ORDER NO. 00-120

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 163

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AMERICAN TELEPHONE TECHNOLOGY, INC., and GTE NORTHWEST INCORPORATED, Pursuant to 47 U.S.C. Section 252.	))))))	ORDER

DISPOSITION: ARBITRATOR'S DECISION ADOPTED AS MODIFIED

Introduction

On October 7, 1999, American Telephone Technology, Inc. (ATTI), filed a petition with the Public Utility Commission of Oregon (Commission) to arbitrate an interconnection agreement with GTE Northwest Incorporated (GTE), pursuant to 47 U.S.C. §§ 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act). GTE filed a response to the petition on November 4, 1999.

On December 16, 1999, Samuel Petrillo, Arbitrator, held an arbitration hearing in Salem, Oregon. Lawrence Freedman and Charles Best, Attorneys, appeared on behalf of ATTI. Marlin Ard and Willard Forsyth, Attorneys, appeared on behalf of GTE. The parties filed opening post-hearing briefs on January 7, 2000. Reply briefs were filed on January 14, 2000.

On February 1, 2000, the Arbitrator issued his decision in this proceeding. GTE and ATTI filed comments on February 11, 2000, regarding the decision. The Arbitrator's decision is attached to this order as Appendix A.

Standards for Arbitration

This arbitration was conducted pursuant to 47 U.S.C. §252 of the Act. Subsection (c) of §252 provides:

> Standards for Arbitration—In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
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> (2) establish any rates for interconnection, services or network elements according to subsection (d); and
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> (3) provide a schedule for implementation of the terms and conditions by the parties tot the agreement.

Commission Review

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by arbitration be submitted for approval to the State commission. Section 252(e)(2)(B) provides that the State commission may reject an agreement (or any portion thereof) adopted by arbitration only "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251, or the standards set forth in subsection (d) of this section." Section 252(e)(3) further provides:

> Notwithstanding paragraph (2), but subject to section 252, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Summary of Commission Decision

Both GTE and ATTI filed comments challenging portions of the Arbitrator's decision. The Commission has reviewed the Arbitrator's decision and the comments in accordance with the standards set out above. We conclude that the Arbitrator's decision, as modified herein, comports with the requirements of the Act, applicable Federal Communications Commission (FCC) regulations, and relevant state law and regulations.

GTE COMMENTS

Issue I--Allocation of Collocation Site Preparation Costs. GTE alleges that the Arbitrator erred by declining to adopt either of GTE's two proposals for allocating collocation site preparation costs; the Site Preparation Charge (SPC) and the ICB Fill Factor (Fill Factor).[1]

Advanced Services Order. The Arbitrator found that GTE's proposals for allocating collocation site preparation costs incorporate averaging methods that are inconsistent with the FCC's *Advanced Services Order.*[2] GTE argues that the FCC allows averaging of site preparation costs. In support of its claim, GTE cites the following language from an FCC brief filed with the United States Court of Appeals for the District of Columbia Circuit in October 1999:

> In promulgating its cost allocation standard, the FCC was guided by an approach that Bell Atlantic voluntarily had adopted in New York. Under that approach the CLEC initially is assessed up-front charges for site preparation only in proportion to the amount of space it actually leases. Thus, as Bell Atlantic describes the approach:
>
> > If Bell-Atlantic-NY incurs $250,000 in order to condition the appropriate amount of common space as well as providing for 1000 sq. ft. of usable space which will be available for collocation, and a given CLEC only requires 1/10 of that space or 100 sq. ft., that CLEC would pay Bell Atlantic-NY a non-recurring charge of $25,000.
>
> However, the Bell Atlantic plan also provided for a five-year amortization of the costs of common space and non-subscribed space that are not initially recovered from collocators. Under that amortization, the unrecovered costs would be averaged (*e.g.*, across a LATA) and recovered from all CLECs collocating within the geographic area upon which the average is calculated (or in part from the ILEC itself, if it uses any of the collocation space.)
>
> Although the Commission did not require ILECs to adopt the particular terms set out in Bell Atlantic's approach, the [*Advanced Services Order*], fairly read contemplates mechanisms for the recovery of an ILEC's prudently incurred costs, including a mechanism that resembles Bell Atlantic's plan. The [*Advanced Services Order*] plainly does not foreclose such mechanisms. The Commission left the details of developing a "proper pricing methodology" to the state commissions in carrying out their responsibilities under section 252 of the Act.

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[1] Arbitrator's Decision at 2-14.

[2] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, 14 FCC Rcd 4761 (rel. March 31, 1999) (A*dvanced Services Order)*.

Brief for Respondents at 50, *GTE Service Corp., et al. v. FCC*, No. 99-1176 (D.C. Cir. 1999)

GTE appears to argue that the foregoing language substantiates the averaging methodology incorporated in its two cost allocation approaches. We disagree for the following reasons:

(a) The Bell Atlantic cost allocation method cited in the FCC's brief provides that, "the CLEC initially is assessed up-front charges for site preparation only in proportion to the amount of space it actually leases." That approach is consistent with the cost allocation method proposed by ATTI and approved by the Arbitrator in this case.

(b) The FCC's brief indicates that the *Advanced Services Order* permits State Commissions to adopt averaging mechanisms to amortize the "costs of common space and non-subscribed space that are not initially recovered from collocators." *GTE did not present such a proposal for consideration in this case*. Instead, GTE's SPC and Fill Factor methods average *all* of the environmental conditioning costs incurred by GTE to prepare collocation space.[3] Even if averaging mechanisms may be employed to allocate specific collocation costs, there is no indication in the FCC's brief that it is reasonable to use such mechanisms to allocate all of the site preparation costs incurred by an ILEC. We think it unlikely that the FCC would support such a result. As the Arbitrator points out, averaging methods such as those GTE has proposed do not account for the actual costs imposed by a collocator at a given central office, cause low-cost collocators to subsidize high-cost collocators, and discourage the efficient utilization of limited collocation space.[4] GTE does not address any of these concerns in its exceptions.[5]

(c) In the unlikely event that the *Advanced Services Order* does permit the averaging of all site preparation costs, we agree with the Arbitrator that GTE

[3] A copy of the Bell Atlantic tariff was introduced into the record as GTE Exhibit 7. GTE described the tariff as being "similar to the Site Preparation Charge that GTE has forwarded." See Letter from GTE counsel Willard L. Forsyth to Arbitrator Petrillo, dated January 7, 2000; S*ee also*, TR. 123, GTE Exhibit 3, LEE/3. As explained above, however, the Bell Atlantic proposal differs significantly from the SPC. Moreover, the specifics of the Bell Atlantic filing, including the amortization of collocation costs not recovered through initial pro-rata charges, were not discussed in the prefiled testimony, at the hearing or in the parties' post-hearing briefs. Consequently, there is no basis in the record to approve such a provision.

[4] Arbitrator's Decision at 9.

[5] Because the Bell Atlantic approach allocates initial costs based on the amount of space occupied by the collocator, it is possible that the concerns identified by the Arbitrator may be mitigated. As emphasized, however, GTE did not submit that proposal in this case, and there is no discussion in the record regarding the amortization of collocation costs not recovered through initial pro-rata charges.

did not provide satisfactory evidence demonstrating that the specific allocation methods it has proposed are reasonable.[6]

(d) GTE did not mention the FCC brief in its testimony or post hearing briefs, despite the fact that (i) the brief was filed on October 15, 1999; (ii) GTE was a party to that proceeding; and (iii) the reasonableness of cost averaging was clearly at issue in this arbitration.[7] That strategy effectively denied ATTI the opportunity to respond to GTE's arguments regarding the FCC's brief. It also prevented ATTI and the Arbitrator from inquiring into GTE's position regarding the amortization of collocation costs not initially recovered through pro-rata charges. To the extent that GTE now alleges that it has somehow been prejudiced by the failure to include an amortization provision in its interconnection agreement with ATTI, its argument is without merit.[8]

Supporting Data. The Arbitrator found that GTE did not adequately explain the methodology used to calculate the SPC and Fill Factor methods.[9] Among other things, the Arbitrator found that GTE did not provide sufficient information regarding the assumptions underlying the methodology used to calculate the SPC, the "nationwide" collocation costs included in the numerator of the SPC and the "nationwide quotes" included in the devisor of the SPC calculation. The Arbitrator also observed that GTE did not include in the record any workpapers or documentation showing the specific costs included in the SPC. The Arbitrator made similar findings regarding the GTE's proposed Fill Factor calculation.

GTE argues that its allocation methods are clearly described in the record and that "there is no legal requirement that GTE provide cost studies or workpapers" supporting its positions in an arbitration proceeding. It emphasizes that neither ATTI nor the Arbitrator requested GTE to supply the information, and that if they had, GTE would have "quickly produced" the information. GTE goes on to claim that it has been "severely prejudiced" by the Arbitrator's "uneven treatment," emphasizing that the Arbitrator had no problem adopting ATTI's "vaguely worded" contract language. GTE alleges that the Arbitrator's conclusions regarding GTE's lack of cost support "ring loudly as a denial of GTE's right to due process." GTE states that it will "gladly provide the Commission additional supporting documentation in the event it chooses to reject or modify the Arbitrator's decision."[10]

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[6] *Id*. at 7-14.

[7] To compound the problem, GTE submitted only the last three pages of a fifty-one-page brief. Without the opportunity to review the entire document, we do not know whether the FCC made other statements regarding this issue and cannot place the FCC's statements in proper context.

[8] This is not to say that the Commission would not consider an amortization provision similar to that proposed by Bell Atlantic if such a proposal was properly presented for review.

[9] Arbitrator's Decision at 10-12.

[10] GTE Comments at 10-12.

GTE's arguments are without merit. GTE's SPC proposal asks the Commission to approve a $336 charge for each square foot of collocation space occupied by ATTI. Thus, GTE has the *burden of proving* that its proposed charge is reasonable. The Commission concurs with the Arbitrator's finding that GTE failed to produce satisfactory evidence demonstrating the reasonableness of the SPC charge.[11]

GTE's claim that ATTI and the Arbitrator are at fault because they did not ask GTE to produce information supporting the SPC charge is a novel argument indeed. Neither ATTI nor the Arbitrator is obligated to make GTE's case for it. Even more surprising is GTE's admission that it had the necessary information at its disposal all along. We have no idea why GTE chose not to produce information justifying the SPC rate, but it alone is responsible for the consequences of that decision.[12]

GTE's claim that it was accorded "uneven treatment" and denied due process is equally perplexing. As explained above, GTE's SPC charge requires ATTI to pay a specific dollar amount for each square foot of collocation space it occupies. It was therefore reasonable for the Arbitrator to inquire into the cost basis underlying the SPC charge. Conversely, ATTI's proposal does not incorporate a specific dollar charge but specifies only the methodology that the parties should follow; *i.e.,* that charges for site preparation and environmental conditioning should be allocated based on the percentage of resources directly utilized by ATTI. Unlike GTE's proposal, the charges paid under ATTI's proposal are determined on individual office-by-office basis. As a result, there are no workpapers or cost information[13] that ATTI could present to support its proposal.

Measuring Usage. The Arbitrator found that it was reasonable and consistent with the FCC's *Advanced Services Order* to allocate collocation site preparation costs based on ATTI's resource usage.[14] He also concluded that it was not possible to determine the efficacy of any particular measurement approach given the record presented. The parties were instructed to address such issues on a case-by-case basis to determine which site preparation costs should be allocated based on the percentage of space occupied by ATTI and which might reasonably be allocated based on ATTI's usage. In reaching this decision, the Arbitrator specified that "GTE should not be obligated to incur substantial costs to install special metering equipment; nor should it

[11] We also agree with the Arbitrator's finding that GTE did not present sufficient evidence to justify the reasonableness of the Fill Factor calculation. *See* Arbitrator's Decision at 12.

[12] Section 252(b)(4)(B) of the Act allows a State Commission to request information from a party if the Commission believes such information is necessary to resolve disputed issues. This authorization is permissive, however. It does not impose a duty on the Arbitrator or the Commission to ensure that a party produces sufficient information to substantiate its position on each disputed issue, as GTE has intimated. Given the technical complexity of the issues and the strict time constraints for conducting arbitrations, such an obligation would place an impossible burden on State Commissions.

[13] GTE incorrectly states that the Arbitrator asked for "cost studies" as opposed to information supporting the type and derivation of costs included in the SPC. GTE Comments at 10-11.

[14] Arbitrator's Decision at 12-13.

have to implement unduly complex monitoring or administrative processes to perform such measurements."[15]

GTE claims that the Arbitrator's decision to allocate certain collocation costs based on ATTI's usage is unsupported by the evidence and is internally inconsistent. According to GTE, the record shows that it is impossible to allocate costs "directly attributable" to a CLEC's usage because GTE's current procedures are not designed to accommodate such a process and because complex monitoring and administrative processes are necessarily required. GTE states that the Arbitrator's decision ignores these facts and is internally inconsistent because it states that GTE should not have to implement complex monitoring or administrative processes.

The Commission does not agree that assigning costs based on a "directly attributable" standard will necessarily require GTE to implement complex monitoring and administrative processes. Rather, we concur with ATTI witness Legursky that it may be possible to allocate certain environmental conditioning costs based upon ATTI's usage without imposing unreasonable burdens on GTE.[16] In addition, we agree with the Arbitrator that the *Advanced Services Order* contemplates that costs may be assigned not only upon the amount of space occupied by a collocator, but also by other reasonable methods such as usage.[17]

GTE's Vagueness Argument. GTE argues that the ATTI contract language[18] adopted by the Arbitrator is "unworkably short and vague" because it contemplates that the parties will engage in additional discussions to arrive at the most appropriate allocation method for different types of site preparation costs. GTE maintains that this alleged defect violates basic contract law.

GTE's claims are without merit. The issue presented to the Arbitrator for decision was whether ATTI's "directly attributable" approach was preferable to GTE's two allocation methods. The Arbitrator was not asked to decide how every cost incurred by GTE should be allocated in every circumstance. Even GTE acknowledges this fact, emphasizing that "the proceeding focused only on the methodology."[19] As the Arbitrator recognized, there was no discussion in the record establishing the "efficacy of any

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[15] *Id.* at 13.

[16] *Id. See also, e.g.*, ATTI Exhibit 2, Legursky/3-4.

[17] Paragraph 51 of the *Advanced Services Order* indicates that pro-rating site preparation costs based on the amount of space occupied by a collocator is only one example of how such costs may be allocated.

[18] ATTI's allocation language states: "GTE will pro-rate collocation space preparation charges for site preparation or environmental conditioning by determining the total charge and allocating a portion to ATTI based on the percentage of the affected resource(s) directly utilized by ATTI. ATTI will be charged only those costs directly attributable to ATTI."

[19] GTE Comments at 10.

particular method of measuring usage"[20] because the issue was not how specific costs would be assigned, but whether it was reasonable to assign costs based on the "directly attributable" standard generally.[21]

Indeed, the very nature of the "directly attributable" allocation method contemplates that costs will be examined on an office-by-office basis and then allocated to ATTI based upon either the percentage of space occupied or ATTI's resource usage. This necessarily requires GTE and ATTI to establish reasonable protocols for assigning specific types of costs under different circumstances.[22] The fact that the parties will now have to negotiate these details does not render the Arbitrator's decision vague or unworkable.

Other Arguments. GTE reiterates a number of arguments that were addressed by the Arbitrator and need not be repeated here. The Commission finds nothing in the Arbitrator's decision that denies GTE the right to recover costs incurred to prepare space for collocation. We concur with the Arbitrator that ATTI's allocation method –which calculates and allocates costs on an office-by-office basis – will provide a better opportunity for cost recovery than either of the approaches recommended by GTE.[23]

Tariff Proposal. On December 30, 1999, GTE filed a tariff with the Commission containing its SPC proposal. The filing was designated docket UT 150 and suspended for investigation pursuant to ORS 759.180 and 759.185.[24] GTE asks the Commission to implement its proposed SPC tariff rates as part of its interconnection agreement with ATTI, pending resolution of the tariff investigation in docket UT 150. The rates would be interim in nature and subject to "retroactive true-up" once the Commission issues a final order in that docket. GTE states that the filing will give the Commission and other interested parties an opportunity to completely review and analyze the SPC and provides a more appropriate forum than this arbitration case.

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[20] Arbitrator's Decision at 13.

[21] It is important to keep in mind that, unlike GTE, ATTI does not propose a specific rate that collocators must pay. Therefore, while it was necessary for the Arbitrator to inquire into how GTE's SPC rate was derived, no such analysis was required in the case of ATTI's proposed "direct attribution" method.

[22] For example, GTE also raises concerns relating to potential changes in usage by ATTI. We see no reason why the interconnection agreement cannot be structured to ensure that GTE is properly compensated for subsequent changes in usage.

[23] GTE argues that the Arbitrator erred by stating that "the challenge [in this case] is to find a cost allocation method that provides GTE with a reasonable opportunity to recover its site preparation costs." GTE asserts that the proper standard is *reasonable certainty* rather than *reasonable opportunity.* In fact, GTE uses both terms in its post hearing briefs. *See, e.g.,* GTE Reply Brief at 14. Moreover, we fail to understand the distinction in the context of this case, because GTE acknowledges that none of the allocation methods presented, including its own, guarantees 100 percent cost recovery.

[24] *See* Order No. 00-080, entered February 11, 2000.

GTE's proposal prejudices ATTI, not only because of the delay involved in obtaining final resolution of this issue, but also because there is no assurance that ATTI will have the same opportunity to present its site preparation cost allocation proposal in the tariff docket. Furthermore, the Commission has suspended GTE's tariff filing for investigation. At this point, we are not certain whether it is more appropriate to evaluate those issues in individual company filings, in a generic proceeding or rulemaking, or in some other manner.

According to the testimony filed by GTE in this case, the SPC was developed to comply with the FCC's decision in the *Advanced Services Order*.[25] However, the *Advanced Services Order* was released on March 31, 1999, more than six months prior to the date ATTI filed its petition for arbitration in this proceeding. GTE does not indicate why it waited until December 30, 1999, to make its SPC tariff filing. Had it filed earlier, the need for ATTI to litigate this matter in an arbitration hearing might have been averted. As it stands however, GTE is asking the Commission to defer resolution of the disputed cost allocation issue for several months so that the same issue can be addressed in a tariff docket that was filed after the arbitration hearing.[26]

GTE points out that, in a case involving these same parties, an Arbitrator for the Washington Utilities and Transportation Commission, deferred the cost allocation issue to WUTC's pending generic collocation docket.[27] However, this case differs from that before the WUTC because GTE's tariff filing in docket UT 150 is not a generic proceeding and was not pending at the time cost allocation issue was presented for arbitration. Section 252(b)(4)(C) of the Act requires State Commissions to resolve each issue presented in a petition for arbitration. Absent reasonable justification, there is no basis for deferring resolution of a disputed issue.

Finally, the Commission is not persuaded by GTE's proposal to implement the SPC tariff on an interim basis subject to retroactive true-up. We suspended the GTE tariff for investigation, not only because of our procedural concerns, but also because there are several outstanding questions concerning the methodology and calculation of the SPC charge. Staff indicates that there are approximately seventy rate elements in the proposed tariff and that the supporting cost studies and documentation will take many months to analyze. If the Commission does go forward with the tariff process, this matter is likely to be extremely controversial and may result in a number of tariff revisions. Furthermore, it is entirely possibly that requiring ATTI to pay up-front collocation charges pursuant to the tariff will prevent that carrier from collocating until after the tariff

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[25] *See, e.g.,* GTE Exhibit 2, Lee/8.

[26] *See*, Public Utility Commission of Oregon Staff Report adopted at the February 8, 2000 Regular Public Meeting, at 1.

[27] *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between American Telephone Technology, Inc., and GTE Northwest, Inc.,* WUTC Docket, UT-990390 (issued December 29, 1999).

investigation has concluded. Even though the tariff rates would be subject to true-up, ATTI is prejudiced if it cannot afford to pay the proposed tariff charge in the first place.

Issue II--UNE Combinations. GTE argues that the Arbitrator went beyond the scope of the UNE combination issue by addressing the Ninth Circuit's decision in *U S WEST Communications, Inc. v MFS Intelenet, Inc. (USWC v. MFS)*.[28] GTE states:

> Neither GTE nor ATTI's proposals for UNE combination language contained an affirmative requirement that GTE provide UNEs in combinations that it does not normally combine.[29]

GTE is incorrect. Section 5 of ATTI's proposed UNE combination language states that "GTE shall provide additional Network Elements individually or in Combinations, *including, without limitation, Network Elements or Combinations which are not ordinarily combined in GTE's network*." Furthermore, the UNE combination issue was designated as a disputed legal issue by the parties. That being the case, it is difficult to fathom GTE's argument that it was impermissible for the Arbitrator to address the Ninth Circuit's recent decision dealing with that issue.

ATTI COMMENTS

Issue II—UNE Combinations Language

FCC Rules 315(c)-(f). The circumstances surrounding this issue are discussed on pp. 15-19 of the Arbitrator's decision. To summarize, the Ninth Circuit's recent ruling in *USWC v. MFS* states that the Eighth Circuit erred when it vacated FCC rules 315(c)-(f) requiring ILECs to combine UNEs that are not ordinarily combined. The Arbitrator acknowledged that the Commission is bound by the Ninth Circuit's decision, but nevertheless found that rules 315(c)-(f) should not be implemented until such time as there is a decision by a court of final jurisdiction. Given the conflict between the Eighth and Ninth Circuits, the Arbitrator noted that there is a strong likelihood that the Supreme Court will grant review of this issue. The Arbitrator also observed that delaying implementation was prudent given the ramifications of the Ninth Circuit's decision upon the operations of GTE and other incumbent providers. Lastly, the Arbitrator emphasized that ATTI would not be prejudiced, because it stated at the hearing that it was not proposing contract language that would require the Commission to implement FCC rules 315(c)-(f) at this time.

ATTI objects to the Arbitrator's decision and argues that the Commission should implement the Ninth Circuit's decision immediately. It claims that a delay in implementation will also delay the development of meaningful competition. MCI WorldCom Inc., and the Western States Competitive Telecommunications Coalition also filed comments in response to the Arbitrator's decision pursuant to OAR 860-016-

[28] 193 F.3d 112, 1121 (9th Cir. 1999).

[29] GTE Comments at 15.

0030(10). These parties maintain that the Commission is required by law to implement the Ninth Circuit's decision regarding FCC rules 315(c)-(f) without delay.

The position advocated in ATTI's post-hearing briefs and comments directly contradict the statements it made during oral argument at the hearing. The Arbitrator specifically asked if ATTI was requesting that the Commission resolve the dispute between the Eighth and Ninth Circuits regarding FCC rules 315(c)-(f). Counsel for ATTI responded that the Commission is "not required to address the issue."[30] In so doing, ATTI effectively waived any right to insist that the rules be implemented at this time.

The Arbitrator was entitled to rely on ATTI's statement that it was not proposing contract language requiring the Commission to implement FCC rules 315(c)-(f). Accordingly, we find that the decision to delay implementation of those rules was proper in this case. Because of this finding, it is not necessary to address the arguments presented by MCI WorldCom Inc., and the Western States Competitive Telecommunications Coalition.[31]

Section 5. The Arbitrator found that Section 5 of ATTI's proposed UNE combination language was overbroad because it requires GTE to combine all elements permitted by law rather than only those elements required by law. ATTI accepts this change and proposes that Section 5 be modified to substitute the word "required" for the word "permitted."

We agree that Section 5 should be modified as suggested by ATTI, provided that the language requiring GTE to comply with requirements in FCC rules 315(c)-(f) is also deleted consistent with the findings set forth above. Section 5 should therefore be revised as follows:

> GTE shall provide additional Network Elements individually or in Combinations, ~~including, without limitation, Network Elements of Combinations which are not ordinarily combined in GTE's network, and shall also combine required Network Elements or Combinations with network components provided by ATTI or third parties, to the extent permitted~~ required by legal, regulatory, judicial, or

[30] TR. 246-247.

[31] This decision is limited to the facts in this case and the parties to this interconnection agreement. ATTI is unlikely to be prejudiced because we expect a final decision on FCC rules 315(c)-(f) within a relatively short time. The Supreme Court's rules allow USWC 90 days, or until mid-April, to petition for a writ of certiorari granting review of the Ninth Circuit's decision in *USWC v. MFS*. If USWC does not file a petition, the matter is closed and GTE will be required to combine elements for ATTI as prescribed in FCC rules 315(c)-(f). The same result will occur if USWC files a petition and the Supreme Court denies certiorari. On the other hand, if the Supreme Court grants review, it is likely to stay the Ninth Circuit's decision and hold the FCC rules in abeyance until it can resolve the dispute between the Eighth and Ninth Circuits. In the unlikely event that the Supreme Court grants review but does not enter a stay of the Ninth Circuit's decision, GTE would be obliged to adhere to the requirements of FCC rules 315(c)-(f) pending a decision by the Supreme Court on the merits.

legislative interpretations of the Act and FCC rules, or as ~~permitted~~ required by the Commission.

Section 6. Section 6 of ATTI's proposed UNE Combinations language defines "currently combined" elements to include combinations forming "part of an operating circuit to provide telecommunications services to a customer" and combinations "composing an existing GTE resale circuit provided to GTE or any other telecommunications provider." It further provides that ATTI shall have the right to convert any existing circuits or lines now being resold to ATTI to combined UNE platforms without additional charge, except as otherwise provided by the Commission.

The Arbitrator's decision correctly states that Section 6 requires GTE to convert resold services to UNE combinations based on the assumption that ATTI's end user customers can be converted with a simple record order change.[32] Since Section 6 requires GTE to convert all of the circuits or lines now resold to ATTI to combined UNE platforms, it also implicitly assumes that GTE is required to offer all of the UNEs currently included in those resold circuits or lines.

The Arbitrator declined to adopt Section 6 of ATTI proposed language. He concluded that there was no support in the record for the assumption that GTE can readily convert resold services to UNE combinations with a simple record order change. The Arbitrator also found that the record did not support the assumption that GTE is required to provide all of the UNEs included in the services currently resold to ATTI.[33]

ATTI alleges that the Arbitrator erred in two respects. First, it states that "the first sentence of Section 6 is not dependent upon the assumptions stated by the Arbitrator and thus should be adopted." We disagree. The first sentence of Section 6 defines current UNE combinations to "include, without limitation, "Network Elements or Combinations composing an existing GTE resale circuit provided to ATTI or any other telecommunications provider." As the Arbitrator emphasized, the record does not indicate what network elements are included in the circuits currently resold to ATTI or other telecommunications providers. That, together with the fact that GTE must only combine those UNEs listed in FCC rule 319, leads us to conclude that the Arbitrator is correct.

ATTI next argues that the remaining language in Section 6 can be changed to account for the Arbitrator's concerns "by making it applicable to the extent customers can be converted with a record order change." Although the Arbitrator rejected

[32] ATTI Reply Brief at 12.

[33] GTE alleges that all of its resold services include operator services, which no longer qualify as a UNE under the FCC's *UNE Remand Order*. If GTE is correct, it is not required to provide UNE combinations that include operator services. *See* Arbitrator's Decision at 18.

Section 6, his decision presumes that the parties will negotiate revised contract language that comports with GTE's obligations under FCC rules 315(b) and 319. We concur.[34]

Section 7. Section 7 of ATTI's proposed UNE Combinations language is designed to make GTE whole in the event UNE combinations provided by GTE are subsequently "delisted." It provides that GTE will receive the difference between the UNE rate and the resale discount rate. The Arbitrator declined to adopt Section 7 because there is no evidence in the record that the amount rebated will cover GTE's cost.

ATTI claims that the Arbitrator's concern can be accommodated by including a provision in the interconnection agreement allowing GTE to charge additional amounts, where required, to cover GTE's costs. The Arbitrator's decision does not preclude the parties from revising Section 7 to include such a provision.

Issue III – Regulatory Changes Language

The Arbitrator adopted ATTI's proposed language dealing with regulatory changes with one exception. Instead of requiring a 30-day negotiation period before a party can invoke the formal dispute resolution provisions of the interconnection agreement, the Arbitrator adopted GTE's proposal for a 90-day period. The Arbitrator agreed that a 30-day time negotiation period is too short given the complexities associated with telecommunications matters, and concluded that the retroactivity clause in the proposed language will ensure that the prevailing party is not harmed. The Arbitrator also found that the parties may always voluntarily agree to a shorter negotiation period on a case-by-case basis. That way, the parties are not obliged to wait the full 90 days if they decide it is better to submit the matter to dispute resolution before the prescribed period expires.

ATTI claims that the Arbitrator mistakenly assumed that the parties must invoke dispute resolution if an issue is not resolved within 30 days. It states that its proposed language merely gives a party the option of seeking dispute resolution after 30 days if negotiations do not appear to be progressing. ATTI argues that there is no reason to wait an additional 60 days if the parties are at an impasse. As an alternative, ATTI suggests that the time period adopted by the Arbitrator be shortened from 90 days to 60 days.

Although we do not believe the Arbitrator misunderstood the issue, we agree with ATTI that 30 days is an adequate amount of time in which to conduct negotiations before dispute resolution may be invoked unilaterally. We believe the 90-day period proposed by GTE is simply too long and will unnecessarily prolong the execution of interconnection agreements required for successful local exchange competition. We are confident that GTE has sufficient resources to analyze regulatory changes and to suggest contract modifications within a 30-day time frame. Furthermore, the parties may always agree to extend the 30-day negotiation period if they require a longer period of time to

[34] To the extent GTE can convert existing resold services to UNE combinations by a simple record order change, then it is obliged to do so, provided, of course, that GTE has a legal obligation to supply all of the UNEs included in those resold services.

negotiate contract revisions due to regulatory changes. In reaching this decision, we note that GTE's principal concern with respect to this issue is that regulatory changes should be implemented promptly.[35] That being the case, it should not have any significant objections to a shorter period for negotiating new contract language to implement such changes.

ORDER

IT IS ORDERED that:

1. The Arbitrator's decision in this case, attached to and made part of this order as Appendix A, is adopted as modified herein.

2. ATTI shall prepare an interconnection agreement complying with the terms of this order within 14 days as provided in OAR 860-016-0030(12). Within 10 days of the date the interconnection agreement is served, GTE shall either sign and file the agreement or file objections to it. If objections are filed, they shall state how the agreement fails to comply with this order and offer substitute language complying with this order. The Commission shall approve or reject a filed interconnection agreement within 30 days of its filing, or the agreement will be deemed approved.

Made, entered, and effective _____.

_____
Ron Eachus
Chairman

_____
Roger Hamilton
Commissioner

_____
Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-14-095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-13-070(2)(a). A party may appeal this order to a court pursuant to applicable law.

[35] GTE Reply Brief at 16-17.

ISSUED February 1, 2000

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 163

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AMERICAN TELEPHONE TECHNOLOGY, INC., and GTE NORTHWEST INCORPORATED, Pursuant to 47 U.S.C. Section 252.	))))))	ARBITRATOR'S DECISION

Introduction

On October 7, 1999, American Telephone Technology, Inc. (ATTI), filed a petition with the Public Utility Commission of Oregon (Commission) to arbitrate a contract for network interconnection with GTE Northwest Incorporated (GTE), pursuant to 47 U.S.C. §§ 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996. GTE filed a response to the petition on November 4, 1999.

On December 16, 1999, Samuel Petrillo, Arbitrator, held an arbitration hearing on this matter in Salem, Oregon. Lawrence Freedman and Charles Best, Attorneys, appeared on behalf of ATTI. Marlin Ard and Willard Forsyth, Attorneys, appeared on behalf of GTE. The parties filed opening post-hearing briefs on January 7, 2000. Reply briefs were filed on January 14, 2000.

Arbitrator's Authority

The federal Telecommunications Act of 1996 (Act) fundamentally restructures the telecommunications industry to provide for the development of competition in local telephone markets. Section 251 of the Act subjects incumbent local exchange carriers (ILECs) to a host of duties intended to facilitate market entry, including the obligation to share their networks with competitors. A requesting carrier may obtain such shared access by purchasing local telephone services at wholesale rates for resale to end users, by leasing elements of the incumbent's network on an unbundled basis, and by interconnecting its own facilities with the incumbent's network. Section 252 of the Act establishes procedures for the negotiation, arbitration, and approval of interconnection agreements between ILECs and requesting carriers.

When an ILEC and a requesting carrier are unable to negotiate the terms and conditions of an interconnection agreement, Section 252(b)(1) allows either party to petition a State commission to arbitrate any open issues. Section 252(c) requires a State commission to:

> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. *See* Section 252(c).

Pursuant to the requirements of the Act, the Commission has promulgated rules establishing procedures for conducting arbitration proceedings. *See* OAR 860-016-0030.

Issues Presented for Arbitration. The parties requested that the Commission arbitrate three issues: allocation of collocation site preparation costs, unbundled network element combinations, and regulatory changes. The latter two issues were designated as legal issues and addressed by the parties in post-hearing briefs.

ISSUE I. -- ALLOCATION OF COLLOCATION SITE PREPARATION COSTS

I. Background. GTE and ATTI disagree on the proper method of allocating extraordinary site preparation and environmental conditioning expenses incurred by GTE to prepare its wire centers for collocation. Extraordinary costs include improvements to power generators; heating, ventilation and air conditioning (HVAC) systems; major equipment rearrangements; major conduit and cable vault additions; and asbestos removal. The extraordinary expense required to prepare a wire center for collocation can range from a minimal amount to well in excess of a million dollars. Site preparation and environmental conditioning costs are paid by collocators on an up-front, one-time basis.

Economic considerations and efficient engineering practices sometimes require that environmental changes be undertaken at once rather than incrementally. Thus, it may be more cost effective for GTE to simply replace a power generator or HVAC system at a wire center rather than add capacity for each new collocating carrier. While major upgrades of this sort are intended to minimize the overall cost of operations, it generally means that the space prepared is greater than that required by the competitive local exchange carrier (CLEC) making the initial collocation request.

Until recently, ILECs required that the first collocator bear financial responsibility for all environmental changes required at a wire center. Under that approach, the first collocator was reimbursed as additional collocators entered the office.

On March 31, 1999, the Federal Communications Commission (FCC) released its First Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 98-147 (hereafter *Advanced Services Order).*[36] In that Order, the FCC rejected the practice of making the first collocator responsible for all site preparation costs. Instead, the FCC concluded:

> "[I]ncumbent LECs must allocate space preparation, security measures, and other collocation charges on a pro-rated basis so the first collocator in a particular incumbent premises will not be responsible for the entire cost of site preparation. For example, if an incumbent LEC implements cageless collocation arrangements in a particular central office that requires air conditioning and power upgrades, the incumbent may not require the first collocating party to pay the entire cost of site preparation. In order to ensure that the first entrant into an incumbent's premises does not bear the entire cost of site preparation, the incumbent must develop a system of partitioning costs by comparing, for example, the amount of conditioned space actually occupied by the entrant with the overall space conditioning expense. *Advanced Services Order* at ¶51.

II. GTE's Proposed Allocation Methods. GTE disagrees with the cost allocation approach adopted in the *Advanced Services Order,* and has appealed that decision to the United States Court of Appeals for the District of Columbia. Nevertheless, GTE proposes two allocation methods that it claims are consistent with FCC policy.

The Individual Case Basis Fill Factor method (ICB Fill Factor method or Fill Factor method) estimates the average number of collocators per central office based upon completed, pending, and forecasted collocation applications in Oregon. GTE includes itself as a collocator for purposes of the calculation. The fill factor is then divided into the total extraordinary costs incurred by GTE at a specific central office to arrive at the upgrade cost each collocator must pay at that wire center. GTE uses the same fill factor for all central offices regardless of the size of the office or the number of carriers able to collocate in an office. In Oregon, the fill factor is four.

GTE's preferred method of allocating space preparation costs is the Site Preparation Charge (SPC). The SPC is an average charge applicable to all CLECs collocating in a wire center. It is designed to recover extraordinary costs associated with major upgrades as well as the costs of security arrangements, electrical work, and inside construction necessary to prepare the collocation space.

According to GTE witness Kirk Lee, roughly half of the SPC is related to extraordinary facility upgrades.[37] This portion of the SPC was calculated by first taking the total dollar amount of the historical ICB collocation quotes made by GTE nationwide.

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[36] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, 14 FCC Rcd 4761 (rel. March 31, 1999) (A*dvanced Services Order)*.

[37] In contrast to the SPC, the Fill Factor approach recovers only major upgrade costs.

That amount was then divided by the total number of collocation quotes made nationwide, regardless of whether those quotes included extraordinary charges or were accepted by a CLEC.[38] For caged collocation arrangements, including shared and sublease arrangements, the total SPC equals $336.00 per square foot of caged space up to 100 square feet.[39] For cageless collocation arrangements, the SPC equals $4,800 per bay.

GTE asserts that the SPC has several advantages over the Fill Factor method. By eliminating the need for case-by-case price quotes, GTE contends that the SPC will expedite collocation intervals and hasten CLEC market entry by:

(a) enabling GTE to provide quotes at the same time the space evaluation is complete, thereby allowing CLECs to place firm collocation orders sooner;

(b) eliminating delays associated with ICB approvals and construction delays;

(c) eliminating expensive ICB costs associated with collocating in offices requiring significant modification, and

(d) facilitating CLEC planning by providing greater certainty regarding collocation costs.

GTE argues that the averaging approach embodied in the SPC and Fill Factor methods is the best available method for recovering collocation-related costs given the FCC decision requiring ILECs to prorate those costs. GTE points out that averaging is an accepted regulatory tool for recovering cost where it is not possible to predict the usage level of a discrete asset or the number of customers that will take service. This is the case with collocation, where it is not possible to accurately predict the number of carriers that will occupy GTE's central offices.

GTE observes that the SPC provides the company with a more reasonable opportunity to recover collocation-related costs than the Fill Factor method, which attempts to predict office occupancy as the basis for allocating costs. By levying an average charge on all collocators, the SPC reduces the overall margin of error and produces a stable revenue stream that should theoretically recover collocation costs over time. GTE claims that the SPC also lowers CLEC costs by spreading cost recovery over a greater base of collocators in a larger number of offices. GTE emphasizes, however, that it may not recover its office-by-office site preparation costs under either of its proposed methods.

[38] GTE Opening Brief at 6. *See also*, Letter from GTE counsel Willard L. Forsyth to Arbitrator Petrillo, dated January 7, 2000, clarifying the testimony of GTE witness Kirk Lee.

[39] Thus, the SPC equals $33,600 for a 100 square foot cage. According to GTE, $18,000 of this amount is attributable to extraordinary upgrade costs. For cages larger than 100 square feet, each square foot over 100 square feet is multiplied by $42.00. GTE Opening Brief at 6.

III. ATTI Objections. ATTI argues that GTE's proposals for apportioning site preparation costs are unreasonable and a barrier to entry. It contends:

(a) The SPC and Fill Factor methods contravene FCC policy because they attempt to recover average costs. GTE may lawfully charge only those costs that are "directly attributable" to ATTI's usage.

(b) The Fill Factor method violates Section 251(c) of the Act because it requires all CLECs to automatically pay 25 percent of the upgrade costs regardless of their space and power requirements. As a result, ATTI may be required to pay a disproportionate and excessive share of site preparation costs wherever it collocates.

(c) GTE has not shown that its costs are caused by collocators rather than by GTE's obligations under the Act. GTE erroneously assumes that "but for" the presence of collocators, GTE would not have to incur any extraordinary costs. ATTI argues that "many of these costs are necessary just for GTE to comply with the Act and should be viewed as 'ordinary costs of doing business' rather than expenses that must be reimbursed by CLECs."[40]

(d) If CLECs choose to compete with GTE on price, downward price pressure will burden new market entrants more than ILECs. Under these circumstances, imposing high average collocation charges discourages CLECs from engaging in price competition and constitutes a barrier to entry.

(e) The SPC is flawed because it is based upon nationwide rather than Oregon-specific costs. Nationwide averages may inflate the SPC and result in over-recovery because they include rural areas that do not accurately reflect GTE's Oregon service territory.

(f) GTE will realize a double recovery if costs included in the SPC have already been recovered from GTE ratepayers. GTE has not presented evidence disproving the potential for double recovery.

(g) The SPC does not include an economic incentive for GTE to control its site preparation expenses. GTE could inflate the cost of market entry by using more expensive materials and by making improvements not required to accommodate collocation at a given location.

ATTI opposes the Fill Factor method for the following reasons:

(a) GTE's statewide estimate of four collocators per wire center (including GTE), guarantees that GTE will pay no more than 25 percent of any wire center improvement regardless of the benefit it actually receives. ATTI contends that, in most cases, GTE will receive a far greater share of the benefits from upgrades than any other party, because it occupies the majority of space and utilizes an overwhelming percentage of the power requirements.

[40] ATTI Opening Brief at 6.

(b) In addition to limiting GTE's cost exposure to 25 percent, the Fill Factor formula allows GTE to over-recover its cost where the upgrade accommodates more than three collocators. ATTI argues that the potential for over-recovery is unlikely to be counterbalanced by instances where less than three CLECs collocate at a wire center. Moreover, GTE's maximum exposure is limited to 50 percent even under circumstances where an upgrade is required but only one CLEC decides to collocate.

(c) As with the SPC approach, the Fill Factor method provides GTE with discretion to upgrade its facilities beyond the level required to accommodate a CLEC's request for collocation. When combined with a predetermined fill factor, this allows GTE to unilaterally increase collocation costs by choosing a more expensive upgrade than is reasonably necessary.[41]

(d) The Fill Factor formula also gives GTE an incentive to delay planned facilities upgrades until a CLEC requests collocation. While ATTI acknowledges that forecasting collocation is not an exact science, it nevertheless argues that GTE is cognizant of historical collocation request rates and other market factors that make particular wire centers more or less likely as collocation sites. By timing facilities upgrades in this manner, GTE can reduce its cost responsibility to only a fraction of the total cost of the upgrade.

IV. ATTI's Proposed Allocation Method. ATTI proposes that GTE prorate extraordinary costs for space preparation and environmental conditioning based on the percentage of the affected resources directly utilized by ATTI.

ATTI asserts that its proposal complies with FCC policy in the *Advanced Services Order*. For space-related costs, ATTI's proposal follows the FCC's example of allocating costs based on the amount of conditioned space a CLEC occupies in an ILEC's wire center. For expenses not specifically related to space, ATTI proposes to allocate costs based on its usage of the resource. Thus, electric power costs would be allocated based on ATTI's actual power consumption rather than on the square footage it occupies. ATTI maintains that this approach is more accurate, and therefore more consistent with the "direct attribution" standard in the *Advanced Services Order.*

ATTI claims that, since GTE is in the best position to engineer and provision facilities necessary to support collocation, it should be required under the Act to bear the economic risk of erroneous forecasting by its network engineers. CLECs do not have access to the planning information possessed by GTE and should not have to pay for more than they receive. ATTI also claims that GTE may benefit from unused collocation facilities because they are more reliable and less expensive to operate than GTE's existing facilities. If GTE can use those facilities for its own needs, it should recover the costs from its ratepayers.

[41] According to ATTI, GTE's discretion over the scope of upgrades also allows it to increase the chances of over recovery by "metering the size, nature, and cost of its upgrades to accommodate more numerous collocation demands in high demand wire centers and fewer collocations in demonstrably less desirable locations. This would effectively increase capacity in wire centers where over-recovery is likely and decrease cost expenditures in wire centers where loss is an increased risk." ATTI Opening Brief at 15.

V. GTE Objections. GTE claims that ATTI's proposal requires GTE to bear the financial risk associated with site preparation costs contrary to §251(c)(6) of the Act, which entitles ILECs to recover costs to implement interconnection and unbundled access from competing carriers. Since site preparation costs are not required "but for" collocation requests, those expenses should not be borne by GTE or its customers.

GTE also disagrees with ATTI's claim that the Advanced *Services Order* requires collocators to pay only those site preparation costs "directly attributable" to a CLEC's collocation request. GTE maintains that the "directly attributable" standard set forth in Paragraph 41 of the *Advanced Services Order* prescribes only how costs should be allocated among collocators using shared collocation arrangements, and does not apply to collocation requests generally. GTE argues that the only relevant provision in the FCC Order is Paragraph 51, requiring pro-rata allocation of collocation costs. GTE contends that both of its allocation proposals satisfy that requirement, while also providing GTE with reasonable certainty that it will recover its costs.

GTE argues that ATTI's cost allocation proposal is flawed because there is little relationship between the cost of the upgrades required and the relative amount of space used or the amount of power or cooling consumed. It also asserts that ATTI's approach is vague and unworkable because it:

(a) does not indicate which costs should be allocated on the basis of usage or how such usage should be measured;

(b) does not enumerate the costs which should be allocated based on the percentage of space occupied by ATTI;

(c) does not indicate whether the "denominator" in the allocation proposal should be the amount of space used by ATTI relative to the total space available to collocator or the total space in the central office, and;

(d) imposes unreasonable administrative burdens on GTE to monitor and track changes in CLEC usage.

VI. Decision -- Allocation of Collocation Site Preparation Charges.

Advanced Services Order. I am persuaded that ATTI has correctly interpreted the FCC's *Advanced Services Order* to require that site preparation expense must be allocated based upon costs directly attributable to the collocating carrier. The FCC discusses space preparation cost allocation in Section IV.2.f. [42] Paragraph 51, quoted

[42] Section IV.2.f of the *Advanced Services Order* consists of Paragraphs 50 and 51. Paragraph 50 discusses the *Advanced Services Order and NRPM*, wherein the FCC sought comment on whether to adopt an approach whereby "a competing provider would be responsible only for its share of the cost of conditioning the collocation space, whether or not other competing providers were immediately occupying the rest of the space." As explained below, this approach is consistent with the FCC's final decision regarding the allocation of space preparation costs. See, *Deployment of Wireline Services Offering Advanced*

above, states that collocation charges must be allocated "on a pro-rated basis so the first collocator in a particular incumbent premises will not be responsible for the entire cost of site preparation." To ensure this result, the FCC also found that "the incumbent must develop a system of partitioning the cost by comparing, for example, the amount of conditioned space actually occupied by the new entrant with the overall space conditioning expenses."

ATTI argues that requirement in paragraph 51 to prorate costs must be read in conjunction with paragraph 41 of the *Advanced Services Order*. That paragraph states, in relevant part:

> In addition, the incumbent *must prorate the charge for site conditioning and preparation undertaken by the incumbent* to construct the shared collocation cage or condition the space for collocation use, regardless of how many carriers actually collocate in that cage, by determining the total charge for site preparation and allocating that charge to a collocating carrier *based on the percentage of total space utilized by that carrier*. In other words, a carrier should be charged only for those costs "directly attributable" to that carrier. (Emphasis supplied.) (Footnotes omitted.)

GTE argues that the "directly attributable" standard applies only to shared collocation arrangements, not to the allocation of collocation space generally. I disagree. Paragraphs 41 and 51 both require the incumbent to prorate site preparation charges based on the portion of total space occupied by the collocating carrier. The sentence in paragraph 41 mandating this result includes a footnote directing the reader to Section IV. 2.f. Since the only substantive discussion in Section IV. 2.f. is contained in paragraph 51, the most plausible construction is that the FCC intended the requirements of paragraphs 41 and 51 to be read together. In other words, the *Advanced Services Order* requires that site preparation costs must be allocated among collocators based upon the percentage of costs directly attributable to each collocator at a particular ILEC premises. Effectively, this means that allocation of site preparation costs must be reasonably related to (a) the number of CLECs collocating at a particular central office, and (b) the actual site preparation costs incurred by each carrier at that wire center.

ATTI's proposed method is consistent with FCC policy because it allocates site preparation costs on an individual case basis for each wire center based on the percentage of space and usage attributable to the collocator. GTE's SPC and Fill Factor methods, on other hand, do not comply with the FCC's requirements. The Fill Factor method is objectionable because it requires collocators to pay the same cost regardless of the number of carriers that can be accommodated at the ILEC's premises and regardless of the amount of space occupied or facilities used by each collocator. The SPC is objectionable because it is not designed to recover the particular site preparation costs incurred at the wire center where the collocation request is made. Instead, collocators

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Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (rel. August 7, 1998) (*Advanced Services Order and NRPM).*

must pay a preset charge regardless of the actual site preparation cost incurred to prepare that office for collocation.

GTE insists that the SPC and Fill Factor methods are consistent with FCC policy and benefit CLECs. GTE claims that, because collocators know in advance how much they must pay, it will facilitate CLEC planning, speed competitive entry, and prevent collocators from incurring high costs associated with site preparation at some central offices. GTE also asserts that its proposals are nondiscriminatory because all collocators pay the same rates.

Notwithstanding these arguments, average cost allocation methods do not account for the actual costs imposed by a collocator at a given central office. They also fail to acknowledge that CLECS may choose different collocation methods as part of their overall competitive strategy. Cost averaging has the effect of benefiting carriers with substantial collocation requirements, while penalizing carriers whose requests impose little or no collocation cost. By eliminating responsibility for differences in cost causation, averaging methods effectively require low-cost collocators to subsidize carriers who impose high collocation costs on GTE.

Forecasting Issues. GTE contends that the "direct attribution" method of cost allocation exposes ILECs to unreasonable financial risks and virtually guarantees that they will not recover their site preparation expenses. GTE maintains that it is impossible to accurately predict the number of CLECs who will seek to collocate at a given central office. This leaves GTE and its customers at risk if the company makes extraordinary investments and the anticipated number of collocators does not materialize.

When GTE receives a request for collocation, it must decide whether it is more economical to make incremental improvements that accommodate only the requesting carrier or to incur additional expenses to accommodate a greater number of collocating carriers. In the latter situation, the FCC's policy prevents ILECs from requiring the first collocator to pay 100 percent of the site preparation expense. Thus, GTE will have to rely on its experience and expertise to forecast the likelihood of collocation on an office-by-office basis. While it may not be possible to predict the precise number of collocators in every instance, I agree with ATTI witness Legursky that GTE is capable of making reasonably accurate forecasts.

Despite GTE's claims to the contrary, the level of risk associated with forecasting collocation should be no greater than that incurred by the company every time it makes investment decisions in the regular course of its business. Essentially, GTE will have to make projections regarding the level and extent of local exchange competition in the area served by the central office. The ability to forecast local exchange competition will be crucial to GTE's economic survival in a competitive telecommunications environment. Forecasting the number of carriers who will enter each central office is simply part of doing business in that new environment.

Although GTE argues that it is impossible to forecast the number of collocators, it concedes that its fill factor calculation is just that, albeit a forecast based on a statewide average rather than on a per-office basis.[43] If anything, it should be much easier for GTE to determine the number of carriers who will collocate at a particular central office than it is to project the number of carriers who are likely to collocate statewide. Analyzing each central office individually allows GTE to rely upon its knowledge of the type of area served by the office, population growth trends, the number and type of businesses served in the area, and any other circumstances unique to that serving area. GTE was not hesitant to rely upon its collocation experience and forecasting ability when it developed the Fill Factor method.[44] It should be able to rely upon the same resources to develop reasonable forecasts for each of its Oregon wire centers.

In evaluating this issue, it should be emphasized that none of the cost allocation methods presented for consideration in this case ensure that GTE will recover all of its site preparation costs. GTE readily acknowledges that neither of its proposed methods provides such a guarantee. As GTE also notes, the challenge is to find a cost allocation method that provides GTE with a reasonable opportunity to recover its site preparation costs from the carriers responsible for those costs.[45] In my opinion, the direct attribution approach approved by the FCC and advocated by ATTI in this proceeding provides GTE with that opportunity.

Supporting Data. GTE did not adequately explain the methodology used to calculate either of its two proposed allocation methods. Mr. Lee's description of the SPC, for example, indicates only that historical collocation costs were tallied and divided by the total number of collocation quotes nationwide. No detail was offered showing how the SPC was computed. Even more surprising, GTE did not include in the record any workpapers or other documentation showing the specific costs included in SPC.[46] Without this information, ATTI and the Commission did not have a reasonable opportunity to inquire regarding the methodology used to compute the SPC or the cost categories included in that charge. As a consequence, there is no way to determine whether the costs recovered by the SPC are reasonable or not.

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[43] GTE Opening Brief at 8.

[44] Mr. Lee testified that GTE relied on its historical experience with collocation to develop the fill factor calculation. Essentially, GTE projects that the number of carriers who will request collocation at its central offices in the future will be consistent with that experience.

[45] GTE Reply Brief at 14.

[46] As noted above, the SPC includes both extraordinary and non-extraordinary costs. GTE supplied a statement after the hearing showing the non-extraordinary recurring and nonrecurring base collocation charges that would be revised or eliminated if the SPC is adopted. Aside from the fact that this information was not included in the record, GTE does not explain why these costs have been included in the SPC or why certain base collocation costs have been eliminated while others have apparently been revised. In addition, GTE does not provide any information to enable the Commission to find (a) that the non-extraordinary costs incorporated in the SPC are appropriately included in up-front nonrecurring site preparation charges paid by collocators and (b) that the charge does not allow double recovery of GTE costs.

In addition to the lack of cost support, several questions regarding the SPC calculation remain unanswered. For example, GTE states that it used total nationwide collocation costs as the numerator in the SPC calculation, but does not indicate the number of wire centers involved, the location of those wire centers, or the type of collocation involved. This information is relevant to determining whether the costs included in the SPC calculation are representative of the site preparation costs GTE will incur at its Oregon wire centers in the future.

Similarly, GTE states that the devisor in the SPC calculation is based on "the total number of collocation quotes made on a nationwide basis regardless of whether those quotes included extraordinary charges or were even accepted by the CLEC." This statement raises additional questions about the reliability of GTE's calculation. It is difficult to understand why GTE used collocation quotes that did not involve any extraordinary costs to calculate a charge designed to recover such costs. It would seem that the quotes used to develop the SPC calculation should have been limited to collocation requests that, in fact, generated extraordinary costs. GTE's decision to use unaccepted collocation quotes is also problematic since these quotes do not represent actual costs incurred by GTE and, in any case, should not be presumed reasonable without some justification on GTE's part.

In its opening brief, GTE suggests that its failure to provide cost support or a detailed explanation of the SPC methodology is not significant since this information was part of a tariff filing at the FCC. GTE points out that a similar filing was made in Oregon following the arbitration hearing in this case.[47] GTE contends that ATTI can review the level and type of costs included in the SPC as part of the tariff process.

GTE's argument is not persuasive. In order to obtain approval of its cost allocation methods, GTE was obligated to supply ATTI and the Commission with information explaining how those methods were developed and the specific cost inputs used in calculating the proposed charges.[48] It does not suffice to say that cost information has been provided in other proceedings. ATTI and the Commission are entitled to review the relevant data and to examine GTE's supporting witnesses in this proceeding regarding that data.[49]

GTE's proposal for applying the SPC in situations where CLECs share collocation space also appears to be contrary to FCC policy. According to Mr. Lee, GTE intends to charge the entire SPC to the first collocator who occupies a shared cage.

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[47] GTE indicates that the tariff was filed on December 30, 1999. GTE Opening Brief at 7.

[48] GTE's arguments address the SPC, but the same conclusions apply to the Fill Factor method. As noted below, GTE also failed to present sufficient evidence to justify the reasonableness of the Fill Factor calculation.

[49] Furthermore, there is no way to tell if the information filed by GTE in the tariff dockets includes all of the workpapers and supporting documentation necessary to determine how the SPC was developed.

Those costs would subsequently be rebated back to the first collocator as additional collocators occupy the shared space. As emphasized above, however, Paragraphs 41 and 51 of the *Advanced Services Order* specifically prohibit the incumbent from imposing the entire site preparation cost upon the first collocator, but instead require that charges be prorated. GTE's shared space proposal is simply a variation on the rebate process rejected by the FCC in the *Advanced Services Order*.

ICB Fill Factor. GTE recommends that the Commission adopt the Fill Factor approach if the SPC is not accepted. As noted above, however, the averaging approach incorporated in both the SPC and Fill Factor calculations is contrary to the cost allocation policy in the *Advanced Services Order.* In the case of the Fill Factor method, the inconsistency stems from the fact that the number of collocators does not vary from office to office regardless of the size or location of the central office. Because of this, each collocator must pay the same amount regardless of the percentage of collocation space occupied or facilities used, a result clearly at odds with the FCC's mandate.

Even if there was no conflict with FCC policy, there is inadequate support in the record to adopt the Fill Factor method. As in the case of the SPC, GTE did not supply any workpapers or documentation to justify the reasonableness of the Fill Factor calculation, specifically (a) information regarding the type of collocation costs that GTE intends to include in the numerator of the calculation, and (b) information concerning the collocators used to compute the fill factor (the devisor in the calculation). GTE claims, for example, that the fill factor estimates the average number of carriers that will collocate at its Oregon central offices. To permit the Commission to assess the reasonableness of that assumption, GTE should have provided, among other things, information concerning the number of wire centers used in calculating the average, the location of those wire centers, the number of collocators included in the calculation, and the time period over which the collocation requests were made.

As emphasized above, the most significant problem with the Fill Factor method is that it discriminates between collocating carriers by charging them the same amount regardless of the amount of collocation space or facilities utilized. In addition, it creates inappropriate economic incentives that discourage the efficient utilization of limited collocation space. If a carrier pays the same percentage of total collocation cost regardless of the space or facilities used, there is no reason to use space efficiently. This, in turn, reduces the collocation space available for other carriers and contravenes the public policy goal of fostering local exchange competition.

Measuring Usage. As noted above, ATTI proposes to allocate site preparation costs based on resource usage and the percentage of space occupied. GTE argues that both approaches are flawed because there is no relationship between costs incurred to prepare a site for collocation and the amount of space or resources consumed. I find that both techniques of assigning costs are encompassed by the "direct attribution" approach adopted by the FCC in the *Advanced Services Order* and should be incorporated in the interconnection agreement subject to the limitations set forth below.

Although ATTI witness Legursky suggested several possible methods for allocating site preparation costs based on usage, ATTI's proposed contract language does not specify the allocation methods applicable to different types of improvements. Instead, ATTI's language appears to contemplate that the parties will attempt to negotiate the most appropriate means of directly assigning site preparation costs on an ICB basis for each central office.

Based on the record presented, it is difficult to draw conclusions about the efficacy of any particular method of measuring usage. For example, in an instance where GTE must install additional power generating equipment to serve ATTI and other collocators, it may be possible to measure ATTI's power consumption relative to other users without difficulty. On the other hand, measuring ATTI's share of a new HVAC unit may not be easily accomplished and might be more appropriately allocated based on the percentage of space occupied by ATTI consistent with the approach suggested in Paragraph 51 of the *Advanced Services Order*.

While I agree that site preparation costs may be allocated based on usage if it is more accurate to do so, GTE should not have to incur unreasonable costs or administrative burdens to perform such measurements. For example, GTE should not be obligated to incur substantial costs to install special metering equipment; nor should it have to implement unduly complex monitoring or administrative processes to perform such measurements.

GTE argues that it will take substantially longer to process collocation requests if ATTI's position is adopted. I agree that the ICB process contemplated by ATTI's approach will take more time to complete than either of the methods proposed by GTE. On the other hand, the time period for responding to ATTI's ICB requests should not be significantly longer than the time frames established in other Commission-approved interconnection agreements that incorporate an ICB process. Also, while it may take ATTI and GTE a short time to work out the details of how specific site preparation costs should be allocated for the first wire center, those agreements should apply to similar improvements made at other wire centers. If the parties are unable to agree upon a reasonable method of allocation in a particular instance, they may pursue dispute resolution under the terms of the interconnection agreement.

Verification Issues. ATTI argues that GTE (a) will be the major beneficiary of extraordinary upgrades necessitated by collocation requests; (b) may deliberately delay planned upgrades so that CLECs are forced to pay those costs, and (c) will make more improvements than are reasonably necessary to accommodate collocation requests. GTE denies these claims and reiterates that no improvements would be required but for the collocation requests.

Although the record shows that GTE may derive some benefit from site preparation efforts, there is no proof that it will be the major beneficiary of such improvements.[50] Likewise, there is no basis for concluding that GTE will attempt to make collocators pay for planned upgrades or that GTE will install unnecessary or unreasonably expensive equipment.[51] As a practical matter, however, the only way to verify the benefits derived from collocation-related expenses is to examine those expenses on a case-by-case basis for each wire center. That way, the parties can determine how each will share in the benefits associated with those improvements. In addition, collocators can satisfy themselves that the site preparation expenses are reasonable in scope and are not appropriately made in conjunction with planned upgrades.

ATTI's method contemplates that site preparation costs will be examined on an individual case basis at each wire center where collocation occurs. Thus, questions concerning the amount of benefit derived by GTE or the coincidence of the collocation request with a planned upgrade will be less problematic than in the case of GTE's proposals where site preparation costs are allocated on either a statewide or nationwide basis without regard to the actual improvements made at each wire center.

State Commission Regulations. Paragraph 51 of the *Advanced Services Order* states:

> We expect the state commissions will determine the proper pricing methodology to ensure that incumbent LECs properly allocate site preparation costs among new entrants. We also conclude that these standards will serve as minimum requirements, and that states should continue to have flexibility to adopt additional collocation requirements, consistent with the Act.

To date, the Oregon Commission has not adopted a pricing methodology or regulations to govern collocation site preparation costs in accordance with the *Advanced Services Order*. It is possible that the Commission may adopt regulations during the term of this interconnection agreement that are inconsistent with the site preparation allocation provisions adopted herein. In that event, the regulatory changes provision in the interconnection agreement will require the parties to negotiate revisions that comply with the new regulations adopted by the Commission. See discussion below.

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[50] For example, GTE might realize efficiency benefits from installing a new power generator or HVAC system.

[51] In its opening brief, GTE alleges that ATTI has an incentive to "game the system" by under-ordering collocation services in order to avoid paying its fair share of extraordinary costs. GTE Opening Brief at 14. ATTI counters in its reply brief that GTE, as a price cap-regulated carrier, has a strong financial incentive to postpone capital investments and foist those costs on collocators. ATTI Reply Brief at 4-5. Although there is no basis in this record to substantiate either of these charges, both underscore the need to examine collocation expenditures on an office-by-office basis.

ISSUE II. -- UNE COMBINATIONS

I. Background. This was designated as a legal issue and was addressed by the parties in their post-hearing briefs. ATTI and GTE disagree regarding the scope of GTE's obligation to provide ATTI with combinations of unbundled network elements (UNEs).

Section 251(c)(3) of the Act requires ILECs to provide "nondiscriminatory access to network elements on an unbundled basis." In its *Local Competition Order*,[52] the FCC promulgated Rule 315, requiring ILECs to combine UNEs on behalf of requesting carriers. Rule 315(b) provides that "an incumbent LEC shall not separate network elements that the incumbent currently combines" except upon the request of a CLEC. Rules 315 (c)-(f) impose additional obligations on the ILECs, including the requirement to combine UNEs "in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network."

In October 1997, the United States Court of Appeals for the Eighth Circuit vacated rule 315(b) and rules 315(c)-(f), finding that the Act did not require ILECs to combine UNEs for requesting carriers.[53] In January 1999, the United States Supreme Court issued its decision in *AT&T v. Iowa Utilities Bd*, reversing portions of the Eighth Circuit's opinion. The Supreme Court reinstated rule 315(b), but did not address rules 315(c)-(f).[54]

In November 1999, the FCC released its *UNE Remand Order*,[55] in response to the Supreme Court's remand of rule 319 (listing the UNEs the ILECs must provide). In that Order, the FCC reaffirmed that rule 315(b) obligates ILECs to provide requesting carriers with UNEs that are "currently combined" by the ILECs.[56] The FCC declined, however, to reinstate rules 315(c)-(f), regarding UNEs that are not ordinarily combined.[57] The

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[52] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15509, ¶ 12 (1996) *(Local Competition First Report and Order*), aff'd in part and vacated in part sub nom., *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel v. FCC*) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd. v. FCC*), aff'd in part and remanded, *AT&T v. Iowa Utilities Bd*., 119 S. Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996), Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997), further recons. pending.

[53] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997).

[54] *AT&T v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).

[55] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket No. 96-98, FCC 99-238, (rel. Nov. 5, 1999) (*UNE Remand Order*).

[56] I*d.* at ¶¶ 479-480. The FCC distinguished UNEs that are "currently combined" from those which are "normally combined." It declined to address the duty to provide "normally combined" UNEs, noting that the issue is currently pending before the Eighth Circuit.

[57] *Id*. at ¶ 481.

FCC observed that it has asked the Eighth Circuit to reinstate rules 315(c)-(f), but emphasized that the matter is still pending.[58]

Shortly before the FCC issued the *UNE Remand Order*, the United States Court of Appeals for the Ninth Circuit, issued its decision in *U S WEST Communications v. MFS Intelenet, Inc. (USWC v. MFS).*[59] Relying upon the Act and the Supreme Court decision in *AT&T v. Iowa Utilities Bd.,* the Ninth Circuit upheld an interconnection agreement requiring USWC to combine elements at MFS's request. The Court stated:

> Although the Supreme Court did not directly review the Eighth Circuit's invalidation of 47 C.F.R. §51.315(c)-(f), its interpretation of 47 U.S.C. §251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

On October 22, 1999, USWC filed a petition for rehearing with the Ninth Circuit in the *USWC v. MFS* case. USWC asked the Court to withdraw its ruling regarding UNE combinations because the Eighth Circuit has exclusive jurisdiction to decide the matter under the Hobbs Act, 28 U.S.C. §2341, *et seq*. The Ninth Circuit denied USWC's petition for rehearing on January 12, 2000.

II. ATTI Position. ATTI's proposed contract language is attached to this decision as Appendix A. Section 5 requires GTE to offer UNE combinations to the extent permitted by law, including UNEs not ordinarily combined in GTE's network. ATTI argues that the GTE's duty to provide already-combined UNEs was settled by the Supreme Court in *AT&T v. Iowa Utilities Bd.*, and the *UNE Remand Order*. It further maintains that the Ninth Circuit's decision in *USWC v. MFS* requires GTE to offer within Oregon, any UNE combination, including combinations of elements not ordinarily combined by GTE.

Section 6 of ATTI's proposed language defines "currently combined" elements to include combinations forming "part of an operating circuit to provide telecommunications services to a customer" and combinations "composing an existing GTE resale circuit provided to GTE or any other telecommunications provider." It further provides that ATTI shall have the right to convert any existing circuits or lines now being resold to ATTI to combined UNE platforms without additional charge, except as otherwise provided by the Commission.

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[58] Id. at ¶¶ 475; 481-483. The FCC emphasized that "the reasoning of the Supreme Court's decision to reinstate rule 315(b) based on the nondiscrimination language of section 251(c)(3) applies equally to rules 315(c)-(f)." Thus, the FCC "believes that the basis upon which the Eighth Circuit invalidated rules 315(c)-(f) has been called into question by the Supreme Court's decision."

[59] 193 F.3d 112, 1121 (9th Cir. 1999).

Section 7 states that, if one or more of the UNEs is removed from the list of UNEs that GTE is required to provide, GTE may revert from UNE pricing back to resale discount pricing. GTE may also require ATTI to reimburse GTE for the difference between the network element price and the resale discount rates for the period of time such circuits were supplied to ATTI under the network element pricing scheme.

III. GTE Position. GTE acknowledges that the Supreme Court's order *AT&T v. Iowa Utilities Bd.,* and the FCC's *UNE Remand Order* require ILECs to provide UNE combinations. For that reason, GTE proposes to include language in the interconnection agreement stating that UNE combinations will be provided as required by law. It points out, however, that there still remains a degree of uncertainty surrounding the combination issue. For example, the *UNE Remand Order* has not yet become effective and is subject to a judicial stay during the appeals process.[60] GTE states that its proposal is designed to avoid a situation where it is mandated to do something that it is contrary to law.

IV. Decision--UNE Combinations. Both parties agree that the interconnection agreement should state that GTE is obligated to provide UNE combinations as required by law. GTE emphasizes that Section 5 of ATTI's proposed contract language goes beyond that requirement by mandating GTE to provide UNE combinations "to the extent permitted" by law. GTE states that it reserves the right to provide only those UNEs it is legally required to provide.

I agree with GTE that Section 5 of ATTI's proposed language is overbroad. It is possible that an ILEC may be "permitted" to do more than it is legally "required" to do. Accordingly, the language in the interconnection agreement should state that GTE's duty to provide UNE combinations is limited to that required by law.

GTE's duty to provide UNE combinations in Oregon is established by the Ninth Circuit's decision in *USWC v. MFS*. The Commission is legally bound to follow that ruling unless it is invalidated by the Supreme Court on appeal. As discussed above, the Ninth Circuit concluded that the Act requires ILECs to provide UNE combinations they currently combine as well as combinations of UNEs not ordinarily combined, provided the latter are technically feasible and do not impair the ability of other carriers to interconnect or obtain UNEs from GTE.

Although *USWC v. MFS* requires GTE to offer within Oregon any UNE combination requested by ATTI, the 90-day time period for USWC to file a Petition for Certiorari with the Supreme Court in that case has not yet lapsed. The clear conflict between the Eighth and Ninth Circuits indicates that there is a substantial likelihood the Supreme Court will grant a Writ of Certiorari in this matter.[61] That being the case, I find that GTE should not be required to comply with rules 315(c)-(f) until the scope of the

[60] The FCC's Order becomes effective 30 days after publication in the Federal Register. The Order was published on January 18, 2000, one week after the reply briefs were filed in this proceeding.

[61] *See, e.g*., Rules of the Supreme Court of the United States, Part III, Jurisdiction on Writ of Certiorari, Rule 10(a), Considerations Governing Review on Writ of Certiorari.

ILECs duty to combine has been resolved by a court of final jurisdiction. There is no question that requiring ILECs to combine network elements not ordinarily combined has major implications for the operations of those telecommunications providers. The prudent approach, therefore, is to postpone implementation of that requirement until such time as litigation surrounding the issue has concluded.

ATTI is not prejudiced by this result. During the hearing, the arbitrator asked whether, in view of the conflict between the Eighth and Ninth Circuits, ATTI was asking the Commission to require GTE to combine UNEs not ordinarily combined. Counsel for ATTI stated that its proposed contract language did not require the Commission to address that issue. [62]

In addition to the foregoing, I am also persuaded that Sections 6 and 7 of ATTI's proposed contract language should not be adopted. Section 6 requires GTE to convert resold services to UNE combinations, based on the assumption that ATTI's end user customers can be converted with a simple record order change.[63] ATTI also assumes that GTE is required to offer all of the UNEs currently included in the services purchased by ATTI for resale.

There is no support in the record for the assumption that GTE can easily convert resold services to UNE combinations. In addition, GTE states that all of its resold services include operator services, which no longer qualify as a UNE. [64] If this allegation is correct, GTE is not required to provide UNE combinations that include operator services. Since there is nothing in the record regarding these either of these issues, I am unwilling to adopt the language in Section 6.

Section 7 raises similar concerns. Although it is designed to make GTE whole in the event UNE combinations provided by GTE are subsequently "delisted," the language provides that GTE will only receive the difference between the UNE rate and the resale discount rate. While that may be sufficient compensation, there is no evidence in the record regarding the matter. I am unwilling to approve such a provision without some basis for concluding that the amount rebated covers GTE's cost.

In summary, I find that the interconnection agreement should include language requiring GTE to provide UNE combinations required by law. The contract should acknowledge that the Ninth Circuit's decision in *USWC v. MFS* prescribes GTE's legal obligation to provide UNE combinations in Oregon. However, that portion of Ninth

[62] TR. 246-247.

[63] ATTI Reply Brief at 12.

[64] In the *UNE Remand Order*, the FCC found that operator services did not satisfy the "necessary" and "impair" tests in §251(d)(2) of the Act. Therefore, ILECs are not obligated to provide operator services as an unbundled element to requesting carriers. *UNE Remand Order* at ¶¶ 438-464. Although operator services were approved as an unbundled element by this Commission in Order No. 96-188, this requirement must now be reexamined. State commissions may require ILECs to provide UNEs in addition to those prescribed by the FCC, but a "necessary" and "impair" analysis must first be conducted in accordance with FCC rule 317. *See* 47 C.F.R. §51.317(d).

Circuit's decision requiring ILECs to combine UNEs not ordinarily combined should not be implemented until that issue has been resolved by a court of final jurisdiction. Sections 5-7 of ATTI's proposed language should not be included in the interconnection agreement for the reasons set forth above.

ISSUE III. – REGULATORY CHANGES

This was also designated as a legal issue by the parties. The parties agree, in principle, to include a contract provision to accommodate changes in regulatory policies or rules, but have been unable to agree on specific language. In correspondence dated January 10, 2000, ATTI proposed the following language for consideration:

> The terms and conditions of this Agreement shall be subject to any and all applicable laws, rules, regulations or other legal actions that subsequently may be prescribed by any federal, state, or local governmental authority. Either Party shall have the right within thirty (30) days following the effective date of such law, rule, regulation or action to request in writing that any affected material term(s) and conditions(s) of this Agreement be amended or modified to bring them into compliance with such law, rule, regulation or action retroactive to such effective date. Should the parties be unable to reach agreement regarding the appropriate terms and conditions within thirty (30) days of such notice, either Party may invoke the Dispute Resolution process prescribed under this Agreement.[65]

In its reply brief, GTE states that ATTI's proposed language – specifically, the inclusion of the retroactivity clause – largely satisfies GTE's concern that regulatory changes be implemented promptly.[66] The remaining difference between the parties relates to the negotiation period before a party can invoke the formal dispute resolution provisions of the agreement. ATTI asks for a 30-day mandatory negotiation period while GTE proposes a 90-day period. GTE contends that 90 days are necessary to give the parties sufficient time to iron out their differences, particularly in view of the complexity and sheer volume associated with many regulatory change documents.

I agree with GTE that a 30-day time period for negotiations is too short given the complexities surrounding telecommunications issues. Even a cursory review of the *Advanced Services Order* and *UNE Remand Order* discussed herein discloses the extremely complex nature of these matters. A 90-day negotiation period is not excessive under these circumstances. Furthermore, the retroactivity clause in the ATTI's proposed language ensures that the prevailing party is not harmed by the time necessary to resolve issues relating to regulatory changes.

[65] *See*, Letter from ATTI counsel Robert H. Jackson to Arbitrator Petrillo, dated January 10, 2000.

[66] GTE Reply Brief at 16-17.

I adopt GTE's proposed 90-day negotiation period with the proviso that the parties may always agree on an individual case basis to a shorter negotiation period if they desire. That way, the parties are not obligated to wait 90 days if they decide it is more appropriate to submit the matter to dispute resolution before the prescribed period expires.

ARBITRATOR'S DECISION

1. GTE and ATTI shall prepare and submit to the Commission an interconnection agreement consistent with the terms of this decision pursuant to the procedures set forth in OAR 860-016-0030(12).

2. As provided in OAR 860-016-0030(10), any party may file written comments within 10 days of the day this decision is served.

Dated at Salem, Oregon, this 1st day of February, 2000.

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Samuel Petrillo
Arbitrator