BELLSOUTH

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July 26, 2000

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VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition by ITC^DeltaCom Communications, Inc. for Arbitration of Certain Unresolved Issues in Interconnection Agreement Negotiations Between ITC^DeltaCom and BellSouth Telecommunications, Inc.*
Docket No. 99-00430

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Reply Memorandum in Support of Motion for Reconsideration. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy Hicks w/permission ch

Guy M. Hicks

GMH:ch
Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: ***Petition by ITC^DeltaCom Communications, Inc. for Arbitration of Certain Unresolved Issues in Interconnection Agreement Negotiations Between ITC^DeltaCom and BellSouth Telecommunications, Inc.***

Docket No. 99-00430

BELLSOUTH TELECOMMUNICATIONS, INC.'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this reply memorandum in support of its motion requesting that the Tennessee Regulatory Authority ("Authority"), acting as Arbitrators, reconsider certain aspects of its resolution of Issue 1(a) in this arbitration with ITC^DeltaCom Communications, Inc. ("DeltaCom"). While opposing BellSouth's motion, DeltaCom makes no serious attempt to justify the modifications to BellSouth's Service Quality Measurements ("SQMs") ordered by the Arbitrators. DeltaCom does not explain how these proposed modifications are necessary to monitor BellSouth's compliance with its obligations under the Telecommunications Act of 1996 ("1996 Act"), particularly when some of these modifications cannot even be implemented. Nor does DeltaCom make any real effort to defend the adoption of modifications that it never requested during negotiations or in this arbitration and that DeltaCom has since implicitly acknowledged elsewhere are unnecessary. DeltaCom's attempt to focus on perceived procedural infirmities in BellSouth's motion should not obscure the obvious conclusion that reconsideration of the Arbitrators' resolution of Issue 1(a) is warranted, especially when the Authority intends to conduct a generic proceeding to examine performance measurements.

II. DISCUSSION

A. BellSouth's Motion Is Not "Premature."

Rather than focusing on the merits of BellSouth's Motion for Reconsideration, DeltaCom insists that the motion should be denied as "premature," citing provisions of the Tennessee Uniform Administrative Procedures Act ("APA"). DeltaCom Response at 2. However, because this arbitration is being conducted pursuant to the 1996 Act, not every provision of the APA that may otherwise control proceedings before the Authority applies here. A good example is Section 4-5-310 of the APA, which permits interested parties to intervene in contested cases before a state agency. The Authority has previously held (and has adopted rules making clear) that there is no right of intervention in arbitrations under the 1996 Act. *See* Rule 1220-5-3-.10(1).

In any event, the fact that the Arbitrators have not yet issued a written order in this proceeding does not warrant denial of BellSouth's motion. DeltaCom cites no authority for the proposition that the "premature" filing of a motion for reconsideration is grounds for denying the motion. This is particularly true under the circumstances of this case, where the Arbitrators are currently considering Final Best Offers on other aspects of Issue 1(a) in this arbitration and when the Arbitrators have a statutorily mandated time by which to resolve all the issues in this arbitration. BellSouth determined that the more prudent course was to file its motion for reconsideration as soon as possible, rather than waiting until the last moment to alert the Arbitrators to BellSouth's concerns about the proposed modifications to BellSouth's SQMs. DeltaCom makes no claim of prejudice as a result of the timing of BellSouth's motion for reconsideration, which makes its argument that BellSouth's motion "should be denied as premature" especially difficult to comprehend.

B. The Authority Should Reconsider The Decision To Order Modifications To BellSouth SQMs That Were Never Requested By DeltaCom And Which DeltaCom Has Implicitly Acknowledged Elsewhere Are Unnecessary.

DeltaCom does not dispute that of the twenty-five specific modifications to BellSouth's SQMs ordered by the Arbitrators upon which BellSouth seeks reconsideration, nineteen (73%) were not even requested by DeltaCom. *See generally* Coon Affidavit ¶¶ 21-50. Nor does DeltaCom dispute that, after the hearing in Tennessee, DeltaCom indicated in arbitration proceedings in Georgia and Alabama that it was willing to accept BellSouth's existing SQMs, without the need for the type of modifications ordered by the Arbitrators. Transcript of the Proceedings, *In re: Petition by ITC^DeltaCom Communications, Inc. for Arbitration of its Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* Docket No. 10854-U, Tr. at 272 (Ga. Public Service Comm'n Nov. 29, 1999); Transcript of the Proceedings, *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc.,* Docket No. 27091, Tr. Vol. I at 200-202 & 208-209 (Ala. Public Service Comm'n Jan. 18, 2000). DeltaCom's response is noticeably silent on why it is necessary to order modifications to BellSouth's SQMs in Tennessee when DeltaCom apparently is more than willing to live without such modifications in other BellSouth states.

DeltaCom argues that it is irrelevant that the modifications to BellSouth's SQMs "do not precisely correspond with ITC^DeltaCom's proposal," insisting that "arbitrators have broad discretion in considering the issues presented by the parties and in resolving these issues." DeltaCom Response at 5. Unfortunately for DeltaCom, the cases it cites in support of this argument involve completely different statutory schemes that have nothing to do with the arbitration of an interconnection agreement under the 1996 Act. For example, *Wailua*

Associates v. Aetna Casualty & Surety Co., 904 F. Supp. 1142 (D. Hawaii 1995), involved the Federal Arbitration Act, and not the 1996 Act. *Sunshine Mining Co. v. United Steel Workers of America,* 823 F.2d 1289 (9th Cir. 1987), and *Hoteles Condado Beach v. Union De Tronquistas Local 901,* 763 F.2d 34 (1st Cir. 1985), involved contracts executed pursuant to the National Labor Relations Act in which the courts confirmed that an arbitrator's decision resolving a dispute under an existing labor contract will be affirmed if the arbitrator's award "draws its essence" from that contract. 823 F.2d at 1294; 763 F.2d at 38. Here, the Authority is being asked to arbitrate the terms of a new interconnection agreement, not arbitrate a dispute under an existing contract, which readily distinguishes the cases relied by DeltaCom.

As DeltaCom acknowledges, the 1996 Act limits the Arbitrators' authority to resolving those issues "set forth in the [arbitration] petition and the response, if any ...." DeltaCom Response at 5 (quoting 47 U.S.C. 252(b)(4)(c)). The issue raised in DeltaCom's arbitration petition was whether the performance measurements and enforcement mechanisms set forth in Attachment 10 to its Petition should be incorporated into the parties' interconnection agreement, while BellSouth's response raised the issue of whether BellSouth's SQMs should be included into the agreement. Neither DeltaCom's arbitration petition nor BellSouth's response requested that the Arbitrators adopt performance measurements that had never even been the subject of negotiations between the parties.[1]

[1] BellSouth acknowledges that the Arbitrators are empowered to impose "appropriate conditions as required to implement subsection (c) of this section ...," which generally incorporates BellSouth's obligations under the 1996 Act. However, as explained more fully below, the modifications to BellSouth's SQMs ordered by the Arbitrators are not necessary to determine whether BellSouth is complying with those obligations, and DeltaCom does not contend otherwise.

It cannot be seriously argued that the 1996 Act is not intended to encourage voluntary negotiations. The United States Court of Appeals confirmed as much, noting that the 1996 Act "establishes a preference for incumbent LECs and requesting carriers to reach agreements independently and that the Act establishes state-run arbitrations to act as a backstop or impasse-resolving mechanism for failed negotiations." *Iowa Utilities Board v. FCC,* 120 F.3d 753, 801 (8th Cir. 1997), *rev'd in part, aff'd in part, AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366 (1999); *see also Bell Atlantic-Delaware, Inc. v. McMahon,* 80 F. Supp. 2d 218, 224 (D. Del. 2000) ("Congress chose to rely primarily on private negotiations to implement the duties imposed by § 251"). It would be totally inconsistent with this statutory scheme to order the parties to include a provision in their interconnection agreement that the parties never even discussed during negotiations. *See US West Communications, Inc. v. Minnesota Public Utilities Comm'n,* 55 F. Supp. 2d 968, 985 (D. Minn. 1999) (in a Section 252 arbitration, parties are "not limited to issues explicitly enumerated in § 251 or the FCC's rules, but rather are limited to issues which have been the subject of negotiations among themselves"). Thus, DeltaCom's attempt to defend the imposition of modifications to BellSouth's SQMs there were never discussed by BellSouth and DeltaCom during negotiations is unconvincing.[2]

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[2] DeltaCom cites to the statement by Director Greer that it should not "come as a total surprise that the Texas Plan was under consideration or parts of it were under consideration during the deliberations and during the negotiations." DeltaCom Response at 4-5. BellSouth does not disagree with this statement *as it relates to ICG*, which specifically and expressly advocated adoption of the Texas Plan during negotiations. However, BellSouth and ICG subsequently reached agreement on the issue of performance measurements and enforcement mechanisms, obviating any need for the Arbitrators to resolve this issue. While BellSouth acknowledges that that it overlooked the January 25, 2000 decision of the Arbitrators to take "judicial notice" of the ICG arbitration in this proceeding, the fact that the Texas Plan may be part of this record does not mean that BellSouth and DeltaCom should be ordered to incorporate portions of that Plan that were never requested by DeltaCom, either in negotiations or in this arbitration.

C. The Arbitrators Should Reconsider The Decision To Order Modifications To BellSouth's SQMs That Are Unnecessary In Determining Whether BellSouth Is Complying With Its Obligations Under the 1996 Act Or Cannot Reasonably Be Implemented.

In its Motion for Reconsideration, BellSouth provided a detailed analysis of the various modifications ordered to BellSouth's SQMs upon which BellSouth was seeking reconsideration. BellSouth explained how these modifications were unnecessary in determining whether BellSouth is complying with its obligations under the 1996 Act and how some of these modifications cannot reasonably be implemented.

DeltaCom's "response" is no response at all. In fact, DeltaCom makes no attempt to even discuss, let alone refute, BellSouth's arguments. For example, BellSouth explained that the Arbitrators' decision to add a measurement from the Texas Plan to reflect "Percent of Accurate and Complete Formatted Mechanized Bills" would add nothing to determining whether BellSouth is rendering accurate bills to its CLEC customers because the Texas Plan measurement merely captures whether all of the components of the bill have been added up correctly by the computer producing the bill, regardless of whether the amount billed is actually correct. DeltaCom elected not address the issue. Nor did DeltaCom address BellSouth's argument that certain measurements would be meaningless because the activity being monitored – for example, Interim Number Portability -- is a thing of the past in Tennessee or because of the relatively small number of transactions being measured. DeltaCom's response also is silent on the time and expense involved in implementing the Arbitrators' modifications, even on an interim basis.

One would have thought that if the modifications to BellSouth's SQMs ordered by the Arbitrators were really important to DeltaCom, DeltaCom would have at least taken the time and effort to try to defend these modifications. However, that is not the case.

DeltaCom's claim that "the panel conducted a full evidentiary hearing on the issue of performance guarantees" misses the point. DeltaCom Response at 6. First, BellSouth's motion seeks reconsideration of the Arbitrators' decision to require certain modifications to BellSouth's SQMs and does not address the issue of "performance guarantees." Second, while the arbitration decision was rendered after a "full evidentiary hearing," little if any of the testimony submitted by either DeltaCom or BellSouth had anything to do with the specific performance measurements being proposed. Third, that the Authority intends to conduct a generic proceeding on the issue of performance measurements and enforcement mechanism strongly suggests that the Authority believes additional hearings are appropriate before resolving this issue on something other than a temporary basis.[3]

III. CONCLUSION

For the foregoing reasons, the Arbitrators should grant BellSouth's motion and reconsider their resolution of Issue 1(a).

[3] On May 16, 2000, BellSouth filed a motion requesting that the Authority convene a generic proceeding to address performance measurements and enforcement mechanisms. To date, not a single party has opposed BellSouth's motion.

Respectfully submitted this 26th day of July, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

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