

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: November 18, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Rojas)
Division of Competitive Markets & Enforcement (Bates, Dowds)

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

AGENDA: 11/30/04 – Regular Agenda – Proposed Agency Action - Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: I:\PSC\GCL\GCO\WP\040779.RCM.DOC

Case Background

Z-Tel Communications, Inc.'s (Z-Tel) existing interconnection agreement with BellSouth Telecommunications, Inc. (BellSouth) in Florida became effective on April 18, 2003 and expired on September 11, 2004. In the course of discussions between the parties for a successor agreement, Z-Tel opted to adopt a new agreement rather than to attempt to renegotiate terms of their existing agreement.

On July 23, 2004, Z-Tel filed its Notice of Adoption of the interconnection agreement between BellSouth and Network Telephone Corporation (Network). On August 5, 2004, BellSouth filed a letter in opposition to Z-Tel's Notice of Adoption. On August 25, 2004, Z-Tel filed a reply to BellSouth's letter in opposition in which they addressed the arguments raised by BellSouth. On September 2, 2004, BellSouth filed a letter accompanying a copy of the FCC's

Interim Rules Order.¹ On September 7, 2004, Z-Tel filed a response letter to BellSouth's letter and filing of the FCC's Interim Rules Order.

Discussion of Issues

Issue 1: Should the Commission accept Z-Tel's Notice of Adoption?

Recommendation: Yes. (Rojas, Bates, Dowds)

Staff Analysis: Staff will address the arguments raised by BellSouth individually in the Analysis portion of this Recommendation.

1. BellSouth never agreed to the Adoption nor did it execute any Adoption Language.

Position of the Parties

BellSouth

BellSouth argues that on July 22, 2004, Z-Tel unilaterally noticed the Commission that it had adopted the interconnection agreement between BellSouth and Network in its entirety. BellSouth states that at no time did it agree to the adoption and further argues that neither BellSouth or Z-Tel executed any adoption language.

Z-Tel

Z-Tel states that the primary purpose of §252(i) of the 1996 Telecommunications Act is to prevent the illegal discrimination that would occur if one party were allowed to operate under an agreement that was not available to another, similarly situated party. Z-Tel argues that its adoption of the Network agreement in its entirety is fully consistent with §252(i) as well as the FCC's "All or Nothing" rule².

Analysis and Conclusion

Staff agrees with Z-Tel that the primary purpose of §252(i) of the 1996 Telecommunications Act is to prevent the discrimination that would occur if one party were allowed to operate under an agreement that was not available to another, similarly situated party. Section 252(i) creates an obligation, that in this instance is unchanged by the current state of flux in the law³. Section 252(i) obligates incumbents, such as BellSouth, to enable Z-Tel and other CLECs to operate upon the same terms and conditions as those provided in a valid existing

¹ Staff notes that, while BellSouth provided a copy of the FCC Interim Rules Order, it made no specific argument as to applicability of the order to the matter at hand. FCC's Order and Notice of Proposed Rulemaking, In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 and CC Docket 01-338 (August 20, 2004)(Interim Rules Order)

² Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Second Report and Order, CC Docket No. 01-338, FCC 04-164. (July 13, 2004) (All or Nothing Order)

³ The Interim Rules Order provides that ILECs must continue, on an interim basis, to provide access to UNEs under the rates, terms and conditions that applied under their interconnection agreements on June 15, 2004..

interconnection agreement. Staff agrees that Z-Tel's adoption is well within its statutory right to opt-in to the Network Agreement in its entirety.

2. Z-Tel did not comply with the terms of its existing interconnection agreement concerning adoptions.

Position of the Parties

BellSouth

BellSouth argues that the Adoption by Z-Tel should be rejected because Z-Tel failed to follow the requirements of its interconnection agreement for such an adoption. BellSouth contends that 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 claims to have signed neither and further argues that Z-Tel has sought to circumvent the standard dispute resolution process by filing its Notice of Adoption. BellSouth claims that permitting the adoption would in effect turn a dispute between interconnecting carriers into an administrative matter that undermines BellSouth's due process.

Z-Tel

Z-Tel argues that BellSouth, by virtue of providing interconnection and access to Network pursuant to the existing agreement between the two companies, has no choice but to offer nondiscriminatory access to Z-Tel pursuant to §252(i). Furthermore, Z-Tel argues that BellSouth's reliance on Section 2.5 of the General Terms and Conditions of the Interconnection Agreement between BellSouth and Z-Tel is erroneous. Z-Tel states that the provision speaks only in terms of the timeliness of BellSouth's obligations. Z-Tel continues that this provision is applicable to "pick and choose" type adoptions, and not to adoptions of agreements in their entirety.

Analysis and Conclusion

Again, Staff emphasizes that §252(i) creates an obligation that, in this instance, is unchanged by the current state of flux in the law. The Interim Rules Order obligates incumbents, such as BellSouth, to enable competitive carriers to operate upon the same terms and conditions as those provided in an existing interconnection agreement as it existed on June 15, 2004. Staff believes that Z-Tel's adoption is well within its statutory right under §252(i) to opt-in to such an agreement in its entirety.

Furthermore, the decision of Z-Tel to choose to adopt an existing interconnection agreement at the expiration of their prior agreement, rather than to attempt to negotiate a successor agreement, is not precluded by the language in the parties' previous interconnection agreement⁴. Staff believes that public policy directs that Z-Tel is in the best position to target

⁴ Z-Tel previously adopted the arbitrated agreement between BellSouth and MCI in Docket No. 000649-TP. The General Terms and Conditions provides express language allowing for adoption of interconnection agreements. (page 4; General Terms and Conditions)

productive use of its resources in establishing terms of interconnection that have not been statutorily precluded.

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 §252(a) and (b)**

Position of the Parties

BellSouth

BellSouth argues that Z-Tel cannot use §252(i) to compel the execution of a new interconnection agreement that does not comply with §251 of the 1996 Act. BellSouth claims that the 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 no longer compliant with existing law. BellSouth states that it is unwilling to include outdated terms and conditions that it views as inconsistent with the parties' rights and obligations under current law.

Z-Tel

Z-Tel argues that §252(i) and the FCC's implementing rules give Z-Tel the right to adopt an effective agreement in its entirety, taking all rates, terms and conditions of the adopted agreement. By the very fact of the Network agreement being active and effective, Z-Tel is within its rights to adopt. To deny adoption of the existing Network agreement in its entirety would violate the nondiscrimination requirements of §252(i). Furthermore, Z-Tel claims that it makes no attempt to avoid the impact of changes of law, and to the extent that they are ripe, BellSouth would be within its rights to initiate discussions under the appropriate change of law provisions in the contract.

Analysis and Conclusion

Staff agrees with Z-Tel that §252(i) and the FCC's implementing rules give Z-Tel an unequivocal right in this instance to adopt an effective agreement in its entirety, taking all rates, terms and conditions of the adopted agreement. The FCC supports this same position in the FCC's All or Nothing Order:

[W]e reject BellSouth's argument that "an agreement in its entirety" does not include general terms and conditions, such as dispute resolution or escalation provisions. Under the all-or-nothing rule, all terms and conditions of an interconnection agreement will be subject to the give and take of negotiations, and therefore, all terms and conditions of an interconnection agreement, to the extent that they apply to interconnection, services or network elements, must be included within an agreement available for adoption in its entirety under §252(i).⁵

⁵ All or Nothing Order at n. 105

Staff believes that the above language is clearly indicative that the FCC has not limited the ability of competitive carriers to exercise §252(i) to adopt an existing interconnection agreement in its entirety. Furthermore, staff believes that nothing in this agreement, or any portion thereof, triggers the grounds for rejection set forth in §252(e)(2). Thus, by virtue of the Network agreement being active and effective, Z-Tel is within its rights to adopt.

To the extent that BellSouth believes that the interconnection agreement Z-Tel seeks to adopt contains terms and conditions that are no longer compliant with existing law, staff would like to point out that the underlying agreement contains BellSouth's standard change of law provisions. To the extent that BellSouth argues that it is unwilling to include outdated terms and conditions that it views as inconsistent with the parties' rights and obligations under current law, staff would like to reiterate that §252(i) creates an obligation, unchanged by the current state of flux in the law, for incumbents, such as BellSouth, to enable competitive carriers to operate upon the same terms and conditions as those provided in a valid and existing interconnection agreement.

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)

Position of the Parties

BellSouth

BellSouth argues that a finding should be made that a "reasonable period of time" expired when the controlling law changed, specifically the Triennial Review Order (TRO) and the D.C. Circuit's vacatur of portions of the TRO. BellSouth further bases this argument on the FCC conclusion that "any reasonable period of time" under Rule 51.809 (c) for adopting pre-existing terms applicable to the exchange of ISP traffic expired upon the effective date of the ISP Order⁶. BellSouth argues that this policy should be expanded to bar Z-Tel from opting into any unbundled network (UNE) provisions in the Network agreement that do not reflect the valid changes in law in the TRO, or the D.C. Circuit's vacatur.

Z-Tel

Z-Tel notes that the Network Agreement became effective on or about June 21, 2003 and is set to expire June 21, 2006. Z-Tel contends that an agreement with approximately two-thirds of its life remaining should be certainly and readily adoptable. Z-Tel agrees that the FCC limited the ability of competitors to adopt reciprocal compensation provisions. However, Z-Tel contends that the FCC did so in an express and specific manner and that the ISP Order is thus limited to its terms and does not establish any general principles.

Analysis and Conclusion

47 C.F.R. §51.809(a) and (c) provide in part the following:

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 red 9151(April 18, 2001) (the ISP Order)

(a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to Section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

(c) Individual 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(h) of the Act.

The FCC has adopted a regulation implementing §252(i) of the Act that requires an ILEC to make an interconnection agreement available for a reasonable period of time, yet there seems to be no definitive standard set forth by the FCC as to what constitutes a reasonable time. The Network agreement became effective on June 20, 2003 and is set to expire June 21, 2006. Staff believes that since the underlying agreement does not expire for two years, it should be deemed timely for adoption, and this Commission should reject BellSouth's argument that a reasonable period of time has expired.

Furthermore, BellSouth concedes that the FCC did not reach the issue of §252(i) adoption of pre-existing agreements in their entirety in its TRO. In actuality, the FCC has issued no language limiting the adoption of agreements in their entirety in this context. Staff finds it persuasive that the FCC did include explicit language limiting adoptions in the ISP Order, but declined to do so with regards to its rulings in the TRO. Additionally, in the underlying agreement, under the heading of Adoption of Agreements, BellSouth states all agreements are available for adoption provided there are at least six months remaining in the term. This language does not indicate whether roll-over agreements are included or excluded. Staff recommends that this Commission reject BellSouth's broad interpretation of the ISP Order and look to the specific language included in the underlying agreement.

Issue 2: Should this Docket be closed?

Recommendation: Yes. This docket should be closed, and Z-Tel's adoption of the Network Interconnection Agreement should have an effective date of July 23, 2004, reflecting the date that the Notice of Adoption was filed this Commission. (Rojas)

Docket No. 040779-TP
Date: November 18, 2004

Staff Analysis: This docket should be closed, and Z-Tel's adoption of the Network Interconnection Agreement should have an effective date of July 23, 2004, reflecting the date that the Notice of Adoption was filed with this Commission. Staff notes, however, that an argument can be made that the effective date should be the date of the vote by this Commission.