

CASE

NUMBER:

99-340

INDEX FOR CASE: 99-340
GTE SOUTH, INC.
Interconnection Agreements
WITH PV TEL

IN THE MATTER OF THE 252(I) ADOPTION LETTER BETWEEN GTE
SOUTH INCORPORATED AND PV TEL

| SEQ NBR | ENTRY DATE | REMARKS |
|------------|---------------|--|
| 0001 | 08/11/99 | Application. |
| 0002 | 08/17/99 | Acknowledgement letter. |
| 0003 | 11/08/99 | FINAL ORDER; APPROVES NEGOTIATED AGREEMENT |



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION
730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

CERTIFICATE OF SERVICE

RE: Case No. 99-340
GTE SOUTH, INC.

I, Stephanie Bell, Secretary of the Public Service Commission, hereby certify that the enclosed attested copy of the Commission's Order in the above case was served upon the following by U.S. Mail on November 8, 1999.

Parties of Record:

Larry D. Callison
State Manager-Regulatory Affairs
GTE South, Inc.
150 Rojay Drive
Lexington, KY. 40503

Joe Buck
PV Tel
1999 East Stone Drive
Suite 419
Kingsport, TN. 37660

Stephanie J. Bell

Secretary of the Commission

SB/sa
Enclosure

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

REVIEW OF AN AGREEMENT)
BETWEEN GTE SOUTH INCORPORATED) CASE NO. 99-340
AND PV TEL PURSUANT TO 47 U.S.C. 252(i))

O R D E R

On August 11, 1999, GTE South Incorporated ("GTE") and PV Tel submitted to the Commission their negotiated agreement for the interconnection of their networks. PV Tel is purporting to adopt the interconnection agreement between GTE and AT&T Communications of the South Central States, Inc., which was approved by the Commission in Case No. 96-478.¹ The adoption letter, which appears to comprise the only document memorializing the parties' principal agreement, was negotiated pursuant to the Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. Sections 251 and 252. Section 252(e) of the 1996 Act requires the parties to an interconnection agreement adopted by negotiation to submit the agreement for approval to the Commission.

The Commission has reviewed the agreement and finds that no portion thereof discriminates against a telecommunications carrier not a party to the agreement. The Commission is somewhat hesitant, however, to find that the implementation of the

¹ Case No. 96-478, Petition by AT&T Communications of the South Central States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement With GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996. (Order dated July 30, 1999).

agreement is consistent with the public interest, convenience, and necessity without affording PV Tel an opportunity to adopt the AT&T agreement in its entirety.

In the agreement filed by GTE, PV Tel has agreed to "not seek UNE platforms or already bundled combinations of UNEs."² The document also contains GTE's legal conclusions regarding its alleged, lawful right to withhold access that is required by law. Its legal analysis is erroneous. However, as this matter represents the voluntary negotiations between the parties, the Commission will approve the agreement. PV Tel should be aware that GTE has been ordered by this Commission to provide when requested the combined UNE platform where the platform already exists in GTE's network.³ 47 U.S.C. 251, the Federal Communications Commission ("FCC") rules, the United States Supreme Court, and this Commission require UNEs to be furnished. Moreover, the Supreme Court specifically upheld the FCC rule prohibiting an incumbent local exchange carrier ("ILEC") from breaking apart UNEs when they are ordered by a competing local exchange carrier ("CLEC") in combination.⁴ The Commission has consistently reiterated its determination that UNEs are central to providing local exchange service and must be provided by ILECs to CLECs in the manner requested. In addition to the references from Case No. 96-478 discussed herein, the Commission

² August 13, 1999 adoption letter at 2.

³ Case No. 96-478, *supra*, (Order dated May 13, 1999).

⁴ AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999); 47 CFR 315(b).

has consistently ruled in other proceedings pursuant to the Telecommunications Act of 1996.⁵

PV Tel must comply with all relevant Commission mandates for serving in this Commonwealth.

The Commission, having been otherwise sufficiently advised, HEREBY ORDERS that:

1. Subject to PV Tel's notification to the Commission within 10 days of the date of this Order that it desires to exercise its legal right to revoke this agreement and adopt the entire AT&T agreement, this agreement negotiated between GTE and PV Tel is approved.

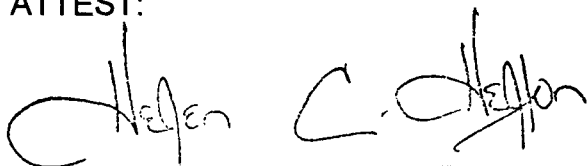
2. PV Tel shall file a tariff for local service prior to providing local service giving 30 days' notice to the Commission and shall comply with all Commission regulations and orders as directed.

⁵ See Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Case No. 96-440, Order dated September 1, 1998, at 17 (requiring GTE to permit MCI to order UNEs in combination and stating, "[t]he Commission will not ... tolerate an ILEC's literally breaking apart network elements that are physically connected in the manner requested by a CLEC"). See also Investigation Regarding Compliance of the State of Generally Available Terms of BellSouth Telecommunications, Inc. With Section 251 and Section 252(d) of the Telecommunications Act of 1996, Case No. 98-348, Order dated August 21, 1998, at 8 (finding "unacceptable" a proposed provision that BellSouth would separate combined elements when a CLEC ordered them in combination and finding that "[s]uch separation and subsequent recombination would serve no public purpose and would increase costs that ultimately would be passed on to the consumer").

Done at Frankfort, Kentucky, this 8th day of November, 1999.

By the Commission

ATTEST:

A handwritten signature in cursive script, appearing to read "Helen C. Shelton". The signature is written in black ink and is positioned above a horizontal line.

Executive Director



COMMONWEALTH OF KENTUCKY
PUBLIC SERVICE COMMISSION

730 SCHENKEL LANE
POST OFFICE BOX 615
FRANKFORT, KY. 40602
(502) 564-3940

August 17, 1999

Larry D. Callison
State Manager-Regulatory Affairs
GTE South, Inc.
150 Rojay Drive
Lexington, KY. 40503

Joe Buck
PV Tel
1999 East Stone Drive
Suite 419
Kingsport, TN. 37660

RE: Case No. 99-340
GTE SOUTH, INC.
(Interconnection Agreements) WITH PV TEL

This letter is to acknowledge receipt of initial application in the above case. The application was date-stamped received August 11, 1999 and has been assigned Case No. 99-340. In all future correspondence or filings in connection with this case, please reference the above case number.

If you need further assistance, please contact my staff at 502/564-3940.

Sincerely,

A handwritten signature in cursive script that reads "Stephanie Bell".

Stephanie Bell
Secretary of the Commission

SB/jc

Larry D. Callison
State Manager
Regulatory Affairs & Tariffs



**GTE Service
Corporation**

KY10H072
150 Rojay Drive
Lexington, KY 40503
606 245-1389
Fax: 606 245-1721

August 11, 1999

Ms. Helen Helton
Executive Director
Public Service Commission
730 Schenkel Lane
Post Office Box 615
Frankfort, Kentucky 40602

RECEIVED

AUG 11 1999

PUBLIC SERVICE
COMMISSION

CASE 99-340

RE: 252(i) Adoption Letter Between GTE South Incorporated and
PV Tel

Dear Ms. Helton:

Enclosed for joint filing by the parties with the Kentucky Public Service Commission (Commission) are six copies of an executed 252(i) Adoption Letter recently executed between GTE South Incorporated and PV Tel.

This Adoption Letter is being provided to the Commission for its review and approval.

Please bring this filing to the attention of the Commission, and if there are any questions, please contact me at your convenience.

Yours truly,

Larry D. Callison

Enclosures

c: Mr. Joe Buck – PV Tel

Connie Nicholas
Assistant Vice President
Wholesale Markets-Interconnection



GTE Network
Services

HQE03B28
600 Hidden Ridge
P.O. Box 152092
Irving, TX 75038
972/718-4588
FAX 972/719-1523

July 20, 1999

Joe Buck
PV Tel
1999 East Stone Drive, Suite 419
Kingsport, TN 37660

Dear Mr. Buck:

GTE has received your letter stating that, under Section 252(i) of the Telecommunications Act of 1996, PV Tel wishes to adopt the terms of the arbitrated Interconnection Agreement between AT&T and GTE that was approved by the Commission as an effective agreement in the State of Kentucky in Docket No. 96-478 (Terms)¹. I understand PV Tel has a copy of the Terms

Please be advised that GTE's position regarding the adoption of the Terms is as follows.

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

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

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

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

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

The Terms which PV Tel seeks to adopt do *not* reflect the Court's decision, and any provision in the Terms that is inconsistent with the decision is nullified.

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

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

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

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

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

PV Tel's adoption of the AT&T arbitrated Terms shall become effective upon filing of this letter with the Kentucky Public Service Commission and remain in effect no longer than the date the AT&T arbitrated Terms are terminated. The AT&T arbitrated agreement is currently scheduled to expire on June 28, 2002.

As these Terms are being adopted by PV Tel pursuant to statutory rights under section 252(i), GTE does not provide the Terms to you as either a voluntary or negotiated agreement. The filing and performance by GTE of the Terms does not in any way constitute a waiver by GTE of its position as to the illegality or unreasonableness of the Terms or a portion thereof, nor does it constitute a waiver by GTE of all rights and remedies it may have to seek review of the Terms, or to petition the Commission, other administrative body, or court for reconsideration or reversal of any determination made by the Commission pursuant to arbitration in Docket No. 96-AB-005, or to seek review in any way of any provisions included in these Terms as a result of PV Tel's 252(i) election.

Nothing herein shall be construed as or is intended to be a concession or admission by either GTE or PV Tel that any contractual provision required by the Commission in Docket No. 96-AB-005 (the AT&T arbitration) or any provision in the Terms complies with the rights and duties imposed by the Telecommunications Act of 1996, the decision of the FCC and the Commissions, the decisions of the courts, or other law, and both GTE and PV Tel expressly reserve their full right to assert and pursue claims arising from or related to the Terms. GTE contends that certain provisions of the Terms may be void or unenforceable as a result of the Court's decision of January 25, 1999 and the remand of the pricing rules to the United States Eighth Circuit Court of Appeals.

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

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

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

Joe Buck
July 20, 1999
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To: PV Tel
Attention: Joe Buck
1999 East Stone Drive, Suite 419
Kingsport, TN 37660
Telephone number: 423/578-1961

(C) PV Tel represents and warrants that it is a certified provider of local dialtone service in the State of Kentucky, and that its adoption of the Terms will cover services in the State of Kentucky only.

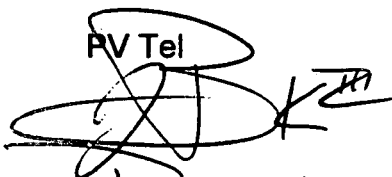
Sincerely,

GTE South Incorporated



Connie Nicholas
Assistant Vice President
Wholesale Markets-Interconnection

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

PV Tel

President

For PV Tel

c: A. Lowery -- NC999142 -- Durham, NC
D. Robinson - HQE03B73 - Irving, TX