BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for arbitration of open issues resulting from interconnection negotiations with Verizon Florida Inc. by DIECA Communications, Inc. d/b/a Covad Communications Company.	DOCKET NO. 020960-TP ORDER NO. PSC-04-0106-FOF-TP ISSUED: January 30, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION

Background

On September 6, 2002, DIECA Communications, Inc, d/b/a Covad Communications Company (Covad) petitioned this Commission to arbitrate certain unresolved interconnection terms, conditions and prices in an agreement with Verizon Florida Inc. (Verizon). Verizon filed its response to Covad's petition on October 1, 2002. This matter was set for an administrative hearing on April 16-18, 2003, by Order No. PSC-02-1589-PCO-TP, issued November 15, 2002. However, upon joint petition by the parties, the hearing date was reset for May 14 and 15, 2003, by Order No. PSC-03-0155-PCO-TP, issued January 30, 2003.

At the prehearing, the parties stipulated to a "paper hearing," whereby all testimony and exhibits would be stipulated into the record with cross-examination waived. Accordingly, the hearing was held on May 14, 2003, consistent with that stipulation. Both parties filed their post-hearing briefs on June 16, 2003. On October 13, 2003, the Final Order on Arbitration, Order No. PSC-03-1139-FOF-TP, was issued.

On October 28, 2003, Covad filed its Motion for Reconsideration of a portion of Order No. PSC-03-1139-FOF-TP. On November 4, 2003, Verizon filed its Opposition to Covad's Motion for Reconsideration.

Covad seeks reconsideration of this Commission's decision on Issue No. 1 in the Prehearing Order, which reads as follows:

> 1. If a change of law, subject to appeal, eliminates one or more of Verizon's obligations to provide unbundled network elements or other services required under the Act and the Agreement resulting from this proceeding, when should that change of law provision be triggered?

That issue pertains to Section 4.7 of the agreement, which contains an initial paragraph upon which there is agreement between the parties. The agreed language reads:

> If any legislative, regulatory, judicial or other governmental decision, order, determination or action, or any change in Applicable Law, materially affects any material provision of this Agreement, the rights or obligations of a Party hereunder, or the ability of a Party to perform any material provision of this Agreement, the Parties shall promptly renegotiate in good faith and amend in writing this Agreement in order to make such mutually acceptable revisions to this Agreement as may be required in order to conform the Agreement to Applicable Law.

The dispute in the arbitration proceeding arose from competing proposals for an additional provision in Section 4.7. Covad proposes as its "best and final offer to Verizon," additional language for Section 4.7 that states as follows:

> During the pendency of any renegotiation or dispute resolution, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, unless the Commission, the Federal Communications Commission, or a court of competent jurisdiction determines that modifications to this Agreement are required to bring it into compliance with the Act, in which case the Parties shall perform their obligations in accordance with such determination or ruling.

In contrast, Verizon proposed the following additional language for the referenced section of the agreement:

> Notwithstanding anything in this Agreement to the contrary, if, as a result of legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in applicable law, Verizon is not required by applicable law to provide any service, payment or benefit, otherwise required to be provided to Covad hereunder, then Verizon may discontinue immediately the provision of any arrangement for such Service, payment or benefit, except that existing arrangements for such Services that are already provided to Covad shall be provided for a transition period of up to forty-five (45) days, unless a different notice period or different conditions are specified in this Agreement (including,

> but not limited to, in an applicable Tariff) or Applicable Law for termination of such Service in which event such specified period and/or conditions shall apply.

The final Order held that a change in law should be implemented when the law takes effect, unless it is stayed by a court or commission having jurisdiction. This Commission found that Verizon's proposed language was more consistent with this principle than Covad's language.

Arguments

Covad explains that the parties agreed on the first part of Section 4.7, the general change in law provision. They disagreed, however, over whether there should be an additional provision specifically addressing changes in the law affecting one part of their relationship, the provision of UNEs, in addition to the general change in law section.

Covad urges that we reconsider our arbitration Order because the Order was based on two errors - one of fact and one of law. According to Covad, we expressly relied upon one incorrect factual statement and one erroneous legal assertion in the Order. The alleged error of fact is the statement in the Final Order that:

> Covad did not cite an instance where its specific position has been adopted.

Order No. PSC-03-1139-FOF-TP at p. 10

Regarding this statement, Covad cites two instances from its post-hearing brief where it reported that language similar to that proposed by Covad was adopted in other states. One was the New York AT&T arbitration with Verizon, and the other was the Virginia Arbitration Award, wherein Verizon's proposed language was specifically rejected. Therefore, Covad argues it did cite to "an instance where its specific position has been adopted." Covad maintains that this statement indicates that we based our decision on an erroneous understanding of the facts.

The alleged error in law is the statement in the Final Order that:

> We also note that in a recent decision on the identical issue this Commission ruled that a change in law should be implemented when the law takes effect, unless it is stayed by a court or commission having jurisdiction.

Covad acknowledges that in the arbitration involving Global NAPS, Order No. PSC-03-0805-FOF-TP, this Commission found that a change in the law should be implemented when it takes effect. However, Covad points out that the same Order specifically rejected having another change-in-law provision in addition to the general change-in-law provision contained in the agreement. Covad cites to the Global NAPS Order, which states:

> We believe there are few industries more dynamic than telecommunications. The possibility of a change in the law affecting any provision of any interconnection agreement is ever present; thus, the general change-in-law provision. It is not apparent to us that the general change-in-law provision is inadequate in the event of a change in the law affecting the ISP issue. Additionally, it would be inconsistent to include a specific provision for ISP issues and not for other issues which may also see change in the foreseeable future.
>
> We find that the parties' interconnection agreement need not include a change-in-law provision specifically devoted to the ISP Remand Order.

Covad argues that what Verizon proposes in this instance is "akin to" the additional change-in-law provision this Commission rejected in Order No. PSC-03-0805-FOF-TP in the GNAPS arbitration.

Accordingly, Covad argues, our decision was based on errors of law and fact. Therefore, we should reconsider our Order in this arbitration.

Verizon argues that Covad has not met the standard for reconsideration of the challenged ruling. Though Covad argues that we did not give sufficient weight to rulings of the New York Public Service Commission and of the Wireline Competition Bureau of the Federal Communications Commission, Verizon notes that this Commission explicitly acknowledged both decisions and simply took a different approach by adopting Verizon's proposal.

Regarding our statement that "Covad did not cite an instance where its specific position has been adopted," Verizon maintains that this Commission correctly found that Covad had identified no state commission or court that had ever approved the language that Covad proposed when it filed its arbitration petition - and Covad does not claim otherwise. Verizon emphasizes that the cited order by the New York Public Service Commission approved Covad's revised proposal. Likewise, the Virginia Award, an order of the FCC's Wireline Competition Bureau, approved similar language to that approved in New York. Verizon urges that this Commission did not overlook any of these points, because the Order expressly references Covad's arguments with respect to both the New York PSC's and the Wireline Competition Bureau's decisions. Verizon further points out that none of the decisions cited by Covad are binding on this Commission.

As to the second issue raised in Covad's Motion, Verizon notes that Covad does not dispute that the GNAPS Arbitration Order held that "a change in law should be implemented when the law takes effect," nor does it claim that the language the Commission adopted is inconsistent with that holding. Rather, Verizon noted, Covad points to another section of that Order, claiming that an agreement should not contain "multiple change in law provisions."

Verizon argues that in the GNAPS order, the rejected provision explicitly required the parties to renegotiate the reciprocal compensation provisions in their agreement in the event of a change in the law modifying the FCC's ISP Remand Order. However, this Commission found that requirement already existed in the existing, negotiated change-in-law provisions in the agreement; thus, the requested provision was superfluous. In contrast, the present dispute is over when Verizon may discontinue providing Covad with access to a UNE or other arrangement following a change in the law eliminating Verizon's obligation to provide such access. No other provision of the present agreement addresses that issue and, Verizon argues, there is no inconsistency between our decision in the present matter and the GNAPS Arbitration Order.

Analysis

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

The first of the two-pronged challenge that forms the basis for the Motion for Reconsideration is the statement in the Order that "Covad did not cite any instance where its proposed language had been adopted." Covad alleges that statement to be an "error of fact." We concede that the statement is incorrect due to the absence of a key modifier, as is obvious by the discussion in the Order concerning the two decisions cited by Covad. That discussion in the Order, however, makes it abundantly clear that this Commission in its deliberations did consider the Covad cited instances wherein its position was accepted in the New York PSC order and the Virginia Arbitration Award. The first paragraph of the discussion of Issue 1 in the challenged order references both of those decisions.

We note that those decisions are not binding on this Commission, and are inconsistent with our past holdings that a change in law should be implemented when the law takes effect. Accordingly, inclusion or exclusion of the statement would have no effect on our ultimate findings. Those cited instances having been considered, we believe that Covad's Motion "reargues matters that have already been considered," and is not a valid basis for granting reconsideration. We do, however, clarify the referenced sentence as follows, "Covad did not cite any persuasive instance where its proposed language had been adopted."

The second challenge alleges that the Order misconstrues the precedent upon which it relies, resulting in an error of law. The cited precedent is Order No. PSC-03-0805-FOF-TP, issued as a final arbitration order in a GNAPS/Verizon agreement dispute. It is our opinion that the cited precedent is consistent with the decision in the present case.

Covad cites two portions of the GNAPS order in support of its Motion. The first portion addresses the issue of when change-in-law provisions should be triggered. There is no disagreement from any party or from our staff that the decision in the GNAPS/Verizon proceeding was that a change-in-law should be implemented when it takes effect. Therefore, there is no inconsistency, and on that point it is sound precedent. However, Covad urges that the more relevant issue from the GNAPS order is that later in that Order this Commission rejected the addition of a narrowly focused change-in-law provision, and yet allowed the inclusion of a somewhat similar additional change-in-law provision in the present proceedings.

We find that the challenged ruling in the present matter is not "akin to" the redundant and specific change-in-law provision the Commission rejected in the GNAPS/Verizon arbitration. In GNAPS, the disallowed change-in-law provision was simply another provision stating that if there was a change-in-law in a very specific subject area, that change would be implemented upon becoming law. In the present dispute, the gravamen of the challenged Issue 1 concerns Verizon's right, absent a commission or court order to the contrary, to discontinue a service to Covad 45 days after a change in the law that relieves Verizon of the obligation to provide that service. This provision is not redundant of the provision the parties have already agreed should be included. Therefore, we believe the GNAPS/Verizon decision on the point argued by Covad is, in fact, distinguishable. Even if the change-in-law provision addressing UNEs were found to be redundant, as in the GNAPS case, it would still not meet the standard for reconsideration. Not only is it undisputed that the approved additional provision at issue here and the provision rejected in the GNAPS case address different aspects of different parties' relationships, but also the decision in this case was based on a different record. As such, while our decision might reflect a slight deviation from a prior ruling in another case (which it does not), such deviation does not result in a mistake of law, but rather a different decision based on different facts and circumstances.

Decision

We find that neither prong of Covad's two-prong challenge to the order on Issue 1 in the present proceeding rises to the standard requiring the granting of Covad's Motion for Reconsideration. Accordingly, Covad's Motion will be denied. Order No. PSC-03-1139-FOF-TP is clarified as set forth in the body of this Order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that DIECA Communications, Inc, d/b/a Covad Communications Company's Motion for Reconsideration is hereby denied and that Order No. PSC-03-1139-FOF-TP is clarified as set forth herein. It is further

ORDERED that this Docket shall remain open pending the submission of a properly executed conforming Agreement. Thereafter, our staff shall review the Agreement and, if in compliance with the findings of this Commission, administratively approve the Agreement and close the Docket.

By ORDER of the Florida Public Service Commission this 30th day of January, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.