

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
STATEMENT OF POSITION

NOW COMES the Staff of the Illinois Commerce Commission (hereafter “the Staff”) by and through its undersigned counsel, and, pursuant to the Administrative Law Judge’s Ruling dated September 24, 2009, states, for its position in the above-captioned proceeding, as follows:

On September 24, 2009, the Administrative Law Judge (hereafter “ALJ”) caused the following Ruling to be issued:

[E]ach party is directed to file a “Statement of Position” on each matter in dispute that summarizes that particular party’s evidence and arguments. This “Statement” should be developed in a manner appropriate for insertion into the Proposed Order. Further, the Statement to be prepared by Bitwise will need to include specific record cites on any references to, or reliance on, the record. Finally, each party is required to frame and state the issue on each matter in dispute, i.e., what is the question that the Commission is being asked to decide.

ALJ Ruling at 1

The Staff’s Statement of Position follows:

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1. Legacy AT&T Cross-connect

Issues:

Is Legacy AT&T collocated at the Illinois Bell Central Office at 320 Fulton Street in Peoria?

Is BitWise in fact purchasing a Local Distribution Channel?

Is BitWise permitted to purchase the disputed Cross-Connect and Local Distribution Channel pursuant to its interconnection agreement (ICA) with Illinois Bell, or must it purchase some or all of these facilities from the AT&T Special Access tariffs?

Staff understands the first set of the disputed facilities to include a DS3 facility running between two Illinois Bell DSX 3 panels, both of which are located in the Illinois Bell central office at 320 Fulton Street in Peoria. Staff Ex. 3.0(R) at 5-6; ALJ Data Request Ex. 2 at 2; ALJ Data Request Ex. 1(d). Staff notes that one of the DSX 3 panels connects to a BitWise DS3 Cable, which in turn runs to the BitWise Cageless Collocation facility located within the Illinois Bell central office at 320 Fulton Street in Peoria, ALJ Data Request Ex. 1(d), while the other Illinois Bell DSX 3 panels connect to a Legacy AT&T DSX 3 facility, which in turn runs to a Legacy AT&T DSX 3 panel located in a Legacy AT&T central office located at 120 SW Jefferson Street in Peoria. ALJ Data Request Ex. 1(d). Staff observes that the Illinois Bell central office at 320 Fulton Street and the Legacy AT&T central office located at 120 SW Jefferson Street are adjacent to one another. BitWise Ex. 2.4. Staff understands BitWise to assert that the circuit is “primarily used to interconnect our Internet service provider for Internet traffic.” BitWise Ex. 2.0 at 2. Staff further understands BitWise to claim that “this is jurisdictionally interstate, but a permitted use of CLEC to CLEC connection.” Id.

With respect to this facility, the Staff understands Illinois Bell to be billing BitWise for DS3 Local Distribution Channel service and DS3 Cross Connection service. Staff Ex. 3.0(R) at 5; AT&T Ex. 3.1, Attachment R4. Staff notes that, for both of these services, the rates Illinois Bell is billing BitWise are found in Illinois Bell’s Illinois Special Access Tariffs. Id.; AT&T Ex. 3.1 at 4-5, and Attachment R4. Staff sees BitWise to assert that it intended to order this facility as a collocation-to-collocation cross-connection, and to suggest that it was entitled to do so under the terms of its ICA with AT&T. BitWise Ex. 5.0 at 7.

In Staff’s opinion, however, BitWise has adduced no evidence in this proceeding that it is in fact entitled to do so. Despite the proximity of Illinois Bell’s Central Office located at 320 Fulton to Legacy AT&T’s office space located at 120 SW Jefferson, Staff

can discover, and believes the record to contain, no evidence that Legacy AT&T is collocated in Illinois Bell's 320 Fulton Central Office. Staff Ex. 3.0(R) at 6. Staff notes that AT&T witness Mark Neinast has testified that: "Legacy AT&T does not have any collocation arrangements with IBT in the Peoria Central Office and has not had one at any time since Bitwise established its account with IBT in 2003." AT&T Ex. 2.2 at 5. Staff observes that, by contrast, BitWise witness Michael Shuler has testified that he has no knowledge of how Illinois Bell's or Legacy AT&T's equipment is legally classified. BitWise Ex. 5.0 at 8. Therefore, Staff considers that there is no evidence to support, and direct evidence that contradicts BitWise's contention that Legacy AT&T has elected to collocate within Illinois Bell's Central Office at 320 Fulton in Peoria. Staff Ex. 3.0(R) at 6.

Further, even if one is prepared to assume, as BitWise urges the Commission to do, BitWise Ex. 5.0 at 8, that the Legacy AT&T DS3 Cable entering Illinois Bell's 320 Fulton Central Office is a collocated facility, Staff takes to view that this does not aid BitWise's argument. Staff understands Mr. Shuler to testify that the traffic transported over this circuit is traffic flowing between BitWise's Internet Service Provider customers and the Internet at large. BitWise Ex. 2.0 at 2; Tr. at 193. Staff points to the ICA between BitWise and Illinois Bell, pursuant to the terms of which 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 Federal Telecommunications Act of 1996 or for obtaining access to Illinois Bell's unbundled network elements pursuant to 47 U.S.C. § 251(c)(3) of the Federal Telecommunications Act of 1996. Staff Cross-Examination Ex. 8 (McPhee) at 1 (4th Amendment to the ICA between BitWise and Illinois Bell, Appendix Physical Collocation, Section 1.3 and Appendix Virtual Collocation, Section 1.1, approved by the Commission in Docket No. 04-0379). However, Staff notes that the traffic placed on these facilities is neither telephone exchange or exchange access traffic, but instead primarily Internet traffic; BitWise itself concedes as much. BitWise Ex. 2.0 at 2. Staff can find no provision in the ICA between BitWise and Illinois Bell that requires Illinois Bell to provide to BitWise these facilities and/or services for the purposes of transporting traffic between an Internet Service Provider and the Internet at large. Staff Ex. 3.0(R) at 8.

Staff sees this alone as being fatal to BitWise's claim. Staff points out that Section 252(a)(1) of the federal Telecommunications Act authorizes carriers to enter into ICAs "without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. §252(a)(1). Staff directs the Commission's attention to Subsection (c)(6) of Section 251, in particular, which relates to the collocation rights that BitWise seeks to assert here.

Staff points the Commission to several occasions in which federal courts have spoken to this question, and specifically where such courts have held that an ICA that does not fully comport with FCC rules and order is binding on the parties regardless of such rules and orders, in light of the fact that: "[p]arties who enter into a voluntary [ICA]

need not conform to the requirements of the Act.” Verizon California, Inc. v. Peevey, et al., 462 F.3d 1142, 1151; 2006 U.S. App. Lexis 22742 at 19; 39 Comm. Reg. (P & F) 358 (9th Cir. 2006). Further, such ICAs are enforceable according to their terms; “[f]ederal law ... gives [a carrier] the right to insist that it be held only to the terms of the [ICA] to which it actually agreed.” Verizon Maryland, Inc. v. RCN Telecom Services, Inc., 232 F. Supp. 2d 539, 554; 2002 U.S. Dist. Lexis 22514 at 33 (D. Md. 2002).

Staff observes that the Commission has taken a similar view, and directs the Commission’s attention to its Order, Illinois Bell Telephone Company, Inc. -vs- Global NAPs Illinois, Inc.: Complaint pursuant to Section 252(e) of the Federal Telecommunications Act of 1996, 47 U.S.C. §252(e), and Sections 4-101, 10-101, and 10-108 of the Illinois Public Utilities Act, 220 ILCS 5/4-101, 220 ILCS 5/10-101, and 220 ILCS 5/10-108, ICC Docket No. 08-0105 (February 11, 2009) (hereafter “Global NAPs Order”), wherein the Commission found that an ICA between two carriers was binding with respect to the contested issues that it addressed. See Global NAPs Order at 15 (location of point of interconnection between two carriers determined with “finality” by terms of ICA); Id. at 25 (dispute regarding transiting “governed by the parties’ ICA”); Id. (affirming the principle that a Section 252 ICA “do[es] not need to conform to the requirements of Section 252 (b) and (c)”). Accordingly, Staff urges the Commission to reject BitWise’s attempt to invoke federal rules and orders that allegedly permit it to order and use the facilities in question from its ICA, notwithstanding the terms of its ICA.

Staff urges the Commission to reject BitWise’s argument that the ICA is: “[t]o some considerable extent ... a contract of adhesion.” Staff RB at 10, *citing* BitWise RB at 13. Staff understands BitWise to suggest that it had: “little ability to negotiate [the terms of the ICA] in a meaningful way[,]” and to assert that it had: “no intention ... to waive its collocation and cross-connection rights[.]” BitWise RB at 13. Staff observes BitWise to argue that: “in [this] case, the [ICA] should be construed in favor of BitWise, the smaller party.” Id.

Staff considers every single one of these statements to be wrong, irrelevant or both. Staff directs the Commission’s attention to BitWise’s aversion to giving any insight into what a contract of adhesion might be as a matter of law, because in Staff’s opinion doing so would be fatal to BitWise’s argument that the BitWise – Illinois Bell ICA is such a contract.

Staff points out that a contract of adhesion has been defined in Illinois as:

A standardized contract prepared entirely by one party, and which, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a “take it or leave it” basis without opportunity for bargaining and under such conditions that the second party or “adherer” cannot obtain the desired product or service save by acquiescing in the form of the agreement.

Star Finance Corp. v. McGee, 27 Ill. App. 3d 421, 426; 326 N.E.2d 518, 522; 1975 Ill. App. Lexis 2078 at 9 (1st Dist. 1975), *citing* Walnut Creek Pipe Distributors, Inc. v. Gates Rubber Co., 228 Cal. App. 2d 810, 39 Cal. Rptr. 767, 771 (1964)

Staff further points out that contracts of adhesion are generally lawful in Illinois. Endsley v. City of Chicago, 319 Ill. App. 3d 1009, 1019; 745 N.E.2d 708, 717; 2001 Ill. App. Lexis 133 at 21; 253 Ill. Dec. 585 (1st Dist. 2001). Staff commends the Commission's attention to Illinois Supreme Court holdings that Illinois courts are generally disinclined to hold that inequality in bargaining power alone is sufficient to invalidate an otherwise enforceable agreement. See, e.g., Melena v. Anheuser Busch, Inc., 219 Ill. 2d 135, 153; 847 N.E.2d 99, 110; 2006 Ill. Lexis 329 at 28; 301 Ill. Dec. 440; 24 I.E.R. Cas. (BNA) 396; 152 Lab. Cas. (CCH) ¶60,191 (2006).

Staff argues that under such a legal definition, the BitWise-Illinois Bell ICA is not a contract of adhesion. Staff points out that BitWise has a right, conferred upon it by statute, to negotiate with Illinois Bell to form an ICA. 47 U.S.C. §252(a)(1). Staff further points out that Illinois Bell has a statutory obligation to negotiate in good faith with BitWise, 47 U.S.C. §251(c)(1), and the Staff does not understand BitWise to suggest that Illinois Bell has not done so. If BitWise does not find the results of the negotiations to its liking, Staff notes that BitWise has a right to compulsory arbitration of disputed issues before this Commission. 47 U.S.C. §252(b)(1).

Thus, Staff sees any disparity in bargaining power between BitWise and Illinois Bell to be compensated for by BitWise's undoubted right to seek favorable contractual terms through compulsory arbitration, as dozens of competing carriers, of all sizes have done since the passage of the federal Telecommunications Act in 1996. In fact, notes Staff, since the time BitWise entered into its first ICA with Illinois Bell in December 2001, see Order Approving Agreement, Illinois Bell Telephone Company (Ameritech Illinois) and Bitwise Communications, Inc.: Joint Petition for Approval of an Interconnection Agreement dated August 27, 2001 pursuant to 47 U.S.C. §252, ICC Docket No. 01-0649 (December 19, 2001), BitWise was entitled to adopt individual either entire ICAs (or even, at one point, selected provisions of ICAs) that Illinois Bell had concluded with other carriers under the so-called "most favored nations" rule. 47 U.S.C. §252(i).

According to Staff, therefore, it is not the case that the ICA is a "take-it-or-leave-it" contract such as would render it adhesionary. At all relevant times, notes Staff, BitWise has had, and continues to have, substantial and meaningful rights conferred by federal statute that might, if it invoked them, result in an ICA containing terms favorable to BitWise. Insofar as the ICA as accepted by BitWise was an Illinois Bell standardized contract, Staff sees this as being due to BitWise making little or no attempt to exercise its undoubted rights to obtain an arbitrated ICA tailored to its own needs. This failure cannot be ascribed to Illinois Bell, the Commission or Staff.

Staff considers BitWise's apparent view that the transaction costs of vindicating its rights were excessive to be telling. Staff sees BitWise as being prepared to execute

an ICA and subsequent amendments, while at the same time refusing to incur the expense of hiring counsel to determine what its rights and responsibilities actually are under that ICA and those amendments. See Tr. at 128 (BitWise witness Michael Shuler states that CLECs must either “go along with what [the ILECs] say ... or pay an attorney to try and sort it out[.]”) Staff notes the inadvisability of such conduct under the circumstances, as suggested by the ALJ. See Tr. at 128 (ALJ asks: “shouldn't an attorney be figured into [the] startup cost of any business?”). Staff notes that BitWise cannot claim to be a sophisticated commercial entity possessing the technical, managerial and financial resources and abilities to provide facilities-based telecommunications service in Illinois, while at the same time arguing that it should not be charged with knowledge of its rights and obligations under its ICA with Illinois Bell.

Staff is unaware of any rule of contractual construction which requires that a tribunal interpreting a contract supply a construction that favors the “smaller” party. Staff considers it likely that BitWise refers to the doctrine of *contra proferentem*, a rule of contractual construction which states that a contract should be construed strictly against the drafter thereof. Bunge v. Northern Trust Co., 252 Ill. App. 3d 485, 493; 623 N.E.2d 785, 791; 1993 Ill. App. Lexis 1611 at 12-13; 191 Ill. Dec. 195 (4th Dist. 1993). However, Staff points out that the doctrine of *contra proferentem* is “at best a *secondary* rule of interpretation, a last resort which may be invoked after all the ordinary interpretative guides have been exhausted.” Bunge at 493; 623 N.E.2d at 791; 1993 Ill. App. Lexis 1611 at 12-13 (emphasis added). Staff further makes clear that the *primary* rule of contract interpretation is to determine the parties’ intent from the contract language itself. Farmers Auto Insurance Ass’n v. Wroblewski, 382 Ill. App. 3d 688, 696; 887 N.E.2d 916, 923; 2008 Ill. App. Lexis 401; 320 Ill. Dec. 772 at 17 (4th Dist. 2008). Where the contract language is unambiguous, the parties’ intent is to be determined solely from the terms of the contract itself. Regency Commercial Assocs., LLC v. Lopax, Inc., 373 Ill. App. 3d 270; 869 N.E.2d 310; 2007 Ill. App. Lexis 476; 311 Ill. Dec. 636 (4th Dist. 2007).

Here, as Staff noted in its Initial and Reply Briefs, the ICA is clear on the disputed point: specifically, collocation is available to BitWise only for the purposes of transmitting and routing telephone exchange service and exchange access pursuant to 47 U.S.C. § 251(c)(2) of the Federal Telecommunications Act of 1996 or for obtaining access to Illinois Bell’s unbundled network elements pursuant to 47 U.S.C. § 251(c)(3) of the Federal Telecommunications Act of 1996. ICA Appendix Physical Collocation provides that:

Physical collocation is available to telecommunications carriers for the placement of telecommunications equipment ... solely for the purposes of (i) transmitting and routing telephone exchange service or exchange access pursuant to 47 U.S.C. §251(c)(2) of [sic] FTA 96 and applicable effective FCC regulations and judicial rulings, or (ii) obtaining access to **SBC-13STATE’s** unbundled network elements pursuant to 47 U.S.C. §251(c)(3) of FTA 96 and applicable effective FCC regulations and judicial rulings.

Staff Cross-Examination Ex. 10 (McPhee) at 3, Section 1.3 (emphasis added)

The Staff understands that physical collocation is at issue here. BitWise is entitled to physical collocation only under the terms set forth in the ICA. Whether or not BitWise intended to waive certain rights related to collocation it might have otherwise had under federal rules is not in Staff's view relevant, since it in fact did waive such rights by the specific terms of the ICA, and BitWise is not, therefore, entitled to use collocation for the purposes it seeks to use it here.

However, even if federal rules and orders applied in derogation of the parties' ICA, it would not, in Staff's opinion, avail BitWise in this case. Staff points out that the FCC's rules implementing 47 U.S.C. § 251(c)(2) and 47 U.S.C. § 251(c)(3) only require Illinois Bell to permit a collocating telecommunications carrier to interconnect its network with that of another collocating carrier if: "the 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). As the Legacy AT&T DS3 Cable is not used for either interconnecting the collocated carrier (Legacy AT&T) to the incumbent LEC (Illinois Bell), or for accessing Illinois Bell's unbundled network elements, Staff does not believe that Illinois Bell is required, pursuant to the language of 47 C.F.R. § 51.323(h), to permit BitWise to connect to Legacy Illinois Bell's DS3 Cable.

Nonetheless, the fact that BitWise cannot lawfully order this facility from the ICA is not, in Staff's opinion, the end of the matter. Staff understands that Illinois Bell is providing BitWise only cross connection service between the BitWise DS3 Cable and Legacy AT&T Cable. Staff Ex. 3.0(R) at 8. The Staff initially believed that Illinois Bell was providing BitWise a cross connection service between two DSX3 cross connect panels within Illinois Bell's Central Office located at 320 Fulton, and in addition a DS3 Local Distribution Channel connecting Illinois Bell's Central Office located at 320 Fulton to the Legacy AT&T premises located at 120 SW Jefferson. AT&T Ex. 2.0 at 8. In Staff's opinion, it is now clear that Illinois Bell is not providing the DS3 circuit connecting AT&T's Central Office located at 320 Fulton to the Legacy AT&T premises located at 120 SW Jefferson. ALJ Data Request Ex. 1(d). Staff observes that the DS3 circuit is provided by Legacy AT&T. Id.; see also ALJ Data Request Ex. 2 at 2 (narrative). Accordingly, in Staff's opinion, Illinois Bell is only providing a cross connection service between two DSX3 cross connect panels within Illinois Bell's Central Office, and not a Local Distribution Channel. Staff Ex. 3.0(R) at 9.

Staff hears Illinois Bell to argue that it appropriately imposed both a Local Distribution Channel Charge and a Cross-Connect charge pursuant to its Access Tariffs. Illinois Bell IB at 21. Illinois Bell, avers Staff, argues the plain language in its Tariff No. 21 supports its position that both the LDC charge and the cross-connect charge are appropriately billed to a carrier obtaining special access service from Illinois Bell in the manner BitWise has obtained them. In Staff's view, however, Illinois Bell's explanation fails to demonstrate that what it is providing BitWise includes a Local

Distribution Channel pursuant to Tariff No. 21. Moreover, the suggestion that the language in Tariff No. 21 is plain does not, in Staff's view, bear much scrutiny.

Staff notes that Illinois Bell points to a list of four basic rate categories (Local Distribution Channel, Channel Mileage Termination, Channel Mileage and Optional Features and Functions) applicable to Section 7 of Tariff No. 21 entitled "Special Access Services." Illinois Bell IB at 22. Staff hears Illinois Bell to then state that it does not provide BitWise either Channel Mileage Termination or Channel Mileage service with respect to the Peoria Legacy AT&T Connection. Id. Illinois Bell then argues that Optional Features and Functions cannot be provided on a standalone basis. Id. at 23. Staff therefore characterizes Illinois Bell's argument as follows: because there are only four basic rate categories within Section 7 of Tariff No. 21, and because three of those rate categories do not apply with respect to the Peoria Legacy AT&T Connection, the fourth category must apply.

The Staff urges the Commission to reject this "process of elimination" argument. At its root, says Staff, is the assumption that Illinois Bell supplied a service out of Section 7 of Tariff No. 21. However, Staff sees it as far from clear, based on Illinois Bell's showing in this proceeding, that Illinois Bell supplied any product or service to BitWise out of Section 7 of Tariff No. 21 for the Peoria Legacy AT&T connection. In order to find that Illinois Bell properly charged BitWise for Local Distribution Channel service, Staff sees it as necessary for the Commission to identify the service that Illinois Bell actually supplied BitWise, rather than the services it did not supply BitWise.

In addition, Staff considers Illinois Bell's process of elimination argument to be founded, in part, on an out-of-context and misleading reference from its tariff. In particular, Illinois Bell indicates that the cross connection service it is providing BitWise in connection with Peoria Legacy AT&T connection is an Optional Feature available pursuant to Section 7 of Tariff No. 21. Illinois Bell IB at 23. Staff notes that to support this assertion, Illinois Bell provides a quotation referring to a type of cross connection service in Section 7 of Tariff No. 21 including the quotation referencing "cross-connection functions provid[ing] for the connection of two digital services of the same bit rate." Id. at 24. However, in Staff's opinion, the cross connection described in this passage is not the cross connection service that Illinois Bell is providing BitWise with respect to the Peoria Legacy AT&T connection. The partial citation, and Illinois Bell's reliance upon it, provides in Staff's view a distorted and misleading characterization of the cross connection service Illinois Bell is providing to BitWise for the Peoria Legacy AT&T connection.

Staff points out that Illinois Bell quotes only a portion of the sentence from Original Page 236 of Tariff No. 21; the entire sentence reads: "[t]he cross connection functions provide for the connection of two digital services of the same bit rate at Fiber Hub locations set forth in 7.4.10 following." In Staff's opinion, this is important, because while Illinois Bell implies that the tariff reference refers to the cross connection service it is providing to BitWise for the Peoria Legacy AT&T connection, the reference in fact does not. Instead Staff understands this reference to refer to a different type of cross

connection – Fiber Hub Cross Connection. Staff sees this difference as important. The section that Illinois Bell refers to goes on to state: “[d]escriptions for each of the available Optional Features are set forth in 7.2 following.” Notably, Fiber Hub cross connection is an Optional Feature found in Section 7.2 of Illinois Bell’s tariff. ILL.C.C. No. 21, 5th Revised Page 272.4.

The cross connection service Illinois Bell is providing BitWise is not in Staff’s opinion such a feature. In fact, according to Staff, Illinois Bell is providing cross connection service pursuant to Section 16 of Tariff No. 21. Thus, while Illinois Bell’s tariff references suggest that the cross connect service it is charging BitWise for with respect to the Peoria Legacy AT&T connection are included as Optional Features and Functions within Section 7 of Tariff No. 21, in Staff’s view this is not the case.

Staff does not find the cross connection service Illinois Bell is providing BitWise for the Peoria Legacy AT&T connection among the list of Optional Features and Functions included within 7.2 of Tariff No. 21 and, therefore, by definition, Staff considers it not among the Optional Features and Functions included within Section 7 of Tariff No. 21. Instead, argues Staff, this cross connection service is contained in Section 16 of Tariff 21.

Staff sees Illinois Bell as giving the impression that the cross connect service for which it is charging BitWise for to the Peoria Legacy AT&T connection is one of the four categories of charges in Section 7, and thereby to bolster its position that the service it is providing are limited to the four types of charges listed for Special Access in Section 7 of Tariff No. 21. However, Staff sees Illinois Bell’s assessment of cross-connection charges from Section 16 of Tariff No. 21 to reveal that there are services and related charges other than those contained in Section 7. This, says Staff, underscores the point that Illinois Bell’s process of elimination argument shows what services it is not supplying BitWise, but it does not and cannot provide any evidence of what services Illinois Bell actually is supplying to BitWise.

According to Staff, Illinois Bell’s attempts to demonstrate that it is supplying something more than a cross connect are similarly misleading and unavailing. First, Illinois Bell states: “IBT is providing a DS3 communication path between the BitWise POI and an IBT DSX3 panel in the IBT Peoria central office at 320[.]” Illinois Bell IB at 23. However, a DS3 cross connection also supplies a DS3 communication path between two points. Thus, notes Staff, this first point provides no information that is useful in distinguishing a Local Distribution Channel from a cross connection.

Staff next understands Illinois Bell to state that the: “LDC charge is levied even if the communications path runs within the same building.” Illinois Bell IB at 23. However, Staff contends that a DS3 cross connection would also be levied for communications paths within the same building, and therefore Staff sees this point as providing no enlightenment.

Staff hears Illinois Bell to argue that the cross connect charge that it imposes is an optional feature and function available in connection with special access services.

Illinois Bell IB at 23. As Staff notes elsewhere, above, this argument is misleading because Illinois Bell is attempting to rely on a process of elimination argument to identify what it is not providing rather than demonstrating that it actually is providing Local Distribution Channel service.

Next, avers Staff, Illinois Bell asserts that the Section of Tariff No. 21 pursuant to which it actually provided its cross connect, Section 16 rather than Section 7, indicates that cross connection service must connect on one end to an Illinois Bell Switched Access and/or Special Access service. Illinois Bell IB at 24. According to Staff, Illinois Bell argues that if it provided a cross connect that did not connect to a Special Access service, this would render its tariff incoherent. Id. at 25. Staff disagrees (noting first that coherence is not a hallmark of the tariff in any case); Staff further notes that, simply because Illinois Bell's tariff indicates that its cross connect service should connect to one of its Special Access services does not compel the conclusion that Illinois Bell provisioned its service this way, nor does it mean that Illinois Bell can assess a charge for a Special Access service it self-evidently did not provide.

Staff contends that the Special Access service to which Illinois Bell would normally have cross connected BitWise's DS3 service is the Special Access service connecting Illinois Bell's Central Office at 320 Fulton to Legacy AT&T's Point of Presence at 120 SW Jefferson. Staff observes that, in his direct testimony, AT&T witness Mark Neinast stated: "[t]he tariff charges being billed by AT&T Illinois cover the costs of all of the facilities from the AT&T DSX3 Panel in the upper left corner of the fourth floor of the AT&T CO at 320 Fulton (as shown on Diagram 2) to the AT&T DSX3 Panel on the first floor of the AT&T IXC POP at 120 SW Jefferson." AT&T Ex. 2.0 at 8 (emphasis added). Staff further points the Commission to Mr. Neinast's additional rebuttal testimony where he stated: "there have been many such DS3s ordered from carriers to this same Legacy AT&T POP, and those carriers have paid, without protest, the applicable tariff charges." AT&T Ex. 2.2 at 8.

In Staff's view, these passages reveal Mr. Neinast, early in this proceeding, to have testified that Illinois Bell was providing the Special Access service connecting Illinois Bell's Central Office at 320 Fulton to Legacy AT&T's Point of Presence at 120 SW Jefferson. However, subsequent evidence revealed, in Staff's opinion, that the Special Access circuit, referred to by Mr. Neinast, was in fact supplied by Legacy AT&T rather than Illinois Bell. ALJ Data Request Ex. 2.0 at 2.

In the same vein, Staff sees AT&T witness Chris Ellis' testimony to reveal the same misunderstanding of the services provided by Illinois Bell. In fact, in its Initial Brief, Illinois Bell, as evidence in that the cross-connect in the Illinois Bell Peoria central office is being used by BitWise to connect to special access services, cites Mr. Ellis' testimony, and in particular, his interpretation of BitWise's service order -- "[t]he quoted language shows that BitWise wanted a DS3, and that this DS3 was to run from BitWise's collocation facility in Peoria (designated elsewhere on this page as 'ACTL PEORILPJH54') to an AT&T facility (PEORILPJW12)." Illinois Bell IB at 27. However, as noted by Illinois Bell, the PEORILPJW12 is the CLLI Code for the Legacy AT&T POP located at 120 SW Jefferson and Illinois Bell did not provide the portion of circuit

between the Illinois Bell and Legacy AT&T Central Offices. Illinois Bell IB at 5. Thus, in Staff's opinion, Mr. Ellis's testimony, like Mr. Neinast's testimony, completely ignores the fact that Illinois Bell did not supply the Special Access service to which Illinois Bell would normally have Cross Connected BitWise's DS3 service.

Finally, Staff avers that Illinois Bell creates the highly misleading impression that Mr. Neinast has provided expert testimony that electronics and equipment are being provided by Illinois Bell with respect to the Legacy AT&T Connection that transform this connection from a cross connect to a Local Distribution Channel. In fact, Staff notes that Illinois Bell quotes Mr. Neinast to testify that: "the cabling and the other DSX3 panel represents that Special Access local distribution channel charge out of AT&T's tariff." Illinois Bell IB at 25, *citing* Tr. at 423.

Staff argues that this proves nothing. In Staff's view, Mr. Neinast here indicates only that the Legacy AT&T Connection includes cabling and a DSX3 panel. Both elements are used for cross-connection purposes, and therefore by referencing them, Mr. Neinast provides in Staff's view no evidence that would suggest that the Legacy AT&T Connection is anything other than a simple cross connect.

Staff next hears Mr. Neinast to state that there are components and electronics necessary to provide a circuit. Illinois Bell IB at 25-26. Staff believes that Mr. Neinast argues there is special equipment that distinguishes a cross-connect from a Local Distribution Channel. However, Mr. Neinast identified no such equipment and provided no evidence that Illinois Bell is providing such equipment with respect to Peoria Legacy AT&T Connection. Illinois Bell's brief implies that a DSX3 panel is such equipment. Illinois Bell IB at 26. In addition, Mr. Neinast provided no evidence that a DSX3 panel would be equipment identified with a Local Distribution Channel and not a cross-connect. Staff points out that this may be because, in fact, DSX3 panel (a cross connect panel) is self-evidently equipment associated with cross-connection.

Staff recommends that the Commission discount any assertion by Illinois Bell that Mr. Neinast possesses expertise in the area of tariffing. Illinois Bell IB at 27. Mr. Neinast's own testimony when asked to identify whether a circuit was a Local Distribution Channel or not, was completely unable to answer the question, stating: "I'm not – I'm not exactly sure. Again I'm not a tariff expert." Tr. at 483. Staff recommends that the Commission consider that, regardless of his experience, Mr. Neinast could not provide any evidence that Illinois Bell is providing BitWise components or equipment above and beyond those necessary for cross connection with respect to the Peoria Legacy AT&T Connection.

Indeed, Staff observes that Mr. Neinast, perhaps unwittingly, provides the most useful summary of the true nature of the services provided by Illinois. Mr. Neinast states:

[T]he special access service is that service to that IXC POP. And then the cross-connect service – from my read of it I believe it's in Section 16 of the Tariff 21 – that is the cross-connect that gives an interconnected carrier

access to an Illinois Bell special access service. So the cross-connect is required to get them access to that special access service. It's not the special access service itself.

Tr. at 475.

In Staff's view this description, considered in light of the actual circumstances, is directly on point. Staff argues that the circuit connecting the Illinois Bell Central Office to the Legacy AT&T POP is what Mr. Neinast refers to as the Special Access service. As has become clear over time in this proceeding, this service is provided by Legacy AT&T and not Illinois Bell. Once this fact is taken into account, it becomes clear that Illinois Bell is providing the cross-connect that gives BitWise access to that Special Access service. This cross-connect is not the Special Access service itself. This being the case, it is Staff's position that the Commission should not permit AT&T to charge BitWise as if it was.

2. Peoria 911 Circuits

Issue:

Is BitWise permitted to purchase the DS1 facilities connecting BitWise to the Illinois Bell Selective Router pursuant to its ICA with Illinois Bell, or must BitWise purchase such facilities under Special Access tariffs?

Staff notes that the second group of facilities billed under this BAN is a pair of DS1 circuits which run from an Illinois Bell DSX1 panel, through Illinois Bell transport equipment, to Illinois Bell's Peoria Bluff selective router. ALJ Data Request Ex. 2 at 2; ALJ Data Request Ex. 1(c).

With respect to the DS1 facilities, Staff understands Illinois Bell to be billing BitWise for DS3 Cross Connection service and DS3 to DS1 Multiplexing service and for two DS1 Transport services. Staff Ex. 3.0(R) at 1-2; AT&T Ex. 3.1, Attachment R4. In each case, the rates Illinois Bell is billing BitWise are found in its Illinois Special Access Tariffs. Id., AT&T Ex. 3.1 at 4-5 and Attachment R4.

In Staff's opinion, BitWise points to no specific alternative services or rates in the ICA between Illinois Bell and BitWise that apply when Illinois Bell provides services that allow BitWise to deliver traffic from its Collocation to the E911 Selective Router. Staff Ex. 3.0(R) at 3. Staff is aware of no rates in the ICA between the parties that are applicable in these circumstances. Id. Accordingly, the appropriate rates in this case for the cross-connection and multiplexing services are Special Access rates. Id. at 3-4.

Staff understands BitWise to assert that certain of the facilities used to provide these DS1 circuits, in particular the DS3 to DS1 multiplexing facilities, are also used to provide local interconnection trunks between BitWise and Illinois Bell. BitWise Ex. 5.0 at 9. Staff sees BitWise to further argue that a multiplexer used for purposes of exchanging local exchange traffic is not normally charged as Special Access. Id. This does not, in Staff's view, alter the fact that the appropriate rates in this case for the cross-connection and multiplexing services are Special Access rates.

Staff observes that, for purposes of exchanging local exchange traffic, each party is responsible for providing facilities on its side of the point of interconnection ("POI") between the parties. AT&T Cross-Examination Ex. 2 (Shuler) (ICA Appendix NIM, Section 2). Staff notes that the multiplexing facilities are on Illinois Bell's side of the POI. ALJ Data Request Ex. 1(c). It is not, however, clear whether the cross connection facilities are on Illinois Bell's or BitWise's side of the POI. Id.

Staff points out that regardless of their location, these cross-connection and multiplexing facilities are used for purposes of enabling BitWise to deliver traffic from its own local exchange customers to Illinois Bell's E911 Selective Router. Thus, the general rule that each party is responsible for providing facilities on its side of the POI between the parties for purposes of exchanging local exchange traffic, does not in Staff's opinion apply in this situation. Id.

Staff notes that the services at issue here can be provided as Special Access services, in which case Special Access rates apply. Id. Even if these cross-connection and multiplexing facilities are used for the dual purposes of exchanging local exchange traffic between BitWise and Illinois Bell customers and enabling BitWise to deliver traffic from its own local exchange customers to Illinois Bell's E911 Selective Router, the outcome is, in Staff's view, the same. Staff Ex. 3.0(R) at 4. The fact that Illinois Bell is providing these services to BitWise over facilities that are also used to provide other services (specifically local interconnection between the parties) does not in Staff's opinion alter the fact that Illinois Bell is providing BitWise cross-connection and multiplexing services for the purposes of allowing BitWise to connect its facilities to the E911 Selective Router. Id. The appropriate rates for such services are, as Staff sees it, Special Access rates. Id. Therefore, in Staff's opinion, Illinois Bell should be permitted to assess, and BitWise should pay Illinois Bell, applicable rates for cross-connection and multiplexing services at the Special Access rates billed by Illinois Bell. Id.

In contrast to the dual purpose nature of cross connection and multiplexing services associated with these connections, Staff understands that the DS1 transport facilities are used exclusively to deliver traffic from BitWise's customers to Illinois Bell's E911 Selective Router. Staff Ex. 3.0(R) at 4-5. Again, Staff considers the appropriate rates in this case for the DS1 transport services to be Special Access rates. Id. Therefore, in Staff's opinion Illinois Bell should be permitted to assess, and BitWise should pay Illinois Bell, applicable rates for DS1 transport services at the Special Access rates billed by Illinois Bell. Id.

In Staff's opinion, BitWise makes a number of unsupported and false assertions in its Initial Brief regarding the Peoria 911 dispute. See BitWise IB at 13-14. Staff points out that Illinois Bell does not, as BitWise suggest, act as a "contractor for the State of Illinois", since the state of Illinois has virtually no role in providing the Public Safety Answering Points (PSAPs) that undertake 911 call answering and dispatch (i.e., the function of answering and responding to 911 calls). Staff makes it clear that such functions are in fact provided by Emergency Telephone System Boards (ETSBs), which are, by statute agencies of local government created by municipal or county referendum. 50 ILCS 750/15.3. ETSBs, and not the state, are the only entities authorized to assess or collect a 911 or wireless 911 surcharge, 50 ILCS 750/ 15.3, 15.4(b), 50 ILCS 751/20, and thereafter to spend such funds on establishing and maintaining a 911 system. 50 ILCS 750/15.4(b)(3), (4); 50 ILCS 751/20. Staff sees BitWise, in short, to display a dangerous lack of knowledge regarding the configuration of the 911 public safety network.

Staff hears BitWise to assert that: "the volume of E911 calls (as noted by rules in other states) would normally necessitate only two or three DS0 channels[.]" BitWise IB at 14. However, Staff points out that BitWise fails to refer the Commission or ALJ to any such out-of-state rules. Staff strongly avers that BitWise's unsupported assertion certainly does not give the Commission or ALJ any basis to depart from *Illinois* rules, which establish very specific trunking requirements. 83 Ill. Adm. Code 725.500(c), (h)-(i). Furthermore, Staff asserts, these rules were no secret to BitWise, since applicants for Certificates of Service Authority specifically agree to comply with them in their Applications.

BitWise further asserts that:

[M]ost Verizon agreements do not have ... terms [requiring the purchase of DS1 trunks to the selective router]; while E911 circuits are still special access. Verizon does not generally override state decisions to allow or disallow indirect interconnection via a CLEC-owned E911 tandem service.

BitWise IB at 14

Again, notes Staff, BitWise does not trouble to cite any record evidence or authority for this assertion, because the record contains no such evidence. Staff points out that Mr. Shuler makes no reference to such evidence in prepared testimony. See BitWise Ex. 1.0, 2.0, 5.0. Likewise, notes Staff, BitWise might perhaps have demonstrated this alleged forbearance on the part of Verizon by introducing as evidence its own Illinois ICA with Verizon, since it undoubtedly has one. Tr. at 122. Staff observes that BitWise did not do so, and is compelled to conclude BitWise failed to take this step because its Verizon ICA would prove nothing favorable to it.

Ultimately, Staff argues, BitWise cannot and does not assert that Illinois Bell has violated Illinois 911 rules; instead, it claims that they are "tilted" in such a way as to "disadvantage" BitWise. In doing so, BitWise concedes that its ICA with Illinois Bell requires compliance with the rules requiring DS1 trunks, and furthermore concedes that

the ICA requirement is consistent with Illinois rules governing dedicated direct trunking. With respect to the Peoria 911 dispute, Staff recommends that BitWise's special pleading be disregarded, and it be required to pay the full amount charged by Illinois Bell for the facilities BitWise purchased.

With one exception, the Staff recommends that the Commission find that Illinois Bell is entitled to payment of, and BitWise is obliged to pay, for all facilities and services associated with BAN 217 s60-4619 619 at the rates billed by Illinois Bell. Staff recommends, however, that the Commission find that Illinois Bell is not entitled to payment of, and BitWise is not obliged to pay, for DS3 Local Distribution Channel service related to the Peoria Legacy AT&T Cross-connect.

Springfield - BAN 217 s60-1710 710

Issues:

Is BitWise permitted to purchase the cross-connection, multiplexing and DS1 transport facilities pursuant to its ICA with Illinois Bell, or must BitWise purchase some or all of these facilities under Special Access tariffs?

Are the facilities in question properly billed under switched access rather than special access tariffs?

As Staff understands matters, the facilities in question consist of cross-connection and multiplexing. Staff Ex. 3.0(R) at 11. Staff notes that these facilities are used to allow BitWise to send traffic from its customers to third party customers located in exchanges where Illinois Bell is not the incumbent local exchange carrier, and specifically to third party customers located in exchanges where Verizon is the incumbent local exchange carrier. Id.

With respect to these facilities, Staff observes that Illinois Bell is billing BitWise for DS3 Cross Connection service and DS3 to DS1 Multiplexing service and for 11 DS1 Transport services, AT&T Ex. 3.1, Attachment R3, billing for the cross connection and multiplexing services at rates found in its Illinois Special Access Tariffs. Id. at 4-5 and Attachment R3. Further, Staff understands Illinois Bell to be billing BitWise for the 11 DS1 Transport services at rates found in its Illinois Switched Access Tariffs. Id.

It is Staff's position that the services in question can be provided as Special Access services, in which case Special Access rates apply. Id. Staff observes BitWise to point to no specific alternative services or rates in the ICA between Illinois Bell and BitWise that applies when Illinois Bell provides services that allow BitWise to deliver traffic from its Collocation to third party carriers in other exchanges where Illinois Bell is not the incumbent local telephone company. Id. As Staff understands matters, the ICA between the parties contains no rates that are applicable in these circumstances. Id.

Therefore, in Staff's opinion, the appropriate rates in this case for the cross-connection and multiplexing services would be Special Access rates. Id.

Staff notes that the cross-connection and multiplexing facilities at issue are also used for the purposes of the exchange of local exchange traffic between BitWise customers and AT&T customers.¹ Id. Staff points out that it is well-settled that, for purposes of exchanging local exchange traffic, each party is responsible for providing facilities on its side of the point of interconnection ("POI") between the parties. AT&T Cross-Examination Ex. 2 (Shuler) (ICA, Appendix NIM, Section 2). Staff observes that the multiplexing facilities appear to be on AT&T's side of the POI. ALJ Data Request Ex. 1(a). However, it is not clear to Staff whether the cross connection facilities are on Illinois Bell's or BitWise's side of the POI. Id.

In the event that these cross-connection and multiplexing facilities are used exclusively for purposes of enabling BitWise to deliver traffic from its own customers to third party customers located in exchanges where Illinois Bell is not the incumbent local exchange carrier, Staff asserts that BitWise is not using the facilities for the purposes of exchanging local exchange or exchange access traffic between its customers and Illinois Bell's local exchange customers. Staff Ex. 3.0(R) at 12. Under such circumstances, the general rule that each party is responsible for providing facilities on its side of the POI for purposes of exchanging local exchange traffic does not, in Staff's opinion, apply. Id. at 12-13. Therefore, Staff considers the appropriate rates in this case for the cross-connection and multiplexing services to be Special Access rates. Id.

Even if Illinois Bell is providing these services to BitWise over facilities that are used to provide other services (namely local interconnection between the parties), this does not, in Staff's estimation, alter the fact that Illinois Bell is providing BitWise cross-connection and multiplexing services for the purposes of allowing BitWise to connect its facilities to those of third party carriers in exchanges where Illinois Bell is not the incumbent local exchange carrier. Staff Ex. 3.0(R) at 13-14. The appropriate rates for such services are, in Staff's view, Special Access rates. Id. at 14. Accordingly, provided these services are used for intrastate purposes,² Staff contends that Illinois Bell should be permitted to assess, and BitWise should pay Illinois Bell for cross-connection and multiplexing services at the Special Access rates billed by Illinois Bell. Id.

The proper rates for the DS1 transport services that Illinois Bell provides BitWise in order to allow BitWise to connect to third party providers in exchanges where AT&T is not the incumbent local exchange carrier are Special Access rates. Staff Ex. 3.0(R) at

¹ In Staff's opinion, there is some question regarding whether, in each of these cases, BitWise is exchanging local exchange traffic with Illinois Bell over these facilities. For example, Staff observes Mr. Shuler to testify that there are no end-user BitWise customers located in the Springfield LATA. Tr. at 161. Rather, Mr. Shuler states the traffic flowing over these circuits is, in some or all cases, traffic from AT&T or third party customers that is directed to BitWise ISP customers physically located in Peoria. Tr. at 99-102.

² If more than 10% of the traffic flowing over these facilities is jurisdictionally interstate traffic, then in Staff's opinion these services should be provided pursuant to AT&T's Federal Special Access Tariffs or Contracts and not AT&T's Illinois Special Access Tariffs. See Staff Ex. 3.0 at 14, n.32, referring to ILL.C.C. No. 21, 1st Revised Sheet 39.1.1.

14. Staff understands that the DS1 transport facilities are used exclusively to deliver traffic from BitWise's customers to third party providers in exchanges where Illinois Bell is not the incumbent local exchange carrier. Id.

However, Illinois Bell is seeking to assess BitWise Switched Access rates. Staff Ex. 3.0(R) at 14. In generally describing differences between switched and special access services Illinois Bell witness Mark Neinast testifies that: "[s]witched Access is not relevant here because Switched Access Service is for Equal Access signaling, which is used by IXCs for interexchange carried traffic." AT&T Ex. 2.2 at 7. Although Mr. Neinast made no assertion that Illinois Bell had incorrectly billed BitWise at switched rather than special access rates Mr. Neinast's general characterization, with which Staff concurs, suggests that Illinois Bell is apparently billing BitWise incorrectly for the DS1 transport services it is providing BitWise in the Springfield area. Staff Ex. 3.0(R) at 15. However, this appears to inure to BitWise's benefit, as Illinois Bell's Intrastate Special Access rates appear to be substantially higher than its Switched Access rates for comparable services. Id. Nevertheless, neither party has raised the issue of whether Special Access rates, rather than Switched Access rates, should have been charged by Illinois Bell for these circuits, nor has either offered any testimony or evidence that specifically supports such a determination. Therefore, Staff offers no opinion on whether Illinois Bell should be permitted to recover these charges at the higher, unbilled rate. Tr. at 558-59.

The Staff recommends that the Commission find that Illinois Bell is entitled to payment of, and BitWise is obliged to pay, for facilities and services associated with BAN 217 s60-1710 710 at the rates billed by Illinois Bell.

Champaign - BAN 217 s60-4625 625

Issues:

Is BitWise permitted to purchase the cross-connection, multiplexing and/or DS1 transport facilities pursuant to its ICA with Illinois Bell, or must BitWise purchase some or all of these facilities under Special Access tariffs?

Are the facilities in question properly billed under switched access rather than special access tariffs?

Staff notes that the facilities in question here are used for purposes identical to those at issue in BAN 217 s60-1710 710: (1) exchange of local exchange traffic between BitWise customers and Illinois Bell customers; and (2) allowing BitWise to send traffic from its customers to third party customers located in exchanges where Illinois Bell is not the incumbent local exchange carrier, and specifically to third party customers located in exchanges where Verizon is the incumbent local exchange carrier. Staff Ex. 3.0(R) at 11; ALJ Data Request Ex. 1(b); ALJ Data Request Ex. 2 at 2 (narrative). Staff further notes that the facilities are configured in a similar or identical

manner, with multiplexing facilities on Illinois Bell's side of the POI. ALJ Data Request Ex. 1(b).

With respect to these facilities, Staff understands Illinois Bell is billing BitWise for two DS3 Cross Connection services and two DS3 to DS1 Multiplexing services and for 25 DS1 Transport services, AT&T Ex. 3.1, Attachment R2, billing for the cross connection and multiplexing services at rates found in its Illinois Special Access Tariffs. Id. at 4-5 and Attachment R2. Likewise, Staff observes Illinois Bell is billing BitWise for the 25 DS1 Transport services at rates found in its Illinois Switched Access Tariffs. Id.

The Staff recommends that the dispute regarding BAN s60-4625 625 should be resolved in the same manner as that in BAN 217 s60-1710 710; the Commission should determine that Illinois Bell is entitled to Special Access rates. Staff Ex. 3.0(R) at 12-15. Again, Staff notes that Illinois Bell is apparently billing BitWise incorrectly for the DS1 transport services it is providing BitWise in the Champaign area – i.e., for Switched, rather than Special Access. Staff Ex. 3.0(R) at 15.

The Staff recommends that the Commission find that Illinois Bell is entitled to payment of, and BitWise is obliged to pay, for facilities and services associated with BAN 217 s60-4625 625 at the rates billed by Illinois Bell.

Quincy – BAN 217 s60-3848-376

Issues:

Is BitWise permitted to purchase the cross-connection, multiplexing and/or DS1 transport facilities pursuant to its ICA with Illinois Bell, or must BitWise purchase some or all of these facilities under Special Access tariffs?

Are the facilities in question properly billed under switched access rather than special access tariffs?

The Staff observes that facilities in question here are used for purposes identical to those at issue in BANs 217 s60-1710 710 and 217 s60-4625 625: (1) exchange of local exchange traffic between BitWise customers and Illinois Bell customers; and (2) allowing BitWise to send traffic from its customers to third party customers located in exchanges where Illinois Bell is not the incumbent local exchange carrier, and specifically to third party customers located in exchanges where Verizon is the incumbent local exchange carrier. Staff Ex. 3.0(R) at 11; ALJ Data Request Ex. 1(e); ALJ Data Request Ex. 2 at 2 (narrative). The Staff further observes that facilities are configured in a similar or identical manner, with multiplexing facilities on Illinois Bell's side of the POI. ALJ Data Request Ex. 1(e).

With respect to these facilities, Staff understands Illinois Bell is billing BitWise for a DS3 Cross Connection service and a DS3 to DS1 Multiplexing service and for 3 DS1

Transport services, AT&T Ex. 3.1, Attachment R1, billing for the cross connection and multiplexing services at rates found in its Illinois Special Access Tariffs. Id. at 4-5 and Attachment R1. Staff further understands Illinois Bell is billing BitWise for the 3 DS1 Transport services at rates found in its Illinois Switched Access Tariffs. Id.

The Staff recommends that the dispute with respect to BAN 217 s60-3848-376 should be resolved in the same manner as that in BANs 217 s60-1710 710 and s60-4625 625; the Commission should determine that Illinois Bell is entitled to Special Access rates. Staff Ex. 3.0(R) at 12-15. Again, Staff notes that Illinois Bell is apparently billing BitWise incorrectly for the DS1 transport services it is providing BitWise in the Champaign area – i.e., for Switched, rather than Special Access. Staff Ex. 3.0(R) at 15.

The Staff recommends that the Commission find that Illinois Bell is entitled to payment of, and BitWise is obliged to pay, for facilities and services associated with BAN 217 s60-3848-376 at the rates billed by Illinois Bell.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its Statement of Position be adopted in its entirety.

Respectfully submitted,

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