BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of ADVANCED TELECOM GROUP, INC., NEXTLINK WASHINGTON, INC., ELECTRIC LIGHTWAVE, INC., FRONTIER LOCAL SERVICES, INC., AND FRONTIER TELEMANAGEMENT SERVICES, INC., for a Declaratory Order or Interpretive and Policy Statement on 47 U.S.C. §252(i) and 47 C.F.R. §51.809	)	Docket No. UT-990355

SUPPLEMENTAL COMMENTS OF

AMERICAN TELEPHONE TECHNOLOGY, INC.

American Telephone Technology, Inc. ("ATTI") respectfully submits its supplemental comments in response to the Commission's Notice of Opportunity to File Supplemental Comments ("Notice"), dated October 15, 1999. ATTI is a small competitive local exchange carrier ("CLEC") serving small business customers as its prime focus. It has operated for several years as a reseller and is now transitioning to a full facilities-based competitive provider in Washington, with collocations planned in ten U S WEST central offices and three GTE central offices within the greater Seattle area. ATTI has recently obtained substantial commitments of both debt and equity financing totaling some $100 million to fund its transition and will use this financing for, among other things, the purchase of four Nortel DMS-500 central office switches,

with one such switch scheduled for installation in the greater Seattle, Washington area.

At the present time, ATTI has pending before this Commission, two arbitration proceedings (Docket No. UT-990385 – U S WEST) and (Docket No. UT-990390 – GTE), in which ATTI is litigating many of the same interconnection issues as are raised in the instant docket. Accordingly, ATTI commends the Commission for its attempt to develop policies that would govern interconnection issues. It has been ATTI's experience, both here in Washington and in other states,[1] that ILECs often begin interconnection contract negotiations from positions that are inconsistent with their previously approved interconnection agreements with other CLECs. In addition, ILECs frequently refuse to allow a CLEC to "pick and choose" among individual contract elements or to obtain an interconnection agreement that is a hybrid of negotiated and arbitrated terms. Therefore, ATTI strongly endorses the Commission's adoption of Policy Principles 1, 4, and 5, among others.

Interconnection arrangements are very important to ATTI. ATTI needs to obtain appropriate contract provisions on key issues affecting its competitive entry into the Washington market. Importantly, several of these key issues have been the subjects of recent and significant regulatory

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Affiliates of ATTI provide or will soon provide CLEC services in several other states, including Colorado, Minnesota and Oregon.

rulings by the courts, this Commission, and the FCC. For a small CLEC like ATTI, however, negotiating a full and complex interconnection contract off of an ILEC "template" from scratch is simply too burdensome and costly. Consequently, ATTI seeks policies that would allow it to focus on the issues important to its competitive entry and to incorporate key recent rulings on those issues without otherwise expending unnecessary resources on the litany of other interconnection contract provisions.

The approach ATTI urges the Commission to endorse would allow CLECs to obtain a contract through a combination or "hybrid" of (1) adoption of interconnection contract terms from existing approved interconnection contracts, and (2) additional terms which would be negotiated or, if negotiations fail, arbitrated. As set forth herein, strong legal and policy reasons support the adoption of this approach.

ATTI believes that local competition law affords it this opportunity. On the majority of issues, ATTI, like most parties, simply wants to obtain a position that generally reflects the Commission's rulings and the law. Moreover, ATTI believes that the Commission would affirm its prior rulings on those issues (if those issues were raised again) where subsequent events have not changed the regulatory landscape. Contracts, which have been previously and extensively arbitrated and approved by the Commission, reflect the Commission's position for the great majority of the contract issues. Accordingly, it only makes sense for both parties to simply adopt many of those

provisions rather than recreating the wheel through the renegotiation of a complex contract hoping to get to the same substantive result.

The resurgence of "pick and choose," and the elimination of the requirement to opt-in to a contract "in its entirety," as a result of the U.S. Supreme Court decision earlier this year, provides CLECs the requisite flexibility to achieve the desired results – an acceptable interconnection contract. CLECs have the right to pick and choose desired provisions from existing agreements. An equally important right, however, is that CLECs are not limited to assembling an entire contract that way. For example, ATTI has chosen to invoke both of these rights in concluding an interconnection agreement with U S WEST for Washington. The matter is currently under arbitration before this Commission.

Historically, competitive carriers have had difficulty obtaining satisfactory interconnection arrangements with incumbent carriers, even where such markets were otherwise theoretically open to competition.[2] Competitors have often been forced to accept one-sided tariff terms. By imposing the substance or architecture of contract provisions, incumbents could limit and hamper the ability of competitors to obtain suitable interconnection terms. The incumbents had (and continue to have)

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See, e.g., Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092 (D.C. Cir. 1981) (A LEC refused to interconnect with an Other Common Carrier ("OCC") under the same terms and conditions that the FCC had ordered for the OCC's interconnection with other LECs.).

the advantage of time on their side, since every day of delay is another day of monopolist profits without additional competition. In crafting Sections 251 and 252 of the Telecommunications Act of 1996 ("Act"), Congress addressed these issues.[3] Clearly, Congress rejected a "one size fits all" approach, such as a tariff. Rather, the Act calls for a range of market entry options, and a similar range of contract approaches underpinning those options. Flexibility is the key, and the primary interest to be served is that of promoting competition in the marketplace.[4] This Congressional goal is pervasive and requires that any otherwise unclear issue under the Act be resolved in favor of the result that promotes local competition.

ATTI advocates herein a "pick and choose" approach wholly consistent with the Act and the FCC's rules. This approach provides for significant flexibility in obtaining a contract in a cost- and resource-efficient way. It represents a pro-competitive approach that allows CLECs to better take advantage of settled contract rulings while tailoring and fashioning appropriate provisions in areas

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See H. R. Rep. No. 104-204, pt. 1, at 74 (1995) ("new entrants into the market for telephone exchange service will face tremendous obstacles since they will be competing against an entrenched service provider").

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In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, First Report & Order, ¶ 3 (rel. August 8, 1996) ("*Local Competition Order*") (recognizing that one of the principal goals of the Act is the "opening of local exchange and exchange access markets to competitive entry").

where existing provisions do not adequately reflect changes in the business or regulatory landscape.[5] This approach is not precluded by anything in the Act. Moreover, it does not harm or prejudice the incumbent. Indeed, the incumbent will still have (or have had) its basic right to negotiate, or arbitrate (if it rejects the competitor's offer), every provision of its contract.[6]

The basic framework underlying this pick and choose approach is founded primarily in Sections 251 and 252 of the Act and the FCC rules and orders implementing those sections. Under the Act, incumbent local exchange carriers ("ILECs") have an overarching and express "duty to negotiate [interconnection terms and conditions] in good faith." *See* 47 U.S.C. § 251(c)(1). In turn, when negotiation fails, the Act gives CLECs the right to petition the Commission "to arbitrate any open issues." *See* 47 U.S.C. § 252(b)(1). The authority for CLEC to negotiate and arbitrate UNE combinations and collocation language, for example, clearly flows from these two sections.

Section 252 of the Act adds a further obligation on ILECs that also supports this approach to pick and choose. Section 252(i) of the Act requires an ILEC to:

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See S. Rep. No. 104-230, at 22 (1995) (finding that one of the purposes of 252(i) is to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated").

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This is not to say, however, that an ILEC can consistently refuse to agree to generally accepted contract terms and still satisfy its duty to negotiate in good faith, which is imposed by Section 251(c)(1) of the Act.

> make available any interconnection, service, or network element provided under this section to which it is a party to any requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

See 47 U.S.C. § 252(i).[7] It is important to note that 252(i) is encompassed *within* the duty to negotiate under 251. This framework supports the conclusion that opt-in under 252(i) was envisioned by Congress to be a component of and complement to the overall negotiation (or arbitration) of contracts.

The FCC rule implementing Section 252(i), commonly referred to as the "pick and choose" rule, largely tracks the language of the statute, and provides, in relevant part, that:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

47 C.F.R. § 51.809(a). In adopting this rule, the FCC explained that CLECs can utilize pick and choose to varying degrees based on a CLEC's particular interconnection plans and needs, including

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7 *See* 47 U.S.C. § 251(c)(1) ("[t]he duty to negotiate in good faith in *accordance with section 252* of this title *the particular terms and conditions of agreements* to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection") (emphasis added).

the "ability to choose among *individual provisions*." *See Local Competition Order* at ¶ 1310. The FCC went on to conclude, in overruling requests to require CLECs to adopt larger portions of contracts, that "this level of disaggregation is mandated by section 252(a)(1)." *See id.* at ¶ 1314. Earlier this year, the U. S. Supreme Court specifically approved the FCC's interpretation of Section 252(i).[8]

A close look at the FCC's discussion of its rule implementing 252(i) supports ATTI's position herein. The specific issue "teed" up for resolution in the NPRM giving rise to the FCC's order was "whether section 252(i) permits requesting telecommunications carriers to choose among *individual provisions* of publicly filed interconnection agreements..." *See Local Competition Order* at ¶ 1298 (emphasis added). The incumbent LECs argued that "section 252(i)'s requirement that a requesting carrier take service upon the same terms and conditions as the original carrier precludes *unbundled availability*." *See id.* at ¶ 1303 (emphasis added, footnote omitted). "New entrants" argued for "individual provisions…," noting in part that "allowing entrants to utilize individual provisions of agreements will lead to increased competition, which, in turn, will drive prices towards the most economically efficient levels, and that these benefits outweigh any additional burden that such unbundling may place upon incumbents in negotiating agreements." *See id.* at ¶ 1304. The FCC took specific note of the position of ALTS (the Association of Local Telephone Services) that

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8 *See AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 728 (1999).

would "permit unbundled availability to the level of the individual paragraphs and sections of section 251, with the exception of network elements provided pursuant to section 251(c)(3), which ALTS believes should be provided individually to non-parties on a disaggregated basis." *See id.* at ¶ 1305. The theme of "unbundled availability" of disaggregated provisions of interconnection contracts runs throughout these positions and comments. Most importantly, the FCC approved this position.

As noted elsewhere herein, the FCC approved a requesting carrier's right to "choose among individual provisions…" *See Local Competition Order* at ¶ 1310. It cited the legislative history (also previously cited herein) that (now) 252(i) was to "make interconnection more efficient…" *See id.* at ¶ 1311. Importantly, it cited as a policy basis the fact that new entrants ought to be able to utilize pick and choose to "reflect their costs and specific technical characteristics of their networks" and to obtain an agreement "consistent with their business plans." *See id.* at ¶ 1312.

The FCC plainly endorsed this approach. It rejected the broad linkage to "terms and conditions" sought by the incumbents and endorsed ALTS' position of "unbundled availability of individual elements," noting that to do otherwise would ignore one of the Act's goals of "promotion of competition." *See Local Competition Order* at ¶ 1312. The Commission should do likewise.

CONCLUSION

For the reasons set forth above, ATTI respectfully requests that the Commission adopt policy principles that recognize the rights of CLECs to "pick and choose" among individual contract elements or to obtain an interconnection agreement that is a hybrid of negotiated and arbitrated terms.

Respectfully submitted,

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Dated: November 10, 1999

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