

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Cbeyond Communications, LLC)
-vs-)
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)

Docket No. 11-0696

**AT&T ILLINOIS' MOTION TO DISMISS CBEYOND'S
FIRST AMENDED VERIFIED FORMAL COMPLAINT**

Illinois Bell Telephone Company (“AT&T Illinois”), by and through its attorneys, hereby moves to dismiss the First Amended Verified Formal Complaint (“Complaint”) filed by Cbeyond Communications, LLC (“Cbeyond”) on April 5, 2012. The Complaint is the latest attempt by Cbeyond to avoid paying certain charges for services provided by AT&T Illinois pursuant to the parties’ interconnection agreement (“ICA”). While Cbeyond amended the Complaint to address its failure to follow the informal dispute resolution procedures required by the ICA, the amendment does not cure the remaining deficiencies pointed out in AT&T Illinois’ initial motion to dismiss and gives rise to new defects. Cbeyond’s Complaint should be dismissed in full for the reasons explained in this motion.

The Complaint challenges AT&T Illinois’ charges for the provision of Clear Channel Capability (“CCC”). The challenged charges fall into two categories. The first category (which AT&T Illinois will refer to as Category 1 charges) includes CCC charges associated with the “rearrangement” or “grooming” of existing DS1/DS1 enhanced extended links (“EELs”). The second category (Category 2 charges) includes CCC charges associated with the initial provisioning of new DS1/DS1 EELs.

Cbeyond's Complaint should be dismissed as to both categories of charges. The propriety of the Category 1 charges was already challenged by Cbeyond and ruled upon by this Commission in Docket No. 10-0188. The Commission denied Cbeyond's complaint in full, finding that Cbeyond failed to prove that any of the charges at issue in that docket violated the parties' ICA or the Illinois Public Utilities Act ("PUA"). If Cbeyond was unsatisfied with the Commission's consideration and resolution of the Category 1 charges in Docket No. 10-0188, the proper and legally required course of action was for Cbeyond to file for rehearing and then, if it was still dissatisfied, file an appeal with the Appellate Court. Having failed to do either, Cbeyond is barred by the collateral attack doctrine from challenging the Category 1 charges a second time in this new proceeding.

Counts One, Two and Three of the Complaint should also be dismissed – as to both categories of charges – because Cbeyond's billing dispute must be decided by reference to the parties' ICA, *not* state or federal law. In Counts One, Two and Three, Cbeyond alleges that AT&T Illinois has violated various provisions of the PUA – specifically, §§ 13-514, 13-801, and 9-250 – by charging Cbeyond for CCC when providing DS1/DS1 EELs and when converting Cbeyond's DS1/DS1 EELs to new serving arrangements. However, the central and dispositive issue in this case (which is finally raised by Cbeyond in its Count Four) is whether AT&T Illinois' charges are authorized by the parties' ICA. The ICA contains the exclusive statement of the respective rights and obligations of Cbeyond and AT&T Illinois, and the provisions of state law relied upon by Cbeyond are irrelevant to the parties' dispute. The Commission's role is to determine whether AT&T Illinois has complied with the ICA and, if it has not, to order AT&T Illinois to comply. Any attempt to do more would be preempted by federal law.

Count One is subject to dismissal for additional reasons, as well. Although Cbeyond has pled its Count One under the Commission's expedited "fast-track" process, 220 ILCS 5/13-514 *et seq.*, Cbeyond does not allege that it has complied with the Commission's "48-hour notice" requirement, which is set forth in § 5/13-515(c). A claim filed under the fast-track procedure "shall include a statement that the requirements of [§ 5/13-515(c)] have been fulfilled and that the respondent did not correct the situation as requested." *Id.* § 5-13-515(d)(2). Cbeyond's Count One does not include the required statement and, therefore, should be dismissed.

Count One should also be dismissed, as to the Category 1 charges, because Cbeyond explicitly waived its right to bring a fast-track complaint relating to any of the charges that were at issue in Docket No. 10-0188. The parties' agreement not to use a fast-track proceeding is clear and, in any event, causes no prejudice to Cbeyond – which has raised claims based on its ICA and other provisions of the PUA that are not part of the Commission's fast-track process.

Count Two of the Complaint, for violation of § 13-801 of the PUA, should be dismissed for the additional reason that it fails to state a claim. Section 13-801 requires interconnection, collocation and network elements to be provided at cost-based rates. Cbeyond's claim is not that AT&T Illinois' CCC charges are something other than cost-based, but rather that those charges are not applicable to the services Cbeyond ordered. While this allegation theoretically might form the basis of some type of claim, it is *not* a claim for violation of § 13-801.

Count Three of Cbeyond's Complaint, based on § 9-250 of the PUA, should also be dismissed based on its failure to state a claim for which relief can be granted. Section 9-250 authorizes the Commission to investigate a carrier's rates, charges and practices and to impose different rates, charges and practices that it deems to be just and reasonable. Section 9-250 has

no application in this case, because the parties' rights and obligations are set forth in the parties' binding ICA and can only be enforced – not modified – by the Commission.

While Count Four of the Complaint, for breach of contract, is an appropriate cause of action in a dispute between two parties to an ICA, this count also fails, for it does not state a claim upon which relief can be granted. The question to be decided by the Commission in Count Four is whether AT&T Illinois' charges for CCC for new DS1/DS1 EELs are authorized by the parties' ICA. The ICA makes clear that CCC is an optional feature that the CLEC may request, and sets forth the applicable charge for that feature. As Cbeyond recognizes in its Complaint, Cbeyond requested CCC when it ordered new DS1/DS1 EELs. Thus, pursuant to the express terms of the ICA, AT&T Illinois provided and charged Cbeyond for CCC at the price set forth in the contract. While Cbeyond claims that AT&T Illinois has violated various general provisions of the ICA by charging Cbeyond for CCC, those general provisions say nothing about the price for CCC and have no relevance to the question before the Commission. Moreover, even if the general provisions were applicable to this case, they must be qualified to the extent made necessary by the specific ICA provisions addressing CCC and its pricing, which specific provisions have been indisputably complied with by AT&T Illinois.

Finally, Cbeyond's claims for various types of damages and penalties are frivolous and should be stricken from the Complaint, as Cbeyond conceded when the parties briefed AT&T Illinois' motion to dismiss Cbeyond's original complaint in this docket.

Background

In 2010, Cbeyond filed a complaint (Docket No. 10-0188¹) challenging AT&T Illinois' non-recurring charges related to what Cbeyond called "EEL rearrangements" or "EEL

¹ The Final Order in Docket No. 10-0188 is attached as Exhibit 1. This Commission may take administrative notice of materials from Docket No. 10-0188, including those materials attached as exhibit hereto. *See* 83 Ill. Admin. Code

grooming.” *See* Ex 2 at 15-16 (Docket No. 10-0188 Complaint).² One of the types of charges Cbeyond specifically challenged in that docket was CCC, which was mentioned in no fewer than six places in that complaint (Ex. 2, ¶¶ 30, 34, 35, 36, 37, 38), and discussed at length in the parties’ briefs. *See* Ex. 3 at 23, 28-29 (AT&T Initial Brief); Ex. 4 at 5 (Cbeyond Initial Brief); Ex. 5 at 30, 41-42 (AT&T Reply Brief); Ex. 6 at 20-21, 25-27 (Cbeyond Reply Brief); Ex. 7 at 2, 18-19 (Cbeyond Brief on Exceptions); Ex. 8 at 15-17 (AT&T Response to Exceptions). Like its latest Complaint, Cbeyond’s complaint in Docket No. 10-0188 alleged that AT&T Illinois’ charges constituted a breach of the parties’ ICA and also violated §§ 13-514, 13-801, and 9-250 of the PUA. 220 ILCS 5/13-514, 13-801 and 9-250. After extensive discovery and briefing on the merits, the Commission dismissed Cbeyond’s complaint in full, finding that “Cbeyond has not shown that AT&T Illinois has acted improperly in the past with respect to the charges at issue here.” Ex. 1 at 33. The Commission also stated: “Now that the dispute has been resolved by the Commission in favor of AT&T, the Commission sees no reason to stop AT&T from pursuing Cbeyond for the amounts billed.” *Id.* at 35. Cbeyond did not appeal from the Commission’s order.

Following the release of the final order on July 7, 2011, AT&T Illinois waited for Cbeyond to pay the charges at issue in Docket No. 10-0188. By August 23, 2011, Cbeyond still had not done so. Therefore, AT&T Illinois sent a letter to Cbeyond stating that AT&T Illinois intended to exercise its contractual right to suspend new ordering and to disconnect service based on Cbeyond’s non-payment of the \$423,040.59 in charges listed in Exhibit A to the Docket No.

200.640(a)(2) (authorizing Commission to take administrative notice of “the orders, transcripts, exhibits, pleadings or any other matter contained in the record of other docketed Commission proceedings”).

² These grooming projects involved EELs consisting of a DS1 loop and DS1 transport, which Cbeyond wanted to replace either with a DS1 loop combined with DS3 transport or with a DS1 loop connected to transport provided by Cbeyond or a third party. *See* Ex. 1 at 28.

10-0188 Complaint (“Exhibit A”).³ In response, Cbeyond filed suit in Cook County Circuit Court (No. 11 CH 30266) to obtain a temporary restraining order (“TRO”) against AT&T Illinois. *See* Ex. 9 (TRO Motion). In the TRO Motion, Cbeyond recognized that “[i]n July, 2011, the Illinois Commerce Commission . . . resolved Cbeyond’s principal billing question,” which was “whether AT&T improperly imposed disconnection and reconnection fees and charges on Cbeyond.” *Id.* ¶ 5. However, according to Cbeyond, “the Commission’s ruling did not address . . . the parties’ dispute with respect to the accuracy of the amounts billed by AT&T.” *Id.* (emphasis by Cbeyond).

Seeking to avoid the expenditure of time and resources needed to litigate a TRO, the parties entered into an “Agreement Regarding Disputed Amounts.” Ex. 10 (“Agreement”). In the Agreement, Cbeyond committed to escrow the total amount of the AT&T Illinois charges it disputed, \$423,040.59, as set forth in Exhibit A. *Id.* ¶ 1. Cbeyond would then have until September 9, 2011, to “advise AT&T of each specific charge . . . which Cbeyond asserts was not accurately billed (the ‘Disputed Charges’), identify all bases for its assertion, and set forth the amount, for each such charge, that it believes should have been billed.” *Id.* ¶ 3. If the parties could not fully resolve Cbeyond’s disputes concerning the accuracy of the bills, then Cbeyond would “bring a complaint proceeding before the Illinois Commerce Commission . . . by no later than October 24[, 2011], unless the parties mutually agree[d] in writing to a later date.” *Id.* ¶ 5.

The parties expressly agreed that any such “proceeding before the Illinois Commerce Commission shall *not* be designated by a fast-track proceeding.” *Id.* (emphasis added). The Agreement also made clear that AT&T Illinois was not agreeing that Cbeyond had any right to challenge the billings that were already disputed and considered in Docket No. 10-0188. The

³ Exhibit A was filed by Cbeyond under seal and marked Proprietary, but this dollar amount was mentioned in Cbeyond’s publicly filed TRO Motion in the Cook County Circuit Court.

Agreement provides, in relevant part: “The parties specifically reserve all arguments they may have with respect to the charges set forth in Exhibit A, and do not, by virtue of anything in this agreement, hereby waive such arguments. The parties specifically acknowledge that AT&T Illinois is not, by this agreement, waiving any arguments it may have that Cbeyond has waived its right to dispute the accuracy of the charges set forth in Exhibit A [to the Complaint in Docket No. 10-0188].” *Id.* ¶ 7.

On September 9, 2011, Cbeyond informed AT&T Illinois that it was not disputing “the accuracy of all billed and withheld loop provisioning and service ordering nonrecurring charges (NRCs) associated with EEL grooming projects that occurred on invoices dated from December 2005 through February 2010 . . . for which it had previously withheld payment” and that Cbeyond would release from escrow \$353,690.99. Ex. 11. Cbeyond asserted, however, that it was “disput[ing] the accuracy of all billed clear channel capability (‘CCC’) NRCs *associated with EEL grooming projects* that occurred on invoices dated from December 2005 through February 2010[.]” *Id.* (emphasis added). Cbeyond did not indicate that CCC charges billed in any context other than those associated with EEL grooming projects were at issue. Nor did AT&T Illinois’ September 23, 2011 response to Cbeyond’s email. *See* Ex. 12.

On October 10, 2011, Cbeyond informed AT&T Illinois by letter that the parties were at an impasse regarding “AT&T’s assessment of Clear Channel Capability (CCC) nonrecurring charges.” Ex. 13. The generic language in the letter did not distinguish between the \$69,349.60 in CCC charges for EEL rearrangements described in Cbeyond’s September 9 email (Category 1 charges) and CCC charges billed in any other context. *See id.*

On October 24, 2011, Cbeyond filed its Complaint in this Commission. Contrary to the parties’ express agreement otherwise (Ex. 10, ¶ 5), Cbeyond filed the Complaint as a fast track

proceeding under 220 ILCS 5/13-515. AT&T Illinois filed a motion to dismiss the Complaint, in full, on November 18, 2011. AT&T Illinois explained, among other things, that the claims based on the Category 2 charges were premature, because Cbeyond failed to comply with the informal dispute resolution provisions of the parties' ICA. The Commission Staff also moved to dismiss the Complaint on separate grounds. The parties fully briefed the two motions to dismiss.

Just a few days before the Commission's expected decision on the motions to dismiss, the parties asked the Administrative Law Judge to defer ruling on the motions for several months to allow the parties to engage in informal dispute resolution as to the Category 2 charges. Those discussions were unsuccessful and, before the Commission could rule on the motions to dismiss, Cbeyond moved for leave to amend its complaint. In the amended Complaint, Cbeyond seeks to challenge both CCC charges associated with EEL "grooming" or "rearrangements" – the Category 1 charges that were addressed in Docket No. 10-0188 – and CCC charges associated with the initial purchase of DS1/DS1 EELs – the Category 2 charges. *See* Complaint at 2 and ¶¶ 27-31. According to the Complaint, AT&T Illinois' imposition of the CCC charges constitutes a breach of the parties' ICA (Count Four) and a violation of §§ 13-514, 13-801, and 9-250 of the PUA (Counts One, Two and Three, respectively). In its prayer for relief, Cbeyond requests a finding that AT&T Illinois has breached the ICA and violated state law, an order requiring AT&T Illinois to cease and desist its allegedly improper conduct, plus "direct, proximate and consequential damages, attorney fees and all other costs," and a statutory penalty. Complaint at 17-18. The request for attorneys' fees, costs and a penalty reflect remedies only available under the fast-track statute. *See* 220 ILCS 5/13-516.

Argument

I. Cbeyond's Challenge To The Category 1 Charges Should Be Dismissed Because The Commission Already Considered And Rejected That Challenge In Docket No. 10-0188, From Which Cbeyond Chose Not to Appeal.⁴

In its Complaint, Cbeyond recognizes that it already “raised the application of the CCC rate in Docket No. 10-0188 in the context of EEL rearrangements, both in briefing and in exceptions to the Proposed Order.” Complaint ¶ 27. In its Docket No. 10-0188 Complaint, in fact, Cbeyond raised the CCC rate in no fewer than six places. Ex. 2, ¶ 35 (“The DS1 Clear Channel Charge is applicable to format a DS1 loop to transmit a clear channel bit stream. When a previously installed DS1 Clear Channel Loop is cross connected to new transport, Illinois Bell does no work to establish or re-establish clear channel on a loop.”); ¶ 37 (“There is . . . no provision in the parties interconnection agreement that authorizes Illinois Bell to charge Cbeyond the \$70.32 initial or \$8.87 additional DS1 Clear Channel installation charges, when Illinois Bell cross connects previously installed loops to new transport[.]”); ¶ 38 (“the \$70.32 and \$8.87 Clear Channel charges to change the transport portion of an EEL are inappropriate, unlawful and a violation of Cbeyond’s Interconnection Agreement”); *see also id.* ¶¶ 30, 34, 36 (also discussing CCC).

Yet, despite repeatedly raising the CCC issue in Docket No. 10-0188, Cbeyond still claims that it should be allowed to reargue its challenge to the Category 1 charges. Cbeyond asserts that “[t]he Commission’s decision in 10-0188 did not approve AT&T Illinois’ practice of billing the CCC rate on either the specific charges at issue in that docket, or new charge[s] being assessed by AT&T Illinois on DS1 loops provisioned since the filing of that complaint.” Complaint ¶ 29. But the Commission *did* decide the CCC issue, and Cbeyond lost, with the

⁴ As set forth herein, Cbeyond’s complaint is subject to dismissal on numerous grounds. The argument raised in Section IV is akin to an argument raised under 735 ILCS 5/2-615; the arguments raised in Sections I, V and VII are akin to arguments raised pursuant to 735 ILCS 5/2-619; and the arguments raised in Sections II, III and VI are akin to arguments that would be brought under both 735 ILCS 5/2-615 and 5/2-619.

Commission concluding that Cbeyond failed to meet its burden to prove that any of the challenged charges were improper.⁵ In the Final Order, the Commission described the CCC issue (Ex. 1 at 15, 17, 25, 27) and properly concluded that “Cbeyond has not shown that AT&T has violated the parties’ ICA” (*id.* at 29). *See also id.* at 33 (“Cbeyond has not shown that AT&T has acted improperly in the past with respect to the charges at issue here.”). The Commission also stated that “[n]ow that this dispute has been resolved by the Commission in favor of AT&T, the Commission sees no reason to stop AT&T from pursuing Cbeyond for the amounts billed.” *Id.* at 35. The Commission made no exception, explicitly or implicitly, for CCC charges.

Thus, Cbeyond cannot legitimately claim that CCC charges were not at issue in Docket No. 10-0188 or were not addressed by the Commission’s decision. The Commission was not required to discuss Cbeyond’s claim about CCC charges in any further detail than it did. As the Commission has explained, “neither the [Public Utilities] Act, the [Illinois] Code, nor case law require[s] the Proposed Order to discuss *every argument of every party on every material issue.*” *Commonwealth Edison Co. Proposal to Establish Rate CS, Contract Service*, Docket No. 93-0425, 1994 Ill. PUC Lexis 260, at *66, 153 P.U.R. 4th 151 (June 15, 1994) (emphasis added). And as the Appellate Court has made clear, “[t]he Commission is *not required to make particular findings* as to each evidentiary fact or claim, nor is the Commission required to disclose its mental operations.” *Abbott Labs., Inc. v. Illinois Commerce Comm’n*, 289 Ill. App. 3d 705, 716 (1st Dist. 1997) (emphasis added).

In short, Cbeyond raised its challenge to the CCC charges in Docket No. 10-0188, but failed to show that the charges violated the parties’ ICA or any other provision of law. If Cbeyond was unsatisfied with the Commission’s consideration of the CCC charge issue, the

⁵ Contrary to Cbeyond’s implication, it was not necessary for the Commission to “approve AT&T Illinois’ practice of billing the CCC rate.” Complaint ¶ 30. Cbeyond, as the Complainant, bore the burden of proving that AT&T Illinois’ billing practices violated the ICA. Cbeyond failed to do so, warranting the denial of its complaint.

proper recourse was to file an appeal from the Commission's decision. Cbeyond chose not to do so, and is now bound by the decision. The collateral attack doctrine prohibits Cbeyond from relitigating the Commission's prior order in this proceeding. *See, e.g., Albin v. Illinois Commerce Comm'n*, 87 Ill. App. 3d 434, 438 (4th Dist. 1980) (holding that intervenors waived right to challenge Commission's grant of certificate of public convenience and necessity to power company "by their failure to appeal" from the Commission order granting certificate and explaining that order was "not subject to collateral attack" in a subsequent proceeding); *Citizens for a Better Env't v. Illinois Wood Energy Partners, L.P.*, Docket No. 92-0274, 1995 WL 17200504 (ICC Nov. 22, 1994) (slip op.) (granting utility's motion to dismiss complaint challenging its facility's classification as a "qualified solid waste energy facility" on the basis that the "complaint is a collateral attack on a duly entered Order to which no appeal was taken" and "[t]he matters raised in the complaint should have been raised in [the earlier] Docket").

As this Commission has explained, "[i]t is fundamental that prior decisions should not be overturned by later decisions without good cause or a compelling reason." *In re Illinois Bell Telephone Co.*, Docket No. 05-0697, 2006 WL 2380606 (ICC July 26, 2006) (slip op.). "If 'there are no findings that there were any errors of law or fact in the [original] order, or that facts or circumstances have changed[,] the Commission [i]s without authority to effectively rescind' its prior orders" – which is exactly what the Commission would be doing were it to entertain Cbeyond's challenge to the Category 1 charges. *Id.* (quoting *Union Elec. Co. v. Illinois Commerce Comm'n*, 39 Ill. 2d 386, 395 (1968) (reversing ICC order that had tried to rescind prior order granting certificate)). *See also Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104, 111-12 (1951) (holding that carrier's complaints filed with Commission, which sought to vacate prior Commission order denying carrier's application for certificate of convenience and

necessity and which were filed after statutory times for rehearing and appeal elapsed, constituted improper collateral attacks on the prior order, which the ICC properly refused to hear); *Citizens Utilities Company Of Illinois Proposed General Increase In Water and Sewer Rates*, Docket No. 84-0237, 1985 WL 1094359 (ICC Mar. 13, 1985) (slip op.) (rejecting Citizens’ argument concerning offsetting payments in lieu of revenues where “the offset argument by Citizens amounts to nothing more than a collateral attack on the Commission’s decisions in past rate cases”).

In its Complaint, Cbeyond implies that AT&T Illinois agreed that Cbeyond could reassert arguments that were already raised and rejected in Docket No. 10-0188. Specifically, Cbeyond asserts that the parties “agreed on August 29, 2011 that any unresolved issues remaining in dispute over billings arising from the ‘EEL rearrangements’ litigated in ICC Docket No. 10-0188, which the parties could not resolve by negotiation, would be brought to this Commission by Complaint no later than October 24, 2011.” Complaint ¶ 30. Cbeyond blatantly misrepresents the parties’ Agreement. The parties entered into the Agreement only after Cbeyond refused to pay the charges upheld in AT&T Illinois’ favor in Docket No. 10-0188, and filed a TRO with the Cook County Circuit Court seeking to enjoin AT&T Illinois from enforcing its contractual rights under the ICA. In the Agreement, AT&T Illinois made abundantly clear that it was *not* agreeing that Cbeyond had a right to challenge anew the CCC charges that were already considered in Docket No. 10-0188. The Agreement provides, in relevant part: “The parties specifically reserve all arguments they may have with respect to the charges set forth in Exhibit A, and do not, by virtue of anything in this agreement, hereby waive such arguments. The parties specifically acknowledge that AT&T Illinois is not, by this agreement, waiving any

arguments it may have that Cbeyond has waived its right to dispute the accuracy of the charges set forth in Exhibit A.” Ex. 10, ¶ 7.

Moreover, even if the Agreement did authorize Cbeyond to further challenge CCC charges related to EEL “rearrangements” – which it does not – the Agreement says only that Cbeyond will identify charges that were “not *accurately billed*.” *Id.* ¶ 3 (emphasis added).⁶ In this proceeding, Cbeyond is not attempting to challenge the accuracy of AT&T Illinois’ bills at all. Instead, Cbeyond is challenging the legal and contractual bases for the CCC charges. These issues were already brought before the Commission in Docket No. 10-0188. If Cbeyond was unsatisfied with the resolution of the issues there, its remedy was to file an appeal. Cbeyond has no right to relitigate legal arguments already rejected by the Commission.

Finally, as the Commission and its Staff have repeatedly pointed out, Cbeyond could seek to remedy its objection to the imposition of Category 1 charges going forward by negotiating or arbitrating a new ICA with AT&T Illinois. *See* Ex. 1 at 33; Staff Motion to Dismiss Original Complaint at 2. In its final order in Docket No. 10-0188, the Commission noted that it was “baffling . . . why Cbeyond has not sought to amend its contract,” which expired in February 2010. Ex. 1 at 33. Cbeyond still has not requested negotiation of a new or amended ICA. Instead, it claimed, in its response to AT&T and Staff’s earlier motions to dismiss in this docket, that negotiating or arbitrating a new ICA would be too drawn-out and expensive for Cbeyond.⁷ In so arguing, Cbeyond completely ignores that negotiation and arbitration of ICAs is mandated by the 1996 Act. As Staff explained, “[t]he issues that Cbeyond raises in this proceeding and

⁶ Indeed, in the TRO Motion it filed in Cook County Circuit Court, Cbeyond expressly recognized that “[i]n July, 2011, the Illinois Commerce Commission . . . resolved Cbeyond’s principal billing question” – which was “whether AT&T improperly imposed disconnection and reconnection fees and charges on Cbeyond” – but asserted that “the Commission’s ruling did not address . . . the parties’ dispute with respect to the accuracy of the amounts billed by AT&T.” Ex. 9, ¶ 5 (emphasis by Cbeyond).

⁷ Cbeyond Response to Motions to Dismiss Original Complaint at 7-8 (filed Dec. 16, 2011).

raised in Docket No. 10-0188 are precisely those issues that the [1996 Act] is designed to address through its negotiation and arbitration provisions.” Staff Motion to Dismiss Original Complaint at 2.⁸

II. Counts One Through Three Fail To State A Claim Because The Parties’ Relationship Is Governed By Their Interconnection Agreement, Not State Law.

The first three counts of Cbeyond’s claim, which allege violations of various provisions of the PUA, are subject to dismissal because the Complaint must be decided, if at all, by reference to the parties’ ICA. The provisions of state law relied upon by Cbeyond are irrelevant to the Commission’s determination. While AT&T Illinois recognizes that the Commission has jurisdiction to entertain breach of ICA claims, in doing so, the Commission must apply the terms and conditions found in the ICA, not some other, independent source of authority.

The relationship between AT&T Illinois and Cbeyond is governed by their ICA, the “Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth” in the 1996 Act. *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2003). The 1996 Act’s “regime for regulating competition in th[e] [telecommunications] industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law.” *Southwestern Bell Tel. Co. v. Connect Commc’ns Corp.*, 225 F.3d 942, 946 (8th Cir. 2000). Pursuant to federal law, “the authority granted to state regulatory commissions is confined to the role described in § 252 [of the 1996 Act] – that of arbitrating, approving, and enforcing interconnection agreements.” *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003). “Once the terms

⁸ See, e.g., *In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc.*, No. 11-3407-TP-CSS, 2011 WL 5023559, ¶ 35 (Ohio P.U.C. Oct. 12, 2011) (explaining that allowing a carrier to challenge its ICA through a complaint proceeding “would undermine the certainty of contractual obligations” and that the proper course for a party dissatisfied with its ICA “is termination of the current interconnection agreement pursuant to the terms of the agreement followed by the negotiation of a successor agreement”) (a copy of the *McLeodUSA decision* is attached hereto as Ex. 14).

[of the ICA] are set, either by agreement or arbitration, and the state commission approves the agreement, it becomes a binding contract.” *Id.* at 1120. *See also* 47 U.S.C. § 252(a)(1) (carriers may “negotiate and enter into a binding [interconnection] agreement”).

After the ICA is approved, the contracting parties are “regulated directly by the interconnection agreement.” *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev’d in part on other grounds sub nom., Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *See also Michigan Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003) (“once an agreement is approved,” the parties are “governed by the interconnection agreement” and “the general duties of [the 1996 Act] no longer apply”). Thus, once approved, the interconnection agreement is the exclusive statement of the parties’ rights and obligations – and both federal *and* state law operating of their own force are irrelevant. *See, e.g., Goldwasser v. Ameritech Corp.*, No. 97 C 6788, 1998 WL 60878, at *11 (N.D. Ill. Feb. 4, 1998) (dismissing claims for violation of §§ 251, 252, 271 and 272 of the 1996 Act, because telecommunications company’s “duties exist . . . only within the framework of the negotiation/arbitration process which the Act establishes to facilitate the creation of local competition”; explaining that “[i]f there are problems with carriers . . . failing to satisfy the[] duties to their competitors [under §§ 251 and 252 of the 1996 Act], the Act establishes the sole remedy: state PUC arbitration and enforcement proceedings, with review by federal courts”), *aff’d on other grounds*, 222 F.3d 390 (7th Cir. 2000).

This Commission does not have authority – under any provision of federal or state law – to modify the approved, binding ICA between AT&T Illinois and Cbeyond to allow Cbeyond to pay different rates or be subject to different conditions than those set forth in the contract. Simply put, “this Commission cannot take action” that will “effectively change[] the terms of

[the] interconnection agreement[],” because that would “contravene[] the Act’s mandate that interconnection agreements have the binding force of law.” *Pac West Telecomm*, 325 F.3d at 1127. As the Illinois Appellate Court has explained, “[n]othing in the [Illinois Public Utilities] Act, even the independent authority for alternative regulation . . . , gives the Commission the power to controvert federal law.” *Illinois Bell Tel. Co. v. Illinois Commerce Comm’n*, 352 Ill. App. 3d 630, 638-39 (3d Dist. 2004) (Commission order that extended wholesale performance remedy plan to CLECs that did not have interconnection agreements with telephone company, as part of alternative regulation plan, was preempted by 1996 Act; access to remedy plan subverted negotiation and arbitration process required by 1996 Act); *see also Illinois Bell Tel. Co. v. Illinois Commerce Comm’n*, 343 Ill. App. 3d 249, 257 (3d Dist. 2003) (tariff that telephone company was ordered to file by the ICC conflicted with federal law regarding interconnection agreements in the 1996 Act; tariff allowed any CLEC that did not have interconnection agreements to opt into the tariff without having to negotiate, mediate, or arbitrate with telephone company, and thus, telephone company lost its right of federal district court review).

Thus, state law is not applicable to the Commission’s decision in this case, except to the extent that it provides the general principles of contract law used to interpret the ICA. The Commission need only decide whether AT&T Illinois breached the ICA. To 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. *See, e.g., Wisconsin Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003) (state tariffing requirement, which “interfer[ed] with the procedures established by the [1996] [A]ct” for negotiating and arbitrating interconnection agreements, was preempted); *AT&T Commc’ns of Illinois, Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402, 410-11 (7th Cir. 2003) (Illinois statute, mandating methodology for ICC

to use in setting rates, was preempted by the 1996 Act; state methodology, which required consideration of only two factors, conflicted with TELRIC methodology, which was established by the FCC to determine rates under the 1996 Act); *Illinois Bell Tel. Co. v. Hurley*, No. 05 C 1149, 2008 WL 239149, at *7 (N.D. Ill. Jan. 28, 2008) (“Because § 13-801 requires unbundling of AT&T Illinois’ network elements to the Competing Carriers, even in situations in which § 251 of the Act do[es] not require the providing of unbundled access to unimpaired CLECs, . . . the court holds that § 13-801 impermissibly preempts the Act[.]”). Counts One, Two and Three of the Complaint therefore should be dismissed.

III. Count One Of The Complaint Should Be Dismissed Because Cbeyond Failed To Plead Compliance With Requirements For A Fast-Track Complaint And, As To The Category 1 Charges, Contractually Waived Any Right To Bring A Fast-Track Complaint.

In Count One of the Complaint, Cbeyond alleges that AT&T Illinois has violated § 13-514(10) of the PUA. Section 13-514 is part of the PUA’s “fast track” provisions, for which § 13-515’s “expedited procedures shall be used.” 220 ILCS 5/13-515(a). *Cf. Ex. 1* at 30 (“13-515 is a procedural statute that attaches to [§] 13-514”). Claims brought under § 13-514 are subject to specific procedures, including a requirement that, before filing a complaint for violation of § 13-514, the complaining party provide the respondent with notice and an opportunity to cure the purported violation. *See* 220 ILCS 5/13-515(c) (“No 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.”). If the alleged violation is not cured within this window, then a complaint may be filed. Moreover, the statute requires that the complaint “*shall include* a statement that the requirements of [§ 5/13-515(c)] have been fulfilled and that the respondent did not correct the situation as requested.” *Id.* § 5-13-515(d)(2) (emphasis added).

In its Complaint, Cbeyond does not allege that it has fulfilled the notice requirement of § 5/13-515(c), or that AT&T Illinois has failed to “correct the situation as requested” in Cbeyond’s 48-hour notice letter.⁹ These pleading requirements are mandatory. *See North County Communications Corp. v. Verizon North Inc. and Verizon South Inc.*, Docket No. 07-0376, 2007 WL 2032782 (ICC July 11, 2007) (dismissing complaint for failure to comply with requirements of § 13-515(d)); *see also Goldberg v. Astor Plaza Condominium Ass’n*, 2012 WL 996973, at *8 (Ill. App. 1st Dist. Mar. 23, 2012) (“The use of the term ‘shall’ strongly indicates that the legislature intended for this statute to be mandatory.”); *People v. Schaefer*, 398 Ill. App. 3d 963, 967 (2d Dist. 2010) (“The word ‘shall’ in a statute or rule generally reflects a ‘clear expression of legislative intent to impose a mandatory obligation.’” (quoting *People v. Blair*, 395 Ill. App. 3d 465 (2009))). Cbeyond’s “fast track” Complaint is deficient on its face because it fails to meet the pleading requirements of § 5/13-515(d)(2). Therefore, Count One of the Complaint, for violation of § 5/13-514, should be dismissed.

Count 1 should also be dismissed because the parties expressly agreed that any “proceeding before the Illinois Commerce Commission” challenging the charges at issue in Docket No. 10-0188 – *i.e.* the Category 1 charges – “shall *not* be designated by a fast-track proceeding.” Ex. 10, ¶ 5 (emphasis added). As Cbeyond’s counsel Gene Watkins recognized at the preliminary hearing in this matter, Cbeyond agreed “not to apply any fast track proceeding in this case.” Ex. 15 at 14. Thus, Cbeyond has contractually waived its right to bring a fast-track challenge, including a challenge based on § 13-514(10), with respect to the Category 1 charges.

Cbeyond cannot legitimately claim that it will be prejudiced by the Commission’s enforcement of the Agreement to resolve the Circuit Court TRO proceeding. Cbeyond’s other

⁹ Cbeyond alleges only that it provided AT&T Illinois with a copy of the new Complaint at least 48 hours before its filing. Complaint ¶ 3.

counts allege claims for breach of the ICA and for violation of two other provisions of the PUA. Thus, Cbeyond has a remedy, just not one based on the fast-track provisions of the PUA, which remedy it waived.¹⁰

IV. Count Two Of Cbeyond’s Complaint Should Be Dismissed Because It Fails To Allege That AT&T Illinois Has Engaged In Any Conduct Addressed By § 13-801 Of The Illinois Public Utilities Act.

In Count Two of its Complaint, Cbeyond alleges that AT&T Illinois violated § 13-801(g) of the PUA, which provides that “[i]nterconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates.” 220 ILCS 5/13-801(g). *See* Complaint ¶¶ 41-45. Cbeyond does not allege, however, that the CCC rates AT&T Illinois has imposed on Cbeyond are anything other than “cost-based” rates. Indeed, the Complaint alleges that the cost-based rate for CCC was established in Docket No. 02-0864. *See* Complaint ¶ 8. Instead, Cbeyond’s Complaint challenges whether the CCC rate should be applied at all when Cbeyond purchases a DS1 or requests the “rearrangement” of a DS1 EEL. *See id.* ¶ 43. Whether a particular rate element is applicable to a particular service – which is the question raised by Cbeyond’s Complaint – is an entirely separate issue that is not covered by § 13-801. Simply put, the facts of this case do not fit within the statute, and therefore Count Two fails to state a claim for violation of § 13-801 and should be dismissed.

V. Count Three Of Cbeyond’s Complaint Should Be Dismissed Because The Commission Does Not Have Authority Under § 9-250 Of The Illinois Public Utilities Act To Impose Rates, Charges Or Practices Different Than Those Set Forth In The Parties’ ICA.

In Count Three of its Complaint, Cbeyond asks this Commission to investigate AT&T Illinois’ application of the CCC rate. Complaint ¶¶ 46-49. Cbeyond asserts that § 9-250 allows

¹⁰ As noted herein, those other, non-fast-track claims are deficient for other reasons and AT&T Illinois seeks their dismissal, as well.

the Commission to investigate AT&T Illinois' rates, charges and practices and "impose rates, charges and practices that are just and reasonable." *Id.* ¶ 49. But the Commission has no authority to do what Cbeyond requests. As explained above (*see* Section II, *supra*), this Commission does not have authority to modify the approved, binding ICA between AT&T Illinois and Cbeyond to order the implementation of different rates, charges or practices than those specified in the ICA. If this Commission finds that AT&T Illinois has *breached* the ICA (which AT&T Illinois has not), then it may order AT&T Illinois to comply with the contract. But it may not order any changes to the rates, charges or practices set forth in the ICA. Cbeyond's claim under § 9-250 therefore must be dismissed.

VI. Count Four Of Cbeyond's Complaint Should Be Dismissed Because It Is Clear From The Face Of The Complaint And The Governing ICA That Cbeyond Ordered CCC Capability And AT&T Illinois Provided It At The Rates Set Forth In The ICA.

As discussed above, the parties' relationship is governed by their ICA, and at its core, this case is nothing more than a breach of contract case. Cbeyond finally asserts its breach of contract claim in its final count. In Count Four, Cbeyond alleges that "AT&T Illinois' misapplication of the CCC rate is a breach of the parties' Interconnection Agreement." Complaint ¶ 51. In contrast to the original complaint (and presumably in response to AT&T Illinois' first motion to dismiss), the amended Complaint actually identifies specific provisions of the ICA that AT&T Illinois has allegedly breached. Complaint ¶ 35. As demonstrated in this section, however, Cbeyond's Complaint does *not* address the only ICA provisions that are relevant to the Commission's inquiry on the breach of ICA claim: (1) § 9.2.7.7.5 of Schedule 9.2.7 of the ICA, which explicitly and unequivocally provides that CCC is an optional feature that may be ordered by a CLEC for an additional cost; and (2) the Pricing Schedule, which sets forth the specific additional cost for CCC. AT&T Illinois fully complied with these provisions,

and the general provisions cited by Cbeyond in its Complaint cannot be used to contradict the specific ICA terms governing CCC.

The ICA is clear regarding CCC. Section 9.2.7.7.5 of Schedule 9.2.7¹¹ states: “The following *optional features* are available if requested by CLEC, at an additional cost.” Ex. 16 at p. 295 of 471 (emphasis added).¹² Section 9.2.7.7.5 then lists “Clear Channel Capability” as one of the optional features. *Id.* The price for optional CCC is set forth in the ICA’s Pricing Schedule. Ex. 16 at pp. 389, 390, 391 of 471 (original pricing schedule) and p. 405 of 471 (02-0864 pricing schedule).

The Complaint is also clear that Cbeyond ordered and received circuits with CCC when it ordered new DS1/DS1 EELs from AT&T Illinois. *See* Complaint at 2-3 (“Cbeyond purchases circuits *that are formatted with clear channel capability* from Illinois Bell as Unbundled Network Elements (‘UNEs’), normally as part of a combination of UNEs called a DS1/DS1 Enhanced Extended Loop (EEL). . . . When Cbeyond orders new DS1/DS1 EEL circuits designed and formatted with clear channel capability, AT&T Illinois bills Cbeyond the DS1 Loop provisioning nonrecurring charge, the DS1 transport non-recurring provisioning charge and the CCC non-recurring provisioning charge.” (emphasis added)).

Because the ICA expressly provides that CCC is an optional feature that the CLEC may order for an additional cost, and Cbeyond ordered CCC as an optional feature when it purchased DS1/DS1 EELs from AT&T Illinois, Cbeyond is required by the ICA to pay the charges set forth in the parties’ ICA. Cbeyond simply has no claim for breach of the ICA.¹³

¹¹ Schedule 9.2.7 deals with Interoffice Transmission Facilities.

¹² Exhibits 16 contains excerpts of the parties’ governing ICA. References to page numbers in Exhibit 16 refer to the numbering in the bottom left-hand corner of each page.

¹³ The discussion in this Section specifically references the allegations made with respect to the Category 2 charges. However, this argument applies equally to the Category 1 charges. Thus, if the Commission determines that the

Ignoring these governing provisions of the ICA, Cbeyond focuses on a host of other provisions that have nothing to do with CCC. See Complaint ¶¶ 35; 51 (citing ICA General Terms & Conditions §§ 0.1.19, 1.55; TRO/TRRO Amendment §§ 3.1.2, 3.1.4, 3.1.5, 6.1, 6.2, 6.5; Article 9 §§ 9.1.1, 9.3.3.4, 9.7; ICC June 9, 2004 Order Amendment, Pricing Schedule). Even if these provisions had any relevance to AT&T Illinois' charges for CCC – which, as explained below, they do not – the specific ICA provisions addressing CCC would control over other, more general, provisions. “It is well-established that where a document contains both general and specific provisions relating to the same subject, the specific provision is controlling.” *Preuter v. State Officers Electoral Bd.*, 334 Ill. App. 3d 979, 991 (1st Dist. 2002) (quoting *Continental Casualty Co. v. Polk Bros., Inc.*, 120 Ill. App. 3d 395, 399 (1st Dist. 1983)). See also *Illinois Bell Telephone Co. v. King City Telephone, LLC*, Docket No. 05-0713, 2006 WL 3950112, at *12 (ICC July 26, 2006) (“Contract law states that where a contract contains general and specific terms, the specific terms control.” (citing *Grevas v. United States Fidelity & Guar. Co.*, 152 Ill. 2d 407, 411 (1992))).

The court's decision in *R.W. Dunteman Co. v. Village of Lombard*, 281 Ill. App. 3d 929 (2d Dist. 1996), is instructive. *Dunteman* involved the interpretation of a contract between a construction company, Dunteman, and the Village of Lombard under which Dunteman was to remove and replace a section of road in the village. “A dispute arose as to whether certain work performed by Dunteman was to be compensated at the ‘pavement removal’ rate provided in the contract or at the ‘special excavation’ rate, which was the lower of the two rates.” *Id.* at 931. The appellate court agreed with the trial court that the higher “pavement removal” rate applied to the work Dunteman performed, finding that the trial court “properly found that an ambiguity

Category 1 claims should not be dismissed on the ground that the charges were already addressed (and found to be properly charged) in Docket No. 10-0188, the Category 1 claims should be dismissed for the independent reason that Cbeyond cannot state a breach of contract claim for them, for the reasons set forth herein.

existed between the special excavation provisions and the pavement removal provisions, both of which covered the same type of material,” and “then correctly concluded that the specific provisions governing the rate of pay . . . controlled.” *Id.* at 936. Likewise, in this case, if there were any ambiguity concerning AT&T Illinois’ right to charge Cbeyond for CCC – which there is not – the specific ICA provisions addressing CCC would control over the general ICA provisions cited by Cbeyond.

There is no ambiguity in the ICA, however, because the myriad provisions cited by Cbeyond do not address the application of the CCC rate. Most of the provisions cited by Cbeyond merely require AT&T Illinois to offer certain products and services on “just, reasonable, and non-discriminatory” “rates, terms, and conditions.” These general provisions do not specifically address CCC and cannot be used as a basis to invalidate the specific ICA provisions setting forth the availability of, and rate for, CCC. For instance, General Terms & Conditions § 1.55 requires AT&T Illinois to provide UNEs “on an unbundled basis on rates, terms and conditions set forth in this Agreement that are just, reasonable, and non-discriminatory.” Ex. 16 at p. 61 of 471. As discussed above, AT&T Illinois provided CCC in accordance with the rates, terms and conditions set forth in the parties’ ICA, and the Commission approved that ICA in accordance with federal law. *See also* TRO/TRRO Amendment § 3.1.2, Ex. 16 at p. 422 of 471 (DS1 Loops); TRO/TRRO Amendment § 3.1.4, Ex. 16 at pp. 422-423 of 471 (DS1 Unbundled Dedicated Transport); TRO/TRRO Amendment § 3.1.5, Ex. 16 at p. 423 of 471 (DS3 Unbundled Dedicated Transport); Article 9, § 9.1.1, Ex. 16 at p. 112 of 471 (requiring AT&T Illinois to provide “nondiscriminatory access to Unbundled Network Elements, upon request, at any technically feasible point on just, reasonable and nondiscriminatory rates, terms and conditions to enable CLEC to provision any telecommunications services within the

LATA”). This Commission has already addressed and rejected several of these same provisions in Docket No. 10-0188, and should reach the same conclusion here.¹⁴

Similarly, Cbeyond cannot find support in any other provisions of the ICA’s TRO/TRRO Amendment to support a breach of contract claim. Cbeyond tried this in Docket No. 10-0188 and the Commission rejected Cbeyond’s argument. It should do the same here. As Cbeyond did in the prior proceeding, it mischaracterizes the purpose and effect of the TRO/TRRO Amendment, and the *TRO*¹⁵ and *TRRO*¹⁶ decisions by the FCC that led to the TRO/TRRO Amendment. While the *TRO* and *TRRO* decisions and the TRO/TRRO Amendment make reference to “converting” existing circuits, they are all addressing the conversion of “wholesale services (e.g., special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, i.e., converting UNEs or UNE combinations to wholesale.” *TRO*, ¶ 587. The *TRO* and *TRRO* decisions, and the TRO/TRRO Amendment, do not address ordering new DS1/DS1 EELs (or changing from one UNE or UNE combination to another UNE or UNE combination as was at issue in Docket No. 10-0188). That distinction is critically significant and is clearly evident in the *TRO* and *TRRO*.

¹⁴ As to §§ 3.1.4 and 3.1.5, the Commission in Docket No. 10-0188 found: “AT&T is alleged to have violated TRO/TRRO Amendment Sections 3.1.4 (DS1 Transport) and 3.1.5 (DS3 Transport), which state that AT&T must provide non-discriminatory access, at Cbeyond’s request, to Unbundled Dedicated Transport. *The UDT rules and the ICA sections that give contractual effect to them do not apply to EEL rearrangements.*” Ex. 1 at 32 (emphasis added). In regard to § 9.1.1, the Commission considered and rejected the applicability of this provision to Cbeyond’s orders for EEL “rearrangements,” finding that the two-step process identified by AT&T for EEL “rearrangements” was proper, and that if Cbeyond wished to challenge that process and AT&T’s rates, it should do so in an ICA arbitration. *See* Ex. 1 at 34 (“Cbeyond cites various federal regulations (47 C.F.R. §51.507(e)), ICA sections (ICA Section 9.1.1) and section 251 of TA96 that it believes supports its position that the rates AT&T charges for the two-step process are improper and not TELRIC compliant. If Cbeyond decides to pursue either an arbitration or a generic proceeding, then the Commission would look at what work AT&T is performing and determine what rates should apply for ‘rearrangements’.”). Thus, for the reasons set forth in Section I, *supra*, Cbeyond is barred from the collateral attack doctrine from again relying on §§ 3.1.4, 3.1.5 and 9.1.1 to challenge the propriety of the Category 1 charges already considered by the Commission in Docket No. 10-0188.

¹⁵ *Triennial Review Order*, 18 FCC Rcd. 16978 (Sept. 17, 2003) (“*TRO*”).

¹⁶ *Triennial Review Remand Order*, 20 FCC Rcd. 2533 (Feb. 4, 2005) (“*TRRO*”).

The Commission agreed with AT&T Illinois in Docket No. 10-0188 and rejected Cbeyond's reliance on § 6.1 of the TRO/TRRO Amendment. In Docket No. 10-0188, the Commission explained:

[T]he TRO/TRRO Attachment Section 6.1 states that "SBC shall provide access to Section 251 UNEs and combinations of Section 251 UNEs without regard to whether a CLEC seeks access to the UNEs to establish a new circuit or to convert an existing circuit from a service to UNEs, provided the rates, terms and conditions under which such Section 251 UNEs are to be provided are included within the CLEC's underlying Agreement". Cbeyond argues that this section of the ICA and the TRO require the rearranging of existing EELs. It relies specifically on the term "to convert an existing circuit to UNEs". The Commission does not read it the same way. *An existing circuit is a circuit that was a Cbeyond customer being served through special access tariffs and now will keep the same circuit but pay UNE prices.* If the parties had intended that to "convert an existing circuit" meant to convert an existing EEL, the ICA would say just that, i.e., to "convert an existing EEL". It does not, which leads us to conclude that Cbeyond is mistaken.

Ex. 1 at 32 (emphasis added). The Commission should reach the same result here.¹⁷

For the same reasons that the Commission rejected Cbeyond's reliance on Section 6.1 of the TRO/TRRO Amendment, the Commission should reject Cbeyond's reliance on Sections 6.2 and 6.5 of the same amendment. Section 6.2 distinguishes between low-capacity and high-capacity EELs¹⁸ and sets forth certain "Eligibility Criteria" applicable when Cbeyond seeks to purchase high-capacity EELs. Ex. 16 at pp. 431-432 of 471. And § 6.5 states: "Other than the Eligibility Criteria set forth in this Section [6], [AT&T Illinois] shall not impose limitations, restrictions, or requirements on requests for the use of UNEs for the service CLEC seeks to offer." Ex. 16 at p. 435 of 471. There is no allegation in this case that AT&T Illinois is imposing any "Eligibility Criteria" on Cbeyond or any "limitations, restrictions, or requirements

¹⁷ With respect to reliance on Section 6.1 of the TRO/TRRO Amendment, Cbeyond also is barred by the collateral attack doctrine from using this provision to challenge the Category 1 charges. *See supra* Section I.

¹⁸ Section 6.2 defines low-capacity EELs as voice grade to DS0 level UNE loops combined with UNE DS1 or DS3 dedicated transport. Such EELs are not even at issue in this case.

on” Cbeyond’s requests for UNEs. And none of these provisions say anything about, let alone prohibit a CLEC from ordering, CCC as an optional feature, as Cbeyond did here, or about what price is applicable to such an order.

Cbeyond next cites to §§ 9.3.3.4 and 9.7 of Article 9 to the ICA, which provide that AT&T Illinois will charge the rates set forth in the Pricing Schedule for UNEs and UNE combinations.¹⁹ That is precisely what AT&T Illinois did here: it charged Cbeyond for CCC at the rate set forth in the parties’ ICA.

Finally, Cbeyond cites to the “ICC June 9, 2004 Order Amendment, Pricing Schedule.” Cbeyond alleges that “[t]he Pricing Schedule referenced in Article 9, Sections 9.3.3.4 and Section 9.7 was amended by the ICC June 9, 2004 Order Amendment, section 2.1.1, to incorporate the rates from ICC Docket No. 02-0864.” Complaint ¶ 35(d). Nothing in the ICC’s June 9, 2004 Order addresses the application of the CCC rate when the CLEC orders a DS1/DS1 EEL. Although one CLEC (AT&T, prior to its merger with SBC) sought clarification concerning the circumstances under which the CCC rate would apply, the Commission’s final order does not address the application of the CCC rate. *See* Complaint ¶¶ 22, 24.²⁰ Since the June 9, 2004 Order does not address the application of the CCC rate, the amendment implementing that order obviously cannot form the basis of a finding that AT&T Illinois has breached its ICA by charging the wrong rate for CCC.

In summary, Cbeyond’s Complaint fails to state a claim for breach of the ICA, because it does not identify any ICA provisions that address the question at hand: what is Cbeyond required

¹⁹ *See* Article 9, § 9.3.3.4, Ex. 16 at p. 118 of 471 (“For new UNE combination[s] listed on Table 1, CLEC shall issue appropriate service requests. These requests will be processed by [AT&T Illinois] and [Cbeyond] will be charged pursuant to the Pricing Schedule.”); Article 9, § 9.7, Ex. 16 at p. 121 of 471 (“For Unbundled Network Elements defined in this Agreement, and for Combinations listed on Table 1, [AT&T Illinois] shall charge [Cbeyond] the UNE rates specified in the Pricing Schedule.”).

²⁰ The final ICA provision Cbeyond identifies as having been “violated,” § 0.1.19 of the General Terms and Conditions, simply contains the definition of “EEL.” Ex. 16, p. 419 of 471.

to pay for CCC when it selects CCC as an optional feature when it orders new DS1/DS1 EELs? That question is answered by reference to § 9.2.7.7.5 of ICA Schedule 9.2.7, which provides that CCC is an “optional feature” available “at an additional cost” when “requested by [a] CLEC.” Ex. 16 at p. 295 of 471. *See also* Ex. 16 at pp. 389, 390, 391 of 471 (original pricing schedule, price for optional CCC), and p. 405 of 471 (02-0864 pricing schedule, price for optional CCC). The 02-0864 Amendment and Pricing Schedule did not change that contract language. To the extent that the general ICA provisions identified in Cbeyond’s Complaint have anything to do with CCC – which, as explained above, they do not – they would have to be read in conjunction with, and modified to the extent necessary by, the specific provisions contained in § 9.2.7.7.5 and the Pricing Appendix. *See, e.g., Henderson v. Roadway Express*, 308 Ill. App. 3d 546, 549 (4th Dist. 1999) (specific provision of settlement agreement, which forbid personal injury plaintiff from assigning period payments, controlled over general provision of settlement agreement referring to “assigns”); *Boyd v. Peoria Journal Star, Inc.*, 287 Ill. App. 3d 796, 798 (3d Dist. 1997) (“full effect should be given to more principal and specific clauses, and general clauses should be subject to modification or qualification necessitated by specific clauses”); *American Federation of State County & Mun. Employees v. State Labor Relations Bd.*, 274 Ill. App. 3d 327, 337 (1st Dist. 1995) (“in construing a contract, courts must give effect to the more specific clause and, in so doing, should qualify or reject the more general clause as the specific clause makes necessary”). Because Cbeyond fails to identify any provisions of the ICA that AT&T Illinois has breached, its Complaint should be dismissed in full.

VII. The Interconnection Agreement Bars Cbeyond’s Prayer For Damages, Attorneys’ Fees And Costs.

In its response to AT&T Illinois’ motion to dismiss Cbeyond’s original complaint, Cbeyond admitted that it is “not entitled [to] consequential damages or attorneys fees under the

terms of the ICA” and that “AT&T’s Motion on this argument should be granted in part, to exclude any remedy to Cbeyond which is inclusive of consequential damages or legal fees.” Cbeyond Response to Motion to Dismiss Original Complaint, at 26. Thus, AT&T Illinois was surprised to read in the amended Complaint that Cbeyond is still demanding “direct, proximate and consequential damages, attorney fees and all other costs associated with bringing this action,” plus penalties. Complaint at 18. Whether Cbeyond’s latest demand was made in error or was a conscious attempt to retreat from its prior admission, Cbeyond has no claim to consequential damages, fees or costs for the reasons set forth in AT&T Illinois’ initial motion to dismiss.²¹

Conclusion

For the reasons explained above, Cbeyond’s Complaint should be dismissed in full.

Dated: May 9, 2012

/s/ Nissa J. Imbrock

²¹ To the extent Cbeyond intends to present a position on this issue different from that set forth in its response to AT&T Illinois’ initial motion to dismiss, Cbeyond has waived any such arguments. For completeness of the record, AT&T Illinois incorporates by reference, as if fully set forth herein, its initial motion to dismiss and related briefs, as it pertains to this issue. *See* AT&T Illinois’ Motion to Dismiss Original Complaint, at 21-25 (Nov. 18, 2011); AT&T Illinois’ Reply in Support of Motion to Dismiss, at 23 (Jan. 9, 2012).

CERTIFICATE OF SERVICE

I, Nissa J. Imbrock, an attorney, certify that a copy of the foregoing AT&T ILLINOIS' MOTION TO DISMISS CBeyond's FIRST AMENDED VERIFIED FORMAL COMPLAINT was served on the following Service List via U.S. Mail and/or electronic transmission on May 9, 2012.

/s/ Nissa J. Imbrock

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