

MICHAEL P. GOGGIN
General Attorney

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

ORIGINAL

RECORDS AND
REPORTING

00 JAN -4 PM 4:30

RECEIVED-FPSC

January 4, 2000

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 Motion to Strike Portions of ITC^DeltaCom Communications, Inc.'s December 22, 1999, Brief or, in the Alternative, Motion to File Brief in Response, 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 (KR)

Michael P. Goggin

AFA _____
APP _____
CAF _____
CMU Favoro
CTR _____
EAG _____
LEG 1
MAS 2
OPC _____
RRR _____
SEC 1
WAW _____
OTH _____

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

RECEIVED & FILED
[Signature]
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

00098 JAN-48

FPSC-RECORDS/REPORTING

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 4th day of January, 2000 to the following:

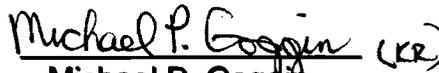
Diana Caldwell
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6175
Fax. No. (850) 413-6176

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

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.
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


Michael P. Goggin (KR)
Michael P. Goggin

*Signed a Protective Agreement

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: January 4, 2000

**BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO STRIKE
PORTIONS OF ITC^DELTACOM COMMUNICATIONS, INC.'S
DECEMBER 22, 1999, BRIEF OR, IN THE ALTERNATIVE,
MOTION TO FILE BRIEF IN RESPONSE**

On December 22, 1999, ITC^DeltaCom Communications, Inc. ("DeltaCom") filed a document it entitled "Response of ITC^DeltaCom Communications, Inc. to Supplemental Brief of BellSouth Telecommunications, Inc. ("Dec. 22 Brief"). In its Dec. 22 Brief, DeltaCom addressed two issues. Buried at page 9 of the Dec. 22 Brief was a topic that DeltaCom entitled "The Tandem Interconnection Rate". Without question, this issue has absolutely nothing whatsoever to do with the purported reason that DeltaCom gave the Commission for filing its Dec. 22 Brief which was to respond to BellSouth's Supplemental Brief regarding the scope of the Commission's authority under Section 364.285, Florida Statutes. In pages 9-14 of its Dec. 22 Brief, DeltaCom addresses an issue it raised in its Arbitration Petition—whether, for purposes of reciprocal compensation, DeltaCom should be entitled to be compensated at the tandem interconnection rate when its switch does not serve the same geographic area or provide tandem functionality. This *is* an issue to be decided by the

Commission in this docket. Pursuant to the Commission's Procedural Order, each party submitted testimony, conducted discovery, the Commission heard live testimony and received evidence on this issue, and each party had the opportunity to fully address this issue in its Post-Hearing Brief. Accordingly, DeltaCom's blatant and improper attempt to reargue this issue (and to introduce *new evidence*) after the record has been closed and the parties have fully briefed this issue should be rejected. BellSouth hereby requests that pages 9-14 of DeltaCom's Dec. 22 Brief, and the exhibit attached thereto, be stricken. Alternatively, BellSouth requests the right to file a brief in response.¹

The remainder of DeltaCom's Dec. 22 Brief (pages 1-8), relates to the only issue that BellSouth addressed in its Supplemental Post-Hearing Brief—whether under Section 364.285, Florida Statutes, the Commission may assess penalties if a party is alleged to have breached an interconnection agreement approved by the Commission pursuant to the Telecommunications Act of 1996. While BellSouth does not agree that DeltaCom should be allowed to file additional briefing on this issue, BellSouth will not object. Although both DeltaCom and BellSouth have each submitted post-hearing briefs fully addressing this issue, it is not a question to be decided in this docket. The briefing was requested simply to assist the Commission in analyzing a question that was raised by the Presiding Officer at the Pre-Hearing Conference. Thus,

¹ For the convenience of the Commission, BellSouth is attaching a copy of a Brief in Response in substantially the form it would file with the Commission, should the Commission deem additional briefing to be more appropriate than striking the improper pages from DeltaCom's Dec. 22 Brief.

while BellSouth does not agree that DeltaCom should get the proverbial "second bite" at the apple, BellSouth does not object to DeltaCom's reiterating its opinion on this question.

Wherefore, for the reasons stated above, BellSouth respectfully requests that the Commission strike pages 9-14 of DeltaCom's Dec. 22 Brief and the exhibit attached thereto or, in the alternative, allow BellSouth to file a Brief in response.

Respectfully submitted this 4th day of January, 2000

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White (KR)

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 (KR)

R. DOUGLAS LACKEY

THOMAS B. ALEXANDER

Suite 4300, BellSouth Center

675 West Peachtree Street, N.E.

Atlanta, GA 30375-0001

(404) 335-0747

190967 V.3

**BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION**

In Re:

Petition for Arbitration of ITC^DeltaCom
Communications, Inc. with BellSouth
Telecommunications, Inc. pursuant to the
Telecommunications Act of 1996.

)
)
)
)
)

Docket No. P-500, Sub 10

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
SUPPLEMENTAL BRIEF**

I. INTRODUCTION

Pursuant to the December 29, 1999 Order of the North Carolina Utilities Commission ("Commission" or "NCUC"), BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Supplemental Brief in response to the brief filed by ITC^DeltaCom Communications, Inc. ("DeltaCom"). In its brief, DeltaCom criticizes the Public Staff's proposed resolution of the tandem switching issue, insisting that the Public Staff has "misinterpreted" applicable rules of the Federal Communications Commission ("FCC") and has imposed "a burden of proof on ITC^DeltaCom which has no legal basis." These criticisms are without merit. The Public Staff's analysis of the tandem switching issue is both legally and factually correct and should be adopted by this Commission.

II. DISCUSSION

A. The Public Staff Correctly Identified DeltaCom's Burden Of Proof On The Tandem Switching Issue.

DeltaCom objects to the finding in the Public Staff's Proposed Order that "[u]nder FCC Rule 51.711, DeltaCom had the burden of showing that its switches performed similar functions to and served a comparable geographic area as BellSouth's tandem switches." However,

DeltaCom's objection that the Public Staff "proposes to expand unduly the requirements of FCC Rule 51.711" (DeltaCom Brief at 2) is based on a misreading of the Public Staff's Proposed Order and a misunderstanding of Rule 51.711(a)(3).¹

BellSouth agrees that "Rule 51.711(a)(3) controls this issue." (DeltaCom Brief at 1.) However, the rule cannot be read in a vacuum as DeltaCom would have the Commission do. On the contrary, Rule 51.711(a)(3) must be read in the broader context of the Telecommunications Act of 1996 ("1996 Act") and the FCC's order adopting the rule, both of which fully support the Public Staff's analysis of DeltaCom's burden of proof on the tandem switching issue.

Under Section 251(b)(5) of the 1996 Act, all local exchange carriers are required to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). The terms and conditions for reciprocal compensation must be "just and reasonable," which requires the recovery of a reasonable approximation of the "additional cost" of terminating calls that originate on the network of another carrier. 47 U.S.C. § 252(d)(2)(A). According to the FCC, the "additional costs" of transporting terminating traffic vary depending on whether or not a tandem switch is involved. *See* First Report and Order, *In re: Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, cc Docket No. 96-98, ¶ 1090 (Aug. 8, 1996) (hereinafter referred to as "*First Report and Order*"). As a result, the FCC determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. *Id.*

¹ For example, DeltaCom complains that the Public Staff "incorrectly states that ITC^DeltaCom had the burden of proving that its switch serves as a tandem." (DeltaCom Brief at 4.) Nowhere does the Public Staff's Proposed Order make any such statement. After identifying DeltaCom's burden of proof on the tandem switching issue and summarizing the scant evidence on the issue, the Public Staff merely concluded that DeltaCom had filed to satisfy its burden so as to be entitled to the same reciprocal compensation rate that would apply for traffic transported and terminated via BellSouth's tandem switch.

The FCC directed state commissions to consider two factors in determining whether a competing local provider (“CLP”) should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent’s tandem switch. First, the FCC directed state commissions to “consider whether new technologies (e.g., fiber ring or wireless network) performed functions similar to those performed by an incumbent LEC’s tandem switch and thus whether some or all calls terminating on the new entrant’s network should be priced the same as the sum of transport and termination via the incumbent LEC’s tandem switch.” *First Report and Order* ¶ 1090. Second, in addition to the functionality comparison, the FCC instructed that where the new carrier’s switch serves a geographic area comparable to that served by the incumbent local exchange carrier’s tandem switch, in which case the appropriate proxy for the new carrier’s costs is the incumbent’s tandem interconnection rate. *Id.*; see also 47 CFR § 51.711(a)(3). Therefore, in order to evaluate whether a CLP should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent’s tandem switch, “*it is appropriate to look at both the function and geographic scope of the switch at issue.*” See *U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp. 2d 968, 977 (D. Minn. 1999) (emphasis added).

DeltaCom argues that the Public Staff erred in comparing the functions performed by DeltaCom’s switch and BellSouth’s tandem switch because, according to DeltaCom, “there simply is no functionality comparison to be made.” (DeltaCom Brief at 3.) However, DeltaCom’s argument cannot be reconciled with the plain language of the FCC’s *First Report and Order*, which directs the Commission to consider whether the CLP is employing new technologies that “perform functions similar to those performed by an incumbent LEC’s tandem switch.” *First Report and Order* ¶ 1090. Likewise, DeltaCom’s argument cannot be reconciled

with various federal district court and state commission decisions which plainly hold that the functions performed by another carrier's switch should be considered in determining whether that carrier is entitled to receive compensation for end-office, tandem, and transport elements in transporting terminating traffic. *See, e.g., U.S. West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp. 2d at 977; *U.S. West Communications, Inc. v. Public Service Commission of Utah*, 1999 U.S. Dist. LEXIS 18148, *12 (D. Utah, Nov. 23, 1999) (affirming commission requirement that U.S. West compensate Western Wireless at the tandem switching rate after concluding that Western Wireless's "switches perform comparable functions and serve a larger geographic area") (copy attached); *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.*, 1999 U.S. Dist. LEXIS 11418, *19 (N.D. Ill., June 22, 1999) (in deciding whether MCI was entitled to the tandem interconnection rate, the commission correctly applied the FCC's test to determine whether MCI's switch "performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch") (copy attached).

For example, in an arbitration initiated by ICG Telecom Group, Inc. ("ICG"), the Florida Public Service Commission recently rejected ICG's request that it be compensated for end-office, tandem and transport elements when it transports terminating traffic from BellSouth. In so doing, the Florida Commission expressly considered the functions performed and geographical area served by ICG's switch. According to the Florida Commission, "the evidence of record does not show that ICG's switch will serve an area comparable to the area served by

BellSouth's tandem switch. In addition, the evidence does not show that ICG's switch will perform the same functions as a BellSouth tandem switch." Docket No. 990691-TP (Dec. 21, 1999).²

As these cases make clear, the Public Staff's Proposed Order correctly identified DeltaCom's burden of proof on the tandem switching issue. Accordingly, the Commission should adopt the Public Staff's Proposed Order making clear that DeltaCom had the burden of showing that its switches performed similar functions to and served a comparable geographic area as BellSouth's tandem switches – a burden that DeltaCom failed to meet.³

B. The Public Staff Correctly Concluded That DeltaCom Had Failed To Satisfy Its Burden of Proof On The Tandem Switching Issue.

DeltaCom also objects to the Public Staff's conclusion that DeltaCom failed to satisfy its burden of proof on the tandem switching issue. (DeltaCom Brief at 4.) However, the Public Staff's conclusion is abundantly correct, particularly given that the record evidence from DeltaCom on the tandem switching issue consisted of slightly more than one page of prefiled testimony in addition to Mr. Rozcyki's responses to four questions from the Public Staff on the issue at the hearing. *See* Tr. Vol. I at 74 & 98; Tr. Vol. II at 43-44. The Public Staff concluded that "DeltaCom presented a paucity of evidence on [the tandem switching] issue" – a conclusion that DeltaCom does not and cannot seriously dispute. (Deltacom Brief at 2.) DeltaCom's latest

² The Florida Commission has not yet entered a written order memorializing its decision in the ICG arbitration on the tandem switching issue. However, attached as Exhibit 1 is a copy of the vote sheet reflecting the Florida Commission's approval of its Staff's recommendation that ICG's request to be compensated at the tandem switching rate be rejected.

³ It is ironic that, while contending that it need not show that its switches perform similar functions to BellSouth's switches, DeltaCom offered testimony on this very point. Specifically, Mr. Rozcyki asserted in conclusory fashion in his pre-filed testimony that "ITC^DeltaCom has designed a network where *its switches perform the same functions as the BellSouth end-office and tandem switches.*" Tr. Vol. I at 98 (emphasis added). Although Mr. Rozcyki did not offer any facts to support this assertion, there would have been no need for DeltaCom to offer testimony on the functionality of its switches in the first place if DeltaCom were correct that "there simply is no functionality comparison to be made."

filing should not obscure the inescapable truth that DeltaCom failed to produce any evidence upon which this Commission could find in DeltaCom's favor on the tandem switching issue.

Indeed, even if the Commission were to conclude that DeltaCom was only required to prove that its switch serves a comparable geographic area to BellSouth's tandem switch (which BellSouth does not believe is the appropriate test), DeltaCom utterly failed to satisfy this burden of proof as well. DeltaCom does not and cannot point to a single shred of evidence in this record that establishes what geographic area its Greensboro switch currently serves and whether that area is comparable to the geographic area served by BellSouth's tandem switch.

In a futile attempt to fill this evidentiary gap, DeltaCom points to its tariffs in North Carolina as well as a "fiber network map" referenced by DeltaCom's counsel during opening statements as "evidence" of DeltaCom's geographic serving area. (DeltaCom Brief at 3.) However, neither DeltaCom's tariffs nor its network map were entered into evidence. Furthermore, even if considered by the Commission, neither DeltaCom's tariffs nor its network map demonstrate what geographic area DeltaCom's switch actually serves in North Carolina. The issue is whether DeltaCom's Greensboro switch "serves" a comparable geographic area, not whether its switch is technically capable of serving a particular geographic area. *See* 47 C.F.R. § 51.711(a)(3); *see also MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.*, 1999 U.S. Dist. LEXIS 11418 (N.D. Ill. June 22, 1999).

The evidence in this record (or lack thereof) on the question of whether DeltaCom's switch serves a comparable geographic area is similar to the record evidence confronted by the federal district court in *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.* In that case, MCI argued that it should be compensated at the tandem rate for its switch in Bensonville, Illinois. The Illinois Commerce Commission ("ICC") rejected

MCI's argument, finding that MCI had failed to provide sufficient evidence to support a conclusion that it was entitled to the tandem interconnection rate.⁴

In affirming the ICC on the tandem switching issue, the federal district court found that MCI's "intentions for its switch" were "irrelevant." According to the court, MCI was required to identify the location of its customers and the geographical area "actually serviced by MCI's switch," which MCI had utterly failed to do. *Id.* at *22-23 n.10. The district court reasoned that:

The "Chicago area" is large, yet MCI offered no evidence as to the location of its customers within the Chicago area. Indeed, an MCI witness said that he "doubted" whether MCI had customers in every "wire center territory" within the Chicago service area. MCI's customers might have been concentrated in an area smaller than that served by an Ameritech tandem switch or MCI's customers might have been widely scattered over a large area, which raises the question whether provision of service to two different customers constitutes service to the entire geographical area between the customers. These are questions that MCI could have addressed, but did not.... In short, *MCI offered nothing but bare, unsupported conclusions that its switch currently served an area comparable to Ameritech tandem switch or was capable of serving such an area in the future.* The ICC's determination that "MCI has not provided sufficient evidence to support a conclusion that it is entitled to the tandem interconnection rate" was not arbitrary and capricious.

Id. at *22-23 (emphasis added).

The district court's reasoning applies equally here. DeltaCom has offered nothing but "bare, unsupported conclusions" that its Greensboro switch currently serves an area comparable to BellSouth's tandem switch. DeltaCom did not provide the location of its customers in North Carolina, which would be essential for the Commission the geographic area DeltaCom's Greensboro switch actually serves and whether that area is comparable to the area served by

⁴ Although the ICC did not make express findings regarding the comparable functions of MCI's switch and Ameritech's tandem switches or the comparative geographical areas served by the various switches, the ICC did discuss the evidence offered by each party on these issues. *Id.* at *20. According to the district court, "[t]he issue of comparable functionality apparently was not in serious dispute" as MCI presented evidence that its switch performed similar functions as Ameritech's tandem switches – evidence that Ameritech did not dispute. *Id.* Indeed, Ameritech did not even raise the comparable functionality issue on appeal, which led the district court to conclude that "only at issue is the geographical areas served by the respective switches." *Id.*

BellSouth's tandem switch. Absent such evidence, DeltaCom has clearly failed to satisfy its burden of proof on this issue, even if that burden were couched as narrowly as DeltaCom proposes.

CONCLUSION

For the foregoing reasons, the Commission should adopt the Public Staff's Proposed Order on the tandem switching issue.

Respectfully submitted this 5th day of January, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.

Edward L Rankin III (SR)
Edward L. Rankin, III
P.O. Box 30188
Charlotte, NC 28202
(704) 417-8833

Thomas B. Alexander
Bennett L. Ross
Suite 4300
675 W. Peachtree Street, NE
Atlanta, GA 30375
(404) 335-0750
(404) 335-0793

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on parties of record by fax and US Mail, first class postage prepaid, this 5th day of January, 2000.

Edward L. Rankin III (K)

191430