BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION OF AMERICAN TELEPHONE TECHNOLOGY, INC. FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996	**DOCKET NO. UT-990385**

RESPONSE OF U S WEST COMMUNICATIONS, INC. TO PETITION OF AMERICAN TELEPHONE TECHNOLOGY, INC. FOR APPROVAL OF OPT-IN CONTRACT PROVISIONS AND ARBITRATION OF INTERCONNECTION ISSUES

I.INTRODUCTION AND SUMMARY

Pursuant to section 252(b)(3) of the Telecommunications Act of 1996 (the "Act"), U S WEST Communications, Inc. ("U S WEST") hereby submits this Response to the Petition of American Telephone Technology, Inc. ("ATTI") for Approval of Opt-In Contract Provisions and Arbitration of Interconnection Issues.

ATTI is a competitive local exchange carrier ("CLEC") that resells U S WEST's products and services in Washington and that recently has established a presence in this state as a facilities-based provider. On March 23, 1999, ATTI requested interconnection negotiations with U S WEST pursuant to section 252(a) of the Act. In the months that followed, representatives of U S WEST and ATTI engaged in negotiations and were able to

reach agreement on some provisions of a proposed interconnection agreement that would govern their interconnection relationship. As the parties were continuing their negotiations, ATTI filed its petition for arbitration.

The petition raises three fundamental issues that the parties have not been able to resolve in negotiations. First, the petition requests that the Commission rule on the scope of ATTI's rights to opt into existing agreements between U S WEST and other carriers pursuant to section 252(i) of the Act. As discussed below, ATTI asserts an extremely broad view of its rights under section 252(i), claiming that it has the right to piece together an interconnection agreement by selecting partial sections from different agreements and melding those sections with other sections that ATTI has drafted. In addition, ATTI contends that it should be permitted to "pick and change" contract language – select language from another agreement and change that language to its liking.

The discussion set forth below demonstrates that ATTI is attempting to expand section 252(i) beyond permissible bounds and well beyond what Congress intended. Particularly in view of this Commission's impending rulemaking relating to section 252(i), the Commission should reject ATTI's overly aggressive use of section 252(i). If the rulemaking supports ATTI's interpretation – a result that U S WEST believes is highly unlikely – ATTI always can seek to have its interconnection agreement modified to comply with the rulemaking.

Second, ATTI is proposing contract language relating to collocation that is not consistent with the Act or the FCC's pronouncements on this issue. For example, ATTI

proposes language that exceeds the requirements the FCC established in its recent 706 Order[1] and that would permit ATTI to collocate virtually any equipment it chooses, regardless whether that equipment is necessary for or used for interconnection and access to unbundled network elements. In addition, ATTI has proposed language that requires U S WEST to combine network elements for ATTI, a request that directly contravenes the Eighth Circuit decision, which was not modified, that 47 C.F.R. §§ 51.315(c)-(f) violate the Act. In other provisions, ATTI needlessly inserts the Commission into the parties' contractual relationship.

Finally, ATTI has proposed contract language relating to the so-called UNE-platform, or combinations of unbundled network elements ("UNEs"), that ATTI would like to acquire at UNE rates instead of at the rates for resale services. ATTI's proposed UNE-platform provisions include language that would require U S WEST to combine elements for ATTI that are not already combined. That language clearly is unlawful and should be rejected. In addition, despite the FCC's recent pronouncement relating to UNEs, there is not a final order, and there is still substantial uncertainty surrounding the UNE-platform. Because it is not yet clear what the law requires of incumbent local exchange carriers ("ILECs") in connection with the UNE-platform, the Commission should defer ruling on this issue until it is finally resolved at the federal level.

For these reasons and the reasons set forth below, the Commission should reject the interconnection agreement that ATTI submitted with its petition. The Commission should adopt the agreement that U S WEST will soon submit in this proceeding.

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[1] Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, CC Docket No. 98-147, FCC 99-48, 1999 FCC LEXIS 1327 (rel. Mar. 31, 1999) ("706 Order").

II.THE ISSUES

A. ATTI's Rights Under Section 252(i)

ATTI's fundamental position relating to its rights under section 252(i) rests on three flawed premises: (1) it has the right to opt into individual provisions of sections of interconnection agreements without adopting the sections in their entirety; (2) it is free to select provisions from agreements between U S WEST and other carriers and then modify those provisions to fit its purposes – referred to as "pick and change" by U S WEST; and (3) the Act permits a hybrid approach under which ATTI can opt into provisions from other agreements without negotiating them and propose new language for other provisions that must be negotiated.

With respect to ATTI's first and second premises, the FCC's rule relating to pick and choose, 47 C.F.R. § 51.809, permits CLECs to adopt interconnection, services, and unbundled element "arrangements" from other approved interconnection agreements, not individual contract provisions. The rule further provides that an ILEC does not have to provide a particular arrangement if the ILEC demonstrates that the cost of providing the arrangement to another carrier would be higher or technically infeasible.[2] The FCC's use of the term "arrangement" is significant, as that term does not support the partial adoption of sections of interconnection agreements.

The significance of the FCC's reference to an "arrangement" is demonstrated by ATTI's treatment of the issue of interconnection in its proposed agreement. U S WEST has an interconnection "arrangement" with AT&T that is defined by all the provisions in the

[2] This language suggests that ATTI should not be permitted to adopt the reciprocal compensation arrangement that U S WEST has with MFS, since ATTI and MFS in all likelihood have different transport and termination costs.

interconnection section of the U S WEST/AT&T interconnection agreement. While ATTI has adopted substantial portions of that section of the AT&T agreement, it did not adopt the AT&T interconnection provisions relating to reciprocal compensation. Instead, ATTI has replaced the provisions relating to reciprocal compensation with provisions from an interconnection agreement between MFS (now WorldCom) and U S WEST. Thus, ATTI has "picked" the AT&T language relating to interconnection but "changed" substantial portions of that language by integrating the provisions from the MFS agreement. The end result of this unlawful exercise is a proposed agreement that contains conflicting provisions and significant redundancy.

By selecting only some of the AT&T provisions relating to interconnection and mixing those provisions with provisions from the U S WEST/MFS agreement, ATTI is not opting into an "arrangement" that U S WEST has with another carrier. Instead, it is creating its own contract language and its own interconnection arrangement specifically tailored to its needs.

In this regard, paragraph 1315 of the FCC's First Report and Order provides that an ILEC can require a requesting carrier to accept all terms that are "legitimately related" to the terms the requesting carrier desires, and the Supreme Court re-affirmed this requirement. The interconnection provisions in U S WEST's agreement with AT&T are integrated and related to each other and compensation provisions are certainly "legitimately related" to the rest of the terms and conditions for providing a service. As such, consistent with paragraph 1315 of the First Report and Order, the FCC's pronouncement, U S WEST should be permitted to require ATTI to adopt all of those provisions, not just those that ATTI desires.

Further, paragraph 1317 of the First Report and Order directs that under section

252(i), "the availability of publicly-filed agreements [is] limited to carriers willing to accept the same terms and conditions as the carrier who negotiated the original agreement with the incumbent LEC." (Emphasis added). Here, as demonstrated by ATTI's proposed modifications to sections of the AT&T agreement, ATTI is not seeking the "same terms and conditions" as AT&T. Accordingly, its attempt to opt into the AT&T agreement directly conflicts with paragraph 1317.

With respect to ATTI's third premise – that ATTI can opt into provisions from other agreements without negotiating them and propose new language for other provisions that must be negotiated – that contention also is not supported by the FCC's pronouncements relating to pick and choose. Section 252(i) is designed to give CLECs a means for entering local telecommunications markets quickly by opting into agreements instead of going through the longer process of negotiation and arbitration. As the FCC stated in paragraph 1321 of the First Report and Order, under Section 252(i), CLECs need not make opt-in requests pursuant to the procedures for initial Section 251 requests, but, instead, are "permitted to obtain [their] statutory rights on an expedited basis." The FCC emphasized that consistent with Congress's intent, the use of an expedited process for Section 252(i) "ensures that competition occurs as quickly and efficiently as possible."

Because Congress enacted Section 252(i) to provide a speedy means for entry into telecommunications markets, neither the Act nor the FCC's pronouncements envision CLECs opting into portions of some agreements while negotiating and arbitrating other contract language. This hybrid approach would undermine the driving force behind Section 252(i), as it would not avoid the use of the procedures associated with Section 251 requests and would not provide the type of speedy entry that Congress envisioned. Moreover, where a CLEC

cobbles together an agreement, as ATTI has done here, by drafting language of its own, taking language from other agreements and changing it, and opting into unchanged language from other agreements, the overall resulting agreement is new and cannot be opted into in whole or in part. To rule otherwise would be deprive an ILEC of the rights and protections afforded by the Act's negotiation and arbitration processes set forth in Sections 251 and 252. Accordingly, for this additional reason, ATTI's attempted use of Section 252(i) is improper.

Finally, the Commission's impending rulemaking relating to pick and choose supports rejecting ATTI's abusive use of this mechanism. Instead of allowing ATTI to use Section 252(i) in an unprecedented and unlawful manner, the Commission should rule in this proceeding that ATTI's pick and choose rights permit it only to opt into whole agreements or unaltered, whole sections of agreements. If the Commission's rulemaking results in a more expansive interpretation of CLECs' pick and choose rights, ATTI can seek to have its agreement modified to reflect that change.

B. ATTI's Proposed Language Relating To Collocation Is Unlawful

Section 251(c)(6) of the Act requires ILECs to permit requesting carriers to collocate equipment that is "necessary" for interconnection and access to unbundled network elements. 47 U.S.C. § 251(c)(6). In the 706 Order, the FCC confirmed that ILECs do not have to permit collocation of equipment that is not used or useful for interconnection or access to unbundled network elements, such as equipment used solely for switching or enhanced services. 706 Order ¶ 30. ATTI, however, has proposed contract language that would permit it to collocate equipment of its choosing, regardless whether the equipment is necessary (or even used) for interconnection or access to unbundled network elements. U S WEST's proposed collocation language recognizes the restrictions on collocation of equipment set

forth in the Act.

In addition, ATTI proposes language for adjacent physical collocation that is inconsistent with the 706 Order by failing to recognize the limits on an ILEC's obligation to accommodate adjacent collocation requests. In paragraph 44 of the 706 Order, the FCC recognized that ILECs have a considerable stake and interest in requests for adjacent collocation requests and that requests for collocation outside the ILEC's premises must, in fact, involve "adjacent" or contiguous property.

ATTI also proposes contractual language for collocation that would require U S WEST to combine network elements for ATTI. The Eighth Circuit vacated the FCC rules, 47 C.F.R. §§ 51.315(c)-(f), that required ILECs to combine elements of their network into different or new configurations or to combine elements of their networks with the facilities of CLECs. See Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), aff'd in part, rev'd in part, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999). In AT&T Corp. v. Iowa Utils. Bd., the Supreme Court did not overturn this determination. Accordingly, those rules remain invalid, and U S WEST has no obligation under the Act to combine elements of its network together or with ATTI facilities. U S WEST's proposed collocation language deletes these unlawful provisions.

Finally, U S WEST's proposed agreement will differ from ATTI's in that it will reduce burdensome Commission oversight that will needlessly delay the collocation process, conform with the Act, and maintain contractual consistency.

Unlike ATTI's contract, U S WEST's proposed agreement will contain installation intervals consistent with U S WEST's standard collocation intervals. Thus,

U S WEST proposed agreement ensures nondiscriminatory treatment of ATTI and other CLECs.

U S WEST's proposed agreement will omit provisions that needlessly insert the Commission into the parties' contractual relationship. For example, ATTI has proposed contractual language that would require Commission approval of various rates even when those rates are specified in tariffs, interconnection agreements, and U S WEST's union contracts. ATTI also proposes Commission oversight of claims of space exhaustion, even though U S WEST posts space availability on its Web page, and provides mechanisms for all CLECs to verify any claim of space exhaustion.

ATTI's proposed language does not ensure and protect network reliability and security, as the Act and relevant FCC regulations require. U S West's proposed agreement will.

ATTI's proposed "expedited" dispute resolution procedures are excessive and duplicative of the dispute resolution provisions of the AT&T agreement it seeks to adopt under section 252(i). U S WEST would eliminate those duplicative procedures.

ATTI proposes contract language that would impose "true-ups" when there is no Commission-approved true up mechanism, or require cost "splitting" where U S WEST has established rates. The majority of U S WEST's collocation rates are established by tariff or agreement; ATTI is not free to alter or "opt out" of

those rates.

U S WEST proposed collocation language will be consistent with the Act, FCC regulations, and ensure contractual uniformity and certainty. The Commission should adopt U S WEST's proposed language.

C. The Commission Should Not Accept ATTI's Proposed Language Relating To Combinations Of Unbundled Network Elements

Despite the FCC's recent press release concerning the UNEs that ILECs are required to make available to CLECs, there is still uncertainty relating to the extent of ILECs' obligations to provide UNE platforms. There is no final order relating to this issue, and it is still unclear, therefore, what is required of ILECs. Accordingly, U S WEST reserves the right to provide a further response to ATTI's proposed contract language relating to UNE combinations.

The uncertainty that still surrounds UNE combinations does not extend to whether an ILEC can be required to combine UNEs for a CLEC that are not already combined. As noted above, the law here is clear: ILECs cannot be so required. Iowa Utils. Bd. v. FCC, 120 F.3d at 813. ATTI's proposed language relating to UNE combinations violates this established principle by requiring U S WEST to combine elements that are not already combined. See section 1.2.6 of ATTI Proposed Interconnection Agreement. Accordingly, the Commission should reject that language.

III.CONCLUSION

For the reasons stated, the Commission should reject the contract language that ATTI is proposing and adopt U S WEST's proposed language. U S WEST will provide its proposed interconnection agreement in a later filing with the Commission.

DATED this 24th day of September 1999.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **Response Of U S West Communications, Inc. To Petition Of American Telephone Technology, Inc. For Approval Of Opt-In Contract Provisions And Arbitration Of Interconnection Issues** upon the following person by facsimile and overnight delivery:

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Dated this 24th day of September 1999.

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