BEFORE THE
ILLINOIS COMMERCE COMMISSION

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

REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

PUBLIC

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Table of Contents

I. Procedural History 3

II. Staff Summary Of Facts 4

III. Summary of Staff's Position 7

IV. Response to AT&T Illinois 8

A. Legal Issues 8

B. General Response to AT&T 10

V. Response to Cbeyond 40

VI. Conclusion 67

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Staff of the Illinois Commerce Commission ("Staff"), by and through its undersigned counsel, pursuant to Section 200.800 of the Illinois Commerce Commission's ("Commission" or "ICC") Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief in the instant proceeding.

I. Procedural History

On March 9, 2010, Cbeyond Communications, LLC filed a Formal Complaint and Request for a Declaratory Ruling pursuant to Sections 13-515 and 10-108 of the Illinois Public Utilities Act, claiming the Illinois Bell Telephone Company d/b/a AT&T Illinois violated Sections 9-250, 13-514 and 13-801 of the PUA and breached the parties' interconnection agreement ("ICA") entered pursuant to Sections 251 and 252 of the federal Communications Act, 47 U.S.C. §251, 252.

On April 5, 2010, AT&T Illinois filed an Answer and a Motion to Dismiss. At a status hearing in front of an Administrative Law Judge ("ALJ"), the parties agreed to discuss the issues privately to work towards a potential settlement. (Tr., May 21, 2010 at 32.) At a

status hearing on June 3, 2010, pursuant to the parties' agreement, the ALJ set a schedule for the submission of stipulated facts, diagrams, and other agreed-upon items, a technical conference with subject matter experts, a mediation session between Cbeyond and AT&T, and a briefing schedule. (ALJ Order, June 10, 2010.) The mediation did not resolve the issues between the parties, and on August 13, 2010, AT&T filed its Opening Brief. On August 16, 2010, Cbeyond filed its Opening Brief. This Reply from Staff follows.

II. Staff Summary Of Facts

On March 9, 2010, Cbeyond Communications, LLC ("Cbeyond") filed with the Commission its Formal Complaint and Petition for Declaratory Ruling ("Formal Complaint"), in which it alleges that Illinois Bell Telephone Company d/b/a AT&T Illinois ("AT&T") violated Sections 9-250, 13-514, and 13-801 of the Illinois Public Utilities Act ("IPUA") and breached the Interconnection Agreement ("ICA") entered into by Cbeyond and AT&T Illinois pursuant to Section 252 of the Federal Telecommunications Act of 1996.[1] Specifically, it alleges that AT&T Illinois billed Cbeyond charges that are not authorized under the parties' ICA for the rearrangement of existing Enhanced Extended Loops ("EELs").

An EEL is a combination of unbundled network elements ("UNEs") consisting of UNE loop or UNE loops ("loop") and UNE dedicated transport ("UDT"), combined using the appropriate cross-connects, and where needed, multiplexing. The central issue in Cbeyond's

[1] Pursuant to the Fifth Amendment (ICC Docket No. 07-0353), the parties' ICA expired on February 4, 2010. Currently, no new agreement or amendment has been entered by the parties or approved by the Commission. Presumably the parties are continuing to operate under the expired ICA.

Formal Complaints is what non-recurring charges should apply under the ICA in the following two rearrangement scenarios:[2]

(i) Changing DS1 loop/DS1 UDT combinations ("DS1/DS1 EEL") to a DS1 loops/DS3 UDT combination ("DS1/DS3 EEL"). (Scenario 1)

(ii) Changing a DS1/DS1 EEL to a standalone DS1 loop. (Scenario 2)

Regarding the non-recurring charges, Cbeyond and AT&T jointly stipulated the following:

> In Scenario 1, AT&T bills Cbeyond the non-recurring (service ordering, disconnection and installation) charges for both parts of the EEL combination: the UDT (which Cbeyond does not dispute) and the Loop (which Cbeyond disputes). (Emphasis added)[3]
>
> In Scenario 2, AT&T bills Cbeyond the non-recurring charges for both parts of the EEL: the service ordering and disconnection charges for the UDT portion (which Cbeyond does not dispute) and the service ordering, disconnection and installation charges for the loop portion (which Cbeyond disputes). (Emphasis added)[4]

For both of the rearrangement scenarios,

> AT&T takes the position that, under the ICA, Cbeyond must pay the charges associated with disconnecting the existing EEL combination and connecting a new EEL combination or other UNE.[5]
>
> Cbeyond disputes AT&T Illinois' requirement that Cbeyond order the disconnection of the loop and the re-installation of the loop to change or remove the transport portion of the combination. Cbeyond contends that when the UDT portion of an EEL is changed, no loop service ordering, disconnection and installation charges contained in the ICA Pricing Schedule are appropriate and applicable. (Emphasis added)[6]

The scope of the disputes with respect to non-recurring charges for the two rearrangement scenarios appears to Staff, however, to be narrower than stated in the Joint

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[2] Joint Stipulation, Cbeyond Communications vs- Illinois Bell Telephone Company d/b/a AT&T Illinois: Formal Complaint and Request for Declaratory Ruling Pursuant to Section 13-515 and 10-108 of the Illinois Public Utilities Act, ICC Docket No. 10-0188 (June 30, 2010) ("Joint Stipulation"), ¶10.

[3] Joint Stipulation at ¶10(a).

[4] Joint Stipulation at ¶10(b).

[5] Joint Stipulation at ¶10(d)

[6] Joint Stipulation at ¶10(c).

Stipulation. First, unlike other loop/transport combinations, there are no loop or transport nonrecurring rates for DS1/DS1 EELs under the ICA. The service ordering and provisioning charges associated with a DS1/DS1 EEL apply to the DS1/DS1 EEL as a whole, not individually to the loop or transport of the DS1/DS1 EEL. In particular, the service ordering and provisioning disconnection charges associated with the disconnection of a DS1/DS1 EEL apply to the DS1/DS1 EEL as a whole. Thus, the disputes with respect to loop service ordering and provisioning disconnection charges associated with the disconnection of DS1/DS1 EELs as stated in the Joint Stipulation are essentially disputes regarding charges that are not to be found in the ICA and thus should be removed from the list of disputed rates.

Second, Cbeyond submits in Exhibit A (to Formal Complaint) 4,630 disputed billing records, which it claims to be the loop nonrecurring charges associated with EEL rearrangements. None of the 4,630 billing records, however, is service ordering or loop service ordering charge. Also Cbeyond provided, in response to a Staff Data Request, the list of nonrecurring rates that AT&T billed and Cbeyond disputes.[7] The list does not include any service ordering or loop service ordering rates either. In particular, it does not include any loop service ordering rates associated with the connection or disconnection of DS1 loops. This seems to suggest that AT&T did not bill Cbeyond any loop service ordering charges for EEL rearrangements. Therefore, the disputes with respect to loop service ordering charges as stated in the Joint Stipulation are essentially disputes regarding charges that AT&T did not even bill Cbeyond and thus should be removed from the list of disputed charges.

With the non-existent rates (i.e., DS1 loop service ordering and provisioning disconnection charges associated with the disconnection DS1/DS1 EELs) and "not billed"

[7] Cbeyond's Responses to Staff Data Request QL-2.04(A)(1) and (A)(2).

rates (i.e., loop service ordering connection charges) removed from the universe of items in dispute, the set of disputed rates in the Joint Stipulation is reduced to: DS1 loop provisioning connection charges, the rate element in **bold** in Table 1.

Table 1: Nonrecurring Charges Associated with EEL Rearrangements*

	Existing Serving Arrangement (DS1/DS1 EELs)	**New Serving Arrangement 1 (DS1/DS3 EELs)**	**New Serving Arrangement 2 (Standalone DS1 Loops)**
Transport	• Service Ordering Disconnection • Provisioning Disconnection	• Service Ordering Connection • Provisioning Connection	
Loop		• Service Ordering Connection • **Provisioning Connection**	• Service Ordering Connection • **Provisioning Connection**

* These are the rate elements corresponding to AT&T's two-step process for EEL rearrangements.

III. Summary of Staff's Position

Consistent with the arguments set forth below, it is the Staff's opinion that the (expired) ICA between AT&T Illinois and Cbeyond does not provide for EEL rearrangements, and in particular, it does not contain explicit rates, terms and conditions governing EEL rearrangements. The Staff therefore recommends that Cbeyond's complaint be denied to the extent that it seeks reimbursements of loop nonrecurring charges that AT&T billed it for EEL rearrangements performed using the two-step process.

It is also Staff's opinion that AT&T has not always billed Cbeyond in a manner consistent with the ICA for EEL rearrangements performed using the two-step process. As such, Staff recommends that AT&T be required to reimburse or credit Cbeyond charges that were not billed in accordance with the ICA for EEL rearrangements performed using the two-step method.

It is Staff's position that Cbeyond has not demonstrated that all billing records in Exhibit A to Formal Complaint are loop nonrecurring charges that AT&T billed it for EEL rearrangements and thus within the scope of its Formal Complaint. If the Commission is to agree with Cbeyond and construe that the (expired) ICA provides for EEL rearrangements (which it should not), it is Staff's recommendation that the Commission limits its granting of Cbeyond's request for reimbursement to billing records that Cbeyond has demonstrated to be loop nonrecurring charges that AT&T billed it for EEL rearrangements performed using the two-step process. Put differently, the Commission should, under no circumstances, grant Cbeyond's request for reimbursement for billing records that Cbeyond has not demonstrated to be loop nonrecurring charges billed by AT&T for EEL rearrangements performed using the two-step process.

IV. Response to AT&T Illinois

A. Legal Issues

AT&T makes its traditional argument that state laws that remain on the books should somehow be ignored by the Commission because it should be preempted. In this vein, AT&T argues:

> 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.[8]

However, as the Commission has concluded on numerous occasions, AT&T's argument reaches too far. *See for example Order on Remand (Phase I)*, Filing to Implement

[8] AT&T Opening Brief, at 8.

Tariff provisions of Section 13-801 of the Public Utilities Act, ICC Docket 01-0614 (April 20, 2005), at 61-62. AT&T argues that the Illinois General Assembly (the "GA") has promulgated laws that inappropriately intrude upon the federal scheme under the Telecommunications Act of 1996 ("TA 96") and thus are preempted.

Moreover, as a creature of statute, the Commission has no general powers except those expressly conferred by the legislature. *Business and Professional People for the Public Interest v. Ill. Commerce Comm'n*, 136 Ill. 2d 192, 244, 555 N.E.2d 693, 716-17 (Ill. 1990). The Illinois Supreme Court has long held that an administrative agency can neither limit nor extend the scope of its enabling legislation. *Carpetland U.S.A. v. Ill. Dept. Employment Security*, 201 Ill. 2d 351, 397, 776 N.E.2d 166, 192 (Ill. 2002) ("An administrative agency lacks the authority to invalidate a statute on constitutional grounds or to question its validity."). In short, "an administrative agency lacks the authority to invalidate a statute on constitutional grounds or to question its validity." *Carpetland USA v. Ill Dept Employment Security*, 201 Ill. 2d 351, 397 (Ill. 2002). Further, AT&T has a remedy readily available to it. Section 253(d) of TA 96 allows a party to petition the FCC to preempt sections of state law that it believes are preempted by federal law. 47 USC §253(d). AT&T can petition the FCC or file at a federal court to have provisions of the PUA. AT&T, however, cannot hope to successfully raise a preemption issue here, in this proceeding.

Moreover, the federal courts have addressed the issue of when tariff provisions inappropriately intrude upon the Federal Act's interconnection agreement procedures. *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003) ("Bie"). *Bie* is arguably the leading case in this line of federal court decisions. As explained below, *Bie* does not stand for the proposition that all tariff provisions addressing interconnection, UNEs and resale are

prohibited by the 1996 Act. Rather, *Bie* holds that tariff provisions that are inconsistent with the 1996 Act to the extent that they *require* an ILEC to offer an alternative means of obtaining interconnection rights *without* an interconnection agreement and essentially create a "parallel proceeding" that bypasses the federal scheme. *Bie* at 444-45. Thus, contrary to AT&T's arguments (AT&T Opening Brief, at 3-8), the Commission is not precluded from finding that state law may impose additional obligations *if* the parties' ICA does not address such circumstances. With these general legal principles in mind, Staff now turns to the facts as AT&T alleges them.

B. General Response to AT&T

Issue No. 1: Does the ICA provide for EEL rearrangements? Or, is the two-step process the only method under the ICA to accomplish EEL rearrangements?

AT&T admits that it billed disconnection and connection nonrecurring charges when Cbeyond requested EEL rearrangements. It explains that the only way to change DS1/DS1 EELs to DS1/DS3 EELs or to standalone DS1 loops under the ICA is to use a two-step process: (i) disconnecting the DS1/DS1 EELs; and (ii) connecting the new serving arrangement (i.e., a DS1/DS3 EEL or standalone DS1 loops). AT&T maintains that it has followed exactly this two-step process. Thus, it argues, it did not violate the ICA by billing Cbeyond disconnection and connection nonrecurring charges for these EEL rearrangements.[9]

Staff agrees with AT&T that the ICA does not provide for the rearrangements of existing EELs.[10] The ICA contains no explicit rates, terms and conditions governing EEL

[9] AT&T Opening Brief, pp.9-17.

[10] The billing charges disputed in this proceeding occurred prior to February 4, 2010 when the parties' ICA expired. Staff's focus herein is on the rates, terms and conditions of the expired ICA – i.e., whether the (expired) ICA contains explicit rates, terms and conditions governing EEL rearrangements.

rearrangements. In particular, Article 9 of the ICA, "Access to Unbundled Network Elements", contains no specific terms and conditions for EEL rearrangements. Similarly, the Pricing Schedule of the parties' ICA contains no rates applicable to EEL rearrangements, a fact that Cbeyond did not contradict or refute in its response to Staff Data Request QL-2.01(A)(2).[11]

The ICA, however, does provide for disconnection of DS1/DS1 EELs, connection of DS1/DS3 EELs and connection of standalone DS1 loops, respectively. So, while the ICA does not provide for them, EEL rearrangements as requested by Cbeyond can be accomplished using the two-step process: (i) disconnection of DS1/DS1 EELs and (ii) connection of DS1/DS3 EELs or standalone DS1 loops. Evidently, this two-step process is not established, and thus not best suited, for EEL rearrangements; nonetheless, it appears to be the only method for EEL rearrangements under the explicit rates, terms, and conditions of the ICA. Thus, AT&T would not be in violation of the ICA if it billed Cbeyond for EEL rearrangements in accordance with this two-step process.

It may be true that this two-step process is not the most efficient method for EEL rearrangements. There may be more direct and efficient methods for such rearrangements. However, the two-step process appears to be the only method provided for under the ICA for EEL rearrangements. In addition, the efficiency of the two-step process for EEL rearrangements is, in Staff's opinion, outside the scope of this proceeding. The pertinent issue in this case is not whether the ICA should have included provisions or processes (i.e., rates,

[11] Staff requested in Staff Data Request QL-2.01(A)(2) that Cbeyond provide "the complete list of non-recurring rates and elements in Parties' ICA at which AT&T is required to provide Cbeyond rearrangement services" to change DS1/DS1 EELs to DS1/DS3 EELs or to standalone DS1 loops. Cbeyond did not provide andy rates applicable to EEL rearrangements in its response.

terms and conditions) for EEL rearrangements. Instead, the issue is whether the ICA does in fact contain such specific rates, terms and conditions, or whether the two-step process is the only method under the ICA for EEL rearrangements. Staff agrees with AT&T that the ICA does not provide for EEL rearrangements and that the two-step process is the only method under the ICA to accomplish EEL rearrangements.

<u>Issue No. 2</u>: Has AT&T billed Cbeyond for EEL rearrangements in accordance with the two-step process?

AT&T maintains that the two-step process is the only method under the ICA for EEL rearrangements and that it has followed exactly this process to perform EEL rearrangements requested by Cbeyond. Thus it did not violate the ICA. AT&T's reasoning is flawed. Embedded in its conclusion – that it did not violate the ICA – is the assumption that it has billed Cbeyond for EEL rearrangements in accordance with the two-step process. This is, however, an assumption, not a proven fact.

Staff agrees that the two-step process is the only method under the ICA for EEL rearrangements. This, however, does not necessarily lead to the conclusion that AT&T has complied with the ICA. To determine whether AT&T has acted in compliance with the ICA requires more than the reading or interpretation of the ICA. It is also necessary to examine the charges that AT&T has billed Cbeyond, and then determine whether these charges are billed in accordance with the two-step method for EEL rearrangements, a matter about which neither party has made much effort to adduce evidence. In this section, Staff will assess whether AT&T has billed Cbeyond in accordance with the two-step process and the ICA by comparing the charges that AT&T has billed Cbeyond against the rates authorized under the ICA for the two-step process for EEL rearrangements.

To change DS1/DS1 EELs to DS1/DS3 EELs using the two-step method, AT&T first disconnects the DS1/DS1 EELs, and then connects the DS1/DS3 EEL. Based on the Pricing Schedule to the First Amendment of the parties' ICA ("Amendment 1 Pricing Schedule"), the nonrecurring rate elements with respect to such a rearrangement are: (i) service ordering and provisioning disconnection charges for the disconnection of DS1/DS1 EELs,[12] (ii) service ordering and provisioning connection charges for the connection of the DS1 loops of DS1/DS3 and (iii) service ordering and provisioning connection charges for the connection of the DS3 UDT of DS1/DS3 EELs. As noted above, service ordering charges are not among the 4,630 disputed billing records submitted by Cbeyond in this proceeding. As such, Staff will omit service ordering charges from its discussion below. Also, for convenience Staff will treat the terms "provisioning connection charge" and "provisioning disconnection charge" as interchangeable with "connection charge" and "disconnection charge," respectively. The DS1/DS1 EEL disconnection charges, DS1 loop connection charges and DS3 UDT connection charges from the Amendment 1 Pricing Schedule are reproduced in Table 2 below.

Table 2: Provisioning NRCs for "DS1/DS1→DS1/DS3" Rearrangements[13]

[12] Note that the First Amendment of the ICA incorporated into the ICA the nonrecurring UNE rates established in ICC Docket 02-0864, which do not have separate loop and transport disconnection (or connection) charges for DS1/DS1 EELs.

[13] Note that "4-wire DS1 Digital Loop to DS1 Dedicated Transport-Collocated" and "DS3 Interoffice UDT-Collocated" are a DS1/DS1 EEL and the DS3 transport of a DS1/DS3 EEL, respectively. However, Cbeyond objected to Staff's referring the charges of $17.20 and $12.13 as the "nonrecurring DS1/DS1 EEL disconnection charges." It also objects to Staff's referring the charges of $139.71 and $48.78 as the "nonrecurring transport connection charges for a DS1/DS3 EEL." Cbeyond's Response to Staff Data Request QL-2.03. Thus, Cbeyond's objections do not seem to have any merits.

• **4-Wire DS1 Digital Loop to DS1 Interoffice Dedicated Transport - Collocated**	
⇨ Disconnection - Initial	$17.20
⇨ Disconnection - Additional	$12.13
• **4-Wire DS1 Digital Loop Connection**	
⇨ Connection - Initial	$248.22
⇨ Connection - Additional	$135.15
• **DS3 Interoffice UDT - Collocated**	
⇨ Connection - Initial	$139.71
⇨ Connection - Additional	$48.78
Sources: the Amendment 1 Pricing Schedule.	

As DS3 transport operates at a speed of 44.736 Mbps while DS1 transport operates at a speed of 1.544 Mbps, the DS3 transport has the equivalent capacity of 28 DS1 transports. According to Cbeyond,

> [T]he monthly recurring cost of multiplexed DS3 UDT is approximately nineteen (19) times more than the monthly recurring cost of DS1 UDT. … … As such, once Cbeyond has nineteen (19) DS1 UDT facilities on a given transport route, Cbeyond has a financial incentive to eliminate the individual DS1 UDTs and replace those DS1 UDTs with a multiplexed DS3 UDT. … … To avail itself of these cost savings, once Cbeyond has nineteen (19) or more DS1 transport facilities on a route, Cbeyond often grooms multiple DS1 transport facilities onto one higher bandwidth transport facility.[14]

It would be reasonable to expect that a "DS1/DS1→DS1/DS3" rearrangement requested by Cbeyond generally changes multiple (i.e., between 19 and 28) DS1/DS1 EELs to a DS1/DS3 EEL consisting of multiple (between 19 and 28) DS1 loops and a DS3 UDT. The provisioning nonrecurring charges associated with such a rearrangement (performed using the two-step process) should consist of EEL disconnection charges, loop connection charges and transport connection charges: (i) DS1/DS1 EEL disconnection charges ($17.20 for initial or $12.13 for additional), (ii) DS1 loop connection charges ($248.22 for initial or $135.15 for

[14] Affidavit of Greg Darnell on Behalf of Cbeyond Communications, LLC, Exhibit B to Cbeyond's Opening Brief ("Greg Darnell Affidavit"), ¶22.

additional), and (iii) DS3 UDT connection charges ($139.71 for initial or $48.78 for additional), with each DS1/DS1 EEL disconnection (and charge) associated with a DS1 loop connection (and charge).

Similarly, to change DS1/DS1 EELs to standalone DS1 loops using the two-step method, AT&T first disconnects the DS1/DS1 EELs, and then connects the standalone DS1 loops. Based on the Amendment 1 Pricing Schedule, the nonrecurring rate elements with respect to such a rearrangement are: (i) service ordering and provisioning disconnection charges for the disconnection of DS1/DS1 EELs; and (ii) service ordering and provisioning connection charges for the connection of standalone DS1 loops. The DS1/DS1 EEL provisioning disconnection charges and standalone DS1 loop provisioning connection charges in Amendment 1 Pricing Schedule are reproduced in Table 3 below.

Table 3: Provisioning NRCs for "DS1/DS1→DS1" Rearrangements

• **4-Wire DS1 Digital Loop to DS1 Interoffice Dedicated Transport - Collocated**	
⇨ Disconnection - Initial	$17.20
⇨ Disconnection - Additional	$12.13
• **DS1 - Design & Central Office**	
⇨ Connection - Initial	$200.75
⇨ Connection - Additional	$100.57

Sources: the Amendment 1 Pricing Schedule.

Thus, the provisioning nonrecurring charges associated with "DS1/DS1→DS1" rearrangements performed using the two-step process consist of: (i) DS1/DS1 EEL disconnection charge of $17.20 for initial or $12.13 for additional and (ii) standalone DS1 loop connection charge of $200.75 for initial or $100.57 for additional.

To determine whether AT&T has billed Cbeyond provisioning nonrecurring charges for EEL rearrangements in a manner consistent with the two-step process and the ICA, one compares the provisioning charges in Table 2 against Cbeyond's actual billing records for "DS1/DS1→DS1/DS3" rearrangements and compares the provisioning charges in Table 3 against Cbeyond's actual billing records for "DS1/DS1→DS1" rearrangements. However, this supposedly simple task is complicated by the fact that the complete billing records — i.e., billing records for the disconnection of DS1/DS1 EELs and billing records for the connection of the new serving arrangement (DS1/DS3 EELs or standalone DS1 loops) — have not been made of record in this proceeding.[15]

In Exhibit A (to its Formal Complaint), Cbeyond submits 4,630 billing records, which it claims to be loop non-recurring charges associated with EEL rearrangements. It did not, however, provide the complete billing records associated with these supposed EEL rearrangements — i.e., billing records for the disconnection DS1/DS1 EELs as well as billing records for the connection of DS1/DS3 EELs or standalone DS1 loops. Without the complete billing records, it is not possible to determine whether any or all charges in Exhibit A are loop nonrecurring charges associated with EEL rearrangements. For example, a charge of $248.22 can be the price for the connection of the DS1 loops of a new (not rearranged) DS1/DS3 EEL. This charge of $248.22 can also be price for the connection of the DS1 loops of the rearranged (not new) DS1/DS3 EEL. There is no evidence of record that all charges in Exhibit A are loop nonrecurring charges that AT&T billed Cbeyond for EEL rearrangements, and thus are within the scope of the Formal Complaint. On the contrary, some of the billing

[15] Cbeyond did not provide the complete billing records associated with disputed billing records in exhibit A (to Formal Complaint) as requested by Staff. See Cbeyond Response to Staff Data Request QL-1.01(A) and (B).

records are indeed not associated with EEL rearrangements, an issue that Staff will address below.

To demonstrate that AT&T has acted in a manner consistent with the two-step process and the ICA we must compare the rates in Table 2 and Table 3 against each and every billing record for "DS1/DS1→DS1/DS3" and "DS1/DS1→DS1" rearrangements, respectively. In contrast, to demonstrate that AT&T has not acted in a manner consistent with the two-step process and the ICA we do not need to do the comparison for each and every billing record for "DS1/DS1→DS1/DS3" or "DS1/DS1→DS1" rearrangements.

As noted above, under the two-step process, AT&T would bill the same charges for the connection of a rearranged DS1/DS3 EEL (i.e., a DS1/DS3 EEL that was rearranged from DS1/DS1 EELs) as it would for the connection of a new DS1/DS3 EEL. Likewise, it would bill the same charges for the connection of a rearranged standalone DS1 loops (i.e., a standalone DS1 loop that was previously provided as part of a DS1/DS1 EEL) as it would for new standalone DS1 loops. In other words, under the two-step process AT&T makes no distinction between rearranged EELs and new EELs, or between rearranged standalone DS1 loops and new standalone DS1 loops. Thus, to demonstrate that AT&T has not acted in a manner consistent with the two-step process or the ICA, it is sufficient to show that it did not bill Cbeyond in a manner consistent with the two-step process or ICA for one or more billing records in Exhibit A.

If all billing records in Exhibit A (to the Formal Complaint) are loop related nonrecurring charges associated with EEL rearrangements, as Cbeyond asserts, <u>and</u> if AT&T has billed Cbeyond for these rearrangements in a manner consistent with the two-step process and the ICA, we would expect to observe simple patterns in the billing records in Exhibit A.

For "DS1/DS1→DS1" rearrangements, we would expect Exhibit A to contain two loop connection charges: $200.75 for initial and $100.57 for additional. For "DS1/DS1→DS1/DS3" rearrangements, we would expect Exhibit A to contain two loop connection charges as well: $248.22 for initial and $135.15 for additional

According to Cbeyond, "all records with a circuit identification beginning with 'DHDU' are UNE Loop non-recurring charges where the transport portion of the EEL was disconnected and no new UNE transport was installed" and "all records with a circuit identification beginning with 'HCFD' are loop non-recurring charges where the transport portion of an EEL was changed to new UNE DS1 or DS3 transport."[16] Thus, all billing records in Exhibit A with a circuit ID beginning with "DHDU" are, or should be, DS1 loop nonrecurring charges associated with "DS1/DS1→DS1" rearrangements. Likewise, all billing records in Exhibit A with a circuit ID beginning with "HCFD" are, or should be, DS1 loop nonrecurring charges associated with "DS1/DS1→DS1/DS3" rearrangements.[17] Accordingly, all charges in Exhibit A for loops with a circuit ID beginning with "HCFD" should be $248.22 (for initial) or $135.15 (for additional). All charges in Exhibit A for loops with a circuit ID beginning with "DHDU" should be $200.75 (for initial) or $100.57 (for additional).

However, this pattern is not reflected in the billing information available. Instead, the patterns in the available billing information contained in Exhibit A are more irregular and chaotic. Instead of four different charges ($248.22, $135.15, $200.75 and $100.57), Exhibit A

[16] Cbeyond's Response to Staff Data Request QL-1.01(B).

[17] Note that the scope of the Formal Complaint is limited to the rearrangements of DS1/DS1 EELs to DS1/DS3 EELs or to standalone DS1 loops. Combining the scope of the billing disputes with the "HCFD" criterion prescribed by Cbeyond, it is only reasonable to conclude that billing records in Exhibit A with a circuit ID beginning with "HCFD" are the DS1 loops of the rearranged DS1/DS3 EELs.

contains eleven different charges[18]. This suggests that AT&T did not bill Cbeyond in a manner consistent with the two-step method and the ICA or that, contrary to Cbeyond's assertion, not all billing records in Exhibit A are loop related nonrecurring charges associated with EEL rearrangements, or both.

An examination of billing records in Exhibit A (to Formal Complaint) reveals potential billing problems in the following areas:[19]

Problem Area 1:	Billing records with a Uniform Service Ordering Code ("USOC") of NR9OU or NR9OW (or billing records with a "Bill Date" of 19-Jan-06, 19-Feb-06, or 19-Mar-06)
Problem Area 2:	Charges paired as ($248.22, $11.97) for initial and ($135.15, $8.25) for additional – i.e., loop connection charges paired with loop disconnection charges
Problem Area 3:	Charges paired as ($200.75, $7.49) – i.e., loop connection charge paired with loop disconnection charge
Problem Area 4	Reimbursements of loop connection charges ($248.22 for initial and $135.15 for additional)
Problem Area 5:	Charges paired as ($248.22, $70.32) for initial and ($135.15, $8.87) for additional – i.e., loop connection charges paired with Clear Channel Capability ("CCC") charges

Problem Area 1: ***Billing records with USOC of NR9OU or NR9OW (or billing records with a "Bill Date" of 19-Jan-06, 19-Feb-06, or 19-Mar-06)***

There are 746 billing records in Exhibit A with USOC = NR9OU or NR9OW, each of which have a "Bill Date" = 19-Jan-06, 19-Feb-06 or 19-Mar-06. Also, these billing records all have a circuit ID beginning with "HCFD". They are, according to Cbeyond, loop

[18] The eleven billed amounts are: $248.22, $135.15, $11.97, $8.25; $200.75, $100.57, $7.49; $280.64, $12.13; $70.32, $8.87. See Column "Billed Amount" in Exhibit A to Formal Complaint.

[19] Note that these may not be the only problem areas. But due to insufficient information, Staff is not able to identify all billing problems in Exhibit A to Formal Complaint. Also, the lack of sufficient information prevents staff from determining whether what appears to be an erroneous billing record in Exhibit A is indeed an erroneous billing or due to Cbeyond's erroneous inclusion of it in Exhibit A.

connection nonrecurring charges associated with "DS1/DS1→DS1/DS3" rearrangements. Based on Table 2 above, these loop connection charges should be either $248.22 (for initial) or $135.15 (for additional). However, the charges in this group of billing records are $200.75, $135.15, or $200.75/$135.15, respectively. Some loop circuits were each assessed one loop connection charge ($200.75 or $135.15) and other loop circuits were each assessed two loop connection charges ($200.75 and $135.15). Evidently, something is amiss with these charges, as they do not mirror the loop connection charges in Table 2, which contains the provisioning nonrecurring charges associated the "DS1/DS1→DS1/DS3" rearrangements performed using the two-step process.

The 746 billing records in this group are associated with 375 loops (or circuit IDs), which can be divided into three subgroups according to the billed amounts: Subgroup 1 includes all loop circuits on which the loop connection charge of $200.75 was assessed. Subgroup 2 includes all loop circuits on which the loop connection charge of $135.15 was assessed. Subgroup 3 includes all loop circuits on which both loop connection charges of $200.75/$135.15 were assessed (Table 4 below).[20]

Table 4: Grouping of Loop Circuits (or Billing Records) By Billed Amounts

	NROU	NROW	Occurrence
Subgroup 1: NROU charge	$200.75		2
Subgroup 2: NR9OW charge		$135.15	4
Subgroup 3: NR9OU and NR9OW charges	$200.75	$135.15	370

Sources: Exhibit A to Formal Complaint.

Subgroup 1

[20] Note that there are 369 loop circuits but 370 pairs of charges $200.75/$135.15 in Subgroup 3. The pair of charges $200.75/$135.15 was assessed twice on one loop circuit.

There are two loop circuits in this subgroup, each of which was assessed a charge of $200.75. From the Amendment 1 Pricing Schedule, the charge of $200.75 is the price for connecting a standalone DS1 loop (initial). But both loops in this subgroup have a circuit ID beginning with "HCFD", and should be the DS1 loops of a rearranged DS1/DS3 EEL. Thus, AT&T applied a rate for the connection of standalone DS1 loops on DS1 loops that, according to Cbeyond, not standalone DS1 loops. In fact, AT&T applied a rate for the connection of standalone DS1 loops on the DS1 loops of a rearranged DS1/DS3 EEL. This is a mismatch and thus improper.

AT&T subsequently decided to reimburse this charge (i.e., $200.75) on both loop circuits. However, it did not replace this charge of $200.75 with a new loop connection charge. As a result, AT&T billed Cbeyond zero net loop connection charges (= billed amount net of reimbursed amount) on these two loops for performing "DS1/DS1→DS1/DS3" rearrangements. This appears to contradict AT&T's position that loop connection charges are appropriate and authorized under the ICA for EEL rearrangements.

Subgroup 2

There are four loop circuits in this subgroup, each of which has a charge of $135.15. From the Amendment 1 Pricing Schedule, the charge of $135.15 is the price for the connection of the DS1 loops of a DS1/DS3 EEL (additional). Since all four loops in this subgroup have a circuit ID beginning with "HCFD", they should be the DS1 loops of a rearranged DS1/DS3 EEL. As noted above, AT&T applies the same rates to the connection of the DS1 loops of a rearranged DS1/DS3 EEL as it would to the connection of the DS1 loops of a new DS1/DS3 EEL. Thus, it seems appropriate to bill this charge ($135.15) for the connection of the DS1 loops of a rearranged DS1/DS3 EEL. For some reason not of record,

AT&T decided to reimburse this charge ($135.15) on one of the four loops in this subgroup, without replacing it with a new loop connection charge. As a result, AT&T billed Cbeyond zero net loop connection charge (= billed amount net of reimbursement) on this loop circuit for performing a "DS1/DS1→DS1/DS3" rearrangement. This is inconsistent with AT&T's position that loop connection charges are appropriate and authorized under the ICA for EEL rearrangements.

Subgroup 3

There are 369 loop circuits in this subgroup, 368 of which were each assessed the pair of charges ($200.75, $135.15), i.e., two loop connection charges on the same loop circuit. On the remaining one loop circuit, AT&T not only billed the pair of charges ($200.75, $135.15), but did so twice. Thus, there are 370 pairs of charges associated with the 369 loop circuits in this subgroup. Since all billing records in this subgroup have a circuit ID beginning with "HCFD, the nonrecurring charges in this subgroup should be loop nonrecurring charges associated with "DS1/DS1→DS1/DS3" rearrangements. That is, they should be the nonrecurring charge for the connection of the DS1 loops of a rearranged DS1/DS3 EEL. From the Amendment 1 Pricing Schedule, however, the charge of $200.75 is the price for the connection of standalone DS1 loops (initial). The charge of $135.15 is the price for the connection of the DS1 loops of a DS1/DS3 EEL (additional). There are no obvious justifications for AT&T to bill the rate applicable to the connection of standalone DS1 loops on the DS1 loops of a rearranged DS1/DS3 EEL, much less to bill this rate in additional to, or on top of, the rate applicable to the connection of the DS1 loops of a DS1/DS3 EEL — i.e., billing two loop connection charges on the same DS1 loops, treating the loops as a standalone DS1 loops and as the DS1 loops of a DS1/DS3 EEL, respectively.

Admittedly, AT&T subsequently issued reimbursement for some of the charges in this subgroup. However, these reimbursements do not appear to be based on any discernible criteria, either regarding the loop circuits selected for reimbursement or the amounts reimbursed. Table 5 below summarizes AT&T's reimbursements for the 370 pairs of charges on the 369 loop circuits.

Table 5: Reimbursements of Paired Charges ($200.75, $135.15)

Reimbursement Index (A1, A2) [21]	**Occurrence**	**Subtotal of Occurrence**
(0, 0)	*3*	
(0, 1)	*1*	4
(1, 0)	*203*	
(1, 1)	*82*	285
(2, 0)*	*27*	
(2, 1)	*8*	
(2, 2)	*1*	36
(3, 0)	*27*	
(3, 1)	*17*	44
(5, 0)	*1*	1

* Two of the 27 occurrences associated with Index (2, 0) occurred on the same loop Circuit.

In this subgroup of 369 loop circuits, the charge of $200.75 was reimbursed on all but four loop circuits. As these billing records all have a circuit ID beginning with "HCFD", they are supposed to be the charges for the connection of the DS1 loops of rearranged DS1/DS3 EELs (i.e., associated with "DS1/DS1→DS1/DS3" rearrangements). The charge of $200.75, in contrast, is the price for the connection of standalone DS1 loops, new or rearranged, and

[21] The reimbursement index (A1, A2) is defined as follows: A1 (A2) ≡ the ratio of the reimbursed amount to the billed amount of $200.75 ($135.15). For example, for a loop with an index of (2, 1), the reimbursed amount is $401.50 (= 2 x $200.75) for the billed amount of $200.75 (i.e., twice the billed amount) and $135.15 (= 1 x $135.15) for the billed amount of $135.15 (i.e., equal to the billed amount), respectively. Thus the total reimbursed amount for this loop circuit is $536.65 (=$401.50 + $135.15), while the total billed amount is $335.90 (= $200.75 + $135.15).

thus is applicable to "DS1/DS1→DS1" rearrangements. So, AT&T might have reimbursed the charge of $200.75 to correct its billing errors (of assessing a charge applicable to standalone DS1 loops on the DS1 loops of a rearranged DS1/DS3 EEL). However, it is unclear why AT&T chose not to reimburse the charge of $200.75 on the remaining four loop circuits.

On three of these four loop circuits, neither charge ($248.22 or $135.15) was reimbursed It does not make sense for AT&T to continue to bill two loop connection charges on the same DS1 loop circuit, treating the loop as a standalone DS1 loop and as the DS1 loop of a DS1/DS3 EEL, respectively. Thus, the pair of charges ($200.75, $135.15) on the three loop circuits is improper and need to be adjusted. For the forth loop circuit, the charge of $135.15 was reimbursed while the charge of $200.75 was not. The remaining or unreimbursed charge ($200.75) is the price for the connection of standalone DS1 loops. But it was assessed on the DS1 loop of a rearranged DS1/DS3 EEL. Thus, it is improper and thus needs to be adjusted.

We now analyze AT&T's reimbursements on the remaining 365 loops circuits (or 366 pairs of charges or 732 billing records) in this subgroup. From Table 5, the charge (or billed amount) of $200.75 was reimbursed on the remaining 365 loop circuits in this subgroup. For 285 of the 365 loop circuits, the reimbursed amount is equal to the billed amount of $200.75. For the remaining 80 of the 365 loop circuits, however, the reimbursed amount exceeds the billed amount by a large margin: the reimbursed amount is 200%, 300% and 500% of the billed amount in 36,[22] 44 and 1 instances, respectively. This results in a gross over-

[22] AT&T billed the pair of charges $200.75/$135.15 twice on one loop circuit. It also issued reimbursement for the billed amount of $200.75 twice on this loop circuit, with the reimbursed amount equal to 200% of the billed amount (i.e., $401.50) each time. But it did not issue reimbursement for the other billed amount (i.e., $135.15)

reimbursement of $25,696.00[23] for the billed amount of $200.75 on the 365 loop circuits. It is certainly reasonable for AT&T to reimburse the billed amount of $200.75 to correct its billing error (i.e., the error of assessing charges applicable to standalone loops on the DS1 loops of DS1/a rearranged DS3 EEL). Yet, there are no obvious reasons for AT&T to issue a reimbursement that exceeds the billed amount and by such a large margin, unless it was done in error.

Also from Table 5 above, the loop connection charge of $135.15 was reimbursed or over-reimbursed on 108 of the remaining 365 loop circuits in this subgroup, but not on the other 257 loop circuits. The reimbursed amount is 200% of the billed amount in one instance and equal to the billed amount in the other 107 instances. As these loop circuits all have a circuit ID beginning with "HCFD", they are the DS1 loops of rearranged DS1/DS3 EELs. From the Amendment 1 Pricing Schedule, the charge of $135.15 is the price for the connection of the DS1 loops of a DS1/DS3 EEL (additional), and thus applies the DS1 loops of a rearranged DS1/DS3 EEL. It seems appropriate to assess this charge of $135.15 on these loops. For some inexplicable reason, AT&T decided to reimburse (or over-reimburse) this seemingly appropriate charge of $135.15 on nearly 30% of the 365 loop circuits, without replacing it with a new loop connection charge.

Overall, there are several problems with the reimbursements of these two billed amounts ($200.75 and $135.15) on the 369 loop circuits in Subgroup 3. From Table 5 there

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on this loop circuit. So, the 36 instances of 100% *over*-imbursements involve 35 loop circuits, with 2 instances occurring on the same loop circuit.

[23] The figure, $25,696.00, is the gross over-reimbursement for the billed amount of $200.75 for the 365 loop circuits. As the charge of $200.75 was not reimbursed on four of the 369 loop circuits in Subgroup 3, the overall over-reimbursement for the billed amount of $200.75 for the 369 loop circuits in Subgroup 3 would be $24,893.00 (= $25,696.00 – 4 x $200.75).

are 108 loop circuits in this subgroup for which AT&T not only reimbursed the billed amount of $200.75 but also reimbursed the billed amount of $135.15, with the reimbursed amount being equal to, or greater than, the billed amount. For 82 of these 108 loop circuits, the reimbursed amounts are equal to $200.75 and $135.15, respectively. In these instances, AT&T practically billed Cbeyond zero net (i.e., billed amount net of reimbursed amount) loop connection charge for performing "DS1/DS1→DS1/DS3" rearrangements. This contradicts AT&T's position that loop connection charges are appropriate and authorized under the ICA for EEL rearrangements.

For the remaining 26 of the 108 loop circuits, the two reimbursed amounts on each loop circuit are at least equal to the billed amounts ($200.75, $135.15), with one of the two reimbursed amounts exceeding the corresponding billed amount. Thus, the total reimbursed amount on each loop circuit exceeds the total billed amount of $335.90 (= $200.75 + $135.15) on the loop circuit for these 26 loop circuits. As a result of these over-reimbursements, AT&T not only billed <u>no</u> net (billed amount net of reimbursed amount) loop connection charge for performing "DS1/DS1→DS1/DS3" rearrangements but it also handed Cbeyond unwarranted benefits in the form of <u>negative</u> net loop connection charges. All in all, Cbeyond received an over-reimbursement (total reimbursed amount net of total billed amount) of $8,767 on these 26 loop circuits. Thus, AT&T's reimbursement policy is difficult to reconcile with its stated position, apart from being somewhat random.

Based on Table 5, there are also 258 instances in which AT&T reimbursed the billed amount of $200.75 but not the billed amount of $135.15. In 55 of the 258 instances, it over-reimbursed the charge of $200.75 by at least 100%, thus resulting in reimbursed amounts equal to or greater than $401.50 (= 2 x $200.75). Thus, the total reimbursed amount on a loop

circuit in these 55 instances exceeds the total billed amount on the loop circuit $335.90 (= $200.75 + $135.15). As a result, though it was not, technically, reimbursed for the billed amount of $135.15, Cbeyond was not only billed no net (= billed amount net of reimbursed amount) loop connection charge for the "DS1/DS1→DS1/DS3" rearrangements, but it was also given unwarranted benefits in the form of negative net loop connection charges, in the 55 instances. Overall, Cbeyond received an over-reimbursement (total reimbursed amount net of total billed amount) in the amount of $9,631 in these 55 instances. This requires an explanation.

Together, there are a total of 81 (= 26 + 55) instances where the total reimbursed amount on a loop exceeds the total billed amount on the loop. As a result, Cbeyond was not billed any net loop connection charges in these 81 instances. To the contrary, Cbeyond seems to have gained unwarranted benefits in the amount of $18,398 (= $8,767 + $9,631) for requesting "DS1/DS1→DS1/DS3" rearrangements in the 81 instances. This is inconsistent with AT&T's position that loop connection charges are appropriate and authorized under the ICA for EEL rearrangements. Moreover, it is irrational for AT&T to issue a reimbursement on a loop that exceeds the total billed amount on the loop.

For the 746 billing records (associated with 375 loop circuits) in this group, the total billed amount exceeds the reimbursed amount only by $10,651.00. As a result of its reimbursement and over-reimbursement, AT&T practically billed Cbeyond an average loop connection charge of $28.40 for performing "DS1/DS1→DS1/DS3" rearrangements on the 375 loops in this group. From the Amendment 1 Pricing Schedule, the rate for the connection of DS1 loops of a DS1/DS3 EEL is $248.22 for initial or $135.15 for additional; and the rate for the connection of standalone DS1 loops is $200.75 for initial or $100.57 for additional.

Thus AT&T's erratic reimbursement "policy" on this group of billing records has greatly benefited Cbeyond and resulted in an average loop connection charge ($28.40) that is substantially lower than the loop connection charges authorized under the ICA for EEL rearrangements performed using the two-step process. Therefore, while the billed amounts ($200.75 or $200.75/$135.15) in this group of billing records are improper, AT&T's reimbursement policy clearly is inexplicable and is inconsistent with its position in this proceeding.

Finally, the billed amounts in Exhibit A associated with USOC of NR9OU and NR9OW are $200.75 and $135.15, respectively. Above Staff has compared these billed charges, with the charges that should have been billed with respect to the two-step process for "DS1/DS1→DS1/DS3" rearrangements. In doing so, however, Staff has ignored the fact that the USOCs of NR9OU and NR9OW in the Amendment 1 Pricing Schedule: (i) are for services completely unrelated to "DS1/DS1→DS1/DS3" rearrangements; and (ii) are associated with rates that don't match what appears on the billing records in Exhibit A. In particular, USOC NR9OU appears in the Amendment 1 Pricing Schedule as a "Service Provisioning" charge for standalone DS1 loops, with a charge of $206.06.[24] USOC NR9OW appears in the Amendment 1 Pricing Schedule as a "Service Provisioning" charge for UNE-P loops, with a charge of $208.24. Thus, the USOC codes in Exhibit A are applied to the wrong services and are, according to the Amendment 1 Pricing Schedule, rated incorrectly.[25]

There is no evidence to suggest that these billing problems are willful violations of the parties' ICA as opposed to unintended billing errors. The assessment of two loop connection

[24] See Line 82 of the Pricing Schedule to the 1st Amendment of the parties' ICA.

[25] See Line 273 of the Pricing Schedule to the 1st Amendment of the parties' ICA.

charges ($200.75, $135.15) on the same DS1 loop circuit (i.e., first treating the loop circuit as a standalone DS1 loops and then as the DS1 loop of a DS1/DS3 EEL) is likely the result of unintended billing errors, given that most of the billed amounts ($200.75) were reimbursed or over-reimbursed. Also, AT&T might have erred, though unintentionally, where the reimbursed amount on a loop exceeds the corresponding billed amount of $200.75 on the loop. Similarly, AT&T may also have erred, though unintentionally, where the total reimbursed amount on a loop circuit exceeds the total billed amount on the loop circuit, thus resulting in Cbeyond being given unwarranted benefits in the form of negative net loop connection charges in these cases. Clearly, these over-reimbursements have substantially benefited Cbeyond, with an overall over-reimbursement of $24,893.00[26] for the billed amount of $200.75. Most noteworthy, AT&T's reimbursement policy on this group of billing records resulted in an average loop connection charge of $28.40 for EEL rearrangements on the 375 loop circuits in this group, which is substantially lower than the loop connection charges authorized under the ICA for EEL rearrangements performed using the two-step process.

AT&T should provide an explanation for the assessment of the two loop connection charges ($200.75 and $135.15) on the same loop in the 370 instances. In particular, AT&T should explain the criteria that it used to select the loop circuits for reimbursement (or over-reimbursement) and the criteria that it used to decide the amount reimbursed. Most importantly it should explain how its reimbursements – which at times resulted in zero net loop connection charges, and at other times resulted in negative net loop connection charges,

[26] The gross over-reimbursement for the billed amount of $200.75 is $25,696.00. Recall that the charge of $200.75 was not reimbursed on four of the 369 loop circuits in Subgroup 3. Thus, the overall over-reimbursement for the billed amount of $200.75 in Subgroup 3 is equal to $24,893.00 (= $25,696.00 – 4 x $200.75).

to Cbeyond – are consistent with its position that loop connection charges are appropriate and authorized under the ICA for EEL rearrangements.

<u>Problem Area 2:</u> ***Charges paired as ($248.22, $11.97) for initial and ($135.15, $8.25) for additional – i.e., loop connection charges paired with loop disconnection charges.***

There are 433 loop circuits in this group, all of which have a circuit ID beginning with "HCFD" and are supposedly the DS1 loops of a rearranged DS1/DS3 EEL. Two charges were assessed on each of the 433 loop circuits: one for the connection, and the other for the disconnection, of the DS1 loops of a DS1/DS3 EEL, with the loop connection charge being $248.22 for initial or $135.15 for additional and loop disconnection charge being $11.97 for initial or $8.25 for additional, respectively. As these loop circuits are the DS1 loops of rearranged DS1/DS3 EELs, it seems appropriate to apply loop connection charges applicable to the DS1 loops of a DS1/DS3 EEL (i.e., 248.22 for initial or $135.15 for additional) on these loop circuits. However, there are no obvious justifications for AT&T to bill loop disconnection charges when performing "DS1/DS1→DS1/DS3" rearrangements using the two-step method. So, the loop disconnection charges of $11.97 for initial and $8.25 for additional in this group of billing records are improper.

AT&T decided to reimburse both (i.e., loop connection and disconnection) charges on 354 of the 433 loop circuits, but neither on the remaining 79 loop circuits. It is unclear what criteria AT&T used to select the 354 loop circuits for reimbursement. Nonetheless, the loop disconnection charges of $11.97 for initial and $8.25 for additional are evidently improper and should be removed from the remaining 79 loop circuits. Moreover, for the 354 loops where the loop connection and disconnection charges were both reimbursed, AT&T did not replace them with any loop connection charge. As a result, AT&T billed Cbeyond zero net

loop connection charges on these loop circuits for performing "DS1/DS1→ DS1/DS3" rearrangements. This is inconsistent with AT&T's position that the loop connection charges are appropriate and authorized under the ICA for EELs rearrangements.

In summary, AT&T should remove the loop disconnection charges from the remaining 79 loop circuits. It should also explain the criteria it used to select these 354 loop circuits for reimbursement (of connection and disconnection charges). Most importantly, it should explain how its reimbursements of loop connection charge in the 354 instances are consistent with its position that the loop connection charges are appropriate and authorized under the ICA for EEL rearrangements.

Problem Area 3: ***Charges paired as ($200.75, $7.49) – i.e., a loop connection charge paired with a loop disconnection charge for a standalone DS1 loop***

There are four loop circuits in this group of billing records, each of which has a circuit ID beginning with "DHDU" and thus are the rearranged standalone DS1 loops (i.e., DS1 loops that have undergone a "DS1/DS1→DS1" rearrangement). Two charges were billed on each of the four loop circuits: one for the connection, and the other for the disconnection, of standalone DS1 loops (i.e., $200.75 and $7.49). Neither charge was reimbursed on any of the four loop circuits. As these loop circuits are the rearranged standalone DS1 loops, the charge of $200.75 seems to be proper. However, there are no justifications for AT&T to bill Cbeyond a charge of $7.49 applicable to the disconnection of standalone DS1 loops when performing "DS1/DS1→DS1" rearrangements using the two-step method. Thus, the loop disconnection charge of $7.49 on these loop circuits is improper and should be removed.

Problem Area 4: ***Reimbursements of loop connection charges ($248.22 for initial and $135.15 for additional)***

There are 480 DS1 loop circuits in this group of billing records, all of which have a circuit ID beginning with "HCFD" and thus are the DS1 loops of rearranged DS1/DS3 EELs (i.e., associated with "DS1/DS1→DS1/DS3" rearrangements). Each of the 480 loop circuits was assessed a charge that is applicable to the connection of the DS1 loops of a DS1/DS3 EEL: $248.22 for initial or $135.15 for additional. So, the charge ($248.22 or $135.15) seems to be properly assessed on these loop circuits. However, for reasons not of record, AT&T decided to reimburse the seemingly proper charges on 413 of the 480 loops in this group. As a result, AT&T practically billed Cbeyond zero net loop connection charges on the 413 loop circuits performing "DS1/DS1→DS1/DS3" rearrangements using the two-step method. This is inconsistent with AT&T's position that loop connection charges are appropriate and authorized under the ICA for EEL rearrangements.

AT&T should explain why it decided to reimburse the loop connection charge on some loop circuits but not on others. In particular, AT&T should explain the criteria it used to select DS1 loops for reimbursement. Most importantly, it should explain how the reimbursements of the loop connection charges in the 413 instances are consistent with its position that loop connection charges are appropriate and authorized under the ICA for EEL rearrangements.

<u>Problem Area 5</u> ***Charges paired as ($248.22, $70.32) for initial and ($135.15, $8.87) for additional – i.e., loop connection charges paired with Clear Channel Capability charges***

There are 1,137 loop circuits in this group of billing records, all of which have a circuit ID beginning with "HCFD" and thus are supposedly the DS1 loops of rearranged DS1/DS3 EELs (i.e., DS1 loops involved in "DS1/DS1→DS1/DS3" rearrangements). Two charges were assessed on each of the 1,137 loop circuits in this group: one for the connection

of the DS1 loops of a DS1/DS3 EEL ($248.22 for initial or $135.15 for additional) and one for Clear Channel Capability ("CCC") ($70.32 for initial or $8.87 for additional). The billed amount of $248.22 was reimbursed in 11 instances, and none of the other three billed amounts ($135.15, $70.32, $8.87) was reimbursed on any loop circuits. There are two problems with the charges in this group of billing records.

First, AT&T's reimbursement of the loop connection charge ($248.22) appears to be inconsistent with its position in this proceeding. As a result of the reimbursement, AT&T did not bill Cbeyond any net loop connection charges on these 11 loop circuits for performing "DS1/DS1→DS1/DS3" rearrangements. AT&T should explain why it decided to reimburse the loop connection charge ($248.22) on some but not other loop circuits. In particular, AT&T should explain the criteria it used to select the loop circuits for reimbursement. AT&T should also explain how the reimbursements of the loop connection charge in the 11 instances are consistent with its position that the loop connection charges are appropriate and authorized under the ICA for EEL rearrangements.

Second, the CCC charge ($70.32 for initial or $8.87 for additional) should not have been billed on any DS1 loops, regardless of whether the DS1 loops are standalone loops or the DS1 loops of DS1/DS1 EELs or the DS1 loops of DS1/DS3 EELs. Clear Channel Capability ("CCC") is an optional service, and CCC charge is applicable, when requested, to DS1 interoffice transport only. There is ample evidence to support this.

(1) *The Original Pricing Schedule to the parties' ICA limits the applicability of CCC charge to DS1 interoffice transport.*

The presentation of nonrecurring UNE rates in the original Pricing Schedule to the parties' ICA ("Original Pricing Schedule") is different than the presentation of nonrecurring

UNE rates in the Amendment 1 Pricing Schedule. For example, the Amendment 1 Pricing Schedule simply listed EEL non-recurring charges without grouping them by EEL type. In contrast, the Original Pricing Schedule grouped all the EEL non-recurring charges by EEL type.[27] The non-recurring rate elements for DS1/DS1 EELs and DS1/DS3 EELs from the Original Pricing Schedule are reproduced in Table 6 below:

Table 6: NRC Rate Elements Applicable To DS1/DS1 and DS1/DS3 EELs

EEL (4-wire Digital Lop to DS1 or DS3 Dedicated Transport) Combination	**Rate***
⇨ Administrative Charge, per order	xxx
⇨ Design & Co Connection, per circuit	xxx
⇨ Carrier Connection Charge, per termination	xxx
• *For DS1 Interoffice Transport or DS1 Entrance Facilities*	
⇨ Administrative Charge, per order	xxx
⇨ Design & Co Connection, per circuit	xxx
⇨ Carrier Connection Charge, per termination	xxx
⇨ **Clear Channel Capability**, **per 1.544 Mbps circuit arranged**	xxx
• *For DS3 Interoffice Transport or DS3 Entrance Facilities*	
⇨ Administrative Charge, per order	xxx
⇨ Design & Co Connection, per circuit	xxx
⇨ Carrier Connection Charge, per termination	xxx
* These NRC rates in the Original Pricing Schedule are no longer effective, thus not reproduced here.	

From the Original Pricing Schedule (or Table 6 above), the loop nonrecurring charges associated with DS1/DS1 EELs were identical to those associated with DS1/DS3 EELs.[28]

[27] In the Original Pricing Schedule, there were eight EEL types: (1) 2-Wire Analog Loop with DS1 Transport, (2) 2-Wire Analog Loop with DS3 transport, (3) 4-Wire Analog Loop with DS1 Transport, (4) 4-Wire Analog Loop with DS3 Transport, (5) 2-Wire Digital Loop with DS1 Transport, (6) 2-Wire Digital Loop with DS3 Transport, (7) 4-Wire Digital Loop with DS1 Transport, and (8) 4-Wire Digital Loop with DS3 Transport.

[28] Note that there were separate nonrecurring charges for the loop and transport of a DS1/DS1 EEL, respectively, in the Original Pricing Schedule. In contrast, in the Amendment 1 Pricing Schedule, the service ordering and provisioning nonrecurring apply to the DS1/DS1 EEL as a whole, not individually to loop and/or transport of the EEL. For DS1/DS3 EELs, however, there are separate service ordering and provisioning nonrecurring charges

The CCC charge was not listed among the DS1 loop nonrecurring charges, and thus was not applicable to the DS1 loops of DS1/DS1 EELs or DS1/DS3 EELs. Clearly, the CCC charge was only listed under, thus limited to, DS1 interoffice transport.[29]

Likewise, the CCC charge was not listed among the standalone DS1 loop nonrecurring charges (not reproduced here) in the Original Pricing Schedule. Thus it is not applicable to standalone DS1 loops. Therefore, the CCC charge in the Original Pricing Schedule did not apply to any DS1 loops, regardless of whether they are standalone DS1 loops or the DS1 loops of DS1/DS1 EELs or the DS1 loops of DS1/DS3 EELs.

AT&T admits that the parties did not introduce amendments to change the applicability of the CCC charge, thus resulting in no shift in the applicability of the CCC charge between the Original Pricing Schedule and Amendment 1 Pricing Schedule.[30] Therefore, the applicability of CCC charge should remain limited to DS1 interoffice transport and remain inapplicable to DS1 loops, as it was in the Original Pricing Schedule.

(2) *Written communications between the parties confirm that, for UNE rates established in ICC Docket No. 02-0864, the applicability of CCC charge is limited to DS1 interoffice transport*

In response to Staff Data Request QL-2.10, AT&T provided Staff the written communications between AT&T and Cbeyond regarding the billing disputes in this instant proceeding. Among the documentations produced, two documents were provided to Cbeyond

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for loop and transport of the EELs, respectively, in the Original Pricing Schedule as well as in the Amendment 1 Pricing Schedule.

[29] In fact, the CCC charge was only listed under, and thus applicable to, DS1 interoffice transport in all four EEL types involving DS1 transport — *i.e.*, (i) 2-Wire Analog Loop with DS1 Interoffice Transport, (ii) 4-Wire Analog Loop with DS1 Interoffice Transport, (iii) 2-Wire Digital Loop with DS1 Interoffice Transport, and (iv) 4-Wire Digital Loop with DS1 Interoffice Transport — in the Original Pricing Schedule.

[30] AT&T's Response to Staff Data Request QL-3.03.

by AT&T to support its position that loop-related non-recurring charges are applicable to EEL rearrangements. One of the documents contains all the non-recurring rates associated with standalone loops ("UNE Loop Doc") and the other contains all non-recurring rates associated with all eight loop/transport combinations ("EEL Doc"), with the rates as established in ICC Docket 02-0864.[31] The EEL Doc specifically clarifies that the Clear Channel Capability is an "optional service", and that CCC "charge is applicable, when requested, to DS1 Interoffice Transport only". (Emphasis added.) Moreover, the EEL Doc also groups all non-recurring rates by EEL type. The nonrecurring rates for DS1/DS1 EELs and DS1/DS3 EELs contained in the EEL Doc are reproduced in Table 7 below.

Table 7: DS1/DS1 and DS1/DS3 EEL Non-recurring Rates*	
EEL (4-wire DS1 Digital Loop to DS1 Interoffice Dedicated Transport) Combination	
• *Non-Channelized DS1 EEL Service Order Charge, per ASR or LSR*	
⇨ Connection (Electronic-Establish)	$11.14
⇨ Disconnection (Electronic-Establish)	$8.63
• *4-Wire DS1 Digital Loop To DS1 Interoffice Dedicated Transport, per circuit*	
⇨ Connection - initial	$280.64
⇨ Connection - additional	$146.40
⇨ Disconnection - initial	$17.20
⇨ Disconnection - additional	$12.13
• *Clear Channel Capability, per circuit (Optional)*	
⇨ **Clear Channel Capability - initial**	$70.32
⇨ **Clear Channel Capability - additional**	$8.87
EEL (4-wire DS1 Digital Loop to DS3 Interoffice Dedicated Transport) Combination	
• *4-Wire DS1 Loop Service Order Charge, per circuit*	
⇨ Connection (Electronic-Establish) - Initial	$11.14

[31] The eight loop/transport combinations are the same as those in the Original Pricing Schedule, with one difference. In the Original Pricing Schedule, there were no separate nonrecurring rates for "collocated" and "non-collocated" loop/transport combinations. For the nonrecurring rates established in ICC Docket No. 02-0864, different sets of nonrecurring charges apply to "collocated" and "non-collocated" loop/transport combinations, respectively.

⇨ Connection (Electronic-Establish) - additional	$10.04
⇨ Disconnection (Electronic-Establish)	$8.63
• *DS3 Transport Service Order Charge, per ASR or LSR*	
⇨ Connection (Electronic-Establish)	$11.44
⇨ Disconnection (Electronic-Establish)	$8.63
• *4-Wire DS1 Digital Loop Connection Charge, per circuit*	
⇨ Connection - initial	$248.22
⇨ Connection - additional	$135.15
⇨ Disconnection - initial	$11.97
⇨ Disconnection - additional	$8.25
• *DS3 Interoffice Dedicated Transport*	
⇨ Connection - initial	$139.71
⇨ Connection - additional	$48.78
⇨ Disconnection - initial	$17.20
⇨ Disconnection - additional	$12.13
* These NRCs were established in ICC Docket 02-0864 and correspond to those in the Amendment 1 Pricing Schedule.	

Clearly, the CCC charge is listed under, and thus applicable, to DS1/DS1 EELs.[32] But it is not listed under, and thus not applicable to, DS1/DS3 EELs or the DS1 loops of DS1/DS3 EELs. Likewise, the CCC charge is not listed among the standalone DS1 loop nonrecurring charges in the UNE Loop Doc (not reproduced here).

The First Amendment to parties' ICA incorporated into the parties' agreement the UNE rates established in ICC Docket No. 02-0864. Thus, the non-recurring rates in the EEL Doc should correspond to the EEL nonrecurring rates in the Amendment 1 Pricing Schedule. Likewise, the nonrecurring rates in the UNE Loop Doc should correspond to the standalone loop nonrecurring rates in the Amendment 1 Pricing Schedule. As a result, the applicability of the CCC charge in the EEL Doc should also correspond to that in the Amendment 1 Pricing

[32] As there are no separate nonrecurring charges for the DS1 loop and DS1 UDT of DS1/DS1 EELs, the CCC charge is simply listed under DS1/DS1 EELs, not under the DS1 UDT of the DS1/DS1 EEL, as it was in the Original Pricing Schedule.

Schedule. Thus, it is reasonable to conclude that the CCC charge under the ICA is applicable to DS1 interoffice transport only, thus not applicable to the DS1 loops of a DS1/DS3 EEL or to standalone DS1 loops.

(3) *AT&T's response to Staff Data Request stated that CCC charge is not applicable to a standalone DS1 loop or the DS1 loops of DS1/DS3 EELs.*

In response to Staff's request to confirm whether the statement that the CCC charge applies to a standalone DS1 loop is true, AT&T responded with a negative or "false". Likewise, for the statement whether the CCC charge applies to the DS1 loops of DS1/DS3 EELs, AT&T's response is also negative or "false".[33]

As noted above, the 1,137 loop circuits in this group all have a circuit ID beginning with "HCFD" and are the DS1 loops of rearranged DS1/DS3 EELs (i.e., DS1 loops associated with "DS1/DS1→DS1/DS3" rearrangements). As the CCC charge is not applicable to DS1 loops, the CCC charge should not have been assessed on the DS1 loops of rearranged DS1/DS3 EELs. Thus, the CCC charge on the 1,137 DS1 loop circuits in this group is improper, though not for the reasons stated by Cbeyond, and should be removed.

It should be noted that limiting the applicability of the CCC charge to DS1 interoffice transport is not equivalent to limiting the CCC functionality to DS1 interoffice transport. Clear Channel Capability formats a DS1 circuit to transmit a clear channel bit stream that allows use of the full bandwidth available on the circuit. Limiting the applicability of the CCC charge to DS1 interoffice transport does not mean that CCC functionality is limited to DS1 interoffice transport. According to the Overview of AT&T's Compliance EEL Provisioning Cost Study in ICC Docket No. 02-0864 ("Cost Study Overview"):

[33] AT&T's Response to Revised Staff Data Request QL-2.09.

> If CCC is provisioned at the time that a DS1 service is provisioned coding can be done within the normal provisioning activities that occur in the DS1, therefore there is no additional CCC non-recurring charge. If however CCC is provisioned on an existing DS1 service, a non-recurring charge does apply because additional activities are required to provision CCC onto the existing DS1 line. (Emphasis added)[34]

Presumably, the time of provisioning, referred to in the Cost Study Overview, refers to the time when a DS1 service is first enabled or established on the circuits, not the time when the DS1 circuits are provided to a CLEC or Cbeyond. The former generally predates the latter. The statements in the Cost Study Overview are consistent with the applicability of CCC charges indicated and/or articulated in the Original Pricing Schedule, the UNE Loop Doc, the EEL Doc and AT&T's Response to Staff Data Requests. Together, they seem to suggest that, for DS1 loops, Clear Channel Capability is typically provisioned at the time when a DS1 service is first enabled on the loop circuits. For DS1 interoffice transport, however, Clear Channel Capability is not typically provisioned when a DS1 service is first enabled on the interoffice transport circuits. This makes sense, since DS1 interoffice transport is generally – with some exception – used in conjunction with DS0 loops and thus would need to be provisioned as channelized DS1 circuits. This explains why the CCC charge has always been applicable, when requested, to DS1 interoffice transport only under the ICA.

Summary AT&T has not been billing Cbeyond for EEL rearrangements in a manner consistent with the two-step process or with the ICA. Some of the inconsistencies seem to have benefited Cbeyond, while others seem to have benefited AT&T. Nonetheless, these billings are inconsistent with the two-step method and the ICA.

[34] See TAB 1 (Cost Study Overview) of the Compliance EEL Provisioning Cost Study in ICC Docket No. 02-0864, which was provided by AT&T in response to Cbeyond Question #28 of Cbeyond First Set of Data Request.

V. Response to Cbeyond

<u>Issue No. 1</u> Has Cbeyond established that the parties' ICA contains explicit rates, terms and conditions for the provisioning of EEL rearrangements?

Cbeyond and AT&T agree that AT&T billed loop nonrecurring charges for performing EEL rearrangement.[35] When Cbeyond requests to change DS1/DS1 EELs to DS1/DS3 EELs or to standalone DS1 loops, AT&T would require that Cbeyond request disconnection of the existing DS1/DS1 EELs and request connection the DS1/DS3 EELs or standalone DS1 loops. Cbeyond contends that the parties' ICA requires AT&T to provide EEL rearrangements and that AT&T's two-step method is not a least-cost method for EEL rearrangements and thus is in violation of the ICA.[36] Staff disagrees.

While the ICA provides for disconnection of existing EELs and connection of new EELs, Staff agrees with AT&T that the ICA does not explicitly provide for EEL rearrangements. That is, the ICA contains no explicit rates, terms and conditions governing EEL rearrangements. Article 9 of the parties' ICA, Access to Unbundled Network Elements, contains no express terms or conditions for changing DS1/DS1 EELs to DS1/DS3 EELs or to standalone loops. Likewise, the Pricing Schedule of the parties' ICA contains no rates applicable to EEL rearrangements, a fact Cbeyond has not contradicted or refuted in its responses to Staff Data Requests seeking such information.[37] Instead, Cbeyond admits that "[t]he Pricing Schedule in the ICA does not contain a nonrecurring provisioning charge

[35] Joint Stipulation at ¶¶10(a)-10(b).

[36] Greg Darnell Affidavit at ¶36.

[37] In Staff Data Request QL-2.01(A)(2), Staff requested that Cbeyond provide "the complete list of non-recurring rates and elements in the parties' ICA at which AT&T is required to provide Cbeyond rearrangement services" to change DS1/DS1 EELs to DS1/DS3 EELs or to standalone DS1 Loops. Cbeyond did not provide any rates in the ICA applicable to these EEL rearrangements in its response.

associated with UNE Loop CFA change orders" [38] and "there are no rate elements in the parties' ICA to change from a 'DS1 Loop/DS1 Transport EEL' to a 'DS1 Loop/DS3 Transport EEL,' or a DS1 Loop (with transport provided by a third-party carrier)." [39]

In a Data Request, Staff requested Cbeyond to "[p]lease confirm if Cbeyond takes the position that Parties' Interconnection Agreement ('ICA') provides for reconfiguration (or 'rearrangement') of existing UNE combinations." Cbeyond provided the following in response:

> "The Request cannot be answered 'yes' or 'no' as it is phrased. It is Cbeyond's position that the parties' ICA requires Illinois Bell ("Illinois Bell" or "AT&T") to alternatively provision or rearrange UNE transport that is cross connected to UNE Loops without being compelled to disconnect and reinstall the UNE Loops. Illinois Bell improperly compels Cbeyond to disconnect the UNE Loop when requesting only the disconnection of the UNE transport portion of a combination of UNEs that together comprise an EEL." (Emphasis added)[40]

Cbeyond elects not to confirm or deny that the ICA provides for EEL rearrangements, but takes the position that the ICA requires AT&T to rearrange UNE transport, as if it were a stand-alone UNE even when provided as part of EEL rearrangements. However, Cbeyond's position is inconsistent with the parties' ICA. The ICA explicitly provides for circumstances and includes a specific charge when a DS1/DS1 EEL is disconnected as it clearly is when either "DS1/DS1→DS1/DS3" or "DS1/DS1→DS1" rearrangements are performed. Cbeyond's response implies that it seeks an outcome where the DS1/DS1 EEL disconnection charge included in the parties' ICA is not applied, but rather some unspecified other transport

[38] Cbeyond's Response to Staff Data Request QL-2.01(A)(1).

[39] Cbeyond's Response to Staff Data Request QL-2.01(A)(2).

[40] Cbeyond's Response to Staff Data Request QL-2.01(A).

rearrangement charges are applied, under circumstances when the DS1/DS1 EEL is disconnected. Cbeyond's position, in Staff's view, is inconsistent with the parties ICA.

Cbeyond argues that it should incur only transport nonrecurring charges, but not loop nonrecurring charges, under circumstances when either "DS1/DS1→DS1/DS3" or "DS1/DS1→DS1" rearrangements are performed. Article 9.1.3 of the ICA specifically provides that prices for UNEs and combinations are set forth in the Pricing Schedule of the parties' ICA. The Pricing Schedule of the ICA, however, does not contain prices for EEL rearrangements. Thus Cbeyond, for example, by seeking to incur only transport related charges and to avoid explicit contractual DS1/DS1 EEL disconnection charges in circumstances when DS1/DS1 EELs are disconnected as they clearly are when either "DS1/DS1→DS1/DS3" or "DS1/DS1→DS1" rearrangements are performed, is presumably seeking to depart from the Pricing Schedule setting forth the rates for UNEs and UNE combinations provided pursuant to the ICA.

Cbeyond has not established that the ICA contains explicit rates, terms and conditions for the provisioning of EEL rearrangements. Neither has it established that the ICA requires AT&T to provide EEL rearrangements in a manner, and in particular at prices, that are different from those specifically contained in the ICA.

Cbeyond may be correct that AT&T's two-step method is not the least cost or most efficient method for EEL rearrangements. This is not surprising, given that AT&T's method is not established, and thus not best suited, for EEL rearrangements. However, insofar as AT&T does not use, or bill Cbeyond in accordance with, a least cost method for EEL rearrangements, it is not due to AT&T violating the ICA or the least cost principal but due to the ICA not providing for such a least cost method for EEL rearrangements.

<u>Issue No. 2</u> **Is Cbeyond's claim that it should incur any loop nonrecurring charges for its EEL rearrangements valid?**

Cbeyond contends that its EEL rearrangements do not require disconnection or connection of DS1 loops and neither does AT&T provide disconnection or connection of the DS1 loops in such rearrangements. So it should not be billed any loop nonrecurring charges when it requests EEL rearrangements. Cbeyond's reasoning and contention appears to be based on its mischaracterization of UNEs and UNE combination and its misinterpretation of the ICA.

1. Cbeyond errs in its claim that AT&T does not provide disconnection or connection of DS1 loops when performing EEL rearrangements.

According to Cbeyond, AT&T does not disconnect or connect DS1 loops when performing EEL rearrangements for Cbeyond. As such, by billing the loop nonrecurring charges, AT&T charges Cbeyond "for something that Cbeyond does not order and AT&T Illinois does not provide."[41] Cbeyond's contention is incorrect and based on its mischaracterization of UNEs and UNE combinations. Regarding UNEs and UNE combinations that it purchases from AT&T, Cbeyond states:

> Cbeyond provides its services to small business customers in Chicago by purchasing from AT&T Illinois clear channel DS1 loops, <u>unbundled DS1 cross-connections</u> and dedicated transport facilities; Cbeyond then connects these facilities to Cbeyond's network located in collocation space that Cbeyond leases from AT&T Illinois. (<u>Emphasis added</u>)[42]
>
> … …
>
> DS1 loops, DS1 dedicated transport, <u>multiplexed DS3 dedicated transport</u> and <u>DS1 cross-connections</u> are all unbundled network elements ("UNEs") that AT&T Illinois must provide Cbeyond under the terms of the ICA. (<u>Emphasis added</u>)[43]

[41] Greg Darnell Affidavit at ¶25

[42] Greg Darnell Affidavit at ¶8.

[43] Greg Darnell Affidavit at ¶12.

… …

> One combination of network elements that the ICA requires AT&T Illinois to make available to Cbeyond is an unbundled DS1 loop, combined via an unbundled DS1 cross-connection, to DS1 Unbundled Dedicated Transport ('UDT'). (Emphasis added)[44]

… …

> Another combination of network elements that the ICA requires AT&T Illinois to make available to Cbeyond is an unbundled DS1 loop, combined via an unbundled DS1 cross-connection, to multiplexed DS3 UDT. (Emphasis added)[45]

Cbeyond characterizes a high cap loop/transport combination (i.e., DS1/DS1 or DS1/DS3 EEL) as composed of three UNEs: (i) UNE DS1 Loop, (ii) UNE DS1 Cross-connection and (iii) UNE DS1 UDT or UNE Multiplexed DS3 UDT. As such, its EEL rearrangements would involve only the change of UNE DS1 cross connects and the change of UNE transport (from UNE DS1 UDT to UNE multiplexed DS3 UDT) or the removal of UNE transport (DS1 UDT), with the UNE DS1 loop unaffected. In other words, by requesting a "DS1/DS1→DS1/DS3" rearrangement, it considers itself to be (i) purchasing a new UNE DS1 cross connection to replace the existing UNE DS1 cross connection and (ii) purchasing a new UNE transport (i.e., UNE multiplexed DS3 UDT) to replace the existing UNE transport (i.e., UNE DS1 UDT). Similarly, by requesting a "DS1/DS1→DS1" rearrangement, it considers itself to be purchasing a new UNE DS1 cross connection to replace the existing UNE DS1 cross connection and to be relinquishing (i.e., disconnecting) the existing UNE transport (i.e., UNE DS1 UDT). It also contends that the appropriate nonrecurring charges for

[44] Greg Darnell Affidavit at ¶14.

[45] Greg Darnell Affidavit at ¶15.

changing UNE DS1 cross connections is zero.[46] So it should incur only transport nonrecurring charges when it requests EEL rearrangements. Cbeyond's reasoning is flawed.

First, contrary to Cbeyond's belief, DS1 cross connections[47] are not an UNE. In fact, DS1 cross connections have never been designated, by the FCC, as an UNE.[48] If they were an UNE as Cbeyond alleges, AT&T would have been required to price and provide DS1 cross connections individually pursuant to Article 9.1.3 of the ICA.[49] Cbeyond concedes that "no nonrecurring charge exists in the ICA to change cross connections."[50] And it asserts that the forward cost of cross connections "is either embedded in the nonrecurring rates for other rate elements or recovered through the monthly recurring rate for cross connections."[51] Ironically, while claiming that DS1 cross connections are an UNE, Cbeyond also claims that the forward-looking nonrecurring cost of such an "UNE" (i.e., cross connections) is included in the nonrecurring rates for other rate elements, i.e., cross connections are not priced individually. Cbeyond cannot argue both ways – i.e., DS1 cross connections are an UNE but are not priced individually. In any case, DS1 cross connections are not, and have never been, an UNE.

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[46] Greg Darnell Affidavit at ¶¶53-54.

[47] Cbeyond describes a DS1 cross-connection a pair of copper wires used to make connection between the Main Distribution Frame (MDF) and a DSX-1 panel. Greg Darnell Affidavit at ¶11.

[48] DS1 Cross Connection was not included in the original list of UNEs designate by the FCC. Neither was (is) it included in the subsequent revised lists of UNEs designated by the FCC.

[49] Article 9.1.3 of the ICA provides that "SBC Illinois shall price each UNE separately, and shall offer each Unbundled Network Element individually."

[50] Greg Darnell Affidavit at ¶ 52.

[51] Greg Darnell Affidavit at ¶54.

By mischaracterizing DS1 cross connection as an UNE, Cbeyond also mischaracterizes UNE DS1 loop. By Cbeyond's description, an UNE DS1 loop terminates at the customer's premises at one end and on the Main Distribution Frame ("MDF") at AT&T's wire center at the other end. As shown below, this is, however, incorrect and inconsistent with the Joint Stipulation. The charts in the Joint Stipulation clearly indicate that a DS1 loop terminates at the customer's premises at one end and on a DS1 Digital Cross-Connect ("DSX-1") panel at the AT&T wire center at the other end. That is, the cross connection between the MDF and the DSX-1 panel is included in, not apart from, the DS1 loop.

Second, Cbeyond's contention that multiplexed DS3 dedicated transport is an UNE, which AT&T is required to provide, is incorrect, if, by multiplexed DS3 dedicated transport, Cbeyond refers to DS3 UDT with DS1/DS3 multiplex installed at one or both ends of the DS3 transmission path. A DS3 interoffice dedicated transport is an UNE, but it does not include any DS1/DS3 multiplexes ("DS1/DS3 Mux") at either end of the DS3 transmission path. Instead, it terminates on a DS3 Digital Cross-Connect ("DSX-3") panel at both ends. A DS1/DS3 EEL, on the other hand, includes a DS1/DS3 Mux, which is required for connecting DS1 loops to the DS3 UDT. A DS1/DS3 EEL, is, in fact, a combination of UNE DS1 loops and a DS3 UDT that are combined using the appropriate cross-connects and multiplexing. In any case, multiplexed DS3 UDT is not an UNE.

Third, Cbeyond's mischaracterizes high cap loop/transport combinations (i.e., DS1/DS1 EELs and DS1/DS3 EELs). As noted, Cbeyond describes a high cap loop/transport combination as composed of three UNEs: (i) UNE DS1 Loop, (ii) UNE DS1 Cross-connection and (iii) UNE DS1 UDT or UNE Multiplexed DS3 UDT. This characterization, while expedient for supporting its position, is incorrect and inconsistent with the Joint

Stipulation. As discussed, neither DS1 cross-connections nor multiplexed DS3 UDT are an UNE. Moreover, Cbeyond's characterization of DS1/DS1 EELs and DS1/DS3 EELs is inconsistent with the Joint Stipulation. Cbeyond (and AT&T) has stipulated, via charts[52], the configurations of UNE DS1 loops, DS1/DS1 EELs and DS1/DS3 EELs, respectively, which can be summarized as follows:

(1) DS1 loops terminate at the customer's premises at one end and on a DSX-1 panel at the other end in AT&T's wire center, regardless of whether they are standalone DS1 loops, or the DS1 loops of DS1/DS1 EELs or the DS1 loops of DS1/DS3 EELs.[53]

(2) The cross connects between the MDF and DSX-1 panel are included as part of the DS1 loops.

(3) The DS1 UDT of a DS1/DS1 EEL terminates at a DSX-1 panel at both ends of the transmission path, which are located in different AT&T wire centers.

(4) The DS3 UDT of a DS1/DS3 EEL terminates at a DSX-3 panel at both ends, which are located in different wire centers.

(5) A DS1/DS3 Mux is located between the DSX-1 and DSX-3 panels in the wire center where the DS1 loops terminate to connect the DS1 loops to the DS3 UDT. The DS1/DS3 Mux is cross connected to the DSX-1 panel on one side and cross connected to the DSX-3 panel on the other. The DS1/DS3 Mux and the cross-connects between the DSX-1 and DSX-3 panels are all included as part of the transport of the DS1/DS3 EEL.

Clearly, from the four charts in the Joint Stipulation, the DS1 cross connects between the MDF and DSX-1 panels at the wire center where DS1 loops terminate are included as part of the DS1 loops, regardless of whether the loops are standalone DS1 loops or the DS1 loops of EELs. Accordingly, the connection of DS1 loops involves connection of the cross

[52] See the four charts in ¶¶ 10(a) and 10(b) of Joint Stipulation: (1a) Scenario 1 – Before Illustration; (1b) Scenario 1 – After Illustration; (2a) Scenario 2 – Before Illustration; and (2b) Scenario 2 – After Illustration.

[53] However, according to Affidavit of Mark T. Schilling, these DS1 loops are not terminated to the same DSX-1 panel, but to three different DSX-1 panels. See, Affidavit of Mark T. Schilling on Behalf of AT&T Illinois to AT&T Opening Brief ("Mark Schilling Affidavit") at ¶¶ 9 and 17.

connects between the MDF and the DSX-1. The disconnection of the cross connects (between the MDF and DSX-1) would disconnect the DS1 loops. Cbeyond appears to acknowledge that its EEL rearrangements require changing cross connections, i.e., disconnection of existing cross connects and connection of new cross connects.[54] The former (i.e., disconnection of cross connects) would disconnect the DS1 loops of the DS1/DS1 EELs and the latter (i.e., connection of new cross connects) would be required for the connection of standalone DS1 loops or the DS1 loops of DS1/DS3 EEL. As a result, contrary to Cbeyond's belief, its EEL rearrangements requested would involve or require disconnection as well as connection of the DS1 loops.[55]

In summary, Cbeyond mischaracterizes UNEs and UNE combinations. In particular, it mischaracterizes DS1 cross connections as an UNE, apart from DS1 loops, and mischaracterizes multiplexed DS3 UDT as an UNE. Its description of UNE combinations is not only incorrect but also inconsistent with the parties' Joint Stipulation. As a result of its mischaracterizations, it errs in concluding that its EEL rearrangements do not require disconnection or connection of the DS1 loops and that AT&T does not disconnect or connect DS1 loops when performing EEL rearrangements.

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[54] Greg Darnell Affidavit at ¶¶ 53-54. In addition, AT&T also confirms that, in performing the EEL rearrangements requested by Cbeyond, AT&T "would disconnect the existing DS1/DS1 EEL 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." Then it would install "a new jumper cable of the correct length at the same location on the MDF where she had just disconnected the old jumper cable, and would terminate that new jumper cable at a different DSX-1 jack panel at a different location than the old DSX-1 jack panel." Mark Schilling Affidavit at ¶¶ 8-9 and ¶¶ 16-17.

[55] It must be noted that the connection (or reconnection) of DS1 loops in the context of rearranging previously installed EELs might involve less work than the connection of a new DS1 loop. The latter may require other work in addition to the connection of the cross connects between the MDF and DXS-1.

2. Is Cbeyond's contention that, by requesting EEL rearrangements, it orders disconnection and connection of one thing – transport correct?

Regarding how to determine the appropriate charges for EEL rearrangements, Cbeyond states,

> For the purpose of determining what charges should apply, what matters is what is being requested and what a least-cost, most efficient carrier is assumed to do in order to provision what was requested. … … Under the terms [of the ICA], AT&T Illinois only gets to charge Cbeyond the cost that would be associated with the work, that a least cost most efficient carrier would do to complete the order. This cost is reflected in the rates for the network elements listed in the Pricing Schedule and Amendment 1 to the ICA as determined by the Commission.[56]
>
> … …
>
> Although the ICA does not specifically say so, it is implied and is common sense that AT&T Illinois only gets to charge Cbeyond rates for network elements that Cbeyond actually purchases. … … However, in violation of this lawful and common sense interpretation of the application of the ICA Pricing Schedule, AT&T Illinois unlawfully charges Cbeyond to disconnect and connect unbundled DS1 Loops when Cbeyond asks AT&T Illinois to disconnect and connect unbundled transport.[57]
>
> … …
>
> The 4-wire DS1 Loop Initial Connection and Additional connection(s) nonrecurring charges, contained in the EEL Provisioning section of ICA Amendment 1, only applies to add NEW DS1 loops to a multiplexed DS1/DS3 UDT EEL. This charge does not apply to cross-connect existing, previously installed DS1 loops, to new DS3 transport as AT&T Illinois bills it.[58]
>
> … …
>
> The Commission determined that there should be no separate nonrecurring charge to provision new cross connections and no nonrecurring charge exists in the ICA to change cross-connections. Therefore, the appropriate nonrecurring charges to change a cross connection, or to solely install a new cross connection is ZERO. Any and all forward-looking cost that the Commission determined should be recovered through UNE rates associated with cross-connections is either embedded in the nonrecurring rates for other rate

[56] Greg Darnell Affidavit at ¶36.

[57] Greg Darnell Affidavit at ¶39.

[58] Greg Darnell Affidavit at ¶51.

> elements or recovered through the monthly recurring charge for cross connections.[59]

Cbeyond appears to acknowledge that the rates established in ICC Docket No. 02-0864, and incorporated into the ICA[60], should apply to EEL rearrangements. What is at issue seems to be: which rates in the Pricing Schedule of the parties' ICA are applicable to EEL rearrangements. In other words, the issue in dispute is what "network elements" or "unbundled network elements" that Cbeyond considers itself to be purchasing when it requests EEL rearrangements.

Cbeyond asserts that, by requesting an EEL rearrangement, it orders "the disconnection and connection of one thing – transport," and that it does not order the disconnection or connection of the DS1 loops.[61] Thus, by requesting "DS1/DS1→DS1" rearrangements, it considers itself to be requesting disconnection of the DS1 UDTs, but not disconnection of the DS1 loops, of the DS1/DS1 EELs. Likewise, by requesting "DS1/DS1→DS1/DS3" rearrangements, it considers itself to be requesting disconnection of the DS1 UDTs, but not disconnection of the DS1 loops, of the DS1/DS1 EELs <u>and</u> connection of a new multiplexed DS3 dedicated transport of the DS1/DS3 EEL without requesting connection of the DS1 loops of the DS1/DS3 EEL. In short, it considers its EEL rearrangements involve only, or are equivalent to, disconnection of DS1 UDTs and connection of multiplexed DS3 dedicated transport, without affecting the DS1 loops. In other words, by requesting EEL rearrangements it considers itself to be relinquishing an existing

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[59] Greg Darnell Affidavit at ¶54.

[60] The First Amendment to the parties' ICA incorporated into the ICA the UNE rates established in ICC Docket No. 02-0864.

[61] Greg Darnell Affidavit at ¶25. See also Cbeyond's Response to Staff Data Request QL-1.01(A).

UNE transport provided as part of a DS1/DS1 EEL (i.e., DS1 UDT) and purchasing a new UNE transport (i.e., multiplexed DS3 UDT). In doing so, it assumes that the DS1 UDTs of DS1/DS1 EELs and the multiplexed DS3 transport of a DS1/DS3 EEL can be relinquished (or disconnected) and purchased, respectively, without in conjunction with the DS1 loops under the parties' contractual agreement (i.e., ICA). This assumption, however, is incorrect.

First of all, as discussed, Cbeyond's EEL rearrangements do require disconnection and connection of DS1 cross connects, thus disconnection and connection of DS1 loops. Second, multiplexed DS3 dedicated transport is not an UNE and cannot be purchased individually as an UNE under the ICA. Multiplexed DS3 dedicated transport is, however, part of a DS1/DS3 EEL, which is a combination of UNE DS1 loops and a DS3 UDT that are combined using appropriate cross-connects and multiplexing. In other words, when Cbeyond purchases DS1 loops and a DS3 UDT in combination, AT&T would perform the combining using appropriate cross connects and multiplexing. However, Cbeyond cannot, under the ICA, purchase multiplexed DS3 dedicated transport individually or without purchasing the DS1 loops and DS3 UDT in combination.

Third, contrary to its belief, Cbeyond may not under the ICA disconnect the DS1 UDTs of DS1/DS1 EELs without relinquishing the DS1/DS1 EELs or the DS1 loops of the DS1/DS1 EELs. The ICA requires AT&T to provide UNEs and UNE combinations, but not rearrangement of UNE combinations. Cbeyond has the option to purchase UNEs <u>individually</u>. In particular, it may purchase individually DS1 loop, DS1 UDT and a DS3 UDT, respectively. It may also purchase UNEs <u>in combination</u>. In particular, it may purchase a DS1 loop in combination with a DS1 UDT (i.e., DS1/DS1 EEL) and DS1 loops in combination with a DS3 UDT (i.e., DS1/DS3 EEL), respectively. While purchased

individually, DS1 loops, DS1 UDT and DS3 UDT are each a distinctive "UNE" offering under the ICA. Likewise, a DS1/DS1 EEL and DS1/DS3 are each a distinctive "combination" offering under the ICA. The five UNEs and UNE combinations – i.e., (i) DS1 loop, (ii) DS1 UDT, (iii) DS3 UDT, (iv) DS1/DS1 EEL, and (v) DS1/DS3 EEL – represent five different offerings under the parties' ICA.[62]

If Cbeyond previously purchased DS1 loops and DS1 UDTs individually and now wishes to replace the DS1 UDTs with a DS3 UDT, it can simply request disconnection of the DS1 UDTs and connection of the DS3 UDT. This would indeed involve disconnection and connection of one thing - transport. Similarly, if it wishes to remove the DS1 UDTs, it can simply request disconnection of the DS1 UDTs. This again would involve disconnection of one thing - transport. However, Cbeyond did not purchase unbundled DS1 loops and DS1 UDTs individually. Instead it purchased them in combination at the prices applicable to the DS1 loop/DS1 UDT combination. In other words, it purchased DS1/DS1 EELs, which is a single unique "combination" offering under the ICA. Thus, Cbeyond may purchase and relinquish the DS1/DS1 EELs under the ICA by requesting connection and disconnection of the DS1/DS1 EELs, respectively. But it may not under the ICA take them apart and request partial disconnection of the DS1/DS1 EELs. In particular, it may not under the ICA

[62] Aside from the facts that (i) UNE DS1 loop, (ii) UNE DS1 UDT and (iii) DS1/DS1 EEL are three different offerings, a DS1 loop and DS1 UDT purchased individually are not equivalent to the DS1 loop and DS1 UDT purchased in combination (i.e., DS1/DS1 EEL). For example, standalone DS1 loops terminate on a different DSX-1 jack panel at a different location (but in the same wire center) than the DS1 loop of the DS1/DS1 EEL. Mark Schilling Affidavit at ¶¶ 8-9 and ¶¶ 16-17. Likewise, 28 DS1 loops and a DS3 UDT purchased individually are not equivalent to a DS1/DS3 EEL consisting of 28 DS1 loops and a DS3 UDT. For example, the 28 DS1 loops and a DS3 UDT purchased individually do not include any DS1/DS3 Mux, the DS1/DS3 EEL does.

disconnect the DS1 UDTs of DS1/DS1 EELs without disconnecting the DS1/DS1 EELs or the DS1 loops of the DS1/DS1 EELs.

It appears that Cbeyond attempts to treat DS1 loops and DS1 UDTs as standalone UNEs even when provided as part of DS1/DS1 EELs. In other words, it attempts to treat DS1 loops and DS1 UDTs purchased in combination as if they were purchased individually. It presumes that it is permitted under the ICA to disconnect the DS1 UDT of a DS1/DS1 EEL without disconnecting the DS1/DS1 EEL or the DS1 loop of the DS1/DS1 EEL, as it is able to do with DS1 UDTs and DS1 loops purchased individually. In doing so, it presumes that a DS1/DS1 EEL is not a single unique offering but a combination of two different offerings under the ICA.[63] This presumption, however, is incorrect.

A DS1/DS1 EEL is a combination of two UNEs: DS1 loop and DS1 UDT. But it is not a combination of two different offerings under the ICA. Like standalone DS1 loop and standalone DS1 transport, which are each a single unique offering under the ICA, the UNE combination DS1/DS1 EEL is also a single unique offering under the ICA. In other words, (i) DS1 loop, (ii) DS1 UDT and (iii) DS1/DS1 EEL are three distinctive offerings under the ICA. In addition, DS1 loops and DS1 UDTs provided in combination (i.e., DS1/DS1 EELs) are not equivalent to DS1 loops and DS1 UDTs provided individually (i.e., standalone DS1 loops and standalone DS1 UDT).[64] DS1/DS1 EELs, for example, are not subject to the same set of rules and regulation or the same set of prices as the DS1 loops and the DS1 UDTs provided individually. Like other UNE combinations, DS1/DS1 EELs are not only subject to all the

[63] See, Cbeyond Responses to Staff Data Request QL-2.01(A), QL-2.03(A), QL-2.04(A), QL-2.05(A), QL-2.06(A), QL-2,.07(A), QL-2.08(A), QL-2.09(A) and QL-2.10(A).

[64] A DS1 loop provided individually is terminated on a different DSX-1 panel at a different location in the wire center than the DS1 loop of a DS1/DS1 EEL. Mark Schilling Affidavit at ¶¶ 16-17.

rules and regulation governing the underlying UNEs but they are also subject to the additional requirements pertaining to "combination". And the rates and rate structures for the connection of DS1 loops and DS1 UDTs purchased individually are not identical to the rates and rate structures for the connection of DS1/DS1 EELs. Cbeyond seems to have confused UNEs with offerings under the ICA. It mistakenly presumes that a DS1/DS1 EEL, which is a combination consisting of two UNEs, is a combination of two offerings. As a result, it erroneously presumes that it may under the ICA request disconnection of the DS1 UDT of a DS1/DS1 EEL without requesting disconnection of the DS1/DS1 EEL or the DS1 loop of a DS1/DS1 EEL. Contrary to its belief, Cbeyond may not under the ICA request disconnection of the DS1 UDT of a DS1/DS1 EEL without requesting the disconnection of the DS1/DS1 EEL or the DS1 loop of the DS1/DS1 EEL, because the DS1/DS1 EEL is a single unique offering under the ICA.

In summary, Cbeyond contends that its EEL rearrangements do not involve or require disconnection and connection of DS1 loops. By requesting EEL rearrangements, it considers itself to be ordering disconnection and connection of one thing – transport, or in other words, relinquishing (disconnecting) an existing UNE transport and purchasing a new UNE transport. Accordingly, it should incur only transport nonrecurring charges, but not loop nonrecurring charges, for EEL rearrangements. However, these contentions are technically and contractually incorrect.

As discussed above, EEL rearrangements do require disconnection and connection of DS1 cross connects, thus disconnection and connection of DS1 loops. Moreover, multiplexed DS3 dedicated transport is not an UNE and cannot be purchased under the ICA, unless as part of a DS1/DS3 EEL. Moreover, an EEL is a single unique "combination" offering, not a

combination of two different offerings. Cbeyond may not under the ICA request disconnection of the DS1 UDT of an DS1/DS1 EEL without requesting disconnection of the DS1/DS1 EEL or disconnection of the DS1 loop of the DS1/DS1 EEL. As a result, its contention that, by requesting EEL rearrangements, it orders disconnection and connection of one thing – transport or that its EEL rearrangements do not involve or require disconnection and connection of the DS1 loops is technically and contractually wrong. Accordingly, its position that it should incur only transport related nonrecurring charges, but not loop nonrecurring charges, under circumstances where either "DS1/DS1→DS1/DS3" or "DS1/DS1→DS1" rearrangements are performed is incorrect.

Issue No. 3 Is Cbeyond's broad assertion that the CCC charge is not applicable to any DS1 circuits it purchases from AT&T correct?

Cbeyond asserts that the CCC charge should not apply to any DS1 circuits it purchases from AT&T.[65] It appears to have based its broad assertion on the following clarification statements in the AT&T's Cost Study Overview:

> If CCC is provisioned at the time that a DS1 service is provisioned coding can be done within the normal provisioning activities that occur in the DS1, therefore there is no additional CCC non-recurring charge. If however CCC is provisioned on an existing DS1 service, a non-recurring charge does apply because additional activities are required to provision CCC onto the existing DS1 line. (Emphasis added)[66]

Cbeyond argues that, since it "always initially orders all DS1 circuits from AT&T Illinois with Clear Channel Capability,"[67] all of its DS1 circuits (purchased from AT&T) are

[65] Greg Darnell Affidavit at ¶¶64-68.

[66] See Tab1 – Cost Study Overview of the Compliance EEL Provisioning Cost Study in ICC Docket No. 02-0864, which was provided by AT&T in response to Cbeyond Question #28 of Cbeyond First Set of Data Request.

[67] Greg Darnel Affidavit at ¶68.

"initially installed as clear channel circuits."[68] Thus, based on the clarification statements in the Cost Study Overview, it should not be billed any additional CCC charge when it orders DS1 circuits with Clear Channel Capability. Cbeyond appears to have misinterpreted the phrase "at the time that a DS1 service is provisioned" and equated it with the time when a DS1 circuit is provided to Cbeyond. This is not correct. The time of provisioning, referred to in the Cost Study Overview, refers to the time when a DS1 service is first enabled or established on the circuits, not the time when the DS1 circuits are first provided to Cbeyond. The former generally predates the latter. The fact that Cbeyond "always initially orders all DS1 circuits from AT&T Illinois with Clear Channel Capability"[69] has no bearing on whether the CCC charge should apply to the DS1 circuits it orders, unless the DS1 services on the circuits are established at the time, not prior to the time, when Cbeyond orders the circuits. There is no evidence it is the case. Thus, Cbeyond's contention that the CCC charge should not apply to any DS1 circuits it purchases from AT&T because all of its DS1 circuits are ordered with clear channel capability is not supported.

It should be noted that the clarification statements in the AT&T Cost Study Overview are not inconsistent with the parties' ICA. As noted before, the CCC charge was applicable to DS1 interoffice transport only in the original Pricing Schedule of the parties ICA. According to AT&T, the parties did not introduce amendments to change the applicability of the CCC charge. Thus the CCC charge remains, under the ICA, applicable to DS1 interoffice transport only. Therefore, Cbeyond's broad assertion that the CCC charge should not apply to any DS1

[68] Greg Darnel Affidavit at ¶64.

[69] Greg Darnel Affidavit at ¶68.

circuits it purchases from AT&T is not only based on its misinterpretation of the clarification statements in the AT&T Cost Study Overview but also contradicted by the parties' ICA.

Issue No. 4 **Has Cbeyond provided supporting evidence for its allegation that AT&T billed Cbeyond loop service ordering charges for performing EEL rearrangements?**

Cbeyond has been inconsistent or incorrect in its statements with respect to the nonrecurring charges AT&T billed it for connection of DS1/DS1 EEL or for rearrangement of EELs. Regarding the nonrecurring charges that AT&T billed it for connection of DS1/DS1 EELs, Cbeyond states that "[t]he analysis shows that AT&T Illinois billed Cbeyond the following charges to have these DS1 circuits connected: DS1 loop service order and provisioning connection nonrecurring charges, DS1 transport service ordering and provisioning connection nonrecurring charges." (Emphasis added)[70] However, there are no loop nonrecurring charges or transport nonrecurring charges with respect to DS1/DS1 EELs under the ICA. The service ordering and provisioning connection (or disconnection) charges with respect to DS1/DS1 EELs apply to the DS1/DS1 EELs, not individually to the DS1 loops or DS1 UDTs of the DS1/DS1 EELs. Cbeyond has provided no evidence that AT&T billed Cbeyond for connection of DS1/DS1 EELs in the manner it describes (i.e., separate loop and transport nonrecurring charges), which would be inconsistent with the ICA.

Regarding the nonrecurring charges that AT&T billed it for EEL rearrangements, Cbeyond alleges that, based on its analysis, "AT&T Illinois billed Cbeyond the following service ordering and provisioning nonrecurring charges to change or eliminate the transport portion of the circuit: DS1 transport service ordering and provisioning disconnection nonrecurring charges; DS3 transport service ordering and provisioning connection

[70] Greg Darnell Affidavit at ¶29.

nonrecurring charges; DS1 Loop service ordering and provisioning nonrecurring charges." (Emphasis added)[71] In its attempt to substantiate its assertion that AT&T "often erroneously bills Cbeyond in excess of $10,200 to disconnect 28 DS1 UDT facilities and connect one DS3 UDT facilities,"[72] Cbeyond provided the following supposed supporting evidence:

> AT&T Illinois often bills Cbeyond twenty-eight DS1 Loop service ordering disconnection nonrecurring charges of $8.63; twenty-eight DS1 Loop service order connection non-recurring charges of $11.14, twenty-eight DS1 dedicated transport service ordering disconnection nonrecurring charges of $8.63; one DS3 Interoffice UDT service ordering connection nonrecurring charge of $11.44, one DS3 Interoffice UDT provisioning charge of $139.71; twenty-eight 4-wire DS1 Loop Initial disconnection provisioning charges of $11.97; twenty-eight 4-wire DS1 Loop Initial connection nonrecurring charges of $248.22; and twenty-eight Clear Channel Capability protocol conversion nonrecurring charges of $70.32. All these nonrecurring charges combined totals $10,200.63. (Emphasis added)[73].

There are several problems with Cbeyond's assertions. First, Cbeyond claims that AT&T billed it "DS1 transport service ordering and provisioning disconnection nonrecurring charges" for EEL rearrangements. Presumably, the "DS1 transport" refers to the DS1 transport of DS1/DS1 EELs. From Amendment 1 Pricing Schedule, the service ordering and provisioning disconnection charges with respect to DS1/DS1 EELs apply to the DS1/DS1 EELs, not individually to the DS1 loop or DS1 UDT of the DS1/DS1 EELs. Thus there are no rate elements such as DS1 transport service ordering disconnection nonrecurring charge or DS1 transport provisioning disconnection nonrecurring charge with respect to DS1/DS1 EELs under the ICA. Cbeyond has provided no evidence that AT&T billed Cbeyond for disconnection of DS1/DS1 EELs in the manner it describes (i.e., billed it DS1 transport,

[71] Greg Darnell Affidavit at ¶30.

[72] Greg Darnell Affidavit at ¶37.

[73] Greg Darnell Affidavit at Footnote 56. See also Cbeyond Opening Brief at Footnote 35.

instead of DS1/DS1 EEL, service ordering and provisioning disconnection charges), which would be inconsistent with the parties' ICA.

Second, Cbeyond appears to allege that AT&T billed it the charge of $8.63 twice, first as "DS1 loop service ordering disconnection nonrecurring charges" and then as "DS1 dedicated transport service ordering disconnection nonrecurring charges." From Amendment 1 Pricing Schedule, the charge of $8.63 is the service ordering disconnection charge with respect to DS1/DS1 EELs, and it applies to the DS1/DS1 EELs, not individually to the DS1 loops or tDS1 UDTs of the DS1/DS1 EELs. Cbeyond, despite its allegation, has provided no evidence that AT&T indeed billed the DS1/DS1 EEL service ordering disconnection charge twice, which would be inconsistent with the ICA. As such, Cbeyond's allegation regarding the application of the charge of $8.63 is unsupported.

Finally, Cbeyond appears to allege that AT&T billed it "DS1 loop service ordering" nonrecurring charges,[74] and in particular "DS1 loop service order connection non-recurring charges" of $11.14,[75] for EEL rearrangements. This allegation seems to be contradicted by Exhibit A to Formal Complaint as well as by Cbeyond's Response to Staff Data Request. In Exhibit A to Formal Complaint, Cbeyond submits a list of nonrecurring charges that it claims to be loop nonrecurring charges billed for its EEL rearrangements, which it disputes. The list of disputed charges in Exhibit A does not include any loop service ordering charges (connection or disconnection). Also, Cbeyond provided, in response to Staff Data Request, the list of charges that AT&T billed and Cbeyond disputes.[76] DS1 loop service ordering

[74] Greg Darnell Affidavit at ¶30.

[75] Greg Darnell Affidavit at Footnote 56. See also Cbeyond Opening Brief at Footnote 35.

[76] Cbeyond's Responses to Staff Data Request QL-2.04(A)(2).

charges (for connection or disconnection) are not included in this list either. This seems to undermine Cbeyond's allegation that AT&T billed it "DS1 loop service ordering" nonrecurring charges, and in particular the "DS1 loop service order connection non-recurring charges" of $11.14, for EEL rearrangements.

<u>Issue No. 5</u> Has Cbeyond has demonstrated that all charges in Exhibit A to Formal Complaint are the loop nonrecurring charges billed for EEL rearrangements?

Cbeyond contends that the parties' ICA provides for EEL rearrangements, and that by requesting EEL rearrangements, it orders disconnection and connection of one thing – transport. As such, it should incur only transport nonrecurring charges, but not loop nonrecurring charges, for EEL rearrangements. Accordingly, as stipulated in the Joint Stipulation, Cbeyond does not dispute transport nonrecurring charges but disputes all loop nonrecurring charges. It submits in Exhibit A to the Formal Complaint 4,630 disputed billing records with a total balance of $423,040.59[77], which it claims to be loop related nonrecurring charges billed for EEL rearrangements. Cbeyond requests that the Commission "order AT&T to credit Cbeyond for all inappropriate charges imposed".[78] While requesting reimbursement for the charges in Exhibit A, Cbeyond has not made any efforts to show that all billing records in Exhibit A are indeed the loop nonrecurring charges billed for EEL rearrangements.

Staff requested that Cbeyond submit the complete billing records with respect to the supposed EEL rearrangements in Exhibit A, which includes charges for the disconnection of the DS1/DS1 EELs, charges for the connection of the DS1 loops and DS3 UDT of the

[77] Some of the charges in Exhibit A have been reimbursed or credited. So the remaining balance of $423,040.59 reflects the billed amounts as well as the reimbursed amounts, with 89% and 11% of it associated with "DS1/DS1→DS1/DS3" and "DS1/DS1→DS1" rearrangements, respectively. Greg Darnell Affidavit at ¶23.

[78] Cbeyond Opening Brief at p. 21.

DS1/DS3 EELs and charges for the connection of the standalone DS1 loops. Cbeyond did not do so as requested but instead provided the following statements:

> Cbeyond objects to this request on the ground that it is overbroad and not likely to lead to the discovery of admissible evidence, and is unduly burdensome and requires Cbeyond to compile information not maintained in the ordinary course of business and therefore outside the permissible scope of discovery.[79]

According to Cbeyond, Exhibit A contains loop related nonrecurring charges (which it disputes) but not the charges for the disconnection of DS1/DS1 EELs or for the connection of the DS3 UDT of the rearranged DS1/DS3 EELs (which it does not dispute). As discussed in Staff's response to AT&T above, without the complete billing records, one cannot determine if any or all non-recurring charges in Exhibit A are indeed loop nonrecurring charges billed for EEL rearrangements. For example, a charge of $248.22 can be a loop provisioning connection charge for the connection of the DS1 loops of a new (not rearranged) DS1/DS3 EEL. This charge of $248.22 can also be a loop provisioning connection charge for the connection of the DS1s loop of the rearranged (not new) DS1/DS3 EEL. There is no evidence that all billing records in Exhibit A are loop related nonrecurring charges associated with EEL rearrangements and, thus, are within the scope of Cbeyond's Formal Complaint.

In place of the complete billing records, Cbeyond provided the following criteria for identifying the loop nonrecurring charges in Exhibit A associated with "DS1/DS1→DS1/DS3" and "DS1/DS1→DS1" rearrangements, respectively:

> [A]ll records with a circuit identification beginning with 'DHDU' are UNE Loop non-recurring charges where the transport portion of the EEL was

[79] Cbeyond Response to Staff Data Request QL-1.01(A) and (B).

> disconnected and no new UNE transport was installed (i.e., the CFA for the loop was changed to that associated with facilities located in a collocation in the loop's serving wire center). In addition, all records with a circuit identification beginning with 'HCFD' are loop non-recurring charges where the transport portion of an EEL was changed to new UNE DS1 or DS3 transport.[80]

According to these criteria, billing records in Exhibit A with a circuit ID beginning "DHDU" are loop nonrecurring charges billed for "DS1/DS1→DS1" rearrangements. Billing records in Exhibit A with a circuit ID beginning with "HCFD" are loop nonrecurring charges billed for "DS1/DS1→DS1/DS3" rearrangements.[81] While this information is helpful, it has proven to be insufficient for verifying or confirming that all billing records in Exhibit A are loop nonrecurring charges billed for "DS1/DS1→DS1" or "DS1/DS1→DS1/DS3" rearrangements and thus are within the scope of this proceeding. Below are instances where billing records meet the "DHDU" or "HCFD" criterion but are not (or may not be) loop nonrecurring charges billed for either type of EEL rearrangements.

1. Billing records that have a circuit ID beginning with "HCFD" but are not nonrecurring charges billed for "DS1/DS1→DS1/DS3" rearrangements.

These billing records all have a circuit ID beginning with "HCFD", and according to the "HCFD" criterion, should be the loop nonrecurring charges "where the transport portion of an EEL was changed to … … DS3 transport." That is, they should be the loop nonrecurring charges billed for "DS1/DS1→DS1/DS3" rearrangements. But they are not. In fact, they are not <u>loop</u> nonrecurring charges, or any kind of nonrecurring charges billed for

[80] Cbeyond's Response to Staff Data Request QL-1.01(B).

[81] Cbeyond's criteria actually states that all billing records with a circuit ID beginning with "HCFD" are "loop nonrecurring charges where the transport portion of an EEL was changed to new UNE <u>DS1 or DS3</u> transport." However, as the scope of billing disputes with respect to loop nonrecurring charges is limited to the two types of EEL rearrangements: "DS1/DS1→DS1" and "DS1/DS1→DS1/DS3", it is only reasonable to conclude that, based on Cbeyond's identifying criteria, all billing records in Exhibit A with a circuit ID beginning with "HCFD" are or supposed to be the loop nonrecurring charges billed for "DS1/DS1→DS1/DS3" rearrangements.

either type of EEL rearrangements. Instead, they are the nonrecurring charges billed for the connection of DS1/DS1 EELs — i.e., DS1/DS1 EEL provisioning connection nonrecurring charge. Such examples include, but may not be limited to, loops with circuit IDs: ***BEGIN CONFIDENTIAL*** XXXXXXXXX, XXXXXXXX, and XXXXXXXXX ***END CONFIDENTIAL***. As the scope of the billing disputes in this proceeding is limited to loop nonrecurring charges billed for EEL rearrangements, the nonrecurring charges for the connection of DS1/DS1 EELs are evidently outside the scope of this proceeding. However, Cbeyond includes these charges among the disputed billing records in Exhibit A and requests reimbursement of them.

In summary, these billing records meet the "HCFD" criterion prescribed by Cbeyond but they are not loop nonrecurring charges associated with "DS1/DS1→DS1/DS3" rearrangements. Thus the "HCFD" criterion has clearly failed, in these instances, to separate billing records associated with the connection of DS1/DS1 EELs from billing records associated with "DS1/DS1→DS1/DS3" rearrangements. Therefore, the "HCFD"/"DHDU" criteria as prescribed by Cbeyond is inadequate, if not improper, for confirming or verifying that all the billing records (in Exhibit A) are loop nonrecurring charges billed for EEL rearrangements.

2. *Billing records that have a circuit ID beginning with "HCFD" but should not have been included among the disputed loop nonrecurring charges in Exhibit A.*

These billing records all have a circuit ID beginning with "HCFD", and according to the "HCFD" criterion, should be the loop nonrecurring charges "where the transport portion of an EEL was changed to … … DS3 transport." That is, they should be the <u>loop</u> nonrecurring charges billed for "DS1/DS1→DS1/DS3" rearrangements. Nonetheless, they are not <u>loop</u> nonrecurring charges. Instead, they are the charges for the disconnection of

DS1/DS1 EELs — i.e., DS1/DS1 EEL provisioning disconnection charges — and may or may not be associated with "DS1/DS1→DS1/DS3" rearrangements. Such billing records include, but may not be limited to, loops with circuit IDs: ***BEGIN CONFIDENTIAL*** XXXXXXXXX and XXXXXXXXX ***END CONFIDENTIAL***. As Cbeyond has stated in its response to a Staff Data Request, it does not dispute nonrecurring charges for the disconnection of DS1/DS1 EELs ($17.20 for initial and $12.13 for additional) associated with "DS1/DS1→DS1/DS3" rearrangements.[82] So, regardless of whether these billing records are associated with "DS1/DS1→DS1/DS3" rearrangements, they should not have been included among the disputed loop nonrecurring charges in Exhibit A, of which Cbeyond requests reimbursement from AT&T.

Again, these billing records all meet the "HCFD" criterion prescribed by Cbeyond but are not loop nonrecurring charges associated with "DS1DS1→DS1/DS3" rearrangements. Thus, Cbeyond's "HCFD" criterion has failed, in these instances, to separate billing records associated with the disconnection of DS1/DS1 EELs (which Cbeyond does not dispute) from the billing records associated with the connection of DS1 loops in "DS1/DS1→DS1/DS3" rearrangements (which Cbeyond disputes). This again shows that the "HCFD"/"DHDU" criteria prescribed by Cbeyond is insufficient, if not improper, for confirming or verifying that all charges in Exhibit A are loop nonrecurring charges associated with EEL rearrangements.

3. *Loop circuits that have a circuit ID beginning with "HCFD" but create an improbable outcome under the "HCFD" criterion.*

Exhibit A includes a significant number of loop circuits that, according to the "HCFD" criterion, have undergone the "DS1/DS1→DS1/DS3" rearrangement <u>twice</u> at different times

[82] Cbeyond's Responses to Staff Data Request QL-2.04(A)(1).

since 2006. Such examples include, but not limit to, loops with a circuit ID: ***BEGIN CONFIDENTIAL*** XXXXXXXXX, XXXXXXXXX, XXXXXXXXX, XXXXXXXXX, XXXXXXXXX, XXXXXXXXX, XXXXXXXXX, and XXXXXXXXX ***END CONFIDENTIAL***. By the "HCFD" criterion, these billing records with a circuit ID beginning with "HCFD" should be the loop nonrecurring charges billed for the "DS1/DS1→DS1/DS3" rearrangement. By the "HCFD" criterion, however, the loop nonrecurring charges have been billed on these loop circuits for "DS1/DS1→DS1/DS3" rearrangements twice at different times since 2006. In other words, by the "HCFD" criterion, these loop circuits have undergone the "DS1/DS1→DS1/DS3" rearrangement twice since 2006. This is improbable, unless Cbeyond changed the DS1/DS1 EELs to a DS1/DS3 EEL, then changed the rearranged DS1/DS3 EEL to DS1/DS1 EELs and again changed the DS1/DS1 EELs to a DS1/DS3 EEL on these loop circuits, which is highly unlikely though not impossible.

Clearly, the "HCFD" criterion is not workable for identifying or selecting billing records that are loop nonrecurring charges associated with "DS1/DS1→DS1/DS3" rearrangements, given this criterion has, in these instances, created an improbable outcome (i.e., loop circuits undergoing the "DS1/DS1→DS1/DS3" rearrangement twice at different times since 2006).

It should be noted that these are not the exhaustive list of charges in Exhibit A that have a circuit ID beginning with "HCFD" but are not (or may not be) loop nonrecurring charges associated with "DS1/DS1→DS1/DS3" rearrangements. However, they are sufficient to conclude that the "HCFD"/"DHDU" criteria prescribed by Cbeyond is insufficient, if not improper, for confirming or verifying that all billing records in Exhibit A are loop

nonrecurring charges associated with EEL rearrangements. As shown, not all billing records in Exhibit A are loop nonrecurring charges associated with either type of EEL rearrangements even though all of them meet the "HCFD" or DHDU" criterion.

In addition to providing the "HCFD"/"DHDU" criteria (which have proved to be insufficient, if not improper), Cbeyond has made little efforts to demonstrate that all billing records in Exhibit A are loop nonrecurring charges associated with EEL rearrangements. Regarding its method of analysis of the billing records, Cbeyond states,

> Because of the sheer volume of circuits, orders and disputed charges involved in this complaint, it would not be productive to address this dispute on a circuit by circuit, or order by order, basis in this affidavit. Exhibits GDJ-1, GDJ-2 and GDJ-3 do, however, substantiate and support all of the statements made in this affidavit. To efficiently address and substantiate Cbeyond's claim in this Affidavit, I have sampled circuits listed on these exhibits (the same DS1 circuits are on all three exhibits) and have performed a detailed analysis on the circuits' provisioning, billing and payment history.[83]

Cbeyond appears to argue that it is not productive to examine <u>all</u> billing records to verify whether they are the <u>loop</u> nonrecurring charges associated with EEL rearrangements. Instead, it is more efficient and productive to select a sample of the billing records for examination and analysis. Cbeyond presents the billed amounts and reimbursed amounts associated with seven loop circuits in Exhibit GDJ-4 to its Opening Brief, which are associated with fourteen billing records. Presumably, these are the billing records in Exhibit A Cbeyond has sampled in order to "sufficiently address and substantiate Cbeyond's claim" in its affidavit. However, an examination of fourteen billing records would not help much to determine whether the 4,630 billing records in Exhibit A are indeed loop nonrecurring

[83] Greg Darnell Affidavit at ¶28. Exhibit GDJ-3 (to Cbeyond's Opening Brief) contains the same list of billing records as Exhibit A to the Formal Complaint. Both exhibits include a list of billing records but no analysis of these billing records. Neither do the other Exhibits to Cbeyond's Opening Brief.

charges associated with EEL rearrangements. As shown, some of the 4,630 billing records in Exhibit A are evidently not the loop nonrecurring charges associated with EEL rearrangements.

Summary Cbeyond requests that the Commission enter judgment in its favor, finding that the parties' ICA provides for EEL rearrangements. It also requests that the Commission order AT&T to reimburse Cbeyond the disputed loop nonrecurring charges included in Exhibit A. However, Cbeyond has made no effort to demonstrate that all billing records in Exhibit A are loop nonrecurring charges associated with EEL rearrangements. As shown, not all billing records in Exhibit A are loop nonrecurring charges associated with EEL rearrangements. If the Commission is to construe that the parties' ICA provides for EEL rearrangements, which it should not, the Commission should not grant Cbeyond's request for reimbursement for the total balance of $423,040.59 in Exhibit A. Instead, the Commission should only grant Cbeyond's request for reimbursement for the billing records that Cbeyond has demonstrated to be loop nonrecurring charges that AT&T billed it for EEL rearrangements. In other words, the Commission should, under no circumstances, grant Cbeyond's request for reimbursement for billing records that Cbeyond has not demonstrated to be the loop nonrecurring charges that AT&T billed it for EEL rearrangements.

VI. Conclusion

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

September 28, 2010

Respectfully submitted,

/s/_____

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

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

STATE OF ILLINOIS	)	
	)	SS
COUNTY OF COOK	)	

AFFIDAVIT OF QIN LIU

I, Qin Liu, first duly being sworn upon oath, depose and state as follows:

1. My name is Qin Liu. My business address is 160 North LaSalle Street, Suite C-800, Chicago, Illinois 60601. I am a Rate Analyst in the Telecommunications Division of the Illinois Commerce Commission.

2. I have read the Reply Brief of the Staff of the Illinois Commerce Commission ("Reply") dated September 28, 2010.

3. I have personal knowledge of the facts and matters discussed in the Reply and, to the best of my knowledge, information and belief, the facts and non-legal opinions expressed in the Reply are true and correct and, if sworn as a witness, I could testify concerning them.

Qin Liu

SUBSCRIBED AND SWORN to before me this 28th day of September, 2010.

NOTARY PUBLIC

OFFICIAL SEAL
ALICE H JOHNSON
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:02/01/13