**BEFORE THE**
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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| In the Matter of the Petition for Arbitration of an Interconnection Agreement Between<br><br>AMERICAN TELEPHONE TECHNOLOGY, INC.<br><br>and<br><br>U S WEST COMMUNICATIONS, INC.<br><br>Pursuant to 47 U.S.C. § 252. | Docket No. UT-990385<br><br>Hon. Lawrence J. Berg<br><br>**REPLY BRIEF OF AMERICAN TELEPHONE TECHNOLOGY, INC.** |

## INTRODUCTION

American Telephone Technology, Inc. ("ATTI") submits this brief in reply to the Post-Hearing Brief of U S WEST Communications, Inc. ("U S WEST") filed in this arbitration proceeding. In its brief, U S WEST misrepresents ATTI's contract proposal and ignores or side-steps a number of legal principles and authorities that do not support the position that U S WEST presents. ATTI now submits this reply to address these errors and to reaffirm that the Commission should approve ATTI's contract proposal.

## DISCUSSION

### I. U S WEST's "Pick and Change" Theory is Based on a Misrepresentation of ATTI's Contract Approach and an Assumption that is Not Supported by the Law or the Record in this Case

As stated in ATTI's opening brief, 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combinations and collocation; and (3) all of the provisions of U S WEST's existing contract with AT&T that are not superceded by the first two components of ATTI's approach.

In its brief, U S WEST objects to the last two elements of ATTI's contract approach under the banner of what it calls "pick and change." Under this theory, U S WEST argues that Section

252(i) of the Telecommunications Act of 1996 ("Act") "does not permit ATTI to adopt language from another interconnection agreement and then alter the language to change its meaning and effect." U S WEST Brief at 4. U S WEST maintains that this is what ATTI proposes to do here with its UNE combinations language. In U S WEST's view, ATTI seeks to "pick" the AT&T "UNE arrangement," which U S WEST believes includes the AT&T combinations provision, and then "change" the AT&T combinations provision. *See* U S WEST Brief at 5. U S WEST is simply wrong.

At the outset, U S WEST has misrepresented ATTI's contract approach to fit the confines of its "pick and change" view. U S WEST asserts that ATTI has "picked" the AT&T combinations language using Section 252(i) and now seeks to "change" that language with its own combinations proposals. With this mischaracterization, U S WEST diverts ATTI's contract approach into an inapplicable line of authorities that require CLECs, when they adopt existing contract language using Section 252(i), to adopt that language verbatim.[1] ATTI, however, has *not* "picked" the AT&T combinations language as U S WEST represents. There is no obligation under Section 252(i), the FCC's *Global NAPs* decision, or the Commission's *Draft Policy Statement* for ATTI to adopt contract language verbatim when ATTI is not using Section 252(i) to adopt that contract language in the first place. Moreover, for every provision of the AT&T contract that ATTI *has* "picked" using Section 252(i), ATTI seeks to adopt those provisions word for word (*i.e.*, without any "change").[2] Whatever the merit of U S WEST's "pick and change" "catch phrase" as a general matter, its is not implicated here. ATTI does not seek to "change" *anything* that it has "picked."

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1 See U S WEST Brief at 5-6 (citing 47 U.S.C. § 252(i); *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 (rel'd Aug. 3, 1999) ("*Global NAPs*"); *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, Principle 2 (W.U.T.C. Oct. 15, 1999)).

2 Logistically, the AT&T provisions that ATTI seeks to adopt may need to be altered to insert ATTI as the contracting party instead of AT&T. ATTI, however, does not propose any other changes.

With the deletion of this factual predicate, U S WEST's argument dissolves.

The only arguable circumstance in which U S WEST's "pick and change" theory would conceivably apply is if ATTI can be *forced* to adopt the *AT&T* combinations language with the other AT&T provisions that it seeks. On this central issue, however, U S WEST offers only one unexplained and unsupported sentence: "If ATTI desires to rely on section 252(i), it must adopt all the provisions in the AT&T/U S WEST agreement relating to UNEs . . .." U S WEST Brief at 5. This bald conclusion is apparently driven by U S WEST's concept of "legitimately related" terms. According to this view, CLECs may not adopt "individual provisions" from existing U S WEST contracts, but can only adopt entire sections relating to broad categories that U S WEST believes are "integrated and related," such as UNEs or interconnection. *See* U S WEST Response to ATTI's Petition at 5.

As discussed in detail in ATTI's brief, U S WEST's concept of "legitimately related" lacks foundation or support here. Indeed, U S WEST's view, if accepted here, would nullify the whole body of FCC rulings and law requiring disaggregation of contract provisions for the purposes of pick and choose and the notion that "unbundled" "individual provisions" must be made available. Without repeating everything said in ATTI's opening brief, ATTI reiterates that the FCC has found that ATTI is entitled to obtain "individual provisions" from existing U S WEST contracts,[3] and at least one other state commission has specifically rejected the "broad category" approach that U S WEST presents here.[4] Moreover, in Washington and Oregon, U S WEST has been a party to recent proceedings in which CLECs were allowed to adopt demonstrably less than "broad

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[3] In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, First Report & Order, ¶ 1310 (rel'd August 8, 1996) ("*Local Competition Order*").

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

categories" of contract terms.[5] Finally, both the FCC and the Commission set high standards to show that terms are "legitimately related" to defeat an otherwise proper pick and choose request, requiring U S WEST to show that the AT&T combinations language is *technically inseparable* from other AT&T contract provisions or that U S WEST would face a disparate cost burden if ATTI adopted other AT&T provisions with the AT&T combinations language. *See Draft Policy Statement* at 6. U S WEST has battled with AT&T in multiple states over literally hundreds of issues regarding interconnection contracts. To now argue that the provisions of such a contract are "integrated and related" is rather strained, at best, as a matter of pure logic. More to the point, U S WEST did not offer one scintilla of record evidence at the hearing to demonstrate in any way that the combinations section ATTI is *not* adopting is related *at all*, let alone "legitimately related" within the meaning the FCC and this Commission have defined, to the sections of the contract it *did* adopt. No U S WEST witness presented testimony or evidence as to how, for example, these provisions worked in tandem, whether a UNE "quid" was exchanged for a combinations "quo," nor how implementing ATTI's proposed combinations language would in any way change the existing contract language. ATTI further submits that U S WEST could not have offered such evidence even if it wanted to, since these provisions do not in fact have such a relationship. The record is now closed, and anything U S WEST argues on this point is simply not supportable by that record.

U S WEST's "pick and change" theory stands or falls on U S WEST's ability to prove that the AT&T combinations language is "legitimately related" to the other provisions of the AT&T contract that ATTI seeks to adopt. With a record devoid of evidentiary support and a failure to

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[5] *See NEXTLINK Washington, Inc. v. U S WEST Communications, Inc.*, Docket No. UT-990340, Sixth Supplemental Order; Recommended Decision (W.U.T.C. August 25, 1999) ("*NEXTLINK*"); *In the Matter of the Petition of Metro One Telecommunications, Inc.*, ARB 100, Order No. 99-242 (Or. P.U.C. March 29, 1999).

otherwise demonstrate that the FCC's and this Commission's standards for "legitimately related" have been met, U S WEST's theory must fall.

## II. U S WEST Insists on Evidence to Support Purely Legal UNE Combinations Obligations

U S WEST argues that, instead of adopting and changing the AT&T combinations language under Section 252(i), ATTI must arbitrate its proposed UNE combinations language under Section 252(b). *See* U S WEST Brief at 6. ATTI agrees. That is exactly what ATTI is doing here. U S WEST nevertheless argues that the only way that the arbitrator can approve ATTI's proposed combinations language is through evidence, and that ATTI has presented none to support its proposal. *See id.* at 6-7. U S WEST misrepresents the law and ATTI's contract proposal for this conclusion and, indeed, contradicts its own previous representations to the Commission in this case. In essence, U S WEST's insistence on evidence is a red herring and a non-issue in the case.

Preliminarily, U S WEST assumes that burden of proof to support the combinations language before the arbitrator is ATTI's. State commission precedent, however, has interpreted the Act to assign the burden of proof "with respect to all issues of material fact" in interconnection arbitrations upon the incumbent LEC.[6] If any evidence was necessary to assist the arbitrator in ruling on the combinations language in this case, it was U S WEST's, not ATTI's.

Beyond U S WEST's mistaken assumption on the burden of proof, U S WEST also fails to show that the arbitrator needs any factual support to approve ATTI's combinations proposal. First of all, U S WEST itself has consistently and repeatedly represented to the Commission and to ATTI in this proceeding that ATTI's combinations proposal invokes purely legal issues. *See,*

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[6] *See In re AT&T Communications of the Midwest, Inc.*, Docket No. P-442, 407/M-96-939, Order (Minn. P.U.C. December 12, 1996) ("The Federal Act attempts to introduce competition into the monopoly markets of incumbent providers. It does this by imposing a number of specific duties on incumbent LECs, all aimed at giving new entrants reasonable and nondiscriminatory access to the networks of incumbents. The Act, in effect, puts the onus on incumbent LECs to open their markets to competitors. It follows then that the burden of proof in proceedings to implement the Act should fall on the incumbent . . ..")

*e.g.*, Amended Joint Statement of Unresolved Issues (filed Oct. 26, 1999). ATTI squarely presented to U S WEST and the arbitrator at the outset its detailed UNE combinations proposal which sets forth the specific obligations expected of U S WEST. U S WEST was the party which chose not to introduce any evidence to challenge ATTI's proposal. The *only* issue U S WEST has raised with respect to the combinations issue is the 252(i) legal issue. It has never raised nor pursued any claim that ATTI's UNE combinations proposal is factually defective in any way. As a matter of due process, U S WEST's insistence that ATTI's proposal now needs evidentiary support must be rejected.

U S WEST's insistence on evidence not only fails as a matter of law, it is not supported by the facts. U S WEST argues that ATTI has not identified the UNEs that U S WEST is obligated to provide and, therefore, combine in ATTI's combinations proposal. From this, U S WEST maintains that ATTI was required to limit what UNEs U S WEST must combine under these obligations by submitting evidence addressing whether a network element satisfies the FCC's "necessary and impair" test. U S WEST misinterprets ATTI's contract language.

ATTI's UNE combinations proposal reflects U S WEST's general *obligations to combine* UNEs under current law. In doing so, ATTI did not leave the list of UNEs that U S WEST must combine unlimited as U S WEST asserts. Importantly, ATTI also did not undertake to establish its own new list of UNEs in its combinations proposal. Instead, ATTI's proposal simply requires U S WEST to combine the same "Network Elements" that U S WEST is already contractually obligated to offer AT&T, and many other providers who have adopted the AT&T contract, under the AT&T provisions that ATTI seeks to adopt. U S WEST in fact offered as its own proposal the AT&T Contract, *specifically including the list of UNEs*. S*ee* Attachment 3 to the AT&T Contract (submitted with U S WEST's arbitration contract proposal).

If the list of UNEs made available by U S WEST needs to be changed in light of the FCC's recent *Remand Order*, the appropriate forum for U S WEST and ATTI, as well as the many other providers that are operating under the AT&T list of UNEs, are the regulatory changes and amendment provisions in the AT&T contract.

The Washington Administrative Procedure Act provisions cited by U S WEST in support of its position only establish that *factual* issues must be supported by the record. *See* U S WEST Brief at 7 (citing Wash. Rev. Code §§ 34.05.461(4), 34.05.570(3)(e) & 34.05.473(6)). ATTI's combinations proposal does not invoke these guidelines. Indeed, both the Commission and the arbitrator have found that the provisions cited by U S WEST do not even apply in this case.[7] U S WEST's string cite to arbitration decisions purportedly relying on evidentiary records is also meaningless. In those cases, the arbitrations may very well have turned on contested *factual* issues. This does not compel the conclusion, however, that certain issues are not purely *legal*, susceptible of determination based on applicable legal standards. Indeed, the key issue at the heart of an interconnection arbitration is what provisions the law compels to be included in an interconnection contract. Section 252(c)(1) of the Act (which *does* apply here) requires the State commission to ensure that the resolution of any open issues "meet the requirements of section 251, including the regulations prescribed by the [FCC]…" *See* 47 U.S.C. § 252(c)(1). This plainly suggests the Commission's duty is to measure the proposed contract terms against applicable *legal* standards. Moreover, the Act permits the Commission to "require the [parties] to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues." *See* 47 U.S.C. § 252(b)(4)(B). This suggests complete latitude in determining what is necessary for

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[7] *See In the Matter of Implementation of Certain Provisions of the Telecommunications Act of 1996*, Docket No. UT-960269, Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996 (W.U.T.C. June 1996) ("*Policy Statement on Interconnection Arbitrations*"); First Supplemental Order – Prehearing Conference Order at 1.

a decision. Here, the Commission did not request any additional information from ATTI on the combined UNE issue. Even if it had, and even if ATTI had refused to respond (which of course did not occur), the Commission may still "proceed on the basis of the best information available to it from whatever source derived." *Id.* There is simply nothing in the Act to impose a wholesale requirement to submit evidence on every issue in an arbitration. Moreover, the Commission's Interpretive and Policy Statement on Interconnection Arbitrations supports this view. *See Policy Statement on Interconnection Arbitrations* at 4-5. In short, if an issue is susceptible to review as a legal issue, nothing prevents the arbitrator from disposing of it that way.

Finally, U S WEST also misrepresents ATTI's combinations proposal by arguing that the proposal unconditionally requires U S WEST to combine UNEs that are not already combined. *See* U S WEST Brief at 10. As stated in ATTI's proposed language, U S WEST's obligation to combine such UNEs only arises "to the extent permitted by legal, regulatory, judicial, or legislative interpretations of the Act and FCC rules or as permitted by the Commission." *See* ATTI UNE Combinations Proposal at § 1.2.6. Beyond this misrepresentation, however, U S WEST attempts to sidestep the Ninth Circuit's[8] approval of a Commission order requiring U S WEST to combine UNEs that are not already combined by relegating it to a footnote and arguing that the Ninth Circuit should not have addressed the issue. *See* U S WEST Brief at 11, n.4. The Ninth Circuit, however, did address the issue, and its findings are now the controlling interpretation of the Act in, at a minimum, those states subject to the jurisdiction of the Ninth Circuit. Washington is one such state. Moreover, U S WEST provides no support for its effective belief that the Eighth Circuit now has exclusive jurisdiction to interpret the Act. Indeed, there is no support for this belief. U S WEST provides no basis to reject ATTI's combinations proposal.

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

## III. ATTI's Adoption of the MFS Reciprocal Compensation Provisions is not Prevented by the Expiration Date in the MFS Contract or Otherwise

U S WEST argues that ATTI cannot pick and choose the MFS reciprocal compensation provisions on a number of grounds. More specifically, U S WEST presents arguments that center on its position that these provisions do not constitute a full "arrangement" under Section 252(i) and that the corresponding provisions in the AT&T contract that will be replaced by the MFS provisions are "legitimately related" to the AT&T "interconnection" section. As noted above and in ATTI's brief, U S WEST's "broad category" approach to pick and choose does not stand up under the Act, FCC rules and orders, this Commission's policy, and the precedent of other state commissions. Moreover, U S WEST is faced with the Commission's recent approval of NEXTLINK's adoption of the same MFS provisions that ATTI seeks here. U S WEST has offered no specific proof or argument why these provisions are now not a full "arrangement" or displace "legitimately related" terms.

Beyond these arguments, U S WEST primarily argues that ATTI cannot adopt the MFS reciprocal compensation provisions because the MFS contract has expired. According to U S WEST, this conclusion is supported by the Commission's *Draft Policy Statement*, which purports to limit the availability of contract terms to when the underlying contract expires. *See Draft Policy Statement* at 6. In turn, U S WEST attempts to discount the Commission's rejection of an expiration-date driven deadline in *NEXTLINK* simply by arguing that the *Draft Policy Statement* was issued after *NEXTLINK* was decided.

ATTI believes that, despite its timing, the Commission's decision in *NEXTLINK* should control in this case. As an initial matter, *NEXTLINK* is official and binding precedent of the Commission; the *Draft Policy Statement*, by its own express terms, is not. In addition, *NEXTLINK* was decided on the specific facts relating to the same MFS provisions that are the subject of ATTI's pick and choose request. The *Draft Policy Statement*, however, reflects the Commission's

tentative opinion on Section 252(i) in the abstract, without the guidance of specific facts or individual circumstances. The choice between *NEXTLINK* and the *Draft Policy Statement* is not a simple matter of timing.

Beyond these initial factors, a review of the rationales underlying *NEXTLINK* and the *Draft Policy Statement* favor the continued availability of the MFS provisions that ATTI now seeks. The primary stated purpose for the Commission's proposed expiration date driven deadline in the *Draft Policy Statement* was its desire to "ensure non-discriminatory treatment" by "limiting the availability of interconnection arrangements to the time period during which they are available under the original agreement." *See Draft Policy Statement* at 6. In *NEXTLINK*, the arbitrator specifically found that this rationale does not logically apply to the MFS contract:

> . . . the requested [MFS] arrangement is part of an agreement that is effective for an indefinite period and continues in full force and effect, even though the original term of the agreement has expired. The argument that the MFS agreement has expired is illusory, and the effective period of the arrangement is no part of the arrangement requested by NEXTLINK.

*NEXTLINK* at 17-18. At least one other state commission has also recognized the arbitrary and potentially discriminatory nature of mechanically tying the availability of contract provisions to contract expiration dates.[9] This finding is also consistent with the express language of the pick and choose rule, which requires U S WEST to provide provisions from contracts to which U S WEST "is" a party. *See* 47 C.F.R. § 51.809(a). U S WEST not only continues to be a party to its contract with MFS, U S WEST is still a party to the MFS reciprocal compensation provisions with NEXTLINK, as well as numerous other providers in Washington that have adopted the MFS agreement. Measured in the express language of the *Draft Policy Statement*, the MFS reciprocal compensation provisions have not ceased to be "available under the original agreement."

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[9] *See In the Matter of the Petition of CenturyTel Wireless, Inc. and Thumb Cellular*, 1999 Mich. PSC Lexis 249, Opinion and Order (Sept. 14, 1999).

While the Commission's proposal in the *Draft Policy Statement* was based on its efforts to avoid discrimination, the arbitrator in *NEXTLINK* specifically and correctly found that imposing an effective date driven deadline on the availability of the MFS contract would actually promote discrimination:

> Limitations strictly based on the effective period of agreements are inconsistent with Section 252(i)'s primary purpose to prevent discrimination. U S WEST's proposal for a deadline-driven definition of a "reasonable period of time" is arbitrary, and inefficiently wastes valuable resources by requiring carriers to renegotiate interconnection agreements in their entirety upon expiration.

*NEXTLINK* at 17. Under Section 252(i), U S WEST and other carriers should not be able to enjoy the exclusive benefit of potentially advantageous contract terms for an indefinite period of time beyond a date they have determined the contract has "expired." Indeed, such a rule would invite contracting parties to manufacture a relatively short "expiration" date for the contract in order to enjoy the exclusive benefit of potentially advantageous contract terms for an indefinite period, to the competitive disadvantage of other carriers.

The rejection of a expiration date driven deadline for adopting MFS provisions in *NEXTLINK* is also supported by the FCC's own rationales for adopting the "reasonable period of time" limitation in the first place. According to the FCC, the driving force behind its time limitation on pick and choose was to accommodate long-term changes in prices, network configurations, and technology. *See Local Competition Order* at ¶ 1319. U S WEST has presented no proof, or even argued, that any of these considerations are implicated by ATTI's adoption of the MFS reciprocal compensation provisions.

Finally, U S WEST argues that an expiration date driven cut-off of pick and choose rights is supported by U S WEST's and MFS's original intent in creating an expiration date in their agreement and by an obligation within the MFS contract to begin negotiating a new contract six months before the expiration date. As an initial matter, U S WEST has provided no evidence

supporting its representations of what its or MFS's original intent was in agreeing to these provisions. The record is devoid of any evidence from US WEST to support the necessary factual predicate that the MFS agreement is expired. U S WEST's frequent references to what the parties' "intent" was and why the parties "agreed" to do certain things is not supported by anything in the record; such references should be disregarded completely by the arbitrator. This is particularly noteworthy since U S WEST was a party in excellent position to submit such evidence if it had chosen to do so. Indeed, at the beginning of this proceeding, U S WEST agreed that ATTI's pick and choose rights turned solely on the law. *See Amended Joint Statement of Unresolved Issues* (filed Oct. 26, 1999). U S WEST never fairly presented the issue of contract expiration as a contested factual issue (nor, for that matter, did U S WEST *ever* raise the issue *at all* until it appeared in its opening brief). Consequently, ATTI was denied the opportunity to present its own evidence or cross-examine on this issue. Moreover, a review of the contract provision does not support U S WEST's interpretation. The language of the provision itself says *nothing* about "expiration" and, without more, gives *no* indication that the agreement has not "continue[d] in full force and effect." U S WEST had ample opportunity to establish the factual predicate which might have given the arbitrator a record basis upon which to support U S WEST's urgings that the contract has expired; in fact, it did not do so. The factual predicate is completely unsupported, and U S WEST's argument regarding the expiration date of the contract, on that basis alone, must fail.

As to the law, neither Congress nor the FCC gave any indication that a CLEC's pick and choose rights turned on contract interpretation or intent. Pick and choose simply gives ATTI the right to adopt portions of contracts to which U S WEST "is a party." *See* 47 C.F.R. § 51.809(a). This broad mandate clearly includes U S WEST's current and ongoing contract with MFS.

Guided by the specific facts and individual nuances of the MFS contract, the Commission has found that the "expiration" date of the MFS contract does not provide any obstacle to the

adoption of the contact's reciprocal compensation provisions. This finding is controlling precedent in Washington, supported by at least one other state commission, and consistent with the express language of the FCC's pick and choose rule and the FCC's express reasons for it. Indeed, the *NEXTLINK* approach fulfills the underlying goals upon which the Commission's informal and generic opinion in its *Draft Policy Statement* based its conclusions. The Commission should allow ATTI to adopt the MFS reciprocal compensation provisions as in *NEXTLINK*.

## IV. U S WEST Gives no Legal Justification for Limiting ATTI's Choice of Where to Connect to U S WEST's Network Beyond Technical Feasibility

As discussed in ATTI's brief, the only limit imposed by the FCC in its *Advanced Services Order* on ATTI's choice of where to connect to U S WEST's network is technical feasibility.[10] U S WEST does not dispute this fact. U S WEST nevertheless continues to herald the reasonableness of its "compromise" position, in which it limits ATTI's connection choice, without any regard to technical feasibility, to a U S WEST determined ICDF if U S WEST also uses the same device for its services.

For its only purported legal support, U S WEST continues to cite FCC Rule 51.323(h)(2), which allows incumbent LECs to refuse to permit CLECs from placing equipment outside of that CLEC's physical collocation space. As an initial matter, this rule only offers U S WEST a strained general implication of U S WEST control of equipment within its wire centers. In any event, U S WEST conceded at the hearing that the *Advanced Services Order* superceded this rule. *See* Hearing Transcript at 68.

Beyond FCC Rule 51.323, U S WEST asserts no legal support for ignoring the *Advanced Services Order's* clear language on the breadth of ATTI's connection options. In addition, U S

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[10] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 99-48, First Report & Order, ¶ 42 (rel'd March 31, 1999) ("*Advanced Services Order*").

WEST misrepresents ATTI's position in an attempt to nevertheless bolster the reasonableness of its compromise position. U S WEST argues that "ATTI asserts inaccurately that the ICDFs . . . are no different from the single point of termination ("SPOT") frame . . .." U S WEST Brief at 19. As demonstrated in ATTI's brief and at the hearing, ATTI is well aware that U S WEST's ICDF may not be a SPOT frame. U S WEST admitted at the hearing, however, that, at times, the ICDF will be a SPOT frame, a device that has been rejected by other state commissions as an inefficient and discriminatory intermediate device.

U S WEST's "compromise" position may well be appropriate fodder for negotiations. However, it certainly does not "carefully track[] the requirements of the Act and the FCC[]," as U S WEST claims it does. U S WEST Brief at 2. Paragraph 42 of the *Advanced Services Order* completely undercuts any claim US WEST could make for the right to ever require ATTI to connect through an intermediate device. U S WEST fails to provide any legal basis for assuming the choice of ATTI's connection to its network, contrary to the express terms of the *Advanced Services Order*.

## V. U S WEST Misinterprets and Misrepresents ATTI's Proposed Language that ATTI Need not Collocate in Order to Obtain Already Connected UNEs

U S WEST argues that there are two fundamental problems with ATTI's proposed contract language clarifying that "U S WEST's obligations to combine UNEs" is not contingent on ATTI collocation. First, U S WEST argues that ATTI's "language assumes that U S WEST has an obligation to combine UNEs for ATTI." U S WEST Brief at 21. This is not true. U S WEST could have no obligation to combine UNEs or very specific obligations to combine UNEs. ATTI's proposed language does not attempt to identify any obligation, it merely reflects that to the extent U S WEST does have combining obligations, ATTI does not need to collocate to obtain UNEs combined by U S WEST.

Even if ATTI's language could be read to assume that U S WEST has a duty to provide combined UNEs, it would be consistent with law. There is no dispute that U S WEST is required to provide UNEs that it currently combines without separation. While not necessary to support ATTI's position, the Ninth Circuit's recent order also establishes that U S WEST's combining obligations extend to UNEs that it does not already combine as well. U S WEST's objection to ATTI's proposed language does not have any merit.

Next, U S WEST argues that ATTI's proposed language is undermined by ATTI's failure to identify the UNEs that U S WEST must combine in ATTI's combinations proposal. U S WEST Brief at 21. This, too, is incorrect. ATTI's combinations proposal specifically references the "Network Elements" identified in the AT&T contract provisions that ATTI seeks to adopt. U S WEST provides no reason for rejecting ATTI's proposed language clarifying that there is no need for ATTI to collocate to establish UNE connections that are already there.

## VI. U S WEST Fails to Show that Audits of ATTI's Collocated Equipment are Necessary in order to Determine Whether ATTI's Equipment is "Used or Useful" for Interconnection or Access to UNEs

As discussed in ATTI's brief, the *Advanced Services Order* generally requires U S WEST to allow ATTI to collocate equipment that is "used or useful" for interconnection or access to UNEs. *See Advanced Services Order* at ¶ 28. In addition, the FCC clarified that if a piece of ATTI equipment is "used or useful" for interconnection or access to UNEs, U S WEST has no discretion to prohibit ATTI from using *any* features or functions of that equipment that are not otherwise used or useful for interconnection or access to UNEs. *See id.*

U S WEST argues that it must be able to audit ATTI's collocated equipment in order to meet its burden of proof to show that ATTI is not "utilizing its equipment" for interconnection or access to UNEs. U S WEST Brief at 24. As discussed in ATTI's brief, U S WEST's burden of proof under the *Advanced Services Order* is not to show that ATTI is not "utilizing its equipment"

for interconnection or access to UNEs. U S WEST's burden is to show that ATTI's equipment "will not actually be used" for these purposes. This latter burden reflects the concept that ATTI's equipment need only be "useful" for interconnection or access to UNEs, not simply used. A U S WEST audit revealing that ATTI is not "utilizing" a piece of its equipment for interconnection or access to UNEs will leave U S WEST no closer to showing that the piece of equipment "will not actually be used" than the simple inventory of ATTI equipment provided to U S WEST under the terms of agreed on collocation language.

U S WEST also argues that audits are necessary "to demonstrate that ATTI is not using its equipment for proper purposes." U S WEST Brief at 25. Under the *Advanced Services Order*, however, ATTI cannot use equipment for an "improper purpose" if the equipment is otherwise "used or useful" for interconnection or access to UNEs. *See Advanced Services Order* at ¶ 28. Paragraph 28 allows ATTI to use any of the available features or functions of collocated equipment. In effect, if equipment is otherwise "used or useful" for interconnection or access to UNEs, ATTI cannot use that equipment for an "improper purpose." U S WEST seeks a police authority that it does not lawfully have.

Contrary to U S WEST's position, ATTI's proposal does not relegate U S WEST to a position of blind trust in evaluating the lawfulness of ATTI's collocated equipment. U S WEST obtains detailed information about ATTI's collocated equipment and would know based on the nature of the equipment what is is used and useful for. Even if U S WEST did require a means of audit, there is no balance or protection in U S WEST's proposal to prevent U S WEST from physically testing and potentially damaging ATTI's equipment or cutting off service to ATTI's customers. These harms should be balanced and limited. There is no record evidence that the listing of the equipment information would not be sufficient to permit the determination U S WEST seeks to make, or any showing that it is reasonable to allow U S WEST to touch and

interfere with ATTI's equipment in the course of random audits. U S WEST may not invoke general and undefined police powers based on a purported and unsupported entitlement to monitor the actual use of ATTI's equipment.

The FCC has found that "ILECs have delayed competitive entry by contesting, on a case-by-case basis, the functionality of a particular piece of equipment … and whether it may be collocated." *See Advanced Services Order* at ¶ 26. U S WEST's proposal opens the door to do more of the same. U S WEST states in its brief that ATTI has no support for its allegations that U S WEST has engaged in anti-competitive conduct. That is not true. ATTI has ample support based on its experience with U S WEST in Minnesota, an area that U S WEST's questions at the hearing carefully sought to avoid. ATTI did not withdraw this portion of its pre-filed testimony, and stands by that testimony. U S WEST's audit proposal should be rejected.

## VII. U S WEST Seeks Clarification of ATTI's Proposed True-up Mechanism for Disputed Charges that Already Provides the Assurance U S WEST Desires

U S WEST conditionally agrees to accept ATTI's proposed mechanism to ensure that ATTI collocation requests are not delayed by disputes over collocation charges. *See* U S WEST Brief at 28. U S WEST conditions its acceptance on a clarification that U S WEST is not obligated to continue to process a collocation request until after it has received the stated charge from ATTI. ATTI's proposed language already clearly provides this assurance:

> 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 to dispute resolution under this Agreement, with a true up if necessary.

U S WEST's request for further clarification of this assurance is unnecessary, and there is no reason to reject the proposed language as written.

## VIII. ATTI Should Only be Required to Pay for Collocation Space that it Reasonably Bargained For

U S WEST argues that ATTI's payment for completed collocation space should not be contingent on ATTI reasonable satisfaction with that space. According to U S WEST, "ATTI's language does not define 'reasonable satisfaction' and effectively leaves the decision to pay entirely up to ATTI." U S WEST Brief at 29. As discussed in ATTI's brief, "reasonable satisfaction" with work performed under a contract is a widely accepted contract principle. By incorporating this principle into the contract, ATTI is simply recognizing a protection that the law provides to ATTI.

U S WEST's argument that "[t]he better approach is to resolve disputes about services U S WEST performs for ATTI through dispute resolution" after ATTI has paid ignores ATTI's right not to pay for collocation space that is not what ATTI bargained for. As discussed in ATTI's brief, it is also not an equitable approach. Under ATTI's proposal, both ATTI and U S WEST will enter dispute resolution with 50% of the price for the collocation space. Under U S WEST's proposal, U S WEST holds all of the money while dispute resolution proceeds. The Commission should approve ATTI's proposal.

## IX. U S WEST Proposes CLEC-to-CLEC Cross-Connect Language That is Not Consistent with Law or the Simple Nature of CLEC-to-CLEC Cross-Connect Requests

U S WEST proposes language relating to CLEC-to-CLEC cross-connect requests that is infirm and unacceptable in several regards. First, U S WEST proposes language which requires ATTI to use a U S WEST ICDF when ATTI chooses to connect to another collocated CLEC through U S WEST's network. As discussed earlier and in ATTI's brief, the *Advanced Services Order* gives U S WEST no authority to limit where ATTI will connect to U S WEST's network beyond technical feasibility. *See Advanced Services Order* at ¶ 42. U S WEST's proposal unlawfully limits ATTI's cross-connection options.

Second, U S WEST proposes to consider CLEC-to-CLEC cross-connection requests as new collocation requests or major changes requiring a quote preparation fee. As discussed in ATTI's brief, this characterization invites U S WEST discretion to reject CLEC-to-CLEC cross-connection requests that are included with new collocation requests. ATI, ATTI's corporate parent, has experienced just such refusals from U S WEST in Minnesota. In addition, CLEC-to-CLEC cross-connection requests that are included within an initial collocation application should not require a separate quote preparation fee. There are significant variables in ordering collocation. CLEC-to-CLEC cross-connection is an expected part of collocation and one of these variables. Indeed, to the extent U S WEST is due any compensation for the minimal role it will normally play in CLEC-to-CLEC cross-connection, that compensation should not be a predetermined quote preparation fee. ATTI should only be charged for the actual costs U S WEST incurs in provisioning CLEC-to-CLEC cross-connection.

Third, U S WEST proposes that it be given ten days to verify a route for ATTI cross-connect cables to another collocated CLEC and to verify that there is adequate cable racking. As discussed in ATTI's brief, the record in this case reflects that these tasks can often be completed with a two minute inspection of the subject U S WEST wire center. U S WEST effectively gives no reason why it cannot respond to an ATTI CLEC-to-CLEC cross-connection request within the seven days that ATTI proposes other than its general assertion that U S WEST believes ten days is reasonable.

ATTI's proposed CLEC-to-CLEC cross-connection proposal retains the full measure of rights and options available to ATTI under the *Advanced Services Order* and the Act. It also reflects the simple nature of CLEC-to-CLEC cross-connection and the marginal role that U S WEST will often play in such arrangements. U S WEST's proposal does neither of these things. The Commission should approve ATTI's CLEC-to-CLEC cross-connection proposal.

## CONCLUSION

For the reasons set forth above and in ATTI's brief, ATTI respectfully requests that the Commission approve ATTI's contract proposal.

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## CERTIFICATE OF SERVICE

I hereby certify that on November 18, 1999, a copy of the Reply Brief of American Telephone Technology, Inc., in Docket No. UT-990385 was sent to the following individual by facsimile and federal express:

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