

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Cbeyond Communications, LLC)	
-vs-)	
Illinois Bell Telephone Company d/b/a)	
AT&T Illinois)	Docket No. 11-0696
)	
Formal Complaint pursuant to Sections 13-)	
515 and 10-108 of the Illinois Public)	
Utilities Act)	
)	

**CBEYOND COMMUNICATIONS, LLC’S RESPONSE TO AT&T’S MOTION TO
DISMISS THE FIRST AMENDED VERIFIED FORMAL COMPLAINT**

COMES NOW, Cbeyond Communications, LLC (“Cbeyond”), by and through its attorneys, and hereby files this Response to the Motion to Dismiss Cbeyond’s First Amended Complaint (“Complaint”) filed by AT&T on May 9, 2012 (“Motion”). It should be indisputable that the Illinois Commerce Commission (“ICC”) has jurisdiction to address a complaint asserting a violation of the Illinois Public Utilities Act brought by a telecommunications carrier who alleges that another telecommunications carrier is misapplying a rate established by the ICC under the ICC’s jurisdiction. AT&T’s Motion should be denied.

I. AT&T’S THEORY OF THE CASE IS MANIFESTLY INCORRECT

Cbeyond amended its complaint to address two issues: (1) Staff’s request that Cbeyond clarify that it was not seeking a declaration regarding a matter between AT&T and Cbeyond; and (2) to add the contractual terms of the Interconnection Agreement (“ICA”) AT&T breached. Cbeyond also sought a delay in the process to respond to AT&T’s assertion that AT&T was not afforded the opportunity to formally negotiate a possible resolution to this dispute. Cbeyond took AT&T’s assertion as an indication that AT&T was interested in negotiating. Unfortunately that was not the case, and Cbeyond was obligated to amend its complaint. That multi-month

delay did yield one positive disclosure, which AT&T presented in its Motion: AT&T's theory of the case.

In its Motion to Dismiss, AT&T finally sets-out its theory of the case.¹ AT&T asserts that language in the original ICA between the parties – from 2003 – allows AT&T to misapply a rate created by the ICC. Specifically, AT&T points to language in the original 2003 ICA that states that clear channel is an option for transport which would be provided at an additional cost. In 2003, the original ICA contained a DS1 transport rate which was not developed to include line coding for clear channel as well as a rate for adding clear channel to DS1 transport. In 2004, the ICC created a new DS1 transport rate element which consolidated the previously separate charges for line coding (clear channel) and provisioning DS1 transport.² That consolidated rate was adopted by the parties as an amendment to their ICA in 2005.³ The flaw in AT&T's theory of the case is that it ignores the fact of the rate consolidation.

The testimony from all the parties in the rate case that established the rate for DS1 transport (Docket 02-0864) – including Illinois Bell's own witnesses – made it clear that line coding was included in the DS1 transport rate.⁴ AT&T's theory fails for a simple reason: if the ICC consolidates the rates for two separate activities (provisioning DS1 transport and line coding for transport), each with separate rates, into a single consolidated rate (provisioning DS1 transport with line coding) – as was the case in Docket 02-0864 – then the new consolidated rate is what should be charged, not the old historical rate for line coding AND the new consolidated

¹ Verified Motion to Dismiss Cbeyond's First Amended Verified Formal Complaint, *Cbeyond Communications, LLC v. Illinois Bell Telephone Co. d/b/a AT&T Illinois*, ICC Docket No. 11-0696, filed May 9, 2012, at pgs. 20-27.

² First Amended Verified Formal Complaint, *Cbeyond Communications, LLC v. Illinois Bell Telephone Co. d/b/a AT&T Illinois*, ICC Docket No. 11-0696, filed May 1, 2012, at ¶¶ 14-21 (“Amended Complaint”).

³ ICC June 9 Order Amendment, attached hereto as Exhibit 1.

⁴ Amended Complaint, at ¶¶ 14-21.

rate – which now includes line coding. By continuing to charge Cbeyond both rates, AT&T is double-recovering for line coding in violation of the PUA and parties’ ICA.

In 2005, the parties amended their ICA to adopt rates established by the ICC in Docket 02-0864. Among those rates were the rates for provisioning certain transport facilities, including DS1 transport. According to the testimony of the CLECs, AT&T (then Illinois Bell) and Staff in Docket 02-0864, the rate for provisioning DS1 transport now included the line coding (AMI or B8ZS) for that facility.⁵ All the parties in Docket 02-0864 agreed that if line coding was ordered at the time the DS1 transport facility was ordered, no additional charge would apply for that specific line coding.⁶ B8ZS line coding is called “clear channel” in telecommunications-speak. It is AT&T’s practice of charging for both clear channel coding for DS1 transport and the full provisioning charge for DS1 transport – even when the line coding is included in the original order for DS1 transport - that is the issue here.

Cbeyond asserts that by adopting the rate for DS1 transport developed in Docket 02-0864, the parties adopted its underlying application. It should be axiomatic that the rate developed for DS1 transport applies to DS1 transport orders. Said more plainly: (1) in Docket 02-0864, the ICC created a rate for DS1 transport that included line coding; (2) Cbeyond and AT&T adopted that rate into their ICA by an amendment which was intended to “effectuate certain pricing changes established by the Commission” in Docket 02-0864; (3) thereafter, Cbeyond ordered DS1 transport under that amended ICA; (4) the ICC rate for DS1 transport, as adopted, should therefore be charged; and (5) because line coding is included in the rate, no additional charge for line coding should be applied. AT&T now argues that language in the ICA which predates the rate for DS1 transport – which allowed AT&T to charge an additional charge

⁵ *Id.*

⁶ *Id.*

for the line coding – trumps the new rate and its intended application.⁷ That is wrong. It should also be noted that AT&T has not disputed the core assertion by Cbeyond that the DS1 transport rate established in 02-0864, and adopted by the parties, includes the costs of line coding.

The amendment to the ICA which incorporated the new DS1 rate for transport includes a provision that resolves the question of whether the 2003 language allowing an additional line coding charge trumps the 2005 rate which includes line coding. Section 1.2 of the amendment, which was intended to “effectuate certain pricing changes established by the Commission” in Docket 02-0864, states that if there is any conflict or inconsistency between the amendment and the existing ICA, then the amendment shall control.⁸ Accordingly, the rate for DS1 transport, including all the activities it supports (like line coding), is the rate established by the 2005 amendment, and any inconsistent language from the 2003 ICA is overruled by the amendment. AT&T’s position that it is allowed to charge more than the DS1 transport rate based on language predating the 02-0864 amendment is, therefore, legally unjustifiable and incorrect.

II. AT&T’S MOTION FACES A HIGH LEGAL BAR

The legal standard governing motions to dismiss sets a very high bar against dismissal. Dismissal of a complaint on the pleadings is warranted only where it is clearly apparent that no set of facts can be proved that would allow the plaintiff to recover. *Gavery v. McMahon & Elliot*, 283 Ill. App.3d 484, 486; 670 N.E.2d 822, 824 (1st Dist. 1996). In deciding such a motion to dismiss, all well-pleaded facts in the complaint must be deemed true, and any reasonable inferences drawn from the allegations of fact must be liberally construed in favor of the non-moving party. *South Chicago Savings Bank v. Braxton*, 178 Ill.App.3d 545, 549; 533 N.E.2d 480, 482 (1st Dist. 1988). The accusation, which must be assumed to be accurate, is that a carrier

⁷ AT&T’s Motion, at pgs. 20-27.

⁸ ICC June 9, 2004 Order Amendment, Exhibit 1.

is misapplying a rate set by the ICC. Accordingly, either a carrier can misapply a rate set by the ICC with impunity from complaint by the customers against whom that rate is misapplied or Cbeyond's Complaint must be allowed to go forward.

III. AT&T'S MOTION SHOULD BE DENIED

AT&T's Motion should be denied. AT&T's Motion takes a "shotgun" approach to its pleading, arguing that: (1) the Order in Docket 10-0188 bars a subset of Cbeyond's claims; (2) AT&T cannot violate state law because it has a contract; (3) there is a technical problem with Cbeyond's pleading; (4) an agreement not to designate this case as a fast track proceeding waived any potential claims which might cause the option of a fast-track proceeding; (5) by charging more for a service than it should AT&T is not violating a requirement that it provide services at cost-based rates; (6) the ICC may not investigate rates it set because the parties have a contract; (7) AT&T has arguments against the contractual provisions Cbeyond claims were breached; and (8) a subset of the remedies requested are contractually barred by the parties' ICA. With the sole limited exception of AT&T's eighth argument regarding Cbeyond's request for consequential damages, none of AT&T's various arguments support dismissal of Cbeyond's claims.

A. Docket 10-0188 Made No Ruling On The Application Of The CCC Rate.

First, AT&T argues that the Order in ICC Docket 10-188 addressed, by implication, a subset of the allegations made in the Complaint – what AT&T calls Category 1 charges – and that this Complaint's outcome (as to those charges) cannot run counter to the Order in 10-0188. That allegation fails for three reasons: (1) Cbeyond is not attacking any part of the Order in 10-0188; (2) the Order in Docket 10-0188 did not make any legal or factual finding regarding the application of CCC charges to new circuits – indeed, apart from noting that the parties presented

positions, it is totally silent on the issue; and (3) no specific billings of CCC were addressed in 10-0188 – it was a generic challenge to AT&T’s practice of billing for loop charges for EEL rearrangements (CCC was a side-issue, albeit one Cbeyond asked to be addressed but which was never addressed by the Commission).

1. There is no *res judicata* effect from the Order in 10-0188.

AT&T’s Motion confuses case law addressing attacks on ICC Orders with case law addressing instances where the ICC revisits the same subjects previously addressed in prior Orders. Those factual scenarios implicate two distinct legal doctrines: *res judicata* and the collateral attack doctrine. The law in Illinois is very clear that *res judicata* does not apply to ICC Orders: The ICC may, if the evidence supports it, revisit the same issue presented in a prior case and arrive at a different outcome. *Commonwealth Edison v. Illinois Commerce Comm’n*, 937 N.E.2d 685, 705 (2d Dist. 2010) (“Illinois courts have consistently held the ‘decisions of the Commission are not *res judicata*.’”) “The concept of public regulation requires that the Commission have power to deal freely with each situation that comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding.” *Id.* (emphasis added).

Therefore, even if there were a legal or factual finding specific to the CCC issue in 10-0188 (which there was not), Cbeyond is still permitted to ask the ICC to consider the arguments and evidence presented in this docket and arrive at a different conclusion. Moreover, AT&T has raised a new theory of the case in this case, and Cbeyond has presented new evidence not previously presented in Docket 10-0188. It is perfectly within the Commission’s authority to address the issues the Complaint presents – even if the Commission already considered some of the issues presented in another docket. As outlined below, there is no finding of fact or

conclusion of law specific to the CCC issue in the order from Docket 10-0188. Nevertheless, the fact that the same issue presented in 10-0188 is being presented here does not, in and of itself, support dismissal of the issue or claim.

2. The collateral attack doctrine does not apply because Cbeyond is not attacking the Order in 10-0188.

The collateral attack doctrine is not implicated by Cbeyond's Amended Complaint. AT&T seeks a limited dismissal of some of Cbeyond's claims on the grounds that such claims are barred by the collateral attack doctrine.⁹ Specifically, AT&T asserts that claims related to "category 1" charges which were brought in Docket 10-0188 are prohibited from consideration in this docket because they constitute a collateral attack on the final order in that case. The collateral attack doctrine prohibits a litigant from attacking an Order of the ICC outside the normal appeal or rehearing procedure. Cbeyond, however, does not seek any change to the 10-0188 order, and no requested relief in Cbeyond's Prayer even mentions the 10-0188 order.¹⁰

Each of the cases cited by AT&T in support of its assertion that the collateral attack doctrine mandates dismissal involves either an attack on an ICC Order or facts inapposite to this case. Thus, in *Albin v. Illinois Commerce Comm'n*, 87 Ill. App. 3d 434 (4th Dist 1980), the litigant's effort to re-litigate the "55 Order" was barred by a PUA provision prohibiting an attack – in court – on the merits of an order for which no appeal was taken. This case is at the ICC – not in court – so the PUA provision at issue in *Albin* does not apply. In *Citizens for a Better Env't v. Illinois Wood Energy Partners*, Docket No. 92-0274, 1995 WL 17200504 (ICC Nov. 22, 1994)(slip Op.), the litigant requested that the ICC Order in Docket 93-0160 be reversed or

⁹ AT&T Motion, at pgs. 9-12.

¹⁰ Amended Complaint, at Prayer for Relief, pgs. 17-18.

reopened. Again, Cbeyond is not asking for that kind of relief here. AT&T's authority are factually inapposite to this case and do not support the dismissal AT&T's Motion seeks.

Importantly, the quotation from *In Re Illinois Bell Telephone Co.*, Docket No. 05-0697, 2006 WL 2380606 (ICC July 26, 2006)(Slip Op.), upon which AT&T relies,¹¹ makes the very point that Cbeyond is making here. AT&T quotes from *In Re Illinois Bell* in support of its flawed argument that Cbeyond's claim should be dismissed because it revisits a topic previously considered. However, AT&T's quotation proves Cbeyond's point: if "prior decisions should not be overturned by later decisions without good cause or a compelling reason" then it is clear that (1) prior decisions MAY be overturned by later decisions (albeit only with "good cause") AND (2) the ICC may entertain a case presenting "good cause" or "compelling reason" to do so. If AT&T's position were correct (essentially that *res judicata* applies to ICC Orders), then there would never be an instance when "good cause" or "compelling reason" could even be presented to the ICC to change its opinion from a prior order.

AT&T's remaining authority all involve attacks on ICC orders. *Illini Coach Co. v. Illinois Commerce Comm'n*, 408 Ill. 104 (1951), by AT&T's own summary, involved at request "to vacate a prior Commission order . . .", and *Union Elec. Co. v. Illinois Commerce Comm'n*, 39 Ill. 2d 386 (1968), involved the rescission of a Commission Order by the ICC itself without following proper procedures under the PUA – again, something not being requested here and therefore factually inapposite.

It is apparent that AT&T's Motion sets up a straw man that Cbeyond is asking for action on the order from 10-0188 and then raises the defense of the collateral attack doctrine in an effort to secure dismissal of the Complaint. As is set-out above, there is no attack on Docket 10-0188.

¹¹ AT&T's Motion, at pg. 11.

Cbeyond's claims are neither barred by the collateral attack doctrine nor *res judicata*. AT&T's Motion arguments based on these doctrines should be denied.

3. There are no factual or legal findings specific to CCC in the 10-0188 Order.

There is not a single finding specific to CCC in the order from Docket 10-0188 which Cbeyond's Complaint in this action could contradict. Section 10-110 of the PUA requires that "[a]t the conclusion of such hearing the Commission shall make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. . . ." ¹² The purpose of this rule is to permit an appellate court to "make an intelligent review of the decision." ¹³ Where the Commission fails to set out its findings to support a decision, "the order is to be set aside." ¹⁴ So the PUA is clear: if the ICC were making a decision regarding the CCC matter in Docket 10-0188, it would have been required to include findings of fact and conclusions of law specific to the CCC issue. It did not.

The Order in 10-0188 is totally silent on the CCC rate portion of the case. Cbeyond certainly asked the Commission to rule that AT&T should not be billing the CCC rate in the context of EEL rearrangements. The manifest truth is that the ICC did not make a single factual or legal finding regarding the CCC rate. While certainly noting the various positions of the parties and staff (none of which were in agreement), ¹⁵ the "Commission Analysis and Conclusion" makes no mention of the CCC rate nor resolves any of the competing party positions mentioned in the fact background section of the Order. AT&T is left to argue that the

¹² 220 ILCS 5/10-110.

¹³ *Cerro Copper Products v. Illinois Commerce Commission*, 83 Ill.2d 364, 370 (Ill. 1980).

¹⁴ *Id.*

¹⁵ "Staff asserts that CCC should not have been billed on any DS1 loops because it is an optional service that is applicable to DS1 interoffice transport only." 10-0188 Order, pg. 15

ICC ruled on the application of the CCC rate by implication.¹⁶ Knowing that it had no specific factual or legal reference to the CCC dispute to use, AT&T argues that the ICC's Order was not required to address Cbeyond's CCC dispute with any detailed findings.¹⁷ If there is to be any preclusive effect, however, the ICC did need to make SOME factual determination, and at a minimum, had to rule on the issue. The ICC did neither in Docket 10-0188.

The ICC's findings of fact and conclusions of law must provide enough detail to allow for judicial review.¹⁸ AT&T relies on two cases to assert that silence can be construed to be a factual and legal finding in its favor but neither case supports that conclusion.¹⁹ Both of AT&T's citations refer to Commission discussion of evidence – not factual findings or conclusions of law. There is no dispute that the ICC set-out the conflicting positions of the parties here. What is missing in this case is ANY finding of fact or conclusion of law by the ICC specifically mentioning the CCC rate or identifying which of the conflicting positions the ICC adopted (if any).

In *Abbott Labs*²⁰ (and the case to which *Abbott Labs* cites for support, *Lefton Iron*, 529 N.E.2d 610), as well as the *Commonwealth Edison*²¹ case, the parties alleged that the ICC erred by not describing the consideration of a particular witness' testimony. In *Abbott Labs* the ICC

¹⁶ AT&T's Motion, at pg. 10.

¹⁷ *Id.*

¹⁸ *Lefton Iron & Metal Co. v. Illinois Commerce Comm'n.*, 174 Ill.App.3d 1049, 529 N.E.2d 610, 614 (1st Dist. 1988) (“The statute provides that the Commission shall make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. The statute has been construed to mean that the order must sufficiently set forth the facts found which form the basis for the order to enable a court to intelligently review them on appeal.”)

¹⁹ AT&T's Motion, at pg. 10.

²⁰ *Abbott Labs., Inc. v. Illinois Commerce Comm'n.*, 289 Ill.App.3d 705, 716 (1st Dist. 1997).

²¹ Order, *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).

did not mention one of the witness's testimony,²² in *Lefton Iron* the ICC did not explain why it accepted one witness' testimony over another,²³ and in *Commonwealth Edison* the ICC did not explain why it did not accept a recommendation by one witness.²⁴ In *Lefton* and *Abbott Labs*, the reviewing court stated that the ICC was "not required make particular findings as to each evidentiary fact."²⁵ In *Commonwealth Edison*, the ICC said the same thing.²⁶

The cases identified by AT&T and this case are distinguished by the facts. The issue here is not one of error related to the ICC's treatment of a particular piece of testamentary evidence as was the case in the authority relied upon by AT&T. The issue here is the absence of any treatment of ALL of the evidence related to a particular disputed issue AND the complete absence of any legal conclusion from those evidentiary determinations.

Both the *Lefton* court and the ICC Order in *Commonwealth Edison* state that the Commission "must sufficiently set forth the facts found which form the basis for the order . . ."²⁷ and that "it is mandatory that the Commission make findings of fact upon the principal issues of the case . . ." Therefore, these decisions squarely refute AT&T's premise that the Commission can make factual findings and rulings by implication.²⁸ If the ICC did issue an Order regarding the CCC rate in Docket 10-0188, then it failed to fulfill its statutory duty to identify the factual findings to support its ruling; in fact, it failed to even suggest it had made a ruling.

The complete absence of any factual finding simply cannot be used by a party to say what factual determination the Commission made. If the ICC did not secretly resolve the CCC issue

²² *Id.*

²³ *Lefton Iron*, at 614.

²⁴ *Commonwealth*, at *64-66.

²⁵ *Lefton Iron* at 614.

²⁶ *Commonwealth* at *66.

²⁷ *Lefton Iron*, at 614

²⁸ *Commonwealth*, at *66.

by subtext in Docket 10-0188, then the basis for AT&T's Motion is moot and the Motion should be denied. If the ICC did rule on the application of the CCC rate, which position did it take?

Staff, AT&T and Cbeyond all presented differing positions regarding the application of the CCC rate. Staff's position, at a minimum, was that AT&T should not have billed the CCC rate on loops (the CCC rate only applies to transport).²⁹ Cbeyond argued that the CCC rate should not be billed on existing circuit rearrangements.³⁰ AT&T asserted that it charged for CCC when clear channel was requested (without specifying whether it was being charged on new or existing circuits).³¹ The ICC could have adopted any of those positions, a combination of them, a different position or ruled that there was insufficient evidence to address the CCC rate in the context of the complaint. The ICC said absolutely nothing. A general denial of the complaint tells us nothing about how to go forward on a specific topic which is not addressed in the Order. In sum: there can be no *res judicata* effect on a topic which is not addressed at all in an ICC Order's findings of fact or conclusions of law (even if *res judicata* applied to ICC Orders).

4. The ICC made no specific determination regarding CCC billing accuracy.

It is clear from the Order itself that the ICC was not making a determination regarding the appropriateness of any particular billing. In fact, when the Staff pointed out to the Commission that the billing for EEL rearrangements, which the ICC had just deemed appropriate in the Order, (the "two-step billing process") was not actually billed by AT&T, the Commission rejected the

²⁹ Reply Brief of the Staff of the Illinois Commerce Commission, *Cbeyond Communications v. Illinois Bell Telephone Company*, ICC Docket No. 10-0188, filed September 28, 2010, at pg. 38. See also, Order, *Cbeyond Communications v. Illinois Bell Telephone Company*, ICC Docket No. 10-0188, filed July 7, 2011, at pg. 15.

³⁰ Order, *Cbeyond Communications v. Illinois Bell Telephone Company*, ICC Docket No. 10-0188, filed July 7, 2011, at pg. 17.

³¹ *Id.*, at pg. 25.

topic as “not properly before the Commission.”³² Staff certainly did not consider some of the CCC bills to be proper. In Staff’s Reply Brief from Docket 10-0188, Staff stated:

In response to Staff’s request to confirm whether the statement that the CCC charge applies to standalone DS1 loop is true, AT&T responded with a negative or “false”. Likewise, for the statement whether the CCC charge applies to the DS1 loops of DS1/DS3 EELs, AT&T’s response is also negative or “false”. [fn: AT&T’s Response to Revised Staff Data Request QL-2.09]³³

As noted above, the 1,137 loop circuits in this group all have a circuit ID beginning with “HCFD” and are the DS1 loops of rearranged DS1/DS3 EELs (i.e. DS1 loops associated with “DS1/DS1 to DS1/DS3” rearrangements). As the CCC charge is not applicable to DS1 loops, the CCC charge should not have been assessed on the DS1 loops or rearranged DS1/DS3 EELs. Thus, the CCC charge on the 1,137 DS1 loop circuits in this group is improper, though not for the reasons states by Cbeyond, and should be removed.³⁴

In resolving the suit by Cbeyond in Illinois court,³⁵ the parties agreed that they would negotiate the accuracy of the bills.³⁶ Cbeyond paid AT&T everything at issue in Exhibit A to the parties’ agreement – except the CCC charges. So the issue remains: did AT&T appropriately bill CCC, and if it did not, do those misapplied bills violate state law and the parties’ ICA? Even if Docket No. 10-0188’s outcome precludes the state law and ICA claims for the Category 1 charges (which it did not), the parties would still need a factual determination regarding the

³² *Id.*, at pg. 34.

³³ AT&T later retracted and reversed those answers.

³⁴ Reply Brief of the Staff of the Illinois Commerce Commission, *Cbeyond Communications v. Illinois Bell Telephone Company*, ICC Docket No. 10-0188, filed September 28, 2010, page 38. *See also*, Order, *Cbeyond Communications v. Illinois Bell Telephone Company*, ICC Docket No. 10-0188, filed July 7, 2011, at pg. 15.

³⁵ Following the Order in 10-0188, AT&T illegally cut-off Cbeyond’s ordering without notice. Cbeyond sought an emergency injunction on the basis that the Order in Docket 10-0188 did not address any of the specific bills listed in an Exhibit A filing in that Docket. The parties agreed to stay Cbeyond’s suit to allow for negotiation over the accuracy of the Exhibit A charges and possible dispute resolution at the ICC.

³⁶ Cbeyond did not mean to imply (“blatantly” or otherwise) that AT&T had waived its right to argue that Docket 10-0188 addressed the CCC charges. Cbeyond does not assert that AT&T waived any arguments (despite AT&T’s claims against Cbeyond).

accuracy of the CCC Category 1 charges. As a consequence, AT&T's Motion seeking dismissal of Category 1 charges should be denied.

B. The Amended Complaint Complies with ILCS 5/13-515(d)(2).

Next in AT&T's "kitchen sink" approach, AT&T argues that, despite the fact that seven months have elapsed since AT&T's first motion to dismiss was filed – in which it did not allege a failure by Cbeyond to allow it 48 hours to correct the complained-of misbehavior – and despite the fact that the parties have sought leave to negotiate the issues in the complaint, AT&T now argues that Cbeyond's Amended Complaint fails to comply with ILCS 5/13-515(d)(2)'s requirement that "a complaint filed under this subsection shall include a statement that the requirements of subsection (c) have been fulfilled and that the respondent did not correct the situation as requested." "Subsection (c)" requires that Cbeyond notify AT&T of the "alleged violation and offer[] the respondent 48 hours to correct the situation." It is not clear that this rule applies to Amended Complaint filed seven months after a pleading compliant with 13-515(d)(2) was originally filed. Nevertheless, the Amended Complaint states that AT&T was notified of the alleged violation 48 hours before the Amended Complaint was filed³⁷ and that AT&T has not corrected the situation.³⁸ Unless the rule is read to require that the "statement" in the complaint must be made in a singular location in the complaint (and applies to Amended Complaints as well), which the rule does not, then AT&T's second basis is meritless. AT&T's request for dismissal of the Complaint should be denied.

³⁷ Amended Complaint, at ¶3.

³⁸ *Id.*, at ¶¶ 28, 36 ("Despite having been provided the evidence and testimony from ICC Docket 02-0864 demonstrating its misapplication of the CCC rate, AT&T Illinois refuses to correct it[']s current practice or correct its past incorrect billing consistent with the parties' ICA.")

C. AT&T Can Violate State Law, Even When It Has an ICA.

AT&T's third argument is that Cbeyond's state law claims should be dismissed because it has a contract with Cbeyond.³⁹ Even if the ICA was inconsistent with state law, and allowed actions which violate state law, AT&T's argument puts the cart before the horse. Cbeyond does not concede that the ICA insulates AT&T from compliance from its obligations under state law, but for purposes of this response, it does not matter. If AT&T has violated the ICA, which is the assumption under the standard for motions to dismiss,⁴⁰ its breach can clearly ALSO constitute a violation of state law. Indeed, Section 13-514(8) of the PUA makes it unlawful, under Illinois law, to violate "the terms of . . . an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act"⁴¹ And, the Commission has jurisdiction to adjudicate those complaints.⁴² At this stage, dismissing claims on the ground that they might be dismissed if another claim (breach of the ICA) were not sustained is premature. Notably, AT&T does not identify any ICA provision that allows it to bill the DS1 transport rates from Docket 02-0864 in a manner at odds with the rate as it was developed in that docket. Nor does it provide any ICA reference refuting that the DS1 provisioning nonrecurring rates adopted into the ICA from 02-0864 were not inclusive of the line coding of the circuit (AMI or B8ZS clear channel). There cannot be preemption of anything until it is established that the ICA is or is not violated. AT&T's assertion that the existence of an ICA insulates it from any possible violation of state law is clearly inaccurate and cannot support a dismissal.

³⁹ AT&T's Motion, at pg. 15.

⁴⁰ *South Chicago Savings Bank v. Braxton*, 178 Ill.App.3d 545, 549; 533 N.E.2d 480, 482 (1st Dist. 1988).

⁴¹ 220 ILCS 5/13-514(8).

⁴² 220 ILCS 5/13-515(d).

D. AT&T's Argument that Cbeyond Waived Claims is False.

AT&T asserts that some claims and possible remedies were inadvertently waived by Cbeyond when it agreed with AT&T that “the proceeding before the Illinois Commerce Commission shall not be designated by a fast track proceeding.”⁴³ That is incorrect and AT&T's should know that Cbeyond would not and did not agree to waive any claims in a settlement agreement that expressly anticipated litigation before the Commission within the agreement. Its argument in this case that there was an inadvertent waiver is not constructive for future negotiations. Nevertheless, AT&T's argument must fail for four reasons: (1) the terms “claim” and “the proceeding” being “designated by a fast-track proceeding” are not mutually inclusive so that an agreement that a proceeding will not be designated as fast-track does not implicate claims which may be brought under a slower track; (2) the parties agreed in the same agreement that “[t]he 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.”; (3) AT&T drafted that language and any ambiguity in it must be construed against AT&T; and (4) AT&T's proposed construction of the TRO Agreement would have left Cbeyond with no opportunity to bring a complaint at the Commission, which expressly conflicts with the language of the agreement. Moreover, if there were an inadvertent waiver, it would only apply to the claims which were the subject of the agreement: what AT&T calls Category 1 claims.

1. Cbeyond did not agree to waive any claims.

Cbeyond sincerely hopes that the parties simply have a different understanding of the language in the agreement as opposed to AT&T trying to play “gotcha.” Cbeyond understood the TRO Agreement to provide that, whatever complaint Cbeyond filed, the parties agreed the

⁴³ AT&T Motion, at pg. 18, *citing* August 29, 2011 Agreement Regarding Disputed Amounts (hereinafter “TRO Agreement”).

resulting proceeding would not use any fast track timelines. Cbeyond's understanding is reasonable and at a minimum establishes an ambiguity in the language upon which AT&T relies.⁴⁴ If AT&T thought all claims which might trigger a proceeding with "fast-track" procedures were being waived in the agreement – which AT&T drafted – then AT&T picked pretty obtuse language to achieve that objective. If AT&T intended to have Cbeyond waive certain claims, it should have used the more specific terms "waive" and "claims" – with the citations to the specific claims being waived.⁴⁵ Cbeyond did not and would not have agreed to waive its claims on its unfiled complaint before the ICC as condition to dismiss its pending complaint before the Circuit Court. And, an agreement that a proceeding would not be designated as fast-track is insufficiently clear to constitute a waiver of all claims which might implicate a fast-track proceedings – especially when the fast-track proceeding allows for the parties to agree not to designate the proceeding as fast-track.⁴⁶

2. The Agreement states that no party is waiving any arguments.

AT&T's reading is particularly deceptive given the fact that the parties went out of their way to make it clear that neither party waived any arguments it might make. The Agreement used broad and inclusive language to achieve that purpose, stating that "The parties specifically

⁴⁴ AT&T quotes Cbeyond's counsel, Mr. Watkins, in support of its waiver argument. What AT&T does not include in its quotation is the context of Mr. Watkins' comment. At the preliminary hearing, AT&T counsel asked if it was obligated to file an Answer at the time it filed its Motion to Dismiss in accordance with the fast-track procedures. Consistent with Cbeyond's understanding of its agreement with AT&T, Mr. Watkins interrupted Mr. Kelly, Cbeyond Illinois counsel (who was beginning to suggest an Answer was wanted) to say that Cbeyond had agreed that no fast track procedures would apply to the case. Mr. Watkins did not say Cbeyond waived any claims. Cbeyond would not file claims if it had just agreed to waive them.

⁴⁵ See *Gallagher v Lenart*, 226 Ill.2d 208, 874 N.E.2d 43 (2007) for a discussion of waiver in general and the need for explicit waivers in some cases. Unlike the cases discussed in *Gallagher*, there isn't even a general waiver here.

⁴⁶ PUA 13-515(a) allows parties to agree to changes in the fast-track timelines.

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.” Comparing that clear language preserving all arguments to the obtuse language AT&T asserts waived Cbeyond’s claims, the Commission should err on the side of non-waiver and reject AT&T’s request for dismissal.

3. Any ambiguity in the Agreement is construed against AT&T.

The Agreement should also be interpreted in Cbeyond’s favor because AT&T drafted the ambiguous language it now claims constituted a waiver of claims by Cbeyond.⁴⁷ It is well-established that when a party drafts ambiguous language, that language is construed against the drafting party in a dispute over its meaning.⁴⁸ AT&T’s argument that there was therefore an inadvertent waiver of claims by Cbeyond should be rejected.

4. AT&T’s construction of the Agreement would have left Cbeyond with no remedy.

In addition, AT&T’s arguments should be dismissed based on purpose of the Agreement. AT&T acknowledges that the Agreement permitted Cbeyond to bring an action at the Commission to resolve the remaining dispute, but construes the Agreement to not allow complaints under Section 13-515. However, AT&T’s Motion also argues that the Commission has no authority under Sections 9-250, the Interconnection Agreement, or Section 13-801 to resolve that dispute.⁴⁹ If the Agreement is construed as AT&T proposes, to not allow a complaint under Section 13-515, then Cbeyond would, according to AT&T, have no statutory

⁴⁷ Attached hereto as Exhibit 2 is the original email transmitting the draft agreement from AT&T counsel.

⁴⁸ *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 115 Ill.2d 482, 505 N.E.2d 314 (1987) (“Ambiguous contractual language is generally construed against the drafter of the language.”)

⁴⁹ AT&T’s Motion, at Sections I and II.

provision under the PUA to bring a complaint before the Commission. In other words, under AT&T's theory, Cbeyond could bring a complaint before the Commission to resolve the remaining dispute, but the Commission would have no authority under any provision of the Public Utilities Act to act on that Complaint. The Commission should not construe a contract to create such an absurd result.⁵⁰ AT&T's assertion that Cbeyond inadvertently waived claims in the TRO agreement should be denied.

E. Misapplying A Rate Can Violate 13-801(g), Even If The Rate Is “Cost-Based” In A Different Context.

AT&T next asserts that Cbeyond's claim alleging that AT&T has violated 13-801(g) should be dismissed for failure to state a claim. Section 13-801(g) requires that carriers like AT&T “shall” provide network elements at “cost-based” rates. In the spirit of its “kitchen sink” approach, AT&T proposes a rather peculiar reading of 13-801(g): that improperly charging an additional rate for a service can never give rise to a claim if the misapplied rate is cost-based in some other context. AT&T argues that the rate it is charging is “cost-based,” albeit not in the context it is charging it, so no claim under 13-801(g) can be made.⁵¹ AT&T does not cite to an authority for its proposition – perhaps because it is an obviously incorrect legal conclusion. Under AT&T's theory, it could charge \$10,000 for a \$2 element without violating a prohibition on charging more than cost-based rates as long as AT&T could find some context in which \$10,000 would be cost-based.

Cbeyond alleges – and for purposes of AT&T's Motion it must be assumed to be true – that AT&T is charging \$70.32 per DS1 more than the Commission determined to be the cost-based rate to provision a DS1 circuit. The cost-based rate for DS1 transport was established in

⁵⁰ *Suburban Auto Rebuilders v. Associated Tile Dealers*, 388 Ill.App.3d 81, 902 N.E.2d 1178, 1190 (1st Dist. 2009.)

⁵¹ AT&T's Motion, at pg. 19.

Docket 02-0864 and it did not include the additional \$70.32 which AT&T is illegally adding to the charge to provision that element. Accordingly, AT&T is charging more than the cost-based rate for DS1 transport. That is a violation of 13-801(g). The fact that the rate AT&T is misapplying might be “cost-based” in a different context is irrelevant to the issue of whether AT&T is providing DS1 transport (a network element) at cost-based rates in compliance with 13-801(g). AT&T’s arguments otherwise are spurious at best and should be soundly rejected.

F. The Commission Can Impose The Requirement That AT&T Correct Its Practice Of Billing The CCC Rate On New DS1 Transport Orders.

AT&T also argues that Cbeyond’s claim pursuant to PUA Section 9-250 fails to state a claim because the Commission may not override the terms of the ICA between the parties by providing the relief Cbeyond requests, namely: “imposing rates, charges and practices that are just and reasonable.”⁵² This is yet another straw man by AT&T. Cbeyond is merely asking that AT&T be compelled to bill Cbeyond the appropriate TELRIC rate as required by the ICA for the provisioning of DS1 transport, a request that is clearly and cleanly within the jurisdiction of the Commission to require. Moreover, it is an unjust and unreasonable practice for AT&T to assess a charge that conflicts with the ICC’s Order in Docket 02-0264, and the Commission may enter that finding if it concludes that AT&T’s practice conflicts with the Commission’s Order. Because AT&T fails to identify what requested relief warrants a wholesale dismissal of Cbeyond’s claims under Section 9-250, AT&T’s request should be denied.

⁵² AT&T’s Motion, at pg. 19.

G. A Motion to Dismiss Is Not the Appropriate Venue To Argue Facts.

AT&T's effort to brief its case fails under the standards for addressing motions to dismiss.⁵³ AT&T spends pages 20 to 27 of its Motion making numerous arguments about its theory of the case – that language in 2003 ICA can trump the application of a rate established in a 2005 amendment. As previously explained above, AT&T's theory is manifestly incorrect. Cbeyond ordered DS1 transport as part of DS1/DS1 EELs. It should be charged the rate for DS1 transport which was established by the Commission in Docket 02-0864 and incorporated into the agreement of the parties in 2005. That rate included the costs of line coding. AT&T's practice of additionally charging \$70 for line coding is, therefore, inappropriate and a breach of the provisions of the ICA identified in the Amended Complaint.

AT&T's argument that more specific clauses trump general provisions is irrelevant when the amendment incorporating the rate in 2005 expressly states that “[t]o the extent there is a conflict or inconsistency between the provisions of this Agreement and the provisions of the Agreement (including all incorporated or accompanying Appendices, Addenda and Exhibits to the Agreement), the provisions of this Amendment shall control and apply but only to the extent of such conflict or inconsistency.”⁵⁴ AT&T will have an opportunity to debate the contractual provisions implicated by this case. At this stage, the Complaint's factual allegations are deemed true and AT&T's Motion should be denied, and AT&T's factual arguments about interpretation of the ICA should be rejected.⁵⁵

⁵³ “All well-pleaded facts in the complaint must be deemed true, and any reasonable inferences drawn from the allegations of fact must be liberally construed in favor of the non-moving party. *South Chicago Savings Bank v. Braxton*, 178 Ill.App.3d 545, 549; 533 N.E.2d 480, 482 (1st Dist. 1988).

⁵⁴ ICC June 9, 2004 Order Amendment, Exhibit 1, at pg. 1.

⁵⁵ *South Chicago Savings Bank*, 178 Ill.App.3d at 549, 533 N.E.2d at 482.

H. AT&T Is Correct That The ICA Bars Part Of Cbeyond's Requested Relief.

Cbeyond should have deleted the request for attorney fees and consequential damages from its Amended Complaint. AT&T is correct that Cbeyond is not entitled consequential damages or attorney fees under the terms of the ICA in this case. To this limited issue, AT&T's Motion on that argument should be granted, in part to exclude any remedy to Cbeyond which is inclusive of consequential damages or legal fees (for Cbeyond).

IV. CONCLUSION

For the foregoing reasons, the Motions To Dismiss filed by AT&T and Staff should be denied, with the sole exception of AT&T's eighth assertion that Cbeyond is not entitled to attorney fees or consequential damages in the circumstances of this case. That request should be granted.

Respectfully Submitted,

Dated: May 30, 2012

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**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Cbeyond Communications, LLC)
-vs-)
Illinois Bell Telephone Company d/b/a)
AT&T Illinois)
)
Formal Complaint pursuant to Sections)
13-515 and 10-108 of the Illinois Public)
Utilities Act)
)

Docket No. 11-0696

STATE OF GEORGIA)
) SS.
COUNTY OF COBB)

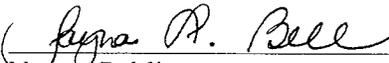
VERIFICATION OF GREGORY J. DARNELL

I, Gregory J. Darnell, being duly first duly sworn and on oath state that I am the Director of Local Exchange Carrier Relations for Cbeyond Communications, LLC, and am competent to testify that I have examined Cbeyond Communications, LLC's Response To AT&T's Motion To Dismiss The First Amended Verified Formal Complaint submitted to the Illinois Commerce Commission on May 30, 2012, that I am familiar with facts sets forth in the Response and Complaint, and those facts are true and correct to the best of my knowledge, information and belief.



Gregory J. Darnell

Subscribed and sworn before me
This 30th day of May 2012



Notary Public

