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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

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WINSTAR COMMUNICATIONS, INC. REPLY TO OPPOSITIONS TO PETITION FOR CLARIFICATION OR RECONSIDERATION

In its Petition for Clarification or Reconsideration, WinStar asked the Commission to clarify both that where a utility owns and/or controls access to a roof, such access is a "right-of-way" within the meaning of the Telecommunications Act of 1996 (the "Act"), and that other telecommunications carriers, including wireless local exchange carriers such as WinStar, have a right of nondiscriminatory access under 47 U.S.C. § 224(f)(1).

The Oppositions made three arguments: 1) roofs are not within the technical definition of the term "right-of-way;"[1] 2) wireless local exchange carriers like WinStar can select from several roofs for placement of their facilities and, accordingly, access to roofs does not fall within the policy

[1] Opposition of American Electric Power Service Corp., et al., dated October 31, 1997, at 6-7; Opposition of Ameritech, dated October 31, 1996, at 41-43.

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of the Act to provide access to "bottleneck" facilities;[2] and 3) in any event, the Act does not give a right of access to wireless communications carriers.[3] These arguments are wrong.

1. The Legal Definitions of "Right-of-Way" and "Conduit" Cover Rooftops To Which Utilities Have Access

There are two issues with respect to the definitions of "right-of-way" and "conduit:" a) whether they apply when the utility has a right of access to the roof and related riser conduits of a building owned by another (where, for example, the LEC is utilizing a rooftop for placement of equipment); and b) whether they apply when the utility has a right of access to the roof and related riser conduits of its own building.[4] As shown below, the technical legal definitions of "right of way" and "conduit" encompasses rooftops and riser conduits.

a) Rights of Way on Buildings Not Owned by the Utility

The term "right of way" has three accepted legal definitions, one of which is "a right belonging to a party to pass over the land of another . . . ." Black's Law Dictionary (6th ed. 1990). See Minneapolis Athletic Club v. Cohler, 287 Minn. 254, 287, 177 N.W.2d 786, 789 (1970) ("the right to pass over another's land").[5] Where a utility owns or controls a right of access to another's

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[2] Opposition of Sprint, dated October 31, 1996, at 22-23; Ameritech at 43; Consolidated Opposition of the US Telephone Association, dated October 31, 1996, at 43.

[3] American Electric Power Service Corp., et al., at 9-12.

[4] The Oppositions are unclear whether a long-term lease of a building would be considered a building owned by another or as its own building. Nonetheless, as we demonstrate herein, WinStar is legally entitled to access the rooftop in any case.

[5] A second definition refers to "the land itself, not the right of passage over it," where the land is used by a railroad to construct a road bed. That definition also supports WinStar's position. See pp. 3-4, infra. The third definition of "right of way" is not relevant to this case -- it refers to who has the preference at intersections or other traffic situations. Black's Law Dictionary (6th ed. 1990).

roof, its right of access literally falls within this definition of "right of way." Indeed, the term "right-of-way" has been used in the case law to encompass the right to cross another's roof. Patalano v. Chabot, 139 Conn. 356, 357, 94 A.2d 15, 16-17 (1952) (right to pass over a roof and flight of stairs, as a means of reaching an adjacent building from the street, characterized by court as a "right of way").

b) Buildings Owned by the Utility

The term "right-of-way" is frequently used in the cases to refer not only to the right to pass over another's land, but also to the land itself when used for purposes of passage. A typical example of this usage is that a railroad "right-of-way" refers not only to situations where the railroad has the right to lay its tracks through someone else's property, but also where the railroad itself owns the land on which the tracks are laid. Black's Law Dictionary (6th ed. 1990); See Joy v. City of St. Louis, 138 U.S. 1, 44 (1890) ("right of way" is "also used to describe that strip of land which railroad companies take upon which to construct their road-bed").

A recent decision of an Arbitration Panel in Michigan confirms this reading of the Act. AT&T Communications of Michigan, Inc., Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Michigan Bell Telephone Company d/b/a Ameritech Michigan, Nos. U-11151, U-11152 (Oct. 28, 1996) ("Michigan Decision") (relevant excerpts in Attachment 1). The panel held that "Rights-of-way in this agreement should include property owned, leased, or otherwise controlled by Ameritech. 'Right-of-way' should not be interpreted in this Agreement to be limited to real estate owned by third parties." Michigan Decision at 50. The panel pointed out that, under Michigan law, "'right-of-way' has been interpreted to mean more than just

property owned by a third party." Michigan Decision at 51. An arbitration panel at the Ohio Public Utilities Commission has reached the same result.[6]

The language of § 224 confirms that Congress intended the term "right-of-way" to include both relevant definitions in the case law -- *i.e.*, the right of passage over another's property, and the right of passage over one's own property. Thus, § 224(a)(1) defines "utility" as a person who "owns or controls" rights of way used for wire communications. This language confirms that the Act incorporates the underlying case law which applies the term "right of way" without regard to whether the carrier owns the underlying property or merely controls it for purposes of passage.

c) Riser Conduits Are "Conduits" Within the Meaning of the Act

Section 224 creates a right of access to "conduits." In its Petition for Clarification or Reconsideration, WinStar argued that, where the utility has access to a roof and the related riser conduit, other telecommunications carriers must be granted nondiscriminatory access under § 224(f)(1). There can, of course, be no doubt that the related riser conduit is a "conduit" within the meaning of the Act. There is absolutely nothing in the meaning of the term "conduit" to exclude riser conduits or to limit the term to conduits on property owned by others (rather than conduits on property owned by the utility itself).

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[6] AT&T Communications of Ohio, Inc.'s Petition for Arbitration etc., No. 96-752-TP-ARB (relevant excerpts in Attachment 2), at pp. 52-53.

2. The Purpose of the Act Covers Rooftop Rights of Way and Riser Conduits

Lacking any basis in the legal definitions of "right-of-way" and "conduits," the Oppositions seek to invoke the policy of the Act. However, to the extent the policy of the Act is relevant, it supports WinStar's position.

The Oppositions are ambivalent with respect to the relevance of the purpose of the Act. On the one hand, they cite cases showing that when Congress uses a technical term such as "right-of-way," it must be presumed to have intended it in its technical sense.[7] On the other hand, they argue that the Act should be read to restrict competitive access to rooftop "rights-of-way," because roofs are not a "bottleneck" facility and the purpose of the Act was only to afford access to bottleneck facilities.[8]

We agree that the policy of the Act may be examined to determine whether Congress intended to use "rights of way" in the technical sense. The rule that Congress is presumed to use technical words in their technical sense is a presumption only and may be overcome by strong evidence that the policy of the Act points to a different definition.[9] However, as we have demonstrated above, the technical legal definitions of "right-of-way" and "conduit" encompass rooftops and riser conduits, regardless of whether the utility owns the underlying property itself or

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[7] American Electric Power Service Corp., et al., at 5-6; Opposition of Duquesne Light Co., dated October 23, 1996, at 5.

[8] Ameritech at 43; U.S. Telephone Ass'n at 43.

[9] See Territory of New Mexico v. United States Trust Co., 172 U.S. 171, 181 (1898): "To support its contention, appellant urges the technical meaning of the phrase 'right of way,' and claims that the primary presumption is that it was used in its technical sense. Undoubtedly that is the presumption, but such presumption must yield to an opposing context and the intention of the legislature otherwise indicated."

merely controls access. Thus, the burden of overcoming the presumption in favor of technical legal definitions lies with the Oppositions, not with WinStar.

The Oppositions have not overcome that presumption. In the first place, the Oppositions have not shown that the policy of the Act excludes rights of access to roofs and related riser conduits. Wireless local exchange carriers like WinStar must have access to roofs and related riser conduits in order to receive signals for distribution to users within the building. In such cases, only that roof and its related riser conduit will serve the purpose. In such cases, the right of way involved is a true "bottleneck" facility.

In other situations -- where the roof is needed for purposes of transmission or relay of signals -- the right-of-way may or may not be a "bottleneck," depending on a variety of factors including the topography of the area and the location of alternative sites. But, in all such cases, access to the utility's right of way will facilitate competitive telecommunications, and that is the fundamental purpose of the Act.

Moreover, there is nothing in the Act to indicate that its application depends on a case-by-case evaluation of whether a "bottleneck" facility is involved. Indeed, such a case-by-case evaluation -- regardless of whether the evaluation is of poles, ducts, conduits, or rights of way, and regardless of whether access is requested by wireline or wireless carriers -- would serve only to turn applications for access to rights of way into contentious and time-consuming proceedings, contrary to the express purpose of the Act to expedite the transition to a competitive market.[10] The Act

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[10] For a fiber-based carrier, access to a given set of poles may or may not be a bottleneck in a given instance. For example, in Chicago, much of MFS' distribution system is not on poles, but in below-ground abandoned coal tunnels. Yet, the arguable availability in any given locale of (continued...)

requires nondiscriminatory access in certain defined situations, and imposes strict deadlines on the access process. Congress did not make access dependent on a factual finding as to whether a particular situation involves a "bottleneck," because it realized that expeditious achievement of competition would be frustrated if the issue of adequate alternative pathways was open to litigation in every case.

Finally, there is nothing in the policy of the Act to support any distinction between situations where the utility owns the underlying property or merely has a right to control access to property owned by another. As the Arbitration Panel in Michigan correctly concluded: "the Panel does not believe Congress intended the access to land on which network distribution facilities are located is to be dependent on whether the original right to use the property to construct and maintain facilities was acquired by lease, easement or license, in fee simple or by way of some other legal interest." Michigan Decision at 51 (Attachment 1).

In summary, a construction of the term "right-of-way," to cover roofs and related riser conduits to which the utility has access regardless of whether it owns the underlying building, would serve the purpose of the Act by facilitating the expeditious access of wireless carriers to facilities that, in most cases, are "bottleneck." In fact, to do otherwise would be to impose a blatant technology-based discrimination. The Commission should make it clear that such a construction was intended.

10/ (...continued)
alternatives for fiber-based carriers does not detract from their absolute right to access to poles, conduits, etc. owned or controlled by the LECs and utilities. Nowhere does the Act place wireless local exchange carriers under a far greater burden -- and, hence, a technological discrimination -- than their wireline counterparts.

3. The Act Gives Wireless Telecommunications Carriers a Right of Access

The Oppositions argue that, in any event, the Act does not afford access to wireless local exchange telecommunications carriers. This argument is contrary to both the language and the policy of the Act. Section 224(f)(1) requires utilities to provide "a cable television system or any telecommunications carrier" with nondiscriminatory access. (Emphasis added). The Act defines "telecommunications carrier" to include any provider of "telecommunications service" (§ 3(44)) -- a term the Act defines broadly in a manner that draws no distinction between wireless and wireline transmission. §§ 3(43), (46). There is simply nothing in the language of the Act to justify denial of access to wireless local exchange carriers such as WinStar.

The Oppositions argue that the Act defines the term "utility" as any utility that owns or controls poles, ducts, conduits, or rights-of-way used for any "wire communications." § 224(a)(1).[11] But, while the Act imposes the wire communications limitation on the entities who must provide access, it imposes no such limitation on the entities to whom access must be provided.[12] Thus, § 224(f)(1) requires utilities to provide access to "any telecommunications carrier," a term that is not limited to wireline carriers. The fact that Congress imposed the "wire communications" limitation in the definition of "utility" shows that, when Congress meant to impose that limitation, it knew how to do so. The absence of any such limitation in the definition of the "telecommunications carriers" to whom access must be provided, makes it clear that no such limitation was intended.

11/ American Electric Power Service Corp., et al., at 10.

12/ For that matter, unlike purely mobile or cellular services, wireless local exchange carriers like WinStar originate and terminate calls over wirelines: their wireless technology only is used for the transfer element (e.g., where local loop is used directly in lieu of fiber (which is why WinStar, for example, refers to its 38 GHz transport as "wireless fiber")).

The Oppositions also argue that when the Pole Attachments Act was originally passed in 1978, it was intended to benefit only cable television systems and, for that reason, the term "pole attachment" must be read as limited to cable or other wires.[13] But the 1996 Amendments amended the definition of "pole attachment." The definition now includes "*any* attachment by a cable television system or a provider of telecommunications service"-- with the 1996 Amendments having added the underscored language. § 224(a)(4) (emphasis added). With the addition of language that encompasses wireless as well as wireline providers, the Amendments removed the previous limitation that the Oppositions seek to perpetuate.

Nor is there any basis in the policy of the Act to support blatant discrimination against wireless local exchange carriers. Moreover, a number of incumbents, like US West, themselves use wireless for a portion of their own network, demonstrating beyond doubt that rooftops represent either a present or potential future distribution right of way, no different than ground-level rights of way.[14] The Oppositions argue that their facilities "are unsuited for the placement of anything other than traditional coaxial or other fiber cable facilities."[15] But the Act addresses the issue of suitability by providing that access may be denied "for reasons of safety, reliability and generally applicable

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[13] American Electric Power Service Corp., et al., at 10-11.

[14] LEC and utility wireless systems, some of which have been in existence for decades, are often massive in scope. The existence of these systems is well documented in FCC databases and include experimental, developmental, secondary and primary authorizations. Indeed, beyond high-profile commercial wireless ventures, LECs and utilities quietly enjoy the use of entire radio services created solely for their use. See 47 C.F.R. § 90.81, Telephone Maintenance Radio Service, and 47 C.F.R. § 90.63, Power Radio Service. Some of the systems created by LECs and utilities under Part 90 of the FCC's rules, as private carrier systems, are now Commercial Mobile Radio Services.

[15] American Electric Power Service Corp., et al., at 11.

engineering purposes."§ 224(f)(2). Where no such reasons for denying attachment exist, the policies as well as the language of the Act demand that wireless communications local exchange carriers be afforded the right of nondiscriminatory access.[16]

CONCLUSION

For the foregoing reasons, the Commission should clarify that incumbent LECs and utilities must provide wireless telecommunications carriers, such as WinStar, with non-discriminatory access to roofs and related rise conduit to which they have access.

Respectfully submitted,

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[16] It is important that the exceptions, for safety, reliability, and engineering reasons, be clearly and carefully framed. In rejecting the contention that § 224 should be narrowly construed to exclude transmission facilities, the Commission correctly concluded that these exceptions are the proper method for dealing with situations where attachments are not appropriate. The same reasoning applies to rooftop access for wireline or wireless facilities; the exceptions of § 224(f)(2) are the proper vehicle for addressing situations in which access is not appropriate. Additionally, the Commission should not be unmindful of the fact that electric lines are routinely used to distribute wireline and wireless traffic. See 47 C.F.R. §§ 15.107, 15.109, 15.207, 15.209.

ATTACHMENTS

ATTACHMENT 1 Michigan Public Service Commission, Excerpts From Decision of Arbitration Panel -- AT&T Communications of Michigan, Inc., Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Michigan Bell Telephone Company d/b/a Ameritech Michigan, Case Nos. U-11151 and U-11152.

ATTACHMENT 2 Public Utilities Commission of Ohio, Excerpts From Arbitration Panel Report in the Matter of AT&T Communications of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Ohio Bell Telephone Company dba Ameritech Ohio., Case No. 96-752-TP-ARB

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

AT&T COMMUNICATIONS OF MICHIGAN, INC.	)	
Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Michigan Bell Telephone Company d/b/a Ameritech Michigan.	)	Case No. U-11151 Case No. U-11152

DECISION OF ARBITRATION PANEL

I.

HISTORY OF PROCEEDINGS

On February 27, 1996, AT&T Communications of Michigan, Inc. (AT&T) requested that Michigan Bell Telephone Company d/b/a Ameritech Michigan (Ameritech) enter into negotiations pursuant to §§ 251 and 252 of the Telecommunications Act of 1996 (the Act), 47 USC §§ 251 and 252, to establish an interconnection agreement with Ameritech. During the months that followed, the parties began negotiations regarding a generic agreement involving the networks in the various states in which both companies (or their affiliates) operate -- namely, Illinois, Indiana, Michigan, Ohio and Wisconsin. As defined in the Act, Ameritech is an Incumbent Local Exchange Carrier (ILEC). AT&T is a "requesting telecommunications carrier" within the meaning of 47 USC 252(a) of the Act, a "telecommunications carrier" as defined by 47 USC 153(a)(44) of the Act, and a "local exchange carrier" (LEC) as defined by 47 USC 153(a)(26) of the Act.

On June 10, 1996, Ameritech submitted to the Michigan Public Service Commission (Commission), and the Commission's counterparts in the other four states in the Ameritech region,

with AT&T in connection with the provisioning of directory listings and directories for AT&T retail customers?

DECISION:

Ameritech, not its publisher, should directly communicate with AT&T in connection with the provisioning of directory listings and directories for AT&T retail customers. This provisioning shall be as set forth in AT&T's proposed Agreement Article XV.

REASONS FOR DECISION:

Since a subsidiary of Ameritech publishes the directory, AT&T should be entitled to look to Ameritech and not to Ameritech's publisher as the appropriate party for performance. Section 251(b)(3) of the Act requires Ameritech to permit nondiscriminatory access to directory listings. Since the directory is published by an Ameritech subsidiary, this may best be accomplished through AT&T's proposed language for § 15.2.5 of the Agreement.

ISSUE 24

Does Ameritech's duty to permit access to rights-of-way include the duty to permit access to real property owned or leased by Ameritech?

DECISION:

Rights-of-way in this agreement should include property owned, leased, or otherwise controlled by Ameritech. "Right-of-way" should not be interpreted in this Agreement to be limited to real estate owned by third parties.

REASONS FOR DECISION:

Pursuant to § 224(f)(1) of the Act, ILECs, such as Ameritech, must grant AT&T and other

telecommunication carriers nondiscriminatory access to all poles, ducts, conduits and rights-of-way owned or controlled by them. As stated at § 1123 of the FCC Order:

> ". . . This directive seeks to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently or otherwise, the installation and maintenance of telecommunications and cable equipment by those seeking to compete in those fields. Section 224(f)(1) appears to mandate access every time a telecommunications carrier or cable operator seeks access to the utility facilities or property identified in that section, with a limited exception allowing electric utilities to deny access 'where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.'"

The term "right-of-way" under the Act should not be interpreted to be limited to property owned by a third party as opposed to property owned by a utility itself. In Michigan "right-of-way" has been interpreted to mean more than just property owned by a third party. Thus, in Westman v Kiell, 183 Mich App 484 (1990) the court stated as follows at page 493:

> "A railroad may acquire in a strip of real property for use as a right-of-way, as in any real property, a fee simple absolute, a determinable fee, an easement, a lease, or a license, as may any other corporate entity or individual. The character of the interest acquired is determined by the language of the conveyance."

Thus, the fact that a strip of land used for a conduit run or other distribution facilities is owned by an ILEC in "fee simple absolute" does not mean it is not used as a "right-of-way" under Michigan law and therefore is not available for use by a new entrant under § 224(f) of the Act. Furthermore, the Panel does not believe Congress intended the access to land on which network distribution facilities are located is to be dependent on whether the original right to use the property to construct and maintain facilities was acquired by lease, easement or license, in fee simple or by way of some other legal interest.

If Ameritech's contract proposal were adopted, Ameritech could exclude AT&T from laying

cable in trenches adjacent to Ameritech's own cable due to the fact that Ameritech was the owner in fee of the underlying property. We note in particular that Ameritech's current Michigan tariff on pole attachment and conduit occupancy permits a third party to place cables or wires "in the company's conduit or trench system where reasonably available." Tariff MPSC No. 20, Part 2, Section 6, General Regulations, A.1 (emphasis added). Thus, Ameritech's own tariff does not distinguish between trench systems located in easements and trench systems located on property owned by Ameritech.

Multiple public utilities may share a single corridor or strip of land as a right-of-way for their respective facilities. The specific legal interest any one of them may have in the underlying real estate is irrelevant in addressing access under § 224(f) of the Act. If the real estate is owned or controlled by an ILEC and is used, planned to be used, or suitable for use for the ILEC's distribution facilities, then the property is a "right-of-way" and AT&T must be given access to it under § 224(f). The purpose of § 224(f)(1) is to ensure that no party can use its control of the enumerated facilities and property to impede, inadvertently, or otherwise, installation and maintenance of telecommunication and cable equipment by those seeking to compete in these fields.

ISSUE 25

Should Ameritech be entitled to deny access to a pole, duct, conduit or right-of-way (referred to jointly as Structure) on the basis of lack of capacity where Ameritech has not taken all reasonable steps, including modification to its Structure to expand its capacity?

DECISION:

AT&T's Agreement language at § 16.1.2 should be included to indicate that before Ameritech

ATTACHMENT 2

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of AT&T Communications of Ohio, Inc.'s Petition for Arbitration of Inter-Connection Rates, Terms, and Conditions and Related Arrangements with Ohio Bell Telephone Company dba Ameritech Ohio.	)))))	Case No. 96-752-TP-ARB

ARBITRATION PANEL REPORT

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of AT&T Communications of Ohio, Inc.'s Petition for Arbitration of Inter-Connection Rates, Terms, and Conditions and Related Arrangements with Ohio Bell Telephone Company dba Ameritech Ohio.	)))))	Case No. 96-752-TP-ARB

ARBITRATION PANEL REPORT

I. Introduction

On February 8, 1996, the President of the United States signed into law the Telecommunications Act of 1996 (the Act).[1] This law seeks to develop competition in the telecommunications industry, particularly in the provision of local exchange services. The Act imposes obligations and responsibilities upon telecommunications carriers, the Federal Communications Commission (FCC), and the state commissions. Included within the provisions of the Act are procedures for negotiation, mediation, arbitration, and approval of interconnection agreements between telecommunications carriers. On February 27, 1996, AT&T Communications of Ohio, Inc. (AT&T) served upon Ameritech Ohio (Ameritech) a written request for negotiations of the rates, terms, and conditions for interconnection, resale services, network elements, and related services and arrangements pursuant to Sections 251 and 252 of the Act and both parties commenced negotiations.

Pursuant to Section 252(b)(1) of the Act, if the parties are unable to reach agreement on the terms and conditions for interconnection, a requesting carrier may petition a state commission to arbitrate any issues unresolved by voluntary negotiation under Section 252(a) of the Act. On August 1, 1996, AT&T filed a petition for arbitration of numerous issues to establish an interconnection agreement between it and Ameritech, pursuant to Section 252(b) of the Act. On July 18, 1996, this Commission established guidelines in order to carry out its duties under Section 252 of the Act. See *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996, Case No. 96-463-TP-UNC (July 18, 1996)*. Under those guidelines, an internal arbitration panel, composed of members of the Commission staff, is assigned to recommend a resolution of the issues in dispute if the parties cannot reach a voluntary agreement. Generally, those guidelines include procedures, under which the nonpetitioning party is required to respond to the petition, a conference is held between the panel and the parties, the parties file arbitration packages, an arbitration hearing with cross-examination of witnesses is held before the panel, and oral arguments are presented by the parties. The undersigned persons were assigned to conduct the arbitration in this matter and make

[1] Pub. L. No. 104-104, 110 Stat.56 (1996) (to be codified at 47 U.S.C. 151 et seq.)

The panel recognizes the value of a long-term performance measurement system as suggested by AT&T with its SPQM system. While it is important that the implementation team develop performance standards during the first few months of the contract period, utilization of a long-term performance measurement system will ensure that those standards are met for the duration of the contract. The panel also believes that development of such a system would help lessen any future misunderstanding between the parties as to the terms and conditions of the contract. However, the panel believes that such a system should be determined by input from both parties; therefore, we encourage the parties to jointly develop such a long-term, performance measurement system.

E. Poles, Conduits, Ducts, and Row

> What process will govern requests for access to poles, conduits, and right-of-way and to what extent should Ameritech have the unilateral right to change that process? (Issue 26)
>
> What pathway facilities must Ameritech make available to AT&T? (Issue 27)
>
> Whether Ameritech must make AT&T's access to poles, conduits, and right-of-way at parity with that Ameritech gives itself? (Issue 28)
>
> How will the charges for these pathway facilities be determined? (Issue 29)

Sections 16.3, 16.3.1, and 16.7 of the contract involve issues related to the process that will govern access to poles, ducts, conduits, and ROW. There was very little testimony on this issue. AT&T never addressed the issue of the process which will govern access. Ameritech witness Mr. Dunny testified that the process for access involves records check and field surveys, access to manholes, and pole permits. Dunny further stated that Ameritech would be willing to agree to the type of process for governing access as it uses in Illinois (Tr. IV, 144). The parties disagree in Section 16.3 on the procedures governing access at times when Ameritech and AT&T are unable to agree on a reasonable cost or time frame for the completion of access-related work, and under what conditions AT&T may establish its own intervals for obtaining access. The panel recommends that the parties review Ameritech's procedures which govern access to poles, ducts, conduit, and ROW which are used by Ameritech in Illinois, and that this issue be ultimately referred to the implementation team, which both parties agree will develop cooperative procedures for implementing the terms of Article XVI.

In Section 16.3.1, AT&T seeks notification in writing to all other parties having attachments on or in the structure to be modified. There was no testimony presented on this aspect of notice. The panel notes that, on the one hand, the parties agree in Section 16.14, that AT&T shall provide Ameritech with notice, without specifying that it needs to be in writing, before entering any Ameritech structure; whereas, in Section 16.7, the parties agree that notice shall be in writing. The panel believes that the parties should refer this issue to the implementation team to determine whether notice should be in writing.

There are two other related notice issues found in Article XVI of the contract, which the panel believes should be referred to the implementation team. First in Section 16.1.2, the parties have a disagreement as to when Ameritech must give notice to AT&T of the denial of access requests. Ameritech witness Mr. Dunny stated that Ameritech may, in some circumstances, find it necessary to deny a request by AT&T for attachment based on safety, reliability, and engineering principles (Ameritech Ex. 5B, at 90). The parties also disagree on what constitutes "insufficient capacity", in when Ameritech must notify AT&T of these situations where Ameritech will not make structure available to AT&T, in Section 16.2.

The panel believes that, in all cases in which AT&T seeks access to an Ameritech facility, AT&T will have provided notice to Ameritech of its need for access. In those situations in which Ameritech believes it necessary to deny such a request, it should provide notice in writing of the reasons for the denial. The panel also believes that Ameritech must be under an obligation to promptly determine the reasons for any denials of access and must respond in writing to AT&T with those reasons within a specific time period. The panel does not agree with Ameritech's proposed notice based on the time it has actual or constructive knowledge of the reasons for such denial. However, the panel is not convinced that AT&T's 45-day time period from the date of the request is too long or too short. Thus, the panel recommends that the parties refer to the implementation team the question of what number of days is appropriate for Ameritech's denial responses.

In Section 16.7, Ameritech seeks to limit the number and scope of requests from AT&T being processed at any time. Ameritech did not present any evidence to support its proposed limit on AT&T requests for access on this. The panel believes that Ameritech should not be able to place limits on the number or scope of requests that AT&T should be able to make, provided that such requests comply with the provisions established by the parties for access.

Ameritech witness Mr. Dunny testified that Ameritech proposes to make its poles, ducts, conduits, and ROW available for the placement of AT&T's wires, cables, and related facilities, to the extent it may lawfully do so. Ameritech defines ROW to include easements and licenses to use the property of others that is

suitable for distribution facilities. Mr. Dunny contends that it does not include property that is owned or leased by Ameritech or its transport equipment enclosures or public ROW (Ameritech Ex. 5B, at 89-90). AT&T witness Mr. Lester claims that AT&T requires access to all of Ameritech's pathways, which includes more than just Ameritech's poles, ducts, conduit and ROW. Mr. Lester testified that AT&T required access to public ROW which was controlled by Ameritech, although he conceded that state law dictates the entity that controls the public ROW (Tr. I, 166). He also stated that this would also include access to structure that is essential to the development of facilities based local service competition, but which excludes access to property and facilities of Ameritech that are not involved in piggybacking along the local distribution network owned or controlled by Ameritech (AT&T Ex. 3, at 11). Mr. Lester conceded that there was no FCC definition of pathways as used by AT&T (Tr. I, 167).

Ameritech witness Mr. Mayer testified that AT&T's definition of ROW goes beyond that of Ameritech and includes Ameritech owned or leased space, public ROW, Ameritech controlled environment vaults, remote terminals, equipment closets and cabinets, pedestals, and wiring and electrical supplies within buildings (Ameritech Ex. 3, at 74) He also testified that the FCC rejected AT&T's pathways definition and that Ameritech cannot approve AT&T's access to public ROW because it does not own or control public ROW in a way that permits Ameritech to give access without the consent of the applicable municipality (*Id.* at 74-75).

Section 251(b)(4) of the Act provides that the LEC has the duty to afford access to the poles, ducts, conduits, and ROW of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224. Paragraph 1185 of the FCC order provides that the intent of Congress was to permit cable operators and telecommunications carriers to piggyback along distribution networks owned or controlled by utilities as opposed to granting access to every piece of equipment or real property owned or controlled by the utility. Commission Guideline XII(B)(1) provides that access to poles, ducts, conduits, and ROW shall be on a first-come, first-serve basis subject to space limitation and taking into consideration a demonstration of the LEC's own future needs. The panel believes that AT&T should be permitted to have nondiscriminatory access to those distribution networks owned or controlled by Ameritech in accordance with the Commission guidelines.

With respect to the issue of specifically what facilities should or should not be included within the definition of poles, ducts, conduit, and ROW and AT&T's proposed pathways, both Ameritech and AT&T, in Section 16.1.1, specifically those facilities they believe fit within their definitions of poles, ducts, conduit and ROW. The panel believes that Ameritech should be required to provide to AT&T nondiscriminatory access to those facilities AT&T will be required to access in order to interconnect its facilities with those of Ameritech for the purpose of local service competition. To the extent that these facilities include Ameritech's owned

or leased space, public ROW, Ameritech controlled environment vaults, remote terminals, equipment closets and cabinets, pedestals, and wiring and electrical supplies within buildings, the panel believes that Ameritech is under an obligation to provide access to AT&T to such facilities.

In its petition, AT&T set forth its position that prices for pathway facilities must be set at LRSIC, be nondiscriminatory, and be inputed into Ameritech's own local service rates. AT&T set forth a proposed pricing structure in Section 4 of Schedule 5 of its proposed contract. AT&T witness Mr. Lester contended that rates for access be provided at nondiscriminatory rates set at LRSIC (AT&T Ex. 2, at 5 and 45). In its petition, Ameritech proposes that AT&T's proposal is unsupported and that the Act does not provide a pricing standard for access to poles, ducts, conduits, or ROW. Ameritech proposes that in accordance with Section 224 of the FCC order, it should follow the existing Commission-approved tariffs with respect to structures in Ohio.

The panel believes that the rates for access to poles, ducts, conduit, and ROW should be offered to AT&T at current rates established in Ameritech's tariff, as these rates were established by Ameritech to mirror FCC rates. To the extent that prices for facilities are not included within Ameritech's tariff, those prices should be set in accordance with Commission Guidelines XII.B.2 and 3. The panel recognizes that, at the present time, there is an ongoing proceeding at the FCC involving the establishment of rates for pole attachments. Thus, until such time as the FCC establishes rates for these purposes different than those used by Ameritech in its tariff, and until such time as the FCC determines and this Commission orders Ameritech to offer access at rates different than identified in its tariff, the panel recommends that Ameritech's rates for access to poles, ducts, conduit, and ROW be provided to AT&T at Ameritech's current tariff rates.

F. Liability/Indemnification

> Should AT&T be required to limit its liability and its customers' remedies for resold local service or service using elements purchased under the Interconnection Agreement so as to minimize Ameritech's exposure to claims based on faulty provision of service by Ameritech? (Issue 32)
>
> Should AT&T be required to indemnify Ameritech against claims by AT&T customers based on defective provision by Ameritech of a resold or purchased service? (Issue 33)
>
> Will damages be limited to the amounts payable for nonconforming or defective service? (Issue 43)

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of November, 1996, a copy of WinStar Communications, Inc. Reply to Oppositions to Petition for Clarification or Reconsideration was sent via postage prepaid, first-class mail to the individuals on the attached list.

Katherine A. Swall

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