BEFORE THE

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

UT-960307

In the Matter of the Petition of AT&T Communications of the Pacific Northwest, Inc. For Arbitration of Interconnection Rates, Terms and Conditions with GTE Northwest Incorporated, Pursuant to 47 U.S.C. Sec. 252(B) of the Telecommunications Act of 1996.	)))))))

POST-ARGUMENT BRIEF OF GTE NORTHWEST INCORPORATED ON DISPUTED LANGUAGE OF AGREEMENT

May 9, 1997

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INTRODUCTION

At the hearing held on this matter pursuant to the April 30, 1997 Order of the Washington Utilities and Transportation Commission, the parties and the decision maker agreed to address several issues by way of a post-hearing brief. Pursuant to that understanding, GTE Northwest Incorporated ("GTE") covers in this brief only the specific issues so identified at the May 2, 1997 argument. GTE therefore does not re-address the many other issues argued orally at the May 2 hearing.

GTE nonetheless adheres to its arguments articulated at that hearing. If anything, this process reinforces the theme GTE has been compelled to adopt throughout this attempt to turn the arbitrator's decision into a final contract. AT&T has consistently attempted to over-reach, and insist on contract provisions which either were not arbitrated at all, or were arbitrated and decided adversely to it. AT&T should not be permitted to do so, either under the Act or sound considerations of public policy.

ISSUE 1: May AT&T Insist on Provisions in the Contract Which Were Not Arbitrated, Solely Because of the Arbitrator's Resolution of Issue 65?

GTE addresses this issue first, because it continues to reoccur throughout this phase of these proceedings. AT&T has continually argued that any issue it might care to raise can be imposed on GTE in this contract, regardless whether it was covered in the arbitration or not. AT&T claims to base this

position on the Arbitrator's decision on Issue 65. AT&T is simply wrong, for at least three reasons. First, AT&T's assertion is flatly contrary to the express procedure designed by Congress. Second, AT&T's argument has already been rejected by the Commission. Finally, AT&T mis-reads the Arbitrator's Report and Decision (hereafter, "Report"), which, when correctly analyzed, does not conflict with the Act or the Commission's decisions.

A. AT&T's Position is Contrary to the Express Terms of the Act.

AT&T's position simply does not comply with the Act. If a contractual provision was not covered in this arbitration, and GTE does not agree to the provision, the provision may not be imposed upon the agreement, under the plain terms of the Act. The Act is explicit: the issues to be arbitrated, and imposed in an agreement, must be stated in the arbitration petition.

Either party to a negotiation under the Act may petition to commence the arbitration process. Specifically, the initiating party must "petition a State commission to arbitrate any open issues." §252(b)(1)(emphasis added). The petitioning party must also submit "all relevant documentation concerning" those issues. §252(b)(2)(A). Thus, it should not be surprising that AT&T, as the petitioning party, submitted its proposed contract: it is certainly "relevant documentation concerning" the open issues identified in its petition.

Any doubt that the arbitration process is restricted to the

open issues identified in the petition is eliminated by §252(b)(4)(A):

> The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

The Act simply could not be more explicit. If an issue was not set forth in the petition (or the response) it is not a proper subject for arbitration, and thus may not be included in an "arbitrated" agreement.

AT&T appears to argue that any issue included in the contract it filed with its petition somehow satisfies the statutory requirement[1]. The short response is that this argument is simply contrary to §252(b)(4)(A), and AT&T may not re-write the statute. The longer answer is to note that AT&T's argument ignores a separate distinction drawn by the Act, in §252(b)(1) and (2). In §252(b)(1), a party may petition to resolve "any open issue." AT the same time, however, pursuant to §252(b)(2)(A) the petitioning party must also provide "all relevant documentation concerning" the open issues. AT&T's proposed contract must be filed pursuant to §252(b)(2)(A); if it served to identify the open issues, then the requirement of §252(b)(1), and the express provisions of §252(b)(4)(A) ("The

[1] GTE notes that AT&T's actions in other states are inconsistent with the theory advanced here. In California, for example, AT&T filed its proposed contract substantially after it filed its petition for arbitration. Obviously, then, the contract cannot serve to identify open issues.

issues set forth in the petition") are all surplusage, at best, and completely avoided, at worst.

A moment's reflection also illustrates that AT&T's argument proves too much. Under AT&T's theory, a party could satisfy its obligations under §252 by simply filing a contract with a petition of literally two sentences: `This is [CLEC's] proposed contract. [CLEC] thinks [ILEC] should sign it, and [ILEC] doesn't.' The enormous burdens which AT&T's theory will impose -- on other parties, and on arbitrators, to argue and decide issues not actually identified nor presented to them -- mandate that AT&T's theory be rejected.

B. AT&T's Theory Has Already Been Rejected by the Commission.

Additionally, attempts such as AT&T's to impose non-arbitrated obligations on GTE over GTE's objection[2] have already been rejected by this Commission. In Docket No. UT-960338[3] the Commission repeatedly rejected proposed contract language which was disputed, if "it was not a subject of the Arbitrator's Decision." MCI Order, at 4-6 passim. Just as AT&T here, MCI had in that case filed a proposed contract with its petition,

[2] Of course, the parties are free to voluntarily negotiate virtually any issue and include it in the agreement, subject to the Commission's review for compliance with the standards established in §252(e)(2)(A).

[3] In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MCImetro Access Transmission Services, Inc. and GTE Northwest Incorporated Pursuant to 47 U.S.C. 252, Commission Order Modifying Arbitrator's Report, and Approving Interconnection Agreement with Modifications, dated April 3, 1997. A Copy is included as Attachment A.

containing the majority of provisions which the Commission later struck as not arbitrated. AT&T's arguments have already been rejected.

C. AT&T Misreads The Arbitrator's Decision.

Finally, contrary to AT&T's interpretation, the Arbitrator's decision is not contrary to the Act or Commission precedent. The Arbitrator decided in Issue 65 "to adopt AT&T's language on points which the Arbitrator has not awarded to GTE." Report, p. 59. AT&T leaps from this to the conclusion that its contract was awarded in its entirety. That leap is in error. The error is apparent when the Arbitrator's Decision is contrasted with the Arbitrator's recounting of "AT&T's Position." There, the Arbitrator noted that AT&T sought for him to "adopt [AT&T's contract] in full." This the Arbitrator did not do. The Arbitrator's decision is substantially more limited. The Arbitrator merely ordered the use of "AT&T's language" on the points not won by GTE.

This was consistent with the overall framework as the Arbitrator articulated it in his Report. The Arbitrator noted, correctly, that "with respect to individual arbitrations, §252(b)(4)(A) of the Act authorizes the Commission to resolve only the issues the parties present." Report, p. 1. Moreover, the Arbitrator noted that his role is limited to the issues the parties actually present: "The arbitrator resolves the issues the parties present by selecting, if possible, one party's offer or the other." Id. (emphasis added).

When viewed in this light, the Arbitrator's resolution of Issue 65 resolves a real world difficulty. On many of the issues resolved by the Arbitrator, neither party prevailed. On other issues, AT&T only substantially prevailed, but not to the point that its contract could simply be adopted unaltered. In all such issues, Issue 65 makes clear, AT&T's language was to be the base. This was an important decision, because in November of 1996, the parties still disagreed over which company's agreement would form the base document. Report, p. 59.

ISSUE 2: Main Agreement, Sections 9.3 and 23.12. May AT&T Impose Through the Contract the Requirement to Arbitrate an Obligation Which a Competent Authority Has Struck Down?

Both Sections 9.3 and 23.12 deal with the same issue: AT&T's attempt to resurrect, through a contractual obligation to arbitrate, a requirement which some court or regulatory authority has struck down. (The distinct disputed provision concerning the scope of Section 9.3 will be dealt with below.) AT&T's proposal, when viewed in the context of the entire agreement arising under the Act, is clearly over-reaching.

In conducting this arbitration under the Act, the parties and the Arbitrator have tried to fulfill the requirements and standards of §251. See §252(c) and (d). Thus, the "agreement" which will result from this process is one which imposes obligations on the ILEC, where the obligations arise from §251. It is no secret that the correct interpretation of §251 is

currently being litigated. Sections 9.3 and 23.12 thus deal with the entirely foreseeable eventuality that some of the obligations may no longer be required. Should that occur, the basis would be eliminated for a provision implementing such a requirement.

For example, in the First Report and Order the FCC determined that operations support systems (OSS) are network elements which an ILEC must provide to competing carriers, and set forth certain rules relating to the provisioning of OSS. However, whether OSS is actually a network element under a proper interpretation of the law is an issue squarely before the Eight Circuit. If the Eight Circuit was to rule that OSS is not a network element, then GTE would be under no obligation to provide OSS to AT&T. AT&T's proposed language in both sections nonetheless seeks to resurrect such an obligation -- as a contractual obligation rather than a statutory obligation -- by making it incumbent upon GTE to "renegotiate" with respect to OSS, subject to binding arbitration if the parties cannot agree. While in such circumstances GTE would certainly be willing to discuss the provision of OSS -- even outside of any statutory obligation -- there would be no legal obligation on GTE to come to an agreement with AT&T on the issue, subject to the determination of some arbitrator.

An analogous situation can be seen when the Decision Maker examines the only other statute of which GTE is aware which contains an obligation like that of the Act. That statute is the National Labor Relations Act, which also requires adversaries to

a relationship to bargain in good faith. Under that law, it has been well established for years that parties may not be forced to agree to "interest arbitration" -- arbitration which will decide contract provisions governing the parties' relationship. NLRB v. Columbus Printing Pressmen, 543 F.2d 1161, 93 LRRM (BNA) 3055 (5th Cir. 1976). The court's rationale there applies equally here. See 543 F.2d at 1164-66, passim. An ILEC is obligated to bargain in good faith over the requirements of §251(b) and (c). §251(c)(1). Those obligations do not include an agreement to bind oneself to an obligation for something which is not -- under the eventuality giving rise to a concern under Sections 9.2 or 23.12 -- in fact an obligation.

There is an additional infirmity with AT&T's proposed Section 9.3. This section is predicated on the joint recognition (when the competing provisions are compared) that judicial review, if it overturns portions of either the Arbitrator's Report or the FCC's Order, will necessitate modification of portions of the Agreement. AT&T's language, however, fails to acknowledge that barring a stay, any order issued subsequent to the filing of this Agreement will be immediately binding on the parties. Thus, GTE's proposed language implements such judicial or administrative modifications when they become effective. In contrast, AT&T's proposed language attempts to delay any modification of the Agreement until such a time as the judicial or administrative action becomes final or nonappealable -- notwithstanding that such governmental action may be fully

binding on the parties for months or years until it becomes no longer appealable. Such over-reaching should not be countenanced.

ISSUE 3: Main Agreement, Section 28.6. May AT&T Impose on GTE the Obligation to Create a Data Base it Currently Does Not Maintain, at No Cost?

As requested at the argument, GTE has confirmed with its technical personnel: GTE does not create or maintain a data base along the lines requested by AT&T in this provision.[4] GTE would be willing to prepare such a data base, if AT&T pays for it. Additionally, given the nature of the numbers in question, GTE would want specific acknowledgement that it accepts only limited liability for the provision of this data base. GTE's proposed language accomplishes these results, and should be selected.

ISSUE 4: Main Agreement, Section 37.10.1. Must AT&T pay a proportionate charge for the 911 router capacity it exhausts?

The comment offered by Mr. Griffith at the argument -- that the counties pay these costs in Washington State -- is ultimately true. In practice, however, the phone company incurs this

[4] Upon further investigation, it appears to GTE that AT&T's insistence on this point is based on a mistake of fact. A data base along the lines addressed in Section 28.6 is typically maintained by the Public Safety Answering Point ("PSAP") providing 911 service. In Washington, PSAP personnel are typically employees of the host county. GTE does not maintain such a data base for itself.

expense, and then is reimbursed by the county. GTE does not believe that it should be required to serve as middle-man for AT&T in dealing with county governments on this issue. This is particularly true, as additional CLECs operate in a given area. GTE could quickly face similar burdens from a multitude of carriers. The better practice is therefore for AT&T to pay the cost for additional capacity to serve its customers, and then seek reimbursement from the county itself.

ISSUE 5: Attachment 2, Section 13.1.2.16. May AT&T Insist on Ambiguous Technical Testing Requirements When the Entire Obligation Was Not Arbitrated?

The Decision Maker requested additional briefing on this section. GTE's language is predicated on a simple fact: the entire issue addressed by Section 13.1, Cooperative Testing, was not arbitrated. GTE is willing to voluntarily undertake some aspects of this, so long as it is carefully prescribed.

The only testing issue to come before the Arbitrator was, very specifically, loop testing. Issue 25, Report, page 48-49. The parties have agreed to a provision specifically covering loop testing. Attachment 2, Section 3.1.1.7. All other kinds of testing, cooperative or not, simply were not arbitrated. GTE is unwilling to agree to this provision unless its language is included.

As GTE made clear in the arbitration, it does not test other than "designed" services. Report, at p. 48. GTE won this issue. Id., at p. 49. GTE is willing to perform such testing for AT&T,

but designed services can not necessarily be held to pre-established, standard technical specifications. That is to say, such circuits have been designed to achieve some new functionality. The standard specifications referred to in AT&T's proposed contractual language may -- or may not -- apply to a specially designed circuit. That is why GTE's proposed language is better, and should be selected by the Decision Maker.

ISSUE 6: Attachment 2, Section 13.5.1 (and Definition of "Interconnection," Attachment 11). May AT&T Use Facilities Provided Under This Agreement to Augment its IXC Network?

GTE does not dispute that, given the FCC's First Order, AT&T may utilize unbundled network elements to provide exchange access to itself for the purpose of providing interexchange service to consumers. See FCC Order, ¶ 356. That is precisely what GTE's contract proposal says, and it should be adopted.

AT&T's proposed definition of "Interconnection," is flatly contrary to the Act's requirements as the FCC has interpreted them. The FCC rejected the idea that interconnection could be utilized for the purpose of originating or terminating interexchange traffic. Order, ¶ 191. Indeed, the FCC viewed "interconnection" in precisely the same way urged by GTE here: "interconnection pursuant to section 251(c)(2) is merely the physical linking of facilities between two networks. . . ." Id., n. 398. That is precisely GTE's position, that "Interconnection" is between networks, not within them. GTE's proposal is, in both

instances, the more reasonable, and should be adopted.

ISSUE 7: Attachment 3, Sections 3.6.2 and 3.6.3. May AT&T be Allowed to Enter and Alter GTE's Property Without a GTE Representative Being Present?

The Arbitrator ruled that GTE's FCC physical collocation tariff controls. GTE's Tariff FCC No. 1, Section 17 is attached hereto. In GTE's tariff, collocation is referred to as "Expanded Interconnection Services." See Section 17.1.1. GTE's tariff plainly provides for escort services anytime a collocating customer's facilities cannot be partitioned for separate entry. Section 17.7.5(E), p. 339. Since the contract provisions at issue, Sections 3.6.2 and 3.6.3, deal with the use of conduits and manholes, such space obviously cannot be partitioned. GTE will follow its collocation tariff (should there be any suggestion that GTE's cost recovery component of these sections is inconsistent with its tariff, GTE would suggest that the Decision Maker make explicit that such cost recovery is governed by the tariff). GTE's proposed contract provision is better than AT&T's.

ISSUE 8: Attachment 14, Section 1.1 and Appendix 1 thereto, Section 2. May AT&T Evade the Initial Service Order Charge Because it Has Agreed to Pay the OUTPLOC?

AT&T's objections are based on a comparison of apples and oranges. The OUTPLOC merely covers the processing of a Local Service Request. See Attachment 10, p. 5. An Initial Service

Order covers a variety of other tasks[5], and is a TSLRIC based non-recurring charge. See Trimble Testimony, Trimble Attachment 3A, page 3, GTE Ex. 8.2. This Decision Maker has already rejected AT&T's attempt to escape GTE's legitimate NRCs. Arbitrator's Supplemental Report, p. 3. He should do so again, and select GTE's language which is consistent with the Arbitrator's decision.

CONCLUSION

AT&T's proposed contract provisions which remain at issue should be rejected by the Decision Maker. AT&T's proposals are, in numerous regards, in conflict with the Act, the Arbitrator's Report, sound public policy and elementary notions of simple fairness. The Decision Maker should instead adopt GTE's proposed provisions, and direct the parties to prepare a conforming contract.

Respectfully submitted this ____ day of May, 1997.

[5] As the Decision Maker is aware from the underlying arbitration, the Initial Service Order recovers a variety of costs, including the costs of service order entry (including an Install Order, a Summary Bill Master Order, and a Change Order), other ordering activities (including Completion/Displacement Notification and Permanent Non-Treatment), billing inquiries, and system processing. GTE Cost Study, TSLRIC Supplemental Materials, p. 166.12 (confidential). These activities have a TSLRIC many multiples of the OUTPLOC referred to by AT&T. Id.

GTE NORTHWEST INCORPORATED

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