

ORIGINAL

HUEY, GUILDAY & TUCKER, P. A.

ATTORNEYS AT LAW
106 EAST COLLEGE AVENUE
SUITE 900, HIGHPOINT CENTER
TALLAHASSEE, FLORIDA 32301

POST OFFICE BOX 1794
TALLAHASSEE, FLORIDA 32302

www.hueylaw.com
TEL: (850) 224-7091
FAX: (850) 222-2593

e-mail: andy@hueylaw.com

J. ANDREW BERTRON, JR.
GEORGE W. HATCH, III
ROBERTO M. VARGAS

JOHN ANDREW SMITH
CHRISTOPHER K. HANSEN
GOVERNMENTAL CONSULTANTS

ORIGINAL

*ADMITTED IN FLORIDA & DC
†BOARD CERTIFIED REAL ESTATE LAWYER
‡CERTIFIED CIRCUIT CIVIL MEDIATOR
**CERTIFIED PUBLIC ACCOUNTANT, FL

ROBERT D. FINGAR
THOMAS J. GUILDAY
J. MICHAEL HUEY††
GEOFFREY B. SCHWARTZ††
VIKKI R. SHIRLEY
M. KAY SIMPSON
J. KENDRICK TUCKER*
MICHAEL D. WEST
WILLIAM E. WILLIAMS††
JOHN S. DERR
ROBIN C. NYSTROM
CLAUDE R. WALKER***
OF COUNSEL

October 26, 1999

BY HAND DELIVERY THIS DATE

RECEIVED-FPSC
OCT 26 PM 2:18
RECORDS AND REPORTING

Blanca S. Bayo
Director, Division of Records and Recording
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket #990750-TP; *Petition for Arbitration by ITC^DeltaCom Communications*

Dear Ms. Bayo:

On behalf of ITC^DeltaCom Communications, Inc., enclosed for filing in the referenced docket are an original and 15 copies of ITC^DeltaCom's Motion for Reconsideration.

Please file stamp the extra enclosed copy and return it to our runner. Thank you for your assistance.

Sincerely,

HUEY, GUILDAY & TUCKER, P.A.

J. Andrew Bertron, Jr.

JAB/
Enclosures
\\Nt1\wp\andy.bertron\ITC\Clerk15.ltr.wpd
AFA _____
APP _____
CAF _____
CMU Flowers
CTR _____
EAG _____
LEG 2
MAS 5
OPC _____
PAI _____
SEC 1
WAW _____
OTH _____

RECEIVED & FILED
ms
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
13151 OCT 26 99
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:)
Petition for Arbitration of ITC^DeltaCom)
Communications, Inc. with BellSouth)
Telecommunications, Inc. Pursuant to the)
Telecommunications Act of 1996)

Docket No.990750-TP

PETITIONER ITC^DELTACOM'S MOTION FOR RECONSIDERATION

Petitioner, ITC^DeltaCom Communications, Inc. (hereinafter "ITC^DeltaCom"), through its undersigned attorneys, pursuant to Rule 25-22.0376, Florida Administrative Code, moves the Commission for reconsideration of certain portions of the Prehearing Order entered in this case and in support states as follows:

BACKGROUND

1. On or about October 1, 1999, BellSouth Telecommunications, Inc. ("BellSouth") filed a Motion to Remove Issues from Arbitration. In its motion, BellSouth alleged that certain issues raised in ITC^DeltaCom's petition were beyond the Commissions' jurisdiction and therefore, such issues and accompanying testimony should be removed from this arbitration. The issues to which BellSouth objected concerned certain performance guarantees proposed by ITC^DeltaCom (issue numbers 1, 2, 14, 16, 20(b), 41, 46, 47 and 49) (collectively "the performance guarantee issues).

2. On October 11, 1999, a Prehearing Conference was held before Commissioner E. Leon Jacobs, as Prehearing Officer. At the Prehearing, the Prehearing Officer granted BellSouth's Motion and struck all of the performance guarantee issues except issue no. 41 from arbitration and the accompanying testimony. The Prehearing Order issued on October 25, 1999

reflects the removal of these issues from arbitration. Thus, ITC^DeltaCom will be prevented at the arbitration from even presenting evidence on the performance guarantee issues.

ARGUMENT

A. Framework of the Act

Section 252 of the Telecommunications Act of 1996 ("the Act") sets forth a framework, pursuant to which telecommunications companies may initiate negotiations with incumbent local exchange companies to effectuate an interconnection agreement for Florida. Where such negotiations reach an impasse, affected parties may petition this Commission for arbitration of "open issues." BellSouth asks the Commission to preclude consideration of certain open issues which are vital to ITC^DeltaCom's ability to compete effectively against BellSouth and other telecommunications companies. BellSouth's position is contrary to the language and spirit of the Act and should be rejected.

B. Self-Effectuating Performance Guarantees.

BellSouth asks this Commission to turn a blind eye to ITC^DeltaCom's request for arbitration of self-effectuating performance guarantees, basing its argument on a misreading of the law. Performance measures and guarantees are necessary to give BellSouth an incentive to meet its obligations under the interconnection agreement. Without them, BellSouth is left with no incentive to discontinue its poor performance.

Section 251(c) of the Act requires that BellSouth provide interconnection and unbundled access to ITC^DeltaCom at parity with the manner in which BellSouth provides such services and facilities to itself. The Act charges the Commission with fashioning policies which ensure such parity. The Act requires the Commission do so in response to a petition for arbitration. The evidence that will be presented by witnesses Rozycki, Hyde and Thomas will show that in many

instances, BellSouth has failed to provide services to ITC^DeltaCom at parity with the services it provides to itself.

Nothing in the law prohibits the inclusion of self-effectuating performance guarantees in an interconnection agreement which will be in place prior to any breach of the contract. This Commission is charged with promoting competition and should find that performance guarantees embedded in the interconnection agreement between the parties will accomplish that objective. BellSouth has not presented any proposed performance guarantees to this Commission, but has done so to the Federal Communications Commission ("FCC"). If allowed, ITC^DeltaCom, through its witnesses, will provide to the Commission a copy of at least one *ex parte* presentation BellSouth made to the FCC in which it proposes self-effectuating performance guarantees.

1. Federal Law.

The Act is highly unusual in structure -- Congress has conferred a duty upon state Commissions and a framework in which telecommunications companies are to enter into bilateral contracts. The Commission is charged - *by Congress* - with implementation of federal, not state standards. Indeed, this proceeding is being conducted for purposes of implementation of federal - not state - standards.

Sections 252(b) and (c) of the Act specify the duties and responsibilities of this Commission with regard to this arbitration. Included in that charge is the responsibility to arbitrate "any unresolved" issues between the parties. Performance guarantees is one such issue. Section 252(b)(4)(C) of the Act states that "[t]he State commission **shall** resolve each issue" brought before it in an arbitration. (emphasis added) The issues of performance guarantees were properly presented and certainly may be considered by the Commission. Similarly, Section 252(c) of the Act states that "[i]n resolving by arbitration under subsection (b) any open issue

and imposing conditions upon the parties” the State commission shall ensure that such resolution meets the requirements of Section 251” and any regulations prescribed by the FCC. There is certainly nothing about performance guarantees that conflicts with the requirements of Section 251 of the Act and the regulations prescribed by the FCC. Indeed, the parity requirements of the Act and the FCC’s pronouncements support the system of self-effectuating guarantees supported by witness Rozycki in his testimony.

It is noteworthy that the Louisiana Public Service Commission Administrative Law Judge assigned to the ITC^DeltaCom/BellSouth arbitration allowed the presentation of evidence regarding performance measures and guarantees at the Louisiana hearing which began on October 4, 1999. Additionally, the Tennessee Regulatory Authority Pre-Arbitration Officer assigned to the ITC^DeltaCom/BellSouth arbitration found performance measures and guarantees to be appropriate for arbitration. *Report and Initial Order of Pre-Arbitration Officer*, TRA Docket No. 99-00430, October 6, 1999. Pursuant to its authority under the Act, the Commission should consider the merits of ITC^DeltaCom’s proposed system of performance guarantees and allow ITC^DeltaCom to go forward with evidence.

2. Florida Law

In response to BellSouth’s state law claim that the Commission’s jurisdictional limits do not allow even the consideration of ITC^DeltaCom’s proposal, it is crucial to understand that ITC^DeltaCom is not requesting an “award” of damages. Rather, ITC^DeltaCom merely asks for the opportunity to arbitrate the inclusion of performance measures and guarantees in an interconnection agreement. If the Commission finds that ITC^DeltaCom is precluded from presenting such an argument then the Commission has effectively pronounced that the issue of self-effectuating performance guarantees was closed before negotiations even began with

BellSouth in January. The Commission should not close this issue as a matter of law. Rather, the Commission should consider the evidence and assign appropriate weight to it to reach a conclusion that furthers competition.

The Commission may arbitrate performance measures because the only limit on its powers under state law is that it may not enter an award of damages which result from events *completed in the past*. The Commission has considered similar arguments. ITC^DeltaCom strongly urges the Commission to look directly and carefully to the decisions of the Florida courts which have been the underlying basis for the Commission's previous consideration of performance guarantees. When one reads those judicial pronouncements, it is clear that the request in this case is appropriate for the Commission's consideration. The root of the Commission's decisions regarding prospective jurisdiction has been the case of *Southern Bell Telephone and Telegraph Company v. Mobile America Corporation, Inc.*, 291 So.2d 199 (Fla. 1974). That case can be easily distinguished from the issue presented by ITC^DeltaCom in the June 11, 1999 filing. In *Southern Bell*, a telephone customer sought damages resulting from the alleged negligent failure of a telephone utility to meet statutory service standards. In holding that the Commission did not have authority to award money damages for past service failures, the Florida Supreme Court stated that:

The ultimate issues raised in a suit for money damages **for a completed, past failure** to meet the statutory standards are, however, a matter of judicial cognizance and determination. . . . Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for **past failures** to provide telephone service meeting the statutory standards.

Id. at 202 (Emphasis supplied). As explained in more detail by the lower court, the Commission did not have jurisdiction over the damages issue because the plaintiff was not seeking "future compliance," but rather was "seeking redress for alleged losses which had already accrued as a

result of defendant's negligence." *Mobile America Corporation, Inc. v. Southern Bell Telephone and Telegraph Company*, 282 So.2d. 181, 183 (Fla. 1st DCA 1973), *aff'd* 291 So.2d 199. "The jurisdiction of the public service commission under the statutory provisions is broad and comprehensive. Yet that jurisdiction has generally been prospective in nature." *Id.* at 184.

The Commission's jurisdiction over prospective performance was also addressed in *Florida Power & Light Co. v. Glazer*, 671 So.2d 211 (Fla. 3d DCA 1996), which held in relevant part that:

The jurisdiction of the public service commission under the statutory provisions is broad and comprehensive. Yet that jurisdiction has generally been prospective in operation. However, it is not a proper tribunal to decide a controversy **after damage has been inflicted**.

Id. at 214, citing *Muskegon Agency, Inc. v. General Tel. Co. of Michigan*, 340 Mich. 472, 65 N.W.2d 748 (1954) (Emphasis supplied).

These cases confirm that the only limitation on the Commission's jurisdiction is that it may not "decide a controversy after damage has been inflicted." ITC^DeltaCom asks that the Commission arbitrate the terms of the interconnection agreement. Arbitration of a performance guarantee is not an award of money damages because the guarantee, like the interconnection agreement itself, operates prospectively.

ITC^DeltaCom has presented a three-tiered set of self-effectuating performance guarantees intended to be applied to the Florida interconnection agreement. In adopting this set of performance guarantees, the Commission should note that the parties are permitted to address performance incentives as a matter of contract and the Commission has statutory authority to impose fines and penalties when companies subject to its jurisdiction violate its orders. The Commission has approved performance guarantees and incentives in the past. For example,


BellSouth's own tariffs require customers who fail to perform by not paying their bills to pay interest to BellSouth. When a customer's check is returned for insufficient funds, a penalty is applied. Similarly, BellSouth tariffs contain many examples of performance guarantees. For example, ITC^DeltaCom will provide as exhibits examples of instances in which BST offers to its customers "service installation guarantees," "performance guarantees," and generally applies credits where service has been interrupted. These guarantees have been approved by this Commission. Mr. Rozycki will discuss these other instances where performance guarantees have been approved.

CONCLUSION

By granting BellSouth's motion, the Prehearing Officer has, as a matter of law, excluded arguments and evidence from consideration of specific open issues set forth in ITC^DeltaCom's Petition for Arbitration, and prevented resolution of key open issues which were not successfully negotiated between the parties. The Commission has the duty under the Telecommunications Act of 1996 to resolve each and every open issue set forth by ITC^DeltaCom in this arbitration. Thus, the Commission should reject BellSouth's attempt to deny ITC^DeltaCom the redress provided under the Act.

WHEREFORE, ITC^DeltaCom respectfully requests that the full Commission panel

assigned to this arbitration reconsider the Prehearing Order and reinstate the deleted performance guarantee issues and accompanying testimony for arbitration.



J. Michael Huey (Fla. Bar # 0130971)
J. Andrew Bertron, Jr. (Fla. Bar # 982849)
Huey, Guilday & Tucker, P.A.
106 E. College Ave., Suite 900 (32301)
Post Office Box 1794
Tallahassee, Florida 32302
850/224-7091 (telephone)
850/222-2593 (facsimile)
Attorneys for ITC^DeltaCom

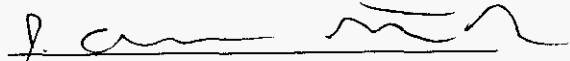
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished this 26th day of October, 1999 to the following:

Diana Caldwell
Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
(hand-delivery)

Nancy B. White
Michael P. Goggin
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(facsimile and U.S Mail)

R. Douglas Lackey
Thomas B. Alexander
E. Earl Edenfield, Jr.
BellSouth Telecommunications, Inc.
Suite 4300, BellSouth Center
675 W. Peachtree Street, N.E.
Atlanta, Georgia 30375
(facsimile and U.S. Mail)



Attorney

a:\tc\MotReconsider.wpd