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

Despite years of negotiations and the rendering of Commission decisions setting terms and conditions upon which the interconnection agreement (the "Agreement") of GTE South Incorporated ("GTE") and AT&T Communications of the South Central States, Inc. ("AT&T") shall be based, the parties have not yet filed a final Agreement. The rapidly changing legal environment in which those negotiations have taken place has made final resolution difficult; however, the United States Supreme Court's recent decision in AT&T Corp. v. Iowa Utilities Bd., 119 S. Ct. 721 (1999) provides some stability to the law. Accordingly, on March 26, 1999, the Commission ordered AT&T and GTE to file a current list of issues remaining to be resolved and to explain the effect of Iowa Utilities Bd. on each issue. On April 20, 1999, the parties responded with filings which include new agreements reached on reciprocal compensation issues and describing the parties' continuing disputes. Commission decisions on outstanding issues follow.

Provision of Unbundled Network Elements

The parties state that they have agreed, based on the Iowa Utilities Bd. decision, to leave unresolved certain unbundled network element ("UNE") issues until the Federal Communications Commission ("FCC") issues new rules to replace 47 C.F.R. 51.319, vacated by the Supreme Court. Rule 319 prescribed a list of UNEs to be provided by incumbent local exchange carriers ("ILECs"). The rule was promulgated pursuant to 47 U.S.C. э 251, which requires an ILEC to provide UNEs "necessary" to a competitor's ability to provide service and without which a competitor's ability to provide service would be "impaired." The rule was vacated by the Supreme Court because the FCC had not given adequate meaning to the statutory terms "necessary" and "impair." Specific UNEs required to be provided by Rule 319 were the local loop, the network interface device ("NID"), switching capability, interoffice transmission facilities, signaling networks and call-related databases, operations support systems functions ("OSS" functions), and operator services and directory assistance.

This Commission finds that these functions provide the very basis of the local telecommunications network. A competitor's ability to provide service would clearly be impaired if those UNEs could not be obtained from the ILEC. This finding is not in conflict with Iowa Utilities Bd. The Supreme Court in that case simply found that the FCC had not given a substantial rationale for its finding that these UNEs are necessary for provision of service by a competitive local exchange carrier ("CLEC"). There is no reason to believe that the FCC will not reinstate this list of necessary UNEs in its rulemaking, together with a rationale supporting the listing under the "necessary" and "impair" standards. Section 251 (c)(3) of the Telecommunications Act of 1996 directly

obligates ILECs to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." Congress obviously contemplated the ability of competitors to provide telecommunications services through use of unbundled network elements. Furthermore, this Commission finds that interconnection and service provided to a CLEC, including use of the ILEC's facilities, must, as utility service sold within this Commonwealth, be adequate and reasonable.[1] This Commission is statutorily required by Kentucky state law to ensure such adequate, reasonably priced service.[2]

The General Assembly has specifically instructed the Commission to apply these regulatory principles to the competitive market:

> The public interest requires that the Public Service Commission be authorized and encouraged to formulate and adopt rules and policies that will permit the commission, in the exercise of its expertise, to regulate and control the provision of telecommunications services to the public in a changing environment, giving due regard to the interests of consumers, the public, the providers of the telecommunications services, and the continued availability of good telecommunications services.

KRS 278.512(1)(c). The statute also specifically instructs the Commission to exercise its discretion in adopting alternative requirements for establishing rates and service by means other than those specified in KRS Chapter 278 if such alternative requirements

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[1] See, generally, KRS Chapter 278. Further, the court in Kentucky CATV Ass'n v. Volz, Ky. App., 675 S.W.2d 393 (1984) made it unquestionably clear that "utility service" over which this Commission has jurisdiction includes the use of a utility's facilities. The court in Volz, id. at 396, found that "[t]he term 'service' not only includes the basic services for which a utility is created, but it also includes any service which arises from the use of a utility's facilities, such as its poles." Accordingly, the Commission's jurisdiction over utilities extended to the facilities of "all utilities," as well as to the rates paid for the use of those facilities. Id.

[2] Id.

are in the public interest. KRS 278.512(2). One factor in determining whether such means are in the public interest is the existence of competition. KRS 278.512(3).

Pursuant to its statutory mandate, this Commission has consistently held that ILEC provision of UNE combinations to competitors is necessary to the growth of meaningful competition in Kentucky. AT&T's forbearance on this issue does not obligate the Commission; nor does it negate Commission Orders previously issued on this subject. Accordingly, GTE must provide the UNEs described herein pursuant to the Agreement. Its statement that it will provide certain UNEs though it is not "obligated" to do so is incorrect. It is obligated to provide these UNEs pursuant to the Commission's Orders.[3]

Furthermore, despite the parties' interim agreement regarding UNE combinations, those UNEs must be provided in combinations if they already exist in combinations in GTE's network. The Supreme Court specifically upheld 47 C.F.R. э 315(b), which prohibits ILECs from separating UNEs when requested in combination. This Commission also has required ILECs, including GTE, to provide these combinations. Continued delay in implementing the Commission's Orders on this issue constitutes continuing harm to the public interest. Further recalcitrance on this issue may result in enforcement action. AT&T shall inform the Commission if GTE continues to refuse to provide AT&T with necessary UNEs in combination. The parties shall include the proposed language of AT&T in regard to UNEs and UNE combinations in their Agreement.

[3] Pursuant to current law, the Commission expresses no opinion herein in regard to whether UNEs other than those described in this Order must be provided. Further

Decisions on other issues, in regard to which the parties assert the Iowa Utilities Bd. decision has no effect, follow:

Disclaimer Language at Section 9.4

GTE asserts that language explaining that the Agreement is not voluntary and that both parties disclaim liability resulting from failure to comply with the Agreement should be included. AT&T objects to the proposed language. The Commission finds that the subject language is, at best, redundant, and, at worst, unlawful. GTE states the obvious in drawing a distinction between this Agreement and those agreements that are reached freely by the parties. GTE is a monopoly provider without strong incentive to enter into the Agreement. Provision of UNEs and services in a nondiscriminatory manner to its competitors will result in infringement upon its monopoly status. Under the circumstances, reasonable agreement by voluntary means appears to be impossible. Anyone who questions whether GTE's provision of interconnection pursuant to the Commission's Orders has been voluntary need only review the record in this case, wherein GTE's many objections appear. Accordingly, there is no reason to include language in the Agreement memorializing GTE's refusal to agree to terms prescribed by this Commission without having been compelled to do so.

Further, AT&T is well within the bounds of reason in refusing to agree that GTE bears no liability for deliberate violation of the Agreement. The parties' Agreement shall not include GTE's proposed language.

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guidance as to whether, and how, additional UNEs will meet the "necessary" and "impair" standards will come from the FCC.

GTE insists that it is not required to sign the Agreement because it is the functional equivalent of a Commission Order and not a mutual agreement. GTE also says its refusal to sign the Agreement does not demonstrate that it will refuse to honor it. Finally, GTE claims the Act does not require it to execute an Agreement reached through compulsory arbitration. GTE's arguments are self-contradictory: if it will abide by the Agreement, there is no sensible rationale for refusing to sign it. AT&T understandably objects to GTE's refusal to sign. Furthermore, GTE's argument lacks any basis in law. The Act requires an "Agreement," whether reached through compulsory arbitration or otherwise. The term "agreement" implies execution. Again, if GTE wishes to demonstrate its unwillingness to enter the Agreement, the record of this case provides ample evidence of its objections. The Agreement shall be executed by both parties.

GTE's Refusal to Implement Its Agreement Until the Commission Has Provided a Mechanism to Recover Its Historic Costs and Has Established a Universal Service Mechanism

GTE insists that its proposed Section 23.8 is appropriate. However, it presupposes certain pricing decisions by this Commission that contradict pricing decisions already made. The Commission-set prices are reasonable, and are based on total element long run incremental cost ("TELRIC"). The Federal District Court for the Eastern District of Kentucky has twice upheld the Commission's use of TELRIC as a pricing methodology.[4] The Commission's universal service proceeding is ongoing and will support those high cost services that, in that docket, are demonstrated to require

[4] See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 1999 WL 166183 (E.D. Ky. 1999), petition for clarification pending; AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc., 20 F.Supp.2d 1097 (E.D. Ky. 1998).

support. For the time being, also pursuant to MCI, supra, prices will not be deaveraged. Under this system, ILECs continue to receive sufficient support during the first phase of competition for the local market. GTE's language proposed for 23.8 shall not be included in the Agreement.

Dispute Regarding Access to Poles, Ducts, Conduits and Rights-of-Way

The parties dispute provisions regarding access to poles, ducts, conduits, and rights-of-way appearing at Attachment 3, Sections 3.1.4.1, 3.2.2, and 3.2.3. The dispute centers around AT&T's position that it is entitled to ancillary pathways to GTE facilities. GTE states that the Commission may not even consider this issue because "ancillary pathways" was not an issue raised in the arbitration position or response. 47 U.S.C. ə 252 (A).

The Commission finds that the distinction GTE draws here is unwarranted. The issue of "ancillary pathways" is not an issue separate from those appearing in the petition and the response. It is, instead, subsumed under issues previously submitted to, and decided by, the Commission. GTE is required to provide, in compliance with 47 U.S.C. ə 251(b)(4), reasonable and nondiscriminatory access to poles, ducts, conduits, and rights-of-way. To the extent that "ancillary pathways" provide such access, AT&T is entitled to use them. The parties' Agreement shall so reflect.

Dispute Regarding AT&T's Request for Use of Space and Electrical Power at Parity with GTE

GTE contends it is not required to provide to AT&T, even where GTE has ownership or other rights to right-of-way in buildings or building complexes, the right to use space it owns or controls; egress and ingress to such space; and the right to use electrical power at parity with GTE. GTE says no such access is required by the Act

and that the request is, in fact, "ludicrous." GTE asserts that the access contemplated by the Act is to the right-of-way itself, not the building surrounding it. GTE objects to permitting AT&T use to electrical power in this "forbidden space."

GTE's argument is defeated by the plain language of the Telecommunications Act of 1996, which requires ILECs to provide to competitors interconnection at "any technically feasible point" that is "at least equal in quality" to that provided to itself, on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. э 251(c)(2). In addition, GTE must provide to competitors unbundled, nondiscriminatory access "at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. э 251(c)(3).

GTE's refusal to permit access to space surrounding its facilities and to required electrical power would effectively prevent AT&T from obtaining any meaningful access at all. Certainly the unreasonable limitations proposed by GTE are discriminatory, in that they would prevent AT&T from obtaining access to facilities that is equal to GTE's. There is no rational argument that the requested access is not "technically feasible." The limitations proposed by GTE in this regard are rejected, and AT&T's proposed language shall appear in the parties' Agreement.

Limitations Proposed by GTE on Provision of Dark Fiber

GTE wishes to include language in the Agreement relieving it from leasing to AT&T more than twenty-five percent of its dark fiber in a particular feeder or dedicated interoffice transport segment. In addition, if GTE can demonstrate within a twelve month period after the date of a dark fiber lease that AT&T is using the leased capacity at a transmission level of less than 622.08 million bits per second, GTE states it should

be permitted to revoke the lease. AT&T apparently has agreed to the proposed limitations, and the Commission will not, at this time, order that the limitations be deleted. However, AT&T should be aware that, in MCI, supra, the Federal District Court found that dark fiber is a UNE that must be provided to CLECs in a nondiscriminatory fashion. Should AT&T wish to assert its rights in this regard, it may so state. In such event, the limiting language of Attachment 3, Section 4.2.1.2 regarding dark fiber shall not be included in the parties' agreement.

Testing Issues

The parties dispute whether certain provisions regarding testing should appear in their agreement. For example, AT&T asks that GTE provide it access for testing at the main distribution frame ("MDF") sufficient to ensure that applicable requirements can be tested by AT&T. AT&T also requests access seven days per week, twenty-four hours per day.

The Commission finds that the access requested by AT&T is reasonably necessary to enable it to test UNEs purchased from GTE. Moreover, the nondiscrimination standards of the Act require the seven days per week, twenty-four hours per day access requested, since GTE has such access. The language proposed by AT&T shall appear in the parties' Agreement.

Charge for Customer Change from GTE to AT&T Local Service

The parties state they have agreed only that the charge for a customer to switch from GTE to AT&T for local service is "to be determined." The Commission finds that a single tariffed charge to switch a customer from one local exchange carrier to another is reasonable and should be applied by the ILEC to all such carrier changes. The

charge for a presubscribed interexchange carrier switch is capped at $5,[5] and such limitation appears reasonable for the charge at issue here. Accordingly, GTE should charge a CLEC or its customer the amount that it charges, per its tariff, for switching a customer's presubscribed interexchange carrier. This decision complies with longstanding Commission policy.[6] The parties shall not incorporate a charge greater than $5 into their Agreement.

CONCLUSION

We emphasize that further delay in executing an agreement incorporating the terms prescribed in this and previous Commission Orders constitutes continued harm to the public interest. Accordingly, the parties are strongly cautioned that failure to file their executed agreement within 20 days of the date of this Order may result in immediate enforcement action.

The Commission having reviewed the record and having been sufficiently advised, IT IS HEREBY ORDERED that the parties shall file their executed Agreement with this Commission, incorporating the decisions reached herein, within 20 days of the date of this Order.

[5] See Administrative Case 323, An Inquiry Into IntraLATA Toll Competition, An Appropriate Compensation Scheme for Completion of IntraLATA Calls by Interexchange Carriers, and WATS Jurisdictionality, Order dated December 29, 1994, at 28.

[6] Id. See also Case No. 95-168, Lisa Gail Gamble, Dawn Elizabeth Howard, Teresa Darcel Cope, and Linda Sue Medley v. West Kentucky Rural Telephone Coop. Corp., Inc., Order dated November 27, 1995.

Done at Frankfort, Kentucky, this 13th day of May, 1999.

By the Commission

ATTEST:

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Executive Director