ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition of DIECA Communications d/b/a Covad Communications Company for arbitration of interconnection rates, terms, conditions and related arrangements with GTE Florida Incorporated	)	DOCKET NO . 990182-TP Filed: March 29, 1999

REBUTTAL TESTIMONY

OF

SAMUEL M. JONES

ON BEHALF OF

GTE FLORIDA INCORPORATED

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GTE FLORIDA INCORPORATED

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Q. ARE YOU THE SAME SAMUEL M. JONES WHO FILED DIRECT TESTIMONY IN THIS PROCEEDING?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. I will respond to the prefiled Direct Testimony of Covad's witness, James D. Earl.

Q. DOES YOUR UNDERSTANDING OF THE NEGOTIATIONS BETWEEN GTE AND COVAD COMPORT WITH THAT OF MR. EARL (EARL DIRECT TESTIMONY AT 2-6)?

A. As an initial matter, it is important to recognize that GTE's negotiations with Covad began many months before Mr. Earl became involved in the process. As Mr. Earl states, he was assigned responsibility for the negotiations in January, after the departure of another attorney from Covad. (Earl Direct Testimony at 2.) While I share Mr. Earl's view that he and I have a professional negotiating relationship (id. at 3), Covad's mid-stream change in negotiators did cause some setbacks. For instance, I believe that Mr. Earl reopened some issues that had already been resolved through negotiations. In

other cases, Mr. Earl may not have been familiar with the details of the parties' various compromises.

I agree, for the most part, with Mr. Earl's chronology of events since he became lead negotiator for Covad, but with one key difference. Mr. Earl alleges that I confirmed that "GTE negotiators had been instructed to suspend substantive discussions on interconnection agreements in the wake of Iowa." (Earl Testimony at 5.) I believe this statement is misleading. GTE did not, in fact, halt all negotiations after the U.S. Supreme Court's decision in AT&T Corporation v. Iowa Utilities Board, Nos. 97-286 et al., 1999 U.S. Lexis 903 (Jan. 25, 1999), as Covad may have perceived. Rather, I informed Covad that GTE would need to briefly refocus the negotiations on items other than UNEs until GTE could quickly assess the impact of this ruling. Because the decision created substantial uncertainty regarding the provisioning and pricing of UNEs (as discussed in GTE's Response to Covad's Petition for Arbitration), a brief delay in negotiations on UNE matters was entirely reasonable. Indeed, Mr. Earl himself notes that the days following the Iowa decision "were quite busy," and indicates that the "legal and practical issues arising from that decision were further complicated for Covad" because the FCC delayed a pending decision in an ongoing docket involving collocation conditions. (Earl Direct Testimony at 4.)

GTE took less than two weeks to evaluate the Supreme Court's decision and to adopt a policy of maintaining the status quo in its interconnection contracts and contract negotiations with CLECs. In fact, on February 10, 1999, GTE sent a letter to this Commission explaining that it planned to continue as though the nullified FCC provisions were in effect and to preserve the "status quo" until the FCC could implement final rules that comply with the Act. In that letter, GTE stated that it would "enter into any new arrangement with any requesting carrier" consistent with the terms set forth therein. (Letter from B.Y. Menard, GTE, to W. D'Haeseleer, FPSC Director of Communications Division, Feb. 10, 1999.) Furthermore, GTE never interrupted negotiations on non-UNE issues, such as the dispute resolution and change-of-law issues Covad raises in its arbitration petition.

In any event, the apparent misunderstanding about the status of negotiations after Iowa has now been cleared up. As Mr. Earl points out, the parties are again engaged in negotiations. (Earl Direct Testimony at 6.)

Q. HAS THE PREHEARING OFFICER MADE A DECISION ON THE ARBITRABILITY OF THE DISPUTE RESOLUTION AND LIMITATION OF LIABILITY ISSUES COVAD HAS PROPOSED?

A. Not yet. GTE continues to oppose arbitration of these issues proposed by Covad. As GTE explained in its Response to Covad's

Petition for Arbitration, its March 17 and March 24 letters to the Commission, and in my Direct Testimony, the Commission has repeatedly ruled that it will not arbitrate these kinds of general contract terms and conditions. They are beyond the scope of arbitration prescribed by Section 251 and 252 of the Telecommunications Act of 1996.

I understand that the prehearing officer may not have an opportunity to rule on the arbitrability of Covad's dispute resolution and limitation of liability issues until the prehearing conference on April 5. In the meantime, the parties have agreed to present their substantive positions on these issues only to preserve their rights in the event the prehearing officer approves them for arbitration.

Q. DO GTE AND COVAD CONTINUE TO DISAGREE ON THE SUBSTANCE OF THE DISPUTE RESOLUTION PROVISION?

A. As I noted in my prefiled Direct Testimony, GTE views alternate dispute resolution and litigation as mutually exclusive options; private dispute resolution is typically considered to be a way of avoiding the greater time and expense associated with court litigation. Nevertheless, GTE has shown its willingness to compromise with Covad on this point. Instead of insisting on alternative dispute resolution as the "sole" means of settling disputes under the contract, GTE has agreed to designate alternative dispute resolution as the "primary remedy" for such disputes. GTE has not agreed to all of

Covad's proposed changes to the draft language, reflected in Attachment 1 to Mr. Earl's Direct Testimony. However, I am optimistic that we can work out mutually agreeable language for this provision through continued negotiations.

Q. MR. EARL INDICATES THAT THE LAW GOVERNING THE CONTRACT IS AN ISSUE IN THIS CASE. IS THAT TRUE?

A. No. The Commission here will resolve only the issues formally identified for resolution; it will not look to the petition for arbitration to try to figure out which specific issues the petitioner wants resolved. Governing law was not identified as an issue for resolution at the issues identification conference Mr. Earl attended on March 9. Therefore, the Commission will not resolve it.

While GTE is not obliged to address the governing law issue, I can observe that GTE's position is very reasonable. If disputes are to be heard in court, GTE believes it is appropriate to take them to the court in the state where the services are provided or the facilities reside.

Once again, I am optimistic that Covad and GTE can resolve this issue through ongoing negotiations.

Q. HAVE THE PARTIES CONCLUDED NEGOTIATIONS ON COVAD'S PROPOSED ISSUE CONCERNING LIMITATION OF LIABILITY?

A. Not yet. As I explained in my Direct Testimony, there is no reason for the parties' interconnection agreement to depart from the liability standard reflected in GTE's retail tariffs–that is, a prorated refund or credit for the period of the service interruption. The Commission agrees; it has recognized that "the Act does not require revisions to GTEFL's tariffed limitations of liability." (Petitions by AT&T Comm. of the Southern States, Inc., MCI Telcomm. Corp. and MCI Metro Access Transmission Services, Inc., Order No. PSC-97-0064-FOF-TP (GTE/AT&T Arbitration) at 98.)

Indeed, GTE believes any greater measure of liability would violate the Act's requirement that ILECs recover their costs of providing services to ALECs. Covad recommends against placing any limits on potential liability from gross negligence or willful misconduct, and would significantly expand liability beyond tariffed limits in all other cases. The unknowable and potentially unlimited liability associated with Covad's proposal has not and cannot be factored into the cost studies that are the basis for GTE's proposed UNE rates (and the UNE rates this Commission set in the AT&T Arbitration). The Commission could not, consistent with the Act, approve Covad's proposal, which would cause costs that are not recovered in the rates charged to Covad.

Q. TURNING TO THE ISSUE OF PRICING OF UNBUNDLED NETWORK ELEMENTS (UNES), MR. EARL STATES THAT THE

"FLORIDA PROCEDURES AND THE RESULTING RATES, TERMS, AND CONDITIONS ON OFFER TO COVAD" DO NOT CONFORM TO THE FCC'S PRICING REQUIREMENTS (EARL DIRECT TESTIMONY AT 8.) IS THIS TRUE?

A. No; Mr. Earl is certainly not correct in stating that "there is no factual dispute on this point." (Earl Direct Testimony at 8.)

As I stated in my Direct Testimony, GTE's primary proposal in this arbitration is the UNE rates it recommended in the GTE/AT&T Arbitration, which concluded in 1997. Its alternative proposal is the rates set by the Commission in the GTE/AT&T Arbitration. Although GTE strongly disputes those rates (and has appealed them in federal district court) they are offered to Covad here in an attempt to avoid a hearing and another evaluation of the same studies GTE submitted in the GTE/AT&T Arbitration.

In any event, both GTE's primary and alternative proposals are based on its cost studies, which were found to "reflect GTE's efficient forward-looking costs." (GTE/AT&T Arbitration Order at 34.) These TELRIC and TSLRIC studies fully complied with the FCC's forward-looking pricing methodology in effect at the time of the GTE/AT&T Arbitration, as is evident from the Order in that Arbitration. (As GTE pointed out in its Response to Covad's Petition, the FCC's pricing methodology is now before the Eighth Circuit Court of Appeals on remand.)

Mr. Earl does not specify how, exactly, "Florida procedures and the resulting rates, terms, and conditions" don't comply with the FCC pricing rules. Covad has made the same kind of claims in its North Carolina and Virginia arbitrations, also without any explanation. I believe these allegations do not stem from any particular knowledge of the procedures or results of past arbitrations in Florida or elsewhere. They are, rather, boilerplate statements made in an attempt to make Covad's request for the FCC's proxy prices seem plausible.

Q. CAN THIS COMMISSION IMPOSE THE FCC'S PROXY PRICES IN THIS ARBITRATION?

A. No. As I pointed out in my Direct Testimony, any perceived need for the FCC's proxies has long since passed. These rates were intended as defaults only, in the event that adequate cost studies could not be made available in time for Commission rate-setting proceedings. The FCC itself confirmed this point in the Iowa proceeding. (See Jones Direct Testimony at 6, quoting Reply Brief for the Federal Petitioners and Brief for the Federal Cross-Respondents at 7 fn. 5.) The very FCC Rules Covad cites direct that proxy rates "shall be superseded once the state commission has completed review of a cost study that complies with the [FCC's] forward-looking economic cost based pricing methodology." (47 C.F.R. sec. 51.513((a)(1).

The Commission completed that review in 1997; it would make no sense–and would be unlawful–to resort to proxy prices the Commission never even used.

Q. DO YOU DISPUTE MR. EARL'S UNDERSTANDING THAT UNE TARIFFS ARE RELEVANT TO THIS PROCEEDING?

A. Yes. Mr. Earl states that GTE is wrong in describing the concept of UNE tariffs as inapposite here because GTE's own draft Agreement refers to tariffs in the "Prices" paragraph. (Earl Direct Testimony at 9 and Att. 4.) That paragraph states: "Individual UNEs and prices are identified on Appendix D attached to this Agreement and made a part hereof, or under the appropriate GTE tariff as referenced in this Article." In other words, UNE prices will be reflected either in an appendix to the Agreement or in appropriate tariffs. This plain language cannot be interpreted to mean that all UNE prices will be tariffed. In fact, the UNEs Covad seeks here–loops, NIDs, and transport–are not tariffed in Florida. Other UNEs Covad may seek in the future (such as SS7) may be tariffed; GTE's proposed language is designed to cover both situations.

Q. DOES MR. EARL'S TARIFFING DISCUSSION RAISE AN ISSUE THAT HAS NOT BEEN IDENTIFIED FOR RESOLUTION IN THIS ARBITRATION?

A. Yes, among other problems. Mr. Earl shifts abruptly from a proxy price discussion to a proposal that would require GTE to change its

UNE tariffs along with changes in federal and state law. (Earl Direct Testimony at 8-9.) This latter section of Mr. Earl's testimony is confusing, but let me try to explain Covad's position and respond to it.

Mr. Earl proposes to include language in the agreement requiring GTE to modify its federal and state UNE tariffs within 30 days of any state or federal regulations altering the "rates, terms, and conditions associated with UNEs." (Earl Direct Testimony at 9 and Att. 4, sec. 2.2.4.) This change-of-law issue was neither raised in Covad's Petition for Arbitration nor identified for resolution in this docket. The language Mr. Earl proposes is similar to that which Covad recommends in the collocation context, and which is reflected in Issue 3 in this case ("Should there be a 30-day period for the filing of tariffs to implement changes in regulation regarding collocation?") Covad did not seek to identify any similar change-of-law issue in the UNE context. Therefore, this issue will not be resolved in this docket.

Even though GTE is not obliged to present its position on this new UNE change-of-law proposal, its substantive problems are obvious.

First, it would require this state Commission to order GTE to make changes in federal tariffs in response to federal regulations. Only the FCC has jurisdiction to require federal tariff changes; this Commission could not order the language Covad seeks even if this issue had been

properly posed for resolution.

Second, as I noted earlier, GTE is not required to and does not file tariffs for any of the UNEs Covad seeks in this proceeding. As such, Covad's proposal for modification of even state UNE tariffs is not relevant to anything in this arbitration.

Third, even if Covad had identified a UNE change-of-law issue, Covad's proposal for resolving that issue goes beyond the scope of this arbitration. Covad wants the Commission to impose a general requirement for GTE to change its tariffs within a specified period after regulatory action. This broad mandate would go beyond the parties' relationship under the specific interconnection agreement contemplated here. The proper place to implement such a general rule is in a rulemaking proceeding, not in an arbitration–let alone an arbitration addressing pricing of UNEs that are not even tariffed.

Fourth, as I explained in the context of Covad's collocation change-of-laws language, there is already general language in the draft Agreement that makes it "subject to any and all applicable laws, rules, or regulations that subsequently may be prescribed by any federal, state, or local governmental authority." (Jones Direct Testimony at 7-8; see also GTE's Response to Covad's Petition for Arbitration at 13, citing Draft Agreement at sec. 32.1.) Any modifications to the legal requirements governing the contract at its execution "will be deemed

to automatically supersede any terms and conditions of th[e] Agreement." (Id.) In view of this language, Covad's tariff modification requirement is not necessary.

GTE disagrees with Mr. Earl's view that GTE should have no substantive objection to "redundant and unnecessary" language like this. My lawyers advise me that guarding against redundant and unnecessary language is a basic principle of contract drafting, so as to avoid potential confusion later in contract interpretation.

Q. DO YOU AGREE WITH MR. EARL THAT ISSUE 2 ("SHOULD COVAD'S USE OF LOOPS AND NIDS ALLOW FOR THE PROVISION OF SPECIAL ACCESS SERVICE?) HAS BEEN SETTLED THROUGH NEGOTIATIONS?

A. Yes, I believe it has, as Mr. Earl indicates (in his Direct Testimony at page 9 and Attachment 5).

Q. HAS ANY PROGRESS BEEN MADE ON ISSUE 3, COVAD'S ISSUE ON CHANGE OF LAWS AFFECTING COLLOCATION?

A. As Mr. Earl indicates, there has been some progress toward settlement of this issue. However, one aspect remains open. That is Covad's change-of-law provision with regard to collocation. As I explained in my Direct Testimony, this provision is unnecessary because the general change-of-law provision (discussed above) will require modifications to the agreement in the event that legal and

regulatory changes affect collocation terms and conditions. (Jones Direct Testimony at 7-8; GTE's Response to Covad's Petition for Arbitration at 13) Covad wants, in effect, a rule requiring tariff changes. I believe this requested action is outside the scope of this arbitration, which is directed toward completion of an interconnection contract. Provisions affecting that contract are, therefore, reasonable; general requirements affecting GTE's tariffs are not.

Q. HAVE GTE AND COVAD RESOLVED ISSUE 4, CONCERNING GTE'S SPACE PLANNING IN LIGHT OF COVAD'S COLLOCATION REQUIREMENTS?

A. Yes, as Mr. Earl indicates in his Direct Testimony (at page 11 and Attachment 7).

Q. PLEASE COMMENT ON MR. EARL'S DISCUSSION OF "MISCELLANEOUS RESOLVED BUT OUTSTANDING ISSUES."

A. Covad's Petition for Arbitration discussed four issues that it specifically declined to present for arbitration. (Petition at 16-19.) Instead, Covad indicated that the parties would continue their efforts to devise specific contract language memorializing their agreements on these matters. I did not provide testimony on any of these issues because Covad did not seek to arbitrate them.

Now, however, Mr. Earl notes that one of these issues–service standards–"remains problematic," and that Covad will request

arbitration of this issue if the parties are unable to reach agreement on it. (Earl Direct Testimony at 12.)

As I understand this Commission's procedures and the Act, Covad was obliged to list in its Petition, and then at the issues identification conference, all of the issues for which it sought arbitration. Covad did not seek arbitration of service standards in its Petition, nor did it propose this issue at the issues identification conference in this docket. As such, my lawyers advise me that Covad has no right to seek arbitration of this matter at some future point in this proceeding. In accordance with the Act, this Commission has established a tight timetable for the events and the ruling in this arbitration. Covad cannot unilaterally change the scope of the proceeding once this timetable has been set. The parties have already presented testimony on all the issues identified for resolution. Additional issues will require additional direct and rebuttal testimony, which will not reasonably fit into the established schedule. If Covad believed there was a chance the parties might not resolve the service standard or other issues through negotiations, it was Covad's responsibility to formally identify these issues for resolution in this arbitration. Issues can be dropped if they are resolved (as is the case with some of the issues Covad originally identified), but they cannot be added if they are not resolved.

Q. PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY.

A. I believe that GTE and Covad have resolved issues 2 (use of loops and NIDs for special access) and 4 (space planning), so that the Commission will not need to arbitrate them. GTE continues to dispute the arbitrability of Covad's proposed issues 5 (dispute resolution) and 6 (limitation of liability), and is, in any event, optimistic that these issues will be resolved through negotiations. Some progress has been made on issue 3 (collocation tariffs) and I am optimistic that it, too, will be settled through ongoing negotiations. The parties will continue to negotiate the issue of UNE pricing, but, so far, Covad maintains the entirely unreasonable position that the Commission should prescribe outdated proxy prices that it has never considered using for GTE's UNEs. GTE hopes that Covad will move off this position once it better understands this Commission's past arbitration decisions and policies.

Q. DOES THAT CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.