Matilda Sanders

ORIGINAL

From: Peg Griffin [pgriffin@moylelaw.com]

Sent: Wednesday, December 28, 2005 12:25 PM

To: Filings@psc.state.fl.us

Cc: Vicki Gordon Kaufman; Chuck McBride; Ken Rogers; Patrick Wiggins; Nancy Sims; Nancy White

Subject: E-filing - New Docket - Complaint

050973-TP

Attachments: VTComplaint FINAL.pdf

Attorney responsible for filing: Vicki Gordon Kaufman
118 N. Gadsden Street
Tallahassee, FL 32301
Telephone: (850) 681-3828
Facsimile: (850) 681-8788
vkaufman@moylelaw.com

Docket Nos. and titles: In Re: Complaint and Petition for Arbitration of Telepak Networks, Inc. Regarding a Dispute Under an Existing Interconnection Agreement with BellSouth Telecommunications, Inc.
Docket No. TBD

Filed on behalf of: Telepak Networks, Inc.

Number of pages: 42
Document attached: Complaint and Petition for Arbitration

Peg G. Griffin
Assistant to Vicki Gordon Kaufman
Moyle, Flanigan, Katz, Raymond & Sheehan, P.A.
118 N. Gadsden Street
Tallahassee, FL 32301
Telephone: (850) 681-3828
Facsimile: (850) 681-8788
E-mail: pgriffin@moylelaw.com

ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE:

COMPLAINT AND PETITION FOR ARBITRATION OF TELEPAK NETWORKS, INC. REGARDING A DISPUTE UNDER AN EXISTING INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.
_____/

DOCKET NO: 050973-TP
Filed: December 28, 2005

COMPLAINT AND PETITION FOR ARBITRATION

Telepak Networks, Inc. ("Telepak Networks"), pursuant to section 120.57(2), Flroida Statutes, and rules 25-22.036, 28-106.201, Florida Administrative Code, files this Complaint and Petition for Arbitration against BellSouth Telecommunications, Inc. ("BellSouth") to enforce, as written, the volume and term discount provisions contained in the existing and approved Interconnection Agreement between BellSouth and Telepak Networks (collectively, "Parties"). In support of its Complaint and Petition, Telepak Networks states:

PARTIES

1. Telepak Networks is a Mississippi corporation authorized to do business in the State of Florida. Telepak Networks furnishes telecommunication services within the State of Florida and is a certified Competitive Local Exchange Carrier ("CLEC"). Telepak Networks' address is Main Street, Meadville, Mississippi 39653. Telepak Networks also maintains offices at Suite 1830, 125 South Congress Street, Jackson, Mississippi 39201.

2. BellSouth is a Georgia corporation authorized to do business in the State of Florida. BellSouth's address is 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375.

3. The persons authorized to receive notices, pleadings, and other communications regarding this Complaint and Petition for Arbitration are:

Charles L. McBride, Jr.
cmcbride@brunini.com
Ken Rogers
krogers@brunini.com
Brunini, Grantham, Grower & Hewes, PLLC
1400 Trustmark Building
Post Office Drawer 119
Jackson, Mississippi 39205
601.948.3101
601.960.6902 (fax)

Vicki Gordon Kaufman
vkaufman@moylelaw.com
Moyle Flanigan, Katz, Raymond, & Sheehan, PA
118 North Gadsden Street
Tallahassee, Florida 32301
850.681.3828
850.681.8788 (fax)

JURISDICTION

4. The Commission has jurisdiction over the claims asserted in this Complaint under Section 252(e) of the Telecommunications Act of 1996 ("TA96"), 47 U.S.C. § 252(e) and pursuant to Chapters 120 and 364, Florida Statutes.

FACTS

5. Telepak Networks and BellSouth are parties to an Interconnection Agreement, dated March 16, 2001, which was negotiated by the Parties pursuant to Section 251(b) of TA96, 47 U.S.C. §251(b). The Interconnection Agreement, which was filed in Docket No. 011641-TP and effective by operation of law on March 14, 2002,

provides, inter alia, for Telepak Networks to resell certain services offered by BellSouth. Pursuant to Attachment 1 of the Interconnection Agreement, Telepak Networks purchases services for resale from BellSouth in Florida at the business and CSA resale discount of 16.81% from tariffed rates, which is available to all certificated Competitive Local Exchange Carriers ("CLECs") in this State.

6. The Interconnection Agreement has been amended several times. Of relevance here, Telepak Networks and BellSouth amended the Interconnection Agreement to provide for additional discounts for certain resold services under a volume and term discount arrangement ("V&T Agreement"). See, Docket No. 020612-TP. A copy of the V&T Agreement is attached as Exhibit A to this Complaint, excerpted from the Parties' Interconnection Agreement. The effective date of the discounts available under the V&T Agreement was January 1, 2002.

7. Generally, the size of the additional discount ("V&T Discount") that BellSouth must provide to Telepak Networks pursuant to the V&T Agreement is determined by the Table attached as Appendix 2 to the V&T Agreement. For example, in 2002, which is Year 1 on the Table, Telepak Networks has committed to the minimum annual revenue target for Tier 3 and therefore is entitled to a V&T Discount of 10.5% in addition to the otherwise applicable resale discount.

8. Against this backdrop, a dispute has arisen between Telepak Networks and BellSouth regarding discounts available under the Interconnection Agreement, as amended.

9. This dispute has arisen because BellSouth has overcharged Telepak Networks for services it purchased under the V&T Agreement. This overcharge has

resulted from BellSouth's failure to calculate the actual dollar value of the V&T Discount in accordance with the unambiguous terms of the V&T Agreement. The V&T Agreement is clear that the V&T Discount applies to the tariffed rates for the BellSouth services it resells. To calculate the dollar value of the total discount, BellSouth should simply add the resale discount to the 10.5% V&T Discount and then multiply the sum by the tariffed rates for the resold services.

10. The V&T Agreement is clear that the V&T Discount is *in addition* to the resale discount and that both discounts apply to the tariff price of the resold services. Section 3.1 of the V&T Agreement states in pertinent that:

> BellSouth shall apply a discount that is a percentage reduction of the total recurring charges within the total billed revenue associated with the Eligible Services based on tariff rates. Discount Levels shall be based on the Annual Revenue Commitment and are provided in Appendix II. The applicable Discount Level shall be selected from the Table contained in Appendix II.
>
> [Emphasis added].

11. BellSouth contends, however, that the V&T Discount should be applied to the resale rates for the resold services. BellSouth thus undertakes a more complicated calculation that involves multiplying the resale discount by the tariffed rates and subtracting the result from the tariff rates to obtain the resale rate. BellSouth then multiplies the resale rate by the V&T Discount percentage and subtracts the result from the resale rate to calculate the final price paid by Telepak Networks. This methodology is erroneous and significantly lowers the dollar value of the V&T Discount.

12. BellSouth defends its flawed calculation of the V&T Discount by referring to Sections 1.3.3 and 12.2 in the V&T Agreement. Neither Section 1.3.3 nor Section 12.2 supports BellSouth's erroneous method of calculating the V&T Discount, however.

13. Section 1.3.3 in fact supports Telepak Networks' method of calculating the V&T Discount. Section 1.3.3 defines the term "Discount Level" as "the percentage reduction from the resale rate in addition to the applicable state mandated resale discount applied monthly to the total recurring charges for the BellSouth services that are eligible for participation in the V&T offering and for which billing has occurred or will occur during the current billing period." This section makes clear, as does Section 3.1, that the V&T Discount applies to the total recurring charges for the resold services eligible for the V&T Discount and that the V&T Discount is "in addition to" the resale discount. Taken together, Sections 3.1 and 1.3.3 state that the V&T Discount is in addition to the resale discount and that both discounts apply to the total recurring tariffed charges for V&T eligible services.

14. BellSouth's reliance on Section 12.2 as a basis for its erroneous method of calculating the V&T Discount is also misplaced because Section 12.2 of the V&T Agreement simply describes the means by which BellSouth's billing to Telepak Networks would be modified to track and to properly reflect the V&T Discount. Section 12.2, however, does not describe the method of calculating the V&T Discount. The method of calculation is described in Section 3.1, which is quoted above.

15. Nothing in Sections 1.3.3 or 12.2 changes the fact that the plain and unambiguous language of Section 3.1 clearly states that the V&T Discount applies to the tariff rates for the resold services. Further, reading Sections 1.3.3 or 12.2 to state that the V&T Discount applies to already discounted resale rate puts those provisions in direct conflict with Section 3.1. It is a long held canon of construction that a contract should be read in a manner that makes the terms thereof harmonious. *See, Jones v. Florida*

Insurance Guaranty Association, Inc., 908 So.2d 435, 456 (Fl. 2005); *City of Homestead v. Johnson*, 760 So.2d 80, 84 (Fl. 2000). The interpretations of Sections 1.3.3, 3.1, and 12.2 espoused by Telepak Networks makes the terms harmonious, while BellSouth's interpretation creates a conflict and should be rejected.

16. Because of BellSouth's incorrect method of calculating the V&T Discount, it has overcharged Telepak Networks in an amount not less than $22,772.62 for services provided in Florida pursuant to the V&T Agreement which was effective on January 1, 2002, through present. BellSouth continues to overcharge Telepak Networks in subsequent monthly statements.

17. On January 8, 2003, Telepak Networks filed a *Petition for Arbitration of an Interconnection Dispute Under an Existing Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 03-AD-0021, with the Mississippi Public Service Commission ("MPSC") to resolve this dispute.

18. The MPSC held oral argument and entered a Final Order in favor of Telepak Networks on January 7, 2004. The MPSC found the provisions of the V&T Agreement to be clear and unambiguous and thus interpreted the Agreement by simply reading the language set out in the 4 corners of the V&T Agreement. The MPSC found that Telepak Networks' interpretation of the V&T Agreement, described above, was correct. The MPSC further found that BellSouth had incorrectly interpreted the V&T Agreement and the MPSC ordered BellSouth to refund Telepak the overpaid amounts plus interest. The MPSC held:

> . . . Telepak Networks' method of calculating the discount is consistent with Sections 3.1 and 1.3.3 of the V&T Agreement. BellSouth's method of calculating the total discount is inconsistent with Sections 3.1 and 1.3.3

> of the V&T Agreement, because it ignores the language of 3.1, which expressly provides that the discount is based upon tariffed rates.[1]

A copy of the MPSC's Final Order is attached to this Complaint and Petition as Exhibit B.

19. BellSouth appealed the MPSC's Order to the United States District Court for the Southern District of Mississippi. On July 12, 2005, the Court issued its Memorandum and Opinion affirming, in its entirety, the MPSC Order. A copy of the federal Court's opinion is attached to this Complaint and Petition as Exhibit C. The Court entered its Final Judgment affirming the MPSC's Order and dismissing all of BellSouth's claims with prejudice on July 28, 2005. A copy of the Final Judgment is attached to this Complaint and Petition as Exhibit D. The very same V&T Agreement which the federal court ruled upon is at issue here. Despite the fact that the issue of the correct interpretation of the V&T Agreement has been conclusively resolved by a federal court, BellSouth has refused to accede to the correct interpretation of the V&T Agreement.

COUNT ONE

20. Telepak Networks incorporates paragraphs 1-19 of this Complaint and Petition as if fully set forth herein.

21. There are no material facts in dispute in this matter. The V&T Agreement is clear on its face and should be interpreted within the 4 corners of the Agreement.

22. BellSouth has improperly applied the V&T Discount contained in the Parties' Interconnection Agreement by ignoring the unambiguous language as agreed by the Parties in the V&T Agreement contained in the Parties' Interconnection Agreement.

[1] Exhibit B, MPSC Final Order at 6.

23. As a result, from the effective date of the V&T Agreement, January 1, 2002, through the present date, BellSouth has overcharged Telepak Networks for services purchased in the amount of $22,772.62, including the applicable interest of $4,114.83 provided in the Interconnection Agreement agreed to by the Parties for a total of $26,887.45.[2]

24. BellSouth should be ordered to refund overcharges it has collected from Telepak Networks as a result of BellSouth's erroneous application of the V&T Discount from January 1, 2002, to present, together with pre and post judgment interest as provided in the Parties' existing Interconnection Agreement, in the amount of $26,887.45.[3]

PRAYER FOR RELIEF

WHEREFORE, Telepak Networks respectfully requests that:

a. The Commission process this Complaint and Petition pursuant to section 120.57(2), Florida Statutes, because there are no material facts in dispute;

b. The Commission enter a Final Order to enforce the Interconnection Agreement as written between the Parties and declare that the V&T Discount applies to the tariff rates for the resold services that are the subject of the V&T Agreement; and

c. The Commission enter a Final Order requiring BellSouth to refund the overcharges it has collected from Telepak Networks as a result of BellSouth's improper application of the V&T Discount, together with pre and post judgment interest as provided in the Parties' existing Interconnection Agreement, attorneys' fees and expenses

[2] This amount will continue to increase as this petition is processed and will need to be updated.
[3] As noted above, this number will need to be updated.

incurred by Telepak Networks in bringing this action together with such other legal and equitable relief as the Commission may deem appropriate.

S/ Vicki Gordon Kaufman

Charles L. McBride, Jr.
cmcbride@brunini.com
Ken Rogers
krogers@brunini.com
Brunini, Grantham, Grower & Hewes, PLLC
1400 Trustmark Building
Post Office Drawer 119
Jackson, Mississippi 39205
601.948.3101
601.960.6902 (fax)

Vicki Gordon Kaufman
vkaufman@moylelaw.com
Moyle Flanigan, Katz, Raymond, & Sheehan, PA
118 North Gadsden Street
Tallahassee, Florida 32301
850.681.3828
850.681.8788 (fax)

Attorneys for Telepak Networks

AMENDMENT
TO THE
INTERCONNECTION AGREEMENT BETWEEN
TELEPAK NETWORKS, INC.
AND
BELLSOUTH TELECOMMUNICATIONS, INC.
DATED MARCH 16, 2001

This Amendment to Interconnection Agreement ("Amendment") is entered into by and between BellSouth Telecommunications, Inc., a Georgia corporation ("BellSouth"), and Telepak Networks, Inc., a Mississippi corporation ("Telepak Networks"). BellSouth and Telepak Networks may be individually referred to herein as "Party" and collectively as "Parties".

WHEREAS, BellSouth and Telepak Networks executed an Interconnection Agreement dated March 16, 2001, and amended on July 9, 2001, July 31, 2001, October 10, 2001, November 5, 2001, and May 3, 2002 (the "Interconnection Agreement"); and

WHEREAS, the Parties desire to amend the Interconnection Agreement as set forth herein;

NOW, THEREFORE, for and in consideration of the promises herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree to amend the Interconnection Agreement as follows:

1. The term of the Amendment shall begin on January 1, 2002, and shall terminate on December 31, 2005. The Parties acknowledge that the term of this Amendment exceeds the term of the Interconnection Agreement. The terms and conditions of this Amendment shall be incorporated into any subsequent interconnection agreement. If no such agreement is executed, this Amendment shall terminate on the date of the Interconnection Agreement with applicable termination liability as described in this Amendment.

2. The existing Interconnection Agreement is hereby amended to add the following, which shall be a new Attachment 1A to the Interconnection Agreement:

   1.0 Volume and Term

   1.1 Scope

   This Amendment applies to the services specified in Appendix I provisioned within the states of Alabama, Florida, Louisiana, Mississippi, and Tennessee.

1.2 PURPOSE

BellSouth and Telepak Networks intend for Telepak Networks to purchase the services set forth in Appendix I at a Discount Level as set forth in Section 1.3.3. The specified services shall be purchased so that Telepak Networks will comply with the revenue commitment set forth in Section 2 below.

1.3 DEFINITIONS

1.3.1 "V&T Eligible Services" are those services listed in Appendix I.

1.3.2 "Annual Revenue Commitment" represents the agreed upon amount of billing to Telepak Networks by BellSouth for BellSouth's V&T Eligible Services purchased by Telepak Networks each year that represent the revenue Telepak Networks agrees to achieve for the purposes of the V&T Agreement. Telepak Networks' Annual Revenue Commitment is included in Appendix II of this Agreement.

1.3.3 "Discount Level" is the percentage reduction from the resale rate in addition to the applicable state-mandated resale discount applied monthly to the total recurring charges for the BellSouth services that are eligible for participation in the V&T offering and for which billing has occurred or will occur during the current billing period.

1.3.4 "A Contract Year" is the twelve-month period during the term of this Agreement beginning on January 1, 2002, the effective date of the Agreement, and will last for 12 months. This date shall also establish the anniversary date for this V&T agreement.

2.0 ANNUAL REVENUE COMMITMENT

2.1 Telepak Networks agrees to an Annual Revenue Commitment in each Contract Year of the V&T Agreement as specified in Appendix II.

2.2 BellSouth and Telepak Networks agree that all recurring charges for V&T Eligible Services billed by BellSouth shall be applied toward Telepak Networks' Annual Revenue Commitment. Telepak Networks' progress toward meeting the Annual Revenue Commitment will be tracked by BellSouth and measured in resale billed dollars with a BellSouth bill date within the appropriate Contract Year.

2.3 Annual Revenue Commitment does not include services purchased by Telepak Networks from the BellSouth Federal or State Access Tariff.

2.4 Telepak Networks will receive credit for recurring charges that are waived due to BellSouth's failure to meet service commitments.

3.0 DISCOUNT LEVELS

3.1 BellSouth shall apply a discount that is a percentage reduction off the total recurring charges within the total billed revenue associated with the Eligible Services based on tariff rates. Discount Levels shall be based on the Annual Revenue Commitment and are provided in Appendix II. The applicable Discount Level shall be selected from the Table contained in Appendix II.

3.2 Charges billed pursuant to Interconnection Agreements except as provided for herein, Federal or State Access Services tariffs, and billing for taxes or public imposed surcharges, including but not limited to, the surcharges for 911 or dual party relay services, will not be subject to a Discount.

3.3 Discounts under this Agreement will be limited to an annual maximum total billed revenue associated with the V&T Eligible Services based on tariff rates as specified in Appendix II.

4.0 REGULATORY CONSIDERATIONS

4.1 Telepak Networks recognizes and agrees that the V&T Agreement is to be applied in accordance with Appendix II to this Amendment and that all services that are included in the V&T Agreement will be purchased in accordance with the approved applicable BellSouth General Subscriber Services Tariff and Private Line Services Tariff in effect in each state. The provisions of such tariffs applicable to the services shall apply unless and except to the extent this Agreement contains express provisions specifically in conflict therewith (in which case the express provisions of this Agreement shall control to the extent permitted by applicable law.)

4.2 Telepak Networks acknowledges that BellSouth may be required to file and obtain approval of the V&T Agreement in certain states prior to implementation of a V&T Agreement in certain states. BellSouth agrees to begin any necessary filings within 30 days after the execution of a V&T Agreement between BellSouth and Telepak Networks.

5.0 COMMITMENT REVISION

5.1 Telepak Networks agrees that if it fails to meet its Annual Revenue Commitment during a given Contract Year, BellSouth shall bill and Telepak Networks agrees to pay the difference between the Annual Revenue Commitment and the actual billed revenue discounted in accordance with the actual realized Tier Level as set forth in Appendix II. BellSouth will issue Telepak Networks a bill for any such resulting amount which shall be payable

thirty (30) days after receipt thereof by the Customer. If Telepak Networks exceeds the Annual Revenue Commitment, BellSouth agrees to credit the difference to Telepak Networks in accordance with Appendix II.

6.0 PROVISION FOR DISCOUNTING ADDITIONAL AND NEW SERVICES UNDER V&T

6.1 For the purposes of this Agreement an Additional Service is an intraLATA service that is tariffed by BellSouth on the effective date of this Agreement and is not considered a Discount Eligible intraLATA Service. A New Service is an intraLATA service that has been tariffed by BellSouth after the effective date of the V&T Agreement. Telepak Networks may submit a request to BellSouth to obtain a discount on the Additional Service or New Service under the Agreement. If the New Service or Additional Service is added to the Discount Eligible Services listed in Appendix I, BellSouth and Telepak Networks may choose to renegotiate the Annual Revenue Commitment and Discount based upon the impact of the Additional Service or New Service.

7.0 ACQUISITION OF NEW BUSINESSES AND MERGER

7.1 In the event Telepak Networks acquires a new business or operation within the BellSouth service area during the term of this Agreement and desires to include the services under this Agreement, BellSouth shall review such request and in the event it determines the inclusion of these services is appropriate, BellSouth and Telepak Networks mutually agree to negotiate in good faith to amend this Agreement, the Annual Revenue Commitment levels in Appendix II, and the associated discounts, as appropriate to include such services in the V&T Agreement. Any revisions due to acquisition will be made during the V&T Annual True-Up at the end of the year in which the acquisition occurred, and will affect the Annual Revenue Commitment for the years following the True-Up.

7.2 In the event Telepak Networks merges with another entity, BellSouth, Telepak Networks, and the newly merged entity may mutually decide to, but Telepak Networks and/or the newly merged entity is under no obligation to, negotiate a new V & T Agreement. If this Agreement is renegotiated, it will not be considered a termination under Section 9 and no penalty will be assessed.

8.0 OTHER NEW BUSINESS OPPORTUNITIES

8.1 Further, in the event BellSouth offers services currently included in this Agreement or new services outside of its existing franchised territory and Telepak Networks subscribes to such services, BellSouth shall review with Telepak Networks such instances to determine the feasibility and/or criteria for including any of the subscribed services in the V&T Agreement.

9.0 TERMINATION LIABILITY

9.1 Notwithstanding anything to the contrary in the General Terms and Conditions, Telepak Networks shall have the right to terminate amendment, prior to expiration by providing BellSouth written notice of such termination 60 days prior to the effective date of the termination.

9.1.1 Notwithstanding anything to the contrary in the General Terms and Conditions, BellSouth shall have the right to terminate amendment, prior to expiration by providing Telepak Networks written notice of such termination 60 days prior to the effective date of termination, when the following condition applies:

(1) If the Telepak Networks fails to meet the minimum Annual Revenue Commitment for the corresponding Contract Year as set forth in Tier 1 of Appendix II.

9.1.2 In the event Telepak Networks or BellSouth terminates the Amendment, Telepak Networks will be charged a termination charge equal to the accumulated V&T credits received during the Contract Year in which termination is effective.

9.2 The application of termination charges pursuant to this Section shall not affect the application of termination charges pursuant to any BellSouth tariff or any other agreement for services not covered by this V&T Agreement.

10.0 TARIFF CHANGES

10.1 If during the term of this Agreement, BellSouth requests and receives regulatory approval for price reductions on tariff services ("Tariff Change") purchased by Telepak Networks and such price reductions cause Telepak Networks to be unable to meet its Annual Revenue Commitment under this Agreement, then the discounts for which Telepak Networks will be eligible under this agreement will be determined based on the revenue that Telepak Networks would have achieved at the rates applicable prior to the Tariff Change and at the volume of service actually achieved.

11.0 ANNUAL TRUE-UP

11.1 Within 90 days of the end of each Contract Year, BellSouth will conduct a review of Telepak Networks' revenue to BellSouth to determine if Telepak Networks achieved or exceeded its Annual Revenue Commitment ("Annual True-Up"). During the Annual True-Up, BellSouth will calculate any adjustment in accordance with Section 5. Telepak Networks may commit to higher levels of spending and negotiate a future discount commensurate with this higher commitment level for subsequent years. During the Annual True-

Up, BellSouth may conduct any necessary audits of Telepak Networks to verify that the services included in this Agreement were used by Telepak Networks in accordance with the terms of the applicable tariffs to the extent such audit rights and procedures are set forth in the applicable tariff or the Interconnection Agreement.
Telepak Networks and BellSouth agree that any credit resulting from the Annual True-Up will be distributed to Telepak Networks as a credit on its bill for V&T Eligible Services within thirty (30) days of the Annual True-up in accordance with Section 5 and Appendix II.

Further, any debit resulting from the Annual True-up for failure to meet the Annual Revenue Commitment or Termination Liability will be billed directly to Telepak Networks and shall be payable to BellSouth within thirty (30) days of the bill date.

12.0 BILLING

12.1 The Parties agree that the billing information currently being provided by BellSouth to Telepak Networks for the resale of General Subscriber Services Tariff (GSST) and Private Line services is acceptable for use under this Amendment in order to calculate the discount level set forth in Appendix II. In the event that any billing question or issue arises, the matter will be subject to the billing dispute provisions of the Interconnection Agreement.

12.2 The Parties agree to place all V&T eligible services under one Q account for each State in which Telepak Networks obtains services from BellSouth and that each such account will be designated as the V&T Q Account for the relevant State. The resale recurring revenue associated with the V&T Eligible services billed under the V&T Q account will be used to calculate V&T credits each month.

12.3 The V&T Discount Levels will be administered and applied using BellSouth's Customer Billing Relationships (CBR) system. CBR will apply the total discounts achieved based on the Annual Revenue Commitment one month in arrears. The reward will be applied to the Other Charges & Credits (OC&C) section of Telepak Networks' bill. The phrase assigned to identify the V&T credits in the OC&C section will be entitled "Rewards under Telepak Networks Resale V&T."

13.0 MISCELLANEOUS

13.1 Telepak Networks will be solely responsible for the identification of Telepak Networks accounts that are V&T eligible. Telepak Networks and BellSouth agree that BellSouth will not be responsible for failure to apply a discount to a V&T eligible account if such failure results from Telepak Network's failure to properly identify such account, unless the account is identified in the manner

directed by BellSouth. Additional V&T eligible accounts may be added only by mutual agreement of the parties.

13.2 This Agreement shall be construed in accordance with the laws of the State of Georgia.

13.3 Except as otherwise provided in this Agreement, notices required to be given pursuant to this Agreement shall be effective when received and shall be sufficient if given in writing, delivered by hand, facsimile, overnight mail delivery, or United States mail, postage prepaid, addressed to the appropriate party at the address set forth below. Either party hereto may change the name and address to whom all notices or other documents required under this Agreement must be sent at any time by giving written notice to the other party. Current addresses are:

BellSouth
Attn: Resale Product Manager
675 W. Peachtree St., NE
Mail Stop 34A51
Atlanta, GA 30375

Telepak Networks
Attn: Operations Manager
125 South Congress Street
Suite 1100
Jackson, MS 39201-3304

13.4 All of the other provisions of the Interconnection Agreement shall remain in full force and effect.

13.5 Either or both of the Parties is authorized to submit this Amendment to the appropriate Commission or other regulatory body having jurisdiction over the subject matter of this Amendment, for approval subject to Section 252(e) of the federal Telecommunications Act of 1996.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed by their respective duly authorized representatives on the date indicated below.

Telepak Networks, Inc.	**BellSouth Telecommunications, Inc.**
Signature on File	Signature on File
Signature	Signature
Gregg Logan	Jerry D. Hendrix
Printed Name	Printed Name
Vice President	Assistant Vice President
Title	Title
June 7, 2002	May 31, 2002
Date	Date

Appendix I
V&T Eligible Services

This Agreement covers GSST and Private Line network transport services and other regulated business services that Telepak Networks may order pursuant to the applicable BellSouth tariff.
These services are:

1. Business Services in A.3:
   Single-line Business Service as defined in A3.7.2
   Multi-line Service as defined in A3.7.4
   Business Plus Service® as defined in A3.43
   Complete Choice® for Business Package as defined in A3.45
2. Services in A40.1:
   Customer Connection to Frame Relay Service
   Back-up Capability
   Frame Relay Service Feature Charges
3. Services in A.42:
   ISDN Business Service as defined in A42.1
   ISDN Residential Service as defined in A42.2
   Primary Rate ISDN as defined in A42.3
4. Special Assembly SONET Rings
5. Private Line Services in B7:
   MegaLink®
   MegaLink® Channel Service
   LightGate®
   SMARTRing® Services
   SyncroNet® Service
   SMARTPath® Service
   MegaLink® Plus Service
   MegaLink® Light Service

If BellSouth changes the name of a particular service listed above, the newly-named service will continue to be offered under this Agreement. However, if BellSouth makes substantive changes in the service offerings listed above or offers a similar product not included in the list above, the Parties will negotiate in good faith an amendment to this V&T Agreement upon request of a Party.

Appendix II
Annual Revenue Commitment

4 Year Agreement

Resale Revenue Achieved

1	$4,554,000	$5,692,500	$7,400,250	$9,620,325	$12,506,423	$16,258,349	$21,135,854	$41,269,217
2	$5,009,400	$6,261,750	$8,140,275	$10,582,358	$13,757,065	$17,884,184	$23,249,439	$45,396,139
3	$5,510,340	$6,887,925	$8,954,303	$11,640,593	$15,132,771	$19,672,603	$25,574,383	$49,935,753
4	$6,061,374	$7,576,718	$9,849,733	$12,804,653	$16,646,048	$21,639,853	$28,131,822	$54,929,328
Discount	8.50%	9.9%	10.5%	13.0%	15.5%	18.0%	19.50%	

The Minimum Annual Revenue Commitment for each year is listed in Tier 1. In the first year of the agreement the Discount level received each month by Telepak Networks will be reflected in the Tier which Telepak Networks selects. At the Annual True-Up, the actual tier achieved by Telepak Networks will be determined and any adjustment to the correct Discount received for that Contract Year will be made. Any additional Discounts will be distributed to Telepak Networks in the form of a credit on its bill. Any reduction in the actual Discount will be billed by BellSouth to Telepak Networks. At each Annual True-Up, Telepak Networks will select the Tier to be used for billing in the following Contract Year, but the Tier selected may not be below the Tier actually achieved in the prior Contract Year. BellSouth will continue to verify the accuracy of the discount each year at the Annual True-Up throughout the life of the Agreement. The maximum Discount Level provided for in this agreement is 19.50%. No higher Discount Level is available in the event that Telepak Networks exceeds Tier 7 in any Contract Year. The maximum revenue eligible for discounts under this Agreement in each contract term year is shown in the Table above. Further, the annual revenues from the Business Services identified in enumerated Item 1 of Appendix 1 can be used to satisfy no more than 10% of the Annual Revenue Commitment in a Contract Year.

AMENDMENT
TO THE
AGREEMENT BETWEEN
TELEPAK NETWORKS, INC.
AND
BELLSOUTH TELECOMMUNICATIONS, INC.
DATED MARCH 16, 2001

Pursuant to this Amendment, (the "Amendment"), Telepak Networks, Inc. ("Telepak Networks"), and BellSouth Telecommunications, Inc. ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated March 16, 2001 ("Agreement").

WHEREAS, BellSouth and Telepak Networks entered into the Agreement on March 16, 2001, and amended on July 9, 2001, July 31, 2001, October 10, 2001, November 5, 2001, May 3, 2002 and June 7, 2002 and;

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. This Amendment deletes the tariff references in Appendix 1, V&T Eligible Services of the June 7, 2002, Volume and Term (V&T) Amendment, and adds the state specific tariff references as set forth in Exhibit 1 attached hereto and incorporated herein by this reference.

2. All of the other provisions of the Agreement, dated March 16, 2001, shall remain in full force and effect.

3. Either or both of the Parties is authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed by their respective duly authorized representatives on the date indicated below.

Telepak Networks, Inc.	**BellSouth Telecommunications, Inc.**
By: Signature on file	By: Signature on file
Name: J. Gregg Logan	Name: Patrick C. Finlen
Title: Vice President	Title: Managing Director
Date: July 12, 2002	Date: July 16, 2002

EXHIBIT 1

Appendix I
Volume and Term
Eligible Services

State	*AL Tariff Section*	*FL Tariff Section*	*LA Tariff Section*	*MS Tariff Section*	*TN Tariff Section*
S.L. Bus. SVC	A.3.7.1	A.3.4.2	A.3.7.1	A.3.7.1	A.3.7.1
M.L. Bus SVC	A.3.7.1	A.3.4.2	A.3.7.1	A.3.7.1	A.3.7.1
Business Plus SVC	A.3.43	A3.43	A3.43	A3.43	A3.43
Complete Choice (Bus)	A.3.45	A3.45	A3.45	A.3.45	A.3.45
CC FR SVC	A.40.1	A40.1	A40.1	A40.1	A40.1
Back up Capability	A.40.1	A40.1	A40.1	A40.1	A40.1
FR SVC Feature Charges	A.40.1	A40.1	A40.1	A40.1	A40.1
ISDN Bus.	A.42.1	A.42.1	A.42.1	A.42.1	A.42.1
ISDN Res.	A.42.2	A.42.2	A.42.2	A.42.2	A.42.2
PRI	A.42.3	A.42.3	A.42.3	A.42.3	A.42.3
MegaLink	B.7	B.7	B.7	B.7	B.7
MegaLink Channel Service	B.7	B.7	B.7	B.7	B.7
LightGate	B.7	B.7	B.7	B.7	B.7
SmartRing Service	B.7	B.7	B.7	B.7	B.7
SyncroNet Svc	B.7	B.7	B.7	B.7	B.7
SmartPath Svc	B.7	B.7	B.7	B.7	B.7
Megalink Plus Service	B.7	B.7	B.7	B.7	B.7
Megalink Light Service	B.7	B.7	B.7	B.7	B.7

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSISSIPPI

RE: TELEPAK NETWORKS, INC., PETITION FOR ARBITRATION OF AN INTERCONNECTION DISPUTE UNDER AN EXISTING INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. **DOCKET NO. 03-AD-0021**

FINAL ORDER

THIS CAUSE came on for hearing on May 19, 2003 before the Public Service Commission of the State of Mississippi ("Commission") on Telepak Networks, Inc.'s ("Telepak Networks") Petition for Arbitration of an Interconnection Dispute Under an Existing Interconnection Agreement with BellSouth Telecommunications, Inc. ("Petition"). The Commission accepted the Petition and treated it as a Formal Complaint against BellSouth Telecommunications, Inc. ("BellSouth") by Telepak Networks for procedural purposes. Due and proper notice of the filing of the Petition and the notice of the time and place of hearing was given in the manner required by law, including publication of notice to the public in the Clarion-Ledger, a newspaper published at the seat of government at Jackson, Hinds County, Mississippi, more than twenty (20) days prior to this date, with proof of publication lawfully filed with this Commission.

The Commission, acting on the above-referenced Petition, having entered its Agreed Scheduling Order and having received and considered the arguments of the parties to the dispute, Telepak Networks and BellSouth ("BellSouth") accordingly finds as follows:

EXHIBIT B

1. Telepak Networks is a Mississippi corporation authorized to do business in the State of Mississippi and is a public utility as defined by Miss. Code Ann. ' 77-3-3(d)(iii)(1998 Supp.). Telepak Networks furnishes telecommunication services as a Competitive Local Exchange Carrier ("CLEC") within the State of Mississippi pursuant to a certificate of public convenience and necessity heretofore issued to Telepak Networks by this Commission in Docket No. 99-UA-0621. Telepak Networks' address is Main Street, Meadville, Mississippi 39653. Telepak Networks also maintains offices at Suite 1830, 125 South Congress Street, Jackson, Mississippi 39201.

2. BellSouth is a Georgia corporation authorized to do business in the State of Mississippi and is a public utility as defined by Miss. Code Ann. ' 77-3-3(d)(iii)(1998 Supp.). BellSouth furnishes telecommunication services within the State of Mississippi as an Incumbent Local Exchange Carrier ("ILEC"). BellSouth's address is 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375. BellSouth's General Counsel in Mississippi is Thomas B. Alexander, Esq., whose address is 790 Landmark Center, 175 E. Capitol Street, Jackson, MS 39201.

3. The Commission has jurisdiction over the parties and the subject matter of the Petition.

4. Telepak Networks and BellSouth are parties to an Interconnection Agreement, dated March 16, 2001, which has been approved by an Order issued in Docket No. 01-AD-0351, a copy of which is on file with the Commission (the "Interconnection Agreement"). The Interconnection Agreement provides for Telepak Networks to resell certain services offered by BellSouth. Pursuant to Attachment 1 of the Interconnection Agreement and this Commission's Order in Docket No. 96-AD-0559,

BellSouth must make services available to Telepak Networks for resale in Mississippi at a 15.75% discount off BellSouth's tariff rates.

5. The Interconnection Agreement has been amended several times. Of relevance here, Telepak Networks and BellSouth amended the Interconnection Agreement to provide for additional discounts for certain resold services under a volume and term discount arrangement. The amendment ("V&T Agreement") was approved by the Commission on October 8, 2002 by an Order issued in Docket No. 01-AD-0351, and a copy of the V&T Agreement has been entered into the record of this cause. However, the effective date of the discounts available under the V&T Agreement was January 1, 2002.

6. The V&T Agreement provides that in consideration of Telepak Networks' commitment, on annual basis, to purchase a minimum amount of services, BellSouth will apply a discount as provided in Appendix 2 to the V&T Agreement. The size of the additional discount ("Discount Level") agreed to by BellSouth is determined by reference to the chart attached as Appendix 2 to the V&T Agreement. For Year 1, 2002, and Year 2, 2003, Telepak Networks committed to the minimum annual revenue target for Tier 3 and is entitled to a Discount Level of 10.5% in addition to the otherwise applicable 15.75% discount off tariff rates.

7. Telepak Networks and BellSouth disagree as to the method of calculation of the actual dollar value of the discount under the V&T Agreement. Telepak Networks contends that the Discount Level applies to tariff rates. Under the method of calculation utilized by Telepak Networks, the discount is calculated by adding the 15.75% resale discount to the 10.5% Discount Level for a total discount of 26.25% off tariff rates.

8. BellSouth contends that the Discount Level in the V&T Agreement does not apply to tariff rates, but rather to tariff rates less the 15.75% resale discount. Under the method of calculation used by BellSouth, therefore, the total discount applied to charges for services purchased by Telepak Networks under the V&T Agreement is less than the total 26.25% discount applicable under the method used by Telepak Networks.

9. It is undisputed by BellSouth that if Telepak Networks' method of calculating the total discount is correct, then BellSouth has overcharged Telepak Networks for services purchased by Telepak Networks under the V&T Agreement from January 1, 2002 through April 28, 2003 by the total amount of $196,835.00.

10. Sections 3.1 and 1.3.3 of the V&T Agreement govern the calculation of the discount; however, the parties disagree as to the meaning of these provisions. Section 3.1 states in pertinent part: "BellSouth shall apply a discount that is a percentage reduction off the total recurring charges within the total billed revenue associated with the Eligible Services based on tariff rates. Discount Levels shall be based on the Annual Revenue Commitment and are provided in Appendix II. The applicable Discount Level shall be selected from the Table contained in Appendix II." In addition to the table setting forth the applicable Discount Level based upon revenue commitments in Appendix II to the V&T Agreement, Section 1.3.3 of the V&T Agreement defines the term "Discount Level" as "the percentage reduction from the resale rate in addition to the applicable state-mandated resale discount applied monthly to the total recurring charges for the BellSouth services that are eligible for participation in the V&T offering and for which billing has occurred or will occur during the current billing period."

11. As a preliminary matter, the Commission must first decide whether it is appropriate to look beyond the four corners of the V&T Agreement to interpret the meaning of Sections 3.1 and 1.3.3 quoted above.[1] If the Commission finds Sections 3.1 and 1.3.3 to be unambiguous, then the Commission may not consider parol or extrinsic evidence.[2] The Commission, after having heard the arguments of counsel for both parties on the subject of whether it should admit parol evidence to assist it in interpreting Sections 3.1 and 1.3.3 of the V&T Agreement, and after reviewing Sections 3.1 and 1.3.3 of the V&T Agreement, finds Sections 3.1 and 1.3.3 to be unambiguous. Accordingly, the Commission has not admitted or considered parol or extrinsic evidence to aid it in interpreting Sections 3.1 and 1.3.3 of the V&T Agreement.

12. Canons of contract construction require that the Commission must read Sections 3.1 and 1.3.3 of the V&T Agreement in a manner that makes them harmonious.[3] Section 3.1 provides that BellSouth shall apply the Discount Level to tariff rates. Section 1.3.3 provides that the Discount Level shall be "in addition to the applicable state-mandated resale discount. ..." When read together in a harmonious manner, Sections 3.1

[1] Section 33 of the Interconnection provides in pertinent part: "This Agreement and its Attachments, incorporated herein by reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them." Section 13.4 of the V&T Agreement provides that "[a]ll of the other provisions of the Interconnection Agreement shall remain in full force and effect." Thus the V&T Agreement is intended as a full and final expression of the parties' intent regarding volume and term discounts.

[2] *See Turner v. Terry*, 799 So. 2d 25, 32 (Miss. 2001) ("Where the contract is not ambiguous, the intention of the contracting parties should be gleaned solely from the wording of the contract.") BellSouth argues that Georgia law should govern this dispute, because of clauses in the V&T Agreement (Section 13.2) and in the Interconnection Agreement (Section 20) both of which provide that the respective agreements will be construed in accordance with the laws of Georgia. The Commission need not decide whether such a clause is enforceable in regulatory proceedings concerning two Mississippi public utilities before this Commission, however, because BellSouth has conceded that Georgia law also requires that the intention of the contracting parties be gleaned solely from the wording of the contract in the absence of any ambiguity. *See* Georgia Code Annotated Section 13-2-2(1) ("Parol evidence is inadmissible to add to, take from, or vary a written contract. ...")

[3] *See Switzer v. Switzer*, 460 So. 2d 843, 846 (Miss. 1984); *Prudential Insurance Co. v. Estate of Russell*, 274 So. 2d 113, 116 (Miss. 1973); *see also supra*, n. 3 and Georgia Code Annotated Section 13-2-2 (4) ("The construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part; ...").

and 1.3.3 plainly state that the Discount Level shall be applied to tariff rates and that such discount is in addition to the state mandated resale discount of 15.75%.

13. Therefore, Telepak Networks' method of calculating the discount is consistent with Sections 3.1 and 1.3.3 of the V&T Agreement. BellSouth's method of calculating the total discount is inconsistent with Sections 3.1 and 1.3.3 of the V&T Agreement, because it ignores the language of 3.1, which expressly provides that the discount is based upon tariff rates.

14. Because of its incorrect interpretation of the V&T Agreement, BellSouth has overcharged Telepak Networks for services purchased by Telepak Networks in Mississippi under the V&T Agreement from January 1, 2002 through April 28, 2003 by the total amount of $196,835.00, plus additional amounts overcharged by BellSouth since April 28, 2003.

15. A second dispute has arisen involving a special MegaLink promotion offered by BellSouth in Mississippi during the fourth quarter of 2002. Under the MegaLink promotion, BellSouth Small Business Customers who sign a 24 or 36-month MegaLink Service and/or MegaLink Channel Service contract during the applicable period will receive a waiver of all nonrecurring charges. Telepak contends that it was eligible to resell this promotion, and is therefore entitled to $60,830.02 for installations of MegaLink services that it resold in Mississippi during the fourth quarter of 2002. BellSouth contends that the MegaLink special promotion was only available for services purchased through the standard tariffs, and not to customers with special pricing arrangements such as contract service arrangements ("CSAs") and volume and term agreements ("V&T Agreements").

16. Section A2.10 of BellSouth's General Subscriber Service Tariff ("GSST") states that "promotions will be made available on a completely non-discriminatory basis to all subscribers meeting the eligibility criteria for each promotion. . . ." Telepak is charged with knowledge of the tariff. The MegaLink promotion was available to CLECs to resell, subject to the eligibility criteria. CLECs with V&T Agreements were not eligible for the MegaLink promotion. Therefore, Telepak Networks was not entitled to resell the promotion, and BellSouth has not overcharged them for installation of MegaLink services resold by Telepak in Mississippi during the fourth quarter of 2002.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED:

1) The Discount Level referred to in the V&T Agreement shall be applied to tariff rates consistent with the manner argued by Telepak Networks for the remainder of the Term of the V&T Agreement;

2) Telepak Networks was not eligible to resell the MegaLink promotion during the fourth quarter of 2002;

3) BellSouth shall immediately refund Telepak Networks the amount of $196,835.00 for services purchased by Telepak Networks in Mississippi under the V&T Agreement from January 1, 2002 through April 28, 2003, plus additional amounts overcharged by BellSouth since April 28, 2003;

6) BellSouth shall pay Telepak Networks interest on the amount of the refunds ordered hereunder at a rate of 8%, accrued from the date of Telepak Networks' filing of its Petition in this matter;

IT IS FURTHER ORDERED that a copy of this Final Order be served on all parties in this case; and

IT IS FURTHER ORDERED that this Final Order shall take effect immediately.

Chairman Callahan votes Aye; Vice Chairman Robinson votes Aye and Commissioner Nielsen Cochran votes Aye.

ORDERED AND ADJUDGED by the Mississippi Public Service Commission, this the 7th day of January, 2003.

Michael Callahan, Chairman

Bo Robinson, Vice Chairman

Nielsen Cochran, Commissioner

MISSISSIPPI PUBLIC SERVICE COMMISSION

ATTEST: A TRUE COPY

Brian U. Ray, Executive Secretary

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC. APPELLANT

VS. CIVIL ACTION NO. 3:04CV245LN

TELEPAK NETWORKS, INC., MISSISSIPPI PUBLIC SERVICE COMMISSION, NIELSON COCHRAN, BO ROBINSON, AND MICHAEL CALLAHAN APPELLEES

MEMORANDUM OPINION AND ORDER

This cause is before the court on appeal from a final decision of the Mississippi Public Service Commission (Commission). The case arises out of a dispute between Bellsouth Telecommunications, Inc. (Bellsouth) and Telepak Networks, Inc. (Telepak) concerning the calculation of the amount of discount Telepak is entitled to receive under the terms of the Volume and Term Agreement (V&T Agreement) negotiated by the parties. The Commission, in its January 8, 2004 order, adopted the interpretation advanced by Telepak regarding the calculation. Bellsouth timely appealed.

Pursuant to the Telecommunications Act of 1996, Bellsouth, as an incumbent local exchange carrier, is required to sell its telecommunications services to competing local exchange carriers, such as Telepak, at wholesale prices. Pursuant to the Interconnection Agreement originally negotiated between Bellsouth and Telepak, the wholesale price is calculated by applying a 15.75% resale discount to Bellsouth's retail price, or "tariff

rate."[1] Subsequently, Bellsouth and Telepak amended the Interconnection Agreement to include the disputed V&T Agreement. Under the V&T Agreement, in addition to the 15.75% resale discount, Telepak is entitled to a further discount depending on the volume of telecommunications services Telepak commits to purchase from Bellsouth. The parties agree that the percentage discount for the relevant time period is 10.5%; however, they disagree as to how that percentage discount should be applied.

Telepak contends that the 10.5% V&T Agreement discount should be added to the 15.75% resale discount, for a total discount of 26.25% off Bellsouth's tariff rate. Bellsouth, on the other hand, contends that the discounts apply separately, so that the 15.75% resale discount is first applied to Bellsouth's tariff rate, to reach what it refers to as the "resale rate," following which the 10.5% discount is applied to the resale rate.[2]

Once the dispute regarding the calculation of the discount arose, Telepak filed a petition with the Commission, which the Commission construed as a formal complaint against Bellsouth, to

---

[1] This resale discount is not unique to Telepak; any reseller who enters into a reseller, or interconnection, agreement with Bellsouth receives this 15.75% discount on Bellsouth's tariff rates.

[2] In its brief, Bellsouth offered an illustration of the effect of the competing interpretations, using a "typical" monthly bill of $750,000. Under Telepak's interpretation, Telepak would be able to purchase these services for $553,125 (a discount of $196,875), while under Bellsouth's interpretation, Telepak would be able to purchase these services for $565,529 (a discount of $184,471), for a difference of $12,404.

which Bellsouth replied. On May 15 and May 19, 2003, the Commission heard oral arguments from the parties, and on January 7, 2004, issued an order finding that Bellsouth had incorrectly interpreted the V&T Agreement and instructing Bellsouth to refund Telepak the overpaid amounts plus interest.

Bellsouth filed this appeal, arguing that the Commission erred in imposing a cumulative 26.25% discount rate under the V&T Agreement and, in doing so, forced Bellsouth to provide an unreasonably high discount in violation of the V&T Agreement and in violation of the Telecommunications Act of 1996.

In its appeal, Bellsouth first asserts that the court should apply a de novo standard of review in considering whether the V&T Agreement, as interpreted by the Commission, meets the requirements of the 1996 Act. See Southwestern Bell Tel. Co. v. Public Utility Comm'n of Tex., 208 F.3d 475, 482 (5th Cir. 2000) (concluding that a district court should consider de novo whether an agreement is in compliance with the 1996 Act and review all other issues decided by a state commission under the more deferential "arbitrary and capricious" standard). For its part, Telepak argues that the court should conduct a de novo review only if it is called upon to determine whether the V&T Agreement complies with sections 251 and 252 of the 1966 Act, and because Bellsouth made no assertion before the Commission that the V&T Agreement failed to comply with either section, such inquiry is inappropriate. In response, Bellsouth states that it "does not

question whether any term of the Agreement violates the 1996 Act," but instead maintains that the Commission's interpretation of the V&T Agreement violates the resale provisions of the 1996 Act, a fact which it could not have known until after the order was issued, and therefore, it argues, the court should review de novo the Commission's interpretation of the agreement.

Bellsouth is correct that de novo review is in order where the question is whether the agreement, as interpreted by the Commission, violates the 1996 Act. See Southwestern Bell Tel. Co., 208 F.3d at 482.[3] Here, however, Bellsouth has failed to demonstrate that the Commission's interpretation of the agreement arguably violates the 1996 Act. In this regard, Bellsouth argues that the Commission's interpretation directly violates the resale provisions of the 1996 Act, and in particular, Section 252(d)(3) of the Act, which requires that the public service commission's determination of the "wholesale rates" be made on the basis of retail rates charged to subscribers "excluding the portion thereof attributable to any marketing, billing, and other costs that will be avoided by the local exchange carrier." However, the fact is, there is no contention that the Commission established the 15.75% discount in a manner other than provided by this provision; and

---

[3] See also Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Co., 350 F.3d 482, 486 (5th Cir. 2003)("A district court reviews the compliance of an interconnection agreement with federal law and related matters of statutory interpretation de novo.").

the fact that the Commission's interpretation allows for taking an additional 10.25% off Bellsouth's tariff rate, as agreed by the parties, does not detract from this conclusion.

Bellsouth appears to claim additionally that the Commission's interpretation of the agreement violates the Act by imposing "a harsh economic impact on Bellsouth," and "impermissibly forc[ing] BellSouth to provide an unreasonably high discount rate in direct contravention of the relevant terms of the V&T Agreement." However, Bellsouth does not suggest that the effective total discount rate of 24.60% to which it admits it agreed is impermissibly harsh, yet it would have the court conclude that a discount of an additional 1.65% crosses the line between what is allowable and what is not. Such reasoning is unpersuasive.

As to the Commission's legal conclusions in interpreting the agreement itself under principles of state contract law, contrary to Bellsouth's insistence, an "arbitrary and capricious" standard is clearly applicable. In Southwestern Bell Telephone Co. v. Public Utility Commission of Texas, 208 F.3d 475, 482 (5th Cir. 2000), the court made it clear that in this circuit, the question whether agreements comply with sections 251 and 252 of the 1996 Act are considered de novo, but "all other issues" are reviewed under an arbitrary-and-capricious standard. See id. ("We shall therefore review de novo whether the interconnection agreements as interpreted by the PUC meet the requirements of the Act, but our review of the PUC's state law determinations will be under the

more deferential arbitrary-and-capricious standard."). As such, the court concludes that the arbitrary and capricious standard is the appropriate standard of review with respect to the Commission's conclusion that the V&T Agreement provided for Telepak to receive a 26.25% discount off Bellsouth's tariff rates.

Under the arbitrary and capricious standard, "a reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 44, 103 S. Ct. 2856, 2867 (1983).

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S. Ct. 239, 245-246, 9 L. Ed. 2d 207 (1962). In reviewing that explanation, [the court] must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Bowman Transp. Inc. v. Arkansas-Best Freight System, supra, 419 U.S. at 285, 95 S. Ct. at 442; Citizens to Preserve Overton Park v. Volpe, supra, 401 U.S. at 416, 91 S. Ct. at 823. Normally, an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id.

With respect to the Commission's finding, Bellsouth takes issue with the Commission's order, arguing it only addressed

§ 1.3.3 of the V&T Agreement and paraphrased § 3.1, and contends that the Commission overlooked other key provisions in the agreement which were relevant to determining how to calculate the discount. Section 3.1, which is found in a portion of the agreement titled "Discount Levels," states,

> Bellsouth shall apply a discount that is a percentage reduction off the total recurring charges within the total billed revenue associated with the Eligible Services based on tariff rates. Discount Levels shall be based on the Annual Revenue Commitment and are provided in Appendix II. The applicable Discount Level shall be selected from the Table contained in Appendix II.

Section 1.3.3, which is found in the "Definitions" section of the agreement, states,

> "Discount Level" is the percentage reduction from the resale rate in addition to the applicable state-mandated resale discount applied monthly to the total recurring charges for the Bellsouth services that are eligible for participation in the V&T offering and for which billing has occurred or will occur during the current billing period.

In its order, the Commission reasoned that § 3.1 provided that Bellsouth shall apply the discount level to tariff rates and § 1.3.3 further provided that the discount level shall be "in addition to the applicable state-mandated resale discount" and concluded that "[w]hen read together in a harmonious manner [these sections] plainly state that the Discount Level shall be applied to tariff rates and that such discount is in addition to the state mandated resale discount of 15.75%."

Bellsouth insists that the Commission "ignored the V&T Agreement's definition of 'Discount Level' as 'the percentage

reduction from the resale rate." (emphasis by Bellsouth). However, Bellsouth made this argument to the Commission on May 19, 2003, and apparently the Commission rejected this argument, adopting instead Telepak's counter-argument that the Commission cannot focus on that single phrase, but must look at the agreement as a whole. In addition, Bellsouth contends that the Commission ignored or failed to "give meaning" to § 3.1 and Appendix II and "overlooked" the fact that the Annual Revenue Commitment is measured in resale billed dollars, rather than the tariff rate. Based on the court's review of the agreement and the Commission's order, it appears the Commission did consider § 3.1 in reaching its conclusion, despite Bellsouth's claim that it failed to "give meaning" to the provision.

As for Appendix II, Telepak argues, and the court agrees, that this provision merely sets forth a table which shows how the discount level percentage is to be determined. Based on the resale revenue commitment for the relevant time period, Telepak can receive a discount level between 6.5% and 19.50%, but this portion of the agreement does not articulate how the discount is to be applied or calculated. Appendix II also contains a "maximum discount level" of 19.50%, and Bellsouth argues that the Commission's interpretation renders this limitation "meaningless." However, the court is not inclined to agree. Whether the discount level is applied to resale rates, under Bellsouth's interpretation, or to tariff rates, under the Commission's

interpretation, the discount level itself, here 10.50%, is still limited by the 19.50% ceiling under the agreement.

Finally, Bellsouth argues that because the "Annual Revenue Commitment," which is the dollar figure used to determine the discount level pursuant to the table in Appendix II, is measured in "resale billed dollars," this further shows that the parties intended to apply the discount level to the resale rate, rather than the tariff rate. In response, Telepak contends that this provision does no more than clarify what value the parties should use to select the appropriate discount level percentage under the table in Appendix II. In other words, this section of the agreement provides that Telepak's revenue commitment figure is based on the volume of services purchased at the discounted resale rate, rather than at the tariff rate, which would be higher, and would thus entitle Telepak to a higher discount level. Again, in the court's opinion, this provision addresses the selection of the discount level percentage, rather than how the discount level is to be applied or calculated, which is clearly the issue in dispute.

In conclusion, the court has thoroughly reviewed the record on appeal, including the transcript of the May 19, 2003 hearing before the Commission, in addition to the V&T Agreement at issue, and the court, mindful of the narrow scope of judicial review, cannot conclude that the Commission's conclusion was arbitrary and capricious.

Based on the foregoing, the order of the Mississippi Public Service Commission in this matter is affirmed.

SO ORDERED this the 12th day of July, 2005.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC. — **PLAINTIFF**

v. — **CIVIL ACTION NO. 3:04CV245LN**

TELEPAK NETWORKS, INC., et al. — **DEFENDANTS**

FINAL JUDGEMENT

This action came before the Honorable Judge Tom S. Lee, United States District Judge, and the issues having been duly heard and a decision having been duly rendered, IT IS ORDERED AND ADJUDGED that the Final Order of the Public Service Commission of the State of Mississippi in this matter is AFFIRMED and all claims against the defendants are dismissed with prejudice.

This the 28th day of July, 2005.

/s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

EXHIBIT D

Prepared by:
/s Charles L. McBride, Jr.
BRUNINI, GRANTHAM, GROWER & HEWES PLLC
1400 Trustmark Building
248 East Capitol Street
Post Office Drawer 119
Jackson, Mississippi 39205-0119
Telephone: (601) 948-3101
Facsimile: (601) 960-6902

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complaint and Petition for Arbitration was served by electronic mail and U.S. Mail this 28th day of December 2005 on the following:

Patrick K. Wiggins
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32301
pwiggins@psc.state.fl.us

Nancy B. White
C/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
Nancy.sims@bellsouth.com
Nancy.white@bellsouth.com

S/ Vicki Gordon Kaufman

Vicki Gordon Kaufman