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 U S WEST COMMUNICATIONS, INC. Pursuant to 47 U.S.C. § 252.	Docket No. UT-990385 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 U S WEST's obligations in three key interconnection areas: (1) pick and choose; (2) UNE combinations; and (3) collocation. Although several collocation issues have been resolved through further discussions between the parties and with the arbitrator, unresolved issues within each of the three interconnection areas raised in ATTI's original petition still remain. Each of these remaining issues are now presented to the Commission for resolution.

BACKGROUND & SUMMARY OF THE ISSUES PRESENTED

ATTI is a small competitive local exchange carrier ("CLEC") serving small business customers as its prime focus. It has operated for several years as a reseller and is now transitioning to facilities-based service in Washington, with collocations planned in ten U S WEST central offices within the greater Seattle area. Interconnection arrangements are therefore very important to ATTI.

Historically, CLECs like ATTI have had difficulty obtaining satisfactory interconnection arrangements with incumbent carriers. With the advantage of time and resources on their side, incumbents could often force CLECs to accept one-sided "tariff" terms as the only effective alternative to incurring stifling costs and delays. Congress crafted Sections 251 and 252 of the Telecommunications Act of 1996 ("Act") to address this very problem.[1] Instead of a "one size fits all" tariff approach, the Act calls for a range of market entry options and interconnection contract approaches to realize these options. Flexibility is the key, and competition in the marketplace is the primary interest to be served.

In negotiating interconnection with U S WEST, ATTI has pursued an approach that reflects the promotion of competition and flexibility called for by the Act. On the majority of issues, ATTI, like most parties, simply wants to obtain a contract that generally reflects the Commission's rulings and the law. Many of these provisions already exist. ATTI has therefore chosen to form most of its contract from provisions that have already been extensively arbitrated and approved by the Commission. The Act specifically affords ATTI this "pick and choose" opportunity.

At least two key interconnection issues, however, have been the subject of recent and significant regulatory rulings by the courts, this Commission, and the FCC, and are not accurately or clearly reflected in existing contract terms. These issues are unbundled network element ("UNE") combinations and collocation. For these issues, ATTI has decided to forego the convenience of

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[1] *See* H. R. Rep. No. 104-204, pt. 1, at 74 (1995) ("new entrants into the market for telephone exchange service will face tremendous obstacles since they will be competing against an entrenched service provider"); *see also 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, ¶ 3 (Rel'd Nov. 5, 1999) ("*Remand Order*") (acknowledging that one of the central purpose of the Act was "to reduce inherent economic and operational advantages possessed by incumbent local exchange carriers").

adopting existing contract provisions in order to obtain, through negotiation and arbitration, the current rights and protections that the law now provides. The Act affords ATTI this right as well.

For UNE combinations, ATTI has proposed language which directly reflects what the United States Supreme Court has now found is the law: U S WEST is obligated to provide to ATTI unseparated UNE combinations that U S WEST currently combines.[2] Beyond this, ATTI has proposed language that obligates U S WEST to provide UNE combinations that are not already combined, when U S WEST is required to do so by law. This conditional obligation was originally drafted to fairly address the uncertainty on this issue created by the Eighth Circuit.[3] While a finding on the affirmative obligation to combine is not necessary to support ATTI's proposed contract language, the Ninth Circuit has, in any event, now clarified the issue: U S WEST *is* required to provide UNE combinations, even if they are not already combined.[4] While the specific elements available to ATTI may change in light of the FCC's week-old, new "list" of UNEs,[5] U S WEST's general obligations to combine UNEs, whatever those UNEs may be, remain the same.

For collocation, ATTI has proposed language to include rights and protections provided in the FCC's recent *Advanced Services Order*[6] and that otherwise promote the pro-competitive goals of the Act. These rights include ATTI's ability:

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

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

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

5 *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*").

6 *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*").

(1) to choose the point of ATTI's interconnection with U S WEST subject only to technical feasibility;

(2) to cross-connect with other collocated CLECs using ATTI's own facilities and without undue U S WEST interference;

(3) to obtain, at the very least, currently combined UNEs without collocation;

(4) to alleviate space exhaustion barriers by obtaining off-premises, adjacent collocation;

(5) to avoid unnecessary and unfettered U S WEST access to ATTI equipment;

(6) to have ready access to expedited dispute resolution of service-affecting collocation matters;

(7) to ensure that ATTI collocation requests proceed, even in the face of potentially unallowable U S WEST collocation charges; and

(8) to pay only for reasonably and suitably constructed collocation space.

ATTI believes that each of the collocation rights and protections are supported by the law and are necessary for its competitive effectiveness in the Washington local exchange market.

In sum, ATTI simply seeks to take advantage of settled contract rulings while tailoring appropriate provisions in areas where existing provisions do not adequately reflect the current business or regulatory landscape.[7] This approach, and ATTI's contract proposals, fall squarely within the express terms of the Act and its clear pro-competitive goals. Moreover, ATTI's approach does not harm or prejudice U S WEST, which now has, and has had, an opportunity to negotiate and/or arbitrate every provision of the contract that ATTI now seeks. The Commission should affirm ATTI's contract proposal.

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

DISCUSSION

I. PICK AND CHOOSE

ATTI seeks to obtain a contract with U S WEST that consists of: (1) the reciprocal compensation provisions in U S WEST's existing contract with MFS; (2) negotiated/arbitrated provisions addressing unbundled network element ("UNE") combinations and collocation; and (3) all of the provisions of U S WEST's existing contract with AT&T that are not superceded by the first two components in ATTI's contract approach.

The basic framework underlying each component of ATTI's contract approach is founded primarily in Sections 251 and 252 of the Act and the FCC rules and orders implementing those sections. Under the Act, U S WEST has an overarching and express "duty to negotiate [interconnection terms and conditions] in good faith." *See* 47 U.S.C. § 251(c)(1). In turn, when negotiation fails, the Act gives ATTI the right to petition the Commission "to arbitrate any open issues." *See* 47 U.S.C. § 252(b)(1). The authority for ATTI's request to negotiate, and now arbitrate, UNE combinations and collocation language flows directly from these two sections.

Section 252 of the Act adds a further obligation on U S WEST which forms the basis for the remaining two components of ATTI's approach. Section 252(i) of the Act requires U S WEST to:

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

See 47 U.S.C. § 252(i). Congress made it clear that this obligation is encompassed *within* the duty to negotiate under 251.[8] This framework supports the conclusion that Congress envisioned opt-in

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[8] *See* 47 U.S.C. § 251(c)(1) (placing upon carriers "[t]he duty to negotiate in good faith in *accordance with section 252* of this title *the particular terms and conditions of agreements* to fulfill the duties described in

under 252(i) to be a component of, and complement to, the overall negotiation (or arbitration) of contracts.

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

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

47 C.F.R. § 51.809(a). In adopting this rule, the FCC explained that CLECs can utilize pick and choose to varying degrees based on a CLEC's particular interconnection plans and needs, including the "ability to choose among *individual provisions*." *See Local Competition Order* at ¶ 1310 (emphasis added). The FCC concluded, in overruling requests to require CLECs to adopt larger portions of contracts, that "this level of disaggregation is mandated by section 252(a)(1)." *See id.* at ¶ 1314. Earlier this year, the U. S. Supreme Court specifically approved the FCC's interpretation of Section 252(i).[9] ATTI's request to adopt identified provisions from U S WEST's existing contracts with MFS and AT&T flows directly from this now definitive authority.

A. ISSUE #1: Whether Section 252(i) of the Act permits ATTI to opt-in to the reciprocal compensation provisions of the interconnection agreement between U S WEST and MFS Communications Company, Inc.?

As discussed above, the FCC's pick and choose rule paints ATTI's right to obtain existing U S WEST contract provisions in very broad terms. According to this rule, U S WEST "shall make

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paragraphs (1) through (5) of subsection (b) of this section and this subsection") (emphasis added).

9 *See AT&T Corp.*, 119 S. Ct. at 738 (finding that "[t]he FCC's interpretation [of Section 252(i)] is not only reasonable, it is the most readily apparent . . .").

available without unreasonable delay to [ATTI] *any* individual interconnection, service, or network arrangement contained in *any* agreement to which it is a party . . .." *See* 47 C.F.R. § 51.809(a) (emphasis added). Moreover, the FCC has found that ATTI can adopt portions of contracts all the way down to the level of "individual provisions." *See Local Competition Order* at ¶ 1310. The plain language of this rule encompasses the MFS reciprocal compensation provisions that ATTI seeks here. Indeed, perhaps the most compelling evidence of this conclusion is that this Commission specifically approved another CLEC's request to adopt the very same MFS provisions less than three months ago.[10]

U S WEST nevertheless opposes ATTI's adoption of the MFS reciprocal compensation provisions, arguing that ATTI cannot adopt these sections without also adopting the entire interconnection section of the MFS agreement. U S WEST has also summarily observed, in a footnote in its response to ATTI's petition, that ATTI and MFS may have different transport and termination costs.

With these arguments, U S WEST is apparently trying to invoke two possible FCC exceptions to ATTI's pick and choose authority.[11] U S WEST, however, has not offered any

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[10] Indeed, ATTI submits that the Commission should apply the doctrine of issue preclusion (and related doctrines) to U S WEST in this case, thus barring it from re-litigating the pick and choose issue. Under this doctrine, a party that has had a full and fair opportunity to litigate an issue, such as the right of a CLEC to opt into a reciprocal compensation clause from another interconnection agreement, is precluded from re-litigating the same issue in another proceeding, even with a different party. *Allen v. McCurry*, 449 U.S. 90 (1980). *General Ins. Co. v. Fort Lauderdale Partnership*, 740 F. Supp. 1483 (W.D.Wash. 1990); *Montgomery County Media Network d/b/a Imagists; Carmen Matias And Andrew N. Wimbish, Jointly; Wood Broadcasting Company; G-A Communications, Inc.; For Construction Permit Conroe, Texas*, Memorandum Opinion and Order, 4 FCC Rcd 3749 (1989).

[11] As discussed further above, the two exceptions arguably implicated by U S WEST's opposition are found in FCC Rule 51.809(b)(1) and in Paragraph 1315 of the *Local Competition Order*. The pick and choose rule is also subject to two other limitations found in subsections (b)(2) and (c) of FCC Rule 51.809. Subsection (b)(2) allows an incumbent LEC to prove that a pick and choose request is technically infeasible. In turn, subsection (c) requires incumbents to make contract provisions available for a reasonable period of time. U S WEST has

evidence to support either of these exceptions, even despite the arbitrator's specific request at the outset of this case to make clear whether any such exception would be claimed to apply. There is no reason for the Commission to reject ATTI's adoption of the MFS reciprocal compensation provisions.

1. U S WEST has Failed to Allege or Prove that ATTI's Adoption of the Provisions it Requests Would Result in Greater Costs

Under Subsection (b)(1) of the pick and choose rule, U S WEST may escape its obligation to provide ATTI the MFS reciprocal compensation provisions if U S WEST *affirmatively proves* that "the costs of providing [the] particular interconnection, service, or element to [ATTI] are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement." *See* 47 C.F.R. § 51.809(b)(1). U S WEST has not met this burden for the MFS reciprocal compensation provisions that ATTI requests here. In fact, U S WEST has offered *no* evidence on this issue, and the record for offering such evidence is now closed.

In its recent *Draft Policy Statement*,[12] the Commission found that detailed and specific proof was necessary to establish a cost differential sufficient to relieve an ILEC of its pick and choose obligations:

> If an ILEC claims that the cost of providing the interconnection, service, or elements to a requesting carrier exceeds the cost of providing it under the original agreement, the ILEC must submit comprehensive cost support to demonstrate the higher cost. In such a case, the Commission expects that the cost support will be consistent with the economic and cost principles set forth in the Commission's generic costing and pricing docket.

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neither alleged nor offered any proof that either of these limitations apply to ATTI's adoption of the MFS reciprocal compensation provisions. They are therefore not at issue.

[12] *See In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996*, Docket No. UT-990355, Draft Interpretive and Policy Statement (W.U.T.C. Oct. 15, 1999) ("*Draft Policy Statement*").

See Draft Policy Statement at 6. U S WEST has not provided *any* cost support in this case. Rather, U S WEST's only response on this issue to date is speculation in a footnote. *See* U S WEST Response at 4 n.2. This is not proof. More importantly, it is clearly not proof sufficient to deny ATTI's pick and choose requests.

2. ATTI's Pick and Choose Requests Include all Legitimately Related MFS Provisions

In its *Local Competition Order*, the FCC indicated that incumbent LECs can require CLECs utilizing pick and choose to adopt all of the terms and conditions in an existing contract that the incumbent LEC proves are "legitimately related" to the provisions that the CLEC wishes to adopt. *See Local Competition Order* at ¶ 1315.

In this proceeding, U S WEST has objected to ATTI's pick and choose requests based on an expansive view of terms that are legitimately related. U S WEST, however, has offered no record evidence in support of this claim. In sum, U S WEST maintains that ATTI is entitled to opt-in to nothing short of broad categories of provisions in an existing interconnection contract. For support, U S WEST relies primarily on the FCC's characterization of pick and choose as permitting CLECs to adopt interconnection, service, or network element "arrangements." In U S WEST's estimation, the FCC's reference to "arrangements" implies a body of contract terms, and not individual provisions. When this concept is applied to this case, U S WEST argues that the reciprocal compensation provisions in its existing contract with AT&T are so "integrated and related" to the interconnection section of the contract as a whole, they cannot be replaced by ATTI's adoption of corresponding provisions from U S WEST's MFS agreement.

As an initial matter, U S WEST's position that the terms and conditions of its contract with

AT&T are "integrated and related" is fairly tenuous as a matter of history. In numerous states, including Washington, U S WEST's contract with AT&T is a patchwork of discretely arbitrated and disputed terms.

In addition to this history, U S WEST's position on the concept of legitimately related terms is also directly contrary to a number of authorities. Despite U S WEST's representations to the contrary, the FCC has specifically found that its pick and choose rule provides CLECs with the right to adopt "*individual provisions*" from existing agreements. *See Local Competition Order* at ¶ 1310.

A closer look at the FCC's discussion of its rule implementing 252(i) further undermines U S WEST's position. The specific issue "teed" up for resolution in the NPRM giving rise to the FCC's order was "whether section 252(i) permits requesting telecommunications carriers to choose among *individual provisions* of publicly filed interconnection agreements..." *See Local Competition Order* at ¶ 1298 (emphasis added). The incumbent LECs argued that "section 252(i)'s requirement that a requesting carrier take service upon the same terms and conditions as the original carrier precludes *unbundled availability*." *See id.* at ¶ 1303 (emphasis added, footnote omitted). "New entrants" argued for "individual provisions…," noting in part that "allowing entrants to utilize individual provisions of agreements will lead to increased competition, which, in turn, will drive prices towards the most economically efficient levels, and that these benefits outweigh any additional burden that such unbundling may place upon incumbents in negotiating agreements." *See id.* at ¶ 1304. The theme of "unbundled availability" of disaggregated provisions of interconnection contracts runs throughout these positions and comments. In the end, the FCC approved this position. This fact alone undermines any notion that provisions are legitimately related simply because U S

WEST has placed them under the same heading in a contract's table of contents. Indeed, this is essentially what the Vermont Public Safety Board found earlier this year in rejecting a similar Bell Atlantic proposal to restrict pick and choose to broad categories of provisions such as interconnection, resale, and collocation.[13]

U S WEST itself has been a party to state commission findings which contradict the position that it is taking here. In the past few months, the Oregon Public Utilities Commission approved the request of Metro One Telecommunications, Inc. to adopt directory assistance listing pricing provisions from U S WEST's existing contract with GTE.[14] The adopted provisions replaced the corresponding provisions in the MCI / U S WEST contract that it was otherwise adopting, exactly what ATTI is proposing here. *See id.*

Perhaps even more compelling, however, is this Commission's recent approval of NEXTLINK's petition to adopt the same MFS / U S WEST reciprocal compensation provisions that ATTI now seeks to adopt. *See NEXTLINK* at 17-18. U S WEST's current position that these provisions cannot now be separated from scores of other "interconnection" provisions is in direct conflict with this Commission's decision rendered less than three months ago. *See id.*

In the end, U S WEST can only require ATTI to adopt more than what is asking for by proving that specific additional provisions are legitimately related. The Commission has recently laid out the scope of this burden:

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[13] *In re New England Telephone and Telegraph Co.*, Docket No. 5713, Order (Vt. P.S.B. February 4, 1999).

[14] *See In the Matter of the Petition of Metro One Telecommunications, Inc.*, ARB 100, Order Nos. 99-242, -411, & -544 (Or. P.U.C. Sept. 20, 1999).

> An ILEC may impose additional terms and conditions as part of an arrangement *only* if the ILEC proves . . . that the . . . arrangement [is] either *technically inseparable* or . . . related in a way that separation *will cause an increase in underlying costs*. Arrangements are not "legitimately related" solely because they were negotiated jointly or through *quid pro quo* bargaining.

Draft Policy Statement at 6 (emphasis added). To date, U S WEST has offered only bald allegations that the interconnection section of its AT&T agreement is made up of "integrated and related terms and conditions" that cannot be disturbed. This is not proof. More importantly, it is not what the Commission has found necessary to defeat ATTI's right to adopt the MFS reciprocal compensation provisions.

U S WEST attempts to condemn ATTI's adoption of the MFS reciprocal compensation provisions as an impermissible attempt by ATTI to tailor an interconnection contract to its own needs. Ironically, however, the FCC has found that the flexibility to tailor a contract to a CLEC's own needs is, in fact, one of the fundamental purposes of Section 252(i) of the Act and pick and choose. *See Local Competition Order* at ¶ 1312. ATTI's adoption of the MFS reciprocal compensation provisions falls squarely within the its legal rights under the Act, the FCC's rules, the findings of this Commission, and precedent from other states. Its pick and choose request should be granted.

B. ISSUE #2: Whether section 252(i) of the Act permits ATTI to opt-in to certain provisions of the agreement between U S WEST and AT&T relating to UNEs but decline to opt-in to provisions on combinations and instead replace such non-adopted provisions with negotiated or arbitrated provisions?

Issue #2 effectively embodies two separate questions. First, does ATTI have the right to obtain a contract that is made up of both negotiated/arbitrated terms and provisions selected from

existing contracts? Second, can ATTI adopt AT&T UNE provisions without also adopting the provision relating to UNE combinations? Both of these questions are discussed in turn below.

1. ATTI's "Hybrid" Contract Approach is Consistent with the Act, the FCC's Rules, Commission Findings, and Other State Precedent

ATTI's contract approach is made up of two key elements flowing from the Act and the FCC's rules. The first element of ATTI's contract approach is its right to negotiate and arbitrate interconnection with U S WEST. More specifically, the Act obligates incumbent providers to negotiate interconnection with CLECs and gives CLECs the option of petitioning state commissions "to arbitrate any open issues." *See* 47 U.S.C. §§ 251(c)(1) & 252(b)(1).

The second element of ATTI's contract approach is its right to adopt "individual provisions" from existing U S WEST contracts. This right stems initially from Section 252(i) of the Act, and has been implemented by the FCC through its pick and choose rule and its interpretation of that rule in its *Local Competition Order*. *See* 47 U.S.C. § 252(i); 47 C.F.R. § 51.809; *Local Competition Order* at ¶¶ 1296-1323.

U S WEST essentially argues that ATTI cannot obtain a contract using both of these elements at the same time. In defining negotiation and arbitration and pick and choose, however, neither Congress nor the FCC has given any indication that these rights are mutually exclusive or "all or nothing" alternatives.

At the outset, it is difficult to imagine that Congress meant to imply the substantial limitation on otherwise broadly stated and complimentary rights that U S WEST now puts forth. In fact, Congress expressly incorporated the pick and choose right in the section of the Act establishing negotiation rights. *See* 47 U.S.C. § 251(c)(1).

In addition, in providing extensive guidance on the application of Section 252(i) of the Act and its own pick and choose rule, the FCC has never ruled that by adopting an individual arrangement or provisions from an existing contract, a CLEC has completely sacrificed its negotiation and arbitration rights under Sections 251 and 252 of the Act. Indeed, its guidance suggests the opposite. In rejecting the notion that CLECs must opt-in to entire contracts rather than individual arrangements, the FCC relied on the fact that a fundamental concept embodied in Section 252(i) was flexibility. *See Local Competition Order* at ¶ 1312. The FCC acknowledged that existing contracts may not provide a CLEC with terms consistent with its individual cost constraints, network characteristics, or business plans. *Id.* The FCC found that the loss of this flexibility would "eviscerate the obligations Congress imposed in section 252(i)." *Id.* The same notion applies with equal force here. If existing contract provisions no longer reflect the state of the law or fail to coincide with a CLEC's competitive needs, U S WEST's position would relegate them to either accepting a stale and unsatisfactory contract or negotiating an entirely new agreement from scratch, the very situation that pick and choose was designed to avoid.

In compliment, pick and choose and negotiation and arbitration clearly achieve the pro-competitive and resource saving goals that Section 252(i) of the Act, and the Act as a whole, were designed to achieve. A "hybrid" approach allows CLECs with limited resources, and state commissions with crowded dockets, to focus their attention on truly new or undecided issues while permitting past resolutions of the majority of other issues to remain in effect. *See Local Competition Order* at ¶ 1312. In contrast, U S WEST's "all or nothing" approach certainly retains the element of efficiency by incenting CLECs to pick and choose existing contracts. This efficiency, however,

comes only at a significant cost to competition, by relegating CLECs to stale or ill-fitting contract provisions or to the crippling resource strain of negotiating an entirely new contract. This is not consistent with the Act.

U S WEST's arguments to the contrary do not withstand scrutiny. U S WEST first argues that a hybrid approach violates the purpose of the pick and choose rule to speed completion of an interconnection contract. What U S WEST ignores, however, is that pick and choose was implemented as an aid to *CLECs*. It does no damage to the rule, nor to either party, when a CLEC decides to forego, in some measure, the protections afforded it by pick and choose in order to ensure that it obtains a contract that captures its full rights and protections under the law and that is consistent with its competitive needs.

U S WEST also argues that a hybrid approach would deprive U S WEST of its negotiation and arbitration rights under the Act. Under ATTI's approach, U S WEST has had an opportunity to negotiate and arbitrate every single provision that will ultimately be made part of its agreement with ATTI. A hybrid approach poses no compromise of U S WEST's rights under the Act.

The viability of U S WEST's position slips further in light of the Commission's recent *Draft Policy Statement*. At the same time U S WEST is attempting to condemn ATTI's "hybrid approach," the Commission has found:

> [P]arties may request approval of an interconnection agreement that is a *hybrid* of negotiated and arbitrated terms, and of individual arrangements that result from pick and choose.

Draft Policy Statement at 4. A recent decision by the Oregon Public Utilities Commission, involving U S WEST, also undermines U S WEST's objections by approving the same contract approach that

ATTI seeks here. In *Metro One*, the Oregon Commission specifically approved Metro One's adoption of U S WEST's existing contract with MCI with the exception of directory assistance listing provisions which were replaced by newly negotiated directory assistance listing provisions. *See Metro One* at 3.

Frankly, U S WEST has by its actions, in this and past proceedings, effectively conceded the appropriateness of a hybrid approach. It has readily agreed to negotiate or arbitrate replacement contract provisions for *collocation* as an adjunct to an otherwise adopted contract under Section 252(i). It has done so here in this very proceeding,[15] has done so previously in Minnesota, and is negotiating to do so in other states. U S WEST's approach to the collocation issue should be applauded as a recognition of its obligation to negotiate contract provisions for which agreement is not otherwise reached. It is entirely inconsistent, however, for U S WEST to negotiate collocation, but otherwise object to a "hybrid" form of contract.

In sum, U S WEST asks this Commission to imply a substantial limitation on broadly stated rights that is inconsistent with FCC interpretation, the policy of the Act itself, the policy of this Commission, and the precedent of a neighboring jurisdiction. The Commission should approve ATTI's contract approach.

2. Pick and Choose Allows ATTI to Adopt the AT&T UNE Provisions without the AT&T Provision Relating to Combinations

This issue brings together a number of the concepts that have been established in the previous sections. First, pick and choose gives ATTI the right to adopt "individual provisions" from existing

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[15] *See* U S WEST Direct Testimony at 3 ("U S WEST also proposes an amendment for the collocation language based on a modified version of the collocation language submitted by ATTI").

U S WEST contracts. *See Local Competition Order* at ¶ 1310. Second, the Act does not limit ATTI to forming an entire contract through pick and choose alone. Taken together, these two principles establish ATTI's right to adopt individual provisions for the AT&T contract without adopting the entire contract. In particular here, these two concepts show that pick and choose allows ATTI to choose individual provisions from the UNE section of the AT&T contract without adopting the entire section. That is what ATTI proposes here.

To date, U S WEST has offered no specific objection to ATTI's adoption of portions of the AT&T contract without the provision relating to UNE combinations. More specifically, U S WEST has not alleged or offered any proof that ATTI's AT&T pick and choose request will result in greater costs, is not technically feasible, or was not made within a reasonable period of time. *See* 47 C.F.R. § 51.809. The only possible limitation on ATTI's AT&T pick and choose request implicated by U S WEST in this proceeding is U S WEST's general position that all provisions within an entire contract section are "legitimately related." *See Local Competition Order* at ¶ 1315. Therefore, only this possible limitation is discussed further below.

a. The AT&T Combinations Provision is not Legitimately Related to the AT&T Provisions that ATTI is Adopting

As discussed earlier, in its *Local Competition Order*, the FCC indicated that incumbent LECs can require CLECs utilizing pick and choose to adopt all of the terms and conditions in an existing contract that the incumbent LEC proves are "legitimately related" to the provisions that the CLEC wishes to adopt. *See Local Competition Order* at ¶ 1315.

As with ATTI's request to adopt the MFS reciprocal compensation provisions, U S WEST appears to argue that ATTI cannot pick and choose anything less than the entire UNE section of the

AT&T contract. As established before, U S WEST's summary approach and general allegations in determining "legitimately related" terms does not withstand scrutiny under the Act, the FCC's rules, Commission precedent and policy, and the findings of other state commissions specifically rejecting a similar "broad category" approach.

The FCC clarified the meaning of "legitimately related" to mean a very direct relationship whereby the inclusion of one term is necessarily dependent on the inclusion of another. It illustrated this approach with an example. According to the FCC, if, for example, a price term was provided in exchange for a term or volume commitment, another carrier cannot later come along and obtain the benefit of the price term without the directly corresponding burden of the term or volume commitment. *See Local Competition Order* at ¶ 1315.

The AT&T contract provision for combinations is not similarly related to the balance of the AT&T contract. There is no interlocking contractual or business dependency in the way that the FCC envisioned. In sum, no "*quid*" was exchanged for a "*quo*." This view is bolstered by the fact that different and specific legal standards govern the combinations issue. As discussed in more detail below, Rule 51.315 governs the issue of combinations. On the other hand, Rule 51.319 governs the "list" of UNEs. While ATTI would agree that these provisions have an impact on each other, they are not "legitimately related" within the meaning of the FCC's rules. To hold otherwise would undercut the vitality of the FCC's plain pronouncement (and the whole body of language in the *Local Competition Order*) regarding the availability of "individual provisions" and the "level of disaggregation" available to CLECs under pick and choose.

This Commission's *Draft Policy Statement* supports ATTI's position as well.[16] According to Commission policy, U S WEST must affirmatively prove that the AT&T Combinations provision is "technically inseparable" from the provisions of the AT&T contract that ATTI is adopting or that the combinations provision is "related in a way that separation will cause an increase in underlying costs." *See Draft Policy Statement* at 6.

As to cost, U S WEST has alleged no disparate burden nor submitted any cost support to satisfy its burden. Moreover, the ATTI proposed combinations language is effectively a clarification and affirmative delineation of combinations duties that U S WEST is generally, although much less clearly, obligated to perform under its existing AT&T combinations language. Substitution of ATTI's proposed combinations language would result in no increase in underlying costs to U S WEST.

U S WEST has also made no allegation or provided any proof that the AT&T combinations provision is technically inseparable from the provisions of the AT&T contract that ATTI seeks to adopt. Indeed, without the AT&T combinations language, the portion of the AT&T contract that ATTI seeks to adopt retains all of the provisions necessary to provision UNEs, including pricing, maintenance, ordering, and billing. The AT&T combinations language is not inseparable.

Finally, Principle 10 of the Commission's *Draft Policy Statement* also provides that "[a]rrangements are not 'legitimately related' solely because they were negotiated jointly or through

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[16] ATTI notes that, in its initial filings in this proceeding, U S WEST acknowledged the Commission's pending investigation of pick and choose as an integral authority in this proceeding, and even asked the arbitrator to defer its ruling on this issue until the Commission's findings had been released. ATTI would oppose any deferral. However, the *Draft Policy Statement* is now available, and wholly supports ATTI's pick and choose requests.

quid pro quo bargaining." *See Draft Policy Statement* at 6. There is even less of an argument that any such arrangements are legitimately related when various of the individual provisions were disputed and developed only through arbitration on an issue by issue basis.

To date, U S WEST has not offered any proof that ATTI's AT&T pick and choose request falls within any of the limitations imposed by the FCC on ATTI's pick and choose authority. Indeed, ATTI believes, as discussed above, that U S WEST cannot provide sufficient proof. The Commission should approve ATTI's adoption of the AT&T provisions it requests.

II. 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 U S WEST. 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.[17]

ATTI has proposed UNE combinations language that reflects the current state of the law. ATTI understands that the FCC has issued its *Remand Order* addressing Rule 51.319 and the list of UNEs on remand from the Supreme Court. 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. ATTI therefore reserves the right to address these issues later, such as in its reply brief. As a general matter, however, ATTI believes that the *Remand Order* has no impact on the combinations

[17] *See Remand Order* at ¶ 5 ("We continue to believe that the ability of requesting carriers to use unbundled network elements, including various combinations of unbundled network elements, is integral to achieving Congress' objective of promoting rapid competition to all consumers in the local telecommunications market.").

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. U S WEST Must Provide UNEs that it Currently Combines in their Currently Combined State

Section 251(c)(3) of the Act obligates U S WEST "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. *See Iowa Utils. Bd.*, 120 F.3d at 813. Earlier this year, however, the United States Supreme Court reversed the Eighth Circuit's decision and reinstated the rule. *See AT&T Corp.*, 119 S. Ct. at 736-38. 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 U S WEST 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.

> 1.2.2 U S WEST shall offer each Network Element individually and in Combinations that it currently combines within its network . . .

1.2.5 When ATTI orders combinations of currently connected Network Elements, U S WEST shall ensure that such Network Elements remain connected and functional without any disconnection or disruption.

2. U S WEST 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, was reviewed by 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 U S WEST 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:

1.2.7 For the purposes of this agreement, Network Elements or Combinations that U S WEST currently combines include, without limitation, Network Elements or Combinations which are being utilized in combination in U S WEST'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 U S WEST resale circuit provided to ATTI or any other telecommunications provider. . .

B. U S WEST'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.

In response to ATTI's arbitration petition, U S WEST asserts that section 1.2.6 of ATTI's UNE combinations proposal requires U S WEST to combine UNEs for ATTI that are not ordinarily combined. Citing to the Eighth Circuit's decision vacating Rule 315(c)-(f), U S WEST argues that the law is clear that U S WEST cannot be forced to combine UNEs which are not ordinarily combined. U S WEST is wrong on both counts.

First, section 1.2.6 of ATTI's UNE combinations proposal does not require U S WEST to combine UNEs that are not ordinarily combined, except on the express condition that the law requires U S WEST to do so. Simply put, if the law does not compel U S WEST to combine UNEs that it does not ordinarily combine, neither does ATTI's proposal.

Second, although U S WEST correctly states that the law is clear on U S WEST's obligation to combine UNEs that are not ordinarily combined, it is mistaken on the correct result, at least in Washington. On October 8, 1999, 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." *See MFS Intelenet, Inc.*, at *7. 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." *Id.* Although a finding of an affirmative obligation to combine is not essential to support ATTI's request, the law in Washington, as stated by the Ninth Circuit, now requires U S WEST to combine UNEs upon request.

The roots of this obligation go deeper than just the Ninth Circuit. As an initial matter, the Ninth Circuit's opinion was based on an appeal stemming from the Washington Commission's approval of provisions requiring U S WEST to combine UNEs.[18] 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 to combine elements under state law.[19] 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.[20]

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[18] *See In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Co. and U S WEST Communications, Inc.*, Docket No. UT-960323 (W.U.T.C. Jan. 8, 1997).

[19] *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).

[20] 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 U S WEST 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 U S WEST 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 U S WEST 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,

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.[21] 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.

ATTI's UNE combinations proposal obligates U S WEST to combine UNEs that are not ordinarily combined simply to the extent required by law. By definition, then, U S WEST can hardly complain. If the law does not require U S WEST to combine UNEs, neither does ATTI's proposal. The fact that the law in Washington does impose this obligation on U S WEST further undercuts U S WEST's position. U S WEST's objections are without merit. The Commission should approve section 1.2.6 of ATTI's UNE combinations proposal.

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).

[21] *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).

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 U S WEST 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 in Washington, whatever they may be, that are not already combined. The FCC's *Remand Order* does not change these obligations. Indeed, the *Remand Order* reaffirms the prior finding by the Supreme Court that all currently connected network elements must be offered as combinations. *See Remand Order* at ¶¶ 1 & 480. This is what ATTI's language proposes.

ATTI believes that if any change is required by the *Remand Order*, it would be to the AT&T contract provisions that ATTI is adopting, not ATTI's combinations proposal. ATTI's combinations proposal simply references the network elements otherwise defined and listed in the provisions of the U S WEST / AT&T Contract that ATTI seeks to adopt. The appropriate mechanism to make any changes to this list required by the *Remand Order* is the "regulatory changes" and "amendments" provisions in the AT&T contract. *See* U S WEST / 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 flow through, if and as necessary and appropriate, 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.

III. COLLOCATION

A. ISSUE #1: Which company will specify cross-connect devices and circuit location in U S WEST's network (e.g., mandatory or permissive use of the ICDF)?

At the heart of this issue are two core principles that stem from the FCC's *Advanced Services Order*. Cross-connection to U S WEST and other collocated providers is a relatively simple and speedy task, but is service affecting and, in many cases, a time sensitive activity. ATTI believes that the two core concepts driving this issue should be clearly reflected in its contract with U S WEST in order to eliminate real possibilities of future, unnecessary delays in connection with ATTI cross-connection requests. U S WEST's proposal does not afford ATTI this protection.

Instead, U S WEST has "offered" in its contract language what is in effect a negotiating compromise proposal. It does not track, nor does it purport to track, the "technical feasibility" standard in the *Advanced Services Order*. Rather, it creates a new "standard" subject to the discretion and manipulation of U S WEST. There is no legal basis upon which to support U S WEST's compromise proposal. Accordingly, it must be denied.

1. Principle #1: The Only Limit on Where ATTI can Connect to U S WEST's Network is *Technical Feasibility*

In Paragraph 42 of the *Advanced Services Order*, the FCC found:

> Incumbent LECs may not require competitors to use an intermediate interconnection arrangement in lieu of direct connection to the incumbent's network *if technically feasible*, because such intermediate points of interconnection simply increase collocation costs without a concomitant benefit to incumbents.

Advanced Services Order at ¶ 42 (emphasis added). This provision clearly defines the full scope of U S WEST's discretion in determining where ATTI can connect to U S WEST's network*: technical*

feasibility. Indeed, this provision effectively removes U S WEST's role in the decision altogether; a connection will work or it won't.

U S WEST's position on this issue is in direct conflict with the FCC's finding. In particular, according to U S WEST's hearing witness, Mr. Mark Reynolds, *U S WEST* has the choice of where ATTI will connect with U S WEST's network:

> US West's position on Issues One and Two is that US West should be the party that specifies both the cross-connect devices and the circuit location for all ATTI to US West UNE connections and on all ATTI to other CLEC collocation cross-connections that are made through a US West ICDF frame.

Hearing Transcript at 63. According to U S WEST, its choice for ATTI's connection is what it calls the "interconnection distribution frame" or "ICDF." Moreover, the ICDF could be different things in different U S WEST wire centers as determined by U S WEST. *See id.* at 74-76. For example, the ICDF could be a main distribution frame ("MDF"), what U S WEST used to call the "single point of termination" or "SPOT" frame, or digital cross-connects to access DS1 and DS3 circuits. *See id* at 74-75. U S WEST admits, however, that at any given wire center, the ICDF may not be the only technically feasible alternative:

> Q (Mr. Freedman): Okay. Assume for the moment that we're in a wire center where, in fact, the ICDF is not the MDF all right. And assume that it is technically feasible, in fact, to interconnect directly to the MDF, through the MDF, for the purposes of access to UNEs or to the network. In that example, would it still be US West's position that it could compel ATTI to interconnect at the ICDF, yes or no?
>
> A (Mr. Reynolds): Yes.

Hearing Transcript at 77-78. U S WEST insists on a level of discretion that it does not have.

Moreover, U S WEST further admits that, at times, the ICDF will be the same thing that several state commissions[22] have characterized and rejected as an intermediate device:

> Q (Mr. Freedman): So then, the ICDF that you're talking about will never be what the state commissions previously referred to as the SPOT frame, or single point of termination; is that correct?
>
> A (Mr. Reynolds): It will never be the same concept.
>
> Q (Mr. Freedman): Will it ever be the same physical device?
>
> A (Mr. Reynolds): Yes.

Hearing Transcript at 86. This is directly contrary to the language of the *Advanced Services Order*, which explicitly prohibits U S WEST from requiring ATTI to connect via an "intermediate interconnection arrangement." *See Advanced Services Order* at ¶ 42. It is also not what ATTI, in most cases, desires:

> ATTI wishes to have what I'll call simple direct connections. Using an ICDF, in many cases, will actually introduce an additional set of wiring and connection points into telephone circuit. It's common knowledge in repairing and looking at causes for trouble in any telecommunications system that the majority of the trouble will occur in the places where you have connection points, not necessarily in the physical cable itself. So we're seeking to minimize the number of connection points.

Hearing Transcript at 26.

U S WEST has attempted to minimize its disregard of the *Advanced Services Order* by offering a compromise limitation on its discretion. According to Mr. Reynolds, "US West is willing to assure ATTI that its access to UNEs via our ICDF frames would essentially be the same as US

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[22] *See e.g., In the Matter of the Generic Investigation of US West Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements*, Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540, Order Resolving Cost Methodology (Minn. P.U.C. May 3, 1999) (adopting hearing examiner's finding that "[u]sing the SPOT frame for interconnection keeps the connections of CLECs at 'arm's length' from the MDF. The SPOT frame is not consistent with the 'direct hookup to an extensive use of an incumbent LEC's local network' required by the 8th Circuit.")

West access to that same type of functionality for its retail services." Hearing Transcript at 64. However fair U S WEST's compromise may purportedly be, it is still the interjection of U S WEST discretion and control where, by law, it has none. Indeed, Mr. Reynolds' hearing testimony revealed that U S WEST's proposed compromise can, in some instances, not be the fair practice that it is touted to be:

> Q (ALJ Berg): . . . if, in fact, US West had a choice in a particular wire center in a sense that it provided retail services through more than one path, then, in that instance, would the CLEC also be entitled to made that same discretionary decision, or is it still an [U S WEST] efficiency determination?
>
> A (Mr. Reynolds): I think it would still be an efficiency determination . . ..

Hearing Transcript at 90-91. ATTI's hearing witness, Mr. David Kunde, interpreted what the practical effect of this situation may be:

> [E]ssentially it makes it necessary for [ATTI] to utilize the ICDF as US West specifies for all of our services, all of our access to UNEs of a particular type, where, for the most part, US West may use that only for a very limited number of services. And the majority of those services will actually traverse a separate, potentially more efficient route.

Hearing Transcript at 100. In sum, U S WEST's compromise position gives U S WEST control that the FCC prohibited, and moreover, leaves the door open to relegate ATTI to using a less efficient network set-up than U S WEST uses for some its services.

Paragraph 42 of the *Advanced Services Order* does not give U S WEST a role in determining where ATTI will connect to U S WEST's network based on efficiency or whether U S WEST uses the same device. The only limitation provided by the FCC is technical feasibility. Perhaps, in some cases, ATTI will request a connection at U S WEST's pre-determined ICDF because it is the most desirable device. U S WEST, however, has no authority to make this decision for ATTI if

technically feasible alternatives are available. When ATTI requests a technically feasible point or device to connect to U S WEST's network it should have the assurance of clear contract language that its choice will be honored.

2. Principle #2: ATTI has the Option of Using a U S WEST Device or Establishing its Own Connection to Cross-connect with Other Collocated CLECs

In Paragraph 33 of the *Advanced Services Order*, the FCC found:

> We now revise our rules to require incumbent LECs to permit collocating carriers to construct their own cross-connect facilities between collocated equipment . . . We see no reason for the incumbent LEC to refuse to permit collocating carriers to cross-connect their equipment, subject only to the same reasonable safety requirements that the incumbent LEC imposes on its own equipment.

Advanced Services Order at 33. In effect, Paragraph 33 gives ATTI the choice of cross-connecting with other collocated CLECs directly, without having to use any U S WEST equipment and subject only to reasonable safety requirements that U S WEST itself imposes on its own equipment. At the hearing, U S WEST agreed that the *Advanced Services Order* gave ATTI this choice:

> Q (Mr. Freedman): So I understand your testimony, then, US West does recognize the right of a CLEC to construct its own cross-connect between its collocated facility and the collocated facility of another CLEC in that wire center; is that correct.
>
> A (Mr. Reynolds): Yes, I believe that's required.

Hearing Transcript at 66.

In addition, at various times in this proceeding, U S WEST has raised FCC Rule 51.323(h)(2) for the general proposition that it retains a measure of control outside of CLEC collocation cages. In the context of direct CLEC-to-CLEC cross-connection, however, U S WEST concedes that the Paragraph 33 of the *Advanced Services Order* plainly and expressly superceded Rule 51.323(h)(2)'s limitations on the placement of CLEC equipment outside of its collocation space:

> Q (Mr. Freedman): In your testimony, you said that US West reads 51.323 of the FCC's order as the authority to determine the network routing for facilities beyond CLEC collocation installations. Do you recall that testimony?
>
> A (Mr. Reynolds): Yes, I do.
>
> Q (Mr. Freedman): But that clearly does not include what you just testified to, which is a CLEC's right to cross-connect to another CLEC and to choose not to use the ICDF; is that correct?
>
> A (Mr. Reynolds): Yes, I believe that the provision that I quoted is superceded by the FCC's new collocation order . . . where it does require incumbent LECs to allow competitive LECs to construct their own cross-connect between collocation installations.

Hearing Transcript at 68.

ATTI's conceded right to cross-connect directly to other collocated CLECs, as an alternative to cross-connection through a U S WEST device, is memorialized in ATTI's proposed section 3.20. In turn, U S WEST has attempted to characterize this right in proposed section 1.20, submitted after the hearing, to address Issue #22 concerning the terms for CLEC-to-CLEC cross connection generally. Despite U S WEST's concession at the hearing, however, ATTI believes that U S WEST's proposal does not fully or accurately reflect Paragraph 33 of the *Advanced Services Order*.

First, U S WEST's proposed section 1.20 makes ATTI's direct cross-connection to other collocated CLECs "subject only to reasonable safety limitations." While this echoes part of the language used by the FCC in Paragraph 33, it omits the requirement that these reasonable safety limitations may only be those that U S WEST imposes on its own equipment. There should be no question that no matter how reasonable a U S WEST safety restriction on ATTI's cross-connection equipment may be, U S WEST may not impose it if U S WEST does not follow the same standard.

Second, U S WEST's proposed section 1.20 violates Concept #1 described above, by

specifying what device ATTI must use when ATTI decides to cross-connect with other collocated CLECs through U S WEST's network. As discussed above, the only limit on where ATTI may interface with U S WEST's network is technical feasibility. *See Advanced Services Order* at ¶ 42. If there is more than one technically feasible device available for ATTI to cross-connect with another collocated CLEC in a wire center, U S WEST's proposal robs ATTI of its choice of those points.

ATTI believes that its contract should reflect the full range of options given to it by law. Principles #1 and #2 identified above reflect two of these clearly established options. They should be included in ATTI's agreement with U S WEST.

B. ISSUE #2: Will U S WEST be allowed to direct the routing of cables to access UNEs in its network? (U S WEST)

or

Can ATTI choose to use ICDF or direct connection to U S WEST's network based only on technical feasibility? (ATTI)

ATTI does not contest, nor does it believe that its proposal interferes with, U S WEST's ability to determine a reasonable route for cables running from ATTI's collocation space to U S WEST's network. In fact, the U S WEST and ATTI proposed sections identified for Issue #2 on the unresolved issues matrix submitted earlier in this proceeding do not even address cable routing. In ATTI's estimation, the heart of the issue between ATTI and U S WEST on Issue #2 is essentially the same as for Issue #1: Can U S WEST force ATTI to connect to U S WEST's network at U S WEST's ICDF if there are other technically feasible alternatives? As discussed earlier, ATTI maintains that the clear answer to this question according to the *Advanced Services Order* is "no." Any proposed language that pre-selects the device where ATTI must connect to U S WEST's

network, or otherwise gives U S WEST discretion on the matter beyond technical feasibility, must be rejected.

C. ISSUE #4: Is there a requirement for co-providers seeking UNE combinations to collocate in order to combine the UNEs?

ATTI believes that the interrelation of collocation and UNE combinations involves two fundamental principles.

1. Principle #1: ATTI has no obligation or need to collocate equipment or use ICDF collocation when U S WEST provides combined UNEs to ATTI that U S WEST has already combined.

It is a simple matter of common sense that if U S WEST has already itself combined UNEs that ATTI has requested, there is no need for ATTI to establish a connection that already exists. Contrary to U S WEST's representations, this concept does not inevitably invoke legal questions about when U S WEST must provide combined UNEs to ATTI; it only establishes that in the event U S WEST does provide connected UNEs to ATTI, ATTI does not have to establish a presence in the U S WEST wire center where that established U S WEST connection is already made. This is a simple concept, but one for which ATTI believes it needs the assurance of clear contract language to eliminate real possibilities for disputes that will result in costly delays of ATTI's access to UNE combinations to which it may be entitled. ATTI believes that its proposed contract language in section 2.1.5 reasonably provide this assurance. Moreover, ATTI's proposal presents this concept without any attempt to define what U S WEST's UNE combination obligation may be. U S WEST objections based on what it believes are unsettled legal issues are entirely misplaced.

Finally, even if legal questions about U S WEST's obligation to provide combined UNEs are somehow invoked by Issue #4, it is uncontroverted that, at least in some instances, U S WEST has

an obligation to provide combined UNEs to ATTI. As discussed in the section devoted to ATTI's UNE combinations proposal, the Supreme Court has affirmed the FCC's rule that forbids U S WEST from separating requested UNEs that U S WEST "currently combines." *See AT&T Corp.*, 119 S. Ct. at 737-38; *see also* 47 C.F.R. § 51.315(b). At the hearing, U S WEST maintained that "the law on ILEC's obligation to provide unbundled elements in an already-combined form is still evolving. We're still awaiting the FCC order." Hearing Transcript at 138. The subject of the FCC's remand proceeding, however, is the list of UNEs in Rule 319, not U S WEST's obligation to provide already-combined UNEs in Rule 315. Whatever list of UNEs the FCC ultimately orders, U S WEST still has a definitively established obligation to leave any currently combined UNEs connected. Indeed, beyond this clearly settled obligation, the law in Washington now extends U S WEST's obligation not to separate already-connected UNEs to affirmatively combining UNEs that are not already connected. *See MFS Intelenet, Inc.*, at *6-7 (affirming the Washington Commission's order requiring U S WEST to affirmatively combine UNEs). Any "evolution" in this finding can only come from the Supreme Court or another ruling from the Ninth Circuit.

ATTI has negotiated its collocation arrangement from a U S WEST template. ATTI is quite naturally concerned that U S WEST will seek to interpret provisions of that document individually or together to conclude that collocation is required for combinations, when in fact no such requirements exists at law. U S WEST's witness was less than direct in dispelling this position. Accordingly, ATTI wants to ensure that it will not be inadvertently held to a commitment to collocate that is otherwise does not agree to make.

In sum, ATTI has proposed language that it believes will afford it necessary protection from potential disputes on whether it must establish a presence in wire centers to access UNEs that are already connected. ATTI's proposal does not attempt to define when it is entitled to receive these already-established combinations. At the same time, ATTI's proposal affords ATTI a protection from unnecessary delays and disputes. ATTI does not see any reason why the Commission should not accept its proposal reflecting Principle #1.

2. Principle #2: When ATTI combines UNEs itself, the only limit on how it chooses to make the connection is technical feasibility.

In both ATTI's and U S WEST's proposed language for Issue #4 in the unresolved issues matrix submitted earlier in this proceeding, the language states that where ATTI wishes to obtain combine U S WEST UNEs, "ICDF Collocation is available, but not required." As discussed in connection with Issue #1, the *Advanced Services Order* makes clear that ATTI's choice of where it will connect to U S WEST's network is limited only by technical feasibility, and cannot be unilaterally relegated to a U S WEST ICDF if technically feasible alternatives are available. *See Advanced Services Order* at ¶ 42. ATTI's and U S WEST's proposals for Issue #4 seem to reflect this concept by leaving ATTI's use of ICDF collocation to combine UNEs optional.

U S WEST's position at the hearing, however, seems to conflict with its proposal:

> Q (Mr. Freedman): Is ICDF collocation the exclusive means by which a competitive LEC can obtain, as I think you said, recombination of elements that are already unbundled?
>
> A (Mr. Reynolds): I believe that [U S WEST] also offers a specific type of ICDF – well, no. Strike that. Yes, it is. For rebundling of US West unbundled network elements, without any physical presence in a cageless, virtual, or physical collocation, that is the exclusive means to recombine already-unbundled network elements that US West offered.

Hearing Transcript at 143. As discussed above, this contradiction raises essentially the same problem addressed in Issue #1. Again, U S WEST, at least in its hearing testimony, proposes to inject limitations and discretion on ATTI's access to its network that it is not afforded by law. The second concept that ATTI believes should be clearly recognized in the context of deciding Issue #4 is that U S WEST is not empowered to limit ATTI's method of UNE combination, when ATTI undertakes this task, to ICDF collocation. ATTI's choice of connection can be limited only by technical feasibility. *See Advanced Services Order* at ¶ 42. U S WEST's proposal seems to reflect this concept; U S WEST's position at the hearing does not.

D. ISSUE #5: Should the requirement for adjacent collocation extend to "Nearby Locations" where U S WEST does not own the property?

The fundamental concern driving this issue is space, and in particular, the continually shrinking amount of it in U S WEST wire centers in Washington. In fact, space exhaustion is a problem of which U S WEST itself is clearly aware:

> Space is a scarce commodity, and we have to find ways to allow companies connectivity into offices where all the wires meet.

Hearing Transcript at 161. The problem is also one of which the FCC is aware. In its *Advanced Services Order*, the FCC adopted several key procedures to make the most of, and increase, existing collocation space. One of these procedures was to give CLECs access to wire centers via "adjacent" collocation:

> [W]e require incumbent LECs, when space is legitimately exhausted in a particular LEC premises, to permit collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible . . . the incumbent LEC must permit the new entrant to construct or otherwise procure such an adjacent structure, subject only to reasonable safety and maintenance requirements.

Advanced Services Order at ¶ 44.

Based on this concept of adjacent collocation, ATTI has proposed contract language that would provide it the opportunity, when space has been exhausted in a U S WEST wire center, to establish collocation either on the same premises as U S WEST's wire center or nearby property. Although U S WEST's proposed section 2.1.7 provided in the unresolved issues matrix submitted earlier in this proceeding appears to provide for connection from nearby locations, U S WEST has generally opposed ATTI's proposal to allow off-premises collocation.

ATTI believes that its proposal is entirely consistent with the *Advanced Services Order's* requirement of adjacent collocation. In Paragraph 44 of the *Advanced Services Order*, the FCC placed no express limitation on adjacent collocation to an ILEC's contiguous wire center property. *See Advanced Services Order* at ¶ 44. Indeed, the only limits that the FCC placed on adjacent collocation, beyond technical feasibility, was that it is "subject only to reasonable safety and maintenance requirements." *Id.* Finally, even if the express language of the FCC's order does not definitively support adjacent collocation, it is most certainly consistent with its intent. Collocation at nearby locations simply increases the "scarce commodity" of collocation space in Washington, with the same interconnection protections afforded to ILECs by the Act.[23]

The FCC expressly empowered state commissions to take measures they deem necessary to implement the concept of adjacent collocation. *See id.* ATTI believes that the Commission should approve the adjacent collocation proposal it puts forth here.

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[23] As acknowledged at the hearing, ATTI's adjacent collocation proposal was drafted with the expectation that ATTI would be responsible for the costs associated with establishing and maintaining adjacent collocation installations at nearby locations and bringing ATTI's connectivity facilities to the U S WEST wire center premises for connection. Accordingly, ATTI would agree to add language to the contract reflecting this position.

At the end of the testimony on this issue, it appeared that ATTI's and U S WEST's disagreement on the fundamental principle of connection from nearby locations was one of mere semantics:

> Q (ALJ Berg): . . . without engaging you in any sort of jurisdictional debate as to whether or not a Commission-ordered requirement that US West provide the necessary facilities at the cost of ATTI or a requesting CLEC at something other than an adjacent location, is there some fundamental unfairness or prejudice to US West doing so? And its meant to be a legitimate question.
>
> A (Mr. Reynolds): I would say no to that, and in fact, I might reference the answer I made to Mr. Griffith, that the company has found ways to provide connectivity to competitive LECs at distant locations. We don't call it collocation . . ..

Hearing Transcript at 160. Whether termed collocation or not, ATTI agrees with the arbitrator that "if this is something ATTI wants to receive and is willing to pay for, it shouldn't matter what its called." *Id.* at 163. ATTI's contract proposal, as amended in this brief, provides a reasonable mechanism to address space exhaustion problems with U S WEST on a case-by-case basis. ATTI asks that the Commission approve its proposal.

E. ISSUE #6: What scope of information should ATTI be required to provide regarding intended use or use of its equipment?

The dispute for this issue centers on language in U S WEST's proposed section 3.3 which gives U S WEST a general right "to audit [ATTI's collocated equipment] to assure that it is being utilized for local interconnection." ATTI believes that U S WEST's proposal is improper and should be rejected on a number of grounds.

Paragraph 28 of the *Advanced Services Order* states that "an incumbent LEC may not refuse to permit collocation of any equipment that is '*used or useful*' for either interconnection or access to unbundled network elements." *Advanced Services Order* at ¶ 28 (emphasis added). The FCC

goes on to state that an ILEC may refuse to allow the collocation of equipment *only* if the ILEC "prove[s] to the state commission that the equipment will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection or access to unbundled network elements." *Id.* U S WEST points to the burden of proof imposed upon it by the FCC and argues that its audit proposal is necessary in order to satisfy this burden. The right that U S WEST's insists upon in its proposal, however, does not coincide with its burden of proof.

U S WEST proposes to audit ATTI's equipment to ensure that it is "utilized for local interconnection." At the outset, U S WEST's proposal limits ATTI's use of its equipment to interconnection, instead of the FCC's finding that equipment may be collocated for interconnection *and* access to UNEs. More importantly, however, U S WEST's proposal implies that ATTI must be using its collocated equipment for interconnection at the time of a U S WEST audit. According to the FCC, ATTI's equipment need only be "useful" for interconnection or access to UNEs. Moreover, it is not U S WEST's burden to show that ATTI is not actually using its collocated equipment for interconnection or access to UNEs, U S WEST must show that ATTI's equipment "will not actually be used" for these purposes. If a piece of ATTI equipment is useful for interconnection or access to UNEs, a U S WEST audit finding that ATTI is not yet using that equipment for such a purpose leaves it no closer to satisfying its burden of proof than when it was notified that such equipment was being installed in ATTI's collocation space.

It should also be noted that U S WEST's audit proposal is not justified by some authority to police what functions of ATTI's equipment ATTI is using. The FCC recognized comments by CLECs that "incumbent LECs have delayed competitive entry by contesting, on a case-by-case basis, the functionality of a particular piece of equipment…" *See Advanced Services Order* at ¶ 26.

Paragraph 28 was designed to address this issue by shifting the burden to the ILEC, and avoid these burdensome disputes. U S WEST's request for audit rights and for affirmative representations regarding the intended use of equipment simply provide a contractual mechanism for a continuation of the case by case contests which the FCC was trying to avoid. The FCC has made it clear that U S WEST cannot limit how ATTI uses its collocated equipment if it is otherwise "used or useful" for interconnection or access to UNEs:

> Nor may incumbent LECs place any limitations on the ability of competitors to use all the features, functions, and capabilities of collocated equipment, including, but not limited to, switching and routing features and functions.

Advanced Services Order at ¶ 28.

In sum, ATTI has already agreed to provide U S WEST with a list of the equipment installed within its collocation space. This listing will provide U S WEST with ample information on whether ATTI's equipment is "used or useful" for interconnection or access to UNEs. Additional audits will serve no purpose.

Even if the Commission somehow finds that U S WEST audits are justified, U S WEST cannot be given the unqualified discretion to access ATTI's equipment that is now reflected in its proposal. At a minimum, U S WEST should be limited to only a certain number of audits within a given timeframe. In addition, reasonable limits should be placed on the duration of audits and the scope of permissible U S WEST access to ATTI equipment. U S WEST should further be made accountable for any costs incurred by ATTI in supervising or participating in the audit, as well as any costs stemming from service interruptions or damage caused to ATTI equipment as a result of U S WEST actions during an audit. Finally, ATTI should have some assurance of adequate measures for ATTI to respond to audit findings. U S WEST's proposal provides none of these protections.

F. ISSUE #9: Should Commission review be a part of the contractual requirements for the following contract provisions:

a. demonstrating that a request for an alternative form of collocation is not technically feasible;
b. denying access to U S WEST facilities due to repeated violations of security requirements;
c. review of U S WEST direct training charges in association with employee training for virtual collocation equipment;
d. review reasonable expenses of U S WEST charged to ATTI to meet technical standard safety requirements and other technical standards of agreement;
e. review price quotes to provide ATTI with adjacent space for cageless collocation; and
f. review expenses of U S WEST charged to ATTI for costs incurred in providing agreed-upon collocation services for which no rate has been developed.

ATTI has proposed contract language specifically acknowledging ATTI's right to challenge certain U S WEST rates and actions in the performance of its collocation obligations under the contract. ATTI does not believe that these references either enlarge ATTI's rights or diminish U S WEST's rights that are already established in the contract. ATTI desires, however, the assurance of these acknowledgements for the specified rates and actions that are, in ATTI's view, subject to a relatively great degree of U S WEST discretion. In each of the areas where ATTI has sought commission review, U S WEST either has the right to take some dramatic action (like deny access for collocation or to an employee) or to impose a cost on ATTI. In either of these situations, ATTI believes it is eminently reasonable and appropriate to temper the otherwise unfettered unilateral discretion of the incumbent LEC with an appropriate review procedure.

G. ISSUE #11: Should there be a separate (expedited) dispute resolution clause for collocation in addition to standard dispute resolution clause already contained in the contract?

ATTI has proposed section 22 as a separate dispute resolution mechanism for the resolution of collocation disputes under its contract with U S WEST. Through this proposal, ATTI and U S WEST will have immediate recourse to the Commission for collocation disputes. ATTI believes that such an expedited mechanism is required for collocation.

For ATTI, collocation is an activity in which time is critical. Delays in collocation inevitably affect the quality and availability to ATTI's customers, and in turn, wall off a much needed stream of capital to fuel a successful service roll out. As Mr. Kunde described in his direct and rebuttal testimony, ATTI's request for an expedited dispute resolution procedure stems from experience, including actual collocation roadblocks, and ineffective remedies, that ATI, ATTI's corporate parent, has experienced in the recent past. While ATTI proposes to adopt the dispute resolution provisions from U S WEST's existing contract with AT&T, ATTI desires the express assurance of its proposed language that any collocation related dispute will be resolved on an expedited basis. U S WEST has shown no reason it would be harmed or prejudiced by this approach.

H. ISSUE #13: In the event the parties disagree on a price quote, should U S WEST be required to proceed to process the interconnection while the disputed charges are referred for dispute resolution under the agreement, with a true-up, if necessary?

Like several other issues raised in this proceeding, the heart of Issue #13 centers on avoiding potential collocation delays. In proposed section 3.7, ATTI has proposed a mechanism whereby its collocation efforts do not come to a screeching halt whenever it is presented with what it believes to be unreasonable or excessive collocation charges by U S WEST. Under this mechanism, whenever the parties disagree on a U S WEST price quote for collocation, ATTI agrees to pay the

charges and U S WEST agrees to continue processing the underlying collocation request while the disputed charges are submitted for Commission review. If the Commission determines that the amount charged by U S WEST and paid by ATTI is unreasonable, the mechanism allows ATTI to recoup from U S WEST any unreasonable amounts. In essence, ATTI's proposal is not about "[w]ho holds the dinero while dispute resolution is pending," as characterized by the arbitrator at the hearing. *See* Hearing Transcript at 185. Instead, ATTI's proposal is about ensuring that its collocation requests are not delayed over pricing disputes.

ATTI believes that its proposal is a sensible and reasonable balance of interests. ATTI's collocation requests are not delayed over pricing disputes, but retains an assurance that it will ultimately not be overcharged for its collocation requests. In turn, U S WEST is paid as requested before continuing to process ATTI's collocation requests, and is only affected if the Commission ultimately finds that U S WEST's charges were unreasonable.

On the unresolved issues matrix submitted earlier in this proceeding, U S WEST indicated that it would be willing to accept ATTI's proposal if it is made clear that U S WEST would receive the quoted price before proceeding to process the interconnection. ATTI's proposal clearly reflects this condition:

> In the event the Parties disagree on price quote, or USW's entitlement to impose such costs, USW will agree, *upon receipt of the quoted price*, to proceed to process the interconnection under this section while the disputed charges are referred for dispute resolution as stated above.

ATTI Proposal at § 3.7 (emphasis added). Therefore, ATTI asks that the Commission approve its proposed language on this issue as reasonable mechanism to ensure the timely processing of collocation requests.

I. ISSUE #17: Should final payment for installation of collocation equipment be based on completion of the job or on ATTI's reasonable satisfaction with the job, resulting in their acceptance of the space?

As characterized by the arbitrator at the hearing, the primary dispute underlying Issue #17 is, in large part, "[w]ho holds the dinero while dispute resolution is pending." U S WEST objects to ATTI's proposed contract language in section 14.1 conditioning ATTI's final payment upon U S WEST's final completion of work to ATTI's reasonable satisfaction or upon ATTI's acceptance of the space.

Contrary to U S WEST's representations in this proceeding, ATTI's proposal does not reserve to ATTI total discretion to refuse payment. Instead, ATTI's proposed language clearly imposes a standard of commercial reasonableness on ATTI's decision. Reasonable satisfaction with work performed under a contract is a widely accepted contract principle. Under this principle, ATTI should only be required to pay for a collocation space if the collocation space provided by U S WEST is what was reasonably requested. ATTI should not be forced to blindly pay for and accept a collocation space that is not what it reasonably bargained for.

Even without well established contract principles, the equities of ATTI's proposal are clearly apparent. When U S WEST presents a collocation space to ATTI for acceptance it has already received 50% of the cost as a down payment. Under ATTI's proposal, each party would have half of the collocation price while dispute resolution was proceeding. Under U S WEST's proposal, U S WEST would hold all of the "dinero." ATTI's proposal is an inherently more equitable position.

ATTI's position is based on established contract principles and fairly apportions the risks of the parties while dispute resolution is pending. The Commission should approve its proposal.

J. ISSUE #21: Should U S WEST be required to provide "bundling" or UNE combination services to ATTI in conjunction with ICDF collocation? (U S WEST – 21A)

or

To what degree should ATTI be required to undertake block and jumper maintenance of ICDF collocation? (ATTI – 21B)

ATTI wants to make clear that it does not need to be physically collocated at the ICDF or at any other point in order to obtain UNE combinations. So long as this is clear, and to the extent ATTI otherwise in its discretion elects to utilize ICDF collocation, ATTI would agree to accept U S WEST's proposed language for resolution of Issue #21.

K. ISSUE #22: What are the appropriate terms and conditions under which ATTI should be permitted to complete cross-connects to other collocated parties?

ATTI's proposal for the terms and conditions under which ATTI would be permitted to complete cross-connects to other collocated CLECs is found in proposed sections 17.2 and 3.20, as reflected in the unresolved issues matrix submitted earlier in this proceeding. As an initial matter, ATTI's proposal recognizes its option to construct its own cross-connection directly to another collocated CLECs space or to go through U S WEST facilities. This right has been conceded by U S WEST and is discussed above under Issue #1.

The heart of Issue #22 is the scope of U S WEST's obligations and involvement when ATTI chooses to establish a direct connection to another CLEC's collocation space without using U S WEST cross-connect devices. When ATTI constructs its own cross-connection directly to the collocation space of another collocated CLEC, the role that U S WEST plays in this arrangement is marginal. In sum, U S WEST need only determine a reasonable route for ATTI's cross-connect cables and whether there is adequate cable racking on this route. At the hearing, U S WEST's witness, Mr. Reynolds, agreed with this assessment:

> Q (Mr. Freedman): What is actually involved in – what physical activities does US West have to do on its part where ATTI constructs its own cross-connect to another CLEC?
>
> A (Mr. Reynolds): US West needs to evaluate the cable route and the overhead racking between the two collocation installations and insure that adequate racking is in place and also design the route and engineer the route that AT&T – ATTI would follow.

Hearing Transcript at 110. ATTI's proposal reflects this limited role that U S WEST will play in ATTI's direct CLEC-to-CLEC cross-connects.

One important part of ATTI's proposal is its recognition of ATTI's right to include a request for CLEC-to-CLEC cross-connection in its original collocation application, and that CLEC-to-CLEC cross-connection requests, whether included in an original application or standing alone, do not require paying a full collocation quote preparation fee ("QPF").[24] CLEC-to-CLEC cross-connection is a routine and expected part of collocation. That it was the focus of significant FCC attention in the *Advanced Services Order* evidences this fact. CLEC-to-CLEC cross-connection also involves little to no additional effort by U S WEST, as discussed above. Indeed, as Mr. Kunde explained at the hearing, ATTI's cross-connect cables would, in many instances, ride along the same cable racking examined or installed by U S WEST in establishing ATTI's connection to U S WEST's network as part of ATTI's original collocation request. *See* Hearing Transcript at 120-21.

Accordingly, ATTI should not be forced to pay an additional QPF, for little to no additional U S WEST work, when that QPF was designed to recover costs for evaluating an entire collocation

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[24] Notably, this aspect of ATTI's proposal was specifically designed to head off a problem that its corporate parent, Advanced Telecommunications, Inc. ("ATI"), has already had with U S WEST in Minnesota. In that situation, U S WEST, for a time, refused to accept and process an ATI collocation request which included a request for CLEC-to-CLEC cross-connection until a new application, along with another QPF, was submitted for the CLEC-to-CLEC cross-connection alone.

request. There are significant variables in ordering collocation. ATTI believes that CLEC-to CLEC cross-connection included with an original collocation application is simply one of these variables. Indeed, even if U S WEST is due some amount of compensation for its efforts related to an ATTI CLEC-to-CLEC cross-connection request, the amount of that compensation should be a direct reflection of U S WEST's efforts, not another substantial and disproportionate QPF to the amount of work actually done. At the hearing, Mr. Reynolds agreed that the "significantly reduced" U S WEST activities involved in a direct CLEC-to-CLEC cross-connection warranted a fee smaller than the U S WEST QPF. U S WEST's proposal, however, fails to reflect this conclusion or provide ATTI with any assurance that U S WEST will not equate and process CLEC-to-CLEC cross-connection requests as full collocation requests or major changes with the attendant disproportionate fees and extended provisioning intervals. In contrast, ATTI's proposal clarifies the marginal role and effort that U S WEST will play in CLEC-to-CLEC cross-connection. The FCC noted in Paragraph 33 of the *Advanced Services Order* that "incumbent LECs may not require competitors to purchase any equipment or cross-connect capabilities solely from the incumbent itself at tariffed rates." This would reasonably reflect a recognition that the activity is one for which the CLEC ought to be able to undertake itself, and without undue burden or expense.

Another notable aspect of ATTI's proposal is that it gives U S WEST seven days to verify cable racking capacity and specify a route for an ATTI direct cross-connection to another collocation CLEC without using a U S WEST cross-connect device. As discussed earlier, U S WEST's duties in provisioning CLEC-to-CLEC cross-connections are minimal. Indeed, as Mr. Kunde noted at the hearing, in many cases determining a route for an ATTI cross-connection to another CLEC's collocation space is simply a matter of visual inspection that could take as few as two minutes. *See*

Hearing Transcript at 119. ATTI believes that seven days affords U S WEST ample opportunity to complete this simple task. At the hearing, however, Mr. Reynolds summarily objected to ATTI's seven day interval, and stated that U S WEST would require ten days instead. *See* Hearing Transcript at 108. He gave no justification for U S WEST's need for this increased interval. Perhaps more importantly, Mr. Reynolds' proposed ten day interval is not reflected in U S WEST's proposal. In fact, U S WEST's proposal makes no special provision for responding to ATTI CLEC-to-CLEC cross-connection requests. As with the QPF, ATTI desires the assurance that U S WEST will not, by default, treat requests that U S WEST admits require minimal U S WEST effort as routine collocation requests with the attendant costs and extended intervals. The silence of U S WEST's proposal on the unique circumstances of CLEC-to-CLEC cross-connection does not provide this assurance.

CONCLUSION

For the reasons set forth above, ATTI respectfully requests that the Commission require U S WEST to provide interconnection contract terms consisting of (1) the reciprocal compensation provisions from U S WEST's existing agreement with MFS; (2) ATTI's proposed contract language

on the issues of UNE combinations and collocation; and (3) the provisions of U S WEST's existing contract with AT&T to the extent such provisions are not superceded by the two contract elements requested 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-990385 was sent to the following individual by fascimile and federal express:

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