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November 4, 2005

VIA HAND DELIVERY

Hon. Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

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

Dear Chairman Jones:

Enclosed are the original and fourteen copies of BellSouth's *Motion for Reconsideration of Final Order of Arbitration Award.*

A copy is being provided to counsel for DeltaCom.

Very truly yours,

Joelle J. Phillips

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

Docket No. 03-00119

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION OF FINAL ORDER OF ARBITRATION AWARD

BellSouth Telecommunications, Inc. ("BellSouth") files this *Motion for Reconsideration of Final Order of Arbitration Award* ("*Motion*"), and respectfully shows the Tennessee Regulatory Authority ("Authority" or "TRA") as follows:

INTRODUCTION

BellSouth files this *Motion* to address three of the issues covered in the TRA's *Final Order of Arbitration Award* ("*Final Order*"). While BellSouth does not agree with the disposition of each issue in the *Final Order*, BellSouth's *Motion* focuses on three issues. Because of the significant impact of these issues, BellSouth seeks reconsideration of the Authority's rulings on Issue 26, Issue 47 and Issue 62. Each of these issues was decided after the Authority requested "best and final" offers from the parties. Throughout that process, Deltacom urged that the Authority was in some way bound to uphold the "best and final" process by accepting one party's proposal. There is, however, no such requirement binding the Authority to limit its own decision-making in that fashion.

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

(d): What should be the market rate?

As the Authority is well aware, this issue has received significant focus in the Generic Change of Law Docket where CLECs are urging the TRA to engage in section 271-based rate setting in a misguided attempt to resurrect the UNE-P regime. The Authority's decision on Issue 26 has provided other CLECs with the hope that the TRA may establish some form of cost-based rates, pursuant to section 271, for former UNEs that the FCC has now de-listed, and this has created a substantial disincentive for the market negotiation of these rates. Moreover, as discussed below, the same section 271-based argument advanced by DeltaCom in support of Issue 26 was rejected by the panel in the Generic Docket when it was used in an attempt to thwart the FCC's "No New Adds" deadline.

Nearly one year after the DeltaCom case was deliberated, the issue of "section 271 jurisdiction" to set rates under the just and reasonable standard again arose – this time in the efforts of CLECs seeking to avoid the FCC's deadline for adding new UNE-Ps ("No New Adds" deadline). Again, CLECs argued that the Authority should require BellSouth to continue providing new UNE-Ps to CLECs after the FCC's deadline at "just and reasonable rates," which could, they argued, be established by the TRA pursuant to section 271. Initially, the TRA, by a 2-1 vote, ordered some alternative relief in an attempt to further negotiations. Director Kyle dissented from that decision, and she firmly and specifically noted that she "disagreed" with the CLECs' section 271 argument.

The following month, the TRA considered the situation again, as the negotiating period established by the majority's alternative relief order was due to expire. At that time, the majority found that the alternative relief had not resulted in a negotiated solution and should end and specifically, ordered that:

> Effective May 16, 2005, BellSouth is no longer required to provide New Adds and may reject any and all new orders for the de-listed UNEs, including new orders to serve the CLECs' embedded base of customers.[1]

Director Kyle did not vote for the *Order* because she had opposed the earlier "alternative relief"; however, taking both orders together, it is clear that every member of that panel voted to reject the CLECs' attempt to override the FCC's No New Adds deadline, over the CLECs' section 271-based objection.

Together, these decisions on No New Adds provide that the TRA has not already adopted the policy of acting under section 271 in the fashion the CLECs suggest. Instead, it is clear that the TRA has already correctly rejected precisely the same section 271-based argument when it confirmed that BellSouth was no longer required to provide new UNE-P adds.[2]

The impact of the TRA's decision to set a market rate has been to embolden CLECs to reject the establishment of rates at the business negotiating table in favor of commission-set rates made instead in a hearing room. This is not what the FCC intended when it determined that market-based rates should govern.

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[1] *Order Terminating Alternative Relief Granted During April 11, 2005 Deliberations*, Docket No 04-00381, *In Re· BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, at 4.

[2] Order July 25, 2005, Docket 04-00381.

The FCC is right to treat section 271 elements differently from 251 UNEs. It makes sense that the FCC rules regarding section 271 elements (*i.e.,* that the provider can set the rate initially as opposed to the regulator) are – and should be – less stringent than those under section 251. Section 251(b) and (c) set forth the provisions that Congress deemed essential to the development of local competition and without which a CLEC is legally "impaired" within the meaning of Section 251(c)(1). Congress thus ensured that state commissions have authority to arbitrate the rates, terms and conditions of access to these elements. ***Conversely, the FCC has determined that CLECs are not impaired without access to section 271 elements that no longer meet the section 251 test, like mass market switching.*** The FCC's conclusions cannot – and should not – be brushed aside. The FCC has reached these conclusions based on an evidentiary finding that competitive alternatives for such elements are readily available in the marketplace "at a price set by the market place."[3] Congress did not subject access to these section 271 elements to the same regulatory scrutiny. Rather, consistent with Congress's overriding intent to "reduce regulation," parties should be allowed to contract freely as to those items without state regulatory interference. Under these circumstances, the FCC concluded that "it would be counterproductive to mandate that the incumbent offer[] the element at forward looking prices." Instead, "the market price should prevail, as opposed to a regulated rate."[4]

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[3] *See e g , UNE Remand Order* at ¶ 473 (where a checklist item is no longer required under Section 251, a competitor is "not impaired in its ability to offer services without access to that element," which can be "acquire[d] . in the marketplace at a price set by the marketplace.").

[4] *Id.*

As the FCC has explained, this means that, for section 271 elements, "the market price should prevail."[5] Thus, a BOC satisfies that federal law standard when it offers section 271 elements at market rates, terms, and conditions, such as where it has entered in "arms-length agreements" with its competitors.[6] Rate-setting by commissions is the opposite of the development of market-based prices discussed in the *USTA II* decision. The two concepts of "market-based" rates on the one hand and "commission-set" rates on the other, are fundamentally at great odds, and this common-sense understanding was precisely what Director Tate discussed when she offered her motion on the market rate for switching in this docket. Director Tate noted the months of calls to negotiate from then Chairman Powell at the FCC and from the TRA itself and went on to conclude that the only course consistent with those calls was to look to the rate that had actually been negotiated:

> DIRECTOR TATE: This dates back to I think Chairman Powell's first request for the parties to do that, and then I tried to do that as well. Mr. Walker admonished me not to undermine the FBO process, although it is really not very much in my nature because, and you-all know, I really as much more of a mediator.
>
> I have played with cutting the numbers in half. I have thought through this a lot, but in order to, I think, be true to my requests and my philosophies about market-based rates, what I would like to propose is – because from my reading of the record, the only rate that has ever been negotiated was the $14 rate, and I would propose that we accept that, ...[7]

Moreover, the failure by certain CLECs to reach an agreed rate – in contravention of the FCC's calls for negotiation of commercial agreements – should not be

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[5] *UNE Remand Order* at ¶ 473; *USTA II,* 359 F.3d at 588-90.
[6] *TRO* at ¶ 664.
[7] 03-00119, *DeltaCom Arbitration,* Transcript of Proceedings, June 21, 2004, at 3.

rewarded. By engaging in any form of state-based, TRA-mandated rate making, the CLECs are rewarded with the same out-dated regulatory regime rejected by the FCC. Director Kyle's motion to deny the CLECs' emergency motion (on No New Adds) recognized that, in order to effectuate the FCC's decisions, the CLECs had to be told "no".

The folly of state commission-driven rate making in this context is clear when DeltaCom's arguments regarding its particular proposed section 271 rate is examined. DeltaCom's constant refrain regarding the proper rate was that it must be ***supported by cost data***. In fact, during this case, DeltaCom has insisted that its proposal is consistent with BellSouth's own cost data provided to the TRA. This position is most revealing. The cost data referenced by DeltaCom is exactly that – ***cost data provided in the context of a TELRIC proceeding.*** While cost data is relevant to TELRIC analysis, it is simply not relevant to a market analysis.

Throughout this proceeding, DeltaCom has attempted to characterize BellSouth's market rate as "unsupported." The fact is, however, that BellSouth's offer need not be supported with ***cost*** data. Cost data is the type of information used to consider to cost-based rates under TELRIC analysis. BellSouth's costs, however, are not relevant to a market rate. The record in this proceeding is clear that BellSouth did, in fact, present evidence that other CLECs are paying rates consistent with the market rate BellSouth has offered to DeltaCom. This evidence, unlike cost evidence, is relevant to whether a market rate is just and reasonable. If the FCC were to evaluate a claim that such a market rate was not just and reasonable, then it would clearly look to evidence of what is happening among

other players in the market. DeltaCom clearly hopes to have the TRA set a "market" rate in the same fashion, and using the same data, as TELRIC rates are set. Such a process will produce a rate that is "market" in name only – a rate that waddles and quacks like the TELRIC duck it really is.

If DeltaCom is permitted to turn the market rate concept on its head in that fashion, in order to achieve a TELRIC rate, for a de-listed UNE, then what CLEC will ever agree to negotiate?

The bottom line is that DeltaCom hopes to reframe the market-based issue into a TELRIC-based issue. In order to do so, DeltaCom consistently offered cost-based arguments relating to this issue. A common sense approach reveals that the use of cost-based analysis to set a market rate is the equivalent of rejecting a market-based rate altogether and instead setting a TELRIC-based rate. This is inconsistent with the FCC's and federal courts' decisions to change the regulatory framework in order to incent true, facilities-based competition. If the only difference in market-rates and TELRIC-rates is the name, then all of the FCC's decisions will be rendered meaningless because nothing will have truly changed.

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

The issue here is whether BellSouth should be required in a section 252 interconnection agreement to pay DeltaCom for collocation (so-called "reverse collocation") at a DeltaCom premises or point of presence ("POP"). BellSouth respectfully submits that the majority committed legal error by creating, without

any basis in the Federal Act, a new right of "reverse collocation" in the context of a section 252 arbitration. The only collocation obligations in the 1996 Act are found in section 251(c)(6), which addresses obligations of incumbent ***LECs, not CLECs***. Nowhere in sections 251 or 252 of the 1996 Act is the concept of reverse collocation discussed or even referenced. Thus, this topic cannot be appropriate for resolution in a section 252 arbitration proceeding.

BellSouth raised this issue of law in both its testimony and post-hearing brief.[8] The Authority did not address this argument in either its initial or best and final offer deliberations. Nor did the majority's order provide any legal analysis or justification for its decision. Indeed, the majority's *Final Order* on Issue 47 does not include a single reference to the Federal Act or any FCC order or rule.

Moreover, the DeltaCom contract language adopted by the majority is ambiguous and vulnerable to gaming by DeltaCom or CLECs who may adopt the DeltaCom interconnection agreement. The *Final Order* adopts DeltaCom's proposed contract language:

> Where BellSouth places equipment on ITC^DeltaCom space and uses that equipment to serve entities other than ITC^DeltaCom, BellSouth derives a benefit and shall abide by the same terms and conditions applied to ITC^DeltaCom for collocation and pay ITC^DeltaCom pursuant to the same rates, terms and conditions for collocation that BellSouth applies to ITC^DeltaCom.[9]

The *Final Order* also requires BellSouth

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[8] BellSouth Post-Hearing Brief at 62-63, and Ruscilli Direct Testimony at 16

[9] The majority provided one exception to this language. BellSouth was not required to pay any nonrecurring charges associated with existing collocations.

> to compensate DeltaCom when Bellsouth locates in DeltaCom's collocation space at the rates, terms and conditions that BellSouth applies to DeltaCom. Reverse collocation charges should be paid on a going-forward basis for existing, as well as future collocations at DeltaCom locations.[10]

Given the *Final Order*'s language, a CLEC could, for example, request a service of BellSouth to be installed at the CLEC's back office location. In order to provide the service, BellSouth must install its own equipment (used solely to provide service to the requesting CLEC) such as (but not limited to) a multiplexer or network interface device, for example. Under DeltaCom's proposed language, once that equipment was installed, the requesting CLEC could claim that BellSouth had established a collocation arrangement and that BellSouth is required to pay collocation charges. In cases, the collocation charges might even be higher than the monthly costs to the CLEC for the requested service setting up an arbitrage situation which surely the Authority did not intend.

As Director Miller pointed out during the arbitrators' deliberations, BellSouth should not be required to pay DeltaCom for "reverse collocation" where there is any benefit to DeltaCom.[11] Unlike BellSouth, which has an obligation to allow DeltaCom to collocate, DeltaCom is protected by the simple fact that it has no obligation under the law to allow BellSouth to "reverse collocate." DeltaCom can simply deny BellSouth's request if it does not agree to BellSouth's proposed terms.

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[10] *See* p. 54-55 of *Final Order*.

[11] *See* p. 32-34 of Transcript of January 12, 2004 deliberations.

Consistent with Director Miller's view, the Georgia Public Service Commission recently rejected DeltaCom's position. The Georgia Commission found that:

> The Issue turns on DeltaCom's obligations. If the collocation is being done for the benefit of and at the request of Deltacom, then BellSouth should not have to compensate DeltaCom for access to its space. However, Deltacom does not have the obligation to allow BellSouth to place equipment in its collocation space for the benefit of other CLECs. DeltaCom can either deny such a request by BellSouth or charge BellSouth for the access.[12]

While BellSouth is willing to negotiate the concept of reverse collocation with DeltaCom and attempt to reach agreement on the rates, terms and conditions for such reverse collocation, this discussion should take place outside the parameters of interconnection negotiations. If the parties cannot reach agreement on rates, terms and conditions for reverse collocation, then DeltaCom can simply refuse to allow BellSouth to collocate at a DeltaCom premises or POP.

The majority should reconsider its order and adopt the Georgia Commission's analysis. Such a result avoids legal error, minimizes the risk of gaming and protects DeltaCom from any unwanted reverse collocation.

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

This issue requires the Authority to determine when a party loses its right to bill for services it rendered. The need to "back bill" sometimes arises simply due to a mistake. Other times, however, back billing is necessary because substantial resources are required to program new billing functions into a myriad of complex

[12] *See Order*, Docket No. 16583-U, January 8, 2004, at 11.

billing systems. The Authority recognized previously that a 90-day limitation on back billing appeared to be too short, especially given the volume of bills BellSouth sends to DeltaCom.[13] It ordered, nevertheless, that the parties' interconnection agreement include a provision that back billing could not exceed three billing cycles, *i.e.* approximately ninety days.

The Authority's decision, if it stands, will, to BellSouth's knowledge, be the most restrictive decision on this issue by any state commission in BellSouth's region. The Georgia Public Service Commission, in its BellSouth-DeltaCom arbitration, rejected DeltaCom's request to limit back billing to ninety days. It held: "Consistent with the BellSouth/AT&T interconnection agreement, the Commission concludes that a twelve-month limitation on back-billing is reasonable."[14] The North Carolina Commission likewise rejected the 90-day limitation advocated by DeltaCom. The North Carolina Commission ordered BellSouth and DeltaCom to include a 12-month back billing limitation in their interconnection agreement in that state, and further ordered that the contract should state that a party could petition the North Carolina Utilities Commission to allow back billing for a particular charge up to 36 months upon the showing of good cause.[15] The Authority's *Order* relied in part on a North Carolina Commission Staff recommendation to limit back billing to 90 days.[16] As stated above, the North Carolina Staff recommendation has been superseded by a North Carolina Commission Order rejecting the 90-day limitation advocated by DeltaCom. The Florida Commission, ruled in an arbitration between

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[13] *Final Order*, at 69.
[14] Order No. 69648, Docket No. 16583-U, at 18.
[15] *Order* (March 2, 2004), Docket No. P-500, Sub 18, at 84
[16] *Final Order,* at 69.

different parties that the five-year statute of limitation in Florida applied to back billing.[17] In addition, there are scores of interconnection agreements on file with the Authority in which CLECs have agreed to allow back billing for a much longer period than ninety days.

It is important to remember that BellSouth has every incentive to bill for services at the time it renders the services. Unfortunately, however, circumstances arise such that BellSouth does not always do so. Sometimes that is due to reasons outside of BellSouth's control. Other times, admittedly, BellSouth, like everyone else, makes a mistake. In either case, BellSouth's customers, in this case DeltaCom, should not be permitted to receive services for free. That, however, is what will happen if the Authority does not allow a sufficient period for back billing. BellSouth's bills to DeltaCom are voluminous and they can be complex. That is the nature of the business. But it is not a good reason to deprive BellSouth and its shareholders of revenue to which it is entitled for services it unquestionably has provided. Ninety days is, as the Authority recognized previously, simply too short a period of time to allow for back billing under these circumstances.

BellSouth respectfully requests that the TRA reconsider its decision to allow BellSouth only ninety days for back billing and order that the parties' interconnection agreement provide for a two-year limitation on back billing. At a minimum, the TRA should allow one year, as that is the shortest period any other state commission in BellSouth's region has, to BellSouth's knowledge, ordered.

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[17] Order No. PSC-03-1139-FOF-TP, Docket No. 020960-TP, at 14

CONCLUSION

For the reasons set forth above, BellSouth respectfully urges the Authority to reconsider its ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2005, a copy of the foregoing document was served on the parties of record, via the method indicated:

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