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May 25, 2000

**BY HAND DELIVERY THIS DATE**

Blanca S. Bayo  
Director, Division of Records and Recording  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket #991946-TP; *Request for Arbitration by ITC^DeltaCom Communications, Inc. Against BellSouth Telecommunications, Inc. for Breach of Interconnection Terms*

Dear Ms. Bayo:

Enclosed for filing in the referenced case are an original and 15 copies of Petitioner ITC^DeltaCom Communications, Inc.'s Supplemental Memorandum in Support of its Motion for Summary Final Order. Please file stamp the extra enclosed copy and return it to our runner.

Thank you for your assistance.

Sincerely,

HUEY, GUILDAY & TUCKER, P.A.

J. Andrew Bertron, Jr.

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Enclosures  
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BEFORE THE STATE OF FLORIDA  
PUBLIC SERVICE COMMISSION

Complaint of ITC^DeltaCom Communications, Inc. )  
Against BellSouth Telecommunications, Inc., for )  
Breach of Interconnection Terms, and Request )  
For Immediate Relief )

Docket No. 991946-TP

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITC^DELTACOM  
COMMUNICATIONS, INC.'S MOTION FOR SUMMARY FINAL ORDER**

Petitioner, ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), by its undersigned counsel, provides this supplemental memorandum in support of its Motion for Summary Final Order ("the Motion"), and says:

**I. BELLSOUTH MISCHARACTERIZES ITC^DELTACOM'S ARGUMENTS**

In its response to the Motion, BellSouth Telecommunications, Inc. ("BellSouth") attempts to boil down ITC^DeltaCom's arguments to three points. However, BellSouth leaves out one critical argument - this case is a matter of contract interpretation for which extrinsic evidence is not admissible unless the contract language is ambiguous.

Assuming, without admitting, that the facts alleged by BellSouth are in dispute, such facts are not material unless the interconnection agreement between the parties is unclear. The main issue in this case, as stated in the Commission's Order Establishing Procedure, is whether the parties are required to compensate each other for delivery of traffic to Internet Service Providers (ISPs) under the interconnection agreement between the parties. The Commission's responsibility in this case is simple: to interpret the applicable language in the interconnection agreement and determine whether reciprocal compensation is due. The language in the interconnection agreement at issue is as follows:

With the exception of the local traffic specifically identified in subsection (C)

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hereafter, each party agrees to terminate local traffic originated and routed to it by the other party. Each Party will pay the other for terminating its local traffic on the other's network the local interconnection rate of \$.009 per minute of use in all states.<sup>1</sup>

49. "Local Traffic" means any telephone call that originates in one exchange or LATA and terminates in either the same exchange or LATA, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff.<sup>2</sup>

Unless these provisions are ambiguous on their face, the decision in this case must be made as a matter of law and the Commission may not admit or consider any evidence. "[P]arole testimony is not admissible to vary or change the terms of a written instrument, if the terms are clear and unambiguous."<sup>3</sup> It is a cardinal rule that the construction of contracts is a question of law.<sup>4</sup> **Before the Commission can allow either party to submit any evidence in this case, it must first make an affirmative finding that the controlling provisions of the interconnection agreement are unclear and ambiguous.**<sup>5</sup> Otherwise, the Commission must rule for one party or the other based on its interpretation of the interconnection agreement alone.

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<sup>1</sup> Section VI(A) of the Interconnection Agreement.

<sup>2</sup> Attachment B to the Interconnection Agreement.

<sup>3</sup> Evidence and Witnesses, 24 Fla Jur 2d §444. See also *Friedman v. Virginia Metal Products Corp.*, 56 so.2d 515, 516 (Fla. 1952) ("The trial judge was correct in excluding parol testimony to vary or change the terms of a written instrument if the terms of that instrument were clear and unambiguous.")

<sup>4</sup> *Friedman*, 56 So.2d 515, 516.

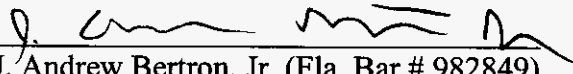
<sup>5</sup> *Emergency Associates of Tampa, P.A. v. Sassano*, 664 So.2d 1000, 1002 (2d DCA 1995). ("Before a trial court can consider such extrinsic evidence in interpreting a contract, the words used must be unclear such that an ambiguity exists on the face of the contract.") (Emphasis added). See also *Sears v. James Talcott, Inc.*, 174 So.2d 776, 778 (Fla. 2d DCA 1965) ("The parol evidence rule serves as a shield to protect a valid, complete and unambiguous written instrument from any verbal assault that would contradict, add to, or subtract from it, or affect its construction."); *Olive v. Tampa Educational Cable Consortium*, 723 So.2d 883, 884 (Fla. 2d DCA 1998) ("Since the agreement is unambiguous the trial court's resort to parol evidence, which included TECC's opinions about Olive's intentions in drafting the agreement, and TECC's interpretation of the agreement, was erroneous.").

As BellSouth stated repeatedly in its Answer and Response to the Complaint in this case, “the terms of the Agreement . . . speak for themselves.” The language in the interconnection agreement is clear and the Commission can and should rule on the ultimate issue as a matter of law.

II. THE COMMISSION SHOULD RULE ON THE MOTION FOR SUMMARY FINAL ORDER BEFORE THE PARTIES PROCEED WITH DISCOVERY

BellSouth states that this case has “progressed to the stage where a continuance would not result in any significant savings in time or money” and now seeks to set depositions prior to the filing of pretrial testimony.<sup>6</sup> On the contrary, this case has not proceeded beyond the pleadings stage.<sup>7</sup> The entire expense of discovery and preparation for an evidentiary hearing can be avoided by ruling on the Motion before the parties proceed with discovery. In the interest of judicial economy and to save expense to both parties, the Commission should either rule on ITC^DeltaCom’s Motion on an expedited basis prior to the commencement of discovery, or else continue these proceedings until such a ruling has been made.

Respectfully submitted this 25<sup>th</sup> day of May, 2000

  
J. Andrew Bertron, Jr. (Fla. Bar # 982849)  
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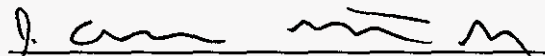
<sup>6</sup> BellSouth Response to Motion of ITC^DeltaCom to Continue Proceedings, May 22, 2000; BellSouth Notices of Deposition, May 24, 2000.

<sup>7</sup> There has been no discovery and no evidence has been filed with the Commission.

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**Counsel for ITC^DeltaCom Communications,  
Inc.**

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

I hereby certify that a true and correct copy of the foregoing has been furnished by **facsimile and U.S. Mail** this 25<sup>th</sup> day of May, 2000 to Nancy B. White c/o Nancy H. Sims, BellSouth Telecommunications, Inc., 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301-1556; R. Douglas Lackey and E. Earl Edenfield, Jr., 675 West Peachtree St., NE, Suite 4300, Atlanta, Georgia 30375; and Diana Caldwell, Esq., Staff Counsel, Florida Public Service Commission, Division of Legal Services, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0850.

  
\_\_\_\_\_  
Attorney