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December 22, 1999

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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:

Enclosed are an original and 15 copies of Petitioner ITC^DeltaCom Communications, Inc.'s Response to Supplemental Brief of BellSouth Telecommunications, Inc. 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.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition by ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom for arbitration of certain unresolved issues in interconnection negotiations between ITC^DeltaCom and BellSouth Telecommunications, Inc.	)))))))	**DOCKET NO. 990750-TP**

RESPONSE OF ITC^DELTACOM COMMUNICATIONS, INC. TO SUPPLEMENTAL BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC.

COMES NOW, ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), and respectfully submits to the Florida Public Service Commission ("Commission") this Response to the *Supplemental Post-hearing Brief Regarding the Scope of Section 364.285, Florida Statutes* ("*Supplemental Brief*"), filed by BellSouth Telecommunications, Inc. ("BellSouth") in the above-referenced arbitration on December 10, 1999.

I. INTRODUCTION

In its instructions to the parties in this arbitration, the Commission asked the parties to address a very narrow issue regarding enforcement of interconnection agreements. Specifically, the Commission asked the parties to brief the following issue: "whether the Commission has jurisdiction to assess penalties pursuant to Section 364.285, Florida Statutes, if it appears that a party is failing to comply with a Commission-approved negotiated or arbitrated agreement." *PreHearing Order*, Docket No. 990750-TP, October 25, 1999, at p. 50.[1]

[1] The Commission also provided that, with respect to post-hearing submissions, "[a] party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time." *Id.* at p. 4.

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In its *Statement of Issues and Positions and Brief*, filed on November 23, 1999, ITC^DeltaCom adhered to the Commission's requirement and addressed the question posed, stating that the answer to the Commission's inquiry is yes.[2]

BellSouth failed to respond to the Commission's request to address this issue in its *Brief of the Evidence*, filed on November 23, 1999.[3] Rather, on December 10, 1999, BellSouth filed a *Supplemental Post-hearing Brief Regarding the Scope of Section 364.285, Florida Statutes*, arguing that the Commission has no authority to impose penalties for violations of an interconnection agreement.

If the Commission is inclined to accept supplemental briefs, ITC^DeltaCom respectfully submits the following comments addressing: (1) BellSouth's arguments regarding the penalties issue; and (2) the Staff's recent recommendation regarding BellSouth's tandem interconnection rate.

II. THE COMMISSION'S AUTHORITY TO IMPOSE PENALTIES

A. BellSouth's Position Regarding Penalties Represents the Height of Hypocrisy.

BellSouth's surprising argument that the Commission may not impose penalties for violating a Commission order reveals the ultimate hypocrisy of BellSouth's position regarding enforcement of interconnection agreements. In its *Supplemental Brief*, BellSouth fails to address the plain language of §364.285, Florida Statutes (1999), which provides that a party within its

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[2] ITC^DeltaCom also submitted that even though the Commission has authority to impose penalties on BellSouth for violations of the interconnection agreement, enforcement complaint proceedings would not be the most efficient method of ensuring compliance by BellSouth. Rather, performance measures and self-effectuating guarantees within the interconnection agreement are needed to properly induce BellSouth to perform.

[3] BellSouth's November 23 brief consisted of 40 full pages.

jurisdiction may be fined when it is found to have "refused to comply with or to have willfully violated *any lawful rule or order* of the commission . . . ." (emphasis added). This provision gives the Commission authority to impose penalties on BellSouth if BellSouth refuses to comply with, or wilfully violates the terms of, the interconnection agreement approved by a *lawful order of the Commission.*

Instead, BellSouth constructs an argument that "[t]he rights and obligations of the parties to an interconnection, resale or unbundling agreement are not determined by the Commission's order approving the agreement, but arise from the agreement itself." *BellSouth Supplemental Brief* at p. 3. BellSouth goes on to argue that the Commission's statutory authority to impose penalties is inapplicable because, in BellSouth's opinion, "[t]he Commission order approving such an agreement is not a mandate to conduct business in a manner determined by the Commission; it is merely a finding that the terms under which the parties have agreed to conduct business are not unlawful." *Id.* Given BellSouth's position regarding performance guarantees, this position is the epitome of hypocritical legal posturing.

BellSouth wants it both ways. On the one hand, BellSouth argues that the Commission has no authority to approve or impose an interconnection agreement containing self-effectuating performance guarantees. On the other hand, BellSouth argues that the Commission may not impose penalties pursuant to its clear statutory authority because the rights and obligations of the parties to an interconnection agreement "arise from the agreement itself." If accepted, the impact of BellSouth's position would leave the Commission virtually powerless to ensure that parties are complying with the mandates of the Telecommunications Act. According to BellSouth, the interconnection agreement cannot contain financial incentives associated with performance, but there is no opportunity for parties to seek meaningful review by the Commission to ensure that

BellSouth fulfills its obligations. BellSouth wants to tie the Commission's hands in all respects and establish a regulatory environment without consequences for violations of the interconnection agreement. This is especially convenient for BellSouth, which has a nearly complete monopoly in the Florida local exchange market.[4]

BellSouth argues that "[a] party aggrieved by an alleged breach may pursue remedies before the Commission and/or the courts. The Commission has the power to provide effective injunctive relief to enforce the agreements it has approved." *BellSouth Supplemental Brief* at p. 4. BellSouth therefore would limit the Commission's authority to prospective injunctive relief. This will not provide an adequate incentive for BellSouth. At the conclusion of this case, there will be an interconnection agreement approved by an order of the Commission. That order, along with the terms of the interconnection agreement itself, will provide the mandate for both parties to perform. Even if a party were to obtain prospective injunctive relief from the Commission against BellSouth, it would amount to a simple affirmation of the terms of the interconnection agreement. What if BellSouth refused to perform? BellSouth's position implies that there would be nothing the Commission could do except make a pronouncement ordering BellSouth to fulfill the obligations to which it is already bound.

---

[4] BellSouth also argues that "there are relatively few instances in which parties have felt it necessary to bring to the Commission a dispute under an interconnection, resale or unbundling agreement with BellSouth." *BellSouth Supplemental Brief* at p. 2. As ITC^DeltaCom has pointed out, this is no doubt due to the fact that the process of litigating against BellSouth before the Commission each and every time it violates the agreement or misses a cutover is economically impractical, if not impossible. BellSouth has demonstrated that it needs standing incentives to perform. The "sue me" approach works an obvious advantage to BellSouth and will only hinder the development of competition. BellSouth's further boast of "more than 350 agreements" is misleading. Most carriers have requested to "opt in" to another carrier's agreement because they do not have the resources to engage in arduous negotiation sessions or costly arbitrations with BellSouth. Moreover, 13 formal complaints during 1999 alleging breach of contract is hardly a record of which BellSouth should be proud.

BellSouth's argument that ITC^DeltaCom should seek relief from the courts or the Commission through individual lawsuits in every case of non-performance promotes an impractical and inefficient approach. First, to the extent BellSouth fails to perform in a particular instance, ITC^DeltaCom will lose the customer whose order was the subject of the nonperformance. That customer is gone as far as ITC^DeltaCom is concerned. No lawsuit can bring that customer back. ITC^DeltaCom's reputation suffers each time such nonperformance occurs. Moreover, litigation is costly and time consuming. It is against the public interest to push all disputes to the courts. This approach would make Florida an inhospitable environment for would-be local exchange competitors. BellSouth's attempt to force competing carriers into litigation -- just to ensure the performance required by the Act -- evidences BellSouth's desire to use the regulatory process and the courts as accomplices in creating roadblocks to competition and the implementation of the Act.

B. Self-Effectuating Performance Guarantees Are Needed and This Commission Has the Authority to Require Them.

BellSouth's position that the rights and obligations between the parties to an interconnection agreement arise from the agreement itself only illustrates the need for the inclusion of self-effectuating performance measures and guarantees in the interconnection agreement. If BellSouth's thesis is true, then the interconnection agreement must address consequences for nonperformance. Without such consequences, the interconnection agreement is not worth the paper on which it is written.

Furthermore, this Commission has the *authority* to require self-effectuating performance guarantees within the context of an interconnection agreement. Indeed, the Commission not only has the authority to arbitrate the issue of performance measures and guarantees, but a duty under

the Act to do so when the issue is raised in an arbitration petition. Sections 252(b) and 252(c) of the Act specify the duties and responsibilities of the Commission with regard to an arbitration of an interconnection agreement. Included in that charge is the responsibility to arbitrate "any unresolved" issues between the parties. 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 Commission's authority when acting as an arbitrator under the Act is determined by federal law. In the Act, Congress used a word -- "arbitration" -- that already had an established meaning under existing federal law, given to it under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* Nothing in the Act suggests that the broad affirmative powers of an arbitrator, as they currently exist under federal substantive law, are intended to be limited in any way. Therefore, "[w]here Congress uses terms that have accumulated settled meaning under common law, the Court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms." *Field v. Mans*, 516 U.S. 59, 116 S. Ct. 437, 133 L.Ed.2d 351 (1996).

Under the Federal Arbitration Act, the arbitrator has the authority to consider any issue submitted to him by the parties. *See, e.g., Sunshine Mining Co. v. United Steel Workers of America*, 823 F.3d 1289, 1294 (9th Cir. 1987). ITC^DeltaCom properly submitted the issue of self-effectuating performance guarantees in its Petition for Arbitration and even proposed language to be included in the interconnection agreement. Any doubts concerning the scope of arbitration should be resolved in favor of arbitration. *Wailua Associates v. AETNA Casualty and Surety Co.*, 904 F. Supp. 1142, 1149 (D.Haw. 1995). The Commission has the authority under federal law, when fulfilling its duties as set forth by Congress in the Act, to consider the issue of

performance measures and self-effectuating guarantees and direct that self-effectuating performance guarantees be included in an interconnection agreement.[5]

Although this Commission has thus far declined to do so, ITC^DeltaCom is not alone in recognizing the importance of performance guarantees. Indeed, the federal courts have made strong pronouncements in support of such a set of remedies:

> Inadequate service can be fatal to a new local exchange carrier such as TCG. If prospective customers try TCG service only to discover that they cannot reliably obtain a dial tone, that calls are disconnected in the middle of a conversation, or that service orders are not timely filled, then those customers will probably switch back to U.S. West and turn a deaf ear to future entreaties from TCG. Adverse publicity will also deter other prospective customers from considering TCG. Even assuming the problems are eventually resolved, that may not be soon enough to save TCG. Moreover, damages in such cases can be difficult to quantify and prove, and it would require years (and considerable expense) to litigate such claims. A further concern is that U.S. West stands to gain financially if customers become dissatisfied with TCG's local service, hence U.S. West is operating under a conflict of interest.
>
> Under the totality of the circumstances, including the PUC's extensive experience in overseeing U.S. West service in Oregon, the PUC could reasonably conclude that enforceable performance standards, i.e., those with teeth, are necessary and proper. Even if no damages are ever paid, the very existence of enforceable standards may help to reassure TCG (and other prospective CLECs) who might otherwise be hesitant to enter the local telephone market, and to minimize the suspicions and accusations

[5] The cases decided by the federal courts under the Act demonstrate that state regulatory commissions have the authority to arbitrate the issue of performance guarantees. *See, e.g., U.S. West Communications, Inc. v. Hix*, 57 F. Supp.2d 1112 (D.Col. 1999) (upholding Colorado PUC's decision to include general performance standards; commission could have made standards detailed); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 40 F. Supp.2d 416 (E.D.Ky. 1999) (holding that although Kentucky PSC was not required by Act to impose performance standards, it could have done so); *U.S. West Communications, Inc. v. TCG Oregon*, 31 F. Supp.2d 828 (D.Or. 1998) (holding that interconnection agreement could include liquidated damages provision mandating damages if U.S. West fails to meet certain performance standards).

> that might otherwise arise between TCG and U.S. West. The PUC also could reasonably have concluded that the liquidated damages clause would help to minimize costly litigation.

U.S. West Communications, Inc. v. TCG Oregon, 31 F. Supp.2d 828, 837-38 (D.Or. 1998). The mere availability of contractual and administrative remedies is not enough to protect ITC^DeltaCom from any failure by BellSouth to perform.

The FCC has encouraged states to impose penalties on an ILEC within the context of an arbitration award when that ILEC fails to perform. FCC Docket No. 98-147, *Third Report and Order*, Docket No. 96-98, *Fourth Report and Order*, p. 76, ¶ 176 (December 9, 1999). The FCC stated:

> We encourage states to establish penalties for failure to meet provisioning intervals as part of any arbitration award. The state could use the provisioning intervals it establishes as a measure to determine whether the incumbent LEC has failed to comply with its section 251(c)(3) unbundling obligations, even if the state has already taken action on prior violations by the same incumbent LEC, with respect to the same central office or the same competing carrier. We encourage states to consider adoption of self-executing remedies to minimize litigation in this area.

Id.

ITC^DeltaCom understands that the Commission has made the decision in this proceeding not to consider performance measures and self-effectuating guarantees. In the wake of that decision, however, it is worth noting that BellSouth now argues -- over two weeks late -- that the Commission has no authority to impose penalties for BellSouth's failure to perform under an interconnection agreement. Accepting BellSouth's argument would produce a system in which any hope of performance by BellSouth will be greatly diminished. ITC^DeltaCom believes in the need for performance measures and self-effectuating guarantees within its interconnection agreement with BellSouth. At a minimum, however, the Commission should

reject BellSouth's hypocritical and anti-competitive position regarding §364.285, Florida Statutes (1999), and recognize that it has the authority to impose penalties on BellSouth for violations of the order approving the interconnection agreement in this Docket.

III. THE TANDEM INTERCONNECTION RATE

ITC^DeltaCom also has become aware of a recent development regarding applicable rate elements for intercarrier compensation in Florida. Subsequent to the filing of briefs in this Docket, the Commission Staff filed on December 9, 1999 its recommendations in the ongoing arbitration proceeding between ICG Telecom Group ("ICG") and BellSouth in Docket No. 990691-TP. ITC^DeltaCom respectfully submits that the recommendation in that Docket misinterprets FCC Rule 51.711 in a manner which, if adopted by the Commission and applied to this case, would impose a burden of proof on ITC^DeltaCom which has no legal basis. Moreover, Staff's reasoning would result in an improper finding on a crucial issue in this Docket.

A. FCC Rule 51.711

The plain language of the FCC Rule 51.711(a)(3) controls this issue. That Rule states that "[w]here the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate of the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate." The Rule does not discuss functional equivalency, nor does it limit the type of switches used by non-ILECs that are entitled to the ILEC's tandem interconnection rate. The Commission is required to adhere to the language of Rule 51.711.

B. The Staff's Recommendation

The Staff appears to be proposing a standard which would unduly expand the requirements of FCC Rule 51.711. Issue 5 in Docket No. 990691-TP states:

> For purposes of reciprocal compensation, should ICG be compensated for end office, tandem, and transport elements of termination where ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch?

On page 34 of its Recommendation, the Staff responds to this inquiry as follows:

> No. The evidence of record does not show that ICG's switch will serve an area comparable to the area served by BellSouth's tandem switch. In addition, the evidence does not show that ICG's switch will perform the same functions as a BellSouth tandem switch. Therefore, staff recommends, for the purposes of reciprocal compensation, that ICG not be compensated for the tandem element of terminating calls on their network which originated on BellSouth's network. However, staff does recommend that ICG be compensated for the transport and end office elements of termination.

The Staff thus expresses two bases for its conclusion: (1) ICG did not prove that its switch would serve a comparable area to that served by BellSouth's tandem switches; and (2) ICG did not demonstrate that its switch would perform "the same functions" as a BellSouth tandem switch.

C. ITC^DeltaCom's Switches in Florida Serve an Area Comparable to That Served by BellSouth's Tandem Switches.

ITC^DeltaCom testified that its local switches in Florida -- which are located in Ocala and Jacksonville -- serve the entire state of Florida, a geographic area "comparable" to the area served by BellSouth's tandem switches. (Transcript of October 27-29, 1999 Hearing, p. 414.)[6] ITC^DeltaCom has on file with this Commission a price list which clearly states the geographic area by exchange available to its facilities-based customers served by its Florida switches. (*ITC^DeltaCom Communications, Inc., Florida Local Price List*, Section 3.2.1, pp. 84-85.2). The Price List shows that ITC^DeltaCom serves exchanges located throughout the state from its

[6] Subsequent citations to the transcript of the October 27-29, 1999 hearing shall be in the following format: ("T-[page number(s)]").

switches in Ocala and Jacksonville. The evidence in this case demonstrating ITC^DeltaCom's ability to provide local service throughout all of Florida distinguishes this case from the ICG/BellSouth arbitration.

D. FCC Rule 51.711 Does Not Require Functional Equivalency.

Staff's recommendation in the ICG case also implies that ICG had a burden of demonstrating that its switches performed the same functions as BellSouth's switches. FCC Rule 51.711(a)(3) makes no mention of tandem functionality, nor does it imply that ALEC switches be functionally equivalent to incumbent LEC tandem switches.[7] If anything, the FCC's language implies an understanding that ALEC network design and switch placement could vastly differ from traditional incumbent LEC network design. Rule 51.711 was crafted to ensure that ALECs were not financially penalized or discouraged from designing networks differently than those designed by the incumbent.

ITC^DeltaCom's network arrangement is an example of the types of radically different designs envisioned in FCC Rule 51.711(a)(3), and also demonstrates why the FCC made no reference to the switches performing "the same functions." The network of ITC^DeltaCom is fundamentally different from that of BellSouth. Rule 51.711(a)(3) requires only that the Commission consider whether a "comparable" geographic area is served -- there simply is no functionality comparison to be made.

There also is no requirement that ITC^DeltaCom's switches serve as a tandem. The language of FCC Rule 51.711 simply does not require a switch of a non-ILEC carrier to be a tandem. In this arbitration, ITC^DeltaCom met its only burden under the Rule -- to show that its

[7] A copy of FCC Rule 51.711(a)(3) is attached hereto for the Commission's convenience.

switch serves a comparable geographic area to the area served by BellSouth's tandem switches. The burden then shifts to BellSouth to demonstrate that ITC^DeltaCom's switch does not serve such a geographical area. BellSouth did not meet this burden -- indeed, it is undisputed that ITC^DeltaCom's switches in Florida serve the entire state.[8]

Indeed, the language of Rule 51.711(a)(3) demonstrates that ITC^DeltaCom's switch does not have to serve as a tandem. The Rule refers to "the switch of a carrier other than an incumbent LEC" serving a comparable geographic area to the area served by "the incumbent LEC's tandem switch." If the FCC intended to require non-ILECs to have tandem switches in order to be entitled to an incumbent LEC's tandem interconnection rate, it would have said so. ITC^DeltaCom's argument is validated by the fact that the FCC specifies the ILEC switch as a "tandem," but uses the broad, unqualified term "switch" when referring to non-ILECs

ITC^DeltaCom has met the only burden contained in Rule 51.711, notwithstanding the Staff's interpretation which would create additional burdens under the law which simply do not exist. ITC^DeltaCom demonstrated that its Ocala and Jacksonville switches serve a geographic area comparable to that of BellSouth's tandem switches. There is no evidence to the contrary. ITC^DeltaCom thus is entitled to the tandem interconnection rate of BellSouth.

IV. CONCLUSION

WHEREFORE, ITC^DeltaCom respectfully requests that the Commission:

(1) Affirm its authority under Section 364.285, Florida Statutes (1999), to impose penalties on BellSouth when it violates the terms of interconnection agreements approved by lawful orders of the Commission; and

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[8] During opening argument in the case, counsel for ITC^DeltaCom distributed a fiber network map identifying the switches which serve Florida.

(2) Declare that ITC^DeltaCom is entitled to the tandem interconnection rate of BellSouth in its Order in this Docket, consistent with the principles described above.

Respectfully submitted this 22nd day of December, 1999.

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CERTIFICATE OF SERVICE
DOCKET NO. 990750-TP

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CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B--COMMON CARRIER SERVICES
PART 51--INTERCONNECTION
SUBPART H--RECIPROCAL COMPENSATION FOR TRANSPORT AND TERMINATION OF LOCAL TELECOMMUNICATIONS TRAFFIC

Current through December 7, 1999; 64 FR 68573

§ **51.711** Symmetrical reciprocal compensation.

(a) Rates for transport and termination of local telecommunications traffic shall be symmetrical, except as provided in paragraphs (b) and (c) of this section.

(1) For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

(2) In cases where both parties are incumbent LECs, or neither party is an incumbent LEC, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs.

(3) Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

(b) A state commission may establish asymmetrical rates for transport and termination of local telecommunications traffic only if the carrier other than the incumbent LEC (or the smaller of two incumbent LECs) proves to the state commission on the basis of a cost study using the forward-looking economic cost based pricing methodology described in §§ 51.505 and 51.511, that the forward- looking costs for a network efficiently configured and operated by the carrier other than the incumbent LEC (or the smaller of two incumbent LECs), exceed the costs incurred by the incumbent LEC (or the larger incumbent LEC), and, consequently, that such that a higher rate is justified.

(c) Pending further proceedings before the Commission, a state commission shall establish the rates that licensees in the Paging and Radiotelephone Service (defined in part 22, subpart E of this chapter), Narrowband Personal Communications Services (defined in part 24, subpart D of this chapter), and Paging Operations in the Private Land Mobile Radio Services (defined in part 90, subpart P of this chapter) may assess upon other carriers for the transport and termination of local telecommunications traffic based on the forward- looking costs that such licensees incur in providing such services, pursuant to §§ 51.505 and 51.511. Such licensees' rates shall not be set based on the default proxies described in § 51.707.

[62 FR 662, Jan. 6, 1997; 62 FR 45587, Aug. 28, 1997]

<General Materials (GM) - References, Annotations, or Tables>

47 C. F. R. § **51.711**

47 CFR § **51.711**

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