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December 22, 2003

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 *Motion for Summary Judgment Order Requiring Audit* and *Memorandum in Support* thereof. 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

MOTION OF BELLSOUTH TELECOMMUNICATIONS, INC. FOR SUMMARY JUDGMENT ORDER REQUIRING AUDIT

BellSouth Telecommunications, Inc. ("BellSouth") files this *Motion for Summary Judgment Order Requiring Audit*, and for the reasons set forth herein and in the supporting *Memorandum* filed contemporaneously herewith, respectfully seeks an order finding and requiring as follows:

1. Finding that the issues presented in the *Complaint* and *Responses* in the above-styled docket are issues of law, regarding which there is no dispute as to relevant facts;

2. Finding that the Parties' Interconnection Agreements require the defendants to submit to an audit as sought by BellSouth; and

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

4. Granting any such other relief the Hearing Officer deems just and proper.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

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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

MEMORANDUM IN SUPPORT OF MOTION OF BELLSOUTH TELECOMMUNICATIONS, INC. FOR SUMMARY JUDGMENT ORDER REQUIRING AUDIT

I. INTRODUCTION

By Order dated November 19, 2003, the Hearing Officer directed the parties to file motions for summary judgment in resolution of this case. BellSouth provides this supporting memorandum addressing the issues in this case.

The legal issues presented are straightforward: BellSouth seeks an order requiring the parties to comply with the audit provisions that they negotiated and included in their interconnection agreements. These audit provisions, contained in the Interconnection Agreements ("Agreements") between BellSouth Telecommunications, Inc. ("BellSouth") and XO Tennessee, Inc. ("XO") and ITC^DeltaCom Communications, Inc. ("DeltaCom") (collectively, the "CLECs"), govern this matter.

In contrast, the CLECs seek to avoid application of the very language they agreed to place in their contracts. They want instead to avoid the audits, to which

they have previously agreed. They want to disregard their contracts and instead rely solely on language in an FCC order – an order that explicitly says that parties should be able to rely on their contracts.

The CLECs argue that language in the June 2, 2000 Supplemental Order Clarification issued by the Federal Communications Commission ("FCC") in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 (*"Supplemental Order Clarification"*) and/or language in the FCC *Report and Order* issued August 21, 2003, in *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338*; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147 (*"Triennial Review Order"* or *"TRO"*) should supplant the language in the parties' contracts. The *Supplemental Order Clarification* was issued before the parties entered into the audit provisions at issue. Had the parties wanted an agreement that mirrored the *Supplemental Order Clarification*, they could have quoted the language in the Agreements, or they could have incorporated the language by reference. Instead, they chose different language. There is no support, in either FCC Order, for the contention that the language in the Order governs when the parties chose different language.

The CLECs contend that BellSouth does not have a legitimate "concern" for seeking an audit to verify the type of traffic being placed over combinations of loop and transport network elements. The fact is, however, that the parties' contracts

do not require BellSouth to demonstrate such a concern. The CLECs also complain about the independent auditor chosen by BellSouth. The Agreements, however, do not permit the CLECs to approve the choice of auditor.

BellSouth respectfully submits its *Motion* and *Memorandum* addressing these issues.

II. OVERVIEW OF RELIEF SOUGHT

The relief sought, and the defenses to that relief, are straightforward. In separate complaints, BellSouth sought orders against XO and DeltaCom related to the same problem. Both CLECs were refusing to permit BellSouth to conduct an audit, even though their interconnection agreements required them to do so. Relying on the applicable provisions in the parties' interconnection agreements, BellSouth filed its complaints seeking an order requiring the CLECs to submit to the audits called for in their Agreements. In response, the CLECs tried to avoid the audits by saying that FCC orders – not the interconnection agreements – impose limits on such audits. As discussed below, however, those orders do not supplant the parties' contract language. Instead, the FCC has clearly said that its order on EELs audits does not displace contract language and that new rules on EELs do not apply retrospectively.

A. The DeltaCom Interconnection Agreement

BellSouth and DeltaCom are parties to an Interconnection Agreement which was entered into between the parties on April 24, 2001. Section 8.3.5.3 of Attachment 2 to that Interconnection Agreement authorizes BellSouth, upon 30 days written notice to DeltaCom, to conduct an audit of DeltaCom's records to verify the type of traffic being

transmitted over combinations of loop and transport network elements purchased by DeltaCom from BellSouth and to determine whether, based on the audit results, DeltaCom is providing a significant amount of local exchange service over the loop and transport combinations. A copy of the relevant portion of the interconnection agreement is attached as Exhibit A.

B. The XO Interconnection Agreement

BellSouth and XO (formerly NEXTLINK) are parties to an Interconnection Agreement, which was entered into between the parties on November 4, 1999. While several provisions of the Agreement were the subject of an arbitration, the audit provisions were the result of negotiation between the parties. Specifically, Section 1.4 of the September 8, 2000 Amendment to that Interconnection Agreement authorizes BellSouth, upon 30 days written notice to XO, to conduct an audit of XO's records to verify the type of traffic being transmitted over combinations of loop and transport network elements purchased by XO from BellSouth and to determine whether, based on the audit results, XO is providing a significant amount of local exchange service over the loop and transport combinations. A copy of the relevant portion of the interconnection agreement is attached as Exhibit B.

C. The Demand for Audit

Consistent with the above-referenced provisions, BellSouth notified each CLEC of its intent to audit. Each CLEC refused to comply, raising objections irrelevant under the terms of the contract.

III. DISCUSSION OF AUTHORITY

A. Interplay Between The Audit Provisions Of The Parties' Interconnection Agreement And The FCC's *Supplemental Order Clarification*.

The audit provisions contained in each agreement were voluntarily negotiated by BellSouth and each CLEC pursuant to Section 252(a)(1) of the Telecommunications Act of 1996 ("1996 Act"). As such, the parties' Agreements control the circumstances under which an audit may be conducted, and the FCC's *Supplemental Order Clarification* has no legal effect in this case. The FCC's *Supplemental Order Clarification* cannot legally be substituted for specific language negotiated by the parties and incorporated into their approved Interconnection Agreement, as the CLECs attempt to do. In fact, the FCC's Order is clear on this point, noting in ¶32, "As the parties indicate, in many cases, their interconnection agreements already contain audit rights. ***We do not believe that we should restrict parties from relying on these agreements.***" *Order* at ¶32, p. 18 (emphasis added).

Section 251(a) of the 1996 Act imposes various duties on telecommunications carriers, and Sections 251(b) and (c) impose additional duties on local exchange carriers and incumbent local exchange carriers ("ILECs"), respectively. *See* 47 U.S.C. § 251(a) - (c). One of the duties imposed upon all carriers is to "negotiate in good faith" interconnection agreements to fulfill the duties described in Sections 251(b) and (c). This allows an ILEC to meet its obligations under Sections 251 (b) and (c) by entering into an interconnection agreement with a requesting carrier through the procedures outlined in Section 252.

Section 252 contemplates two methods by which parties may enter into an interconnection agreement. The first is through voluntary negotiation. If carriers are unable to negotiate voluntarily an interconnection agreement, either party may petition the state public service commission to arbitrate any open issues. *See* 47 U.S.C. § 252(a). In these instances, the provisions at issue (the audit provisions) were negotiated, not arbitrated.

Importantly, when parties negotiate and enter into an interconnection agreement on a voluntary basis, they may do so "without regard to the standards set forth in subsections (b) and (c) of Section 251." 47 U.S.C. § 252(a)(1). In other words, parties who voluntarily negotiate terms of an interconnection agreement – as in this case – bind themselves to the terms of that agreement, which may or may not incorporate all of the substantive obligations imposed under Sections 251(b) and (c) and any implementing FCC rules. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000) ("The reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)"). As the Eighth Circuit Court of Appeals explained, voluntarily negotiating an interconnection agreement allows a competing carrier and an ILEC to "agree to rates or terms that would not otherwise comply with the law or be required under the Act, as long as the state commission

ultimately approves." *Southwestern Bell Telephone Co. v. Missouri Public Service Comm'n*, 236 F.3d 922, 923 (8th Cir. 2001).

The ability of carriers to negotiate an interconnection agreement "without regard to subsections (b) and (c) of Section 251" extends to rules and orders of the FCC – such as the *Supplemental Order Clarification*. *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, n. 9 (8th Cir. 1997), *aff'd in part, rev'd in part on other grounds, AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) ("The FCC's rules and regulations have direct effect only in the context of the state-run arbitrations, because an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations"). The FCC has acknowledged as much, noting that "parties that voluntarily negotiate agreements need not comply with the requirements we establish under Sections 251(b) and (c), including any pricing rules we adopt." First Report and Order, CC Docket 96-98, ¶¶ 54 & 58 (Aug. 6, 1996).

In this case, BellSouth and the CLECs voluntarily negotiated audit provisions in their interconnection agreements, which agreements were approved by the TRA. As part of those agreements, the parties agreed to the specific terms and conditions for EELs, including language governing any audit conducted by BellSouth. Consistent with the 1996 Act, the voluntarily negotiated agreement between BellSouth and the CLECs does not have to comport with the requirements of Sections 251(b) and (c), including the FCC's *Supplemental Order Clarification.* Accordingly, BellSouth's request to conduct an audit of the CLECs' records is

controlled by the parties' Interconnection Agreement, and not by any audit requirements adopted by the FCC in its *Supplemental Order Clarification*.

The CLECs' and BellSouth's voluntarily-negotiated audit provisions govern this dispute and not the FCC's *Supplemental Order Clarification*. This is clear from various court decisions which have refused to impose obligations under Sections 251(b) and (c) on parties to a voluntarily negotiated interconnection agreement. For example, in *Law Offices of Curtis V. Trinco LLP v. BellAtlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), the Second Circuit Court of Appeals considered the extent to which an end-user customer could bring a claim for alleged violations of Section 251 of the 1996 Act based on conduct that breached the interconnection agreement between the ILEC and the end user's carrier. In dismissing such claims, the Second Circuit noted:

> Once the ILEC 'fulfills the duties' enumerated in subsection (b) and (c) by entering into an interconnection agreement in accordance with section 252, it is then regulated directly by the interconnection agreement. Moreover, the fact that the Telecommunications Act allows parties to negotiate interconnection agreements without regard to subsections (b) and (c) of Section 251, indicates that Congress envisioned the possibility that the negotiated parts of the interconnection agreement could result in a different set of duties than those defined by the statute. To read the Telecommunications Act in a way such that ILECs are governed exclusively by the broadly worded language of Section 251 would make the option of negotiating interconnection agreements without regard to subsections (b) and (c) of section 251 superfluous.

Id. at 322 (citations omitted). The court of appeals refused to allow a requesting carrier to "end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251." *Id.*

Similarly, in *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002) (copy attached), the federal district court refused to impose obligations under Section 251(b) and (c) upon an ILEC that had voluntarily negotiated an interconnection agreement. In that case, the plaintiff alleged that Verizon had failed to fulfill its duties under Section 251 of the 1996 Act by providing poor service, failing to provide pricing information, and intentionally causing a loss of phone service to the plaintiff's customers. In rejecting such claims, the district court noted that Verizon had negotiated with the plaintiff and had agreed upon the terms of interconnection agreements that had been approved by the state commission. According to the court, "upon the approval of the agreements, the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)." The court held that the plaintiff "may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts...." *Id.*

Ignoring the plain language of Section 252(a)(1) and established case law, the CLECs argue that BellSouth's auditing rights are subject to the procedures and requirements set forth in the FCC's *Supplemental Order Clarification.* The CLECs apparently contend that the *Supplemental Order Clarification* somehow "trumps" the language in the parties' Agreement – a contention that flies in the face of *Law Offices of Curtis V. Trinco LLP* and *Ntegrity.* These cases squarely hold that the duties of a party to a negotiated interconnection agreement under the 1996 Act are governed by the terms of that agreement, even though the agreement may contain obligations different than those that would otherwise apply by operation of

Section 251(b) or Section 251(c). The courts' reasoning in *Law Offices of Curtis V. Trinco LLP* and *Ntegrity* is fatal to the CLECs' theory that the *Supplemental Order Clarification* governs BellSouth's audit rights, rather than the terms of the parties' Agreement.

No dispute exists that the FCC issued its *Supplemental Order Clarification* in connection with the adoption of rules establishing the network elements that an ILEC must unbundle under Section 251(c). *See Supplemental Order Clarification* ¶ 1. After the FCC issued its *Supplemental Order Clarification*, the parties negotiated the terms and conditions surrounding EELs, including the audit language in their Agreements. Because the CLECs and BellSouth were negotiating a voluntary agreement, they were free to agree to terms concerning an audit that were different from or did not otherwise comply with the audit requirements adopted by the FCC in its *Supplemental Order Clarification,* which is precisely what the parties did.

For example, in their Agreements, BellSouth and the CLECs omitted any requirement that BellSouth articulate a particular "concern" before conducting an audit. Allowing the CLECs to now insist upon the FCC's audit provisions because the *Supplemental Order Clarification* somehow represents a standard under Section 251(c) to which the parties must adhere would render superfluous the parties' ability to negotiate an interconnection agreement "without regard to the standards set forth in" Section 251(c). 47 U.S.C. § 252(a)(1). Furthermore, adopting the CLECs' position in this case would allow the CLECs to "end run" and "litigate around" the carefully negotiated audit language in the parties' Agreements, which

the courts have held federal law does not permit. *Law Offices of Curtis V. Trinco LLP*, 294 F.3d at 322; *Ntegrity*, 2002 U.S. Dist. LEXIS 1471.

The CLECs' theory that the *Supplemental Order Clarification* somehow "trumps" the audit language in the Agreement also is inconsistent with the *Supplemental Order Clarification* itself. In declining to adopt certain auditing guidelines, the FCC noted that many "interconnection agreements already contain audit rights." *Supplemental Order Clarification,* ¶ 32. According to the FCC, "We do not believe that we should restrict parties from relying on these agreements." *Id.* However, that is precisely what would happen here because, if the Commission were to adopt the CLECs' theory, BellSouth would be restricted from relying on the express audit language in its Agreements with the CLECs.

In addition to being inconsistent with the statutory language of the 1996 Act and every authority on the issue, adopting the CLECs' position also would undermine the entire negotiation or arbitration scheme under the 1996 Act. To the extent the CLECs were interested in having the FCC's audit requirements govern an audit by BellSouth, the CLECs could have asked during negotiations that the specific audit language from the *Supplemental Order Clarification* be incorporated by reference into the parties' Agreements. To the extent the CLECs were not satisfied with the audit provisions in the Parties' agreement and was insistent upon incorporating the FCC's audit requirements, the CLECs could have requested arbitration by the TRA on that issue. Again, the CLECs did not do so. Having elected not to include the FCC's audit requirements in the Agreement directly

through negotiation or arbitration, the CLECs are not entitled to seek to do so indirectly through this enforcement proceeding.

The law is clear that neither the unbundling requirements of Section 251(c) nor the FCC's rules and orders implementing those requirements can override the express terms of the parties' Agreement. Because BellSouth and the CLECs voluntarily agreed to audit language in their Agreement that this Commission approved, BellSouth's ability to audit the CLECs' records is governed solely by the terms of that Agreement. Consistent with the plain language of Section 252(a)(1) and the holding of every case to address the issue, BellSouth's audit rights are not governed by the FCC's *Supplemental Order Clarification*.[1]

B. The Basis For BellSouth's "Concern" That Would Justify An Audit Under The FCC's Supplemental Order.

As explained immediately above, the circumstances under which BellSouth can audit the CLECs' records is governed by the plain language in the parties' Interconnection Agreement; that language does not require that BellSouth articulate a particular "concern" as a prerequisite to conducting an audit.

Even assuming, however, that the FCC's *Supplemental Order Clarification* governs this dispute, which is not the case, the FCC's passing reference that an audit could be undertaken only when the ILEC "has a concern that the requesting carrier is not meeting the qualifying criteria for providing a significant amount of

[1] The outcome in this case might be different if the parties' Interconnection Agreement were silent on the issue of EELs or BellSouth's ability to conduct an audit. In such a case, an argument could be made that the interconnection agreement should be interpreted and enforced consistent with applicable law, which would include the substantive requirements set forth in the FCC's *Supplemental Order Clarification*. However, that is not this case, since the Agreements are not silent on the issue of EELs and contain express language negotiated by the parties setting forth the specific circumstances under which an audit would be conducted.

locale exchange service" is not a "limitation," as the CLECs contend. In paragraph 31 of the *Supplemental Order Clarification*, the FCC was expressing its agreement with WorldCom that the provisioning of an unbundled loop and transport combination for a requesting carrier should occur upon request and should not be delayed by the ILEC's requiring an audit prior to provisioning. What the CLECs have claimed is a "limitation" to the ILEC's audit rights is in fact found only in a footnote to the FCC's finding that an audit should not be required prior to provisioning an unbundled loop and transport combination for a requesting carrier. In fact, the FCC merely acknowledged that the February 28, 2000 Joint Letter stated that "audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service." The FCC agreed that "this should be the only time that an incumbent LEC should request an audit."

Thus, the "limitation" upon which the CLECs relies was merely a statement that audits would not be conducted prior to provisioning unbundled loop and transport combinations, and that both ILECs and CLECs had previously stated that audits would not be routine. The FCC's *Supplemental Order Clarification* puts in place a fair and symmetrical process aimed at speeding the provisioning process while providing compliance safeguards; just as the ILEC is required to convert the circuits upon request, the CLEC is required to allow an audit upon request. The FCC clearly did not provide requesting carriers the right to challenge the legitimacy of the ILEC's concern as to compliance with the restrictions, nor did the FCC even require the ILEC to share its concern with the CLEC prior to conducting the audit.

Indeed, the FCC merely required the ILEC to provide notice to the FCC of audits, so that the FCC could monitor the use of audits. The FCC did not in any way require or suggest that any pre-approval of the audit request was necessary – not by the FCC, let alone by the CLEC whose records were subject to audit.

Nevertheless, BellSouth has shared with these CLECs the basis of its concern that the CLECs may not be providing a significant amount of local exchange service by virtue of records gathered reflecting that an inordinate amount of traffic from these CLECs is not local and that the CLECs have changed jurisdictional factors significantly. BellSouth's concerns are well founded.

BellSouth readily admits that an audit may indicate that the CLEC is in full compliance with the local usage requirements. However, neither BellSouth nor the TRA will know for certain whether the CLECs have complied with these requirements until an audit is conducted, just as the parties' agreements provide.

C. <u>The Auditor Selected by Bellsouth is "Independent", and the contracts do not require a "mutually agreed upon" auditor.</u>

BellSouth has selected an independent third party, American Consultants Alliance ("ACA") to conduct the audits. ACA is "independent" in that it is an outside firm, not controlled by BellSouth. Webster's defines "independent" as "not subject to control by others" and "not affiliated with a larger controlling unit," Webster's Ninth New Collegiate Dictionary. ACA is therefore "independent" as that term is used in ordinary parlance. If the parties had intended the term to have some additional meaning, they would have explained that explicitly. Absent language indicating a special meaning, words in contracts are given their ordinary

meaning. *See, e.g., Seeley v. Pilot Life and Casualty Co.*, 432 SW2d, 58 (Tenn. 1968); *Petty v. Sloan,* 277 SW2d 355 (Tenn. 1955).

The contract provides no right to a "mutually acceptable" auditor.

CONCLUSION

The TRA should not allow this audit to be further delayed and should order the CLECs to submit to the audit consistent with the terms of their Interconnection Agreements.

Respectfully submitted,

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exchange service. The loop-transport combinations must terminate at ITC^DeltaCom's collocation arrangement in at least one BellSouth central office. This option does not allow loop-transport combinations to be connected to BellSouth's tariffed services. Under this option, ITC^DeltaCom is the end user's only local service provider, and thus, is providing more than a significant amount of local exchange service. ITC^DeltaCom can then use the loop-transport combinations that serve the end user to carry any type of traffic, including using them to carry 100 percent interstate access traffic; or

8.3.5.1.2 ITC^DeltaCom certifies that it provides local exchange and exchange access service to the end user customer's premises and handles at least one third of the end user customer's local traffic measured as a percent of total end user customer local dialtone lines; and for DS1 circuits and above, at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually, and the entire loop facility has at least 10 percent local voice traffic. When a loop-transport combination includes multiplexing, each of the individual DS1 circuits must meet this criteria. The loop-transport combination must terminate at ITC^DeltaCom's collocation arrangement in at least one BellSouth central office. This option does not allow loop-transport combinations to be connected to BellSouth tariffed services; or

8.3.5.1.3 ITC^DeltaCom certifies that at least 50 percent of the activated channels on a circuit are used to provide originating and terminating local dial-tone service and at least 50 percent of the traffic on each of these local dial-tone channels is local voice traffic, and that the entire loop facility has at least 33 percent local voice traffic. When a loop-transport combination includes multiplexing, each of the individual DS1 circuits must meet this criteria. This option does not allow loop-transport combinations to be connected to BellSouth's tariffed services. Under this option, collocation is not required. ITC^DeltaCom does not need to provide a defined portion of the end user's local service, but the active channels on any loop-transport combination, and the entire facility, must carry the amount of local exchange traffic specified in this option.

8.3.5.2 In addition, there may be extraordinary circumstances where ITC^DeltaCom is providing a significant amount of local exchange service, but does not qualify under any of the three options set forth in Section 8.3.5.1.1, 8.3.5.1.2, 8.3.5.1.3. In such case, ITC^DeltaCom may petition the FCC for a waiver of the local usage options set forth in the June 2, 2000 Order. If a waiver is granted, the Parties shall amend this Agreement within 45 days of ITC^DeltaCom's request to the extent necessary to incorporate the terms of such waiver.

8.3.5.3 BellSouth may audit ITC^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 ITC^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, ITC^DeltaCom shall reimburse BellSouth for the cost of the audit. If, based on its audits, BellSouth concludes that ITC^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 ITC^DeltaCom.

8.3.5.4 ITC^DeltaCom may convert special access circuits to combinations of loop and transport UNEs pursuant to the terms of this Section and subject to the termination provisions in the applicable special access tariffs, if any.

8.3.6 Rates

8.3.6.1 Georgia

8.3.6.2 The non-recurring and recurring rates for the EEL Combinations of network elements set forth in 8.3.4 whether Currently Combined or new, are as set forth in Attachment 11.

8.3.6.3 On an interim basis, for combinations of loop and transport network elements not set forth in Section 8.3.4, where the elements are not Currently Combined but are ordinarily combined in BellSouth's network, the non-recurring and recurring charges for such UNE combinations shall be the sum of the stand-alone non-recurring and recurring charges of the network elements which make up the combination. These interim rates shall be subject to true-up based on the Commission's review of BellSouth's cost studies.

8.3.6.4 To the extent that ITC^DeltaCom seeks to obtain other combinations of network elements that BellSouth ordinarily combines in its network which have not been specifically priced by the Commission when purchased in combined form, ITC^DeltaCom, at its option, can request that such rates be determined pursuant to the Bona Fide Request/New Business Request (NBR) process set forth in this Agreement.

8.3.6.5 All Other States

8.3.6.5.1 Subject to Section 8.3.2 and 8.3.3 preceding, for all other states, the non-recurring and recurring rates for the Currently Combined EEL combinations set forth in Section 8.3.4 and other Currently Combined network elements will be the sum of the recurring rates for the individual network elements plus a non recurring charge set forth in Attachment 11.

1.3.8 STS-1 Interoffice Channel + STS-1 Local Loop

1.3.9 DS3 Interoffice Channel + DS3 Channelization + DS1 Local Loop

1.3.10 STS-1 Interoffice Channel + DS3 Channelization + DS1 Local Loop

1.3.11 2-wire VG Interoffice Channel + 2-wire VG Local Loop

1.3.12 4wire VG Interoffice Channel + 4-wire VG Local Loop

1.3.13 4-wire 56 kbps Interoffice Channel + 4-wire 56 kbps Local Loop

1.3.14 4-wire 64 kbps Interoffice Channel + 4-wire 64 kbps Local Loop

1.4 Special Access Service Conversions

NEXTLINK may not convert special access services to combinations of loop and transport network elements, whether or not NEXTLINK self-provides its entrance facilities (or obtains entrance facilities from a third party), unless NEXTLINK 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 NEXTLINK converts its special access services to combinations of loop and transport network elements at UNE prices, NEXTLINK, hereby, certifies that it is providing a significant amount of local exchange service over such combinations, as set forth in 1.4.1 below. If, based on audits performed as set forth in this section, BellSouth concludes that NEXTLINK 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 NEXTLINK. Notwithstanding any provision in the Parties interconnection agreement to the contrary, BellSouth may only conduct such audits as reasonably

Exhibit B

necessary to determine whether NEXTLINK 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 NEXTLINK 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 NEXTLINK shall be responsible for reimbursement to BellSouth for the reasonable costs of such audit. NEXTLINK shall cooperate with said auditor, and shall provide appropriate records from which said auditor can verify NEXTLINK'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 NEXTLINK in the ordinary course of business.

1.4.1 EEL combinations for DS1 level and above will be available only when NEXTLINK provides and handles a significant amount of the end user's local exchange service. NEXTLINK shall be deemed to be providing a significant amount of the end user's local exchange service where NEXTLINK meets one of the three circumstances set forth in 1.4.1.1, 1.4.1.2, or 1.4.1.3 below. NEXTLINK hereby certifies that all requests for EEL combinations, existing or new, shall meet one of these circumstances. Should extraordinary circumstances exist where NEXTLINK is providing a significant amount of local exchange service to an end user but does not qualify under any of these three circumstances, NEXTLINK may petition the FCC for a waiver of these requirements.

1.4.1.1 NEXTLINK certifies that it is the exclusive provider of the end user's local exchange service. In such circumstance, the EEL combination(s) must terminate at NEXTLINK's collocation arrangement at at least one BellSouth Central Office. Such EEL combinations may not be connected to other BellSouth tariffed services. NEXTLINK may use the EEL combination(s) that serve that end user to carry any type of traffic; or

1.4.1.2 NEXTLINK certifies that it provides local exchange and exchange access service to the end user customer's premises and handles at least one third of the end user customer's local traffic measured as a percent of total end user customer local dialtone lines; and, for DS1 circuits and above, at least 50 percent of the activated channels on the loop portion of the EEL combination have at least 5 percent local voice traffic individually, and the entire loop facility has at least 10 percent local voice traffic. When such EEL combination includes multiplexing, each of the individual DS1 circuits must meet this criteria. In the circumstance set forth in this subsection, the EEL combination(s) must terminate at NEXTLINK's collocation arrangement in at least one BellSouth Central Office. Such EEL combinations may not be

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2003, a copy of the foregoing document was served on the following, via the method indicated:

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