BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

INTRODUCTION

American Telephone Technology, Inc. ("ATTI") submits this brief in reply to the Opening Brief of GTE Northwest, Inc. ("GTE") filed in this arbitration proceeding. In its brief, GTE misstates ATTI's position on a number of issues and reaches a number of misleading conclusions from both the law and the facts relevant to this case. ATTI now submits this reply to address these errors and to reaffirm that the Commission should approve ATTI's contract proposal.

DISCUSSION

I. ISSUE #1: Sharing Collocation Costs Associated with Space Conditioning

For this issue, GTE opens by attempting to defend its fill-factor proposal. GTE argues that its proposal "complies with the FCC's mandate" on cost allocation in the *Advanced Services Order*[1] because the fill-factor formula "does not recover 100% of the extraordinary cost from the collocator which caused GTE to incur those costs." GTE Brief at 1. While GTE's representation is true to a degree, it is misleadingly and significantly incomplete. Beyond the general requirement that GTE

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

pro-rate upgrade costs, GTE ignores, both in its brief and in its proposed formula, the FCC's specific example of how to implement this requirement. According to the FCC, upgrade costs should be apportioned based on the direct benefit from the upgrade that a collocating CLEC actually receives. *See Advanced Services Order* at ¶ 51; *see also id.* at ¶ 41 ("*a carrier should be charged only for those costs directly attributable to that carrier*") (emphasis added). This is a powerful and critical concept necessary to advance local competition. Yet, GTE departs from this concept for the ostensible convenience of its own statewide estimates. On its face, GTE's proposal does not even purport to "comply with the FCC's mandate" of charging ATTI *only those costs directly attributable to ATTI*. Indeed, beyond this, GTE's alternative to direct attribution provides GTE with a potential windfall of cost recovery at the expense of collocating CLECs, as discussed in ATTI's brief. The FCC certainly did not "mandate," or even invite, such a result.

GTE also represents that its proposal "fairly assigns a portion of the extraordinary costs to each collocator benefitting from the project, including GTE itself." GTE Brief at 1-2. This, too, is not true. First, GTE's formula only "assigns a portion" of the costs of an upgrade to GTE and the first *three* collocating CLECs benefitting from that upgrade (*i.e.,* 25% each). If any other CLECs later benefit from the same upgrade, their assigned "portion" does not represent GTE cost; rather, it represents GTE *profit*. Second, GTE's assignment of costs is not "fair." *Prima facie*, as stated above, GTE's formula does not purport to follow the FCC's guidance of "directly attributable costs." In fact, GTE's formula requires CLECs to pay 25% of the cost of an upgrade even if they receive only 1% of the benefit of that upgrade. In addition, every benefitting CLEC is required to pay the same amount even if the benefit they receive is several times less or more than another collocating CLEC. Moreover, GTE's formula contemplates that GTE will assume the same percentage of the

cost of an upgrade when, in most cases, GTE will receive the disproportionately greater share of benefit from the upgrade. GTE's approach is not a "fair" apportionment of costs "to each collocator benefitting from the project."

GTE next attempts to criticize ATTI's proposal to allocate costs based on the percentage of space, power, or other benefit that ATTI will actually receive from an upgrade. GTE argues that "[i]f the Commission were to adopt ATTI's approach, this would mean that GTE and its customers would be forced to bear the majority of costs necessitated by a collocation request." GTE Brief at 2. GTE also characterizes ATTI's proposal as a "noncompensatory approach." *Id.* at 3. As an initial matter, GTE fails to explain or support these conclusions. Indeed, as a practical matter, GTE's conclusions are not correct. ATTI's proposal affords GTE the opportunity for *full* cost recovery when GTE and collocated CLECs eventually use an upgrade to its capacity. In fact, ATTI's proposal creates an appropriate mechanism to incent GTE to economically and efficiently tailor upgrades to the actual need for such upgrade in a central office.

Both ATTI's proposal and GTE's proposal leave GTE with some exposure to less than full cost recovery where additional collocation requests do not follow an upgrade. The core difference, however, is that ATTI's proposal does not allow GTE to overcharge the first few collocating CLECs to reduce this risk or set GTE up for windfall cost recovery. GTE already has a significant degree of control over its potential for loss by controlling the size, nature, and expense of an upgrade beyond the requirements of the prompting collocation request. GTE's proposal only stacks the deck further in GTE's favor at the expense of collocating CLECs. Contrary to GTE's broad conclusions, the fact that ATTI's proposal does not allow GTE to arbitrarily accelerate or to obtain *unlimited* "cost" (or "profit") recovery does not mean that ATTI's proposal will not allow GTE to recover *all* of its costs.

GTE also challenges ATTI's assertion that GTE's formula invites GTE to delay regular GTE upgrades in order to share the cost of such upgrades with CLECs. GTE Brief at 3. GTE first argues that "GTE cannot avoid its service responsibilities by delaying necessary upgrades on the speculation that a collocator may 'come along' to help pay for them." As described in ATTI's brief, GTE's ability to expect collocation requests in particular wire centers based on historical data and other factors is more than pure speculation. Indeed, GTE's own fill-factor formula is driven by what GTE itself terms "the expected number of collocators in the impacted central office." *See* GTE Brief at 1. Moreover, all GTE upgrades will not necessarily impact GTE's ongoing service responsibilities. Upgrades also fuel expansion and improvements of service. GTE's witness at the hearing effectively conceded that there is *nothing* under GTE's proposal, as structured, to prevent GTE from including ordinary planned upgrades, or upgrades necessary for future expansion, in the costs to be "shared" with other collocators. *See* Hearing Transcript at 95-98. GTE's testimony also revealed that there is also *nothing* to require that these costs, in fact, be "extraordinary" or "triggered by a collocation request" as GTE asserts. *See id.*; *see also* GTE Brief at 2. In effect, GTE's proposal leaves the determination of what costs will be "shared" to the unilateral discretion of the one party which would benefit from the abuse of that discretion the most: GTE.

GTE also argues that "there is no evidence that in Washington State GTE has delayed any upgrade so that a CLEC would have to pay a disproportionate share of cost." GTE Brief at 4. As an initial matter, even if GTE has not delayed an upgrade in Washington to share the cost with CLECs, GTE's proposed formula still invites GTE to do so in the future. Moreover, while there is no evidence of GTE delays in Washington, GTE itself points out evidence in the record of GTE upgrade delays to avoid costs in other states. *See id.* At the hearing, GTE acknowledged that its

capital expenditure policies and decisions are not made independently in each state, but on a centralized basis through headquarters personnel in Texas. *See* Hearing Transcript at 115. Consequently, the uncontroverted testimony about GTE's prior decisions to delay upgrades in order to dump those costs on a purchaser of GTE properties is very relevant to the potential for similar behavior in Washington.

Finally, GTE argues that the past instances of GTE upgrade delays reflected in the record involved the sale of assets and that "[i]t would make no economic sense" for GTE to delay upgrades in plant that it has no intention of selling. GTE Brief at 4. Whether GTE intends to sell plant or not, however, the same economic motivation remains: avoidance of costs. While GTE's existing service quality and obligations may, at times, preclude GTE from acting on this economic incentive, these roadblocks will not always be there. In sum, if GTE's formula is adopted, GTE will, at times, have the means, the motive, and the opportunity to improperly shift the cost of GTE upgrades to CLECs. Its proposal cannot be accepted.

ATTI's proposal, on the other hand, flows squarely from the FCC's requirement that "*a carrier should be charged only for those costs directly attributable to that carrier.*" Indeed, it would be hard to craft contract language that would more closely fit this test than that offered here by ATTI.

It is very important for the arbitrator to note how important this issue is for the advancement of local competition. GTE states in its testimony that these upgrades could amount to "millions and millions" of dollars. As significant as the *known* collocation costs can be, to inject a variable wholly in the control of the incumbent LEC that could result in the delivery of a bill of hundreds of thousands of dollars to a CLEC for the privilege of collocating in just one central office, could throw

complete havoc into a CLEC's business and financial plans and totally knock the props out from under facilities based local competition. This is not an appropriate result. This is not the provision of collocation on rates, terms, and conditions that are "just, reasonable and non-discriminatory." *See* 47 U.S.C. section 251(c)(6). The Commission should approve ATTI's proposal.

II. ISSUE #2: GTE's Obligation to Provide Unbundled Network Elements ("UNEs") in Requested Combinations

GTE Provides no Reason for the Commission to Reject ATTI's Proposed UNE Combinations Language

GTE fails to offer one word of objection to the substance of ATTI's proposed UNE combinations language. At the hearing, GTE presented no evidence that ATTI's combinations proposal was technically infeasible or otherwise inappropriate. Similarly, in its brief and other representations in this proceeding, GTE has not made any legal challenge to ATTI's position that its combinations language accurately reflects applicable and definitive combinations rulings from the United States Supreme Court and other authorities. Instead, GTE simply argues that the Commission should defer considering ATTI's proposal "until the parties have had sufficient time to digest the UNE Order[2] and try to implement it after it takes effect." GTE Brief at 6.

GTE's request must fail in the first instance because the *Remand Order* does not change any of the combining obligations reflected in ATTI's proposed combinations language. Despite GTE's ambiguous references to the *Remand Order* and its role in this proceeding, the FCC continued, as it consistently has in the past, to draw a clear line in the *Remand Order* between (1) an ILEC's combining obligations generally, and (2) the actual list of UNEs to which those obligations apply.

---

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

The FCC made it very clear that its *Remand Order* only impacted the latter. In fact, it expressly declined to address an ILECs general combining obligations.

ATTI's combinations proposal reflects the same distinction recognized by the FCC between combining obligations generally and the list of UNEs that must be combined. ATTI's proposal only establishes GTE's general combining obligations and does not purport to identify any specific UNEs that GTE must combine beyond those already available to ATTI through the AT&T contract. To the extent it will have any effect whatsoever, the *Remand Order* will only impact the list of UNEs in the AT&T contract, which is not at issue in this arbitration case. Accordingly, GTE's (or, for that matter, ATTI's) recourse regarding the impact of the *Remand Order*, if any is necessary, is to effectuate appropriate amendments in the manner envisioned in the adopted provisions of the AT&T contract. The *Remand Order* presents no basis for delaying or influencing the arbitrator's determination of the combinations proposal advanced by ATTI in this proceeding.

Finally, ATTI notes that delay prejudices ATTI. ATTI's testimony filed herein and elsewhere reflects the high costs it faces in getting to market and the consequential need to timely obtain a contract, deploy its facilities, and begin generating revenues on its investment. ATTI is statutorily entitled to a timely determination of the combinations issue based upon the law affecting *combinations* as it exists today. That legal framework supports the approval of ATTI's proposal.

III. ISSUE #3: Requirement of Background Information for ATTI's Employees

GTE Ignores the Discriminatory Impact of its Mandatory Drug Testing Policy if Applied to ATTI

On this issue, GTE continues to assert an overly simplistic and surface view of the requirements of Paragraph 47 of the *Advanced Services Order* and the circumstances in this case.

In particular, GTE views ATTI's objection to the requirement as simply a challenge to the "wisdom or reasonableness of mandatory drug screening." GTE Brief at 8. This is not the case.

As discussed in ATTI's brief, GTE's right to impose the same reasonable security requirements on ATTI as it imposes on itself is expressly limited in instances where such a requirement is discriminatory and would result in greater collocation costs without concomitant benefit to the security of GTE's equipment. Discrimination occurs when the impact on one party is proportionally different than the impact on the other. There is ample evidence of such a disproportionate impact of GTE's mandatory drug screening in this case. ATTI described "substantial human resources issues" and noted that "while GTE may have developed and reviewed its specific policies over a period of years, ATTI would be forced in the context of trying to rapidly deploy its rollout to scramble to comply with GTE's detailed background policies," resulting in "delay, legal ramification, and potential loss of human or vendor resources…" ATTI Direct Testimony at 3. Imposition of GTE's mandatory drug screening policy is, in fact, discriminatory, since it will almost of necessity have a different impact on ATTI than it will on GTE, or possibly even other collocators.

The record also reflects that this disproportionate burden is also not offset by any appreciable benefit to the security of GTE's equipment. As conceded on the record, GTE operated for many years without drug testing. Moreover, ATTI is self-motivated to allow only qualified and trustworthy technicians to access GTE wire centers. Further, GTE policy already prohibits ATTI personnel from accessing GTE equipment. Given all of this, it was GTE's burden to show the incremental benefit that would be realized as a result of the substantial increased cost imposed on ATTI. Yet, GTE offered *no* record evidence to prove such benefit. Tellingly, GTE offered no

evidence to show that there was significant (or, indeed, *any*) benefit during the period after it implemented mandatory drug screening versus the lengthy prior period when it did not.

As discussed in ATTI's brief, GTE's drug screening policy, although facially neutral, is discriminatory in practice. The Commission should reject GTE's proposed imposition of this policy on ATTI's employees.

IV. ISSUE #4: 10-day Interval to Notify ATTI of Space Availability and Feasibility of Collocation Requests

GTE Provides no Support for its Proposed 15-day Interval

GTE argues that the 10-day interval for space availability and feasibility notifications in Paragraph 55 of the *Advanced Services Order* should mean 10 business days, which in GTE's estimation is approximately 15 calendar days, the interval that GTE proposes. GTE's reasoning does not withstand scrutiny.

ATTI does not believe that GTE's interpretation stands the test of common sense or analogous definitions and rules. It is undisputed that the FCC's order only used the term "days." Simply put, ATTI contends that the FCC, like most institutions and individuals, means "calendar" days when it utilizes the term "days" without otherwise specifically designating the usage as "business" days. Black's Law Dictionary defines a "day" as "any 24-hour period; the time it takes the earth to revolve once on its axis." Black's Law Dictionary, Seventh Edition, at 402. Moreover, the FCC's rules provide that unless a filing period is less than 7 days, "intermediate holidays shall not be counted in determining the filing date." 47 C.F.R. § 1.4(g). The FCC also has a separate definition for the term "business days," suggesting that it will make the distinction between calendar and business days when it intends to do so. *Id.* at § 1.4(e)(2).

Contrary to GTE's representation, even if the FCC "meant" 10 business days in Paragraph 55 of the *Advanced Services Order*, in most instances, this interval will be shorter than the 15 calendar days that GTE now proposes. Even under the broadest interpretation of the FCC's order, GTE's proposal exceeds what the FCC found to be reasonable.

GTE also continues to argue for a 15-day interval to maintain systemwide consistency. *See* GTE Brief at 9-10. In its recent comments to the FCC, however, GTE claimed that its normal procedure was to respond to CLEC collocation requests within 10 business days. *See* Comments Filed on Behalf of GTE in CC Docket No. 98-147 (Sept. 25, 1998). As noted above, 15 days is, in most instances, longer than 10 business days.

GTE also argues that a 10 calendar day interval would be burdensome because GTE has to contend with multiple collocation requests that require site visits by personnel who "perform this task in addition to their regular jobs." GTE Brief at 10. As an initial matter, the fact that GTE has multiple requests and requires site visits does not automatically imply a burden requiring two full business weeks to respond. In addition, the fact that GTE views its established duty to answer collocation requests as a duty outside of the "regular jobs" of its employees weighs against its own impression of the limits of its ability to respond. Indeed, as noted in ATTI's brief, at least one other state commission has approved an incumbents obligation to respond within only 8 business days.[3]

ATTI proposes nothing more than what the FCC has found to be reasonable. Indeed, even if the Commission determines that the FCC meant business, instead of calendar days, this interval

---

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

is still shorter than what GTE has proposed in this proceeding. ATTI believes that it is entitled to the full measure of rights and protections that the law affords it. In this instance, the law affords it the right to have GTE respond to its collocation requests within 10 days. The Commission should approve this interval.

CONCLUSION

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

Respectfully submitted,

Lawrence R. Freedman[4]
ARTER & HADDEN, LLP
1801 K Street, N.W., Suite 400K
Washington, D.C. 20006
(202) 775-7136
(202) 857-0172 (fax)

Richard J. Busch
FOSTER, PEPPER & SHEFELMAN
777 – 108th Avenue, NE, Suite 1500
Bellevue, WA 98004
(425) 451-0500
(425) 455-5487 (fax)

Counsel for American Telephone Technology, Inc.

[4] Admitted to practice law in Maryland and the District of Columbia.

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 1999, a copy of the Reply Brief of American Telephone Technology, Inc. in Docket No. UT-990390 was sent to the following individual by facsimile and federal express:

Judith A. Endejan
Williams, Kastner & Gibbs PLLC
Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101-2380

_____
Richard Davis