

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

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

ILLINOIS BELL TELEPHONE COMPANY REPLY TO EXCEPTIONS

Now comes Illinois Bell Telephone Company (“IBT”), by and through its counsel, and states as follows in reply to the exceptions filed by Commission Staff and BitWise Communications, Inc. (“BitWise”):

I. Reply to Staff Exceptions

Staff proposed a single exception to page 46 of the Proposed Order (“PO”) to clarify that it has no obligation to present a recalculation of IBT’s billings to BitWise to take into account decisions reached in the PO. IBT has no objection to the revised language that Staff proposes.

II. Reply to BitWise Exceptions

A. Introduction

BitWise’s Brief on Exceptions (“BitWise BOE”) fails to comply with at least three important aspects of the Commission’s rules of practice. As a result, the Commission should disregard the noncompliant portions of BitWise’s submission.

First, under Section 200.830(b) of the Commission’s rules, exceptions must be stated and numbered separately. 83 Ill. Admin. Code 200.830(b). BitWise did not number its exceptions but instead orders them largely based on the organization of the PO, which leads BitWise to take exception to multiple substantive issues under one heading (*e.g.*, BitWise BOE at 2- 4, 7). One

section of BitWise’s BOE – Switched Access vs. Special Access Rates Repercussions (pp. 9-10) – has no counterpart in the PO and addresses a topic that BitWise discusses at length earlier in its exceptions. *Id.* at 4-6. As a result, IBT has had to organize its reply to these exceptions in a less straightforward manner to make sure it has addressed all of BitWise’s contentions. Such efforts would be unnecessary if BitWise had complied with the format prescribed by the rules of practice.

Second, under Section 200.830(e), statements of fact in a party’s exceptions should be supported by citations to the record. 83 Ill. Admin. Code 200.830(e). In multiple places, BitWise makes factual assertions for which it provides no record citations. *See, e.g.*, BitWise BOE at 3 (stating that ICA arbitration would be too costly for BitWise), 3 (stating that only 2 of 28 Peoria trunks are used for 911 service), 5-6 (stating that applicability of switched access rates in particular situation was “undisputed”), 6 (discussing difference between month-to-month and term rates for special access). If BitWise cannot be bothered to provide record citations for “facts” it is using to support its positions, the Commission should have no obligation to consider those positions.

Finally, BitWise, in multiple places, takes exception to portions of the PO that describe either IBT’s or Staff’s position on the issues. *See, e.g.*, BitWise BOE at 4-5 (IBT position on Springfield), 5 (Staff position on Springfield), 7 (IBT position on Quincy). BitWise does not base these exceptions on the contention that the PO incorrectly describes the other party’s position, but seemingly argues that it is inappropriate for the PO to describe positions with which BitWise disagrees. *See, e.g., id.* at 5 (asserting that PO’s discussion of Staff’s position on special

access rates “is improper”).¹ BitWise’s attempt to muzzle the Administrative Law Judge (“ALJ”) from describing the other parties’ positions is counter to the overall goal of the Commission’s practice rules to promote the “[i]ntegrity of the fact-finding process” and to “achieve a correct and legally sustainable decision.” 83 Ill. Admin. Code 200.25(a).

BitWise’s failure to comply with the rules of practice creates more work for the other parties and the Administrative Law Judge (“ALJ”), and it hinders the preparation of an accurate and sustainable order. The Commission should disregard BitWise’s exceptions to the extent that they are based on unsupported factual assertions and reject its attempts to limit explanation of other parties’ positions.

B. Peoria BAN Dispute (Cross-Connect)

BitWise (apparently²) asserts that the ALJ erred in concluding that IBT properly billed the cross-connection charge associated with the Peoria BAN out of IBT’s tariff. BitWise BOE at 2. Instead, BitWise (again apparently) maintains that the cross-connection should have been billed out of the parties’ ICA. *Id.* BitWise’s exception is meritless.

As a threshold *and dispositive* matter, BitWise conceded in its reply brief that it was appropriate for IBT to bill BitWise for a cross-connect charge out of its tariff. At pages 2-3 of its Reply Brief, filed on September 21, 2009, BitWise noted that “the only change that Staff believes should apply is the cross-connect charge taken from the non-CLEC collocation (Expanded Interconnection) tariff.” BitWise then stated: “[W]e accept this is reasonable at \$1.01

¹ Despite its effort to remove descriptions of other parties’ positions from the PO, BitWise takes the contradictory position that the PO is also flawed because it fails to provide, from BitWise’s perspective, a sufficient description of the dispute process. *See* BitWise BOE at 7-8.

² BitWise contradicts itself in its BOE. At page 2, it states that “beginning with the second full paragraph on page 27 of the ALJPO through the remainder of the Commission Analysis and Conclusion (Peoria) section of the ALJPO ending at the bottom of page 28, BitWise proposes no changes.” But then on page 4, BitWise proposes to gut the entirety of the second full paragraph on page 27. IBT will give BitWise the benefit of the doubt and respond as though BitWise intends to take exception to that second paragraph, even though BitWise is far from clear in its BOE.

per month.” *Id.* Thus, BitWise has conceded that IBT appropriately billed out of its tariff, as opposed to the ICA, and has waived the claim it now makes in its BOE that the ALJ erred. The ALJ can therefore deny BitWise’s first exception without further consideration.

Even if BitWise had not conceded that IBT appropriately billed BitWise a cross-connection charge out of its tariff, its exception should still be denied. BitWise posits, as the basis for its exception, that “[t]here is no evidence that this is not a collocation to collocation cross-connect.” BitWise BOE at 2.³ As the ALJ affirmatively concluded, however, the facility at issue is *not* a connection between two collocators (presumably, BitWise and Legacy AT&T). PO at 27. The uncontroverted evidence adduced at hearing overwhelmingly supports this; it shows that Legacy AT&T is not collocated anywhere in the IBT central office. AT&T Illinois Ex. 2.0 (Neinast Direct), lines 177-195; AT&T Illinois Ex. 2.2 (Neinast Addit. Rebuttal), lines 103-110 (stating that no collocation-to-collocation cross-connect exists between BitWise and Legacy AT&T since 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.) Therefore, this can not be a collocation-to-collocation arrangement, as Staff too concluded. Staff Ex. 3.0(R) (Zolnierek Rev. Addit.), lines 116-26.

If AT&T were collocated in the IBT central office, BitWise’s position would still fail. Under the plain terms of BitWise’s ICA, collocation is available to BitWise only for the purposes of transmitting and routing telephone exchange and exchange access pursuant to 47 U.S.C. § 251(c)(2) of the Telecommunications Act of 1996 (“1996 Act”) or for obtaining access to IBT’s unbundled network elements pursuant to 47 U.S.C. § 251(c)(3) of the 1996 Act. Staff Cross Ex.

³ BitWise conflates the burden of proof here. As the ALJ found (PO at 4, 28), BitWise bears the burden of proof in this proceeding. It would not be enough for BitWise to show a lack of evidence that the facility at issue is not a collocation to collocation cross-connect. BitWise has to come forth with affirmative evidence that the facility at issue is, in fact, a collocation to collocation cross-connect. But this is really an academic point, because BitWise cannot establish either proposition.

10 (McPhee) at §6.1; Staff Init. Br. at 13. But this is not what BitWise is doing in the Peoria LATA. The evidence establishes that the traffic at issue is exclusively and solely traffic destined for BitWise’s internet service provider located outside of the LATA and is therefore interLATA traffic being passed to Legacy AT&T, who is acting as an interexchange carrier (“IXC”). *See* Jt. Resp. to ALJ Data Request 1(d); AT&T Illinois Ex. 2.2 (Neinast Addit. Rebuttal), lines 46-57; BitWise Ex. 5.0 (Shuler Addit.), lines 57-59 (purpose of connection to Legacy AT&T was for upstream connectivity needed by BitWise’s ISP); Tr. at 193:7-11 (Mr. Shuler testifying that BitWise’s internet traffic carried by Legacy AT&T goes from the Legacy AT&T IXC POP in Peoria to Chicago); BitWise Ex. 2.0 (Shuler Rebuttal), lines 309-12. Thus, the equipment here is not used either for interconnecting Legacy AT&T to IBT, or for access to IBT’s unbundled network elements, and therefore IBT is not required to permit BitWise to interconnect to Legacy AT&T.

BitWise also posits that Legacy AT&T is “functionally a Section 201 collocator.” BitWise BOE at 2. It is entirely unclear what BitWise means by “functionally” and BitWise offers no record cite or legal authority for this proposition. Whatever it means, it does not apply here, because, as noted above, Legacy AT&T is *not* a collocator in IBT’s central office. Moreover, Section 201 is irrelevant to BitWise’s contention that it should have been billed under the parties’ ICA. Here, BitWise voluntarily entered into its ICA with IBT. “Parties 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 (9th Cir. 2006). *See* Staff Init. Br. at 14, *citing Verizon Maryland, Inc. v. RCN Telecom Services, Inc.*, 232 F. Supp. 2d 539, 554 (D. Md. 2002) (“Federal law ... gives [a carrier] the right to insist that it be held only to the terms of the [ICA] to which it actually agreed.”)

BitWise further argues that Legacy AT&T is located in IBT's central office. BOE at 4. While it offers no elaboration, BitWise appears to be alluding to its argument that the IBT Peoria central office at 320 Fulton and the Legacy AT&T Peoria central office at 120 SW Jefferson are located in the same building. *See, e.g.*, BitWise Init. Br. at 6 (“BitWise and Legacy AT&T are in the same building with IBT...”). There is no merit to BitWise's assertion, as was fully addressed in IBT's initial and reply brief. *See* IBT Init. Br. at 4; IBT Reply Br. at 9-10.

Finally, in a last gasp, BitWise alleges that BitWise “ha[d] no bargaining power regarding the terms of the ICA,” and that “[a]rbitration of major sections of the ICA would be far too costly for a small CLEC such as BitWise.” BitWise BOE at 2-3. This assertion is simply groundless, which is perhaps best established by the fact that BitWise provides no record support for it. BitWise's exception, and its suggested self-serving revisions to the PO, should be rejected.

C. Peoria and Champaign BAN Disputes (911-Related Services)

BitWise takes exception to statements on pages 27 and 43 of the PO on the ground that the multiplexers through which its 911 traffic passes in the Peoria and Champaign LATAs should not be billed at special access rates. BitWise BOE at 3-4, 7.⁴ The basis for these exceptions is the PO's supposed failure to recognize that the multiplexers should be billed at “local” rates established by BitWise's ICA, because most of the channels in the multiplexers are used for local service and only two channels in each multiplexer are used for 911 purposes. *Id.* at 3. The Commission should reject these exceptions.

Although the PO does not discuss, by name, BitWise's “minimal use for 911” argument regarding the Peoria multiplexer, it is clear that the PO rejected that argument. The PO agrees

⁴ Apparently because of a typographical error, BitWise describes only the paragraph of the PO – but not the page – where the Champaign 911 issue is discussed. *See* BitWise BOE at 7. The PO discusses the issue at page 43.

with the positions of IBT and Staff, finding that, under the ICA, BitWise had an obligation to have 911 facilities in place and that, “if IBT provides such facilities to BitWise, the billings will be pursuant to IBT’s access tariffs.” PO at 27. BitWise’s only support for reaching the opposite conclusion – and billing the multiplexer at local/ICA rates – is the assertion that 911 services “are, after all, local in nature.” BitWise BOE at 4. Such a throwaway line is no basis to ignore the ICA provision requiring that 911-related services be billed at special access rates. *See* AT&T Illinois Ex. 2.0 (Neinast Direct), lines 300-04 & Attachment 3 (911 Appendix) at Section 3.3.2; Staff Ex. 3.0(R) (Zolnierrek Rev. Addit.), lines 63-65.⁵ In addition, the PO explicitly considered, and correctly rejected, BitWise’s contention that the multiplexer charge should be pro-rated based on the number of channels used for 911. The post-hearing briefs of both IBT and Staff explained why proration of the multiplexer charge was inappropriate. *See* IBT Reply Br. at 19; Staff Init. Br. at 17-18. BitWise’s exceptions provide no basis to revisit the PO’s conclusions on these issues and should be rejected.

IBT also bills BitWise for 911-related DS1 transport services in the Peoria LATA. *See* AT&T Illinois Ex. 3.1 (Ellis Rebuttal), p. 4 & Attachment R4; AT&T Illinois Ex. 2.2 (Neinast Addit. Rebuttal), lines 268-74. The PO found that these services were correctly billed at special access rates. PO at 27. Although BitWise proposes that this finding be struck from the PO (BitWise BOE at 3-4), its exceptions provide no argument to support such an outcome. BitWise’s failure to provide any basis for this portion of its exception dooms it to failure.

D. Springfield, Quincy and Champaign BAN Disputes

⁵ BitWise makes this “minimal use” argument for the Peoria multiplexer (BitWise BOE at 3) and incorporates it by reference for the Champaign multiplexer. *Id.* at 7. However, one difference between the use of the multiplexers in the two LATAs undercuts this argument in the Champaign LATA. In particular, the record shows that more than half of the 28 channels in the Champaign multiplexer were used for special access (rather than local) purposes: 2 channels for 911 and 13 channels for the exchange of traffic with Verizon exchanges. *See* AT&T Illinois Ex. 2.2(a) (AT&T Illinois response to Staff Data Request 2.04).

BitWise (apparently⁶) takes exception to the PO's conclusion that it should be billed at special access rates – rather than switched access rates – for DS1 transport services in the Springfield LATA. BitWise BOE at 5-6. It takes similar exception to the PO's conclusions on this issue in the Quincy and Champaign LATAs, incorporating its Springfield arguments by reference. BitWise BOE at 6-7 (Quincy), 7 (Champaign). Because the billing disputes for the three LATAs are largely identical, IBT will address BitWise's exceptions for all three in this section of its reply.⁷

As a preliminary matter, IBT will point out three important determinations that the PO made regarding the billing in these three LATAs, which BitWise does not dispute. First, the PO, in concluding that special access rates are applicable, rejected BitWise's primary argument why IBT's billing was improper: that the parties' ICA governed billing for the services at issue and that BitWise should be billed nothing because the relevant facilities were on IBT's side of the Point of Interconnection. *See* BitWise Init. Br. at 16. BitWise's exceptions, however, seem to focus solely on whether switched or special access rates are applicable (*see* BitWise BOE at 5-6), not on whether the ICA governs the situation. BitWise thus has abandoned the claim that the services are governed by the ICA and that it should be billed nothing for them.

Second, IBT bills BitWise for three types of access services in the three LATAs: DS3 cross-connections, DS3-to-DS1 multiplexing, and DS1 transport to various Verizon exchanges. *See* IBT Init. Br. at 29 (listing record citations for services provided to BitWise). BitWise's exceptions appear only to address the PO's decisions on charges for "DS1 transport services to the Verizon exchanges." BitWise BOE at 5. BitWise thus concedes the correctness of the PO's

⁶ As discussed below, BitWise does not take exception to the PO's general conclusion that special access rates apply to the services at issue in these LATAs.

⁷ BitWise also has submitted an exception to the PO's conclusions on the proper billing of certain 911-related services in the Champaign LATA. IBT responds to that exception in Section II(C) of its reply.

determination that cross-connection and multiplexing in the three LATAs should be billed at special access rates, as IBT has done. *See* AT&T Illinois Ex. 3.1 (Ellis Rebuttal), p. 4 & Attachments R1 (Quincy), R2 (Champaign), R3 (Springfield); Staff Ex. 3.0(R) (Zolnierek Rev. Addit.), lines 196-98, 207-09, 216-18.

Third, BitWise also apparently agrees with the PO's conclusion that special access rates apply even to DS1 transport services, at least on a going-forward basis. BitWise's exceptions do not advocate deletion of the finding – in the first paragraph of the PO's "Commission Analysis and Conclusion" section for each BAN – that the services for which IBT bills BitWise "are properly provided pursuant to Special Access Tariffs." PO at 33 (Springfield), 37 (Quincy), 42 (Champaign). BitWise only seeks deletion of the second and third paragraphs of the PO's conclusion sections, which require recalculation of the billing for DS1 transport services from switched access to special access rates. *See* BitWise BOE at 6 (Springfield), 7 (Quincy), 7 (Champaign).

It is difficult to address the substantive basis for BitWise's exceptions for the three BANs because the analysis in its brief is meandering and opaque. As pointed out earlier (*see* Section II(A) *supra*), BitWise's vehement objection to language on pages 30 and 32 of the PO (*see* BitWise BOE at 4-5) improperly seeks deletion of descriptions of IBT's and Staff's positions, not any conclusion reached by the PO.⁸ In addition, BitWise's assertions that IBT could have billed the DS1 transport services at special access rates all along (BitWise BOE at 5), that special access rates should only be billed going forward (*id.* at 6), or that special access rates should be billed retroactively only at the level applicable to a term contract (*id.*) do not challenge the PO's conclusion that special access rates should apply. (Indeed, the assertions bolster such a

⁸ BitWise also seeks deletion of a portion of the description of IBT's position for the Quincy LATA. *See* BitWise BOE at 7.

conclusion.) Moreover, BitWise only adds to the confusion when it proposes, in its replacement language for the “Summary” section of the PO, that the billing for the three LATAs be corrected to reflect the “[a]pplication of switched access rates” (BitWise BOE at 11) – since that is exactly how IBT has billed the DS1 transport services all along. *See* AT&T Illinois Ex. 3.1 (Ellis Rebuttal), p. 4 & Attachments R1 (Quincy), R2 (Champaign), R3 (Springfield); Staff Ex. 3.0(R) (Zolnierrek Rev. Addit.), lines 198-200, 209-10, 219-20.

It may be that BitWise’s only substantive argument on this issue is that the PO improperly went outside the scope of the Complaint in considering whether special access rates should apply to DS1 transport services when IBT had billed those services at switched access rates. BitWise BOE at 5. However, in the Complaint (p. 2 ¶ 5), BitWise described its dispute in broad terms – “BitWise believes it has been overcharged for telecommunications services” – and the relief it sought was “a determination by the Commission of the proper rates to be charged by AT&T to BitWise.” Complaint, p. 2; *see also* Informal Complaint at 4 (asking that IBT be required “to re-rate the disputed portion of bills”). Given such an expansive request for relief, the PO could reasonably conclude that “the question of the correctness of the unpaid billings for the [three LATAs] has been put before the Commission” (PO at 33 (Springfield), 37 (Quincy), 43 (Champaign)), and it could then direct that IBT take appropriate measures to correct those billings to reflect the rates applicable under the appropriate section of the IBT access tariff. BitWise’s exceptions for the Springfield, Quincy and Champaign BANs have no merit and should be rejected.

E. Timing and Circumstances of the Billing Disputes

BitWise takes exception to what it views as an incomplete discussion in the PO (at p. 43) of the dispute history between BitWise and IBT. *See* BitWise BOE at 7-8. It therefore proposes

to add language to the PO on the amount of payments it made to IBT through 2006 and its contention that IBT owes it reciprocal compensation payments. *Id.*⁹ BitWise’s first proposal should be rejected because it does not correctly reflect the record, and the second proposal should be rejected because it involves an issue that the Commission was not asked to decide.

BitWise’s proposed language on its payments to IBT fails to recognize that the record contains differing evidence on the total amount of its payments. *Compare* BitWise Ex. 1.0 (Shuler Direct), lines 64-65 (stating that BitWise paid \$464,540.02) *with* AT&T Illinois Ex. 3.1 (Ellis Rebuttal), lines 136-38 & Attachment R7 (listing payments, by BAN, that total approximately \$400,000). Given this conflicting evidence, which no party attempted to explore or explain at the hearing, it would be inappropriate to accept BitWise’s position. In any event, how much BitWise may have paid IBT on the four accounts through 2006 is irrelevant, since the PO concludes that billings prior to January 22, 2007 – and thus any payments for those billings – are not within the Commission’s jurisdiction. PO at 46-47. Since BitWise does not challenge this January 22, 2007, cutoff (*see* BitWise BOE at 11), there is no point in adding further discussion of events that happened in 2006 or earlier.

BitWise’s proposed language on reciprocal compensation fails to recognize that it did not ask the Commission to resolve any issue regarding IBT’s alleged failure to pay reciprocal compensation to BitWise. In the Statement of Position that BitWise filed on October 5, 2009, it stated that Attachment A to its Exhibit 5.0 “outlined the issues that BitWise believes needs [sic] to be determined in this complaint proceeding.” BitWise Statement of Position at 5. Attachment A to Exhibit 5.0 makes no mention of reciprocal compensation payments (*see* BitWise Ex. 5.0 (Shuler Addit. Testimony), Attachment A), and the topic is not otherwise mentioned in

⁹ BitWise also includes a reference to reciprocal compensation in its exceptions to the “Summary” section of the PO. BitWise BOE at 11.

BitWise's Statement of Position. Moreover, in a February 6, 2009, hearing, Mr. Shuler stated that BitWise only had issues with the Peoria, Springfield, Quincy and Champaign access BANs (*see* Tr. at 25-26), and that it had no dispute regarding its other IBT accounts, including those involving reciprocal compensation.

It is utterly improper, during the exceptions process, for BitWise to ask the Commission to rule in its favor on an issue 1) that BitWise neither mentioned in its briefs nor asked the Commission to decide in its post-hearing statement of issues for decision; 2) that BitWise's president told the ALJ was not in dispute shortly after the Complaint was filed; 3) that BitWise gave only a passing mention in its testimony; 4) about which it offered no evidence on specific amounts owed; and 5) that neither IBT nor Staff addressed in its written testimony. Accordingly, the Commission should reject the additional language about reciprocal compensation that BitWise proposes on page 8 of its Brief on Exceptions, as well as the reference to reciprocal compensation it proposes for the "Summary" section of the PO. *See* BitWise BOE at 11.

F. Billing Claims Arising Prior to January 22, 2007

BitWise takes exception to the PO's discussion of the two-year limitations period found in section 9-252 of the Public Utilities Act ("PUA"), 220 ILCS 5/9-252, as being inapplicable to the parties' dispute. BitWise BOE at 8-9. It therefore proposes replacement language explicitly stating that section 9-252 is inapplicable and that the Commission has jurisdiction to resolve the dispute. (The replacement language does not specify a basis for this jurisdiction, however.)

Although IBT agrees that section 9-252 is inapplicable here, and argued that point in its own Exceptions, it disagrees with BitWise's analysis of the issue. As IBT pointed out in its Brief on Exceptions, the Commission cannot rely on section 9-252 because that section is not applicable to competitive telecommunications services and because the special access services at

issue here are competitive services. *See* IBT BOE at 10. BitWise’s contention that section 9-252 applies only to “public utilities,” and not to “telecommunications carriers” such as IBT or BitWise (*see* BitWise BOE at 8), is incorrect. Under section 13-101, the “public utilities” sections of the PUA are applicable to “noncompetitive telecommunications rates and services.” 220 ILCS 5/13-101. As a result, to the extent that charges for any noncompetitive services are in dispute between BitWise and IBT, section 9-252 would be applicable.¹⁰

Moreover, the ultimate point of BitWise’s exception is unclear. Although BitWise argues that the two-year limitation in section 9-252 is inapplicable, it nonetheless endorses use of such a two-year period in the Commission’s final order. Specifically, in its replacement language for the “Summary” section of the PO, BitWise proposes to retain the January 22, 2007, cutoff on the Commission’s jurisdiction and the correction of IBT’s billings. *See* BitWise BOE at 10-11. BitWise does not explain the basis for its acceptance of the cutoff date, but it is consistent with IBT’s position that BitWise’s claims are governed by the two-year limitations period established by section 9-252.1 of the PUA, 220 ILCS 5/9-252.1. IBT BOE at 9-11; *see* BitWise Response to Motion to Dismiss ¶ 8 (stating that disputed charges were within time limitations of § 9-252.1). Therefore, the Commission should reject the replacement language that BitWise proposes for the section of the PO on “Billing Claims Arising Prior to January 22, 2007,” and should instead adopt IBT’s proposed language on the limitations issue.

G. Switched Access vs. Special Access Rates Repercussions

¹⁰ For example, switched access services are noncompetitive. *See* Order, *Illinois Commerce Commission On Its Own Motion vs. Illinois Bell Telephone Company et al., Investigation into Non-Cost Based Access Charge Rate Elements in the Intrastate Access Charges of Incumbent Local Exchange Carriers in Illinois; Illinois Commerce Commission On Its Own Motion, Investigation into Implicit Universal Service Subsidies in Intrastate Access Charges and to Investigate how these Subsidies should be Treated in the Future; Illinois Commerce Commission On Its Own Motion, Investigation into the Reasonableness of the LS2 Rate of Illinois Bell Telephone Company*, Docket Nos. 97-0601; 97-0602; 97-0516 (consolidated), 2000 Ill PUC Lexis 1004, at *206-07 (March 29, 2000).

The section of BitWise’s exceptions brief (pp. 9-10) addressing the “repercussions” of billing BitWise at special access rates for certain services in the Springfield, Quincy and Champaign LATAs¹¹ is perplexing. Although BitWise criticizes the PO’s requirement that the billing be recalculated, it proposes no explicit accompanying changes to the PO. It instead raises three unconvincing reasons why the applicability of special access rates should be limited.

First, BitWise states that it disagrees with the PO’s direction to recalculate the bills at special access rates because such a recalculation would harm BitWise financially. BitWise BOE at 9. The financial consequences a party may suffer as a result of a Commission order is not a proper basis for an exception. Such an exception could be raised in every billing dispute that the Commission is asked to decide. BitWise’s Complaint asked the Commission to determine the “proper rates” it should be charged. Complaint at 2. Now that BitWise has learned that the “proper rates” were higher than it expected, it should not be allowed to claim financial hardship and walk away from the very relief it requested.

Second, BitWise asserts that section 9-250 of the PUA is applicable to the dispute and that, under this provision, any billing change that the Commission orders here could only be prospective. BitWise BOE at 10. In general, section 9-250 allows the Commission to investigate the reasonableness of a carrier’s rates and, if appropriate, establish new rates. 220 ILCS 5/9-250. Assuming that section 9-250 were applicable here,¹² the PO, in directing recalculation of the bills, did not find that the (lower) switched access rates that IBT charged BitWise were “unjust, unreasonable, discriminatory or preferential.” 220 ILCS 5/9-250. It simply found that IBT billed BitWise under the wrong section of the tariff. *See* PO at 33, 37, 42.

¹¹ IBT reiterates that, based on the portions of the PO to which BitWise takes exception, BitWise is not disputing the special access classification of DS3 cross-connections and DS3-to-DS1 multiplexing in the three BANs. *See* Section II(D) *supra*.

¹² During the hearing, the ALJ prohibited certain questioning by BitWise’s counsel on the ground that the reasonableness of IBT’s rates was not at issue. Tr. at 525-26, 545-46.

In other words, the PO directed a true-up; it did not establish a new rate. Moreover, to the extent that BitWise may have tried to present a claim under section 9-250, the PO rejected it. The PO in no way endorsed the position – which BitWise asserted in the Complaint and at the hearing – that the parties’ ICA governed the rate for DS1 transport services in the three BANs.

Third, BitWise asserts that the Commission’s rule on unbilled service, 83 Ill. Admin. Code § 735.70(g)(1), is applicable and allows IBT to backbill BitWise at special access rates for only one year from the date of the Commission’s final order in this docket. BitWise BOE at 10. This assertion is wrong for several reasons.

As an initial matter, the Part 735 rules do not apply to carrier-to-carrier relationships, such as the wholesale relationship between IBT and BitWise. IBT presented extensive arguments in support of this position in the motion to dismiss it filed at the start of the case. *See* IBT Motion to Dismiss ¶¶ 1-8; IBT Reply in Support of Motion to Dismiss ¶¶ 10-17. IBT incorporates those arguments by reference and will not repeat them here.¹³

Even assuming the Part 735 rules were applicable, section 735.70(g)(1) addresses situations where a carrier determines that it has failed to bill a customer for services provided and, of its own volition, sends out a revised bill. That is not the situation here. IBT has been directed to revise its billing in the three LATAs by a Commission order. The restriction on backbilling found in the Commission’s rules thus does not apply.

Moreover, application of a rule that prevents carriers from backbilling an increased rate more than one year from the date of the Commission’s final order would give customers a clear incentive to dawdle in seeking resolution of billing disputes. BitWise claims to have had issues with its access billing since the services were established in 2003-04 (*see* BitWise Ex. 1.0

¹³ In deciding the Motion to Dismiss, the ALJ did not reach any decision on whether Part 735 applies “as between carriers.” ALJ Ruling of March 27, 2009, at 1.

(Shuler Direct), lines 173-75) but only filed its Complaint in early 2009. Given BitWise's delay in seeking resolution of its billing disputes, it should not be allowed to use section 735.70(g)(1) as a shield to fend off much of the backbill that its Complaint may ultimately engender. In summary, the Commission should reject BitWise's proposal to limit the applicability of special access rates here.

Conclusion

For all the foregoing reasons, Illinois Bell Telephone Company asks that the exceptions proposed by BitWise be rejected and that the exceptions proposed by Staff and by Illinois Bell Telephone Company be adopted.

Respectfully submitted,

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