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October 27, 2003

VIA HAND DELIVERY

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

Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996
Docket No 03-00119

Dear Chairman Tate:

Enclosed are the original and fourteen copies of BellSouth's Post-Hearing Brief. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re Petition for Arbitration of ITC^DeltaCom Communications, Inc with BellSouth Telecommunications, Inc Pursuant to the Telecommunications Act of 1996

Docket No 03-00119

BELLSOUTH TELECOMMUNICATIONS, INC. POST-HEARING BRIEF

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I. PROCEDURAL BACKGROUND

This matter began when ITC^DeltaCom Communications, Inc ("DeltaCom") filed with the Tennessee Regulatory Authority ("TRA" or "Authority") a Petition for Arbitration ("Petition") pursuant to the provisions of Section 252 of the Telecommunications Act of 1996 ("1996 Act") On March 4, 2003, BellSouth Telecommunications, Inc ("BellSouth") filed a Response to the Petition Initially, DeltaCom presented the TRA with seventy-one (71) issues, excluding subparts, to resolve Through diligent negotiations by the Parties, both before and after the hearing, there remain only twenty-one (21) issues, excluding subparts, for the Authority's consideration

The hearing in this matter was held on August 27-28 and September 12, 2003 At the hearing, BellSouth submitted the direct and rebuttal testimony of John Ruscilli, Kathy Blake, Ronald Pate and Keith Milner DeltaCom submitted direct and rebuttal testimony from Joe Gillan, Robert Bye, Jerry Watts, Steve Brownworth, Don Wood, and Mary Conquest This Post-Hearing Brief is submitted as directed by the Authority at the close of the hearing

II. LEGAL STANDARDS AND PROCESSES APPLICABLE FOR ARBITRATIONS UNDER THE 1996 ACT

Sections 251 and 252 of the 1996 Act encourage negotiations between parties to reach local interconnection agreements Section 252(a) of the 1996 Act requires incumbent local exchange companies to negotiate the particular terms and conditions of agreements to fulfill the obligations described in Sections 251(b) and 251(c)(2)-(6) As part of the negotiation process, the 1996 Act allows a party to petition a state commission for arbitration of unresolved issues [1] The petition must identify the issues

[1] 47 U S C § 252(b)(2)

resulting from the negotiations that are resolved, as well as those that are unresolved [2] The petitioning party must submit along with its petition "all relevant documentation concerning (1) the unresolved issues, (2) the position of each of the parties with respect to those issues, and (3) any other issues discussed and resolved by the parties "[3] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the Authority receives the petition [4]

The 1996 Act limits the Authority's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response [5] Issues or topics not specifically related to these areas are outside the scope of an arbitration proceeding Importantly, Section 252 makes clear that the Arbitrators' role is to resolve the parties' open issue to "meet the ***requirements*** of Section 251, including the regulations prescribed by the Commission " 251(c)(1) (emphasis added) Thus, it is clear that the Arbitrators' role is to ensure that the ILEC is doing what is ***required*** There is no reference in Section 251 and 252 to Arbitrators requiring an ILEC to do everything and anything that is technically feasible or to do more than those things ***required*** by the Act

During the hearing (and undoubtedly in its brief), DeltaCom suggested that the Authority consider the law in terms of whether it *prohibited* DeltaCom's requests rather than whether the law *required* BellSouth to provide what DeltaCom sought BellSouth submits that such a view is not only irrational, it is inconsistent with the very language of

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[2] *See generally,* 47 U S C §§ 252 (b)(2)(A) and 252 (b)(4)
[3] 47 U S C § 252(b)(2)
[4] 47 U S C § 252(b)(3)
[5] 47 U S C § 252(b)(4)

the 1996 Act, which is written in terms of *obligations*, not technical possibilities[6] As noted above, Section 252(c) of the 1996 Act requires the Authority to ensure that arbitration decisions meet the *requirements* of Section 251 DeltaCom wants more than what the law requires – it wants anything that is possible for BellSouth to do so long as the law does not prohibit it Moreover, Deltacom refuses to pay for such demands in a way that provides a business rationale for BellSouth to take on contractual obligations over and above the requirements of the law

In short, BellSouth simply requests that the Authority apply the arbitration standards set forth in the 1996 Act, and reject DeltaCom's request to apply the "we want it, BellSouth could find a way to do it, and we want BellSouth to do it for free" standard that DeltaCom seems to support

III. OVERVIEW OF THE ISSUES REMAINING TO BE RESOLVED BY THE AUTHORITY

The Act contemplates negotiation that results in a business agreement that makes business sense DeltaCom's positions, however, lack business sense in three overarching respects (1) DeltaCom wants relief irrespective of whether the 1996 Act obligates BellSouth to provide it, (2) DeltaCom wants special arrangements immediately for itself without concern for the impact upon the rest of the industry, and, (3) DeltaCom wants the relief for free, even if BellSouth incurs costs to provide it These positions, and DeltaCom's testimony on key issues, confirm that DeltaCom does not seek a fair business agreement, consistent with the Telecom Act Instead DeltaCom seeks to obtain irrational advantages to advance an irrational business model

[6] Indeed, §251(b) is entitled "*OBLIGATIONS* OF ALL LOCAL EXCHANGE CARRIERS" and §251(c) is entitled "ADDITIONAL *OBLIGATIONS* OF INCUMBENT LOCAL EXCHANGE CARRIERS" (emphasis added)

A. On Local Switching, DeltaCom Bluntly Admits That It Has Its Own Nashville Switch, But It Prefers To Take Advantage Of Cheaper Switching From BellSouth And Let Its Own Switch Sit Idle.

Typical of DeltaCom's disregard for rational business sense was the testimony of DeltaCom's witness Jerry Watts regarding DeltaCom's use of its own switches Mr Watts testified unambiguously that DeltaCom has made the business choice to purchase switching from BellSouth rather than use its own switch Mr Watts went on to explain that DeltaCom believed that other CLECs as well have recognized the opportunity to take advantage of switching through regulatory arbitrage from BellSouth rather than using their own switches

[Mr Edenfield]
Q And DeltaCom has a switch in Nashville?

[Mr Watts]
A We've got a switch in Tennessee I think it's in Nashville

Q If you have a switch in Nashville, why would you need to buy unbundled local switching from BellSouth?

A Because when we filed an ex parte with the FCC in response to some questions we got – our president got from Commissioner Abernathy specifically on that issue – I don't have it with me today But when you do the cost analytics of trying to use your switch for analog mass market application, you just can't get there The expenses that you incur in terms of what you still have to acquire from BellSouth and your internal expenses make it impractical for you to be able to offer a product in that market that is competitive

Q I'm not sure I understand that Are you saying it is cheaper for you to buy switching from BellSouth than it is for you to put in your own switch?

A I'm saying that for the DSO, the analog level, mass market, residential, which we have an offer on in Tennessee, a new offer in for small business – and, again, this is common knowledge within the industry That's the reason we have UNE-P That's the reason it was ordered and has been

sustained by the FCC and I hope will be by this commission If you look at the products offered in that residential, small business market, the only practical way to offer a competitive product is by using UNE-P

Are there exceptions? Yes There are a few exceptions that I'm sure, you know, we'll talk about along the way in certain circumstances But in general, you know, if you look at the market penetration and how that service provided, UNE-P is the only viable entry strategy that I'm aware of for that market for the majority of the customers And like I said, it may be there could be exceptions in some circumstances

Q. And I'm sorry. I lost this somewhere in the answer. Is it cheaper for DeltaCom to buy switching from BellSouth at the current TELRIC prices than it is for DeltaCom to provide service through its own switch?

A. Yes. For the majority of the DSO level, analog level customer, mass market, we have not been able to develop a business model that will allow you to do that, own your own switch in a way that lets us offer a product at a competitive price.

(Watts, Tr p 82-83, emphasis added)

It is clear from this testimony that DeltaCom urges the Authority to order BellSouth to enter into an agreement that encourages companies like DeltaCom to let their own switches sit idle Obviously, such a plan not only defies business sense, but raises serious policy issues for the Authority Regulatory policy that provides a perverse incentive to engage in a business without using one's own resources is simply bad for Tennessee Real competition is not served by agreements that encourage companies like DeltaCom to ignore their own investment in the hopes of obtaining a service at an irrational price as a result of a regulatory mandate Tennesseans are better served when competitors engage in real facilities-based competition using their own assets and, as a result, create jobs for Tennesseans

B. DeltaCom Urges The TRA To Ignore FCC Precedent And Impose Regulation On BellSouth's Retail DSL Product, Even Though DeltaCom's Own Choice To Use UNE-P Is The Only Obstacle To Providing Voice Service To BellSouth DSL Customers.

DeltaCom's irrational business perspective is particularly evident with respect to the DSL over UNE-P issue As noted at the hearing, this issue is of paramount concern to BellSouth Having invested its resources in developing this broadband product, which is not regulated by the Authority, DeltaCom's effort to require BellSouth to change the manner in which it offers its non-regulated broadband product ignores the business realities

First, businesses like BellSouth would not invest their resources in the development of a non-regulated product if businesses like DeltaCom were able to reach out and impose regulation on that non-regulated product merely by referencing it in the context of an arbitration relating to regulated telecommunications services

Second, while DeltaCom seeks to characterize BellSouth's policy of providing its broadband product only to its telecommunications customers as unreasonable, the evidence introduced at the hearing clearly indicates that BellSouth is not alone in its decision to provide its broadband product only to its own customers This policy is shared by MCI and by DeltaCom's own partner-in-merger, BTI (Hearing Ex 8 and 9, stating those companies' policy limiting DSL to its voice customers)

Third, while DeltaCom feigns confusion (and oversimplifies the issue) by asking why BellSouth would be willing to lose a DSL customer, the truth is more complex The business reality is that BellSouth did not develop its DSL product to be used the way DeltaCom urges Altering BellSouth's business plan to use its DSL product differently would be costly for BellSouth (and, in all likelihood could result in high prices for DSL

customers) Moreover, there is no legal justification for taking away BellSouth's control over its own unregulated product As discussed below, the FCC has repeatedly recognized that the Telecom Act simply does not require what DeltaCom seeks

C. DeltaCom Attempts To Obtain Advantages Over Other CLECs By Using This Arbitration, Instead Of The Regional Change Control Process, To Obtain Its Preferred Changes To BellSouth's Operational Support Systems Prioritized Ahead of the CLEC Community's Preferences

Issues 66 and 67 each present a situation in which DeltaCom attempts to obtain a change to BellSouth's Operation Support System ("OSS") through its interconnection agreement, rather than using the Change Control Process ("CCP"), which is the regional process by which BellSouth communicates with the CLEC community as a whole regarding, among other things, changes to the OSS The CCP allows all CLECs to have a voice in upgrades to the OSS and, particularly, in the *priority* in which OSS changes will be made

In its 2001 arbitration in Tennessee with AT&T, BellSouth stated that "the content of the CCP is not an appropriate issue for arbitration with an individual CLEC " BellSouth pointed out then, as it does now, that the CCP involves other CLECs and is a regional process BellSouth requested that the Arbitrators not impose requirements on the CCP that will affect parties not involved in this proceeding Even AT&T, which sought rulings on several CCP-related issues in its 2001 arbitration, acknowledged that "the change control process should control implementation of new interfaces,

management of interfaces in production (including defect correction), and the retirement of interfaces "[7]

The TRA Arbitrators unanimously declined to grant relief on AT&T's CCP arbitration issues, stating

> The CCP is used to manage changes to the systems, processes, and documentation that comprise BellSouth's OSS The CCP is important to AT&T ***and other CLECs***, as they need time to modify their OSS systems and processes in response to changes implemented by BellSouth to BellSouth's OSS AT&T claims that its ability to perform the day-to-day tasks necessary to provide adequate service would be disrupted if it were not provided sufficient notice to adjust its OSS In sum, the CCP is a necessary companion to OSS access as it allows ***both CLECs and ILECs*** to maintain and improve OSS functionality without imposing an undue burden or delay on either party
>
> At the time the Arbitrators conducted the hearing in this arbitration four sub-issues remained unresolved AT&T did not submit any evidence demonstrating that the language in the current CCP is unreasonable and failed to establish that the existing CCP documents are inadequate Further, AT&T failed to present sufficient testimony to support its contention that BellSouth has deviated from the requirements of the CCP [8]

(emphasis added)

Like AT&T in its Arbitration, DeltaCom has presented no evidence in this case that demonstrates that the current CCP is inadequate DeltaCom's requests in this area should have been pursued in the context of the CCP escalation and dispute resolution procedure that allows CLECs to petition the Authority if they are aggrieved by an action taken (or not taken) by the CCP

In the regional CCP context, DeltaCom's interests would be balanced against the other CLECs whose priorities would instead be set aside in favor of DeltaCom if

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[7] See, *Final Order of Arbitration Award, In Re Petition for Arbitration of the Interconnection Agreement Between AT&T Communications of the South Central States, Inc , TCG MidSouth, Inc and BellSouth Telecommunications, Inc* , Docket No 00-00079, dated November 29, 2001 at p 34-35

[8] *See Final Order or Arbitration Award* in Authority Docket No 00-00079 at p 34-35

DeltaCom prevails on these issues in this two-party arbitration Obviously, if all CLECs chose this route, the CCP would be utterly undermined and the opportunity to approach CLEC OSS concerns on a regional community-wide basis would be lost As the following exchange illustrates, DeltaCom is well aware of the CCP, yet chooses to not use it

[Mr Hicks]

Q But you have not submitted a change request that mirrors the request you're making of the TRA?

[Ms Conquest]

A Not at this time, No

(Tr p 309) Clearly, DeltaCom chose not to follow the dispute resolution procedures clearly outlined in the CCP (where its interests would be balanced with those of other CLECs) and instead chose a forum where it has the potential to move its singular interests to the head of the list

The Authority has consistently endorsed the CCP as the vehicle for addressing modifications to BellSouth's OSS, including the appeal procedure for aggrieved CLECs The CCP allows the CLEC community, as a whole, to determine (i e , rank) which OSS modifications are the most critical Once all CCP participants agree to the ranking of modifications, BellSouth begins implementing the OSS modifications based on that ranking DeltaCom seeks to avoid the Authority- and FCC-approved process by circumventing the rankings of the CLEC community at large

If DeltaCom were granted the relief it seeks in this Section 252 arbitration proceeding (and the Authority were to order BellSouth to implement any of the requested changes), then these issues will go to the top of the CCP modification list as

a regulatory mandate from the Authority and supplant the CLEC community's regional ranking The Authority should not allow DeltaCom, or any single CLEC, to substitute its opinion for the will of the entire CLEC community If DeltaCom is aggrieved by the decision of the CCP, DeltaCom can challenge that decision via the established appeal procedure The Authority should maintain its practice of requiring CCP issues to be decided in the CCP

D. The Triennial Review Order Sheds Some New Light On Issues In This Arbitration.

As the Authority is well aware, the FCC recently released the Triennial Review Order ("TRO") While the TRO state proceedings are just beginning, and the TRO may be the subject of stay or reversal by appellate courts, there are a number of issues in this Section 252 arbitration proceeding that are impacted by the TRO BellSouth believes that issues 9, 11, 21, 25, 26, 36, 37 and 57 are impacted to some degree by the TRO BellSouth continues to consider the detailed impact the TRO will have on BellSouth operations, as it develops policy positions relative to the TRO Clearly, the TRO proceedings will be the primary process in which the TRO will be implemented BellSouth addresses below, however, the impact of the TRO on the above-referenced issues, to the extent the TRO appears to be applicable

Issue 2(a): Is BellSouth required to provide DeltaCom the same directory listing language it provides to AT&T?

Issue 2(b): Is BellSouth required to provide an electronic feed of the directory listings of DeltaCom customers?

Issue 2(c): Does DeltaCom have the right to review and edit its customers' directory listings?

DISCUSSION

DeltaCom acknowledged during the arbitration hearing that Issue 2(a) is moot DeltaCom ultimately determined that the directory listing language from the AT&T and BellSouth interconnection agreement does not provide for an electronic feed to AT&T's directory listings and therefore does ***not*** provide what DeltaCom is seeking [9] Accordingly, the parties agreed that the Authority need not rule on Issue 2(a) (Conquest, Tr p 236-237)

While the two remaining issues, 2(b) and 2(c), as stated, only appear to impact BellSouth, the testimony filed by DeltaCom appears to suggest that DeltaCom is seeking relief from BellSouth Advertising & Publishing Company ("BAPCO"), an unregulated affiliate of BellSouth [10] To the extent that DeltaCom is seeking relief from BAPCO, such relief is inappropriate under the 1996 Act Directory publishing, which is not even addressed in Section 251 of the Act, is a matter that should be negotiated between DeltaCom and BAPCO It is not a proper subject of an arbitration proceeding, because it has absolutely nothing to do with nondiscriminatory access to directory listings, and relates instead to directory publishing BellSouth believes that these two issues are not appropriate for arbitration under Section 252 of the 1996 Act [11]

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[9] DeltaCom stipulated to the fact that in three of the nine states in BellSouth's region, DeltaCom opted into the AT&T and BellSouth interconnection agreement in lieu of arbitrating During the hearing, DeltaCom acknowledged that the AT&T agreement was "good enough" in the other three states without a contract provision requiring an electronic feed of DeltaCom's directory listings (Tr p 239)

[10] DeltaCom seeks, among other thing, a "one-time snapshot of the ***BAPCO*** database for DeltaCom data " (Conquest Direct at p 3) (emphasis added)

[11] BellSouth does not waive its argument that the Authority lacks jurisdiction to rule on directory publishing issues Unlike the directory cover case, where there was a TRA rule addressing directory covers, there is no TRA rule addressing, much less requiring an electronic feed of listings

In the event the Authority decides to render a decision regarding these issues in this proceeding (which it need not do), however, BellSouth offers the following, which demonstrates that DeltaCom's position lacks merit

BellSouth provides access to its directory assistance database and charges appropriate fees to do so in accordance with both its Agreement and its tariff Directory listings are highly (99 999%) accurate (Ruscilli Direct p 6) DeltaCom has provided no substantial evidence on which to base a regulatory mandate for an electronic feed Moreover, there is no legal requirement that BellSouth provide an electronic feed of directory listings for DeltaCom customers

This issue has been a moving target throughout the parties' substantial negotiations There is nothing in DeltaCom's pre-filed direct or rebuttal testimony even remotely suggesting that DeltaCom would be willing to pay for BellSouth or BAPCO to develop an electronic feed solely for DeltaCom During the arbitration hearing, however, DeltaCom seemed to acknowledge that it would be willing to pay a reasonable cost-based rate (Conquest, Tr p 241) DeltaCom and BAPCO have exchanged proposals on paying BAPCO to develop the enhanced service DeltaCom seeks (Conquest, Tr p 245)

DeltaCom conceded during the arbitration hearing that it already has the ability to review and edit its own directory listings through access to its customer service records (Conquest, Tr p 244) Moreover, Ms Conquest admitted that BAPCO provides CLECs such as DeltaCom with review pages of listings prior to the closing of the directory (Conquest, Tr p 245) Thus, DeltaCom can review its own listings and provide any necessary edits directly to BAPCO or it can review the BAPCO review pages for the

same purpose DeltaCom, however, would prefer not to incur the effort associated with making certain that its listings are accurate and seeks instead to improperly shift that cost to BellSouth

The Authority should decline DeltaCom's request that BellSouth be made to bear the financial burden of creating additional efficiencies for DeltaCom That is simply a cost of doing business for DeltaCom At the very least, now that DeltaCom has finally recognized its obligation to pay BellSouth to develop and provide and electronic feed solely for DeltaCom, the Authority should order that DeltaCom continue its negotiations with BellSouth to establish a market-based price for this new service

Issue 9: Should BellSouth be required to provide interfaces for OSS to DeltaCom which have functions equal to that provided by BellSouth to BellSouth's retail division?

DISCUSSION

As demonstrated during the arbitration hearing, this is a dispute about contract language, not functionality DeltaCom's witness agreed with BellSouth on the applicable legal standard for nondiscriminatory access to OSS (Conquest, Tr p 270) DeltaCom also acknowledged that BellSouth is offering contract language that obligates it to provide nondiscriminatory access to OSS – language taken verbatim from the 1996 Act (Conquest, Tr p 272) Oddly, DeltaCom continues to request contract language ("Systems may differ, but all functions will be at parity") that is nowhere mentioned in the Act Introducing this different language will no doubt, provide ambiguity on which to base disputes in the future Contract language should reduce, not add, ambiguity and uncertainty When asked whether DeltaCom's proposed language represented the same or a different standard than that set forth in the Act, DeltaCom's witness stated, "I

think it's ***basically*** the same standard" (Conquest, Tr p 271, emphasis added) DeltaCom further stated that its proposed language was a "paraphrase" of the statute (Conquest, Tr p 275) The Authority should decline the invitation to mandate the inclusion of language that is "basically" consistent with or a paraphrase of the law

Moreover, this issue is nothing more than an attempt by DeltaCom to rehash a previously-determined outcome The most important aspect of any discussion about BellSouth's nondiscriminatory access to OSS is what the FCC and the nine state regulatory authorities for BellSouth's region have ruled in all of BellSouth's 271 applications – that BellSouth provides nondiscriminatory access to its OSS for performing the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing To the extent DeltaCom seeks some modification to BellSouth's regional OSS, the appropriate forum is the CCP – not a two-party arbitration

Parity also has been previously addressed by state commissions in a number of performance measurements dockets BellSouth is unmistakably in compliance with the requirements for nondiscriminatory access to OSS, and there are numerous metrics and associated penalties in place to ensure that BellSouth remains in compliance [12] DeltaCom acknowledged during the hearing that it had submitted no evidence suggesting that BellSouth was "backsliding" on its commitment to nondiscriminatory access (Conquest, Tr p 274) This is significant The Authority should reject DeltaCom's attempt to replace the nondiscriminatory access standard set forth in the 1996 Act and relied upon by the FCC and nine state commissions The FCC recently looked at this issue in the TRO and concluded that "[w]e thus decline to change our

[12] DeltaCom was a signatory to the 271 settlement in Tennessee, which incorporated the Florida SQM and SEEMs plans for use in Tennessee through December, 2003

approach to OSS but note that Covad remains entitled on a going-forward basis to nondiscriminatory access to OSS as defined herein " (TRO at ¶ 568)

Therefore, the Authority should accept BellSouth's proposed language for the agreement, which plainly affirms BellSouth's commitment to comply with the requirements of nondiscriminatory access

Issue 11(a): Should the interconnection agreement specify that the rates, terms and conditions of the network elements and combinations of network elements are compliant with state and federal rules and regulations?

DISCUSSION

This issue involves the applicability of state law in an arbitration proceeding brought pursuant to Section 252 of the 1996 Act DeltaCom suggests that every state law addressing the rates, terms, and conditions under which BellSouth provides unbundled network elements ("UNEs") should be referenced in the Interconnection Agreement DeltaCom's request rests on the inaccurate assumption that states may impose additional unbundling requirements on the basis of state law DeltaCom seeks contract language supporting this erroneous legal conclusion

BellSouth submits that DeltaCom's proposal is in direct conflict with the 1996 Act As discussed above, the standards governing this arbitration are set forth in Section 252, which provides

> STANDARDS FOR ARBITRATION – In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall –
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251,
>
> (2) establish any rates for interconnection services, or network elements according to subsection (d), and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement

The unbundling requirements of Section 251 are ***federally*** mandated and do not reference ***state*** law The reason for this is obvious – state law is not allowed to frustrate the national regulatory scheme as implemented by the FCC Although a state commission has the authority to enforce state access and interconnection obligations, it may do so only to the extent "consistent with the requirements" of federal law and so as not to "substantially prevent implementation" of the requirements and purposes of federal law 47 U S C §251(d)(3)

While the Act cited above was clear on this point before, the FCC's TRO clarifies and reiterates that states may not use state law to impose additional unbundling requirements The FCC specifically discussed the potential impact of state law on the federal unbundling regime, noting

> We also find that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, is limited by the restraints imposed by subsections 251(d)(3)(B) and (C) We are not persuaded by AT&T's argument that a state commission may impose additional unbundling obligations in the context of its review of an interconnection agreement without regard to the federal scheme Therefore, we find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation
>
> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)I Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation

> It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules

(TRO, at ¶¶ 194, 195) The FCC's reasoning flatly contradicts DeltaCom's position that the TRA require BellSouth to adhere to all state unbundling requirements, whether or not consistent with federal law

To the extent the Authority is addressing unbundling under Section 251 of the 1996 Act or pursuant to directives of the FCC, then BellSouth is amenable to adding language to that effect to the interconnection agreement DeltaCom, however, is attempting to circumvent federal unbundling obligations by having BellSouth be bound by state law, even if those state laws are inconsistent with federal law The Authority should decline DeltaCom's offer and should adopt BellSouth's proposed language

Issue 21: Does BellSouth have to make available to DeltaCom dark fiber loops and transport at any technically feasible point?

DISCUSSION

This issue involves the definition of unbundled dark fiber loops and, in reality, it is nothing more than DeltaCom's attempt to create a new UNE not recognized by the FCC The local loop network element, whether dark fiber or otherwise, has been defined as a "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises "[13] Likewise, interoffice transmission facilities (including dark fiber transport) are currently defined as transmission facilities between wire centers or between switches [14] The TRO does not alter the definition of the local loop network element and defines the interoffice transport network element more narrowly than was the case

[13] 47 C F R 51 319 (a)(1)
[14] *See,* 47 C F R 51 319 (d)(1)

earlier As BellSouth's witness Mr Milner explained, DeltaCom is attempting to broaden the UNE definition to include something that does not fit within either

There is no doubt that the TRO addresses both dark fiber and transport In fact, unless the applicable sections of the TRO are stayed by a Court, the definition of dedicated transport will be limited to "transmission facilities connecting incumbent LEC switches and wire centers within a LATA " (TRO at ¶365) As to common transport (to which dark fiber unbundling obligations have never been applied), it apparently will only be a UNE in those locations where switching is ultimately determined to be a UNE (TRO at ¶534) Dark fiber loops and transport are discussed throughout the TRO and any conclusions to be drawn regarding dark fiber loops and transport will have to await the outcome of the state commission TRO proceedings (TRO at ¶638)

Currently, BellSouth makes unbundled dark fiber loops and transport available to all CLECs at their collocation arrangements consistent with existing FCC Rules In fact, as of April 2003, BellSouth had 56 unbundled fiber arrangements for 15 different customers across BellSouth's region (Milner Direct at 19) Each of those unbundled fiber arrangements was delivered to a CLEC collocation space within a BellSouth wire center (*Id*)

This issue arises solely because DeltaCom seeks to take advantage of a specific situation where BellSouth agreed to meet DeltaCom at a place other than DeltaCom's collocation space Specifically, DeltaCom was faced with a situation where there were no available fiber access points into BellSouth's central office Instead of rejecting DeltaCom's request to bring the fiber into DeltaCom's collocation space, as BellSouth was well within its rights to do, BellSouth agreed in that specific circumstance to meet

DeltaCom in a manhole outside the BellSouth central office (Milner, Tr p 540-541) Proving the adage that *no good deed goes unpunished*, DeltaCom now seeks to take advantage of BellSouth's cooperation and, although misplaced, has fashioned an argument that DeltaCom should be allowed to access unbundled dark fiber loops and transport at any point of DeltaCom's choosing DeltaCom would even have BellSouth splice together *unlit* fiber strands in such a way as to create new UNEs, which BellSouth clearly is not required to do

Aside from the obvious chilling effect on BellSouth's willingness to cooperate with CLECs on such issues in the future, DeltaCom's position is simply contrary to the law What DeltaCom actually seeks is the ability to create a new dark fiber UNE to and from points of DeltaCom's choosing, even if the facility does not run to a central office or a switch (that is, the new dark fiber UNE would be neither an unbundled loop nor unbundled interoffice transport per the FCC's definition of such) Clearly, such a facility would conflict with the FCC's definition of an unbundled dark fiber loop or transport (Milner, Tr p 541)[15] As far as the creation of a new dark fiber UNE is concerned, even if the Authority had the authority to create a new dark fiber UNE, DeltaCom put forth absolutely no evidence of impairment or necessity – a prerequisite to the establishment of any UNE This alone is fatal to DeltaCom's argument

To the extent DeltaCom seeks dark fiber segments that run between customer locations or between other locations not defined as either loops or transport under the

[15] In response to Director Jones' questions regarding the interplay between 47 C F R §§ 319 and 321, BellSouth witness Milner pointed out that Section 319 sets forth the universe of UNEs required and Section 321 describes the interconnection methods, which apply only to the finite list of required UNEs (Milner, Tr p 577-578)

FCC's definitions, BellSouth has a tariff offering to accommodate DeltaCom's needs [16] DeltaCom is well aware of the existence of this tariff but, as usual, seeks to avoid paying for the specific network configuration it desires In fact, this entire issue is driven by DeltaCom's attempt to get dark fiber segments at prices cheaper than DeltaCom could either self-provision or purchase through BellSouth's Dry Fiber Tariff (Milner, Tr p 556-557)

BellSouth is not obligated to create new UNEs Instead, BellSouth's obligation is to provide access to UNEs as they exist within its network and as they are specifically defined in FCC rules See 47 C F R 51 319(1)(1), 47 C F R 51 319(d)(1) In its 271 proceedings, the FCC found no fault with BellSouth's provisioning of dark fiber (Milner, Tr p 557)

Parties may mutually agree to some other interconnection point, however, DeltaCom should not be in the position to dictate when and where the interconnection will take place between DeltaCom's network and BellSouth's network (Milner, Tr p 540-541) Thus, the Authority should reject DeltaCom's request to have unilateral power to create new UNEs and, instead, require the mutual agreement of the parties (which has worked well in the past) if DeltaCom desires to access dark fiber at points other than of DeltaCom's collocation arrangements or if DeltaCom requests that unlit fiber be provided in a manner inconsistent with the FCC's definitions of dark fiber loops or dark fiber transport

[16] *See*, BellSouth FCC Tariff No 1, §§ 7 2 10 and 7 5 13

Issue 25: Should BellSouth continue providing an end-user with ADSL service where DeltaCom provides UNE-P local service to that same end user on the same line?

DISCUSSION

The FCC has concluded previously that BellSouth has no obligation to provide Digital Subscriber Line ("DSL") service over a competitive LEC's leased facilities as DeltaCom seeks For example, in its *Memorandum Opinion and Order* released September 18, 2002, WC Docket No 02-0150 (*BellSouth Five-State 271 Application*) at ¶64, the FCC reiterated

> As we stated in the Georgia/Louisiana Order, an incumbent LEC has no obligation, under our rules, to provide DSL service over the Competitive LEC's leased facilities Moreover, a UNE-P carrier has the right to engage in line splitting on its loop As a result a UNE-P carrier can compete with BellSouth's combined voice and data service over the UNE-P loop in the same manner (footnotes omitted)

Nothing has changed since the FCC consistently has spoken to this issue in each of BellSouth's 271 applications DeltaCom has presented no factual basis or legal argument justifying its demand that the TRA order Bellsouth to do precisely what the FCC has said it need not do Such an obligation would place a regulatory requirement on Bellsouth above and beyond the obligations imposed by the Telecommunications Act, as DSL is not a telecommunications service

DeltaCom's own witness, Ms Conquest, conceded that DSL is an enhanced information service (Conquest, Tr p 264, lines 17-18) She further conceded that the provision of DSL to CLEC voice customers was merely a voluntary business decision – and that the FCC did not require BellSouth to provide DSL as DeltaCom sought, but rather merely did not prohibit it (Conquest, Tr p 252, lines 20-23, "Q So if it's a

business decision, that would mean it's a voluntary decision? A I believe so" Conquest, Tr p 250, line 4, "It doesn't require you, but it doesn't prohibit you")

Clearly, DeltaCom understands that the FCC has declined to impose this obligation on ILECs like Bellsouth Turning a blind eye to this precedent, DeltaCom now invites the TRA to do what the FCC has declined to do – yet DeltaCom has no valid legal support for imposing this obligation Moreover, the business reality is that DeltaCom's "problem" with respect to DSL is merely the consequence of its own business choice to build its business solely around the use of UNE-P Having reaped the benefits of the higher profit margin available using UNE-P, DeltaCom now wants the TRA to pile on the UNE-P advantages by relieving DeltaCom of one business consequence of its choice to serve its customers solely using UNE-P instead of resale Serious business men and women recognize that a business plan must weigh the advantages (like the profit margin of UNE-P) with the potential drawbacks (like the lack of availability of BellSouth-provided DSL over UNE-P) DeltaCom, seemingly blind to business realities, wants the TRA to take away all the potential drawbacks of its own business plan

The fact is that DeltaCom has a real option – if it chose to use it – in resale While other RBOCs have taken the position (fully supported by FCC precedent) that they do not make DSL available on resold lines, BellSouth provides that option (Ruscilli, Tr p 632) CLECs simply have to make a business choice - UNE-P, with the richer profit margin, or resale, with the potential to serve customers who want Bellsouth's DSL product [17] DeltaCom does not want to choose – it wants the TRA to

[17] More than 98% of BellSouth's customers in Tennessee do ***not*** subscribe to Bellsouth's Fast Access® service (Ruscilli Rebuttal p 7) Consequently, DeltaCom can use UNE-P to compete

ignore the FCC's analysis and require Bellsouth to insure that DeltaCom has everything it wants without having to make the same business choices every other business must make

DeltaCom's proffered justifications for asking the TRA to require BellSouth to change the way it offers its DSL service are theories that lack both legal merit and common business sense These legal theories that the DSL policy is somehow discriminatory or constitutes an unlawful tying arrangement have already been considered and rejected by the FCC

As a factual matter, DeltaCom presented no evidence, and there is none, that BellSouth's policy on DSL has impeded ***even one*** Tennessee consumer's ability to choose an alternative local service provider DeltaCom's witnesses were unable to offer even a solitary Tennessee example demonstrating its contention

DeltaCom lacks either a solid legal theory or even one hard fact to support its position that the TRA should impose new regulation on BellSouth's broadband business Rather, the business reality is that CLECs will provide their own DSL arrangements for their own voice customers if BellSouth is not forced to provide that for them This is evidenced by MCI's recent decision to roll out its own DSL offering as part of "The Neighborhood" in Tennessee (Bye, Tr p 211) Likewise, DeltaCom's own testimony that it has its own DSL trial in process also supports this conclusion (Conquest, Tr p 259, lines 9-11, "Q How about can we agree that DeltaCom is trialing a DSL product? A Yes, sir, we can ") The Authority should consider these business

for 98% of BellSouth's customers Thus, even in theory, this matter is only an issue with 2% of BellSouth's customers In fact (as opposed to theory), DeltaCom was unable to produce even ***one*** example of a Tennessee customer who had been affected by BellSouth's policy DeltaCom could not testify to a single specific example of even one Tennessee customer lost due to BellSouth's DSL policy Consequently, this entire discussion is nothing more than a theory

realities before accepting DeltaCom's invitation to create policy with such a chilling potential

Just as DeltaCom's other positions lack ordinary business sense, Deltacom's position on DSL also defies business logic DeltaCom wants the benefit of BellSouth's investment in BellSouth's new product, which is not a telecommunications service Without any basis in the Telecommunications Act or any other law, DeltaCom seeks to create a legal obligation for BellSouth simply to give DeltaCom the fruits of its investment in DSL, even though DeltaCom contributed none of the investment to the development of this product As discussed below, there can be no regulatory, legal or business justification for such a position

I. The FCC has Declined to Require What DeltaCom Seeks, and DeltaCom's Reliance on Other States' Orders is Misleading.

DeltaCom's witness attempted to paint a misleading picture of the rulings on DSL to date The truth is that the TRA should be guided by what the FCC has already concluded on this issue DeltaCom has attempted to obscure that truth

First, DeltaCom witness Mary Conquest submitted pre-filed testimony in which she testified about the rulings of state commissions in Kentucky and Louisiana relating to DSL [18] During cross-examination at the hearing, however, Ms Conquest conceded that, although her testimony indicates that she was not aware of any other state rulings, in fact she was aware of both the North Carolina and South Carolina decisions (both

[18] Notably, both of these decisions have been appealed Moreover, the Kentucky decision addresses the federally-tariffed wholesale DSL product – which is not the retail DSL product at issue in this case After the hearing, on October 21, 2003, the Georgia Commission voted to impose obligations on BellSouth's DSL product, which BellSouth opposes This decision, based on interpretation of a Georgia Interconnection Agreement, has not yet been reduced to writing No doubt, when it is, BellSouth will appeal, as it is flawed as a matter of law, and it is inconsistent with the FCC precedent

supporting BellSouth's position) when she filed her pre-filed testimony, noting, "I guess I should have asked myself the question a little differently " (Conquest, Tr p 248-249) Frankly, BellSouth believes she should have ***answered*** the question a little differently – and truthfully Had she done so, she would have answered by noting that she was well aware of the two Carolina decisions that squarely conflict with DeltaCom's position Had she answered "differently" – and truthfully – she might also have mentioned that the FCC has also rejected the very arguments that DeltaCom expects the TRA to accept

Ms Conquest also conceded that, while she included reference in her testimony to press information regarding ***Canadian regulators*** to support her position, she failed to make even a single reference to our own United States FCC's rulings regarding this issue Ms Conquest conceded on cross-examination that she was well aware that the FCC has ruled that an ILEC like BellSouth does not have to provide DSL service over UNE-P lines (Conquest, Tr p 250, lines 5-8) Ms Conquest attempted to discount the FCC ruling on this issue on the basis that the FCC did not prohibit BellSouth from providing its DSL service over UNE-P lines, but merely ordered that BellSouth was not required to do so, characterizing it as a "business decision" (Conquest, Tr p 250, lines 20-21) and, moreover, a "voluntary decision" (Conquest, Tr p 252, lines 22-23) While she testified that BellSouth had the right to "voluntarily" exercise its own "business" decision-making regarding this issue, Ms Conquest continued to contend that DeltaCom sought the TRA to ***require*** (not merely permit) BellSouth to provide DSL in this fashion, even though BellSouth had not made a voluntary business decision to do so

As noted above, the FCC specifically said in its *Five-State 271 Order* that "an incumbent LEC has no obligation under our rules to provide to DSL service over the competitive LECs' leased facilities" *Order* at ¶ 164 [19] DeltaCom's direct testimony, however, is completely void of reference to this important precedent Clearly in the context of CLEC argument that BellSouth's DSL policy constituted discrimination, the FCC decided otherwise

The FCC, in fact, specifically pointed to line splitting as an option available for CLECs who wanted to provide voice service to a customer while that customer received DSL from another provider *Id* DeltaCom relied upon the testimony of a witness from Cinergy Communications in an attempt to convince the TRA that the FCC was wrong about line splitting Mr Bye conceded, however, that while his pre-filed testimony was that "[Line splitting] is not an option!" (Heck pre-filed rebuttal, adopted by Bye, p 5 [punctuation in the original]), the FCC has explicitly noted that line splitting is an option for CLECs (Bye, Tr p 195-196)

Notably, DeltaCom, rather than relying on anyone from its own company, chose to present a Cinergy witness, Mr Bye, to testify that he was unaware of any carrier other than Covad "offering any sort of DSL service in Tennessee" On cross-examination, however, Mr Bye conceded that this was an overstatement, which was "inartfully drafted" (Bye, Tr 203, lines 11-12) In fact, Mr Bye clarified that even his own employer, Cinergy, "offers DSL service in Tennessee" (Bye, Tr 203, lines 22-23) Thus, like Ms Conquest, who agreed that she should have worded her pre-filed testimony differently, Mr Bye, too, conceded that the pre-filed testimony he adopted was drafted "inartfully" and that he could not truthfully testify to the bleak picture painted

[19] This decision was confirmed by the FCC in the Tennessee/Florida 271 Order *See* ¶ 178

by the prefiled testimony, which stated that "to [Mr Bye's] knowledge, the only other carrier offering any sort of DSL service in Tennessee is Covad " (Heck pre-filed rebuttal at p 5, adopted by Bye) Mr Bye contended that what he really meant to say was that he (a Cinergy employee) was not aware of a DSL provider willing to partner with a different company (DeltaCom) in a line-splitting capacity that was acceptable to DeltaCom (Bye, Tr p 202)

The selection of Mr Bye to provide testimony on behalf of DeltaCom was unusual DeltaCom chose not to use a DeltaCom employee who could testify with personal knowledge about what DeltaCom itself had done to evaluate potential line-splitting partners (such as its own merger partner, BTI) Instead DeltaCom chose to present the testimony of a witness from a different company who, of course, had no personal knowledge of such efforts by DeltaCom At its core, Mr Bye's testimony on this issue simply is that he is unaware of potential line-splitting partners for DeltaCom Unawareness, particularly the unawareness of an employee of ***another company***, is not the same as evidence that no such partner exists Moreover, the idea that either Cinergy or DeltaCom is unable to find a line-splitting partner is not credible in light of the FCC's finding in this area The fact is that CLECs, like Cinergy and DeltaCom, have had the opportunity in each of BellSouth's 271 applications to argue that line-splitting does not provide them a suitable option with respect to DSL The FCC has, however, rejected that argument after evaluating the evidence [20]

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[20] *See* ¶ 164 of the FCC's Five-State 271 Order where the FCC rejected KMC and NuVox claims, finding

> an incumbent LEC has no obligation, under our rules to provide DSL service over the competitive LEC's leased facilities Moreover, a UNE-P carrier has the right to engage in line splitting on its loop As a result, a UNE-P carrier can compete with BellSouth's combined voice and data offering on the same loop by providing the

Mr Bye's testimony also revealed an additional flaw in DeltaCom's assertion that BellSouth's policy is anti-competitive Mr Bye agreed that, based on the websites of both BTI and MCI, these companies also appeared to offer DSL ***only to their own voice customers*** (Bye, Tr 211, lines 5-17) MCI's website clearly instructs customers that they cannot keep MCI DSL if they discontinue their voice service Similarly, even DeltaCom's merger partner, BTI, recognizes the legitimacy of the very DSL policy DeltaCom attacks in this case (Exhibit 8, p 5 "BTI offers DSL service only as part of a bundled option such as Simplici-T, VoicePack or bundled with BTI local dialtone ")

The simple fact is that the FCC has squarely addressed the issue and upheld an ILEC's right to refuse to provide its DSL internet access product over a UNE-P line The FCC reconfirmed its conclusion that an ILEC is not required to provide DSL service over UNE lines in its recent TRO It addressed the "DSL over UNE-P Issue" in the TRO in discussing the continued need for unbundling the high frequency portion of the loop (HFPL) for Line Sharing

> Since some incumbent LECs have thus far refused to provide xDSL service to customers that obtain voice service from a competitive LEC, by necessity, any of the over 11 million voice customers served by competitive LECs who seek XDSL service would have to obtain that service from a competing carrier (footnotes omitted)

(TRO ¶ 259) The FCC stated that it could no longer find that CLECs are unable to obtain the HFPL from other CLECs through line splitting, citing Covad's increasing use of line splitting with carriers such as AT&T (*Id*) Thus, the FCC reconfirmed the existence of the "no DSL over UNE-P" practice, did not express any concern or

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customer line splitting voice and data service over the UNE-P loop in the same manner

displeasure regarding this practice and, indeed, cites that practice in support of its decisions to phase out Line Sharing while continuing Line Splitting obligations

In the TRO, the FCC also refused CompTel's request to unbundle the low frequency portion of the loop (LFPL) (TRO ¶ 270) CompTel had requested that the Commission unbundle the LFPL in order to end what it called the "anti-competitive tying arrangements" engaged in by ILECs (CompTel Comments, p 43) CompTel was referring to the fact that ILECs "have tied their local voice services with their xDSL products" (*Id*) "As a result, a customer that wishes to obtain xDSL service from the ILEC while obtaining local voice service from a competing carrier often is rejected by the ILEC" (*Id*)

In rejecting CompTel's argument, the FCC found

> [U]nbundling the low frequency portion of the loop is not necessary to address the impairment faced by requesting carriers because we continue (through our line splitting rules) to permit a narrowband service-only competitive LEC to take full advantage of an unbundled loop's capabilities by partnering with a second competitive LEC that will offer xDSL service

(*Id*) Thus, once again, the FCC found that line splitting would alleviate any impairment claims by CLECs concerning the DSL over UNE-P issue [21]

II. DeltaCom's Request that the TRA Require BellSouth to Change the Way it Offers DSL in Order to Benefit DeltaCom is Nothing More than an Attempt to Get a Business Benefit With No Business Investment.

Before UNE-P even existed in Tennessee, BellSouth developed DSL as an overlay to its voice service and subsequently spent substantial sums deploying the infrastructure necessary to make the service available throughout the state (Ruscilli,

[21] Mr Bye attempted to address the TRO in his live testimony, referencing it several times and suggesting that the TRO supported DeltaCom's position on DSL Clearly, however, the TRO is consistent with the FCC's earlier decisions confirming BellSouth's right to decline to provide DSL over UNE-P

Tr p 607) Now, after BellSouth has invested the time and money to make DSL a success and is poised to reap the benefits of its investments, DeltaCom wants the Authority to require BellSouth to alter the manner in which it offers this broadband service and offer it instead as a stand-alone product, even though DSL is a federally-tariffed service that is subject to the exclusive jurisdiction of the FCC None of the various theories offered by DeltaCom to support this request is valid

The Authority should not be swayed by the attempts of DeltaCom to paint itself as a crusader for consumer choice For example, while DeltaCom asserts that BellSouth's policy not to provide DSL on a line served by a competitor via the UNE-P "limit[s] consumer choice," DeltaCom's merger partner, BTI, simultaneously imposes the very same policy on its own customers (Conquest Direct at p 6, line 20 and Exhibit 8) Ms Conquest was unable to back up her consumer choice argument with any actual fact demonstrating any Tennessee consumer's choice had been limited (Conquest, Tr p 255-256) The fact is that competition in the local market in Tennessee is flourishing, and there is no evidence that BellSouth's DSL policy (or the identical policy of BTI and MCI) has impeded consumers' choice of local service providers [22]

The idea that BellSouth should be forced to offer standalone DSL service in the name of "consumer choice" is misguided While customers should be free to choose their most preferred combination of services and service providers *from among those being offered*, there can never be any circumstance—and there are none in unregulated, competitive markets—in which consumers (or competitors purporting to

[22] The sole specific examples offered as evidence in support of this mantra about limiting consumer choice is contained in Ms Conquest's pre-filed testimony Yet, on cross, Ms Conquest conceded that ***none of the examples she cited involved even a single Tennessee customer*** The simple fact is that neither Ms Conquest, nor any other witness, was able to cite even one single, solitary Tennessee example to back up that claim (Tr p 255, line 9 – p 256, line 22)

speak on behalf of consumers) can *force* unwilling suppliers to enter into specific selling arrangements with them That the customer may prefer a combination of services and service providers that is not offered does not mean the customer is being "punished," as DeltaCom claims DeltaCom seeks to serve its own self-interest by forcing BellSouth to supply a service when it is not in its rational economic self-interest to do so, which is the case with standalone DSL service (Ruscilli, Tr p 628-629) This is flatly inconsistent with DeltaCom's admission that providing DSL is a matter of voluntary business choice

The true fact is that DeltaCom's own business decisions are the only thing limiting their voice customers' choices for internet access DeltaCom has numerous options by which it could expand its customers' choices

1. **Line-Splitting**

As noted above, CLECs that provide voice service to customers using loops leased from BellSouth also can provide their customers with DSL service by entering into a line-splitting arrangement with another DSL provider Thus, consumers that want DSL service could choose any CLEC that offers a DSL service via a line-splitting arrangement If DeltaCom were truly crusading for consumer choice, it could engage in line splitting – just as the FCC has suggested

2. **Resale**

Additionally, unlike other RBOCs, BellSouth will make available DSL service on any BellSouth-provided exchange line, including lines on which a CLEC provides voice service as a reseller (Ruscilli, Tr 628, lines 18-24, p 632, lines 5-6) Thus, consumers that want BellSouth DSL service can choose any reseller as their provider of voice service, as substantial number of Tennessee consumers have done DeltaCom's own

Ms Conquest conceded during the hearing that resale is an option (Conquest, Tr p 258, lines 19-20, "Q It's an option, can we agree on that? A It is an option") DeltaCom's testimony revealed that DeltaCom does not prefer this option because it only wants to do business using the higher profit margin available using UNE-P (Conquest, Tr p 270, lines 3-4)

3. Develop Its Own Product

Obviously, CLECs like MCI and BTI are offering their own DSL product, and DeltaCom could do so as well Ms Conquest admitted that DeltaCom is trialing a DSL product (Conquest, Tr p 258) Clearly, the merger with BTI can only make that endeavor more feasible

4. Intermodal Options

Perhaps most obviously, DeltaCom could refer its customers to the myriad of intermodal competitors for internet access – including the dominant market player – cable

DeltaCom ignores these other choices, claims its customers' choices are "limited", and seeks to remedy this nonexistent "limitation" with a TRA regulatory mandate to force BellSouth to change its DSL service (which is not a telecom service even regulated by the TRA) from an overlay to its voice service into a standalone offering Such an imposition on BellSouth's business decisions (decisions Ms Conquests characterized as "voluntary") in its unregulated broadband endeavor would unfairly disadvantage BellSouth DeltaCom's arguments ignore the fact that BellSouth's federally-tariffed DSL service is an interstate service subject to the ***exclusive*** jurisdiction of the FCC *See* Memorandum Opinion and Order, *In re BellSouth*

Telecommunications, Inc, BellSouth FCC Tariff No 1, FCC 98-317 at ¶1 (Nov 30, 1998) BellSouth's end-user DSL product ("Fast Access®") is an enhanced retail high-speed DSL-based internet access service, and it is a non-regulated enhanced service that is ***not within the jurisdiction*** of the Authority *See In re Remand Proceedings Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, 6 FCC Red 7571 (1991) [23]

DeltaCom has failed to persuade the FCC – the only regulatory body with jurisdiction over any part of BellSouth's DSL service – to order BellSouth to do what DeltaCom wants Consequently, DeltaCom now seeks to obscure the FCC's rulings and entice the TRA to impose new regulatory burdens on a non-regulated product There is just no regulatory law supporting such an imposition Moreover, given the development of the broadband market – and the state of the telecom market – such an effort would constitute bad policy – burdening those in the industry who are investing in innovation and limiting the development of more technological choices for customers looking for internet access options other than the big cable companies

DeltaCom's request would require that BellSouth incur millions of dollars in costs to make the systems and operational changes necessary to support a standalone DSL offering – costs that DeltaCom, true to form, has not offered to pay It also would result in BellSouth's losing substantial revenues due to the inability to offer unique bundles of products and services – lost revenues that BellSouth could never recover Perhaps

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[23] The recent 9th Circuit Court of Appeals case, *Brand-X Internet Services, et al v FCC*, Case No 02-70518, 02-70684, and 02-70685, addressing cable modem technology offers no support for the argument DeltaCom asserts The *Brand X* decision merely identifies cable modem service as an information service with a telecommunications component The telecommunications service identified in the *Brand X* decision is simply the part of the cable service that is similar to the interstate DSL transmission component, which is federally tariffed

most importantly, it would further hinder BellSouth's ability to compete with the dominant market players – cable providers – in this very competitive market (Ruscilli, Tr p 637, lines 2-8; p 635-636)

To the extent DeltaCom is asking the Authority to dictate the rates, terms, and conditions by which BellSouth offers FastAccess or BellSouth's wholesale DSL service (which is a component of FastAccess service), that request is also beyond the Authority's jurisdiction, because FastAccess is unregulated and wholesale DSL service is an interstate telecommunications service over which the FCC, and not the Authority, has jurisdiction In fact, in an order addressing BellSouth's wholesale DSL service, the FCC found that this offering permits "Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet" and is an *"interstate service"* that is *"tariffed at the federal level"* *See Memorandum Opinion and Order, In re BellSouth Telecommunications, Inc , BellSouth FCC Tariff No 1*, FCC 98-317 at ¶ 1 (Nov 30, 1998) (emphasis added), *see also Memorandum Opinion and Order, In the Matter of GTE Telephone Operating Cos* GTOC Tariff No I, 13 F C C Rcd 22,466 at ¶ 1 (October 30, 1998) As a result, the Authority lacks the jurisdiction to grant the relief DeltaCom is seeking

III. DeltaCom Failed to Produce Any Evidence to Support Its Assertion that BellSouth's DSL Policy Constitutes An Unlawful "Tying" Arrangement.

In an attempt to find some legal argument on which to rest its request for an order requiring BellSouth to change the way it offers DSL, DeltaCom further alleges that BellSouth's DSL policy constitutes an anticompetitive tying arrangement (Conquest Direct, p 5, lines 21-22) DeltaCom's argument turns the law on tying arrangements on its head Moreover, even if DeltaCom's theory were recognized at law (which it is not),

DeltaCom has presented no facts to support its tying theory Consistent with its strategy to obfuscate FCC precedent elsewhere in its case, DeltaCom conveniently fails to mention that this "tying" theory also has been rejected by the FCC Memorandum Opinion and Order, *In re Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc , and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in Florida and Tennessee*, WC Docket No 02-307 (December 19, 2002)

A. DeltaCom's "Tying" Claim Fails To Satisfy The Law On Such Claims, Which Requires The Showing Of Four Essential Elements.

DeltaCom uses the terms "anticompetitive tying arrangement", but its testimony lacks the elements required to present an actual antitrust claim of unlawful tying As applied in federal antitrust law,[24] tying involves using market power in one market (A) to foreclose competition in a second market (B) *See Eastman Kodak Co v Image Technical Servs , Inc* , 504 U S 451, 462 (1992) ("A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier'") (quoting *N Pac Ry Co , v United States*, 356 U S 1, 5, 2 L Ed 2d 545, 78 S Ct 514-6 (1958)) The mechanics of tying are simple a monopoly supplier of service A refuses to supply that service by itself and requires customers to also purchase service B Under some circumstances, the monopolist can make more money by following such a strategy and competing suppliers of service B can be effectively foreclosed from the market That is because any customer who buys the

[24] While DeltaCom has not stated the legal basis for its "tying" claim, BellSouth assumes DeltaCom seeks to make an arrangement pursuant to federal antitrust law

competitors' market B services must find a substitute for the monopolist's service A, which is, by assumption difficult to do (*Id*)

The law is clear that not every refusal to sell two products separately constitutes an unlawful tying arrangement *Jefferson Parish Hospital Dist No 2 v Hyde,* 466 U S 2, 11 (1984) Thus, it is not sufficient to allege that a company has merely linked two products or chosen not to sell the products separately Rather, as the United States Supreme Court has explained, "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product (product A) to force the buyer into the purchase of a tied product (product B) that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms" *Id* at 12 In order for the seller to be able to "force" its tied product (product B) on an otherwise unwilling buyer, the seller must have sufficient market power in the tying market (for product A) (*Id* at 14)

DeltaCom's argument turns the legal definition of tying backwards, alleging that BellSouth is requiring customers of its more competitive service (DSL) to also purchase its less competitive service (basic exchange voice service) Thus, DeltaCom asserts that BellSouth's DSL is product A and BellSouth's voice service is product B Given the definition of tying and the business realities of the broadband market, DeltaCom's tying theory makes no sense

Under the principles of federal antitrust law outlined above, for BellSouth's policy to impair DeltaCom's ability to compete for residential local exchange (product B) customers as the result of tying, BellSouth would have to be a monopoly provider of

broadband Internet access services (product A) to residential customers [25] Otherwise, the actions of which DeltaCom complains would have no effect on its business potential DeltaCom customers would simply buy broadband access services from someone other than BellSouth (like cable companies, wireless provides, satellite provides, or dial-up providers) Obviously, thousands of Tennessee customers and 98% of BellSouth's customers, choose not to purchase BellSouth's DSL product As discussed below, the dominant player in that market is cable – not DSL Because BellSouth does not have the requisite market power in the Internet access market, and customers currently have available to them substitutes for BellSouth's DSL service (as discussed in greater detail below), there can be no harm in the context of an antitrust claim to competition or competitors in the local exchange market from BellSouth's business decision not to supply its DSL services on unbundled loops leased to CLECs DeltaCom's argument is simply inadequate in the context of antitrust principles

An anticompetitive tying arrangement has four essential elements (1) a "tying" product and a "tied" product, (2) evidence that the seller forced the buyer to purchase the tied product as a prerequisite to get the tying product, (3) that the seller has sufficient economic power in the tying product market to coerce buyer acceptance of the tied product, and (4) anticompetitive effects in the tied market *Amey, Inc v Gulf*

[25] This aspect of DeltaCom's argument is particularly disingenuous DeltaCom uses the term "monopolist" – no doubt in the hope that it will be given weight because of BellSouth's position as an Incumbent The obvious flaw is that, as to broadband service, no telecom company has ever had a monopoly Prior to divestiture and the break-up of the Bell System, no one provided retail broadband service, and DSL technology had not even been invented Undaunted by the facts, however, DeltaCom hopes that by using the word "monopolist" in a dispute with BellSouth, it will be able to draw support from the misleading idea that because the incumbents were once the sole provider of local telecommunications service, they should be seen as "monopolists" in the broadband market Of course, that is not the case – the reality is that Cable is the leader in the broadband market, and, as to new technologies like DSL, BellSouth had no head start – it just worked harder than competitors like DeltaCom

Abstract & Title, Inc, 758 F 2d 1486, 1502-1503 (11th Cir 1985), *cert denied,* 475 U S 1107 (1986) As discussed in turn below, DeltaCom has not and cannot establish a single one of these four essential elements, particularly given that DeltaCom's testimony utterly fails to address any of them [26]

B. DeltaCom Has Failed To Define The Relevant Product Market.

To establish an invalid tying arrangement under federal law, DeltaCom must identify the relevant market in which the tying product exits and must establish that BellSouth has sufficient power within that market to be able to force consumers to purchase the tied product *Jefferson Parish,* 466 U S at 21 (stating that "a tying arrangement cannot exist unless two separate product markets have been linked") To do so requires "a determination [of] precisely what the tying and tied product markets are" *Queen City Pizza, Inc v Domino's Pizza, Inc*, 124 F 3d 430, 443 (3d Cir 1997) Defining a tying product market generally involves "describing those groups of producers which, because of the similarity of their products, have the ability – actual or potential – to take significant amounts of business away from each other" *U S Anchor Mfg, Inc v Rule Industries, Inc*, 7 F 3d 986, 995 (11th Cir 1993) (internal quotations omitted)

DeltaCom's witnesses never define the relevant tying product market, and, in fact, DeltaCom's testimony is completely silent on the issue To the extent DeltaCom is suggesting that the relevant market is the Tennessee DSL market in BellSouth's service territory, this is just another example of DeltaCom's refusal to see business realities Obviously, DSL service is not a market by itself Rather, DSL is merely one of many

[26] In addition to these elements, it is appropriate to consider business justification in evaluating a tying claim In this case, BellSouth has demonstrated ample justification for its decision not to offer DSL on a standalone basis separate and apart from its voice service (either retail or resold)

products offering ***internet access***, and it competes with the dominant player – cable modems (Ruscilli, Tr p 637, lines 2-5) In defining the relevant market, it is misleading to ignore the numerous other products available to provide Internet access to end users, products that, in fact, have the actual and potential ability "to take significant amounts of business away" from BellSouth's DSL service *See U S Anchor Mfg , Inc* , 7 F 3d at 995, *Town Sound & Custom Tops, Inc v Chrysler Motors Corp* , 959 F 2d 468, (3rd Cir 1992) (rejecting a relevant market consisting only of new Chrysler cars manufactured for sale in the United States because "such a narrow definition makes no sense in terms of real world economics, and as a matter of law we cannot adopt it")

The existence of strong – in fact, dominant – competitors for the internet access customers is abundantly clear Even DeltaCom concedes that "there are other providers " (Conquest, Tr p 259, lines 20-25, "Q When I was talking about the fact that BellSouth competes with a number of other broadband providers such as cable TV, satellite, wireless, other DSL providers and all that, would you agree that that's the case? A I think there are providers I think [DSL] is one of the better products in the market ") A recent decision of the D C Circuit rejecting the FCC's line sharing rules was premised on the fact that the broadband market includes services in addition to DSL and that "robust competition" exists in that market *See United States Telecom Ass'n v FCC,* 290 F 3d 415 (D C Cir 2002), *cert denied WorldCom, Inc v United States Telecom Ass'n,* 155 L Ed 2d 344 (2003) (*"USTA")*

The record is undisputed that Tennessee consumers seeking Internet access have various options available to them other than DSL technology, including cable

modem service, satellite, and wireless, among others (Conquest, Tr p 259-260) DeltaCom made no attempt to refute the existence of this intermodal competition

In fact, by the time BellSouth began offering DSL, large cable companies such as Time Warner, Comcast, and Cox had already been deploying broadband Internet access service via cable modem technology for several years Cable had the advantage of being first to the broadband market Cable companies continue to leverage this primacy advantage and to enjoy higher availability and greater geographic coverage of their broadband services in most markets in the BellSouth region in which they compete *USTA* at p 420

The business reality is that DSL is only one player in an internet access market filled with both DSL technology and other intermodal competition In addition to cable technology, consumers also can utilize satellite and wireless data service providers for Internet access Satellite and wireless data service providers, such as DirectPC, utilize emerging technologies to compete for the high-end residential and business consumer Business consumers also choose among Frame Relay and similar services, which are offered by numerous carriers to provide businesses the broadband connectivity they require without having to use DSL or other technologies (Conquest, Tr p 259-260)

In addition to broadband, consumers also can choose from a host of providers that offer dial-up service as a means of accessing the Internet As BellSouth witness Ruscilli explained, BellSouth's DSL service competes against dial-up services, as customers routinely decide whether accessing the Internet with a broadband connection is worth the additional money (Ruscilli, Tr p 642)

Although DeltaCom suggested in its pre-filed testimony that BellSouth dominates some sort of "DSL" market, the business reality is, as Ms Conquest acknowledged during the hearing, that the Internet access market is wide open and much broader than DeltaCom's deceptively narrow portrayal (Conquest, Tr pp 259-260) In reality, numerous providers other than BellSouth, using technology other than DSL, have demonstrated an ability to compete successfully in the Internet access market As a result, the "DSL market" does not constitute a relevant, singular product market This fact alone constitutes a fatal flaw in DeltaCom's tying claim *See Queen City Pizza, Inc* , 124 F 3d at 443 (dismissing plaintiff's tying claim because the proposed tying market was "not a relevant market for antitrust purposes")

C. BellSouth Does Not Possess Market Power In A Relevant Product Market.

Even assuming DeltaCom had correctly defined the relevant product market, which is not the case, BellSouth does not possess requisite market power in any properly defined Internet access market In the context of a tying claim, market power is defined as "the power to raise prices to supra-competitive levels or the power to exclude competition in the relevant market either by restricting entry or new competitors or by driving existing competitors out of the market " *U S Anchor Mfg , Inc* , 7 F 3d at 994 Market power is generally measured by market share, although it also can be demonstrated by direct evidence that the defendant raised prices and drove out competition in the tied product market *Jefferson Parish*, 466 U S at 27, *Metzler v Bear Automotive Service Equipment Co* , 19 F Supp 2d 1345, 1361, n 17 (S D Fla 1998) No such evidence was presented in this case

With respect to market share, DeltaCom offered no credible evidence of BellSouth's share of the relevant product market, even if it had been properly defined by DeltaCom While DeltaCom's witness Ms Conquest refers to trying, her testimony does not even attempt to quantify BellSouth's "market share" in the internet access market, or in a high-speed internet access market, or even in a "DSL market "

The fact is that, even if the relevant product market were limited solely to high-speed Internet access, BellSouth lacks the requisite power even in that more narrow market necessary to establish the market power of elements of an illegal tying arrangement as required under federal case law Both the FCC and the United States Court of Appeals for the D C Circuit have recognized the competitiveness of the high-speed Internet access market *See United States Telecom Ass'n v FCC,* 290 F 3d at 428-430 (noting the FCC's own findings that "repeatedly confirmed both the robust competition, and the dominance of cable, in the broadband market") DeltaCom offered no evidence to demonstrate that Bellsouth represents anything near the levels required to establish market power under relevant precedent *See Times-Picayune Publishing Co v United States,* 345 U S 594, 612-613 (1953) (newspapers' 33-40 percent of advertising market insufficient to establish market power), *Bailey v Allgas, Inc*, 284 F 3d 1237, 1250 (11th Cir 2002) (a defendant with less than 50 percent market share does not possess market power), *Rebel Oil Co, Inc v Atlantic Richfield Co*, 51 F 3d 1421, 1438 (9th Cir 1995) ("Numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power") Thus, there is simply no evidence to support a finding basis for the Authority to find that BellSouth has the requisite market power in any relevant product market, whether that market is defined

as Internet access generally or high-speed Internet access specifically This also constitutes a fatal flaw in DeltaCom's "tying" argument

D. DeltaCom Has Failed To Establish That BellSouth Forces Consumers To Purchase The Tied Product To Get The Tying Product.

The third element of an invalid tying arrangement requires evidence that BellSouth forced consumers to buy the tied product (BellSouth voice service, according to DeltaCom) in order to get the tying product (BellSouth's DSL service, according to DeltaCom) *See Amey,* 758 F 2d at 1502-1503 (noting that one element to an illegal tying claim is that the buyer was in fact forced to buy the tied product to get the tying product) DeltaCom cannot establish this element because consumers can purchase BellSouth DSL service without purchasing voice service from BellSouth

No dispute exists that BellSouth makes its DSL service available over resold voice lines Conquest, Tr p 258 Thus, a consumer can purchase FastAccess from BellSouth and purchase his or her voice service from a CLEC reselling BellSouth's line Because a consumer is not forced to buy voice service from BellSouth but rather can obtain voice service from a reseller and still get FastAccess service from BellSouth, there is no requirement that the customer purchase both products – which is the crux of a tying claim Because DeltaCom cannot show that the products are in fact "tied", BellSouth's DSL policy by definition does not constitute an unlawful tying arrangement This is also fatal to the "tying" claim

E. DeltaCom Has Failed To Establish Any Anticompetitive Effects In The Tied Product Market.

The fourth element of an unlawful trying arrangement – anticompetitive effects in the tied market – is properly analyzed in terms of the prices of the tied and tying bundle

Kypta v McDonald's Corp, 671 F 2d 1282 (11th Cir 1982) Specifically, as the Eleventh Circuit Court of Appeals has held

> Injury resulting from a tie-in must be shown by establishing that payments for both the tied and tying products exceeded their combined fair market value The rationale behind this requirement is apparent A determination of the value of the tied products alone would not indicate whether the plaintiff indeed suffered any net economic harm, since a lower price might conceivably have been exacted by the [defendant] for the tying product Unless the fair market value of both the tied and tying products are determined and an overcharge in the complete price found, no injury can be claimed, suit then would be foreclosed

Id at 1285

Thus, based on this precedent, in order to establish that BellSouth's DSL policy constitutes an unlawful tying arrangement, DeltaCom must show that the combined price for voice service and DSL service as a package was greater than if the services had been sold independently DeltaCom has alleged nothing of the sort *See Will v Comprehensive Accounting Corp*, 776 F 2d 665, 673 (7th Cir 1985) (no unlawful tying arrangement when customers did not pay supracompetitive rates for the "tied product"), *United Farmers Agents Ass'n v Farmers Ins Exchange*, 89 F 3d 233, 237 (5th Cir 1996) (affirming summary judgment, noting "plaintiffs have failed to even allege that the tied bundle cost more than the sum of their market prices") The failure to show anticompetitive effects in the market for the tied product is also a fatal flaw in DeltaCom's argument

Thus, out of four required legal elements necessary to make a claim of illegal tying, DeltaCom has demonstrated zero of the four DeltaCom has utterly failed to prove any of the elements necessary to establish an unlawful tying arrangement

The tying claim is nothing more than grasping at legal straws in an attempt to create the illusion that DeltaCom has some legal basis for its request that the TRA impose upon BellSouth what DeltaCom concedes is a matter up to BellSouth's "voluntary" business decision The truth is that DeltaCom can point to no legal justification for requiring BellSouth to do as DeltaCom wants No law requires it, and BellSouth, in its own ***business*** judgment, has not ***volunteered*** to do it There can be no justification for granting DeltaCom's request BellSouth's packaging of DSL with voice service is not anticompetitive because Tennessee customers have many alternatives to BellSouth's DSL service, and voice providers such as DeltaCom have alternative mechanisms to provide internet access services if they wish to compete in those markets or to provide bundles of broadband access and local exchange services

IV. Granting DeltaCom The Relief It Seeks Would Be Bad Policy, Causing Negative Consequences Extending Far Beyond This Docket.

Given the lack of any legal theory on which to rest DeltaCom's request for an order requiring BellSouth to offer stand-alone DSL, DeltaCom really seeks to have the TRA impose an obligation to further a policy goal When acting in its policy-making role, however, the Authority has long recognized the charge of the General Assembly to encourage competition, innovation and technical advancement T C A § 65-4-123 Granting the relief requested by DeltaCom on this point, however, would have precisely the opposite effect

Requiring that BellSouth provide its DSL service to voice customers served by DeltaCom via the UNE-P would discourage rather than promote investment and technical innovation Granting such relief would reward those (like DeltaCom) who

make no investment in technological advancement[27] and punish those who do DeltaCom's request would saddle BellSouth with economic burdens that would adversely impact, and consequently slow, BellSouth's DSL deployment in Tennessee in contravention of the statute's mandate to encourage such technological development Similarly, such a policy would institute a perverse incentive for DeltaCom and other CLECs to refrain from expanding their own DSL network in Tennessee and to stop their ongoing DSL trials Moreover, a policy consistent with DeltaCom's position would thwart competing DSL providers in their attempts to offer DSL service to DeltaCom voice customers If BellSouth were required to provide DSL service to every DeltaCom voice customer,[28] BellSouth's ability to take full advantage of its DSL investments would be jeopardized If BellSouth were not permitted to take full advantage of its DSL investments in Tennessee, BellSouth would have little incentive to make such investments in the future (Ruscilli, Tr pp 607, 628, 636)

Although DeltaCom wants the Authority to believe otherwise, granting the relief DeltaCom seeks would have negative consequences that extend well beyond DSL and DeltaCom's voice customers served via UNE-P In a nutshell, DeltaCom's position is that, because BellSouth is a large company with lots of customers, it should be required

[27] This is yet another example of DeltaCom's perplexing view of the business world Just as DeltaCom is comfortable with arguing for regulatory handouts that permit it to ignore its own switch in favor of obtaining switching from BellSouth at an artificially low price, DeltaCom also believes it is appropriate to ask the TRA to provide it with yet another advantage with no investment Competitors who develop business models solely around regulatory benefits with no recognition of the business reality are not engaged in the kind of sustainable competition the Telecommunications Act and the Tennessee Code were intended to bring about

[28] Given the chance to clarify and narrow DeltaCom's request, DeltaCom's witness responded to Director Jones' inquiry by reiterating that DeltaCom wants it all – *both* for BellSouth to refrain from discontinuing DSL service to customers who choose to discontinue voice service *and* for BellSouth to be forced to serve all DeltaCom voice customers with DSL whether they had it before or not

to make available an unregulated service to those customers served by BellSouth's competitors

Of course, taken to its illogical extreme, DeltaCom's position could be used to require BellSouth to make available any unregulated service to any CLEC, regardless of whether the CLEC is competing via UNE-P, unbundled loops, or even resale For example, if the Authority were to accept DeltaCom's position in this case, another CLEC that had decided not to invest in voice mail could insist that BellSouth be required to provide its voice mail services on a standalone basis And this argument would not be limited to BellSouth's existing unregulated services At a time when the General Assembly has clearly indicated its preference for a competitive market, with less regulation, not more, such a ruling would set Tennessee on the wrong course

The consequences of such a ruling should be obvious The net effect would be to discourage investment by penalizing the company that has taken all the risk and shouldered all the burden of developing these services, while rewarding carriers that have decided to invest little, if anything, in Tennessee This policy would be flatly inconsistent with the mandate for technological advancement found in T C A § 65-4-123

BellSouth made the decision to invest in DSL throughout the State, just as any other carrier could have done Substantial investment was required to build BellSouth's DSL network, and not unlike any other business decision, deciding to deploy DSL involved calculated risks Having taken the risks and having invested the capital and human resources necessary to bring the product to market, BellSouth should rightly reap the rewards of its investment It is contrary to Tennessee law, sound economic

principles, and just plain, old-fashioned business sense to allow DeltaCom, which could have made the same business decisions but chose not to, to now benefit from risks it did not take and investments it did not make

Issue 26(a): Is the line cap on local switching in certain designated MSAs only for a particular customer at a particular location?

DISCUSSION

These issues involve the local switching exemption found in FCC Rule 51 319(c)(2), which provides that "an incumbent LEC shall not be required to unbundle local circuit switching for requesting telecommunications carriers when the requesting telecommunications carrier serves end-users with four or more voice grade (DSO) equivalents or lines " This exception is subject to certain requirements, such as BellSouth providing nondiscriminatory access to combinations of unbundled loops and transport throughout Density Zone 1 and the local circuit switches being located in the top 50 Metropolitan Statistical Area (MSA), and in Density Zone 1 There is no dispute that BellSouth meets these requirements and falls within the exception for the Nashville MSA, the only top 50 MSA in Tennessee

The specific issue to be addressed in this proceeding is whether this exception applies when the customer's four lines are not all located at the same premises The Authority previously addressed this issue in the AT&T Arbitration Order and ruled that

> In its decision in the BellSouth/AT&T arbitration proceeding, the Authority voted to "***permit BellSouth to aggregate lines provided to multiple locations of a single customer*** to determine compliance with FCC Rule 51 319(c)(2) " In support of this decision, the Authority took guidance from the FCC's Third Report and Order[29] in that the FCC chose to utilize the term "customer" throughout its discussion, rather than "customer location "

[29] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 99-328, CC Docket No 96-98, released Nov 5, 1999, paras 293-297 ("Third Report and Order")

(*See* Final Order of Arbitration Award in Docket No 00-00079, dated November 29, 2001, page 20) (emphasis added)

> The Authority subsequently clarified this decision in response to AT&T's Petition for Reconsideration of the Order The Authority clarified that "[a]lthough BellSouth can aggregate lines of a customer running from multiple locations for the purpose of determining if BellSouth is obligated to provide unbundled local switching pursuant to FCC Rule 51 319(c)(2), this aggregation must be based on each location within the Nashville Metropolitan Statistical Area served by AT&T " (*See* Order Granting in Part Requests for Reconsideration and Clarification, Docket No 00-00079, dated April 22, 2002, page 5) (emphasis added)

DeltaCom's attempt to retain old language from its existing interconnection agreement that is contrary to both the Authority's previous findings and the FCC's Order should be rejected The language proposed by BellSouth fully comports with the rulings of the Authority and the FCC and should be accepted

DeltaCom offers no new fact, law or policy issue not previously considered by the Authority when it rendered that prior decision [30] Thus, the Authority should reject DeltaCom's attempt to have the Authority reconsider the long-standing position on this issue Appendix B of the TRO, referencing amendments to Part 51 of Title 47 of the Code of Federal Regulations, and specifically Rule 51 319(d)(3)(ii), specifically states "Until the state commission completes the review described in paragraph (b)(2)(iii)(B)(4) of this section, an incumbent LEC shall comply with the four-line 'carve-out' for unbundled switching established in [the *UNE Remand Order*, 15 FCC Rcd at 3905)] " (TRO Appendix B, p 25)

BellSouth simply seeks to continue availing itself of the switching exemption as set forth by the FCC and the Authority while DeltaCom seeks to avoid those same rules

[30] To the extent that the Authority reviews this issue in the context of any state TRO proceeding (*See*, TRO at ¶ 497), any such decision can be incorporated into the interconnection agreement via the change of law provisions

by adding language into the interconnection agreement that will impose burdens on BellSouth that are not required by law and that are contrary to the Authority's decision in the AT&T arbitration The Authority should reject DeltaCom's attempt to add such language to the interconnection agreement The language BellSouth proposes to include in the parties' interconnection agreement fully obligates BellSouth to provide unbundled local switching in accordance with FCC Rules (Blake Rebuttal, p 2-3) The Authority should approve such language until such time as its state proceedings under the FCC's TRO require a change

BellSouth acknowledges the continuing obligation to provide local switching under Section 271 of the 1996 Act, even in those instances where local switching is no longer a UNE under Section 251 of the 1996 Act (Milner, Tr p 528-529) Thus, the remaining issue is the price BellSouth will charge for non-UNE local switching [31]

Issue 26(d): What should be the market rate?

DISCUSSION

As noted above, the TRA's authority to set rates in a Section 252 arbitration proceeding is limited to the establishment of "rates for interconnection services, or network elements according to subsection (d)", which is the TELRIC pricing standard for unbundled network elements Obviously, the TELRIC pricing standards do not apply to non-UNE switching, thus, the Authority has no jurisdiction, as a matter of law, in the context of a Section 252 arbitration proceeding, to set such rates The appropriate pricing standard for non-UNEs is found in Sections 201 and 202 of the 1996 Act, which

[31] Issue 26(c), which addresses BellSouth's obligation to continue to provide local switching to DeltaCom in those situations where BellSouth has been relieved of the obligation to unbundle local switching *(i e* , where local switching is no longer a UNE), has been deferred by the parties

require "just and reasonable" rates [32] Thus, as demonstrated below, the FCC (not state commissions) will be the final arbiter of whether a non-UNE rate is "just and reasonable" under the 1996 Act

The issue of just and reasonable rates, including an analysis of jurisdiction and compliance, is also discussed by the FCC in the TRO (*See generally*, ¶¶656-664) The FCC ruled

> Whether a particular checklist element's rate satisfies the just and reasonable standard of section 201 and 202 is a fact-specific inquiry that the Commission [the FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6) We note, however, that for a given purchasing carrier, a BOC might satisfy the standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate

(TRO, at ¶664) As discussed in the TRO, the FCC has reserved for itself the jurisdiction to determine whether a rate is just and reasonable through either Section 271 long distance applications or federal complaint proceedings BellSouth is not aware of any challenge to BellSouth's market rates during the course of BellSouth's Section 271 proceedings either at the state or federal level

Also enlightening is the FCC's analysis of the manner in which a BOC can demonstrate that rates are just and reasonable, specifically through a showing that multiple agreements have the same market rate Virtually every BellSouth Interconnection Agreement approved by the Authority, *including the current*

[32] *See*, *UNE Remand Order*, 15 FCC Rcd at 3905, ¶470

BellSouth/DeltaCom Interconnection Agreement,[33] contains the very market rates about which DeltaCom complains This showing alone, at least under the FCC's TRO analysis, demonstrates that BellSouth's market rates are just and reasonable [34] Thus, the Authority should reject DeltaCom's position on this issue

DeltaCom's case on this issue emphasized the "development" of BellSouth's rate and sought to make much of the lack of workpapers or cost information "justifying" the $14 00 rate This emphasis wholly misses the mark The fact is that "market" rates are those that the market sets As noted above, numerous other carriers are paying this same rate under their own approved interconnection agreements

As a legal matter, DeltaCom has identified ***no*** legal precedent identifying any guidance on how a state agency would go about establishing a market rate – other than looking at what currently exists in the market Now that the TRO has firmly clarified that the determination of the "justness" and "reasonableness" of such rates is a matter to be addressed to the FCC, the Authority should reject DeltaCom's effort to hold, at the state level, that the rate currently being charged to numerous other carriers is unjust or unreasonable

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[33] *See*, BellSouth/DeltaCom Interconnection Agreement dated April 24, 2001, Attachment 11, pages 33-34, *See also*, Amendment to the Interconnection Agreement signed by DeltaCom on September 19, 2002

[34] DeltaCom contends that simply because the market rate is higher than the TELRIC rate, the market rate must be unreasonable However, DeltaCom offers no comparison of BellSouth's market rate to the market rate other providers in BellSouth's region charge for local switching Likewise, DeltaCom offers no evidence of DeltaCom's internal switching costs, or the costs to DeltaCom for placing its own switch, both of which could exceed BellSouth's market rate

Issue 36(a): Should DeltaCom be able to connect UNE loops to special access transport?

Issue 36(b): Are special access services being combined with UNEs today?

DISCUSSION

This issue addresses whether BellSouth has an obligation to combine special access (tariffed) services with unbundled UNE loops, a concept known as "co-mingling " Prior to the effective date of the TRO, FCC Rule 47 C F R regarding combinations addressed the combining of multiple UNEs [35] Nowhere did that rule require, or even mention, the combining of special access services with UNEs Further, the FCC specifically addressed this matter in its Supplemental Clarification Order and rejected MCI's request to *eliminate the prohibition* on co-mingling [36] In doing so, the FCC ruled that it was "not persuaded on this record that removing this prohibition would not lead to the use of unbundled network elements by IXCs solely or primarily to bypass special access services "[37] This FCC prohibition on co-mingling was necessary and appropriate to prevent substantial market dislocations and to protect an important source of funding for universal service

Apparently, the prohibition on co-mingling has been eliminated in the TRO (TRO at ¶584) Notwithstanding this, issues such as the pricing of co-mingled elements will be dependent upon further state proceedings identifying which elements will remain UNEs (TRO at fn 1796) However, if the TRO is stayed by the courts or otherwise is not effective by the time the Authority makes a decision on this issue, the Authority

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[35] 47 C F R 51 315

[36] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order Clarification, CC Docket No 96-98, FCC 00-183, 15 FCC Rcd 9587, para 28 (rel June 2, 2000), at ¶28 ("Supplemental Order Clarification")

[37] *Id*

should follow the current (pre-TRO) law on co-mingling Thus, the Authority should defer any final resolution of this issue until after the Authority has concluded the state TRO proceedings in Tennessee

Issue 37: Where DeltaCom has a special access loop that goes to DeltaCom's collocation space can that special access loop be converted to a UNE loop?

DISCUSSION

This issue addresses whether BellSouth has an obligation to convert a special access (tariffed) circuit to a stand-alone UNE loop DeltaCom cannot cite to any FCC rule or order that obligates BellSouth to convert a special access loop to a UNE loop There simply is no FCC rule or order that places such an obligation on BellSouth The "conversion" requirements specified by the FCC in the Supplemental Order Clarification apply only to conversions of special access circuits to loop and transport (EEL) UNE *combinations* That is not the type of conversion DeltaCom seeks in this arbitration proceeding (Blake Direct, p 8)

The issue of conversions also is addressed in the TRO, but the ultimate issue of whether a conversion is allowed will be dependent upon further state proceedings identifying which elements will remain UNEs and whether CLECs meet certain eligibility requirements (TRO at ¶ 586) The safe harbor requirements set forth in the Supplemental Order Clarification have apparently been superceded by the TRO becoming effective, and the new eligibility requirements are very complex (TRO at ¶¶ 590, 591-629) Further, the FCC declined to set forth in the TRO a definitive conversion process, leaving such a process to be worked out between the CLECs and ILECs (TRO at ¶585)

Currently, DeltaCom has a number of options available by which it can accomplish this facility conversion For instance, DeltaCom can order stand-alone UNEs, in accordance with its Interconnection Agreement, and then transfer the traffic currently routed over the existing special access circuit to those UNEs (Blake Direct at 8-9) Also, DeltaCom can submit an NBR to BellSouth to pursue an accommodation on rates, terms and conditions under which BellSouth would perform such a conversion for DeltaCom (Id) While BellSouth stands ready to pursue such an accommodation, DeltaCom refuses to pay BellSouth for the provisioning and installation costs, billing and repair system modification costs, and the conversion process development costs BellSouth incurs in performing these conversions (Blake, Tr p 465) As usual, DeltaCom wants the work performed, they just do not want to pay for it, irrespective of the fact that BellSouth incurs costs in performing the work (Blake, Tr p 465)

As with co-mingling (Issue 36), if the TRO is stayed by the courts at the time the Authority makes a decision on this issue, the Authority should follow the current law on combinations The Authority should reject DeltaCom's position and should direct DeltaCom to avail itself of and pay for the other options that are available If the TRO is effective, the Authority should direct the parties to utilize the change of law provisions in the Interconnection Agreement to effectuate the requirements of the TRO

Issue 44: Should the interconnection agreement set forth the rates, terms and conditions for the establishment of trunk groups for operator services, emergency services, and intercept?

Issue 46: Does BellSouth have to provide BLV/BLVI to DeltaCom consistent with the language proposed by DeltaCom?

DISCUSSION

These issues involve an attempt by DeltaCom to convince the Authority to order BellSouth to provide a retail service that BellSouth does not want to provide and does not currently provide to its own customers While only tangentially related to the overall issue, DeltaCom has raised the issue of whether rates, terms and conditions found in a tariff (operator services trunks) should be incorporated into the Interconnection Agreement Currently, BellSouth and DeltaCom have a trunk group established between BellSouth's operator service platform and DeltaCom's operator service platform (Brownworth, Tr p 355) That trunk group has been in existence since before the FCC determined that operator services and directory assistance ("OS/DA") were no longer UNEs [38] (Id)

Turning to the larger issue, DeltaCom agrees that BellSouth provides DeltaCom with the necessary interconnection, services and network elements for DeltaCom retail customers to do busy line verification ("BLV") and busy line verification interrupt ("BLVI") on BellSouth's retail customers' lines (Brownworth, Tr p 356) In other words, BellSouth is complying with 1996 Act that allows DeltaCom the ability to offer a retail BLV/BLVI service DeltaCom, however, wants the Authority to order BellSouth to provide, *to BellSouth's retail customers*, the ability to conduct busy line verification and busy line verification interrupt on DeltaCom's retail customers' telephone lines

BellSouth's retail customers can request BLV and BLVI on any other BellSouth retail customer's line BellSouth does not offer to any BellSouth retail customer the

[38] Tennessee is the only state in the BellSouth nine state region whose state commission still treats OS and DA as UNEs

ability to have BLV or BLVI on any CLEC retail customer's line That is an economic choice BellSouth made, given the expense involved in requesting BLV and BLVI on other carriers' networks DeltaCom acknowledges that this is BellSouth's choice (Brownworth, Tr p 357) DeltaCom further acknowledges that it is able to provide a service to its customers that BellSouth does not provide to its customers, (Brownworth, Tr p 358) Particularly enlightening is the fact that DeltaCom cannot point to any other carrier (CLEC or otherwise) that allows their retail customers to do BLV and BLVI on DeltaCom's network In fact, DeltaCom admits that it does not have reciprocal trunk groups to all operator services platforms in the state of Tennessee (Brownworth, Tr p 359)

To the extent DeltaCom tries to portray this as a public safety issue, such a proposition rings hollow As noted above, not all operator services platforms in Tennessee are interconnected, making it impossible for every subscriber in Tennessee to do BLV and BLVI on every other subscriber (Id) Moreover, if a subscriber truly believes there may be an emergency situation, then the subscriber should call E911 If, in fact, there is an emergency situation, the caller has wasted precious time by waiting for the BellSouth operator to get through to the DeltaCom operator, who then has to break in on the line If there is silence on the line, the operator is not going to be in a position to assess the situation to determine if there is actually an emergency situation Subscribers should be encouraged to call E911 in an emergency, not an operator who is powerless to provide emergency services

Surely, if DeltaCom was concerned that this issue was of statewide importance then DeltaCom would have sought an industry-wide solution, which DeltaCom has not

done (Brownworth, Tr p 364) The fact that DeltaCom has not broached this topic on an industry-wide basis suggests that DeltaCom's true motivations are directed towards its financial position, not public safety If DeltaCom can convince the Authority to order BellSouth to provide retail BLV and BLVI in the manner requested by DeltaCom, then BellSouth would be forced to pay DeltaCom for every BLV and BLVI call to a DeltaCom retail customer (Id) The Authority need look no further than this fact to understand DeltaCom's true motivation

Clearly, BellSouth's retail services to its own customers are not UNEs and, therefore, are outside the parameters of this Section 252 arbitration proceeding Even if they were not, the evidence demonstrates that BellSouth is providing BLV/BLVI in a nondiscriminatory manner and at parity with how it provides such functionality to other CLECs Therefore, the Authority should direct DeltaCom to continue ordering OS trunks out of the applicable tariff and refuse to order BellSouth to provide a retail service that BellSouth is not required to and does not want to provide [39]

Issue 47: Should BellSouth be required to compensate DeltaCom when BellSouth collocates in DeltaCom's collocation space? If so, should the same rates, terms and conditions apply to BellSouth that BellSouth applies to DeltaCom?

DISCUSSION

This issue addresses whether BellSouth should have to pay DeltaCom for collocation ("reverse collocation") at a DeltaCom premises or point of presence ("POP") The only collocation obligations in the 1996 Act are found in Section 251(c)(6), which addresses obligations of incumbent LECs, not CLECs Nowhere in Sections 251 or 252

[39] If the Authority is inclined to order BellSouth to provide the service requested by DeltaCom, DeltaCom should be required to pay for the service, including the costs required for the manual intervention necessary to provide the service (Ruscilli, Tr p 651)

of the 1996 Act is the topic of reverse collocation discussed or even referenced Thus, this topic cannot be appropriate for resolution in a Section 252 arbitration proceeding While BellSouth is willing to discuss the concept of reverse collocation with DeltaCom and attempt to reach agreement on the rates, terms and conditions for such reverse collocation, this discussion should take place outside the parameters of interconnection negotiations If the parties cannot reach agreement on rates, terms and conditions for reverse collocation, then DeltaCom can simply refuse to allow BellSouth to collocate at a DeltaCom premises or POP

Beyond the legal issue, it is important to note that BellSouth has not collocated (as that term is defined in the 1996 and FCC Rules) its equipment at a DeltaCom POP location or any other location for the sole purpose of interconnecting with DeltaCom's network or accessing UNEs in the provision of a telecommunications service to the end users located in DeltaCom's serving area (Ruscilli Direct at 17-18) What BellSouth has actually installed at various POPs in Tennessee is equipment that is being used to provision Special and Switched Access Services ordered by DeltaCom and/or DeltaCom's end user customers at various POP locations (Id) This equipment provides DeltaCom with dedicated LightGate® services and base-line services at these POP locations, which are then used by DeltaCom to provide its end users with particular services (*Id*) Consistent with BellSouth's FCC Tariff No 1, Section 2 3 3 and Tennessee Access Services Tariff E2 3 3, it is DeltaCom's responsibility to provide to BellSouth, at no charge, "equipment space and electrical power required by [BellSouth] to provide services under this Tariff at the points of termination of such service " DeltaCom should not be allowed to avoid its obligations by trying to fashion an

argument that shifts DeltaCom's financial responsibilities to BellSouth

In addition to this equipment, BellSouth has installed additional equipment in certain locations which utilize excess capacity on existing BellSouth terminals to exchange local traffic with DeltaCom (Ruscilli Direct at 19-21) In each instance, the equipment was installed either because DeltaCom made such a request, or the arrangement was mutually beneficial None of this equipment was placed as a stand-alone local interconnection arrangement, each was incident to an existing Special and/or Switched Access Services arrangement (*Id*) DeltaCom has never sent BellSouth a collocation invoice for any of these arrangements (Ruscilli Direct at 20) Further, in those situations when DeltaCom has the right to choose the point of interconnection ("POI") and has chosen a DeltaCom central office as the POI, BellSouth should not be deemed to have voluntarily chosen the DeltaCom central office as the POI for BellSouth's originated local interconnection traffic Those instances cannot be considered voluntary collocation arrangements

If the Authority does choose to address this issue, it is BellSouth's position that all of the existing POPs and any other locations in which BellSouth has placed equipment, including any augments to the equipment already placed at these sites, should be exempted from any future collocation agreement This is because these locations have never been the subject of a collocation agreement in the past and were established to the mutual benefit of the parties at the time, without any expectation, at least on BellSouth's part, that they would be subject to a collocation agreement in the future The prior collocation agreement was not used as the basis for establishing those arrangements and the lack of any billing under the collocation agreement on

DeltaCom's part for those arrangements is evidence that DeltaCom did not intend for those types of arrangements to be governed by a collocation agreement either

For any POPs or other DeltaCom locations that are established ***after*** the effective date of the new collocation agreement, BellSouth would agree to pay mutually negotiated charges for BellSouth equipment located and used solely for the purposes of delivery of Bellsouth's originated local interconnection traffic, and only if BellSouth voluntarily requests to place a POI for BellSouth's originated local interconnection traffic in a particular POP or other DeltaCom location

Rates under this proposal would not be included in the new Interconnection Agreement that is the subject of this proceeding, because, as discussed earlier, it is not a Section 251 requirement Instead, the proposal would be included in a separate agreement and have the same expiration date as the new Interconnection Agreement (Ruscilli Direct at 24)

For the reasons discussed above, the Authority should adopt BellSouth's position If the Authority is interested in having the parties negotiate towards a reverse collocation agreement, BellSouth is willing to participate in such negotiations outside of the Section 252 arbitration process

Issue 56(a): May BellSouth charge a cancellation charge which has not been approved by the Authority?

Issue 56(b): Are these cancellation costs already captured in the existing UNE approved rates?

DISCUSSION

This issue involves BellSouth's right to assess a cancellation charge when DeltaCom cancels a local service request ("LSR") prior to the LSR completing, and the

appropriate cancellation rate DeltaCom does not appear to contest the fact that BellSouth incurs an expense when an LSR is cancelled prior to completion, nor does DeltaCom appear to contest that premise that BellSouth should be entitled to some compensation (Woods, Tr p 178, "I don't disagree that BellSouth performs work to provision a service, and that what's properly reflected in these nonrecurring charges ") DeltaCom's issues appear to be that the percentage of the approved non-recurring charge that BellSouth seeks to use as a cancellation charge is taken from an interstate tariff and, therefore, have not been "approved" by the Authority DeltaCom is wrong on both accounts

First, the rates BellSouth charges when a CLEC cancels an LSR are based on Authority-approved non-recurring installation rates for the specific UNE (Ruscilli Pre-filed Direct at p 25) When DeltaCom cancels an LSR, cancellation charges are prorated to charge a portion of the Authority-approved non-recurring installation rate [40] The pro-ration is based on the point within the provisioning process that DeltaCom cancels the LSR and derived from the schedule in BellSouth's B2 4 4 Private Line Tariff (for UNEs billed from the CRIS system) or BellSouth's FCC No 1 Tariff, Section 5 4 (for UNEs billed from the CABS system) (*Id*) Since the Authority has approved the nonrecurring rates BellSouth charges for UNE installation and provisioning, BellSouth's recovery of its costs incurred prior to the cancellation of the LSR is appropriate and cost-based Thus, the Authority should allow BellSouth to assess a cancellation charge as calculated by BellSouth using Authority-approved non-recurring installation rates as the basis and applying the completion percentages consistent with BellSouth's tariffs

[40] For non-designed UNE-P orders that are placed electronically, BellSouth does not charge for cancellation regardless of when the cancellation order is placed by DeltaCom so long as the order does not fall out and require manual intervention (Tr p 687)

DeltaCom's witness Mr Wood did not contest the fact that the Authority has often approved such provisions in other interconnection agreements and such a provision is contained in the Authority-approved Tennessee SGAT (Woods, Tr p 181-83) Consequently, the Authority has in fact approved the use of the percentage deriving from the schedules in the tariffs referenced above

Issue 57(a): Should BellSouth be permitted to charge for DeltaCom conversions of customers from a special access loop to a UNE loop?

Issue 57(b): Should the conversion be completed such that there is no disconnect and reconnect (*i.e.*, no outage to the customer)?

DISCUSSION

This issue is related to Issue 37, discussed above As noted in the discussion of Issue 37, this issue addresses, preliminarily whether BellSouth has an obligation to convert a special access (tariffed) loop to a ***stand-alone UNE loop*** Again, DeltaCom cannot cite to any FCC rule or order that obligates BellSouth to convert a special access loop to a UNE loop There simply is no FCC rule or order that places such an obligation on BellSouth The "conversion" requirements specified by the FCC in the Supplemental Order Clarification apply only to conversions of special access circuits to loop and transport (EEL) UNE *combinations*, not stand-alone UNEs

As noted in the discussion of Issue 37, however, the issue of conversions is addressed in the TRO, but the ultimate issue of whether a conversion is allowed will be dependent upon further state proceedings identifying which elements will remain UNEs and whether CLECs meet certain eligibility requirements (TRO at ¶586) The safe harbor requirements set forth in the Supplemental Order Clarification will be superceded by the TRO, and the new eligibility requirements are very complex (TRO at ¶¶ 590,

591-629) Further, the FCC declined to set forth in the TRO a definitive conversion process, leaving such a process to be worked out between the CLECs and ILECs (TRO at ¶585)

Irrespective of any potential changes in the law, in an effort to avoid payment, DeltaCom contends that replacing special access circuits with standalone UNEs "is a conversion where there is no disconnection and reconnect, but simply a billing change" (Brownworth Direct, p 15) DeltaCom's contention is simply wrong Replacing special access services with stand-alone UNEs requires two separate orders involving two different basic classes of services (Blake Direct at 8-9) Because the process to convert special access services to stand-alone UNEs is complex, BellSouth offers, through the New Business Request ("NBR") process, to project manage the conversions (*Id*) If DeltaCom is not willing to pursue a NBR and pay BellSouth for project managing the process, DeltaCom has other options to minimize service outage for the end user For instance, DeltaCom can order stand-alone UNEs, in accordance with its Interconnection Agreement, and then transfer the traffic currently routed over the existing special access circuit to those UNEs Alternatively, DeltaCom may chose to issue the disconnect ("D") and new connect ("N") orders itself and attempt to time the orders to minimize downtime (Id)

In the event that the Authority determines that BellSouth is obligated to convert special access circuits to stand-alone UNE loops, it is clearly appropriate for BellSouth to charge DeltaCom for installation and provisioning of the stand-alone UNEs ordered by DeltaCom to replace the existing special access circuits The rates BellSouth proposes to charge DeltaCom are the Authority-approved nonrecurring rates for the

stand-alone UNEs (Blake Rebuttal at 14) Typically, DeltaCom refuses to pay BellSouth for the various costs BellSouth incurs in performing these conversions (Blake, Tr p 465) As noted above, DeltaCom wants the work performed, they just do not want to pay for it, irrespective of the fact that BellSouth incurs costs in performing the work (Blake, Tr p 465)

Until the Authority concludes the state TRO proceedings in Tennessee, it is impossible to know which network elements will be UNEs Thus, as with co-mingling (Issue 36), the Authority should defer any final resolution of this issue until after the Authority has concluded the state TRO proceedings in Tennessee

Issue 58(a): Should the Interconnection Agreement refer to BellSouth's website address to Guides such as the Jurisdictional Factor Guide?

Issue 58(b): Should BellSouth be required to post rates that impact UNE services on its website?

DISCUSSION

This issue addresses whether the Interconnection Agreement should have the flexibility to reference certain technical guides and publications that are maintained on BellSouth's website and not attached to the Interconnection Agreement Allowing BellSouth to maintain technical guides and publications (many of which are voluminous) on a website permits BellSouth to periodically change these documents to reflect operational and technical specifications changes (Ruscilli, Tr p 610) Currently, BellSouth notifies CLECs via Carrier Notification Letters in advance of changes impacting UNE services Carrier Notification Letters are posted on BellSouth's website as soon as possible, and serve as proper notification to CLECs (Watts, Tr p 136)

Therefore, CLECs will have ample opportunity to evaluate whether a change will impact their business and bring any concerns to BellSouth and/or the Authority

The ramifications of adopting DeltaCom's position are obvious With approximately 90 CLECs and resellers in Tennessee,[41] each with their own interconnection or resale agreement, the problems associated with getting the concurrence of each and every CLEC to make even a minor technical modification are significant, if not insurmountable BellSouth could end up with thousands of variations on technical documents that would destroy any standardization of operations Even if all CLECs were to agree to a change, the process of amending each and every one of the 90 Interconnection Agreements would take a tremendous amount of effort by BellSouth and the Authority [42]

Moreover, many of the industry guides are modified on a collaborative basis – such as the process for determining where a CLEC can place a DSLAM in a remote terminal (Watts, Tr p 131) Other guides involve public safety issues such as 911 routing guide information A county agency that sets up a new emergency answering position needs that information updated quickly in the same manner for BellSouth and all CLECs (Ruscilli, Tr p 697-699)

DeltaCom suggests that it should not be subject to changes that are "de minimis" but fails to define that term in a helpful way Certainly, changes to national jurisdictional reporting, DSLAM placement, and 911 routing could be more than "de minimus" in DeltaCom's mind However, such changes may well be in the public interest To implement them efficiently and consistently among BellSouth and all of the CLECs in

[41] According to DeltaCom witness Brownworth, there are 86 CLECs in Tennessee (Tr p 360)
[42] The Authority staff reviews each amendment Each amendment is then put on the Authority's Agenda for approval

Tennessee, the flexibility of referencing such updates, rather than negotiating them with 00 CLECs, is obvious

BellSouth is not aware of any prior decision on this issue by the Authority However, BellSouth directs the Authority to a decision by the South Carolina Public Service Commission ("South Carolina Commission") on this issue in a Section 252 arbitration proceeding between HTC and Verizon In that arbitration, the South Carolina Commission considered the issue of whether Verizon should be allowed to incorporate tariffs and other outside documents as part of its Interconnection Agreement with HTC The South Carolina Commission ruled that

> We agree with Verizon that its [position] ensures that the new interconnection agreement will evolve at the same pace as the rapidly developing telecommunications industry Further, Verizon's language ensures that the Parties will continue to conduct their relationship according the most current tariffs, guidelines and industry procedures Moreover, Verizon's website is an invaluable tool for all CLECs doing business with Verizon, as Verizon's website is continually updated to assist all CLECs run their business more efficiently We also agree that incorporating Verizon's tariffs and other external documents insures that every carrier will be on equal competitive footing Moreover, regarding HTC's concern that Verizon can unilaterally alter the interconnection agreement, HTC can participate in the change management process where industry guidelines and Verizon's tariffs are addressed [43]

The same observations made by the South Carolina Commission are equally applicable to this issue in this proceeding If BellSouth makes a charge to a referenced guide that DeltaCom believes is unreasonable or arbitrary, it can always bring that to the attention of the Authority

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[43] Order on Arbitration, *In Re Petition of HTC Communications, Inc for Arbitration of an Interconnection Agreement with Verizon South, Inc* , Order No 2002-450 in SCPSC Docket No 2002-66-C at 8 (June 12, 2002)

Regarding the rate issue, BellSouth provides rates to individual CLECs upon amendment of their Interconnection Agreements, and BellSouth has agreed to provide DeltaCom with an amendment within 30 days of receipt of such a request (Watts, Tr p 70) Once new UNE rates are approved by the Authority, a CLEC may request that its Interconnection Agreement be amended to incorporate the new or revised rates Apparently, DeltaCom wants BellSouth to post a notice of new, approved UNE rates on BellSouth's website Since TRA UNE proceedings are public information, CLECs are aware of any new, approved rates, at the same BellSouth has this information – when the Authority orders late changes Therefore, posting the rates on BellSouth's website is not necessary

Issue 59: Should the payment due date be thirty days from the receipt of the bill?

DISCUSSION

This issue addresses the terms under which DeltaCom makes payments on BellSouth invoices to DeltaCom DeltaCom, like every other CLEC that does business with BellSouth, has a set bill date for every invoice BellSouth sends to DeltaCom (Ruscilli Direct at 59) Based on that bill date, DeltaCom knows exactly what date the payment is due for each of those invoices (*Id*) BellSouth's billing systems are programmed around that bill date and BellSouth's anticipated cash flows are based on receiving payments on particular days of the month BellSouth's billing systems and practices for both wholesale and retail customers are built upon this methodology In fact, BellSouth is hard-pressed to think of any company (automobile finance companies, utility companies, credit card companies, etc) that does not have established recurring

payment due dates on their invoices Even DeltaCom has a set due date (the 15th of each month) for bills it renders to BellSouth

DeltaCom now seeks to change this system and, not surprisingly, it does not want to pay for any costs associated with making this type of massive regional billing system modification [44] Instead of DeltaCom having invoice payments due on set days of the month, as it has done for the past twenty years with BellSouth,[45] it wants to make payments based on a time frame to be calculated from when it actually receives the bill Aside from involving a dramatic change to complex billing systems, DeltaCom's proposal is also unnecessary DeltaCom admits to receiving well over ninety percent of their bills from BellSouth electronically, which obviously results in DeltaCom having even more time between the date they receive the bill and the payment due date (Ruscilli, Tr p 705) (Watts Direct at 18) Moreover, through its own testimony, DeltaCom acknowledges having years of timely payment to BellSouth for wholesale services (Watts Direct at 20) If BellSouth's bill payment terms are onerous, as DeltaCom implies, it is doubtful that DeltaCom would have the good payment history that it touts

In addition, BellSouth's long-standing billing practice in no way limits DeltaCom's ability to review and dispute invoices received from BellSouth DeltaCom can dispute invoices long after the payment due date and, in fact, DeltaCom files such disputes Thus, the current billing practice in no way prejudices DeltaCom's ability to dispute charges that it believes are improper

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[44] There is nothing in DeltaCom witness Jerry Watts' Direct or Rebuttal testimony suggesting that DeltaCom would be willing to pay one nickel of the costs

[45] DeltaCom testified that it is "a company with years of timely payment to BellSouth " (Watts Direct p 120)

Finally, both the Authority and the FCC considered BellSouth's billing practices during the course of BellSouth's Section 271 long distance application and concluded that BellSouth's billing and billing practices (including this one) were non-discriminatory Moreover, it is undisputed that the Authority has performance metrics, and associated penalties, in place that measure whether BellSouth is providing timely and accurate bills to DeltaCom

Clearly, DeltaCom cannot justify the massive regional billing system modifications that it wants for free that would be required to accommodate DeltaCom's proposal Thus, the Authority should decline to accept DeltaCom's proposition on this issue

Issue 60(a): Should the deposit language be reciprocal?

Issue 60(b): Must a party return a deposit after generating a good payment history?

DISCUSSION

This issue involves the circumstances under which deposits will be required Fundamentally, DeltaCom does not dispute that BellSouth should be able to collect deposits where warranted (Watts, Tr p 155) It is the definition of "where warranted" that is the debate BellSouth has proposed a list of criteria that would be used to determine whether a deposit is warranted in any given circumstance BellSouth believes that the criteria it proposes will protect BellSouth and, at the same time, fairly separate those CLECs that are not a credit risk from those that are[46] The criteria proposed by DeltaCom lack reasonable recognition of business realities As a result,

[46] Compare BellSouth's criteria to DeltaCom's Tennessee P S C No 1 Local Tariff, §2 5 5, wherein the only deposit criteria is DeltaCom being the sole arbiter of whether a deposit is due from a retail customer ("The Company [DeltaCom] ***may*** require from any customer or prospective customer a cash deposit ") (emphasis added)

they are too lax and, if adopted by other CLECs, would result in virtually no CLEC paying a deposit, which would subject BellSouth to significant additional financial risk

DeltaCom relies on a Policy Statement from the FCC as authority that DeltaCom should not pay a deposit [47] Such reliance is misplaced This policy statement simply provides guidance regarding modification of deposit provisions in interstate access tariffs (Policy Statement at ¶1) In addition, the FCC considered narrower protections, such as accelerated and advanced billing, in lieu of deposits (*Id* at ¶30) DeltaCom, however, seeks to extend the timeframe for paying BellSouth's bills (See discussion of Issue 59 above) Typically, DeltaCom wants it both ways, avoid the deposit and, at the same time, extend the payment due date Thus, for the reasons stated above, the Authority should adopt the deposit criteria proposed by BellSouth

DeltaCom also raises the issue of whether deposit obligations should be reciprocal This is a red herring BellSouth is obviously not similarly situated with a CLEC provider and, therefore should not be subject to the same creditworthiness and deposit requirements and standards (Ruscilli Direct at 30-31) Unlike DeltaCom, BellSouth does not have the option of declining to do business with a credit-risky CLEC, as that business relationship is mandated by the 1996 Act Further, if BellSouth is buying services from a CLEC provider's tariff, the terms and conditions of such tariff will govern whether BellSouth must pay a deposit (*Id*) Finally, BellSouth's regional bills to DeltaCom average approximately 8 million dollars monthly (Watts, Tr p 159) DeltaCom's bills to BellSouth are substantially less, about $700,000 per month according to DeltaCom (Watts, Tr p 164) Placing a deposit burden upon BellSouth

[47] Policy Statement, *In the Matter of Verizon Petition for Emergency Declaratory and Other Relief*, WC Docket No 02-202, (Rel December 23, 2002)

would potentially result in BellSouth paying deposits to more than a hundred CLECs and resellers in Tennessee As Mr Ruscilli's testimony demonstrated, ARMIS and other data show a dramatic increase in BellSouth uncollectibles (Ruscilli Rebuttal at 17-18] Thus, the Authority should not require reciprocal deposit arrangements

The final issue is whether BellSouth should be required to return a deposit after a CLEC generates a good payment history for six months Even DeltaCom admits that a good payment history alone is not necessarily indicative of whether a company will ultimately end up in bankruptcy DeltaCom admits that payment history should be only ***one of*** the primary factors in determining whether a deposit should be maintained (Watts, Tr p 156) (emphasis added) Indeed, DeltaCom, after boasting a good payment history with BellSouth for almost 20 years, filed for bankruptcy (Watts, Tr p 156-157) In addition to DeltaCom, over the last two years BellSouth has had a number of very large customers that were current on their payments up until the day they filed bankruptcy (Ruscilli Rebuttal at 16) Under DeltaCom's proposal, even if a CLEC's credit-worthiness *declined* over a six month period, as long as the CLEC made timely payments BellSouth would have to return the CLEC's deposit (Tr p) Such a result is inequitable and defies common sense Also noteworthy is the fact that DeltaCom's own deposit tariff (Tennessee P S C No 1 Local Tariff, Section 2 5 5) does *not* provide for the return of a deposit if a DeltaCom retail customer has a good payment history for six consecutive months

For all these reasons, the Authority should not use payment history as a factor in determining when, if ever, a deposit should be returned Nor should the Authority accept DeltaCom's invitation to micromanage credit issues

Issue 62: What is the limit on back-billing for undercharges?

DISCUSSION

This issue addresses whether the Authority should impose a limitation on a party's ability to back-bill for services rendered DeltaCom cites no legal authority to support its position that BellSouth should be precluded from back-billing after 90 days from the date the service was rendered BellSouth's position is that limitations for back billing should be governed by the state's applicable statute of limitations The applicable statute of limitations for contracts which are not otherwise expressly provided for in a statute is six years See T C A § 28-3-109 Billing for services performed for CLECs under interconnection contracts are therefore governed by this statute

Moreover, DeltaCom acknowledges that the current Interconnection Agreement between the parties expressly provides for back-billing in certain circumstances For instance, the Amendment to the Interconnection Agreement signed by DeltaCom on September 19, 2002 ("Amendment") expressly provides that

> BellSouth currently is developing the billing capability to mechanically bill the recurring and non-recurring Market Rates in this section In the interim where BellSouth cannot bill Market Rates, BellSouth shall bill the rates in the Cost-Based section preceding in lieu of the Market Rates and reserves the right to true-up the billing difference

Amendment at 640 (Watts, Tr p 137) BellSouth strives to bill all incurred charges in less than 90 days, but due to the complexity of billing systems and telecommunications services, 90 days is not always a sufficient amount of time for the retrieval of billing data and records and any system programming to substantiate and support the billing (Ruscilli Rebuttal p 21) DeltaCom acknowledges that the FCC found BellSouth's billing system in the context of its Section 271 proceeding to be nondiscriminatory and that the

SQM and SEEMS plans provide metrics and penalties to incent BellSouth's billing performance (Watts, Tr p 142-143)

In addition, DeltaCom's proposal could result in a situation when DeltaCom actually received the service from BellSouth and obtained revenue from DeltaCom's retail customer but, due to some technical problem, BellSouth did not realize it had not billed DeltaCom for that service within 90-days (Watts, Tr p 140-141) BellSouth would then be precluded (under DeltaCom's proposal) from billing DeltaCom for the service, resulting in DeltaCom being unjustly enriched

In the only billing example that DeltaCom cites to support its arguments, BellSouth had been providing DeltaCom with ADUF records for the last three years, but did not bill the per ADUF record charge as set forth in their Interconnection Agreement for the period February 2000 to November 2001 DeltaCom, therefore, has had the records necessary to bill other carriers for the originating and terminating messages reported by ADUF If DeltaCom has not billed the other carriers, that is not BellSouth's fault As a matter of fact, DeltaCom has either billed, or has had the opportunity to bill the other carriers for three years without having to pay BellSouth for providing the ADUF records (Ruscilli Rebuttal at 22)

Based on the discussion above, the Authority should decline to impose any limitation on a party's ability to back-bill for services rendered under the Interconnection Agreement However, if the Authority is inclined to address this issue of carrier back-billing, BellSouth submits that the issue is better addressed by relying on existing state law statutes of limitation or in a generic rulemaking proceeding, wherein the rule would be applicable to all carriers in the state of Tennessee, and not just to BellSouth [Cite

Tennessee cable case] The Authority would commit legal error by imposing a new statute of limitation inconsistent with T C A § 28-3-109 in this two party arbitration

Issue 63: Is it appropriate to include language for audits of the parties' billing for services under the interconnection agreement?

DISCUSSION

This issue involves a legal interpretation of Section 252(i), which addresses the ability of CLECs to adopt provisions of other BellSouth interconnection agreements, and provides

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement

Specifically, DeltaCom seeks to adopt "audit" language out of an existing AT&T/BellSouth Interconnection Agreement Clearly, audits are not an "interconnection, service, or network element" provided by BellSouth, therefore, the 1996 Act does not allow DeltaCom to adopt that specific language from the AT&T/BellSouth Interconnection Agreement Audits are certainly not necessary for BellSouth to prepare and submit bills to DeltaCom DeltaCom failed to establish that the language it seeks to adopt is in any way an interconnection, service, or network element Therefore, the Authority should reject DeltaCom's attempt to improperly use Section 252(i)

To the extent DeltaCom attempts to establish a separate basis for audit language, DeltaCom fails to make such a showing The Authority has adopted performance measurements to address the accuracy and timeliness of BellSouth's bills to DeltaCom (and all CLECs) If BellSouth's billing practices fall below these standards,

BellSouth is penalized Further, both the Authority and the FCC have reviewed extensively BellSouth's billing practices and procedures and found them to be nondiscriminatory Thus, inclusion of audit language for billing system is unnecessary, and the Authority should reject DeltaCom's position on this issue

Issue 64: What terms and conditions should apply to Access Daily Usage File ("ADUF")?

DISCUSSION

DeltaCom is asking BellSouth to isolate and provide to DeltaCom only certain ADUF records BellSouth is not required to do this Consistent with the FCC's 271 Orders in BellSouth's states, BellSouth provides competing carriers with complete, accurate, and timely ADUF reports on the service usage of their customers in substantially the same manner that BellSouth provides such information to itself [48] DeltaCom did not dispute that the FCC made this finding (Conquest, Tr p 289) If DeltaCom wants a customized report, different from the type of report all of the other CLECs receive, it should file a New Business Request BellSouth submits that the terms and conditions for the provision of ADUF service to DeltaCom should be pursuant Attachment 7, Section 5 7 of BellSouth's proposed Interconnection Agreement (Ruscilli Direct, p 35)

ADUF provides the CLECs with records for them to bill interstate and intrastate access charges, whether the call was handled by BellSouth or an interexchange carrier ("IXC") (Ruscilli Direct, p 34) ADUF also provides records for billing reciprocal compensation charges to other local exchange carriers and IXCs for calls originating

[48] *See* Memorandum Opinion and Order, *In re Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc , and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services In Alabama, Kentucky, Mississippi, North Carolina, and South Carolina,* WC Docket No 02-150 (September 18, 2002), ¶108

from and terminating to unbundled switch ports (*Id.*) ADUF records are generated when a DeltaCom end user, served by an unbundled port, places a call using an access code (i.e., 1010XXX) to an end user within the designated local calling area (Ruscilli Rebuttal, pp. 22-23). In this situation, the call is recorded as an access call – the location of the terminating end user has no bearing on the generation of the record (Ruscilli Rebuttal, p. 23).

DeltaCom argued in its pre-filed testimony that it should not be required to pay BellSouth for ADUF records associated with local calls (Conquest Direct, p. 8). Yet DeltaCom acknowledged during the hearing that BellSouth ADUF records properly include billing for certain local calls (Conquest, Tr. p. 293, 295.) DeltaCom cannot have it both ways.

During the hearing, and after much equivocation and attempted hair-splitting, DeltaCom finally acknowledged that it might be willing to pay a higher rate for a customized report.

> [Mr. Hicks.]
>
> Q. Okay. Would DeltaCom be willing to pay a higher ADUF rate reflecting BellSouth's increased costs in producing a new report?
>
> MR. ADELMAN: I want to just at this point, with your indulgence, Madame Director, instruct and remind the witness not to respond with any information that's the subject of a settlement negotiation. I assume the question doesn't try to get at that.
>
> MR. HICKS: That's correct.
>
> THE WITNESS: I don't have knowledge of what we would be willing to pay.
>
> BY MR. HICKS:

Q I really was just asking would you be willing to pay a higher ADUF rate I'm not asking for a dollar figure or how much you would be willing to pay I'm asking in concept, if we provide something different for you, would you be willing to pay for it?

A I'm sure we would be willing to pay a reasonable rate

Q Okay

A I have a problem with the term "higher rate" that you used in your question I don't understand

Q Well, there's a current ADUF rate for the existing service, and if you're asking for a customized service, I'm presuming that the rate would be higher than it is now Isn't that a reasonable assumption?

A Are you saying that the rate would be higher for screening each record, or are you saying the rate would be higher just for the records that we choose to have you provide us? I'm a little unclear as to what you're asking

Q Okay Isn't it a per query rate? In other words, it's whatever it is times the number of records you get?

A Actually, there are two rate elements

Q Okay Two rate elements I'm just asking you in concept I'm not trying to pin you down on dollars or talking about settlement negotiations In concept, is DeltaCom willing to pay a higher ADUF rate to get this customized service?

A I think that I would have to see the proposal before I could answer that Again, I'm a little hung up on your term, a higher ADUF rate I don't know, again, if you're asking me am I willing to pay for every message that you screen at a higher rate to get you to throw the messages away? If that's your question, no, I'm not willing to do that ***If you're asking me am I willing to pay a higher rate to get a clean report that has the screening or the filtering that you're implying, certainly that's possible, depending on what that rate might be.*** (Conquest, Tr p 293, 295, emphasis added)

Consistent with the FCC's 271 Orders in BellSouth's states, BellSouth provides competing carriers with complete, accurate, and timely reports on the service usage of their customers in substantially the same manner that BellSouth provides such

information to itself BellSouth should not be required to provide custom reports for each CLEC when the reports generated for all CLECs consistent with industry standards will suffice (*Id*)

Issue 66: Should BellSouth provide testing of DeltaCom end-user data to the same extent BellSouth does such testing of its own end-user data?

DISCUSSION

Once again, arbitration is not the appropriate forum for the resolution of this issue This issue involves processes and systems changes that affect all CLECs on a regional basis and should be addressed in the CCP Indeed, currently pending Change Requests will provide the enhanced functionality that should satisfy the enhanced functionality sought by DeltaCom (Pate Direct pp 13-18) [49] Change Request CR0896 is slotted for Release 16 0, scheduled for implementation in May 2004, part of CR0897 has already been implemented, and the remaining portion will be implemented in the ELMS6 industry Release 14 0, scheduled for November 2003 (*Id*)

To provide additional functionality, CR0896 was originally drafted by a group of CCP member CLECs This change was designed to modify the CLEC Application Verification Environment ("CAVE") to allow CLECs to test using their own company-specific data with live CLEC-owned accounts and BellSouth test accounts without impacting account status (*Id*) After reviewing the request, BellSouth notified the CLECs, in accordance with CCP procedures, that BellSouth could not support the entire request due to the exorbitant development cost---estimated at $5 5 million [50] BellSouth said it would however, at an estimated cost of $1 2 million (for coding and installing

[49] Change Request CR0896 and parts of CR0897

[50] CCP guidelines allow BellSouth to reject CLEC change requests because of cost, industry direction or lack of technical feasibility (Pate, Pre-filed Direct Testimony at 13, fn 7) (citing CCP Guidelines)

software 'filters' in the production environment[51]), support the first part of the request relating to developing the ability for CLECs to use their own accounts in CAVE (Tr p 734??) The CLECs agreed to consider each portion of the request as separate items (*Id*)

At a significant cost of $4 35 million, the second part of CR0896 would have required BellSouth to establish a new test site and billing system in order to provide an environment for CLEC test orders to be processed through the provisioning and billing steps (*Id*) BellSouth worked with the CLECs to find a solution to this otherwise cost-prohibitive request, and solved the problem by proposing that individual CLECs take responsibility for establishing and paying for lines that can be provisioned with whatever specifications the CLEC desires These lines can be tested in the CAVE environment through whatever steps the CLEC desires and then reused in future testing scenarios (*Id*)

BellSouth's successful cooperative effort provides CLECs with multiple benefits they have control over how and when the accounts are configured, installed, billed, etc , without requiring BellSouth's involvement—or the need for a CLEC to provide BellSouth with 60-day advance notice (*Id*) Additionally, since these lines will bill real charges to the CLECs, just as any of their end user live accounts would, actual billing to the CLECs will be generated (*Id*) Importantly, the capabilities provided by the two parts of CR0896 provide CLECs the very "end-to-end" testing that DeltaCom said it desires (Pate Direct, pp 13-18, Rebuttal, pp 11-15) CLEC community is satisfied by this

[51] The "production environment" is defined as the versions of system or interface programs that are in current use by the CLECs for 'live' pre-ordering and ordering functions On the other hand, the 'test' environment is where CLECs can test ordering and pre-ordering scenarios on current versions or, in a pre-release mode, the capabilities of an upcoming software release (*Id* at fn 8)

change request, and DeltaCom never voiced dissent when agreement to proceed with this plan was reached (*Id*) If, for some unknown reason, DeltaCom has needs for CAVE testing that are additional to or divergent from the functionality expressed by the rest of the CLEC community, then DeltaCom should follow appropriate CCP procedure and simply submit a change request

Likewise, CR0897, submitted on August 1, 2002, was drafted by a group of CCP member CLECs that, in seeking additional functionality, asked BellSouth to "expand CAVE to support increased CLEC testing through multiple simultaneous versions of TAG API (pre-order and order), and EDI/LSOG (i e , LSOG2 & LSOG4) versions as well as Encore Releases (i e , Encore Release 10 4 as well as Release 10 5) " (*Id*)

After reviewing the request, BellSouth notified the CLECS that, at $8 0 million (a conservative estimate) the obviously excessive development cost precluded supporting the entire request (*Id*) However, as with CR0896, BellSouth compromised and asked the CLECs to allow the change request to be separated into two parts—one for the support of multiple versions of TAG API[52] and EDI in CAVE, and one for support of multiple Encore releases [53] In so doing, BellSouth supported a portion of the request, and in fact, BellSouth has already made available to CLECs the ability for CAVE to support all TAG APIs currently in production (*Id*) While BellSouth continues to support

[52] When XML replaces TAG API (phasing in between September 2003 and March 2004), CAVE will be equipped to provide equivalent capabilities for testing in XML that CLECs currently have for TAG API (*Id* at fn 10)

[53] This description of the various versions of system and interface software programming is somewhat complex While it provides the technical aspects of CR0897, it really says, in layman's terms, that the CLECs as a group use multiple interfaces, and even those using the same interfaces may be using different versions of that interface's software BellSouth's CAVE takes that reality into consideration, without punishing the CLECs for using multiple interfaces and software versions (*Id* at Fn 11)

two versions of EDI in production, the capability to support two versions in CAVE will not be available until November 2003 [54] (*Id*)

Due to the huge costs involved, BellSouth simply cannot support the second part of CR0897, and again, under CCP guidelines, cost is a legitimate reason for BellSouth to reject a CLEC change request For each Encore release to be supported in CAVE, a separate CAVE environment is required However, to mitigate some of the perceived problems, the Encore releases have a "backward compatibility" capability that allows CLEC regression testing in CAVE at any time during the 45-day testing window The current change request is adequate to satisfy the needs expressed by DeltaCom for testing multiple versions of EDI, and if DeltaCom claims that is not the case, it should follow the procedure that everyone else in the CCP follows submit a change request (*Id*)

Apparently, DeltaCom feels that May 2004 is too long to wait for implementation of CR0896, and DeltaCom lacks confidence that BellSouth will deliver the functionality as BellSouth has said it would DeltaCom ignores the fact that it will be able to see the user requirements, as explained below, 34 weeks prior to implementation of the functionality BellSouth is consistently following CCP guidelines, and, in the event BellSouth does not do so, DeltaCom can seek relief through the CCP

The CCP provides the opportunity for the CLECs to prioritize, by CLEC vote alone, the candidate change requests, and that vote, along with available capacity,

[54] BellSouth normally maintains two versions of EDI in production- as long as there are any CLECs that are using either of the versions All EDI CLECs currently are using Issue 9, and the previous version-Issue 7- has been removed from production to allow BellSouth to begin preparation for the next EDI version – ELMS6 – that will be implemented in industry Release 14 0 in November 2003 At that point, two versions of EDI will again be in production, and both will be available to test within CAVE (*Id* at fn 12)

helps to determine into which release a particular change request will be slotted (*Id*)[55] Although the timeframe for implementation does not meet DeltaCom's every desire, as recently as December 2002 the FCC has concluded "that BellSouth implements competitive LECs' change requests *in a timely manner* [and] as we have previously recognized, OSS changes such as these are difficult to implement" (*Id*)[56]

DeltaCom's concerns regarding whether BellSouth will deliver the feature as promised have no basis in fact and constitute nothing more than speculation In accordance with the norm in release management within the CCP, the draft user requirements for each release (including those of each feature within the release) are not due to the CLECs until a minimum of 34 weeks prior to the release implementation, and the final requirements are not due until 15 weeks prior to implementation (*Id*) There is absolutely no evidence suggesting that BellSouth is predisposed to arbitrarily or routinely changing feature requirements

With its multiple positive endorsements of BellSouth's testing environments, the FCC has found them to be sufficient [57] For example, in paragraph 187 of the *BellSouth Multistate Order*[58] the FCC found "that BellSouth's testing environments allow competing carriers the means to successfully adapt their systems to changes in BellSouth's OSS no party raises an issue in this proceeding that causes us to change this determination We are thus able to conclude, as we did in the *BellSouth Georgia/Louisiana Order*, that BellSouth's testing processes are adequate" (footnotes

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[55] At the quarterly prioritization meeting on December 12, 2002, CR0896 was ranked #8 out of 21 change requests that were prioritized (*Id* at fn 14)

[56] Citing FCC Order 02-331, BellSouth Florida/Tennessee Order, WC Docket No 02-307, at ¶116 (Footnotes omitted) (emphasis added)

[57] See e g , FCC Order No 02-260, WC Docket No 02-150, September 18, 2002, FCC Order No 02-331, WC Docket No 02-307, December 19, 2002

[58] FCC Order No 02-260, WC Docket No 02-150, September 18, 2002

omitted) Moreover, in its more recent BellSouth Florida/Tennessee Order, in paragraph 125 and footnote 424, the FCC further noted that BellSouth expanded and improved the CAVE test bed "to ensure that the CAVE environment mirrored the internal test environment and the production environment" [59] In that proceeding the FCC did not address any complaints about an allegedly deficient CAVE testing environment, since no such complaints were made

In summary, DeltaCom's "parity" argument on testing must fail

DIRECTOR MILLER So then you do not perform a testing capability that is not also available to DeltaCom in your opinion?

THE WITNESS (Mr Pate) That's correct (Pate, Tr p 428) (See also Pate, Tr p 384)

Accordingly, DeltaCom's attempt to convince the Authority that the CCP's prioritization process for this change request, or the timeframe for implementation of these change requests for enhanced functionality, is somehow not in accordance with the CCP should be dismissed The Authority should readily recognize that the submission of this issue for arbitration in this proceeding is inappropriate and rule that any inclusion of contract language related to this issue in the two-party interconnection agreement is completely unwarranted and contrary to the regional , industry CCP

Issue 67: May BellSouth shut down OSS systems during normal working hours (8 a.m. to 5 p.m.) without notice or consent from DeltaCom?

DISCUSSION

This entire issue is born out of one, single event in which BellSouth performed a systems upgrade during the weekend after Christmas last year Arbitration is not the appropriate forum for the resolution of this issue

[59] FCC Order No 02-331, WC Docket No 02-307, December 19, 2002

DeltaCom's request is a severe over-reaction to one incident, and the requested relief involves process and systems changes that affect all CLECs on a regional basis and should be addressed in the CCP (Pate, Tr p 381) In addition, BellSouth provides DeltaCom and all CLECs with OSS system availability times At certain times these systems are not available due to scheduled maintenance or upgrades These are normally performed during off peak hours CLECs are given notice as governed under CCP when OSS systems will not be available during normal availability hours (Conquest, Tr p 312)

Barring unforeseen events, BellSouth adheres to the operational hours and maintenance windows posted for its OSS a year in advance on its website (Conquest, Tr p 310, 315) There is no basis for the suggestion that BellSouth is predisposed to routinely or arbitrarily shut down the CLECs' – or, specifically DeltaCom's – access to BellSouth's OSS, either during working hours or otherwise As noted above, BellSouth is aware of a single event regarding the implementation of Release 11 0 in December 2002, but as explained thoroughly in Mr Pate's testimony, that single event simply reflects DeltaCom's inability to schedule its workforce when provided appropriate advance notification of justifiable changes to BellSouth's schedule, in accordance with the CCP process (*Id*)

BellSouth's wholesale support environment is heavily computer and software based, and it is not entirely unusual for circumstances to arise that require deviations from the posted schedule Usually, those circumstances are controllable When a deviation becomes necessary, BellSouth provides notification – in advance – to the

CLECs, advising them of the date, time, expected duration and reason for the change in schedule (Conquest, Tr p 315)

It is an unfortunate fact that systems also go down unexpectedly, and thus the resulting downtime cannot be anticipated The language proposed by DeltaCom is onerous and unrealistic, and it simply does not allow BellSouth the flexibility to deal with unexpected situations or to make prudent business decisions A system shut down such as the one that DeltaCom complains of is a rare event, and indeed DeltaCom admitted it is unaware of any other such instance

DeltaCom acknowledged that of the software releases implemented this year, ***none*** resulted in taking down CLEC OSS systems during normal business hours (Conquest, Tr p 315-316) Indeed, DeltaCom was unable to identify any other instance besides the one on December 27, 2002 where the systems have been taken down during business hours (Conquest, Tr p 310)

DeltaCom's proposed language reflects an over-reaction to that single event that was, in fact, no violation of BellSouth's obligation to provide nondiscriminatory access to its OSS, nor of its adherence to the posted system downtimes DeltaCom's proposed language would unnecessarily limit BellSouth's flexibility to deal with unexpected or high risk situations and hinder BellSouth's ability to make prudent business decisions that are in the best interest of the industry and the CLEC community as a whole (Pate Rebuttal p 17) If any interconnection agreement language is needed regarding this issue, the Authority should adopt BellSouth's proposed language, which allows flexibility for realistic operations, and protects the CLECs at the same time because it is a commitment to do what BellSouth already does

Regarding the one-time implementation of Release 11 0 that DeltaCom complains of, BellSouth did not shut down the OSS without the knowledge of, or the proper notification to, the CLECs In fact, the reason that BellSouth shut down the OSS at noon on December 27, 2002 was due to a decision made by the CLEC community on a CCP conference call on November 4, 2002 Ms Conquest, a DeltaCom witness testified that the CLEC community supported and wanted Release 11 0 and viewed it as a high priority (Conquest, Tr p 311) Given the complexity of Release 11 0, BellSouth and the CLECs discussed the merits of delaying the Release from the original December 7, 2002 implementation date, and whether it should be implemented during the weekend of December 28, 2002 (Option 1) or the weekend of January 19, 2003 (Option 2) (Pate Direct, pp 22-23) After the conference call, a CLEC vote favoring Option 1 determined that the implementation should occur during the weekend of December 28, 2002 – a weekend between the Christmas and New Year's holidays (*Id*)

Accordingly, on November 22, 2002, with more than the 30-day advance notification required by the CCP,[60] BellSouth issued Carrier Notification SN91083483 to confirm the new dates of the implementation of Release 11 0 and to notify the CLECs that the associated downtime of all electronic interfaces, would begin at 12 00 Noon EST on Friday, December 27, 2002 Furthermore, on December 6, 2002, the Carrier Notification was revised to add information about the downtime of the LCSC fax servers

[60] Ms Conquest acknowledged that DeltaCom itself received more than the 30-day advance notification Ms Conquest was not aware of a CLEC other than DeltaCom that asked that the implementation of Release 11 0 be delayed The CCP guidelines provide "Software Release Notifications will be provided 30 calendar days or more in advance of the implementation date" (page 47, Step 10, Item 3) If that release requires changes to system availability (as this release did), such information will also be provided in that notification (as it was for this release)

and telephone lines, and to push back the start of the systems downtime to 1 00 p m on the 27th (*Id*) Both notifications were sent well enough in advance to allow CLECs to plan properly for the downtime (*Id*)

The final result was a successful implementation of Release 11 0 It also should be noted that one additional aspect of the decision for the CLECs was the anticipated light CLEC activity during the holiday season (*Id*) Although DeltaCom claims that it was inconvenienced by this necessary release, if anything it was BellSouth's employees who were inconvenienced with the selection of that date by the CLECs, because BellSouth employees had to work during the holiday season to complete the successful release Moreover, as Ms Conquest had to admit, DeltaCom and the other CLECs benefit from the systems upgrades such as Release 11 0 (Conquest, Tr p 311)

The Authority should not require BellSouth to amend or in any way change the CCP guidelines regarding the scheduling and posting of interface and system downtime The Authority should find that the Change Control Process is the more appropriate forum in which to address this issue Alternatively, the Authority should adopt BellSouth's language, which reflects the fact that the process that currently exists, is approved, and most importantly – it works

IV. CONCLUSION

DeltaCom's case includes example after example of its expectation that others should carry its business burdens It wants other CLECs to bear the burden of subrogating their OSS changes in the CCP while DeltaCom's preferences go to the head of the line It wants the TRA to impose regulation on a non-regulated internet access product so it can reap the benefits of that product without having to invest in its

development It wants to be assured of the benefits of UNE-P profits but be insulated from any conceivable drawback of such a single-minded business plan It wants to be a "competitor" in Tennessee without investing in Tennessee, and it seems to see nothing troubling about a business in which it obtains services from BellSouth rather than using its own switch already in place Accommodating DeltaCom's expectation – that it should be able to shift all its ordinary business burdens and costs to others – is not good for competition It's good for DeltaCom and bad for building sustainable competition in Tennessee

For all the reasons discussed above, the Authority should adopt BellSouth's positions on each of the issues in dispute BellSouth's positions on these issues are reasonable and consistent with the requirements of the 1996 Act, which cannot be said about the positions advocated by DeltaCom

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2003, a copy of the foregoing document was served on the parties of record, via the method indicated

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