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Tuesday, March 16, 1999

VIA Federal Express

Ms Blanca Bayo, Director
Divisions of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

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RE: Docket No. 990182-TP
Covad Petition for Arbitration of Interconnection Agreement with GTE

Dear Ms Bayo:

Enclosed for filing are an original and fifteen copies of a letter from Covad Communications Company to Ms Beth Keating, as requested, relating to Covad's Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with GTE.

Service has been made as indicated on the Certificate of Service.

- ACK _____
- AFA _____ Please do not hesitate to contact me if you have any questions concerning this matter.
- APP _____ Thank you for your assistance.
- CAF _____
- CMU _____ Sincerely,
- CTR _____
- EAG _____ James D. Earl and Thomas Koutsky
- LEG _____ 2 Assistant General Counsel
- LIN _____ 3 Enclosures
- OPC _____
- RCH _____
- SEC _____ 1 cc: Attached Service List
- WAS _____
- OTH _____

DOCUMENT NUMBER-DATE

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Beth Keating
Senior Attorney, Legal Services Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0866

RE: The obligation of State commissions to resolve each issue set forth in an arbitration petition

Dear: Ms Keating

This letter responds to your request that Covad and GTE address the issue of whether the Florida Public Service Commission should exercise discretion to substantively address some, but not all, of the open issues identified by Covad in its arbitration petition. (Docket No. 990182-TP)

My review of the applicable provisions of the Telecommunications Act of 1996 leads me to conclude that the Florida Public Service Commission is required to address all open issues identified either by Covad in its petition or by GTE in its response. Moreover, the federal statutory requirements are well grounded in practicality, given the tremendous disparity in bargaining power between CLECs and ILECs and the fact that CLECs

typically must obtain critical essential inputs from the ILEC with which they also compete at the service offering level.

Section 252(b)(4)(C) of the Communications Act of 1934 (as amended by the Telecommunications Act of 1996), 47 U.S.C. §252(b)(4)(C), seems dispositive:

The State commission *shall resolve each issue set forth in the petition and the response*, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section. (emphasis added)

The obligation to resolve each issue identified by the parties is subsequently referenced in the later statutory section that establishes standards for arbitration, 47 U.S.C. §252(c):

STANDARDS FOR ARBITRATION.--*In resolving by arbitration under subsection (b) any open issues* and imposing conditions upon the parties to the agreement, a State commission shall--

- (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
- (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. (emphasis added)

It is important to note that subsections (1) through (3) above in no way detract from the obligation of a State commission to resolve "any open issues", rather they impose certain requirements on a State commission in the discharge of its obligation to resolve by arbitration "any open issues." That is, section 252(c) does not limit the issues to be resolved to section 251 issues, but states that "any open issues" must be resolved in conformity with section 251 and other requirements.

Clearly, the federal law applicable to the current arbitration involving Covad and GTE does not allow the Florida Public Service Commission to "pick and choose" among the open issues identified by the parties, deciding to deal substantively with some and not with others.

There are good, practical reasons underpinning the statutory requirements.

The Telecommunications Act of 1996 recognizes throughout that there will often be considerable disparity in bargaining power between a CLEC seeking to negotiate an interconnection agreement and the ILEC that controls access to the unbundled network elements. As a competitor, an ILEC will attempt to raise the barriers to entry by

imposing higher costs or more lengthy delays on CLECs than would be warranted if no conflict of interest existed between ILEC and CLEC. Moreover, an ILEC has no incentive whatever to allow (let alone encourage) a CLEC to differentiate itself by offering better, faster or cheaper service.

State arbitration proceedings act as a potential curb on the unfettered exercise of ILEC bargaining power. Federal statutes compel State commissions to arbitrate "any open issue" because of the relationship among seemingly separate provisions of an interconnection agreement.

The "commercial" terms of an interconnection agreement can be used by an ILEC to effectively deny access by imposing unreasonable dispute resolution, liability, or forum selection provisions. By way of illustration, assume that a CLEC were able to overcome ILEC intransigence and obtain UNE and collocation rates, terms and conditions it believed were just and reasonable. If the ILEC were able to impose on the CLEC provisions that (1) avoided liability for non-delivery of UNEs and/or compelled a dispute resolution process that was not responsive to the CLEC's legal requirements (e.g., type of damages or ability to consolidate claims), then the just and reasonable rates, terms and conditions would have been negotiated for naught. Those "favorable" provisions could be devoid of effect without provisions that provide for the enforcement the CLEC deemed appropriate in light of its business imperatives. The Telecommunications Act of 1996, particularly in its provisions relating to arbitration of interconnection agreements, recognizes the "interconnectedness" of all things. An ILEC's incentives to perform well under the agreement (and in furtherance of the policy objectives of the Act) are affected by many provisions -- not merely the sections that define UNEs and collocation terms and obligations.

As you are aware, the Telecommunications Act contains provisions that address the situation when a State commission "fails to carry out its responsibility" with respect to the arbitration of interconnection agreements (47 U.S.C. §252(e)(5)). During the pendency of the proceedings that resulted in the Supreme Court decision in *AT&T Corp. v. Iowa Util. Bd.*, Nos. 97-826 *et al.*, __ U.S. __ (Jan. 25, 1999), this statutory provision was probably viewed within the context of the jurisdictional disputes giving rise to that litigation. This is no longer the case.

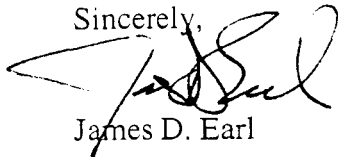
The Virginia State Corporation Commission has recently requested parties in a proceeding not involving Covad to advise it whether that Commission, as an exercise of state sovereignty, should "fail to act to carry out its responsibilities" in order to place federal issues before the FCC for resolution. Virginia staff is considering such a recommendation in the Covad/GTE arbitration that is the Virginia analog to this proceeding in Florida. The motivation appears to be the federal nature of the pricing dispute between Covad and GTE and the federal tariffs that are implicated in the collocation dispute.

Federal law requires the Florida Public Service Commission to decide substantively, and in the context of the entire interconnection agreement, "each issue set forth in the petition

and the response". If, however, the Florida Public Service Commission should decide to resolve only some of the open issues, or should decide to resolve none of the issues in light of the preponderance of federal matters the parties seek to address, then Covad respectfully requests that such official determination be made as quickly as possible. An expedited decision would enable Covad to swiftly bring the arbitration to the FCC (perhaps consolidated with analogous arbitrations in other states) in order to bring the arbitration of its interconnection agreements with GTE to closure.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "James D. Earl", written over a horizontal line.

James D. Earl

cc. Robert C. Atkinson
Deputy Chief (Enforcement)
Common Carrier Bureau
Federal Communications Commission