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October 17, 2003

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**Re: Docket No. 030137-TP (ITC^DeltaCom)**

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Statement of Issues and Positions and Post Hearing Brief, which we ask that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Andrew D. Shore (EO)

Andrew D. Shore

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

**CERTIFICATE OF SERVICE**
**Docket No. 030137-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 17th day of October, 2003 to the following:

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Andrew D. Shore

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

| | | |
|---|---|---|
| In RE: | | |
| Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996 | ) | Docket No. 030137-TP |
| | ) | Filed: October 17, 2003 |

BELLSOUTH TELECOMMUNICATIONS, INC.'S
STATEMENT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF

## INTRODUCTION

There are three common characteristics to the issues raised by DeltaCom in this proceeding: DeltaCom wants relief irrespective of whether the 1996 Act obligates BellSouth to provide it; DeltaCom wants the relief immediately without concern for the impact upon the rest of the industry; and DeltaCom wants the relief for free, even if BellSouth incurs costs to provide it. DeltaCom's mantra is that the Commission should consider the law in terms of whether it prohibits the Commission from ordering BellSouth to incur several new obligations for DeltaCom's benefit, not whether the law requires BellSouth to perform such tasks. Not only is such a "standard" irrational, it is inconsistent with the language of the 1996 Act, which is written in terms of obligations, not technical possibilities.[1] Section 252(c) of the 1996 Act requires this Commission to ensure that its determinations in this arbitration meet the requirements of Section 251. BellSouth simply requests that the Commission apply the arbitration standards set forth in the 1996 Act, and reject DeltaCom's request to apply the "we want it; we want it now;

[1] Section 251(b) is entitled "*OBLIGATIONS* OF ALL LOCAL EXCHANGE CARRIERS" and §251(c) is entitled "ADDITIONAL *OBLIGATIONS* OF INCUMBENT LOCAL EXCHANGE CARRIERS." (Emphasis added)

and we want it for free" standard that underlies virtually every issue that DeltaCom raised in this arbitration.

## ISSUES POTENTIALLY IMPACTED BY THE TRO

As the Commission is well aware, the FCC recently released the TRO. Notwithstanding the efforts undertaken by CLECs and the FCC to have them heard before any other court, the numerous legal challenges to the TRO have been consolidated before the D.C. Circuit Court. Among other issues pending before the D.C. Circuit are motions to stay the effectiveness of the TRO pending the appeals from it. There are a number of issues in this Section 252 arbitration that could be impacted if the TRO remains effective. BellSouth believes that issues 9, 11, 21, 25, 26, 36, 37 and 57 are impacted to some degree by the TRO. However, given the length and complexity of the TRO, BellSouth has not yet completed its analysis of the TRO and the impact the TRO will have on BellSouth's operations. BellSouth offers excerpts from the TRO in this Brief only to demonstrate the directives of the FCC as they seem to relate to some of the issues raised in this arbitration.

## STATEMENT OF ISSUES AND BELLSOUTH'S POSITIONS

**ISSUE 2(a): Should BellSouth provide DeltaCom, for the term of this Agreement, the same directory listing language found in the BellSouth/AT&T Interconnection Agreement?**

*** Pursuant to 47 U.S.C. § 252(i), DeltaCom can adopt directory listing terms from the Commission-approved agreement between BellSouth and AT&T, but such terms may only be incorporated into DeltaCom's agreement for the term of the AT&T contract. ***

**ISSUE 2(b): Should BellSouth be required to provide an electronic feed of the directory listings of DeltaCom customers?**

*** The directory listing obligations of the 1996 Act do not extend to directory publishing issues. The Commission thus should not address this issue in this section 252 arbitration. Alternatively, BellSouth should not be required to develop the processes to provide an electronic feed of directory listings for DeltaCom customers. ***

**ISSUE 2(c): Should DeltaCom have the right to review and edit its customers' directory listings?**

*** DeltaCom has the right, pursuant to its contract with BAPCO, to review and edit its customers' directory listings. This directory publishing issue is not the proper subject of a section 252 arbitration. ***

These issues involve DeltaCom customers' directory listings that appear in the telephone book. While DeltaCom's statement of the issues makes it appear as if these issues impact only BellSouth, DeltaCom's testimony suggests that DeltaCom is seeking relief from BellSouth Advertising & Publishing Company ("BAPCO"), an unregulated affiliate of BellSouth. To the extent that DeltaCom is seeking relief from BAPCO, such relief is inappropriate under the 1996 Act. Directory publishing is a matter that should be negotiated between DeltaCom and BAPCO.

The Commission does not have jurisdiction over BAPCO. Consequently, this Commission may not decide issues between BAPCO and a CLEC in Section 252 arbitrations (or other proceedings). In the event the Commission decides to consider these issues in this proceeding (which it should not), however, BellSouth offers the following discussion on each of the issues.

Addressing Issue 2(a), pursuant to 47 USC § 252(i), DeltaCom can adopt rates, terms and conditions for any interconnection, service, or network element from an interconnection agreement filed and approved pursuant to 47 USC § 252, under the

same terms and conditions as the original Interconnection Agreement. To the extent DeltaCom adopts rates, terms and conditions for directory listings from an agreement filed and approved by this Commission, such an adoption would be incorporated into DeltaCom's agreement for the original term of the adopted agreement (i.e., for the term of the AT&T agreement). [2] The language included in BellSouth's proposal should replace the adopted language when it expires.

Addressing Issue 2(b), this is not a proper subject of an arbitration proceeding,because it has absolutely nothing to do with nondiscriminatory access to directory listings, and relates instead to directory publishing. BAPCO is a legal entity distinct from BellSouth Telecommunications, Inc. (Tr. 350) It is not regulated by the Commission.

DeltaCom has a separate agreement with BAPCO pursuant to which DeltaCom receives review pages prior to the close of directories. (Tr. 350) Indeed, DeltaCom's Ms. Conquest admitted that BAPCO is required, pursuant to its contract with DeltaCom, to provide DeltaCom with a reasonable opportunity to review and correct its subscriber listings in advance of publication, and that BAPCO fulfills that obligation. (Tr. 350-51) Moreover, Ms. Conquest testified that DeltaCom has never asserted that BAPCO has in any way failed to fulfill its contractual obligation to provide DeltaCom with a reasonable opportunity to review and correct, if necessary, its subscriber listings in advance of publication. (Tr. 351)

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[2] *See*, Memorandum Opinion and Order, *In the Matter of Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198 (Rel. August 5, 1999) at fn 27, wherein the FCC ruled that "... the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or the portions of that agreement), including its original expiration date."

Alternatively, and without waiving the foregoing position on jurisdiction, BellSouth provides access to its directory assistance database and charges appropriate fees to do so in accordance with both its Agreement and its tariff; however, there is no legal requirement that BellSouth provide an electronic feed of directory listings for DeltaCom customers. DeltaCom seeks to have the Commission require BellSouth to incur the expense associated with creating a specialized system to provide an electronic feed for directory listings solely for DeltaCom, notwithstanding the fact that DeltaCom is not willing to pay for it. BellSouth testified, unequivocally, that it does not possess such capabilities. "BellSouth is not required to provide (and does not have the system capabilities to provide) an electronic feed of directory listings for DeltaCom customers." (Tr. 561)

Addressing Issue 2(c), DeltaCom has the right to review and edit its customers' directory listings through access to their customer service records. BellSouth does not have a database through which review and edits of directory listings may be made. This issue is between DeltaCom and BAPCO and should not be the subject of an arbitration with BellSouth.

Moreover, as noted above, Ms. Conquest admitted that BAPCO provides DeltaCom with review pages of listings prior to the closing of the directory. DeltaCom can review its listings and provide any necessary edits directly to BAPCO. DeltaCom, however, would prefer not to incur the cost associated with making certain that its listings are accurate and seeks instead to improperly shift that cost to BellSouth.

Finally, DeltaCom's claim that it needs an electronic feed to review its customer listings prior to publication in BAPCO's directories in order to "protect itself from costly

adjustments, litigation and customer dissatisfaction," (Tr. 326), rings hollow. The fact, which Ms. Conquest acknowledged, is that DeltaCom is unable to cite even a single instance of one of its customers' listings being omitted or incorrectly printed. (Tr. 349)

**ISSUE 9: Should BellSouth be required to provide interfaces for OSS to DeltaCom which have functions equal to that provided by BellSouth to BellSouth's retail division?**

*** The 1996 Act requires that BellSouth provide nondiscriminatory access to its OSS. There is no legitimate need for the parties' interconnection agreement to state otherwise, especially since DeltaCom admits that its proposed language would not impose any greater obligation on BellSouth. ***

There is no dispute that the 1996 Act requires BellSouth to provide CLECs, including DeltaCom, with nondiscriminatory access to its OSS. Not only did this Commission and the FCC find, after exhaustive analysis, in BellSouth's 271 proceedings, that BellSouth is fulfilling that obligation, DeltaCom admitted at the hearing that BellSouth continues to provide nondiscriminatory access to its OSS:

> Q. When you say we're compliant then what your testimony is that Bellsouth is providing you with nondiscriminatory access to its OSS?
>
> A. I'd like to use an example if I could.
>
> COMMISSIONER DEASON: Could you answer –
>
> THE WITNESS: The answer is yes. I'm sorry. . . .

(Tr. 353) In addition, there are numerous metrics and associated penalties in place to ensure that BellSouth remains in compliance.

The Commission should reject DeltaCom's attempt to replace the nondiscriminatory access standard set forth in the 1996 Act. The FCC reaffirmed its

position regarding access to OSS in the TRO: "We thus decline to ... change our approach to OSS ... but note that Covad remains entitled on a going-forward basis to nondiscriminatory access to OSS as defined herein." (TRO at ¶ 568) Ms. Conquest conceded that the language DeltaCom proposes on this issue would not require BellSouth to do anything that it is not already obligated to do pursuant to the 1996 Act. (Tr. 354-55) Thus, by DeltaCom's own admission, there is no reason for the Commission to direct the parties to include DeltaCom's proposed language in their interconnection agreement. The Commission instead should accept BellSouth's proposed language, which affirms BellSouth's commitment to continue to comply with the requirement that it provide nondiscriminatory access to its OSS.

**ISSUE 11(a): Should the interconnection agreement specify that the rates, terms and conditions of the network elements and combinations of network elements are compliant with state and federal rules and regulations?**

*** No. The unbundling requirements of Section 251 are federally mandated. State Commission action in an arbitration of an interconnection agreement must be consistent with Section 251. There is no need, and, indeed, it would be inappropriate, to recite that the federally mandated contract complies with state law. ***

DeltaCom suggests that every state law addressing the rates, terms, and conditions under which BellSouth provides unbundled network elements ("UNEs") should be referenced in the Interconnection Agreement. BellSouth disagrees -- DeltaCom's proposal is in direct conflict with the 1996 Act. The standards governing this arbitration are set forth in Section 252, which provides:

> STANDARDS FOR ARBITRATION – In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall –

> (1) ensure that such resolution and conditions meet the requirements of section 251; including the regulations prescribed by the Commission pursuant to section 251;
>
> (2) establish any rates for interconnection services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

The unbundling requirements of Section 251 are federally mandated and do not reference state law. The reason for this is obvious – state law is not allowed to frustrate the national regulatory scheme as implemented by the FCC. Although a state commission has the authority to enforce state access and interconnection obligations, it may do so only to the extent "consistent with the requirements" of federal law and so as not to "substantially prevent implementation" of the requirements and purposes of federal law. 47 U.S.C. §251(d)(3).

The FCC recently considered the potential impact of state law on the federal unbundling regime and concluded:

> We also find that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, is limited by the restraints imposed by subsections 251(d)(3)(B) and (C). We are not persuaded by AT&T's argument that a state commission may impose additional unbundling obligations in the context of its review of an interconnection agreement without regard to the federal scheme.... Therefore, we find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.
>
> ... If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)I. Similarly, we recognize that in at least some instances existing state requirements will not be

> consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.

(TRO, at ¶¶ 194, 195). The FCC's reasoning is fatal to DeltaCom's proposal to require that BellSouth adhere to all state unbundling requirements, whether or not consistent with federal law.

To the extent the Commission is addressing unbundling under Section 251 of the 1996 Act or pursuant to directives of the FCC, then BellSouth is amenable to adding language to that effect to the interconnection agreement. DeltaCom is, however, attempting to circumvent federal unbundling obligations by having BellSouth be bound by state law, even if those state laws are inconsistent with federal law. The Commission should decline DeltaCom's offer and should adopt BellSouth's proposed language.

**ISSUE 21: Does BellSouth have to make available to DeltaCom dark fiber loops and transport at any technically feasible point?**

*** No. By definition, a UNE loop must terminate at a distribution frame and transport is between wire centers or switches. DeltaCom purchases facilities at other locations pursuant to federal tariff. The fact that DeltaCom would prefer to pay TELRIC rates for such facilities does not justify creating a new UNE. ***

This issue involves the definition of unbundled dark fiber loops and DeltaCom's request to create a new UNE. It is driven entirely by DeltaCom's attempt to get dark fiber segments at prices cheaper than DeltaCom could either self-provision or purchase them through BellSouth's FCC Dry Fiber Tariff.

The local loop network element, whether dark fiber or otherwise, is defined as a "transmission facility between a distribution frame (or its equivalent) in an incumbent

LEC central office and the loop demarcation point at an end-user customer premises."[3] Likewise, interoffice transmission facilities (including dark fiber transport) have been defined as transmission facilities between wire centers or between switches.[4] Per the TRO, the definition of dedicated transport will be limited to "transmission facilities connecting incumbent LEC switches and wire centers within a LATA." (TRO at ¶365) And as to common transport, it apparently will only be a UNE in those locations where switching is ultimately determined to be a UNE. (TRO at ¶534)

Currently, BellSouth makes unbundled dark fiber loops and transport available to all CLECs at their collocation arrangements consistent with existing FCC Rules. In fact, as of April 2003, BellSouth had 43 unbundled fiber arrangements for 12 different customers across BellSouth's region. (Tr. 527) Each of those unbundled fiber arrangements was delivered to a CLEC collocation space within a BellSouth wire center. (Id.).

DeltaCom's position is contrary to the law. What DeltaCom actually seeks is the ability to create a new dark fiber UNE to and from points of DeltaCom's choosing, even if the facility does not run to a central office or a switch. Such a facility would conflict with the FCC's definition of an unbundled dark fiber loop or transport. In fact, DeltaCom's technical expert, Mr. Brownworth, admitted that the dark fiber connections DeltaCom seeks do not meet the FCC's definition of a loop. (Tr. 292-93) As far as the creation of a new dark fiber UNE is concerned, even if the Commission had the authority to create a new dark fiber UNE, DeltaCom put forth absolutely no evidence of impairment or necessity – a prerequisite to the establishment of any UNE.

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[3] 47 C.F.R. 51.319 (a)(1)

[4] *See*, 47 C.F.R. 51.319 (d)(1)

To the extent DeltaCom seeks dark fiber segments that run between customer locations or between other locations not defined as either loops or transport under the FCC's definitions, BellSouth has a federal Dry Fiber tariff offering to accommodate DeltaCom's needs.[5] DeltaCom is well aware of the existence of this tariff and, indeed, purchases point-to-point dry fiber today pursuant to that tariff. (Tr. 289) DeltaCom admits that it simply would rather have these facilities at TELRIC-based UNE prices than at the tariffed rate it pays today. (Tr. 289-90)

**ISSUE 25: Should BellSouth continue providing an end-user with ADSL service where DeltaCom provides UNE-P local service to that same end user on the same line?**

*** No. ***

As the Commission is well aware, issues addressing whether BellSouth should be required to provide DSL service to customers receiving voice service from a CLEC are being addressed by the Commission in Docket No. 020507-TL. Both BellSouth and DeltaCom are parties to that proceeding. BellSouth incorporates by reference the testimony and legal arguments it presented in that case, and agrees that resolution of the issues in that proceeding, which is scheduled to be decided by the Commission before an Order is issued in this arbitration, will govern the outcome of this issue.

**ISSUE 26(a): Is the line cap on local switching in certain designated MSAs only for a particular customer at a particular location?**

*** No. ***

**ISSUE 26(b): Should the Agreement include language that prevents BellSouth from imposing restrictions on DeltaCom's use of local switching?**

*** No. The only applicable restrictions are set forth in the FCC's rules. ***

[5] *See*, BellSouth FCC Tariff No. 1, §§ 7.2.10 and 7.5.13.

The issue is whether the local switching exemption in FCC Rule 51.319(c)(2), which provides that so long as certain enumerated requirements are met, "an incumbent LEC shall not be required to unbundle local circuit switching for requesting telecommunications carriers when the requesting telecommunications carrier serves end-users with four or more voice grade (DSO) equivalents or lines," applies when the customer's four lines are not all located at the same premises. The Commission previously addressed this issue in the arbitration between BellSouth and AT&T, ruling that "BellSouth will not be allowed to aggregate lines provided to multiple locations of a single customer, within the same MSA, to restrict AT&T's ability to purchase local circuit switching at UNE rates to serve any of the lines of the customer." (Order No. PSC-01-1951-FOF-TP, September 28, 2001, at 7) Even though BellSouth disagrees with that decision, it is, as Ms. Blake testified, willing to incorporate language into its interconnection agreement with DeltaCom that reflects the Commission's ruling on this issue in the AT&T arbitration. (Tr. 395-96)

With respect to part (b) of this issue, BellSouth simply seeks to avail itself of the switching exemption as set forth by the FCC, while DeltaCom seeks to avoid those same rules by adding language into the interconnection agreement that will impose burdens on BellSouth that are not required by law. The Commission should reject DeltaCom's attempt to add such language to the interconnection agreement.

**ISSUE 26(c): Is BellSouth required to provide local switching at market rates where BellSouth is not required to provide local switching as a UNE? Does the Florida Public Service Commission have the authority to set market rates for local switching? If so, what should be the market rate?**

*** BellSouth is required to provide local switching to CLECs pursuant to section 271 in cases where switching is not a UNE under section 251. The Commission does not

have the authority to determine in this section 252 arbitration the appropriate rate for switching when it is not a UNE. ***

BellSouth acknowledges its obligation to provide local switching under Section 271 of the 1996 Act, even in those instances where local switching is no longer a UNE under Section 251 of the Act. The sole issue is the price BellSouth charges for non-UNE local switching.

The Commission's authority to set rates in a Section 252 arbitration proceeding is limited to the establishment of "rates for interconnection services, or network elements according to subsection (d)," which the FCC determined is the TELRIC pricing standard. 47 U.S.C. § 252c(2). The TELRIC pricing rules do not apply to non-UNE switching; thus, the Commission has no jurisdiction, in the context of a Section 252 arbitration proceeding, to set such rates. The appropriate pricing standard for non-UNEs is found in Sections 201 and 202 of the 1996 Act, which require "just and reasonable" rates.[6] Thus, the FCC (not state commissions) will be the final arbiter of whether a non-UNE rate is "just and reasonable" under the 1996 Act.

The FCC discussed the issue of just and reasonable rates, including an analysis of jurisdiction and compliance in the TRO:

> Whether a particular checklist element's rate satisfies the just and reasonable standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy the standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, **a BOC might demonstrate that the rate at which it offers**

[6] *See, UNE Remand Order*, 15 FCC Rcd at 3905, ¶470.

**a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.**

(TRO, at ¶664) (emphasis added). The FCC has thus reserved for itself the jurisdiction to determine whether a rate is just and reasonable through either proceedings assessing Section 271 long distance applications or federal complaint proceedings. Significantly, BellSouth is not aware of any challenge to BellSouth's switching market rates during the course of BellSouth's Section 271 proceedings either at the state or federal level.

Moreover, even if this Commission had authority to determine whether BellSouth's switching rate is "just and reasonable" under the 1996 Act (which it does not), BellSouth clearly passes the test. As quoted above, the FCC concluded that a BOC can demonstrate that rates are just and reasonable by showing that it has entered into contracts pursuant to which other carriers have voluntarily agreed to pay the rate in question. Virtually every BellSouth Interconnection Agreement approved by the Commission, including the current BellSouth/DeltaCom Interconnection Agreement,[7] contains the very market rates about which DeltaCom complains. (Tr. 110-15) This showing alone demonstrates that BellSouth's market rates are just and reasonable.[8] Thus, the Commission should reject DeltaCom's position on this issue.

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[7] *See*, BellSouth/DeltaCom Interconnection Agreement dated April 24, 2001, Attachment 11, pages 33-34; *See also*, Amendment to the Interconnection Agreement signed by DeltaCom on September 19, 2002.

[8] DeltaCom contends that simply because the market rate is higher than the TELRIC rate, the market rate must be unreasonable. However, DeltaCom offers no comparison of BellSouth's market rate to the market rate other providers in BellSouth's region charge for local switching. Likewise, DeltaCom offers no evidence of DeltaCom's internal switching costs, or the costs to DeltaCom for placing its own switch, both of which could exceed BellSouth's market rate.

**ISSUE 36(a): Should DeltaCom be able to connect UNE loops to special access transport?**

*** No. A prohibition on co-mingling, which the FCC has previously instituted, is necessary and appropriate to prevent substantial market dislocations and to protect an important source of funding for universal service. To the extent the FCC changes its rule in the TRO, BellSouth will comply. ***

**ISSUE 36(b): Does BellSouth combine special access services with UNEs for other CLECs?**

*** No. ***

This issue addresses whether BellSouth has an obligation to combine special access (tariffed) services with unbundled UNE loops, a concept known as "co-mingling." Pre-TRO, the FCC's rule regarding combinations, 47 C.F.R. § 51.315, addressed only the combining of UNEs.[9] The rule did not require, or even mention, the combining of special access services with UNEs. Further, the FCC specifically addressed this matter in its Supplemental Clarification Order and rejected MCI's request to eliminate the prohibition on co-mingling.[10] A prohibition on co-mingling is necessary and appropriate to prevent substantial market dislocations and to protect an important source of funding for universal service.

The TRO purports to remove the prohibition on co-mingling. (TRO at ¶584) Issues such as the pricing of co-mingled elements will, nevertheless, be dependent upon further state proceedings identifying which elements will remain UNEs. (TRO at fn.

[9] 47 C.F.R. 51.315.

[10] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order Clarification, CC Docket No. 96-98, FCC 00-183, 15 FCC Rcd 9587, para. 28. (rel. June 2, 2000), at ¶28 ("Supplemental Order Clarification").

1796) However, if the TRO is stayed at the time the Commission makes a decision on this issue, the Commission should follow the prior FCC rule prohibiting co-mingling. If the TRO is effective or becomes effective subsequent to such a decision, the parties would utilize the change of law provisions in the Interconnection Agreement to effectuate the requirements of the TRO.

**ISSUE 37: Where DeltaCom has a special access loop that goes to DeltaCom's collocation space, can that special access loop be converted to a UNE loop?**

*** BellSouth is not obligated to convert a special access loop to a UNE loop." ***

DeltaCom concedes that there is no FCC rule or order that obligates BellSouth to convert a special access loop to a UNE loop. (Tr. 277) The "conversion" requirements specified by the FCC in the Supplemental Order Clarification apply only to conversions of special access circuits to loop and transport (EEL) UNE combinations. That is not the type of conversion DeltaCom seeks in this arbitration proceeding. (Tr. 276) Notably, although DeltaCom witness Mr. Brownworth testified under oath that a stand-alone loop qualifies as a UNE combination because DeltaCom is billed for the loop, cross-connect, and POP bay when it purchases a stand-alone loop, he admitted on cross-examination that DeltaCom's position in its pre-hearing submissions with the Commission has been that a stand-alone loop "is not a combination." (Tr. 277-78) Mr. Brownworth conceded, and he had no choice, that his testimony was inconsistent with DeltaCom's position statement, to which DeltaCom is bound. (Tr. 278-79) That is hardly controversial, because there is not, and never has been a POP bay UNE, nor a cross-connect UNE on the FCC's (or anyone else's) list of UNEs. Thus, they cannot be part of a UNE combination.

The issue of conversions is addressed in the TRO, but the ultimate issue of whether a conversion is allowed will be dependent upon further state proceedings identifying which elements will remain UNEs and whether CLECs meet certain eligibility requirements. (TRO at ¶586) The safe harbor requirements set forth in the Supplemental Order Clarification will apparently be superceded upon the TRO becoming effective, and the new eligibility requirements are very complex. (TRO at ¶¶ 590, 591-629) Further, the FCC declined to set forth in the TRO a definitive conversion process, leaving such a process to be worked out between the CLECs and ILECs. (TRO at ¶585)

Currently, DeltaCom has a number of options available by which it can accomplish this facility conversion it seeks here. DeltaCom can order stand-alone UNEs in accordance with its Interconnection Agreement and then transfer the traffic currently routed over the existing special access circuit to those UNEs. (Tr. 401) Also, DeltaCom can submit a New Business Request to BellSouth to try and reach an accommodation on rates, terms and conditions under which BellSouth would perform such a conversion for DeltaCom. (Tr. 409) While BellSouth stands ready to try and reach such an accommodation, DeltaCom refuses to pay BellSouth for the provisioning and installation costs, billing and repair system modification costs, and the conversion process development costs BellSouth incurs in performing these conversions. As usual, DeltaCom wants the work performed; they just do not want to pay for it, irrespective of the fact that BellSouth incurs costs in performing the work. (Tr. 414)

As with co-mingling (Issue 36), if the TRO is not effective when the Commission makes a decision on this issue, the Commission should reject DeltaCom's position and direct

DeltaCom to avail itself of and pay for the other options that are available. If the TRO becomes effective subsequent to such a decision, the parties would utilize the change of law provisions in the Interconnection Agreement to effectuate the requirements of the TRO.

**ISSUE 44: Should the interconnection agreement set forth the rates, terms and conditions for the establishment of trunk groups for operator services, emergency services, and intercept?**

*** No. These services are not UNEs and are, therefore, provided pursuant to tariff, not the parties' interconnection agreement. ***

**ISSUE 46: Does BellSouth have to provide BLV/BLVI to DeltaCom? If so, what should be the rates, terms and conditions?**

*** BLV/BLVI are tariffed services, not UNEs, and the terms by which BellSouth makes them available are, therefore, not appropriate for a section 251 arbitration. BellSouth will provide BLV/BLVI at parity with how it provides such functionality to its retail customers. ***

This issue involves an attempt by DeltaCom to convince this Commission to order BellSouth to provide a retail service that BellSouth does not want to provide. While only tangentially related to the overall issue, DeltaCom has raised the issue of whether rates, terms and conditions found in a tariff (operator services trunks) should be incorporated into the Interconnection Agreement. BellSouth and DeltaCom have a trunk group established between BellSouth's operator service platform and DeltaCom's operator service platform, which has been in existence since before the FCC determined that operator services and directory assistance ("OS/DA") were no longer UNEs. (Tr. 233) DeltaCom receives that trunk group under the rates, terms and conditions set forth in BellSouth's tariff. Because OS/DA is no longer a UNE under

Section 251 of the 1996 Act, DeltaCom's request that the rates, terms and conditions from the tariff be incorporated into the Interconnection Agreement is improper.

Turning to the larger issue, BellSouth provides DeltaCom with the necessary interconnection, services and network elements for DeltaCom retail customers to do busy line verification ("BLV") and busy line verification interrupt ("BLVI") on BellSouth's retail customers' lines. DeltaCom, however, wants the Commission to order BellSouth to provide, to BellSouth's retail customers, the ability to conduct busy line verification and busy line verification interrupt on DeltaCom's retail customers' telephone lines.

BellSouth's retail customers can request BLV and BLVI on any other BellSouth retail customer's line. BellSouth does not offer to any BellSouth retail customer the ability to have BLV or BLVI on any CLEC retail customer's line. That is an economic choice BellSouth made, given the expense involved in requesting BLV and BLVI on other carriers' networks. DeltaCom cannot point to any other carrier (CLEC or otherwise) that allows their retail customers to do BLV and BLVI on DeltaCom's network.

To the extent DeltaCom tries to portray this as a public safety issue, such a proposition rings hollow. Not all operator services platforms in Florida are interconnected, making it impossible for every subscriber in Florida to do BLV and BLVI on every other subscriber. Also, if a subscriber truly believes there may be an emergency situation, then the subscriber should call E911. If, in fact, there is an emergency situation, the caller has wasted precious time by waiting for the BellSouth operator to get through to the DeltaCom operator, who then has to break in on the line. If there is silence on the line, the operator is not going to be in a position to assess the

situation to determine if there is actually an emergency situation. Subscribers should be encouraged to call E911 as the first option in an emergency, not an operator who is powerless to provide emergency services.

The fact that DeltaCom has not broached this topic on an industry-wide basis suggests that DeltaCom's true motivations are directed towards its financial security, not public safety. If DeltaCom can convince the Commission to order BellSouth to provide retail BLV and BLVI in the manner requested by DeltaCom, then BellSouth would be forced to pay DeltaCom for every BLV and BLVI call to a DeltaCom retail customer. The Commission need look no further than this fact to understand DeltaCom's true motivation.

Clearly, BellSouth's retail services to its own customers are not UNEs and, therefore, are outside the parameters of this Section 252 arbitration proceeding. Even if they were not, the evidence demonstrates that BellSouth is providing BLV/BLVI in a nondiscriminatory manner and at parity with how it provides such functionality to other CLECs. Therefore, the Commission should direct DeltaCom to continue ordering OS trunks out of the applicable tariff and refuse to order BellSouth to provide a retail service that BellSouth is not required to and does not want to provide.

**ISSUE 47: Should BellSouth be required to compensate DeltaCom when BellSouth collocates in DeltaCom's collocation space? If so, should the same rates, terms and conditions apply to BellSouth that BellSouth applies to DeltaCom?**

*** No. This issue is not appropriate for this section 252 arbitration, because the issue of BellSouth placing equipment at DeltaCom's premises is not addressed in the 1996 Act. ***

This issue addresses whether BellSouth should have to pay DeltaCom when it places equipment at a DeltaCom premises or point of presence ("POP") ("reverse collocation"). The only collocation obligations in the 1996 Act are found in Section 251(c)(6), which addresses obligations of incumbent LECs, not CLECs. DeltaCom admits that "reverse collocation" is not discussed or even referenced anywhere in the Act. (Tr. 282) Thus, this topic is not appropriate for resolution in a Section 252 arbitration proceeding.

Beyond the legal issue, it is important to note, and DeltaCom does not dispute, that BellSouth has not collocated (as that term is defined in the 1996 and FCC Rules) its equipment at a DeltaCom POP location or any other location for the sole purpose of interconnecting with DeltaCom's network or accessing UNEs in the provision of a telecommunications service to the end users located in DeltaCom's serving area. (Tr. 284) What BellSouth has actually installed at eight DeltaCom POPs in Florida is equipment that is being used to provision Special and Switched Access Services ordered by DeltaCom and/or DeltaCom's end user customers at various POP locations. (*Id.*) Consistent with BellSouth's FCC Tariff No. 1, Section 2.3.3 and its Florida Access Services Tariff, it is DeltaCom's responsibility to provide to BellSouth, at no charge, "equipment space and electrical power required by [BellSouth] to provide services under this Tariff at the points of termination of such service." DeltaCom was aware of this obligation before purchasing such services (Tr. 282-83), and DeltaCom should not be allowed to avoid its obligations by trying to fashion an argument that shifts DeltaCom's financial responsibilities to BellSouth.

DeltaCom has never attempted to bill BellSouth a collocation or other charge for the use of space in the eight DeltaCom locations in Florida where BellSouth has placed equipment at DeltaCom's request. (Tr. 287) Further, in those situations when DeltaCom has the right to choose the point of interconnection ("POI") and has chosen a DeltaCom central office as the POI, BellSouth should not be deemed to have voluntarily chosen the DeltaCom central office as the POI for BellSouth's originated local interconnection traffic. Those instances cannot be considered voluntary collocation arrangements.

**ISSUE 56(a): May BellSouth charge a cancellation charge which has not been approved by the Commission?**

*** The rates BellSouth charges when DeltaCom cancels an LSR allow BellSouth to recover the costs incurred prior to the cancellation and equal a percentage of the Commission-approved installation non-recurring charge, based upon the point in the provisioning process when DeltaCom cancels the LSR. ***

**ISSUE 56(b): Are these cancellation costs already captured in the existing UNE approved rates?**

*** No. ***

DeltaCom does not contest the fact that BellSouth incurs an expense when DeltaCom cancels a Local Service Request ("LSR") prior to completion; nor does DeltaCom assert that BellSouth is not entitled to some compensation from Deltacom in that situation. DeltaCom's "expert," Don Wood, claimed that Bellsouth's cancellation charges are not computed by "beginning with a cost study compliant with section 252." (Tr. 186) He claims that the rates BellSouth is proposing are taken entirely from an interstate tariff. Mr. Wood is wrong on both accounts.

First, the rates BellSouth charges when a CLEC cancels an LSR are based on Commission-approved non-recurring installation rates for the specific UNE. (Tr. 591) In fact, Mr. Wood admitted on cross-examination that when the Commission set these rates it stated that they were cost-based, and that the establishment of the rates did in fact "begin with a cost study" submitted by BellSouth. (Tr. 191-92)[11] When DeltaCom cancels an LSR, cancellation charges are a prorated portion of the Commission-approved non-recurring installation rate. The pro-ration is based on the point within the provisioning process that DeltaCom cancels the LSR and derived from the schedule in BellSouth's B2.4.4 Private Line Tariff (for UNEs billed from the CRIS system) or BellSouth's FCC No. 1 Tariff, Section 5.4 (for UNEs billed from the CABS system). (Tr. 591-92) Since the Commission has approved the nonrecurring rates BellSouth charges for UNE installation and provisioning, BellSouth's recovery of its cost incurred prior to the cancellation of the LSR is appropriate and cost-based.

**ISSUE 57(a): Should BellSouth be permitted to charge for DeltaCom for converting customers from a special access loop to a UNE loop?**

*** Yes. ***

**ISSUE 57(b): Should the Agreement address the manner in which the conversion will take place? If so, must the conversion be completed such that there is no disconnect and reconnect (i.e., no outage to the customer)?**

*** No. ***

BellSouth is not required to convert a special access (tariffed) loop to a stand-alone UNE loop. As noted in the discussion of Issue 37, however, the issue of conversions is addressed in the TRO, but the ultimate issue of whether a conversion is

[11] While hardly surprising to those who have seen Mr. Wood testify previously, the fact that he testified, "Certainly one of the inputs to the rates . . . began with the nonrecurring cost study. There's no doubt about that," and thirty seconds later claimed that the rates at issue do not begin with a cost study, (Tr. 192-93), compels the Commission to disregard Mr. Wood's testimony completely.

allowed depends upon further state proceedings identifying which elements will remain UNEs and whether CLECs meet certain eligibility requirements. (TRO at ¶586) The safe harbor requirements set forth in the Supplemental Order Clarification will apparently be superceded based upon the TRO, and the new eligibility requirements are very complex. (TRO at ¶¶ 590, 591-629) Further, the FCC declined to set forth in the TRO a definitive conversion process, leaving such a process to be worked out between the CLECs and ILECs. (TRO at ¶585)

Irrespective of any potential changes in the law, in an effort to avoid payment, DeltaCom contends that replacing special access circuits with standalone UNEs "is a conversion where there is no disconnection and reconnect, but simply a billing change." (Tr. 241-42) DeltaCom is wrong. Replacing special access services with stand-alone UNEs requires two separate orders involving two different basic classes of services. (Tr. 403) Because the process to convert special access services to stand-alone UNEs is complex, BellSouth offers, through the NBR process, to project manage the conversions. (Id.) If DeltaCom is not willing to pursue a NBR and pay BellSouth for project managing the process, DeltaCom has other options to minimize service outage for the end user. For instance, DeltaCom can order stand-alone UNEs, in accordance with its Interconnection Agreement, and then transfer the traffic currently routed over the existing special access circuit to those UNEs. (Id.) Alternatively, DeltaCom may chose to issue the disconnect ("D") and new connect ("N") orders itself and attempt to time the orders to minimize downtime. (Id.)

In the event that the Commission determines that BellSouth is obligated to convert special access circuits to stand-alone UNE loops, it is appropriate for BellSouth

to charge DeltaCom for installation and provisioning of the stand-alone UNEs ordered by DeltaCom to replace the existing special access circuits. The rates BellSouth proposes to charge DeltaCom are the Commission-approved nonrecurring rates for the stand-alone UNEs. Typically, DeltaCom refuses to pay BellSouth for the various costs BellSouth incurs in performing these conversions.

**ISSUE 58(a): Should the Interconnection Agreement refer to BellSouth's website address to Guides such as the Jurisdictional Factor Guide?**

*** Yes. Doing so allows BellSouth to implement operational changes that do not materially impact the terms of the interconnection agreement. ***

**ISSUE 58(b): Should BellSouth be required to post rates that impact UNE services on its website?**

*** No. ***

This issue addresses whether the Interconnection Agreement should reference certain technical guides and publications that are maintained on BellSouth's website and not attached to the Interconnection Agreement. Allowing BellSouth to maintain technical guides and publications (many of which are voluminous) on a website permits BellSouth to periodically change these documents to reflect operational and technical specifications changes. (Tr. 593) Currently, BellSouth notifies CLECs via Carrier Notification Letters in advance of changes impacting UNE services. (Tr. 594) Carrier Notification Letters are posted on BellSouth's website as soon as possible, and serve as proper notification to CLECs. (Id.) Therefore, CLECs will have ample opportunity to evaluate whether a change will impact their business and bring any concerns to BellSouth and/or this Commission.

The ramifications of adopting DeltaCom's position are obvious. With nearly 150 CLECs in Florida, each with their own interconnection agreement, the problems associated with getting the concurrence of each and every CLEC to make even a minor technical modification are significant, if not insurmountable. (Tr. 593) BellSouth could end up with thousands of variations on technical documents that would destroy any standardization of operations. Even if all CLECs were to agree to a change, the process of amending each and every one of the approximately 150 Interconnection Agreements would take a tremendous amount of effort by BellSouth and the Commission.

The South Carolina Public Service Commission addressed a similar issue in a Section 252 arbitration proceeding between HTC and Verizon. It considered the issue of whether Verizon should be allowed to incorporate tariffs and other outside documents as part of its Interconnection Agreement with HTC, and concluded that:

> We agree with Verizon that its [position] ensures that the new interconnection agreement will evolve at the same pace as the rapidly developing telecommunications industry. Further, Verizon's language ensures that the Parties will continue to conduct their relationship according the most current tariffs, guidelines and industry procedures. Moreover, Verizon's website is an invaluable tool for all CLECs doing business with Verizon, as Verizon's website is continually updated to assist all CLECs . . . run their business more efficiently. We also agree that incorporating Verizon's tariffs and other external documents insures that every carrier will be on equal competitive footing. Moreover, regarding HTC's concern that Verizon can unilaterally alter the interconnection agreement, HTC can participate in the change management process where industry guidelines and Verizon's tariffs are addressed.[12]

[12] Order on Arbitration, *In Re Petition of HTC Communications, Inc. for Arbitration of an Interconnection Agreement with Verizon South, Inc.*, Order No. 2002-450 in SCPSC Docket No. 2002-66-C at 8 (June 12, 2002).

The same observations made by the South Carolina Commission are equally applicable to this issue in this proceeding.

Regarding the rate issue, BellSouth provides rates to individual CLECs upon amendment, and BellSouth has agreed to provide DeltaCom with an amendment within 30 days of receipt of such a request. (Tr. 594) Once new UNE rates are approved by the Commission, a CLEC may request that its Interconnection Agreement be amended to incorporate the new or revised rates. Apparently, DeltaCom wants BellSouth to post a notice of new, approved UNE rates on BellSouth's website. Since UNE proceedings are public information, CLECs are aware of any new, approved rates, at the same BellSouth has this information – when the Commission issues an order. Therefore, posting the rates on BellSouth's website is not necessary.

**ISSUE 59: Should the payment due date begin when BellSouth issues the bill or when DeltaCom receives the bill? How many days should DeltaCom have to pay the bill?**

*** BellSouth invoices DeltaCom every 30 days. Payment should be due by the next bill date. ***

This issue addresses the terms under which DeltaCom makes payments on BellSouth invoices to DeltaCom. DeltaCom, like every other CLEC that does business with BellSouth, has a set bill date for every invoice BellSouth sends to DeltaCom. (Tr. 594) Based on that bill date, DeltaCom knows exactly what date the payment is due for each of those invoices. (Id.) BellSouth's billing systems are programmed around that bill date and BellSouth's anticipated cash flows are based on receiving payments on particular days of the month. BellSouth's billing systems and practices for both wholesale and retail customers are built upon this methodology.

DeltaCom now seeks to change this system and, not surprisingly, it does not want to pay for any costs associated with making this type of massive regional billing system modification. Instead of DeltaCom having invoice payments due on set days of the month, as it has done for the past twenty years with BellSouth, it wants to make payments based on a time frame to be calculated from when it actually receives the bill.

BellSouth's long-standing billing practice in no way limits DeltaCom's ability to review and dispute invoices received from BellSouth. DeltaCom can dispute invoices long after the payment due date and, in fact, DeltaCom files such disputes. (Tr. 124) Thus, the current billing practice in no way prejudices DeltaCom's ability to dispute charges that it believes are improper. DeltaCom acknowledges that it receives approximately 94% of its billings from BellSouth electronically, which results in DeltaCom having even more time between the date it receives the bill and the payment due date. (Tr. 139)

Finally, DeltaCom acknowledged that both the Commission and the FCC considered all of BellSouth's billing practices during the course of BellSouth's Section 271 long distance application and concluded that BellSouth's billing and billing practices (including this one) were non-discriminatory. (Tr. 123-24) DeltaCom also acknowledged that the Commission has performance metrics, and associated penalties, in place that measure whether BellSouth is providing timely and accurate bills to DeltaCom. (Tr. 123)

**ISSUE 60(a): Should the deposit language be reciprocal?**

*** No. First, BellSouth is not situated similarly with a CLEC. Second, BellSouth generally purchases service from CLECs pursuant to tariffs, and the terms of the tariffs govern the applicability of a deposit. ***

**ISSUE 60(b): Must a party return a deposit after generating a good payment history?**

*** No. Payment history alone is not an adequate measure of credit risk. ***

**DISCUSSION**

DeltaCom does not dispute that BellSouth should be able to collect deposits where warranted. It is the definition of "where warranted" that is the issue. BellSouth has proposed a list of criteria that would be used to determine whether a deposit is warranted in any given circumstance. BellSouth believes that the criteria it proposes will protect BellSouth and, at the same time, fairly separate those CLECs that are not a credit risk from those that do pose a risk. The criteria proposed by DeltaCom are too lax and, if adopted by other CLECs, would result in virtually no CLEC paying a deposit, which would subject BellSouth to significant financial risk. BellSouth's bills to DeltaCom are approximately $8 million per month regionally. (Tr. 129) DeltaCom's position that it should not be required to pay BellSouth *any* deposit is unreasonable. (*Id.*)

DeltaCom relies on a Policy Statement from the FCC as authority that DeltaCom should not pay a deposit.[13] Such reliance is misplaced. The FCC's Policy Statement simply provides guidance regarding modification of deposit provisions in interstate access tariffs. (Policy Statement at ¶1) In addition, the FCC considered narrower protections, such as accelerated and advanced billing, in lieu of deposits. (Id. at ¶30) DeltaCom, however, seeks to extend the timeframe for paying BellSouth's bills. (See

[13] Policy Statement, *In the Matter of Verizon Petition for Emergency Declaratory and Other Relief*, WC Docket No. 02-202, (Rel. December 23, 2002).

discussion of Issue 59 above). Typically, DeltaCom wants it both ways; avoid the deposit and, at the same time, extend the payment due date. Thus, for the reasons stated above, the Commission should adopt the deposit criteria proposed by BellSouth.

DeltaCom also argues that deposit obligations should be reciprocal. BellSouth is not similarly situated with a CLEC provider and, therefore should not be subject to the same creditworthiness and deposit requirements and standards. (Tr. 595) Unlike DeltaCom, BellSouth does not have the option of declining to do business with a credit-risky CLEC, as that business relationship is mandated by the 1996 Act. Further, if BellSouth is buying services from a CLEC provider's tariff, the terms and conditions of such tariff will govern whether BellSouth must pay a deposit. (Id.) Placing a deposit burden upon BellSouth would potentially result in BellSouth paying deposits to almost 150 CLECs in Florida. Thus, the Commission should not require reciprocal deposit arrangements.

The final sub-issue concerning deposits is whether BellSouth should be required to return a deposit after a CLEC generates a good payment history for six months. Even DeltaCom admits that a good payment history alone is not necessarily indicative of whether a company will ultimately end up in bankruptcy. (Tr. 133) Indeed, DeltaCom itself filed for bankruptcy protection last year. (Tr. 126-27) In addition to DeltaCom, over the last two years BellSouth has had a number of very large customers that were current on their payments up until the day they filed bankruptcy. (Tr. 616i) Under DeltaCom's proposal, even if a CLEC's credit-worthiness declined over a six month period, as long as the CLEC made timely payments BellSouth would have to return the CLEC's deposit. Such a result is inequitable and makes no sense. To wit, DeltaCom's

deposit tariff does not provide for the return of a deposit if a retail customer has a good payment history for six consecutive months. (Tr. 134)

Additionally, if a CLEC fails to pay (after maintaining a good payment history or otherwise), BellSouth is faced with a lengthy process prior to disconnection of the service. In addition to the month for which the CLEC did not pay, BellSouth may be required to provide an additional month (or more) of service while notices are being given and the disconnection process is taking place, resulting in more than two months of outstanding debt, even if the CLEC has paid timely prior to that point. (Tr. 616) Six months of timely payment is not enough alone to protect BellSouth in the event DeltaCom ceases making timely payments. Thus, the Commission should not use payment history as the primary factor in determining when, if ever, a deposit should be returned.

**ISSUE 62: Should there be a limit on the parties' ability to back-bill for undercharges? If so, what should be the time limit?**

*** Yes, the limit should be the one year prescribed in Chapter 25-4.110(10) of the Florida Commission's Rules. ***

DeltaCom cites no authority to support its position that BellSouth should be precluded from back-billing after 90 days from the date the service was rendered. DeltaCom's position is puzzling, given that the current Interconnection Agreement between the parties expressly provides for back-billing in certain circumstances. For instance, the Amendment to the Interconnection Agreement signed by DeltaCom on September 19, 2002, ("Amendment") expressly provides that:

> BellSouth currently is developing the billing capability to mechanically bill the recurring and non-recurring Market Rates in this section. In the interim where BellSouth cannot bill Market Rates, BellSouth shall bill the rates in

the Cost-Based section preceding in lieu of the Market Rates and reserves the right to true-up the billing difference.

Amendment at 640 (footnotes)

In addition, DeltaCom's proposal could result in a situation when DeltaCom actually received the service from BellSouth and obtained revenue from DeltaCom's retail customer but, due to some technical problem, BellSouth did not realize it had not billed DeltaCom for that service or was unable to bill for the service within 90-days. BellSouth would be precluded under DeltaCom's proposal from billing DeltaCom for the service, resulting in DeltaCom being unjustly enriched. Taking the argument one step further, DeltaCom agrees the limitation on back-billing would apply when BellSouth fails to bill DeltaCom for services rendered by BellSouth; however, the limitation would not apply if BellSouth inadvertently overbilled DeltaCom. (Tr. 120-21)

The Commission should decline to impose any limitation on a party's ability to back-bill for services rendered under the Interconnection Agreement. However, if the Commission is inclined to address this issue of carrier back-billing, BellSouth submits that the issue is better addressed in a generic rulemaking proceeding, wherein the rule would be applicable to all carriers in the state of Florida, and not just to BellSouth.

**ISSUE 63: Should the Agreement include language for audits of the parties' billing for services under the interconnection agreement? If so, what should be the terms and conditions?**

*** No. Performance measurements addressing the accuracy and timeliness of billing provide sufficient mechanisms for monitoring BellSouth's billing. ***

This issue involves a legal interpretation of Section 252(i) of the 1996 Act, which addresses the ability of CLECs to adopt provisions of interconnection agreements between BellSouth and other CLECs. It provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Specifically, DeltaCom seeks to adopt "audit" language out of an existing AT&T/BellSouth Interconnection Agreement. Clearly, audits are not an "interconnection, service, or network element" provided by BellSouth; therefore, the 1996 Act does not allow DeltaCom to adopt that specific language from the AT&T/BellSouth Interconnection Agreement. Audits are certainly not necessary for BellSouth to prepare and submit bills to DeltaCom. DeltaCom failed to establish that the language it seeks to adopt is in any way an interconnection, service, or network element. Therefore, the Commission should reject DeltaCom's attempt to improperly use Section 252(i).

To the extent DeltaCom attempts to establish a separate basis for audit language, DeltaCom fails to make such a showing. This Commission has established performance measurements to address the accuracy and timeliness of BellSouth's bills to DeltaCom (and all CLECs). (Tr. 599) If BellSouth's billing practices fall below the standards set by the Commission, BellSouth is penalized. Further, both the Commission and the FCC have reviewed extensively BellSouth's billing practices and procedures and found them to be nondiscriminatory. Inclusion of audit language for billing systems is unnecessary, and the Commission should reject DeltaCom's position on this issue.

**ISSUE 64: What terms and conditions should apply to the provision of ADUF records?**

*** BellSouth provides DeltaCom ADUFs in the same manner it provides them to other CLECs. BellSouth should not be required to provide DeltaCom a customized record. ***

DeltaCom is asking BellSouth to isolate and provide to DeltaCom only certain ADUF records. BellSouth is not required to do this. Consistent with the FCC's 271 Orders in BellSouth's states, BellSouth provides competing carriers with complete, accurate, and timely reports on the service usage of their customers in substantially the same manner that BellSouth provides such information to itself. If DeltaCom wants a customized report, it should file a New Business Request.

ADUF provides the CLEC with records for billing interstate and intrastate access charges, whether the call was handled by BellSouth or an interexchange carrier ("IXC"). ADUF also provides records for billing reciprocal compensation charges to other local exchange carriers and IXCs for calls originating from and terminating to unbundled switch ports. (Tr. 620) The terms and conditions for the provision of ADUF service to DeltaCom should be pursuant Attachment 7, Section 5.7 of BellSouth's proposed Interconnection Agreement.

ADUF records are generated when a DeltaCom end user, served by an unbundled port, places a call using an access code (i.e., 1010XXX) to an end user within the designated local calling area. (Tr. 621) In this situation, the call is recorded as an access call – the location of the terminating end user has no bearing on the generation of the record. (*Id.*) DeltaCom is asking BellSouth to generate a custom report for it, excluding local calls and/or duplicative calls. (*Id.*)

DeltaCom would like for this Commission to order BellSouth to create a customized ADUF report for DeltaCom, despite the fact that DeltaCom does not know what it would cost for BellSouth to do so; DeltaCom has not offered to pay BellSouth to develop the capability; and DeltaCom could rectify the problem itself which creates the perceived need for the customized report. BellSouth should not be required to provide custom reports for each CLEC when the reports generated for all CLECs consistent with industry standards will suffice. (*Id.*)

Consistent with the FCC's 271 Orders in BellSouth's states, BellSouth provides competing carriers with complete, accurate, and timely reports on the service usage of their customers in substantially the same manner that BellSouth provides such information to itself.[14] If DeltaCom wants a customized report, it should submit a New Business Request. BellSouth should not be required to provide a customized report to DeltaCom for free, which is what DeltaCom is requesting.

**ISSUE 66: Should BellSouth provide testing of DeltaCom end-user data? If so, what are the rates, terms, and conditions for such testing?**

*** The CCP, not a two-party arbitration, is the appropriate forum to address this OSS issue that impacts all CLECs. It is a non-issue in any event – BellSouth has agreed to provide what DeltaCom requests. ***

[14] *See* Memorandum Opinion and Order, *In re Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Alabama, Kentucky, Mississippi, Florida, and South Carolina,* WC Docket No. 02-150 (September 18, 2002), ¶108.

This section 252 arbitration is not the appropriate forum for the resolution of this OSS issue. This issue involves processes and systems changes that affect all CLECs on a regional basis and should be addressed in the CCP.

Moreover, this "issue," as DeltaCom admitted at the hearing, is in fact a non-issue. By way of background, BellSouth's CAVE testing environment allows CLECs to test the pre-ordering and ordering functions of upgrades to OSS interfaces. (Tr. 362) The CCP specifically addresses CLEC testing of OSS. (Tr. 365) As part of the CCP, CLECs can and do request enhancements to BellSouth's testing environments. (*Id.*) DeltaCom's issue is that it wants to be able to test in CAVE using its own data. (Tr. 365-66) DeltaCom admitted at the hearing that a pending Change Request scheduled for implementation will allow DeltaCom to test using its own data. (Tr. 366-67)[15] In addition, implementation of this change request will provide CLECs the "end-to-end" testing that DeltaCom said it desires. (Tr. 463)

The CCP provides the opportunity for the CLECs to prioritize, by CLEC vote alone, the candidate change requests, and that vote, along with available capacity, determines the release in which a particular change request is slotted. [16] Although the timeframe for implementation does not meet DeltaCom's every desire, as recently as December 2002, the FCC has concluded "that BellSouth implements competitive LECs'

[15] For a full discussion of the history of the CCP Change Requests addressing testing, see the testimony of Bellsouth's OSS expert, Mr. Pate at Tr. 461-67.

[16] At the quarterly prioritization meeting on December 12, 2002, CR0896 was ranked #8 out of 21 change requests that were prioritized. (Tr. 366-67)

change requests in a timely manner [and] as we have previously recognized, OSS changes such as these are difficult to implement."[17]

Finally, the FCC, on multiple occasions, has concluded that BellSouth's testing environments are satisfactory and meet the standards established by the FCC.[18] For example, in paragraph 187 of the BellSouth Multistate Order[19] the FCC found "that BellSouth's testing environments allow competing carriers the means to successfully adapt their systems to changes in BellSouth's OSS ... no party raises an issue in this proceeding that causes us to change this determination .... We are thus able to conclude, as we did in the BellSouth Georgia/Louisiana Order, that BellSouth's testing processes are adequate." (Footnotes omitted). Similarly, in its more recent BellSouth Florida/Tennessee Order, in paragraph 125 and footnote 424, the FCC further noted that BellSouth expanded and improved the CAVE test bed "to ensure that the CAVE environment mirrored the internal test environment and the production environment." [20] In that proceeding, the FCC did not address any complaints about an allegedly deficient CAVE testing environment, because no CLEC made such a complaint.

This Commission should recognize that the submission of this issue for arbitration in this proceeding is inappropriate and rule that any inclusion of language related to this issue in the agreement is completely unwarranted.

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[17] Citing FCC Order 02-331, BellSouth Florida/Tennessee Order, WC Docket No. 02-307, at ¶116. (Footnotes omitted) (emphasis added).

[18] See e.g., FCC Order No. 02-260, WC Docket No. 02-150, September 18, 2002; FCC Order No. 02-331, WC Docket No. 02-307, December 19, 2002.

[19] FCC Order No. 02-260, WC Docket No. 02-150, September 18, 2002.

[20] FCC Order No. 02-331, WC Docket No. 02-307, December 19, 2002.

**ISSUE 67: Should BellSouth be allowed to shut down OSS systems during normal working hours (8 a.m. to 5 p.m.) without notice or consent from DeltaCom?**

*** This issue involves systems changes that affect all CLECs and should be addressed in the CCP, not in a two-party arbitration. In addition, BellSouth provides CLECs with at least 30 days' notice when OSS systems are taken down for maintenance or upgrades. These are normally performed during off peak hours. ***

Barring unforeseen events, BellSouth adheres to the operational hours and maintenance windows for its OSS posted a year in advance on its website. (Tr. 467) DeltaCom's raising this issue is based entirely on a single event where BellSouth needed to shutdown interfaces for a few hours on the afternoon of December 27, 2002, in order to implement Release 11.0. (Tr. 357-58)

BellSouth's wholesale support environment is heavily computer and software based. When a deviation from a maintenance schedule becomes necessary, BellSouth provides notification – in advance – to the CLECs, advising them of the date, time, expected duration and reason for the change in schedule. (Tr. 468)

It is an unfortunate fact that systems also go down unexpectedly, and thus the resulting downtime cannot be anticipated. The language proposed by DeltaCom is onerous and unrealistic, and it simply does not allow BellSouth the flexibility to deal with unexpected situations or to make prudent business decisions. A system shut down such as the one that DeltaCom complains of is a rare event, and indeed, DeltaCom admitted that it was a one-time event. (Tr. 357-58)

DeltaCom's proposed language reflects an over-reaction to that single event that was, in fact, no violation of BellSouth's obligation to provide nondiscriminatory access to

its OSS, nor of its adherence to the posted system downtimes. The Commission, therefore, should adopt BellSouth's proposed language, which allows flexibility for realistic operations, and protects the CLECs at the same time because it is a commitment to do what BellSouth already does.

Regarding the one-time implementation of Release 11.0 that DeltaCom complains of, BellSouth did not shut down the OSS without the knowledge of, or the proper notification to, the CLECs. In fact, the reason that BellSouth shut down the OSS at noon on December 27, 2002, was due to a decision made by the CLEC community on a CCP conference call on November 4, 2002. (Tr. 469) Given the complexity of Release 11.0, BellSouth and the CLECs discussed the merits of delaying the Release from the original December 7, 2002, implementation date, and whether it should be implemented during the weekend of December 28, 2002 (Option 1) or the weekend of January 19, 2003 (Option 2). (*Id.*) After the conference call, a CLEC vote favoring Option 1 determined that the implementation should occur during the weekend of December 28, 2002 – a weekend between the Christmas and New Year's holidays. (*Id.*) One additional aspect of the decision for the CLECs was the anticipated light CLEC activity during the holiday season. (Tr. 470)

Accordingly, on November 22, 2002, with more than the 30-day advance notification required by the CCP,[21] BellSouth issued Carrier Notification SN91083483 to confirm the new dates of the implementation of Release 11.0 and to notify the CLECs that the associated downtime of all electronic interfaces, would begin at 12:00 Noon

[21] According to the CCP guidelines (page 47, Step 10, item 3), "Software Release Notifications will be provided 30 calendar days or more in advance of the implementation date." If that release requires changes to system availability (as this release did), such information will also be provided in that notification (as it was for this release).

EST on Friday, December 27, 2002. (Tr. 470) Furthermore, on December 6, 2002, the Carrier Notification was revised to add information about the downtime of the LCSC fax servers and telephone lines, and to push back the start of the systems downtime to 1:00 p.m. on December 27. (*Id.*) The result was the successful implementation of Release 11.0. (*Id.*)

The Commission should not require BellSouth to amend or in any way change the CCP guidelines regarding the scheduling and posting of interface and system downtime. The Commission should adopt BellSouth's language reflecting the fact that the process that currently exists, is approved, and most importantly – it works.

Respectfully submitted, this 17th day of October, 2003.

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