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Before the  
Federal Communications Commission  
Washington, D.C. 20554

OCT - 5 1998

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 ) CC Docket No. 98-79  
GTE Telephone Operating Companies )  
GTOC FCC Tariff No. 1 )  
GTOC Transmittal No. 1148 )

**OPPOSITION OF GTE  
TO AT&T'S APPLICATION FOR REVIEW**

GTE Service Corporation and its affiliated domestic telephone operating companies (collectively, "GTE"),<sup>1</sup> pursuant to 47 C.F.R. § 1.115(d), hereby files its Opposition to AT&T's Application for Review ("Application") in the above-referenced matter.<sup>2</sup> The Application should be rejected because (1) the Order sufficiently addressed the issues raised and (2) adequate alternative remedies are available to AT&T.

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<sup>1</sup> GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc.

<sup>2</sup> Application for Review of AT&T (filed September 18, 1998). The petition below was filed by AT&T's affiliate TCG, but for the purposes of this pleading TCG's claims will be identified as AT&T's.

## I. The Bureau's Decision Below

In the Order Designating Issues for Investigation, the Bureau examined the general policy claims of AT&T, e\*spire, Intermedia and MCI (collectively "petitioners") regarding interconnection, resale, and unbundling now set forth in AT&T's Application for Review.<sup>3</sup> These issues were not specific to GTE's ADSL service, but rather addressed industry-wide legal and policy issues raised by ADSL offerings. Virtually all of the claims set forth in the Application, like those in AT&T's initial petition to deny GTE's ADSL tariff, are based on ILEC interconnection obligations contained in Section 251.

In response to these claims, the Bureau concluded that "[w]e do not designate for investigation issues arising under sections 251 and 252 or the Commission's expanded interconnection rules in this section 204(a) proceeding."<sup>4</sup> The Bureau did cite to several elements of the Commission's recent *Wireline Advanced Services Order*<sup>5</sup> that extend various legal obligations to GTE's ADSL service, including those imposed under Section 251(c). In addition, the Bureau noted that GTE has stated it will provide ADSL service on an "unbundled basis."

The Bureau also pointed out that a panoply of enforcement mechanisms are

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<sup>3</sup> See Order Designating Issues For Investigation, CC Docket 98-79, (rel. August 20, 1998) at ¶¶ 15-16 ("Designation Order"). GTE only addresses the claims of AT&T and its affiliate TCG, since AT&T is the author of the pending pleading.

<sup>4</sup> Designation Order at ¶ 18.

<sup>5</sup> *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, and related dockets, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188 (released August 7, 1998) (hereinafter "*Wireline Advanced Services Order*").

available to the extent that GTE does not live up to its Section 251 regulatory obligations:

If it becomes apparent that GTE is not meeting these obligations and competitors have difficulty negotiating interconnection agreements, obtaining access to unbundled network elements, or purchasing telecommunications services for resale pursuant to sections 251 and 252, competitors may seek mediation pursuant to section 252(a)(2) or arbitration pursuant to section 252(b).<sup>6</sup>

Similarly, the Bureau concluded that GTE remained subject to the interconnection rules and suggested that if GTE failed to comply with these obligations, carriers had alternative Commission enforcement procedures available.<sup>7</sup>

## **II. AT&T's Application for Review**

AT&T urges the Commission to grant its Application for Review and require the Bureau to "conduct a complete and comprehensive investigation" of the issues raised by each petition.<sup>8</sup> AT&T then offers a series of sweeping assertions regarding the alleged shortcomings of the Designation Order. AT&T asserts that the Order undermines the notion that "[t]he lawfulness of a tariff filed with the FCC should be determined by the FCC."<sup>9</sup> AT&T also argues that "[w]here, as here, the Bureau has recognized that 'significant concerns' have been raised as to whether this tariff is in compliance with the statute, the Bureau has a clear obligation to review those allegations and require

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<sup>6</sup> Designation Order at ¶ 19.

<sup>7</sup> Designation Order at ¶ 20.

<sup>8</sup> Application at 1.

<sup>9</sup> Application at 4.

corrections to the tariff if the allegations prove correct.”<sup>10</sup> Finally, AT&T asserts that the Bureau’s decision “leaves parties without remedy in the face of improper tariffs.”<sup>11</sup>

**III. The Bureau’s Decision Sufficiently Addressed the Issues Raised.**

AT&T’s Application should be rejected because the issues raised are not appropriate for a tariff proceeding, the Order adequately addressed the concerns raised in the petitions, the Commission has wide discretion in these matters, an expanded investigation would be duplicative and wasteful in light of contemporaneous Commission proceedings, and carriers have other procedural vehicles available to address any future concerns.

**A. AT&T’s Claims Are Not Appropriate for a Tariff Proceeding**

The Bureau Order reasonably concluded not to investigate these issues because the petitioners’ claims are not appropriate for a tariff proceeding. Section 204(a) by its express terms limits the issues to be investigated to those concerning “the lawfulness” of the tariff itself. In its Application, AT&T instead raises arguments regarding Section 251 policy issues, such as resale and unbundling, which are not related to the *legality* of the underlying tariff, but rather go to policy issues more appropriately addressed in a rulemaking.<sup>12</sup> The Commission has held that where an application to review a Bureau tariff order ultimately requests relief that would “require a rulemaking, a waiver application,

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<sup>10</sup> Application at 5.

<sup>11</sup> Application at 5.

<sup>12</sup> These issues are, in fact, being considered in the *Wireline Advanced Services Order*, CC Docket No. 98-147.

or an application for declaratory ruling," denial of an application for review is appropriate.<sup>13</sup> The Commission found this rationale particularly sound where, as here, the Commission had invited comment on the relevant issue in a pending rulemaking.<sup>14</sup> AT&T is seeking relief beyond the scope of this tariff proceeding. Therefore, the application should be denied.

**B. The Bureau's Order Adequately Addresses the Issues Raised by AT&T and Other Petitioners**

Even if petitioners' claims are appropriately raised in a tariff proceeding, it is clear that the Bureau has determined that such claims are more effectively addressed elsewhere. In large part, the Bureau found that the May 22 Petitions<sup>15</sup> had been adequately addressed by the intervening August 7 *Wireline Advanced Services Order*.<sup>16</sup> Yet, AT&T fails to even acknowledge that the *Wireline Advanced Services Order* exists. Similarly, to the extent that the issues raised by AT&T relate to the enforcement or interpretation of interconnection agreements, the Bureau accurately determined that those issues are the province of the states. "[S]tate Commissions retain the primary authority to

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<sup>13</sup> 1993/1994/1995/1996 *Annual Access Tariff Filings, GSF Order Compliance Filings*, 12 FCC Rcd 6277, 6315 (1997).

<sup>14</sup> *Id.*

<sup>15</sup> The petitions of TCG, e\*spire, Intermedia and MCI were all filed on May 22, 1998.

<sup>16</sup> The only "unbundling" issue presented by the tariff itself is whether a customer must connect at ADSL through GTE's frame relay service. As the Bureau acknowledged, GTE has already indicated a willingness to unbundle ADSL from its frame relay offering. Designation Order at ¶ 19. An investigation of this issue is, therefore, not necessary.

enforce the substantive terms of the agreements made pursuant to sections 251 and 252.”<sup>17</sup> Thus, the Order adequately resolved the petitions.

**C. The Commission Has Broad Discretion in Addressing the Issues Raised by AT&T And Other Petitioners**

It is well-settled that an agency is vested with broad discretion to proceed by rulemaking or adjudication in resolving disputes.<sup>18</sup> Here, the Bureau plainly determined that the *Wireline Advanced Services Order* rulemaking adequately addresses the broad federal legal and policy issues set forth in the petitions. Unbundling, nondiscriminatory access and resale are particularly appropriate issues for rulemaking; “Rule making is agency action which regulate[s] the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. . . .”<sup>19</sup> The issues raised in the petitions were generally not specific to GTE and were largely of a policy or legal nature. Thus there seems little basis for creating a GTE-specific fact finding adjudication

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<sup>17</sup> *Iowa Utilities Board v. FCC*, 120 F.3d 753, 804 (8th Cir. 1998), cert. granted sub nom. *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826, etc. (U.S., Jan. 26, 1998).

<sup>18</sup> See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.”); *National Labor Relations Board v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *Busse Broadcasting Corp. v. FCC*, 87 F.3d 1456, 1463 (D.C. Cir. 1996).

<sup>19</sup> *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 218-19 (1988) (Scalia, J., concurring).

to resolve industry-wide purely legal issues.<sup>20</sup> Certainly there is no basis for AT&T's claim that such an investigation is mandatory to resolve these matters.

The soundness of the Bureau's decision is further illustrated by the Commission's broad discretion in conducting tariff investigations.<sup>21</sup> In general, an agency decision not to suspend and investigate a tariff is unreviewable by the courts.<sup>22</sup> This wide latitude is granted in part due to the availability of other vehicles to address issues raised by tariffs. Here, these vehicles include Section 251 and 252 state proceedings.<sup>23</sup> The availability of other remedies should also give the Commission further comfort in not initiating an

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<sup>20</sup> The one "purely legal" issue designated for investigation – the interstate nature of GTE's ADSL service – was, of course, proper for this proceeding since the legitimacy of GTE's tariffing in the interstate jurisdiction turns upon the determination of this issue. In contrast, as noted *supra*, the issues raised by AT&T do not impact the legality of GTE's tariff itself.

<sup>21</sup> Indeed, an agency does not even automatically have to reach every issue whose importance it had noted and upon which it had actually conducted a hearing. *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 41-42 (D.C. Cir. 1990) ("[T]he FCC [may] decline to investigate a tariff in the first place; that decision is entrusted to its unreviewable discretion.")

<sup>22</sup> *Direct Marketing Association v. FCC*, 772 F.2d 966, 969 (D.C. Cir. 1985) (citations omitted); *Aeronautical Radio Inc. v. FCC*, 642 F.2d 1221, 1234 (D.C. Cir. 1980) ("[A]gency decisions relating to the acceptance of a tariff filing are non-final orders, generally not subject to judicial review.")

<sup>23</sup> In other contexts, the courts have pointed to the availability of other remedies, such as Section 208, as reason to deem unreviewable decisions regarding tariff investigations. *Direct Marketing Association v. FCC*, 772 F.2d 966, 969 (D.C. Cir. 1985) (citations omitted); *see also Aeronautical Radio Inc. v. FCC*, 642 F.2d 1221, 1234 (D.C. Cir. 1980) ("The act of acceptance creates no irreparable harm because investigatory hearings are available for examination of the filing on the merits." (citing 47 U.S.C. §§ 206-209)).

investigation on these issues here. The Commission has delegated its wide discretion to the Bureau and nothing in the Bureau's Order warrants Commission review.

The only authority AT&T cites in substantive support of the Bureau's purported failure to fulfill its obligation to review tariffs that raise "significant concerns" is *MCI v. FCC*.<sup>24</sup> However, the *MCI* case is not applicable because it did not involve tariffs; nor did that decision reverse a Commission decision based on arbitrary treatment, as AT&T's description seems to suggest. Rather, *MCI* struck down a rulemaking based on inadequate public notice and concluded "we need not now decide whether the Commission's decision is arbitrary and capricious on the merits."<sup>25</sup> The lack of relevant citations in the Application (there are only two substantive citations in the entire pleading) is further evidence of the fundamental shortcomings of AT&T's position. AT&T fails to cite to a single case in which the Commission has overturned a Bureau decision not to investigate a particular facet of a tariff challenged by a competitor.

#### **D. Designation of These Issues Would Be Duplicative and Wasteful**

Designation of the petitions' Section 251 issues also would be wasteful and duplicative. The Commission is given broad procedural powers to address issues in the most efficient and responsible way.<sup>26</sup> Here, AT&T would have the Commission mandate

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<sup>24</sup> *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136 (D.C. Cir. 1995) (cited in Application at 5, n. 10.)

<sup>25</sup> *Id.* at 1143.

<sup>26</sup> See 47 U.S.C. § 154(j) (FCC has authority to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice"); *GTE Service Corp. v. FCC*, 782 F.2d 263 (D.C. Cir. 1986); see also

(Continued...)

an investigatory proceeding to address policy issues already being evaluated, with full industry and public participation, in the *Wireline Advanced Services* proceeding.<sup>27</sup> AT&T would also have the Bureau initiate four investigatory dockets to address virtually identical issues for GTE, Bell South, Pacific Bell, and Bell Atlantic. Similarly, AT&T would have the Commission tread into the jurisdiction of fourteen GTE states to determine how the ADSL tariff impacts various interconnection agreements. Such redundant and *extra-jurisdictional* efforts do not serve the public interest and cannot be countenanced.

**E. Adequate Remedies Exist Should Any Carrier Believe That GTE Has Failed to Fulfill Its Regulatory Obligations**

As the Designation Order correctly notes,<sup>28</sup> there are sufficient procedural avenues available for any carrier to challenge actions of GTE which it believes are inconsistent with regulatory requirements. As set out above, this conclusion is undeniably accurate. AT&T's bald claim that carriers are left without a remedy is nothing more than empty rhetoric.

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*Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978)  
("administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'")

<sup>27</sup> Indeed, AT&T is fully participating in the *Wireline Advanced Services* proceeding, and filed comments with many other parties on September 25, 1998.

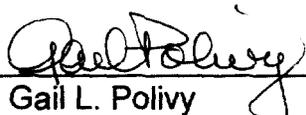
<sup>28</sup> Designation Order at ¶¶ 19-20.

**CONCLUSION**

For the foregoing reasons, the Commission should reject AT&T's Application for Review in its entirety. The Bureau's decision not to investigate AT&T's claims was wholly reasonable.

Respectfully submitted,

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October 5, 1998

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## Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Opposition of GTE to AT&T's Application for Review" have been mailed by first class United States mail, postage prepaid, on October 5, 1998 to all parties on the attached list.

  
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