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October 17, 2003

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: Docket No. 030851-TP 030137

Dear Ms. Bayó:

Enclosed for filing on behalf of ITC^DeltaCom Communications, Inc. are an original and fifteen copies of ITC^DeltaCom Communications, Inc.'s Posthearing Brief in the above referenced docket. Also enclosed is a 3 1/2" diskette with the document on it in Microsoft Word 97/2000.

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 yours,

Floyd R. Self

FRS/amb
Enclosures
cc: Nanette Edwards, Esq.
Parties of Record

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

POST-HEARING BRIEF OF ITC^DELTACOM TELECOMMUNICATIONS, INC.

COMES NOW, ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), and submits its Post-Hearing Brief. ITC^DeltaCom respectfully requests the Commission resolve the remaining issues in this arbitration consistent with the discussion below.[1]

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") is a conflicted supplier. Its business relationship as a wholesale provider to its customer ITC^DeltaCom is peculiar and atypical. BellSouth is ITC^DeltaCom's wholesale supplier of essential facilities and services within the BellSouth Florida territory. Simultaneously, BellSouth is ITC^DeltaCom's fiercest retail competitor for local exchange customers in Florida. This unusual relationship and BellSouth's status as the bottleneck monopoly provider of wholesale telecommunications services is the reason Congress has left to state regulators, including this Commission, the authority to arbitrate disputes under the Telecommunications Act of 1996 ("Act"). Similarly, the Florida legislature has left authority to the Commission under independent Florida law to arbitrate this dispute. (§364.162, Florida Statutes).

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[1] The arbitration petition originally contained 71 unresolved issues (some with subparts). The parties successfully resolved a majority of the issues. The Commission need only resolve the remaining open issues addressed in this brief: Issue Nos. 2(a-c), 9, 11(a), 21, 25, 26, 36, 37, 44, 46, 47, 56, 57, 58, 59, 60, 62, 63, 64, 66, and 67.

The parties deferred Issues 30, 31, 33 and 34 pending issuance of the Triennial Order by the Federal Telecommunications Commission ("FCC"). The stipulated terms of the deferral were stated on the record. The subject matter covered by those issues will be the topic of negotiations between the parties. If these negotiations are unsuccessful, either party may petition the Commission for resolution within 90 days of the date of the Triennial Order. Transcript of September 3-5, 2003 Hearing, Volume 1, p 9. The Triennial Order was issued on August 21, 2003 and the parties currently are trying to negotiate resolution of these four issues.

In its Brief, BellSouth will not even suggest that the Commission should consider what is in the best interest of Florida consumers. Rather, BellSouth will ask the Commission to decline to exercise any discretion or judgment and to order only that which is minimally prescribed by the Act. BellSouth does not argue that the Commission is pre-empted or without authority to grant the relief sought by ITC^DeltaCom – because it cannot. By its very terms, BellSouth's doctrine ensures that Florida consumers will be deprived of competition allowed by law. Moreover, BellSouth is asking this Commission to turn its back on potential benefits allowed by state law and contemplated by regulations and orders of this Commission.

II. THE SIMPLE STANDARD THE COMMISSION SHOULD APPLY

Many of the issues in dispute involve complex engineering or economics. Nonetheless, all can be resolved by application of a simple three-part standard. **The Commission must determine whether the relief sought is: (1) technically feasible; (2) permissible (*i.e.* not expressly prohibited) under the law; and (3) in furtherance of competition ultimately benefiting Florida's local exchange consumers.** Based on the evidence of record, applying this simple standard, the Commission should resolve the remaining open issues as urged by ITC^DeltaCom below.

III. REMAINING OPEN ISSUES

Issue 2: Directory Listings

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

DELTACOM POSITION: *Yes. DeltaCom should have access to its end user customer listings in a reasonable time prior to publication in the BellSouth Directory. BellSouth sends the listings to BAPCO and DeltaCom should be able to verify that they have been accurately submitted.*

b) Should BellSouth be required to provide an electronic feed of the directory listings of DeltaCom customers?

DELTACOM POSITION: *Yes. ALECs' listings are commingled with BellSouth listings, but distinguished by the OCN. These should be extracted prior to book print for review. An electronic comparison of what was submitted versus what is being printed is in the best interest of both parties and will reduce customer dissatisfaction and confusion.*

c) Should DeltaCom have the right to review and edit its customers' directory listings?

DELTACOM POSITION: *Yes. Since DeltaCom is blind to the actions between BellSouth and BAPCO, and bears the financial responsibility to its end user, DeltaCom must be able to validate the accuracy of the listings.*

ITC^DeltaCom provides its end user customer listings to BellSouth for inclusion in the local phone directory. Transcript of September 3-5, 2003 Hearing, page 325.[2] Some of these listings must be manually keyed by BellSouth personnel. All iterations are not viewable by ITC^DeltaCom. (Id.) BellSouth then provides this information to its affiliate, BellSouth Advertising and Publishing Company ("BAPCO"). ITC^DeltaCom is seeking an electronic feed of these listings prior to publication so that it can ensure the accuracy of its customers' listings. BAPCO's website allows ITC^DeltaCom only to view a single listing at a time – and then only in the "top 100" directories in the region, which do not include a majority of Floridians. (T-326, 350). BellSouth should be required to provide these listings electronically either by: (1) providing a list of only the ITC^DeltaCom customers; or (2) providing the entire electronic list subject to a strict protective agreement that limits ITC^DeltaCom's usage and access to such records for validation purposes only. BellSouth does not contend that compliance with ITC^DeltaCom's request is technically infeasible or precluded by law. (T-628-29).

BellSouth attempts to distance itself from BAPCO and suggests that ITC^DeltaCom's recourse is only with its affiliate BAPCO. This argument fails because ITC^DeltaCom must provide its listings to BellSouth and does not provide them directly to BAPCO. The bottom line is that BellSouth is responsible for directory listing information. The Commission cannot ignore

[2] The transcript citation format hereinafter will be as follows: "(T-[page number])."

BellSouth's involvement in the process as urged by BellSouth. BellSouth is playing a shell game with ITC^DeltaCom, and the losers are Florida consumers whose listings suffer from an undisputed higher risk of inaccurate directory listings.

Incredibly, companies who provide retail directory listings can obtain the full electronic version of directory listings through a tariffed offering to publishers. (T-371). Thus, the full set of listings with service provider information is available electronically from BellSouth to third party publishers. Instead of being willing to provide this information to ITC^DeltaCom as requested, BellSouth argues that ITC^DeltaCom should simply access individual Customer Service Records ("CSRs"). This argument is a red herring. BellSouth fails to mention that the CSR will not reflect any BellSouth-created omissions or corrections or alterations made by BAPCO. (T-326). ITC^DeltaCom's experience with BellSouth in this regard is particularly confounding, given that another ILEC already provides an electronic feed of directory listings in the manner ITC^DeltaCom seeks. (T-370). It is not disputed that BellSouth's refusal to provide this data electronically increases the risk of inaccurate listings and consumer dissatisfaction.[3]

In the parallel arbitration between the parties before the North Carolina Utilities Commission ("NCUC"), the NCUC Staff recently recommended that BellSouth be required to "take the necessary steps to ensure that BAPCO provides ITC with an electronic version of galley proofs." NCUC Staff Recommendation, NCUC Docket No. P-500, Sub 18, October 10, 2003 ("NCUC Staff Recommendation"), p. 8. The NCUC Staff also noted that the responsibility for providing directories to end users lies with BellSouth, and concluded, "[t]he fact that BellSouth chooses to contract with BAPCO to publish and distribute its directories should not

[3] ITC^DeltaCom is willing to pay a reasonable, cost-based rate to receive the listings electronically. BellSouth has often chided ITC^DeltaCom for not filing a New Business Request ("NBR") for electronic listings. In response, ITC^DeltaCom ultimately filed an NBR on July 29, 2003, only to have BellSouth deny it on August 21, 2003, reverting to its BAPCO shell game. The Commission should require that the listings be provided electronically until BellSouth produces a cost study and obtains Commission approval of a rate.

absolve BellSouth of its obligations with regard to directories." Id. This reasoning is sound and should be followed by this Commission.

Issue 9: OSS Interfaces

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?

DELTACOM POSITION: *Yes. It is a requirement of the Telecom Act that OSS be nondiscriminatory. BellSouth should provide all OSS functions in all areas at parity. It should not be allowed to provide more advantageous OSS to its retail centers than provided to ITC^DeltaCom.*

Contract language regarding OSS should be unambiguous.

The Commission should order the parties to include the following language in the interconnection agreement:

> BellSouth will provide to ITC^DeltaCom access to all functions for pre-order that are provided to the BellSouth retail groups. Systems may differ, but all functions will be at parity in all areas, i.e., operational hours, content performance. All mandated functions, i.e., facility checks, will be provided in the same timeframes in the same manner as provided to BellSouth retail centers.

This language is clear and consistent with the law. BellSouth wants either no language or a vague reference to nondiscriminatory access. ITC^DeltaCom seeks more definition to avoid future disputes. Limiting the contract to general recitations of the Act is not particularly useful in governing the operations of the parties. One critical purpose of an interconnection agreement is to give application to the Act. Indeed, the parties are before the Commission in part because the language of the Act is not sufficiently precise to resolve certain operating issues.

The language put forward by ITC^DeltaCom acknowledges that BellSouth should be required to provide interfaces for Operational Support Systems ("OSS") that are equal to that enjoyed by BellSouth's retail division. BellSouth takes the position that because the

Commission gave it a favorable Section 271 recommendation, it should not have to include ITC^DeltaCom's proposed language. BellSouth argues that because of the Section 271 cases, ITC^DeltaCom's proposed language is "additional and unessential language on an already established point." (T-481). Reliance on the 271 recommendations assumes the telecommunications industry is static. BellSouth must agree that systems change with new technology and different demands.

BellSouth argues only that ITC^DeltaCom's language is unnecessary – in other words, that the principles embodied in ITC^DeltaCom's request are already covered by other sections of the interconnection agreement. Given BellSouth's vehement opposition to language that it can attack only as superfluous, its objection is less than convincing. BellSouth has yet to state a substantive objection to the language proposed by ITC^DeltaCom. ITC^DeltaCom's language will more explicitly ensure that ITC^DeltaCom will have access to the same OSS functions and information provided in the same timeframes and manner as those provided to BellSouth's retail sales division. Parity and nondiscriminatory access demand no less.[4]

Issue 11(a): Access to UNEs (compliance with state law)

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?

DELTACOM POSITION: *Yes. Several states have retained authority to establish UNEs. The interconnection agreement must be approved by state commissions and therefore must be compliant with state orders and regulations. BellSouth again seeks only the minimum obligation.*

[4] In other states, BellSouth also has proffered a red herring argument that ITC^DeltaCom's language seeks to allow access to functionalities BellSouth is not required to provide such as credit information. ITC^DeltaCom does not seek proprietary strategic marketing information from BellSouth and has said so clearly. Again, despite BellSouth's opinion that ITC^DeltaCom's language is "unnecessary," the language is consistent with the law and will provide clarity and definition to the relationship between the parties.

ITC^DeltaCom seeks inclusion of language that requires compliance with state law. A state law reference is particularly appropriate in Florida because of the pro-consumer laws and regulations adopted by the Florida legislature and this Commission. The Florida Legislature has found the competitive provision of telecommunications services, including local exchange services to be in the public interest and the commission is charged to promote competition. (§364.01, Florida Statutes). In the face of this important state authority, BellSouth's opposition to the simple request to include language requiring compliance with state law is dismissive of the Commission's authority, unsupported by any good policy, and hypocritical in light of BellSouth's reliance on state law with regard to other arbitration issues. (See discussion of Issue No. 62 – Back-billing, *infra*).

The interconnection agreement should specify that BellSouth's rates, terms, and conditions for network elements and combinations of network elements must be compliant with both state and federal rules and regulations. State commissions are given significant authority over interconnection agreements, as evidenced by the existence of this docket. As long as the decisions of this Commission are not inconsistent with, and do not frustrate the implementation of, Section 251 of the Act, they will not be preempted and will remain binding on BellSouth and ITC^DeltaCom.

BellSouth will cite the Triennial Order language indicating that states cannot create new UNEs or re-establish UNEs that the FCC eliminated, and will argue that this makes state law irrelevant. See Triennial Order, ¶¶ 194-195. This is wrong for at least two reasons grounded in state law.[5] First, Section 252(e)(3) of the Telecommunications Act clearly preserves states authority to establish or enforce other requirements of State law in its review of an agreement,

[5] Moreover, as described in the section herein relating to unbundled local switching, Section 271 of the Act provides independent obligations and authority.

including requiring compliance with intrastate telecommunications service quality standards or requirements. Furthermore, in several instances the TRO encourages state commissions to engage in arbitration hearings or other proceedings to ensure that unbundled network elements are available to competitive carriers. See Triennial Order, ¶¶ 385, 638. Second, state law still applies to govern the parties' relationship. This Commission has significant independent state authority over telecommunications services and federally mandated authority over the interconnection agreement even if certain limitations are placed on that authority by pronouncements of the FCC.

BellSouth's steadfast refusal to acknowledge the Commission's authority without any apparent justification is troubling to say the least. BellSouth's position also is hypocritical, as BellSouth makes an argument (albeit a flawed one) with regard to backbilling (Issue 62 – see *infra*) that is entirely dependent upon state law. BellSouth's audacity was illustrated during the hearing:

> Q: I listened closely to your summary with regard to Issue 62, and you cited very specifically to the Florida rules with regard to backbilling, didn't you?
>
> A: Yes. The telecom rules. Yes, I did.
>
> Q: So in that case you're very glad to have the Florida PSC's rules control an issue between these parties –
>
> A: Yes.

(T-629). The Commission should not countenance BellSouth's hypocrisy and should order that the interconnection agreement include language that requires compliance with Florida state law.

Issue 21: Dark Fiber Availability

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

DELTACOM POSITION: *Yes. BellSouth wants to require DeltaCom to pick up dark fiber loops only at the DeltaCom collocation site. In fact, the parties meet in locations other than a collocation site. It is technically feasible for BellSouth to make dark fiber loops available at other locations.*

Dark Fiber Should be Available at Any Technically Feasible Point in the Same Manner that Dry Fiber is Made Available.

ITC^DeltaCom seeks access to dark fiber at any technically feasible point, not only at ITC^DeltaCom collocation sites. BellSouth's refusal is based completely on the parsing of words and twisting of the FCC's rules, and results in a disparity between the parties regarding access to fiber that is easily called into service for the benefit of Florida consumers.

ILECs like BellSouth regularly deploy fiber in segments with planned "breaks" in the path where larger backbone cable meets smaller distribution or lateral cables that connect to specific customer locations or remote terminals. (T-215). BellSouth assures itself flexibility by placing "splice cases" at these points so that it can splice strands of fiber together to complete a path between two locations. (Id.) Extra fiber is left in place and unconnected to address future demand. The issue is whether BellSouth will provide access to this "unlit" fiber at Commission-approved cost-based UNE rates at locations other than ITC^DeltaCom's collocation spaces within BellSouth central offices, such as at other carriers' collocation sites and in nearby access points (where fiber can be spliced) like manholes. (T-216). BellSouth refuses to accommodate ITC^DeltaCom in this regard, but does not suggest it is prohibited from doing so.

BellSouth admitted that providing dark fiber as requested by ITC^DeltaCom is technically feasible. (T-546). Of course, BellSouth could not deny this since it has already provided dark fiber to ITC^DeltaCom at non-collocation sites in the past at cost-based rates.

(T-544). BellSouth also argues that it is not *required* to provision dark fiber as requested by ITC^DeltaCom and seeks language that will allow it to stop doing so despite the fact that ITC^DeltaCom is willing to pay for it and that it will benefit Florida consumers.[6]

BellSouth does not argue that providing ITC^DeltaCom with access to dark fiber at non-collocation sites is prohibited by law or contrary to good public policy. Indeed, BellSouth admits that it has provided ITC^DeltaCom with dark fiber at splice points such as a manhole rather than at ITC^DeltaCom's collocation site in the past.[7] Rather, BellSouth argues that "BellSouth's definitions of dark fiber comport with the definitions of loop and transport under the FCC's rules." BellSouth cites to 47 C.F.R. 51.319(a)(1) and 47 C.F.R. 51.319(d)(1) as support for its position that it is only required to make dark fiber loops available at the demarcation point associated with ITC^DeltaCom's collocation arrangements within BellSouth central offices.[8] In essence, BellSouth argues that the "loop" definition provided for by the FCC does not include fiber without electronics on either end – that is, not connected to a central office of BellSouth or ITC^DeltaCom POP.

However, BellSouth ignores the FCC's rules codified at 47 CFR 51.311 (d), 51.321(a)–(c), and 51.307(a). The very rule cited by BellSouth, Rule 51.319, also states that BellSouth must offer nondiscriminatory access in accordance with Rule 51.311 and Section 251(c)(3) of the Act. Rule 51.311(d) provides that "previous successful access to an unbundled element at a

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[6] ITC^DeltaCom wants to pay for the fiber at cost-based rates as well as any special construction needed for interconnection. Moreover, BellSouth offers unlit fiber or "dry fibers" in the manner sought by ITC^DeltaCom in its FCC Tariff. BellSouth's intransigence on this issue seems solely based on its desire to avoid Commission-approved TELRIC rates for monopoly elements at its facilities in Florida.

[7] BellSouth has indicated in hearings in other states that it does not seek to remove those existing arrangements that are provided at cost-based rates.

[8] BellSouth has existing language in its interconnection agreement with NewSouth explicitly stating that dark fiber shall be provided at any technically feasible point. (T-270). Despite this clear language, BellSouth will still rely on its tortured and defective legal argument that what ITC^DeltaCom is seeking is not really "dark fiber."

particular point in a network, using particular facilities is substantial evidence that access is technically feasible at that point..." In addition, Rules 51.321(a)–(c) provide that BellSouth is required to provide any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point. These rules and BellSouth's previous successful provisioning of dark fiber to ITC^DeltaCom at non-collocation sites weighs heavily in favor of requiring such provisions in the future.

BellSouth now asks for pity, saying that Issue 21 really asks "whether any good deed should go unpunished?" (T-544). BellSouth's overwrought suggestion that it is being "punished" if it is required to provide dark fiber to ITC^DeltaCom at those locations in the network where it has previously provided such access is based only on BellSouth's newly found desire to frustrate ITC^DeltaCom's ability to compete and provide service to its customers. In fact, requiring BellSouth to do so levels the playing field because BellSouth can easily call this fiber into service for itself. BellSouth is legally required pursuant to Rules 51.311(d), 51.321(a)-(c), and 51.307 to provide access to unbundled elements at any technically feasible point on terms and conditions that are just, reasonable and nondiscriminatory. BellSouth's provision of dark fiber at a manhole for ITC^DeltaCom is substantial evidence that it is technically feasible to provide dark fiber at locations other than a collocation site. If ITC^DeltaCom orders dark fiber and requests that the dark fiber be provided at a manhole rather than ITC^DeltaCom's collocation site, BellSouth will refuse that order and demand that ITC^DeltaCom place the order for fiber pursuant to BellSouth's access tariff and pay access rates. This is entirely unjustified.

This issue also is one where state law can be dispositive. Each LEC is required to provide access to and interconnection with its facilities and this includes all or portions of such services as needed to provide local exchange services. (§§364.16 and 364.162, Florida Statutes).

The Commission can resolve this issue by ordering that TELRIC rates for dark fiber are just and reasonable.

Recently, in the BellSouth region, the NCUC Staff has recommended that BellSouth's unreasonable position regarding dark fiber be rejected. In analyzing the precise issue before this Commission, in the ITC^DeltaCom arbitration, the NCUC Staff concluded that "BellSouth should be required to allow ITC to access unused dark fiber facilities at any technically feasible point in BellSouth's network, not merely at ITC's collocation sites located in BellSouth's wire centers." NCUC Staff Recommendation, p. 13. The NCUC went on to recommend defining "technically feasible point" as including "any particular premises or point on an ILEC's network where interconnection or access to unbundled network elements has previously been successful." Id.

Other state regulatory commissions have reached the same conclusion that ITC^DeltaCom asks this Commission to reach. Many states have recognized that an ILEC's refusal to splice and terminate dark fiber for CLECs violates ILECs' unbundling obligations and unreasonably limits the amount of unbundled dark fiber available to CLECS. SBC, for example, has argued before state commissions in California, Indiana and Texas that because un-terminated fiber is not connected to equipment at the customer location at the termination point it need not be unbundled. The California Public Utilities Commission ("CPUC") rejected SBC's contention noting that it "is an attempt to define away its legal obligations" and that the California PUC did "not want to set a rule in place that would allow [SBC] to evade its obligations to unbundle dark fiber for CLECs, as mandated by the FCC." *Application by Pacific Bell Telephone Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission*

Services, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996, A.01-01-010, Final Arbitrator's report Cal. PUC, July 16, 2001 at 130, 139.

SBC made similar assertions in two cases before the Texas Public Utilities Commission ("Texas PUC"). In the first case, the Texas PUC held:

> SWBT incorrectly interprets the FCC's intention. SWBT states that, consistent with the FCC's mandate in Paragraph 328, it is only obligated to provide dark fiber as a UNE if the fiber connects two points in SWBT's network. The Arbitrators, however, agree with CoServ's argument that "connectivity does not equal termination." Consequently, the Arbitrators find that the UNE Remand Order discussed connectivity in the context of distinguishing dark fiber that was already "in place and called into service" from the example of unused copper wire "stored in a spool in a warehouse."

Docket 23396, *Petition of CoServ, Inc. for Interconnection Agreement with SWBT*, Arbitration Award at 139, TX PUC, April 17, 2001.

In a subsequent case, the Texas PUC ruled that 'unterminated and unspliced fibers should be made available to [the CLEC] for use as UNE dark fiber," and that "[SBC] has an obligation to provide that unspliced UNE dark fiber to [the CLEC] and splice it upon request." *Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone*, Docket No. 25188, at 139, TX PUC, July 31, 2002 ("EPN Texas Revised Arbitration Award"). The Texas PUC explained its decision by noting that it found "no reason to distinguish between fiber that is deployed and spliced and fiber that is deployed and un-spliced; doing so would limit [CLECs'] ability to request UNE dark fiber." EPN Texas Revised Arbitration Award, at 139.

Several other state commissions[9] including those in the District of Columbia,[10] Indiana,[11] Massachusetts, and Rhode Island[12] have examined the issue and have ordered ILECs to splice dark fiber for requesting CLECs. For example, the Massachusetts Department of Telecommunications and Energy ("MADTE") dismissed the arguments raised by Verizon regarding the technical feasibility of splicing dark fiber and concluded "that it is *technically feasible* and *consistent with industry practice* to lease dark fiber **at splice points.**"[13] In fact, the MADTE concluded that Verizon itself resplices "from time to time" and that those "splice points are designated for [Verizon], itself, to use as junction points in its network."[14] Accordingly, the MADTE saw "little distinction between a splice performed on behalf of [Verizon] and that performed for another carrier" and ordered Verizon to provide access to dark fiber at any technically feasible point including existing splice points as well as hard termination points.[15] The MADTE required Verizon to perform splicing at the CLEC's request in order to make a

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[9] Most of these state decisions are cited in the FCC's recent Triennial Review Order in footnotes 1189, 1190, 1191, and 1934.

[10] *TAC 12 – Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Washington, DC, Inc.*, Order No. 12286, Order on Reconsideration, (DC PSC Jan. 4, 2002) ("*D.C. Dark Fiber Order*") at ¶ 62, 87.

[11] *Re: AT&T Communications of Indiana, Inc.,* Cause No. 40571-INT-03, Slip Opinion, at 79, 129-130 (Nov. 20, 2000) ("Indiana Order").

[12] *In re: Verizon-Rhode Island's TELRIC Studies - UNE Remand,* Docket No. 2681, Report and Order, at 19, 22-23 (Rhode Island PUC, Dec. 3, 2001) *("RI Dark Fiber Order")* ("Verizon is required to splice dark fiber at any technically feasible point on a time and materials basis, so as to provision continuous dark fiber through one or more intermediate central offices without requiring the CLEC to be collocated at any such offices."); Jan. 29, 2002 Tr. at 18:21-186:3.

[13] *New England Telephone and Telegraph Company d/b/a Bell Atlantic Massachusetts,* Decision D.P.U./D.T.E. 96-83, 96-94-Phase 4-N, at 33 (Mass. DTE Dec. 13, 1999) ("We impose no collocation requirement ... it is technically feasible and consistent with industry practice to lease dark fiber at splice points.") ("Mass. DTE Phase 4N Order") (emphasis added); *New England Telephone and Telegraph Company d/b/a NYNEX, et al.*, Decision D.P.U. 96/73-74, 96/80-81, 96-84-Phase 4-R Order at 4-5 (Mass. DTE Aug. 17, 2000), 2000 Mass. PUC Lexis 6..

[14] *New England Telephone and Telegraph Company d/b/a NYNEX,* Decision D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 3, at 48-49 (Mass. DTE Dec. 4, 1996) *("Mass. DTE Phase 3 Order").*

[15] *Mass. DTE Phase 3 Order*, at 48.

fiber strand "continuous by joining fibers at existing splice points within the same sheath."[16] The FCC in its Triennial Review Order cited this state decision in footnote 1190 and clearly stated that the splicing of cable is one of the modifications ILECs must perform on the behalf of CLECs.

The District of Columbia Public Service Commission ("DC PSC")[17] observed that the Indiana Commission and MADTE permit access to dark fiber at splice points[18] and in light of this precedent and other analysis, concluded that Verizon must provide access to dark fiber at splice points.[19] The Rhode Island PUC, following the lead of the MADTE, ordered Verizon to "*splice* dark fiber at any technically feasible point so as to make dark fiber continuous through one or more intermediate offices *without requiring the CLEC to be collocated at any such intermediate offices.*"[20]

Referring to these decisions, the FCC in its Triennial Order recognized the efforts of the state commissions to address ILECs' attempts to restrict access to dark fiber:

> We note that many state commissions have directly addressed these issues through arbitrations and other proceedings. For example, states have addressed the pre-ordering and ordering processes including determinations about what information incumbent LECs must make available about the location of dark fiber, the extent to which incumbent LECs must allow or perform splicing and other preparatory work, and access to dark fiber transport that traverses through intermediate central offices where the competitive LEC is not collocated. *We recognize the hard*

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[16] Mass. DTE No. 17, Miscellaneous Network Services, Part B, § 17.1.1.A.1; *Mass. DTE Phase 4N Order*, at 33; *D.C. Dark Fiber Order*, at ¶ 57.

[17] *TAC 12 – Petition of Yipes Transmission, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Washington, DC, Inc.*, Order No. 12286, Order on Reconsideration, at ¶ 57 (DC PSC Jan. 4, 2002) ("*D.C. Dark Fiber Order*").

[18] *D.C. Dark Fiber Order*, at ¶ 61.

[19] *D.C. Dark Fiber Order*, at ¶ 62, 74, 87.

[20] *In re: Verizon-Rhode Island's TELRIC Studies – UNE Remand*, Docket No. 2681, Report and Order, at 19, 22-23 (Rhode Island PUC, Dec. 3, 2001) (emphasis added).

> *work of the state commissions to make dark fiber meaningfully available and endorse such efforts here.*

Triennial Order, ¶ 385 (footnotes omitted) (emphasis added). The FCC went on to state:

> The requirement we establish for incumbent LECs to modify their networks on a nondiscriminatory basis is not limited to copper loops, but applies to all transmission facilities, including dark fiber facilities. For example, several state commissions have rejected incumbent LEC attempts to deny competitive access to dark fiber where a competitive LEC seeks access to the network in the same manner as the incumbent LEC [footnote omitted]. Incumbent LECs must make the same routine modifications to their existing dark fiber facilities for competitors that they make for their own customers – including the work done on dark fiber to provision lit capacity to end users. Although the record before us does not support the enumeration of these activities in the same detail as we do for lit DS1 loops, *we encourage state commissions to identify and require such modifications to ensure nondiscriminatory access.*

Triennial Order, ¶ 638 (emphasis added).

In light of these facts, the Commission should adopt the best practices regarding splicing and termination of dark fiber developed by state commissions around the country and endorsed by the FCC. The Commission should allow ITC^DeltaCom to access dark fiber at any technically feasible point in its network, even if providing such access would require BellSouth to undertake fiber splicing for ITC^DeltaCom. ITC^DeltaCom is willing to pay special construction charges when BellSouth does this work. The pricing for the fiber itself should be at UNE rates.

Issue 25: <u>Provision of ADSL where ITC^DeltaCom is Local UNE-P Provider</u>

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?

DELTACOM POSITION: *Yes. DeltaCom has received consumer complaints that the consumer can't take DeltaCom voice service because if he or she does, BellSouth disconnects the consumer's ADSL service. This is an anticompetitive tying arrangement. Consumers should be able to select one company for high-speed internet and one for voice service.*

This Commission should follow its previous decisions that BellSouth's policy of not providing its FastAccess DSL service over a CLEC UNE-P line is unlawful. The Commission has already concluded in an arbitration proceeding that "in the interest of promoting competition in accordance with state and federal law, BellSouth shall continue to provide FastAccess even when BellSouth is no longer the voice provider because the underlying purpose of such a requirement is to encourage competition in the local exchange telecommunications market, which is consistent with Section 251 of the Act and with Chapter 364, Florida Statutes." *In re: Petition by Florida Digital Network, Inc. for Arbitration or Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Final Order on Arbitration, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP (Florida PSC, June 5, 2002).

DSL is a high speed Internet service that allows Florida customers to access the internet and use telephone voice services simultaneously without the need to obtain a separate line. The upper spectrum of a copper loop is used to carry the DSL internet signal while the voice signal is carried on the lower spectrum of the loop at the same time. BellSouth's retail consumer DSL product is called Fast Access. BellSouth wants the Commission to allow it to refuse to provide its Fast Access DSL service to customers who are served via UNE-P by an ALEC of the customer's choosing. Indeed, even where a customer is currently served by BellSouth and has Fast Access service, BellSouth desires to undergo the work and expense to disconnect that service if the customer chooses an alternative UNE-P local provider.

The anticompetitive nature of BellSouth's argument is plain. The only reason BellSouth would *want* to refuse to provide FastAccess to customers who choose a competitor is *because* that will prevent customers from choosing voice providers other than BellSouth, even though the

customer otherwise would have preferred to do so. BellSouth ultimately finds it advantageous to refuse service to customers – although BellSouth may be risking disconnection, it must fully be *expecting* to retain both the DSL and voice service by daring the customer to choose a competitive voice provider. Thus, BellSouth is willing to risk receiving only the UNE-P wholesale revenue on a line in the hope that it will retain both the customer's retail voice and its DSL revenue. BellSouth is playing a game of chicken in order to thwart the development of local competition.

If allowed, BellSouth's DSL policy would be a classic tying violation. Under antitrust law, a tying arrangement is "an agreement by a party to sell one product [the "tying" product] but only on the condition that the buyer also purchases a different (or tied) product . . . " *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Thus, three elements of a tying claim may be distilled: (1) there must be a tying and a tied product; (2) the sale of the tying product must be conditioned on the sale of the tied product; and (3) the tying arrangement must be anticompetitive. BellSouth's DSL policy would satisfy each of these three elements. First, BellSouth would offer a tying (or desired) product – its DSL product—and also a tied product – its retail voice service. Second, BellSouth would condition the sale of its DSL service on consumers' purchase of BellSouth's retail voice service. Third, BellSouth's tying scheme would be anticompetitive.[21]

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[21] BellSouth's tying arrangement is anticompetitive for at least three reasons, as outlined by Ms. Conquest in her testimony. (T-328-330). First, BellSouth's policy essentially forces potential competitors to enter two markets simultaneously in order to meet demand for high speed internet services. In other words, a CLEC would have to develop a DSL product at the same time it is trying to penetrate the BellSouth stranglehold on the local exchange market. The result is a disincentive for competition and a contradiction of the policy expressed in Paragraph 56 of the FCC's Line Sharing Order: "[r]equiring that competitors provide both voice and xDSL services, or none at all, effectively binds together two distinct services that are otherwise technologically and operationally distinct. Such bundling . . . will not drive additional investment dollars toward voice [services], because it does not make voice [services] more lucrative . . . ."

Second, BellSouth's policy allows it to "cherry pick" the most attractive customers from the mass market, thereby reducing the profitability of entry by would-be competitors. ITC^DeltaCom's experience is that there is a

Other commissions in the BellSouth region in addition to this one have rejected BellSouth's policy as anticompetitive. The Louisiana Public Service Commission ("LPSC") ruled that BellSouth would be required to provide its DSL service over CLP UNE-P loops. *In re: BellSouth's provision of ADSL service to end-users over CLEC loops Pursuant to the Commission's directive in Order U-22252-E*, Order No. R-26173, Docket R-26173 (Jan. 24, 2003) ("Louisiana Order"). There the LPSC stated that "the Commission's policy is to support competition in all telecommunications markets, including local voice service. The anti-competitive [e]ffects of BellSouth's policy are at odds with the Commission's, and thus should be prohibited." *Id.* at 6. In the LPSC's Clarification Order issued in the same docket, the Commission stated that its order applies to customers receiving UNE-P service, regardless of whether the customer has FastAccess or DSL service from an ISP carrier using BellSouth's wholesale DSL product, and regardless of whether the customer obtains DSL service before or after migrating the service to the CLEC. *In re: BellSouth's provision of ADSL service to end-users over CLEC loops Pursuant to the Commission's directive in Order U-22252-E*, Order No. R-26173-A, Docket R-26173 (April 4, 2003) ("Louisiana Clarification Order"). The Kentucky Public Service Commission also has found BellSouth's DSL policy unlawful. *In re Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252*, Order, Case No. 2001-00432 (Kentucky PSC, October 15, 2002) ("Kentucky Clarification Order") (requiring

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correlation between DSL purchasers and the more profitable voice service customers. BellSouth's policy therefore intimidates these highly desirable customers from exercising the full panoply of local voice services they might otherwise consider.

Finally – and most critically for Florida consumers – BellSouth's policy limits the choices consumers can make with regard to their telecommunications services. By refusing to provide its DSL product to CLEC UNE-P customers, BellSouth communicates that negative consequences befall those who exercise their rights of choice. This is entirely contrary to the very basis of telecommunications deregulation and competition. The Commission should reject BellSouth's illegal tying arrangements and reaffirm the rights of Florida consumers to choose their providers with regard to both internet and voice services.

BellSouth to provide DSL service to requesting ISPs when the end user customer chooses a UNE-P CLEC).[22]

BellSouth argues that CLECs can retain DSL service for their customers by either serving the customer through resale or by partnering with other CLECs offering DSL. Resale has not proven to be a viable mass market entry strategy anywhere in the United States. Even if it had, ITC^DeltaCom's services to a resale customer are limited to the features and services provided by BellSouth on that line. This creates technical limitations and does not allow ITC^DeltaCom the flexibility to provide the level of high quality service its customers demand. As for partnering with other CLECs, most CLECs who offer DSL simply resell BellSouth's DSL product or lack an equivalent service footprint to BellSouth's service territory. Indeed, BellSouth's long-standing monopoly status in the voice market gave it a significant head start and a ready-made market in which to sell its Fast Access product. The fact remains that no CLEC is similarly situated to BellSouth in this regard, and BellSouth should not be allowed to dictate the entry strategies of its competitors by applying an arbitrary, anticompetitive, anti-consumer policy.

Issue 26: Local Switching – Line Cap and Other Restrictions

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

DELTACOM POSITION: *The existing contract language states that the four line cap only applies to a single physical end user location with four or more DSO equivalent lines.*

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

[22] In addition, in a proceeding initiated by MCI regarding BellSouth's DSL over UNE-P policy in Georgia PSC Docket No. 11901-U, the Georgia Commission Staff has recently recommended that the Commission grant MCI's requested relief and order BellSouth to continue to provide its FastAccess DSL to a customer who is served by a competitive UNE-P carrier for local voice service.

DELTACOM POSITION: *Yes. This language is in other carrier agreements and is in the parties' current interconnection agreement.*

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?

DELTACOM POSITION: *This issue is subject to the FCC Triennial Review order and the findings of the Commission pursuant to that order. To the extent BellSouth is allowed to price a service at market rates, those rates must be approved by the Commission and supported by relevant market data and analysis.*

BellSouth should make unbundled local switching available pursuant to terms and conditions that promote local competition. Regarding Issue 26(a), ITC^DeltaCom seeks an order that requires BellSouth to apply the four line cap only to a single physical end user location and not to combine multiple locations of the same end user. Regarding Issue 26(b), ITC^DeltaCom merely asks for contract language that prohibits BellSouth from imposing restrictions on local switching.

The rates, terms, and conditions for the provision of unbundled local switching that BellSouth must provide under § 271(c)(2)(B)(vi) of the Act has extremely important ramifications for the issues before the Commission in this proceeding. The Commission's policy determination of the pricing, terms, and conditions of "de-listed" local switching under § 271 (an issue explicitly addressed in the Triennial Order) could significantly impact the positions taken by various parties in this docket, would potentially remove an enormous amount of the industry uncertainty surrounding this proceeding, and therefore should be considered as a threshold issue.

The FCC affirmed in the Triennial Order that Bell Operating Companies ("BOCs") which have received interLATA long distance authority in a state, such as BellSouth, must provide CLECs unbundled local switching pursuant to the § 271 competitive checklist.[23] Section

[23] Section 271(c)(2)(B)(vi) of the Act provides: "(B) Competitive Checklist – Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of

271(c)(2)(A) of the Act provides that these "checklist" requirements are to be implemented through the interconnection agreements or SGATs approved by state commissions. Section 271 provides an independent statutory basis for BellSouth's obligation to "provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251."[24] This "independent obligation" thus requires BellSouth to provide unbundled switching even if "no impairment" is found in a market pursuant to the § 251 unbundling analysis called for in the Triennial Order.[25] Thus, even if mass market unbundled local switching is "de-listed" as a network element unbundled pursuant to § 251(c)(3), BellSouth still must provide CLECs access to unbundled local switching in all its Florida markets, and this Commission retains the authority to ensure that the rates, terms and conditions comply with law. (§§364.01; 364.16; 364.162, Florida Statutes).

Regarding Issues 26(c) and (d), ITC^DeltaCom strongly urges the Commission to reject BellSouth's unsupported $14.00 "market rate" for unbundled local switching in the MSAs where the four line cap applies. The Commission should order, for purposes of the interconnection agreement, its already established TELRIC rate for unbundled local switching, as that rate is the only "just and reasonable" rate in evidence in this case.

1. 26(a) – Aggregation

After an extended colloquy at the hearing, BellSouth conceded that the Commission's decision in the recent AT&T Arbitration would be followed with regard to the parties' Florida interconnection agreement. (T-87). Therefore, for all intents and purposes, this issue is now

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this subparagraph if such access and interconnection includes each of the following: ... (vi) Local switching unbundled from transport, local loop transmission, or other services."

[24] Triennial Order, ¶653.

[25] Triennial Order, ¶¶653-655.

closed and the Commission should simply retain the current Commission-approved interconnection agreement language regarding the limitation of the four line cap rule to particular customers at particular locations.

2. 26(b) – Restrictions

This issue concerns BellSouth's refusal to include language in the contract that would prohibit BellSouth from imposing restrictions on local switching. ITC^DeltaCom believes such language is necessary to ensure that BellSouth does not apply arbitrary restrictions that create barriers to ITC^DeltaCom's ability to access UNEs under state and federal rules and regulations. ITC^DeltaCom has proposed the following language, which is in the parties' current interconnection agreement approved by this Commission at Attachment 2, Section 9.1.2:

> Except as otherwise provided herein, BellSouth shall not impose any restrictions on ITC^DeltaCom regarding the use of Switching Capabilities purchased from BellSouth provided such use does not result in demonstrable harm to either the BellSouth network or personnel or the use of the BellSouth network by BellSouth or any other telecommunications carrier.

BellSouth has failed to explain what is objectionable about this language. Further, this language essentially tracks the requirements of 47 C.F.R. §§ 51.309(a) and (b). ITC^DeltaCom's proposed language is reasonable and the Commission should order its inclusion in the interconnection agreement.

3. 26(c) – "Market Rate"

In instances where the four line cap rule applies, BellSouth proposes the inclusion in the interconnection agreement of a $14.00 "market rate" for unbundled local switching. This is in contrast with the Commission-ordered rate of $1.40. BellSouth's rate is patently unreasonable on its face. BellSouth offers this rate as a so-called "market rate" under the presumption that it

reflects a just and reasonable price in a competitive market for local switching. It is in fact nothing of the sort. The proposed rate is a price gouge.

As if the mere submission of a $14.00 rate – a 900% increase over the Commission-approved just and reasonable rate – were not incredible enough on its face, the discussion on the record regarding the development of this so-called "market rate" are even more remarkable. First, BellSouth admitted that it is still required to offer unbundled local switching under the Act – it simply doesn't want to do so at TELRIC prices where the four line cap rule applies. (T-415). BellSouth further admitted that if its position were adopted in this case, the Commission would be approving the $14.00 rate. (T-418).

One might assume BellSouth would provide some support for a rate it seeks to have approved by the Commission. Instead, BellSouth did not even offer flimsy support for its astronomical rate. After admitting that Section 251 of the Act requires rates, terms and conditions to be "just and reasonable," BellSouth's witness stated that she was unfamiliar with how the $14.00 rate was developed.[26] (T-418) Summing up the strength of BellSouth's evidence on this point, the following exchange regarding BellSouth discovery responses took place at the hearing:

> Q. And in that question, you are asked to describe the process used by BellSouth to arrive at the $14 rate; correct?
>
> A. Yes.
>
> Q. And you were unable to describe the process; correct?
>
> A. We were unable to describe the process that was used at the time the $14 market rate was developed, yes. That was –

[26] Sections 201 and 202 of the Act very directly require that rates be "just and reasonable."

Q. I understand. And you were unable to do that because, as you say in this response, the individuals have left the company; correct?

A. Yes.

Q. As a matter of fact, there's no one with any knowledge or information of the process left at the company; correct?

A. We have not been able to locate anyone . . .

(T-418).

Apparently *no one* at BellSouth has this information, as evidenced by BellSouth's responses to discovery requests filed by ITC^DeltaCom in North Carolina and Tennessee. These responses show that not only does no person at BellSouth have any knowledge or information regarding the development of the $14.00 rate, but also that any persons who might have such knowledge have now left the company.[27] When asked to describe the process for developing the $14.00 rate, BellSouth responded:

> BellSouth has been unable to locate anyone with knowledge or information of the process used to arrive at the "market rate" of $14.00. The individuals that were involved in the process are no longer employees of the company.[28]

When asked to provide workpapers or supporting documentation for the development of the rate, BellSouth responded that it was unable to locate any.[29] This embarrassing lack of support for BellSouth's absurdly inflated $14.00 rate calls for rejection of BellSouth's position.

Despite the fact that no evidence was produced of a market for unbundled local switching, it was suggested during the hearings that the $14 rate was a market rate set by market

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[27] See Hearing Exhibit 17 and BellSouth's responses to ITC^DeltaCom Interrogatory Nos. 47 and 48. (See also T-419-420).

[28] Id.

[29] Id.

conditions. Any argument BellSouth makes that the $14 rate was set by a market analysis is directly contradicted by the deposition testimony of BellSouth's "product manager" for unbundled switching. Indeed, BellSouth's Jim Maziarz stated during his deposition that while he, too, was unaware of any study or analysis he thinks the $14 rate is based on the cost of a combination of a variety of elements offered by BellSouth.(Maziarz Deposition Ex. 4, pp. 49-51) Thus, while the origin and basis of the $14 rate is without any support in the record, and BellSouth will not admit to performing any analysis, BellSouth may be using embedded costs of a combination of elements as a way to circumvent the Commission's ordered TELRIC based rates for elements. The only fact that is clear is that only one rate that was offered into evidence can be found to be just and reasonable as required by law. That rate is the Commission approved TELRIC rate. In effect, BellSouth has left the Commission with no choice but to order the TELRIC rate be the only rate incorporated in the interconnection agreement.[30]

Essentially, BellSouth seeks inclusion in a Commission-approved interconnection agreement of a $14.00 rate without a shred of evidence from BellSouth – no cost studies, no demonstration of competitive alternatives – *nothing*. BellSouth admits it has an obligation under Sections 251 and 271 to provide unbundled local switching. However, to price unbundled switching at $14 is to *de facto* not offer unbundled switching in Florida. BellSouth cannot seriously argue that there is a market for unbundled local switching that would justify its attempted price gouge of ITC^DeltaCom. Desperate to provide evidence of such a "market," BellSouth stated at the hearing that there are companies in Florida who have their own switches. (T-421). BellSouth never testified whether any of these companies offer unbundled local switching, nor when asked could it identify a comparison of its $14 rate to any other product

[30] Pursuant to longstanding precedent (most notably the Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986) decision), deference is given to the state commission for setting or approving rates for local services.

offered by another telecommunications company. (T-423). The Commission should determine that this disingenuous effort by BellSouth is patently unreasonable.

ITC^DeltaCom seeks the inclusion in the interconnection agreement of the Commission-approved switching rate of $1.40. To the extent the four line cap rule applies, it is possible that a non-TELRIC rate could be considered "just and reasonable" under the Act. However, there are only two rates in evidence in this case – the Commission-approved TELRIC rate (by definition "just and reasonable") and the $14.00 rate offered by BellSouth without any support. If BellSouth wanted the Commission to approve a rate other than $1.40, it had the burden of proving such a rate was just and reasonable. Since BellSouth failed to provide any probative evidence of support for the $14.00 rate, the Commission is precluded from concluding that such a rate is "just and reasonable." There simply is no evidence upon which to base such a conclusion.[31] The only "just and reasonable" rate available from record evidence is the UNE rate set by this Commission after extensive hearings and deliberations. BellSouth's failure to support the $14.00 rate has left this Commission with only one reasonable choice. The Commission should order the inclusion of the previously pronounced "just and reasonable" $1.40 rate in the interconnection agreement.

Issue 36: UNE/Special Access Combinations

a) Should DeltaCom be able to connect UNE loops to special access transport?

DELTACOM POSITION: *Yes. The parties' current interconnection agreement provides for this combination and it is in other interconnection agreements. ITC^DeltaCom should not be forced to make changes to the existing network. There is no technical impediment to BellSouth providing special access/UNE combinations.*

In the current interconnection agreement, ITC^DeltaCom is allowed to interconnect special access transport to UNE loops. (T-272). BellSouth asks the Commission to remove this

[31] The North Carolina Commission Staff recently found no evidence supporting the $14.00 rate. The staff recommended that the NCUC decline to take jurisdiction over this issue at this time. (P. 18).

language from the agreement for purposes of the contract at issue in this case. BellSouth has cited to what it claims is an FCC prohibition on "commingling" as support for this position. The "commingling" restriction mentioned in the FCC's Supplemental Clarification Order applied to combining loop and transport UNE combinations with tariffed services, and therefore BellSouth's position would not have been supported by the FCC.

The Triennial Order unambiguously resolves this issue by expressly approving commingling. The FCC held that CLECs may connect, combine or otherwise attach UNEs and UNE combinations to wholesale services (*e.g.*, switched and special access). Triennial Order, ¶ 579. The FCC also required ILECs to perform the necessary functions to effectuate such commingling upon request. Id. CLECs also are allowed to commingle tariffed and UNE services. Triennial Order, ¶ 584. BellSouth's position thus has been fully rejected by the FCC, and the Commission should order that language allowing ITC^DeltaCom to combine UNEs and UNE combinations to with wholesale services be included in the interconnection agreement. [32] In the parties' North Carolina arbitration, the NCUC Staff has agreed that the issuance of the Triennial Order compels BellSouth to permit commingling. NCUC Staff Recommendation, p. 20.

Issue 37: Conversion of Special Access Loop to Stand-alone UNE Loop

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?

DELTACOM POSITION: *DeltaCom has some Special Access loops that go to DeltaCom's collocation. This is not a combination. The AT&T/BellSouth agreement provides that in such instances the special access loop can be converted to a UNE loop. DeltaCom merely seeks the same treatment. This is an administrative change only for BellSouth.*

[32] Furthermore, it was disingenuous for BellSouth to ignore the FCC's announced decision of February 20, 2003 that it would clear the way for commingling in the Triennial Order. BellSouth's position was patently offensive prior to the issuance of the Triennial Order, and is completely unsupportable at this point.

Issue 57: Rates/Charges for Conversion of Special Access to UNE-based Service

a) Should BellSouth be permitted to charge for DeltaCom for converting customers from a special access loop to a UNE loop?

DELTACOM POSITION: *No. This is an administrative change only. The BellSouth and AT&T interconnection agreement permits AT&T to send a spreadsheet with a list of those Special Access circuits to be converted to a UNE loop that goes to a collocation. There is no technical impediment to such conversions.*

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)?

DELTACOM POSITION: *Yes. BellSouth has agreed to this process with AT&T. DeltaCom should be afforded the same or similar opportunities.*

The Commission should require BellSouth to convert special access loops to stand-alone UNEs upon request from ITC^DeltaCom. It is technically feasible to do so and will cause only administrative costs because the facilities used to provide service pursuant to special access offerings and UNE offerings do not change. BellSouth should perform these conversions without physical disconnection and reconnection. The appropriate charge should cover administrative costs only and should not include termination charges, reconnect or disconnect fees, or nonrecurring charges associated with establishing service for the first time. BellSouth has a charge for the conversion of special access services to EELs, and the conversion cost to stand-alone UNEs should be no greater than that rate.

BellSouth has refused to convert special access circuits to stand alone UNEs in the past, arguing that the FCC previously only ordered that ILECs convert special access services to EELs and did not address conversions to stand-alone UNEs. (T-412-413). BellSouth has agreed to language with AT&T whereby these conversions occur without any outage to the customer. (Id.) Because the only real change that occurs with one of these conversions regards the appropriate billing rate, the charge by BellSouth should be administrative only. (T-444).

The Triennial Order appears to resolve these issues conclusively. The FCC has concluded that CLECs may convert existing access service arrangements to stand-alone UNEs or EELs and vice versa, and has affirmed that these conversions should be seamless and not affect end user perceptions of service quality. Triennial Order, ¶ 586. The FCC also prohibited the imposition of untariffed termination charges, re-connect and disconnect fees, and nonrecurring charges associated with establishing service for the first time. Triennial Order, ¶ 587. Although the FCC did not establish a specific timeframe for conversions, it directed carriers to include such timeframes in interconnection agreements and suggested that effectuating price changes as of the next billing cycle would be considered reasonable. Triennial Order, ¶ 588. Clearly this language in the Triennial Order underscores the FCC's intention that the RBOCs comply with the conversion quickly and not after a nine month impairment case as was insinuated by BellSouth witness Blake (T. 434).

The Triennial Order notwithstanding, BellSouth's policy has been unjustified and irrational. BellSouth already has a process to convert special access services to EELs and admitted that it was technically feasible to have a process for conversions to stand-alone UNEs. (T-443-444). BellSouth further admitted that conversions do not require breaking apart facilities, and that the same circuit is in place and carrying traffic before and after the conversion. (T-429). The ultimate difference is the rate paid by the CLEC. (T-427). BellSouth simply does not want to offer elements to ITC^DeltaCom at the Commission-approved rates. BellSouth has never been able to identify anything other than semantic distinctions between special access services and UNEs, most notably that different BellSouth repair groups are responsible for each. When

pressed to identify the process differences between conversions to EELS and conversions to stand-alone UNEs, BellSouth was unable to articulate any differences. (T-429-430).[33]

Issue 44: Establishment of Trunk Groups for Operator Services

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

DELTACOM POSITION: *Yes. DeltaCom has its own operator/DA center and must be able to interconnect its TOPS platform with BellSouth's. DeltaCom is connected today and this mutually benefits BellSouth's operator services center as well as DeltaCom. This interconnection helps protect consumers' safety.*

Issue 46: BLV/BLVI

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

DELTACOM POSITION: *DeltaCom has proposed language that is in the parties' current interconnection agreement. Unlike other CLECs, DeltaCom has its own operator/DA center and must be able to interconnect with BellSouth. BellSouth provides BLV/BLVI when its customers call other BellSouth customers – just not when BellSouth customers call DeltaCom customers.*

BellSouth should be required to interconnect with ITC^DeltaCom for the purpose of exchanging local traffic, including local operator traffic. This issue is one of public safety and ensuring that Florida consumers can utilize the telecommunications infrastructure to reach one another. There currently are two-way interconnection trunks in place between the parties, fully paid for by ITC^DeltaCom at tariffed access rates, and there is no technical reason the parties cannot provide Busy Line Verify ("BLV") and Busy Line Verify Interrupt ("BLVI") services to one another. ITC^DeltaCom is one of the few CLECs with its own operator service center. BellSouth's policy discriminates against facilities-based ITC^DeltaCom customers and presents

[33] In the parties' North Carolina arbitration, the NCUC Staff concluded that "BellSouth should allow ITC to convert Special Access Loops that go to ITC's collocation to UNE loops and vice versa." NCUC Staff Recommendation, p. 21. The NCUC Staff also recommended that these conversions take place without any disconnection of the customer, and that any charge for the conversions must "reflect TELRIC-based pricing principles and be submitted for approval prior to imposition." Id., p. 28.

serious safety concerns for Florida consumers trying to reach loved ones in times of potential emergency.

BLV/BLVI services increase consumer safety. This is where an operator can check a line that is repeatedly busy to determine whether there is conversation on the line (BLV) and can even interrupt the call in an emergency (BLVI). (T-274, 631). BellSouth will perform this service for its own customers, but *only* if they are calling customers on the BellSouth network and *not* the ITC^DeltaCom network. (T-658-659). BellSouth admits it is technically feasible to perform these services in these instances. (T-631, 660-661). BellSouth has admitted in other states that it currently offers operator center-to-operator center connections with some independent telephone companies. BellSouth's policy also negatively impacts other CLEC customers and ITC^DeltaCom UNE-P customers on BellSouth's network, who cannot have BellSouth operators perform BLV/BLVI services when calling ITC^DeltaCom facilities-based customers. (T-657-658).

Moreover, BellSouth's decision to deny BLV/BLVI services to those who seek to check the lines of ITC^DeltaCom customers is not based on any technical limitation. BellSouth readily admitted that what ITC^DeltaCom seeks is technically feasible and that the trunks to perform these services are in place today. (T-631-632). When asked whether ITC^DeltaCom's request was legally prohibited or not, BellSouth agreed that it was not and referred to BellSouth's position in this case as "a business decision." (T-632). Indeed, when asked by Commissioner Deason whether BellSouth could simply transfer a BellSouth customer seeking BLV/BLVI services to the ITC^DeltaCom operator, BellSouth could only state that "[t]here probably technically could be a way to do that . . . ." (T-661). BellSouth apparently does not want to

provide these services to customers -- at least when they want to reach ITC^DeltaCom customers – no matter how simple the solution.

Once again, the law does not support BellSouth's intransigence. Section 251 of the Act requires all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. FCC Rule 51.305(a)(1) further provides that ILECs shall interconnect for the "transmission and routing of telephone exchange traffic, exchange access traffic, or both." Here, the parties have the facilities in place but BellSouth is impeding the ability of its customers and any other CLEC customers using the BellSouth network to interrupt or verify the busy line of an ITC^DeltaCom customer.

Trunks between the BellSouth and ITC^DeltaCom operator centers have been in place for the last five years, and the interconnection agreements between the parties have described the associated rates, terms and conditions. (T-233, 274). Now, BellSouth seeks to remove this language from the interconnection agreement and require ITC^DeltaCom to order these services from BellSouth's access tariff, which doesn't even address local traffic.[34] This is an unacceptable alternative for ITC^DeltaCom because ITC^DeltaCom already has its own operator center. (T-233). By simply referencing operator services in its access tariff, BellSouth effectively is refusing to provide BLV/BLVI services to its customers when they call ITC^DeltaCom customers. BellSouth discriminatorily refuses to provide BLV/BLVI services to customers who use BellSouth's network when its customers happen to be calling customers on the ITC^DeltaCom network.[35]

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[34] See Section 18 of BellSouth's Access Tariff (Operator Services), which only refers to inter-LATA services and IXCs. There are no references to local service or to CLECs.

[35] To the extent BellSouth incurs costs in providing this service to customers calling an ITC^DeltaCom customer, it can recover such costs from the customers who ask for the service.

BellSouth's policy further provides that if a BellSouth customer is trying to reach an ITC^DeltaCom customer and the line is perpetually busy, the only option is for that BellSouth customer to dial 911. Aside from the obvious disparity BellSouth's proposal creates between BellSouth and ITC^DeltaCom customers, not all calls in which a BLV/BLVI might be performed merit a call to 911. As Mr. Brownworth for ITC^DeltaCom aptly noted, "[w]e do not feel it is appropriate to send consumers to 911 to investigate busy signals." (T-275). For example, if conversation is heard on the line, there might be no need to involve precious and limited emergency services. BellSouth's policy thus encourages haphazard customer behavior with regard to 911 calls. Furthermore, what if there is an emergency, but it has occurred on the caller's end? In that case, BellSouth's policy prevents consumers from reaching loved ones – specifically, loved ones who are on the ITC^DeltaCom network – in times of concern and potential emergency. The Commission should not countenance this policy and should order BellSouth to take appropriate measures to secure the safety of Florida consumers.

BellSouth has implied that ITC^DeltaCom's request in this case is insincere because ITC^DeltaCom has not made its request to apply generally to the industry. Amazingly, BellSouth seems to criticize ITC^DeltaCom's concerns over safety as *insufficiently broad*, since the result of this case would be only to ensure BLV/BLVI capability between the operator platforms of ITC^DeltaCom and BellSouth. Surely BellSouth does not suggest that it is willing to provide BLV/BLVI for all providers, but not for ITC^DeltaCom.

This is a two-party Section 252 arbitration to determine interconnection agreement language and ITC^DeltaCom has appropriately not treated it as a generic docket. Moreover, very few CLECs are similar to ITC^DeltaCom because the vast majority do not have their own operator services platforms. (T-233). In any event, with regard to operator services issues and

public safety, ITC^DeltaCom would gladly participate in a generic Commission effort to interconnect all operator services platforms if the Commission deems such a proceeding appropriate. ITC^DeltaCom has no objection to applying operator services interconnection requirements on a statewide basis to improve public safety. To promote safety, for purposes of this case, the Commission should require BellSouth to interconnect operator platforms and provide BLV/BLVI services to their customers when they want to reach ITC^DeltaCom customers.[36]

Issue 47: Reverse Collocation

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?

DELTACOM POSITION: *Yes. This is contained in existing agreement language. The rates, terms and conditions BellSouth applies to DeltaCom in this situation should be applied to BellSouth when it collocates in DeltaCom's collocation space. BellSouth uses DeltaCom's space to serve DeltaCom's competitors – all DeltaCom asks is to be compensated for this use.*

BellSouth admits that it uses ITC^DeltaCom collocation space to serve carriers who are competitors of ITC^DeltaCom. (T-632-633). Indeed, it is undisputed that BellSouth realizes significant revenue from such facilities. BellSouth does not even try to hide the fact that it reaps obvious benefits from the use of ITC^DeltaCom's collocation space:

> Q. And you would agree with me that BellSouth today has some equipment located on ITC^DeltaCom's premises in the State of Florida; correct?
>
> A. Yes. We -- I think there are seven or ten locations, depending on how you want to count them. There's one where we have three or four sets of equipment placed there, and I think that's counted twice, where we've been over the years providing special access services to either DeltaCom directly or to customers of DeltaCom.

[36] The NCUC Staff recently recommended in the North Carolina arbitration that ITC^DeltaCom's positions be adopted on both Issue 44 and 46. NCUC Staff Recommendation, pp. 21-23.

Q. And BellSouth uses that equipment or has the potential to use that equipment to provide services to telecommunications companies who compete with ITC^DeltaCom, you would agree with that; correct?

A. Yes. The potential is there.

Q. And BellSouth would charge those competitors of ITC^DeltaCom and thus realize revenue from that equipment that is BellSouth's equipment located on the premises of ITC^DeltaCom in Florida; correct?

A. Yes. If it did that, it would.

(T-632-633).

BellSouth refuses to agree to a provision in the interconnection agreement that would require payment for this usage of ITC^DeltaCom's space. This is yet another example of BellSouth's unwillingness to accept reciprocal terms in the interconnection agreement. When ITC^DeltaCom places equipment in BellSouth's space, BellSouth charges for the space, space preparation, power requirements, cross-connect charges (where applicable), and rent on the use of space and power for ITC^DeltaCom equipment. (T-272). These rates for collocation were set by the Commission. Indeed, BellSouth argued strongly that these rates were too low. However, when BellSouth seeks to use ITC^DeltaCom's space, it expects to receive this space and associated services for no charge. (T-583-584). BellSouth refuses to pay (even at rates it claimed to the Commission were too low) for use of ITC^DeltaCom's spaces.

BellSouth agreed just prior to the last arbitration proceeding with ITC^DeltaCom to pay reverse collocation charges. (T-613). It turns out that ITC^DeltaCom didn't understand the agreement the same way that BellSouth did. As BellSouth witness Ruscilli noted in his rebuttal testimony, "BellSouth did so because it believed there to be no harm in signing the agreement, since BellSouth had no intention of electing to collocate its equipment, *as this term is defined by*

the Act, in a DeltaCom central office for the purposes of interconnection or access to UNEs." (T-613) (emphasis added). This disingenuous word-parsing should not be rewarded. Incredibly, as BellSouth defines collocation, it could never be collocated at ITC^DeltaCom's premises.[37] Why sign the agreement? BellSouth's tortured explanation is revealing.

Whether ITC^DeltaCom has a duty to permit collocation of BellSouth equipment in its space is not the issue. The issue is reciprocity and whether BellSouth must compensate ITC^DeltaCom when it uses ITC^DeltaCom's space to serve ITC^DeltaCom's competitors. BellSouth correctly points out that it has located equipment in ITC^DeltaCom's Points of Presence ("POPs") for provisioning special and switched access services ordered by ITC^DeltaCom. (T-651). However, that is not the only activity of BellSouth with regard to the equipment it locates in ITC^DeltaCom's space. BellSouth can use this equipment to support products sold to other carriers, where ITC^DeltaCom is the interexchange provider and BellSouth is the local provider. (Id.). It also delivers BellSouth DS3s for BellSouth local-originated traffic on this equipment. (Id.) ITC^DeltaCom should not be forced to allow BellSouth to utilize excess capacity to benefit competitors of ITC^DeltaCom without reasonable compensation.

In considering the use of BellSouth equipment in ITC^DeltaCom collocation space to serve other carriers, the NCUC Staff recently recognized the inequity of BellSouth's position:

> . . . [I]t does not appear that ITC is required to provide space without charge for the provision of either special or switched access to other parties or local interconnection. Such a

[37] BellSouth argues that only ILECs have a duty to permit collocation of other carriers' equipment in its locations, citing Section 251(c)(6) of the Act and emphasizing that the duty to provide physical collocation is "at the premises of the local exchange carrier." (47 U.S.C. § 251(c)(6)). However, "local exchange carrier" is defined in the Act as "any person that is engaged in the provision of telephone exchange service or exchange access" and thus is not limited to incumbents. 47 U.S.C. § 153(26). BellSouth also ignores the duty under Section 251(a)(1) of the Act of all telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."

> requirement would be inequitable. Similarly, the Commission can see no justification for allowing BellSouth to avoid payment of collocation charges for equipment already located in ITC space or augments to that equipment. Moreover, just as BellSouth would require ITC to pay for collocation space if BellSouth designates its own space as a point of interconnection, BellSouth should compensate ITC when ITC designates its own space as a point of interconnection for the delivery of BellSouth's originated traffic. Therefore, the Commission finds that BellSouth should compensate ITC for collocation of BellSouth equipment in ITC space when the equipment is used for local interconnection or the provision of switched or special access to carriers other than ITC.

NCUC Staff Recommendation, p. 25. This Commission should adopt the same reasoning and order BellSouth to pay collocation charges where appropriate.

The appropriate collocation rate is the Commission-ordered collocation rate, which BellSouth agrees is appropriate and reasonable. BellSouth's only defense appears to be that this issue is not "appropriate" for a Section 252 arbitration because of its legal argument about the duty to collocate. Independent of BellSouth's legal argument, the issue of compensation for use of ITC^DeltaCom's space is still an "unresolved issue" regarding the interconnection agreement between the two parties. The Commission should order BellSouth to pay to ITC^DeltaCom the Commission-ordered rate for collocation whenever BellSouth utilizes ITC^DeltaCom space for activities other than those requested by ITC^DeltaCom.

Even if BellSouth's narrow view of the duty to collocate were correct, its refusal to pay ITC^DeltaCom for use of ITC^DeltaCom space to serve other carriers would not be justified under the Act. Further, if the rates, terms, and conditions for such interconnection services cannot be successfully negotiated between parties, the Commission "shall determine the reasonable rates, terms, or conditions for the interconnection services." The Commission has already established a rate for collocation and should apply it to BellSouth's use of ITC^DeltaCom space.

Issue 56: Cancellation Charges

a) May BellSouth charge a cancellation charge which has not been approved by the Commission?

DELTACOM POSITION: *No. Cancellation charges have not been approved by the Commission.*

b) Are these cancellation costs already captured in the existing UNE approved rates?

DELTACOM POSITION: *The basis for a separate cost-based cancellation charge has not been established by BellSouth.*

BellSouth should not be permitted to impose or include in the interconnection agreement a "cancellation charge" which is not derived from factors supported by record evidence. BellSouth seeks to impose this cancellation charge despite the fact that BellSouth has made no cost study to support the factors that set such a rate. (T-186-188). BellSouth simply seeks to incorporate factors from its interstate access tariff or private line tariff. (T-187-188).

The Commission has the jurisdiction to set UNE rates. BellSouth argues that its proposed rates are unrelated to UNEs, but in fact they relate to charges associated with ordering network elements. BellSouth slyly argues its proposed rates are "Commission-approved," but of course it means *FCC*-approved and is not referring to this Commission. Moreover, the Commission should be concerned about adopting a precedent that would authorize BellSouth to "in the context of an interconnection agreement . . . just reach out and grab FCC tariff terms and conditions . . . ." (T-187). It will be virtually impossible for this Commission and competitive carriers like ITC^DeltaCom to know which of the thousands of filed rates at the FCC it needs to investigate and potentially challenge as not cost-based. The Commission should not allow BellSouth unchecked authority to incorporate FCC tariff rates not supported before and approved by this Commission.

BellSouth claims it is using the nonrecurring ordering charge approved by this Commission and applying certain factors to it to determine the appropriate cancellation charge. However, the factors and percentages used by BellSouth still come from the FCC tariff and are based on a 1990 access filing with that Commission. (T-187). This means the FCC either accepted the filing without review, or even if the FCC reviewed the 1990 filing, it "approved" it based on an entirely different standard than this Commission uses with regard to UNE rates. (T-187-188). The reference chosen by BellSouth from that 1990 filing relates to a service that has very little to do with the work activities at issue in this docket. (T-188).

Specifically, Section 5.4(B)(2) of BellSouth's FCC Access Tariff provides that if the customer cancels an Access Order on or after the Design Layout Report Date, a cancellation charge is determined using the critical dates in subsection 4(b). There are 12 critical dates and the percentages for each critical date are contained in Section 5.4(B)(4)(e). As explained by Mr. Wood, BellSouth is taking these factors to generate a cancellation charge for a "designed service or circuit" and the factors simply do not apply to a UNE. (T-188). It is noteworthy that there is no cancellation charge in BellSouth's General Subscribers' Tariff.

BellSouth is asking this Commission to approve a set of factors that will be used to generate a charge for UNE services that has not been analyzed by the Commission. (T-187-188). This Commission, BellSouth, and the CLECs just went through an extensive cost case in Docket No. 990649-TP. BellSouth had ample opportunity in that case to provide support for the cancellation charge it seeks to impose. To date, BellSouth has not provided any study to support its proposed factors. (T-192). For these many reasons, BellSouth should not be allowed to impose its unsupported, non-approved cancellation charge.[38]

[38] The NCUC Staff has recently agreed with ITC^DeltaCom in the parties' North Carolina arbitration, noting that BellSouth has "failed to make any showing that its cancellation charges are TELRIC-based as required for Section

Issue 58: Unilateral Amendments to Interconnection Agreement

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

DELTACOM POSITION: *No. BellSouth should not be allowed to unilaterally modify the contract in a manner that could financially or operationally impair DeltaCom and its customers.*

b) Should BellSouth be required to post rates that impact UNE services on its website?

DELTACOM POSITION: *Yes. DeltaCom had a service-impacting situation where BellSouth modified certain USOCs and it was not clearly communicated that a contract revision was necessary in order to avoid the disruption.*

BellSouth wants the ability to unilaterally change the nature of the interconnection agreement by making modifications to off-contract documents without ITC^DeltaCom's agreement and certainty with regard to material terms. This is directly contrary to the basic principles of a contractual agreement. ITC^DeltaCom should have the right to agree to any changes that have more than a *de minimus* impact on ITC^DeltaCom's operations. The very nature of a contract is mutual consent. BellSouth seeks to incorporate into the interconnection agreement its "Guides," which are documents written by BellSouth with no regulatory oversight or industry input. (T-115-116). These Guides should be either incorporated as of a certain date in time or attached to the contract. Any subsequent changes that would have a material impact on ITC^DeltaCom should be mutually agreed upon. Rejecting BellSouth's request for this unfettered discretion hopefully will provide an incentive for BellSouth to treat ITC^DeltaCom like competitive market vendors treat their customers. (T-117). A contrary policy will only encourage more inefficiency and cost-shifting by BellSouth.

BellSouth makes the argument that if one of the changes to the Guides had more than a *de minimus* impact on ITC^DeltaCom, it would require the agreement of every Florida ALEC

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251 pricing of unbundled network elements." NCUC Staff Recommendation, p. 27. The NCUC Staff thus recommended that "BellSouth may not assess a cancellation charge which has not been approved by this Commission." Id.

with a similar contract provision as that sought by ITC^DeltaCom in order to make the change. (T-626). While this may present an administrative inconvenience for BellSouth, such inconvenience does not mean that BellSouth should be able to unilaterally modify the obligations of the parties' contract (or its agreement with any other ALEC, for that matter). Mr. Watts explained that while some changes, such as those to technical guides, may not be objectionable:

> [O]ur concern, our position here is that BellSouth should not be able to change those documents that they have unilateral control over in ways that can have a material negative impact on ITC^DeltaCom or in ways that materially change the contract that we enter into.

(T-117).

ITC^DeltaCom is willing to support a review process where the industry in general could have sufficient scrutiny to ensure against arbitrary changes by BellSouth. To be more specific, ITC^DeltaCom proposes the following be included in the interconnection agreement:

> Except as otherwise set forth in Attachment 3, Section XXX concerning the Jurisdictional Factor Guide, the Parties acknowledge that certain provisions of this Agreement incorporate by be reference various BellSouth document and industry publications (collectively referred to herein as the "Provisions"), and that such Provisions may change from time to time. The Parties agree that if the change or alteration was made as a result of the Change Control Process (CCP), a revision to ANSI or Telcordia guidelines or OBF guidelines of if ITC^DeltaCom agrees to such change or alteration, any such change or alteration shall become effective with respect to ITC^DeltaCom pursuant to the terms of the notice to ITC^DeltaCom via the applicable Internet website posting. Specifically, all changes or alterations which: (1) alters, amends or conflicts with any term of this Agreement; (2) changes any charge or rate, or the application of any charge or rate, specified in this Agreement; or (3) would require ITC^DeltaCom to incur more than minimal expense will require ITC^DeltaCom consent which shall not be unreasonably withheld.. For purposes of item (3) above, costs associated with disseminating notice of the change or providing training regarding the change to employees shall not be deemed "more than

> minimal." In the event the Parties disagree as to whether any alteration or amendment described in this Section is effective as to ITC^DeltaCom pursuant to the requirements of this Section, either Party may file a complaint with the Commission pursuant to the dispute resolution provisions of this Agreement.

To the extent BellSouth argues that this alternative process is administratively burdensome, it should be reminded that under basic principles of contract law, it is not permitted to make unilateral, material changes to an agreement between the parties without mutual consent. If BellSouth were allowed to make nonconsensual or non-ordered changes, the interconnection agreement would not be worth the paper on which it is written.

Issue 59: Payment Due Date

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?

DELTACOM POSITION: *DeltaCom needs 30 days to pay from the date a bill is received from BellSouth. DeltaCom receives thousands of BellSouth invoices monthly, often several days after the invoice date. DeltaCom has to review each bill for errors. BellSouth sends approximately 95% of bills electronically. The received date is easily knowable.*

Thirty days from receipt of a bill from BellSouth for ITC^DeltaCom to pay is a reasonable payment due date given the evidence demonstrated at the hearing. At one time all bills sent by BellSouth were delivered by regular mail. As a result there was great uncertainty regarding when those bills were received. Now, ITC^DeltaCom receives approximately 1,700 invoices from BellSouth every month, 94% to 97% of which are transmitted electronically. (T-138). This prevalence of electronic billing means that BellSouth knows *exactly* when ITC^DeltaCom receives its bills. BellSouth provides a 30-day payment period, but it runs from the time the bill is generated within BellSouth – the "bill date." Both parties acknowledged that even with electronically transmitted invoices, the actual date the bill is rendered to ITC^DeltaCom is not until several days later. (T-21, 661-662).

ITC^DeltaCom needs sufficient time to analyze and review the 1,700 invoices in order to ensure the bills are accurate. Surely even BellSouth would admit that any prudent business would undertake this type of review for accuracy. Errors are a legitimate concern for ITC^DeltaCom, as evidenced by the existence of approximately 4,000 current billing disputes with BellSouth and ITC^DeltaCom's experience of late billing by BellSouth. (T-21, 41). BellSouth's position appears to be that ITC^DeltaCom must meet the "due date," which is the next "bill date" (again, the time the bill is generated within BellSouth), regardless of when ITC^DeltaCom actually receives the bill. This is patently unfair and provides no incentive for BellSouth to improve deficiencies in its billing process.

Since the beginning of 2003, ITC^DeltaCom has been billing BellSouth on a monthly basis. (T-124). BellSouth complained about not having an adequate period of time to pay bills it was receiving from ITC^DeltaCom, and ITC^DeltaCom responded by putting in place a process that ensures that BellSouth has a full 30 days from receipt of ITC^DeltaCom bills in which to pay. ITC^DeltaCom simply asks that the Commission require BellSouth to provide the same to ITC^DeltaCom.[39]

Issue 60: Deposits

a) Should the deposit language be reciprocal?

DELTACOM POSITION: *Yes. DeltaCom proposes language that is consistent with FCC policy on deposits. The parties disagree regarding whether a deposit should be assessed at all. BellSouth seeks more stringent deposit requirements than exist in the current agreement. DeltaCom's language more accurately reflects DeltaCom's years of timely payments to BellSouth.*

b) Must a party return a deposit after generating a good payment history?

[39] In the parties' North Carolina arbitration, the NCUC Staff recently recommended that the interconnection agreement provide that the due date of bills be 26 days from the date of receipt. NCUC Staff Recommendation, p. 31.

DELTACOM POSITION: *See (a) above and language proposed by ITC^DeltaCom in Mr. Watts' testimony.*

BellSouth should not be permitted to require a deposit in light of ITC^DeltaCom's more than 20-year good payment history. ITC^DeltaCom seeks three things with regard to deposits: (1) interconnection agreement language that recognizes ITC^DeltaCom's long, undisputed record of good payment and that no deposit be charged to ITC^DeltaCom at this time; (2) reciprocity – in other words, both parties operate under the same deposit language with regard to one another; and (3) deposits should be returned if they are collected from a customer who subsequently establishes a good payment history.

BellSouth and ITC^DeltaCom have a long business relationship that spans approximately 20 years. During that time, ITC^DeltaCom has maintained a good payment history. On cross-examination, BellSouth conceded that ITC^DeltaCom has never failed to pay an undisputed bill in the past 20 years. (T-636, 664). Despite this uninterrupted history of good payment – even during the pendency of the Chapter 11 reorganization of ITC^DeltaCom's parent company – BellSouth now insists on charging an exorbitant deposit where none has previously been required. Unbelievably, BellSouth also opposes reciprocal language regarding deposits without any real justification.[40]

ITC^DeltaCom simply believes that if a party has an established good payment history, as BellSouth admits is the case with ITC^DeltaCom, no deposit should be required. If ITC^DeltaCom were a new entrant and was trying to establish a relationship with BellSouth, the circumstances might call for a different result. BellSouth's call for a deposit after decades of good payment appears calculated to increase its leverage over an ambitious competitor and to further flex its already-formidable market power.

[40] ITC^DeltaCom bills BellSouth millions of dollars a year for services. (T-138).

BellSouth argues the telecommunications industry has become more risky and that this justifies its request of ITC^DeltaCom. The FCC has recently rejected this popular but unfounded premise in rejecting the requests of BellSouth and other ILECs to demand increased deposit requirements under their interstate access tariffs. See *In the Matter of Verizon Petition for Emergency Declaratory and Other Relief*, WC Docket No. 02-202, *Policy Statement*, Rel. December 23, 2002 ("Policy Statement"). In its Policy Statement, the FCC concluded that "the risk posed by uncollectibles may not be as great as alleged by certain carriers." (Policy Statement, ¶ 14.) While certain factors may reasonably precipitate accelerated billing and collection cycles, the FCC nonetheless maintained the status quo with respect to deposit requirements, explaining, "[w]e do not believe, however, that additional deposit requirements are warranted at this time." (Id.) In justifying its decision not to require additional deposit requirements, the FCC noted that "incumbent LECs operating under price caps normally are considered subject to both the benefits and burdens of unconstrained earnings." (Id. at ¶ 18). For example, the FCC contrasted the extraordinary returns earned by incumbents in the "crisis" year 2001--which for BellSouth was 19%--with their more "ordinary" (although still high) returns in 1990—in which BellSouth earned a 13% rate of return on interstate services. (Policy Statement at ¶ 18 (internal citations omitted)). ITC^DeltaCom demonstrated that BellSouth's total uncollectibles are actually relatively small. (T-57). Further, BellSouth recovers uncollectible bad debt costs in UNE rates. (Id.)

BellSouth tries to put a different – and misleading – spin on the FCC's Policy Statement. BellSouth counsel inquired whether under ITC^DeltaCom's deposit proposal it would be willing to pay bills in an accelerated timeframe. (T-131). BellSouth has relied in other states on the FCC Policy Statement language that supported the idea of "narrower protections, such as

accelerated and advanced billing" in making this argument. However, it is important to recognize that the FCC was not mandating accelerated payment. The context of the decision was that *only if a deposit were appropriately charged, and such deposit would present a significant hardship upon a carrier, the FCC expressed a preference for allowing such a carrier to satisfy the risk concerns of the party charging the deposit through accelerated payment.* A deposit in this case is inappropriate in the first place, making BellSouth's implication irrelevant.

ITC^DeltaCom has proposed very thorough deposit language through the testimony of Mr. Watts (T-59-61). ITC^DeltaCom asks that this language be adopted and be applied to both parties equally. ITC^DeltaCom bills BellSouth and expects to get paid. BellSouth would enjoy the same benefits as ITC^DeltaCom and would not be subject to a deposit as long as it had a good payment history.[41]

Good payment history is the key to determining whether deposits are appropriate in existing business relationships. ITC^DeltaCom has given BellSouth no good reason to request a huge deposit. If for some reason in the future a deposit is appropriate, however, ITC^DeltaCom believes that such deposits should be returned when a good payment history is reestablished. Deposits should provide security and not be used as weapons against competitors. Again, BellSouth is in the conflicted role of wholesale supplier and retail competitor and this conflict has led to BellSouth's unreasonable request. The Commission should reject BellSouth's position.

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[41] Questions were asked about ITC^DeltaCom's deposit policies with regard to its own retail customers. (T-125-126). ITC^DeltaCom's retail deposit policies are not a helpful analogy in this case, because the critical difference between the relationship of ITC^DeltaCom with its customers – as compared to BellSouth's relationship with its wholesale customers – is that virtually every customer that does business with ITC^DeltaCom has a competitive option. ITC^DeltaCom does not have a market of competitors from which to choose with regard to the provision of wholesale telecommunications services. BellSouth is the "only game in town" and has now taken a hostile and unjustified position with regard to requiring a security deposit from ITC^DeltaCom despite its long, good history of payment. The Commission should prohibit this predatory behavior of BellSouth.

In the parallel arbitration in North Carolina, the NCUC Staff has made recommendations with regard to the same deposit issues before this Commission. Consistent with ITC^DeltaCom's position, the NCUC Staff has recommended that the interconnection agreement's deposit obligations be reciprocal and that, pursuant to the North Carolina retail deposit rules, deposits be returned with interest after a period of steady payment. NCUC Staff Recommendation, p. 34-35. The NCUC Staff also recommended that the creditworthiness standards proposed by BellSouth comply with the NCUC retail deposit rules, in particular NCUC Rules R12-2, R12-4 and R12-5. Notably, NCUC Rule R12-2 provides that a customer can establish credit in several ways including where:

> "(2) The applicant demonstrates that he is a satisfactory credit risk by appropriate means including, but not limited to, references which may be quickly and inexpensively checked by the utility; or
>
> (3) The applicant has been a customer of the utility for a similar type of service within a period of twenty-four consecutive billings preceding the date of application and during the last twelve consecutive billings for that prior service has not had service discontinued for nonpayment of bill or had more than two occasions in which a bill was not paid when it became due; provided, that the average periodic bill for such previous service was equal to at least fifty per centum of that estimated for the new service; and provided further, that the credit of the applicant is unimpaired"

While the NCUC Staff Recommendation on the creditworthiness standard for the interconnection agreement is not precisely what ITC^DeltaCom sought in that case, it does recognize the importance of a good payment history by incorporation of the retail deposit rules. This Commission likewise should emphasize the importance of a good payment history, as well as mandate that the deposit language be reciprocal and that deposits (if appropriate in the first instance) be returned after six months of steady payment (with accrued interest).

Issue 62: Limitation on Backbilling

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

DELTACOM POSITION: *Yes. The limit should be no longer than 90 days. Backbilling charges longer than 90 days is inappropriate and puts ITC^DeltaCom in an untenable position with its retail customers. Laws and rules regarding retail billing are not the appropriate analogy, and in fact support DeltaCom's position in this case.*

The Commission does not have a rule or regulation regarding back-billing between carriers. Therefore, ITC^DeltaCom asks that this issue be addressed in the interconnection agreement. Back-billing for extended periods of time exposes both companies to the problem of not being able to establish accurate cost structures for the pricing of retail services. It also makes it more difficult for the party receiving the late charges to verify their accuracy, as some data needed to do so may no longer be readily available. As an example of this problem, ITC^DeltaCom received a notice on March 21, 2003 from BellSouth regarding backbilling for daily usage file ("DUF") records provided in *February of 2000.* (Ex. 6). The underbilled portion of the ODUF/ADUF records provided from February 2000 to November 2001 is $550,000. This type of mistake should not be allowed to continue, as it creates obvious impediments to ITC^DeltaCom's ability to know its costs and compete with BellSouth on a retail basis.

BellSouth argues for reference to Commission Rule 25-4.110(10) for retail customers, which states, "[w]here any undercharge in billing of a customer is the result of a company mistake, the company may not backbill in excess of 12 months." This argument should be rejected, especially in the context of intercarrier billing in the telecommunications industry.

BellSouth implied two additional arguments through its cross-examination. The first is that ITC^DeltaCom is limited in its own backbilling to retail customers based on either tariff

limitations or retail billing rules across the region. (T-122). Retail billing time periods are not an appropriate analogy. The issue in this arbitration regards wholesale billing between carriers, which actually can have a tremendous impact on accurate and timely billing to *retail* customers. Second, BellSouth asked the following question:

> [L]et's assume that BellSouth made a mistake in your favor. For example, let's assume that BellSouth overbilled DeltaCom for more than 90 days. Under your position, would BellSouth owe DeltaCom only for 90 days or for more than 90 days?

(T-120-121). BellSouth clearly misunderstands ITC^DeltaCom's position. In the case where BellSouth underbills, it is *BellSouth's* fault. ITC^DeltaCom asks in these cases that backbilling be limited to 90 days – and agrees to abide by the same rule with regard to its billing to BellSouth. Likewise, in the case described in the hypothetical question posed by BellSouth counsel (over-billing), it is yet again a *BellSouth* mistake, albeit an entirely different one. In neither case should the appropriate remedy be to punish the non-mistaken party. If BellSouth overbills ITC^DeltaCom, it should correct the mistake by providing a refund. ITC^DeltaCom agrees that it should abide by the same principle if it overbills BellSouth. BellSouth's analogy is faulty and a hollow attempt to distract the Commission from the real issue.[42]

ITC^DeltaCom asks the Commission to limit backbilling by 90 days to accomplish two very important public policy goals: (1) to provide incentive to BellSouth to clean up its frustrating and often inaccurate billing system; and (2) to ensure some stability and reasonable expectations between the parties regarding the costs of doing business. BellSouth's attempts to correct errors made several months or even years ago puts ITC^DeltaCom at a severe disadvantage in terms of planning and competition in the retail market.

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[42] The NCUC Staff has recently recommended in the North Carolina arbitration that it is appropriate to limit backbilling to 90 days. NCUC Staff Recommendation, p. 36.

Issue 63: Audits

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?

DELTACOM POSITION: *Yes. DeltaCom offered the language from AT&T's Interconnection Agreement. BellSouth should provide the same treatment to DeltaCom it is willing to provide to AT&T.*

ITC^DeltaCom wants the right to audit the voluminous bills sent by BellSouth every month. ITC^DeltaCom has asked for the language in the AT&T/BellSouth interconnection agreement approved by the Commission, but BellSouth has refused to include this language based on its tortured view of the "pick and choose" rule. Aside from the "pick and choose" rule, ITC^DeltaCom wants the contractual right to audit BellSouth bills, effective for the full term of the interconnection agreement at issue in this case.

BellSouth erroneously views this issue as simply a legal debate over the "pick and choose" rule in Section 252(i) of the Act. ITC^DeltaCom has requested the same language that BellSouth provides to AT&T regarding the right to audit BellSouth bills. However, BellSouth argues this language would only be effective as long as the AT&T agreement is in place. ITC^DeltaCom rejects this view of the "pick and choose" rule as unworkable. It would leave the BellSouth/ITC^DeltaCom interconnection agreement silent as to audit rights when the AT&T contract expires. Moreover, if the language is appropriate for inclusion in the AT&T agreement, it is appropriate for the ITC^DeltaCom agreement – for the full length of the ITC^DeltaCom agreement.[43]

More important than a legal debate over the extent of BellSouth's "pick and choose" obligations, however, is the substantive underlying need for ITC^DeltaCom to have audit rights

[43] The NCUC Staff fully agreed with ITC^DeltaCom on this point in its Recommendation in the North Carolina arbitration. The NCUC rejected BellSouth's "pick and choose" ploy by simply recommending the inclusion of language in the ITC^DeltaCom interconnection agreement – for the term of that agreement – providing for the auditing of billing functions. NCUC Staff Recommendation, p. 37.

with regard to BellSouth's bills. ITC^DeltaCom receives approximately 1,700 invoices from BellSouth every month. (T-138). These are transmitted over 21 billing cycles and each invoice contains substantial amounts of data. Without the right to audit BellSouth, ITC^DeltaCom has no effective way of ensuring that the billing process on BellSouth's side is accurate and functioning properly. The issue is therefore very important with regard to an essential component of the parties' business relationship.

Desperate to justify its discriminatory treatment of ITC^DeltaCom, BellSouth will argue that ITC^DeltaCom's request for audit rights is unnecessary given the Commission's performance measures and penalties regarding the accuracy of BellSouth's billing. This blasé attempt to dismiss ITC^DeltaCom's concerns misses the mark. BellSouth's compliance or non-compliance with billing accuracy standards has nothing to do with ITC^DeltaCom's issue in this case. Even if BellSouth meets the standards set by the Commission, that wouldn't provide ITC^DeltaCom with the information needed to *audit* BellSouth's invoices. ITC^DeltaCom wants to use its own resources to audit bills for accuracy, not simply observe as BellSouth either passes muster with regard to the billing standards or suffers financial penalties as a result of a failure to perform.

BellSouth refuses to act reasonably regarding audits, despite the fact that ITC^DeltaCom has agreed to allow BellSouth audit rights with regard to several other issues in the interconnection agreement. These include auditing systems regarding Percent Interstate Usage ("PIU"), Percent Local Usage ("PLU"), Percent Local Facilities ("PLF") and local percentage usage for EELs. ITC^DeltaCom has agreed with regard to all of these issues to afford auditing rights to BellSouth. (T-637-638). The Commission should order, for the full term of the

agreement at issue in this case, that BellSouth be obligated to provide ITC^DeltaCom auditing rights identical to those provided to AT&T.

Issue 64: ADUF

What terms and conditions should apply to the provision of ADUF records?

DELTACOM POSITION: *ADUF is the Access Daily Usage File. When DeltaCom buys unbundled local switching, BellSouth provides DeltaCom an ADUF record for the billing of the access charges. DeltaCom should not be billed for ADUF records associated with local calls.*

BellSouth provides ITC^DeltaCom an ADUF record for the billing of access charges when ITC^DeltaCom purchases unbundled local switching. (T-320). This record is necessary for ITC^DeltaCom to pass along the appropriate long distance charges to the end user. The problem is that BellSouth currently includes some local calls in the ADUF records provided to ITC^DeltaCom. ITC^DeltaCom should not be billed for ADUF records associated with local calls. These charges are inappropriate for inclusion in ADUF records and are not recovered from the end user.

BellSouth has rejected ITC^DeltaCom's request that only access charges be billed via ADUF records, calling it a request for a "customized" report. BellSouth's argument boils down to: "sorry, we do something incorrectly and want to charge you extra to fix it." Why should ITC^DeltaCom's request to be billed accurately be deemed a request for a "customized" report? If BellSouth's current system generates an ADUF record with regard to local calls (including but not limited to 10-10-XXX calls made to local numbers – see T-320), it should not be ITC^DeltaCom's responsibility to pay for BellSouth's broken system. BellSouth should put a filter in place for the benefit of the industry in order to clean up its billing problem. The burden of providing an accurate BellSouth bill does not lie with ITC^DeltaCom.

Issue 66: Testing of End User Data

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

DELTACOM POSITION: *Yes. A set of test cases with controlled data is required. BellSouth's retail operation can test code prior to deployment and see results in ordering, provisioning, maintenance and billing venues. DeltaCom cannot test in more than one system when migrating to a new code version. DeltaCom should have parity.*

BellSouth should provide ITC^DeltaCom the ability to test its data to the same extent BellSouth's retail division tests its own data. BellSouth has agreed through the Change Control Process ("CCP") to enhance testing functionality by May, 2004 so that CLECs can perform testing with "live" or actual customer information. (T-491). Currently only BellSouth enjoys this advantage. Even though BellSouth has "targeted" the May, 2004 date, the Commission should mandate explicit interconnection agreement language requiring BellSouth to provide this functionality by no later than June 1, 2004. Additionally, ITC^DeltaCom should be allowed a test venue that will support the version of TAG or EDI in production and the version to which ITC^DeltaCom is migrating. This is needed to ensure that ITC^DeltaCom is not negatively impacted by the migration to a new Release of ENCORE or CAVE.

Testing of end user data prior to live production is very important to ensure that new systems are working properly and consumers and carriers are not negatively impacted. ITC^DeltaCom referred to testing as a key ingredient to any carrier's business. All parties understand that testing is critical to retail operations, whether they be BellSouth's or those of a CLEC, because testing provides the ability to preview and change systems prior to actually putting them into production. ITC^DeltaCom simply wants to be able to have the same type of testing abilities that the BellSouth retail unit enjoys. The Commission should affirm this principle in its order.

CLECs have requested enhancements to testing through the CCP. BellSouth currently enjoys the ability to test its data "end to end" using the tools and format that will be in its production systems. (T-374-375). To use its Operating Customer Number ("OCN"), a CLEC like ITC^DeltaCom must order test accounts as real active accounts and pay the associated rates. (Id.) BellSouth has agreed to provide the ability for CLECs to use their own accounts in CAVE. (T-375). This enhancement is "scheduled" for implementation in May 2004. (T-491-492). To ensure that this targeted date doesn't slip, ITC^DeltaCom simply asks that the Commission order as part of the interconnection agreement that BellSouth provide this enhancement no later than June 1, 2004 to ITC^DeltaCom. Since BellSouth already has committed to provide this enhancement in principle, it should have no objection to putting this commitment in writing.

BellSouth rejected a different portion of the testing enhancement requests made by CLECs. Change Request Number 1258 asked BellSouth to expand CAVE to support increased CLEC testing of ENCORE release versions, i.e., Release 12.0 as well as Release 13.0. (T-367-368). The issue here is when a new Release of ENCORE is put into production, a CLEC operating on the prior standard in effect loses its testing capabilities. (T-333). ITC^DeltaCom is requesting that it be allowed to test in both environments – the new standard and the existing one – in order to ensure that the migration to the new system doesn't impact operations or consumers. BellSouth can do this on its retail side. (T-362). BellSouth has rejected this request in the CCP due to an estimated cost of $8 million. However, as BellSouth commonly boasts, it has expended hundreds of millions of dollars on OSS enhancements over the past few years. This enhancement is needed for ITC^DeltaCom and other CLECs to ensure parity with the testing capabilities enjoyed by BellSouth's retail division.

Issue 67: Availability of OSS Systems

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?

DELTACOM POSITION: *Absent an emergency, BellSouth should not shut down DeltaCom's access to all OSS during normal working hours without consent of DeltaCom. DeltaCom schedules staff based on published support hours. When BellSouth takes down all systems during normal business hours, DeltaCom pays employees with no tools to conduct customer transactions.*

ITC^DeltaCom relies on BellSouth's OSS in order to submit ordering and pre-ordering information for customers who contact ITC^DeltaCom regarding telecommunications services. The three OSS interfaces at issue are LENS, TAG, and EDI. All three can be used to submit customer orders and associated information, but ITC^DeltaCom loses this capability when BellSouth shuts down *all three of them* at the same time. ITC^DeltaCom is not seeking a provision that requires all three interfaces to be working during normal business hours (Monday to Friday, 8 a.m. to 5 p.m.) – simply that at least one of them be working. (T-356-357).

ITC^DeltaCom further understands that OSS systems cannot be perfect. ITC^DeltaCom does not seek a prohibition on taking down the systems in an emergency or even negative consequences for BellSouth in the event of inadvertent failures. The real issue here is when BellSouth plans in advance to upgrade its OSS or release updated software. All ITC^DeltaCom asks in these non-emergency situations is that BellSouth work these upgrades outside of normal business hours, or work on some but not all three interfaces at a single time. Otherwise, BellSouth should have to obtain ITC^DeltaCom's consent prior to taking down all OSS interfaces during normal working business hours.

BellSouth improperly characterizes this issue as regarding a single incident back on December 27, 2002. While ITC^DeltaCom believes that situation was not handled properly, it does not ask that any action be taken against BellSouth. It is true that while BellSouth retail

operations remained active, ITC^DeltaCom had to turn customers away and effectively was prevented from handling customer orders for several hours on a Friday. (T-356-357, 388). BellSouth relies on the dispute over a single incident to argue that occasions where all three OSS interfaces are taken down during normal business hours are rare. If this is the case, then BellSouth should have no real objection with the language sought by ITC^DeltaCom. ITC^DeltaCom seeks assurance in the new interconnection agreement that it will be able to serve its retail customers with at least a partially functioning OSS during normal working business hours.

Respectfully submitted this 17th day of October, 2003.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following parties by Hand Delivery (*), and/or U. S. Mail this 17th day of October, 2003.

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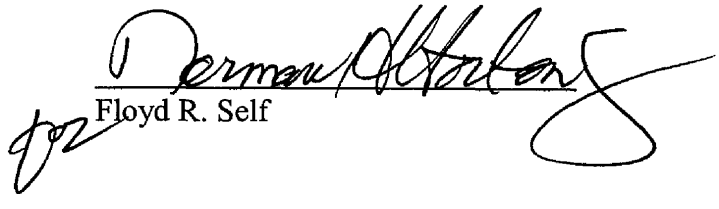

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