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 ORDER NO. PSC-00-2233-FOF-TP ISSUED: November 22, 2000

The following Commissioner participated in the disposition of this matter:

E. LEON JACOBS, JR.

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION AND DENYING MOTION FOR LEAVE TO FILE REPLY MEMORANDUM AND MOTION TO STRIKE

BY THE COMMISSION:

I. Background

On June 11, 1999, ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom (DeltaCom) filed a Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 (Act)[1] seeking arbitration of certain unresolved issues in the interconnection negotiations between DeltaCom and BellSouth Telecommunications, Inc. (BellSouth). On July 6, 1999, BellSouth filed its response.

An administrative hearing was held on October 27-29, 1999, on the issues. Subsequent to the hearing, the parties filed a Joint Motion of the Parties Notifying the Commission of Recently Resolved Issues, by which additional issues were removed from this arbitration proceeding. On March 15, 2000, the final order on

[1] 47 U.S.C. 252(b)

arbitration, Order No. PSC-00-0537-FOF-TP, (Final Order) was issued.

On March 30, 2000, BellSouth filed a Motion for Reconsideration of the Final Order. On April 11, 2000, DeltaCom filed its Response to BellSouth's Motion for Reconsideration. On April 24, 2000, BellSouth filed a Motion for Leave to File a Reply Memorandum. DeltaCom filed a Motion to Strike BellSouth's Motion for Leave to File Reply Memorandum and its Response to BellSouth's Reply Memorandum on May 8, 2000. Finally, on May 16, 2000, BellSouth filed a Response to DeltaCom's Motion to Strike Motion for Leave to File Reply Memorandum. Staff's recommendation addressing the issues raised in the motions was deferred to allow the parties time to negotiate a settlement. On October 24, 2000, BellSouth filed a Notice of Partial Withdrawal of Motion for Reconsideration.

This docket was originally assigned to a two member panel. In light of the resignation on one of the panel members, the remaining panel member rendered the decision on reconsideration consistent with Section 350.01(5), Florida Statutes. The parties were contacted and raised no objections.

II. Jurisdiction

Part II of the Federal Telecommunications Act of 1996 (Act) sets forth provisions regarding the development of competitive markets in the telecommunications industry. Section 251 of the Act regards interconnection with the incumbent local exchange carrier and Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements.

Section 252(b) addresses agreements arrived through compulsory arbitration. Specifically, Section 252(b)(1) states:

> (1) Arbitration. - During the period from the 135th to 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Section 252(b)(4)(C) states that the State commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. This section requires this Commission to conclude the resolution of any unresolved issues not later than nine months after the date on which the local exchange carrier received the request under this section.

In addition, Section (e)(5) states:

> Commission to act if state will not act.--If a State commission fails to act to carry out is responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

III. Leave to File Reply Memorandum

In Support of its Motion for Leave to File Reply Memorandum, BellSouth states that the three issues upon which it sought reconsideration are of critical importance and could have an impact well beyond the interconnection agreement between DeltaCom and BellSouth. BellSouth argues that before resolving such critical issues that could impact the entire local market in Florida, the Commission should have the benefit of all relevant information that bears on such issues, including the information set forth in its proposed Reply Memorandum.

Although DeltaCom filed a Response to BellSouth's Proposed Reply Memorandum, DeltaCom also filed a Motion to Strike BellSouth's Motion for Leave to File Reply Memorandum. DeltaCom argues that BellSouth's Motion for Leave to File a Reply Memorandum is an abuse of the process and attempts to reargue issues already litigated in the case. DeltaCom asserts that our rules on procedure do not provide for additional opportunities to argue

positions beyond the filing for reconsideration. Therefore, DeltaCom requests that BellSouth's Motion for Leave to file Reply Memorandum and the Reply Memorandum be stricken.

The Uniform Rules and Commission rules do not provide for a Reply to a Response to a Motion for Reconsideration. Upon consideration, I find it reasonable to deny BellSouth's Motion for Leave to File a Reply Memorandum. Moreover, I further find DeltaCom's Motion to Strike is rendered moot.

IV. Motion for Reconsideration

In its Motion for Reconsideration, BellSouth raises three issues. First, BellSouth argues that the Commission should reconsider its finding that the parties should pay reciprocal compensation at a rate of $.009 per minute of use. Second, BellSouth argues that the Commission should reconsider the finding that BellSouth failed to provision unbundled network elements in such a manner so as to provide DeltaCom "with a meaningful opportunity to compete with BellSouth." Finally, BellSouth argues that the Commission should reconsider the finding that the application fee for cageless physical collocation should be $1,279.

A. Reciprocal Compensation

In its Notice of Partial Withdrawal of Motion for Reconsideration, BellSouth states that the issue of reciprocal compensation has been resolved between the two parties and it withdraws its Motion for Reconsideration on that issue.

Based upon the forgoing, I acknowledge BellSouth's withdrawal of the portion of its Motion for Reconsideration relating to the reciprocal compensation rate issue.

B. Meaningful Opportunity to Compete

1. Arguments

BellSouth

In its Motion, BellSouth argues that the Commission should reconsider the finding that DeltaCom has been denied a meaningful

opportunity to compete against BellSouth as the Commission overlooked the evidence in the record and the decision is inconsistent with our other findings. BellSouth argues that the Commission should reconsider this finding because it lacks the requisite foundation of competent and substantial evidence. BellSouth argues that there is no record evidence upon which the Commission could find that DeltaCom has been denied a meaningful opportunity to compete against BellSouth. BellSouth asserts that the only evidence presented by DeltaCom was limited and, therefore, the Commission could not possibly draw any such conclusion. Finally, BellSouth asserts that this finding is impossible to reconcile with other findings in the Final Order.

DeltaCom

In its response, DeltaCom argues that because BellSouth has not been aggrieved by the finding, this part of its motion should be denied on that basis alone. However, DeltaCom further argues that BellSouth is incorrect when it argues that the Commission's finding lacks the requisite foundation of competent and substantial evidence. DeltaCom notes general and specific testimony of its witness Hyde with regard to specific incidents of BellSouth's failure to provide UNEs at parity and modem degradation resulting from IDLC conversions. DeltaCom argues that the Commission's conclusion was supported by competent evidence and reconsideration of the same evidence is unnecessary.

2. Decision

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. Rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the

record and susceptible to review." Steward Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Upon consideration, I find that our decision need not be reconsidered on this issue because BellSouth has not shown any mistake of fact or law. However, a scrivener's error should be corrected. At the January 11, 2000, Special Agenda Conference, the Commission asked staff not to include in the Commission's Order a confusing sentence regarding BellSouth not providing DeltaCom a meaningful opportunity to compete that was contained in staff's recommendation. Due to a scrivener's error, the sentence was not removed. Accordingly, Order No. PSC-00-0537-FOF-TP shall be corrected to delete the incorrect language.

The first sentence of the first full paragraph at page 16 currently states:

> We agree that the ALECs will be "denied a meaningful opportunity to compete" with BellSouth if the quality of access to a UNE and the UNE itself are lower than BellSouth provides to itself.

This sentence is hereby deleted. The first sentence in the third paragraph of page 16 currently reads:

> Upon consideration, based on the testimony in the record and provisions of the Act and FCC Order 96-325, the quality of the access to the UNEs or the UNEs that BellSouth has provisioned in this proceeding do not provide ITC^DeltaCom with a meaningful opportunity to compete with BellSouth.

This sentence is also deleted. The first sentence of the third full paragraph on page 16 shall now read:

> Upon consideration, we find that for competition to flourish in the local market, customers must come to rely on the ALECs' service just as they have come to depend on

the timeliness and quality of the ILECs' services.

C. Charges for Cageless and Shared Collocation - Application Fee/Planning Fee

1. Arguments

BellSouth

BellSouth argues that the finding that the cageless physical collocation application fee should be $1,279 is arbitrary, not supported by substantial evidence, and is contrary to existing law. BellSouth argues that while DeltaCom proposed that the cageless physical collocation application fee should be set at the application fee established by the Commission for virtual collocation, it proposed that the Commission-approved application fee for physical collocation should apply to cageless collocation as well. BellSouth stated that the Commission did not accept either of these proposals, but instead made a series of adjustments to the approved physical collocation application fee to arrive at a rate of $1,279.

BellSouth asserts that while the Commission noted that the calculation was derived based upon testimony and evidence presented in this case, the Final Order never identifies the testimony and evidence relied upon. BellSouth argues that it is not aware of any testimony or evidence in the record that would justify the adjustments to the work times assumed by us in the calculation, since neither party advocated any such adjustments.

BellSouth suggests that the Commission's apparent reliance on the FCC's Advanced Services Order, that requires ILECs to make space availability information accessible to LECs who may want to collocate, even if correct, does not reduce the work time involved in processing an application for physical collocation, whether cageless or caged. BellSouth adds that two days after the Final Order was issued, the United States Court of Appeals for the District of Columbia Circuit reversed and vacated certain portions

of the FCC's Advanced Services Order[2]. BellSouth states that certain portions of paragraph 42 were vacated. In particular, BellSouth asserts it is the portions of Paragraph 42 that requires incumbent local exchange carriers to "give competitors the option of collocating equipment in any unused space within the incumbent's premises, to the extent technically feasible, and not require competitors to collocate in a room or isolated space separate from the incumbent's own equipment" that were vacated. BellSouth argues that this language was relied upon by DeltaCom witness Don Wood in support of DeltaCom's view that cageless physical collocation resembles virtual collocation. BellSouth concludes that the Court of Appeals' decision eliminates the rationale ostensibly relied upon by us for treating the price and rate structure for cageless physical collocation different from the prices and rate structure for caged physical collocation.

DeltaCom

In its Response, DeltaCom argues that the facts belie the claim that the $1,279 application fee for cageless collocation established by the Commission was arbitrary. DeltaCom argues that the Commission agreed with its 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. DeltaCom asserts that BellSouth's argument based on the FCC's Advanced Services Order was vacated is without merit. DeltaCom asserts that because the Commission relied on witness Wood's testimony and paragraph 40 of the Advanced Services Order, which was left undisturbed by the D.C. Circuit's decision, that the Commission's decision was reasonable and supported by witness Wood's expert testimony.

2. Decision

Upon further review of the record, I acknowledge that the record does not support a specific derivation of the application fee. While I agree in theory with DeltaCom's witness Wood that the application fee for cageless collocation should be less, there is

[2] See GTE Service Corp. v. FCC, 2000 US App. LEXIS 4111 (D.C. Cir. March 17, 2000).

no record evidence to support the fee established. Therefore, BellSouth's Motion for Reconsideration of the Commission's finding that the cageless physical collocation application fee should be $1,279 is granted. Moreover, I find that the application fee shall be set at $3,248.00, which the Commisison also approved in Order No. PSC-98-0604-FOF-TP[3], at page 166. This rate is reasonable for this proceeding and supported by the record because the Commission took Official Recognition of Order No. PSC-98-0604-FOF-TP.

Based upon the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion to File Reply Memorandum is denied. Therefore, ITC^DeltaCom Communications, Inc.'s Motion to Strike is moot. It is further

ORDERED that BellSouth Telecommunications Inc.'s Motion for Reconsideration is granted with respect to the application fee as set forth in the body of this Order. The application fee shall be set at $3,248.00. It is further

ORDERED that BellSouth Telecommunications Inc.'s Motion for Reconsideration is denied with respect to the statement regarding the provisioning of unbundled network elements. However, the scriveners error in Order No. PSC-00-0537-FOF-TP shall be corrected as set forth in the body of this Order. It is further

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[3] Dockets No. 960833-TP - Petition by AT&T Communications of the Southern States, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act 1996; 960757-TP - Petition by Metropolitan Fiber Systems of Florida, Inc. for arbitration with BellSouth Telecommunications Inc. concerning interconnection rates, terms, and conditions, pursuant to the Federal Telecommunications Act of 1996; and 960846-TP - Petition by MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996.

ORDERED that BellSouth Telecommunications Inc.'s withdrawal of the portion of its Motion for Reconsideration relating to the reciprocal compensation rate issue is acknowledged. It is further

ORDERED that the parties shall submit a signed agreement that complies with our decisions in this docket for approval within twenty days of the issuance of this Order. It is further

ORDERED that this docket shall remain open pending Commission approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

By ORDER of the Florida Public Service Commission this 22nd day of November, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).