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Ms. Blanca S. Bayo, Director
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Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

March 12, 1999

Re: Docket No. 990182-TP
Petition of DIECA Communications Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with GTE

Dear Ms. Bayo:

Please find enclosed an original and fifteen copies of GTE Florida Incorporated's Response for filing in the above matter. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at 813-483-2617.

Sincerely,

Kimberly Caswell

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of DIECA Communications Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with GTE	Docket No. 990182-TP Filed: March 12, 1999

GTE FLORIDA INCORPORATED'S RESPONSE TO COVAD'S PETITION FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, CONDITIONS AND RELATED ARRANGEMENTS WITH GTE

GTE Florida Incorporated (GTE) responds to the Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with GTE (Petition), filed February 15, 1999, by DIECA Communications Inc. d/b/a Covad Communications Company (Covad).

Covad presents seven issues for arbitration. GTE believes that most, if not all, of these issues, can be resolved by negotiation. Covad's allegation that GTE unilaterally ended negotiations arose from an apparent misunderstanding between the parties. That misunderstanding has now been corrected and Covad and GTE are engaged in negotiations.

In the following sections, GTE provides an updated account of the status of negotiations; explains the current state of the law relevant to this arbitration; sets forth GTE's positions on the issues Covad has submitted to arbitration; and discusses procedural options.

I. STATUS OF NEGOTIATIONS

As Covad indicates, Covad and GTE engaged in negotiations for many months before Covad filed its Petition (Petition at 4.) These negotiations concerned not just Florida, but Oregon, North Carolina, and Virginia, as well. The parties hoped to negotiate a template agreement to be customized, as necessary, for use in each of the four states.

Covad also correctly states that reasonable progress was made in the negotiations. But it repeatedly alleges that this progress ended when GTE halted negotiations as a result of the U.S. Supreme Court's decision in AT&T Corp. v. Iowa Util. Bd., Nos. 97-286 et al., ____ U.S. ____ , 1999 WL 24568 (Jan. 25, 1999), which nullified the FCC's rules requiring incumbent local exchange carriers (ILECs) to provide unbundled network elements (UNEs) unconditionally (see discussion of the status of the law, below). Covad's stated understanding of GTE's actions in the wake of the Supreme Court decision is not accurate.

Soon after the Supreme Court ruled, GTE informed Covad that it would need to briefly refocus the negotiations on items other than unbundled network elements (UNEs) until GTE could quickly assess the impact of the Court's decision. GTE did not interrupt negotiations, nor did it signify an end to the negotiating process. In fact, on February 10, 1999, GTE sent a letter to this Commission explaining that it planned to continue as though the nullified FCC provisions were in effect and to preserve the "status quo" until the FCC could implement final rules that comply with the Act. In that letter, GTE stated that it would "enter into any new arrangement with any requesting carrier" consistent with the terms set forth therein. (Letter from B.Y. Menard, GTE, to W. D'Haeseleer, FPSC Director,

Division of Communications, Feb. 10, 1999.)

Nevertheless, Covad, judging by its Petition, believed GTE had ceased all negotiations with Covad. GTE believes this misunderstanding may have been fostered by Covad's lead negotiator departing from Covad in the midst of the negotiations.

In any event, GTE has been able to contact Covad to reinitiate negotiations. GTE believes Covad now shares GTE's view that most or all of the issues Covad has raised will be settled through negotiation, instead of arbitration.

II. STATUS OF THE LAW

Although GTE believes that it and Covad now share an accurate perception of the status of their negotiations, Covad still misunderstands the effect of the Supreme Court's Iowa Utilities Board decision. Covad acknowledges that the Court vacated the FCC's Rule 319, which listed the UNEs that incumbent local exchange carriers (ILECs) were to provide. However, Covad believes that the FCC's pricing rules and proxy rates remain "unaffected" and "the law of the land." (Petition at 7.) This is not true.

In fact, the Court created substantial uncertainty regarding the pricing (as well as the provisioning) of UNEs. The Court upheld on statutory grounds the FCC's jurisdiction to establish rules implementing the pricing provisions of the Act. But because the Eighth Circuit Court of Appeals (which issued the decision that was appealed to the Supreme Court) had not reviewed the substantive validity of the FCC's rules, neither did the Supreme Court. Iowa Util Bd. at *6-8 and *4 n.3. This important issue will go back to the Eighth Circuit on remand. Thus, contrary to Covad's assertions, the pricing methodology

that must be employed to satisfy the requirements of the Act and the United States Constitution is still an open issue.

Covad is, likewise, mistaken that this Commission can rely on the proxy prices the FCC set in 1996 to establish UNE rates for GTE in this case. As a factual matter, the proxy rates are not relevant in Florida. As explained below, this Commission never used these default rates to set prices for GTE's UNEs; rather, it used GTE's cost studies.

As a legal matter, the Commission could not, in any event, revert to the proxy rates. The FCC's proxy rates were only intended as a temporary pricing option until cost studies could be submitted to the state commissions. The FCC itself has confirmed this point. In its Reply Brief in the Iowa Utilities Board case, the Government states: "the Commission's temporary and optional 'default proxies' were designed for a past period in which no cost studies could have been made available to the state commissions. They have no relevance to this case." (Reply Brief for the Federal Petitioners and Brief for the Federal Cross-Respondents at 7 fn. 5.)

Finally, the Supreme Court's ruling vacating the FCC's Rule 319 introduces a level of uncertainty that Covad declines to recognize. Covad believes it is "perfectly appropriate" for the Commission to approve a GTE-Covad agreement with the FCC's "unbundling rules as currently drafted." (Petition at 8.) While GTE has volunteered to continue to offer the UNEs included in the FCC's Rule 319 (see discussion below), it nevertheless emphasizes that the FCC and federal courts have yet to resolve the question of which UNEs ILECs must lease (as well as the question of the methodology to be employed in pricing these UNEs).

III. UNRESOLVED ISSUES

A. Legal Issues

Three of Covad's seven arbitration issues are legal in nature. That is, they do not address substantive interconnection matters, but rather methods for dispute resolution and liability assessment. Based on Commission precedent, these are not arbitrable issues because they do not fall within the items for arbitration reflected in Sections 251 and 252 of the Act (that is, interconnection, unbundled access, resale, collocation, and the like). As the Commission stated in GTE's arbitration with AT&T and MCI: "We will limit our consideration to the items enumerated in Sections 251 and 252 to be arbitrated, and matters necessary to implement those items." (Petitions by AT&T Comm. of the Southern States, Inc., MCI Telecomm. Corp. and MCI Metro Access Transmission Services, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE Florida Inc. Concerning Interconnection and Resale Under the Telecomm. Act of 1996, Order No. PSC-97-0064-FOF-TP (GTE/AT&T Arbitration Order) (Jan. 17, 1997), at 98.) Neither dispute resolution nor liability measures appears in Sections 251 and 252, and neither is necessary to implement the terms of the Act. Thus, these issues must be resolved through negotiation, rather than arbitration.

At the issues identification conference, GTE opposed inclusion of Covad's legal issues in this docket. However, GTE agreed to address those issues here and in its prefiled testimony because the expedited schedule in this proceeding would not permit argument on the scope of the issues before this Response and the testimony were due.

GTE expects that the parties will soon resolve these legal issues through

negotiations. If they do not, they have agreed to Staff's suggestion (at the issues identification conference) that they will submit in writing, on March 17, their positions as to whether Covad's dispute resolution, governing law, and limitation of liability issues are proper matters for arbitration. GTE's discussion of substantive positions here is presented in the event that the prehearing officer approves inclusion of Covad's legal issues in this arbitration. Discussion of these matters here does not compromise GTE's view that they are not arbitrable issues or its rights to further challenge their inclusion in this proceeding.

Issue 1: Dispute Resolution

Covad states that it "supports alternatives to litigation" but that it is "unwilling to waive its right to seek relief from a court of competent jurisdiction regarding disputes arising out of, or related to, the Interconnection Agreement." (Petition at 9.) In addition, Covad alleges that GTE's "delay in responding to Covad on this point constitutes a failure to negotiate in good faith pursuant to 47 C.F.R. section 51.301(a),(c)(6)." (Id. at 10.)

As explained above, Covad's perception of delay on GTE's point seems to have arisen from a misunderstanding of GTE's negotiating stance after the Iowa Utilities Board decision. GTE did not suspend all negotiations after the Supreme Court ruling, as Covad mistakenly believed, and was at all times prepared to discuss dispute resolution terms. In any event, the parties have resumed negotiation of this issue and, as such, GTE believes the bad faith issue Covad raised is moot.

With regard to GTE's substantive position on dispute resolution, GTE, like Covad, favors alternatives to litigation. GTE does not, however, understand how Covad could at

once support alternative dispute resolution procedures and litigation, which GTE views as mutually exclusive approaches. GTE proposes a process under which the parties would first escalate the dispute internally to pursue resolution. If that failed, the parties would go to binding arbitration. This is the dispute resolution process reflected in GTE's interconnection contract with AT&T, which has been adopted by numerous alternative local exchange carriers (ALECs) here by means of the Act's Section 252(i) opt-in process.

Issue 2: Governing Law

GTE believes this issue is related to the above-discussed dispute resolution issue. GTE is not sure, exactly, what Covad's position is, but it appears that Covad would like to litigate a dispute in any "jurisdictionally competent federal district court," regardless of the state in which the dispute arises. (Petition at 10.) Covad's proposal assumes that the parties will take their disputes to court, rather than to binding arbitration. As explained, GTE favors private dispute resolution; if this is the exclusive dispute resolution mechanism, then Covad's governing law issue is moot. If the parties agree that they should have the right to pursue a remedy in court, GTE would propose that the parties take a dispute to any court of competent jurisdiction in the state where the dispute arose.

Issue 3: Limitation of Liability

Covad asks the Commission to establish the parameters of the parties' liability for willful misconduct, gross negligence, and ordinary negligence. (Petition at 10.) As explained above, this is not a proper issue for resolution in this arbitration. The

Commission has specifically determined, as a matter of law, that limitation of liability, liquidated damages, and indemnifications issues are not arbitrable, and that "companies should not require the assistance of the Commission to establish contract provisions affording to each of them protections that will not cause unreasonable exposure to liability, direct or third-party, or hinder competitive entry." (GTE/AT&T Arbitration Order at 98.)

In the event that the Commission agrees to resolve the limitation of liability issues, GTE asks it to recognize, as it has before, that "the Act does not require revisions to GTEFL's tariffed limitations of liability." (Id.) As such, the liability standard reflected in GTE's tariffs should govern its contract with Covad, as well. Specifically, liability for negligence or wilful misconduct should be limited to a credit for or refund of charges for the service or feature at issue, appropriately prorated to correspond to the duration of the service interruption. This measure recognizes that GTE's service prices are not set to cover the unknowable and potentially unlimited liability that could flow from telecommunications service interruptions. This rationale applies equally to GTE's retail services and the wholesale elements to be made available to Covad under contract.

B. Substantive Issues

Issue 4: Prices of Unbundled Loops

For UNE prices, Covad states that it will accept incorporation into the agreement by reference any GTE Florida tariff that "(1) is wholly consistent with applicable orders of the Florida Public Service Commission and (2) the tariff and any such state commission

orders are consistent with the federal UNE pricing rules." Covad alleges that, "[s]ince the Florida Public Service Commission has not yet adopted rates applicable to GTE that are consistent with the federal pricing rules, Covad believes that the Commission should apply the FCC proxy loop rate of $13.68 to the interconnection agreement the subject of this arbitration until such time as the Commission adopts conforming rates." (Petition at 11.)

Covad is mistaken about the Commission's past actions in setting UNE rates, as well as the ability of this Commission to use the FCC's proxy rates. With regard to the latter point, GTE explained above, in Section II, that any perceived need to rely on proxy rates has long since passed. Default proxies were intended to set interim prices only where cost studies could not be made available in time for UNE rate-setting proceedings. Here in Florida, the Commission has never considered using proxy rates to set UNE rates for GTE. In its first arbitration in 1996, GTE submitted cost studies in compliance with the UNE pricing standards set forth in the Act's Section 252(d) and this Commission's conforming methodology, which it describes as "an approximation of TSLRIC." (ATT/GTE Order at 25.) The Commission found that GTE's cost studies "are appropriate because they approximate TSLRIC cost studies and reflect GTEFL's efficient forward-looking costs. We believe the cost studies can be used to set permanent rates for those elements covered by the cost studies, since the assumptions appear reasonable." (AT&T/GTE Order at 34.) Given this Commission's reliance on GTE's cost studies to set permanent UNE rates, Covad's request for the FCC's proxy rates makes no sense, either legally or practically.

The concept of UNE tariffs is also inapposite in Florida. Covad's tariff reference is specific to Oregon, which is unusual in that it requires UNE prices to be tariffed. UNE prices are not tariffed here, so the Commission will necessarily refuse Covad's request for incorporation of a tariff rate into the interconnection agreement.

In addition, Covad fails to recognize, once again, that the validity of the "federal pricing rules" is in question. Covad's request for the Commission to set rates in accordance with these rules is, therefore, ill-founded. As explained above, the Supreme Court did not pass judgment on the FCC's pricing rules; that task now falls to the Eighth Circuit on remand.

GTE's pricing proposal, unlike Covad's, is Florida-specific. GTE continues to support the cost studies and rates it filed in its arbitrations with AT&T and MCI in consolidated Dockets 960847-TP and 960980-TP. Because the Commission already has those studies and rate recommendations, GTE does not believe it is necessary to refile them in this Docket. Rather, GTE plans to incorporate them by reference into this Docket by means of prefiled testimony. GTE will furnish a copy of the cost studies and associated rates to Covad upon its request, and pursuant to an appropriate protective agreement.

While the Commission in the GTE/AT&T arbitration used GTE's cost studies as a basis for pricing UNEs, it made certain revisions to that study and it rejected GTE's proposed prices, which included an appropriate level of common costs. (Petitions by AT&T Comm. of the Southern States, Inc., MCI Telecomm. Corp. and MCI Metro Access Transmission Services, Inc. for Arbitration of Certain Terms and Conditions of a Proposed

Agreement with GTE Florida Inc. Concerning Interconnection and Resale Under the Telecomm. Act of 1996, Order No. PSC-97-0064-FOF-TP (GTE/AT&T Arbitration Order) (Jan. 17, 1997).) As a result, the prices the Commission ordered there were well below a level that would permit GTE to recover its actual costs. GTE has, therefore, appealed the GTE/AT&T Arbitration Order in federal district court. That case has been argued and a decision is pending. (GTE Florida Inc. v. Julia Johnson et al. and AT&T Comm. of the Southern States, Inc.; MCI Telecomm. Corp.; and MCIMetro Access Transmission Services, Inc., Civ. Action No. 4:97CV26MP.)

Even though GTE strongly disagrees with the rates established in the GTE/AT&T arbitration, GTE is willing to offer those rates to Covad. This offer does not in any way compromise GTE's rights to appeal or otherwise challenge the rates set in this arbitration. In fact, as GTE witness Jones will explain in his prefiled testimony, GTE will specifically conditions the availability of these rates upon the appropriate reservation of rights by GTE.

GTE makes this offer in the spirit of compromise and practicality. The Commission has already evaluated and rejected the rates GTE filed in its arbitration with AT&T and MCI, and it has already evaluated and revised the cost studies submitted there. GTE does not wish to force the Commission to formally repeat this process. GTE's compromise offer–if Covad accepts it–will save the Commission and the parties the considerable time and resources they would otherwise need to spend on a full cost case. It recognizes, in addition, the parties' need to go forward with business as usual while the issues presented by the Supreme Court's ruling are resolved.

GTE's proposal is very fair to Covad. The UNE rates GTE has offered Covad have been adopted (through the Act's Section 252(i) opt-in process) by most ALECs that have executed interconnection contracts with GTE.

Covad suggests that if the Commission declines to adopt the proxy rates, "it will either have to complete the cost case required by 47 C.F.R. section 51.51(e)(2) by June 9, 1999, or this arbitration will be removed to the FCC pursuant to 47 C.F.R. sections 51.801-807." (Petition at 11.) That is not true. GTE's compromise approach would avoid both the non-cost based proxy rates and another complete cost case. If Covad continues to insist on the FCC's proxy rates, however, GTE will have no choice but to rely on its previously submitted cost studies.

Issue 5: Nomenclature of Loop and NID

Covad proposes language that would recognize that the "use of a NID should encompass not only the provision of local service, but also the provision of special access service when used by Covad to provide interstate DSL service." Covad alleges that its position is consistent with the FCC's ruling that GTE's ADSL service is jurisdictionally interstate. (Petition at 13.)

Covad's objective in presenting this issue is not clear. GTE believes Covad is trying to avoid any restrictions on Covad's use of the NID when Covad provides its own loop. In particular, Covad seems to want to make clear that it can use an unbundled NID to provide interstate (specifically, special access), as well as

intrastate, services.

It is not GTE's policy to attempt to control the service an interconnector provides over its own loops. Thus, GTE would not oppose including language in the contract to this effect. In fact, GTE believes the parties have already resolved this issue through negotiations, and GTE expects that it will be withdrawn.

Issue 6: Collocation Issues

Although Covad designates its Issue 6 "Collocation Issues," this issue is not about collocation, per se, but rather about contract modification in the event of regulatory changes affecting collocation. Covad seeks language stating that if state or federal regulations alter the rates, terms, and conditions for providing collocation, GTE will modify its federal and state collocation tariffs to incorporate such alterations within 30 days of the regulation's effective date or within the time specified in the regulations themselves. Covad apparently believes such language is potentially necessary to accommodate the FCC's pending decision in its Deployment of Wireline Services Offering Advanced Telecommunications Capability proceeding, CC Docket number 98-147. (Petition at 14.)

GTE believes it and Covad have already agreed to language that will resolve this issue. Specifically, the parties' draft Agreement, section 32.1, states that if changes are made to the legal requirements governing the contract when it was executed, then "[a]ny modifications to those requirements will be deemed to

automatically supersede any terms and conditions of [the] Agreement." The draft agreement further states that it is subject to any subsequently enacted federal or state laws, rules and regulations. If any such laws, rules, or regulations require the parties to negotiate, the parties shall agree on the compliance amendments within 30 days. If they do not, the parties shall resolve their dispute in accordance with the Agreement's dispute resolution procedures.

In view of this provision, Covad's suggested language specific to modification of collocation regulations is redundant and unnecessary. The parties' negotiated language will apply to all sections of the Agreement, including the collocation provisions. That language explicitly recognizes that the contract will change along with any legal or regulatory changes affecting the contract. Such contract changes will be automatic unless the new law or regulation requires the parties to negotiate. Even in this instance, there is a 30-day deadline, with resort to dispute resolution if the parties cannot agree on new language.

Although Covad's language does not include the reference to dispute resolution, that mechanism will be available, in any event, if the parties disagree about the nature of the contract changes necessary to effect the new law or regulation. There is, in summary, no difference in the purpose or effect of Covad's proposed collocation-specific provision and the general change-of-law provision governing the entire Agreement. In fact, the general provision allows for automatic changes, which Covad's language does not.

GTE believes that Covad may have overlooked the already existing draft language that resolves this issue. GTE expects that the parties' ongoing discussions will obviate the need to arbitrate this issue.

Issue 7: Space Planning

Covad asserts that GTE should consider the needs of Covad and other ALECs in its facilities planning process, in accordance with 47 C.F.R. section 51.323(f)(3). (Petition at 15.) GTE does not disagree, and believes the parties have now resolved this issue through negotiations.

* * *

In addition to the issues it presents for arbitration, Covad discusses a number of "miscellaneous resolved but outstanding issues." (Petition at 16-19.) No response to these issues is necessary here because, as Covad states, they have already been resolved through negotiations.

IV. PROCEDURAL MATTERS

Covad does not request a hearing in connection with this arbitration because it believes the relief it seeks does not present any disputed factual issues. Instead, Covad asks the Commission to assign an arbitrator to resolve the issues presented or perhaps consider Commission mediation of the disputed issues. Covad also

states that it would not object to consolidation of its nearly-identical arbitration petitions against GTE in Florida, North Carolina, and Virginia. (Petition at 20.)

GTE does not necessarily seek a hearing on Covad's arbitration Petition. However, GTE cannot agree that its Petition raises no disputed factual issues. In particular, Covad alleges that GTE committed a bad faith curtailment of all negotiations after the Supreme Court rendered the Iowa Utilities Board decision. As explained above, in Section I, GTE disputes this factual allegation.

Nevertheless, GTE believes it may be possible to avoid a hearing in this case. Ongoing discussions with Covad may well cause it to withdraw its request for bad faith sanctions against GTE. Likewise, GTE believes the parties will eventually resolve most or all of the specific issues presented for arbitration. If Covad does not, however, accept GTE's offer of the prices established in the GTE/AT&T arbitration, a hearing will likely be inevitable.

As the Commission knows, it does not assign individual arbitrators, as Covad suggests. Rather, it holds a full hearing before some or all of the Commissioners. This hearing process is conducted in accordance with Section 120.57 of the Florida Statutes.

While cancellation of the hearing in this case is, GTE believes, a reasonable possibility, it is probably necessary to pursue the requisite prehearing procedures while the parties continue to negotiate. GTE is not averse to mediation. But mediation is only necessary if and when the parties reach an impasse in

negotiations. Because the parties are still engaged in productive negotiations, mediation is not appropriate at this time.

Finally, GTE believes that consolidation of Covad's Florida arbitration Petition with the others it has filed elsewhere is not appropriate and not in keeping with this Commission's Rules and customs. Furthermore, all of the utilities commissions involved have adopted widely varying policies and rulings in past arbitrations. Those decisions will necessarily affect Covad's respective arbitrations. Because these various rulings cannot reasonably be reconciled, consolidation of the arbitration would be impractical.

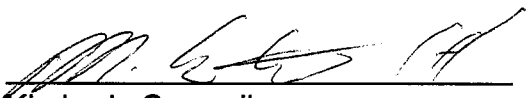
V. CONCLUSION

For all the reasons explained in this Response, GTE urges the Commission to reject Covad's positions, to the extent they are inconsistent with GTE's recommendations, and to incorporate into the interconnection agreement each of the positions GTE advocates in this proceeding.

In addition, GTE asks the Commission to reject Covad's request that the Commission "impose whatever remedy it deems appropriate" for GTE's asserted "deliberate refusal to engage in any substantive negotiations since the Supreme Court's Iowa decision on January 25, 1999." (Petition at 19.) There is no basis for this relief because GTE and Covad are, in fact, engaged in negotiations now. As GTE explained above, Covad incorrectly believed GTE had unilaterally suspended

all negotiations, when GTE indicated only a reasonable need to evaluate the effect of the Supreme Court's decision on substantive unbundling issues.

Respectfully submitted on March 12, 1999.

By: 

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Attorney for GTE Florida Incorporated

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of GTE Florida Incorporated's Response in Docket No. 990182-TP were sent via overnight delivery on March 11, 1999 to:

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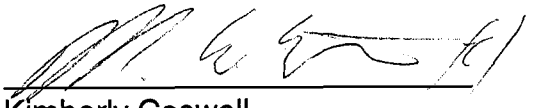

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