BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

November 14, 2005

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

RESPONSE OF ITC^DELTACOM TO BELLSOUTH'S MOTION FOR RECONSIDERATION

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") files the following response to the "Motion for Reconsideration" filed by BellSouth Telecommunications, Inc. ("BellSouth"), disputing the Authority's findings on three issues.

SUMMARY

As BellSouth acknowledges (Motion, at 1), the company's main objection to the Authority's rulings appears to be that BellSouth is frustrated with the arbitrators' use of the "final best offer" ("FBO") process to resolve disputed issues. Having unwisely proposed FBOs which reflected little or no change in the company's original positions, BellSouth now files a motion proposing new "final" offers. Having played the game and lost, BellSouth seeks to change the rules.

I. A Just and Reasonable Switching Rate

After determining that the Authority had both a legal right and the obligation to establish a "just and reasonable" rate for unbundled switching provided pursuant to Section 271, the Authority asked the parties to submit FBOs as to what that rate should be.

In response, ITC^DeltaCom proposed a switching rate of $5.08 (usage included) which was based on BellSouth's historic costs and was 26% to 50% higher than ITC^DeltaCom's original, TELRIC-based proposal. On the other hand, BellSouth's FBO did not contain a stand alone rate for switching. BellSouth merely repeated its standard, commercial offer for its DS0 Wholesale Local

Voice Platform Service but made no effort to demonstrate how the company arrived at that rate. Instead, BellSouth continued to insist that the Authority had no jurisdiction over the rate of a Section 271 element.

In its "Motion to Reconsider," BellSouth has dropped the jurisdictional argument but now contends that the agency should have approved an interim switching rate of $14.00 (plus usage) rather than the $5.08 proposed by ITC^DeltaCom.[1]

As previously mentioned, BellSouth's FBO did not include the $14.00 rate or any other rate for stand alone switching rate nor, as the Authority wrote, did BellSouth demonstrate that "the rate is reasonable by showing that it had entered into arm's length agreements with other similarly situated purchasing carriers to provide the switched element at the rate proposed in its final best order." Order, at 38.

BellSouth's latest proposal has a number of internal contradictions.[2] More importantly, it is too late now for BellSouth to make a new, "final" best offer in this arbitration process. BellSouth will, of course, have the opportunity to propose a permanent rate for 271 switching which, if the Authority agrees, will be applied retroactively in place of the interim rate of $5.08. But, unless and until the Authority sets a new permanent rate, the interim rate remains in effect.

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[1] Although BellSouth's Motion does not reiterate the company's often-stated position on the jurisdiction issue, BellSouth does include (almost as an aside) the novel theory that the TRA has already ruled in favor of BellSouth on that point. Motion, at 2-3. BellSouth, however, does not cite to any language in any Authority order holding that the TRA lacks jurisdiction over 271 UNEs because, of course, no such language exists. On the other hand, the Authority's final order in this arbitration devotes sixteen pages to explain how the Authority reached the opposite conclusion, sixteen pages that are never mentioned in BellSouth's filing It is, to say the least, an unpersuasive strategy when BellSouth files a Motion asking the Authority to reconsider its decision on the 271 issue without ever addressing the decision itself

[2] For example, the so-called $14 00 "market" rate appears to be about twice BellSouth's current "market" rate for its DS0 Wholesale Local Voice Platform Service and neither rate bears any apparent relationship to BellSouth's costs of providing switching — for the simple reason that no competitive market for switching exists. One of the defining characteristics of a functioning market is that prices are forced towards costs. BellSouth's repeated assertion that "market rates" are unrelated to costs is an economic absurdity. That BellSouth could impose its $14 00 charge on some CLECs is evidence of monopoly power, not a competitive market See ITC^DeltaCom's letter to Chairman Tate, May 3, 2004, at footnote 3

The FBO process, sometimes called "baseball" arbitration, is a standard procedure used by arbitrators and one that the Authority has employed many times. See MCI Telecom v. Michigan Bell Tel. Co., 79 F. Supp.2d 768, 775 (E.D. Michigan, 1999) It is intended to "force both parties to be more reasonable in their final offers."[3] ITC^DeltaCom offered such a compromise; BellSouth did not. There is no legal or equitable reason to start the process again.

II. Time Limit on Back Billing

The two remaining issues raised by BellSouth in the "Motion for Reconsideration" also seem to reflect BellSouth's unhappiness with the FBO process.

The parties disagreed on a time limit for back billing. BellSouth's FBO proposed a two-year limit. ITC^DeltaCom proposed three billing cycles, ie., approximately ninety days. Given those two options, the Authority adopted the position of ITC^DeltaCom.

BellSouth now proposes to compromise with a time period of one year which, according to the company, has been adopted by several other state commissions in the BellSouth region.

If BellSouth's FBO had been for one year instead of two, perhaps the Authority's decision would have been different. Perhaps not. In adopting the FBO of ITC^DeltaCom, the Authority noted that the Public Staff of the North Carolina Commission had also recommended a ninety-day limit. In any event, BellSouth's one-year proposal comes too late. As seems so often the case with

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[3] The Practising Law Institute has published an article, "Zlaket Rules and Alternative Dispute Resolution," describing the "baseball" arbitration procedure, its practice and purpose (481 PLI/Lit 631 at 642).

> In baseball arbitration, the former mediator, who now will make a binding arbitration decision, will receive each party's final best offer The arbitrator then will choose which of the two offers he or she believes affords the more appropriate resolution of the dispute The arbitrator may not enter a compromise order, i.e., he or she is only authorized to accept one of the two final offers. This hybrid procedure creates a significant incentive for the parties to reach an agreement through mediation, because they both know that absent an agreement, the mediator/arbitrator will immediately resolve the dispute This procedure also tends to force both parties to be more reasonable in their final offers; if their demand is not the "most" reasonable of the two, their offer will be rejected and the opposition's accepted

BellSouth, the company cannot bring itself to make a reasonable offer until it is forced to do so by circumstance. The FBO process is intended to discourage that kind of negotiating tactic.

III. Reverse Co-location

Finally, BellSouth objects to the Authority's decision to require BellSouth to pay co-location charges to ITC^DeltaCom in those situations where BellSouth's equipment occupies space belonging to ITC^DeltaCom and BellSouth is using that equipment, in whole or in part, to provide service for itself or for other CLECs.

First, BellSouth argues that this issue should not be considered in this arbitration because so-called "reverse co-location" is not an issue "discussed or even referenced" in the federal Telecommunications Act and therefore outside the scope of this proceeding. Motion, at 8. BellSouth disregards the language of 47 U.S.C. §251(a)(1) which requires all telecommunications carriers "to interconnect directly or indirectly with facilities and equipment" of other carriers. The terms and conditions under which BellSouth interconnects with ITC^DeltaCom clearly fall under that provision.

Second, BellSouth suggests that, in lieu of the FBOs proposed by the parties, the Authority should adopt the position of the Georgia Commission, which BellSouth characterizes as being consistent with statements made by TRA Director Miller during the Authority's deliberations. Here again, the time has passed for BellSouth to make a new FBO. Furthermore, BellSouth has failed to demonstrate how the Authority's decision to adopt the contract language proposed by ITC^DeltaCom is "ambiguous and vulnerable to gaming" by CLECs. Motion, at 8. The Authority's intent on this issue is very clear. In the unlikely event that a disagreement arises from application of the contract language, either party can always bring its complaint to the agency.

For these reasons, the Motion for Reconsideration should be denied.

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. mail, to:

Guy Hicks
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on this the 11th day of November 2005.

Henry Walker