

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA**

In Re: Petition of ITC^DeltaCom)
Communications, Inc. for)
Mediation of Certain Issues)
)

Docket No. 050450-TP

**RESPONSE OF ITC^DELTACOM COMMUNICATIONS, INC. TO BELL SOUTH
TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS**

ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") submits the following response to the Motion to Dismiss filed by BellSouth Telecommunications, Inc. ("BellSouth").

I. INTRODUCTION

On June 30, 2005, ITC^DeltaCom filed the above-captioned Petition for Mediation of Certain Issues asking the Florida Public Service Commission ("FPSC" or "Commission") to mediate or, in the alternative, open a contested case proceeding to resolve a number of disputed issues between ITC^DeltaCom and BellSouth. The Petition was filed pursuant to sections 11 and 16.4 of the parties' current interconnection agreement ("ICA"), which was approved by the FPSC in 2001. Section 11 provides that "either Party, may petition [the Commission] for a resolution" of a dispute.¹ The disputed issues listed in the Petition arise as the result of regulatory and legal decisions which have materially affected the terms of the parties' agreement and require that these terms be renegotiated. Section 16.4, which covers changes in applicable law, states that if the parties are unable to negotiate new terms within ninety days, the parties may ask the Commission to resolve their dispute pursuant to Section 11.² This petition was filed less than two weeks after the ninety day period expired.

¹ Section 11 states, "Except as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the Commission for a resolution of the dispute . . ."

² Section 16.4 states, "In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of ITC^DeltaCom or BellSouth to perform any material terms of this

II. ARGUMENT AND CITATION TO AUTHORITY

Rather than responding to the substantive issues raised in the Petition, BellSouth filed a Motion to Dismiss. BellSouth has regrets about the ICA. In hindsight, BellSouth does not like the effect of a freely negotiated provision in its ICA with ITC^DeltaCom. BellSouth's second thoughts center on its consent to the alternative dispute resolution process set forth in Sections 16.4 and 11 of its Florida ICA. BellSouth does not dispute that, under the parties' interconnection agreement, ITC^DeltaCom has a contractual right to seek relief from the FPSC in order to resolve disputed issues; nor does BellSouth dispute that the FPSC has the power and duty, under both state and federal law, to address the issues raised in the Petition. BellSouth simply contends that this Petition should be dismissed because some, but not all,³ of the issues raised in the Petition are also pending before the FPSC in the generic "change-of-law" docket and, therefore, this additional proceeding is "inefficient" and "inconsistent" with the purpose of the generic docket.

BellSouth's Motion has no legal basis. The Commission should give meaning to Sections 11 and 16.4 of the ICA. When triggered, those provisions unequivocally provide for a two phase process: First, the parties are to negotiate for at least 90 days. Second, either party may ask the FPSC for alternative dispute resolution. BellSouth happily availed itself of the first phase. Indeed, BellSouth points out that it was the party that "requested" negotiated amendments to the ICA.⁴ The ICA was

Agreement, ITC^DeltaCom or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in Section 11."

³ The ITC^DeltaCom Petition lists forty-three issues. According to BellSouth, thirty-three of those issues either mirror issues raised in the generic docket or "are subsumed" within those issues. That leaves ten issues which, even BellSouth acknowledges, are unique to the Petition.

⁴ BellSouth Motion at p. 3. BellSouth did not resist the bilateral negotiations that preceded ITC^DeltaCom's Petition even though the subject of those discussions could affect other CLECs and were the subject of contemplated generic investigations.

applied and during the negotiations period, in the interest of settlement, ITC^DeltaCom compromised on numerous positions.

The unresolved issues now move to the second phase contemplated in the ICA – the petition for alternative dispute resolution.⁵ The only condition in the ICA on this part of the process is that “to the extent any issue disputed hereunder involves issues beyond the scope of authority or jurisdiction of the [FPSC]” the parties may seek resolution in another forum.⁶ BellSouth has not argued the issues are not within the scope of the jurisdiction of the FPSC. If BellSouth was adverse to the dispute resolution procedures, it should not have agreed to Sections 16.4 and 11 of the ICA. The FPSC has conducted numerous generic proceedings since passage of the Act. Indeed, the existence of generic proceedings covering some aspect of telecommunications in Florida has been a constant over the last decade a fact known to and contemplated by all parties when they negotiated the agreement. If BellSouth had reservations, it could have sought express conditions to the second phase of the process. BellSouth could have negotiated additional qualifying language stating that unresolved issues would be addressed generically. It is not difficult to imagine language that would have supported BellSouth’s Motion (*e.g.*, “unless such issues are the subject of an ongoing proceeding in which ITC^DeltaCom is a participant”). The ICA could have included conditions under which a Petition for Alternative Dispute Resolution would not lie. It does not. BellSouth asks the Authority to change the ICA by reading into it such an additional condition. The FPSC should decline to do so.

At a minimum, the Commission should move forward in this docket on issues on which ITC^DeltaCom has a unique perspective. For example, in the Petition, ITC^DeltaCom has raised the “commingling” issue (Issue 12) which BellSouth asserts corresponds to Issue 13 in the generic

⁵ ITC^DeltaCom is optimistic some of the unresolved issues can still be settled and has sought to do so by asking the Commission to appoint a mediator (which could be its Staff) to facilitate settlement of these issues.

⁶ ICA Section 11, see p. 2 *infra*.

proceeding.⁷ In the Petition, ITC^DeltaCom submitted a confidential attachment (Exhibit B) showing fourteen diagrams of loop and transport service arrangements. ITC^DeltaCom believes these will be the most common commingling requests made by ITC^DeltaCom and seeks specific contract language and pricing on these arrangements. The generic docket does not, of course, address this kind of proprietary, company-specific request, nor could it practically do so. On the other hand, it is critical to ITC^DeltaCom that its interconnection agreement include rates, terms, and conditions for these commingling arrangements. Similarly, ITC^DeltaCom has proposed company-specific contract language on other issues which are likely not to be resolved in the generic docket.⁸

ITC^DeltaCom must have new contract language in place to be able to provide service after March 11, 2006, when traditional UNE-P service is no longer available. BellSouth has already indicated to another state commission that BellSouth believes it “highly unlikely, if not a certainty” that the generic proceedings now scheduled throughout the region will be completed in time to have new ICAs in place by March 11, 2006.⁹ That is a risk that ITC^DeltaCom cannot afford to take. Therefore, the company has filed this Petition, as it has the right to do under its ICA, to insure that, regardless of the timing of the generic docket, ITC^DeltaCom has an alternative proceeding in which to amend its ICA prior to the FCC’s deadline.¹⁰

⁷ BellSouth’s Motion mistakenly equates ITC^DeltaCom Issue 12 with Issue 14 in the generic docket (Motion at footnote 5). There may well be other errors in BellSouth’s attempt to correlate the two dockets but, for purposes of this response, ITC^DeltaCom has not done a detailed comparison. As stated above, even BellSouth concedes that there are ten issues raised in the Petition that are not addressed at all in the generic docket.

⁸ Had ITC^DeltaCom not filed this Petition, listing all the disputed issues that have arisen from the change-of-law negotiations in accordance with sections 11 and 16.4 of the parties’ interconnection agreement, BellSouth might argue that ITC^DeltaCom had waived its rights to have these issues resolved by the FPSC. That was a risk ITC^DeltaCom did not wish to take.

⁹ See “BellSouth Response to ITC^DeltaCom Motion for Clarification,” filed July 15, 2005, in Docket P-500, Sub 18 (N.C. Public Service Commission), at 3, emphasis added.

¹⁰ Given the parties uncertainty over the outcome of the change-of-law proceedings and the possibility that new agreements will not be in place by March, 2006, one would assume that the parties could agree to an interim contract which would be subject to a true-up based on the outcome of the change-of-law dockets and the adoption of new interconnection agreements. BellSouth, however, has rejected ITC^DeltaCom’s offer of an interim agreement, evidencing that it is BellSouth’s plan to force the CLECs to sign commercial contracts in order to be able to continue providing service to mass market customers after March 11, 2006. Now that BellSouth has successfully argued that the provisions of the TRRO eliminating UNE-P, but only those provisions, are “self-effectuating,” it is in BellSouth’s best interest that litigation over

While BellSouth's superficial Motion may seem benign, it urges the FPSC down a potentially perilous path. A state commission's discretion to determine the substantive rights and duties between parties subject to the commission's jurisdiction is circumscribed by the dictates of due process. *See AT&T Commc'ns of the Sw., Inc. v. Sw. Bell Tel. Co.*, 86 F. Supp. 2d 932, 951–55 (W.D. Mo. 1999) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Determining the amount of process due is to be determined by the balancing test established in *Mathews*, balancing the private interest to be affected by the official action, the risk of an erroneous deprivation of the interest through the procedures used, and the additional value of increased procedural safeguards against the government's interests, including its interest in administrative efficiency. Courts have cautioned state regulators that all of their proceedings must consistently employ the concepts of due process and fairness to both parties. *See, e.g., Pac. Bell v. Pac-West Telecomm., Inc.*, 325 F.3d 1114, 1125–26, 1128 (9th Cir. 2003) (holding that the California commission's generic orders were unlawful because the Act did not bestow a "general rule-making" authority upon state commissions and required arbitrated inter-connection agreements to have the binding force of law, which was undermined by the commission's issuance of generic orders while disregarding due process and other restrictions on adjudicative proceedings). *See also Sw. Bell Tel. Co. v. State Corp. Comm'n of Kan.*, 2005 U.S. Dist. LEXIS 1727, at *12–*14 (D. Kan. Jan. 26, 2005) (discussing *Pacific Bell*).

Indisputably, the more cautious approach for the FPSC would be to deny BellSouth's Motion and conduct a dispute resolution proceeding as requested by the Petition. Removing all issues to a generic proceeding in this case may substantially violate ITC^DelatCom's right to due process. Because of the generalized nature of a generic proceeding, ITC^DeltaCom would not necessarily be able to have its specific issues adequately addressed before the FPSC nor could it obtain the appropriately tailored solutions necessary to resolve its unique concerns.

other issues, such as the establishment of 271 rates and enforcement of BellSouth's commingling obligation, drag on as long as possible.

ITC^DeltaCom recognizes that state regulators, including this FPSC, have used generic proceedings to address issues common to multiple interconnection agreements, such as the establishment of TELRIC-based UNE rates. (See 47 U.S.C. §252(g), recognizing that states may consolidate proceedings in certain circumstances.) On the other hand, the federal Telecommunications Act also states that BellSouth's offering of generally available terms and conditions to all competitors "shall not relieve a Bell operating company" of its duty to engage in bilateral negotiations with individual carriers and to enter into bilateral agreements with each such carrier.¹¹ See 47 U.S.C. §252(f)(5). In this case, the establishment of a generic proceeding does not and cannot relieve BellSouth of its contractual obligations to engage in bilateral negotiations with ITC^DeltaCom, which are continuing,¹² nor does it release BellSouth from the obligation to participate in this docket.

Finally, BellSouth's Motion states that certain issues listed in the Petition may not be negotiated by the parties nor addressed by the FPSC in this proceeding because those issues were not impacted by any change in law.¹³ BellSouth's argument, however, is at odds with its position during the negotiations it requested under Section 16.4 of the ICA. For example, Petition Issue 20, which relates to the interval for "hot cuts," may not be the subject of any change of law. However, BellSouth, not ITC^DeltaCom, brought this issue to the "change in law" negotiations. BellSouth refused to stand by the current contract language concerning "hot cuts" and proposed new language to ITC^DeltaCom. If BellSouth had not sought such new language during the dispute resolution negotiations, the "hot cuts" issue would not be included in the Petition. Similarly, with regard to Issue 27 (conversion of resold services to other services), BellSouth sought during negotiations to strike

¹² As noted in the Petition, ITC^DeltaCom believes these negotiations would be greatly facilitated by the presence of THE Staff acting as a mediator. BellSouth, however, adamantly refuses to consider this less expensive and more efficient alternative to litigation. See footnote 7, supra.

¹³ BellSouth's Motion to Dismiss at 6. BellSouth's Motion is nonspecific on this point, but generally states that, "DeltaCom cannot simply change terms of its existing agreement that it does not like and that do not arise from changes in law...."

language from the agreement even though ITC^DeltaCom contended the issue was not clearly impacted by any change of law. ITC^DeltaCom would be pleased to keep language on both of these issues. There is no apparent change in law affecting these issues. Nonetheless, during the 90-day negotiation period, BellSouth sought to change the language in the parties' ICA covering these issues. Although ITC^DeltaCom did not believe the contract language relating to these and other similar issues was effected by any change in law, BellSouth left ITC^DeltaCom with no other choice but to include these issues in the Petition.

III. CONCLUSION

There is no legal basis to grant BellSouth's Motion to Dismiss. ITC^DeltaCom is entitled as a matter of law to bring these issues before the FPSC and to have them resolved. ITC^DeltaCom asks that the FPSC convene a meeting to discuss and clarify the issues in the Petition and establish a schedule to resolve those issues as soon as practical.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. mail this 8th day of August, 2005 to:

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