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August 19, 1999

VIA HAND DELIVERY

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

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

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Brief of BellSouth Telecommunications, Inc. Regarding The Appropriateness Of Certain Issues In This Arbitration Proceeding. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING THE APPROPRIATENESS OF CERTAIN ISSUES IN THIS ARBITRATION PROCEEDING

I. INTRODUCTION

On August 4, 1999, pursuant to a Notice of Pre-Arbitration Conference dated July 29, 1999, the Tennessee Regulatory Authority, through its duly appointed Pre-Hearing Officer, conducted a Pre-Arbitration Conference at which both parties were represented. At the conclusion of the August 4 conference, the parties were requested to file a Joint Issues List and to address certain of the issues through a legal brief. The parties' Joint Issues List of the remaining unresolved issues is being filed separately. Pursuant to the directions from the Pre-Hearing Officer, this Brief will address the appropriateness of the following issues in this Arbitration proceeding: Issues 1(a); 1(b); 2(b)(ii); 2(b)(iii); 2(c)(x); and 3. BellSouth will address each of the requested issues in turn below.

II. ARGUMENT

Issue 1(a): Performance Measurements and Performance Guarantees (Att. 10)

Should BellSouth be required to comply with the 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?

ITC^DeltaCom Communications, Inc. ("DeltaCom") filed a Petition for Arbitration with the Tennessee Regulatory Authority ("Authority") on June 11, 1999, asking the Commission to arbitrate some seventy-three (73) disputed interconnection agreement issues with BellSouth Telecommunications, Inc. ("BellSouth"). A number of these issues, including Issues 1(a) and 1(b), relate in one form or another to so called "performance guarantees" or what really amounts to DeltaCom's attempt to obtain penalties or liquidated damages in its contract with BellSouth. These issues are not appropriate for arbitration in this proceeding for a number of reasons, including the fact that the Authority does not have the legal authority to assess or impose liquidated damages in an interconnection agreement. Therefore, the Authority should find that DeltaCom's proposal to have the Authority impose so called "performance guarantees" should not be arbitrated in this proceeding. BellSouth's position is bolstered by several factors: the Authority lacks statutory authority to award or impose liquidated damages in the context of an interconnection agreement; the undisputed fact that other remedies are available under both state and federal law to address the issue (e.g., breach of contract lawsuits in civil court, as well as complaint cases brought before the Authority or the FCC); and, finally, the Authority has already correctly determined that it will not "require a system of penalties and credits" in the context of an arbitration of an interconnection agreement. (*See* Brief of the Tennessee Regulatory Authority, Case No. 3-97-0616, at 26, U.S. Dist. Court, M.D. Tenn. (filed April 13, 1998)).

The issue of liquidated damages (which DeltaCom refers to as "performance guarantees") is not a topic that is ever addressed in the local competition provisions of

the 1996 Act; it is thus wholly beyond the scope of the arbitration proceedings before the Authority.

Section 251 of the Act sets forth a specific series of topics regarding which incumbents must negotiate. In particular, Section 251(c)(1) places on incumbents the obligation "to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section." 47 U.S.C. § 251(c)(1). If those negotiations do not result in an agreement, the State commission that arbitrates the matter must ensure that its resolution of the remaining "open issues" "meet[s] the requirements of section 251" -- that is, that the incumbent has fulfilled the duties enumerated in Sections 251(b) and (c). 47 U.S.C. § 252(c)(1).

None of the "requirements of section 251" involves a duty to agree on a liquidated damages provision. Thus, the Act does not specifically require an arbitrated agreement to satisfy any conditions regarding liquidated damages. That should be the end of the matter.

In any event, even the FCC has concluded that State commissions should impose only the compliance requirements that they "deem necessary." First Report and Order, 11 FCC Rcd at 15657, ¶ 210. It is certainly appropriate for an agency not to "deem" the imposition of a liquidated damages provision necessary where, as here, there are ample alternative modes for obtaining relief, such as petitioning the Authority or filing a common-law contract claim (which could group many small claims together to make such litigation cost-effective).

Furthermore, as noted above and as the FCC itself has recognized, DeltaCom has available to it the full array of contractual and administrative remedies should BellSouth breach its agreement. *See* First Report and Order, 11 FCC Rcd at 15565, ¶ 129 (emphasizing the existence of common-law and administrative remedies in this context). DeltaCom is certainly not the first company to enter into an agreement with a company that also competes with it, and there is no reason that the standard legal remedies -- the remedies that parties to commercial agreements have pursued for centuries -- are somehow uniquely inadequate here.

Finally, the Florida Public Service Commission has reached the same conclusion with respect to the issue of liquidated damages as the Authority reached in connection with the MCI arbitration (Docket No. 96-01271). In a recent arbitration case between BellSouth and MediaOne Florida Telecommunications, Inc.[1], the Florida Public Service Commission issued a Prehearing Order, which among other issues, addressed whether the issue of liquidated damages should be included in an arbitration. The Prehearing Order states as follows:

> B. Issue 13, filed by MediaOne, raised the following issue: Should the Florida Public Service Commission arbitrate performance incentive payments and/or liquidated damages for purposes of the MediaOne/BellSouth Interconnection Agreement? If so, what performance incentive payments and/or liquidated damage amounts are appropriate, and in what circumstances?
>
> The issue regarding the award of liquidated damages has been raised and denied in other dockets that have been arbitrated by this Commission. Petition of DIECA Communications, Inc. D/b/a Covad Communications Company, Order No. PSC-99-01715-PHO-TP (April 15, 1999). Based on the prior rulings in those dockets, I find that the Commission is without

[1] Florida Public Service Commission Docket No. 990149-TP.

jurisdiction to arbitrate issues on damages. Thus, Issue 13 shall not be arbitrated in this proceeding[2].

Many other state commissions that have considered the issue of liquidated damages concur in the same conclusion reached by the Authority on this issue.[3]

Finally, with respect to DeltaCom's proposed performance measurements, BellSouth believes that performance standards and similar type provisions are inappropriate for two-party arbitrations.[4] If at all, these type of provisions are better considered in a proceeding where all interested parties may participate. Therefore, if the Authority were to decide that it is appropriate to further investigate performance standards, it should do so by means of a generic type proceeding in which all interested parties may participate. Otherwise, the Authority faces the very real danger of addressing this issue on a piecemeal basis, which would most likely produce disparate results.

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[2] Prehearing Order No. PSC-99-1309-PHO-TP of Commissioner E. Leon Jacobs, Jr., as Prehearing Officer, Dated July 8, 1999, in Docket 990149-TP.

[3] *See, e.g., In re Petition by Sprint Comm. Co. Limited Partnership for Arbitration with BellSouth Telecomm., Inc.*, No. 961150-TP, at 5 (Fla. PSC Feb. 3, 1997) (refusing to "arbitrate issues regarding liquidated damages or other indemnification provisions"); Petition of TCG Pittsburgh for Arbitration to Establish an Interconnection Agreement with Bell Atlantic - PA, Inc., No. A-310213F0002, at 19 (Pa. PUC Nov. 1, 1996) ("the need for explicit penalties is obviated by the plethora of other remedies available"); *In re Petition by Brooks Fiber Comm. of New Mexico, Inc. for Arbitration with US WEST Comm., Inc.*, No. 96-337TC, at 33 (N.M. SCC Dec. 27, 1996) ("it is unnecessary to include the liquidated damages clause"); *In re Petitions for Approval of Arbitration of Unresolved Issues*, No. 8731, at 35 (Md. PSC Nov. 8, 1996) ("existing procedures and remedies are sufficient" and the Commission does "not see the necessity for any further . . . penalties"); *In re Interconnection Agreement Negotiations Between AT&T and BellSouth*, No. 96-AD-0559, at 9 (Miss. PSC 1997) ("AT&T already has appropriate recourse if BellSouth fails to satisfy the terms of the final Interconnection Agreement . . . there is no need for additional provisions.")

[4] Interestingly, in a recent arbitration involving another CLEC and BellSouth, the CLEC's witness testified that the "issue of performance standards and enforcement mechanisms is one of industry-wide importance. A generic proceeding aimed at a single set of performance standards and enforcement mechanisms is the only practical approach." See Pre-filed Rebuttal Testimony of Karen Notsund for ICG Telecom Group, Inc., North Carolina Utilities Commission Docket No. P-582, Sub 6, pp. 8-9.

Issue 1(b): Performance Guarantee for Due Dates (Att. 6-4.8.15)

Should BellSouth be required to waive any nonrecurring charges when it misses a due date?

BellSouth's position is that this DeltaCom proposal would require the Authority to impose liquidated damages, which is improper. BellSouth will not restate the arguments it made regarding Issue 1(a), but will simply adopt those here.

Notwithstanding BellSouth's position that it is inappropriate to arbitrate this issue, BellSouth agrees with the Authority's Staff that the wording of Issue 1(b), should be revised to provide further clarity. BellSouth agrees that Issue 1(b) should also include the following question:

If so, under what circumstances and for which UNEs?

Finally, in a good faith effort to resolve this issue rather than have it arbitrated, BellSouth is willing to voluntarily agree to waiver of certain charges regarding conversion of UNE loops, including the following language:

A. Not later than twenty-four (24) hours prior to the scheduled conversion time, either BellSouth or DeltaCom may call the other party to reschedule the scheduled conversion time or due dates. The parties shall, at that time, agree upon a new conversion time or date, as appropriate.

B. If less than twenty-four (24) hours in advance of the scheduled conversion time, either party requests that the conversion be rescheduled, the following shall apply:

If BellSouth requests the new conversion time, it shall waive and/or refund the non-recurring charges applicable to the scheduled conversion time and new conversion time, including time specific charges, if included.

If DeltaCom requests the new conversion time, DeltaCom shall be assessed the non-recurring charge applicable to the originally scheduled conversion, in addition to the non-recurring charge applicable to the new conversion time.

C. If BellSouth fails to meet the conversion time periods contained in Section ____, it shall waive the non-recurring charges applicable to the scheduled conversion and the non-recurring charges applicable to any rescheduled conversion. Should the conversion period fail to be met due to DeltaCom's request that it be rescheduled, then DeltaCom will be assessed duplicate non-recurring charges. In no event shall either Party be assessed charges in both B. and C. for said rescheduling request.

Issue 2(b)(ii): UNEs – Elements Offered (Att. 2-1.3, 2.3.1, 3,2.3.1.7)

Should BellSouth be required to continue providing those UNEs and combinations that it is currently providing to ITC^DeltaCom under the interconnection agreement previously approved by the Authority?

With respect to DeltaCom's request for continued access to those UNEs that it is using to provide service today, BellSouth is willing, and indeed has agreed, to continue to provide any individual UNE currently offered, but under the reasonable condition that the network elements BellSouth offers may change as a result of the FCC's current proceeding to resolve Rule 51.319 which was vacated by the U.S. Supreme Court in the *Iowa Utilities Bd.* case. (525 U.S. ___, 142 L. Ed. 2d 834).

With respect to DeltaCom's request for the continued provision of certain UNE combinations that DeltaCom contends it is receiving today, BellSouth's position is that it is not required to combine network elements on behalf of CLECs. BellSouth's offer,

indeed its commitment to the FCC, to continue providing the same individual UNEs until the FCC finalizes its proceeding regarding Rule 51.319, does not extend generally to UNE combinations. The FCC's Rules (51.315(c) – 51.315(f)) that attempted to impose a requirement on ILECs to combine UNEs were vacated by the Eighth Circuit in the *Iowa Utilities Bd.* case and since no party challenged that ruling before the U.S. Supreme Court those rules are not in effect. Thus, BellSouth is not required to combine network elements on behalf of another carrier.

Although BellSouth is not required to combine UNEs, BellSouth has voluntarily offered to provide a number of UNE combinations[5] at the sum of the UNE prices. Additionally, BellSouth is willing to provide combinations of certain functions upon the execution of a voluntary commercial agreement that is not subject to the requirements of the 1996 Telecommunications Act.

Finally, at the Pre-Arbitration Conference, DeltaCom's representatives stated that the UNE combination which they are being currently provided by BellSouth consists of a loop connected to access transport, which is a tariffed service (*See* Pre-Arbitration Conference Transcript at pp. 95-101). BellSouth's position is that regardless of the reason that BellSouth purportedly provides that network combination to DeltaCom today, BellSouth is not obligated under the 1996 Act or the FCC's rules to do so in a new interconnection agreement. Furthermore, Section 251(c)(3) of the 1996 Act requires incumbent local exchange carriers ("ILECS") to provide "access to network

[5] BellSouth provides the following combinations of network elements at the sum of the UNE prices:

Loop and cross connect
Port and cross connect
Port and common transport
Port and cross connect and common transport
Loop with loop channelization (inside central office)

elements on an unbundled basis." (emphasis added). There is no requirement for BellSouth to provide combinations of UNEs to other carriers, let alone any requirement to provide combinations consisting of a UNE with a tariffed service. The Authority should reject DeltaCom's request the same as it did NEXTLINK, Tennessee, L.L.C.'s request for certain UNE combinations in its Arbitration with BellSouth. (*See* First Order of Arbitration Award, Petition of NEXTLINK Tennessee, L.L.C. for arbitration of Interconnection with BellSouth Telecommunications, Inc. Tennessee Regulatory Authority Docket No. 98-00123 dated May 18, 1999, p. 140). ("NEXTLINK Arbitration Order").

Issue 2(b)(iii): UNEs – Extended Loops and Loop/Port Combination (Att. 2-1.3, 2.3.1.3, 2.3.1.7)

Should BellSouth be required to provide to ITC^DeltaCom extended loops and the loop/port combination?

BellSouth's position, as stated earlier in response to Issue 2(b)(ii), is that neither the 1996 Act nor the FCC's Rules require BellSouth to combine UNEs on behalf of another carrier such as DeltaCom. For convenience, BellSouth adopts its earlier arguments with respect to UNE combinations here.

With respect to DeltaCom's specific request for an "extended loop," there is no question that an extended loop constitutes a combination of a UNE loop and UNE dedicated transport. BellSouth is not required to provide such a UNE combination. The Authority has previously held that it will not require BellSouth to provide UNE combinations to CLECs when it expressly found in the NEXTLINK Arbitration Order:

> That, to the extent BellSouth is willing to combine network elements for NEXTLINK, the parties should negotiate the charge that would apply to

Loop and loop channelization (inside central office) and cross connect

> such combinations with the combinations and charges not being subject to the requirements of the 1996 Act.

First Order of Arbitration Award, Petition of NEXTLINK Tennessee, L.L.C. for Arbitration of Interconnection with BellSouth Telecommunications, Inc., Tennessee Regulatory Authority Docket No. 98-00123, dated May 18, 1999, at p. 14.

As stated previously, BellSouth is willing to voluntarily negotiate a commercial arrangement with DeltaCom for the combination of certain UNEs outside of the requirements of the 1996 Act.

In light of the statements made by DeltaCom representatives during the August 4 Pre-Arbitration Conference with respect to their desire to have BellSouth provide three different "flavors" of loop combinations, BellSouth is compelled to object to what it sees as an attempt by DeltaCom to interject new issues seriously out of time. DeltaCom claims that the reason it included seventy-three (73) issues (not counting the multiple questions within issues) was to provide sufficient detail in the presentation of its issues. If DeltaCom had intended to request its so called three "flavors" of UNE loop combinations, it should have expressly stated them in its Petition for Arbitration. At the Pre-Hearing Conference, BellSouth learned for the first time that DeltaCom was attempting to have an "extended loop" to mean something other than its generally understood meaning of a UNE loop, cross connection, and dedicated transport.

At the Pre-Arbitration Conference, DeltaCom stated that it also meant to request an "extended loop" comprised of a UNE loop, cross connection, and special access transport service. BellSouth strenuously objects to including this new form or "flavor" (to use DeltaCom's word) of combination (UNE loop and a tariffed service) for several reasons. First, DeltaCom did not expressly include it as part of any issue set forth in its

Petition for Arbitration as is required under Section 252(b)(2)(A) of the Act. Second, BellSouth is not required to provide UNE combinations under the 1996 Act or the FCC's rules (See BellSouth's earlier arguments with respect to the FCC's Rules 51.315(c) through 51.315(f) having been vacated). Finally, their request is not for a combination of UNEs but to combine a UNE with a tariffed service. BellSouth is under no requirement to provide a UNE (i.e. loop) combined with a tariffed service (i.e., special access transport service) under the requirements of Section 251(c) of the 1996 Act. (See also BellSouth's earlier arguments with respect to tariffed access transport service). The Authority should reject DeltaCom's unseasonable request to include a new issue in this Arbitration.

Finally, with respect to DeltaCom's request for its so called third "flavor" of UNE loop combination (i.e., loop, cross connect, and port), BellSouth simply reiterates its earlier arguments that it is not required to provide such a UNE combination. The combination of the local loop and the switch port, particularly when priced at the sum of the UNEs as requested by DeltaCom, would replicate local exchange service and, thus, create an opportunity for price arbitrage. However, as noted earlier, BellSouth is willing to perform certain functions upon execution of a voluntary commercial agreement that is not subject to the Act. This would be consistent with the Authority's prior ruling in the NEXTLINK Arbitration proceeding (TRA Docket No. 98-00123).

Issue 2(c)(x): Reimburse Costs to Accommodate Modifications (Attachment 2 – 2.2.2.8)

Should BellSouth reimburse any costs incurred by ITC^DeltaCom to accommodate modifications made by BellSouth to an order after sending a firm order confirmation ("FOC")?

BellSouth's position on this issue as currently written is that BellSouth would have no reason to initiate an order modification after a firm order confirmation ("FOC") has been sent to DeltaCom. Therefore, DeltaCom's proposal should not be included in the interconnection agreement. BellSouth, however, only recently learned from DeltaCom what they claim to have really meant to request by means of this issue. BellSouth now understands that DeltaCom is actually seeking to arbitrate this issue stated as follows:

> Under what conditions, if any, should BellSouth be required to reimburse any costs incurred by ITC^DeltaCom to accommodate modifications made by BellSouth to an order after sending a firm order confirmation ("FOC")? If so, what are the costs?

As will be reflected in the separately filed Joint List of Remaining Unresolved Issues, BellSouth will agree to this wording of the issue here. BellSouth's position, however, remains the same --- BellSouth does not initiate an order modification after a FOC has been sent. In light of the further clarification provided by DeltaCom at both the Florida Commission's recent Issue Identification conference and the Tennessee Authority's August 4, 1999, Pre-Arbitration Conference, BellSouth understands that DeltaCom is seeking reimbursement of some undefined costs in circumstances such as where DeltaCom has submitted an order pursuant to BellSouth's business rules, but those rules have been modified or changed, either before or after DeltaCom has submitted its order and it is rejected as not being in compliance with those business rules. BellSouth can foresee a host of problems should DeltaCom's request be granted.

The problems that would be faced by both parties include how and on what basis will the triggering event or circumstance be determined in order to recover any such costs and equally difficult, how and on what basis will the alleged costs be determined or calculated.

Issue 3: Reciprocal Compensation (Att. 3 – 6.0; GTC-definition of "local" and "reciprocal compensation")

What should be the rate for reciprocal compensation? Should BellSouth be required to pay reciprocal compensation to ITC^DeltaCom for all calls that are properly routed over local trunks, including calls to Information Service Providers ("ISPs")?

BellSouth's position on the question of whether reciprocal compensation is applicable to "all calls that are properly routed over local trunks, including calls to Internet service providers ("ISPs"), is straightforward and primarily relies upon FCC rulings, particularly the FCC's February 26, 1999 Declaratory Ruling in CC Docket Nos. 96-98 and 99-68 ("Declaratory Ruling").

Reciprocal compensation is applicable only to "local traffic", not necessarily to all traffic routed over "local" trunks. Specifically, FCC Rule 51.701 defines "local traffic" to which reciprocal compensation is applicable as "telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission." Since "local" trunks may properly route or carry access, or toll, traffic in addition to local traffic, BellSouth does not agree that the test for the application of reciprocal compensation should be the type of trunk, but should be based upon the traffic carried or routed over those trunks. Reciprocal compensation should only be applied to traffic that meets the FCC's definition of "local traffic".

Specifically, with respect to ISP-bound traffic, it is clear that reciprocal compensation is not applicable to such traffic. The payment of reciprocal compensation for ISP-bound traffic is inconsistent with the law and is contrary to sound public policy. ISP bound traffic is access traffic; thus, the reciprocal compensation obligations do not apply. The FCC's recent Declaratory Ruling makes it abundantly clear that the FCC has, will retain, and will exercise jurisdiction over ISP traffic.

BellSouth's position is that the Authority should not address the issue of compensation for ISP-bound traffic. Since reciprocal compensation in the 1996 Act is limited to "local traffic", compensation for ISP-bound traffic is not subject to a Section 252 arbitration proceeding. The FCC's Declaratory Ruling makes it clear that traffic to ISPs is access traffic and largely interstate in nature. Thus, such traffic is not a part of the Act's reciprocal compensation obligations and should not be arbitrated. Although the FCC's Declaratory Ruling attempts to, at least temporarily, authorize state commissions to arbitrate the issue of inter-carrier compensation for ISP-bound traffic, it is highly questionable whether the FCC can do so. Further, the FCC does not have the authority to broaden the scope of Section 252 to cover such arbitrations. Consequently, compensation for such traffic is not subject to arbitration under Section 252 nor is the payment of such compensation a requirement under Section 271 of the Act.

Until such time as the FCC issues a final ruling with respect to inter-carrier compensation for ISP-bound traffic, BellSouth's position is that the Authority should simply direct the parties to establish a mechanism to track ISP-bound calls originating on each party's respective network on a going-forward basis. Each party should agree to abide by the FCC's final and nonappealable order on the issue of inter-carrier

compensation for ISP traffic. The parties would then simply agree to "true-up" any compensation that may be due for ISP-bound calls based upon the FCC's intercarrier compensation mechanism.

With respect to the appropriate rate for reciprocal compensation, BellSouth's position is that such rate should be established using the elemental rates for end office switching, tandem switching, and common transport that are actually used to transport and terminate the traffic. Elemental based prices are the appropriate rates to use since they will more closely match the costs actually incurred to transport and terminate the traffic. The Authority has already considered evidence of the appropriate rates for reciprocal compensation in its generic UNE cost proceeding, and does not need to do so again in a two party arbitration proceeding. The permanent rates ultimately established by the Authority in Docket No. 97-01262 should simply be incorporated into the DeltaCom/BellSouth Interconnection Agreement.

Finally, with respect to whether the Authority has previously resolved the ISP-bound traffic and reciprocal compensation issue in other proceedings, BellSouth's position is that such rulings should not be determinative on this proceeding. Specifically, the Authority should not rely upon its NEXTLINK Arbitration order in Docket No. 98-00123, where the Authority found that "consistent with the Authority's decision in Docket 98-00118 [Brooks Fiber's Complaint over payment for ISP-bound traffic under its existing Interconnection Agreement], the parties are required to treat traffic that originates from and terminates to an ISP as local traffic subject to the payment of reciprocal compensation." (*See* First Order of Arbitration Award, Petition of NEXTLINK

First Order of Arbitration Award, with BellSouth Telecommunications, Inc. Tennessee Regulatory Authority Docket No. 98-00123, May 18, 1999, at p. 15)(emphasis added).

BellSouth respectfully disagrees with the Authority's decision in the NEXTLINK Arbitration Order on this issue. Nonetheless, that decision should not be applied to this Arbitration proceeding since the Authority's underlying decision in the Brooks Fiber ISP complaint case was premised upon an interpretation of language in an existing Interconnection Agreement. Obviously, the issue presented through this Arbitration involves a new interconnection agreement. Therefore, the Authority's Brooks Fiber decision which rendered an interpretation of that specific existing contract is not relevant to this case. BellSouth has made it clear during its negotiations with DeltaCom that it does not intend in any way to have reciprocal compensation apply to ISP-bound traffic since it is not local, but rather, as the FCC has confirmed, is interstate access in nature.

III. MISCELLANEOUS MATTERS

BellSouth is attaching a copy of the Florida Public Service Commission's August 13, 1999, Order Establishing Procedure in the DeltaCom Arbitration with BellSouth in that state in Docket No. 990750-TP. At the Pre-Arbitration Conference, BellSouth had committed to provide the Authority with a copy of the Issues List developed in Florida. The Issues List is Attachment "A" to the Procedural Order.

Additionally, for the convenience of the Authority and the Staff in conducting the Hearing and in resolving the disputed issues in this Arbitration, BellSouth is willing to agree that the Authority's Staff may directly ask questions of the parties' witnesses at the Hearing in this matter.

IV. CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Authority to adopt BellSouth's positions and legal arguments on the specific issues addressed herein.

Respectfully submitted,

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom for arbitration of certain unresolved issues in interconnection negotiations between ITC^DeltaCom and BellSouth Telecommunications, Inc.	DOCKET NO. 990750-TP ORDER NO. PSC-99-1589-PCO-TP ISSUED: August 13, 1999

ORDER ESTABLISHING PROCEDURE

On June 11, 1999, ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom (ITC^DeltaCom) filed a Petition for Arbitration pursuant to 47 U.S. C 252(b) to arbitrate certain unresolved issues in the interconnection negotiations between ITC^DeltaCom and BellSouth Telecommunications, Inc. (BellSouth). On July 6, 1999, BellSouth filed its response. This matter is currently set for hearing on October 27-29, 1999.

This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

The scope of this proceeding shall be based upon the issues raised by the parties and Commission staff (staff) up to and during the prehearing conference, unless modified by the Commission. The hearing will be conducted according to the provisions of Chapter 120, Florida Statutes, and all administrative rules applicable to this Commission.

Discovery

When discovery requests are served and the respondent intends to object to or ask for clarification of the discovery request, the objection or request for clarification shall be made within ten days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes.

The hearing in this docket is set for October 27 - 29, 1999. Unless authorized by the Prehearing Officer for good cause shown, all discovery shall be completed by October 20, 1999. All interrogatories, requests for admissions, and requests for production of documents shall be numbered sequentially in order to

facilitate their identification. The discovery requests will be numbered sequentially within a set and any subsequent discovery requests will continue the sequential numbering system. Pursuant to Rule 28-106.206, Florida Administrative Code, unless subsequently modified by the Prehearing Officer, the following shall apply: interrogatories, including all subparts, shall be limited to 200, and requests for production of documents, including all subparts, shall be limited to 200.

Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been made a part of the evidentiary record in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time period set forth in Section 364.183, Florida Statutes.

Diskette Filings

See Rule 25-22.028(1), Florida Administrative Code, for the requirements of filing on diskette for certain utilities.

Prefiled Testimony and Exhibits

Each party shall prefile, in writing, all testimony that it intends to sponsor. Such testimony shall be typed on 8 ½ inch x 11 inch transcript-quality paper, double spaced, with 25 numbered lines, on consecutively numbered pages, with left margins sufficient to allow for binding (1.25 inches).

Each exhibit intended to support a witness' prefiled testimony shall be attached to that witness' testimony when filed, identified by his or her initials, and consecutively numbered beginning with 1. All other known exhibits shall be marked for identification at the prehearing conference. After an opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits may be offered into evidence at the hearing. Exhibits accepted into evidence at the hearing shall be numbered sequentially. The pages

of each exhibit shall also be numbered sequentially prior to filing with the Commission.

An original and 15 copies of all testimony and exhibits shall be prefiled with the Director, Division of Records and Reporting, by the close of business, which is 5:00 p.m., on the date due. A copy of all prefiled testimony and exhibits shall be served by mail or hand delivery to all other parties and staff no later than the date filed with the Commission. Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

Prehearing Statement

All parties in this docket shall file a prehearing statement. Staff will also file a prehearing statement. The original and 15 copies of each prehearing statement shall be prefiled with the Director of the Division of Records and Reporting by the close of business, which is 5:00 p.m., on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission. Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position. Such prehearing statements shall set forth the following information in the sequence listed below.

(a) The name of all known witnesses that may be called by the party, and the subject matter of their testimony;

(b) a description of all known exhibits that may be used by the party, whether they may be identified on a composite basis, and the witness sponsoring each;

(c) a statement of basic position in the proceeding;

(d) a statement of each question of fact the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;

(e) a statement of each question of law the party considers at issue and the party's position on each such issue;

(f) a statement of each policy question the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue;

(g) a statement of issues that have been stipulated to by the parties;

(h) a statement of all pending motions or other matters the party seeks action upon; and

(i) a statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.

Prehearing Conference

Pursuant to Rule 28-106.209, Florida Administrative Code, a prehearing conference will be held in this docket at the Betty Easley Conference Center, 4075 Esplanade Way, Tallahassee, Florida. Any party who fails to attend the prehearing conference, unless excused by the Prehearing Officer, will have waived all issues and positions raised in that party's prehearing statement.

Prehearing Procedure: Waiver of Issues

Any issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the prehearing order shall demonstrate that: it was unable to identify the issue because of the complexity of the matter; discovery or other prehearing procedures were not adequate to fully develop the issue; due diligence was exercised to obtain facts touching on the issue; information obtained subsequent to the issuance of the prehearing order was not previously available to enable the party to identify the issue; and introduction of the issue could not be to the prejudice or surprise of any party. Specific reference shall be made to the information received, and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order. When a party is unable to take a position on an issue, it shall bring that fact to the attention of the Prehearing Officer. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain "no position at this time" prior

to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement.

Document Identification

To facilitate the management of documents in this docket, exhibits will be numbered at the Prehearing Conference. Each exhibit submitted shall have the following in the upper right-hand corner: the docket number, the witness's name, the word "Exhibit" followed by a blank line for the exhibit number and the title of the exhibit.

An example of the typical exhibit identification format is as follows:

Docket No. 12345-TL
J. Doe Exhibit No. _____
Cost Studies for Minutes of Use by Time of Day

Tentative Issues

Attached to this order as Appendix "A" is a tentative list of the issues which have been identified in this proceeding. Prefiled testimony and prehearing statements shall address the issues set forth in Appendix "A".

Controlling Dates

The following dates have been established to govern the key activities of this case.

1)	Petitioner's and Respondent's direct testimony and exhibits	August 16, 1999
2)	Rebuttal testimony and exhibits	September 13, 1999
3)	Prehearing Statements	September 20, 1999
4)	Prehearing Conference	October 11, 1999
5)	Briefs	November 19, 1999
6)	Hearing	October 27-29, 1999

Use of Confidential Information At Hearing

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding. Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute. Failure of any party to comply with the seven-day requirement described above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.

When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material

that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material. Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so. At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

Post-Hearing Procedure

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

Based upon the foregoing, it is

ORDERED by Commissioner E. Leon Jacobs, as Prehearing Officer, that the provisions of this Order shall govern this proceeding unless modified by the Commission.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 13th day of August, 1999.

/s/ E. Leon Jacobs, Jr.
E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

DWC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for

reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

ATTACHMENT A

1.* Should BellSouth be required to comply with the 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?

2.* Should BellSouth be required to waive any nonrecuring charges when it misses a due date?

3. a) What is the definition of parity?

b) Pursuant to this definition, should BellSouth be required to provide the following:

1) Operational Support Systems (OSS),
2) UNEs,
3) White Page Listing, and
4) Access to Numbering Resources
5) An unbundled loop using Integrated Digital Loop Carrier (IDLC) technology;
6) Interconnection;
7) Service intervals on winbacks;
8) Priority guidelines for repair and maintenance and UNE provisioning; and
9) White Page Listings to independent third party publishers?

4. Should BellSouth be required to provide the specifications to enable ITC^DeltaCom to parse the Customer Service Records (CSRs)? If so, how?

5. Should BellSouth be required to provide a download of the Regional Street Address Guide (RSAG)? If so, how?

6. Should BellSouth be required to provide changes to its business rules and guidelines regarding resale and UNEs at least 45 days in advance of such changes being implemented? If so, how?

7.* Until the Commission makes a decision regarding UNEs and UNE combinations, should BellSouth be required to continue providing those UNEs and combinations that it is currently providing to ITC^DeltaCom under the interconnection agreement previously approved by this Commission?

8.* a)* Should BellSouth be required to provide to ITC^DeltaCom extended loops or the loop/port combination?

b)* If so, what should the rates be?

9. Should BellSouth be required to provide UNE testing results to ITC^DeltaCom? If so, how?

10. Should the parties be required to perform cooperative testing within two hours of a request from the other party?

11. Should BellSouth be required to provide NXX testing functionality to ITC^DeltaCom? If so, how?

12. What should be the installation interval for the following loop cutovers:

a) single
b) multiple

13. Should SL1 orders without order coordination be specified by BellSouth with an a.m. or p.m. designation?

14.* Should the party responsible for delaying a cutover also be responsible for the other party's reasonable labor costs?

15. Should BellSouth be required to designate specific UNE Center personnel for coordinating orders placed by ITC^DeltaCom?

16.* Should each party be responsible for the repair charges for troubles caused or originated outside of its network? If so, how should each party reimburse the other for any additional costs incurred for isolating the trouble to the other's network?

17. Should BellSouth be responsible for maintenance to HDSL and ADSL compatible loops provided to ITC^DeltaCom?

18. If a customer orders a loop which requires special construction charges be paid for by ITC^DeltaCom, and BellSouth reuses the same facilities to provide service to the customer for itself or on behalf of another CLEC, should BellSouth be required to refund ITC^DeltaCom the amount ITC^DeltaCom paid to BellSouth for Special Construction for that customer?

19. Under what conditions, if any, should BellSouth be required to reimburse any costs incurred by ITC^DeltaCom to accommodate

modifications made by BellSouth to an order after sending a firm order confirmation (FOC)?

20.* a) Should BellSouth be required to coordinate with ITC^DeltaCom 48 hours prior to the due date of a UNE conversion?

b)* If BellSouth delays the scheduled cutover date, should BellSouth be required to waive the applicable non-recurring charges?

c) Should BellSouth be required to perform dial tone tests at least 48 hours prior to the scheduled cutover date?

21. Should BellSouth be required to establish Local Number Portability (LNP) cutover procedures under which BellSouth must confirm with ITC^DeltaCom that every port subject to a disconnect order is worked at one time?

22. How should "order flow-through" be defined?

23. Should BellSouth be required to pay reciprocal compensation to ITC^DeltaCom for all calls that are properly routed over local trunks, including calls to Internet Service Providers (ISPs)?

24. What should be the rate for reciprocal compensation?

25. Should ITC^DeltaCom and BellSouth be required to follow the ATIS/OBF business rules?

26. Should BellSouth be required to provide ITC^DeltaCom access to Universal Service Order Codes (USOCs), Field Identifiers (FIDs) and other information necessary to process orders in a downloadable format?

27. Should BellSouth be required to maintain both the current and the next previous version of an electronic interface?

28. Should ITC^DeltaCom have at least 90 days advance notice prior to BellSouth discontinuing an interface?

29. If ITC^DeltaCom needs to reconnect service following an order for a disconnect, should BellSouth be required to reconnect service within 48 hours?

30. Should BellSouth be required to maintain UNE/LCSC hours from 6 a.m. to 9 p.m.?

31. Should BellSouth be required to provide a toll free number to ITC^DeltaCom to answer questions concerning BellSouth's OSS proprietary interfaces from 8 a.m. to 8 p.m.?

32. What information should be included in the Firm Order Confirmation (FOC)?

33. Should the Parties establish escalation procedures for ordering/provisioning problems?

34. What type of repair information should BellSouth be required to provide to ITC^DeltaCom such that ITC^DeltaCom can keep the customer informed?

35. Should both parties be required to train their technicians on the procedures contained in the interconnection agreement which sets forth the manner in which each party must treat the other's customers?

36. Should BellSouth provide cageless collocation to ITC^DeltaCom 30 days after a firm order is placed?

37. Should ITC^DeltaCom and its agents be subject to stricter security requirements than those applied to BellSouth's agents and third party outside contractors?

38. What charges, if any, should BellSouth be permitted to impose on ITC^DeltaCom for BellSouth's OSS?

39. What are the appropriate recurring and non-recurring rates and charges for:

    a) two-wire ADSL/HDSL compatible loops,
    b) four wire ADSL/HDSL compatible loops, or
    c) two-wire SL1 loops.

40. a) Should BellSouth be required to provide:

        1) two-wireSL2 loops or
        2) two-wireSL2 loop Order Coordination for Specified Conversion Time?

    b) If so, what are the appropriate recurring and non-recurring rates and charges?

41.* Should BellSouth be permitted to charge ITC^DeltaCom a disconnection charge when BellSouth does not incur any costs associated with such disconnection?

42. What should be the appropriate recurring and non-recurring charges for cageless and shared collocation in light of the recent FCC Advanced Services Order No. FCC 99-48, issued March 31, 1999, in Docket No. CC 98-147?

43. Should BellSouth be permitted to charge for ITC^DeltaCom for conversions of customers from resale to unbundled network elements? If so, what is the appropriate charge?

44. What procedures should ITC^DeltaCom and BellSouth adopt for meet-point billing?

45. Which party should be required to pay for the Percent Local Usage (PLU) and Percent Interstate Usage (PIU) audit, in the event such audit reveals that either party was found to have overstated the PLU or PIU by 20 percentage points or more?

46.* Should the losing party to an enforcement proceeding or proceeding for breach of the interconnection agreement be required to pay the costs of such litigation?

47.* What should be the appropriate standard for limitation of liability under the interconnection agreement?

48.* Should language covering tax liability be included in the interconnection agreement, and if so, whether that language should simply state that each Party is responsible for its tax liability?

49.* Should BellSouth be required to compensate ITC^DeltaCom for breach of material terms of the contract?

50.** Should the Parties continue operating under existing local interconnection arrangements?

* Denotes issues currently in dispute between the Parties.

** ITC^DeltaCom requests that this issue be stated as follows. BellSouth disagrees.

(a) Should the current interconnection agreement language continue regarding cross-connect fees, reconfiguration charges or network redesigns, and NXX translations?

(b) What should be the definition of the terms local traffic, and trunking options?

(c) What paramenters should be established to govern routing ITC^DeltaCom's originating traffic and each party's exchange of transit traffic?

(d) Should the parties implement a procedure for binding forecasts?

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

[✓] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight

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