

February 24, 2005

*Via Overnight Mail*

Ms. Blanca S. Bayó  
Director, Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

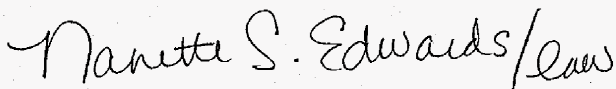
Re: **Docket No. 041269-TP**  
*Petition to Establish Generic Docket to Consider Amendments to  
Interconnection Agreements Resulting From Changes of Law*

Dear Ms. Bayó:

Please find enclosed a copy of ITC^DeltaCom Communications, Inc.'s letter to BellSouth in response to BellSouth's Carrier Notice Letter SN91085039 dated February 11, 2005, of which fifteen (15) additional copies are included for filing in the above referenced docket.

Should you have any questions regarding this filing, please contact me at 256-382-3856.

Sincerely,



Nanette S. Edwards  
Director, Regulatory

Enclosures

February 21, 2005

VIA OVERNIGHT MAIL AND  
FACSIMILE: (404) 529-7839

Mr. Doug Lackey, Esq.  
Counsel -BellSouth  
BellSouth Center - Suite 4300  
675 West Peachtree Street, NE  
Atlanta, Georgia 30375

Mr. Jerry Hendrix  
Assistant V.P. Interconnection Services  
675 W. Peachtree Street  
Atlanta, Georgia 30375

RE: Carrier Notice Letter SN91085039

Dear Sirs:

BellSouth Telecommunications, Inc.'s ("BellSouth's") carrier notice letter dated February 11, 2005, outlines actions that BellSouth plans to take that are directly inapposite to the FCC's Order released on February 4, 2005 in Docket No. WC 04-313 and CC 01-338 ("TRRO"). The TRRO, scheduled to become effective March 11, 2005, contrary to the assertions in your carrier notice, does not allow BellSouth to refuse UNE-P orders associated with the embedded base of UNE-P customers or orders for new UNE-P customers on it's effective date. Indeed for all three elements (switching, high capacity loops and transport) the FCC establishes a transition period and requires the parties to use the change of law processes outlined in our existing interconnection agreements. As you are aware, the change of law provisions in our existing contracts provide for good faith negotiations between the parties to implement a material change of law.<sup>1</sup>

This letter constitutes notice to BellSouth on behalf of ITC^DeltaCom Communications, Inc. ("DeltaCom") and Business Telecom, Inc., ("BTI") that if BellSouth undertakes the actions outlined in the carrier notice letter then (1) BellSouth is in breach of our existing

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<sup>1</sup> See Exhibit A containing the applicable pages from our interconnection agreement. This language is in all of our BellSouth/DeltaCom and BellSouth/BTI interconnection agreements.

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interconnection agreements and (2) BellSouth will be in violation of the FCC Order and will be causing irreparable harm to DeltaCom and BTI by failing to process orders for our existing base of UNE-P customers. By immediate response to this letter, we request assurances from BellSouth of its intent to comply with the terms of our existing interconnection agreements. DeltaCom is prepared to participate immediately in good-faith negotiations regarding the changes in law reflected in the TRRO. Indeed, we have requested, both in writing and verbally, negotiation dates from BellSouth beginning in December of 2004.<sup>2</sup> We have not received a response.

The TRRO provides for a twelve-month transition period, effective March 11, 2005, for the conversion of UNE-P to alternative facilities, applicable to the *embedded* customer base. TRRO, at ¶¶ 227-28. With regard to transition of the embedded customer base, the TRRO provides for the parties to negotiate during the twelve-month period pursuant to the change of law provisions in their interconnection agreements, and for a true-up, retroactive to March 11, 2005, of the difference between the rates in the parties' interconnection agreement and the transition rates as decreed by the TRRO. See *id.*, at ¶ 227, n. 630.

The FCC further states that the transition period is not applicable to *new* UNE-P lines added after March 10, 2005, but the FCC adds a qualifying phrase:

This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order.

*Id.*, at ¶ 227. There would have been no reason for the FCC's reference to other sections of the TRRO if the FCC had intended that CLECs were categorically prohibited from adding new UNE-P lines pursuant to section 251 as of the effective date of the TRRO.

As "specified," the TRRO requires parties to interconnection agreements to follow the change of law procedures in those documents. The FCC states that:

carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements.

*Id.* The FCC also states:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus,

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<sup>2</sup> See Exhibit B.

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carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, *the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order.* We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

*Id.* at ¶ 233.

Consequently, the FCC purports neither to abrogate existing contracts or the change of law provisions in interconnection agreements, nor to preempt state commission jurisdiction with regard to enforcement or amendment of those agreements, and the *TRRO* by its own terms recognizes that, as of March 11, 2005, subject to the terms of their interconnection agreements, CLECs will be able to add new UNE-P customers, provided that the parties to those agreements embark in negotiations in good faith and without any unreasonable delay. To hold otherwise would fail to effect the FCC's intent, as evinced by a reading of the "four corners" of the *TRRO*.

Although BellSouth cites the phrase italicized above from paragraph 227 of the *TRRO*, BellSouth in essence maintains that the phrase's reference is merely to the continued providing of switching *pursuant to commercial agreements*. (See the top of page 2 of the carrier notification.) The FCC's reference, however, is to continued unbundling of network elements pursuant to 47 U.S.C. 251(c), which BellSouth maintains does not apply to local circuit switching after March 10, 2005 and does not apply to commercial agreements. Hence BellSouth's argument on this point is contradictory.

With regard to high capacity loops and transport, the harm to DeltaCom/BTI from BellSouth's threatened disregard of the interconnection agreements would be particularly severe. The FCC noted that BellSouth is required to accept a self-certification for loops and transport until it becomes clear what high capacity loops and transport routes are no longer required to be unbundled. BellSouth's filing of February 18, 2005 states that BellSouth will not comply with the self-certification procedure. Given that BellSouth has already been found to have engaged in anticompetitive activity with regard to its special access pricing and there is still no replacement for the TSP program<sup>3</sup> (which DeltaCom

<sup>3</sup> See *In the Matter of AT&T v. BellSouth Telecommunications, Inc.*, Memorandum Opinion and Order, File No. EB-04-MD-010 (rel. December 9, 2004). We are also concerned that BellSouth is attempting to avoid its commingling obligations outlined in the TRO by requiring that any discounts associated with special access services will evaporate if the service is commingled with any UNEs. The whole point of commingling is to allow DeltaCom to operate under one network just like BellSouth and avoid the expense of operating two networks (one local and one non-local).

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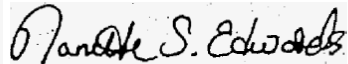
and BTI purchased), we are extremely concerned with BellSouth's abject disregard of the FCC's admonition that good faith negotiation must take place in order to effectuate this change of law and BellSouth's stated intention to disregard the FCC's Order on this point.

Finally, on a conference call with you, Mr. Lackey, on February 14, 2005, you acknowledged that BellSouth won't even be ready to provide a proposed amendment for DeltaCom/BTI to review until March 14, 2005 and you stated that you were not in a position to commit to that date. Clearly, the Parties will not have had an opportunity to negotiate this change of law, which becomes effective on March 11, 2005.

In conclusion, if BellSouth does not retract its position outlined in the carrier notice letter by no later than February 25, 2005, and provide DeltaCom/BTI with reasonable assurance of BellSouth's intent to comply with the terms of the interconnection agreements, DeltaCom/BTI will be forced to pursue those legal remedies that will afford protection to its business and its customers (retail and wholesale) and to prevent irreparable harm to our business.

I look forward to your timely response.

Very truly yours,



Nanette S. Edwards

Director - Regulatory, Sr. Regulatory Attorney

cc: State Commissions  
FCC Wireline Bureau

**EXHIBIT A**

receipt of ITC^DeltaCom's initial request or as mutually agreed upon by the Parties.

No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

Except as otherwise set forth in Attachment 3, Section 2 concerning the Jurisdictional Factor Guide, the Parties acknowledge that certain provisions of this Agreement incorporate by reference various BellSouth document and industry publications (collectively referred to herein as the "Provisions"), and that such Provisions may change from time to time. The Parties agree that: 1) If the change or alteration was made as a result of the Change Control Process (CCP), a revision to ANSI or Telcordia guidelines or OBF guidelines or if ITC^DeltaCom agrees in writing to such change or alteration, any such change or alteration shall become effective with respect to ITC^Deltacom pursuant to the terms of the notice to ITC^DeltaCom via the applicable Internet website posting; 2) Any other changes that (a) alters, amends or conflicts with any term of this Agreement, (b) changes any charge or rate, or the application of any charge or rate, specified in this Agreement, will be implemented through amendment of this Agreement; and 3) all other changes that would require ITC^DeltaCom to incur more than minimal expense will not become effective as to ITC^DeltaCom provided ITC^DeltaCom has submitted to BellSouth notice within thirty (30) days of receipt/posting of BellSouth's notice of such change. For purposes of item (3) above, costs associated with disseminating notice of the change or providing training regarding the change to employees shall not be deemed "more than minimal." In the event the Parties disagree as to whether any alteration or amendment described in this Section is effective as to ITC^DeltaCom pursuant to the requirements of this Section, either Party may file a complaint with the Commission pursuant to the dispute resolution provisions of this Agreement, and until a Commission issues its order regarding the dispute, the change shall not take effect.

Execution of this Agreement by either Party does not confirm or infer that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).

✓ 15.4

In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of ITC^DeltaCom or BellSouth to perform any material terms of this Agreement, ITC^DeltaCom or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such

mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in Section 11.

If any provision of this Agreement, or the application of such provision to either Party or circumstance, shall be held invalid, the remainder of the Agreement, or the application of any such provision to the Parties or circumstances other than those to which it is held invalid, shall not be effective thereby, provided that the Parties shall attempt to reformulate such invalid provision to give effect to such portions thereof as may be valid without defeating the intent of such provision.

If ITC^DeltaCom changes its name or makes changes to its structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of ITC^DeltaCom to notify BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.

16. Indivisibility

The Parties intend that this Agreement be indivisible and nonseverable, and each of the Parties acknowledges that it has assented to all of the covenants and promises in this Agreement as a single whole and that all of such covenants and promises, taken as a whole, constitute the essence of the contract. Without limiting the generality of the foregoing, each of the Parties acknowledges that any provision by BellSouth of space for collocation was related to the provision of interconnection and unbundled network elements under this Agreement as set forth in Attachment 4 and is governed by the other applicable attachments to this Agreement. The Parties further acknowledge that this Agreement is intended to constitute a single transaction, and that the obligations of the Parties under this Agreement are interdependent.

17. Waivers

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.

Governing Law

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Georgia, without regard to its conflict of laws principles.



(and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); provided however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease.

#### **Adoption of Agreements**

BellSouth shall make available to BTI on a state-by-state basis, pursuant to 47 USC § 252 and the FCC rules and regulations regarding such availability, any interconnection, service or network element provided under any other agreement filed and approved under 47 USC § 252, provided a minimum of six months remains on the term of such agreement. The Parties shall adopt all rates, terms and conditions concerning such other interconnection, service or network element and any other rates, terms and conditions that are legitimately related to the interconnection, service or network element being adopted. In such adoption, BTI may adopt a portion of a multi-state agreement relating to all or less than all of the states covered by such agreement. However, BTI may not adopt a portion of an agreement that applies to one state to be applicable in another state. The term of the adopted agreement or provisions shall expire on the same date as set forth in the agreement that was adopted.

#### **14. Modification of Agreement**

**14.1** If either Party changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of such Party to notify the other Party of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.

**14.2** No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

In the event that any effective legislative, regulatory, judicial or other legal action creates a need for rates, terms or conditions to be added to this Agreement, or materially affects any material rates, terms, or conditions of this Agreement, or the ability of BTI or BellSouth to perform any material terms of this Agreement, BTI or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in this Agreement.

#### **15. Non-waiver of Legal Rights**

**EXHIBIT B**

Edwards, Nanette (ITCD)

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**From:** Edwards, Nanette (ITCD)  
**Sent:** Monday, December 20, 2004 2:56 PM  
**To:** 'Hamman, John'; Karno, Michael D  
**Cc:** Houck, Jean; JerryWatts@itcdeltacom.com  
**Subject:** re: Permanent UNE Rules/TRO

John/Michael:

The FCC announced its permanent rules for unes on or about 12/15/04. The written order has not yet been released to my knowledge; however, pursuant to the change of law provisions of our existing interconnection agreements, I request that we go ahead and set up dates/times to negotiate an amendment.

Please let me know a date/time that is convenient for you between Jan. 11-17th. anticipate that the written order will be out by then.

Regards,

Nanette

2/21/2005

**Edwards, Nanette (ITCD)**

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**From:** Edwards, Nanette (ITCD)  
**Sent:** Thursday, January 06, 2005 8:28 AM  
**To:** Kamo, Michael D; 'Hamman, John'  
**Cc:** Houck, Jean; Watts, Jerry (ITCD)  
**Subject:** Re: arb window for SC

Michael/John:

I need to know bell's position regarding SC as soon as possible. I sent an email regarding setting dates for negotiations on the permanent rules, but I have not rec'd a response. Granted, we don't have the FCC's written order and I don't know when it will be released.

What do you want to do ?

Regards,

Nanette

2/21/2005

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