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ILLINOIS  
COMMERCIAL COMMISSION

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**ILLINOIS COMMERCE COMMISSION**

BEFORE THE  
COMMERCE COMMISSION

BITWISE COMMUNICATIONS, INC.,

*Complainant,*

vs.

GALLATIN RIVER COMMUNICATIONS, LLC  
AND  
MADISON RIVER COMMUNICATIONS  
CORPORATION

*Respondents.*

Docket No. 07 - 0394

**VERIFIED AMENDED COMPLAINT**

BitWise Communications, Inc. ("BitWise"), by and through its undersigned attorneys, brings this verified amended complaint against Gallatin River Communications, LLC ("Gallatin" or "GRC") and its direct and indirect parent, Madison River Communications Corporation ("Madison River" or "MRC") (together, "the Respondents"), pursuant to Sections 10-108 and 13-515 of the Illinois Public Utilities Act ("PUA") (220 ILCS 5/10-108, 5/13-515). BitWise complains of acts or things done or omitted to be done by Respondents in violation of: (i) the parties' Interconnection Agreements<sup>1</sup>, (ii) Sections 13-514 and 13-801 of the PUA (220 ILCS 5/13-514, 5/13-801) and

<sup>1</sup> On August 24, 2004, BitWise entered into its first Interconnection Agreement with Gallatin. See Gallatin River Communications, L.L.C. and BITWISE Communications, Inc., Joint Petition for Approval of Negotiated Interconnection Agreement pursuant to 47 U.S.C. § 252, Illinois Corporation Commission Docket No. 04-0536 ("First ICA"). The ICC approved the First ICA on October 10, 2004. See Exhibit 1.

On October 15, 2006, BitWise entered into a second Interconnection Agreement with Gallatin. See Gallatin River Communications, L.L.C. and BITWISE Communications, Inc., Joint Petition for Approval of Negotiated Interconnection Agreement pursuant to 47 U.S.C. § 252, Illinois Corporation Commission Docket No. 06-0676 ("Second ICA"). The ICC approved the Second ICA on December 20, 2006. See Exhibit 2.

Section 252(a) of the Federal Communications Act of 1934, as amended by the Telecommunications Act of 1996 (47 U.S.C. § 252(b)) (“FCA”).

## I. THE PARTIES

1. BitWise Communications, Inc., d/b/a OmniLEC is an Illinois Corporation with its principal place of business at 331 Fulton Street, Suite 300, Peoria, IL 61602.

2. BitWise is a competitive local exchange carrier (“CLEC”) licensed by the Illinois Commerce Commission (“ICC”).

3. Gallatin River Communications, LLC is organized under the laws of Delaware and has its principal place of business at 200 Enterprise Drive, Riverway Business Park, Pekin, IL 61554.

4. Gallatin holds licenses issued by the ICC authorizing it to provide local exchange and long distance communications services and is the incumbent local exchange carrier (“ILEC”) serving the Pekin and several nearby exchanges.

5. Madison River Communications Corporation is a Delaware Corporation with its principal place of business at 103 South Fifth Street, Mebane, NC 27302.

6. At the time the actions detailed in this complaint occurred, MRC was owned by Madison River Telephone Company, LLC.

7. Pursuant to a transaction that was approved by the ICC's March 21, 2007 Order in Docket 07-0043, CenturyTel, Inc. acquired all of the outstanding shares of MRC from Madison River Telephone Company, LLC.

8. This transaction closed on April 30, 2007.

9. According to MRC's website, MRC provides communications services under

the names of Madison River Communications, LLC; Mebtel, Inc.; Gallatin River Communications, LLC; Coastal Utilities, Inc.; Gulf Telephone Company; Gulf Long Distance, Inc.; and Coastal Long Distance Services, Inc. See [http://www.madisonriver.net/about\\_us/regulatory.php](http://www.madisonriver.net/about_us/regulatory.php).

10. The operations of each of the companies listed in paragraph 9, are regulated by the Federal Communications Commission for interstate service and by the state regulatory commission in each state in which they provide service.

11. MRC provides telecommunications services in the State of Illinois through its direct and tiered ownership of Gallatin.

12. MRC is the ultimate parent of and, on information and belief, exercises management and ownership control over Gallatin.

13. At the time the actions in the complaint occurred, and to date, MRC owns 39% of Gallatin's parent company, Gallatin River Holdings, LLC, that owns 100% of Gallatin.

MRC also owns a 61% interest in several subsidiary companies, Madison River Holdings, LLC, Madison River LTD Funding LLC, and Madison River Management, LCC, all of which have controlling ownership interests in Gallatin's immediate parent company, Gallatin River Holding, LLC.

## II. JURISDICTION

14. All parties to this verified amended complaint are subject to the jurisdiction of the ICC with respect to the matters raised herein by virtue of the telecommunications services provided in the State of Illinois, the licenses issued by the ICC for such purposes, and by the actions of the parties with respect to the claims herein.

15. MRC is an appropriate party to this verified amended complaint due to its direct and frequent participation in the decisions and actions of its subsidiary, GRC, which gave rise

to BitWise's claims. MRC's direct and frequent participation is evidenced, in part, by the involvement of several employees, including, but not limited to:

- 15.1 Stephen Murray, who at all times during the past two and a half years represented himself as the "Director of Regulatory Affairs" for MRC; Mr. Murray's direct participation and involvement in GRC's decision-making and actions is evidenced throughout this verified amended complaint; and
- 15.2 Michael Skrivan, who at all times during the past two and a half years represented himself as an employee of MRC and who acted in both an oversight and authorization capacity with respect to certain GRC decisions and actions subject to claims in this amended verified complaint.

MRC is also a proper party to this verified amended complaint because of: (i) its involvement in the development, negotiation, approval, and implementation of the parties' Second ICA, (ii) involvement in GRC's billing systems and practices, and (iii) involvement in and development of GRC's policies with regard to reciprocal compensation, among other reasons enunciated in this verified amended complaint.

16. The ICC has jurisdiction over this proceeding under Sections 13-514 and 13-515 of the PUA.

17. The ICC also has jurisdiction under the Federal Telecommunications Act of 1996 under 47 U.S.C. § 251(d)(3) (conferring authority to state commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251).

### III. PROCEDURAL MATTERS

18. BitWise has fulfilled the requirements of Section 13-515(c) of the PUA (220 ILCS 5/13-515(c)). Specifically, BitWise provided Gallatin with written notice of the violations of

Section 13-514, alleged herein, and offered Gallatin forty eight (48) hours to cure its violations. Gallatin failed to cure. The relevant correspondence between the parties is attached hereto as Exhibit 3.

19. BitWise is not filing a Request for Leave for its counsel to appear before this Commission at this time, because the Commission previously approved of the undersigned, out-of-state counsel's appearance at the initial status conference.

20. Pursuant to Part 766.15(a) of the ICC's rules, BitWise agrees to waive the statutory timeline requirements in Section 13-515(d) of the PUA.

21. Pursuant to Part 766.1050 of the ICC's rules, BitWise agrees to electronic service to the e-mail addresses listed in the signature section contained herein.

#### IV. BACKGROUND AND FACTS UNDERLYING CLAIMS

22. BitWise began its wholesale business relationship with Gallatin on November 10, 2004, upon the ICC's approval of the parties' First ICA.

##### Collocation Delays and Billing Disputes

23. On May 9, 2005, BitWise contacted Gallatin to establish collocation between the parties pursuant to Part C, Attachment IV, Section 2.16 of the First ICA. See Exhibit 4. As required by this clause, Gallatin was required to provide the contact names, work restriction guidelines, and technical publication guidelines within ten (10) business days of receiving BitWise's request. Gallatin, however, did not respond until June 20, 2005, and then only after BitWise's President, Mike Shuler, contacted David Rudd, Gallatin's outside counsel, to remind him of Gallatin's duty to complete collocation within ninety (90) days of receiving a collocation request. See Exhibit 5. The parties then spent another month and a half negotiating terms. The terms agreed to by the parties required BitWise to pay a \$3,348.48 Application Fee plus one-half of the

non-recurring collocation charges, \$3,468.41, bringing the initial installment payment to \$6,816.59, which the parties agreed would be payable upon initiation of construction.

24. Gallatin delivered a final collocation “quote” to BitWise on August 10, 2005 in the form of an invoice for \$6,816.59. See Exhibit 6. By the time BitWise received the collocation quote/invoice, the 90-day implementation interval sanctioned by the FCC had already passed; Gallatin had yet to begin construction.

25. BitWise paid the invoice in full on August 26, 2005. See Exhibit 7; see also Exhibit 12.

26. Almost immediately thereafter, BitWise was subjected to a Gallatin billing error. The September 25, 2005 invoice, the first invoice ever issued to BitWise, contained a collocation charge for \$35,383.79, almost five times the amount agreed to by the parties. See Exhibit 8.

27. Gallatin’s counsel eventually conceded the billing error,<sup>2</sup> but the correction did not actually appear on the October invoice. When the credit did arrive on the November 25, 2006 invoice, instead of crediting the entire \$35,383.79 amount, as it should have, all Gallatin did was reduce the charge to \$3,147.73 – the amount of the second installment that, by agreement, was not supposed to become due until construction of the collocation facility was completed. The charge was preemptively billed and listed in the invoice as “late,” thereby subject to late fees. See Exhibit 10. Gallatin also improperly assessed “telecommunications taxes” to the “construction costs,”

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<sup>2</sup> See Exhibit 9, October 10, 2005 e-mail from David Rudd to Mike Shuler:

“Almost forgot, ignore the bill. It is obviously wrong. You should not have to pay the other half of the nonrecurring charges for the collocation until your space is ready to use.”

BitWise did not immediately pay this dispute, but waited until Gallatin issued a correct bill before making payment.

which are exempt from such taxes. BitWise notified Gallatin of these disputes seeking resolution thereof. *Id*

28. Over seven months after Gallatin received BitWise's request for collocation and four months after the statutory deadline, Gallatin completed collocation. See Exhibit 11. The correct charges for collocation completion, \$3,571.91, were included in the December 25, 2005 invoice. BitWise paid the entire undisputed amount on January 27, 2006, even though Gallatin had still not credited BitWise for the erroneous telecommunications taxes included in the previous invoice. It took four months for Gallatin to receive credit for these charges. See Exhibit 12.

29. The billing dispute over collocation should have ended once the correct payments were made. However, when it came time for Gallatin to build its case for demanding assurances pursuant to Section 5 of the parties' Second ICA, discussed below, Gallatin ignored its admitted billing mistake. Instead, Gallatin used a superficial snapshot of its internal invoice records and noted a "past due" charge from September 2005. In doing so, Gallatin used the existence of this erroneous internal record to support its claims that BitWise is a chronically delinquent payer and credit risk requiring assurances of payment.

30. Indeed, Gallatin used the costs carried over from collocation as the foundation for the subsequent claim that BitWise has a long history of late payment. This, despite the facts that: (1) BitWise properly disputed all collocation charges, (2) BitWise made the correct payments according to instructions from Gallatin employees, and (3) Gallatin was the party breaching the Interconnection Agreement by unnecessarily delaying collocation and billing BitWise erroneous charges over the course of several invoice cycles. Baseless and factually devoid allegations of non-payment and/or delinquent payment, such as this, are at the foundation of Gallatin's March 7, 2007

letter in which it exercises the Demand for Assurances clause set forth in Section 5 of the parties' Second ICA.

31. To punctuate the collocation billing issue, even though Gallatin billed BitWise the "completed" collocation charges a month before the collocation was completed, in breach of the parties' payment plan, and subsequently used the existence of these charges in its internal records to support claims of BitWise's chronic delinquency, the fact is that as soon as BitWise confirmed completion of the collocation, it properly and fully paid all charges pursuant to the parties' agreement. See Exhibit 12.

32. Gallatin's inability to accurately bill wholesale charges began early and has persisted throughout the parties' relationship. Each time a new billing issue arose, BitWise communicated its concerns to Gallatin via e-mail, a form of communication readily-accepted by GRC. BitWise primarily communicated billing issues to Karen Lewis, a GRC customer service and billing representative. However, from approximately August 2006 until recently, BitWise also communicated billing issues to Stephen Murray, MRC's Director of Regulatory Affairs, as Mr. Murray was designated by GRC as its "designated representative," authorized to handle disputes escalated pursuant to the dispute resolution provisions of the parties' ICAs.

#### Wholesale Billing Issues Persist

33. More and more billing problems began cropping up as BitWise grew and began adding customers to its network. For example, prior to February 2006, Gallatin's invoices did not contain any customer circuit IDs, thereby making it impossible for BitWise to identify and properly dispute objectionable charges.

34. BitWise's President, Mike Shuler, notified Karen Lewis of this billing problem after receiving Gallatin's invoice. A month later, on February 7, 2006, Karen Lewis finally replied to

Mike Shuler's request for resolution of the billing disputes:

"Good Morning! We are working on a fix where your customer's IDs will print on your invoice. Hopefully this will be done by your next bill on the 25th. Meanwhile, I am faxing you your December invoice. I have hand written your customer's name and circuit ID corresponding to the loop charge. I will do the same for your January invoice. Let me know if you have any questions."

See Exhibit 13.

35. Within two days of receiving the requested clarification of the charges, BitWise paid all undisputed charges. Whereupon, as of February 9, 2006, BitWise had paid Gallatin in full for all undisputed charges. See Exhibit 12.

36. Moving on to the January billing period; Gallatin was late in sending the January 2006 invoice. Instead of arriving in mid-January, as was the usual practice, the invoice arrived on February 16, 2007 – a mere three (3) days before the payment on the account was due. The January invoice, again, contained erroneous charges. Mike Shuler advised Gallatin of this on March 9, 2006:

The January invoice (2420412) has charges on it for "Interconnect-2 Wire SO Charge" and "Interconnection-2 Wire CO Charge" for \$25.15 and \$11.81 respectively. I can not find anywhere in the ICA where it states we will be charged these amounts for install. We also should not be charged any taxes since we charge our customers the same taxes.

Invoice Amount: \$5,236.16

Disputed Amounts:

SO/CO: \$2,092.71

Taxes: \$524.72

We will hand deliver a check to your payment office for the undisputed amount of \$2,618.73 first thing in the morning on 3/10/2006.

See Exhibit 14.

37. Payment on the undisputed amount was made on March 10, 2006. Whereupon, as of March 10, 2006, BitWise had paid Gallatin in full for all undisputed charges. See Exhibit 12.

38. As alluded to earlier in the complaint, Gallatin references this period of time as evidence that BitWise is “chronically” late in paying its bills and therefore warrants a demand for assurances. See e.g., Exhibit 15. Once again, however, the facts prove that Gallatin does so in ignorance of the circumstances surrounding each of the aforementioned invoice periods.

39. Erroneous billing practices continued to arise as the parties’ wholesale business relationship progressed alongside BitWise’s business expansion. On April 7, 2006, Mr. Shuler alerted Karen Lewis to additional billing problems with the January and February 2006 invoices. He stated:

“In reviewing the Feb. bill I noticed a major error that is also applicable to the January bill. I thought I was crazy so I had Eric look at it to... If you look at the Dec. 25th bill we were billed for 19 lines. If you look at the Jan. 25th bill we were billed for 69 lines. But you will notice that on the Jan. bill we were charged 71 DS-0 charges. This would be impossible since we only gained 50 lines. The same problem exists on the Feb. bill too. Am I not reading something correctly?”

See Exhibit 16.

40. Following this e-mail, Mr. Shuler continued to seek clarification from Karen Lewis regarding the erroneous charges on the bills. In almost every instance, Karen Lewis was either slow or incomplete in her responses to Mike Shuler’s inquiries, thereby compounding delays in BitWise’s payments. See Exhibit 17.

41. Finally, on May 5, 2006, Karen Lewis responded to Mike Shuler advising BitWise of the “correct” amount owed for bills prior to the invoices issued on April 25, 2006. Specifically, Ms. Lewis wrote to Mr. Shuler:

“Mike, I show \$5120.82 outstanding. Let me know if you disagree. Also, throw away that disconnect notice.”

See Exhibit 18.

42. On the next business day after receiving this clarification from Ms. Lewis, BitWise paid all undisputed amounts owed to Gallatin. This payment amount of \$5,120.82 on May 9, 2006, brought BitWise’s account balance of undisputed amounts with Gallatin to zero. See Exhibit 12.

43. The billing disputes up to this point in time were the result of Gallatin’s failure to bill charges accurately and in compliance with agreements, either contractual or negotiated. In the midst of these unresolved billing disputes, BitWise continued to expand its services, signing-up customers previously subscribed to Gallatin’s services, including business customers in need of T-1 circuits (“DS-1s”).

**Gallatin’s Refusal to Provision DS-1s Per ICA Terms**

44. In reliance on the cost-based wholesale pricing established in the First ICA, BitWise entered into service agreements with a handful of prospective customers who required DS-1s. To fulfill the agreements, BitWise contacted Gallatin to inquire which of the two recurring DS-1 rates set forth in the First ICA applied. See Exhibit 19. DS-1 rates are contained in “Part C. Supplemental Attachment VII. PRICES FOR UNBUNDLED NETWORK ELEMENTS, Recurring Charges” of the First ICA. See Exhibit 20. According to the ICA, these DS-1 circuits appeared to be as low as \$125.00 (Entrance Facilities DS-1 \$125.00) or as high as \$138.00 (DS-1 Loop Monthly Recurring Charge - \$138.00). *Id.*

45. However, Gallatin denied BitWise’s request to provision DS-1s at either the \$125.00 or \$138.00 rate. See Exhibit 21. Gallatin’s inaction delayed BitWise’s ability to provide prospective customers telephone and internet service. *Id.*

46. As time passed, Mike Shuler became concerned BitWise would lose these newly signed customers due to Gallatin's continuing refusal to provision DS-1s. Indeed, one Gallatin customer did, eventually, cancel its service order. See Declaration of Michael Shuler ("Shuler Declaration") at ¶ 20.

47. To facilitate provisioning of the circuits, Mike Shuler contacted Gallatin repeatedly, eventually setting up a face-to-face meeting with Gallatin's President, Fred Miri, to discuss the situation. See Shuler Declaration at ¶ 20. This meeting was attended by Fred Miri, Karen Lewis, and Mike Shuler.<sup>3</sup> *Id.* at ¶ 21.

48. At the meeting, Mike Shuler requested DS-1s at the rates listed in the First ICA. *Id.* at ¶ 22. First, Mr. Shuler specifically alerted Mr. Miri to the \$125.00 price for DS-1 facilities listed on page one of "Part C. Supplemental Attachment, VII. PRICES FOR UNBUNDLED NETWORK ELEMENTS, Recurring Charges." *Id.* However, Mr. Miri refused to recognize that the requested DS-1s qualified for this price. *Id.* To support this, Mr. Miri loosely cited to Newton's Telecom Dictionary, claiming erroneously that under the definition therein, a DS-1 for an "entrance facility" goes through the wall of a collocation office and has no local loop; therefore, according to Mr. Miri, the DS-1s BitWise was requesting fell outside of this definition. *Id.* Mr. Shuler pointed out that this reading of the definition of entrance facility was clearly outside the context of the discussion. *Id.* Mr. Miri refused to budge from his position, even though it disregarded the fact that to offer a UNE at rates, terms or conditions that were outside the scope of the First ICA would require a written amendment, filed with and approved by the ICC. *Id.* Gallatin did not do so.

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<sup>3</sup> Despite claims to the contrary, MRC's Director of Regulatory Affairs and GRC's counsel, Stephen Murray, was not in attendance at this meeting. Therefore, although he may have offered his client counsel, he was not "privy" to the parties' discussion or the terms posed by either Fred Miri or Karen Lewis during this meeting. Any of his claims regarding the details of the DS-1 "promotional" agreement are in hearsay and inadmissible. *Id.*

49. After approximately fifteen minutes of arguing their conflicting positions, Mr. Shuler felt that since Mr. Miri was not going to concede to offering the DS-1s under the \$125.00 rate, he directed Mr. Miri to page five of the UNE Appendix, in which ISP DS-1s are listed at \$138.00. *Id.* at ¶ 23. At this point in the meeting, Mr. Miri left the room, apparently to consult with Stephen Murray, MRC's Director of Regulatory Affairs. *Id.* When he returned, Mr. Miri refused to concede that the requested DS-1s were included under this definition, arguing that these DS-1s were not available because they were part of the package price for "ISP DS-1s." *Id.* Mr. Shuler countered Mr. Miri by explaining that telecommunications regulations permit individual UNE elements to be separated from combinations or bundled packages. *Id.* Again, Mr. Miri was unwilling to concede this point. *Id.*

50. Recognizing that further definitional arguments would not result in Gallatin provisioning DS-1s at rates specified in the UNE pricing guide, and realizing he was under increased pressure from customers to provision DS-1s ordered several weeks ago, Mike Shuler asked Mr. Miri to provide him with a reasonable quote for the DS-1s. *Id.* at ¶ 24.

51. Mr. Miri informed Mr. Shuler he was currently drafting a new Interconnection Agreement with Stephen Murray and was willing to provide DS-1s for the price to be listed in the new agreement until interconnection agreement negotiations were finalized. *Id.* at ¶ 25. Mr. Miri quoted a monthly reoccurring charge of \$193.00, plus an additional charge of \$35.86 for a local four wire loop, and a \$400.00 non-recurring charge on all DS-1s going forward. *Id.*; see also Exhibits 22 and 23. At no time did he agree to limit the number of DS-1s provisioned. See Shuler Declaration at ¶ 25.

52. At this point in the meeting, Karen Lewis interjected that Gallatin's billing system was unable to handle the new pricing arrangement. *Id.* at ¶ 26. Therefore, she suggested that

in order to accommodate Mr. Miri's quote, Gallatin would provide a credit on invoices each month to compensate for the retail rates on the DS-1s until the new wholesale price was in place. *Id.*

53. No additional conditions on or limitations to the "promotional" offering were either discussed at the meeting and none were agreed to by BitWise. *Id.* at ¶ 27. Mike Shuler did not agree to an arrangement that would require BitWise to pay full retail tariff prices each month, with the "hopes" of a credit at some indeterminate later date, at least several months in the future.<sup>4</sup> *Id.* Mike Shuler was also not told that the verbal agreement contemplated only a limited quantity of DS-1s and he did not agree to this condition. *Id.* Rather, he understood the verbal agreement to be limited only in duration to the time period between March 2006 and whichever date a new ICA was executed. *Id.*

54. On March 15, 2006, Gallatin employee, Bev Martin, took the first step to implement the promotional agreement by setting out the elements and pricing for DS-1s:

The monthly charges for this T1 includes a 4 wire smart jack:

\$193.00 -T1

\$ 35.86 -Local 4 wire loop

The non recurring charge would be:

\$400.00

See Exhibit 22.

55. Mike Shuler accepted the rates quoted by Bev Martin to alleviate any further provisioning delays due to the fact that BitWise had already signed up new customers weeks earlier that had been anxiously (and even angrily) awaiting installation of the DS-1 circuits. See Exhibit 23; see also Shuler Declaration at ¶ 20.

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<sup>4</sup> Even if BitWise signed a new ICA the day of the agreement on promotional rates, on average it takes the ICC at least two months to approve the agreement. BitWise would have been pound-foolish to have agreed to such an absurd proposition.

56. Following Mr. Shuler's acceptance of the quote, Bev Martin confirmed the agreement by indicating that Gallatin would process four DS-1 orders at the prices listed in the initial March 15<sup>th</sup> e-mail. She also instructed Mike to send her **any additional orders** for DS-1s. See Exhibit 23. Bev's instructions confirmed what Mr. Shuler understood regarding the details and scope of the "agreement" discussed at a meeting on or around March 13, 2006, which was that until a new ICA was executed, BitWise would be entitled to order as many DS-1s as it needed under the "promotional" price; no other conditions or limitations were discussed or agreed to, other than Karen Lewis' explanation that the billing system could not bill the promotional charges properly until they were loaded into the system, following execution of the new ICA. See Shuler Declaration at ¶ 25.

#### Gallatin's Failure to File Amendment to ICA

57. This "agreement" on the DS-1 pricing was not memorialized in any written document, other than the e-mail correspondence between Mike Shuler and Bev Martin. The "agreement" was not incorporated into an amendment to the First ICA. And the "agreement" was never filed with the ICC.

#### DS-1 Billing Dispute

58. When BitWise received its first invoice containing charges associated with the DS-1 orders, Mr. Shuler noticed that Gallatin did not bill BitWise the \$228.86 in recurring charges agreed to by the parties. See Exhibit 24. Instead, Gallatin invoiced BitWise for a much larger amount. The DS-1 pricing in the April 25, 2006 invoice was as follows:

Amount Billed: \$667.33 (April 3 - May 24) + \$1,710.00 (3 DS1's NRC)

*Id.*

59. This recurring charge was far greater than the charges quoted by Bev Martin and accepted by BitWise.<sup>5</sup> It also differed from Mike Shuler's expectations of what the charges should have been based on his analysis of the various billing cycles applicable to the circuits. For example, in his e-mailed list of disputed charges, Mike Shuler indicates that, if based on the rate quoted by Bev Martin and the fifty-one days from April 3, 2006 to May 24, 2006, the amount owed by BitWise should be \$278.20 per month plus a \$510.00 non-recurring charge.<sup>6</sup> *Id.*

60. Over the ensuing weeks, throughout May and early June, BitWise contacted Gallatin on several occasions, seeking to confirm its understanding of the \$278.20 and \$510.00 charges. See Shuler Declaration at ¶ 35. Gallatin did not respond. As the invoice due date arrived, Mike Shuler again contacted Gallatin inquiring as to payment protocols applicable to the DS-1 charges. *Id.* The questions BitWise presented to Gallatin were simple: Are BitWise's calculations of the "agreed upon" DS-1 charges correctly calculated based on the 51-day billing cycle? If so, does BitWise need to pay only the "agreed upon" promotional rates? Or must it first dispute the charges as they appeared in the invoice, then pay the undisputed portion? BitWise received no response and no answers from Gallatin. *Id.* The invoice due date came and went.

61. On June 6, 2006, Gallatin suspended BitWise's ability to place orders for the first time. By instituting this suspension, Gallatin impeded BitWise's ability to compete.

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<sup>5</sup> It was, however, consistent with Karen Lewis' explanation regarding the billing system's limitations.

<sup>6</sup> Indeed, BitWise's calculation of the \$510.00 non-recurring charge was incorrect, since by their very nature NRCs do not vary based on billing cycles. Hence, there was legitimate reason for BitWise to seek Gallatin's clarification of the amount owed. Furthermore, confusion such as this only became more and more compounded as time passed and Gallatin continued its refusals to offer any clarifications. After months of accumulated DS-1 charges, and having never obtained any clarifications on its initial inquiries, it would be unreasonable to expect BitWise to precisely identify and pay "undisputed" charges. Hence, as will be shown later, the best BitWise could do was to make payments based on "good faith" estimates.

62. On June 19, 2006, Mike Shuler placed Gallatin on written notice it was formally disputing the DS-1 charges, as reflected in the April 25<sup>th</sup> invoice. See Exhibit 24. Prior to remittance of payment, Mr. Shuler sought answers from Gallatin on whether or not it would adhere to the billing dispute procedures set forth in the First ICA and thereby properly address the disputed, unpaid portion of the DS-1 charges. *Id.* (“I need a reply in writing that Gallatin is refusing to honor the ICA and expects BitWise to pay the full balance, including the disputed amounts. I will be sending a check for \$8,201.20 [the undisputed portion] upon acceptance of my billing claims and confirmation that the billing dispute process, outlined in the ICA (section 21.2), will be followed. I have attached the ICA for your convenience. Please respond as soon as possible, as we would like to resolve our balance with Gallatin immediately.”). *Id.*

63. Gallatin denied the dispute within 24 hours, stating that the “promotional” arrangement would be implemented when BitWise signed a new interconnection agreement due to “billing system” limitations. Gallatin further advised Mike Shuler for the first time that the promotional rate was limited to the initial 3 circuits:

“We have investigated your billing dispute and have determined that the dispute is Denied, because; The e-mail from Bev Martin specifying the applicable rate elements is consistent with the “Promotional Pricing” discussed between Fred and you. However, as was explained at the time of the Promotional Pricing arrangement, this arrangement cannot be billed because it is not yet in GRC’s billing system. Once the new ICA is executed and implemented, then the promotional pricing will be activated in the GRC billing system, made effective and GRC will make a retroactive adjustment to these 3 circuits utilizing the rate elements and Pricing that Bev sent to you. The retroactive adjustment only applies to these three circuits. Also, **it is my understanding** that Fred offered the Promotional Pricing arrangement as an incentive to quicken the pace of the replacement ICA negotiations and that these prices would not be in effect until the new ICA was approved by the ICC.

We apologize if there is any confusion with the billing aspect of this arrangement. However, we have no mechanism for billing these rates until the new ICA is implemented in the near future, in which case the retroactive adjustment will occur sooner...” (emphasis added).

*Id.*

64. Gallatin's denial of BitWise's dispute led BitWise to escalate the DS-1 dispute via the Parties' respective designated representatives, consistent with Section 21. See e.g., Exhibit 27 (June 21, 2006 e-mail from Jonathan Marshlian to David Rudd, "As you should be aware, the billing disputes which gave rise to the ordering freeze are directly linked to the DS-1 pricing issue... I [ ] look forward to discussing with you and Stephen and GRC management our concerns regarding the DS-1 UNE loop issue and to reaching a temporary compromise agreement on pricing until such time as a replacement ICA is executed.").

65. Because the denied DS-1 pricing dispute was escalated to counsel of both parties, Gallatin had no authority under the First ICA to treat the undisputed DS-1 charges as due and owing for the periods before and after June 21, 2006.

66. Gallatin's denial e-mail also contained an inaccurate recantation of discussions and, importantly, the "meeting of the minds" that occurred during Mike Shuler's March 13<sup>th</sup> meeting with Fred Miri and Karen Lewis. See Shuler Declaration at ¶¶ 20 - 27.

#### **June 2006 Ordering Suspension**

67. Despite BitWise's efforts to work with Gallatin's billing personnel to clarify the terms and conditions of the "promotional" agreement so that undisputed charges could be identified and paid, on June 6, 2007, Gallatin proceeded to suspend BitWise's ordering privileges without appropriate notice.

68. Leading up to early June 2006, Gallatin was sending BitWise automatically computer generated disconnect notices, advising it of impending disconnection of service due to delinquent payment. See Exhibit 25. These notices persisted on a monthly basis for over a year.

69. The automatically generated "Disconnect Notice" provided BitWise with a

generic notice – the same type of notice one of Gallatin’s *retail* customers would receive if it failed to pay its bills before Gallatin cut off their service. For example, the Disconnect Notice informs BitWise that Gallatin will suspend basic service unless “a dispute is filed with Gallatin River Communications, or a serious illness or other extenuating circumstances exists in your household.” *Id.* These Disconnect Notices, which were sent to BitWise each month for over a year, do not comply with the notice requirements of either the First or Second ICA.

70. None of the Disconnect Notices advised BitWise that its ability to “order new services” would be suspended. The notices merely advised that Gallatin would suspend “basic services.” Gallatin never actually did what the notices threatened. Instead, Gallatin suspended ordering, which is materially different than suspending “basic services.”

71. Furthermore, Gallatin never once sent a copy of a Disconnect Notice to BitWise’s counsel, which, in and of itself, violates the notice provisions of both the First and Second ICAs.

72. On June 7, 2006, the day after Gallatin suspended BitWise’s ordering, Stephen Murray, MRC’s Director of Regulatory Affairs and GRC’s designated agent, sent an e-mail to Mike Shuler advising him of Gallatin’s intent to terminate the First ICA pursuant to Part A, Section 3, part 3.3.<sup>7</sup> See Exhibit 26.

73. Stephen Murray’s e-mail indicated that the negotiating period for a new interconnection agreement began back on February 1, 2006. *Id.* According to his calculations, “using Feb. 1 as the “start date” [the parties were] at day 127 of the 135 day negotiating period.”

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<sup>7</sup> GRC previously attempted to provide notice of termination of the First ICA to BitWise on November 1, 2005. However, this notice – sent by certified mail on MRC letterhead – did not reach Mike Shuler because Stephen Murray, the drafter of the November 1, 2005 notice, addressed the letter to an office location that BitWise vacated several years prior. Mr. Murray did succeed in delivering a copy of the letter to BitWise’s counsel.

Stephen Murray advised BitWise to formally submit an agreement for an extension of the negotiating window. *Id.* BitWise agreed to engage in ICA negotiations in the manner requested. See Exhibit 27.

74. BitWise petitioned Gallatin for a brief extension of time. *Id.* Gallatin agreed to extend the negotiating window until August 2006. *Id.* Although agreeing to extend the negotiations period, Gallatin initially insisted that BitWise pay all amounts due, including disputed DS-1 charges (and applied late fees) before the ordering suspension would be lifted.

75. Through negotiations by their designated representatives, Jonathan Marashlian for BitWise and Stephen Murray, MRC's Director of Regulatory Affairs, for Gallatin, the Parties reached an agreement to resolve the June ordering suspension, as follows: Gallatin agreed to accept payment for the "undisputed" charges associated with BitWise's \$18,543.25 account balance in exchange for lifting the freeze. See Exhibit 28. These negotiations also resulted in agreement that BitWise's ability to order DS-1 circuits at the "promotional" rate would not be limited to the initial 4 circuits. See Exhibit 29.

76. On June 20, 2006, Mike Shuler delivered a cashier's check to Gallatin in the amount of \$7,103.10, an amount calculated by BitWise as the "undisputed" portion of the invoiced charges. Subsequent to this payment, Gallatin determined (without explanation or billing details) that BitWise still owed \$114.31 and demanded payment before restoring ordering privileges. *Id.*; see also Exhibit 31. Mike Shuler paid this amount on June 21, 2006, thereby bringing the balance of the undisputed charges to zero. See Exhibit 12. Not only was BitWise's "undisputed" account balance zeroed out on this date, it was zeroed out pursuant to the explicit agreement of Gallatin's agents and designated representatives for escalated dispute resolutions, Stephen Murray and David Rudd. See e.g., Exhibits 29 and 30.

77. Despite agreement of the Parties' designated representatives on resolution of the billing issues and Gallatin's subsequent lifting of the ordering freeze, Gallatin did not cease issuing Disconnect Notices. See Exhibit 31. Gallatin made no internal effort to reflect the resolution agreed to by the parties' designated representatives, thereby maintaining the artificial appearance that BitWise was in arrears on "undisputed" charges. Gallatin continued to use this "appearance" of indebtedness and delinquency as a weapon to coerce BitWise – this is the same weapon Gallatin has continued to use for over a year now.

#### September 2006 Ordering Suspension

78. The next "event" occurred in early September, just as negotiations on the Second ICA were winding up.

79. BitWise submitted billing disputes related to the August invoice to Gallatin on September 5, 2006. Without notice, the following day Gallatin reinstated the ordering freeze – a freeze that delayed provisioning of emergency 911 circuits. See Exhibit 32; see also Exhibit 33.

80. Gallatin's designated representative, Stephen Murray, was at first ignorant of the ordering suspension. See Exhibit 33. After "checking with" Fred Miri, Stephen Murray sent the following response:

1. **Late Payment:** Bitwise is late in making payment to GRC for its existing circuits. This is nothing new and regretfully has been a recurring trend...
2. **Disputes:** GRC had offered, in advance of the new ICA, pricing related to a product in the new ICA as an incentive to expedite matriculation of the new ICA. Bitwise had asked for 4 circuits, we agree, but Bitwise only ordered 3 circuits. Subsequently, Bitwise asked for more circuits at this same discounted pricing structure, we refused, as the original offer was for only these 4 (really 3) circuits, because that is all that was ordered. *[This statement is false, even if Gallatin intended to limit the promotional availability to the original circuits ordered, this agreement was modified by agreement of counsel during the billing dispute escalation]* Bitwise wanted GRC to bill the circuits at the discounted rate, which we could not do, because the billing system would not allow us to do so until the rates and

products were entered into the billing system after the new ICA was in-place. We advised Bitwise to dispute the difference and once the ICA was in-place we would credit the difference to other circuits. [*This statement is false, see Exhibit 25. Gallatin never advised BitWise to dispute the difference between invoiced charges and promotional rates. Instead, Gallatin never recognized the existence of a disputed balance. At all times, Gallatin treated all balances owed at the end of the month as valid, due and owing. Otherwise, it would not have suspended ordering twice nor would it have continued sending Disconnect Notices.*] Since then there have been multiple attempts by Bitwise to obtain circuits at this discounted pricing, which have been declined. Bitwise has then sent in disputes for the difference on these subsequent circuits, which have also been declined. Hence, part of the past due amount. [*This statement ignores the terms agreed to by Mr. Murray just two months earlier during the resolution of the June ordering suspension*]

**3. Order suspension:** Jonathan, although we do not like declining orders for circuits. However, it is the only tool we have to ascertain payment from our interconnected CLECs, particularly when they are delinquent in payment. [*This is an admission that Gallatin, with the blessing of MRC's Director of Regulatory Affairs, abused its ability to suspend ordering to coerce actions his companies desired. Exercising the "tool" must coincide with compliance with the predicates set forth in the First ICA. Gallatin did not comply with the predicates.*] It concerns us, as it does you, that some of the declined circuits are 911 circuits, but GGRC did not create the situation that resulted in the circuits being declined. Rather, Bitwise has by no being current in its payment. The current ICA is very specific that GGRC has the right to decline circuit orders for late payment. As regards the 911 circuits, I would think that Bitwise position is more perilous than GRC's, because it is Bitwise fault that the circuits are being declined, not GRC's...

**Bottom line:** The discounted pricing was a one time promotional offer. We intend to abide by our original commitment and will render the appropriate discount, after the ICA and its associated pricing is in place. Please be mindful, that if things had progressed more quickly, that Bitwise would be enjoying this discounted pricing for these circuits on their orders... [*Mr. Murray concedes that Gallatin is backsliding on the commitments the parties mutually agreed to two months earlier and, instead, is reverting to its "original" commitment. Of course, the original commitment, in and of itself, is a fabrication.*] (notes and emphasis added.)

See Exhibit 33.

81. Mr. Miri sent the parties an e-mail 11 minutes before Mr. Murray's e-mail. (Murray's being sent at 1:10 PM on September 7, 2007 and Miri's at 12:59 PM the same day). See Exhibit 34. Mr. Miri's statement directly contradicts Mr. Murray's statement that was sent after

“checking with” Mr. Miri. The two e-mails are a mere 11 minutes apart, (Murray’s being sent at 1:10 PM on September 7, 2007 and Miri’s at 12:59 PM the same day).

82. Mr. Miri’s e-mail declares:

“I reluctantly agreed that for those four T1s that we would put them in at the tariff rate, but once the ICA was signed and approved we would adjust them back to when they were installed and issue a credit for the difference between the current rate and what the rate will be in the new ICA. **Until that happened all billing was to be paid and not withheld.**”

*Id.*

See Exhibit 33.

83. On September 18, 2006, BitWise’s counsel corresponded with Stephen Murray, seeking clarification of the total amount owed by BitWise, inclusive of disputed charges, and proposing a resolution that was consistent with Gallatin’s demands in an effort to lift the ordering suspension. See Exhibit 35.

84. On September 19, 2006, Stephen Murray replied:

I do not know the current balance owed; I will need to check with the company President. I have placed a call into Fred and will try to have this data for this afternoon's call.

*Id.*

**September Settlement Agreement: “Billing Dispute Resolution”**

85. During the afternoon’s call and soon thereafter, BitWise’s counsel and Mr. Murray discussed and agreed to a proposal intended to resolve the DS-1 billing dispute and resultant ordering suspensions once and for all. Pursuant thereto, BitWise agreed to execute the Second ICA and pay all disputed and undisputed charges then pending in exchange for Gallatin’s production of a “promo” circuit billing reconciliation (necessary to identify all future, expected credits) and “immediate” credit in the amount of \$6,000.00. See Exhibit 36. The reconciliation was critical to

BitWise because, if it was going to cut a check for all disputed and undisputed charges on the expectation that a substantial portion would be credited back at a later date, management wanted some written confirmation of the anticipated future credits, particularly given Gallatin's poor record of adhering to prior negotiated billing dispute resolutions.

86. On September 25, 2006, with ordering still suspended, Mike Shuler contacted Mr. Murray to follow-up on the "settlement" agreement. Mr. Murray replied:

"Yes, although, I am running a bit behind. I should have [the payment amount] completed tomorrow. The last I heard, your order process had resumed and during a discussion with Fred today, I learned that we will not be disturbing your order processing..."

See Exhibit 37.

87. This was not to be the case. Finally, on September 28, 2006, Mr. Murray sent BitWise a reconciliation spreadsheet. See Exhibit 38. Mr. Murray specifically noted that several price discrepancies existed, but that these disputed amounts could be "ferreted out" later.<sup>8</sup> *Id.* At Stephen Murray's insistence, BitWise agreed to Gallatin's request to refrain from formalizing the September billing dispute resolution in a written Settlement Agreement:

If this is OK, please advise and *I will set the wheels in motion.* **I would prefer to avoid a General release and settlement, as I see this as a minor billing adjustment, and to go the settlement route, will require some sign offs...** (emphasis added).

*Id.*

88. On September 29, 2007, immediately after receiving these undisputed totals, Mike Shuler replied:

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<sup>8</sup> In support of its efforts to terminate BitWise's ICA, Gallatin has claimed that BitWise should have and could have paid "undisputed" amounts and that it had no excuse for not making payments on undisputed amounts. However, as evidenced by the fact it took Stephen Murray three days to prepare a "promo" credit and billing reconciliation spreadsheet in which: (1) Murray concedes he could not identify the precise amounts owed, (2) fails to include disputed late fees, and (3) in the reconciliation), Gallatin has an easier time .

I owe Gallatin \$9,387.43, which would be correct pending additional refunding of interest charges on the \$5,922.37. For the sake of speed I will take a cashiers check for \$9,387.43 immediately to Gallatin to wipe out our balance and reinstate ordering. Any additional credits can be applied to our next bill. Please let me know if I am misinterpreting your spread sheet and the result of paying this remaining balance of \$9,387.43.

*Id.*

89. Despite his explicit request for confirmation “[i]f this is OK,” Mr. Murray never responded to Mike Shuler’s question. Nevertheless, in haste to re-establish ordering privileges, BitWise paid the \$9,387.43 amount, once again reducing the undisputed amount BitWise owed to Gallatin to zero. See Exhibit 12.

#### **Gallatin’s Failure to Implement September Billing Dispute Resolution**

90. Stephen Murray apparently had a family emergency at the beginning of October and was on an extended leave of absence from the company.<sup>9</sup> By that time, Mr. Murray had become BitWise’s primary contact for all escalated billing disputes. Having not yet finalized the implementation of the late September billing dispute settlement agreement (which at Gallatin’s insistence was not memorialized in contract), Mr. Murray’s absence frustrated BitWise’s ability to settle up with Gallatin by paying all undisputed charges existing during the applicable time period.

91. BitWise could not resolve any billing problems with Gallatin during Mr. Murray’s extended absence. With Mr. Murray on leave, no one else at Gallatin responded to or assisted BitWise in the resolution of routine billing disputes and no action was taken to implement the dispute resolution agreement that had been reached with Mr. Murray. Throughout Mr. Murray’s absence, BitWise continued to contact other Gallatin employees, including Karen Lewis, in search of billing clarifications. See Exhibit 39 (addressing a billing dispute that was completely unrelated to

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<sup>9</sup> As explained in the following paragraphs, BitWise did not become aware of Mr. Murray’s leave of absence until mid-October. See Exhibit 40.

the DS-1 dispute, but instead had to do with a non-existent DS-1 circuit and inaccurate charges for a mux).

92. But BitWise did not receive any responses or resolutions from anyone at Gallatin.

93. On October 17, 2006, Gallatin finally contacted BitWise regarding Mr. Murray's absence. David Rudd advised Mike Shuler that "[Stephen Murray] promised to care for some issues for you. Because of a continuing medical situation in his family he will be unavailable the rest of this week. When he returns he will contact you." See Exhibit 40. Responding to the news of Mr. Murray's leave of absence, Mike Shuler advised David Rudd as follows:

That is not an issue for me as long as you can guarantee that our ordering will not be suspended while we wait for him. In a few days our bill is due and we are not 100% sure what to pay and have been waiting on a response from him.

*Id.*

94. David Rudd responded to Mike Shuler's request for assurances and guidance, as follows: "Gallatin will agree to not suspend working orders if you will pay the undisputed amount. I am told that the total amount owed to Gallatin is about 18K (including disputed amounts and other issues Steve was addressing.) If you make payment in the amount of 8K Gallatin will not suspend working orders. Is this agreeable to you?" See Exhibit 41. Mike Shuler agreed to the \$8,000.00 proposal, concluding it was "fair and reasonable until Steve returns." *Id.* BitWise posted payment in the amount of \$8,000.00 on October 19, 2006. See Exhibit 12.

95. As of November 14, 2006, subsequent to the parties' execution of the Second ICA, BitWise had yet to receive an invoice correctly reflecting the DS-1 charges, nor had it received any clarification as to when credits for the "promo" circuits would be issued or what invoiced charges these credits would apply to.

96. Instead of following through with the late September “settlement” agreement (which, at Gallatin’s insistence was not formalized as a “Release”), addressing the long-standing billing disputes, and making an effort to apply the “promo” credits immediately following the execution of the Second ICA, Gallatin acted as if the September events, negotiated agreements, and promises didn’t even exist. Gallatin continued to send monthly Disconnect Notices and continued to insist that BitWise pay the full, invoiced charges.

97. In mid-November, Stephen Murray finally returned to the office and began to address the billing disputes. See Exhibit 42. He readily admitted to being tardy in responding to BitWise and conceded he was unaware of whether any aspect of the parties’ resolution of the “minor billing issue” back in late September had been implemented in his absence. *Id.* He agreed to look into the matter and provide BitWise with the correct amount owed. *Id.* Mr. Shuler specifically advised Mr. Murray that he had not yet paid the October invoice, but was prepared to do so once Mr. Murray told him how much to pay. *Id.*

98. On November 29, 2006, Mr. Murray sent BitWise a “revised adjustment” of the promo credits, containing the “latest revision.” See Exhibit 43. Mike Shuler again asked: How much do I need to pay? *Id.* Mr. Murray didn’t answer, but instead questioned Karen Lewis. *Id.* BitWise did not get an answer to its question.

99. On December 12, 2006, BitWise sent Gallatin its first request for payment of reciprocal compensation, consistent with the terms of the Second ICA, executed in September. See Exhibit 44. On December 19, 2006, BitWise followed its request for payment with an e-mail containing invoices and supporting data (contained in Excel Spreadsheets). *Id.* Gallatin did not respond to the invoices.

100. Directing attention back to Gallatin's invoices, which had not been addressed by Mr. Murray since bucking the issue to Karen Lewis back on November 30, 2006, Mike Shuler reached out to Mr. Murray on December 18, 2006, asking his question once again and offering to provide assistance, if necessary, to determine the amount BitWise was obligated to pay under the parties' September "billing dispute resolution." See Exhibit 43. This time Stephen Murray replied:

I do know that the billing system is not quite "up to speed." However, I did send it the adjustment request (internal formality) to senior management. I will check and get back to you...

*Id.*

101. In this correspondence, Mr. Murray confirmed that since BitWise was prepared to make payment at any time, all late fees and penalties for non-payment would be waived. *Id.*

102. Yet despite these assurances from Gallatin's in-house legal counsel, its designated representative for handling of escalated billing disputes, and the person responsible for implementing the "billing dispute resolution" of September 2006, Gallatin continued on its normal course of billing all charges, disputed and undisputed, and including late fees in all invoices, and automatically sending out Disconnect Notices each month.

103. Gallatin's next contact with BitWise was not until January 5, 2007, when Karen Lewis sent Mike Shuler a generic, "estimated" breakout of charges, devoid of any separation of disputed and undisputed charges and no indication that BitWise's dispute regarding late fees was being addressed. See Exhibit 45. Moreover, no indication was given as to when Gallatin would actually "apply" the estimated \$10,410.37 adjustment. *Id.* This, despite the fact the parties' Second ICA was executed in September and approved by the ICC in December.

104. On the same day, Mike Shuler inquired as to the status of the reciprocal compensation invoices that were delivered in December. *Id.* Stephen Murray acknowledged receipt

of the December invoices and even indicated that he had requested traffic reports from Gallatin for purposes of comparing the traffic exchanged between the two companies. *Id.*

### January Ordering Suspension

105. The very next week, on January 15, 2007, Gallatin once again suspended BitWise's ordering privileges without advance notice. See Exhibit 47. Mike Shuler immediately contacted Stephen Murray alerting him of the freeze, informing him that no advance notice was provided, and reminding him that Gallatin had yet to send the billing/payment clarification that had been promised as part of the September "billing dispute resolution":

"We have already expressed our willingness to pay Gallatin several times and have already paid \$9,000 [sic] previously in a good faith payment without a corrected bill and already stated that we were not going to pay any more until this was straightened out. It is not our fault that Gallatin has taken an excessive amount of time to correct their own bill and I see no reason as to why we should be penalized for it.

I am requesting that Gallatin release the ordering suspension immediately. If Gallatin would like us to pay them I would suggest sending us a proper bill along with acknowledgement and detail of the credits so that we may verify them ourselves. Within 48 hours of receipt of the proper documentation from Gallatin, BitWise will pay Gallatin all past due amounts."

*Id.*

106. On January 16, 2007, Gallatin applied a credit to BitWise's account. See Exhibit 50. Without the aid of a spreadsheet detailing the credits (promised by Stephen Murray at the time the billing dispute was purportedly resolved in late September 2006), BitWise conducted an internal analysis and identified estimated "late fees" that Gallatin neglected to include in the December credit. BitWise determined that Gallatin still owed it credits of over \$3,000.00 for misapplied late fees.

107. By now, BitWise had started constructing its own fiber network in Pekin, Illinois. BitWise embarked on its facilities-build to free itself of Gallatin's constant suspensions,

poor facilities, and overall unreliability as a wholesale services and facilities provider. Nevertheless, BitWise still depended on Gallatin as an incumbent provider to lease UNEs for customers to which BitWise's build-out had not yet reached. Therefore, Gallatin's continued suspension of BitWise's ordering resulted in a loss of revenue and reputation among potential and existing customers. See Exhibit 48. BitWise has documented evidence that several potential customers, mostly Gallatin customers, were lost as a result of Gallatin's surprise suspensions. See Shuler Declaration and Attachments.

108. Despite Gallatin's continued failure to fully implement the September "billing dispute resolution," and in the face of BitWise counsel's explanation to Stephen Murray and Fred Miri that their action in suspending ordering without thirty (30) days' advance notice to both BitWise and its counsel violated the parties' ICA, Fred Miri responded by threatening to demand a deposit. See Exhibit 49.

109. BitWise's counsel first e-mailed, then engaged Stephen Murray in negotiations to avoid any deposit demands. *Id*

110. On January 19, 2007, BitWise made three "good faith" payments in the amount of \$8,000.00 each,<sup>10</sup> specifically conditioning payment on finally obtaining a clarification of the invoices and credits. *Id* With the DS-1 issue believed to be resolved but for the late fees, BitWise hoped that, upon receiving this amount, Gallatin would cease from threatening to terminate service and refrain from demanding a deposit request.

111. Following BitWise's \$24,000.00 payment, ordering privileges were restored. See Exhibit 50. Gallatin still did not provide a breakdown of the DS-1 credits, nor did it send any

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<sup>10</sup> Mike Shuler based the "good faith" estimate on the amount previously deemed acceptable to Gallatin's outside counsel, David Rudd, back in mid-October 2006.

clarification as to what any outstanding balances applied at this point in time. Because of Gallatin's continued refusal to provide the promised (and necessary) clarification of the actual, undisputed amount due, it was not possible for BitWise to ascertain how much it owed, particularly with regard to disputed late fees. See Exhibit 51.

112. Therefore, BitWise contacted Gallatin on January 29, 2007. Three days later, on February 1, 2007, Karen Lewis responded:

\$43,705.55 was your balance 12/25/06. An adjustment was given for \$10,410.37 on 1/16/07. This brought your balance to \$33,295.18. Three payments were made totaling \$24,000.00 on 1/19/07 this brought your balance to \$9,295.18. Current until your new invoice printed on 1/25/07 which now makes the \$9,295.18 past due. Your invoice prints on the 25th of every month. When that invoice prints any outstanding balance becomes **past due** and generates the disconnect notice.

*Id.*

113. On March 7, 2007, Gallatin invoked Section 5 of the Interconnection Agreement. Gallatin's basis for this request was cited as BitWise's long history of late payment.<sup>11</sup>

114. In an attempt to resolve Gallatin's demand, on March 8, 2007, Mike Shuler sent Karen Lewis another e-mail to summarize the lingering billing problems and offered a reasonable means of resolving them once and for all:

I have asked several times for a breakout of the credit of \$10,410.37 that Gallatin applied to our account on the Jan 25th invoice numbered 4019582. It states that it was applied to only invoice 3912892. However, as I've explained, I have no way of knowing what invoices this credit is truly for and what line items within each invoice the credit is applied to. This is totally inconsistent with the billing procedures set forth in our Interconnection Agreement and probably a violation of the FCC's Truth-in-Billing regulations. Without an "itemized" breakdown not only of invoiced

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<sup>11</sup> Attached to its Demand for Assurances letter, see Exhibit 56, was a spreadsheet prepared by Gallatin that was purposely designed to inflate billing amounts and obfuscate the nature of the disputed amounts. True to form, Gallatin did not separate out "disputed" from "undisputed" amounts, grouped all properly disputed amounts - such as the collocation charges and the DS-1 disputes - together with monthly charges, and maliciously **listed the invoice issued date as the payment due date**. All of these techniques painted a picture so false that relying on this spreadsheet to substantiate billing claims was and is impossible.

charges, but credits as well, BitWise is harmed. It also makes it virtually impossible on a go-forward basis to deal with current or future invoiced charges which may or may not be subject to dispute and credit. Basically, I must be provided the ability to maintain and audit my books and Gallatin is denying me this fundamental ability. See section 8.1 of our interconnection agreement.

Bottom line is that, without the detail, I can't agree or confirm that the credit applied is accurate, nor can I confirm that our current balance or the interest charges applied to it each month are valid. I am very willing to sit down together in Pekin and go over all of our bills line by line until we both can come to an agreement on what we truly owe and settle this once and for all.

See Exhibit 52.

115. Per Mike Shuler's request Karen Lewis agreed to meet with him the following week. Prior to the meeting, and to continue to maintain good faith with Gallatin, BitWise made another \$8,000 payment on March 8<sup>th</sup> to prevent another ordering suspension before the parties met and discussed the remaining disputed amounts. See Exhibit 53.

#### March Ordering Suspension

116. Even after receiving BitWise's payment, and without required notice, Gallatin suspended ordering. *Id.* This ordering suspension remains in effect as of the filing of this complaint.

117. Finally, on March 20, 2007, almost a year from the day BitWise first ordered DS-1s and exactly three (3) months after the Second ICA became effective, Gallatin finally provided BitWise with documentation explaining the basis for the credits applied to resolve the DS-1 dispute. See Exhibit 54. Almost immediately upon receiving the DS-1 billing clarification it sought for over four months, on March 22, 2007, BitWise paid all "known" non-disputed amounts then owing -- \$10,760.51. Not only did this payment bring BitWise current, according to BitWise's records it resulted in an undisputed charge credit balance of \$1,208.23. See Exhibit 12.

118. Gallatin maintained the March ordering suspension for over three (3) months, until approximately June 28, 2007.

### Gallatin's Loop Provisioning Cap and other Anti-competitive Conduct

119. In late August 2006, as negotiations on the Second ICA were progressing, BitWise learned that Gallatin had placed a cap on provisioning loops ordered by CLECs and taken other actions intended to discriminate against and harm BitWise. See Exhibit 55. BitWise became aware of the following Gallatin policies and conduct:

- Imposition of a cap on provisioning CLEC loop orders requiring truck rolls; cap of two (2) loops per CLEC, per day, up to a maximum of five (5);
- Purposefully delaying number porting to BitWise to provide Gallatin a longer “win back” window of opportunity;
- Imposing a policy to provision “good clean” loops for NTS, another Gallatin CLEC customer, and ensure BitWise is provisioned lesser quality loops; and
- Intentionally delaying and dropping trouble tickets on DS-1s

*Id.*

120. Specific details and documented experiences which support the existence of and damages caused by these policies and actions are set forth in the Shuler Declaration and Attachments.

### Default; Threatened Cancellation of ICA and Termination of Services

121. Despite the credit balance on undisputed charges, Gallatin maintained the ordering suspension. Then, on May 9, 2007, Gallatin moved to exercise the Default clause of the Second ICA, Section 11, through written notice advising BitWise of its intent to cancel the Second ICA and terminate the provision of services there under. See Exhibit 56, May 9, 2007 from Gallatin to BitWise re: Default: ICA Cancellation (“Default Letter”).

122. In the Default Letter, Gallatin supports the threatened cancellation and termination with demonstrably false statements, such as: “There is an egregious and long history of late payment coupled with consistently large outstanding balances since January 2006...”; “flagrant

poor payment history...”; “Prior efforts to ‘work with’ BitWise to collect past due and outstanding balances have required substantial resources of GRC... these efforts have had ‘mixed’ results.” *Id.*

123. BitWise’s only “history” of late payment involves “disputed charges.” However, per the First and Second ICAs, Gallatin is forbidden from treating disputed charges as due and owing. Wherefore, Gallatin cannot use the fact of non-payment of “disputed charges” against BitWise for purposes such as demanding assurances and default. The fact that Gallatin did not even maintain a trail of clear and unambiguous internal records of the disputed charges is telling.

124. Gallatin’s statement about “prior efforts to ‘work with’ BitWise to collect past due and outstanding balances” ignores that the past due amounts were disputed charges or arose from a complicated and lengthy billing dispute. The statement also ignores that BitWise was vigilant in trying to get payment issues resolved whereas Gallatin did very little to matriculate resolution of the billing disputes, even when agreements had been reached with the Parties’ designated representatives. Instead, Gallatin allowed its billing system to automatically generate a monthly “Disconnection Notice,” as if BitWise was a run-of-the-mill retail customer.

125. Gallatin’s efforts to collect disputed amounts prompted BitWise to follow-up on the reciprocal compensation invoices it sent to Gallatin in December 2006. After checking its records, BitWise confirmed that, from December through May, Gallatin neither paid the invoiced reciprocal compensation charges nor did it provide BitWise with notice of any billing disputes regarding the December invoices.

126. On May 10, 2007, BitWise re-delivered reciprocal compensations invoices and included additional invoices for intervening months. It did so in the identical format and to the very same Gallatin employee they had been previously delivered in December 2006. See Exhibit 57.

127. On May 18, 2007, over five (5) months after receiving invoices and supporting data, Gallatin enlisted outside counsel, Joseph Murphy, to dispute BitWise's contractual rights. See Exhibit 58, May 18, 2007 letter from Joseph Murphy to Jonathan Marashlian.

128. On May 29, 2007, BitWise responded and explained that Gallatin's counsel was creating excuses for non-payment that could not be substantiated either by the language set forth in the four corners of the Second ICA or credible and admissible parole evidence. See Exhibit 59, May 29, 2007 letter from Jonathan Marashlian to Joseph Murphy.

129. Soon thereafter, at a mediation attended by several ICC staff members, Gallatin's counsel admitted to basing his argument on an earlier version of the parties' Second ICA, not the ICA that was approved by the ICC. In a June 4, 2007 memorandum, Gallatin conceded that it does, indeed, have a contractual obligation to pay reciprocal compensation on all traffic exchanged between the carriers' networks up to a 3:1 ratio, including ISP Bound traffic. See Exhibit 60, June 4, 2007 memorandum from Joseph Murphy to Commission Staff at pg. 2.

130. Despite admitting the Second ICA requires compensation be paid, Gallatin still refused to pay the invoices, claiming instead that it was analyzing them "because the volume of traffic originated by BitWise appears excessive in relation to its customer base." *Id*

131. In subsequent correspondence with Gallatin and its counsel, BitWise essentially tried to explain that customer base size is not a very good indicator of traffic expectations and offered suggestions on how it could verify the traffic. See Exhibit 61, June 8, 2007 e-mail from Jonathan Marashlian to Joseph Murphy and Stephen Murray.

132. Even with BitWise's offer of assistance, to this day Gallatin has failed to pay the reciprocal compensation invoices.

133. To simplify and sum up the key events of the past 14 months:

- 133.1 BitWise orders DS-1 circuits at prices set forth in the parties' ICA;<sup>12</sup>
- 133.2 Gallatin refuses to provision the DS-1s at the rates established in the ICA;
- 133.3 Gallatin proposes a promotional offering that BitWise accepts, not knowing that Gallatin had attached conditions to and limitations on the offering;
- 133.4 Both before and after BitWise learns of the conditions and limitations, the charges are disputed because: (a) the billed charges were not what Mike Shuler agreed to; and (b) no sane business would agree to pay two, three or four times the amount legitimately and lawfully owed based on promises of future credits, particularly when those future credits, by Gallatin's own admission, were a "reward" for "matriculating" a new Interconnection Agreement;
- 133.5 Instead of acknowledging the DS-1 dispute and assigning a designated representative to deal with it, Gallatin simply ignored it. By ignoring and failing to properly treat the dispute, Gallatin continued to act as if all of its invoiced charges were due and owing;
- 133.6 Almost simultaneously (and out of the blue) Gallatin brings up the issue of a new Interconnection Agreement;
- 133.7 Gallatin suspends ordering and refuses to deal with the DS-1 dispute until BitWise pays 100% of all invoiced charges and agrees to ICA negotiations on an expedited basis.;

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<sup>12</sup> The First ICA between BitWise and Gallatin is the same arbitrated ICA between Gallatin and Essex Telecom that was approved by the ICC in 2000.

133.8 Gallatin continues to ignore billing disputes and uses the existence of unpaid balances on BitWise's account (comprised largely of disputed DS-1 charges) to justify two additional ordering suspensions;

133.9 In the midst of all this, BitWise negotiates a Second ICA which requires Gallatin to pay reciprocal compensation on ISP Bound traffic. When BitWise tries to bill for reciprocal compensation, Gallatin feigns ignorance;

133.10 Shortly after invoices for reciprocal compensation were sent, however, Gallatin issues a demand for assurances, setting in motion the march towards the threatened cancellation of the ICA and termination of services, scheduled for June 25, 2007.

134. Between May 21, 2007 and June 22, 2007, BitWise, Gallatin and MRC (and, on at least one occasion, CenturyTel) participated in ICC staff supervised mediation in an effort to avoid cancellation of the Second ICA and termination of services on June 25, 2007.

135. In the mediations, Gallatin offered BitWise an opportunity to avoid termination of services if it agreed to deliver an onerous Letter of Credit or, in the alternative, enter into negotiations of a Third Interconnection Agreement ("Third ICA"). By the Respondents' admissions, the proposed Third ICA was built on the CenturyTel model agreement. At the time it was proffered, the Respondents assured BitWise the Third ICA contained the exact same rates as the Second ICA. But when BitWise reviewed the terms of the proposed Third ICA, it determined that the agreement required both parties to exchange all traffic exclusively on a bill and keep basis. Agreeing to the Third ICA would have expunged BitWise's rights in the Second ICA to receive reciprocal compensation on ISP Bound traffic up to the 3:1 ratio, thereby depriving BitWise of compensation payments for the Second ICA's remaining 18-month term.

136. On June 18, 2007, BitWise provided Gallatin with notice of its intent to file a formal complaint. See Exhibit 3.

137. Through its actions and inactions over the course of the past two-and-a-half years, Gallatin has pushed BitWise to the limits of reasonableness. So much so that BitWise's management was forced to conclude that the only way it could compete against Gallatin on a level playing field was to overbuild Gallatin's network throughout Pekin, Illinois and become entirely independent of Gallatin's wholesale services and facilities. See Exhibit 62, September 7, 2007 e-mail from Michael Shuler to Jonathan Marashlian ("FYI: My actual response to this is hiring 2 more construction employees and calling in a bunch of JULIE locates and starting my construction in 3 days after the locates are good. I'm sick of these bastards. If it's a battle they want then it's a battle they will get. GPON will beat shitty copper any day. Perhaps this is what I needed to get me off my lazy butt and truly take over a city vs... slowly picking away at it.").

138. However, BitWise can't build fast enough to avoid the irreparable harm that would be caused if Gallatin had followed through with its threatened termination of services on June 25, 2007. To avoid the potentially devastating consequences of a termination, BitWise proffered Gallatin a Letter of Credit that provides more than adequate assurances, even though none are warranted at all. See Exhibit 63.

139. Having taken steps to protect itself and the public, BitWise now files this verified amended complaint to set the record straight and obtain the recourse needed to compensate it for the damages caused by Gallatin and MRC.

#### COUNT 1

##### **Breaches of Sections 5, 11 and 17 of the Second Interconnection Agreement And Violation of Section 13-514(8) of the Illinois Public Utilities Act**

140. Bitwise incorporates and realleges paragraphs 1 - 139 above, as if fully set forth herein.

141. Gallatin's exercise of Section 5 of the parties' Second ICA, Assurance of Payment, breaches the ICA, as there is no reasonable basis for Gallatin to require assurances of BitWise's ability to pay "undisputed charges." The only charges BitWise is required to pay pursuant to Section 21.2 of the First ICA and Section 8.3 of the Second ICA, are "undisputed" charges, as follows:

21.2 If any portion of an amount due to a Party ("the Billing Party") under this Agreement is subject to a bona fide dispute between the Parties, the Party billed (the "Non-Paying Party") shall within thirty (30) days of its receipt of the invoice containing such disputed amount give notice to the Billing Party of the amounts it disputes ("Disputed Amounts") and include in such notice the specific details and reasons for disputing each item. The Non-Paying Party shall pay when due all undisputed amounts to the Billing party. The balance of the Disputed Amount shall thereafter be paid with appropriate late charges, if applicable, upon final determination of such dispute.

See Exhibit 1, First ICA at Section 21.2.

8.3 If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party shall give notice to the billing Party of the amounts it disputes ("Disputed Amounts"), within ninety (90) days of the billing date and include in such notice the specific details and reasons for disputing each item. A Party may also dispute prospectively with a single notice a class of charges that it disputes. Notice of a dispute may be given by a Party at any time, either before or after an amount is paid (but within 90 days), and a Party's payment of an amount shall not constitute a waiver of such Party's right to subsequently dispute its obligations to pay such amount or to seek a refund of any amount paid. The billed Party shall pay by the Due Date all undisputed amounts... "

See Exhibit 2, Second ICA at Section 8.3.

142. When all facts are considered and applied in proper context to each monthly invoice cycle, including bona fide disputes, blanket disputes of unauthorized or erroneous charges, and subsequent payment arrangements or dispute resolution agreements with Gallatin's management and legal counsel/designated representatives, there can be but one conclusion: BitWise made all reasonable and lawfully required efforts to remain current on its payment of undisputed charges throughout its wholesale business relationship with Gallatin; and it did so in a commercially

reasonable manner and in compliance with its obligations under contract. The evidence overwhelmingly disproves Gallatin's claims that BitWise has:

- “[A] history of 14 consecutive late payments”; See Exhibit 56, May 9, 2007 Gallatin letter to BitWise re: Default: ICA Cancellation at March 7, 2007 Gallatin letter to BitWise demanding Assurance of Payment pursuant to Section 5 of the ICA;
- “[C]onsistent late payment history”; *Id.*
- [A]n egregious and long history of late payment coupled with consistently large outstanding balances since January 2006.” *Id.* at May 9<sup>th</sup> Default letter;
- “[H]igh outstanding balances have been as high as approximately \$40,000...”; *Id.*
- “[F]lagrant poor payment history and high outstanding balances”; *Id.*
- “[C]ontinuing tardiness and default on its payment obligations”; See Exhibit 58, May 18, 2007 letter from Joseph Meyer to Jonathan S. Marashlian;
- “[T]here is a clear and unambiguous ‘basis in fact’ for Gallatin’s demand, which is the result of BitWise’s abysmal payment history... This payment history and BitWise’s continued failure to keep its accounts current is precisely why Gallatin cannot and will not withdraw its deposit demand.” *Id.*

143. Each of these assertions is unsubstantiated and based on Gallatin’s misleading and incomplete internal records.

144. To the extent BitWise’s account fell into arrears with regard to undisputed amounts, the cause of such late payments was caused by Gallatin’s breaches of the parties’ ICAs, including its (i) failure to properly and timely cure disputes, (ii) failure to recognize disputed charges in either its invoices or internal billing records, (iii) failure to adhere to payment arrangements and other negotiated agreements with management and Gallatin’s counsel/designated representatives, (iv) untimely responses to BitWise’s inquiries and concerns regarding questionable and disputed charges, and (v) other factors under Gallatin’s exclusive control.

145. Gallatin ignores its own breaches of the ICA in bad faith to make false claims against BitWise and fabricate a situation that, on the surface, might support its exercise of Section 5 of the Second ICA.

146. Gallatin's multiple breaches render its March 7, 2007 Demand for Assurance unreasonable, unjustified, and a violation of Section 5 of the Second ICA.

147. When confronted with the explanation for BitWise's refusal to comply with the March 7<sup>th</sup> Demand for Assurances letter and BitWise counsel's request that the demand be withdrawn, Gallatin's counsel stated that BitWise's "payment history and [its] continued failure to keep its accounts current is precisely why Gallatin cannot and will not withdraw its deposit demand." See Exhibit 58.

148. Because there was neither a chronically delinquent payment history nor any "failure to keep its accounts current" nor any other evidence that BitWise presented a credit risk at the time Gallatin exercised Section 5, its Demand for Assurances was groundless and made in bad faith. Hence, Gallatin's exercising of Section 5 is in breach of the Second ICA and its duty to deal in good faith.

149. On May 9, 2007, Gallatin began the notice process needed to exercise the Default provision, Section 11, of the Second ICA.

150. Gallatin scheduled the cancellation of the Second ICA and termination of services provided there under for June 25, 2007.

151. On June 22, 2007, out of an abundance of caution and to ensure no harm was caused either to itself or the public, BitWise satisfied Gallatin's demand for assurances by delivering an irrevocable Letter of Credit in the requested amount of \$19,444.00. See Exhibit 63, Letter of Credit.

152. By exercising Section 5 of the Second ICA without adequate factual or reasonable justification and by unreasonably threatening cancellation and termination pursuant to Section 11 without foundation or just cause, Gallatin breached the terms of the parties' Second ICA.

153. Gallatin's breaches imposed substantial costs on BitWise. In addition to substantial legal fees incurred in responding to and defending against Gallatin's false claims, BitWise's management and employees were also forced to expend valuable time and financial resources over several months in an effort to ensure essential services were not cancelled. Gallatin's breaches have impeded BitWise's ability to make telecommunications services available to consumers, in violation of 13-514(8).

154. WHEREFORE, BitWise Communications, Inc. respectfully requests that the Commission enter judgment in its favor and against Gallatin River Communications, LLC and Madison River Communications Corporation, and that the Commission:

- Declare Gallatin's Demand for Assurances a willful and deliberate breach of Section 5 of the Second ICA;
- Declare Gallatin's threatened exercise and exercise of the Default provisions a willful and deliberate breach of Section 11 of the Second ICA;
- Declare Gallatin in breach of Section 17 of the Second ICA for its failure to act in good faith in its performance of the agreement;
- Declare Gallatin's above enumerated breaches of the Second ICA to be violations of 13-514(8);
- Order Gallatin and MRC to reimburse BitWise for all expenses, legal fees and lost revenue resulting from Gallatin's breaches;
- Order Gallatin and MRC to pay all costs and attorney fees associated with investigating and bringing this action; and
- Grant BitWise such other relief as the Commission shall deem appropriate.