BEFORE THE

TENNESSEE REGULATORY AUTHORITY

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**

POST-HEARING BRIEF OF ITC^DELTACOM COMMUNICATIONS, INC.

COMES NOW, ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), and submits its Post-Hearing Brief. ITC^DeltaCom respectfully requests the Tennessee Regulatory Authority ("TRA") resolve the remaining issues in this arbitration consistent with the discussion below.[1]

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") is a conflicted supplier. Its business relationship as a wholesale provider to its customer ITC^DeltaCom is peculiar and atypical. BellSouth is ITC^DeltaCom's wholesale supplier of essential facilities and services within the BellSouth Tennessee territory. Simultaneously, BellSouth is the dominant retail competitor against ITC^DeltaCom for local exchange customers in Tennessee. This unusual relationship is

[1] The arbitration petition originally contained 71 unresolved issues (some with subparts). The parties successfully resolved a majority of the issues. The Commission need only resolve the remaining open issues addressed in this brief: Issue Nos. 2(a-c), 9, 11(a), 21, 25, 26, 36, 37, 44, 46, 47, 56, 57, 58, 59, 60, 62, 63, 64, 66, and 67.

The parties deferred Issues 30, 31, 33 and 34 pending issuance of the Triennial Order by the Federal Telecommunications Commission ("FCC"). The stipulated terms of the deferral were stated on the record. The subject matter covered by those issues will be the topic of negotiations between the parties. If these negotiations are unsuccessful, either party may petition the Commission for resolution within 90 days of the date of the Triennial Order. The Triennial Order was issued on August 21, 2003 and the parties currently are trying to negotiate resolution of these four issues.

the reason Congress obligated state regulators, including the TRA, to arbitrate disputes under the Telecommunications Act of 1996 ("Act").

In its Brief, BellSouth will not even suggest that the TRA should consider what is in the best interest of Tennessee consumers. Rather, BellSouth will ask the TRA to decline to exercise any discretion or judgment and to order only that which is minimally prescribed by the Act. BellSouth does not argue that the TRA is pre-empted or without authority to grant the relief sought by ITC^DeltaCom – because it cannot. By its very terms, BellSouth's doctrine ensures that Tennessee consumers will be deprived of competition allowed by law. Moreover, BellSouth is asking this TRA to turn its back on potential benefits allowed by state law and contemplated by regulations and orders of the TRA.

II. THE SIMPLE STANDARD THE AUTHORITY SHOULD APPLY

Many of the issues in dispute involve complex engineering or economics. Nonetheless, all can be resolved by application of a simple three-part standard. **The TRA must determine whether the relief sought is: (1) technically feasible; (2) permissible (*i.e.* not expressly prohibited) under the law; and (3) in furtherance of competition ultimately benefiting Tennessee's local exchange consumers.** Based on the evidence of record, applying this simple standard, the TRA should resolve the remaining open issues as urged by ITC^DeltaCom below.

III. REMAINING OPEN ISSUES

Issue 2: Directory Listings

It is Critical that the Directory Listings of Tennessee Consumers be Accurate.

ITC^DeltaCom provides its end user customer listings to BellSouth for inclusion in the local phone directory. Prefiled Direct Testimony of Mary Conquest ("Conquest Direct"), p. 2. Some of these listings must be manually keyed by BellSouth personnel. All iterations are not viewable by ITC^DeltaCom. Id. at 3 BellSouth then provides this information to its affiliate,

BellSouth Advertising and Publishing Company ("BAPCO"). ITC^DeltaCom is seeking an electronic feed of these listings prior to publication so that it can ensure the accuracy of its customers' listings. BAPCO's website allows ITC^DeltaCom only to view a single listing at a time – and then only in the "top 100" directories in the region, which do not include a majority of Tennesseans. Transcript of August 27-28, September 12, 2003 Hearing, pages 226, 244-245.[2] BellSouth should be required to provide these listings electronically either by: (1) providing a list of only the ITC^DeltaCom customers; or (2) providing the entire electronic list subject to a strict protective agreement that limits ITC^DeltaCom's usage and access to such records for validation purposes only. BellSouth admitted that compliance with ITC^DeltaCom's request is technically feasible and is not prohibited by law. (T-615).

BellSouth attempts to distance itself from BAPCO and suggests that ITC^DeltaCom's recourse is only with its affiliate BAPCO. This argument fails because ITC^DeltaCom must provide its listings to BellSouth and does not provide them directly to BAPCO. The bottom line is that BellSouth is responsible for directory listing information. The TRA cannot ignore BellSouth's position in the process as urged by BellSouth. BellSouth is playing a shell game with ITC^DeltaCom, and the losers are Tennessee consumers whose listings suffer from an undisputed higher risk of inaccurate directory listings.

Incredibly, companies who provide retail directory listings can obtain the full electronic version of directory listings through a tariffed offering to publishers. (T-242-243). Thus, the full set of listings with service provider information is available electronically from BellSouth to third party publishers. Instead of being willing to provide this information to ITC^DeltaCom as requested, BellSouth argues that ITC^DeltaCom should simply access individual Customer

[2] The hearing transcript citation format hereinafter will be as follows: "(T-[page number])."

Service Records ("CSRs"). This argument is a red herring. BellSouth fails to mention that the CSR will not reflect any BellSouth-created omissions or corrections or alterations made by BAPCO. There are at least six points of errors that can occur during this process, enhancing the likelihood of listing errors on the BellSouth/BAPCO side. (T-244). ITC^DeltaCom's experience with BellSouth in this regard is particularly confounding, given that another ILEC already provides an electronic feed of directory listings in the manner ITC^DeltaCom seeks. Despite BellSouth's admission that it is important for Tennessee consumers to have accurate listings (T-613), it is not disputed that BellSouth's refusal to provide this data electronically increases the risk of inaccurate listings and consumer dissatisfaction.[3]

In the parallel arbitration between the parties before the North Carolina Utilities Commission ("NCUC"), the NCUC Staff recently recommended that BellSouth be required to "take the necessary steps to ensure that BAPCO provides ITC with an electronic version of galley proofs." NCUC Staff Recommendation, NCUC Docket No. P-500, Sub 18, October 10, 2003 ("NCUC Staff Recommendation"), p. 8. The NCUC Staff also noted that the responsibility for providing directories to end users lies with BellSouth, and concluded, "[t]he fact that BellSouth chooses to contract with BAPCO to publish and distribute its directories should not absolve BellSouth of its obligations with regard to directories." Id. This reasoning is sound and should be followed by the TRA.

[3] ITC^DeltaCom is willing to pay a reasonable, cost-based rate to receive the listings electronically. BellSouth has often chided ITC^DeltaCom for not filing a New Business Request ("NBR") for electronic listings. In response, ITC^DeltaCom ultimately filed an NBR on July 29, 2003, only to have BellSouth deny it on August 21, 2003, reverting to its BAPCO shell game. (T-242). The Commission should require that the listings be provided electronically until BellSouth produces a cost study and obtains Commission approval of a rate.

Issue 9: OSS Interfaces

When Possible, Contract Language Regarding OSS Should be Unambiguous.

The TRA should order the parties to include the following language in the interconnection agreement:

> BellSouth will provide to ITC^DeltaCom access to all functions for pre-order that are provided to the BellSouth retail groups. Systems may differ, but all functions will be at parity in all areas, i.e., operational hours, content performance. All mandated functions, i.e., facility checks, will be provided in the same timeframes in the same manner as provided to BellSouth retail centers.

This language is more clear than the language promoted by BellSouth. BellSouth wants either no language or a vague reference to nondiscriminatory access. ITC^DeltaCom seeks more definition to avoid future disputes. Limiting the contract to general recitations of the Act is not particularly useful in governing the operations of the parties. BellSouth admitted as such. (T-408). One critical purpose of an interconnection agreement is to give application to the Act. Indeed, the parties are before the TRA in part because the language of the Act is not sufficiently precise to resolve certain operating issues.

The language put forward by ITC^DeltaCom acknowledges that BellSouth should be required to provide interfaces for Operational Support Systems ("OSS") that are equal to that enjoyed by BellSouth's retail division. BellSouth takes the position that because the TRA gave it a favorable Section 271 recommendation, it should not have to include ITC^DeltaCom's proposed language. BellSouth argues that because of the Section 271 cases, ITC^DeltaCom's proposed language is "additional and unessential . . . ." (T-382). Reliance on the 271 recommendations assumes the telecommunications industry is static. BellSouth must agree that systems change with new technology and different demands.

BellSouth argues only that ITC^DeltaCom's language is superfluous – in other words, that the principles embodied in ITC^DeltaCom's request are already covered by other sections of the interconnection agreement. BellSouth has yet to state a substantive objection to the language proposed by ITC^DeltaCom. ITC^DeltaCom's language will more explicitly ensure that ITC^DeltaCom will have access to the same OSS functions and information provided in the same timeframes and manner as those provided to BellSouth's retail sales division. Parity and nondiscriminatory access demand no less.

BellSouth proffered an almost incomprehensible argument that ITC^DeltaCom's language seeks to allow access to "functionalities" BellSouth is not required to provide such as credit information or customer profiling. (T-403). Ironically, BellSouth disguised its argument that ITC^DeltaCom's language is confusing and ambiguous with a befuddling distinction between "functions" and "functionalities." (T-404-406). BellSouth admitted that it is required to provide to ITC^DeltaCom "substantially same time and manner for those where there's a retail analog." (T-412). ITC^DeltaCom's language accomplishes exactly that. Again, despite BellSouth's opinion that ITC^DeltaCom's language is "unnecessary," the language is consistent with the law and will provide clarity and definition to the relationship between the parties. Other than its attempts to confuse the issue in order to preserve only the broadest generalities in the interconnection agreement, BellSouth offers no substantive reason to reject ITC^DeltaCom's proposed language.

Issue 11(a): Access to UNEs (compliance with state law)

The Interconnection Agreement Should Refer to State Law.

ITC^DeltaCom seeks inclusion of language that requires compliance with state law. A state law reference is particularly appropriate in Tennessee because of the pro-consumer and pro-competitive laws and regulations adopted by the Tennessee legislature and the TRA. See

T.C.A. §65-4-123 (2003). In the face of this important state authority, BellSouth's opposition to the simple request to include language requiring compliance with state law is dismissive of the TRA's authority, unsupported by any good policy, and hypocritical in light of BellSouth's reliance on state law with regard to other arbitration issues. (See discussion of Issue No. 62 – Back-billing, *infra*).

The interconnection agreement should specify that BellSouth's rates, terms, and conditions for network elements and combinations of network elements must be compliant with both state and federal rules and regulations. State commissions are given significant authority over interconnection agreements, as evidenced by the existence of this docket. As long as the decisions of the TRA are not inconsistent with, and do not frustrate the implementation of, Section 251 of the Act, they will not be preempted and will remain binding on BellSouth and ITC^DeltaCom.

BellSouth will cite language in the FCC's recent Triennial Review Order ("Triennial Order") indicating that states cannot create new UNEs or re-establish UNEs that the FCC eliminated, and will argue that this makes state law irrelevant. See Triennial Order, ¶¶ 194-195. This is wrong for at least two reasons grounded in state law.[4] First, Section 252(e)(3) of the Telecommunications Act clearly preserves states' authority to establish or enforce other requirements of state law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements. Furthermore, in several instances, the Triennial Order encourages state commissions to engage in arbitration hearings or other proceedings to ensure that unbundled network elements are available to competitive carriers. See Triennial Order, ¶¶ 385, 638. Second, state law still applies to govern the parties'

[4] Moreover, as described in the section herein relating to unbundled local switching, Section 271 of the Act provides independent obligations and authority.

relationship. The TRA has significant independent state authority over telecommunications services and federally mandated authority over the interconnection agreement even if certain limitations are placed on that authority by pronouncements of the FCC.

BellSouth's steadfast refusal to acknowledge the TRA's authority without any apparent justification is troubling to say the least. BellSouth's position also is hypocritical, as BellSouth makes an argument (albeit a flawed one) with regard to backbilling (Issue 62 – see *infra*) that is entirely dependent upon state law. BellSouth has confirmed its reliance on state law on the backbilling issue. (T-618-619). Its audacity was further illustrated during the hearing when it subsequently gave a less than enthusiastic endorsement of the TRA's ability to properly carry out its role with regard to telecommunications issues:

> Q: You're not suggesting that the Tennessee Regulatory Authority would, pursuant to authority under Tennessee law, do anything that's inconsistent with the Telecommunications Act, would you?
>
> A: I'm not suggesting that they would *intentionally* do that, but those things are always subject to interpretation . . .

(T-620-621) (emphasis added). BellSouth's argument borders on insulting. The TRA should not countenance BellSouth's hypocrisy on application of state law and its lack of faith in the TRA's ability to act consistently with federal law. The TRA should order that the interconnection agreement include language that requires compliance with Tennessee state law.

Issue 21: Dark Fiber Availability

Dark Fiber Should be Available at Any Technically Feasible Point in the Same Manner that Dry Fiber is Made Available.

ITC^DeltaCom seeks access to dark fiber at any technically feasible point, not just at ITC^DeltaCom collocation sites. BellSouth's refusal is based completely on the parsing of words and twisting of the FCC's rules. At bottom, BellSouth's argument asks the TRA to

endorse a disparity between the parties regarding access to fiber that is easily called into service for the benefit of Tennessee consumers.

ILECs like BellSouth regularly deploy fiber in segments with planned "breaks" in the path where larger backbone cable meets smaller distribution or lateral cables that connect to specific customer locations or remote terminals. Prefiled Direct Testimony of Steve Brownworth ("Brownworth Direct"), p. 10. BellSouth assures itself flexibility by placing "splice cases" at these points so that it can splice strands of fiber together to complete a path between two locations. Id. Extra fiber is left in place and unconnected to address future demand. The issue is whether BellSouth will provide access to this "unlit" fiber at TRA-approved cost-based UNE rates at locations other than ITC^DeltaCom's collocation spaces within BellSouth central offices, such as at other carriers' collocation sites and in nearby access points (where fiber can be spliced) like manholes. (T-547). BellSouth refuses to accommodate ITC^DeltaCom in this regard, but does not suggest it is prohibited from doing so.

BellSouth admitted that providing dark fiber as requested by ITC^DeltaCom is technically feasible. (T-550). Of course, BellSouth could not deny this since it has already provided dark fiber to ITC^DeltaCom at non-collocation sites in the past at cost-based rates. (T-550). Even after parsing words in the FCC's Rules, BellSouth argues only that it is not *required* by the Act to provision dark fiber as requested by ITC^DeltaCom and seeks language that will allow it to stop doing so despite the fact that ITC^DeltaCom is willing to pay for it and that it will benefit Tennessee consumers.[5]

[5] ITC^DeltaCom wants to pay for the fiber at cost-based rates as well as any special construction needed for interconnection. Moreover, BellSouth offers unlit fiber or "dry fibers" in the manner sought by ITC^DeltaCom in its FCC Tariff. BellSouth's intransigence on this issue seems solely based on its desire to avoid Commission-approved TELRIC rates for monopoly elements at its facilities in Tennessee.

BellSouth cannot argue that providing ITC^DeltaCom with access to dark fiber at non-collocation sites is prohibited by law or contrary to good public policy. Indeed, BellSouth admits that it has provided ITC^DeltaCom with dark fiber at splice points, such as a manhole, rather than at ITC^DeltaCom's collocation site in the past.[6] It also admitted that the current interconnection agreement does not contain the limitation BellSouth seeks in this case. (T-544). BellSouth argues only that "BellSouth's definition of 'dark fiber' comports with the FCC's definitions, and those rules limit dark fiber to the provision of unbundled loops and unbundled transport." (T-540). BellSouth cites to 47 C.F.R. 51.319(a)(1) and 47 C.F.R. 51.319(d)(1) as support for its position that it is only required to make dark fiber loops available at the demarcation point associated with ITC^DeltaCom's collocation arrangements within BellSouth central offices.[7] In essence, BellSouth argues that the "loop" definition provided for by the FCC does not include fiber without electronics on either end – that is, not connected to a central office of BellSouth or ITC^DeltaCom POP.

BellSouth's position, however, ignores and contradicts the FCC's rules codified at 47 C.F.R 51.311 (d), 51.321(a)–(c), and 51.307(a). The very rule cited by BellSouth, Rule 51.319, also states that BellSouth must offer nondiscriminatory access in accordance with Rule 51.311 and Section 251(c)(3) of the Act. Rule 51.311(d) provides that "previous successful access to an unbundled element at a particular point in a network, using particular facilities is substantial evidence that access is technically feasible at that point..." In addition, Rules 51.321(a)–(c) provide that BellSouth is required to provide any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point. Director Jones

[6] BellSouth indicated that it did not intend to tear down those existing arrangements. (T-544).

[7] BellSouth has existing language in its interconnection agreement with NewSouth explicitly stating that dark fiber shall be provided at any technically feasible point. Brownworth Direct, p. 11. Despite this clear language, BellSouth will still rely on its tortured and defective legal argument that what ITC^DeltaCom is seeking is not really "dark fiber."

addressed BellSouth's obligation to provide interconnection at technically feasible points in response to BellSouth's legal argument:

> You don't get that from the words on their face, though? You get that based on your position on this particular issue? The words on their face – at the point must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible, and – I mean, is there something else that suggests that the FCC was not considering access of this type other than these words on their face?

(T-578). BellSouth responded in the only way it could – by restating its tortured legal arguments. (T-578-579). The FCC rules and BellSouth's previous successful provisioning of dark fiber to ITC^DeltaCom at non-collocation sites weighs heavily in favor of requiring such provisions in the future.

BellSouth's overwrought suggestion that it is being "punished" if it is required to provide dark fiber to ITC^DeltaCom at those locations in the network where it has previously provided such access is based only on BellSouth's newly found desire to frustrate ITC^DeltaCom's ability to compete and provide service to its customers. (T-540). In fact, requiring BellSouth to continue providing ITC^DeltaCom dark fiber at technically feasible points levels the playing field because BellSouth can easily call this fiber into service for itself. BellSouth is legally required pursuant to Rules 51.311(d), 51.321(a)-(c), and 51.307 to provide access to unbundled elements at any technically feasible point on terms and conditions that are just, reasonable and nondiscriminatory. BellSouth's provision of dark fiber at a manhole for ITC^DeltaCom is substantial evidence that it is technically feasible to provide dark fiber at locations other than a collocation site. If ITC^DeltaCom orders dark fiber and requests that the dark fiber be provided at a manhole rather than ITC^DeltaCom's collocation site, BellSouth will refuse that order and

demand that ITC^DeltaCom place the order for fiber pursuant to BellSouth's access tariff and pay access rates. This is entirely unjustified.

This issue also is one where state law can be dispositive. Each LEC is required to provide access to and interconnection with its facilities and this includes all or portions of such services as needed to provide local exchange services. The TRA can resolve this issue by ordering that TELRIC rates for dark fiber are just and reasonable. See T.C.A. § 65-5-201 (2003).

Recently, in the BellSouth region, the NCUC Staff recommended that BellSouth's unreasonable position regarding dark fiber be rejected. In analyzing the precise issue before the TRA, in the ITC^DeltaCom arbitration, the NCUC Staff concluded that "BellSouth should be required to allow ITC to access unused dark fiber facilities at any technically feasible point in BellSouth's network, not merely at ITC's collocation sites located in BellSouth's wire centers." NCUC Staff Recommendation, p. 13. The NCUC went on to recommend defining "technically feasible point" as including "any particular premises or point on an ILEC's network where interconnection or access to unbundled network elements has previously been successful." Id.

Other state regulatory commissions have reached the same conclusion that ITC^DeltaCom asks the TRA to reach. Many states have recognized that an ILEC's refusal to splice and terminate dark fiber for CLECs violates ILECs' unbundling obligations and unreasonably limits the amount of unbundled dark fiber available to CLECs. SBC, for example, has argued before state commissions in California, Indiana, and Texas that because un-terminated fiber is not connected to equipment at the customer location at the termination point, it need not be unbundled. The California Public Utilities Commission ("CPUC") rejected SBC's contention noting that it "is an attempt to define away its legal obligations" and that the California PUC did "not want to set a rule in place that would allow [SBC] to evade its

obligations to unbundle dark fiber for CLECs, as mandated by the FCC." *Application by Pacific Bell Telephone Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access TransmissionServices, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A.01-01-010, Final Arbitrator's report Cal. PUC, July 16, 2001 at 130, 139.

SBC made similar assertions in two cases before the Texas Public Utilities Commission ("Texas PUC"). In the first case, the Texas PUC held:

> SWBT incorrectly interprets the FCC's intention. SWBT states that, consistent with the FCC's mandate in Paragraph 328, it is only obligated to provide dark fiber as a UNE if the fiber connects two points in SWBT's network. The Arbitrators, however, agree with CoServ's argument that "connectivity does not equal termination." Consequently, the Arbitrators find that the UNE Remand Order discussed connectivity in the context of distinguishing dark fiber that was already "in place and called into service" from the example of unused copper wire "stored in a spool in a warehouse."

Docket 23396, *Petition of CoServ, Inc. for Interconnection Agreement with SWBT*, Arbitration Award at 139, TX PUC, April 17, 2001.

In a subsequent case, the Texas PUC ruled that "unterminated and unspliced fibers should be made available to [the CLEC] for use as UNE dark fiber," and that "[SBC] has an obligation to provide that unspliced UNE dark fiber to [the CLEC] and splice it upon request." *Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone*, Docket No. 25188, at 139, TX PUC, July 31, 2002 ("EPN Texas Revised Arbitration Award"). The Texas PUC explained its decision by noting that it found "no reason to distinguish between fiber that is deployed and spliced and fiber that is deployed and un-spliced; doing so would limit [CLECs'] ability to request UNE dark fiber." EPN Texas Revised Arbitration Award, at 139.

Several other state commissions[8] including those in the District of Columbia,[9] Indiana,[10] Massachusetts, and Rhode Island[11] have examined the issue and have ordered ILECs to splice dark fiber for requesting CLECs. For example, the Massachusetts Department of Telecommunications and Energy ("MADTE") dismissed the arguments raised by Verizon regarding the technical feasibility of splicing dark fiber and concluded "that it is *technically feasible* and *consistent with industry practice* to lease dark fiber **at splice points.**"[12] In fact, the MADTE concluded that Verizon itself resplices "from time to time" and that those "splice points are designated for [Verizon], itself, to use as junction points in its network."[13] Accordingly, the MADTE saw "little distinction between a splice performed on behalf of [Verizon] and that performed for another carrier" and ordered Verizon to provide access to dark fiber at any technically feasible point including existing splice points as well as hard termination points.[14]

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[8] Most of these state decisions are cited in the FCC's recent Triennial Review Order in footnotes 1189, 1190, 1191, and 1934.

[9] *TAC 12 – Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Washington, DC, Inc.*, Order No. 12286, Order on Reconsideration, (DC PSC Jan. 4, 2002) ("*D.C. Dark Fiber Order*") at ¶ 62, 87.

[10] *Re: AT&T Communications of Indiana, Inc.,* Cause No. 40571-INT-03, Slip Opinion, at 79, 129-130 (Nov. 20, 2000) ("Indiana Order").

[11] *In re. Verizon-Rhode Island's TELRIC Studies - UNE Remand,* Docket No. 2681, Report and Order, at 19, 22-23 (Rhode Island PUC, Dec. 3, 2001) *("RI Dark Fiber Order")* ("Verizon is required to splice dark fiber at any technically feasible point on a time and materials basis, so as to provision continuous dark fiber through one or more intermediate central offices without requiring the CLEC to be collocated at any such offices."); Jan. 29, 2002 Tr. at 18:21-186:3.

[12] *New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts,* Decision D.P.U./D.T.E. 96-83, 96-94-Phase 4-N, at 33 (Mass. DTE Dec. 13, 1999) ("We impose no collocation requirement ... it is technically feasible and consistent with industry practice to lease dark fiber at splice points.") ("Mass. DTE Phase 4N Order") (emphasis added); *New England Telephone and Telegraph Company d/b/a NYNEX, et al.*, Decision D.P.U. 96/73-74, 96/80-81, 96-84-Phase 4-R Order at 4-5 (Mass. DTE Aug. 17, 2000), 2000 Mass. PUC Lexis 6..

[13] *New England Telephone and Telegraph Company d/b/a NYNEX,* Decision D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3, at 48-49 (Mass. DTE Dec. 4, 1996) *("Mass. DTE Phase 3 Order").*

[14] *Mass. DTE Phase 3 Order*, at 48.

The MADTE required Verizon to perform splicing at the CLEC's request in order to make a fiber strand "continuous by joining fibers at existing splice points within the same sheath."[15] The FCC, in its Triennial Review Order, cited this state decision in footnote 1190 and clearly stated that the splicing of cable is one of the modifications ILECs must perform on behalf of CLECs.

The District of Columbia Public Service Commission ("DC PSC")[16] observed that the Indiana Commission and MADTE permit access to dark fiber at splice points[17] and in light of this precedent and other analysis, concluded that Verizon must provide access to dark fiber at splice points.[18] The Rhode Island PUC, following the lead of the MADTE, ordered Verizon to "*splice* dark fiber at any technically feasible point so as to make dark fiber continuous through one or more intermediate offices *without requiring the CLEC to be collocated at any such intermediate offices*."[19]

Referring to these decisions, the FCC in its Triennial Order recognized the efforts of the state commissions to address ILECs' attempts to restrict access to dark fiber:

> We note that many state commissions have directly addressed these issues through arbitrations and other proceedings. For example, states have addressed the pre-ordering and ordering processes including determinations about what information incumbent LECs must make available about the location of dark fiber, the extent to which incumbent LECs must allow or perform splicing and other preparatory work, and access to dark fiber transport that traverses through intermediate central offices where

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[15] Mass. DTE No. 17, Miscellaneous Network Services, Part B, § 17.1.1.A.1; *Mass. DTE Phase 4N Order*, at 33; *D C Dark Fiber Order*, at ¶ 57.

[16] *TAC 12 – Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Washington, DC, Inc.*, Order No. 12286, Order on Reconsideration, at ¶ 57 (DC PSC Jan. 4, 2002) ("*D.C. Dark Fiber Order*").

[17] *D.C. Dark Fiber Order*, at ¶ 61.

[18] *D.C Dark Fiber Order*, at ¶ 62, 74, 87.

[19] *In re: Verizon-Rhode Island's TELRIC Studies – UNE Remand*, Docket No. 2681, Report and Order, at 19, 22-23 (Rhode Island PUC, Dec. 3, 2001) (emphasis added).

> the competitive LEC is not collocated. *We recognize the hard work of the state commissions to make dark fiber meaningfully available and endorse such efforts here.*

Triennial Order, ¶ 385 (footnotes omitted) (emphasis added). The FCC went on to state:

> The requirement we establish for incumbent LECs to modify their networks on a nondiscriminatory basis is not limited to copper loops, but applies to all transmission facilities, including dark fiber facilities. For example, several state commissions have rejected incumbent LEC attempts to deny competitive access to dark fiber where a competitive LEC seeks access to the network in the same manner as the incumbent LEC [footnote omitted]. Incumbent LECs must make the same routine modifications to their existing dark fiber facilities for competitors that they make for their own customers – including the work done on dark fiber to provision lit capacity to end users. Although the record before us does not support the enumeration of these activities in the same detail as we do for lit DS1 loops, *we encourage state commissions to identify and require such modifications to ensure nondiscriminatory access.*

Triennial Order, ¶ 638 (emphasis added).

In light of these facts, the Commission should adopt the best practices regarding splicing and termination of dark fiber developed by state commissions around the country and endorsed by the FCC. The Commission should allow ITC^DeltaCom to access dark fiber at any technically feasible point in its network, even if providing such access would require BellSouth to undertake fiber splicing for ITC^DeltaCom. Furthermore, ITC^DeltaCom is willing to pay special construction charges when construction is required. The pricing for the fiber itself should be at UNE rates.

Issue 25: <u>Provision of ADSL where ITC^DeltaCom is Local UNE-P Provider</u>

Tennessee Consumers Should be Given Choice.

BellSouth should continue providing end users with its Fast Access DSL service when such end users choose ITC^DeltaCom as their voice provider and ITC^DeltaCom serves the customer via UNE-P. BellSouth's policy is anticompetitive and denies choices to Tennessee

consumers. Further, BellSouth's policy provides a disincentive for customers who want to switch to UNE-P providers. The TRA should order BellSouth to continue to offer Fast Access DSL service to CLEC UNE-P customers.

DSL is a high speed Internet service that allows Tennessee customers to access the internet and use telephone voice services simultaneously without the need to obtain a separate line. The upper spectrum of a copper loop is used to carry the DSL internet signal while the voice signal is carried on the lower spectrum of the loop at the same time. BellSouth's retail consumer DSL product is called Fast Access. BellSouth wants the Commission to allow it to refuse to provide its Fast Access DSL service to customers who are served via UNE-P by a CLEC of the customer's choosing. Indeed, even where a customer is currently served by BellSouth and has Fast Access service, BellSouth desires to undergo the work and expense to disconnect that service if the customer chooses an alternative UNE-P local provider.

The anticompetitive nature of BellSouth's argument is plain. The only reason BellSouth would want to refuse to provide FastAccess to customers who choose a competitor is because that will prevent customers from choosing voice providers other than BellSouth, even though the customer otherwise would have preferred to do so. BellSouth ultimately finds it advantageous to refuse service to customers—although BellSouth may be risking disconnection—thus, it must fully be *expecting* to retain both the DSL and voice service by daring the customer to choose a competitive voice provider. Apparently, BellSouth is willing to risk receiving only the UNE-P wholesale revenue on a line in the hope that it will retain both the customer's retail voice and its DSL revenue. BellSouth is playing a game of chicken in order to thwart the development of local competition.

If allowed, BellSouth's DSL policy would be a classic tying violation. Under antitrust law, a tying arrangement is "an agreement by a party to sell one product [the "tying" product] but

only on the condition that the buyer also purchases a different (or tied) product . . . " *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Thus, three elements of a tying claim may be distilled: (1) there must be a tying and a tied product; (2) the sale of the tying product must be conditioned on the sale of the tied product; and (3) the tying arrangement must be anticompetitive. BellSouth's DSL policy would satisfy each of these three elements. First, BellSouth would offer a tying (or desired) product – its DSL product—and also a tied product – its retail voice service. Second, BellSouth would condition the sale of its DSL service on consumers' purchase of BellSouth's retail voice service. Third, BellSouth's tying scheme would be anticompetitive.[20]

It is technically feasible for BellSouth to provide its DSL service to a customer served via UNE-P by a CLEC. (T-625). This was amply demonstrated by the fact that ITC^DeltaCom had UNE-P customers using the BellSouth Fast Access service for several months until BellSouth sent a notice to ITC^DeltaCom (and other CLECs) stating that either BellSouth was going to disconnect the customers' DSL service or ITC^DeltaCom would have to return those customers to BellSouth for local voice service. Conquest Direct, p. 8; Exhibit B thereto. ITC^DeltaCom

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[20] BellSouth's tying arrangement is anticompetitive for at least three reasons, as outlined by Ms. Conquest in her testimony. (T-328-330). First, BellSouth's policy essentially forces potential competitors to enter two markets simultaneously in order to meet demand for high speed internet services. In other words, a CLEC would have to develop a DSL product at the same time it is trying to penetrate the BellSouth stranglehold on the local exchange market. The result is a disincentive for competition and a contradiction of the policy expressed in Paragraph 56 of the FCC's Line Sharing Order: "[r]equiring that competitors provide both voice and xDSL services, or none at all, effectively binds together two distinct services that are otherwise technologically and operationally distinct. Such bundling . . . will not drive additional investment dollars toward voice [services], because it does not make voice [services] more lucrative . . . ."

Second, BellSouth's policy allows it to "cherry pick" the most attractive customers from the mass market, thereby reducing the profitability of entry by would-be competitors. ITC^DeltaCom's experience is that there is a correlation between DSL purchasers and the more profitable voice service customers. BellSouth's policy therefore intimidates these highly desirable customers from exercising the full panoply of local voice services they might otherwise consider.

Finally – and most critically for Tennessee consumers – BellSouth's policy limits the choices consumers can make with regard to their telecommunications services. By refusing to provide its DSL product to CLEC UNE-P customers, BellSouth communicates that negative consequences befall those who exercise their rights of choice. This is entirely contrary to the very basis of telecommunications deregulation and competition. The Commission should reject BellSouth's illegal tying arrangements and reaffirm the rights of Tennessee consumers to choose their providers with regard to both internet and voice services.

has made it clear that it will give BellSouth the use of the upper portion of the loop for free. (T-232). BellSouth admitted that it does not subsidize the cost of FastAccess with revenues from standard voice service, and further, that there are costs involved with disconnecting customers' DSL service. (T-626-627). BellSouth's DSL product is presumably priced above its costs, meaning that BellSouth is foregoing positive revenues simply to deny service to UNE-P customers. BellSouth is using its policy to impede competition in the Tennessee local exchange market by leveraging its DSL product to intimidate customers from choosing alternative voice providers.

In the most recent decision in the Bellsouth region regarding this very issue, on October 21, 2003, the Georgia Public Service Commission ordered BellSouth to cease and desist its policy of denying or terminating Fast Access DSL service to customers who are served by CLEC UNE-P providers. *Complaint of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. Against BellSouth Telecommunications, Inc.*, Georgia PSC Docket No. 11901-U. The Georgia Commission adopted its Staff's recommendation that declared BellSouth's policy to be not only a tying violation but also an anticompetitive practice in general.

Other commissions in the BellSouth region also have rejected BellSouth's policy as anticompetitive. The Louisiana Public Service Commission ("LPSC") ruled that BellSouth would be required to provide its DSL service over CLP UNE-P loops. *In re: BellSouth's provision of ADSL service to end-users over CLEC loops Pursuant to the Commission's directive in Order U-22252-E*, Order No. R-26173, Docket R-26173 (Jan. 24, 2003) ("Louisiana Order"). There the LPSC stated that "the Commission's policy is to support competition in all telecommunications markets, including local voice service. The anti-competitive [e]ffects of BellSouth's policy are at odds with the Commission's, and thus should be prohibited." *Id.* at 6.

In the LPSC's Clarification Order issued in the same docket, the Commission stated that its order applies to customers receiving UNE-P service, regardless of whether the customer has FastAccess or DSL service from an ISP carrier using BellSouth's wholesale DSL product, and regardless of whether the customer obtains DSL service before or after migrating the service to the CLEC. *In re: BellSouth's provision of ADSL service to end-users over CLEC loops Pursuant to the Commission's directive in Order U-22252-E*, Order No. R-26173-A, Docket R-26173 (April 4, 2003) ("Louisiana Clarification Order"). The Kentucky Public Service Commission also has found BellSouth's DSL policy unlawful. *In re Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252*, Order, Case No. 2001-00432 (Kentucky PSC, October 15, 2002) ("Kentucky Clarification Order") (requiring BellSouth to provide wholesale DSL service to requesting ISPs when the end user customer chooses a UNE-P CLEC).

BellSouth argues that CLECs can retain DSL service for their customers by either serving the customer through resale or by partnering with other CLECs offering DSL. Resale has not proven to be a viable mass market entry strategy anywhere in the United States. Even if it had, ITC^DeltaCom's services to a resale customer are limited to the features and services provided by BellSouth on that line. This creates technical limitations and does not allow ITC^DeltaCom the flexibility to provide the high level of service its customers demand. As for partnering with other CLECs, most CLECs who offer DSL simply resell BellSouth's DSL product or lack an equivalent service footprint to BellSouth's service territory. Indeed, BellSouth's long-standing monopoly status in the voice market gave it a significant head start and a ready-made market in which to sell its Fast Access product. The fact remains that no CLEC is similarly situated to

BellSouth in this regard, and BellSouth should not be allowed to dictate the entry strategies of its competitors by applying an arbitrary, anticompetitive and anti-consumer policy.

Finally, although the Triennial Review Order does not address BellSouth's retail DSL service, the Order does adapt new rules under which a CLEC "may...combine...UNEs or combinations of UNEs to wholesale services (e.g., switched and special access services offered pursuant to tariff)." TRO at p. 579.[21] BellSouth's wholesale DSL service is classified by the FCC as an access service.[22] An ISP, for example, may purchase DSL from BellSouth's interstate tariff, combine that DSL service with the ISP's unregulated, information service and sell the packaged product to customers at retail.[23] Pursuant to the FCC's new rules, CLECs may now purchase DSL from BellSouth's interstate tariff and combine that service with any UNE or combination of UNEs, i.e., a UNE-P line, and BellSouth is required to "perform the functions necessary to commingle" a UNE-P line with BellSouth's wholesale DSL service, if requested by a CLEC. Rule § 51.309 (f).

In light of the FCC's express requirement that BellSouth can no longer refuse to provide wholesale DSL service over a UNE-P line, BellSouth's policy of refusing to provide its retail DSL service over that same line only highlights the fact that the company's policy is motivated solely by the belief that BellSouth can use its unregulated retail DSL service as leverage to deter customers from choosing a CLEC for voice service. The anticompetitive result is the same as if

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[21] See Rules §§ 51. 309(e) and (f), (TRO, App. B, p. 3) and Rule §51.5 (which defines "commingling" to include the "combining" of a UNE combination with wholesale services purchased from an incumbent LEC). TRO, App. B, p. 1.

[22] See Rule § 51.5, defining "qualifying service" to include "access services, such as digital subscribes line services." TRO, App. B, p. 2; see also TRO ¶ 140.

[23] See Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C. p. 24,011 at 24,030 (1998); Brand X Internet Services v. FCC, U.S. Court of Appeals for the Ninth Circuit, Docket No. 02-70518, decision released Oct. 6, 2003, concurring opinion of Judge Thomas (discussing the obligation of LECs to make wholesale DSL service available to competitors).

BellSouth adopted a policy of refusing to sell Yellow Page advertising to CLEC customers – a patently illegal "tying arrangement" which this Authority has been expressly directed by the General Assembly "to prohibit." T.C.A. § 65-5-208 (c).

Issue 26: Local Switching – Line Cap and Other Restrictions

BellSouth Should Make Unbundled Local Switching Available Pursuant to Terms and Conditions that Promote Local Competition.

The rates, terms, and conditions for the provision of unbundled local switching that BellSouth must provide under § 271(c)(2)(B)(vi) of the Act have extremely important ramifications for the issues before the TRA in this proceeding. The TRA's policy determination of the pricing, terms, and conditions of "de-listed" local switching under § 271 (an issue explicitly addressed in the Triennial Order) could significantly impact the positions taken by various parties in this docket, would potentially remove an enormous amount of industry uncertainty surrounding this proceeding, and therefore should be considered a threshold issue.

The FCC affirmed in the Triennial Order that Bell Operating Companies ("BOCs") which have received interLATA long distance authority in a state, such as BellSouth, must provide CLECs unbundled local switching pursuant to the § 271 competitive checklist.[24] Section 271(c)(2)(A) of the Act provides that these "checklist" requirements are to be implemented through the interconnection agreements or SGATs approved by state commissions. Section 271 provides an independent statutory basis for BellSouth's obligation to "provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251."[25]

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[24] Section 271(c)(2)(B)(vi) of the Act provides: "(B) Competitive Checklist – Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following: ... (vi) Local switching unbundled from transport, local loop transmission, or other services."

[25] Triennial Order, ¶653.

This "independent obligation" thus requires BellSouth to provide unbundled switching even if "no impairment" is found in a market pursuant to the § 251 unbundling analysis called for in the Triennial Order.[26] Thus, even if mass market unbundled local switching is "de-listed" as a network element unbundled pursuant to § 251(c)(3), BellSouth still must provide CLECs access to unbundled local switching in all its Tennessee markets, and the TRA retains the authority to ensure that the rates, terms, and conditions comply with law.

Regarding Issue 26(a), ITC^DeltaCom seeks an order that requires BellSouth to apply the four line cap only to a single physical end user location and not to combine multiple locations of the same end user. Regarding Issue 26(b), ITC^DeltaCom merely asks for contract language that prohibits BellSouth from imposing restrictions on local switching. Regarding Issues 26(c) and (d), ITC^DeltaCom strongly urges the TRA to reject BellSouth's unsupported $14.00 "market rate" for unbundled local switching in the MSAs where the four line cap applies. The TRA should order, for purposes of the interconnection agreement, its already established TELRIC rate for unbundled local switching, as that rate is the only "just and reasonable" rate in evidence in this case.

1. 26(a) – Aggregation

The FCC's four-line cap rule provides that BellSouth is not required to unbundle local switching in the top 50 MSAs where the customer has four or more DSO equivalent lines. For customers with multiple locations, BellSouth is trying to aggregate such customers' lines in order to fall within the four line cap rule and avoid its obligation to unbundle local switching. BellSouth's argument has been flatly rejected by the FCC, which recently affirmed its intent that the local switching exception be applied on a per-location basis. *In the Matter of Petition of*

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[26] Triennial Order, ¶¶653-655.

WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration, FCC Docket No. 00-218, Memorandum Opinion and Order, July 17, 2002, ¶¶ 362-363. Moreover, the parties' current interconnection agreement at Attachment 2, Section 9.1.3.2 limits the application of this rule to "a single end user's account name at a single physical end user location." The TRA should adhere to the language it has already approved in the parties' current interconnection agreement, consistent with the FCC's orders, regarding the limitation of the four line cap rule to particular customers at particular locations.[27]

2. 26(b) – Restrictions

This issue concerns BellSouth's refusal to include language in the contract that would prohibit BellSouth from imposing restrictions on local switching. ITC^DeltaCom believes such language is necessary to ensure that BellSouth does not apply arbitrary restrictions that create barriers to ITC^DeltaCom's ability to access UNEs under state and federal rules and regulations. ITC^DeltaCom has proposed the following language, which is in the parties' current interconnection agreement approved by this Commission at Attachment 2, Section 9.1.2:

> Except as otherwise provided herein, BellSouth shall not impose any restrictions on ITC^DeltaCom regarding the use of Switching Capabilities purchased from BellSouth provided such use does not result in demonstrable harm to either the BellSouth network or personnel or the use of the BellSouth network by BellSouth or any other telecommunications carrier.

BellSouth has failed to explain what is objectionable about this language. Further, this language essentially tracks the requirements of 47 C.F.R. §§ 51.309(a) and (b). ITC^DeltaCom's

[27] Moreover, in the recent parallel Florida arbitration between the parties, BellSouth conceded this issue and it is now closed in Florida.

proposed language is reasonable and the TRA should order its inclusion in the interconnection agreement.

3. 26(c) – "Market Rate"

In instances where the four line cap rule applies, BellSouth proposes the inclusion in the interconnection agreement of a $14.00 "market rate" for unbundled local switching. This is in contrast with the TRA-ordered rate of $1.89. BellSouth's rate is patently unreasonable on its face. BellSouth offers this rate as a so-called "market rate" under the presumption that it reflects a just and reasonable price in a competitive market for local switching. It is in fact nothing of the sort. The proposed rate is a price gouge.

BellSouth is still legally obligated to provide, under the requirements of Section 271, unbundled switching to CLECs such as ITC^DeltaCom. (T-91). BellSouth admitted this obligation at the hearing – it simply doesn't want to do so at TELRIC prices where the four line cap rule applies. (T-474). Even where TELRIC principles are not required to apply, however, BellSouth's pricing discretion is not open-ended and is subject to the FCC-approved standard for rates that are "just and reasonable." Prefiled Direct Testimony of Joe Gillan ("Gillan Direct"), pp. 7-10; UNE Remand Order, ¶ 470. BellSouth concedes the application of the "just and reasonable" standard. (T-474-475).[28]

Despite the fact that no evidence was produced of a market for unbundled local switching, it was suggested during the hearings that the $14.00 rate was a market rate set by market conditions. The three-line rule was not intended to demarcate between a monopoly market and a competitive market, and BellSouth has offered no real evidence of a market for unbundled local switching. Gillan Direct, pp. 11-14. As if the mere submission of a $14.00 rate

[28] Sections 201 and 202 of the Act very directly require that rates be "just and reasonable."

– a 865% increase over the TRA-approved just and reasonable rate – were not incredible enough on its face, BellSouth's complete lack of support regarding the development of this so-called "market rate" is even more remarkable.

One might assume BellSouth would provide some support for a rate it seeks to have approved by the TRA. Instead, BellSouth did not even offer flimsy support for its astronomical rate. After admitting that Section 251 of the Act requires rates, terms and conditions to be "just and reasonable," BellSouth's witness stated that she was unfamiliar with how the $14.00 rate was developed. (T-480-481). Summing up the strength of BellSouth's evidence on this point, the following exchange regarding BellSouth discovery responses took place at the hearing:

> Q. Without speculating, you have no idea how the $14 rate was derived, do you?
>
> A. No, I do not, and that's basically consistent with the response we gave.
>
> Q. And without speculating, you couldn't find anyone who had any idea how the $14 rate was derived, could you?
>
> A. No, I could not. We could not. Again, like we said, the employees that were involved in this product back three years ago are no longer with the company. I did speak with the product manager who has this product now, and he was not privy or did not inherit any information or documentation from the people who used to develop this rate.

(T-480-481).

Apparently *no one* at BellSouth has this information, as evidenced by BellSouth's responses to discovery requests filed by ITC^DeltaCom in North Carolina and Tennessee. These responses show that not only does no person at BellSouth have any knowledge or information regarding the development of the $14.00 rate, but also that any persons who might have such

knowledge have now left the company.[29] When asked to describe the process for developing the $14.00 rate, BellSouth responded:

> BellSouth has been unable to locate anyone with knowledge or information of the process used to arrive at the "market rate" of $14.00. The individuals that were involved in the process are no longer employees of the company.[30]

When asked to provide workpapers or supporting documentation for the development of the rate, BellSouth responded that it was unable to locate any.[31]

BellSouth cannot seriously argue that there is a market for unbundled local switching that would justify its attempted price gouge of ITC^DeltaCom. Desperate to provide evidence of such a "market," BellSouth stated at the hearing that there are companies in Tennessee who have their own switches. (T-421). BellSouth never testified whether any of these companies offer unbundled local switching, nor when asked could it identify a comparison of its $14 rate to any other product offered by another telecommunications company. (T-486-487).

BellSouth was given a second bite at the apple to demonstrate the existence of a competitive market for unbundled local switching in its October 13, 2003 supplemental discovery filing with the TRA. BellSouth is trying to pull the wool over the TRA's eyes, as evidenced by its Late-Filed Hearing Exhibit No. 1, which asked BellSouth to "verify which CLECs, if any, in the State of Tennessee offer unbundled local switching and at what rate they offer this service." The fact that BellSouth's response was not subject to cross-examination notwithstanding, it simply lacks any credibility. BellSouth responded in relevant part:

> In response to Director Jones' question, BellSouth contacted all of the CLECs identified in Hearing Exhibit No. 3 to ascertain if they offered unbundled local switching . . . . The only carriers that have

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[29] See Gillan Direct, Exhibits JPG-1, JPG-2. (See also T-419-420).

[30] Id.

[31] Id.

> responded to date are Z-Tel, BTI and Memphis Networx . . . . As BellSouth anticipated, the CLECs . . . have been less than forthcoming, as shown by their lack of responsiveness. BellSouth believes that the resistance of CLECs to sharing information on this matter . . . demonstrates that these carriers are engaged in competitive marketing for these services and are, therefore, reluctant to provide information to BellSouth about switching.

Late Filed Hearing Exhibit No. 1. BellSouth's wildly speculative conclusion about the availability of competitive unbundled local switching is *directly contradicted by the attached documents to its response.* In the Z-Tel response, Z-Tel correctly points out that the website prints attached to the BellSouth letter are not even from its website (a point also made by BTI and Memphis Networx). Id. Further, Z-Tel doesn't flatly reject the request to provide information – it simply points out that the BellSouth request was made without the offer of a protective order. Id. Even more telling – the BTI and Memphis Networx responses affirmatively reply that they *do not offer competitive unbundled local switching.* Again, the evidence in this case not only fails to demonstrate the lack of competitive local switching options, it confirms the lack of such a market.

ITC^DeltaCom seeks the inclusion in the interconnection agreement of the TRA-approved "just and reasonable" switching rate of $1.89. Mr. Gillan recommended that the TRA approve cost-based UNE rates for unbundled local switching. Gillan Direct, pp. 19-20; (T-92). To the extent the four line cap rule applies, it is possible that a non-TELRIC rate could be considered "just and reasonable" under the Act. However, there are only two rates in evidence in this case – the TRA-approved TELRIC rate (by definition "just and reasonable") and the $14.00 rate offered by BellSouth without any support. If BellSouth wanted the TRA to approve a rate other than $1.89, it had the burden of proving such a rate was just and reasonable. Since BellSouth failed to provide any probative evidence of support for the $14.00 rate, the TRA is

precluded from concluding that such a rate is "just and reasonable." There simply is no evidence upon which to base such a conclusion.[32]

Essentially, BellSouth seeks inclusion in a TRA-approved interconnection agreement of a $14.00 rate without a shred of evidence from BellSouth – no cost studies, no demonstration of competitive alternatives – *nothing*. BellSouth admits it has an obligation under Sections 251 and 271 to provide unbundled local switching. However, to price unbundled switching at $14 is to *de facto* not offer unbundled switching in Tennessee.

Issue 36: UNE/Special Access Combinations

The Interconnection Agreement Must Permit Combinations of UNE loops and Special Access Transport.

In the current interconnection agreement, ITC^DeltaCom is allowed to interconnect special access transport to UNE loops. (T-334, 514). BellSouth asks the Commission to remove this language from the agreement for purposes of the contract at issue in this case. BellSouth has cited to what it claims is an FCC prohibition on "commingling" as support for this position. The "commingling" restriction mentioned in the FCC's Supplemental Clarification Order applied to combining loop and transport UNE combinations with tariffed services, and therefore BellSouth's position would not have been supported by the FCC.

The Triennial Order unambiguously resolves this issue by expressly approving commingling. Indeed, it is unclear why BellSouth will not agree to settle this issue. The FCC held that CLECs may connect, combine or otherwise attach UNEs and UNE combinations to wholesale services (*e.g.*, switched and special access). Triennial Order, ¶ 579. The FCC also required ILECs to perform the necessary functions to effectuate such commingling upon request.

[32] The NCUC Staff recently found no evidence supporting the $14.00 rate, and recommended that the NCUC decline to take jurisdiction over this issue at this time. NCUC Staff Recommendation, p. 18.

Id. CLECs also are allowed to commingle tariffed and UNE services. Triennial Order, ¶ 584. BellSouth's position thus has been fully rejected by the FCC, and the TRA should order that language allowing ITC^DeltaCom to combine UNEs and UNE combinations to with wholesale services be included in the interconnection agreement. [33] In the parties' North Carolina arbitration, the NCUC Staff has agreed that the issuance of the Triennial Order compels BellSouth to permit commingling. NCUC Staff Recommendation, p. 20.

Issue 37: Conversion of Special Access Loop to Stand-alone UNE Loop

Issue 57: Rates/Charges for Conversion of Special Access to UNE-based Service

The Interconnection Agreement Must Require BellSouth to Convert Special Access Loops to Stand-Alone UNEs.

The Commission should require BellSouth to convert special access loops to stand-alone UNEs upon request from ITC^DeltaCom. It is technically feasible to do so and will cause only administrative costs because the facilities used to provide service pursuant to special access offerings and UNE offerings do not change. To minimize disruption to Tennessee consumers, BellSouth should perform these conversions without physical disconnection and reconnection. The appropriate charge should cover administrative costs only and should not include termination charges, reconnect or disconnect fees, or nonrecurring charges associated with establishing service for the first time. BellSouth has a charge for the conversion of special access services to EELs, and the conversion cost to stand-alone UNEs should be no greater than that rate.

[33] Furthermore, it was disingenuous for BellSouth to ignore the FCC's announced decision of February 20, 2003 that it would clear the way for commingling in the Triennial Order. (T-532: "Just words on a press release or words in – someone was listening to something. It could change by the actual – the order gets written. That was my – why I used the term 'speculation.' Until it's written in ink on a page, it's hard to know exactly what the ultimate words will say.") BellSouth's position was patently offensive prior to the issuance of the Triennial Order, and is completely unsupportable at this point.

BellSouth has refused to convert special access circuits to stand alone UNEs in the past, arguing that the FCC previously only ordered that ILECs convert special access services to EELs and did not address conversions to stand-alone UNEs. (T-465, 516). BellSouth has agreed to language with AT&T whereby these conversions occur without any outage to the customer. (Id.) Because the only real change that occurs with one of these conversions regards the appropriate billing rate, the charge by BellSouth should be administrative only. (T-504-505, 515).

As with the commingling issue, the Triennial Order resolves these issues conclusively. The FCC has concluded that CLECs may convert existing access service arrangements to stand-alone UNEs or EELs and vice versa, and has affirmed that these conversions should be seamless and not affect end user perceptions of service quality. Triennial Order, ¶ 586. The FCC also prohibited the imposition of untariffed termination charges, re-connect and disconnect fees, and nonrecurring charges associated with establishing service for the first time. Triennial Order, ¶ 587. Although the FCC did not establish a specific timeframe for conversions, it directed carriers to include such timeframes in interconnection agreements and suggested that effectuating price changes as of the next billing cycle would be considered reasonable. Triennial Order, ¶ 588. Clearly this language in the Triennial Order underscores the FCC's intention that the RBOCs comply with the conversion quickly and not after a nine month impairment case as BellSouth has insinuated in other states.

The Triennial Order notwithstanding, BellSouth's policy has been unjustified and irrational. BellSouth already has a process to convert special access services to EELs and has admitted it was technically feasible to have a process for conversions to stand-alone UNEs. (T-500). BellSouth further admitted that conversions do not require breaking apart facilities, and that the same circuit is in place and carrying traffic before and after the conversion. (T-503, 527-529). The ultimate difference is the rate paid by the CLEC. (T-499, 513). BellSouth simply

does not want to offer elements to ITC^DeltaCom at the TRA-approved rates. BellSouth has never been able to identify anything other than semantic distinctions between special access services and UNEs, most notably that different BellSouth repair groups are responsible for each. When pressed to identify the process differences between conversions to EELS and conversions to stand-alone UNEs, BellSouth was unable to articulate any differences. (T-508-511).[34]

Issue 44: Establishment of Trunk Groups for Operator Services

Issue 46: BLV/BLVI

BellSouth Should be Required to Interconnect with ITC^DeltaCom for the Purpose of Exchanging Local Traffic, Including Local Operator Traffic.

BellSouth should be required to interconnect with ITC^DeltaCom for the purpose of exchanging local traffic, including local operator traffic. This issue is one of public safety and ensuring that Tennessee consumers can utilize the telecommunications infrastructure to reach one another. There currently are two-way interconnection trunks in place between the parties, fully paid for by ITC^DeltaCom at tariffed access rates, and there is no technical reason the parties cannot provide Busy Line Verify ("BLV") and Busy Line Verify Interrupt ("BLVI") services to one another. ITC^DeltaCom is one of the few CLECs with its own operator service center. BellSouth's policy discriminates against Tennessee facilities-based ITC^DeltaCom customers and presents serious safety concerns for Tennessee consumers trying to reach loved ones in times of potential emergency.

BLV/BLVI services increase consumer safety. This is where an operator can check a line that is repeatedly busy to determine whether there is conversation on the line (BLV) and can

[34] In the parties' North Carolina arbitration, the NCUC Staff concluded that "BellSouth should allow ITC to convert Special Access Loops that go to ITC's collocation to UNE loops and vice versa." NCUC Staff Recommendation, p. 21. The NCUC Staff also recommended that these conversions take place without any disconnection of the customer, and that any charge for the conversions must "reflect TELRIC-based pricing principles and be submitted for approval prior to imposition." Id., p. 28.

even interrupt the call in an emergency (BLVI). (T-337). BellSouth will perform this service for its own customers, but *only* if they are calling customers on the BellSouth network and *not* the ITC^DeltaCom network. (T-337, 650-651). BellSouth admits it is technically feasible to perform these services in these instances. (T-649, 657). It further agreed that ITC^DeltaCom's request is not legally prohibited and BellSouth's policy is simply a "business decision." (T-608, 650). BellSouth has admitted in other states that it currently offers operator center-to-operator center connections with some independent telephone companies. BellSouth's policy also negatively impacts other CLEC customers and ITC^DeltaCom UNE-P customers on BellSouth's network, who cannot have BellSouth operators perform BLV/BLVI services when calling ITC^DeltaCom facilities-based customers. (T-651-652, 655).

BellSouth was asked whether its operators could simply forward the calls affected by its "business decision" to ITC^DeltaCom operators, but could not answer the question. (T-653-654). Director Jones specifically asked BellSouth to provide this information by October 13. (T-656). In its October 13 filing with the TRA, BellSouth restated the question as "[c]an a BellSouth end-user call a BellSouth operator and verify whether a DeltaCom end-user's line is busy?" BellSouth's response is mostly a restatement of its position in the case, with the startling additional admission that:

> It is unlikely that the customer making the inquiry would have the knowledge of which carrier would be providing the local exchange service to the end user line in question. Thus, BellSouth's operator would have to query some database of in-service telephone numbers to derive the serving carrier. *BellSouth's databases do not currently contain this information.*

Late Filed Hearing Exhibit No. 3, October 13, 2003. (emphasis added). BellSouth cannot seriously suggest that it will not query a database in an effort to improve the safety of Tennessee consumers.

Chairman Tate expressed concerns regarding the fact that BLV/BLVI services are technically feasible and asked whether this was simply a cost issue. (T-657). BellSouth responded in the affirmative, and has relied on the fact that it doesn't want its operators to have to take the time to communicate with ITC^DeltaCom operators to serve consumers who desire BLV/BLVI services. (T-653). Of course, BellSouth's concern over costs only applies to facilities-based customers of CLECs and not to customers on the BellSouth network. BellSouth apparently does not want to provide these services to customers – at least when they want to reach ITC^DeltaCom customers – no matter how simple it would be to do so.

Once again, the law does not support BellSouth's intransigence. Section 251 of the Act requires all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. FCC Rule 51.305(a)(1) further provides that ILECs shall interconnect for the "transmission and routing of telephone exchange traffic, exchange access traffic, or both." Here, the parties have the facilities in place but BellSouth is impeding the ability of its customers and any other CLEC customers using the BellSouth network to interrupt or verify the busy line of an ITC^DeltaCom customer.

Trunks between the BellSouth and ITC^DeltaCom operator centers have been in place for the last five years (paid for entirely by ITC^DeltaCom)[35], and the interconnection agreements between the parties have described the associated rates, terms and conditions. (T-336, 355). Now, BellSouth seeks to remove this language from the interconnection agreement and require ITC^DeltaCom to order these services from BellSouth's access tariff, which doesn't even address local traffic.[36] This is an unacceptable alternative for ITC^DeltaCom because

[35] ITC^DeltaCom provides BLV/BLVI to all its ITC^DeltaCom customers, including customers trying to reach BellSouth customers, but BellSouth has not paid ITC^DeltaCom any fees for the facilities.

[36] See Section 18 of BellSouth's Access Tariff (Operator Services), which only refers to inter-LATA services and IXCs. There are no references to local service or to CLECs.

ITC^DeltaCom already has its own operator center. (T-355-356). By simply referencing operator services in its access tariff, BellSouth effectively is refusing to provide BLV/BLVI services to its customers when they call ITC^DeltaCom customers. BellSouth discriminatorily refuses to provide BLV/BLVI services to customers who use BellSouth's network when its customers happen to be calling customers on the ITC^DeltaCom network.[37]

BellSouth's policy further provides that if a BellSouth customer is trying to reach an ITC^DeltaCom customer and the line is perpetually busy, the only option is for that BellSouth customer to dial 911. (T-654). Aside from the obvious disparity BellSouth's proposal creates between BellSouth and ITC^DeltaCom customers, not all calls in which a BLV/BLVI might be performed merit a call to 911. As Mr. Brownworth for ITC^DeltaCom aptly noted, "[w]e don't feel it's appropriate to send consumers to 9-1-1 to investigate busy signals." (T-337). For example, if a conversation is heard on the line, there might be no need to involve precious and limited emergency services. BellSouth's policy thus encourages haphazard customer behavior with regard to 911 calls. Furthermore, what if there is an emergency, but it has occurred on the caller's end? In that case, BellSouth's policy prevents consumers from reaching loved ones – specifically, loved ones who are on the ITC^DeltaCom network – in times of concern and potential emergency. The TRA should not countenance this policy and should order BellSouth to take appropriate measures to secure the safety of Tennessee consumers.

BellSouth has implied that ITC^DeltaCom's request in this case is insincere because ITC^DeltaCom has not made its request to apply generally to the industry. Indeed, BellSouth bemoans the supposed complications surrounding this issue based on the fact that there are other carriers with operator platforms. (T-657). Amazingly, BellSouth seems to criticize

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[37] To the extent BellSouth incurs costs in providing this service to customers calling an ITC^DeltaCom customer, it can recover such costs from the customers who ask for the service.

ITC^DeltaCom's concerns over safety as *insufficiently broad*, since the result of this case would be only to ensure BLV/BLVI capability between the operator platforms of ITC^DeltaCom and BellSouth. Surely BellSouth does not suggest that it is willing to provide BLV/BLVI for all providers, but not just for ITC^DeltaCom.

This is a two-party Section 252 arbitration to determine interconnection agreement language and ITC^DeltaCom has appropriately not treated it as a generic docket. Moreover, very few CLECs are similar to ITC^DeltaCom because, as BellSouth admits, the vast majority do not have their own operator services platforms. (T-655). In any event, with regard to operator services issues and public safety, ITC^DeltaCom would gladly participate in a generic TRA effort to interconnect all operator services platforms if the TRA deems such a proceeding appropriate. ITC^DeltaCom has no objection to applying operator services interconnection requirements on a statewide basis to improve public safety. To promote safety and good public policy, for purposes of this case, the TRA should require BellSouth to interconnect operator platforms and provide BLV/BLVI services to their customers when they want to reach ITC^DeltaCom customers.[38]

Issue 47: <u>Reverse Collocation</u>

BellSouth Should Pay ITC^DeltaCom the TRA-Ordered Collocation Rate When It Locates Equipment in ITC^DeltaCom's Facilities and Serves ITC^DeltaCom's Competitors Using Those Facilities.

BellSouth admits that it has placed equipment in ITC^DeltaCom collocation space that can be used to provide services to ITC^DeltaCom's competitors:

[38] The NCUC Staff recently recommended in the North Carolina arbitration that ITC^DeltaCom's positions be adopted on both Issue 44 and 46. NCUC Staff Recommendation, pp. 21-23.

Q. Does BellSouth have the potential to use the equipment located in ITC^DeltaCom's premises that is owned by BellSouth to provide services to other telecommunications companies including the competitors of ITC^DeltaCom?

A. Yes . . . [i]t is technically possible.

Q. And if BellSouth were to provide services to competitors of ITC^DeltaCom using equipment located in ITC^DeltaCom's premises, would BellSouth charge for those services?

A. Yes, we would in that hypothetical.

(T-660-661). BellSouth further admits that it actually uses equipment in ITC^DeltaCom collocation space in other states to provide services to such competitors and realize revenues therefrom. (T-667). Despite this use of ITC^DeltaCom space in a manner that can be used to the benefit of other carriers, BellSouth adamantly refuses to compensate ITC^DeltaCom in those situations. (T-669-670).

BellSouth refuses to agree to a provision in the interconnection agreement that would require payment for this use of ITC^DeltaCom's space even when BellSouth gets paid by competitors of ITC^DeltaCom for services BellSouth provides to such competitors through use of the space. This is yet another example of BellSouth's unwillingness to accept reciprocal terms in the interconnection agreement. When ITC^DeltaCom places equipment in BellSouth's space, BellSouth charges for the space, space preparation, power requirements, cross-connect charges (where applicable), and rent on the use of space and power for ITC^DeltaCom equipment. (T-659). These rates for collocation were set by the TRA. Indeed, BellSouth argued strongly that these rates were too low. (T-659-660). However, when BellSouth seeks to use ITC^DeltaCom's space, it expects to receive this space and associated services for no charge. (T-664-665). BellSouth refuses to pay, even at rates it claimed to the Commission were too low, for use of ITC^DeltaCom's spaces.

BellSouth agreed just prior to the last arbitration proceeding with ITC^DeltaCom to pay reverse collocation charges. (T-345, 663-664). It turns out that ITC^DeltaCom didn't understand the agreement the same way that BellSouth did. As BellSouth witness Ruscilli noted in his rebuttal testimony, "BellSouth did so because it believed there to be no harm in signing the agreement, since BellSouth had no intention of electing to collocate its equipment, *as this term is defined by the Act*, in a DeltaCom central office for the purposes of interconnection or access to UNEs." Prefiled Rebuttal Testimony of John Ruscilli ("Ruscilli Rebuttal"), p. 12. (emphasis added). This disingenuous word parsing should not be rewarded. As BellSouth now defines collocation, it could never be collocated at ITC^DeltaCom's premises and thus could never be required to pay ITC^DeltaCom under the terms of the agreement.[39]

Whether ITC^DeltaCom has a duty to permit collocation of BellSouth equipment in its space is not the issue. The issue is reciprocity and whether BellSouth must compensate ITC^DeltaCom when it uses ITC^DeltaCom's space to serve ITC^DeltaCom's competitors. BellSouth correctly points out that it has located equipment in ITC^DeltaCom's Points of Presence ("POPs") for provisioning special and switched access services ordered by ITC^DeltaCom. (T-668). However, that is not the only potential activity of BellSouth with regard to the equipment it locates in ITC^DeltaCom's space. BellSouth can use this equipment to support products sold to other carriers, where ITC^DeltaCom is the interexchange provider and BellSouth is the local provider. (Id.). It also delivers BellSouth DS3s for BellSouth local-originated traffic on this equipment. (Id.) ITC^DeltaCom should not be forced to allow

[39] BellSouth argues that only ILECs have a duty to permit collocation of other carriers' equipment in its locations, citing Section 251(c)(6) of the Act and emphasizing that the duty to provide physical collocation is "at the premises of the local exchange carrier." (47 U.S.C. § 251(c)(6)). However, "local exchange carrier" is defined in the Act as "any person that is engaged in the provision of telephone exchange service or exchange access" and thus is not limited to incumbents. 47 U.S.C. § 153(26). BellSouth also ignores the duty under Section 251(a)(1) of the Act of all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."

BellSouth to utilize excess capacity to benefit competitors of ITC^DeltaCom without reasonable compensation.

In considering the use of BellSouth equipment in ITC^DeltaCom collocation space to serve other carriers, the NCUC Staff recently recognized the inequity of BellSouth's position:

> . . . [I]t does not appear that ITC is required to provide space without charge for the provision of either special or switched access to other parties or local interconnection. Such a requirement would be inequitable. Similarly, the Commission can see no justification for allowing BellSouth to avoid payment of collocation charges for equipment already located in ITC space or augments to that equipment. Moreover, just as BellSouth would require ITC to pay for collocation space if BellSouth designates its own space as a point of interconnection, BellSouth should compensate ITC when ITC designates its own space as a point of interconnection for the delivery of BellSouth's originated traffic. Therefore, the Commission finds that BellSouth should compensate ITC for collocation of BellSouth equipment in ITC space when the equipment is used for local interconnection or the provision of switched or special access to carriers other than ITC.

NCUC Staff Recommendation, p. 25. The TRA should adopt the same reasoning and order BellSouth to pay collocation charges where appropriate.

The appropriate collocation rate is the TRA-ordered collocation rate, which BellSouth agreed was appropriate and reasonable in the prior collocation agreement between the parties. (T-664). BellSouth's only defense appears to be that this issue is not "appropriate" for a Section 252 arbitration because of its legal argument about the duty to collocate. Independent of BellSouth's legal argument, the issue of compensation for use of ITC^DeltaCom's space is still an "unresolved issue" regarding the interconnection agreement between the two parties. The TRA should order BellSouth to pay to ITC^DeltaCom the TRA-ordered rate for collocation whenever BellSouth utilizes ITC^DeltaCom space for activities other than those requested by ITC^DeltaCom.

Issue 56: Cancellation Charges

BellSouth Should Not be Permitted to Impose or Include in the Interconnection Agreement a "Cancellation Charge" for Which There is no Supporting Cost Information in the Record.

BellSouth should not be permitted to impose or include in the interconnection agreement a "cancellation charge" which is not derived from factors supported by record evidence. BellSouth seeks to impose this cancellation charge despite the fact that BellSouth has made no cost study to support the factors that set such a rate. (T-172, 686). BellSouth simply seeks to incorporate factors from its interstate access tariff or private line tariff. (T-686-687).

The TRA has the jurisdiction to set UNE rates. BellSouth argues that its proposed rates are unrelated to UNEs, but in fact they relate to charges associated with ordering network elements. BellSouth argues its proposed rates are "Commission-approved," but of course it means *FCC*-approved and is not referring to the TRA. Moreover, the TRA should be concerned about adopting a precedent that would authorize BellSouth to "just go out and pull something out of the FCC tariff." (T-173). It will be virtually impossible for the TRA and competitive carriers like ITC^DeltaCom to know which of the thousands of filed rates at the FCC it needs to investigate and potentially challenge as not cost-based. (T-173-174). The TRA should not allow BellSouth to have unchecked authority to incorporate FCC tariff rates not supported before and approved by this Authority.

BellSouth claims it is using the nonrecurring ordering charge approved by this Authority and applying certain factors to it to determine the appropriate cancellation charge. However, the factors and percentages used by BellSouth still come from the FCC tariff and are based on a 1990 access filing with that Commission. (T-173). This means the FCC either accepted the filing without review, or even if the FCC reviewed the 1990 filing, it "approved" it based on an

entirely different standard than the TRA uses with regard to UNE rates. (T-173-174). The reference chosen by BellSouth from that 1990 filing relates to a service that has very little to do with the work activities at issue in this docket. (T-174-175).

Specifically, Section 5.4(B)(2) of BellSouth's FCC Access Tariff provides that if the customer cancels an Access Order on or after the Design Layout Report Date, a cancellation charge is determined using the critical dates in subsection 4(b). There are 12 critical dates and the percentages for each critical date are contained in Section 5.4(B)(4)(e). As explained by Mr. Wood, BellSouth is taking these factors to generate a cancellation charge for a designed service or circuit and the factors simply do not apply to a UNE. (T-174-175). It is noteworthy that there is no cancellation charge in BellSouth's General Subscribers' Tariff.

BellSouth is asking this Authority to approve a set of factors that will be used to generate a charge for UNE services that has not been analyzed by the TRA. (T-171). An extensive cost case was conducted in Docket No. 97-01262 where BellSouth had ample opportunity in that case and to provide support for the cancellation charge it seeks to impose. BellSouth appears to argue that since its SGAT refers to the FCC tariff for cancellation charges, somehow the TRA approved the cancellation charge as a UNE rate. ITC^DeltaCom does not believe that the cancellation charges proposed by BellSouth are in any way compliant with the TELRIC methodology as required by Section 251. Furthermore, these cancellation factors are not applied to BellSouth general subscribers as they are not in the General Subscriber Tariff. For these many reasons, BellSouth should not be allowed to impose its unsupported, non-approved cancellation charge.[40]

[40] The NCUC Staff has recently agreed with ITC^DeltaCom in the parties' North Carolina arbitration, noting that BellSouth has "failed to make any showing that its cancellation charges are TELRIC-based as required for Section 251 pricing of unbundled network elements." NCUC Staff Recommendation, p. 27. The NCUC Staff thus recommended that "BellSouth may not assess a cancellation charge which has not been approved by this Commission." Id.

Issue 58: Unilateral Amendments to Interconnection Agreement

BellSouth Should Not be Allowed to Unilaterally Modify the Interconnection Agreement by Making Changes to Off-Contract Documents that it Wishes to Incorporate by Reference into the Agreement.

BellSouth wants the ability to unilaterally change the nature of the interconnection agreement by making modifications to off-contract documents without ITC^DeltaCom's agreement and certainty with regard to material terms. This is directly contrary to the basic principles of a contractual agreement. ITC^DeltaCom should have the right to agree to any changes that have more than a *de minimus* impact on ITC^DeltaCom's operations. The very nature of a contract is mutual consent. BellSouth seeks to incorporate into the interconnection agreement its "Guides," which are documents written by BellSouth with no regulatory oversight or industry input. (T-58-59). These Guides should be either incorporated as of a certain date in time or attached to the contract. Any subsequent changes that would have a material impact on ITC^DeltaCom should be mutually agreed upon. Rejecting BellSouth's request for this unfettered discretion hopefully will provide an incentive for BellSouth to treat ITC^DeltaCom like competitive market vendors treat their customers. A contrary policy will only encourage more inefficiency and cost-shifting by BellSouth.

BellSouth makes the argument that if one of the changes to the Guides had more than a *de minimus* impact on ITC^DeltaCom, it would require the agreement of every Tennessee CLEC with a similar contract provision as that sought by ITC^DeltaCom in order to make the change. (T-130). While this may present an administrative inconvenience for BellSouth, such inconvenience does not mean that BellSouth should be able to unilaterally modify the obligations of the parties' contract (or its agreement with any other CLEC, for that matter). Mr. Watts explained that while some changes, such as those to technical guides, may not be objectionable:

> Our position a very basic and simple one. That is these documents are part of the contract at the time you sign the contract.
>
> . . .
>
> We don't want BellSouth to have the arbitrary ability to change some of these documents or changes that BellSouth makes unilaterally, and we don't want them to have the ability to make changes that can have a significant impact on ITC^DeltaCom.

(T-129). BellSouth admits that its position on this issue would in fact allow it to make unilateral changes to the interconnection agreement that would have a significant impact on ITC^DeltaCom. (T-692-693).

ITC^DeltaCom is willing to support a review process wherein the industry in general could have sufficient scrutiny to ensure against arbitrary changes by BellSouth. To be more specific, ITC^DeltaCom proposes the following be included in the interconnection agreement:

> Except as otherwise set forth in Attachment 3, Section XXX concerning the Jurisdictional Factor Guide, the Parties acknowledge that certain provisions of this Agreement incorporate by reference various BellSouth document and industry publications (collectively referred to herein as the "Provisions"), and that such Provisions may change from time to time. The Parties agree that if the change or alteration was made as a result of the Change Control Process (CCP), a revision to ANSI or Telcordia guidelines or OBF guidelines of if ITC^DeltaCom agrees to such change or alteration, any such change or alteration shall become effective with respect to ITC^DeltaCom pursuant to the terms of the notice to ITC^DeltaCom via the applicable Internet website posting. Specifically, all changes or alterations which: (1) alters, amends or conflicts with any term of this Agreement; (2) changes any charge or rate, or the application of any charge or rate, specified in this Agreement; or (3) would require ITC^DeltaCom to incur more than minimal expense will require ITC^DeltaCom consent which shall not be unreasonably withheld.. For purposes of item (3) above, costs associated with disseminating notice of the change or providing training regarding the change to employees shall not be deemed "more than minimal." In the event the Parties disagree as to whether any alteration or amendment described in this Section is effective as to ITC^DeltaCom pursuant to the requirements of this Section, either Party may file a complaint with the Commission pursuant to the dispute resolution provisions of this Agreement.

To the extent BellSouth argues that this alternative process is administratively burdensome, it should be reminded that under basic principles of contract law, it is not permitted to make unilateral, material changes to an agreement between the parties without mutual consent. If BellSouth were allowed to make nonconsensual or non-ordered changes, the interconnection agreement would not be worth the paper on which it is written.[41]

Issue 59: Payment Due Date

ITC^DeltaCom Seeks a Payment Due Date for BellSouth Bills of 30 Days from the Receipt Date.

A payment due date of thirty days from receipt of a bill is a reasonable payment due date given the evidence demonstrated at the hearing. At one time all bills sent by BellSouth were delivered by regular mail. As a result, there was great uncertainty regarding when those bills were received. Now, ITC^DeltaCom receives approximately 1,700 invoices from BellSouth every month, 94% to 97% of which are transmitted electronically. (T-142, 705-706). This prevalence of electronic billing means that BellSouth knows *exactly* when ITC^DeltaCom receives its bills. BellSouth provides a 30-day payment period, but it runs from the time the bill is generated within BellSouth – the "bill date." Both parties acknowledged, however, that even with electronically transmitted invoices, the actual date the bill is rendered to ITC^DeltaCom is not until several days later. (T-59, 708-709).

ITC^DeltaCom needs sufficient time to analyze and review the 1,700 invoices it receives in order to ensure the bills are accurate. Even BellSouth admitted that "a prudent business" would verify the accuracy of bills it receives. (T-706). Errors are a legitimate concern for

[41] Incredibly, BellSouth was not even willing to concede that "it would be *reasonable* for the interconnection agreement to include a provision that allowed ITC^DeltaCom to seek TRA review where BellSouth wants to change a document that is referenced in the interconnection agreement in a way that would materially affect ITC^DeltaCom." (T-702-703) (emphasis added).

ITC^DeltaCom, as evidenced by the existence of approximately 4,000 current billing disputes with BellSouth and ITC^DeltaCom's experience of late billing by BellSouth. (T-147). BellSouth's position appears to be that ITC^DeltaCom must meet the "due date," which is the next "bill date" (again, the time the bill is generated within BellSouth), regardless of when ITC^DeltaCom actually receives the bill. Moreover, if ITC^DeltaCom cannot meet this date (even if the bill is late), it is subject to late fees. (T-710). This is patently unfair and provides no incentive for BellSouth to improve deficiencies in its billing process.

Since the beginning of 2003, ITC^DeltaCom has been billing BellSouth on a monthly basis. (T-164). BellSouth complained about not having an adequate period of time to pay bills it was receiving from ITC^DeltaCom, and ITC^DeltaCom responded by putting in place a process that ensures that BellSouth has a full 30 days from receipt of ITC^DeltaCom bills in which to pay. ITC^DeltaCom simply asks that the Commission require BellSouth to provide the same to ITC^DeltaCom.[42]

Issue 60: Deposits

BellSouth Should Not be Permitted to Require a Deposit in Light of ITC^DeltaCom's More Than 20-Year Good Payment History.

BellSouth should not be permitted to require a deposit in light of ITC^DeltaCom's more than 20-year good payment history. ITC^DeltaCom seeks three things with regard to deposits: (1) interconnection agreement language that recognizes ITC^DeltaCom's long, undisputed record of good payment and that no deposit be charged to ITC^DeltaCom at this time; (2) reciprocity – in other words, both parties operate under the same deposit language with regard to

[42] In the parties' North Carolina arbitration, the NCUC Staff recently recommended that the interconnection agreement provide that the due date of bills be 26 days from the date of receipt. NCUC Staff Recommendation, p. 31.

one another; and (3) deposits should be returned if they are collected from a customer who subsequently establishes a good payment history.

BellSouth and ITC^DeltaCom have a long business relationship that spans approximately 20 years. During that time, ITC^DeltaCom has maintained a good payment history. On cross-examination, BellSouth conceded that ITC^DeltaCom has never failed to pay an undisputed bill in the past 20 years. (T-159, 716). Despite this uninterrupted history of good payment – even during the pendency of the Chapter 11 reorganization of ITC^DeltaCom's parent company – BellSouth now insists on charging an exorbitant deposit where none has previously been required. Unbelievably, BellSouth also opposes reciprocal language regarding deposits without any real justification.[43]

ITC^DeltaCom simply believes that if a party has an established good payment history, as BellSouth admits is the case with ITC^DeltaCom, no deposit should be required. If ITC^DeltaCom were a new entrant and was trying to establish a relationship with BellSouth, the circumstances might call for a different result. BellSouth's call for a deposit after decades of good payment appears calculated to increase its leverage over an ambitious competitor and to further flex its already-formidable market power.

BellSouth argues the telecommunications industry has become more risky and that this justifies its request of ITC^DeltaCom. The FCC has recently rejected this popular but unfounded premise in rejecting the requests of BellSouth and other ILECs to demand increased deposit requirements under their interstate access tariffs. See *In the Matter of Verizon Petition for Emergency Declaratory and Other Relief*, WC Docket No. 02-202, *Policy Statement*, Rel. December 23, 2002 ("Policy Statement"). In its Policy Statement, the FCC concluded that "the

[43] ITC^DeltaCom bills BellSouth millions of dollars a year for services. (T-138).

risk posed by uncollectibles may not be as great as alleged by certain carriers." (Policy Statement, ¶ 14.) While certain factors may reasonably precipitate accelerated billing and collection cycles, the FCC nonetheless maintained the status quo with respect to deposit requirements, explaining, "[w]e do not believe, however, that additional deposit requirements are warranted at this time." (Id.) In justifying its decision not to require additional deposit requirements, the FCC noted that "incumbent LECs operating under price caps normally are considered subject to both the benefits and burdens of unconstrained earnings." (Id. at ¶ 18).

For example, the FCC contrasted the extraordinary returns earned by incumbents in the "crisis" year 2001--which for BellSouth was 19%--with their more "ordinary" (although still high) returns in 1990—in which BellSouth earned a 13% rate of return on interstate services. (Policy Statement at ¶ 18 (internal citations omitted)). ITC^DeltaCom demonstrated that BellSouth's total uncollectibles are actually relatively small. (T-60). Further, BellSouth recovers uncollectible bad debt costs in UNE rates. (Id.)

BellSouth tries to put a different – and misleading – spin on the FCC's Policy Statement. BellSouth counsel inquired whether under ITC^DeltaCom's deposit proposal it would be willing to pay bills in an accelerated timeframe. (T-158). BellSouth has relied in other states on the FCC Policy Statement language that supported the idea of "narrower protections, such as accelerated and advanced billing" in making this argument. However, it is important to recognize that the FCC was not mandating accelerated payment. The context of the decision was that *only if a deposit were appropriately charged, and such deposit would present a significant hardship upon a carrier, the FCC expressed a preference for allowing such a carrier to satisfy the risk concerns of the party charging the deposit through accelerated payment.* A deposit in this case is inappropriate in the first place, making BellSouth's implication irrelevant.

ITC^DeltaCom has proposed very thorough deposit language on pages 25-28 of the Prefiled Direct Testimony of Mr. Watts. ITC^DeltaCom asks that this language be adopted and be applied to both parties equally. ITC^DeltaCom bills BellSouth and expects to get paid. BellSouth would enjoy the same benefits as ITC^DeltaCom and would not be subject to a deposit as long as it had a good payment history.[44]

Good payment history is the key to determining whether deposits are appropriate in existing business relationships.[45] ITC^DeltaCom has given BellSouth no good reason to request a huge deposit. If for some reason in the future a deposit is appropriate, however, ITC^DeltaCom believes that such deposits should be returned when a good payment history is reestablished. Deposits should provide security and not be used as weapons against competitors. Again, BellSouth is in the conflicted role of wholesale supplier and retail competitor and this conflict has led to BellSouth's unreasonable request. The Commission should reject BellSouth's position.

In the parallel arbitration in North Carolina, the NCUC Staff has made recommendations with regard to the same deposit issues before this Commission. Consistent with ITC^DeltaCom's position, the NCUC Staff has recommended that the interconnection agreement's deposit obligations be reciprocal and that, pursuant to the North Carolina retail deposit rules, deposits be returned with interest after a period of steady payment. NCUC Staff Recommendation, pp. 34-35. The NCUC Staff also recommended that the creditworthiness

[44] BellSouth likely will argue in its Brief, as it has argued in other states, that ITC^DeltaCom charges its own retail customers deposits. ITC^DeltaCom's retail deposit policies are not a helpful analogy in this case, because the critical difference between the relationship of ITC^DeltaCom with its customers – as compared to BellSouth's relationship with its wholesale customers – is that virtually every customer that does business with ITC^DeltaCom has a competitive option. ITC^DeltaCom does not have a market of competitors from which to choose with regard to the provision of wholesale telecommunications services. BellSouth is the "only game in town" and has now taken a hostile and unjustified position with regard to requiring a security deposit from ITC^DeltaCom despite its long, good history of payment. The Commission should prohibit this predatory behavior of BellSouth.

[45] It is noteworthy that BellSouth's intrastate and interstate access tariffs only require a deposit of an existing access customer (IXCs) in the event of a "history of late payments." See Section E.2.4.1. (a).

standards proposed by BellSouth comply with the NCUC retail deposit rules, in particular NCUC Rules R12-2, R12-4 and R12-5. Notably, NCUC Rule R12-2 provides that a customer can establish credit in several ways including where:

> (2) The applicant demonstrates that he is a satisfactory credit risk by appropriate means including, but not limited to, references which may be quickly and inexpensively checked by the utility; or
>
> (3) The applicant has been a customer of the utility for a similar type of service within a period of twenty-four consecutive billings preceding the date of application and during the last twelve consecutive billings for that prior service has not had service discontinued for nonpayment of bill or had more than two occasions in which a bill was not paid when it became due; provided, that the average periodic bill for such previous service was equal to at least fifty per centum of that estimated for the new service; and provided further, that the credit of the applicant is unimpaired.

While the NCUC Staff Recommendation on the creditworthiness standard for the interconnection agreement is not precisely what ITC^DeltaCom sought in that case, it does recognize the importance of a good payment history by incorporation of the retail deposit rules. This Commission likewise should emphasize the importance of a good payment history, as well as mandate that the deposit language be reciprocal and that deposits (if appropriate in the first instance) be returned after six months of steady payment (with accrued interest).

Issue 62: <u>Limitation on Backbilling</u>

The Interconnection Agreement Should Include a Reciprocal Provision that Prevents Either Party from Back-Billing Undercharges Longer Than 90 Days.

The TRA does not have a rule or regulation regarding back-billing between carriers. Therefore, ITC^DeltaCom asks that this issue be addressed in the interconnection agreement. Back-billing for extended periods of time exposes both companies to the problem of not being able to establish accurate cost structures for the pricing of retail services. It also makes it more

difficult for the party receiving the late charges to verify their accuracy, as some data needed to do so may no longer be readily available.

BellSouth references Tenn. Code Ann. § 28-3-109 for business transactions, which states, "(a) The following actions shall be commenced within six (6) years after the cause of action accrued: . . . (3) Actions on contracts not otherwise expressly provided for." (T-611). This argument should be rejected, especially in the context of intercarrier billing in the telecommunications industry. The issue in this arbitration regards wholesale billing between telecommunications carriers, which actually can have a tremendous impact on accurate and timely billing to *retail* customers.

BellSouth counsel tried to confuse the backbilling issue at the hearing, asking ITC^DeltaCom whether it would be appropriate under ITC^DeltaCom's position for BellSouth to have to refund amounts it had overbilled more than 90 days in the past. (T-140-141). BellSouth clearly misunderstands ITC^DeltaCom's position. In the case where BellSouth underbills, it is *BellSouth's* fault. ITC^DeltaCom asks in these cases that backbilling be limited to 90 days – and agrees to abide by the same rule with regard to its billing to BellSouth. Likewise, in the case described in the hypothetical question posed by BellSouth counsel (over-billing), it is yet again a *BellSouth* mistake, albeit an entirely different one. BellSouth's witness later conceded this point. (T-718). In neither case should the appropriate remedy be to punish the non-mistaken party. If BellSouth overbills ITC^DeltaCom, it should correct the mistake by providing a refund. ITC^DeltaCom agrees that it should abide by the same principle if it overbills BellSouth. BellSouth's analogy is faulty and a hollow attempt to distract the TRA from the real issue.[46]

[46] The NCUC Staff has recently recommended in the North Carolina arbitration that it is appropriate to limit backbilling to 90 days. NCUC Staff Recommendation, p. 36.

BellSouth was forced to concede that the TRA is not bound to adopt the six-year statute of limitations for purposes of the interconnection agreement, admitting that there is no legal prohibition against the inclusion of a 90-day backbilling limitation. (T-719). Moreover, BellSouth is trying to discriminate against ITC^DeltaCom in this case by proposing a ridiculous six-year backbilling time period. BellSouth has entered into contracts with multiple vendors where the backbilling periods are limited to 90 or 180 days. (T-718-719). BellSouth's position is patently unreasonable, especially in light of its faulty billing process that has led to ITC^DeltaCom receiving bills for services that were provided *years* ago.

ITC^DeltaCom asks the TRA to limit backbilling by 90 days to accomplish two very important public policy goals: (1) to provide incentives to BellSouth to clean up its frustrating and often inaccurate billing system; and (2) to ensure some stability and reasonable expectations between the parties regarding the costs of doing business. BellSouth's attempts to correct errors made several months or even years ago puts ITC^DeltaCom at a severe disadvantage in terms of planning and competition in the retail market.

Issue 63: Audits

The Parties Should Have Audit Rights.

ITC^DeltaCom wants the right to audit the voluminous bills sent by BellSouth every month. ITC^DeltaCom has asked for the language in the AT&T/BellSouth interconnection agreement approved by the Commission, but BellSouth has refused to include this language based on its tortured view of the "pick and choose" rule. Aside from the "pick and choose" rule, ITC^DeltaCom wants the contractual right to audit BellSouth bills, effective for the full term of the interconnection agreement at issue in this case.

BellSouth erroneously views this issue as simply a legal debate over the "pick and choose" rule in Section 252(i) of the Act. ITC^DeltaCom has requested the same language that

BellSouth provides to AT&T regarding the right to audit BellSouth bills. BellSouth, however, argues this language would only be effective as long as the AT&T agreement is in place. ITC^DeltaCom rejects this view of the "pick and choose" rule as unworkable. It would leave the BellSouth/ITC^DeltaCom interconnection agreement silent as to audit rights when the AT&T contract expires. Moreover, if the language is appropriate for inclusion in the AT&T agreement, it is appropriate for the ITC^DeltaCom agreement – for the full length of the ITC^DeltaCom agreement.[47]

More important than a legal debate over the extent of BellSouth's "pick and choose" obligations, however, is the substantive underlying need for ITC^DeltaCom to have audit rights with regard to BellSouth's bills. ITC^DeltaCom receives approximately 1,700 invoices from BellSouth every month. (T-142). These are transmitted over 21 billing cycles and each invoice contains substantial amounts of data. Without the right to audit BellSouth, ITC^DeltaCom has no effective way of ensuring that the billing process on BellSouth's side is accurate and functioning properly and that ITC^DeltaCom is in fact being billed the correct amounts. By way of example, if BellSouth bills for time and materials for work performed and ITC^DeltaCom believes that the charge is unusually high, ITC^DeltaCom should have the right to audit those charges, and Bellsouth is the only entity with the information necessary to audit those charges. The issue is therefore very important with regard to an essential component of the parties' business relationship.

Desperate to justify its discriminatory treatment of ITC^DeltaCom, BellSouth argued that ITC^DeltaCom's request for audit rights is unnecessary given the TRA's performance measures and penalties regarding the accuracy of BellSouth's billing. (T-725-726). This attempt to

[47] The NCUC Staff fully agreed with ITC^DeltaCom on this point in its Recommendation in the North Carolina arbitration. The NCUC rejected BellSouth's "pick and choose" ploy by simply recommending the inclusion of language in the ITC^DeltaCom interconnection agreement – for the term of that agreement – providing for the auditing of billing functions. NCUC Staff Recommendation, p. 37.

dismiss ITC^DeltaCom's concerns misses the mark. BellSouth's compliance or non-compliance with billing accuracy standards has nothing to do with ITC^DeltaCom's issue in this case. Even if BellSouth meets the standards set by the TRA, that wouldn't provide ITC^DeltaCom with the information needed to *audit* BellSouth's invoices. ITC^DeltaCom wants to use its own resources to audit bills for accuracy, not simply observe as BellSouth either passes muster with regard to the billing standards or suffers financial penalties as a result of a failure to perform.

BellSouth refuses to act reasonably regarding audits, despite the fact that ITC^DeltaCom has agreed to allow BellSouth audit rights with regard to several other issues in the interconnection agreement. These include auditing systems regarding Percent Interstate Usage ("PIU"), Percent Local Usage ("PLU"), Percent Local Facilities ("PLF") and local percentage usage for Special Access Circuits converted to EELs. ITC^DeltaCom has agreed with regard to all of these issues to afford auditing rights to BellSouth. (T-726). The TRA should order, for the full term of the agreement at issue in this case, that BellSouth be obligated to provide ITC^DeltaCom auditing rights identical to those provided to AT&T.

Issue 64: ADUF

ITC^DeltaCom Should Not be Billed for ADUF Records Associated with Local Calls.

BellSouth provides ITC^DeltaCom an ADUF record for the billing of access charges when ITC^DeltaCom purchases unbundled local switching. (T-288). This record is necessary for ITC^DeltaCom to pass along the appropriate long distance charges to the end user. The problem is that BellSouth currently includes some local calls in the ADUF records provided to ITC^DeltaCom. ITC^DeltaCom should not be billed for ADUF records associated with local calls. These charges are inappropriate for inclusion in ADUF records and are not recovered from the end user.

BellSouth has rejected ITC^DeltaCom's request that only access charges be billed via ADUF records, calling it a request for a "customized" report. BellSouth's argument boils down to: "sorry, we do something incorrectly and want to charge you extra to fix it." Why should ITC^DeltaCom's request to be billed accurately be deemed a request for a "customized" report? If BellSouth's current system generates an ADUF record with regard to local calls (including but not limited to 10-10-XXX calls made to local numbers – see T-231), it should not be ITC^DeltaCom's responsibility to pay for BellSouth's broken system. BellSouth should put a filter in place for the benefit of the industry in order to clean up its billing problem. The burden of providing an accurate BellSouth bill does not lie with ITC^DeltaCom.[48]

Issue 66: Testing of End User Data

BellSouth Should Provide ITC^DeltaCom the Ability to Test Its Data to the Same Extent BellSouth's Retail Division Tests Its Own Data.

BellSouth should provide ITC^DeltaCom the ability to test its data to the same extent BellSouth's retail division tests its own data. BellSouth has agreed through the Change Control Process ("CCP") to enhance testing functionality by May 2004 so that CLECs can perform testing with "live" or actual customer information. (T-299, 432). Currently only BellSouth enjoys this advantage. Even though BellSouth has "targeted" the May 2004 date, the Commission should mandate explicit interconnection agreement language requiring BellSouth to provide this functionality by no later than June 1, 2004. Additionally, ITC^DeltaCom should be allowed a test venue that will support the version of TAG or EDI in production and the version to which ITC^DeltaCom is migrating. This is needed to ensure that ITC^DeltaCom is not negatively impacted by the migration to a new Release of ENCORE or CAVE.

[48] As a compromise, ITC^DeltaCom is willing to use a self-reporting process by which it would review BellSouth's current faulty reports, identify the records that are appropriately included therein and therefore usable, and report the results back to BellSouth. ITC^DeltaCom would then pay for only those reports that it can use. (T-231).

Testing of end user data prior to live production is very important to ensure that new systems are working properly and consumers and carriers are not negatively impacted. BellSouth admitted this at the hearing. (T-423-424). Testing is a key ingredient to any carrier's business. All parties understand that testing is critical to retail operations, whether they be BellSouth's or those of a CLEC, because testing provides the ability to preview and change systems prior to actually putting them into production. ITC^DeltaCom simply wants to be able to have the same type of testing abilities that the BellSouth retail unit enjoys. The Commission should affirm this principle in its order.

CLECs have requested enhancements to testing through the CCP. BellSouth currently enjoys the ability to test its data "end to end" using the tools and format that will be in its production systems. (T-228, 303). To use its Operating Customer Number ("OCN"), a CLEC like ITC^DeltaCom must order test accounts as real active accounts and pay the associated rates. (Id.) BellSouth has agreed to provide the ability for CLECs to use their own accounts in CAVE. (T-299). This enhancement is "scheduled" for implementation in May 2004. (T-299, 432). To ensure that this targeted date doesn't slip, ITC^DeltaCom simply asks that the Commission order as part of the interconnection agreement that BellSouth provide this enhancement to ITC^DeltaCom no later than June 1, 2004. Since BellSouth already has committed to provide this enhancement in principle, it should have no objection to putting this commitment in writing.

BellSouth rejected a different portion of the testing enhancement requests made by CLECs. Change Request Number 1258 asked BellSouth to expand CAVE to support increased CLEC testing of ENCORE release versions, i.e., Release 12.0 as well as Release 13.0. (T-302). The issue here is when a new Release of ENCORE is put into production, a CLEC operating on the prior standard in effect loses its testing capabilities. (T-299). ITC^DeltaCom is requesting that it be allowed to test in both environments – the new standard and the existing one – in order

to ensure that the migration to the new system doesn't impact operations or consumers. BellSouth can do this on its retail side. (T-299, 302). BellSouth has rejected this request in the CCP due to an estimated cost of $8 million. As BellSouth commonly boasts, however, it has expended hundreds of millions of dollars on OSS enhancements over the past few years. This enhancement is needed for ITC^DeltaCom and other CLECs to ensure parity with the testing capabilities enjoyed by BellSouth's retail division.

BellSouth asks this Commission to ignore ITC^DeltaCom's request on testing issues because of the CCP. Notwithstanding the fact that BellSouth has already rejected in the CCP much of what ITC^DeltaCom seeks, the CCP is not a process by which BellSouth decisions are reviewed in an objective context. BellSouth admitted that the persons who make the ultimate decisions – and indeed decide upon any escalated issues – are all employees of BellSouth. (T-394-398). Moreover, the remedy for a CLEC dissatisfied with the CCP escalation process is to bring a complaint to the TRA. (T-398-399). BellSouth admitted that this arbitration is a complaint, but it still believes the issues are not appropriately decided in this case. (T-399-400). These forum-related arguments already have been rejected by the TRA. *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. With BellSouth Telecommunications, Inc., Docket No. 03-00119, Initial Order Regarding BellSouth's Motion to Remove Issues and Other Pre-Hearing Procedural Issues*, August 20, 2003. The TRA should not allow BellSouth to be the judge, jury, and executioner with regard to all OSS issues, and should decide the OSS testing issues in favor of ITC^DeltaCom in this case.

Issue 67: Availability of OSS Systems

The Commission Should Prohibit BellSouth From Taking Down All OSS Interfaces During Normal Working Business Hours Except in an Emergency or When Consented to by ITC^DeltaCom.

ITC^DeltaCom relies on BellSouth's OSS in order to submit ordering and pre-ordering information for customers who contact ITC^DeltaCom regarding telecommunications services. The three OSS interfaces at issue are LENS, TAG, and EDI. All three can be used to submit customer orders and associated information, but ITC^DeltaCom loses this capability when BellSouth shuts down *all three of them* at the same time. ITC^DeltaCom is not seeking a provision that requires all three interfaces to be working during normal business hours (Monday to Friday, 8 a.m. to 5 p.m.) – simply that at least one of them be working. (T-305-306, 315).

ITC^DeltaCom further understands that OSS systems cannot be perfect. ITC^DeltaCom does not seek a prohibition on taking down the systems in an emergency or even negative consequences for BellSouth in the event of inadvertent failures. The real issue here is when BellSouth plans in advance to upgrade its OSS or release updated software. All ITC^DeltaCom asks in these non-emergency situations is that BellSouth perform these upgrades outside of normal business hours, or work on some but not all three interfaces at a single time. Otherwise, BellSouth should have to obtain ITC^DeltaCom's consent prior to taking down all OSS interfaces during normal working business hours.

BellSouth again acts as judge and jury with regard to operating hours, and parses words with ITC^DeltaCom. BellSouth agreed in its prefiled testimony that consent should be obtained from ITC^DeltaCom before taking down all OSS systems during normal business hours. (T-434). After closer scrutiny on cross-examination, it became apparent that BellSouth did not mean this at all. (T-434-437). After many attempts by BellSouth to cloud the issue, BellSouth

was forced to admit that if a CLEC expressed a concern and BellSouth adhered to its original decision, that was the definition of "consent" in BellSouth's opinion. (T-437). This recalcitrant attitude and deliberate misuse of the concept of "consent" is frustrating for ITC^DeltaCom and its consumers who will need service during normal working business hours, but may not be able to receive it because BellSouth can shut down all OSS pre-ordering and ordering systems in a non-emergency situation.

BellSouth improperly characterizes this issue as regarding a single incident back on December 27, 2002. While ITC^DeltaCom believes that situation was not handled properly, it does not ask that any action be taken against BellSouth. In that instance, ITC^DeltaCom had to turn customers away and effectively was prevented from handling customer orders for several hours on a Friday. (T-313). This is in sharp contrast to BellSouth, whose retail systems were completely unaffected. (T-445). BellSouth relies on the dispute over a single incident to argue that occasions where all three OSS interfaces are taken down during normal business hours are rare. If this is the case, then BellSouth should have no real objection with the language sought by ITC^DeltaCom. ITC^DeltaCom seeks assurance in the new interconnection agreement that it will be able to serve its retail customers with at least a partially functioning OSS during normal working business hours.

Respectfully submitted this 27th day of October, 2003.

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CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served by United States mail a copy of the within and foregoing, **ITC^DELTACOM COMMUNICATIONS, INC.'S ARBITRATION POST HEARING BRIEF TO BELLSOUTH** upon the following person, properly addressed as follows:

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

This 27th day of October, 2003.

Henry Walker