

ORIGINAL

Matilda Sanders

From: Slaughter, Brenda [Brenda.Slaughter@BellSouth.COM]
Sent: Wednesday, July 20, 2005 2:52 PM
To: Filings@psc.state.fl.us
Cc: Linda Hobbs; Fatool, Vicki; Holland, Robyn P; Nancy Sims; Bixler, Micheale; Shore, Andrew
Subject: Docket 050450-TP
Importance: High
Attachments: 050450-TP Motion to Dismiss.pdf; 050450-TP BST Response to ITC DeltaCom Petition.DOC

- A. Brenda Slaughter
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- B. Docket No.: 050450-TP – Petition of ITC^DeltaCom Communications, Inc. for Mediation of Certain Issues
- C. BellSouth Telecommunications, Inc.
 on behalf of Andrew D. Shore
- D. 10 pages total (including letter, certificate of service, and pleading) -- PDF
 8 pages total (in lieu of disk) -- WORD
- E. BellSouth Telecommunications, Inc.'s Response to the Joint Petition for Generic Proceeding

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CTR _____
 ECR <<050450-TP Motion to Dismiss.pdf>> <<050450-TP BST Response to ITC DeltaCom Petition.DOC>>

GCL _____
 OPC *****

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July 20, 2005

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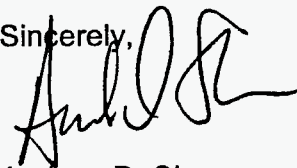
Re: Docket No. 050450-TP
Petition of ITC^DeltaCom Communications, Inc. for Mediation of
Certain Issues

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Motion to Dismiss, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,



Andrew D. Shore

Enclosure

cc: All Parties of Record
Jerry D. Hendrix
R. Douglas Lackey
Nancy B. White

DOCUMENT NUMBER-DATE

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FPC-COMMISSION CLERK

**CERTIFICATE OF SERVICE
DOCKET NO. 050450-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

(*) Federal Express, Electronic Mail and First Class U.S. Mail this 20th day of July, 2005

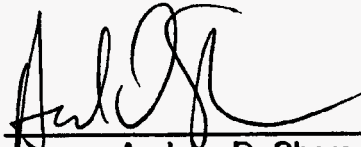
to the following:

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Andrew D. Shore

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of ITC^DeltaCom) Docket No. 050450-TP
Communications, Inc. for)
Mediation of Certain Issues) Filed: July 20, 2005

BELLSOUTH'S MOTION TO DISMISS

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files this motion to dismiss the Petition of ITC^DeltaCom ("ITC") for Mediation and Dispute Resolution ("Petition").

INTRODUCTION

The appropriate place for ITC to litigate change of law issues is in the Commission's generic change of law proceeding, Docket No. 041269-TP, not in a two-party proceeding. The Commission established the generic proceeding so that it could determine in the most efficient manner what changes are required in existing interconnection agreements ("ICAs") between BellSouth and CLECs, including ITC, as a result of recent FCC Orders. ITC, both as an individual entity and as a member of CompSouth, has participated actively in the change of law proceeding, including in the negotiation and presentation of the joint issues matrix. ITC has, nevertheless, recently filed a separate, individual ICA change of law Petition.

ITC is the only CLEC that has sought to initiate its own change of law proceeding. ITC requests that the Commission appoint a mediator to attempt to assist the parties in resolving change of law issues and to make findings of fact and conclusions of law as to those issues the parties do not resolve. It would be inefficient and inconsistent with the purpose of the generic change of law proceeding to allow ITC

to litigate change of law issues outside of the generic proceeding. Consequently, the Commission should dismiss ITC's Petition.

The Commission also should deny ITC's request that the Commission appoint a mediator to take part in change of law negotiations between BellSouth and ITC. The parties' ICA does not require, nor even mention, mediation. To the extent ITC relies on the 1996 Act as a basis for requesting mediation, the federal legislation does not compel mediation. A private mediation of issues that affect most, if not all, CLECs would hardly be fruitful, and would take up what is already a limited time that the parties and the Commission have to resolve change of law issues. This Commission, to BellSouth's knowledge, has never *required* that a party mediate a dispute, and there is no reason for it to depart from precedent here.

DISCUSSION

The ICA between BellSouth and ITC. The effective ICA that governs the relationship between ITC and BellSouth allows either party to request that the agreement be amended to reflect any changes in law that impact the parties' obligations under their ICA. The ICA also states that a party may petition the Commission to resolve any dispute over incorporating changes in law. ITC quotes the relevant portions of the change of law and dispute resolution provisions of the ICA in paragraphs 11 and 12 of its Petition.

BellSouth and ITC agree that their ICA is not compliant with current law. BellSouth requested that the parties negotiate amendments to their ICA to bring it into compliance with recent changes in the law and, although the parties have had discussions towards that end, they have not successfully negotiated amendments.

The Commission's generic change of law proceeding. In anticipation of the potential for duplicative litigation, and because the change of law issues arising out of the FCC's recent orders affect most, if not all, CLECs in the same manner, BellSouth petitioned the Commission to open what is now Docket No. 041269-TP, the generic change of law proceeding. Specifically, BellSouth requested that the Commission determine what changes the FCC's recent decisions require in existing ICAs between BellSouth and CLECs. By Order issued February 15, 2005, the Commission denied various parties' motions to dismiss BellSouth's Petition to establish generic docket. See Order Denying Motions to Dismiss, No. PSC-05-0171-FOF-TP. **The Commission concluded that "a generic proceeding is appropriate in this matter because it provides an efficient process where all affected persons may participate in one proceeding rather than create duplicative litigation."** *Id.* at 6 (emphasis added). The primary Orders at issue in the generic docket are the FCC's Triennial Review Order and Triennial Review Remand Order.

In a subsequent Order establishing the scope of the generic change of law proceeding, the Commission reiterated that it would be much more efficient for it to hear change of law issues related to CLEC ICAs with BellSouth in one generic proceeding than it would be for the Commission to conduct potentially hundreds of change of law proceedings for each BellSouth ICA in Florida individually. The Commission thus ruled that:

In the interest of administrative efficiency, it is appropriate that all certificated CLECs operating in BellSouth's Florida territory be bound by the ultimate findings in this proceeding. Each CLEC has an equal opportunity to participate in the litigation of this matter, including conducting discovery and sponsoring testimony for the

hearing. Additionally, no CLEC is precluded from continuing to negotiate with BellSouth during the pendency of this proceeding.

See Order Establishing Scope of Proceeding, No. PSC-05-0639-PCO-TP, at 1.

ITC's participation in the generic docket. ITC intervened in the generic change of law docket long before the Commission ordered that all certificated CLECs operating in BellSouth's Florida territory would be bound by the Commission's findings in that proceeding. See ITC Petition to Intervene in Docket No. 041269-TP, filed March 15, 2005. ITC stated that it "had substantial interests which will be subject to determination or will be affected by the resolution of issues in this proceeding." *Id.* at 2. The Commission granted ITC's motion to intervene on April 7, 2005, by Order No. PSC-05-0367-PCO-TP

ITC has participated actively in the generic change of law proceeding. Its representatives took part in numerous conference calls between CLECs and BellSouth to discuss and negotiate the joint issues list filed in the generic change of law proceeding on June 29, 2005. The joint issues matrix states that it was agreed to between BellSouth, the member companies of CompSouth, SECCA, US LEC, XO, and Sprint. ITC is a member company of CompSouth. Indeed, its Vice President for Government and Industry Affairs, Jerry Watts, is the President of CompSouth.

ITC's duplicative individual change of law Petition. Notwithstanding the Commission's clear directive that *all* change of law issues would be addressed in a single generic docket, ITC filed its Petition seeking to establish this separate, individual change of law docket. **Notably, even though most if not all CLECs have a change of law clause in their ICA that is materially the same as the provision in ITC's ICA**

with BellSouth, ITC is the only CLEC that filed a separate, individual change of law proceeding. Many of the issues set forth in ITC's Petition are the *exact* issues that the Commission will resolve in its generic change of law proceeding. For example, ITC's Issue No. 1 asks whether the Commission has the authority to order BellSouth to provide UNEs pursuant to some authority other than section 251 of the 1996 Act and, if it does, what the rates, terms, and conditions should be. That is Issue No. 8 on the joint issues matrix filed in the generic proceeding. Another example is ITC Issue No. 14, addressing Routine Network Modifications, which is the same issue as Issue No. 26 in the generic case.¹ Moreover, pursuant to the agreement between BellSouth and the CLECs, ITC could have raised any additional change of law issue on or before June 29, 2005, for resolution in the generic case

In addition to those ITC change of law issues that clearly on their face parallel an issue set forth on the joint issues matrix in the generic proceeding, most of ITC's remaining issues are subsumed within more broadly phrased issues in the generic case. For example, ITC acknowledges that Issue No. 5 in its Petition arises as result of the FCC's rules regarding commingling. Issue No. 14 in the generic case asks broadly what language should be included in ICAs to implement commingling.² In negotiating

¹ The following is a list of issues set forth in ITC's Petition for an individual change of law proceeding that mirror issues the parties, including ITC, agreed to resolve in the generic change of law docket: ITC Issue 1/Generic Issue 8; ITC Issue 4/Generic Issue 4; ITC Issue 9/Generic Issue 16; ITC Issue 12/Generic Issue 14; ITC Issue 14/Generic Issue 26; ITC Issue 15/Generic Issue 28; ITC Issue 18/Generic Issue 24; ITC Issue 19/Generic Issue 2; ITC Issue 21/Generic Issues 11 and 12; ITC Issue 22/Generic Issues 11 and 12; ITC Issue 30/Generic Issue 20; ITC Issue 31/Generic Issue 20; ITC Issue 32/Generic Issue 10; ITC Issue 33/Generic Issue 26; ITC Issue 35/Generic Issue 19; ITC Issue 36/Generic Issue 9; ITC Issue 38/Generic Issue 10; ITC Issue 40/Generic Issues 15 and 29; ITC Issue 42; Generic Issue 22; ITC Issue 43/Generic Issue 8; ITC Issue 44/Generic Issue 30.

² The following is a list of issues set forth in ITC's Petition for an individual change of law proceeding that are subsumed within issues that the parties, including ITC, agreed to resolve in the generic change of law docket: ITC Issue 2/Generic Issue 10; ITC Issue 3/Generic Issue 15; ITC Issue 7/Generic Issue 3; ITC Issue 8/Generic Issue 15; ITC Issue 10/Generic Issue 10; ITC Issue 11/Generic Issue 4; ITC Issue 16/Generic Issue 28; ITC Issue 17/Generic Issue 28; ITC Issue 24/Generic Issue 26;

the joint issues matrix for the generic docket, the parties (including ITC) deliberately worded issues broadly so that they could litigate any sub-issues included within the broader issue. For those sub-issues, ITC is free to propose language and offer testimony in support of such language in the generic proceeding.

ITC's Petition is inappropriate and should be dismissed. The Commission has previously ordered that it will address *all* change of law issues in one generic proceeding, and not in hundreds of individual proceedings for each CLEC and/or each ICA. There is no legitimate basis for ITC to have its own change of law proceeding. Allowing it to do so would thwart the efforts of all other carriers and this Commission to address change of law issues in an efficient and timely manner. ITC has a forum in which it should have raised any appropriate change of law issue. If ITC wishes to raise change of law issues that are not already teed up for resolution in the generic case, it must follow the procedures the Commission established in that docket for parties to propose issues. See Order Establishing Procedure, No. PSC-05-0736-PCO-TP.

To the extent ITC's Petition seeks to raise issues that do not result from recent changes in the law, those issues are not appropriate for resolution in the generic proceeding or in a separate proceeding brought pursuant to the change of law provision in the parties' ICA.³ ITC cannot simply change terms of its existing agreement that it does not like and that do not arise from changes in law through the guise of lumping them into a change of law Petition.

ITC Issue 25/Generic Issue 26; ITC Issue 37/Generic Issue 2; ITC Issue 39/Generic Issue 2; ITC Issue 41/Generic Issue 10

³ BellSouth is not in this Response setting forth its substantive position with respect to each issue set forth in ITC's Petition. If the Commission does not dismiss ITC's Petition, which is what it should do, BellSouth reserves its right to respond further in pleadings and/or testimony, as may be ordered by the Commission.

A two-party mediation of generic change of law issues would not be appropriate in any event. Even if the Commission did not dismiss ITC's Petition, which it should, it should not order the parties to enter into mediation over change of law issues. The parties' ICA makes no mention of mediation. The 1996 Act likewise does not require the appointment of a mediator. As the Commission noted in its Order establishing the scope of the generic change of law docket, "no CLEC is precluded from continuing to negotiate with BellSouth during the pendency of this proceeding." Order Establishing Scope of Proceeding, at 1. BellSouth continues to negotiate change of law terms with various CLECs, and would be pleased to continue to negotiate with ITC. With the generic proceeding pending, however, even if the appointment of a mediator were otherwise appropriate, the Commission should not appoint one here. It would be a waste of time under the circumstances.

CONCLUSION

For the reasons set forth above, the Commission should dismiss ITC's Petition in its entirety.

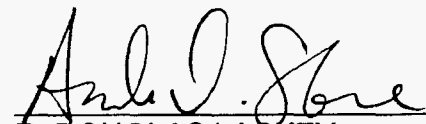
Respectfully submitted this 20th day of July, 2005.

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