BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between AMERICAN TELEPHONE TECHNOLOGY, INC., and GTE NORTHWEST, INCORPORATED Pursuant to 47 U.S.C. Section 252.	)	DOCKET NO. UT-990390 COMMISSION ORDER ADOPTING ARBITRATOR'S REPORT, IN PART; MODIFYING REPORT, IN PART; AND APPROVING NEGOTIATED AND ARBITRATED INTERCONNECTION AGREEMENT

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I. BACKGROUND

A. PROCEDURAL HISTORY

1 This matter comes before the Commission[1] on review of an Arbitrator's Report and Decision (Report) pursuant to the Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56 (1996) (Act). On April 3, 1999, American Telephone Technology, Inc. (ATTI) requested to negotiate an interconnection agreement (ATTI Agreement) with GTE Northwest, Incorporated (GTE). On September 9, 1999, ATTI filed with the Commission a petition for arbitration and request to receive arrangements previously approved by the Commission pursuant to Sections 252(b)(1) and 252(i) of the Act.

2 ATTI is a competitive local exchange carrier (CLEC) and is authorized to provide switched and non-switched local exchange and long distance services in Washington. GTE is an incumbent local exchange company (ILEC), as defined in 47 U.S.C. § 251(h) and provides local exchange and other telecommunications services throughout the state of Washington. The Commission has jurisdiction over the petition and the parties pursuant to 47 U.S.C. §§ 251-252 and RCW 80.36.610.

3 The majority of terms in the ATTI Agreement are made available by GTE from its existing interconnection agreement with AT&T Communications of the Pacific Northwest, Inc.(AT&T Agreement),[2] pursuant to Section 252(i) of the Act and 47 C.F.R. § 51.809

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[1] In this decision, the Washington Utilities and Transportation Commission is referred to as the Commission. The Federal Communications Commission is referred to as the FCC.

[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 Agreement (August 25, 1997) (AT&T Agreement).

(the FCC's pick and choose rule). Additionally, ATTI and GTE presented four open issues for resolution in the arbitration.

4 The Commission entered an Order on Arbitration Procedure, appointed an Arbitrator, and entered a Protective Order on September 14, 1999. GTE filed its response on September 24, 1999. On September 28, 1999, a prehearing conference was held to establish a procedural schedule, and a prehearing conference order was entered on October 8, 1999. Both parties filed direct testimony on October 15, 1999, and rebuttal testimony on October 19, 1999.

5 An arbitration hearing was conducted on November 2, 1999, at the Commission's offices in Olympia, Washington. Both parties filed post-hearing opening briefs on November 12, 1999, and responding briefs on November 17, 1999. The Arbitrator's Report was served on December 29, 1999. The Report established a schedule for the parties to request review of the Arbitrator's decisions, to request approval of negotiated and arbitrated terms, and to file an interconnection agreement.

6 On January 21, 2000, ATTI requested approval of the negotiated and arbitrated terms of the ATTI Agreement. On that same date, GTE filed a brief requesting that several decisions in the Arbitrator's Report be modified, and that the remainder of terms be approved. On February 9, 2000, ATTI filed a response to GTE's brief. Also on that date, the parties filed an interconnection agreement consistent with the Arbitrator's Report, except for a disagreement over language regarding one arbitrated issue.

7 Commission Staff made recommendations and the parties presented oral arguments regarding the Arbitrator's Report at an open public meeting on February 17, 2000. The Commission reviewed the record of the proceeding, the Arbitrator's Report, the ATTI Agreement, written comments by the parties, the written Commission Staff memorandum, and all oral comments made at the hearing.

B. APPEARANCES

8 Jeffery Oxley, attorney, appeared on behalf of ATTI, and Judy Endejan, attorney, appeared on behalf of GTE.

C. THE ARBITRATOR'S REPORT

9 The Arbitrator's Report makes the following decisions:

(1) The determination of permanent rates for the allocation of collocation space conditioning costs is deferred to the Commission's Generic Proceeding, and interim rates are impractical and inconsistent with the public interest;
(2) GTE must perform and ATTI must pay for the functions necessary to combine requested unbundled network elements (UNEs) in any technically feasible manner;

(3) ATTI is not required to submit employee drug screening certification as a prerequisite to entering GTE's facilities; and
(4) GTE must notify ATTI of the availability of collocation space within ten business days of ATTI's request.

D. ATTI'S REQUEST FOR APPROVAL

10 ATTI did not petition for review of any arbitration decision, and requests that the Commission approve the negotiated, arbitrated, and adopted terms of the Agreement.

E. GTE'S REQUEST FOR REVIEW

11 GTE requests that the Commission modify the Arbitrator's Report regarding combined UNEs and that it only be required to refrain from separating network elements that it currently combines. The parties also disagree on language implementing the Arbitrator's decision in the ATTI Agreement.

12 GTE also seeks reversal of the decision that its drug screening requirement is discriminatory and does not result in additional protection of its equipment.

F. COMMISSION STAFF'S RECOMMENDATIONS

13 Commission Staff recommends that the Commission adopt the Arbitrator's report with two modifications. First, Staff recommends that the Commission approve contract language regarding UNE combinations that is most consistent with the Arbitrator's decision. Commission Staff states that ATTI's proposed contract language regarding UNE combinations is reasonable, while GTE's proposed language is not consistent with the Arbitrator's Report.

14 Second, Commission Staff recommends that the Arbitrator's decision regarding drug screening be adopted and amended to provide that GTE may seek further review of the dispute if its relevant policies or security arrangements change in the future.

G. SUMMARY OF COMMISSION ORDER

15 The Commission affirms and adopts the Arbitrator's finding that the determination of permanent rates for the allocation of collocation space conditioning costs be deferred to the Commission's Generic Proceeding. Subsequent to the Arbitrator's Report, the parties negotiated and requested approval of interim rates for the allocation, subject to later true-up of collocation costs. Consequently, the Commission makes no final review of that part of the Arbitrator's decision.

16 The Commission adopts the Arbitrator's decision that GTE must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner. The Commission finds that ATTI's proposed contract language is consistent with

the Arbitrator's Report and other Commission Orders, and that it should be incorporated into the ATTI Agreement.

17 The Commission adopts the Arbitrator's decision regarding drug screening, and modifies the Report to provide that GTE may seek further review of the dispute if its relevant policies or security arrangements change in the future.

18 The Commission adopts all other arbitration decisions in the Report, and incorporates relevant discussions from the Report into this Order.[3] The Commission also approves the negotiated, arbitrated, and adopted terms of the ATTI Agreement.

II. MEMORANDUM

A. RELEVANT PROCEEDINGS

1. The Commission's Generic Cost and Pricing Proceeding

19 As part of its effort to fully implement the Act, the Commission entered an Order on October 23, 1996, initiating a generic proceeding to review costing and pricing issues for interconnection, unbundled network elements, transport and termination, and resale. The Commission stated that rates adopted in the then pending arbitration proceedings would be interim rates, until permanent rates were established. The Generic Proceeding is underway.[4] Accordingly, the prices approved in every interconnection agreement are interim rates and are subject to the Commission's decisions in the Generic case.

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[3] Numerous changes to the exact text in the Report have been made to make the Commission's Order more clear and grammatically correct. However, where the Commission adopts a decision in the Arbitrator's Report, discussion of the issues is substantially unchanged.

[4] *In the Matter of the Pricing Proceeding For Interconnection, Unbundled Elements, Transport and Termination, and Resale*, UT-960369 (general), UT-960370 (U S WEST), UT-960371(GTE); Order Instituting Investigations; Order of Consolidation; and Notice of Prehearing Conference, November 21, 1996 (Generic Proceeding). On April 16, 1998, the Commission entered an interlocutory order determining costs in Phase I of the Generic Case. The Commission held hearings in October and December 1998 to set permanent prices. On August 30, 1999, the Commission entered an Order determining prices in Phase II of the proceeding (17th Supplemental Order). Phase III of the Generic case and other proceedings have been commenced to further investigate the cost and pricing of collocation, to consider deaveraged loop pricing proposals for different geographic zones, and to consider all other unresolved cost and pricing issues deferred by the Commission in the 17th Supplemental Order.

2. FCC Proceedings Implementing the Telecommunications Act of 1996

a. The FCC's Pick and Choose Rule

20 On August 8, 1996, the Federal Communications Commission (FCC) issued its First Report and Order (Local Competition Order), and promulgated rules (FCC Rules).[5] The FCC concluded that Section 252(i) entitles all parties with interconnection agreements to exercise pick and choose rights regardless of whether they included pick and choose clauses in their agreements.[6] Numerous parties petitioned for judicial review of the Local Competition Order to the Eighth Circuit Court of Appeals and asked that court for a stay of the order.[7]

21 On September 27, 1996, the Eighth Circuit temporarily stayed the entire body of the FCC's Rules. On October 15, 1996, the Eighth Circuit stayed the FCC Rules relating to pricing of interconnection and the pick and choose provisions.[8]

22 On July 18, 1997, the Eighth Circuit entered an order vacating several of the FCC Rules.[9] On October 14, 1997, the Court entered an order on rehearing vacating additional FCC Rules. The Eighth Circuit decisions were thereafter appealed to the U. S. Supreme Court.

23 On January 25, 1999, the Supreme Court ruled that the FCC's local competition rules, with the exception of 47 C.F.R. § 51.319, are consistent with the Act.[10] On June 10, 1999, the Eighth Circuit entered an order reinstating 47 C.F.R. § 51.809 (the "pick and choose" rule).

b. The FCC's Combination of Unbundled Network Elements Rule

24 Among the rules initially vacated by the Eighth Circuit was the UNE combination rule, 47 C.F.R. § 51.315(c)-(f), and afterwards the court also vacated 47 C.F.R. §51.315(b).[11] On appeal, parties challenged the orders vacating Rule 51.315; however, the court did not address Rule 51.315(c)-(f).

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[5] *In the Matter of the Implementation of the Local Competition Rules of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 15499, First Report and Order (August 8, 1996), Appendix B- Final Rules.

[6] Local Competition Order, 11 FCC Rcd at 16139-40, ¶ 1316.

[7] *Iowa Util. Bd. v. Federal Communications Comm'n*, 109 F.3d 418, 421 (8th Cir. 1996).

[8] *Iowa Util. Bd. v. Federal Communications Comm'n*, 109 F.3d 418 (8th Cir. 1996).

[9] *Iowa Util. Bd. v. Federal Communications Comm'n*, 120 F.3d 753 (8th Cir. 1997).

[10] *AT&T Corp. v. Iowa Util. Bd*, 119 S. Ct. 721 (1999).

[11] *Iowa Util. Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997)

25 The Supreme Court rejected arguments by ILECs that the Act requires CLECs to combine network elements for themselves and reversed the Eighth Circuit's decision that Rule 315(b) violates the Act. Although the Eighth Circuit Court presently is considering the validity of Rule 315(c)-(f), the U. S. Court of Appeals for the Ninth Circuit recently considered the Supreme Court's decision regarding UNE combinations (MFS case).[12]

26 In that case, U S WEST appealed the decision of the Commission approving the MFS Agreement and the decision of the federal district court granting summary judgment on all issues to the Commission and MFS. The Ninth Circuit relied upon the Act and the Supreme Court's interpretation of the Act, and affirmed the provision in the MFS Agreement that requires U S WEST to combine elements at the request of MFS.[13]

c. The FCC's Collocation Rules

27 The FCC amended its interconnection rules in its Advanced Services Order, addressing collocation requirements to encourage competitive LEC deployment of advanced services.[14] 47 C.F.R. § 51.321 was amended, in relevant part, to require an ILEC to report on the availability of collocation space within ten days to a requesting carrier. 47 C.F.R. § 51.323 was amended, in relevant part, to allow an ILEC to require reasonable security arrangements to protect its equipment and ensure network reliability.

3. The Commission's Duty Under the Telecommunications Act of 1996

28 Two central goals of the Act are the nondiscriminatory treatment of carriers and the promotion of competition.[15] The Act contemplates that competitive entry into local telephone markets will be accomplished through interconnection agreements between ILECs and CLECs, setting forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act. 47 U.S.C. § 251(c)(1). Each interconnection agreement must be submitted to the Commission for approval, regardless of whether the agreement was negotiated or arbitrated, in whole or in part. 47 U.S.C. § 252(d).

29 Section 252(i) of the Act permits third parties to obtain access to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under Section 252.[16] The FCC

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[12] *U S WEST Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999).

[13] *Id.* at 1121.

[14] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, 14 FCC Rcd 4761 (1999) (Advanced Services Order).

[15] Local Competition Order, 11 FCC Rcd at 16139, ¶ 1315.

[16] Local Competition Order, 11 FCC Rcd at 16139, ¶ 1314.

ordered that requesting carriers are entitled to obtain their statutory rights on an expedited basis, and left to state commissions the details of implementing expedited procedures for making arrangements available.[17]

4. The Commission's Section 252(i) Interpretive and Policy Statement

30 On June 15, 1999, several parties filed a joint petition requesting that the Commission issue a declaratory order or an interpretive and policy statement regarding implementation of the pick and choose rule. The petitioners alleged that their efforts to pick and choose provisions from existing interconnection agreements had demonstrated uncertainty as to the implementation of the pick and choose rule.

31 On June 29, 1999, the Commission served a notice that interested persons could file comments regarding implementation of the pick and choose rule in Docket No. UT-990355. On October 15, 1999, the Commission issued further notice to file supplemental comments regarding a draft interpretive and policy statement. On November 30, 1999, the Commission issued an Interpretive and Policy Statement consisting of ten guiding principles to implement Section 252(i) of the Act and the FCC's pick and choose rule (Section 252(i) Policy Statement).[18]

5. Standards for Arbitration

32 The Act provides that in arbitrating agreements, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the FCC under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c).

B. ISSUES, DISCUSSION, AND DECISIONS

1. How Should GTE Allocate the Costs to Condition Collocation Space Among Carriers?

33 Both parties agree that final resolution of space-conditioning costs should be resolved in the Generic Proceeding. However, GTE initially sought review of the Arbitrator's decision on the ground that some interim resolution needs to be included in the ATTI Agreement. Subsequently, the parties negotiated and requested approval of interim terms for the allocation and true-up of costs. Consequently, the Commission adopts the

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[17] Local Competition Order, 11 FCC Rcd at 161341, ¶ 1321.

[18] *In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996*, Interpretive and Policy Statement, Docket No. UT-990355 (November 30, 1999).

Arbitrator's decision deferring this issue to the Generic Proceeding, and no final review of the decision regarding interim rates is necessary.

a. ATTI's Position

34 ATTI argues that the costs to condition collocation space should be allocated among carriers based on the percentage of total conditioned square feet of space they occupy and their *pro rata* use of HVAC and power.

b. GTE's Position

35 GTE argues that the costs to condition collocation space should be allocated among carriers based on an actual average fill factor calculated by determining the number of wire centers where collocation occurs and the total number of completed and pending requests for collocation.

c. Discussion and Decision

36 The FCC's Advanced Services Order states:

> We conclude, based on the record, that incumbent LECs must allocate space preparation, security measures, and other collocation charges on a pro-rated basis so the first collocator in a particular incumbent premises will not be responsible for the entire cost of site preparation.

Advanced Services Order, 14 FCC Rcd at 4789.

37 The FCC deferred to state commissions the determination of the proper pricing methodology to ensure that incumbent LECs properly allocate site preparation costs among new entrants. The Commission tentatively concluded that these provisions of the FCC's order were binding on the Commission, and the Commission sought further comment on this issue by parties in the Generic Proceeding.[19]

38 Furthermore, The Commission required GTE to file a new collocation cost study in Phase III of that proceeding in compliance with the FCC's Advanced Services Order.[20] Subsequently, the Commission ordered that a new proceeding be opened to address cost and pricing issues for UNEs and, as relevant, cost studies and pricing of collocation.[21]

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[19] Generic case, 17th Supplemental Order, ¶ 284.

[20] Generic case, 17th Supplemental Order, ¶ 531.

[21] Generic Case, Nineteenth Supplemental Order - Prehearing Conference Order, Section I.D., at p. 4 (November 9, 1999). The new proceeding is Docket No. UT-003013.

39 No decision is to made in this proceeding regarding the allocation of collocation costs because the determination of just, reasonable, and nondiscriminatory collocation costs and prices has begun in the Generic Proceeding. The allocation of costs to condition space affects all parties requesting collocation from GTE, and should properly be addressed in the same proceeding as GTE's collocation cost study.

2. Should GTE Be Required to Combine Network Elements for ATTI When GTE Does Not Ordinarily Combine Those Elements in its Own Network or to Combine its Own Elements with Those of ATTI?

40 The Arbitrator's Report requires GTE to (1) combine unbundled network elements when providing them to ATTI, even when those elements are not ordinarily combined in GTE's own network and (2) combine its unbundled network elements with those of ATTI. GTE petitions for review of the decision that it must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from GTE's network, or with UNEs possessed by ATTI. The Commission affirms and adopts the decision in the Arbitrator's Report.

41 The Parties have been unable to agree on language implementing this part of the Arbitrator's Report, and each party submits proposed language on review. The Commission rejects GTE's proposed language as inconsistent with the Commission's final decision. ATTI's proposed language is either taken verbatim from the Arbitrator's Report or is consistent with the Report and other Commission Orders. ATTI's proposed contract language should be incorporated into the ATTI Agreement.

a. ATTI's Position

42 ATTI requests that GTE make available terms and conditions related to unbundled network elements (UNEs) from the AT&T Agreement, but requests that combinations of UNEs be made available as a separate arrangement. ATTI petitions to obtain UNE combinations by arbitration, and it proposes contract language for approval.

43 ATTI requests that GTE both make available combinations of UNEs that it currently combines and those that are not already combined, including UNEs from ATTI's network. Although the FCC reissued its rule regarding UNEs following the Supreme Court's remand, ATTI argues that it is entitled to receive the same UNEs that are provided in the AT&T Agreement, and that any changes to that list must be made subject to the "regulatory changes" and "amendments" provisions.

b. GTE's Position

44 GTE argues that its obligation to provide UNEs does not extend to all network elements but only to those elements that meet the "necessary and impair" test in Section 251(d)(2) of the Act, and that the FCC has specifically required ILECs to unbundle. ATTI is not entitled to unbundled access to, or combinations of, other network elements. GTE also

argues that it is not required to combine UNEs that are not already combined in its network. GTE proposes contract language in support of its request that the Commission reverse these portions of the Arbitrator's Report.

c. Discussion and Decision

45 The parties identified and submitted the UNE-combinations issue as a legal issue to be resolved in arbitration; not as a factual issue. ATTI's initial request for combined UNEs includes proposed contract language that raises factual issues not addressed in the record or that are indirectly related to combined UNEs. For example, ATTI proposes terms regarding pricing adjustments, provisioning intervals, circuit conversions, and Operations Support System (OSS) functions. Accordingly, the decisions that ensue are not based upon contract language initially proposed by ATTI. However, as discussed below, ATTI's subsequently proposed language to implement the Arbitrator's decision is approved.

46 GTE's obligation to provide UNEs does not extend to all network elements but only to those elements that meet the "necessary and impair" test in Section 251(d)(2) of the Act and that the FCC has specifically required ILECs to unbundle. Since both parties agree that the terms for unbundled network access in the AT&T Agreement be made available to ATTI (Attachment 2), any changes to the list of network elements must be made pursuant to Sections 9 (Regulatory Matters), 15 (Alternative Dispute Resolution), and 23.8 (Regulatory Agency Control).

47 The Commission retains jurisdiction to require ILECs to unbundle additional network elements, but it also must apply a standard consistent with that articulated by the Supreme Court. Although ATTI requests that GTE be required to combine "individual Network Elements" with "other Network Elements" or "network components," ATTI does not identify any additional network element with the requisite specificity to determine whether access is "necessary" or whether lack of access "impairs" its ability to provide service.

48 The Act states, in pertinent part, that it is:

> "The duty [of the incumbent LEC] to provide, to any requesting telecommunications carrier *for the provision of a telecommunications service*...access to network elements on an unbundled basis[.] An incumbent local exchange carrier shall provide such unbundled network elements in a manner *that allows requesting carriers to combine such elements in order to provide such telecommunications service."*

47 U.S.C. § 251(c)(3) (emphasis added).

49 The Act, therefore, expressly permits the combination of elements by a requesting carrier for the purpose of providing a telecommunications service. The FCC takes this view, finding no basis to conclude from the Act's language "a limitation or requirement in

connection with the right of new entrants to obtain access to unbundled elements."[22] Consistent with this interpretation, the FCC Rules permit requesting carriers to combine unbundled elements to provide a telecommunications service. 47 C.F.R. § 51.315(a).

50 As discussed above, the Eighth Circuit initially vacated the FCC's Rules requiring ILECs to combine network elements for CLECs, and on rehearing also vacated Rule 315(b), which prohibited an ILEC from separating network elements it currently combines in its network unless requested by the CLEC.

51 On January 25, 1999, the Supreme Court issued its decision in *AT&T Corp*. With respect to the FCC's combination rule, the Supreme Court reversed the Eighth Circuit's decision that Rule 315(b) violates the Act. In affirming this rule, the Court rejected the argument that the Act requires CLECs to combine network elements for themselves. Accordingly, GTE must provide UNE combinations to ATTI that it currently combines in its network.

52 In its review of the MFS Agreement, the U. S. Court of Appeals for the Ninth Circuit interpreted the Supreme Court's decision regarding UNE combinations. The MFS Agreement states:

> USWC [U S WEST] agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS.

MFS Agreement, ¶ XXXI.A.3. The District Court had previously held that this provision does not violate the Act because it provides for compensation to U S WEST for performing the functions necessary to combine the elements; thus, it does not upset pricing distinctions between unbundled elements and resold services.

53 The Ninth Circuit Court affirmed the provision in the MFS Agreement that requires U S WEST to combine elements at the request of MFS. The Court did not rely on the FCC's Rules to affirm the provision, rather it relied upon the Act and the Supreme Court's interpretation of the Act. According to the Court:

> The district court's holding sustaining the provision in the MFS Agreement requiring U S West to combine unbundled network elements at MFS's request before leasing must be affirmed under the rationale of [*AT&T Corp.*], sustaining a provision prohibiting an incumbent from separating already-combined elements before leasing.

MFS case, at 1121. The Ninth Circuit Court did not rely on the federal regulations and its decision does not unlawfully intrude on the Eighth Circuit Court's jurisdiction as argued by GTE.

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[22] Local Interconnection Order, 11 FCC Rcd at 15666, ¶ 328.

54 The Supreme Court considered whether the Act mandates that elements must never be provided in a combined form. In resolving this issue, the Supreme Court held:

> Because [47 U.S.C. § 251(c)(3)] requires elements to be provided in a manner that "allows requesting carriers to combine" them, incumbents say that it contemplates the leasing of network elements in discrete pieces. It was entirely reasonable for the [FCC] to find that the text does not command this conclusion. It forbids incumbents to sabotage network elements that are provided in discrete pieces, and thus assuredly contemplates that elements may be requested and provided in this form. . . But it does not say, or even remotely imply, that elements must be provided only in this fashion and never in combined form.

AT&T Corp., 119 S. Ct. at 737. It follows, the Court held, that the FCC regulation prohibiting an ILEC from separating already-combined network elements was not inconsistent with the Act.

55 The Ninth Circuit Court followed that holding:

> It also necessarily follows from [*AT & T Corp.*] that requiring US West to combine unbundled network elements is not inconsistent with the Act: the MFS combination provision does not conflict with the Act because the Act does not say or imply that network elements may only be leased in discrete parts.

MFS case at 1121. The Ninth Circuit Court found that the Supreme Court undermined the Eighth Circuit's rationale for invalidating 47 C.F.R. § 51.315(c)-(f), and concluded that it must follow the Supreme Court's reading of the Act by upholding the terms in the MFS Agreement despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

56 Likewise, the Commission follows the Ninth Circuit Court's decision. Procedural objections aside, GTE presents no compelling argument in support of its position that it should not be required to combine network elements at the request of other carriers. The Commission also rejects GTE's proposed contract language as inconsistent with the Commission's Order in this case.

57 GTE must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from GTE's network, or with network elements possessed by ATTI. However, GTE need not combine UNEs in any manner requested if not technically feasible, but must combine UNEs ordinarily combined in its network in the manner they are typically combined. ATTI's proposed

language to implement the Commission's decision is reasonable, and is consistent with the Arbitrator's Report and other Commission Orders.[23]

3. Should ATTI Employees Be Required to Submit to Drug Screening as a Condition to Enter GTE's Facilities?

58 The Arbitrator's Report found that GTE's requirement that ATTI employees submit to drug screening as part of a background investigation was discriminatory, and that it did not result in any additional protection of GTE's equipment. GTE petitions for review of the Arbitrator's decision. The Commission affirms and adopts the decision that ATTI employees will not at this time be required to submit to drug screening as part of GTE's background investigation. However, the Commission amends the decision to provide that GTE may seek further review of the dispute if its relevant policies or security arrangements change in the future.

a. ATTI's Position

59 ATTI objects to GTE's requirement that ATTI employees complete GTE's Certification of Background Investigation form (CBI) because it requires that drug screening be performed. ATTI does not independently require employee drug testing. ATTI argues that GTE's requirement is discriminatory because it imposes a greater administrative burden on ATTI than it does on GTE.

60 ATTI also argues that the drug screening requirement results in increased collocation costs without the concomitant benefit of providing necessary protection of GTE's

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[23] ATTI proposes that Paragraph 32.2 should state: "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: "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.**" (Changes in bold).

equipment. ATTI argues that GTE fails to establish that its drug screening requirement is reasonable or necessary.

b. GTE's Position

61 GTE requires that all collocators fill out a CBI in order to obtain a keycard and access to GTE facilities. The CBI requires that a drug screen be conducted on those employees certified by the collocating carrier for access.

62 GTE claims that it treats all of its employees and collocators the same with respect to the issue of drug testing, and argues that the FCC's Advanced Services Order provides that GTE may impose security requirements on other carriers that are as stringent as those it imposes on itself. GTE argues that it is not required to establish that drug screening is reasonable or necessary because it is not discriminatory.

63 GTE argues that the drug screening requirement only applies to ATTI employees seeking access to ATTI's facilities, and that there is no persuasive evidence that ATTI would incur burdensome costs. Even if its drug screening policy constitutes a discriminatory security requirement, GTE argues that it provides necessary protection of its equipment.

c. Discussion and Decision

64 The FCC's Advanced Services Order states:

> We conclude, based on the record, that incumbent LECs may impose security arrangements that are as stringent as the security arrangements that incumbent LECs maintain at their own premises either for their own employees or for authorized contractors. To the extent existing security arrangements are more stringent for one group than the other, the incumbent may impose the more stringent requirements. Except as provided below, we conclude that incumbent LECs may not impose more stringent security requirements than this. As stated differently, 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, 14 FCC Rcd at 4787-8.

65 The FCC defers to the business practices of ILECs to determine what security requirements are reasonable. This deference is marked by the requirement that other carriers comply with the more stringent of two security standards imposed by ILECs (and not the least stringent). In the event that an ILEC seeks to impose security requirements on carriers that differ from those imposed on its own employees or its authorized contractors, the ILEC must demonstrate that the requirement provides necessary protection for its equipment.

66 Although the record in this case reveals that Nortel, one of GTE's authorized contractors, requires its employees to submit to drug testing and that GTE imposes the same security requirements on all CLEC contractors, there is no evidence in the record regarding requirements imposed by GTE on all of its authorized contractors, other than Nortel. Therefore, based on the record, the requirements imposed by GTE on its own employees must be regarded as the more stringent of the two groups.

67 The record also reveals that GTE's employees hired before 1990 are exempt from its drug screening requirement.[24] However, there is no evidence disclosing how many GTE employees are exempt, and how many are required to comply with the drug screening requirement. If only some, but not all, GTE employees with access to its wire centers are required to comply with the drug screening requirement, then GTE fails to persuasively argue that it imposes the same security arrangements on other carriers that it imposes on itself. Therefore, GTE seeks to impose a requirement on ATTI that it does not impose on its own employees. Also, GTE's security justification for imposing drug screening is weakened by its failure to require testing for all of its employees.

68 The Commission rejects GTE's argument that its requirements are not discriminatory because they do not apply to CLEC employees hired before 1990. Although a few collocating CLECs may have begun operations prior to 1990, the local exchange carrier market did not become competitive until after passage of the Act in 1996, and there was little (if any) need for CLECs to hire qualified central office technicians prior to that date. GTE's hiring-date cut-off of 1990 is self-serving and discriminatory.

69 Although ATTI exaggerates the increased collocation costs caused by drug screening, some costs are certain to occur. The Commission rejects ATTI's argument that the costs it would incur are unconscionably disproportionate to GTE because of their relative financial resources. The mere fact that a collocating carrier may incur costs in order to implement a compliance program does not mean that relevant security requirements are discriminatory. However, the fact that additional costs will be incurred by the collocating CLEC is sufficient to require that the ILEC demonstrate that additional necessary protection of its equipment will result.

70 Testimony by GTE witness R. Kirk Lee that CLEC employees have no incentive to protect GTE's equipment is unsupported by other evidence and is not credible. ATTI employees are responsible for protecting ATTI's customers connected through GTE's equipment, as well as protecting ATTI's own expensive equipment. There is no basis to conclude that ATTI's unscreened employees pose any greater risk to GTE's equipment than GTE's unscreened employees.

71 GTE's drug-screening policy merely requires collocating carriers to certify that an employee seeking access to GTE's wire centers has passed a test. Drug screening provides a snapshot of an employee's compliance at one singular point in time, and there is

[24] Transcript, volume 2, page 26, lines 13-19.

no evidence in the record that drug screening would achieve any additional necessary protection of GTE's equipment that is not provided by the other information required on the CBI.[25] The test is not randomly performed, repeat testing is not required, and ATTI is not required to report whether its employees have failed to pass the test on prior occasions.

72 GTE fails to demonstrate that the imposition of a discriminatory drug screening requirement provides additional necessary protection of its equipment, beyond the protection achieved by the other information provided to GTE on the CBI.

73 However, provisions in the FCC's advanced Services Order allowing ILECs to impose security arrangements on other carriers is not static in time. In other words, GTE may impose the same security arrangements at its premises that it imposes on its own employees or on its group of authorized contractors, from time to time.

74 ATTI is not exempt from additional nondiscriminatory security arrangements imposed by GTE in the future. If GTE changes its relevant policies or implements other security arrangements, then it may seek further review under the dispute resolution procedures in the Agreement or under Commission rules, if necessary.

4. What Is a Reasonable Period of Time for GTE to Notify ATTI Whether Collocation Space Is Available?

75 Neither party petitioned for review of the Report's finding on this issue. Accordingly, the Commission affirms and adopts the finding that GTE must notify ATTI whether collocation space is available within ten business days of ATTI's request to collocate.

a. ATTI's Position

76 ATTI proposes a ten-day interval for GTE to notify ATTI whether collocation space is available after GTE receives an ATTI collocation request. ATTI argues that its proposal is consistent with the FCC's Advanced Services Order, and that a reference to ten days, in the normal course of things, means ten *calendar* days and not ten *business* days. ATTI also argues that a collocation space assessment can reasonably be conducted by GTE in ten calendar days.

b. GTE's Position

77 GTE proposes a fifteen-calendar-day interval in order to achieve network wide consistency. Alternatively, GTE argues that it is unclear on the face of the Advanced Services Order whether the FCC intended the collocation assessment interval to be ten

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[25] Other background questions that must be answered on the CBI include whether the employee: has been convicted of a felony within the prior seven years; has ever been employed by or discharged for cause by GTE; and has ever worked for a contractor on GTE premises or been removed from GTE premises for cause.

calendar days or ten business days. GTE argues that the FCC expressly relied on comments filed by GTE which supported a ten-business-day interval.

78 Finally, GTE asserts that this issue is really about reasonableness. According to GTE, a ten- calendar-day interval is not reasonable, particularly during holidays and traditional vacation periods, because of staffing schedules and work loads.

c. Discussion and Decision

79 The Commission agrees with GTE that this issue is really about the reasonableness of the competing proposals. In a prior proceeding before the Commission, all parties agreed that fifteen days was a reasonable period for an ILEC to perform a collocation space assessment, and all intervals were stated in calendar days.[26]

80 Subsequent to the Commission's Collocation Order, the FCC's Advanced Services Order provided for a ten-day interval.[27] The FCC referred to and relied on GTE's comments that ten business days was a reasonable interval.

81 The Commission acknowledges that consistent standards between jurisdictions may promote efficient business operations. However, GTE's operational procedures should not take precedence over FCC requirements. The Commission finds that the FCC intended the assessment interval to be ten business days. A ten-business-day interval also is the approximate equivalent of the fifteen-calendar-day interval that the Commission previously found to be reasonable.

82 GTE must notify ATTI whether collocation space is available within ten business days of ATTI's request to collocate.

III. OTHER MATTERS

83 In all other respects, the Commission affirms and adopts the Arbitrator's Report.

84 Having considered the Arbitrator's Report and comments filed by the parties, the entire record herein, and all written and oral comments made on behalf of the parties, the Commission makes the following findings of fact and conclusions of law:

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[26] The Commission combined three proceedings to review denials of collocation requests because of space limitations; *In the Matter of the Petition for Arbitration of An Interconnection Agreement Between MFS Communications Company, Inc., and U S WEST Communications, Inc., In the Matter of the Petition for Arbitration of An Interconnection Agreement Between TCG SEATTLE and U S WEST Communications, Inc., In the Matter of the Interconnection Agreement Between Electric Lightwave, Inc., and U S WEST Communications, Inc.*, Docket No. UT-960323, UT-960326, and UT-960337, Commission Decision and Final Order Modifying Initial Order, In Part, and Affirming, In Part (November 11, 1999) (Collocation Order).

[27] Advanced Services Order, 14 FCC Rcd at 4791.

IV. FINDINGS OF FACT

85 1. Having discussed in detail the evidence concerning all material matters and having stated our findings of fact and conclusions of law in the text of the Order, the Commission now makes the following summary of those comprehensive determinations. Those portions of the preceding detailed findings and conclusions pertaining to the Commission's ultimate findings and conclusions in this matter are incorporated by this reference.

86 2. The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of telecommunications companies in the state.

87 3. The Washington Utilities and Transportation Commission is authorized by the Telecommunications Act of 1996 to arbitrate and approve interconnection agreements between telecommunications carriers, pursuant to Sections 251 and 252 of the Act. The Commission is specifically authorized by state law to engage in that activity. RCW 80.36.610.

88 4. GTE Northwest, Incorporated (GTE), is engaged in the business of furnishing telecommunications services, including, but not limited to, basic local exchange service within the state of Washington, and is a local exchange carrier as defined in the Act.

89 5. American Telephone Technology, Inc. (ATTI), is a telecommunications carrier as defined in the Act, and is operating within the state of Washington, and provides basic local exchange services within the GTE service area.

90 6. On September 9, 1999, ATTI filed a petition for arbitration under 47 U.S.C. § 252(b).

91 7. On December 29, 1999, an Arbitrator's Report and Decision issued resolving disputes. The parties requested approval of negotiated and arbitrated terms on January 21, 2000. The parties filed an interconnection agreement consistent with the Arbitrator's Report on February 9, 2000, except for a disagreement over language regarding one arbitrated issue.

92 8. The allocation of costs to condition collocation space affects all parties requesting collocation from GTE.

93 9. GTE does not require its employees hired before 1990 to submit to drug screening as part of its background investigation. ATTI does not require any of its employees to submit to drug screening.

94 10. GTE requires that all collocators fill out a background investigation form in order to obtain a keycard and access to GTE facilities. The form requires that a drug screen be conducted on those employees certified by the collocating carrier for access.

95 11. ATTI provides GTE with all requested information regarding its employees background, except drug screening.

96 12. The Agreement will facilitate local exchange competition in the state of Washington by enabling ATTI to enter the local exchange market and increase customer choices for local exchange services.

V. CONCLUSIONS OF LAW

97 1. The Commission has jurisdiction over the subject matter and parties to this proceeding.

98 2. This arbitration and approval process was conducted pursuant to and in compliance with 47 U.S.C. § 252 and the Commission's Interpretive and Policy Statement Regarding Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996.

99 3. Permanent rates, including the allocation of costs to condition collocation space, should not be determined in arbitration proceedings.

100 4. The Act does not say or imply that UNEs must be separately provided and never in combined form. The requirement that GTE must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner does not conflict with the Act.

101 5. GTE's proposed language regarding UNE combinations is inconsistent with the Arbitrator's Report. ATTI's proposed language is either taken verbatim from the Arbitrator's Report or is consistent with the Report and other Commission Orders.

102 6. GTE's requirement that ATTI employees submit to drug screening as part of a background investigation is discriminatory, and it does not result in any additional protection of GTE's equipment.

103 7. ATTI is not exempt from additional nondiscriminatory security arrangements imposed by GTE in the future. If GTE changes its relevant policies or implements other security arrangements, then it may seek further review under the dispute resolution procedures in the Agreement or under Commission rules, if necessary.

104 8. A reasonable period of time for GTE to notify ATTI whether requested collocation space is available is ten business days.

105 9. The negotiated terms of the Agreement are consistent with the public interest, convenience, and necessity.

106 10. The negotiated terms of the Agreement do not discriminate against any other telecommunications carrier.

107 11. The arbitrated provisions of the Agreement meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC pursuant to Section 251, and the pricing standards set forth in Section 252(d) of the Act.

108 12. The laws and regulations of the state of Washington, and Commission orders shall govern the construction and interpretation of the Agreement. The Agreement shall also be subject to the jurisdiction of the Commission and the Washington courts.

VI. ORDER

THE COMMISSION ORDERS:

109 1. GTE must raise the issue of permanent rates to allocate space-conditioning costs among collocating carriers in Commission Docket No. UT-003013, or a related proceeding.

110 2. GTE must perform and ATTI must pay for the functions necessary to combine requested UNEs in any technically feasible manner either with other UNEs from GTE's network, or with network elements possessed by ATTI. However, GTE need not combine UNEs in any manner requested if not technically feasible, but must combine UNEs ordinarily combined in its network in the manner they are typically combined.

111 3. ATTI's proposed language regarding UNE combinations is approved and incorporated into the ATTI Agreement.

112 4. ATTI employees are not required to undergo drug screening as part of a background investigation prior to entry to GTE's facilities under GTE's current practices and policies.

113 5. GTE must notify ATTI whether collocation space is available within ten business days of ATTI's request to collocate.

114 6. The ATTI Agreement is effective as of the date of this Order. Within ten days of service of this Order the parties must execute and file a revised interconnection agreement incorporating the decisions in this Order.

115 7. In the event that the parties further revise, modify, or amend the agreement approved herein, the revised, modified, or amended agreement shall be deemed a new

negotiated agreement under the Act and the parties must submit it to the Commission for approval, pursuant to 47 U.S.C. § 252(e)(1) and relevant provisions of state law, before the agreement may take effect.

116 8. The laws and regulations of the state of Washington, and Commission orders shall govern the construction and interpretation of the Agreement. The Agreement shall also be subject to the jurisdiction of the Commission and the Washington courts.

DATED at Olympia, Washington, and effective this day of March 2000.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

WILLIAM R. GILLIS, Commissioner