

BEFORE THE TENNESSEE REGULATORY AUTHORITY

**NASHVILLE, TENNESSEE
August 31, 2000**

IN RE:

**PETITION FOR ARBITRATION OF ITC^DELTACOM
COMMUNICATIONS, INC. WITH BELL SOUTH
TELECOMMUNICATIONS, INC. PURSUANT TO
THE TELECOMMUNICATIONS ACT OF 1996**

**DOCKET NO.
99-00430**

SECOND INTERIM ORDER OF ARBITRATION AWARD

This matter came before the Directors of the Tennessee Regulatory Authority ("the Authority") acting as Arbitrators on August 1, 2000 upon the filing of final best offers by ITC^DeltaCom Communications, Inc. ("DeltaCom") and BellSouth Telecommunications, Inc. ("BellSouth") and the filing of a *Motion for Reconsideration* by BellSouth.

On June 11, 1999, DeltaCom filed a petition requesting the Authority arbitrate the interconnection agreement between it and BellSouth. The Directors accepted DeltaCom's petition for arbitration on June 29, 1999, appointed themselves as Arbitrators, and directed the General Counsel or his designee to serve as the Pre-Arbitration Officer. BellSouth responded to the petition on July 6, 1999. The Authority heard testimony related to the unresolved issues at a three-day hearing held from November 1, 1999 through November 3, 1999. The Arbitrators deliberated at a public meeting on April 4, 2000. The Arbitrators resolved most of the issues, but ordered the parties to submit final best offers on issues 4(a), 5 and 8(e) within thirty (30) days of receipt of the transcript by the Authority and issue 1(a) within forty-five (45) days of receipt of the transcript by the Authority.

DeltaCom filed final best offers as to issues 4(a), 5 and 8(e) on May 4, 2000, amended final best offers as to issues 4(a), 5, and 8(e) on May 12, 2000, and final best offer as to issue 1(a) on May 22, 2000. BellSouth filed final best offers as to issues 4(a), 5 and 8(e) on May 8, 2000, final best offer as to issue 1(a) on May 22, 2000, and a response to DeltaCom's final best offers on July 27, 2000.¹ In addition, BellSouth filed a *Motion for Reconsideration* on May 22, 2000. DeltaCom filed a response to the motion on June 8, 2000, and BellSouth filed a reply to the response on July 26, 2000.

I. Motion for Reconsideration

Filed on May 22, 2000, BellSouth's *Motion for Reconsideration* was directed at the Arbitrator's April 4, 2000 public deliberations, not at any written order. *The Rules of Practice and Procedure Governing Proceedings under Section 252 of the Federal Telecommunications Act of 1996*² do not specifically provide for reconsideration. Moreover, there are no other rules concerning motions for reconsideration of arbitrators' rulings under the Federal Telecommunications Act of 1996.

Two rules, however, do provide guidance. Rule 1220-5-3-.14 --*Arbitration Awards*, of *The Rules of Practice and Procedure Governing Proceedings under Section 252 of the Federal Telecommunications Act of 1996* states in pertinent part: "All awards shall be in writing and shall state the issue and the manner in which the issue has been resolved." (Emphasis added). *The Rules of Practice and Procedure*, Chapter 1220-1 (which were adopted on June 20, 2000 and will become effective on September 13, 2000) and specifically Rule 1220-1-2-.20 --

¹ The Authority did not request responses.

² Both parties orally agreed to abide by these rules at the Pre-Arbitration Conference held on August 4, 1999, and on August 18, 1999 and on October 11, 1999, DeltaCom and BellSouth respectively filed pleadings confirming such agreement.

Petitions for Reconsideration requires that any petition for reconsideration shall be filed within fifteen (15) days after the entry of an order, and should be directed at the written order memorializing the decision made during the deliberations. Using these two rules as guidance, the Arbitrators opine that a petition for reconsideration should be filed within fifteen (15) days after the entry of an order, and should be directed at the findings and/or conclusions that are memorialized in such written order. As no written order had been entered as of May 22, 2000, the Arbitrators conclude that BellSouth's *Motion for Reconsideration* was filed prematurely and, therefore, is dismissed without prejudice.

II. Final Best Offers

- A. 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 this Petition?**

During the April 4, 2000 deliberations, the Arbitrators concluded that the interconnection agreement should include performance measures and enforcement mechanisms. Thereafter, the Arbitrators adopted BellSouth's September 15, 1999 Service Quality Measurements ("SQMs") and thirty (30) additional measures from the Texas Performance Plan³ with associated definitions and business rules. In addition, the Arbitrators concluded that all measurements shall be at the Tennessee level and BellSouth data should be used for all measurements and calculations. As specified in BellSouth's proposal in the Voluntary Self-Effectuating Enforcement Mechanisms

³ On January 25, 2000, the Arbitrators proposed taking official notice of the ICG arbitration record, Docket No. 99-00377, which contains the final Texas Performance Plan and late filed exhibits outlining the differences in the Texas Plan and BellSouth's Service Quality Measurements ("SQMs"). The Arbitrators gave the parties an opportunity to respond and none objected. Thereafter, the Arbitrators took official notice of Docket No. 99-00377 and relied upon the record in that docket.

("VSEEMs"), BellSouth shall make performance reports available through an electronic medium to DeltaCom on a monthly basis. Finally, the Arbitrators concluded that further information was necessary to fully resolve this issue. Therefore, the Arbitrators requested final best offers on the following five items:

1. The electronic medium to be used in providing DeltaCom with access to the performance report and underlying data;
2. The process to be utilized to determine BellSouth's compliance or non-compliance with the standard and/or benchmark;
3. Standards and/or benchmarks for each measurement. Standards must be specific and measurable. Parity or retail analog should include the specific service to which parity will be measured or the retail analog companion. Additionally, a methodology should be provided for defining or calculating the performance standard and/or benchmark, for each measure, such as the method contained in the VSEEMs for each measure;
4. Enforcement mechanisms. These must be specific and should provide the number of occurrences at which the enforcement mechanism applies (threshold) and the specific enforcement mechanism once the threshold is met. Enforcement mechanisms should be categorized by tiers structured similar to those contained in BellSouth's VSEEMs and should include appropriate caps; and
5. Circumstances that would warrant a waiver request from BellSouth and the time frame for submitting such waiver request.

The Arbitrators also directed BellSouth to file a reasonable commitment date as to when the measurements will be available for the SQMs where it is noted that the level of disaggregation is under development together with the availability date for the thirty (30) additional, adopted measures.

After careful consideration of the parties' final best offers, the Authority finds that the parties failed to properly respond to the specific items listed by the Authority during the April 4, 2000 deliberations. The parties did not simply respond to the five unresolved issues based on the already decided issues. Instead, both parties included alterations and/or amendments to the performance measures adopted by the Authority during the April 4, 2000 deliberations, and then provided final best offers premised upon their suggested altered and/or amended performance

measures. Because the parties failed to take into consideration the decisions of the Arbitrators made during the April 4, 2000 deliberations and provide final best offers based on those decisions, the Arbitrators conclude that resubmission of final best offers on issue 1(a) is necessary. The parties shall resubmit their revised final best offers within fifteen (15) days of the entry of this Order.

B. Issue 4(a): Should BellSouth provide cageless collocation to DeltaCom thirty (30) days after a firm order is placed?

During the April 4, 2000 deliberations, the Arbitrators made the following findings: "Based on the record, DeltaCom's request for thirty days may not be unreasonable in some circumstances. On the other hand, there are scenarios that would require extraordinary actions making a thirty-day deadline impossible. Recognizing the validity of both positions, the Arbitrators request the submission of final best offers." After careful consideration of the final best offers submitted by the parties on this issue, the Arbitrators find that DeltaCom's offer, with one exception, best addresses the concerns of the Arbitrators expressed during the deliberations. Specifically, DeltaCom's final best offer provides for a thirty (30) day interval for the provisioning of cageless collocation and includes a sixty (60) business day maximum, thus, allowing additional time for extraordinary circumstances. BellSouth, on the other hand, did not put forth a minimum interval and set the maximum interval at ninety (90) days for ordinary circumstances and one hundred-thirty (130) days for extraordinary circumstances. For these reasons, the Arbitrators adopt DeltaCom's final best offer on this issue without any reference to adjacent collocation. Further, any language related to adjacent collocation is not to appear in the

final interconnection agreement submitted to the Authority for approval unless specifically negotiated and agreed to by the parties.⁴

C. Issue 5: Should the parties continue operating under existing local interconnection arrangements?

During the April 4, 2000 deliberations, the Arbitrators noted that Exhibit B to the proposed interconnection agreement contained nineteen (19) concerns referencing Issue 5. The Arbitrators found that the concerns could be fundamental to the completion of the interconnection agreement, but further found that the record was insufficient to formulate a sound recommendation. Thereafter, the Arbitrators requested submission of final best offers for each of the nineteen (19) concerns.

The parties reached an agreement as to fifteen (15) of the nineteen (19) concerns. In addition, both parties recognized in their final best offers that the Arbitrators had already resolved the concern related to reciprocal compensation when they disposed of Issue 3(1) during the April 4, 2000 deliberations. This being the case, only three (3) concerns remain. These are (1) the definition of local traffic; (2) the treatment of transit traffic; and (3) binding forecasts.

After careful consideration of the final best offers, the Arbitrators make the following findings. First, the Arbitrators find that BellSouth's proposed definition of local traffic is too broad and that DeltaCom's proposed definition of local traffic provides specific details. Second, the Arbitrators find that DeltaCom's language regarding the treatment of transit traffic is identical to the language in the parties' existing agreement and BellSouth has not provided any justification for deviating from that language. Finally, the Arbitrators find that the Pre-

⁴ At the conclusion of the Arbitrators' August 1, 2000 deliberations, BellSouth requested clarification as to language contained in DeltaCom's final best offer regarding adjacent collocation. After discussion, both parties voluntarily agreed to remove any reference to adjacent collocation from the language adopted by the Arbitrators.

Arbitration Officer's *Report and Initial Order* filed on October 6, 1999 excluded the binding forecast issue from the arbitration and the Arbitrators accepted the *Report and Initial Order* on December 3, 1999. Based on these findings, the Arbitrators adopt DeltaCom's final best offers related to the definition of local traffic and the treatment of transit traffic. In addition, the Arbitrators decline to consider final best offers on the issue of binding forecasts.

D. Issue 8(e): Whether language covering tax liability should be included in the interconnection agreement, and if so, should that language simply state that each party is responsible for its own tax liability?

During the April 4, 2000 deliberations, the Arbitrators requested that the parties submit final best offers setting forth language that clearly and concisely sets forth the tax liabilities of the parties. After careful consideration of the final best offers, the Arbitrators find that DeltaCom's proposal leaves issues open to dispute while BellSouth's language provides a comprehensive scheme for addressing tax liability issues. Moreover, the Arbitrators recognize that, although BellSouth's offer may be better suited to BellSouth than DeltaCom, the offer includes a provision for cooperation and references the dispute resolution process outlined in Section 16 of the proposed Interconnection Agreement. For these reasons, the Arbitrators adopt the final best offer of BellSouth.

III. Ordered


The *Motion for Reconsideration* filed by BellSouth Telecommunications, Inc. is dismissed without prejudice. The parties shall resubmit final best offers as to Issue 1(a) within fifteen (15) days of the entry of this order. The filing shall consist of:

1. The electronic medium to be used in providing DeltaCom with access to the performance reports and underlying data;
2. The process to be utilized to determine BellSouth's compliance or non-compliance with the standard and/or benchmark;

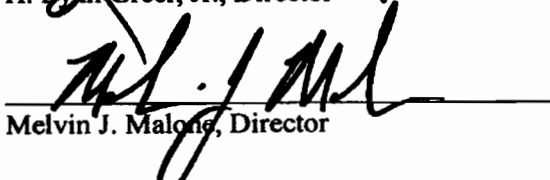
3. Standards and /or benchmarks for each SQM (September 15, 1999 version) and the thirty (30) additional measurements adopted. Standards must be specific. Parity or retail analog should include the specific service to which parity will be measured or the retail analog companion. Additionally, a methodology should be provided for defining or calculating the performance standard and/or benchmark, for each measure, such as the method contained in the VSEEMs for each measure;
4. Enforcement mechanisms. These must be specific and should provide the number of occurrences at which the enforcement mechanism applies (threshold) and the specific enforcement mechanism once the threshold is met. Enforcement mechanisms should be categorized by tiers structured similar to those contained in BellSouth's VSEEMs and should include appropriate caps; and
5. Circumstances that would warrant a waiver request from BellSouth and the time frame for submitting such waiver request.

ITC^DeltaCom Communications Inc.'s final best offer for Issue 4(a) is adopted with the condition that any language related to adjacent collocation not appear in the final interconnection agreement submitted to the Authority for approval. As for Issue 5, ITC^DeltaCom Communications Inc.'s final best offers related to the definition of local traffic and the treatment of transit traffic are adopted. BellSouth Telecommunications, Inc.'s final best offer for Issue 8(e) is adopted.

TENNESSEE REGULATORY AUTHORITY,
BY ITS DIRECTORS ACTING AS ARBITRATORS


Sara Kyle, Chairman


H. Lynn Greer, Jr., Director


Melvin J. Malone, Director

ATTEST:


K. David Waddell, Executive Secretary