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Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

March 24, 1999

Re: Docket No. 990182-TP
Petition of DIECA Communications Inc. d/b/a Covad Communications Company
for Arbitration of Interconnection Rates, Terms, Conditions and Related
Arrangements with GTE

Dear Ms. Bayo:

This is GTE Florida Incorporated's (GTE) response to Covad's March 16, 1999, letter to Staff Attorney Beth Keating concerning the arbitrability of the dispute resolution and limitation of liability issues Covad has presented. (Letter from J.D. Earl, Covad, to

ACK Beth Keating, FPSC (Covad Letter).)

AFA

APP As GTE explained in its Response to Covad's Petition for Arbitration and in the Direct
Testimony of Samuel M. Jones in this proceeding (as well as in GTE's March 17, 1999

CAF letter on this subject), the Commission has repeatedly refused to arbitrate legal issues

CMU such as limitation of liability. In GTE's arbitration with AT&T and MCI, the

CTR Commission stated, for instance, that "GTEFL is correct that the Act does not require
revisions to GTEFL's tariffed limitations of liability. We will limit our consideration to

EAG the items enumerated in Sections 251 and 252 to be arbitrated, and matters

LEG necessary to implement these items. Neither liability, indemnification nor liquidated

LIN 3 damages provisions fall within that limitation....the companies should not require the

OPC assistance of the Commission to establish contract provisions affording to each of

RCH them protections that will not cause unreasonable exposure to liability.... We note that

SEC 1 we declined to arbitrate liquidated damages provisions in Docket No. 960757-TP

WAS

OTH A part of GTE Corporation

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[BellSouth's arbitration with MFS]." Petitions by AT&T Comm. of the Southern States, Inc., MCI Telecomm. Corp. and MCI Metro Access Transmission Services, Inc., Order, Docket Nos. 960847-TP and 960980-TP (Jan. 17, 1997), at 98.

Covad seems unaware of this precedent, which is dispositive here. As the Commission has pointed out, it need only arbitrate the substantive matters set forth in Section 251 and 252 of the Telecommunications Act of 1996 (concerning interconnection requirements, collocation terms, unbundled network element prices, and the like). The Commission is not, as Covad contends, required to arbitrate any "open issue" a carrier might propose in an arbitration. Rather, the issue must be grounded in Sections 251 and/or 252. Neither dispute resolution nor limitations of liability are mentioned in the Act, nor are such provisions required to implement the substantive provisions of Sections 251 and 252. Covad's contrary interpretation of the Act is at odds with this Commission's.

Covad's expansive view of this Commission's obligations under the Act conflicts not only with this Commission's rulings, but also with a recent recent federal court opinion. In an appeal of an arbitration decision before the Kentucky Public Service Commission, MCI argued that the Kentucky Commission violated the Act by refusing to arbitrate general terms and conditions concerning performance standards, reporting requirements and "penalty provisions" (such as liquidated damages). MCI, like Covad here, argued that the "open issues" language in Section 252(e)(5) required the Commission to arbitrate these issues it had presented. BellSouth, like GTE here, pointed out that these kinds of provisions are not mentioned anywhere in the Act and are thus beyond the scope of arbitration. The Court agreed with BellSouth, stating: "[t]his Court will not conclude that silence on the part of Congress implies that it is the duty of a state commission to include such provisions in an interconnection agreement. MCI's arguments that the absence of said provisions was a violation of the Act by the PSC must fail." MCI Telecomm. Corp. and MCI Metro 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., Mar. 11, 1999), at 30-31.

Furthermore, it is not true, as Covad suggests, that an ILEC's obligations under an interconnection contract could be "devoid of effect" without the "enforcement" provisions Covad seeks. (Covad Letter at 3.) This Commission will retain jurisdiction to enforce the interconnection agreement resulting from this arbitration, so the specter of GTE breaching the contract with impunity is unrealistic. In addition, GTE has not taken the position that no liability should attach to failures to deliver the items and services under the contract. Rather, as Mr. Jones points out in his Direct Testimony (and as reflected in the GTE/AT&T/MCI arbitration decision quoted above), GTE's tariffed limitations of liability will continue to apply. The negotiated dispute resolution


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and forum selection provisions in GTE's contracts with scores of other CLECs are, likewise, reasonable and have not provoked any complaints.

GTE trusts that this Commission will not be intimidated by Covad's threats to "bring the arbitration to the FCC" under Section 252(e)(5) if the Commission declines to arbitrate the general contract terms Covad seeks. (Covad Letter at 5.) The FCC "will not take an expansive view of what constitutes a state's 'failure to act'" under Section 252(e)(5). Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, CC Docket No. 96-98, FCC 96-325, at para. 1285 (Aug. 8, 1996). As the above-cited federal court decision confirms, this Commission is well within its rights to refuse to arbitrate these issues, as other Commissions have done. (For example, the North Carolina Utilities Commission has "declined to prescribe general terms and conditions," including those related to liability and indemnity, and has repeatedly dismissed such issues in arbitration proceedings. See, e.g., Petition of MCI Telecomm. Corp. for Arbitration of Interconnection with GTE South Inc., Order Ruling on Objections, Comments, Unresolved Issues, and Composite Agreement, Docket No. P-141, Sub 30 (July 3, 1997), at 31, 33.) The Commission has complied with the timelines and procedural requirements set forth in Section 252; there is plainly no legal basis for Covad to unilaterally seek to have the FCC preempt this Commission's jurisdiction over this arbitration.

Please contact me if you have any questions.

Sincerely,


Kimberly Caswell

KC:tas

c: Staff Counsel
James D. Earl, Esq.

AIRBORNE