COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

On September 1, 1998, the Commission entered its Order in this case ruling on continuing disputes between GTE South Incorporated ("GTE") and MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, "MCI") in regard to the parties' proposed interconnection agreement (the "Agreement"). GTE has filed a petition requesting the Commission to reconsider its portions of the Order and to clarify its decision regarding the quality of service GTE is required to provide to MCI pursuant to the Agreement.

Contract Language Regarding Prices to be Negotiated

GTE argues that the Commission should reconsider its decision with regard to contract language governing prices that are not yet established. The Commission held in its Order of September 1 that neither party's proposed language was necessary to govern such pricing negotiations. GTE now requests that, in the alternative, the contract at Section 1.8 of Appendix C should provide that "prices for services provided pursuant to this Agreement which are not expressly set forth in this Agreement shall be determined in accordance with applicable law." GTE contends that this statement

would establish a framework for the parties to negotiate prices. It is not entirely clear why it is necessary to specify in an agreement that negotiations for services required by law shall take place in accordance with law. However, in the absence of an objection from MCI, and in order to ensure that the necessary framework for negotiations exists, the Commission modifies its Order to reflect that the suggested language set forth above shall be incorporated into the parties' Agreement.

The Quality of Service to be Provided by GTE

GTE requests the Commission to clarify its Order to make it clear that GTE need not provide interconnection, network elements, and access to those elements at higher levels of quality than GTE provides to itself, its affiliates, or third parties. Pursuant to 47 U.S.C. § 251(c)(2)(C), which provides that an Incumbent Local Exchange Carrier ("ILEC") must provide service that is "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection," it is clear that such superior service need not be furnished by GTE. Portions of the agreement that provide that GTE must furnish service that is superior to that provided to itself or to third parties must be stricken.

Provision of Unbundled Network Elements

Finally, GTE contends that the Commission's decisions in relation to sales of combinations of unbundled elements cannot stand because they are in conflict with federal law as explicated by the Eighth Circuit Court of Appeals in Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998). The Commission's Order required GTE to furnish unbundled network elements in combination to MCI *if* the requested combinations already exist in GTE's network. The

Commission in its Order also permits GTE to charge a one-time "glue charge" to reimburse it for its expense and expertise in having assembled the elements. GTE cites a federal court decision explicitly stating that the Eighth Circuit Court of Appeals' opinion on this issue has a preemptive effect on state law to the contrary. See US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., No. C97-132OR (W.D. Wash. July 21, 1998). GTE also asserts – correctly – that the Eighth Circuit Court of Appeals' decision is effective during the pendency of the United States Supreme Court determination on the issue.

The preemption issue need not be addressed here. The Commission's Order is not in conflict with Iowa Utilities. The Court in Iowa Utilities, 120 F.3d at 813, found that "the Act does not require the incumbent LECs to do *all* of the work." Id. (Emphasis in original.) The PSC has not, however, ordered GTE to take any affirmative action to combine anything; nor has it ordered GTE to sell UNE combinations at UNE rates alone. Instead, pursuant to the Order, GTE may sell UNE combinations at UNE prices *plus* a "glue charge" to compensate it for its time and expertise in having combined the elements. If it wishes, GTE may also have the option of disabling the UNE combination electronically and allowing the CLEC to "combine" the elements through use of the "recent change" mechanism. A UNE combination that has been disabled in such a way is no longer electronically "combined."

The Eighth Circuit Court of Appeals clearly contemplated that competing carriers would have direct access to the network such as the "recent change" mechanism provides, in order to "combine" UNEs. See Id. at 813 ("... the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to

their networks than have to rebundle the unbundled elements for them"). If there were any doubt that electronic "rebundling" complies with Iowa Utilities, that doubt is dispelled in the Iowa Utilities court's unequivocal rejection of the ILECs' contention that competitors should not be permitted to provide services "entirely by acquiring all of the necessary elements on an unbundled basis from an incumbent LEC." Id. at 814. The court upheld the FCC's rule on the issue and declared that nothing in the Act "requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled network elements." Id.

In fact, nothing in the Eighth Circuit's opinion requires physical, as opposed to electronic, separation of UNEs, then connection to a CLEC's physical facility, then reconnection to the ILEC's network. On the contrary: the Eighth Circuit has made it quite clear that the CLEC need not even own a physical facility in order to furnish service to the public solely by means of UNEs purchased from an ILEC.

Having reviewed the petition and having been sufficiently advised, the Commission reaffirms its Order in all respects except as stated herein. However, the Commission recognizes that the law in this area is volatile. Accordingly, it will revisit these issues in light of any applicable change in law, including the pending ruling of the United States Supreme Court in the appeal of the Iowa Utilities decision.

Extension of Time to File Conforming Interconnection Agreement

GTE has petitioned for an extension of 60 days from October 1, 1998 to file a conforming interconnection agreement. It asserts MCI concurs in the request. Therefore, GTE and MCI shall file their conforming interconnection agreement by no later than December 1, 1998.

It is SO ORDERED.

Done at Frankfort, Kentucky, this 12th day of October, 1998.

PUBLIC SERVICE COMMISSION

Chairman

Commissioner

DISSENTING OPINION OF EDWARD J. HOLMES, VICE CHAIRMAN

I disagree with the majority opinion in that I do not believe GTE should be required to furnish UNEs in combination pending the decision of the United States Supreme Court in the Iowa Utilities case.

Edward J. Holmes
Vice Chairman

ATTEST:

Executive Director