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January 13, 2004

VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and ITC^DeltaCom Communications, Inc.*

Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and XO Tennessee, Inc.

Docket No. 02-01203

Dear Chairman Tate:

Enclosed are the original and fourteen copies of BellSouth's *Response to the Joint Motion of XO and ITC^DeltaCom for Summary Judgment.* Copies of the enclosed are being provided to counsel of record.

Cordially,

Joelle Phillips

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and ITC^DeltaCom Communications, Inc.*

Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and XO Tennessee, Inc.

Docket No. 02-01203

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO THE JOINT MOTION OF XO AND ITC^DELTACOM FOR SUMMARY JUDGMENT

BellSouth Telecommunications, Inc. ("BellSouth") files this *Response to the Joint Motion of XO and ITC^DeltaCom for Summary Judgment.*

Discussion

I. The Joint Motion Completely Ignores the Parties' Interconnection Agreements, Relying Solely Instead on the FCC's *Supplemental Order Clarification* and *Triennial Review Order.*

The *Joint Motion* of ITC^DeltaCom Communications, Inc. ("DeltaCom") and XO Tennessee, Inc. ("XO") relies ***solely*** on the provisions of the FCC's *Triennial Review Order* and the *Supplemental Order Clarification*. The glaring flaw in the *Motion* is the complete failure to address the provisions in the parties' own interconnection agreements relating to audits. While XO and DeltaCom argue about the requirements or limitations of these FCC orders, they completely fail to recognize what is plain in their interconnection agreements.

As the CLECs concede, each of these interconnection agreements was entered into ***following*** the FCC's *Supplemental Order Clarification*. Yet, rather than quoting the

language of the *Order* or specifically incorporating the *Order* by reference, the CLECs and BellSouth negotiated interconnection agreements with ***different*** language relating to audits. Recognizing that "many interconnection agreements already contain audit rights," the *Supplemental Order Clarification* explicitly states that "we do not believe that we should restrict parties from relying on these agreements." *Order* at ¶32,

Consequently, the parties' interconnection agreements govern. Even the *Order,* on which the CLECs rely, makes this clear. The CLECs' argument that the *Supplemental Order Clarification* "provides the legal basis for the original audit request" (*Motion* at p. 2) is simply incorrect. Instead, the true fact is that the parties each negotiated an interconnection agreement that did not mirror or incorporate the language in these orders, and, consequently, ***that agreement governs and provides the relevant legal basis for these audits***.

Notwithstanding the fact that BellSouth's complaints clearly relied on the language contained in the interconnection agreements, the CLECs' joint summary judgment motion fails to discuss the interconnection agreement or the provision in the *Supplemental Order Clarification* establishing that the *Order* does not supplant interconnection agreements of the parties.

II. The Joint Motion is Flatly Inconsistent with the FCC's EELs Decision, Which Balanced ILEC and CLEC Concerns About EELs.

The CLECs' reliance on the FCC's *Supplemental Order Clarification* not only fails to give sufficient recognition to the *Order*'s reference to interconnection agreements, but it also flies in the face of the substance and spirit of the FCC's decision relating to EELs. Stated simply, the FCC recognized both ILEC and CLEC concerns regarding EELs and

struck a balance between those concerns. For the CLECs, the FCC provided them immediate access to EELs, clarifying that CLECs need not demonstrate that they are entitled to EELs before obtaining the EELs. Balancing this CLEC advantage against ILEC concerns, the FCC provided ILECs with the right to audit to determine whether or not the CLECs had obtained EELs in accordance with the rules. In this case, these CLECs have gotten the CLEC benefit of that FCC compromise, namely immediate access to EELs. Their objection to audit, however, is an attempt to prevent BellSouth from receiving the ILEC benefit afforded by the FCC's compromise, namely an audit to determine whether the EELs were obtained properly. (Importantly, that benefit was also expressly afforded to BellSouth pursuant to the parties' interconnection agreements.)

Even if the FCC *Supplemental Clarification Order,* rather than the agreement, governed EEL audits, the CLECs' position would be wrong. The FCC made the compromise decision that EELs would be immediately available but that ILECs would be protected in the event that CLECs wrongly obtained those EELs because ILECs were able to audit. These CLECs seek to turn that compromise into a completely one-sided regime in which they ***both*** receive immediate access to EELs ***and*** are excused from the very audits to which they agreed in their interconnection agreements.

In an attempt to enjoy their benefit, while depriving BellSouth of its benefit, the CLECs seek to impose burdens and conditions on BellSouth's benefit – rendering it meaningless. Specifically, the FCC did not require the ILEC to have a "demonstrable 'concern'" as the CLECs claim in the joint motion. *Motion* at p. 3. Moreover, these CLECs attempt to completely nullify the FCC's compromise by manufacturing a requirement not only that the ILEC have a concern that the EELs are not in compliance

with the safe harbors, but also that the CLEC must agree with the sufficiency of that concern before BellSouth can audit. Neither the FCC nor the parties' respective interconnection agreements allow the CLEC a unilateral right to reject the audit by rejecting the ILEC's reasons for conducting the audit. Because the interconnection agreements do not even require BellSouth to state a concern with respect to the CLECs' compliance, these CLECs cannot rely on their own self-serving declarations that BellSouth's concerns are not sufficient to avoid the audits to which they agreed.

III. The CLECs' Position Lacks Common Sense: It Ignores the Fact That BellSouth Will Pay the Costs of the Audit Should the Audit Demonstrate EELs Compliance. The Limitations on Methodology Urged by the CLECs Would Illogically Prevent the Auditors from Conducting an Appropriate Review of the EELs.

In addition to being inconsistent with the interconnection agreements and the FCC orders, the CLECs' position also flies in the face of common sense. If BellSouth is wrong in its concern that these CLECs have obtained EELs to which they are not entitled, then BellSouth will pay the cost of the audit, just as the interconnection agreement provides. If, on the other hand, the CLECs prevail and BellSouth is unable to the conduct the audit to which these parties agreed in their interconnection agreements, then these CLECs may succeed in maintaining EELs to which they are not entitled. Without an audit, however, the true facts will never be learned. With an audit, the true facts will either support BellSouth's position, in which BellSouth will be entitled to relief, or the audit will demonstrate compliance, and BellSouth will bear the cost of the audit.

The CLECs' contentions relating to the independence of the auditor and the methodology of the audit simply exceed the scope of the rights contained in the

interconnection agreement as discussed in BellSouth's *Complaint and Motion*. Obviously, BellSouth has the same concerns with new EELs that it has with converted EELs. Limiting the audit in that fashion is illogical and runs the risk that neither the TRA nor BellSouth will ever be able to discover if the CLECs have ordered EELs to which they are not entitled.

The CLECs' claim that these audits "would impose significant and unwarranted financial and administrative burdens" also rings hollow. *Motion* at p. 4. First, these CLECs have refused even to meet with BellSouth to discuss what information the auditors would need to conduct an audit. Thus, they have no basis upon which to make a claim that the audits would be financially or administratively burdensome in any way. Second, the time and resources that the CLECs have expended in attempting to avoid the audit likely far exceed any costs that they would incur in proceeding with the audit; suggesting that the CLECs are actually more concerned about the costs they may incur if the audit finds noncompliance.

IV. The Triennial Review Order Does Not Alter the Requirements of the Parties' Interconnection Agreements.

The CLECs' reliance on the FCC's Triennial Review Order (TRO) is not relevant to an audit requested under different rules and under contract language that predates the TRO. Regardless, the CLECs have misinterpreted the TRO.

First, the CLECs rely on the TRO in an attempt to impose a requirement that ILECs actually have evidence in hand prior to being allowed to audit. Contrary to the CLECs' position, however, the reference in paragraph 622 of the TRO, on which the CLECs rely, merely states that EELs will be converted upon self-certification as to

compliance with the applicable requirement, "subject to later verification based upon cause . . ." This language does not require the ILEC to first provide evidence that any EEL is being misused before it can audit. Obviously, the FCC does not require that the ILEC have such evidence in hand before auditing, because such evidence may only be obtained through an audit. Nonsensically, the CLECs would have the Authority believe that an ILEC must first ***have the evidence*** in order to be allowed ***to look for the evidence***. Particularly where the Parties' agreements provide the right to audit, such circuitous logic is beyond reason.

Second, the CLECs wrongfully suggest that the FCC's orders limit audits to only converted EELs. The FCC's previous order, the Supplemental Order Clarification, did not address new EELs because, at that time, the FCC had not required ILECs to provide new EEL combinations. ILECs could choose to take advantage of an exemption on unbundling switching in portions of the top 50 MSAs if the ILEC made available new EELs in that area, but the FCC had not imposed a general requirement to make new EELs available. There is no reason to believe that had there been a general requirement to make new EEL combinations available, the same audit rules would not apply. Further, as BellSouth has stated previously, it is the parties' interconnection agreements that govern EEL audits, not the FCC rules.

Third, while the CLECs are correct that the TRO requires auditors to perform the audit pursuant to AICPA standards, the FCC's prior order contained no such requirement. With respect to audit rights for new EELs, the CLECs would have this Authority believe that a requirement in the TRO that did not exist in the prior order proves that such requirement was not applicable under the prior order. With respect to

auditing standards, the CLECs are arguing just the opposite – that because AICPA standards are required to be followed under the TRO, they must also be followed under the prior FCC order and the parties' interconnection agreements. Clearly the CLECs are taking such position only when it can be twisted to their benefit. The real fact is that the TRO has no bearing whatsoever on the rules that apply to the parties in this case. There was no FCC requirement to utilize AICPA standards when the interconnection agreements were negotiated, and thus there is no such requirement in the parties' interconnection agreements.

Fourth, the TRO allows the independent auditor to use its judgment in defining the scope of the audit. The TRO does not require that only a sample of the EEL circuits be tested. In this particular case, the auditor chosen by BellSouth utilizes a sample of switch usage data for each EEL circuit. It is reasonable for an auditor, in its judgment, to verify compliance on each circuit using a sampling of data, because noncompliance on any one circuit may have a material impact on the amount of money the CLEC owes the ILEC. It appears that the CLECs in this case have chosen to substitute their view as to how a sample should be tested as opposed to the view of the auditor, a result not contemplated by the TRO. Further, and more importantly, the TRO requirements were nonexistent at the time the parties negotiated their interconnection agreements, and have no bearing on either the FCC rules in place during the time period in question or the requirements set forth in the interconnection agreement.

Finally, the CLECs have totally misinterpreted paragraph 625 of the TRO to suit their own needs. While the CLECs would have this Authority believe that paragraph 625 requires CLECs and ILECs to incorporate the "basic principles" set forth in the

TRO, regardless of other details that the parties may wish to include, such an interpretation is not only contrary to the plain meaning of the language in paragraph 625, but also to the entire purpose behind negotiation of interconnection agreements under the Act. The FCC merely stated in paragraph 625 that while it is setting forth basic principles regarding audits, it also recognizes carriers' ability to set forth specific details regarding EEL audits in interconnection agreements. Thus, states are in the best position to address implementation issues in the event of disputes between the parties regarding the FCC's rules or the terms of an interconnection agreement.

The FCC has by no means required, as the CLECs wrongly suggest, that all parties utilize the certification and audit criteria set forth in the TRO even when the parties have agreed otherwise. Such an interpretation would be completely contrary to Section 252(a)(1) of the Act, which permits parties to negotiate and enter into an interconnection agreement voluntarily, "without regard to the standards set forth in subsections (b) and (c) of Section 251." If the Authority were to adopt the CLECs' interpretation of paragraph 625 of the TRO, no carrier would ever be willing to negotiate without regard to the requirements of Sections 251(b) and (c) of the Act, because those bargained-for exchanges could be rendered meaningless if a carrier later decided, in a particular instance, that it preferred to apply the FCC's rules rather than the terms of its interconnection agreement. Further, the CLECs misquote the FCC. The CLECs claim that in paragraph 626 of the TRO, "[t]he agency found that these "basic principles" strike 'the appropriate balance'" between rights of incumbents and risks of illegitimate audits. *Motion* at p. 7. However, paragraph 626 states that "an annual audit right" strikes that appropriate balance. Thus, the language the CLECs cite actually supports BellSouth's

position that an audit is proper. And while BellSouth appreciates the CLECs' pointing out language from the TRO that actually supports BellSouth's position, the TRO is neither relevant nor binding to the audits at hand.

Conclusion

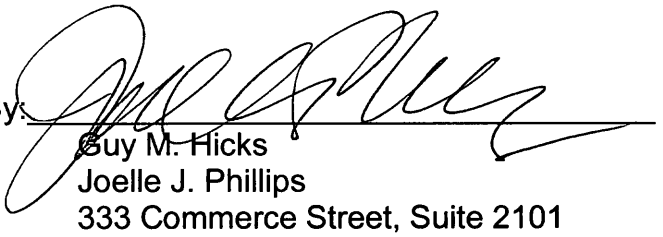
In light of the negotiated interconnection agreements between these parties, BellSouth's *Motion for Summary Judgment* should be granted. BellSouth's complaint is premised upon the parties' interconnection agreements, not the FCC's *Supplemental Order Clarification* and certainly not the TRO. Neither FCC order states that it is intended to override the parties' agreements. Moreover, the *Supplemental Order Clarification* clearly establishes that interconnection agreements establishing audit rights are not supplanted by the *Order*.

The CLECs' conclusion that "this matter is over" is, to some extent, correct: Given that the CLECs have established no legal basis to depart from the parties' interconnection agreements, the controversy regarding these audits should, in fact, be over. BellSouth has a clear right under the interconnection agreement to conduct the audit that it seeks, and the FCC orders relied upon by the CLECs do not provide a valid basis to supplant the interconnection agreements negotiated between the parties.

For all the foregoing reasons and the reasons presented in BellSouth's complaint and *Motion for Summary Judgment*, BellSouth respectfully urges the hearing officer to deny the CLECs' summary judgment motion and to grant BellSouth's summary judgment motion.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2004, a copy of the foregoing document was served on the following, via the method indicated:

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