

**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 and Request for)	
Declaratory Ruling pursuant to Sections)	
13-515 and 10-108 of the Illinois Public)	
Utilities Act)	

**AT&T ILLINOIS’ REPLY IN SUPPORT OF ITS MOTION TO DISMISS
CBEYOND’S FIRST AMENDED VERIFIED FORMAL COMPLAINT**

Illinois Bell Telephone Company (“AT&T Illinois”), by and through its attorneys, hereby files the following reply in support of its motion to dismiss the First Amended Verified Formal Complaint (“Complaint”) filed by Cbeyond Communications, LLC (“Cbeyond”) on April 5, 2012. Cbeyond accuses AT&T Illinois (at 5) of using a “shotgun” approach in its motion to dismiss. But AT&T Illinois should not be faulted for identifying all the defects in Cbeyond’s pleading simply because those defects are numerous. Moreover, it is Cbeyond that is abusing the motion to dismiss process, by using the first four pages of its response brief to argue the merits of its claims, rather than to respond to the arguments actually raised in AT&T Illinois’ motion. The Commission need not consider Cbeyond’s factual arguments, because Cbeyond’s Complaint should be dismissed in full as a matter of law, for the reasons originally set forth in AT&T Illinois’ motion and explained further in this reply.¹

Introduction and Summary of Argument

As AT&T Illinois explained in its motion, Cbeyond’s Complaint challenges two categories of AT&T Illinois’ charges for the provision of Clear Channel Capability (“CCC”). The first category (referred to in the motion and herein as Category 1 charges) includes CCC

¹ The documents referred to herein as Exhibits 1 through 16 were attached to AT&T’s motion to dismiss; Exhibits 17 and 18 are attached to this response brief.

charges associated with the “rearrangement” or “grooming” of DS1 enhanced extended links (“EELs”). The second category (Category 2 charges) includes CCC charges associated with the initial provisioning of a DS1 circuit. At no point does Cbeyond take issue with AT&T Illinois’ characterization of the categories of charges at issue here.

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. Cbeyond admits that it raised the Category 1 charges in Docket No. 10-0188, but argues that the Commission’s ruling did not adequately address them. But that argument is both untrue and, ultimately, irrelevant. 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 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. Cbeyond has not identified any new “evidence” that would support deviating from this well-established doctrine, which is designed to provide the Commission and litigants with finality and prevent wasteful, duplicative proceedings such as this one.

Count Four of the Complaint, for breach of the parties’ interconnection agreement (“ICA”), fails to state a claim upon which relief may be granted, because the ICA unambiguously provides that CCC is an optional feature that a CLEC may request and sets forth the applicable charge for that feature. Cbeyond recognizes that it requested CCC when it ordered new DS1/DS1 EELs (and does not dispute this in its Response), and thus is contractually required to pay for that feature. Cbeyond asserts that dismissal would be premature at this time because Cbeyond has offered a different *legal* interpretation of the ICA than the one set out in

AT&T Illinois' motion. But Cbeyond does not identify any *factual* disputes that would prevent the Commission from granting AT&T Illinois' motion at this time. Resolving competing *legal* theories through a motion to dismiss is perfectly appropriate.

Cbeyond's theory is that the Commission's decision in Docket No. 02-0864 had the legal effect of modifying the parties' ICA. But the Commission's decision simply revised the prices for certain products, services and features – including CCC. Following the Commission's decision in Docket No 02-0864, AT&T Illinois has charged Cbeyond the revised (and much lower) price for CCC when it orders CCC as an optional feature for DS1/DS1 EELs. The Commission's decision in Docket No. 02-0864 did *not* change, in any way whatsoever, the ICA language providing that, when Cbeyond orders CCC as an optional feature, it will be billed the CCC rate set forth in the ICA's pricing appendix. Nor did the ICA amendment, by which the parties substituted new prices for the products and services available under their ICA, create any ambiguity about what products and services were still available.

Counts One, Two and Three – for violations of sections 13-514, 13-801, and 9-250 of the Illinois Public Utilities Act (“PUA”) – should be dismissed because Cbeyond's billing dispute must be decided by reference to the terms and conditions contained in the parties' ICA, *not* state or federal law. Cbeyond asserts that it would be premature for the Commission to decide this issue until the Commission has ruled on the substance of Cbeyond's breach of ICA claim, but there is no reason for such delay. The dispositive issue in this case is whether AT&T Illinois' charges are authorized by the parties' ICA – an issue that can and must be decided in AT&T Illinois' favor based on the plain, unambiguous language of the ICA. 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. The Commission can do no more, and any attempt to do so would be preempted by federal law.

Cbeyond's claim for violation of section 13-514 (Count One) is also barred 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. Cbeyond claims that there was no waiver or, in the alternative, that its waiver was inadvertent. But the parties' agreement not to use fast-track proceedings 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 proceedings.

Cbeyond's claim for violation of section 13-801 (Count Two) is subject to dismissal for an additional reason, too: that statute applies only where a carrier has failed to charge “cost based” rates, something that Cbeyond does not allege in its Complaint. 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 might form the basis of some type of claim, it is *not* a claim for violation of section 13-801.

Finally, Cbeyond concedes that AT&T Illinois' motion to dismiss should be granted to the extent that Cbeyond has requested consequential damages, attorneys' fees and costs, as these remedies are barred by the parties' ICA.

Argument

I. Cbeyond Misapplies The Legal Standard For Deciding A Motion to Dismiss.

It is well established that, in deciding a motion to dismiss, all “well-pleaded *facts* and reasonable inferences” to be drawn therefrom are “accepted as true.” *Evans ex rel. Husted v. Gen'l Motors Corp.*, 314 Ill. App. 3d 609, 614 (2d Dist. 2000) (emphasis added). Cbeyond

claims that, for purposes of the motion to dismiss, its allegation that AT&T Illinois “is misapplying a rate set by the ICC” “*must* be assumed to be accurate.” Response at 4-5 (emphasis added). *See also id.* at 19 (erroneously claiming that the Commission “must . . . assume[] to be true” Cbeyond’s allegation 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”). But this allegation is a “conclusion[] of law,” which is “*not* accepted as true” in deciding a motion to dismiss. *Evans*, 314 Ill. App. 3d at 614 (emphasis added). *See also, e.g., Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 300 (2d Dist. 2010) (“A plaintiff need not prove his case at the pleading stage; however, he must allege specific facts supporting each element of the cause of the action, and ‘the court will not admit conclusions of law and conclusory allegations not supported by specific facts.’” (quoting *Visvardis v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (1st Dist. 2007))). Indeed, if the Commission were to presume all legal conclusions to be true, it could never grant a motion to dismiss on any basis, as it would have to accept at face value a complainant’s statement that a legal claim exists. When the correct standard governing a motion to dismiss is applied, it is clear that none of the legal claims contained in Cbeyond’s complaint can survive.

II. The Collateral Attack Doctrine Bars Cbeyond’s Challenge to the Category 1 Charges.

AT&T Illinois explained in its motion to dismiss that the issue of whether the Category 1 charges violate the ICA was raised in Cbeyond’s complaint in Docket No. 10-0188, was extensively briefed by the parties, and was considered and rejected by the Commission in its final decision. *See* Motion at 9-14. Therefore, if Cbeyond was unsatisfied with the Commission’s consideration and resolution of the issue, Cbeyond was required to file an appeal

from the Commission’s decision. Having failed to do so, Cbeyond is bound by that decision and cannot use a new complaint case to collaterally attack the Commission’s reasoning.

Unlike in its response to AT&T Illinois’ motion to dismiss Cbeyond’s original complaint in this docket, Cbeyond’s response to this motion acknowledges the existence of the collateral attack doctrine and attempts to address it on its merits.² But, as explained in this section, Cbeyond’s arguments are based on a misunderstanding of the law and a misstatement of the pertinent facts. Cbeyond’s claim as to the Category 1 charges should, therefore, be dismissed.³

A. Cbeyond’s Latest Complaint Attacks the Commission’s Order In Docket No. 10-0188, Using The Same Arguments And “Evidence” That Cbeyond Used – And The Commission Rejected – In That Earlier Docket.

Cbeyond claims that the collateral attack doctrine is inapplicable in this proceeding, because Cbeyond is not attacking any part of the order in Docket No. 10-0188. *See* Response at 7-9. But that is exactly what Cbeyond is doing, regardless of its denial. As Cbeyond recognizes, it repeatedly “raised the application of the CCC rate in Docket No. 10-0188 in the context of EEL rearrangements,” in its complaint and “in briefing and in exceptions to the Proposed Order.” Complaint ¶ 27. *See also* Motion to Dismiss at 9. The parties briefed the CCC issue extensively.⁴ And the Commission rejected all of Cbeyond’s arguments. 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

² For reasons that are unclear, Cbeyond also asserts that “[t]here is no *res judicata* effect from the Order in 10-0188.” Response at 6. There is no need for AT&T Illinois to address this argument, because AT&T has never asserted *res judicata* and none of the cases relied upon by AT&T Illinois in its motion to dismiss were based on *res judicata*.

³ Cbeyond asserts the Final Order in Docket No. 10-0188 “did not make any legal or factual finding regarding the application of CCC charges to *new circuits*” – *i.e.* the Category 2 charges. Response at 5. AT&T agrees, and that is why it raised the collateral attack doctrine as to the Category 1 charges only.

⁴ *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).

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. There is simply no merit to the suggestion that the Commission somehow did not address the CCC issue.

Cbeyond feigns confusion as to how the Commission decided the CCC issue in Docket 10-0188, stating: “If the ICC did rule on the application of the CCC rate, which position did it take?” Response at 12. Obviously, the Commission decided that Cbeyond did not prove that the CCC rate as applied by AT&T Illinois violated the ICA, just as the Commission decided that Cbeyond had not proved that AT&T Illinois violated the ICA in any other way. Cbeyond was the complainant in Docket No. 10-0188, and had the burden of proof. Cbeyond alleged in that docket that AT&T Illinois breached the ICA in numerous ways, including by imposing CCC charges on EEL “rearrangements.” *See* Ex. 2, ¶¶ 30, 34, 35, 36, 37, 38 (Docket No. 10-0188 Complaint). The Commission rejected *all* of Cbeyond’s breach arguments. Thus, the Commission agreed with AT&T Illinois that Cbeyond failed to show any breach. There can be no confusion about “which of the conflicting positions [on CCC] the ICC adopted.” Response at 10.

In this docket, Cbeyond again raises the same arguments as to why the CCC charges should not be applied to EEL rearrangements. If the Commission were to accept Cbeyond’s arguments in this docket, it would be overturning its decision in Docket No. 10-0188 as to the CCC charges. This same tactic was rejected by the Commission in *In re Illinois Bell Telephone Co.*, Docket No. 05-0697, 2006 WL 2380606 (ICC July 26, 2006) (slip op.). In that proceeding, Staff argued that the collateral attack doctrine “applies ‘only if a party seeks to open a closed case.’” *Id.* The Commission found that, “[i]n reality . . . Staff *is* attempting to re-open a closed

case, i.e., Docket 01-0539,” and rejected Staff’s argument that the collateral attack doctrine was inapplicable. *Id.* (emphasis added). The Commission explained that “Staff’s arguments and exceptions would take this Commission all over the map,” but, “[i]n the end, . . . they only serve to bring into focus the source of its objections, i.e., Staff’s belief that the decision in Docket 01-0539 was erroneous.” *Id.*

Cbeyond attempts, but fails, to distinguish the collateral attack doctrine precedent cited in AT&T’s motion. *See* Response at 7-8. Cbeyond asserts that *Albin v. Illinois Commerce Commission*, 87 Ill. App. 3d 434, 438 (4th Dist. 1980), is inapposite because the plaintiff in that case sought to “attack – in court – . . . the merits of an order for which no appeal was taken.” Response at 7. But the collateral attack doctrine is applied by this Commission just as it is applied by the courts, as *In re Illinois Bell* (discussed above) and *Citizens for a Better Environment* aptly illustrate. In the latter case, the Commission granted a utility’s motion to dismiss a complaint challenging its facility’s classification as a “qualified solid waste energy facility,” because the “complaint [wa]s 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] [d]ocket.” *Citizens for a Better Environment v. Illinois Wood Energy Partners, L.P.*, Docket No. 92-0274, 1995 WL 17200504 (ICC Apr. 12, 1995) (slip op.). Thus, the collateral attack doctrine applies in an ICC proceeding in which the complainant seeks to challenge a prior Commission order, either expressly by asking to reopen or reverse a prior decision, or implicitly by asking the Commission to reach a different result than it reached on the same issue in an earlier order.

Cbeyond argues that the Commission should not apply the collateral attack doctrine in this case, because Cbeyond has “presented new evidence not previously presented in Docket 10-

0188.” Response at 6. But there is no “new evidence” at issue in this proceeding. All Cbeyond has done is cite to records from Docket No. 02-0864 – records that are nearly a decade old. That evidence is not new. It is not new to the Commission, which presided over Docket No. 02-0864, or to Cbeyond, which already relied on this “evidence” in Docket No. 10-0188. In fact, Cbeyond’s Complaint in this case relies on exactly the same testimony that it presented in its response brief in Docket No. 10-0188, the testimony of Chris F. Cass. *Compare* Complaint ¶¶ 14-15, 18, *with* Ex. 6 at 25-27 (Cbeyond Response Brief), *and* Ex. 7 at 18 (Cbeyond Exceptions Brief). Cbeyond’s complaint also cites to the very same testimony of Dr. Kent Currie that it relied on in Docket No. 10-0188. *Compare* Complaint ¶ 21, *with* Ex. 17 (Ex. F to Cbeyond Corrected Response Brief). Thus, it is abundantly clear that this is not a case where, subsequent to the Commission’s issuance of a final order, new events occurred that resulted in the creation of new evidence relevant to an issue decided in the final order. Cbeyond has been aware all along of what occurred in Docket No. 02-0864. The collateral attack doctrine should not be ignored to allow Cbeyond to rehash arguments raised and rejected in Docket No. 10-0188.

Similarly, Cbeyond asserts that the Commission should ignore the collateral attack doctrine because “AT&T has raised a new theory of the case in this case.” Response at 6. But all AT&T Illinois has done is file a motion to dismiss Cbeyond’s complaint; AT&T Illinois is not the complainant, and it is not required to present and has not presented any “theory of the case” at this motion to dismiss stage. Cbeyond, as the complainant, bears the burden of proof. In any event, AT&T Illinois has always taken the position that its billing of CCC charges complies with the ICA. *See* Ex. 3 at 23, 28-29 (AT&T Initial Brief); Ex. 5 at 30, 41-42 (AT&T Reply Brief); Ex. 8 at 15-17 (AT&T Response to Exceptions).

If Cbeyond was unhappy with the Commission's consideration of the evidence and arguments regarding CCC in Docket No. 10-0188, it could and should have appealed that decision to the Appellate Court in accordance with the Commission's rules. Cbeyond has not presented any compelling reason why it should not be subject to these rules just like every other party that appears before the Commission.

B. The Commission's Analysis Of The CCC Issue In Docket No. 10-0188 Was Sufficient, But Its Sufficiency Is Ultimately Irrelevant Because Cbeyond Failed To File An Appeal.

As explained above, the Commission's Final Decision in Docket No. 10-0188 addressed the arguments made by the parties as to the applicability of the CCC charges and, ultimately, rejected Cbeyond's argument that those charges, or any of the other charges challenged by Cbeyond in the docket, constituted a breach of the governing ICA. The Commission was not required to address each and every argument raised by Cbeyond. Cbeyond asserts that the case law AT&T Illinois cited on this point concerns only the Commission's failure to explain how it assessed witnesses' testimony. But this is not what those decisions hold. Instead, the law is clear that "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). *See also Abbott Laboratories, Inc. v. Illinois Commerce Commission*, 289 Ill. App. 3d 705, 716 (1st Dist. 1997) ("The 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." (emphasis added)).

Lefton Iron & Metal Co. v. Illinois Commerce Commission, 174 Ill. App. 3d 1049 (1st Dist. 1988), illustrates exactly this point. In *Lefton*, the appellant, a scrap metal dealer, argued that the Commission’s decision contained insufficient support for its finding that a railroad did not possess “market dominance” and therefore was not subject to rate regulation by the Commission; the determination of whether “market dominance” existed was based on evidence of the railroad’s variable costs. *See id.* at 1053-55. Although the Commission did not make an explicit finding that the railroad lacked market dominance, the Appellate Court found that the Commission’s decision was sufficient because the order “noted that [the railroad] offered evidence in support of its figures” and the scrap metal dealer “submitted evidence in opposition”; the order “expressly stated that the Commission considered all of the evidence in the proceeding”; and the order concluded that the prevailing party had “met its burden of proof by convincingly showing its variable cost.” *Id.* at 1056. According to the Appellate Court, these “findings of the Commission provide this court a path which it can follow and are legally sufficient.” *Id.* Likewise, in this case, the Commission’s order in Docket No. 10-0188 discussed the respective positions of the parties concerning whether AT&T Illinois’ CCC charges violated the ICA (Ex. 1 at Ex. 1 at 15, 17, 25, 27); the order expressly stated that the Commission gave “due consideration to the entire record” (*id.* at 36); and the order concluded that “Cbeyond has not shown that AT&T has violated the parties’ ICA” (*id.* at 29; *see also id.* at 33, 36).

More importantly, *Lefton* and *Abbot Labs* both illustrate how Cbeyond was legally required to proceed if it believed that the Commission’s findings and conclusions in Docket No. 10-0188 were inadequate: Cbeyond was required to petition for rehearing and then, if still dissatisfied, file an appeal. *See* 220 ILCS 5/10-201(a). Both cases cited by Cbeyond involved properly filed direct appeals from Commission orders. *See Lefton*, 174 Ill. App. 3d at 1051;

Abbott Labs, 289 Ill. App. 3d at 783-84. Nothing in these decisions suggests that a party may fail to appeal a final order of the Commission and then, because it believes the order contains insufficient findings, file a new complaint with the Commission seeking to collaterally attack the earlier, unappealed order.⁵ If Cbeyond’s position were correct, it would defeat the entire purpose of the appeals procedure and deadlines set forth in the PUA.

Cbeyond asserts that the PUA’s requirement that the Commission “make and render findings concerning the subject matter and facts inquired into and enter its order based thereon” is designed “to permit an appellate court to ‘make an intelligent review of the decision.’” Response at 9. “Where the Commission fails to set out its findings to support a decision,” Cbeyond argues, “the order is to be set aside.” *Id.* But Cbeyond misses the point of this requirement: where a order contains insufficient findings, it may be set aside *by the appellate court*, following a timely direct appeal by the injured party. The requirement that a party file an appeal to challenge a Commission order cannot be circumvented by using a subsequent Commission proceeding to attack matters that were already at issue (and decided) in a prior Commission proceeding. *See, e.g., Albin v. Illinois Commerce Commission*, 87 Ill. App. 3d 434, 438 (4th Dist. 1980) (holding that intervenors waived right to challenge Commission’s grant of certificate of public and 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 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

⁵ *Abbott Labs* also made clear that, even when an appeal from a Commission order is properly filed, the only arguments that can be raised in the Appellate Court are those arguments that were expressly identified by the parties in their petitions for rehearing. 289 Ill. App. 3d at 710 (explaining that “[g]eneralized contentions [in a petition for rehearing] that a decision of the Commission is unlawful will not preserve particular issues for review” in the Appellate Court). Cbeyond did not seek rehearing at all in Docket No. 10-0188.

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”).

As a result, even if it were true that the Commission was required to discuss the Category 1 charges in greater detail in its order in Docket No. 10-0188 – which it was not – then Cbeyond was required to seek rehearing of the order and then, if it was still dissatisfied, file an appeal with the Appellate Court. In *Illini Coach Co. v. Illinois Commerce Commission*, 408 Ill. 104 (1951), the Illinois Supreme Court made clear that a Commission order is not subject to collateral attack even if there were a procedural irregularity in the Commission proceedings (in that case, a failure by the Commission to receive or read the transcript of evidence).⁶ The Supreme Court explained that, because the Commission had jurisdiction over the subject matter and the parties, any “irregularity” in the proceedings before the Commission “could do no more than render the orders voidable and subject to be set aside upon review.” *Id.* at 110. Because the party challenging the Commission’s decision “failed to make application for rehearing of the [Commission’s] orders” and “prosecuted no appeal as prescribed by the statute,” “[a]ny prejudice to [the party] arising out of its failure to take advantage of the adequate procedure for review provided by the statute was due to its own inaction and not to the orders complained of” and the orders were “not open to collateral attack” in a later proceeding. *Id.* at 111-12. In this case, too, it was Cbeyond’s “failure to take advantage” of the “procedure for review provided by” the PUA that caused the alleged prejudice Cbeyond now complains of – *not* the supposed shortcomings of the Commission’s decision in Docket No. 10-0188. Cbeyond should not be allowed to challenge the Category 1 charges a second time in this docket.

Instead, as the Commission and its Staff have repeatedly pointed out, Cbeyond could remedy its objection to the Category 1 charges going forward by negotiating or arbitrating a new

⁶ Cbeyond alleges no procedural irregularity in the proceedings in Docket No. 10-0188.

ICA with AT&T Illinois. In its final order in Docket 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. And as Staff explained in its motion to dismiss Cbeyond’s original complaint, “[t]he issues that Cbeyond raises in this proceeding and 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 2.⁷ Cbeyond’s argument also ignores that the parties, Staff, and the Commission have already spent considerable time and resources litigating Cbeyond’s (multiple) complaints challenging the Category 1 charges. Cbeyond’s attempt to raise arguments already raised and rejected in Docket No. 10-0188 makes a mockery of the Commission’s rules and should be rejected.

C. Cbeyond’s Alternative Argument, That The Commission Should Address The “Accuracy” Of The CCC Charges, Is A Red Herring, Because Cbeyond’s Complaint Challenges The Applicability Of The CCC Charges To EEL Arrangements, *Not* the Accuracy Of AT&T Illinois’ Billing.

Taking its own “shotgun” approach to argument, Cbeyond asserts that, even if the Commission has already rejected its argument in Docket No. 10-0188 concerning the applicability of CCC charges to EEL rearrangements, the Commission still must address the “accuracy” of AT&T Illinois’ billing for CCC. Cbeyond’s argument breaks down into two parts. The first part of Cbeyond’s argument is that, “[i]n resolving the suit by Cbeyond in Illinois [circuit] court, the parties agreed that they would negotiate the accuracy of the bills.” Response at 13. This is patently false. The Agreement the parties reached to avoid litigation over Cbeyond’s request for a temporary restraining order (the “Agreement”) provides that “[t]he

⁷ 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”) (attached hereto as Ex. 18).

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].” Ex. 10, ¶ 7.

The second part of Cbeyond’s argument is that, “[e]ven if Docket No. 10-0188’s outcome precludes the state law and ICA claims for the Category 1 charges (which it does not), the parties would still need a factual determination regarding the accuracy of the CCC Category 1 charges.” Response at 13-14. But Cbeyond’s Complaint does not allege that AT&T Illinois’ bills are “inaccurate.” Instead, the Complaint alleges that “AT&T Illinois’ *misapplication of the CCC rate* is a breach of the parties’ Interconnection Agreement.” Complaint ¶ 51 (emphasis added).⁸ This is the same argument that Cbeyond raised – and the Commission rejected – in Docket No. 10-0188.⁹ Thus, Cbeyond’s Complaint as to the Category 1 charges should be dismissed.

III. Cbeyond Fails To State A Claim for Breach Of The ICA.

As AT&T Illinois explained in its motion, the ICA makes clear that CCC is an optional feature that the CLEC may request, and sets forth the applicable charge for that feature. Cbeyond’s Complaint recognizes that 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. The general ICA provisions cited by Cbeyond in the Complaint say nothing about the price for CCC and have no relevance to the

⁸ Even Cbeyond concedes that its claims are not about the “accuracy” of AT&T Illinois’ bills. Rather, Cbeyond acknowledges that it wants this Commission to determine if “AT&T *appropriately* bill[ed] CCC” or if AT&T “misapplied” CCC in violation of state law and the parties’ ICA. Those are not matters of accuracy (which would include, for instance, whether AT&T Illinois calculated its bills correctly, or charged for a circuit that Cbeyond did not order).

⁹ In support of its position that the Commission must address the “accuracy” of AT&T Illinois’ bills for the Category 1 charges, Cbeyond cites to a portion of Staff’s Reply Brief in Docket No. 10-0188, in which the Commission referred to AT&T Illinois data request responses stating that CCC does not apply to standalone DS1 loops and the loop portion of DS1/DS3 EELs. *See* Response at 13. As Cbeyond recognizes but buries in a footnote (*id.* at 13, n.33), AT&T Illinois promptly revised those data request responses to correctly indicate that CCC charges *do* apply to those two types of orders.

question before the Commission. *See* Motion at 23-26. And even if those general provisions were applicable, they would have to be qualified to the extent made necessary by the specific ICA provisions addressing CCC and its pricing. *See id.* at 26.

In response, Cbeyond asserts that AT&T Illinois' arguments raise factual issues and "a motion to dismiss is not the appropriate venue to argue facts." Response at 21. That assertion is ironic, given that the first four pages of Cbeyond's response are spent arguing the merits of the case. Regardless, AT&T Illinois' argument as to the breach of ICA claim is based on the plain language of the ICA, not on any extrinsic facts. "The construction of an unambiguous contract ... is purely a question of law." *Peck v. Froehlich*, 367 Ill. App. 3d 225, 228 (4th Dist. 2006). And a motion to dismiss "allow[s] for a threshold disposition of [such] questions of law." *Webb v. Damisch*, 362 Ill. App. 3d 1032 (1st Dist. 2005) (quoting *Mio v. Alberto-Culver Co.*, 306 Ill. App. 3d 822, 824 (2d Dist. 1999)) (internal quotation marks omitted).

Cbeyond does not argue that the ICA is ambiguous. Instead, Cbeyond makes its own, purely legal, argument: that the amendment made to the ICA following the Commission decision in Docket No. 02-0864 (the "ICC June 9, 2004 Order Amendment") controls over the original ICA language governing the ordering and pricing of CCC. *See* Response at 21. But the ICC June 9, 2004 Order Amendment simply changed the prices for various products, services and features, including CCC. *Compare* Ex. 16 at pp. 389, 390, 391 of 471 (original pricing schedule), *with* Ex. 16 at p. 405 of 471 (02-0864 pricing schedule). The language of the Amendment could not be clearer:

- The Amendment "require[s] the incorporation into the [ICA] of new prices" (Ex. 16 at p. 396 of 471, second "Whereas" paragraph);
- The "Parties are entering to th[e] Amendment to incorporate pricing changes into the [ICA]" (Ex. 16 at p. 396 of 471, fourth "Whereas" paragraph);

- The amendment is made “[s]olely to conform the [ICA] to effectuate certain pricing changes established by the Commission” in Docket No. 02-0864 (Ex. 16 at p. 396 of 471, § 2.1.1);
- “Nothing in th[e] Amendment expands, contracts, or otherwise affects either Party’s ... obligations under the [ICA] beyond the express provisions of th[e] Amendment” (Ex. 16 at p. 397 of 471, § 2.2);
- “EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS OF THE UNDERLYING AGREEMENT SHALL REMAIN UNCHANGED” (Ex. 16 at p. 397 of 471, § 4.1) (emphasis in original); and
- “The Parties acknowledge and agree that th[e] Amendment is the result of ICC rate orders and solely addresses pricing” (Ex. 16 at p. 397 of 471, § 5.1).

The ICC June 9, 2004 Order Amendment did not, as Cbeyond implies, “consolidate[]” the rates for DS1 transport and CCC into a single rate. Response at 2. Quite the contrary, the amended price list contains a separate rate for CCC, just as the original price list did.¹⁰ The ICC June 9, 2004 Order Amendment had no effect on the ICA language that is controlling here. Subsequent to the Docket No. 02-0864 Amendment, Section 9.2.7.7.5 of Schedule 9.2.7 to the ICA still reads: “The following *optional features* are available if requested by CLEC, at an additional cost.” Ex. 16 at p. 295 of 471 (emphasis added). Section 9.2.7.7.5 still 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). Thus, while the price for CCC changed in 2004 (it was substantially reduced), the circumstances when that charge applies remained the same.

Cbeyond would have the ICC June 9, 2004 Order Amendment create a new product under the ICA – DS1 Transport with CCC. But the ICC June 9, 2004 Order Amendment makes clear that “[n]othing in this Amendment expands, contracts, or otherwise affects either Party’s

¹⁰ As the ICC June 9, 2004 Order Amendment notes, there were some rate structure changes reflected in the amended pricing list, specifically the disaggregation of connection and disconnection charges. See Ex. 16 at p. 405 of 471, lines 195-197, 199-228, and 238-240. But there is nothing in the Amendment suggesting that the way CCC is billed has changed.

rights or obligations under the Agreement beyond the express provisions of this Amendment.” Ex. 16 at p. 397 of 471, § 2.2. Cbeyond cannot point to any provision in the ICC June 9, 2004 Order Amendment that expressly – or otherwise – changes the original ICA language that CCC is an “optional feature” that is “available if requested by CLEC, at an additional cost.”

Cbeyond’s response does not address any of the general provisions of the ICA that it relied on in the Complaint – all of which, as AT&T Illinois explained in its motion, are irrelevant to AT&T Illinois’ charges for CCC. Since Cbeyond does not address AT&T Illinois’ motion to dismiss as to these general provisions, AT&T Illinois will not repeat its arguments here, and refers the Commission to pages 22 to 27 of its motion to dismiss. Cbeyond takes the position that it need not address AT&T Illinois’ arguments, because “[a]t this stage, the Complaint’s factual allegations are deemed true.” Response at 21. But, as explained above, AT&T Illinois’ argument is not based on facts; it is based on the plain, unambiguous language of the ICA. Cbeyond fails to identify any ambiguity that would require further consideration by the Commission. Thus, the Commission can and should address at this stage the “pure[] question of law” raised by AT&T Illinois’ motion: whether the ICA authorizes AT&T Illinois’ charges for CCC. *Peck*, 367 Ill. App. 3d at 228.

IV. Because Cbeyond’s Complaint Fails To State A Claim for Violation of The ICA, Cbeyond Can Have No Independent Claims For Violation of State Law.

The foundation of Cbeyond’s entire Complaint is the allegation that AT&T Illinois’ charges for CCC (both Category 1 and Category 2 charges) are not authorized by the parties’ ICA. As AT&T Illinois demonstrated in its motion to dismiss and further explained above, Cbeyond is precluded from disputing certain charges (the Category 1 charges) and failed to state a claim for breach of ICA as to any of the charges. Cbeyond thus has no viable claim for breach of the ICA or any other claim based on the CCC charges. As a result, Cbeyond’s claims for

violation of sections 13-514, 13-801, and 9-250 of the PUA must fail because, without a valid claim for breach of the ICA, no freestanding claim for violation of state law may be maintained.

Cbeyond and AT&T Illinois are parties to a binding, negotiated ICA, which defines and constrains the parties' relationship. Upon that ICA's approval, Cbeyond and AT&T Illinois agreed to be "regulated directly by the interconnection agreement," rather than by general principles of federal or state law. *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"). All that the parties are required to do is comply with the terms and conditions of the ICA. *See, e.g., McLeodUSA*, 2011 WL 5023559, ¶ 34 (Ex. 18) (finding that "AT&T's collocation charges, even if alleged to be unjust or discriminatory, do not entitle PAETEC to relief through a complaint" proceeding where the charges were authorized by the parties' negotiated ICA).

Cbeyond argues that AT&T Illinois has "put[] the cart before the horse" and must prevail on the breach of ICA claim before Cbeyond's claims for violation of various sections of the PUA can be dismissed. Response at 15.¹¹ However, because Cbeyond has failed to allege a cognizable claim for violation of the ICA, the same conduct challenged in its breach of ICA claim *cannot* form the basis of a claim for violation of a state statutory requirement. Imposing such state law requirements on the parties' relationship – which is governed by their binding,

¹¹ Cbeyond asserts that the Commission must assume, for purposes of deciding AT&T Illinois' motion to dismiss, that "AT&T has violated the ICA." Response at 16. Cbeyond is confusing facts with legal conclusions. As explained above in Section I, such a "conclusion[] of law" is not entitled to any presumption of truth. *Evans ex rel. Husted v. General Motors Corp.*, 314 Ill. App. 3d 609, 614 (2d Dist. 2000).

negotiated ICA – would “interfere with the procedures established by the [1996] [A]ct” for negotiating and arbitrating interconnection agreements” and thus be preempted. *Wisconsin Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003). *See also 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[.]”).¹² Counts One, Two and Three of the Complaint therefore should be dismissed.

V. Cbeyond Contractually Waived Any Right To Bring A Fast-Track Complaint Challenging The Category 1 Charges.

AT&T Illinois explained in its motion to dismiss that the parties have already contractually 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.” Motion at 18 (quoting Ex. 10, ¶ 5 (emphasis added)). Because section 13-514 is part of the PUA’s fast-track provisions, Count One of Cbeyond’s Complaint is barred by the parties’ Agreement.¹³

¹² Cbeyond is correct that § 13-514(8) of the PUA makes it unlawful for a carrier to violate the terms of an ICA in certain circumstances. Response at 15. Unfortunately for Cbeyond, the Complaint alleges only that AT&T Illinois has violated § 13-514(10), not § 13-514(8).

¹³ Cbeyond again mischaracterizes AT&T’s argument here to make it appear unfair, implying that AT&T seeks dismissal of both the Category 1 charges – which were already at issue in Docket No. 10-0188 – and the Category 2 charges – which were not. *See* Response at 16. But AT&T’s position on waiver has always been limited to the Category 1 charges.

In its response, Cbeyond mischaracterizes AT&T Illinois' argument as being that Cbeyond "inadvertently" agreed to waive its fast-track claims. Response at 16. But AT&T Illinois does not claim that the waiver was inadvertent. To the contrary, the parties' Agreement was negotiated and reviewed by Cbeyond's experienced lawyers, one of whom expressly recognized at the preliminary hearing in this matter that Cbeyond agreed "not [to] apply *any* fast track proceeding in this case." Ex. 15 at 14 (emphasis added). Even if Cbeyond made an inadvertent mistake – both through the Agreement and again at the preliminary hearing – Cbeyond has identified no legal doctrine that would allow it to avoid the application of the freely negotiated, arms-length Agreement.

Cbeyond also argues that the Agreement's general "non-waiver" provision preserves its right to bring a claim under section 13-514 of the Commission's fast track provisions. See Response at 17-18. Cbeyond's overly broad reading of this provision would render the earlier, specific waiver regarding fast-track proceedings, and arguably the entire agreement, a nullity and thus violate well-established rules of contractual interpretation. See, e.g., *Nationwide Mut. Fire Ins. Co. v. T & N Master Builder & Renovators*, 2011 WL 5073757, at *7 (Ill. App. 2d Dist. Oct. 25, 2011) ("It is well established that, where an inconsistency exists in a contract, a more specific provision controls over a more general one."); *Board of Managers of Hidden Lake Townhome Owners Ass'n v. Green Trails Improvement Ass'n*, 404 Ill. App. 3d 184, 190 (2d Dist. 2010) ("a court will not interpret [an] agreement so as to nullify provisions or render them meaningless"). In addition, Cbeyond's argument is inconsistent with its admission that, by waiving its right to bring a fast-track proceeding, it has waived any right to have applied the timelines set forth in section 13-515. See Response at 17 & n.44. If it were true that the Agreement's general non-waiver provision nullified the parties' specific agreement concerning fast-track proceedings, then

that conclusion would apply both to the cause of action created by the fast-track statute and to the timelines included therein.

Cbeyond also argues that enforcing the contractually agreed upon waiver of claims under the fast-track proceedings would be unfair, because it would leave Cbeyond without a remedy for AT&T Illinois' purported violations of the ICA. According to Cbeyond, "AT&T's Motion . . . argues that the Commission has no authority under Section 9-250, the Interconnection Agreement, or section 13-801 to resolve that dispute." Response at 18. But that is not what AT&T Illinois argued. AT&T Illinois of course recognizes that the Commission has authority over claims for breach of ICA and for violation of section 13-801. But the petitioner first has to state a claim for such misconduct, which Cbeyond has failed to do.

Finally, Cbeyond asserts that any ambiguity in the Agreement must be construed against the drafter, AT&T Illinois. Response at 18. But there is no ambiguity in the Agreement, so there is no need to apply that rule of construction. The Agreement's waiver provisions should be enforced as written, and Cbeyond's claim based on section 13-514 should be dismissed.

VI. Cbeyond Fails To State A Claim For Violation Of Section 13-801.

AT&T Illinois explained in its motion to dismiss that Cbeyond has failed to state a claim for violation of section 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" – because Cbeyond does not allege that the CCC rates AT&T Illinois has imposed on Cbeyond are anything other than "cost-based" rates. 220 ILCS 5/13-801(g). Motion at 19. Just the opposite: the Complaint alleges that the proper cost-based rate for CCC was established in Docket No. 02-0864. *See* Complaint ¶ 8.

Cbeyond argues in response that use of the Commission-set, cost-based, CCC rate should nonetheless be found to violate section 13-801 because the rate is not “cost-based” if charged in “some different context” – *i.e.*, when AT&T Illinois is providing “DS1 transport.” Response at 19. However, a rate is either cost-based or not cost-based. A rate’s status as cost-based does not change from one context to the other. 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 section 13-801. Simply put, the facts of this case do not fit within the statute, and therefore Cbeyond’s claim for violation of section 13-801 should be dismissed.

VII. Cbeyond Fails To State A Claim For Violation Of Section 9-250 Of The PUA.

AT&T Illinois explained in its motion to dismiss that Cbeyond’s claim for violation of section 9-250 of the PUA – which allows the Commission to investigate AT&T Illinois’ rates, charges and practices and “impose rates, charges and practices that are just and reasonable” – is subject to dismissal because the Commission must enforce the parties’ ICA as written, and it has no authority to determine what is “just and reasonable” outside the confines of the ICA. Motion at 19-20.

Cbeyond asserts that AT&T Illinois’ argument is a “straw man” because “Cbeyond is merely asking that AT&T bill Cbeyond the appropriate TELRIC rate *as required by the ICA* for the provisioning of DS1 transport.” Response at 20 (emphasis added). But Cbeyond proves AT&T Illinois’ point: If this Commission finds that AT&T Illinois has *breached* the ICA (which AT&T Illinois has not), then the remedy is for the Commission to enforce the ICA as it is written. There is no need and no authority for the Commission to do otherwise; the claim for violation of section 9-250 simply collapses into the claim for breach of the ICA. If Cbeyond

does *not* have a claim under the ICA, then it also cannot have a claim under section 9-250, because the Commission cannot impose any rates, charges or practices that are different than those set forth in the ICA.

VIII. Cbeyond Concedes That The Interconnection Agreement Bars Its Prayer For Consequential Damages And Legal Fees.

Cbeyond recognizes in its response brief that “Cbeyond 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.” Response at 26. AT&T Illinois agrees. Since the only advantage Cbeyond would gain from prevailing on a claim for violation of section 13-514, which it would not gain from prevailing on a breach of contract claim, is the ability to seek attorneys’ fees and consequential damages, at this point it is a moot point that Cbeyond failed to comply with the Commission’s “48-hour notice” requirement, which is set forth in section 13-515(c).

Conclusion

For these reasons, Cbeyond’s Complaint should be dismissed in full.

Dated: June 13, 2012

Respectfully Submitted,

AT&T Illinois

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CERTIFICATE OF SERVICE

I, Nissa J. Imbrock, an attorney, certify that a copy of the foregoing AT&T ILLINOIS' REPLY IN SUPPORT OF ITS 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 June 13, 2012.

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