BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AMERICAN TELEPHONE TECHNOLOGY, INC. and GTE NORTHWEST, INC. Pursuant to 47 U.S.C. § 252.	Docket No. UT-990390 Hon. Lawrence J. Berg **POST-HEARING BRIEF OF AMERICAN TELEPHONE TECHNOLOGY, INC.**

INTRODUCTION

In its original petition, American Telephone Technology, Inc. ("ATTI") requested a determination of the scope of ATTI's rights and obligations in three key interconnection areas: (1) pick and choose; (2) UNE combinations; and (3) collocation. In the course of further negotiations, the parties have narrowed the number of issues within these areas to four. Moreover, the parties have resolved all issues within the area of pick and choose, leaving only issue relating to UNE combinations and collocation. Each of the four remaining issues are presented below for the Commission's resolution.

ISSUE #1:Collocation Space Conditioning Cost Allocation

The question underlying Issue #1 is how GTE may reasonably apportion the costs of space conditioning to ATTI and other collocating CLECs under the FCC's *Advanced Services Order*.[1] The

[1] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, FCC 99-48, First Report & Order (rel'd March 31, 1999) ("*Advanced Services Order*").

primary guidance on space conditioning cost allocation from the FCC's order is found in Paragraph 51:

> [I]ncumbent LECs must allocate space preparation, security measures, and other collocation charges on a pro-rated basis so the first collocator in a particular incumbent premises will not be responsible for the entire cost of the site preparation. For example, if an incumbent LEC implements cageless collocation arrangements in a particular central office that requires air conditioning and power upgrades, the incumbent may not require the first collocating party to pay the entire cost of site preparation. In order to ensure that the first entrant into an incumbent's premises does not bear the entire cost of site preparation, the incumbent must develop a system of partitioning the cost by comparing, for example, the amount of conditioned space actually occupied by the new entrant with the overall conditioning expense.

Advanced Services Order at ¶ 51.

The instructive portion of Paragraph 51 is the FCC's example of a reasonable cost allocation mechanism for space preparation. In particular, the FCC focused on the amount of conditioned space a CLEC *actually occupies* as the determinative factor in allocating overall space preparation costs. This focus on *actual benefit* is reflected in Paragraph 41 of the FCC's order, as well:

> In making shared cage arrangements available . . . the incumbent must prorate the charge for site conditioning and preparation undertaken . . . by determining the total charge for site preparation and allocating that charge . . . based on the percentage of total space utilized . . . In other words, *a carrier should be charged only for those costs directly attributable to that carrier*." (emphasis added)

Id. at ¶ 41. Although the FCC's discussion of cost allocation in Paragraph 41 was made in the context of shared cage arrangements, not space preparation, the same general concept of effective cost sharing shown in Paragraph 51 remains: direct attribution of costs.

A. ATTI's Proposal is Based on Direct Attribution of Cost Consistent with the *Advanced Services Order*

ATTI's proposed cost allocation mechanism specifically incorporates the FCC's position that ATTI "should be charged only for those costs directly attributable" to ATTI. *See id.* For space preparation cost allocation, ATTI's proposal is modeled on and directly reflects the FCC's example of space preparation cost allocation based on the amount of conditioned space ATTI actually occupies in a GTE wire center. For conditioning expenses that are not specifically related to space, ATTI's has proposed a mechanism based on direct attribution as well. Mr. David Kunde, ATTI's witness, described this additional proposal at the hearing:

> [F]or other types of very large ICB types of costs having to do with power plant, such as generator or battery plant, we would recommend that we utilize a percentage of what we're asking for. If we're asking for 20 amps and it's a 100-amp power supply, then yes, we would pay 20 percent of it.

Hearing Transcript at 82. ATTI believes that its proposed mechanisms for cost allocation are reasonable and entirely consistent with what the *Advanced Services Order* requires. In short, ATTI will pay for what it uses.

In his direct testimony, Mr. R. Kirk Lee, GTE's factual witness, agreed that ATTI's proposal is consistent with what the FCC's believed is an appropriate cost allocation scheme. *See* GTE Direct Testimony at 6. He nonetheless maintained that the FCC's scheme, and thus ATTI's scheme, was inconsistent with the FCC's own order. *See id.* at 7-9. Throughout his testimony, as filed and at the hearing, Mr. Lee limited his criticism of ATTI's allocation method to unexplained conclusions that the space and usage levels in ATTI's formula are an "arbitrary ratio" and have "little relationship" or "have little to do with" actual costs expended. *See id.* at 7; GTE Rebuttal Testimony at 3; Hearing

Transcript at 104-05. Mr. Kunde, however, painted a very clear picture of the direct and measurable relationship between usage and cost that the FCC desires:

> Q (Ms. Endejan): Now, under ATTI's approach, you would only pay for those upgrade expenses based upon the space you occupy in a central office; is that your approach?
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> A (Mr. Kunde): For space preparation expenses, yes, but for other types of measurable expenses, such as can be measured with power, can be measured with heating, ventilating and air conditioning, where you can measure BTU and wattage dissipation factors and so forth, those are all specifications that are made right on the collocation application form. Those are certainly measurable, and you can also measure total capacity of either a power plant or an HVAC plant, that we would have a pro-rated share of percentage of utilization of that particular plant and not on a space allocation basis.

Hearing Transcript at 81. The record supports ATTI's position that its proposal is reasonable and that it falls squarely within the terms and spirit of the *Advanced Services Order*. The Commission should approve ATTI's proposal.

B. GTE's Proposed Fill-Factor Methodology is Inconsistent with the *Advanced Services Order* and Sets GTE up for Windfall Cost Recovery at the Expense of ATTI and other CLECs

GTE's cost allocation proposal substitutes direct cost attribution with statewide estimates. In particular, GTE proposes to divide conditioning costs by what it has determined, at some point, to be the statewide average of collocators per GTE wire center, plus one, to reflect GTE's presence as well. GTE has determined that this modified statewide average or "fill-factor" for Washington is four (*i.e.*, 3 collocators + GTE). Hearing Transcript at 128.

From the outset, GTE's focus on inflexible estimates differs on its face from what the FCC specifically found to be appropriate. While GTE seeks to minimize the significance of the FCC's recommended cost allocation scheme as nothing more than an example, the fact remains that GTE's

deviation from direct attribution distances it from the FCC's express recommendation and casts an immediate cloud on GTE's proposal. Beyond this initial obstacle, the record also reflects a host of shortcomings in GTE's fill-factor formula that inappropriately stack the deck in GTE's favor.

First, under its formula, GTE is only obligated to pay the same percentage of upgrade costs as collocating CLECs. The uncontradicted record shows, however, that GTE will, in most cases, receive a far greater share of the benefits from upgrades than any other party. As Mr. Kunde noted in his direct and rebuttal testimony, GTE will most likely occupy the majority of space and utilize an overwhelming percentage of the power plant in each of its wire centers. *See* ATTI Direct Testimony at 3; ATTI Rebuttal Testimony at 2. If, however, GTE's statewide estimate of three collocators per wire center is realized in the aggregate, as GTE believes, GTE's formula *guarantees* that GTE will only be required to pay for 25% of wire centers improvements. GTE will only pay a portion of the actual benefit it receives.

GTE's formula not only limits GTE's cost responsibility to 25%, it forces CLECs to pay 25% of upgrade costs automatically, regardless of the percentage of the upgrade a CLEC actually uses. In most cases, this percentage far exceeds the amount of conditioned space or power plant upgrades that a CLEC, like ATTI, will actually need or use. Mr. Kunde gave an example of this in his testimony at the hearing:

> If we're asking for 20 amps and [the upgrade] is a 100-amp power supply, then yes, we would pay 20 percent of it. But if we're asking for 40 amps and [the upgrade is] a 50,000 kilowatt generator being put in, we certainly wouldn't be expecting to pay 20 to 25 percent of a half-million dollar generator when all we want is 40 amps.

Hearing Transcript at 82. Mr. Kunde's example illustrates the disproportionate and excessive cost that ATTI would potentially have to pay for relatively marginal space and power requests under

GTE's formula. In many cases, GTE's formula will create a substantial barrier to market entry by forcing CLECs like ATTI to pay extraordinary sums for ordinary collocation requests. This cannot be what the FCC anticipated in Paragraph 51 of the *Advanced Services Order*.

Similarly, GTE's fill-factor formula will also lead to discrimination. Although all CLECs benefiting from an upgrade are required to pay the same percentage of upgrade costs, all of those CLECs will probably not receive the same benefit. GTE's formula requires one CLEC using 20 amps of power from a generator upgrade to pay the same amount as a CLEC requiring 40 amps. The Act requires GTE to offer collocation on nondiscriminatory terms and conditions. *See* 47 U.S.C. § 251(c). GTE's cost allocation formula violates this core responsibility.

GTE's formula also allows GTE to receive a windfall beyond simply limiting its cost exposure to 25%. As described at the hearing, when GTE recovers all of the costs of an upgrades from the first three collocating CLECs, any other CLECs requesting collocation before another upgrade is undertaken still pay GTE 25% of the cost of the original upgrade. In effect, these CLECs become, as the arbitrator termed, "profit centers" for GTE. *See* Hearing Transcript at 118. For example, if GTE determines that a CLEC's collocation request requires an upgrade to a GTE wire center, under GTE's formula, that CLEC will be charged 25% of the cost of that upgrade, and GTE will initially assume the responsibility for the remaining 75%. The formula then requires each collocating CLEC thereafter to pay 25% of the original cost of the upgrade until GTE determines than another upgrade is necessary. GTE's recovery, therefore, is only limited by the number of collocation requests its upgrade can ultimately accommodate. In particular, if the initial upgrade could support collocation requests from 10 CLECs, GTE could conceivably recover two and one-half times what the project cost.

At the hearing, GTE acknowledged that the possibility of this windfall was built into its formula. *See* Hearing Transcript at 114-18. GTE's only response was that this over-recovery would be counterbalanced by GTE loss in low demand wire centers where GTE would have less than three collocators with which to share costs. *See id.* Even with this possible offset, however, GTE's potential for windfall cost recovery is far greater than its risk of loss. GTE's maximum exposure would be where a CLEC's collocation requested prompted an upgrade and no further CLECs were available to share the cost. Under GTE's formula, 50% of the cost of the upgrade would be attributable to the single collocating CLEC (25%) and GTE (25%). Thus, the remaining 50% would be GTE's maximum loss exposure. In contrast, GTE's potential windfall in high demand wire centers is limited only by the number of CLECs that a single upgrade can accommodate.

GTE's Collocation Inventory Summary, used to derive GTE's fill-factor and submitted in response to Bench Request #1, illustrates the discrepancy between GTE's risk of loss and potential for gain. The last column of the inventory lists the total number of complete and pending collocation requests for 13 GTE wire centers in Washington. For this example, assume that the first collocating CLEC in each wire center prompted upgrades that were sufficient to accommodate the remaining complete and pending collocation requests for those wire centers. If each collocator above 3 collocators in a particular wire center represented over-recovery to GTE and each collocator below 3 collocators in a particular wire center represented loss, the net product of GTE gains (15) and losses (9) would be over-recovery from 6 collocators.

GTE's fill factor is based on present and pending requests from collocators. As time passes, new collocators will make requests. If these requests are concentrated in the same central offices on which GTE calculated its fill factor, the fill factor should decrease and each CLEC should pay

a smaller portion of shared collocation charges. However, GTE does not propose to adjust its fill factor to account for the inevitable increase in collocation requests.

GTE's formula also allows GTE to exploit and magnify the formula's inherent problems in furtherance of GTE's own economic advantage. First, GTE retains the discretion to determine the scope of upgrades beyond the minimum capacity required by the collocation request prompting the improvements. When this discretion is combined with a predetermined fill factor, GTE can increase CLEC collocation costs by simply choosing a more expensive upgrade than is reasonably necessary.

Second, GTE's discretion over the scope of upgrades allows GTE to increase the opportunity for over-recovery and minimize potential loss. Although GTE has maintained that is difficult to anticipate the timing of collocation requests for any given wire center, GTE is aware of the historical demand for each of its wire centers to date and other potential market factors that would indicate that one wire center is a more desirable target for collocation than others. From this, GTE could, to a degree, meter the size, nature, and cost of its upgrades to accommodate more numerous collocation demands in high demand wire centers and fewer collocations in demonstrably less desirable locations. This would effectively increase capacity in wire centers where over-recovery is likely and decrease cost expenditures in wire centers where loss is an increased risk.

GTE's formula also fails to consider regularly scheduled upgrades that are not prompted by CLEC collocation requests. As Mr. Kunde testified:

> [T]he formula gives GTE a compelling reason to delay facilities upgrades for power or HVAC which it itself requires until a CLEC requests collocation. The formula gives GTE the incentive to time its facility upgrades and attempt to related them to CLEC collocation requests so as to reduce GTE's costs . . . Although a CLEC may benefit from the upgrade, its percentage utilization of that resource will be far less than the share of its costs.

ATTI Direct Testimony at 4. As discussed above, the forecasting of collocation requests for individual wire centers may not be an exact science. It is, however, not a complete "shot in the dark" as GTE has alleged. *See* Hearing Testimony at 107. GTE is aware of the historical collocation request rates and other market factors making individual GTE wire centers more or less likely as collocation targets.

In sum, GTE's fill-factor formula invites substantial and discriminatory barriers to CLEC collocation efforts with built-in economic incentives and devices for GTE to make the barriers even higher. In contrast, Paragraph 51 of the *Advanced Services Order* presents an example of proper cost allocation that ATTI has essentially parroted in its proposal. The Commission should approve ATTI's proposal.

ISSUE #2: GTE's Obligation to Provide UNE Combinations

ATTI believes that it is entitled to obtain an interconnection contract that clearly and accurately reflects the current state of the law. ATTI's ready and clear access to the full measure of its current rights and protections under the Act is important in all aspects of its interconnection with GTE. As ATTI transitions to facilities-based service in Washington, however, this ready and clear access takes on particular importance in ATTI's access to combined UNEs.

ATTI has proposed UNE combinations language that reflects the current state of the law. ATTI understands that the FCC has issued its order addressing Rule 51.319 and the list of UNEs on remand from the Supreme Court.[2] In the passage of three days, ATTI has not had time to fully review and incorporate the ramifications of the over 200-page order into this opening brief. As a

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[2] *See In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, Third Report and Order (Rel'd Nov. 5, 1999) ("*Remand Order*").

general matter, however, ATTI believes that the *Remand Order* has no impact on the combinations provisions that ATTI has proposed here. The *Remand Order* and ATTI's proposed UNE combinations language are discussed in detail below.

A. Access to Currently Combined UNEs

1. GTE Must Provide UNEs that it Currently Combines in their Currently Combined State

Section 251(c)(3) of the Act obligates GTE "to provide . . . nondiscriminatory access to network elements on an unbundled basis . . .." 47 U.S.C. § 251(c)(3). In implementing this section, the FCC adopted rule 51.315(b), which states that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). In 1997, the United States Court of Appeals for the Eighth Circuit vacated the FCC's rule, finding that the Act did not support any duty on incumbent LECs to combine elements.[3] Earlier this year, however, the United States Supreme Court reversed the Eighth Circuit's decision and reinstated the rule.[4] According to the Court:

> Rule 315(b) forbids an incumbent to separate already-combined network elements before leasing them to a competitor . . . In the absence of Rule 315(b) . . . incumbents could impose wasteful costs . . . it is well within the bounds of reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.

Id. at 737-38. With Rule 315(b) intact and subject to no further appeal, there is no longer any question that GTE must provide UNEs that it currently combines to ATTI in their currently combined state. ATTI's proposal, as presented below, clearly reflects this rule and should be approved by the Commission.

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3 *See Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753, 813 (8th Cir. 1997).

4 *See AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 738 (1999).

1. GTE shall offer each Network Element individually and in Combinations that it currently combines within its network . . .

4. When ATTI orders combinations of currently connected Network Elements, GTE shall ensure that such Network Elements remain connected and functional without any disconnection or disruption.

2. GTE May Not Separate Currently Combined UNEs Even if They Form an Entire Functioning Circuit

In its further efforts to implement Section 251(c)(3) of the Act, the FCC found that CLECs could provide local telephone service by relying solely on UNEs leased from an incumbent LEC. *See Local Competition Order* at ¶¶ 328-40. This finding is commonly referred to as the "all elements rule." This rule, too, made it to the Supreme Court, and like Rule 315(b), was affirmed as a reasonable interpretation of the Act. According to the Court:

> [W]e think that the Commission reasonably omitted a facilities-based ownership requirement. The 1996 Act imposes no such limitation; if anything, it suggests the opposite . . . Rule 315(b) could allow entrants access to an entire preassembled network.

AT&T Corp., 119 S. Ct. at 736-37. In other words, Rule 315(b) and the "all elements rule" conclusively establish, subject to no further appeal, that GTE may not separate currently combined network elements, even if they form an entire working circuit. The following section of ATTI's proposal clearly reflects this concept and should be approved by the Commission:

6. For the purposes of this agreement, Network Elements or Combinations that GTE currently combines include, without limitation, Network Elements or Combinations which are being utilized in combination in GTE's network, including, for example, as part of an operating circuit to provide Telecommunications Services to a Customer, including, by way of further illustration, the Network Elements or Combinations composing an existing GTE resale circuit provided to ATTI or any other telecommunications provider. . .

B. GTE's Obligation to Combine UNEs for ATTI That are not Already Combined

In its 1997 decision, the Eighth Circuit not only vacated Rule 315(b), which obligates incumbent LECs to leave currently combined UNEs combined, the court vacated subsections (c) through (f) of Rule 315 as well. These subsections impose upon incumbent LECs affirmative obligations to combine UNEs, including the specific obligation in subsection (c), to combine UNEs that are not "ordinarily combined." *See Iowa Utils. Bd.*, 120 F.3d at 813. The Supreme Court did not specifically address the Eighth Circuit's ruling on these subsections.

On October 8, 1999, however, the United States Court of Appeals for the Ninth Circuit found that "[a]lthough the Supreme Court did not directly review the Eighth Circuit's invalidation of 47 C.F.R. § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act."[5] In the Ninth Circuit's view, "[i]t . . . necessarily follows from [the Supreme Court's decision] that requiring US West to combine unbundled network elements is not inconsistent with the Act . . . We must follow the Supreme Court's reading of the Act despite the [Eighth Circuit's] [*sic*] prior invalidation of the nearly identical FCC regulation."[6] The law in Washington, therefore, is now clear: GTE is required to combine UNEs upon request.

The roots of this obligation go deeper than the the Ninth Circuit. As an initial matter, the Ninth Circuit's opinion was based on appeal stemming from the Washington Commission's approval of provisions requiring the combination of UNEs. In addition, last year, the Commission found that the Eighth Circuit's stay of the FCC's combinations rules did not preempt it from ordering ILECs

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5 *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, Case No. 98-35146, 1999 WL 799082 (9th Cir. (Wash.) Oct. 8, 1999).

6 *Id.*

to combine elements under state law.[7] State commissions in Maryland, Pennsylvania, New Jersey, Oregon, Michigan, Colorado, Connecticut, and Utah have also found similar state law authority to order ILECs to combine UNEs despite the Eighth Circuit's decision.[8]

Finally, the continuing vitality of the Eighth Circuit's combinations ruling is itself up in the air. On remand from the Supreme Court, the Eighth Circuit has invited comment on its stay of FCC Rule 315(c)-(f) in light of the Supreme Court's interpretation of Section 251(c)(3) of the Act.[9] In addition, although the FCC, in its recent *Remand Order*, deferred to the Eighth Circuit's pending reconsideration of this issue, the FCC nonetheless expressed its view that the Eighth Circuit's previous invalidation of subsections (c) through (f) of the FCC's combinations rule could not stand in light of the Supreme Court's decision. *See Remand Order* at ¶¶ 481-82.

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7 *See In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest, Inc.*, Docket No. UT-960307, Commission Order Partially Granting Reconsideration (W.U.T.C. March 16, 1998).

8 *In the Matter, on the Commission's own Motion, to Consider the Total Service Long Run Incremental Costs and to Determine the Prices of Unbundled Network Elements, Interconnection Services, Resold Services, and Basic Local Exchange Services for Ameritech Michigan*, Case No. U-11280, Order on Rehearing (Mi. P.S.C. January 28, 1998); *DPUC Investigation into Rebundling of Telephone Company Network Elements*, Docket No. 98-02-01, Decision (Ct. D.P.U.C. July 8, 1998); *In the Matter of the Interconnection Contract Negotiations Between AT&T Communications of the Mountain States, Inc. and GTE Communications, Inc.*, Docket No. 96-087-03, Order on Reconsideration (Ut. P.S.C. June 9, 1998); *In the Matter of the Investigation into Compliance Tariffs Filed by GTE Communications, Inc.*, Docket Nos. UT 138 & 139, Order No. 98-444 (Or. P.U.C. November 13, 1998); *In re the Investigation and Suspension of Tariff Sheets Filed by GTE Communications, Inc. with Advice Letter No. 2617, Regarding Tariffs for Interconnection, Local Termination, Unbundling and Resale of Services*, Docket No. 96S-331T, Decision No. C98-267 (Co. P.U.C. February 18, 1998); *In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services*, Docket No. TX95120631, Order (N.J.B.P.U. October 22, 1998); *In the Matter of the Petitions for Approval of Agreements and Arbitration of Unresolved Issues*, Case No. 8731, Phase II(c), Order No. 74671 (Md. P.S.C. November 2, 1998); *Joint Petition of Senators Fumo, Madigan and White, the Pennsylvania Cable & Telecommunications Association, and 7 Competitive Local Exchange Carriers for Adoption of Partial Settlement Resolving Pending Telecommunications Issues*, Docket No. P-00991648, Joint Motion (Pa. P.U.C. August 26, 1999).

9 *See Iowa Utils. Bd. v. FCC*, Case Nos. 96-3321/3406/3410/3414/3416/3418/3424/3430/3436/3444/3450/3453/3460/3507/3520/3603/3604/3608/3696/3708/3709/3756/3901/3906/3982/3274, Order on Remand from the Supreme Court of the United States (8th Cir. June 10, 1999).

Section 5 of ATTI's UNE combinations proposal obligates GTE to combine UNEs that are not ordinarily combined only to the extent required by law. If the law does not require GTE to combine UNEs, neither does ATTI's proposal. Clearly, however, the law in Washington imposes this obligation on GTE. ATTI's proposal, therefore, provides ATTI the assurance of an established and clear contractual obligation when ordering combinations from GTE. The Commission should approve section 5 of ATTI's UNE combinations proposal.

C. The FCC's *Remand Order* Does not Undermine, and Indeed, Supports ATTI's Contract Proposal

The UNE combinations rights that ATTI has included in its proposal do not stand or fall on what UNEs are available. No matter what UNEs GTE must offer, it must provide to ATTI those that it currently combines. Moreover, in light of the Ninth Circuit's recent order, it must also provide UNEs, whatever them may be, that are not already combined. The FCC's *Remand Order* does not change these obligations. Indeed, the *Remand Order* contains a provision which reaffirms the prior finding by the Supreme Court that all currently connected network elements must be offered as combinations. This is what ATTI's language proposes.

ATTI's proposal does not purport to identify any specific UNEs that GTE must combine. Instead, it simply references the network elements otherwise defined and listed in the provisions of the GTE / AT&T Contract that ATTI seeks to adopt. Accordingly, any change in the list of UNEs, or the conditions under which they must be offered, required by the *Remand Order*, would be to the AT&T UNE provisions that ATTI is adopting, not ATTI's combinations proposal. The appropriate mechanism to make any necessary changes to this list of UNEs in the AT&T contract is the "regulatory changes" and "amendments" provisions in the AT&T contract. *See* GTE / AT&T

Interconnection Contract at §§ 17 & 24.3. These provisions provide a clear means to amend any UNE obligations affected by the *Remand Order* in the AT&T contract. Any necessary change to AT&T UNE provisions would appropriately flow through to ATTI's combinations proposal.

Accordingly, while the *Remand Order* will likely bear further and closer review, ATTI's initial position is that it need not influence the arbitrator's approval of ATTI's contract proposal here.

ISSUE #3: Application of GTE's Background Investigations Requirements on ATTI Employees

The question underlying Issue #3 is whether GTE can require ATTI's employees to complete the same GTE Certification of Background Investigation Form that GTE requires of its own employees in order to obtain access to GTE's wire centers. ATTI primarily objects to the this requirement because the form requires a certification that the ATTI employee submitting the form has had a drug screening performed as part of a background investigation. Although ATTI has a policy addressing employee drug use in the workplace, ATTI does not require employee drug testing and has no system in place to administer such a program.

The central provision of law guiding the scope of GTE's ability to impose a drug screening requirement on ATTI employees is Paragraph 47 of the *Advanced Services Order*. According to the FCC:

> [I]ncumbent LECs may impose security arrangements that are as stringent as the security arrangements that incumbent LECs maintain at their own premises either for their own employees or for authorized contractors. To the extent existing security arrangements are more stringent for one group than for the other, the incumbent may impose the more stringent requirements . . .

Advanced Services Order at ¶ 47.

GTE defends its drug screening requirement by looking to the first sentence of Paragraph 47 and noting that the same requirement applies to GTE employees and to ATTI employees. Despite

the surface appeal of GTE's position, ATTI believes that the situation at hand invokes deeper consideration under the language of Paragraph 47. The last sentence of the FCC's discussion in Paragraph 47 is the operative language which ATTI believes warrants a more thorough examination of GTE's requirement:

> [T]he incumbent LEC may not impose discriminatory security requirements that result in increased collocation costs without the concomitant benefit of providing necessary protection of the incumbent LEC's equipment.

Advanced Services Order at ¶ 47. The knee-jerk response to this language is the same as GTE's original position; if GTE imposes the same drug screening requirement on ATTI employees as it does on GTE employees, there is no discrimination. The issue, however, is not that simple.

As a matter of practice, GTE's employee drug screening requirement will impose a larger burden on ATTI than it does on GTE. This is the essence of discrimination. GTE's employee drug screening policy was developed and implemented in 1990 on GTE's own timetable and in an environment where GTE had an established market presence. In contrast, if GTE's drug policy were imposed on ATTI, ATTI would have to scramble to reinvent established human resource policies and administration in the context of a rapid service and facilities roll-out in a now highly competitive marketplace. Indeed, ATTI's entire facilities-based roll out in GTE territories in Washington could conceivably be put on hold until ATTI could implement GTE's drug policy in order to access GTE wire centers. Even after implementation, ATTI would be faced with burdens that GTE, with nearly ten years of experience with its policy and substantially greater financial resources, would have:

> Q (Mr. Freedman): What, in fact, would be the burden to ATTI if even a small number of employees could not be employed to do their jobs in a wire center as a result of the imposition of this mandatory drug screening policy?
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> A (Mr. Kunde): The burden would be on ATTI to be able to dispatch or a requirement to enter a particular wire center to do work is to find and sort through all

> of the employees and find the ones that are able to be dispatched to the GTE central offices, and this would be particularly burdensome on a call-out basis or when you have an after-hours type of dispatch requiring significant network outages to be controlled or maintained.

Hearing Transcript at 48. In sum, imposition of the GTE employee drug screening policy would represent a substantial barrier to ATTI's entry into the competitive market, a burden that GTE does not face to an appreciably equivalent degree. This is discrimination.

Applying GTE's employee drug screening policy to ATTI employees also satisfies the other requirements of the last sentence of Paragraph 47 of the *Advanced Services Order*, in that it would result in increased collocation costs without the concomitant benefit of providing necessary protections of GTE's equipment. The increased costs to ATTI of establishing GTE's policy are readily apparent, as discussed earlier in highlighting the discriminatory impact of the policy on ATTI in relation to GTE. ATTI has submitted testimony showing that it will suffer a substantial burden as a result of this policy. The lack of concomitant benefits to the protection of GTE's equipment are arguably equally apparent. GTE offered no real evidence showing the difference between a policy of mandatory drug testing and one without. Indeed, GTE's witness, Mr. Mr. R. Kirk Lee, acknowledged that GTE operated for years without such a policy. Mr. Lee also acknowledged that ATTI is self-motivated to allow only duly qualified and trustworthy technicians to access GTE wire centers containing ATTI's own valuable and sensitive equipment. *See* Hearing Testimony at 36. Mr. Lee further acknowledged that GTE's policy expressly prohibits ATTI personnel from coming anywhere close to GTE equipment. *See id.* at 37. Finally, it was also demonstrated at the hearing that federal drug-free workplace laws provide for seven methods by which a drug-free workplace be established, none of which include the imposition of mandatory drug screening. *See* 41 U.S.C. §

701; Hearing Transcript at 40. The courts have further found that this federal statute does not provide a basis for mandatory drug testing. *See* Hearing Transcript at 40-41.

In sum, ATTI is self-incented to allow only qualified and trustworthy technicians in GTE wire centers, ATTI personnel are not allowed to be near GTE equipment, and federal law provides for drug-free workplaces without the use of mandatory drug testing. The imposition of GTE's employee drug screening policy would add little to no benefit to the protection of GTE's equipment in contrast to the substantial cost and resource burden on ATTI.

GTE's employee drug screening policy, although facially neutral, is discriminatory in practice. GTE has not shown any further protection to its equipment than ATTI's established practices already provide. The Commission should reject GTE's proposed imposition of its mandatory employee drug screening requirement on ATTI employees.

ISSUE #4:Collocation Space Availability and Feasibility Notification Interval

The question underlying Issue #4 is what is a reasonable amount of time for GTE to notify ATTI of collocation space availability and feasibility after GTE receives an ATTI collocation request. ATTI has proposed a 10-day interval for GTE's response based on the FCC's finding that 10 days was a reasonable interval in Paragraph 55 of the *Advanced Services Order*. In turn, GTE has proposed a 15-day interval based on the previous approval of this timeframe by state commissions in Florida and California and its desire to have systemwide consistency.

As noted above, the primary authority underlying ATTI's proposed 10-day interval is Paragraph 55 of the *Advanced Services Order*, which provides, in relevant part:

> The practices of several carriers suggest that provisioning intervals can be short. Both GTE and Ameritech state that they respond to physical collocation requests within ten days by advising the requesting carrier whether space is available or not.

> We view ten days as a reasonable time period within which to inform a new entrant whether its collocation application is accepted or denied.

Advanced Services Order at ¶ 55. ATTI has therefore proposed *exactly* what the FCC found to be a reasonable interval to respond to collocation requests.

GTE attempts to explain its opposition to ATTI's 10-day proposal by arguing that the FCC really meant 10 "business" days because the FCC relied on GTE's comments that specified 10 "business" days. While GTE's comments before the FCC did specify 10 business days, Ameritech's comments did not. *See* Comments Filed on Behalf of Ameritech in CC Docket No. 98-147 (Sept. 25, 1998). According to Ameritech's comments, "[w]hen Ameritech receives an order for physical collocation, it responds within 10 days as to whether space is available . . .." *Id.* at 45. Notably, in the same paragraph, Ameritech described other intervals, and for those intervals, specified that they were to be measured in business days. *Id.* The FCC referred to the comments of both GTE and Ameritech in setting the 10-day interval. With the underlying discrepancy between GTE's and Ameritech's comments, all that we are left with is the plain language of the Paragraph 55: 10 days. Contrary to Mr. Lee's steadfast representations at the hearing, in the normal course of things, an unqualified statement of a number of days usually means calendar, not business days. The 10 (calendar) day interval proposed by ATTI is the same interval specifically approved by the FCC. It should be approved by the Commission.

In contrast, GTE's arguments for a proposed 15-day interval do not withstand scrutiny. First of all, 15 days is not the period of time that the FCC found to be a reasonable interval to respond to CLEC collocation requests. Indeed, whether the FCC's finding is interpreted in business or calendar days, GTE's proposed interval exceeds what the FCC found to be reasonable under either

interpretation. Second, GTE argues for systemwide consistency, but in its comments submitted to the FCC in the Advanced Services Docket, FCC characterized its typical CLEC collocation request response interval as 10 business days. *See* Comments Filed on Behalf of GTE in Docket No. 98-147, at 74 (Sept. 25, 1998).

Finally, GTE's position that anything short of a 15-day interval would not be feasible is not only undermined by Ameritech's and its own representations to the FCC, at least one state commission has approved another ILEC's agreement to an interval of as few as 8 business days.[10]

ATTI proposes nothing more than what the FCC has found to be reasonable. Indeed, even if the Commission determines that the FCC meant business, instead of calendar days, this interval is still shorter than what GTE has proposed in this proceeding. ATTI believes that it is entitled to the full measure of rights and protections that the law affords it. In this instance, the law affords it the right to have GTE respond to its collocation requests within 10 days. The Commission should approve this interval.

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[10] *Joint Complaint Against New York Telephone Company Concerning Provisioning of Local Exchange Service*, Case 95-C-0657, Order Directing Tariff Changes and for Non-Price Terms and Conditions for Collocation (N.Y.P.S.C. March 2, 1998) (approving Bell Atlantic's agreement to and 8 business day feasibility interval).

CONCLUSION

For the reasons set forth above, ATTI respectfully requests that the Commission require GTE to provide interconnection contract terms consisting of ATTI's proposed language as discussed above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 11, 1999, a copy of the Post-Hearing Brief of American Telephone Technology, Inc. in Docket No. UT-990390 was sent to the following individual by fascimile and federal express:

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