BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION OF AMERICAN TELEPHONE TECHNOLOGY, INC. FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996	**DOCKET NO. UT-990385**

POST-HEARING BRIEF OF U S WEST COMMUNICATIONS, INC.

I.INTRODUCTION AND SUMMARY

Two fundamental issues are at the core of this interconnection arbitration between American Telephone Technology, Inc. ("ATTI") and U S WEST Communications, Inc. ("U S WEST") conducted pursuant to the Telecommunications Act of 1996 ("the Act"). First, ATTI seeks to create an interconnection agreement primarily by relying on section 252(i) of the Act, the provision that allows competitive local exchange carriers ("CLECs") to opt into agreements that incumbent local exchange carriers ("ILECs") have with other competitive carriers. In doing so, ATTI stretches section 252(i) beyond its intended purpose and seeks opt-in rights that are not permitted by the Act, the FCC's orders relating to pick and choose, or this Commission's Draft Interpretive and Policy Statement relating to pick and choose recently issued in Docket No. UT-990355 ("Draft Statement").

Second, ATTI has proposed new language relating to the issue of collocation that raises several factual and legal issues concerning the parties' rights and obligations under the

Act and FCC orders relating to collocation. As with its positions relating to section 252(i), ATTI seeks collocation rights that are not supported by the Act, the FCC's orders, or orders from this Commission. For that reason, U S WEST has proposed competing language relating to collocation that carefully tracks the requirements of the Act and the FCC's pronouncements on collocation in its Advanced Services Order issued March 31, 1999.[1] The discussion that follows explains why the language U S WEST has proposed is consistent with applicable law and should be adopted.

Each of these two fundamental issues includes sub-issues. The sub-issues relating to section 252(i) and ATTI's pick and choose rights involve ATTI's attempt to opt into only the reciprocal compensation provision of the interconnection agreement between U S WEST and MFS Communications Company ("MFS"). As discussed below, the U S WEST/MFS agreement is expired and, therefore, ATTI cannot be permitted to opt into it. In its recent Draft Statement relating to pick and choose, the Commission confirmed that carriers should not be permitted to opt into arrangements in interconnection agreements that have expired. Draft Statement at ¶ 18. That principle is consistent with interpretations of section 252(i) from other commissions around the country, and it establishes that ATTI cannot opt into the reciprocal compensation provision of the expired U S WEST/MFS agreement.

The other sub-issue relating to section 252(i) involves ATTI's attempt to opt into only select provisions of the arrangement in the U S WEST/AT&T agreement relating to unbundled network elements ("UNEs"). While it seeks to opt into some of the provisions of

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[1] In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-48 (rel. March 31, 1999) (referred to herein as "Advanced Services Order" or "706 Order").

that agreement relating to UNEs, ATTI also seeks to change other provisions and to substitute its own language. This approach to section 252(i), aptly described as "pick and change," plainly is impermissible under FCC precedent and this Commission's Draft Statement.

Because ATTI cannot pick and change the UNE provisions of the U S WEST/AT&T agreement, it was required to arbitrate all the UNE language it is proposing. In other words, it was required to present evidence supporting the language it was advocating. ATTI failed to do so. There is no evidence in the record that supports or even explains the UNE language that ATTI is seeking. Indeed, although a central issue relating to UNEs is ATTI's contention that U S WEST must provide all network elements that are currently combined at UNE prices, ATTI's witness surprisingly was unable even to identify the network elements that ATTI is seeking or to state whether the elements it seeks are unbundled elements or network elements that are not required to be unbundled. This shortcoming in its proof is fatal to ATTI's request for adoption of the UNE language it proposes. Equally significant, ATTI's proposed language relating to UNEs improperly would require U S WEST to combine UNEs and other network elements that are not already combined.

With respect to the disputes surrounding collocation, there are several sub-issues that were the focus of the parties' evidentiary presentations at the hearing. U S WEST describes the evidence and the law supporting the collocation language it seeks in the sections that follow. In sum, the collocation provisions that U S WEST is proposing closely track the FCC's Advanced Services Order, while also accommodating practical engineering and network-related concerns. As such, U S WEST's proposed language, unlike ATTI's proposals, is firmly grounded in the law and the evidence and, therefore, should be adopted.

For these reasons, U S WEST urges the Commission to rule that: (1) ATTI is permitted to opt into the interconnection agreement between U S WEST and AT&T; (2) ATTI cannot opt into the reciprocal compensation provision of the U S WEST/MFS agreement but, instead, must accept the bill and keep provision in the U S WEST/AT&T agreement; (3) ATTI cannot pick and change the UNE provisions in the U S WEST/AT&T agreement but, instead, must opt into those provisions without changing them; and (4) U S WEST's proposed contract language relating to collocation reflects the current state of the law and should be adopted.

II.DISCUSSION

A. ATTI's proposed language relating to unbundled network elements is based upon an impermissible "pick and change" approach to section 252(i) and should be rejected (Unresolved Legal Issue 2).

The discussion that follows demonstrates that ATTI's request for proposed contract language relating to UNE combinations is premised upon an impermissible, unlawful use of section 252(i). That section does not permit ATTI to adopt language from another interconnection agreement and then alter that language to change its meaning and effect. Further, because ATTI cannot rely on section 252(i) for its proposed UNE language, it was required to present evidence in support of its language. It failed to do so and, hence, there is no support in the record for that language.

Accordingly, U S WEST requests that the Commission reject ATTI's proposed language relating to UNE combinations and adopt instead the unaltered UNE provisions in the U S WEST/AT&T interconnection agreement. There is no dispute about ATTI's ability to opt into the unaltered UNE language in the AT&T/U S WEST agreement; that is the language that the Commission should order.

1. ATTI is not permitted under section 252(i) to change language that it picks and chooses from another interconnection agreement.

ATTI takes a two-pronged approach to the language it advocates in the agreement relating to UNEs. First, invoking section 252(i), it seeks to opt into the UNE arrangement in the interconnection agreement between U S WEST and AT&T. Second, it proposes changes to that arrangement that, according to ATTI, are "tailored" to reflect its view of "the current state of the law." ATTI Arbitration Petition at 13. In other words, ATTI wants to adopt many of the provisions in the AT&T/U S WEST agreement relating to UNEs, but it also wants to change or replace numerous provisions. This "pick and change" approach to section 252(i) is unlawful and should not be permitted. If ATTI desires to rely on section 252(i), it must adopt all the provisions in the AT&T/U SWEST agreement relating to UNEs without changing them.

The FCC has clearly ruled that section 252(i) does not permit competitive local exchange carriers ("CLECs") to pick and change contract language. In In the Matter of Global NAPs, Inc. Petition for Preemption of Jurisdiction of the new Jersey Board of Public Utilities, CC Docket No. 99-154, Memorandum Opinion and Order at 3 (August 3, 1999), the FCC provided a discussion of the rights and obligations that section 252(i) creates. As part of that discussion, the FCC expressly stated that parties cannot change the language of agreements they seek to opt into: "Negotiation is not required to implement a section 252(i) opt-in arrangement; indeed, neither party may alter the terms of the underlying agreement." Id. (emphasis added). This statement by the FCC is consistent with the plain meaning of section 252(i), which provides in relevant part that a local exchange carrier must make available other agreements "upon the same terms and conditions as those provided in the

agreement." (emphasis added).

This Commission's Draft Statement relating to section 252(i) mirrors the FCC's statement and the language of the Act. As noted earlier, Principle 2 of the Draft Statement prohibits a carrier from changing the language of an agreement it seeks to opt into:

> Except for changes in the names of the parties, internal references, or other minor changes, a requesting carrier that requests to receive an existing agreement in its entirety, or to receive individual arrangements in an agreement, must adopt the original contract verbatim.

Accordingly, the applicable law indisputably prohibits ATTI from opting into some provisions of the UNE arrangement in the U S WEST/AT&T agreement relating to UNEs while changing other provisions in that arrangement.

2. ATTI failed to present evidence in support of its proposed changes to the section of the AT&T/U S WEST interconnection agreement relating to unbundled network elements.

Because ATTI cannot use section 252(i) for the UNE language it seeks, it was required to arbitrate that language under section 252(b) and to present evidence supporting the contract provisions it advocates. ATTI failed to do so, and, as a result, there is nothing in the record upon which the Commission could base a ruling adopting ATTI's proposed UNE language. The language is simply unsupported.

It is fundamental, of course, that the Commission's findings in this proceeding must be based on the evidence in the record. See, e.g., Wash. Rev. Code §§ 34.05.461(4), 34.05.570(3)(e), 34.05.476(3).[2] Indeed, federal courts reviewing interconnection agreements pursuant to section 252(e)(6) typically focus on whether the evidentiary record created in an

[2] While these provisions of the Washington Administrative Procedure apply to adjudicative proceedings, as the Arbitrator stated in his opening remarks at the hearing, this proceeding is non-adjudicative but is nevertheless "guided by" the principles of the Washington APA. Tr. at 7.

arbitration supports the agreement under review. See, e.g., MCI Telecommunications Corp. v. Ameritech Illinois, Inc., Case No. 97 C 2225, 1999 U.S. Dist. LEXIS 11418 at 23 (N.D. Ill. June 22, 1999) ("The ICC's determination that 'MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate' was not arbitrary and capricious"); MCI Telecommunications Corp. v. GTE Northwest, Inc., 41 F. Supp. 2d 1157, 1183 (D. Or. 1999) (Commission's ruling found to be supported by "substantial evidence in the record"). See also U S WEST Communications, Inc. v. Jennings, 46 F. Supp.2d 1004 (D. Ariz. 1999); Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., No. A 97-CA-132 SS, 1998 U.S. Dist. LEXIS 15637 (W.D. Tex. Aug. 31, 1998); MCI Telecommunications Corp. v. U S WEST Communications, Inc., Case No. C97-1508R, 1998 U.S. Dist. LEXIS 21585 (W.D. Wash. July 21, 1998).

Here, ATTI's failure of proof relating to the UNE language it proposes is more than a legal technicality; it is a shortcoming that precludes the Commission from finding that ATTI's proposed language is lawful. Indeed, the evidence elicited by U S WEST demonstrates affirmatively that ATTI's proposed language is unlawful. At the hearing, ATTI's witness, Mr. Kunde, was abundantly clear that through its proposed language, ATTI is seeking to require U S WEST to provide both unbundled network elements and network elements that ILECs have not been ordered to unbundle:

> Q. Is it ATTI's expectation that U S WEST will sell ATTI elements, network elements, that are not unbundled?
>
> A. Yes.
>
> Q. Including elements that are not currently classified as unbundled by the FCC?
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> A. My yes was predicated on, for example, the resale of services.

> There are certain resale services that aren't considered unbundled. They are certainly all bundled together in a package.

Tr. at 130; see also tr. at 126-27. As Mr. Kunde candidly acknowledged, ATTI's true intent is to require U S WEST to provide the same resale services ATTI currently purchases from U S WEST but at UNE rates, regardless whether the resale services include network elements that U S WEST is not required to unbundle. Tr. at 132.

ATTI's purpose is improper. U S WEST's obligation to provide network elements does not extend to all network elements but only to those elements that meet the "necessary and impair" test in section 251(d)(2) and that the FCC has specifically required ILECs to unbundle. See section 251(c)(3) and section 251(d)(2). In AT&T Corp. v. Iowa Utilities Bd., 119 S.Ct. 721, 735 (1999), the Supreme Court made clear that before ILECs can be required to unbundle network elements and provide them to CLECs, it is essential to conduct a careful analysis of whether access to the elements is necessary and whether the failure to obtain access "would impair the ability to provide services." The Court concluded that the FCC failed to conduct the proper analysis in identifying the elements that ILECs must unbundle and, on that ground, it vacated 47 C.F.R. § 51.319. In so doing, the Court emphasized the limitations on ILECs' obligation to provide access to UNEs:

> We cannot avoid the conclusion that, if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all. It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.

Id.

By failing to distinguish between network elements that the FCC has concluded ILECs must unbundle and those that ILECs are not required to unbundle, ATTI's proposed

language for UNEs ignores the limitations on unbundling that the Supreme Court recognized and that are embodied in section 251(d)(2). For example, section 1.2.2 of ATTI's proposed "UNE Combination Language" would require U S WEST to "offer each Network Element individually and in Combinations that it currently combines within its network at the time of an ATTI request for such Combinations."[3] This language does not limit the elements that U S WEST would have to provide in a combined form to the elements that the FCC has required ILECs to unbundle.

Moreover, while seeking to require U S WEST to provide access to network elements beyond those that the FCC has required ILECs to unbundle, ATTI failed to provide any evidence addressing whether those additional elements – which it could not even identify -- meet the necessary and impair test. For example, in AT&T Corporation, the Supreme Court stated that an important consideration in applying the necessary and impair test is whether the elements that CLECs seek are available from sources other than the ILEC's network. Id. at 735. To support the broad UNE language it proposes, ATTI was required, at a minimum, to identify the additional elements it seeks and to present evidence addressing whether those elements are available only from U S WEST. Its failure to present that evidence and other evidence needed to meet the necessary and impair test necessarily precludes a finding by the Commission that ATTI's proposed UNE language is lawful.

Finally, ATTI's UNE combinations language also includes provisions that improperly would require U S WEST to combine network elements that it does not already combine. For example, section 1.2.6 of ATTI's proposed UNE language provides that "U S WEST

[3] ATTI's proposed UNE language is set forth in Exhibit B of its arbitration petition.

shall provide additional Network Elements individually or in Combinations, including, without limitation, Network Elements or Combinations which are not ordinarily combined in U S WEST's network . . . ." (emphasis added). The Commission should reject this language.

Section 251(c)(3) makes clear that the requesting carrier (and not the ILEC) will actually combine the unbundled elements in order to provide a telecommunications service. Accordingly, in Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 & n. 39 (8th Cir. 1997), aff'd in part, rev'd in part, AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999), the United States Court of Appeals for the Eighth Circuit vacated FCC Rules 315(c)-(f), which required ILECs to combine network elements into configurations different from their current configurations and to combine ILEC elements with CLEC facilities. The Eighth Circuit held that section 251(c)(3) cannot reasonably be read to require ILECs to combine elements for CLECs but, instead, requires CLECs to combine elements themselves. Id. In AT&T Corporation, the Supreme Court did not address this issue, thereby leaving the Eighth Circuit's ruling intact. Because the Eighth Circuit held that the Act does not require ILECs to perform these combinations, and that holding stands, it would be improper to require U S WEST to combine elements of its network that are not currently combined or to combine elements of its network with ATTI's facilities. Therefore, the Commission should reject ATTI's UNE language on the additional ground that it improperly requires U S WEST to combine elements for ATTI.[4]

[4] The issue of whether ILECs can be required to combine UNEs pursuant Rule 315(c)-(f) is again before the Eighth Circuit on remand from the Supreme Court. However, those rules are not in effect. Because this issue is properly before the Eighth Circuit, which is the appellate court that has been designated to review the FCC's First Report and Order, the Ninth Circuit should not have reached this issue in its recent decision in U S WEST Communications, Inc. v. MFS Intelenet, Inc., Nos. 98-35146, 98-35203, 1999 U.S. App. LEXIS 25032 (9th Cir. Oct. 8, 1999). In that case, the Ninth Circuit ruled that the Eighth Circuit erred in invalidating Rule 315(c)-(f). That holding does not resurrect

B. ATTI should not be permitted to opt into the reciprocal compensation provision of U S WEST's interconnection agreement with MFS (Unresolved Legal Issue 1).

ATTI incorrectly contends that it has the right to opt in to the reciprocal compensation language of U S WEST's prior agreement with MFS under section 252(i). Because the U S WEST/MFS agreement has expired, ATTI is not permitted to opt into any portion of the agreement.

The MFS agreement became effective January 8, 1997, and the parties agreed to a term of two and one-half years. Thus, the "Term of Agreement" provision of the MFS agreement states:

> This Agreement shall be effective for a period of 2 ½ years, and thereafter the Agreement shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties agree to commence negotiations on a new agreement no later than two years after this Agreement become effective.

In accordance with this provision, the MFS agreement expired on July 7, 1999, and it is no longer available for adoption under Section 252(i).

ATTI argues that because U S WEST and MFS have extended the agreement pending their negotiation and execution of a replacement interconnection agreement, the MFS agreement continues to be available to ATTI for opt in. However, ATTI's interpretation of the "term of agreement" provision is not tenable because it renders part of that provision superfluous. As ATTI understands the agreement, it has no expiration date. Indeed, under ATTI's theory, one could not know whether the agreement had ever expired without looking outside the agreement to determine whether a "replacement agreement" exists. This

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these rules, and, accordingly, the Commission should not follow them.

interpretation misconstrues the parties' intent.

The parties' contract language clearly shows that U S WEST and MFS envisioned a two and one-half year term. To facilitate negotiation of the follow-on contract, the parties agreed to operate under the existing agreement until a new agreement is in place. This accommodation was for the parties' convenience only. The mutual intent of U S WEST and MFS was to ensure continuity, as well as the ability to negotiate a new agreement, without the need to agree to "interim" agreements during their negotiations. But the parties plainly did not intend to waive the contract's expiration date. This is clear from the fact that they imposed an obligation to commence negotiations for a new agreement six months prior to the expiration of the old agreement.

If the U S WEST/MFS agreement has no expiration date, as ATTI suggests, the provision requiring U S WEST and MFS to negotiate a new agreement six months prior to the expiration of the old agreement literally makes no sense. Under well-established principles of contract interpretation, ATTI's analysis cannot withstand scrutiny. The parties' agreement to operate under the existing agreement cannot alter the fact that the agreement was for a two and one-half year term, and that the agreement expired July 7, 1999.

ATTI contends that NEXTLINK of Washington, Inc. v. U S WEST Communications, Inc., Docket No. UT-990340, Sixth Supplemental Order; Recommended Decision (August 25, 1999) compels the conclusion that ATTI may opt in to the expired MFS reciprocal compensation language. In NEXTLINK, the Commission permitted the Co-Provider to opt in to the reciprocal compensation provision of the expired MFS agreement. Id. at 20. However, subsequent to NEXTLINK, this Commission issued its Draft Statement relating to section 252(i) which establishes that parties cannot opt into interconnection agreements that

have expired:

> Principle 8: An interconnection arrangement made available pursuant to Section 252(i) must be made available for the specific time period during which it is provided under the interconnection agreement from which it was selected. For example, if the interconnection arrangement was included in an agreement that expired on December 31, 2000, it must be available to other carriers only until December 31, 2000. The purpose of limiting availability of interconnection arrangements to the time period during which they are available under the original agreement is to ensure non-discriminatory treatment of carriers, including the carrier who negotiated or arbitrated the initial agreement.

Policy Statement at 6 (emphasis added).

This principle establishes that the parties and the Commission must look to the expiration date of the original agreement to determine whether a carrier can opt into that agreement. In the present case, the expiration date of the original agreement was July 7, 1999. Accordingly, the arrangement ATTI seeks is not available for opt-in.

ATTI's proposal also is inconsistent with Principle 6 of the Draft Statement, which provides:

> Principle 6: The "reasonable period of time" during which arrangements in any interconnection agreement (including entire agreements) must be made available for pick and choose by a requesting carrier extends until the expiration date of that agreement. A requesting carrier may not receive arrangements from any agreement that is no longer effective. If carriers were allowed to adopt arrangements from expired agreements, the result would be to extend the effective period of any particular interconnection arrangement. Such an extension would be unreasonable and unduly burdensome to ILECs because it could require an ILEC's continuing performance of obligations that were based on outdated assumptions.

Policy Statement at 5.

ATTI's request to opt into the U S WEST/MFS agreement would effectively read the words "expiration date" out of Principle 6 entirely, and thus undermine the policies that

underlie that principle. Simply put, the U S WEST/MFS agreement has an expiration date -- July 7, 1999 – and, under Principle 6, the reciprocal compensation arrangement of that agreement is not available for opt in after that date.

In addition, even if the U S WEST/MFS agreement were not expired, ATTI still would be prohibited from opting into it. The FCC's rule relating to pick and choose, 47 C.F.R. § 51.809, permits CLECs to adopt interconnection, services, and unbundled element "arrangements" from other approved interconnection agreements, not individual contract provisions. The FCC's use of the term "arrangement" is significant, as that term does not support the adoption of partial sections of interconnection agreements.

The significance of the FCC's reference to an "arrangement" is demonstrated by ATTI's treatment of the issue of interconnection in its proposed agreement. U S WEST has an interconnection "arrangement" with AT&T that is defined by all the provisions in the interconnection section of the U S WEST/AT&T interconnection agreement. While ATTI has adopted substantial portions of that section of the AT&T agreement, it did not adopt the AT&T interconnection provisions relating to reciprocal compensation. Instead, ATTI has replaced the provisions relating to reciprocal compensation with provisions from an interconnection agreement between MFS (now WorldCom) and U S WEST. Thus, ATTI has "picked" the AT&T language relating to interconnection but "changed" substantial portions of that language by integrating the provisions from the MFS agreement. For the reasons discussed above relating to ATTI's UNE combination proposals, this attempt by ATTI to pick and change language in the interconnection section of the U S WEST/AT&T agreement is impermissible.

In addition, paragraph 1315 of the FCC's First Report and Order provides that an

ILEC can require a requesting carrier to accept all terms that are "legitimately related" to the terms the requesting carrier desires, and the Supreme Court affirmed this requirement. AT&T Corporation, 119 S.Ct. at 738. The interconnection provisions in U S WEST's agreement with AT&T are integrated and related to each other and compensation provisions are certainly "legitimately related" to the rest of the terms and conditions for providing a service. As such, consistent with paragraph 1315 of the First Report and Order, U S WEST should be permitted to require ATTI to adopt all of those provisions, not just those that ATTI desires.

Further, as discussed previously in connection with ATTI's UNE combinations language, paragraph 1317 of the First Report and Order directs that under section 252(i), "the availability of publicly-filed agreements [is] limited to carriers willing to accept the same terms and conditions as the carrier who negotiated the original agreement with the incumbent LEC." (Emphasis added). Here, as demonstrated by ATTI's proposed modifications to sections of the AT&T agreement, ATTI is not willing to accept the "same terms and conditions" as AT&T. Accordingly, its attempt to opt into the AT&T agreement directly conflicts with paragraph 1317.

Finally, paragraph 1314 of the First Report and Order makes clear that providing an interconnection or access arrangement on the same terms and conditions as contained in an agreement approved under Section 252 includes the rates involved in that arrangement. Thus, the FCC states that a carrier "may obtain access to individual elements such as unbundled loops at the same rates, terms, and conditions as contained in any approved agreement." (emphasis added). It is implicit in this language that rates are not, by themselves, an "arrangement" for opt-in purposes.

By seeking to opt into the reciprocal compensation provision of one agreement, while at the same time opting into the interconnection arrangement from another agreement, ATTI seeks "rates, terms, and conditions" for interconnection not contained in any existing agreement. Accordingly, ATTI may not adopt the reciprocal compensation provision of the MFS agreement.

C. U S WEST's proposed language relating to collocation is consistent with the FCC's pronouncements and should be adopted (Unresolved Factual Issues 1, 2 4, 5, 6, 9, 11, 13, 17, 18, 21, and 22)

1. The Commission should permit U S WEST to specify cross-connect devices and to direct the routing of cables ATTI will use to access UNEs in U S WEST's network (Unresolved Factual Issues 1, 2).

The differences in the parties' proposed language relating to issues 1 and 2 stem from a fundamental disagreement about the extent to which U S WEST should be permitted to control its own network. U S WEST views it as essential that it retain control over how CLECs connect to frames in its central offices, while ATTI believes that it should have substantial control over that process. In support of its proposed language and its positions relating to these issues, U S WEST relies in part on 47 C.F.R. § 51.323(h)(2), which provides:

> An incumbent LEC is not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC's premises outside of the actual physical collocation space.

This language recognizes, both explicitly and implicitly, the ILEC's legitimate need to maintain control of CLEC activities in wire centers.

The two specific issues that must be decided are: (1) whether U S WEST should be permitted to specify the cross-connect device ATTI uses to gain access to UNEs; and (2)

whether U S WEST should be permitted to determine where on a cross-connect ATTI's circuits should terminate. We will address the second issue first, since agreement on that issue seemed to emerge during the hearing.

As Mr. Reynolds explains, as a practical matter, only U S WEST has the ability to identify the appropriate point for interconnection on a U S WEST cross-connect device, since only U S WEST engineers know the location of the desired cross-connect port or circuit. Reynolds Direct ("Ex. T-201") at 5. Mr. Reynolds elaborated on this point during the hearing:

> The rationale for [our] position is that it is U S WEST's network, and that U S WEST understands the routing of its cables, it understands which cross-connects access which UNEs, and thus it really has to be U S WEST that specifies the cross-connect and the points on the cross-connect frame.

Tr. at 63-64.

During the hearing, Mr. Kunde expressed agreement with U S WEST's position that it should be permitted to identify the points on its cross-connect facilities for interconnection by ATTI. He acknowledged that U S WEST has a legitimate need to maintain control over its cross-connect facilities and that only U S WEST is able to identify the appropriate points on a cross-connect device for interconnection or access to UNEs. Tr. at 45-46. Therefore, there appears to be no dispute between the parties that the contract language should specify that U S WEST retains control over identifying the points on its cross-connect devices where ATTI will interconnect or gain access to UNEs.

With respect to the second issue—whether U S WEST should be permitted to specify the type of cross-connect device ATTI uses—U S WEST has proposed contract language establishing that U S WEST will have that ability but will use the same frames for ATTI that

it uses for its retail services. As set forth in Mr. Reynolds' testimony, the language U S WEST advocates is as follows:

> ATTI may order access to UNEs which ATTI may connect to other network elements or combine for the purpose of offering finished retail services. ATTI will utilize the ICDF to access USW UNEs in USW's Wire Center only to the same extent, on the same terms and conditions, as USW utilizes the ICDF for provision of its retail services.

Reynolds Rebuttal ("Ex. T-204") at 3.

U S WEST's desire to be able to determine the types of cross-connect facilities ATTI uses is based on its need to manage its network as efficiently as possible. Depending on the circumstances specific to U S WEST's individual central offices, it may be more efficient to use one type of frame over another type for U S WEST's retail services and for providing CLECs access to UNEs. U S WEST should have the ability to make those efficiency determinations. See tr. at 64-65. The need to give ILECs the ability to manage their central offices efficiently is why, in U S WEST's view, the FCC recognized in the provision cited above that ILECs are not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC's premises outside of the actual physical collocation space. Here, as Mr. Reynolds explains, concerns that U S WEST may treat ATTI unequally in the selection of frames are addressed by U S WEST's commitment to use the same frames for its retail services that it uses to provide UNEs to ATTI. Ex. T-201 at 7.

ATTI asserts inaccurately that the ICDFs U S WEST would use for its retail services and to provide UNE access are no different from the single point of termination ("SPOT") frame that U S WEST has offered in proceedings in other states. In fact, the term "ICDF"

refers to all distribution frames in U S WEST's central offices, not just SPOT frames. Tr. at 65. ICDFs include, for example, main distribution frames ("MDFs") and digital cross-connects that U S WEST uses for access to DS1s and DS3s. Tr. at 73-75. Depending on the conditions in each central office, the use of one of these frames instead of another may be more efficient, and U S WEST's proposed contract language ensures that U S WEST will be able to make the most efficient choices.

ATTI asserts that U S WEST's proposed use of ICDFs is prohibited by paragraph 42 of the FCC's Advanced Services Order which provides in relevant part:

> 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 connection simply increase collocation costs without a concomitant benefit to incumbents.

However, as Mr. Reynolds explains, rather than increasing collocation costs, U S WEST's proposed use of ICDFs actually will reduce costs by providing ATTI with a single point of access to all facilities instead of requiring it to obtain separate points of access for each type of facility. Ex. T-201 at 6-7. Thus, the economic concern the FCC identified in the language quoted above is not implicated by U S WEST's proposal.

Accordingly, U S WEST requests that the Commission adopt U S WEST's language in sections 2.1.1, 2.1.2, 2.1.3, and 3.21 of U S WEST's proposed contract section relating to collocation.

2. The Commission should adopt U S WEST's proposed language relating to whether ATTI must collocate in order to combine UNEs (Unresolved Factual Issue 4).

In section 2.1.5 of the collocation section of the agreement, U S WEST makes clear that it will provide ATTI with ICDFs for accessing and interconnecting UNEs. Under ICDF

collocation, A CLEC is not required to collocate equipment in a U S WEST wire center in order to gain access to facilities and to combine UNEs and ancillary services. U S WEST's proposed language reflects this offering.

ATTI's proposed language for this section goes substantially further by attempting to establish that "USW's obligations to combine UNEs" is not contingent on whether ATTI elects to collocate in a specific U S WEST central office. There are two fundamental problems with ATTI's proposed language. First, the language assumes that U S WEST has an obligation to combine UNEs for ATTI. For the reasons discussed above, that assumption is incorrect. U S WEST is not required to combine UNEs for ATTI.

Second, all language that ATTI proposes relating to combinations of elements must be read with the knowledge that ATTI has not identified the elements it believes it should be able to obtain in a combined form. Since ATTI has not identified those elements, it is presumptuous for ATTI to assert that its ability to obtain combinations is not contingent upon whether it collocates. The critical questions that ATTI has not answered are: (1) which network elements?; and (2) without knowing which network elements, how can it be assumed that no collocation is necessary to obtain combinations? Because of these uncertainties, the Commission should reject ATTI's attempt to establish that it need not collocate to obtain combinations, regardless which network elements it seeks to obtain in a combined form.

3. The Commission should adopt U S WEST's revised language relating to ATTI's request to extend "adjacent collocation" to "nearby locations" (Unresolved Factual Issue 5).

This issue involves whether ATTI should be required to collocate on the property of U S WEST that is adjacent to its wire centers or whether ATTI should be permitted to

collocate at "nearby" property that is not owned by U S WEST. As Mr. Reynolds explains in his testimony, the FCC's Advanced Services Order requires ILECs only "to permit collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible." Advanced Services Order at ¶ 44 (emphasis added). U S WEST's proposed contract language, set forth in section 2.1.7 of the collocation section, mirrors the FCC's language by referring to "adjacent collocation."

ATTI seeks to expand upon the FCC's Order by proposing contract language that would allow it to "collocate" at "nearby locations" that are not on U S WEST's property.[5] ATTI's language is not supported by the Advanced Services Order, which speaks only of "adjacent" collocation, not locating equipment on property that is nearby the ILEC's wire centers. Moreover, as Mr. Reynolds discusses, if ATTI is permitted to locate its equipment off U S WEST's premises, significant additional costs will result, including costs associated with trenching, placing conduit, placing power cabling, and placing fiber facilities. Ex. T-201 at 9. In addition, U S WEST will incur administrative costs arising from this off-site location of equipment, including costs associated with quote preparations, contractor bids, and obtaining permits. Id. at 9-10. While Mr. Kunde states that ATTI will pay for these additional costs (tr. at 148-51), the contract language ATTI is proposing (section 2.1.7) does not say that. Thus, Mr. Kunde candidly acknowledges that ATTI's proposed contract language would be clearer if it provided that ATTI would pay any additional costs resulting from this off-site "collocation" or location of ATTI's equipment. Tr. at 152.

While U S WEST strongly believes that it should not be required to permit off-site

[5] U S WEST takes exception to ATTI's use of the term "collocation" to refer to locating its equipment outside U S WEST's premises. The term "collocation" should be used only when a carrier is locating on the premises of the ILEC's wire center.

"collocation," in an effort to resolve this issue consistent with the discussion the parties had during the hearing, U S WEST is proposing the following new language for section 2.1.7:

> 2.1.7 Adjacent Physical Collocation
>
> Adjacent Physical Collocation allows ATTI to obtain space for collocated facilities in a cabinet on the contiguous real property of USW (the "On Grounds Location"). To the extent space inside USW's central office is not available, USW will offer this option at ATTI's election. USW will extend AC power up to a maximum of 200 feet from the USW power source. Alternatively, ATTI may obtain commercially available power. USW will extend facilities sufficient to establish connectivity to USW's network and distribution frame to ATTI's Collocation space where ATTI is in an On Grounds Location. Adjacent Physical Collocation may be ordered using the Collocation order form through the BFR process. To the extent the WPUC orders USW to make Adjacent Physical Collocation available on property other than USW's contiguous real property, USW will respond to such requests on an ICB basis using the BFR process.

4. The Commission should adopt language that allows U S WEST to exercise its right to determine whether ATTI's collocated equipment is "used or useful" for interconnection or access to UNEs (Unresolved Factual Issues 6, 6.C.).

Section 251(c)(6) of the Act requires ILECs to permit requesting carriers to collocate equipment that is "necessary" for interconnection and access to unbundled network elements. 47 U.S.C. § 251(c)(6). In the Advanced Services Order, the FCC confirmed that ILECs do not have to permit the collocation of equipment that is not used or useful for interconnection or access to unbundled network elements, such as equipment used solely for switching or enhanced services. 706 Order ¶ 30. Further, in paragraph 28 of that Order, the FCC placed the burden on ILECs to prove that collocated equipment "will not be actually used by the telecommunications carrier for the purpose of obtaining interconnection or access to unbundled network elements."

Issues 6 and 6(C) involve U S WEST's request for contract language that will allow it to enforce its right not to permit ATTI to collocate equipment that is neither useful nor used for interconnection or access to UNEs. Specifically, U S WEST wants to ensure that it has access to sufficient information to allow it to determine independently whether ATTI is using its collocated equipment for these purposes. Accordingly, U S WEST's proposed language in sections 3.3 and 3.4 of the collocation section of the agreement establishes that: (1) U S WEST has the right to audit ATTI's equipment to ensure ATTI is using it for local interconnection; and (2) ATTI will provide written notice to U S WEST explaining how its collocated switching equipment will be used for interconnection or access to UNEs.

In contrast to U S WEST's language, ATTI's proposed language relating to this issue – set forth in section 3.2 of the collocation section – would not obligate ATTI to provide any information concerning how it is using its collocated equipment. ATTI's proposal provides only that "U S WEST may request" information from ATTI about the use of its equipment and, read literally, does not require ATTI actually to provide any information. Equally important, ATTI's language would not give U S WEST the ability to determine for itself – without relying solely on information provided by ATTI – how ATTI is utilizing its equipment. In other words, under ATTI's proposal, U S WEST would have to depend exclusively on information provided by ATTI and ATTI apparently would have the discretion not to provide any information. That result would effectively nullify U S WEST's ability to exercise its right, as established in the Advanced Services Order, to prove to this Commission that ATTI is not using its equipment for interconnection or access to UNEs.

The parties' competing language on this issue should be read in light of the FCC's assignment of the burden of proof to ILECs. U S WEST reasonably requests that it have an

independent means for evaluating ATTI's use of its collocated equipment so that, if necessary, U S WEST can demonstrate that ATTI is not using the equipment for proper purposes. As a practical matter, without the ability to conduct that evaluation independently through an audit, U S WEST will not be able to meet its burden of proof and, in theory, ATTI would be able to use its equipment for impermissible purposes. With the language it is proposing, ATTI effectively would require U S WEST to take a "trust me" approach and to accept ATTI's word concerning the use of its equipment. But, in the words of a former American president, it is important to "trust, but verify." That is what U S WEST is seeking to do through its proposed language.

ATTI's fundamental objection to U S WEST's proposed language centers around its concern that the audit U S WEST seeks will be overly intrusive. However, as Mr. Reynolds made clear, U S WEST is willing to agree to reasonable restrictions on the audit to ensure that there is not improper interference with ATTI's operations or its equipment. Tr. at 172.

Finally, U S WEST urges the Commission to consider the section 252(i) implications of its ruling on this issue. While it may be that ATTI's word about the use of its equipment is reliable, the same may not hold true for other carriers that may seek to opt into the collocation agreement between U S WEST and ATTI. The potential for other carriers to opt into this language provides further support for U S WEST's request that it be permitted to determine independently how ATTI is using its equipment.

5. ATTI's proposed language that would provide for Commission review of specific issues relating to collocation and charges relating to collocation is unnecessary and should be rejected (Unresolved Factual Issues 9a.—9f.).

In various places in its section relating to collocation, ATTI has proposed language

that calls for direct review by this Commission of the details of the parties' interconnection relationship. ATTI's language proposes direct review by the Commission of determinations by U S WEST that a request for an alternative form of collocation is not technically feasible (ATTTI section 3.5); decisions by U S WEST to deny ATTI access to U S WEST facilities because of repeated violations of security requirements (ATTI section 3.15); charges U S WEST assesses to recover costs it incurs to train employees in the handling of equipment for virtual collocation (ATTI section 4.6); charges U S WEST assesses to recover costs associated with meeting safety requirements and other technical standards (ATTI sections 5.11, 5.12, and 6.3); price quotes U S WEST provides relating to adjacent space for careless collocation (ATTI section 6.2); and charges U S WEST assesses for collocation services for which no rate has been established (ATTI section 7.1).

None of the reviews by the Commission that ATTI seeks is necessary. First, the dispute resolution clause in the U S WEST/AT&T agreement that ATTI is opting into already gives the parties a broad right to seek review by the Commission of issues relating to their interconnection relationship. Specifically, section 27.2 of Part A of that agreement provides:

> In the event AT&T and U S WEST are unable to agree on certain issues during the term of the Agreement, the Parties may identify such issues for arbitration before the Commission. Only those points identified by the Parties for arbitration will be submitted.

This broad right to bring issues before the Commission renders ATTI's additional language superfluous.

Second, ATTI's proposal also overlooks the other means that are available to ATTI to redress any wrongs it believes it has suffered. ATTI has the ability to invoke the dispute resolution procedures in the U S WEST/AT&T agreement, it can file an informal complaint

with the Commission, and it can petition the Commission on a formal basis pursuant to WAC 480-09-530. With all of these options available, there is no legitimate need for the additional review by the Commission that ATTI is proposing.

As explained in Mr. Kind's testimony, ATTI's request for Commission review of the details of the parties' interconnection relationship is based in substantial part on unsupported assertions that U S WEST is engaged in anti-competitive behavior and is prone to charging inflated, anti-competitive rates. See, e.g., Kunde Direct ("Ex. T-101") at 5-7. As became plain during the hearing, however, these allegations are wholly without foundation. When pressed as to the precise nature of U S WEST's supposed anti-competitive conduct, ATTI had no answers and no specifics and ultimately agreed to withdraw some of Mr. Kunde's testimony containing these allegations. Tr. at 33-44. Accordingly, the supposed foundation for the Commission review that ATTI seeks is non-existent.

For these reasons, the Commission should reject ATTI's language calling for Commission review of the issue listed above.

6. There is no need for a dispute resolution clause for collocation separate from and in addition to the generally applicable dispute resolution clause in the AT&T/U S WEST interconnection agreement (Unresolved Factual Issue 11).

For the same reasons that ATTI's proposed language calling for direct Commission review of contract issues is unnecessary, so too is ATTI's request for a separate, expedited dispute resolution clause for collocation (ATTI section 22). As discussed above, ATTI has several means for bringing disputes relating to collocation and other issues to the attention of the Commission. The procedures that are available to ATTI include an expedited dispute resolution process that is set forth in the dispute resolution clause of the U S WEST/AT&T

interconnection agreement (section 27.1). With these procedures already available, there is no need for the additional procedures that ATTI seeks.

7. If ATTI and U S WEST disagree on a price quote relating to grooming circuits to reclaim space, U S WEST should proceed with the work while the disputed charge is resolved only if it receives 50 percent of the price from ATTI (Unresolved Factual Issue 13).

This issue involves the following disputed language relating to price quotes for grooming circuits to reclaim space:

> In the event the parties disagree on the 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 under this Agreement, with a true up if necessary.

U S WEST can agree to this language only if it is clarified to ensure that U S WEST receives payment for fifty percent of the quoted price (fifty percent of the price is due upon acceptance of the quote by ATTI) before U S WEST begins to process the interconnection under this section. If this language cannot be so clarified, it must be stricken.

ATTI argues that both parties are protected by a true-up mechanism, even if U S WEST does not receive an up-front payment. This is not the case. If U S WEST is compensated only after dispute resolution is concluded, then ATTI will have the power under this provision to effectively force U S WEST to finance the collocation costs that are properly attributable to ATTI.

8. U S WEST's right to be paid for the costs it incurs to install collocation equipment should not be conditioned upon ATTI's undefined "reasonable satisfaction" with the job (Unresolved Factual Issue 17)

U S WEST strongly objects to ATTI's proposed language that would condition

payment for work involving the installation of collocation equipment upon ATTI's "reasonable satisfaction" with the work (ATTI section 14.1). U S WEST is entitled to be reimbursed for the services it provides under the agreement to provide interconnection, including collocation, as established by section 252(d)(1) of the Act. ATTI's proposal that it pay only if it is "satisfied" with U S WEST's work potentially creates a gaping hole in U S WEST's right of cost recovery. ATTI's language does not define "reasonable satisfaction" and effectively leaves the decision to pay entirely up to ATTI. It is easy to see how this broad discretion to refuse payment could lead to U S WEST not recovering its costs and to abuse by CLECs. It is important to remember, again, that if the Commission accepts this language, other carriers may later adopt it. U S WEST has no assurance that ATTI, much less other unknown carriers that may opt in, would apply the "reasonable satisfaction" standard fairly and not attempt to use it to avoid legitimate payment obligations.

The better approach is to resolve disputes about services U S WEST performs for ATTI through the dispute resolution process. That approach preserves ATTI's right to contest payments for work that it believes is not properly performed while also minimizing the risk to U S WEST that it will not be paid for the work it performs for ATTI and other CLECs that may opt into this agreement.

9. U S WEST should not be required to provide ATTI with bundling or UNE combination services in connection with ICDF collocation (Unresolved Factual Issue 21).

Based on recent discussions, U S WEST's understanding is that the parties have resolved this issue by agreeing on U S WEST's proposed language.

10. The Commission should adopt U S WEST's proposed language relating to the terms and conditions applicable to ATTI's completion of cross-connects to other collocated parties (Unresolved Factual Issue 22).

Because Issue 22 did not arise until several days before the hearing, U S WEST did not have proposed contract language relating to this issue at the hearing. Pursuant to the Arbitrator's instruction during the hearing, on November 2, 1999, U S WEST provided ATTI with the following proposed language for section 3.20 of the collocation section of the agreement:

> ATTI may construct its own connection, using copper or optical fiber equipment, between ATTI's equipment and that of another Co-Provider. Using an approved vendor, ATTI may place its own connecting facilities outside of the actual physical collocation space, subject only to reasonable safety limitations. USW will provide ATTI the same connection to the network as USW uses for provision of services to USW end users. The direct connection to USW's network is provided to ATTI through direct use of USW's existing cross connection network. ATTI and USW will share the same distributing frames for similar types and speeds of equipment, where technically feasible and space permitting.

This language should be read in conjunction with U S WEST's proposed language for section 17.2 of the collocation section:

> A request by ATTI to cross connect with another collocated provider, with or without using ICDF Collocation, will be considered a new Collocation request or a major change requiring a QPF. In the event ATTI requests cross connection with another collocated provider without using ICDF Collocation, USW shall verify capacity on, and identify, a route for the cross connection facilities within ten (10) days of ATTI's request. USW shall then allow ATTI thirty (30) days to construct the cross connection facilities necessary for the cross connection or, upon ATTI's request, USW shall provide a quote for, and complete construction of, such facilities within the timeframes established for ICDF Collocation.

As this language reflects, U S WEST recognizes ATTI's right to perform cross-

connects between its collocated space and the collocated space of another CLEC. The disagreement between the parties centers on the terms and conditions that will apply to the performance of the cross-connects. There are a small number of terms and conditions that U S WEST views as essential.

First, U S WEST must be permitted to recover the costs it will incur even where ATTI performs the cross-connect. For example, even when ATTI performs the cross-connect, U S WEST engineers still must determine the route for the connection to follow and must ensure that overhead cable racking and routing are in place. These activities require U S WEST to prepare a quote, and, in turn, require that U S WEST recover the costs of preparing the quote. Tr. at 108. As Mr. Reynolds explains, the quote fee is under development and will be different from--and, in all likelihood, less than--the quote preparation fee for standard collocation. Tr. at 108, 111. In addition, U S WEST must be permitted to recover the costs of cable racking, the costs of engineering time, and, where appropriate, the cost of the cable itself. Id. at 108.

Second, U S WEST requests that it be given ten days, instead of the seven days ATTI proposes, to verify a route and to engineer the collocation route from ATTI to another CLEC. Tr. at 108. U S WEST's experience indicates that ten days is a reasonable timeframe for performing this work.

Third, U S WEST requests that ATTI become an approved U S WEST vendor if it desires to perform the cross-connects itself. For safety and security reasons, U S WEST requires that only approved vendors can engage in construction activities in its central offices. To become approved, vendors must be bonded, must have insurance, and must demonstrate that they have the necessary knowledge and skill to perform activities in a central office. Tr.

at 108-09. The reasonableness of these requirements is, we believe, self-evident; it is easy to imagine the problems that could arise if unqualified, unapproved vendors were allowed to engage in construction in U S WEST's central offices. Thus, the contract language should require ATTI to become an approved vendor or, alternatively, should require ATTI to select a vendor approved by U S WEST to perform the work.

U S WEST's proposed contract language set forth above provides these important terms and conditions. Because these terms are necessary, the Commission should adopt U S WEST's language.

III.CONCLUSION

For the reasons stated, the Commission should adopt an interconnection agreement that contains the language proposed by U S WEST.

DATED this 11th day of November 1999.

Respectfully submitted,

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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

IN THE MATTER OF THE PETITION OF AMERICAN TELEPHONE TECHNOLOGY, INC. FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH U S WEST COMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996	**DOCKET NO. UT-**

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Post-Hearing Brief of U S WEST Communications, Inc. upon the following person by facsimile and overnight delivery:

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