BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 8, 2000

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

RESPONSE OF ITC^DELTACOM COMMUNICATIONS, INC. TO BELLSOUTH TELECOMMUNICATIONS, INC.'S SECOND MOTION FOR RECONSIDERATION AND CLARIFICATION

I. INTRODUCTION

COMES NOW ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and hereby responds to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Reconsideration and Clarification.[1] The Tennessee Regulatory Authority ("TRA"), acting as arbitrators, issued an Interim Order of Arbitration Award on August 11, 2000, in this docket.[2]

---

[1] BellSouth's latest Motion is one in a barrage of unsupported post-hearing pleas for a "do-over." BellSouth previously filed a Motion for Reconsideration with respect to Issue 1(a) on May 22, 2000, which the TRA dismissed as premature. BellSouth also filed a Motion for Clarification on April 25, 2000, regarding a retroactive "true-up" provision for reciprocal compensation. ITC^DeltaCom's response to the Motion for Clarification is attached hereto as Exhibit "A."

[2] The hearing in this matter was conducted on November 1-3, 1999 before the members of the TRA pursuant to Section 252 of the Telecommunications Act of 1996 (the "Act"). The TRA orally announced its decision on April 4, 2000.

BellSouth does not offer the TRA any new or additional arguments or bring to light any new authority that would support reconsideration and reversal of the TRA's Order.[3] Although described in part as a request for clarification, the contents of BellSouth's Motion are nothing more than an unsupported plea for the TRA to reverse itself. The TRA has entered a pro-competitive Order and should direct the parties to submit an interconnection agreement that is compliant with that Order as soon as possible. ITC^DeltaCom deliberately will not endeavor to repeat the same discussion from previous pleadings, nor will it rehash the evidence that was presented and thoroughly briefed.

II. DISCUSSION

A. Issue 1(a) - Performance Measurements and Guarantees

(i) Context

BellSouth's shifting positions regarding performance measures and guarantees are truly remarkable. When ITC^DeltaCom first approached BellSouth to negotiate a renewal of its interconnection agreement, BellSouth was unwilling to even discuss enforcement mechanisms. Despite repeated attempts to resolve the issue amiably through negotiations, ITC^DeltaCom was told by BellSouth there was no way it would agree to ***any*** performance guarantees. When ITC^DeltaCom asked for arbitration of the issue, BellSouth continued to refuse consideration of enforcement mechanisms and argued to ITC^DeltaCom that the arbitrators were without legal

---

[3] The federal courts have stated that the rationale for a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence. . . . [A] motion for reconsideration addresses only factual and legal matters that the Court may have overlooked. . . . It is improper on a motion for reconsideration to ask the Court to rethink what [it] had already thought through -- rightly or wrongly." *Glendon Energy Co. v. Borough of Glendon*, 836 F.Supp. 1109, 1122 (E.D.Pa. 1993) (citing *Ciba-Geigy Corp. v. Alza Corp.*, Civ.A. No. 91-5286, 1993 WL 90412 (D.N.J. March 25, 1993) (internal quotations and citations omitted).

authority to require such measures.[4] The message from BellSouth was clear: enforcement guarantees would only happen if won through intense, high-stakes litigation. Indeed, BellSouth even offered expert testimony to the TRA arguing that the law prohibits adoption of performance guarantees in a Section 252 arbitration.

After being implored to do so at the hearings at the eleventh hour, BellSouth finally offered its own Service Quality Measurements ("SQMs") as a scheme that it would accept as part of the interconnection agreement resulting from this proceeding. Of course, BellSouth's scheme did not include any self-effectuating enforcement mechanisms that were not wholly contingent upon Section 271 approval. Now, after having lost the battle, BellSouth asserts that the TRA should reverse its decision to require certain modifications to the BellSouth SQMs because the TRA's modifications do not precisely correspond with ITC^DeltaCom's proposal. BellSouth offers no legal support for this contention. Indeed, the TRA and the courts have found to the contrary.

(ii) Authority

State Commissions act as arbitrators under the Act. Federal courts have held that arbitrators have broad discretion in considering the issues presented by the parties and in resolving these issues. *See Wailua Associates v. Aetna Casualty and Surety Co., 904 F.Supp. 1142 (D.Haw. 1995); Sunshine Mining Co. v. United Steel Workers of America*, 823 F.2d 1289, 1294 (9th Cir. 1987); *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 38

---

[4] The legal issue was briefed extensively. It is noteworthy that subsequent to the filing of those briefs, the District Court in Florida issued a decision which affirmed the principle espoused by the TRA in the Order. *MCI Telecommunications Corp. v. BellSouth Telecommunications*, Inc., 2000 WL 1239840 (N.D.Fla. 2000).

(1st Cir. 1985). Section 252 of the Act provides that "[t]he State Commission shall resolve each issue set forth in the petition and the response, if any, *by imposing appropriate conditions as required* to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues. . ." 47 U.S.C. § 252(b)(4)(C) (emphasis added). It is irrelevant that neither ITC^DeltaCom nor BellSouth proposed the exact modifications ordered by the panel. The panel has discretion to fashion resolutions to unresolved issues consistent with the Act and the public interest. Nowhere in the Act does it state that a State commission must correspond its resolution of the issues to the precise proposals of the parties. The panel conducted a full evidentiary hearing on the issue of performance measurements and guarantees and crafted a plan that it believes "to be just, reasonable, and nondiscriminatory, as required by federal law." *See* Transcript of the Proceedings, at 17 (April 4, 2000).

BellSouth further argues that the panel's modifications are unnecessary in determining whether BellSouth is complying with its obligations under the Act. This argument by BellSouth is untenable. As stated above, the panel conducted a full evidentiary hearing on the issue of performance guarantees and rendered its decision. Additionally, this issue has been briefed by both parties extensively at the request of Director Malone. BellSouth is simply using its Motion for Reconsideration in an attempt to re-arbitrate this same issue.[5]

---

[5] During the hearing, BellSouth had every opportunity to present its arguments with respect to the plan being discussed or to offer alternative plans. In fact, Director Greer stated:

> During the hearing Mr. Varner made it clear that BellSouth did not feel that either the Texas Plan nor the VSEEMs that BellSouth is proposing to the FCC were appropriate for use in the interconnection agreement between BellSouth and DeltaCom. During the hearing, I implored Mr. Varner to present to the Authority something that would be acceptable to BellSouth. He plainly stated that no plan

Now that the panel has made its decision to require the parties to incorporate performance measurements and guarantees in the interconnection agreement, BellSouth is asking for a "do-over." It is time, however, for BellSouth to move forward with compliance with the Order of the panel.

B. Issues 2(b)(ii) and 2(b)(iii) - Extended Loops and Loop/Port Combinations or "EELS"

The TRA resolved issues 2(b)(ii) and 2(b)(iii) by adopting the same resolution reached in the ICG/BellSouth Arbitration, Docket No. 99-00377. The TRA found "that in locations where loops and transport co-exist, BellSouth shall, when requested by DeltaCom, combine the loop and transport elements at the sum of the associated unbundled network element prices." BellSouth asserts that it understands the phrase "in locations where loops and transports co-exist" to mean locations where those specific elements are currently combined. BellSouth's understanding is at odds with Federal Communication Commission ("FCC") Rule 51.315(b).

FCC Rule 315(b) is the basis for the TRA's decision on this issue. The United States Supreme Court has affirmed the FCC's rules relating to combinations and those rules are in effect today. *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S.Ct. 721 (1999). BellSouth's argument that the Eighth Circuit Court of Appeals has reaffirmed its decision to vacate the FCC's Rules 315(c)-(f) is irrelevant. The issue of whether BellSouth must provide elements that it currently combines is governed by Rule 315(b), which is in effect and valid. *Iowa Utilities Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000) ("the Supreme Court reversed our decision to vacate 47

---

involving enforcement mechanisms would be acceptable to BellSouth without 271 approval.

See Transcript of the Proceedings, at 17 (April 4, 2000).

C.F.R. § 51.315(b)"). The TRA relied on Rule 315(b), not on Rules 315(c)-(f), in making its decision to require BellSouth to combine the loop and transport elements where BellSouth currently combines them in their network. *See Interim Order of Arbitration Award*, at 28.

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). The FCC has provided guidelines as to the meaning of "currently combines." 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 315(b) means 'ordinarily combined within their network, in the manner in which they are typically combined.'" *Third Report and Order*, ¶ 479 (emphasis added). The FCC went on to expressly decline to address the arguments put forward by incumbent LECs like BellSouth urging a new, more restrictive interpretation of Rule 51.315(b).

The Georgia Public Service Commission also recently addressed this issue and concluded that BellSouth is required to provide existing combinations and all combinations of UNEs that are ordinarily combined in BellSouth's network. In reaching this decision, the Georgia Commission stated that "adopting BellSouth's proposed 'currently combined' interpretation would only make the process more cumbersome for the CLEC; it would not prevent the CLEC from obtaining and using the same UNE combinations." *See Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996*, Docket No. 10854-U, Georgia Public Service Commission (July 5, 2000).

For ITC^DeltaCom to compete effectively with BellSouth, BellSouth must follow the law and provide the combinations which comprise extended loops at FCC-compliant rates. The TRA should compel BellSouth to continue providing extended loops to comply with the FCC Rules and to promote competition in Tennessee.

C. Issue 3(d) - Reciprocal Compensation

The TRA's Order requires that BellSouth pay reciprocal compensation for all calls to ISPs. The Order does not require any retroactive "true-up" or retroactive adjustment. BellSouth asks the TRA to reverse course, arguing that the payment of reciprocal compensation for ISP traffic should be subject to a retroactive "true-up."[6] The TRA correctly determined that the payment of reciprocal compensation is appropriate for termination of ISP-bound traffic. There is no legal authority requiring the TRA to do anything to the contrary. Moreover, there is no policy that would support a reversal.

(i) The FCC Declaratory Order

Until the FCC adopts a nationwide, reciprocal compensation rate, it would be premature for the Commission to decide when and how the rate is to be applied to pre-existing interconnection agreements. In the past, BellSouth has argued that because the FCC announced that it intended to embark on a federal policy addressing ISP traffic, the TRA should either ignore its responsibility by not acting or should adopt a policy that would change on a retroactive basis. BellSouth argued that the TRA should concede authority in every way to the federal government over calls to ISPs. The FCC's decision announcing that it will begin a rulemaking to fix an

---

[6] BellSouth couches its reconsideration request in terms of "clarification." But, in fact, BellSouth urges something it argued clearly once before that was not accepted by the TRA.

"interstate" reciprocal compensation rate for all ISP traffic, however, **has been vacated** by the United States Court of Appeals and remanded to the FCC. *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). In light of the Court's highly skeptical description of the FCC's jurisdictional claims, it is unclear whether the FCC will ever be able to fix a federal, reciprocal compensation rate that will survive judicial review. In these circumstances, it hardly makes sense for the TRA to presume that such a rate will be established, to cede jurisdiction and to order a retroactive true-up.

Even if the FCC eventually sets a federal rate, no one knows whether the FCC rate will preempt state-approved rates or how the federal rate will affect existing interconnection agreements. Additionally, even if such a preemption was sought by the FCC and was affirmed on review, it could only be applied on a prospective basis. In other words, it would only apply to traffic terminated after the preemption. At one extreme, the FCC may decide to fix a federal rate, preempt all existing interconnection agreements, and order prospective adjustments to offset any over or under collections (i.e., a "true-up") resulting from state regulatory decisions. At the other extreme, the FCC might simply delegate the fixing of reciprocal compensation rates to state arbitrators subject only to federal court review. Multiple alternatives lie between the two extremes. Once the FCC issues its opinion, the TRA will be able to make a meaningful decision about how the federal rule should be interpreted and applied. Assuming that the TRA retains discretion in applying the FCC's rule, it would be foolish for the TRA to issue a decision in September 2000 binding the TRA to the interpretation of a federal rate that may (or may not) be issued months, or even years, from now.

(ii) A True-Up Would Be Anti-Competitive

Unlike BellSouth, which still retains monopoly power in many areas and markets, competitive local exchange carriers cannot make "true-up" payments to BellSouth and recoup those expenses by raising rates to captive customers. A true-up requirement in this case could have an anti-competitive impact on CLECs, especially smaller, newer carriers. A retroactive true-up provision that could materially affect a carrier's financial condition would increase the carrier's risk, deter investors, and dampen the carrier's ability to raise capital. This would particularly hurt smaller, newer carriers and would greatly limit the ability to bring services to Tennessee consumers.

(iii) Other Jurisdictions

BellSouth's Motion states that other commissions in BellSouth's region have ordered a retroactive true-up. Specifically, BellSouth cites to the Alabama Public Service Commission, the Georgia Public Service Commission, the Kentucky Public Service Commission, and the North Carolina Utilities Commission. BellSouth's argument is grossly misleading. BellSouth directs the TRA's attention to decisions of these state commissions issued before the D.C. Circuit Court of Appeals vacated the FCC's order claiming jurisdiction over ISP-bound calls. What BellSouth buries in footnotes or neglects to mention at all, however, is what is most relevant. The ***most recent*** decisions of the Georgia Public Service Commission and a panel appointed by the Alabama Public Service Commission in the *ITC^DeltaCom arbitration* before these Commissions, held that reciprocal compensation should be paid for ISP calls ***without any retroactive true-up***. *See Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996*, Docket

No. 10854-U, Georgia Public Service Commission (July 5, 2000); *Petition by ITC^DeltaCom Communications, Inc. Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 27091, Alabama Public Service Commission (August 8, 2000). BellSouth relegates this recent Georgia Commission decision to a footnote, calling it inexplicable, and does not mention at all the Alabama panel recommendation. Contrary to BellSouth's misdirection, if it is interested in the decisions of neighboring states, the TRA should focus on these most recent decisions, which indicate a change in state commissions' analysis of reciprocal compensation for ISP traffic after the D.C. Circuit Court of Appeals decision.

(iv) ITC^DeltaCom Is Not An "Affiliate" of MindSpring

BellSouth contends that clarification of the reciprocal compensation issue is particularly needed in this case because ITC^DeltaCom is "affiliated" with MindSpring, which has merged with EarthLink. This assertion is contrary to Tennessee law and, more importantly, bears no relevance to the issue of reciprocal compensation. The TRA should not be distracted by this red-herring.

ITC^DeltaCom Communications, Inc. is wholly owned by Interstate FiberNet, Inc. ("IFN"), which in turn is wholly owned by ITC^DeltaCom, Inc., a company publicly traded on the NASDAQ. Under Tennessee law, an "affiliate" is defined as "a person that directly, or indirectly through one (1) or more intermediaries, controls, or is controlled by, or is under common control with, the person specified." T.C.A. § 48-11-201. ITC^DeltaCom is not an affiliate of MindSpring under this definition.

For SEC reporting purposes and in an abundance of caution, ITC^DeltaCom, Inc. listed MindSpring in the Related Party Transactions section of its most recent Form 10-K. MindSpring is a completely separate entity from ITC^DeltaCom. This SEC disclosure is principally for purposes of identification of the interlocking relationship of two of ITC^DeltaCom's directors with MindSpring, which has a total of eleven directors. Moreover, ITC^DeltaCom, Inc. stated that its transactions with the listed entities, including MindSpring, "are generally representative of arm's-length transactions." Form 10-K of ITC^DeltaCom, Inc. at F-23. An arm's length transaction is not the same as the "control" required under Tennessee law for affiliated companies. ITC^DeltaCom has no ability to control MindSpring nor does MindSpring have the ability to control ITC^DeltaCom. Of course, this relationship is quite different from that between BellSouth and the BellSouth Corporation's wholly-owned ISP affiliate, BellSouth.net.

Furthermore, and more importantly, whether ITC^DeltaCom is an affiliate of MindSpring does not change the fact that a carrier should be entitled to recover the cost of handling ISP traffic. It makes absolutely no difference to which ISP the call is terminated for purposes of reciprocal compensation. ITC^DeltaCom is simply attempting to recover its costs for handling this type of traffic. There is no dispute that when a BellSouth customer calls an ITC^DeltaCom customer (regardless of the identity of the ITC^DeltaCom customer), BellSouth causes costs. The TRA rightfully held that such costs should be borne by the cost causer.

D. Issue 6(d) - Rates and Charges for Collocation

The TRA was correct in its decision to require that virtual collocation rates should apply to cageless collocation. Cageless collocation permits CLECs to place certain equipment in the BellSouth central office for the purpose of interconnecting with the BellSouth network. In

contrast to "caged" or "walled" collocation, the equipment in cageless collocation is not physically separated from the ILEC's equipment with barriers and separate supporting facilities. Cageless collocation does not involve space identification, build-outs of enclosures, power and HVAC, all of which are necessary in a caged environment. As the TRA previously found, ITC^DeltaCom should not be required to pay physical collocation rates when BellSouth does not perform the same functions in a caged collocation environment as in a cageless one.

It is noteworthy that subsequent to the TRA's decision, a panel appointed by the Alabama Public Service Commission made a similar ruling. The Alabama panel stated:

> If we were to apply the rates set in Alabama for physical collocation, the high application fee would apply to both caged and cageless collocation. In fact, most of the rates would apply. The only savings that DeltaCom would see would be in space construction and possibly space preparation costs. We believe that the FCC intended for the CLECs to benefit from the efficiencies of cageless collocation. These benefits include both time and cost savings. Thus, we recommend that the Commission apply the FCC's rates for virtual collocation to cageless collocation until this Commission establishes rates for cageless collocation in a cost docket.

Petition by ITC^DeltaCom Communications, Inc. Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 27091, Alabama Public Service Commission (August 8, 2000).

III. CONCLUSION

The TRA has correctly decided the issues addressed in BellSouth's Motion. BellSouth has provided no new law or evidence upon which the TRA should reverse itself. BellSouth's Motion should be denied.

Respectfully submitted this 8th day of September, 2000.

H. LaDon Baltimore, Esq. (BPR #003836)
Farrar & Bates, L.L.P.
211 7th Avenue North, Suite 420
Nashville, Tennessee 37219
(615) 254-3060

David I. Adelman
Charles B. Jones, III
Sutherland Asbill & Brennan LLP
999 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 853-8000

Nanette S. Edwards
Regulatory Attorney
ITC^DeltaCom Communications, Inc.
4092 S. Memorial Parkway
Huntsville, Alabama 35802
(256) 650-3957

Attorneys for ITC^DeltaCom

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of September, 2000, 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 Guy Hicks, Esq., BellSouth Telecommunications, Inc., 333 Commerce Street, Suite 2101, Nashville, TN 37201-3300.

H. LaDon Baltimore

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Time Warner Telecom of the Mid-South, L.P. Pursuant to Section 252(b) of the Telecommunications Act of 1996	)	Docket No. 99-00797
Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996	)	Docket No. 99-00430
Petition of NEXTLINK Tennessee, LLC for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc.	)	Docket No. 98-00123

RESPONSE TO BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR CLARIFICATION

Time Warner Telecom of the Mid-South, L.P., ITC^DeltaCom Communications, Inc., and NEXTLINK Tennessee LLC (collectively, the "Respondents") submit the following brief in opposition to the "Motion for Clarification" filed by BellSouth Telecommunications, Inc. ("BellSouth") in each of the three, above-captioned arbitration decisions.

INTRODUCTION

Although characterized by BellSouth as a "Motion for Clarification," the carrier's request would be more accurately described as a Petition to Reconsider. In each of the Respondents' arbitration proceedings, the TRA has orally announced that BellSouth should pay

reciprocal compensation for ISP-bound telephone calls as an interim solution "pending completion of the FCC's rulemaking" on the ISP issue. The agency did not, however, order any type of retroactive "true up" of reciprocal compensation rates. Assuming, as BellSouth apparently does, that the FCC will eventually fix a federally mandated, reciprocal compensation rate for ISP traffic, BellSouth asks that the TRA reconsider its decision and require that the federal rate be applied retroactively to the Respondents as soon as the rate becomes legally effective. For the reasons explained below, the Respondents oppose BellSouth's request.

ARGUMENT

I. Until the FCC adopts a nationwide, reciprocal compensation rate, it would be premature for the TRA to decide when and how the rate is to be applied to pre-existing interconnection agreements.

A. Although not mentioned in BellSouth's motion, the FCC's decision announcing that it will begin a rulemaking to fix an "interstate" reciprocal compensation for all ISP traffic has been vacated by the United States Court of Appeals and remanded to the agency. *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D.C. Cir., 2000). In light of the Court's highly skeptical description of the FCC's jurisdictional claims, it is questionable whether the FCC will ever be able to fix a federal, reciprocal compensation rate that will survive judicial review. In these circumstances, it hardly makes sense for the TRA to presume that such a rate will be established. It makes even less sense to declare now that the FCC's rate should become effective in Tennessee before it has been reviewed again by the Court of Appeals.

B. Even if the FCC eventually sets a federal rate, no one knows whether the FCC rate will preempt state-approved rates or how the federal rate will affect existing interconnection

agreements. At one extreme, the FCC may decide to fix a federal rate, preempt all existing interconnection agreements, and order prospective adjustments to offset any over or under collections (*i.e.*, a "true-up") resulting from state regulatory decisions. At the other extreme, the FCC might simply delegate the fixing of reciprocal compensation rates to state arbitrators subject only to federal court review. Multiple alternatives lie between. Once the FCC issues its opinion, the TRA will be able to make a meaningful decision about how the federal rule should be interpreted and applied. Assuming that the TRA is granted some discretion in applying the FCC's rule, it would be foolish for the agency to issue a decision in May, 2000, binding the agency regarding the interpretation of a federal rate that may (or may not) be issued months, or even years, from now.

II. Unlike BellSouth, which still retains monopoly power in many areas and markets, competitive local exchange carriers cannot make "true-up" payments to BellSouth and recoup those expenses by raising rates to captive customers. A true- up requirement in this case could have an anti-competitive impact on CLECs, especially smaller, newer carriers.

CLECs rates are, of course, driven both by the costs of providing service and by market conditions. If a CLEC's underlying cost of providing service to a customer is $20 a month, the CLEC presumably fixes its rates to cover that cost. But if, two years from now, the CLEC is retroactively assessed additional charges for providing that service, the CLEC cannot recover that charge from the customer nor can it recoup the loss from other customers, as a monopoly provider could do.

Furthermore, a retroactive true-up provision that could materially affect a carrier's financial condition would increase the carriers's risk, deter investors, and dampen the carrier's

ability to raise capital. This would particularly hurt smaller, newer carriers but would presumably have little impact on BellSouth.[1]

III. Finally, although the Directors are considering this matter as arbitrators under the federal Telecommunications Act, it is far from certain whether the Directors have the legal power to order retroactive rate adjustments absent the agreement of the affected carriers. Under state law, the TRA clearly has no such authority. See *South Central Bell v. Tennessee Public Service Commission*, 675 S.W.2d 718 (Tenn. Ct. App., 1984). Any attempt to derive such power solely from the federal Act would raise an additional but unnecessary legal dispute and likely invite judicial review.

IV. BellSouth's arguments for a true-up are not persuasive, and, in two respects, appear to be misleading.

A. BellSouth argues (at 4) that "every other state commission in BellSouth's region" that has ordered the payment of reciprocal compensation for ISP traffic has also ordered a retroactive true-up based on an anticipated ruling by the FCC. BellSouth identifies those states as Alabama, Georgia, Kentucky, and North Carolina. [2] BellSouth also states in footnote 1 that the Florida Commission has ruled that "ISP traffic is interstate in nature for which reciprocal compensation should not be paid during the pendency of the FCC's rulemaking."

---

[1] This may have been one of the reasons the TRA made no provision for a retroactive true-up of UNE rates in docket 97-01262. That proceeding, now in its third year, could have a substantial, prospective impact on telephone rates in Tennessee. If the new UNE prices were retroactively applied back to 1996, one suspects that even BellSouth would object to such a large and unfair exercise in retroactive ratemaking.

[2] Each of those state decisions cited by BellSouth was issued before the Court of Appeals vacated the FCC's order claiming jurisdiction over ISP-bound calls.

That statement is inaccurate. In several recent arbitration decisions, the Florida Commission has ordered BellSouth to continue paying reciprocal compensation for ISP traffic pursuant to the parties' prior interconnection agreements until such time as the FCC issues a ruling. There is no provision in Florida for a retroactive true-up.

BellSouth is, of course, well aware of these Florida rulings. During the same week that BellSouth filed its "Motion for Clarification" in Tennessee stating that Florida had not ordered the payment of reciprocal compensation for ISP traffic, another BellSouth attorney filed a brief with the Florida Commission accurately stating that Florida has ordered such payments. The brief states (at page 5, footnote 1):

> BellSouth does not agree that reciprocal compensation should be paid for traffic to ISPs. However, this Commission has concluded otherwise in a series of decisions interpreting BellSouth's interconnection agreements with various ALECs. **These decisions, coupled with recent arbitrations in which the Commission has directed the parties to continue operating under the reciprocal compensation provisions of their existing agreements on an interim basis, have the practical effect of obligating BellSouth to pay reciprocal compensation for ISP traffic in Florida for the foreseeable future.** (Emphasis added).

Copies of the relevant pages are attached.

B. If the TRA is, in fact, granted any discretion in how it will apply a hypothetical federal rate for ISP traffic, BellSouth's request that the TRA implement the FCC rule on the date it becomes effective C rather than following judicial review C is inconsistent with language that BellSouth itself has insisted be included in the interconnection agreement with ITC^DeltaCom . That language, drafted by BellSouth and included in the carrier's template interconnection agreement (Section 16.4) states that future legal and regulatory decisions cannot change the terms

of the agreement until those decisions become "final and non-appealable." The full section states:

> In the event that any **final and nonappealable** legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of ITC^DeltaCom or BellSouth to perform any material terms of this Agreement, ITC^DeltaCom or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in Section 11. (Emphasis added). [3]

BellSouth, in effect, now asks the TRA to carve out an exception to Section 16.4 regarding the issues of reciprocal compensation. It is, of course, too late for BellSouth to raise new arbitration issues. Furthermore, it is disturbing that BellSouth would propose language in an agreement and then try to persuade the TRA to change the effect of that language as it applies to one issue without informing the agency of the inconsistency.

Having reluctantly accepted BellSouth's "final and non-appealable" language, ITC^DeltaCom finds it dismaying, to say the least, that BellSouth would try to evade the consequences of that language as soon as it becomes apparent that the provision might work against BellSouth's interests.

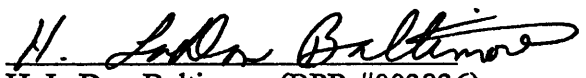
CONCLUSION

For these reasons, BellSouth's "Motion for Clarification" should be denied.

---

[3] This language was included in Exhibit A to the ITC^DeltaCom arbitration petition. The fact that Section 16.4 is not highlighted indicates that the parties had negotiated and accepted this language prior to the June 11th filing of the ITC^DeltaCom arbitration petition.

Respectfully submitted,



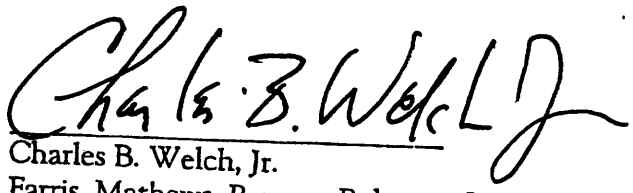
H. LaDon Baltimore (BPR #003836)
Farrar &Bates
211 7th Avenue North
Suite 420
Nashville, Tennessee 37219
PH: (615) 254-3060
FAX: (615) 254-9835

Counsel for ITC^DeltaCom

Henry Walker by H. John Dalton w/ permission

Henry Walker
Boult, Cummings, Connors & Berry
P.O. Box 198062
Nashville, TN 37219
PH: (615) 252-2363

Counsel for NEXTLINK Tennessee LLC



Charles B. Welch, Jr.
Farris, Mathews, Branan, Bobango &Hellen, P.L.C.
618 Church Street, Suite 300
Nashville, Tennessee 37219
PH: (615) 726-1200
FAX: (615) 726-1776

Counsel for Time Warner Telecom of Mid-South

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 15th day of May, 2000, to:

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

H. LaDon Baltimore

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	**Docket No. 990750-TP**
	)	
Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996.	)	
	)	**Filed: April 24, 2000**

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

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Reply Memorandum in support of its motion seeking reconsideration of three aspects of Order No. PSC-00-0537-FOF-TP issued by the Florida Public Service Commission ("Commission") on March 15, 2000 ("March 15 Order"). Notwithstanding the contrary arguments by ITC^DeltaCom Communications, Inc. ("DeltaCom"), BellSouth has met the standards for reconsideration, and the Commission should reconsider its findings concerning: (1) the appropriate reciprocal compensation rate; (2) whether BellSouth is providing unbundled network elements so as to allow DeltaCom "a meaningful opportunity to compete"; and (3) the application fee for cageless physical collocation.

II. DISCUSSION

A. BellSouth's Motion Meets The Standard For Reconsideration

BellSouth's Motion for Reconsideration is not asking the Commission "to re-weigh the evidence presented at the hearing." DeltaCom Response at 1. Nor is BellSouth seeking "a second hearing on the same contentions" presented at the arbitration. *Sentinel Star Express Co. v. Florida Public Service Commission,* 322 S.2d 503, *505* (Fla. *1975).* Rather, BellSouth is seeking

BellSouth customers to customers served by the ALEC industry rather than visa versa. Thus, while the $.009 rate would be "reciprocal" in the sense that it would be paid both by BellSouth and ALECs, the amount of traffic against which the rate is to be applied is not.[1]

DeltaCom's reference to the recent D.C. Circuit decision in *Bell Atlantic Telephone Companies v. FCC,* 2000 WL 273383 (D.C. Cir., March 24, 2000), is curious, since this case has absolutely nothing to do with the issues presently before the Commission. DeltaCom Response at 4. In that case, the D.C. Circuit vacated and remanded the FCC's Declaratory Ruling in CC Docket 96-98 and Notice of Proposed Rulemaking in CC Docket 99-68, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 14 FCC Rcd 3698 (1999), because, according to the Court, the FCC had not adequately explained its conclusion that calls to an ISP do not terminate at the ISP's local point of presence but instead at a distant website. However, the D.C. Circuit's opinion in no way alters the Commission's legal obligation in this arbitration to adopt reciprocal compensation rates that are cost-based in accordance with the 1996 Act and the FCC's pricing rules. Thus, the D.C. Circuit's recent decision is hardly "supportive" of the Commission's decision to adopt a reciprocal compensation rate that does not comply with these legal standards.

As an alternative to adopting existing Commission-approved reciprocal compensation rates, BellSouth has proposed that the $.009 rate be an interim rate subject to true-up once the Commission establishes new rates in Docket No. 990649-TP. DeltaCom objects to the Commission's doing so because, according to DeltaCom, it is not clear what reciprocal

[1] BellSouth does not agree that reciprocal compensation should be paid for traffic to ISPs. However, this Commission has concluded otherwise in a series of decisions interpreting BellSouth's interconnection agreements with various ALECs. These decisions, coupled with recent arbitration decisions in which the Commission has directed the parties to continue operating under the reciprocal compensation provisions of their existing agreements on an interim basis, have the practical effect of obligating BellSouth to pay reciprocal compensation for ISP traffic in Florida for the foreseeable future.