

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

John Friedberg)	
)	
vs.)	
)	Docket No. 15-0339
Ambit Illinois, LLC)	
)	
Complaint as to over charge in Cook County, Illinois.)	

REPLY IN SUPPORT OF RESPONDENT AMBIT ILLINOIS, LLC’S
MOTION TO DISMISS

Respondent, Ambit Illinois, LLC (“Ambit”), pursuant to 83 Ill. Admin. Code § 200.190 and 735 ILCS § 5/2-619(a)(9), respectfully files this reply in support of its October 27, 2015 Motion to Dismiss (“Motion to Dismiss”) Petitioner’s First Amended Formal Complaint (“Amended Complaint”).¹ In support of its Motion to Dismiss, Ambit states as follows:

INTRODUCTION

1. Plaintiff’s Response to Defendant’s Motion to Dismiss (“Plaintiff’s Response”) does not offer any legal or factual bases for the ALJ and the Illinois Commerce Commission (“ICC” or “Commission”) to deny Ambit’s Motion to Dismiss. While Plaintiff’s Response purports to raise disputed issues of material fact and law, in reality Plaintiff has simply failed to make this showing. The Commission should therefore grant Ambit’s Motion to Dismiss.

¹ Plaintiff has separately moved to strike the Affidavit of Brenda Kerrick in support of Ambit’s Motion to Dismiss. Ambit does not believe that there are any deficiencies in that affidavit. In the alternative, if there are any such deficiencies, Ambit has remedied them with the Reply Affidavit of Brenda Kerrick, submitted herewith. The parties will brief this issue separately pursuant to the Administrative Law Judge’s (“ALJ”) ruling dated October 18, 2015.

**THERE IS NO MATERIAL DISPUTE CONCERNING
THE APPLICABLE TERMS OF SERVICE AGREEMENT**

2. Plaintiff attempts to create a “dispute” about the governing Terms of Service Agreement (also referred to as “Terms of Service”), stating that the Terms of Service attached as Exhibit (“Ex.”) 1.1 to Ambit’s Motion to Dismiss are not, in fact, the governing Terms of Service. Plaintiff claims to have accessed the applicable historical Terms of Service that were in effect in the period 2012-2013 from Ambit’s website and states that it has attached them as Ex. A to the Declaration of Leon Zelechowski.² There are several problems with these claims.

3. First, Plaintiff has not actually attached an Ex. A to the Declaration of Leon Zelechowski. Thus, there are no alternative Terms of Service at issue and there is no dispute as to which Terms of Service govern.

4. Second, only the current Terms of Service are available on the Ambit website. Reply Affidavit of Brenda Kerrick ¶¶ 7-8. To be clear: there is no way for the general public to access historical Terms of Service through Ambit’s website. *Id.* Thus, whatever document Mr. Zelechowski may or may not have downloaded and printed from Ambit’s website and failed to attach to his declaration, it is certainly not the terms of Service that were in effect in February of 2012, when Plaintiff and Ambit entered into a contract whereby Ambit would provide natural gas to Mr. Friedberg on the Guaranteed Savings Plan – Natural Gas (“Guaranteed Savings Plan”). *Id.* at ¶¶ 7-9; Affidavit of Brenda Kerrick at ¶ 4.

5. Third, Plaintiff appears to be fixated on what it refers to as a “ten day notice requirement” that is allegedly present in the Terms of Service attached to Ambit’s Motion to Dismiss as Ex. 1.1, but absent from the Terms of Service Mr. Zelechowski allegedly obtained from Ambit’s website (but failed to attach to his declaration). *See* Plaintiff’s Response at 3.

² Contemporaneously with the filing of Plaintiff’s Response, Mr. Zelechowski appeared as counsel of record for Plaintiff. In an unorthodox maneuver, counsel has therefore also made himself a witness in this proceeding.

This discussion of a “ten day notice requirement” is neither accurate nor material. Indeed, contrary to Plaintiff’s representation, no documents at issue in this case contain a “ten day notice requirement.” Specifically, the Terms of Service attached to Ambit’s Motion to Dismiss as Ex. 1.1 clearly do not contain a “ten day notice requirement.” As Ambit explained in its Motion to Dismiss, the Terms of Service clearly do provide that the Guaranteed Savings Plan is for a 12-month period, and that if the customer wishes to continue on that plan, the customer must request to renew the plan.³ It is undisputed that Mr. Friedberg did not make such a request. The presence or absence of a “ten day notice requirement” in any purported version of Ambit’s Terms of Service is simply not relevant to this case.

**THE TERMS OF SERVICE AGREEMENT IS THE CONTRACT
BETWEEN PLAINTIFF AND AMBIT**

6. Plaintiff next insinuates that the Customer Sign Up document attached to his Amended Complaint as Ex. A, BATES 10003 is *the* contract between Plaintiff and Ambit, and contains the entirety of the terms and conditions governing their agreement. *See* Plaintiff’s Response at 3 (defining Customer Sign Up document alternatively as “agreement” or “contract”), and 4-5 (Section entitled “No Additional Terms of Service Were Ever Incorporated Into the Contract Between Plaintiff and Ambit”). This argument also fails, for several reasons.

7. First, the three paragraph Customer Sign Up document does not contain enough specificity to establish the relevant terms of the contract. “A contract, to be valid, must contain offer, acceptance, and consideration; *to be enforceable, the agreement must also be sufficiently definite so that its terms are reasonably certain and able to be determined.*” *DiLorenzo v. Valve*

³ The Terms of Service state: “The Guaranteed Savings Plan – Natural Gas, rate will be set at a competitive variable market rate with an annual savings of 1% less than the incumbent utility’s published supply rate for the same 12-month period that you received gas supply service from Ambit Energy under this Agreement.” Ambit Ex. 1.1 at 1. The Terms of Service also clearly state: “At the end of each 12 month period, you must renew your Guaranteed Savings Plan to continue to receive the 1% annual savings guarantee. ... If Ambit Energy does not receive a request to renew your plan, your service will continue on the Illinois Select Natural Gas plan.” *Id.* The Terms of Service further explain that the Illinois Select Variable Natural Gas Plan is a month-to-month variable rate plan that does not guarantee savings. *See id.*

and Primer Corp., 347 Ill. App. 3d 194, 199-200 (1st Dist. 2004) (emphasis added). The Customer Sign Up document does not even begin to provide the details necessary for a contract of this type, such as billing, product selection, terms and pricing, and other details provided in the Terms of Service.

8. Indeed, the Terms of Service Agreement states on its face that it is the “Agreement” between the parties:

The following is your Terms of Service Agreement with Ambit Illinois, LLC d/b/a Ambit Energy (“Ambit Energy,” “Company,” “us,” “our”). Ambit Energy, as your alternative gas supplier (“AGS”), will offer you (“Customer”) gas supply services at a competitive rate while North Illinois Gas Company d/b/a NICOR Gas (“NICOR”) continues to serve as the Customer’s Local Distribution Company (“LDC”). Customer agrees that they are 18 years of age and authorized to enter into this Ambit Energy Gas Supply Terms of Service Agreement (“Agreement”). You are not required to be an Ambit Energy consultant in order to receive equal pricing offers, terms, conditions, and gas supply service from Ambit Energy as you would if you were an Ambit Energy consultant.

Ambit Ex. 1.1 at 1.

9. Second, in Illinois, customer agreements such as the Terms of Service are routinely mailed after services such as television, electricity, or natural gas supply are established. In *Bess v. Direct TV, Inc.*, 381 Ill. App. 3d 229, 240 (5th Dist. 2008), an Illinois appellate court determined that an arbitration provision contained in a customer agreement mailed to plaintiff after the plaintiff’s satellite service was activated was enforceable. In reaching this conclusion, the court stated: “the Customer Agreement at issue is typical of consumer agreements for computer, credit card, and other online or catalog purchases wherein the agreements are delivered with the product or the first billing and consumers may approve or reject the terms on receipt of the agreement.” *Id.* at 239-240.

10. The *Bess* court looked with approval to the Seventh Circuit decision in *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997), where a computer

purchaser was bound by an arbitration clause included in the terms sent to the buyer. In doing so, the *Bess* court recognized that “certain practical considerations support permitting vendors to enclose the legal terms with their products.” *Bess*, 381 Ill. App. 3d at 239-240. Notably, the *Hill* court held that “A contract need not be read to be effective; people who accept take the risk that unread terms may in retrospect prove unwelcome.” *Hill*, 105 F.3d at 1148. Moreover, the *Hill* court stated:

Oral recitation would not avoid customers’ assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.

Id. at 1149.⁴

11. Plaintiff claims that this governing Illinois law does not exist and cites inapplicable case law from Michigan and Florida regarding website-based terms and conditions concerning arbitration clauses. Plaintiff’s Response at 4-5. In both of those cases – which are not governing law in Illinois – the arbitration clauses were not in the contract documents, were not clearly mentioned or described, were not linked to the document, were never provided or referred to in any other form, and/or were buried among other voluminous details. *See Manasher v. NECC Telecom*, Case No. 06-10749, 2007 WL 2713845, at *5 (E.D. Mich. Sept. 18, 2007); *Affinity Internet, Inc. v. Consol. Credit Counseling Servs., Inc.*, 920 So. 2d 1286, 1287-1288 (Fla. Dist. Ct. App. 2006).

12. In contrast, here, the Terms of Service Agreement is not simply website-based terms and conditions – it is *the* contract document containing all the relevant terms and

⁴ *See also James v. McDonald Corp.*, 417 F.3d 672, 678 (7th Cir. 2005) (finding patron entered agreement to arbitrate by participating in game and stating that to require cashiers “to recite to each and every customer the fourteen pages of the Official Rules, and then have each customer sign an agreement to be bound by the rules, would be unreasonable and unworkable.”); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (finding that licensing terms inside software box were binding where buyer accepted the terms by using the software after having an opportunity to read the license).

conditions. Moreover, the Customer Sign Up document referencing the Terms of Service is less than one page long, the Terms of Service are clearly and visibly referenced, a link to the Terms of Service is provided, *and* Ambit separately sent Terms of Service to Plaintiff on at least three other occasions *at the physical address and email address that Plaintiff is using in this proceeding*. See Amended Complaint at Ex. A, BATES 10003; Ambit Motion to Dismiss at 2, n.1; Affidavit of Brenda Kerrick at ¶¶ 4-7; Reply Affidavit of Brenda Kerrick at ¶¶ 5-6.⁵ In short, the cases Plaintiff cites are not legally binding and are factually inapposite.

13. Moreover, the *Manasher* case is actually harmful to Plaintiff's argument. It states:

It is irrelevant whether Plaintiffs actually read the arbitration provision of the Disclosure and Liabilities Agreement if the Disclosure and Liabilities Agreement was incorporated by reference into the contract between the parties. See *Ginsberg v. Myers*, 215 Mich. 148, 150-151, 183 N.W. 749 (1921). 'Where one writing references another instrument for additional contract terms, the two writings should be read together.' *Forge v. Smith*, 458 Mich. 198, 207, 580 N.W.2d 876 (1998). 'In a written contract a reference to another writing, if the reference be such as to show that it is made for the purpose of making such writing a part of the contract, is to be taken as a part of it just as though its contents had been repeated in the contract.' *Id.* at 208, n. 21, 580 N.W.2d 876 (citing *Whittlesey v. Herbrand Co.*, 217 Mich. 625, 628, 187 N.W. 279 (1922)).

Manasher, 2007 WL 2713845, at *3.

14. Third, even if the Customer Sign Up document did contain enough specificity to represent the entire contract between Plaintiff and Ambit, and the Terms of Service were somehow not applicable, the Customer Sign Up document itself references "twelve consecutive months with Ambit Energy." Amended Complaint at Ex. A, BATES 10003. Therefore, if this document is the entirety of the contract, then the only reasonable interpretation of the contract term is twelve months, after which the contract, along with the Guaranteed Savings Plan, would

⁵ Plaintiff notes a discrepancy between the version numbers of the Terms of Service referenced in the Customer Sign Up document and on the bottom of Ambit Ex. 1.1. It appears that the Customer Sign Up document contains a typo, as the only operative version of the Terms of Service in 2012 was the version provided as Ambit Ex. 1.1. See Affidavit of Brenda Kerrick at ¶ 4; Reply Affidavit of Brenda Kerrick at ¶ 9.

expire. That is, of course, precisely what happened in this case. And, at the end of that twelve month period, Ambit sent Plaintiff a renewal letter indicating that it was enclosing Plaintiff's "Terms of Service that will be effective February 25, 2013" and explaining the need to renew his current plan if he so desired. Reply Affidavit of Brenda Kerrick at ¶ 6; Ambit Ex. 2.2. Again, it is undisputed that Plaintiff did not renew his plan.

CONCLUSION

15. In conclusion, it is undisputed that Plaintiff was made aware that the contract between Plaintiff and Ambit contained Terms of Service. *See e.g.* Amended Complaint at Ex. A, BATES 10003; Ambit Exs. 1.1, 1.2, 1.3, and 2.2; Affidavit of Brenda Kerrick at ¶¶ 4-8; Reply Affidavit of Brenda Kerrick at ¶ 5-6. It is also undisputed that Plaintiff never read those Terms of Service *and* that Plaintiff never renewed his contract. Declaration of John Friedberg at ¶ 4; Affidavit of Brenda Kerrick at ¶ 8. The case law is clear that Plaintiff's failure to read the applicable contract terms is no excuse. *Bess*, 381 Ill. App. 3d at 239-240; *Hill*, 105 F.3d at 1148-1149. *See also Manasher*, 2007 WL 2713845, at *3. The terms of the contract must govern. The Commission and the parties should not be required to expend any further judicial resources on this matter.

WHEREFORE, for the reasons stated above and in Ambit's Motion to Dismiss, Ambit respectfully requests that this Court dismiss Mr. Friedberg's Amended Complaint with prejudice.

Date: November 20, 2015

Respectfully submitted,

/s/ Ronit C. Barrett

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VERIFICATION OF BRENDA KERRICK

I, Brenda Kerrick, first being duly sworn, depose and state that I am Vice President, Product Management for Ambit Illinois, LLC, that I have read the foregoing Reply In Support of Respondent Ambit Illinois, LLC's Motion to Dismiss, and that the facts and statements contained therein are true and correct to the best of my knowledge, information, and belief.

Brenda Kerrick
Brenda Kerrick

Subscribed and sworn to before
me this 19th day of November, 2015.

Paul L. Colter

