STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the petition of **AT&T COMMUNICATIONS OF MICHIGAN, INC.,** for arbitration to establish an interconnection agreement with **GTE NORTH INCORPORATED** and **GTE SYSTEMS OF MICHIGAN.**	Case No. U-11165

At the December 12, 1996 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. John C. Shea, Commissioner
Hon. David A. Svanda, Commissioner

ORDER APPROVING AGREEMENT ADOPTED BY ARBITRATION

I.

HISTORY OF PROCEEDINGS

On August 16, 1996, AT&T Communications of Michigan, Inc., (AT&T) filed a petition for arbitration regarding the pricing, terms, and conditions of an interconnection agreement with GTE North Incorporated and GTE Systems of Michigan (GTE) pursuant to Section 252 of the federal Telecommunications Act of 1996, 47 USC 252. On September 10, 1996, GTE filed a response. Daniel E. Nickerson, Jr., of the Commission's Administrative Law Judge Division and Robin Ancona and Thomas L. Saghy of the Commission's Communications Division were assigned to the arbitration panel.

On September 11, 1996, the arbitration panel conducted an initial meeting with the parties to establish a procedural framework for addressing disputed issues. The parties also made initial presentations regarding their positions on the disputed issues. On October 2, 1996, the parties each filed proposed decisions of the arbitration panel. On October 14 and 15, 1996, the parties made oral presentations to the panel.

On November 12, 1996, the arbitration panel issued its decision, which identified 69 issues, including two that were resolved by agreement of the parties. The panel also acknowledged that the parties had agreed to submit a joint interconnection agreement consistent with the panel's decision.

On November 25, 1996, AT&T and GTE filed their objections to the decision of the arbitration panel. On December 2, 1996, the parties filed a joint draft agreement, with disputed provisions highlighted.

As indicated in the arbitration decision, some disputed points were resolved by the parties prior to the decision. The parties indicate in their objections that they both accept the arbitration panel's resolution of several other issues. The Commission finds that those issues should be resolved as agreed by the parties, either through their consent or by their acquiescence to the arbitration decision.

In addressing the majority of issues that continue to be disputed, it must be kept in mind that approval of an interconnection agreement is subject to a tight statutory time frame. The Commission recognizes that arbitration functions as an efficient, speedy mechanism for resolving disputes and, as a result, it does not entail all of the procedures that are observed in contested case proceedings. Instead, the arbitration process relies on the experience and familiarity of the Commission and its Staff with respect to the telecommunication industry and market conditions in

Michigan as a means of reaching decisions that promote full and fair competition as expeditiously as possible. See the September 23, 1996 order in Case No. U-11134, pp. 3-4.

The Commission commends the panel for reaching its decision under challenging circumstances, despite the necessity of applying untried standards and procedures. In general, the Commission finds that the arbitration decision is well reasoned and provides an appropriate framework for crafting interconnection arrangements. Therefore, the Commission accepts each determination of the arbitration panel unless otherwise indicated in this order. The modifications required by this order are relatively few, particularly when compared to the numerous issues. With these modifications, the Commission finds that the arbitration decision provides the basis for an agreement that is just, reasonable, and nondiscriminatory.

II.

DISCUSSION

GTE's Procedural Objections

GTE objects to the arbitration process as violative of its procedural rights. It complains that the arbitration panel adopted AT&T's positions that are based upon undisclosed Ameritech Michigan cost data. It further contends that the panel violated 47 USC 252(b)(4)(B) by relying on the data of another local exchange company (LEC), even though there was no showing that GTE failed or refused to provide cost information related to its own operations. GTE argues that it was denied its right to cross-examine AT&T's witnesses. It claims that the arbitration panel failed to provide a reasoned basis for its findings. It argues that the "baseball" arbitration used by the panel violated the standards in 47 USC 252(b) that state commissions must apply in resolving disputed issues.

GTE argues that the panel should have adopted GTE's proposed rates on an interim basis because they are the only ones that will ensure that GTE recovers its actual costs, will not incur an unconstitutional taking of its property, and will not sustain irreparable financial injury. GTE proposes a reconciliation proceeding that would order retroactive rate adjustments if necessary.

The Commission finds that GTE's generalized objections to the arbitration process are not well taken. Most of those arguments were addressed and rejected in the July 16 and September 23, 1996 orders in Case No. U-11134, which instituted the arbitration framework. In those orders, the Commission unequivocally established that contested case procedures would not apply to arbitration, that formal discovery procedures in contested case proceedings would not apply, and that the parties would not be permitted to cross-examine witnesses. GTE's objections merely express disagreement with the Commission's previous rulings as well as the arbitration mechanism established by law.

As for the contention that only GTE's proposed rates would provide adequate compensation, GTE does not cite anything specifically to corroborate its bare statement that lower rates would cause it to operate at a loss. As provided in the Michigan Telecommunications Act,[1] other Commission cases have begun the process of developing cost methodologies, which continue to undergo refinement.[2] Nothing cited by GTE supports its argument that actual costs are the standard prevailing under the law, let alone what an "actual cost" standard means or how it would be applied in an interconnection proceeding. GTE also fails to provide any convincing legal rationale to support its argument that only its proposed rates will meet constitutional standards.

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[1]MCL 484.2101 et seq.; MSA 22.1469(101) et seq.

[2]In an order issued today in Case No. U-11281, the Commission commenced a proceeding to develop an approved TSLRIC study for GTE.

To the extent that GTE's specific objections to the arbitration panel's determinations incorporate its generalized objections to the arbitration process, the Commission rejects those objections as well.

Wholesale Pricing of Services Offered for Resale

The arbitration panel determined that GTE must make all of the services that it offers to its retail, or end-user, customers available on a wholesale basis to AT&T for resale to AT&T's retail customers. The panel also addressed restrictions on the classes of customers who would be permitted to purchase the resale services from AT&T. Arbitration decision, pp. 4-8.

The panel made a number of detailed findings regarding the types of costs that are currently recovered in GTE's retail rates, but that would not be incurred by GTE, either in whole or in part, if it sold the services to AT&T at wholesale. The panel stated that these avoided costs should be excluded from the wholesale rates that AT&T would pay to GTE. The panel concluded that a discount rate of 25%, applied to GTE's retail rates, would produce a reasonable approximation of rates that cover wholesale costs and should be used to price services sold to AT&T for resale. Id., pp. 4-6, 9-12.

GTE raises numerous objections, arguing, among other things, that wholesale rates should be set on the basis of its own avoided cost studies, which support discounts ranging between 5.5% and 19.71%. GTE objections, pp. 12-13, 22. It also argues that the arbitration panel's findings regarding avoided costs were flawed and that more restrictions on resale should be recognized than were accepted by the panel. AT&T raises an objection to the panel's finding that an incumbent LEC should be permitted to recover any additional costs incurred as a result of selling services on a wholesale basis as an offset to the avoided costs.

The Commission finds that the arbitration panel's determinations, at pages 4-12 of its decision, are an appropriate basis for the rates, terms, and conditions of selling wholesale services. It rejects both parties' objections and accepts the panel's determinations on the resale provisions without modification.

Although the panel's resolution of the discount rate for resale services differs somewhat from the 22% discount in the AT&T/Ameritech Michigan interconnection agreement that was approved in the November 26, 1996 order in Cases Nos. U-11151 and U-11152 (Case No. U-11151 et al.), at pages 9-11, GTE's and Ameritech Michigan's operations in Michigan are also markedly different. Unlike Ameritech Michigan, which is by far the largest basic local exchange provider in Michigan (as well as four other Midwestern states) and serves several of the most densely populated urban areas in this state, GTE's service territory is more far flung and has a larger proportion of its customers in areas that cannot be expected to benefit as much from economies of scale.[3] Also, Ameritech Michigan has been more pro-active in adapting its communications services and technologies to a market-driven environment. Under the circumstances, it is likely that GTE's cost structure has benefited less from economies of scale and from efficiency efforts spurred by the prospect of entering new markets and reflects a greater proportion of costs that would be avoided in a wholesale context. The three percentage point difference between the two discount rates accounts for these differences. Because the pricing decisions in this case are interim in nature, any imprecision in the cost estimates can be redressed when appropriate cost studies are approved.

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[3]Demographic characteristics of GTE's service territory were a basis for its unsuccessful claim that it is entitled to a rural telephone company exemption under 47 USC 251(f). See the August 28, 1996 order in Cases Nos. U-10860, U-11133, and U-11137.

However, one modification to the arbitration decision is required that will affect wholesale pricing. See arbitration decision, pp. 72-73 (issue 60). As stated by GTE, its wholesale rates should reflect any change in the tariff rate of its corresponding retail services. Because resale prices in the interconnection agreement are a function of applying a fixed discount percentage to the rate structure in a retail tariff, the Commission agrees that a change in the tariff rate would mean that the resale price would undergo a proportionate change.

Pricing of Unbundled Network Elements and Interconnection Arrangements

AT&T proposed that unbundled network elements and other services related to interconnection be priced in accordance with a cost study that it developed by making adjustments to an Ameritech Michigan total service long run incremental cost (TSLRIC) study. GTE's pricing proposal was based on its Market-Determined Efficient Component Pricing Rule model.

In a comprehensive analysis of the pricing issues, the arbitration panel rejected GTE's model and generally adhered to AT&T's cost study and pricing methodologies, with a few exceptions. Arbitration decision, pp. 12-29. As one exception, the panel modified AT&T's proposed port price for local switching and approved a monthly rate of $1.59 per port. Id., p. 15. For purposes of collocation, the panel also adopted intrastate tariff access rates (which are generally the same as interstate access rates filed with the Federal Communications Commission).[4] Id., pp. 14, 16, 18. It stated that bill-and-keep arrangements, as agreed by the parties, were permissible on a temporary basis, but that other compensatory arrangements for transport and termination of local traffic should be established prospectively once a TSLRIC study has been approved. Id., pp. 16, 29-30.

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[4]The panel's approach to collocation pricing is consistent with the order in Case No. U-11151 et al., at page 9. That order rejected arguments similar to those advanced by AT&T in this case.

It found that rates for attachments to poles, ducts, conduits, and rights-of-way should be governed by MCL 484.2361; MSA 22.1469(361). Id., p. 17.

The Commission adopts the panel's findings regarding these pricing issues. The panel's findings are comparable to the prices and methodologies adopted by the Commission in Case No. U-11151 et al. The Commission emphasizes that the pricing decisions reached in this arbitration are interim in nature and will be revised to reflect the outcome of the TSLRIC study that will be approved as a result of proceedings initiated today in Case No. U-11281.[5]

Routing of Operator Services and Directory Assistance

The arbitration panel found that the agreement should obligate GTE to route operator services and directory assistance (OS/DA) calls to AT&T's platforms. According to the panel, this obligation applies when AT&T provides local exchange service, either by purchasing GTE's retail services for resale or by purchasing unbundled network elements from GTE. Arbitration decision, pp. 31-31 (issues 17 and 18).

GTE objects to being required to route OS/DA calls from AT&T customers to AT&T's platforms. It argues that, in some instances, its switches have limitations that make this type of specialized routing technically infeasible. It also argues that, in the context of providing AT&T with wholesale services for resale, the federal Telecommunications Act does not require it to disaggregate OS/DA services because its own retail customers do not have the option of purchasing a different routing for those services, which are sold as part of a bundled package of basic local exchange services.

[5]In an order issued today in Case No. U-11207, the Commission rejected a TSLRIC study submitted by GTE and deferred the process of approving a study to Case No. U-11281.

The Commission finds that the arbitration decision should be modified in two respects. First, technical limitations should be taken into account, given that some switches may not be capable of accommodating the specialized routing of OS/DA services. At the same time, there are also indications that technical constraints on specialized routing are the exception, not the rule. As stated by AT&T, it is "technically feasible in *most switches currently in use* of incumbent LECs to provide custom routing to permit a new entrant to self provide operator services and directory assistance." AT&T proposal for decision of the arbitration panel, p. 38 (emphasis added). Therefore, GTE must provide specialized routing for OS/DA services in most instances and may be excused from doing so only if there are legitimate technical considerations that cannot be overcome through reasonable accommodations. This requirement is consistent with the Commission's decision in Case No. U-11151 et al., supra, p. 25, which recognized that technical feasibility may be a legitimate constraint in some circumstances, but that it should not be an excuse to impede competition. GTE bears the clear burden of proof with respect to technical feasibility issues.

Second, the Commission finds that GTE should not be obligated to route OS/DA services to AT&T's platform when AT&T resells basic local exchange service that it purchases from GTE at wholesale. The premise of providing retail service on a resale basis is that the competing provider may purchase, at a wholesale discount, the service offerings that the incumbent LEC provides to its retail customers. The choices of the reseller are limited to the services and packages of services that the incumbent LEC makes available to its own retail customers and do not permit the reseller to purchase disaggregated elements of those packages. This limitation should not impose an unnecessary obstacle to AT&T's own OS/DA services, so long as AT&T has the option of providing local service by using GTE's unbundled network elements in conjunction with specialized routing.

Number Portability

The arbitration panel determined that interim number portability should be provided by GTE through direct inward dialing and remote call forwarding. Arbitration decision, pp. 56-57 (issue 48). AT&T says that it should be permitted to pursue other number portability options, including route indexing, through the bona fide request process. The Commission agrees that the bona fide request process is available to explore the feasibility and availability of other approaches to number portability.

Poles, Ducts, Conduits, and Rights-of-Way

The arbitration panel determined that GTE must provide AT&T with nondiscriminatory access to GTE's poles, ducts, conduits, and rights-of-way for the purpose of attaching its own facilities. However, the panel rejected AT&T's argument that parity is the standard for providing nondiscriminatory access. Arbitration decision, pp. 67-68 (issue 55). The panel further found that GTE may reserve spare capacity for its future use only if the amount it reserves is reasonable under the circumstances. It determined that GTE must modify its poles, ducts, conduits, and rights-of-way if necessary to accommodate AT&T's requests for additional capacity, as long as AT&T pays the cost of the modifications required to add the capacity. Id., pp. 70-71 (issues 57 and 58).

AT&T argues that the panel's decision permits GTE to favor its own interests in reserving spare capacity for future use. It contends that federal law prohibits GTE from reserving unused attachment capacity for its own future needs and obligates GTE to grant any request by AT&T to attach its facilities to unused space.

The Commission generally agrees with the panel that GTE's reservation of spare capacity for future use should be limited to what is reasonable under the circumstances. However, the

Commission emphasizes that GTE's treatment of spare capacity must be consistent with its obligation to provide uniform, nondiscriminatory access to all providers. At a minimum, this means that competing providers, including AT&T, must have an equivalent opportunity to procure spare capacity and reserve it for their own future use. It also means that GTE's responses to requests for spare capacity must be evaluated under a reasonableness standard, particularly when there are competing claims for the same capacity. To provide guidance in applying this standard, the Commission finds that GTE's actions will be deemed presumptively reasonable if it allocates spare capacity on the basis of 25% for its own use and 75% for the use of competing providers.

The arbitration panel stated that GTE's obligation to provide access to rights-of-way included all possible pathways for communicating with an end-user. It clarified that this requirement extended to land used for conduit or other distribution facilities, even if GTE owned the property in fee simple (instead of holding an easement or other subordinate property interest). Id., pp. 68-70 (issue 56). The panel's decision should be understood in light of the Commission's discussion of this issue in Case No. U-11151 et al., supra, at page 18.

Availability of Interconnection, Service, or Network Elements

This issue raises the question of how to interpret 47 USC 252(i), which provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

The issue is similar to one addressed in Case No. U-11151 et al., supra, at pages 12-13, in which the Commission stated:

> The proper interpretation of Section 252(i) of the [federal Telecommunications Act] is a major issue that does not need to be addressed at this time. This is particularly true in light of the expedited nature of the interconnection agreement approval process.

The same holds true in this case. Therefore, the arbitration panel's decision on this issue is vacated. See arbitration decision, pp. 73-75 (issue 62).

Bona Fide Request Process

GTE makes a limited objection to the decision of the arbitration panel to approve a bona fide request process. Arbitration decision, p. 75 (issue 63). It says that the process would subject AT&T's requests for new services to decision-making by an arbitrator. The Commission agrees that the bona fide request provisions of the interconnection agreement should be modified to exclude new services that GTE is not otherwise obligated by law to make available to AT&T.

Unauthorized Attachments to Local Loop Facilities

The arbitration panel shifted financial responsibility to AT&T for unauthorized attachments to local loop facilities owned by GTE, but used by AT&T to provide service to its customers. Arbitration decision, p. 76 (issue 64). In keeping with AT&T's objection, the Commission agrees that responsibility for unauthorized attachments should reside with the provider that holds legal title to, and the rights to maintain and control the physical integrity of, the facilities.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, 1992 AACS, R 460.17101 et seq.

b. The interconnection agreement, as adopted by the arbitration panel and modified in this order, should be approved.

THEREFORE, IT IS ORDERED that:

A. The interconnection agreement, as adopted by the arbitration panel and modified in this order, is approved.

B. A complete copy of the interconnection agreement, as adopted by the arbitration panel and modified in this order, shall be filed within ten days of the issuance of this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

I dissent, as discussed in my separate opinion.

/s/ John C. Shea
Commissioner

/s/ David A. Svanda
Commissioner

By its action of December 12, 1996.

/s/ Dorothy Wideman
Its Executive Secretary

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the petition of **AT&T COMMUNICATIONS OF MICHIGAN, INC.,** for arbitration to establish an interconnection agreement with **GTE NORTH INCORPORATED** and **GTE SYSTEMS OF MICHIGAN.**	)	Case No. U-11165

DISSENTING OPINION OF COMMISSIONER JOHN C. SHEA

(Submitted on December 12, 1996 concerning order issued on same date.)

I am not able to join in the approval of the accompanying order. As I have stated previously, see, November 1, 1996 Dissenting Opinion in Case No. U-11138, the means to reach the result embodied in the accompanying order cannot, as the majority states, arise under federal law. Rather, the Michigan Telecommunications Act, 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., (the "MTA") is the only authority that should control this proceeding.

The MTA quite clearly spells out the necessary process for approving interconnection agreements. Under Section 303(2) of the MTA, the Commission has authority to approve interconnection arrangements between basic local exchange service providers. Indeed, Section 305(1)(b) forbids a basic local exchange service provider from refusing to interconnect. Section 352 sets forth the prices for interconnection. Section 203(1) of the MTA authorizes the Commission to issue orders only after a contested case held pursuant to the Michigan Administrative Procedures Act, MCL 24.201 et seq.; MSA 3.560(101) et seq. No such contested case was convened in this matter and there is no resulting record upon which the

Commission can fashion an order. Instead, this matter has reached conclusion under a federal mandate that is at odds with the due process provisions of the Michigan Administrative Procedures Act.

Failure to observe these mandatory provisions of state law renders this proceeding -- and the interconnection agreement at issue -- fatally flawed. Thus, while settlements between adverse parties should be encouraged, and while the interconnection agreement, as the majority intends to approve it, appears to be in the public interest, I must reluctantly dissent.

John C. Shea, Commissioner