ORIGINAL

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 PROPOSED REPLY MEMORANDUM

I. INTRODUCTION

COMES NOW, ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), and hereby responds to BellSouth's proposed *Reply Memorandum*, which was filed by BellSouth Telecommunications, Inc. ("BellSouth") in this Docket on April 24, 2000. As if its March 30, 2000 *Motion for Reconsideration* -- which simply reargued certain issues in the case with no new evidence or arguments -- was not enough, BellSouth apparently feels it necessary to simply reargue these issues a second time in its proposed *Reply Memorandum*. For the reasons as stated in ITC^DeltaCom's *Motion to Strike*, filed contemporaneously herewith, BellSouth's attempt to get yet another bite at the same apple should be rejected by this Commission. In any event, even when considered, BellSouth's *Reply Memorandum* amounts to nothing more than re-argument. Again, BellSouth offers no new evidence and presents no arguments that could not have been raised previously. BellSouth's second request for a "do-over" should be denied.

II. DISCUSSION

A. BellSouth Still Fails to Meet the Standard for a Motion for Reconsideration.

BellSouth cites no new authority or argument to support its contention that its Motion is "completely consistent with the purpose behind seeking reconsideration of agency decisions."

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Instead, it simply cites two of the cases previously cited by ITC^DeltaCom, without any further explanation of why reconsideration is warranted. This demonstrates that BellSouth's purpose is simply to reargue certain aspects of the Commission's order with which it is not satisfied. As stated before, the purpose of a motion for reconsideration is not to re-weigh the evidence presented at the hearing. The only cases that were cited by BellSouth in its *Motion for Reconsideration* were clearly inapplicable because they concerned *judicial* review of agency rules, agency orders, and circuit court orders. *See Response of ITC^DeltaCom to BellSouth Telecommunications, Inc.'s Motion for Reconsideration*, pp. 1-2.

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

First, BellSouth restates its heavy reliance on the distinction between a *negotiated* interconnection agreement and an *arbitrated* interconnection agreement. As stated previously, the Commission does not blindly approve any interconnection agreement, but closely examines them, 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). The Commission previously approved the current interconnection agreement between the parties as nondiscriminatory and consistent with the public interest, convenience, and necessity. BellSouth's assertion on page 3 of its proposed Reply Memorandum that "there are no prior 'findings' upon which the Commission could rely to support a $.009 reciprocal compensation rate" is tantamount to saying the Commission made an error in approving the $0.009 rate in the prior agreement. Any argument to that effect has been waived. The

Commission is entitled to rely upon the provisions of the prior agreement, including the $.009 rate for reciprocal compensation.

In the height of hypocrisy, BellSouth also argues that it is "beyond dispute" that the $.009 rate for reciprocal compensation does not comply with the FCC's Pricing Rules. This is an interesting argument, given that BellSouth failed to make the same contention with regard to the South Carolina Public Service Commission's decision in the concurrent arbitration between the parties in that state approving a $.009 rate for reciprocal compensation -- *a holding not disputed by BellSouth.* Apparently, BellSouth believes the $.009 rate to be lawful and otherwise compliant with the FCC's Pricing Rules in South Carolina, where the Commission did not apply reciprocal compensation to the delivery of Internet Service Provider ("ISP") traffic[1], but somehow illegal and unjustified when adopted by this Commission in conjunction with applying the rate to ISP traffic. BellSouth's argument is transparent and two-faced, and should be rejected by the Commission.

Next, BellSouth again reargues that the Commission should utilize 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

[1] ITC^DeltaCom has appealed the South Carolina Public Service Commission's decision not to apply reciprocal compensation to ISP traffic to the federal District Court of South Carolina (Case No. 3-99-399610).

case. The Commission was not required to adopt a new rate without sufficient evidence. 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.

BellSouth also quibbles with ITC^DeltaCom when it ridicules the fact that ALECs will have to pay the same rate for reciprocal compensation to BellSouth. BellSouth complains about the success of ALECs in attracting ISP customers, and concludes on page 5 of its proposed *Reply Memorandum* by stating that "while the $.009 rate would be 'reciprocal' in the sense that it would be paid both by BellSouth and ALECs, the amount of traffic against which the rate is to be applied is not." Exactly what relevance this statement by BellSouth has with regard to what the *rate* for reciprocal compensation should be is unclear. However, BellSouth's statement amounts to nothing more than an admission that the costs incurred by ALECs to deliver the traffic of BellSouth's customers -- and thus the amount paid by BellSouth in reciprocal compensation -- may be higher. If BellSouth's customers are creating a significant amount of traffic, then ITC^DeltaCom is entitled to reciprocal compensation for delivering that traffic.[2]

Finally, and in yet another re-argument, BellSouth reiterates its request that the Commission should make clear that the $0.009 rate is an interim rate subject to true-up. 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

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[2] BellSouth also criticizes ITC^DeltaCom for citing Bell Atl. Tel. Cos. v. Federal Communications Comm'n, 2000 WL 273383 (D.C. Cir., March 24, 2000), arguing that this Commission is still obligated to adopt a rate which complies with the law. BellSouth's argument is irrelevant, because the Commission has done just that, as clearly and adequately explained in the Commission's Order.

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.[3] BellSouth's only new argument is to claim that ITC^DeltaCom is being hypocritical because it argued during the case for the establishment of loop rates pending final determination of rates in light of the FCC rules. This argument is irrelevant, since the Commission *denied* ITC^DeltaCom's request to establish loop rates subject to true up. It is now BellSouth who seeks to change the Commission's Order, not ITC^DeltaCom. BellSouth has failed to meet its burden on reconsideration.

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

BellSouth also reiterates its request that the Commission reconsider its finding that BellSouth has denied ITC^DeltaCom a meaningful opportunity to compete. BellSouth's mere disappointment with the statement made by the Commission after fairly weighing the evidence in the record is not a basis for reconsideration. BellSouth argues that the Commission was not even asked to decide whether BellSouth had denied ITC^DeltaCom a meaningful opportunity to compete. First, this is not true, since ITC^DeltaCom has argued throughout the case that BellSouth has not provided access to unbundled network elements at parity. Second, the Commission is not prohibited from making findings based on the evidence which support the substantive holdings of its decision.

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[3] 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).

BellSouth restates its belief that the Commission weighed the evidence incorrectly. However, ITC^DeltaCom Witness Hyde testified at length, both generally and with regard to 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.

Contrary to BellSouth's position, nothing in *GTE Service Corp. v. FCC*, 2000 U.S. App. LEXIS 4111 (D.C. Cir., March 17, 2000), requires a different conclusion regarding the application fee for cageless collocation. 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

Motions for Reconsideration should not be made lightly, especially where the moving party simply dislikes the conclusions reached by the Commission. BellSouth has gone one step further by filing a second pleading making the same basic arguments -- again, premised essentially on its dissatisfaction with certain outcomes in the Commission's Order. 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 Commission's conclusions. That is not a basis for a proper motion for reconsideration, and is certainly not the basis for filing a Reply to a Response, outside of the procedure established by this Commission. BellSouth's motion should be denied.

Respectfully submitted this 4th day of May, 2000.

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I hereby certify that a true and correct copy of the foregoing has been furnished to the following this 4th day of May , 2000:

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