

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of DIECA
Communications, Inc. d/b/a Covad
Communications Company for
arbitration to establish
interconnection agreement with
GTE Florida Incorporated.

DOCKET NO. 990182-TP
ORDER NO. PSC-99-0715-PHO-TP
ISSUED: April 15, 1999

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on April 5, 1999, in Tallahassee, Florida, before Commissioner E. Leon Jacobs, as Prehearing Officer.

APPEARANCES:

James D. Earl, Esquire, and Thomas Koutsky, Esquire, 700
13th Street NW, Suite 950, Washington, D.C. 20005.
On behalf of DIECA Communications, Inc. d/b/a Covad
Communications Company.

Kimberly Caswell, Esquire, One Tampa City Center, 201
North Franklin Street, Post Office Box 110, FLTC0007,
Tampa, Florida 33601-0110.
On behalf of GTE Florida Incorporated.

Beth Keating, Esquire, and Catherine Bedell, Esquire,
Florida Public Service Commission, 2540 Shumard Oak
Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff.

PREHEARING ORDER

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

DOCUMENT NUMBER-DATE

04788 APR 15 99

FPSC-RECORDS/REPORTING

II. CASE BACKGROUND

On September 9, 1998, DIECA Communications Inc. d/b/a Covad Communications Company (Covad) requested interconnection negotiations with GTE in three states, including GTE Florida Incorporated (GTEFL) pursuant to Section 252 of the Telecommunications Act of 1996 (the Act). The parties were unable to reach agreement on a number of issues. Therefore, Covad filed this Petition for Arbitration of the unresolved issues on February 16, 1999. This matter has been set for hearing April 28, 1999.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183(4), Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing.

The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer

than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
James D. Earl	Covad	All Issues
*Chuck Haas	Covad	All Issues

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
Michelle Meny	GTEFL	1
Dennis Trimble	GTEFL	1
Samuel M. Jones	GTEFL	2-6

Rebuttal

*Terry Murray	Covad	1
Samuel M. Jones	GTEFL	All Issues

*The testimony of these witnesses was not prefiled. See Section XI of this Order.

VII. BASIC POSITIONS

COVAD: Covad seeks an interconnection agreement that will render it commercially and competitively viable in Florida. To that end, it seeks assistance, through arbitration, to counterbalance the disparity in bargaining power with GTE. Of particular concern is Covad's ability to obtain elements at rates, terms, and conditions that are just, reasonable and non-discriminatory and in full compliance with federal pricing rules.

GTEFL: The UNEs Covad seeks in this proceeding (loops, NIDs, and transport) should be priced at the rates GTEFL proposed in its arbitration with AT&T and MCI, concluded in 1997. In an effort to avoid a hearing in this matter, however, GTEFL will make available to Covad the rates the Commission ordered in that earlier arbitration, and which numerous other alternative local exchange carriers (ALECs) have adopted. Petitions by AT&T Comm. Of the Southern States, Inc., MCI Telecomm. Corp. And MCI Metro Access Transmission Services, Inc., Order No. PSC-97-0064-FOF-TP (Jan. 17, 1997). Covad's request for the Commission to price UNEs using the FCC's default proxies makes no sense, because this Commission has already ordered rates based on GTEFL's cost studies in previous arbitrations.

GTEFL will not oppose Covad's request to use loops and NIDs for special access service, and it will agree to consider the collocation requirements of Covad in its space planning process.

GTEFL will not agree to a contract provision mandating collocation tariff modifications in the event of legal or regulatory changes affecting collocation terms and conditions. Such a provision is unnecessary, given the general change-of-law provision already in the draft Agreement.

GTEFL opposes arbitration of the dispute resolution and limitation of liability issues Covad has proposed. These issues have not been accepted for arbitration. They are beyond the scope of this proceeding because they do not concern substantive items reflected in Section 251 and 252 of the Telecommunications Act of 1996 (Act). This position is consistent with Commission rulings in other arbitrations.

STAFF: Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

ISSUE 1: What price should apply to the following:

- A. Unbundled Loops
- B. NIDs
- C. Transport

POSITIONS

COVAD: Covad does not believe that GTEFL offers loops, NIDs and transport to Covad in compliance with the federal pricing rules, 47 C.F.R. §§51.501-51.515. Covad also believes that the Florida state process underlying the GTE offer of loops and transport to Covad is not in compliance with the federal pricing rules. Covad believes that the

Supreme Court decision in *AT&T Corp. V. Iowa Util. Bd.*, Nos. 97-826 et al., issued January 25, 1999, compels the Florida Public Service Commission to apply the federal pricing rules to the rates, terms and conditions for GTE's provision of loops, NIDs, and transport to Covad in this arbitration. Covad believes the Commission should apply the proxies for forward-looking economic cost, 47 C.F.R. § 51.513, absent a state proceeding conducted in conformity with the federal pricing rules within the arbitration period.

GTEFL: The prices GTEFL proposed in its arbitration with AT&T and MCI (consolidated Dockets 960847-TP and 960980-TP) should apply to the listed UNES. GTEFL would, however, make available the prices the Commission set in that arbitration, subject to appropriate reservation of GTEFL's rights to appeal those rates and to any true-up if the rates are later found unlawful. All prices should include associated non-recurring charges.

STAFF: Staff takes no position at this time.

ISSUE 2: Should Covad's use of loops and NIDs allow for the provision of special access service?

POSITIONS STIPULATED - The parties have reached an agreement on Issues 2 and 4. They will submit the agreed language at a later date.

ISSUE 3: Should there be a 30-day period for the filing of tariffs to implement changes in regulation regarding collocation?

POSITIONS

COVAD: Covad believes that, if tariffs are to control prices, terms and conditions of Unbundled Network Elements, then GTE should commit to conform those tariffs to applicable state and federal requirements within an appropriate time period. Change of law provisions relating to the interconnection agreement do not apply to separate, independent tariffs.

GTEFL: No. This arbitration is not the appropriate forum for a general rule mandating tariff changes if collocation regulations change. Such a provision is, in any event, unnecessary because the draft contract already contains a general change-of-law clause that subjects the agreement to subsequent legal and regulatory changes.

STAFF: Staff takes no position at this time.

ISSUE 4: Should GTEFL be required to take into consideration Covad's present and future collocation requirements when GTEFL plans renovations of existing facilities or constructs or leases new facilities?

POSITIONS STIPULATED - The parties have reached an agreement on Issues 2 and 4. They will submit the agreed language at a later date.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
			<u>Direct</u>
James D. Earl	Covad	_____ (JDE-1)	Decisions of State Commissions relating to the GTE COSTMOD and SCIS models
James D. Earl	Covad	_____ (JDE-2)	GTE's federal tariff for ADSL service
James D. Earl	Covad	_____ (JDE-3)	Current proposed tests of open issues

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
James D. Earl	Covad	_____ (JDE-4)	Print - Out Copies of GTE web site offers of DSL service

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. STIPULATIONS

The parties have reached an agreement on Issues 2 and 4. They will submit the agreed language at a later date.

XI. RULINGS

A. Disputed Issues

At the March 9, 1999, issues identification meeting, a dispute arose as to whether certain issues should be included for arbitration in this proceeding. The issues, proposed by Covad, related to dispute resolution procedures and limitation of liability. GTEFL argued that this Commission has never arbitrated these types of issues and has indicated in the past that it would ". . . limit [its] consideration to the items enumerated in Sections 251 and 252 . . . and matters necessary to implement these items." Citing Order No. PSC-97-0064-FOF-TP, issued January 17, 1997, in Dockets Nos. 960847-TP, and 960980-TP. GTEFL noted that a recent federal court opinion has upheld a similar view expressed by the Kentucky Public Service Commission. Citing MCI Telecomm. Corp. And MCIMetro Access Transmission Services, Inc. V. BellSouth Telecomm., Inc., Ky. P.S.C. et al., Civ. Action no. 97-76, slip op. (U.S. D.C. E.D. Ky., March 11, 1999) at 30-31.

Covad asserted that we must arbitrate every open issue in Covad's petition. Covad argued that the language in Section 252(b)(4)(c) should be read broadly. That language states that the state commission must ". . . resolve each issue set forth in the petition and the response. . . ." Covad believes it is important for the Commission to address these issues, because of the

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disparity in the bargaining power between GTEFL and Covad. Covad adds that if we do not address these issues, Covad may seek to remove this arbitration to the FCC pursuant to Section 252(e)(5) for failure to carry out the Commission's responsibility regarding this arbitration.

As noted by GTEFL, we have refrained from addressing these types of issues in arbitrations, and have focused, instead, upon the substantive requirements of Sections 251 and 252 of the Act. As explained in Order No. PSC-97-0064-FOF-TP,

We will limit our consideration to the items enumerated in Sections 251 and 252 to be arbitrated, and matters necessary to implement those items. Neither liability, indemnification nor liquidated damages provisions fall within that limitation.

Order at p. 98.

As we also explained in that Order, the parties should not need our assistance in establishing contractual provisions that provide each adequate protection. I believe that the same rationale holds true in this case as well. These issues shall, therefore, be removed from the list of issues for determination in this proceeding.

I must, however, emphasize that removal of these issues from this arbitration proceeding in no way lessens GTEFL's duty to negotiate any remaining open contractual matters with Covad in good faith in accordance with 47 U.S.C. § 251 (c)(1) of the Act. This decision does not prevent Covad from filing a complaint with us should GTEFL fail to abide by § 251(c)(1) in negotiating these provisions, nor does it give GTEFL carte blanche to impose on Covad unfair or discriminatory provisions in these areas.

B. Witnesses

Covad listed two witnesses in its prehearing statement for whom it has not prefiled testimony and exhibits in accordance with the Order Establishing Procedure for this Docket.

Covad has indicated that Terry Murray has had insufficient time to review the cost studies provided to Covad by GTEFL on March 26, 1999. Covad has asked for leave to late-file rebuttal

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testimony for this witness. Covad's request is granted. Covad must, however, file the testimony and exhibits for this witness on or before April 20, 1999, and must serve GTEFL with copies by express mail.

As for Chuck Haas, Covad has requested that Mr. Haas be allowed to either adopt portions of Mr. Earl's direct testimony relating to the commercial and competitive impact of the pricing of UNEs, or to file additional testimony addressing these points. GTEFL objects to this proposal. Due to the unusual nature of the request, I hereby direct the parties to attempt to negotiate a resolution. If, however, the parties are unable to agree, Covad may request leave to file Mr. Haas's testimony. In view of the approaching hearing date, the parties are encouraged to resolve this issue as expeditiously as possible.

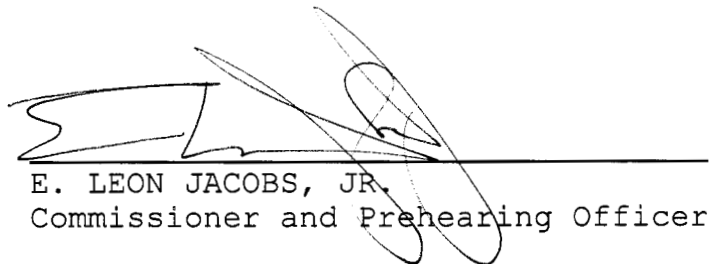
C. Discovery Deadline

The discovery deadline set forth in Order No. PSC-99-0507-PCO-TP shall be extended to April 26, 1999.

It is therefore,

ORDERED by Commissioner E. Leon Jacobs, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 15th day of April, 1999.


E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

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		4/13/99	①
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CITY	TAMPA	STATE	ZIP
		FL	33602
SENT BY:	CASWELL/LEGAL 813-483-2606		
PHONE			
TO	DIECA Comm. INC. DBA COVAD		
ADDRESS	2330 CENTRAL EXPRESSWAY, BLDG. B		
CITY	SANTA CLARA	STATE	ZIP
		CA	95050
ATTN:			
	PHONE		

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April 14, 1999

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RECORDS AND
REPORTING

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) *BK*

RE: DOCKET NO. 990182-TP - PETITION OF DIECA COMMUNICATIONS,
INC. D/B/A COVAD COMMUNICATIONS COMPANY FOR ARBITRATION
TO ESTABLISH INTERCONNECTION AGREEMENT WITH GTE FLORIDA
INCORPORATED.

99-0715-PHD

Attached is a PREHEARING ORDER, to be issued in the above-referenced docket. (Number of pages in order - 12)

BK/anr
Attachment
cc: Division of Communications
I: 990182po.bk

2/0 -

MUST GO TODAY

FLORIDA PUBLIC SERVICE COMMISSION - RECORDS AND REPORTING

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Notice of _____ For (Date) _____ In Docket No. _____
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Date and Time Completed 4/22 Job Checked For Correctness and Quality (Initial) [Initials]

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Date Mailed / Verified By /