

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

Cbeyond Communications, LLC,	)	
	)	
vs.	)	
	)	Docket No. 10-0188
Illinois Bell Telephone Company	)	
	)	
Formal Complaint and Request for	)	
Declaratory Ruling Pursuant to Sections	)	
13-515 and 10-108 of the Illinois Public	)	
Utilities Act.	)	

**AT&T ILLINOIS’ OPENING BRIEF**

Illinois Bell Telephone Company (“AT&T Illinois”), by and through its attorneys, hereby files its opening brief and requests that judgment be entered in its favor on the Formal Complaint and Request for Declaratory Ruling filed by Cbeyond Communications, LLC (“Cbeyond”) and that Cbeyond be directed to pay all disputed charges within 30 days of the Commission’s order.

**BACKGROUND**

Cbeyond and AT&T Illinois are parties to an interconnection agreement (“ICA”) that was approved by this Commission in 2004 and subsequently amended multiple times.<sup>1</sup> The ICA sets forth the unbundled network elements (“UNEs”) that AT&T Illinois has agreed to provide Cbeyond, as well as the rates for those UNEs. One of the UNEs that AT&T Illinois provides pursuant to the ICA is the DS1 loop/DS1 transport Enhanced Extended Link (“EEL”), or

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<sup>1</sup> Attachments D through H to the Appendix to AT&T Illinois’ Opening Brief (“Appendix”) include certain provisions of the ICA (the General Terms and Conditions, and Article 9) and the First, Third and Fifth amendments to the ICA. The Commission approved the ICA in Docket No. 04-0420 and the amendments in Docket Nos. 05-0147, 05-0844, and 07-0353 respectively. The Commission “can take administrative notice of its own findings and orders,” including those in the dockets listed above. *Citizens Utility Bd. v. ICC*, 276 Ill. App. 3d 730, 735 (1st Dist. 1995). Attachments A through C to the Appendix contain the affidavits of Frederick C. Christensen, Kitty Drennan, and Mark T. Schilling. References in this brief to attachments to the Appendix will be cited as “Attach. \_\_\_.”

DS1/DS1 EEL.<sup>2</sup> Since at least early 2006, Cbeyond has purchased DS1/DS1 EELs from AT&T Illinois. *See* Exhibit A to Complaint (listing disputed charges by bill date); Attach. B (Drennan Aff.) ¶ 8. From time to time, Cbeyond has decided to make changes to its network and change its DS1/DS1 EELs to DS1/DS3 EELs<sup>3</sup> or to stand-alone unbundled DS1 loops connected to third-party transport. *Jt. Stip.* ¶¶ 7-10. In order to effectuate what Cbeyond requests, AT&T Illinois must first remove the existing DS1/DS1 EEL, by disconnecting the DS1 loop from the DS1 transport. Then, AT&T Illinois must establish a new serving arrangement using a DS1 loop, either in combination with DS3 transport (a DS1/DS3 EEL combination) or as a stand-alone unbundled DS1 loop (where transport is provided by a third party). *Id.* ¶ 10. After completing this work, AT&T Illinois has billed Cbeyond the nonrecurring charges set forth in the ICA for the requested services. Those nonrecurring charges were calculated according to the pricing parameters established in this Commission’s Docket No. 02-0864.<sup>4</sup>

## **ARGUMENT**

As AT&T Illinois explains in Section I below, it is well settled under federal and state law that the ICA between Cbeyond and AT&T Illinois is the exclusive statement of the parties’ rights and obligations as regards the federal Telecommunications Act of 1996 (“1996 Act”). If AT&T Illinois has complied with the ICA, then any state law that purports to create obligations

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<sup>2</sup> A DS1/DS1 EEL is “an unbundled DS1 loop in combination, or commingled, with a dedicated DS1 transport.” Attach. G, Illinois TRO/TRRO Attachment, § 6.2(A). Pursuant to the parties’ ICA, AT&T Illinois agreed to provide DS1/DS1 EELs to Cbeyond. Attach. E (ICA Article 9), § 9.3.7.

<sup>3</sup> A DS1/DS3 EEL is “an unbundled DS1 loop in combination, or commingled, with . . . a dedicated DS3 transport.” Attach. G, Illinois TRO/TRRO Attachment, § 6.2(A). Pursuant to the parties’ ICA, AT&T Illinois agreed to provide DS1/DS3 EELs to Cbeyond Attach. E (ICA Article 9), § 9.3.7.

<sup>4</sup> *See* Order, *Illinois Bell Telephone Company – Filing to Increase Unbundled Loop and Nonrecurring Rates*, ICC Dkt. No. 02-0864 (June 9, 2004) (“02-0864 Order”).

for AT&T Illinois above and beyond, or in conflict with, the ICA violates federal law and is preempted.

Thus, just as the parties have stipulated, “the issue in this case is what charges apply under the parties’ interconnection agreement” under two different scenarios: 1) where Cbeyond wants to disconnect an existing EEL in order to use the transport portion of that EEL to create a new EEL; and 2) where Cbeyond wants to disconnect an existing EEL and replace it with a stand-alone DS1 loop (*i.e.*, no longer have a loop-transport UNE combination). Jt. Stip. ¶ 10(a), (b). Section II of this brief, therefore, addresses what charges are appropriate for the service orders at issue here, and Cbeyond’s claim in Count IV that AT&T Illinois has breached the ICA with respect to the charges AT&T Illinois has imposed. AT&T Illinois has no objection to making the service changes Cbeyond has requested; however, AT&T Illinois expects Cbeyond to comply with the ICA’s rates, terms and conditions applicable to those changes. The ICA sets out the non-recurring charges that apply to Cbeyond’s requested disconnection of an existing DS1/DS1 EEL and establishment of a new serving arrangement.<sup>5</sup>

Cbeyond asserts that it should not be required to pay the rates set out in its ICA. Instead, Cbeyond wants only to order a “rearrangement” (Complaint ¶ 39) of its DS1/DS1 EELs or “to reassign cross-connections” (¶ 26), and argues it should be charged no more than a “cross-connect” charge. However, the “rearrangement” of an EEL – or the “cross-connect” of a loop to a different transport – is not a product or service available to Cbeyond under the terms of the ICA. Cbeyond has conceded this. Neither the ICA nor the Pricing Schedule refers to, or

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<sup>5</sup> These charges are contained in Attachment A to the First Amendment to the parties’ ICA, which sets forth the UNE rates established pursuant to this Commission’s June 9, 2004 Order in Docket No. 02-0864. *See* Attach. F. Paragraph 8 of Mr. Christensen’s Affidavit (Attach. A) identifies the specific line numbers in Attachment A for the various charges at issue here.

contains rates, terms and conditions for, EEL “rearrangements,” or “reassignments,” or whatever Cbeyond wants to call them.

Knowing that it cannot bootstrap its case theory into the four corners of the ICA, Cbeyond resorts to arguing, at least at times, that the ICA should be *amended* to include a new rate for a new service – EEL “rearrangement” – that Cbeyond claims AT&T Illinois must provide. But the Commission is powerless to do that, at least in the context of this complaint proceeding, under well-established federal and state law which recognizes that the parties’ ICA is the binding statement of the parties’ respective rights and obligations.

AT&T Illinois is also entitled to judgment on each of Cbeyond’s other three counts, as explained in Section III. In those counts, Cbeyond alleges that AT&T Illinois has violated various provisions of the Illinois Public Utilities Act (“PUA”), 220 ILCS 5/13-514, 5/13-801, and 5/9-250, by charging Cbeyond nonrecurring charges for converting its DS1/DS1 EELs to new serving arrangements. However, the central and dispositive issue in this case is whether AT&T Illinois’ charges are authorized by the parties’ ICA, as even Cbeyond has now agreed. It. Stip. ¶ 10.<sup>6</sup> Since the ICA contains the exclusive statement of Cbeyond’s and AT&T Illinois’ rights and obligations, the provisions of state law relied upon by Cbeyond are irrelevant to the parties’ dispute. To the extent that Cbeyond alleges that state law requires AT&T Illinois to go above and beyond what is required of it in the ICA, or to conduct itself contrary to the ICA’s terms, state law is preempted.

Even putting aside preemption, the facts do not support Cbeyond’s claims that AT&T Illinois has violated state law. Cbeyond cannot prevail on Count I, asserting various violations

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<sup>6</sup> ALJ Moran concurred. *See* Tr. at 26 (stating that “the interconnection agreement is the most important thing here ... [a]nd so the Commission really doesn’t have a whole lot of authority to intrude [on that] agreement”). *See also id.* at 25-27 (Sections 9-250, 13-515 and 13-801(b) do not apply; Section 13-514 does not apply, except subsection (8)).

of Section 13-514 of the PUA, because, even accepting all of Cbeyond's allegations as true, Count I has no relevance to the parties' dispute.<sup>7</sup> Count II, which alleges a violation of Section 13-801, fails because the portion of Section 13-801 upon which Cbeyond relies requires proof that AT&T Illinois discriminated against Cbeyond in favor of some other party, and no such proof exists. And Cbeyond cannot prevail on Count III, which Cbeyond brings pursuant to Section 9-250, because it asks the Commission to change the rates, terms and conditions of the parties' binding ICA. The Commission does not possess the authority to do so.

Nor can Cbeyond challenge the non-recurring charges associated with work performed by AT&T Illinois. Cbeyond contends that AT&T Illinois performs little or no work when it fulfills Cbeyond's orders. However, the rates about which Cbeyond complains were calculated using the pricing parameters established by this Commission in its *02-0864 Order*. As detailed in Section IV below, Cbeyond cannot collaterally attack these binding rates in this proceeding.

Even if Cbeyond could properly challenge AT&T Illinois' charges, the record demonstrates that the charges are proper. AT&T Illinois must perform a substantial amount of work to fulfill Cbeyond's Local Service Requests – not just on the transport portion of the EELs, but also on the loop portion – as AT&T Illinois demonstrates in Section V.

**I. The Parties' ICA Is The Exclusive And Binding Statement Of The Parties' Respective Rights And Obligations Pursuant To The Telecommunications Act Of 1996.**

The relationship between AT&T Illinois and Cbeyond is governed by their ICA, the “Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the [1996] Act.” *Michigan Bell. Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2003).

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<sup>7</sup> The lone potential exception is Cbeyond's allegation that AT&T Illinois has violated subsection 13-514(8). However, that claim fails for the same reason as Cbeyond's breach of contract claim – AT&T Illinois has not breached the parties' ICA – as well as for independent reasons. *See* Section III below.

The 1996 Act’s “regime for regulating competition in th[e] [telecommunications] industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law.” *Southwestern Bell Tel. Co. v. Connect Commc’ns Corp.*, 225 F.3d 942, 946 (8th Cir. 2000). Pursuant to federal law, “the authority granted to state regulatory commissions is confined to the role described in § 252 [of the 1996 Act] – that of arbitrating, approving, and enforcing interconnection agreements.” *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003). “Once the terms [of the ICA] are set, either by agreement or arbitration, and the state commission approves the agreement, it becomes a binding contract.” *Id.* at 1120. *See also* 47 U.S.C. § 252(a)(1) (carriers may “negotiate and enter into a binding [interconnection] agreement”).

After the ICA is approved, the contracting parties are “regulated directly by the interconnection agreement.” *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 104 (2d Cir. 2002), *rev’d in part on other grounds sub nom., Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *See also Michigan Bell Tel. Co. v. MCImetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003) (“once an agreement is approved,” the parties are “governed by the interconnection agreement” and “the general duties of [the 1996 Act] no longer apply”). Thus, once approved, the interconnection agreement is the exclusive statement of the parties’ rights and obligations – and federal and state law operating of their own force are irrelevant. *See, e.g., Goldwasser v. Ameritech Corp.*, No. 97 C 6788, 1998 WL 60878, at \*11 (N.D. Ill. Feb. 4, 1998) (dismissing claims for violation of Sections 251, 252, 271 and 272 of the 1996 Act, because telecommunications company’s “duties exist . . . only within the framework of the negotiation/arbitration process which the Act establishes to facilitate

the creation of local competition”; explaining that “[i]f there are problems with carriers . . . failing to satisfy the[] duties to their competitors [under Section 251 and 252 of the 1996 Act], the Act establishes the sole remedy: state PUC arbitration and enforcement proceedings, with review by federal courts”), *aff’d on other grounds*, 222 F.3d 390 (7th Cir. 2000).

In this complaint proceeding, the Commission’s sole role is to interpret and enforce the ICA, using state law principles of contract interpretation. As the Seventh Circuit has explained, “[a] decision ‘interpreting’ an [interconnection] agreement” raises a question under the applicable state’s “law of contracts.” *Illinois Bell Tel. Co. v. Worldcom Tech., Inc.*, 179 F.3d 566, 574 (7th Cir. 1999). *See also Southwestern Bell Tel. Co. v. Pub. Util. Comm’n of Texas*, 208 F.3d 475, 485 (5th Cir. 2000); *Southwestern Bell Tel. Co. v. Brooks Fiber Commc’ns of Oklahoma, Inc.*, 235 F.3d 493, 499 (10th Cir. 2000).

This Commission does not have authority – under any provision of federal or state law – to modify AT&T Illinois and Cbeyond’s approved, binding ICA to allow Cbeyond to pay different rates or be subject to different terms and conditions than those set forth in the ICA. Simply put, “this Commission cannot take action” that will “effectively change[] the terms of [the] interconnection agreement[],” because that would “contravene[] the Act’s mandate that interconnection agreements have the binding force of law.” *Pac West Telecomm*, 325 F.3d at 1127. As the Illinois Appellate Court has explained, “[n]othing in the [Illinois Public Utilities] Act, even the independent authority for alternative regulation . . . , gives the Commission the power to controvert federal law.” *Illinois Bell Tel. Co. v. ICC*, 352 Ill. App. 3d 630, 638-39 (3d Dist. 2004) (ICC order that extended wholesale performance remedy plan to CLECs who did not have interconnection agreements with telephone company, as part of alternative regulation plan, was preempted by 1996 Act; access to remedy plan subverted negotiation and arbitration process

required by 1996 Act); *see also Illinois Bell Tel. Co. v. ICC*, 343 Ill. App. 3d 249, 257 (3d Dist. 2003) (tariff that telephone company was ordered to file by the ICC conflicted with federal law regarding interconnection agreements in the 1996 Act; tariff allowed any CLEC who did not have an interconnection agreement to opt into the tariff without having to negotiate, mediate, or arbitrate with telephone company, and therefore, telephone company lost its right of federal district court review).

Thus, state law is simply not applicable to the Commission's decision in this case, except to the extent that it provides the general principles of contract law used to interpret the ICA. The Commission need only decide whether AT&T Illinois breached the ICA, just as the parties have stipulated. *Jt. Stip.* ¶ 10. To the extent that Cbeyond claims that state law imposes obligations on AT&T Illinois above and beyond, or even contrary to, what the parties agreed to in their ICA, the state law is preempted. *See, e.g., Wisconsin Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003) (state tariffing requirement, which "interfere[ed] with the procedures established by the [1996] [A]ct" for negotiating and arbitrating interconnection agreements, was preempted); *AT&T Commc'ns of Illinois, Inc. v. Illinois Bell Tel. Co.*, 349 F.3d 402, 410-11 (7th Cir. 2003) (Illinois statute, mandating methodology for ICC to use in setting rates, was preempted by the 1996 Act; state methodology, which required consideration of only two factors, conflicted with TELRIC methodology, which was established by the FCC to determine rates under the 1996 Act); *Illinois Bell Tel. Co. v. Hurley*, No. 05 C 1149, 2008 WL 239149, at \*7 (N.D. Ill. Jan. 28, 2008) ("Because § 13-801 [of the PUA] requires unbundling of AT&T Illinois' network elements to the Competing Carriers, even in situations in which § 251 of the [1996] Act do not require the providing of unbundled access to unimpaired CLECs, . . . the court holds that § 13-801 impermissibly preempts the [1996] Act[.]").

Therefore, we turn to the issue properly before this Commission – whether AT&T Illinois violated its ICA with Cbeyond by imposing connection and disconnection charges for the work AT&T Illinois performed for Cbeyond.

**II. AT&T Illinois Did Not Violate The Parties’ ICA By Imposing Connection And Disconnection Charges When Cbeyond Sought To Replace Its Existing EELs With New EELs Or New Stand-Alone Unbundled DS1 Loops.**

Count IV of Cbeyond’s complaint alleges that AT&T Illinois has breached the parties’ ICA by imposing connection and disconnection charges when Cbeyond requested that AT&T Illinois change its existing DS1/DS1 EELs to DS1/DS3 EELs or to unbundled DS1 loops. As established below, Cbeyond cannot point to any provision in the parties’ ICA that AT&T Illinois violated. Nor can Cbeyond point to any provision in the ICA that supports Cbeyond’s theory that it only has to pay a cross-connection rearrangement charge, or something other than the connection and disconnection charges set forth in the ICA and billed by AT&T Illinois. No such rearrangement product or service exists under the ICA, nor is there a rate element for such a service. And while Cbeyond might wish its current agreement had such a product or service and a corresponding rate, it is Cbeyond that had (and still has) ample opportunity to try to obtain an ICA that actually does. It is not the province of this Commission to ignore the language of the parties’ ICA, or amend it, to provide what Cbeyond seeks.

The parties’ ICA permits Cbeyond to order UNEs as well as certain pre-established UNE combinations. When Cbeyond orders a UNE or combination, there are non-recurring charges set forth in the ICA that Cbeyond must pay in order to connect the requested product or service. Cbeyond also pays monthly recurring charges so long as it is obtaining the product or service from AT&T Illinois. When Cbeyond no longer desires the UNE or UNE combination it ordered, it pays non-recurring disconnection charges, as set forth in the ICA.

One of the UNE combinations that Cbeyond ordered from AT&T Illinois is a type of high capacity EEL. Cbeyond subsequently wanted a different type of high capacity EEL, in some instances, or a different stand-alone UNE (not a combination like an EEL) in other instances. Specifically, Cbeyond initially ordered DS1/DS1 EELs, which consist of a DS1 loop combined with DS1 transport provided by AT&T Illinois. There is no dispute that Cbeyond ordered and obtained DS1/DS1 EELs from AT&T Illinois. But Cbeyond no longer wants some of the DS1/DS1 EELs it ordered. Instead, Cbeyond wants (in some instances) a DS1/DS3 EEL, which is a DS1 loop combined with DS3 transport, through a DS1 to DS3 multiplexer.<sup>8</sup> And in other instances, Cbeyond just wants an unbundled DS1 loop that it can connect to transport provided by another carrier.

Having addressed what Cbeyond wants, the next question is: what products and services are available under the parties' ICA to effectuate what Cbeyond wants? The answer is clear. Under the ICA, there is only one way to effectuate what Cbeyond wants. First, the existing DS1/DS1 EEL combination must be disconnected. Second, the product that Cbeyond desires, instead of the DS1/DS1 EEL combination that it previously had, must be connected. That is exactly the process AT&T Illinois has followed. And there is no dispute between the parties that (1) disconnection of the existing DS1/DS1 EEL combination, and (2) connection of the new product Cbeyond wants – whether it be a DS1/DS3 EEL combination or a stand-alone unbundled DS1 loop – are both available under the parties' ICA at rates set forth in the ICA Pricing Schedule.

Cbeyond objects to the way that AT&T Illinois has effectuated the changes that Cbeyond sought, and argues that AT&T Illinois should have used a different process. But Cbeyond does

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<sup>8</sup> This type of multiplexer aggregates two or more DS1s and transmits them over a single DS3 facility. Attach. C (Schilling Aff.) ¶ 9.

not and cannot identify any provision in the ICA that provides for any process other than the one AT&T Illinois followed for changing from a DS1/DS1 EEL to a new arrangement: (a) disconnection of the existing DS1/DS1 EEL; and (b) connection of the new serving arrangement, either a DS1/DS3 EEL or an unbundled DS1 loop.

Cbeyond asserts that it only wants to order a “rearrangement” (Complaint ¶ 39) of its DS1/DS1 EELs or “to reassign cross-connections” (*id.* ¶ 26), and argues it should be charged no more than a “cross-connect” charge. The ICA, however, does not provide for a “rearrangement” from one EEL combination to another EEL combination (or to another UNE for that matter), as much as Cbeyond might wish otherwise. Neither in its complaint, nor through its discovery responses, has Cbeyond been able to point to any provision in the ICA that allows for such a rearrangement, or permits bypassing of the disconnection and connection process that AT&T Illinois followed.

Moreover, although Cbeyond alleges that AT&T Illinois should be required to “process change orders to reassign cross-connections” (Complaint ¶ 26), Cbeyond has in fact conceded that the ICA does not support its theory that it ought to pay just a cross-connection charge:

[N]o provision of the parties’ interconnection agreement contemplates mere cross connection re-assignments.

Cbeyond Response In Opposition to Motion to Dismiss (“Dismissal Response”) at 12. By Cbeyond’s own admission, then, the ICA does not require AT&T Illinois to provide the service or product Cbeyond demands (“rearrangement” or “reassignment”), because *no such product or service exists* under its ICA. A breach of contract “can only exist where a party fails to carry out a term, promise, or condition of a contract.” *Talbert v. Home Sav. of America, F.A.*, 265 Ill. App. 3d 376, 380 (1st Dist. 1994). This admission alone dooms Cbeyond’s case.

Similarly, Cbeyond knows that the only way to obtain what it wants is to try to amend its ICA with AT&T Illinois. Cbeyond at one point proposed to AT&T Illinois to “amend the parties’ Interconnection Agreement to create a non-recurring rate, equal to the ICC’s previously determined Total Element Long Run Incremental Cost (TELRIC) incurred by Illinois Bell to disconnect a cross-connect.” Complaint ¶ 57; *see also* Attach. B (Drennan Aff.) ¶ 13. There is an irreconcilable inconsistency between Cbeyond’s admission that the ICA needs to be amended to provide for the “rearrangement” service Cbeyond demands and any claim that the ICA has all along required AT&T Illinois to provide such “rearrangement” in the manner and at the price Cbeyond desires. By seeking an amendment, Cbeyond has again admitted that the existing ICA does not contain such a service, or corresponding rate, and on that basis Count IV of its Complaint fails.

Notwithstanding these admissions, Cbeyond has ticked off at least four ICA provisions throughout the course of this proceeding that it claims supports its case. None do.

First, Cbeyond asserted in its response to AT&T Illinois’ motion to dismiss<sup>9</sup> (for the first time) that AT&T Illinois has breached Section 9.1.3 of the parties’ ICA. There is no evidence that AT&T Illinois has done anything contrary to that contract provision – a provision that says absolutely nothing about the EEL “rearrangements” Cbeyond demands.

Section 9.1.3 of the ICA provides:

Certain specific terms and conditions that apply to the Unbundled Network Elements and the Combinations of Unbundled Network Elements SBC Illinois shall provide to CLEC are described herein and in the attached Schedules. Prices for UNES and combinations are set forth in the attached Pricing Schedule. SBC ILLINOIS shall price each UNE separately, and shall offer each Unbundled Network Element individually, and in Combinations as defined in this Article 9. In no event shall SBC

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<sup>9</sup> Motion to Dismiss Cbeyond’s Formal Complaint and Request for Declaratory Ruling (“Motion to Dismiss”).

Illinois require CLEC to purchase any Unbundled Network Element in conjunction with any other service or element.

Attach. E, § 9.1.3.

The facts do not support Cbeyond's claim that Section 9.1.3 has been breached. Section 9.1.3 simply addresses Cbeyond's right to purchase UNEs separately or in combination. It says nothing about *changes* from existing UNEs or UNE combinations to new UNEs or UNE combinations. There is no dispute here that Cbeyond purchased and AT&T Illinois provisioned UNE combinations, specifically DS1/DS1 EELs. *See, e.g.*, Complaint ¶¶ 20, 24. But now, Cbeyond no longer wants some of those DS1/DS1 EEL combinations; it instead wants a different UNE combination, a DS1/DS3 EEL, or a stand-alone DS1 loop. *Id.* ¶ 24. Cbeyond is free to cease obtaining one UNE combination and order a new UNE or UNE combination pursuant to the process set out in the ICA – the same process Cbeyond has been following for the past four years: (1) disconnection of the existing DS1/DS1 EEL combination; and (2) connection of a new DS1/DS3 EEL combination or stand-alone DS1 loop.<sup>10</sup>

Cbeyond has asserted that it should not now be required to follow the process set out in the ICA, because it only wants a “rearrangement of an EEL” or a “‘cross-connect’ of a loop to a different transport.” Dismissal Response at 6. According to Cbeyond, AT&T Illinois may not “tether a loop disconnect order” to Cbeyond's request for a “change to the transport UNE.” *Id.* at 5. But the plain language of Section 9.1.3 of the ICA does not support Cbeyond's theory. That section does not say that “rearrangement” is a service or product under the ICA or give Cbeyond a right to demand that AT&T Illinois “rearrange” one UNE combination to form another, different UNE combination. Nor does it say that Cbeyond is free to disconnect part of a

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<sup>10</sup> These charges are contained in Attachment A to the First Amendment to the parties' ICA, which sets forth the UNE rates established pursuant to this Commission's June 9, 2004 Order in Docket No. 02-0864. *See also* Attach. A (Christensen Aff.) ¶ 8.

UNE combination and use only that part to connect to a new form of transport.<sup>11</sup> Instead, Cbeyond claims it has a right to do something that Section 9.1.3 does not contemplate or address.

The second provision of the ICA which Cbeyond argues AT&T Illinois has breached is Section 9.1.1, which provides:

SBC ILLINOIS shall provide CLEC nondiscriminatory access to Unbundled Network Elements, upon request, at any technically feasible point on just, reasonable and nondiscriminatory rates, terms and conditions to enable CLEC to provision any telecommunications services within the LATA, . . . in accordance with the federal Telecommunications Act of 1996, applicable FCC orders, rules and regulations, and applicable state statutes, orders, rules and regulations. . . .

Attach. E, § 9.1.1.

Cbeyond's complaint did not explain how AT&T Illinois supposedly has violated Section 9.1.1. And indeed, it is difficult to understand how AT&T Illinois could have violated any applicable federal or state law, because it has charged Cbeyond the rates contained in the ICA – rates that this Commission approved. In response to AT&T Illinois' earlier motion to dismiss, Cbeyond alleged for the first time that AT&T Illinois has breached Section 9.1.1 because “it is a violation of the *TRO*<sup>12</sup> to compel Cbeyond to make a change to the UNE Loop when Cbeyond only requests a change to the transport UNE.” Dismissal Response at 5. Cbeyond claims that paragraph 575 of the *TRO* “mandate[s] that AT&T Illinois provision EELs as separate UNEs (a loop UNE and a transport UNE).” Dismissal Response at 2. Cbeyond concludes, therefore, that AT&T Illinois may not “require[] Cbeyond to pay for changes to EEL combinations as if the EEL is a single provisioned UNE.” *Id.*

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<sup>11</sup> As will be shown below in Section V, AT&T Illinois must make changes to both the loop and transport portions of the existing DS1/DS1 EEL to connect Cbeyond's newly requested DS1/DS3 EEL.

<sup>12</sup> *Triennial Review Order*, 18 FCC Rcd 16978 (rel. Aug. 21, 2003).

Cbeyond's reliance on the *TRO* is misplaced. The parties agreed in the TRO/TRRO Amendment to the terms and conditions necessary to "give contractual effect to the effective portions of the *TRO* . . . ." Attach. G (Third Amendment at 1, Sixth Whereas clause). The parties further agreed that, to the extent there was a conflict between the TRO/TRRO Amendment and the original ICA (which includes Section 9.1.1), the TRO/TRRO Amendment trumps the original ICA. *Id.* § 2. Thus, Section 9.1.1 cannot be read to impose any obligations on AT&T Illinois beyond those agreed to in the TRO/TRRO Amendment.<sup>13</sup>

Third, Cbeyond relies on Section 5.2 of the TRO/TRRO Amendment to support its claim of breach, asserting that this provision confirms Cbeyond's reading of the *TRO*. Dismissal Response at 6. Cbeyond is wrong. Cbeyond asserts that Section 5.2 requires AT&T Illinois to "connect an existing loop UNE provisioned to Cbeyond with alternative transport 'obtained at wholesale from SBC . . . or third parties.'" *Id.* (ellipsis by Cbeyond). While this is what Section 5.2 says, Cbeyond is *not* simply requesting that AT&T Illinois connect a UNE loop with transport. Cbeyond is asking for a "rearrangement" of an *existing* UNE combination to form a new, different UNE or UNE combination. In order to accomplish that result, Cbeyond must order the disconnection of one UNE combination and the installation of a different, new UNE or UNE combination.

Fourth, Cbeyond relies on Section 5.3 of the TRO/TRRO Amendment to support its breach of contract claim. Dismissal Response at 6. Cbeyond asserts that Section 5.3 requires AT&T Illinois to "connect loops [or an EEL] leased or owned by CLEC to a third-party's

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<sup>13</sup> Nor can Cbeyond look to the *TRO* operating on its own force. The parties' relationship is governed by their approved, binding ICA. The 1996 Act gives carriers the right to privately negotiate an ICA "without regard" to the duties set forth in Sections 251(b) and (c) of the 1996 Act (47 U.S.C. § 252(a)(1)), or the pricing standards set forth in Section 252(d) of the Act (*Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 492-93 (2002)), and thus the *TRO* and other FCC orders implementing Section 252. *See also* Section I *supra*. Even if the *TRO* provided for the rearrangement service Cbeyond claims it does, the fact that the TRO/TRRO Amendment does not do so forecloses Cbeyond's argument.

collocation arrangement . . . .” *Id.* (ellipsis by Cbeyond). But Section 5.3 does not say anything about how existing UNE combinations are to be treated. As AT&T Illinois has repeatedly explained, Cbeyond must disconnect the existing EEL and order a new serving arrangement using a DS1 loop. This is the process required by Section 9.3.3.4 of the ICA’s UNE, and the process Cbeyond has followed for the last four years. The ICA allows Cbeyond to order “new UNE combinations” via “appropriate service requests” pursuant to Section 9.3.3.4 of the UNE Appendix. Attach. E, § 9.3.3.4. Cbeyond can accomplish its desired “rearrangement” by (a) ordering disconnection of an existing DS1/DS1 EEL; and (b) ordering a new serving arrangement using a DS1 loop.

Cbeyond’s interpretation of Sections 5.2 and 5.3 of the TRO/TRRO Amendment also is undercut by another provision of the ICA – Section 9.3.3.1.1. That provision demonstrates that, where the parties intended for a “reconfiguration” of an existing UNE combination to be allowed without going through the two-step disconnection and new order process, the parties knew how to say so explicitly. Section 9.3.3.1.1 governs the “reconfiguration” of existing qualifying special access services to combinations of unbundled loop and transport. The ICA provides that such a reconfiguration “shall not be considered a new combination involving UNEs hereunder.” Attach. E, § 9.3.3.1.1. By contrast, nothing in the ICA provides for “reconfiguration” of EELs. Therefore, the standard process for disconnecting an existing UNE combination and ordering a new UNE or UNE combination applies.

In the end, the menu of products and service available under the parties’ ICA simply does not include the “EEL rearrangement service” that Cbeyond wants. Cbeyond has had multiple opportunities to try to obtain an ICA with AT&T that has the “rearrangement” service Cbeyond wishes it had. But Cbeyond has not availed itself of any of those opportunities. Instead, it chose

in 2004 to opt into an agreement that was negotiated by another carrier (Complaint ¶ 14; Attach. B (Drennan Aff.) ¶ 5), which surely did not have Cbeyond's particular business plan in mind. Then, rather than negotiate a new ICA when the 2004 ICA expired, Cbeyond chose to avail itself of its right to extend the term of that ICA for another three years, pursuant to the merger between AT&T Inc. and BellSouth Corp. See Attach. H (Fifth Amendment at 1); Attach. B (Drennan Aff.) ¶¶ 11-12. Even today, with its ICA expired since February of this year, Cbeyond has still not asked AT&T Illinois to commence negotiations for a new ICA (*id.* ¶ 14). During such negotiations Cbeyond could request the rearrangement service and related rates its current ICA does not have. And if it cannot negotiate such an agreement with AT&T Illinois, Cbeyond could seek arbitration before this Commission, and ask the Commission to include the rearrangement service and rates pursuant to federal law. See 47 U.S.C. § 252(b). Cbeyond's failure to pursue opportunities to obtain a "rearrangement" service does not validate its claims here.

### **III. Cbeyond Cannot Prevail On Counts I, II Or III And Therefore Judgment Should Be Entered In Favor Of AT&T Illinois.**

As with Count IV, Cbeyond cannot establish its entitlement to judgment on its other counts. As set forth in Section I above, state law is not relevant to the Commission's decision in this case, except to the extent that it provides the general principles of contract law used to interpret the ICA. To the extent that Cbeyond claims that state law imposes obligations on AT&T Illinois above and beyond, or even contrary to, what the parties agreed to in their ICA, the state law is preempted.

Putting that argument aside, no facts have been presented, in the parties' stipulation or otherwise, to sustain Counts I through III on the merits. Thus, AT&T Illinois is entitled to judgment in its favor on those counts as well.

In Count I of its Complaint (¶¶ 59-69), Cbeyond alleges that AT&T Illinois has violated subsections (1), (2), (6), (8), (10), (11), and (12) of Section 13-514 of the PUA. First, Cbeyond asserts (¶ 62) that AT&T Illinois violated subsection 13-514(1). That subsection provides a remedy where a carrier “refused or delayed interconnections or collocation” or “provided inferior connections” to a CLEC. There is no evidence that AT&T Illinois has refused to provide or delayed providing interconnection or collocation to Cbeyond. Nor could it: Cbeyond already has and is operating under a Commission-approved ICA with AT&T Illinois (Complaint ¶ 1), and can continue to obtain interconnection under that agreement. Cbeyond’s only dispute is over the rates it must pay pursuant to the ICA for UNEs and services associated with provisioning UNEs.

Second, Cbeyond alleges (¶ 63) that AT&T Illinois violated subsection 13-514(2), which provides a remedy where a carrier “unreasonably impaired the speed, quality or efficiency of services” it provides to the CLEC. Cbeyond has brought forth no facts that demonstrate that AT&T Illinois’ actions have impaired the speed, quality or efficiency of services AT&T Illinois provides under the ICA. Again, Cbeyond challenges only the rates that AT&T Illinois charges it for some of those services.

Third, Cbeyond claims (¶ 64) that AT&T Illinois violated subsection 13-514(6). Subsection (6) applies where a carrier acts in a manner that “has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers.” However, Cbeyond has not pled that AT&T Illinois has acted in a manner that affects Cbeyond’s ability to provide service to its customers. Instead, Cbeyond alleges that AT&T Illinois’ actions have had a substantial adverse effect on “the ability of other carriers to provide transport service to Cbeyond.” *Id.* That is not actionable under 13-514(6), at least not in a case brought by Cbeyond, as opposed to one brought by one of those “other carriers.”

Fourth, Cbeyond claims (§ 65) that AT&T Illinois violated subsection 13-514(8). Subsection (8) applies to situations where a carrier has “violat[ed] the terms of or unreasonably delay[ed] implementation of an interconnection agreement . . . in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to consumers.” AT&T Illinois acknowledges that Count IV alleges that it has violated certain provisions of the ICA. However, as detailed above in Section II, AT&T Illinois has not violated the provisions on which Cbeyond relies to support its claim of breach. Moreover, by its plain terms, subsection (8) requires not only that a carrier has violated the terms of or unreasonably delayed implementation of its ICA, but also that the carrier’s actions have an adverse impact *on consumers*. There is nothing in the record to support a claim that, if Cbeyond prevailed here, it would make its services available to consumers at lower prices or more quickly or more broadly. Absent such harm, a claim under Section 13-514(8) also must fail.

Fifth, Cbeyond asserts (§ 66) that AT&T Illinois violated subsection 13-514(10). Subsection (10) provides a remedy where a carrier has “fail[ed] to offer network elements.” Cbeyond admits that AT&T Illinois provides it with various types of High Capacity EELs, including DS1/DS1 and DS1/DS3 EELs, and disputes only the rates it must pay for services AT&T Illinois performs to provision those EELs. Cbeyond therefore cannot prove an entitlement to relief under Section 13-514(10).

Sixth, Cbeyond asserts (§ 68) that AT&T Illinois violated subsection 13-514(12). Subsection (12) provides a remedy where a carrier has violated “an order of the Commission regarding matters between telecommunications carriers.” In particular, Cbeyond alleges that AT&T Illinois has violated this section by “imposing nonrecurring charges that have not been authorized under the Commission’s Order in Docket No. 02-0864.” *Id.* This claim is absurd

because Cbeyond admits elsewhere in the Complaint that the charges it is disputing were determined by the Commission in Docket No. 02-0864. *Id.* ¶¶ 29-30. If AT&T Illinois is charging the rates established pursuant to the *02-0864 Order*, it cannot also be violating that order.

In Count II of its Complaint (¶¶ 70-75), Cbeyond asserts that AT&T Illinois violated a subsection of Section 13-801 of the PUA. The portion of Section 13-801 upon which Cbeyond bases its claim is 13-801(b)(1)(C) (*see id.* ¶ 71), which provides:

(1) An incumbent local exchange carrier shall provide for the facilities and equipment of any requesting telecommunications carrier's interconnection with incumbent local exchange carrier's network on just, reasonable, and nondiscriminatory rates, terms and conditions: . . .

(C) that is *at least equal in quality and functionality to that provided by the incumbent local exchange carrier to . . . any other party to which the incumbent local exchange carrier provides interconnection.*

(Ellipsis in Cbeyond Complaint; emphasis added.)

By its plain terms, this provision prohibits an incumbent carrier from discriminating against one CLEC in favor of another party. Yet Cbeyond has not come forth with any facts to support its assertion that AT&T Illinois provided to another carrier facilities and equipment of better quality or functionality than what AT&T Illinois provided Cbeyond. Instead, Cbeyond simply alleges that AT&T Illinois should offer Cbeyond different rates than it currently does for “rearranging” Cbeyond’s high-capacity EELs. AT&T Illinois is therefore entitled to judgment on Count II.<sup>14</sup>

Finally, in its Count III (¶¶ 76-79), Cbeyond asks this Commission to investigate and to declare unjust and unreasonable the non-recurring charges that AT&T Illinois has been charging

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<sup>14</sup> As part of its Count I, Cbeyond also claims (¶ 67) that AT&T Illinois violated subsection 13-514(11). Under subsection 13-514(11), a violation of Section 13-801 is a prohibited action. Since Cbeyond cannot sustain a claim for violation of Section 13-801, it also has no claim for violation of subsection 13-514(11).

Cbeyond for disconnecting DS1/DS1 EELs and establishing new serving arrangements using DS1 loops. Cbeyond asserts (§ 77) that Section 9-250 of the PUA allows the Commission to investigate AT&T Illinois' rates and "establish new rates . . . in lieu thereof." But the Commission has no authority to do what Cbeyond requests. As explained above (*see supra* Section II), this Commission *does* have authority under Section 252 of the 1996 Act to arbitrate and approve an ICA in the first instance. But "[o]nce the terms [of the ICA] are set, either by agreement or arbitration, and [this Commission] approves the agreement, it becomes a binding contract." *Pac West Telecomm*, 325 F.3d at 1120. After that point, "[t]his Commission *cannot* take action" that will "effectively change[] the terms of applicable interconnection agreements," because that would "contravene[] the Act's mandate that interconnection agreements have the binding force of law." *Id.* at 1127 (emphasis added).

Simply put, this Commission does not have authority to modify AT&T Illinois' and Cbeyond's approved, binding ICA to allow Cbeyond to pay different rates than those set forth in the contract. If this Commission finds that AT&T Illinois has *breached* its ICA (which AT&T Illinois has not), then it may order AT&T Illinois to comply with the contract. But it may not order Cbeyond to pay, or AT&T Illinois to accept, rates that are different than the ones in the ICA.<sup>15</sup> AT&T Illinois also is entitled to judgment on Count III.

#### **IV. Cbeyond's Complaint Is An Impermissible Collateral Attack On This Commission's Prior Orders.**

Cbeyond admits that the rates AT&T Illinois is charging for the services it performs to fulfill Cbeyond's "rearrangement" orders are the rates this Commission established in its 02-

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<sup>15</sup> As discussed in AT&T Illinois' Motion to Dismiss, the Commission has authority *under federal law* to entertain petitions and conduct generic, industry-wide proceedings to update UNE/interconnection/collocation rates to ensure compliance with TELRIC. Motion to Dismiss at 14, n.7. But the Commission cannot, acting exclusively pursuant to *state law*, declare rates in a single interconnection agreement "unjust and unreasonable" and fashion new rates that are "just and reasonable" that would become immediately effective, without regard either to the rules and standards governing TELRIC or to the terms and express requirements of the ICA at issue. *Id.*

0864 Order. See Complaint ¶¶ 30, 32, 34. Cbeyond seems to assert, however, that those rates are too high for the work that AT&T Illinois actually performs when it transforms Cbeyond's DS1/DS1 EELs into either DS1/DS3 EELs or stand-alone DS1 loops connected to third-party transport. Such an argument is an impermissible collateral attack on the rates established in the 02-0864 Order and the Commission's Order in Docket No. 05-0147 incorporating those rates into the AT&T Illinois/Cbeyond ICA.

It is well-established that, like a court judgment, a Commission decision is not open to collateral attack "except for fraud in its procurement, and even if the judgment is so illegal or defective that it would be set aside or annulled on a proper direct application, it is not subject to collateral impeachment so long as it stands unreversed and in force." *Illini Coach Co. v. ICC*, 408 Ill. 104, 110 (1951); see also *City of Galesburg v. ICC*, 47 Ill. App. 3d 499, 508 (3d Dist. 1977) (rejecting, as improper collateral attack, city's attempt to challenge determinations made by ICC in earlier gas rate-making case).

Cbeyond may not attack the rates established in Docket 02-0864 through the current docket. Such a move is particularly improper because, in seeking Commission approval for the amendment incorporating the 02-0864 rates into the AT&T Illinois/Cbeyond ICA, Cbeyond represented that it had voluntarily agreed to the amendment and that the amendment would be "consistent with the public interest, convenience and necessity." Joint Petition for Approval of 1<sup>st</sup> Amendment to the Interconnection Agreement, ICC Dkt. No. 05-0147, at 1 (Mar. 2, 2005).<sup>16</sup> Indeed, Cbeyond's current attack on the 02-0864 rates is based on the opposite premise: that the rates are inconsistent with the public interest.

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<sup>16</sup> AT&T Illinois asks the Commission to take administrative notice of the Joint Petition pursuant to 83 Ill. Admin. Code § 200.640(a)(2).

Cbeyond also cherry-picks certain activities forming the basis for the EEL nonrecurring charges established in Docket No. 02-0864 and asserts that, because such activities allegedly do not occur with a “rearrangement,” AT&T Illinois’ use of the 02-0864 rates is unjustified for the work it actually performs. *See, e.g.,* Complaint ¶¶ 32-33 (outside plant work), 34-35 (clear channel capability). But the 02-0864 rates include, for each task or activity, an associated occurrence probability that “measures how frequently the task or activity is expected to occur.” *02-0864 Order* at 163; *see also id.* at 193-94. Accordingly, the 02-0864 rates already assume that AT&T Illinois will need to perform outside plant work to process orders for DS1/DS1 EELs, DS1/DS3 EELs and stand-alone DS1 loops only a limited percentage of the time. This argument too is an improper collateral attack on the rates established in the *02-0864 Order* and incorporated into the parties’ ICA in Docket No. 05-0147.

**V. Even If Cbeyond Were Allowed To Challenge AT&T Illinois’ Binding Rates, The Record Shows That The Rates Are Justified Because AT&T Illinois Must Perform A Substantial Amount Of Work To Implement Cbeyond’s Service Requests.**

Finally, Cbeyond maintains that AT&T Illinois’ non-recurring rates for disconnecting existing DS1/DS1 EEL combinations and establishing new DS1/DS3 EEL combinations or new stand-alone unbundled loops do not reflect the actual cost of performing those services. *See* Complaint ¶ 58. Specifically, Cbeyond challenges the non-recurring charges associated with work performed on the loop portion of the EEL combinations. *See* Jt. Stip. ¶ 10(a), (b). In essence, Cbeyond contends that AT&T Illinois performs little or no work on the loop portion of the EELs when it fulfills Cbeyond’s “rearrangement” orders. As AT&T Illinois explained in the previous section, the rates about which Cbeyond complains were calculated using the pricing parameters established by this Commission in Docket No. 02-0864. Therefore, Cbeyond cannot collaterally attack AT&T Illinois’ binding rates in this proceeding.

Even if Cbeyond had a right to challenge AT&T Illinois' charges, the record demonstrates that the charges are entirely appropriate. AT&T Illinois must perform a substantial amount of work to fulfill Cbeyond's Local Service Requests ("LSRs") – not just on the transport portion of the EELs, but also on the loop portion.

In their Joint Stipulation, the parties identified two different scenarios in which AT&T Illinois must perform work on Cbeyond's existing DS1 EELs. *See* Jt. Stip. ¶ 10. In the first scenario, Cbeyond submits a service order seeking to disconnect the unbundled dedicated transport ("UDT") portion of an existing DS1/DS1 EEL and replace it with new UDT, creating a new DS1/DS3 EEL. Jt. Stip. ¶ 10(a); Attach. C (Schilling Aff.) ¶ 5. In the second scenario, Cbeyond submits a service order seeking to remove the UDT portion of an existing DS1/DS1 EEL. Jt. Stip. ¶ 10(b); Attach. C (Schilling Aff.) ¶ 15. In this second scenario, Cbeyond no longer wants an EEL of any type; instead it wants an unbundled DS1 loop. Jt. Stip. ¶ 10(b); Attach. C (Schilling Aff.) ¶ 15. Regardless of which scenario is involved, AT&T Illinois performs a variety of tasks to complete Cbeyond's orders.

First, AT&T Illinois must process Cbeyond's LSRs. As Mr. Christensen explained, the LSRs submitted by Cbeyond for the orders at issue here typically require manual intervention by the Local Service Center ("LSC"). Attach. A (Christensen Aff.) ¶ 11. The LSC service representative must make sure that Cbeyond submitted a complete and accurate LSR, and then enter data into fields in the Local Access Service Request System ("LASR"). *Id.* The service representative must also create a Service Order ("SO") based on the LSR and ensure its accuracy before sending it on to AT&T Illinois' Network organization for the next stage of the process, design. *Id.* ¶¶ 7, 11.

Second, a circuit engineer designs the new circuit based on the SO. Attach. C (Schilling Aff.) ¶¶ 8, 16. As Mr. Schilling explains in his affidavit, the circuit designer must identify the specific facilities and equipment to be disconnected and connected by AT&T Illinois' technician. *Id.* ¶ 8. The design also must be inventoried on AT&T Illinois' Trunks Integrated Records Keeping System ("TIRKS"), so the new arrangement can be identified among the hundreds or thousands of loops between a Main Distributing Frame ("MDF") and different DSX-1 panels. *Id.* Even though the SOs at issue here require AT&T Illinois to change an existing EEL combination into a new EEL combination or stand-alone DS1 loop with third-party transport, AT&T Illinois still must perform the same types of circuit design activities as it did when Cbeyond originally ordered the DS1/DS1 EEL combination. Attach. A (Christensen Aff.) ¶ 12.

This is a consequence of the DS1 circuit architecture. As Mr. Schilling explained, a DS1 loop extends from the Network Interface Device ("NID") at the premises of the CLEC's end-user customer ("End User"), to the MDF or its equivalent in the AT&T Illinois serving wire center. Attach. C (Schilling Aff.) ¶ 6. When establishing DS1 loops, the equivalent of the MDF in AT&T Illinois' wire centers is the DSX-1 jack panel. *Id.* See also Jt. Stip. ¶ 10(a) & (b) (depicting DS1 loop as extending from Network Interface Device to DSX-1 jack panel in serving wire center). DSX-1 jack panels are stationary, meaning that they are hardwired in place and cannot be moved. Attach. C (Schilling Aff.) ¶ 6.

The facility that connects the portion of the loop running from the MDF to the DSX-1 jack panel is called a "jumper cable." *Id.* ¶ 7. The MDF, like the individual DSX-1 jack panels, is stationary. Therefore, it is the jumper cable portion of the loop that must be physically disconnected and connected to transform an existing EEL combination into a new EEL combination or a stand-alone unbundled loop connected to third-party transport. *Id.*

Third, after the design work is complete, the next step is to physically alter the required network elements inside and outside the Central Office. The AT&T Illinois technician in the serving wire center reviews the circuit information stored in TIRKS, and disconnects the existing DS1 EEL by physically removing the jumper cable running between the MDF and the DSX-1 jack panel used by the original circuit. *Id.* ¶ 8. The necessary network alterations differ, based on which of the two scenarios is involved with Cbeyond's order.

As explained above, in Scenario 1, Cbeyond wants to change the unbundled dedicated transport ("UDT") portion of the EEL. *See id.* ¶ 5. Such an order requires the AT&T technician to disconnect the existing jumper cable from the MDF and, following the design specifications, install one end of a new jumper cable at the same location on the MDF. *Id.* ¶ 9. The technician then runs the new jumper cable from the MDF to its termination point at the appropriate DSX-1 jack panel, which is in a different location than the DSX-1 jack panel at which the original DS1 loop terminated. *Id.* The new DSX-1 jack panel is pre-wired to a 1-by-3 multiplexer. *Id.* The technician also plugs in a Hekimian Digital Test Access Unit ("DTAU") at the new DSX-1 jack panel. *Id.* To complete the transport portion of the order, an AT&T technician disconnects and connects certain facilities at the end office where Cbeyond (or a third party carrier) has its collocation cage. *Id.* ¶ 11.

In Scenario 2, Cbeyond submits an LSR asking AT&T Illinois to *remove* the UDT portion of an existing DS1/DS1 EEL and create a stand-alone DS1 loop. *Id.* ¶ 15; Jt. Stip. ¶ 10(b). Such an order requires the AT&T technician to disconnect the existing EEL combination by physically removing the jumper cable running between the MDF and the existing DSX-1 jack panel in the End User's serving wire center. Attach. C (Schilling Aff.) ¶ 16. This disconnects the loop from the AT&T Illinois-provided transport. *Id.*

Next, the technician installs one end of a new jumper cable at the same location on the MDF and terminate the other end of the jumper cable at a DSX-1 jack panel located in a different place than the jack panel that served the now-disconnected DS1 EEL combination. *Id.* ¶ 17. The technician then plugs in a DTAU at the new DSX-1 jack panel. *Id.* To complete the transport portion of the order, an AT&T Illinois technician in the end office where Cbeyond (or the third-party carrier) has its collocation cage disconnects the cross-connect on the existing DS1 transport facility. *Id.* ¶ 18.

In both scenarios, the fourth and final step in provisioning Cbeyond's LSRs is to test the overall connectivity of the service end to end with a tool called a "T-Berd." In Scenario 1, the AT&T Illinois technician tests the entire circuit, including both the loop and the transport portions of the circuit, to ensure accurate transmission quality. *Id.* ¶ 12. In Scenario 2, the AT&T technician tests the entire circuit – from the End User's NID to the demarcation point of the collocation facility – to ensure accurate transmission quality. *Id.* at ¶ 19. Under either scenario, after the technician completes test acceptance, a call is placed to a Cbeyond representative, and the circuit is turned over to Cbeyond or its third-party carrier. *Id.* ¶¶ 12, 19.

The parties' ICA – specifically, the Pricing Schedule in the ICA's First Amendment – sets forth AT&T Illinois' rates for performing the tasks described above. Each of AT&T Illinois' rate elements captures specific work activities that AT&T Illinois must perform in order to provide Cbeyond with its requested services. Attach. A (Christensen Aff.) ¶ 10. These rate elements are denoted on Cbeyond's bills with various Universal Service Ordering Codes ("USOCs"). *Id.* ¶ 8. The ICA's Pricing Schedule divides the relevant rate elements into two work activity categories, "Loop Non-Recurring Charges" and "Provisioning Non-Recurring Charges."

The Loop Non-Recurring Charges, with corresponding USOCs,<sup>17</sup> that Cbeyond disputes are:

- Initial Loop - Service Provisioning (“1CRG1”)
- Additional Loop - Service Provisioning (“1CRG2”)
- Initial DS1 Loop Design and Central Office Disconnection (“NKCG1”)
- Design CO Connect Charge – DS1 Loop (“NR9OU”).<sup>18</sup>

These charges are appropriate because they cover the work activities described above that are associated with the processing of Cbeyond’s LSR and the issuance of the SO by the LSC. As explained above, the LSRs submitted by Cbeyond that form the basis of its complaint typically require manual intervention by the LSC. Attach. A (Christensen Aff.) ¶ 11.

The loop-related Provisioning Non-Recurring Charges, with corresponding USOCs,<sup>19</sup> that Cbeyond disputes are:

- Initial 4-Wire Digital Loop Connection (“NKCBL”)
- Initial 4-Wire Digital Loop Disconnection (“NKCBM”)
- Additional 4-Wire Digital Loop Connection (“NKCBN”)
- Additional 4-Wire Digital Loop Disconnection (“NKCBO”)
- Initial Clear Channel Capability Connection (“NKCC6”)<sup>20</sup>

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<sup>17</sup> See Exhibit A to Complaint, p. 129 (listing USOCs and rate elements); Attach. A (Christensen Aff.) ¶¶ 8, 10 & n.5.

<sup>18</sup> AT&T Illinois discontinued use of USOC NR9OU for this rate element in March 2006 as part of its implementation of the *02-0864 Order*. Attach. A (Christensen Aff.) ¶ 8 n.5.

<sup>19</sup> See Exhibit A to Complaint, p. 129 (listing USOCs and rate elements); Attach. A (Christensen Aff.) ¶¶ 8, 10 & n.6.

<sup>20</sup> Clear channel capability formats the DS1 Loop to transmit a clear channel bit stream and allows use of the full bandwidth available on the circuit. When it submits an LSR, a CLEC explicitly orders such capability via the Network Channel code it chooses. Attach. A (Christensen Aff.) ¶ 8 n.4.

- Additional Clear Channel Capability Connection (“NKCC7”)
- Carrier Connect Charge – DS1 Loop (“NR9OW”).<sup>21</sup>

These charges are appropriate because they cover the work activities described above that AT&T Illinois engineers and technicians must perform to (a) design the service, (b) physically connect the required network elements both inside and outside of the Central Office, and (c) test the overall connectivity of the service. Attach. A (Christensen Aff.) ¶ 12. The design activities are the same ones that must be performed when a CLEC orders a new EEL combination. *Id.* The provisioning and connectivity testing activities must be done by AT&T Illinois technicians employed by AT&T Illinois’ HiCap Provisioning Center, the Local Operations Center and the Special Services Center. *Id.* Thus, each of AT&T Illinois’ charges is related to work AT&T Illinois must perform to implement Cbeyond’s orders, and each of those charges is authorized by the ICA.

In summary, it is clear that AT&T Illinois must perform a variety of tasks on the loop portion of the EEL combination to fulfill Cbeyond’s service orders. Accordingly, AT&T Illinois’ billing of the rates established pursuant to the *02-0864 Order* is appropriate.

### CONCLUSION

As demonstrated above, AT&T Illinois’ charges for changing Cbeyond’s DS1/DS1 EELs to DS1/DS3 EELs or to stand-alone unbundled DS1 loops are authorized by the parties’ ICA. That is the beginning and end of this Commission’s inquiry. The ICA is a binding agreement that must be enforced as written. Given that AT&T Illinois has complied with the requirements of its ICA, it cannot be found to have violated any of the provisions of state law relied upon by Cbeyond. Those provisions, to the extent they create obligations for AT&T Illinois above and

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<sup>21</sup> AT&T Illinois discontinued use of USOC NR9OW for this rate element in March 2006 as part of its implementation of the *02-0864 Order*. Attach. A (Christensen Aff.) ¶ 8 n.6.

beyond or in conflict with the ICA, are preempted by the 1996 Act. Moreover, even if state law were applicable, each of Cbeyond's claims that AT&T Illinois violated the PUA would fail on the merits, as well.

Given the binding nature of the ICA, the Commission may not, as Cbeyond suggests, amend the ICA or establish new TELRIC rates in this proceeding. Cbeyond has had numerous opportunities to negotiate for the inclusion of an EEL "rearrangement" service in its ICA with AT&T Illinois, yet has failed to do so. Cbeyond is therefore bound to follow the only process set forth in the ICA that effectuates a change from a DS1/DS1 EEL to a DS1/DS3 EEL or stand-alone loop – and to pay the Commission-approved rates set forth in the ICA for AT&T Illinois' services. Those rates cover the substantial work that AT&T Illinois must perform to process Cbeyond's service requests. AT&T Illinois therefore requests that the Commission enter judgment in its favor on each count of Cbeyond's complaint and direct Cbeyond to pay all disputed charges within 30 days of the Commission's order.

Dated: August 13, 2010

Respectfully Submitted,

AT&T Illinois

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**CERTIFICATE OF SERVICE**

I, Michael T. Sullivan, an attorney, certify that a copy of the foregoing AT&T ILLINOIS' OPENING BRIEF was served on the following Service List via U.S. Mail and/or electronic transmission on August 13, 2010.

/s/ Michael T. Sullivan  
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