

ORIGINAL

Matilda Sanders

From: Fatool, Vicki [Vicki.Fatool@BellSouth.com]
Sent: Thursday, August 05, 2004 2:43 PM
To: Filings@psc.state.fl.us
Subject: 040779-TP BST's Opposition to Notice of Adoption of Network Tel. Corp.'s Interconnection Agreement by Z-Tel
Importance: High

A. Vicki Fatool
Legal Secretary to Nancy B. White
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5560
vicki.fatool@bellsouth.com

B. Docket No.: 040779-TP -- Notice of the Adoption Existing Interconnection, Unbundling, Resale and Collocation Agreement between BellSouth Telecommunications, Inc. and Network Telephone Corporation by Z-Tel Communications, Inc.

C. BellSouth Telecommunications, Inc.
on behalf of Nancy B. White

D. 21 pages total (including letter, certificate of service, pleading and attachments 1 thru 4)
.pdf version 21 pages
word version 14 pages

E. BellSouth Telecommunications, Inc.'s Opposition to Notice of Adoption of Network Telephone Corporation's Interconnection Agreement By Z-Tel Communications, Inc.
.pdf and word version attached

<<040779-T.pdf>> <<BP5Y01!.DOC>>

CMP _____

COM _____

CTR _____ The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential, proprietary, and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from all computers. 113

GCL _____

OPC _____

MMS _____

RCA _____

SCR _____

SEC 1

OTH _____

8/5/2004

DOCUMENT NUMBER-DATE

08551 AUG-5 3

FPSC-COMMISSION CLERK

ORIGINAL

Legal Department

Nancy B. White
General Counsel - Florida

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5558

August 5, 2004

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

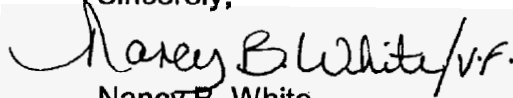
**Re: Docket No.: 040779-TP
Notice of the Adoption of Existing Interconnection,
Unbundling, Resale and Collocation Agreement between
BellSouth Telecommunications, Inc. and Network Telephone
Corporation by Z-Tel Communications, Inc.**

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Opposition to Notice of Adoption of Network Telephone Corporation's Interconnection Agreement by Z-Tel Communications, Inc., which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,


Nancy B. White

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

DOCUMENT NUMBER-DATE
08551 AUG-5 04
FPSC-COMMISSION CLERK

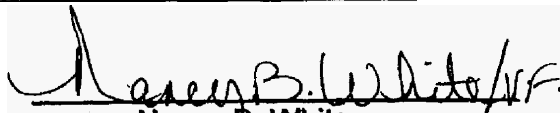
**CERTIFICATE OF SERVICE
DOCKET NO. 040779-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and First Class U.S. Mail this 5th day of August, 2004 to the following:

Victor McKay
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6393
vmckay@psc.state.fl.us

Womble Carlyle Law Firm
Michael B. Hazzard
1401 Eye Street, N.W.
Washington, D.C. 20005
Tel. No. (202) 857-4540
Fax. No. (202) 261-0035
mhazzard@wcsr.com

Z-Tel Communications, Inc.
601 South Harbour Island Blvd.
Suite 220
Tampa, FL 33602-5706
Tel. No. (813) 233-4611
Fax. No. (813) 233-4620
regulatorycomplaints@z-tel.com


Nancy B. White

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Notice of the Adoption Existing)
Interconnection, Unbundling, Resale and)
Collocation Agreement between BellSouth)
Telecommunications, Inc. and Network)
Telephone Corporation by Z-Tel)
Communications, Inc.)
_____)

Docket No.: 040779-TP

Filed: August 5, 2004

**BELLSOUTH TELECOMMUNICATION, INC.'S OPPOSITION
TO NOTICE OF ADOPTION OF NETWORK TELEPHONE
CORPORATION'S INTERCONNECTION AGREEMENT
BY Z-TEL COMMUNICATIONS, INC.**

BellSouth Telecommunications, Inc. ("BellSouth") files this Opposition to Z-Tel Communications, Inc.'s ("Z-Tel") Notice of Adoption of the Interconnection Agreement between BellSouth and Network Telephone Corporation ("Network Telephone"). As will be set forth below, the Florida Public Service Commission ("Commission") should reject Z-Tel's Notice of Adoption for the following reasons: (1) BellSouth never agreed to the adoption and has never executed adoption language; (2) Z-Tel did not comply with the terms of its existing interconnection agreement concerning adoptions; (3) Section 252(i) of the Telecommunications Act of 1996 does not entitle a party to terms and conditions of interconnection or access to unbundled network elements that are not otherwise available to a party by negotiation or arbitration under Section 252(a) and (b); and (4) Z-Tel did not request adoption of certain terms of the subject agreement within a reasonable period of time, as required by 47 C.F.R. §51.809(c).

1. First, on July 22, 2004, Z-Tel unilaterally noticed the Commission that it had adopted the interconnection agreement between BellSouth and

Network Telephone in its entirety. Z-Tel did not seek Commission approval of this adoption in its Notice. At no time did BellSouth agree to the adoption. It should also be noted that neither BellSouth nor Z-Tel executed any adoption language.

2. Z-Tel's existing interconnection agreement with BellSouth in Florida became effective on April 18, 2003 and expires on September 11, 2004. Z-Tel adopted the MCI WorldCom Communications Interconnection Agreement with BellSouth for Florida dated September 12, 2001. On January 21, 2004, BellSouth requested negotiations with Z-Tel for a new interconnection agreement. (Attachment 1). No response was received from Z-Tel. On February 20, 2004, BellSouth forwarded a second request to Z-Tel for negotiations. (Attachment 2). No response was received from Z-Tel. On March 22, 2004, BellSouth sent Z-Tel a third request for negotiations. (Attachment 3). Once again, no response was received. On April 20, 2004, BellSouth attempted to contact Z-Tel once more. (Attachment 4). No response was received from Z-Tel. In addition to BellSouth's request for negotiations, BellSouth also sent Z-Tel a copy of BellSouth's proposed agreement.

3. Second, the purported "Adoption" by Z-Tel should be rejected because Z-Tel failed to follow the requirements of its interconnection agreement for such an adoption. Specifically, Section 2.5 of the General Terms and Conditions of the Interconnection Agreement between BellSouth and Z-Tel states that the adoption becomes "effective as of the date the parties sign an agreement or amendment." BellSouth has signed neither. In addition, Section 2.5 of the

General Terms and Conditions states the BellSouth will make available interconnection in accordance with the Act and with the applicable FCC rules and regulations. If Z-Tel believes that BellSouth has not followed this provision of the Interconnection Agreement, its recourse is to seek dispute resolution pursuant to the terms of the Agreement. Z-Tel has sought to circumvent the dispute resolution process that this Commission has approved for purported violations of the Agreement by filing its Notice of Adoption. Z-Tel should not be permitted to turn a dispute between interconnecting carriers into an administrative matter that undermines BellSouth's due process.

4. Third, the Telecommunications Act of 1996 (the "1996 Act") was enacted to promote competition by encouraging and facilitating the entry of competitive local exchange providers ("CLECs") into local service markets. See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999). Three modes of competitive entry are contemplated under Section 251 of the 1996 Act, which imposes three categories of obligations on incumbent local exchange companies ("ILECs") such as BellSouth: (1) to allow a facilities-based CLEC, such as a cable company, to interconnect with the ILEC's network in order to complete calls from one network to the other (2) to sell to other reseller CLECs at a wholesale discount the retail telecommunications services offered by an ILEC to its end users; and (3) to provide CLECs access to network elements of the ILEC's local network on an unbundled basis at cost-based rates. 47 U.S.C. § 251(c). Section 251(c) requires ILECs to provide interconnection, unbundled network elements,

and telecommunications services for resale on nondiscriminatory terms and conditions.

5. Section 252 sets forth the process by which ILECs execute interconnection agreements with CLECs that set forth the rates, terms and conditions of interconnection, resale and access to unbundled elements. Under Section 252, the terms of such agreements are either voluntarily negotiated by the parties (47 U.S.C. § 252(a)) or, if a voluntary agreement cannot be reached, arbitrated by the state commission (47 U.S.C. § 252(b)). All Section 252 agreements, whether negotiated or arbitrated, are subject to approval by the state commissions. See 47 U.S.C.

§ 252(e). A state commission may approve a voluntarily negotiated agreement, even though it contains terms and conditions that are executed “without regard to the standards set forth in subsections (b) and (c) of Section 251.” See 47 U.S.C. § 252(a) and (e). An agreement arbitrated under the 1996 Act, however, must comply with those standards. *Id.* at § 252(e).

6. Section 252(i) provides that a local exchange carrier must make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. Under the FCC’s rules implementing this section, a CLEC must adopt an agreement in its entirety, and it must adopt an agreement within a reasonable period of time after it is available for public

inspection under section 252(f) of the 1996 Act.¹ Section 252(i) does not provide an independent standard for confecting interconnection agreements. Rather, the primary purpose of this section is to prevent the illegal discrimination that would occur if one party were allowed to operate under an agreement that was not made available to another, similarly situated party.² Z-Tel cannot use Section 252(i) to compel BellSouth to execute a new interconnection agreement that does not comply with Section 251 of the 1996 Act. There is no dispute that the pre-existing interconnection agreement Z-Tel seeks to adopt contains terms and conditions that, although compliant with the law in effect at the time the agreement was executed, are not compliant with existing law. BellSouth does not agree to accept terms and conditions for Z-Tel's new agreement that are no longer required by law or that are contrary to law. Any finding that Section 252(i) compels such a result is contrary to law and, if adopted, would undermine the important public policy the new legal regime seeks to promote.

¹ See *In the Matter of Review of the Section 251 Unbundling Obligations of the Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order (July 13, 2004) ("*Second Report and Order*"). In its *First Report and Order* (see n. 2, *infra*), the FCC interpreted Section 252(i) to permit CLECs to adopt certain terms and conditions of another CLEC's approved agreement without having to adopt other terms and conditions they did not want -- the so-called "pick and choose" rule. At the time it interpreted Section 252(i) in this manner, the FCC "had no practical experience with the actual mechanics of interconnection agreements." See *Second Report and Order*, ¶9. The FCC recently reconsidered this interpretation in light of several years of practical experience. On July 13, 2004, the FCC rejected the "pick and choose rule, and now requires a CLEC invoking section 252(i) to adopt the entire agreement, not just the terms and conditions it likes. These new rules become effective August 23, 2004.

² See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and order, 11 FCC Rcd 15499, 16139, at ¶ 1314 (1996) ("*First Report and Order*"), modified on recon., 11 FCC Rcd 13042 (1996), *aff'd in part, vacated in part, Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part, Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

7. The interconnection agreement that Z-Tel seeks to adopt does not reflect the changes of law contained in certain rules promulgated in the FCC's Triennial Review Order dated August 3, 2003.³ Nor does it reflect the vacatur of other rules in the Triennial Review Order by the D. C. Circuit Court of Appeals effective March 16, 2004 ("USTA II").⁴ BellSouth is not willing to agree to include in Z-Tel's new interconnection agreement outdated terms and conditions that are inconsistent with the parties' rights and obligations under current law.

8. Specifically, Attachment 2 of the Network Telephone agreement sets forth the rates, terms and conditions of access to unbundled network elements. It contains provisions based on the FCC's second set of unbundled network element rules that were vacated by the D.C. Circuit of Appeals in 2002 ("USTA I")⁵ and replaced by different rules in the FCC's Triennial Review Order issued on August 21, 2003. Some of these newer rules remain valid and enforceable today. For example, the Triennial Review Order modified the definition of the unbundled network element known as "dedicated transport" to include only those facilities creating a transmission path between ILEC switches and wire centers, thus eliminating the ILEC's obligation to unbundle entrance facilities (i.e., facilities between an ILEC switch or wire center and a CLEC switch or wire center). Further, the FCC modified the ILEC's obligation to provide unbundled access to fiber loops under certain conditions. Neither of these

³ Report and Order and Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("Triennial Review Order").

⁴ United States Telecom Association v. FCC, 359 F.3d 554, application for writ of certiorari pending.

⁵ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, 15 FCC Rec 3696, 3725 (1999), vacated in *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

Triennial Review Order provisions were vacated on appeal, and they reflect the state of the law as it exists today. The Network Telephone interconnection agreement does not recognize that these provisions have been affected by changes in the law.

9. BellSouth has notified Z-Tel of its intent to modify the agreement, both in the context of subsequent agreements where interconnection agreements are expiring, and of amendments to agreements that are not due to expire. BellSouth provided Z-Tel with BellSouth's proposed follow-on interconnection agreement and a market based rate agreement on 2/19/04 that included all states that Z-Tel currently provided local services. That interconnection agreement reflected language pursuant to TRO requirements. On 5/18/04, BellSouth provided Z-Tel with updates to the previously provided interconnection agreement to reflect language pursuant to the Court Ruling. Since then, BellSouth developed a new Attachment 2 for the interconnection agreement and a new market based rate agreement that could not be provided. In addition, for the TRO, BellSouth initiated notice of change of law for the nine existing Z-Tel interconnection agreements (AL, FL, GA, KY, LA, MS, NC, SC, and TN) on October 29, 2003 and additional notice along with the proposed amendments for each of the nine states on November 25, 2003. Reminder letters were sent on January 12, 2004 and February 16, 2004. For the Court Ruling, BellSouth sent notice of change of law with the proposed amendment for each of the nine existing Z-Tel interconnection agreements on July 6, 2004.

10. Attachment 3 of the Network Telephone agreement deals with the rates, terms and conditions of the interconnection of the Network Telephone and BellSouth networks. Certain provisions of Attachment 3 deal with reciprocal compensation for termination of ISP-bound traffic. Those provisions reflect the terms of the FCC's ISP Order,⁶ under which the FCC allowed carriers that were exchanging traffic during the first quarter of 2001 to continue receiving compensation for ISP-bound traffic, albeit at transitional, capped rates.

11. As noted earlier, the 1996 Act provides three ways for a CLEC like Z-Tel to become a party to an interconnection agreement. A CLEC can: (1) negotiate an agreement pursuant to Section 252(a)(1); (2) ask the state commission to arbitrate issues that have not been resolved by negotiation pursuant to Section 252(b); or (3) adopt an agreement in its entirety, and within a reasonable period of time, pursuant to Section 252(i). See Second Report and Order, n. 1 *infra*. Neither the first nor the second of these options would compel BellSouth to offer Z-Tel the access to unbundled network elements that appears in Attachment 2 of the Network Telephone agreement. The first option would not compel this result because BellSouth is unwilling to voluntarily offer Z-Tel these rights in light of the change in controlling law wrought by the Triennial Review Order (as the result of *USTA I*) and the D. C. Circuit Court of Appeal's *USTS II* decision. The second option would not compel this result because, if Z-Tel were to arbitrate these issues today, the post-Triennial Review Order legal

⁶ Order on Remand and Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, 16 FCC rcd 9151 (April 18, 2001) (the "ISP Order").

requirements would apply, and these requirements clearly do not now compel BellSouth to offer service under the terms of the Network Telephone agreement that have been obsoleted by changes in the law.⁷

12. The issue before the Commission, therefore, is whether the third option – adoption under section 251(i) – compels BellSouth to perpetuate a non-compliant regime when neither of the first two options requires this illogical and inequitable result. Section 251(i) of the Act provides that:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Section 51.809(c) sets forth national standards for implementing Section 252(i). See 47 C.F.R. § 51.809. It provides that such agreements "shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(f) of the Act." 47 C.F.R. §51.809(c). This tribunal should find that this "reasonable period of time" expired when the controlling law

⁷ Section 252(e)(2)(B) of the Act provides for rejection of an arbitrated agreement if it "does not meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to Section 251 or the standards set forth in subsection (d) of [Section 252]." Federal appellate courts have interpreted this to mean that the FCC regulations that are in effect when an interconnection agreement is reviewed – including those recently reinstated and those newly promulgated – must be applied to disputed agreements. See *Illinois Bell Tel. Co. v. McCarty*, 362 F.3d 378, 394 (7th Cir. 2004); *US West Comm. Inc. v. Jennings*, 304 F.3d 950, 958 (9th Cir. 2002); *GTE South, Inc. v. Morrison*, 199 F.3d 733, 740-41 (4th Cir. 1999). Thus, if Z-Tel were to arbitrate ISP and unbundled network element language today, post-TRO law would not compel BellSouth to offer Z-Tel the same ISP and Triennial Review Order language that appears in the Network Telephone Agreement that was arbitrated under law that has been substantially modified by the Triennial Review Order.

changed. This position is consistent with both FCC and federal appellate court precedent.

13. The FCC explained its rationale for the limitation contained in Rule 51.809(c) in its First Report and Order. Given the reality that “pricing and network configuration choices are likely to change over time,” the FCC stated that “it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing that agreement or term have changed.” See First Report and Order, ¶ 1319. Subsequently, the FCC extended this rationale to conclude that changes in law, in addition to changes in technical requirements, must be considered in applying the “reasonable period of time” limitation in Rule 51.809(c). See ISP Order, *supra* at n. 11. In its ISP Order, the FCC changed the rules regarding the reciprocal compensation owed for transport and termination of telecommunications traffic bound for Internet Service Provider (“ISP”) destinations.⁸ The FCC recognized that prior law would be inappropriately perpetuated if carriers were permitted, subsequent to the Order, to use section 252(i) to opt into agreements that predated its Order. To prevent this inappropriate result, the FCC concluded that “any reasonable period of time” under Rule 51.809(c) for adopting pre-existing terms applicable to the exchange of ISP-bound traffic expired upon the effective date of the ISP Order. See ISP Order, at ¶82 and fn. 155 (permitting a CLEC to opt into rates in pre-existing

⁸ Section 251 imposes an obligation upon all telecommunications carriers to establish reciprocal compensation arrangements for (47 U.S.C. § 251(b)(5)); and Section 252 provides the standards applicable to such compensation (Id. §252(c)(2)).

agreements would “seriously undermine” FCC’s effort to fix the regulatory problem the Order was intended to address, and delay the transition to the new regime).

14. Under the FCC’s interpretation of Rule 51.809(c)’s “reasonable period of time” limitation, Z-Tel is also barred from opting into any unbundled network elements provisions in the Network Telephone agreement that do not reflect the valid changes of law in the Triennial Review Order, or the D.C. Circuit’s vacatur of other invalid rules in that Order effective March 16, 2004. Many of the Triennial Review Order provisions that changed pre-existing law were not modified, vacated or remanded on appeal, and they reflect the state of the law as it exists today.

15. In its Triennial Review Order, the FCC, as in its ISP Order, explicitly recognized the importance of quickly transitioning to a new legal regime -- in this case, one that governs access to unbundled network elements – and the concomitant danger of undue delay in implementation. Based on this concern, the FCC declined to rule that the change of law provisions in existing agreements would not be triggered until after exhaustion of all appeals. It stated:

Given that the prior UNE rules have been vacated and replaced today by new rules, *we believe that it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order.*

See Triennial Review Order, ¶ 705 (emphasis added)

See also id., ¶703 (finding that “delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry”).

16. The FCC made this statement in August of 2003 -- almost a year ago. Allowing Z-Tel to adopt the Network Telephone Agreement would accomplish precisely what the FCC sought to avoid, and that is, an unwarranted perpetuation "for months or even years" of rules that are clearly illegal. It would leave Z-Tel, and every other new CLEC, free to execute new agreements, through section 252(i), that do simply do not comply with the law.⁹ Although the FCC did not squarely reach the issue of Section 252(i) adoption of pre-existing, noncompliant agreements in the Triennial Review Order, this Commission clearly has authority to, and should, determine that Rule 51.809(c) and the FCC's interpretation of that rule as set forth in the ISP Order bars a result so plainly at odds with public policy.¹⁰

17. In addition to the FCC, federal courts of appeal have held that it is appropriate to reform existing interconnection agreements to comply with changes in the law. In *AT&T v. BellSouth*, 229 F.3d 457 (4th Cir. 2000), AT&T and BellSouth arbitrated certain issues before the North Carolina commission,

⁹ The same rationale applies to Z-Tel's requested adoption of terms and conditions that are based on rules that the

D. C. Circuit vacated, effective March 16, 2004. BellSouth disagrees that vacated rules have to be replaced by new rules in order for a "change of law" to occur. If anything the policy arguments are far stronger with respect to provisions in the AT&T agreement that are based on unbundled network element rules vacated in *USTA II*, in which case the court vacated those rules for a second time. *USTA II*, 359 F.3d 554 (court concludes that "[a]gain, regrettably, much of the [FCC's] resulting work is unlawful").

¹⁰ This commission clearly has jurisdiction to determine what constitutes a "reasonable period of time" within the meaning of section 51.809(c) under the facts and circumstances of this case. In the recent Second Report and Order, in which the FCC reinterpreted and rejected the "pick and choose" rule that previously applied to Section 252(i) "opt-ins," several parties asked the FCC specifically for a declaration that agreements governing network elements no longer subject to mandatory unbundling under the D. C. Circuit's March 3, 2004 decision are not subject to section 252(i). The FCC declined to express an opinion on this issue, concluding that it was beyond the scope of that proceeding. See Second Report and Order, fn. 100 (FCC declined to "take a position on any issue outside the scope of the FNPRM"). This Commission is free, therefore, to rule on this issue, and it should do so by adopting BellSouth's position.

which entered an order that was appealed to the federal district court and then to the Fourth Circuit. By the time the Fourth Circuit decided the matter, both the Eighth Circuit and the United States Supreme Court had issued opinions that changed the law that had been in effect when the North Carolina commission entered its order. The Fourth Circuit, therefore, remanded the case to the district court so it could reconsider the order in light of those changes of law. *See Id.* at 459, 464.

18. AT&T, however, asked the Fourth Circuit to order the district court to reinstate a "negotiated" provision of the agreement that required BellSouth, at the request of AT&T, to recombine network elements that had been unbundled. *See Id.* at 465. AT&T argued that this was a negotiated provision which, unlike arbitrated provisions, can be included in interconnection agreements "without regard to the standards set forth in . . . Section 251" of the Act. *Id.* at 465-66. AT&T, therefore, argued that the district court had erred in striking this provision from the agreement. *Id.*

19. The Fourth Circuit disagreed and concluded that this provision, "although negotiated, may be reviewed by the district court for consistency with the 1996 Act and [existing] law thereunder." *Id.* at 466. The Court explained that:

AT&T is correct that the 1996 Act permits parties to negotiate--rather than arbitrate--provisions of their interconnection agreement; however, provisions not arbitrated are also not necessarily negotiated "without regard to the standards set forth in subsections (b) and (c) of section 251." That is, the 1996 Act requires both the ILEC and CLECs to negotiate in good faith. When the parties are so negotiating, many of their disputes will have been previously resolved by, among other things, FCC Rules and interpretations,

prior state commission rulings and interpretations, and agreements reached with other CLECs--all of which are a matter of public record. In this light, many so-called "negotiated" provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act.

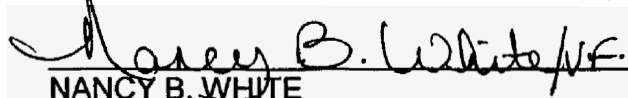
Id.

The parties, therefore, were not required to continue operating under that provision. Just as AT&T was not entitled to continue operating under a negotiated provision after the law affecting that provision had changed, Z-Tel is not entitled to operate under provisions negotiated by others after the law affecting those provisions has changed.

WHEREAS, for the reasons set forth above, BellSouth respectfully requests the Commission find that Z-Tel is not entitled to adopt the existing interconnection agreement between BellSouth and Network Telephone.

Respectfully submitted this 5th day of August, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.


NANCY B. WHITE

c/o Nancy Sims
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301
(305) 347-5558


R. DOUGLAS LACKEY

675 W. Peachtree Street
Suite 4300
Atlanta, Georgia 30375
(404) 335-0747

545830

BellSouth Interconnection Services

675 W. Peachtree Street N.E.
Room 34S91
Atlanta, Georgia 30375

Lynn Allen-Flood
404-927-1376
Fax: (404) 529-7839

Sent via Electronic Mail and Certified Mail

January 21, 2004

Ms. Peggy Rubino
Z-Tel Communications, Inc.
601 South Harbour Island Blvd.
Suite 220
Tampa, FL 33602

Re: Request that Z-Tel Communications, Inc. (Z-Tel) engage in negotiations with BellSouth Telecommunications, Inc. (BellSouth) pursuant to Section 251(c)(1) of the Telecommunications Act of 1996 and General Terms and Conditions of the Interconnection Agreements between Z-Tel Communications, Inc. and BellSouth Telecommunications, Inc.

Dear Peggy:

On March 19, 2003, BellSouth and Z-Tel entered into Interconnection Agreements for the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. The Interconnection Agreements the Parties entered into were adoptions by Z-Tel of the MCI WorldCom Communications, Inc. and BellSouth Interconnection Agreements. The expiration dates for those Agreements are as follows:

FL - 09/11/04
NC - 11/04/04
GA - 11/11/04
MS - 05/06/05
AL - 06/16/05
LA - 06/16/05
TN - 06/16/05
KY - 07/28/05
SC - 07/29/05

BellSouth is hereby requesting that Z-Tel commence good-faith negotiations with BellSouth to enter into a new agreement(s) in compliance with Section 251(c)(1) of the Communications Act of 1934, as amended ("Act"). Considering that the existing Interconnection Agreements do not expire simultaneously, BellSouth proposes that we commence negotiations for all states with this notice with plans to have a new Agreement in place by the expiration of the earliest state Agreement, which is Florida. Please confirm that Z-Tel is agreeable to this plan.

BellSouth Interconnection Services

In an effort to move the negotiation process along, a copy of the BellSouth Standard Interconnection Agreement and Market Based Rate Agreement will be forwarded to you via email. Once you have had an opportunity to review the proposed agreements, please provide any proposed counter language to me via redline. If need be, we will begin scheduling meetings between the companies to address issues raised per your redlined language.

BellSouth looks forward to working with Z-Tel. Should you have questions regarding this, please do not hesitate to call me.

Sincerely,

Lynn Allen-Flood
Manager-Interconnection Services

BellSouth Interconnection Services

675 West Peachtree Street, NE
Room 34S91
Atlanta, Georgia 30375

Lynn Allen-Flood
404-927-1376
FAX: 404 529-7839

Sent Via Electronic Mail and Certified Mail

February 20, 2004

Ms. Peggy Rubino
Z-Tel Communications, Inc.
601 South Harbour Island Blvd.
Suite 220
Tampa, FL 33602

Dear Peggy:

Pursuant to the General Terms and Conditions of the existing Interconnection Agreement between Z-Tel Communications, Inc. and BellSouth Telecommunications, Inc. dated April 18, 2004, BellSouth notified you that it wished to commence negotiations of the Subsequent Agreement, as defined in the existing Interconnection Agreement, and forwarded to you an agreement to be used as the starting point for such negotiations. This proposed Agreement is positioned to replace the nine individual state Agreements that currently is in place for Z-Tel Communications, Inc..

We have an obligation under the Telecommunications Act to comply with the terms of the existing Interconnection Agreement between the parties, which specifies the process for negotiation of the Subsequent Agreement. As of February 20, 2004, thirty (30) days of the negotiation period have elapsed. The arbitration window opens on June 4, 2004.

Per your request, I have provided the Word documents of the proposed Interconnection Agreement. Please let me know if you have any questions.

Sincerely,

Original Signed
Lynn Allen-Flood
Manager, Interconnection Service

BellSouth Interconnection Services

675 West Peachtree Street, NE
Room 34891
Atlanta, Georgia 30375

Lynn Allen-Flood
404-927-1376
FAX: 404 529-7839

Sent Via Electronic Mail and Certified Mail

March 22, 2004

Ms. Peggy Rubino
Z-Tel Communications, Inc.
601 South Harbour Island Blvd.
Suite 220
Tampa, FL 33602

Re: 60 Day Notice - Commencement of Negotiations for a Subsequent Agreement(s) to Replace the Existing Interconnection Agreement(s)

Dear Peggy:

Pursuant to the General Terms and Conditions of the existing Interconnection Agreement between Z-Tel Communications, Inc. and BellSouth Telecommunications, Inc. dated April 18, 2004, BellSouth notified you that it wished to commence negotiations of the Subsequent Agreement, as defined in the existing Interconnection Agreement, and forwarded to you an agreement to be used as the starting point for such negotiations. This proposed Agreement is positioned to replace the nine individual state Agreements that currently are in place for Z-Tel Communications, Inc.

We have an obligation under the Telecommunications Act to comply with the terms of the existing Interconnection Agreement between the parties, which specifies the process for negotiation of the Subsequent Agreement. As of March 21, 2004, sixty (60) days of the negotiation period have elapsed. The arbitration window opens on June 4, 2004.

You have been provided with BellSouth's proposed Agreement. Please provide any counter language via redline so that we may begin negotiating issues to resolution if possible.

Please let me know if you have any questions.

Sincerely,

Original Signed

Lynn Allen-Flood
Manager, Interconnection Service

BellSouth Interconnection Services

675 West Peachtree Street, NE
Room 34S91
Atlanta, Georgia 30375

Lynn Allen-Flood
404-927-1376
FAX: 404 529-7839

Sent Via Electronic Mail and Certified Mail

April 20, 2004

Ms. Peggy Rubino
Z-Tel Communications, Inc.
601 South Harbour Island Blvd.
Suite 220
Tampa, FL 33602

Re: 90 Day Notice - Commencement of Negotiations for a Subsequent Agreement(s) to Replace the Existing Interconnection Agreement(s)

Dear Peggy:

Pursuant to the General Terms and Conditions of the existing Interconnection Agreement between Z-Tel Communications, Inc. and BellSouth Telecommunications, Inc. dated April 18, 2003, BellSouth notified you on January 21, 2004 that it wished to commence negotiations of the Subsequent Agreement, as defined in the existing Interconnection Agreement, and forwarded to you an agreement to be used as the starting point for such negotiations. This proposed Agreement is positioned to replace the nine individual state Agreements that currently are in place for Z-Tel Communications, Inc. Receiving no response, BellSouth notified you again on February 20 and March 22. Attached are copies of the referenced correspondence.

We have an obligation under the Telecommunications Act to comply with the terms of the existing Interconnection Agreement between the parties, which specifies the process for negotiation of the Subsequent Agreement. As of April 20, 2004, ninety (90) days of the negotiation period have elapsed, leaving little time to negotiate new terms and conditions prior to the start of the arbitration window. The arbitration window opens on June 4, 2004.

If I do not receive a response from you by April 30, 2004, and if you continue to refuse to negotiate a Subsequent Agreement, BellSouth may notify the Public Services Commissions that you have failed to respond to requests for negotiations of the Subsequent Agreement in accordance with the terms of the Interconnection Agreement and request the Commissions mediate negotiations for the parties or take such other action as the Commission deems appropriate.

Please let me know if you have any questions.

Sincerely,
Original Signed
Lynn Allen-Flood
Manager, Interconnection Service

Cc: Michael Karno