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

February 17, 1997

960847-TP

Re: Docket No. ~~960980-TP~~
Petition by 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 Comments Regarding Its Proposed Agreement with MCI Metro Access Transmission Services, Inc. in the above matter. Also enclosed is a diskette with a copy of the Comments in WordPerfect 6.1 format. The proposed agreement is being filed today by MCI under separate cover.

Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at (813) 483-2617.

Very truly yours,

2 Kimberly Caswell/dm

Kimberly Caswell

KC:tas
Enclosures

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| 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 and conditions of a proposed agreement with GTE Florida Incorporated concerning interconnection and resale under the Telecommunications Act of 1996 | ) | Docket No. 960847-TP<br>Docket No. 960980-TP<br>Filed: February 17, 1997 |

**GTE FLORIDA INCORPORATED'S COMMENTS REGARDING ITS PROPOSED AGREEMENT WITH MCI METRO ACCESS TRANSMISSION SERVICES, INC.**

GTE Florida Incorporated (GTE) files these Comments in conjunction with the interconnection, resale and unbundling agreement (Agreement) that MCI Metro Access Transmission Services, Inc. (MCIm) and GTE were required to file today under the Commission's decision in this arbitration. (Order no. PSC-97-0064-FOF-TP, Jan. 17, 1997, at 147 (Order).)

The Order directs the parties to submit for approval a contract containing two types of provisions: 1) those that implement the Commission's "decision regarding the unresolved issues" and 2) and those that reflect "issues resolved by the parties." (Order no. PSC-97-0064-FOF-TP, Jan. 17, 1997, at 147 (Order).)

Most of the contract provisions fall into the second category--issues the parties have themselves resolved. Since this language is agreed, the Commission need do nothing more than consider it for approval. The same is true for all but a handful of the provisions

conforming the Agreement to the Commission's rulings on the unresolved issues.[1] In this regard, the parties disagree as to how to structure language that properly implements the Commission's decisions in these matters. In these instances, GTE and MCIm have submitted competing language, and ask the Commission to choose the version that most closely embodies the Commission's decision. Because these issues were litigated, the Commission can lawfully make such a choice.

MCIm, however, has proposed that the Commission add to the Agreement numerous provisions that concern issues that were never arbitrated and never resolved by the Commission. In many cases, these provisions impose obligations on GTE that go well beyond and even contradict what GTE is required to do under the Telecommunications Act of 1996 (Act) and the FCC's regulations under the Act. The Commission cannot lawfully add these provisions to the Agreement and must instead disregard them. Approving MCIm's proposed additions in the absence of any evidence, let alone the requisite competent and substantial evidence, would be plainly arbitrary and capricious. MCIm is, in effect, seeking an even more advantageous result than it would have received under its "Mediation Plus" request--which the Commission denied.

Part I explains further why MCIm's request for the Commission to summarily decide non-litigated issues is improper and must not be granted. In Part II, GTE comments on MCIm's proposed language for both arbitrated and non-arbitrated provisions. Where appropriate, GTE has suggested competing language. GTE's presentation of competing

[1] GTE emphasizes that "agreement" for purposes of the contract does not mean that the parties voluntarily produced the document. Rather, it is submitted to comply with the Commission's Order.

language and argument for non-arbitrated issues in no way means that the Commission can now decide these issues. This language is included only to make clear that GTE has not agreed to the contract additions MCIm has inserted and to underscore their unreasonableness. GTE is not asking the Commission to choose between the competing language for these non-arbitrated, unresolved issues, all of which are relatively minor operational, technical or administrative matter. None of MCIm's language is necessary for implementation of a comprehensive interconnection agreement.[2]

## I. THE AGREEMENT MUST INCLUDE ONLY PROVISIONS THAT WERE AGREED TO AND ISSUES RESOLVED BY THE COMMISSION

### A. The Order Does Not Resolve the Matters MCIm Seeks to Add to the Agreement

The Commission's Order governs the procedures for submission of the arbitrated agreement. As noted above, it instructs the parties to include only two types of provisions: 1) agreed-upon and 2) conformed to the Order. (Order at 147.) There is no category for language that was not agreed to and that does not comport with the Commission's decision. MCIm's arguments for including this third category have not been made clear to GTE, but MCIm may attempt to suggest that the new issues it has introduced into the Agreement were somehow resolved in the Commission's Order. This argument is easily dismissed through a common-sense test: the Commission can simply read MCIm's

[2] GTE's comments are based on a version of the Agreement provided a few days before the filing date; MCIm represented that this would be the version filed with the Commission. GTE assumes that its version is the same as the version provided to the Commission, but reserves the right to make additional comments if necessary.

proposed provision and then look to the Order to see if there is anything there that requires that provision in the Agreement. In all instances, there is not. To illustrate this point with just a few examples, MCIm proposes language controlling intellectual property rights, audits and examinations, and bill payment dates. None of these issues--or any of the others MCIm now raises--were resolved in the Order (or even discussed during the case). Because MCIm's proposals do not embody Commission decisions on unresolved issues (and because they are not mutually agreed), they do not comply with the Order's unambiguous directives for contract content and must be rejected outright.

### B. MCIm Did Not Properly Present or Litigate the Issues It Seeks to Add to the Agreement

As an alternative to claiming that GTE has mistakenly construed the Order, MCIm may argue that the fault lies with the Commission--that it failed to resolve the issues MCIm presented for arbitration. This strategy, too, is meritless; MCIm did not properly present or litigate any of the matters it now presents for Commission decision.

GTE does not dispute that MCIm had a right to arbitrate all open issues. With this right, however, comes the responsibility to actually litigate those issues, so they are capable of Commission resolution. If this obligation was not obvious enough to MCIm, it was made doubly clear in the Prehearing Order, where the Commission directed each party to "participate fully in the litigation" of the issues it presented. (Order no. PSC-96-1275-PHO-TP, issued Oct. 11, 1996, at 3.) MCIm's merely saying it arbitrated certain matters does not make it so. MCIm's own actions belie any contention that it even

intended to arbitrate the relatively minor issues it now asks the Commission to resolve.

As MCIm stated in its Petition, "[t]he Act does not dictate the specific procedures to be followed by state commissions in conducting arbitration proceedings, but instead leaves wide discretion to the states." (MCIm's Petition for Arbitration, filed Aug. 26, 1996, at 8.) The Commission properly conducted this arbitration by means of a formal hearing as prescribed by the Florida Administrative Procedure Act for proceedings to determine parties' substantial interests. (Fla. Stat. ch. 120.57.)

MCIm routinely participates in Commission hearings and well understands the associated procedures, as its filings in this case indicate. In short, a proceeding is typically initiated by a party's application or petition; the parties identify issues to be resolved, through an issues identification workshop; the parties' witnesses submit prefiled direct testimony on those issues; there is opportunity for prefiled rebuttal to other parties' direct testimony; the parties file prehearing statements; a prehearing conference is held; the Commission issues a prehearing order; a hearing is conducted, with cross-examination of witnesses; the parties file posthearing statements; and the Commission issues its decision. At none of these stages did MCIm's behavior indicate that it would litigate the minor issues it now raises, or that it expected the Commission to resolve them in its Order.

MCIm's Petition for Arbitration focussed on the "major issues" that would "clearly need to be litigated and resolved by the Commission." (Petition at 7.) MCIm proposed negotiation and mediation (discussed below) for the numerous other issues that were operational, technical, and administrative in nature. (Petition at 7-10; see also MCIm's Motion to Establish Procedure for "Mediation Plus" (Mediation Plus Motion), filed Aug. 26,

1996.)

With its Petition, MCIm submitted a proposed list of issues to be resolved, as instructed in the Commission's Initial Order Establishing Procedure. (Order no. PSC-96-1053-PCO-TP, at 6.) MCIm indicated that these issues combined the detailed items on its "term sheet" submitted with its Petition into broader categories. To this end, MCIm's proposed issue number 30 was: "What other requirements should be included in the arbitrated agreement with respect to interconnection and access, unbundling, resale, ancillary service, and associated arrangements?", accompanied by the notation "all Term Sheet Items not covered by any prior issue." MCIm ostensibly proposed this catch-all issue to allow it to address and obtain resolution of any operational, technical, and administrative details it wanted covered in the interconnection contract.

It is significant, then, that MCIm later withdrew this issue at the issues identification workshop the Staff held among GTE, MCIm, and AT&T on September 12, 1996. No analogous issue was ultimately identified in that session, and there was no dispute among the parties, either at the issues identification workshop or anytime later, that the issues slated for resolution were inadequate or prejudicial to any party.

Consistent with the issues identified, none of MCIm's prehearing filings mentioned, let alone took a position on, the specific matters it now asks the Commission to resolve. Because these matters did not appear in MCIm's prefiled direct testimony, GTE could not have rebutted them in its own written testimony. MCIm's prehearing statement did not take any position on the issues it now raises. Nor did MCIm use the prehearing conference to express any concerns about any lack of opportunity to arbitrate all of the issues it felt

important--despite the fact that MCIm's request for mediation on the technical, operational, and administrative issues had been denied before the prehearing conference; MCIm thus had plenty of notice that it had to specifically identify these matters for arbitration, through Commission-established processes, or forego their resolution by the Commission.

At the hearing, there was no cross-examination on the issues MCIm now raises, nor would such cross-examination have been permissible, because cross-examination is limited to the scope of the prefiled testimony. As noted, there was nothing in MCIm's prefiled testimony addressing these matters. MCIm's posthearing statement did not mention them either. Finally, the Commission's Order did not resolve them, nor could it have, because there was no evidence to ground any such resolutions.

Despite MCIm's statements and actions indicating that it intended to rely on negotiation, rather than arbitration, to resolve the relatively minor issues, it might try to claim that these issues were properly before the Commission in this arbitration because they were mentioned in the term sheet attached to MCIm's Petition. This argument is patently implausible for several reasons.

First, the term sheet does not even mention much of the new matter MCIm now raises. To take just a few examples, there is nothing there that refers to MCIm's proposals in the Agreement concerning housing MCIm's NXXs in GTE's switches; furnishing MCIm a root cause analysis of trouble; granting MCIm rights to switch modifications; transmitting monthly summaries of MCIm's usage-sensitive messages; or treatment of retired cable.

Second, focussing only on the term sheet assumes away the existence of all of the above-discussed Commission procedures and ignores MCIm's own actions under those

procedures. MCIm cannot seriously argue that, despite the well-established and well-understood procedures for conducting this arbitration, the Commission was expected to extract from MCIm's 125-page term sheet and summary the specific issues MCIm expected to be resolved and appropriately frame them for resolution. Likewise, under this logic, GTE would have been expected to present testimony on those issues (despite the fact that MCIm itself presented no such testimony).

Third, the term sheet could not be the definitive document governing the Commission's duties in this case because it changed before the hearing. Several positions appearing there were modified and many of the disputed matters it included were settled in negotiations that continued during the hearing process. The parties did not feel the need to inform the Commission of these revisions and resolutions on the items in the term sheet, thus confirming MCIm's understanding that settlement of these minor issues did not affect any of the other issues officially identified for litigation in the arbitration. Further, MCIm has not claimed that the provisions that were successfully negotiated were instead arbitrated. It cannot now legitimately assert that other provisions it chose to negotiate were, in fact, arbitrated, just because negotiation has not yet settled those issues.

### C. MCIm Is Trying to Force the Commission to Approve the Mediation Plus Outcome It Already Rejected

MCIm's objective in introducing new matter into the Agreement is clear: since ongoing negotiations on these non-litigated items have not resolved them to MCIm's

satisfaction, MCIm now asks the Commission to step in and settle them. In effect, MCIm is ignoring this Commission's denial of its Motion to Establish Procedure for Mediation Plus and trying to force the Commission to sanction an outcome it has already rejected.

MCIm filed its Mediation Plus Motion along with its Petition for Arbitration on August 26, 1996. In the Motion, MCIm stated that major issues, such as the menu and prices of unbundled elements and services offered for resale, "will clearly need to be litigated and resolved by the Commission." (Mediation Plus Motion at 2. See also MCIm's Petition for Arbitration at 7.) It noted that "numerous other technical, operational, and administrative issues" were also unresolved, but that MCIm was "optimistic that with the proper Commission-mandated and supervised mechanism in place, many of these items can still be resolved by negotiations, without the necessity for resolution by the Commission." (Id.) MCIm asserted that the application of the Commission's arbitration procedures, while well-suited to resolution of the major issues, would be ill-advised for the "multitude" of detailed technical, operational, and administrative issues that might be "capable of negotiated settlement by the parties." Finally, it recognized that the Commission would need to schedule a second hearing to arbitrate any issues that were unsuccessfully resolved by the parties. (Mediation Plus Motion at 4-5.)

The Commission denied MCIm's Motion on September 13, 1996, stating that the Commission's calendar was already too crowded to contemplate another hearing if negotiations failed. (Order No. PSC-96-1152-PCO-TP, 96 FPSC 9:322, 324.) Nevertheless, MCIm forged ahead with its strategy to address the minor matters through negotiations. As explained above, it chose not to litigate any of these issues, which, for

the most part, were, in fact, resolved through negotiations. The proposed contract is over 275 pages long, and most of it covers operational, technical, and administrative detail. Still, MCIm is not satisfied that GTE has not accepted its positions on the relatively few minor matters MCIm has raised, so it has asked the Commission to add them to the Agreement. In other words, MCIm wants the Mediation Plus result–Commission resolution of unsuccessfully negotiated issues--but without the mediation, and without the hearing that even MCIm openly admitted would be necessary if negotiations failed. If the Commission accepts MCIm's request to decide the non-arbitrated issues, it will have given MCIm even more than it asked for in the Mediation Plus Motion it denied months ago.

Even aside from the serious due process problems attendant resolution of non-arbitrated issues, the Commission should not allow MCIm to undermine the integrity of its decisionmaking process in this way. The Commission did not constrain MCIm from litigating the issues it now raises; MCIm itself chose to leave these things to negotiations. MCIm cannot now expect the Commission to grant it relief from the effects of a fully voluntary strategy that may not have worked out exactly as MCIm hoped it would.

### D. MCIm Asks the Commission to Take Unlawfully Arbitrary Action

If, despite the explicit terms of its own Order governing submission of agreements, the Commission is inclined to accept MCIm's invitation to summarily decide non-arbitrated issues, it will do so unlawfully. It is axiomatic that administrative agencies cannot take arbitrary and capricious action. See, e.g., Seminole County Bd. Of County Comm'rs v. Long, 422 So.2d 938 (Fla. 5 DCA 1982); State ex rel. Watson v. Lee, 24 So.2d 798

(1946). In this regard, a reviewing court will examine whether the agency based its decision on competent, substantial evidence in the record and whether it afforded adequate due process. See, e.g., Lee County v. Sunbelt Equities, II, Ltd. Partnership, 619 So. 2d 996 (1993 Fla. 2d DCA); Rivera v. Dawson, 589 So.2d 1385 (Fla. 5th DCA 1991); Hollywood Firemen's Pension Fund v. Terlizzese, 538 So.2d 934 (Fla. 4th DCA 1989). Adopting MCIm's proposals would fail these tests for arbitrary action.

To meet the competent and substantial standard, the evidence the Commission relies upon for its findings must be "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1st DCA 1957); Clark v. Dep't of Professional Regulation, Bd. of Medical Examiners, 463 So.2d 328 (Fla. 5th DCA 1985). Further, there must be some rational connection between the facts found and the choice made. Port of Jacksonville Maritime Ad Hoc Committee, Inc. v. U.S. Coast Guard, 788 F.2d 705 (11th Cir. 1986). In this case, there is no evidence that would support any substantive Commission conclusions on the matters MCIm raises, let alone any evidence that would be adequate under the De Groot definition. There were no facts found on these matters, let alone any that would allow the Commission to make a rational decision. The Commission has no information about, for instance, whether GTE's network or administrative structure can reasonably accommodate MCIm's newly presented demands, or what MCIm's proposals, if accepted, would cost GTE. As explained, MCIm offered no testimony or argument about these issues at any stage of the proceedings. And no matter what arguments it makes now, they are too late to ground any Commission decisions. By

law, GTE had the right to a meaningful hearing on all issues to be resolved in this proceeding, including "an opportunity to respond, to present evidence and argument on all issues involved [and] to conduct cross-examination and submit rebuttal evidence." (Fla. Stat. ch. 120.57(1)(b)(4).) GTE was denied the opportunity to do any of these things on the issues MCIm now raises because MCIm did not properly present or litigate them. In fact, even MCIm recognized the requirement of a "typical Commission hearing" in the event these relatively minor issues were not settled through arbitration (Mediation Plus Motion at 5)--which is exactly the outcome that occurred. Approving MCIm's proposals to resolve these issues would plainly deny GTE its due process.

The Commission should disregard the provisions MCIm has unilaterally presented (these are listed as Attachment A) and review only the portions of the Agreement that were resolved by the parties themselves or by the Commission. Where appropriate, the parties can continue negotiating the issues MCIm has raised, but their resolution is not necessary for approval of a comprehensive Agreement.

## II. COMMENTS ON DISAGREED PROVISIONS

Under GTE's rationale set forth above, provisions are marked as "disagreed" (and GTE's proposal represented in bold italics) in the Agreement for one of three reasons: 1) they were arbitrated and resolved, but the parties have not agreed on the requisite conforming language; or 2) they were not arbitrated and not resolved, so they should not be included in the Agreement at all; or 3) they relate to liability and indemnification, which was litigated, but which the Commission did not resolve.

Below, GTE specifies the category of disagreement associated with particular provisions in the Agreement. GTE once again emphasizes that it is not asking the Commission to resolve the issues that were not arbitrated and not resolved in the Order (Part C, below). The Commission must disregard these provisions. GTE seeks Commission resolution of only the disputes on implementing language for provisions that were litigated and resolved. These few items are addressed in Part B, below.

Finally, the following Part A concerns the special case of liability and indemnification. This issue was litigated, and GTE considers limitations of liability essential to governing the parties' relationship under the Agreement. The Commission, however, declined to resolve the liability and indemnification issues, leaving them instead to negotiations between the parties. (Order at 98.) Unfortunately, the parties were unable to successfully conclude their negotiations on this matter within the time allotted for submission of the Agreement. Because this issue is so important, GTE asks the Commission to intervene, and to choose GTE's version of the liability and indemnification language. This action is permissible because these matters were properly presented and tried.

In the alternative, the Commission could allow the parties additional time for negotiation of these provisions. If those negotiations ultimately fail, the parties should be permitted to seek resolution from the Commission. In no event should GTE be expected to finalize an agreement without any limitations on its potential liability. Because GTE has been compelled to permit numerous interconnectors access to its network at a fundamental level, GTE no longer has complete control over that network. It would be

unfair and unreasonable to impose virtually open-ended liability on GTE, as MCIm has recommended, when GTE's ability to prevent network errors and failures has been undermined by interconnection and unbundling obligations it did not voluntarily accept.

### A. Limitation of Liability Provisions

1. Article III, Section 20 ("Indemnification")

The indemnification issue was arbitrated, as the Commission has acknowledged in its Order, but instead of resolving it, the Commission directed the parties to negotiate. (Order at 98.) MCIm and GTE have made some progress in these efforts. They both appear to believe that mutual indemnification is appropriate against third party claims incurred where (i) negligent or intentional acts of a party's employees or agents cause damage or injury to persons or property, and (ii) a party causes environmental contamination or liability. The parties have further agreed on the procedures for indemnification. But MCIm's proposed indemnification language is unacceptable for the following reasons.

a. MCIm would require GTE to defend and pay claims brought by MCIm's end users against MCIm. As GTE's witnesses have testified, and GTE has argued during the course of this proceeding, this is unreasonable because GTE has no ability to control the terms on which MCIm contracts with its end users or the measure of damages MCIm accepts, and GTE is not being compensated for accepting any such liability. MCIm has been unwilling to make any commitment with respect to the terms on which it will limit its

liability to third parties for which indemnity might be sought. Indeed, MCIm has told GTE that it may accept far greater liability vis-a-vis its customers than previously agreed to by local carriers. As GTE has pointed out before in this proceeding, this will be an unbeatable competitive advantage. If MCIm wishes to accept such liability (including, possibly, liquidated damages or consequential damages), and to use this as a basis for competition, then it is free to do so, but GTE should not be forced to fund this strategy.

b. MCIm has argued to GTE that it looks for indemnification only where GTE has failed to comply with the Agreement.[3] GTE is willing to agree to specified damages measures (as set forth in Article VIII) for specified failures to provide service. But GTE cannot be asked to accept unlimited liability toward MCIm customers where, for example, technical problems (or even, for example, negligent actions resulting in a fire or damage to equipment) cause GTE to be late in providing access to a service or feature.

c. GTE has asked that a party provide indemnification where, as a result of its use of Network Elements, resale of services, interconnection or similar matters, a claim is brought against the other party by the owner or licensor of intellectual property. Some of GTE's pre-existing software and other license agreements may not permit GTE to use

[3] MCIm's language is not clear on this point, and would require GTE to indemnify MCIm even where there has been no breach of the Agreement, so long as GTE's "negligence" causes the claim. GTE's language limits tort-like claims to "injuries or damage to any person or property," thereby requiring an appropriate connection between the negligent act and the nature of the claim. For example, if GTE's service person driving to an MCIm customer service call is "negligent" and causes a traffic accident, GTE is willing to indemnify MCIm against any claim from the other parties to the traffic accident. GTE is not willing to indemnify MCIm against the claim raised by the MCIm customer whose service was delayed as a result. And if MCIm agrees, in its contract with its customer, to pay consequential damages or severe penalties, GTE is not willing to indemnify MCIm when the customer asks MCIm to make good on its obligation.

intellectual property in order to provide service to third parties. GTE cannot accept responsibility where the services it is compelled to offer under the Act violate a preexisting commercial agreement with a third party. MCIm should be responsible for securing additional licenses and, if MCIm's use of GTE's network results in claims by third parties, MCIm should defend such claims.

d. GTE believes indemnification is appropriate where content transmitted over the network by a party or that party's end users results in tort claims, such as libel, slander, defamation or similar types of actions, against the other party. MCIm has used slightly different language with respect to libel, slander and similar claims. MCIm's proposal, however, would not indemnify GTE for third party claims of libel, slander or similar torts based upon *content transmitted by MCIm end users over GTE's network.* MCIm has not indicated what other libel, slander or similar claims might be brought by third parties based upon this Agreement, or what its proposed language would cover.

Accordingly, GTE's suggested indemnification language should be approved because it reflects commercially reasonable terms which resolve the issues discussed above. MCIm's proposed Section 20.1 does not, so it must be rejected.

2. Article III, Section 22 ("Limitation of Liability")

MCIm's proposed Section 22 deems "lost revenue" caused by a breach of obligations under the Agreement to be "direct damages." This is contrary to customary practice and presents the possibility of wide-open claims by MCIm against GTE based

upon theories of economic loss.[4]

GTE further objects to the idea that damages limitations would be voided by "repeated breaches." This caveat makes the damages limitation almost worthless in any significant dispute, and is patently unreasonable where a particular service is likely to be provided in thousands or millions of instances during the contract term.

GTE's tariffs--for good reason--have always excluded lost revenues and other consequential damages. There is no way to know what consequential damages might occur because even a *single* telephone call is not completed. Further, GTE cannot control "lost revenues" or other consequential damages suffered by MCIm. The potential "lost revenue" to MCIm from any breach by GTE depends entirely upon the terms that MCIm sets with its customers. There is nothing in the Agreement that compensates GTE for bearing the risk of such consequential damages.

GTE proposed language to MCIm that clearly and appropriately limits GTE's liability for consequential damages. GTE's proposed liability limitation is consistent with GTE tariffs and with current practice among telecommunications carriers and between carriers and their end users. MCIm rejected this proposal.

GTE made the further reasonable request--also rejected--that the Agreement expressly state that GTE's tariff liability does not apply as between GTE and MCIm's end users, and that liability for errors be expressly excluded.

Under GTE's proposal, MCIm would have available appropriate remedies. If MCIm

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[4] MCIm's language contradicts itself, excluding "consequential" damages, on the one hand, while deeming lost revenue (a consequential damage) to be "direct" damages, on the other.

believes that GTE has breached the Agreement, it can seek relief before the Commission or in a private arbitration. That relief, however, should be limited to (i) any agreed liquidated damages, (ii) any direct damages, and (iii) an appropriate injunction or order.

For all the reasons discussed, the Commission should accept GTE's proposed language on this issue.

### B. Arbitrated and Resolved Items

1. Article V, Section 3.1.3.2 (concerning resale of voice mail)

MCIm and GTE disagree as to the nature of the Commission's resolution of this issue, which was litigated in this case. Specifically MCIm proposed a resale requirement for ancillary services such as inside wire maintenance and voice mail. (See Order at 44, recounting MCIm witness Price's testimony.) GTE opposed this requirement, because the Act does not require resale of non-telecommunications services and the Commission's jurisdiction over unregulated services like voice mail and inside wire is limited. (See GTE's Posthearing Statement at 7.)

In the section of its Order discussing miscellaneous "other services" proposed for resale, the Commission stated that an ILEC "is required to offer for resale... any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. Therefore, we find that GTE shall be required to resell such services as special access, including private line services tariffed under the special access tariff, COCOT coin and coinless lines, and operator and directory assistance services." (Order at 51.) The Commission did not include voice mail in this list, despite the fact that

it was specifically mentioned earlier in the resale section, where the Commission refers to Mr. Price's testimony on ancillary services. As such, GTE does not believe the Commission intended to impose a resale obligation on voice mail, which, in any case, was not found to be a telecommunications service. The Commission should thus order MCIm to delete its proposed section 3.1.3.2 from the Agreement.

2. Article VI, Section 18 ("Dark Fiber")

The parties continue to disagree about how to best reflect the Commission's resolution of this matter.

The Commission found that dark fiber was not a network element and declined to require GTE to lease it, except under explicitly limited circumstances. (Order at 22.) Specifically, the Commission instructed GTE to lease dark fiber to MCIm under the same terms and conditions as those GTE offered to Metropolitan Fiber Systems of Florida, Inc. (MFS) in a contract executed last year. That contract gives MFS the right to lease dark fiber facilities "if available."

MCIm's proposed language gives an unintended meaning to the phrase, "if available," granting it immediate rights that go well beyond those MFS obtained in the contract that is also to govern MCIm's rights to dark fiber.

GTE's Beverly Menard negotiated the MFS agreement and participated in all sessions where the now-contentious phrase was discussed. She knows--and has testified under oath--that the parties intended the language at issue to mean that "if GTE ever decides to offer dark fiber and if [GTE has] facilities available, then MFS has a right to

them." (Docket 961173-TP, Hearing Transcript at 774-75.)

GTE's proposed language for section 18.2 thus faithfully embodies the rights granted to MCI. It thus makes MCIm's rights identical to MFS', as the Order requires. The Commission should thus accept GTE's implementing language and reject MCIm's attempt to obtain greater rights than MFS received.

3. Article VIII, Section 2.1.4.2 (concerning telephone number reservation)

The terms of and conditions for access to code assignments and other numbering resources was specifically litigated in Issue 29 in this case. MCIm agreed that this issue did not appear to be in dispute, because it would accept GTE's commitment to nondiscriminatory access to numbering resources. (MCIm's Posthearing Brief at 75.) The Commission accordingly ruled that GTE would be required to treat MCIm in a nondiscriminatory manner. (Order at 131.)

Now, however, MCIm seeks reservation of numbers on a favored basis for MCIm. GTE does currently reserve blocks of numbers for specific purposes; i.e., Centranet. If MCIm places a resale order for Centranet service, it would receive a number assignment from the same block of numbers. GTE will still administer these numbers. However, MCIm can obtain numbers from the North American Numbering Plan (NANP) Administrator, just like any other telephone carrier, and they, in fact, have, with no charges for these NXXs. Moreover, MCIm is able to reserve numbers on the same terms and conditions as any other purchaser of GTE services.

In addition, if GTE extends MCIm the ability to reserve 100 telephone numbers for

successive periods of 45 days at no charge, as MCIm's language would require, it will likely need to do so for all ALECs. As the Commission knows, telephone numbers are a very limited resource and there are numerous certificated ALECs in Florida, not all of which may be as reputable as MCIm. Even aside from the obvious potential for abuse that MCIm's language presents, there would be difficult problems efficiently utilizing limited numbers if many ALECs took advantage of the broad rights granted by MCIm's recommendation.

For these reasons, the Commission should reject MCIm's language, which goes beyond the nondiscrimination obligation imposed by the Commission and which is ill-advised from a policy standpoint.

Article X, Sections 8.1.1 and 9.1.1 (concerning modification compensation)

These sections are incorrectly represented as agreed; this language was under negotiation at the time the contract was given to the printer and GTE's competing proposals were erroneously excluded. Specifically, GTE recommends replacing the phrase, "to the extent the cost of such modification is incurred for the sole benefit of MCIm," with the phrase, "to the extent that a modification is undertaken solely at MCIm's request."

The difference between the respective formulations is that MCIm's will impose upon other attaching or occupying entities part of the costs of a modification which MCIm requests, but which may incidentally benefit these other entities. Thus, in a particular instance, MCIm could refuse to pay GTE the full costs of a modification that only it wanted,

arguing that other entities also received some benefit from it. At the same time, these other entities, who did not ask for the modification, would likely dispute their obligation to pay GTE anything for it. This situation will threaten GTE's ability to collect the full amount incurred for the modifications.

GTE's language conforms more closely to the Order, which quotes from the FCC's language stating that "'If a user's modification affects the attachments of others who do not initiate or request the modification...the modification cost will be covered by the initiating or requesting party.'" (Order at 142, quoting First Report and Order at ¶ 1211.)

The Commission should adopt GTE's conforming language.

Appendix E ("Reciprocal Compensation for Call Termination")

Appendix E of the Conformed Agreement sets forth compensation for transport and termination of local (Sections 2.1, 2.2), intraLATA (Section 2.3), intrastate Switched Access (Section 2.4) and interstate Switched Access (Section 2.5) calls when MCIm has purchased unbundled local switching from GTE.

As the normal type language of the Appendix E indicates, the parties are in general agreement as to the basic compensation paid for transport and termination over unbundled switching elements. GTE does not, however, agree with MCIm's proposition that GTE should be forced to forego all access charges for intraLATA, intrastate and interstate calls for the reasons discussed below.

Generally, GTE proposes to insert the phrase "applicable RIC and CCL charges" in those provisions where such charges would be applicable. The Commission

unquestionably held that intrastate access charges would continue to be applied on toll calls. See Order at 123-24. Relying upon Section 364.16(3)(a) of the Florida Statutes, as well as the Commission's toll default policy established in Order NO. PSC-96-1231-FOF-TP, the Commission concluded that carriers cannot avoid switched access charges with respect to toll traffic. Id. at 124. Rather, local and toll traffic must be separately identified and the appropriate charges shall be assessed respectively for each type of call. GTE's proposed language merely clarifies this aspect of the Order.

GTE respectfully requests that its edits as set forth in Appendix E be adopted by the Commission.

a. App. E, Sections 2.3.1.1, 2.3.2.1, 2.3.3.1, 2.3.4.1, 2.4.1.1

In each of these cases, MCIm's customer is originating an intraLATA toll or intrastate switched access call that traverses GTE's local switch, and in each case GTE is entitled to the access charges it would normally receive for handling the call--the residual interconnection charge (RIC) and the carrier common line (CCL) charge. The RIC is an intrastate switched access rate element currently assessed on a per minute of use basis for both originating and terminating traffic of interexchange carriers and toll providers. The CCL is also assessed on a per minute basis for both originating and terminating traffic of interexchange carriers and toll providers, and recovers the costs of the local loop not recovered through local rates or the subscriber line charge (SLC/EUCL). These elements were developed as part of an initial step towards establishing competitive pricing in access markets and allowed transport rate elements to be set in an economically efficient manner. As such, these elements provide a vehicle for recovering the cost of

public policy choices made by the Commission, including maintaining affordable local service rates.

In each of the call situations listed above, GTE would be entitled to recovery of both the RIC and the CCL if it were providing the function provided by MCIm using GTE's unbundled local switch. However, when MCIm purchases unbundled local switching at the prescribed rate, it makes no contribution to the public policy choices of the Commission, including affordable local service--the charges for unbundled local switching do not include any contribution towards maintenance of public policy costs equal to the RIC or the CCL. This leaves GTE less able to bear the cost of continuing to provide local service at regulated rates. Furthermore, if GTE cannot assess these charges, then MCIm would receive an undeserved windfall and enjoy a significant competitive advantage in the access markets. In effect, MCIm would receive a subsidy because it would receive GTE's access charges without incurring the corresponding cost created by Commission pricing policies. Moreover, MCIm's long distance affiliate would be able to completely avoid access charges to the extent it could terminate calls over MCIm's local network using GTE's unbundled switching. Until access charges are revised generally, such a result would directly contradict prudent public policy.

Accordingly, the language in this Appendix should not be approved without the revisions it has suggested.

b. App. E, Sections 2.3.4.3, 2.3.5.1, 2.3.6.1, 2.3.7.1, 2.4.2.1

In each of these cases, an intraLATA toll or intrastate switched access call

traversing GTE's local switch is terminating to a MCIm customer. The situation is the reverse of that described at (a), above. For the same reasons, GTE is entitled to receive the RIC and the CCL, and GTE's language must be included in the Agreement.

c. App. E, Section 2.5.1.1, 2.5.2.1

In these cases, GTE is either originating or terminating an interstate switched access call originated by MCIm's customer. Normally, GTE would receive originating and terminating interstate RIC and CCL. For the same reasons discussed above at (a) with reference to intrastate access charges, MCIm's purchase of an unbundled switching element does not justify taking interstate access charges away from GTE.[5]

Accordingly, GTE's language must appear in the Agreement.

### C. Nonarbitrated Items

**ARTICLE III: GENERAL PROVISIONS**

1. Article III, Section 13 ("Revenue Protection")

MCIm's proposed language would require GTE to provide "partitioned access to

[5] Notably, even the First Report and Order, which subjected incumbent LECs to severely unfavorable pricing regulations, clearly allowed incumbent local exchange carriers to continue to receive interstate access charges under certain conditions. See, First Report and Order, ¶¶ 716-32. The FCC pointed out that interexchange carriers with competitive local exchange carrier subsidiaries could totally avoid access charges by serving customers through unbundled network elements rather than resale. Id. at 719. As such, MCIm and its long distance affiliate could exempt themselves from the access charge system, leaving other carriers to pick up the slack. Accordingly, the FCC allowed incumbent LECs to continue to charge purchasers of unbundled local switching for all interstate minutes traversing GTE's switch under certain conditions. See, id. ¶ 720. This regulation has, however, been stayed by the Eighth Circuit and is not currently effective.

fraud prevention, detection and control functionality within pertinent Operations Support Systems." GTE's existing systems do not permit "partitioned access." At the very least, MCIm should agree that this feature need only be provided "when available" and MCIm should commit to pay the cost of development (or share this cost with any other ALECs demanding the feature).

In addition, MCIm's proposed section 13.1.1 to 13.1.3 would make GTE responsible for all "uncollectible or unbillable revenues" resulting from various events. This language is unacceptable because it is inconsistent with the way GTE and other carriers now treat unbillable or uncollectible revenues resulting from fraud, malicious software alternation and switching errors. MCIm's language also places no incentive on MCIm to reduce unbillable or uncollectible errors, when MCIm will often be in the best position to prevent such errors.

MCIm's language does not state a clear remedy and leaves open the possibility that it would make a claim against GTE for its entire revenue lost due to fraud. GTE's rates do not reflect this risk. Therefore, GTE would be acting as MCIm's insurer against fraud. GTE's proposal, in contrast, would provide MCIm the same remedy now available to interexchange carriers in the access environment. MCIm would receive a credit for the monthly recurring charge or other charges for the underlying service or Network Element, on a pro rata basis for the period during which the fraud or other error occurred.

2. Article III, Section 23 ("Intellectual Property")

MCIm's proposed language regarding intellectual property rights is unacceptable.

As discussed above (Art. III, section 20, Indemnification), GTE believes that MCIm should indemnify GTE if its purchase of Network Elements or resale causes a third party to bring infringement claims against GTE, and GTE also believes that MCIm should cooperate with GTE and bear the primary responsibility to seek any additional licenses necessary in order for MCIm to provide its service. GTE's intellectual property licenses predate the 1996 amendments to the Act, in some cases by many years, and GTE should not bear the unknown cost of renegotiating these licenses, as MCIm's approach would require.

The Commission should disregard MCIm's proposed section 23.1 and refuse to add it to the Agreement.

3. Article III, Section 24.2 ("Remedies")

In this section, MCIm has proposed an extraordinary penalty for GTE's failure to switch a subscriber to MCIm within a specified time period. It is unduly punitive, as it is framed in terms of gross revenues rather than MCIm's actual contractual damages (which may be negligible or non-existent), and it is one-sided. GTE and MCIm have discussed a reciprocal arrangement under which MCIm would give GTE a similar payment when MCIm switches a subscriber without authorization. MCIm has not, however, been willing to settle other liability and indemnification issues and, as such, the parties have been unable to resolve this issue. Therefore, this proposal for unilateral penalties must not appear in the Agreement.

4. Article III, Section 28 (tariff review)

MCIm's proposed language for this section would require GTE to consult with MCIm whenever it planned to file a tariff relating to the subject matter of the Agreement. This proposal essentially requires GTE to obtain MCIm's sign-off before filing a tariff. If GTE consulted with MCIm, but nevertheless filed a tariff MCIm found objectionable, MCIm could invoke the dispute resolution processes of this Agreement or sue GTE for breach based on the argument that GTE did not adequately protect its rights. In addition, requiring GTE to consult with each ALEC before filing a tariff would severely undermine GTE's ability to quickly and efficiently introduce new products and services. As it is, GTE does not have its competitors' flexibility in this area, because they do not have to file tariffs. Introducing an additional drag on GTE's process for introducing and modifying services would further cripple its competitive position.

Further, the Commission must realize that approval of an agreement containing the language MCIm suggests will conflict directly with the stay of the First Report and Order by the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit stayed provisions of the First Report and Order that would have had the same operative effect as MCIm's "pick and choose" language here. Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. Oct. 15, 1996) (order granting stay pending judicial review). As such, the Commission cannot allow MCIm to incorporate this provision by default, as doing so would contradict the stay and undermine the policy underlying federal court stays of administrative actions: as the Supreme Court stated in Scripps Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942), "an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to

have been wrong." Id. at 9 (Frankfurter, J.).

Moreover, on a practical level, the language MCIm proposes would subvert the contract negotiation process and prevent GTE from reaching reasonable compromises or balancing concerns. MCIm's proposal, if adopted, would effectively prevent GTE from ever negotiating a compromise with any party--trading favorable payment terms for an agreement to provide better service, or offering on a limited basis a creative arrangement or experiment for delivering services--as MCIm could immediately claim access to the same experiment. Similar concerns led directly to the issuance of the Stay Order against the FCC's "pick and choose" provisions.

MCIm's suggested section 28 must be deleted from the Agreement.

Article III, Section 39 and passim ("Audits and Examinations")

GTE has agreed to give MCIm certain limited audit rights at various places in the Agreement (Article IV, Section 3.1 (usage audit); Article VIII, Sections 6.1.3.7 and 6.1.7.6 (usage audit); Article XIII, Section 1.7 (security procedure audit)). GTE has further agreed to reporting requirements throughout Articles VII and VIII of the Agreement (See, e.g., section 8.1.3).

GTE cannot, however, accept a general audit of its services four times a year, or sweeping "examinations" at any time, as MCIm's unreasonable language would require. Moreover, if GTE were to agree to such a provision with MCIm, it might be compelled to accept similar demands from every other ALEC, thereby multiplying the number of audits and examinations it must endure.

MCIm should thus agree to replace its Section 39 with GTE's Section 39 and related changes to the specific audits allowed by the agreement (the related section numbers are enumerated above). This would replace MCIm's overly broad procedure with general guidance for reasonable audits and modify the specific audit procedures to clarify their relation to this section.

6. Article III, Section 41 ("Dispute Resolution")

The parties have made considerable headway in their negotiation of a dispute resolution mechanism. All that remains at issue is the relatively minor matter of time frames for conclusion of required negotiations, and MCIm's insistence on a broad exception to preclusion of relief outside the dispute resolution process.

With regard to this latter point, MCIm and GTE agree that the Commission is one appropriate forum for resolution of disputes that may arise under the Agreement. In negotiations, however, MCIm has not been willing to agree to any restrictions upon what other forum might be available for resolution of disputes. MCIm would reserve the right to seek a remedy in any court having jurisdiction. MCIm has not even provided for a waiver of a jury trial. And because it has not specified any priority between resolutions options, it is likely that both parties would rush to place a dispute before their preferred forums, rather than attempting to resolve it without third party intervention. MCIm's proposal is not consistent with commercial practice for complex agreements between private parties.

GTE has proposed a standard dispute resolution provision for complex intercarrier

and other commercial contracts--providing for a limited period of discussion between the parties' representatives, followed by commercial arbitration. GTE further indicated that, given MCIm's expressed concern about GTE's original language, GTE was willing to give clear priority in the Agreement to resolution of disputes under the auspices of the Commission, should the Commission accept jurisdiction.

GTE further believes that the parties should be required to discuss any dispute in good faith for a specified period before seeking resolution before a third party, whether it be the Commission, a court or an arbitrator.

The agreement should not permit MCIm to shop for what it believes may be the most appropriate procedure--including a possible jury trial--but rather should specify an agreed-upon procedure, as GTE's language does.

## ARTICLE IV: INTERCONNECTION

1. Article IV, Section 1.4 ("Location of additional IPs")

GTE has agreed to language that is reasonably necessary to allow MCIm to locate additional interconnection points. It cannot, however, agree to "cooperate with MCIm in obtaining [a] third party owner's permission to place facilities in a telephone closet." This provision prescribes no limitations on GTE's obligation to cooperate with MCIm. Under this provision, MCIm could, for example, require GTE to participate in litigation against a third party owner or even adopt its legal theories for forcing access to the desired space. GTE is not averse to taking reasonable measures to support MCIm's access to space it does not own or control, and has expressed its intention to do so voluntarily, but an

unrestricted obligation to "cooperate with MCIm" is unwarranted and unduly burdensome for GTE, particularly because MCIm has not offered to compensate GTE for its efforts to "cooperate," no matter how extensive.

2. Article IV, Section 3.3.1 (concerning reciprocal compensation)

This section requires GTE to pay MCIm a tandem switching rate for all calls terminated through MCIm's switch with one exception. GTE would pay the end office rate for calls terminating to NXXs assigned to MCIm's switch, but only when MCIm's switch has a direct trunk to GTE's end office. Although GTE agrees with the balance of the paragraph, the last clause relating to direct end office trunks must be deleted.

Normally, carriers pay each other for transport and termination based on the network functions performed. If a call is completed through a carrier's tandem and end office switches, the carrier receives both tandem and end office switching rates. If a call is completed through a direct trunk to a carrier's end office, the carrier only receives the end office switching rate, as no tandem function has been performed. During negotiations, MCIm stated that it uses "dual function" switches that perform both tandem and end office functions. However, it stated that it believed it should receive tandem switching rates when it performs tandem switching functions--i.e., when MCIm's switch routes traffic between switches--and should otherwise only receive the end office switching rate. GTE agrees with MCIm in this respect. But the bolded language at the end of the section imposes a result directly contrary to MCIm's position in negotiations. This language allows GTE to pay the end office switching rate only where traffic is terminating over a direct trunk

from GTE's end office. As such, GTE would pay the tandem switching rate whenever MCIm's switch was connected to GTE's tandem switch, even though the MCIm switch might simply route the call to an end user and would not, in such a case, perform any tandem switching functions. This is an odd and unwarranted outcome. Moreover, it is prohibited by the Act, which only allows "costs associated with the transport and termination on *each carrier's network facilities*" of the other party's calls. 47 U.S.C. § 252(d)(2)(A)(i) (emphasis added). If MCIm has not deployed a given facility, it cannot impose a charge for such facilities on GTE.[6]

For these reasons, and given that the Order does not require such a result, the bolded language at the end of this section must be deleted.

2. Article IV, Section 4.4.5 (concerning trunk group provisioning intervals)

MCIm's language for this section would require GTE to provision local interconnection trunk groups by the "Desired Due Date," meaning the date requested by MCIm when it orders such trunk groups. This type of customer-determined interval, however, is not realistic for local interconnection. The environment in which these trunk groups will be ordered will involve multiple ALECs, each with different requirements, ordering different trunk groups in different locations for different purposes. GTE, as it has

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[6] MCIm may have included this provision because, under 47 C.F.R. § 51.711(a)(3), it may charge a tandem switching rate where its non-tandem switch serves the same geographic area as a GTE tandem switch. MCIm would be wrong to have done so. This regulation was stayed and is not currently effective. Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. Oct. 15, 1996) (order granting stay pending judicial review) (staying the effect of sections 51.701 to 51.717, inclusive).

been unable to receive activity forecasts from most ALECs, is completely unable to predict the demand for trunk groups, and as such has no way of predicting the intervals within which it will meet that demand. Consequently, GTE views this provision as an unacceptable performance standard.

GTE can, however, provide a firm order confirmation setting forth the time at which GTE will be able to provision the needed facilities. This will give MCIm a specific date on which it can expect GTE to provision the trunk group. GTE will attempt to meet MCIm's desired due date, but must be given the flexibility to adjust intervals when necessary to meet heavy order loads. GTE's proposed language thus should replace MCIm's in the final agreement.

## ARTICLE VI: UNBUNDLED NETWORK ELEMENTS

As a general matter, GTE and MCIm were able to reach substantial agreement on language regarding provision of Unbundled Network Elements necessary to incorporate the Order or otherwise generally acceptable to the parties.

From GTE's perspective, this agreement was based primarily upon Section 1.1 of Article VI. Section 1.1 of Article VI modifies the more than 90 pages of technical and performance standards set forth in Article VI, and makes it clear that the standards may not apply across GTE's network, and are only intended as a "default" in the absence of indication by GTE that its equipment or network meets different interface standards. MCIm indicated that its primary concern is in getting notice from GTE with respect to technical and performance criteria, rather than in holding GTE to any of the specific standards as

a contractual requirement.

GTE continues to believe that detailed technical and network design or performance standards, which change over time and vary by equipment and location, should be addressed outside of the Agreement. GTE believes that the parties should instead establish procedures for the documentation and regular exchange of technical information. Such procedures will quickly supplant anything in Article VI. Nevertheless, at MCIm's insistence, GTE is willing to have the standards included in the Agreement solely as a general "baseline" for information regarding GTE's network.

GTE's comments with respect to specific provisions of Article VI are as follows:

1. Article VI, Sections 7.2.2.2 and 7.2.2.3 (concerning rights to switch modifications)

After extensive negotiations over Section 7.2, GTE and MCIm have been able to agree on a process that can be used to request modifications to its switches. The parties continue to disagree, however, on two points. MCIm's proposed language in Section 7.2.2.2, shown in bold, indicates that the only limit to MCIm's exclusive rights in any modifications are rights MCIm may have "granted to any other person or retained for itself." Second, MCIm's proposed language at Section 7.2.2.3 imposes the entire cost of any modification on GTE should GTE itself elect to use the modification after it has been developed.

With regard to MCIm's exclusive rights language in Section 7.2.2.2, GTE cannot agree that MCIm retains exclusive rights to modifications. When a modification may be

a standard modification available from the vendor, the vendor may still retain intellectual property rights in the modification, in which case MCIm has no rights whatsoever. Furthermore, when a modification must be developed and is not standard, the vendor may still retain all intellectual property rights to such modifications. MCIm's proposed language would require GTE to ignore its vendor agreements that in many cases allow the vendor and its licensees to retain such rights. GTE cannot agree to subjecting itself to potential contractual liability to its vendors at MCIm's request. Accordingly, MCIm's language must be deleted and replaced with GTE's proposed language, which properly subjects MCIm's rights to "any rights retained by the vendor or other third parties."

GTE cannot agree to Section 7.2.2.3. Section 7.2.2.2 provides that parties who use a modification developed and paid for by MCIm will reimburse MCIm on a pro-rata basis. However, should GTE ever use the same modification, Section 7.2.2.3 would require GTE to reimburse MCIm for the cost of the modification. This result would be odd as well as anticompetitive. MCIm would, effectively, incur no cost for the modification--it would be completely reimbursed by third party payments and GTE. Nothing in the Act, the FCC's Interconnection Order or this Commission's Order in this case requires that MCIm enjoy the competitive advantage of subsidized network development. Conversely, GTE would suffer a competitive disadvantage; as it would most likely bear the majority of the modification costs, all other users of the modification would pay less than GTE (particularly MCIm, who pays nothing).

Finally, this section does not mention any transfer of rights upon payment from GTE to MCIm. MCIm will have thus obtained something--exclusive rights to the modification--for

nothing. Simply requiring all carriers, including GTE and MCIm, to bear their pro-rata share of the costs of a given modification is the only way to avoid these anti-competitive results.

Accordingly, MCIm's proposed Section 7.2.2.3 must not appear in the final Agreement, while GTE's obligation to pay for its pro-rata share of the costs of modifications would be made clear by inserting GTE's proposed language in Section 7.2.2.2.

## ARTICLE VII: ANCILLARY SERVICES

1. Article VII, Sections 6.1.2.1, 6.1.2.2, 6.1.2.3 (concerning transfer of ownership and billing for Yellow Page listings).

MCIm's proposed language for this section is unjustified and at odds with the nature of the yellow pages business. This language that would require GTE to transfer billing responsibility or ownership of yellow page listings to MCIm must not be added to the Agreement. Both white page and yellow page listings were subject to national stipulation by the parties, generally requiring GTE to provide listings for MCIm subscribers. This stipulation was intended to dispose of all directory-related issues with MCIm on a nationwide basis. Although GTE has agreed to transfer white pages listings, which are generally subject to regulation, the Agreement cannot properly impose any requirements regarding yellow pages. Yellow pages are a competitive, unregulated product not subject to the requirements of Sections 251 and 252 of the Act. Thus, MCIm cannot use the mandatory negotiation and arbitration process of Section 252 to force agreements in this area on GTE. To this end, it is significant that in its issues list submitted with its Petition

for Arbitration, MCIm included an issue regarding access to yellow pages listings (MCIm's proposed issue 23). At the issues identification workshop, MCIm agreed to remove the yellow pages aspect for purposes of the official list of issues to be resolved in this arbitration.

2. Article VII, Section 6.6.1 ("Performance Measurements and Reporting")

This section requires GTE to meet certain performance intervals for updating its directory listings information. While GTE will provide such updates at the same intervals it uses to update its own subscriber information, it has no obligation to meet the standards set by MCIm, and it cannot agree that these standards are reasonable or can be met in all cases. Accordingly, this section should not be included in the Agreement.

## ARTICLE VIII: BUSINESS PROCESS

1. Article VIII, Section 2.1.4.3 (concerning reservation of telephone numbers and installation of NXXs)

In this section, MCIm proposes requiring GTE to install MCIm NXXs in GTE's switches according to local calling areas defined by MCIm. This recommendation, raised here for the first time, is not validly grounded in the Act or FCC requirements, and would unduly and unnecessarily burden GTE. If GTE is compelled to install numbers based on MCIm-defined local calling areas, it will have to make costly programming changes to adapt its switches to the second local calling area. Furthermore, MCIm's section does not mention anything about cost recovery for installing such NXX codes, and is not limited in

any way. For these reasons, GTE is justified in insisting on deletion of MCIm's proposed Section 2.1.4.3.

3. Article VIII, Section 4.7 (concerning bill payment periods)

In negotiations, GTE has made its best efforts to accommodate MCIm's request for extended payment periods for CBSS bills. As an initial matter, this issue will be relevant only as long as GTE is issuing CBSS bills. In this regard, GTE estimates that it will be able to transition to CABS-like billing in just a few months.

While GTE has internally discussed the possibility of longer payment intervals for CBSS bills with MCIm, GTE has determined that these longer payment periods would require adjustment of GTE's current billing cycles and would impose unreasonably high costs on GTE. Given that GTE will apply the same billing cycles to MCIm as it will to all other carriers, this additional expense is unwarranted, since MCIm will be receiving non-discriminatory treatment. Accordingly, although GTE and MCIm appear to agree that the payment period for bills should be set at a 30/20 day period, GTE cannot agree to the longer period for CBSS bills. As such, the bolded language in this section must be replaced with GTE's language.

4. Article VIII, Section 5.1.6 (concerning summary of usage-sensitive messages)

Although GTE has been willing to agree to a broad range of information exchanges regarding usage, the monthly file summarizing usage sensitive messages required by this section is not available from GTE. Accordingly, GTE cannot at this time agree to this provision. Given that this section is not required by the Commission Order, it must be deleted, although GTE may discuss the matter with MCIm in future negotiations.

5. Article VIII, Section 7.1.11 (concerning "root cause analysis")

This proposed section would require GTE to perform a "root cause analysis" if it fails to provide maintenance performance and service quality at parity. GTE is willing to inform MCIm of the reason it might be unable to provide service at parity. However, this section, by requiring GTE to perform an analysis for the failure at its own expense, effectively imposes an additional--and unwarranted--remedy that can be exercised at MCIm's option. GTE is thus justified in resisting its imposition.

## ARTICLE X: RIGHTS OF WAY

1. Article X, Sections 1 and 3.3 (concerning selection of space)

MCIm's proposed Section 1 states that "GTE shall allow MCIm to select the space MCIm will occupy." Section 3.3 states that GTE will provide certain information "to facilitate non-discrimination in MCIm's selection of space." Neither of these sections accurately reflects GTE's obligations under the Act or the way in which space on poles and in ducts, conduits and rights-of-way is apportioned. Although MCIm can, of course,

provide GTE with its requested route, and ask for certain facilities along that route, GTE retains the discretion to select the space MCIm's facilities will actually occupy along that route. This type of discretion is absolutely necessary to GTE if it is to maintain any sort of order and efficiency in the use of space in poles, ducts, conduits and rights-of-way, which GTE will administer in a non-discriminatory manner. Accordingly, GTE must insist on its formulation of sections 1 and 3.3.

2. Article X, Section 6.2 ("Inquiry Request")

Although this Section appears as agreed in the version of the Agreement submitted to the Commission, it is not; a planned settlement of this issue failed after the Agreement was sent to the printer.

This section requires GTE to respond to "inquiry requests" from MCIm, and reflects discussions the parties have had over the attachment request process in general. However, the parties did not finally resolve several disputes regarding this process and, as such, GTE will not agree to offer an inquiry request process to MCIm. The requested process would allow MCIm to make an informal inquiry prior to making an attachment request. This additional process unnecessarily duplicates the functions of the attachment request. The attachment request process is designed to allow requesting parties to determine whether space exists, will be used by all other parties contracting with GTE, and should be sufficient to meet MCIm's needs. Accordingly, this section should be deleted from the Agreement submitted.

2. Article X, Section 15.1 ("Charges for Unauthorized Attachments")

During negotiations, MCIm agreed to include most of GTE's provisions regarding charges for unauthorized attachments. Most of Section 15 is acceptable to both parties. However, they disagree over certain language concerning charges for unauthorized attachments.

An additional charge for unauthorized attachments is commercially reasonable. MCIm's version of Section 15, however, imposes only the charges MCIm would have normally paid. Paying only this amount would give a carrier an incentive to ignore the process set forth in this Article, place unauthorized attachments, and then present GTE with a *fait accompli*. Moreover, GTE suffers damages from unauthorized attachments insofar as it is unable to accurately determine available space without field surveys, must often build around unauthorized attachments, and may suffer damage to its physical plant if unauthorized attachments are placed without proper make-ready work. Accordingly, GTE must insist on its proposed language.

3. Article X, Sections 17 and 18 ("Indemnification" and "Insurance")

During negotiations, MCIm agreed to include one paragraph of GTE's original indemnification and insurance provisions in the Agreement. Although MCIm modified this paragraph slightly, the paragraph itself, Section 17, is acceptable to GTE. Nevertheless, the Agreement must include the rest of GTE's indemnification and insurance provisions. GTE applies the same indemnification and insurance requirements to any carrier that requires access to its poles--such provisions are absolutely necessary where the

placement and use of telecommunications equipment on GTE's property can give rise to serious questions of liability between the parties, to the parties' respective employees and agents, and to the public at large. Consequently, allowing MCIm to avoid such requirements would be inherently discriminatory, and thus violate the non-discrimination provisions of Sections 224 and 251 of the Act.

Accordingly, MCIm should agree to replace Section 17 with GTE's proposed language for Sections 17 and 18.

3. Article X, Section 19.7 (concerning cost of removal for retired cable)

This section would require GTE to make space available in conduits that contain retired cable. While GTE agrees to make such space available, it needs to make clear that the cost of removing retired cable must lie with the carrier requesting such space. Removal of retired cable from conduit is a normal part of make-ready work. Forcing GTE to absorb this cost when it is required to prepare facilities for MCIm would be unfair in the extreme--all carriers bear the cost of removing retired cable when they want to use space, even GTE. Thus, requiring MCIm to also bear this cost is a necessary part of "non-discriminatory access."

Accordingly, this last sentence should be deleted and replaced with GTE's language.

## ARTICLE XI
## NUMBER RESOURCES AND PORTABILITY

Article XI, Section 4.8.4 (ported and shadow numbers in the LIDB)

This section is incorrectly represented as agreed; the document was printed before GTE could consult with its subject matter expert on this provision. GTE has now learned it inaccurately reflects GTE's network capabilities.

This proposed section would require GTE to include both the ported number and the "phantom" number in GTE's Line Information Database (LIDB). As indicated in Article VI, Section 12, GTE can place ported numbers in the LIDB--as such, whenever a third party calls the ported number, it will be routed appropriately. However, GTE does not currently have the technical capability of placing a number assigned by MCIm, whether this is called a "phantom" or "shadow" number, in its LIDB.[7] Moreover, this capability is not necessary for MCIm to provide service. If a number ported to an MCIm customer is stored in the LIDB, and a party dials the number, the call will, in all cases, be routed appropriately. No one, to GTE's knowledge, will receive any number assigned by MCIm (which GTE assumes is what MCIm means by "shadow" number), and as such storage in the LIDB is not necessary for this number--indeed, the whole point of number portability is to avoid the need for other parties to have a second number. Accordingly, the words "and the shadow" must be stricken from this section.

## APPENDIX C: PRICE SCHEDULE

[7] During negotiations, MCIm stated that it meant this section to require the inclusion of "shadow," rather than "phantom," numbers in the LIDB and attempted to draw a distinction between the two. GTE's experts in this field, however, are not aware of any distinction and cannot, in any case, include any number other than the ported number in the LIDB.

1. Appendix C, Section 1.8 (concerning rates to be determined)

MCIm proposes that rates should be considered to-be-determined (TBD) "[i]f a provision references prices in Appendix C or if a provision specifically refers to a price or prices or to provision at cost, but does not reference Appendix C, and there are no corresponding prices already set forth in Appendix C for such item." However, the Agreement would require prices in two situations that may not fall within this provision. First, the Agreement contains numerous technical references which the parties agree GTE may not meet as of the Effective Date of the Agreement. GTE understands, however, that MCIm would pay for the cost of necessary upgrades to meet such standards, if specifically requested by MCIm. Indeed, this would be entirely consistent with the bona fide request process the Agreement establishes and which MCIm must use if it wants higher levels of service than GTE currently provides itself and others.

Second, the Conformed Agreement contains numerous sections that require GTE to provide a service, but do not specify cost recovery. GTE is not obliged to provide these services for free, and understands that some measure of cost recovery will be allowed. Again, these unspecified costs may not be covered by the language cited above.

Accordingly the parties should substitute GTE's proposed language for the bolded language at Section 1.8.

## CONCLUSION

For all the reasons discussed in these Comments, the Commission should (1) order addition of GTE's liability and indemnification language to the Agreement; and (2) approve

GTE's formulations of conforming language for the provisions GTE has specified as arbitrated and resolved. It should not and cannot lawfully approve MCIm's proposals for additional language on issues that were never litigated or resolved in this arbitration.

Respectfully submitted on February 17, 1997.

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## ATTACHMENT A
## UNILATERAL SECTIONS NOT REQUIRED BY THE ARBITRATION ORDER

| SECTION | DESCRIPTION |
|---|---|
| Art. III, Sec. 13 | Liability for uncollectible or unbillable revenue |
| Art. III, Sec. 20.1 | Indemnification obligation |
| Art. III, Sec. 22.1 | Exceptions to limitation of liability, including characterization of lost revenue as direct damages |
| Art. III, Sec. 23.1 | Defense of intellectual property claims |
| Art. III, Sec. 23.2 | Obligation to obtain licenses from third parties |
| Art. III, Sec. 24.2 | Liability of GTE for illegal change to subscriber carrier selection |
| Art. III, Sec. 28 | Inspection of tariffs |
| Art. III, Sec. 39 | Audits by MCIm |
| Art. III, Sec. 41 | Dispute resolution process |
| Art. IV, Sec. 1.4 | Cooperation to obtain access to telephone closet |
| Art. IV, Sec. 3.3.1 | "in the LERG for that rate center for which GTE terminates calls through direct end office trunks" |
| Art. IV, Sec. 4.4.5 | Interval for provisioning of trunk groups |
| Art. VI, Sec. 7.2.2.2 | Rights to modifications to switches |
| Art. VI, Sec. 7.2.2.3 | Reimbursement for GTE use of modifications |
| Art. VII, Sec. 6.1.2.1 | Transfer of yellow page listings to MCIm |
| Art. VII, Sec. 6.1.2.2 | See Art. VII, Sec. 6.1.2.1 |
| Art. VIII, Sec. 6.1.2.3 | See Art. VII, Sec. 6.1.2.1 |

| | |
|---|---|
| Art. VIII, Sec. 6.6.1 | Performance standard for updates of databases |
| Art. VIII, Sec. 2.1.4.3 | Housing of NXXs in GTE switches |
| Art. VIII, Sec. 4.7 | Payment periods for bills |
| Art. VIII, Sec. 5.1.6 | Communication of usage sensitive messages |
| Art. VIII, Sec. 7.1.11 | Root cause analysis |
| Art. X, Sec. 1 | Selection of space |
| Art. X, Sec. 3.3 | See Art. X, Sec. 1 |
| Art. X, Sec. 6.2 | Inquiry request |
| Art. X, Sec. 15.1 | Charge for authorized attachments |
| Art. X, Sec. 17 | Insurance and indemnification |
| Art. X, Sec. 19.7 | Cost of cable removal |
| Art. XI, Sec. 4.8.4 | Shadow numbers in LIDB |

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Comments of GTE Florida Incorporated in Docket No. 960980-TP was hand-delivered(*) or sent via overnight delivery(**) on February 17, 1997 to the parties listed below.

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