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RECORDS AND
REPORTING

October 1, 1999

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 990750-TP (ITC^DeltaCom)

Dear Ms. Bayó:

Enclosed please find an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion to Remove Issues from Arbitration, which we ask that you file in the above-referenced matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Michael P. Goggin
Michael P. Goggin (pw)

- AFA _____
- APP _____
- CAF _____
- CMU 1 _____
- CTR _____
- EAG _____
- LEG 1 _____
- MAS 2 _____
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- SEC 1 _____
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- OTH _____

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

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In Re:)	
)	Docket No. 990750-TP
Petition for Arbitration of ITC^DeltaCom)	
Communications, Inc. with BellSouth)	
Telecommunications, Inc. pursuant to the)	
Telecommunications Act of 1996.)	Filed: October 1, 1999
)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION TO REMOVE ISSUES FROM ARBITRATION**

On August 13, 1999, the Florida Public Service Commission ("Commission") issued its Order Establishing Procedure in this matter (Order No. PSC-99-1589-PCO-TP). Attachment "A" to the Order Establishing Procedure contains a list of 50 tentative issues to be addressed by the Commission at the hearing currently scheduled for October 27th through 29th, 1999. BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Pre-Hearing Officer remove from this arbitration certain issues and testimony filed by ITC^DeltaCom Communications, Inc. ("ITC"). The issues and accompanying testimony that BellSouth seeks to remove fall into three categories: (1) issues that are inappropriate for arbitration because such issues concern damages or penalties; (2) issues that exceed the scope of the disputed issues raised in ITC's petition and BellSouth's response, and; (3) issues more appropriately addressed in one of the Commission's ongoing generic proceedings.

ARGUMENT

A. Issues That are Inappropriate for Arbitration Because Such Issues Concern Damages or Penalties.

Tentative issues 1, 2, 14, 16, 20(b), 41, 46, and 49 concern demands by ITC that the Commission impose liquidated damages or penalties against BellSouth. The

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Commission has established a clear chain of precedent that damage and penalty issues are not appropriate for arbitration because the Commission lacks the statutory authority to award such damages. See Order No. PSC-96-1579-FOF-TP (December 31, 1996); Pre-Hearing Order No. PSC-99-01715-PHO (April 15, 1999); Pre-Hearing Order No. PSC-99-1309-PHO-TP (July 8, 1999); Pre-Hearing Order No. PSC-99-1926-PHO-TP (September 28, 1999). Thus, tentative issues 1, 2, 14, 16, 20b, 41, 46, 47, and 49 are not appropriate for arbitration and should be removed from the proceeding, together with the attendant testimony.

B. Issues That Exceed The Scope Of The Disputed Issues Raised In ITC's Petition And BellSouth's Response

Any attempt by ITC to introduce new issues in this arbitration must be rejected as being contrary to the Telecommunications Act of 1996 ("1996 Act"). Section 252(b)(2)(A)(i)-(iii) expressly sets forth the duties of the petitioner (in this instance ITC) when filing for arbitration. Under the 1996 Act, ITC is required to state "the unresolved issues" in the Petition. Issues and positions from a draft agreement or an issues matrix contained in exhibits attached to the Petition do not comply with the Act. See *MCI Telecomm. Corp. V. Pacific Bell*, Case No. C97-0670, slip op. At 35 (N.D. Cal., Sept. 29, 1998) ("[S]imply listing an issue in an appendix to a petition does not sufficiently 'set forth' the issues for arbitration, and accordingly the issue is not properly before the Court."). The reason proper pleading is so important is that the responding party needs a reasonable opportunity to respond to the Petition. See Section 252(b)(3). Furthermore, Section 252(b)(4)(A) of the 1996 Act requires the Commission to "limit its consideration of any petition under Paragraph (1) ... to the issues set forth in the

petition and in the response, if any, filed under Paragraph (3).” (emphasis added).

Against this legal background, tentative issues 3(b)(1) and 50 reflect an attempt by ITC to improperly expand and introduce new issues into this arbitration proceeding.

1. Tentative Issue 3(b)(1)

In the “ACCESS TO OSS” section of his direct testimony, ITC witness Michael Thomas raises for the first time the issue of MSAG. (Thomas Direct, at 6-7) The issue of access to OSS is discussed as a parity concern in Issue 2 of the Petition. At no point in the discussion of any parity issues, (Issues 2, and 2(a)(i) through 2(a)(vii) of the Petition) or elsewhere in the Petition, does ITC raise, either explicitly or even by reference, the issue of MSAG.

Likewise, Tentative issue 5 cannot be interpreted to include the MSAG issue. The MSAG and the RSAG are different databases that serve different purposes. The RSAG database provides specific addresses and facilities information for pre-ordering and ordering purposes. The MSAG, on the other hand, provides street address information for the exchanges in which ALECs operate to allow them to create the necessary customer files for E911 automatic location identification.¹ Obtaining a download of the RSAG does not equate to obtaining a download of the MSAG. In other words, the RSAG and the MSAG are different issues.

It is clear from the Petition that ITC did not ask for arbitration of the provision of

¹ The Commission should note that BellSouth currently provides MSAG data to ITC on a quarterly basis at no charge and has no plans to discontinue this practice. In fact, BellSouth has agreed to include this in the agreement.

the MSAG database. Thus, through testimony, ITC impermissibly is seeking to broaden the issues in the arbitration. In this arbitration, the Commission must limit its consideration of issues to the issues set forth in the Petition. (Section 252(b)(4)(A)). ITC evidently understood this requirement inasmuch as it listed 73 different issues in its Petition. MSAG, however, was not among those 73 issues and, therefore, should not be arbitrated by the Commission. Based on the foregoing, BellSouth requests that the Commission strike those portions of the testimony discussing MSAG, including the Thomas direct testimony from page 6, line 16 through page 7, line 4.

2. Tentative Issue 50

As originally set forth in the Petition, Tentative issue 50 inquired, “[S]hould the Parties continue operating under existing local interconnection arrangements?” ITC’s position on this was “[y]es. There is no reason to change the arrangement for local interconnection that has worked well for the past two years. That arrangement was previously approved by the Commission.” (Petition, at 31). The issue as set forth in the Petition is straightforward – whether ITC is entitled to continue to operate under the parties’ current Interconnection Agreement. Now, however, ITC contends that Tentative issue 50 should be redrafted to include *four* separate subparts, one subpart of which is not related in any way to the matters covered by the existing interconnection agreement. Specifically, ITC requests the following re-write of Tentative issue 50:

- a) Should the current interconnection agreement language continue regarding cross-connect fees, reconfiguration charges or network redesigns, and NXX translations?
- b) What should be the definition of the terms local traffic, and trunking options?

- c) What parameters should be established to govern routing ITC^DeltaCom's originating traffic and each party's exchange of transit traffic?
- d) Should the parties implement a procedure for binding forecasts?

ITC's effort to "rephrase" Issue 50 is nothing more than a blatant attempt to improperly add issues to the arbitration. By way of example, subpart (d), regarding binding forecasts, is particularly egregious in that the current Interconnection Agreement does not even mention binding forecasts. It strains credulity to believe that Issue 50, as set forth in the Petition, was meant to cover a topic that is not even addressed in the current Interconnection Agreement.

The issue is more serious than simply a choice of words in the Tentative Issues List. In Mr. Hyde's direct pre-filed testimony, he opined that "ITC^DeltaCom believes that it is necessary to enter into a binding forecast with BellSouth as part of the Interconnection agreement between the parties." (Hyde Direct, at 25). He further testified that "I urge the Commission *to direct* BellSouth to enter into a binding forecast with ITC^DeltaCom within the interconnection agreement between the parties and *require penalties* should the requirements of the binding forecast not be met." (Hyde Direct, at 26) (emphasis added). ITC is not only seeking to "rephrase" the issues list, it is asking this Commission to grant it relief it did not seek in the Petition and, moreover, impose *penalties* on BellSouth as part of that relief.

ITC now contends, through Mr. Hyde, that ITC phrased Issue 50 broadly "to preserve these issues" in Attachment 3 of the agreement while BellSouth "was reviewing ITC^DeltaCom's proposed language." (Hyde Direct, at 24). Specifically, Mr.

Hyde testified that “in order to preserve these issues, ITC^DeltaCom *generically requested* the same interconnection language that is in our current agreement as part of issue 5.” (Hyde Direct at 24) (emphasis added). The 1996 Act does not provide for the “generic” listing of issues in a petition for arbitration. Additionally, ITC’s request here is more expansive than just asking for what was contained in its “old” agreement, as Mr. Hyde contends, since some of the items now being requested are clearly not the “same” items as those found in the earlier agreement. Furthermore, Mr. Hyde contends that “ITC^DeltaCom then listed each section of the proposed language it provided BellSouth that it understood as open and under review as an unresolved issue in Exhibit B.” (Hyde Direct, at 24). Undoubtedly, ITC’s approach does not comply with the requirements of the Act, and does not provide BellSouth with the notice of the issues to which it is entitled. As noted above, attachments to the petition do not adequately set forth “unresolved issues.” See *MCI Telecomm. Corp. v. Pacific Bell*, Case No. C97-0670, slip op. at 35(N.D. Cal., Sept. 29, 1998).

Moreover, Mr. Hyde’s testimony demonstrates the prejudice to BellSouth that will result if the Commission adopts ITC’s approach to pleading. Specifically, Mr. Hyde testified that “[r]ather than address all issues in Exhibit B that are still undecided, I request that I be able to update and supplement my testimony to the extent necessary to adequately address any unresolved issues.” (Hyde Direct, at 25). In other words, ITC contends that it need not plead the issues it wants arbitrated; rather, it simply can file testimony at any point in the proceeding setting forth its position on the issues to be addressed by the Commission. The Act specifically rejects this approach, and the Commission should as well. BellSouth requests that the Commission limit Tentative

issue 50 to the original language of the Petition, and strike testimony that attempts to expand the issue beyond the original language.

CONCLUSION

Based on the foregoing, BellSouth respectfully requests that the Commission remove tentative issues 1, 2, 14, 16, 20b, 41, 46, 47, and 49, together with the attendant testimony, from this arbitration proceeding. BellSouth also requests that the Commission strike ITC's testimony concerning MSAG, as the issue was not raised in the petition. Finally, BellSouth requests that tentative issue 50 be limited as originally set forth in the petition, and that any testimony expanding the issue be stricken.

Respectfully submitted this 1st day of October 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE
Docket No. 990750-TP

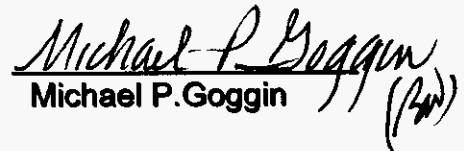
I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

(+) Hand-Delivery (#) Facsimile and U.S. Mail this 1st day of October, 1999 to the following:

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