

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Wayne Underwood,)	
)	
vs.)	
)	
Illinois Bell Telephone Company)	
d/b/a SBC)	Docket No. 14-0301
d/b/a AT&T Illinois)	
)	
Petition for a Declaratory Ruling that)	
late fee collections during the period)	
7/1/2002-2/18/2010 violated Illinois)	
Administrative Code Section 735.160(a))	
and should be refunded to customers)	

**Staff of the Illinois Commerce Commission
Motion for Leave to File a Response to the Petition
and to the Motion
and Verified Response**

Pursuant to Rules 200.190(e) and 200.220 of the Commission’s Rules of Practice, 83 Adm. Code §200.190(e), §200.220, and the Administrative Law Judge’s ruling of May 9, 2014, allowing responses to be filed on or before June, 6, 2014, the Staff of the Illinois Commerce Commission (“Staff”) does hereby submit this Motion for Leave to File a Response and Verified Response to the Petition for a Declaratory Ruling and the AT&T Illinois Motion to Dismiss in the above-captioned proceeding. See, attached verification form of Dr. James Zolnierek.

I. Background

On April 10, 2014, Petitioner Wayne Underwood, d.b.a. Swedes Home Repair (“Underwood” or “Petitioner”) filed a Petition for a Declaratory Ruling that Illinois Bell

Telephone Company, (Variously doing business under its own name, or as SBC, or as AT&T Illinois) late fee collections during the period 7/1/2002-2/28/2010 violated Illinois Administrative code Section 735.160(a) and should be refunded to customers ("Petition"). While filed on April 10, 2014, the Petition itself is dated December 24, 2013 (Petition, 6) and the Verification of Wayne Underwood attached to the Petition is dated February 6, 2014 (Petition, Attached Verification). Underwood petitioned the Commission to (1) find that Illinois Bell's billing practices during the period July 1, 2002 through February 28, 2010, failed to comply with the Illinois Administrative Code for omitting any dated postmark on the bill envelope, "thereby withholding from Bell customers the true due date of its bills and charging Bell customers unlawful late fees," and (2) order Bell to refund late fees to all affected parties. Petition, 1.

On May 1, 2014, AT&T Illinois filed a Verified Section 2-619.1 Motion to Dismiss Petition for Declaratory Ruling ("Motion"). On May 9, 2014, the Administrative Law Judge held a status hearing at which she set the response date of June 6, 2014. Replies to the responses are due June 27, 2014.

II. Motion

Staff seeks leave to respond to the Petition and the Motion. Under the Commission rules, responses to a request for a declaratory ruling must be filed within 21 days, or by May 1, 2014 (83 Ill. Adm. Code 200.220), and responses to motions should be made within 14 days of the motion (83 Ill. Adm. Code 200.190(e)). Pursuant to the ALJ ruling at the May 9, 2014, hearing, responses may be made by June 6, 2014. Staff understands this to be a response to both the Motion and the Petition. To the extent that it may be required, however, Staff includes this motion for leave to respond to both for good cause shown.

Petitioner requests that the Commission review AT&T Illinois' billing practices. Petition 5, P15. There are a number of defects and ambiguities in the Petition, however, that warrant clarification. Aside from the confusing dates on the pleadings, the relief requested is from a period beginning in July 2002, twelve years ago, and ending in February 2010, four years ago. Underwood is seeking \$126,068,865 in refunds to all Bell customers for alleged illegal late fee charges. Petition, 5, P 14, 16. Because of the broad scope of these assertions, the complexity of the procedural history and allegations raised, the broad scope of those potentially impacted in the state of Illinois, and the vague and ambiguous form of the pleadings that have required substantial research and review, good cause exists to grant this motion for leave to respond to the Petition and the Motion. Staff's Verified Response will assist the Commission by providing clarification to the issues raised in this docket. Given the untimeliness of the Petition itself, and the fact that there are no other parties in the docket besides those named in the caption, no party will be prejudiced by accepting Staff' verified response into the record. Therefore, Staff does hereby so move.

III. Response

Petitioner asserts that he paid late-payment charges at some point during the period between July 1, 2002 and February 28, 2010. Petition, ¶2. Petitioner does not state why he made one or more late payments, and more specifically does not claim that his late payment or payments were caused by the failure of AT&T Illinois to include a postmark on his telephone bill. See, *generally*, Petition. He does not state the dollar amount of the late-payment charges he paid, or when he paid them. *Id.* Petitioner argues that, since AT&T Illinois' practices purportedly did not comply with Commission

Rule 735.160(a), relief in the form of “disgorgement” of all late-payment charges paid by all AT&T Illinois customers during the period between July 1, 2002 and February 28, 2010 is required. Petition, ¶¶ 16, 17. This sum purportedly is \$126,068,865.00. Petition, ¶14.

Petitioner is foreclosed from seeking such a remedy, at least before this Commission for the reasons discussed below.

A. No Class Actions May be Filed or Maintained before the Commission

First, what Petitioner actually seeks – although he avoids describing it in such terms – is relief on behalf of the entire class of customers who paid late-payment charges for any reason; it is certainly beyond peradventure that Petitioner himself did not pay slightly over \$126 million in late-payment charges during the relevant period. Furthermore, Petitioner seeks relief on behalf of himself and “all other affected [AT&T Illinois] customers.” Petition, ¶17. The Commission’s rules, however, are quite clear; Rule 200.95 provides that, “[b]ecause the Commission does not have statutory authority to entertain class actions, no such actions shall be filed or maintained before the Commission.” 83 Ill. Adm. Code 200.95. Due to this prohibition, on its face, the Commission may not entertain class actions such as the one at issue here. As the Illinois Appellate Court has noted:

Because the Commission has no express or implied power to hear class actions and since the administrative rules governing the Commission do not permit the complainants to proceed in a class action, the Commission's decision denying the complainants' motion to certify two classes would be affirmed, in any event.

Moncada v. Commerce Comm’n, 164 Ill.App.3d 867, 872-73; (1st Dist. 1987)

Here, Petitioner seeks to circumvent this clear doctrine by not styling his Petition as a class action and by not seeking class certification. This, however, rings hollows. As noted, Petitioner in fact, if not in form, seeks relief not only on his own behalf, but also on behalf of all other person's who rendered late payment fees. *Cf.* 735 ILCS 5/2-801 *et seq.* (rules allowing suit by representative plaintiff on behalf of others similarly situated). Likewise, the selfsame claims raised in this matter have been previously raised and adjudicated as a class action proceeding, by the same class counsel. See In re Illinois Bell Telephone Link-Up II and Late Charge Litigation, 2013 IL App (1st) 113349; 994 N.E.2d 553 (1st Dist. 2013). Clearly this action is, in substance, a class action barred by Commission rules and, as such, should be dismissed.

B. The Commission May Not Grant Equitable Relief

Further, in seeking disgorgement of all late-payment charges made by all customers during the relevant period, Petitioner seeks what is clearly an equitable remedy beyond the Commission's statutory jurisdiction. See Id., ¶29; 994 N.E.2d at 561 (“[no] reasonable basis [found in Link-Up II / Late Charge case] to invoke an equitable remedy and order disgorgement[.]”) It is well established, however, that the Commission lacks equitable jurisdiction. See, e.g., Fountain Water Dist. v. Commerce Comm'n, 291 Ill.App.3d 696, 703 (5th Dist. 1997) (“Fountain Water Dist.”) (Commission correctly concluded that it had no jurisdiction to consider equitable estoppel argument raised by Petitioner). As explained in Fountain Water Dist., an administrative agency is different from a court because an agency only has the authorization given to it by the legislature through the statutes. Id., 703 , citing, Business & Professional People for Public Interest v. Illinois Commerce Comm'n, 136 Ill.2d 192, 243 (1989). An administrative agency has

no inherent judicial powers. Fountain Water Dist., 703, citing, Ford v. Environmental Protection Agency, 9 Ill.App.3d 711, 292 N.E.2d 540 (1973).

The Petitioner may argue that he employed the term “disgorgement” to mean changed rates or practices, refunds or reparations within the meaning of Sections 9-250 and 9-252 of the Illinois Public Utilities Act. See 220 ILCS 5/9-250, 9-252. However, Section 9-250 does not avail Petitioner. It provides in relevant part that:

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates ... charged or collected by any public utility for any service ... or in connection therewith, or that the ... practices or any of them, affecting such rates or ... charges ... are unjust, unreasonable, discriminatory or preferential, or in any way in violation of any provisions of law, ... the Commission shall determine the just [and] reasonable ... rates[,] ... charges ... or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

The Commission shall have power, upon a hearing, had upon ... complaint, to investigate a single rate[,] ... charge, ... or practice ... of any public utility, and to establish new rates[,] ... charges, ... or practices or schedule or schedules, in lieu thereof.

220 ILCS 5/9-250.

This clearly authorizes the Commission to require a utility or telecommunications carrier to alter its rates, charges or practices prospectively. Here, Petitioner seeks precisely the opposite: a retrospective declaration that certain AT&T Illinois practices were unlawful in the light of regulations then in force. Obviously Section 9-250 affords the Petitioner no basis for relief.

Nor does Section 9-252. It provides in relevant part that:

When complaint is made to the Commission concerning any rate or other charge of any public utility and the Commission finds, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its ... service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal

rate from the date of payment of such excessive or unjustly discriminatory amount.

220 ILCS 5/9-252.

The difficulty that this presents for Petitioner is the fact that it must be read in a manner consistent with Section 9-240 of the Act, which provides in relevant part that:

[N]o public utility shall charge ..., collect or receive a greater or less or different compensation for any ... service rendered or to be rendered, than the rates or other charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time[.]

220 ILCS 5/9-240.

In short, the proper, just, and nondiscriminatory rate that a utility may charge for services is the rate that is contained in its filed tariffs. Thus, reparations under Section 9-252 are available only if a complainant demonstrates that he or she was charged an amount in excess of the tariffed rate. Petitioner does not allege that he was charged in excess of AT&T Illinois' filed charge for late payment. Accordingly, remedies under Sections 9-250 and 9-252 are unavailable to Petitioner, at least based on the allegations contained in the Petition.

In short, Petitioner has brought his claim in a manner that the Commission has no authority to entertain, and seeks relief the Commission has no authority to grant. Dismissal of his claim is appropriate on these bases.

C. Declaratory Ruling is Not the Appropriate Remedy

One other aspect of the relief Petitioner seeks warrants scrutiny. Specifically, the Petitioner styles his pleading "Petition for a Declaratory Ruling" (although, as seen, it is more than that), and seeks, inter alia, "a declaratory ruling that [AT&T Illinois'] practices during the period July 1, 2002 through February 28, 2010 did not conform to the

requirements of ...[the] Commission's Regulation, 83 Ill. Admin. Code 735.160(a)[.]”
Petition, ¶17. However, the regulation regarding which Petitioner seeks a declaration
has not been in effect since December 10, 2010. Id., ¶¶ 1, 9.

Petitioner’s request comes to grief as a result of the Commission’s rule governing
issuance of declaratory rulings, which provides in relevant part that:

When requested by the affected person, the Commission may in its sole
discretion issue a declaratory ruling with respect to ... the applicability of any
statutory provision enforced by the Commission or of any Commission rule to the
person(s) requesting a declaratory ruling[.]

83 Ill. Adm. Code §200.220

Petitioner is not requesting a declaration that Rule 735.160(a) in its pre-
December 10, 2010, was or was not applicable to him; instead, he is asking for a
declaration that AT&T Illinois, to which the rule was undoubtedly applicable, violated the
rule. This request seeks relief beyond the scope of the declaratory ruling regulation,
which authorizes the Commission, in its discretion, to determine whether a rule is
applicable to the entity seeking the ruling.

Further, the Petitioner seeks a declaration regarding a rule that is no longer in
force and effect in the form regarding which he seeks a declaration. In the light most
favorable to Petitioner, he seeks a declaration regarding the application of a version of a
rule that was amended over three years ago. In other words, it is a rule that the
Commission no longer enforces, at least in the form regarding which a declaration is
sought.

This is a relevant matter, and indeed one that the Commission has found to be
outcome determinative. In TracFone Wireless, Inc.: Verified Petition for Declaratory
Ruling finding that Section 17 of the Wireless Emergency Telephone Safety Act

[WETSA], 50 ILCS 751/17, does not apply to require TracFone Wireless, Inc. to remit monthly wireless carrier surcharges to the Illinois Commerce Commission, ICC Docket No. 07-0027, the petitioner sought a declaration that it was not required to remit the wireless 9-1-1 surcharge required under Section 17 of WETSA for the period between December 22, 1999 and December 31, 2003, on the basis that the statute as it existed during that period did not specifically require prepaid wireless carriers to remit the surcharge, although the statute as it existed on and after January 1, 2004 did so. Order at 1, 4-5, TracFone Wireless, Inc.: Verified Petition for Declaratory Ruling finding that Section 17 of the Wireless Emergency Telephone Safety Act [WETSA], 50 ILCS 751/17, does not apply to require TracFone Wireless, Inc. to remit monthly wireless carrier surcharges to the Illinois Commerce Commission, ICC Docket No. 07-0027 (October 29, 2007) (TracFone Order). Pursuant to further amendments, responsibility for enforcing Section 17 was transferred from the Department of Central Management Services to the Commission effective July 1, 2004. TracFone Order, 5.

The Commission found as follows:

Staff questions whether Section 17, as it existed prior to 2004, constitutes a statute “enforced by” the Commission within the meaning of Section 200.220(a)(1). Staff correctly emphasizes that Section 17 is “a statute that the Commission *never enforced in its contested [i.e., pre-2004] form.*” Staff Reply at 4 (emphasis in original). As we have already discussed, the original text of WETSA, which TracFone believes did not require remittance of surcharges, ceased to be effective on January 1, 2004. DCMS’s “rights, powers duties and functions” concerning WETSA were not transferred to this Commission by the General Assembly until July 1 of that year. Therefore, this salient question is framed: are statutory provisions (principally, Section 17 and WETSA’s definitions) “enforced by” us, so as to confer authority to enter a declaratory ruling under Section 5-150 of the Illinois APA (as implemented through Section 200.220(a)(1) of our rules), solely because we now administer those provisions, even though those provisions were outside our purview and contained different terms at all times relevant to this dispute?

The Commission concludes that the answer to the foregoing question is no. During the time TracFone was remitting the disputed surcharges, the General Assembly had assigned the collection of WETSA surcharges to DCMS. In our view, the declaratory authority provided by Section 1-150 does not include the power to issue retroactive rulings about the application of a law “enforced by” another agency during the relevant time period (particularly when that law was modified and, for that reason, never enforced by us). We reject the idea that our authority to issue declaratory rulings extends to second-guessing the prior performance of sister agencies.

TracFone Order, 7 (emphasis added).

While not squarely on all fours with this proceeding, the TracFone logic applies. The Commission should not exercise its discretion to issue a declaration regarding a version of a rule that is four years out of date, and which currently applies neither to AT&T Illinois nor to anyone else. The provision in question now contains different terms, and authorizes and prohibits different activities. Declaratory relief should be therefore denied.

D. Section 9-252 Has a Two Year Time Limit for Bringing Claims under the Public Utilities Act

Finally, on page 9, of AT&T Illinois’ Motion to Dismiss, AT&T Illinois argues that the Petition is barred by Section 9-252’s two year statute of limitations. Section 9-252 of the Act states in pertinent part:

All complaints for the recovery of damages shall be filed with the Commission within 2 years from the time the produce, commodity or service as to which complaint is made was furnished or performed, and a petition for the enforcement of an order of the Commission for the payment of money shall be filed in the proper court within one year from the date of the order, except that if an appeal is taken from the order of the Commission, the time from the taking of the appeal until its final adjudication shall be excluded in computing the one year allowed for filing the complaint to enforce such order.

220 ILCS 5/9-252.

Here, to the extent that the Commission may decide that a rate recovery mechanism may apply, Petitioner still failed to bring the claim at issue to the Commission in a timely manner. As stated above, the relief requested is from a period beginning in July 2002, twelve years ago, and ending in February 2010, four years ago. This is clearly beyond the two year timeframe specified within the statute. Moreover, the Section 9-252 statutory remedy is the exclusive remedy of a public utility's customers alleging excessive rates or unjust charges. See Commonwealth Edison Co. v. Allis-Chalmers Mtg. Co., 207 F. Supp. 252 (N.D. IL 1962), aff'd 315 F.2d 564, cert denied, 375 U.S. 834; Village of Evergreen Park v. Commonwealth Edison Co., 296 Ill. App. 3d 810, 813 (1998). The provision does not provide for the tolling of the claim where it may have been filed in another venue. See John Henry Stevens v. Ameren Illinois Company d/b/a/ Ameren Illinois, 2011 WL 2541901, Order, ICC Docket No. 10-0651 (June 22, 2011) (neither Section 9-252 nor Section 9-252.1 provides the Commission with authority to extent the statute of limitations).

The Commission has addressed this question in the past. In a similar proceeding in which a complainant asked for monetary damages under Section 9-252 of the Act, 220 ILCS 5/9-252, after the two year time limit had passed, the Commission said that “[t]here is simply no authority in the [Act] for the Commission to either waive or modify the limitations period. The proper course for the Complainant to take was to file a formal complaint with the Commission and subsequently request a stay while he litigated the matter in the courts. There is no automatic tolling of the two-year limitations period while a complainant pursues another legal remedy.” Sampath Kumaran v. Illinois Bell Telephone Company, 1994 WL 16778971, Order, ICC Docket No. 92-0296 (Oct. 5,

1994). See also, Patel v. Commonwealth Edison Co., 1991 WL 33915149, Order, ICC Docket No. 98-0208 (Nov. 17, 1999).

In the instant case, the petitioner claims that “whatever limitations period applies to this claim has been continuously tolled by the pendency of class litigation in the Illinois Courts from at least 2005 to January 13, 2014 seeking recovery of these charges.” Petition, 5. Petitioner has not, however, provided any legal support for this assertion. Whatever merits there may or may not be to the Petitioner’s claim, the applicable statutory provision and legal precedent require that the Commission dismiss the complaint because it was not filed within the two year statute of limitations required in the Act.

IV. Conclusion

WHEREFORE, for the reasons set forth above, the Commission should grant Staff’s motion to respond, make findings consistent with Staff’s response herein, and grant the motion to dismiss, or, in the alternative, deny the Petition.

Respectfully submitted,

/s/

CHRISTINE F. ERICSON
MATTHEW L. HARVEY
Counsel for the Staff of the Illinois
Commerce Commission

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CHRISTINE F. ERICSON
MATTHEW L. HARVEY
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601

Phone: (312) 793-2877
Fax: (312) 793-1556
E-mail: cericson@icc.illinois.gov
mharvey@icc.illinois.gov