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October 28, 1996

Ms. Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket Nos. [redacted]-TP and 960980-TP
Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. for arbitration of certain terms and conditions of a proposed agreement with GTE Florida Incorporated concerning interconnection and resale under the Telecommunications Act of 1996

Dear Ms. Bayo:

Please find enclosed for filing an original and fifteen copies of GTE Florida Incorporated's Posthearing Statement in the above matters. Also enclosed is a diskette with a copy of the Posthearing Statement in WordPerfect 5.1 format. Service has been made as indicated on the Certificate of Service.

Very truly yours,

K. Caswell for

Anthony P. Gillman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. for arbitration of certain terms conditions of a proposed agreement with GTE Florida Incorporated concerning interconnection and resale under the Telecommunications Act of 1996	)	Docket No. 960847-TP Docket No. 960980-TP Filed: October 28, 1996

GTE FLORIDA INCORPORATED'S POSTHEARING STATEMENT

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TABLE OF CONTENTS

PAGE

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GTE FLORIDA INCORPORATED'S POSTHEARING STATEMENT

I. GTE's Basic Position

Pricing is the paramount consideration in this arbitration. It touches all of the issues presented for resolution. Properly set prices will open the local market to fair and effective competition, just as Congress intended. Improper pricing will, on the other hand, prevent consumers from enjoying the benefits that efficient markets produce. To avoid this outcome, the Commission must adopt GTE's prices for unbundled elements, interconnection and resale rates.

GTE's prices are the only ones in front of this Commission that reflect the actual costs GTE will incur to maintain its network and ensure adequate phone service to all comers, while promoting rational competition. In contrast, the prices AT&T and MCI suggest are based on the unproven and highly questionable Hatfield model that uses random inputs based on some fantasy local telephone network. Because neither AT&T nor MCI have established any evidentiary basis for the Commission to accept this model, it would be arbitrary and capricious for it to do so. Even AT&T's own policy expert, Joseph

Gillan, acknowledged that setting prices below GTE's actual costs would result in the deterioration of the network, the destruction of GTE, and harm to the local consumer. (Tr. 111-13.) As the Eighth Circuit recognized in its Order staying the FCC's pricing provisions, even the most temporary implementation of inappropriately low rates would impose enormous, irreparable and unlawful losses on GTE. *See* Stay Pending Judicial Review, Nos. 96-3321 *et al.* (8th Cir. Oct. 15, 1996) (Stay Order) at 18. It would also cause this Commission and the State of Florida to take GTE's property in violation of the fifth Amendment of the U.S. Constitution, as well as Article 10, section 6 and Article 1, section 9 of the Florida Constitution. This Commission must not take such action.

In this brief, GTE reviews the record and asks this Commission to set rates in accordance with its unrefuted evidence. GTE provided detailed cost studies and economic models and answered all questions about them. Only rates based on these studies will ensure that there is no taking of GTE's property and that GTE receives just and reasonable compensation for its services. AT&T's experts have testified that a facilities-based network of GTE's scope and size may never develop. (Gillan, Tr. 123.) If that network is to remain viable, GTE cannot be required to subsidize AT&T and MCI.

Nor should GTE be forced to configure and operate its network solely for the benefit of its competitors, as it would have to if the Commission accepts AT&T's and MCI's positions on the technical issues in this case. With regard to these matters--which include, among others, the level of mandatory unbundling; resale conditions; and access to GTE's operations support systems--GTE urges the Commission to favor competition over any particular competitor. With this objective in mind, the Commission will choose GTE's reasonable and common-sense positions on the technical issues.

II. GTE's Positions on the Issues

Issue 1: What services provided by GTEFL, if any, should be excluded from resale?

****The Commission should exclude from resale below-cost services; promotions; future AIN services; public and semi-public payphone lines; and non-telecommunications services. GTE will resell, but not at wholesale rates, services already priced at wholesale; operator services and directory assistance; non-recurring charge services; and future contracts.****

GTE will offer for resale, at a discount, all of the services currently available at retail, except those categories which would undermine the long-term competitive objectives of the Telecommunications Act of 1996 (Act). These exceptions are permissible under the FCC Order interpreting the Act, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96-325 (Aug. 8, 1996) (FCC Order), because GTE has proven that they are reasonable and nondiscriminatory, as explained below. 47 CFR §51.613(b).

Below-cost services. At this time, GTE's only below-cost service is local residential (R1) service (including flat, measured, and Lifeline options). (Wellemeyer, Tr. 1465; McLeod, Tr. 1321.) Because this service is already sold at rates below the cost of providing it, a further discount off those rates would be unjustified. Today, below-cost services receive contribution from other services--such as toll, access, and vertical services--that are priced above their incremental costs. If GTE is forced to resell below-cost service to ALECs at a discount, they will (1) obtain avoided-cost discounts for both below-cost and above-cost services; and (2) pocket the contributions from the above-cost services that subsidized below-cost services. (McLeod, Tr. 1275-76; Wellemeyer, Tr. 1435.) Accordingly, GTE cannot cover its total costs unless below-cost services are excluded from its wholesale offerings or are repriced to cover their costs. Any other result would be contrary to the Act's emphasis on the incumbent local exchange carriers (ILECs') entitlement to recover their costs of providing services to the alternative local exchange carriers (ALECs), (McLeod, Tr. 1321), as well as the Florida Legislature's own determination that flat-rate local service should in no event be resold before July 1, 1997. Fla. Stat. § 364.161(2).

AT&T and MCI offered no credible logic to rebut GTE's reasoning and proof on this point. They argued that GTE should be financially indifferent to reselling below-cost services. (Sather, Tr. 531-32; Price, Tr. 850-51.) This is wrong because, as Mr. Wellemeyer explained, AT&T and MCI are fully expected to self-provide their basic local service customers with the more lucrative, complementary services, such as the toll services that are today the core of their business. GTE will thus lose the all-important ability to provide contribution for the below-cost service. (Wellemeyer, Tr. 1438, 1465.)

Further, AT&T's and MCI's analogies to the development of the interLATA market, (Sather, Tr. 520, Price, Tr. 865), are too simplistic to be at all convincing. InterLATA carriers were not compelled to price any of their services below-cost--which is the very point of GTE's argument.

Finally, allowing ALECs to buy services below their economic costs will be a powerful disincentive to the Act's ultimate goal--development of facilities-based competition. A rational company will never build its own facilities if it can continue to obtain services below the costs it would incur to provide them itself.

Promotions. AT&T and MCI now agree that GTE should at least be permitted to prohibit resale of promotions lasting less than 90 days. (Price, Tr. 922; Sather, Tr. 534.) While this concession is beneficial, it is not enough. There is no pro-competitive reason for GTE to offer any promotions at a discount. When GTE resells a service at wholesale, the ALEC sets the retail price for that service. It can, if it chooses, reduce its customary retail price to offer consumers a promotional discount, just as GTE does. (Sather, Tr. 534.) Thus, an ALEC will be fully able to compete with GTE--just as it competes with any other ALEC--on a promotional basis without the windfall of an additional discount rate off the already reduced promotional rate. If the Commission does not restrict resale of promotions, GTE will never be able to distinguish its offerings from those of its competitors. Every time GTE offers a reduced promotional price, the ALEC will be able to undercut GTE's price on the same promotion--not because of the ALECs' competitive efficiency, but simply because of an artificially imposed price structure. GTE will thus have no incentive to offer creative promotions, some of which may last longer than 90 days--a result which is plainly contrary to the interests of Florida consumers. (Wellemeyer, Tr. 1435-36, 1466; McLeod, Tr. 1276-77.)

GTE asks only for the same degree of flexibility its competitors have. The evidence disproves AT&T's and MCI's contentions that this equitable treatment will prompt GTE to shift consumers to perpetually discounted, nonstandard offerings if the Commission accepts GTE's position. To this end, GTE has demonstrated its good intentions by agreeing to resell discount calling plans. (Wellemeyer, Tr. 1464.)

Future AIN Services. GTE has agreed to resell its currently tariffed advanced intelligent network (AIN) services at a wholesale discount. (Wellemeyer, Tr. 1444-45.) GTE has not, however, agreed to offer all future AIN-based services for resale. As discussed in response to Issue 13(a), below, any manipulation of the current means of providing AIN services must consider network security and integrity concerns. Issues involving trigger access to a competing carrier's network platform and services must be resolved before GTE could offer carte blanche access to any AIN services that might yet be developed. In any event, GTE's agreement to resell currently tariffed AIN services fully meets the Act's requirements. (Wellemeyer, Tr. 1444-45, 1464.)

Public Pay Telephone Lines. The Act requires resale only of retail services. (47 USC § 251(c)(4)(A).) Public payphone lines are not retail service offerings. Further, Mr. Price could not conclude that the Act required resale of payphone lines because public payphone providers are "not necessarily carriers." (Price, Tr. 923.) In any case, it is impossible to resell an individual call, which is what will be conceptually required if GTE's position on this issue is rejected. (Wellemeyer, Tr. 1468.) Thus, a resale restriction makes sense in both legal and practical terms.

Semi-Public Pay Telephone Lines. GTE will not resell semi-public pay telephone lines for a number of reasons. The coin station is an essential part of this service. Because GTE cannot be required to sell equipment, it cannot be required to resell the entire service. Further, MCI and AT&T will self-provide the toll portion of the service, so there is no need for GTE to wholesale it. Finally, the service is not currently priced to support the requested maintenance and collection activities without substantial support from toll; GTE will not receive this support from carriers like MCI and AT&T which will provide the toll themselves. (Wellemeyer, Tr. 1445-46.)

Non-telecommunications Services. MCI, at least, has asked GTE to resell non-telecommunications services. MCI admits that these are not telecommunications services required to be resold under the Act. (Price, Tr. 920.) However, it believes the Commission should order GTE to resell them because it will be advantageous for MCI. (Price, Tr. 921.)

Aside from the fact that the Act does not require resale of non-telecommunications services, those that MCI cites as resale candidates (inside wire maintenance (IWM) and voice messaging) are unregulated, so the Commission's jurisdiction over them is limited. There is, moreover, no policy reason supporting resale. There are many non-ILEC sources for these kinds of services. For instance, IWM can be provided by any number of electricians and other independent contractors. Because of these competitive alternatives, this Commission last year rejected a proposal to reregulate this service (Order no. PSC-95-0035-FOF-TL, Jan. 9, 1995).

* * *

GTE is willing to resell the following services, but not at wholesale rates:

Services Already Priced at Wholesale. These services include special access and private line services offered under the special access tariff, and COCOT coin and coinless lines. (Wellemeyer, Tr. 1436, 1446.) With regard to this group, GTE notes the FCC's logic that, even though ILECs' access tariffs do not prevent end users from purchasing the service, the language and intent of section 251 of the Act clearly demonstrate that access services do not fall into the category of those an ILEC "'provides at retail to subscribers who are not telecommunications carriers.'" FCC Order at ¶ 873. GTE similarly considers COCOT subscribers to be wholesale providers, and has priced its offerings accordingly.

Moreover, AT&T, which in this proceeding is a putative reseller of pay telephone services, is today itself a provider of pay telephone services. This same congruence exists for both MCI and AT&T with respect to private line services. This situation presents arbitrage opportunities which contravene the Act's goal of fair and rational competition.

Operator Services and Directory Assistance. Under the Act, resale rates are to exclude the costs the ILEC avoids by offering the service at wholesale, as compared to retail. (47 USC § 252(d)(3).) If no costs are avoided, there is necessarily no discount. This is the case for operator services and directory assistance. They require the same activities to be performed at both the retail and resale levels. The costs for these services are recovered through separate rates, and are not included in the rates for other services offered for resale. (Wellemeyer, Tr. 1436-37, 1446.)

Non-recurring Charge Services. There are no costs that can reasonably be expected to be avoided by providing these services at wholesale, so no discount is warranted. Primary service ordering and installation rates should instead be based on an appropriate study reflecting the costs of wholesale provisioning. (Wellemeyer, Tr. 1447.)

Existing Contracts. GTE has agreed to resell future contracts at a price that reflects the costs avoided by selling at wholesale. (Wellemeyer, Tr. 1523.) GTE's existing contracts, however, should not be resold. These contracts were individually negotiated before the imposition of any resale requirement and they do not reflect the possibility of resale. (Wellemeyer, Tr. 1522.)

There is no basis for AT&T's overblown claim that GTE's proposed limitation on contract resale will allow it to "ignore the tariffing process, move all of their services to a contract arrangement, and totally avoid the ability of anyone to compete." (Sather, Tr. 541.) First, GTE will, as noted, resell future contracts. Second, GTE has never in the past tried to use contract offerings as an anticompetitive device; effective Commission and Court remedies are, in any case, available to remedy such behavior.

Issue 2: Should GTEFL be prohibited from imposing restrictions on the resale of GTEFL services?

****No. The exceptions set forth in response to Issue 1 should apply. Cross-class selling should also be prohibited, and GTE's use and user restrictions should continue. These restrictions are reasonable and nondiscriminatory.**

To the extent that this issue overlaps with Issue 1, regarding exclusions from resale, GTEFL refers the Commission to its position there. GTE proposes the following, additional limitations on resale. The Commission may impose these restrictions under the Act because GTE has made the requisite showing that they are reasonable and nondiscriminatory, as discussed below. (47 CFR §51.613.)

Cross-class Selling. Under the FCC's regulations, a state commission may permit an ILEC to prohibit an ALEC from reselling a service purchased at wholesale to categories of subscribers who would not be eligible to take the same services from the ILEC. This would forbid, for example, the resale of residential service to business subscribers. GTE does not believe that AT&T and MCI oppose the cross-class selling restriction.

Use and User Restrictions. Some of GTE's current tariffs restrict the entities which can buy the tariffed service or the uses to which the service may be put. As Messrs.

Sather and Price point out, these restrictions are a by-product of the social pricing practiced under rate of return regulation. (Sather, Tr. 527; Price, Tr. 865.) They were created to curb increases to basic local rates by generating contribution from other classes of customers. AT&T and MCI assert that these restrictions are anachronistic in an environment where prices are based on their costs.

GTE wholeheartedly agrees. If non-cost factors are entirely removed from rates, there is no need for use or user restrictions. But this is not the case today. When GTE elected price regulation, its rates were not rebalanced to reflect their true costs. Instead, a rate structure was imposed that freezes or strictly limits rate changes for particular services for some years to come. As such, the social pricing effects of rate of return regulation remain very much present in GTE's rates, even under price regulation and competition. So the use and user restrictions that "were necessary under the prior regulatory regime," (Price, Tr. 865), remain appropriate until rates are rebalanced. The continuation of these restrictions do not, as Mr. Price concludes, "prevent[] prices from becoming more rational." *Id.* They are, rather, a necessary response to irrational prices.

It is no answer to GTE's proposal to say that GTE itself elected price regulation. This does not change the fact that rates were not rebalanced before price regulation began. In any case, GTE had no practical choice but price regulation. Because it has over 100,000 access lines, the Florida statutory scheme would have permitted competitive entry into GTE's local exchange markets even if GTE had not "elected" price regulation. (McLeod, Tr. 1333-34; Fla. Stat. § 364.051(1)(a).) In other words, GTE, unlike small carriers, did not have the option of retaining both rate of return regulation and its local exchange monopoly. (Fla. Stat. § 364.337). In any case, GTE began to operate under price regulation before the federal Act was passed. As such, it could not have known about the resale and interconnection obligations that Act would impose. (McLeod, Tr. 1385-86.)

Issue 3: What are the appropriate wholesale rates for GTEFL to charge when AT&T or MCI purchase GTEFL's retail services for resale?

**** Wholesale rates should be based on avoided, not avoidable, costs. Thus, prices for resold services should equal retail rates minus net avoided costs. AT&T's and MCI's methodology should be rejected because it is based solely on the pricing requirements of the FCC Order which has been stayed and has no effect. ****

A. GTE's Avoided Cost Study Best Satisfies the Requirements of the Act.

The Act's language regarding wholesale rates is unambiguous:

> For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for telecommunications service requested, *excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.*

(47 USC § 252(d)(3) [emphasis added].) Unlike the studies relied upon by AT&T and MCI, GTE's study fully complies with this language. The wholesale rates produced by GTE's study exclude the portion of marketing, billing, collection and other costs that will be avoided. In contrast, AT&T's and MCI's proposal assumes that *all* costs in certain categories are avoided, an assumption that is contrary to the plain meaning of the statute. If this position were correct, Congress would have placed a period after the phrase "excluding the portion thereof attributable to any marketing, billing, collection, and other costs," because the following phrase--"that will be avoided by the local exchange carrier"--

would be superfluous. The rules of statutory construction require that each word, each phrase, and each provision in a statute be given effect. *See, e.g., Crandon v. United States,* 494 U.S. 162, 171 (1990); *Penn. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990). As such, GTE's model should be used to set rates for resale services.

GTE's model computed avoided costs of $0.83 per line per month for residential service and $1.06 per line per month for business services (Wellemeyer, Tr. 1401.) Although the study produced a composite discount of 7%, separate discount percentages were calculated based upon categories of service (7.1% for usage services; 5.5% for business vertical services; 6.6% for residential vertical services; and 15.3% for advanced services). As GTE witness Wellemeyer testified, GTE's wholesale prices equal its retail prices minus its net avoided costs. Net avoided costs equal avoided retail cost plus the additional costs of providing wholesale service. (Wellemeyer, Tr. 1404.) To determine the net costs that "will be avoided" by GTE, GTE conducted an extensive study of its operations, analyzing all of its existing work centers to determine which activities or functions in each work center would be avoided in a wholesale environment (Ex. 36, Tab 20). The total annual cost was determined from the books and records of each such center. (Wellemeyer, Tr. 1410.) GTE then determined the costs of functions that would be avoided in a wholesale environment.

The costs GTE avoids will be partially offset by new costs which GTE must incur as a wholesale provider. GTE will incur $0.53 in additional costs as a result of becoming a wholesaler of these services instead of a retailer. MCI has acknowledged that GTE will incur additional costs in satisfying MCI's demands that GTE provide it with functionalities and capabilities which are not presently provided to GTE's retail customers. To this end, Mr. Price testified that MCI seeks new, wholesale-related pre-service ordering capabilities, on-line automated order processing, on-line monitoring, and a process for exchange of confidential customer information and service quality reports. (Price, Tr. 800-01, 878.) All of the costs associated with these and other wholesale activities must be factored into the wholesale rate.

AT&T and MCI had few, if any, specific criticisms of the manner in which GTE's Avoided Cost Study was conducted. They opposed the study primarily because it did not comply with the FCC's rules (which now have no effect). (Lerma, Tr. 581-83.) Although Mr. Price advanced certain broad criticisms, they were not based on any review of the study (Price, Tr. 855). Incredibly, he criticized the study for being too precise. (Price, Tr. 857.) MCI thus requests the Commission to ignore a detailed and precise study in favor of a "sledge-hammer" approach using broad percentages which are not based on any empirical data.

B. MCI's and AT&T's Avoided Cost Assumptions Lack Any Empirical Foundation.

In contrast to those submitted by GTE, neither AT&T nor MCI produced any studies analyzing the specific costs which GTE would avoid. (Price, Tr. 875-76, 882-83; Lerma, Tr. 598.) Instead, they relied on the FCC's hypothetical methodology. (Price, Tr. 870, 875; Lerma, Tr. 591, 598.) Because the Eighth Circuit's Stay has rendered the FCC's rules ineffective, there is no longer any justification for accepting AT&T's and MCI's avoided cost arguments.[1] They can point to no evidence to support their analysis because no such evidence exists. Indeed, their assumptions regarding avoided costs are, at best, devoid of common sense and, at worst, outlandish. AT&T and MCI are merely attempting to increase the avoided cost percentage by arbitrarily choosing large avoided cost discounts for the direct expense accounts regardless of what expense GTE will actually avoid in the provision of wholesale services. When compared with actual data regarding GTE's functions, AT&T's and MCI's assumptions are revealed as illogical and wrong, as explained below:

1. **Product Management (Acct. 6611).** AT&T excluded 100% of all product management expenses, asking the Commission to assume that GTE will not have any costs relating to product development, product roll-out and product support. During cross examination, though, AT&T admitted that wholesalers incur product development costs. Yet it offered no evidence as to why GTE would not incur these same costs in reselling local services to AT&T. (Lerma, Tr. 606-07.) In essence, not only is AT&T assuming that GTE will exit the retail business, it apparently assumes GTE will exit the wholesale business as well. MCI similarly acknowledged that GTE, as a wholesaler, would continue

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[1] If the Commission chooses to adopt the FCC's methodology despite the Stay and the lack of any record evidence to support that methodology, it should approve GTE's Modified Avoided Cost Study. That study was presented as a less preferred alternative to GTE's primary option, the cost study detailed in this section. The Modified Avoided Cost Study was conducted in accordance with the stayed Order and rules. (Wellemeyer, Tr. 1459-60.) GTE did not, however, blindly adopt the percentages of avoided costs assumed by the FCC, which were, in any case, cast as rebuttable presumptions (FCC Order at ¶ 909). GTE's Modified Avoided Cost Study presented unrefuted evidence rebutting the FCC's presumptions. Under this study, the discount percentage should be no more than 11.25%.

to incur product development costs to train its staff, support services, change and file tariffs and do other activities necessary to develop a new product. (Price, Tr. 896-98.)

2. **Sales (Acct. 6612).** AT&T assumes that GTE will avoid 100% of the sales function while MCI, in accordance with the (now ineffective) FCC rules, presumes that 90% of this account will be avoided. GTE's study disproves these unrealistic assumptions. It is illogical to assume GTE will incur no sales expense in a wholesale environment. GTE has calculated its avoided cost factor based on analysis of the sales work centers and has determined that the sales function that currently supports today's wholesale activities (*i.e.*, access service) will not be avoided.

3. **Call Completion Services (Acct. 6621).** Both AT&T and MCI assume GTE will avoid 100% of these operator service-type expenses because these companies contend they will be providing these services themselves. This is irrelevant to the determination of the costs avoided as a result of reselling local exchange services. The expenses for these services are recovered under separately tariffed rates. Because they are not included in the rates of any of the services being resold to AT&T and MCI, they are not avoided. (Wellemeyer, Tr. 1432; Lerma, Tr. 619.)

4. **Number Services (Acct. 6622).** AT&T assumes that because it will provide its own directory assistance service that GTE will avoid these costs. As noted above regarding Account 6621, this is simply not true. GTE will still have to provide directory assistance to ALECS and end users and therefore will not avoid these costs. Moreover, the expenses for these services are not incurred in providing the services being resold to AT&T and MCI. As such, they will not be avoided.

5. Customer Services (Acct. 6623). Again, AT&T assumes, without any analysis, that 100% of these costs will be avoided. In the modified study AT&T presented in its rebuttal testimony, AT&T made an adjustment for carrier access expenses. This adjustment is of no evidentiary value since it was based upon Bell Atlantic data from the State of Pennsylvania. (Lerma, Tr. 632-33; Ex. 14.) Moreover, it assumes that only one-quarter of one percent of expenses (.26%) would not be avoided, a figure which has no relationship to GTE's revenues generated from access services. (Lerma, Tr. 633.) GTE, on the other hand, has determined that 41.45% of these costs will be avoided. There is no dispute that the ordering activities will still be required to provide services to ALECs on a wholesale basis.

C. Lost Opportunity Costs Arising from Toll Contributions Losses Should Be Included in GTE's Wholesale Rates.

When applying the avoided cost discount for basic exchange services only, a net adjustment to costs should be made to acknowledge the foregone contribution to the retail rate associated with complementary services, such as intraLATA toll. An ALEC reseller is very likely to package and self-provision intraLATA toll with the resold local exchange service, rather than purchase it from GTE for resale. (Wellemeyer, Tr. 1423.) The resale opportunity cost for each basic exchange access service is calculated as the difference between the current toll margin per line and the access margin per line, as set forth in Exhibit 34. GTE will not include a net adjustment for lost opportunity costs when an ALEC reseller provided toll service to the end user prior to initiation of resale or in the case where GTE would continue to provide intraLATA toll. (Wellemeyer, Tr. 1425.)

<u>Issue 4 (a)</u>: Should GTEFL be required to implement a process and standards that will ensure that AT&T and MCI receive services for resale, interconnection, and unbundled network elements that are at least equal in quality to those that GTEFL provides itself and its affiliates?

****There is no reason for a mandate. GTE has already agreed to provide service to ALECs in a nondiscriminatory manner at the quality levels that apply to its own services.****

This issue appears to raise two different matters. The first is whether GTE is required to provide interconnection, resold services, and unbundled elements to ALECs at the same quality standards that apply to GTE's own services. The second is whether GTE must implement processes (such as access to OSS) on a nondiscriminatory basis that are equal in quality to GTE's.

The first matter, concerning standards, should no longer be considered an issue for resolution in this arbitration. GTE has already agreed to provide service quality to ALECs that is nondiscriminatory and equal to that which GTE provides to itself and its affiliates. (McLeod, Tr. 1306.) GTE believes this issue was originally raised because AT&T believed that it should receive more than equal treatment--that is, higher quality service than GTE provides to itself. (Shurter, Tr. 193.) Even more incredibly, AT&T seemed to want this higher level of service for free. In this regard, it complained that GTE had "made clear that if AT&T wants something more than...minimum parity, it may request and must pay for it." Mr. Shurter criticized this entirely reasonable position as an example of "the somewhat paternalistic view that if something is enough for GTE it ought to be enough for AT&T." (Shurter, Tr. 199.)

Perhaps AT&T later recognized how shocking this attitude was, because Mr.

Shurter renounced it at the hearing. He testified that AT&T would not, in fact, expect GTE to provide AT&T with unique service standards, and that if AT&T wanted higher standards, it would negotiate and pay for them. (Shurter, Tr. 234.) GTE concurs with AT&T's reconsidered position. Although the Act does not require GTE to provide different service standards than those which apply to its own operations, GTE is willing to negotiate with ALECs to provide them upon appropriate compensation. But it would be impossible for GTE to comply with a mandate for unique standards that would, in effect, require different service standards for all of the seventy or more companies which will eventually interconnect with GTE across the nation. (McLeod, Tr. 1323-24.)

GTEFL will likewise establish processes to ensure nondiscriminatory treatment of ALECs. To this end, ALECs will ultimately receive the real-time interactive access to GTE's OSS that they seek. Such access cannot, however, be provided immediately, and GTE cannot be expected to pay for the system creation and modifications the ALECs may request. This issue is treated in more detail in GTE's response to Issue 6.

(b) Should GTEFL be required to provide AT&T and MCI loop testing information prior to the establishment of service to an AT&T or MCI customer?

****No. GTE does not routinely perform loop testing on its own lines. When it does perform loop tests, it does not retain the results. If AT&T and MCI want routine testing and tracking, they must pay for creation of the systems to perform such functions.****

GTE believes this is no longer an issue for resolution in this arbitration. At the hearing, AT&T conceded that it would not expect GTE to provide AT&T with any better treatment for loop testing than it provides itself (Shurter, Tr. 288.) Since GTE does not routinely test its loops and does not retain the results of any tests it does perform, (Hartshorn, Tr. 1146), AT&T would presumably not expect GTE to do such tests or reporting for AT&T. Since GTE's loop testing practices have been clarified, MCI might also be expected to drop its request for loop testing and reporting. If not, GTE would expect MCI to pay for creation of the new systems necessary to perform these functions.

Issue 5: What are the appropriate contractual provisions for liability and indemnification for failure to provide service in accordance with the terms of the arbitrated agreement?

****GTE's current tariff provisions giving credit for service interruptions should continue to govern its relations with other carriers. The Commission must reject AT&T's and MCI's proposed indemnification provisions because the unknowable costs of unlimited consequential damages have not and cannot be factored into the rates charged to AT&T and MCI.****

GTE's current tariffs grant customers pro-rata credit for service outages and interruptions. These longstanding provisions govern GTE's relationships with end user, as well as carrier, customers. AT&T and MCI have taken access services from GTE under these provisions for well over 10 years without raising any concerns about indemnification if GTE's network fails to function as intended. There is nothing in the Act that requires--either implicitly or explicitly--any revisions to GTE's limitations of liability. Indeed, the proposals advanced by AT&T and MCI are impermissible under the Act and inconsistent with its goal of encouraging efficient competition.

AT&T proposes that GTE must "accept liability for unbillable or uncollectible revenues caused by GTE's actions or inactions." (Shurter, Tr. 211, 203.) This proposal deserves no serious consideration; it is inconsistent even with AT&T's own position on service quality standards.

GTE's employees, like AT&T's, sometimes make mistakes. GTE's network, like

AT&T's, sometimes fails. But, like AT&T, GTE is able to provide high quality, reliable service despite these occasional lapses (Shurter, Tr. 233.) In fact, Mr. Shurter testified to GTE's expertise in and experience in managing the local exchange business, (Tr. 172), its "capable people" running its network, (Tr. 172), and its "personnel capable of responding to a new competitive environment" (Tr. 229). He further testified that GTE should not be expected to meet service performance standards for AT&T that are superior to GTE's own (Shurter, Tr. 234). AT&T has thus acknowledged that it would be unreasonable to hold GTE to a standard of perfect service.

Yet that is exactly what AT&T's indemnity provision would do. (McLeod, Tr. 1386.) Even though GTE would be providing AT&T quality service--under Mr. Shurter's own definition--it would effectively need to compensate AT&T for <u>any</u> uncollectible or unbillable amount. There are no limits to the liability that GTE could incur, because any "action or inaction," intentional or unintentional, would require payment from GTE. In every case, AT&T could--and, acting as a self-interested business, would--claim that GTE either caused or could have prevented AT&T's purported revenue losses. Occurrences giving rise to liability could range from the mundane missed due date to the more unusual software glitch that cripples the network. In the latter case, as AT&T well knows from its own experience, uncollectible or unbillable revenues could be substantial.

To protect against the enormous losses that could flow from even a small mistake, AT&T, like GTE, limits its liability through tariff and contract provisions. Although Mr. Shurter tried to claim that AT&T's own contracts with end users guarantee against loss of revenues due to AT&T's actions or inactions, (Shurter, Tr. 247), AT&T could produce no such provisions upon GTE's request. In fact, AT&T limits its liability through tariffs, just as GTE does. (Shurter, Tr. 247-48.) Mr. Shurter's unsupported opinions to the contrary, AT&T's compensation proposal is not a customary term in industry contracts; in fact, limitations of liability are customary in large commercial contracts.

Mr. Shurter, however, proposes the equivalent of strict liability, with customers forced to pay for a comprehensive insurance policy for AT&T. (McLeod, Tr. 1282-83.) If AT&T wants to shift all of the risk of doing business to GTE, it cannot be done without GTE's agreement and corresponding adjustment of rates for services AT&T purchases. (McLeod, Tr. 1307.)

The fact that AT&T's compensation recommendation would hold GTE to a standard of perfection that is unattainable--and not even expected by AT&T--is reason enough to warrant its rejection. An additional, uncontroverted rationale is that accepting AT&T's compensation proposal would violate the Act's requirement that ILECs recover their costs of providing services to ALECs. AT&T's proposal raise GTE's costs because GTE would have to pay AT&T every time its "actions or inactions" caused AT&T to lose revenue. (Shurter, Tr. 203.) These costs have not been factored into any of the cost studies presented in this proceeding as a basis for rates for unbundled elements and services offered for resale. While AT&T has not considered how GTE should recover the costs associated with its recommendation, (Shurter, Tr. 245-46), this Commission cannot be so cavalier. There is no evidence in this case about how much AT&T's proposal would cost GTE. In fact, it would be impossible to include this element in any rate calculations, because it is an entirely unknowable--and potentially huge--cost. The Commission cannot, consistent with the Act, approve a proposal that would cause costs that are not recovered in the rates GTE charges to AT&T.

The same criticisms apply to MCI's proposed provision. MCI attempts to position its proposal as reasonable because it imposes reciprocal indemnification obligations on GTE and MCI. This posture ignores the nature of the relationship between the parties. MCI is GTE's customer; GTE will be providing service to MCI. As a practical matter, then, virtually all of the potential opportunities for indemnification would run from GTE, the network owner, to MCI, the customer. There are very few, if any, likely instances in which GTE would sustain damages that MCI would have to pay under MCI's proposed language.

MCI's provision is not much better than AT&T's in circumscribing the possibilities for liability. MCI would hold GTE responsible for GTE's "repeated breach of any one or more of its material obligations" under its agreement with MCI. While MCI witness Inkellis opined that a failure of GTE to meet blocking standards, for instance, may not constitute a material breach, especially if no damages are incurred, (Inkellis, Tr. 1086), he concluded that GTE should not be able to limit its liability for "a regular pattern of failure to meet... standards or if the standard was missed by a substantial amount on several occasions" (Inkellis, Tr. 1088.) Thus, it is apparent that MCI is concerned (although without any basis) about GTE intentionally acting in an anticompetitive way to harm MCI. Indeed, Mr. Inkellis admitted as much in his prefiled testimony:

> MCI believes that repeated breaches of material terms *is tantamount to intentional or grossly negligent breach* (which GTE accepts should cause it to lose any liability limitation protection).

(Inkellis, Tr. 1068 [emphasis added].) Although MCI admits that its interpretation of "repeated breaches" means intentional or gross negligence, it is unwilling to set forth this interpretation in the agreement. MCI is also unwilling to define repeated breaches or material obligations. (Inkellis, Tr. 1093.) MCI's purpose is obvious. It wants to make it as easy as possible to place all legal and financial responsibility on GTE for any failure to provide perfect service. MCI knows that even the least creative of attorneys will be able to allege the existence of at least two breaches (thereby constituting "repeated") over an undefined period of time to foist all liability on GTE for all consequences relating to a network fault. As a rational company trying to maximize its revenues, it would be in MCI's best interest to claim material breach for any error that happened more than once.

MCI's recommendation may be even worse than AT&T's in the potential for enormous and unknowable liability that it presents. Under MCI's indemnity obligation, GTE would have to compensate MCI for damages MCI must pay to third parties as a result of events that were purportedly due to GTE's failure to meet a term of its agreement with MCI. (Inkellis, Tr. 1066.) To take an example Mr. Inkellis uses, "if a telephone company's banking customer is unable to place a trade, the customer might incur substantial damages while the cost of the failed call might be pennies" (Inkellis, Tr. 1072-73). Under MCI's proposal, GTE could well be liable for the money this banker lost if it's the second time a call was dropped because of a GTE system fault, albeit an unintentional one.

MCI's provision, if the Commission accepts it, will give MCI an unbeatable competitive advantage, especially with regard to the lucrative business sector. Today, GTE's and MCI's tariffs and contracts with end users limit their liability to service credits, as noted above. If MCI's language is adopted, MCI will not have to insist on such liability limitations in its contracts with customers. If it is assured recovery from GTE, as it would be under the proposed provision, MCI could pass that recovery on to the third party customer--the banker in Mr. Inkellis' example--who claims consequential damages because of a network fault. GTE cannot offer a similar service guarantee for its customers because it has no one to recover from (except, of course, GTE's customers). The definitive advantage MCI would gain through its proposed indemnity provision would be unfair and inimical to efficient competition. Under its proposal, if a system fault blocks two calls over a several-month period, and the second call happens to be the multi-million dollar trade, MCI could make GTE pay for the multi-million dollar loss. Thus, MCI's competitive edge would be due not to its own skill in the marketplace, but to an artificially-imposed right to hold GTE responsible for the disproportionate effects of minor, unintentional transmission effects.

Although GTE no longer operates under rate of return regulation, Mr. Inkellis has incorrectly concluded that there is no reason for limitations of liability. If anything, there is even more reason for such provisions. The Commission should still be concerned about the rates customers pay for services; the fact that prices will be determined through market forces, rather than earnings regulation, is immaterial to the consumer. Moreover, Mr. Inkellis grossly overstates the connection between MCI's indemnification provision and assuring efficiency on GTE's part. No telecommunications carrier has ever provided faultless service, and none can be expected to. Indeed, the opportunities for system faults beyond GTE's control--which can well count as repeated breaches of material obligations--will likely increase as GTE is compelled to offer other companies direct access to critical network functions, systems, and databases, as MCI and AT&T urge in this proceeding.

GTE uses the same network to provide its own services as it will to provide interconnectors' services. It will thus have no incentive to degrade the operation of that network. Moreover, GTE has no history of anticompetitive conduct, so AT&T's and MCI's apparent expectations of nefarious conduct on GTE's part are wholly unfounded. If there are significant problems with the services GTE provides to AT&T and MCI, potent legal remedies and the Commission's complaint process are available and effective. If GTE's limitations of liability are to be negotiated away, the prices ALECs will pay for services must increase. There is no other option under the Act, which mandates full cost recovery.

Issue 6: Should GTEFL be required to provide real-time and interactive access via electronic interfaces to perform the following: pre-service ordering; maintenance/repair; service order processing and provisioning; customer usage data transfer; local account maintenance?

****No mandate is necessary, because GTE has already agreed in principle to provide real-time, interactive access to its existing operations support systems.****

AT&T's prefiled testimony on this point was full of sound and fury, but signified nothing at the hearing. In its prefiled direct and rebuttal testimony, AT&T complained about GTE's refusal to provide any access to its OSS, even on an interim basis, until the cost recovery issue was resolved: "without an agreement on price, GTE is not even willing to discuss a work plan to implement essential electronic interfaces" (Shurter, Tr. 172); "GTE has also refused to agree to an interim solution until the parties reach agreement on pricing issues" (Shurter, Tr. 217).

These statements proved to be untrue. At the hearing, Mr. Shurter admitted that AT&T and GTE had agreed to interim solutions for access to GTE's OSS to enable AT&T

to get into the local market. (Shurter, Tr. 275.) At this first stage, GTE has staffed a National Open Market Center (NOMC) just to process ALECs' orders, (Shurter, Tr. 275), and OSS access will be automated to the extent feasible. Service orders will be transferred directly from and to ALECs via GTE's network data mover that is used today for access ordering. (Drew, Tr. 2018.) GTE will not require carriers to fax orders back and forth, as Rochester Telephone required of AT&T in connection with AT&T's failed market entry in New York, so MCI's and AT&T's emphasis of this example, (Shurter, Tr. 216; DeCamp, Tr. 1028-29), is not germane to this arbitration. Under the interim agreements, MCI's and AT&T's customers will typically receive their telephone numbers and installation dates in "real time," while they are on the phone with the MCI or AT&T service representative. (Drew, Tr. 2020.)

For the second interim stage of OSS access, GTE has committed to removing the human interfaces present during the first interim stage. The negotiations on these measures are progressing quite well, as Mr. Shurter acknowledged, and he expects final agreement within the next couple of weeks. (Shurter, Tr. 277-78.) Even without definitive agreement, GTE is working on the second stage processes. (Drew, Tr. 2074.) So while it is true that GTE rightly considers cost recovery (discussed below in subpart (c)) for OSS access an urgently important issue--as any prudent company faced with multi-million dollar expenditures would--GTE has not, contrary to Mr. Shurter's accusations, refused to move forward on providing OSS access until the cost recovery issue is resolved. GTE has already spent over a million dollars on systems modifications in this interim stage. This is in addition to the substantial cost of establishing the NOMC.

The third and final stage of OSS will permit ALECs real-time, interactive access to GTE's OSS. This is what AT&T and MCI ultimately want, and what GTE has agreed to do, as Mr. Shurter again acknowledged. (Shurter, Tr. 280.) Direct access cannot occur, however, without significant additional development. GTE's OSS--which contain millions of lines of code--were developed over several years in order to provide access to only GTE. They were never intended for multiple-provider access. Without the appropriate OSS gateways, any ALEC would be able to view any information in GTE's system, change databases, and modify customers' services and network configurations. The potential for compromise of the network--for instance, by a single hacker--is staggering. It should be obvious that GTE must be permitted to adequately partition its systems before other carriers are permitted entry into them. (Drew, Tr. 2075-76.)

GTE has begun assessing what needs to be done to implement the requested electronic interfaces. Both companies have now requested interfaces that will be based on standards developed by the industry. (Shurter, Tr. 279; DeCamp, Tr. 1026.) Although the standards-setting process is underway, there is no consensus on the complete set of necessary standards, as Mr. Shurter and Mr. DeCamp admitted. (DeCamp, Tr. 1049; Shurter, Tr. 283.) Just as importantly, GTE cannot give AT&T the "specific committed plan with a date certain" that it wants for interface deployment, (Shurter, Tr. 281), until it tells GTE exactly what type of access it requires to each specific system. Neither carrier has yet given GTE the detailed specifications it would need to develop any interfaces. (Shurter, Tr. 281; McLeod, Tr. 1380.) Thus, their complaints about alleged foot-dragging on GTE's part deserve no credence.

Further, GTE recognizes its obligations as a telecommunications company subject to this Commision's jurisdiction. However, as Mr. Shurter admitted, GTE cannot authorize access to systems it does not own. (Shurter, Tr. 295.) This is the case for some of GTE's largest OSS, which GTE merely licenses from third-party vendors for substantial fees. The Commission does not have jurisdiction over these third-party vendors, which have the legal right to control access to the systems they market. AT&T raised this issue in its cross-examination of Mr. McLeod, attempting to explore whether AT&T would gain title to OSS features in certain instances. AT&T's mistake, however, is in assuming that GTE has all title rights in the OSS it uses. (Tr. 1375-78.) Because it does not, AT&T, in fact, may well be compelled to acquire such rights, just as GTE does, from the vendors who own the systems. GTE asks the Commission to recognize that GTE does not have complete authority over the terms and conditions of access to third-party systems, and that it cannot compel GTE to violate its licensing agreements with those vendors.

Finally, while GTE is committed to providing the access to OSS that AT&T and MCI want, the Act does not require GTE to build <u>new</u> systems that might be helpful to these other carriers. GTE further notes that the FCC required only access to the ILECs' OSS functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing. (FCC Order at ¶ 523.) GTE would discuss development and implementation of other capabilities only with the understanding that the requesting company will pay for them. GTE believes MCI is not averse to this position. (DeCamp, Tr. 1055.)

In summary, GTE believes this subissue already been resolved. GTE and AT&T have agreed on first-step interim OSS access processes, and they are very near agreement on second-step interim procedures. GTE's commitments on the first- and second-stage interim processes should also satisfy MCI, which expressed the same concerns as AT&T, but which seemed less clear than AT&T on the agreements that had already been reached.

GTE has also agreed to provide the long-term solution that both MCI and AT&T want--real-time, interactive access to GTE's OSS. As discussed below, however, the timing and cost recovery issues remain to be settled.

<u>Issue 6(b)</u>: If this process requires the development of additional capabilities, in what time frame should they be deployed?

****It is impossible to set a deployment date until industry standards have been determined, AT&T and MCI have given GTE their detailed access specifications, and GTE has, in turn, been able to assess the tasks associated with these specifications.****

As GTE explained above, the full electronic bonding that AT&T and MCI have asked for will, in fact, require the development of significant additional capabilities. The industry standards that both companies agree are a prerequisite to undertaking the modifications necessary to permit third-party OSS access do not even exist. Due to the lack of industry standards or even national uniformity, the arbitrator in the AT&T/GTE proceeding in Pennsylvania declined to recommend that GTE be required to develop electronic interfaces for AT&T at this time. (Application of AT&T Comm. of Penn., Inc.; Petition for Arbitration of Interconnection Agreement with GTE North, Inc., Recommended Decision, (Pa. Rec. Decision) Oct. 10, 1996, at 31.)

The lack of certainty about industry standards is compounded by the fact that neither AT&T nor MCI has given GTE the detailed specifications essential to providing the long-term, electronic access they want. After GTE receives these specifications, it will need to evaluate the tasks that need to be completed to permit direct access. GTE has only been able to make a start at this evaluation process, because it has been properly focussing on interim measures. Nevertheless, it is clear that implementation of electronic bonding for its numerous and interrelated systems will be extraordinarily complex. (Drew, Tr. 2040.)

No firm date can be set for deployment of electronic bonding without knowing exactly when the industry standards will be determined, what these standards will entail, what specific types of access AT&T and MCI will want to which systems, and what GTE needs to do to provide that access. (Drew, Tr. 2042.) Even AT&T and MCI appear to recognize that this high level of uncertainty precludes any timing mandates. No party to this proceeding has proposed any specific date for completion of the requested electronic access. AT&T's prefiled papers suggested "the earliest practicable date in 1997," (Shurter, Tr. 193), although it acknowledged in negotiations that creation of electronic interfaces would take several years. In fact, it had proposed a minimum of almost two years for their development. (Drew, Tr. 2042-43.) Likewise, Mr. DeCamp's initial understanding was that electronic bonding could not be completed by the beginning of 1997: "MCI does not expect that real-time interfaces will be in place January 1, 1997." (DeCamp, Tr. 1040.)

In short, there is not enough evidence in this proceeding for the Commission to set a date for completion of electronic bonding. GTE suggests the parties be permitted to continue the productive efforts they have already started toward establishing this capability. To this end, AT&T has stated that it will provide GTE with detailed access specifications within a couple of weeks, (Shurter, Tr. 281), so that GTE can assess with more particularity the steps it needs to take to implement the requests. GTE encourages MCI to likewise draw up its access specifications. The other variable--the industry process to establish standards--can be expected to conclude without delay, given the self-interest of the participants.

<u>Issue 6(c)</u>: What are the costs incurred, and how should those costs be recovered?

****It is impossible to know what costs will be incurred until the standards and specifics associated with the requested electronic bonding have been determined. Whatever the costs GTE incurs, the Act requires full recovery from the parties requesting access.****

The heart of the controversy about electronic interfaces is not whether they will be built--GTE has committed to doing so--but how the development and operating costs will be recovered. At this initial stage, it is impossible to know what costs GTE will incur in deploying electronic bonding. As explained above, there is still too much uncertainty--most of it external to GTE--about the details of establishing such access.

It is not important, at this point, to know what the costs will be. It is critical, however, to determine how they will be recovered. GTE cannot be expected to rush to implement all of AT&T's and MCI's demands upon only the vague assurance that they will pay their "fair share." GTE has shown its good faith by initiating deployment of interim access measures with no agreement on payment. The lack of a clear directive for the ALECs to pay the costs of deploying both interim and long-term measures, however, is a recipe for delay and dispute on their part. Without action from this Commission, MCI and AT&T will have no incentive to ever come to agreement with GTE on cost recovery. And without being ordered to pay for the interfaces they demand, MCI and AT&T are not likely to seriously analyze the specific kind and degree of access they really need, as opposed to just demanding interactive access to every system, even those that may be of little value to them.

GTE is entitled to recover all of its costs resulting from the development, implementation, and operational support for access to its OSS. (Drew, Tr. 2043-44.) While GTE would expect to share the cost of particular OSS <u>enhancements</u> that benefit GTE's retail operations, (McLeod, Tr. 1378), AT&T would have GTE share the costs for even AT&T's <u>access</u> to GTE's OSS. (Shurter, Tr. 174.) This position is astonishing. GTE will derive no benefit from establishing gateways to allow third-party access to its systems, (Drew, Tr. 36), and AT&T has not been able to argue otherwise. Instead, Mr. Shurter offered the curious logic that GTE's satisfying AT&T's access demands will benefit GTE by supporting its wholesale business. (Shurter, Tr. 265.)

AT&T has no right to determine GTE's wholesale strategy and no right to make GTE pay for something it would not develop or use for its own operations. Neither AT&T nor MCI can point to anything in the Act that remotely contemplates that cost recovery for third-parties' access to ILECs' OSS will come from the ILECs themselves. AT&T's convoluted logic that ILECs will benefit by allowing competitors direct access to their OSS is untenable, as well as patently unfair. It is not, however, new. In last year's intraLATA presubscription docket, AT&T argued that ILECs should pick up part of their costs of implementing intraLATA presubscription because they would somehow benefit from competitive entry into the toll market. The Commission wisely rejected this argument: "Those that stand to benefit, the IXCs, should pay for the opportunity; those that will lose, the LECs, should not." (Order no. PSC-95-0203-FOF-TP, Feb. 13, 1995, at 30.)

Exactly the same logic applies here. In this context, the Pennsylvania arbitrator's recommended decision is instructive. He recommended that:

> the interconnection agreement provide for AT&T to pay for the Pennsylvania-specific costs of GTE's development of electronic interfaces made necessary to provide the direct access to its OSS requested by AT&T, with provision for GTE to make refunds to AT&T for a portion of the costs so paid in the event other CLECs request the same services and use the same interfaces.

(Pa. Rec. Decision at 32). The arbitrator declined, moreover, "to set a date certain, as requested by AT&T, for GTE to provide the cost estimates and supporting data," pending establishment of industry standards or a national agreement. *Id.* at 31.

A similar approach would be fair in Florida, as well. The Commission should order the ALECs--in this case, AT&T and MCI--to pay GTE all of its costs associated with the design, testing, deployment, implementation, and ongoing support for their requested access to GTE's OSS, including both interim and long-term measures. These payments to GTE would, of course, be in addition to any licensing fees AT&T and MCI might need to pay the third-party owner of GTE's OSS. The Commission should also recognize that GTE cannot produce firm cost estimates until after industry standards have been set and the carriers supply GTE with their access specifications.

<u>Issue 7(a)</u>: When AT&T or MCI resells GTEFL's local exchange service, or purchases unbundled local switching, is it technically feasible: 1) to route 0+ and 0- calls to an operator other than GTEFL's; 2) to route 411 and 555-1212 directory assistance calls to an operator other than GTEFL's; or 3) to route 611 repair calls to a repair center

other than GTEFL's?

****Customized routing to other carriers' operator platforms is not currently technically feasible. GTE will provide available routing capabilities on an interim basis if AT&T and MCI agree to pay all associated costs. GTE does not use 611 for repair calls.****

AT&T has asked GTE to unbundle its switch so that AT&T can route its customers to AT&T's operator services (OS) and directory assistance (DA) platforms, with dedicated trunk groups linked to any interexchange carrier (IXC) AT&T designates. (Shurter, Tr. 223.) AT&T apparently believes such unbundling is technically feasible because GTE switches already provide this capacity on orders from GTE's own service centers.

As Mr. Hartshorn testified, AT&T misunderstands the nature of the service provisioning and activation process. For AT&T to provide end users the ability to separately route their OS, DA, and long-distance calls, a unique line class code (LCC) value must be determined for every permutation of the required options, and the LCCs must then be placed on each customer's switch entry. GTE would need to perform manual searches to find the required LCC values. Moreover, AT&T's proposal could adversely affect network capabilities, as more LCCs and more routing options are added. (Hartshorn, Tr. 1135-37.) Thus, GTE's position on direct routing is not just "a matter of policy," as Mr. Shurter claims, (Tr. 223), but one of technical feasibility.

Aside from GTE's concerns, Lucent Technologies issued a letter detailing a number of issues which must be resolved before AT&T's LCC solution becomes feasible. (Hartshorn, Tr. 1132.; Ex. 27.) Any long-term routing solution will likely require the development of industry standards from which equipment manufacturers, such as Lucent, can design and build products. Because such standards do not yet exist, AT&T's proposed solution would require GTE to first alter its existing switches, then undo those modifications when a permanent solution is found. (Hartshorn, Tr. 1133.) GTE should not be expected to reallocate its limited resources to an ultimately futile task.

Issue 7(b): If this process requires the development of additional capabilities, in what time frame should they be deployed?

****As explained above, significant additional capabilities will be necessary to comply with AT&T's and MCI's customized routing requests. It is too soon to set a date for deployment since no industry standards have yet been developed.****

As GTE discussed above and in the testimony of its witness Hartshorn, (Tr. 1135-38), substantial work will be necessary before GTE could comply with AT&T's and MCI's customized routing requests. Any long-term solution will likely involve the establishment of industry standards. Thus, there is no evidence in the record that would allow the Commission to set an implementation schedule.

Issue 7(c): What are the costs incurred, and how should those costs be recovered?

****Because there is too much uncertainty regarding a workable customized routing solution, there is no information to calculate the costs associated with such a solution. Whatever these costs are, they must be recovered from the carriers requesting such routing.****

GTE cannot calculate the costs of customized routing, even with regard to AT&T's unacceptable LCC proposal, at this time. To do so, it would need to know, for example, the number of routing possibilities AT&T wants for each switch and the number of different routing options AT&T wishes to make available to its customers. (Hartshorn, Tr. 1136.) Further, the costs of the requisite switch capacity increases associated with AT&T's request would vary with particular switches. In any case, GTE believes the cost for these capacity increases alone could run to many tens of millions of dollars. (Hartshorn, Tr. 1136.)

As explained above, GTE believes it would be imprudent to order GTE to implement AT&T's LCC routing solution. If, contrary to GTE's position, the Commission requires GTE to implement this method, AT&T must be required to pay all of the costs that it causes. These costs would result not just from implementation of the routing capability itself, but also from, among other things, undoing the interim LCC solution when a permanent solution becomes available. (*See* Hartshorn, Tr. 1137-39.)

<u>Issue 8</u>: Should GTE be required to provide AT&T and MCI with the billing and usage recording services that AT&T and MCI have requested?

****GTE will provide AT&T and MCI with the same billing and usage recording services GTE provides to itself.****

Billing and usage recording fit within the issue of OSS access, discussed above in response to Issue 6. In addition to the more general concerns stated there, GTE adds that MCI and AT&T will receive the same billing services GTE provides itself. Specifically, it has agreed to AT&T and MCI requests to provide CABS billing for trunk-side interconnection, or ILEC/ALEC billing. This capability is available today. (Drew, Tr. 2018.) CABS billing for line-side interconnection, or end-user billing, is not available today, even for GTE itself, so GTE can not yet provide it to other carriers. GTE is, however, working toward development of CABS capability for line-side billing. (Drew, Tr. 2023.) This commitment would appear to satisfy at least MCI, which does not seem to expect immediate CABS capability. (DeCamp, Tr. 1042-43.) In the meantime, GTE will provide billing through CBSS, the same system it uses for its own end user bills. (Drew, Tr. 2023.)

Issue 8(b): If this process requires the development of additional capabilities, in what time frame should they be deployed?

****CABS billing for GTE/ALEC billing is available today. GTE is working toward developing CABS capability for end user billing, but no completion date can be set based on the record in this proceeding.****

As noted above, no additional capabilities are required for trunk-side CABS billing. While GTE is working toward development of line-side CABS billing capability, no completion date has been set yet, and none has been proposed in this case.

Issue 8(c): What are the costs incurred, and how should those costs be recovered?

****The specific costs of meeting MCI's and AT&T's billing and usage recording demands cannot yet be calculated. Whatever those costs, AT&T and MCI, the cost causers, must pay them.****

There is nothing in the record that would permit calculation of the specific costs associated with AT&T's and MCI's requests for line-side CABS billing and any enhanced usage recording or other features they might desire. It is not necessary to know the specific costs to determine appropriate cost recovery. AT&T and MCI should pay for the development, ongoing support for, and use of, any new features or systems they request. GTE's response to Issue 6(c) more completely responds to the cost recovery question.

Issue 9: What type of customer authorization is required for access to customer account information and transfer of existing services?

****Under the Act, GTE may disclose customer account information for any purpose, including transfer of existing services, to designated providers only upon "affirmative written request by the customer," so that is what this Commission should require.****

The Act is unambiguous with respect to disclosure of customer proprietary network information (CPNI), which includes customer account information the ILEC acquired through its provision of telecommunications services to a customer: "A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer." (47 USC § 702.)

AT&T's and MCI's proposals for release of CPNI ignore this clear directive. They would require GTE to disclose a customer's CPNI with no written customer authorization and even before a customer commits to transfer to MCI or AT&T. Specifically, AT&T and MCI have proposed a "blanket letter of authorization process" (carrier LOA) which would allow them to authorize transfer of all of a customer's services from GTE to AT&T or MCI (Shurter, Tr. 194; DeCamp, Tr. 1038-39.) MCI's and AT&T's name for this process is misleading, because no one--not AT&T or MCI or GTE--would be required to get a letter from the customer authorizing the release of CPNI necessary to identify the services to be transferred. GTE would simply be required to release it to ALECs upon their respective assurances that the customer has authorized such disclosure.

This process would allow MCI and AT&T to access CPNI even for those customers that eventually decide not to transfer their services to the carrier to which the CPNI had been disclosed. Mr. Shurter admitted that such disclosure would be permitted under the AT&T's proposal. (Shurter, Tr. 293.) AT&T and MCI seem to believe that their recommendation is permissible under the Act's initiation of service exception to the written authorization rule. (See 47 U.S.C. § 222.) Certainly, the more plausible reading is that CPNI would be released only after the customer's verifiable commitment to transfer service to another carrier.

The Pennsylvania arbitrator confirmed the plain meaning of the Act, recommending that the interconnection contract require submission of a customer's affirmative written consent before GTE may release his CPNI. The arbitrator found that such consent "will not...constitute the erection of a significant barrier to new entrants or impede the development of competition." (Pa. Rec. Decision at 34.)

Aside from disregarding the plain language of the Act, the proposed "as is" transfer by carrier LOA leaves many practical questions unanswered. For instance, AT&T's and MCI's service offerings will not be exactly congruent with GTE's. Thus, there will be cases in which a customer's services cannot simply be transferred "as is," and GTE will need to retain some of the customer's services by means of establishing a residual account. In this situation, MCI's and AT&T's proposal would allow them access to all of a customer's CPNI, even for services they don't provide. Even if a carrier LOA were legally permissible (which it is not), its use can't be extended to obtaining CPNI associated with services or features the ALEC does not even provide. (Drew, Tr. 2051-52.) Access to such information could only be used to give ALECs an unfair marketing advantage by allowing them to propose alternatives to GTE services. GTE does not have such access to its competitors' CPNI and there is no reason for them to get it from GTE without customer permission.

There are also consumer concerns associated with MCI's and AT&T's proposal. Slamming has been a significant problem in the long distance market. AT&T itself was reprimanded just this year for slamming. In January, the FCC's Common Carrier Bureau issued a Notice of Apparent Liability for Forfeiture to AT&T in the amount of $40,000 for slamming. 11 FCC Rcd 1885 (1996). This practice can be expected to be worse in the local market in the absence of clear and unmistakable consumer consent to transfer services. Since customers often have a number of different local services (as opposed to the interexchange situation), there is a greater potential for transfer of more services than the customer intended.

Contrary to Mr. Shurter's implication, (Tr. 175), GTE has not acknowledged the usefulness of the carrier LOA process in the local service context. LOAs are used to authorize PIC changes, but that does not mean their use should be blithely accepted for local service changes. A PIC change is simply a call routing change. It can affect only one service. It does not raise CPNI issues or questions with regard to which of a customer's potentially numerous services will be transferred.

In accordance with the Act, GTE will release customer CPNI upon written authorization of the customer, or carriers can obtain CPNI from the customers themselves.

Issue 10: What are the appropriate rates, terms, and conditions, if any, for call guide pages, directory distribution, and inclusion of AT&T's and MCI's logos on the directory cover?

****GTE would accept AT&T's proposed contract terms requiring GTE to permit AT&T to purchase one page in the information section of the directory; and requiring AT&T to pay $2.49 per directory for secondary distribution. GTE will not include other companies' logos on its cover.****

GTE believes this issue has been resolved. During the hearing, Mr. Shurter accepted GTE's offer to include AT&T's essential customer contact information along with other ALECs' information in the call guide pages of GTE's directory at no charge. (Shurter, Tr. 290-91.) No product information will be permitted in these call guide pages. In addition, AT&T and MCI may purchase an additional page at rates to be decided later. (AT&T Contract § 19.3.) GTE would propose pricing at a substantial discount off the full-page rate available to other purchasers of directory space, but price was not discussed on the record.

With regard to secondary directory distribution (i.e., outside the scheduled annual delivery), AT&T agreed to pay the same amount that GTE pays for such secondary delivery–$2.49 per directory. (Shurter, Tr. 289; AT&T Contract § 19.1.4.) This amount is not included in GTE's calculation of costs avoided in wholesaling local service, so there is no issue of double charging.

These terms are included in the contract AT&T proposed for acceptance in this proceeding. MCI's willingness to agree to these terms is less clear, as it did not seem aware of GTE's specific proposals at the time of the hearing. If the Commission is to order these terms with regard to AT&T, MCI would be offered the same options.

GTE would not agree to any request for inclusion of other companies' logos on its cover (or more space in its directories). GTE has a First Amendment right to control the content of its directories, including their covers. GTE cannot be compelled to alter its directories--and thus its speech--to conform to an agenda (*e.g.*, the marketing of a competitor's products and services) which GTE has not set. *See, e.g., Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California*, 475 U.S. 1, 9 (1975); *Central Illinois Light Co. V. Citizens Util. Board*, 827 F.2d 1169, 1172-73 (7th Cir. 1987).

Constitutional principles also have implications for rate-setting in connection with GTE's directories. Since GTE has the right to deny AT&T and MCI a forum for promoting their services, GTE may certainly establish the terms under which it will voluntarily make its directories available for this purpose. GTE does not believe any party is asking the

Commission to set prices for directory space, but, to the extent that they do, the Commission has no choice but to reject these requests.

<u>Issue 11(a)</u>: Should GTEFL be required to provide AT&T and MCI access to GTEFL's directory assistance database?

****Because third-party access to GTE's directory assistance database is not technically feasible today, GTE should not be ordered to provide such access in this proceeding.****

It is not currently technically feasible for GTE to provide multiple-user access to its DA database. Such access presents serious problems with regard to safeguarding the security and integrity of the data. These problems will need to be resolved through vendor-endorsed solutions before GTE can begin making the system modifications (including a gateway) to permit DA database access. (Johnson, Tr. 1534.)

<u>Issue 11(b)</u>: If this process requires the development of additional capabilities, in what time frame should they be deployed?

****This process will require additional capabilities to ensure the security and integrity of GTE's databases. Vendors will dictate the timing of the development of these capabilities. There is no evidence in the record that would allow the Commission to establish a time frame for deployment.****

As explained above, GTE cannot modify its system to allow access to its DA database before the development of vendor-endorsed solutions to ensure the security and integrity of that database. The vendors will thus, to a large degree, dictate the timing of DA database access. In any event, there is no evidence in this arbitration that would permit the Commission to set a date for third-party access to GTE's DA database.

<u>Issue 11(c)</u>: What are the costs incurred, and how should those costs be recovered?

****The costs of the necessary additional capabilities cannot be calculated at this time. Whatever the costs will be, they should be recovered from the parties**

requesting access to the DA database.**

It is impossible to know at this point the specific costs GTE will incur in adding the capabilities to make DA database access technically feasible because part of the solution will be driven by vendors. While cost remains unknown, it is clear that it will be significant because GTE will need to implement a gateway and measures to guarantee the security and integrity of customer data. Whatever the eventual costs of development, deployment, and ongoing operation, the Commission should order the parties requesting access--here, MCI and AT&T--to pay them in full because they, not GTE, will benefit from the access.

<u>Issue 12</u>: **How should PIC changes be made for AT&T's and MCI's local customers?**

****The PIC change process should remain as it is today. End users and interexchange carriers should continue to be permitted to submit changes directly to GTE. AT&T's and MCI's request to break the automated process in place today will result in a cumbersome and uneconomical process.****

The primary interexchange carrier (PIC) change process today is fully mechanized. An IXC submits a PIC change electronically to GTE, which then automatically makes the routing change. No human intervention is necessary, except to the extent that end users themselves call GTE to make changes to their PICs.

This automated system--called the "ultimate electronic interface" by AT&T witness Gillan (Tr. 95)--was developed at the IXCs' request--among them AT&T and MCI. Now, those same companies would break the mechanized process that is finally in place after years of development.

Mr. Shurter claims that AT&T's position is not a change from the current process, but just a change in the electronic interfaces by which PIC changes are made. (Shurter, Tr. 287-88.) This semantic subterfuge collapses upon comparison of the existing process and AT&T's proposal. Under AT&T's approach, MCI, for example, would submit a change electronically, just as it does today, to transfer a customer's interexchange service from AT&T to MCI. But instead of quickly completing the change, as it does today, GTE's system would need to discern that the change is for an AT&T local customer, then reject the request. GTE would then need to call MCI and tell it to call AT&T to handle the change. AT&T may or may not then call its customer, after which AT&T would resubmit the PIC change to GTE. In addition, end users themselves would not be permitted to change their own PICs; they would first need to ask permission from AT&T or MCI.

Thus, a simple and efficient process will be transformed into a cumbersome and inefficient one. (Drew, Tr. 2045.) This outcome contradicts AT&T's own emphasis on the importance of simplicity and economic efficiency in the PIC change process. (Shurter, Tr. 2220.)

MCI and AT&T complain that the current system interferes with their "customer-facing" relationships. This has not been a concern before and it is not valid now. If a customer wishes to change his PIC, he should be permitted to do so, just as he always has done, without asking his current carrier. GTE will derive no competitive advantage from maintaining the current process; because it is automated, it does not present a marketing opportunity for GTE.

GTE will, however, be affected if the existing automated process is dismantled. Costly modifications will be necessary to allow the system to detect and reject changes that come from another local carrier. GTE will also need to contact that carrier to tell it the change has been rejected. GTE will, moreover, have to deal with dissatisfied customers who are told they need to make another phone call to get their PIC changed. Introduction of all of these inefficiencies is unjustified when the plain fact is that GTE must make the change in the end anyway.

In his prefiled testimony, GTE witness Drew allowed that, if an industry standard for AT&T's and MCI's approach could be developed, GTE would likely comply with it. (Drew, Tr. 2045.) At the hearing, AT&T offered into evidence part of a document from the National Order and Billing Forum (OBF) Committee purporting to adopt such a standard. Upon GTE's objection, Chairman Clark directed AT&T to produce the entire document, stating that only the entire document would be admitted into evidence. (Tr. 2092-93.) GTE never received the document from AT&T and can only assume it was never filed with the Commission. Thus, neither the partial document nor the entire document is in the record for the Commission's consideration.

Furthermore, the partial document AT&T proffered reflected "final closure" on the PIC order process on August 29, 1996. AT&T's Rebuttal Testimony in this arbitration was filed on September 24, 1996. If the issue was very important to AT&T, one assumes the purported new standard would have been treated in its prefiled testimony.

In any case, Mr. Drew, GTE's OSS witness, was not aware of the apparently new standard AT&T mentioned. Particularly in light of Mr. Drew's testimony, it would have been more productive if AT&T had discussed this new information with GTE in an effort to reach some resolution through negotiation, instead of surprising GTE with it at the hearing. Nonetheless, GTE will evaluate AT&T's information when it is able to obtain a complete

OBF document and will consider implementing AT&T's PIC change approach if, indeed, the necessary standards have been established. AT&T and MCI would, of course, have to pay for the required system modifications, as well as inefficiencies the new system will introduce into the current PIC change process. In the meantime, GTE should not be prohibited from making PIC changes upon request of other IXCs or their customers. (Drew, Tr. 2045-46.)

Issue 13(a): Are the following items considered to be network elements, capabilities, or functions? If so, is it technically feasible for GTEFL to provide AT&T and MCI with these elements: network interface device; loop distribution; local switching; operator systems; dedicated transport; common transport; tandem switching; signaling link transport; signal transfer points; service control points/databases; loop concentrator/multiplexer (AT&T only); loop feeder (AT&T only); multiplexing/digital cross-connect (MCI only); DA service; 911 service; AIN capabilities; operations support systems?

**** GTE will unbundle the NID, loop, port, transport, and its signaling systems, and will provide access to OSS functions. It will consider other unbundling requests, such as subloop unbundling, on a case-by-case basis.****

Because there is no standard configuration for GTE's network, the technical feasibility of any unbundling request will vary with the element requested. GTE is willing to consider specific unbundling requests made by either AT&T or MCI on a case-by-case basis. However, in order to determine the technical requirements of particular requests and whether any additional compensation is required, GTE must address each unbundling request on a case-by-case basis. It appears, based upon the testimony of the technical witnesses of AT&T and MCI, that agreement exists on this issue as well as many other aspects of unbundling. Each aspect is addressed below.

<u>Network Interface Device (NID)</u>. GTE will permit AT&T and MCI to connect their

loops directly to GTE's NID, provided that such interconnection does not adversely affect the reliability and security of GTE's network. (Hartshorn, Tr. 1128.)

Loop Distribution, Loop Feeder (AT&T only) and Loop Concentrator/Multiplexer (AT&T only). These items are treated together because they are all aspects of sub-loop unbundling. Although not required by the FCC, GTE has agreed to address requests for subloop unbundling on a case-by-case basis. Because there is no standard network configuration, the technical feasibility of such unbundling will depend on the manner in which each particular loop is configured.[2] Also, GTE may incur additional costs in providing such unbundling. As such, GTE is willing to provide subloop unbundling as long as all technical requirements are met and it receives adequate compensation for making such subloop unbundling possible. Although AT&T appeared to demand across-the-board unbundling in its prefiled testimony, its witness on this subject later agreed to allow GTE to address each request on a case-by-case basis:

(Questions by Mr. Gillman)

Q. And we [GTE] would have to look on those requests on a case by case basis, wouldn't we?

A. I think that would be a normal thing to do.

(Crafton, Tr. 393.) AT&T's apparent disagreement with GTE did not pertain to GTE's

[2] For example, GTE witness Hartshorn testified that in order to unbundle loops at central offices that use IDLCs, channel boxes would need to be installed. (Hartshorn, Tr. 1131.) AT&T's Mr. Crafton acknowledged this problem and noted that there may be half a dozen ways to unbundle IDLCs and it is up to GTE to decide how to do this. (Crafton, Tr. 390.) Further, with respect to main-cable-fed designs, a feeder cable may not exist. Again, AT&T agreed that certain loops may not contain a feeder portion. (Crafton, Tr. 386.)

desire to address unbundling requests individually. Rather, Mr. Crafton stated that the parties had not yet agreed to a procedure to handle such requests. (Crafton, Tr. 398.)[3] MCI's technical witness, Paul Powers, concurred that a case-by-case approach was appropriate, stating that it would be necessary for GTE and MCI to negotiate the technical details before an unbundled loop would be provided by GTE. (Powers, Tr. 995-96.)

Also, there is no dispute that GTE is entitled to recover its costs incurred in meeting unbundling requests. Both Mr. Crafton and Mr. Powers acknowledged that it was appropriate for GTE to recover these costs. Mr. Crafton testified that the additional costs (such as those relating to the unbundling with IDLCs) ought to be part of the costs AT&T pays to GTE. (Crafton, Tr. 392-93.) Mr. Powers agreed that it would be reasonable to compensate GTE for additional costs created by the unbundling request. (Powers, Tr. 994-95.)

Local Switching. GTE is willing to unbundle the port, which does not include all the vertical features in the switch. (*See* Trimble, Tr. 1845.) Through the port, ALECs can obtain access to both the local switching capability of GTE's switch and the capability to route calls from the trunk side of the switch (*e.g.*, switched access, toll, E-911, directory service). This is fully sufficient to allow them to compete effectively in the local market.

Operator Systems. This item, as AT&T has requested it, includes operator services and directory services. These functional categories encompass numerous different

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[3] Mr. Crafton was not aware of the details of any proposals which had been made to GTE regarding requests for unbundled loops. He stated that he expected GTE to respond to unbundling requests in thirty days. He was not aware whether agreement had been reached on this point. (Crafton, Tr. 398-99.)

components, which AT&T has requested mostly by way of examples. (Crafton, Tr. 328.) It is thus impossible to answer whether unbundling "operator systems" in general is feasible. The only practical approach in this area is to consider specific requests for particular capabilities on a case-by-case basis. (Johnson, Tr. 1534.)

Dedicated Transport, Common Transport. Dedicated and common transport, as GTE understands them, are technically feasible today. AT&T acknowledged that such unbundled elements are presently provided as part of GTE's access tariff. (Crafton, Tr. 410.) GTE will continue to offer them under tariff.

Tandem Switching. Tandem switching is not an issue in this proceeding because GTE has only one tandem switch in Florida. (Crafton Tr. 410.)

Signaling Link Transport, Signal Transfer Points (STPs), Service Control Points/Databases (SCPs). These are all components of GTE's Signaling System 7 (SS7) network. It is not technically feasible to unbundle the SS7 network into these discrete parts, as proposed by AT&T and MCI. Any attempt to do so would jeopardize network integrity, with potentially disastrous consequences. Further, there are no technical standards to support such unbundling. (Morris, Tr. 1174-76.)

Today, interconnection with an SS7 network occurs at the STP, which was designed to be the entry point to an SS7 network and to provide access to all SS7 functions. The STP is the only physical point at which interconnection is technically feasible, and GTE will offer such interconnection. By interconnecting at the STP, AT&T and MCI can gain access to the SCPs and associated databases. (Morris, Tr. 1167-74.) Because they can access all of the SS7 functions through this type of interconnection, the unavailability of further levels of unbundling will not harm the ALECs' ability to compete in the local service market. (Morris, Tr. 1173-74.)

Based upon Mr. Crafton's testimony, there no longer appears to be an issue regarding interconnection through the STP. To the end, he stated that AT&T "recognize[s] that the access to either a switch or to a service control point database in the SS7 network can only occur through its STP." (Crafton, Tr. 415.)

Multiplexing/Digital Cross-connect (MCI only). GTE will provide ALECs digital cross-connect functionality just as it does today, under the same terms available to IXCs.

Directory Assistance Service. This is not a network element, but GTE will offer its tariffed operator and directory assistance services for resale on the same terms and at the same rates as its corresponding retail offerings. As GTE explained in response to Issue 1, no wholesale discount is warranted because these activities require GTE to perform the same activities at both the wholesale and retail levels. (Wellemeyer, Tr. 1436.)

911 Service. GTE is unaware of any outstanding issues with regard to this service. While GTE does not consider 911 service a network element, it does support provision of the service. GTE's terms for providing 911 functionality are reflected in its interconnection contract with Intermedia Communications Incorporated, which has been approved by the Commission. *See In re: Petition for Approval of Interconnection Agreement with Intermedia Communications of Florida, Inc. by GTE Florida Incorporated*, Order no. PSC-96-0784-FOF-TP (June 17, 1996). In addition, MCI and GTE have agreed on language for 911 service in an interim contract.

Advanced Intelligent Network (AIN) Capabilities. As noted by the FCC and confirmed by the record in this case, it is not technically feasible to unbundle the AIN trigger, as AT&T requests.[4] As explained in detail by GTE witness Michael DellAngelo, such unbundling should not be required until standards are developed permitting proper mediation. GTE's position in this regard accords with the FCC's. In its Order, the FCC interpreted the Act's unbundling provisions to require ILECs to make their AIN SCP (or database) available to competitors either through the sale of local switching services or, if adequate safeguards exist, through interconnection of the competitor's local switch to the ILEC's STPs (Order at ¶ 486). The Order also requires that ALECs have access to ILECs' Service Management System (SMS) and Service Creation Environment (SCE) (Order at ¶¶ 493, 495). GTE has, for purposes of this arbitration, agreed to this unbundling and is therefore in full compliance with the Order. This level of access provides AT&T and other ALECs access to all AIN services on an even keel with the LECs. (DellAngelo, Tr. 1961-62.) The FCC expressly did not permit direct access to AIN triggers in the switch. (FCC Order at ¶ 488.)

AT&T's requests in this arbitration go dangerously beyond the access ordered by the FCC. AT&T makes two requests, neither of which is technically feasible: (1) AT&T seeks access to all available AIN TDPs in ILEC end office switches; and (2) AT&T wants to interconnect its network with GTE's SS7 network in order to exchange AIN messages between GTE's end offices and AT&T's AIN SCP. (Crafton, Tr. 351-52.) Such requests are not technically feasible.

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[4] The lack of feasibility was apparently recognized by MCI as well, which is not seeking unmediated access to AIN functionalities at this time. (Powers, Tr. 989-90.)

In defining "technically feasible," the FCC explicitly excluded access to network elements that would negatively affect network reliability and security:

> [L]egitimate threats to network reliability and security must be considered. ...Negative network reliability effects are necessarily contrary to a finding of technical feasibility. Each carrier must be able to retain responsibility for the management, control, and performance of its own network.

(FCC Order at ¶ 203.) Direct access to AIN, as requested by AT&T, would threaten network reliability and security. As amply demonstrated by GTE Witness DellAngelo, end office switches were not designed to support the direct (*i.e.*, unmediated) access AT&T seeks. Such direct access could severely harm the reliability and security of the public-switched network system, other telecommunications service providers' networks, and end users, because AIN, among other things, introduces a set of functional capabilities that allow an AIN SCP to control internal switch call processing functions.

This access allows the AIN SCP to control routing functions and call processing information which can have a detrimental impact on all AIN subscribers, switch-based end-users' services and normal AMA billing record generation. Mediation controls key call processing functions including: privacy, security, routing, billing, screening, feature interactions, operational procedures, reliability, provisioning, performance monitoring, error handling, customer care, network management, and interconnection testing. (DellAngelo, Tr. 1963.) Mr. DellAngelo cited numerous scenarios that could arise in regard to call processing if third-party access is provided without adequate mediation:

- Third parties can change the Billing Number forwarded to an IXC on a real-time, call-by-call basis.
- Third parties can change the Carrier Identification Code on a real-

time, call-by-call basis and override an end user's presubscribed carrier or 10XXX-dialed carrier codes, *i.e.*, "slamming."

- Third parties can change the Calling Party Number of the originator and negatively affect terminating-type services such as CLASS services.

- Third parties can change the Privacy Indicator of the Calling Party's Number.

- A third party can control any AIN trigger assigned in the office independent of the AIN service provider.

- All IN applications and AIN have an overload control mechanism known as Automatic Call or Code Gapping (ACG). ACG and attendant mediation can be seriously compromised resulting in, among other things, failures of call completion.

- Since AIN AMA record generation is under the total control of an AIN SCP, billing records can be detrimentally affected.

- AIN call processing capabilities allow an AIN service to request the serving switch to play announcements or play announcements and collect digits. These announcements can be disrupted.

- There are specific AIN trigger precedence rules over switch-based functions. Depending upon the trigger activated, the subscriber may not be able to call emergency 911 service.

(DellAngelo, Tr. 1963-66.) Although GTE is not opposed to providing such access, it is not technically feasible until appropriate mediation standards are established.

AT&T's witness on this issue, Ray Crafton, who is not an engineer and who admitted that his responsibilities include the profit and loss of AT&T's entry in the local market, (Crafton, Tr. 381-82), would have the Commission believe that existing AIN standards already contain adequate safeguards, and that additional mediation will only result in unacceptable costs and delays. (Crafton, Tr. 376.) He is simply mistaken. There are no existing standards or mediation functions performed in the network TDPs. Effective mediation would require that the switch be partitioned, a feat that is not easily accomplished or provided by external mediation platforms.

Mr. Crafton would also have the Commission believe that standards have already been developed. Again, he is mistaken. He referred specifically to an AIN test between AT&T and BellSouth, but he did not introduce the actual test results in evidence. It was clear why AT&T chose not offer to introduce the report (it was introduced by GTE). Upon review of that report, it was evident that no such standards were developed as a result of that test. In its comments in the report, BellSouth made it very clear:

> Because key areas such as routing, billing, error handling, network management, network security, feature interaction, provisioning, and operations, administration and maintenance were only handled on a de minimis basis during the test arrangement, it is BellSouth's position that no firm conclusions regarding these critical areas can be drawn from the test results. . . .

(Ex. 8, BellSouth Dissenting Report, at 2).

This test was done from AT&T's lab to BellSouth's lab. As such, no actual customers were involved in the test. Further, the test did not examine AIN access by multiple third parties. As explained by GTE's witness DellAngelo, unmediated access by multiple third parties is what will cause harm to the networks. (DellAngelo, Tr. 16.) BellSouth also concluded that the test results were not sufficient to "draw definitive conclusions" regarding unbundled AIN issues and that there were still many issues that needed resolution. *Id.* And despite AT&T's reliance on proceedings before the Illinois Commission to support its position on this issue, the decision there expressed serious concern about network harm and required implementation of the appropriate safeguards to prevent that harm. (DellAngelo, Tr. 2004-05.)

Mr. Crafton's statements to the contrary, the fact is that the industry has not developed any standards for unbundling AIN triggers. Indeed, even he acknowledged that the triggers have never been unbundled outside a lab test and that such test did not involve a GTD-5 central office. Again, GTE is not opposed to providing the access; however, it must be permitted only after appropriate mediation standards are created. In an effort to resolve these problems, GTE has been actively participating in the "LEC Proposal for an Industry IN Project," which seeks to identify and resolve the technical and operational issues associated with unbundling AIN. It is through such an industry forum that resolution of technical and operational issues should occur. (DellAngelo, Tr. 1975.) Until a resolution is possible, however, AT&T's requests for direct access are not technically feasible. Florida's telecommunications network should not be used as a "laboratory guinea pig."

Operations Support Systems. As detailed in GTE's response to Issue 6, GTE will develop the electronic bonding MCI and AT&T have requested to access GTE's OSS.

Issue 13(b): What should be the price of each of the items considered to be network elements, capabilities, or functions?

**** Except for the already tariffed services, the items offered should be priced at total long-run incremental cost, as calculated by GTE, plus a reasonable share of joint and common costs. A departure from the standard set forth by GTE will effect an unconstitutional taking of its property.****

It is essential that this Commission accept the prices recommended by GTE recommended in Exhibit 49, sponsored by GTE witness Trimble.

GTE's ability to recover its costs has profound ramifications for Florida consumers. Service and network element prices that impair GTE's financial integrity will discourage investment in GTE's local telecommunications network. That investment is critical for GTE to fulfill its carrier of last resort obligations, as well as maintaining and expanding the infrastructure necessary for new competitors to enter the local telephone market.

In this arbitration, GTE has presented the only prices that are based on the actual costs GTE will incur to adequately maintain its network and ensure fair competition. GTE's prices are based on the "market-determined efficient component-pricing rule" (M-ECPR) which calculates GTE's forward-looking costs as determined by the market. Additionally, GTE has given the Commission detailed cost studies which provide the evidentiary basis for these prices.

In contrast, the prices AT&T and MCI suggest are based on the Hatfield Model, which calculates costs through undisclosed algorithms and formulas and uses random inputs unrelated to any local telephone network existing anywhere. Because neither AT&T nor MCI have produced any evidence to support this model, and because AT&T's and MCI's witnesses have admitted that it is not based on the actual costs of <u>any</u> local telephone company, this Commission must disregard the Hatfield Model and any prices based on that model.

The harm of below-cost prices--like those the Hatfield Model produces--was recognized by the Eighth Circuit in its stay of the "operation and effect" of the FCC's unlawful default rates. The Eighth Circuit's criticisms of these proxy rates logically extend to any below-cost prices imposed on an ILEC. Accepting the below-cost prices AT&T and

MCI propose would cause this Commission and the State of Florida to take GTE's property, in violation of the Fifth Amendment of the U.S. Constitution, as well as Article 10, section 6 and Article 1, section 9 of the Florida Constitution. This Commission must not take such action.

A. GTE's Prices Are Based on an Economic Framework that Encourages Competition and Allows Adequate Compensation.

The economic framework GTE proposes, the M-ECPR, bases prices on forward-looking costs, promotes competition and, when combined with a competitively neutral end-user charge, satisfies the Act's requirement that the ILEC be allowed to earn "a reasonable profit" (47 USC § 252(d)(1)).

The M-ECPR differs from the FCC Order's efficient component-pricing rule, which, to avoid confusion, shall be called the FCC-ECPR. The FCC correctly rejected the FCC-ECPR. Unlike the simplistic FCC-ECPR, M-ECPR promotes competition by capping prices for each unbundled network element at the price of its market alternative. In that respect, the M-ECPR benefits consumers and avoids all of the shortcomings that the FCC attributed to the FCC-ECPR. Because the market will not permit GTE to charge a price for an unbundled element that exceeds that element's stand-alone cost, it encourages efficient competitive entry.

Because GTE's rate structure retains the subsidies created by rate-of-return regulation, its full costs cannot be recovered by pricing based solely on market alternatives. To compensate GTE for those additional costs, this Commission must eventually also establish a competitively neutral, nonbypassable end-user charge. Without some sort of end-user charge, facilities-based entry and M-ECPR pricing of unbundled network elements will produce stranded costs equal to the difference between GTE's net revenues under traditional regulation and what GTE will earn under the M-ECPR. Although this end-user charge is not included in its recommended prices, GTE believes this matter must be addressed in the future to ensure GTE full cost recovery, as the Act intends.[5] (Trimble, Tr. 1917.)

B. GTE's Cost Studies Are the Only Evidence Before this Commission Based Upon the Actual Costs of Providing Local Telephone Service.

GTE is the only party to this arbitration that has presented cost studies based on the actual costs GTE will incur in providing local telephone service in the future. As fully described in Exhibit 49, GTE used engineering process modules to calculate the incremental costs of local, toll, switched access, unbundled loops, unbundled ports and other network features. These models directly and explicitly reflect the underlying production technology by duplicating processes required to engineer the particular production function under review. *Id.* The models are populated with company-specific information including actual office or system size, technology, traffic data and mileage

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[5] Six categories of costs cannot be fully recovered without end-user charges: (1) shared costs of network operation incurred among two or more (but not all) of GTE's services, but not wholly attributable to any single service; (2) common costs of network operation incurred among all of GTE's services; (3)losses GTE sustains in providing services to preferred classes of customers at prices below their incremental costs; (4) costs incurred as a result of incumbent burdens which only GTE must bear, even after the advent of competition; (5) costs GTE incurs to accomplish government-mandated unbundling of network elements or resale of network services; and (6) losses GTE incurs when its avoided costs are incorrectly overstated and are used to establish the avoided discount that competitors receive for wholesale services.

information. The modeling process calculates both the volume-sensitive and volume-insensitive costs necessary to develop a TSLRIC. The model's results are conservative because GTE has not added any calculations to reflect increased risks in the marketplace.

Because the TSLRIC methodology does not include any common costs, GTE added a reasonable contribution of common costs based on GTE's actual data. GTE determined that its forward-looking common costs were approximately 47% of direct costs. (Trimble, Tr. 1802.)

In telling contrast, the Hatfield Model used data inputs from a hypothetical telephone company that does not exist in Florida or anywhere else. Further, the Hatfield Model uses a 10% factor to adjust for common costs regardless of GTE's actual common costs or the typical common costs of any local telephone provider. Neither AT&T nor MCI has analyzed actual ILEC common costs. In fact, MCI's economic witness mystifyingly testified that it would be inappropriate to look at the actual common costs of a local telephone provider when estimating the forward-looking common costs of a local telephone provider. (Ex. 18 at 60-61.)

To avoid arbitrary and capricious action, this Commission must reject the Hatfield outputs and instead rely on GTE's actual costs to set prices.

C. Because the Hatfield Model Has No Economic or Factual Foundation, the Commission Should Reject this Model and All Testimony and Prices Based Upon It.

Because the Hatfield Model purports to be expert opinion evidence, it must meet certain standards of scientific and technical reliability and validity before this Commission can consider it. The Hatfield Model does not meet these standards. It is nothing more than a set of untested, self-serving calculations and assumptions which AT&T and MCI have assembled into an unscientific, unproven, and ungainly amalgamation of spreadsheets. Specifically, the Hatfield Model is unsupportable and invalid because: (1) it uses unreliable and unverifiable assumptions, calculations and formulas; (2) it has never been internally or externally validated by its proponents and has failed simple verification tests performed by others; and (3) the vast majority of the 370 user inputs to the model are based on a non-existent, fantasy local telephone company.

Use of the Hatfield model or prices derived from it would be legal error and would deny GTE payment of its actual costs. Accordingly, this Commission must disregard it.

1. This Commission Must Rely Only on Expert Evidence that Is Relevant and Reliable.

This Commission is bound by law to rely only on evidence that is in the record and reliable and which may not be based on speculation or supposition. *See Tamiami Trail Tours, Inc. v. Bevis*, 299 So.2d 22, 24 (1974). *See also Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm'n*, 126 N.E.2d 314, 319-320 (Ohio 1955); *Ferguson-Steere Motor Co. v. State Corp. Comm'n*, 306 P.2d 637, 638-39 (N. Mex. 1957).

The rules of evidence provide that opinion testimony, even if offered by an expert, is inadmissible unless it represents scientific or technical knowledge, rather than speculation, and will assist the fact finder to understand the evidence or determine the facts. To qualify as scientific or technical knowledge, the testimony must be grounded in the methods and procedures of the scientific or technical field, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2795 (1993), and the proposed testimony must be supported by appropriate validation.[6] That is, it must rest on good grounds, based on what is known in the field. *Id.* Generally, scientific or technical theories will meet this standard if they are testable and tested, if they have been subjected to peer review through publication or other means, or are generally accepted in the field. *Id.* at 2796-97.

The fact that rules of evidence may not be strictly enforced in administrative proceedings by no means obligates or permits this Commission to consider any evidence proffered, no matter how immaterial or fantastic, especially in the crucial area of expert testimony.

In *Seering v. Department of Social Services*, the California Court of Appeals discussed the importance of strict adherence to the evidentiary rule on expert evidence. This rule requires a prerequisite showing that the scientific methodology underlying expert testimony is generally accepted as reliable in the scientific community. *Id.* at 422. The court reasoned that the reliability requirement protected against a nonexpert being misled by the '"aura of infallibility"' that may surround unproved scientific method. It found that the danger of persuasive, but unreliable, expert testimony was equally as present in an administrative hearing as in a trial, so that the same prerequisite should apply to admission of expert testimony. *Id.* at 429. *See also, e.g., Valley Gas Co. v. Burke*, 446 A.2d 1024, 1026, 48 P.U.R.4th 217 (R.I. S.Ct. 1982); *Re El Paso Elec. Co.*, 19 Texas P.U.C. Bulletin

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[6] This Posthearing statement cites extensively to cases decided in accordance with the Federal Rules of Evidence. This is appropriate for two reasons. First, any appeal of this Commission's decision will go to a United States District Court, which presumably will weigh the admissible evidence that supports that decision. Second, this matter is before this Commission in accordance with the jurisdictional grant set forth in the Act, such that federal evidentiary standards are accordingly material to proceedings under that statute.

2278, (Apr. 6, 1994); *Re Potomac Elec. Power Co.*, 81 Md. P.S.C. 150, (May 1, 1990); *Re Delmarva Power and Light Co.*, 84 Md. P.S.C. 365 (Nov. 5, 1993).

Additionally, the Act presents an unusual situation in which either party can ask a federal court to review this Commission's decision. The standard of review has not been established. Presumably, a federal court will be obliged to disregard a Commission decision based on inadmissable and unreliable evidence.

Accordingly, even though it may have applied evidentiary rules less strictly during the hearing than would a trial court, this Commission must adhere to the rules of evidence in determining what evidence should be considered in rendering its decision.

As set forth below, the Hatfield Model cannot meet these standards and, thus, the Commission should rely on neither the model nor opinions founded on this model.

2. The Hatfield Model Is Based on Unreliable and Unverifiable Assumptions, Calculations and Formulas.

The Hatfield Model is a black box of untested, self-serving calculations and assumptions. Notwithstanding its authors' repeated assertions otherwise, very few of the model's inputs or variables are capable of being adjusted by the user. The Model itself is really not a computer model at all, but a simple EXCEL spreadsheet--and a spreadsheet like no other, at that. It consists of more than 1 million cells of data and information. (Wood, Tr. 1675.) Of those cells, only 370 inputs may be manually adjusted. *Id.* Even its proponents acknowledge "that on a percentage basis most of the cells can't be changed." (Wood, Tr. 1674.)

Although cost model experts such as Dr. Duncan have attempted to examine the formulas and calculations contained within the Hatfield Model, the password protections added to the model make this almost impossible. In other words, one cannot take the model and trace through how a specific equation is used without going through each and every cell by hand. (Ex. 48 at 57.)

Continuing changes in the Hatfield Model make it all the more difficult to evaluate. Version 2.2, Release 1 only became available in late June. Version 2.2, Release 2 became available on August 26, 1996. Yet a third release may soon be forthcoming. (Wood, Tr. 1737.)

Although Mr. Wood suggested that the only inputs that are hard-wired or password-protected to preclude adjustment are those that come from government studies, (Wood, Tr. 1676-77), the Commission staff pointed out two critical "assumptions" that cannot be adjusted. This first is the structure fraction of .33 used in the model. (Wood, Tr. 1753.) This assumption drops GTE's trenching costs from $45 a foot to $15 a foot based on the unsupported assumption that GTE will convince other parties to pay the additional $30. (Wood, Tr. 1755-58.) According to the Staff's calculations, this assumption led to a reduction in the loop price of $3.90 a month. (Wood, Tr. 1758.) The Hatfield Model also uses a .700 network operations factor which assumes, without basis, that network operations expenses will be reduced by 30% from 1995 levels. According to the Staff's calculation, this undocumented assumption decreases the loop price by 62 cents per month.

AT&T and MCI cannot expect this Commission to blithely accept a model without the explanation that would allow independent verification of its calculations and formulas, along with the evidence necessary to support its assumptions. The Hatfield Model simply cannot meet the reliability requirements of the rules of evidence and should not be considered. *See In re TMI Litigation Cases*, 911 F. Supp. 775, 790, 793-94 (M.D. Pa. 1996) (uncertainties as to methodology employed and creator's inability to explain how figures from hypothesis were derived mandate exclusion).

3. The Hatfield Model Has Never Been Validated by Its Proponents and Has Failed at Least One Basic Validation Test of Cost Models.

One of the hallmarks of scientific or technical reliability is that a model is testable and tested. The Hatfield Model has never been verified by comparing it to real world phenomena. (Duncan, Tr. 1780.) This reason alone is sufficient to reject it. *TMI Litigation,* 911 F. Supp. at 795.

As Dr. Duncan explained, one way to test the model against real world results would be to build the model based on data from a few years back and attempt to forecast today's costs. But Hatfield and Associates (HAI) have not compared their results to any real-world data. A model that has failed this most basic of cost model tests cannot meet the most liberally applied standards of reliability and so cannot be used to set real-word prices.

4. Most of the Model's 370 User inputs Are Based on a Hypothetical Telephone Company.

AT&T and MCI have asked this Commission to consider a model which is not based on the data from any actual local telephone company, yet purports to accurately predict the costs of such a company. When Mr. Wood was asked whether he could identify <u>any</u> "inputs that contain values that were derived specifically from the GTE Florida market," he replied, "No. ... [N]ational defaults were used unless there was a reason to change them.

And there weren't any reasons that were identified." (Wood, Tr. 1707.) Mr. Wood admitted that the Model does not utilize fill factors, growth demand, network routes, labor costs, or depreciation lives specific to Florida and that he had not compared the model's inputs to actual Florida data. (Wood Tr. 1702-18.)

Furthermore, Mr. Wood, who was not involved in the model's development, criticized its documentation and explanation of how many of the inputs' values were selected. "I wish they had explained [them] a little better. I think that [use of the 'HAI assumption' explanation for input values] was a shorthand they used to get this document out that I think should have been explained better. ... I wish they had flushed it out a little better in the document. We're working on that." (Wood, Tr. 1722.)

It is also instructive to examine the Input Summary chart that was released just weeks ago at Mr. Wood's deposition. The Summary purports to identify the 370 user inputs, their values and, most importantly, the source of those values. Even a cursory review of that chart demonstrates that these critical variables are primarily drawn from undocumented and unsupported HAI assumptions. It is difficult to give any credence to Mr. Wood's argument that these inputs were supported by "simply potentially hundreds of documents," when neither he nor HAI was able to identify a single one. (Wood, Tr. 1724-25.)

Mr. Wood was also skeptical about some of the Input Summary's explanations of how other default input values were chosen. For example, the Summary indicates that certain statistical abstracts were used to derive the values assigned for the number of business lines assumed in the model. Asked about the model's purported reliance on such abstracts, Mr. Wood distanced himself from the claim: "I don't know, Mr. Fuhr. I was just looking at that as you were looking at it. I have talked to the Hatfield folks about how they--the discussion of this particular input. They did not indicate to me at the time of that discussion that they were relying on statistical abstracts." (Wood, Tr. 1729.)

In sum, the Hatfield Model is neither scientific nor reliable enough to warrant consideration by the Commission under relevant evidentiary standards. Its conclusions lack the necessary evidentiary support the Commission's decision must have under the new federal law. That decision must be based on admissible and reliable evidence. Only scientific evidence of the sort approved in *Daubert* can satisfy the dictates of that law. For these reasons, this Commission should decline to consider the Hatfield Model, all testimony related to the Hatfield Model, and all prices based upon the Hatfield Model.

5. Pricing Below GTE's Actual Costs Is An unlawful Taking.

Adopting prices below GTE's actual costs would be an unlawful taking. The extent of this taking was demonstrated by Mr. Trimble when he discussed the potential impact of FCC's proxy rates on GTE's revenues. His example assumed that GTE was still providing all services, but at wholesale rates:

> The FCC's proxy rates would generate total revenues for the Company of 436 million dollars. For those same items, loops, switching and vertical services, GTE's 1995 revenues were 950 million dollars. The difference between the proxy and current revenues still with GTE providing all the services is 514 million dollars. Employment of the proxies would in essence mean a 54% reduction in GTE's total revenues for those services. One could say 54% reduction for something that is being resold, in essence, seems a wee bit much.

(Trimble, Tr. 1878-79.)

The Supreme Court's *Brooks-Scanlon* decision long ago established the rule that the

Takings Clause of the U.S. Constitution forbids a regulator from forcing a utility to operate a segment of its business at a loss because the firm happens to be profitable in another segment of its business. *Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana*, 251 U.S. 396, 399 (1920). The Court concluded that:

> [A] carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage. ... The plaintiff may be making money from its sawmill and lumber business but it no more can be compelled to spend that than it can be compelled to spend any other money to maintain a railroad for the benefit of others who do not care to pay for it.

Id. *Brooks-Scanlon* and the dozens of subsequent cases that have construed the Takings Clause stand for the proposition that this Commission may not force a regulated entity such as GTE to provide a regulated service below cost without due compensation. This rule applies even to temporary or interim rates.

Application of these well-established constitutional principles requires that GTE recover all of its forward-looking costs and earn a fair rate of return on its historic costs. As explained in the Takings Report included in GTE's Responses to MCI's and AT&T's Petitions, GTE must recover the following types of costs to prevent an unlawful taking: (1) incremental costs; (2) all forward-looking joint and common costs; (3) GTE's costs of subsidizing other services; (4) and GTE's costs of unbundling and resale. The Takings Clause also prohibits the use of overstated avoided costs, such as those that AT&T and MCI propose. As described in GTE's Takings Report, neither the FCC's proxy rates nor the prices proposed by AT&T and MCI would allow GTE to recover fully <u>any</u> of these costs, notwithstanding the language of the Act enabling the recovery of all "costs" and the provisions of the U.S. and Florida Constitutions requiring no less.

In addition to allowing GTE to recover its forward-looking costs, any rates set by this Commission must allow GTE a reasonable return on its historic costs. Under the AT&T and MCI proposals, GTE recovers none of its historic or embedded costs in building the very network with which AT&T and MCI now seek interconnection. Yet, the Takings Clause requires a fair rate of return for regulated utilities on their investments. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299. The question for regulators has traditionally been: "On which investments is the utility entitled to a fair rate of return?" In his concurrence in *Duquesne*, Justice Scalia correctly concluded that "prudently incurred investment[s] may well have to be counted" to determine whether a taking has occurred. *Id. at* 317. At a minimum, the Commission must include <u>all</u> prudently incurred investments by GTE in constructing the very network that the government would now take from the company for the use of third parties. Thus, GTE is entitled to recover that portion of its historic costs not yet recovered and to earn a fair rate of return on those investments.

Neither AT&T nor MCI has presented evidence demonstrating that GTE's investments in constructing the local exchange network were imprudent and should be excluded. Nor could they, for those investments were closely scrutinized by this Commission. Thus, to the extent that AT&T and MCI now seek access to GTE's network, they should have to either pay for an appropriate share of (and return on) those historic costs or GTE should be allowed a rate rebalancing, an end user charge, or a one-time payment which would account for the monies prudently spent by GTE, but which are now stranded by the transition from regulation to competition.

6. The Eighth Circuit's Stay Renders the Proxy Rates a Nullity and Any Evidence Regarding the FCC's Default Proxy Rates or Similar Pricing Should Not Be Considered.

On October 15, 1996, the U.S. Court of Appeals for the Eighth Circuit stayed the "operation and effect" of the FCC's pricing rules promulgated under the Act. *Stay Order at 8.* The Eighth Circuit granted the stay because this Commission, GTE and the other petitioners had made a "strong argument" that the FCC acted beyond the scope of its authority in establishing pricing rules and that GTE and others would be irreparably injured in absence of a stay. *Id.* at 13.

Specifically, the Court ruled that GTE would be irreparably harmed if the FCC's pricing methodologies were forced on GTE. The Court accepted GTE's argument that the FCC's pricing would force GTE to offer its services to carriers like AT&T and MCI at prices below actual costs, causing GTE to incur irreparable losses in customers, goodwill and revenue. Stay Order at 18. The Court found, in effect, that imposition of the proxy rates would unduly penalize GTE:

> As we explained above, we are persuaded that, absent a stay, the proxy rates would frequently be imposed by the state commissions and would result in many incumbent LECs suffering economic losses beyond those inherent in the transition from a monopolistic market to a competitive one.

Id.

AT&T and MCI have asked this Commission to use proxy prices to set the prices of unbundled network elements such as collocation, poles, and conduits. (Guedel, Tr. 476.)

The Eighth Circuit's Stay Order requires the Commission to disregard this request.[7] That Order also provides additional support for disregarding the Hatfield Model prices proposed by AT&T and MCI. The Hatfield prices would force GTE to sell elements below actual costs, causing it to incur irretrievable losses in customers, goodwill and revenue.

7. Implementation Of Rates Below GTE's Actual Costs Would Inflict Irreparable Harm on GTE, New Entrants and Florida Consumers.

As the Eighth Circuit recognized, if this Commission were to implement rates even temporarily below GTE's actual costs, the harm to GTE would be catastrophic and irreparable. This is because: (1) there could be no real truing up of rates to require the ALECs to reimburse GTE for its lost revenue; and (2) GTE would lose irretrievable market share by virtue of AT&T's and MCI's entry into the market at such low rates. Stay Order at 18.

Contrary to AT&T's assertions, problems created by underpricing now cannot be corrected later. (Gillan, Tr. 134-135.) As this Commission stated in its *Motion for Stay Pending Judicial Review* filed in the Eighth Circuit on September 19, 1996:

If entrepreneurs enter into the local market based on the wrong pricing

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[7] By virtue of the stay, the Order has no legal force or effect. An agency rule or regulation is operative only on and after its effective date. (*See Crouch v. Indiana*, 638 N.E.2d 861, 864 (Ind. Ct. App. 1994); *Woody v. Bogan*, 832 F. Supp. 1109, 1116 (E.D. Mich. 1993); *Randell v. Newark Hous. Auth.*, 384 F.2d 151, 154 (3d Cir. 1967), aff'd, 393 U.S. 870 (1968). Thus, courts reject arguments and evidence premised on inapplicable statutes, rules or regulations. *See, e.g., Cuff v. International Business Mach. Co.*, No. 92-0936, 1992 WL 129610, at *3 (E.D. Pa. 1992) (finding irrelevant an argument based on a portion of a federal law not yet in effect); *Crouch*, 638 N.E.2d at 864 (holding inadmissible evidence of intoxication obtained prior to the effective date of the approved method for administering a breath test); *Katradis v. Davel*, No. 86-2519, 1987 WL 8535, at *2 n.5 (E.D. Pa. 1987) (dismissing discrimination claim premised on a regulation not yet in effect at the relevant times).

> signals, then harm will result to many, including investors. It is reasonable to assume that if a firm enters the local market based on interconnection rates and resale rates that are artificially low and then offers a pricing schedule to consumers that could not be sustained when costs to the provider are increased, then harm will come.

Id. at 4.

If this Commission chooses to impose some form of interim rates pending further review, GTE's proposed rates would help to ameliorate the problems inherent in applying interim rates. First, if the Commission is addressing the pricing standards that are established by the Act, it likely and ultimately will find that GTE's rates are the most accurate for the services and elements being provided. Little or no use of a true-up mechanism will be required. Second, even if the Commission completed its review of cost and price studies to find future rates at some figure slightly below GTE's, GTE proposes to refund any excess portion of the rate finally and reasonably determined to be appropriate.

In contrast, if AT&T's and MCI's rates were applied, there would be no way for GTE to make up the shortfall. There would be no way to recompense GTE for the tremendous market share loss resulting from artificially low interim rates. Application of artificially low interim default rates would provide AT&T and MCI an unfair advantage over GTE in attracting customers, beginning from the moment competition takes over. Instead of end-user prices set to reflect their true costs, the interim rates, to MCI's and AT&T's advantage, would shift those costs to GTE. They thereby would have the luxury of setting their end-user prices lower than demanded by a real-world cost structure. Consumers would be duped, and GTE would lose market share to the unfairly competing ALEC. Moreover, AT&T and MCI's promise of lower rates would cause loss of goodwill among GTE's customers, who may well conclude that, if AT&T and MCI are offering super-low prices for service and undercutting GTE, then they should switch carriers. This Commission should avoid making its regulations the sole reason that customers would reach such a conclusion.

In short, the Commission has only one reasonable pricing option: adopt GTE's proposed rates. Only then will there be no need for any party to pursue takings claims or other damage suits against the state of Florida, this Commission and perhaps others.

<u>Issue 14</u>: Should GTEFL be prohibited from placing any limitations on AT&T's and MCI's ability to combine unbundled network elements with one another, or with resold services, to provide telecommunications services to consumers in any manner AT&T and MCI choose?

****No. ALECs cannot reassemble network elements to avoid taking wholesale offerings. The Act's pricing standards for unbundled elements and services offered for resale are deliberately different. AT&T and MCI wish to create arbitrage opportunities that would eviscerate the Act's unambiguous distinction between unbundled elements and wholesale services.****

AT&T and MCI should not be permitted to avoid the mandated resale pricing standards by recombining unbundled elements into a service equivalent to a wholesale offering. (McLeod, Tr. 1268.)

Under the Act, unbundled network elements are priced at cost plus a reasonable profit. (47 USC § 252(d)(1).) Retail services made available for resale are priced at a wholesale rate. (47 USC § 252(e).) Based on this distinction, AT&T and MCI have identified an arbitrage opportunity that could provide them a substantial windfall. Specifically, they seek permission to take and then recombine unbundled elements in any manner they wish, allowing them to replicate resold services. For instance, they would likely purchase unbundled loop and port services in combination at unbundled rates to avoid buying basic local service for resale. (Wellemeyer, Tr. 1447.) Buying unbundled elements rather than wholesale offerings will allow them, in some cases, to obtain the same result, but for much less money.

This proposal would render meaningless the Act's distinction between unbundled elements and resale and the associated, respective pricing standards. Neither Congress nor the FCC intended to encourage this sort of tariff arbitrage. (Wellemeyer, Tr. 1447.)

Issue 15(a): Should GTEFL be required to provide AT&T and MCI with access to GTEFL's unused transmission media?

****No. Dark or dim fiber is not "used in the provision of a telecommunications service." As such, it is not a network element subject to unbundling under the Act.****

The Act defines "network element" to include only those facilities that are "used in the provision of a telecommunications service." (47 USC § 3(45) [emphasis added].) ILECs do not "use" dark fiber in their networks--transport circuits must be "lit" to be used. MCI witness Powers confirmed that dark fiber is not used to provide telecommunications services. (Powers, Tr. 1005.) Because dark fiber does not meet the statutory definition of a network element, it is not subject to unbundling. (Hartshorn, Tr. 1145-46.) As MCI's witness Powers admitted, the FCC has not required ILECs to make dark fiber available. (Powers, Tr. 964.)

In addition to sound legal reasons, it is good policy to restrict access to GTE's dark fiber. Dark fiber is "spare" equipment, similar to fiber stored on a reel in a warehouse. It has been placed in the ground only because it makes better economic sense to do so from a network planning perspective. Allowing other parties to take advantage of GTE's placement of spare cable disrupts its planning process, thereby raising its costs. It is additionally unfair because, under MCI's proposal, GTE would be required to provide plant records to detail the location of excess capacity. (Powers, Tr. 965.) ALECs could thus discern GTE's expansion plans and devise their own, preemptive competitive responses.

Issue 15(b): What are the costs incurred, and how should those costs be recovered?

****Because dark fiber is not an unbundled element, GTE has provided no information on costs.****

Because it is not an unbundled element under the Act, GTE has not calculated the costs that would be incurred in association with the provision of dark or dim fiber. If GTE chooses to provide this item, the parties should negotiate its price.

Issue 16: At what points should AT&T and MCI be permitted to interconnect with GTEFL?

****AT&T and MCI may interconnect with GTE at any of the minimum technically feasible points required by the FCC. Interconnection at additional points will be at GTE's discretion.****

Under the Act, interconnection can take place only at points where it is technically feasible. (47 USC § 251(c)(2)(B)).) To this end, many factors may frustrate or even prevent interconnection, including incompatibility between ALEC and ILEC equipment; too many ALECs desiring interconnection at a given point; the inability of ILEC switching and transport equipment to handle additional traffic; and unavailability of collocation space. (Munsell, Tr. 1542.) These factors demonstrate that technical feasibility should not be presumed (and interconnection mandated) just because an ALEC may have already interconnected at a given point. (Munsell, Tr. 1555-56.) This approach, advocated by

AT&T and MCI, is not required by the FCC's Order, which states that interconnection at a particular point using particular facilities is only "substantial evidence" of technical feasibility at that point or at "substantially similar points in networks employing substantially similar facilities." Thus, interconnection cannot occur at any point and in whatever manner an ALEC wants. The requested point must be substantially similar and employ substantially similar facilities, and even then interconnection is not presumptively feasible. (Munsell, Tr. 1556.)

Issue 17(a): What access should be provided by GTEFL for its poles, ducts, conduits, and rights-of-way?

****Despite GTE's concerns about the constitutionality of the Act's provisions on this matter, GTE will provide access to these facilities in accordance with its property rights and reasonable concerns for network safety, reliability, capacity, and engineering standards.****

The Act did not strip GTE of its property rights. While GTE will allow other companies access to its poles, ducts, and rights-of-way, it should not be precluded from applying reasonable constraints on that access. (Jernigan, Tr. 1190-1205.)

GTE disputes AT&T's and MCI's apparent belief that GTE's property should be treated as if it were in the public domain. MCI and AT&T want this Commission to force GTE to allow ALECs unconditional access to its facilities. MCI's Mr. Price, for example, testified that GTE should not be permitted to refuse access for any reason--even network safety and reliability. He believes that GTE should simply trust MCI not to make requests that might harm the network, (Price, Tr. 908-09), an approach that GTE would necessarily have to take with regard to any interconnector.

This obviously unreasonable position deserves little discussion. It is not a matter of preference, as Mr. Price asserts, (Tr. 908), but of practicality. GTE, and only GTE, knows its network well enough to understand when an access request may present safety, reliability, capacity, or engineering concerns. Moreover, GTE will be held responsible if something does go wrong because it still owns the facilities. Consistent with the FCC's Order, then, this Commission should permit GTE to take into account issues of capacity, safety, reliability, and engineering when considering access requests. (*See* FCC Order at ¶ 1176.) In addition to the scope of access granted under the Act, the reservation of space issue has been contentious. GTE asks the Commission to allow GTE to reserve space on its poles and in its conduits for its own future needs. As the Commission knows, GTE has continuing carrier of last resort obligations; reserve capacity is essential to ensuring its ability to quickly serve new customers. In addition, depriving GTE of the ability to reserve space on its own facilities will discourage it from constructing facilities sufficient to satisfy future needs. Efficient investment and long-range strategic planning will become impossible. (Jernigan, Tr. 1204-05.)

Forbidding GTE from reserving space for its own future needs is also squarely at odds with the language of section 224(f)(1) of the Act, which applies a nondiscrimination requirement only to those for whom access must be "provided," not to the owner, whose "access" is synonymous with its ownership right.

GTE disagrees with the FCC's interpretation that the Act does not permit non-electric utilities to reserve space on their own facilities. GTE believes that the States, not the FCC, are in the best position to determine how best to accommodate carrier of last resort obligations as they may exist in State statutes. Further, a prohibition on GTE's reservation of space, coupled with the access rate requirements of section 224 and the FCC's implementing regulations, effects a taking of GTE's property in violation of the U.S. and Florida Constitutions. In *Loretto v. Tele-prompter Manhattan CATV Corp.*, 458 U.S. 419, the U.S. Supreme Court made it clear that property rights include the rights to "possess, use, and dispose" of the property. *Id.* at 435. The Court emphasized that "the power to exclude" is a key attribute of property ownership. *Id.* By its interpretation of section 224, the FCC would strip GTE, as a property owner, of its right not only to exclude others, but to make use of its own property in the future.

This Commission has considered the takings issue before in the collocation context. There, it determined that it had no authority to take the LECs' property: "we observe that the Commission lacks the power of eminent domain which is required to take property. We agree that the authority to determine the appropriate compensation for a taking rests with the judiciary." *Petition for Expanded Interconnection*, 94 FPSC 3:399, 405 (1994).

The same conclusion applies here. This Commission cannot, consistent with its previous opinion interpreting Florida law, deny GTE the use of its property, whether it is central offices, poles, conduits, or other facilities. That use includes reservation of space for future needs. The Commission must thus reject AT&T's and MCI's position on this issue.

<u>Issue 17(b)</u>: What are the costs incurred, and how should those costs be recovered?

****The costs will vary with the site of the requested access. The party requesting access should pay all of the costs, including those associated with make-ready, replacement, rearrangement, and any other, related activities.****

The costs of access to any particular pole, conduit, or right-of-way will vary with the site and the nature of the access request. These costs will include those associated with make-ready activities, rearrangement or replacement of facilities, and any other tasks required to fulfill the particular access request. The costs applicable will be calculated after a specific request is made.

Section 224 of the Act sets forth a formula for determining the costs a pole owner will be entitled to recover, but the FCC has deferred the determination of appropriate rates for pole attachments and other facility uses to a future proceeding. (FCC Order at ¶ 1215.) GTE will take the position there, as it does here, that to the extent that section 224 mandates access, GTE must recover the fair market value of the property taken. This is the only compensation standard that accords with Florida and federal constitutional law.

Issue 18: Does the term "rights-of-way in Section 224 of the Act include all possible pathways for communicating with the end user?

****No. The Act does not use the term "pathway" anywhere, and Congress did not intend such a broad expansion of the traditional right-of-way concept.****

The Commission should reject MCI's and AT&T's suggestion that the Act confers a right of access to all possible "pathways" to end users. The term "pathway" appears nowhere in the Act, and there is no indication that Congress intended to expand the meaning of right-of-way, which has always referred to a right to place poles or conduits across private or public property. (Jernigan, Tr. 1200-01.) As the FCC correctly notes, reading "pathway" into the Act would grant ALECs "access to every piece of equipment or real property owned or controlled by the utility." (Order at ¶ 1185.) This result goes far beyond the Congress' intent to allow other carriers to "'piggyback" along distribution networks owned or controlled by the utility." (FCC Order at ¶ 1185.)

The concept of ownership or control the FCC notes here is also important in considering the access issue. Many of GTE's right-of-way easements have been obtained from private owners (rather than governmental entities). They are often non-assignable, such that GTE lacks the ownership or control necessary to grant access to third parties. While GTE will arrange for ALECs to have access to public and non-exclusive private rights of way, ALECs will need to negotiate with the private property owner for access to exclusive rights of way, just as GTE must. (Jernigan, Tr. 1202-03.)

<u>Issue 19</u>: Should GTEFL be required to provide interim number portability solutions including remote call forwarding, flex-direct inward calling, route index portability hub, and local exchange route guide reassignment?

****No. It would be a needless waste of resources for GTE to provide all four of these options on just an interim basis, particularly when LERG reassignment isn't even a portability method. GTE will continue to offer tariffed remote call forwarding and is also willing to provide direct inward dialing.****

AT&T has requested that GTE provide four methods of number portability on an interim basis: remote call forwarding (RCF); directory number-route indexing (DNRI); route indexing-portability hub (RIPH); and local exchange routing guide (LERG) reassignment. GTE asks the Commission to order, at most, only interim RCF and DID service (which is different from flex-inward direct calling).

As an initial matter, the Commission can easily eliminate LERG from AT&T's list of recommendations because it is not a number portability method at all. It is, more accurately, a proposed change to the industry standard for assigning and routing numbers to end offices. While LERG reassignment can reassign numbers to different carriers or end offices, it is not a way of porting numbers. While a customer may keep the same number with a different carrier under the code format change AT&T proposes, number porting will still be necessary if the customer does not want to change his carrier. (Menard, Tr. 2105.)

Even if LERG reassignment could be considered a portability method, it still has severe drawbacks. Among other things, LERG reassignment would require elimination of the industry standard for routing telephone calls. Every switch of every company--not just GTE--would need to be reprogrammed. Billing and other support systems that are based on NPA-NXX codes would need to be modified. And, as noted, a true method of number portability would still be required if a customer's number was reassigned to a provider he had not chosen. (Menard, Tr. 2107-08.)

AT&T's number portability expert himself recognized the limitations of LERG reassignment. AT&T's analysis pointed out that LERG was designed to deal with low volume network rearrangements, rather than the potentially large volume of service provider moves. (Crafton, Tr. 430.) And while Mr. Crafton testified that AT&T "could live with LERG reassignment at the NXX level," (Crafton, Tr. 432), GTE has no end users with entire NXXs, (Menard, Tr. 2127), so AT&T does not need LERG reassignment at all from GTE. In any case, LERG reassignment at the 1000 number block is not technically feasible because of the massive billing system and administrative changes it would require. (Menard, Tr. 2129.)

Likewise, DNRI (called "route index portability hub" in this Issue) is not currently available over GTE's network. Its implementation would require, among other things, expensive modifications to GTE's ordering, billing, and provisioning systems. GTE should not be expected to use its limited resources for these undertakings when DNRI will be only an interim measure. The FCC has directed carriers to begin implementing long-term number portability solutions as soon as October 1, 1997. (First Report & Order and Further Notice of Proposed Rulemaking in CC Docket 95-116, issued July 2, 1996 (Number Portability Order), at ¶¶ 77, 110; Menard, Tr. 2110.)

GTE is willing to provide two options--direct inward dialing (DID) and RCF. These are good interim number portability choices because they are reliable, proven methods and can be provided today without costly network modifications. (Menard, Tr. 2099.) In fact, this Commission has already approved RCF for interim portability. (Menard, Tr. 2097.)

AT&T has not proven that its proposed methods would serve its expressed needs any better than would RCF and DID. While GTE recognizes that these options have drawbacks as <u>permanent</u> solutions, GTE is not proposing them as such in this arbitration. GTE's position is fully consistent with the FCC's reasoning that "Congress intended that currently available number portability measures be provided until a long-term number portability method is technically feasible and available." (Number Portability Order at ¶ 111.)

GTE believes its RCF and DID proposal satisfies MCI. (*See Price*, Tr. 812.) However, because of the brief window of use of any interim arrangements, the Commission should reject MCI's proposal for ILECs to adopt meet-point billing arrangements for access charges paid by IXCs for calls terminated via LEC-provided interim portability arrangements. (Menard, Tr. 2120.) This approach would require extensive billing system modifications. The cost and effort of making such modifications is not justified given their limited lifespan. (Menard, Tr. 2120.)

<u>Issue 20</u>: What should be the cost recovery mechanism to provide interim local number portability in light of the FCC's recent order?

****GTE's tariffed rates for RCF should remain in place. GTE's costs of implementing DID and any other methods the Commission might order should be recovered through appropriate tariffs or a cost pooling system.****

The Act states that the cost of establishing number portability "shall be borne be all telecommunications carriers on a competitively neutral basis as determined by the FCC." (47 USC § 251(e)(2).) While the FCC has set forth guidelines for the States to use in setting interim number portability rates, it has also recognized that States may require carriers to file tariffs, as Florida has done. (Menard, Tr. 2108.)

In any event, the number portability issue affects all LECs, not just those currently in arbitrations. For this reason, this Commission has already scheduled hearings to explore the issue of competitive neutrality with respect to pricing for number portability. GTE, as well as MCI and AT&T, are participating in that docket, which is a more appropriate forum to focus on compensation issues that reach beyond this arbitration. In the meantime, the Commission should refrain from making any changes in GTE's RCF tariff. Any rates set for DID should be based on GTE's costs to provide the service.

<u>Issue 21(a)</u>: Should GTEFL be prohibited from placing any limitations on interconnection between two carriers collocated on GTEFL's premises, or on the types of equipment that can be collocated, or on the types of uses and availability of the collocated space?

****No. GTE should be permitted to place reasonable conditions on cross-connections between ALECs and ALECs should not be permitted to collocate switching, enhanced services or customer premises equipment.****

GTE believes the FCC's Order goes beyond the scope of its authority to order collocation under the principles of statutory construction enunciated in the District of Columbia Circuit Court's 1994 decision overturning the FCC's previous collocation mandate. *See Bell Atlantic Tel. Cos. v. F.C.C.*, 24 F.3d 1441, 1445 (D.C. Cir. 1994.) (Cantrell, Tr. 1229-30.) For example, GTE does not believe, as the FCC does, that the Act imposes a duty to facilitate interconnection between third parties on the ILEC's premises. Despite these concerns, GTE recognizes that this Commission has allowed such cross-connections in its Order number PSC-96-0445-FOF-TP. Although that Order is on appeal, GTE will for the time being permit cross-connections between collocating ALECs as long as the provisioning of the cross-connect by GTE or the ALECs shall be at GTE's option. In addition, the connected equipment must be used for interconnection with GTE or access to GTE's unbundled network elements; space must be available; GTE must be able to provide reasonable security arrangements; and the ALECs must pay the full costs associated with the cross-connect. (Cantrell, Tr. 1240-41.)

With regard to the types of equipment that may be collocated, AT&T and MCI seek the right to collocate any equipment that may be merely convenient or advantageous. This is not the Act's standard, which requires only collocation of equipment that is "necessary for interconnection or access to unbundled network elements." (47 USC §251(c)(6).) Expansion of this standard to allow placement of any type of equipment ALECs might desire presents obvious space exhaustion and related concerns. (Cantrell, Tr. 1232-33.) In particular, equipment which provides switching functionality will not be permitted. GTE's position is consistent with the FCC's on this point. (Cantrell, Tr. 1254.)

Further, the Act does not permit ALECs to demand collocation at any site they might choose, including vaults and remote units. Such collocation is not limited to what is necessary for interconnection and fails to consider space limitations. In addition, there is little benefit from collocating at sites that do not perform routing or rating functions. Nevertheless, GTE would be willing to consider collocation at any structure that houses network facilities on a case-by-case basis. (Cantrell, Tr. 1236-37.)

Finally, GTE should be permitted to reserve space for future use in accordance with a five-year planning horizon. Planning for GTE's network, already very complex, will grow increasingly so as it begins to offer numerous unbundled components (*e.g.*, loops, ports, switching). Moreover, any enhanced network functionality will be available for all end users, those of both ILECs and ALECs. The more services sold to an ALEC, the more space GTE will need to expand.

GTE believes any ALEC opposition to GTE's proposal for reservation of space may be based on the mistaken assumption that GTE will impose restrictions on the amount of space a collocator can request. MCI at least held this assumption before the hearing. (Power, Tr. 982.) GTE's physical collocation tariff does not, in fact, limit the amount of space an individual ALEC can request. (Cantrell, Tr. 1248.)

Finally, the Commission should reject the various suggestions advanced by AT&T and MCI that will require GTE to give away unbundled network components for free or that arbitrarily raise GTE's costs. To this end, GTE should not be forced to pay for trunking for AT&T to interconnect in alternate locations when space is not available for either physical or virtual collocation. It should not be ordered to give ALECs the right to convert existing virtual collocation arrangements to physical ones at no charge. It should not be compelled to implement build-outs anytime and anywhere AT&T requests them. (Cantrell, Tr. 1245-56.) And it should not be required to comply with uniform time frames for establishing collocations. In this regard, MCI called into question the reasonableness of its own proposed three-month interval for physical collocation, (Powers, Tr. 978), with other testimony that indicated GTE should have six months to complete make-ready work for pole attachments and the like (Price, Tr. 907).

Issue 21(b): What are the costs incurred, and how should those costs be recovered?

****GTE's costs associated with collocation are shown in its cost study submitted in this docket. The parties requesting collocation should pay all of the costs associated with their individual requests.****

Consistent with GTE's view that collocation is a taking of its property, GTE should receive just compensation based on the fair market value of the property at issue. Despite this conviction, GTE's alternative position in this docket is that it will permit collocation if the costs of such collocation are fully recovered from the entity seeking such collocation, in accordance with the Act. GTE's costs are reflected in its cost study.

Issue 22: What should be the compensation mechanism for the exchange of local traffic between AT&T or MCI and GTEFL?

****GTE's rates for termination of an ALEC's traffic should be cost-based, as the Act provides. Rates should be determined in accord with the Market Determined-Efficient Component Pricing Rule. Establishment of any bill-and-keep arrangements should be strictly at GTE's discretion.****

Under the Act, any compensation mechanism for transport and termination of traffic must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." The cost determination must be made "on the basis of a reasonable approximation of the additional costs of terminating such calls." (47 USC § 252(d)(2)(A)i&ii.)

The FCC interpreted this standard to require the States to apply one of three rate-setting options: (1) TELRIC plus a reasonable allocation of joint and common costs; (2) bill-and-keep, if neither party rebuts the FCC's symmetrical pricing presumption and if traffic is approximately equal; and (3) the FCC's default proxy rates. Because the Eighth Circuit's Stay has rendered the FCC's pricing provisions ineffective, Florida is now free to devise any method it wishes for termination and transport. Accordingly, it must adhere to the letter and intent of the Act and allow the parties to recover their respective true costs of transport and termination.

These costs for GTE should be determined using the market-efficient component pricing rule explained by GTE witness Sibley. (Munsell, Tr. 1561.) In no event should the Commission accept AT&T's TELRIC calculations, which grossly underestimate GTE's costs. This criticism is more fully explained above, in response to Issue 13 and in Dr. Sibley's testimony. (Munsell, Tr. 1561.)

A symmetrical pricing approach will also result in underrecovery of GTE's costs. As GTE witness Munsell testified, AT&T's call termination costs will most likely be less than GTE's due to the expectation that AT&T will deploy newer equipment using a relatively higher percentage of its network's capacity. Under symmetrical pricing, GTE will thus subsidize AT&T, because AT&T will receive more than it costs AT&T to complete a call. This outcome is impermissible under the Act. (Munsell, Tr. 1562-63.)

The Commission should also refuse to mandate a bill-and-keep arrangement. There is no way for this Commission to determine whether the volume of traffic exchanged will be equal, such that bill-and-keep would produce adequate cost recovery. (Munsell, Tr. 1564.) A bill-and-keep mandate would thus lack the requisite evidentiary foundation.

Nevertheless, GTE is willing to voluntarily agree to bill and keep as long as the proposed arrangement, predicated upon approximately equal traffic flows, would be for transport and termination of <u>local</u> traffic only. Also, interLATA access must be carried over separate trunk groups and not intermingled with local and local toll traffic. (Munsell, Tr. 1564-65.) In the spirit of promoting the competitive process, GTE proposes a broad definition of roughly balanced as equating to plus or minus ten percent. The originating/terminating split could thus be up to 60/40. Either party may request studies not more frequently than quarterly if traffic is suspected to fall outside this parameter. Further, either party could terminate the bill-and-keep arrangement with twelve months' notice. (Munsell, Tr. 1565.)

<u>Issue 23</u>: What intrastate access charges, if any, should be collected on a transitional basis from carriers who purchase GTEFL's unbundled local switching element? How long should any transitional period last?

****Until local rates are rebalanced and intrastate universal service issues resolved, full intrastate access charges should be collected from ALECs purchasing GTE's unbundled local switching element.****

GTE will assess a per-minute charge to ALECs for all traffic it switches. For calls that "traverse" an unbundled local switching element (<u>i.e.</u>, port) that the ALEC purchased and that would cause access charges today, GTE will charge the local switching rate plus the carrier common line and residual interconnection charges. These are not "access charges"; rather, they are local switching charges that provide continued contributions in lieu of access charges. They do not alter the ALECs' right or obligation to assess access charges. The ALEC will be responsible for assessing such charges to IXCs. For calls that do not traverse an unbundled port, full switched access rates would apply.

The FCC notes that application of these elements is intended to provide continued contribution to universal service and local service rate support. Therefore, rates should continue at their currently tariffed levels and not at the diminished levels contained in the FCC's Order. Accepting the FCC's approach would be arbitrary and capricious rate making, since no justification has been provided for applying only 75% of the RIC and because GTE's rates which enjoy contribution from access charges have not been rebalanced. (Trimble, Tr. 1859-60.)

<u>Issue 24</u>: Should GTE be required to provide notice to its wholesale customers of changes to GTEFL's services: If so, in what manner and in what time frame?

****GTE's tariff filing will be sufficient notice of changes in its services. GTE cannot provide longer notice windows than those that apply to its own internal operations.****

GTE will file tariffs with the Commission to reflect changes to existing services. A tariff <u>is</u>, in purpose and effect, a public notification. The statutory 15-day period between the filing date and the effective date would therefore be adequate advance notice. (McLeod, Tr. 1311.) As Mr. McLeod testified, GTE itself often does not know about service changes much more than a day or two before the tariff is filed. (McLeod, Tr. 1310.) This just-in-time tariff change process is consonant with the demands of a competitive marketplace. Service development cycles are constantly being compressed, and details regarding ordering, billing, feature availability, and prices are determined literally days or hours before a filing. (McLeod, Tr. 1310.) AT&T's proposal for 45-day advance notice (which GTE assumes would apply only to GTE retail services that AT&T takes at wholesale) (Shurter, Tr. 306), is severely out of step with these practical considerations. It would be impossible for GTE to comply with this demand—or with any uniform, mandatory notice period--at least not without crippling GTE's ability to quickly respond to its competition. If a specific notice period is imposed, it is inevitable in some instances that GTE will have to either delay introduction of a service or violate the notice rule. This is not the way to create fair and effective competition.

Issue 25: What should be the term of the agreement?

****The agreement should last for two years. Anything longer would be at odds with the rapidly changing telecommunications marketplace.****

The initial, arbitrated agreement should last no longer than two years. The telecommunications marketplace is in the throes of stunning change. Technology continues to evolve at a record pace. The legal regime governing the industry has been completely overhauled. Firms are combining and recombining in ways that defy traditional lines of interest.

It is anyone's guess as to what market contours this chaos will eventually produce. Long-term agreements between firms operating in the shifting environment are more likely to undermine competition than promote it. Given all the uncertainty surrounding the advent of local competition, MCI's and AT&T's proposed 5-year term, (Shurter, Tr. 189), is far longer than the period of transition from monopoly to competition. Even though AT&T argues for a five-year term, it proposes to hedge its bets with a provision giving it the unilateral ability to terminate its contract with GTE on 90 days' notice. (AT&T Contract, § 3.1.) This wholly unreasonable proposal (which amounts to elimination of any term provision at all) illustrates AT&T's attitude that it should be permitted to saddle GTE with all the risks and uncertainties of AT&T's doing business. (McLeod, Tr. 1282.) AT&T attempts to rationalize its five-year proposal with analogies to the interexchange market twenty years ago. (Shurter, Tr. 189.) This disingenuous argument, of course, asks the Commission to ignore the enormous differences between AT&T today--a giant corporation with the ability to leverage the biggest share of the interexchange market--and AT&T's nascent long-distance challengers two decades ago.

AT&T's and MCI's proposal will prevent efficient readjustment of relationships between market participants that will likely be inevitable as competition progresses and the effectiveness of the initial ground rules is tested. A two-year term properly balances the interests of all competitors, GTE included. It is long enough to establish open and effective market entry by MCI and AT&T, particularly considering the sophistication and financial wherewithal of these competitors. (McLeod, Tr. 1282.) At the same time, it does not risk imposition of long-term and irreversible disabilities on GTE.

Issue 26: Can the agreement be modified by subsequent tariff filings?

****While negotiation is the best way to establish terms governing competitive markets, entry of an agreement will not affect the Commission's jurisdiction to require tariff filings.****

GTE believes that negotiation can produce conditions that will most effectively foster open competition. Nevertheless, GTE also recognizes that Florida law requires it to file tariffs with the Commission. (McLeod, Tr. 1328-31.) It is unrealistic to expect that GTE will never need to make changes in the services it offers today and, indeed, MCI does not disagree that GTE should have the ability to file tariffs to modify its retail services subject to resale. (Tr. 1331.) Otherwise, GTE could not keep pace with customer demand, an outcome that would harm both GTE and resellers taking its wholesale services.

Particularly given the level of uncertainty accompanying the initiation of local competition, GTE does not believe the Commission should constrain its jurisdiction by a blanket declaration that tariffs can never affect the contracts that result from this arbitration. It should retain the authority to review and approve tariffs based upon all considerations pertinent at the time, including the public interest and market factors. (McLeod, Tr. 1308.)

Issue 27(a): When MCI resells GTEFL's services, is it technically feasible or otherwise appropriate for GTEFL to brand operator services and directory services calls that are initiated from those resold services?

****No. Such branding would require customized routing, which is not technically feasible. Branding itself raises its own set of technical problems, which cannot be resolved without significant time and expense.****

Despite the designation of this issue as specific to MCI, GTE believes AT&T has also raised it, and will accordingly include AT&T in this response.

Under the FCC's rules, an ILEC can refuse ALECs' unbranding or rebranding requests with regard to resold operator, call completion, or directory assistance service if the ILEC proves that the restriction is reasonable and nondiscriminatory, such as showing that it lacks the capability to comply with such requests. 47 CFR 51.613(c). GTE has made the requisite showing in this case.

GTE witness Johnson has testified that GTE is not currently capable, for technical reasons, of providing unique branding of ALECs' services in a resale or unbundled environment. Before branding can occur, customized routing must be possible. As Mr. Johnson testified, the requisite vendor-endorsed solution to this issue does not yet exist. (Johnson, Tr. 1530-31.) Thus, Mr. Shurter is wrong in thinking that the direct routing issue is one of policy, rather than technical feasibility. (Shurter, Tr. 223.)

Even if the routing issue were resolved today, the branding process raises its own set of technical concerns. Pre-branding (*i.e.*, at the beginning of a directory assistance call) requires, among other things, sufficient identification capabilities and branding capacities at the operator service (OS) switch; a dedicated trunk group to properly identify calls for branding; and extensive table work within each OS network switch for each individual ALEC's branding phrasing.

Post-branding (which can occur at any time during a recorded response to a DA call) on operator services is not, in practical terms, technically feasible because MCI would have to have all its customers designated to unique NPA/NXX groups. For resold lines and unbundled ports, of course, ALECs will share many numbers within a single NPA/NXX. (Johnson, Tr. 1531-32.)

Finally, it is unreasonable to expect GTE to route part of an ALEC's traffic to its platform and part to GTE. To the extent that GTE is eventually able to satisfy branding requests, it must know whether an ALEC intends to use its own operators or GTE's. GTE should not be forced to prepare for both possibilities, as it seems MCI wishes. MCI will implement only one option, so GTE should only be required to implement one option. Further, since an ALEC could order unique branding from GTE, then quickly transition to using its own operators, GTE would require up-front recovery of all development and implementation costs. (Johnson, Tr. 1533.)

Issue 27(b): When GTEFL's employees or agents interact with MCI's customers with respect to a service provided by GTEFL on behalf of MCI, what type of branding requirements are technically feasible or otherwise appropriate?

****It is reasonable and appropriate for GTE to continue to identify its employees and its business offices as its own. GTE is willing to provide only a no-access door-hanger when providing services to MCI or other ALEC customers.****

MCI's position on this issue is emblematic of the extreme attitude it and AT&T have taken in this proceeding. They expect exactly the same opportunities to distinguish their products and services as they would have if they chose to be facilities-based competitors, instead of resellers. This is an unreasonable expectation and a burden that is unintended by the Act.

MCI's proposal for personnel branding would require GTE contact employees to change their identities several times a day, depending on the carrier for the subscriber served at any particular time. Because whatever is ordered in this proceeding is likely to be the standard for GTE's relationships with other ALECs, GTE employees would need to carry company-specific branding material--uniforms, truck magnets, literature and the like--for an unlimited number of ALECs and for GTE itself. GTE employees would spend an inordinate amount of time trying to determine for whom they were working and coordinating the branding of its various carriers. GTE could never recover the intangible, but very real, costs of the inefficiencies this requirement would introduce into its operations. At most, GTE should be expected to provide only an unbranded door-hanger if a GTE repair person makes a repair call and finds no one on the premises.

Branding of GTE personnel in repair centers and other business offices should not be an issue. MCI customers will call MCI, not GTE, for repairs and other service-related matters. (McLeod, Tr. 1386.) If an MCI customer misdirects his call to a GTE service center, GTE will give the customer the telephone number for MCI, just as MCI would be expected to do if the situation is reversed.

<u>Issue 28</u>: In what time frame should GTEFL provide CABS-like billing for services and elements purchased by MCI?

****GTE can provide CABS billing today for the interconnection services MCI purchases.****

This issue was discussed above, in GTE's response to Issue 6, concerning access to GTE's OSS. In brief, GTE can provide CABS billing today for trunk-side services, which is what this question seems to contemplate. Development of CABS billing for line-side services is underway.

<u>Issue 29</u>: What are the appropriate rates, terms, and conditions for access to code assignments and other numbering resources?

****To the extent that GTE serves as central office code administrator for a given region, it will support all ALEC requests related to central office (NXX) code administration and assignments in a timely and effective manner.****

For the regions in which it is the Central Office Code Administrator (today, the 813 and 941 area codes), GTE will respond to MCI and AT&T requests for numbering code assignments and related matters in a timely and effective manner. All carriers should comply with code administration requirements as prescribed by the FCC, this Commission, and industry guidelines. It is, of course, a carrier's responsibility to program and update its own switches and network systems to recognize and route traffic to the other carrier's assigned NXX codes at all times. Neither carrier shall impose any fees or charges on the other carrier for such activities. (Menard, Tr. 2119.)

GTE believes its position on this issue satisfies MCI's request for nondiscriminatory access to code assignments and other numbering resources.

<u>Issue 30</u>: Should the agreement be approved pursuant to Section 252(e)?

****Yes. The Commission must approve the agreement, but it should recognize that contract provisions that were not arbitrated should be considered under the *nondiscrimination* and public interest standard of section 252(e)(2)(A), rather than (B), which governs the arbitrated provisions.****

Under the Act, the Commission must approve the agreement, whether it results from negotiations or arbitration. However, the Act establishes different standards of review for negotiated and arbitrated provisions. Under section 252(e)(2)(A), an agreement (or portion thereof) adopted by negotiation may be rejected only if it discriminates against a telecommunications carrier not a party to the agreement or if the agreement's implementation is not consistent with the public interest. If the agreement (or any portion thereof) is adopted by arbitration, the Commission must consider whether it fails to meet the requirements of Section 251, associated regulations, or the standards set forth in subsection 252(d).

This language contemplates that portions of an agreement may be reviewed under subsection 252(e)(2)(A), governing negotiations, while other portions may be assessed under subsection 252(e)(2)(B). In the present case, GTE and AT&T and MCI, respectively, have agreed to provisions which are not being arbitrated. Although these provisions must still be approved by the Commission, they must be considered under the nondiscrimination and public interest standards of section 252(e)(2)(A), rather than the 252 (e)(2)(B) standard.

<u>Issue 31</u>: What are the appropriate post-hearing procedures for submission and approval of final arbitrated agreements?

****The parties should be directed to negotiate an agreement that accords with the terms of the Commission's order in this arbitration. To avoid future disputes, the parties must have sufficient time to incorporate the Commission's directives into a full and final agreement.****

In resolving the issues presented for arbitration, the Commission must "provide a schedule for implementation of the terms and conditions by the parties to the agreement." (47 USC § 252(c).) The Commission should thus direct GTE and MCI and AT&T, respectively, to negotiate an agreement incorporating the terms of its Order. The agreement will then be submitted for approval in accordance with section 252(e)(1).

The Commission has been asked to resolve numerous complex issues in this case. Translation of these resolutions into specific contract terms will be no simple task (AT&T's proposed contract alone is about 300 pages long). In order to avoid future disputes, the Commission must allow sufficient time to incorporate its findings into a comprehensive and integrated agreement. Two weeks, as MCI and AT&T propose, is not enough. Indeed, the parties were given almost that long (12 days) to write their Posthearing Statements. In comparison, two weeks to produce a contract governing the telecommunications market structure is plainly unreasonable. This proposal would also unfairly burden GTE, which would have to negotiate and finalize two of the most complex commercial contracts it will ever write within an unduly compressed time frame, while MCI and AT&T, respectively, need only concern themselves with one agreement each.

GTE believes 30 days is a reasonable period for contract finalization, particularly considering that MCI and AT&T have each proposed 14 days. GTE's proposal is just slightly more than twice that, which properly accounts for the fact that GTE will be negotiating one contract each for MCI and AT&T.

Respectfully submitted on October 28, 1996.

By: ______________________

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Posthearing Statement in Docket Nos. 960847-TP and 960980-TP were hand-delivered (*) or sent via overnight delivery (**) on October 28, 1996 to the parties listed below.

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