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

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VIA HAND DELIVERY

Mr. K. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

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

Dear Mr. Waddell:

This letter is in response to your request for information dated May 11, 2001. In accordance with the decision of the Authority on May 15, 2001, BellSouth has filed its best and final proposal regarding the rates, terms and conditions for the other than "switch as is" combinations. BellSouth and ITC^DeltaCom have reached agreement on language addressing the definition of Currently Combined in their interconnection agreement. However, since ITC^DeltaCom has filed a response to your request for information, BellSouth submits this response to the Authority.

1. Please explain the nature of your differences.

The issue of the appropriate definition of "currently combined" was not an issue in the arbitration between ITC^DeltaCom and BellSouth in Docket No. 99-00430. Rather, at issue in the arbitration was whether BellSouth was to provide combinations of network elements at all. The Authority found that: "Consistent with that decision (ICG/BellSouth Arbitration, Docket No. 99-00377 dated August 4, 2000) and pursuant to FCC orders and the Supreme Court, the Arbitrators find 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." As the state of the law currently exists, BellSouth is only required to offer CLECs network elements that are "currently combined" (i.e., already actually combined to a particular service location).

Section 251(c)(3) of the 1996 Act requires incumbent LECs such as BellSouth to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." From the plain wording of the 1996 Act, there is no doubt that the CLECs are required to combine the network elements for themselves. Notwithstanding this very plain language, the FCC initially interpreted the 1996 Act to require the incumbent LECs to combine the UNEs, upon the request of a CLEC. The FCC's interpretation was codified in FCC Rules 51.315(c), which provides in pertinent part that: "Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network...."

CFR § 51.315(c), however, was vacated by the 8th Circuit Court of Appeals in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) *rvsd in part*, 525. U.S. 366 (1999). The reversal of this rule was not a part of the appeal to the Supreme Court of the United States and that part of the 8th Circuit's decision was not reviewed, vacated or reversed. Nevertheless, the 8th Circuit, as part of its review of those sections of its decision that were reviewed by the Supreme Court and remanded for further action, reconsidered, essentially on its own motion, its ruling vacating this particular subsection. That is, even though it was not required to do so, the 8th Circuit reviewed again its decision to vacate CFR §51.315(c), and confirmed its earlier ruling. The 8th Circuit Court of Appeals said:

> Rule 51.315(b) prohibits the ILECs from separating previously combined network elements before leasing the elements to competitors. The Supreme Court held that 51.315(b) is rational because "[section] 251(c)(3) of the Act is ambiguous on whether leased network elements may or must be separated." AT&T Corp, 525 U.S. at 395. Therefore, under the second

> prong of *Chevron*, the Supreme Court concluded 541.315(b) was a reasonable interpretation of an ambiguous statute.
>
> Unlike 51.315(b), subsections (c)-(f) pertain to the combination of network elements. Section 251(c)(3) specifically addresses the combination of network elements. It states, in part, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. Here, Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall "combine such elements." It is not the duty of the ILEC to "perform the functions necessary to combine unbundled network elements in any manner" as required by the FCC's rule. See 47 C.F.R. §51.315(c).

It is hard to imagine how the Court could have been much clearer on this point. Even the FCC understood what it had been told by the 8th Circuit in its first order addressing these rules. In the FCC's Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, released November 5, 1999 ("UNE Remand Order"), the FCC confirmed that incumbent local exchange carriers ("ILECs") presently have no obligation to combine network elements for CLECs when those elements are not currently combined in the ILEC's network. As the FCC made clear, Rule 51.315(b) applies to elements that are "in fact" combined, stating that "[t]o the extent an unbundled loop is in fact connected to unbundled dedicated transport, the statute and our rule 51.315(b) require the incumbent to provide such elements to requesting carriers in combined form." (¶ 480). The FCC declined to adopt a definition of "currently combines" that would include all elements "ordinarily combined" in the incumbent's network. *Id.* (declining to "interpret rule 51.315(b) as requiring incumbents to combine unbundled network elements that are 'ordinarily combined'...").

BellSouth agrees that it cannot separate elements that are already in fact combined and serving the particular location or customer in question unless requested to do so by the CLEC.

ITC^DeltaCom did send language to BellSouth on April 6, 2001, indicating that it wanted to amend the previously agreed to language to reflect the Authority's decision in Docket No. 97-01262. BellSouth communicated to ITC^DeltaCom that it was in the process of determining whether it would be appealing the Authority's order in Docket No. 97-01262, specifically as it pertained to the issue of currently combined network elements, and instead, in order to file an agreement that both parties could sign at that point, offered language that basically postponed addressing this issue for 60 days. ITC^DeltaCom agreed to BellSouth's proposal and signed an agreement that included the language contained in the April 25 submission.

The parties have not reached agreement on the issue of the appropriate rates for new combinations to be included in the agreement reflecting the Authority's decision in Docket No. 97-01262. As BellSouth was not aware in that docket that the Authority intended to order BellSouth to make available new combinations in addition to those that are currently combined, BellSouth's cost studies which were filed on June 9, 2000, address only existing, currently combined network elements rather than new combinations of network elements. This was communicated to ITC^DeltaCom as one of the reasons BellSouth desired more time to negotiate language, including rates, on this issue. BellSouth has not, and is not, proposing any "glue" charges to ITC^DeltaCom to reflect costs incurred by BellSouth to provide the services agreed to in the April 25 agreement between the parties.

2. Does the Interim Order of Arbitration Award in Docket 99-00430, provide the necessary guidance to enable the parties to reach agreement on the Definition of "currently combined?" If not, why not?

The Interim Order of Arbitration Award in Docket No. 99-00430 dated August 11, 2000 did not provide the necessary guidance to enable the parties to reach the agreement on the definition of "currently combined." As stated above, BellSouth's understanding of the Authority order was that BellSouth must provide loop/transport or EEL combinations pursuant to FCC orders and federal rulings. Neither the FCC nor the 8th Circuit Court of Appeals require ILECs to combine network elements for CLECs where the elements are not in fact already combined to provide service to a particular location. Thus, BellSouth believed it was offering EELs pursuant to FCC orders and federal court rulings as specified in its proposed

language on this issue. As stated above, BellSouth and ITC^DeltaCom have now reached agreement on language addressing the definition of "currently combined."

> 8.2.1 Pursuant to the Authority's orders in Docket No. 97-01262 and Docket No. 99-00430, BellSouth shall provide to ITC^DeltaCom in Tennessee UNE combinations in accordance with the terms of this Agreement regardless of whether such combinations are Currently Combined. Neither Party waives any rights to appeal or otherwise challenge the Authority's directive that BellSouth provide these UNE combinations.

See BellSouth's May 22, 2001 best and final submission, Section 8.2.1. *See also* Section 8.4.1.

> 3. This issue has been decided in this docket as well as in other Authority proceedings, including permanent prices. Why should the Authority arbitrate this same issue between the same two parties?

BellSouth is not asking the Authority to arbitrate this issue again. ITC^DeltaCom and BellSouth were not able to reach final agreement on all aspects of this issue, including appropriate rates and language, in time to file the April 25 agreement. Thus, both parties agreed to re-evaluate this issue and the appropriate rates over the ensuing 60 days. Given the additional time, BellSouth believed the parties would reach an agreement on this issue.

> 4. It appears that based on this language, that negotiations are still ongoing. Is this, in fact, a final agreement? Please explain.

Yes. The fact that the parties agreed to reconvene after approval of the agreement does not change the fact that BellSouth believed this agreement to be final. It has been BellSouth's experience that changes will be made to this and other agreements over their lives, once final agreements are approved by the Authority. BellSouth and ITC^DeltaCom both agreed to the language submitted on April 25, 2001 in Section 8.2.1 of Attachment 2 to the agreement. If ITC^DeltaCom did not agree with the final language, it could have requested assistance from the Authority in lieu of signing the April 25 agreement.

Very truly yours,

Guy M. Hicks

GMH/jej

CERTIFICATE OF SERVICE

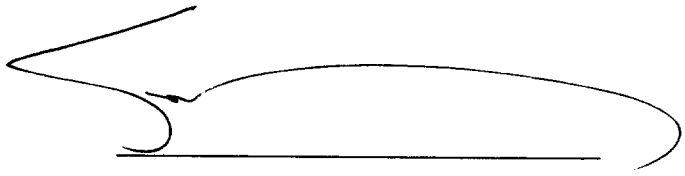
I hereby certify that on June 7, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

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

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

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

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



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