

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Cbeyond Communications, LLC,)	
)	
vs.)	
)	Docket No. 10-0188
Illinois Bell Telephone Company)	
)	
Formal Complaint and Request for)	
Declaratory Ruling Pursuant to Sections)	
13-515 and 10-108 of the Illinois Public)	
Utilities Act.)	

**AT&T ILLINOIS’ RESPONSE TO CBeyond’S MOTION FOR LEAVE
TO FILE AN AMENDED VERIFIED COMPLAINT *INSTANTER***

Illinois Bell Telephone Company (“AT&T Illinois”), by and through its attorneys, hereby responds to the Motion for Leave to File An Amended Verified Complaint *Instanter*, filed by Cbeyond Communications, LLC (“Cbeyond”) on January 25, 2001. AT&T Illinois respectfully requests that the Court deny Cbeyond’s Motion for the reasons set forth herein.

SUMMARY

Cbeyond filed its complaint in this matter on March 9, 2009, nearly one year ago. Following an unsuccessful attempt at mediation, the parties agreed to stipulate to certain facts and file merits briefs for the Administrative Law Judge (“ALJ”), who would determine if she could dispose of this case without an evidentiary hearing. Merits briefing was completed on October 22, 2010, and the ALJ committed to rule by the end of January. Tr. at 55.

On January 25, 2011 – long after merits briefing was complete and only a few days before the ALJ’s decision was expected – Cbeyond moved for leave to file an amended complaint seeking to add a brand new statutory claim and introduce new legal theories. While Cbeyond claims that the amended complaint is intended to simply “clarify its allegations about AT&T’s improper practices” and to more specifically identify the provisions of the

interconnection agreement that AT&T has purportedly breached (Motion to Amend ¶¶ 5, 6), the proposed new complaint does far more than that. The motion to amend is a transparent, belated attempt by Cbeyond to add a brand new discrimination claim to this case and to provide a post-hoc rationalization for Cbeyond's irrelevant data requests, which are the subject of a pending motion to compel. The motion to amend should be denied for a host of reasons.

First and foremost, through the amendment, Cbeyond seeks to salvage its irrelevant data requests by adding a new statutory claim and introduce new legal theories on the eve of a ruling by the ALJ on the parties' extensive merits briefing. Second, Cbeyond has failed to comply with its obligations under 220 ILCS 5/13-515(c), which requires that, before filing a complaint alleging violations of 220 ILCS 5/13-514, the complainant must provide the other carrier with notice of the dispute and a 48-hour period in which to cure. Third, Cbeyond's motion to amend should also be denied, in full, because Cbeyond has failed to demonstrate that it would be in the interests of justice to allow amendment. Cbeyond purports to seek amendment to "conform the pleadings to the proof" pursuant to 735 ILCS 5/2-616(c), but that is not an appropriate justification given the facts of this case. Fourth, allowing Cbeyond to amend at this late date would circumvent the Commission's special rules applicable to complaints alleging violations of Section 13-514. Cbeyond is not entitled to have the benefits of these provisions without also taking their accompanying burdens. In addition, the original complaint alleges a violation of 220 ILCS 5/9-250, a claim that *must* be resolved by the Commission within a year, unless that deadline is extended by agreement of the parties (which it has not been). Allowing Cbeyond to amend would necessarily push the completion date of this case far beyond the March 2011 deadline for the Section 9-250 claim. Cbeyond could have filed its amended complaint much

earlier in the case. Finally, Cbeyond has failed to demonstrate that the four equitable factors, considered by courts analyzing motions to amend, weigh in its favor.

ARGUMENT

I. Cbeyond's Motion to Amend Belatedly Seeks to Introduce a New Statutory Claim and New Legal Theories on the Eve of the ALJ's Ruling in Hopes of Saving Its Motion to Compel.

Cbeyond's amendment seeks to add a new statutory claim and introduce new legal theories on the eve of an anticipated ruling by the ALJ on the parties' merits briefing. Specifically, Cbeyond seeks to amend its complaint to add a whole new cause of action for violation of Section 13-505.2 of the Illinois Public Utilities Act (Amended Complaint at ¶¶ 14, 90-93), to expand its original cause of action under Section 13-801(b) to include two new subsections of that statute (*id.* at ¶¶ 12, 79, 82), and to allege discrimination by AT&T in favor of carriers other than Cbeyond (*id.* at ¶ 51).¹

This, of course, is not the first time that Cbeyond has attempted to change its theory of this case. The basis upon which Cbeyond asserts it is entitled to relief here has changed over and over throughout this proceeding, as AT&T demonstrated in its reply brief. *See* AT&T Reply Brief at 3-5. The Motion to Amend represents yet another attempt by Cbeyond to alter its position.

Seen in its true light, Cbeyond's request to amend its complaint is nothing more than an attempt to justify a series of irrelevant data requests. As the ALJ is aware, there is a fully briefed motion to compel regarding several data requests propounded by Cbeyond, which AT&T maintains are, among other defects, irrelevant and burdensome, and constitute nothing more than

¹ Cbeyond also seeks to add various specific references to the ICA which were notably absent from the original complaint, a defect that AT&T pointed out as early as April 5, 2010. *See* AT&T Motion to Dismiss at pp. 6-8. Cbeyond does not present any legitimate justification for why it has waited so long, and until after merits briefing, to specify in its complaint the ICA sections it believes are relevant.

a fishing expedition.² While Cbeyond argued in its motion to compel that it had raised claims in its original complaint that made its discovery requests relevant, AT&T's response demonstrated that that was simply not the case.

As AT&T explained, despite extensive discovery by Cbeyond earlier in this proceeding, Cbeyond's latest data requests were the first time Cbeyond requested data about AT&T Illinois' charges to *other* CLECs. AT&T objected to the requests because, among other things, they were not relevant to Cbeyond's purported "discrimination" claim against AT&T Illinois. *See* Response to Motion to Compel, at 7-11. Neither Cbeyond's complaint, nor the briefs Cbeyond filed in support thereof during 2010, alleged that AT&T Illinois charged similarly-situated CLECs different rates for the same EEL "rearrangement" services AT&T Illinois provided to Cbeyond. *See id.* at 8-9. Nor does the parties' Joint Stipulation, which formed the foundation for extensive merits briefing, identify discrimination in favor of other carriers as one of the issues in this case. Instead, prior to moving to amend, the only specific allegation Cbeyond ever made concerning discrimination was that AT&T Illinois' billing practices impeded Cbeyond's ability to buy the services of third-party transit providers. *See* Complaint at pp. 2-3 & ¶¶ 55, 61, 64. Although Cbeyond may insist to the contrary, its effort to now add claims of discrimination vis-à-vis other CLECs effectively concedes that AT&T was correct in its opposition to the motion to compel.

² As AT&T pointed out in its opposition to Cbeyond's motion to compel (*see* AT&T Response to Motion to Compel at 5-7), Cbeyond did not even mention, let alone challenge, the burden objection interposed by AT&T in its written objections and in the letter by AT&T's counsel subsequent to the parties' discovery conference. Instead, as AT&T predicted would happen (*see id.* at 5 n.3), Cbeyond waited until its reply brief to address the burden objection at all, thereby depriving AT&T of any opportunity to respond.

II. Cbeyond’s Motion to Amend Must Be Denied Because It Alleges A New Discrimination Claim For Which Cbeyond Never Provided AT&T Illinois The Notice Required By Section 13-515(c).

Cbeyond’s amended complaint fails to comply with the requirements of 220 ILCS 5/13-515(c) and must therefore be denied. Section 13-515 sets forth the “expedited procedures [that] shall be used to enforce the provisions of Section 13-514.” 220 ILCS 5/13-515(a). Pursuant to this provision, “[n]o complaint may be filed under this Section until the complainant has first notified the respondent of the alleged violation and offered the respondent 48 hours to correct the situation.” 220 ILCS 5/13-515(c).

Cbeyond’s amended complaint fails to comply with this provision, because Cbeyond never provided AT&T Illinois with the required notice of its new discrimination claim. In this new claim, Cbeyond alleges that AT&T Illinois discriminated against it by charging other, similarly-situated CLECs different rates than it charges Cbeyond for EEL “rearrangements.” *See* Amended Complaint at p. 2 & ¶¶ 51, 82, 90-93. The 48-hour letter Cbeyond sent to AT&T Illinois prior to filing the original complaint fails to provide notice of any such claim. *See* Complaint Ex. B. Instead, the 48-hour letter simply asserts that AT&T Illinois’ charges for EEL “rearrangements” are not authorized by the interconnection agreement or the law, and that AT&T Illinois’ billing practices “impair[] the ability of other carriers to provide transport services to Cbeyond and other carriers.” *Id.* at pp. 1-2. Cbeyond cannot use that old 48-hour letter as a hook to insert a brand new claim into this case.

Cbeyond’s failure to provide AT&T Illinois with notice of its allegedly discriminatory billing practices, and 48 hours to correct the situation, is fatal to Cbeyond’s attempt to amend its complaint. Order, *Apps Communications, Inc. v. Illinois Bell Telephone Co.*, Docket No. 06-0761, 2009 WL 5503208, a p. 4 (ICC Dec. 2, 2009) (“Because Apps failed to provide AT&T

Illinois with a 48-hour notice of the supposed § 13-514(6) violations alleged in the Complaint, it cannot avail itself of the cause of action provided by that section.”). Since the new claim is so obviously subject to dismissal, there is no point in allowing Cbeyond’s requested amendment. *See Hayes Mechanical Inc. v. First Indus., L.P.*, 351 Ill. App. 3d 1, 7 (1st Dist. 2004) (“It is not necessary for the parties to go through the process of filing an amended pleading and then testing its sufficiency by a motion to dismiss – when ruling on a motion to amend, the court may consider the ultimate efficacy of a claim as stated in a proposed amended pleading.”).³

Unsurprisingly, Cbeyond asserts that its amended complaint simply “clarifies” its allegations concerning discrimination. *See* Motion to Amend ¶¶ 2-5. But Cbeyond cannot point to a single allegation in the original complaint that even suggests that Cbeyond based its discrimination claim on AT&T Illinois’ purported failure to charge Cbeyond the same rates for the EEL “rearrangements” at issue here as it charged other similarly-situated CLECs. Cbeyond’s specific allegation that AT&T Illinois’ charges “impair[] the ability of other carriers *to provide transport services to Cbeyond and other carriers*” (Complaint at p. 3 (emphasis added)), and its vague general allegation that the charges are “discriminatory” (*id.* at p. 2 & ¶ 79), fail to constitute the requisite notice of Cbeyond’s new discrimination claim.

One of the Commission’s ALJs has previously found that 220 ILCS 5/13-515(c)’s 48-hour “notice requirement” is satisfied only “when the subject carrier is provided sufficient detail to understand and cure the alleged violation of Section 13-514.” Administrative Law Judge’s Ruling, *Globalcom, Inc. v. Illinois Bell Telephone Company*, Docket No. 02-0365, at p. 2 (ICC July 5, 2002). In this case, Cbeyond’s 48-hour letter did not give AT&T Illinois sufficient notice of Cbeyond’s claim that AT&T Illinois discriminated against Cbeyond in favor of other CLECs.

³ Likewise, amending the complaint to include a claim under Section 13-505.2 (Cbeyond’s proposed Count V) may be futile as well, as it is not clear that Section 13-505.2 gives rise to a cause of action enforceable by a CLEC.

Indeed, AT&T Illinois was given *no* notice that it should investigate how it was billing other CLECs, and *no* opportunity to change its billing practices, if necessary.

Because Cbeyond never provided the required notice of its discrimination claim, it cannot amend its complaint to include the new claim. *See id.* at 12 (dismissing, for failure to comply with Section 13-515(c), “Globalcom’s claim that Ameritech contravenes Section 13-514 by imposing” certain “qualifications on the provision of new EELs”); Order, *North County Communications Corp. v. Verizon North Inc. & Verizon South Inc.*, Docket No. 07-0376, 2007 WL 2032783, at *1 (ICC July 11, 2007) (“This matter should be dismissed without prejudice in light of NCC's failure to comply with the filing requirements associated with complaints brought under Section 13-515. The filing requirements are not burdensome and are set forth in plain language in the governing statute and rule.”); Order, *New Millennium Telecommunications, Inc. v. MCI WorldCom Communications, Inc.*, Docket No. 01-0560, 2001 WL 1772354 (ICC Aug. 23, 2001) (denying emergency relief under Section 13-515(e) where complainant made no allegation it had complied with requirements of Section 13-515(c)).

II. Cbeyond Is Not Entitled To Amend Under The Commission’s Rules Or The Civil Rules.

Beyond its failure to comply with Section 13-515(c), Cbeyond also fails to demonstrate that it is entitled to amend its complaint, especially at this late date.

A. Cbeyond’s Amended Complaint Would Not Conform The Pleadings To The Proof.

Cbeyond asserts that 735 ILCS 5/2-616(c) authorizes Cbeyond to amend its complaint “to conform the pleadings to the proof.” Motion to Amend ¶ 7. That provision is simply not applicable. A party amends its complaint to conform the pleading to the proof when something has been proved (e.g., after trial). *Village of Wadsworth v. Kerton*, 311 Ill. App. 3d 829, 842 (2d Dist. 2000) (“Pursuant to section 2-616(c) . . . , a party may amend its complaint at any time,

before or after judgment, if the amendment is made to conform the plaintiff's pleadings *to the proof at trial.*") (emphasis added); *Luther v. Norfolk and Western Ry. Co.*, 272 Ill. App. 3d 16, 26-27 (5th Dist. 1995) ("given the liberal policy of permitting amendments to pleadings, courts may allow, *after the close of the evidence*, amendments to conform pleadings to the proof, 'but their materiality to the evidence already introduced must be apparent'" (quoting *Lawson v. Hill*, 77 Ill. App. 3d 835, 845 (2d Dist. 1979)) (emphasis added).

The only "proof" that has been offered in this proceeding thus far has been the pleadings and the affidavits and other documents that the parties submitted with their merits briefing. None of those materials supports Cbeyond's claim that AT&T Illinois has charged other similarly-situated CLECs more favorable rates for EEL "rearrangements." This allegation was never made – and certainly not supported with any competent proof – in the original complaint. And it is nowhere mentioned in the lengthy affidavit of Greg Darnell that was submitted with Cbeyond's merits briefs. The discrimination claim came to light only after Cbeyond issued data requests, as part of a fishing expedition to try to find proof of such a claim, effectively conceding that such proof does not in fact exist in the current record. Therefore, 735 ILCS 5/2-616(c) does not provide a basis for Cbeyond's motion to amend. *See, e.g., Friestedt v. Chicago Transit Authority*, 129 Ill. App. 2d 153, 156 (1st Dist. 1970) (before a court will allow "amendment to conform to the proof," "the materiality of the amendment to the proof already produced must be apparent").

Cbeyond is likely to assert in reply that the declaration of Greg Darnell, which Cbeyond attached to its new complaint and offered in support of its motion to compel AT&T Illinois' response to certain data requests, constitutes "proof" of its new discrimination claim. As an initial matter, such an argument is pure bootstrapping, since Cbeyond is effectively arguing that a

document it presented as part of its motion to *amend* is the “proof” already in the record that justifies the amendment. Moreover, as AT&T Illinois already explained in response to the motion to compel, Mr. Darnell’s declaration is not competent evidence and thus is insufficient to support such a discrimination claim, let alone “prove” it. *See* Response to Motion to Compel at 9-10. First, the declaration is inadmissible hearsay, and reflects Cbeyond’s inability to induce any representative of another CLEC to make a sworn statement in support of Cbeyond’s position. Second, the declaration provides inadequate information about Mr. Darnell’s alleged sources at the two CLECs he claims to have contacted, making it impossible to determine whether those sources are in a position to provide credible information about the orders their companies place with AT&T Illinois or the way AT&T Illinois bills for those orders. *See* Response to Motion to Amend at 9-10. In sum, Mr. Darnell’s hearsay declaration simply does not constitute “proof” of Cbeyond’s new discrimination claim. It is clear that Cbeyond is seeking to amend *not* to conform the pleadings to the proof, but instead to justify a discovery fishing expedition to *find* proof for a new claim that Cbeyond is hoping may exist.

Because Cbeyond has no proof to support its new discrimination claim, it obviously has no right to amend the complaint to conform to that non-existent proof. The Commission should therefore deny Cbeyond’s motion to amend. *See, e.g., Calumet Const. Corp. v. Metropolitan Sanitary Dist. of Greater Chicago*, 222 Ill. App. 3d 374, 380 (1st Cir. 1991) (affirming denial of motion to amend complaint to include allegation of bad faith, where the evidence produced by plaintiff in support of its motion for partial summary judgment “did not support an allegation of bad faith”).

B. Allowing Cbeyond To Amend At This Late Date Would Circumvent The Commission's Procedural Rules.

Even if the amended complaint's new allegations were supported by proof – which they are not – the motion to amend should nonetheless be denied, because Cbeyond cannot show that there is good cause for the Commission to ignore its well-settled rules on the presentation of “fast-track” claims like the ones raised by Cbeyond. Cbeyond's complaint, which alleges violations of 220 ILCS 5/13-514, is “subject to the timelines contained in 13-515(d)(7).” Order, *Z-Tel Communications, Inc. v. Illinois Bell Telephone Co.*, Docket No. 02-0160, 2002 WL 32760714, at *3 (ICC May 8, 2002). As this Commission has recognized, “[t]he time limits contained therein are very short.” *Id.* Unless the parties agree otherwise, “[t]he hearing must commence within 30 days of the filing of the Complaint and the ALJ's decision must be issued within 60 days.” *Id.*

While AT&T Illinois agreed to waive these deadlines after receiving Cbeyond's original complaint, AT& did *not* agree that Cbeyond could amend its complaint at any time, or could wait until this late stage to assert a wholly new legal theory. Cbeyond chose to file its claim pursuant to Section 13-514 and, following the logic of the *Z-Tel* order, “[o]ne of the reasons for making this choice presumably was to take advantage of” the special remedies available under Section 13-515, such as having its attorneys' fees paid by its opponent or subjecting its opponent to possible penalties. *Id.* Upon making this choice to proceed under the fast-track statute, Cbeyond is entitled to the benefits of that choice, but takes with those benefits certain burdens and obligations too, such as a limited ability to amend its complaint. *See Sprint Communications L.P. v. Illinois Bell Telephone Co.*, Docket No. 07-0629, 2008 WL 5971191, at *25 (ICC July 30, 2008) (explaining that complainant proceeding under § 13-515 could lay “claim to certain benefits, including the potential availability of remedies that would otherwise be unavailable,”

but also took on certain burdens); *Z-Tel*, 2002 WL 32760714, at *3. (denying Z-Tel's motion to amend to assert new claim, where AT&T Illinois did not agree to waive deadlines as to that claim).

Cbeyond's proposed amendment is also untimely because it runs afoul of another procedural requirement. Count III of the Complaint alleges a violation of 220 ILCS 5/9-250, and claims under that provision *must* be decided within one year, unless the parties agree to extend the deadline for decision. 220 ILCS 5/10-108. *See Order, Avenue Business Center, Inc. v. Illinois Bell Telephone Co.*, Docket No. 03-0447, 2005 WL 856143, at *3 (ICC Mar. 9, 2005) (finding that, once Section 10-108 deadline has passed, Commission "lacks authority... to render findings and enter an order based on such findings"). AT&T Illinois has not consented to an extension of the one-year deadline. Were the Commission to allow Cbeyond to amend its complaint, it would be impossible for the Commission to complete this case within the required one-year period – which expires on March 9, 2011. Yet allowing the amendment would effectively extend the one-year deadline for Cbeyond's Section 9-250 claim, regardless of whether AT&T Illinois consents. This is yet another reason why Cbeyond's motion to amend should be denied.

C. The Interests Of Justice Weigh Strongly In Favor Of Denying Cbeyond's Motion to Amend.

As Cbeyond recognizes, courts typically consider four factors in determining whether a motion to amend should be granted: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleadings could be identified." *Compton v. Country Mutual Ins. Co.*, 382 Ill. App. 3d 323, 332 (quoting *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d

263 (1992)) (upholding trial court's denial of plaintiff's motion to amend). While this is not the typical case – because it is subject to the Commission's special procedures under Sections 9-250 and 13-515 – at least three of the four factors weigh in favor of denying Cbeyond's motion to amend.⁴

First, AT&T Illinois, the ALJ, and the Commission Staff would all be prejudiced if Cbeyond's motion to amend were allowed. AT&T Illinois and Staff have already spent over ten months dealing with extensive discovery, and drafting comprehensive briefs based on Cbeyond's original complaint and the Joint Stipulation to which AT&T and Cbeyond agreed. Were amendment allowed, the parties would likely be required to engage in additional discovery and additional briefing – substantially increasing the already significant amount of time and resources devoted to this matter. *See Tongate v. Wyeth Laboratories, a Division of American Home Prods. Corp.*, 220 Ill. App. 3d 952, 970 (1st Dist. 1991) (affirming denial of motion to amend complaint filed five weeks before trial, and finding that plaintiff's "new claim could prejudice the defendant, as the defendant would need additional time to prepare its response"). In addition, AT&T Illinois would be further prejudiced by having to wait even longer for a determination whether Cbeyond owes it substantial amounts of money. By Cbeyond's own admission, the disputed amount was at least several hundred thousand dollars at the time of the filing of the original complaint (*see Confidential Version of Complaint at 3*), an amount that presumably has only grown higher in the 11 months since the Complaint was filed.⁵

⁴ With respect to whether the amendment cures the defect, Cbeyond seems to want to have it both ways. It maintains that the original complaint properly alleges all of its claims, but then asserts that its complaint has a defect requiring amendment. If the original complaint is defective, then prior Commission decisions suggest that the appropriate step is dismissal of that complaint and assessment of costs on Cbeyond. *See, e.g., North County*, 2007 WL 2032783, at *1.

⁵ Cbeyond has not paid the disputed charges at issue here for more than four years. *See Appendix L to AT&T Illinois Reply Brief (Reply Affidavit of Kitty Drennan) ¶ 13.*

Cbeyond denies that allowing amendment would result in prejudice or surprise because, according to Cbeyond, the amendment “merely clarifies the specific discriminatory conduct upon which Cbeyond bases its claims.” Motion to Amend ¶ 11. That is patently false. At most, Cbeyond’s original complaint asserted that AT&T Illinois’ billing practices were discriminatory toward third-party transit providers – *not* toward Cbeyond vis-à-vis other, similarly-situated CLECs. *See also* Cbeyond Response in Opposition to Motion to Dismiss at 19 (stating that AT&T’s allegedly discriminatory conduct was “charging Cbeyond for services that it does not charge itself”). Those are entirely distinct claims, which would be proven with entirely different evidence. Moreover, the parties negotiated and executed a detailed Joint Stipulation setting forth what is in dispute in this case, and nothing in that Joint Stipulation addresses Cbeyond’s new discrimination claims. AT&T Illinois made perfectly clear throughout this proceeding that it understood Cbeyond’s discrimination claim to be premised on the effect AT&T Illinois’ conduct has on third-party transport providers. *See* Motion to Dismiss at 12-13 (section of motion titled “Cbeyond Fails To State A Claim For Violation Of Section 13-801 Because It Does Not Allege That AT&T Illinois Discriminated Against It In Favor Of Another Party”); *see also* AT&T Illinois’ Opening Brief at 20; AT&T Illinois’ Reply Brief at 20. AT&T Illinois never heard anything to the contrary until the parties met and conferred in late December about Cbeyond’s irrelevant data requests. Of course, then, AT&T Illinois is legitimately surprised by Cbeyond’s new discrimination claim and will be prejudiced by having to defend against such a claim at this late date, after merits briefing has already been completed.

Cbeyond also asserts that it would be “disingenuous” of AT&T Illinois to assert prejudice or surprise, because “Cbeyond has already produced discovery requests concerning this topic.” Motion to Amend ¶ 11. It is Cbeyond that is being disingenuous on this point. Simply serving

discovery on an issue not previously raised in the case does not somehow render that issue relevant or make the motion to amend less prejudicial or surprising. Cbeyond did not serve these data requests until more than ten months after it filed the complaint, and after the parties and Staff had already conducted extensive discovery. The data requests only appeared after the parties finished briefing the merits of Cbeyond's complaint based on the parties' Joint Stipulation, and while the ALJ was considering those briefs. If Cbeyond's motion to amend were granted, the parties would likely have to conduct even more discovery and submit new briefs on the new claim. There can be no doubt that allowing amendment would result in prejudice and surprise. *See, e.g., Trident Industrial Prods. Corp. v. American Nat'l Bank & Trust Co.*, 149 Ill. App. 3d 857, 866 (1st Dist. 1986) (finding trial court did not abuse its discretion in denying plaintiff's motion to amend, where amendment "would require additional discovery" and trial would be delayed).

Second, Cbeyond's proposed amendment is not timely, for the reasons explained in Section III.B, above. Cbeyond of course disagrees, asserting that its motion to amend should be considered timely because this case "has not progress [sic] to the hearing stage." Motion to Amend ¶ 10. This argument is a red herring. While the ALJ has not conducted an evidentiary hearing in this case, the parties already filed their merits briefs, with the hope that this case could be resolved without the need for hearing.⁶ Cbeyond's attempt to introduce a new claim at this late date undermines the parties' and the ALJ's previous efforts to resolve Cbeyond's self-styled "expedited" complaint in a timely manner, and suggests that Cbeyond has not acted in good faith. Moreover, there is nothing in the Commission's rules or the civil rules which gives Cbeyond an absolute right to amend any time prior to hearing.

⁶ Cbeyond clearly agreed that the claims raised in its complaint were ready for resolution without hearing, since its merits briefs end with the request that the Commission grant the Complaint and enter judgment in Cbeyond's favor. *See* Cbeyond Opening Brief at p. 20; Cbeyond Response Brief at p. 29.

Cbeyond also claims that its motion to amend is timely because “AT&T’s refusal to recognize Cbeyond’s claim about discrimination in the marketplace had not been formally raised by AT&T prior to its data requests objections.” Motion to Amend ¶ 10. This is simply untrue. In one of its first submissions in this case – the motion to dismiss – AT&T Illinois made clear that Cbeyond’s discrimination claim under 220 ILCS 5/13-801(b) fails because it does not allege that AT&T Illinois has favored some other party over Cbeyond. *See* Motion to Dismiss at 12-13 (section of motion titled “Cbeyond Fails To State A Claim For Violation Of Section 13-801 Because It Does Not Allege That AT&T Illinois Discriminated Against It In Favor Of Another Party”); *see also* AT&T Illinois Opening Brief at 20; AT&T Illinois Reply Brief at 20. Therefore, Cbeyond has known all along that AT&T Illinois believed Cbeyond’s discrimination claim to be deficient, because it failed to allege that AT&T Illinois discriminated against Cbeyond in favor of some other carrier. Yet Cbeyond waited over nine months to amend its complaint to try to include such a claim.

Third, Cbeyond’s motion to amend completely fails to address the last factor considered by courts in determining whether amendment is proper: whether the party seeking amendment had, but failed to take advantage of, earlier opportunities to amend the complaint. *See Compton*, 382 Ill. App. 3d at 332. In this case, there can be no dispute that Cbeyond could have amended its complaint long ago if it intended to assert a claim that AT&T Illinois discriminated against Cbeyond in favor of other CLECs. Cbeyond’s declarant, Mr. Darnell, claims that Cbeyond became aware of the facts purportedly giving rise to the claim as early as February, 2008. Motion to Compel, Ex. C. In that month, Mr. Darnell claims that he spoke with William Haas of PAETEC Communications, Inc., about how AT&T Illinois bills PAETEC for “nonrecurring charges by AT&T when it changes or eliminates the transport portion of the EEL, i.e.,

rearrangement or grooming.” *Id.* Thus, by Cbeyond’s own admission, it could have included its discrimination claim in the original complaint, which it filed in March 2010, more than two years after the supposed Darnell/Haas conversation. *See Pietka v. Chelco Corp.*, 107 Ill. App. 3d 544, 556 (1st Dist. 1982) (“an amendment should not ordinarily be permitted if it sets forth matters of which the pleader had full knowledge at the time of filing the original pleading and no excuse is offered for not putting the substance of the amendment therein”). Cbeyond offers no excuse for its delay in seeking amendment.

Moreover, Cbeyond has known since April 2010 – when AT&T Illinois filed its motion to dismiss – that, in AT&T Illinois’ view, Cbeyond’s original complaint made no allegation that AT&T Illinois has discriminated against Cbeyond in favor of any other carrier. Cbeyond could have moved to amend its complaint at that time. Instead, Cbeyond waited until AT&T Illinois and Staff had both expended substantial resources dealing with discovery and drafting briefs based on the original complaint. Only after that briefing was complete did Cbeyond seek to conduct discovery about AT&T Illinois’ billing of other CLECs. And only after AT&T Illinois reasonably objected to those requests, on the basis that they were not relevant to the complaint, did Cbeyond finally move to amend. Cbeyond should not be allowed to amend its complaint simply to justify its fishing expedition into AT&T Illinois’ treatment of other CLECs. *See Mendelson v. Ben A. Borenstein & Co.*, 240 Ill. App. 3d 605, 620 (1st Dist. 1992) (affirming denial of motion to amend where “[i]t is clear that plaintiff had ample opportunity to change theories” earlier, “yet chose otherwise”); *Talas v. Youngstown Sheet & Tube*, 134 Ill. App. 3d 103, 107-08 (1st Dist. 1985) (affirming denial of motion to amend where, between date of filing original complaint and proposed amendment, “many opportunities to amend had presented

themselves”). The interests of justice counsel against allowing Cbeyond to amend its complaint this far into the case.

CONCLUSION

Accordingly, for all the foregoing reasons, the ALJ should deny Cbeyond’s Motion to Amend.

Dated: February 9, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, James A. Huttenhower, an attorney, certify that a copy of the foregoing was served on the following Service List via U.S. Mail and/or electronic transmission on February 9, 2011.

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