2017 IL App (1st) 161139-U

No. 1-16-1139

FIFTH DIVISION
March 31, 2017

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION, Petitioner-Appellant, v. ILLINOIS COMMERCE COMMISSION and ILLINOIS BELL TELEPHONE COMPANY d/b/a AT&T Illinois d/b/a AT&T Illinois Wholesale, Respondents-Appellees.	)	Petition for Review of the Orders of the Illinois Commerce Commission. No. 15-0254

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

O R D E R

¶1 *HELD*: The Illinois Commerce Commission properly ruled on the petition filed by the Illinois Public Telecommunications Association, which sought a refund from AT&T for the imposition of excessive carrier rates. The Association was collaterally estopped from raising its claim where the matter had been fully litigated and neither the facts nor the law had changed in

Illinois. The Association's petition was also time-barred. The Commission did not abuse its discretion in refusing to reopen an investigation into AT&T's rates.

¶2 Petitioner, the Illinois Public Telecommunications Association (Association), appeals the dismissal of its petition by the Illinois Commerce Commission (Commission) finding the Association was not entitled to refunds for excessive carrier rates charged by the Illinois Bell Telephone Company d/b/a AT&T Illinois d/b/a AT&T Illinois Wholesale (AT&T). The Association additionally appeals the Commission's refusal to reopen an investigation to determine whether such refunds were warranted following a change in the federal landscape regarding the matter. Based on the following, we affirm.

¶3 FACTS

¶4 This matter first commenced in 1997 when the Association filed a verified petition with the Commission requesting an investigation to determine whether AT&T's cost-based carrier rates for telephone lines leased to payphone service providers exceeded section 276 of the federal Telecommunications Acts of 1996 (Federal Act) (47 U.S.C. § 276 (Feb. 8, 1996)). The Commission represented members providing payphone and related telecommunications services throughout Illinois. Following the investigation, in a November 12, 2003 decision, the Commission held that AT&T's rates did not comply with the federal standard and had to be changed going forward, but concluded that no retroactive refunds would be awarded to the Association on the previously-approved rates. The Commission reasoned that refunds on excessive charges since April 15, 1997, would violate the prohibition against retroactive ratemaking. The Association appealed the 2003 Commission decision before this court and also simultaneously sought an appeal before the FCC.

¶5 This court affirmed the Commission's 2003 decision, holding that the Association's members were not entitled to refunds because Illinois law barred refunds on tariffed rates. *Illinois Public Telecommunications Ass'n v. Illinois Commerce Comm'n*, No. 1-04-0225 (Nov. 23, 2005) (unpublished order pursuant to Illinois Supreme Court Rule 23). The Illinois Supreme Court and the United States Supreme Court subsequently denied the Association's requests to review our decision. *Illinois Public Telecommunications Ass'n v. Illinois Commerce Comm'n*, 219 Ill. 2d 565 (2006); *Illinois Public Telecommunications Ass'n v. Illinois Commerce Comm'n*, 549 U.S. 1205 (2007).

¶6 Then, on February 13, 2013, the FCC denied the Association's request for a declaratory ruling that the Commission's 2003 decision violated federal law. In so doing, the FCC found that federal law did not require refunds and all refund decisions were left to the states' discretion. The FCC, however, did advise that refunds of excessive charges *could* be ordered back to the April 15, 1997, deadline. The Association appealed the FCC's decision, which was affirmed by the D.C. Circuit Court of Appeals. See *Illinois Public Telecommunications Ass'n v. Federal Commerce Commission*, 752 F.3d 1018 (D.C. Cir. 2014). The United States Supreme Court denied the Association's request for *certiorari* of that ruling.

¶7 On April 1, 2015, the Association filed a petition with the Commission requesting that it rescind its 2003 decision finding that refunds were not available for AT&T's rate standard violation or, in the alternative, to reopen its previous investigation based on the FCC's 2013 ruling that refunds could be ordered and recent federal court decisions finding the same, namely, *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075 (9th Cir. 2006), and *TON Services, Inc. v. Qwest Corp*., 493 F.3d 1225 (10th Cir. 2007). In response, AT&T and the staff of the

Commission moved to dismiss the petition. The Administrative Law Judge issued a proposed order recommending that the Commission dismiss the petition.

¶8 While the Association's petition was pending, the Illinois Supreme Court issued its opinion in *Price v. Philip Morris, Inc.*, 2015 IL 117687. Based on its interpretation of the *Price* opinion, the Association then filed a motion to withdraw its petition from the Commission, indicating its intent to instead file a motion to recall this court's mandate in *Illinois Public Telecommunications Ass'n*, No. 1-04-0225 (Nov. 23, 2005) (unpublished order pursuant to Illinois Supreme Court Rule 23). AT&T and the staff of the Commission filed objections to the withdrawal of the petition. Simultaneously, the Association filed a motion before this court to recall the mandate in case number 1-04-0225. On January 27, 2016, the Commission denied the Association's motion to withdraw its petition, finding that the motion was not supported by *Price* and would enable the Association to "later refile a claim, the issue of which has already been decided, was a final judgment on the merits, and involved the same party."

¶9 Ultimately, on February 10, 2016, the Commission entered an order dismissing the Association's petition and denying its request to reopen the AT&T investigation. In so doing, the Commission maintained that the 2013 FCC ruling "unquestionably left the issue of refunds to the states." The Commission noted that the FCC and D.C. Circuit Court of Appeals provided that state commissions *may* order refunds, but both were clear in stating that states were *not required* to order refunds. As a result, where Illinois had already resolved the refund issue in 2003 and 2005, the Commission held that the Association's petition was barred as a matter of law by the doctrines of *res judicata*, collateral estoppel, law of the case, and improper collateral attack. The Commission additionally found the petition was barred by the statute of limitations. The Commission subsequently denied the Association's motion for rehearing of that decision.

¶10 On December 22, 2016, this court denied the Association's motion to recall our prior mandate in case number 1-04-0225.

¶11 This appeal followed.

¶12 ANALYSIS

¶13 The Association first contends that, pursuant to *Price*, the Commission lacked authority to rule on the Association's petition where the proper forum for review of the underlying matter was this court. More specifically, the Association argues that *Price* established a rule that a party seeking postjudgment relief in a case where the appellate court has already made a ruling on the matter must first seek postjudgment relief in the appellate court via a motion to recall the prior mandate.

¶14 We need not analyze the Association's contention where the question has been rendered moot. "An appeal is considered moot if no actual controversy exists or if events have occurred that make it impossible to grant the complaining party effectual relief." *Fisch v. Loews Cineplex Theater, Inc.*, 365 Ill. App. 3d 537, 539 (2005). Generally, courts will not consider moot or abstract questions or render advisory decisions. *Id*. at 540. Instead, an action will be dismissed as moot once the plaintiff has secured what was originally sought. *Id.* at 539-40.

¶15 On December 22, 2016, after the parties had fully briefed this appeal, the Second Division of this court issued a ruling denying the Association's motion to recall the mandate issued in case number 1-04-0225. The Second Division explained that the Association's motion to recall the mandate failed to comply with the timing requirements imposed by Illinois Supreme Court Rule 368(c) (eff. July 1, 2006), which had not been amended or vacated following *Price*.

Accordingly, not only was the Association able to file its motion to recall this court's mandate, but this court considered and denied said motion. The Association's contention, therefore, has been rendered moot.

¶16 The Association next contends the Commission should reverse its 2003 decision denying refunds for AT&T's violation of section 276 of the Federal Act where the FCC ruled in 2013 that refunds were not barred by the statute, the D.C. Circuit Court of Appeals affirmed the 2013 FCC ruling, and other federal decisions held the same. In the alternative, the Association contends the Commission should reopen its investigation in light of those decisions, which now permit refunds for rate violations.

¶17 We first provide the applicable standards of review. The Commission is an administrative agency responsible for setting utility rates, deriving its power from the Public Utilities Act (Act) (220 ILCS 5/1-101 *et seq.* (West 2002)). A reviewing court gives great deference to a Commission's decision as an administrative body possessing expertise in the field of public utilities. *Citizens Utility Board v. Illinois Commerce Comm'n*, 2016 IL App (1st) 152936, ¶ 8. The Commission's findings of fact are considered to be *prima facie* true and its rules, regulations, orders, or decisions shall be held to be *prima facie* reasonable. 220 ILCS 5/10-201(d) (West 2002). The moving party bears the burden of proof for all issues raised on appeal. 220 ILCS 5/10-201(d) (West 2002). We will not reverse the Commission's order or decision unless: (1) the decision was not supported by substantial evidence; (2) the Commission acted outside of its jurisdiction; or (3) the proceeding or manner by which the Commission made its decision violated the State or Federal Constitution or relevant laws in prejudice to the appellant. 220 ILCS 5/10-201(e)(iv) (West 2002).

¶18 The Association argues that the Commission erred in dismissing its petition where the FCC had determined refunds may be appropriate for violations of carrier rate requirements, which had not yet been considered by the Commission or any Illinois court. The Association maintains that its petition established it was entitled to refunds as a result of AT&T's excessive charging of network services to payphone providers from April 15, 1997, to December 12, 2003, in violation of section 276 of the Federal Act. The Association additionally argues that the Commission failed to provide findings and analysis sufficient to allow informed judicial review and applied the wrong standard of review, namely, that for a summary judgment motion, in dismissing the petition.

¶19 Based on our review, we conclude that the Association's petition was properly dismissed. At the outset, we find the Commission's February 10, 2016, order was sufficiently complete to inform this court of its analysis and findings for our review in compliance with section 200.190(f) and section 10-201(e)(iii) of the Illinois Administrative Act. 83 Ill. Admin. Code § 200.190(f) (eff. Aug. 15, 1996) ("[w]hen the Commission grants a contested motion to dismiss a proceeding, in whole or in part, the Commission shall issue an order presenting its rationale for the grant); 220 ILCS 5/10-201(e)(iii) (West 2016) ("[i]f the court determines that the Commission's rule, regulation, order or decision does not contain findings or analysis sufficient to allow an informed judicial review thereof, the court shall remand the rule, regulation, order or decision, in whole or in part, with instructions to the Commission to make the necessary findings or analysis).

¶20 Moreover, we find the Commission properly considered the standard required for a motion to dismiss under the circumstances of this case. Relying on section 10-108 of the Act as its basis for relief, the Association's petition alleged the Commission's 2003 decision should be

reversed in light of the FCC's 2013 ruling. Section 10-108 is a general, procedural provision providing the Association authority to file a complaint and providing the Commission the discretion to schedule a hearing thereon. 220 ILCS 5/10-108 (West 2012). In response, AT&T and the staff of the Commission argued the petition should be dismissed for failing to follow proper notice procedures, as well as for violating a number of doctrines related to the finality of the matter and a violation of the statute of limitations. In order to determine whether the Association's petition was subject to dismissal on the bases raised by AT&T and the staff of the Commission, like a section 2-619 motion to dismiss, the Commission reviewed whether a defect or defense avoided or defeated the petition. See 735 ILCS 5/2-619 (West 2012).

¶21 Ultimately, the Commission found that, where Illinois had already resolved the refund issue in 2003 and 2005, the Association's petition was barred as a matter of law by the doctrines of *res judicata*, collateral estoppel, law of the case, and improper collateral attack, as well as by the statute of limitations. In so doing, the Commission reviewed the FCC's 2013 ruling and determined that Illinois law had not changed as a result of that ruling. In fact, the FCC's 2013 ruling merely reiterated that it was within each state's discretion whether to award a refund for a carrier rate violation. Illinois law had established that refunds under the circumstances were improper. See *Mandel Brothers Inc. v. Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 209-11 (1954) (prohibiting refunds of previously-approved rates even if the rates are later reversed); *Independent Voters of Illinois v. Illinois Commerce Comm'n*, 117 Ill. 2d 90, 97-99 (1987); *Citizens Utilities Co. v. Illinois Commerce Comm'n*, 124 Ill. 2d 195, 206-17 (1988); *People ex rel. Hartigan v. Illinois Commerce Comm'n*, 148 Ill. 2d 348, 394-98 (1992). As a result, the FCC 2013 ruling did not alter the law in Illinois. Accordingly, where neither the facts nor the law had changed since its 2003 decision, the Commission properly considered whether the Association's

petition was subject to dismissal. Critically, the issue of whether the Association was entitled to refunds from AT&T for the time period between April 15, 1997, to December 12, 2003, was barred by the doctrine of collateral estoppel. *People ex rel. Madigan v. Illinois Commerce Comm'n*, 2012 IL App (2d) 1000024, ¶ 23 (the doctrine of collateral estoppel bars the relitigation of an issue already decided in a prior case where: (1) the issue decided prior is identical to the one currently presented; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privity with a party in the prior adjudication).

¶22 Furthermore, we find that the Association's petition was properly dismissed as untimely. Again, the Association's petition cited section 10-108 of the Act as the basis for relief. Section 10-108 details the requirements for filing said complaint and for providing notice to the parties; the statute does *not* provide for refunds, which was the relief requested by the Association. See 220 ILCS 5/10-108 (West 2012). Instead, section 9-252 of the Act provides the requested relief, in that "the Commission may order a public utility [that has charged an excessive or unjustly discriminatory amount for its product, commodity or service] to make due reparation to the complainant." 220 ILCS 5/9-252 (West 2012). Section 9-252, however, includes a 2 years statute of limitations on complaints for recovery of damages "from the time the produce, commodity or service as to which complaint is made was furnished or performed." 220 ILCS 5/9-252 (West 2012). The rates for which the Association sought a refund were established on June 7, 1995, and were superseded by new Commission-approved rates on December 13, 2003. As a result, the Association was required to file its petition no later than December 13, 2005. The Association's April 1, 2015, petition clearly failed to comply with the applicable statute of limitations.

¶23 In addition, to the extent federal law applied to the requested reparations relief in Illinois, federal law acted as a time-bar where an action for the recovery of overcharges had to be initiated within two years from the time the cause of action accrued. 47 U.S.C. § 415(c) (Nov. 30, 1974). The Association alleged it was entitled to recovery due to AT&T's failure to comply with the federal rate established by section 276 of the Federal Act. The Commission ruled that AT&T had to change its rates going forward, but denied the Association's request for recovery of overcharges on November 12, 2003. As a result, the Association's cause of action accrued on November 12, 2003, and the statute of limitations ran on November 12, 2005, for purposes of the applicable federal law. The Association's petition failed to comply with the federal statute of limitations as well.

¶24 Finally, the Association contends the Commission erred in refusing to reopen its investigation of AT&T and the propriety of refunds following the FCC's decision and the subsequent federal decisions.

¶25 Section 200.900 of the Illinois Administrative Code provides that:

> "After issuance of an order by the Commission, the Commission may, on its own motion, reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, such reopening." 83 Ill. Admin. Code § 200.900 (eff. Nov. 21, 2014).

Additionally, pursuant to section 10-113 of the Act (220 ILCS 5/10-13 (West 2002), 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." It is clear that the Commission's decision whether to reopen an

investigation or, ultimately, to rescind, alter, or amend any of its orders or decisions is discretionary.

¶26 Simply stated, where we have determined the law in Illinois did not change following the FCC's 2013 ruling, we conclude the Commission did not abuse its discretion in refusing to reopen an investigation into the Association's allegations against AT&T.

¶27 CONCLUSION

¶28 We affirm the dismissal of the Association's petition and the Commission's refusal to reopen an investigation into AT&T.

¶29 Affirmed.