

MICHAEL P. GOGGIN  
General Attorney

BellSouth Telecommunications, Inc.  
150 South Monroe Street  
Room 400  
Tallahassee, Florida 32301  
(305) 347-5561

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December 10, 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 is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Supplemental Post-Hearing Brief Regarding the Scope of Section 364.285, Florida Statutes, which we ask that you file in the captioned docket.

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

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

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*Mr*  
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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

U.S. Mail this 10th day of December, 1999 to the following:

Diana Caldwell  
Staff Counsel  
Florida Public Service  
Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850  
Tel. No. (850) 413-6175  
Fax. No. (850) 413-6176

BellSouth Telecomm., Inc.  
BellSouth Center  
675 West Peachtree Street, N.E.  
Suite 4300  
Atlanta, Georgia 30375-0001  
Tel. No. (404) 335-0794  
Fax. No. (404) 658-9022

David I. Adelman, Esq.  
Charles B. Jones, III, Esq.  
Sutherland Asbill & Brennan L.L.P.  
999 Peachtree Street  
Atlanta, GA 30309-3996  
Tel. No. (404) 853-8000  
Fax. No. (404) 853-8806

  
Michael P. Goggin

\*Signed a Protective Agreement

Nanette S. Edwards, Esq. •  
Regulatory Attorney  
ITC^ DELTACOM  
700 Blvd. South  
Suite 101  
Huntsville, Alabama 35802  
Tel. No. (256) 650-3957  
Fax. No. (256) 650-3936

J. Michael Huey  
J. Andrew Bertron, Jr.  
Huey, Guilday & Tucker, P.A.  
106 East College Avenue  
Suite 900 (32301)  
Post Office Box 1794  
Tallahassee, Florida 32302  
Tel. No. (850) 224-7091  
Fax. No. (850) 222-2593

Parkey Jordan, Esq.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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: December 10, 1999

**Supplemental Post-hearing Brief Regarding the Scope of  
Section 364.285, Florida Statutes**

In its Pre-Hearing Order issued on October 25, 1999, Order No. PSC-99-2117-PHO-TP, the Commission requested post-hearing briefing of a legal issue that is not an issue to be decided in this arbitration. The issue, as stated in the Pre-Hearing Order, is "whether the Commission has jurisdiction to assess penalties pursuant to Section 364.285, Florida Statutes, if it appears that a party is failing to comply with a Commission-approved negotiated or arbitrated agreement." The issue arose in the context of a decision by the Presiding Officer in this matter to adhere to the Commission's prior orders holding that the Commission lacks the authority to compel parties to an interconnection agreement to include penalty or liquidated damage provisions in their agreement. See, e.g. Order No. PSC-96-1579-FOF-TP (December 31, 1996). The Pre-Hearing Officer expressed concern that without authority to award damages in cases in which a party is alleged to have breached a Commission-approved agreement, the Commission might not be able to provide timely and effective remedies or to deter such breaches.

Before addressing the issue, it is worth noting that there are relatively few instances in which parties have felt it necessary to bring to the Commission a dispute under an interconnection, resale or unbundling agreement with BellSouth.<sup>1</sup> Most of these, such as the cases involving reciprocal compensation for call traffic bound to Internet Service Providers ("ISPs") and BellSouth's obligation to provide combinations of network elements, involve questions that have been hotly disputed before numerous state commissions and the Federal Communications Commission ("FCC") by virtually all industry participants. Accordingly, it is not surprising that individual parties might disagree on such issues in Florida. In view of the relatively small number of complaints filed with the Florida Commission and the ever-evolving nature of the parties' rights and obligations under the Telecommunications Act of 1996 ("1996 ACT"), BellSouth does not agree that there is a pressing need for an award of damages, particularly given the Commission's existing injunctive powers.

The Commission does not have jurisdiction pursuant to Section 364.285, Florida Statutes, to assess fines or penalties if a party to an agreement approved by the Commission pursuant to Section 252 of the 1996 Act breaches that agreement, whether the agreement is entered into through negotiation or as a result of arbitration. To rule otherwise would be inconsistent with the Telecommunications Act and the role of the Commission under the 1996 Act.

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<sup>1</sup> So far in 1999, BellSouth has filed more than 350 resale, unbundling and/or interconnection agreements or amendments to such agreements with the Commission. By contrast, only 13 complaints have been filed in 1999 alleging a breach of a Commission approved agreement

The ultimate purpose of the 1996 Act is to replace regulation of telecommunications markets with competition. Accordingly, telecommunications carriers are required to negotiate agreements to govern the manner in which they do business with one another, rather than have a regulatory agency regulate the relationship. 47 U.S.C. § 251(c)(1). The rights and obligations of the parties to an interconnection, resale or unbundling agreement are not determined by the Commission's order approving the agreement, but arise from the agreement itself.

The parties are required to seek Commission approval of their agreement only to ensure that the terms to which the parties agree to obligate themselves are consistent with the 1996 Act and with the public interest. 47 U.S.C. § 252(e). The Commission's order approving such an agreement is not a mandate to conduct business in a manner determined by the Commission; it is merely a finding that the terms under which the parties have agreed to conduct business are not unlawful. If an ALEC or an ILEC breaches such an agreement, they violate a duty owed to the other party by virtue of the agreement itself--they do not violate an order of the Commission. Thus, the Commission's authority to assess penalties under F.S. §364.285 does not apply.

Similarly, the Commission's order resolving an arbitration under the Telecommunications Act does not provide jurisdiction to penalize a party under F.S. § 364.285 if it later breaches the arbitrated agreement. Although the

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involving BellSouth, many of which involved a dispute over the payment of reciprocal compensation for Internet-bound traffic.

Commission, in the relatively few cases in which parties cannot agree on all terms, may be called upon to arbitrate certain issues in connection with such agreements, the Commission's role in such cases is limited to deciding which disputed terms must be included in the agreement. 47 U.S.C. § 252(b). The Commission may not impose terms of its own choosing upon the parties—its authority to arbitrate is limited to the issues identified by the parties in the arbitration petition and the response. 47 U.S.C. § 252(b)(4). Once the parties submit for approval an agreement including the arbitrated terms, they have complied with the Commission's arbitration order. Accordingly, after the agreement, including the arbitrated terms, has been approved, the arbitration order does not provide any basis for assessing fines or penalties under § 364.285, Florida Statutes. As with a negotiated agreement, the duties each party owes to the other arise from the agreement, not from the arbitration order or the order approving the agreement.

The Commission is presently fulfilling the role Congress envisioned for it when the Telecommunications Act was passed -- construing the Act, reviewing agreements between carriers to ensure that they are consistent with the Act, and construing and enforcing the agreements it has approved. A party aggrieved by an alleged breach may pursue remedies before the Commission and/or the courts. The Commission has the power to provide effective injunctive relief to enforce the agreements it has approved. Accordingly, the inability to assess penalties for breaches of Interconnection, Unbundling and/or Resale

Agreements approved by the Commission does not deprive the Commission or the parties of adequate means to enforce such agreements.

Respectfully submitted this 10th day of December, 1999

BELLSOUTH TELECOMMUNICATIONS, INC.

*Nancy B. White*  
(HW)

NANCY B. WHITE  
MICHAEL P. GOGGIN  
c/o Nancy Sims  
150 South Monroe Street, Suite 400  
Tallahassee, FL 32301  
(305) 347-5558

*R. Douglas Lackey*  
(HW)

R. DOUGLAS LACKEY  
THOMAS B. ALEXANDER  
Suite 4300, BellSouth Center  
675 West Peachtree Street, N.E.  
Atlanta, GA 30375  
(404) 335-0747

188384