

Moreover, the performance standards that have been included in recent interconnection agreements address only a small fraction of the performance issues and, as AT&T contends, perhaps do not address adequately competitive level playing field concerns.

AT&T has suggested, as an alternative to adopting its proposals now, the expeditious development of performance standards and remedies. We agree with that approach and, further, we conclude that AT&T's proposed performance categories (see Appendix B) encompass the fundamental areas for which measurement criteria and related remedies need to be developed. Apart from our efforts to address generically standards for wholesale services and network facilities, we concur with AT&T that an expedited process is needed for the development of standards for the interconnection agreement between these two companies.

We will expect to have carrier-to-carrier performance standards in place for New York Telephone and AT&T within 90 days of the effective date of the interconnection agreement. We therefore require these companies to develop concrete proposals for the performance categories in Appendix B. If the parties are not prepared to submit agreed-upon standards within 30 days of the effective date of the interconnection agreement, they must submit their proposals to Judge Harrison, who will select standards for our approval.

#### Timetable for Providing Elements

Arguing that providing the network elements required by the FCC and element combinations is a complex process, New York Telephone offers the following target dates for availability of elements and combinations, but states that these cannot be guaranteed:

Elements Required by the FCC

<u>Element</u>	<u>Availability</u>
Local Loop	Today
Network Interface Device (NID)	
1/1/97 Local Switching	
Early 1997 Tandem Switching	
Early 1997 Interoffice Transmission Facilities	
(Common) Early 1997 Signaling Networks and Call-Related Databases	Today
Functions	1/1/97
Directory Assistance	Today
	Operations Support System
	Operator Services and
<u>Combinations Requested by AT&amp;T</u>	
Basic Local Service excluding OS/DA	Early 1997
Loop Combination	Today
Dedicated Circuit Combination	Today
Local Network Interconnection Combination	Early
1997 Loop/Network Combination	
Early 1997 NID Plus Combination	
Early 1997	

AT&T requests firm dates for the provision of these elements, and wants New York Telephone to be held strictly accountable for failing to meet target dates. Acknowledging that there is some level of uncertainty regarding target dates, AT&T asserts that New York Telephone should be required to provide notice prior to any instance where it expects a target date to slip, together with specific justification for the delay. AT&T further asks us to state that failing to meet target dates for unbundled elements and combinations required by AT&T will result in our determination that New York Telephone has failed to meet the competitive checklist requirements of the Act.

New York Telephone, in reply, states that it has agreed to provide advanced notice of any delays. It argues against relating the competitive checklist to any of the target dates, however, noting that the checklist requirement and the arbitrated agreement requirements are independent of each other, and that the Act does not contemplate that the provision of unbundled elements be instantaneous.

AT&T's point that element and element combination target dates need to be specific and subject to slippage under only extraordinary circumstances is well taken. The target dates advanced by New York Telephone should be considered to be commitments subject to revision only in extraordinary circumstances, and only after New York Telephone has given advanced notice and specific justification for a revised target date. Where New York Telephone has indicated "early 1997" as a target, we will specify March 1, 1997 in each instance, unless the parties agree to a different date. New York Telephone will be required to meet an earlier target date for an element or combination, if it can be demonstrated that other incumbent LECs have been able to meet earlier dates, and if New York Telephone cannot demonstrate that it cannot reasonably do likewise.

Bona Fide Request Process

AT&T requests the formulation of a bona fide request process for the provision of new unbundled elements and points of interconnection. That such a process can be the subject of this arbitration, AT&T asserts, is evident from the FCC's invitation to the States to take an active role in evaluating the success or difficulties in implementing the FCC's requirements.<sup>1</sup>

New York Telephone responds that, while it supports development of an orderly process for telecommunications carriers to make such requests beyond their initial interconnection agreements, such a process is beyond the scope of this arbitration. Moreover, New York Telephone continues, the Act itself provides the negotiation/arbitration process for the achievement of interconnection terms and, unless the parties agree between themselves on another approach, there is no statutory authority for a different approach to be imposed through arbitration. According to New York Telephone, the §252

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<sup>1</sup> Order, ¶ 248.

arbitration process "is continuous and request driven and applies each and every time a requesting carrier seeks an element from the incumbent to the extent such element is not already provided."<sup>1</sup>

AT&T responds that nothing in the Act or the Order implies that a full-scale arbitration must occur whenever there is a request for a new element or for interconnection. AT&T points out that the FCC, while setting general rules regarding nondiscriminatory access to unbundled elements, stated:

We expect that the states will implement the general nondiscrimination rules set forth herein by adopting, inter alia, specific rules determining the timing in which incumbent LECs must provision certain elements, and any other specific conditions they deem necessary to provide new entrants, including small competitors, with a meaningful opportunity to compete in local exchange markets.<sup>2</sup>

We do not believe that the Act intended for the procedure spelled out in §252 to be followed in full for each and every future request by a carrier for an additional unbundled element, or even more generally for modifications of interconnection agreements achieved through arbitration. It is within the province of the States to adopt workable and more efficient procedures for the consideration of future requests or modifications initiated by parties, just as we have reserved the right in some instances (e.g., resale terms and conditions) to change the terms and conditions of arbitrated agreements, as required by the public interest, through our normal regulatory processes.

Moreover, we conclude that a bona fide request process should be in place with the interconnection agreement, and we

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<sup>1</sup> New York Telephone's Initial Brief on Law and Policy, p. 54.

<sup>2</sup> Order, ¶ 310.

note that an agreement we have approved<sup>1</sup> includes processes New York Telephone supports for inclusion in this proceeding. In fact, the parties are in near agreement on the components of a bona fide request process. The process would include the following steps:

(1) Request Initiation. The parties agree that a request for new elements must be made in writing, and include a technical description of the element. They also agree that New York Telephone must acknowledge the request within ten days of its receipt;

(2) Preliminary Analysis. New York Telephone would make an initial determination of whether it will provide the element, or will not provide the element because it is technically infeasible or because it does not qualify as a network element under the Act. The parties agree that New York Telephone will conclude its analysis within thirty days of the receipt of the request;

(a) AT&T argues that New York Telephone should state at the end of the thirty days if the element is readily or currently available and, if so, should make it immediately available to AT&T. We agree that, in that circumstance, the element should be made available without delay;

(b) If New York Telephone's initial determination is that the requested element is not available, the parties agree that good faith negotiations should continue to attempt to redefine the request. The parties disagree as to what should happen if an impasse is reached, but as to that, the process for alternative dispute resolution we intend to develop, discussed below, would be employed;

(3) Detailed Quote. The parties agree that, once agreement is reached that provision of a new element is feasible,

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<sup>1</sup> Case 96-C-0608, NYNEX and MFS Agreement, Order Approving Interconnection Agreement (issued October 3, 1996).

if AT&T wishes New York Telephone to proceed it must then submit a written request for a quote and provide payment for the preparation of a quote. Within 90 days of that request to proceed, New York Telephone will complete the development of the proposal for the element, including the applicable prices and installation intervals;

(4) Confirmation of Order. New York Telephone proposes that AT&T would have thirty days to confirm an order after receipt of its detailed quote. AT&T would like 90 days to consider a quote, and we conclude that AT&T should be afforded 90 days in view of the factors it must then consider;

(5) Cancellations. The parties agree that AT&T may cancel its request at any time, and also that AT&T will incur no costs if it does so within the preliminary analysis phase, that is, within thirty days of its initial request. New York Telephone would assess AT&T with all costs it actually incurs thereafter, up until the point of cancellation. Up until the time the quote is received, AT&T would pay actual costs incurred, but after the quote is received, AT&T argues that the cost estimates in the quote itself should be a limiting factor. We agree, and adopt AT&T's position that for any cancellation occurring after the receipt of the quote, charges to AT&T should not exceed the lesser of actual costs incurred or the estimate in the quote plus 20%.

To conclude, we believe that a bona fide request process should be in place at the outset. We adopt the process as just described, with our resolution of points of disagreement between the parties.

#### COLLOCATION

##### Virtual Collocation

AT&T asks that New York Telephone be required to provide either physical collocation or virtual collocation, at the discretion of the interconnecting carrier. New York

Telephone argues that it is required to provide physical collocation, and is not required to provide virtual collocation unless it is unable reasonably to provide physical collocation.

The Act imposes on incumbent LECs the duty "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . at any technically feasible point within the carrier's network."<sup>1</sup> From this, AT&T infers that the choice of the connecting point may be made by the interconnecting carrier.

New York Telephone points out, however, that there is specific language in the Act with respect to the choice between physical and virtual collocation. The duty imposed on incumbent LECs by the Act in this regard is:

to provide . . . for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.<sup>2</sup>

Accordingly, New York Telephone argues, although an incumbent LEC is not precluded from offering both physical and virtual collocation from a given facility, if it so desires, the Act requires only physical collocation, a requirement that it can be relieved of only by permission of the State commission.

AT&T observes, however, that the FCC has determined that "any requesting carrier may choose any method of technically feasible interconnection or access to unbundled elements at a

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<sup>1</sup> 47 U.S.C. §251(c)(2)(B).

<sup>2</sup> 47 U.S.C. §251(c)(6).

particular point."<sup>1</sup> Thus, the FCC intends that the virtual collocation option should also be provided, irrespective of whether physical collocation is available.<sup>2</sup> From this, AT&T argues, a competitor must be allowed to select virtual collocation when, in its judgment, that best suits its needs. New York Telephone argues, however, that the Act and the Order are clearly inconsistent, and therefore the Commission is bound by the Act, and not by the Order.

We do not agree with New York Telephone's position that requiring virtual collocation upon request is inconsistent with the Act. The Act requires physical collocation, except when infeasible, and does not prohibit the further requirement of virtual collocation; indeed, we have already ordered New York Telephone to file tariffs for the provision of combined physical and virtual collocation, and found that doing so is consistent with the Act and with the Order.<sup>3</sup> Consistent with our earlier determinations, we will continue to require New York Telephone to provide virtual collocation on request.

#### Timetable for Collocation

The parties submitted to this arbitration the question of the appropriate timetable for handling collocation requests. Since the issues list was submitted, we have issued an order which the parties indicate they accept as controlling on these

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<sup>1</sup> Order, ¶ 549.

<sup>2</sup> Order, ¶ 552. The FCC has also promulgated rules in this area. 47 CFR §§51.321, 51.323.

<sup>3</sup> Cases 94-C-0095 *et al.*, *supra*, the June 25 Order, p. 32; Cases 94-C-0095 *et al.*, Order Denying Reconsideration and Referring Issues to Arbitration Proceedings (issued November 18, 1996), p. 10.

issues.<sup>1</sup> AT&T makes two additional suggestions, both of which we decline to adopt.

First, AT&T requests that New York Telephone be required to confirm that space is available within eight days of receipt of an application. We have required New York Telephone to provide site survey results within eight business days of an application, and that requirement meets AT&T's concern.

Second, AT&T proposes that we require a joint planning meeting for the purpose of setting appropriate milestones for various construction details, to take place no later than 15 days after New York Telephone's receipt of an application. Our order permits the parties 30 days for negotiations and up to 20 days for detailed engineering, and observes that an applicant can request that engineering work proceed simultaneously with negotiations, if it agrees to pay for any costs incurred if the request is cancelled. It would appear that a meeting such as that envisioned by AT&T would be beneficial if not necessary in such a case. We find our requirements to be adequate, however, and see no need to mandate specific meetings within our approved collocation timetable.

#### Remedies for Timetable Non-Compliance

AT&T proposes that if New York Telephone fails to meet the collocation completion date without a showing of good cause it should be awarded damages, including interest on capital invested in equipment that cannot be used because of the delay, and (if appropriate) penalties.

New York Telephone argues that neither the Act nor the Order requires that damages or penalties be assessed if timetables are not met. New York Telephone contends that the provision of collocated space is unique for each premises and

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<sup>1</sup> Case 96-C-0036, Complaint of AT&T Communications of New York, Inc., Order to Resolve Complaint and Clarify ONA Order (issued September 30, 1996).

that it is unreasonable to assume that circumstances will not arise which may delay the completion date. To the extent that we determine that a remedy is needed, New York Telephone asserts the remedy should be determined on a case-by-case basis. Any fixed penalties, it continues, should be developed in a separate proceeding and should be applicable to all companies on a reciprocal basis.

AT&T disputes the need for reciprocity on this matter, noting that it is New York Telephone's competitors that require collocation to compete, and not the other way around. Timely completion of collocation arrangements is essential to New York Telephone's competitors, AT&T continues, and penalties such as those it proposes would provide a needed incentive for New York Telephone to avoid delays. Moreover, AT&T asserts, its proposal is a conservative reflection of the harm it suffers from such a delay, while filing complaints in each case of delay would be burdensome and counterproductive.

We agree with AT&T that the timely provision of collocation arrangements to competitors is an essential ingredient for the development of effective competition, and that penalties for non-compliance may be appropriate. We have recently directed New York Telephone to file revisions to its 900 tariff "to establish standard collocation provisions, including acceptable terms and conditions to establish appropriate liability and indemnification provisions," plus any collocation "rates, charges and fees, or increases thereof," to be effective on a temporary basis subject to refund.<sup>1</sup> As we have done with the 915 tariff, we expressly incorporate into the AT&T/New York Telephone interconnection agreement such terms and conditions, including future changes thereto, and make them a part of this agreement.

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<sup>1</sup> Ibid., p. 11.

Collocation requirements are among those that we expect to be enforced through the arbitration process established below.

We find that the arbitration process provides for adequate remedies in case of non-compliance.

#### Rates for Collocation

AT&T and New York Telephone agreed, in their initial presentations, that the Act requires the provision of physical collocation on terms that are "just, reasonable, and nondiscriminatory,"<sup>1</sup> and that the FCC has interpreted this requirement to mean that, as in the case of unbundled elements, a TELRIC cost methodology must form the basis for collocation charges. According to New York Telephone, its existing tariff rates are consistent with TELRIC cost methodology because they use cost allocations that result in rates somewhat lower than a full TELRIC analysis, including projected costs, would produce. Meanwhile, New York Telephone continues, it expects to file a collocation TELRIC cost study by December 31, 1996.

AT&T, while disputing the conclusion that existing rates are based on TELRIC methodology, agrees to the use of the existing tariff rates<sup>2</sup> until permanent TELRIC-based rates are developed to replace them. AT&T adds, however, that the interim rates should be subject to a true-up following the introduction of new rates. New York Telephone has not responded to this suggestion, and the issue is before us.

As noted earlier, we are inclined wherever possible in this arbitration to make interim rates temporary and subject to true-up. We have recently ordered New York Telephone to file collocation tariffs by mid-November, to be effective in mid-December, which will include rates and charges; these tariffs are

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<sup>1</sup> 47 U.S.C. ¶ 251(c)(6).

<sup>2</sup> PSC No. 900, Section 12.

to become effective on a temporary basis.<sup>1</sup> Accordingly, our existing collocation rates will therefore be used as interim rates, subject to change as a result of the November 1996 filing, also on an interim basis, and with all interim rates ultimately subject to true-up.

Collocation of Remote Modules

AT&T has requested a finding that federal law permits it to locate remote switching modules (RSMs) and remote line modules (RLMs) in its collocated space or cages, to be used for purposes other than switching. New York Telephone disputes the request.

In support of its request, AT&T notes that the Act requires collocation of equipment "necessary for interconnection or access to unbundled elements,"<sup>2</sup> and that the FCC has concluded that in this context the term "necessary" does not mean "indispensable" but rather "used" or "useful."<sup>3</sup> However, the FCC has also concluded that collocation is required only for the purposes of interconnection or access to unbundled elements, and not for the purpose of providing enhanced services.<sup>4</sup> And, the FCC stated, "we expect, in situations where the functionality of a particular piece of equipment is in dispute, that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements."<sup>5</sup>

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<sup>1</sup> Case 96-C-0036, supra, Order to Resolve Complaint and Clarify ONA Order, p. 11.

<sup>2</sup> 47 U.S.C. §251(c)(6).

<sup>3</sup> Order, ¶ 579.

<sup>4</sup> Order, ¶ 581.

<sup>5</sup> Ibid.

AT&T states that it "is prepared to make an offer of proof as to the reasonableness of its proposal."<sup>1</sup> We will permit AT&T to locate RSMs or RLMs in collocated space, in instances where it is demonstrated to us that the equipment is used for interconnection or access to unbundled elements. AT&T may submit a petition to provide evidence regarding its proposals at its discretion.

#### MISCELLANEOUS ISSUES

##### Compensation for Alternate-Billed-to-Third-Party Calls

In our proceeding for the development of a regulatory framework for the transition to competition in the local exchange market,<sup>2</sup> we ordered local exchange carriers to file, no later than November 20, 1996, reports describing the steps they have taken to support mutual billing, billing data exchanges, and other areas of joint cooperation. It was and remains our view that mutual cooperation in these areas will be important to the successful development of local exchange competition. The passage of the Act and the accelerated implementation thereunder of interconnection agreements has, of course, brought a number of these issues to the fore. It is not surprising that a few of these issues need to be resolved here.

In this arbitration, the issue has been presented as to the proper revenue allocation between AT&T and New York Telephone when calls (such as collect calls) are billed to and paid for by someone other than the calling party (*i.e.*, a "third party"). New York Telephone has presented two basic scenarios.<sup>3</sup>

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<sup>1</sup> AT&T's Initial Brief on Law and Policy, p. 60.

<sup>2</sup> Case 94-C-0095, *supra*, Opinion No. 96-13 (issued May 22, 1996), mimeo p. 39.

<sup>3</sup> Two additional scenarios involving calls billed to or originating from callers in a region outside of New York Telephone's region have also been presented. With respect to

The first scenario involves the situation where someone places a call over a line resold by AT&T, but charges the call (e.g., places a collect call) to a New York Telephone customer. In this circumstance, New York Telephone argues that it should bill its customer at its rates and, further, that it should keep the revenue because it incurred all of the costs (including operator assistance and billing and collection) associated with the call. In this first scenario, AT&T argues, the revenue should go to it inasmuch as the call originated on one of its customer's lines.

In the second scenario, New York Telephone postulates that a call is placed over one of its customer's lines, but billed to a third party that is an AT&T resale customer. In this instance, AT&T bills its customer, and according to New York Telephone AT&T has agreed with it that AT&T will bill its customer, but that New York Telephone will bill the call to AT&T, for its compensation, at the wholesale discount rate. In other words, this call would be treated as a resold service provided to the AT&T customer that accepted the charges. AT&T does not comment on this scenario, except to point out that the outcome is not symmetrical for these two scenarios, though AT&T believes it should be.

Neither approach is correct. New York Telephone's approach in the first scenario is illogical. AT&T, which is purchasing New York Telephone's service for resale and therefore paying New York Telephone for the call and associated operator services in this scenario, is entitled to have New York Telephone recover for the call at AT&T's rates, and to have the revenue

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the interrelationship between AT&T and New York Telephone, however, these scenarios are analogous in critical respects, and need not be also discussed.

returned to it by New York Telephone, less an appropriate credit for New York Telephone's billing and collection.<sup>1</sup>

In the second scenario, New York Telephone would similarly transform a call placed on its service at its rates into a resold service, just because the call is billed to a third party that is a reseller's customer, and this approach is equally infirm, even if AT&T has agreed to it. AT&T is correct that the result should be symmetrical, and that means that in this scenario the call is a New York Telephone's customer's call which should be billed, by AT&T, at New York Telephone's rates. AT&T would then turn the revenue over to New York Telephone, keeping an appropriate credit for billing and collection.

These parties are free, of course, to work out mutual compensation arrangements in the future, and submit them for our approval as amendments to their interconnection agreement. For now, the billing arrangement just described will be adopted, and the five cent rate, discussed below, is appropriate in this context.

#### Billing and Collection for IP Calls

Two rather narrow issues have been posed concerning billing and collection for calls placed to information providers (IPs), such as those provided through "900" numbers or through designated NXX codes. Here, AT&T and New York Telephone agree that they will perform billing and collection (B&C) for IP calls, and they agree that the billing entity should be reimbursed for

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<sup>1</sup> New York Telephone's approach would apparently have it collect twice for the call while AT&T would remain uncompensated. It may be that New York Telephone intends that AT&T would not pay for the call, and therefore the call is transformed from an AT&T resold call into a New York Telephone call. If so, the issue is simply the rate to be charged. But it is not sensible that a call originating on a resold line would lose its resale status and rate just because a collect call is made. The charges are AT&T's charges, even if billed to someone else.

its cost of doing so by the other carrier. The issues relate to (1) the price, and (2) liability for uncollectibles. Although the terms would be reciprocal, it is expected that the bulk of the B&C would be performed by AT&T, for calls to IPs served by New York Telephone.

With respect to price, New York Telephone proposes a 5 cent per call B&C fee, while AT&T proposes an 8 cent per call fee. New York Telephone argues that the 5 cent price includes enough to compensate AT&T for any uncollectibles it may have, while AT&T argues that it should not have to absorb any uncollectible liability. For its part, New York Telephone argues that 5 cents is an industry norm, although it presents no proof of that, and in its reply comments it asserts that the 5 cents includes an uncollectible allowance.<sup>1</sup> AT&T, however, claims that Ameritech charges 8 cents. AT&T goes on to claim that billing for IP calls requires special billing formats and that uncollectibles are higher on IP billings than for standard message services. Also, by inference from New York Telephone's IP tariff, AT&T argues that New York Telephone itself claims a cost of 11 cents per message to bill and collect for calls to its variable-priced Mass Announcement Service (MAS) programs. Imposing on it the burden of uncollectibles, AT&T continues, would be to impose a barrier to resale, inasmuch as New York Telephone does not absorb the cost of its own uncollectibles on IP calls; AT&T offers a vague claim that New York Telephone does not pay IPs if it cannot collect.

For the most part, neither party has directly addressed the other's points on this issue, and it remains unclear whether the parties intended to include variable-priced programs, beyond "976" calls. In resolving this issue, we have considered our dual interest in ensuring that carriers called upon to do billing

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<sup>1</sup> In October 1995 New York Telephone filed its 914 tariff with a 2 cent billing and collection payment to other carriers.

and collection are fairly compensated, and ensuring that callers to IPs get the services they request at the price they expect. We conclude that 5 cents may well be something close to an industry norm for B&C for third party, collect, and credit card calls for other carriers generally, but we also credit AT&T's point that B&C for IP calls (and even just the 976 calls at issue here) is more costly than B&C for standard calls. Accordingly, we will accept AT&T's proposed 8 cent price.

However, we conclude that AT&T should be on the same footing as New York Telephone with respect to uncollectibles. New York Telephone should extend to AT&T the same forgiveness policy that it applies to its own end user customers for calls to IPs. AT&T may extend that same forgiveness to its own customers, and it can protect itself from further uncollectible liability with blocking. Therefore AT&T should absorb any uncollectibles it incurs.<sup>1</sup>

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

The Act requires a LEC "to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."<sup>2</sup> We have exercised our authority to regulate pole attachments.<sup>3</sup>

AT&T argues, however, that the terms and conditions currently in effect in New York do not comply with the Act. AT&T states that the terms and conditions by which it obtains pole attachments and right-of-way access from New York Telephone are currently embodied, for the most part, in agreements reached

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<sup>1</sup> New York Telephone, pursuant to our policy, blocks the end user's line in the event of a second refusal to pay IP charges.

<sup>2</sup> 47 U.S.C. §251(b)(4).

<sup>3</sup> Public Service Law §119-a.

between the two parties over the years. AT&T points to a number of conditions which it argues must be altered for compliance with the Act, in general terms to specify how New York Telephone will provide pro-competitive, non-discriminatory access, to eliminate the one-sided liability and indemnification clauses found in existing agreements, and to incorporate the FCC's guidelines. AT&T argues that such changes are required as a matter of sound policy, and it asks for a review of existing agreements with this point in mind, offering to negotiate new agreements with New York Telephone.

We agree with AT&T that terms and conditions for access to poles, ducts, and conduits should be reviewed with the goals of open competition in mind. We do not agree, however, that AT&T has demonstrated that our existing rules and regulations are in violation of the Act, and we find that no special provisions related to such access need to be included in this arbitration agreement. We note that the existing rates, terms, and conditions related to attachment to utility poles (including New York Telephone's) are currently under review in Case 95-C-0341, wherein resolution of issues related to competitive equity is the primary focus.

#### Dispute Resolution Process

Once an interconnection agreement between AT&T and New York Telephone is in effect, the likelihood is that disputes will arise under the agreement. Such disagreements could include, AT&T observes, good faith disagreements about the meaning of its terms, relationship issues between the parties unforeseen by the agreement, perceptions by one party that the other is not complying in good faith with the agreement's terms, or perceptions by one party that the other is engaging in conduct that, while not covered by the agreement, arguably interferes with its fulfillment. In these circumstances, AT&T postulates, the success of an arbitrated interconnection agreement may well

depend upon the availability of an efficient and timely dispute resolution process.

AT&T proposes a hybrid alternative dispute resolution (ADR) process including negotiation and third-party arbitration,<sup>1</sup> and argues that we have ample authority under the Act to adopt a dispute resolution process for this interconnection agreement. It is the intention in the Act, AT&T argues, that interconnection agreements achieved under its auspices will be effectively implemented<sup>2</sup> and AT&T observes, moreover, the Act's provision that "subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement."<sup>3</sup>

In response, New York Telephone asserts that a dispute resolution process cannot be established in this arbitration. According to New York Telephone, our existing complaint procedures must be applied to handle disagreements or complaints arising out of interconnection agreements. We may change our procedures, New York Telephone continues, but only pursuant to the appropriate notice and comment process required by the State Administrative Procedure Act. New York Telephone also maintains that a third-party ADR process would not be in the public interest; there would be significant delay, it argues, as time would be needed for a third-party arbitrator/mediator to learn the substance and the background of any interconnection dispute. Finally, New York Telephone maintains, the public interest

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<sup>1</sup> AT&T's Brief on Fact and Policy Issues, Exhibit 8.

<sup>2</sup> 47 U.S.C. §§252(b)(4)(C) and 252(c)(2). The FCC too, noting that "operational issues may be among the most difficult for the parties to resolve," alludes to "the critical importance to eliminating these barriers" to the Act's effectiveness, and pledges "to enforce our rules in a manner that is swift, sure, and effective." Order, ¶ 18.

<sup>3</sup> 47 U.S.C. §252(e)(3).

requires that we not relinquish our jurisdiction over such disputes.

Responding to these points, AT&T argues that the existing regulatory process is not well-suited for the prompt resolution of interconnection disputes. Indeed, AT&T observes that despite the involvement of agency staff, three recent complaints AT&T filed against New York Telephone involving service problems have been in litigation for 22 months, twelve months, and eight months, respectively, and the last two of these are not yet finally resolved. According to AT&T, effective competition will require a process to more quickly resolve disputes. The use of a third-party arbitrator, AT&T submits, would not entail a slower process, nor would it involve the relinquishing of Commission jurisdiction over disputes.

We agree with AT&T that an ADR process makes sense for disputes arising out of the interconnection agreement affecting the obligations and performance of the parties, and we include one in this interconnection agreement. The process is contained in Appendix C and Annex 1, and substantially follows the process proposed by AT&T, albeit with some important changes.

This process is intended to provide for the expeditious resolution of all disputes between the parties arising under this agreement. Dispute resolution under the procedures provided in this agreement shall be the exclusive remedy for all disputes between the parties arising out of this agreement or its breach.

NYT and AT&T will be precluded from resorting to any court, agency, or private group with respect to such disputes, except in accordance with this dispute resolution process.

Essentially, the process contained in Appendix C allows the parties, if they agree to do so, to submit a dispute to us for resolution. If they do, we will resolve the dispute, with whatever procedure appears best suited for doing so, as expeditiously as possible. If they do not agree to submit a dispute to us for resolution, the parties must submit a dispute

for resolution pursuant to informal dispute resolution mechanisms detailed in Appendix C. If the dispute is not resolved by the informal process, the dispute must be submitted for arbitration pursuant to the procedures outlined in Appendix C.

Thereafter, the parties must submit to us for our review the arbitrator's decision and award, as well as each party's position on the award and statement as to whether the party agrees to be bound by it or seeks to challenge it. We will determine whether to review a determination. If we have not asserted jurisdiction to review a determination and award within fifteen days, the award at that point becomes final and binding on the parties. Should we review the award, we may do so by whatever procedure appears best suited to the issues involved, and as expeditiously as possible.

We emphasize that nothing in the dispute resolution process relieves either company, nor restricts our jurisdiction, with respect to responsibilities to end users.

#### Interim Number Portability Rates

Another issue before us is interim pricing for interim number portability. The Act<sup>1</sup> requires all LECs to provide number portability, to the extent it is technically feasible to do so, in compliance with FCC requirements. The Act also states that "[t]he cost of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC]."<sup>2</sup> The FCC, in its First Report and Order on Telephone Number Portability ("The LNP Order"),<sup>3</sup> has developed guidelines for the States to utilize in developing rates for interim number portability, as well as rules

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<sup>1</sup> 47 U.S.C. §251(b)(2).

<sup>2</sup> 47 U.S.C. §251(e)(2).

<sup>3</sup> CC Docket 95-116 (issued July 2, 1996).

for the sharing of terminating access charge revenues. The States are free to set rates within the scope of these guidelines.

New York Telephone has advanced two alternative proposals:

1. A rate structure that can be found in New York Telephone's 914 tariff, which is in effect today ("the Rochester Plan"). Under this structure, New York Telephone does not render a discrete charge for each number, path or line ported. Rather, New York Telephone may charge each carrier for a percentage of its total number portability costs based on the percentage of each carrier's working telephone numbers that are ported numbers. New York Telephone also retains the access charges associated with calls to ported numbers as part of its compensation;
2. A \$2.00/month charge for porting a business telephone number and \$1.00/month charge for porting a residential number. Under this approach, New York Telephone proposes to share the switched access charges collected from interexchange carriers for calls to the ported number.

AT&T objects, contending that neither of these proposals complies with the LNP Order. As to the first proposal, AT&T indicates it believes the Rochester Plan is in compliance with the LNP Order to the extent that it allocates number portability costs fairly among carriers; however, according to AT&T, it fails to comply with respect to switched access charges associated with calls to ported numbers, which it says must be collected under a meet point billing arrangement. The FCC, AT&T observes, has decided that:

Neither the forwarding carrier, nor the terminating carrier, provides all the facilities when a call is ported to the other carrier. Therefore, we direct forwarding carriers and terminating carriers to assess on IXCs charges for terminating access through meet-point billing arrangements.<sup>1</sup>

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<sup>1</sup> The LNP Order, ¶ 140.

New York Telephone's second proposal, AT&T observes, is not one of the four options adopted by the FCC.

The FCC's four approved approaches are:

1. The mechanism in the Rochester Plan, as described above;
2. A mechanism based on a carrier's number of active telephone lines (or numbers or customers) to the total number of active telephone lines (or numbers or customers) in a service area;
3. Cost recovery based on each carrier's gross revenues net of charges to other carriers; and
4. A cost recovery mechanism that requires each carrier to pay for its own costs of interim number portability.

The first three of these approaches would be used to determine the payments of new entrants to incumbents, and would be reciprocal.<sup>1</sup>

AT&T says that it prefers the fourth option, under which New York Telephone would pay its own costs of number portability. However, if that approach is not adopted, AT&T says it prefers the first approach (the Rochester Plan), which would use existing tariffs for interim number portability as a model. According to AT&T, this approach, together with meet-point billing for terminating access minutes of use, conforms to the LNP Order.

New York Telephone's second proposal is unsupported and has not been shown to be reasonable. AT&T's preferred approach, under which New York Telephone would absorb all of its own costs of interim number portability, appears clearly unreasonable.

Both parties agree secondarily, however, to the Rochester Plan, which is a method we have already implemented and have determined to be reasonable. The only difference between

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<sup>1</sup> The LNP Order, ¶ 137.

their positions relates to terminating access revenues. On that issue, New York Telephone asserts that the acceptance in New York of the Rochester Plan formula, which places the lion's share of the LNP costs on NYT, was part of "an overall package" that also allowed New York telephone to retain access revenue for IXC calls to ported customers.<sup>1</sup> New York Telephone's position is not persuasive and, in any event, is inconsistent with the LNP Order.

Accordingly, we adopt AT&T's position, under which meet-point billing of terminating access revenues would be used, in compliance with the LNP Order.

#### Dark Fiber

The term "dark fiber" refers to fiber optic transmission facilities that are deployed, but are not connected at either end to electronics, and are not in use. AT&T requests the right to lease New York Telephone's dark fiber, on request, and to "reserve reasonable amounts of it on a non-discriminatory basis."<sup>2</sup> In support of the request, AT&T asserts that because the FCC has not yet acted on this issue we are free to do so in an arbitration case.<sup>3</sup> AT&T submits for our adoption a proposed agreement providing the terms and conditions for leasing dark fiber.

New York Telephone opposes any requirement that it lease dark fiber, under any terms and conditions. According to New York Telephone, AT&T's request lacks merit and has not been justified. It is significant, New York Telephone asserts, that the FCC has not acted to require it to lease its dark fiber to competitors, especially since the FCC has declined to consider dark fiber to be an unbundled element under the Act. Moreover,

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<sup>1</sup> New York Telephone's Initial Brief on Law and Policy, p. 70.

<sup>2</sup> AT&T's Initial Brief on Law and Policy, p. 77.

<sup>3</sup> Order, ¶ 450.

New York Telephone observes, we have previously declined to require New York Telephone to lease dark fiber because it is not a tariffed service.<sup>1</sup> New York Telephone argues that it would be unreasonable to require it to lease its dark fiber, because it is not in the business of constructing and providing fiber facilities for other carriers. AT&T, New York Telephone asserts, can and should deploy its own facilities.

We agree with New York Telephone on this issue, and will not require it to lease dark fiber. AT&T argues that our previous decision is no longer pertinent because the issue is no longer whether dark fiber is a tariffed service, but is now whether it is a required element to be sold under the Act; however, dark fiber is not an element. New York Telephone should not have to lease facilities against its will when it is not in the business of providing facilities (as opposed to services and service networks) to competitors. Such a requirement could interfere unreasonably with New York Telephone's investment and construction plans. Moreover, it could provide an unreasonable disincentive to competitive carriers to enter into facilities-based competition. Even if the proposal had merit with respect to smaller, new entrants in the market, AT&T can and should be expected to purchase and deploy for itself the facilities that it needs.

#### CONCLUSION

We have herein decided the issues presented to us for arbitration as required by the Act. Attached as Appendix D is an implementation schedule for the actions we have required.

The Commission Orders:

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<sup>1</sup> Case 94-C-0577, ACC's Request for Collocation and Related Services, Order Resolving ONA Task Force Issues (issued December 28, 1994), pp. 10-11.

1. The issues presented for arbitration by AT&T Communications of New York, Inc. and New York Telephone Company are resolved as decided herein.

2. These proceedings are continued.

By the Commission,

(SIGNED)

JOHN C. CRARY  
Secretary