Akerman Senterfitt
ATTORNEYS AT LAW

Fort Lauderdale
Jacksonville
Los Angeles
Madison
Miami
New York
Orlando
Tallahassee
Tampa
Tysons Corner
Washington, DC
West Palm Beach

Suite 1200
106 East College Avenue
Tallahassee, FL 32301

www.akerman.com

850 224 9634 *tel* 850 222 0103 *fax*

March 20, 2008

**VIA ELECTRONIC FILING**

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**DOCKET No. 080110-TP** - Complaint and petition for resolution of interconnection pricing dispute against Verizon Florida, LLC, by of Bright House Networks Information Services, LLC.

Dear Ms. Cole:

Enclosed for electronic filing on behalf of Bright House Networks Information Services, LLC, please find Bright House Networks Information Services, LLC's response in Opposition to Verizon Florida, LLC's, Motion to Dismiss the Complaint and Petition filed in this Docket.

If you have any questions, please do not hesitate to contact me.

Sincerely,

**Beth Keating**
**AKERMAN SENTERFITT**
106 East College Avenue, Suite 1200
Tallahassee, FL 32302-1877
Phone: (850) 224-9634
Fax: (850) 222-0103

Enclosures

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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|---|---|
| In re: **Complaint and petition for resolution of interconnection pricing dispute against Verizon Florida, LLC, by of Bright House Networks Information Services, LLC.** | Docket No. 080110-TP<br>Filed: March 20, 2008 |

## OPPOSITION TO MOTION TO DISMISS

Bright House Networks Information Services (Florida), LLC, ("Bright House"), through its attorneys, hereby responds to the Motion to Dismiss filed by Verizon Florida, LLC ("Verizon").[1]

This case involves an effort by Verizon, an incumbent local exchange carrier ("ILEC"), to throw grit in the gears of facilities-based competition through an elaborate form of bait-and-switch. Verizon agreed to provide Bright House directory listings for free. To get them, Bright House just has to give Verizon the listing information. *See* Interconnection Agreement, §§ 19.3, 19.1. Yet Verizon doggedly asserts that when Bright House does so, Verizon can charge $24.00 each – leading to specious bills totaling about $4 million.

The tab is so large – and it keeps growing – for a simple reason: Bright House is a facilities-based competitive local exchange carrier ("CLEC") that is making real headway winning customers from Verizon. This plain and simple fact makes this case illustrative of what – it is now clear – the next generation of competitive battles in the telephone industry will look like.

Back in the mid-1990s, competition was based on resale of ILEC facilities and services – either literal resale, or CLEC purchases of unbundled network elements ("UNEs"). This kind of competition was doomed from the start – or at least fated to limited success – because it only works if the ILEC willingly participates in its own economic destruction by assisting the CLEC, day after day and month after month. ILECs resisted this threat of slow economic suicide through a

[1] In a separate pleading, pursuant to Rule 25-22.0022, Bright House is requesting oral argument on Verizon's motion.

combination of refusals to comply with their obligations and a massive federal-level effort to change the rules. And ultimately they tamed the threat.[2] The result is that today, innumerable would-be UNE or resale CLECs have gone bankrupt,[3] while the two once-formidable CLEC champions – MCI and AT&T – have been assimilated into the reigning ILECs, Verizon and Southwestern Bell (which successively absorbed Pacific Bell, Ameritech, and BellSouth, on the way bought the old competitive AT&T, and took that name as its own).

Some CLECs – suspicious of relying on the ILECs for anything – focused on market niches where facilities were generally not needed, such as the then-growing market for Internet Service Providers ("ISPs"). These CLECs initially prospered from high reciprocal compensation payments. But this strategy was denigrated as "regulatory arbitrage" and suppressed.[4] More fundamentally, the market passed it by, as high-speed Internet connectivity (such as cable modem service or digital subscriber line ("DSL") service) has come to replace dial-up as the consumers' first choice.[5]

So, more than a decade after the Telecommunications Act of 1996, the only real ILEC rivals left standing are full facilities-based competitors like Bright House. We provide service to

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[2] In broad terms, that was the purpose and effect of the "Triennial Review Remand Order." *See Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Local Exchange Carriers,* Order on Remand, 20 FCC Rcd 2533 (2005) (limiting CLEC access to various UNEs and eliminating the "UNE-Platform" entirely).

[3] Five years ago, the Federal Communications Commission ("FCC") noted in an arbitration proceeding that "volatility" in the telecom industry had "resulted in the bankruptcy of 144 carriers." *Petition of Cavalier Telephone LLC Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc. and for Arbitration,* Memorandum Opinion And Order, 18 FCC Rcd 25887 (2003) at ¶ 166. It is common knowledge that the number of CLEC bankruptcies has only increased since then.

[4] *Intercarrier Compensation for ISP-Bound Traffic,* Order on Remand & Report & Order, 16 FCC Rcd 9151 (2001) at ¶¶ 2, 6-7, 21 (characterizing CLECs serving ISPs as engaging in "regulatory arbitrage"); *on review, WorldCom v. FCC,* 288 F.3d 429 (D.C. Cir. 2002).

[5] *See Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order,* 19 FCC Rcd 20179 (2004) at ¶ 20 (noting that "market developments" were easing demand for dial-up services).

customers using our own network facilities and those of affiliates. We do not resell ILEC services. We do not use ILEC UNEs. Our business model is not driven by one-way traffic flows and intercarrier compensation.

ILECs – including Verizon – are obviously going to look for ways to respond to this new competition. So, while Verizon's opportunities to attack a real facilities-based competitor are more limited, it has developed a keen understanding of where such competitors are vulnerable: during the uncertain period when a customer is shifting away from Verizon, likely never to return. This crucial moment of transition is where Verizon has learned to focus its attention – and where it is repeatedly breaking the rules to preserve its still-formidable advantages of incumbency.

In 2004, Bright House brought Verizon before this Commission for refusing to port the telephone numbers – and transfer the services – of customers who bought unrelated, unregulated DSL services from Verizon.[6] That problem was solved when the FCC, in an initially unrelated case brought by BellSouth, ruled that DSL was not an excuse for delaying number porting.[7] Last year, Bright House brought Verizon before this Commission for exploiting its advance knowledge that a customer was leaving – knowledge only acquired because Verizon has to cooperate in porting the number to Bright House – to unfairly target those customers with illegal retention marketing efforts. That case remains pending.[8] And now this year brings Verizon's effort to improperly

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6 *See* Commission Docket No. 041170-TP, Complaint and Request for Declaratory Ruling of Bright House Networks Information Services LLC (Florida) (filed September 30, 2004).

7 *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers,* Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830 (2005) at ¶ 36.

8 *See* Commission Docket No. 070691-TP, Complaint and Request for Emergency Relief (filed November 16, 2007). On March 4, 2008, the Commission rejected Verizon's motion to dismiss this complaint, and on March 18, it consolidated this complaint with a similar one from Comcast.

inflate Bright House's cost of acquiring customers from Verizon by trying to charge $24.00 for a task that Verizon clearly and unequivocally has to do for free.

In light of this ongoing, growing pattern of Verizon interference with transferring customers to Bright House, it is not surprising that Verizon wants the Commission to dismiss this case without ever looking at the merits.

Verizon's Motion to Dismiss is based on the fact that the parties' agreement contemplates a form of alternative dispute resolution. Our complaint frankly acknowledged this fact, but also explained why that provision is not controlling here. *See* Complaint at ¶¶ 9-11. Verizon nonetheless seeks dismissal and referral to private arbitration. As described in the Complaint, and below, the Commission should deny Verizon's motion.

First and foremost, while consideration of the parties' interconnection agreement is necessary to understand this dispute, the dispute is not, fundamentally, about the parties' interconnection agreement or how it is supposed to operate. Verizon knows it has to provide directory listing services to Bright House and is doing so. Bright House knows that to get its listings into Verizon's directory databases it must submit the relevant customer information (name, address, etc.) and is doing so. The problem is that, while the agreement plainly says that Verizon will do this for free, Verizon is brazenly claiming that somehow it is entitled to charge Bright House anyway. Despite months of private negotiations between the parties, Verizon has never explained how it can tie $4 million in charges to the actual language of the agreement.[9] In these circumstances, it is fair to say that Verizon is not acting "under" the agreement. It is acting entirely

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[9] Verizon suggests that Bright House is unwilling "to engage in constructive dispute resolution," Motion at 5, but the fact is that Bright House and Verizon have informally been discussing this dispute and searching for a negotiated resolution of it for many months. The contents of those private settlement discussions may not be disclosed here; suffice it to say, however, that after extensive discussions the parties positions remain completely irreconcilable.

outside the agreement – *ultra vires,* in effect – but then trying to use the agreement as a fig leaf to cover its naked grab for a last bit of money as it loses customers to Bright House. This is simply an anticompetitive effort to impose added customer acquisition costs on Bright House, not any legitimate dispute under the agreement. Bright House is seeking a ruling that the agreement ***does not*** permit Verizon to send bills; it is not seeking an interpretation or an enforcement of Verizon's obligation to do anything.

Second, though Verizon tries to denigrate these concerns, Verizon's conduct in this case implicates key matters of competitive policy for this Commission. As described above, Verizon's opportunities to undermine competition from facilities-based CLECs are limited. They center around the activities needed to effectively and efficiently ***transfer*** customers from Verizon to Bright House. The history of the last several years shows that this is not merely a set of ministerial actions that will occur seamlessly and without controversy. To the contrary, it is now entirely clear that if facilities-based competition is to flourish in Florida, this Commission will have to forcefully and, we suspect, repeatedly articulate and enforce procompetitive policies relating precisely and specifically to the steps involved in transferring customers between facilities-based providers. This is why our complaint – while certainly noting the parties' interconnection agreement – relied as well on Florida Statutes § 364.01(4)(g), which states that the Commission shall "ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior." *See* Complaint at ¶ 9. Verizon's effort to impose outrageously high costs on Bright House when acquiring a customer from Verizon, in the face of an agreement that says the relevant functions will be provided for free, is "anticompetitive behavior," pure and simple. This case plainly implicates important Commission policy concerns independent of the agreement itself.

In fact, the Commission has previously recognized – in a case cited by Verizon – that even an ***exclusive*** arbitration/alternative dispute resolution clause does not divest the Commission of its authority to directly hear cases that involve matters of public policy.[10] That case involved a garden-variety ILEC-CLEC dispute about establishing interconnection facilities,[11] which the Commission found did not raise significant general policy issues, so referral to private arbitration was fair. Clearly, however, ***this*** case is different because it ***does*** involve important policy issues.

This case is also different from the cases cited by Verizon[12] because those cases involved contract provisions establishing a "binding" arbitration procedure,[13] which the Commission also characterized as the "sole" or "exclusive" way to resolve disputes.[14] The alternative dispute

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[10] *In re: Request for arbitration concerning complaint of XO Florida, Inc. against Verizon Florida Inc. (f/k/a GTE Florida Incorporated) regarding breach of interconnection agreement and request for expedited relief,* Docket No. 011252-TP, Order No. PSC-01-2509-FOF-TP, 2001 Fl. PUC LEXIS 1422, at [*5]-[*6] (Fl. PSC 2001). *See* Verizon Motion at 3, note 8 (citing XO case).

[11] *See* Docket No. 011252-TP, Complaint, available on-line via the Commission's website at: http://www.psc.state.fl.us/library/filings/01/12076-01/12076-01.pdf.

[12] *In re: Request for arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes,* Docket No. 001097-TP, Order No. PSC-00-2250-FOF-TP, 2000 Fla. PUC LEXIS 1514 (Fl. PSC 2000); *In re: Request for arbitration concerning complaint of Intermedia Communications, Inc., and petition for emergency relief against GTE Florida Incorporated regarding request for physical collocation in specific central offices,* Docket No. 981854-TP, Order No. PSC-99-0564-FOF-TP, 1999 Fla. PUC LEXIS 563 (Fl. PSC 1999). *See* Verizon Motion at 3, notes 7 & 9 (citing cases). We note that in the Intermedia case, the CLEC filed the complaint not because it had an actual dispute that it wanted the Commission to resolve, but rather because it thought it had to file a formal complaint in order to keep its place "in line" in seeking collocation from the ILEC. It is hardly surprising that the Commission dismissed that case without reaching the merits.

[13] The XO and Intermedia cases cited above referred specifically to a provision calling for "binding arbitration," while the Supra case contained a clause indicating that arbitration would be the "exclusive" remedy for any disputes.

[14] The XO and Supra cases refer to the private arbitration requirements as both the "sole" and "exclusive" remedy for disputes. The Intermedia case refers to private arbitration as the "exclusive" remedy.

resolution procedure in this case is neither binding, final, sole nor exclusive.[15] To the contrary, as we pointed out in our Complaint, the relevant provisions recognize that the Commission may take jurisdiction of a dispute before a private arbitration has occurred, and expressly state that arbitration results are ***not*** final or binding, because they expressly permit an appeal to the Commission. *See* Complaint at ¶ 11. There is no reason to require private "arbitration" of the dispute here when the relevant provisions of the agreement plainly contemplate direct Commission involvement.[16]

In this regard, the policy of the Federal Arbitration Act, on which Verizon relies (*see* Verizon Motion at 4-5), is to provide a means by which parties can efficiently, fully and finally resolve disputes without resort to litigation. The provision in the agreement here, which guarantees either party the right to appeal a dispute to the Commission following private arbitration, shows that this case does not implicate those policies. Because private arbitration under the agreement is ***not*** final, the policies that might normally impel the Commission to require strict adherence to those provisions simply do not apply. In fact, forcing this dispute into time-consuming, interlocutory private arbitration would run counter to the Commission's direct responsibilities for interpreting and enforcing interconnection agreements. At least one federal court has relied on these consideration to reverse a state commission for including a mandatory arbitration clause in an interconnection agreement:

> Section 252(c) lists certain specific duties of [a state commission], such as establishing rates for interconnection services and network elements, and

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[15] We recognize that one provision in the contract (which we supplied as an exhibit, and which Verizon quotes) characterizes the alternative dispute resolution process as "exclusive." For the reasons discussed here and in our Complaint, however, that characterization is simply not accurate.

[16] Verizon itself concedes that "Bright House may appeal the arbitrator's decision to the Commission." Verizon Motion to Dismiss at 5. Verizon fails to recognize, however, that the policy considerations favoring private arbitration – speed of resolution, and cost savings – are vitiated almost to the vanishing point when private arbitration cannot produce a full and final resolution of the dispute.

> ***supervising the implementation of the statutory terms and conditions by the parties in their interconnection agreement.***
>
> ...
>
> The PSC's decision [to require arbitration] affects both the parties' rights and the mechanism of review contemplated by the Act in two significant respects. First, it empowers a third party (a commercial arbitrator) to render a binding decision on the parties' disputes. While the parties here have not directly raised the issue, meaningful administrative or judicial review of a final and binding decision by an arbitrator is problematic. Second, the PSC's decision to delegate final decision making authority to a third party ***results in a de facto abdication of its responsibilities under the 1996 Act.*** As already noted, state commissions are required to ensure that parties' agreements comply with the goals and purposes of the Act. Moreover, state commissions retain the authority, and remain charged with the responsibility, to enforce interconnection agreements. Accordingly, the PSC's decision to delegate this responsibility to an entity or party not contemplated by the statutory mechanism of review is contrary to the 1996 Act.

*Verizon New York, Inc. v. Covad Communications Company,* 2006 US DIST LEXIS 7414, [*15] - [*19] (N.D.N.Y 2006) (emphasis added, citations and footnotes omitted). This analysis shows that this Commission does not stand in the same legal or policy position as a generalist court considering a private arbitration clause in a privately negotiated contract. To the contrary, Congress has delegated specific responsibilities to state regulators under the 1996 Act which mandate continued involvement in the ongoing relations between ILECs and CLECs. (Of course, Florida law imposes similar responsibilities on the Commission.) These responsibilities counsel against granting Verizon's motion, particularly where, as noted above, the supposed benefits of private arbitration – a rapid and final resolution of disputes – are not, in fact, accomplished by the provisions on which Verizon is relying.

Furthermore, other provisions in the parties' agreement recognize the appropriateness of and need for continuing Commission involvement. For example, Section 23.8 states that the Agreement "shall at all times be subject to changes, modifications, orders, and rulings by the FCC and/or the applicable state utility regulatory commission to the extent the substance of this

Agreement is or becomes subject to the jurisdiction of such agency." This provision would make no sense if every dispute that arose under it, in all circumstances, had to be resolved by private arbitration.

This is all the more true with respect to Bright House's alternative claim, which is that ***if*** the agreement somehow contemplates that Verizon could charge ***something*** for its administrative work in uploading Bright House's directory listing information, that charge must be established by the Commission, not by private arbitration. As just noted, Section 23.8 expressly recognizes that the agreement is subject to "changes" and "modifications" by virtue of this Commission's continuing jurisdiction over it. And this is particularly true for prices. Section 42 of the Agreement states the "general principle" that "All services currently provided hereunder ... and ***any new and additional services ... to be provided hereunder shall be priced in accordance with*** all applicable provisions of the Act and ***the rules and orders of*** the FCC and ***any state public utility commission having jurisdiction over this Agreement.***"[17] Verizon gamely suggests that it would be appropriate to have a private arbitrator set a regulated price for Verizon's administrative tasks, but it understandably cites no authority for the proposition that anyone other than a state commission can set binding prices in matters arising under Sections 251 and/or 252 of the federal Communications Act.

For all these reasons, the Commission should reject Verizon's Motion to Dismiss. This case involves important policy matters regarding how this Commission will enable and encourage facilities-based competition. Verizon's claim to be acting under the interconnection agreement ***at all*** is, at best, tenuous. Unlike the cases cited by Verizon where the Commission deferred to private arbitration, in this case on its face, the parties' agreement contemplates continued Commission involvement, and the private arbitration procedure is neither sole, exclusive, binding, nor final. In

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[17] A copy of the Agreement provisions just cited is attached as an Exhibit to this filing.

these circumstances the Commission may, and should, exercise its own direct jurisdiction over the parties and their competitive relations in the marketplace to accept this case and resolve this dispute.

Respectfully submitted this 20th day of March, 2008,

By: _____

Christopher W. Savage
Davis Wright Tremaine, LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, D.C. 20006
Tel: 202-973-4200
Fax: 202-973-4499
chrissavage@dwt.com

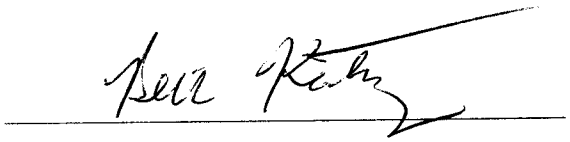
Beth Keating
Akerman Senterfitt
106 East College Ave., Suite 1200
Tallahassee, Fl 32301
Tel: 850-521-8002
Fax: 850-222-0103
beth.keating@akerman.com

Attorneys for:
Bright House Networks Information Services (Florida), LLC
March 20, 2008

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via US Mail and Electronic Mail* to the persons listed below this 20th day of March, 2008:

| | |
|---|---|
| Dulaney L. O'Roark, III, VP/General Counsel*<br>Verizon Florida, LLC<br>P.O. Box 110, MC FLTC 0007<br>Tampa, FL 33601<br>de.oroark@verizon.com | David Christian*<br>Verizon Florida, Inc.<br>106 East College Ave.<br>Tallahassee, FL 32301-7748<br>David.christian@verizon.com |
| Rick Mann, Staff Counsel*<br>Florida Public Service Commission,<br>Office of the General Counsel<br>2540 Shumard Oak Blvd.<br>Tallahassee, FL 32399-0850<br>rmann@psc.state.fl.us | Beth Salak, Director/Competitive Markets and Enforcement*<br>2540 Shumard Oak Blvd.<br>Tallahassee, FL 32399-0850<br>bsalak@psc.state.fl.us |

By: 

Beth Keating
**Akerman Senterfitt**
106 East College Avenue, Suite 1200
P.O. Box 1877 (32302)
Tallahassee, Florida 32301
(850) 521-8002
Fax: (850) 222-0103
beth.keating@akerman.com

# EXHIBIT 1

to this Agreement with respect to such arrangement, except as consented to in writing by the other Party. No subcontractor shall be deemed a third party beneficiary for any purposes under this Agreement.

23.3 [Intentionally Deleted]

23.4 **Binding Effect** - This Agreement shall be binding on and inure to the benefit of the respective successors and permitted assigns of the Parties.

23.5 **Nonexclusive Remedies** - Except as otherwise expressly provided in this Agreement, each of the remedies provided under this Agreement is cumulative and is in addition to any remedies that may be available at law or in equity.

23.6 **No Third-Party Beneficiaries** - Except as specifically set forth in Section 10.4 and 10.5, this Agreement does not provide and shall not be construed to provide third parties with any remedy, claim, liability, reimbursement, cause of action, or other privilege.

23.7 **Referenced Documents** - Whenever any provision of this Agreement refers to a technical reference, technical publication, AT&T Practice, GTE Practice, any publication of telecommunications industry administrative or technical standards, or any other document expressly incorporated into this Agreement, it will be deemed to be a reference to the most recent version or edition (including any amendments, supplements, addenda, or successors) of such document that is in effect at the time of the execution of this Agreement, and will include the most recent version or edition (including any amendments, supplements, addenda, or successors) of each document incorporated by reference in such a technical reference, technical publication, AT&T Practice, GTE Practice, or publication of industry standards.

23.8 **Regulatory Agency Control** - This Agreement shall at all times be subject to changes, modifications, orders, and rulings by the FCC and/or the applicable state utility regulatory commission to the extent the substance of this Agreement is or becomes subject to the jurisdiction of such agency. "Business Day" shall mean Monday through Friday, except for holidays on which the U. S. Mail is not delivered.

23.9 [Intentionally Deleted]

23.10 **Publicity and Advertising** - Any news release, public announcement, advertising, or any form of publicity pertaining to this Agreement, or the provision of Local Services, Unbundled Network Elements, Ancillary Functions or Interconnection Services pursuant to it, or association of the Parties with respect to provision of the services described in this Agreement shall be subject to prior written approval of both GTE and AT&T. Neither Party shall publish or use any advertising, sales promotions or other publicity materials

## PART V: PRICING

42. **General Principles**

All services currently provided hereunder including resold Local Services , Network Elements and Combinations, Interconnection and any new and additional services or Network Elements to be provided hereunder shall be priced in accordance with all applicable provisions of the Act and the rules and orders of the FCC and any state public utility commission having jurisdiction over this Agreement.

43. **Price Schedules**

43.1 **Local Service Resale**

The prices to be charged to AT&T for Local Services shall be as specified in Attachment 14.

43.2 **Unbundled Network Elements**

The prices charged to AT&T for Unbundled Network Elements shall be as specified in Attachment 14 and shall be nondiscriminatory.

43.2.1 If implementation of an unbundled loop feeder supports shared used of required unbundling facilities, the cost of such facilities shall be allocated and prorated among all users in a non-discriminatory and competitively neutral manner. If such implementation supports only AT&T's use, then AT&T shall pay to GTE the incremental cost of such implementation.

43.2.2 If implementation of an unbundled loop concentrator /mutiplexer element supports shared used of required unbundling facilities, the cost of such facilities shall be allocated and prorated among all users in a non-discriminatory and competitively neutral manner. If implementation supports only AT&T's use, then AT&T shall pay to GTE the incremental cost of such implementation.

43.2.3 AT&T will be responsible for the costs (if any) required to create an interface at the main distribution frame if such interface does not already exist, such as in the case of an Integrated Digital Loop Carrier System.

43.3 **Interconnection**

43.3.1 Reciprocal Compensation applies for transport and termination of Local Traffic billable by GTE or AT&T which a Telephone Exchange