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GTE

Marceil Morrell**
Vice President & General Counsel - Florida

Associate General Counsel
Anthony P. Gillman**
Leslie Reicin Stein*

Attorneys*
Kimberly Caswell
M. Eric Edgington
Ernesto Mayor, Jr.

* Licensed in Florida
** Certified in Florida as Authorized House Counsel

GTE Telephone Operations

One Tampa City Center
201 North Franklin Street, FLTC0007
Post Office Box 110
Tampa, Florida 33601
813-483-2606
813-204-8870 (Facsimile)

December 18, 1996

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

Re: Docket No. 961173-TP
Petition of Sprint Communications Company Limited Partnership for Arbitration of Proposed Interconnection Agreement with GTE Florida Incorporated Pursuant to the Telecommunications Act of 1996

Dear Ms. Bayo:

Please find enclosed for filing an original and fifteen copies of GTE Florida Incorporated's Posthearing Statement in the above matter. Also enclosed is a diskette with a copy of the Posthearing Statement in WordPerfect 5.1 format. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at (813) 483-2615.

Very truly yours,

Anthony P. Gillman

Anthony P. Gillman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Sprint Communications Company Limited Partnership for Arbitration of Proposed Interconnection Agreement with GTE Florida Incorporated Pursuant to the Telecommunications Act of 1996	Docket No. 961173-TP Filed: December 18, 1996

GTE FLORIDA INCORPORATED'S POSTHEARING STATEMENT

Anthony P. Gillman, Esq.
Kimberly Caswell, Esq.
GTE Florida Incorporated
P. O. Box 110, FLTC0007
Tampa, Florida 33601
Telephone: (813) 483-2606

Edward Fuhr, Esq.
Katherine Murphy, Esq.
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
Telephone: (804) 788-8200

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GTE FLORIDA INCORPORATED'S POSTHEARING STATEMENT

I. GTE's Basic Position

A. Summary

In this arbitration, Sprint seeks to undermine the structure of the Telecommunications Act of 1996 (Act) and subvert Congressional intent. Sprint's overriding message is that it is entitled to the same rates and terms the Commission determined for GTE's respective interconnection contracts with AT&T and MCI. Aside from ignoring the Commission's legal obligation to make its decision solely on the record before it (which GTE discusses in more detail below), Sprint's approach guts the Act's arbitration provisions.

The Act embodies Congress' conclusion that particularized agreements that emerge from negotiation and arbitration will best produce vigorous competition. Sprint's contrary view--that varying terms will produce only discrimination--cannot be right. If it were, Congress would not have bothered to adopt the Act at all and industry relationships would continue to be governed only by tariffs, which establish exactly the same rates and terms for everyone.

Sprint's own behavior belies its discrimination arguments. Sprint resolved numerous issues with GTE before and even during the arbitration proceedings. For instance, before hearing, Sprint withdrew all the technical issues so hotly contested in the AT&T arbitration. Then, in mid-hearing, it withdrew the operations support systems issues that also figured prominently in the AT&T arbitration. The issues were settled under different terms than the Commission ordered for AT&T and MCI. If Sprint truly believed its discrimination theory, it would not have accepted any different rates, terms or conditions than those ordered for AT&T and MCI.

This Commission's approval of differing interconnection contracts also precludes Sprint's discrimination contentions. For instance, GTE has executed agreements with ICI and MFS that contain different terms, including rates for interconnection and number portability. (Menard, Tr. 772, 790.) Neither the Commission nor the ALECs ever raised any discrimination issue in the contract review and approval process. (Menard, Tr. 809.)

Sprint's most-favored nations (MFN) proposal, if adopted, would make doubly sure that nothing remained of the Act's negotiation and arbitration framework. Sprint's MFN clause would permit it to pick and choose individual rates and terms from any other company's interconnection contract with GTE. As the Eighth Circuit Court of Appeals concluded in staying the FCC's pick-and-choose rule that Sprint relies upon, this rule would "undercut any agreements that are actually negotiated or arbitrated." Iowa Util. Board v. F.C.C., Nos. 96-3321 et al. (8th Cir. Oct. 15, 1996) (Stay Order at 16). An agreement would never be final, thus destabilizing the entire regime for negotiated and arbitrated agreements.

To preserve the scheme Congress established to create competitive markets, the Commission must reject Sprint's MFN proposal and its misguided "discrimination" arguments. It must look solely to the record in this proceeding to guide the parties to a final and binding agreement. Based on that record, the Commission should adopt GTE's prices for unbundled elements, interconnection, and wholesale services. Only GTE's prices reflect the actual costs GTE will incur to maintain its network and ensure universal service, while promoting rational competition. Indeed, the only viable option in this proceeding is to adopt GTE's prices, because Sprint has presented no analysis or evidence of its own to refute GTE's cost studies.

Setting prices below GTE's actual costs would result in deterioration of the network that must serve customers of both GTE and its ALEC interconnectors. If GTE's network is to remain viable, it must not be forced to subsidize new entrants, as Sprint openly believes is appropriate. (Stahly, Tr. 295.) As the Eighth Circuit recognized in staying the FCC's pricing provisions, even the most temporary implementation of inappropriately low rates would impose enormous, irreparable and unlawful losses on GTE. See Stay Order at 18. It would also cause the Commission and the State of Florida to take GTE's property in violation of the Fifth Amendment of the U.S. Constitution, as well as Article 10, section 6 and Article 1, section 9 of the Florida Constitution. This Commission must not take such action.

Finally, the Commission must strictly enforce the Act's distinction between unbundling and resale. Sprint cannot be allowed to take apart GTE's network just so it can obtain a reassembled service that is identical to a service that GTE resells, but at a different price. Congress did not intend to create two sets of wholesale rates for the same services. Sprint's suggestion to the contrary is disproven, once and for all, by the legislative history of the Act's pricing standards.

B. The Commission Must Base Its Decision on the Record in this Case.

The legality of simply transferring the Commission's rulings in the AT&T/GTE arbitration to this case has become a critical issue which deserves discussion at some length because Sprint has adopted a "discrimination" theme as the basis for all of its positions on the issues in this case.[1] Granting Sprint's request would contravene due process and the core principles of the Act.

Sprint is essentially asking to be relieved of its statutory obligation to present proof to support the claims of its petition, and correspondingly, preclude the Commission from fully adjudicating the evidence before it. The United States Supreme Court has long recognized that an action by a public utilities commission that deprives a telephone company of property requires an evidentiary hearing to satisfy the procedural due process requirements of the Fourteenth Amendment.[2] The rights to due process under the Fourteenth Amendment and under Article I, Section 9 of the Florida Constitution are co-extensive.[3]

Sprint's petition implicates GTE's property rights, and, accordingly, its due process rights. Sprint has asked for access to many different types of GTE's property--its network elements, its databases, and its facilities for interconnection and traffic exchange--and

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[1] Unless otherwise indicated, "AT&T" includes both AT&T and MCI for purposes of this posthearing statement and the phrase "AT&T/GTE arbitration" refers to the consolidated arbitrations of AT&T and MCI in Docket numbers 960847-TP and 960980-TP.

[2] Ohio Bell Tel. Co. v. Pub. Utili. Comm'n of Ohio, 301 U.S. 292 (1936).

[3] Bonavista Condominium Association, Inc. v. Bystrom, 520 So 2d 84, 96-97 (1988).

GTE is entitled to rulings grounded on the evidence in this case. A merely nominal opportunity to be heard is not enough; rather, GTE has a right to the Commission's thorough and careful considerations of the record in only this proceeding.

Although Congress could have set up a procedure whereby the results of the first state arbitration would bind all subsequent parties seeking arbitration, it did not do so. Section 252(b) of the Act requires each petitioner to submit all relevant documentation concerning its unresolved issues along with its petition for arbitration. Sprint is obligated to present evidence supporting these issues, rather than relying on AT&T's results--and thus, AT&T's record--as a substitute for a true evidentiary presentation here.

Aside from any legal problems, this approach makes no practical sense. Sprint's petition and arguments are materially different from AT&T's. For instance, in the AT&T/GTE arbitration, AT&T proposed the so-called Hatfield Model as the means of pricing unbundled elements. While Sprint has argued here that GTE's proposed rates are inappropriate, it never suggested the Commission use the Hatfield Model. In fact, Sprint rejected that Model in Pennsylvania's recent Universal Service Proceeding (Docket I-00940035). Similarly, in a recent FCC filing, Sprint opposed AT&T's request for geographic deaveraging of proxy loop prices and state-wide deaveraging of permanent loop prices.[4] These are just a few examples of the disagreements between Sprint and AT&T that arose in the FCC's proceeding implementing the Act. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325 (Aug.

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[4] See Opposition of Sprint to Petitions for Reconsideration in FCC Docket 96-98 (Oct. 31, 1996).

8, 1996) (FCC Order) at ¶¶ 882-97.

Because its position here contradicts its prior assertions in numerous proceedings, Sprint should be estopped from asserting that the AT&T/GTE decision should be adopted. Judicial estoppel, also known as the doctrine of preclusion of inconsistent positions, prohibits a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. American Nat'l Bank of Jacksonville v. FDIC, 710 F.2d 1528, 1533 (11th Cir. 1985). This concept is relevant to Sprint's attempt here to take advantage of the AT&T results without regard to conflicting opinions it has advanced in the recent past. For instance, Mr. Stahly, Sprint's pricing witness, admitted that in California, Sprint took the position that GTE's cost studies were reasonable. (Stahly, Tr. 294.) In fact, at the FCC, Sprint urged the adoption of low wholesale discounts as part of its opposition to AT&T's views. (Stahly, Tr. 294; see also FCC Order ¶ 882.) And though Mr. Stahly is not even familiar with AT&T's methodology, (Stahly, Tr. 296), Sprint now seeks to embrace the results of the AT&T/GTE arbitration. The Commission should reject this blatant opportunism offered as a basis for decision here.

It would, moreover, violate GTE's due process rights for the AT&T/GTE record to be judicially noticed as the basis for a decision in this arbitration--which is, in effect, what will occur if the Commission merely overlays the AT&T result onto this case. In this regard, Justice Cardozo's observations in Ohio Bell, supra, are instructive:

> The right to...a [fair and open] hearing is one of the rudiments of fair play assured to every litigant by the 14th Amendment as a minimal requirement....There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimum requirement has been neglected or ignored.

301 U.S. at 304-05 [emphasis added].

The Commission should not be tempted by "convenience or expediency" to adopt the AT&T/GTE results in place of evaluating and ruling only on the evidence in the record here. There is, moreover, nothing in the Act or the Commission's Rules that would allow the record in one arbitration to be imposed unilaterally upon a party in another, which is the effect Sprint seeks with its promotion of the AT&T outcome. If Sprint wants the results of the AT&T/GTE arbitration, it should have submitted and adequately defended evidence to support that result. Sprint's request is instead tantamount to incorporating by reference AT&T's theories--without giving GTE any opportunity to offer evidence about the additional problems with these theories that have emerged since the AT&T/GTE arbitration.

Sprint's novel discrimination theory cannot hide the fact that it failed to carry its burden as the Petitioner in this case. The Commission must not allow Sprint to benefit from this lapse by granting its request to adopt the AT&T/GTE results.

II. GTE's Positions on the Issues

Issue 2: What should the rates be for each of the following items:

- **Network Interface Device**
- **Local Loop;**
- **Local Switching;**
- **Interoffice Transmission Facilities;**
- **Tandem Switching;**
- **Signaling and Call-Related Databases?**

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

A. Only GTE's Proposals Meet the Act's Goals and Constitutional Requirements.

In this proceeding, the Commission must: (1) set prices for unbundled network elements, interconnection and resale services that will encourage efficient entry into local exchange markets, eventually leading to facilities-based competition, and (2) accomplish this without taking GTE's property. The first of these objectives flows from the Act. The second is required under the Fifth Amendment to the United States Constitution, as well as Article 10, section 6 and Article 1, section 9 of the Florida Constitution. GTE's pricing proposals will enable the Commission to achieve both objectives.

By setting prices for unbundled elements and interconnection based on a market-determined price--and permitting that price to fall based on market forces--GTE's approach encourages efficient entry in the same way markets do. GTE's recommendations will avoid an unconstitutional taking of GTE's property by enhancing the Company's opportunity to recover its forward-looking common costs, which GTE has proved to be substantial. To the extent that GTE has stranded costs that cannot be recovered through its pricing methods, a competitively neutral end-user charge must be imposed in order to avoid a taking.

Sprint's proposal, in contrast, accomplishes neither of the mandatory objectives in this arbitration. Sprint asks the Commission to adopt the prices set in the AT&T/GTE arbitration, (Stahly, Tr. 278), which, as GTE explained, is a legally impermissible outcome. (See Basic Position, supra.) Moreover, as explained below, these prices would encourage entry by inefficient firms seeking to take advantage of subsidies.

Indeed, Sprint's approach would undercut the Act's primary purpose--encouragement of facilities-based competition. Entrants which receive GTE's services and inputs at subsidized prices will have no incentive to build facilities of their own. And inefficient entrants attracted by artificially low prices may well crowd out their more efficient competitors.

The Act's pricing standard for unbundled network elements is clear: State commissions "shall" determine "just and reasonable" rates and such rates "shall" be based on cost and may include a reasonable profit. 47 U.S.C. § 252(c)-(d)(1). A Commission's determination of "just and reasonable" rates must, of course, be based on competent, reliable, and relevant evidence.

Sprint agrees with GTE that, under the Act, the prices for unbundled network elements should be based on total element long-run incremental cost (TELRIC) and include a reasonable share of GTE's forward-looking common costs. (Stahly, Tr. 296.) The questions the Commission must settle are thus: (1) what are the TELRICs for the various elements?; and (2) what should be added to the TELRICs in setting prices?

B. Only GTE Submitted Cost and Pricing Evidence.

In this proceeding, Sprint offered no evidence of GTE's costs or the appropriate prices for unbundled network elements. Mr. Stahly admitted that Sprint had not conducted any cost studies of its own because it "simply didn't have time to." (Stahly, Tr. 292, 336.)

Not surprisingly, Sprint chose not to submit its Benchmark Cost Model in this proceeding, as it has elsewhere. BCM-2, when run in its default capacity mode, produces a loop price of $25.44. When Lucent Technology contract prices are used, BCM-2 produces a loop price of $33.61. (Steele, Tr. 460-61.) Both figures exceed the corresponding rates adopted in the AT&T/GTE arbitration.

Although Sprint expressed concerns about GTE's own use of the BCM-2, Sprint never attempted to run the model with GTE Florida data or examine GTE's runs. (Stahly Tr. 305-07.)

Sprint alleged that it did not have time to do a thorough review of GTE's cost studies. (Stahly, Tr. 337.) Yet Mr. Stahly admitted that GTE offered its cost studies to Sprint in July 1996 and that he had seen a copy of the cost studies in this docket a couple of weeks before the arbitration. (Stahly, Tr. 322-23.)

GTE's cost studies (Exhibit 12) are uncontroverted. These studies reject both: (1) the "embedded" approach, in which even obsolete technologies are assumed to be used on a forward-looking basis; and (2) the hypothetical approach, in which assumptions are divorced from the concrete circumstances GTE faces on a going-forward basis. (Steele, Tr. 415.) Instead, the cost studies analyze GTE, but without regard to past practices that lack relevance to the future.

GTE's studies have all of the key attributes of a proper analysis of actual forward-looking, long-run incremental costs. First, they are incremental--they study the costs of offering the service or element versus the costs of not offering it.

Second, they follow principles of cost causation. They capture both the volume-sensitive and volume-insensitive costs attributable to the precise element in question, and exclude the common or shared costs that are necessary to the operation of the Company as a whole. (Steele, Tr. 459.) They use forward-looking average fill factors to determine the per-unit TELRICs for loop and transport network elements. (Steele, Tr 460.) Volume-sensitive and volume-insensitive costs for switching were developed in a similar manner, using GTE's COSTMOD model and the Bellcore SCIS model. (Steele, Tr. 460; Ex. 12 (labeled BIS-1, Preface 1.10 to Steele DT).) Consistent with the Act and the FCC, GTE's switching TELRIC per-minute-of-use costs do not include the costs for vertical services. GTE developed TELRIC studies for vertical services separately. (Steele, Tr. 461.)

Third, GTE's cost studies are forward-looking. (Steele, Tr. 415.) No obsolete technology is used. GTE relies instead on current network design standards that it now uses to provision loops, switching, and transport facilities. For example, with respect to technology, the cost models assume digital switches and fiber technology for interoffice transport. Although GTE still uses analog transmission facilities, it recognizes that this technology is outdated, and therefore excludes it from the study.

GTE's cost studies are, in fact, conservative. For example, they do not adjust depreciation and cost of capital to reflect the increased risks associated with the new, competitive environment and rapidly evolving technology. (Steele, Tr. 416.) Had GTE made these adjustments, its TELRICs would have been higher.

Sprint presented no evidence to contradict GTE's conservative, Florida-specific cost studies. <u>The only evidence of GTE's costs is in GTE's cost studies</u>. Thus, its TELRICs are the appropriate starting point for pricing interconnection and unbundled network elements.

C. AT&T's Evidence and Arguments Should Not Be Considered in this Proceeding.

Sprint will likely try to substantiate its belief that it should receive the AT&T/GTE arbitration results because GTE presented the same cost studies in this proceeding as it did there. This argument, however, ignores the fact that the AT&T/GTE decision was also based in part on AT&T's and MCI's evidence and arguments. For example, Staff set interim prices for loop feeder and loop distribution based on the Hatfield Study results. (AT&T Staff Rec. at 135.) But such subloop unbundling was not even an issue in this arbitration. Additionally, GTE believes that AT&T's arguments likely affected the amount of common costs added to each element's TELRIC.

If Sprint seeks the benefit of AT&T's evidence and analysis, then GTE should have the opportunity to present additional evidence about the problems uncovered in AT&T's approach in proceedings elsewhere since AT&T's arbitration with GTE here.

First, for example, AT&T's Hatfield Model systematically "assumes" away huge amounts of investment and expense. By operation of invisible formulae and unsupported assumptions, the Model "writes off" overnight hundreds of millions of dollars of investments. At the same time, it "assumes" forward-looking expenses will be immediately slashed by tens of millions of dollars.

Second, the Model has no tapering algorithm to reflect the reality that cable sizes get smaller as they approach the end user. Instead, the Model assumes giant, wrist-sized 400 pair cables go to every home, thus distorting the efficiencies realizable by any company and seriously underestimating costs.

Third, the Model underestimates by several hundred feet the drop and distribution cable required to service the average consumer.

Fourth, the Model fails to calculate net present value over the life cycle of a switch, ignoring the fact that the present value of an investment must equal the initial cost of the investment plus the present value of future upgrades. Because vendors price switches as loss leaders and achieve their high margins through add-ons, this omission by AT&T again produces unduly low input prices.

GTE's cost studies, by contrast, are firmly and reliably rooted in the realities of GTE's Florida operations on a forward-looking basis. They are uncontroverted in this proceeding and provide the proper basis for setting prices here.

D. GTE Has Fully Justified Its Pricing Proposals.

GTE and Sprint agree that pricing at TELRIC is not appropriate, and that an additional amount must be added to reflect, at a minimum, GTE's common costs. (Stahly, Tr. 296.) GTE has demonstrated that: (1) its common costs are substantial, (2) prices must reflect this fact, to the degree possible, and (3) prices should be set at market-determined levels pursuant to the M-ECPR methodology to promote efficient competition and further the recovery of GTE's common costs.

1. GTE's Common Costs Are Substantial

GTE presented the <u>only</u> evidence regarding its specific common costs, although Sprint agreed that ILECs have a great deal of joint and common costs in their network and infrastructure. (Hunsucker, Tr. 180.) In fact, GTE showed that its forward-looking common costs exceed $455 million, which translates to about 41-47% of its total costs. (Trimble, Tr. 426, 462.) This percentage is to be expected. It reflects GTE's significant economies of scale--economies which the FCC recognizes will benefit all requesting carriers through their use of GTE's network. See FCC Order ¶11.

GTE presented two different methods of estimating its forward-looking common costs. The first approach--the top-down or "economic" method Dr. Sibley described--shows common costs to be 47% of total costs.[5] (Trimble, Tr. 426.) The second approach --an accounting approach--looked at specific uniform system of accounts (USOA) categories for costs the Company expects to incur in the future and that are not included in the TSLRIC/TELRIC studies. (Trimble, Tr. 428.) It shows common costs to be 41% of total costs. (Steele, Tr. 462). The point is not the precise number, but rather the fact that common costs are very substantial. (Sibley, Tr. 377.)

GTE's common costs cannot be compared directly to the figures advanced by AT&T, and by extension, Sprint. GTE specified many separate USOA accounts to be included within its common costs (see Ex. 13) while the ALECs looked only at corporate operations expenses. (Steele, Tr. 461-62.) While GTE's corporate operations expense calculation--14% of its direct costs--is in line with what the ALECs have advocated (Steele,

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[5] This method subtracts from GTE's total forward-looking cash flow those costs that are attributable to specific services. Remaining are the forward-looking costs that are not attributable to specific services--in other words, the Company's forward-looking common costs. Revenue data from 1995 is a reliable guide for approximating forward-looking costs because regulation permits the firm the opportunity to produce a revenue stream that is only just sufficient to replace its depreciated capital over time to cover its current operating revenue. Absent above-normal profits or significant inefficiencies, therefore, revenue data is an appropriate guide. There is no evidence that Florida has permitted either of these situations to occur. For example, GTE's return on equity at the end of 1995 was 11.95% as compared to its authorized level of 12.2%. (Sibley, Tr. 375-76.)

Tr. 462), GTE has also included additional costs which represent 27% of GTE's direct costs. If these additional items were not included in GTE's common costs, then GTE's TELRICs would have to increase by 27% to capture these costs. (Id.)

Sprint has adduced no evidence that GTE will avoid incurring a single dollar of the costs it has identified as part of its joint and common costs. Neither can Sprint gain any ground by claiming that GTE's joint and common costs are too high. If some joint and common costs should have been allocated to specific elements, then the TELRIC for those elements must, in any case, be increased in direct proportion to the decrease in GTE's common costs.

2. Prices Must Reflect the Magnitude of GTE's Common Costs.

Both the Act and the Constitution require that GTE be permitted to recover its costs plus a reasonable profit. If GTE is forced to sell unbundled elements at rates that do not cover all costs associated with these elements, the result would be a taking of its property without just compensation. (See GTE's Takings Report, included in its Response to Sprint's Petition.) The prices Sprint asks this Commission to adopt would result in a taking of substantial magnitude.

If GTE is forced to sell all of its elements at the rates set in the AT&T/GTE arbitration, GTE's $964 million annual revenues will fall by $314 million--a 33% reduction. (Trimble, Tr. 464-66.) Plainly, GTE cannot withstand a reduction of this magnitude and still recover its forward-looking common costs. (Id. at 466.)

Ultimately, there are only two sources of recovery of these costs: new entrants or consumers. The merit of recovering common costs from entrants (to the extent the market will permit) is obvious. A firm's common costs are closely related to its economies of scope. The FCC has stated that part of what it envisions new entrants obtaining from the ILECs are their economies of scale and scope. (See FCC Order ¶ 11.) New entrants should pay for the common costs associated with these benefits, to the extent that pricing will permit. Otherwise, Florida consumers will be asked to subsidize Sprint's entry.

3. M-ECPR Will Best Promote Competition and Common Cost Recovery.

GTE used the M-ECPR to determine appropriate prices for the loop, port and local switching. (Trimble, Tr. 463.) (Other prices, including transport, multiplexing and SS7 features, were set at existing tariffed rates. (Trimble, Tr. 435.))

M-ECPR pricing will promote efficient competition and will enable GTE to recover its common costs to a far greater degree than the AT&T results Sprint promotes. As Dr. Sibley explained, the M-ECPR introduces a market constraint on prices. (Ex. 11.) It does not allow GTE to charge a price for an unbundled element that exceeds the element's stand-alone cost, or to recover any alleged "monopoly profit." Essentially, market forces will prevent any excessive markup above TELRIC and in many cases provide prices substantially below GTE's full costs.

To illustrate the point, consider the M-ECPR price for a loop. The interstate 2-wire special access line is a good substitute for a loop. The stand-alone cost of this element is approximately $33.08. Accordingly, the M-ECPR loop price is set at that amount. This is not a make-whole price. As Mr. Sibley demonstrated, if GTE set the loop price based on the revenues it would generate from the loop in the absence of competition, the price would be roughly twice as high.

This higher price would represent the FCC-ECPR price, as defined (and properly rejected) by the FCC. Unlike the M-ECPR, the theory the FCC rejected does not allow for the downward adjustment of prices in response to market forces. (Sibley, Tr. 367.) Only if the FCC-rejected version of ECPR is used will GTE be economically "indifferent" between selling directly to the consumer or reselling elements to CLECS. Under M-ECPR, market forces will adjust the prices downward. For example, because of market alternatives, M-ECPR produces an unbundled loop price that is less than half of the price produced under the version of ECPR rejected by the FCC.

Market alternatives exist for many local service components. There are multiple providers of signaling services. In fact, GTE buys signaling from Sprint. (Sibley, Tr. 377.) There are also competitive commercial providers of switching services, including competitive access providers, and adaptations of long-distance facilities to carry out local exchange switching. (Sibley, Tr. 363.) Because these are not monopoly inputs, the market will not allow monopoly profits for them.

The Commission should price GTE's unbundled elements under the M-ECPR approach, and it should accept GTE's specific prices that this methodology yields. At the same time, however, the Commission should recognize that M-ECPR does not guarantee full recovery of GTE's forward-looking common costs. In the case of an average business unbundled loop, for example, a make-whole price would be $64.56. GTE's proposed rate is $33.08 and the market may cause the price to drop well below this amount. As a result, and because M-ECPR (unlike the version of ECPR the FCC rejected) does not allow GTE to recover its full opportunity costs, M-ECPR pricing will not make GTE whole. Rather, it strands investment which GTE is entitled to recover as a matter of constitutional law.

This recovery should be accomplished through a competitively neutral end-user charge. (Sibley, Tr. 378-79.) This charge is necessary under the Act's directive that ILECs should recover all of their costs. 47 U.S.C. § 252(d)(l).[6] Without it, GTE will be unable to upgrade, provision or maintain its network. (Sibley, Tr. 380.) This hurts everyone, including Sprint.

E. Sprint's Proposed Uniform Markup Is Unsound.

Sprint proposes the Commission use a uniform markup over TELRICs instead of M-ECPR. This approach, Sprint argues, "treats the non-competitive markets as if they were competitive." (Stahly, Tr. 226.) Sprint thus ignores the simple fact that competitive markets do not have equal markups. Rather, competitive firms' markups vary considerably across products and markets. (Sibley, Tr. 364.) Indeed, Mr. Stahly admitted that Sprint does not price its own products with a uniform markup, and could point to no other company that did so. (Stahly, Tr. 310.)

Sprint's notion that "uniform markups are nondiscriminatory" (Stahly, Tr. 226) is similarly meritless. Indeed, uniform markups are more likely to be discriminatory since they create subsidies for some services and result in below-cost prices for others. (Sibley,

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[6] GTE believes the Eighth Circuit's Stay Order affirms the need for an end-user charge. Indeed, one of the reasons GTE and the ILECs sought a stay was because the forward-looking TELRIC methodology "does not consider historical or 'embedded' costs (i.e., costs that an incumbent incurred in the past)." (Stay Order at 11.) Because GTE's cost studies are forward-looking TELRIC studies, an end-user charge is necessary to recover the costs of its past investment.

Tr. 364.)

Because Sprint's uniform markup lacks a sound empirical basis and is at odds with the operation of competitive markets, it deserves no serious consideration.

F. Deaveraged Loop Prices Are Inappropriate Until Rates Are Rebalanced.

Geographic deaveraging of loop prices, as Sprint has proposed, cannot occur until GTE's rates are rebalanced to reflect actual costs within geographic areas. (Menard, Tr. 795.) Although Sprint generally advocated geographically deaveraged rates for network elements, it was unable to articulate which elements should be geographically deaveraged. (Stahly, Tr. 339.) Sprint also admitted that it lacked the cost data necessary to propose deaveraged rates (Stahly, Tr. 341) and that Sprint did not intend to advocate deaveraged rates in <u>this</u> proceeding. (Stahly, Tr. 339.) In light of these admissions and GTE's evidence, geographic deaveraging is inappropriate at this time.

G. The Commission Must Consider GTE's Universal Service Obligations.

The Commission must also consider the universal service subsidies embedded in GTE's rates. Sprint admits that GTE will continue to have universal service obligations and, even in the face of local competition, must make capital investments to serve all customers. (Stahly, Tr. 313-14.)

Now that GTE's franchise protections have been removed, however, both the Act and Constitutional principles prohibit the State of Florida from imposing on GTE alone the costs of supporting universal service. Section 254(f) of the Act requires that:

> [e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis in a manner determined by the State to the preservation and advancement of universal service in that State.

Before any further competitive entry occurs, this Commission must establish a mechanism to ensure that these new entrants contribute, on an equitable and nondiscriminatory basis, to the provision of universal service. The U.S. and Florida Constitutions also prohibit requiring GTE--and GTE alone--to continue providing residential services below cost without providing a means of recovering such costs.

This requirement can, and must, be satisfied in one of two ways. The Commission must either: (1) implement a "specific, predictable, and sufficient mechanism" that is competitively neutral and to which all new carriers contribute to universal service on "an equitable and nondiscriminatory basis," § 254(f); or (2) take into account the costs of any subsidies used to support universal service in setting GTE's rates for interconnection and unbundled elements, § 252(d). Because the Commission has not yet established an effective funding mechanism that satisfies these requirements, it must consider the effect of social subsidies when determining the rates for interconnection and unbundled elements.

In absence of an equitable universal service funding mechanism, setting rates that do not consider artificial subsidies would run afoul of Section 252(d)'s requirement that the Commission set "just and reasonable" rates based on GTE's true costs. The Commission must thus condition the implementation of these rates on the establishment of a "specific, predictable, and sufficient mechanism" for universal service funding.

* * *

GTE has fully justified its cost studies. Sprint has produced no studies of its own or even reviewed GTE's in any detail. Under the circumstances, the Commission should adopt GTE's rates proposed in Exhibit 13 (labeled Trimble Exs. DBT-3A and DBT-3B)

<u>Issue 3</u>: Should GTE be prohibited from placing any limitations on Sprint's ability to combine unbundled network elements with one another, or with resold services, or with Sprint's, or a third party's facilities to provide telecommunications services to consumers in any manner Sprint chooses?

**** Reasonable restrictions are necessary to prevent Sprint from circumventing the Act's pricing distinction between resale and unbundling. Legislative history proves that Congress did not intend to adopt two sets of wholesale pricing standards for the identical services. ****

This issue asks the Commission to determine whether Sprint should be permitted to unbundle and then reassemble GTE's network to obtain the identical services GTE offers for resale. (Menard, Tr. 741; Hunsucker, Tr. 183.) While Sprint would obtain the same service either way, the price it pays for the unbundled combination will in many cases be much lower than that of the corresponding wholesale offering. Sprint has thus identified a price arbitrage opportunity that would afford it a substantial windfall. The Commission must not permit this outcome, which was never intended--and indeed, explicitly foreclosed--by Congress.

The Commission must, of course, decide this arbitration in accordance with the Act. (Stahly, Tr. 290.) There, Congress imposed upon the ILECs the separate duties of (1) unbundling their networks into discrete elements (47 U.S.C. §251(c)(3)); and (2) making available for resale their retail services (47 U.S.C. §251(c)(4)). As Sprint acknowledges, the Act imposes distinct pricing standards for unbundled network elements and for services to be resold. (Hunsucker, Tr. 183.) Unbundled network elements are priced at cost plus a reasonable profit. (47 U.S.C. § 252(d)(1).) Retail services made available for resale are priced at a wholesale rate (47 U.S.C. § 252(e).).

Sprint asks the Commission to ignore this clearly-drawn distinction between unbundling and resale. Sprint's position, if adopted, would give new entrants the option of buying retail services under one pricing formula, or purchasing all the network functions needed to provide that same service under a wholly different pricing formula. The Act's unbundling standards would thus become a substitute for--rather than an alternative to--buying retail services at wholesale rates.

As GTE and others have pointed out in their filings in the Eighth Circuit appeal of the FCC Order, Congress did not intend this plainly implausible result. (Menard, Tr. 746.) Indeed, members of Congress who submitted an amici curiae brief in that proceeding agree with GTE.[7] (Menard, Tr. 809.)

GTE believes the language of the Act, on its face, precludes the nonsensical outcome of making telecommunications "the first industry in the world that has two sets of wholesale rates for exactly the same thing that are dramatically different." (Trimble, Tr. 511.) Nevertheless, if the Commission has any remaining doubts about sanctioning this

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[7] At the hearing, GTE tried to introduce the Congressmen's brief as either evidence or for official recognition. Both requests were denied. GTE believes it has the right to cite the brief--a publicly filed document in a federal judicial proceeding--even though the Commission declined to take official recognition of it. GTE further believes it was entitled the opportunity to lay a foundation for introduction of the brief before it was excluded, and that Staff and Commission members should have been permitted to read and decide for themselves whether the brief had significant probative value. Nevertheless, GTE will defer to the Commissioner's ruling and refrain from citing the brief.

obvious arbitrage potential, they are laid to rest by the legislative history of the pricing provisions in the Act.

The bill that eventually became the Telecommunications Act of 1996 was a compromise based on separate Senate and House measures (S. 652 and H.R. 1555, respectively). The Senate bill did not discuss specific pricing standards for resale, but did require ILECs to make available discrete parts of their networks to competitors at prices "based on the cost...of providing the unbundled element," which "may include a reasonable profit." (S. 652, § 101(a) (proposed §251(d)(6).) On the other hand, the House set forth only an expansive "just, reasonable, and nondiscriminatory prices" guideline for unbundled network facilities, (H.R. 1555, § 101(a) (proposed § 242(a)(2)), but directed ILECs to "offer services, elements, features, functions, and capabilities for resale at wholesale rates" (Id. (proposed § 242 (a)(3)(A).)

The Conference Committee which reconciled the House and Senate bills was aware that the specific pricing standards in the respective measures addressed different circumstances. To this end, the House Report indicates that its resale pricing formula was primarily intended to address the situation of a non-facilities-based carrier who wishes to offer the same service an ILEC provides. (H.R. Rep. 204, 104th Cong., 1st Sess. 72 (1995).) As GTE explains in response to Issue 4, legislators were well aware of the historical State practice of setting rates of some services (e.g., toll and discretionary services) well above cost as a means of maintaining basic local rates at below-cost levels. If the Senate's "cost plus profit" approach were applied to resale, resellers could cherry-pick the more lucrative customers to which the ILEC must charge above-cost rates, leaving the ILEC with no way to recover the losses sustained in providing below-cost services.

Instead, the pricing provisions that appear in the Act reflect the Conference Committee's clear delineation between an ALEC's right of "access to network elements on an unbundled basis" for the provision of its own facilities-based services, and an ALEC's right to buy the ILEC's retail services at wholesale for the purpose of resale. This history affirms GTE's understanding that Section 251(c)(3) of the Act ("Unbundled Access") contemplates that a firm taking unbundled items will itself provide some network functionality, rather than just seek to replicate the same service offered at wholesale. (Menard, Tr. 746, 753.)

Sprint, however, would have this Commission ignore the plain language of the Act as well as explicit Congressional intent. It seeks the resurrect the Congressional debate--now settled in the Act--over the application of the more favorable "cost plus profit" standard to services offered for resale. It seeks to pay the "cost plus profit" standard, but without building <u>any</u> of its own facilities. This approach eviscerates the statutory distinction between resale and unbundling and the associated, respective pricing standards. Regardless of its skill in the marketplace, Sprint would be able to undercut GTE's prices for its above-cost services. It will also suppress the facilities-based competition that is the ultimate ideal of the Act. No new entrant will build its own facilities if it can make almost risk-free profits with little investment. As Ms. Menard explained, Sprint will bear no additional risk by taking the unbundled service, relative to buying that same service at wholesale. GTE will still do all the work in the unbundling scenario because it will need the put the unbundled elements together at the ALEC's discretion. (Menard, Tr. 747-48.)

GTE understands that the Commission declined to accept GTE's position on the rebundling issue in its arbitration with AT&T and MCI. GTE does not advocate that Sprint be treated differently than AT&T or MCI in this regard. (Menard, Tr. 750.) However, the Commission's actions in the AT&T case should not constrain it from rethinking this issue. Indeed, the Commission could reconsider and revise its decision there either before or after an Order is issued in this docket. The Commission always has the option of changing its policies as long as it presents a reasoned basis for doing so. GTE believes a more thorough consideration of the legislative history of the Act's pricing provisions is a legitimate basis for a new vote on the rebundling issue in the AT&T/MCI case.

Issue 4: What services provided by GTE, if any, should be excluded from resale?

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

GTE will offer for resale, at a discount, all of the services currently available at retail, except those categories which would undermine the long-term competitive objectives of the Act. (Wellemeyer, DT 43.) The FCC permits these exceptions because GTE has proven that they are reasonable and nondiscriminatory, as explained below. 47 CFR §51.613(b).

In contrast to GTE's detailed evidence on each type of service that should not be resold, Sprint provided almost no evidence or information about its position on resale exclusions. When counsel for GTE tried to learn more about Sprint's views on resale exclusions from Mr. Stahly at the hearing, Sprint objected, noting that the witness was not slated to testify to this issue. (Tr. 283.) Sprint's entire evidentiary presentation, then, appears to consist of the following statement by Sprint witness Hunsucker:

> As for the issue of exclusion of services for resale, the FCC Rules in 51.613 basically only allowed two direct exceptions. Specific examples, those would be cross-class selling which says that Sprint cannot buy residential service and resell it to a business service, Sprint fully believes that is appropriate. The only other restriction was promotions of less than 90 days are excluded from resale at a wholesale discount. The Act in 251(c)(4) said any telecommunications service. GTE is seeking in this to restrict the resale of below-cost services, contract service arrangements, and grandfathered services. Sprint believes there should be no other restrictions, that these services should not be restricted from resale, and we concur with the Commission's decision and action that was taken on Monday.

(Hunsucker, Tr. 138-39.)

As an initial matter, Mr. Hunsucker has misconstrued GTE's position. GTE will, in fact, resell grandfathered services, as long as Sprint offers them only to the existing group of subscribers. (Wellemeyer, DT 44.) The FCC explicitly allows this condition.

GTE's position on contract resale is also less extreme than Sprint believes. GTE will agree to offer new contract services for resale, although, for the reasons discussed below, it cannot resell existing contracts. (Wellemeyer, DT 49-50.)

Sprint's characterization of GTE's position on below-cost services is correct, as discussed below. But as the quote above demonstrates, Sprint has raised no explicit opposition to GTE's other categories of proposed resale restrictions--public and semi-public pay telephone services and future AIN-based services. It also did not address GTE's plan to offer for resale, but not at wholesale rates, any services already priced at wholesale; operator and directory assistance services; and nonrecurring-charge services.

Because it not even clear that Sprint opposes these aspects of GTE's resale position, the Commission has no reason to reject them. In any case, Sprint provided no substantive rebuttal to GTE's proof that the resale restrictions it proposes are reasonable and nondiscriminatory. It is not true, as Sprint would have this Commission believe, (Hunsucker, Tr. 138), that the FCC would allow only the two resale exceptions Sprint noted above. The FCC's part 51 rules that Sprint cites, in fact, contemplate that further resale restrictions may be required and reserve to the State Commissions the authority to impose these restrictions as long as they are reasonable and nondiscriminatory. (Wellemeyer, DT 44-45.)

Likewise, the Commission should not accept Sprint's reliance on the GTE-AT&T/MCI arbitration decision as a substitute for a well-defined position and adequate evidence. As the Commission well knows, it is bound to decide this case only on the evidence in this case. Sprint cannot turn to the decision and underlying record in the ATT/MCI proceeding to shore up its scant presentation here.

The more detailed rationale for each of GTE's proposed resale restrictions follows.

<u>Below-cost services</u>. At this time, GTE's only below-cost service is local residential (R1) service. (Wellemeyer, Tr. 584.) Because this service is already sold at rates below the cost of providing it, a further discount off those rates would be unjustified. As Sprint acknowledged, ILECs can survive by selling below-cost services because these services are subsidized by contributions from others--such as toll, access, and vertical services--that are priced above their incremental costs. (Stahly, Tr. 280; Hunsucker, Tr. 181.) If GTE is forced to resell below-cost service to ALECs at a discount, they will (1) obtain

avoided-cost discounts for both below-cost and above-cost services; and (2) pocket the contributions from the above-cost services that subsidized below-cost services (Wellemeyer, DT 45-46.)

Sprint itself illustrated the inequity of this outcome with its cross-examination of Ms. Menard. If GTE is required to resell residential services at the rates from the AT&T/GTE case, Sprint will be able to purchase an R1 line for $10.27 that costs GTE $24.75 to provide. (See Ex. 19.) This Commission must not sanction such disparate treatment as between GTE and Sprint.

It is certain that Congress recognized and intended to accommodate the historical effects of the States' social pricing policies within the Act's resale pricing provisions. The House Report on its version of the telecommunications legislation (which was later reconciled with the Senate version to become the existing Act) states that:

> determining the resale rates should be accomplished by taking into account the rate at which local service is tariffed in a particular State. The rate should reflect whether, and to what extent, the local dialtone service is subsidized by other services, such as toll service, long distance access, subsidized through the pricing for other features, such as call forwarding and call waiting, or subsidized through explicit subsidies from a universal service fund.

H.R. Rep. No. 204, 104th Cong., 1st Sess 72 (1995).

Further, the Act does not, either explicitly or implicitly, guarantee that resale will be profitable. In fact, Congress rejected this very concept. The House bill would have imposed the duty to offer services for resale at "economically feasible" rates to the reseller. (H.R. 1555, proposed §242(a)(3).) This pricing standard was sharply criticized for failing to recognize that local telephone service is "heavily subsidized." (Additional Views of

Reps. Dingell, Tauzin, Boucher & Stupak, H. Rep. 204, 104th Cong., 1st Sess, 208-09.)

An across-the-board discount for all GTE's retail services, including those below-cost, wholly ignores Congress' intention for States to tailor resale policies to State-specific conditions. Given existing circumstances in Florida, the only effective way to respond to the well-understood problem of lingering subsidies is to prohibit resale of local residential service. The better long-term solution, which GTE fully supports, is to rebalance the Company's rates to remove the artificial subsidies that are incompatible with a wholesale discount. (Menard, Tr. 807.) Without a prohibition on resale or a rationalization of rates, GTE will be denied the opportunity to cover its total costs. As Sprint's chart comparing unbundled and resold local service illustrated, GTE will lose $14.45 on each R1 line if it is ordered to resell this service at the wholesale rates established in the AT&T/GTE arbitration. (Ex. 19; Menard, Tr. 757-58, 806.) This outcome is contrary to the above-discussed Congressional intent and the Act's emphasis on the ILECs' entitlement to recover their costs of providing services to new entrants.

Wholesaling basic service will also violate the Florida Legislature's own determination that flat-rate local service should in no event be resold before July 1, 1997. Fla. Stat. § 364.161(2). The Commission cannot lawfully find that the Act preempts the Florida statutory prohibition on resale of below-cost services before July of 1997. (AT&T Rec. at 27.) The Commission receives its delegation of authority from the Legislature--not the other way around. See Grove Isle, Ltd. v. State Dep't of Env'h Reg., 454 So.2d 571 (Fla. 1st DCA 1984). The Commission cannot summarily decide that part of its governing statute is no longer valid and, in effect, tell the Legislature that the agency need no longer comply with it. "Actions by an agency inconsistent with legislative purposes or beyond the scope of the agency's authority are considered ultra vires and without legal effect." Burris, Administrative Law, 1987 Survey of Florida Law, 12 Nova L. Rev. 299, 316 (1988). See also State Dep't of Insurance v. Ins. Svcs. Office, 434 So.2d 908 (Fla. 1st DCA 1983).

To avoid this outcome, the Commission is obliged to interpret the Act in harmony with Florida law if there is any way to do so. To this end, while the FCC "declined to limit" resale offerings to exclude below-cost services, it did not prohibit a resale restriction under the Act. The States' ability to impose reasonable and nondiscriminatory restrictions is indisputable. So is Congress' intent that the States should retain all the authority traditionally reserved to them, including especially the pricing of local facilities and services. See, e.g., 47 U.S.C. § 252(d) (governing local pricing); 47 U.S.C. § 152(b) (leaving intact State jurisdiction over intrastate communication service). Given these facts, below-cost services cannot be resold in Florida, as a matter of law, before July 1, 1997. As a matter of policy, the Commission should further find GTE's proposed resale restriction reasonable and nondiscriminatory.

Sprint presented no credible logic to rebut GTE's reasoning and proof on this point. Before Sprint's attorney halted cross-examination of Mr. Stahly on resale restrictions, the witness opined that GTE should be financially indifferent to reselling below-cost services, because it will make the same profit whether it sells to an end user or to an ALEC at an avoided cost discount. (Stahly, Tr. 281.) This is wrong because, as Mr. Wellemeyer explained, Sprint fails to consider the effect of GTE's loss of contribution from other offerings, such as vertical services and toll. Sprint cannot plausibly deny that it will provide the toll service that is today its reason for existing, especially since GTE has almost completed its implementation of 1+ "equal access" capability. (Menard, Tr. 768.) With the loss of these more lucrative, complementary services, GTE will lose the all-important ability to provide contribution for its below-cost service. (Wellemeyer, DT 45-46.)

Finally, allowing ALECs to buy services below their economic costs will be a powerful disincentive to what Sprint agrees is the Act's ultimate goal--development of facilities-based competition. (Hunsucker, Tr. 178.) With adoption of the Act, federal legislators envisioned "hundreds of thousands of new jobs and tens of billions of dollars being invested in infrastructure and technology." 142 Cong. Rec. H1174 (daily ed. Feb. 1, 1996) (statement of Rep. Buyer). This economic growth--much of which was expected to come from the local exchange market--will never occur if ALECs can continue to obtain services below the costs they would incur to provide them with their own facilities.

Promotions. Promotions resale does not really fall within any issue slated for resolution in this arbitration. Promotions are not a "service," and this issue addresses only services. To this end, the Commission Staff clarified in its AT&T/GTE Recommendation that promotions are to be considered within the context of resale restrictions, rather than exclusions from resale. (AT&T Rec. at 28.) Unlike GTE's AT&T/MCI arbitration, there is no separate resale restrictions issue in this case. And, as noted earlier, Sprint did not provide testimony on promotions, except to point out that the FCC allowed ILECs to restrict their resale if they are under 90 days. (Hunsucker, Tr. 138-39.)

Nonetheless, if the Commission determines that it should rule on promotions, there is no pro-competitive reason for GTE to offer any promotions at a discount. When GTE resells a service at wholesale, the ALEC sets the retail price for that service. It can reduce its customary retail price to offer consumers a promotional discount, just as GTE or any other firm can. Sprint can thus compete on a promotional basis without the windfall of an additional discount rate off the already reduced promotional rate. If the Commission does not restrict resale of promotions, GTE will never be able to distinguish its offerings from those of its competitors. (Wellemeyer, Tr. 584.) It will have no incentive to offer creative promotions, some of which may last longer than 90 days--a result which is plainly contrary to the interests of Florida consumers. (Wellemeyer, DT 46-47.)

GTE asks only for the same degree of flexibility its competitors have. Sprint has failed to offer any rationale for limiting promotions to 90 days, other than the ill-founded notion that it "wanted to comply with the FCC order." (Stahly, Tr. 282.) This is not sufficient to rebut GTE's showing that its position on promotions is reasonable and nondiscriminatory.

Future AIN Services. Again, GTE is not sure there is any dispute on resale of AIN services, since GTE could find no Sprint testimony on this issue. In any case, GTE will resell its currently tariffed advanced intelligent network (AIN) services at a wholesale discount. (Wellemeyer, DT 47.) This approach fully meets the Act's requirements.

GTE has not, however, agreed to offer all future AIN-based services for resale. GTE cannot offer carte blanche access to any AIN services that might be developed without prior resolution of difficult network security and integrity issues. These critical matters were not discussed in this case because AIN unbundling was not an issue. This fact confirms GTE's view that there is no basis in the record to determine that GTE should resell future AIN services. In particular, the arguments Staff found convincing with regard to AIN resale in the AT&T/MCI case (AT&T Rec. at 29) are wholly absent from the record here.

Public Pay Telephone Lines. The Act requires resale only of retail services. (47 USC § 251(c)(4)(A).) Public payphone lines are not retail service offerings. (Wellemeyer, DT 47.) In any case, it is impossible to resell an individual call, which is what will be conceptually required if GTE's position on this issue is rejected. (Wellemeyer, Tr. 596.) Thus, a resale restriction makes sense in both legal and practical terms. Since Sprint did not address this point, the Commission has no basis to rule against GTE. Again, the kind of evidence that Staff found persuasive in the AT&T and MCI arbitration (AT&T Rec. at 30) is not in this record.

Semi-Public Pay Telephone Lines. Sprint did not address resale of semi-public pay telephone lines, so it is not clear whether this matter is disputed. In any case, GTE will not resell semi-public pay telephone lines for a number of reasons. (Wellemeyer, DT 47.) Because GTE cannot be required to resell the coin station (which is an essential part of this service), it cannot be required to resell the entire service. Further, Sprint will self-provide the toll portion of the service, so there is no need for GTE to wholesale it.

Non-telecommunications Services. Sprint has asked GTE to provide it inside wire maintenance (IWM) and express dialtone, (Hunsucker, DT 8, 22), though the purported legal basis for doing so--whether resale or otherwise--is not clear. In any case, Sprint admits that inside wire maintenance is not a telecommunications service, (Hunsucker, Tr. 163), and thus it is not required to be resold under the Act. (47 U.S.C. §251(c)(4).)

Likewise, GTE's express dialtone is not regulated, nor is it even a "service"--retail or otherwise. It is simply a convenience feature that GTE chooses to provide at some sites within GTE's service area.

Consistent with the Act, Sprint itself has asked only for resale of "regulated telecommunications services." (Sprint Petition at 7; Ex. 7 at 6.) Since IWM and express dialtone do not fit within this category, Sprint's own petition precludes a Commission decision that GTE should make these kinds of services available to Sprint.

* * *

GTE is willing to resell the following services, but not at wholesale rates. Sprint did not refute any of GTE's testimony with regard to these service categories; thus, the kind of arguments that persuaded Staff in the AT&T case (AT&T Rec. at 31) do not appear anywhere in this Sprint arbitration record.

<u>Services Already Priced at Wholesale</u>. These services include special access and private line services offered under the special access tariff, and COCOT coin and coinless lines. (Wellemeyer, DT 48.) With regard to this group, GTE notes the FCC's logic that, even though ILECs' access tariffs do not prevent end users from purchasing the service, the language and intent of section 251 of the Act demonstrate that access services do not fall into the category of those an ILEC "'provides at retail to subscribers who are not telecommunications carriers.'" (FCC Order at ¶ 873.) GTE similarly considers COCOT subscribers to be wholesale providers, and has priced its offerings accordingly.

<u>Operator Services and Directory Assistance</u>. Under the Act, resale rates are to exclude the costs the ILEC avoids by offering the service at wholesale, as compared to

retail. (47 USC § 252(d)(3).) If no costs are avoided, there is necessarily no discount. This is the case for operator services and directory assistance. They require the same activities to be performed at both the retail and resale levels. The costs for these services are recovered through separate rates, and are not included in the rates for other services offered for resale. (Wellemeyer, DT 48.)

Non-recurring Charge Services. There are no costs that can reasonably be expected to be avoided by providing these services at wholesale, so no discount is warranted. Primary service ordering and installation rates should instead be based on an appropriate study reflecting the costs of wholesale provisioning. (Wellemeyer, DT 48.)

Existing Contracts. GTE has agreed to resell future contracts at a price that reflects the costs avoided by selling at wholesale. (Wellemeyer, DT 50.) GTE's existing contracts, however, should not be resold. These contracts were individually negotiated before the imposition of any resale requirement and they do not reflect the possibility of resale. (Wellemeyer, DT 49-50.) Resale of existing contracts is practically and conceptually illogical.

Issue 5: What are the appropriate wholesale recurring and non-recurring charges, terms and conditions for GTE to charge when Sprint purchases GTE's retail services for resale?

**** Wholesale rates should be based on avoided, not avoidable, costs. Thus, prices for resold services should equal retail rates minus net avoided costs.****

A. The Commission Must Adopt GTE's Avoided Cost Discounts.

In this arbitration, GTE provided probative evidence of costs it will avoid, and the new costs it will incur, by offering its services through wholesale, rather than retail, channels. GTE did two cost studies, both of which analyze in detail GTE work centers to determine what the Company's costs will be in a wholesale environment.

Sprint has taken an entirely different tack. Just as in the case of unbundled network elements, it has ignored the evidence specific to GTE. Instead, it proposes adoption of the AT&T/GTE arbitrated rates. (Stahly, Tr. 278.) Sprint, however, produced no evidence to support those rates. This is a critical lapse, because the avoided cost determination in the AT&T case "strikes a balance between the parties' different interpretations of avoided costs." (AT&T Rec. at 60.) It is impossible to strike the same evidentiary balance here as the Commission did in the AT&T case. For that to occur, Sprint would have had to produce the same evidence and analysis that both AT&T and MCI did in the other case. That, of course, did not happen.

Indeed, Sprint produced no evidence at all, either of GTE's costs, or in support of AT&T's or MCI's analysis of those costs. Sprint, in fact, admitted that it did not produce any evidentiary support for its criticisms of GTE's studies. (See Stahly, Tr. 343.)

There is thus no balance at all to be struck in this case because there is no opposing evidence. The Commission must accept GTE's cost analysis as it stands.

B. Consistent with the Act, GTE's Avoided Cost Discount Is Based on the Costs It Will Actually Avoid.

Section 252(d)(3) of the Act states that this Commission "shall determine wholesale rates" for services based on retail rates less the portion attributable to "any" costs that "will be avoided." Thus, wholesale rates must be based on "avoided," not "avoidable," costs. Prices for resold services should be set at GTE's wholesale prices, which equal its retail prices minus net avoided costs. Net avoided costs are GTE's actual avoided retail costs, because some avoided retail costs are offset by the additional costs of providing wholesale service. (Wellemeyer, Tr. 532.) For example, if GTE's retail price for a service is $1.00, its avoided retailing cost is $.10, and its additional wholesaling cost is $.05, then its wholesale price, based on its actual avoided costs, is $.95.

Contrary to Sprint's apparent view, wholesale rates are not to be set based on "avoidable" costs associated with the retail product. (Stahly, RT 40.) That notion, advanced by the FCC in its now-stayed Order, is inconsistent with the Act, which states that commissions "shall determine wholesale rates on the basis of retail rates charged to subscribers...excluding the portion attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." (47 U.S.C. §252(d)(3) [emphasis added].)

Thus, the Act does not treat all costs in any particular categories as avoided. Even the FCC's ineffective Order does not mandate such an extreme approach; at most, it creates a rebuttable presumption that some costs will be largely avoided. Furthermore, the FCC expressly found that some existing retailing expenses will continue to be incurred in the wholesale environment and that new expenses may be incurred as well. (FCC Order at ¶ 928.) The FCC calls for these expenses to be taken into account in calculating the avoided cost discount. Id.

C. The Commission Should Adopt GTE's Original Avoided Cost Study Because It Reliably Reflects GTE's Circumstances.

GTE submitted two avoided costs studies. Both studies take into account the obvious fact--confirmed by GTE's experience in the wholesale business and acknowledged by the FCC--that there are costs in the wholesale environment that cannot reasonably be avoided.

GTE's Original Avoided Cost Study is the more thorough of the two. It calculates an avoided cost discount for each of five GTE service categories: residential, business, usage, vertical, and advanced. This study, which reflects actual costs for Florida customers, analyzes all of the work centers (for example, GTE's customer contact center) to determine which activities or functions in each work center would be avoided in a wholesale environment. (Wellemeyer, Tr. 534.) The costs associated with these "avoided" activities were determined using actual 1995 cost data. The avoided cost discount for each of these services was calculated on a national basis, because the costs that will be avoided are incurred on a national (or regional) basis. (Wellemeyer, Tr. 536-37.)

Once GTE determined which costs would be avoided, it turned to the second part of the avoided cost equation--the new costs it will incur as a result of the work GTE will necessarily perform to support its wholesale offering to competing carriers ("substitute costs"). (Wellemeyer, Tr. 592.) If those costs are not included in wholesale rates, then GTE would either not recover the expenses it incurs to support those wholesale offerings, or it would not be able to provide those services to the competing carrier. (Id. at 592.) An example would be the substitute costs incurred when GTE has to render a bill to a competing carrier. (Id.) To properly calculate these costs, GTE looked to its existing wholesale business--carrier access. It identified and analyzed existing wholesale services similar in nature to those in each of the retail service categories to estimate the costs of substituted wholesale activities. These existing wholesale services are provided through a well-established process and, as such, yield the most accurate information on the cost of the wholesale provision of line-based and usage-based services. (Id. at 546.) Avoided costs were then calculated by taking affected retail costs and subtracting substitute costs. (Id. at 536.)

GTE's Avoided Cost Study produces avoided costs of $0.83 per line per month for residential services and $1.06 per line per month for business services. Although the study produced a composite discount of 7%, separate discount percentages were calculated based upon appropriate service category (7.1% for usage services; 5.5% for business vertical services; 6.6% for residential vertical services, and 15.3% for advanced services). These are the actual costs of servicing Florida consumers. (Id. at 531.)

D. GTE Presented the Only Reliable ARMIS-Based Study.

GTE's Modified Avoided Cost Study uses the framework of the MCI Avoided Cost Study the FCC adopted. (Wellemeyer, Tr. 556-57.) This alternate analysis should be used only in the event that the FCC's wholesale pricing rules are upheld. GTE's primary option, the service-based study, best reflects the letter and intent of the Act.

The MCI study determined avoided cost based on USOA accounts. GTE modified MCI's study as expressly permitted by the FCC. See FCC Order ¶ 917. In particular, it analyzed the six direct expense accounts which the FCC "rebuttably presumed" contained costs that would be 90% to 100% avoided. Based on its workcenter analysis and its experience as an access wholesaler, GTE determined the true percentages of expenses in these accounts that it likely will avoid. (Id. at 558.) The result was an avoided cost discount of 11.25%. (Id. at 565.)

The evidence amply supports the discount factors in GTE's Modified Avoided Cost Study. No discount is included for call completion expenses (account 6621) because, even in the wholesale environment, GTE will be required to offer these services in the exact same manner as they are offered today. GTE's operator expenses are production costs, not retail costs. These costs are the same whether the service is provided at retail or wholesale. (Id. at 561-63.) In fact, these services are separately tariffed from GTE's retail offerings. GTE's conclusion about operator services costs holds true whether or not Sprint also provides operator services, (Wellemeyer, DT 36-37) and the same sort of analysis applies to number services (account 6622).

GTE has also established that substantial expenses in account 6623--customer services--will not be avoided. (Id. at 559.) The carrier access expenses in account 6623 are not avoided, since access services are not offered for resale, and the associated expenses are not included in the retail rates for services that are offered for resale. Account 6623 also includes service ordering expenses. It is beyond dispute that GTE will continue to incur expenses to process service orders from new entrants. ALECs will order services in virtually the same way that end user customers today do. (Id. at 559-60.)

GTE has also shown that product management costs (account 6611) will not be substantially avoided. (Id. at 561.) Even if it exited the retail market entirely, GTE surely would continue to improve its existing products and develop new ones in order to succeed as a wholesaler in the long run.

Sales and advertising expenses (accounts 6612 and 6613) will be largely, but not entirely, avoided. GTE will face competition even as a wholesaler, and this will entail some advertising. Sales expenses likewise will be incurred to some extent, just as they are incurred now when GTE services Sprint in the context of its carrier line of business.

E. Sprint Has Previously Agreed With GTE's Positions on Avoided Costs.

In prior proceedings, Sprint has agreed with GTE regarding its avoided cost allocations. As Mr. Wellemeyer testified, Sprint's witness Brevitz in California's open network access docket observed that GTE California's avoided cost estimations were consistent with those made in other states, and that "United Telephone-Southeast recently filed in Tennessee a detailed avoided cost analysis that indicates net avoided costs of $.91 per month per access line (5.71% of retail revenues) and 10.41% of retail revenues for other services." (Mr. Brevitz's testimony is included in GTE's Response to Sprint's Petition under Tab 3.) Mr. Brevitz further stated that "[r]esale discounts of the size identified by GTEC and the United/Tennessee studies are appropriate for the Commission to adopt." (Wellemeyer, Tr. 568.)

Sprint has also advanced arguments at the FCC that support positions similar to GTE's here. Sprint asserted, for example, that marketing expenses such as product management, sales, and product advertising would in fact be incurred for wholesale services; that account 6790 for uncollectible receivables might actually increase in wholesale operations; that system account 6620 (operator systems expense) should not be considered avoidable; and that the accounts for testing expenses, plant operations, and administration expenses are not even partially avoidable. (See FCC Order, ¶ 897)

F. Calculation of the Wholesale Rate for Basic Local Service Should Account for Foregone Contribution.

Basic local exchange service is a special case with respect to determining the retail price. It is nearly always purchased as a package with complementary services, such as intraLATA toll, which subsidize the basic service. This is not a competitive loss, but rather an effect of longstanding social pricing policies in Florida. (Wellemeyer, Tr. 585.) Therefore, the relevant retail price to use in calculating the wholesale rate is the bundled rate for toll and local service.

If GTE were forced to resell below-cost services without any consideration of the opportunity cost associated with the high contribution from complementary services, that contribution would become a windfall profit for Sprint. Consumers would obtain no benefit from this transfer. It would simply allow Sprint to realize a profit on revenues GTE relies on to cover its costs of providing basic service. Therefore, whenever Sprint will supply toll to a new customer who currently receives it from GTE, the wholesale rate for basic exchange should equal (1) the retail price, (2) less the avoided cost, (3) plus the lost toll contribution, (4) less the incremental cost of providing access.

G. The Commission Should Accept GTE's Wholesale Service Non-Recurring Charges.

Only GTE has presented evidence regarding nonrecurring charges (NRCs). (See Ex. 13.) These charges were designed to recover separately the costs of service ordering and installation activities, recognizing to the extent possible any like functions required for various types of local service request (LSR) activity. (Trimble, Tr. 430.)

There are two resale scenarios which would call for the application of these resale NRCs. The first is a "new" resale service for an end user who establishes service within a GTE local service area, but chooses an ALEC reseller for local service. The second is a "conversion" where an existing GTE retail end user switches to an ALEC reseller. Since the anticipated GTE ordering activities required to complete the associated LSRs are the same, and since the installation charges will apply only when installation is required (e.g., for "new" services), there is no need to distinguish between these two cases. (Id.)

Because Sprint offered no evidence to rebut GTE's NRC proposals, the Commission should accept them without modification.

Issue 9: Is it appropriate for GTE to provide customer service records to Sprint for pre-ordering purposes? If so, under what conditions?

**** GTE will provide Sprint with customer service records after Sprint submits a local service request to GTE. Otherwise, the Act requires written customer authorization before any CPNI disclosure.****

The Act is unambiguous with respect to disclosure of customer records, which are included within the category of customer proprietary network information (CPNI) that the ILEC gained through provision of telecommunications services to a customer. Section 222(c) states: "A telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer."

This directive accords with this Commission's own CPNI rules, which require written customer authorization in all cases before CPNI can be disclosed to information service providers. These rules are stricter even than the FCC's, demonstrating this Commission's foremost priority of protecting customer privacy. Investigation into the State-wide Offering of Access to the Local Network for the Purpose of Providing Information Services, Order No. 21815 at 38-40 (Sept. 5, 1989). Last year, the Florida Legislature braced this concern with a statutory prohibition that makes it a second degree misdemeanor for any telecommunications company employee to disclose customer account records "except as authorized by the customer" or through other legal means. (Fla. Stat. § 364.24(2).)

An unconditional right of access to customer information for so-called "pre-ordering" purposes would undermine Florida's deliberately high regard for customer privacy protections. It would mean that an ALEC could access any customer's CPNI, without that customer's permission, and before the customer even commits to take service from that ALEC.

It is unclear whether Sprint specifically proposes a blanket letter of authorization (LOA) process (as AT&T and MCI did in their arbitration), although Sprint has noted its willingness to accept the blanket LOA approach. The Commission should not, in any event, consider adopting the blanket LOA as the sole customer permission to access CPNI. Most importantly, it is impermissible under the Act's explicit requirement for written customer authorization. A blanket LOA will not require anyone--neither the ALEC nor GTE--to get written or otherwise verifiable permission from the customer before his CPNI is released. The Commission is well aware that interexchange carriers' use of the blanket

LOA has not stemmed slamming problems. To the contrary, AT&T recently paid $30,000 to settle a Florida slamming case; the stipulation indicated problems in the LOA process. Initiation of Show Cause Proceedings Against AT&T Communications of the Southern States, Inc. for Violation of Rule 25-4.118, F.A.C., Interexchange Carrier Selection, Order PSC-96-1405-AS-TI (Nov. 20, 1996).

Slamming remains all too common, despite repeated censures from federal and state regulators. See, e.g., Notice of Apparent Liability for Forfeiture, 11 FCC Rcd 1885 (1996) (AT&T required to pay $40,000 for slamming); see also Florida slamming dockets involving MCI (Docket 960186-TL), Furst Group Headquarters (Docket 950709-TI), Heartline (Docket 960627-TI), and GE Capital Exchange (Docket 951420-TI). Slamming violations can be expected to multiply several-fold if the Commission sanctions use of the blanket LOA in the local arena. Since customers often have a number of local services (as opposed to the single-service interexchange situation), there is a greater potential for transfer of more services than the customer intended (especially on an "as is" transfer) in the absence of his clear and unmistakable consent. (See Drew, DT 38.) If Sprint truly believes that "the overriding concern" in transferring customers from one LEC to another is "ensuring that the customer is not harmed," (Hunsucker, Tr. 164), then the Commission cannot deny customers control over their CPNI.

In the AT&T case, Staff misconstrued the nature of the debate on CPNI disclosure. "Staff believes that the ILECs need not be the guardians of the customer's privacy because the ALECs have that duty as well." (AT&T Rec. at 105.) GTE believes that neither the ILECs nor the ALECs have the right to control the customer's privacy--that right should instead rest firmly with the customer. (Drew, Tr. 660.) Without his entitlement to written consent, that customer cannot be assured that his CPNI will be used and disclosed only as he intends.

In this regard, Staff's reliance on the Act's section 222(b) as adequate to ensure customer privacy is inapposite in the pre-ordering context. That section does, in fact, impose a duty of confidentiality on a carrier receiving CPNI from another carrier, but only "for purposes of providing any telecommunications service." The section's emphasis on "providing" the service assumes that the customer has already selected and signed on with the carrier to which the information was disclosed. This language just reinforces GTE's view that Congress never intended for disclosure to occur before the customer has committed to another carrier. If carriers have an unconditional right to CPNI for pre-ordering, they may well never "provide" any service at all to the customer--a clear violation of the Act.

GTE believes Staff is similarly mistaken in its application of section 222(d)(1), which it says "provides for permitting access to CPNI for purposes of initiating telecommunication services without mention of customer approval." (AT&T Rec. at 105.) This section states in relevant part:

> Nothing in this section, [222] prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers...to initiate, render, bill, and collect for telecommunications services.

Again, however, if CPNI is accessed for pre-ordering purposes, and the customer decides not to choose the ALEC, there will be no service initiation--so the exception will not apply and the Act will have been violated. Furthermore, as Mr. Drew pointed out, GTE does not today have the technical capability of limiting access to just a particular customer's CPNI. Direct access to GTE's customer account database means that Sprint will be able to see the CPNI of other GTE or ALEC customers--including those who have indicated no intention of initiating service with Sprint. (Drew, Tr. 656, 662-63.)

Perhaps the best and most obvious proof that the ALECs want something much broader than the statute contemplates is apparent in the simple fact that they have never used the term "service initiation" in their requests--rather, it is always "pre-ordering." If pre-ordering were congruent with service initiation, one would expect the ALECs to simply use the term service initiation and thus avoid much of the controversy over this issue.

The simple fact is that access to CPNI for pre-ordering does not fit within any of the exceptions in the Act. Rather, the plain language of the statute requires written customer authorization in this instance. Staff's feeling that this mandate would be "unworkable" is irrelevant to determination of this issue. (AT&T Rec. at 105.) The Commission is permitted to set policy only within the language of the Act, and that language does not admit Staff's interpretation. Indeed, GTE finds it shocking that Staff apparently does not believe that <u>any</u> customer approval at all--written or otherwise--is a prerequisite to CPNI access. (<u>Id.</u>)

This view goes even beyond Sprint's position in this arbitration. GTE understands that Sprint would ask verbal customer approval before it requested that customer's CPNI from GTE. (Hunsucker, Tr. 160 ("we would obviously, I think, tell the customer that we would be requesting the information from GTE").) Sprint further notes that it would seek

CPNI only for customers who had initiated contact with Sprint to sign up for its service, and not for those to whom Sprint directed marketing efforts. (Hunsucker, Tr. 159-60.) Sprint proposes that the processes for service transfers (notably "as is" transfers of all of a customer's services) would be reciprocal. (Hunsucker, Tr. 164.) Sprint would pay for customer service record information, and it would not request toll-related CPNI if the customer indicates he wants only local service from Sprint. (Hunsucker, Tr. 161-62.) Sprint would also submit an order for CPNI before it could access to that CPNI, although it was not clear whether the order would be separate from the local service request. (Hunsucker, Tr. 161-62 (Q. (by Mr. Gillman) "So you wouldn't get local [CPNI] unless you filed a local order?" A. (by Mr. Hunsucker) "That's correct." See also Sprint Petition at 34 ("Once Sprint has obtained a customer," GTE shall provide information on services the customer had with GTE.)

The above-listed conditions Sprint proposed were not recommended by AT&T or MCI in their arbitration with GTE. In addition, GTE's analysis here includes points not raised in the AT&T arbitration. These are key differences which alone preclude transferring the AT&T CPNI decision to this arbitration. Because Sprint's position is more reasonable, a more reasonable ruling is warranted here. The Commission should adopt all of Sprint's conditions, with the additional admonition that Sprint should obtain written customer authorization before it can access CPNI or that Sprint may access CPNI only after it has submitted a local service request (in which case no written authorization would be necessary). Imposition of one of these two conditions is necessary to comply with the Act.

At the very least, the Commission should adopt GTE's position on an interim basis, until the FCC issues its pending ruling on carriers' CPNI obligations under the Act. Implementation of the Telecomm. Act of 1996: Telecomm. Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Dkt. 96-115, FCC 96-221. Until that decision is issued--perhaps as early as year-end 1996 (Drew, Tr. 660)--it is better to err on the side of more, rather than less, privacy protection.

Issue 10: What rates are appropriate for the transport and termination of local traffic between Sprint and GTE?

****Any rates the Commission sets should be based on each carrier's respective true costs. Symmetrical rates are improper because they are not cost-justified and would likely force GTE to subsidize Sprint.****

Under the Act, any compensation mechanism for transport and termination of traffic must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." The cost determination must be made "on the basis of a reasonable approximation of the additional costs of terminating such calls." (47 U.S.C. § 252(d)(2)(A)i&ii.) True to the letter and intent of the Act, the Commission must allow the parties to recover their respective true costs of transport and termination. (Menard, Tr. 741.)

These costs for GTE should be determined using the M-ECPR explained by GTE witness Sibley. (Munsell, DT 16.) In the AT&T/GTE arbitration, Staff expressed concern that the M-ECPR would "discourage the incentive for competition." (AT&T Rec. at 201-02.) GTE believes Staff's belief there was thoroughly unsupported. Nevertheless, GTE in this case has produced additional evidence and analysis that should remove any doubt about the appropriateness of using M-ECPR to set rates. (See GTE's Position on Issue 2.)

Nevertheless, if the Commission declines to give GTE correct compensation under the M-ECPR approach, it should at least set rates in accordance with GTE's TSLRIC plus forward-looking joint and common costs. In no event should the Commission accept Sprint's calculation of GTE's TELRIC (which is based on the now-stayed and ineffective FCC pricing provisions). (Munsell (adopted by Menard), DT 16.) Likewise, it should reject Sprint's arbitrary cap on joint and common costs. (Munsell/Menard, DT 26.)

GTE's TSLRIC and TELRIC calculations and methodology remain unrefuted, given the fact that Sprint has declined to review GTE's cost studies in any detail. GTE has fully supported all of the cost data proposed as the basis for rate-setting, including its use of the volume-insensitive factor. In the AT&T/MCI arbitration, Staff based its prices on GTE's cost studies, but expressed "misgivings" about accepting the volume-insensitive factor the Company used. While Staff acknowledged the propriety of including volume-insensitive costs in a TSLRIC study, it noted that it could find no supporting rationale in the record for GTE's use of this factor. (AT&T Rec. at 202.)

Although GTE is confident that it justified its volume-insensitive factor in the AT&T/MCI arbitration, it has definitively laid this matter to rest in this case. Mr. Steele amply clarified this aspect of GTE's study at the hearing, largely through cross-examination from the Staff. At least 11 pages of the transcript, as well as an exhibit to Mr. Steele's testimony, deal with the role of the volume-insensitive factor in GTE's cost study. (Steele, Tr. 459-60, 490-92, 494-96, 499-501; Ex. 12.) In particular, Mr. Steele emphasized that the inclusion of both volume-sensitive and -insensitive costs in GTE's study "is not only consistent with GTE's cost study principles, but is consistent with the FCC's First Report, as well as the local service providers of MCI, AT&T and Sprint, and others as well, including the Staff of this Commission." (Steele, Tr. 459.) He described in detail GTE's method for capturing both volume-sensitive and -insensitive costs for each element, including those relevant to transport and termination. (See Steele, Tr. 460, Ex. 12.) Mr. Steele further explained how the volume-insensitive costs (and certain other factors) accounted for the difference between GTE's existing cost studies and those previously submitted in the generic interconnection docket. (Steele, Tr. 489-90, 495-501.)

Staff's only misgivings about the termination costs GTE presented were in association with GTE's volume-insensitive factor. (AT&T Rec. at 202.) Staff thus set rates for tandem and end office switching that were unquestionably below GTE's reported costs. (AT&T Rec. at 203.) Given Staff's now-deeper understanding of GTE's cost studies, and in particular the volume-insensitive factor, GTE would expect Staff's misgivings to have been eliminated. GTE is thus entitled, on the basis of this record, to its proposed rates that fully cover its reported costs.

Those rates, moreover, should be used only to set GTE's prices, since they reflect only GTE's costs. As Ms. Menard testified, Sprint's costs for terminating calls will, most likely, be less than GTE's costs for terminating calls, because Sprint will have deployed newer equipment using a relatively higher percentage of its network's capacity. (Menard, Tr. 795-98; Munsell/Menard, DT 7.) Thus, GTE's costs are not a suitable proxy for determining the actual costs of interconnection. Using these proxies to establish a symmetrical pricing scheme, as Sprint proposes, will unfairly force GTE to subsidize Sprint, because it will receive far more than the cost it incurs to complete a call. This system, moreover, contravenes the Act's directive that pricing for transport and termination must permit carriers mutual and reciprocal recovery of costs which are determined on the basis of a reasonable approximation of the additional costs of terminating calls. (Munsell/Menard, DT 26-27.)

It is impossible to draw any conclusions about Sprint's specific costs because it has submitted no studies or other evidence showing those costs. There is thus no justification in this record for using GTE's costs as a proxy for Sprint's, particularly in view of GTE's testimony that those costs are probably quite a bit lower than GTE's. Certainly, Sprint's failure to produce any cost data cannot be used as an excuse for setting rates based on GTE's costs. Accepting Sprint's proposed symmetrical approach would only reward it for producing no evidence about its own costs.

Issue 23: Should GTE make available any price, term and/or condition offered to any carrier by GTE to Sprint on a most-favored nation's (MFN) basis: If so, what restrictions, if any, would apply?

****No. Sprint's MFN proposal would undermine the Act's negotiation and arbitration framework and stifle competition. No agreement would ever be final if an ALEC can constantly modify it to include more favorable, individual terms as they are negotiated with other ALECs.****

The most-favored nation (MFN) "pick-and-choose" clause Sprint proposes would stifle both competition and the negotiation process the Act is designed to encourage. GTE has agreed to an MFN clause that is consistent with section 252(i) of the Act, the purpose of which is to prevent incumbent ILECs from discriminating among carriers. To this end, GTE will provide to Sprint any fully negotiated contract GTE has entered into with another ALEC. (Menard, Tr. 783, 789.)

Sprint, however, is not satisfied with obtaining the same contract agreed to by another ALEC. (See Hunsucker, Tr. 141.) Rather, it demands the right to pick-and-choose those contractual provisions it likes in a particular contract and reject those it does not. (See Menard, Tr. 791-92.) Sprint's aim is to take isolated provisions from numerous contracts to create an entirely new agreement without ever entering into negotiations with GTE. Id.

A. The Eighth Circuit's Stay Rejects Sprint's Position.

Sprint's position is essentially the same as that taken by the FCC in its Order. The FCC's "pick-and-choose" rule (Rule 51.809) would have allowed an ALEC to "cherry pick" favorable provisions from a variety of different agreements, regardless of whether the agreement was arbitrated or negotiated. Like Sprint's request, the FCC went well beyond the express terms of the Act in approving its pick-and-choose rule.

When GTE and other parties sought a stay of the FCC's pick-and-choose rule (among other provisions) in the Eighth Circuit, GTE argued that adoption of such a rule would cause irreparable injury. The Court summarized GTE's position as follows:

> The petitioners' objection is that the rule would permit the carriers seeking entry into a local market to "pick and choose" the lowest-priced individual elements and services they need from among all of the prior approved agreements between that LEC and other carriers, taking one element and its price from one agreement and another element and its price from a different approved agreement. Moreover, if an LEC and Carrier A, for example, reach an approved agreement, and then the LEC and a subsequent entrant, Carrier B, agree in their agreement to a lower price for one of the elements or services provided for in the LEC's agreement with

> Carrier A, Carrier A will be able to demand that its agreement be modified to reflect the lower cost negotiated in the agreement with Carrier B. Consequently, the petitioners assert that the congressional preference for negotiated agreements would be undermined because an agreement would never be finally binding, and the whole methodology for negotiated and arbitrated agreements would be thereby destabilized.

Stay Order at 12. The Court agreed with GTE, holding that the FCC's pick-and-choose rule would cause irreparable injury by "further undercut[ting] any agreements that are actually negotiated or arbitrated." (Stay Order at 17.) It also recognized that the FCC's pick-and-choose rule undermined negotiations between ILECs and ALECs.[8] Holding that the FCC's pricing rules and pick-and-choose rule would stymie "the opportunity for effective private negotiations," the court issued an order staying these rules. Stay Order at 17.

Without the stay, the pick-and-choose rule would destabilize the entire negotiation process. No agreement would be "final" because an ALEC would constantly modify it as new agreements containing more favorable terms are executed.

For these reasons, as the Court of Appeals has recognized, Sprint's request for an

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[8] The Court stated:

> We are persuaded...by the petitioners' evidence that the negotiations preferred by the Congress are already breaking down.... These experiences indicate that the FCC's pricing rules will derail current efforts to negotiate and arbitrate agreements under the Act, and the "pick and choose" rule will operate to further undercut any agreements that are actually negotiated or arbitrated. <u>The inability of the incumbent LECs and the state commissions to effectively negotiate and arbitrate agreements free from the influence of the FCC's pricing rules, including the "pick and choose" rule, will irreparably injure the interests of the petitioners</u>

Stay Order at 17 [emphasis added].

MFN clause that would allow it to pick and choose from individual contract provisions should be denied.

B. GTE's MFN Clause Is Consistent With the Act and Preserves the Negotiation Process.

Sprint alleges that not allowing it to pick and choose the same provisions that GTE has granted another ALEC would be discriminatory. (See Hunsucker, Tr. 142.) This contention is entirely meritless. As noted above, GTE agrees to provide Sprint any fully negotiated contract GTE enters with another ALEC. Sprint, however, must be required to adopt all of the terms and conditions contained in the contract, as section 252(i) of the Act instructs. (Menard, Tr. 773, 777, 790-91.) Sprint should not be permitted to select isolated provisions from several agreements, as it requests.

Sprint ignores the Act's requirement that ILECs make available any interconnection service or network element provided in another agreement "under the same terms and conditions." 47 U.S.C. § 252(i). The terms and conditions of an agreement are reflected in the entire contract. (Menard, Tr. 773, 777, 790-91.) An interconnection agreement is the product of the give-and-take process of negotiation envisioned by the Act. Sprint's proposal to unilaterally pick-and-choose the most favorable terms of any agreement ignores this essential aspect of negotiations.[9]

As noted, one of the Act's principal purposes is to encourage parties to negotiate interconnection agreements. Sprint's proposed MFN clause removes any incentive the

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[9] Sprint's "pick-and-choose" proposal eviscerates the give-and-take process that is the hallmark of negotiated agreements. See, e.g., John D. Calamari & Joseph M. Perillo, Contracts, §1-3 at 6 (3d ed. 1987).

parties have to negotiate. Sprint would not need to negotiate because it merely could wait until another ALEC obtains a particular provision Sprint desires. Indeed, Sprint concedes that the pick-and-choose provision "would stifle the negotiation process" by granting it the ability to unilaterally elect terms and conditions (including rates) that GTE agrees to with another ALEC in a subsequent agreement, thereby avoiding its contract obligation. (See Hunsucker, Tr. 167-69.) Hence, GTE also would be wary of negotiating, realizing that any provision it agrees to in one negotiation would be available to all other ALECs, but not necessarily with the corresponding benefits and duties embodied in the entire contract. Commissioner Kiesling recognized the inappropriateness of such an arrangement, stating that "it inserts Sprint into the negotiations between [another ALEC] and GTE in the sense that [Sprint is] going to be dictating what they have to consider when they negotiate." (Tr. 173.)

GTE remains willing to offer Sprint any contract fully negotiated with another ALEC. (Menard, Tr. 777, 783.) This approach is consistent with the MFN provision in GTE's Commission-approved interconnection contract with MFS. Petition for Approval of Interconnection Agreement Between GTE Florida Inc. and MFS Pursuant to Telecomm. Act of 1996, Order No. PSC-96-1401-FOF-TP (Nov. 20, 1996). That clause requires MFS to adopt "the rates, terms, and conditions offered to the third party." Id. [emphasis added.] This is a critical difference from Sprint's proposed language, which would allow it to adopt "individual rates, terms, and conditions offered to the third party." (Hunsucker, RT 10 [emphasis added].)

Sprint's insistence on being able to fashion an entirely new contract by selecting the most favorable terms of other contracts severely inhibits GTE from negotiating individual provisions with Sprint or any other carrier. The MFN clause offered by GTE is consistent with section 252(i) of the Act. Sprint's proposed pick-and-choose clause is not and should be rejected.

<u>Issue 24</u>: Should the agreement be approved pursuant to Section 252(e)?

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

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

In this proceeding, Sprint and GTE settled and withdrew several issues before the conclusion of the hearings. This forward movement in the negotiations is consistent with Congress' ideal that parties should rely on negotiations to establish the terms of competition. The Commission should, to the extent that it can, encourage productive negotiations.

At the hearing, however, Staff raised the issue of whether the parties would integrate the arbitrated and negotiated terms into a single contract for submission. GTE assumed it would, as no other approach would make sense. (Menard, Tr. 783.) Sprint cannot operate under half a contract. For instance, rates for unbundled elements will be determined through this arbitration, while the parties decided interconnection terms by themselves. Since the Act sets forth different standards of approval for negotiated and arbitrated terms, the parties will designate which contract terms fall into each of the two categories. Withdrawal of certain issues from arbitration means only that they were not arbitrated, not that they shouldn't be included in a final agreement. In this regard, GTE understands that the issues withdrawn from the AT&T/MCI arbitration will nevertheless be part of the total agreement. (Tr. 786-87.)

Given the explicit distinction in the Act between the standards for review of negotiated and arbitrated agreements, there is no basis for the Commission to assess the entire agreements under subsection 252(e)(2)(B), which governs only arbitrated terms. Clearly, all of the terms of the agreement to be drafted by GTE and Sprint were not arbitrated. A ruling that the entire agreement will be reviewed under the stricter arbitration standard will only prompt the parties to submit two separate agreements--one to be evaluated under the nondiscrimination and public interest standards of subsection 252(e)(2)(A), governing negotiations, and another to be assessed under the stricter arbitration standards set forth in subsection 252(e)(2)(B). This result is inefficient from the standpoint of the Company and the Commission (which will have to open two dockets), as well as nonsensical, because the parties will regard the contract as an integrated whole even if it is submitted to the Commission in two separate pieces.

Issue 25: What are the appropriate post-hearing procedures for submission and approval of final arbitrated agreements?

****The parties should be directed to negotiate an agreement that accords with the terms of the Commission's order in this arbitration. Thirty days is the shortest reasonable period for contract finalization.****

In resolving the issues presented for arbitration, the Commission must "provide a schedule for implementation of the terms and conditions by the parties to the agreement." (47 USC § 252(c).) The Commission should thus direct GTE and Sprint to negotiate an agreement incorporating the terms of its Order. The agreement will then be submitted for approval in accordance with section 252(e)(1), with the negotiated provisions reviewed under section 252((e)(2)(A) and the arbitrated terms considered under section 252(e)(2)(B). (See GTE's position on Issue 25.)

The Commission has been asked to resolve numerous complex issues in this case. Translation of these resolutions into specific contract terms will be no simple task. In order to avoid future disputes, the Commission must allow sufficient time to incorporate its findings into a comprehensive and integrated agreement. GTE believes 30 days from the date of the arbitration Order is a reasonable period for contract finalization. Any shorter period would unduly burden GTE, which must negotiate numerous interconnection contracts at the national level during the same period. GTE does not believe Sprint has opposed GTE's proposed 30-day negotiation period.

Respectfully submitted on December 18, 1996.

By: Anthony P. Gillman/dm

Anthony P. Gillman, Esq.
Kimberly Caswell, Esq.
P. O. Box 110, FLTC0007
Tampa, Florida 33601

Edward Fuhr, Esq.
Katherine Murphy, Esq.
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Posthearing Statement in Docket No. 961173-TP were sent via overnight delivery on December 18, 1996 to the parties listed below.

Monica Barone/Charlie Pellegrini
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Benjamin W. Fincher
Sprint
3100 Cumberland Circle
Atlanta, GA 30339

C. Everett Boyd
Ervin, Varn, Jacobs, Odom & Irvin
305 S. Gadsden Street
Tallahassee, FL 32302

Anthony P. Gillman

Anthony Gillman