

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

Docket No. 11-0696

**AT&T ILLINOIS' REPLY IN SUPPORT OF ITS COMBINED
SECTION 2-619.1 MOTION TO DISMISS CBeyond'S
SECOND AMENDED VERIFIED FORMAL COMPLAINT**

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Introduction and Summary of Argument

As AT&T Illinois explained in its motion to dismiss the Second Amended Complaint (“Complaint”), Cbeyond 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 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.

AT&T Illinois moved to dismiss Cbeyond’s Complaint based on a variety of pleading defects. Cbeyond spends much of its response arguing the merits of the case rather than responding to the motion at hand. But all of Cbeyond’s allegations and arguments are ultimately irrelevant if Cbeyond is unable to explain how they form the basis of a claim for which this Commission can grant relief. As explained in AT&T Illinois’ motion and this reply, Cbeyond’s Complaint should be dismissed as to both categories of charges under sections 2-615 and 2-619 of the Illinois Code of Civil Procedure.

Under section 2-619 – which authorizes motions to dismiss based on affirmative matter outside the four corners of the pleading – Cbeyond’s Complaint should be dismissed for multiple reasons. *First*, all four counts of Cbeyond’s Complaint should be dismissed as to the Category 1 charges, because the ALJ has found that the Category 1 charges were not part of the amended complaint, and did not grant Cbeyond leave to add the Category 1 charges to its Second Amended Complaint. Cbeyond now argues that the Category 1 charges have always been a part of its complaint, and thus that it was not required to seek leave to add the charges, even though it knew the ALJ understood its amended complaint *not* to include the Category 1 charges and failed to clarify that position in its earlier briefs or in a motion for reconsideration. Regardless,

Cbeyond's challenge to the Category 1 charges is barred by the collateral attack doctrine because, in Docket No. 10-0188, Cbeyond already asserted that AT&T Illinois' imposition of the Category 1 charges breached the parties' interconnection agreement ("ICA"), and the Commission already rejected that argument. If Cbeyond was unsatisfied with the Commission's consideration and resolution of the Category 1 charges in Docket No. 10-0188, the proper and legally required course of action was for Cbeyond to file for rehearing and then, if it was still dissatisfied, file an appeal with the Illinois Appellate Court. Cbeyond has not identified any new evidence or issues that would warrant 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.

Second, Count Four of the Complaint, for breach of contract, should be dismissed because it is clear from the plain language of the agreement that AT&T Illinois' charges are authorized by the ICA. In response, Cbeyond claims that AT&T Illinois was required to submit an affidavit to support its argument. However, the ICA provisions on which AT&T Illinois' argument rely are contained in the parties' ICA, which was approved by this Commission; the Commission may take administrative notice of that document. Cbeyond also argues that AT&T Illinois' motion raises fact issues – yet fails to point to a single example of any fact in dispute. The Commission can and should construe the parties' unambiguous ICA at the motion to dismiss stage, based on its plain language. The ICA is unambiguous that CCC is an optional feature that the CLEC may request, and sets forth the applicable charge for that feature. Cbeyond admits that it 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 relied on by Cbeyond say nothing about the price for CCC and cannot be used to create an ambiguity where none exists.

Third, Counts One, Two and Three of the Complaint should all be dismissed – as to both categories of charges – because Cbeyond’s billing dispute must be decided by reference to the parties’ ICA, *not* state or federal law. In Counts One, Two and Three, Cbeyond alleges that AT&T Illinois has violated sections 13-514, 13-801 and 9-250 of the PUA, respectively, by charging Cbeyond for CCC when providing DS1/DS1 EELs and when converting Cbeyond’s DS1/DS1 EELs to new serving arrangements. All three counts boil down to a single argument: the Category 1 and Category 2 charges AT&T Illinois imposes for CCC are not “cost based.” What Cbeyond has repeatedly refused to acknowledge, however, is that, regardless of whether rates are cost based, the rates Cbeyond is legally required to pay are those set forth in its ICA. 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.

Fourth, Count Two of the Complaint, for violation of section 13-801(g) of the PUA, is subject to dismissal for another, similar reason: section 13-801 does not apply to carriers – like AT&T Illinois – that are not subject to an alternative form of regulation if the requirements of section 13-801 exceed or are more stringent than the requirements of the Telecommunications

Act of 1996 (“1996 Act”) and regulations of the Federal Communications Commission (“FCC”). The 1996 Act recognizes that, once parties have entered into a binding ICA, their relationship is then governed directly by the terms and rates set forth in that ICA, not by potentially conflicting requirements set by a state law such as section 13-801(g).

In the Section 2-615 portion of its motion – which concerns motions to dismiss based on defects apparent on the face of the Complaint – AT&T Illinois identified two additional reasons for dismissing Cbeyond’s complaint. *First*, Counts One, Two and Three, for violations of sections 13-514, 13-801 and 9-250 of the PUA, respectively, should be dismissed because Cbeyond failed to obey the ALJ’s direction that Cbeyond clarify the “statutory elements [that] are involved in th[ese] statutes and how that relates to Cbeyond and the facts alleged in the Complaint.” Cbeyond appears indignant that AT&T Illinois would point out its failure to comply with the ALJ’s order. But it is Cbeyond that has ignored the ALJ’s order and, therefore, its claims for violation of the PUA should again be dismissed.

Second, Count Two should be dismissed for the additional reason that, while section 13-801 requires interconnection, collocation and network elements to be provided at cost-based rates, Cbeyond’s claim is not that AT&T Illinois’ CCC charges are something other than cost-based, but rather that those charges are not applicable to the services Cbeyond ordered.

Argument

I. AT&T Illinois’ Section 2-619 Motion to Dismiss Should Be Granted.

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

AT&T Illinois explained in its motion to dismiss that Cbeyond’s Complaint should be dismissed because Cbeyond, without leave of the ALJ, added the Category 1 charges to its Second Amended Complaint even after the ALJ found that those charges were not part of

Cbeyond's amended complaint. Cbeyond now claims that the Category 1 charges "have always been a part of this case, so there was no obligation to seek leave to more clearly present them." Response at 7. *See also id.* at 8-9. But that is not what the ALJ found. In her August 31 opinion, the ALJ found that "a reading of the Amended Complaint makes it clear that [Cbeyond] is only disputing Clear Channel Capability rates for situations where the charge is levied on orders for new DS1/EEL circuits," and "[t]herefore, the propriety of what AT&T calls 'Category 1 charges' is not at issue here." 8/31/12 ALJ Ruling at 5. Cbeyond did not seek clarification of the ALJ's order. It simply filed an amended complaint that included the Category 1 charges. While Cbeyond's complaint as to the Category 1 charges can be dismissed on this basis alone, it should also be dismissed for the further reasons set forth in this section.¹

1. 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.

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 13-18. In the Final Order, the Commission described the CCC issue (Ex. 1 at 15, 17, 25, 27²) and properly concluded that "Cbeyond has not shown that AT&T has violated the parties' ICA" (*id.* at 29). *See also id.* at 33 ("Cbeyond has not shown that AT&T has acted improperly in the past with respect to the charges at issue here."). The Commission also stated that "[n]ow that this dispute has been resolved by the Commission in favor of AT&T, the Commission sees no reason to stop AT&T from pursuing Cbeyond for the amounts billed."

¹ As it did in its earlier responses, Cbeyond asserts that "[t]here is no *res judicata* effect from the Order in 10-0188." Response at 10. This argument continues to baffle AT&T Illinois, as AT&T Illinois has never asserted *res judicata*, and none of the cases relied upon by AT&T Illinois in its motion to dismiss was based on *res judicata*.

² The documents referred to herein as Exhibits 1 through 18 were attached to AT&T Illinois' motion to dismiss.

Id. at 35. The Commission made no exception, explicitly or implicitly, for CCC charges. Thus, it is simply untrue that “[t]he Order in 10-0188 is totally silent on the rate portion of the case.” Response at 13. The Commission rejected all of Cbeyond’s claims and concluded that AT&T Illinois could pursue Cbeyond for the amounts billed. This includes the CCC charges. If Cbeyond was unsatisfied with the Commission’s consideration and resolution of the CCC 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 Order.

Cbeyond argues that the Commission should not apply the collateral attack doctrine in this case because “AT&T has raised a new theory of the case, and Cbeyond has presented new evidence not previously presented in Docket 10-0188.” Response at 10. Both parts of that assertion are incorrect. AT&T has not “raised a new theory of the case.” *Id.* AT&T Illinois has simply filed 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” in filing this motion to dismiss. Cbeyond, as the complainant, bears the burden of proof on all elements of its claims. 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).

Moreover, Cbeyond has not presented “new evidence” in this proceeding. Response at 10. All Cbeyond has done is cite to records from Docket No. 02-0864 – records that are 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. Indeed, Cbeyond’s Complaint in this case relies on the same testimony that it presented in

its response brief in Docket No. 10-0188, the testimony of Chris F. Cass. *Compare* Complaint ¶¶ 15-20, *with* Ex. 6 at 25-27 (Cbeyond Response Brief), *and* Ex. 7 at 18 (Cbeyond Exceptions 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.³ Cbeyond has been aware all along of what occurred in Docket No. 02-0864. The Commission should not ignore the collateral attack doctrine and allow Cbeyond to rehash issues raised and rejected in Docket No. 10-0188.

Cbeyond attempts, but fails, to distinguish the collateral attack doctrine precedent cited in AT&T’s motion. *See* Response at 11-12. 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 via a ‘judicial proceeding’ – . . . the merits of an ICC order for which no appeal was taken.” Response at 11. But the collateral attack doctrine is applied by this Commission just as it is applied by the courts, as illustrated in *Citizens for a Better Environment*. In that 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 and docket.

³ Under the Commission’s rules of practice, if a party seeks rehearing based on additional evidence, it is required to provide “an explanation why such evidence was not previously adduced.” 83 Ill. Admin. Code § 200.880(a).

Cbeyond also 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 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, as well as in “briefing and in exceptions to the Proposed Order.” Complaint ¶ 29. Indeed, the parties briefed the CCC issue extensively.⁴ In its final order, the Commission recognized and described the CCC issue raised by Cbeyond, but nonetheless concluded that “Cbeyond has not shown that AT&T has violated the parties’ ICA.” *Id.* at 29. Just because the Commission did not decide the issue the way Cbeyond wanted does not mean that the Commission failed to consider the issue at all. In short, there is simply no merit to the suggestion that the Commission somehow did not address the CCC issue.⁵

In this docket, Cbeyond raises the same arguments as to why the CCC charges should not be applied to EEL rearrangements that it raised in Docket No. 10-0188. 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

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 Response Brief); Ex. 7 at 2, 18-19 (Cbeyond Brief on Exceptions); Ex. 8 at 15-17 (AT&T Response to Exceptions).

⁵ 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 15. 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.

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 may also believe that the Commission’s decision in Docket No. 10-0188 was erroneous, but it took no steps to challenge that decision and, therefore, is bound by it.

2. 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 order 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 that 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 discuss particular evidence. Response at 14. 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). *See also Abbott Laboratories, Inc. v. Illinois Commerce Commission*, 289 Ill. App. 3d 705, 716 (1st Dist. 1997) (“*Abbott Labs*”) (“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 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 *Abbott 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.⁶ 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, if the Commission *did* reject its challenge to the Category 1 charges in Docket No. 10-0188, the Commission “did not fulfill its statutory duty to identify the factual findings to support its ruling.” Response at 15. If that were true, however, Cbeyond could have sought to have the Commission's decision set aside *by the appellate court*, following a timely direct appeal. 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 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 lieu of revenues where “the offset argument by

⁶ *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.

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).⁷ 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

⁷ 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 2.⁸ 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.

3. Cbeyond’s 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.

Cbeyond argues 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. Response at 16-17. 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 ¶ 53 (emphasis added).⁹ This is the

⁸ See, e.g., *In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc.*, No. 11-3407-TP-CSS, 2011 WL 5023559, ¶ 35 (Ohio P.U.C. Oct. 12, 2011) (explaining that allowing a carrier to challenge its ICA through a complaint proceeding “would undermine the certainty of contractual obligations” and that the proper course for a party dissatisfied with its ICA “is termination of the current interconnection agreement pursuant to the terms of the agreement followed by the negotiation of a successor agreement”) (Ex. 15).

⁹ 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” the CCC rate in violation of state law and the parties’ ICA. Response at 17. Those are not matters of accuracy (which would include, for instance, whether AT&T Illinois added up the charges on its bills correctly, or charged for a circuit that Cbeyond did not order).

same argument that Cbeyond raised – and the Commission rejected – in Docket No. 10-0188. Thus, Cbeyond’s Complaint as to the Category 1 charges should be dismissed.

Cbeyond also asserts 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 17. This is patently false. The Agreement the parties reached to avoid litigation over Cbeyond’s request for a temporary restraining order provides that “[t]he 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.

For these reasons, Cbeyond’s Complaint should be dismissed to the extent that it is based on the Category 1 charges Cbeyond already challenged in Docket No. 10-0188.

B. Cbeyond’s Claim For Breach Of The ICA Should Be Dismissed.

In its motion (at 24), AT&T Illinois demonstrated that its charges for CCC comply with the parties’ ICA. Section 9.2.7.7.5 of Schedule 9.2.7 of the ICA states: “The following *optional features* are available if requested by CLEC, at an additional cost.” Ex. 18 at p. 295 of 471 (emphasis added). Section 9.2.7.7.5 then lists “Clear Channel Capability” as one of the optional features. *Id.* The price for optional CCC is set forth in the ICA’s Pricing Schedule. *Id.* at pp. 389, 390, 391 of 471 (original pricing schedule) and p. 405 of 471 (02-0864 pricing schedule). Because the ICA expressly provides that CCC is an optional feature that Cbeyond may order for an additional cost, and Cbeyond ordered CCC as an optional feature when it purchased DS1/DS1 EELs from AT&T Illinois, Cbeyond is required by the ICA to pay the charges set forth in the parties’ ICA. Cbeyond simply has no claim for breach of the ICA.¹⁰

¹⁰ The discussion in this Section specifically references the allegations made with respect to the Category 2 charges. However, this argument applies equally to the Category 1 charges. Thus, if the Commission determines that the

Cbeyond's response to AT&T Illinois' motion to dismiss Count Four reflects confusion about the applicable law, as well as the structure of the parties' ICA and amendments. As a result, the Commission should reject Cbeyond's position.

First, Cbeyond objects that the motion is improper because AT&T Illinois relies on materials outside the Complaint, which are not supported by affidavit. Cbeyond Response at 19-20. The only materials on which AT&T Illinois relies are provisions of the parties' ICA: namely, section 9.2.7.7.5 of Schedule 9.2.7 of the ICA, and the original and revised ICA Pricing Schedules. *See* Motion at 24. Although the Complaint does not specifically mention the first two items, the revised Pricing Schedule is actually Exhibit 5 to the Complaint. In any event, the Commission approved the ICA – including Schedule 9.2.7 and the original Pricing Schedule – in Docket No. 04-0420. *See* Complaint ¶ 34. Under section 200.640(a) of the Commission's rules of practice, the Commission can take administrative notice of the terms of an ICA submitted to it. This is particularly appropriate where, as here, one party is alleging a breach of contract and where looking at other parts of the contract will aid in effective disposition of the case. *Advocate Health and Hospitals Corp. v. Bank One, N.A.*, 348 Ill. App. 3d 755, 759 (1st Dist. 2004).

Second, Cbeyond objects that the Motion improperly raises factual issues at a preliminary stage of the case when Cbeyond's factual allegations must be deemed to be true. Response at 20, 21. In reality, AT&T Illinois has not raised any factual issues; it has asked the Commission to construe provisions of a contract, a matter of law, not fact, and a perfectly normal activity in evaluating a motion to dismiss. *See Coles-Moultrie Electrical Coop. v. City of Sullivan*, 304 Ill. App. 3d 153, 158 (4th Dist. 1999) (“Since contract construction is a question of law for the court, an action may be dismissed under section 2-619 ... based on the court's interpretation of the

Category 1 claims should not be dismissed on the ground that the charges were already addressed (and found to be properly charged) in Docket No. 10-0188, the Category 1 claims should be dismissed for the independent reasons set forth in this Section.

contract at issue.”). Moreover, Cbeyond’s so-called “facts” about how the ICA and its amendments should be construed are actually legal conclusions that are not entitled to a presumption of truth.¹¹ See *Evans ex rel. Husted v. Gen’l Motors Corp.*, 314 Ill. App. 3d 609, 614 (2d Dist. 2000).

Third, Cbeyond asserts that a provision in the TRO/TRRO amendment to the parties’ ICA resolves any inconsistency in the rates applicable to EEL orders involving CCC. Cbeyond Response at 20 & n.40. But Cbeyond must be confused about the claim it has raised here. Cbeyond’s claim is that the transport rates set by the Commission in Docket No. 02-0864 control over specific rates for CCC contained in the parties’ original and amended ICA. See Complaint ¶¶ 15, 27. The Commission approved the amendment incorporating the 02-0864 rates into the ICA in Docket No. 05-0147, not in the parties’ TRO/TRRO amendment, which the Commission approved in Docket No. 05-0844.¹² As a result, reliance solely on the TRO/TRRO amendment is irrelevant to a determination about what rate for CCC should apply here. See also Motion at 26-29.

Finally, Cbeyond contends that, at best, the Motion raises an ambiguity between different provisions of the parties’ ICA and that this ambiguity cannot be resolved on a motion to dismiss. Cbeyond Response at 21. In fact, it is Cbeyond that is attempting to create contract ambiguity here. Cbeyond contends (at 1) that it wants to pay the “rate the parties put in their contract” for DS1 and DS3 transport and that AT&T Illinois “charges an extra \$70 each time Cbeyond orders one of those products,” and repeats this assertion over and over in its brief (at 6, 20, 24, 25). But

¹¹ See, e.g., Complaint ¶ 31 (“AT&T Illinois continues to misapply the CCC rate to orders for new DS1 circuits riding on multiplexed UNE DS3 transport (DS1/DS3 EELs) and on new DS1/DS1 EEL circuit orders.” (emphasis added)), ¶ 55 (AT&T’s misapplication of the CCC rate is clearly at odds with all the testimony and evidence in ICC Docket 02-0864” (emphasis added)).

¹² The TRO/TRRO amendment is Exhibit 2 to the Complaint, and the 02-0864 pricing schedule is Exhibit 5 to the Complaint. If necessary, AT&T Illinois requests that the Commission take administrative notice of Docket Nos. 05-0147 and 05-0844 under section 200.640(a) of the Commission’s rules of practice.

Cbeyond never points to a specific ICA provision that sets forth the rate Cbeyond insists is the correct one for the products Cbeyond ordered. By contrast, AT&T Illinois has charged Cbeyond for CCC in accordance with section 9.2.7.7.5 of Schedule 9.2.7 of the ICA, using the specific rate for CCC set forth in the revised ICA Pricing Schedule. Ex. 18 at pp. 295 of 471 (§ 9.2.7.7.5) and 405 of 471 (price for optional CCC). AT&T Illinois has provided the only citations in the record showing the price for the product Cbeyond ordered. Cbeyond has failed to rebut this demonstration that AT&T Illinois' charges comply with the plain language of the ICA.

Instead, Cbeyond asserts that this conduct is a breach of various general provisions of the ICA, if those provisions are viewed in conjunction with materials outside the four corners of the contract. *See* Complaint ¶¶ 15-24. In effect, Cbeyond's Response (and its claim in Count Four) asks the Commission to adopt the "provisional admission approach" to contract interpretation, under which a party to a contract with facially unambiguous language seeks to proffer parol evidence "for the purpose of showing that an ambiguity exists which can be found only by looking beyond the clear language of the contract." *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill.2d 457, 463 (1999). The Illinois Supreme Court has expressly rejected adoption of the provisional admission approach in breach of contract cases. *Id.* at 464. The Commission should do the same here and dismiss Count Four.¹³

¹³ Like the contract at issue in *Air Safety*, the ICA at issue here contains an integration clause. *See* Section 1.33.1 of the General Terms and Conditions (included in Exhibit 3 to the Complaint).

C. Because Cbeyond Has No Viable Claim For Breach 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 a violation of state law may be maintained. Indeed, Cbeyond concedes (at 5) that AT&T Illinois "is not subject to inconsistent state law claims if AT&T acts within the requirements of the [ICA]."

That is because Cbeyond and AT&T Illinois' binding, negotiated ICA 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 must prevail on the breach of ICA claim before Cbeyond’s claims for violation of various sections of the PUA can be dismissed. *See* Response at 15. 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 would “interfere with the procedures established by the [1996] [A]ct” for negotiating and arbitrating interconnection agreements” and thus would 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[.]”). Counts One, Two and Three of the Complaint therefore should be dismissed.¹⁴

¹⁴ Of note, Cbeyond does make a new argument in its response concerning how AT&T Illinois’ actions have violated section 13-514(8) of the PUA. Response at 18. But Cbeyond’s Complaint alleges only a violation of section 13-514(10), not section 13-514(8). *See* Complaint ¶¶ 41-42. Cbeyond cannot use its response brief to add new claims to its Complaint.

D. Count Two Of The Complaint – For Violation Of Section 13-801(g) Of The PUA – Should Also Be Dismissed Because AT&T Illinois Is An Electing Provider That Is Not Subject To Section 13-801 To The Extent The Statute Imposes Obligations That Exceed The Requirements Of The 1996 Act Or The FCC’s Regulations.

Cbeyond misrepresents AT&T Illinois’ arguments regarding the effect of its status as an Electing Provider on the claim raised in Count Two, for violation of section 13-801 of the PUA. Contrary to Cbeyond’s assertion, AT&T Illinois does not contend that it “is not subject to 13-801 at all” because it is an Electing Provider. Cbeyond Response at 17. AT&T Illinois’ position is that section 13-801 applies to Electing Providers in a limited way and only to the extent that the statute imposes state law obligations equivalent to those imposed by Section 251 of the 1996 Act and accompanying regulations. *See* 220 ILCS 5/13-801(a); Motion at 18-19. Because AT&T Illinois and Cbeyond have an ICA approved by the Commission, their relationship is governed by that ICA, and the general duties established by section 251 and state law no longer apply. Cbeyond’s claim under section 13-801(g) thus collapses into the breach of ICA claim it alleges in Count Four.¹⁵ Because Count Two adds nothing to Cbeyond’s other claims, the Commission should dismiss it.

II. AT&T Illinois’ Section 2-615 Motion To Dismiss Should Be Granted.

A. Counts One, Two and Three of the Complaint Should Be Dismissed Because Cbeyond Did Not Revise Those Counts To Comply With The ALJ’s August 31, 2012 Ruling.

In her August 31 decision, the ALJ dismissed Counts One, Two and Three of Cbeyond’s amended complaint, with leave to amend, because the pleadings did not allege sufficient information to allow her to determine whether the PUA applies to the parties’ dispute. 8/31/12

¹⁵ Although Cbeyond stresses that, under section 13.506(k), the Commission “retains its existing authority” to enforce section 13-801 (Response at 17), it neglects to mention that the extent of the Commission’s authority under section 13-801 varies, depending on whether a carrier is subject to regulation under an alternative regulation plan. *See* 220 ILCS 5/13-801(a). If, as is true of AT&T Illinois here, the carrier is not subject to an alternative plan of regulation, section 13-801 imposes only the same obligations as the 1996 Act.

ALJ Ruling at 6. Specifically, at the hearing announcing her ruling, the ALJ stated that she “need[s] to know what statutory elements are involved in th[ese] statutes and how that relates to Cbeyond.” 8/30/12 Transcript at 22. As AT&T Illinois pointed out in its section 2-615 motion, Cbeyond has not added any allegations to clarify the “statutory elements [that] are involved in th[ese] statutes and how that relates to Cbeyond” and the facts alleged in the Complaint. Motion at 12. Cbeyond appears indignant that AT&T Illinois would point out that it failed to comply with the ALJ’s order. Indeed, Cbeyond declares (at 24) that “there is no defect to cure.” But it is not AT&T Illinois that gave Cbeyond the direction to clarify its claims under the PUA, and it is not AT&T Illinois that ignored the ALJ’s directive.

Cbeyond points to a single new allegation in its Second Amended Complaint that it apparently believes fixes any and all defects in the amended complaint. Response at 22-23. This allegation (Complaint ¶ 26) concerns an AT&T Illinois cost study filed in Docket No. 02-0864. But Cbeyond’s Complaint does not allege how the cost study is evidence of a violation of sections 13-514, 13-801 or 9-250. Moreover, Cbeyond admits that, in Docket No. 02-0864, the Commission “did not address” the CCC rate element’s application to initial DS1 orders. Complaint ¶¶ 24, 26.

Cbeyond’s assertion (at 23) that “numerous additional facts and explanations were added to the Complaint” may be correct, but it does not save the Complaint. For example, with regard to Count One, Cbeyond claims (at 23 n.44) that 32 specific paragraphs in the Complaint show it has adequately pled a claim and, by inference, cured the defects found by the ALJ. But the substantive contents of 23 of these paragraphs went essentially unchanged from the first amended complaint to the Second Amended Complaint.¹⁶ As for the remaining nine paragraphs,

¹⁶ Compare the following paragraph pairs from the first amended complaint and Second Amended Complaint: 7 (first amended) versus 8 (second amended); 9 versus 10; 11 versus 12; 13 versus 14; 14 versus 15; 16 versus 17; 19

five (¶¶ 16, 18-20, 26) simply provide additional information about cost studies prepared for Docket No. 02-0864, and four (¶¶ 9, 27, 31, 36) expand the list of rate elements that Cbeyond believes are at issue. Notably, none of these changes addresses the specific flaws that the ALJ found with Cbeyond's prior complaint; the absence of adequate information about the "statutory elements [that] are involved in th[ese] statutes and how that relates to Cbeyond." 8/30/12 Transcript at 22. Because Cbeyond did not adequately respond to the ALJ's concerns, its Complaint should again be dismissed.

B. Count Two Of Cbeyond's Complaint Also Should Be Dismissed Because It Fails To Allege That AT&T Illinois Has Engaged In Any Conduct Addressed By Section 13-801 Of The PUA.

The second prong of AT&T Illinois' section 2-615 Motion challenged Count Two of the Complaint, essentially on the theory that Cbeyond was trying to fit a square peg (the CCC rate set in earlier docket) into a round hole (section 13-801(g)). That is, Count Two alleged that, even though the rate AT&T charges Cbeyond for CCC was established by the Commission in Docket No. 02-0864, and even though the rates that the Commission set in that docket were cost-based rates (*see* Complaint ¶ 9), AT&T Illinois' use of the CCC rate set in Docket No. 02-0864 violates the requirement of section 13-801(g) that the company provide certain services at cost-based rates. However, whether a particular rate element applies to a particular service is an issue that section 13-801(g) simply does not cover. *See* Motion at 33.

Setting aside the adjectives¹⁷ and automotive analogies, Cbeyond's response asserts (at 25) that the CCC rate that AT&T charges is cost-based only "in some other context," but is improper here. However, the "context" here is that Cbeyond is ordering particular types of EELs

versus 21; 20 versus 22; 21 versus 23; 22 versus 24; 23 versus 25; 26 versus 28; 27 versus 29; 29 versus 30; 30 versus 32; 31 versus 33; 32 versus 34; 33 versus 35; 35 versus 37; 36 versus 38; 37 versus 39; 38 versus 40; and 39 versus 41. Changes that Cbeyond made to some of these paragraphs include replacing "ICA" with "Interconnection Agreement" and adding citations to exhibits attached to the Complaint.

¹⁷ Cbeyond repeatedly calls AT&T Illinois' position "absurd." Cbeyond Response at 25.

and asking that those circuits have a specific configuration (*i.e.*, with CCC), and AT&T Illinois is charging the price for CCC configuration set forth in the section of the Pricing Schedule that governs EEL provisioning. Moreover, section 13-801(g) does not speak of the “context” of the cost-based rates it prescribes, and Cbeyond’s position represents a dubious attempt to expand the scope of the statute. Because Cbeyond’s allegations do not fit within the terms of section 13-801(g), Count Two should be dismissed.

Conclusion

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

Dated: December 21, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, James A. Huttenhower, an attorney, certify that a copy of the foregoing brief was served on the following Service List via U.S. Mail and/or electronic transmission on December 21, 2012.

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