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 COMMUNICATIONS, LLC'S MOTION TO VOLUNTARILY DISMISS ITS COMPLAINT WITH PREJUDICE

Illinois Bell Telephone Company ("AT&T Illinois"), by and through its attorneys, hereby files its Response to Cbeyond Communications LLC's ("Cbeyond") Motion to Voluntarily Dismiss Its Complaint With Prejudice. For the following reasons, AT&T Illinois respectfully requests that the Commission deny Cbeyond's motion.

ARGUMENT

I. Cbeyond Should Not Be Allowed To Voluntarily Dismiss Its Complaint On The Eve Of A Final Order By The Commission.

As the ALJ is fully aware, this proceeding has been marked by Cbeyond constantly changing its theory concerning how AT&T Illinois has purportedly breached the parties' interconnection agreement ("ICA") and, as a consequence of that alleged breach, violated Sections 9-250, 13-514 and 13-801 of the Illinois Public Utilities Act ("PUA"). Following over a year of litigation, an unsuccessful attempt at mediation, and exhaustive discovery and briefing on Cbeyond's ever-shifting theories, the ALJ issued her decision on March 15, 2011. Cbeyond filed an exceptions brief challenging nearly every aspect of that decision, to which AT&T Illinois and the Commission Staff each have responded in detail. Pursuant to Section 13-515 of

the PUA, all that is left to be done in this docket is for the Commission to adopt the ALJ's decision or issue a final order of its own. Yet, on the eve of a final decision by the Commission, Cbeyond has abruptly decided, without any explanation whatsoever, to voluntarily dismiss its complaint. Given Cbeyond's complete lack of explanation for its latest move, one can only assume that Cbeyond seeks to avoid an unfavorable decision on the merits. And while Cbeyond claims to seek dismissal "with prejudice," it nonetheless suggests that there is a possibility of "a second litigation upon the subject matter" raised in the complaint. Mot. to Dismiss ¶ 2.

Cbeyond claims that "[a] plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant." Mot. to Dismiss ¶ 2. As explained below, not only is Cbeyond incorrect about the controlling law, but it is also incorrect (as well as disingenuous) when it claims that no prejudice would result to AT&T Illinois if Cbeyond were allowed to voluntarily dismiss at this late date. Based on its erroneous interpretation of the parties' ICA, Cbeyond has, for approximately four years, refused to pay amounts that were properly billed by AT&T Illinois for services rendered to Cbeyond. For over two years, during the pendency of this complaint proceeding and the informal dispute resolution process that preceded it, AT&T Illinois has been unable to take any action to collect those disputed amounts. After having expended substantial effort, time and resources on the litigation of this dispute, AT&T Illinois will clearly be prejudiced if the proceeding does not conclude with the issuance of a final Commission order resolving once and for all the parties' dispute over the appropriate interpretation and application of the ICA. Cbeyond's attempt to voluntarily dismiss on the eve of a final decision undermines this Commission's procedures and makes a mockery of the substantial efforts that AT&T Illinois, the Commission Staff, and the ALJ have devoted to

Cbeyond's complaint over the last year. Cbeyond's motion to voluntarily dismiss should be denied.

A. Pursuant To Section 13-515 Of The PUA, The Commission Must Either Adopt The ALJ's Proposed Decision Or Issue A Decision Of Its Own.

Contrary to Cbeyond's contention that "[t]here is no Commission Rule of Practice or Illinois Administrative Code Section . . . to preclude Cbeyond from voluntarily dismissing its complaint," Mot. to Dismiss ¶ 2, the PUA does, in fact, address Cbeyond's ability to voluntarily dismiss after the ALJ has issued a decision resolving claims for violation of Section 5/13-514. Under the governing statute, Cbeyond has no right to voluntarily dismiss.

Cbeyond's complaint alleges violations of Section 13-514, and therefore is governed by the expedited procedures set forth in Section 13-515. *See* 220 ILCS 5/13-514, 5/13-515. Section 13-515(d)(8) provides that after the ALJ has issued a written decision, and any petitions for review challenging that decision have been filed, the Commission "shall" do one of two things: either "decide to adopt the decision of the [ALJ]" or "issue its own final order." 220 ILCS 5/13-515(d)(8). In this case, the ALJ already issued a written decision; Cbeyond already filed its petition for review of the written decision (*i.e.*, its "exceptions" brief); and both AT&T Illinois and the Commission Staff have responded to Cbeyond's petition for review. Thus, pursuant to Section 13-515(d)(8), all that remains to be done, and all that can be done, is for the Commission to either adopt the ALJ's decision or issue its own final order.

AT&T Illinois recognizes that parties and the Commission may "mutually agree to adjust the procedures established in" Section 13-515. 220 ILCS 5/13-515(a). However, AT&T Illinois has not agreed, and does not agree, to adjust the procedural requirement that the Commission either "decide to adopt the decision of the [ALJ]" or "issue is own final order." 220 ILCS 5/13-

515.[1] Thus, the Commission cannot abdicate this duty based on Cbeyond's untimely request to voluntarily dismiss its complaint. Section 13-515(d)(8) is written in mandatory terms, providing that "the Commission *shall* decide to adopt the decision of the [ALJ] or *shall* issue its own final order." 220 ILCS 5/13-515(d)(8) (emphasis added). This provision evinces the legislative intent that once a case has proceeded to the point where an order by the ALJ has been issued, the complainant cannot voluntarily dismiss its complaint to avoid an adverse decision on the merits, absent the respondent's agreement. *See People v. Thomas*, 171 Ill. 2d 207, 222 (1996) ("use of the word 'shall' indicates a mandatory obligation unless the statute indicates otherwise"). Thus, the Commission must either adopt the ALJ's decision or issue its own final order.

Cbeyond chose to file its claim pursuant to Section 13-514 and "[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 seeking to have its attorneys' fees paid by AT&T Illinois or subject AT&T Illinois to possible penalties. *Order, Z-Tel Communications, Inc. v. Illinois Bell Telephone Co*., Docket No. 02-0160, 2002 WL 32760714, at *3 (ICC May 8, 2002). 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, such as the limit on its ability to unilaterally withdraw 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).

[1] While AT&T Illinois agreed to waive the timelines set forth in Section 13-515, and agreed to the adjustment of several discrete requirements, it has never provided a blanket waiver of all of Section 13-515's procedural requirements and does not agree to do so now.

B. Cbeyond Does Not Have An Unqualified Right To Voluntarily Dismiss Its Complaint.

Even if Section 13-515 did not prevent the Commission from granting a contested voluntary motion to dismiss after the issuance of the ALJ's decision (and it clearly does), the Commission would still have the discretion to deny such a motion. This Commission has previously recognized that it has the power to deny a complainant's request to voluntarily dismiss its complaint prior to the issuance of a final order by the Commission. *See* Order on Reopening, *Illinois-American Water Company Petition for consent to and approval of an Agreement with American Water Resources, Inc.*, No. 02-0517, 2003 WL 22319270, at *1-2 (ICC Sept. 16, 2002). Moreover, the Commission has expressly held that "voluntary dismissal, subsequent to hearing, should *not* be permitted where its sole purpose is to avoid an unfavorable judgment." *Id*. at *2 (emphasis in original). In this case, like in *Illinois American Water*, the only apparent purpose of Cbeyond's motion to voluntarily dismiss is to avoid an unfavorable judgment on the merits. Therefore, according to this Commission's reasoning, Cbeyond's motion "is impermissible and should be denied." *Id*. Moreover, as the Commission observed in *Illinois American Water*, "this matter has been fully litigated over a 13-month period of time," and "the ALJ, Staff, [and AT&T Illinois], collectively, have spent valuable time and resources" on this litigation. *Id*. In addition,"[a] complete record has been established upon which the Commission can deliberate and make its decision." *Id*. Thus, this Commission's precedent requires denial of Cbeyond's motion.

In support of its position that it has an "unqualified" right to voluntarily dismiss in the absence of prejudice, Cbeyond cites a single case, *Jones v. Securities & Exchange Commission*, 298 U.S. 1, 19 (1935). *See* Mot. to Dismiss ¶ 2. But *Jones* has no application to this proceeding. First, *Jones*, by its clear terms, is limited in application to *federal* administrative agencies. *Jones*,

298 U.S. at 19 ("The general rule is settled for the *federal* tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter." (emphasis added)).

Second, *Jones* involved a *registration statement* filed with the Securities and Exchange Commission ("SEC"), not a complaint filed against an adverse party. In *Jones*, the fact that adverse parties were *not* involved was a major factor in the Court's determination that the registrant should have been allowed to withdraw his registration statement. *See id*. at 22-23 ("In this proceeding, there being no adversary parties, the filing of the registration statement is in effect an ex parte application for a license to use the mails and the facilities of interstate commerce for the purposes recognized by the act. . . . Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned.").

Third, the precedential effect of *Jones* has been called in serious doubt by numerous subsequent decisions, and the case is no longer viewed as controlling by the SEC itself. *See, e.g.*, *Columbia General Inv. Corp. v. Securities and Exchange Comm'n*, 265 F.2d 559, 562 (5th Cir. 1959) ("[T]he Supreme Court itself has cast great doubts on the continued vitality of the [*Jones*] case – a possibility which this Court and others have discussed – and then treat it as impliedly overruled[.]"); *In The Matter Of National Lithium Corporation*, Release No. 33-4378, 1961 WL 61069, at *14-15 (S.E.C. July 6, 1961) (explaining that "the shifting sands of legislation and judicial interpretation have made *Jones* a shrinking oasis in a large desert," finding that the SEC's "consent to withdrawal of the registration statement would not be

consistent with the public interest and the protection of investors," and denying the registrant's motion to withdraw registration statement).

Finally, even if *Jones* did apply, it would simply guide this Commission to look to the voluntary dismissal rules that a court would apply under similar facts. *See Jones*, 298 U.S. at 19 ("in the absence of a statute to the contrary, the power of a commission to refuse to dismiss a proceeding on motion of the one who instituted it cannot be greater than the power which may be exercised by the judicial tribunals of the land under similar circumstances"). As noted above, under Section 13-515(d)(8), this Commission does not permit voluntary dismissal of a complaint to avoid an adverse decision on the merits, absent the respondent's agreement. And while there is no state court rule addressing voluntary dismissal after a case has proceeded as far as this one – to the issuance of an order on the merits – the closest rule is 735 ILCS 5/2-1009(c), which applies after a trial or hearing has begun. Section 2-1009(c) provides: "After trial or hearing begins, the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof." *Id.* Tested against this provision, Cbeyond's motion to voluntarily dismiss is clearly insufficient, even if Section 13-515(d)(8) does not mandate rejection of that motion, which it clearly does. AT&T Illinois has not, and will not, file a stipulation agreeing to Cbeyond's voluntary dismissal of the complaint. And Cbeyond has not provided any explanation for seeking dismissal at this late date, much less any evidence or affidavit supporting such an explanation. In addition, even if Cbeyond met the requirements of Section 2-1009, the Commission would still be empowered to fix the terms on which dismissal would be allowed. Therefore, even if *Jones* were applicable – which it is not – Plaintiff still would not have an "unqualified right" to voluntarily dismiss its complaint. Mot. to Dismiss ¶ 2.

C. AT&T Illinois Would Be Prejudiced If Cbeyond Were Allowed To Voluntarily Dismiss Its Complaint At This Late Date.

Assuming *Jones* had any application here – which it does not – even Cbeyond recognizes that it would be entitled to voluntarily dismissal only if no "legal prejudice will result to [AT&T Illinois] other than the mere prospect of a second litigation upon the subject matter." Mot. to Dismiss ¶ 2. Yet, Cbeyond does not even attempt to explain why, in its view, AT&T Illinois would not be prejudiced by Cbeyond's voluntary dismissal of the complaint. Allowing dismissal of the complaint now would undermine AT&T Illinois' contractual right to have its disputes with Cbeyond formally resolved by the Commission.

All of the claims made in Cbeyond's complaint arise from a dispute concerning the proper application of the parties' ICA to Cbeyond's orders for what Cbeyond calls EEL "rearrangements." The ICA sets forth a mandatory dispute resolution process that the parties must follow. Pursuant to this process, a party may file a complaint in the Commission only after it has invoked the informal dispute resolution process set forth in Section 1.9.3 of the ICA, and that informal process has failed. *See* Ex. A, § 1.9.2.1. In this case, Cbeyond invoked the formal dispute resolution process when it filed its complaint with this Commission. Pursuant to the ICA, if the Commission finds that Cbeyond has "refused or failed to pay all or any portion of any amount required to be paid" to AT&T Illinois, then Cbeyond must pay its bills or face disconnection of "the resale services and/or network elements" for which delinquent amounts are outstanding. *Id.*, § 1.10.1.3.

AT&T Illinois, at Cbeyond's demand, has complied with all of the ICA's requirements for dispute resolution. And AT&T Illinois has patiently awaited payment from Cbeyond of the disputed EEL "rearrangement" charges, which Cbeyond to this date still has not paid. Allowing Cbeyond to voluntarily dismiss on the eve of a final decision by the Commission would

circumvent the dispute resolution process set forth in the ICA and severely prejudice AT&T Illinois by leaving unresolved the parties' dispute over the proper interpretation of the ICA as it relates to the amounts that AT&T Illinois has billed and Cbeyond has refused to pay. The parties' dispute must come to an end.

CONCLUSION

For these reasons, AT&T Illinois respectfully requests that the Commission deny Cbeyond's motion to voluntarily dismiss the complaint.

Dated: May 9, 2011

Respectfully Submitted,

AT&T Illinois

By: /s/ Michael T. Sullivan

James A. Huttenhower
General Attorney
AT&T Illinois
225 W. Randolph Street
Floor 25 D
Chicago, Illinois 60606
Telephone: (312) 727-1444

Michael T. Sullivan
Nissa J. Imbrock
Mayer Brown LLP
71 South Wacker Drive
Chicago, Illinois 60606
Telephone: (312) 782-0600

CERTIFICATE OF SERVICE

I, Michael T. Sullivan, an attorney, certify that a copy of the foregoing AT&T ILLINOIS' RESPONSE TO CBEYOND COMMUNICATIONS, LLC'S MOTION TO VOLUNTARILY DISMISS ITS COMPLAINT WITH PREJUDICE was served on the following Service List via U.S. Mail and/or electronic transmission on May 9, 2011.

/s/ Michael T. Sullivan
Michael T. Sullivan

Service List ICC Docket No. 10-0188

Jessica L. Cardoni
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601

Greg Darnell
Director
ILEC Relations
Cbeyond Communications, LLC
320 Interstate North Parkway
Atlanta, GA 30339

Michael Dover
Atty. for Cbeyond Communications, LLC
Kelley Drye & Warren LLP
333 W. Wacker Dr.
Chicago, IL 60606

Henry T. Kelly
Atty. for Cbeyond Communications, LLC
Kelley Drye & Warren LLP
333 W. Wacker Dr., Ste. 2600
Chicago, IL 60606

Michael J. Lannon
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, IL 60601

Julie Musselman Oost
Economic Analyst for Cbeyond
Communications, LLC
Kelley Drye & Warren LLP
333 W. Wacker Dr.
Chicago, IL 60606

Karl Wardin
Executive Director
Regulatory
Illinois Bell Telephone Company
555 Cook St., Fl. 1E
Springfield, IL 62721

Charles (Gene) E. Watkins
Sr. Counsel
Cbeyond Communications, LLC
320 Interstate N. Parkway, SE, Ste. 300
Atlanta, GA 30339

Leslie Haynes
Administrative Law Judge
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601