

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of AT&T Com-)
munications of Ohio for Arbitration of In-) Case No. 96-832-TP-ARB
terconnection Rates, Terms, and Conditions)
and Related Arrangements with GTE North)
Incorporated.)

ENTRY

The Commission finds:

- (1) By Opinion and Order of May 1, 1997, the Commission resolved disputed language relative to the interconnection agreement between AT&T Communications of Ohio and GTE North Incorporated which was submitted to the Commission on March 18, 1997, for review.
- (2) In our Opinion and Order we ordered the parties to adopt specific language incorporating the Commission's directives relative to the disputed sections.
- (3) On May 16, 1997, as amended on July 24, 1997, the parties jointly submitted the interconnection agreement which they indicate either conforms or is not inconsistent with the Commission's May 1, 1997 Opinion and Order. The parties have granted the Commission additional time to consider this matter.
- (4) On July 18, 1997, the United States Court of Appeals for the Eighth Circuit (Eighth Circuit) issued its decision in *Iowa Util. Board v. FCC*, 1997 WL 4003401 (8th Cir., 1997), in which it reviewed of the FCC's First Report and Order in CC Docket No. 96-98, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*.
- (5) On July 25, 1997, GTE submitted a filing with the caption "GTE North's Supplemental Comments Regarding the Previously Filed Interconnection Agreement In Light of the Eighth Circuit's Opinion and Order". As a result of the Eighth Circuit's decision, GTE contends that the proposed interconnection agreement fails to meet the requirements for approval as set forth in Section 252(e)(2)(B) of the Telecommunications Act of 1996 (1996 Act) and, therefore, must be rejected by the Commission. In the alternative, GTE believes that the Com-

mission should direct the parties to revise the draft contract in conformance with the Eighth Circuit's decision and to then resubmit the revised contract for Commission review.

GTE identifies a number of areas in which the company believes that the proposed agreement is deficient. GTE contends that the Eighth Circuit's decision confirms the following principles: (1) the need to establish prices that are not confiscatory; (2) the need to base prices on the cost which GTE will reasonably incur using its own actual network; (3) the need to maintain the distinction between resale and unbundled network elements. GTE believes that a number of the proposed contract provisions in this matter violate these principles.

GTE provides that, based on the Eighth Circuit's decision, state commissions must provide incumbent local exchange companies (ILECs) with adequate compensation in order to avoid the ILECs pursuing a property taking claim. GTE believes that such compensation must be based on its own network (true compensation), rather than premised on an unbuilt superior network. GTE contends that this is especially true now that the Eighth Circuit has reversed the FCC's requirement that ILECs, at the request of a new entrant carrier, must provide unbundled network elements at a superior level of quality than that which the ILEC provides to itself. Therefore, GTE contends that the existing interconnection agreement must be modified in order to ensure that GTE not be required to provide new entrant carriers with a higher level of service or with a nonexistent unbundled network element. In addition, GTE states that any service ordering or implementation obligations of GTE that are not currently used by GTE or that are unnecessary to accomplish interconnection or access to unbundled network elements (e.g., notice requirements, ordering requirements, performance standards or reporting) must be deleted.

GTE further provides that, based on the Eighth Circuit's decision, the distinction between the purchase of resale versus unbundled network elements must be maintained. GTE draws this conclusion based on the Eighth Circuit's determination that ILECs should not be required to recombine unbundled network elements for the new entrant carriers for the purpose of recreating the ILECs network. GTE believes that to do otherwise would be tantamount to the purchase of a resale service but at a lower price. In accordance with the

Eighth Circuit's decision, GTE believes that the proposed agreement must be amended to require that the new entrant carriers, and not the ILECs, be responsible for the combining of unbundled network elements. Further, GTE believes that, for the purpose of combining the unbundled network elements, AT&T must enter into a collocation arrangement in order to allow for the combination of the unbundled network elements, such as the loop and the port. GTE also proposes that, under an unbundled network scenario, GTE should only be responsible for the functioning of each individual unbundled network element and not for the performance of the combined element as a whole.

GTE asserts that the Eighth Circuit decision emphasizes that an ILEC is not required to provide access to unbundled network elements at a higher level of quality than that which it provides to itself. GTE also believes that the Eighth Circuit decision rejected the FCC's prior requirement that a network element must be unbundled if it is technically feasible to do so. GTE asserts that, although the Eighth Circuit indicated that Section 251(c)(3) of the 1996 Act requires access to unbundled elements at any technically feasible point, that is not the same as determining whether a given element may or may not be unbundled. Therefore, GTE believes that the proposed interconnection agreement must be modified to only require the unbundling of network elements which are both technically feasible and currently available.

Relative to the issue of the provision of proprietary elements, GTE believes that the Eighth Circuit's decision establishes that, pursuant to Section 251(d)(2)(A) and (B) of the 1996 Act, ILECs are not required to provide access to proprietary network elements unless such access is necessary and failure to provide such access would impair a new entrant carrier's ability to provide service.

Finally, GTE directs the Commission's attention to the Eighth Circuit decision in *Competitive Telecommunications Association v. FCC*, 96-3604, 1997 U.S.Appp.Lexis 15398 (8th Cir., 1997). GTE contends that the court's decision upheld the FCC's rule that assessed two separate universal service support charges on an interim basis until universal service reforms are completed, despite the fact that these charges are not related to the cost of the unbundled network elements. GTE believes that this decision supports GTE's arguments that state

commissions must adopt an interim universal service funding mechanism in order to preserve existing intrastate subsidies.

- (6) On August 12, 1997, AT&T filed a document captioned as "AT&T's Response to GTE's Comments Regarding The Eighth Circuit's Opinion and Order". AT&T rejects the aforementioned arguments presented by GTE. AT&T represents that many of the contract sections that GTE now proposes to delete were actually negotiated and agreed to by the parties. AT&T believes that GTE has selectively presented portions of the Eighth Circuit's decision and has, in some instances, attempted to add new issues which have no relationship to the pertinent interconnection agreement. AT&T claims that GTE is simply attempting to relitigate issues for which it was previously unsuccessful before the Commission. In general, AT&T believes that the Commission's prior decisions in this case are consistent with the Eighth Circuit's decision. AT&T advocates that the Commission's prior determinations in this case were well developed and not dependent on the FCC's rules or rationale. AT&T's specific responses to the arguments raised by GTE are described below.

In regard to GTE's property takings arguments, AT&T contends that the Eighth Circuit did not make a determination regarding this matter. AT&T also calls attention to the fact that the Commission, in this proceeding, has already determined that such concerns should be properly addressed via a rate case proceeding.

In response to GTE's arguments regarding the appropriate pricing standards, AT&T purports that the Eighth Circuit decision expressed no opinion on this issue. Rather, AT&T contends that the Eighth Circuit simply vacated the FCC's pricing rules and did not review the rules on their merits.

Relative to GTE's arguments pertaining to the recombination of unbundled network elements, AT&T finds that GTE's position is unreasonable to require a new entrant carrier to incur the expense of installing its own facilities (via collocated space) for the purpose of recombining unbundled elements which are already combined in the ILECs' networks in the ordinary course of business. While acknowledging that the Eighth Circuit did vacate subsections (c) through (f) of the 47

C.F.R. §51.315 which governed the creation of new combinations of elements that presently do not exist in the ILECs' networks, AT&T believes that this position is consistent with the Eighth Circuit's decision, the 1996 Act (specifically Section 251 ([c][3]), and those portions of the FCC's rules (specifically 47 C.F.R. §51.315 subsection [b]) which were not vacated. AT&T argues that all of these provisions require that ILECs must provide access to unbundled network elements on terms that are no less favorable than those under which the ILEC provides service to itself. In response to GTE's contentions regarding the application of the Eighth Circuit's decision relative to the provision of operation support systems (i.e. ordering systems and performance standards), AT&T asserts that these are essential processes to ensure that a new entrant carrier is receiving the same quality of service as that of the ILEC. It is AT&T's position that these processes relate to the issue of nondiscrimination and not the issue of superior quality. Additionally, AT&T contends that many of the performance and technical standards contained in the proposed interconnection agreement were a result of negotiations between the companies. AT&T rejects GTE's arguments that, although these systems may be technically feasible, they are not currently available and, therefore, should not be required. AT&T believes that the Eighth Circuit's decision was intended to provide access to the existing network and all of its existing capabilities, despite the fact that some of the features may not be currently available.

Based on the above rationale, AT&T asserts that GTE is incorrect in its contention that AT&T cannot provide service simply by the utilization of GTE's unbundled network elements. In support of this assertion, AT&T contends that Section 251(c)(3) of the 1996 Act contemplates that a requesting carrier can provide service entirely through an ILEC's network without the use of its own facilities.

In response to GTE's arguments regarding the Eighth Circuit's decision pertaining to universal service funding, AT&T finds these statements to represent a new issue which goes beyond the scope of the proposed agreement and should, therefore, be rejected.

- (7) Prior to the issuance of the Eighth Circuit's July 18, 1997, decision in *Iowa Util. Board*, the Commission had performed a review of the parties' May 16, 1997 interconnection agree-

ment, as amended on July 24, 1997. Although we do believe that the submitted agreement comports with our May 1, 1997 Opinion and Order the Commission believes that a reexamination of the proposed agreement is necessary due to the Eighth Circuit's decision and GTE's filing of July 25, 1997.

The Commission does not agree with GTE's arguments regarding the Eighth Circuit's decision relative to the property-takings claim. The Commission agrees with AT&T regarding its assessment of the Eighth Circuit's decision relative to this issue. The Eighth Circuit clearly stated that the takings claim was not ripe for review in that appeal. The Eighth Circuit did not pursue any further analysis on this point. The court did note that such a claim could be presented to a federal district court under the review provisions of subsection 252(e)(6) of the 1996 Act. The Commission finds that, although the Eighth Circuit found the property-taking arguments to be premature GTE's arguments on this issue were previously addressed on the merits and rejected in the Commission's Arbitration Award of May 1, 1997.

Related to GTE's arguments regarding its takings claim is GTE's position that the Commission must modify the basis on which GTE is to be provided with adequate compensation for AT&T's usage of its network. The Eighth Circuit clearly held that it is the state commissions, and not the FCC, which are empowered to regulate the pricing of local telephone service, including the pricing of unbundled network elements. The Commission notes that it recently considered this similar issue in its September 18, 1997 Entry on Rehearing in Case No. 96-922-TP-UNC (*In the Matter of the Review of Ameritech Ohio's Economic Costs for Interconnection, Unbundled Network Elements, and Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic*). It is also important to recognize that the rates established in this proceeding represent interim prices which are subject to a true-up mechanism once the permanent rates are established in GTE's subsequent TELRIC proceeding. Therefore, the Commission rejects GTE's arguments regarding the need to modify the interconnection pricing methodology to be charged by GTE to AT&T.

Responding to GTE's representations that the distinction must be maintained between the provision of local service via resale and the provision of local service via unbundled net-

work elements, the Commission finds that the Eighth Circuit clearly intended that an ILEC's duty to unbundle network elements is not limited to only requests from facilities-based carriers. Although the court has reached such a determination, it did not determine the extent to which a nonfacilities-based carrier could utilize unbundled network elements for the provision of local service. Therefore, the Commission will take no further action on this issue at this time.

The Commission agrees with GTE's arguments that, based on the Eighth Circuit's decision, the proposed interconnection agreement language should be modified to require that, "AT&T, and not GTE, should assume responsibility for the combining of purchased unbundled network elements". The Commission also agrees with AT&T's contention that the Eighth Circuit's decision still requires the enforcement of 47 C.F.R. §51.315 subsection (b). This section provides that "except upon request, an ILEC shall not separate requested network elements that the ILEC currently combines". Therefore, the Commission directs GTE and AT&T to modify the proposed agreement language in order to reflect that, "GTE shall not be responsible for the combining of the unbundled network elements, except in those situations in which GTE presently combines the desired elements for its own purposes. In the event that AT&T is purchasing unbundled network elements which GTE does not currently combine a collocation (physical or virtual) or other appropriate arrangement will be required." The proposed interconnection agreement language should also provide that, "in those situations in which AT&T combines the unbundled network elements, GTE shall only be responsible for the functioning of each of the unbundled network elements which it provides and not for the performance of the combined elements as a whole."

The Commission agrees with GTE that, based on the Eighth Circuit decision, the proposed interconnection agreement should be modified to only require that GTE provide access to unbundled network elements at levels of quality which are equal, and not superior to that which GTE provides to itself, presently and on a going forward basis as technology evolves. The Commission finds that, although not obligated to, GTE may still choose to agree to provide a higher level of service upon request by AT&T. The Commission also concludes that

the Eighth Circuit rejected the FCC's use of "technically feasible" to determine what services must be unbundled. The Commission agrees with AT&T that the Eighth Circuit decision must be interpreted to require that GTE unbundle its existing network and all of its associated capabilities (consistent with the FCC's regulations establishing the duty to unbundle network elements), even if such services are not presently being utilized by GTE for a similar function or purpose. Any other conclusion would conflict with Congress' competitive intent for the 1996 Act and the Eighth Circuit's specific determination that operational support systems shall be considered as an unbundled network element.

In regard to the issue of proprietary elements, despite GTE's representations that ILECs are not required to provide access to proprietary network elements unless such access is necessary and that failure to provide it would impair a new entrant carrier's ability to provide service, the Commission finds that the Eighth Circuit upheld the FCC's interpretation of 251(d)((2) and determined that the ILEC obligation for unbundled network element provision includes proprietary services unless the carrier can offer the same service through the use of nonproprietary unbundled network elements. As a related matter, the Eighth Circuit affirmed the FCC's interpretation that a new entrant carrier would be prejudiced if the alternative services (nonproprietary) offered by the ILEC would increase the rates to be incurred by the new entrant carriers.

Finally, in regard to GTE's arguments regarding universal service support funding, the Commission agrees with AT&T that this issue has been inappropriately raised in the context of this docket. Rather, at the appropriate time, GTE should raise its concerns on this issue in Case No. 97-632-TP-COI (*In the Matter of the Commission Investigation of the Universal Service Discounts.*).

- (8) In accordance with the aforementioned determinations, the parties are directed to modify the proposed interconnection agreement and resubmit the amended agreement for the Commission's consideration on or before October 17, 1997. Additionally, the Commission notes that, pursuant to the June 26, 1997 Entry on Rehearing in this matter, the parties were directed, by August 26, 1997, to provide the Commission with proposed language relative to an interim termination/cancellation fee. As of this date, the parties have

failed to submit such language. Therefore, the parties must include this language in conjunction with the other modifications required to be submitted to the Commission for approval.

It is, therefore,

ORDERED, That the May 16, 1997, interconnection agreement submitted by the parties in this case must be modified in accordance with the findings above. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Craig A. Glazer, Chairman

Jolynn Barry Butler

Ronda Hartman Fergus

David W. Johnson

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JSA/pdc