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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GTE FLORIDA INCORPORATED,

VS CASE NO. 4:97CV211-RH

JULIA L. JOHNSON, et al.,

JUDGMENT

This action came before the Court for consideration with the Honorable Robert L. Hinkle presiding. The issues have been considered and a decision has been rendered.

The Florida Public Service Commission's Final Order on Arbitration and Final Order Approving Arbitrated Agreement Between GTE and MCI are affirmed with respect to overall pricing methodology, allowing MCI to pick and choose the dark fiber provision from an agreement between GTE and another carrier, number portability, and adoption of statewide averaged rates on a transitional basis; declared invalid with respect to failure to arbitrate the open issues of whether the parties' agreement should include a limitation of liability provision, an audit and examination system, or an inquiry procedure with respect to the availability and location of conduit, poles, ducts and right-of-way; and vacated for further explanation or consideration with respect to the price of local loops, combining of network elements, wholesale pricing of directory assistance and operator services, continuing effects of statewide averaged rates, and whether GTE should be required to make its dark fiber network element available to MCI, all as set forth in the Order on Merits entered December 13, 2000. Defendant Commissioners of the Florida Public Service Commission shall conduct further proceedings consistent with the Court's Order on Merits, this judgment, and any decision of the United States Supreme Court on review of *Iowa Utilities Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000).

ROBERT A. MOSSING, CLERK

December 13, 2000
DATE

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

GTE FLORIDA INCORPORATED,

Plaintiff,

v. CASE NO. 4:97cv211-RH

JULIA L. JOHNSON, et al.,

Defendants.

ORDER ON MERITS

This is another in a series of challenges under the Telecommunications Act of 1996, 47 U.S.C. §§ 251-52, to decisions of the Florida Public Service Commission with respect to the terms and conditions under which an incumbent local exchange carrier must provide services and make facilities and network elements available to a competitor. All of the issues presented by this case have been resolved

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in prior orders of this court addressing other decisions of the Florida Commission. The issues are resolved in this order primarily by reference to those prior orders.

Background - The Statutory Framework

Historically, local telephone service was provided in the United States on a monopoly basis by carriers regulated under state law by state public service commissions. Congress fundamentally changed that approach by enacting the Telecommunications Act of 1996. The Act imposes on local carriers, as a matter of federal law, various duties designed to foster competition. The Act allows state commissions the option of taking a major role in implementing the Act's requirements.

The federal duties imposed on each "incumbent local exchange carrier" - that is, on each carrier who previously provided local service on a monopoly basis - include the obligation to sell local services at wholesale to any competing carrier for resale by the competing carrier to customers, the obligation to allow competitors to

interconnect with the incumbent's facilities for the purpose of providing services to the competitor's own customers, and the obligation to make certain "network elements" - parts of its telecommunications system - available to competing carriers for their use in providing service to their own customers. These duties are described in greater detail in MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., 2000 WL 1239840 (N.D. Fla. 2000).

The Act also imposes on each incumbent the duty to negotiate in good faith with any requesting carrier on the terms and conditions of an agreement under which these various duties will be fulfilled. See 47 U.S.C. § 251(c)(1). The Act likewise imposes on requesting carriers the duty to negotiate in good faith. Id.

If the parties reach a negotiated agreement, it must be submitted to the state commission for approval. See 47 U.S.C. § 252(e)(1). If the parties fail to agree on all terms and conditions, any party to the negotiation may request binding arbitration before the state commission of

"any open issues." 47 U.S.C. § 252(b)(1).[1]

The Act provides for judicial review of the commission's decisions in federal district court. See 47 U.S.C. § 252(e)(6). The case at bar is an action for judicial review under this provision.

Background - The Case at Bar

Plaintiff GTE Florida Incorporated ("GTE") is the incumbent local exchange carrier in parts of the State of Florida. Defendant MCI Telecommunications Corp. ("MCI") is a competitor. In accordance with the Telecommunications Act of 1996, GTE and MCI entered negotiations for an agreement under which MCI would purchase certain services for resale, would interconnect with GTE's facilities, and would have access to GTE's network elements. They were unable to agree on all terms and conditions of an agreement and thus sought and obtained arbitration before the Florida Public Service

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[1] If the state commission chooses not to act on either a negotiated agreement or request for arbitration, the Federal Communications Commission must assume the responsibilities of the state commission. See 47 U.S.C. § 252(e)(5).

Commission. Following an evidentiary hearing, the Florida Commission issued a final arbitration order and, in due course, an order approving the agreement entered between GTE and MCI as directed by the arbitration order. GTE now brings this action challenging the Florida Commission's decision in certain respects, and MCI counterclaims challenging the decision in other respects. GTE has named as additional defendants the individual Commissioners of the Florida Public Service Commission, in their official capacities.[2]

The parties have agreed that this court's review should be conducted based solely on the record as compiled in the Florida Commission. The parties have submitted briefs and presented oral argument, and more recently have submitted supplemental briefs addressing the decision of the United States Supreme Court in AT&T Corp. v. Iowa Utilities Bd.,

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[2] Such an action for judicial review of a state commission's decision may proceed against the individual commissioners in their official capacities in accordance with Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), and thus is not barred by the Eleventh Amendment. See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., 1997 WL 1133453 (N.D. Fla. 1997).

525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999).

This order constitutes the court's ruling on the merits.

Standard of Review

The Telecommunications Act provides for actions such as the case at bar in a single sentence:

> In any case in which a State commission makes a determination under [the Act], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [the Act].

47 U.S.C. § 252(e)(6).[3] The Act does not further specify the standard of review to be applied in determining "whether the agreement . . . meets the requirements of" the Act.

For the reasons set forth at length in MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., 2000 WL 1239840 (N.D. Fla. 2000), I will review *de novo* issues regarding the

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[3] The "agreement" to which this provision applies is an interconnection agreement of the type here at issue. The "statement" to which this provision applies is a statement of a Bell operating company of generally available terms. See 47 U.S.C. § 252(f). No such statement is involved here.

meaning and import of the Telecommunications Act, and I will review state commission determinations of how to implement the Act as so construed only under the arbitrary and capricicus standard. This apparently is the standard of review advocated by all parties to this proceeding.

Merits

I. PRICING

The Telecommunications Act directs state commissions to set "just and reasonable" prices for interconnection and network elements "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." 47 U.S.C. § 252(d)(1). The parties to this action dispute the proper method of calculating cost and specific pricing decisions.

For the reasons set forth in AT&T Comms., Inc. v. GTE Florida, Inc., No. 4:97cv300-RH (N.D. Fla. Dec. 12, 2000), I uphold the Florida Commission's pricing decisions in all

respects, except that I direct the defendant Commissioners to explain or further consider their decision with respect to the specific prices established for local loops.

II. COMBINING UNBUNDLED NETWORK ELEMENTS

For the reasons set forth in AT&T Comms., Inc. v. GTE Florida, Inc., No. 4:97cv300-RH (N.D. Fla. Dec. 12, 2000), I uphold the Florida Commission's determination that when GTE provides unbundled network elements to MCI that MCI uses to provide complete service, MCI may pay only the aggregate price of the unbundled network elements; MCI need not pay the wholesale price of complete service. I direct the defendant Commissioners to reconsider the issue of whether GTE or MCI must do the combining of the network elements.

III. PICK AND CHOOSE

For the reasons set forth in AT&T Comms., Inc. v. GTE Florida, Inc., No. 4:97cv300-RH (N.D. Fla. Dec. 12, 2000), I uphold the Florida Commission's determination that MCI properly could "pick and choose" the dark fiber provision of

GTE's interconnection agreement with another carrier.

IV. WHOLESALE PRICING

For the reasons set forth in AT&T Comms., Inc. v. GTE Florida, Inc., No. 4:97cv300-RH (N.D. Fla. Dec. 12, 2000), I uphold the Florida Commission's determination that the wholesale price GTE may charge MCI for operator and directory assistance services must be reduced by avoided costs, but I direct the defendant Commissioners to explain or further consider their decision regarding the appropriate amount of the reduction.

V. OPEN ISSUES

For the reasons set forth in AT&T Comms., Inc. v. GTE Florida, Inc., No. 4:97cv300-RH (N.D. Fla. Dec. 12, 2000), and MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., 2000 WL 1239840 (N.D. Fla. 2000), I conclude that the Florida Commission erred when it refused to arbitrate the open issues of whether the parties' agreement should include a limitation of liability provision, an audit and examination

system, or an inquiry procedure with respect to the availability and location of conduit, poles, ducts and right-of-way. The defendant Commissioners will be directed to arbitrate these open issues.

VI. NUMBER PORTABILITY

For the reasons set forth in AT&T Comms., Inc. v. GTE Florida, Inc., No. 4:97cv300-RH (N.D. Fla. Dec. 12, 2000), I uphold the Florida Commission's determination on number portability.

VII. GEOGRAPHIC DEAVERAGING

For the reasons set forth in AT&T Comms., Inc. v. GTE Florida, Inc., No. 4:97cv300-RH (N.D. Fla. Dec. 12, 2000), and AT&T Comms., Inc. v. BellSouth Telecomms., Inc., No. 4:97cv262-RH (N.D. Fla. Sept. 28, 2000), I conclude that (1) the Florida Commission's adoption of statewide averaged rates, on a transitional basis, did not violate the Act and was not arbitrary and capricious, but that (2) effective as of May 1, 2000, the Florida Commission became obligated to

deaverage rates over at least three geographic areas, in accordance with 47 C.F.R. § 51.507(f).

Because of the passage of time, it is unclear whether the Florida Commission's decision now under review will continue to have effects inconsistent with 47 C.F.R. § 51.507(f). The defendant Florida Commissioners thus will be directed to reconsider their decision to assure that it does not produce results inconsistent with that rule.

VIII. DARK FIBER

For the reasons set forth in MCI Telecomms. Corp. v. BellSouth Telecomms., Inc., 2000 WL 1239840 (N.D. Fla. 2000), I conclude that dark fiber is a "network element" within the meaning of the Telecommunications Act of 1995. The defendant Commissioners will be directed to consider further the issue of whether GTE should be required to make its dark fiber network element available to MCI.

Conclusion

The Florida Commission's determinations were consistent with the Telecommunications Act of 1996 and not arbitrary and capricious with respect to overall pricing methodology, pricing of network elements combined to provide entire service, a carrier's ability to pick and choose provisions from an interconnection agreement between other carriers, number portability, and statewide averaged rates on a transitional basis. The Florida Commission's refusal to arbitrate open issues and failure to treat dark fiber as a network element contravened the Telecommunications Act. The Florida Commissioners will be directed to explain or consider further their determinations on other issues as set forth above.

In accordance with these rulings,

IT IS ORDERED:

The clerk shall enter judgment stating, "The Florida Public Service Commission's Final Order on Arbitration and Final Order Approving Arbitrated Agreement Between GTE and

MCI are affirmed with respect to overall pricing methodology, allowing MCI to pick and choose the dark fiber provision from an agreement between GTE and another carrier, number portability, and adoption of statewide averaged rates on a transitional basis; declared invalid with respect to failure to arbitrate the open issues of whether the parties' agreement should include a limitation of liability provision, an audit and examination system, or an inquiry procedure with respect to the availability and location of conduit, poles, ducts and right-of-way; and vacated for further explanation or consideration with respect to the price of local loops, combining of network elements, wholesale pricing of directory assistance and operator services, continuing effects of statewide averaged rates, and whether GTE should be required to make its dark fiber network element available to MCI, all as set forth in the Order on Merits entered December 13, 2000. Defendant Commissioners of the Florida Public Service Commission shall conduct further proceedings consistent with the Court's Order on Merits, this judgment, and any decision of the

United States Supreme Court on review of Iowa Utilities Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000)." The clerk shall close the file.

SO ORDERED this 13th day of December, 2000.

Robert L. Hinkle
United States District Judge