S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the petition of **BRE COMMUNICATIONS, L.L.C.,** for arbitration of interconnection terms, conditions, and prices from **GTE NORTH INCORPORATED** and **CONTEL OF THE SOUTH, INC.,** d/b/a **GTE SYSTEMS OF MICHIGAN**.	)))))))	Case No. U-11551

At the November 5, 1998 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

On January 28, 1998, the Commission issued an order approving with modification the decision of the arbitration panel concerning an interconnection agreement between GTE North Incorporated and Contel of the South, Inc., (collectively, GTE) and BRE Communications, L.L.C., (BRE) pursuant to the provisions of the federal Telecommunications Act of 1996, 47 USC 151 et seq. (federal Act). In that order, the Commission noted certain issues for which neither party's position was acceptable. The Commission therefore determined that the parties should continue negotiations to reach a mutually agreeable resolution, with the proviso that should the parties be unable to reach agreement, the Commission would choose between the parties' respective last best offers.

On September 17, 1998, BRE and GTE submitted an interconnection agreement, which contains certain provisions for which the parties dispute the appropriate language. In addition, each party submitted a brief memorandum supporting its positions on the disputed items.

According to the parties, there are four issues requiring Commission resolution before an interconnection agreement may be executed. These issues involve contract provisions concerning limitation of liability, forecasting accuracy, reciprocal compensation, and appropriate performance quality standards. The parties request that the Commission choose the provisions to be incorporated in the agreement, in accordance with the Commission's January 28, 1998 order.

Limitation of Liability

GTE claims that language limiting its liability is essential because the additional risk of unlimited liability is not reflected in the prices and other terms of the proposed agreement. GTE represents that all of its nearly 700 interconnection agreements contain some limitation of liability language. Failure to include such language, in GTE's view, creates unreasonable risks for both parties, and may provide an incentive for abusive conduct and anticompetitive behavior.

Pursuant to a suggestion by a member of the Commission Staff, GTE states, it proposes to incorporate limitation of liability language found in the interconnection agreement between GTE Communications Corporation (a competitive local exchange company) and Ameritech Michigan. See, Case No. U-11675. GTE requests that the Commission approve this proposed language.

On the other hand, BRE asserts that the parties have already agreed to language throughout the contract that sufficiently protects the parties under the circumstances and that further limiting language is neither necessary nor desirable. Therefore, BRE takes the position that no further limiting language should be included.

The Commission finds that GTE's proposed language found in Article XXVI of the interconnection agreement between GTE Communications Corporation and Ameritech Michigan should be approved as a reasonable provision for limiting the parties' liability to each other. However, those provisions should be modified to reflect that the limitations do not apply to intentional or wilful conduct that violates either the Michigan Telecommunications Act, MCL 484.2101 et seq.; MSA 22.1469(101) et seq., or the federal Act.

Forecasting Reliability

GTE states that the parties have agreed that BRE will provide forecasts to GTE for near future service orders. GTE would like to rely on BRE's forecasts for purposes of planning for staff and facilities to efficiently meet BRE's needs in a manner that complies with the contract performance standards. If BRE overestimates its needs, GTE asserts, the incumbent local exchange company will incur needless costs to be ready for a demand that does not exist. On the other hand, GTE states, if BRE underestimates its needs, GTE may be unprepared to meet BRE's need within the time parameters of the contract performance standards.

GTE argues that it should not be held liable for any failure to meet contract performance standards if BRE incorrectly forecasts its requirements. It suggests that otherwise BRE could intentionally understate its probable needs so that GTE is unable to meet the contract standards and is thus liable for penalties.

GTE notes that the contract does not currently provide specific remedies for failure to meet quality standards, but instead the parties rely on the Commission's ability to fine, penalize, or compensate competitive local exchange companies (LECs) to provide the incentive to meet contract performance requirements.

BRE responds that it has agreed to work with GTE to provide accurate forecasts, but does not agree that those forecasts should be binding to the extent that GTE should be excused from its duties under the contract or that BRE should be penalized for overly optimistic forecasts. BRE commits to make good faith efforts to provide GTE with forecasts that are as accurate as possible. However, BRE states that it accepts the language proposed by GTE, on the condition that (1) the language may not form a basis on which to hold BRE to perfection on forecasting accuracy and (2) GTE's performance may not be excused if BRE is inaccurate in its forecasting.

The Commission finds that GTE's proposed language should be incorporated into the agreement. That language contemplates that the parties will work together to develop joint planning and forecasting responsibilities, which will include periodic review, state-wide annual forecasts by BRE on a quarterly basis, and the requirement that BRE notify GTE promptly of changes greater than 10% to the current forecast that generate a shift in the demand curve for the next forecasting period. These requirements do not appear onerous. There is no contract provision that expressly provides for GTE to escape liability for performance failures based on a particular percentage of inaccuracy in forecasting. Neither is such a defense expressly barred by the contract provisions. It appears to the Commission that an advance ruling on the consequences of inaccurate forecasting is not in the parties' or the public's interests. Should the issue arise, the parties may seek redress in an appropriate forum, as provided by law.

Reciprocal Compensation

GTE notes that the arbitration panel adopted GTE's proposed language with regard to the appropriate rate for local traffic exchange, "as modified to include the rate established in Case No. U-11165." Further, the panel noted that the rates established in the arbitration would be

interim rates until the completion of Case No. U-11281 (the case in which the Commission examined GTE's total service long run incremental cost studies). GTE asserts that its proposed contract language follows the panel's decision, unlike BRE's proposed language.

GTE explains that its contract language provides that the parties will not bill each other if exchanged traffic is in balance, but will issue bills only when an "out of balance" situation occurs. Traffic would be considered to be out of balance if either party has terminated 60% or more of the total terminated minutes on the parties' systems. GTE states that this modified bill-and-keep arrangement benefits both parties because the cost to bill the other party is often greater than the amounts collected when minor differences in exchanged traffic occur. GTE asserts that only when the parties' respective traffic is significantly different should they bill for minutes of use.

BRE notes that when the arbitration panel issued its decision, the Commission had not yet completed Case No. U-11281. Thus, BRE states, the arbitration panel adopted interim bill-and-keep for the exchange of local traffic and payment of reciprocal compensation. BRE asserts that the arbitration panel explicitly noted the pending decision in Case No. U-11281 and stated that "following the issuance of that [final order in Case No. U-11281], the parties agree that the new prices will apply." BRE argues that the Commission's January 28, 1998 order in this case adopted, with certain unrelated modifications, the arbitration panel's decision. Thus, BRE concludes, following the Commission's decision in Case No. U-11281, bill and keep is no longer an appropriate method to compensate for termination of local traffic, and reciprocal compensation should be implemented immediately.

MCL 484.2352; MSA 22.1469(352) provides that the rates for termination of local traffic "shall be the rates established under commission case U-10647 and shall remain in effect until new total

service long run incremental cost studies for such services have been approved by the commission."[1] On May 11, 1998, the Commission issued its final order in Case No. U-11281, in which it set new local call termination rates based on its review and analysis of GTE's cost studies. Those new rates do not provide for bill and keep even when traffic between the networks is roughly within balance.

The Commission notes that interconnecting providers may agree to use bill and keep for local traffic termination, but the present parties have not done so. Thus, the appropriate rate for local traffic termination between the parties is that set in Case No. U-11281. The Commission therefore rejects GTE's proposed language.

Performance Standards

GTE commits that, with respect to interconnection, unbundled network elements, and resale services provided under the interconnection agreement, it will provide BRE nondiscriminatory access as required by Section 251 of the federal Telecommunications Act of 1996, 47 USC 251. GTE states that the performance measures that it offered to BRE in negotiations and submitted to the Commission are the same performance measures currently provided to all competitive LECs negotiating with GTE in Michigan and are the same as those appearing in all of its arbitrated or negotiated agreements nationwide. GTE notes that the proposed measures detail the areas of performance to be tracked and reported on a monthly basis to each competitive LEC on request.

GTE states that it is currently participating in a wide variety of efforts to establish uniform requirements for quality measurement and reporting as well as remedies for failure to meet the

[1]The local termination rates referred to in the statute included what was termed a "quiet zone," which held that if local traffic between two providers was in balance, the providers would not charge each other for terminating local traffic. If the balance of traffic fell outside of the quiet zone, the Commission set the rate at 1.5 cents per minute of use

established standard. In GTE's view, an industry-wide uniform standard will benefit both competitive LECs and the incumbent LECs for ease in administration and development of appropriate software. In the meantime, however, GTE commits that it will increase the number and type of measures from those currently offered to competitive LECs.

GTE states that, consistent with its support of statistical comparisons to assure parity in service between competitive LECs, its proposed contract language allows for nondiscriminatory deviations from the service quality that GTE provides itself. It asserts that its proposed language will ensure that the level of performance under the contract is exactly at the same level that GTE provides itself. In contrast, GTE argues, the language proposed by BRE would require GTE to provide a higher level of service to BRE than it provides itself, a requirement that it says is inconsistent with the federal Act. Iowa Utilities Board v Federal Communications Commission, 120 F3d 753 (CA8, 1997).

BRE, on the other hand, states that pursuant to the directions in the Commission's January 28, 1998 order, the parties have submitted their respective last best offers on this issue. BRE argues that its proposed performance measures require GTE to provide service in a manner that is more nearly at parity with how GTE provides those services to itself. BRE argues that each GTE performance measure contains a qualifier[2] that allows GTE to provide a lower quality service to BRE. In BRE's view, there should be no disparity allowed between service GTE provides itself and that which it provides BRE.

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[2]The two example qualifiers pointed out by BRE include: (1) ". . . not more than 2.5% below the percent of GTE customer install" found in Appendix A, Pre-Ordering/Ordering/ Provisioning section; and (2) "is more than 10% of the average repair time for GTE customers" found in Appendix A, Maintenance/Repair Standard 3.

The arbitration panel and the Commission rejected GTE's original proposal because it would allow GTE to provide services to BRE at a quality substandard to what it provides itself. GTE's new proposal has not altered the level of required performance, but has merely removed the consequences for failure to meet the performance standards. Thus, the GTE's proposed language does nothing to ameliorate the problem that caused the arbitration panel to reject it.

On the other hand, the arbitration panel rejected BRE's original proposal because of the unsupported penalty provisions that it contained. BRE's new proposal is more reasonable in that it removes the penalty provisions and contemplates that BRE may seek redress in an appropriate forum for any GTE breach. It appears to the Commission that of the two last best offers, BRE has provided the most reasonable. Therefore, the Commission concludes that BRE's proposed contract performance standards should be adopted.

The Commission notes GTE's comments concerning generic proceedings to establish performance levels required to meet the nondiscrimination provisions of the federal Act. The Commission has initiated such a generic proceeding to examine whether the Commission should establish such performance standards. See the Commission's October 2, 1998 order in Case No. U-11654. Any such standards adopted by the Commission at a future date may provide the base line for an incumbent LEC's service to a competitive LEC, but would not lower the quality of service provided for in a previously approved interconnection agreement.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.;

MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The interconnection agreement between GTE and BRE should include provisions consistent with this order.

THEREFORE, IT IS ORDERED that, within 30 days of the date of this order, GTE North Incorporated and Contel of the South, Inc., and BRE Communications, L.L.C., shall submit an executed interconnection agreement that is consistent with the discussion and conclusions reached in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

By its action of November 5, 1998.

/s/ Dorothy Wideman
Its Executive Secretary

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	)	

Suggested Minute:

> "Adopt and issue order dated November 5, 1998 resolving the four remaining issues concerning language to be included in the interconnection agreement between BRE Communications, L.L.C., and GTE North Incorporated and Contel of the South, Inc., d/b/a GTE Systems of Michigan, as set forth in the order."