

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Public Telecommunications)
Association, an Illinois not for)
profit corporation,)
)
Petition to determine whether) Docket No. 15-0254
Illinois local exchange carriers are)
in compliance with the Illinois)
Public Utilities Act and Section 276)
of the Communications Act of 1934.)

**ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION
REPLY TO MOTIONS TO DISMISS**

The motion to dismiss filed by AT&T Illinois (AT&T) is premised on a fundamental misstatement of the law and history of the proceedings on this matter. AT&T argues that every tribunal that has reviewed the Association’s claim that refunds are an available remedy for violations of the cost based rate requirements of Section 276 of the federal Telecommunications Act of 1996 has rejected its position. This is simply untrue. In contradiction to AT&T’s argument that the federal filed rate doctrine¹ bars refunds of the tariffed rates, the Federal Communications Commission (FCC) has subsequently agreed with the Illinois Public Telecommunications Association (Association) that Section 276 and FCC regulations do in fact authorize refunds of those tariffed rates back to April 15, 1997 for such violations. Furthermore, the FCC’s interpretation of the federal statute and federal law was not known to the Commission or to the Illinois Appellate Court when they made their findings.

When the Illinois Commerce Commission determined that AT&T violated the Section 276 requirements, the Commission had no direction from the FCC as to what remedies were

¹ AT&T argued that the federal rate doctrine expressed in as expressed in *Arizona Grocery Co. v. Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (1932) barred refunds of the tariffed rates The Illinois Commerce Commission (Commission) and Illinois Appellate Court accepted this position.

available. The Commission, and later the Illinois Appellate Court, accepted AT&T's argument that refunds of the tariffed rates were barred under the federal filed rate doctrine and the corresponding state laws adopting that doctrine. The FCC's subsequent decision authorizing such refunds has rejected the fundamental assumption supporting those decisions. In fact, no Illinois decision has considered or analyzed whether refunds of violations of Section 276, that are authorized by federal statute and regulations, would be independently barred by the state filed rate doctrine where the federal doctrine from which it was adopted does not bar such refunds. This is the question presented to the Commission for the first time in this proceeding. Both the Public Utilities Act and state case law authorize the Commission's proceeding to undertake that consideration. The Association does not propose to simply reiterate previous arguments based on the same facts and law previously considered. The Association addresses the refund issue in light of the subsequent holdings issued by the FCC that refunds are not barred under federal law and are an available remedy.

AT&T would have the Administrative Law Judge (ALJ) believe that the Association's positions in these proceedings have repeatedly been rejected by the Commission and other tribunals. But a review of these proceedings reveals instead that it is AT&T's substantive positions that have been disproven. First AT&T claimed that its rates to payphone providers on and after April 15, 1997 were cost based in compliance with the FCC's new services test. However, the Commission found that AT&T's rates were not cost based.² Second, AT&T certified that it had complied by April 15, 1997 with the prerequisites for receipt of dial around compensation on its payphones by providing actual cost based rates to independent payphone

² *Illinois Commerce Commission Investigation into Certain Payphone Issues as Directed in Docket 97-0225, ICC Docket No. 98-0195, Interim Order, November 12, 2003, Finding 20 (ICC Payphone Order).*

providers.³ This certification was also false.⁴ Third, AT&T argued that refunds of the tariffed rates for violations of Section 276 were barred by the federal filed rate doctrine.⁵ The FCC held that refunds for Section 276 violations are not barred by federal law and may be granted back to April 15, 1997.⁶

Now, AT&T argues that the Commission has no basis for further consideration of the refund issue and should dismiss the proceeding. But the FCC stated that although the Commission concluded refunds were not required it may well find refunds are appropriate considering the FCC's holdings (1) that refunds are an available remedy under the federal statute and regulations⁷ and (2) that they should be ordered where the BOC's rates were not compliant with the FCC's new services test (NST) although the BOC certified they were and had been collecting dial around compensation.⁸ Both the Illinois Public Utilities Act (PUA) and case law supports the Commission's consideration of the effect of this regulatory ruling on the decision of whether to order AT&T to refund the charges to payphone providers that exceeded the federally required new services test cost based rates.

I. AT&T and Staff's Motions to Dismiss

AT&T and the Staff have moved to dismiss the Association's petition. There are two basic types of motions to dismiss. One motion admits all well-pleaded facts and attacks the legal sufficiency of the complaint. It does not raise affirmative defenses but alleges only defects appearing on the face of the complaint. The motion should point out the defects complained of

³ *In the Matter of Ameritech Illinois, U S West Communications, Inc. et al., v. MCI Telecommunications Corporation*, Memorandum Opinion and Order, DA 99-2449, par. 23, released November 8, 1999, 1999 WL 1005080.

⁴ See footnote 2.

⁵ *ICC Payphone Order*, pp. 38 – 40.

⁶ *In the Matter of Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, Declaratory Ruling and Order, CC Docket No. 96-128, FCC 13-24, released February 27, 2013, ¶47 (*FCC Refund Order*).

⁷ *Id.*

⁸ *Id.* At ¶38 fn. 161.

and specify the relief sought. See 735 ILCS 5/2-615; *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 639 N.E.2d 1282, 1289 (1994). If the plaintiff can state a cause of action by amending the pleadings dismissal with prejudice should not be granted. *Bowe v Abbott Laboratories, Inc.*, 240 Ill.App.3d 382, 608 N.E.2d 223 (1st Dist. 1992). Dismissal of a cause of action on the pleadings is proper only where it is clearly apparent that no set of facts can be proven entitling plaintiff to recover. *Illinois Graphics Co., supra*.

The other form of a motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matter that appear on the face of the complaint or are established by external submissions which act to defeat the plaintiff's claim. See 735 ILCS 5/2-619; *Illinois Graphics Co.*, 639 N.E.2d 1289 – 90.

Staff argues that the Association's cause of action is barred by affirmative matter avoiding the legal effect or defeating the claim, citing 735 ILCS 5/2-619(a)(9). Staff Motion at 6. AT&T claims that the petition is barred by *res judicata*, collateral estoppel, the law of the case, as an improper collateral attack on the Commission's order and by the statute of limitations. AT&T Motion at 6 – 10. Presumably AT&T considers this similar to a Section 2-619 motion.

AT&T further argues that the pleadings are defective because it was not filed in Docket 98-0195, was not served on all the parties, did not include AT&T's name and address as a respondent and the Commission did not serve AT&T. AT&T Motion at 5 – 6. Presumably AT&T considers this similar to a Section 2-615 motion. But see *Illinois Graphics Co.*, 159 Ill.2d 469, 639 N.E.2d 1282, 1289 where the movant's failure to clearly identify the type of motion may be fatal if prejudice results to the nonmovant.

Finally, AT&T argues that the Association cannot meet the standards for reopening Docket 98-0195. AT&T Motion at 10 – 14. However, this appears to be an argument on the merits and not on the pleadings, which pleadings must be taken as true on a motion to dismiss. *Illinois Graphics, supra*.

Both motions wholly ignore the fundamental nature of the instant petition, i.e. that the Illinois denial of refunds was based on the now erroneous assumption that the federally required tariffed rates to payphone providers which violated Section 276 requirement for cost based rates were not subject to refunds and that refunds were barred by the federal filed rate doctrine and the state doctrine adopting the federal standard.⁹ Since the Commission and Illinois Appellate Court made those holdings, the FCC determined that the federal statute and FCC orders provide that refunds are an available remedy for violation of the cost based rate requirements.¹⁰ Therefore the federal filed rate doctrine did not operate as a bar to ordering refunds where the rates were not cost based in compliance with the FCC's new services test, contrary to the primary basis relied on in the earlier Illinois decisions.¹¹ This is both a fact and point of law not available to the Commission or Illinois appellate court at the time of their consideration and decision. This necessitates a review by the Commission which relied upon an erroneous premise in its earlier decision where it did not have the benefit of the FCC's ruling that refunds are, in fact, an available remedy for violations of the cost based requirements.

Illinois law provides for consideration of changes in fact or law that were previously not available to the tribunal when it first determined an issue. See 735 ILCS 5/2-1401. Under the

⁹ *ICC Payphone Order*, E. Commission Analysis and Conclusion, pp. 42-43; *Illinois Public Telecommunications Association v. ICC*, No. 1-04-0225, unpublished order.

¹⁰ *FCC Refund Order*, ¶47.

¹¹ The FCC's interpretation of the federal statute it is charged with implementing must be given effect even where a court may have previously reached a contrary conclusion, unless the FCC's interpretation is unsustainable on its face. *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

Code of Civil Procedure a party may petition for relief from a decision by bringing to the attention of the tribunal factual matters that would have prevented it from entering its decision had those matters been presented prior to the decision. See *Price v. Philip Morris, Inc.*, 2014 IL App (5th) 130017. A party may also challenge a defective judgment for legal reasons. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill.2d. 85, 94, 858 N.E.2d 1 (2006).

This is even truer in the matters before the Commission. Section 10-113 of the Public Utilities Act provides that at any time the Commission may rescind, alter or amend any order or decision made by it. 220 ILCS 5/10-113.

Anything in this Act to the contrary notwithstanding, the Commission *may at any time*, upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any rule, regulation, order or decision made by it. Any order rescinding, altering or amending a prior rule, regulation, order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original rules, regulation, orders or decisions. ... (Emphasis added)

It has long been established that the PUA vests continuing jurisdiction in the Commission. The Illinois Supreme Court found that the extent of the power of control of public utilities which the PUA confers on the Commission “leaves no room for doubt but what the legislature intended that the Commerce Commission should have a continuing jurisdiction over its rules, regulations, orders and decisions and that while acting within the scope of such power it may, if the facts warrant, rescind ...” a previous order. *Black Hawk Motor Transit Co. v. ICC*, 398 Ill. 542, 76 N.E.2d 478, 486 (1947). To rescind means to abrogate, annul, to vacate or set aside. *Id.*, 76 N.E.2d at 485.

Black Hawk had argued that a previous decision of the Commission had become final and that the Commission lacked authority to reopen the matter. The Supreme Court held that Commission orders never becomes so conclusive as to prevent the Commission from rescinding

them if the facts warrant and the power is exercised in accordance with the statute. *Id.* The power to rescind must be exercised according to the provisions of the statute. The statute requires a written complaint be filed with the Commission,¹² notice be given to the interested parties¹³, an opportunity for a hearing, and findings of fact sufficient to support the order that is finally entered. *Id.*

Contrary to AT&T and Staff's arguments that the Commission's prior order denying refunds is final and conclusive, the statute provides continuing jurisdiction in the Commission to rescind, alter or modify a previous decision where warranted and provided the Commission follows the statutory requirements.

Similar to the instant case, *Price* involved the state's application of its interpretation of federal regulations. There the plaintiff had won a \$10.1 billion judgment against Philip Morris for advertising its cigarettes as "light" and "low tar" when there were no health benefits from the product. In defense of this consumer fraud action, the manufacturer relied on an affirmative defense found in the Illinois Consumer Fraud Act that made the act inapplicable to conduct "specifically authorized" by any federal regulatory body. Philip Morris argued that consent decrees from the Federal Trade Commission enforcement actions permitting the use of these terms in advertising. The trial court found that no regulatory body had ever required or specifically approved Philip Morris use of these terms. The Supreme Court reversed and ordered a dismissal of plaintiff's action, holding that the FTC had specifically authorized these actions. *Id.*, at 2 – 4.

¹² The requirement to bring such matters by complaint negates AT&T's objections to the Association raising this matter by complaint.

¹³ AT&T complains that it was not served notice of the petition. There is no lack of notice where the party appears and participates. *Black Hawk*, 76 N.E.2d at 486.

When years later the FTC issued statements that it never intended to define those terms, provide guidance or authorize their use as descriptors, the Illinois Appellate Court recognized that the Supreme Court's holding was based on a misinterpretation of the federal regulatory scheme. The position of the federal regulator was not available to present in the original proceeding. Had the Supreme Court been aware of the federal regulator's statement the Supreme Court most likely would have ruled differently. The Appellate Court held that a party may bring to the attention of the tribunal matters that would have prevented the decision had those matters been presented prior to the decision. *Id.*, at 14.

The doctrines of *res judicata*, collateral estoppel, collateral attack and law of the case¹⁴ do not prevent the Commission or the court from considering new facts or law that were not available to them at the time of the previous decision. The guiding principle is to prevent the enforcement of a judgment when to do so would be unfair, unjust or unconscionable. Relief should be granted when necessary to achieve justice, which is the highest obligation. *People v. Lawton*, 212 Ill.2d 285, 297, 818 N.E.2d 326, 334-35 (2004). Judgments may be challenged for defective legal reasons too. *Id.*, 818 N.E.2d at 334-35; *Price*, at 14.

Here the legislature has granted the Commission even greater authority to ensure the proper application of regulation by authorizing the rescission of previous orders at any time. When the Commission found that refunds were barred by the federal rate doctrine as expressed in *Arizona Grocery* it was unaware that the FCC would determine that Section 276 and the FCC orders provided that refunds were an available remedy for violations of the cost based rate requirements of Section 276. Under the federal scheme refunds are not barred by the federal filed rate doctrine upon which the Commission relied. In accord *Davel Communications, Inc. v.*

¹⁴ The *FCC Refund Order* issued pursuant to the FCC's continuing jurisdiction over Section 276 is part of the law of the case. AT&T and Staff both participated in the proceeding.

Qwest Corp., 460 F.3d 1075 (9th 2006); *TON Services v. Qwest Corp.*, 493 F.3d 1225 (10th 2007).

Contrary to arguments by AT&T and Staff, neither the FCC nor the D. C. Circuit Court affirmed the Commission's denial of refunds. After holding that refunds may be available back to April 15, 1997, contrary to this Commission's earlier finding, the FCC declined to arbitrate individual state decisions on refunds leaving it to them to apply the FCC's ruling. *FCC Refund Order*, ¶41. But the FCC did state that Illinois may well find that refunds are appropriate despite its earlier holding. *Id.*, at 47.

Staff argues that Section 9-240 of the Public Utilities Act codifies the filed rate doctrine. Just as the state filed rate doctrine corresponds to the federal filed rate doctrine, the federal act similarly codifies the doctrine in Section 203. See 47 U.S.C. §203. Notwithstanding the federal filed rate doctrine and Section 203, the FCC found that Section 276 and the FCC orders make available refunds for violations of Section 276. Where the rates of a Bell Operating Company (BOC) were not NST-compliant even though the BOC had certified that they were and had been collecting dial around compensation, refunds should be ordered. *FCC Refund Order*, ¶38 fn.161. AT&T certified that its rates were NST-compliant and collected \$200 million in compensation from 1997 through 2003. But the Commission found that AT&T's rates were not cost based during this time.

Not only has the FCC authorized refunds as a remedy, but most states have received refunds of overcharges, despite that they have similar state filed rate doctrines mirroring the federal doctrine. Petition at 16; see *TON*, 493 F.3d at 1236 fn. 14. The Commission is charged with implementing federal law and policy. The FCC has found that refunds may be available for Section 276 violations. Payphone providers in most states have received refunds for Section 276

