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June 12, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
12th Street Lobby, TW-A325
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

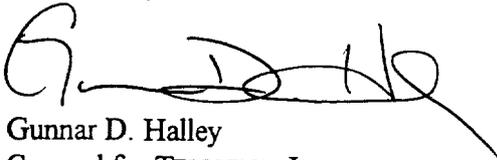
Re: Ex Parte Presentation in WT Docket No. 99-217 and CC Docket No. 96-98

Dear Ms. Salas:

Please find attached a letter from myself, on behalf of Teligent, Inc., delivered today to Jeffrey Steinberg, Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau regarding the above-referenced proceedings.

In accordance with the Commission's rules, for each of the above-mentioned proceedings, I hereby submit to the Secretary of the Commission two copies of this notice of Teligent's written ex parte presentation.

Respectfully submitted,



Gunnar D. Halley
Counsel for TELIGENT, INC.

cc: Wilbert Nixon (WTB)	Leon Jackler (WTB)	Lauren Van Wazer (WTB)
Joel Taubenblatt (WTB)	Paul Noone (WTB)	Cheryl King (CSB)
Eloise Gore (CSB)	Christopher Wright (OGC)	David Horowitz (OGC)
Joel Kaufman (OGC)	Jonathan Nuechterlein (OGC)	Jeffrey Steinberg (WTB)

Enclosure

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June 12, 2000

Mr. Jeffrey S. Steinberg, Deputy Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-C236
Washington, DC 20554

RECEIVED
JUN 12 2000
OFFICE OF THE CLERK
FEDERAL COMMUNICATIONS COMMISSION

Re: WT Docket No. 99-217 and CC Docket No. 96-98

Dear Mr. Steinberg:

In the *Competitive Networks* Notice of Proposed Rulemaking, the Commission tentatively concluded that "so long as a utility uses any pole, duct, conduit, or right-of-way for wire communications, . . . all rights-of-way that it owns or controls, whether publicly or privately granted, and regardless of the purpose for which a particular right-of-way is used, are subject to section 224."¹ It also tentatively concluded that "the obligations of utilities under Section 224 encompass in-building conduit, such as riser conduit, that may be owned or controlled by a utility."² The Notice also explains the Commission's tentative conclusion "that the definition of 'right-of-way' as including a publicly or privately granted right to place a transmit or receive antenna on public or private premises is consistent with the common usage of the term."³

¹ Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217 and CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, 14 FCC Rcd 12673 at ¶ 41 (1999)(*"Competitive Networks Notice"*).

² Id. at ¶ 44.

³ Id. at ¶ 42.

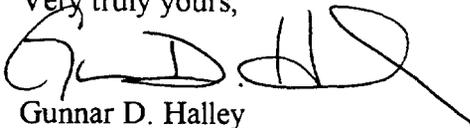
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Mr. Jeffrey S. Steinberg
June 12, 2000
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Teligent wishes to bring to the attention of the Commission a similar conclusion by the Kentucky Public Service Commission. The Commonwealth of Kentucky has certified to the Commission under Section 224(c) of the Communications Act that it regulates poles, ducts, conduits and rights-of-way. In the course of a 1996 arbitration of MCI's interconnection agreement with GTE, MCI sought to have the PSC require GTE to allow access to rights-of-way on a nondiscriminatory basis where GTE had control, contractual or otherwise, over pathways such as equipment closets in private office buildings. The PSC concluded that "Section 251 of the Act supports MCI's position, describing a LEC's duty to provide nondiscriminatory access to any pole, conduit, or right-of-way owned or controlled by it."⁴

In the *Competitive Networks* rulemaking, the Commission also seeks comment on whether a nondiscrimination requirement would preclude exclusive contracts between telecommunications carriers and owners of multi-tenant environments.⁵ The Kentucky PSC addressed this issue, as well. During the arbitration of the proposed interconnection agreement, MCI requested that GTE be precluded from using its relationship with property owners to deny MCI access to pathways that GTE does not own or control. The PSC "assume[d] that GTE w[ould] not act unreasonably in wielding influence with third parties to deny MCI access" and noted that, in the event that such unreasonable practices occurred, disputes could be brought to the PSC's attention.⁶ I have enclosed a copy of the relevant Kentucky PSC decision for your reference.

Very truly yours,



Gunnar D. Halley
Counsel for TELIGENT, INC.

Enclosure

CC: Wilbert Nixon (WTB) Leon Jackler (WTB) Lauren Van Wazer (WTB)
Joel Taubenblatt (WTB) Paul Noone (WTB) Cheryl King (CSB)
Eloise Gore (CSB) Christopher Wright (OGC) David Horowitz (OGC)
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⁴ Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale under the Telecommunications Act of 1996, Case No. 96-440, Order (KY PSC, Dec. 23, 1996)("Kentucky PSC Arbitration Decision").

⁵ *Competitive Networks Notice* at ¶ 61.

⁶ See Kentucky PSC Arbitration Decision.



[Go To Best Hit]

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION BY MCI FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH GTE SOUTH INCORPORATED CONCERNING INTERCONNECTION AND RESALE UNDER THE TELECOMMUNICATIONS ACT OF 1996

)
)
) CASE NO. 96-440
)
)
)

ORDER

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 ("the Act") was enacted to open all telecommunications markets to competition. See Conference Report, H.R. Rep. No. 458, 104th Cong., 2d Sess., at 113 (1996). Section 251 of the Act requires incumbent local exchange carriers to negotiate in good faith with new entrants to the local exchange market. Section 252 permits the parties to those negotiations to petition a state commission to arbitrate unresolved issues. Subsection (b)(4)(C) states that the state commission "shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement." Subsection (b)(4)(A) requires the Commission to "limit its consideration . . . to the issues set forth in the petition and in the response." Subsection (b)(4)(C) requires the Commission to resolve the issues presented not later than nine months after the date on which the incumbent local exchange carrier received the request for negotiations.

On April 3, 1996, MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (hereinafter, collectively "MCI") submitted a request for negotiations to GTE South Incorporated ("GTE"). On September 10, 1996, MCI submitted its petition for arbitration to this Commission. Pursuant to the Act, this proceeding is to be concluded by January 3, 1997.

Numerous issues have been raised in this proceeding, and have been argued by the parties in filed documents and testimony, at hearing, in briefs, and in their best and final contract offers and accompanying explanations. Some issues are broad, involving policy and law; others are highly specific. Our discussions of the issues are included in the body of this Order. Specific prices are included in Appendix 1.

As a final introductory matter, the Commission notes that the parties have submitted their disagreements regarding contract terms. Many of the issues so raised are of minimal, if any, significance. The Commission does not consider these issues subject to arbitration and orders the parties to reach a compromise on these issues and to include final, agreed upon language in the final contract. The Commission's resolution of the issues presented should enable the parties to decide upon their own contract language and submit it for approval pursuant to Section 252(e)(1), within 60 days of the date of

this Order.

The emphasis of the Act is on free negotiations between the parties. Accordingly, should GTE and MCI wish to alter an aspect of their contract based on decisions reached herein, they may negotiate such alterations and submit them to this Commission for approval. Further, the Commission encourages the parties to return to the Commission on rehearing with any specific, narrowly-defined issues they believe are appropriate for rehearing. Finally, the Commission will require appropriate studies to be submitted by GTE to enable the Commission to make necessary adjustments as described infra.

I. SERVICES TO BE OFFERED FOR RESALE AND RESTRICTIONS AND EXCLUSIONS THEREON

In this proceeding the companies have presented evidence and avoided cost studies regarding provision of service through resale. The companies have presented a plethora of issues to be arbitrated with regard to resale. In some cases the issues are discussed in depth. However, where issues have been decided in previous orders of the Commission and the FCC, these decisions remain in effect. Some issues are directly addressed by the Act. The Commission in its Order of September 26, 1996 in Administrative Case No. 35511 Administrative Case No. 355, An Inquiry into Local Competition, Universal Service, and the Non-Traffic Sensitive Access Rate. and its subsequent rehearing Order of October 31, 1996 made decisions regarding resale. The Commission reaffirms those decisions herein and offers further reiteration of the rules established, and any necessary clarification to those rules, below. In regard to issues not specifically addressed, GTE shall provide service to MCI on a nondiscriminatory basis and equal in quality to that it provides to itself and its customers. Thus, all tariffed services of GTE should be available for resale at the wholesale discount with the exceptions and restrictions noted herein. Services tariffed subsequent to this Order will be considered on a case-by-case basis.

GTE argues that it should not have to resell services that are priced below cost because it would further decrease revenues by selling them at a discount. Residential service, GTE argues, is priced below cost and the margin is made up by selling highly profitable vertical and toll services. First, GTE's position on this matter is untenable under the Act which, at Section 251(c)(4), requires services offered at retail to customers who are not telecommunications carriers to be available for resale at an avoided cost discount. Residential service is offered at retail to customers who are not telecommunications carriers, and therefore cannot be exempted as GTE suggests. Second, GTE's assertion that resale of residential service would automatically cause it to lose related vertical and toll services is not accurate. GTE would also resell vertical services and possibly toll to the ALEC, thereby retaining the same margin. The reduction in GTE's revenue consists of costs it avoids. Toll revenue may indeed be lost, but such loss could occur through toll competition in any event. Thus, allegedly below-cost service, including residential service, should be available for resale.²² For additional rationale, see Administrative Case No. 355, Order dated September 26, 1996, at 16-17.

GTE proposes to offer the following services for resale but not at the wholesale discounted rate: services already priced at wholesale rates, including but not limited to special access and private line services tariffed under GTE's special access tariffs; payphone coin and coinless lines; services provided on an individual case basis ("ICB"); operator services and directory assistance services; services offered for a non-recurring charge; and inside wire maintenance.

The Commission finds that special access and private line services tariffed under GTE's special access tariffs should be available for resale at the wholesale discount rate. Special access and private line services are tariffed services and meet the statutory definition of services which are subject to resale. Pay telephone lines and related services also are tariffed and should be available for resale at the wholesale discounted rate on a nondiscriminatory basis. GTE should make available all features for resale at discount. Operator services and directory assistance must also be offered for resale at wholesale discount. ICB service, however, allows GTE to price tariffed services below tariffed rates to meet competition. These rates are competitive rates, and further discounts would compromise GTE's ability to compete. Therefore, ICB service should be available for resale at no discount.

GTE proposes that MCI should be responsible for payment of all non-recurring charges applicable to resold services. MCI argues that GTE has not submitted non-recurring costs on a forward looking total element long run incremental cost ("TELRIC") basis. The Commission finds, however, that non-recurring charges are tariffed and should therefore be available for resale at the wholesale discounted rate. They are not network elements that must be priced on an unbundled element basis.

GTE and MCI dispute whether inside wire maintenance and voice mail services should be resold. The Commission will not require GTE to resell these unregulated services. They are non-tariffed: inside wire maintenance is unregulated and voice mail has been exempted from regulation. MCI should provide these services itself or obtain them from independent contractors if it wishes to offer them to its customers. GTE declines to offer for resale at a discount any promotion available to its customers if that promotion is available for a period of 90 days or less. GTE's position complies with previous Commission rulings as well as with the FCC's decision.³³ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (August 8, 1996), ("FCC Order").

MCI has requested that GTE unbundle operator services from the basic local service offering. GTE is not required by the Act or by this Commission to unbundle operator services. However, to the extent that MCI wishes to provide its own operator services it may do so and shall be responsible for all network modification costs to route calls to its own operators.

GTE declines to offer future AIN-based services for resale because outstanding issues remain regarding trigger access to MCI's network platform and services. The Commission will review each new service offering in the future and make a determination as to whether they should be made available for resale on a case-by-case basis.

MCI requests that CENTREX services be available for resale and outlines several conditions be placed on the provision of this service. CENTREX service is tariffed and therefore is subject to resale at the wholesale discount. However, to the extent that MCI has requested terms and conditions that are inconsistent with GTE's tariff, MCI's request is denied.

The Commission has ordered, by the authority conferred upon it by the Act at Section 251(c)(4)(B), that cross-class selling is prohibited. While MCI may resell these services, it shall provide the same type of service to its end-users as GTE would provide. The Commission also finds that new entrants are prohibited from reselling services such as exchange access. MCI may not resell services to provide access to the local network as an alternative to tariffed switched and special access.

The Commission finds with regard to issues not specifically addressed that GTE shall provide on a nondiscriminatory basis service to MCI that is equal in quality to that it provides to itself and its customers as required by the Act.

Wholesale Rates

MCI filed an avoided cost study for GTE based on FCC methodology. The resulting rate was 16.21 percent. This study is based on Automatic Reporting Management Information System ("ARMIS") 43-04 data for GTE Kentucky. GTE files a separate ARMIS report for the former Contel properties, and this report was not included in the study. MCI used total expenses for the denominator in its calculation of the wholesale discount. The FCC methodology uses a revenue base for the calculation of the wholesale discount rate.

GTE also filed an avoided cost study in this proceeding; however, the Commission rejects the study because it does not use Kentucky-specific data. GTE based its study on nationwide operations with data from nationwide cost centers that cannot be verified by this Commission. GTE also uses revenues to allocate expenses to each expense category. Revenues and expenses generally possess no direct cause and effect relationship, especially with regard to local residence and local business service. GTE has failed to produce any evidence to the contrary.

Therefore, the Commission will require GTE to use the interim rate of 18.81 percent until it files an avoided cost study based on Kentucky-specific data that is verifiable by this Commission. This study should analyze each of the directly avoided expense accounts reflected in GTE's "FCC compliant"

avoided cost study by job function code. The study should show whether the expenses associated with each code will be avoided, should quantify the avoided costs, and should state the total costs. The FCC compliant cost study filed by BellSouth in Case No. 96-43144 Case No. 96-431, Petition by MCI for Arbitration of Certain Terms And Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996. is the preferred format.

II. PERFORMANCE STANDARDS AND PROCEDURES, LOOP TESTING, AND INDEMNIFICATION AND LIABILITY

MCI argues that GTE should implement a process and standards to ensure that MCI receives services for resale interconnection and unbundled network elements that are at least equal in quality to those GTE provides to itself. MCI also requests that GTE be required to provide loop testing information to MCI prior to the establishment of service to an MCI customer. The Commission finds that, as GTE is required to provide the same quality of service to MCI as it provides to itself, there does not appear to be any reason to assume that GTE will not in good faith provide such service. It is reasonable to assume that GTE will conduct the same loop testing on loops used to serve MCI customers as GTE performs on loops to serve its own customers. Specific sharing of this loop testing information is therefore unnecessary, as are specific indemnity and liability provisions in the contract. There is no evidence to suggest that GTE will breach its obligations as provided by contract and by law. Should problems arise regarding the quality of service provided, MCI may of course bring the matter to the Commission's attention.

III. ELECTRONIC INTERFACES FOR ORDERING, REPORTING AND PROCESSING OF CUSTOMER INFORMATION

MCI requests electronic interactive access to pre-service ordering; maintenance and repair; service order processing and providing; customer usage data transfer; and local account maintenance. The Commission agrees with MCI that such real-time access should be provided. Telecommunications competition requires real time access. Without it, competitors cannot offer customer service equal in quality to that provided by the incumbent.⁵⁵ FCC Order, Appendix B, Section 5.3.19. Any ILEC that does not currently comply with this requirement should do so as expeditiously as possible. The January 1, 1997 FCC target does not appear feasible. Consequently, an interim solution must be put into place until July 1, 1997. Permanent solutions should be put into place by that date. The costs should be borne by the ALECs on a fairly apportioned basis. As competition develops, additional ALECs will be required to bear their share of these costs.

IV. ROUTING OF 0+, 0-, 411, 611, AND 555-1212 CALLS

In accordance with Administrative Case No. 355, the Commission will not require GTE to furnish resold tariffed services minus operator services. In contrast, if a carrier provides service through unbundled elements, in the interim GTE shall retain 0+, 0-, 411, 611, and 555-1212 calls. As the network evolves and an industry solution is available, GTE shall offer these services on an unbundled basis. GTE has offered no evidence that providing these routing functions is not technically feasible.⁶⁶ This Commission adopts in its entirety the FCC definition of "technical feasibility" in Appendix B, Section 5.5 of the FCC Order. Costs should be recovered at TELRIC rates.

V. BILLING AND USAGE RECORDING SERVICES

This issue is composed of four parts: (1) provision of accurate billing information in a timely manner, (2) the need for a specific billing format, (3) the time frame in which changes are to be available, and (4) determination and recovery of costs.

GTE appears to have agreed to provide accurate and timely billing as requested by MCI. Therefore, this issue does not require further Commission consideration. With regard to a format for the exchange of data, the Commission requires that any language needed to make the agreement clear and concise as to the parties' requirements; the requirements of the Act and the FCC's order should be incorporated into the

agreement.

MCI requests that January 1, 1997 be the effective date based on its observation that no evidence has been presented to indicate that additional capabilities are required by GTE to provide the services. The Commission believes that GTE as well as other incumbent LECs have been preparing for local competition since the passage of the Act. The Commission also believes that GTE as well as other incumbent LECs have been aware of the requirements of ALECs, including billing requirements, for some time. Therefore, it appears reasonable to the Commission that the services required by MCI should be available by January 1, 1997.

MCI contends that TELRIC is the proper costing methodology and that GTE has not proven that additional costs will be incurred. The Commission agrees with MCI's position that the costs of providing billing and recording services should be at TELRIC. To the extent that GTE can provide this Commission with evidence as to its incurred costs for providing these services, the Commission will allow cost recovery from MCI.

VI. CUSTOMER AUTHORIZATION FOR ACCESS TO CUSTOMER ACCOUNT INFORMATION

GTE proposes to require MCI to provide a blanket Letter of Authorization ("LOA") for GTE to release a customer to MCI and a signed LOA from the customer for GTE to release its existing customer information to MCI. MCI prefers to provide a blanket LOA for the release of information for all customers. Requiring a signed LOA for each customer would be a barrier to competition in that it would delay the process of signing up a new customer. Such delay would almost certainly constitute a competitive disadvantage to MCI. Therefore, the Commission orders that the blanket LOA proposed by MCI is appropriate under the Act.

VII. CALL GUIDE PAGES, DIRECTORY DISTRIBUTION, AND INCLUSION OF MCI'S LOGOS ON THE DIRECTORY COVER

MCI requests directory publication of the same service information as GTE on call guide pages and the appearance of its logo on the directory cover. MCI asserts that it will be disadvantaged if it cannot publish information about its services in call guide pages and have its logo on the telephone directory. The Commission finds that, because GTE must provide services to MCI on par with services provided to itself, GTE should not advertise its own product information on call guide pages and place its own logo on the cover of directories without affording space for similar publication of name and services to MCI. Moreover, GTE should distribute directories to MCI customers on the identical bases it distributes directories to its own customers. GTE and MCI should negotiate on appropriate prices for MCI's publication in the telephone directories. Any disputes regarding the prices may, of course, be brought to the Commission's attention.

VIII. ACCESS TO DIRECTORY ASSISTANCE DATABASE

Access to GTE's directory information database as requested by MCI should be required where technically feasible. GTE argues that damage will occur when multiple users gain access to its database and that a secure database gateway is lacking. However, pursuant to the FCC Order, to which the Commission adheres in this respect, in order to establish that a request is not technically feasible because it will adversely affect network reliability, GTE must show "by clear and convincing evidence" that compliance with a request would result in "specific and significant adverse network reliability impacts."⁷⁷ FCC Order 96-325, Appendix B, §51.5. GTE has failed to carry this burden of proof. Therefore, the Commission requires GTE to provide the requested access to ALECs within 60 days of this Order. System modification and cost recovery shall be determined during this period. Any implementation costs should be borne by the ALECs on a fairly apportioned basis. As competition develops, additional ALECs will be required to bear their share of these costs.

IX. PREFERRED INTEREXCHANGE CARRIER CHANGES FOR MCI'S LOCAL CUSTOMERS

Preferred interexchange carrier ("PIC") changes must be referred to the LEC of record. MCI's handling of its own customers' requests is consistent with MCI's status as point of contact for its customers.

X. NETWORK ELEMENTS: TECHNICAL FEASIBILITY

MCI requests Network Interface Device, Loop Distribution, Loop Concentrator, Local Switching, Operator Systems, Dedicated Transport, Common Transport, Tandem Switching, Signaling Link Transport, Signal Transfer Points, Service Control Points/Databases, Multiplexing/Digital Cross-connect, Directory Assistance Service, 911 Service, AIN Capabilities, and Operations Support Systems. GTE shall offer nondiscriminatory access to the submitted list of network elements to MCI. The FCC states that technical feasibility exists if there are no technical or operational concerns preventing fulfillment of a request for interconnection, access or methods.⁸⁸ FCC Order, Appendix B, Section 51.5. The Commission agrees with this reasoning, and therefore determines that it is technically feasible for GTE to provide each of the requested network elements. MCI must also be permitted to interconnect with GTE wherever technically feasible.

XI. PRICING OF NETWORK ELEMENTS

GTE proposes using the market-determined efficient components pricing rule ("M-ECPR") methodology to price its unbundled network elements.⁹⁹ GTE argues that its M-ECPR is not the same pricing rule rejected by the FCC Order. See Williams testimony at 8-9; generally, the attached report by Doane, Sibley, Sidak, Spulber, and Williams ("Doane Report"); and TE Vol. II of III at 232-238. An M-ECPR price as defined for an unbundled network element is equal to the sum of its TELRIC and alleged opportunity costs. GTE argues that M-ECPR will promote competitive local market entry because its ability to overprice its unbundled network elements is constrained by competitive market alternatives to its unbundled network elements.¹⁰¹⁰ Williams Testimony at 9-10 and Doane Report generally. The M-ECPR price must be between the TELRIC cost (price floor) and its stand alone cost (price ceiling). GTE argues that burdens imposed on it as an incumbent LEC, such as the requirement that it serve as carrier of last resort, necessitated the incurrence of its common costs; therefore, GTE reasons, it must be allowed full recovery. To the extent that unbundled element M-ECPR prices do not fully recover common costs, GTE proposes a non-bypassable end-user surcharge, to be designed at a later date, to recover these costs.¹¹¹¹ Id. at 9-12 and Doane Report at 3. MCI argues that it is inappropriate to guarantee the recovery of GTE's embedded costs and regulated revenues.¹²¹² TE Vol. II of III at 18 and 50.

The Commission agrees with MCI and rejects GTE's proposal to implement a non-bypassable end-user surcharge. Further, the Commission rejects the implicit assumption in GTE's arguments that it is guaranteed recovery of its embedded costs as reflected in its current revenue streams. Until passage of the Act, GTE has had the opportunity to recover its embedded costs through various means, including a franchised operating territory. Absent the Act, GTE is guaranteed the opportunity to achieve an authorized level of return, but it has never been guaranteed the absolute level of return. Moreover, GTE has not been guaranteed full recovery of all its costs, only the opportunity to recover those judged to be prudently incurred. The Act has taken away GTE's exclusive franchise, but it has not guaranteed GTE the full recovery of its costs. GTE has never possessed any such guarantee.

A large portion of GTE's Response to MCI's Petition ("GTE Response"), like its arguments and testimony during the hearing in this matter, is devoted to impassioned discussion of its alleged constitutional right to recover all its historic costs and to earn some allegedly "fair" rate of return on its investment.¹³¹³ See GTE Response at 17 ("[u]nder the Fifth Amendment . . . GTE must have an opportunity to recover and earn a fair rate of return on this investment").

Although the Commission is not the proper forum to adjudicate constitutional issues, the Commission recognizes that outright confiscation implicates constitutional concerns. See *Duquesne Light Co. v.*

Barasch, 488 U.S. 299 (1989). However, the Commission rejects GTE's argument to the extent it implies GTE has some inalienable right to a particular level of profit. Furthermore, property which has been dedicated to a public purpose can be regulated and even physically occupied if the regulation involves the dedicated public purpose. *Munn v. Illinois*, 94 U.S. 113, 126 (1876). Thus, to the limited extent that collocation and unbundled facilities requirements may constitute a "taking," there is no constitutional violation if GTE is justly compensated, e.g., if it receives "what a willing buyer would pay . . . to a willing seller." *United States v. Miller*, 317 U.S. 369, 374 (1943). The prices set by this Order meet this standard. Finally, Section 252(d)(1)(A) of the Act specifically states that the price set for a network element or interconnection must be based on the cost of that element or interconnection, as "determined without reference to a rate-of-return or other rate-based proceeding" (emphasis added). That section goes on to state that a commission "may" add a reasonable profit to the cost-based price it sets. *Id.* The prices set by this Order meet this standard.

Cost Study Methodologies

MCI and GTE both submitted cost studies which rely upon different methodologies and purport to calculate the forward looking TELRIC cost of GTE's unbundled network elements. Both companies employed considerable effort through informal conferences, prefiled testimony, and hearing testimony to explain and defend their cost models.¹⁴¹⁴ For example, see Jernigan Testimony and TE Vol. II of III at 12-60, 209-347, and Steele and Trimble Testimonies, respectively. MCI used the Hatfield model to derive its estimates of GTE's TELRIC element costs. MCI readily acknowledged that its model does not reflect GTE's actual network design and costing processes. However, MCI argues that the model produces a reasonable approximation of GTE's unbundled network element TELRIC costs. MCI further states that primary advantages of the Hatfield model over GTE's TELRIC studies are its reliance upon publicly available ARMIS data and openness to public scrutiny.¹⁵¹⁵ See, generally, Jernigan and McAnney Testimonies. GTE's TELRIC studies use engineering process models and certain accounting data to estimate its forward looking TELRIC costs.¹⁶¹⁶ See Steele Testimony Attachment 1, "GTE Telephone Operations TELRIC/TSLRIC Methodology."

The Commission finds that the Hatfield model is a useful tool which can be used as an independent estimate to check the reasonableness of GTE's TELRIC estimates.¹⁷¹⁷ GTE used the Benchmark Cost Model - Version II in a similar fashion for its 2-Wire loop TELRIC cost. Steele Testimony at 12. The Commission also finds that GTE's TELRIC cost study methodology will provide the best estimate of GTE's unbundled network element TELRIC cost. However, there are indications in the record that some of the assumptions underlying GTE's TELRIC studies may have led to overstated unbundled network element cost estimates.¹⁸¹⁸ GTE's position in this case is virtually identical to that it presents in its arbitration with American Communications Services, Inc. ("ACSI"), Case No. 96-467, The Petition by American Communications Services, Inc., and Its Local Exchange Operating Subsidiaries, for Arbitration with GTE South, Incorporated and Contel of Kentucky Pursuant to the Telecommunications Act of 1996. However, the Commission's findings regarding GTE's costs will be generally applicable across all its arbitration proceedings. Therefore, the Commission will use all information at hand in rendering its decisions.

There are a variety of adjustments and changes in underlying assumptions which could be made to GTE's TELRIC cost estimates. GTE argues that its TELRIC estimates have neither been adjusted for changes in risk with respect to its cost of capital nor for changes in depreciation lives of sunk investments or for declining technology costs. Common costs are not included in TELRIC cost estimates either.¹⁹¹⁹ Steele Testimony at 9-11. The practical effect of these adjustments could increase TELRIC cost estimates for unbundled network elements.

The Commission has additional concerns regarding the assumptions underlying GTE's TELRIC studies. There is a general concern regarding the reflection of forward looking technology in the TELRIC study found in Tabs 4 and 5 of the GTE Workpapers, both of which provide the cost basis for GTE's unbundled loop prices. GTE submitted a 4-wire loop study at Tab 5, and two different 2-wire loop studies, one in Tab 4 and the other in Tab 10. There are two primary differences between the Tab 4 and Tab 10 studies:

(1) assumptions underlying the treatment of loops whose length is greater than 12 kilofeet, and (2) inconsistent blending of business and residential loops. Examination and comparison of the underlying workpapers, coupled with testimony at both the MCI and ACSI hearings, fuel Commission concerns that the Tab 4 loop study embodies technology assumptions which may overstate loop costs.²⁰²⁰ See Case No. 96-440 TE Vol. II of III at 323-327, 331, and Steele Testimony Appendix I at 1.4. For example, GTE states at 331, that it did not incorporate next generation digital loop carrier and other associated technology; rather it says it relies upon non-integrated pair-gain devices via D4 channel banks. In Case No. 96-467, TE Vol. I of II at 278-311, there was a similar discussion regarding technology deployment. Under cross-examination, GTE acknowledged that given the realities of how its network will develop over the next year, the Tab 10 loop study would be more appropriate than the Tab 4 study. Given that the TELRIC studies are long run and forward looking in nature, it is inappropriate for GTE to ignore deployment of new currently available technology. The Commission finds that the Tab 10 loop study more appropriately embodies forward looking technology assumptions. In addition, Tab 10 does not take business loops into consideration, whereas Tab 4 does. The Commission has similar concerns regarding the relationship between Tab 5 and Tabs 11-13.²¹²¹ Tab 5 is the TELRIC study for unbundled 4-wire (business) loops. Tabs 11-13 are the business one party, business key, and business PBX services, respectively. Generally, Tabs 11-13 are built around 2-wire costs detailed in Tab 10, while Tab 5 costs are generally assumed to be double the 2-wire costs found in Tab 4. Also, in performing its loop studies, GTE did not combine those residences and businesses using similar loop technology in Tabs 10-13 as it did in Tabs 4-5. In other words, it is not clear that GTE has applied underlying assumptions uniformly across its cost studies.

In addition to technology assumptions, the Commission has other general concerns about GTE's assumptions and model input values. For example, there is concern regarding GTE's use of fill factors equal to 50 percent and any differences between actual and objective fill factors in feeder and distribution cable.²²²² See Tabs 4 and 10 of the GTE Workpapers and Steele Testimony Appendix I at 1.4. In Case No. 96-467 Kahn raises questions concerning the distribution and cost of cable and wire, which include support structures and fill factors. Kahn Rebuttal Testimony at 14 and TE Vol. II of II at 55-62. The Loop Technology Module of the CostMod system seems to incorporate an 85 percent objective fill factor for feeder cable, and distribution cable is engineered to its ultimate capacity.²³²³ Steele Testimony Appendix I at 1.4.

Another Commission concern regards the construction of the annual cost factors ("ACF") and other factor loadings. At the hearing in Case No. 96-467, GTE lowered its TELRIC loop cost estimate by \$1.27 for 2-wire loops and \$1.70 for 4-wire loops. These cost reductions were the result of retail costs embedded in the ACFs which would be avoided at the wholesale level.²⁴²⁴ Case No. 96-467, TE Vol. I of II at 271. It is not clear which ACFs were adjusted, whether any other unbundled network element would be affected, or if there might be additional costs inappropriately embedded in the ACFs.²⁵²⁵ In Case No. 96-467, Kahn also raised the concern regarding the presence of retail costs. See Kahn Rebuttal Testimony at 7-10, and TE Vol. II of II at 55-62. The Commission is concerned that the mathematical formula used to calculate the TELRIC loop cost for loops over 12 kilofeet in the low density range overstates the statewide weighted average by \$1.21. Finally, \$0.34 for billing and collections should be excluded from the unbundled loop calculation.²⁶²⁶ See GTE Workpapers Tab 10 pages 97-9 and 112. The Commission will adjust the unbundled loop cost accordingly.

GTE's forward looking common or opportunity costs are defined as the difference between GTE's 1995 regulated revenues and directly attributable costs (TELRIC) associated with unbundled network elements.²⁷²⁷ Trimble Testimony at 8 and Attachment 1. GTE derived the M-ECPR price of an unbundled network element by estimating a competitive market price using similar or analogous competitive markets, often the interstate market.²⁸²⁸ Using the interstate or other competitive markets as proxy markets to set the price of unbundled network elements may not always produce reliable estimates of market prices. No party disputed that the market for switches and, hence, switched based services, is competitive. Similarly, there are providers of private line or dedicated access transmission

other than the LEC. However, it is not clear that dedicated private lines are a viable alternative to basic residential loops and that they should therefore serve as the basis for setting unbundled loop rates. Testimony demonstrates that the respective M-ECPR prices recover varying amounts of common costs. Id. at Attachment 3. For example, unbundled 2-wire loops were estimated to have a TELRIC cost of \$28.13 and were priced at \$30.00, the price of a 2-wire dedicated transmission line at the interstate level. Many unbundled element prices are taken from GTE's interstate tariffs.²⁹²⁹ Id. at 16-17 and Attachment 3A.

Finally, the recovery of non-traffic sensitive ("NTS") revenue streams is also of concern to this Commission. In Administrative Case No. 355, the Commission signaled its intent to allow local exchange carriers to continue to recover their NTS revenues, currently recovered through access charges, through a universal service fund. Some years ago each LEC's NTS revenue requirement was residually calculated and was intended to support local service. The Commission does not, however, intend that local service costs currently being recovered through access charges and ultimately through the universal service fund will be recovered twice. After examining GTE's cost studies and pricing proposals, the Commission cannot ascertain whether or how these local service costs have been considered.

GTE proposes two different pricing scenarios regarding local switching elements.³⁰³⁰ Trimble Testimony, Attachments 3A and 3B. Proposal A provides access to all local switching elements through the ALEC's purchase of GTE's unbundled line side port element. Minutes of use switched and vertical services would then be resold to the ALEC. Proposal B is similar to Proposal A and includes monthly and non-recurring charges for the unbundled port and unbundled switch features, and a local per minute of use switching charge.³¹³¹ Id. at 23-25. The Commission rejects GTE's local switching element pricing proposals.

The Commission finds that the appropriate price for an unbundled network element should cover its incremental cost, described in this case as TELRIC, as well as a reasonable proportion of shared and common cost. Cost study assumptions should be forward looking in nature and not necessarily designed to recover historical or embedded costs. The Commission also rejects MCI's proposal to price unbundled network elements at TELRIC cost as calculated by the Hatfield model.³²³² See, generally, McAnney Testimony.

Due to the complexity of GTE's cost models, and the concerns discussed herein, the Commission finds that further investigation is warranted. For now, until GTE otherwise proves its costs are reasonable, the Commission will make temporary adjustments to GTE's cost study results and will set unbundled network element prices accordingly. The unbundled network element rates prescribed herein reflect the Commission's concerns regarding GTE's TELRIC studies. See Appendix 1. To the extent that adjustments to costs and prices are warranted, the Commission will conduct a true-up on a prospective basis. The rates provided herein are intended to be temporary pending further investigation of the TELRIC studies and pending consideration of the manner in which NTS and NECA universal service payments support local service cost recovery.

For the unbundled loop categories, a \$19.65 rate should be set for 2-wire loops. From this base loop rate, we followed the relationship between GTE's 2-wire TELRIC and the TELRIC studies for 4-wire loop. The \$19.65 reconciles the Commission's concerns as discussed herein. Within 60 days of the date of this Order, GTE should provide TELRIC studies for those unbundled network elements that do not have a TELRIC estimate listed in GTE's best and final offer, including non-recurring charges.

In setting initial prices herein, the Commission adhered to the following principles: if GTE furnished a TELRIC study, the price is equal to TELRIC as discussed above; if no GTE TELRIC has been furnished, we looked to MCI's Hatfield TELRIC; if neither the GTE nor the MCI TELRIC study was relevant, then no price is listed pending GTE's submission of a TELRIC study.

XII. COMBINING NETWORK ELEMENTS TO PROVIDE SERVICE

GTE claims it is the FCC's rules that permit MCI and other requesting carriers to purchase unbundled elements and reassemble them to provide end-to-end telephone service.³³³³ GTE Response, 15. These

rules, GTE argues, violate the Act, which draws a distinction between the purchase of unbundled elements and the purchase of service at wholesale rates for purposes of resale. The Act does indeed price the purchase of service for resale separately from the purchase of unbundled elements. However, the Act, at Section 251(c)(3) also states unequivocally that a requesting carrier must be provided with "nondiscriminatory access to network elements on an unbundled basis" and that the incumbent must provide the elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." Thus, pursuant to the Act itself, and not to the FCC rules alone, MCI may combine unbundled network elements it purchases to provide any service it chooses. GTE may not restrict or price its sale of unbundled network elements on any basis not provided in the Act.

XIII. UNUSED TRANSMISSION MEDIA

Unused transmission media constitute a valuable resource to the public switched network, and therefore MCI should have the right to lease or buy it from GTE for the provision of telecommunications services. However, MCI should begin construction using any requested fiber within 6 months of the execution of a lease or buy contract. MCI should not propose to lease or buy unused transmission media for future unspecified uses, and GTE should not refuse to lease or sell it to MCI without legitimate business purposes. GTE should base this decision on its network and design and, if refusing a request, should show that it will need this unused transmission media within 5 years.

XIV. ACCESS TO POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY

MCI proposes to have access to GTE's poles, ducts, conduits, and rights-of-way, including access to buildings owned by GTE. MCI requests that GTE provide information on the location and availability of access to poles, ducts, conduits, and rights-of-way within 20 days of any request; that it reserve for MCI's use adequate space on any requested pole, duct, conduit, or right-of-way for 90 days following the request; and that MCI be permitted 6 months to begin construction on any GTE pole, duct, conduit, or right-of-way.

In contrast, GTE proposes at least 30 business days to respond to requests and argues that no time frame should be established in which GTE would have to make space available. GTE further asserts that MCI should not be able to reserve space. However, GTE does concede that it should provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way as they are available.

The Commission finds that GTE should provide MCI with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. The Commission also finds that 30 business days to respond to requests for availability of poles, ducts, conduits, and rights-of-way is reasonable. MCI shall begin construction of facilities on GTE's poles, ducts, conduits, and rights-of-way within 6 months of notification of the availability of space.

Recovery of Access Costs

MCI states that costs of existing capacity should be recovered through a nondiscriminatory rental fee designed to recover a pro rata share of the facility costs.

The Act states at Section 251(b)(4) that the LECs have the duty "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." A rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than the amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital cost of the utility attributable to the entire pole, duct, conduit, or right of way. 47 U.S.C. §224(d).

The Commission finds that GTE and MCI should develop rates for access to poles, ducts, conduits, and

rights-of-way that are consistent with federal law.

Access to **Private Pathways**

MCI seeks to have the Commission require GTE to allow access to rights-of-way in a nondiscriminatory basis where GTE has control, contractual or otherwise, over pathways such as equipment closets in private office buildings. MCI also requests that GTE be precluded from using its relationship with property owners to deny MCI access to pathways it does not own or control.

Section 251 of the Act supports MCI's position, describing a LEC's duty to provide nondiscriminatory access to any pole, conduit or right-of-way owned or controlled by it. Further, the Commission assumes that GTE will not act unreasonably in wielding influence with third parties to deny MCI access. Any disputes may be brought to the Commission's attention.

XV. INTERIM LOCAL NUMBER PORTABILITY COST RECOVERY

Each LEC should bear its own costs for providing remote call forwarding as an interim number portability option. The Act, at Section 251(e)(2), designates the FCC as the authority which shall determine number portability costs on a competitively neutral basis. According to the FCC, the cost of number portability should be borne by each carrier so as to avoid significant effect on any carrier's ability to compete with other carriers for customers.³⁵³⁵ See, generally, Telephone Number Portability, First Report and Order and Further Notice of Proposed Rule-Making, CC Docket No. 95-116 (July 27, 1996). The FCC concluded that pricing number portability on a cost-causative basis could defeat the purpose for which it was mandated.³⁶³⁶ Id. Moreover, requiring each LEC to bear its own costs should provide an incentive to the ILECs to implement long-term number portability.

XVI. LIMITATIONS ON, AND COSTS OF, COLLOCATION

GTE seeks to limit the interconnection between two carriers collocated on its premises, the types of equipment that can be collocated, and the types of users and availability of the collocated space. However, pursuant to the Act, GTE must provide collocation on rates, terms and conditions that are just, reasonable, and nondiscriminatory.³⁷³⁷ GTE argues that this requirement constitutes a "taking" of its property. For reasons discussed supra, the Commission rejects this contention. Virtual collocation may be required if GTE demonstrates to the Commission a lack of physical space.³⁸³⁸ Telecommunications Act of 1996, Section 251(c)(6). FCC Order 96-355, Appendix B, § 51.323. Pursuant to federal law, ALECs have the right to collocate telecommunications equipment that they deem necessary to provide service to their end-users. Interconnection, or cross-connection, between collocators is mandated by the FCC.³⁹³⁹ FCC Order at Paragraph 595. The costs for physical presence on GTE's premises should be based on comparable prices for leased office space per square foot.

XVII. COMPENSATION FOR EXCHANGE OF LOCAL TRAFFIC

MCI argues that the transport and termination of local traffic should use symmetrical rates based on TELRIC principles. The FCC Order, it asserts, permits mutual traffic exchange only for the physical interconnection between two networks and requires reciprocal symmetrical compensation for transport and termination of traffic. The price for transport termination, MCI contends, should be set in accordance with TELRIC principles and the Hatfield model prices for tandem switching, local switching and transport.

On the other hand, GTE asserts that there should be mutual reciprocal compensation but that it should be based on traffic sensitive switched access charged rates because local interconnection provides the same functionality as switched access. Substituting other prices, according to GTE, will expand the local calling areas beyond the existing boundaries and will erode basic service support currently received from access charges.

Section 252(d)(2) requires the commissions to consider terms and conditions for reciprocal compensation to be just and reasonable only (1) if they provide for mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facility of calls that originate on the network facilities of the other carrier, and (2) if they determine costs on the basis of a reasonable

approximation of the additional cost of terminating calls. The Commission is aware of the cost to alternative LECs to begin a process of reciprocal compensation. It is also aware that the market will be best served by swift development of the necessary recording and billing arrangements to provide reciprocal compensation among local carriers. However, in order to encourage immediate development of meaningful local competition, the Commission will permit bill and keep arrangements for no more than one year. Though the term of this contract is two years, MCI and GTE shall submit within one year of this order a modification to their contract requiring mutual compensation if MCI elects to bill and keep for the first year of this contract.

The pricing for termination of local calls should be at TELRIC. GTE argues tariffed access rates are more appropriate than TELRIC. However, compensation for local calls should be based on actual cost instead of subsidies that are present in existing rates. If the parties are unable to agree on an appropriate TELRIC-based price, they may petition the Commission for resolution and submit cost support.

XVIII. TRANSITIONAL INTRASTATE ACCESS CHARGES

MCI's position is that the price for unbundled local switching should be based on its forward looking economic cost in accordance with TELRIC principles. The price should not include any additional charge for intrastate switched access minutes that traverse GTE's switch, and in particular should not replace intrastate NTS revenues that GTE would have received if it had retained the end-user customer.

MCI further states that, under the Act, rates for unbundled network elements may not include any funding for universal service such as the carrier common line charge and the transport interconnection charge. Finally, MCI opines that under the Act the FCC has no authority to impose a transitional charge as discussed below and that the Commission should decline to impose this non-cost-based charge on new entrants. GTE proposes that tariffed switched access rates should be the appropriate rate for all intrastate switching.

In imposing the transitional access charge, the FCC noted the charges were not consistent with the long-term competitive market. However, in the short term, until Universal Service Fund and access charge reform issues are settled, the charges are necessary to avoid unintended adverse consequences for universal service. The FCC also concludes that such a process is appropriate at the state level for purchasers of intrastate access services from the incumbent LECs.4040 FCC Order at Paragraph 729.

The Commission, likewise, is concerned with the short-term effect on universal service which could develop as a result of ALECs bypassing ILECs' access charges through the purchase of unbundled network elements. In Administrative Case No. 355, the Commission described its plans for establishing an intrastate Universal Service Fund after a series of workshops is held. Therefore, until the Commission is able thoroughly to investigate the entire universal service issue, it will require MCI to pay tariffed intrastate access charges to GTE. The transitional mechanism will be in effect until such time as the Commission completes its review of universal service and establishes an intrastate Universal Service Fund.

XIX. NOTICE OF SERVICE CHANGES

MCI argues that GTE's wholesale customers must be afforded adequate notice of changes in GTE's services. The Commission agrees this is a reasonable request. MCI should be given at least 45 days' notice so it may alter its tariff and marketing efforts.

XX. BRANDING ISSUES

MCI argues that directory assistance service and operator services should be branded as it requests and that it should have the option of providing its own branding material. GTE argues that it is not required by the Act to brand operator or directory services and that such branding is not technically feasible. However, the FCC has concluded that where operator, call completion or directory assistance is part of a service or service package, failure of the LEC to comply with branding requests presumptively constitutes an unreasonable restriction on resale except in cases when it is technically not feasible.⁴¹⁴¹ See FCC Order, Paragraph 971. The LECs should, however, be compensated for costs incurred in complying with branding requests by the carrier which made the request.

The Commission finds, therefore, that in those instances where branding is technically feasible⁴²⁴² The Commission reiterates its adherence to the FCC definition of technical feasibility. It should be provided for operator services where GTE brands its own. Parity is the extent of the Commission's requirement. Where branding does take place, GTE shall determine the additional cost it will incur to provide it and bill MCI for such costs. The parties may petition the Commission for resolution of any billing disputes. GTE argues it should not be responsible for leaving MCI-branded cards at MCI customer locations when GTE employees or agents interact with MCI customers. The Commission finds, however, that drop-off cards should be branded if MCI provides the cards to GTE and absorbs their cost.

XXI. BILLING SYSTEMS AND FORMATS

MCI seeks to require GTE to provide a carrier access billing system ("CABS") format for billing MCI. This would require GTE's translation of the information output from its customer billing system ("CBSS") into CABS format. MCI notes that NYNEX has been using its customer record information system to provide CABS-formatted billing since October of 1996.

The Commission is also aware that BellSouth will provide CABS-formatted billing by interfacing its customer received information system with its CABS system.⁴³⁴³ See Case No. 96-431.

There is no apparent reason why GTE cannot provide the same service. Therefore, the Commission will require that GTE provide billing to MCI on a CABS-formatted basis. The necessary modification should be made by GTE as soon as possible.

XXII. CONTRACT TERM AND MODIFICATIONS

According to MCI, the contract should have a five year term to create adequate certainty for financial commitments. However, due to continuing and radical changes in the telecommunications industry, the Commission finds that a two year term is more reasonable.

MCI also argues that GTE should not be able to modify the contract by subsequent tariffs filings. But, to meet the rapid market changes, GTE must be permitted to propose tariffs for Commission review. MCI, of course, may notify the Commission of its opposition to any tariff changes that will affect its contract with GTE.

IT IS THEREFORE ORDERED that:

1. The parties shall complete their agreement in accordance with the principles and limitations described herein and shall submit their final agreement for Commission review within 60 days of the date of this Order.
2. The cost studies required to complete the Commission's investigation into appropriate pricing as discussed herein shall be filed by GTE within 60 days of the date of this Order.

Done at Frankfort, Kentucky, this 23rd day of December, 1996.

By the Commission

ATTEST:

Executive Director

