

**ORIGINAL
FILE COPY**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Arbitration of Terms and)
Conditions Between ICG)
Telecom Group, Inc. and GTE)
Florida Incorporated,)
Pursuant to 47 U.S.C. § 252)
_____)

Docket No. 970336-78

Filed: March 18, 1997

**DIRECT TESTIMONY OF CINDY ZARA SCHORHAUT
ON BEHALF OF ICG TELECOM GROUP, INC.**

DOCUMENT NUMBER - DATE
02826 MAR 18 97
FPSC-RECORDS/REPORTING

ORIGINAL.
THE COPY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Arbitration of Terms and)
Conditions Between ICG)
Telecom Group, Inc. and GTE)
Florida Incorporated,)
Pursuant to 47 U.S.C. § 252)
_____)

Docket No.

Filed: March 18, 1997

**DIRECT TESTIMONY OF CINDY ZARA SCHONHAUT
ON BEHALF OF ICG TELECOM GROUP, INC.**

DOCUMENT NUMBER-DATE

02826 MAR 18 97

FPSC-RECORDS/REPORTING

1 **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

2 **DIRECT TESTIMONY OF CINDY ZARA SCHONHAUT**

3 **ON BEHALF OF ICG TELECOM GROUP, INC.**

4 **Q. PLEASE STATE YOUR NAME, ADDRESS AND EMPLOYMENT.**

5 **A. My name is Cindy Zara Schonhaut and I am Senior Vice President for**
6 **Government Affairs and Acting General Counsel for ICG**
7 **Communications, Inc., the parent company of ICG Telecom. My office**
8 **is at 9605 East Maroon Circle, Englewood, Colorado, 80112.**

9 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND WORK**
10 **EXPERIENCES.**

11 **A. I have 17 years experience in the telecommunications industry, in**
12 **particular in government affairs matters. I have been with the**
13 **competitive local telecommunications industry for over six years. I had**
14 **been the Vice President for Government Affairs at ICG Corporate for less**
15 **than one year when I was promoted to Senior Vice President. I came to**
16 **ICG after almost five years as a Vice President for Government Affairs**
17 **with MFS Communications, where I was responsible for federal and state**
18 **regulatory and legislative matters. In particular, I testified before several**
19 **state regulatory agencies in order to obtain authorization for MFS to**
20 **provide local telecommunications services and in an effort to persuade**
21 **regulators to adopt pro-competitive public policies. I also represented**
22 **MFS by lobbying Congress leading up to passage of the**
23 **Telecommunications Act of 1996 and worked to bring about the local**

1 competition policies developed by the Federal Communications
2 Commission (FCC). Previously, I was an attorney with the FCC and
3 handled various common carrier and telecommunications issues,
4 including the development and implementation of access charges,
5 deregulatory initiatives, incentive regulation and pro-competitive public
6 policies. I was one of the attorneys assigned to implement the
7 divestiture of the former Bell System in 1984. From 1986 to 1989 I was
8 Special Counsel to the Federal/State Joint Board responsible for
9 jurisdictional separations and universal service subsidy policies. In that
10 role, I also represented the FCC before all state regulatory agencies
11 regarding telecommunications matters, including representation before
12 the National Association of Regulatory Utility Commissioners (NARUC).
13 Later, I served as the Legal Advisor for common carrier matters to FCC
14 Commissioner Andrew C. Barrett, before joining MFS Communications
15 in 1991.

16 **Q. HAVE YOU PARTICIPATED IN THE NEGOTIATIONS WITH GTE?**

17 **A.** Yes. I participated personally in most of the negotiating sessions as
18 ICG's in-house counsel and regulatory expert.

19 **Q. WHAT IS THE FORMAT OF YOUR TESTIMONY?**

20 **A.** My testimony follows the issues matrix that has been submitted as a part
21 of the arbitration petition.

22 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

1 **A.** The purpose of my testimony is to address areas of disagreement
2 between ICG and GTE not addressed by Mr. John Boersma. My
3 intention is to present ICG's position on each issue and the reasons that
4 underlie that position.

5 **Q.** **HAVE GTE AND ICG BEEN ABLE TO COME TO AN AGREEMENT IN THE**
6 **AREA OF POST TERMINATION ARRANGEMENTS?**

7 **A.** No.

8 **Q.** **CAN YOU DESCRIBE THE DIFFERENCES?**

9 **A.** ICG believes that interconnection arrangements in place at the
10 termination of the agreement should remain in place under the terms of
11 the agreement until GTE and ICG are able to reach and implement a new
12 interconnection agreement. This would allow ICG to begin to compete
13 in the marketplace and enter into long-term arrangements with customers
14 without worrying that at the end of the term of the agreement, GTE
15 could raise the rates on existing arrangements in a manner that made it
16 necessary for ICG to terminate arrangements to customers. If GTE and
17 ICG were not able to come to an agreement with respect to the
18 continuing terms and conditions for the embedded customers, i.e., for
19 those interconnection arrangements in place at the termination of the
20 agreement, either ICG or GTE could resort to some form of arbitration or
21 dispute resolution process. But customers should not have to be left in
22 danger of losing service because GTE and ICG cannot come to

1 agreement.

2 Since GTE is the bottleneck provider, and will continue to be so for
3 the foreseeable future, ICG cannot be in a business position where GTE
4 can make it uneconomic for ICG to enter into long term arrangements
5 with potential customers. Even in the absence of such long term
6 arrangements, if GTE can simply raise the prices of services to whatever
7 level it deems appropriate or significantly change the terms and
8 conditions at the end of the contract term, ICG's relationships with its
9 customers are rendered inherently unstable.

10 ICG recognizes that if it wanted to service new customers after
11 termination of the Agreement it might have to take service under
12 generally available terms and conditions approved by the Commission or
13 under tariffed terms and conditions. But that is an entirely different issue
14 than whether ICG should be exposed to a whole new pricing structure
15 in order to provide service to embedded customers.

16 **Q. IS THE ARRANGEMENT YOU PROPOSE CONSISTENT WITH THE**
17 **TELECOMMUNICATIONS ACT OF 1996?**

18 **A. Yes.** It would allow competitive entry into the local exchange market
19 served by GTE while assuring GTE of continuing compensation for those
20 arrangements provided during the term of the agreement. Since
21 presumably these arrangements have already been priced consistent with
22 the mandate of the Act, and because, as reflected in the FCC's and

1 many state "Price Cap" or other incentive regulatory regimes,
2 telecommunications is a declining cost industry, GTE would certainly be
3 receiving fair compensation.

4 **Q. WHAT IS THE NEXT AREA THAT YOU WOULD LIKE TO DISCUSS**
5 **WHERE ICG AND GTE HAVE BEEN UNABLE TO REACH AGREEMENT?**

6 **A. The next area is whether GTE should be able to avoid its obligations**
7 **under the agreement by selling off a part of its local exchange service.**

8 **Q. PLEASE DESCRIBE ICG'S POSITION.**

9 **A. ICG believes that if either ICG or GTE sells or otherwise transfers a**
10 **specific operating area or any portion thereof, the agreement should**
11 **continue to be binding on the purchaser or transferee. This approach is**
12 **the normal way in which most commercial transactions work. In the**
13 **absence of such a provision, if GTE sells off a portion of its operating**
14 **territory, ICG could not necessarily continue to provide services to a**
15 **customer to whom it may have made a long term commitment in**
16 **reasonable reliance on the agreement with GTE. GTE's decisions**
17 **regarding sale of exchanges would be able to disrupt ICG's customer**
18 **relations, particularly since customers are often looking to consolidate**
19 **their telecommunications business with a single provider across different**
20 **areas. ICG could not offer any customer in any GTE territory any**
21 **assurance that ICG would be able to continue to offer service in the**
22 **event GTE elected to sell off a portion of its local exchange operations.**

1 **Q. WHAT IS THE ICG'S POSITION REGARDING BILLING DISPUTES FOR**
2 **BILLS THAT ICG HAS ALREADY PAID?**

3 **A. ICG believes that once it has paid a bill, it should have up to one year to**
4 **raise billing disputes. In some cases, in the early phases of serving a**
5 **market, ICG may not have enough experience with the market to realize**
6 **that a particular bill is anomalous, even though ICG's subsequent**
7 **experience in that market will make the anomaly apparent. Furthermore,**
8 **bills are generally paid within routine billing and payment cycles. Billing**
9 **errors, by contrast, may not be picked up until there is an audit and**
10 **review of the bills that have been paid. GTE would suffer no real**
11 **detriment under ICG's proposal since it will already have been paid. ICG**
12 **only seeks to preserve its rights to raise billing errors under this**
13 **provision.**

14 **GTE believes ICG should have only 30 days after a bill is rendered-**
15 **-whether paid or not--to raise a billing dispute. This would create the**
16 **perverse incentive to dispute every bill where there could be any**
17 **question regarding that bill instead of paying the routine bills and**
18 **conducting routine audits of bills after the fact. The latter is a more**
19 **desirable commercial practice.**

20 **Q. TURNING TO CONFIDENTIAL INFORMATION, WHAT IS THE**
21 **DIFFERENCE OF OPINION BETWEEN ICG AND GTE?**

22 **A. ICG believes that a party receiving confidential information who desires**

1 to disclose that information to a relevant regulatory authority should be
2 able to disclose the information to that authority if the party (i) provides
3 adequate notice to the other party; and (ii) permits the other party to
4 seek confidential treatment for the confidential information under the
5 procedures of the agency to which the disclosure is being made. ICG
6 believes this is necessary in order to ensure proper regulatory oversight
7 of the negotiating process as well as implementation of interconnection
8 agreements, as contemplated by the Telecommunications Act and by
9 most state statutes, rules and regulatory policies. GTE does not believe
10 such disclosures to governmental agencies under confidentiality
11 procedures should be permitted.

12 **Q. TURNING NEXT TO THE ESCALATION PROCEDURES FOR DISPUTE**
13 **RESOLUTION, WHAT IS ICG'S POSITION?**

14 **A.** ICG believes that either party should be able to insist on having any
15 dispute arising under the agreement raised to the level of at least a vice
16 president. In my experience, senior management will focus on disputes
17 early and make sure that the company representatives sent to address
18 the dispute have full authority to resolve disputes if the alternative is the
19 need for the senior manager later to become fully involved to resolve the
20 dispute. Certainly, in ICG's experience with GTE, access to decision
21 making personnel is absolutely necessary.

22 **Q. WHAT ARE THE DIFFERENCES OF OPINION BETWEEN ICG AND GTE ON**

1 **THE ISSUE OF ARBITRATION?**

2 **A. ICG believes recourse to arbitration proceedings should be readily**
3 **available if dispute resolution procedures have not been successful within**
4 **30 days. Similarly, ICG believes either party should be able to insist that**
5 **a hearing be commenced within 30 days of the demand for arbitration.**
6 **The deadline will encourage both parties to move quickly to resolve the**
7 **dispute, and if no resolution is forthcoming, to have it resolved quickly**
8 **by an outside party.**

9 **Further, ICG believes that there must be an even more expeditious**
10 **procedure for disputes involving service to customers. These disputes**
11 **should be able to go to arbitration within five days if they are not**
12 **resolved.**

13 **ICG believes that depositions in arbitration proceedings should not**
14 **be limited to one individual. At a minimum, each party should be able to**
15 **depose five individuals. Limiting the number of depositions to one means**
16 **that if the party who is being deposed does not have enough knowledge**
17 **to cover all the aspects of the dispute, there may be no evidence from**
18 **witnesses who are knowledgeable on the particular subject matter at**
19 **issue.**

20 **Q. WHAT IS ICG'S POSITION ON INDEMNIFYING PARTIES WHO HAVE**
21 **BEEN GROSSLY NEGLIGENT OR HAVE ENGAGED IN WILLFUL**
22 **MISCONDUCT?**

1 **A.** **ICG does not believe that either party should be obligated to indemnify**
2 **the other if the other party has been grossly negligent or engaged in**
3 **willful misconduct. In situations where both parties have been either or**
4 **both grossly negligent or engaged in willful misconduct, each should bear**
5 **its own damages. This approach would seem to reflect fundamental**
6 **public policy.**

7 **Q.** **DOES ICG TAKE A SIMILAR POSITION REGARDING LIMITATION ON**
8 **LIABILITY?**

9 **A.** **Yes. ICG does not believe that there should be any limitation of liability**
10 **where a party has engaged in gross negligence or willful misconduct.**

11 **Q.** **SHOULD GTE BE ABLE TO REQUIRE ICG TO PAY THRD PARTY**
12 **INTELLECTUAL PROPERTY CLAIMS FOR SERVICES GTE IS PROVIDING**
13 **TO ICG AND FOR WHICH ICG IS PAYING GTE.**

14 **A.** **No. ICG believes that if it is buying a service from GTE, GTE should**
15 **have already determined that it has the right to sell the service to ICG.**
16 **Presumably, the costs GTE has paid to secure intellectual property rights**
17 **are reflected in the prices being charged to ICG. ICG should not have to**
18 **bear the additional risk that, in the event the holder of some intellectual**
19 **property right associated with the service ICG is buying from GTE asserts**
20 **the right to additional royalties or fees, ICG would be left responsible.**
21 **It is highly unusual for a party, like GTE, to be selling ICG a service, but**
22 **asserting that ICG will be responsible in the event a third party claims**

1 ICG does not have the right to use the service in question because it is
2 infringing upon a right GTE should have purchased in order for GTE to
3 provide the service in the first place. To my knowledge, GTE does not
4 impose this exposure to potential liability for third party claims on any
5 other customers and GTE should not be able to impose such a condition
6 on ICG.

7 **Q. WHAT DOES ICG BELIEVE SHOULD HAPPEN IN THE EVENT OF A**
8 **DECISION OF A REGULATORY AGENCY OR COURT INVALIDATING A**
9 **PROVISION OR PROVISIONS OF THE AGREEMENT?**

10 **A. ICG believes that in that event, no matter what the provision, the parties**
11 **should first attempt to negotiate in good faith to reach agreement on a**
12 **replacement provision(s) that is in accord with the court or regulatory**
13 **agency action. In the event the parties cannot reach agreement, ICG**
14 **believes there must be some procedure in place other than either party**
15 **having the right to void or terminate the agreement. ICG is willing to**
16 **discuss what the procedure should be, such as arbitration, mediation, or**
17 **a proceeding before the relevant state commission. But there must be**
18 **some procedure other than a party being able to walk away from the**
19 **agreement. ICG is particularly concerned that, if GTE chose to terminate**
20 **the agreement under these circumstances, ICG would be left unable to**
21 **provide services to its customers, again destroying ICG's ability to enter**
22 **into any kind of long term relationship with customers that gives**

1 customers any form of stability and the ability to use a single provider in
2 multiple areas.

3 **Q. DOES ICG BELIEVE THE AGREEMENT WITH GTE SHOULD CONTAIN A**
4 **"RULE OF CONSTRUCTION" PROVIDING THAT THE AGREEMENT IS**
5 **NOT TO BE CONSTRUED AGAINST THE DRAFTING PARTY?**

6 **A. No. ICG has not objected to a rule of construction providing that an**
7 **agreement should not be construed against any party in the event of**
8 **ambiguities where, in fact, the agreement is the product of a joint**
9 **negotiation. Indeed, the agreement proffered to GTE by ICG contained**
10 **such a provision. However, in the circumstance of this agreement,**
11 **where GTE has insisted upon using as the basis for negotiations an**
12 **agreement drafted entirely by GTE and which was not the subject of**
13 **good faith negotiations, no such rule of construction is warranted. ICG**
14 **does not object to a rule of construction such as the one contained in the**
15 **agreement proffered by ICG if the Commission orders that agreement to**
16 **be used as the framework for negotiation.**

17 **Q. DOES THAT CONCLUDE YOUR TESTIMONY AT THIS TIME?**

18 **A. Yes it does.**

19

CERTIFICATE OF SERVICE

**I HEREBY CERTIFY that a true and correct copy of the Direct Testimony of
Cindy Zara Schonhaut On Behalf of ICG Telecom Group, Inc. has been furnished by
hand delivery(*) or U.S. Mail to the following parties of record this 18th day of March,
1997:**

***Martha Brown
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard, Room 390M
Tallahassee, Florida 32399-0850**

**Anthony Gillman
GTE Florida Incorporated
Post Office Box 110, MC 7
Tampa, Florida 32301**


**Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (904) 222-2525**

**Attorneys for ICG Telecom
Group, Inc.**