

**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 RESPONSE TO BRIEF ON EXCEPTIONS
OF CBEYOND COMMUNICATIONS, LLC**

Illinois Bell Telephone Company (“AT&T”), by and through its attorneys, hereby files its Response to the Brief on Exceptions of Cbeyond Communications, LLC (“Cbeyond”). For the following reasons, and except as noted, Cbeyond’s exceptions should be denied.

I. RESPONSE TO CBEYOND’S EXCEPTIONS

A. The Proposed Order Properly Concluded That The Specific Provisions Of The Parties’ Interconnection Agreement Control Over The General Provisions And That AT&T Did Not Breach The Interconnection Agreement.

Cbeyond challenges portions of Section III(b)(3) of the Proposed Order (“PO”), providing replacement language for most of the second paragraph and all of the third paragraph of this part of the PO.¹ Cbeyond contends that the PO’s analysis of the parties’ interconnection agreement (“ICA”) is incorrect as a matter of law because the ICA is ambiguous, and that AT&T’s section 2-619 motion to dismiss was procedurally improper. Cbeyond also seeks three “clarifications” of the PO.

¹ For unknown reasons, Cbeyond addresses the first paragraph and the first sentence of the second paragraph of Section III(b)(3) in Section 3 of its Exceptions Brief.

Cbeyond first argues that the PO misapplies Illinois law because it grants AT&T's motion to dismiss after finding that the ICA was ambiguous. Cbeyond bases this argument on *Hubbard Street Lofts, LLC v. Inland Bank*, 2011 IL App (1st) 102640, 963 N.E.2d 262. Cbeyond Exceptions at 11-12. In fact, it is Cbeyond that misstates Illinois law.

Cbeyond is correct that the two companies "dispute which provision of the ICA apply [sic] to the charges" at issue (*id.* at 12), but disagreement about which provision of a contract governs a dispute does not present a question of fact. As the PO correctly recognizes, the parties' dispute concerns if general provisions of the ICA govern (Cbeyond's position), or if provisions specifically addressing the clear channel capability ("CCC") charge control (AT&T's position). PO at 10. As the Illinois Supreme Court points out, "Courts and legal scholars have long recognized that, where both a general and a specific provision in a contract address the same subject, the more specific clause controls." *Grevas v. United States Fidelity & Guaranty Co.*, 152 Ill. 2d 407, 411 (1992). In discussing this principle, Illinois courts may have referred to an "ambiguity" caused by the conflict between general and specific contract provisions on the same subject,² but those courts still proceeded to construe the terms of the contract and decide which provision governed the dispute.³

Moreover, Cbeyond neglects to mention that *Hubbard Street* – the only case cited in its argument – states that whether "a contract is ambiguous is a question of law for the court to

² See, e.g., *Countryman v. Industrial Comm'n*, 292 Ill. App. 3d 738, 742 (2d Dist. 1997); *R.W. Dunteman Co. v. Village of Lombard*, 281 Ill. App. 3d 929, 936 (2d Dist. 1996); *Brzozowski v. Northern Trust Co.*, 248 Ill. App. 3d 95, 99 (1st Dist. 1993). The PO (at 10) relies on *Nationwide Mut. Fire Ins. Co. v. T & N Master Builder & Renovators*, 2011 IL App (2d) 101143, 959 N.E.2d 201, 209, which talks about the "inconsistency" between general and specific contract provisions and affirms the trial court's granting of defendants' motion for judgment on the pleadings.

³ See *Countryman*, 292 Ill. App. 3d at 742-43; *R.W. Dunteman*, 281 Ill. App. 3d at 936; *Brzozowski*, 248 Ill. App. 3d at 99-100.

decide,” and, in fact, affirmed the trial court’s dismissal of the case. 963 N.E.2d at 271.⁴ It was perfectly appropriate for the ALJ to determine, on a motion to dismiss, whether the specific ICA provisions on CCC governed over the more general contract provisions on which Cbeyond relied. The ALJ also properly determined that the specific pricing provision applies here and that, therefore, AT&T has not breached the ICA. PO at 10. This exception should be rejected.⁵

Cbeyond next contends that AT&T’s motion to dismiss was procedurally improper because AT&T relied on ICA provisions not addressed in Cbeyond’s complaint and because it did not provide an affidavit, as required by 735 ILCS 5/2-619(a). Cbeyond Exceptions at 12-13. The Commission should reject this contention for two reasons.

First, Cbeyond’s replacement language admits that a court has discretion whether to construe strictly the affidavit requirement in section 2-619(a). *See* Cbeyond Exceptions at 15 n. 45 (stating that Illinois courts have found that failure to file required affidavit is “not necessarily fatal”). Assuming for the sake of argument that this affidavit requirement applied to AT&T’s motion, it is obvious that the PO did not construe the affidavit requirement strictly, so that Cbeyond’s exception is really an attack on the ALJ’s exercise of discretion. Yet Cbeyond offers no explanation why this exercise of discretion was inappropriate⁶ and thus provides no reasoned basis for revising the PO. More recent Illinois decisions confirm that Illinois courts have flexibility regarding compliance with the affidavit requirement. *See, e.g., Asset Acceptance, LLC*

⁴ Cbeyond’s replacement language (*see* Cbeyond Exceptions at 16 n.49) also refers to *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281 (1990). *Quake*, however, did not involve a dispute in which it was necessary to construe general and specific contract provisions addressing the same subject.

⁵ There also appears to be a typographical error in the last sentence of Section III(b)(3) of the Proposed Order. That section addresses both AT&T’s argument that Counts I, II and III should be dismissed because the ICA, not state or federal law, is controlling (Motion to Dismiss at Section III(B)(3)) and AT&T’s argument that it did not breach the ICA (*id.* at Section III(B)(4)). Therefore the last sentence should also list Count I as being dismissed.

⁶ Cbeyond simply relies on citation to a 37-year-old case, *Yale Development Co. v. Oak Park Trust & Savings Bank*, 26 Ill. App. 3d 1015 (2d Dist. 1975). *See* Cbeyond Exceptions at 12-13.

v. Tyler, 2012 IL App (1st) 093559, 966 N.E.2d 1039, 1045; *Doe v. Montessori School of Lake Forest*, 287 Ill. App. 3d 289, 296 (2d Dist. 1997).

However, as AT&T explained in its Reply, the affidavit requirement does not apply here. This aspect of the Motion to Dismiss relied on three provisions of the parties' ICA, one of which was part of Exhibit 5 to the Second Amended Complaint and the other two of which were approved by the Commission in Docket 04-0420 and thus are an appropriate subject for administrative notice. AT&T Reply at 15. *See Advocate Health & Hospitals Corp. v. Bank One, N.A.*, 348 Ill. App. 3d 755, 759 (1st Dist. 2004) (stating court may take judicial notice of "facts contained in public records where such notice will aid in the efficient disposition of the case").

Cbeyond's last argument is that the Commission should make three clarifications to the PO if it "does not follow the law set-out above." Cbeyond Exceptions at 13. Although this phrasing suggests that the clarifications should be made regardless of whether the Commission accepts Cbeyond's other arguments in Section 1, Cbeyond provides no alternative replacement language addressing only these desired changes. Cbeyond thus has failed to comply with the Commission's requirement that "a suggested replacement statement or finding *must* be incorporated" with a party's exception. 83 Ill. Admin. Code § 200.830(b) (emphasis added).

In any event, Cbeyond's first requested clarification (at 13) – that the PO should not state that Cbeyond agrees that a particular ICA provision is applicable – makes no difference here. Even if the PO misstated Cbeyond's position,⁷ the order's ultimate conclusion on this issue would not change: that is, the order would follow the well-established principle that, "where both a general and a specific provision in a contract address the same subject, the more specific clause controls." *Grevas v. United States Fidelity and Guaranty Co.*, 152 Ill. 2d 407, 411 (1992).

⁷ Cbeyond does agree that the specific CCC rate can be charged in certain contexts. *See* Second Amended Complaint at pp. 1-2 & ¶ 54.

Cbeyond's second requested clarification (at 13-14) challenges the PO's conclusion that Cbeyond failed to show why the CCC-specific ICA provisions should not be applied. Cbeyond contends that the Docket 02-0864 and TRO/TRRO amendments to the ICA adopted pricing standards are inconsistent with the CCC-specific provisions on which AT&T relies, and that Cbeyond's view of contract interpretation must prevail because "all well-pleaded facts in the complaint must be deemed true." Cbeyond Exceptions at 14 (quoting *South Chicago Savings Bank v. Braxton*, 178 Ill. App. 3d 545, 549 (1st Dist. 1988)). But Cbeyond's allegations that AT&T has applied the wrong rate are legal conclusions – not facts – and thus not entitled to a presumption of truth. *See* AT&T Reply at 16 n.11. And the case law is clear that, when there is an inconsistency between specific and general provisions in a contract, it is the role of the judge to determine whether the specific or general provisions govern, as the ALJ did here.⁸

Cbeyond cites no authority for its third requested clarification (at 14), seeking deletion of language regarding renegotiation of the companies' ICA. This clarification seems to be an excuse for Cbeyond to launch a verbal assault on AT&T's negotiation practices, unsupported by citation to anything in the record here.⁹ As a result, the Commission should simply ignore this jeremiad.

B. The Commission Should Reject Cbeyond's Exception To The Proposed Order's Conclusion That Cbeyond Failed To Timely Assert Error In The August 31, 2012 Order.

Cbeyond proposes to eliminate the last paragraph of Section III(b)(2) of the PO as "unnecessary" and "incorrect as a matter of law." Cbeyond Exceptions at 17.

⁸ *See Countryman*, 292 Ill. App. 3d at 742-43; *R.W. Dunteman*, 281 Ill. App. 3d at 936; *Brzozowski*, 248 Ill. App. 3d at 99-100.

⁹ *See* 83 Ill. Admin. Code § 200.830(e) (requiring that statements of fact in briefs on exceptions "be supported by citation to the record").

AT&T agrees that the last paragraph of Section III(b)(2) is not *needed* to support the PO's ultimate conclusion regarding Cbeyond's inability to challenge the Category 1 charges. The PO correctly finds that the Commission's order in Docket 10-0188 decided – and rejected – Cbeyond's challenge to those charges (*see* PO at 7-9), and Cbeyond does not take exception to the PO's decision to dismiss the Second Amended Complaint to the extent it involves Category 1 charges. *See* Cbeyond Exceptions at 41-42.

Nevertheless, the PO properly concludes that Cbeyond waived its ability to contest a finding in the ALJ Ruling of August 31, 2012 (“ALJ Ruling”) regarding whether the Category 1 charges were part of the case. PO at 9. Cbeyond claims that this finding was legally incorrect, but AT&T disagrees, given the particular circumstances here. At an August 30, 2012 status hearing, the ALJ passed out a draft of what would become the ALJ Ruling and asked the parties whether they had questions about it. Motion to Dismiss, Ex. 14 at 21.¹⁰ That draft contained the statement that “the propriety of what AT&T calls ‘Category 1 charges’ is not at issue here” – a statement repeated in the ALJ Ruling. *See* ALJ Ruling at 5. Although Cbeyond sought clarification of other aspects of the draft ruling (*see* Motion to Dismiss Ex. 14 at 22), it did not seek to correct the ALJ's apparent misunderstanding about whether Cbeyond was contesting the Category 1 charges, although it would have been easy for Cbeyond to do so. Cbeyond thus seems to have played a game of “Gotcha” with the ALJ on this point, and any chastisement it received in the PO is appropriate.

¹⁰ The cited excerpts from the August 30, 2012 status hearing transcript are contained in Exhibit 14 to AT&T's Motion to Dismiss (“Motion to Dismiss, Ex. 14 at ___”).

C. AT&T's Assertion That The Parties' Interconnection Agreement, Not State Or Federal Law, Controls Here Was Procedurally Proper, And Cbeyond Misstates AT&T's Position.

Cbeyond again challenges portions of Section III(b)(3) of the PO, seeking to insert several sentences into the second paragraph of this part of the PO. Cbeyond tries to justify these revisions because AT&T's position is "absurd" and its legal argument is "procedurally incorrect." Cbeyond Exceptions at 19, 20.

As an initial matter, Cbeyond's argument itself seems procedurally improper. Section 200.830(b) of the Commission's rules of practice states that exceptions "with respect to statements, findings of facts or rulings of law must be specific." 83 Ill. Admin. Code § 200.830(b). Cbeyond here does not take exception to anything *specific* in the PO, it does not seek to change the PO's conclusion on this issue, and it even states that the PO agreed that AT&T's argument was improper. Cbeyond Exceptions at 19.¹¹ Cbeyond merely seeks to graft four new sentences into the PO, apparently to conform to its idea of how the order's reasoning should be structured. Such copy-editing is not a proper use of the exceptions process.

Substantively, Cbeyond misrepresents AT&T's position, which is that Cbeyond's statutory claims in Counts I, II and III collapse into consideration of whether AT&T has breached the parties' ICA (Count IV). AT&T has not argued that the mere fact of the ICA's existence bars any claim other than one for breach of contract. AT&T instead argues that, to the extent that Cbeyond claims that state law imposes obligations on AT&T contrary to, or above and beyond, what the ICA requires, that state law is preempted. *See* AT&T Motion to Dismiss at 22. Cbeyond's adjectives, adverbs, and feigned outrage are beside the point, and the Commission should reject Cbeyond's Exception.

¹¹ Subpart A of this section of Cbeyond's Exceptions Brief is simply a diatribe against AT&T's supposed position; it never mentions the PO.

D. The Commission Should Adopt Section III(c)(1) Of The Proposed Order, Dismissing Counts I, II and III On The Additional Ground That Cbeyond Failed To Amend These Counts As Directed By The ALJ.

Despite the clear conclusion in the ALJ Ruling that “[t]here are simply not enough facts alleged by Cbeyond in the Amended Complaint’ for the ALJ to determine the sufficiency of the pleading” (PO at 12, quoting ALJ Ruling at 6), and the ALJ’s equally clear directive to Cbeyond to (again) amend its First Amended Complaint (*id.*), Cbeyond declined to make substantive changes. Cbeyond’s Second Amended Complaint did not add a single new fact. PO at 12. Nor did it specify “what statutory elements are involved in th[ese] statutes *and how that relates to Cbeyond,*” as the ALJ instructed Cbeyond to do if it amended its complaint again. Motion to Dismiss Ex. 14 at 22 (emphasis added). The ALJ rightly concluded that Cbeyond, having squandered its chance to fix its amended complaint, indeed by not even trying to fix it, should not be given yet another chance to frame its claims. PO at 12. Therefore, the Proposed Order properly dismissed Counts I, II and III, with prejudice.

Cbeyond raises a smokescreen of incorrect and irrelevant arguments to try to garner another bite at the apple. Its Exception should be denied.

1. AT&T’s Motion is Not Deficient.

Cbeyond’s argument here is not so much that AT&T’s Motion is deficient, but that the ALJ Ruling is deficient. When the ALJ considered the identical allegations in Cbeyond’s First Amended Complaint, she concluded that “[t]here simply are not enough facts alleged by Cbeyond in the Amended Complaint” for the ALJ to determine if Cbeyond’s pleading was sufficient. ALJ Ruling at 6; *see also* PO at 12. The ALJ granted Cbeyond leave to amend its complaint, which it did. But Cbeyond did not add any new facts.¹² Nor did it identify “what

¹² As discussed in subpart 3 below, Cbeyond added one fact to its Second Amended Complaint, but it was not new.

statutory elements are involved in th[ese] statutes *and how that relates to Cbeyond*” (Motion to Dismiss Ex. 14 at 22 (emphasis added)), as the ALJ instructed Cbeyond to do if it filed a Second Amended Complaint.

This is precisely what AT&T argued in its Motion to Dismiss, and the ALJ correctly agreed. Cbeyond apparently expects AT&T, or perhaps the ALJ,¹³ to fill in the holes in Cbeyond’s Second Amended Complaint with the missing facts. But that is not AT&T’s or the ALJ’s role. Cbeyond was told that its First Amended Complaint was deficient. Cbeyond was given a chance to correct it. It made an insufficient attempt to do so. And now it blames the ALJ and AT&T.

Cbeyond’s argument (Cbeyond Exceptions at 23-24) that it is not required to identify the elements of its cause of action is a red herring. The ALJ directed Cbeyond not just to identify the elements, but to explain how those elements “relate[] to Cbeyond.” Motion to Dismiss Ex. 14 at 22. In other words, Cbeyond was directed to allege facts to support every one of the elements of its causes of action, as Cbeyond concedes it is required to do. Cbeyond Exceptions at 24 (“Cbeyond must allege sufficient facts to support the elements of a claim.”). The ALJ appropriately concluded that Cbeyond had not done so.

2. Cbeyond Did Not Plead Sufficient Facts to State Claims Under Counts I, II, and III.

Cbeyond spends eight pages of its brief trying to establish that the allegations from its First Amended Complaint – which it repeated wholesale in its Second Amended Complaint – were sufficient to state claims, notwithstanding that the ALJ had found these allegations insufficient in the ALJ Ruling. Cbeyond offers nothing new in its Exceptions Brief that the ALJ

¹³ In its Exceptions, Cbeyond complains that it sought additional guidance from the ALJ about how to cure the defects in Counts I, II and III (Cbeyond Exceptions at 23), but apparently did not get the guidance it was hoping for (*id.* at 24).

did not consider when (1) dismissing, without prejudice to refiling, Cbeyond First Amended Complaint, in August of last year, or (2) dismissing, with prejudice, Cbeyond's Second Amended Complaint in January of this year.¹⁴

3. The Single “New” Fact That Cbeyond Relies On Is Not New At All.

Despite the ALJ's direction to Cbeyond to use its chance to replead Counts I, II and III to try to show how the elements in each of its counts “relates to Cbeyond,” in its Second Amended Complaint, Cbeyond repeated, near verbatim, the language from its First Amended Complaint. In fact, Cbeyond only “added” one fact to the Second Amended Complaint. But that fact is nothing new, and does not salvage Cbeyond's causes of action.

As the ALJ pointed out, the quoted language from paragraph 26 of the Second Amended Complaint upon which Cbeyond relies (“If CCC is provisioned at the time that a DS1 service is provisioned coding can be done within the normal provisioning activities that occur in the DS1, therefore, there is no additional CCC non-recurring charge”) is *identical* to language that appeared in paragraph 15 of the First Amended Complaint. PO at 12.¹⁵

Cbeyond's attempts to characterize this evidence as “new” falls flat. Cbeyond asserts that the statement made by AT&T *after* the final order in Docket 02-0864 is somehow more significant than the identical statement made by AT&T *before* the final order. Cbeyond Exceptions at 32-33. But there is no difference. As Cbeyond itself notes, all factual allegations are construed in the light most favorable to Cbeyond (Cbeyond's Response to AT&T Motion to Dismiss at 7) and this statement when made by AT&T before the final order has the same effect,

¹⁴ Indeed, it appears that most of the changes in the argument that Cbeyond made between its response to AT&T's motion to dismiss (Cbeyond Response to AT&T Motion to Dismiss at 22-24) and this section of its Exceptions brief (Cbeyond Exceptions at 25-31) were to move material from footnotes to the body of its brief, and to add a few more quotes from the portions of the complaint it had cited before. This all may have made Cbeyond's brief on this issue appear longer, but it certainly did not make the argument any different, or in any way compelling.

¹⁵ Cbeyond admits that this “new” quote “agrees with the prior evidence.” Cbeyond Exceptions at 33.

for purpose of a motion to dismiss, as the identical statement made by AT&T after the final order. The problem for Cbeyond is that the statement, even if assumed true and whether made before or after the final order in Docket 02-0864, does not give rise to any claims for violation of the Public Utilities Act (“PUA”) (Counts I, II and III), as the ALJ previously concluded. ALJ Ruling at 6; PO at 12 (“As the ALJ Ruling of August 31, 2012 pointed out, the allegations in these counts do not state facts indicating that AT&T breached any law.”).

4. Dismissal With Prejudice Was Appropriate.

Cbeyond notes that the Proposed Order relates to Cbeyond’s *third* complaint in this action. Cbeyond Exceptions at 34. As explained above, in dismissing Cbeyond’s second complaint, the ALJ instructed Cbeyond to identify “what statutory elements are involved in th[ese] statutes and how that relates to Cbeyond.” Motion to Dismiss Ex. 14 at 22. And as explained above, Cbeyond failed to do that. Cbeyond now wants a fourth chance to plead its case and asserts that “it was certainly an abuse of discretion” to dismiss Counts I, II and III with prejudice. Cbeyond Exceptions at 33.

Cbeyond relies solely on a recent appellate court case in seeking another bite at the apple. But even as characterized by Cbeyond, that case – *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, 972 N.E.2d 1238 – is completely distinguishable. As Cbeyond observes in discussing *Razor Capital*, the trial court judge there had expressed a need to get clarification about the prevailing law and its application to the case before it. Cbeyond Exceptions at 34. Specifically, the trial court invited the parties to appeal its decision, stating “I don’t mind being appealed on this, so I’m not offended if that’s the case particularly in this area because I think we need some clarification....” *Razor Capital*, 972 N.E.2d at 1243. The trial court’s uncertainty about the applicable law was central to the appellate court’s decision to remand the case to give the plaintiff a chance to amend. “Where even the trial court appears to have been uncertain as to the

pleading requirements, we do not believe that precluding plaintiff from pursuing its claim is a just result.” *Id.* at 1248.

Here, the ALJ was not at all uncertain as to the applicable law. Cbeyond disingenuously suggests otherwise, asserting she “expressed uncertainty as to the required elements for a properly pled cause of action.” Cbeyond Exceptions at 34-35. The ALJ did no such thing, and Cbeyond takes the ALJ’s statements grossly out of context. What the ALJ said was that she “need[s] to know what statutory elements are involved in th[ese] statutes and how that relates to Cbeyond.” Motion to Dismiss Ex. 14 at 22. The ALJ at no point expressed any doubt about what the law was, as was the case in *Razor Capital*. She merely recited the unremarkable proposition that a complaint must set forth the elements of a cause of action and the facts that support each of those elements.

Similarly absent from this case is any suggestion that the ALJ misled Cbeyond as to what a proper complaint would look like or what the applicable law was. That, however, was also an important factor in *Razor Capital*. In deciding that dismissal of the plaintiff’s complaint should be without prejudice, the appellate court noted that “the trial court, in its laudable attempts to guide plaintiff, potentially misguided it.” 972 N.E.2d at 1248.¹⁶ Cbeyond makes no such allegation here (nor could it), further distinguishing *Razor Capital*.

For these reasons, the Commission should adopt Section III(c)(1) of the Proposed Order *en toto*.

¹⁶ Specifically, the appellate court explained that, “[t]o the extent that the trial court suggested that recovery of attorney fees or anything other than the principal balance is precluded unless the plaintiff attaches a written agreement reflecting the entire agreement between the parties, we disagree.” 972 N.E.2d at 1248.

E. Section III(c)(2) Of The Proposed Order Correctly Concludes That Cbeyond Has Failed To State A Claim For Violation Of Section 13-801 Of The PUA.

Cbeyond's accusation that the ALJ insufficiently reviewed and incorrectly interpreted section 13-801 of the PUA is without foundation. The PO correctly concludes that the question of whether the CCC rate should be applied to a particular service has no bearing on whether AT&T has complied with section 13-801. PO at 12. The matter at issue in this case is whether the rate is being applied in accordance with the parties' ICA (and as the ALJ concludes, it is).

In Count II, Cbeyond alleges that AT&T violated section 13-801(g), which provides that “[i]nterconnection, collocation, network elements, and operations support systems shall be provided by the incumbent local exchange carrier to requesting telecommunications carriers at cost based rates.” 220 ILCS 5/13-801(g). *See* Complaint ¶¶ 43-47. Cbeyond does not allege, however, that the CCC rates AT&T has imposed on Cbeyond are anything other than “cost-based” rates. Indeed, in its latest Complaint, Cbeyond continues to allege that the cost-based rate for CCC was established in Docket 02-0864. *See id.* ¶ 9. Instead, Cbeyond's Complaint challenges whether the CCC rate should be applied at all when Cbeyond purchases a DS1 or requests the “rearrangement” of a DS1 EEL. *See id.* ¶ 45. 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 section 13-801 does not cover. Moreover, as Cbeyond has no choice but to admit, the final order in Docket 02-0864 “did not address” a CLEC's request that the Commission clarify that the CCC rate element applies only to “rearrangement” of existing DS1 circuits. *Id.* ¶¶ 24, 26. Simply put, the facts of this case do not fit within the statute, and therefore the PO correctly concluded that Count II failed to state a claim for violation of section 13-801 and should be dismissed.

Cbeyond's reliance on *Allstate Ins. Co. v. Winnebago County Fair Association* is misplaced. Contrary to Cbeyond's suggestion, the Court in *Allstate* did not consider matters outside of the plain language of the statute. Nor did it analyze the legislative history of the statute at issue. Instead, the *Allstate* court confirmed the hornbook precept that, in interpreting a statute, "the threshold task of a court is to examine the terms of the statute itself." 131 Ill. App. 3d 225, 228 (2d Dist. 1985). Thus, the *Allstate* court analyzed the text of the statute and determined that the "plain meaning of the statute" resolved the issue at hand. It did not need to, and did not, look at extrinsic legislative history. Here too, with respect to section 13-801, there is no need to go beyond the text of the PUA to determine that Cbeyond's claim does not fall within the plain language of the statute.

Moreover, section 13-801 is certainly not a "statutory provision not yet judicially interpreted," as was the case in *Allstate*. Cbeyond Exceptions at 38. Section 13-801 of the PUA has been the subject of extensive review.¹⁷ Notably, Cbeyond does not cite to any of these cases to support its strained interpretation of section 13-801. Nor does Cbeyond offer a single reference to any Commission order in Docket 01-0614 that supports its argument here, despite the many years of litigation in that proceeding.¹⁸

¹⁷ Cbeyond assuredly agrees, noting the "eight (8) years of litigation over Section 13-801 in ICC Docket 01-0614." Cbeyond Exceptions at 36. This, of course, presumably includes the judicial review of section 13-801 itself, as well as ICC proceedings involving section 13-801, by both state and federal courts. See, e.g., *AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Co.*, 349 F.3d 402 (7th Cir. 2004); *Globalcom v. Illinois Commerce Commission*, 347 Ill. App. 3d 592 (1st Dist. 2004); *Illinois Bell Telephone Co. v. Box*, 548 F.3d 807 (7th Cir. 2008); *Illinois Bell Telephone Co. v. Hurley*, 2008 WL 239149 (N.D. Ill. Jan. 28, 2008); *Illinois Bell Telephone Co. v. O'Connell-Diaz*, 2006 WL 2796488 (N.D. Ill. Sept. 28, 2006); *Illinois Bell Telephone Co. v. Hurley*, 2005 WL 735968 (N.D. Ill. Mar. 29, 2005).

¹⁸ Cbeyond's citation to an ICC order characterizing the argument of AT&T's predecessor, SBC, is unavailing. Cbeyond Exceptions at 37-38. First, the citation just describes an argument that was made by SBC, not a conclusion by the ICC. Second, all that SBC argued was that the ICC had not developed a state-law pricing methodology and that the federal TELRIC standard applied. But that has nothing to do with whether Cbeyond has stated a claim that AT&T's rates are not cost-based, as required by section 13-801.

Furthermore, even if it were necessary and appropriate to look at legislative history, Cbeyond does not point to any legislative history that supports its interpretation of section 13-801, let alone subpart (g) upon which its claim is based. Instead, Cbeyond cites a single statement from Representative Hamos that section 13-801 is intended to “open telecommunications markets.” Cbeyond Exceptions at 39. That generalized statement by a single legislator certainly is not grounds for expanding the scope of subsection 13-801(g) far beyond its own language.

In sum, Cbeyond is trying to fit a square peg (the CCC rate set in earlier docket) into a round hole (section 13-801(g)). The PO correctly concluded that this is not possible and granted AT&T’s 2-615 motion to dismiss Count II for the additional reason that it does not state a claim under section 13-801(g) of the PUA.

F. No Substantive Changes Should Be Made To The Introductory Paragraphs Of The Proposed Order.

For the reasons stated above, the Commission should not reverse the ALJ’s conclusion dismissing the entirety of Cbeyond’s Second Amended Complaint. Therefore, Cbeyond’s suggested modification to the first paragraph of the Proposed Order to add “in part and denied in part” should be rejected.

AT&T does not oppose deleting what appears to be a duplicate quotation mark and adding a sentence regarding the filing of Cbeyond’s Second Amended Complaint in the second paragraph of the Proposed Order.

G. AT&T Does Not Oppose Cbeyond’s Proposed Changes To Section II(a).

AT&T does not oppose Cbeyond’s proposed changes to Section II(a).

H. AT&T Does Not Oppose Cbeyond's Proposed Replacement Language Dismissing Category 1 Charges As To All Counts.

Cbeyond proposes replacement language (at 41-42) that would expand the PO's dismissal of the Category 1 charges to all four counts of the complaint. AT&T does not oppose this exception.

I. Cbeyond's Proposed Changes To The Finding And Ordering Paragraphs Should Be Denied.

Cbeyond proposes replacement language (at 42-43) that would revise the Finding and Ordering Paragraphs in the PO to reflect the outcome set forth in the other exceptions that Cbeyond has proposed. Given that AT&T disagrees with the bulk of those other exceptions,¹⁹ it urges the Commission to reject Cbeyond's proposed language.

II. CONCLUSION

For the reasons set forth above, Cbeyond's exceptions should be denied, except to the limited extent stated herein.

¹⁹ AT&T does agree that the Commission should dismiss, with prejudice, all counts of the Second Amended Complaint with regard to the Category 1 charges.

Dated: February 14, 2012

Respectfully Submitted,

AT&T Illinois

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CERTIFICATE OF SERVICE

I, James A. Huttenhower, an attorney, certify that a copy of the foregoing AT&T Response to Brief on Exceptions was served on the following Service List via U.S. Mail and/or electronic transmission on February 14, 2013.

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