

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Citizens Utility Board)

-vs-

Illinois Bell Telephone Company)
(Ameritech Illinois))

Complaint to stop Ameritech from using)
misleading marketing and advertising)
materials and statements concerning)
Simplifive and CallPack rates.)

00-0043

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ILLINOIS
COMMERCE COMMISSION

**MOTION OF ILLINOIS BELL TELEPHONE COMPANY
TO DISMISS CONSUMER FRAUD AND SECTION 13-514 CLAIMS**

Illinois Bell Telephone Company (“Ameritech Illinois”) moves to dismiss those portions of the above-captioned complaint (the “Complaint”) alleging violations of the Illinois Consumer Fraud and Deceptive Practices Act (the “Consumer Fraud Act”) and Section 13-5 14 of the Illinois Public Utilities Act (the “Public Utilities Act”). As explained below, the Illinois Commerce Commission (the “Commission”) has jurisdiction over the subject matter of the Complaint pursuant to 9-250, and 9-252 of the Public Utilities Act. However, the Commission does not have jurisdiction to resolve consumer fraud claims pursuant to the Consumer Fraud Act, as such. Nor, most importantly, does it have jurisdiction to award damages, attorneys fees or costs as relief. Moreover, the Complaint’s claims under Section 13-514 of the Public Utilities Act are both substantively and procedurally defective. Thus, while Ameritech Illinois agrees that the Complaint may

go forward under Sections 9-250 and 9-252 of the Public Utilities Act, those allegations or claims relying on the Consumer Fraud Act or Section 13-5 14 of the Public Utilities Act should be dismissed.

FACTS

The Complaint includes three counts: Count I, titled “Misrepresentation” (Complaint at ¶¶ 1-1 8); Count II, titled “Unjust and Unreasonable Practice and Rates” (id. at ¶¶ 19-26); and Count III, titled “Impediment to Competition” (id. at ¶¶ 27-34).

Counts I and II are nearly identical, both factually and conceptually. Both counts allege that Ameritech Illinois misrepresented the impact of its Simplifive and CallPack rate plans by claiming that those plans will save consumers money, when (CUB alleges) customers are actually likely to pay more under those plans than they would at standard “rack” rates. (Id. at ¶¶ 3-6, 8-11, 21, 23-24). The primary differences between the two counts are the acts relied upon and the relief sought. Count I relies on the Consumer Fraud Act and seeks damages, attorneys’ fees and costs. (Id. at ¶ 16, 18). Count II relies on Sections 9-250 and 9-252 of the Public Utilities Act and seeks reparations. (Id. at ¶ 26).

Count III of the Complaint also alleges misrepresentations in the marketing of the Simplifive and CallPack rate plans. Like Count II, Count III alleges that Ameritech Illinois has falsely represented that Simplifive and CallPack customers will save money, compared to standard rates. In addition, Count III alleges that the packaged pricing of

Bands A, B and C usage in a single plan is confusing to consumers and that Ameritech Illinois should inform consumers that competition varies between the usage bands. Finally, Count III contends that the absence of itemized billing, by usage band, for customers subscribing to Simplifive and CallPack prevents comparison of rates under those plans with standard rack rates. Count III relies on Section 13-514 of the Public Utilities Act and seeks an order directing Ameritech Illinois to stop marketing its plans in the ways addressed in the Complaint. (Id. at ¶¶ 27-34).

ARGUMENT

I. THE COMMISSION HAS NO AUTHORITY TO PROVIDE RELIEF PURSUANT TO THE CONSUMER FRAUD ACT.

The Commission is not a court of general jurisdiction. Its authority is limited to that provided by the Public Utilities Act. Business and Professional People for the Public Interest v. Commerce Comm'n, 136 Ill. 2d 192, 201, 240 (1989). In a complaint case, its power is limited to addressing “any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or any order or rule of the Commission.” 220 ILCS 5/10-108 (emphasis added).

Fraud claims per se are beyond the Commission’s authority. Sutherland v. Illinois Bell Telephone Co., 254 Ill. App. 3d 983 (1st Dist. 1993). In determining whether a claim properly belongs before the Commission, the question is whether the complainant seeks reparations for an unreasonable or excessive rate, or whether the claim is one for damages

or other types of relief that can be awarded only by a court. “[I]t is the nature of the relief requested, and not the label attached thereto, that is determinative of whether the ICC has jurisdiction over a complaint.” Sutherland, 254 Ill. App. 3d at 990; accord Village of Evergreen Park v. Commonwealth Edison Co., 296 Ill. App. 3d 810, 816-17 (1st Dist. 1998); Thrasher v. Commonwealth Edison Co., 159 Ill. App. 3d 1076, 1079-80 (1st Dist. 1987).

As Count II of the Complaint demonstrates, CUB’s allegations can and should be addressed by the Commission pursuant to its general “just and reasonable” authority under Sections 9-250 and 9-252 of the Act. CUB alleges that Ameritech Illinois has engaged in an unjust and unreasonable practice, by misleading customers and by charging them more than they would have been charged under rack rates. As relief, CUB seeks reparations pursuant to Sections 9-250 and 9-252 of the Public Utilities Act. (Complaint at ¶¶ 21-22, 26). That is a Public Utilities Act claim properly within the Commission’s jurisdiction. See. e.g., Evergreen Park, 296 Ill. App. 3d at 816-17; Thrasher, 159 Ill. App. 3d at 1079-80.

However, Count I of the Complaint alleges fraud, pursuant to the Consumer Fraud Act. As relief for that claim, CUB seeks unspecified “damages” (not reparations) for consumers and the recovery of CUB’s attorneys’ fees and costs. (Complaint at ¶ 18). Such relief is not within the Commission’s power. It is well established that the Commission may not award damages. Evergreen Park, 296 Ill. App. 3d at 816-17; Sutherland, 254 Ill. App. 3d at 990; Thrasher, 159 Ill. App. 3d at 1079-80. Nor may any

administrative agency award attorneys' fees, absent an express grant of statutory authority—a grant that appears nowhere in the Public Utilities Act. City of Chicago v. Fair Employment Practices Comm'n, 65 Ill. 2d 108, 112-13 (1976). Because the relief sought for the fraud claim is “judicial” in nature, the Commission cannot grant it, and Count I of the Complaint must be dismissed. See Thrasher, 159 Ill. App. 3d at 1079.’

Indeed, this is clear from the Consumer Fraud Act itself. That act has its own enforcement mechanisms, which do not involve the Commission. Specifically, the Consumer Fraud Act provides for actions seeking actual damages (id. at 505/10a) and for injunctive relief, restitution and civil penalties (815 ILCS 505/7). A consumer who has been damaged may file an action for damages. Id. at 505/10a(a). Or the Attorney General or a State’s Attorney may pursue injunctive relief, restitution and civil penalties. Id. at 505/7(a)-(c). In both cases, the law provides that a court is the proper forum for such actions. Nothing in the Consumer Fraud Act indicates that the Commission, or any other administrative agency, can properly entertain such a claim. 815 ILCS 505/7, 505/10a.

As a result, to the extent Count I of the Complaint relies on the Consumer Fraud Act, it must be dismissed. Therefore, Paragraphs 16 through 18 of the Complaint should

¹ The Complaint (¶ 15-17) asserts that the Commission’s general oversight authority (220 ILCS 5/4-101) permits the Commission to enforce directly the Consumer Fraud Act. That assertion is clearly incorrect. The Illinois Supreme Court has held that the Commission’s oversight authority provides no substantive power that is not granted elsewhere in the Public Utilities Act. Commerce Comm’n v. East St. Louis & Carondelet Ry. Co., 361 Ill. 606, 615 (1935).

be stricken, and CUB's prayers for relief must be revised accordingly.*

II. CUB'S SECTION 13-514 CLAIMS ARE BOTH SUBSTANTIVELY AND PROCEDURALLY DEFECTIVE.

Count III of the Complaint relies on Section 13-514 of the Public Utilities Act. The Section 13-514 claims should also be dismissed, both for substantive and procedural reasons. Substantively, Count III states traditional rate claims that can and should be addressed in a traditional Article Nine "just and reasonable" inquiry. Procedurally, CUB failed to follow the steps required to pursue a complaint under Section 13-514. As a result, such claims would be procedurally defective even if they otherwise might properly be addressed under that provision.

A. CUB's Complaint Lies Outside the Scope of Section 13-514 of the Public Utilities Act.

Section 13-514 of the Public Utilities Act provides accelerated proceedings and additional forms of relief for certain specified types of competitive complaints. 220 ILCS

² Ameritech Illinois does not question the notion that—in the course of determining whether Ameritech Illinois' conduct was just and reasonable under the Public Utilities Act—the Commission may consider the standards of the Consumer Fraud Act, or any other state or federal laws or policies that may be relevant. However, nothing requires that the Commission apply the standards of the Consumer Fraud Act without considering their appropriateness in light of the "just and reasonable" standard of the Public Utility Act. The Commission has generally rejected the notion that it must strictly apply standards imported from outside the Public Utilities Act. For example, in the course of approving the Ameritech/SBC merger, the Commission declined to rely entirely on the U.S. Department of Justice's Merger Guidelines. As the Commission explained, "While the Commission recognizes the merits of both the Guidelines and similar analytical frameworks, the Commission resists the invitation to apply any of these doctrines in a strict fashion. Instead, the Commission will maintain flexibility in interpreting and in applying elements of the Guidelines and similar analytical frameworks." Order, Ill. C.C. Dkt. 98-0555, p. 97 (Sept. 23, 1999). Indeed, it is doubtful that the Consumer Fraud Act directly governs CUB's claims at all, regardless of the forum in which those claims might be pursued. See 815 ILCS 505/106(1); Cahnman v. Sprint Corp., 961 F.Supp. 1229 (N.D. Ill. 1997), aff'd 133 F.3d 484 (7th Cir. 1998), cert. denied 118 S. Ct. 2368.

5/13-514(1)-(8). However, as the Commission has recently ruled, Section 13-5 14 does not supplant Article Nine for purposes of addressing traditional “rate” complaints. Order, Ill. C.C. Dkt. 99-0465, p. 13 (Dec. 2, 1999). This Complaint is nothing more than a traditional “just and reasonable” rate complaint, and it should be addressed as such.

As noted above, Count II of the Complaint makes clear that CUB’s misrepresentation claims can be addressed by the Commission under Sections 9-250 and 9-252 of the Public Utilities Act. (Complaint at ¶¶ 21-24, 26). The same allegations also appear in Count III. (Id. at ¶¶ 32, 34). The remaining allegations of Count III also raise traditional rate issues: whether different usage bands should be “bundled” in a single rate (id. at ¶ 31) and whether Ameritech Illinois’ bills for Simplifive and CallPack customers should be itemized by usage band (id. at ¶ 33). These are traditional rate issues, addressed to the terms and conditions upon which Ameritech Illinois provides service.

By contrast, CUB’s claims are fundamentally different from the types of claims identified by Section 13-514 as violations of that provision. Section 13-514 generally addresses “carrier to carrier” issues in the provision of competitive services: terms and conditions of interconnection (220 ILCS 5/13-514(1), (4)); speed, quality and efficiency of wholesale service (id. at 13-514(2)); availability of network information (id. at 13-514(3)); interpretation of interconnection agreements (id. at 13-514(8)); and other issues affecting competitive interactions between and among carriers (id. at 13-514(5)-(7)). CUB’s allegations address none of those issues. In essence, the allegations of Count III of the Complaint are that Ameritech Illinois’ Simplifive and CallPack tariffs, and the billing and

marketing practices associated with those tariffs, are misleading and unreasonable. Those allegations are traditional Article Nine consumer claims -not competitive claims properly addressed under Section 13-5 14. As the Commission has ruled, there is nothing in Section 13-5 14 of the Public Utilities Act to indicate that it is an appropriate mechanism for reviewing “terms and conditions” upon which Ameritech Illinois provides tariffed services. Order, Ill. C.C. Dkt. 99-0465 at 13.

Addressing CUB’s claims in the context of a traditional Article Nine complaint is also consistent with Commission practice in analogous cases. For example, prior to the effective date of Section 13-514, the Commission resolved allegations of misleading representations in the marketing of slamming protection in a conventional Section 1 O-1 08 complaint, alleging discrimination under Section 9-241 of the Public Utilities Act. Order, Ill. C.C. Dkts. 96-0075 & 96-0084 (cons.), pp. 4-5 (April 3, 1996). CUB’s claims in this case can and should be addressed in the same manner, pursuant to Sections 9-250 and 9-252 of the Public Utilities Act.

B. Even if the Complaint Included Potential Section 13-514 Claims, CUB Failed to Follow that Section’s Procedural Requirements.

Finally, even if the claims in Count III of the Complaint met the substantive requirements of Section 13-5 14 — which they do not — CUB has failed to follow the procedural requirements of that provision.

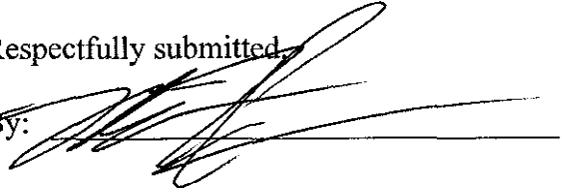
Section 13-514 includes detailed, specific notice and service rules, none of which have been followed in this case. For example, “No complaint may be filed under this Section until the complainant has first notified the respondent of the alleged violation and offered the respondent 48 hours to correct the situation.” 220 ILCS 5/13-515(c). The complaint itself “shall include a statement that the requirements” for advance notice have been fulfilled. Id. at 5/13-515(d)(2). No such notice was given here, and no such statement appears in the Complaint. Similarly, the complaint “shall be served in hand upon the respondent, the executive director, and the general counsel of the Commission at the time of filing.” Id. at 5/13-515(d)(1). Service in this case did not comply with that requirement.

Nor, to date, have either the parties or the Commission sought to enforce any of the other procedural requirements applicable to a Section 13-514 complaint. Section 13-514 requires an answer within seven days of the filing of the complaint (Id. at 5/13-515(d)(4)), a prehearing conference within 14 days (Id. at 5/13-515(d)(7)), and a hearing within 30 days (id. at 5/13-515(d)(7)). None of those things occurred, yet all of the deadlines passed without protest from CUB. In fact, the Complaint explicitly seeks “an expedited hearing consistent with Section 10-108 of the PUA,” not under Section 13-515, which is the procedural vehicle for a Section 13-514 complaint. (Complaint at 11 (emphasis added)). Thus, it seems clear that CUB knows that it does not have a valid Section 13-514 action. As a result, Paragraph 29 of the Complaint should be stricken

CONCLUSION

In short, all of CUB's allegations in this case can and should be addressed under Sections 9-250 and 9-252 of the Public Utilities Act, consistent with the legal theory of Count II of the Complaint. Paragraphs 16-18 and 29 of the Complaint should be stricken, as should those prayers for relief which seek damages, attorneys' fees and costs.

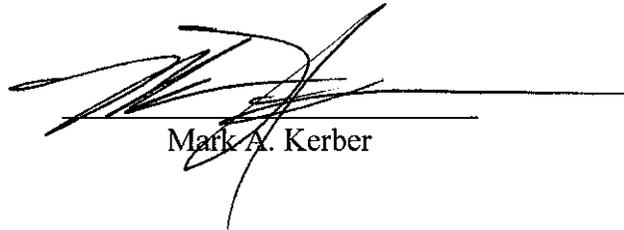
Respectfully submitted,

By: 

Mark A. Kerber
Louise A. Sunderland
Illinois Bell Telephone Company
225 West Randolph, HQ27C
Chicago, Illinois 60606
(312) 727-7140

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Motion Of Illinois Bell Telephone Company To Dismiss Consumer Fraud And Section 13-5 14 Claims was served upon all parties on the service list via Facsimile and Federal Expresss overnight mail this 1st day of March, 2000.



Mark A. Kerber

SERVICE LIST

ICC Docket No. 00-0043

Donna Caton
Chief Clerk
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62794

Robert Kelter
Citizens Utility Board
208 S. LaSalle Street, Suite 1760
Chicago, Illinois 60604

Hearing Examiner David Gilbert
Illinois Commerce Commission
160 N. LaSalle, C-800
Chicago, Illinois 60601

Mark A. Kerber
Louise Sunderland
Ameritech Illinois
225 W. Randolph, 27C
Chicago, Illinois 60606

Susan L. Satter
Citizens Utility Board
2615 W. Sunnyside
Chicago, Illinois 606253022

Terry Larkin
Illinois Bell Telephone Company
555 E. Cook St., Fl. 1E
Springfield, Illinois 62721

Janice Dale
Assistant Attorney General
100 W. Randolph, 11th Floor
Chicago, Illinois 60601

Matt Harvey
Illinois Commerce Commission
160 N. LaSalle, C-800
Chicago, Illinois 60601