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Blanca S. Bayo
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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:

Enclosed are an original and 15 copies of Petitioner ITC^DeltaCom Communications, Inc.'s Response to BellSouth Telecommunications, Inc.'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/
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition by ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom for arbitration of certain unresolved issues in interconnection negotiations between ITC^DeltaCom and BellSouth Telecommunications, Inc.	)))))))	**DOCKET NO. 990750-TP**

RESPONSE OF ITC^DELTACOM TO BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

COMES NOW, ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), and hereby responds to the Motion for Reconsideration filed by BellSouth Telecommunications, Inc. ("BellSouth") in this Docket on March 30, 2000. BellSouth asks for reconsideration with regard to three issues addressed in Order No. PSC-00-0537-FOF-TP, issued by the Commission on March 15, 2000. BellSouth offers no new evidence and presents no arguments that could not have been raised previously. BellSouth's Motion for Reconsideration is nothing more than a cry for a "do-over" on the few issues that were not decided favorably to BellSouth in this case. BellSouth's motion should be denied.

II. DISCUSSION

A. A Motion for Reconsideration is Not a Forum for BellSouth to Re-Argue the Case

The purpose of a motion for reconsideration is not to re-weigh the evidence presented at the hearing. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315, 317 (Fla. 1974). Rather, a motion for reconsideration is limited to "specific matters which do not appear to be reflected in [an agency's] reasoning and decision." *Sentinel Star Express Co. v. Fla. Public Service*

Comm'n, 322 So.2d 503, 505 (Fla. 1975). As the Florida Supreme Court explained in *Diamond Cab Co. of Miami v. King*, 146 So.2d 889, 891 (Fla. 1962):

> The purpose of a petition for rehearing is merely to bring to the attention of . . . . the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance. It is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the judgment or the order. [citation omitted].

Most of the cases cited in BellSouth's Motion do not address the standard for granting a motion for reconsideration. Rather, these cases concern *judicial* review of agency rules, agency orders, and circuit court orders. (*See Agrico Chemical Co. v. Dept. of Environmental Regulation* (Fla. 1st DCA 1978) (judicial review of agency rule); *Ammerman v. Fla. Board of Pharmacy*, 174 So.2d 425 (Fla. 3d DCA 1965) (judicial review of circuit court order); *De Groot v. Sheffield*, 95 so.2d 912 (Fla. 1957) (judicial review of trial court order dismissing action); *Atlantic Coast Line Railroad Co. v. King*, 135 So.2d 201 (Fla. 1961) (judicial review of agency order); *Caranaci v. Miami Glass and Engineering Co.*, 99 so.2d 252 (Fla. 3d. DCA 1957) (judicial review of agency order).

B. The Commission's Holding that the Rate for Reciprocal Compensation Should Be Set at $0.009 Should Not Be Reconsidered.

BellSouth argues that the Commission should reverse itself regarding the rate for reciprocal compensation. BellSouth claims that such rate is "contrary to existing law." *BellSouth Motion for Reconsideration*, pp. 2-6.[1] BellSouth argues that: (1) the Commission cannot justify its decision by looking at the previously approved rate in the parties' current interconnection agreement; (2) Commission Order No. PSC-96-1579-FOF-TP compels a

[1] The pages of BellSouth's Motion are not numbered. All page citations in this response, therefore, are based on counting pages from the first page of the Motion.

different finding; and (3) the Commission's decision would unjustly enrich the Alternative Local Exchange Carrier ("ALEC") industry. These arguments are unavailing.

The Commission's reliance upon the parties' current interconnection agreement for the $0.009 rate for reciprocal compensation is not error. BellSouth relies heavily on the distinction between a *negotiated* interconnection agreement and an *arbitrated* interconnection agreement. This distinction is irrelevant with regard to the Commission's decision in this case. The Commission does not blindly approve any interconnection agreement. Rather, the Commission closely examines all interconnection agreements, whether they be the results of negotiation or arbitration. The Telecommunications Act of 1996 provides that the Commission may reject a negotiated interconnection agreement if it is discriminatory or inconsistent with "the public interest, convenience, and necessity." 47 U.S.C. 252(e)(2)(A). Because the Commission previously approved the current interconnection agreement between the parties as nondiscriminatory and consistent with the public interest, convenience, and necessity, the Commission may rely upon its findings and thus the provisions of that agreement, including the $0.009 rate for reciprocal compensation. Indeed, ITC^DeltaCom witness Rozycki discussed and supported the rate for the previous agreement in his testimony before the Commission in this Docket. (Hearing Transcript of October 27, 1999, pp. 118-19).

BellSouth argues that the Commission should have utilized elemental UNE billing rates (calling them the "cost-based rates for reciprocal compensation") approved by this Commission in Order No. PSC-96-1579-FOF-TP to set the rate for reciprocal compensation. *BellSouth Motion* at 3-4. The Commission did not accept the position of either BellSouth or ITC^DeltaCom with regard to the rate for intercarrier compensation, but rather found that "there is insufficient record evidence to conclude that a rate other than the current rate is appropriate."

Order at 37. BellSouth did not submit a cost study covering intercarrier compensation in this case. The Commission was not required to adopt a new rate without sufficient evidence.[2] The Commission appropriately applied its independent judgment and exercised its discretion to rely on its previous determination, approving a rate for intercarrier compensation between ITC^DeltaCom and BellSouth.[3]

It is noteworthy that subsequent to the Commission's decision, the U.S. Court of Appeals for the D.C. Circuit vacated the FCC's decision regarding inter-carrier compensation for ISP-bound traffic. Bell Atl. Tel. Cos. v. Federal Communications Comm'n, 2000 WL 273383 (D.C. Cir., March 24, 2000). This vacated FCC decision formed a basis for BellSouth's arguments in this case. The D.C. Circuit criticized the FCC's end-to-end analysis, which the FCC traditionally used for its jurisdictional purposes to decide whether ISP-bound traffic is "local" for purposes of Section 251(b)(5) of the Act. It also found that calls to ISPs appear to fit the definition of "termination" in that the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the "called party." The D.C. Circuit's recent decision is

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[2] BellSouth unfairly attempts to introduce new evidence by attaching the affidavit of Ronald Moreira to its Motion. The affidavit and its contents should be stricken because ITC^DeltaCom has not had an opportunity to cross-examine Mr. Moreira and because a party may not unilaterally submit additional evidence after the close of the hearing whenever it desires. Furthermore, this information is not specific to the issues in this case, i.e., it relates not to ITC DeltaCom, but to the ALEC industry as a whole. This affidavit should more appropriately be introduced, if at all, in a generic docket.

[3] BellSouth also makes the specious argument that the ALEC industry will be unjustly enriched by the $0.009 rate. This makes no sense, since the rate is reciprocal, meaning that ALECs will have to pay BellSouth at the same rate. Moreover, BellSouth willingly submitted that same rate to the Commission for approval as part of its previous interconnection agreement with ITC^DeltaCom.

supportive of the Commission's decision and the positions espoused by ITC^DeltaCom in this case.

In the alternative, BellSouth argues that the Commission should make clear that the $0.009 rate is "an interim rate subject to true-up once the Commission establishes new rates in Docket No. 990649-TP." *BellSouth Motion* at 5. BellSouth's suggestion should be rejected for two reasons. First, it is not clear what the result of Docket No. 990649-TP will be with regard to rates for intercarrier compensation. Second, the parties need certainty going forward regarding the rate for intercarrier compensation. A true-up in this instance does not provide this certainty. The $0.009 rate is supported by the evidence and should be incorporated into the agreement. The Commission need not reconsider its decision. If the Commission changes the rate for intercarrier compensation at some future time, such decision should only apply prospectively.[4]

C. The Commission Was Correct in Finding that ITC^DeltaCom Has Been Denied a Meaningful Opportunity to Compete.

BellSouth asks the Commission to reconsider its finding that BellSouth has denied ITC^DeltaCom a meaningful opportunity to compete. *BellSouth Motion* at 6. This request is especially curious, since that finding has not aggrieved BellSouth in any way. The Commission should deny this part of BellSouth's motion on that basis alone.

In any event, BellSouth is simply incorrect when it argues that the Commission's finding "lacks the requisite foundation of competent and substantial evidence." *Id.* BellSouth seems to be simply disappointed with the statement made by the Commission after weighing the evidence in the record. ITC^DeltaCom Witness Hyde testified at length, both generally and with regard to

[4] In addition to the need for certainty in intercarrier rates, Florida law prohibits retroactive ratemaking. *Miami v. Fla. Public Service Comm'n*, 208 So.2d 249, 259-260 (Fla. 1968).

specific incidents, about BellSouth's failure to provide UNEs at parity (based on its circular argument that it doesn't provide UNEs to itself) and modem degradation resulting from IDLC conversions. The Commission recounted this evidence and BellSouth's responsive testimony in great detail in its Order. *See Order* at 10-14. The Commission found the evidence provided by ITC^DeltaCom more persuasive on this point, and rejected BellSouth's argument that "there are no retail analogues for any UNEs, and thus BellSouth cannot provision UNEs at parity with its retail service." *Order* at 16. The Commission's conclusion was supported by competent evidence. Reconsideration of the same evidence is unnecessary.

D. The Commission-Established Rate for BellSouth's Cageless Collocation Applicable Fee is not Arbitrary.

BellSouth argues that the $1,279 application fee for cageless collocation established by the Commission was arbitrary. The facts belie this claim. The Commission simply agreed with ITC^DeltaCom Witness Wood's testimony that the labor costs involved in processing an application will be lessened by the FCC's requirement in its *Advanced Services Order* that ILECs make cageless collocation arrangements available "without waiting until a competing carrier requests a particular arrangement, so that competitors will have a variety of collocation options from which to choose." ¶ 40; *See Commission Order* at 75-76. This decision is completely reasonable and supported by the evidence, namely Mr. Wood's expert testimony.

BellSouth also cites *GTE Service Corp. v. FCC*, 2000 U.S. App. LEXIS 4111 (D.C. Cir., March 17, 2000), which vacated portions of ¶ 42 of the FCC's *Advanced Services Order.* BellSouth argues this decision is relevant because it "was relied upon by DeltaCom witness Don Wood in support of DeltaCom's view that cageless physical collocation resembles virtual collocation." *BellSouth Motion* at 10-11. This argument has no merit, however, because the

Commission relied on Mr. Wood's testimony and ¶ 40 of the *Advanced Services Order* in adjusting the application fee for cageless collocation. Paragraph 40 was left undisturbed by the D.C. Circuit's decision.

III. CONCLUSION

BellSouth's *Motion for Reconsideration* contains no new evidence or arguments. The thrust of BellSouth's arguments is that the Commission made evidentiary findings without support, but even a cursory review of the Commission's *Order* demonstrates that this is not the case. BellSouth simply dislikes the conclusions reached by the Commission after a fair weighing of the evidence on these issues which was presented by the parties. That is not a basis to reconsider the Commission's decision. BellSouth's motion should be denied.

Respectfully submitted this 11th day of April, 2000.

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CERTIFICATE OF SERVICE
DOCKET NO. 990750-TP

I hereby certify that a true and correct copy of the foregoing has been furnished to the following this 11 day of April , 2000:

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