

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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

**AT&T ILLINOIS' RESPONSE TO CBeyond COMMUNICATIONS, LLC'S  
BRIEF ON EXCEPTIONS TO THE ALJ'S PROPOSED ORDER**

Illinois Bell Telephone Company (“AT&T Illinois”), by and through its attorneys, hereby files its Response to Cbeyond Communications LLC’s (“Cbeyond”) Brief On Exceptions to the ALJ’s Proposed Order. For the following reasons, AT&T Illinois respectfully requests that Cbeyond’s exceptions be denied in full.

**ARGUMENT**

**I. THE PROPOSED ORDER DOES NOT DECIDE CONTESTED ISSUES OF FACT AND WAS THE ANTICIPATED RESULT OF THE PROCESS TO WHICH THE PARTIES AGREED.**

In the first substantive section of its Brief on Exceptions (“BOE”), Cbeyond makes two general arguments why the Proposed Order’s dismissal of the Complaint is wrong and why the case should instead be set for an evidentiary hearing. First, Cbeyond claims that there are disputed issues of material fact and that the issuance of a Proposed Order at this time represents a “deviation” from the parties’ agreement regarding the prosecution of the case. Cbeyond BOE at 6. Second, Cbeyond contends that the Proposed Order is premature because (a) the parties and Staff disagree about what rate elements apply to the orders that Cbeyond submits; and (b) the

parties submitted contradictory cost support for those rates. *Id.* Neither argument is compelling, as explained in detail below.

**A. Cbeyond's Objections To The Adjudicatory Process To Which It Agreed Are Untimely And Without Merit.**

In its Exceptions, Cbeyond suggests that the Proposed Order is “premature” and a “deviation from the agreement of the parties.” Cbeyond BOE at 6. Those suggestions are meritless. In reality, Cbeyond simply does not like the result of the process to which it agreed and in which it fully participated. Of course, at no point in Cbeyond’s initial or response brief did it lodge any objections or raise any concerns about the process. It was not until the Administrative Law Judge (“ALJ”) released her Proposed Order, in which she ruled against Cbeyond, that Cbeyond is suddenly heard to complain.

Indeed, it is implausible that Cbeyond did not understand that this process might result in a determination that the matters in dispute could be decided without an evidentiary hearing. That is precisely what the parties proposed and what the ALJ adopted as the way to proceed with this case. The two sources to which Cbeyond points in support of its argument both serve to defeat it. As the email from Mr. Huttenhower made clear, the process AT&T Illinois proposed was designed to give each party a chance to argue that it was entitled to relief, based on the parties’ joint stipulation and affidavits each party chose to submit, and that afterward a determination would be made whether there were disputed issues of material fact that needed to be resolved. Cbeyond BOE at 6-7 and Ex. B. The statements by the ALJ at the October 26 status conference confirm that, after the briefing, the ALJ would decide whether an evidentiary hearing was necessary. As set forth in the Proposed Order, the ALJ determined that one was not necessary in order for her to rule on Cbeyond’s Complaint.

Moreover, Cbeyond filed an initial and reply brief in which it argued that it was entitled to a judgment in its favor based on the record before the Commission. *See* Cbeyond Init. Br. at 20 (“request[ing] that the Commission grant its Complaint and Request for Declaratory Ruling [and] enter judgment in favor of Cbeyond and against AT&T ...”); Cbeyond Response Br. at 29 (same quote). It cannot now be heard to argue that there is something unfair or surprising about the ALJ’s determination that AT&T Illinois, not Cbeyond, was entitled to judgment in its favor. In addition, Cbeyond did not argue in either its initial brief or its response brief that there were disputed issues of material fact that precluded judgment; in fact it argued exactly the opposite. Cbeyond Init. Br. at 20; Cbeyond Response Br. at 29. It was not until it filed exceptions that Cbeyond started to argue that such disputed issues of material fact existed. Thus, Cbeyond has waived such arguments and is estopped from raising them here.

As discussed below, the Proposed Order sets forth a complete and well-reasoned analysis supporting judgment in AT&T Illinois’ favor, based on the stipulation between the parties, the uncontested language of the parties’ interconnection agreement (“ICA”), and the correct application of state contract and federal telecommunications law. The ALJ correctly determined that, under the plain and unambiguous language of the ICA, AT&T Illinois has properly billed Cbeyond for the work Cbeyond requested and AT&T Illinois provided. Nothing in that analysis implicates any disputed issues of material fact.

**B. There Are No Disputed Issues of Material Fact To Be Resolved.**

Cbeyond divides its arguments about the existence of disputed factual issues into three subparts: (1) the parties’ ICA contains rates for the disconnection of the transport portion of an EEL (Cbeyond BOE at 7-10); (2) these rates are appropriate for the orders that Cbeyond submitted (*id.* at 10-11); and (3) the ICA also contains rates either for adding DS3 transport to a

DS1 loop or for connecting a DS1 loop to collocation (*id.* at 11-14). In each subpart, Cbeyond awkwardly struggles to come up with supposed issues of disputed fact to justify its desire for an evidentiary hearing. In reality, the issues that Cbeyond raises do not involve disputed facts or, if there is disagreement, those disputes are not material to the Commission's resolution of the case. The Commission accordingly should reject Cbeyond's contentions.

Before addressing the various subparts of Cbeyond's argument, AT&T Illinois will discuss a fundamental problem underlying Cbeyond's entire position here. Cbeyond insists that the Proposed Order was incorrect in concluding that the ICA "does not contain rates specific to the rearrangement of EELs." Cbeyond BOE at 7. Cbeyond, however, agrees that the service orders at issue here involve the "rearranging" of EELs, since it asserted in its Complaint that it only wanted to order a "rearrangement" (Complaint ¶ 39) of its DS1/DS1 EELs or "to reassign cross-connections" (*id.* ¶ 26). And Cbeyond has conceded that "no provision of the parties' interconnection agreement contemplates mere cross connection re-assignments."<sup>1</sup> Thus, the ICA does not allow Cbeyond simply to pay just a cross-connection charge to accomplish a "rearrangement."

Consistent with this, Cbeyond asserted from the outset that the ICA needs to be amended to provide for the "rearrangement" service Cbeyond demands. Complaint ¶ 57. There is, of course, an irreconcilable inconsistency between Cbeyond's admission that the ICA must be amended to provide for "rearrangements" and its current position that the Proposed Order ignored specific rate elements in the ICA that would allow Cbeyond to accomplish "rearrangements" in the manner and at the price it desires. By seeking an amendment, Cbeyond conceded that the existing ICA does not provide for a rearrangement service, or a corresponding rate. This inconsistency also completely undermines Cbeyond's argument that the Proposed

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<sup>1</sup> Cbeyond Response In Opposition to Motion to Dismiss at 12.

Order (at 29) was wrong in concluding that the rearrangement of EELs was a product or service “not contemplated in” Docket No. 02-0864, the proceeding that established the framework for calculation of the UNE loop and nonrecurring rates found in the ICA.

**1. Cbeyond’s own submissions confirm that the Proposed Order made the correct decision about the rates applicable to disconnection of DS1 transport.**

Cbeyond first points to certain rates in the ICA, which it asserts are applicable to disconnecting the transport portion of a DS1 EEL (as opposed to disconnecting “the whole EEL”). Cbeyond BOE at 8. Cbeyond then asserts that, because rates exist for disconnecting the transport portion of an EEL, the Proposed Order incorrectly concluded that the ICA contained no rates for rearrangements, and it asks for an evidentiary hearing because “there is a material factual error [sic] in dispute.” *Id.* at 10.

Cbeyond claims a factual dispute exists about whether the rates applicable to disconnecting the transport portion of a DS1/DS1 EEL, rather than the rates applicable to disconnecting the whole EEL, apply to its orders. Cbeyond, however, is the architect of such a dispute. Cbeyond asserts in its BOE (at 8-9) that the rates applicable to its orders are specific rates in the ICA for disconnecting only the transport portion of a DS1/DS1 EEL – an \$8.63 service order charge (Pricing Appendix, line 132<sup>2</sup>) and a \$12.35 disconnection provisioning charge (Pricing Appendix, line 194).<sup>3</sup> But Cbeyond previously stated in discovery responses,

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<sup>2</sup> The Pricing Appendix is Attachment A to the First Amendment to the parties’ ICA. This amendment is Attachment F to AT&T Illinois’ Opening Brief and Exhibit C to Cbeyond’s Response Brief.

In the Pricing Appendix, the actual names of the rate elements that Cbeyond lists on page 8 of its BOE are as follows:

- Line 156 – Electronic Non-channelized DS1 EEL Service Order (Disconnection);
- Line 132 – Electronic DS1 Transport Service Order Charge per ASR or LSR (Disconnection);
- Line 207 – 4-Wire DS1 Digital Loop to DS1 Interoffice Dedicated Transport Collocated – Initial (Disconnection); and
- Line 194 – DS1 Interoffice UDT – Collocated – Initial (Disconnection).

<sup>3</sup> Although Cbeyond cites to pages 12-16 of its Response Brief as previously setting forth its argument about the existence of these two rates (*see* Cbeyond BOE at 7 n.25), the cited pages of the Response Brief do not discuss different types of disconnection provisioning charges.

submitted by both parties during the briefing, that the ordering and provisioning nonrecurring charges that “are applicable to this type of network change” (*i.e.*, rearrangement of DS1/DS1 EEL to DS1/DS3 EEL) are two entirely different rate elements – an \$8.63 service order charge (Pricing Appendix, line 156) and a \$17.20 disconnection provisioning charge (Pricing Appendix, line 207). *See* Cbeyond Response to Staff Data Request QL-2.01(A)(2)(i).<sup>4</sup> The Affidavit of Greg Darnell also indicates that these particular service order and disconnection provisioning charges (\$8.63 and \$17.20) are appropriate for the orders that Cbeyond submitted. *See* Exhibit B to Cbeyond’s Opening Br. (Darnell Aff.) ¶ 37 n.55. These are the same rates that Cbeyond now asserts are only applicable to disconnection of “the whole EEL” (Cbeyond BOE at 8) and that it now asserts AT&T Illinois should not have charged. A party does not create a disputed issue of fact by taking contradictory positions, and there is no need for an evidentiary hearing to allow Cbeyond to explain which of its two competing positions it now believes is correct. This is but another example of the ever-changing nature of the theories underlying Cbeyond’s case. *See, e.g.*, AT&T Illinois Reply Br. at 4-5.

In any event, any factual dispute about the proper rate for disconnecting DS1 transport, assuming such a dispute exists, is not material, because Cbeyond has not challenged the charges that AT&T Illinois billed for the disconnection of DS1 transport. Cbeyond admits that it has to pay ordering and provisioning non-recurring charges for the disconnection of DS1 transport. Cbeyond BOE at 9-10. Cbeyond also must agree that the transport-related charges that AT&T Illinois billed are correct, because the chart of disputed charges attached as Exhibit A to the Complaint does not include charges in any of the dollar amounts (\$8.63, \$12.35, \$17.20) listed in

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<sup>4</sup> This data request response is included in Attachment I to AT&T Illinois’ Reply Brief. The response is also Exhibit B to Cbeyond’s Response Brief.

the four bullet points found on page 8 of Cbeyond's BOE. If these charges are not in dispute between the parties, they are not material to the Commission's resolution of the Complaint.

**2. There is no material issue of disputed fact regarding the rates applicable to disconnection of DS1 transport.**

Cbeyond's second argument also involves the Proposed Order's supposed conclusions about the rates for disconnection of DS1 transport, and this argument fails for the same reasons as its first argument. Cbeyond again contends that the Proposed Order ignores the evidence it introduced regarding specific rates supposedly applicable to disconnecting only the transport portion of a DS1/DS1 EEL, and that the decision instead allows AT&T Illinois to "make an *ad hoc* choice of which rates under the ICA" apply to Cbeyond's orders. Cbeyond BOE at 11.

As explained in subsection B(1) above, Cbeyond takes a contradictory position on which service order and provisioning charges are applicable to the disconnection of transport for a DS1/DS1 EEL. Its own discovery response and Mr. Darnell's affidavit affirm that one set of rates (\$8.63 plus \$17.20 = \$25.83) is "applicable to this type of network change,"<sup>5</sup> while its BOE purports to endorse a lower set of rates (\$8.63 plus \$12.35 = \$20.98). *See* Cbeyond BOE at 10-11. Although Cbeyond asserts that Staff and AT&T Illinois failed to rebut the appropriateness of the lower rate set forth in the BOE, Cbeyond's own admission that the higher set of rates is "applicable" serves as more than adequate rebuttal.

In addition, also as explained in subsection B(1), any dispute about which set of rates AT&T Illinois should have charged for disconnecting transport for a DS1/DS1 EEL is not material to the Commission's resolution of the Complaint. The chart of disputed charges attached to the Complaint does not include any service ordering and provisioning charges related

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<sup>5</sup> Exhibit B to Cbeyond Response Br. (Cbeyond Response to Staff Data Request QL-2.01(A)(2)(i)); Attachment I to AT&T Illinois Reply Br. (same); Exhibit B to Cbeyond Opening Br. (Darnell Aff.) ¶ 37 n.55.

to disconnection of transport, so Cbeyond must agree that AT&T Illinois' billing of such charges is correct.

Furthermore, Cbeyond's attack on the Proposed Order here is objectionable on procedural grounds. Although Cbeyond refers to the Proposed Order's "determination to the contrary" regarding the choice of rates for disconnection of transport (Cbeyond BOE at 10) and to its conclusion that AT&T Illinois can "make an *ad hoc* choice of which rates" apply (*id.* at 11), in neither instance does Cbeyond provide a citation to any passage in the Proposed Order setting forth the conclusions it challenges. Such generalized attacks on the contents of a Proposed Order violate the spirit, if not the letter, of Section 200.830 of the Commission's Rules of Practice. *See* 83 Ill. Admin. Code § 200.830(b) (stating that exceptions "with respect to statements, findings of fact or rulings of law must be specific").

**3. The Proposed Order correctly determined the rates applicable to connection of a DS1 loop to DS3 transport or collocation.**

Cbeyond's third argument addresses the rates applicable when DS3 transport is added to a DS1 loop to create a DS1/DS3 EEL (Scenario 1, discussed in Cbeyond BOE at 11-13) or when a DS1 loop is connected to collocation belonging to Cbeyond or a third party (Scenario 2, discussed in *id.* at 13-14). Since Cbeyond treats the two scenarios separately, AT&T Illinois will respond to them separately.

**(a) Scenario 1**

Cbeyond's arguments regarding Scenario 1 are confusing. The bulk of the discussion seems to argue that a factual dispute exists whether the DS3 transport connection charge – which Cbeyond does not specify – includes the costs AT&T Illinois incurs in cross-connecting a DS1 loop to DS3 transport. Cbeyond BOE at 12. But Cbeyond adds that, if it is wrong about what work activities the DS3 transport connection charge includes, it would be obligated to pay "the

ICA's standalone DS3 nonrecurring charge" (*id.* at 13) – which it also does not specify. Interspersed in the discussion are assertions that Cbeyond objects to the payment of loop nonrecurring charges because they over-compensate AT&T Illinois for the work it actually performs, although Cbeyond provides no record citations to support these assertions. *See id.* at 12, 13.

Cbeyond contends that the Proposed Order unfairly accuses it of attempting to re-litigate aspects of Docket No. 02-0864 (Cbeyond BOE at 11), but Cbeyond's position here actually confirms the Proposed Order's accusation. By calling for an evidentiary hearing that would examine whether "the EEL-specific DS3 transport rate fully compensates AT&T for the work it is allegedly performing" (*id.* at 13) or whether "a full loop NRC for a short cross-connect grossly overcompensates AT&T" (*id.* at 12), Cbeyond clearly seeks to re-evaluate matters that the Commission examined and decided in Docket No. 02-0864.<sup>6</sup> As AT&T Illinois explained previously, such a collateral attack is improper. *See* AT&T Illinois Opening Br. at 21-23.

Moreover, what gets lost in Cbeyond's fog of words is that Cbeyond does not dispute the propriety of "the EEL-specific DS3 transport rate" (Cbeyond BOE at 13) that, it claims, should be the subject of an evidentiary hearing. In response to the same Staff data request discussed above, Cbeyond stated that a \$139.71 charge to install new DS3 transport was "applicable" to the rearrangement of a DS1/DS1 EEL to a DS1/DS3 EEL. *See* Exhibit B to Cbeyond Response Br. (Cbeyond Response to Staff Data Request QL-2.01(A)(2)(i)). It also agreed in the parties' Joint Stipulation that it did not dispute the transport installation charge that AT&T Illinois bills in Scenario 1. *See* Joint Stipulation at 6, ¶ 10(a). If Cbeyond does not dispute this charge, any

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<sup>6</sup> *See also* Cbeyond BOE Ex. A at 9 (proposing exception language stating that "an evidentiary hearing is required relating to the rate elements associated to the work performed by AT&T for the services Cbeyond requests").

alleged inadequacy in the Proposed Order's discussion of the charge is irrelevant and involves facts that are not material to the Commission's decision.

**(b) Scenario 2**

Cbeyond makes one primary argument regarding Scenario 2. It criticizes the Proposed Order for ignoring Sections 5.2 and 5.3 of the TRO/TRRO Amendment to the ICA (Attachment G to AT&T Illinois Opening Br.), which supposedly sets forth the process applicable to connecting a UNE loop to collocation.

Cbeyond's reliance on Sections 5.2 and 5.3 is misplaced for several reasons. First, Cbeyond made no mention of these contract sections in its opening brief, so that it waived its ability to rely on them in its Exceptions. *See* AT&T Illinois Reply Br. at 5 n.4.<sup>7</sup> Second, to the extent that Cbeyond did rely on these sections earlier in the case, in responding to AT&T Illinois' motion to dismiss,<sup>8</sup> AT&T Illinois explained at that time why neither section was relevant. That is, Sections 5.2 and 5.3 address the connection of UNE loops to collocation and transport. They do not address what is involved here: the "rearrangement" of an existing UNE combination into something else. *See* AT&T Illinois Reply in Support of Motion to Dismiss at 9-11. Third, as addressed below in Section II, Cbeyond fundamentally mischaracterizes the purpose of the TRO/TRRO Amendment and the specific situations in which the provisions Cbeyond cites are applicable.

Moreover, Cbeyond's argument regarding Scenario 2 is completely at odds with the relief it seeks in its exceptions: *i.e.*, an evidentiary hearing to address unresolved issues of material fact regarding the rates applicable to Cbeyond's service orders. Instead, Cbeyond simply asserts that

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<sup>7</sup> Although Cbeyond did refer to these sections in its Reply Brief, it provided no explanation why it believed they were controlling. *See* Cbeyond Response Br. at 19. Given that Cbeyond made scant mention of this argument in its briefing, it has no justification for complaining that the Proposed Order "barely addresses this scenario at all." Cbeyond BOE at 14.

<sup>8</sup> *See* Cbeyond Response in Opposition to Motion to Dismiss at 6-7.

the Proposed Order is wrong about Scenario 2 as a matter of law for failing to take into account Sections 5.2 and 5.3. *See* Cbeyond BOE at 14 (calling Proposed Order’s conclusion “plainly incorrect”). Whether these two sections provide a “clear” process applicable to the connection of loops to collocation (*id.*) is a question of contract interpretation, not a factual dispute which can only be resolved through an evidentiary hearing. The Proposed Order simply interpreted the ICA in a different way than Cbeyond wanted.

**II. CBeyond’S EXCEPTIONS BRIEF FAILS TO IDENTIFY ANY PROVISION OF FEDERAL LAW THAT THE PROPOSED ORDER VIOLATES.**

In Section II of its exceptions brief, Cbeyond asserts that the Proposed Order violates several provisions of federal law – including provisions that Cbeyond had never even mentioned previously. Cbeyond’s arguments in this section raise pure questions of law, undermining Cbeyond’s claim that the ALJ erred by not holding evidentiary hearings before issuing the Proposed Order. And as explained below, none of Cbeyond’s legal arguments has any merit.

Cbeyond’s primary argument is based on the FCC’s *TRO* decision and § 6.1 of the TRO/TRRO Amendment to the parties’ ICA.<sup>9</sup> These provisions require AT&T Illinois to “provide access to Section 251 UNEs and combinations of Section 251 UNEs without regard to whether CLEC seeks access to the UNEs to establish a new circuit or to *convert an existing circuit* from a service to UNEs . . . .” Cbeyond BOE at 16-17 (quoting TRO/TRRO Amendment § 6.1) (emphasis added). The Proposed Order correctly determined that the foregoing language does not apply to Cbeyond’s requests to “disconnect” or “rearrange” its EELs, because they are not requests to “establish a new circuit” or to “*convert an existing circuit* from a service to UNEs.” Proposed Order at 32 (emphasis added). As the order explained, “[a]n existing circuit,” as that term is used in ¶ 587 of the *TRO* and § 6.1 of the TRO/TRRO Amendment, is “a circuit

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<sup>9</sup> The TRO/TRRO Amendment is Attachment G to AT&T Illinois’ Opening Brief.

that was a Cbeyond customer being served through special access tariffs and now will keep the same circuit but pay UNE prices.” Proposed Order at 32. “If the parties had intended [in § 6.1] that to ‘convert an existing circuit’ meant to convert an existing EEL,” the Proposed Order concluded, “the ICA would say just that, i.e., to ‘convert an existing EEL.’” *Id.*

Cbeyond’s argument that the service orders at issue here are orders to “convert an existing circuit from a service to UNEs” blatantly ignores the history and purpose behind the *TRO* and the *TRO/TRRO* Amendment. As AT&T Illinois has repeatedly explained, and the Proposed Order determined, the *TRO*’s reference to “converting” existing circuits is addressing the conversion of “wholesale services (*e.g.*, special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale.” *TRO*, ¶ 587. The *TRO* and the *TRO/TRRO* Amendment do not address changing from one UNE or UNE combination to another UNE or UNE combination, which is what is at issue here. *See* Proposed Order at 32. The Proposed Order also properly took into account the functional difference between converting from a special access service to UNEs (a billing function only) and disconnecting an EEL, explaining:

[I]n ¶ 587 of the *TRO*, the FCC found that re-connect and disconnection fees in the [first scenario] could deter conversion to UNEs or UNE combinations from special access service. The FCC’s reasoning was that ILECs are never required to perform a conversion in order to continue serving their own customers because it is only a billing function. That reasoning does not apply here. The two scenarios at issue here[, disconnecting an EEL to connect a portion of the loop with either DS3 transport or third-party transport,] involve more than billing changes and, at the very least, there is work done on the cross connects.

Proposed Order at 32.

The other provisions of federal law on which Cbeyond relies are equally inapplicable. Cbeyond asserts, for the very first time, that the Proposed Order is preempted by 47 U.S.C. § 253(d). *See* Cbeyond BOE at 15. But Cbeyond says nothing else about preemption, or even

quotes from the cited provision. Section 253(d) provides: “If, after notice and an opportunity for public comment, *the [Federal Communications] Commission* determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, *the Commission* shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary . . . .” 47 U.S.C. § 253(d) (emphases added). On its face, it is clear that § 253(d) can be applied only by the *FCC*, not by this Commission, so Cbeyond’s invocation of the statute can only be viewed as a veiled threat. Moreover, the Proposed Order would be subject to the FCC’s preemptive authority only if it “prohibit[ed] or ha[d] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service” (47 U.S.C. § 253(a)). In this case, there is no basis for Cbeyond to claim that the Proposed Order prohibits or has the effect of prohibiting it from providing telecommunications service. The only issue here is whether “AT&T has provided Cbeyond with EELs and EEL rearrangements according to the rates and terms of the ICA.” Proposed Order at 28.

Aside from the *TRO* and Section 253, Cbeyond claims that the Proposed Order violates three other provisions of federal law by purportedly “tying” the UNEs in an EEL “such that the ‘cost of separating them’ is the cost of disconnecting two UNEs when only one is ordered to be disconnected.” Cbeyond BOE at 16 (emphasis in original). First, Cbeyond asserts that the Proposed Order violates 47 U.S.C. § 251(c)(3). Cbeyond BOE at 15, 16 n.4. However, as AT&T Illinois has repeatedly explained, and which Cbeyond has not addressed, Section 251(c) is inapplicable to the parties’ ICA because the 1996 Act gives carriers the right to privately negotiate an ICA “without regard” to the duties set forth in Sections 251(b) and (c) of the 1996 Act (47 U.S.C. § 252(a)(1)), or the pricing standards set forth in Section 252(d) of the Act

(*Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 492-93 (2002)). See AT&T Illinois Opening Brief at 15 n.13, 17; AT&T Illinois Reply Brief at 16 & n.15.

Second, Cbeyond argues that the Proposed Order violates 47 C.F.R. § 51.307(a). Cbeyond BOE at 15, 16 n.4. Cbeyond never cited that provision in its opening or response briefs, and thus this (purely legal) argument should be rejected. In any event, Cbeyond does not bother to provide the text of § 51.307(a) and never explains *how* the Proposed Order violates that section. That regulation, which simply parrots 47 U.S.C. § 251(c)(3), states that “[a]n incumbent LEC shall provide . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory . . . .” 47 C.F.R. § 51.307(a). The Proposed Order already determined that § 51.307, in its entirety, is inapplicable to this dispute, because “[t]here is no allegation in the record that AT&T Illinois is not allowing Cbeyond to individually order UNE loops or individually order UNE transport.” Proposed Order at 33. Instead, “[t]he problem is that Cbeyond does not want to pay to separate them [the loop and transport] once it has asked that they be joined.” *Id.*

Third, Cbeyond argues that the Proposed Order violates 47 C.F.R. § 318(a). Cbeyond BOE at 15, 16 n.4. This (purely legal) argument also must be rejected because Cbeyond never made it in its opening or reply briefs. And again, Cbeyond fails to quote the regulation that it cites or explain *how* the Proposed Order supposedly runs afoul of § 51.318(a). That regulation simply states: “an incumbent LEC shall provide access to unbundled network elements and combinations of unbundled network elements without regard to whether the requesting telecommunications carrier seeks access to the elements to establish a new circuit or to convert an existing circuit from a service to unbundled network elements.” 47 C.F.R. § 51.318. As the

Proposed Order found, the factual scenario at issue here is not Cbeyond seeking to “convert an existing circuit”; it is Cbeyond seeking to disconnect an EEL. Proposed Order at 32.

Finally, Cbeyond complains that the rates set forth in the ICA for the “rearrangement” Cbeyond desires are too high and “fundamentally anti-competitive.” Cbeyond BOE at 17. Cbeyond’s complaints are disingenuous. Cbeyond expressly agreed to the rates set forth in the ICA. Moreover, those rates were approved by the Commission in Docket No. 02-0864, and therefore they are not subject to collateral attack here. *See* AT&T Illinois Opening Br. at 21-23. Cbeyond could have sought to amend the ICA to include different rates. *See* Proposed Order at 33 (“It is baffling to the Commission why Cbeyond has not sought to amend its contract.”). But Cbeyond, despite multiple opportunities, has chosen not to try to amend, instead opting to extend the term of its ICA pursuant to the AT&T/BellSouth merger conditions. *See* AT&T Illinois Opening Br. at 17. Since Cbeyond agreed to the ICA, and has not sought to amend it, the Proposed Order correctly focused on what the binding ICA provides. Cbeyond has no right, under the ICA or federal law, to retroactively amend its ICA when it believes the rates to which it agreed are too high. As the Proposed Order recognized, if Cbeyond wishes to challenge the approved rates, it must seek to open “an arbitration or a generic proceeding” to “look at what work AT&T Illinois is performing and determine what rates should apply for ‘rearrangements.’” Proposed Order at 34. “[A]n investigation into the proper rates for rearrangements is not proper here.” *Id.*

### **III. CBYOND HAS FAILED TO IDENTIFY ANY ERROR IN THE PROPOSED ORDER CONCERNING THE CCC RATE ELEMENT.**

In the final section of its exceptions brief, Cbeyond asserts that the Proposed Order ignores the requirements of Section 10-111 of the Public Utilities Act because it does not address the proper application of the Clear Channel Capability (“CCC”) rate element. Cbeyond BOE at

18-19. Cbeyond articulated its CCC argument for the first time in its response brief, and even then failed to explain how AT&T Illinois' application of the CCC rate element violates any provision of the parties' ICA.

Once again, Cbeyond is trying to rewrite the ICA to provide for different rates than the ones to which it agreed. As AT&T Illinois demonstrated, CCC is available as an ordering option in the EEL provisioning section of the Pricing Schedule developed in Docket No. 02-0864. AT&T Illinois Reply Br. at 42 (citing Attachment M (Fuentes Niziolek Reply Aff.) ¶ 11). If Cbeyond's orders for reconfiguration of its DS1/DS1 EELs were coded to request CCC, then AT&T Illinois billed Cbeyond the appropriate charge for the service it requested. Notably, although Staff did raise questions in its brief about AT&T Illinois' billing of the CCC rate element (*see* Staff Reply Br. at 33-39), Staff's exceptions brief does not identify any disagreement with the Proposed Order's treatment of AT&T Illinois' billing for CCC.

The Proposed Order properly disposed of the CCC argument when it concluded that "Cbeyond has not shown that AT&T has acted improperly in the past with respect to the charges at issue here." Proposed Order at 33. The Commission is not required to address this point in any further detail than it has already. *See, e.g., Abbott Laboratories, Inc. v. Illinois Commerce Comm'n*, 289 Ill. App. 3d 705, 716 (1st Dist. 1997) ("The Commission is not required to make particular findings as to each evidentiary fact or claim, nor is the Commission required to disclose its mental operations."); Order, *Commonwealth Edison Co. Proposal to Establish Rate CS, Contract Service*, Docket No. 93-0425, 1994 Ill. PUC Lexis 260, at \*66, 153 P.U.R. 4th 151 (June 15, 1994) ("neither the Act, the Code, nor case law require the Proposed Order to discuss every argument of every party on every material issue").<sup>10</sup> Summary treatment of particular

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<sup>10</sup> The case cited by Cbeyond (at 19), *Cerro Copper Products v. ICC*, 83 Ill. 2d 364 (1980), is inapposite because it involved *ratemaking*, not the interpretation of a binding ICA. Moreover, that case ultimately held that the

billing issues is certainly appropriate, given Cbeyond's assertion in its Response Brief that its "claims in this case are about illegal UNE tying, not bill specifics." Cbeyond Response Br. at 27 (capitalization edited). In sum, the Proposed Order properly rejects Cbeyond's challenge to the CCC rate element.

### CONCLUSION

In summary, the Commission should not alter the reasoning or the conclusions of the Proposed Order. Cbeyond has identified no disputed issues of fact and, even if factual disputes exist, they are not material. Accordingly, the cases on which Cbeyond relies (*see* Cbeyond BOE at 6, 14) do not require the Commission to conduct an evidentiary hearing. In addition, the Proposed Order correctly found that the two-step process of disconnecting a DS1/DS1 EEL and connecting a loop to DS3 transport or collocation was "the only process contained in the ICA to effectuate what Cbeyond wishes to do." Proposed Order at 32. The Commission should uphold that finding and dismiss the Complaint.

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Commission's ratemaking decision was "justified by the record" and that the appellate court had erred by overturning the Commission's decision. *Id.* at 372.

Dated: April 5, 2011

Respectfully Submitted,

AT&T Illinois

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**CERTIFICATE OF SERVICE**

I, Michael T. Sullivan, an attorney, certify that a copy of the foregoing AT&T ILLINOIS' RESPONSE TO CBEYOND COMMUNICATIONS, LLC'S BRIEF ON EXCEPTIONS TO THE ALJ'S PROPOSED ORDER was served on the following Service List via U.S. Mail and/or electronic transmission on April 5, 2011.

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