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September 20, 2000

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

Re: FPSC Docket 991946-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of ITC^DeltaCom Communication, Inc. are an original and fifteen copies of ITC^DeltaCom's Response to BellSouth's Motion for Reconsideration in the above referenced docket.

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

Thank you for your assistance with this filing.

Sincerely,

Norman H. Horton, Jr.
for Floyd R. Self

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Enclosure
cc: Nanette Edwards, Esq.
Parties of Record

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11825 SEP 20 00
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Request for arbitration concerning complaint of ITC^DeltaCom Communications, Inc. against BellSouth Telecommunications, Inc. for breach of interconnection terms, and request for immediate relief	Docket No. 991946-TP Filed: September 20, 2000

ITC^DELTACOM COMMUNICATIONS, INC.'S RESPONSE TO BELLSOUTH'S MOTION FOR RECONSIDERATION

ITC^DeltaCom Communications, Inc. ("DeltaCom") hereby responds in opposition to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Reconsideration ("Motion"), and states as follows:

1. By Order No. PSC-00-1540-FOF-TP ("Order") issued August 24, 2000, this Commission resolved a complaint filed by DeltaCom with respect to the Interconnection Agreement ("Agreement") between the parties. In the complaint, DeltaCom asserted that BellSouth was in breach of the Agreement by not complying with the Agreement's reciprocal compensation provision. In its Order, this Commission found that as a matter of law the Agreement clearly and unambiguously requires BellSouth to pay reciprocal compensation for ISP traffic, and granted DeltaCom's Motion for Summary Final Order. BellSouth has now filed its Motion raising the same matters already considered and rejected. Since BellSouth has not shown that the Commission misconstrued or overlooked any law or evidence, the Motion should be denied.

2. In reviewing BellSouth's Motion for Reconsideration, the Commission must determine whether the Motion identifies a point of fact or law that the Commission failed to consider in rendering the Order. *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962). When ruling on a motion for reconsideration, it is not proper for the Commission to reargue matters that it has previously considered. *See State ex. rel. Jaytex Realty Co. v. Green*, 105 So. 2d 817 (Fla. 1st DCA 1958); *see also Lowe Investment Corporation v. Clemente*, 685 So. 2d 84 at 86 (Fla. 2nd DCA 1996) (denying motion for rehearing where there was no point of law or fact misconstrued or overlooked by the court). The Florida First DCA has stated:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision.... Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

Jaytex Realty Co., 105 So. 2d at 818-19. In its Motion, BellSouth is merely attempting to reargue matters already decided as a matter of law. BellSouth raises no new issues or rules of law that would entitle BellSouth to have this Commission reconsider its Order. Therefore, BellSouth's Motion should be denied.

I. BellSouth's Entire Motion Rests Erroneously on the Presumption that this Commission Should Have Considered Extrinsic Factual Evidence.

3. In its Motion, BellSouth alleges that the Commission "overlooked or failed to consider facts" about the intent of the parties as to how the reciprocal compensation provisions of the Agreement between the parties would apply to calls terminated to an ISP. But the Commission did consider this issue. Throughout the Order, the Commission considered and ultimately found that the intent of the parties could be determined from the clear and unambiguous language of the contract. Looking at the contract, the Commission correctly determined the Agreement calls for reciprocal compensation for all local traffic, including traffic to ISPs. The fact that BellSouth tries to twist this into the "remarkable" decision that Internet traffic is local simply is not the issue. Because the intent of the parties could be determined as a matter of law, from the terms of the Agreement, it was inappropriate for the Commission to inquire any further.

4. The Commission's decision to look first to the Agreement itself for the intent of the parties was correct as a matter of law. In Florida, it is well settled that contract disputes should be settled by the court without reliance on any extrinsic evidence of intent when the language used in the contract is unambiguous. As the Florida Supreme Court stated in *Friedman v. Virginia Metal Products Corp.*, 56 So. 2d 515 at 516 (Fla. 1952), "[t]he trial judge was correct in excluding parole testimony to vary or change the terms of a written instrument if the terms of that instrument were clear and unambiguous." This is what happened here.

5. Contrary to BellSouth's Motion, parole evidence is not to be considered when it is determined by the court that the intent of the parties is clear from the contract. *See e.g. Lemon v. Aspen Emerald Lakes Associates, LTD.*, 446 So. 2d 177 (Fla. 5th DCA 1984). Indeed, the parole evidence rule exists to protect valid, unambiguous contracts from any assault that would change the

written instrument in any way. *See Sears v. James Talcott, Inc.*, 174 So. 2d 776 at 778 (Fla. 2nd DCA 1965). Quite simply, it is improper to use extrinsic evidence to create ambiguity where none exists on the face of the document. The Commission did not overlook or fail to consider this issue as BellSouth would suggest. The Commission purposely excluded evidence on this issue because the Agreement speaks directly to the requirement of reciprocal compensation for local traffic which includes calls to ISPs. Therefore, no extrinsic evidence need be, or should be, considered. Accordingly, there is no basis for reconsideration.

II. The Commission Correctly Applied Florida Law on Summary Orders By Determining that the Contract was Clear and Unambiguous Thereby Finding No Disputed Issues of Material Fact.

6. BellSouth asserts as its second and third points that the Commission was wrong to conclude that there were no disputed issues of material fact and that the Commission overlooked or failed to apply the proper standard for a summary order. Once again, BellSouth is questioning the Commission's conclusion that the contract on its face was not ambiguous. BellSouth's argument on these points is inappropriate for a motion for reconsideration. Under Florida law, it is improper to seek reconsideration to "challenge [the court] as to the correctness of [its] conclusions on the matters considered and passed upon in [its] order." *See Department of Revenue v. Leadership Housing, Inc.*, 322 So. 2d 7 at 8,9 (Fla. 1975) (citing *Texas Co. v. Davidson*, 80 So. 558 (Fla. 1918)). *See also Jaytex Realty Co.*, 105 So. 2d at 818-19 (block quote supra). The Florida Supreme Court has explicitly stated that applications for rehearing should not be considered when they merely question conclusions made by the court. *See* Texas Co., 80 So. 558 at 559.

7. In an attempt to rescue its position, BellSouth tries to stretch its point by claiming that the Commission overlooked the "ultimate fact issue in dispute." However, this argument also fails as a matter of law. The fact of the matter is that the first question the Order addresses is "whether the record shows an absence of disputed material facts under the substantive law applicable to the action." Order at 13. Quite simply, it does not matter whether there is a disputed ultimate fact or any other fact -- the Order makes it very clear why it is inappropriate to consider parole evidence. The Commission correctly applied the substantive law of contracts and determined as a matter of law that the Agreement was unambiguous. That's the end of the inquiry.

8. A first year law school student learns that if a contract is clear and unambiguous on its face then parole evidence is not allowed. This Commission determined that the Agreement between BellSouth and DeltaCom is clear and unambiguous. On the basis of this determination, the Commission correctly excluded BellSouth's affidavit and all of the other facts BellSouth raised to dispute its obligation to pay reciprocal compensation. The case was correctly decided as a matter of law by looking within the four corners of the Agreement. On the basis of this conclusion, there were no disputed material facts, and it was proper to enter a summary final order. Accordingly, the Commission did not overlook or fail to consider BellSouth's factual evidence because the Commission correctly looked to the substantive law of contracts and decided the issue as a matter of law.

WHEREFORE, on the basis of the foregoing, BellSouth's Motion for Reconsideration should be denied.

Respectfully submitted,

for FLOYD R. SELF, ESQ.
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and

Nanette Edwards, Esq.
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Regulatory Affairs Manager
4092 South Memorial Parkway
Huntsville, AL 35802

Attorneys for ITC^DeltaCom Communications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of ITC^DeltaCom Response to BellSouth's Motion for Reconsideration in Docket No. 991946-TP have been served upon the following parties by Hand Delivery (*) and/or U. S. Mail this 20th day of September, 2000.

Tim Vacarro, Esq.*
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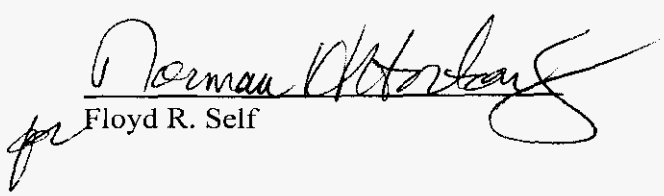

for Floyd R. Self