BEFORE THE

TENNESSEE REGULATORY AUTHORITY

December 7, 1999

In Re:	)	
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Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996	))))	**Docket No. 99-00430**

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

COMES NOW, ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and hereby submits this Post-Hearing Brief in the above-referenced arbitration with BellSouth Telecommunications, Inc. ("BellSouth") under the Telecommunications Act of 1996 (the "Act"). The hearing in this matter was conducted November 1-3, 1999 before Directors Malone, Greer, and Kyle, acting as arbitrators under Section 252 of the Act.

I. PROCEDURAL HISTORY

In January 1999, ITC^DeltaCom initiated negotiations with BellSouth in an attempt to renew its interconnection agreement with BellSouth for Tennessee. The previous interconnection agreement had been approved by the Tennessee Regulatory Authority ("Authority" or "TRA") and had governed the relationship between ITC^DeltaCom and BellSouth for the two-year period beginning March 12, 1997.[1] ITC^DeltaCom has been one of

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[1] The interconnection agreement that ITC^DeltaCom wanted renewed had been voluntarily negotiated. The TRA found the agreement to be consistent with the public interest, convenience and necessity, and approved its terms pursuant to Section 252(e)(2)(A) of the Act.

the most active competitive local exchange companies in the BellSouth region and desires to bring its competitive presence to the Tennessee local exchange market.[2]

For several months, ITC^DeltaCom and BellSouth conducted negotiations, the results of which were disappointing. While ITC^DeltaCom wanted to continue in large part the previously approved interconnection agreement, BellSouth took a very different approach. BellSouth proposed an entirely new agreement which was substantially different in form and substance from the existing contract. (Transcript of November 1-3, 1999 Hearing, p. 33).[3] ITC^DeltaCom attempted to reach a negotiated agreement with BellSouth covering the disputed issues between the parties. When these negotiations failed with regard to many important issues, ITC^DeltaCom followed the dictates of the Act and filed a Petition for Arbitration on June 11, 1999. The parties participated in a pre-hearing conference and hearings were scheduled to begin November 1, 1999.[4]

II. SUMMARY OF ARGUMENT

Competition in Tennessee's local exchange market is in the public interest and should be encouraged. That principle is at the heart of the Act and should guide the Authority (acting as arbitrators) as it considers competing policy arguments in this Docket. When considering each of the issues presented in the June 11, 1999 filing, the Authority should adopt

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[2] ITC^DeltaCom is one of the largest purchasers of UNEs and has deployed an extensive fiber optic network in the BellSouth region.

[3] Subsequent citations to the Transcript of the November 1-3, 1999 hearing will be in the following format: "(T-[page number].)"

[4] As a result of negotiations conducted during the November 1-3, 1999 hearings and thereafter, the parties have successfully settled several additional issues in the original Petition. Only unresolved issues are discussed in Section III, *infra*.

the policy that best facilitates local competition in Tennessee. The TRA's decision in this Docket will dictate the climate that will govern the relationship between ITC^DeltaCom and BellSouth for the two-year period after approval of the interconnection agreement. Those two years may prove to be the most critical with regard to whether real competition will ever develop in the Tennessee local exchange market.

Each issue that remains in dispute, and was not excluded from the arbitration by decision of the Pre-Arbitration Officer, will be specifically addressed in this brief. However, there are four issues remaining in controversy in this Docket that are of such importance they justify separate discussion in this summary. Those critical issues are: (1) performance guarantees; (2) extended local loops; (3) the payment of reciprocal compensation for the termination of Internet Service Provider ("ISP") traffic; and (4) the rates and terms for cageless collocation. These issues also will be more specifically addressed in the detailed discussion in Section III, *infra*.

(1) Performance Measures and Guarantees.

A system of self-effectuating financial incentives should be included in the interconnection agreement between ITC^DeltaCom and BellSouth. Such guarantees will act as a powerful incentive to BellSouth to perform in accordance with the dictates of the Act. Section 251(c) of the Act requires that BellSouth provide interconnection and unbundled access to ITC^DeltaCom at parity with the manner in which BellSouth provides such services and facilities to itself.[5] The record indicates that based on ITC^DeltaCom's experience, in many instances,

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[5] *See Third Report and Order*, FCC 99-238, November 5, 1999, ¶ 481 (stating that the Supreme Court held that Section 251(c)'s non-discrimination requirement means that access provided by the incumbent LEC must be at least equal in quality to that which the incumbent LEC provides to itself).

BellSouth has failed to provide services to ITC^DeltaCom at parity with the services it provides to itself. This has been particularly true with regard to UNE provisioning and UNE cutovers. For example, ITC^DeltaCom presented evidence that out of 47 missed customer scheduled cut over dates in a given time period, BellSouth caused 41 of the missed dates. *See* Exhibits TAH-2 and TAH-3.[6] BellSouth's systems are regional in nature. Thus, problems experienced in other states is of great importance for purposes of considering the needs of CLECs in Tennessee. BellSouth did not dispute that it caused the missed cut overs described in the exhibits to witness Hyde's testimony. Indeed, the data presented by Witness Hyde through Exhibit TAH-3 was prepared by BellSouth.

The TRA should be concerned about incentives for BellSouth to provide inferior service to would-be competitors. The evidence shows that BellSouth has acted on these incentives and provided inferior service to ITC^DeltaCom. BellSouth's response is simple and woefully inadequate. BellSouth takes the position that the threat of complaints to the TRA or lawsuits in the Tennessee courts provides an adequate incentive for BellSouth to perform fully under the interconnection agreement. Put simply, BellSouth would have ITC^DeltaCom bring a complaint to the TRA and/or file a lawsuit each and every time BellSouth fails to perform. Such a requirement will not facilitate competition and certainly would not create a hospitable environment which would encourage local market entry in Tennessee. BellSouth's attitude in this regard ignores the costs and time associated with protracted litigation. Moreover, this structure

[6] The cutovers referred to in Exhibits TAH-1 and TAH-2 were for UNE orders. ITC^DeltaCom does not currently serve local customers in Tennessee. The data is regional in nature and based principally on ITC^DeltaCom's experiences in Alabama, Georgia, North Carolina, and South Carolina.

would favor BellSouth, which has vast resources and a well-established regulatory apparatus that has been developed at ratepayer expense.

The central policy objection of BellSouth to ITC^DeltaCom's proposed performance guarantees is that such a system of financial incentives will create a "moral hazard" that will harm the competitive balance in Tennessee. Although this argument has no merit -- ITC^DeltaCom wants service, not payments -- it further is irrelevant because ITC^DeltaCom does not propose to receive any payment associated with its proposed self-effectuating performance guarantees. Indeed, payments would be made to the state. ITC^DeltaCom seeks to provide strong financial incentives for BellSouth to fully perform under the interconnection agreement.[7] That is a behavior the TRA should encourage. BellSouth may argue there is a moral hazard associated with ITC^DeltaCom's potential misuse of the guarantees simply for purposes of creating expenses for BellSouth. This concern is convoluted and remote at best. Moreover, it would be contrary to ITC^DeltaCom's economic incentives and simple logic to deliberately sabotage the provision of service to its own customers.

As discussed in Section III, Issue 1(a), *infra*, the TRA has ample authority to direct that performance guarantees be included in the interconnection agreement.[8] Indeed, the

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[7] ITC^DeltaCom does not want revenues from the guarantees, nor is the point to increase the revenues of the state. (T-62). As witness Rozycki stated, "I hope that BellSouth never has to pay a nickel of money to the state as a fine for not achieving the performance that's specified in either ours or in BellSouth's SQMs . . . The objective here is to get BellSouth performing the way they should be and the way that all competitors would like them to perform so that we can get into the market more quickly." (*Id.*)

[8] Pursuant to the briefing schedule set forth at the conclusion of the hearing, ITC^DeltaCom addressed the issue of the TRA's authority to require self-effectuating performance measures and guarantees as part of the interconnection agreement in a separate Brief submitted at the request of the Directors on November 23, 1999 in this Docket and will not repeat

TRA (acting as arbitrators) is charged by Congress with resolving the open issues in this Docket. Pursuant to this duty, the Authority should require performance measures and self-effectuating guarantees in the interconnection agreement between the parties. Although BellSouth has not proposed any performance guarantees to the TRA, it has done so to the Federal Communications Commission ("FCC"). *See* Exhibit CJR-1.[9] ITC^DeltaCom has presented a three-tiered set of self-effectuating performance measures and guarantees. ITC^DeltaCom's proposal is set forth in Attachment 10 to the Proposed Interconnection Agreement, which was attached as "Exhibit A" to the Petition. ITC^DeltaCom's proposal is the only one regarding self-effectuating performance guarantees in evidence. Despite encouragement from the TRA, BellSouth has not made a proposal regarding performance guarantees in this case.

(2) Extended Loops.

The combination of an unbundled loop, cross connection and special access transport -- or an "extended loop" -- will enable ITC^DeltaCom to provide service to areas of Tennessee where collocation is not yet economically feasible.[10] In particular, this combination will allow ITC^DeltaCom to provide service outside of the most densely populated areas of the state. BellSouth currently combines those elements when it offers service using a special access

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that entire discussion herein.

[9] During the hearings, BellSouth stated it would file as a Late-Filed Hearing Exhibit the most recent *ex parte* proposal to the FCC regarding self-effectuating performance guarantees. ITC^DeltaCom has not received a copy of this Late-Filed Exhibit.

[10] Until a critical mass of customers is realized in a particular area, it is not economically feasible to establish a collocation in the central office serving that area. (T-260).

circuit. Under FCC Rule 315(b), therefore, BellSouth must provide extended loops to ITC^DeltaCom.

Over the past two years, BellSouth has provisioned approximately 2500 of these extended local loops to ITC^DeltaCom in the BellSouth region. BellSouth claims it provided this combination of network facilities in error and seeks the Authority's permission to refuse to provision that combination in Tennessee. Without extended loops, ITC^DeltaCom will be forced to curtail its plans to bring the benefits of competition to Tennessee's less densely populated areas. That result is contrary to the intent of the Act, the public interest, and the policies of the TRA. Thus, the continued provision of this combination for purposes of providing extended loops to ITC^DeltaCom must be included in the interconnection agreement between the parties.

(3) Reciprocal Compensation for Termination of ISP Traffic.

Section 251(b)(5) of the Act requires the parties to establish a mechanism whereby compensation is exchanged between incumbent local exchange carriers such as BellSouth and competitive local exchange carriers such as ITC^DeltaCom "for the transport and termination of telecommunications." The issue of payment of intercarrier compensation for the carriage of ISP-bound traffic is the subject of great debate and presented by BellSouth in a complicated and technical manner. However, when examined from a policy perspective, the issue of intercarrier compensation is quite clear and relies on the fundamental principle of cost causation. It cannot be disputed that the originator of a call causes the use of the telecommunications network. Without the origination of the call, the network would be idle. The placing of a call causes costs for both carriers -- the company that provides service to the originator of the call, and the company that terminates the call for the caller's service provider. The TRA should embrace the fundamental principle of cost causation. That is to say, the party that causes the costs should bear the burden of those costs.[11]

During the hearings, BellSouth did not dispute that three 20-minute calls placed to three different customers -- a residential customer, a bank (for computerized banking services) and an ISP -- if served by the same central office, would travel over the same facilities, through the same path and would cause the same costs. (T-546-50). Assuming the calls were placed by a BellSouth customer and were delivered to an ITC^DeltaCom customer, each call would cause the same costs to ITC^DeltaCom. In each case, the costs would be caused by the same customer -- the BellSouth customer. BellSouth has not withheld payments of compensation associated with the residential or the bank customer and does not contest that such payments should be due under the interconnection agreement that will be adopted pursuant to the TRA's order in this Docket. BellSouth has only contested payments as they relate to the ISP customer. In determining whether reciprocal compensation is due, there should be no distinction made based solely on the identity of the customer. If the TRA engages in such distinctions, nothing will prevent it from discriminating between other types of customers simply based on customer identity.[12] This form of discrimination would constitute bad public policy.

The interconnection agreement should require that reciprocal compensation be paid when calls are terminated on the network of a different carrier, regardless of whether such calls are terminated to an ISP. The previously approved rate for such reciprocal compensation is

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[11] Even BellSouth witness Taylor agrees with this proposition. (T-549).

[12] Perhaps BellSouth would next suggest that compensation not be due for carrying calls to customer service call centers or other types of businesses.

$.009 per minute of use. Neither party produced a cost study which supports a different rate, and ITC^DeltaCom should be allowed to rely on the established rate. In an effort to resolve this issue, however, ITC^DeltaCom has proposed a rate of $.0045 per minute of use with a phase down to elemental rates, if appropriate. (T-336-37).[13] ITC^DeltaCom submits that $.0045 is closer to a cost based rate. ITC^DeltaCom has made a substantial effort in the spirit of compromise to address BellSouth's concerns by agreeing to a much lower rate for compensation paid when a call is delivered to an ITC^DeltaCom customer who happens to be an ISP.

(4) Cageless Collocation

In its March 31, 1999 *Advanced Wire Services Order*, (Docket No. 98-1477), the FCC has made it clear that ILECs such as BellSouth must make available a new form of collocation -- "cageless collocation." Cageless collocation is an "alternative" collocation arrangement required by the FCC whereby ILECs "must allow competitors to collocate in any unused space in the incumbent LEC's premises, without requiring the construction of a room, cage, or similar structure, and without the creation of a separate entrance to the competitor's space." *Advanced Wire Services Order*, ¶ 42. Cageless collocation is a cost-effective means for CLECs to place equipment in ILEC central offices to interconnect with the ILEC network. Under a cageless collocation arrangement, CLECs own the equipment and are responsible for its care and maintenance. In contrast to "caged" or "walled" physical collocation, the equipment is not to be physically separated from the ILEC's equipment with barriers and separate supporting facilities.

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[13] ITC^DeltaCom's proposal in this regard contemplates the inclusion in elemental rates of tandem switching, as required by the FCC. (T-337).

The first issue regarding cageless collocation in this proceeding is the proper provisioning interval. The TRA should require BellSouth to provide cageless collocation to ITC^DeltaCom within 30 calendar days after a firm order for such collocation. BellSouth argues for an interval of between 90 to 130 business days and claims, without any commitment, that it will endeavor to provision cageless collocation as soon as possible. BellSouth is simply trying to apply the same provisioning interval to cageless collocation that applies to caged, or "walled," collocation arrangements. The Authority should reject this position because the interval for caged or "walled" collocation involves space identification, build-outs of enclosures, power and HVAC, all of which are not necessary in a cageless environment. Furthermore, the FCC has directed all ILECs to identify existing space to make cageless arrangements available. If BellSouth fulfills this duty, cageless collocation can be provided to competing carriers without significant delay.

The second issue addresses what rates the Authority should establish for cageless collocation. The TRA should establish interim rates for cageless collocation that are based on BellSouth's rates for virtual collocation with adjustments to remove charges for installation, maintenance and repair and training. The FCC's description of cageless collocation mirrors the characteristics of a virtual collocation arrangement, except that under a virtual collocation arrangement, the CLEC does not have physical access to the ILEC premises and the CLEC equipment is under the physical control of the ILEC (including installation, maintenance and repair responsibilities). Thus, BellSouth will incur less costs when provisioning cageless collocation than with virtual collocation.

A full discussion of various FCC orders and positions taken by BellSouth is provided at Section III, Issue 3, *infra*.

III. DISCUSSION OF ARBITRATION ISSUES

The following section discusses the remaining unresolved issues in this Docket, specifically Petition Issues 1(a), 2 (subparts concerning OSS and UNEs), 2(a)(iv), 2(b)(ii), 2(b)(iii), 3, 4(a), 5, 6(a), 6(b), 6(c), 6(d), 7(b)(iv), 8(b), 8(e) and 8(f). All other issues have been resolved between the parties and will not be discussed herein.

Issue 1(a):

Should BellSouth be required to comply with 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 to the Petition?

(a) The TRA Has Authority to Implement Performance Guarantees.[14]

BellSouth argues that the arbitrators do not have the authority to decide the issue of performance measures and self-effectuating guarantees. ITC^DeltaCom submits that the TRA not only has the authority to arbitrate the issue of performance measures and guarantees, but a duty under the Act to do so. Sections 252(b) and 252(c) of the Act specify the duties of the TRA with regard to this arbitration. Included in that charge is the responsibility to arbitrate "any

[14] The parties have addressed the issue of the TRA's authority to require performance measures and guarantees in briefs filed in this Docket on November 23, 1999. ITC^DeltaCom expressly incorporates its November 23, 1999 filing herein, and, for the sake of convenience, summarizes its position.

unresolved" issues between the parties. Performance guarantees is one such issue. Section 252(b)(4)(C) of the Act states that "[t]he State commission *shall* resolve each issue" brought before it in an arbitration. (emphasis added). ITC^DeltaCom has properly set forth the issue of performance guarantees in its Petition for Arbitration, and the TRA has the duty to resolve that issue.

As fully discussed in ITC^DeltaCom's November 23, 1999 Brief, the TRA's authority when acting as an arbitrator under the Act is determined by federal law. In the Act, Congress used a word -- "arbitration" -- that already had an established meaning under existing federal law, given to it under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* Nothing in the Act suggests that the broad affirmative powers of an arbitrator, as they currently exist under federal substantive law, are intended to be limited in any way. Therefore, "[w]here Congress uses terms that have accumulated settled meaning under common law, the Court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms." *Field v. Mans*, 516 U.S. 59, 116 S. Ct. 437, 133 L.Ed.2d 351 (1996).

Under the Federal Arbitration Act, the arbitrator has the authority to consider any issue submitted to him by the parties. *See, e.g., Sunshine Mining Co. v. United Steel Workers of America*, 823 F.3d 1289, 1294 (9th Cir. 1987). Any doubts concerning the scope of arbitration should be resolved in favor of arbitration. *Wailua Associates v. AETNA Casualty and Surety Co.*, 904 F. Supp. 1142, 1149 (D.Haw. 1995). The TRA has the authority under federal law, when fulfilling its duties as set forth by Congress in the Act to act as arbitrators, to consider this issue and direct that self-effectuating performance guarantees be included in the interconnection agreement which is the subject of this arbitration.[15]

(b) The Need for Performance Guarantees.

BellSouth attacks ITC^DeltaCom's proposal on jurisdictional grounds because it knows there is a clear need for self-effectuating performance guarantees as a matter of policy. Performance measures and guarantees are essential for three primary reasons: (1) BellSouth has competitive and financial incentives to block the entry of ITC^DeltaCom into the Tennessee local exchange market; (2) as the owner of the local loop, BellSouth has the means to limit ITC^DeltaCom's ability to provide quality service; and (3) seeking redress through the regulatory complaint procedure or through the courts would be wasteful and ineffective in a competitive environment. (T-34).

ITC^DeltaCom incurs costs when BellSouth fails to perform. (T-35-36). Performance measures and guarantees are necessary and in the public interest because such provisions would create a strong incentive for BellSouth to perform. ITC^DeltaCom's proposed performance measures and self-effectuating guarantees consist of specified performance benchmarks. *See* Petition, Exhibit A, Attachment 10. The benchmarks were developed to closely match the services that BellSouth provides to itself. ITC^DeltaCom does not seek to realize any

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[15] The cases decided by the federal courts under the Act demonstrate that state regulatory commissions have the authority to arbitrate the issue of performance guarantees. *See, e.g., U.S. West Communications, Inc. v. Hix*, 57 F. Supp.2d 1112 (D.Col. 1999) (upholding Colorado PUC's decision to include general performance standards; commission could have made standards detailed); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 40 F. Supp.2d 416 (E.D.Ky. 1999) (holding that although Kentucky PSC was not required by Act to impose performance standards, it could have done so); *U.S. West Communications, Inc. v. TCG Oregon*, 31 F. Supp.2d 828 (D.Or. 1998) (holding that interconnection agreement could include liquidated damages provision mandating damages if U.S. West fails to meet certain performance standards).

revenues from the payment of such penalties. Indeed, ITC^DeltaCom suggested such penalties may be paid to the state treasury and applied directly for the benefit of Tennesseans. (T-66-67).

ITC^DeltaCom proposed a three-tiered set of performance measures and guarantees. The first tier guarantees involve the waiver of non-recurring charges in a variety of circumstances in which BellSouth fails to perform.[16] The second tier of guarantees is triggered when BellSouth fails to meet a measurement in two out of three months during a quarter. Where such a "Specified Performance Breach" occurs, BellSouth should provide compensation of $25,000. (T-35-36). This level of payment is calculated by estimating the revenues lost from a typical ITC^DeltaCom customer ($750 per month) over a three-year period. (*Id.*). The third level of guarantee compensation is triggered only in cases of extreme and extraordinary nonperformance, where BellSouth fails to meet a single measure five times during a six month period. The specific terms associated with such a "Breach of Contract" are provided in paragraph 25 of the proposed General Terms and Conditions attached to the Petition as part of Exhibit A. For those extreme cases, BellSouth must pay guarantees of $100,000 for each default for each day the default continues. (T-36).

The second and third tier performance guarantees are critical. Limiting the guarantee to a one-time waiver leaves BellSouth with the opportunity and incentive to miss the rescheduled cut over appointment. Without any consequences whatsoever for missing a cutover

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[16] The first tier of guarantees is similar to those which BellSouth offers to its retail customers pursuant to Tariffs approved by the TRA. *See, e.g.*, *Prefiled Rebuttal Testimony of Christopher Rozycki*, Exhibit CJR-1.

date multiple times, BellSouth will have no incentive to keep its promises.[17] Indeed, the only incentive for BellSouth will be to keep the customer as a BellSouth customer by damaging the reputation of ITC^DeltaCom to that customer and others who hear of the experience. When BellSouth fails to perform, the customer often blames ITC^DeltaCom and simply decides to return to BellSouth. This perverse result can be avoided through the implementation of performance measures and self-effectuating guarantees.

BellSouth argues that ITC^DeltaCom should seek relief from the courts or the TRA through individual lawsuits in every case of non-performance.[18] This approach is impractical and inefficient. First, to the extent BellSouth fails to perform in a particular instance, ITC^DeltaCom will lose the customer whose order was the subject of the nonperformance. That customer is gone as far as ITC^DeltaCom is concerned.[19] No lawsuit can bring that customer back. Moreover, ITC^DeltaCom's reputation suffers each time such nonperformance occurs. Litigation is costly and time consuming. It is against the public interest to push all disputes to the courts. Moreover, it makes Tennessee an inhospitable environment for would-be local exchange competitors. BellSouth's attempt to force competing carriers into litigation -- just to ensure the

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[17] In other words, if the TRA enacts only Tier 1 guarantees, once an event is missed there is no incentive remaining for BellSouth to not continue to miss the event. Once the non-recurring charge is waived, no "carrot" remains to provide an incentive to perform.

[18] In an apparent contradiction, BellSouth has suggested its own set of self-effectuating performance guarantees to the FCC. *See* Exhibit CJR-1.

[19] As witness Rozycki stated, "seeking remedies through the existing regulatory complaint process or through the courts is simply not adequate in a competitive environment. These processes will stifle, not encourage, the growth of competition." (T-34).

performance required by the Act -- evidences BellSouth's desire to use the TRA and the courts as accomplices in creating roadblocks to competition and the implementation of the Act.

ITC^DeltaCom is not alone in recognizing the importance of performance guarantees. Indeed, the federal courts have made strong pronouncements in support of such a set of remedies:

> Inadequate service can be fatal to a new local exchange carrier such as TCG. If prospective customers try TCG service only to discover that they cannot reliably obtain a dial tone, that calls are disconnected in the middle of a conversation, or that service orders are not timely filled, then those customers will probably switch back to U.S. West and turn a deaf ear to future entreaties from TCG. Adverse publicity will also deter other prospective customers from considering TCG. Even assuming the problems are eventually resolved, that may not be soon enough to save TCG. Moreover, damages in such cases can be difficult to quantify and prove, and it would require years (and considerable expense) to litigate such claims. A further concern is that U.S. West stands to gain financially if customers become dissatisfied with TCG's local service, hence U.S. West is operating under a conflict of interest.
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> Under the totality of the circumstances, including the PUC's extensive experience in overseeing U.S. West service in Oregon, the PUC could reasonably conclude that enforceable performance standards, i.e., those with teeth, are necessary and proper. Even if no damages are ever paid, the very existence of enforceable standards may help to reassure TCG (and other prospective CLECs) who might otherwise be hesitant to enter the local telephone market, and to minimize the suspicions and accusations that might otherwise arise between TCG and U.S. West. The PUC also could reasonably have concluded that the liquidated damages clause would help to minimize costly litigation.

U.S. West Communications, Inc. v. TCG Oregon, 31 F. SUPP.2d 828, 837-38 (D.Or. 1998). The mere availability of contractual and administrative remedies is not enough to protect ITC^DeltaCom from any failure by BellSouth to perform.

There must be strong incentives in place for BellSouth to provide parity to CLECs in Tennessee such as ITC^DeltaCom. ITC^DeltaCom operated in the BellSouth region for the past two years without any self-executing performance guarantees. BellSouth's performance during that time has been substandard, to say the least. BellSouth should be given a strong incentive to perform. The specific instances of non-performance outlined in the proprietary exhibits of ITC^DeltaCom witness Hyde are greatly disturbing. The TRA must act to give "teeth" to the interconnection agreement between the parties to ensure that BellSouth's obstreperous and anti-competitive behavior is minimized.

Despite strong encouragement from the TRA, BellSouth did not offer a set of self-effectuating guarantees. Thus, the only guarantees supplied in evidence are those put forward by ITC^DeltaCom. These self-effectuating performance guarantees are needed now, not at some distant point in the future. In response to witness Varner's comment that the TRA should wait to adopt whatever performance measures and guarantees *might* be adopted by the FCC, Director Greer responded:

> But doesn't that put us back in the same position we were talking about earlier as it relates to regulatory limbo? Doesn't that lead us back to my argument earlier this morning, that that thing could take four, three, four, five years to litigate, and all this time these CLECs are sitting out here with no remedies or very few remedies or fewer remedies than they might have?

(T-816). ITC^DeltaCom agrees and submits that the TRA should require performance measures and self-effectuating guarantees in the interconnection agreement at issue in this Docket.

Issue 2

(b) Pursuant to this definition [of "parity"], should BellSouth be required to provide the following, and if so, under what conditions and at what rates:

(1) Operational Support Systems ("OSS").

OSS are the systems used by CLECs, such as ITC^DeltaCom, to enroll and begin serving customers. Access to these systems must make available to ITC^DeltaCom the same functionalities as those enjoyed by BellSouth. In its much anticipated Rule 319 remand decision, the FCC reaffirmed its finding that OSS are UNEs for purposes of Section 251(c)(3) of the Act and that access to OSS must be made available to ITC^DeltaCom at nondiscriminatory rates, terms and conditions. *Third Report and Order*, FCC 99-238, November 5, 1999, at pp. 192-98 (¶¶424-437). Thus, access to OSS must be at parity with BellSouth's access to its own systems.[20]

The lack of parity is illustrated by the fact that 62% of orders submitted electronically to BellSouth by ITC^DeltaCom "fall out" -- in other words, these orders do not flow through BellSouth's OSS system electronically and must be manually processed by BellSouth. *Prefiled Direct Testimony of Michael Thomas*, p. 2. When orders are placed which include certain commonly ordered services by ITC^DeltaCom on behalf of its retail customers, the orders fall out of BellSouth's system. For example, if a Tennessee doctor's office with six lines desires to switch from BellSouth to ITC^DeltaCom and add a hunting feature, ITC^DeltaCom would submit a UNE order for the customer to BellSouth electronically through EDI. That order will not flow-through BellSouth's system -- it "falls out" by design and must be entered

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[20] The evidence is clear that BellSouth does not provide access to OSS at parity. ITC^DeltaCom has gone to great expense and effort to develop the ability to submit orders through EDI electronically. *Prefiled Direct Testimony of Michael Thomas*, p. 2. BellSouth's systems must meet the needs of ITC^DeltaCom and must provide access to OSS at least equal to that enjoyed by BellSouth.

manually by BellSouth personnel. *Prefiled Rebuttal Testimony of Michael Thomas*, pp. 9-10. When that same order is entered by BellSouth directly into its DOE system, in order to provide the same services to the doctor's office as a retail customer of BellSouth, the order is processed electronically. Although BellSouth has alleged that a December 18, 1999 upgrade to its OSS will correct this problem, this is not currently the case. *Id.* at 9.

Just as important, there are several other commonly ordered services by ITC^DeltaCom on behalf of its retail customers which similarly do not "flow through." One example is the PBX feature, a commonly ordered service by ITC^DeltaCom customers. Orders requesting PBX service for a retail customer should not fall out of the system simply because ITC^DeltaCom is the ordering company. Such a result violates the Act. The heart of this problem is BellSouth's failure to "map" between EDI and its SONGS system. *Id.* at 10. BellSouth should be directed to complete the mapping between EDI and SONGS as soon as possible for all commonly ordered services.[21] BellSouth's systems must meet the needs of ITC^DeltaCom and must provide access to OSS at least equal to that enjoyed by BellSouth. Both companies enter such orders manually -- ITC^DeltaCom through EDI and BellSouth through SONGS -- but it is only ITC^DeltaCom's orders that must be re-entered manually by BellSouth personnel. BellSouth thus does not offer OSS at parity.

There are two types of costs associated with OSS: development costs and usage costs. BellSouth should not be able to charge CLECs for the costs to develop OSS. BellSouth argues that ITC^DeltaCom should have to pay for OSS development because ITC^DeltaCom and

[21] In addition to hunting, it is undisputed that loop orders that are in a hubbing arrangement area "fall out" by design. Additionally, orders which include PBX service flow through for BellSouth, but fall out by design for ITC^DeltaCom and other would-be competitors.

other CLECs are the users of OSS. *Prefiled Direct Testimony of William Taylor*, pp. 30-31. This perception -- that OSS costs are caused by new entrants -- is due to the fact that BellSouth has the vast majority of local exchange customers, and CLECs will be using BellSouth's system to migrate customers away from BellSouth. Indeed, as a practical matter, the customers initially will all be going from BellSouth to ITC^DeltaCom. CLECs, however, must build out their own systems to work with BellSouth's OSS and, as a result, incur significant development costs of their own. *Prefiled Direct Testimony of Don Wood*, pp. 13-14. As previously stated, it is undisputed that ITC^DeltaCom has done so. Moreover, the development of OSS is a requirement imposed on BellSouth by Congress. *Id.* at 13. In exchange for the requirement, once all applicable conditions are met, BellSouth will be permitted interLATA in-region entry. Accordingly, the TRA should find that it is in the public interest for carriers to pay their own OSS development costs. CLECs bear the costs of development on their systems and BellSouth will be rewarded with interLATA entry once all conditions are met.

With regard to the use of OSS, the Authority addressed this issue at page 34 of its recent *Order Re Petitions for Reconsideration and Clarification of Interim Order on Phase I* in Docket No. 97-01262:

> The directive of the Authority, as reflected in the Interim Order, states that all carriers (ILEC, CLEC, etc.) should pay a recurring rate to recover OSS costs. The TRA's Order is clarified to state that *OSS interface costs should be recovered from all users of the new systems, whether ILECs or CLECs.*

(emphasis added). Thus, the TRA recognized that the development of OSS by BellSouth is for the benefit of, and use by, both CLECs and ILECs. Consistent with this Order, the TRA should direct that BellSouth, as an ILEC user of OSS, contribute to the recovery of OSS interface costs pursuant to the TRA's ruling in Docket No. 97-01262. BellSouth's rates and charges for OSS must be spread over BellSouth's entire retail customer base. Such a policy reduces the per customer costs to *de minimus* levels and greatly facilitates competition.

(2) UNEs

It is undisputed that pursuant to Section 251(c) of the Act, BellSouth must provide UNEs to ITC^DeltaCom at cost-based rates that comply with Section 252(d) of the Act and the FCC's Pricing Rules which were reinstated by the United States Supreme Court in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. CT. 721, 142 L.Ed.2d 835 (1999). In the TRA's *Order Re Petitions for Reconsideration and Clarification of Interim Order on Phase I* in Docket No. 97-01262, the correct standard for UNE pricing was implemented. ITC^DeltaCom supports the TRA's *Order*, which, if made permanent, would resolve this issue. (T-262).

(3) An Unbundled Loop Using Integrated Digital Loop Carrier ("IDLC") Technology.

Section 251(c)(3) of the Act requires that BellSouth provide access to UNEs in a manner that is nondiscriminatory. Thus, BellSouth must provide ITC^DeltaCom access to UNEs in a manner that is at parity with that which it provides to itself. For UNEs that are migrated from BellSouth customers served via IDLC or for customers' locations where BellSouth would use IDLC for its own service, BellSouth provides an inferior service to ITC^DeltaCom. Instead of offering the same IDLC technology to ITC^DeltaCom that it utilizes to provide service to its own customers, BellSouth would have the TRA allow it to use either (1) long copper loops that result in a substandard loop with excessive loss and increased likelihood of noise problems; or (2) outdated UDLC technology that increases costs and will not always provide the same quality and features of IDLC. *Prefiled Direct Testimony of Thomas Hyde*, pp. 3-4.

ITC^DeltaCom's position on this issue is quite moderate. ITC^DeltaCom asks the TRA to require BellSouth to provide IDLC *equivalency*, not necessarily IDLC itself. BellSouth seeks to *convert* customers who desire to be served by ITC^DeltaCom to UDLC technology. Converting a customer from IDLC to UDLC adds two additional analog to digital conversions in the CLEC's pathway. These conversions degrade modem capability and other features. (T-124-25). Moreover, it is contrary to the Act and anti-competitive for BellSouth to convert a customer from IDLC to UDLC when that customers selects ITC^DeltaCom. The TRA should require BellSouth to furnish UNE IDLC equivalency for all end users currently served by IDLC. Otherwise, the customer will experience an inferior quality of service with ITC^DeltaCom, and blame ITC^DeltaCom -- when the real fault lies with BellSouth.[22]

Indeed, the Authority agrees with ITC^DeltaCom. The TRA has recently affirmed that "[i]f BellSouth is providing IDLC service to its own customers in a particular area, it shall be required to provide this same IDLC to competitors to avoid giving itself preferential treatment over its competitors." TRA Docket No. 97-01262, *Order Re Petitions for Reconsideration and Clarification of Interim Order on Phase I*, p. 22 (November 3, 1999). ITC^DeltaCom agrees and submits that the TRA's prior rulings should control the decision in this arbitration. Accordingly,

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[22] In some limited instances, BellSouth currently provides IDLC-equivalent service to ITC^DeltaCom by providing loop UNEs via the "side door" IDLC methodology that splits the loop off the switch. *See Prefiled Rebuttal Testimony of Thomas Hyde*, p. 14. This configuration has provided IDLC-equivalent service to ITC^DeltaCom in the small number of instances where it has been deployed. Moreover, BellSouth does not refute the availability of the "side door" IDLC arrangement.

the decision in this Docket should state that BellSouth must provide UNE loops to ITC^DeltaCom with the same quality as those it uses to serve BellSouth retail customers. Where IDLC technology is utilized to serve BellSouth retail customers, IDLC technology must be made available to ITC^DeltaCom to serve ITC^DeltaCom retail customers.[23]

Issue 2(b)(ii):

Until the Commission 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 Commission?

BellSouth should continue providing those unbundled network elements and combinations that it is currently providing under the existing interconnection agreement. The FCC issued its *Third Report and Order* on November 5, 1999, confirming the continuance of six of the seven previous unbundled network elements: (1) loops, including loops used to provide high-capacity and advanced telecommunications services; (2) network interface devices; (3) local circuit switching (except for larger customers in major urban markets); (4) dedicated and shared transport; (5) signaling and call-related databases; and (6) operations support systems. The FCC also required incumbents to provide unbundled access to subloops, or portions of loops, and dark fiber optic loops and transport.

[23] In the Louisiana arbitration between ITC^DeltaCom and BellSouth, the Louisiana Public Service Commission Staff has recently recommended that "BellSouth must provide, at a minimum, an equivalent product to BST's IDLC loop." LPSC Docket No. U-24206, *Post-Hearing Brief of the Louisiana Public Service Commission Staff*, p. 10 (November 30, 1999).

With regard to combinations, the U.S. Supreme Court has affirmed the FCC's Rules relating to combinations and those rules are in effect today. *AT&T Corp.*, 119 S. Ct. at 736-37. FCC Rule 315(b) requires that "[e]xcept upon request, an incumbent LEC shall not separate requested network element that the incumbent LEC currently *combines*." (emphasis added). There can be no dispute that BellSouth currently *combines* local loops and switch ports (creating a loop-port switch combination) and local loops and transport facilities (creating extended loops as requested by ITC^DeltaCom). Because BellSouth currently combines those elements of its network, pursuant to Rule 315(b), it must make those elements available to CLECs on a combined basis and at prices that reflect the cost that would be incurred to provide these network elements in combination (pursuant to Rules 51.501 through 51.513).

In its *Third Report and Order*, the FCC cited back to its intentions when drafting Rule 315(b), stating that in the *First Report and Order*, "the Commission [FCC] concluded that the proper reading of 'currently combines' in Rule 51.315(b) means 'ordinarily combined within their network, in the manner in which they are typically combined.'" (¶ 479). Rule 315(b) uses the phrase "currently combines." Thus, the TRA should require BellSouth to provide UNEs to ITC^DeltaCom in combined form which are ordinarily combined within its network, and in the manner in which they are typically combined. These UNEs should be priced to reflect the cost that would be incurred to provide the combination, not the cost to provision the UNEs separately. BellSouth should be required to submit a cost study that recognizes the price for such combinations must be less than the sum price of the elements which are combined. BellSouth has submitted such a study reflecting prices for UNEs in combined form in a recent Georgia proceeding which showed that UNEs provided in combined form result in fewer costs than those provided on a separate basis. A similar study must be submitted in Tennessee. Until such a study is provided and subjected to scrutiny in hearings, the price for combinations should be equal to the sum of the TELRIC-based rates for the elements in the combination.

Issue 2(b)(iii):

(a) Should BellSouth be required to provide to ITC^DeltaCom the following combinations:

(1) Loop/port combination
(2) Loop transport UNE combinations
(3) Loop UNE connected to access transport

ITC^DeltaCom's existing interconnection agreement, which was approved by the TRA pursuant to Section 252 of the Act, contains a provision stating that, "the Parties shall 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."

BellSouth admits that it has provided 2500 extended loops to ITC^DeltaCom pursuant to the current interconnection agreement. (T-710-11).[24] Incredibly, BellSouth claims it provisioned these extended loops by mistake. (T-711).Extended loops permit ITC^DeltaCom to offer service into less densely populated areas by allowing ITC^DeltaCom to efficiently enter markets without having to install a dedicated collocation space in each and every BellSouth

[24] Currently, ITC^DeltaCom purchases special access transport out of BellSouth's FCC Tariff No. 1 in order to extend the UNE loop. The TRA should affirm that ITC^DeltaCom will continue to have the option to connect UNE loops to special access transport as a means of extending the UNE loop. ITC^DeltaCom currently pays BellSouth the special access rates for dedicated transport, which are well above TELRIC-based costs for the provision of the service.

central office. This creates efficiency in that ITC^DeltaCom can put collocation spaces in central offices where there is sufficient demand, and still use that space to serve remotely located customers. *See Prefiled Direct Testimony of Thomas Hyde*, p. 7.

Furthermore, BellSouth is required to provide extended loops to ITC^DeltaCom under the law.[25] Witness Wood's unrebutted testimony is that BellSouth currently combines local loops and transport facilities in its network today to provide service to retail customers. (T-260-61). The FCC has noted that "incumbent LECs routinely combine loop and transport elements for themselves." *Third Report and Order*, November 5, 1999, ¶ 481. As discussed above, FCC Rule 315(b) requires that "[e]xcept upon request, an incumbent LEC shall not separate requested network element that the incumbent LEC currently *combines*." (emphasis added). There can be no dispute that BellSouth currently *combines* local loops and switch ports (creating a loop-port switch combination) and local loops and transport facilities (creating extended loops as requested by ITC^DeltaCom).

Several other state commissions have made it clear that extended loops, or "extended links" ("EELs") must be provided to CLECs. For example, the California Public Utilities Commission has required Pacific Bell to demonstrate that it has made the "extended link UNE -- which consists of the loop functionality delivered to a distant central office -- available to

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[25] BellSouth disputes this interpretation of the law and claims it will provide this combination at its sole discretion and only pursuant to a "Professional Services Agreement," or "PSA." (T-719-20). According to BellSouth's view of the law, these PSAs are interconnection agreements that may not need to be submitted for approval by the TRA under Section 252. (T-721). BellSouth witness Varner said "[w]hat I do know is that they [PSAs] are not required to meet the pricing standards under Section 252 for cost based rates." (T-721). He went on to claim the rates in the "PSAs" can "discriminate between CLECs." (T-724).

CLECs."[26] Pennsylvania has required the UNE-P and EEL except where Bell Atlantic proves by a preponderance of the evidence that collocation is a more reasonable economical alternative to the provision of the EEL.[27] The states of Texas, New York and Alabama have also ensured that EELs (or "extended loops") are made available to CLECs.

For ITC^DeltaCom to effectively compete with BellSouth, BellSouth must follow the law and provide the combinations which comprise extended loops at FCC-compliant rates. Given the importance of extended loops to retail competition, it is no surprise that BellSouth wants to discontinue this offering -- and even threatens to take away existing service. The TRA should compel BellSouth to continue providing extended loops to comply with the FCC Rules and to promote competition in Tennessee.

(b) If so, what should the rates be?

Because BellSouth currently combines those elements of its network, pursuant to Rule 315(b), it must make those elements available to CLECs on a combined basis and at prices that reflect the cost that would be incurred to provide these network elements in combination (pursuant to Rules 51.501 through 51.513). BellSouth should be required to submit a cost study for extended loops that recognizes the price for such combinations must be less than the sum price of the elements which are combined. Until such a study is filed and adopted, the price should be the sum of the TELRIC-based prices of the components of the extended loop.

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[26] *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks*, California PUC Decision No. 98-12-069, p. 156 (December 17, 1998).

[27] *Joint Petition of NextLink Pennsylvania, Inc., et al, for Adoption of Partial Settlement Resolving Pending Telecommunications Issues*, Pennsylvania PUC Docket No. P-00991648, *Opinion and Order*, p. 83 (August 26, 1999).

Issue 3(1):

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

BellSouth admits that when a BellSouth customer places or originates a call and uses the ITC^DeltaCom network to complete that call, ITC^DeltaCom incurs costs. (T-549). Thus, if the call is never made by the BellSouth customer, there is no cost. The costs are a result of the use of ITC^DeltaCom's network. When the call is completed to any residential or business customer (other than an ISP), BellSouth has agreed to pay compensation as required by the Act to ITC^DeltaCom. Compensation for those calls is not in dispute in this docket. BellSouth's position is that whenever the customer on the other end of that call happens to be an ISP, no compensation is due to ITC^DeltaCom.

On cross-examination, Witness Taylor was asked to consider a simple hypothetical. In the hypothetical, a caller served out of the BellSouth Belle Meade Central Office takes local service from BellSouth. The caller places three 20-minute calls: one to his mother, one to a bank (for computerized banking services), and one to an ISP -- all three of whom are ITC^DeltaCom local customers served out of the BellSouth Second Avenue Central Office. BellSouth conceded that all three calls take the same path and travel over the same types of facilities. (T-548-49). BellSouth agreed that the costs were caused by the caller. (T-549). BellSouth agreed that ITC^DeltaCom incurs such costs and that the costs differ only inasmuch as the ITC^DeltaCom facilities which are deployed to terminate calls differ. (T-549-50). Thus, BellSouth's argument turns completely on who is on the other end of the telephone when the call is terminated.

BellSouth does not dispute that the caller -- the person who places the call -- is the causer of that call, and thus is also the causer of the costs that are incurred to complete that call. (T-549). That caller is using the network of his carrier and another carrier to complete a single call. ITC^DeltaCom submits that it is the responsibility of the carrier serving the caller who places the call to ensure the call is completed. Indeed, the carrier serving the caller is in privity with the caller and collects rates from the caller in exchange for service. If use of the network of another company is needed to complete that call, the caller's carrier must compensate the other carrier for use of that carrier's network. Presumably, the costs associated with such compensation will be collected from the caller, who after all, was the cost causer.

The FCC's February 25, 1999 *Declaratory Ruling* evidences the FCC's view that compensation must be paid to carriers for termination of calls to ISPs. The FCC held that "[w]hile to date the Commission has not adopted a specific rule governing the matter, we do note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that **compensation is due for that traffic**." *FCC Declaratory Ruling*, February 25, 1999, ¶ 25 (emphasis added). Subsequent to the FCC's pronouncement, the states of California, Maryland and Florida have all determined that compensation is due when traffic is terminated to an ISP. Most recently, the North Carolina Public Utilities Commission held, in the context of an arbitration proceeding between ICG Telecom Group, Inc. and BellSouth under the Act, that reciprocal compensation be applied to ISP-bound calls.[28] In all of those cases, the decisions were made on a prospective basis in the context of arbitrations under Section 252 of the Act. In other words, they were not cases in which existing contracts were being interpreted.

BellSouth argues that ISP-bound traffic is interstate in nature and thus, as a matter of law, is not subject to the Act's requirements that compensation be exchanged between carriers. Whether the traffic is interstate, intrastate or jurisdictionally mixed is not outcome determinative of this issue. Regardless of the jurisdictional nature of the traffic, compensation must still be paid when a carrier terminates the calls of another carrier's customers. It is undisputed evidence in this Docket that ITC^DeltaCom uses exactly the same type of facilities to deliver calls to ISPs as with any other call. (T-548-49). Not applying reciprocal compensation to ISP-bound traffic would afford BellSouth free use of ITC^DeltaCom's network when BellSouth customers place calls to ISP customers of ITC^DeltaCom.

Consistent with the language used by the FCC in its February Declaratory Ruling, the TRA should hold that reciprocal compensation is due for calls to ISPs, just as with any other local call. At bottom, where costs are incurred by ITC^DeltaCom for carrying the traffic of a BellSouth customer, BellSouth must compensate ITC^DeltaCom for such carriage.[29] Accordingly, ITC^DeltaCom's proposed contract language covering this issue should be incorporated into the interconnection agreement between the parties.

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[28] *In the Matter of ICG Telecom Group, Inc., For Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*, NCUC Docket No. P-582, Sub 6, p. 17 (November 4, 1999).

[29] BellSouth proposes that its customers who call ISP customers of ITC^DeltaCom be allowed to use ITC^DeltaCom's network without BellSouth paying *any* compensation. Indeed, BellSouth argues that payment should be made from ITC^DeltaCom to BellSouth.

Issue 3(2):

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

Sections 252(d)(2)(A)(i) and (ii) of the Act require that the rate paid for reciprocal compensation be based on cost. Specifically, Section 252(d)(2)(A) states that the rate must be based on the cost associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier and must reflect "a reasonable approximation of the additional costs of terminating such calls." The TRA approved the $.009 rate for reciprocal compensation when it approved the interconnection agreement which governed the relationship between the parties for the past two years. That rate was in the public interest. If it had not been, the TRA would have rejected it pursuant to Section 252(e)(2)(A)(ii), which provides that state commissions should reject a negotiated agreement when such agreement is "not consistent with the public interest, convenience, and necessity."

ITC^DeltaCom initially proposed the current rate of $.009 that is contained in the current interconnection agreement. That rate is still reasonable and meets the requirements of the Act. The TRA could choose to simply continue that rate going forward.[30] If the Authority is inclined to adopt an interim rate until cost-based rates for reciprocal compensation can be

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[30] As stated by the FCC in its *First Report and Order*, CC Docket No. 96-98, Released August 8, 1996, ¶ 1085:

> Regardless of whether the incumbent LEC's transport and termination prices are set using a TELRIC-based economic cost study or a default proxy, we conclude that it is reasonable to adopt the incumbent LEC's transport and termination prices as a presumptive proxy for other telecommunications carriers' additional costs of transport and termination.

established, ITC^DeltaCom proposed as a compromise in an effort to settle the issue (BellSouth would not negotiate this issue) an interim rate of $.0045 per minute of use. (T-336). ITC^DeltaCom would accept this as an interim rate if applied to the termination of all local traffic including that bound for ISPs. Furthermore, ITC^DeltaCom even expressed a willingness to phase-down to elemental billing rates for local interconnection, tandem switching, and transporting. (T-336-37). Thus, the TRA could also establish a permanent rate for reciprocal compensation -- including traffic bound for ISPs -- based on elemental billing rates for local interconnection, transport and tandem switching.

Whichever rate the Authority decides is most appropriate, it is clear that some compensation to ITC^DeltaCom for carrying a BellSouth customer's ISP-bound traffic should be paid by BellSouth.

<u>**Issue 4(a):**</u>

Should BellSouth provide cageless collocation to ITC^DeltaCom 30 days after a firm order is placed?

Pursuant to the FCC's *Advanced Wireline Services Order*[31], ITC^DeltaCom is entitled to utilize "cageless collocation" in BellSouth central offices. Indeed, the availability of cageless collocation is a critical element required for ITC^DeltaCom to effectively compete for local services in Tennessee. Cageless collocation does not require the construction of an enclosure for ITC^DeltaCom to place its equipment in the BellSouth central office.

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[31] *Advanced Wireline Services Order*, No. FCC 99-48, FCC Docket No. CC 98-147 (March 31, 1999).

The TRA should require BellSouth to provide cageless collocation to ITC^DeltaCom within 30 calendar days after a firm order confirmation ("FOC") for such collocation is placed. BellSouth takes the position that the proper interval for provisioning cageless collocation should be 90 to 130 business days. In an effort to construct a barrier to the utilization of cageless collocation in Tennessee, BellSouth has suggested that the same intervals needed for caged separate collocation arrangements are applicable. This position strains credulity.[32] The 90 to 130 business day interval involves space identification, build-outs of enclosures, power and HVAC, all of which are not necessary in a cageless environment. (T-255-57). Furthermore, pursuant to the *Advanced Wireline Services Order*, the FCC has directed ILECs to identify existing space to make cageless arrangements available. If BellSouth fulfills this duty imposed upon it by the FCC, cageless collocation can be provided to competing carriers without significant delay. *Id.*; (T-258-59).

The FCC emphasized the importance of the timely and efficient provisioning of cageless collocation at ¶ 54 of the *Advanced Wireline Service Order*. Indeed, the FCC encouraged the state commissions to adopt specific intervals and implies that such intervals should be markedly shorter than those for more cumbersome forms of collocation which require separate space. *See Advanced Wireline Services Order*, ¶ 38. Cageless collocation is akin to virtual collocation. Indeed, without examination of equipment ownership labels, even a

[32] As Director Greer stated during the hearings, "I mean we've already gone to the point where we know now we don't have to have walled in spaces for switches. And that was a very strong position BellSouth took early on in arbitration, and now we don't hear that argument anymore. But it seems like we're still looking for things that take a long time to get a CLEC collocated in your [BellSouth's] facilities, and I don't understand the problem. I'm concerned this is a stalling issue, quite frankly, and you're going to have do some convincing." (T-196).

telecommunications engineer could not distinguish virtual collocation arrangements from cageless collocation arrangements in a central office. (T-256).

Other state commissions have examined this issue and established cageless collocation intervals which are substantially less than what BellSouth proposes in this case. For example, the Texas Public Utility Commission has established, for active collocation space, a cageless collocation interval of seventy (70) days where Southwestern Bell installs the bays/racks and fifty-five (55) days where such work is done by the CLEC.[33] The Utah Commission, pursuant to Utah Regulation R746-365-3(c)(iv) ("Network Guidelines Applicable to All Telecommunications Corporations"), requires that collocation arrangements must be completed by an ILEC within forty-five (45) days of the telecommunications corporation's acceptance of the ILEC's quotation.

More recently, the Virginia Commission Staff filed its report and recommendation that the provisioning intervals for cageless collocation for space that is already conditioned should be comparable to that of virtual collocation of equipment in a premises. This is consistent with the testimony of Witness Wood on behalf of ITC^DeltaCom that virtual collocation is very similar to cageless collocation and should be provided in the same or similar time frames. The Virginia Staff also recommended that Bell Atlantic must provide cageless collocation within an interval of sixty (60) calendar days.[34] The Louisiana Public Service Commission Staff has also recently

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[33] *Investigation of Southwestern Bell Telephone Company's Entry Into Texas InterLATA Telecommunications Market*, Texas PUC Order No. 51, Project No. 16251, *Approving Time Intervals for Provisioning Collocation Under Revised Collocation Tariff* (August 18, 1999).

[34] *Re: Application of Bell Atlantic -- Virginia, Inc., For Approval of its Network Services Interconnection Tariff*, SCC-Va.- No. 218, Case No. PUC990101, p. 39 (October 27, 1999.)

recommended a 60-day interval for the provision of cageless collocation for the interconnection agreement between ITC^DeltaCom and BellSouth.[35]

Issue 5:

Should the Parties continue operating under the existing local interconnection arrangements?

This issue was broken into subtopics in ITC^DeltaCom's testimony to more clearly identify the issues that remained open at the time of the hearings before the TRA. For purposes of clarity, the TRA should utilize the more detailed subtopics identified in ITC^DeltaCom's testimony and the Exhibit B matrix which was incorporated into the Petition. The specific subtopics are discussed below. Each of these subtopics was expressly included in ITC^DeltaCom's June 11, 1999 filing, and BellSouth has adequately responded to each of the subtopics. Thus, any argument put forward by BellSouth that it did not have adequate notice or an opportunity to respond to the issues that remain open within this issue is specious.

The existing interconnection agreement addresses, at least in part, each of the subtopics with the exception of binding forecasts.[36] The parties have been able to negotiate all the other provisions concerning local interconnection. As the parties have not been able to come to agreement on these issues, ITC^DeltaCom recommends that the existing language should remain in place. BellSouth agreed to the language that is in the existing agreement and the TRA

[35] LPSC Docket No. U-24206, *Post Hearing Brief of the Louisiana Public Service Commission Staff*, p. 16 (November 30, 1999).

[36] ITC^DeltaCom respectfully reiterates its belief that the issue of binding forecasts was properly "set forth" in attachments to its Petition. The Pre-Hearing Officer recommended the exclusion of consideration of the binding forecast issue. The TRA affirmed this recommendation. The issue of binding forecasts therefore will not be discussed herein.

approved that agreement approximately two years ago as compliant with the Act and consistent with the public interest as required by Section 252(e)(2)(A) of the Act.

(a) Should the current interconnection agreement language continue regarding cross-connect fees, reconfiguration charges, or network redesigns and NXX translations?

The interconnection agreement that was previously approved by the Authority as compliant with Section 252 of the Act covers the issue of cross-connect fees, reconfiguration charges, or network redesigns and NXX translations. BellSouth has not provided any evidence that compels the TRA to conclude these requirements are no longer appropriate for the interconnection agreement between the parties and the parties have been unable to negotiate any alternative arrangements. BellSouth seems to have simply left these issues unaddressed. The terms and conditions in the previously approved interconnection agreement will enable ITC^DeltaCom to make significant investments in facilities in Tennessee and effectively enter the local exchange market. Those terms should continue. The language contained in the existing interconnection agreement covering this issues should be renewed and incorporated in the interconnection agreement resulting from this proceeding.

(b) What should be the definition of the terms "local traffic" and "trunking options"?

The terms local traffic and trunking options are defined in the interconnection agreement that has governed the relationship between the parties for the past two years. ITC^DeltaCom submits that those definitions should be incorporated into the renewed interconnection agreement which will result from this Docket. BellSouth submits that the definition should be revised to state that ISP-bound traffic is not included in the definition of local traffic. BellSouth, however, took a very different approach with regard to the definition of "order flow through." (Issue 2(g), which has now been settled.) In that case, BellSouth believed the term need not be defined at all. In this case, BellSouth urges the TRA to adopt a definition which is even more specific - and indeed, is wholly different - from the one contained in the previously approved interconnection agreement.

BellSouth has not provided any compelling reason to modify the definition of local traffic for purposes of the interconnection agreement between these parties. As a result, the definition which was previously determined by the Authority to be compliant with the Act should be incorporated into the interconnection agreement which will result from this Docket.

(c) What parameters should be established to govern routing ITC^DeltaCom's originating traffic and each party's exchange of transit traffic?

Similar to the subtopics of Issue 5 discussed above, with regard to the parameters that govern routing of ITC^DeltaCom originating traffic and each parties exchange of transit traffic, ITC^DeltaCom submits that the language contained in the existing interconnection agreement, which was found to be compliant with Section 252 of the Act in 1997 should be renewed for an additional two years. BellSouth has not provided any evidence - or even any credible argument - that these parameters should not be continued. Accordingly, the parties should continue the previous language into the renewed interconnection agreement.

Issue 6(a):

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

Each telecommunications carrier should be responsible for its own OSS development costs. BellSouth should not be able to capitalize on its monopoly position by imposing only its OSS charges on competing carriers. Electronic interfaces that allow competing carriers to have real-time electronic access to BellSouth's systems are a requirement of Section 251(c) of the Act. This requirement for equal access reflects the telecommunications policies of the Congress. The costs associated with the transition to the competitive model espoused by Congress are not attributable to a particular carrier's competitive entry into the local exchange market. Instead, the costs derive from the Act's requirement that local exchange markets shall be open to competition.

CLECs also incur costs associated with this transition. CLECs are required to bear their own costs. BellSouth and other ILECs should similarly bear the transition costs imposed by Congress. Development of OSS is a classic *transition* cost. The development of OSS will track the transition to competition. With regard to development, BellSouth argues that ITC^DeltaCom should have to pay for OSS development because ITC^DeltaCom and other CLECs are the users of OSS. This is, of course, primarily true at the present time since BellSouth has the vast majority of local exchange customers, and CLECs will be using BellSouth's system to migrate customers away from BellSouth. *Prefiled Direct Testimony of Don Wood*, p. 13. It does not, however, change the fact that CLECs will incur transition OSS costs as well. In the future, all carriers will use each other's OSS systems to migrate customers in a fully competitive environment. Allowing one of these carriers to impose its OSS development costs on the other carriers simply because it starts out with all of the customers would hinder the benefits of competition for Tennessee consumers. The TRA should not allow BellSouth to impose OSS development charges on CLECs.

With regard to the use of OSS, the Authority addressed this issue at page 34 of its recent *Order Re Petitions for Reconsideration and Clarification of Interim Order on Phase I* in Docket No. 97-01262:

> The directive of the Authority, as reflected in the Interim Order, states that all carriers (ILEC, CLEC, etc.) should pay a recurring rate to recover OSS costs. The TRA's Order is clarified to state that *OSS interface costs should be recovered from all users of the new systems, whether ILECs or CLECs.*

(emphasis added). Consistent with this Order, the TRA should direct that BellSouth, as an ILEC user of OSS, contribute to the recovery of OSS interface costs and that such costs be spread over all telecommunications customers, including those of BellSouth, pursuant to the TRA's ruling in Docket No. 97-01262.

Issue 6(b):

What are the appropriate recurring and non-recurring rates and charges for:

(a) Two-wire ADSL/HDSL compatible loops.

(b) Four-wire ADSL/HDSL compatible loops.

(c) Two-wire SL1 loops.

(d) Two-wire SL2 loops.

(e) Two wire SL2 loop Order Coordination for Specified Conversion Time.

It is undisputed that pursuant to Section 251(c) of the Act, BellSouth must provide UNEs to ITC^DeltaCom at cost-based rates that comply with Section 252(d) of the Act and the FCC's Pricing Rules which were reinstated by the United States Supreme Court in *AT&T Corp. v.*

Iowa Utilities Bd., 525 U.S. 366, 119 S. CT. 721, 142 L.Ed.2d 835 (1999). In the TRA's *Interim Order*, the correct standard for UNE pricing was implemented. ITC^DeltaCom supports the TRA's Interim Order, which, if made permanent, would resolve the UNE pricing issues (except for OSS, *see supra*) raised in the Petition. (T-262).

Issue 6(c):

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

BellSouth seeks to assess ITC^DeltaCom disconnection charges any time ITC^DeltaCom loses a customer - even when no physical disconnection occurs and thus no cost is incurred. ITC^DeltaCom asserts that if a disconnect does not actually occur, there clearly are no costs and thus, no disconnection charges should be assessed. It is the standard practice of ILECs to charge disconnect charges to retail customers when service is installed to ensure recovery. CLECs are not retail customers and should not be treated as such -- they have an ongoing business relationship which makes the ILEC policy toward retail customers inapplicable here. *Prefiled Direct Testimony of Don Wood*, p. 22. In many cases, a line is maintained for purposes of providing "warm dial tone" service. In particular, it is inappropriate to charge a non-recurring charge for this disconnection because such a rate seeks to recover actual labor for the disconnection. If warm dial tone is being provided, this labor did not actually occur. *Id.* In any event, the TRA should not allow BellSouth to impose a disconnect fee when no disconnection actually occurs.

The Authority should also not allow BellSouth to double-recover costs when a physical disconnect actually takes place. When a customer selects a new carrier, BellSouth charges a disconnect fee to the initial carrier and a reconnect fee to the new carrier. This is a double-recovery of costs because it represents the same work activity. *Id.* at p. 22-23. Only in rare circumstances will BellSouth disconnect a customer and not reconnect that customer at the same time to a different carrier. *Id.*

Issue 6(d):

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 TRA should establish interim rates for cageless collocation that are based on BellSouth's rates for virtual collocation with adjustments to remove charges for installation, maintenance and repair and training. The FCC's description of cageless collocation mirrors the characteristics of a virtual collocation arrangement. (T-255-56). The exception is that under a virtual collocation arrangement, the CLEC does not have physical access to the ILEC premises and their equipment is under the physical control of the ILEC (including installation, maintenance and repair responsibilities). From a cost and rate perspective, the characteristics of a virtual collocation arrangement are the same as a cageless collocation arrangement. (T-257-58). In fact, if a telecommunications engineer were to visit a BellSouth central office, he would not be able to decipher the difference between a virtual collocation arrangement and a physical collocation arrangement, but for a label on the equipment. (T-256). The party paying the maintenance engineer would be the only means for determining whether it was a virtual collocation (BellSouth would be paying for maintenance) or cageless collocation (the CLEC would be paying for the maintenance directly). (T-256-58). The CLEC is also responsible for training and repair charges in a cageless collocation arrangement. Under cageless collocation, therefore, BellSouth will incur less costs than under virtual collocation.

Thus, calculation of the rates that may be charged for cageless collocation are relatively simple. The Authority should utilize the BellSouth rates for virtual collocation with adjustments to remove charges for installation, maintenance and repair and training. Those functions are to be performed directly by the CLEC and thus the costs are to be borne directly by the CLEC, not the ILEC. These rates should remain in effect in the absence of a cost study performed specifically for cageless collocation -- something BellSouth has not done. BellSouth's position is that the rates for physical collocation should apply to cageless collocation.

Given the stark, undisputed factual differences between these two forms of collocation, it is obvious that using physical collocation rates would greatly overstate the actual costs to BellSouth. BellSouth should be required to produce a cageless collocation cost study which can be scrutinized by the TRA. Until it does so, the rates should be the same as those for virtual collocation, adjusted to remove costs related to installation, maintenance and repair and training.[37]

Issue 7(b)(iv):

Which party should be required to pay for the Percent Local Usage ("PLU") and 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?

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[37] In the Louisiana arbitration between the parties, the Staff has adopted this position. Docket No. U-24206, *Post Hearing Brief of the Louisiana Public Service Commission Staff*, p. 23 (November 30, 1999).

encourage settlement of disputes outside of the TRA and courts. The concept of a "loser pays" provision in a contract is nothing new and is generally regarded as a mechanism to discourage frivolous litigation. Indeed, the interconnection agreement between ITC^DeltaCom and BellSouth which was previously approved contains a "loser pays" provision. ITC^DeltaCom simply seeks to continue that provision for two more years.

Despite agreeing to it two years ago, BellSouth now opposes a "loser pays" provision because on the theory that such a provision will have a chilling effect on carriers pursuing even legitimate claims. BellSouth also contends that a "loser pays" provision should not be included in the contract because often it is unclear which party is the loser and which party is the winner after a dispute is adjudicated. BellSouth's argument that a "loser pays" provision will create a chilling effect is wholly without merit. To the contrary, where a company has a strong claim, supported in fact and law, a "loser pays" provision makes it economically feasible to bring such a claim. Without "loser pays" relief, even the most legitimate claims may not be brought because of fear of excessive costs associated with litigation against a massive company such as BellSouth. With regard to the difficulty of determining which party wins when the outcome is unclear or represents a compromise decision, each party will bear its own costs. Thus, in such cases, the contract will be enforced as if there is no "loser pays" provision. It is only in cases where the outcome is clear that the "loser pays" provision would be triggered.

BellSouth's opposition to a "loser pays" provision is particularly disturbing in light of its vigilant opposition to the inclusion of any self-executing penalties in the interconnection agreement. BellSouth's mantra throughout this proceeding has been that where BellSouth does not perform under the interconnection agreement, ITC^DeltaCom must seek relief through litigation before the Authority and the courts. Despite BellSouth's acknowledgment to the FCC that self-effectuating performance guarantees are workable (*see* Exhibit CJR-1), before the TRA it has steadfastly taken a "sue me" approach to enforcement of the Authority's orders and the interconnection agreement. The leverage of BellSouth in this regard is clear. BellSouth is saying to ITC^DeltaCom, if BellSouth fails to perform, ITC^DeltaCom must take on BellSouth's battery of lawyers, lobbyists and expert witnesses and must do so at its own expense in every case. That is to say, even where ITC^DeltaCom is right on the facts and right on the law, the process of enforcement is going to be very time consuming and expensive. Such an environment is hardly conducive to local market entry by ITC^DeltaCom or any CLEC and certainly can serve as a deterrent to continued efforts to bring the benefits of competition to Tennessee.

ITC^DeltaCom's "loser pays" approach is conducive to settlement, deters frivolous litigation, acts in part as a self-effectuating performance guarantee and will create much needed equity in the regulatory process. Assuming BellSouth intends to perform fully under the interconnection agreement, it is difficult to understand its steadfast opposition to performance guarantees and the "loser pays" provision. The "loser pays" provision proposed by ITC^DeltaCom should be included in the interconnection agreement. A "loser pays" provision, coupled with performance measures and guarantees, will create the strongest environment for self enforcement of the interconnection agreement.

Issue 8(e):

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

The interconnection agreement does not need to include language relating to the payment of taxes. The previously approved interconnection agreement between the parties contained no provisions related to taxes. There is no evidence that the failure to include such a provision has created any problem for either party over the past two years. BellSouth argues that provisions covering tax liability should be included in the interconnection agreement because "taxes tend to be very complicated." During negotiations with ITC^DeltaCom, BellSouth provided extensive language relating to taxes which was extremely complicated in itself. However, it should be noted that BellSouth did not put forward its suggested language before the TRA and it is nowhere in the record. In the spirit of compromise, ITC^DeltaCom proposed language which was less verbose and easier to understand. BellSouth has not accepted this language. In any event, there is no need to address tax liability in the interconnection agreement. This is a matter between the particular companies and the relevant taxing authorities.

Issue 8(f):

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

ITC^DeltaCom has asked for inclusion in the contract of a simple provision that recognizes a material breach of the interconnection agreement will give rise to liability. BellSouth will in no way be prejudiced by the inclusion of such a provision. Indeed, in light of BellSouth's argument that redress for any breach must be sought through litigation before the TRA and courts, it appears that such a provision is consistent with BellSouth's approach. The provision proposed by ITC^DeltaCom is simple and straightforward and should be included in the interconnection agreement.

IV. CONCLUSION

ITC^DeltaCom urges the TRA, acting as arbitrators under the Act, to order the parties to enter into an interconnection agreement consistent with the positions as delineated above. When considering the issues -- especially those of a strict policy nature -- ITC^DeltaCom respectfully asks the TRA to render decisions which will promote the development of local competition. Not only will such decisions be consistent with the language of the Act and the FCC's pronouncements, but will ultimately result in tremendous benefits to Tennessee consumers.

Respectfully submitted this 7th day of December, 1999.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of December, 1999, a true and correct copy of the foregoing was served by hand delivery, facsimile transmission, overnight delivery or U. S. Mail, first class postage prepaid, to the following:

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