BellSouth Telecommunications, Inc.
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

Guy M. Hicks
General Counsel

615 214-6301
Fax 615 214-7406

December 29, 2000

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

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 and Clarification. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH/jem

Enclosure

241039

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

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

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 and clarify certain aspects of its August 11, 2000 Interim Order of Arbitration Award (the "Interim Order"). Although BellSouth originally sought reconsideration and clarification of Issue 1(a) (performance measures), combined Issues 2(b)(ii) and 2(b)(iii) (Extended Loops and Loop/Port Combinations or "EELs"), Issue 3(d) (Reciprocal Compensation for Internet-bound traffic), and Issue 6(d) (Rates for Cageless Physical Collocation), BellSouth and ITC^DeltaCom Communications, Inc. ("DeltaCom") have since resolved their reciprocal compensation dispute. Thus, the only issues that remain the subject of BellSouth's motion concern performance measures, EELs, and rates for cageless physical collocation.

While submitting a 13-page response in opposition to BellSouth's motion, DeltaCom makes little, if any, effort to actually address the substantive issues raised by BellSouth. This is particularly true with respect to the modifications to BellSouth's Service Quality Measurements ("SQMs") ordered by the Arbitrators – an issue DeltaCom essentially ignores. On those rare

occasions when it addressed the substantive issues in BellSouth's motion, DeltaCom frequently overlooked the facts or the law or both in so doing. BellSouth's motion outlines more than adequate grounds for the Authority's granting reconsideration and clarification and is not merely a request for a "do-over" as claimed by DeltaCom. DeltaCom Response at 1, n.1.[1]

II. ISSUE 1(a) – PERFORMANCE MEASURES

DeltaCom does not dispute that it never requested the vast majority of the modifications to BellSouth's SQMs ordered by the Arbitrators. Nor does DeltaCom dispute that it has since indicated its willingness to accept BellSouth's SQMs without such modifications. DeltaCom makes no attempt to explain how the Arbitrators' proposed modifications are necessary in determining whether BellSouth is complying with its obligations under the 1996 Act or how these modifications can reasonably be implemented. Nor does DeltaCom explain why BellSouth should be required to expend the resources to modify the SQMs only on a temporary basis, in light of the Authority's apparent desire to conduct a generic proceeding to examine performance measurements.

[1] DeltaCom argues that reconsideration is not warranted because BellSouth allegedly failed to offer "any new or additional arguments or bring to light any new authority that would support reconsideration and reversal of the TRA's Order." DeltaCom Response at 2. This argument is belied by the fact that BellSouth's motion contains: (1) evidence of statements made by DeltaCom after the hearing in this case that it was not seeking modifications to BellSouth's SQMs; (2) evidence not previously considered by the Authority explaining why the modifications ordered by the Arbitrators are unnecessary in determining whether BellSouth is complying with its obligations under the Telecommunications Act of 1996 ("1996 Act") and why certain of those modifications cannot reasonably be implemented; and (3) citation to recent judicial and administrative decisions not previously considered by the Arbitrators that undermine the Interim Order's resolution of the EELs and cageless collocation rate issues. Such arguments fully warrant reconsideration even under the standard for reconsideration advocated by DeltaCom.

Instead, DeltaCom insists that none of this matters because, according to DeltaCom, the Arbitrators have "broad discretion" to do whatever they want. DeltaCom Response at 3. Not surprisingly, DeltaCom fails to cite any relevant authority in support of this novel legal theory. While DeltaCom does cite three federal court decisions, each involves a completely different statutory scheme that has 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, 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)). DeltaCom's arbitration petition raised the issue of 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 were not incorporated in the parties' proposals or that had never even been the subject of negotiations between the parties.[2]

It cannot be seriously argued that the 1996 Act was intended to encourage voluntary negotiations. The United States Court of Appeals for the Eighth Circuit 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 provisions in their interconnection agreement that the parties never proposed, let alone 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").

This was the implicit conclusion reached by a federal district court in Florida in a case cited by DeltaCom, albeit for a different proposition. *See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 1286 (M.D. Fla. 2000); *see also* DeltaCom's

[2] 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 was explained in detail in BellSouth's motion, 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.

Response at 3, n.4. In that case, the federal court held that the Florida Public Service Commission was bound to arbitrate under the 1996 Act MCI WorldCom's request to include in an interconnection agreement with BellSouth specific performance criteria and a compensation mechanism similar to a liquidated damages provision. The court based its decision upon an expansive reading of the language in Section 252(b)(1) permitting arbitration of "any open issues." According to the court, "The statutory term 'any open issues' makes clear that the right to arbitrate is as broad as the freedom to agree; *any issue on which a party unsuccessfully seeks agreement may be submitted to arbitration.*" *Id.* at 1297. By contrast, under the district court's reasoning, any issue on which a party did not seek agreement may not be arbitrated, which is fatal to DeltaCom's attempt to defend the imposition of modifications to BellSouth's SQMs there were never raised, let alone discussed during the parties' negotiations.

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 to address the issue. Likewise, DeltaCom did not 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 apparently 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 the performance measurements set forth in BellSouth's SQMs; it does not address the issue of "performance guarantees." Thus, DeltaCom's entire discussion of self-effectuating enforcement mechanisms is completely irrelevant to the matter at hand.

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 ordered by the Arbitrators. In fact, DeltaCom does not point to any evidence presented at the hearing that would support the adoption of the modifications at issue. 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.

III. ISSUES 2(b)(ii) AND 2(b)(iii) – EXTENDED LOOPS AND LOOP/PORT COMBINATIONS OR "EELS"

BellSouth has requested clarification of the Arbitrators' resolution of these issues to make clear that: (1) BellSouth has no obligation to combine unbundled loops and unbundled transport on behalf of DeltaCom where those elements are not in fact currently combined; and (2) DeltaCom should be able to convert special access facilities to unbundled elements only in accordance with the requirements established by the Federal Communications Commission ("FCC"). While insisting that BellSouth's request is "at odds" with the FCC's rules, DeltaCom fails to come to grips with decisions of the courts and the FCC which make clear that BellSouth's position is entirely consistent with the 1996 Act and applicable FCC rules.

The same cannot be said about DeltaCom's twisted and strained reading of the law, particularly FCC Rule 51.315(b). DeltaCom Response at 5. As interpreted by the United States Supreme Court, Rule 51.315(b) prohibits incumbent local exchange carriers ("ILECs") from *separating* currently combined elements. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 393, 395 (1999) (reinstating FCC Rule 315(b) because that rule "forbids an incumbent to separate *already-combined* network elements before leasing them to a competitor"; Rule 315(b) is lawful as a ban on "*disconnecting previously connected elements*, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants") (emphases added; internal quotation omitted). BellSouth recognizes its obligation not to separate network elements that are currently combined. However, nothing in the Supreme Court's decision or Rule 51.315(b) can reasonably be read to obligate BellSouth to combine network elements simply because the same combination exists somewhere in BellSouth's network.

DeltaCom's insistence that the recent decision of the United States Court for Appeals for the Eighth Circuit is "irrelevant" fares no better. DeltaCom at 5. The Eighth Circuit squarely held that requesting carriers such as DeltaCom, not incumbents such as BellSouth, have the duty to "combine previously uncombined network elements." *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000), *petitions for cert. pending*, Nos. 00-511, *et al.* This holding eviscerates DeltaCom's argument that BellSouth must combine unbundled loops and unbundled transport on behalf of DeltaCom simply because those elements are combined somewhere in BellSouth's network. *See Verizon North, Inc. v. Strand*, No. 5:98-CV-38, slip op. at 14 (W.D. Mich. Dec. 6, 2000) (holding that a state commission order that requires an incumbent to "provide bundling at the behest of competitive LECs conflicts with and is preempted by the [1996 Act]").

Although DeltaCom may be unwilling to do so, even the FCC has recognized the significance of the Eighth Circuit's decision. In its *Third Report & Order,* the FCC noted the dispute concerning the scope of Rule 51.315(b) – that is, whether the rule only applies to unbundled network elements that are currently combined or whether it applies to elements that are "normally" combined. *Third Report & Order* ¶ 479. However, the FCC declined to resolve this dispute "because this matter is currently pending before the Eighth Circuit ...." *Id.* According to the FCC, until the Eighth Circuit ruled, incumbents are only required under the 1996 Act and the FCC's rules to provide EELs in combined form "[t]o the extent an unbundled loop is in fact connected to unbundled dedicated transport ...." *Third Report & Order* ¶ 480.

Of course, the Eighth Circuit has since spoken, and its decision is fatal to the expansive reading of Rule 51.315(b) urged by DeltaCom. This may explain why the FCC and other competing local exchange carriers have filed petitions for certiorari asking the United States Supreme Court to review the Eighth Circuit's decision on the combinations issue.

DeltaCom can take little comfort in the single state commission decision from Georgia adopting DeltaCom's position on the EEL issue. DeltaCom Response at 6. First, the Georgia Commission reached its decision based upon an earlier ruling issued before the Eighth Circuit's opinion. Second, although not mentioned by DeltaCom, the Georgia Commission made clear that it would "reevaluate its decision on this issue" if the Eighth Circuit were to determine that "ILECs have no legal obligation to combine UNEs under the Federal Act ...." *See* Order, *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc.*, Docket 10854-U, at 6 (Ga. Public Service Comm'n June 29, 2000) quoting Docket 10692-U). Of course, the Eighth Circuit has now made that determination, which undermines the one commission decision to which DeltaCom so tenuously grasps.

Third, although again not mentioned by DeltaCom, the other three state commissions in BellSouth's region to resolve this issue have rejected the argument that BellSouth must combine network elements on DeltaCom's behalf. *See* Order No. 1999-690, *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* Docket No. 1999-259-C, at 31-35 (S.C. Public Service Comm'n Oct. 4, 1999); Order No. PSC-00-0537-FOF-TP, *In re: Petition by ITC^DeltaCom Communications, Inc. for Arbitration of Certain Unresolved Issues in Interconnection Negotiations with BellSouth Telecommunications, Inc.*, Docket No. 990750-TP, at 29 (Fla. Public Service Comm'n March 15, 2000); Final Order on Arbitration, *In re: Petition by ITC^DeltaCom Communications, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) the Telecommunications Act of 1996,* Docket 27091, at 16 (Ala. Public Service Comm'n Sept. 27, 2000). There is no reason for the Authority to reach a different result here.

IV. ISSUE 6(d) -- RATES AND CHARGES FOR COLLOCATION

Finally, BellSouth has requested reconsideration of the Arbitrators' decision that virtual collocation rates should apply to cageless collocation, at least on an interim basis. While insisting that the Arbitrators' decision "was correct," DeltaCom makes no attempt to address the FCC's rules that define cageless collocation as a type of physical collocation. *See* 47 C.F.R. § 51.323(k) ("An incumbent LEC's physical collocation offering must include the following: ... (2) Cageless collocation ..."). Nor does DeltaCom address the FCC's recent order recognizing that cageless physical collocation is nothing more than a physical collocation arrangement without the cage. *See, e.g.,* Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *In re: Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Docket 98-147, et al., ¶ 2 n.4 (Aug. 10, 2000) ("In a caged physical arrangement, a competitive LEC leases and has direct physical access to caged space at an incumbent LEC structure for its equipment. Cageless collocation eliminates the cage surrounding the competitive LEC's equipment").[3]

DeltaCom's claim that equipment in cageless collocation arrangements "is not physically separated from the ILEC's equipment" and that cageless collocation "does not involve space identification" or "power and HVAC" is simply false. DeltaCom Response at 12. First, the United States Court of Appeals for the District of Columbia Circuit struck down the FCC's rules

[3] In fact, the FCC has adopted rules that establish deadlines by which ILECs must provide "all forms of physical collocation," including cageless physical collocation. 47 C.F.R. § 51.323(l). The FCC's decision to establish the same provisioning intervals for caged physical collocation as well as for cageless physical collocation further underscores the fallacy in the position advocated by DeltaCom that cageless physical collocation is just like virtual collocation.

that purported to require ILECs to give competitors the option of collocating equipment in any unused space with the ILEC's premises and to prohibit ILECs from requiring competitors to collocate in a room or isolated space separate from the incumbent's own equipment. *See GTE Service Corp. v. FCC,* 205 F.3d 416 (D.C. Cir. 2000). In so doing, the Court of Appeals expressly held that there was no "reasonable justification" for prohibiting ILECs "from requiring competitors to use separate or isolated rooms or floors," since the 1996 Act only requires that ILECs reasonably provide space for physical collocation, "nothing more." *Id.* at 426. Consistent with the D.C. Circuit's decision, BellSouth can reasonably segregate its equipment from a competitor's equipment in a cageless physical collocation arrangement. In order to do so and before determining where a particular cageless physical collocation will be located in a particular central office, BellSouth must necessarily identify what space is available.

Second, even the FCC has recognized that cageless collocation arrangements in a particular central office may necessitate air conditioning and power system upgrades. This is the reason the FCC prohibited an ILEC from requiring the first collocating party to pay the entire cost of site preparation, including a party seeking cageless physical collocation. *See* First Report and Order and Further Notice of Proposed Rulemaking, *In re: Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, ¶ 51 (1999), *aff'd in relevant part, GTE Service Corp. v. FCC,* 205 F.3d 416 (D.C. Cir. 2000). DeltaCom has no answer to BellSouth's argument that there are no virtual collocation rates that would allow BellSouth to recover the costs of site preparation work for cageless physical collocation. The lack of such rates only underscores the inappropriateness of the Arbitrators' decision on this issue.

DeltaCom insists that it is "noteworthy" that one other state commission has adopted its position on this issue. DeltaCom Response at 12. However, what is even more noteworthy, although not mentioned by DeltaCom, is that the other three state commissions in BellSouth's region to resolve this issue has squarely rejected the notion that virtual collocation rates should apply to cageless physical collocation. *See* Order No. 1999-690, *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* Docket No. 1999-259-C, at 92 (S.C. Public Service Comm'n Oct. 4, 1999); Order No. PSC-00-0537-FOF-TP, *In re: Petition by ITC^DeltaCom Communications, Inc. for Arbitration of Certain Unresolved Issues in Interconnection Negotiations with BellSouth Telecommunications, Inc.,* Docket No. 990750-TP, at 75 (Fla. Public Service Comm'n March 15, 2000) (finding unpersuasive the argument that "the rate elements for virtual collocation should apply" to cageless collocation); Order, *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc.,* Docket 10854-U, at 10 (Ga. Public Service Comm'n June 29, 2000) (finding that physical collocation rates are the appropriate rates for cageless collocation). The reasoning of these state commission decisions is persuasive and should be followed here.

V. CONCLUSION

For the foregoing reasons, the Arbitrators should grant BellSouth's Motion for Reconsideration and Clarification.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

Guy M. Hicks
333 Commerce Street., Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

Patrick Turner
675 West Peachtree Street, N.E.
Suite 4300, BellSouth Center
Atlanta, GA 30375-0001
(404) 335-0761

240839

CERTIFICATE OF SERVICE

I hereby certify that on December 29, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

H. LaDon Baltimore, Esquire
Farrar & Bates
211 Seventh Ave. N, # 320
Nashville, TN 37219-1823

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Nanette S. Edwards, Esquire
ITC^DeltaCom
4092 South Memorial Parkway
Huntsville, AL 35802