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Guy M. Hicks
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December 9, 1999

Mr. 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:

BellSouth Telecommunications, Inc. ("BellSouth") is in receipt of the December 3, 1999 letter from Nanette S. Edwards of ITC^DeltaCom to Tom Alexander of BellSouth. Although is not clear why DeltaCom elected to file this letter with the Tennessee Regulatory Authority ("Authority"), BellSouth has no choice but to file this response to make clear its disagreement with some of the statements in Ms. Edward's letter.[1]

In her letter, Ms. Edwards expresses DeltaCom's "understanding" that "Tier 1 of petition Issue 1(a) is closed" because BellSouth has agreed "to provide the waiver of non-recurring charges for each performance measure in Attachment 10 of the Exhibit A of the Arbitration Petition filed June 11, 1999." BellSouth purportedly made this agreement in a brief, although Ms. Edwards' letter does not identify the particular brief at issue or the specific language upon which DeltaCom formed its "understanding." However, BellSouth assumes that DeltaCom is referring to BellSouth's brief on "Performance Guarantees" and "Penalties" filed with the Authority on November 23, 1999. In footnote 2 to this brief, BellSouth stated as follows: "With respect to remedies under tier one, BellSouth and DeltaCom have reached an agreement on the circumstances under which BellSouth

[1] As a preliminary matter, Ms. Edwards' letter refers to a "mandatory" mediation in Alabama, which is not accurate. The mediation that occurred under the auspices of the Alabama Commission was voluntarily agreed to by DeltaCom and BellSouth.

will waive nonrecurring charges for its failure to perform. Consequently, the issues concerning the waiver of nonrecurring charges have been removed from this arbitration. *See* Revised Joint Issues Matrix filed November 19, 1999."

BellSouth does not understand how this statement reasonably can be read to suggest that BellSouth has agreed to DeltaCom's proposed Tier one "performance guarantees." BellSouth has never made any such agreement, and BellSouth apologizes if there was any confusion on this point in its brief filed with the Authority.

Nonetheless, the fact remains that DeltaCom's arbitration petition raised two specific issues concerning waiver of nonrecurring charges, both of which have been resolved. *See* Arbitration Petition ¶ 13 (Issue 1(b) -- "Should BellSouth be required to waive any nonrecurring charges when it misses a due date?"); and ¶ 39 (Issue 2(c)(xiv) -- "Should BellSouth be required to waive the applicable nonrecurring charges [when it fails to coordinate with DeltaCom prior to due date]?"). BellSouth's position is that, in light of the resolution of the specific issues related to the waiver of nonrecurring charges, DeltaCom should not be permitted to relitigate these same issues under the general rubric of "performance guarantees" under Issue 1(a). This was the point BellSouth was attempting to make in its brief. Thus, BellSouth agrees with Ms. Edwards that Tier 1 of Issue 1(a) should be considered closed, but not for the reasons given by Ms. Edwards.

Interestingly, DeltaCom at one point appears to have agreed with BellSouth. In its post-arbitration brief filed with the Louisiana Public Service Commission, DeltaCom recognized a relationship between its proposed Tier one "performance guarantees" and the specific issues related to waiver of nonrecurring charges. Specifically, DeltaCom advised the Louisiana Commission that "the first tier, related to waiver of non-recurring charges, was filed as Petition Issue 1(b). This issue has been settled by the parties." Post Hearing Brief of ITC^DeltaCom Communications, Inc. Docket No. U-24206 at 11, n. 7 (excerpts attached as Exhibit 1).

DeltaCom has since retracted this representation in a letter to the Louisiana Commission dated December 7, 1999 (copy attached as Exhibit 2). However, it is difficult to reconcile Ms. Edwards' December 3 letter with the statements in DeltaCom's December 7 letter. In its December 3 letter filed with the Authority, DeltaCom expressed its understanding that BellSouth had settled Issue 1(a) by

offering to accept the Tier I "performance guarantees" as proposed by DeltaCom. However, four days later, on December 7, DeltaCom advised the Louisiana Commission that "the parties had not settled any part of Issue 1(a)."

Notwithstanding any apparent confusion on DeltaCom's part, BellSouth has not accepted DeltaCom's proposed Tier one "performance guarantees." However, BellSouth believes the Tier one "performance guarantees" under Issue 1(a) should be closed because the parties have resolved the specific issues concerning the circumstances under which BellSouth will waive nonrecurring charges. BellSouth appreciates the opportunity to set the record straight.

Yours very truly,

Guy Hicks

cc: Don Baltimore
Nanette Edwards
David Adelman

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BEFORE THE

LOUISIANA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996	)	**Docket No. U-24206**

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 October 4-7, 1999 before Chief Administrative Law Judge ("ALJ") Valerie S. Meiners.

I. PROCEDURAL HISTORY

In January 1999, ITC^DeltaCom initiated negotiations with BellSouth in an attempt to renew its interconnection agreement with BellSouth for Louisiana. The previous agreement had been approved by the Louisiana Public Service Commission ("Commission") and had governed the relationship between ITC^DeltaCom and BellSouth for the two year period beginning March 12, 1997.[1] ITC^DeltaCom made significant investments in a fiber optic-based telecommunications network in Louisiana based on the terms and conditions in the

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

Exhibit 1

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 Commission Has Authority to Implement Performance Guarantees.

BellSouth has not contested whether the Commission has the authority to arbitrate the issue of inclusion of performance measures and guarantees in the interconnection agreement between ITC^DeltaCom and BellSouth. BellSouth has, however, supported a position taken by the Commission Staff to exclude this issue from consideration in this Docket. In its letter of September 30, 1999, the Staff took the position that this Commission should not hear issues in ITC^DeltaCom's arbitration petition which relate to performance measurements and guarantees, because those issues are being addressed generally in Docket No. U-22252, subdocket C. The ALJ deferred ruling on this motion.

Nothing in the Act gives the Commission authority to preclude certain issues from arbitration simply because "those issues affect and interest more carriers than merely those in this docket." (Staff letter at p. 1) Perhaps more importantly, even BellSouth agrees to waive non-recurring charges where BellSouth misses a scheduled cutover date. *Prefiled Direct Testimony of Alphonso Varner* at p. 17. The effect of refusing to make a ruling in the context of this Docket would be to mandate that certain issues be closed even before the commencement of negotiations. Nothing in the Act supports such a theory of estoppel. Moreover, it would

restructure the framework embedded in Section 252 of the Act from one where carriers seek arbitration of issues to one where Commissions implement the Act through generic proceedings.[6]

BellSouth has contested the authority of other state commissions to arbitrate the issue of performance measures and guarantees. Should BellSouth make that argument before this Commission, ITC^DeltaCom submits that the Commission 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 and responsibilities of the Commission with regard to this arbitration. Included in that charge is the responsibility to arbitrate "any 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 this Commission has the duty to resolve that issue.

The Commission'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

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[6]While such a restructuring may appeal to the Commission and indeed may be quite efficient, it is nonetheless contrary to Section 252 of the Act.

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. The AETNA Casualty and Surety Co.*, 904 F. Supp. 1142, 1149 (D.Haw. 1995). The Commission has the authority under federal law, when fulfilling its duties as set forth by Congress in the Act, to consider the issue of performance guarantees.

Moreover, 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). The law is clear that the Commission may arbitrate this issue.

(b) The Need for Performance Guarantees.

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

Louisiana 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-11-12, Oct. 4.).

ITC^DeltaCom incurs costs when BellSouth fails to perform. (T-49, Oct. 6.). 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 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 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 Louisianans. (T-13, Oct. 4.).

ITC^DeltaCom proposed a three-tiered set of performance measures and guarantees.[7] 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-12, Oct. 4.) 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

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[7] The first tier, related to waiver of non-recurring charges, was filed as Petition Issue 1(b). This issue has been settled by the parties.

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-12-13.).

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 cutover appointment. This problem was illustrated during the cross-examination of BellSouth Witness Varner:

> Q: [counsel for ITC^DeltaCom]: Now, for some reason, the customer is [sic] decides they're willing to stick with us [ITC^DeltaCom]. So we process the order and do everything that we're supposed to do. And we get another scheduled cut-over date. You [BellSouth] miss again. Our technician shows up, yours doesn't. Is there any financial consequence to BellSouth whatsoever for repeatedly missing the cutover date?
>
> A. [Witness Varner]: No. We haven't proposed one beyond the initial waiver of non-recurring charges.

(T-52, Oct. 6).

BellSouth argues that ITC^DeltaCom should seek relief from the courts or the Commission through individual lawsuits in every case of non-performance.[8] 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. No lawsuit can bring that customer

[8] In an apparent contradiction BellSouth has suggested its own set of self-effectuating performance guarantees to the FCC. BellSouth's proposal to the FCC is attached to witness Rozycki's testimony as Exhibit CJR-3.

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 Louisiana an inhospitable environment for would-be local exchange competitors. BellSouth's attempt to force competing carriers into litigation evidences BellSouth's desire to use the Commission and the courts as accomplices in creating roadblocks to 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.
>
> 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. ITC^DeltaCom needs an interconnection agreement with "teeth."

There must be strong incentives in place for BellSouth to provide parity to CLECs such as ITC^DeltaCom. ITC^DeltaCom operated in Louisiana 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. This Commission must act to give "teeth" to the interconnection agreement between the parties to ensure that BellSouth's obstreperous and anti-competitive behavior is minimized.

Issue 2 and 2(a)(iv)

(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

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December 7, 1999

VIA HAND DELIVERY

The Honorable Valerie Seal Meiners
Chief Administrative Law Judge
Louisiana Public Service Commission
Administrative Hearings Division
P.O. Box 91154
Baton Rouge, Louisiana 70821-9154

RE: Docket No. U-24206, Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc.
File No.: 15015-0

Dear Judge Meiners:

ITC^DeltaCom Communications, Inc. would like to clarify the resolution of Issues 1(a) and 1(b) in the above-referenced docket. Unfortunately, to date, the parties have not settled any part of Issue 1(a). The parties have resolved Issue 1(b) which relates to the waiver of non-recurring charges in the event of a failed UNE cutover. Issue 1(a) includes many other performance guarantees including "Tier 1" guarantees, which provide for the waiver of non-recurring charges in the event that BellSouth fails to meet other scheduled service requirements. Put simply, Issue 1(a) is far broader than Issue 1(b).

We apologize for any confusion created by our discussion of these issues in our November 23, 1999 post-hearing brief. In particular, we acknowledge that footnote 11 in the brief incorrectly makes reference to part of Issue 1(a) as resolved.

Exhibit 2

Please let me know if you have any questions regarding this matter.

Very truly yours,

KEAN, MILLER, HAWTHORNE, D'ARMOND,
McCOWAN & JARMAN, L.L.P.

Gordon D. Polozola

GDP/jmp
cc: Official Service List (via hand-delivery or facsimile)
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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

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