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REPORTING

June 5, 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. 991946-TP (ITC^DeltaCom Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response in Opposition to Supplemental Memorandum in Support of ITC^DeltaCom Communications Inc.'s Motion for Summary Final Order, 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,

E. Earl Edenfield, Jr.
E. Earl Edenfield, Jr.
(2)

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

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**CERTIFICATE OF SERVICE
DOCKET NO. 991946-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Facsimile and U.S. Mail 5th day of June, 2000 to the following:

Diana Caldwell
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Commission
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Represents ITC^DeltaCom


E. Earl Edenfield, Jr.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:)	
)	Docket No. 991946-TP
Complaint of ITC^DeltaCom)	
Communications, Inc. Against BellSouth)	
Telecommunications, Inc. for Breach of)	
Interconnection Terms, and Request for)	
Immediate Relief)	Filed: June 5, 2000
_____)	

BELLSOUTH TELECOMMUNICATION INC.'S RESPONSE IN OPPOSITION TO SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITC^DELTACOM COMMUNICATION INC.'S MOTION FOR SUMMARY FINAL ORDER

Although neither authorized by Order of the Florida Public Service Commission ("Commission") nor Commission Rules, ITC^DeltaCom Communications, Inc. ("DeltaCom") filed a Supplemental Memorandum in Support of Motion for Summary Final Order ("Supplemental Memorandum). In the event that the Commission considers the arguments presented in the Supplemental Memorandum, BellSouth Telecommunications, Inc. ("BellSouth") responds as follows:

DISCUSSION

Apparently realizing the inadequacy of the grounds stated in the Motion for Summary Final Order, DeltaCom seeks to provide an additional ground upon which the Commission should grant summary disposition in this proceeding. The additional argument presented by DeltaCom in the Supplemental Memorandum is equally misplaced and should be rejected by the Commission. In short, DeltaCom argues that the Interconnection Agreement is unambiguous as to whether reciprocal compensation is due for ISP traffic and, therefore, the parol evidence rule precludes the Commission from

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considering evidence of the facts surrounding the negotiation and execution of the Interconnection Agreement.

As in the other reciprocal compensation complaint proceedings heard by the Commission, the ultimate outcome will turn, in large part, on the definition given to the term “terminates” as that term is used in the definition of local traffic. It is important to note that the term “terminates” is not defined in the Interconnection Agreement. What DeltaCom fails to mention is the fact that the Interconnection Agreement provides specific guidance on how undefined terms are to be construed:

91. “Undefined Terms.” The Parties acknowledge that terms may appear in this Agreement which are not defined and agree that any such terms shall be construed in accordance with their customary usage in the telecommunications industry as of the effective date of this Agreement.

General Terms and Conditions, Attachment B (Definitions).

At a minimum, given its importance to the resolution of this proceeding, the fact that “terminates” is an undefined term raises a question of fact as to the usage of the term as of the effective date of the Interconnection Agreement. This alone is enough to defeat DeltaCom’s Motion for Summary Final Order. (*See, Fla. Stat. § 671.205(2)* (defining usage of trade and stating that “[t]he existence and scope of such a usage are to be proved as facts”); *see also Affiliated FM Ins. Co. v. Constitution Reins. Corp.*, 416 Mass. 839, 626 N.E.2d 878, 882 (Mass. 1994); *Restatement (Second) of Contracts*, § 222(2) (1991).)

Further, the applicability of the parol evidence in any particular proceeding is governed by the established rules of contract interpretation. As noted by the Florida Fourth District Court of Appeals in *Fecteau v. Southeast Bank, N.A.*, 585 So.2d 1005 (Fla. 4th DCA 1991):

In the absence of ambiguity, the language itself is the best evidence of the parties' intent and its plain meaning controls. (Citation omitted)

On the other hand, "when a contract is ambiguous and the parties suggest different interpretations, the issue of the proper interpretation is an issue of fact requiring the submission of evidence extrinsic to the contract bearing upon the intent of the parties." (Citation omitted) When there are two reasonable interpretations, summary judgment is inappropriate because there is a genuine issue of material fact. (Citations omitted)

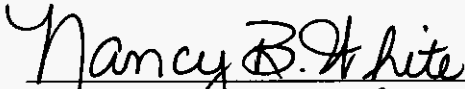
The Interconnection Agreement language cited by DeltaCom is void of any express assertion of whether reciprocal compensation is due for ISP traffic. As mentioned above, one of the primary issues in this proceeding is whether to apply BellSouth's or DeltaCom's definition of the term "terminates." Clearly, the Interconnection Agreement is in a posture where there is language to which the parties are subscribing different interpretations, although each contends that the language is unambiguous as to that party's position. As noted by the Courts in these situations, "it is well-established legal principle that if a written contract is ambiguous so that the intent of the parties cannot be understood from an inspection of the instrument, extrinsic or parol evidence of the subject matter of the contract, of the relation of the parties, and of the circumstances surrounding them when they entered into the contract may be received in order to properly interpret the instrument." *Lemon v. Aspen Emerald Lakes Assocs, Ltd.*, 446 So.2d 177 (Fla. 5th DCA 1984).

Based on the foregoing, the Commission should deny DeltaCom's Motion for Summary Final Order. In addition the Commission should, based on Florida law, consider the facts and circumstances surrounding the parties' intent at the time the Interconnection Agreement was negotiated and executed, including those set forth in the


affidavit of Jerry Hendrix attached to BellSouth's Response to DeltaCom's Motion for Summary Final Order.

Respectfully submitted this 5th day of June 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.



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