BELLSOUTH

BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, Tennessee 37201-3300

615 214-6301
Fax 615 214-7406

Guy M. Hicks
General Counsel

December 7, 1999

VIA HAND DELIVERY

David Waddell, Executive Secretary
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. 99-00430

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Post-Hearing Brief. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

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Enclosure

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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. 99-00430

BELLSOUTH TELECOMMUNICATIONS, INC.'S POST-HEARING BRIEF

I. INTRODUCTION

This arbitration was initiated by ITC^DeltaCom Communications, Inc. ("DeltaCom") before the Tennessee Regulatory Authority ("Authority") pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 ("1996 Act"). BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Post-Hearing Brief to address the remaining issues in dispute and requests that the Authority adopt BellSouth's position on each of these issues.[1]

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[1] Since DeltaCom filed its petition for arbitration, the parties have continued to attempt to reach agreement on the disputed issues. These attempts have been successful as the parties filed a revised joint list of unresolved issues with the Authority on September 13, 1999, which removed a number of issues from the arbitration. Since the hearings in this case, the parties have reached agreement on the following additional issues: Issue 1(b) (waiver of nonrecurring charges); Issue 2(a) (definition of parity); Issue 2(a)(i)(2) (Regional Street Address Guide download); Issue 2(a)(ii) (advanced notice of business rule changes); Issue 2(c)(i) (NXX testing); Issue 2(c)(ii) (loop cutover intervals); Issue 2(c)(iii) (order coordination); Issue 2(c)(iv) (labor costs); Issue 2(c)(v) (designation of personnel); Issue 2(c)(vi) (trouble repair and isolation charges); Issue 2(c)(viii) (maintenance of HDSL and ADSL compatible loops); Issue 2(c)(xiv) (waiver of nonrecurring charges); Issue 2(c)(xv)(A) (UNE conversion coordination); Issue 2(f) (local number portability cutover procedures); Issue 2(g) (definition of "order flow through"); Issue 3(h) (reconnection); Issue 3(m) (repair information); Issue 6(e) (resale conversions); and Issue 7(b)(ii) (meet-point billing arrangements). On November 19, 1999, the parties filed a new revised joint list of unresolved issues removing all these settled issues from this arbitration.

II. DISCUSSION

Issue 1(a) -- Performance Measurements and Performance Guarantees (Att. 10)

Should BellSouth be required to comply with the performance measures and guarantees for pre-ordering/ordering, resale, and unbundled network elements ("UNEs"), provisioning, maintenance, interim number portability and local number portability, collocation, coordinated conversions and the bona fide request processes as set forth fully in Attachment 10 of Exhibit A of this Petition?

Issue 8(f) -- Breach of Contract (GTC – 25)

Should BellSouth be required to compensate ITC^DeltaCom for breach of material terms of the contract?

The parties do not dispute the importance of or need for performance measurements in the parties' interconnection agreement. The only dispute is which performance measures should be included. BellSouth submits that the appropriate performance measures are BellSouth's Service Quality Measurements ("SQMs"), which are comprehensive measures covering BellSouth's performance in nine separate categories: (1) pre-ordering; (2) ordering; (3) provisioning; (4) maintenance and repair; (5) billing; (6) operator services and directory assistance; (7) E911; (8) trunk group performance; and (9) collocation. BellSouth's SQMs were developed as a result of proceedings before the Louisiana Public Service Commission, Docket No. U-22252-C, the Georgia Public Service Commission, Docket 7892-U, and in response to the Notice of Proposed Rulemaking issued by the Federal Communications Commission ("FCC") in Docket 98-56. Coon, Tr. Vol. IIID at 776-3 – 777-4.

Even though it had ample opportunity to do so, DeltaCom has elected not to participate in the various proceedings conducted by state commissions in BellSouth's region on the issue of performance measurements. Rozycki, Tr. Vol. IA at 46. Instead, DeltaCom is advocating the adoption of performance measurements from proceedings in Texas, even though DeltaCom was not involved in those proceedings. *Id.* at 44. DeltaCom's proposed measurements are based on a draft proposal by the staff of the Texas Public Service Commission that DeltaCom obtained from a consultant. *Id.* The Texas Commission staff has since modified its proposed performance measurements – modifications that are not reflected in DeltaCom's proposal. *Id.* at 45. The Authority should decline to adopt performance measurements based upon an outdated proposal in Texas that has no relevance to BellSouth, particularly when the Louisiana and Georgia Public Service Commissions and numerous interested parties have devoted countless hours to developing comprehensive performance measures suitable to the industry in BellSouth's region.

As a result of these countless hours, BellSouth's SQMs are available to DeltaCom and every other competing local exchange carrier ("CLEC") in Tennessee today. The same cannot be said about DeltaCom's proposed performance measurements. That BellSouth's SQMs have undergone rigorous review and are currently available for use were reasons cited by the South Carolina Public Service Commission for adopting BellSouth's SQMs rather than DeltaCom's proposed performance measures. Exhibit 1, Order No. 1999-690, *In re: Petition of ITC^DeltaCom Communications for Arbitration with BellSouth Telecommunications, Inc.*, Docket No. 1999-259-C, at 11 (Oct. 4, 1999) ("*South Carolina Order*"). The South Carolina Commission found that the SQMs "have undergone two years of review and formulation by the FCC and several state commissions and input from various CLECs. As such, the Commission recognizes that these performance measurements are in place and ready to be implemented within the context of this agreement until the Authority can conclude its generic proceedings." *Id.* at 11-12.

While complaining about BellSouth's SQMs, DeltaCom has never actually compared the SQMs with DeltaCom's proposed performance measurements to determine in what respect, if any, the SQMs are allegedly deficient. Rozycki, Tr. Vol. IA at 50. Interestingly, the South Carolina Commission asked DeltaCom to make such a comparison almost two months ago, which DeltaCom has yet to do. *Id.* However, BellSouth has taken the time to make such a comparison and has determined that BellSouth's SQMs are actually more comprehensive than DeltaCom's proposed performance measurements. Coon, Tr. Vol. IIID at 780-782; *see also* Rozycki, Tr. Vol. IA at 52-53 (acknowledging that BellSouth's SQMs contain order completion notice measure, while DeltaCom's proposal does not contain a similar measure).

That DeltaCom has not compared BellSouth's SQMs with its proposed performance measures is not surprising, given that DeltaCom has never taken issue with BellSouth's SQMs other than the fact that they do not have "performance guarantees" associated with them. DeltaCom witness Rozycki recently admitted as much in the arbitration hearings in Georgia. According to Mr. Rozycki, DeltaCom "would be willing to accept the performance measures, the SQMs, of BellSouth *so long as they are coupled with the guarantees* that we have proposed." *See* Transcript of Hearing before the Georgia Public Service Commission, *In re: Petition of ITC^DeltaCom Communications, Inc. for Arbitration of its Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket 10854-U, at 271-73 (Nov. 29, 1999) (emphasis added). By its own admission, therefore, DeltaCom is not so much concerned about the details of how BellSouth's performance is measured, so long as such performance is backed by "guarantees."

BellSouth has previously briefed the Authority's power to adopt DeltaCom's proposed "performance guarantees," which is incorporated herein by reference. However, even assuming the Authority has the power to impose DeltaCom's proposed "performance guarantees" in this arbitration (which BellSouth submits is not the case), there are compelling reasons why the Authority should decline to do so.

First, DeltaCom's proposed "performance guarantees" are not tied to cost or based on any economic principles. Rather, they appear to be set based upon the estimated revenue DeltaCom would lose if a customer were to be lost. Taylor, Tr. IIIA at 532-140. However, as BellSouth witness Taylor explained, not every service failure by BellSouth or failure to adhere to a specified performance measure would cause a customer to leave DeltaCom. *Id.*

Second, DeltaCom's proposed "performance guarantees" would take effect irrespective of whether the fault was BellSouth's, DeltaCom's, the customer's, or no one in particular. Even if rewritten to apply only when fault can be unambiguously ascertained, the measures do not compare the service BellSouth supplies other CLECs or its own retail customers with the service it provides DeltaCom, and the measures do not account for statistical variation in those measures. As a result, under DeltaCom's proposal, BellSouth would pay "performance guarantees" when even the level of service it supplies DeltaCom is the same as that which it supplies itself. *Id.*

Third, adopting DeltaCom's proposed "performance guarantees" would be inconsistent with prior decisions of this agency rejecting similar proposed "performance guarantees." In the NEXTLINK arbitration, the Authority declined to adopt NEXTLINK's proposal for "self-executing remedies" that would have applied in the event BellSouth failed to meet performance measures or loop provisioning intervals to which the parties had agreed. First Order of Arbitration Award, Docket No. 98-00123, at 16 (May 18, 1999). Without reaching the issue of whether self-executing remedies were appropriate, the Authority concluded that it was not possible to fashion remedies based on the evidentiary record developed in the arbitration proceeding.

The same is true here, as the evidentiary record in this arbitration is indistinguishable from the record in the NEXTLINK arbitration. Like NEXTLINK, DeltaCom has simply proposed a series of performance measures and a corresponding series of "performance guarantees." Deltacom has not bothered to explain in any real detail how those guarantees were developed. Nor has DeltaCom established that its guarantees are reasonable or are in any way logically related to BellSouth providing nondiscriminatory access as required by the 1996 Act.

Prior to its decision in the NEXTLINK arbitration, the Authority also declined to adopt MCI's proposal for a system of penalties and credits that would have applied in the event BellSouth failed to meet certain performance measures. *See* Second and Final Order of Arbitration Awards, Docket No. 96-01271 (Jan. 23, 1997). The Authority concluded that "MCI's proposed system of non-performance credits and penalties is wholly unnecessary, redundant, and not required by law." Brief of the Tennessee Regulatory Authority, Case No. 3-97-0616, at 25 (filed April 13, 1998). According to the Authority, there is no legal requirement mandating the creation of a supplement enforcement scheme for arbitrated interconnection agreements and, in view of the reasonableness and adequacy of remedies available in the event of a breach of such agreement, the Authority's "refusal to require a system of penalties and credits, as requested by MCI, was eminently reasonable ...." (*Id.* at 26).

The Authority's reasoning in the MCI arbitration applies equally here. In the event BellSouth fails to comply with its obligations under the interconnection agreement with DeltaCom, DeltaCom has adequate remedies under Tennessee and federal law and is free to seek relief from this Authority or the courts. Although DeltaCom claims that requiring it to do so "would effectively thwart competition in the local telephone market," DeltaCom Initial Post-Hearing Brief Regarding Performance Guarantees at 11, the lack of "performance guarantees" in

Tennessee has not hindered local competition in Tennessee. Indeed, such competition has been robust, at least in those market segments where competitors have chosen to compete.

DeltaCom's predictions of "constant and continuous litigation" absent "performance guarantees" ring hollow. *Id.* CLEC complaints filed with the Authority concerning BellSouth's performance have been relatively few and far between, notwithstanding the absence of "performance guarantees" in Tennessee since the local market was opened to competition in 1995.[2] Furthermore, rather than reducing litigation, adopting DeltaCom's "performance guarantees" would likely have the opposite effect. Given the substantial sums at risk, the parties would have substantial incentive to litigate whether the conditions have been satisfied so as to warrant the large payments envisioned by DeltaCom. Consequently, adopting DeltaCom's "performance guarantees" will not save the parties "a considerable expenditure of time and money," as DeltaCom contends, but rather will only change the type of regulatory proceeding upon which time and money must be spent.

BellSouth's SQMs comply with decisions of two of the Authority's sister commissions on the issue of performance measurements. Because the SQMs are sufficient for the CLEC industry in Georgia and Louisiana as a whole, they should be sufficient for DeltaCom in Tennessee as well. DeltaCom has not articulated any legitimate bases for adopting an individualized set of performance measurements that would apply only to DeltaCom, particularly when performance measurements should be consistent across all CLECs in order for the Authority to monitor whether BellSouth is providing nondiscriminatory access. Accordingly, the Authority should

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[2] The exception has been complaints filed by various CLECs against BellSouth over the payment of reciprocal compensation for Internet-bound traffic. Nothing in DeltaCom's "performance guarantee" proposal would even remotely address this issue.

resolve this issue by directing the parties to incorporate BellSouth's SQMs into their interconnection agreement.

Issue 2 -- <u>Parity – General (GTC – 3.2; Att. 2-2.3.1.4-.5; Att. 6-1.1)</u>

Pursuant to the definition of parity agreed to by the parties, should BellSouth be required to provide the following and, if so, under what conditions and at what rates: (1) Operational Support Systems ("OSS"); and (2) UNEs.

It is not clear what relief DeltaCom is seeking under this issue that is not already subsumed under other issues. *See generally* Issue 2(b)(ii) (UNEs - elements offered); Issue 2(b)(iii) (combinations of UNEs); Issue 6(a) (rates and charges for OSS). Indeed, DeltaCom devoted little, if any, testimony to Issue 2, other than the definition of "parity" – a definition upon which the parties have now reached agreement. There is no dispute that BellSouth must provide nondiscriminatory access to OSS and unbundled network elements, and the record amply demonstrates that BellSouth is doing so.

BellSouth currently provides CLECs with nondiscriminatory electronic interfaces to access BellSouth's OSS, including: the Local Exchange Navigation System and the Telecommunications Access Gateway for pre-ordering, ordering, and provisioning; Electronic Data Interexchange for ordering and provisioning; Trouble Analysis and Facilities Interface for maintenance and repair; Electronic Communications Trouble Administration for maintenance and repair; and Optional Daily Usage File, Enhanced Optional Daily Usage File, and Access Optional Daily Usage File for billing. BellSouth also offers CLECs manual interfaces to its OSS. These interfaces allow CLECs to perform pre-ordering, ordering, provisioning, maintenance and repair, and billing functions for resale service in substantially the same time and manner as BellSouth does for itself, and, in the case of unbundled network elements, provide a reasonable competitor with a meaningful opportunity to compete, which is all that is required. Pate, Tr. Vol. IIID at 755-756.[3]

DeltaCom's claim that BellSouth's OSS "does not work," Rozycki, Tr. Vol. IA at 31-5, is belied by the facts. As BellSouth witness Pate explained, BellSouth has continued to enhance its OSS, and CLECs' use of these systems has grown exponentially. Between 1998 and 1999, the number of CLEC orders increased by 21 percent, including an increase of 70 percent in the use of the electronic ordering interface that is used by DeltaCom. The flow through rate for these interfaces has exceeded 90 percent. Pate, Tr. Vol. IIID at 753-39. The CLEC industry has made good use of BellSouth's OSS, and DeltaCom should be able to do likewise.[4]

With respect to nondiscriminatory access to UNEs, the only specific issue raised by DeltaCom concerns the unbundling of loops served by Integrated Digital Loop Carrier systems, which is discussed below. Although DeltaCom also offers anecdotal "evidence" about alleged difficulties with unbundled loops provisioned by BellSouth in other states, none of the incidents about which DeltaCom complains occurred in Tennessee, since DeltaCom is not even doing business in this State. Furthermore, such anecdotal evidence does not, by itself, mean that

[3] That CLECs have nondiscriminatory access to BellSouth's OSS is illustrated by TAFI, BellSouth's maintenance and repair interface. The TAFI interface used by CLECs such as DeltaCom is the same maintenance and trouble repair system used by BellSouth's own retail representatives for non-designed services, except that the CLEC TAFI combines functionality for both residential and business services, while BellSouth must use separate TAFI interfaces for its residential and business retail units. Pate, Tr. Vol. IIID at 755-756.

[4] Although DeltaCom complains that more than 50% of its orders submitted electronically "fall out" for manual handling, DeltaCom markets complex business services to its customers – orders for which are designed to fall out for manual handling using the same processes that BellSouth uses to handle the same orders for its retail customers. Thus, the fallout rate experienced by DeltaCom is not representative of the CLEC community as a whole. Between January and September 1999, the CLEC aggregate fallout rate was only 7.9%. Pate, Tr. Vol. IIID at 753-47

BellSouth has failed to provide nondiscriminatory access to UNEs. *See In re: Application of BellSouth Corp., et al., For Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, ¶ 200 (Oct. 13, 1998). This is particularly true given that a number of cases cited by DeltaCom merely involved slight problems in provisioning the order, even though the order was completed on the due date. Milner, Tr. Vol. ID at 184-55. In other instances, DeltaCom's orders could not be worked because of a lack of facilities. While these facility delays are regrettable, the lack of facilities impacts all end user customers in the same manner, whether they are end user customers of DeltaCom or BellSouth. *Id.* This is the essence of nondiscriminatory treatment.

Issue 2(a)(iv) -- Parity – Integrated Digital Loop Carrier ("IDLC") (Att. 2-3.1)

Should BellSouth be required to provide an unbundled loop using IDLC technology which will allow ITC^DeltaCom to provide consumers the same quality of service as that offered by BellSouth to its customers?

BellSouth provides access to all of its loops on an unbundled basis, including those loops served by Integrated Digital Loop Carrier ("IDLC") technology. Currently, 21 percent of the loops in Tennessee are served utilizing IDLC. Milner, Tr. Vol. ID at 184-49.

However, IDLC equipment involves the "integration" of loop facilities with switched facilities by eliminating equipment in the central office. When a CLEC such as DeltaCom wants to serve an end-user customer using its own switch and that end-user customer is currently served by BellSouth over IDLC equipment, the customer's loop can no longer be "integrated" with the BellSouth switch. Thus, BellSouth must "disintegrate" a loop served by IDLC so that DeltaCom can connect the loop to its switch. Milner, Tr. Vol. ID at 184-5.

BellSouth utilizes six technically feasible methods to unbundle an IDLC-delivered loop, including the use of: (1) copper facilities; (2) integrated network access systems; (3) "side-door" or hair-pin arrangements; (4) digital "side-door" arrangements; (5) next generation digital loop carrier facilities; and (6) non-integrated or universal digital loop carrier ("DLC") system. Milner, Tr. Vol. ID at 184-7 – 184-9. BellSouth utilizes all the technically feasible methods identified by the FCC to unbundle an IDLC-delivered loop, and BellSouth is willing to consider any other technically feasible method proposed by DeltaCom. Hyde, Tr. Vol. IC at 136-37; Milner, Tr. Vol. ID at 184-7.

DeltaCom insists that in unbundling an IDLC-delivered loop, BellSouth should be required to furnish "IDLC equivalency" for all end users currently served by IDLC. Hyde Tr. Vol. IC at 135. DeltaCom does not explain how this is to be done and offers few insights as to the precise remedy DeltaCom is seeking. DeltaCom witness Hyde made clear that DeltaCom is not asking that the Authority "mandate any specific use of any particular kind of technology" and acknowledged that there are "limitations on IDLC to certain degrees and in certain manners." Hyde Tr. Vol. IC at 142-43.

Most of the unbundling methods utilized by BellSouth apparently are acceptable to DeltaCom. Hyde Tr. Vol. IC at 141. However, it appears that DeltaCom is seeking a prohibition against BellSouth unbundling an IDLC-delivered loop using the universal DLC method, although DeltaCom never comes right out and says so. Hyde, Tr. Vol. IC at 147-48. There is no legal basis for the Authority to grant DeltaCom such relief. First, the FCC identified non-integrated "loop carrier links," which would include a universal DLC system, as one technically feasible method by which incumbents must unbundle IDLC-delivered loops. *First Report and Order,* Docket 96-38, ¶ 384, n.831 (quoting comments of MCI). Nothing in the FCC's orders can be read to prohibit BellSouth from utilizing a technically feasible unbundling method.

Second, the Authority should decline DeltaCom's invitation to micromanage BellSouth's provisioning of network elements. In any given situation, BellSouth may not have the luxury of choosing between methods of unbundling an IDLC-delivered loop. For example, while DeltaCom espouses the virtues of the "side-door" arrangement and insists that it "should be mandated for more extensive use," Hyde, Tr. Vol. IC at 140-41, Mr. Hyde acknowledged that use of such an arrangement is not technically feasible in every instance and that certain switches in BellSouth's network cannot support such an arrangement. Hyde, Tr. Vol. IC at 142.

The difficulties inherent in DeltaCom's proposal are illustrated by the following example. Assume DeltaCom requests that BellSouth unbundle an IDLC-delivered loop to serve a particular business customer in Nashville. Assume further that the only existing facilities available by which BellSouth can remove the loop from its switch and provide it to DeltaCom is through the use of spare capacity on a universal DLC system. Under DeltaCom's proposal, BellSouth would be unable to unbundle the loop in this manner, but instead presumably would be required to build new facilities or add new equipment in order to accommodate DeltaCom. Requiring BellSouth to do so when an existing universal DLC system is available is unreasonable, unduly burdensome, and inconsistent with BellSouth's obligations under the 1996 Act. It also would take longer for BellSouth to provision an unbundled loop by building new facilities or adding new equipment, which is ironic given DeltaCom's complaints about provisioning intervals.

Third, DeltaCom's claim that customers served by loops using universal DLC somehow receive inferior service is without merit. Twelve percent of BellSouth's loops in Tennessee currently utilize universal DLC, Milner, Tr. Vol. ID at 184-49, and there has been no showing that these customers receive "inferior service." Mr. Hyde agreed that there is no "perceptible" difference in voice transmissions between an IDLC delivered loop and a universal DLC loop. Hyde, Tr. Vol. IC at 146. Mr. Hyde also acknowledged that BellSouth customers have no guarantees concerning the type of technology that will be used by BellSouth to provide service and that a BellSouth customer being served by an IDLC loop today could be served by a universal DLC loop tomorrow. Hyde, Tr. Vol. IC at 149; Milner, Tr. Vol. ID at 184-10.

While a universal DLC system does involve an additional analog to digital conversion that could potentially affect modem speed, the analog loops at issue in this arbitration are only required to support voice grade service and data at speeds up to 9.6 kbs. Although it may support higher speeds, it is not required to do so, particularly when there are other variables that come into play, such as the type of modems and kind of transmission equipment involved. As Mr. Milner explained, if a DeltaCom end-user requires specific transmission parameters that are not associated with a basic unbundled loop, DeltaCom may order a different type of loop that provides those parameters or may submit a bona fide request for a network element with those unique transmission parameters. Milner, Tr. Vol. IC at 184-10. Thus, DeltaCom can achieve its desired technical requirements without hamstringing BellSouth in the manner in which it provisions unbundled loops.[5]

Issue 2(b)(ii) -- UNEs – Elements Offered (Att. 2 – 1.3, 2.3.1.3, 2.3.1.7)

Until the Authority makes a decision regarding UNEs and UNE combinations, should BellSouth be required to continue providing those UNEs and combinations that it is currently providing to ITC^DeltaCom under the interconnection agreement previously approved by this Authority?

Notwithstanding pages of pre-filed testimony and three days of hearings, the relief DeltaCom is seeking with respect to this issue remains unclear. By the plain terms of the parties' expired interconnection agreement, BellSouth and DeltaCom continue to operate under that agreement until a new interconnection agreement is in effect. As a result of this arbitration, the

[5] In resolving this issue, the South Carolina Commission found that BellSouth was providing "access to all of its loops on an unbundled basis, including those loops served by IDLC technology." Exhibit 1, *South Carolina Order* at 22. The South Carolina Commission declined to require "any additional access to unbundled loops." *Id.* at 23.

parties will have a new agreement that will reflect the Authority's decisions on all the remaining issues raised by DeltaCom, including those issues relating to unbundled network elements and network combinations. Once the Authority renders its decision on these issues, the question posed by this issue will be rendered moot.

DeltaCom apparently seeks to use this issue to try to persuade the Authority that it should be entitled to purchase so-called "extended loops" or "EELs" under the parties' expired interconnection agreement. Hyde, Tr. Vol. IC at 154-55. Although DeltaCom has asked the Authority to arbitrate the "extended loop" issue for purposes of DeltaCom's new interconnection agreement, this arbitration is not the proper forum for DeltaCom to litigate rights under its expired agreement. If DeltaCom is aggrieved by any actions of BellSouth under the expired agreement, DeltaCom's proper remedy is to file a complaint with the Authority. That DeltaCom has not done is not surprising since DeltaCom is not even doing business in Tennessee.

However, even assuming the interpretation of the expired agreement is properly before the Authority under the guise of an arbitration, which is not the case, DeltaCom's interpretation is flawed. BellSouth is under *no* obligation, either by contract, the 1996 Act, or the FCC's Rules, to combine unbundled network elements with BellSouth's retail services. The question of "extended loops" first arose when DeltaCom ordered channelized special access (a tariffed service), and then ordered unbundled loops to be terminated to the special access facility. BellSouth employees erroneously completed DeltaCom's orders. By the time BellSouth discovered its mistake, BellSouth had already erroneously combined a number of loops with special access service for DeltaCom. Varner, Tr. Vol. IIIA at 577-126.[6]

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[6] The term "extended loop" or "EEL" is commonly understood to refer to a combination of an unbundled loop and unbundled transport. *See, e.g., Third Report and Order,* CC Docket

To avoid a complete disruption of DeltaCom's service (which would potentially affect DeltaCom's end users), BellSouth reached an oral agreement with DeltaCom in April 1999 by which BellSouth would continue provisioning these "extended loops" to DeltaCom until such time as DeltaCom could establish collocation arrangements in the affected central offices. Consistent with this agreement, DeltaCom submitted numerous collocation applications in May 1999 across BellSouth's region, and BellSouth is currently in the process of implementing DeltaCom's collocation orders. When these collocation arrangements are completed, BellSouth's provisioning of "extended loops" to DeltaCom will be curtailed, and existing "extended loops" will be converted to unbundled loops and unbundled dedicated transport, which BellSouth will deliver to DeltaCom's collocation space and which DeltaCom can combine in order to provide telecommunications services. Varner, Tr. Vol. IIIA at 577-127.

Nothing in DeltaCom's expired interconnection agreement entitles DeltaCom to purchase unbundled loops without collocation, which is the purpose of a so-called "EEL." Indeed, the expired agreement made clear that DeltaCom would access unbundled network elements solely through collocation. For example, Article IV.B.1 plainly states: "Interconnection shall be achieved via collocation arrangements DeltaCom shall maintain at a BellSouth wire center or other BellSouth network point." Furthermore, although DeltaCom had discretion in selecting the type of arrangement, the expired agreement *only obligated BellSouth to deliver an unbundled loop or port element "to the DeltaCom collocation arrangement.*" Article IV.B.2 (emphasis added). *See also* Article IV.B.4 ("*DeltaCom shall access BellSouth's unbundled loops via collocation* at the BellSouth wire center where those elements exist. *Each loop or port shall be delivered to DeltaCom collocation* by means of a cross connection.") (emphasis added). BellSouth agreed to

96-98, ¶ 474 (Nov. 5, 1999). However, the combination at issue here is a combination of an permit DeltaCom to place certain types of equipment in its collocation space for the express purpose of permitting DeltaCom to "interconnect[] to unbundled loop elements." Article IV.B.3 & IV.B.10. All of these provisions would be rendered superfluous if, as DeltaCom claims, it were contractually entitled to purchase unbundled loops without bothering to collocate in those offices.

DeltaCom's claim to "extended loops" hinges solely on Article IV.B.14, which obligated the parties to attempt "in good faith to mutually devise and implement a means to extend the unbundled loop sufficient to enable DeltaCom to use a collocation arrangement at one BellSouth location per LATA (e.g., tandem switch) to obtain access to the unbundled loop(s) at another such BellSouth location over BellSouth facilities." While this language contemplated that the parties would negotiate the terms and conditions of potential "extended loop" arrangements, such negotiations never took place. DeltaCom simply began ordering special access and unbundled loops terminated to the special access facility – orders that BellSouth erroneously completed. It is difficult to conceive how DeltaCom can rely upon this provision under such circumstances.[7]

Issue 2(b)(iii) -- <u>UNEs – Extended Loops and Loop/Port Combinations (Att. 2 – 1.3, 2.3.1.3, 2.3.1.7)</u>

Should BellSouth be required to provide to ITC^DeltaCom extended loops or the loop/port combination? If so, what should the rates be?

The issue concerning extended loops and loop-port combinations was largely resolved as a result of the FCC's *Third Report and Order* in CC Docket 96-98 (Nov. 5, 1999), as modified by

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unbundled loop and a special access service. Hyde, Tr. Vol. IC at 158-59.

[7] DeltaCom has represented elsewhere that it needs EELs in order to serve rural areas in BellSouth's region. DeltaCom made such a claim in South Carolina, where DeltaCom has approximately 1,000 EELs in place. However, the South Carolina Commission rejected DeltaCom's claim, finding that "... there is no evidence that ITC^DeltaCom is making any serious attempt to serve rural customers today." Exhibit 1, *South Carolina Order* at 34. Indeed, Mr. Hyde admitted under cross-examination in this proceeding that DeltaCom is not using extended loops to "serve any rural offices today." Hyde, Tr. Vol. IC at 162.

the FCC's Supplemental Order issued on November 24, 1999. The FCC confirmed that BellSouth presently has no obligation to combine network elements for CLECs such as DeltaCom, when those elements are not currently combined in BellSouth's network. The FCC rules, 51.315(c)-(f), that purported to require incumbents to combine unbundled network elements were vacated by the Eighth Circuit Court of Appeals and were not appealed to or reinstated by the Supreme Court. The question of whether those rules should be reinstated is pending before the Eighth Circuit, and the FCC declined to revisit those rules at this time. *Third Report and Order,* ¶ 481.

The FCC also confirmed that when unbundled network elements, as defined by the FCC, are currently combined in BellSouth's network, BellSouth cannot separate those elements except upon request. 47 C.F.R. § 51.315(b). For example, when a loop and a port (at least for certain customers with fewer than four access lines) are currently combined by BellSouth to serve a particular customer, that combination of elements must be made available to CLECs, such as DeltaCom. According to the FCC, requesting carriers are entitled to obtain such combinations "at unbundled network element prices." *Id.* at ¶ 480. The Authority is establishing permanent prices for unbundled network elements in Docket No. 97-01262. Under the circumstances, it is not clear what additional relief DeltaCom is seeking from the Authority with respect to this issue.

To the extent DeltaCom wants the Authority to adopt an expansive view of "currently combined" so as to obligate BellSouth to combine elements for DeltaCom, the Authority should reject DeltaCom's request. DeltaCom witness Wood opined that BellSouth is required to provide combinations of elements so that DeltaCom can serve a customer, even if that customer is not served by BellSouth and even though BellSouth has no existing facilities in place to serve that customer. According to Mr. Wood, because BellSouth "currently combines loops and switch [ports] through its network today," Rule 315(b) requires that BellSouth combine those elements for DeltaCom, apparently anywhere and everywhere. Wood, Tr. Vol. IIB at 311-12.

However, the FCC does not share Mr. Wood's views. As the FCC made clear in its *Third Report and Order,* Rule 51.315(b) applies to elements that are "in fact" combined. *See id.* ¶ 480 ("To the extent an unbundled loop is in fact connected to unbundled dedicated transport, the statute and our rule 51.315(b) require the incumbent to provide such elements to requesting carriers in combined form"). The FCC declined to adopt the definition of "currently combined," which is espoused by DeltaCom, that would include all elements "ordinarily combined" in the incumbent's network. *Id.* (declining to "interpret rule 51.315(b) as requiring incumbents to combine unbundled network elements that are 'ordinarily combined' …"). Thus, Mr. Wood's view that BellSouth should be required to provide combinations anywhere, even for customers not currently served by BellSouth, cannot be reconciled with the FCC's *Third Report and Order.*[8]

Likewise, to the extent DeltaCom wants the Authority to define an EEL as a separate unbundled network element that BellSouth must provide, the Authority should reject this request as well. In its *Third Report and Order,* the FCC expressly declined "to define the EEL as a separate network element in this Order. As discussed above, the Eighth Circuit is currently reviewing whether rules 51.315(c)– (f) should be reinstated. We see no reason to decide now whether the EEL should be a separate network element, in light of the Eighth Circuit's review of those rules." *Third Report and Order*, ¶ 478. Accordingly, except to the extent where currently

[8] Mr. Wood stated during cross-examination that DeltaCom was not asking this Authority "to do something different" than the FCC with respect to the circumstances under which BellSouth must provide combinations of network elements to DeltaCom. Wood, Tr. Vol. IIB at 312-13. Accordingly, because the FCC has determined that Rule 315(b) applies only to elements that are "in fact" combined and not to elements "ordinarily combined," this issue should no longer be in dispute.

combined elements in BellSouth's network that comprise an EEL are located, BellSouth currently has no legal obligation to provide DeltaCom with the EEL.

Furthermore, even if there are circumstances when DeltaCom has purchased currently combined elements that may comprise the EEL, DeltaCom's ability to convert special access facilities to unbundled elements should be constrained until the FCC completes its Fourth Notice of Proposed Rulemaking. *Third Report and Order*, ¶ 489. Such constraints are necessary in order to allow the FCC to develop an adequate record to examine the concern "that allowing requesting carriers to obtain combinations of loop and transport unbundled network elements based on forward-looking cost would provide opportunities for arbitrage of special access services," and thereby negatively impact universal service. *Third Report and Order*, ¶ 494; November 24 Supplemental Order ¶ 4. Until that rulemaking is complete, the FCC has made clear that carriers may not convert special access services to combinations of unbundled network elements unless the carrier uses combinations of network elements to provide a significant amount of local exchange service, in addition to exchange access service to a particular customer. November 24 Supplemental Order ¶¶ 2 & 4.

The resolution of this issue is relatively straightforward: DeltaCom should be entitled to purchase extended loops and loop and port combinations to the extent permitted by and consistent with the FCC's *Third Report and Order* as modified by its November 24, 1999 Supplemental Order. Nothing more, and nothing less.

Issue 3 -- Reciprocal Compensation (Att. 3 – 6.0; GTC – definition of "local" and "reciprocal compensation")

Should BellSouth be required to pay reciprocal compensation to ITC^DeltaCom for all calls that are properly routed over local trunks, including calls to Information Service Providers (ISPs)?

No serious dispute exists that ISP-bound traffic is "non-local interstate traffic." *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, ¶ 26, n.87 (Feb. 26, 1999) (hereinafter "*Declaratory Ruling*"). The Authority should decline to require the payment of reciprocal compensation for ISP-bound traffic, since "reciprocal compensation obligations should apply only to traffic that originates and terminates within a local calling area ...." *First Report and Order,* CC Docket 96-98, ¶¶ 1034-35 (Aug. 8, 1996). This is result reached by the South Carolina Public Service Commission, which recently held in an arbitration involving DeltaCom that reciprocal compensation is not an appropriate compensation mechanism for ISP-bound traffic. Exhibit 1, *South Carolina Order,* at 64 ("Further, since Section 251 of the 1996 Act requires that reciprocal compensation be paid for local traffic, the Authority further finds that the 1996 Act imposes no obligation on parties to pay reciprocal compensation for ISP-bound traffic").

Indeed, because the FCC intends to establish an inter-carrier compensation mechanism for ISP-bound traffic, there is no requirement that the Authority establish an interim compensation arrangement at this time. However, to the extent the Authority decides to do so, the Authority should select one of the interim mechanisms proposed by BellSouth. These include: (1) bill and keep; (2) tracking and holding any compensation in abeyance pending the establishment of an inter-carrier compensation mechanism by the FCC; or (3) the establishment of a compensation arrangement similar to that which exists for other access traffic. Any of these three interim inter-carrier compensation mechanisms would be consistent with the 1996 Act and applicable FCC rules. The same cannot be said about DeltaCom's proposal that reciprocal compensation be paid for ISP-bound traffic.[9]

1. Reciprocal Compensation Is Not An Appropriate Cost Recovery Mechanism for ISP-Bound Traffic.

Although both parties agree that there are costs associated with calls by BellSouth end users to ISPs served by DeltaCom, the question before the Authority is what is the appropriate mechanism to allow DeltaCom to recover such costs. Rozycki, Tr. Vol. IIB at 336; Varner, Tr. Vol. IIIA at 589-591. Notwithstanding DeltaCom's claims to the contrary, however, reciprocal compensation is not an appropriate cost recovery mechanism, interim or otherwise.

By its very nature, reciprocal compensation is a *cost-based mechanism* designed to provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of local traffic. 47 U.S.C. § 251(b)(5). Reciprocal compensation rates should compensate a carrier for the forward-looking costs its incurs. Even DeltaCom recognizes that reciprocal compensation, as provided for in Sections 251(b)(5) and 252(d)(2) of the 1996 Act, is a cost recovery mechanism. Rozycki, Tr. Vol. IIB at 349.

Nevertheless, while insisting that reciprocal compensation will allow it to recover its cost of handling ISP-bound traffic, DeltaCom has never determined what its costs are. Rozycki, Tr. Vol. IIB at 346. As DeltaCom witness Rozycki explained, "... we have not done a cost study, so we do not know the precise costs." *Id.* However, Mr. Rozycki admitted that it would have been

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[9] Because ISP-bound traffic is "non-local interstate traffic" not governed by the reciprocal compensation requirements of Section 251(b)(5) of the 1996 Act or the FCC's rules, *Declaratory Ruling*, ¶ 26, n.87, BellSouth submits that the establishment of an inter-carrier compensation mechanism for ISP-bound traffic is not properly the subject of arbitration under the 1996 Act. Although the FCC purported to empower state commissions to regulate ISP-bound traffic in the context of Section 252 arbitration, the FCC's authority to do so is being challenged in court. *See Bell Atlantic Telephone Companies, et al. v. FCC,* Action No. 99-1094 (D.C. Cir. March 8, 1999).

helpful for the Authority had DeltaCom quantified its cost of handling ISP-bound traffic and acknowledged that the Authority should be concerned about the "overrecovery of costs by the CLEC for ISP traffic." Rozycki, Tr. Vol. IIB at 347-50. Yet, without cost studies or some determination of DeltaCom's costs in handling ISP-bound traffic, it is entirely possible that the payment of reciprocal compensation for ISP-bound traffic would result in DeltaCom overrecovering its costs, as Mr. Rozycki was forced to admit:

> Q. ... Without knowing what DeltaCom's costs are in handling ISP traffic, can this Authority ensure that DeltaCom is not overrecovering its costs associated with handling that traffic through the payment of reciprocal compensation?
>
> A. It cannot ensure that.

Rozycki, Tr. Vol. IIB at 352. While Mr. Rozycki acknowledged that reciprocal compensation for ISP-bound traffic should not be "a gravy train or a get rich mechanism for CLECs," DeltaCom can give no assurances that it would not receive a windfall from the payment of reciprocal compensation for ISP-bound traffic. The potential for such a windfall is very real, which explains why CLECs use reciprocal compensation to "pass along price breaks to the ISP that would not normally occur in a non-distorted, competitive market." Varner, Tr. Vol. IIIA at 57-138.[10]

DeltaCom tries to overcome its failure to prove that it would only recover its costs if reciprocal compensation were paid for ISP-bound traffic by contending that DeltaCom can rely upon BellSouth's costs rather than developing a cost study of its own. Rozycki, Tr. Vol. IIB at 351-52. This argument fails for two reasons. First, BellSouth has not studied the costs associated

[10] Mr. Rozycki did not know whether DeltaCom offers special credits, refunds, or reciprocal compensation sharing arrangements to ISPs in order to attract their business. Rozycki, Tr. Vol. IIC at 359. Mr. Rozycki made no attempt to determine whether DeltaCom offered such enticements, even though he had been previously asked the same question in the arbitration hearings in North Carolina and even though Mr. Rozycki could have obtained that information from another department within DeltaCom. Rozycki, Tr. Vol. IIC at 360 & 368-69.

with ISP-bound traffic. BellSouth's cost studies, which may be used by the Authority to establish reciprocal compensation rates, examined the costs of transporting and terminating voice traffic, not the costs of handling ISP-bound traffic. The distinction is important because, as Mr. Rozycki acknowledged, ISP-bound traffic has, on average, significantly longer hold times than traditional voice traffic. Rozycki, Tr. Vol. IIB at 348; *see also Report of the NARUC Internet Working Group, Pricing and Policies for Internet Traffic on the Public Switched Network,* at 2 (March 1998); Atai and Gordon, *Impacts of Internet Traffic on LEC Networks and Switching Systems,* at 3-4 (Bellcore 1996). These longer hold times make ISP-bound traffic a different animal in terms of cost than traditional local voice traffic, and the reciprocal compensation rates currently in place do not account for those cost differences. Rozycki, Tr. Vol. IIB at 349; Starkey, Tr. Vol. IIC at 404.[11]

Because of the longer hold times for ISP calls, the payment of reciprocal compensation for ISP-traffic based upon rates for transporting and terminating local voice traffic will result in an over-recovery of call set up costs. Taylor, Tr. Vol. IIIA at 532-56. In its *Declaratory Ruling*, the FCC recognized that "efficient rates for inter-carrier compensation for ISP-bound traffic are not likely to be based entirely on minute-of-use pricing structures." *Declaratory Ruling* ¶ 29. The FCC expressed concern that "pure minute-of-use pricing structures are not likely to reflect accurately how costs are incurred for delivering ISP-bound traffic." *Id.* DeltaCom's reciprocal compensation proposal cannot be reconciled with the FCC's concerns.

[11] In recognition of the differences in the average hold times between ISP-bound traffic and traditional local voice traffic, ICG Telecommunications, Inc. ("ICG") submitted to the North Carolina Utilities Commission an adjusted call length proposal that reduced the proposed reciprocal compensation rate in an attempt to ensure that ICG did not recover more setup costs than ISP-bound calls actually generate. Starkey, Vol. IIC Tr. at 389-94; Exhibit 3. For whatever reason, ICG did not make the same proposal in this proceeding.

Second, DeltaCom's argument that FCC rules permit DeltaCom to use BellSouth's costs as a proxy is a red herring. The rule upon DeltaCom relies – 47 C.F.R. § 51.711 – governs symmetrical reciprocal compensation rates for local traffic, not ISP-bound traffic. The FCC has made clear that these rules do not govern ISP-bound traffic, as Mr. Rozycki acknowledged. Rozycki, Tr. Vol. IIB at 347; *see also Declaratory Ruling*, ¶ 26 n.87. As a result, the FCC's rules do not and cannot excuse DeltaCom for failing to come forward with any evidence that reciprocal compensation for ISP-bound traffic would only allow DeltaCom to recover its costs rather than generating a windfall for DeltaCom at the expense of BellSouth customers.[12]

2. Reciprocal Compensation For ISP-Bound Traffic Is Bad Public Policy.

DeltaCom wants the Authority to focus solely on the effect on ISPs of a decision not to require the payment of reciprocal compensation for ISP-bound traffic. However, when considering the establishment of an interim inter-carrier compensation mechanism for ISP-bound traffic, the Authority should focus on the effect that mechanism would have on the *overall* development of competition in Tennessee, rather than on only *one* segment of the market. DeltaCom and other CLECs should be encouraged to serve all markets segments, which does not occur when reciprocal compensation is paid for ISP-bound traffic.

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[12] Although the Authority previously has ordered the payment of reciprocal compensation for ISP-bound traffic, it did so prior to issuance of the FCC's *Declaratory Ruling*. Here, the Authority is not interpreting the terms of an existing interconnection agreement, as was the case in *Brooks Fiber*, Docket 98-00118. The only arbitration involving BellSouth to date in which the Authority has addressed the reciprocal compensation issue was the NEXTLINK arbitration, Docket 98-00123. There, the Authority directed NEXTLINK and BellSouth to treat ISP-bound traffic as "local" traffic for reciprocal compensation. However, the Authority's decision was based upon its order in *Brooks Fiber* and did not take into account the FCC's *Declaratory Ruling*. On December 6, 1999, BellSouth filed a motion requesting that the Authority reject the provision in BellSouth's interconnection agreement with NEXTLINK requiring the payment of reciprocal compensation for ISP-bound traffic. That motion has been taken under advisement.

A number of adverse consequences to competition will result from the payment of reciprocal compensation for ISP-bound traffic. Specifically, such payment harms competition by: (1) reducing CLECs' incentive to service residence and business end user customers; (2) further subsidizing ISPs; (3) encouraging uneconomic preferences for CLECs to serve ISPs due to the fact that CLECs can choose the customers they want to serve and CLECs could offer lower prices to ISPs without reducing the CLECs' net margin; (4) establishing unreasonable discrimination among providers (interexchange carriers versus ISPs); and (5) creating incentives to arbitrage the system, such as schemes designed solely to generate reciprocal compensation. Taylor, Tr. Vol. IIIA at 532-98; Varner, Tr. Vol. IIIA at 577-135. None of these results is desirable in Tennessee or anywhere else.[13]

The market distortion caused by reciprocal compensation for ISP-bound traffic has been recognized by several State commissions. Most notably, the Commonwealth of Massachusetts Department of Telecommunications and Energy made the following findings of relevance here:

> The unqualified payment of reciprocal compensation for ISP-bound traffic, implicit in our October Order's construing of the 1996 Act, *does not promote real competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders*. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition.

[13] DeltaCom does not dispute that requiring the payment of reciprocal compensation for ISP-bound traffic would involve the payment of substantial sums of money by BellSouth to DeltaCom and other CLECs. However, such payments apparently do not concern DeltaCom because, according to Mr. Rozycki, BellSouth is a "very profitable" company that can "afford" it. Rozycki, Tr. Vol. IIC at 367. According to Mr. Rozycki, if "things begin to spin out of control" and BellSouth began "losing money," BellSouth could "come to this Commission" for "recourse." *Id.* Mr. Rozycki's view that BellSouth should be required to pay reciprocal compensation unless it posts financial loses is absurd. Mr. Rozycki also does not explain how BellSouth can obtain "recourse" from the Authority for such loses consistent with its price regulation plan.

Order, D.T.E. 97-116-C, p. 32 (May 19, 1999) (emphasis added). The Massachusetts Commission saw through the veneer of the reciprocal compensation argument advanced by DeltaCom, and the Authority should do likewise.

The market distortions recognized by the Massachusetts Commission have occurred in Tennessee and elsewhere in BellSouth's region. Between April 1999 and September 1999, the total minutes of use from BellSouth end users to ISP customers served by CLECs in Tennessee grew by approximately 63%. By contrast, the local minutes of use from BellSouth end users to non-ISP customers served by CLECs in Tennessee grew by less than 1% during the same time period. Varner, Tr. Vol. IIIA at 574-92. Likewise, some CLECs have billed BellSouth more in reciprocal compensation than the revenues these CLECs receive from their own end-user customers. Schonhaut, Tr. Vol. IID at 496-97 (ICG's reciprocal compensation billings to BellSouth in July 1999 in Tennessee exceeded ICG's revenues from end user customers in the State by approximately 159%); Starkey, Tr. Vol. IIC at 429-30 (KMC generated approximately $636,000 in revenues from ten ISP customers in Louisiana, while billing BellSouth approximately $2 million in reciprocal compensation for traffic to those ten ISPs). Such evidence vividly demonstrates that CLECs are targeting ISPs at the expense of non-ISP customers and are attempting to make reciprocal compensation from ISPs a separate line of business, which is hardly consistent with this Authority's mission to promote competition in all market segments.

3. Consistent With Cost Causation Principles, DeltaCom Should Recover The Costs Associated With ISP-Bound Traffic From ISPs, Not BellSouth.

In seeking reciprocal compensation for ISP-bound traffic, DeltaCom wants BellSouth to pay the cost of calls to the Internet rather than the ISPs whose customers generate such calls.

DeltaCom's position violates basic principles of cost-causation, which dictate that the cost of ISP--bound traffic should be recovered from the ISPs DeltaCom serves, not BellSouth.

BellSouth and DeltaCom do not dispute the notion that costs should be borne by the cost causer. Rozycki, Tr. Vol. IA at 31-27; Taylor, Tr. Vol. IIIA at 532-9. The question becomes who is the cost causer when a call is placed to the Internet through an ISP. The logical answer to this question is that when an end user places a call to an ISP, that end user is acting as a customer of the *ISP*, much as when that end user places a long distance call as a customer of the interexchange carrier. Taylor, Tr. Vol. IIIA at 532-14. As Dr. Taylor noted, "the same subscriber that acts in the capacity of a customer of the originating ILEC when making a local voice call is seen to act in the capacity of a customer of the ISP when making an Internet call." Taylor, Tr. Vol. IIIA at 532-11. As a result, the carrier whose customer originates the call, prices the service, and receives the money, ought to charge the full cost of that call to the customer. Thus, according to Dr. Taylor, the price the ISP charges ought to cover the full cost that the end user causes. *Id.* at 532-15-16.

Instead of attempting to rebut Dr. Taylor's opinions, DeltaCom merely laments its alleged inability to compete in the marketplace if it is required to recover the cost of ISP-bound traffic from its ISP customers. Rozycki, Tr. Vol. IA at 31-29. This claim ignores that the prices BellSouth charges its ISP customers do not reflect receipt of any reciprocal compensation, and it is those prices against which DeltaCom is competing. Varner, Tr. Vol. IIIA at 577-135. Thus, DeltaCom should be able to charge its ISP customers for the costs associated with ISP-traffic, as BellSouth attempts to do, and still compete successfully for ISP customers.

A decision by the Authority not to award DeltaCom reciprocal compensation would *not* mean that DeltaCom would have uncompensated costs. Rather, the crucial point that DeltaCom attempts to gloss over is that "*[t]he CLECs' ISP customers compensate the CLECs for services* *that are provided just like an ILEC's ISP customer compensates the ILEC.*" Varner, Tr. Vol. IIIA at 574-32 (emphasis added). If DeltaCom does not recover its costs from the ISP it services, it is likely charging the ISP rates that are below cost. Furthermore, according to Mr. Varner, "paying DeltaCom reciprocal compensation for ISP-bound traffic would result in BellSouth's end user customers subsidizing DeltaCom's operations." Varner, Tr. Vol. IIIA at 577-57. The subsidy stems from the fact that DeltaCom is the only party compensated in the two-carrier arrangement because DeltaCom receives revenue from its ISP customer, while BellSouth receives no compensation.

Consistent with principles of cost causation, BellSouth has proposed that the Authority direct the parties to implement a bill and keep mechanism for ISP-bound traffic pending the establishment of an inter-carrier compensation mechanism by the FCC. Under a bill-and-keep arrangement, neither of the two interconnecting carriers would charge the other for ISP-bound traffic that originates on the other carrier's network. Varner, Tr. Vol. IIIA at 577-34. Instead, it would ensure that the parties recover their costs from the cost causer, namely the ISP.[14]

4. Any Interim Inter-Carrier Compensation Mechanism Should Recognize That ISP-Bound Traffic Is Interstate In Nature And Will Be Regulated As Such By The FCC.

In its *Declaratory Ruling*, the FCC confirmed that ISP-bound traffic is not local, and ISP-bound traffic does not terminate at the ISP's local server, but continues over the Internet to host computers that may be located in another state or another nation. *Declaratory Ruling* ¶ 12. The FCC also made clear that ISPs are users of exchange access service. *Id.* ¶ 5. Rather than paying

[14] Although Mr. Starkey testified that FCC Rule 51.713 would preclude the Authority from adopting a bill and keep arrangement for ISP-bound traffic, Starkey, Tr. Vol. IIC at 414, the FCC has made clear that this rule and other rules that govern the payment of reciprocal compensation for local traffic do not apply to ISP-bound traffic. *Declaratory Ruling*, ¶ 26, n.87.

local carriers for their use of such exchange access service through the payment of access charges, as do interexchange carriers, however, ISPs pay for exchange access that is equal to the rate for local exchange service. *Id.* The FCC made clear that its decision to exempt ISPs from the payment of access charges does not change the nature of the service ISPs receive – it is exchange access service for which ISPs pay local exchange rates. *Id.* at ¶ 16.

Because ISPs use exchange access service, BellSouth also has proposed an interim inter-carrier compensation mechanism premised upon the revenue sharing arrangement that exists in the access world. The fact that the FCC has exempted enhanced service providers, including ISPs, from paying access charges and instead allowed them to purchase service out of the business exchange tariff is precisely the reason that a separate sharing plan is necessary. Unlike other access services, which are billed on a usage-sensitive basis, ISPs purchase flat rate basic business local exchange services. Only one carrier can bill the ISP, and the business exchange rate billed to the ISP is the only source of revenue to cover any of the costs incurred in provisioning access service to the ISP. Varner, Tr. Vol. IIIA at 577-38. Thus, a plan to share the access revenue paid by the ISP among all the carriers involved in handling the traffic is appropriate.

Because of the FCC's plans to establish an inter-carrier compensation mechanism of its own, the Authority may decline to establish the sharing plan proposed by BellSouth, particularly since it is likely to be preempted once the FCC rules. Under the circumstances, the Authority may decide simply to require that the parties track ISP-bound traffic originating on each parties' network on a going-forward basis. Once there is an effective order from the FCC establishing an inter-carrier compensation mechanism for ISP-bound traffic, the parties will "true-up" any payments retroactively from the effective date of the interconnection agreement. Varner, Tr. Vol. IIIA at 577-34. *See* Order, *In re: Petition of Birch Telecom of Missouri, Inc.,* Case No. TD-98-

278 (Mo. Pub. Service Comm'n April 16, 1999) (no reciprocal compensation for ISP-bound traffic, but requiring parties to track ISP traffic and "true up" once FCC rules).[15]

Issue 3 – <u>Reciprocal Compensation Rates (Att. 3 – 6.0)</u>

What should be the rate for reciprocal compensation per minute of use, and how should it be applied?

This issue involves two questions: first, whether the Authority should adopt the reciprocal compensation rate proposed by DeltaCom, even though it does not comply with the pricing standards of the 1996 Act; and, second, whether the Authority should allow DeltaCom to recover reciprocal compensation for functions DeltaCom does not perform. BellSouth submits the answer to both questions is "no."

In resolving the issues in this arbitration, the Authority must adhere to the standards set forth in the 1996 Act. Specifically, the 1996 Act requires that a state commission establish "just and reasonable" terms for reciprocal compensation, which means that rates must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of local traffic and that such rates be determined "on the basis of a reasonable approximation of the additional cost of terminating such calls." 47 U.S.C. § 252(d)(2)(A).

The reciprocal compensation rate proposed by DeltaCom does not satisfy these standards. First, DeltaCom has made no showing that its proposed reciprocal compensation rate of $.0045 per minute is "just and reasonable." Indeed, DeltaCom arrived at this rate simply by taking the reciprocal compensation rate in its expired interconnection agreement ($.009 per minute) and

[15] At least one state commission in BellSouth's region has adopted a variation of this proposal. In *In re: Petition by ICG Telecom Group, Inc. for Arbitration,* Docket No. 27069 (Nov. 10, 1999), the Alabama Public Service Commission required BellSouth and ICG to pay reciprocal compensation for ISP-bound traffic pending a decision from the FCC. However, such payments are to be retroactively "'trued-up' to the level of inter-carrier compensation ultimately adopted by the FCC." Order at 19.

cutting it in half. Rozycki, Tr. Vol. IA at 31-25. DeltaCom can take no comfort in the fact that its expired interconnection agreement was approved by the Authority because the Authority did not, as DeltaCom alleges, determine that a reciprocal compensation rate of $.009 per minute was "compliant with Sections 251 and 252 of the Act." *Id.* Rather, because DeltaCom's prior interconnection agreement was a negotiated agreement, the Authority could approve the agreement so long as it was nondiscriminatory and not inconsistent "with the public interest, convenience, and necessity." 47 U.S.C. § 252(e)(2)(A). The Authority was not required to, nor did it, determine whether the rates in the *voluntarily negotiated agreement* complied with the pricing standards of the 1996 Act; such a determination is only required in approving an *arbitrated agreement*. *See* 47 U.S.C. § 252(e)(2)(B).

Second, the Authority is establishing "just and reasonable" reciprocal compensation rates in Docket 97-01262 for the transport and termination of local traffic by BellSouth and other CLECs in Tennessee. DeltaCom has not explained any reason why those rates should not apply to it as well, particularly when DeltaCom has not presented a cost study or any other empirical basis to find that DeltaCom's costs of transporting and terminating local traffic are different than the costs determined in Docket 97-01262.[16]

The other aspect of the reciprocal compensation issue upon which the parties disagree is how the reciprocal compensation rate should be applied. DeltaCom is asking the Authority to compensate it for the cost of equipment it does not own and for tandem switching functions it does not perform. The Authority should reject this "money for nothing" proposal. Consistent

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[16] Under cross examination, Mr. Rozycki indicated that DeltaCom was willing to adopt BellSouth's proposal to use the existing reciprocal compensation rates in the parties' interconnection agreement which would be trued up to reflect the reciprocal compensation rates adopted by the Authority in Docket 97-01262. Rozycki, Tr. Vol. IIB at 341. Thus, it is not clear why this issue remains in dispute.

with applicable FCC rules and industry standards, the Authority should determine that DeltaCom does not qualify for tandem switching and common transport when it does not perform these functions. If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation as if it had been, which is the essence of DeltaCom's proposal.

DeltaCom's claim that it is entitled to the tandem interconnection rate is loosely based upon FCC rules which state that: "Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the LEC carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate." 47 CFR § 51.711(a)(3). However, tandem switching compensation requires not only that the CLEC switch serve the same geographic area, but also that the CLEC network "perform functions similar to those performed by an ILEC's tandem switch *First Report and Order*, CC Docket 96-98, ¶ 1090 (Aug. 6, 1996). As the FCC noted in adopting Rule 51.711:

> We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) *perform functions similar to those performed by an incumbent LEC's tandem switch* and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch.

Id. Thus, DeltaCom must meet two requirements in order to be compensated at the tandem interconnection rate: (1) DeltaCom's network must perform functions similar to those performed by BellSouth's tandem switch; and (2) DeltaCom's switch must serve a geographic area comparable to BellSouth's. DeltaCom cannot meet either of these requirements.

First, DeltaCom's network does not perform functions similar to those performed by BellSouth's tandem switch. The FCC has defined "local tandem switching capability" as:

(A) Trunk-connect facilities, which include, but are not limited to, the connection between trunk termination at a cross connect panel and switch trunk card;
(B) The basic switch trunk function of connecting trunks to trunks; and
(C) The functions that are centralized in tandem switches (as distinguished from separate end office switches), including but not limited, to call recording, the routing of calls to operator services, and signaling conversion features.

Third Report and Order, proposed Section 51.319(c)(2). While DeltaCom's switch may be *capable* of performing tandem switching functions when connected to end office switches, DeltaCom has presented no evidence that its switches actually perform such functions. For example, there is no evidence in this record that: (1) DeltaCom interconnects end offices or performs trunk-to-trunk switching; (2) DeltaCom switches BellSouth's traffic to another DeltaCom switch; or (3) DeltaCom's switch provides other centralization functions, namely call recording, routing of calls to operator services and signaling conversion for other switches, as BellSouth's tandems do and as required by the FCC's rules.

Other State commissions have rejected arguments that a CLEC's switch performs the same functions as a tandem switch. For example, the Florida Public Service Commission has held: "We find that the Act does not intend for carriers such as MCI to be compensated for a function they do not perform. Even though MCI argues that its network performs 'equivalent functionalities' as Sprint in terminating a call, MCI has not proven that it actually deploys both tandem and end office switches in its network. If these functions are not actually performed, then there cannot be a cost and a charge associated with them. Upon consideration, we therefore conclude that MCI is not entitled to compensation for transport and tandem switching unless it actually performs each function." Order No. PSC-97-0297-FOF-TP, Docket 962120-TP, at 10-11 (March 14, 1997). *See also* Order No. PSC-96-1532-FOF-TP, Docket No. 960838-TP, at 4 (Dec. 16, 1996) ("The evidence in the record does not support MFS' position that its switch provides the transport element; and the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually use the network facility for which it seeks compensation").

Second, even assuming DeltaCom's switch performed the same functions as BellSouth's tandem switch (which is not the case), there is no evidence in the record that DeltaCom's switch serves a geographic area comparable to BellSouth's. In fact, because DeltaCom has not activated its switch in Tennessee, it is impossible for this Authority to find that DeltaCom's switch "serves a geographic area comparable to the area served by" BellSouth's tandem switch. Rozycki, Vol. IIB Tr. at 344. Such a finding would require that DeltaCom identify the location of the customers it serves in Tennessee – information that is nowhere in the record. For example, assume that after it activates its switch in Tennessee, DeltaCom serves fifty business customers in Nashville, all of which are located in a single office complex located next door to DeltaCom's switch. Under no set of circumstances could DeltaCom seriously argue in such a case that its switch serves a comparable geographic area to BellSouth. *See* Decision 99-09-069, *In re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom*, Application 99-03-047, at 15-16 (Sept. 16, 1999) (finding "unpersuasive" MFS's showing that its switch served a comparable geographic area when many of MFS's ISP customers were actually collocated with MFS's switch).

To the extent DeltaCom seeks to be compensated at the tandem interconnection rate, it was incumbent upon DeltaCom to show that its network performs functions similar to those performed by BellSouth's tandem switch and that its switch serves a geographic area comparable to BellSouth's. DeltaCom failed to make this showing, and the Authority should deny DeltaCom's request for relief on this issue.

Issue 4(a) -- Cageless Collocation (Att. 4 – 6.4)

Should BellSouth provide cageless collocation to ITC^DeltaCom 30 days after a complete application is filed?

The parties do not disagree that a timeframe should be established for the provisioning of cageless collocation. The disagreement is whether the Authority should adopt BellSouth's intervals that are based on historical experience with provisioning other types of physical collocation or whether it should adopt the arbitrary timeframes proposed by DeltaCom. BellSouth proposes that the Authority require BellSouth to provision cageless collocation as soon as possible, but not later than 90 calendar days for ordinary circumstances or within 130 calendar days for extraordinary circumstances. Milner, Tr. Vol. ID at 193.[17]

Consistent with FCC rules, BellSouth's physical collocation offering includes the option of cageless collocation. Milner, Tr. Vol. ID at 184-26. However, while ordering incumbents to make cageless collocation available, the FCC declined to "adopt specific provisioning intervals at this time." *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket 98-147 ¶ 54 (March 31, 1999) (*"Advanced Services Order"*). As the FCC explained, "we have adopted several new collocation rules in this Order, and we do not yet have sufficient experience with the implementation of these new collocation arrangements to suggest timeframes for provisioning." *Id.* The FCC previously has cautioned that any performance standards, which would include collocation provisioning intervals, "should be grounded in historical experience to ensure that such standards are fair and reasonable." *In re: Performance Measurements and*

[17] Extraordinary circumstances would include situations when BellSouth must make major additions to its heating and cooling plant or power equipment or engage in asbestos abatement procedures in order to accommodate a collocation request. Milner, Tr. Vol. ID at 193.

Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56, ¶ 125 (April 17, 1998).

The 30-day interval DeltaCom proposes for cageless collocation does not come close to meeting this requirement. DeltaCom has not submitted any data, study, or analysis concerning actual provisioning intervals that would allow the Authority to determine whether 30 days is a "fair and reasonable" amount of time for BellSouth to provision a cageless collocation. Indeed, DeltaCom did not even explain how its proposed timeframe was developed. Although DeltaCom witness Wood apparently does not believe such information is necessary, the FCC obviously disagrees. *Id.* (performance measures should be grounded on "historical experience").

The fact that BellSouth does not have to construct an enclosure does not affect the other work involved in establishing cageless collocation. For example, in order to provision the arrangement, BellSouth may have to complete space conditioning, add to or upgrade the heating, ventilation, and air conditioning system for the area, add to or upgrade the power plant capacity and power distribution mechanism, or build out network infrastructure components such as the number of cross connects requested. This collocation area and network infrastructure work must take place regardless of the type of physical collocation arrangement selected. Accordingly, BellSouth's proposed provisioning intervals are appropriately applied to either enclosed (caged) or unenclosed (cageless) physical collocation. Milner, Tr. Vol. ID at 184-28.

While opining that thirty days "is far too long" and that the work involved in provisioning cageless collocation actually takes about "three hours," DeltaCom witness Wood's opinions on this point are not credible. Wood, Tr. Vol. IIB at 300-301. Mr. Wood acknowledged that he is not a network engineer, has never worked as a network engineer, and has never provisioned a collocation arrangement in his entire career. In fact, in Docket 97-01262, Mr. Wood was not even offered as an expert on collocation. Wood, Tr. Vol. IIA at 273.

Furthermore, Mr. Wood's testimony is premised upon the mistaken belief that BellSouth must take "proactive efforts" to identify available space for cageless collocation. Wood, Tr. Vol. IIA at 253-60. Although Mr. Wood seeks to glean such a requirement from the FCC's *Advanced Services Order,* that is not what the order says. Rather, the FCC's *Advanced Services Order* requires BellSouth "to make each of the new arrangements outlined below available to competitors as soon as possible, without waiting until a competing carrier requests a particular arrangement, so that competitors will have a variety of collocation options from which to chose." *Advanced Services Order*, ¶ 40. BellSouth has complied with this requirement by making cageless collocation available as an option for CLECs without waiting for a specific request. However, nothing in the FCC's *Advanced Services Order* can reasonably be read to obligate BellSouth "to know already where the opportunities are [for cageless collocation]" before a request for cageless collocation is ever made, which is Mr. Wood's position. Wood, Tr. Vol. IIA at 259. Furthermore, Mr. Wood's view that BellSouth has all of the records at its disposal so it knows at any given time the location of every inch of unused space in every single one of its central offices in the State of Tennessee is pure fantasy. Wood, Tr. Vol. IIB at 303.

Mr. Wood's testimony on the parameters of cageless collocation also cannot be reconciled with the FCC's *Advanced Services Order*. For example, in explaining his understanding of what BellSouth must do in provisioning a cageless collocation arrangement, Mr. Wood opined that if there is "a slot that is available in an existing bay ... for cageless collocation," BellSouth cannot deny the requesting CLEC that "existing slot." Wood, Tr. Vol. IIA at 278. In response to the question whether BellSouth must allow CLECs to collocate on shelves within a bay as opposed to the entire bay, Mr. Wood responded: "Yes. *I don't think there is any exclusion here that would suggest that this would be only in increments of entire bays.*" Wood, Tr. Vol. IIB at 284 (emphasis added). However, when confronted with the FCC's *Advanced Services Order,* Mr. Wood admitted that the FCC did not say that a CLEC could take one shelf within a single bay and conceded that the FCC spoke only in terms of "*single bay increments.*" *Id.* at 285 (emphasis added).

DeltaCom seems to have lost sight of the fact that BellSouth has committed to using its best efforts to provision each and every physical collocation arrangement, including cageless collocation, *as soon as possible.* BellSouth's proposed provisioning intervals represent the maximum amount of time that should be required to provision a cageless collocation arrangement. In any given case where the work associated with most physical collocation arrangements is not actually required, such as preparing the space and adding to the existing power systems, the actual provisioning interval would be shorter. For example, in June 1999, BellSouth provisioned 39 physical collocation arrangements in Tennessee, which took an average of 105 calendar days to complete, while in August 1999, BellSouth provisioned 25 physical collocation arrangements in Tennessee, which took an average of 73 calendar days to complete. Milner, Tr. Vol. ID at 198. BellSouth's proposed provisioning intervals for cageless collocation are based upon historical experience in provisioning actual physical collocation, which cannot be said for DeltaCom's proposed interval.

Issue 5 -- <u>Local Interconnection (Att. 3)</u>

Should the Parties continue operating under existing local interconnection arrangements?

For reasons that are not readily apparent, DeltaCom is asking the Authority to decide that DeltaCom should be permitted to operate under the terms of its expired local interconnection agreement, while at the same time asking the Authority to arbitrate numerous disputes concerning proposed terms for a new interconnection agreement. DeltaCom never attempts to explain this obvious inconsistency.

Furthermore, DeltaCom never identifies the specific provisions of the expired agreement under which it seeks to continue operating nor did DeltaCom offer any testimony supporting its position on these unspecified provisions. In the November 19, 1999 Joint Issues Matrix, DeltaCom referenced existing "trunking options" and "routing parameters." What "trunking options" is DeltaCom proposing? Similarly, what "routing parameters" does DeltaCom have in mind? DeltaCom never says and did not submit one word of testimony on these issues. Accordingly, there is no basis upon which the Authority can grant DeltaCom any relief.[18]

Issue 6(a) -- Rates and Charges for BellSouth OSS (Att. 11)

What charges, if any, should BellSouth be permitted to impose on ITC^DeltaCom for BellSouth's OSS?

DeltaCom insists that it should not have to pay for any cost associated with the electronic interfaces that BellSouth has developed to permit CLECs to have nondiscriminatory access to BellSouth's OSS. DeltaCom seeks to be excused from paying such costs because, according to DeltaCom, it did not cause these costs to be incurred. DeltaCom's theory of OSS cost causation is misguided.

The conclusion that CLECs should bear the cost of OSS development was recently confirmed in *AT&T Communications of the South Central States, Inc. v. BellSouth Telecommunications, Inc.*, 20 F. Supp. 2d 1097 (E.D. Ky. 1998). In that case, AT&T challenged

[18] In apparent recognition of the flawed nature of its request, DeltaCom attempted to expand the scope of Issue 5 after the arbitration petition was filed, seeking to add new issues concerning transit traffic, binding forecasts, and other newly raised matters. The Authority correctly refused to permit DeltaCom to do so.

the decision of the Kentucky Public Service Commission that required CLECs, but not BellSouth, to pay the cost of the electronic interfaces. In rejecting AT&T's challenge, the district court held:

> The FCC regulations only state that ILECs must cooperate with competitors and make available access to the OSS, *but FCC regulations do not state that access to an ILEC's OSS must be subsidized by the ILEC. ... Because the electronic interfaces will only benefit the CLECs, the ILECs, like BellSouth, should not have to subsidize them.* BellSouth has satisfied the nondiscrimination prong by providing access to network elements that is substantially equivalent to the access provided for itself. *AT&T is the cost causer, and it should be the one bearing all the cost; and there is absolutely nothing discriminatory about this concept.*

Id. at 1104 (emphasis added). The Court's reasoning is equally applicable here.

Mr. Wood's argument that reinstatement of the FCC's pricing rules require that the costs of OSS be borne by BellSouth as well as CLECs is flawed. Mr. Wood's proposal is equivalent to imposing a competitive neutrality requirement, which is not required under Section 252(d)(1). The pricing standards for unbundled network elements in Section 252(d)(1), which include OSS, do not mandate competitive neutrality. That is different from the pricing standard in Section 251(e)(2), which requires that the cost of number portability "be borne by all telecommunications carriers on a competitively neutral basis as determined by the Authority." 47 U.S.C. § 251(e)(2). The FCC has interpreted this language to mean "that the cost of number portability borne by each carrier does not affect significantly any carrier's ability to compete with other carriers for customers in the marketplace." First Report and Order, CC Docket No. 95-116 ¶ 131 (July 2, 1996). However, as the FCC noted:

> *Ordinarily the Commission follows cost causation principles, under which the purchaser of a service would be required to pay at least the incremental cost incurred in providing that service. With respect to number portability, Congress has directed that we depart from cost causation principles if necessary in order to adopt a 'competitively neutral' standard,* because number portability is a network function that is required for a carrier to compete with the carrier that is already serving a customer. Depending on the technology used, to price number portability

> on a cost causative basis could defeat the purpose for which it was mandated. *We emphasize, however, that this statutory mandate constitute a rare exception to the general principle, long recognized by the Authority, that the cost-causer should pay for the cost that he or she incurs.*

Id. (emphasis added).

In this case, there is no "statutory mandate" that would create an exception to the principle that the cost causer should pay for the costs that he or she incurs. For the electronic interfaces developed solely for use by the CLECs, the CLECs caused those costs to be incurred. Accordingly, consistent with general principles of cost causation, CLECs, including DeltaCom, should pay these OSS costs as determined by the Authority in Docket 97-01262.

Issue 6(b) -- Rates and Charges for UNEs (Att. 11)

What are the appropriate recurring and non-recurring rates and charges for BellSouth two-wire and four wire ADSL/HDSL compatible loops, Two-wire SL2 loops, Two-wire SL1 loops, Two-wire SL2 loop Order Coordination for Specified Conversion Time?

By raising this issue, DeltaCom ostensibly seeks to relitigate the rates for unbundled network elements that the Authority will establish in Docket 97-01262. DeltaCom should not be permitted to do so, and the rates the Authority establishes in that docket should apply to DeltaCom as well. Any other outcome would result in DeltaCom obtaining a competitive advantage over other CLECs in Tennessee.

Furthermore, even if the Authority were inclined to revisit issues it is presently considering in a pending docket, DeltaCom has not presented any basis for the Authority to do so. With respect to recurring and nonrecurring rates for two-wire ADSL and HDSL compatible loops, four-wire HDSL compatible loops, and SL1 loops, DeltaCom has not made any specific rate proposals whatsoever. Wood, Tr. Vol. IIB at 331. Accordingly, there is no basis for granting DeltaCom relief on this issue, even if the Authority were otherwise so inclined.[19]

Issue 6(b) -- Rates and Charges for UNEs (Att. 11)

What are the appropriate recurring and non-recurring rates and charges for BellSouth two-wire and four wire ADSL/HDSL compatible loops, Two-wire SL2 loops, Two-wire SL1 loops, Two-wire SL2 loop Order Coordination for Specified Conversion Time?

This issue represents yet another attempt by DeltaCom to litigate an issue presently pending in Docket 97-01262. BellSouth has agreed to provide DeltaCom with two-wire SL2 loops with or without Order Coordination for Specified Conversion Time and has proposed to incorporate in the interconnection agreement the rates for two-wire SL2 loops that the Authority ultimately adopts in Docket 97-01262. Varner, Tr. Vol. IIIA at 577-64.

It is not clear what more DeltaCom is seeking. DeltaCom has not made any specific proposals for recurring and nonrecurring two-wire SL2 loop rates. Wood, Vol. IIB Tr. at 331. Thus, there is no basis for the Authority to grant relief to DeltaCom.

Issue 6(c) -- Rates and Charges for Disconnection (Att. 6 – 4.8.20)

Should BellSouth be permitted to charge ITC^DeltaCom a disconnection charge when BellSouth does not incur any costs associated with such disconnection?

This issue represents yet another attempt by DeltaCom to revisit issues raised in and that are being addressed by the Authority in Docket 97-01262. For example, DeltaCom argues that "disconnect charges should not be assessed to CLECs until the customer actually leaves the

[19] Although DeltaCom has asked the Authority to establish rates for a "four-wire ADSL compatible loop," there is no such thing. As BellSouth witness Varner explained, "ADSL functionality is not applicable to four-wire loops," and DeltaCom presented no evidence to the contrary. Varner, Tr. Vol. IIIA at 577-64.

system." Wood, Tr. Vol. IIA at 253-25. However, DeltaCom apparently overlooks the fact that this is precisely the conclusion reached by the Authority in Docket 97-01262. There, the Authority determined that disconnect charges should be assessed at the time the costs are in fact incurred. Consistent with that determination, BellSouth has presented disconnect costs as separate items that are paid when the customer actually disconnects service, and it is not clear what more DeltaCom is seeking.

DeltaCom also complains about alleged "double counting of costs," claiming that BellSouth does not incur disconnect costs when the circuit is not physically disconnected. Wood, Tr. Vol. IIA at 253-26. While this may be partially true when BellSouth is the end-to-end provider of service, it is not true when a CLEC utilizes unbundled network elements to provide service. Even if no physical disconnection takes place, record changes would still need to be processed, for which there are costs. Furthermore, when a CLEC no longer wants to purchase an unbundled element from BellSouth, BellSouth must physically perform certain tasks, such as physically removing the unbundled loop from the cross-connects. These work activities are appropriately reflected in the disconnect costs calculated by BellSouth. Caldwell, Tr. Vol. IIID at 772-269.

DeltaCom's claim that if an end user decides to change service providers, the connect and disconnect activities are "a single activity" is simply wrong. Wood, Tr. Vol. IIA at 253-26. While the activities may take place at the same time, different transactions performed by different work groups are involved in connecting and disconnecting network elements. For example, assume the end user is a DeltaCom customer served by unbundled network elements purchased from BellSouth, including a loop and cross-connects. If this customer decides to return to BellSouth and DeltaCom relinquishes the facilities, then record changes would need to be made and cross-connects to DeltaCom's collocation space would be removed. These activities are reflected in the disconnect cost DeltaCom would pay. Additional activities, the cost of which would be charged to the end user, would then need to be done to re-establish service, such as connecting the customer to BellSouth's switch, testing and translations. Caldwell, Tr. Vol. IIID at 772-269.

In short, disconnect charges would only apply if DeltaCom requests that BellSouth no longer provide a particular unbundled network element. If DeltaCom wants, for whatever reason, to retain an element purchased from BellSouth, no disconnect charges would be assessed (although DeltaCom would still be responsible for the recurring charges associated with that unbundled element). A disconnect request causes BellSouth to incur costs due to the physical activities associated with disconnection, and BellSouth should be entitled to recover those costs.

Issue 6(d) -- <u>Rates and Charges for Collocation (Att. 11)</u>

What should be the appropriate recurring and nonrecurring charges for cageless and shared collocation in light of the recent FCC Advanced Services Order No. FCC 99-48, issued March 31, 1999, in Docket No. CC 98-147?

The Authority will establish rates for physical collocation in Docket 97-01262, including rates for a collocation application, floor space, power, and cross-connects. Whether a CLEC wants caged collocation, cageless collocation, or shared collocation, an application is necessary, and a certain amount of square footage in the central office, a certain amount of power, and certain cross connects would be required. Authority-approved rates should govern for these services, and nothing in the FCC's *Advanced Services Order* requires a different result. Obviously, to the extent a CLEC requests a cageless collocation arrangement that does not require space preparation and does not entail the construction of an enclosure, BellSouth would not charge the CLEC for these services.

DeltaCom appears to suggest that the physical collocation rates that will be established by the Authority do not apply because, according to DeltaCom, cageless collocation mirrors the characteristics of a virtual collocation arrangement. Wood, Tr. Vol. IIA at 253-21. As a result, DeltaCom proposes that the Authority adopt cageless collocation rates based upon BellSouth's tariffed rates for virtual collocation with some unspecified adjustments, which Mr. Wood never bothered to present and could not even quantity. Wood, Tr. Vol. IIB at 287 & 294. DeltaCom's proposal is misguided and its reliance upon virtual collocation rates is misplaced.

Notwithstanding DeltaCom witness Wood's testimony to the contrary, the FCC does not consider cageless collocation as an "alternative" to physical collocation. Wood, Tr. Vol. IIB at 289. To the contrary, the FCC's rules define cageless collocation as a type of physical collocation. *See* 47 C.F.R. § 51.323(k) ("An incumbent LEC's physical collocation offering must include the following: ... (2) Cageless collocation ..."). Since cageless collocation is a type of physical collocation, it makes no sense to use virtual collocation rates as a proxy for cageless collocation.

Furthermore, Mr. Wood is simply wrong when he contends that, in a virtual collocation arrangement, "BellSouth owns the equipment and incurs the expense of maintaining it," while in a physical collocation arrangement DeltaCom "will own and maintain the equipment." Wood, Tr. Vol. IIA at 253-22. As is evident from even a cursory review of Section 20 of BellSouth's FCC Tariff No. 1, the carrier purchasing virtual collocation "owns" the equipment, not BellSouth (although the carrier leases it to BellSouth "for the nominal sum of one dollar"). Caldwell, Tr. Vol. IIID at 772-273. Likewise, the carrier purchasing virtual collocation incurs the expense of maintaining the equipment, not BellSouth. *Id.* Thus, virtual collocation rates are not a "proxy" for cageless physical collocation.

BellSouth also has proposed an interim rate for a keyless Security Access System in order to comply with the FCC's *Advanced Services Order*. This interim rate is based upon a rate approved by the Florida Public Service Commission, and BellSouth proposes that this rate apply to DeltaCom as well until a compliant cost study can be completed and filed with the Authority. Varner, Tr. Vol. IIIA at 577-66. DeltaCom has not raised any objection to this interim rate or to the Authority establishing an interim rate for a keyless Security Access System. BellSouth also has proposed rates for files cross connect and fiber pot bays that DeltaCom may require for shared or cageless collocation *Id.* These rates are based on cost studies developed consistent with the methodology adopted by the Authority in Docket 97-01262. Caldwell, Tr. Vol. IID at 772-18.

Issue 7(b)(iv) – <u>Audits (Att. 3 – 2.0)</u>

Which party should be required to pay for the Percent Local Usage (PLU) and the Percent Interstate Usage (PIU) audit, in the event such audit reveals that either party was found to have overstated the PLU or PIU by 20 percentage points or more?

This issue is relatively straightforward: should one carrier that inaccurately reports information to a significant extent to another carrier be required to pay for the costs of the audit that uncovers the inaccurate information. BellSouth's position is that, if a BellSouth requested audit reveals that DeltaCom has overstated PLU/PIU percentages by 20 percentage points or more, DeltaCom should pay for the audit; otherwise, BellSouth would be required to do so. Numerous interconnection agreements filed with the Authority include a similar provision regarding PIU/PLU audits, and there is no reason not to include such a provision in BellSouth's agreement with DeltaCom. Varner, Vol. IIIA at 577-69.

DeltaCom's position is that each Party should pay for their own audit regardless of the outcome, because otherwise it would constitute a "penalty." DeltaCom's position is inconsistent with basic principles of cost causation. If DeltaCom overstates the PLU/PIU percentages by 20 percentage points or more and BellSouth must conduct an audit to uncover that inaccurate information, DeltaCom has caused the costs of the audit to be incurred and should pay for those costs. Furthermore, paying the costs of an audit is not akin to a "penalty," since BellSouth would only be entitled to recover its costs incurred in conducting the audit, not fines or punitive damages. DeltaCom has advance notice of an audit, which gives DeltaCom an opportunity to review its records, correct the PLU/PIU percentage, if necessary, and thereby avoid the costs of conducting the audit. Including such a provision in the interconnection agreement is reasonable and would create an incentive for DeltaCom to report accurately PLU/PIU information in the first place.[20]

Issue 8(b) – General Contract Issues – Loser Pays (GTC – 11)

Should the losing party to an enforcement proceeding or proceeding for breach of the interconnection agreement be required to pay the costs of such litigation?

Issue 8(e) – General Contract Issues – Tax Liability (GTC – 13.1; Att. 1 – 11.5)

Should language covering tax liability be included in the interconnection agreement, and, if so, should that language should simply state that each Party is responsible for its tax liability?

The inclusion of a "loser pays" provision, as proposed by DeltaCom, would have a chilling effect on both parties to the extent that even meritorious claims would not be filed. The 1996 Act is not yet four years old and clearly represents an evolving area of law and regulation. Complaints

[20] Under cross examination, Mr. Rozycki indicated that DeltaCom was willing to adopt BellSouth's proposal on the PLU/PIU audit if DeltaCom accepted BellSouth's waiver of nonrecurring charges proposal. Rozycki, Tr. Vol. IB at 89. DeltaCom accepts BellSouth's language on waiver of nonrecurring charges, and those issues have been removed from this arbitration. Thus, based upon Mr. Rozycki's prior representations, it is not clear why the audit issue remains in dispute.

to regulatory commissions will naturally be brought by various parties seeking clarification as issues emerge. Often there is no clear "winner" or "loser," thus further complicating the use of a "loser pays" clause. A "loser pays" provision serves no useful purpose and would only discourage carriers from seeking to establish or clarify their rights under existing interconnection agreements, which is hardly is the public interest.

DeltaCom's view that there is no need for language governing the parties respective tax liability under the interconnection agreement ignores that such language appears in numerous interconnection agreements approved by the Authority. A variety of taxes are imposed upon telecommunications carriers, both directly and indirectly. As would be expected, problems and disputes over the application and validity of these taxes will and do occur. The interconnection agreement should clearly define the respective rights and duties for each party in the handling of such tax issues so that they can be resolved fairly and quickly. BellSouth has proposed language for the interconnection agreement based upon BellSouth's experiences with tax matters and liability issues in connection with the parties' obligations under interconnection agreements. This language should be included in BellSouth's interconnection agreement with DeltaCom.

CONCLUSION

The Authority should adopt BellSouth's position on the remaining issues in dispute in this arbitration. BellSouth's position on these issues is reasonable and consistent with the 1996 Act, which cannot be said about the positions advocated by DeltaCom.

This 7th day of December, 1999.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: ______________________________

Guy M. Hicks
333 Commerce Street., Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

R. Douglas Lackey
Thomas B. Alexander
Bennett L. Ross
675 West Peachtree Street, N.E.
Suite 4300, BellSouth Center
Atlanta, GA 30375-0001
(404) 335-0750

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

[✓] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight

Gary Hotvedt, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500

[ ] Hand
[✓] Mail
[ ] Facsimile
[ ] Overnight

H. LaDon Baltimore, Esquire
Farrar & Bates
211 Seventh Ave. N, # 320
Nashville, TN 37219-1823

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