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EXECUTIVE SECRETARY

October 22, 1999

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

Via Hand Delivery

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

Dear Mr. Waddell:

Enclosed for filing are the original and 13 copies of the revised Direct Testimony of Thomas Hyde, Christopher Rozycki, and Don Wood. This testimony has been revised in response to a request from the Staff to include additional references to the specific issues being addressed in the testimony.

The exhibits are the same as originally filed and, therefore, are not resubmitted.

Copies of the enclosed are being provided to counsel of record.

Sincerely,

Don

H. LaDon Baltimore
LDB/dcg
Enclosures
cc: Guy Hicks, Esq.

FILE

BEFORE THE TENNESSEE REGULATORY AUTHORITY



**NASHVILLE, TENNESSEE**

**October 22, 1999**

| | | |
|---|---|---|
| **IN RE:** | ) | |
| | ) | |
| **PETITION FOR ARBITRATION BY** | ) | |
| **ITC^DELTACOM COMMUNICATIONS,** | ) | **DOCKET NO. 99-00430** |
| **INC. WITH BELLSOUTH** | ) | |
| **TELECOMMUNICATIONS, INC.,** | ) | |
| **PURSUANT TO THE** | ) | |
| **TELECOMMUNICATIONS ACT OF 1996** | ) | |

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**DIRECT TESTIMONY OF CHRISTOPHER J. ROZYCKI**
**ON BEHALF OF ITC^DELTACOM COMMUNICATIONS, INC.[1]**

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[1]Identical to direct testimony filed October 15, 1999 with the exception that issues have been inserted.

# I. INTRODUCTION

Q: PLEASE STATE YOUR NAME, POSITION AND BUSINESS ADDRESS.

A: My name is Christopher J. Rozycki. I am Director of Regulatory Affairs for ITC^DeltaCom Communications Inc., ("ITC^DeltaCom"). My business address is 700 Boulevard South, Suite 101, Huntsville, Alabama 35802.

Q: PLEASE DESCRIBE YOUR BUSINESS EXPERIENCE AND BACKGROUND.

A: I have over 25 years of experience in telecommunications and other regulated industries. Before joining ITC^DeltaCom in March 1998, I was employed by Hyperion Telecommunications, Inc. as Director of Regulatory Affairs. I directed all aspects of Hyperion's regulatory activity in 12 states and before the Federal Communications Commission ("FCC"). This included filing for certificates to be a competitive local exchange carrier ("CLEC") in these states and creating and/or amending over 40 state and federal tariffs for local, access, long distance, and dedicated services. I coordinated filings before the FCC and state commissions, including Virginia, Pennsylvania, New York, New Jersey, Vermont, Tennessee, Louisiana, and South Carolina.

Between 1983 and 1997, I was employed by AT&T. During my tenure there I held positions in Treasury/Finance (regulatory), Law & Government Affairs (docket management), Access Management (access-price negotiations), and Network Services Division (cost analysis of local infrastructure). While in Access Management, I testified before the Pennsylvania Public Utility Commission and the Delaware Public Service Commission on subjects like LEC-access pricing and regulation.

Before joining AT&T, I was a consumer advocate in Fairfax County, Virginia. Between 1982 and 1983, I represented county ratepayers in electric, gas, and telephone rate cases. I testified before the Virginia State Corporation Commission on several occasions, generally on the subject of rate of return.

As a partner in an energy and regulatory consulting firm from 1979 to 1982, my responsibilities included all of the firm's regulatory work for the Department of Energy.

Early in my career I was employed as an economist for two public-utility consulting firms that specialized in utility rate-case work on behalf of consumer advocates and state commissions and as an economist for the U.S. Department of Energy, where I evaluated the impact of energy-conservation regulations.

I hold a master's degree in Economics from George Mason University in Fairfax, Virginia and a bachelor's degree in Economics from Georgetown University in Washington, DC.

Q. WHAT ARE YOUR RESPONSIBILITIES AT ITC^DELTACOM?

A. As Director of Regulatory Affairs, I am responsible for all regulatory activities of ITC^DeltaCom related to its local, long distance, and wholesale telecommunications services. These activities include CLEC certification; monitoring of dockets; and the filing and maintenance of tariffs, customer complaints, interconnection and traffic exchange agreements.

Q. HAVE YOU PROVIDED TESTIMONY IN OTHER REGULATORY PROCEEDINGS?

A. Yes. I have provided testimony on a variety of issues in Alabama, Georgia, Mississippi, North Carolina, Virginia, Pennsylvania, Delaware, New York, and Vermont.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A. My testimony will provide an overview to our case. ITC^DeltaCom's petition for arbitration focuses on several key issues: performance measures and performance guarantees, the functionality of Operational Support Systems ("OSS") and OSS charges, parity, reciprocal compensation or payment for ISP traffic, price and availability of individual unbundled network elements ("UNEs"), availability of UNE combinations, physical collocation, and other general contract issues.

Q: HAVE ANY OF THE ISSUES INCLUDED IN YOUR ARBITRATION FILING BEEN RESOLVED?

A: Yes. Attached as Exhibit CJR –1 is a summary of those issues ITC^DeltaCom believes are resolved as a result of negotiations with BellSouth. At the time of the filing of this testimony however, the parties have not finalized their agreement in writing. To be clear, ITC^DeltaCom reserves its right to arbitrate these issues should there not be a meeting of the minds or should a dispute regarding the contract language arise.

Q. DOES YOUR TESTIMONY ADDRESS ALL OF THE UNRESOLVED ISSUES RESULTING FROM YOUR NEGOTIATIONS WITH BELLSOUTH?

A. No. There are a number of other issues addressed by witnesses sponsored by ITC^DeltaCom in this case. Additionally, there are numerous issues which we will not contest. We are not contesting every disagreement with BellSouth in an attempt to reduce the open issues to a manageable number. This does not mean we agree with BellSouth's position on these issues, and we reserve the right to keep these issues open until the negotiations and arbitration are complete.

Q. PLEASE EXPLAIN WHY THERE ARE SO MANY UNRESOLVED ISSUES AFTER OVER SIX MONTHS OF NEGOTIATIONS.

A. There are several reasons behind the list of unresolved issues that remain. There are, however, two overriding reasons that I believe ITC^DeltaCom and BellSouth have failed to mutually agree.

First, ITC^DeltaCom is primarily focused on providing its customers with the best service available at the most reasonable price. If ITC^DeltaCom were to agree to the terms and conditions of the contract that BellSouth wants it to accept, it could not provide the quality of service its customers have come to expect from ITC^DeltaCom, nor could it come close to the service BellSouth is providing its own customers. In essence, ITC^DeltaCom would be offering substandard service at premium prices, a guaranteed formula for failure.

Second, BellSouth has been quite uncompromising on even the most basic elements of the agreement required for any CLEC to survive the rigors of competition, much less succeed. To ensure that ITC^DeltaCom and its customers receive parity of service, there are several basic or fundamental elements which must be incorporated in its interconnection agreement. These include: (1) performance measures with guarantees; (2) parity; (3) a fully functioning Operational Support System; (4) proper availability and pricing of UNEs and collocation; and (5) agreement by BellSouth that it will compensate ITC^DeltaCom for the use of and access to ITC^DeltaCom's network.

Q. ARE THERE LESS TECHNICAL REASONS FOR THE NUMEROUS UNRESOLVED ISSUES?

A. BellSouth opened these negotiations by presenting ITC^DeltaCom with its "template" interconnection agreement. This agreement is very different from ITC^DeltaCom's current interconnection agreement, and would be a giant step backward for ITC^DeltaCom. Realizing this, ITC^DeltaCom proposed that the starting point of negotiations should be its existing contract. BellSouth would not agree, arguing that it could not effectively deal with hundreds of contracts and was looking to move companies like ITC^DeltaCom onto its "standard contract" with its "standard language." This template contract had major disadvantages, but it also had several small improvements to ITC^DeltaCom's existing contract. The one improvement we sought to capture was the overall organization or outline of the template.

Q. HOW WOULD YOU CHARACTERIZE THE LANGUAGE IN THE BELLSOUTH TEMPLATE?

A. Much of the language in the " template" is anti-competitive, denying ITC^DeltaCom the parity that is required by the Telecommunications Act. Language such as this makes it nearly impossible for ITC^DeltaCom to successfully compete with BellSouth.

Q. HOW HAS YOUR EXPERIENCE IN THE MARKETPLACE AFFECTED YOUR DECISION TO ARBITRATE?

A. ITC^DeltaCom's decision to arbitrate is based on its experience in the marketplace with BellSouth as its primary vendor of unbundled network elements. This experience has taught us that BellSouth is either currently incapable of or unwilling to deliver service equal to that which it gives itself. As a result, ITC^DeltaCom has vigorously argued for language that will insure that BellSouth delivers service in a timely fashion, and equal in quality to the service it provides itself. By contrast, BellSouth has refused to accept language that would require it to provide service at parity with the service it provides itself.

Q. PLEASE CHARACTERIZE BELLSOUTH'S NEGOTIATING PHILOSOPHY.

A. It appears that BellSouth is using a win-lose strategy, and is rarely seeking common ground. ITC^DeltaCom was not treated as a customer or a buyer of BellSouth network and services, but as a competitor. BellSouth presented much of its language in an "our way is the only way" fashion. BellSouth also repeatedly refused to commit to any form of enforceable performance measures.

## II. PERFORMANCE MEASURES AND PERFORMANCE GUARANTEES

**Issue 1(a): 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?**

Q. WHY ARE PERFORMANCE MEASURES SUCH AN IMPORTANT REQUIREMENT FOR ITC^DELTACOM?

A. Experience has shown ITC^DeltaCom that measures must be taken to ensure that BellSouth provides high-quality wholesale service to its customer, i.e., ITC^DeltaCom. Without performance measures and performance guarantees, BellSouth is unlikely to provide service in the same manner that it provides itself. In fact, in some situations, BellSouth's service to ITC^DeltaCom fails to come close to the service it provides to itself. This is true for both the timeliness and the quality of the services and equipment that BellSouth provides to ITC^DeltaCom. These facts will be demonstrated in the testimony of Thomas Hyde and Michael Thomas.

Furthermore, if BellSouth succeeds in its 271 application, then there must be "anti-backsliding measures" incorporated in our contract or we may never get the quality of service that we and our customers are entitled to under the provisions of the 1996 Telecommunications Act.

Q. WHY ARE ANTI-BACKSLIDING MEASURES NECESSARY?

A. BellSouth is a competitor with significant market power as well as a supplier of network services to ITC^DeltaCom. As a result, there are economic incentives that pressure BellSouth and its employees to provide better service to its own customers and subsidiaries than it provides to its competitor, ITC^DeltaCom. Today, BellSouth's incentive to perform in a competitively neutral manner is found in Section 271 of the Telecommunications Act, the opportunity to enter the long-distance market. Once BellSouth obtains 271 authority, there is little to prevent it from discriminating in the service it provides its competitors.

To eliminate this possibility, anti-backsliding measures must be put in place. Anti-backsliding measures are requirements that would prevent BellSouth from acting in an anti-competitive manner in providing the network and services required by CLECs. These anti-backsliding measures could be implemented in the form of regulations put in place by the FCC or state public service commissions. In fostering a more competitive local telecommunications market; however, anti-backsliding measures will be far more effective with performance measures and guarantees such as those introduced by ITC^DeltaCom in this interconnection agreement.

Q. IS THERE EVIDENCE THAT PERFORMANCE MEASURES SHOULD BE INCORPORATED IN INTERCONNECTION AGREEMENTS?

A. Yes. Several states, including California and Texas, are in the process of adopting performance measures with performance guarantees. Attached as exhibit CJR –2 is the performance remedies section of the SBC and Southland amendment, which has been filed with the Texas Public Utility Commission, and which will be incorporated into ITC^DeltaCom's interconnection agreement with SBC. Finally, BellSouth itself seems to have acknowledged that such measures are necessary by proposing its own Self-Effectuating Enforcement Measures to the FCC on April 8, 1999. Attached as exhibit CJR-3 is the BellSouth proposed Self-Effectuating Enforcement Measures. These proposed enforcement measures fall far short of the truly useful measures proposed by ITC^DeltaCom, but they do indicate BellSouth's willingness to work toward a solution. BellSouth, however, has refused to include its FCC proposal in our contract.

In addition, I understand that the Authority is working to develop performance measures. To the extent the measures proposed by ITC^DeltaCom do not conflict with those developed or being developed by the Authority, ITC^DeltaCom believes that the measures contained in Attachment 10 of Exhibit A should be implemented by the parties. If a conflict does arise in the future, the agreement would be revised to reflect the changes required by the Authority.

Q. PLEASE EXPLAIN HOW ITC^DELTACOM'S PROPOSED PERFORMANCE MEASURES AND PERFORMANCE GUARANTEES ARE STRUCTURED?

A. ITC^DeltaCom has structured its performance measures and performance guarantees as a three-tiered system.

At the first level, BellSouth must meet specified performance benchmarks as found in Exhibit A, Attachment 10 to ITC^DeltaCom's Petition. These benchmarks have been developed to closely match the services that BellSouth provides itself. Each of the 45 performance measures has a specific performance guarantee associated with it. Failure to meet the benchmark causes the terms of the guarantee to be invoked. In some cases performance guarantees require refunds of nonrecurring charges. In other cases, the performance guarantee indicates that it is a performance metric. Performance metrics are included throughout the performance measures to ensure parity of service.

The second level constitutes what we have labeled a "Specified Performance Breach." A Specified Performance Breach occurs when BellSouth fails to meet a single measurement for two consecutive months or twice during a quarter. Where a Specified Performance Breach occurs, BellSouth shall be required to compensate ITC^DeltaCom $25,000 for each measurement BellSouth failed to meet.

The third level is defined as a "Breach-of-Contract." A Breach-of-Contract occurs where BellSouth fails to meet a single measure five times during a six-month period. The specific terms associated with a Breach-of-Contract may be found in paragraph 25 of the General Terms and Conditions. A Breach-of-Contract results in penalties in the amount of $100,000 for each default for each day the breach or default continues.

Q. THE DOLLAR AMOUNTS ASSOCIATED WITH A SPECIFIED PERFORMANCE BREACH OR A BREACH-OF-CONTRACT APPEAR HIGH. DO YOU BELIEVE THESE AMOUNTS ARE JUSTIFIED?

A. Yes. Not only are these levels appropriate, such levels may in fact be necessary. BellSouth is an extremely large company with significant market power. BellSouth has both the ability and the economic incentive to limit the ability of ITC^DeltaCom to compete in the local market. Because ITC^DeltaCom depends entirely on BellSouth for its access to local customers within BellSouth territory, BellSouth's dominating market power must be controlled. The principal way to achieve this without placing significant regulatory requirements upon BellSouth is through effective performance measures in ITC^DeltaCom's interconnection agreement. The guarantees associated with Specified Performance Breaches or the damages arising from a Breach-of-Contract must be set high enough to discourage poor performance by BellSouth. Given the relative size of BellSouth, damages of $100,000 are a small amount for BellSouth to pay.

Q: DO TIERS 2 AND 3 RESULT IN A WINDFALL TO ITC^DELTACOM?

A: No. In other jurisdictions, BellSouth has argued that the state commissions should not adopt tiers two and three because that encourages ITC^DeltaCom to “game” the process and would result in unearned income to ITC^DeltaCom. Because ITC^DeltaCom wants performance not damages, ITC^DeltaCom’s solution to BellSouth’s concerns is to pay tiers two and three to the State. ITC^DeltaCom believes that tier one, which is simply a refund or credit of money paid by ITC^DeltaCom for services not delivered, should continue to be refunded back to ITC^DeltaCom. In summary, there must be an self-enforcement mechanism in the agreement requiring performance.

Q. IF THE TENNESSEE REGULATORY AUTHORITY WERE TO ADOPT BELLSOUTH'S PROPOSED "SELF EFFECTUATING PERFORMANCE MEASURES," WOULD THESE MEASURES BE SUFFICIENT TO INSURE PARITY?

A. No. BellSouth's proposal for self-effectuating enforcement measures presented recently to the FCC fails in two critical areas. First, the performance standards themselves do not guarantee that BellSouth will provide service to CLECs equal to that which it provides itself. Second, without consequences for poor performance, BellSouth has little incentive to deliver the services required by CLECs to compete. Our own experience suggests yet another reason. BellSouth's Operational Support Systems currently fall far short of providing a competitive alternative to BellSouth's own internal OSS. This means that even if BellSouth were to agree to performance measures, they simply cannot meet them, given the way their OSS currently performs. As a result, BellSouth must be required to bring its OSS performance up to an acceptable competitive level.

## III. PARITY

Issue 2; 2(a)(iv); and 2(b)(i):

(a) What is the definition of parity?

(b) Pursuant to this definition, should BellSouth be required to provide the following and if so, under what conditions and at what rates?

a. Operational Support Systems("OSS");

b. UNEs;

c. Access to Numbering Resources;

d. An unbundled loop using integrated Digital Loop Carrier ("IDLC") technology; and

e. Priority guidelines for repair and maintenance and UNE provisioning?

Q. WHY IS PARITY SUCH AN IMPORTANT ISSUE FOR ITC^DELTACOM?

A. Parity is not just an important issue, it is at the heart of the Telecommunications Act because it is vital to the survival of companies like ITC^DeltaCom. Unless ITC^DeltaCom can service customers in BellSouth's territory using BellSouth's network on an equal basis with BellSouth itself, then ITC^DeltaCom will be unable to compete in the local market. The authors of the Telecommunications Act envisioned exactly this kind of competition when they crafted Sections 251 and 252.

Whether it is a fully functioning operational support system, interconnection to BellSouth's network, tariff change notification, access to UNEs such as IDLC loops, or equal treatment with White pages listings, ITC^DeltaCom must receive the same kind of service and support that BellSouth provides to itself. Unfortunately, the service and support that ITC^DeltaCom is receiving today is significantly less than that provided by BellSouth to itself or its end-users. This places ITC^DeltaCom at a distinct competitive disadvantage, as its services are delivered at slower intervals and at a lower quality than that which BellSouth provides itself.

ITC^DeltaCom is already experiencing the repercussions of purchasing UNEs at less than parity. In numerous instances the winback process for BellSouth begins while the customer is waiting for their service to be turned up by ITC^DeltaCom. The unreasonable delays caused by BellSouth forces customers to wait for their service to be activated. This delay provides BellSouth with ample time -- too much time -- to approach the customer and attempt to win them back by offering to get them back in service more quickly. This "window of opportunity" is made possible by the disparity in provisioning that ITC^DeltaCom experiences. This is one reason why parity is critical to opening BellSouth's network to the forces of competition.

## A. Operational Support Systems

Q. IS ITC^DELTACOM HAVING PROBLEMS WITH THE OPERATIONAL SUPPORT SYSTEMS PROVIDED BY BELLSOUTH?

A. Yes. ITC^DeltaCom witnesses Mike Thomas and Thomas Hyde will talk extensively about the problems we are having. In addition to the specific problems ITC^DeltaCom is having with BellSouth's OSS, there are more fundamental problems at issue. For instance, BellSouth has indicated that for each order ITC^DeltaCom places, it will be assessed an OSS charge. BellSouth has offered two options. The first is a regional price of $3.50 per OSS order. The second is for ITC^DeltaCom to pay the state ordered rates for each OSS order. Neither of these options is acceptable to ITC^DeltaCom for several reasons.

First, BellSouth's OSS currently does not work. Today, ITC^DeltaCom orders frequently take more than 10 days from the time it submits the order to BellSouth to the time the customer's service is up and running. A BellSouth customer, in many instances, could order the same service directly from BellSouth in 24 to 48 hours.

Second, ITC^DeltaCom currently has no way to parse the LENS Customer Service Record ("CSR") to speed the preordering process, and BellSouth has not committed to providing ITC^DeltaCom a download of the RSAG database including updates.

Third, the prices that have been suggested, ranging from $3.50 to nearly $11, are unacceptable and have no competitive analogy. Prices for similar kinds of services are generally rolled into the price of the product or service. Competitive firms may recover these costs only if they can do so while keeping the price of their service competitive. In the case of BellSouth, the closest thing to a competitive analogy is BellSouth's own OSS. The BellSouth OSS is rolled into the price of its service. Its customers are not assessed separate OSS charges. CLECs should pay no more for OSS than BellSouth charges its own customers.

Fourth, ITC^DeltaCom did not request a separate system be constructed for it. ITC^DeltaCom considers it acceptable to have direct access into BellSouth's existing operational support systems. BellSouth chose to construct a separate system for CLECs to use for preordering, ordering, provisioning, and maintenance.

Fifth, ITC^DeltaCom should not be required to pay for any system or interface that it does not use.

Finally, if it is determined that BellSouth should be reimbursed for the cost of developing a separate OSS, then this cost should be spread among all telecommunications users within BellSouth territory. This cost should be considered a cost of opening the market to competition and should be borne by all telecommunications users equally. Don Wood will also address OSS charges.

## IV. ACCESS TO BELLSOUTH'S NETWORK

### A. Audits

**Issue 7(b)(iv): 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?**

Q. SECTION 2 OF THE LOCAL INTERCONNECTION ATTACHMENT 3 ADDRESSES AUDITS. ARE THE PARTIES IN AGREEMENT AS TO HOW AUDITS FOR LOCAL AND TOLL TRAFFIC WILL BE TREATED?

A. No. The parties disagree as to who should pay for the audits. BellSouth believes that if the auditing party finds errors in the records of the other party that are equal to or greater than 20%, then the audited party should pay for the audit. ITC^DeltaCom disagrees. It is our opinion that each party should pay for its own audits regardless of the outcome. It is interesting to note that BellSouth is in favor of this penalty but will not consider providing credits or refunds of nonrecurring charges when it fails to deliver service to ITC^DeltaCom.

## V. GENERAL CONTRACT LANGUAGE ISSUES

### A. Loser Pays

**Issue 8(b): 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?**

Q. DID ITC^DELTACOM AND BELLSOUTH AGREE TO A PROVISION IN THE CURRENT INTERCONNECTION AGREEMENT THAT WOULD DISCOURAGE FRIVOLOUS COMPLAINTS?

A. Yes. ITC^DeltaCom has recommended the following language, which was previously filed and approved with the Authority:

> The Party that does not prevail shall pay all reasonable costs of the arbitration or other formal complaint proceeding, including reasonable attorney's fees and other legal expenses of the prevailing Party.

Q. WHAT WAS BELLSOUTH'S RESPONSE TO THIS PROPOSED LANGUAGE?

A. BellSouth does not agree with this "loser pays" proposal. This fact alone is cause for concern. Since the enactment of the Telecommunications Act, BellSouth has lost a number of cases before state commissions and the courts. If BellSouth were made responsible for the legal expenses associated with these cases, then it might begin to think twice about forcing CLECs to file complaints or other claims against BellSouth. A "loser pays" clause would reduce the amount of litigation before the Authority.

## B. Taxes

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

Q. ARE THE PARTIES IN DISPUTE OVER LANGUAGE REGARDING THE RESPONSIBILITY FOR PAYMENT OF TAXES?

A. Yes, we have been unable to agree upon the language to be included. ITC^DeltaCom's current interconnection agreement contains no language regarding taxes. During the two years that the existing agreement has been in place, there have been no disputes over the payment of taxes. Yet, BellSouth's template introduces extensive language to deal with a problem that does not exist. In the spirit of compromise, ITC^DeltaCom proposed the following language:

> Any Federal, state or local excise, license, sales, use or other taxes or tax-like charges (excluding any taxes levied on income) resulting from the performance of this Agreement shall be borne by the Party upon which the obligation for payment is imposed under applicable law, even if the obligation to collect and remit such taxes is placed upon the other Party. Any such taxes shall be shown as separate items on applicable billing documents between the Parties. The Party obligated to collect and remit taxes shall do so unless the other Party provides such Party with the required evidence of exemption. The Party obligated to pay any such taxes may contest the same and shall be entitled to the benefit of any refund or recovery. The Party obligated to collect and remit taxes shall cooperate fully in any such contest by the other Party by providing, records, testimony, and such additional information or assistance as may reasonably be necessary to pursue the contest.

The language proposed by ITC^DeltaCom covers substantially the same issues as BellSouth's language addresses using significantly fewer words. We see no reason why BellSouth should not accept our proposed compromise language.

## VI. RECIPROCAL COMPENSATION

**<u>Issue 3</u>: 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)?**

Q. DESCRIBE THE ISSUE.

A. ITC^DeltaCom has proposed continuing the current reciprocal compensation rate found in the existing interconnection agreement, while BellSouth has proposed elemental billing based on the state ordered rates for local transport, end office switching, and tandem switching.

Q. HAS EITHER PARTY SHOWN ANY INTEREST IN COMPROMISING ITS INITIAL POSITION AND SETTLING THIS DISPUTE OVER RECIPROCAL COMPENSATION?

A. Yes. ITC^DeltaCom offered to agree to a form of elemental billing if BellSouth would agree to pay reciprocal compensation for traffic to ISPs. BellSouth has refused to compromise its unreasonable position. Thus, while ITC^DeltaCom has offered to reduce its initial compensation rate by approximately 75%, BellSouth has not moved an inch.

Q. HAS BELLSOUTH PROPOSED ANY METHOD OF COMPENSATING ITC^DELTACOM FOR THE USE OF ITS NETWORK?

A. Not to my knowledge. BellSouth has simply refused to pay and refused to negotiate a compensation method for calls to ISPs who are customers of CLECs. BellSouth has argued that these calls are interstate and therefore not covered under our agreement. More recently, BellSouth has argued that ISPs are carriers and that ITC^DeltaCom should pay BellSouth access ISP-bound traffic. In essence, BellSouth has told ITC^DeltaCom that it must provide them free use of its network for all calls to the Internet and **<u>to pay BellSouth</u>** for the privilege of carrying the traffic for free!

Q. PLEASE SUMMARIZE WHY THE AUTHORITY SHOULD REQUIRE RECIPROCAL COMPENSATION FOR TRAFFIC ORIGINATED BY CUSTOMERS OF BELLSOUTH THAT IS BOUND FOR ISP CUSTOMERS OF ITC^DELTACOM.

A. Section 251 of the Telecommunications Act of 1996 requires that BellSouth negotiate in good faith. Calls from customers of BellSouth to ISP customers of ITC^DeltaCom cause ITC^DeltaCom to incur significant costs. The Authority should allow recovery of these costs through reciprocal compensation.

Q. WHAT ARE THE DIFFERENCES BETWEEN ITC^DELTACOM AND BELLSOUTH WITH RESPECT TO RECIPROCAL COMPENSATION?

A. There are essentially two areas in dispute between the parties, the price for reciprocal compensation, and the traffic to which reciprocal compensation applies.

Q. PLEASE SUMMARIZE YOUR CONCERNS WITH THE BELLSOUTH PROPOSAL FOR RECIPROCAL COMPENSATION.

A. BellSouth's proposal is difficult to describe because it is discriminatory and contrary to the spirit of the Telecommunications Act. BellSouth's proposal discriminates in three ways: (1) it denies ITC^DeltaCom the ability to recover its costs for terminating local calls for BellSouth; (2) it grants BellSouth free access to ITC^DeltaCom's network when sending ISP calls to it without reciprocating with an offer of equal value; and (3) it requires ITC^DeltaCom to subsidize BellSouth's profit margins and shareholders by providing below-cost service.

## A. Reciprocal Compensation Pricing

**Issue 3. What should be the rate for reciprocal compensation per minute of use, and how should it be applied?**

Q. DESCRIBE THE ISSUE.

A. ITC^DeltaCom has proposed continuing the current reciprocal compensation rate found in the existing interconnection agreement, while BellSouth has proposed elemental billing based on the state ordered rates for local transport, end office switching, and tandem switching.

Q. ARE THERE ANY OTHER ISSUES?

A. Yes. BellSouth has proposed a different computation for ITC^DeltaCom's transport rate, one which will not allow ITC^DeltaCom to recover its costs in the same manner that BellSouth does. In essence, while BellSouth proposes that it be allowed to recover its cost of terminating ITC^DeltaCom originated local calls, it would have ITC^DeltaCom charge less than its cost of terminating BellSouth originated local calls. Not only is BellSouth's proposal anti-competitive, it would have customers of ITC^DeltaCom subsidize BellSouth.

Q. DO YOU MEAN THAT BELLSOUTH IS TRYING TO SET UP A SYSTEM OF PRICING WHERE CUSTOMERS OF ITC^DELTACOM WOULD SUBSIDIZE RESIDENTIAL CUSTOMERS OF BELLSOUTH?

A. No, I do not mean that. BellSouth is trying to establish a pricing scheme where ITC^DeltaCom and its customers will subsidize the profit margins and the stockholders of BellSouth.

Q. PLEASE EXPLAIN.

A. BellSouth's pricing scheme discriminates against ITC^DeltaCom and its customers in several ways. First, it rewards BellSouth for its inefficiency, allowing it to charge for each element it uses in terminating local calls, including actual transport. Second, it penalizes ITC^DeltaCom by requiring that it use a formula for transport designed to lower the charges to BellSouth and thereby denies ITC^DeltaCom full recovery of its costs, and permits ITC^DeltaCom charge for only end office switching.

Q. WHY IS BELLSOUTH DENYING ITC^DELTACOM THE ABILITY TO RECOVER ITS COSTS FOR TRANSPORT?

A. BellSouth pressed hard in its first round of negotiations with CLECs for high reciprocal compensation rates when it thought that the balance of revenue would be flowing its way. Now that it is possible that both the states and the FCC will rule that some form of compensation is due to companies that handle ISP traffic, BellSouth is pressing just as hard for unreasonably low compensation to CLECs. BellSouth has proposed that ITC^DeltaCom be required to charge transport between ITC^DeltaCom's point of presence located within the LATA to the V & H coordinates of the ITC^DeltaCom terminating NPA/NXX in the same LATA. In essence, BellSouth wants ITC^DeltaCom to charge a proxy transport based on the way BellSouth's network is configured, not based on ITC^DeltaCom's actual transport. Just as BellSouth charges for each and every component in its network that ITC^DeltaCom uses, so should ITC^DeltaCom be able to charge BellSouth. Thus, if BellSouth wishes to charge ITC^DeltaCom for transport, end office switching, and tandem switching on its terms, then so too should ITC^DeltaCom be able to charge BellSouth for the same elements as they are configured in ITC^DeltaCom's network.

Q. YOU MENTIONED SWITCHING, WHAT IS THE PROBLEM WITH BELLSOUTH'S PROPOSAL?

A. As with transport, BellSouth is trying to tilt the revenue scales its way. When ITC^DeltaCom picks up local traffic at a BellSouth tandem, BellSouth will charge ITC^DeltaCom for both tandem and end office switching. But when ITC^DeltaCom handles calls for BellSouth, even though it may perform the same tandem and end office switching functions in one switch, BellSouth proposes it should only pay the end office rate.

Q. IS THERE A CORRECT OR BETTER WAY TO HANDLE THESE IMBALANCES IN COSTS AND REVENUE FLOW?

A. Yes, I believe there is. A single negotiated rate can be crafted to insure that neither party is disadvantaged with respect to the other. I will discuss this rate and its development in more detail later in my testimony.

Q. YOU HAVE INDICATED THAT A SINGLE RATE FOR RECIPROCAL COMPENSATION IS A MORE EQUITABLE AND REASONED SOLUTION TO THE CURRENT PRICING DILEMMA. WHAT DO YOU THINK THAT RATE SHOULD BE?

A. I believe the rate should be set at $0.0045 for the two-year term of this contract. The rate should then be reduced by $0.0005 per year until it reaches BellSouth's TELRIC-based rates for transport and switching. The rate should be equal at all times. This would help minimize BellSouth's gaming and arbitrage schemes. It would also allow ITC^DeltaCom some time to fill its network, so that it gets closer to recovering its cost by the time the rate reaches BellSouth's TELRIC-based rates.

Q. HOW DO YOU EXPLAIN OR RATIONALIZE THE RATE OF $0.0045 WHEN BELLSOUTH'S TELRIC COSTS ARE LOWER?

A. ITC^DeltaCom faces much higher costs than does BellSouth. BellSouth is a multi-billion dollar monopoly. As such, it has significant bargaining power that ITC^DeltaCom does not possess. Thus, when BellSouth buys switches, fiber, or electronics for its network, it is capable of negotiating much more favorable pricing than ITC^DeltaCom. BellSouth can also go into the market and borrow capital at much lower rates than ITC^DeltaCom. Finally, the BellSouth network is operating at or near full capacity, while ITC^DeltaCom's network is operating at much lower capacity. These factors give ITC^DeltaCom a much higher cost structure than that faced by BellSouth. Since the costs faced by each firm are so different, it is appropriate to compromise, to move to the middle ground when negotiating a rate for the mutual exchange of traffic.

## B. Reciprocal Compensation For ISP Traffic

**Issue 3: 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)?**

Q. WHAT IS ITC^DELTACOM'S POSITION ON THE PAYMENT OF RECIPROCAL COMPENSATION FOR BELLSOUTH CUSTOMER ORIGINATED CALLS TO ISPS?

A. I would rather start with a more basic question: What is ITC^DeltaCom's position on compensation for all forms of traffic? ITC^DeltaCom believes in the "calling party pays" concept. That is, the party or company responsible for originating a call is responsible for the costs associated with that call. Thus, when individuals make local calls, they and their telecommunications carrier are responsible for the costs associated with that call. Likewise, when individuals "call" the Internet, they and their telecommunications carrier are responsible for those costs too. If, for instance, a BellSouth customer calls <u>BellSouth.net</u>, then that customer and BellSouth are responsible for the cost of that call. The costs associated with the call are not the responsibility of the receiver, <u>BellSouth.net</u>, nor are they the responsibility of the receiving telecommunications carrier or network.

Q. WHEN THAT SAME BELLSOUTH CUSTOMER CALLS AN ISP CUSTOMER OF ITC^DELTACOM, DOES THE COST RESPONSIBILITY CHANGE?

A. No. The responsibility of that call still belongs to the caller and BellSouth. As a result, BellSouth and its customer should pay for the call. This fundamental concept of cost-causer responsibility helps to make markets work.

Consider a long distance call. We generally think of these calls as containing three parts: the originating access part, the long distance part, and the terminating access part. Each part may be handled by a different carrier, but each carrier is paid for its role in handling the call through a detailed compensation plan. Additionally, each carrier is paid by the calling party, either directly or indirectly.

Calls to the Internet are similar in that there are multiple parts to each Internet session. Assuming the call is initiated over standard phone lines, the initial part of the call, its delivery to the Internet service provider or ISP, may be handled by one or more carriers. Each of these carriers plays a roll in delivering the call to its destination, and as such, each should be compensated.

Q. SHOULD THE ISP BEAR SOME OF THE COSTS IN GETTING EACH CALL TO ITS LOCATION?

A. Yes, and in fact it does. The ISP pays for its local phone line, just as any user or receiver of telephone calls would.

Q. BESIDES THE PHONE LINE, SHOULD THE ISP BEAR SOME OF THE COST ASSOCIATED WITH GETTING EACH CALL TO THE ISP'S LOCATION?

A. Not in my view. The phone system in this country has been set up so that the calling party pays for the variable costs associated with each call, whether it is a local call or a long distance call. There are, of course, exceptions, such as, collect calls, 800-type calls, and dedicated or private line services. This system has been very successful.

Q. DOES THE ACT REQUIRE BELLSOUTH TO NEGOTIATE?

A. Yes, Section 251 (c)(1) requires BellSouth to negotiate in good faith. While BellSouth has no economic incentive to cooperate or negotiate with CLECs, ITC^DeltaCom has no choice but to negotiate. This places ITC^DeltaCom at an extreme disadvantage when trying to establish or renegotiate an interconnection agreement.

Consider the following situation. If BellSouth refuses to negotiate a fair price for handling of its traffic to ISPs, then ITC^DeltaCom could refuse to deliver this traffic for BellSouth. If ITC^DeltaCom chose not to deliver this traffic, then it would lose its ISP customers – they would have no incentive to remain customers of ITC^DeltaCom if it were unable or unwilling to deliver their traffic.

The threat of losing its ISP customers would force ITC^DeltaCom to deliver BellSouth's traffic at no charge. Faced with the higher cost of serving these ISPs, ITC^DeltaCom would be forced to raise its price. The increase in price could drive these customers to seek other alternative local service providers. As ISPs look for alternatives, they may find that no CLEC could provide them a better price. In the end they would be driven back to BellSouth. The only way to offset this significant market power is for regulators to either require BellSouth to negotiate a fair price, or to order a mutually beneficial reciprocal compensation that applies to ISP and local traffic.

Q. DOES THE FACT THAT THE FCC RECENTLY DECLARED ISP TRAFFIC JURISDICTIONALLY INTERSTATE MAKE RECIPROCAL COMPENSATION FOR ISP TRAFFIC ILLEGAL?

A. No. In fact the FCC has indicated that until it proposes rules, the states are free to determine whether to require reciprocal compensation for ISP-bound traffic. The FCC states:

> Nothing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.[2]

Therefore, the Authority should find that it is equitable to impose reciprocal compensation as an appropriate interim inter-carrier compensation mechanism for the recovery of costs associated with the delivery of ISP-bound traffic.

Q. PLEASE SUMMARIZE WHY THE AUTHORITY SHOULD REQUIRE RECIPROCAL COMPENSATION FOR TRAFFIC ORIGINATED BY CUSTOMERS OF BELLSOUTH THAT IS BOUND FOR ISP CUSTOMERS OF ITC^DELTACOM.

A. Section 251 of the Telecommunications Act of 1996 requires that BellSouth negotiate in good faith. Calls from customers of BellSouth to ISP customers of ITC^DeltaCom cause

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1 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, CC Docket No. 96-98; CC Docket No. 99-68, ¶ 27 (February 26, 1999).

ITC^DeltaCom to incur significant costs. The Authority should allow recovery of these costs through reciprocal compensation.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes it does. However, since the parties intend to continue negotiating after the submission of my testimony, I reserve to modify and update my testimony.