COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION BY AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH GTE SOUTH INCORPORATED CONCERNING INTERCONNECTION AND RESALE UNDER THE TELECOMMUNICATIONS ACT OF 1996	))))))))	CASE NO. 96-478

O R D E R

On February 14, 1997, the Commission issued its arbitration decision in this case. Since then, the parties have disagreed as to the contractual language to implement the decision, have raised issues subsumed by the broader issues resolved in the Order of February 14, 1997, and have reargued key matters as judicial decisions have been rendered in this rapidly evolving area of law. On March 26, 1999, the Commission issued its Order requiring the parties to reappraise their disputes in light of the Supreme Court's decision in AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721 (1999). The parties responded and, on May 13, 1999, the Commission issued its Order resolving these final disagreements as to the appropriate contract terms to implement the February 14, 1997 Order. The May 13 Order requires GTE South Incorporated (GTE) to provide the combined UNE platform when the platform already exists in GTE's network, although the parties had agreed to leave the issue in abeyance pending the FCC's issuance of a new list of UNEs. The Order also rejected GTE's proffered language describing the Agreement as an involuntary one; required GTE to sign the

Agreement; rejected GTE's argument that the Agreement should remain ineffective until GTE is permitted to recover its historic costs; required GTE to allow AT&T Communications of the South Central States, Inc. (AT&T) to use electricity and space near its equipment as necessary for nondiscriminatory access; required GTE to allow AT&T to use "ancillary pathways" as necessary to receive nondiscriminatory access to poles, ducts, conduits, and rights-of-way; required GTE to permit AT&T the same access for testing as it has itself; and required a single charge applying to all competitive local exchange carriers (CLECs) for customer LEC changes. An Agreement (the "June 2 Agreement") was filed by AT&T on June 2, 1999 that, except for language found at Section 1.1., complies with Commission Orders. GTE's signature appears on the June 2 Agreement. However, GTE has included a notation on the signature page stating its representative has signed the June 2 Agreement under "duress" caused by this Commission's Order.

The day before the May 13 Order was entered, AT&T had filed a document alleged to be an agreement of the parties (the "May 12 Agreement"). The May 12 Agreement is not in compliance with Commission Orders. It provides, among other things, that AT&T will not seek UNE combinations, and that UNE issues remain in dispute. The disputed portions are clearly marked. GTE has not signed the May 12 Agreement, declaring that it did not enter into it voluntarily. GTE also says the Agreement deprives GTE of its "right to recover its historic costs," and that it does not join AT&T's request that the Commission approve the Agreement.[1]

[1] Letter from GTE to Helen C. Helton, Executive Director, dated May 12, 1999.

On June 2, the day AT&T filed the June 2 Agreement with GTE's permission, GTE filed a petition requesting rehearing of the May 13 Order ["GTE Petition"], raising numerous issues. It requests the Commission to rescind its May 13 Order and to "review" the May 12 Agreement rather than the June 2 Agreement, despite its assertions that its having entered into the May 12 Agreement was not voluntary and that it "cannot" ask that it be approved.[2] GTE now claims that the May 12 Agreement memorializes the parties' *resolution* of their disputes, and that the parties' agreement on those terms prohibits the Commission, under the Act, from altering it in any way.[3] GTE cannot have it both ways: either the May 12 Agreement is a genuine agreement, resolved by the parties, or it is a document submitted under compulsion. If the latter, GTE's argument that the PSC cannot lawfully disturb the parties' freely negotiated "resolution" of issues carries no weight. GTE makes clear that it objects to both agreements. It can hardly argue, at the same time, that one of these agreements embodies the result of free negotiations.

AT&T responded to GTE's petition on June 14, 1999 ["AT&T Response"]. AT&T contends that the May 13 Order should stand, that the Commission should review the June 2 Agreement, and that GTE's characterization of the procedural posture of this case is in error. AT&T asserts that the May 13 Order is lawful because, inter alia, it is not an "arbitration" decision per se; it is simply a follow-up to the arbitration decision

[2] Id.

[3] Specifically, GTE contends that the Act limits state commission authority "[t]o the extent parties are able to resolve issues through their own negotiations." GTE Petition at 5.

itself the February 1997 Order -- in which the Commission decided the issues in this case. The decisions have already been made; the May 13 Order simply specifies language to implement those decisions. AT&T also points out that this case involves an arbitration, not an independent negotiation followed by submission of an agreement, and that the Commission has full authority under state and federal law to take the steps it has taken to ensure that the ultimate agreement in this case is in accord with its Orders.

Next, GTE argues that the Commission's determination regarding GTE's obligation to furnish unbundled network elements ("UNEs") in combination is invalid because there is no evidentiary basis for it in this record -- even though the PSC's decisions on this and related issues constitute policy determinations that are not dependent on facts found in a particular proceeding. GTE says the Commission should review only the May 12 Agreement, which places the UNE combination issue into a "parking lot" to remain unresolved until the FCC issues new UNE rules. However, to defer an issue is not to resolve it. Acceptance of the incomplete May 12 Agreement would result in further delaying the introduction of meaningful competition in GTE's territory -- a result inimical to the purpose of the Telecommunications Act of 1996.

AT&T rightly contends that the Commission's decisions comport with applicable law, including all other Commission decisions reached on these issues. The UNE issue has been perhaps the most vehemently litigated -- and re-litigated -- since passage of the Act. Nevertheless, 47 U.S.C. 251, FCC rules, the United States Supreme Court, and this Commission require UNEs to be furnished. Moreover, the Supreme Court specifically upheld the FCC rule prohibiting an ILEC from breaking apart UNEs when

they are ordered by a competing local exchange carrier ("CLEC") in combination.[4] It makes little sense for GTE to insist now that it is not required to provide pre-existing combinations.

The Commission has repeatedly dealt with disputes regarding UNEs. The Orders which demonstrate this Commission's consistently reiterated determination -- that UNEs essential to providing local exchange service must be provided by ILECs to CLECs in the manner requested -- are in this record as well as the records of other Commission proceedings pursuant to the Telecommunications Act of 1996.[5] GTE's refusal to cease rearguing the same issues does not negate previous Commission Orders on the subject. The May 13 Order merely repeats what the Commission previously has said, in this and other dockets. GTE is required by law to comply with those Orders.

[4] Iowa Utilities Board; 47 C.F.R. 315(b).

[5] See Order dated February 14, at 9-13 (requiring the provision of all twelve UNEs requested by AT&T at TELRIC, rather than resale, price); Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Case No. 96-440, Order dated September 1, 1998, at 17 (requiring GTE to permit MCI to order UNEs in combination and stating, "[t]he Commission will not tolerate an ILEC's literally breaking apart network elements that are physically connected in the manner requested by a CLEC"). See also Investigation Regarding Compliance of the Statement of Generally Available Terms of BellSouth Telecommunications, Inc. With Section 251 and Section 252(d) of the Telecommunications Act of 1996, Case No. 98-348, Order dated August 21, 1998, at 8 (finding "unacceptable" a proposed provision that BellSouth would separate combined elements when a CLEC ordered them in combination and finding that "[s]uch separation and subsequent recombination would serve no public purpose and would increase costs that ultimately would be passed on to the consumer").

GTE cites the Supreme Court's remand of Rule 319 to the FCC, requiring the FCC to establish real guidelines to demonstrate when failure of an ILEC to provide a particular UNE will "impair" a CLEC's provision of service. However, the Supreme Court did not object to the FCC list of UNEs per se. It merely stated that the FCC must produce a meaningful rationale to establish that the provision of FCC-required UNEs must be "necessary" and that the lack of their provision would "impair" a CLEC's ability to provide service. For the time being, since there is no effective federal law on the subject of which UNEs are required to be provided, state law, as declared by this Commission, prevails. This Commission agrees with the Vermont Commission's recent declaration that the current absence of an FCC list of UNEs may result in "legitimate disagreement about which elements should be made available, but it is *into this breach that state jurisdiction under both the Act and state law neatly steps."*[6] This Commission ordered GTE to provide AT&T the UNEs it requested almost two and a half years ago -- and the Commission is explicitly given authority by the Act to establish "access and interconnection obligations of local exchange carriers" when those obligations are not inconsistent with the Act.[7] Further, KRS 278.512 explicitly authorizes the Commission to regulate telecommunications services in a competitive environment.

Finally, the Commission finds that it is a violation of the Telecommunications Act of 1996 to permit key provisions of interconnection agreements to remain unresolved

[6] Order re: Procedural Schedule for Further Proceedings on the UNE Platform, Docket No. 5713, Vt. PSC, at 5 (March 16, 1999) (emphasis added), cited in AT&T Response at 13.

[7] 47 U.S.C. Section 251(d)(3).

more than three years after passage of the Act. As the Federal District Court for the Eastern District of Kentucky has unequivocally stated, the "clear intention" of Congress in passing the Act was "to encourage the rapid deployment of new technology through competition and reduced regulation."[8] The May 12 Agreement will not help to achieve that goal.

Based on the foregoing, the Commission concludes that neither the procedural nor substantive arguments advanced by GTE have merit. This docket concerns an arbitration, not submission of an independently negotiated agreement which resolved all issues between the parties. Accordingly, the Commission is within its authority in requiring that its Orders issued herein are embodied in the parties' interconnection agreement. The Commission also is within its authority in requiring that key disputes be resolved rather than deferred.

The June 2 Agreement, except for Section 1.1 of the "General Terms and Conditions," complies with this Commission s Orders. Most provisions of Section 1.1 merely memorialize the parties' differing interpretations of the law and restate their reservation of rights to seek judicial review. More troublesome is the section's statement that, until the FCC issues "new rules" regarding the UNEs it will require, AT&T may not seek UNE combinations. Section 1.1 also states that disputed language regarding the combination issue "shall remain disputed and shall not be resolved by the Commission" and that the parties will submit the agreement "notwithstanding the absence of provisions resolving the Combination issue." These provisions appear to relate only to the Agreement as it existed before revision in compliance with the Commission's May

[8] AT&T Communications of the South Central States v. BellSouth Telecommunications, Inc., 20 F. Supp.2d 1097, 1102 (E.D. Ky. 1998).

13 Order, and their inclusion in the June 2 Agreement may simply be oversight. Further, Section 1.1 inappropriately provides that, "if the Commission, notwithstanding the Parties' requests to the contrary," resolves the UNE combination issue, the revised language related to such issue "shall not be applied or used until after the FCC issues its New Rules."

The Commission finds that, although the June 2 Agreement is largely satisfactory, Section 1.1 should be deleted. Portions of this section are clearly obsolete, since they refer to the Commission's resolution of the UNE issues as a future contingency rather than as a past action. Other portions, which imply that the Commission lacks authority to resolve such an issue, are wholly inappropriate.

CONCLUSION

The Commission concludes that the May 13 Order was necessary to resolve outstanding disputes between the parties that were not resolved by the May 12 Agreement. Accordingly, the May 12 Agreement -- if such it may be called, despite GTE's refusal to sign it or to recommend its approval -- should be rejected, and GTE's petition for rehearing of the May 13 Order should be denied. Further, the Commission finds that the June 2 Agreement, except for Section 1.1, should be approved.

The Commission having reviewed the record and having been otherwise sufficiently advised, IT IS HEREBY ORDERED that:

1. The motion for rehearing is denied.

2. The May 12 Agreement is rejected.

3. The June 2 Agreement, except for Section 1.1 of the "General Terms and Conditions, is approved.

4. The parties shall file, within ten (10) days of the date of this Order, their Agreement as filed on June 2, 1999, except that Section 1.1 shall be deleted in its entirety.

Done at Frankfort, Kentucky, this 22nd day of June, 1999.

By the Commission

ATTEST:

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Executive Director