

ISSUE DATE: March 26, 1997

DOCKET NO. P-442, 407, 5321, 466/CI-96-1541

NOTICE AND ORDER FOR HEARING

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey  
Joel Jacobs  
Marshall Johnson  
Mac McCollar  
Don Storm

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Investigation of GTE-  
Minnesota's Cost of Providing  
Interconnection and Unbundled Network  
Elements

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**PROCEDURAL HISTORY**

On December 12, 1996, the Commission issued its ORDER RESOLVING ARBITRATION ISSUES AND OPENING COST PROCEEDING (GTE/AT&T Arbitration Order) in Docket No. P-442, 407/M-96-939 In the Matter of AT&T Communications of the Midwest, Inc.'s Petition for Arbitration with Contel of Minnesota, Inc. d/b/a GTE Minnesota under Section 252(b) of the Federal Telecommunications Act of 1996 (GTE/AT&T Arbitration). In that Order the Commission established interim prices for interconnection and unbundled network elements in the territory served by Contel of Minnesota, Inc., d/b/a GTE-Minnesota (GTE). The Commission also initiated the present proceeding to establish prices to replace the interim prices.

On December 27, 1996, the Commission invited interested persons to comment on this proceeding's scope, schedule and procedural treatment. The Commission received comments from AT&T Communications of the Midwest, Inc. (AT&T), Frontier Communications of Minnesota, Inc. (Frontier), GTE, MCImetro Access Transmission Services, Inc. (MCImetro), the Minnesota Department of Public Service (the Department), the Minnesota Independent Coalition (MIC), and the Minnesota Office of the Attorney General - Residential Utilities Division (OAG). The Commission received reply comments from AT&T, Frontier, GTE, MCImetro, the Department and MIC.

On March 12, 1997, the Commission initiated a cost proceeding to establish prices to replace the interim prices the Commission had established for US West Communications. In the Matter of a Generic Investigation of US West Communication's Cost of Providing Unbundled Network Elements, Docket No. P-422, 5321, 3167, 466, 421/CI-96-1540 (US West's Generic Cost Proceeding).

On March 18, 1997, the Commission heard oral argument on the present matter.

## FINDINGS AND CONCLUSIONS

### **I. Jurisdiction**

The Commission has jurisdiction over this proceeding pursuant to §§ 216A.05, 237.06 and 237.16 of Minnesota Statutes, and §§ 252 (b), (c) and (d) of the Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (the Act).

### **II. Scope of Proceedings**

#### **A. Uncontested items**

Various parties suggested that the docket establish the cost of the following items:

- unbundled network elements,
- unbundling,
- collocation,
- interconnection,
- access operational support systems,
- call completion services,
- directory assistance,
- interim number portability and
- dark fiber.

No party objected to any item on this list. The Commission approved a similar list for US West's Generic Cost Proceeding. The Commission finds it reasonable to include an investigation of the cost of these items within the scope of this proceeding.

The Commission's staff also recommended that the Commission permit the Office of Administrative Hearings' Administrative Law Judge (ALJ), as discussed below, to determine what additional related issues to include within the docket. No party objected to this proposal. The Commission finds the proposal reasonable, and consistent with its actions in US West's Generic Cost Proceeding. Therefore, the Commission will defer to the ALJ's judgment to determine what additional related issues to include within the docket.

#### **B. Contested item--geographic and temporal deaveraging**

Within GTE's system, the cost of providing some elements of telephone service may vary from place to place -- especially between urban and rural places -- and from time to time -- especially between times of peak demand and times of low demand. Someone that calculates the cost for an element without addressing cost changes over geography and time effectively generates an average cost for that element. Someone that generates multiple costs for an element, reflecting changes in geography and time, effectively generates "deaveraged" costs. The parties disagree about whether the current proceeding should attempt to incorporate deaveraging into the costing analysis.

As a matter of law, the Federal Communications Commission (FCC) observed that the Act directs state commissions to establish prices based on cost, and construed this language to mandate geographically-deaveraged costs.<sup>1</sup> As a matter of fact, some cost models purport to show that costs do indeed vary by geography.

On the other hand, the Act apparently limits the extent to which the Commission may geographically deaverage rates, regardless of cost:

[C]onsumers in all regions of the nation, including low-income consumers and those in rural, insular, and high-cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available *at rates that are reasonably comparable to rates charged for similar services in urban areas.*

47 U.S.C. § 254(b)(3), emphasis added.

Some parties express concern that determining geographically-deaveraged costs will result in much higher costs being associated with providing rural services before mechanisms for subsidizing high-cost areas are in place. As a result, some parties have proposed considering geographic deaveraging in a separate docket, perhaps in conjunction with a consideration of subsidies for high-cost areas. In particular, the Department suggests establishing a separate, state-wide docket for determining a methodology for determining geographically deaveraged rates.

The Commission will approve consideration of both geographic and temporal cost variations in the present proceeding. Failure to consider these matters would undermine the very purpose of this docket: the rigorous determination of GTE's costs. This holding is consistent with the Commission's decision in US West's Generic Cost Proceeding.

Concerns about the consequences of considering deaveraging are premature. The Commission will retain discretion in implementing any resulting changes. Regarding mechanisms for subsidizing services in high-cost areas, the FCC plans to issue new rules regarding subsidies for high-cost areas on May 8, 1997, before the anticipated start of these proceedings. Additionally, the Commission intends to address this matter in Phase II of the Commission's local competition rulemaking, which will proceed concurrently with this docket. In any event, the Commission is reluctant to pass judgment on the consequences of deaveraged rates without

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<sup>1</sup>FIRST REPORT AND ORDER, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (August 8, 1996) ¶¶ 764-65; Appendix B -- Final Rules § 51.507. The Eighth Circuit has stayed the effect of this portion of the order. *Iowa Utilities Board v. FCC*, File No. 96-3321, Order Granting Stay Pending Judicial Review (October 15, 1996).

first learning about the costs that would underlie those rates.

**C. Contested item--GTE's wholesale discount**

Under the Act, a competitive local exchange company (CLEC) may provide service to its customers by interconnecting and using the facilities of the incumbent local exchange company (ILEC), such as GTE. When a CLEC wants to do this, the Act directs the state commission to establish the rates the ILEC may charge the CLEC. The commission may set these wholesale rates by taking the amount of the ILEC's retail rate and deducting the amount of the ILEC's wholesale discount. 47 U.S.C. § 252(d)(3). The wholesale discount reflects the share of the ILEC's costs that it could avoid in providing service on a wholesale, rather than retail, basis.

GTE asks the Commission to reconsider its decision about GTE's wholesale discount in the context of this proceeding. GTE argues that its current discount rate reflects "avoidable cost" rather than "avoided cost" as required by the Act.

The purpose of this proceeding is to provide a forum for matters that did not receive a full hearing on the record of GTE's Arbitration, and were therefore decided on an interim basis. There is no shortage of information on the appropriate discount rate for GTE. In the GTE/AT&T Arbitration Order, the Commission established GTE's wholesale discount rate after finding that it had sufficient evidence to do so.

[T]he 24.9% wholesale discount proposed by the Department and recommended by the Administrative Law Judge is methodologically and empirically sound, supported by substantial evidence, and in the public interest. The Commission will set the wholesale discount at 24.9%.

GTE/AT&T Arbitration Order, p. 12 (December 12, 1996). The Commission subsequently reaffirmed this position when it declined to reconsider it. ORDER RESOLVING ISSUES AFTER RECONSIDERATION AND APPROVING INTERCONNECTION AGREEMENT, p. 7 (March 14, 1997). Therefore, the Commission will decline to include a reconsideration of GTE's wholesale discount rate within the scope of this proceeding.

**D. Contested item--access charge reform and universal service**

Access charges and universal service support represent two sources of revenue to an ILEC. An ILEC levies access charges on long-distance telephone companies that use the ILEC's system for originating or terminating long-distance calls. In addition, certain ILECs receive payments from the federal Universal Service Fund, designed to offset high operating costs. Because these revenue sources are more closely related to a ILEC's overall operating costs than to the cost of a specific service, they have the effect of supporting service in high-cost areas. The FCC, states, and federal/state joint boards are in the process of reforming both access charges and universal service.

GTE asks the Commission to include consideration of these revenue sources, and their reforms, within the scope of this proceeding. GTE argues that they are inextricably linked with other cost issues, and that it would be more efficient to deal with these matters in this proceeding than in a separate proceeding.

No other party supports GTE's request. To the contrary, both AT&T and the Department oppose it, arguing in favor of addressing access charges and universal service in a separate proceeding, if at all.

The Commission will decline to include access charges and universal service within the scope of the present proceeding. The purpose of this docket is to analyze GTE's costs, not its revenues. The scope of this docket will be sufficiently challenging without these additions.

#### **E. Contested item--rate rebalancing and joint/common/stranded costs**

GTE asks the Commission to include a consideration of rate rebalancing, joint and common costs, and stranded costs within the scope of this proceeding. GTE argues that these matters are inextricably linked to the other items in the docket.

"Rate rebalancing" refers to a rate design linking rates to costs. "Joint costs" refer to costs of a production process in which two or more outputs are produced, such that when one output is generated, the others are also generated at no additional cost.<sup>2</sup> "Common costs" refer to costs of a production process which do not increase with output. And, generally speaking, "stranded costs" refer to costs incurred in a regulated environment that may not be recovered in the transition to a competitive environment.

AT&T opposes including rate rebalancing within the scope of this docket. AT&T argues that it is inappropriate to consider rate design in the context of a cost-analysis docket, and that it would unduly complicate and delay an already challenging docket.

The Commission will decline to include a consideration of rate rebalancing within the current docket. However, the Commission finds it appropriate to consider joint and common costs, and stranded costs, when considering other GTE costs. Therefore, the Commission will grant GTE's request to include considerations of joint and common costs, and stranded costs, within the scope of this docket.

### **III. Procedures the parties should follow in this docket**

The Commission's staff proposed the following procedures, which it compiled from the positions of the parties:

- a. Refer the generic cost proceeding to the Office of Administrative Hearings for

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<sup>2</sup>*Id.*, FIRST REPORT AND ORDER, ¶ 676.

hearing before an ALJ.

- b. Request that the ALJ facilitate the submission of cost models and supporting documentation, mutual discovery, pre-filed testimony, a short focused evidentiary hearing to allow cross-examination, post-hearing briefs, and a report and recommendation from the ALJ.
- c. Require that all filed cost studies include--
  - (1) the cost model software programs, including the application software, if necessary,
  - (2) a computer and an operating system at the party's location, if necessary,
  - (3) the input data used in the filed cost studies,
  - (4) a written explanation of assumptions, processes and calculations of the cost model, including the engineering model, if any, underlying the cost model,
  - (5) a manual explaining the use of the cost model programs,
  - (6) a demonstration that each model duplicates all of the cost model outputs included in the cost studies, and
  - (7) a chart showing which cost elements are related to, or incorporated by, the prices in the AT&T/GTE interconnection contracts.
- d. Direct all parties sponsoring a cost study and/or a cost methodology to file testimony supporting the cost study and/or methodology.

No party objected to these procedures, which substantially conform to the procedures approved in US West's Generic Cost Proceeding. The Commission finds these procedures reasonable, and will adopt them.

#### **IV. Schedule the parties should follow in this docket**

The Commission's staff proposed a procedural schedule for the Commission to recommend to the ALJ presiding over this case, in which the parties would file their cost studies by April 30, 1997. While some parties opined that they could complete the tasks within the docket's scope more quickly, no party objected that the staff's proposal caused undue delay. However, the Department and GTE each proposed refinements to the schedule.

The Department proposed that any party's delay in providing every element of its cost study supporting materials would postpone the testimony filing date by an equal period. No party objected to this proposal. The Commission finds the Department's request reasonable, and

will note it in the schedule that the Commission recommends to the ALJ.

GTE asked to postpone the beginning of the schedule for two and a half months. The additional time would permit GTE to prepare new cost studies that would address many of the concerns leveled at GTE's cost studies in its arbitration case. Without this additional time, according to GTE, GTE would have no option but to refile the same cost study that it filed in its arbitration case, which the Commission and the parties found lacking.

AT&T and MCImetro objected to GTE's proposed change to the procedural schedule. AT&T argued that prolonging the uncertainty about GTE's permanent rates would impede competition. GTE has had adequate time to prepare, according to AT&T, because GTE could have begun its new cost study as soon as the inadequacies of the old one had become apparent, in the context of GTE's arbitration. AT&T observed that the Commission had recommended that parties file cost studies, supporting testimony and materials by March 31, 1997, in US West's Generic Cost Proceeding. In the spirit of compromise, however, AT&T proposed postponing the cost study filing date to the end of May.

In contrast, neither the OAG nor the Department objected to GTE's request. They emphasized the importance of receiving *good* cost studies and supporting information *on schedule*, even if the schedule commenced two and a half months later.

The Commission will grant GTE's request to recommend extending the beginning of the staff's proposed procedural schedule by two and one-half months. The importance of obtaining accurate data does not militate in favor of haste. Considering the time and effort expended to create the record in GTE's Arbitration case -- a record that could not support the establishment of permanent rates -- the Commission will accept the addition of two and one-half months to the procedural schedule as a reasonable price to pay to assure an adequate record in the present case.

In granting this postponement, however, the Commission emphasizes that it places a priority on resolving the matters within the scope of this docket. The Commission expects all parties to fulfill their obligations under the procedural schedule eventually approved by the ALJ. The parties are hereby notified that the Commission disfavors any further delay in the filing of cost studies.

## **V. Burden of proof**

AT&T and MCImetro advocate placing the burden of proof in this docket on GTE. They argue that GTE has superior access to most of the information relevant to this docket. GTE is the "moving" party in this proceeding, seeking to challenge the *status quo* rates established in the GTE/AT&T Arbitration, according to AT&T.

GTE argues that the Commission should not place the burden of proof on GTE. Longstanding Anglo-American jurisprudence dictates that the petitioning party bear the burden of proof, and GTE did not petition to establish this docket.

The Department questions the relevance of a traditional “burden of proof” to the current docket. Notions of a “moving” or “petitioning” party are inapplicable to the present case, according to the Department, because the Commission’s decision in the GTE/AT&T Arbitration did not create a presumption in favor of the interim rates. The Department advocates placing the burden of proof regarding the merits of any cost study on the proponents of that study.

Because the Commission desires to obtain substantial evidence for the record of this proceeding to inform its decisions, the Commission will retain the concept of “burden of proof” in this docket. The Commission will place on GTE the burden to prove matters of material fact by a preponderance of the evidence because GTE has superior access to most of the relevant information. However, the Commission is sensitive to the potential for injustice in requiring GTE to bear the burden of production on matters where another party has superior access to the relevant data. Therefore, if the ALJ concludes that another party has control of the critical information regarding a disputed issue, the Commission will defer to the ALJ to shift the burden of production to that party with respect to that issue. The ALJ may also shift the burden to the extent necessary to comply with applicable FCC regulations. This decision is largely consistent with the Commission’s decisions in the GTE/AT&T Arbitration Order and in US West’s Generic Cost Proceeding Order.

The Commission will clarify, however, that it created no presumption in favor of the interim rates from the GTE/AT&T Arbitration Order. In initiating this docket, the Commission stated that --

the cost information in the record does not merit the confidence required to set permanent rates. The Commission will set interim rates ... and will initiate a proceeding to set permanent rates based on more exhaustive and reliable evidence.

Therefore, the Commission charges the ALJ to review the evidence in the case *de novo*, without regard to the Commission’s decision to implement the interim rates.

#### **IV. Administrative Matters**

##### **A. Administrative Law Judge**

The Administrative Law Judge assigned to this case is Allen E. Giles. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2543.

##### **B. Hearing Procedure**

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to

7829.3200. Copies of these rules and statutes may be purchased from Minnesota's Bookstore, 117 University Avenue, St. Paul, Minnesota 55155, (800) 657-3757.

Under these rules formal parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Any person intending to appear at the hearing as a formal party must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Order. Failure to appear at the hearing may result in facts and issues being resolved against the party who fails to appear.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions. They should take note that any material introduced into evidence may become public data unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Dennis Ahlers, Assistant Attorney General, Suite 350, 121 7th Place East, St. Paul, Minnesota 55101-2147, (612) 296-0410.

The time, date, and place of the evidentiary hearing will be set by order of the ALJ after consultation with the Commission and intervening parties.

### **C. Parties and Intervention**

Current parties to this proceeding are AT&T, Frontier, GTE, MCImetro, the Department, MIC, and OAG. Anyone else who wishes to become a formal party to this proceeding shall promptly file a petition to intervene with the Administrative Law Judge, and serve copies on all current parties and on the Commission. Minn. Rules, part 1400.6200.

### **D. Prehearing Conference**

A prehearing conference will be held on Monday, April 21, 1997, at 9:00 a.m. in the Large Hearing Room, Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147.

All parties and persons intending to intervene should attend the conference, prepared to discuss time frames, scheduling and any other matter left unresolved by this Order.

### **E. Application of Lobbying Provisions**

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., apply to rate setting proceedings. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to that Act and to contact the Minnesota Ethical Practices Board, telephone number (612) 296-1720, with any questions.

### **F. Ex Parte Communications**

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7000 to 7845.7600, which all parties are urged to consult.

## **ORDER**

1. The scope of this proceeding shall include an investigation of the following costs:
  - unbundled network elements,
  - unbundling,
  - collocation,
  - interconnection,
  - access operational support systems,
  - call completion services,
  - directory assistance,
  - interim number portability,
  - dark fiber,and additional related issues as determined by the ALJ.
2. The Commission includes geographic and temporal (peak and off-peak) deaveraging within the scope of this proceeding.
3. The Commission declines to reconsider GTE's wholesale discount rate within the scope of this proceeding.
4. The Commission excludes rate rebalancing from the scope of this proceeding.
5. The Commission includes stranded/joint/common costs within the scope of this proceeding.

6. The Commission --
  - a. refers the generic cost proceeding to the Office of Administrative Hearings for hearing before an ALJ;
  - b. requests that the ALJ facilitate the submission of cost models and supporting documentation, mutual discovery, pre-filed testimony, a short focused evidentiary hearing to allow cross-examination, post-hearing briefs, and a report and recommendation from the ALJ; and
  - c. requires that all filed cost studies include--
    - (1) the cost model software programs, including the application software, if necessary,
    - (2) a computer and an operating system at the party's location, if necessary,
    - (3) the input data used in the filed cost studies,
    - (4) a written explanation of assumptions, processes and calculations of the cost model, including the engineering model, if any, underlying the cost model,
    - (5) a manual explaining the use of the cost model programs,
    - (6) a demonstration that each model duplicates all of the cost model outputs included in the cost studies, and
    - (7) a chart showing which cost elements are related to, or incorporated by, the prices in the AT&T/GTE interconnection contracts; and
    - (8) testimony supporting the cost study and/or methodology.

7. The Commission --
  - a. directs all parties proposing a cost study or a cost study methodology to submit such studies no later than July 15, 1997,
  - b. requests that the ALJ file a report and recommendations with the Commission by February 13, 1998, and
  - c. requests that the ALJ consider the following schedule:

Procedures Before the Office Of Administrative Hearings

April 21, 1997	ALJ convenes prehearing conference.
July 15	Parties submit proposed cost studies, supporting testimony and material.
October 15*	Parties submit testimony regarding other parties' cost studies.
November 28	Parties submit rebuttal testimony.
December 5	Parties submit surrebuttal testimony.
December 19	ALJ convenes evidentiary hearings.
January 9, 1998	Parties file initial briefs.
January 23	Parties file reply briefs.
February 13	ALJ files reports.

Proceedings before the Commission

February 23      Parties file exceptions to ALJ's report  
March 16            Parties begin oral arguments; Commission begins deliberations.  
April 3              Commission issues Order.

\* or 90 days following the submission of all proposed cost studies and supporting testimony and materials, as determined by the ALJ.

8.    The Commission --
  - a.   places the burden of proof on GTE with respect to issues of material fact,
  - b.   declares that the facts at issue must be proven by a preponderance of the evidence, and
  - c.   gives the ALJ the discretion to shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute, or to the extent required by FCC regulation.
9.    The Commission affirms that the GTE/AT&T Arbitration Order created no presumption in favor of the interim rates approved in that proceeding.
10.   The contested case proceeding shall begin with a prehearing conference on Monday, April 21, 1997, at 9:00 a.m. in the Large Hearing Room, Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147.
11.   This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (612) 297-4596 (voice), (612) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

**ATTACHMENT A**

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS  
Suite 1700  
100 Washington Square  
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION  
Suite 350  
121 Seventh Place East  
St. Paul, Minnesota 55101-2147

In the Matter of the Investigation of GTE-  
Minnesota's Cost of Providing  
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Elements

MPUC Docket No. P-442, 407, 5321, 466/ CI-  
96-1541

OAH Docket No.

**NOTICE OF APPEARANCE**

Name and Telephone Number of Administrative Law Judge:

Allen E. Giles  
(612) 349-2543

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: \_\_\_\_\_

DATE: \_\_\_\_\_