STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Kintetsu World Express	)	
-vs-	)	
Illinois Bell Telephone Company	)	
	)	10-0441
Complaint as to billing/refund	)	
in Wood Dale, Illinois.	)	

VERIFIED MOTION TO DISMISS

Illinois Bell Telephone Company ("AT&T Illinois") hereby moves to dismiss portions of the Complaint on the grounds that it raises claims that are time-barred and it seeks relief that the Commission cannot grant. In support of this motion, AT&T Illinois states as follows:

INTRODUCTION

Complainant Kintetsu World Express (U.S.A.) Inc. ("Kintetsu") filed this Complaint on July 12, 2010. The Complaint consists of the Commission's two-page, preprinted complaint form, completed by Kintetsu ("Complaint Form"), along with an attached three-page "Formal Complaint" prepared by Kintetsu's attorneys ("Complaint") and a two-page spreadsheet identified as Exhibit A.

The Complaint alleges that, prior to May 2003, AT&T Illinois provided telephone and data services to Kintetsu's office and warehouse in Wood Dale, Illinois,[1] pursuant to three different AT&T account numbers. Complaint ¶¶ 3, 5. The Complaint also alleges that Kintetsu had "more than 120 distinct telephone numbers associated with" the three accounts. Complaint ¶ 6.

[1] Kintetsu's U.S. headquarters is located in Jericho, New York, and it has many other facilities throughout the country. *See* Complaint ¶¶ 2-3.

Starting in May 2003, Kintetsu switched its telephone and data services to XO Communications Services, Inc. ("XO").[2] Complaint ¶ 7. Specifically, 100 of Kintetsu's telephone numbers were ported from AT&T Illinois to XO in May 2003, and an additional 20 numbers were ported from AT&T Illinois to XO in July 2003. Complaint ¶ 8. The Complaint asserts that, after these numbers were ported, AT&T Illinois "ceased providing service" to Kintetsu. Complaint ¶ 9.

AT&T Illinois continued billing Kintetsu for the three accounts from July 2003 through January 2009, and Kintetsu paid those bills. Complaint ¶¶ 10, 12. These bills were sent to Kintetsu's U.S. headquarters in New York. Complaint ¶ 11.[3] Exhibit A to the Complaint shows that the amount of the monthly payments that Kintetsu made for the accounts between July 2003 and January 2009. See Complaint ¶ 13 and Exhibit A. These payments ranged from approximately $700 to approximately $1700 per account, depending on the particular account and month. The payments shown on Exhibit A total $236,355.84.

Kintetsu contacted AT&T Illinois in 2009 to seek a refund for the payments made between July 2003 and January 2009. Complaint ¶ 13. AT&T Illinois refused to provide the requested refund, and Kintetsu submitted an informal complaint to the Commission in April 2010. *See* Complaint ¶¶ 16, 17. Kintetsu then filed this action, seeking a refund of the $236,355.84, plus interest, attorneys' fees and costs. *See* Complaint Form, p. 2.

ARGUMENT

The Commission should dismiss substantial portions of Kintetsu's claims for two reasons. First, the applicable statute of limitations under the Public Utilities Act bars Kintetsu

[2] The Complaint refers simply to "XO Communications." According to the Commission's records, XO Communications Services, Inc., is the entity holding certificates to provide telecommunications services in the state.
[3] Both before and after May 2003, the billing address for the accounts also was Kintetsu's U.S. headquarters in Jericho, New York.

from recovering for any allegedly erroneous billing more than two years old. Second, the Commission lacks the authority to provide some of the relief Kintetsu requests.

1. Statute of Limitations

The Commission should dismiss the Complaint to the extent it is based on bills sent to Kintetsu prior to July 12, 2008, on the ground that such claims are barred by the applicable statute of limitations. Under Section 9-252.1 of the Public Utilities Act, "[a]ny 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." 220 ILCS 5/9/252.1. Kintetsu must be deemed to have had knowledge of the allegedly incorrect billing here no later than August 2003, because its Complaint asserts that AT&T Illinois "ceased providing service" to Kintetsu after the 120 telephone numbers were ported to XO. *See* Complaint ¶¶ 8, 9. That porting activity concluded in July 2003 (Complaint ¶ 8), so any AT&T Illinois bill that Kintetsu received after that time – for any amount greater than $0.00 – should have tipped off Kintetsu that it was being billed erroneously.[4] Since Kintetsu's Complaint was filed on July 12, 2010, any claim based on bills issued before July 12, 2008, is barred by 220 ILCS 5/9-252.1. *See* Order, *Shah v. Illinois Bell Telephone Co.*, Ill. C.C. Dkt. No. 03-0494 (Nov. 23, 2004) at 9-10 (attached as Exhibit 1); *Patel v. Commonwealth Edison Co*., 1999 Ill. PUC Lexis 932, at *6-7 (Nov. 17, 1999) (attached as Exhibit 2).

2. Requested Relief

The Commission also should dismiss Kintetsu's request for costs and attorneys' fees. The AT&T Illinois tariff specifically limits the company's liability for service errors, and clearly precludes recovery for any consequential damages arising from the billing issues described in the

[4] If this matter proceeds to hearing, AT&T Illinois will argue that the services it provided Kintetsu on the three accounts included more than the 120 telephone numbers ported to XO, so that it was entitled to bill Kintetsu after July 2003 for services that were neither ported nor disconnected.

Complaint. In particular, the General Terms and Conditions of the tariff provide that the company's liability "shall in no event exceed an amount equivalent to the proportionate charge to the customer for the period of service" during which a "mistake, omission, interruption, delay, error or defect in transmission occurs." As the tariff provides, "No other liability shall in any case attach to the Company." Ill. C.C. No. 20, Part 2, Section 2, Sheet 2, ¶ 3.1 (attached as Exhibit 3).[5]

Both the Illinois Supreme Court and this Commission have ruled that the limitation of liability provision in the tariff precludes a customer from recovering any amount in excess of the cost of service for the term of the mistake supposedly made by the company. See In re Illinois Bell Switching Station Litigation, 161 Ill. 2d 233, 244, 641N.E.2d 440, 445 (1994); Order, Woods v. Illinois Bell Telephone Co., Ill. C.C. Dkt. 01-0127 (Sept. 26, 2001) (attached as Exhibit 4). In Woods, the Commission denied a complaint seeking economic damages such as wage compensation, travel time, and the cost of replacement telephone service, relying on the limitation of liability provision in AT&T Illinois' tariff. Exhibit 4 at 2. As the Commission ruled, the tariff "does not provide a remedy for the economic loss damages sought by Complainant." Id.

Kintetsu's request for reimbursement of costs and attorneys' fees is comparable to the claims rejected in Illinois Bell Switching Station Litigation and Woods. Paragraph 3.1 of AT&T Illinois' General Terms and Conditions of Service (Exhibit 2), the validity of which has been confirmed by the Illinois Supreme Court and this Commission, clearly precludes the relief that Kintetsu seeks.

[5] AT&T Illinois requests that the Administrative Law Judge take administrative notice of the provisions of the AT&T Illinois tariff pursuant to Section 200. 640(a)(3) of the Commission's rules of practice. As of June 29, 2010, this provision was moved to Ill. C.C. No. 19, Part 2, Section 2, Sheet 8, ¶ 3.1.

WHEREFORE, for all of the foregoing reasons, the Commission should dismiss the Complaint to the extent that it seeks recovery for bills issued prior to July 12, 2008, and that it seeks recovery of costs and attorneys' fees.

Respectfully submitted,

_/s/_____

James A. Huttenhower
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VERIFICATION

I, James A. Huttenhower, on oath, state that I am one of the attorneys for AT&T Illinois, that I have reviewed the foregoing **VERIFIED MOTION TO DISMISS**, and that, to the best of my knowledge, information and belief, the statements contained therein are true and correct.

James A. Huttenhower

Subscribed and sworn to before
me this 5th day of August, 2010

Notary Public, State of Illinois

OFFICIAL SEAL
SANDRA L HARLING
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:12/05/10

CERTIFICATE OF SERVICE

I, James A. Huttenhower, an attorney, certify that a copy of the foregoing **VERIFIED MOTION TO DISMISS** was served on the service list via U.S. Mail and/or electronic transmission on August 6, 2010.

/s/

James A. Huttenhower

Service List ICC Docket No. 10-0441

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