BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 13, 2004

IN RE:	)	
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ENFORCEMENT OF INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND ITC^DELTACOM COMMUNICATIONS, INC.	)	**DOCKET NO. 02-01203**
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ENFORCEMENT OF INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND XO TENNESSEE, INC.	)	

REPORT AND RECOMMENDATION OF PRE-HEARING OFFICER

This matter came before the Pre-Hearing Officer on January 22, 2004 for the purpose of hearing oral arguments on the cross motions for summary judgment of BellSouth Telecommunications, Inc ("BellSouth") and ITC^DeltaCom Communications, Inc ("DeltaCom") jointly with XO Tennessee, Inc ("XO" – together with DeltaCom referred to as the "CLECs") filed with the Tennessee Regulatory Authority (the "TRA") on December 22, 2003 For the reasons stated herein, the Pre-Hearing Officer recommends that summary judgment in favor of the CLECs be granted in part

Background

An Interconnection Agreement between BellSouth and DeltaCom was approved by the TRA on August 10, 2001 Included in this agreement is a section entitled "Special Access Service Conversions" with the following relevant subsections

8 3 5 1 [DeltaCom] may not convert special access services to combinations of loop and transport network elements, whether or not [DeltaCom] self-provides its entrance facilities (or obtains entrance facilities from a third party) , unless [DeltaCom] uses the combination to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer To the extent [DeltaCom] requests to convert any special access services to combinations of loop and transport network elements at UNE prices, [DeltaCom] shall provide to BellSouth a letter certifying that [DeltaCom] is providing a significant amount of local exchange service (as described in this section) over such combinations The certification letter shall also indicate under what local usage options [DeltaCom] seeks to qualify for conversion of special access circuits

8 3 5 3 BellSouth may audit [DeltaCom] records to the extent reasonably necessary in order to verify the type of traffic being transmitted over combinations of loop and transport network elements The audit shall be conducted by a third party independent auditor, and [DeltaCom] shall be given thirty days written notice of scheduled audit Such audit shall occur no more than one time in a calendar year, unless results of an audit find noncompliance with the significant amount of local exchange service requirement In the event of noncompliance, [DeltaCom] shall reimburse BellSouth for the cost of the audit. If, based on its audits, BellSouth concludes that [DeltaCom] is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in the Interconnection Agreement In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from [DeltaCom]

The Interconnection Agreement between BellSouth and XO,[1] approved by the TRA on August 29, 2000, contains the following language also found in a section entitled "Special Access Service Conversions"

1 4 [XO] may not convert special access services to combinations of loop and transport network elements, whether or not [XO] self-provides its entrance facilities (or obtains entrance facilities from a third party), unless [XO] uses the combination to provide a "significant amount of local exchange service," to a particular customer, as defined in 1 4.1 below. To the extent [XO] converts its special access services to combinations of loop and transport network elements at UNE prices, [XO], hereby, certifies that it is providing a significant amount of local exchange service over such

[1] The Interconnection Agreement was originally between BellSouth and Nextlink Tennessee, Inc, which changed its name to XO Tennessee, Inc pursuant to a September 26, 2000 Order of the TRA entered in Docket No 00-00842

> combinations, as set forth in 1 4 1 below If, based on audits performed as set forth in this section, BellSouth concludes that [XO] is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in the Interconnection Agreement In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from [XO] Notwithstanding any provision in the Parties interconnection agreement to the contrary, BellSouth may only conduct such audits as reasonably necessary to determine whether [XO] is providing a significant amount of local exchange service over facilities provided as combinations of loop and transport network elements, and, except where noncompliance has been found, BellSouth shall perform such audits no more than once each calendar year BellSouth shall provide [XO] and the FCC at least thirty days notice of any such audit, shall hire an independent auditor to perform such audit, and shall be responsible for all costs of said independent audit, unless noncompliance is found, in which case [XO] shall be responsible for reimbursement to BellSouth for the reasonable costs of such audit. [XO] shall cooperate with said auditor, and shall provide appropriate records from which said auditor can verify [XO]'s local usage certification as set forth in 1 4 1 below In no event, however, shall BellSouth or its hired auditor require records other than those kept by [XO] in the ordinary course of business

Pursuant to these provisions, BellSouth provided a thirty-day notice to DeltaCom and XO on May 23, 2002, and April 26, 2002, respectively, of its intent to conduct an audit [2] The CLECs have refused to allow BellSouth to proceed with an audit under the terms proposed by BellSouth.[3]

On November 5, 2002, BellSouth filed a complaint against DeltaCom in TRA Docket No. 02-01203 and an identical complaint against XO in TRA Docket No 02-01204, alleging a violation of the respective audit provisions DeltaCom and XO both filed an answer and counter-complaint on December 5, 2002, essentially alleging that BellSouth's request to conduct an audit was inconsistent with both the language of the interconnection agreement

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[2] *Complaint of BellSouth Telecommunications, Inc to Enforce Interconnection Agreement Against DeltaCom*, p 4 (November 5, 2002), *Complaint of BellSouth Telecommunications, Inc to Enforce Interconnection Agreement Against XO*, p 5 (November 5, 2002)

[3] *Id, Answer and Counter-Complaint of DeltaCom*, p 5 (December 5, 2002), *Answer and Counter-Complaint of XO*, p 4 (December 5, 2002)

and the requirements of the Federal Communications Commission ("FCC" or "Commission") Because these two dockets raised identical issues, the Chairman of the Authority consolidated the dockets into Docket No 02-01203 at the regularly scheduled Authority Conference held on November 18, 2002

Statutory and Regulatory Framework

In its third order pertaining to implementation of the Telecommunications Act of 1996, the FCC concluded that all requesting carriers are entitled to convert special access services to a combination of loop and transport, or extended enhanced loop ("EEL"), at unbundled network element prices [4] In a subsequent order, the FCC clarified that this conversion is not available to long-distance telecommunications service providers ("IXCs") unless the IXC is providing a "significant amount" of local exchange service [5] Accordingly, in order to justify a conversion, a requesting carrier must certify that the EEL will be used for a "significant amount" of local traffic [6] To confirm compliance with this local service requirement, the FCC authorized limited audits of the requesting carrier by the provisioning incumbent local exchange carrier ("ILEC") [7]

BellSouth's *Motion for Summary Judgment Order Requiring Audit*

In its *Motion for Summary Judgment Order Requiring Audit*, BellSouth seeks the following relief

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[4] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 99-238 (*Third Report and Order and Fourth Further Notice of Proposed Rulemaking*) 15 F C C R 3696, ¶ 486 (November 5, 1999)

[5] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 99-370 (*Supplemental Order*) 15 F C C R 1760, ¶¶ 4-5 (November 24, 1999)

[6] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, FCC 00-183 (*Supplemental Order Clarification*) 15 F C C R 9587, ¶ 29 (June 2, 2000) (hereinafter "*Clarification*")

[7] *Id*

1 A finding that the issues presented in the Complaints and Answers in the above styled docket are issues of law, regarding which there is no dispute as to relevant facts,

2 A finding that the Parties' Interconnection Agreements require the defendants to submit to an audit as sought by BellSouth,

3 An order requiring the defendants to submit to and cooperate with an audit conducted by American Consultants Alliance ("ACA") of all extended enhanced loops, such audit to commence as soon as practicable, but in no event later than 30 days from the issuance of such order, and

4. Any other such relief the Pre-Hearing Officer deems just and reasonable

In pursuance of the requested relief, BellSouth essentially contends that the Interconnection Agreements contain the totality of its authority to audit the CLECS to determine compliance with the "significant amount of local exchange service" requirement [8] BellSouth further contends that, although the FCC has authorized and provided guidelines for such audits, the Commission has also sanctioned deviation from these guidelines by private agreement, pursuant to the perimeters established under 47 U S C A § 252(a)(1) for the voluntary negotiation of interconnection agreements [9] For this reason, BellSouth suggests that any dispute regarding its audit authority must be resolved by the language of each Interconnection Agreement [10]

On this premise, BellSouth concludes that it has appropriately exercised its audit authority Contrary to the position espoused by the CLECs, BellSouth argues that neither Interconnection Agreement requires BellSouth to "articulate a particular concern" as a

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[8] BellSouth's *Memorandum in Support of Motion for Summary Judgment Order Requiring Audit*, p 5 (December 22, 2003) (hereinafter "BellSouth's *Memo*")

[9] BellSouth's *Memo*, at 5-12 *See also, Clarification*, at ¶ 32 (allowing parties to rely on audit provisions contained in negotiated interconnection agreements)

[10] BellSouth's *Memo*, at 5-12

prerequisite to an audit [11] BellSouth suggests that the CLECs are obligated to permit any audit requested with the requisite thirty-day notice [12] BellSouth further argues that nowhere does either Interconnection Agreement exclude new EELS from its audit authority [13] Finally, BellSouth contends that its choice of American Consultants Alliance complies with the ordinary meaning of "independent" as defined by Webster's Dictionary,[14] an acceptable standard since no particular meaning for "independent" was specified in either agreement [15] BellSouth also contends that the scope of the audit is appropriately determined by the auditor and that a sampling of data from each EEL, rather than a sampling of EELS, is appropriate and necessary to make an assessment of compliance.[16]

Joint Motion of DeltaCom and XO for Summary Judgment

In the *Joint Motion of DeltaCom and XO for Summary Judgment*, the CLECs contend that, notwithstanding relevant provisions of the Interconnection Agreements, BellSouth's audits must be conducted in compliance with federal guidelines and suggest that BellSouth's audit requests conflict with these guidelines in the following respects [17]

1 BellSouth's audit request must be "based upon cause;"

2 An audit can include only EEL conversions, and

3. The auditor must conduct the evaluation in accordance with the standards of the American Institute for Certified Public Accountants ("AICPA") and must also meet the AICPA standards for determining independence

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[11] *Id* at 12
[12] *Id* at 13-14
[13] BellSouth's *Response to the Joint Motion of XO and DeltaCom for Summary Judgment*, p 6 (January 13, 2004) (hereinafter "BellSouth's *Response*")
[14] (Defining "independent" as "not subject to control by others" and "not affiliated with a larger controlling unit")
[15] BellSouth's *Memo*, at 14-15
[16] BellSouth's *Response*, at 7
[17] *Joint Motion of DeltaCom and XO for Summary Judgment*, p 6 (December 22, 2003) (hereinafter "*Joint Motion*)

The CLECs contend that BellSouth's audit requests violate federal requirements because they failed to articulate a concern that is arguably required by the FCC before an audit may be commenced [18] The CLECs also contend that federal audit provisions, as well as the audit provisions in the interconnection agreements, apply to only converted, but not to new, EELs [19] Finally, the CLECs request that BellSouth be required to select a "truly independent auditor" and that such auditor examine only a "representative sampling of EELs" rather than every EEL employed by the CLECs.[20]

Standard for Summary Judgment

The procedural standards governing review of motions for summary judgment are well settled [21] Tennessee Rule of Civil Procedure 56 04 provides that summary judgment is appropriate when (1) no genuine issues with regard to the material facts relevant to the claim or defense contained in the motion remain to be tried and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts [22] The moving party bears the burden of proving that its motion satisfies these requirements [23] To properly support its motion, the moving party must either affirmatively negate an essential element of the nonmovant's claim or conclusively establish an affirmative defense.[24]

After a properly supported motion for summary judgment is asserted, the burden shifts to the nonmovant to respond with evidence establishing the existence of specific,

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[18] *Joint Motion*, at 3, *See also, Clarification*, at ¶ 31, n 86
[19] *Joint Motion*, at 4-6, *See also, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 03-36 (*Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*) 18 F C C R 19,020, ¶ 623 (August 21, 2003) (hereinafter "*Report and Order*")
[20] *Joint Motion*, at 5, 6
[21] *See* Tenn R Civ P 56, *Hunter v Brown*, 955 S W 2d 49, 50-51 (Tenn 1997)
[22] *See Byrd v Hall*, 847 S W 2d 208, 210 (Tenn 1993), *Anderson v Standard Register Co* , 857 S W 2d 555, 559 (Tenn 1993)
[23] *See Downen v Allstate Ins Co* , 811 S W 2d 523, 524 (Tenn 1991)
[24] *See McCarley v West Quality Food Serv* , 960 S W 2d 585, 588 (Tenn 1998), *Robinson v Omer*, 952 S W 2d 423, 426 (Tenn 1997)

disputed, material facts which must be resolved by the trier of fact [25] Thus, if the moving party successfully negates a claimed basis for the action, the nonmovant may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim If the moving party fails to negate a claim, the nonmovant's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail [26]

The standards governing the assessment of evidence in the summary judgment context are also well established The evidence must be viewed in the light most favorable to the nonmovant and all reasonable inferences must be drawn in the nonmovant's favor [27] Summary judgment is appropriate only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion [28]

Findings of Fact and Conclusions of Law

According to 47 U S C A § 252(a)(1), a voluntarily negotiated interconnection agreement need not comply with the requirements of 47 U S C.A § 251 (b) or (c). Because the interconnection agreements at issue in this Docket were voluntarily negotiated, the Parties were at liberty to include terms materially different from their federal counterparts [29]

Notwithstanding this freedom to negotiate, the audit provisions of both interconnection agreements are largely consistent with federal requirements, *i e*, audits are justified to the extent "reasonably necessary" to determine compliance with the local usage requirements, the CLECs are entitled to a thirty-day notice prior to any audit, absent a

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[25] *See Byrd,* 847 S W 2d at 215
[26] See *McCarley*, 960 S W 2d at 588, *Robinson*, 952 S W 2d at 426
[27] *See Robinson*, 952 S W 2d at 426, *Byrd*, 847 S W 2d at 210-11
[28] *See McCall v Wilder*, 913 S W 2d 150, 153 (Tenn 1995), *Carvell v Bottoms*, 900 S W 2d 23, 26 (Tenn 1995)
[29] *See AT&T Corp v Iowa Utilities Bd*, 525 U S 366, 373, 119 S Ct 721, 726, 142 L Ed 2d 835 (1999)

finding of non-compliance, only one audit per year is permitted, absent a finding of non-compliance, the ILEC pays for the cost of the audit, and the audit must be conducted by an independent auditor [30] However, neither agreement, as pertaining to audit requirements, references federal law or in any way suggests an intent to defer to federal law for any inconsistent or absent provision, strongly suggesting that the interconnection agreements are meant to govern in this respect Accordingly, the cross motions for summary judgment should be decided in reference to the language of the interconnection agreements, rather than federal law. In doing so, the intent of the parties should be determined from the four corners of the interconnection agreements [31]

On this premise, there is no readily apparent reason that an audit request from BellSouth must be "based upon cause" as suggested by the CLECs The interconnection agreements do provide for audits as "reasonably necessary" to determine or verify compliance with the local traffic requirement, but "reasonably necessary" may just as rationally apply to the breadth of the audit as well as to the justification for the audit However, neither interconnection agreement provides a process whereby BellSouth actually articulates cause to the CLEC prior to commencement of the audit Accordingly, it is rational to place the decision to conduct an audit initially within the discretion of BellSouth, the party bearing the cost of the audit should there be no findings of noncompliance

Also based on the language of the interconnection agreements, audits should be limited to converted, rather than new, EELs While it may be true, as suggested by BellSouth, that the concerns are the same with new and converted EELs, the interconnection agreements do not provide for the audit of new EELs As mentioned above, the relevant audit language is found in both interconnection agreements in a section entitled "Special

[30] *Clarification*, at ¶¶ 29, 31
[31] *See Simonton v Huff*, 60 S W 3d 820, 825 (Tenn Ct App 2000)

Access Service Conversions "[32] Each section refers multiple times to converted EELs and not at all to the acquisition of new EELs In the absence of any reference to new EELs, it is reasonable to conclude that the audit provisions are meant to apply to converted EELs only

Matters not specifically addressed in the interconnection agreements are left for resolution by the TRA For instance, each agreement requires an audit to be conducted by an independent auditor, but neither agreement provides a method for ascertaining the independence of the auditor The FCC has expressly stated that this issue is most appropriately decided by the relevant state commission[33] In this instance, additional information is needed from the Parties in order for the TRA to make this determination Additional information is also necessary in order for the TRA to determine an appropriate audit methodology, *e g* , whether the audit should utilize a sampling of EELs or a sampling of data from each and every EEL

Recommendation

For the reasons specified above, it is recommended that the Panel decide the cross-motions for summary judgment as follows

1 Deny BellSouth's *Motion for Summary Judgment Order Requiring Audit* in its entirety

2 Grant the *Joint Motion of DeltaCom and XO for Summary Judgment* to the extent that it seeks to limit an audit by BellSouth to converted EELs

3. Deny the *Joint Motion of DeltaCom and XO for Summary Judgment* in all other respects.

[32] Interconnection Agreement with DeltaCom, Section 8 3 5, Interconnection Agreement with XO, Section 4 1

[33] *Report and Order*, at ¶ 625 (August 21, 2003)

It is also recommended that the Panel make the following express pronouncements:

1. BellSouth is not required to articulate a justification prior to the commencement of an audit conducted pursuant to the terms of the interconnection agreements;

2 The interconnection agreements allow for an audit of only converted EELs;

3 BellSouth shall submit for TRA approval the letter of engagement between itself and its independent auditor, and

4 BellSouth shall submit for TRA approval a proposed methodology/procedure for conducting each audit of converted EELs

Respectfully submitted,

Kim Beals, Counsel
as Pre-Hearing Officer