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August 9, 2000

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Ms. Blanca Bayó, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: FPSC Docket No. 991946-TP

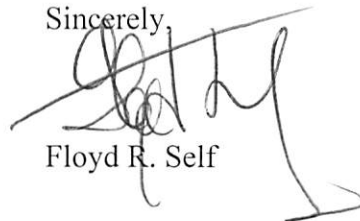
Dear Ms. Bayó:

Enclosed for filing on behalf of ITC^DeltaCom Communications, Inc. are an original and fifteen copies of their Motion for Leave to File Supplemental Authority in the above-referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,



Floyd R. Self

FRS/amb
Enclosure

cc: Nanette Edwards, Esq.

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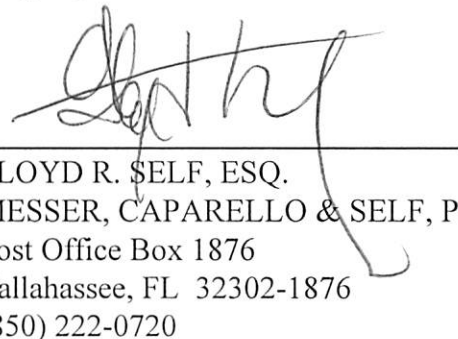
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning)	
complaint of ITC^DeltaCom Communications, Inc.)	
against BellSouth Telecommunications, Inc.)	Docket No. 991946-TP
for breach of interconnection terms, and request)	Filed: August 9, 2000
for immediate relief)	
<hr/>		

ITC^DELTA COM'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY

ITC^DeltaCom Communications, Inc. ("DeltaCom"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby requests leave to file supplemental authority in support of its Motion for Summary Final Order. On July 12, 2000, the North Carolina Utilities Commission ("NCUC") issued its order in Docket No. P-55, SUB 1197, granting DeltaCom's Motion for Judgement (the North Carolina equivalent of a motion for summary final order or summary judgement). The interconnection agreement at issue in the NCUC proceedings is the exact same interconnection agreement at issue in this Florida PSC proceeding as the DeltaCom-BellSouth interconnection agreement is a regional agreement. Undersigned counsel has attempted to contact counsel for BellSouth, but has been unable to discuss this Motion. A copy of the NCUC Order is attached for the Commission's review.

Respectfully submitted this 9th day of August, 2000.



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DOCUMENT NUMBER-DATE

09601 AUG-98

FPSC-RECORDS/REPORTING

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1197

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
ITC*DeltaCom Communications, Inc.,)
 Complainant,)
) ORDER CONCERNING
v.) RECIPROCAL
) COMPENSATION
BellSouth Telecommunications, Inc.,)
 Respondent)

BY THE COMMISSION: On March 13, 2000, ITC*DeltaCom Communications, Inc. (DeltaCom), filed a Complaint to Enforce Interconnection Agreement against BellSouth Telecommunications, Inc. (BellSouth).

In its Complaint, DeltaCom states that it had an Interconnection Agreement with BellSouth which was approved, as amended, by the Commission by Orders dated September 24, 1997, January 6, 1998, and September 30, 1998 (the "Agreement"). The Agreement provides for the payment of reciprocal compensation for the termination of local traffic on each other's networks, and defines local traffic as "any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA, or a corresponding Extended Area Service ('EAS') exchange." (Attachment B, ¶ 49.) DeltaCom alleges that BellSouth had breached the Agreement by failing to compensate DeltaCom for mutual traffic exchange. Specifically, DeltaCom alleges that BellSouth refused to compensate DeltaCom for terminating telephone traffic placed within the same local calling area from a BellSouth end user to an Internet Service Provider (ISP).

DeltaCom cited the Commission's decisions in Docket No. P-55, Subs 1027, 1094 and 1096, and Docket No. P-582, Sub 6, in which the Commission ruled that a call to an ISP is considered to be terminated when it is delivered to the ISP, and thus constitutes "local traffic" for purposes of reciprocal compensation under substantially similar Interconnection Agreements entered into by BellSouth. DeltaCom points out that the provisions of its Agreement with BellSouth were substantially similar to the counterpart provisions in the interconnection agreements in those dockets and, as such, the decisions in those dockets constitute binding precedent for BellSouth's obligation to pay reciprocal compensation for the termination of ISP traffic. DeltaCom also notes that the substantial majority of other State regulatory agencies which have considered this issue have agreed with the Commission and have ruled that ISP traffic is local traffic for purposes of reciprocal compensation.

DeltaCom requested the Commission to grant expedited consideration to its Complaint, enter an Order declaring BellSouth in breach of its Agreement with DeltaCom for failure to pay reciprocal compensation, order BellSouth to immediately pay DeltaCom reciprocal compensation for the termination of ISP traffic, order BellSouth to pay DeltaCom reciprocal compensation for termination of future ISP traffic, award DeltaCom the costs of this action, including its reasonable attorneys' fees, as provided for in the Agreement, and grant DeltaCom such other relief as is just and proper.

BellSouth filed its Answer to DeltaCom's Complaint on April 3, 2000. In its Answer, BellSouth relied heavily on the Federal Communications Commission's February 26, 1999, Declaratory Ruling in the local competition docket, CC Docket Nos. 96-98 and 99-68 (the "Declaratory Ruling"), and reiterated its well-known contention that ISP traffic is interstate in nature and therefore does not constitute "local traffic" under the parties' Agreement for purposes of reciprocal compensation. BellSouth also contended that the parties never reached the required meeting of the minds on whether ISP traffic would be subject to reciprocal compensation, and thus DeltaCom's breach of contract claim must fail. Finally, BellSouth took the position that the Agreement's reciprocal compensation provisions are unambiguous and do not require reciprocal compensation for ISP traffic. (See BellSouth's Answer, "General Response.")

On April 19, 2000, DeltaCom filed its Reply to Answer and Motion for Judgment, in which it requested the Commission to enter judgment in its favor as a matter of law without holding an evidentiary hearing, since (i) there are no issues of fact which would require a hearing in this matter, and (ii) DeltaCom is entitled to judgment under the Commission's prior precedent and as a matter of law.

The Commission entered an Order on May 1, 2000, setting DeltaCom's Motion for Judgment for oral argument on May 30, 2000.

On May 18, 2000, BellSouth filed a Motion for Evidentiary Hearing. In its motion, BellSouth argued that it is entitled to an evidentiary hearing under the Commission's Rules and Regulations because this is a formal complaint proceeding and because it had requested a hearing. BellSouth also contended that there are issues of fact concerning the parties' intent which require an evidentiary hearing, and therefore DeltaCom is not entitled to judgment as a matter of law.

DeltaCom filed a response in opposition to BellSouth's motion on May 24, 2000. DeltaCom noted that BellSouth is not entitled to an evidentiary hearing merely because it has requested one. Moreover, there are no issues of fact which require such a hearing, since the Agreement is unambiguous on its face and therefore the parties' purported intent is irrelevant to the issue of whether BellSouth is obligated to pay reciprocal compensation to DeltaCom under the Agreement.

By Order dated May 26, 2000, the Commission denied BellSouth's Motion for Evidentiary Hearing and ordered all discovery stayed pending the Commission's ruling on DeltaCom's Motion for Judgment.

This matter came on for oral argument before the Commission on May 30, 2000. At oral argument, DeltaCom noted that the Commission has consistently ruled in previous dockets that ISP traffic is local traffic for purposes of reciprocal compensation under substantially similar BellSouth Interconnection Agreements. DeltaCom also argued that the FCC's Declaratory Ruling does not affect the Commission's prior rulings, since (i) the FCC expressly deferred to state regulatory agencies on this issue in the Declaratory Ruling, and (ii) the United States Court of Appeals for the District of Columbia has in any event vacated the Declaratory Ruling. DeltaCom also argued that the Agreement is unambiguous and therefore its plain language controls as a matter of law. As a result, BellSouth's arguments concerning the parties' purported intent are irrelevant and an evidentiary hearing is unnecessary. Finally, DeltaCom pointed out that the Commission rejected BellSouth's request for an evidentiary hearing and entered judgment against BellSouth as a matter of law in Docket No. P-55, Sub 1096, under similar circumstances.

At oral argument, BellSouth again requested that the Commission hold an evidentiary hearing in this matter. BellSouth argued that the FCC's Declaratory Ruling requires the Commission to hold an evidentiary hearing in proceedings like this one to determine the parties' intent on a case-by-case basis. BellSouth also reiterated its position that the FCC has conclusively ruled that ISP traffic is interstate in nature, and therefore such traffic cannot constitute "local traffic" under the Agreement for purposes of reciprocal compensation. Finally, BellSouth again contended that there are issues of fact concerning the parties' intent with respect to the Agreement which prohibit the Commission from entering judgment as a matter of law in favor of DeltaCom. The Commission notes that BellSouth argued for the first time at oral argument that the Agreement is ambiguous with respect to compensation for ISP traffic, even though BellSouth initially asserted in its Answer that the Agreement is unambiguous.

WHEREUPON, the Commission now makes the following

FINDINGS AND CONCLUSIONS

1. That the reciprocal compensation provision contained in the Interconnection Agreement between BellSouth and DeltaCom are fully applicable to telephone exchange service calls that terminate to ISP customers when the originating caller and the called number are associated with the same local calling area.
2. That BellSouth shall bill and pay reciprocal compensation for all such calls.

3. That BellSouth shall immediately forward to DeltaCom all sums currently due together with required late payment charges, plus interest, in accordance with the Agreement.

4. That BellSouth shall forward to DeltaCom all sums coming due in the future for such traffic in accordance with the Agreement.

5. That DeltaCom is the prevailing party in this docket, and BellSouth shall reimburse DeltaCom for the costs and expenses, including reasonable attorneys' fees, incurred by DeltaCom in connection with this docket.

DISCUSSION

This docket is the first instance that the Commission has had to rule on the issue of reciprocal compensation in an "old" agreement -- i.e., one entered into prior to the FCC's Declaratory Ruling -- since the FCC Declaratory Ruling was issued in February 1999. For the reasons set out below, the Commission finds good cause to find for DeltaCom on the pleadings and direct BellSouth to pay reciprocal compensation for ISP-bound traffic. In its Complaint, DeltaCom stated that the outstanding balance due as of June 30, 1999, was \$1,401,022.01 (not including interest), which is continuing to increase on a daily basis.

There are essentially two main issues. The first is whether BellSouth is entitled to an evidentiary hearing. The second is whether the FCC's Declaratory Ruling mandates that the Commission change, or at least consider changing, its original view with respect to "old" agreements that ISP-bound traffic is local and entitled to reciprocal compensation.

Evidentiary Hearing. In its essentials, this matter involves the construction of certain language in the Interconnection Agreement between DeltaCom and BellSouth -- more specifically, whether ISP-bound traffic falls under the definition of "local traffic" and is thus entitled to reciprocal compensation.

The Agreement and subsequent Fourth Amendment of August 27, 1997, under Section VI(B), address the exchange and termination of local traffic and conditions for mutual compensation between DeltaCom and BellSouth. Paragraph 3 of the Fourth Amendment substituted Section VI(B) of the Agreement:

B. Compensation

With the exception of the local traffic specifically identified in subsection (C) hereafter, each party agrees to terminate local traffic originated and routed to it by the other party. Each Party will pay the other for terminating its local traffic on the other's network the local interconnection rate of \$.009 per

minute of use in all states. Each Party will report to the other a Percent Local Usage ("PLU") and the application of the PLU will determine the amount of local minutes to be billed to the other party. Until such time as actual usage data is available, the parties agree to utilize a mutually acceptable surrogate for the PLU factor. For purposes of developing the PLU, each party shall consider every local call and every long distance call. Effective on the first of January, April, July and October of each year, the parties shall update their PLU.

Section VI(A) of the Agreement provides as follows:

A. Exchange of Traffic

The parties agree for the purpose of this Agreement only that local interconnection is defined as the delivery of local traffic to be terminated on each party's local network so that customers of either party have the ability to reach customers of the other party, without the use of any access code or delay in the processing of the call. Local traffic for these purposes shall include any telephone call that originates and terminates in the same LATA and is billed by the originating exchange outside of BellSouth's service area with respect to which BellSouth has a local interconnection arrangement with an independent LEC, with which DeltaCom is not directly connected. The parties further agree that the exchange of traffic on BellSouth's Extended Area Service (EAS) shall be considered local traffic and compensation for the termination of such traffic shall be pursuant to the terms of this section. EAS routes are those exchange within an exchange's Basic Local Calling Area, as defined in Section A3 of BellSouth's General Subscriber Services Tariff.

Attachment B to the March 12, 1997 Agreement defines "local traffic" as follows:

49. "Local Traffic" means any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3, of BellSouth's General Subscriber Service Tariff.

As DeltaCom has pointed out, the provisions in its Agreement with BellSouth are substantially similar to the counterpart provisions in the interconnection agreements in a long line of other dockets where the Commission has found ISP traffic to be local. See, Docket No. P-55, Subs 1027 and 1096. In none of those cases did the Commission feel

constrained to hold an evidentiary hearing, even when requested.¹ Generally, parol evidence regarding intention or understanding only becomes relevant when the language is ambiguous. The Commission believes that the Agreement is not ambiguous with respect to the parties' obligations to pay reciprocal compensations for terminating ISP traffic. Therefore, the unambiguous plain language of the Agreement controls and the parties' purported intent is irrelevant as a matter of law. See, e.g., Hinkle v. Bowers, 88 N.C. App. 387, 363 S.E.2d 206 (1988).

In any event, the Commission notes that, conspicuous by its absence, was any attempt by BellSouth to establish a mechanism to separate ISP traffic from local calls or otherwise provide for differential treatment for such traffic -- including its own traffic.

Declaratory Ruling. In its arguments and Brief, BellSouth went to great lengths to argue that the FCC's Declaratory Ruling mandates the Commission to, in effect, reverse its prior rulings and to reject its alleged adherence to the now discredited "two-call" theory in favor to the FCC's "one call" theory.

As a preliminary matter, the Commission would observe that the characterization that the Commission has used a "two-call" theory is not entirely accurate. The Commission has never said in so many words that there were two calls. Rather, the Commission has held that "the call terminates when it is delivered to the called local exchange telephone number of the end user ISP." See February 26, 1998 Order in Docket No. P-55, Sub 1027 at 6. Thus, the Commission has identified a single call but has remained resolutely agnostic concerning the nature of the communication traveling into cyberspace.

The Commission, of course, recognizes that the FCC has rendered an opinion that ISP-bound traffic is essentially non-local interstate traffic. The Commission has been careful to defer to this ruling in any arbitration concerning "new" interconnection agreements -- i.e., agreements entered into subsequent to the FCC's Declaratory Ruling -- by requiring an interim inter-carrier compensation mechanism subject to true-up based on the FCC's ultimate decision regarding methodology. The Commission has continued to do this even in spite of the fact that the D.C. Circuit Court of Appeals vacated and remanded the FCC's Declaratory Ruling and so cast it into limbo, at least for the time being. See, Bell Atlantic Tel. Co. v. FCC, No. 99-1094 (D.C. Cir March 24, 2000).

But this matter involves an "old" agreement and, despite BellSouth's arguments that the Declaratory Ruling does not permit the Commission to apply its previous theories, this

¹ The only exception to not having evidentiary hearings was Docket No. P-55, Sub 1094, involving a complaint of MCImetro Transmission Services, Inc., against BellSouth concerning their interconnection agreement. However, the reciprocal compensation issue was just one issue among many, and BellSouth presented little evidence on this issue. In any event, the result was identical to that in the other cases.

is exactly what the Declaratory Ruling does permit. In fact, one would be hard pressed to find a better example in recent regulatory law where a body such as the FCC has gone to such great lengths to reassure state commissions that nothing in its decisions was designed to overturn or call into question previous decisions. See, e.g., Para. 1 ("parties should be bound by their existing interconnection agreements, as interpreted by state commissions"); Para. 21 ("We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions. . . apply to ISP-bound traffic"); Para. 24 ("Nothing in this Declaratory Ruling, therefore, necessarily should be construed to question any determination a state commission has made, or may make in the future, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements"). The FCC also pointed out that the rule it intended to adopt would govern prospective compensation. See, e.g., Paras. 28 and 30.

BellSouth cited to Para. 27 of the Declaratory Ruling for the proposition that the Commission must reconsider its decision on the local nature of ISP traffic under "old" agreements. Para. 27 does nothing of the sort. It specifically states that a state commission might conclude, in light of the Declaratory Ruling, "that it is not necessary to re-visit those determinations." It also noted that the Declaratory Ruling "might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server. . ." (emphasis added), but even this was not meant to preclude state commissions from applying appropriate legal or equitable principles and requiring the payment of reciprocal compensation for ISP traffic pursuant to "old" agreements.

As can be seen, the FCC's language is permissive, not mandatory. The Commission finds it inappropriate to revise its conclusions regarding reciprocal compensation for ISP traffic pursuant to "old" agreements for four major reasons. First, the Interconnection Agreement provides for the payment of reciprocal compensation for local traffic. The Agreement does not identify a separate class of seven-digit calls to ISPs as either interstate or exempt from reciprocal compensation; i.e., there is no exception for traffic that is transported and terminated to an ISP. BellSouth could have specifically excluded ISP traffic from the definition of the term "local traffic" as set forth in the Agreement, but did not do so. Second, the Commission is confident in the soundness of its original decisions; the fact that the FCC has sought to supersede such reasoning on a prospective basis is of no particular significance when it comes to "old" agreements.² Third, to accept the full logic of BellSouth's argument would be to say there can be no compensation for ISP traffic because none has been otherwise provided for. That would be manifestly unjust because there are costs which are incurred in terminating such traffic.

² The FCC implicitly recognized the responsibility of interpretations that the traffic was local when it said: ". . . we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." Declaratory Ruling, Para. 25.

Even if one were to institute an interim mechanism, this would imply a post hoc revision of the rate and its design with all the attendant difficulties. Fourth, the Commission has already adopted a common-sense policy that is both legally acceptable and administratively simple -- that is, ISP traffic is local traffic for the purposes of "old" agreements, but for "new" agreements such traffic is to be compensated by an interim inter-carrier compensation mechanism to be trued-up once the FCC has ruled. The Commission notes in passing that these new reciprocal compensation rates are closer to cost because they are composed of TELRIC-based unbundled network element rates and tend to be substantially lower than the first-generation reciprocal compensation rates. This by itself should remove a major irritant that has led local exchange companies especially to protest earlier agreements.

Furthermore, it should be noted that the weight of authority in other states is that the Declaratory Ruling does not affect the application of reciprocal compensation provisions to ISP calls under "old" agreements. Before the Declaratory Ruling, 27 state commissions issued decisions concluding that reciprocal compensation applies to ISP calls. Since the Declaratory Ruling, at least 18 state commissions have concluded that the decision does not affect their previous findings.³ Only three state commissions have ruled otherwise -- Louisiana, New Jersey, and Massachusetts. Of particular interest is the Alabama case involving Telecom Group, Inc. and DeltaCom and BellSouth (Docket No. 28619, March 4, 1999) interpreting the same Agreement filed and approved by this Commission. The Alabama Public Service Commission concluded that reciprocal compensation applies to ISP traffic because the definition of "local traffic" did not exclude ISP traffic and the parties, the regulatory bodies, and industry have consistently treated ISP traffic as local. This decision was sustained by the U.S. District Court for the Middle District of Alabama. See, BellSouth Telecommunications, Inc. v. ITC-DeltaCom Communications, Inc., et al., U.S. District Court, Middle District of Alabama, Civil Action 99-D-287-N (November 15, 1999). There is nothing in the FCC's Declaratory Ruling which requires or causes the Commission to reconsider and depart from its previous decisions requiring reciprocal compensation for ISP traffic under "old" interconnection agreements, including the Agreement at issue in this complaint proceeding.

Lastly, citing Section XXV.A. of the Agreement, DeltaCom is requesting reasonable costs and attorney's fees. The relevant section reads: "The Party which 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." This Section appears straightforward and BellSouth has not addressed the question

³ Commissions in the following states either have issued a decision after the ISP order determining -- or reconfirming -- that reciprocal compensation applies to calls to ISPs, or have reconfirmed or denied petitions for reconsideration of similar decisions issued before the ISP Order: Alabama, California, Colorado, Delaware, Florida, Georgia, Hawaii, Indiana, Maryland, Minnesota, Nebraska, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, and Washington.

despite ample opportunity to do so. Therefore, as the prevailing party, DeltaCom is entitled to reasonable costs, including reasonable attorney's fees.

For all of the foregoing reasons, the Commission finds good cause to require BellSouth to pay reciprocal compensation to DeltaCom for the ISP-bound traffic at issue in this docket.

IT IS, THEREFORE, ORDERED as follows:

1. That the reciprocal compensation provision contained in the Interconnection Agreement between DeltaCom and BellSouth is fully applicable to telephone exchange service calls that terminate to ISP customers when the originating caller and the called number are associated with the same local calling area, and that BellSouth shall bill and pay reciprocal compensation for such calls.
2. That BellSouth shall immediately forward to DeltaCom all sums currently due for such reciprocal compensation together with required late payment charges, plus interest, in accordance with their Interconnection Agreement.
3. That BellSouth shall forward to DeltaCom all sums coming due in the future for such reciprocal compensation in accordance with the Agreement.
4. That, inasmuch as DeltaCom is the prevailing party in this docket, BellSouth shall reimburse DeltaCom for the reasonable costs and expenses, including reasonable attorney's fees, incurred by DeltaCom in accordance with the parties' Agreement. DeltaCom shall forward to BellSouth an invoice for such costs and expenses, and BellSouth shall have ten days from the date of such invoice to pay DeltaCom the amount reflected in such invoice or to file with the Commission specific objections to the invoice.

ISSUED BY ORDER OF THE COMMISSION.

This the 12th day of July, 2000.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of ITC^DeltaCom Motion for Leave to File Supplemental Authority in Docket No. 991946-TP have been served upon the following parties by Hand Delivery (*) and/or U. S. Mail this 9th day of August, 2000.

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