

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. and Network Telephone Corporation by Z-Tel Communications, Inc.	DOCKET NO. 040779-TP ORDER NO. PSC-05-0158-PAA-TP ISSUED: February 9, 2005
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The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

NOTICE OF PROPOSED AGENCY ACTION
ORDER ACKNOWLEDGING ADOPTION OF INTERCONNECTION AGREEMENT

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. 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

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

II. Analysis and Decision

A. Unilateral Adoption versus Bilateral Agreement

BellSouth claims it never agreed to the Adoption nor did it execute any Adoption Language. 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. 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" rule¹

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

B. Compliance with Current Agreement

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

Again, we emphasize 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 continue providing unbundled access to mass market switching, enterprise market loops, and dedicated transport under the same rates, terms, and conditions that applied under their interconnection agreements as of June 15, 2004. We find 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 agreement. We find that public policy directs that Z-Tel is in the best position to target productive use of its resources in establishing terms of interconnection that have not been statutorily precluded.

¹ 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)

C. Availability of Terms

BellSouth claims 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). 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. 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. 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.

We find 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).

As a general matter, the FCC has not limited the ability of competitive carriers to exercise §252(i) to adopt an existing interconnection agreement in its entirety, except to the extent that the FCC's Interim Rules Order affected a carrier's ability to adopt provisions pertaining to the provision of certain elements after June 15, 2004. Furthermore, we find 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, this Commission would like to note 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, this Commission reiterates 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.

D. Adoption Time Frame

BellSouth claims that 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). 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. 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.

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

(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. We find that since the underlying agreement does not expire for two years, it should be deemed timely for adoption. Therefore, this Commission rejects 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. We find 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. This

Commission rejects BellSouth's broad interpretation of the ISP Order and finds it necessary to look to the specific language included in the underlying agreement.

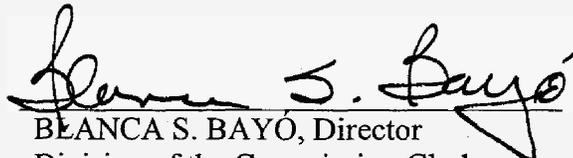
Therefore it is,

ORDERED by the Florida Public Service Commission that the Notice of Adoption of the interconnection agreement between BellSouth and Network Telephone Corporation by Z-Tel is hereby accepted. It is further

ORDERED that this docket should be closed upon the issuance of a Consummating Order, and Z-Tel's adoption of the Network Interconnection Agreement shall have an effective date of July 23, 2004, reflecting the date that the Notice of Adoption was filed with this Commission. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

By ORDER of the Florida Public Service Commission this 9th day of February, 2005.


BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 2, 2005.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.