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October 8, 1999

BY HAND DELIVERY THIS DATE

Blanca S. Bayo
Director, Division of Records and Recording
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket #990750-TP; *Petition for Arbitration by ITC^DeltaCom Communications*

Dear Ms. Bayo:

On behalf of ITC^DeltaCom Communications, Inc., enclosed for filing in the referenced docket are an original and 16 copies of ITC^DeltaCom's Response to BellSouth's Motion to Remove Issues From Arbitration. Please file stamp the extra enclosed copy and return it to our runner. Thank you for your assistance.

Sincerely,

HUEY, GUILDAY & TUCKER, P.A.

J. Andrew Bertron, Jr.

AFA ____
APP ____
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CMU Tawors
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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. 990750-TP

ITC^DELTACOM COMMUNICATIONS, INC.'S OPPOSITION TO BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO REMOVE ISSUES FROM ARBITRATION

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") hereby files this opposition to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion to Remove Issues from this arbitration proceeding. BellSouth asks this Commission to make severe and dramatic rulings. That is, it asks the Commission, as a matter of law, to exclude arguments and evidence from consideration of specific open issues set forth in ITC^DeltaCom's Petition for Arbitration. Put simply, the Motion asks the Commission to find that, as a matter of law, ITC^DeltaCom is estopped from bringing evidence before the Commission regarding certain issues. If the Commission grants BellSouth's Motion, it will prevent resolution of key open issues which were not successfully negotiated between the parties. The Commission has the duty under the Telecommunications Act of 1996 ("Act") to resolve each and every open issue set forth by ITC^DeltaCom in this arbitration. Thus, the Commission should reject BellSouth's attempt to deny ITC^DeltaCom the redress provided under the Act.

A. Framework of the Act

Section 252 of the Act sets forth a framework, pursuant to which telecommunications companies may initiate negotiations with incumbent local exchange companies to effectuate an interconnection agreement for Florida. Where such negotiations reach an impasse, affected parties may petition this Commission for arbitration of "open issues." BellSouth asks the Commission to preclude consideration of certain open issues which are vital to ITC^DeltaCom's ability to compete effectively against BellSouth and other telecommunications companies. Moreover, one of the issues which BellSouth seeks to exclude, access to the Master Street Address Guide ("MSAG"), relates directly to the public safety of Florida consumers. BellSouth's position is contrary to the language and spirit of the Act and should be rejected.

B. Self-Effectuating Performance Guarantees.

BellSouth asks this Commission to turn a blind eye to ITC^DeltaCom's request for arbitration of self-effectuating performance guarantees, basing its argument on a misreading of the law. Performance measures and guarantees are necessary to give BellSouth an incentive to meet its obligations under the interconnection agreement. Without them, BellSouth is left with no incentive to discontinue its poor performance.

Section 251(c) of the Act requires that BellSouth provide interconnection and unbundled access to ITC^DeltaCom at parity with the manner in which BellSouth provides such services and facilities to itself. The Act charges the Commission with fashioning policies which ensure such parity. The Act requires the Commission do so in

response to a petition for arbitration. The evidence that will be presented by witnesses Rozycki, Hyde and Thomas will show that in many instances, BellSouth has failed to provide services to ITC^DeltaCom at parity with the services it provides to itself.

Nothing in the law prohibits the inclusion of self-effectuating performance guarantees in an interconnection agreement which will be in place prior to any breach of the contract. This Commission is charged with promoting competition and should find that performance guarantees embedded in the interconnection agreement between the parties will accomplish that objective. BellSouth has not presented any proposed performance guarantees to this Commission, but has done so to the Federal Communications Commission ("FCC"). ITC^DeltaCom, through its witnesses, will provide to the Commission a copy of at least one *ex parte* presentation BellSouth made to the FCC in which it proposes self-effectuating performance guarantees.

1. Federal Law.

The Act is highly unusual in structure -- Congress has conferred a duty upon state Commissions and a framework in which telecommunications companies are to enter into bilateral contracts. The Commission is charged - *by Congress* - with implementation of federal, not state standards. Indeed, this proceeding is being conducted for purposes of implementation of federal - not state - standards.

Sections 252(b) and (c) of the Act specify the duties and responsibilities of this Commission with regard to this arbitration. Included in that charge is the responsibility to arbitrate "any unresolved" issues between the parties. Performance

guarantees is one such issue. Section 252(b)(4)(C) of the Act states that "[t]he State commission **shall** resolve each issue" brought before it in an arbitration. (emphasis added) The issues of performance guarantees were properly presented and certainly may be considered by the Commission. Similarly, Section 252(c) of the Act states that "[i]n resolving by arbitration under subsection (b) any open issue and imposing conditions upon the parties" the State commission shall ensure that such resolution meets the requirements of Section 251" and any regulations prescribed by the FCC. There is certainly nothing about performance guarantees that conflicts with the requirements of Section 251 of the Act and the regulations prescribed by the FCC. Indeed, the parity requirements of the Act and the FCC's pronouncements support the system of self-effectuating guarantees supported by witness Rozycki in his testimony.

It is noteworthy that the Louisiana Public Service Commission Administrative Law Judge assigned to the ITC^DeltaCom/BellSouth arbitration allowed the presentation of evidence regarding performance measures and guarantees at the Louisiana hearing which began on October 4, 1999. Additionally, the Tennessee Regulatory Authority Pre-Arbitration Officer assigned to the ITC^DeltaCom/BellSouth arbitration found performance measures and guarantees to be appropriate for arbitration. *Report and Initial Order of Pre-Arbitration Officer*, TRA Docket No. 99-00430, October 6, 1999. Pursuant to its authority under the Act, the Commission should consider the merits of ITC^DeltaCom's proposed system of performance guarantees and allow ITC^DeltaCom to go forward with evidence.

2. Florida Law

In response to BellSouth's state law claim that the Commission's jurisdictional limits do not allow even the consideration of ITC^DeltaCom's proposal, it is crucial to understand that ITC^DeltaCom is not requesting an "award" of damages. Rather, ITC^DeltaCom merely asks for the opportunity to arbitrate the inclusion of performance measures and guarantees in an interconnection agreement. If the Commission finds that ITC^DeltaCom is precluded from presenting such an argument then the Commission has effectively pronounced that the issue of self-effectuating performance guarantees was closed before negotiations even began with BellSouth in January. The Commission should not close this issue as a matter of law. Rather, the Commission should consider the evidence and assign appropriate weight to it to reach a conclusion that furthers competition.

The Commission may arbitrate performance measures because the only limit on its powers under state law is that it may not enter an award of damages which result from events *completed in the past.* The Commission has considered similar arguments. **ITC^DeltaCom strongly urges the Commission to look directly and carefully to the decisions of the Florida courts which have been the underlying basis for the Commission's previous consideration of performance guarantees.** When one reads those judicial pronouncements, it is clear that the request in this case is appropriate for the Commission's consideration. The root of the Commission's decisions regarding

prospective jurisdiction has been the case of *Southern Bell Telephone and Telegraph Company v. Mobile America Corporation, Inc.*, 291 So.2d 199 (Fla. 1974). That case can be easily distinguished from the issue presented by ITC^DeltaCom in the June 11, 1999 filing. In *Southern Bell*, a telephone customer sought damages resulting from the alleged negligent failure of a telephone utility to meet statutory service standards. In holding that the Commission did not have authority to award money damages for past service failures, the Florida Supreme Court stated that:

> The ultimate issues raised in a suit for money damages **for a completed, past failure** to meet the statutory standards are, however, a matter of judicial cognizance and determination. . . . Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for **past failures** to provide telephone service meeting the statutory standards.

Id. at 202 (Emphasis supplied). As explained in more detail by the lower court, the Commission did not have jurisdiction over the damages issue because the plaintiff was not seeking "future compliance," but rather was "seeking redress for alleged losses which had already accrued as a result of defendant's negligence." *Mobile America Corporation, Inc. v. Southern Bell Telephone and Telegraph Company*, 282 So.2d. 181, 183 (Fla. 1st DCA 1973), *aff'd* 291 So.2d 199. "The jurisdiction of the public service commission under the statutory provisions is broad and comprehensive. Yet that jurisdiction has generally been prospective in nature." Id. at 184.

The Commission's jurisdiction over prospective performance was also addressed in *Florida Power & Light Co. v. Glazer*, 671 So.2d 211 (Fla. 3d DCA 1996), which held in relevant part that:

> The jurisdiction of the public service commission under the statutory provisions is broad and comprehensive. Yet that jurisdiction has generally been prospective in operation. However, it is not a proper tribunal to decide a controversy **after damage has been inflicted**.

Id. at 214, *citing Muskegon Agency, Inc. v. General Tel. Co. of Michigan*, 340 Mich. 472, 65 N.W.2d 748 (1954) (Emphasis supplied).

These cases confirm that the only limitation on the Commission's jurisdiction is that it may not "decide a controversy after damage has been inflicted." ITC^DeltaCom asks that the Commission arbitrate the terms of the interconnection agreement. Arbitration of a performance guarantee is not an award of money damages because the guarantee, like the interconnection agreement itself, operates prospectively.

ITC^DeltaCom has presented a three-tiered set of self-effectuating performance guarantees intended to be applied to the Florida interconnection agreement. In adopting this set of performance guarantees, the Commission should note that the parties are permitted to address performance incentives as a matter of contract and the Commission has statutory authority to impose fines and penalties when companies subject to its jurisdiction violate its orders. The Commission has approved performance guarantees and incentives in the past. For example, BellSouth's own tariffs require customers who fail to perform by not paying their bills to pay interest to BellSouth.

When a customer's check is returned for insufficient funds, a penalty is applied. Similarly, BellSouth tariffs contain many examples of performance guarantees. For example, ITC^DeltaCom will provide as exhibits examples of instances in which BST offers to its customers "service installation guarantees," "performance guarantees," and generally applies credits where service has been interrupted. These guarantees have been approved by this Commission. Mr. Rozycki will discuss these other instances where performance guarantees have been approved.

C. Binding Forecasts and Master Street Address Guide ("MSAG")

1. The June 11, 1999 Filing

With regard to the issues of binding forecasts and the MSAG, BellSouth contends that the Commission may not consider these issues because they were not included in the Petition. The record is clear, however, that ITC^DeltaCom expressly incorporated a proposed interconnection agreement and summary issues matrix into its Petition for Arbitration. (*See* paragraphs 6 and 7) That Petition was filed nearly four months ago on June 11, 1999. Exhibit A of the proposed interconnection agreement clearly covers these issues and Exhibit B, the summary matrix of issues, also clearly covers the issues of binding forecasts and the MSAG and sets out the positions of the parties regarding these issues. Moreover, as BellSouth's Motion acknowledges, the binding forecast issue was included in the prefiled testimony of ITC^DeltaCom witness Hyde. (BellSouth Motion at p. 5.) Indeed, BellSouth addressed that issue in the prefiled testimony of BellSouth witnesses Varner. (See Varner Rebuttal at pp. 16-17) The

MSAG issue was covered in witness Thomas's prefiled direct testimony. (See Thomas Direct at p. 6) The MSAG issue was similarly pled. With regard to the MSAG, the Commission should not ignore the public safety and welfare impact of excluding that issue from consideration. The only purpose of the MSAG is to allow ITC^DeltaCom to accurately and quickly route 911 and E911 calls. Without daily updates of the MSAG, Florida consumers are put at risk. BellSouth's actions in this regard are reckless and must be rejected.

BellSouth cites MCI Telecomm. Corp v. Pacific Bell, 1998 U.S. Dist. LEXIS 17556 (N.D. Calif. 1998), for the proposition that "[i]ssues and positions from a draft agreement or an issues matrix contained in exhibits attached to the Petition do not comply with the Act." (BellSouth Motion at p. 2.) To call this a mischaracterization would be an understatement. That decision actually involved several cases, and the portion of the opinion relied upon by BellSouth dealt with different facts than at issue before the Commission. In that case, MCI did not list access to "dark fiber" in its list of arbitration issues. Rather, dark fiber was *merely mentioned* in the papers. Indeed, in that case, the California PUC went forward and considered evidence regarding the dark fiber issue. Although dicta on appeal, the Court upheld the California PUC's discussion that this did not sufficiently "set forth" the issue for arbitration under the Act. Id. at 74. In this case, ITC^DeltaCom included the binding forecast and MSAG issues in the exhibits to its petition, which were clearly and expressly incorporated into the Petition, and even provided a comparison of the parties' positions and requested relief. Both issues were

identified as ones that ITC^DeltaCom "believes are unresolved." Moreover, in the next section of the MCI Telecomm. Corp. case, in reference to a different proceeding, the same court noted that the CPUC held that AT&T sufficiently "set forth" an issue regarding technical specifications for GTE's provision of various facilities and services to AT&T by referencing said specifications in a matrix attached as an exhibit to its arbitration petition. Id. at 76-77. Even if this case were binding law on this Commission, this ruling demolishes BellSouth's overreaching position that an "issues matrix contained in exhibits attached to the Petition" is noncompliant with the Act.

2. Florida Law.

BellSouth's position directly contradicts the laws of the state of Florida. Florida's Rules of Civil Procedure expressly provide that "[a]ny exhibit attached to a pleading shall be considered a part thereof for all purposes. Statements in a pleading may be adopted by reference in a different part of the same pleading, in another pleading, or in any motion." Fla. R. Civ. P. 1.130(b) (1998). Applying Rule 1.130(b), Florida courts have consistently held that when a party attaches an exhibit to a pleading, that exhibit becomes part of the pleading and must be reviewed accordingly. Hillcrest Pacific Corp. v. Yamamura, 727 So.2d 1053, 1055 (Fla. 4th DCA 1999); Ginsberg v. Lennar Florida Holdings, Inc., 645 So.2d 490, 494 (Fla. 3d DCA 1994), rev. denied, 659 So.2d 272 (Fla. 1995). Therefore, Exhibits A and B must be considered as part of the Petition for purposes of ruling on BellSouth's Motion. Thus, the issues of the binding forecast and MSAG are appropriate for consideration. BellSouth's position that these issues are

precluded because ITC^DeltaCom addressed them primarily in an exhibit is a hypertechnical distinction without a difference. Neither the Act nor Florida law prohibits the vehicle used by ITC^DeltaCom to "set forth" issues for arbitration.

Finally, BellSouth argues the binding forecast issue and the MSAG should be excluded from consideration in this docket because to do otherwise would deny BellSouth a "reasonable opportunity to respond to the Petition." (Motion at p. 2). Thus, BellSouth's claim is grounded in due process, amounting to a claim that it did not have an adequate opportunity to present its views on this issue. The facts do not support this claim. It is undisputed that these issues were the subject of the voluntary negotiations between the parties, they were included in the June 11, 1999 filing, they were the subject of prefiled testimony, and most importantly, BellSouth responded to ITC^DeltaCom's arguments regarding these issues both in its prefiled testimony and will undoubtedly do so again at the hearing. BellSouth's Motion regarding these issues should be dismissed as wholly without merit.

Respectfully submitted, this 8th day of October, 1999.

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I hereby certify that a true and correct copy of the foregoing has been furnished this 8th day of October, 1999 to the following:

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