

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Approval of An)
Interconnection Agreement Between)
) Docket No. UT-990390
)
AMERICAN TELEPHONE TECHNOLOGY, INC.) REPLY TO PETITION FOR REVIEW OF
and) ARBITRATOR'S REPORT AND DECISION AND
GTE NORTHWEST INCORPORATED) REQUEST FOR APPROVAL OF
) INTERCONNECTION AGREEMENT
)
)

Pursuant to 47 USC Section 252

INTRODUCTION.

Pursuant to Paragraph 62 of the Arbitrator's Report and Decision issued in this Docket on December 29, 1999, and the Commission's Notice Extending Opportunity to File Reply Briefs and Interconnection Agreement, dated February 1, 2000, American Telephone Technology, Inc.(ATTI), a subsidiary of Advanced Telecommunications, Inc.(ATI), files its Reply to the Petition for Review and Request for Approval of the Arbitrator's Report and Decision which was filed by GTE Northwest Inc. (GTE) on January, 21, 2000. ATTI also requests approval of the negotiated terms of the Interconnection Agreement with GTE and the terms requested pursuant to Section 252(i) which are not disputed. ATTI filed a brief in support of the Arbitrator's Decision on January 21, 2000.

In its Petition, GTE requests that the Commission revise the Arbitrator's Report on three issues: 1) allocation of space conditioning costs; 2) combinations of unbundled network elements; and 3) ATTI compliance with GTE's drug screening requirement. GTE, like ATTI, does not ask for review of the Arbitrator's Decision on the remaining issue of notification of collocation space availability.

ARBITRATED ISSUES

Collocation Space Conditioning Cost

The Arbitrator did not reach a decision regarding this issue because he concluded that the

issue should be decided in the Commission's Generic Cost proceeding.¹ While ATTI would have preferred that the Commission adopt the ATTI proposal in lieu of deferring the issue to the Generic proceeding, ATTI has not asked that the Arbitrator's Decision be reviewed.

In its Petition for Review GTE proposes that its contract language on allocation of collocation costs be used until the Commission determines final rates in the Generic Proceeding. ATTI agrees that the GTE proposal should apply, on an interim basis, subject to true-up after the Generic Proceeding is concluded. That language is reflected in the agreement filed under separate cover.

Provision of Unbundled Network Elements

GTE takes issue with the Arbitrator's Decision on UNEs because it requires GTE to combine UNEs for ATTI which are not already combined. It is GTE's position that it has no obligation to combine UNEs for ATTI that are not already combined. GTE dismisses the Ninth Circuit's decision in *US WEST Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999) which upheld such a requirement, as "severely flawed" and urges the Commission to ignore the Ninth Circuit's ruling. That the Commission cannot and should not do.

Arbitrator Berg correctly concluded that the Ninth Circuit had upheld a decision of this Commission that required an ILEC to "combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS." Arbitrator's Decision at ¶28. Arbitrator Berg was also correct in his conclusion that the Commission is bound to follow the Ninth Circuit Court's decision. For the same reasons that it approved the combining of UNEs for MFS, the Commission should do so for ATTI. To do otherwise would be discriminatory and would contradict this Commission's previous holdings as well as the Ninth Circuit's decision. The Arbitrator's Decision should be approved and ATTI's proposed language adopted.

¹ In the Matter of the Pricing Proceedings for Interconnection, Unbundled Elements, Transport and Termination, and Resale, UT-960369, 960370 and 960371.

The parties have been unable to agree on language implementing this part of the Arbitrator's Decision. ATTI proposes that the Arbitrator's Decision regarding UNEs be incorporated into the GTE/AT&T agreement that ATTI is adopting pursuant to Section 252(i). ATTI proposes that Section 32 "Unbundled Network Elements", of that agreement be changed, as indicated in bold type, to reflect the Arbitrator's Decision. Specifically, ATTI proposes that Paragraph 32.2 should state:

32.2 GTE will permit ATTI to interconnect ATTI's facilities or facilities provided by ATTI or by third parties, with each of GTE's unbundled Network Elements **and Combinations** at any point designated by ATTI that is technically feasible.

and that Paragraph 32.5 state:

32.5 GTE shall offer each Network Element individually and in combination with any other Network Element or Network Elements, so long as such combination is technically feasible, in order to permit ATTI to combine such Network Element or Network Elements with another Network Element or other Network Elements obtained from GTE or with network components provided by itself or by third parties to provide telecommunications services to its customers. **In addition, GTE will provide Network Element Combinations to ATTI that it currently combines in its network. GTE shall offer such individual unbundled Network Elements and Combinations in order to permit ATTI to combine the identified unbundled Network Elements obtained from GTE with network components provided by itself or by third parties to provide Telecommunications Services to ATTI's subscribers. GTE must perform, and ATTI must pay for, the functions necessary to combine requested Network Elements from GTE's network, or with network elements possessed by ATTI. GTE is not required to combine unbundled Network Elements in any manner requested if not technically feasible, but must combine unbundled Network Elements ordinarily combined in the GTE network in the manner they are typically combined. ATTI may purchase unbundled Network Elements individually or in Combinations without restrictions as to how those elements may be rebundled. When**

ordering a Combination, ATTI shall have the option of ordering, and GTE shall provide when requested, all features, functions and capabilities of each Network Element. ICB pricing will be used where prices are otherwise not available.

Drug Testing of ATTI Employees

GTE asks the Commission to overrule the Arbitrator's Decision that its attempt to impose a drug-screening requirement on ATTI employees should be rejected. GTE argues that its requirement is not discriminatory because it applies the same rules to ATTI that it applies to itself. However, GTE employees hired before 1990 are exempt from its drug-screening requirement. As the Arbitrator correctly concluded, the local exchange carrier market did not become competitive until after passage of the Telecommunications Act in 1996. Therefore, applying a 1990 "grandfathering" date to CLEC employees is meaningless. Under such a test virtually all CLEC employees would have to be subject to the test while a potentially large number of GTE employees would not. Thus while GTE's policy is facially neutral, it is discriminatory in practice. As the Arbitrator put it, the imposition of the 1990 hiring date cut-off is "self-serving and discriminatory." Arbitrator's Decision at ¶42.

The FCC, in its Advanced Services Order, made it clear that discriminatory security requirements that result in increased collocation costs cannot be imposed if they don't result in increased protection of equipment.

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

Advanced Services Order, at ¶47, 14 FCC Rcd at 4787-8.

Since GTE has decided that employees hired before 1990 don't need drug testing, it certainly does not appear that GTE believes such testing is vital to the protection of its equipment. The

Arbitrator found that there was “no evidence in the record that drug screening would achieve any appreciable necessary protection of GTE’s equipment that is not provided by the other information on the CBI”(Certification of Background Investigation). Arbitrator’s Decision at ¶45. He also concluded that there would be additional cost incurred by ATTI because of drug screening, although not as much as ATTI asserted. Arbitrator’s Decision at ¶43. In short, GTE has shown no benefit to this requirement and certainly no benefit that would justify the additional cost imposed upon ATTI. The Arbitrator’s Decision should be approved by the Commission.

Proposed language for the Supplemental Agreement to reflect the Arbitrator’s Decision is attached as Exhibit A and is reflected in the Agreement as filed.

THE COMMISSION SHOULD APPROVE THE INTERCONNECTION AGREEMENT INCLUDING THE ARBITRATOR’S DECISIONS

ATTI and GTE are filing, under separate cover, an Interconnection Agreement that includes negotiated terms, terms requested pursuant to Section 251(i), and terms intended to implement the arbitrated decisions. On the arbitrated issues that remain in dispute the parties have included alternative language to be implemented depending on the Commission’s decision. The great majority of the provisions of the Agreement were previously approved by the Commission in its approval of the agreement between GTE and AT&T Communications of the Pacific Northwest, Inc. (AT&T)² and the agreement between GTE and Electric Lightwave, Inc.³ The remaining provisions have either been agreed upon through negotiations or have been arbitrated. Much of the Supplemental agreement addresses issues of collocation that are being addressed in response to FCC orders on that issue. The proposed agreement complies in all respects with the Act, FCC rules, Washington law and the Commissions rules. Because the agreement is consistent with applicable laws and prior Commission decisions concerning interconnection agreements, the Agreement is not discriminatory against non-parties to this arbitration proceeding and is consistent with the public

² In the Matter of the Petition for Arbitration of An Interconnection Agreement Between AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest, Incorporated, Docket No. UT-960307, Commission Order Approving Interconnection Agreement (August 25, 1997).

³ In the Matter of the Petition for Arbitration of An Interconnection Agreement Between GTE Northwest, Incorporated, Docket No. UT-980370.

interest, convenience and necessity. The Agreement will allow ATTI to provide a full array of local exchange services as a competitive local carrier in GTE's local exchange service areas in Washington.

Furthermore, this Agreement is consistent with the Commission's Interpretive and Policy Statement regarding such agreements issued in Docket No. UT-960269, and with Commission precedent concerning such agreements.

CONCLUSION

The Commission should approve the Arbitrator's Decision and incorporate it into the interconnection agreement between the parties. For the foregoing reasons the Commission should find that the Agreement is in the public interest and consistent with state and federal law and approve it.

Dated this 9th day of February, 2000

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