

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	PROCEDURAL BACKGROUND	1
III.	PRELIMINARY MATTERS.....	2
	A. JURISDICTION	2
	B. LEGAL STANDARDS	4
	C. OVERVIEW.....	5
IV.	THE PEORIA BAN DISPUTE.....	5
	A. BITWISE’S POSITION (PEORIA) BAN 217 s60-4619 619.....	5
	B. IBT’S POSITION (PEORIA) BAN 217 s60-4619 619.....	7
	C. STAFF POSITION (PEORIA) BAN 217 s60-4619 619.....	15
	D. COMMISSION ANALYSIS AND CONCLUSION (PEORIA)	26
V.	THE SPRINGFIELD BAN DISPUTE	29
	A. BITWISE’S POSITION-(SPRINGFIELD) BAN 217 s60-1710 710	29
	B. IBT’S POSITION-(SPRINGFIELD)BAN 217 s60-1710 710	29
	C. STAFF POSITION – (SPRINGFIELD) BAN 217 s60-1710 710	31
	D. COMMISSION ANALYSIS AND CONCLUSION (SPRINGFIELD)	33
VI.	THE QUINCY BAN DISPUTE	34
	A. BITWISE POSITION- (QUINCY) BAN 217 s60-3848 376	34
	B. IBT POSITION - (QUINCY) BAN 217 s60-3848 376	34
	C. STAFF POSITION (QUINCY) BAN 217 s60-3848-376.....	36
	D. COMMISSION ANALYSIS AND CONCLUSION (QUINCY).....	37
VII.	THE CHAMPAIGN BAN DISPUTE.....	38
	A. BITWISE’S POSITION (CHAMPAIGN) BAN 217 s60-4625 625.....	38
	B. IBT’S POSITION (CHAMPAIGN) BAN 217 s60-4625 625	38
	C. STAFF POSITION – (CHAMPAIGN) BAN 217 s60-4625 625	41
	D. COMMISSION ANALYSIS AND CONCLUSION – (CHAMPAIGN).....	42
VIII.	ASSESSING THE AMOUNTS DUE AND OWING.....	43
	A. TIMES AND CIRCUMSTANCES OF THE BILLING DISPUTES	43
	B. BILLING CLAIMS ARISING PRIOR TO JANUARY 22, 2007	44
	C. RECENT DEVELOPMENTS FOR BILLING.	45
	D. SUMMARY	46
IX.	FINDINGS AND ORDERING PARAGRAPHS.....	47

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

BITWISE Communications, Inc. :
-vs- :
Illinois Bell Telephone Company : **09-0052**
Complaint as to over-billing and threatened :
termination of service. :

PROPOSED ORDER

By the Commission:

I. Introduction

On January 22, 2009, BitWise Communications, Inc. (“BitWise”) filed a formal complaint with the Illinois Commerce Commission alleging that the Illinois Bell Telephone Company (“Illinois Bell” or “IBT”) overcharged BitWise for certain services that it purchased from Illinois Bell pursuant to the Commission-approved interconnection agreement (“ICA”) between the parties, and thereafter threatened to terminate such services for its alleged failure to pay. BitWise alleges that Illinois Bell’s conduct constitutes one or more violations of the parties’ ICA as well as of Part 735 of the Commission’s Rules, 83 Ill. Adm. Code 735.10, *et seq.*

Among its requested relief, BitWise sought an order directing Illinois Bell to desist from further attempts to disconnect service. BitWise contended that it had complied with Section 735.190(d) of the Commission’s Rules, and that disconnection was therefore prohibited at that point.

II. Procedural Background

On January 27, 2009, Illinois Bell filed a Notice of Intent to Disconnect (“Notice”) stating that it intended to disconnect services to BitWise under the Contested Accounts on or after February 6, 2009. In support, Illinois Bell asserted that: (a) BitWise is not entitled to invoke Section 735.190(d), which applies exclusively to carrier-to-carrier relations; and (b) even if Section 735.190(d) was found to apply, BitWise failed to comply with it because it had not paid Illinois Bell any portion of sums Illinois Bell alleges to be due and owing on the Contested Accounts. Illinois Bell stated that it would therefore disconnect service to the Contested Accounts unless BitWise pays the undisputed portion of outstanding bills on the accounts in question. On January 28, 2009, the Administrative Law Judge (“ALJ”) issued a Ruling directing Illinois Bell to refrain from disconnecting service to BitWise until a hearing in the matter was convened on February 6, 2009. See ALJ Ruling.

On February 6, 2009, a hearing was held on the matter, and after arguments were taken, the ALJ directed that the status quo ante be maintained until further notice. Tr. at 30. A schedule was set to move the proceeding forward.

On February 10, 2009, Illinois Bell filed its Motion to Dismiss. In its Motion, Illinois Bell argued that, first, Code Part 735 does not apply to carrier-to-carrier relations; and, second, that even if Code Part 735 could properly be invoked, BitWise failed to do so here. Both Staff and BitWise responded to this Motion, recommending its denial, to which Responses Illinois Bell filed a Reply. The ALJ denied Illinois Bell's Motion by an ALJ Ruling that issued on March 27, 2009.

On April 21 and 22, 2009, an evidentiary hearing was held in the matter. Admitted into the record was the direct and rebuttal testimony of Michael Schuler on behalf of BitWise; the direct and rebuttal testimony of Dr. James Zolnierek on behalf of Staff; and, the direct testimony of Scott McPhee; the direct and rebuttal testimony of Mark Neinast; and the direct and rebuttal testimony of Chris L. Ellis, on behalf of Illinois Bell. All parties engaged in witness cross-examination during the hearing.

At the conclusion of these hearings, however, the ALJ determined that the record was deficient insofar as the parties were unable to even concur in the nature, location and configuration of the physical facilities they used to exchange traffic. Illinois Bell and BitWise agreed to prepare diagrams and a narrative describing those physical facilities, and the matter was set over for status to May 20, 2009. Tr. at 428. On that hearing date, the network diagrams were admitted into evidence. ALJ Data Request Ex. 1(a)-(e); Tr. at 443. The matter was continued to June 24, 2009 for further status, at which time the narrative description was admitted into evidence, i.e., ALJ Data Request Ex. 2.

Further evidentiary proceedings were held on August 18, 2009 with respect to the ramifications of the agreed-upon network configurations now in evidence. Added to the record on this date was the Additional Testimony of BitWise witness Michael Shuler; the Additional Rebuttal Testimony of Illinois Bell witness Mark Neinast, and the Additional Testimony of Staff witness Dr. James Zolnierek. At the conclusion of this proceeding, the ALJ caused the matter to be marked "Heard and Taken." A briefing schedule was established.

In compliance therewith, the parties' Initial Briefs were filed and served on September 9, 2009. Reply Briefs were filed on September 21, 2009. The ALJ further had the parties submit their respective statements of position on the issues for this Order. On January 25, 2010, the ALJ issued a Proposed Order.

III. Preliminary Matters

A. Jurisdiction

Settling the question of the Commission's authority to hear the instant dispute is a challenging matter. The statutory authority upon which BitWise relies upon to bring its Complaint is not readily apparent from the face of the pleading. For its informal complaint (and made an attachment to the formal complaint), BitWise sought relief

under Sections 5-201, 5-202 and 9-250 of the Public Utilities Act. These provisions, as pointed out by Staff, appear inapplicable to the relief sought by BitWise in this proceeding.

Staff believes that, notwithstanding its vagueness as to statutory basis, this Complaint arises under Section 10-108 of the Public Utilities Act, which provides, in relevant part that:

Complaint may be made ... by any ... corporation ... by petition or complaint in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission. 220 ILCS 5/10-108.

Staff also refers us to another portion of this statute which identifies that Article IX complaints, i.e., complaints regarding the rates, charges, classifications or services of a public utility, are to be disposed of by Commission order no later than one year after the filing of such complaint unless parties agree to an extension. *Id.* Such an extension has been agreed to by all parties to the instant proceeding.

Finally, Staff points out that certain federal statutes and regulations are relevant to this proceeding. Specifically, Staff notes Section 252 of the federal Telecommunications Act of 1996 to provide, in relevant part, that:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251...an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers **without regard to the standards set forth in subsections (b) and (c) of section 251** [governing interconnection generally, and ILEC interconnection obligations specifically]. 47 U.S.C. §252(a)(1) (emphasis added)

Further, Staff observes FCC Rule 51.323(h) to provide that:

As described in paragraphs (1) and (2) of this section, an incumbent LEC shall permit a collocating telecommunications carrier to interconnect its network with that of another collocating telecommunications carrier at the incumbent LEC's premises and to connect its collocated equipment to the collocated equipment of another telecommunications carrier within the same premises, **provided that 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) (emphasis added).

While, as the Staff has noted, the Complaint does not truly sound in Article IX of the Public Utilities Act, it purports to do so in some measure. For its part and in the course of argument, IBT suggests that the complaint falls under Section 9-252.1 of the Public Utilities Act. The ALJ's Ruling of March 27, 2009, observed that the core of the dispute arises from the parties' interconnection agreement ("ICA"). Indeed, BitWise claims to be aggrieved by tariffed rates applicable to certain services under certain circumstances. At bottom, however, BitWise's challenge is not to the rates per se. The proposition that BitWise advances is that the rates in question are not applicable to the services it obtained from Illinois Bell. Instead, BitWise claims that it should be able to purchase the services pursuant to under its ICA.

The Telecommunications Act of 1996 gives state commission a primary role with respect to interconnection agreements. A principal duty is to approve or reject the final interconnection agreement whether it was negotiated by the parties or arbitrated by the state commission. With the power to approve is the power to construe. Thus here, where the construction of an interconnection agreement that the Commission approved is at issue, it seems clear that our jurisdiction is established.

As will be seen in the course of this Order, however, the instant complaint is a hybrid that requires our review of both the ICA and the tariff-based billings tendered by IBT. The Commission concludes (and as will be explained later), that to the extent any matters in this complaint are outside the parties' ICA, these would reasonably fall under Section 9-252 of the Act.

B. Legal Standards

Where a statute does not specifically assign the burden of proof, courts have uniformly imposed on administrative agencies the common-law rule that the party seeking relief has the burden of proof. Scott v. Dept. of Commerce and Community Affairs, 84 Ill. 2d 42, 53; 416 N.E.2d 1082, 1088 (1981). The term "burden of proof" includes the burden of going forward with the evidence, and the burden of persuading the trier of fact. People v. Ziltz, 98 Ill. 2d 38, 43; 455 N.E.2d 70, 72 (1983). The burden of persuading the trier of fact does not shift throughout the proceeding, but remains with the party seeking relief. Ambrose v. Thornton Twp. School Trustees, 274 Ill. App. 3d 676, 680; 654 N.E.2d 545, 548 (1st Dist 1995), *app. den.*, 164 Ill. 2d 557 (1995). Accordingly, and in this instance, BitWise has the burden of proof.

The matter at hand is a contested proceeding. Section 10-15 of the Illinois Administrative Procedure Act provides that "[u]nless otherwise provided by law or stated in the agency's rules, the standard of proof in any contested case hearing conducted under this Act by an agency shall be the preponderance of the evidence." 5 ILCS 100/10-15. The Commission has observed that this standard appears to be "the appropriate standard in all contested cases[.]" Order at 4, Illinois Commerce Commission on its Own Motion: Amendment of 83 Ill. Admin. Code Part 200, Docket 92-0024 (April 29, 1992). Consequently, as Staff points out, the standard of proof in this proceeding is the preponderance of the evidence standard.

C. Overview

At a high level, the dispute in this proceeding is the proper jurisdictional classification of certain facilities that the parties agree exist, and further agree that BitWise had ordered. The heart of the parties' disagreement centers on whether these facilities can properly be ordered pursuant to, and under the terms of, the parties' interconnection agreement ("ICA") and several amendments thereto – as BitWise would contend, or whether these facilities must be ordered under the terms of AT&T's special access tariffs – as AT&T contends.

More specifically, the matter before this Commission relates to a host of charges that IBT has billed to BitWise over the past six years and which BitWise, has largely refused to pay. While BitWise appears to have submitted some disputes to IBT challenging some of the unpaid bills (mostly prior to 2004), the dispute process was not successful either for BitWise or for IBT. Engaging with Staff in the informal dispute resolution process also did not resolve these issues. The only agreement up to now is that the instant dispute centers on the billing account numbers ("BAN") here listed:

- BAN 217 s60-4619 619 (Peoria)
- BAN 217 s60-1710 710 (Springfield)
- BAN 217 s60-4625 625 (Champaign)
- BAN 217 s60-3848-376 (Quincy)

The Commission will now consider, individually, the evidence and arguments that pertain to each BAN.

IV. THE PEORIA BAN DISPUTE

A. BitWise's Position (Peoria) BAN 217 s60-4619 619

Michael Shuler, the President and CEO of BitWise, testified for the Complainant. He stated that BitWise is a Competitive Local Exchange Carrier ("CLEC") that built its own network in Central Illinois pursuant to an Order of the Commission dated November 21, 2000 in Docket 00-0480. Mr. Schuler explained that BitWise provides local and interexchange telecommunications services and Internet services to approximately 2,500 customers and that it has interconnection agreements with Illinois Bell, Verizon and Century Tel (Gallatin River). From 2000 through 2006, Mr. Schuler testified, BitWise paid IBT \$464,540.02, and IBT here claims that BitWise owes it, for services rendered in the four LATAs, approximately \$340,000.00. He further testified that the charges for the four BANS have been disputed without any resolution of the matter. Complainant's Exhibit 1.0 at 3-4.

Generally, Mr. Shuler testified that IBT has improperly classified the circuits in the four LATAs as either Interstate Switched Access or Special Access under its Illinois Tariff No. 21, when the circuits in dispute should have been billed in accordance with the interconnection agreement between the parties. Mr. Shuler specifically cited

sections 2.2, 2.3 and 2.7.1 and 2.7.2 of the Interconnection Agreement, SBC-13 State NIM, to show that BitWise should have been billed \$0 per month for local interconnection past the Point of Interconnection.

Billings at special access rates instead of ICA rates.

With respect to the Peoria LATA, BitWise complains that IBT is billing it for DS3 Local Distribution Channel Service and DS3 Cross Connection service under Ameritech FCC Special Access Tariffs. According to BitWise, it ordered these facilities as a collocation-to-collocation cross-connection, and pursuant to the terms of its ICA with IBT. BitWise asserts that the evidence it has provided shows that the 320 Fulton Central Office of IBT in which BitWise is located and the Legacy AT&T space at 120 SW Jefferson are, without gap, in the same indistinguishable building. Further, as noted by Mr. Shuler, Legacy AT&T and IBT share the same CLLI code.

BitWise considers it obvious from a review of ALJ Exhibit 1(d) that even if the AT&T area were a separate building, the channel termination belonged to Legacy AT&T, not IBT, and BitWise should not have been charged for channel termination. Moreover, in accordance with the FCC Collocation Order (FCC 01-204 Fourth Report and Order in CC Docket No. 98-147), it is clear to BitWise that this is interstate internet traffic as testified to by Mr. Shuler. Thus, BitWise argues, only a charge of \$1.01 per month is appropriate.

The LDC and Cross-Connection Billing.

BitWise notes Staff to agree that IBT is only providing a cross-connection service between two DSX3 cross-connect panels within IBT's central office and not a Local Distribution Channel. According to BitWise, this is clear from a review of ALJ Exhibit 1(d) and the narrative, ALJ Exhibit 2 at 2. Thus, BitWise contends, only a charge of \$1.01 per month is appropriate and not the billings of \$3,701.01 per month. According to BitWise, IBT did not provide Special Access service for the cross-connected BitWise DS3 service. Moreover, BitWise argues, it did not order a Special Access circuit from IBT nor did it intend to order Special Access. BitWise maintains that AT&T interpretation of the cross-connect ASR as an order for Special Access was erroneous at best, and a deceptive practice at worst.

According to BitWise, the Local Distribution Channel does not need other electronics to provide functionality to the circuit. BitWise sets out at page 3 of its Reply Brief that:

The DSX3 panel is simply a passive entity of de minimis cost; each panel carries multiple DSX3 connections and the circuit in question presumably consumes only two jacks (one for each direction of transmission) on each carrier's side. There should (be) no other electronics needed, as the circuit does not actually go anywhere. Hence, literally no service is being provided. Legacy AT&T owns the local distribution channel into its portion of the building.

The Peoria BAN Multiplexing Dispute.

As set out on ALJ Exhibit 1(c) and ALJ Exhibit 2 at 2, BitWise observes that there are a pair of DS1 circuits which run from an IBT DSX1 panel, through IBT transport equipment to IBT's Peoria Bluff selective router. According to BitWise, IBT is billing BitWise under its Special Access Tariffs for the M13 multiplexor.

In essence, BitWise points out, the same argument applies for the E911 service that is provided in both Peoria and Champaign. Specifically, and referring to the Peoria diagram, i.e., ALJ Exhibit 1c, Mr. Shuler testified that:

...the only reason that it (the multiplexer) is being billed as a Special Access multiplexer is that two E911 circuits pass through it. A multiplexer used for local trunks is not normally charged Special Access.

He also testified that IBT is charging BitWise Special Access rates for the entire multiplexer when only one fourteenth (2 of 28) ports are used for E911. Complainant's Exhibit 5.0 at 9. According to Mr. Shuler, if he were aware that IBT was treating the entire multiplexer as Special Access, BitWise would have fed the E911 circuits on its DS1 circuits at the POI. Id.

B. IBT's Position (Peoria) BAN 217 s60-4619 619

As background for the dispute, Illinois Bell explains that BitWise reaches the IBT central office at 320 Fulton in downtown Peoria via fiber BitWise has constructed from its central office at 331 Fulton. The fiber is routed through IBT's building into BitWise's collocation bay; from this bay, there are prewired cables, owned by BitWise, that are connected to IBT's DSX panels. There are 6 DS3s and 56 DS1s prewired between BitWise and the IBT DSX panels. Jt. Response to ALJ Data Request 1(c), 1(d); Jt. Response to ALJ Data Request 2 at 1-2. IBT's facilities begin at these DSX panels.

One of the six BitWise DS3s going to an IBT DSX3 panel is connected to an IBT owned M13 multiplexer that breaks down the DS3 into 28 individual DS1s. Jt. Response to ALJ Data Request 1(c); Jt. Response to ALJ Data Request 2, p. 2. Two DS1s run from the multiplexer through IBT transport equipment to the Peoria Bluff 911 selective router. Jt. Resp. to ALJ Data Request 1(c); Jt. Resp. to ALJ Data Request 2 at 2; Staff Ex. 3.0(R) at lines 27-31. Another of the six BitWise DS3 cables going to IBT's DSX3 panels is connected to a second IBT DSX3 panel which is dedicated to Legacy AT&T. Tr. at 472. Legacy AT&T then has a cable running from this second IBT DSX3 panel to Legacy AT&T's DSX3 panel located at the Legacy AT&T central office at 120 SW Jefferson. Legacy AT&T then carries this circuit to the internet. Jt. Resp. to ALJ Data Request 1(d); Jt. Resp. to ALJ Data Request 2 at 2.

IBT began billing BitWise for access services in the Peoria LATA in January 2003, under Billing Account Number ("BAN") 217-s60-4619-619. AT&T Illinois Ex. 3.1, Attachment R7 at 12. As of early April 2009, IBT was billing BitWise two types of monthly special access charges related to the multiplexer used for 911 services: a \$1.01 Cross-Connection charge, and a \$490.00 DS3-to-DS1 Multiplexing charge (for a

60-month term plan in Zone 4). AT&T Illinois Ex. 3.1 at 4 & Attachment R4. IBT also was billing BitWise two types of monthly charges for special access transport services for the two 911-related DS1s: a \$105.00 DS1 Channel Mileage Termination charge, and a \$34.10/mile DS1 Channel Mileage charge. AT&T Illinois Ex. 3.1, Attachment R4.

IBT also was billing BitWise two types of monthly special access charges related to the circuit connecting BitWise's internet traffic to Legacy AT&T: a \$1.01 Cross-Connection charge, and a \$3700.00 DS3 Local Distribution Channel ("LDC") charge. AT&T Illinois Ex. 3.1 (Ellis Rebuttal), Attachment R4. The Cross-Connection and LDC charges represent distinct services that IBT provides. The cross-connection encompasses the wiring running from the BitWise POI to the DS3 cable that goes to the IBT DSX3 panel dedicated to the Legacy AT&T POP, while the LDC encompasses the dedicated DSX3 panel and channel capacity equipment and other electronics needed to provide functionality to the circuit. Tr. at 317-18, 472.

BitWise and IBT had a different network set-up in the Peoria LATA prior to the configuration described above. The two companies first agreed to a network architecture plan for the Peoria LATA in 2002-03. BitWise Ex. 2.0 at lines 71-73 & Ex. 2.3; AT&T Illinois Ex. 2.1 at lines 203-220 and Diagram 6R. That configuration changed subsequent to 2003, after BitWise made arrangements for cageless collocation in the IBT Peoria central office. BitWise Ex. 2.0 at lines 72-73; AT&T Illinois Ex. 2.1 at lines 222-224; Tr. at 93-94.

In February 2006, BitWise submitted an order to the AT&T Access Service Center for a new DS3 in the Peoria LATA. AT&T Illinois Ex. 3.1 at lines 107-10 and Attachment R6; BitWise Ex. 1.0 at lines 132-36. Through this order, BitWise requested a DS3 circuit running from its collocation space in the IBT Peoria central office (PEORILPJH54) to the Legacy AT&T IXC POP at 120 SW Jefferson (PEORILPJW12). The order also asked IBT to provide the facilities to connect the two locations. AT&T Illinois Ex. 3.1 at lines 116-26. IBT's provision of the facilities for this connection meant that special access channel charges were appropriate. *Id.*, lines 126-27. The code "04QB" used on one section of the order could designate a circuit used for local interconnection running between two CLEC collocation spaces (BitWise Ex. 1.0 at lines 146-48), but the code also could be used to order an access service billed at tariff rates (AT&T Illinois Ex. 2.0 at lines 201-11).

Billing at special access rates and not at rates in the parties' ICA

IBT asserts that there is really no dispute between the parties that the charges at issue in the Peoria internet dispute pertain to facilities that are used for traffic between BitWise and another carrier for purposes of reaching the internet. IBT notes that the agreed diagram for the Peoria LATA internet cross connect dispute, i.e., Jt. Resp. to ALJ Data Request 1(d), shows that the IBT DS3 cable depicted in red at the top of the box representing the IBT central office at 320 Fulton connects via an IBT DSX3 panel in the same central office to a Legacy AT&T DS3 cable that runs to the Legacy AT&T central office at 120 SW Jefferson, and then onward to BitWise's ISP. It is these IBT

facilities (the DS3 cable and DSX3 panel each located in the 320 Fulton central office), IBT argues, that give rise to the charges in dispute here.

IBT states that the traffic at issue is clearly being routed to the IXC network of Legacy AT&T, an entity distinct from IBT. IBT maintains that there is nothing in the record to suggest that this traffic is destined for an IBT end user or any other end user located in the Peoria LATA, or that any of the facilities at issue involve interconnection arrangements between IBT and BitWise. IBT argues that BitWise has established this circuit solely for its end users' interexchange access service and not for the exchange of traffic between BitWise's end users and AT&T Illinois' end users within the Peoria LATA.

Since the traffic at issue is on a dedicated facility between a CLEC and another carrier, IBT asserts that the services being provided by IBT over its facilities are special access services, which are provided *via* IBT's Access Tariff No. 21. "Special access" service, IBT explains, consists of a dedicated transmission path provided by the incumbent local exchange carrier ("ILEC") that connects the facilities of the customer (including a CLEC such as BitWise) with an IXC or other carrier. The facilities leased by BitWise from IBT are special access facilities because they are dedicated facilities used to connect BitWise to an IXC (Legacy AT&T), according to IBT.

IBT disagrees that the facilities at issue are part of a collocation-to-collocation arrangement, as BitWise has asserted. No collocation-to-collocation cross-connect exists between BitWise and Legacy AT&T because Legacy AT&T does not have a collocation arrangement with IBT in the Peoria central office and has not had one at any time since 2003. IBT notes that Staff's witness concurred in this point. Similarly, IBT argues, the arrangement in Peoria is not a CLEC to CLEC cross-connect, as BitWise has repeatedly posited. Legacy AT&T is not acting as a CLEC when it provides internet access to BitWise; instead it is acting as an IXC. IBT points out that BitWise conceded both in its pre-filed testimony and at hearing that the traffic being passed to Legacy AT&T is for internet access destined for outside the Peoria LATA.

IBT notes that BitWise also concedes in its initial brief 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.* IBT does not understand 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. But, IBT observes, BitWise provides no legal support for this proposition.

Moreover, IBT argues, BitWise's discussion of collocation suggests that it misconstrues at a fundamental level, what collocation actually is. For example, IBT observes BitWise to suggest 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, IBT goes on to explain that

carriers can have a presence in a central office in many scenarios, such as meet-point arrangements, that are not collocation.

IBT next asserts that, 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. On this point again, AT&T notes, Staff agrees.

IBT observes that BitWise cites various FCC orders and rules to argue that they "do not directly address the Legacy AT&T case" or "these shared buildings." BitWise Init. Br. at 9-11. But, according to IBT, this argument does nothing to support BitWise's position in any manner. Given that BitWise points to no order or rule that imposes different standards for collocations involving Legacy AT&T undermines BitWise's argument that this Commission's analysis of the issues should somehow hinge on the fact that Legacy AT&T is involved.

BitWise also asserts that the Access Service Request ("ASR") it submitted to IBT for these facilities supports its claim that it ordered these facilities as interconnection out of its ICA. IBT disagrees and states that the purported evidence to which BitWise points does not support its position. IBT notes that there is not a collocation-to-collocation scenario and the code 04QB cited by BitWise is used for both UNE requests under an ICA and access requests under the tariff.

IBT notes BitWise to allege that IBT's ordering process is unfair and that IBT is engaging in "deceptive practices." IBT denies those allegations. IBT maintains that BitWise's order clearly sought special access services. IBT further explains that the ordering process employed by IBT is the product of industry-wide collaboration (in which BitWise was more than welcome to participate), and BitWise does not present any evidence to show that IBT did anything inconsistent with these industry developed ordering processes.

IBT points out that 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. According to IBT, however, 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; or that (2) Legacy AT&T was operating as a CLEC in connection with the internet traffic BitWise was delivering to AT&T; or that (3) BitWise would only be charged a cross-connect and not the local distribution channel ("LDC") charge; or that (4) BitWise could obtain the services it ordered out of the parties' ICA.

IBT observes BitWise to argue that there was no "meeting of the minds" between IBT and BitWise about what BitWise ordered. See BitWise Init. Br. at 8. 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. IBT maintains that it was correct in so interpreting the order. But, IBT posits, 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 that IBT was intending to bill BitWise for special access pursuant to its tariff. IBT notes Mr. Schuler to have testified that BitWise had options available to it other than ordering special access through IBT's Access Tariff. BitWise Init. Br. at 12. If this was the case, it is not clear to IBT why BitWise did not take advantage of those options once it learned IBT was charging it for special access under IBT's tariff. By not cancelling its order, IBT argues, BitWise has acquiesced in IBT's interpretation of the order as special access, and waived any right it had to contest the charges.

IBT also disagrees with BitWise's claim that the IBT Peoria central office at 320 Fulton and the Legacy AT&T central office at 120 SW Jefferson are located in the same building. IBT points to what it believes is 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 central office was partitioned between IBT and the Legacy AT&T IXC. 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. IBT avers that BitWise did not rebut any of this evidence.

Finally, IBT believes that BitWise is attempting to mount a collateral attack on the rates contained in IBT's Tariff No. 21. 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. IBT asserts that the ALJ was correct.

The proper charging of both a cross-connection charge and a local distribution channel charge for the facilities in the IBT Peoria central office that connect BitWise's collocation space to a Legacy AT&T DS3 cable.

IBT asserts that it has billed BitWise, on a monthly basis, an LDC charge and a cross-connect charge. IBT maintains that both of these charges are appropriate under IBT's Access Tariff. In explanation thereof, IBT points to Tariff 21 Original Page 234, which states that there are four basic rate categories applicable to special access services. IBT notes that it does not assess Channel Mileage Termination or Channel Mileage charges against BitWise due to the short length of the IBT-provided DS3 at issue here. Tr. at 474:15-21 (Neinast). See also Tariff 2nd Rev. Page 235, AT&T Illinois Late Filed Ex. 4.0 at 137 ("The Channel Mileage Termination charge does not apply to circuits which have no Channel Mileage."). Thus, the only two charges applicable in the situation are: (1) the Local Distribution Channel charge and (2) "Optional Feature and Functions," if any.

IBT also points to the description of the LDC at Tariff 21, 2nd Rev. Page 235. AT&T Illinois Late Filed Ex. 4.0 at 137. IBT argues that it is providing a DS3 communications path between the BitWise POI and an IBT DSX3 panel in the IBT

Peoria central office at 320 Fulton; thus, IBT is providing a local distribution channel to BitWise and therefore may properly bill the LDC charge to BitWise.

Regarding the cross-connect charge that IBT imposes, IBT notes that the Access Tariff provides that cross-connects are one of the optional feature and functions available in connection with special access services. IBT Tariff 21 Original Page 235.1, AT&T Illinois Late Filed Ex. 4.0 at 138.

IBT also cites Tariff 21 3rd Rev. Page 615 which describes the type of cross-connection between the BitWise POI and the Illinois Bell DS3 cable at issue in the diagram of the Peoria internet dispute. IBT Tariff 21, 3rd Rev. Page 615, AT&T Illinois Late Filed Ex. 4.0 at 158, 160; AT&T Illinois Ex. 3.1 (Ellis Rebuttal), at 4 and Attachment R4. According to IBT, the Tariff makes clear that the purpose of the ACCSI cross-connect is to provide for the connection of a customer provided channel to switched access and/or special access services being provided by IBT. IBT argues that that is what the cross-connect is being used for in the instant case. IBT explains that BitWise has provided its own DS3 cable going into the DSX3 panel shown on the upper left-hand side of the Joint Response to ALJ Data Request 1(d). BitWise's cable is then cross-connected at that DSX3 panel to the IBT-provided special access services that are provided in the IBT-owned DSX3 panel that is dedicated to Legacy AT&T. Tr. at 472:3-10 (Neinast).

IBT notes Staff to suggest that it is possible that the cross-connect itself is the sum total of the special access service being provided by IBT. IBT argues that such a hypothesis is inconsistent with the plain language of Section 16.4 of the tariff. IBT maintains that the language of Section 16.4 does not make sense if the special access service to which one is cross-connecting is the cross-connect itself. IBT also points out that Tariff 21 Original Page 235.1 states that "Optional Features" "are features and functions which *may be added to a Special Access Service.*" AT&T Illinois Late Filed Ex. 4.0 at 138 (emphasis added). According to IBT, a reading of the tariff that treats a cross-connect as the special access service itself renders the language on Page 235.1 incoherent.

To support its position, IBT points to the testimony of its witness Neinast, who explained (during both the original hearing and the additional hearing in this matter), that IBT provides more than just a cross-connect to BitWise. Tr. at 472 (Neinast); see *also id.* at 473-474 (cross-connection is between BitWise POI and IBT cable going to dedicated Legacy AT&T POP), 476-477. IBT points out that Mr. Neinast further explained that the cross-connect "gives an interconnected carrier access to an Illinois Bell Special Access service. . . . *It's not the Special Access service itself.*" Tr. at 475:15-20 (Neinast) (emphasis added). See *also id.* 317, 477.

IBT observes that BitWise presented no evidence to rebut Mr. Neinast's testimony on this topic at either the original or additional hearing, nor did it even cross-examine Mr. Neinast on the matter. IBT further notes that Staff witness Zolnierrek did not present any specific evidence to show that IBT was merely providing a cross-connect. IBT points out that Dr. Zolnierrek just stated his belief that what is depicted on the Joint Response to ALJ Data Request 1(d) is simply a cross-connect. According to

IBT, Dr. Zolnierek's position ignores the presence of the IBT-owned DSX3 panel that is dedicated to Legacy AT&T. Tr. at 318 (Neinast).

IBT disagrees with Staff's suggestion that the cross-connect might be being used to connect to special access service ordered by some other party. IBT observes Dr. Zolnierek to have conceded that the only two possible carriers who could order special access from IBT in this situation are BitWise and Legacy AT&T. Tr. at 574:14-21 (Zolnierek). Yet, IBT asserts, no one presented any evidence that Legacy AT&T had ordered special access from IBT. Indeed, IBT points out, Mr. Neinast testified that Legacy AT&T orders neither switched nor special access in Peoria. Tr. at 480:12-22 (Neinast). Thus, IBT argues, there is no basis to conclude that the cross-connect provided to BitWise is being used to enable BitWise to connect to a special access service being ordered by someone else.

IBT asserts that the evidence in the record points to only one conclusion, i.e., that the cross-connect in the IBT Peoria central office is being used by BitWise to connect to the special access services *BitWise ordered*, and should pay for. IBT points to Attachment R6 to the Ellis Rebuttal Testimony, which is a copy of the first six pages of the February 2006 ASR through which BitWise requested the DS3 facility in the Peoria LATA. AT&T Illinois Ex. 3.1 (Ellis Rebuttal), at lines 116-27. IBT maintains that, based on how BitWise filled out the ASR, it is clear that BitWise intended to order special access services from IBT, and intended for IBT to provide the Local Distribution Channel.

IBT observes that Staff 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 later learned IBT was not. In IBT's view, 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, IBT notes that Staff does not point to any evidence in the record to establish that proposition. Contrary to Staff's unsupported hypothesis, IBT asserts that the LDC is not the DS3 cable between the IBT and Legacy AT&T central offices; LDC is provided through the IBT-owned DSX panel in the IBT central office at 320 Fulton (discussed above).

IBT observes BitWise to similarly misconstrue what the LDC is. IBT notes BitWise to say that since Legacy AT&T brought the DS3 cable from its central office to IBT's central office, that this somehow means the "channel termination belonged to Legacy AT&T." IBT asserts that there is no evidence that Legacy AT&T owns the channel termination in dispute here, or that that the channel termination exists within the Legacy AT&T DS3 cable. IBT asserts that what the 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, IBT continues, 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 IBT witness McPhee, and what IBT has provided to BitWise.

Finally, IBT points out, the evidence shows that BitWise reconfigured its network in Peoria no later than February of 2006. Although this change in configuration undoubtedly affected the billing for the Peoria BAN, BitWise submitted no specific evidence explaining any alleged problems with the billing under the earlier configuration, and thus, IBT posits, the Commission has no way of knowing whether the record here – which focuses on the current Peoria configuration – is even relevant to the earlier period. Therefore, IBT argues, there is no basis for the Commission to disallow the charges imposed by IBT for the period prior to February of 2006.

The multiplexing and cross-connection charges for 911-related services are appropriately billed by IBT at special access rates and not at rates in the parties' ICA.

The DS1 transport charges for the circuits connecting BitWise to the E911 selective router appropriately billed by IBT at special access rates and not at rates in the parties' ICA.

To send traffic from its customers to the E911 selective router in Peoria Bluff, IBT explains that BitWise obtains from IBT a DS3 cross-connection and DS3-to-DS1 multiplexing service, as well as DS1 transport services such as channel mileage and channel mileage termination. Further, the cross-connection and multiplexing also allow BitWise to exchange local traffic with IBT.

Illinois Bell asserts that, under the parties' ICA, BitWise has an obligation to have 911-related facilities in place. According to IBT, the ICA also makes clear that, if IBT provides facilities to BitWise for 911 purposes, those facilities will be billed pursuant to the IBT Access Tariff. These provisions, it asserts, justify IBT's billing of the 911-related facilities at special access rates.

IBT points out that the Commission Staff has concurred that the charges for DS3 facilities and for DS1 transport services should be billed at special access rates. Staff also concluded that any dual use of the DS3 facilities (e.g., multiplexing for both 911 and local interconnection traffic) did not affect the applicability of special access rates.

IBT notes that BitWise provides no explanation for its refusal to pay the charges for 911-related DS1 transport services. And, IBT maintains that BitWise has failed to prove that those charges are invalid. IBT points out that BitWise's arguments about why it disputes the 911-related charges relate *only* to the multiplexing charge. In particular, IBT sees BitWise to contend 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. IBT would have it be noted, however, that Staff specifically rejected BitWise's suggestion that the multiplexing charge should be prorated based on the number of channels used for 911 service, as compared to local service. Tr. at 521-23. In addition, IBT observes that BitWise pointed to nothing in the IBT Access Tariff or the ICA that supports its position. Therefore, IBT argues, there is nothing on record to disprove the positions of IBT and Staff.

IBT contends that it has been properly billing BitWise for the services that BitWise has been using since 2003, but not paying for since 2006. It requests that the Commission affirm that all of the charges in dispute between the parties (including accrued late payment charges) are properly due and owing from BitWise pursuant to

IBT's Access Tariff. IBT further requests that the Commission permit IBT to disconnect BitWise's service if BitWise does not pay the amounts determined by the Commission to be owed within 30 days of the Commission's Order.

C. Staff Position (Peoria) BAN 217 s60-4619 619

Staff understands the first set of 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 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). 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. 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. 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, Staff understands Illinois Bell to be billing BitWise for DS3 Local Distribution Channel service and DS3 Cross Connection service. 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. 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.

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 notes AT&T witness Mark Neinast to have 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. In contrast, Staff observes BitWise witness Michael Shuler to have testified that he has no knowledge of how Illinois Bell's or Legacy AT&T's equipment is legally classified. Therefore, Staff considers there to be no evidence to support, and direct evidence to contradict, BitWise's contention that Legacy AT&T has elected to collocate within Illinois Bell's Central Office at 320 Fulton in Peoria.

Further, Staff argues, even if one is prepared to assume, as BitWise urges the Commission to do, that the Legacy AT&T DS3 Cable entering Illinois Bell's 320 Fulton Central Office is a collocated facility, this does not aid BitWise's argument. Staff understands Mr. Shuler to have testified that the traffic transported over this circuit is traffic flowing between BitWise's Internet Service Provider customers and the Internet at large. 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 04-0379). Here however, Staff notes that the traffic placed on these facilities is neither telephone exchange or exchange access traffic, but instead primarily Internet traffic; and it observes BitWise to itself concede as much. Staff states that it 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 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 where the 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 Reply Br. at 13. Staff observes BitWise to argue that: "in [this] case, the [ICA] should be construed in favor of BitWise, the smaller party." Id.

For its part, 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 observes 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 (1st Dist. 2001). Staff commends the Commission's attention to Illinois Supreme Court holdings that the 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).

Staff asserts 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 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, Docket 01-0649 (December 19, 2001), BitWise was entitled to adopt 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 situation that the ICA is a “take-it-or-leave-it” contract such as would render it adhesiory. 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 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 (where the 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 that would have a contract be construed strictly against the drafter thereof. Bunge v. Northern Trust Co., 252 Ill. App. 3d 485, 493, 623 N.E.2d 785, 791 (4th Dist. 1993). Staff points out, however, 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 (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, (4th Dist. 2007).

Here, Staff notes, 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) oif [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)

Staff maintains that 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 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.

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 mere 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. 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. Staff observes that the DS3 circuit is provided by Legacy AT&T. 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 sees 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. In Staff’s view, 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 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. According to Staff, however, 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. Further, Staff notes 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. In Staff’s view, 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.

Further, Staff observes Illinois Bell to assert 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. 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. 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 Ellis’ testimony to reveal the same misunderstanding of the services provided by Illinois Bell. 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 Initial Br. at 27. As noted by Illinois Bell, however, 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 Initial Br. 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.

In Staff’s view, 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 this regard, 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. Staff recalls that when asked to identify whether a circuit was a Local Distribution Channel or not, Mr. Neinast was 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, despite 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.

At the same time, however, Staff observes that Mr. Neinast provided the most useful summary of the true nature of the services provided by Illinois when he stated that:

[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 testimonial description, when considered in light of the actual circumstances, shows itself to be 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, Staff maintains that this service is provided by Legacy AT&T and not Illinois Bell. According to Staff, Illinois Bell is providing the cross-connect that gives BitWise access to that Special Access service. Where the cross-connect is not the Special Access service itself, it is Staff's position that the Commission should not permit AT&T to charge BitWise as if it was.

With respect to the Peoria 911 Circuits issue, Staff views the question as being whether BitWise is permitted to purchase the DS1 facilities connecting BitWise to the Illinois Bell Selective Router pursuant to its ICA with Illinois Bell, or must it 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. 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. In each case, Staff observes, the rates Illinois Bell is billing BitWise are found in its Illinois Special Access Tariffs.

Staff notes that 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 is aware of no rates in the ICA between the parties that are applicable in these circumstances. Accordingly, Staff asserts, the appropriate rates in this case for the cross-connection and multiplexing services are Special Access rates. 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. Staff sees BitWise to further argue that a multiplexer used for purposes of exchanging local exchange traffic is not normally charged as Special Access. 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. 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. Regardless of their location, Staff points out, 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.

Staff notes that the services at issue here can be provided as Special Access services, in which case Special Access rates apply. 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. 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. The appropriate rates for such services are, as Staff sees it, Special Access rates. 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.

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. Again, Staff considers the appropriate rates in this case for the DS1 transport services to be Special Access rates. 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.

In Staff's opinion, BitWise makes a number of unsupported and false assertions in its Initial Brief regarding the Peoria 911 dispute. BitWise Initial Br. 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. In short, Staff sees BitWise, to display a dangerous lack of knowledge regarding the configuration of the 911 public safety network.

Staff observes 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. Staff points out, however, that BitWise fails to refer the Commission or the 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.

Staff observes BitWise to further assert 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. 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. 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.

D. Commission Analysis and Conclusion (Peoria)

We understand that Illinois Bell has been billing BitWise for both a DS3 Local Distribution (LDC”) service and DS3 Cross Connection Service out of its Special Access Tariffs. IBT explains that “special access” service consists of a dedicated transmission path provided by the incumbent local exchange carrier (here, IBT) that connects the facilities of the customer (here, BitWise) with an IXC or other carrier (here, Legacy AT&T). For its part, BitWise asserts that it intended to order this facility as a collocation to collocation cross-connection such as it is entitled to under the parties’ ICA. The evidence presented by BitWise, however, does not support its claim. Altogether, the record showings and the argument presented by IBT and Staff demonstrate to the Commission that the parties’ ICA does not pertain in these premises. To the extent that

BitWise attempts to challenge or undermine the parties' ICA, we consider its arguments unavailing. Like many carriers before and since, BitWise had every opportunity to negotiate and arbitrate an ICA that would address its specific needs. It has no cause to complain on this basis.

We further understand that with respect to the Peoria BAN, IBT is billing BitWise for 911-related facilities at special access rates. Here again, we observe BitWise to assert that the ICA is controlling on the rates. But nothing on record supports such a claim. The Commission accepts Illinois Bell's position with respect to the pair of DS1 circuits which run from an Illinois Bell DSX1 panel, through Illinois Bell transport equipment, to Illinois Bell's Peoria Bluff 911 selective router. The cross-connection and multiplexing facilities are shown to be used for purposes of enabling BitWise to deliver traffic from its own local exchange customers to Illinois Bell's E911 Selective Router. From our review of the record and the arguments presented by Staff and IBT, it is clear to the Commission that BitWise is not entitled to purchase the services provided with respect to this BAN, which enable BitWise to send traffic from its customers to Illinois Bell's E911 Selective Router, out of the parties' ICA. More specifically, the Commission observes both Staff and IBT to agree that, under the ICA, BitWise has an obligation to have 911-related facilities in place and, if IBT provides such facilities to BitWise, the billings will be pursuant to IBT's access tariffs. Further, we are persuaded by both Staff and IBT that even if, as BitWise claims, only two of the DS1 channels coming out of the multiplexer are used for 99 service, no proration is required. Accordingly, we conclude that IBT's billings are correct in respect to this matter.

With respect to the Peoria Legacy AT&T cross-connect, we agree with Staff and IBT that the cross connect in question cannot be ordered from the ICA, nor is it, as BitWise argues, a connection between two collocated CLECs. Even if it were, Staff informs us that federal rules do not require Illinois Bell to permit BitWise to interconnect with another collocating carrier unless the collocated equipment used for the interconnection is also used to interconnect with Illinois Bell, which is not the situation here. While finding that BitWise is not entitled to purchase the services provided with respect to this BAN out of the parties' ICA we take further account of BitWise's position that this service includes a cross connect, but not a DS3 Local Distribution Channel.

Indeed, there is much dispute between the parties as to the appropriateness of the LDC charge that IBT is billing for. Staff and BitWise appear to approach the issue from the same perspective. BitWise maintains that IBT has only provided a cross-connect to a channel termination that belongs to Legacy AT&T. We observe Staff to likewise assert that the special access service in this instance is being provided by Legacy AT&T and not Illinois Bell. Staff contends that IBT is only providing the cross-connect which is different from the special access service itself.

At the same time, the Commission observes IBT to contend that it provides more than just a cross-connect to BitWise. According to IBT, the LDC is not the DS3 cable between the IBT and Legacy AT&T central office, but is provided through the IBT-owned DSX panel in the IBT central office. According to IBT, there is no evidence that Legacy AT&T owns the channel termination or that the channel termination exists within the Legacy AT&T DS3 cable. To the contrary, we see IBT to argue, the DSX3 panel in

IBT's central office (to which the Legacy AT&T cable is connected) is owned by IBT and has been dedicated exclusively to carrying traffic to Legacy AT&T. The LDC charge being imposed by IBT, it explains, covers the equipment and functionality provided in that IBT-owned DSX3 panel and this is the Special Access being provided. Further, IBT maintains that a section of the tariff pursuant to which it provided its cross-connect indicates that cross-connection service must connect on one end to an Illinois Bell switched Access and /or Special Access Service. According to IBT, the only two possible carriers who could order special access from IBT in this situation are BitWise and Legacy AT&T. And, IBT claims, there is no evidence to rebut its witness' testimony stating that Legacy AT&T does not order either switched or special access in Peoria.

We note Staff to take a different view of the situation. For Staff, simply because IBT's tariff indicates that its cross-connect service should connect to one of its special access services does not necessarily mean that IBT provisioned its service this way in these premises. Staff maintains that the special access service to which IBT would normally have cross-connected BitWise's DS3 service was supplied by Legacy AT&T and not IBT. Staff notes that IBT's testimony only indicates that the Legacy AT&T connections include cabling and a DSX3 panel. According to Staff, both of these elements are used for cross-connection purposes. Staff points out that while IBT's testimony indicates that there is special equipment that distinguishes a cross-connect from an LDC, no such equipment has been identified on record nor has it been established that IBT provides such particular equipment with respect to the Legacy AT&T connection.

The Commission must keep in mind that BitWise has the burden of proof in this proceeding. As we review the whole of the evidence and argument, the real question is whether special access is needed in the situation or if a simple cross-connect will suffice. BitWise and Staff appear to tell us that special access is necessary but that it is provided by Legacy AT&T. That proposition, however, does not appear to be well established. There is nothing of record to contradict the testimony showing that Legacy AT&T does not order either switched or special access in Peoria.

Still, we observe Staff to contend that there is a failure on IBT's part to demonstrate that it is providing BitWise an LDC, for reason that a DS3 cross connection in itself supplies a DS3 communication path between two points. From this assertion we would infer that only a cross connection is necessary under the configuration and only a cross-connection charge is properly billed.

In the final analysis, the Commission is compelled to note that there is no evidence to show that IBT is providing BitWise with any components, equipment or circuitry that is above and beyond that is necessary for cross-connection. Stated another way, IBT has not differentiated or made clear that it is providing anything more or different than the cross-connect that gives BitWise access to the special access that is provided by Legacy AT&T. This means that we grant relief on BitWise's complaint on this particular aspect of the LDC charges and to the extent that will be determined in a latter part of this Order.

V. THE SPRINGFIELD BAN DISPUTE

A. BitWise's Position-(Springfield) BAN 217 s60-1710 710

According to BitWise, the instant dispute centers on whether the billing charge on each of the BAN bills is for DS1 to DS3 muxing past the POI. Mr. Shuler testified that these are local interconnection and should be charged under ICA rates. He pointed to the ICA NIM Sections 2.2, 2.3 and 2.7 to support his position that the tariff rates charged by IBT are rates applicable to trunks used by long-distance carriers. Mr. Schuler further stated that: "These DS1s are only being used for local interconnection." Complainant's Exhibit 1.0 at 6. He concluded: "...the bills are for services past the POI. The mux, which is past the POI, is used for local interconnection to the LATA for both AT&T and Verizon." Complainant's Exhibit 2.0 at 10.

B. IBT's Position-(Springfield)BAN 217 s60-1710 710

Illinois Bell explains that BitWise reaches the IBT Springfield central office from the BitWise central office in Peoria through facilities it leases from McLeod; these facilities include a DS3 cable running from McLeod's collocation space in the IBT Springfield central office to an IBT DSX3 panel. The parties' Joint Response to ALJ Data Request 2 identifies that DSX3 panel is "the location of the BitWise and Illinois Bell POI for calls that are exchanged between the two carriers."

IBT states that its facilities begin at this point. The IBT DSX3 panel is connected by a DS3 cable to an IBT M13 multiplexer that breaks down the DS3 into 28 individual DS1s. As of early April 2009, 11 of the DS1s coming from the multiplexer connected to Verizon switches, while others connected to IBT switches. The multiplexer thus allows BitWise to reach Verizon exchanges in the LATA, but also allows it to exchange local traffic with IBT.

IBT and Verizon jointly provision the 11 DS1 circuits running to the Verizon exchanges, with the boundary between each carrier's facilities designated by a meet point. Each carrier bills BitWise for the facilities on that carrier's side of the meet point, calculated as a percentage of the length of the circuit. This percentage is known as the billing interconnection percentage or "BIP." The facilities at issue run between the IBT DSX3 panel and the fiber meet point with Verizon, but do not include any DS1s running to the IBT tandem or local switches.

IBT states that it began billing BitWise for access services in the Springfield LATA in October 2003, under BAN 217-s60-1710-710. As of early April 2009, IBT was billing BitWise two types of monthly special access charges related to the circuit for the multiplexer: a \$1.01 Cross-Connection charge, and a \$780.00 DS3-to-DS1 Multiplexing charge (for Zone 2). IBT also was billing BitWise two types of monthly switched access direct transport charges related to the 11 DS1s going to Verizon: a \$15.60 Channel Mileage Termination charge, and a \$4.50 Channel Mileage charge. (IBT's special access rates for DS1 transport services are substantially higher than its switched access rates for those services.) The amount of Channel Mileage for the individual DS1s varies according to the particular Verizon exchange to which the DS1 connects, as does the BIP applied to the Channel Mileage rate.

The multiplexing and cross-connection charges are appropriately billed by IBT at special access rates and not at rates in the parties' ICA; The DS1 transport charges for the circuits connecting BitWise to Verizon exchanges in the LATA are appropriately billed by IBT at special access rates and not at rates in the parties' ICA.

IBT observes BitWise to assert that, because the facilities and DS1 transport services at issue are on the IBT side of the POI, they are not the financial responsibility of BitWise under the ICA. IBT agrees that, under the ICA, each party is responsible for providing the facilities on its side of the parties' POI, and that the multiplexing and DS1 facilities are on IBT's side of the POI.

But, IBT asserts, the allocation of financial responsibility under the ICA applies only to facilities used for the exchange of local exchange traffic between BitWise and IBT. It is inapplicable in the situation where, as here, the facilities at issue are used for the exchange of traffic between BitWise and a carrier, such as Verizon, that operates in an exchange where IBT is not the ILEC. IBT contends that this distinction is confirmed by the parties' Joint Response to ALJ Data Request 2, which states that the IBT DSX3 panel containing the BitWise POI is "the location of the BitWise and Illinois Bell POI for calls that are exchanged *between the two carriers.*" Jt. Resp. to ALJ Data Request 2, p. 1 (emphasis added). IBT points out that accepting BitWise's position would validate its assertion that the IBT central office in Springfield is the location of not only BitWise's POI with IBT, but also its POI with Verizon. IBT contends that such an assertion is absurd, because BitWise's POI with Verizon can only be somewhere on Verizon's network.

Illinois Bell observes BitWise's secondary argument to avoid liability for the charges is that BitWise should be allowed to exchange traffic with Verizon through IBT's tandems in the LATA, and thus there is no need for the direct trunks for which IBT is billing it. In response, IBT argues that BitWise's position directly contradicts the Third Amendment to the parties' ICA, which makes clear that BitWise had to establish direct trunks to a third-party carrier (such as Verizon) operating in a non-IBT exchange, once traffic between BitWise and that carrier reached a certain threshold. IBT also argues that BitWise voluntarily entered into the Third Amendment, so it cannot now use its dislike of the requirements of that amendment as a reason to challenge charges resulting from orders it placed pursuant to the amendment. Tr. at 132-33 (Shuler).

Overall, IBT points out that both its witnesses and the Staff witness agree that the cross-connection and multiplexing facilities should be billed at special access rates because BitWise is not using them exclusively to exchange local or exchange access traffic with IBT. The parties' ICA contains no rates that would apply in a situation where IBT provides services that allow BitWise to deliver traffic from its space in an IBT central office to third-party carriers in exchanges where IBT is not the ILEC. Staff Ex. 3.0(R) (Zolnierek Rev. Addit.), lines 260-66.

Payment of switched or special access rates for the DS1 circuits connecting BitWise to the Verizon exchanges.

With respect to the DS1 transport services going to Verizon exchanges, Staff asserts that IBT should have billed those services at special access rates, rather than switched access rates. Staff Ex. 3.0(R) (Zolnierek Rev. Addit.), lines 295-303. IBT's position is that, if the Commission rules that the DS1 transport charges should be billed at special access rates, the Company will take steps to modify the billing for those services to the higher special access rates.

IBT contends that BitWise should be required to pay at least the switched access rates it was billed for the DS1 transport services connecting it to the Verizon exchanges. There is no question that IBT provided the services at issue; it simply billed BitWise for those services at a substantially lower rate than it should have. See Staff Ex. 3.0(R) (Zolnierek Rev. Addit.), lines 303-05 (discussing rate differential). To the extent that BitWise submitted disputes regarding these charges, those disputes did not assert that IBT made a mistake by charging switched access rates. And BitWise has paid IBT *nothing* for these services since 2006. Under the circumstances, it would be appropriate for the Commission to find that BitWise should pay for the DS1 services as IBT billed them – at switched access rates. If the Commission were to rule otherwise and absolve BitWise from all responsibility for the DS1 charges simply because IBT may have billed them at an incorrect (but lower) rate, BitWise would receive an undeserved and unfair windfall.

C. Staff Position – (Springfield) BAN 217 s60-1710 710

Staff observes that there are two issues of concern in the instant situation. These are:

1. 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?
2. Are the facilities in question properly billed under switched access rather than special access tariffs?

As Staff understands it, the facilities here in question consist of cross-connection and multiplexing. 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.

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. 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. As Staff understands matters, the ICA between the parties contains no rates that are applicable in these circumstances. Therefore, in Staff's opinion, the appropriate rates in this case for the cross-connection and multiplexing services would be Special Access rates.

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. 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. 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.

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. 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.

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. The appropriate rates for such services are, in Staff's view, Special Access rates. Accordingly, provided these services are used for intrastate purposes, 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.

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 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.

Staff notes, however, that Illinois Bell is seeking to assess BitWise Switched Access rates. 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. This error, Staff notes, 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. Where neither party has raised the issue or offered evidence of whether Special Access rates - rather than Switched Access rates - should have been charged by Illinois Bell for these circuits, Staff offers no opinion on whether Illinois Bell should be permitted to recover these charges at the higher, unbilled rate.

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.

D. Commission Analysis and Conclusion (Springfield)

With respect to the Springfield LATA, the record shows that the facilities associated with this dispute 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. We find it to be well demonstrated that BitWise is not entitled to purchase the facilities and services provided with respect to this BAN, and which enable BitWise to send traffic from its customers to third party customers located in non-Illinois Bell exchanges, out of the parties’ ICA. As such, and on the entirety of the record, the Commission accepts Illinois Bell’s position that these services are properly provided pursuant to Special Access tariffs. BitWise has not proven or convinced us otherwise.

This is not, however, where our analysis ends. The Commission observes evidence showing that Illinois Bell has been incorrectly billing BitWise for services at switched rates rather than special access rates. We cannot ignore this matter that arises out of and falls within the scope of this proceeding. Errors in billings, left unpaid, can be evidenced both ways in an open dispute. Of course, had BitWise paid the charges as submitted, Illinois Bell might be barred from revising its billings (unless some legal provision allowed for such relief). The record, however, shows BitWise to have paid nothing since 2006.

In the situation here, where the question of the correctness of the unpaid billings for the Springfield LATA has been put before the Commission, we are compelled to be exact in our determinations. Accordingly, we direct Illinois Bell to modify the BitWise billings for the DS1 transport services going to the Verizon exchanges to reflect special access rates instead of switched rates (subject only to the conclusions set out in the final Part of this Order).

VI. THE QUINCY BAN DISPUTE

A. BitWise Position- (Quincy) BAN 217 s60-3848 376

These disputes center on whether the billing charge on each of the BAN bills is for DS1 to DS3 muxing past the POI. Mr. Shuler testified that they are local interconnection and should be charged under ICA rates. He pointed to the ICA NIM Sections 2.2, 2.3 and 2.7 to support his position that the tariff rates charged by IBT are rates applicable to trunks used by long-distance carriers. He stated: "These DS1s are only being used for local interconnection." (Complainant's Exhibit 1.0, page 6) He concluded that: "the bills are for services past the POI. The mux, which is past the POI, is used for local interconnection to the LATA for both AT&T and Verizon." (Complainant's Exhibit 2.0 at 10)

B. IBT Position - (Quincy) BAN 217 s60-3848 376

IBT explains that BitWise reaches the IBT Quincy central office from the BitWise central office in Peoria through facilities it leases from McLeod; these facilities include a DS3 cable running from McLeod's collocation space in the IBT Quincy central office to an IBT DSX3 panel. Jt. Resp. to ALJ Data Request 1(e); Jt. Resp. to ALJ Data Request 2, p. 2. The parties' Joint Response to ALJ Data Request 2 identifies that DSX3 panel is "the location of the BitWise and Illinois Bell POI for calls that are exchanged between the two carriers."

IBT's facilities begin at this point. The IBT DSX3 panel is connected by a DS3 cable to an IBT M13 multiplexer that breaks down the DS3 into 28 individual DS1s. Jt. Resp. to ALJ Data Request 1(e). As of early April 2009, three of the DS1s coming from the multiplexer connected to Verizon switches, while others connected to IBT switches. Jt. Resp. to ALJ Data Request 1(e); Jt. Resp. to ALJ Data Request 2, p. 2. The multiplexer thus allows BitWise to reach Verizon exchanges in the LATA, but also allows it to exchange local traffic with IBT. Jt. Resp. to ALJ Data Request 2, p. 2; Staff Ex. 3.0(R) (Zolnierrek Rev. Addit.), lines 224-32.

IBT and Verizon jointly provision the three DS1 circuits running to the Verizon exchanges, with the boundary between each carrier's facilities designated by a meet point. Tr. at 504 (Neinast). Each carrier bills BitWise for the facilities on that carrier's side of the meet point Tr. 505 (Neinast)), calculated as a percentage of the length of the circuit. This percentage is known as the billing interconnection percentage or "BIP." The facilities at issue run between the IBT DSX3 panel and the fiber meet point with Verizon, but do not include any DS1s running to the IBT Quincy local switch. Jt. Resp. to ALJ Data Request 2, p. 2.

IBT began billing BitWise for access services in the LATA in November 2004, under BAN 217-s60-3848-376. As of early April 2009, IBT was billing BitWise two types of monthly special access charges related to the circuit for the multiplexer: a \$1.01 Cross-Connection charge, and an \$825.00 DS3-to-DS1 Multiplexing charge (for Zone 4). IBT also was billing BitWise two types of monthly switched access direct transport charges related to the three DS1s going to Verizon: a \$15.60 Channel Mileage Termination charge, and a \$4.50 Channel Mileage charge. (IBT's special access rates

for DS1 transport services are substantially higher than its switched access rates for those services.) The amount of Channel Mileage for the individual DS1s varies according to the particular Verizon exchange to which the DS1 connects, as does the BIP applied to the Channel Mileage rate.

The multiplexing and cross-connection charges appropriately billed by IBT at special access rates or at rates in the parties' ICA.

The DS1 transport charges for the circuits connecting BitWise to Verizon exchanges in the LATA appropriately billed by IBT at special access rates or at rates in the parties' ICA.

IBT observes BitWise to take the position that, because the facilities and DS1 transport services at issue are on the IBT side of the POI, they are not the financial responsibility of BitWise under the ICA. IBT agrees that, under the ICA, each party is responsible for providing the facilities on its side of the parties' POI, and that the multiplexing and DS1 facilities are on IBT's side of the POI.

But, IBT asserts, the allocation of financial responsibility under the ICA applies only to facilities used for the exchange of local exchange traffic between BitWise and IBT. It is inapplicable where, as here, the facilities at issue are used for the exchange of traffic between BitWise and a carrier, such as Verizon, that operates in an exchange where IBT is not the ILEC. This distinction is confirmed by the parties' Joint Response to ALJ Data Request 2, which states that the IBT DSX3 panel containing the BitWise POI is "the location of the BitWise and Illinois Bell POI for calls that are exchanged *between the two carriers.*" Jt. Resp. to ALJ Data Request 2 at 2 (emphasis added). IBT points out that accepting BitWise's position would validate its assertion that the IBT central office in Quincy is the location of not only BitWise's POI with IBT, but also its POI with Verizon. IBT contends that such an assertion is absurd, because BitWise's POI with Verizon can only be somewhere on Verizon's network.

As its secondary position, Illinois Bell observes BitWise to further assert that it should be allowed to exchange traffic with Verizon by piggy-backing on IBT's network to reach Verizon's tandem in the LATA, and thus there is no need for the direct trunks for which IBT is billing it. In response, IBT argues that BitWise's position directly contradicts the Third Amendment to the parties' ICA, which makes clear that BitWise had to establish direct trunks to a third-party carrier (such as Verizon) operating in a non-IBT exchange, once traffic between BitWise and that carrier reached a certain threshold. IBT also argues that BitWise voluntarily entered into the Third Amendment, so it cannot now use its dislike of the requirements of that amendment as a reason to challenge charges resulting from orders it placed pursuant to the amendment.

Overall, IBT points out that both its witnesses and the Staff witness agree that the cross-connection and multiplexing facilities should be billed at special access rates because BitWise is not using them exclusively to exchange local or exchange access traffic with IBT. The IBT/BitWise ICA contains no rates that would apply in a situation

where IBT provides services that allow BitWise to deliver traffic from its space in an IBT central office to third-party carriers in exchanges where IBT is not the ILEC.

With regard to the DS1 transport services going to Verizon exchanges, Staff asserts that IBT should have billed those services at special access rates, rather than switched access rates. IBT's position is that, if the Commission rules that the DS1 transport charges should be billed at special access rates, the Company will take steps to modify the billing for those services to the higher special access rates. IBT Init. Br. at 33.

Paying switched or special access rates for the DS1 circuits connecting BitWise to the Verizon exchanges.

IBT contends that BitWise should be required to pay at least the switched access rates it was billed for the DS1 transport services connecting it to the Verizon exchanges. There is no question that IBT provided the services at issue; it simply billed BitWise for those services at a substantially lower rate than it should have. See Staff Ex. 3.0(R) (Zolnierek Rev. Addit.), lines 303-05 (discussing rate differential). To the extent that BitWise submitted disputes regarding these charges, those disputes did not assert that IBT made a mistake by charging switched access rates. And BitWise has paid IBT *nothing* for these services since 2006. Under the circumstances, it would be appropriate for the Commission to find that BitWise should pay for the DS1 services as IBT billed them – at switched access rates. If the Commission were to rule otherwise and absolve BitWise from all responsibility for the DS1 charges simply because IBT may have billed them at an incorrect (but lower) rate, BitWise would receive an undeserved and unfair windfall.

C. Staff Position (Quincy) BAN 217 s60-3848-376

Staff observes that there are two issues for consideration in the instant matter. These are:

1. Whether BitWise is 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?
2. Whether the facilities in question are 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 (Springfield) and 217 s60-4625 625 (Champaign). These are for: (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 be resolved in the same manner as that in BANs 217 s60-1710 710 and s60-4625 625. As such, Staff contends, the Commission should determine that Illinois Bell is entitled to Special Access rates. 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.

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.

D. Commission Analysis and Conclusion (Quincy)

With respect to the Quincy LATA, the record shows that the facilities associated with this dispute 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. We find it to be well demonstrated that BitWise is not entitled to purchase the facilities and services provided with respect to this BAN, which enable BitWise to send traffic from its customers to third party customers located in non-Illinois Bell exchanges out of the parties' ICA. As such, and on the entirety of the record, the Commission accepts Illinois Bell's position that these services are properly provided pursuant to Special Access tariffs.

This is not, however, where our analysis ends. The Commission observes there to be evidence showing that Illinois Bell has been incorrectly billing BitWise for services at switched rates rather than special access rates. We cannot ignore this matter that arises out of and is consistent with the scope of this proceeding. Errors in billings, left unpaid, can be evidenced both ways in an open dispute. Of course, had BitWise paid the charges as submitted, Illinois Bell might be barred from revising its billings (unless some legal provision allowed for such relief). In this instance, however, BitWise has paid nothing since 2006.

Here, where the question of the correctness of the unpaid billings for the Quincy LATA has been put before the Commission, we are compelled to be exact in our determinations. As such, we direct Illinois Bell to modify the BitWise billings for the DS1 transport services going to the Verizon exchanges to reflect special access rates instead of switched rates (subject only to the conclusions set out in the final Part of this Order).

VII. THE CHAMPAIGN BAN DISPUTE

A. BitWise's Position (Champaign) BAN 217 s60-4625 625

Here again, BitWise asserts, the dispute center on whether the billing charge on each of the BAN bills is for DS1 to DS3 muxing past the POI. BitWise notes its witness Shuler to have testified that these are local interconnection and should be charged under ICA rates. He pointed to the ICA NIM Sections 2.2, 2.3 and 2.7 to support his position that the tariff rates charged by IBT are rates applicable to trunks used by long-distance carriers. Mr. Schuler stated that: "These DS1s are only being used for local interconnection." Complainant's Exhibit 1.0 at 6. He further concluded that "the bills are for services past the POI. The mux, which is past the POI, is used for local interconnection to the LATA for both AT&T and Verizon." Complainant's Exhibit 2.0 at 10.

On the channels to Verizon, BitWise claims that it would have preferred to interconnect at the tandem, rather than separate end office trunks to Verizon, but IBT insisted on bypassing the tandem. It then insists that its portion of these meet-point circuits should be billed at access rates, rather than as local interconnection circuits, even though they are actually carrying local traffic.

BitWise also observes Dr. Zolnierек to suggest that these Verizon meet-point circuits may be more appropriately special access than switched access. BitWise disagrees, to the extent that these circuits must be at all chargeable. BitWise argues that circuits are frequently divided between local interconnection and switched access, based on intraLATA usage, and that these are no exception. Verizon could thus prorate its portion of the circuit based on PLU. In addition, BitWise argues. switched access tariffs are available "unbundled," not in the post-1996 sense, but in an earlier meaning applied to optional features of switched and special access service (per Tariff 21, section 5). In this sense, the circuit in question, if chargeable, is not going to a customer premise (the usual sense of Special Access), but in an unbundled switched access circuit, going to a carrier switch.

BitWise notes that the Champaign BAN has yet another item in dispute. This is an E911 multiplexor situation, similar to Peoria, wherein the same DS3 circuit carries E911 and local traffic.

B. IBT's Position (Champaign) BAN 217 s60-4625 625

BitWise reaches the IBT Champaign central office from the BitWise central office in Peoria through facilities it leases from McLeod; these facilities include a DS3 cable running from McLeod's collocation space in the IBT Champaign central office to an IBT DSX3 panel. The parties' Joint Response to ALJ Data Request 2 identifies that DSX3 panel is "the location of the BitWise and Illinois Bell POI for calls that are exchanged between the two carriers."

IBT's facilities begin at this point. The IBT DSX3 panel is connected by a DS3 cable to two IBT M13 multiplexers that break down the two DS3s into 28 individual DS1s for each DS3. As of early April 2009, 25 of the DS1s coming from the

multiplexers connected to Verizon switches, 2 DS1s connected to the 911 selective router in the Champaign central office, and other DS1s connected to IBT switches. The multiplexers thus allow BitWise to reach Verizon exchanges in the LATA and to provide 911 services, but also allow it to exchange local traffic with IBT.

IBT and Verizon jointly provision the 25 DS1 circuits running to the Verizon exchanges, with the boundary between each carrier's facilities designated by a meet point. Each carrier bills BitWise for the facilities on that carrier's side of the meet point, calculated as a percentage of the length of the circuit. This percentage is known as the billing interconnection percentage or "BIP." The facilities at issue run between the IBT DSX3 panel and the fiber meet point with Verizon, but do not include any DS1s running to the IBT tandem or local switch.

IBT began billing BitWise for access services in the LATA in October 2003, under BAN 217-s60-4625-625. As of early April 2009, IBT was billing BitWise two types of monthly special access charges related to the circuit for the multiplexer: a \$1.01 Cross-Connection charge, and a \$795.00 DS3-to-DS1 Multiplexing charge (for Zone 3).

IBT also was billing BitWise two types of monthly switched access direct transport charges related to the 25 DS1s going to Verizon: a \$15.60 Channel Mileage Termination charge, and a \$4.50 Channel Mileage charge. (IBT's special access rates for DS1 transport services are substantially higher than its switched access rates for those services.) The amount of Channel Mileage for the individual DS1s varies according to the particular Verizon exchange to which the DS1 connects, as does the BIP applied to the Channel Mileage rate. There were no charges for any transport services for the two DS1s used for 911 traffic; the multiplexer and the selective router are in the same central office.

The multiplexing and cross-connection charges are appropriately billed by IBT at special access rates or at rates in the parties' ICA?

The DS1 transport charges for the circuits connecting BitWise to Verizon exchanges in the LATA appropriately billed by IBT at special access rates or at rates in the parties' ICA?

IBT observes BitWise to take the position that, because the facilities and DS1 transport services at issue are on the IBT side of the POI, they are not the financial responsibility of BitWise under the ICA. IBT agrees that, under the ICA, each party is responsible for providing the facilities on its side of the parties' POI, and that the multiplexing and DS1 facilities are on IBT's side of the POI.

However, IBT argues, the allocation of financial responsibility under the ICA applies only to facilities used for the exchange of local exchange traffic between BitWise and IBT. It is inapplicable where, as here, the facilities at issue are used for the exchange of traffic between BitWise and a carrier, such as Verizon, that operates in an exchange where IBT is not the ILEC. This distinction is confirmed by the parties' Joint Response to ALJ Data Request 2, which states that the IBT DSX3 panel containing the

BitWise POI is “the location of the BitWise and Illinois Bell POI for calls that are exchanged *between the two carriers*.” *Jt. Resp. to ALJ Data Request 2*, p. 1 (emphasis added). IBT points out that accepting BitWise’s position would validate its assertion that the IBT central office in Champaign is the location of not only BitWise’s POI with IBT, but also its POI with Verizon. IBT contends that such an assertion is absurd, because BitWise’s POI with Verizon can only be somewhere on Verizon’s network.

BitWise’s secondary argument to avoid liability for IBT’s charges is that BitWise should be allowed to exchange traffic with Verizon through IBT’s tandems in the LATA, and thus there is no need for the direct trunks for which IBT is billing it. In response, IBT argues that BitWise’s position directly contradicts the Third Amendment to the parties’ ICA, which makes clear that BitWise had to establish direct trunks to a third-party carrier (such as Verizon) operating in a non-IBT exchange, once traffic between BitWise and that carrier reached a certain threshold. IBT also argues that BitWise voluntarily entered into the Third Amendment, so it cannot now use its dislike of the requirements of that amendment as a reason to challenge charges resulting from orders it placed pursuant to the amendment. *Tr.* at 132-33 (Shuler).

Overall, IBT points out that both its witnesses and the Staff witness agree that the cross-connection and multiplexing facilities should be billed at special access rates because BitWise is not using them exclusively to exchange local or exchange access traffic with IBT. The IBT/BitWise ICA contains no rates that would apply in a situation where IBT provides services that allow BitWise to deliver traffic from its space in an IBT central office to third-party carriers in exchanges where IBT is not the ILEC. *Staff Ex. 3.0(R)* (Zolnierek Rev. Addit.), lines 260-66.

With regard to the DS1 transport services going to Verizon exchanges, IBT notes Staff to assert that IBT should have billed those services at special access rates, rather than switched access rates. *Staff Ex. 3.0(R)* (Zolnierek Rev. Addit.), lines 295-303. IBT’s position is that, if the Commission rules that the DS1 transport charges should be billed at special access rates, the Company will take steps to modify the billing for those services to the higher special access rates.

Whether BitWise is to pay switched or special access rates for the DS1 circuits connecting BitWise to the Verizon exchanges.

IBT contends that BitWise should be required to pay at least the switched access rates it was billed for the DS1 transport services connecting it to the Verizon exchanges. There is no question that IBT provided the services at issue; it simply billed BitWise for those services at a substantially lower rate than it should have. See *Staff Ex. 3.0(R)* (Zolnierek Rev. Addit.), lines 303-05 (discussing rate differential). To the extent that BitWise submitted disputes regarding these charges, those disputes did not assert that IBT made a mistake by charging switched access rates. See *AT&T Illinois Ex. 3.0* (Ellis Direct), lines 126-39, 164-80 (discussing disputes received from BitWise). And BitWise has paid IBT *nothing* for these services since 2006. *Id.*, lines 261-63; *BitWise Ex. 1.0* (Shuler Direct), lines 60-62. Under the circumstances, it would be appropriate for the Commission to find that BitWise should pay for the DS1 services as IBT billed them – at

switched access rates. If the Commission were to rule otherwise and absolve BitWise from all responsibility for the DS1 charges simply because IBT may have billed them at an incorrect (but lower) rate, BitWise would receive an undeserved and unfair windfall.

The multiplexing and cross-connection charges for 911-related services are appropriately billed by IBT at special access rates and not at rates in the parties' ICA.

The DS3 cross-connections and multiplexing that BitWise obtains from IBT in this LATA not only allow BitWise to exchange local traffic with IBT and to exchange traffic with Verizon, but also allow BitWise to send traffic from its customers to the E911 selective router.

IBT asserts that, under the parties' ICA, BitWise has an obligation to have 911-related facilities in place. The ICA also makes clear that, if IBT provides facilities to BitWise for 911 purposes, those facilities will be billed pursuant to the IBT Access Tariff. These provisions justify IBT's billing of the 911-related facilities at special access rates.

IBT also points out that Staff has concurred that the charges for DS3 facilities and for DS1 transport services should be billed at special access rates. Staff also concluded that any dual use of the DS3 facilities (e.g., multiplexing for both 911 and local interconnection traffic) did not affect the applicability of special access rates.

BitWise offered no specific testimony, and presented minimal argument, about the basis for its refusal to pay the 911-related charges in Champaign. It contends 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. IBT responds that BitWise's proposal to treat the multiplexer as local interconnection because its use for 911 purposes is minimal makes no sense. In fact, more than half of the 28 channels on the multiplexer carrying BitWise's two 911 circuits are used either for 911 service or for service to Verizon, and thus are used for special access purposes. In addition, the Commission Staff specifically rejected BitWise's suggestion that the special access multiplexing charge should be prorated based on the number of channels used for 911 service, as compared to local service. See Tr. at 521-23.

C. Staff Position – (Champaign) BAN 217 s60-4625 625

Staff observes that there are two issues for consideration in the instant matter. These are:

1. Whether BitWise is permitted to purchase the cross-connection, multiplexing and/or DS1 transport facilities pursuant to its ICA with Illinois Bell, or must it purchase some or all of these facilities under Special Access tariffs?
2. Whether the facilities in question are 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 (Springfield). This means that they are used for: (1) the 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 further notes that the facilities are configured in a similar or identical manner, with multiplexing facilities on Illinois Bell's side of the POI.

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, with billing for the cross connection and multiplexing services at rates found in its Illinois Special Access Tariffs. Likewise, Staff observes that Illinois Bell is billing BitWise for the 25 DS1 Transport services at rates found in its Illinois Switched Access Tariffs.

The Staff recommends that the dispute regarding BAN s60-4625 625 (Champaign) be resolved in the same manner as that in BAN 217 s60-1710 710 (Springfield). As such, Staff maintains, the Commission should determine that Illinois Bell is entitled to Special Access rates. 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

D. Commission Analysis and Conclusion – (Champaign)

With respect to the Champaign LATA, the record shows that the facilities associated with this dispute 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. We find it to be well demonstrated that BitWise is not entitled to purchase the facilities and services provided with respect to this BAN, which enable BitWise to send traffic from its customers to third party customers located in non-Illinois Bell exchanges, out of the parties' ICA. As such, and on the entirety of the record, the Commission accepts Illinois Bell's position that these services are properly provided pursuant to Special Access tariffs. Our conclusion is consistent with the recommendations of Staff.

This is not, however, where our analysis ends. The Commission observes evidence showing that Illinois Bell has been incorrectly billing BitWise for services at switched rates rather than special access rates. We cannot ignore this matter that arises out of and falls within the scope of this proceeding. Errors in billings, left unpaid, can be evidenced both ways in an open dispute. Of course, had BitWise paid the charges as submitted, Illinois Bell might be barred from revising its billings (unless some

legal provision allowed for such relief). The record, however, shows BitWise to have paid nothing since 2006.

In the situation here, where the question of the correctness of the unpaid billings for the Champaign LATA has been put before the Commission, we are compelled to be exact in our determinations. Accordingly, we direct Illinois Bell to modify the BitWise billings for the DS1 transport services going to the Verizon exchanges to reflect special access rates instead of switched rates (subject only to the conclusions set out in the final Part of this Order).

We further conclude that the multiplexing and cross-connection charges for 911-related services are appropriately billed by IBT at special access rates. BitWise has not persuaded us otherwise. As IBT points out, under the parties' ICA, BitWise has an obligation to have 911-related facilities in place. The ICA also makes clear that, if IBT provides facilities to BitWise for 911 purposes, those facilities will be billed pursuant to the IBT Access Tariff. These provisions justify IBT's billing of the 911-related facilities at special access rates. This issue is being decided in a manner consistent with our determinations for the Peoria LATA.

VIII. ASSESSING THE AMOUNTS DUE AND OWING.

A. Times and Circumstances of the Billing Disputes

The Complaint at hand alleges little in terms of the time periods at issue for the instant billing dispute. According to the record, BitWise states that it had an ongoing dispute with IBT over the billing of the four BANs "since the first billings to BitWise." BitWise Ex. 1.0 lines 173-75. More specifically, Mr. Schuler stated that BitWise had disputed the charges for the BANs "[s]ince the inception of these services." *Id.*, lines 66-67. Generally, BitWise disputes the amount of approximately \$340,000. Its formal Complaint was filed on January 22, 2009.

The record shows that the AT&T Access Service Center processed ten disputes on the BANs at issue since the accounts were established. According to IBT, eight of these disputes were submitted prior to February 2004. Further, IBT explains, seven of the dispute submissions involved only charges on the Peoria BAN, two submissions involved only charges for the Springfield BAN, and one submission involved only charges from BitWise's September 2008 bills for the Champaign, Quincy and Springfield BANs. We observe IBT to state that it denied each set of disputes, either because BitWise did not provide enough information to allow evaluation of its claims; because the services were being billed as BitWise ordered them; or, because the services were correctly billed at access rates.

The record further shows that BitWise made occasional payments on the four BANs at issue from the time of their establishment in 2003 and 2004 and until late 2006. By December 2006, IBT informs, BitWise stopped paying on these BANs. As of March 2009, Illinois Bell states that the past due amount owed on each account, including late payment charges, was as follows:

● Peoria (217-s60-4619-619)	\$157,793.16
● Springfield (217-s60-1710-710)	\$70,517.10
● Quincy (217-s60-3848-376)	\$45,628.10
● Champaign (217-s60-4625-625)	\$99,912.69

Illinois Bell asserts that, with respect to billings prior to 2006, BitWise has not presented any evidence to support its claim that it is not liable for the charges as billed by IBT. In particular, we observe Illinois Bell to give reasons why BitWise is obligated to pay the charges that IBT has billed with respect to the Peoria Lata prior to February 2006. IBT points to record evidence showing that BitWise reconfigured its network in Peoria no later than February of 2006. BitWise Ex. 1.0 at lines 132-37 (BitWise submitted order for DS3 cross-connect in early 2006); BitWise Ex. 2.0 at lines 71-73 & Ex. 2.3 (shows Peoria network architecture plan from 2002, which later changed); AT&T Illinois Ex. 3.1 at lines 108-110 & Attachment R6 (February 2006 ASR through which BitWise ordered DS3 to Legacy AT&T); and Tr. at 96-97 (Peoria architecture change occurred 4-5 years ago and sometime prior to February 2006). This evidence, IBT argues, raises serious questions as to whether and to what extent the record here – which focuses only the current Peoria configuration – is at all relevant to the earlier period.

It is fundamental that changes in configuration will affect service billings. We further agree that the record gives this Commission no clear indication of where, when and in what ways the BitWise configuration changed from its inception to the present state. All that the Commission knows is what the ALJ Exhibits portray and these represent the situation in 2009. It is never enough for a complainant to allege that it disputed charges from the very onset of billing. The Commission needs to know all of the attendant circumstances that were in existence at all relevant points in time and that might bear on the service billings. It cannot speculate. The burden was on BitWise to make clear and definite its showing at all relevant times and stages of its dispute. In this instance, the record fails to provide factual information required to substantiate errors in billings for the Peoria LATA prior to 2006 and thus, there is no evidentiary basis for the Commission to disallow the charges imposed by IBT for the period prior to February of 2006.

But, as will be seen, this is not decisive of the time frame for the complaint before us.

B. Billing Claims Arising Prior to January 22, 2007

On brief, as in an earlier pleading, IBT maintains that the Commission should deny the instant Complaint to the extent that it seeks relief for bills sent to BitWise with a due date prior to January 22, 2007, because such relief is barred by the applicable statute of limitations. IBT observes Section 9-252.1 of the Public Utilities Act to state that: “[a]ny complaint relating to an incorrect billing must be filed with the Commission no more than 2 years after the date the customer first has knowledge of the incorrect billing.” 220 ILCS 5/9-252.1.

As shown on record, IBT would have the Commission note that its first invoice to BitWise for the Peoria BAN issued in January 2003, the same for the Champaign and Springfield BANs in October 2003, and for the Quincy BAN in November 2004. Given the testimony stating that BitWise disputed its billings from the very start, IBT maintains that BitWise had knowledge of the supposedly incorrect billing since it first began receiving invoices from IBT. Since the Complaint was filed on January 22, 2009, IBT asserts that any claim based on invoices issued prior to January 22, 2007, is barred by 220 ILCS 5/9-252.1.

In denying IBT's earlier limitations argument, and given the nature of the complaint, we observe that the ALJ questioned whether the parties' ICA addressed the topic. Today, having concluded that the billings in question are governed by IBT's Access Tariff and not the ICA, we believe that any provision in the parties' ICA limiting the time for submission of disputes is irrelevant.

Looking to the specific language of Section 9-252.1, we observe that the statute applies when a customer pays a bill as submitted and the billing is incorrect due to "charging more than the published rate" or in "measuring the quantity or volume" of the service provided. 220 ILCS 5/9-252.1. This does not reflect the instant situation. On the other hand, the provisions of Section 9-252 are broader in scope. This statute speaks to a complaint concerning "any rate or other charge" of any public utility where that public utility has charged an excessive or unjustly discriminatory rate for its product, commodity or service. 220 ILCS 5/9-252. This factual predicate is closer to what BitWise has complained of here. As such, the instant complaint falls under Section 9-252 of the PUA. Under Section 9-252, a complaint must be filed within two years from the time the product, commodity or service was furnished.

To be sure, BitWise has not plead its complaint under either Section 9-252 or Section 9-252.1. From the very outset and continuing through the briefing stages, BitWise has maintained that the issues are governed by the parties' ICA, which, we are shown, has a shorter limitations period. Had the ICA governed this issue, the General Terms & Conditions appendix of the ICA set out that a party can only dispute charges for which the bill due date is within 12 months of the date that the party submitted its dispute. AT&T Illinois Late Filed Ex. 4.0 at 57 (General Terms & Conditions, § 10.1.2). In other words, if this provision were applicable, IBT notes that it would limit BitWise from challenging the validity of any charges billed prior to January 22, 2008.

C. Recent Developments for Billing.

The record shows that since the time of the first evidentiary hearing had in this proceeding in April 2009, BitWise submitted orders to modify the access facilities it obtains from IBT in three of the LATAs at issue:

First, the Commission observes that BitWise has decided to exit the Quincy market, such that it disconnected the services that IBT had been providing in that LATA. Tr. at 587, 588. This business choice has no bearing on the

unpaid billings in dispute prior and up to BitWise's disconnection.

Second, the Commission notes that BitWise decided to reconfigure its service in the Peoria LATA, so that it could eliminate the multiplexing charge. Tr. at 587-88; AT&T Illinois Ex. 2.2 at lines 327-28. While Mr. Shuler explains that the new Peoria configuration "could have been that way to begin with" (Tr. at 588), this does nothing to undermine Bitwise liability for charges incurred during the relevant periods.

Third, we are informed that BitWise disconnected enough of its DS1 circuits in the Champaign LATA so that it could consolidate the remaining DS1s onto one multiplexer and eliminate the other multiplexer. Tr. at 587, 588; AT&T Illinois Ex. 2.2 at 324-27. So too, it is indicated that between March and July 2009, BitWise reduced the number of DS1s going to Verizon exchanges in the Champaign LATA from 25 to 9. AT&T Illinois Ex. 2.2(a) (IBT response to Staff Data Request 2.04). These measures are relevant only to determine billing from their inception up to the present date.

The Commission makes no comment on Mr. Shuler description of these various changes as "housecleaning." Tr. at 586. Or, on his explanation that BitWise "had basically not paid much attention [to those circuits] and had a lot of extra circuits that we no longer needed." Tr. at 496; Tr. 586. We are told, however, that the parties anticipate that these changes will lower BitWise's access bills in the three LATAs going forward.

NOTE: In their respective briefs on exceptions, and if appropriate, the parties and Staff will individually or jointly present a compilation of the amounts owed to Illinois Bell by BitWise and to date, that is developed in accordance with the decisions set out in this Proposed Order, as summarized below.

D. Summary

In accord with all of the issues decided in this proceeding, including the governing legal authority, the Commission concludes that:

1. All billings prior to January 22, 2007 are beyond this Commission's jurisdiction pursuant to Section 9-252 and, as such, remaining owing to IBT in the amount and manner billed.
2. After January 22, 2007, the billings are to be corrected to reflect:
 - a. Removal of the LDC channel charges; and

- b. Application of special access rates instead of switched access rates for the Springfield, Quincy and Champaign LATAs (noting that the Quincy service was disconnected sometime after April 2009).
- c. The more current billings to date will reflect the changes noted in Section C above.
- d. In all other respects, the disputed billings reflect charges due and owing to Illinois Bell by the complainant, BitWise.

IX. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

- (1) BitWise is a competitive local exchange carrier that was certificated by this Commission in Docket 00-0480;
- (2) Illinois Bell Telephone Company, an Illinois corporation, provides local telecommunications service in the State of Illinois and is a public utility within the meaning of Section 3-105 of the Illinois Public Utilities Act ("Act");
- (3) the Commission has jurisdiction over the parties and over the subject matter of the complaint;
- (4) the Commission approved the parties' interconnection agreement ("ICA") on December 19, 2001 in Docket 01-0649.
- (5) the Complaint filed by BitWise on January 22, 2009 alleges improper billings by Illinois Bell under the parties ICA;
- (6) the Complaint is shown to be viable under Section 9-252 of the PUA should be granted in part and denied in part;
- (7) all billings for IBT's charges prior to January 22, 2007 are beyond this Commission's jurisdiction pursuant to Section 9-252.
- (8) IBT should revise its billings to BitWise for the Peoria LATA on or subsequent to January 22, 2007 and remove the LDC charge;
- (9) IBT should revise its billings to BitWise for the Springfield, Quincy and Champaign LATA to reflect special access rates instead of switched access rates;
- (10) In all remaining respects, BitWise should pay Illinois Bell for all outstanding charges consistent with the Order that amount to _____.

IT IS ORDERED that the Complaint filed by BitWise and against Illinois Bell is granted in part and denied in part.

It is further ordered that IBT will revise its billings to BitWise for the Peoria LATA that issued subsequent to January 22, 2007 and remove the LDC charge;

It is further ordered that IBT will revise its billings to BitWise for the Springfield, Quincy and Champaign LATA from January 22, 2007 to reflect special access rates instead of switched access rates;

It is further ordered that in all remaining respects, BitWise is owing to Illinois Bell for all outstanding charges consistent with the Order that amount to _____.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

DATED:	January 25, 2010
BRIEFS ON EXCEPTIONS DUE:	February 8, 2010
REPLIES ON EXCEPTIONS DUE:	February 16, 2010

Eve Moran,
Administrative Law Judge