

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 26, 2003

IN RE:

**PETITION FOR ARBITRATION OF
ITC^ DELTACOM COMMUNICATIONS, INC.
WITH BELL SOUTH TELECOMMUNICATIONS, INC.**

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**DOCKET NO.
03-00119**

**REPORT AND RECOMMENDATION OF PRE-ARBITRATION OFFICER
REGARDING ISSUES IMPACTED BY *TRIENNIAL REVIEW* DECISION —
REFORMATTED**

On August 21, 2003, the FCC released the order addressing its triennial review of unbundling obligations of incumbent local exchange carriers.¹ The *Triennial Review Order* ("TRO") impacts numerous issues currently outstanding in this arbitration proceeding. Since the TRO was released subsequent to the filing of direct and rebuttal testimony by the parties, the pre-arbitration hearing in this matter held three conference calls with the parties on August 25 and 26, 2003 to determine how to proceed with the hearing in light of the FCC's Order. The purpose of this *Report and Recommendation* is to present the Pre-Arbitration Officer's recommendations to the panel.

The new rules adopted by the FCC in the TRO impact a number of outstanding issues, specifically Issue Nos. 9, 11, 25, 36, 37 and 57. These new FCC rules are a matter of law and do not require state regulators to conduct additional proceedings, contrary to the case for other matters such as unbundled circuit switching. It is BellSouth's position that all issues impacted

by the TRO should be deferred while DeltaCom contends that the Authority is required to proceed with all issues pursuant to Section 252 of the Telecommunications Act of 1996.²

It is important to point out that release of the TRO at this time disadvantaged both parties. It is the opinion of the Pre-Arbitration Officer, however, that application of such rules should not require additional evidence from the parties. Such application can be sufficiently addressed in post-hearing briefs by the parties. However, parties should not be foreclosed from presenting relevant evidence, if necessary, addressing matters raised in the TRO just as they would any other recently released FCC Authority. Therefore, in the event the parties feel that it is necessary to supplement their testimony only as it relates to the impact of the TRO on outstanding issues, they may do so in live testimony presented during the hearing. While this is not the usual practice of the Authority, the unusual circumstances preceding the hearing in this matter dictate such departure. However, it is important to reiterate, witness testimony may only be supplemented for purposes of addressing the elements of the TRO as they relate to the specific issues being deliberated in this arbitration.

There are two other outstanding issues, Nos. 21 and 26, that will be the subject of Authority proceeding(s) to be held pursuant to the TRO. These issues relate to the availability of dark fiber (No. 21) and local circuit switching as an unbundled network element (No. 26). These two issues may be encompassed in impairment analyses to be conducted by the Authority within nine months of the effective date of the TRO.

The parties have been informed of the possibilities that decisions reached in the impairment proceedings could impact findings by this arbitration panel. However, it is

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers. Report and Order on Remand. CC Docket No. 01-00338.* Released, August 21, 2003.

² 47 U.S.C. §252 (b).

incumbent upon the arbitrators to address all issues before it. Section 252(b)(4) (c) of the Telecom Act states that:

The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

Therefore, it is the Pre-Arbitration Officer's opinion that these two issues should be heard by the panel on the scheduled hearing dates. Every effort should be made, however, to avoid duplicating issues that will be heard in the proceeding(s) to be conducted by the Authority pursuant to the TRO. To this end, the parties agreed to remove Issue Nos. 26(b) and 26(c) from the arbitration proceeding. Further, it is the opinion of the Pre-Arbitration Officer that it would not be appropriate or feasible to conduct an impairment analysis in a proceeding limited to two parties. Such impairment analyses will require input from multiple providers with regard to facility location and availability.³

Accordingly, the Pre-Arbitration Officer recommends that the panel hear testimony from the parties and render a decision on Issue Nos. 21 and 26(a) and (d). Such testimony may incorporate presumptions and other findings by the FCC in the TRO but not portions of the Order pertaining to impairment analyses by state regulatory commissions. The TRO dedicates a great deal of discussion pertaining to presumptions regarding the availability of UNEs prior to or absent findings of impairment or no impairment by state commissions. Such information appears

³ One of the remaining issues, No. 26(d) addresses the market rate for local circuit switching in the event that it is not required to be offered as a UNE. This is an issue that will likely be addressed in Authority proceedings held pursuant to the TRO. DeltaCom, however, contends that it does not presently have an agreement with BellSouth for a market based switching rate and needs such rate to operate while the Authority conducts its *Triennial Review* proceedings. BellSouth contends that the Authority does not have jurisdiction to set such market rate. In light of the circumstances and considering that DeltaCom presented this as an issue for arbitration, it is the pre-arbitration Officer's opinion that the panel must consider Issue 26(d).

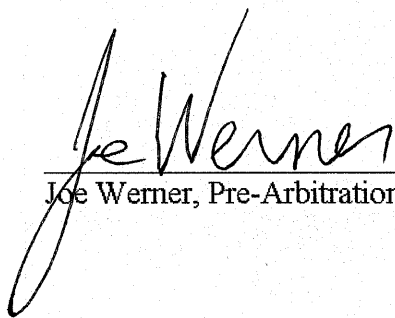
to be essential to resolving Issues 21 and 26(a) and (d) in compliance with applicable laws and regulations. An impairment analysis, however, should not be part of this proceeding.

Conclusion

In summary, the Pre-Arbitration Officer recommends that:

- 1) The hearing be held as scheduled beginning at **9 a.m., Wednesday, August 26, 2003.**
- 2) Subparts b) and c) of Issue 26 are removed from the arbitration per agreement by the parties.
- 3) The parties be permitted to supplement their testimony at the hearing, if necessary, only to the extent that the supplemental information relates to the revised rules and/or presumptions addressed in the TRO.
- 4) The Authority will address Issue Nos. 21 and 26(a) and (d) in the context of the FCC requirements as they relate to presumptions and other findings by the FCC but not portions of the Order that pertains to impairment analyses by state regulatory commissions.

The Pre-Arbitration Officer requests that the panel consider this report at the beginning of the hearing on Wednesday, August 27, 2003.


Joe Werner, Pre-Arbitration Officer