

ORIGINAL



Beverly Y. Menard
Regulatory & Governmental Affairs
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GTE Service Corporation

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October 4, 1999

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

RECEIVED
FLORIDA PUBLIC
SERVICE COMMISSION
99 OCT -5 AM 10:13
MAIL ROOM

991497-TP

Re: Docket No.
Adoption of Covad/GTE Interconnection Agreement by Kexa, Inc. d/b/a Capital Explorations Communications

Dear Ms. Bayo:

Please find enclosed for filing an original and five copies under Section 252(i) of the Telecommunications Act of 1996 of Kexa, Inc. db/a Capital Explorations Communications' adoption of the negotiated Interconnection Agreement between GTE Florida ("GTE") and Covad Communications ("Terms") in Docket 990182. The enclosure includes an adoption letter signed by both GTE and Capital Explorations Communications which is self-explanatory, and which sets forth the manner in which the Terms will be applied in Capital Explorations Communications' case. GTE considers this agreement effective with this filing with the FPSC.

As the enclosed letter explains, GTE is not voluntarily entering the Terms with Capital Explorations Communications and does not waive any rights and remedies it has concerning its position as to the illegality or unreasonableness of the Terms. GTE contends that certain provisions of the Terms may be void or unenforceable as a result of the United States Eighth Circuit court of Appeals July and October, 1997 decisions, the Supreme Court of the United States' decision of January 25, 1999 and the remand of the pricing rules to the United States Eighth Circuit Court of Appeals. Any modification to the underlying Terms shall automatically apply to Capital Explorations Communications. GTE is preserving its legal positions in every respect as to the Terms in the hands of Capital Explorations Communications, well as in the hands of Covad Communications.

Sincerely,

Beverly Y. Menard

Beverly Y. Menard

BYM:wjh
Enclosure

c: Ken Schulte, Kexa, Inc., d/b/a Capital Explorations Communications

DOCUMENT NUMBER-DATE

11998 OCT-5

Connie Nicholas
Assistant Vice President
Wholesale Markets-Interconnection



GTE Network
Services

HQE03B28
600 Hidden Ridge
P.O. Box 152092
Irving, TX 75038
972/718-4586
FAX 972/719-1523

August 2, 1999

Ken Schulte
Senior Vice President
Kexa, Inc. d/b/a
Capital Explorations Communications
3915 Laurelwood Lane
Delray Beach, FL 33445

Dear Mr. Schulte:

We have received your letter stating that, under Section 252(i) of the Telecommunications Act of 1996, you wish to adopt the terms of the Interconnection Agreement between Covad Communications Company ("Covad") and GTE that was approved by the Commission as an effective agreement in the State of Florida in Docket No. 99-0182 (Terms)¹. The terms provide for the election by Covad of certain additional provisions from a GTE arbitrated agreement ("Arbitrated Provisions"). I understand you have a copy of the Terms.

Please be advised that our position regarding the adoption of the Terms is as follows.

On January 25, 1999, the Supreme Court of the United States ("Court") issued its decision on the appeals of the Eighth Circuit's decision in *Iowa Utilities Board*. Specifically, the Supreme Court vacated Rule 51.319 of the FCC's First Report and Order, FCC 96-325, 61 Fed. Reg. 45476 (1996) and modified several of the FCC's and the Eighth Circuit's rulings regarding unbundled network elements and pricing requirements under the Act. *AT&T Corp. v. Iowa Utilities Board*, No. 97-826, 1999 U.S. LEXIS 903 (1999).

Three aspects of the Court's decision are worth noting. First, the Court upheld on statutory grounds the FCC's jurisdiction to establish rules implementing the pricing provisions of the Act. The Court, though, did not address the substantive validity of the FCC's pricing rules. This issue will be decided by the Eighth Circuit on remand.

¹ *These "agreements" are not agreements in the generally accepted understanding of that term. GTE was required to accept these agreements, which were required to reflect the then-effective FCC rules.

Second, the Court held that the FCC, in requiring ILECs to make available all UNEs, had failed to implement section 251(d)(2) of the Act, which requires the FCC to apply a "necessary" or "impair" standard in determining the network elements ILECs must unbundle. The Court ruled that the FCC had improperly failed to consider the availability of alternatives outside the ILEC's network and had improperly assumed that a mere increase in cost or decrease in quality would suffice to require that the ILEC provide the UNE. The Court therefore vacated in its entirety the FCC rule setting forth the UNEs that the ILEC is to provide. The FCC must now promulgate new UNE rules that comply with the Act. As a result, any provisions in the Terms requiring GTE to provide UNEs are nullified.

Third, the Court upheld the FCC rule forbidding ILECs from separating elements that are already combined (Rule 315(b)), but explained that its remand of Rule 319 "may render the incumbents' concern on [sham unbundling] academic." In other words, the Court recognized that ILEC concerns over UNE platforms could be mooted if ILECs are not required to provide all network elements: "If the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network."

The Terms which Kexa, Inc. d/b/a Capital Explorations Communications ("Capital") seeks to adopt does *not* reflect the Court's decision, and any provision in the Terms that is inconsistent with the decision is nullified.

GTE anticipates that after the FCC issues new final rules on UNEs, this matter may be resolved. In the interim, GTE would prefer not to engage in the arduous task of reforming agreements to properly reflect the current status of the law and then to repeat the same process later after the new FCC rules are in place. Without waiving any rights, GTE proposes that the parties agree to hold off amending (or incorporating the impact of the decision into) the Terms and let the section 252(i) adoption proceed by maintaining the status quo until final new FCC rules are implemented (the "New Rules"), subject to the following package of interdependent terms:

1. GTE will continue to provide all UNEs called for under the Terms until the FCC issues the New Rules even though it is not legally obligated to do so.
2. Likewise, Capital agrees not to seek UNE "platforms," or "already bundled" combinations of UNEs.
3. If the FCC does not issue New Rules prior to the expiration of the initial term of the Terms, GTE will agree to extend any new interconnection arrangement between the parties to the terms of this proposal until the FCC issues its New Rules.

4. By making this proposal (and by agreeing to any settlement or contract modifications that reflect this proposal), GTE does not waive any of its rights, including its rights to seek recovery of its actual costs and a sufficient, explicit universal service fund. Nor does GTE waive its position that, under the Court's decision, it is not required to provide UNEs unconditionally. Moreover, GTE does not agree that the UNE rates set forth in any agreement are just and reasonable and in accordance with the requirements of sections 251 and 252 of Title 47 of the United States Code.
5. The provisions of the contract that might be interpreted to require reciprocal compensation or payment as local traffic from GTE to the telecommunications carrier for the delivery of traffic to the Internet are not available for adoption and are not a part of the 252(i) agreement pursuant to FCC Rule 809 and paragraphs 1317 and 1318 of the First Report and Order.

GTE believes that the first four conditions above are adequately explained by the first part of this letter. The reason for the last condition is the FCC gave the ILECs the ability to except 252(i) adoptions in those instances where the cost of providing the service to the requesting carrier is higher than that incurred to serve the initial carrier or there is a technical incompatibility issue. The issue of reciprocal compensation for traffic destined for the Internet falls within FCC Rule 809. GTE never intended for Internet traffic passing through a telecommunications carrier to be included within the definition of local traffic and the corresponding obligation of reciprocal compensation. Despite the foregoing, some forums have interpreted the issue to require reciprocal compensation to be paid. This produces the situation where the cost of providing the service is not cost based under Rule 809 or paragraph 1318 of the First report and Order. As a result, that portion of the contract pertaining to reciprocal compensation is not available under this 252(i) adoption. In its place are provisions that exclude ISP Traffic from reciprocal compensation. Specifically, the definition of "Local Traffic" includes this provision: "Local Traffic excludes information service provider ("ISP") traffic (i.e., Internet, 900 – 976, etc)".

In sum, GTE's proposal as described above would maintain the status quo until the legal landscape is settled.

Capital's adoption of the Covad Terms shall become effective upon filing of this letter with the Florida Public Utilities Commission and remain in effect no longer than the date the Covad Terms are terminated. The Covad agreement is currently scheduled to expire on June 14, 2001.

Mr. Ken Schulte
August 2, 1999
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As these Terms are being adopted by you pursuant to your statutory rights under section 252(i), GTE does not provide the Terms to you as either a voluntary or negotiated agreement. The filing and performance by GTE of the Terms does not in any way constitute a waiver by GTE of its position as to the illegality or unreasonableness of certain Arbitrated Provisions or a portion thereof, nor does it constitute a waiver by GTE of all rights and remedies it may have to seek review of the Arbitrated Provisions, or to petition the Commission, other administrative body, or court for reconsideration or reversal of any determination made by the Commission pursuant with respect to the Arbitrated Provisions, or to seek review in any way of any provisions included in these Terms as a result of Capital's 252(i) election.

Nothing herein shall be construed as or is intended to be a concession or admission by either GTE or Capital that any Arbitrated Provisions comply with the rights and duties imposed by the Telecommunications Act of 1996, the decision of the FCC and the Commissions, the decisions of the courts, or other law, and both GTE and Capital expressly reserve their full right to assert and pursue claims arising from or related to the Arbitrated Provisions. GTE contends that certain provisions of the Terms may be void or unenforceable as a result of the Court's decision of January 25, 1999 and the remand of the pricing rules to the United States Eighth Circuit Court of Appeals.

Should Capital attempt to apply such conflicting provisions, GTE reserves its rights to seek appropriate legal and/or equitable relief. Should any provision of the Terms be modified, such modification would likewise automatically apply to this 252(i) adoption.

Please indicate by your countersignature on this letter your understanding of and commitment to the following three points:

- (A) Capital adopts the Terms of the Covad agreement for interconnection with GTE and in applying the Terms, agrees that Capital be substituted in place of Covad in the Terms wherever appropriate.
- (B) Capital requests that notice to Capital as may be required under the Terms shall be provided as follows:

To : Kexa, Inc. d/b/a Capital Explorations Communications
Attention: Ken Schulte
3915 Laurelwood Lane
Delray Beach, FL 33445
Telephone number: 561-498-3903
FAX number: 561-498-3904

Mr. Ken Schulte
August 2, 1999
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- (C) Capital represents and warrants that it is a certified provider of local dialtone service in the State of Florida, and that its adoption of the Terms will cover services in the State of Florida only.

Sincerely,

GTE FLORIDA INCORPORATED



Connie Nicholas
Assistant Vice President
Wholesale Markets-Interconnection

Reviewed and countersigned as to points A, B, and C:

KEXA, INC. D/B/A CAPITAL EXPLORATIONS COMMUNICATIONS



for Kexa, Inc. d/b/a
Capital Explorations Communications

c: D. Robinson - HQE03B73 - Irving, TX