

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

BitWise Communications, Inc.)	
)	
vs.)	No. 09-0052
)	
AT&T)	
)	
Complaint as to over-billing and threatened)	
termination of service.)	

ILLINOIS BELL TELEPHONE COMPANY'S POST-HEARING REPLY BRIEF

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Now comes Illinois Bell Telephone Company (“IBT”), by and through its counsel, and for its Post-Hearing Reply Brief states as follows:

I. INTRODUCTION

IBT largely anticipated the arguments that BitWise Communications, Inc. (“BitWise”) made in its Initial Brief and has therefore already addressed most of them in detail. As was shown in the opening brief and is further discussed below, BitWise’s view of the disputes between the parties is misguided. BitWise pays scant attention to the factual record developed here. It also presses factually incorrect and irrelevant arguments and mischaracterizes the law. Worse yet, since BitWise does not have either the facts or the law on its side, it resorts to baseless allegations of malfeasance by IBT. That BitWise has had to turn to such arguments demonstrates the weakness of its position on the merits.

II. ARGUMENT

A. The Commission Should Reject BitWise’s Arguments To The Extent BitWise Failed To Provide Record Citations.

As an initial matter, BitWise’s initial brief demonstrates a tenuous connection to the record. Because of BitWise’s failure to provide record citations in the brief, and its repeated reference to “facts” that are either contradicted by the record or nowhere found in the record, the

Commission should disregard those portions of the brief for which BitWise provides no citations or contradicts the record.

Overall, BitWise's brief is striking in its lack of citations to the lengthy record developed here. The "fact" section of the brief (BitWise Init. Br. at 2-7) – which essentially summarizes Michael Shuler's written testimony but ignores the testimony of all other witnesses and any live testimony from the evidentiary hearing – contains only five citations specifying where certain information can be found in Mr. Shuler's testimony. *See id.* at 4, 5 (two citations), 7 (two citations). This lack of citation is even more glaring in the "argument" section (*id.* at 8-16), which includes only three citations to the record (*id.* at 12, 13, 15), two of which refer to statements by attorneys (*id.* at 12, 13), rather than to testimony by a witness. It is difficult to respond to BitWise's arguments when the factual support for those arguments is undisclosed.

In addition, the brief includes numerous factual assertions that were not the subject of testimony or otherwise supported by documents admitted as evidence. Such non-record assertions are particularly plentiful in BitWise's discussion of the 911-related charges in the Peoria Local Access Transport Area ("LATA"), where BitWise states that 1) IBT "chose to put" the E911 selective router in the Peoria Bluff central office (BitWise Init. Br. at 13); 2) interconnected VoIP service providers can connect to a selective router through third-party E911 aggregators (*id.* at 14); 3) "rules in other states" allow 911 connectivity at a DS0 level (*id.*); 4) "most Verizon agreements" have different provisions regarding 911 interconnection (*id.*); and 5) 93 percent of the ports on the Peoria multiplexer are used for local interconnection. *Id.* BitWise provides no record citations for any of these statements – an understandable omission, given that the record contains no evidence supporting them. Similarly, BitWise asserts, without any possible record support, that IBT and Legacy AT&T had "secret arrangements" regarding the

treatment of their respective central offices in downtown Peoria as separate buildings. *Id.* at 12, In addition, BitWise’s reliance on IBT Tariff 21, section 5, in stating its position on the Champaign BAN (*id.* at 15) is inappropriate, since that portion of the IBT access tariff is not part of the record.¹

Finally, BitWise’s brief contains a number of statements that are contradicted by the record. For example, BitWise asserts that the parties’ interconnection agreement (“ICA”) was made part of the record on April 13, 2009. BitWise Init. Br. at 2. This is incorrect. Although it is true that Staff filed a motion on April 13 to have the Commission take administrative notice of the ICA, the Administrative Law Judge (“ALJ”) denied that motion. Tr. at 49. Instead, the ALJ ruled that “[e]ach party is responsible to put in those pages of the Interconnection Agreement that it is either using for its case or in rebuttal of another party’s case.” Tr. at 42. The brief also asserts that, if IBT terminated service to BitWise on the four accounts at issue, local businesses using BitWise’s services would not be able to make or receive calls. BitWise Init. Br. at 3. This assertion is highly questionable, given Mr. Shuler’s testimony on cross-examination that BitWise had no retail end users in the Quincy, Springfield and Champaign LATAs (Tr. at 160-61, 168-69, 169-70), and that the majority of the traffic in Peoria consists of internet traffic, not voice calls. Tr. at 148; BitWise Ex. 2.0 (Shuler Rebuttal), lines 39-41. The brief then asserts that “most” of the amount BitWise allegedly owes IBT is for services billed to the Peoria Billing Account Number (“BAN”). BitWise Init. Br. at 4. In fact, as of March 2009, the unpaid charges for the Peoria BAN were approximately \$158,000, compared to a total of \$216,000 billed on the other three BANs at issue. *See* AT&T Illinois Ex. 3.0 (Ellis Direct), lines 266-74. Finally, the

¹ BitWise could have included this tariff material as part of a late-filed exhibit (Tr. at 47-48), but it did not do so.

brief asserts that the Legacy AT&T Peoria central office had to have a CLLI² code different than the one for the IBT Peoria central office to be a separate location for billing purposes. *See* BitWise Init. Br. at 5-6, 11-12. This assertion ignores the evidence that CLLI codes are controlled by an industry group and are used primarily to inventory equipment (AT&T Illinois Ex. 2.2 (Neinast Addit.), lines 161-62; Tr. at 314 (Neinast)), and that the switch in the Legacy AT&T Peoria central office was installed and assigned a CLLI code prior to divestiture. AT&T Illinois Ex. 2.2 (Neinast Addit.), lines 165-69. The accumulation of such incorrect statements raises doubts about the overall credibility of BitWise’s submission.

These citation problems are so extensive as to constitute a violation of the Commission’s rules of practice. Section 200.800 requires that factual statements in briefs be supported by citation to the record. 83 Ill. Admin. Code § 200.800(a). “Strict adherence to the requirement of citing relevant pages of the record is necessary to expedite and facilitate the administration of justice,” and courts can reject a party’s argument simply because the party has failed to provide record support for it. *Maun v. Department of Professional Regulation*, 299 Ill. App. 3d 388, 399, 701 N.E.2d 791, 799 (4th Dist. 1998); *see also Avery v. Sabbia*, 301 Ill. App. 3d 839, 844, 704 N.E.2d 750, 753 (1st Dist. 1998).

BitWise’s failure to provide record support for most of its brief, its reliance on non-record information, and its misstatements about the contents of the record violate both the letter and the spirit of the Commission’s rules of practice. As a result, the Commission should disregard any of BitWise’s factual assertions that are not supported by or are contradicted by the record. In addition, the Commission should disregard any arguments based on those unsupported or incorrect assertions.

² “CLLI” is the abbreviation for Common Language Location Identifier. AT&T Illinois Ex. 2.2 (Neinast Addit.), lines 161-62.

B. IBT Properly Charged BitWise A Local Distribution Channel Charge and a Cross-Connect Charge In Connection With The Special Access Service IBT Provided To BitWise in the Peoria LATA To Enable BitWise To Pass Internet Traffic To Legacy AT&T.

1. BitWise is incorrect that the services at issue were not properly ordered out of IBT's Access tariff as special access.

As IBT foreshadowed in its Initial Brief, BitWise's arguments with respect to the internet dispute in the Peoria LATA are based on a fundamental misunderstanding of the facts and the law. There are at least seven ways in which BitWise has misstated the facts or the law, or both.

First, BitWise is incorrect – as a matter of both fact and law – in its repeated assertion that this dispute concerns a collocation-to-collocation connection. *See, e.g.*, BitWise Init. Br. at 4 (alleging BitWise ordered a cross-connect between it and a Legacy AT&T collocation); *id.* at 8 (BitWise “order[ed] what it assumed to be a collocator-to-collocator cross-connection”). The undisputed evidence is that Legacy AT&T is not, nor was it ever during the relevant time, collocated in the IBT central office. AT&T Illinois Ex. 2.0 (Neinast Direct), lines 177-195; AT&T Illinois Ex. 2.2 (Neinast Addit. Rebuttal), lines 103-110. BitWise cannot point to anything to suggest otherwise, as Staff too has concluded. Staff Init. Br. at 12.

Faced with this uncontroverted evidence, BitWise concedes that Legacy AT&T may not be a collocator “in the legal sense.” BitWise Init. Br. at 9. Instead, it suggests that “Legacy AT&T was a collocator in almost every practical sense.” *Id.* It is not at all clear what BitWise is trying to argue here. BitWise seems to be suggesting that Legacy AT&T's alleged “unique status” (BitWise's words) as a result of divestiture somehow supports its treatment as a collocator when it legally is not one. *Id.* BitWise provides no legal support for this proposition.³ Moreover, BitWise's discussion of collocation suggests that it fundamentally misconstrues what

³ Nor does BitWise provide any support whatsoever for its speculation that “Legacy AT&T would be a regular ICA or Tariff collocator in many buildings in which it does not, as a vestige of Divestiture, retain a partial interest.” BitWise Init. Br. at 9.

collocation actually is. BitWise suggests that, so long as Legacy AT&T has a “point of attachment” in the IBT central office, it is collocated there. BitWise Init. Br. at 9. As a threshold matter, IBT does not know what is meant by a “point of attachment,” as that is not a term used in the telecommunications field. In any event, carriers can have a presence in a central office in many scenarios, such as meet-point arrangements, that are not collocation.

BitWise cites various FCC orders and rules, and then argues that they “do not directly address the Legacy AT&T case” or “these shared buildings.” BitWise Init. Br. at 9-11. But this argument does not support BitWise’s position in any manner. To the contrary, the fact that BitWise points to no FCC (or Commission) order or rule that imposes different standards for collocations involving Legacy AT&T completely undermines BitWise’s argument that this Commission’s analysis of the issues should somehow hinge on the fact that Legacy AT&T is involved.⁴

Moreover, even if Legacy AT&T were collocated in the IBT central office, it would not matter. Under the plain terms of BitWise’s ICA, collocation is available to BitWise only for the purposes of transmitting and routing telephone exchange and exchange access pursuant to 47 U.S.C. § 251(c)(2) of the Telecommunications Act of 1996 (“1996 Act”) or for obtaining access to IBT’s unbundled network elements pursuant to 47 U.S.C. § 251(c)(3) of the 1996 Act. Staff Cross Ex. 10 (McPhee) at §6.1; Staff Init. Br. at 13. This is not what BitWise is doing in the

⁴ BitWise’s reference to paragraph 60 of the Collocation Order (*Fourth Report and Order*, In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, July 12, 2001) does not advance its case either. *See* BitWise Init. Br. at 10. Paragraph 60 merely talks about the difference in impact on the property rights of the incumbent local exchange carrier (“ILEC”) between cross-connects provisioned by the ILEC versus those provisioned by a competing local exchange carrier (“CLEC”), and expresses a preference for the former.

Peoria LATA; the traffic at issue is internet traffic, not telephone exchange and exchange access traffic. BitWise Ex. 2.0 (Shuler Rebuttal) at 2. Staff agrees. *See* Staff Init. Br. at 13.⁵

Second, BitWise is incorrect in its repeated assertion that this dispute concerns a CLEC-to-CLEC cross-connect. *See* BitWise Init. Br. at 5 (asserting that dispute is about a “CLEC to CLEC connection”); *id.* at 6 (BitWise “need[ed] only to cross-connect its facilities”); *id.* at 8 (“order what it assumed to be a ... cross-connection”). Legacy AT&T is not acting as a CLEC when it provides internet access to BitWise for traffic that is being routed to outside the Peoria LATA; instead it is acting as an interexchange carrier (“IXC”). IBT Init. Br. at 19, 20; Tr. at 193:7-11 (Shuler).⁶ BitWise’s view is that there is no difference between Legacy AT&T in its IXC capacity and Legacy AT&T in its CLEC capacity. Tr. at 71-72 (Shuler). That view is completely unfounded, as reams of FCC and Commission rules and orders, and countless court cases, attest.

BitWise repeatedly references what it expected or assumed it would get when it placed its service order and how much it expected or assumed it would pay. *See* BitWise Init. Br. at 4 (Shuler expected installation pursuant to the ICA, at \$1.01); *id.* at 5 (Shuler “believed he was

⁵ BitWise argues that its ICA is not the operative document regarding its collocation rights and that it is entitled to whatever the FCC rules say. BitWise is wrong, as a matter of law, as Staff cogently explains in its brief. *See* Staff Init. Br. at 13-15. BitWise then attempts to distance itself from the very ICA it agreed to, by arguing, for the first time in its brief, that the ICA is a “contract of adhesion.” BitWise Init. Br. at 13. There is no evidence to support this reckless charge, nor would this be the appropriate forum to address such an argument if there were. In any event, even if the FCC collocation rules applied, instead of the ICA, BitWise is still wrong. The FCC rules allow a collocator to interconnect with another carrier only if that carrier’s “collocated equipment is also used for interconnection with the incumbent LEC or for access to the incumbent LEC’s unbundled network elements.” 47 C.F.R. § 51.323(h). Legacy AT&T’s equipment is not being used for interconnection with IBT or for accessing IBT’s unbundled network elements. *See* IBT Init. Br. at 231; *see also* Staff Init. Br. at 15.

⁶ BitWise argues at page 10 of its brief that the Collocation Order requires an ILEC to provide a cross-connection between a CLEC and another carrier, not just between CLECs. BitWise’s argument is irrelevant, as (1) Legacy AT&T is not a collocator in the IBT central office and (2) Legacy AT&T did not request a cross-connect with BitWise.

In any event, no one is disputing that IBT is providing a cross-connect (although there is a dispute whether the cross-connect is provided via ICA or tariff). The parties do, however, disagree as to whether IBT is providing more than a cross-connect (*i.e.* the Local Distribution Channel), and the FCC orders and rules to which BitWise refers do not in any way address that question.

only ordering a cross-connection”); *id.* at 8 (BitWise “order[ed] what it assumed to be a collocator-to-collocator cross-connection”). As shown above, still to this day, BitWise fundamentally misunderstands the facts. Thus, it is not altogether surprising that, when BitWise placed its order, it may have been operating under the same misapprehension of the facts. That, of course, does not excuse BitWise from paying for what it actually ordered, since what it actually ordered differs from what it thought it ordered due only to BitWise’s own misunderstandings.⁷ Notably, there is nothing in the record to suggest that IBT ever told BitWise, either before or after BitWise placed its order, that (1) Legacy AT&T was collocated in the IBT central office, (2) Legacy AT&T was operating as a CLEC in connection with the internet traffic BitWise was delivering to AT&T, (3) BitWise would only be charged a cross-connect and not the local distribution channel (“LDC”) charge, or (4) BitWise could obtain the services it ordered out of the parties’ ICA.

BitWise argues at page 8 of its initial brief that there was no “meeting of the minds” between IBT and BitWise about what BitWise ordered. BitWise is correct that IBT interpreted the order that BitWise submitted as one for special access, and provisioned and billed for the service provided accordingly. As IBT demonstrates in its testimony and briefing, IBT was correct in so interpreting the order. But putting that aside, if BitWise indeed thought that it was ordering something out of its ICA, only to learn that IBT did not agree, BitWise should have cancelled its order when it realized (at the latest, upon receipt of the first bill) that IBT was intending to bill BitWise for special access pursuant to its tariff.⁸ By not cancelling its order,

⁷ As detailed in IBT’s Initial Brief, the actual Access Service Request submitted by BitWise strongly supports the conclusion that BitWise, in fact, intended to order special access. *See* IBT Init. Br. at 27-28.

⁸ BitWise stated that it had options available other than ordering special access through IBT’s Access Tariff. *See, e.g.,* BitWise Init. Br. at 12 (“BitWise could simply have brought fiber optic directly into the Legacy AT&T side.”). If this was the case, it is not clear why BitWise did not take advantage of those options once it learned IBT was charging it for special access under IBT’s tariff.

BitWise has acquiesced in IBT's interpretation of the order as special access, and waived any right it had to contest the charges, now that it has enjoyed, for several years, the benefits of the services IBT has provided.

Third, BitWise continues to insist, in the face of uncontroverted evidence, that the IBT Peoria central office at 320 Fulton and the Legacy AT&T Peoria central office at 120 SW Jefferson are located in the same building. *See* BitWise Init. Br. at 5-6 (noting that the two central offices have same first eight digits of their CLLI codes and are "within the same building"); *id.* at 6 ("BitWise and Legacy AT&T are in the same building with IBT..."); *id.* at 8; *id.* at 9 (Legacy AT&T "already occupied part of the building"). To support this argument, BitWise creates evidence out of whole cloth. BitWise points to Mr. Shuler's testimony that "if the Legacy AT&T building were truly separate for billing purposes, it would have a separate CLLI code" BitWise Init. Br. at 6; *see id.* at 5, 12. Yet, Mr. Shuler has no credible basis for saying this. CLLI codes are assigned by a third party pursuant to industry guidelines and are not principally used for billing purposes; instead, they are principally used for provisioning of facilities and routing of traffic. IBT presented extensive evidence demonstrating that the IBT central office and the Legacy AT&T central office were part of one central office prior to the divestiture of the Bell System in 1984, when that larger Peoria central office, and the facilities it contained, was partitioned between IBT and the Legacy AT&T IXC. AT&T Illinois Ex. 2.2 (Neinast Addit.), lines 126-34. IBT also explained that the Legacy AT&T switch in the 120 SW Jefferson building was installed and assigned a CLLI code prior to divestiture and that the CLLI code was not changed at or after divestiture. AT&T Illinois Ex. 2.2 (Neinast Addit.), lines 165-71. BitWise did not rebut any of this evidence.⁹

⁹ BitWise makes reference to a Pacific Bell central office in California that allegedly supports its position here. BitWise Init. Br. at 12. Although BitWise does not provide any citation in its brief, it is presumably referring to Mr.

Mr. Shuler conceded that he does not know much about the partitioning of the AT&T buildings and facilities that occurred as a result of the divestiture of the Bell System, explaining that he was only five years old at the time. Tr. at 113. Indeed, Mr. Shuler testified that he thought the Bell System was broken up in 1996, not 1984 (following a 1982 court settlement). Tr. at 114 (“I never really researched the history that well.”). With all due respect, the President and CEO of a CLEC ought to have familiarized himself with divestiture and the impact on Legacy AT&T and the resulting RBOCs (including IBT’s original post-divestiture parent company, Ameritech Corporation.) This is all the more true when the dispute before this Commission involves central office space that was partitioned as part of divestiture.¹⁰

Notwithstanding that BitWise’s President and CEO professed to know little about divestiture, BitWise did not hold back in making all sorts of irrelevant and totally unfounded claims about divestiture, the resulting relationship between Legacy AT&T and IBT, and IBT’s position in this case. For instance, BitWise claims at page 8 of its brief that “IBT’s argument appears to hinge on the unique and non-transparent arrangements it had with Legacy AT&T as a result of the 1984 Divestiture.” *See also* BitWise Init. Br. at 12 (alleging IBT and Legacy AT&T have “essentially secret arrangements” and IBT is “attempting to spring a ‘gotcha’ trap”). While it is undeniably true that the break-up of the Bell System was a one-of-a-kind event in the history

Shuler’s rebuttal testimony. BitWise Ex. 2.0 at 13. Mr. Shuler’s testimony is rank hearsay and should be disregarded. *Id.* (testifying “we have been told of cases ...”). Moreover, even if Mr. Shuler’s testimony were admissible, it proves nothing. At divestiture, Legacy AT&T facilities and buildings were divided between Legacy AT&T and the various Regional Bell Operating Companies (“RBOC”). How one central office was treated in California does not bear on how another building was treated in Illinois.

¹⁰ Similarly, in its written testimony and during the hearing, BitWise repeatedly conflated IBT and Legacy AT&T and professed not to know which entity it was dealing with, even though, as BitWise concedes in its brief, IBT and Legacy AT&T were not part of the same company at the time BitWise placed its order in the Peoria LATA. *See* Tr. at 68-78 (Shuler); BitWise Init. Br. at 8. It is troubling that a carrier like BitWise would not be able to keep track of the entities with which it was doing business. Certainly, its failure to do so in its testimony led to confusion at the hearing, and by Mr. Shuler’s own admission, led to confusion within BitWise as to what it had ordered from whom. Tr. at 70 (it is “very difficult to tell the difference between the companies”); *id.* at 75 (“we’re not sure which AT&T we’re dealing with half the time”); *id.* at 76 (“we can’t tell the difference either... Which one are we hooking up to half the time? We have no idea.”); *id.* at 77.

of telecommunications, and that many of the resulting arrangements occasioned by divestiture were indeed unique, there was nothing transparent or secret about the break-up or the resulting arrangements. *See, e.g., United States v. Western Electric Co.*, 552 F. Supp. 131 (D.D.C. 1982), 569 F. Supp. 1057 (D.D.C. 1983). Further, at the time that BitWise ordered its special access service, IBT and Legacy AT&T were not only separate companies, BitWise Init. Br. at 8, they were competitors of each other. There is simply nothing to substantiate BitWise’s claim that IBT and Legacy AT&T were in cahoots or that IBT had some special deal with Legacy AT&T to play “gotcha” with BitWise.

BitWise further suggests that “IBT is [] taking the very obscure case of these shared buildings and attempting to carve out a narrow exception for a broad federal policy.” BitWise Init. Br. at 11. It is BitWise, not IBT, who is attempting to argue that this case should be viewed differently because Legacy AT&T is involved. As discussed above, BitWise cannot point to anything to support doing so. Similarly, BitWise posits that “[t]he unique fact of [Legacy AT&T’s] shared occupancy of the building mak[es] it unnecessary for them to formally order the same collocation as needed by other carriers.” *Id.* BitWise does not support this assertion in any manner; it just baldly posits it. (Of course, as established above, Legacy AT&T is *not* sharing a building with IBT.)¹¹

Fourth, as with BitWise’s arguments relating to the Champaign, Quincy and Springfield LATAs, BitWise tries to suggest that the POI between BitWise and IBT dictates the result here. BitWise Init. Br. at 4. The BitWise/IBT POI is only relevant to local interconnection between BitWise and IBT. It has no bearing on the dispute involving the circuit to Legacy AT&T, which

¹¹ In the end, BitWise concedes that, as a result of divestiture, the space that had been assigned CLLI code PEOPILPJ “was divided between the two companies” in 1984. *See* BitWise Init. Br. at 8. That concession is all that really matters here.

clearly does not relate to local interconnection. IBT Init. Br. at 31-32; *see also* Section II.B. *infra*.

Fifth, BitWise attempts in its brief, as it tried to do at the hearing, to mount a collateral attack on the rates contained in IBT's Tariff No. 21. *See* BitWise Init. Br. at 5 (asserting that it costs IBT zero to provision the circuit BitWise ordered but that IBT is charging \$3,701.01 per month). At the hearing, the ALJ ruled that this proceeding was not the appropriate forum to address IBT's costs and declined to admit evidence on the topic. Tr. at 546-47. The ALJ was correct. This is not a case about IBT's costs to provide service or the reasonableness of the rates contained in IBT's tariff.¹²

Sixth, BitWise claims that it self-provisioned the Special Access channel termination by bringing its own facilities into IBT's central office. *See* BitWise Init. Br. at 6, 8. The fact that BitWise brought its own facilities to the IBT central office is neither disputed nor relevant. And whether any of those facilities are properly called "Special Access" is not important. What are relevant are the services that IBT has provisioned. It is undisputed that IBT provides the circuit that connects BitWise to Legacy AT&T. IBT Init. Br. at 18. BitWise all but ignores this,¹³ and ignores that IBT, as discussed below, has provided not just a cross-connect but the components and electronics that permit BitWise to pass its internet traffic to Legacy AT&T.

Seventh, BitWise alleges that IBT's ordering process is unfair and that IBT is engaging in "deceptive practices." BitWise Init. Br. at 7, 8. IBT responded to the particulars of BitWise's claims about its order process in its initial brief, and those claims have no merit. *See* IBT Init.

¹² BitWise also attacks the tariff offering itself, arguing that the FCC rules concerning collocator cross-connection postdate the tariff and therefore render it "nugatory." BitWise Init. Br. at 12. As discussed elsewhere, BitWise misconstrues those FCC rules. Moreover, to the extent that BitWise is attempting to argue the tariff should be revised in light of some subsequent change in law, this is not the correct proceeding in which to do so.

¹³ BitWise states that its facilities, which it calls "Special Access," are "used for our connection to Legacy AT&T." BitWise Init. Br. at 8. What BitWise conveniently omits in that language, and all of its brief, is that BitWise's facilities connect to Legacy AT&T via two IBT DSX3 panels and a DS3 cable. It is those IBT-owned DSX3 panels and the functionality they provide, not anything BitWise or Legacy AT&T provides, that are at issue here.

Br. at 21 (regarding claim that IBT uses “same NC code” as alleged at page 7 of BitWise’s initial brief). IBT further demonstrated that BitWise’s order clearly sought special access services. *Id.* at 27-28. Nor is there any credence at all to BitWise’ allegation of “deceptive practices.” The ordering process employed by IBT is the product of industry-wide collaboration (in which BitWise was more than welcome to participate)(Tr. at 88-90 (Shuler)), and BitWise does not present a scintilla of evidence that IBT did anything inconsistent with those industry developed ordering processes.

In view of the foregoing, the Commission should adopt the position advocated by IBT and Staff and conclude that the service provided to BitWise in the Peoria LATA to carry BitWise’s internet traffic to Legacy AT&T is properly provided and billed out of IBT’s Access Tariff as special access service.

2. IBT properly imposed the LDC charge, in addition to the cross-connect charge.

As discussed above, Staff agrees with IBT that the facilities that IBT has provided to BitWise with respect to the Peoria internet dispute are properly ordered, provided and billed as part of IBT’s special access offering in its Access Tariff. Where Staff disagrees with IBT is in the imposition of the LDC charge. Staff opines that IBT is “providing BitWise only a cross connection service between the BitWise DS3 cable and the Legacy AT&T Cable.” Staff Init. Br. at 15. Staff therefore proposed that the Commission completely disallow the LDC charge.

IBT discussed Staff’s position at length in its initial brief, IBT Init. Br. at 21-28, and notes that Staff’s initial brief does not address at all the language in IBT’s tariff that makes clear that the LDC is one of the four basic rate categories for special access and that describes what the LDC is. *See* IBT Init. Br. at 22-23. Nor does Staff address the tariff language that explains that the cross-connect that IBT has charged is an optional feature used to connect BitWise’s channel

to the special access service being provided by IBT. *Id.* at 23-24. Staff also does not address the testimony of IBT witness Mark Neinast, who explained that IBT was providing more than a cross-connect: the cross-connect, as is contemplated by the tariff, is simply used to connect to the special access service, and the LDC comprises the equipment and electronics, including the IBT-owned DSX3 panel dedicated to Legacy AT&T internet traffic, necessary to carry that traffic. *Id.* at 25-27.

All that Staff's brief says in support of its position is that it originally believed that IBT was also providing the DS3 cable that ran from IBT's DSX3 Panel in IBT's central office at 320 Fulton to the Legacy AT&T DSX3 Panel in the Legacy AT&T central office at 120 SW Jefferson, but that it later learned IBT was not. Staff Init. Br. at 15-16. What appears to be underlying Staff's position (indeed what must be) is Staff's belief that the DS3 cable that runs from the IBT central office to the Legacy AT&T central office is the LDC. Yet Staff does not point to any evidence in the record to establish that proposition. And Mark Neinast's testimony directly refutes it. As he explained:

[T]his cross-connect charge on the BitWise bill represents the cross-connect from the BitWise POI to that [DS3] cabling that goes to the panel that's dedicated to the AT&T IXC POP. And that cabling and the other DSX3 panel represents that Special Access local distribution channel charge out of AT&T's tariff.

Tr. at 472:3-10 (Neinast). *See also id.* at 475:15-20 (Neinast) (cross-connect "gives an interconnected carrier access to an Illinois Bell Special Access service. So the cross-connect is required to get them access to the Special Access service. It's not the Special Access service itself.").

Mr. Neinast further explained:

A single piece of wire does not make a circuit; you have to have components and electronics at each end of that wire in order to make the circuit.

The circuit that BitWise had ordered was for Internet access to an interexchange carrier. *And part of that was ordered out of the AT&T Illinois tariff [and] associated all of the channel capacity equipment necessary to make that piece of wire actually transmit Internet services.*

Tr. at 318 (Neinast)(emphasis added).

Contrary to Staff's unsupported hypothesis, the LDC is not the DS3 cable between the IBT and Legacy AT&T central offices; as Mr. Neinast explained, the LDC is provided through the IBT-owned DSX panel in the IBT central office at 320 Fulton.¹⁴ Thus Staff's argument fails.

BitWise similarly misconstrues what the LDC is. At page 9 of its Brief, BitWise says that since Legacy AT&T brought the DS3 cable from its central office to IBT's central office, that somehow means the "channel termination belonged to Legacy AT&T." There is no evidence that Legacy AT&T owns the channel termination in dispute here, or that the channel termination exists within the Legacy AT&T DS3 cable. And BitWise of course does not point to any evidence. What the uncontroverted evidence does show is that the DSX3 panel in IBT's central office to which the Legacy AT&T cable is connected is owned by IBT, which has dedicated it exclusively to carrying internet traffic to Legacy AT&T, such as the very traffic that BitWise is delivering. And, as discussed above, the evidence further shows that the LDC charge being imposed by IBT covers the equipment and functionality provided in that IBT-owned DSX3 panel. This is what special access service is, as described by Scott McPhee, and what IBT has provided to BitWise. AT&T Illinois Ex. 1.0 (McPhee Direct), lines 149-51; *see also* AT&T Illinois Late Filed Ex. 4.0, p. 131 (IBT Tariff 21, 2nd Rev. Page 232, §7.1, describing Special Access services).

¹⁴ On the parties' agreed diagram (Jt. Resp. to ALJ Data Request 1(d)), this IBT-owned DSX panel is located at the upper right hand corner of the IBT central office.

BitWise is correct on one score – there is a channel termination (and thus a channel) that is part of the facilities carrying BitWise’s internet traffic to Legacy AT&T, and beyond. BitWise thereby concedes that what is involved here is more than just a cross-connect.¹⁵ As described in IBT’s Access Tariff, “[o]ne Local Distribution Channel charge applies per customer designated premises at which the channel is terminated.” AT&T Illinois Late Filed Ex. 4.0, p. 137 (Tariff 21, 2nd Rev. Page 235, §7.1.2). That is what IBT is charging for here. The channel termination that BitWise agrees exists has a corresponding LDC that must be paid for. The evidence is clear that that LDC is being provided by IBT, and pursuant to its Access Tariff, IBT may properly charge BitWise for it. The Commission should therefore uphold IBT’s imposition of the LDC charge in the Peoria LATA.

C. IBT Properly Billed BitWise for Facilities Used to Reach Verizon Exchanges.

BitWise’s position regarding the charges for facilities it uses to reach Verizon exchanges in the Champaign, Quincy and Springfield LATAs largely rests on arguments that IBT addressed in its initial brief. IBT thus incorporates those arguments here. *See* IBT Init. Br. at 29-34.

BitWise’s primary argument is that IBT is responsible, under the parties’ ICA, for the cost of the multiplexing and DS1 transport services in each LATA since the facilities are on IBT’s side of the point of interconnection (“POI”) (BitWise Init. Br. at 16) and the DS1s carry local traffic (*id.* at 15). As IBT argued in its initial brief, although the DS1 facilities are located on IBT’s side of the POI, IBT is not responsible for them unless they are used for the exchange of local traffic between Bitwise and IBT. To the extent that the DS1s may be carrying “local traffic,” that traffic is being exchanged between BitWise and Verizon, not between BitWise and

¹⁵ Likewise, BitWise’s admission that there is a channel termination necessarily contradicts its characterization that all IBT is doing here is “pulling the cable across its common areas.” BitWise Init. Br. at 10. As Mark Neinast explained, in addition to the cross-connect and the DS3 cable, IBT provides the equipment and electronics necessary to carry BitWise’s internet traffic to Legacy AT&T. *See supra*.

IBT.¹⁶ In addition, the multiplexing service can be charged at special access rates since it is not used exclusively for the exchange of local traffic between BitWise and IBT. *See* IBT Init. Br. at 31-32.

BitWise's secondary argument is that it should not bear financial responsibility for the DS1s to the Verizon exchanges because it would have preferred to exchange traffic with Verizon at the IBT tandem, rather than establish separate trunks. BitWise Init. Br. at 15. As IBT argued in its initial brief, BitWise's position contradicts the terms of the ICA and is beyond the scope of the Complaint. *See* IBT Init. Br. at 32-33.

The only new position that BitWise asserts regarding this group of charges is that, if it must be charged for the DS1s to the Verizon exchanges, it should be charged at switched access rates. BitWise Init. Br. at 15. IBT agrees that BitWise should pay the switched access rates it was billed for these services, and Staff agrees that BitWise should pay at least those rates. *See* Staff Init. Br. at 22 (Springfield), 23-24 (Champaign), 25 (Quincy).

The Commission, however, should give no credence to BitWise's explanation for its position. First, it is difficult to determine what BitWise means when it refers to switched access service that is "unbundled' [but] not in the post-1996 sense" (BitWise Init. Br. at 15), and BitWise does little to explain the significance of this different sort of unbundling. Second, the source on which BitWise relies in making this point (IBT Tariff 21, section 5) is not part of the record. Finally (and similarly), evidence on Verizon's practices with regard to the billing of such

¹⁶ BitWise may be making a different argument regarding the charges from the Quincy LATA, since it points out that Verizon controls the tandem there and asserts that IBT should charge it "no more than a cost-based rate" for the DS1s. BitWise Init. Br. at 16. The Commission should disregard this argument because BitWise neither explains why the different tandem arrangement in Quincy is significant, nor specifies a source or an amount for the "cost-based rate" it should have been charged. Moreover, as discussed in Section II.B.1 above, this is not a proceeding to examine IBT's costs to provide service.

meet-point facilities also is not part of the record and, in any event, Verizon's supposed practices are irrelevant to IBT's obligations under its access tariff.

D. IBT Properly Billed BitWise for E911-Related Facilities.

BitWise's Initial Brief makes clear that the only 911-related charges in dispute here involve multiplexing in the Peoria and Champaign LATAs. BitWise Init. Br. at 13 (Peoria), 15 (Champaign). In particular, BitWise argues that it should not be billed the entire multiplexing charge at special access rates since only two of the DS1 channels coming out of the multiplexer are used for 911 service, while the remaining DS1s are used for local interconnection. *Id.* at 14. BitWise accordingly proposes either that 1) the multiplexing be treated entirely as a local interconnection (and thus that it pay nothing for the service), or 2) the special access multiplexing charge be prorated to reflect that only 2 out of 28 channels involve 911 service. *Id.* at 14-15.

Neither of BitWise's proposals has a credible basis. Its first proposal – that the multiplexer be treated as local interconnection because its use for 911 purposes is “minimal” (*id.* at 14) – is a pure throwaway, since BitWise provides no other reasoning to support the proposal. In fact, this “minimal use” rationale completely falls apart in the Champaign LATA, where more than half of the 28 channels on the multiplexer carrying BitWise's two 911 circuits are used for special access purposes.¹⁷ In addition, although other channels on the Peoria multiplexer are used for local interconnection, BitWise cites to no record evidence (and there is none) to support

¹⁷ As of March 2009, BitWise used 13 of the 28 DS1s coming out of the 816 multiplexer for the exchange of traffic with Verizon., 2 for 911 service, and only 7 for the exchange of traffic with IBT. *See* AT&T Illinois Ex. 2.2(a) (AT&T Illinois response to Staff Data Request 2.04).

its suggestion that 93 percent of the ports on the Peoria multiplexer are used for local interconnection. *See id.* at 14.¹⁸

BitWise supports its proration proposal by asserting that there is “no clear rule” for requiring that a facility used for both local interconnection and access purposes be charged at access rates. *Id.* at 14. It also points to the treatment of switched access service under the ICA¹⁹ as precedent for proration of the multiplexing charge. *Id.* at 14. During the evidentiary hearing, there was extensive discussion about the possibility of prorating the multiplexing charge based on the number of channels going through the multiplexer that are used for local service (*i.e.*, which BitWise’s counsel described as the percent of local usage or “PLU”). Tr. at 523-31. The Staff witness, James Zolnierrek, stated that the parties’ ICA contained no provision requiring the use of a PLU in these circumstances, and he rejected the idea that the PLU was even an applicable concept when two diverse types of service (local interconnection and 911) were involved. Tr. at 527-28. Accordingly, aside from wishful thinking, there is no support in the record for BitWise’s proration proposal.

The remainder of BitWise’s argument on 911-related issues consists of complaints that the Illinois E-911 rules, in general, are “tilted to make [the service] a ‘cash cow’ for IBT.” BitWise Init. Br. at 14. However, BitWise’s carping about the unfairness of its obligations²⁰ to connect directly with the E911 selective router and to connect at a “dual DS1 level” is irrelevant to whether it should be charged special access rates for the 911-related services it unquestionably receives. Moreover, its references to the terms of unspecified “Verizon agreements” that contain

¹⁸ BitWise’s recent actions to reconfigure its service in Peoria and eliminate the multiplexer (Tr. at 587-88 (Shuler)) support the inference that many of the channels on the multiplexer were spares.

¹⁹ BitWise, however, provides no record citation for its statement regarding the ICA’s treatment of switched access service.

²⁰ The obligations to which Bitwise objects are established by Commission rule. *See* 83 Ill. Admin. Code § 725.500(c) (prescribing “[d]edicated direct trunking” as “the standard method of providing incoming 9-1-1 circuits” and requiring “a minimum of two trunks” in each trunk group); AT&T Illinois Ex. 2.2 (Neinast Addit.), lines 309-12.

different terms (*id.* at 14) are cryptic, irrelevant and – most significantly – unsupported by record evidence (or any citation to same).

BitWise provides no explanation for its refusal to pay the charges for 911-related DS1 transport services in the Peoria LATA, and its reasons for refusing to pay 911-related multiplexing charges in the Peoria and Champaign LATAs make no sense and lack support in the record. The Commission accordingly should follow the recommendation of the Staff, find that IBT's charges for 911-related special access services are correct, and order BitWise to pay them.

III. CONCLUSION

For all the foregoing reasons, IBT requests that the Commission deny BitWise's Complaint and affirm that all of the charges in dispute between the parties (including late payment charges) are properly due and owing from BitWise. IBT further requests that the Commission permit IBT to disconnect BitWise's service if BitWise does not pay the amounts determined to be owed within 30 days of the Commission's Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James A. Huttenhower, an attorney, hereby certify that I caused a copy of the foregoing Illinois Bell Telephone Company's Initial Post-Hearing Brief to be served on the parties on the attached service list by U.S. Mail and/or electronic transmission on the 21st day of September, 2009.

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