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RECORDS AND REPORTING

September 23, 1999

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. 990750-TP (ITC^DeltaCom/BellSouth Arbitration)

Dear Ms. Bayó:

Enclosed is the original and fifteen copies of BellSouth Telecommunications, Inc.'s Response to ITC^DeltaCom's Motion to Compel, which we ask that you file in the above-referenced matter.

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,

Thomas B. Alexander

Thomas B. Alexander (TW)

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

AFA _____
APP _____
CAF _____
CMU Favor
CTR _____
EAG _____
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CERTIFICATE OF SERVICE
Docket No. 990750-TP

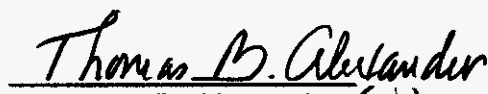
I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

U.S. Mail this 23rd day of September, 1999 to the following:

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*Signed a Protective Agreement

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In the Matter of:)
)
Petition for Arbitration of)
ITC^DeltaCom Communications, Inc.)
with BellSouth Telecommunications, Inc.)
Pursuant to the Telecommunications)
Act of 1996)
_____)

Docket No. 990750-TP

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE
TO MOTION TO COMPEL OF ITC^DELTACOM COMMUNICATIONS, INC.**

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth"), by and through counsel, responds to ITC^DeltaCom Communications, Inc.'s ("DeltaCom") Motion to Compel, which was filed on September 16, 1999. In its Motion, DeltaCom seeks to compel a response by BellSouth to DeltaCom Request for Production of Documents No. 4. The disputed discovery request along with BellSouth's response are attached hereto as Exhibit "A". DeltaCom seeks information that is not relevant to this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. By seeking production of this information, DeltaCom is misusing the discovery process in an attempt to obtain highly sensitive competitive information for market purposes under the guise of Commission procedures and the rules of civil procedure regarding discovery in Florida. As will be set out in more detail below, the Commission should deny DeltaCom's Motion to Compel.

DISCUSSION

Upon even a cursory reading of DeltaCom's Motion it is clear that DeltaCom has failed to meet its burden under Florida law to prove that the information it requested through discovery to BellSouth is relevant to any issue in this arbitration. Rule 28-106.203 of the Florida Administrative Code provides that discovery in matters before the Commission shall be conducted "through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. Rule 1.280(b)(1) of the Florida Rules of Civil Procedure provides:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The Florida courts have long held that the party seeking to compel discovery has the burden of proving that the discovery being sought is relevant to the subject matter involved in the pending action. *See Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995) (discovery must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to the discovery of admissible evidence); *Brooks v. Owens*, 97 So. 2d 693, 699 (Fla. 1957) (there must be some connection between the information sought

and the action itself before it becomes discoverable); *City of Miami v. Florida Public Service Commission*, 226 So. 2d 217, 218-219 (Fla. 1969) (burden rests on party seeking discovery to show that discovery sought is relevant to the proceeding).

Additionally, the unsupported assertion in DeltaCom's Motion that the information it seeks is "directly relevant" to its case (Motion at 2) does not compel the Commission simply to *assume* that such information is relevant and, thus, the Commission must order BellSouth to produce it. DeltaCom has the burden of proving the relevance to this arbitration proceeding of the information it seeks, and the Commission has broad discretion to deny such discovery requests, particularly, where as in the instant proceeding, DeltaCom has failed to meet its burden of proof. *See Compton & Assocs. V. Porlick, Poliquin, Samara, Inc.*, 662 So. 2d 428, 429-30 (Fla. App. 3 Dist. 1995) (order compelling production of corporate records reversed where there was no showing that the documents were relevant to the lawsuit); *Richard Mulholland & Assoc. v. Polverari*, 698 So. 2d 1269, 1270 (Fla. App. 2 Dist. 1997) (protective order should be granted when pleadings indicate that the documents requested are not related to any pending claim or defense). For the reasons set forth below, BellSouth opposes the production of the information being sought by DeltaCom through its Motion to Compel with respect to Request for Production No. 4.

DeltaCom's Request for Production No. 4

The only issue to which DeltaCom claims its Request for Production No. 4 relates is its request for certain unbundled network elements ("UNEs"), including

ADSL/HDSL compatible loops (See Petition for Arbitration at Issue 6(b)). The Florida Commission established the rates for these UNEs (2 Wire ADSL compatible loop and 2 Wire and 4 Wire HDSL compatible loops) through an earlier proceeding. (See Order No. 98-0604-FOF-TP in Docket Nos. 960757-TP; 960833-TP; and 960846-TP). ITC^DeltaCom's request for a "four-wire ADSL compatible loop" is also not appropriate for arbitration since ADSL functionality is not applicable to four-wire loops. Thus, BellSouth does not believe that DeltaCom's discovery request, which purportedly relates to its issue regarding the appropriate rates for certain UNEs, including ADSL/HDSL compatible unbundled loops, is relevant at all. BellSouth certainly does not plan to re-litigate the costs of unbundled elements previously established by this Commission. In addition, BellSouth already has produced UNE cost studies for Florida from the Commission's proceedings in Docket Nos. 960757-TP; 960833-TP; and 960846-TP that are relevant to this issue in response to a previous discovery request by DeltaCom, as DeltaCom acknowledges on page 2 of its Motion.

More importantly for purposes of DeltaCom's Motion, the unbundled ADSL compatible loop offering, which is what DeltaCom is seeking in its Arbitration, is completely different from BellSouth's federally tariffed wholesale ADSL service offering. To be clear, DeltaCom has not requested arbitration over BellSouth's federally tariffed wholesale ADSL service, but only as to ADSL/HDSL compatible unbundled network element loops. The cost studies for the unbundled ADSL compatible loops are different from the cost studies for the BellSouth federally tariffed wholesale ADSL service offering. Specifically, the underlying

assumptions made in the two cost studies are different. For example, the cost study supporting BellSouth's federally tariffed wholesale ADSL service does not even include the cost of the loop since it is assumed that the ADSL service is incremental to basic service. Thus, the associated work functions for the respective cost studies are also different based upon this underlying assumption. In other words, DeltaCom's supposition that the costs included in the federally tariffed ADSL cost study are the same costs necessary for providing ADSL compatible loops (Motion at 2) is simply wrong.

As stated in its Response to this discovery request, BellSouth contends that the information sought in this Interrogatory is neither relevant, nor likely to lead to the discovery of admissible evidence in this case. The information that is being sought by DeltaCom through its Motion to Compel concerns BellSouth's federally tariffed wholesale ADSL service offering. This tariffed service offering is sold to CLECs and/or ISPs, who then resell the service to their end-user customers. It is an entirely different offering from the UNEs sought by DeltaCom in this proceeding. Any comparison DeltaCom seeks to make between the two offerings would be an apples-to-oranges comparison that has no relevance to a decision on the issues in this arbitration.

In its Petition for Arbitration, DeltaCom sought rates and charges for ADSL/HDSL two-wire and ADSL/HDSL four-wire unbundled loops¹. The UNEs

¹ As noted previously herein, the Commission has already established rates for the 2 Wire ADSL compatible UNE loop and the 2 Wire and 4 Wire HDSL compatible loops. There is no 4 Wire ADSL compatible UNE loop. (See Florida Commission Order No. 98-0604-TP dated April 29, 1998.

loops are a connection from the BellSouth wire center to the end user's premises that is technically capable of providing both ADSL and basic local exchange service. When CLECs purchase this loop, they can provide both voice and data service to the end user. A key distinction between the UNE ADSL compatible loop and BellSouth's wholesale tariffed ADSL service offering is that the UNE ADSL compatible loop is just the facility over which ADSL *can be* provided, while the ADSL wholesale service offering, which is provided over the end-user customer's local exchange loop, includes the equipment necessary to provide the ADSL service, itself. With respect to the UNE ADSL compatible loop, the CLEC must use some of its own equipment, either at the BellSouth central office or other site, as technology requires and at the customer premises to provide the voice and data service over this unbundled loop.

In contrast, BellSouth's federally tariffed wholesale ADSL service provides the ability to offer high-speed data service over the same line used by an existing end user's basic local exchange service. It is offered on a wholesale basis typically to ISPs. The ISPs, in turn, resell the service to end users and charge the end users for the high-speed data access. BellSouth's wholesale ADSL service is only available on certain exchange service lines provided by BellSouth and is not available on local exchange facilities provided by another local service provider. BellSouth's wholesale ADSL service offering, which is provided over the end-user customer's local exchange loop, includes all of the equipment necessary to make the service operational. Thus, it is totally different from BellSouth's UNE ADSL compatible loop offering.

DeltaCom makes only a passing claim of “relevance” in its attempt to have the Commission compel BellSouth to produce the requested information.

DeltaCom argues on page 2, paragraph 4, in its Motion that “[s]ome of the costs included in the ADSL FCC tariff filing are the same costs necessary for providing the UNE (unbundled network element) ADSL-compatible loop. Therefore, this information is directly relevant to ITC^DeltaCom’s case.” This singular statement or purported claim of relevance simply is incorrect. For example, again, the work functions for the UNE ADSL compatible loops sought by DeltaCom and the tariffed wholesale ADSL service are different; and perhaps, more importantly, the cost study for the tariffed wholesale service does not include the cost of the loop.

BellSouth’s ADSL tariffed service is not a designed service and does not involve installation of a physical facility on the customer’s premises because the ADSL service actually “rides on” the customer’s existing local service facility. BellSouth’s ADSL tariffed service, contained in BellSouth’s FCC Tariff No. 1, is a non-designed interstate transport service which is an overlay to the customer’s existing service, i.e., basic residence or business service which the customer orders and pays for separately. BellSouth’s wholesale tariffed ADSL service utilizes these existing facilities in conjunction with BellSouth’s Exchange Access Asynchronous Transfer Mode Service (XAATMS) to provide ADSL service.

On the other hand, the unbundled ADSL compatible loop, which is exactly what ITC^DeltaCom is seeking in the instant Arbitration, always requires a designed physical loop facility. Thus, the work involved in the two offerings are completely different and of no relevance to one another.

Moreover, the cost studies done to support the UNE ADSL compatible loop offering are totally different from those done to support the wholesale tariffed ADSL service offering and filed with the FCC. The UNE cost study, which was done in conformance with this Commission's cost orders, is a TSLRIC study and includes some contribution toward BellSouth's joint and common costs. This TSLRIC study, which DeltaCom referred to in its Petition, is the appropriate study to use since it studied the specific unbundled network elements that DeltaCom sought in its Arbitration Petition. The wholesale service offering cost study, on the other hand, is a TSLRIC study that studies direct long run incremental costs, but does not include any of BellSouth's shared and common costs. Again, and most significantly, the cost study for the tariffed wholesale service offering does not include the loop. For these reasons, among others, these two cost studies are completely different and cannot, and should not, be compared as DeltaCom inappropriately seeks to do here.

The information DeltaCom seeks has no bearing on the issues in the Arbitration. For this reason, BellSouth believes that DeltaCom is seeking the production of the information purely for improper competitive reasons. The work functions involved in the two offerings are completely different, and the cost studies are not the same. There is no legitimate reason that DeltaCom needs this information and, thus, BellSouth strenuously objects to its production.

Finally, it must be noted that this is not DeltaCom's first attempt to move to compel the production of BellSouth's cost studies, which support the federally

tariffed ADSL service. DeltaCom recently did so in South Carolina, and lost. A copy of the

South Carolina Commission's Directive after it denied DeltaCom's Motion to Compel on this very issue is attached hereto as Exhibit "B". (BellSouth will gladly supply a copy of the final written order when it becomes available). Like the South Carolina Commission, this Commission should deny DeltaCom's Motion to Compel.

CONCLUSION

For the aforesated reasons, BellSouth respectfully requests that the Commission deny DeltaCom's Motion to Compel.

This 23rd day of September, 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

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179294

BellSouth Telecommunications, Inc.
FPSC Docket No. 990750-TP
First Production of Documents
August 11, 1999
Item No. 4
Page 1 of 1

REQUEST: BellSouth's recent ADSL FCC tariff filing, Transmittal No. 513, with Exhibits A and B (Proprietary Version) and BellSouth's ADSL tariff filing that was effective September 8, 1998, with Exhibits A and B (Proprietary Version).

RESPONSE: BellSouth objects to this Data Request on the grounds that it seeks information concerning BellSouth's retail services which is not relevant to any issue in this proceeding nor is it reasonably calculated to lead to the discovery of admissible evidence. Although the Commission has been asked to arbitrate rates for a certain limited number of unbundled network elements, the rates that a BellSouth end-user customer pays for a BellSouth retail service is irrelevant to this issue because, as the Federal Communications Commission has repeatedly held, unbundled network elements do not have a retail analogue. *See In re: Application of BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket 98-121, 13 FCC Rcd 20599 ¶ 87 (Oct. 13, 1998); *See In re: Application of BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket 97-208, 13 FCC Rcd 539 ¶ 98 (Dec. 24, 1997); and *In re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket 97-137, 12 FCC Rcd 20543 ¶ 141 (Aug. 19, 1997). Subject to this objection and without waiving this objection, BellSouth, in an effort to be responsive, is attaching hereto copies of BellSouth's publicly available Transmittals Nos. 476 and 513 as filed with the Federal Communications Commission (F.C.C.), including appendixes A and B. Transmittal 476 became effective on September 3, 1998, while transmittal 513 became effective July 24, 1999.

COMMISSION DIRECTIVE

ADMINISTRATIVE DEPT. XX

DATE August 31, 1999

TRANSPORTATION DEPT. _____

DOCKET NO. 1999-259C

UTILITIES DEPT. _____

ORDER NO. _____

SUBJECT: Docket No. 1999-259-C - Petition for Arbitration of ITC DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Discuss with the Commission a Motion to Compel filed by ITC DeltaCom Communications, Inc. A Response in Opposition to the Motion to Compel has been filed by BellSouth Telecommunications, Inc. COMMISSION ACTION:

*ISSUE ORDER DENYING MOTION TO COMPEL
FILED BY ITC DELTA COM.*

PRESIDING BRADLEY
BRADLEY ✓
CARRUTH M
CLYBURN ✓
ELLIOTT ✓
MITCHELL ✓
MOSELEY ✓
SAUNDERS ✓
REGULAR SESSION ✓
SPECIAL SESSION _____
TIME OF SESSION 11:00AM

APPROVED _____
APPROVED 30 DAYS _____
ACCEPTED FOR FILING _____
DENIED _____
AMENDED _____
TRANSFERRED _____
SUSPENDED _____
CANCELED _____
SET FOR HEARING _____
ADVISED _____
CARRIED OVER _____
RECORDED BY Phyllis [Signature]