to tether a disconnection and reinstallation of the loop UNE when Cbeyond only requests a change in the transport UNE on an EEL is outlandish. Section 9.3.3.4 only provides that "[f]or a new UNE combination listed on Table 1, CLEC shall issue appropriate service requests." Nowhere in Section 9.3.3.4 (or Table 1) is Illinois Bell authorized to require Cbeyond to disconnect and reinstall the loop UNE when all Cbeyond requires is to change the transport UNE on an EEL. Illinois Bell's claim that the generic language in Section 9.3.3.4 authorizes the very conduct that is the foundation of the complaint is significant – if Section 9.3.3.4 is the provision on which Illinois Bell imposes its unjust and unreasonable fees, then Cbeyond may be entitled to a judgment as a matter of law, for there is nothing in this section that permits Illinois Bell to violate other provisions of the parties' ICA or the *TRO*.

Cbeyond agrees that § 9.3.3.4 is an important provision in this dispute. Section 9.3.3.4 does allow the parties to reach agreement to determine what is an "appropriate" service request when Cbeyond wishes to change the transport UNE on a EEL. However, Illinois Bell argues that it is unilaterally authorized to say that the "appropriate" service request is one which requires

Cbeyond to not only pay for the disconnection of the transport, but also requires the disconnection and reinstallation of a UNE loop. Cbeyond has never agreed to this, the parties' ICA cannot be read to require this, this interpretation conflicts with federal law, and Illinois Bell's claim that Section 9.3.3.4 preempts federal law is unfounded and baseless. As made clear by the *TRO*, an EEL is made up of a combination of loops and transport facilities, connected by cross connections, it is not itself a UNE. *TRO*, ¶ 575.

Instead of addressing the issue on point, Illinois Bell brazenly argues that Cbeyond attempted to amend the parties' interconnection agreement to allow the parties to change one portion of an EEL combination, and that this effort somehow exempts Illinois Bell from any liability for a breach to the parties' interconnection agreement. Nothing could be further from the truth. As Cbeyond alleged in the Complaint, Illinois Bell has never been authorized by the ICC to charge CLECs for the loop UNE disconnection and reinstallation when the transport UNE is modified. Complaint, ¶ 40. The complaint further alleges that neither the ICA nor any tariff authorizes Illinois Bell to impose those charges. Complaint, ¶ 37, 41. However, in an attempt to reach a resolution of which service requests would be required, Cbeyond tried to negotiate alternative arrangements. Complaint, ¶ 57. At first, Illinois Bell agreed to some provisions, but later rescinded its agreement. Complaint, ¶ 49-50. Illinois Bell's claim that Cbeyond's efforts to resolve the parties' dispute is an admission that Illinois Bell's conduct is authorized by the ICA is not only an attempt to revise history, but rebutted directly by the allegations of the Complaint.

Despite Illinois Bell's contentions, Count IV is based on allegations that Illinois Bell's charges for UNE loop disconnect and reinstallation charges breaches the parties' ICA, and are not authorized by the parties ICA, which itself is a breach of the ICA. Illinois Bell acknowledges that it refuses to process orders to allow Cbeyond to migrate a portion of an EEL

combination to a competitive carrier unless Cbeyond pays for the entire combination of loop, transport and cross connect disconnection and re-provisioning. This is an express violation of the terms of the parties' interconnection agreement and therefore a breach. Illinois Bell's Motion To Dismiss as to Count IV should be denied.

II. The Illinois Commerce Commission has Jurisdiction to Enforce State Laws that Regulate the Conduct of Telecommunications Carriers. (Counts I – III).

Illinois Bell next argues that the parties' interconnection agreement 'preempts' all state law (and presumably Commission orders and decisions), because interconnection agreements were contemplated by the federal Telecommunications Act of 1996, 42 U.S.C. § 252 (the "Act"). (Motion To Dismiss, 8-9). Illinois Bell states that, "[t]o the extent that Cbeyond claims that state law imposes obligations on AT&T Illinois above and beyond, or even contrary to, what the parties agreed to in their ICA, the state law is preempted." (Motion To Dismiss, 10).

First, it is bizarre that Illinois Bell would hide behind the federal law in support of its unlawful conduct. Nowhere does Illinois Bell claim, argue or give a hint of the purported federal law that supports its position that it may impose the allegedly unlawful UNE loop disconnection and reinstallation charges (*i.e.* charges that are not authorized by statute, FCC order, ICC order, the ICA, state tariff or any other basis.) Second, the complaint alleges that Illinois Bell's failure to comply with the terms of the parties' interconnection agreement and its obligations under state and federal law, constitute an independent state law violation. Third, Illinois Bell's argument that the Commission lacks jurisdiction over the interconnection arrangements between Cbeyond and Illinois Bell not only ignores Section 13-514 of the Act, which prohibits a carrier from knowing impeding competition, but would require the Commission to ignore numerous other sections of the Act and case law to the contrary. Several sections of the Illinois Public Utilities Act impose duties and obligations on carriers, and require the Commission to enforce regulations

over carrier to carrier relationships, including Section 13-702 (prohibiting discrimination by a telecommunications carrier), Section 13-509 (governing the agreements for the provision of competitive services), Section 13-505.6 (governing the provision of unbundled network elements), and Section 13-505.2 (prohibiting discrimination in the provision of noncompetitive services.) Moreover, no case has ever held that the Illinois Commerce Commission's authority over the relationship between Illinois Bell and Cbeyond is limited to the parties solely limited to the parties' interconnection agreements, and Illinois Bell has not cited a single case to support its claim.

It is clear that Illinois Commerce Commission has jurisdiction over allegations of breach an interconnection agreement approved under 47 U.S.C. § 252, even where the allegations of a complaint also allege violations of state laws. *Sprint Communications L.P. v. Illinois Bell Telephone Co.*, Order, ICC Dkt. No. 07-0629, 2008 WL 5971191 (July 30, 2008); *Verizon Maryland Inc. v. Public Service Commission*, 240 F.3d 279, 304 (4thCir. 2001), vacated on other grounds, 535 U.S. 635 (2002)[6]; *see also Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000); *South-western Bell Tel. Co. v. Brooks Fiber Comm. of Oklahoma, 235 F.3d 493* (10th Cir. 2000). Further, the FCC has concluded that "inherent in state commissions' express authority to mediate, arbitrate, and approve interconnection agreements under § 252 is the authority to enforce previously approved agreements." *In Re Starpower Communications*, 15 F.C.C. Red.1127747 (2000). In *Sprint*, the Commission rejected similar claims by Illinois Bell that the Commission lacked jurisdiction to adjudicate whether

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[6] The Fourth Circuit held that both Maryland law and the Federal Communications Act of1934 grant the Commission authority to interpret and enforce interconnection agreements that it approves under §252, but the Supreme Court found it unnecessary to address this issue on review.

Illinois Bell's conduct violated Section 13-514, Section 10-108, and Section 13-801 of the Illinois Public Utilities Act. The Commission held that "it is well established that AT&T already must comport with state-specific requirements regarding interconnection." *Id.* at *10. It is plain that the Commission was created to exercise supervisory powers over Illinois public utilities such as Illinois Bell. *Sheffler v. Commonwealth Edison Co.*, No. 09-0849, 2010 WL 743883, *7 (1st Dist., Feb. 26, 2010); citing 220 ILCS 5/4-101 and *Alhambra-Grantfork Tel. Co. v. Illinois Commerce Comm'n*, 358 Ill. App. 3d 818, 823 (5th Dist. 2005). And, while it is true that the Commission's power to regulate public utilities must be derived solely from statute and not through its own action (*see Peoples Energy Corp. v. Illinois Commerce Comm'n*, 142 Ill. App. 3d 917, 923 (1st Dist. 1986)), the Illinois Public Utilities Act specifically authorizes the Commission to entertain actions such as those found in Cbeyond's Complaint. The court in *Sheffler* explained:

> The Act specifically provides that the Commission "shall have general supervision of all public utilities" including "the manner in which their plants, equipment and other property * * * are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with this Act and any other law, with the orders of the Commission and with the charter and franchise requirements." Further, authority to order improvements to a public utility's facilities is vested with the Commission in section 8-503 of the Act.

Citing 220 ILCS 5/4-101 and 220 ILCS 5/8-503. In fact, "[t]he very purpose of the Act is to maintain control over the operation of utilities so as to prevent them from exacting unjust, unreasonable, and discriminatory rates." *Id.* at *8; *citing Bloom Township High School v. Illinois Commerce Comm'n*, 309 Ill. App. 3d 163, 175 (1999).

Consequently, Illinois Bell's argument that the Commission's role in regulating a public telephone utility is always confined to "arbitrating, approving, and enforcing interconnection agreements" under section 252 of the Act is simply false. (Motion to Dismiss, 8). Cbeyond's

Complaint and each of its causes of action allege that Illinois Bell's practice of charging Cbeyond for services it does not perform, and which are barred by federal law, the parties' ICA, and its Bell's tariffs, is unjust, unreasonable and discriminatory, which is an area specifically reserved for Commission action. Therefore, there can be no doubt that the Commission has the authority to entertain this action.

Illinois Bell's argument that the parties' interconnection agreement 'preempts' all state laws and that therefore state law is 'irrelevant' to Illinois Bell's interactions with Cbeyond is completely meritless and unfounded. (Motion To Dismiss, 8-10). Illinois Bell cites a litany of case which stand for the proposition that federal telecommunications laws preempt inconsistent state law.[7] In point of fact, none of the cases cited (and no case found by Cbeyond) stand for the radical proposition forwarded by Illinois Bell: that the Commission may not entertain an action based on a telecommunications carrier's unjust, unreasonable and discriminatory practices *unless* that practice is found in the terms of an interconnection agreement approved by the Commission.

Here, Cbeyond properly alleges that no provision of the parties' interconnection agreement contemplates mere cross connection re-assignments, and that Illinois Bell's conduct violates that parties' ICA. Cbeyond alleges that "[t]here is no provision in the parties' Interconnection Agreement that authorizes" Illinois Bell to require Cbeyond to require disconnection and re-provisioning of portions of an EEL combination where those facilities are

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[7] *See Law Offices of Curtis v. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002) (finding that a 47 U.S.C. § 252 interconnection agreement controls over the list of general duties found in 47 U.S.C. § 251; no reference state law violations or preemption of state laws); *Goldwasser v. Ameritech Corp.*, No. 97 C 678, 1998 WL 60878, *11 (N.D. Ill. Feb. 4, 1998) (same). And *Michigan Bell Tel. Co. v. MCIMetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir.) actually undercuts Illinois Bells position by stating that "The [1996] Act permits a great deal of state commission involvement in the new regime … According to the Federal Communications Commission, as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the [1996] Act, state regulations are not preempted." *Citing In re Public Utilities Commission of Texas*, 13 FCC Rcd 3460 ¶ 52 (Oct. 1, 1997).

contemplated to remain the same. Complaint, ¶ 37. The Commission must accept these facts as true under the standards for a motion to dismiss. Moreover, Illinois Bell admits that that it affirmatively *refuses to process* change orders for portions of EEL combinations. Therefore, Illinois Bell's argument would be valid only if the Interconnection Agreement required Illinois Bell's conduct, such conduct was required by federal law, and such conduct conflicted with state law. However, Illinois Bell has not even alleged that the relief requested under state law would conflict with a federal law.

And, as described above, the Commission has the authority to entertain causes of action based on Illinois Bell's unjust, unreasonable and discriminatory pricing and. *See Abbott Labs, Inc. v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 711 (1st Dist. 1997) ("The Commission possesses plenary power under the Act with respect to the supervision of public utilities, including the power to establish reasonable rates and charges for service"). Therefore, the Commission plainly has statutory authority to examine Illinois Bell's unjust, unreasonable and discriminatory practice of charging Cbeyond for services it does not perform, regardless of whether it is found in the parties' interconnection agreement or not. Moreover, the parties' interconnection agreement does not 'preempt' state law, and the Commission must apply federal and state law to determine whether Illinois Bell's practices are unjust, unreasonable or discriminatory. Consequently, Illinois Bell's Motion To Dismiss as to Counts I through III as 'preempted' should be denied.

III. The Complaint states a claim for 220 ILCS 5/13-514 (Count I), for 13-801 (Count II), and for 9-250 (Count III).

Sensing the weakness of its 'preemption' arguments, Illinois Bell takes on Counts I through III individually. However, Illinois Bell's facile arguments raise no issues as to the legal sufficiency of any of these claims. *Iseberg v. Gross*, 366 Ill. App. 3d 857, 860 (1st Dist. 2006);

City of Chicago v. Beretta U.S.A. Corp., 213 Ill. 2d 351, 364 (2004). Instead, Illinois Bell disputes Cbeyond's factual allegations, and then claims that Cbeyond has failed to state a claim. Once again Illinois Bell ignores the standards on motions to dismiss which require the facts alleged in Complaint be treated as true, and is wrong on the law. *Id*.

A. Cbeyond States A Claim For 220 ILCS 5/13-514 (Count I).

Count I of Cbeyond's Complaint is directed to Illinois Bell's improper practice of charging Cbeyond for services it does not perform. As a result of this improper practice, Cbeyond alleges violations under subsections (1), (2), (6), (8), (10) and (11) of 220 ILCS 5/13-514. Illinois Bell's Motion To Dismiss takes issues with five of the six per se impediments to competitions as examples of violations section 5/13-514.[8] None of Illinois Bell's arguments with regard to these five subsections are sufficient to dismiss for failure to state a claim and Illinois Bell completely ignores the standard for violation of section 5/13-514, namely whether its practices are an impediment to competition in the marketplace.[9]

Section 13-514 provides that "[a] telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market." Regardless of any subsections, allegations relating to this statement alone are sufficient to state a claim for violation of section 13-514. Cbeyond alleges that this practice increases its own costs to connect exiting UNE loops to new third party competitive providers and increases costs to utilize transport form alternative transport carriers. (Complaint, ¶¶ 40, 55). Moreover, these costs are not imposed by

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[8] Illinois Bell's Motion To Dismiss does not take issue with (and therefore waives any dismissal arguments on) Cbeyond's allegations with regard to 220 ILCS 5/13-514(6). *Compare* Complaint, ¶ 64 *with* Motion To Dismiss, 11-12.

[9] Subsection (11) creates a per se impediment for a violation of 220 ILCS 5/13-801. Cbeyond's response to Illinois Bell's Motion To Dismiss is treated supra, in Section III.B.

Illinois Bell on itself when it does cross connect re-assignment for grooming in its network. These allegations are sufficient to defeat Illinois Bell's motion.

In addition, Cbeyond's Complaint alleges that Illinois Bell must permit Cbeyond to terminate High Capacity EELs to third party's facilities and collocations. *See* Complaint, 2 and ¶ 23, citing Section 6.3.4 ICA; TRO/ TRRO Amendment §§ 5.2 and 3. The Complaint further alleges that Illinois Bell "refuses to permit Cbeyond to use a third-party transport provider" unless Cbeyond pays charges for work it does not perform. (Complaint, 3 and ¶¶ 26, 45-46.) And, the Complaint plainly alleges that Illinois Bell's refusal to effectuate the cross connect without paying for the unperformed services of disconnection and re-provisioning "restrict[s] Cbeyond's ability to utilize transport from alternative transport carrier" because it must pay a fee for services not performed to migrate its traffic away from Illinois Bell (Complaint, ¶¶ 54 and 55). Therefore, Illinois Bell's argument that there are no allegations as to its refusal or delay in providing interconnection is false. Cbeyond has properly plead facts sufficient to state a cause of action under 220 ILCS 5/13-514.

In addition, however, Illinois Bell's practice of charging for work not performed demonstrates several *per se* violations of section 13-514. A *per se* violation is a statutorily-identified act considered an impediment to competition and therefore a violation of section 13-514.

With regard to subsections (1) and (2), Illinois Bell argues that the "Complaint does not allege that AT&T Illinois has refused to provide or delayed providing interconnection or collocation to Cbeyond" and "does not allege that AT&T Illinois' actions have impaired the speed, quality or efficiency of services AT&T provides." (Motion To Dismiss, 11). Once again, Illinois Bell's arguments are factually false and miss the mark on the law.

In both subsection (1) and (2), Illinois Bell argues that Cbeyond does not sufficiently plead that it delayed or impaired the quality of services provided by Cbeyond even if it imposes unjust, unreasonable and unauthorized charges, prevented Cbeyond from changing to an alternative transport provider, and required Cbeyond to pay for unnecessary loop disconnection and reinstallation charges.. *See* Motion To Dismiss, 11. However, other than asserting that Cbeyond has not plead the necessary elements for a violation of Section 13-514(1) and (2), which it has (see ¶¶ 59-63), Illinois Bell does not raise a legal defense to these allegations. Moreover, Section 5/13-514's focus is preventing a carrier from "knowingly imped[ing] the development of communication in any telecommunications service market." Illinois Bell's refusal to execute a cross-connection to an alternative transport provider, without payment for work it does not perform (the UNE loop disconnection and reinstallation charges), inhibits Cbeyond from migrating traffic to competitive carriers, which falls squarely into this category. Therefore, under subsections (1) and (2), Illinois Bell's a practice is *per se* impediment to the development of competition.

Next, Illinois Bell explains that "[s]ubsection (8) applies to situations where a carrier has 'violated the terms of … an interconnection agreement in a manner that unreasonably delays, increase the cost, or impedes the availability of telecommunications services to consumers'." (Motion To Dismiss, 11-12). Cbeyond agrees. [10]

However, Illinois Bell states that no claim is alleged because either there is no allegation that "if Cbeyond prevailed here, it would make its services available to consumers at lower prices or more quickly or more broadly", or because "Cbeyond makes only conclusory allegations." (Motion Dismiss, 12 and fn.5). Illinois Bell's arguments are unsupported because

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[10] Cbeyond described the sections of the ICA that Illinois Bell violated in Section I, *infra*.

there is no requirement that a complaint demonstrate that the final price for consumers would be lower to demonstrate a harm to competition. Moreover, Illinois Bell's argument that Cbeyond's allegations are "conclusory" once again ignores the pleading standards for a motion to dismiss. *See Iseberg*, 366 Ill. App. 3d at 860 (in reviewing the sufficiency of a complaint, the Commission must accept as true all well-pled facts, and draw all reasonable inferences in favor of plaintiffs). Therefore, Illinois Bell's arguments with regard to section (6) are baseless and its motion to dismiss this claim should be rejected.

Lastly, Illinois Bell takes issue with Cbeyond's allegations regarding subsections (10). Illinois Bell states that a *per se* violation of section 13-514 could only be found if it had "failed to offer network elements," and that Cbeyond has never been refused access to its network. (*See* Motion To Dismiss, 12).

Once again, Illinois Bell mis-reads the statute and Complaint. Subsection (10) states that Illinois is in violation if it "fail[s] to offer network elements that the Commission or the Federal Communications Commission has determined must be offered on an unbundled basis to another telecommunications carrier *in a manner consistent with* the Commission's or Federal Communication Commission's orders or rules requiring such offerings." (emphasis added). Cbeyond's Complaint correctly (and properly) alleges that Illinois Bell's practice of charging Cbeyond for disconnection and re-provisioning the entire combination of an EEL when it merely disconnects the transport portion of the EEL is not consistent with the Commission's or Federal Communications Commission's orders and rules. (*See* Complaint, 2 and ¶¶ 23, 27-29) (citing Section 6.3.4 ICA; TRO/ TRRO Amendment §§ 5.2 and 3; 47 CFR § 507(e); In the matter of Illinois Bell Telephone Company filing to Increase Unbundled Loop And Nonrecurring Rates,

ICC Docket 02-0864, at 174 (Jun. 9, 2004)). Consequently, Illinois Bell's arguments regarding subsection (10) are meritless.

Analysis of Illinois Bell's arguments with regard to Section 13-514 reveals that Illinois Bell does not dispute the fact that its practice impedes competition in the marketplace generally, and fails as to each of the per se impediments alleged in Cbeyond's Complaint. Consequently, Illinois Bell's Motion To Dismiss should be denied with respect to its Section 13-514 claim, Count I of the Complaint.

B. Cbeyond States A Claim For 13-801 (Count II).

Count II of Cbeyond's Complaint alleges a violation of 220 ILCS 5/13-80113-801(b)(1). Section 13-801(b)(1) provides that Illinois Bell, as an incumbent local exchange carrier, "shall provide for the facilities and equipment of any requesting telecommunications carrier's interconnection with incumbent local exchange carrier's network on just, reasonable, and nondiscriminatory rates, terms and conditions." Illinois Bell argues that section 13-801(b)(1) can only be alleged if Cbeyond identifies "a single carrier to which AT&T Illinois supposedly provided facilities and equipment of better quality or functionality than what AT&T provided Cbeyond." (Motion, 13).

First, Illinois Bell has cited no case law, and Cbeyond has similarly found no case law, that states that a complaint must allege with specificity the names of other carriers that an incumbent carrier like Illinois Bell has discriminated in favor of. Instead, a complaint will satisfy its burden of pleading (and thus will properly state a claim) where the complaint alleges that "the particular transgression was unreasonable in light of all the relevant surrounding circumstances." *See 21st Century Telcom of Illinois, Inc.*, Ill. Com. Comm'n, No. 00-0219 at 24, 2000 WL 1344506 (Jun. 15, 2000).

Here, Cbeyond's Complaint alleges that Illinois Bell charges Cbeyond and other competitive local exchange carriers to terminate and re-connect transport facilities that it does not charge itself, which inhibits use of competitive carriers by Cbeyond. (Complaint, 3 and ¶¶ 26, 45-46, 54-55). Moreover, the practice of Illinois Bell charging Cbeyond for services that it does not charge itself is discriminatory under Section 13-801(b)(1). Therefore, Illinois Bell is squarely wrong when it states that Cbeyond has not alleged facts identifying that charges unjust, unreasonable, and discriminatory charges and conditions by charging Cbeyond for services that it does not charge itself. Consequently, Cbeyond has stated a claim for section 13-801 and Illinois Bell's Motion To Dismiss as to Count II should be denied.

C. Cbeyond States A Claim For Relief Under Section 9-250 (Count III).

Count III of Cbeyond's Complaint requests that the Commission investigate Illinois Bell's practice of charging Cbeyond for services it does not perform under 220 ILCS 5/9-250. Specifically, Illinois Bell's practice requires Cbeyond to submit a disconnection and re-provision order for all of the loops and facilities in the EEL combination when Cbeyond requests only one portion of the EEL be changed to new transport provider. (Complaint, ¶ 78). Illinois Bell claims that "the Commission has no authority to do what Cbeyond requests." (Motion To Dismiss, 13). Once again, Illinois Bell is mistaken. Section 9-250 provides that "[t]he Commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice … of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof." Moreover, the statute provides that the "Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules,

regulations, contracts or practices" after finding charges or practices "unjust, unreasonable, discriminatory or preferential."

Despite the clear language in the statute, Illinois Bell claims that the Commission is limited to enforcing the parties' interconnection agreement, a redux of its arguments stating that state law is 'preempted' by the interconnection agreement. For all the reasons stated in Section II, Illinois Bell's arguments here should be rejected. Here, no provision of the parties' interconnection agreement allows Illinois Bell to tether the disconnection of the loop UNE when Cbeyond requests a change in the transport UNE, and no provision of the parties' ICA permits Illinois Bell to impose unjust and unreasonable fees for that practice. Moreover, Cbeyond's Complaint alleges that, "[b]y inappropriately increasing Cbeyond's cost to migrate to higher bandwidth transport services, Illinois Bell has unreasonably restricted Cbeyond's ability to utilize transport from alternative transport carriers. [Illinois Bell's] action have impaired and frustrated Cbeyond's ability to purchase transport from third-party transport vendors …" (Complaint, ¶ 55). Consequently, Cbeyond has stated a claim and the Commission should deny Illinois Bell's Motion To Dismiss as to Count III.

IV. Cbeyond's Prayers For Relief Are Not Limited To Illinois Bell's Breach Of The Parties' Interconnection Agreement.

Lastly, Illinois Bell seeks to strike "direct, proximate and consequential damages, attorney fees and all other costs" sought by the Cbeyond Complaint. (Motion To Dismiss, 17). The Commission should recognize Illinois Bell's arguments as a red herring, and a transparent attempt to divert the issue away from its practice of charging Cbeyond for work it does not perform.

Cbeyond's Complaint validly states a claim against Illinois Bell for a violation of 220 ILCS 5/13-514 (Count I), a violation of 220 ILCS 5/13-201 (Count II), a violation of 220 ILCS

5/9-250 (Count III), and a breach of the parties interconnection agreement (Count IV). Illinois Bell claims that the parties' interconnection agreement precludes recovery for these violations based on the interconnection agreement's limitation of liability clauses. Yet, even the interconnection agreement's terms cited by Illinois Bell do not preclude direct damages. *See* Section 1.7.1.2 and 1.7.2. And, Illinois Bell fails to explain why the damages permitted pursuant to 220 ILCS 5/13-516 for violations by telecommunications carriers who conduct prohibited act cannot be assessed by the Commission. Illinois Bell presents no case law or argument that indicates the Commission cannot assess these remedies in light of unjust, unreasonable and discriminatory conduct by Illinois Bell and fails to even cite to section 516. Consequently, Illinois Bell's arguments seeking to strike Cbeyond's prayers for relief fail to raise a question as to the validity of the relief sought. These argument should therefore be rejected.

CONCLUSION

Illinois Bell's Motion To Dismiss fails to defend its practice of charging Cbeyond for work it does not perform. Therefore, it is uncontested and admitted that when Cbeyond seeks to change the a portion of an EEL combination, Illinois Bell charges Cbeyond to fully disconnect and re-provision all portions of the EEL, including the loop, transport facilities and cross connections. Yet, Illinois Bell does not disconnect, install or provision a all portions of the EEL, as a result of Cbeyond's request. Instead, Illinois Bell performs the work requested by merely changing one part of the EEL (leaving untouched the remaining EEL facilities), but still charges Cbeyond as if it were performing disconnection, installation and provisioning of these loops and transport services. The Parties' ICA provides that Illinois Bell may require "appropriate" service requests and these appropriate service requests will be charged pursuant to the ICA Pricing Schedule. The parties disagree over the "appropriateness" of the service request required by

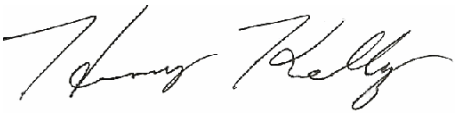
Illinois Bell and the "appropriateness" of the charges assessed to change to an alternative transport arrangement associated with a previously installed UNE loop. It is not appropriate for Illinois Bell to require Cbeyond to submit orders for work that it will not and does not do, and it is not appropriate for Illinois Bell to charge Cbeyond for work that it did not do. It is the traditional role of the Commission to resolve the parties' dispute over what is "appropriate" in this instance.

Illinois Bell's Motion To Dismiss fails to challenge the key facts alleged in Cbeyond's Complaint, and fails to acknowledge the standards for motions to dismiss. Consequently, Illinois Bell's Motion To Dismiss should be denied in its entirety.

Respectfully Submitted,

Dated: April 26, 2010

CBEYOND COMMUNICATIONS, LLC



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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CBEYOND COMMUNICATIONS, LLC	)	
	)	
-VS-	)	
	)	**Docket No. 10-0188**
ILLINOIS BELL TELEPHONE COMPANY D/B/A	)	
AT&T ILLINOIS	)	
	)	
FORMAL COMPLAINT AND REQUEST FOR	)	
DECLARATORY RULING PURSUANT TO SECTIONS	)	
13-515 AND 10-108 OF THE ILLINOIS PUBLIC	)	
UTILITIES ACT	)	

NOTICE OF FILING

Please take notice that on April 26, 2010, we caused to be filed via electronic mail with the Illinois Commerce Commission, **Response In Opposition To Illinois Bell Telephone Company's Motion To Dismiss Cbeyond Communications, LLC's Formal Complaint And Request For Declaratory Ruling.** A copy of the foregoing documents are hereby served upon you.

/s/ Henry T. Kelly
Henry T. Kelly, attorney for
Cbeyond Communications, LLC

CERTIFICATE OF SERVICE

I, Henry T. Kelly, on oath state that I served this **Notice of Filing** and a copy of the **Response In Opposition To Illinois Bell Telephone Company's Motion To Dismiss Cbeyond Communications, LLC's Formal Complaint And Request For Declaratory Ruling**, on the attached service list via electronic mail on April 26, 2010.

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