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BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In the Matter of the Petition) Docket No. UT-990390
for Arbitration of an)
Interconnection Agreement) Volume 1
Between) Pages 1.1 - 1.35
)
AMERICAN TELEPHONE TECHNOLOGY,)
INC., and GTE NORTHWEST,)
INCORPORATED.)
)
Pursuant to 47 U.S.C. Section)
252.)
_____)

A hearing in the above matter was held on November 2, 1999, at 1:00 p.m., at 1300 Evergreen Park Drive Southwest, Olympia, Washington, before Administrative Law Judge LAWRENCE BERG.

The parties were present as follows:

AT&T, by Lawrence R. Freedman, Attorney at Law, Arter & Hadden, 1801 K. Street, N.W., Suite 400 K, Washington, D.C., 20006-1301.

GTE NORTHWEST, INCORPORATED, by Judith A. Endejan, Attorney at Law, Williams, Kastner & Gibbs, P.L.L.C., Two Union Square, 601 Union Street, Suite 4100, Seattle, Washington 98101.

1 JUDGE BERG: This is an arbitration hearing before the
2 Washington Utilities and Transportation Commission in Docket
3 Number UT-990390, captioned In The Matter of the Petition for
4 Arbitration of the Interconnection Agreement between American
5 Telephone Technology Inc. and GTE Northwest Incorporated pursuant
6 to 47 U.S.C. § 252. American Telephone Technology Inc. shall
7 also be referred to as ATTI and GTE Northwest Incorporated shall
8 also be referred to as GTE.

9 This case comes before the Commission today, November 2,
10 1999, in the Commission's offices in Olympia, Washington. This
11 hearing is conducted pursuant to Notice properly served on all
12 parties on October 21, 1999. The arbitration hearing is being
13 conducted pursuant to
14 47 U. S. C § 252 also known as the Telecom Act of 1996 and
15 Commission Docket No. UT-960269 Interpretative and Policy
16 Statement Regarding Arbitration and Approval of Agreements Under
17 the Telecom Act.

18 Arbitrations conducted under the Telecom Act are not deemed
19 adjudicative proceedings pursuant to the Washington
20 Administrative Procedure Act, but are guided by its principals.
21 At this point in time, we will take appearances by the parties
22 beginning with ATTI and then GTE.

23 MR. FREEDMAN: Good afternoon, Your Honor, my name is
24 Lawrence Freedman, Counsel for ATTI, and with me on my right is
25 David Kunde, who is ATTI's principal witness, and also with me on

1 my left is Jeffrey Oxley who is Director of Regulatory Affairs
2 who also responded to the second set of data requests.

3 JUDGE BERG: All right, and for GTE?

4 MS. ENDEJAN: Yes, ah, Judy Endejan, from Williams, Kastner
5 & Gibbs, here today representing GTE Northwest. I have with me
6 on my left Mr. Kirk Lee who will testify on behalf of the company
7 and Ms. Joan Gage who is a manager in GTE's regulatory
8 department.

9 JUDGE BERG: Thank you very much. There've been
10 preliminary discussion regarding the procedures we will follow
11 here today. There are four issues that the parties have
12 outlined as unresolved between them. Of the four issues, one
13 issue is of a legal nature; three issues are of a factual nature.
14 We will proceed on a issue-by-issue basis. ATTI will be allowed
15 to qualify its witness and for its witness to make a brief
16 summary, of its - of his testimony, filed with the - previously
17 filed with the Commission, or to briefly describe ATTI's stated
18 position on any given issue as we address them after which GTE or
19 opposing party will conduct cross examination. After cross
20 examination is concluded, GTE's witness will be qualified, make
21 a brief summary statement, be cross-examined. Then the advisors
22 or the bench may ask questions of the parties, subsequent to
23 which the parties will be given an opportunity to conduct brief
24 redirect, if necessary, and recross examination.

25 My name is Larry Berg. I've been appointed as arbitrator in

1 this case by the Commission. Advising me in this proceeding are
2 Ms. Jing Roth, Commission Staff economist, Mr. David Griffith,
3 Commission Staff engineer, and Tre Hendricks, Administrative Law
4 Section, judges' clerk.

5 There's one - there's two preliminary matters to address.
6 Ms. Endejan, we had some discussion where GTE expressed it may
7 have an objection to the hearing format here today. Is there
8 anything for the record - statement for the record that you'd
9 like to make?

10 MS. ENDEJAN: Your Honor, I - I don't think it's necessary.
11 I think that we - we expressed a preference to proceed witness-
12 by-witness as opposed to issue-by-issue. I don't believe that
13 will prejudice the - prejudice as much by proceeding in the
14 manner that you've decreed.

15 JUDGE BERG: All right, and do you want to make any
16 statement regarding ATTI's presentation of testimony relating to
17 the 10 versus 15-day interval Issue No. 4, even though there was
18 no pre-filed testimony?

19 MS. ENDEJAN: I guess for the record I would just state
20 that I - there was no discussion of Issue No. 4 in either of Mr.
21 Kunde's direct or rebuttal testimony. So to the extent he
22 interjects any item of fact or - or matter that could have been
23 brought up in his pre-filed testimony, I would object and state
24 that if - it could prejudice my ability to effectively cross
25 examine the witness. However, I also recognize that this issue

1 is a relatively discrete issue, and having dealt with quite
2 quickly, and it is my intent, hopefully, to be able to not be
3 prejudiced by the failure to have had a prior disclosure of
4 anything that Mr. Kunde might say on this.

5 JUDGE BERG: All right, I'm going to consider this a
6 continuing objection, by GTE. I had expressed to the parties off
7 the record that it was also my impression that this relates to an
8 issue that is much in the way of a lay issue and that the
9 statement of ATTI of its position in the Unresolved Issues Matrix
10 revised October 22, 1999 could serve as the basis for cross
11 examination of the witness. GTE should make any subsequent
12 arguments about the consideration of that stated position in the
13 testimony which is received here today in its post hearing
14 briefs. Anything from you, Mr. Freedman, before we move on?

15 MR. FREEDMAN: I would like to make the brief observation
16 that - you know, I recognize that that the desire is to see these
17 matters in pre-filed testimony and obviously we've considered it
18 hardly to be a legal issue, but by the same token, to the extent
19 things are stated today by Mr. Lee, which are not verbatim in
20 his pre-filed testimony, I assume that you'd expect us to be
21 prepared to try and address them and therefore we would hope that
22 that would be taken into account.

23 JUDGE BERG: Another issue that was brought up to be
24 resolved prior to beginning testimony were objections by ah GTE
25 over responses to data requests by ATTI. My understanding is

1 that both parties have agreed that GTE could present arguments in
2 the form of Motion to Compel here this morning and that if it
3 prevailed, ATTI is prepared to provide testimony in response to
4 those previously unanswered discovery requests.

5 Ms. Endejan, would you like to start with describing
6 describing what those two issues are in presenting your position?

7 MS. ENDEJAN: Thank you, Your Honor, yes. On October 15th,
8 GTE served a first set of data requests to ATTI. There were nine
9 data requests identified in that first set. ATTI objected to all
10 of them. After consultation with my client at GTE and further
11 discussion with Mr. Freedman, we concluded that there were – we
12 could narrow down for purposes of what we deemed to be most
13 relevant here, two specific questions. Mr. Freedman and I
14 discussed the matter on Friday and he stated that-a should you
15 find them relevant and appropriate here that he would be in a
16 position to provide responses here on the record today.

17 The first request that-a GTE wants an answer to is an answer
18 to this question. Does ATTI intend to serve business customers
19 with four or more lines in the Seattle MSA or any other MSA in
20 Washington State? This question has relevancy to perhaps one of
21 the only factual issues which we do deem related to GTE's
22 obligation to provide unbundled network elements. Without going
23 into a lot of the legal arguments which you will hear summaries
24 of at the end of today's proceedings, the FCC and its September
25 15th press release, and I recognize that it is just a press

1 release, indicated that one of the obligations that an
2 independent incumbent LEC would not have to assume in providing
3 unbundled network elements, would be switching where LECs would
4 not be to provide access to unbundled local circuit switching for
5 customers with four or more lines that are located in the densest
6 part of the top 50 MSA. Therefore, the answer to this question
7 is relevant to whether and what type of unbundling obligation GTE
8 might have to assume in the Seattle area. We do not know where
9 ATTI is targeting. We do not know a geographical market it
10 intends to serve or whether it intends to serve business
11 customers with four or more lines. We think that it would be
12 very helpful for the arbitrators who know that that piece of
13 information because it has a direct bearing on what ultimately
14 will be GTE's unbundled network obligations. We are all
15 disadvantaged by the FCC's failure to get out the final Order
16 which is the issue the press release is about on September 15th.
17 Everyday I'm told - every day I check, I'm told it's imminent. I
18 don't know when that's going to be. So, I'm trying to proceed on
19 the best basis I know how to find a narrow, discrete piece of
20 information that's going to be very, very important in the not-
21 too-distant future because I'm assuming the FCC ultimately will
22 issue that Order. So that is the reason why we seek the answer
23 to No. 5.

24 The second question is we ask ATTI to identify those GTE
25 central offices in Washington where it seeks co-locations. This

1 is directly relevant, particularly because of Mr. Kunde's comments
2 about potential huge costs creating barriers to entry, and
3 particularly because in its petition of arbitration, it indicated
4 that AT&T intended to co-locate in three Washington central
5 offices. So that tells us that they must have identified the
6 central offices or they wouldn't have said that they were going
7 to co-locate in three. Because if we knew what those were, we
8 might have a better clue with respect to the cost positions of
9 the parties - a lot of the cost positions which Mr. Kunde
10 discusses in his testimony. So, in a nutshell, I think that a
11 response to both of those questions would certainly assist the
12 arbitrator and ultimately reach whatever decision the arbitrator
13 has to make in this case.

14 JUDGE BERG: Which was the actual numerical designation of
15 the second issue? The first one was No. 5. What was the second
16 one?

17 MS. ENDEJAN: Well, the second one was a combination,
18 actually of - modification of Question No. 7.

19 JUDGE BERG: All right.

20 MS. ENDEJAN: To the first set of data requests.

21 JUDGE BERG: Mr. Freedman?

22 MR. FREEDMAN: Your Honor, we respectfully, but quite
23 vigorously disagree. There's absolutely no relevance to any of
24 the nine items in the first set of data requests, if anything,
25 you need to know to determine the issues in front of you.

1 Indeed, if you look at the nine requests – and we would be happy
2 to provide them to you – they’re nothing more than simply a far-
3 flung approach to somehow take a shotgun after it to determine
4 ATTI’s business plans. But there is absolutely nothing – nothing
5 in the Telecommunications Act of 1996 that conditions your legal
6 rights to contractual provisions under an interconnection
7 contract what your business plans may be to implement those
8 rights. There’s absolutely nothing that conditions that. And
9 were that the case, I can guarantee you that every arbitration
10 hearing that has more than three issues before the tribunal,
11 would never finish. We’d still be going through the hearings
12 that started at the end 1996 determining what AT&T’s business
13 plans were, what MCI’s business plans were, and what MFS -- what
14 MFS’s business plans were. So your Honor, when Ms. Endejan
15 indicated that these two were what she called the most relevant
16 there were certainly no concession on my part that any of these
17 are relevant. Moreover, Your Honor, there was a stipulation that
18 Ms. Endejan and I indicated that notwithstanding any ruling you
19 may make to the extent that the discovery would come in and that
20 it would be without any concession whatsoever – that these were,
21 in fact, relevant or appropriate for issues before the tribunal
22 today. Moreover, Your Honor, in fact, what both of the discovery
23 questions that Ms. Endejan has raised either were not accurately
24 reflected in her statement to you today or did not track the FCC
25 Order that she refers to. If you look –

1 Do you have before you, Your Honor, the actual set of data
2 requests that were filed?

3 JUDGE BERG: No, but I'd prefer not to see them.

4 MR. FREEDMAN: Okay. Well, Your Honor, I will read it to
5 you because what, in fact, what was served on ATTI, um, going to
6 the first issue is, quote, Does ATTI intend to serve business
7 customers with four or more lines in the Seattle MSA or any other
8 MSA in Washington State?, close quote. The problem is that that
9 doesn't even - I can wait until you're done -

10 JUDGE BERG: Thank you.

11 MR. FREEDMAN: That doesn't even track legal standard, Your
12 Honor, to the extent that it was appropriate to have CLEC's come
13 in and divulge their business plans for the purpose of
14 determining what legal obligations are entitled to an
15 interconnection contract, this question is not helpful because
16 the FCC's press release, which is not an Order talks about the,
17 quote, densest areas which Ms. Endejan indicated in her summary
18 of that not issued Order - current press release - and question
19 five, in short, doesn't even talk about that. And assuming it
20 did, Your Honor, be it far from me to be the one to try and
21 discern or figure out what is meant by the term 'densest area' or
22 to do an overlay of what ATTI's intentions are to decide what
23 ultimately fits within that category. I submit, Your Honor, that
24 if and when the FCC's Order comes out and if and when these
25 issues are thrashed out, there'll be a lot of ink spilled and a

1 lot of paper flowing on the issue of how that's to be interpreted
2 and applied. So, the question would not be relevant in any
3 sense, and the question is framed that ATTI doesn't track the
4 applicable language of the FCC Order. Moreover combined UNEs is
5 a legal issue, plain and simple. As you've stated at the start
6 of the hearing and as the parties have cast the issue in their
7 statement of the issues in the Unresolved Issues Matrix, if the
8 parties have not proceeded along the lines of any factual issues
9 in this case, Mr. Lee, in his prefiled testimony on behalf of GTE
10 did not submit factual testimony of the issue of combined UNEs
11 and neither did we because both parties have an understanding
12 that this was a legal issue.

13 As to Item No. 7, again the question which is posed to us is
14 not a question as stated by Ms. Endejan this afternoon. It just
15 says identify the central offices in Washington where ATTI seeks
16 co-location. And, again, it's now been modified to say GTE's
17 central offices which is fine, but the bottom line is, again,
18 it's seeking what a CLEC's business plans are and aside from the
19 fact that you don't need to know that information to decide the
20 legal issues posed to you, I would submit, Your Honor, to set a
21 dangerous precedent and a slippery slope if you allow that
22 information to be compelled. Because the next case that comes
23 along, somebody will, perhaps, all nine of these data requests
24 some of which includes, quote, State the number of business
25 customers currently served in the state of Washington. State

1 whether ATTI intends to serve business customers as its target
2 market. Or this one – If the answer to the foregoing question is
3 yes, provide all documents which describe ATTI's business plan
4 for Washington. Provide a copy of all interconnection agreements
5 which ATTI's entered into. Provide a copy of all resale
6 agreements which ATTI's entered into. Identify any central
7 offices anywhere where ATTI currently has co-located its
8 equipment. In short, Your Honor, these data requests do not seek
9 information which is probative and relative of the legal
10 obligations for which the tribunal is required to determine
11 today. And for those reasons and the reasons that I stated
12 before, I respectfully request that you deny the request for
13 answers to those discoveries.

14 JUDGE BERG: Ms. Endejan, I don't think Mr. Freedman's
15 description of the issues is much different than you've presented
16 them, so I don't think it's necessary for you to respond as to
17 whether or not you accurately presented the statement of the
18 issue, but I do want to give you an opportunity to respond.

19 MS. ENDEJAN: Thank you, Your Honor. I– I was – I guess
20 we're – we're here – we're trying to determine whether the
21 questions I've asked are going to give the – give you information
22 that you need to have in your hand when you are ruling on the
23 arbitration – arbitrator's interconnection obligations that we
24 will have. Now, it seems to me that if the FCC has a condition
25 that says that incumbent LECs need not provide access to

1 unbundled local circuit switching for customers with four or more
2 lines that are located in the densest part of the top 50
3 metropolitan statistical areas, you need to know if that is going
4 to have any bearing whatsoever on what GTE's legal obligations to
5 ATTI are going to be. I think that Mr. Freedman mis-
6 characterizes what GTE is seeking here. We're not seeking
7 wholesale discovery of their business plans and anti-competitive
8 edge. We want to know what they plan on doing, so that we will
9 know what the facts are, so that we can deal with the situation,
10 applying the facts to the legal obligations at hand. I find it
11 ironic that we're not supposed to know what central offices of
12 GTE ATTI wants to seek location in thereby leaving GTE completely
13 in the dark in terms of having any idea of whether these COs are
14 COs that are going to require massive conditioning costs, whether
15 these are COs for which this is really a non issue. Typically,
16 CLECs such as ATTI submit an application for co-location
17 requests. They identify where they want to go. Um, Mr. Kunde
18 spent a great deal of time talking about the costs that are - our
19 proposal would have upon ATTI, but that's all sheer speculative -
20 that's all something that we have no idea of putting any frame
21 around - or dragging down to, you know, *terra firma* - to earth -
22 to determine what, in fact, the costs are because we don't know
23 where they want to go. They know where they want to go. They
24 know that they want to go in at least three central offices -
25 that's part of the Petition - it seems to me directly relevant to

1 ask them to tell us which CO. So, if – if we do not get the
2 answers to these questions and if you were to hypothetically
3 mandate imposition of an unbundling obligation such as suggested
4 by ATTI and their proposed language, we would have to come back
5 before you to redo the whole section if, in fact, in reality
6 there were situations where under the law ATTI was not entitled
7 to provide access – was not entitled to have access to unbundled
8 local service switching. It's not a difficult question to
9 answer. It does not require ATTI to tell us their deepest,
10 darkest business plan. It just allows us to know if ATTI is
11 going to be in the category of CLECs to whom this condition might
12 apply. So, that's – that's why we respectfully ask that these
13 two questions be answered – we talk through these; we narrow
14 them down; we're not insisting upon answers to the questions Mr.
15 Freedman otherwise read; we modify the question to only apply to
16 these central offices. So, he is correct that I did state No. 7
17 exactly accurately, but it was done in an attempt to make it as
18 unobtrusive and unburdensome as possible for ATTI. Thank you.

19 JUDGE BERG: Thanks to both Counsel for the excellent
20 arguments. If I thought this information would assist me in any
21 minimum way to resolve the issues as outlined and as I understand
22 them to from the parties, I wouldn't hesitate to require the
23 information as requested, but quite frankly, I don't see how this
24 information will assist me in – in any way. What I see as what
25 we need to do under Issue No. 1 is to develop a system for

1 allocating the costs to be incurred as a result of co-location
2 and that would be without regard to whether it was one or a
3 hundred different requests for co-location. That approach – that
4 methodology approach, I don't believe is driven by any specific
5 identification of relevant central offices or driven by whether
6 or not ATTI has an intention to serve one particular class of
7 customer versus any others. I think that the prudent approach
8 would be just to presume, in fact, that ATTI is going to seek to
9 co-locate in GTE's central offices and that it will serve all
10 potential business customers within a market. I don't think that
11 the issues that are being presented to me are directed to respond
12 to ATTI's intent to market one particular business client versus
13 any other. Where ATTI makes reference to huge costs creating
14 barriers to entry, I just think that is the hyperbole that seems
15 to be prevalent in all these arbitrations and whether they're
16 huge costs of creating barriers to entry or, or slight costs,
17 it's all a matter of interpretation and I think what we need to
18 focus on are what are the costs and how should they properly be
19 allocated? The identification of specific central offices or the
20 identification of the business customers to serve don't assist
21 me. Any issues that need to be resolved here to the extent that
22 any other point in time a party asserts legal rights, that have
23 not been addressed in a proceedings like this, I imagine there
24 will be some ongoing need for future dispute resolution, but I
25 don't want to try and resolve any and all possible disputes on a

1 speculative basis here today. At this time, we're going to take
2 a short break so that meeting management can come in, set up a
3 portable P.A. system with microphones to ensure that we will have
4 a higher quality recording than by just letting the system run as
5 it's presently set up. The note that I have received is that the
6 Commission may not be making any reporter available for this
7 proceeding here today and if that turns out to be the case, I
8 want to make sure that I have the highest quality record as can
9 be made for the rest of the proceeding.

10 MR. FREEDMAN: How long a break, Your Honor, would you say
11 that we should take?

12 JUDGE BERG: My understanding is that it will take 15
13 minutes to set the equipment up.

14 MR. FREEDMAN: Okay, shall we return at 2:30?

15 JUDGE BERG: Yes, Ms. Endejan, is there anything before we
16 break? All right. Ah, we'll be adjourned until 2:30.

17 JUDGE BERG: we're back on the record in UT-990390,
18 arbitration hearing between ATTI and GTE. At this point in time,
19 pursuant to agreement between the parties, we'll take up what
20 has been identified as Issue No. 3 Requirement of Background
21 Information for ATTI's Employees. Mr. Freedman, what I'd like
22 you to do first is to go ahead, I'm going to go swear the
23 witnesses in at the same time, but then what I'll have you do is
24 go ahead qualify Mr. Kunde's testimony if there's any corrections
25 to make, we'll do that at the outset with regards to his

1 testimony in its entirety. Likewise, Ms. Endejan, the first time
2 we turn to Mr. Lee to testify, I'll have you qualify ah, Mr. Lee
3 as to any and all changes even though we'll be addressing issues
4 on an issue-by-issue basis.

5 All right? If the witnesses will please stand. Raise your
6 right hand. Do you affirm under penalty of perjury that the
7 testimony you will give here today will be the truth, the whole
8 truth and nothing but the truth?

9 MR. LEE: I do.

10 MR. KUNDE: I do.

11 MR OXLEY: I do.

12 JUDGE BERG: Thank you very much. And, Mr. Freedman, I'll
13 also expect that if Mr. Oxley will be testifying as to any
14 particular issue, you'll let me know ahead of time.

15 MR. FREEDMAN: Yes, Your Honor, and I think it would be
16 limited to the issue on which you provided a discovery response -
17 Issue No. 3.

18 JUDGE BERG: All right. if you'll go ahead, Mr. Freedman,
19 and qualify Mr. Kunde's testimony, and then Mr. Kunde, ah, you
20 can proceed to give a brief summary of ATTI's position with
21 regards to Issue No. 3.

22 MR. FREEDMAN: Thank you, Your Honor, this is Larry
23 Freedman, for ATTI. Mr. Kunde, would you state your name and
24 business address for the record, please?

25 MR. KUNDE: My name is David Kunde. My business address

1 is 730 South Second Avenue, in Minneapolis, Minnesota.

2 MR. FREEDMAN: Ah, Mr. Kunde, did you cause to be filed in
3 this proceeding direct and rebuttal testimony?

4 MR. KUNDE: Yes, I did.

5 MR. FREEDMAN: I'm going to hand to you what I've marked as
6 Exhibit T-101 and ask you to briefly review that exhibit. Mr.
7 Kunde, have you had an opportunity to review what has been marked
8 as Exhibit T-101?

9 MR. KUNDE: Yes, I have.

10 MR. FREEDMAN: And is that a true and correct copy of the
11 direct testimony filed on your behalf in this case?

12 MR. KUNDE: Yes, it is.

13 MR. FREEDMAN: Mr. Kunde, I'm going to hand you what has
14 been pre-marked as Exhibit No. T-102 and would ask you to review
15 that exhibit. Mr. Kunde, have you had an opportunity to review
16 what has been marked as Exhibit No. T-102?

17 MR. KUNDE: Yes, I have.

18 MR. FREEDMAN: And is Exhibit T-102 a true copy of the
19 rebuttal testimony filed on your behalf in this case?

20 MR. KUNDE: Yes, it is.

21 MR. FREEDMAN: And Mr. Kunde, do you have any corrections or
22 amendments for what was filed in Exhibits T-101 or T-102?

23 MR. KUNDE: No, I do not.

24 MR. FREEDMAN: Mr. Kunde, do you have a summary prepared of
25 your direct testimony on Issue No. 3 in this case?

1 MR. KUNDE: Yes, I have.

2 MR. FREEDMAN: Could you please present that summary to the
3 arbitrator? Oh, oh, I'm sorry. I meant state it - not . . .

4 MR. KUNDE: Oh. The Issue No. 3 has to do with
5 requirement for background information for ATI's - ATTI's
6 employees. ATTI basically disagrees with having to adopt
7 effectively GTE's human resources practices. ATTI certainly has
8 huge incentives - incentive - to have a safe and secure
9 workplace. Those incentives are in the terms of costs in that
10 ATTI will be placing equipment, multimillion dollars worth of
11 equipment both in GTE offices, as well as in our own offices
12 that these same employees would be responsible for.
13 Additionally, ATTI, has the burden of a reputation in the market
14 and I would submit that that may even be more critical for ATTI
15 being a relatively unknown newcomer to a particular market and
16 that market reputation is very important to us. Therefore, there
17 may be greater business risks for a smaller business like ATTI
18 relative to making sure that our equipment and our service - that
19 that equipment is providing it is done in a safe and secure
20 manner. ATTI is committed to treating all of its employees
21 fairly and equally. We believe that GTE's proposal invites
22 discrimination by causing us to, if we do not elect to test or
23 re-test all of our employees, it will cause us to have to test
24 certain employees and not other employees. It will cause us to
25 have to potentially test new hire employees where existing

1 employees may not have been tested previously.

2 GTE's proposed testing and background check appear to be
3 one-time pre-employment events. They occur before an employee is
4 hired. ATTI has certainly already hired some of our employees
5 and we have additional hiring yet to go, and, additionally, ATTI
6 is not convinced that the GTE methodology is necessarily an
7 effective method for assuring an employees' future and continued
8 behavior. Mandatory drug and background testing is certainly a
9 controversial issue in today's society. It can be a
10 controversial and unorthodox type of policy to some extent to
11 administer from a human resources perspective. It takes a lot of
12 human resource and legal resource to make sure that it's done
13 correctly. GTE's background form only asks that a test was taken
14 and the result of that test as we've reviewed the form. My
15 questions begin to arise, and, well, what happens next? GTE
16 assumes that there is some developed policy in the background
17 that then says if an employee has an infraction or fails the drug
18 test, what happens then? It's not a simple process. Do you re-
19 test? Do you not hire that employee? Do you wait three months
20 and re-hire or re-offer a particular position? What happens to
21 employees who already are existing employees within ATTI? I
22 would submit that this is not a simple issue and could expose
23 ATTI to significant legal risk, expense and uncertainty. I
24 believe that GTE's measures certainly will increase our costs -
25 the cost of co-location for a smaller CLEC like ourselves with

1 essentially little or no benefit; therefore, we consider the
2 requirement to go back and to begin to adopt drug testing
3 policies and background checking policies that are exactly the
4 same as GTE's unreasonable.

5 JUDGE BERG: Thank you Mr. Kunde. Ms Endejan, to begin
6 with, does GTE have any objections to the admission of Exhibits
7 T-101 and T-102?

8 MS. ENDEJAN: Your Honor, the only issue that I might have
9 relates to Mr. Kunde's testimony on Issue No. 2 because it
10 appears that it is based on – not on his knowledge information,
11 but on Mr. Oxley's, if Mr. Freedman's representations about the
12 discovery requests holds true. So, if this testimony is not
13 based upon his personal knowledge, but upon Mr. Oxley's, I would
14 move to strike that testimony, um, and cross examine Mr. Oxly
15 about it.

16 JUDGE BERG: Can you give me a specific reference?

17 MS. ENDEJAN: A specific reference, um . . . Well, all of
18 the – there are two questions under Issue 2.

19 MR. FREEDMAN: Which document . . .

20 MS. ENDEJAN: Document? The direct testimony, T-101. And,
21 he seems to address the human resource concerns. He addresses
22 the issues that ATTI apparently has with GTE's background
23 investigation practice. Now, when I sent the data requests to
24 ATTI, which Mr. Freedman has marked as an exhibit, they indicated
25 that the party with knowledge of human resources issues and

1 practices was not Mr. Kunde, but Mr. Oxley. So, I guess I am – I
2 want to know which witness is – has the knowledge to be cross
3 examined about the ATTI human resources issues policies and
4 practices and if it's not Mr. Kunde, then I want his testimony
5 stricken on this, and I want to talk to Mr. Oxley about this.

6 MR. FREEDMAN: Your Honor?

7 JUDGE BERG: Mr. Freedman, please respond.

8 MR. FREEDMAN: There's no basis to strike the testimony
9 whatsoever. Mr. – ATTI stands by the testimony submitted on
10 behalf of Mr. Kunde and Mr. Kunde is prepared to speak to that
11 testimony and to respond to Ms. Endejan's questions about it,
12 whatever they may be. As to the issue of Mr. Oxley filing the
13 response to the additional data requests, when those data
14 requests were filed, they required further and additional
15 information beyond what was in the testimony. We assumed that to
16 be the case or else we're not sure why the data requests would
17 have been filed in the first place and when it became clear that
18 that was the case, Mr. Oxley, as the Director of Regulatory
19 Affairs took responsibility for providing those answers to Ms.
20 Endejan. We don't see anywhere the – any, any rule that would
21 require a discovery data request to be responded to by the very
22 same parties that requires – that provides the testimony. But
23 out of caution, we want to have the response to the second data
24 request introduced on the record, and we have Mr. Oxley here
25 and he's available to be cross examined by Ms. Endejan and we

1 welcome her to do that now.

2 MS. ENDEJAN: We're going to have to voir dire Mr. Kunde
3 about exactly what he does know in his testimony, and that might
4 assist you in making whatever ruling you might be making on this
5 point.

6 JUDGE BERG: Let me see if I understand what you're saying
7 Mr. Freedman is that Mr. Oxley is also here to testify with
8 regards to the response provided by ATTI in data request No. 2?

9 MR. FREEDMAN: Yes, Your Honor.

10 JUDGE BERG: Well, Ms. Endejan, the way I think we ought
11 to proceed is that you go ahead and you conduct your cross
12 examination of Mr. Kunde, and any questions that Mr. Kunde can't
13 answer, you hold, and we'll provide an opportunity for you to ask
14 questions of Mr. Oxley afterwards. Let's go off the record for
15 a moment.

16 JUDGE BERG: After discussion off the record, GTE shall
17 go ahead and proceed with its cross examination of Mr. Kunde on
18 what I'm referring to as issue No. 3 using the designation of
19 issues in the October 22nd matrix although this issue has also
20 been previously been identified as Issue No. 2. In Mr. Kunde's
21 direct testimony, we will hold the issue of the admission of T-
22 101 until the conclusion of cross examination of Mr. Kunde. Ah,
23 Ms. Endejan at this point in time, does, ah, GTE have any
24 objections to the admission of Exhibit T-102?

25 MS. ENDEJAN: No, Your Honor.

1 JUDGE BERG: All right. T-102 will be admitted into the
2 record. Ah, please proceed with cross examination.

3 CROSS-EXAMINATION

4 BY MS. ENDEJAN:

5 Q. Good afternoon, Mr. Kunde. Ah, I understand that your
6 title is vice president of technical planning operations and
7 administration, correct?

8 A. That is true.

9 Q. Does supervision of the human resources function fall
10 under your line of responsibility?

11 A. If you're referring to the Human Resources Department,
12 no, it does not.

13 Q. I'd like to ask you some questions about your testimony
14 on Issue No. 2 regarding the reasonable background investigation.
15 First of all, um, let me ask you - you have seen the proposed GTE
16 Certification of Background Investigation form, have you not?

17 A. Yes I have.

18 Q. And I believe that this was provided to the arbitrator
19 as an attachment to GTE's October 22, 1999 letter. Um, I have an
20 additional copy if it would ease of the arbitrator, if you'd like
21 to have one.

22 JUDGE BERG: I believe I do have a copy of that. Let me
23 take a moment just to locate my copy.

24 MR. FREEDMAN: Are you going to be asking questions that's
25 on the form?

1 MS. ENDEJAN: Yes.

2 MR. REEDMAN: Okay.

3 JUDGE BERG: Ms. Endejan, do you have a spare copy handy?
4 Is that a spare copy that I can keep for the record?

5 MS. ENDEJAN: That would be fine.

6 JUDGE BERG: All right. I'm going to mark the GTE's
7 Certification of Background Investigation form as Exhibit 205 -
8 excuse me - ah, yes, we'll call that 205 even though it will have
9 relevance to the testimony of both witnesses.

10 Q. Do you have a copy of what is now marked as Exhibit 205
11 in front of you, Mr. Kunde?

12 A. Yes I do.

13 Q. Is it your understanding that this form has to be
14 filled out in order for an ATTI employee to obtain a key card?

15 A. My understanding is that is GTE's intention - that we
16 would fill that out and that is their position.

17 Q. And the purpose of filling this out would be to qualify
18 for a key card, correct?

19 A. Yes.

20 Q. In preparing for this proceeding, Mr. Kunde, did you
21 read the FCC's First Report and Order that was released on March
22 31, 1999 that-a is entitled In the Matters of Deployment of
23 Wireline Services Offering Advanced Telecommunications
24 Capability?

25 A. No, I cannot say that I did.

1 Q. Did you review any portions of that Order?

2 A. Yes, there would be portions of that Order that I did
3 review.

4 Q. Did you review the portion of the Order that relates to
5 security requirements that ILEC can require of co-locators
6 seeking entry into ILEC facilities?

7 A. I would defer that question to Mr. Oxley, but no, I did
8 not review that.

9 Q. You are aware, are you not, that GTE imposes a drug-
10 testing requirement on its own employees?

11 A. Yes, I am.

12 Q. So you would agree with me, then, that GTE is not
13 asking ATTI to do something that GTE is not willing to do for its
14 own employees?

15 A. Yes, that's true.

16 Q. In order to prepare your testimony on Exhibit - your
17 direct testimony, which would be Exhibit T-101 on this issue
18 which appears on pages 2 and 3, did you familiarize yourself with
19 ATTI's employment recruitment and selection process?

20 A. Yes, I did.

21 Q. Does ATTI have a policy on alcohol and drugs in the
22 workplace?

23 A. Not specifically.

24 Q. I believe in your opening remarks you made some
25 statements about ATTI has a huge incentive to have a safe

1 workplace. Are you, - would it be fair to say that ensuring that
2 workers or employees are not operating under the influence of
3 drugs would be important to achieving a safe workplace?

4 A. Very much so.

5 Q. If ATTI does not have a drug policy in place, how does
6 ATTI check to see if any of its employees might be operating
7 under the influence of drugs or another illegal substance?

8 A. ATTI would prefer instead of doing an up front pre-
9 employment check to observe the behavior of an employee while
10 performing the work given that the pre-employment check is a one-
11 time type of thing that an employee could certainly skip their
12 utilization of an illicit substance for a period of as short as a
13 month, potentially, and get through that screen. It is our
14 concern the employee's behavior on the job - not necessarily on a
15 pre-employment basis - and we believe that a more effective
16 method is do background and reviews of an employee's particular
17 references to determine previous history in addition to observe
18 the employee while working in our environment.

19 Q. Do you inquire as to whether your employees have had a
20 felony conviction when you do this thorough background
21 investigation?

22 A. The reference check is with previous employers - and,
23 no, we do not inquire as to a felony conviction.

24 Q. Is there a particular ATTI application form that an
25 employee who might want to work for ATTI would fill out?

1 A. Yes there is.

2 Q. And have you seen one?

3 A. Yes I have.

4 Q. Did you look at it for purposes of preparing your
5 testimony today?

6 A. No, I did not.

7 Q. So therefore, based upon your testimony, the only way
8 that ATTI checks to see if potential employees would pose an
9 undue security risk is to check with previous employers. Is that
10 your testimony?

11 A. No it's not - it's to check with previous employers and
12 to observe performance on the job.

13 Q. I see. So you have to wait for them to demonstrate
14 that they might pose an undue security risk on the job before you
15 would deal with it. Is that - is that what ATTI's practice is.

16 A. It certainly wouldn't be - we wouldn't be able to deal
17 with it before they had demonstrated the behavior.

18 Q. All right. You state that you are purchasing your
19 DMS500 switches from Nortell on lines 37 and 38 of page 2 of your
20 testimony. Do you see that?

21 A. Yes, I do.

22 Q. Do you intend to install switches in any central
23 offices in Washington State purchased from Nortell?

24 A. Certainly. But they're not GTE offices; they're ATTI
25 offices. ATTI will have its own central offices separate and

1 distinct from anything that we would put into GTE's central
2 office.

3 Q. Would you ever have any of Nortell's employees act as a
4 vendor for you in connection with performing work in any GTE
5 central office?

6 A. Yes, we would.

7 Q. Prior to preparing your testimony, did you inquire into
8 Nortell's employment practices with respect to drug screening for
9 its employees?

10 A. Yes, we did.

11 Q. And, did you learn that, in fact, Nortell does require
12 drug testing for its employees?

13 A. Yes, we did.

14 Q. So, then, wouldn't it be safe to say that GTE's
15 requirement in its form would not necessarily impact the
16 practices of Nortell which already requires drug screening,
17 wouldn't you agree?

18 A. If Nortell were our only subcontractor or vendor,
19 that's true - that would not necessarily impact the practice of
20 Nortell except for having to fill out the paperwork and the
21 required form on an advanced basis.

22 Q. You would agree with me that telecommunications central
23 offices have strict security requirements, wouldn't you?

24 A. Yes, they do.

25 Q. You would agree with me that it's fair to require that

1 only persons who have authorized key cards be allowed access to
2 the sensitive telecommunications equipment, wouldn't you?

3 A. By definition the key card does allow access, yes. So
4 an unauthorized access card holder would have access to that
5 particular office.

6 Q. And you have to fill out a form to get a key card in
7 most central offices, if not all central offices where you would
8 seek co-location, wouldn't you agree?

9 A. According to the GTE policies and practices, that's
10 what GTE would have us do, yes.

11 Q. Don't you have to fill out a form for any other central
12 offices where you would seek access, get a security card to
13 perform work in connection with co-locating your equipment.

14 A. Yes, there's usually a form to be filled out with an
15 employee's name and information about the employee's work related
16 at the company, not necessarily that employee's background check
17 or drug testing information.

18 Q. Now, your statement on lines, um, 12, 13 and 14 of page
19 3 of your direct testimony is as follows: Even if these
20 modifications could be imposed, they would implicate substantial
21 human resource issues with respect to ATTI and its vendors. Now,
22 are you able to testify about those substantial human resource
23 issues or is that something that Mr. Oxley has to testify about?

24 A. That's something that Mr. Oxley has researched and put
25 together information on.

1 Q. But you did not research these substantial human
2 resources issues before you prepared your testimony?

3 A. No, I did not.

4 Q. Now, under GTE's proposed practice of-a requiring that
5 you fill out the form that is now Exhibit 205. Not all ATTI
6 employees would have to fill out that form or be tested, would
7 they?

8 Q. Only those ATTI technicians who would want access to a
9 GTE central office, correct?

10 A. Correct. It's not our issue to fill it - to object to
11 filling out the form. It's the information contained in the form
12 and the requirement of additional work activity ATTI would have
13 to perform.

14 Q. Can you give me an idea of - of your - strike that.
15 How large is the ATTI workforce in Washington State?

16 A. I don't know the exact amount, but approximately 20 to
17 30 employees currently right now.

18 Q. And of those 20 to 30 employees, how many of them would
19 ATTI intend to seek authorization from GTE to have access to a
20 GTE central office ?

21 A. There would be two or three of those employees
22 potentially, but ATTI is not operating, yet, in Washington State,
23 so we will be adding significant additional employees beyond
24 those two or three.

25 Q. I believe you testified that you think this requirement

1 is burdensome, correct? I'm just trying to ascertain what kind
2 of burden we're talking about here, Mr. Kunde, we're talking
3 about three employees or 30 employees? Can you tell me over the
4 next year because that's the window that we're let's say we're
5 operating from here. How many more employees would have to be
6 qualified for entry to a GTE central office?

7 A. At this point, it's merely speculation and certainly
8 would be dependent upon the result of how successful we might be
9 in the business plan, but it would be somewhere in the order of
10 anywhere from 10 to 30 employees that may need to have that
11 certification.

12 Q. Other than - strike that. Would it be fair to say that
13 Nortell would be your primary outside vendor for purposes of
14 performing, ah, services at a GTE central office? Can I re-ask
15 that?

16 JUDGE BERG: Yes, go ahead. Off the record ...

17 JUDGE BERG: Back on the record. How much longer . . .

18 MS. ENDEJAN: About three more questions.

19 JUDGE BERG: All right, let's go ahead and let's, let's
20 finish cross examination of this witness before we do the
21 changeover.

22 MS. ENDEJAN: Okay, where was I?

23 Q. Ah, Nortell. Is Nortell your primary outside vendor
24 that you would be using to have access for - I'm sorry - let me
25 rephrase that. Would Nortell probably be the vendor that would

1 need to have access to GTE's central office facilities to perform
2 work for ATTI for the most part? Would that be your primary one?

3 A. Nortell or a subcontractor of Nortell.

4 MS. ENDEJAN: Your Honor, I would like to offer into
5 evidence what you have assigned an Exhibit No. 2 which is Exhibit
6 203 ATTI's Supplemental Response to GTE's Second Data Request.

7 JUDGE BERG: All right. I haven't seen these. Is this a
8 copy for me?

9 MR. FREEDMAN: Your Honor?

10 JUDGE BERG: Yes sir, Mr. Freedman?

11 MR. FREEDMAN: I think we would object unless the complete
12 response to this is entered into the record.

13 JUDGE BERG: All right. And is it my understanding that
14 the com -

15 MR. FREEDMAN: Complete response is what we identified as T-
16 103 - the Response to the Second Set of Data Requests. And we'd
17 be prepared to provide that into the record at this time.

18 JUDGE BERG: All right. Let me deal with this
19 cumulatively. I understand ATTI is objecting to the solitary
20 admission of 203. Ms. Endejan, does GTE have any objections to
21 the admission of Exhibit 103?

22 MS. ENDEJAN: Well, Your Honor, I would object to the
23 response to Question No. 4 because I - I believe it's basically
24 self-serving extra testimony. However, I also would object that
25 if ATTI wants to offer this document, that it has to offer all of

1 the documents and you haven't added the attached attachments to
2 it.

3 MR. FREEDMAN: We can provide those, Your Honor.

4 MS. ENDEJAN: So, if there is a complete set of all the
5 relevant documents, um, we would not object to the admission of
6 ATTI's response to No. 1, No. 2, No. 3. We would object to the
7 admission of No. 4. Admission of No. 4 would require further
8 cross examination of Mr. Oxley.

9 JUDGE BERG: Explain to me. I haven't seen this, but
10 explain to me why we're linking all these other responses to the
11 issue of responses to – on the issue of background information.
12 Is there something about the response to background information
13 that doesn't stand alone or requires the other responses for
14 context?

15 MS. ENDEJAN: Not really. I mean the response is to No. 1,
16 2 and 3 are pretty straightforward. No. 4, I think, raises a lot
17 of rhetorical questions and is not really a factual answer – it's
18 more in the nature of testimony.

19 JUDGE BERG: All right. Sometimes you're going to have
20 to. . . first of all, you have to understand that we're used to
21 getting self-serving declarations in any contested case much less
22 this arbitration between these parties. Mr. Freedman, could you
23 provide me with what would be characterized as a complete set of
24 – of the ATTI's response as you and Ms. Endejan understand it to
25 be so I can look at it?

1 MR. FREEDMAN: Yes, Your Honor. Can we go off the record
2 for a moment, please?

3 JUDGE BERG: Yes. We'll be off the record.

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