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January 12, 2000

via Hand Delivery

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RECORDS AND REPORTING

Ms. Blanco Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
Betty Easley Conference Center
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Petition of BellSouth Telecommunications, Inc. for Arbitration of the Interconnection Agreement Between Time Warner Telecom of Florida, L.P., pursuant to Section 252 (b) of the Telecommunications Act of 1996 -- Docket No. 991605 -TP

Dear Ms. Bayo:

Enclosed for filing please find an original and fifteen copies of Time Warner Telecom of Florida, L.P.'s Motion for Summary Order for the above-referenced docket. You will also find a copy of this letter enclosed. Please date-stamp this copy to indicate that the original was filed and return a copy to me.

If you have any questions regarding this matter, please feel free to contact me. Thank you for your assistance in processing this filing.

Respectfully,

PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.

Peter M. Dunbar
Peter M. Dunbar

RECEIVED & FILED
me
FPSC-BUREAU OF RECORDS

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cc: All Parties of Record (w/ enclosure)

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BELLSOUTH)
TELECOMMUNICATIONS, INC.)
for Arbitration of the Interconnection)
Agreement Between TIME WARNER)
TELECOM OF FLORIDA, L.P.,)
Pursuant to Section 252(b) of the)
Telecommunications Act of 1996.)

DOCKET NO. 991605-TP
Filed: January 12, 2000

TIME WARNER TELECOM OF FLORIDA, L.P.'S
MOTION FOR SUMMARY ORDER

TIME WARNER TELECOM OF FLORIDA, L.P., (“Time Warner”), pursuant to §120.57(1)(d), F.S., and Rule 28-106.204(h), F.A.C., or Rule 1.510, Fla. R. Civ. Pro., moves the Commission to enter a Summary Order directing the parties to continue to operate under the terms of the Time Warner/BellSouth Interconnection Agreement and directing BellSouth Telecommunications, Inc. (“BellSouth”) to pay Time Warner for ISP-bound traffic at the reciprocal compensation rate set forth in that Interconnection Agreement until the FCC issues its final ruling on whether reciprocal compensation is due for ISP-bound traffic. In support thereof, Time Warner states:

I.

INTRODUCTION

1. Time Warner Telecom of Florida, L.P., is a Florida corporation offering dedicated transport, data, and local switched services to medium and large business customers in 19 U.S. metropolitan areas, and high-speed Internet access in several of these areas. Time Warner provides service to Florida customers in the Orlando and Tampa metropolitan areas.

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FPSC-RECORDS/REPORTING

2. On September 24, 1996, the Florida Public Service Commission (“Commission”) approved an Interconnection Agreement between BellSouth and Time Warner (“BellSouth/Time Warner Interconnection Agreement”) which governed the relationship between the companies regarding reciprocal compensation arrangements and numerous other issues. The parties began negotiating a new interconnection agreement November 30, 1998. Despite extensive efforts, the parties were unable to resolve one issue. Accordingly, the terms of the BellSouth/Time Warner Interconnection Agreement continue to govern the relationship of the parties; however, BellSouth has failed to pay Time Warner all reciprocal compensation due under the Time Warner/BellSouth Interconnection Agreement.

3. On October 15, 1999, BellSouth timely filed with the Commission its *Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration* requesting arbitration of the unresolved issue between Time Warner and BellSouth. BellSouth set forth the sole unresolved issue as follows: “What should be the appropriate definition of “local traffic” for purposes of the parties’ reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act?” See *Petition of BellSouth Telecommunications, Inc. for Section 252(b) Arbitration*, ¶9. BellSouth’s position is that “‘local traffic’ should be defined to apply only to traffic that originates and terminates within a local area. The definition should expressly exclude traffic to Internet Service Providers, which is interstate traffic.” *Id.*

4. On November 9, 1999, Time Warner submitted its *Response to the Petition for Arbitration of BellSouth Telecommunications, Inc.*, wherein Time Warner set forth its position on the unresolved issue as follows: “[f]or purposes of reciprocal compensation, calls to ISP/ESPs are to be treated as local traffic.”

5. The Federal Communications Commission (“FCC”) has initiated proceedings on the issue of a prospective payment mechanism for ISP-bound traffic which may moot inconsistent state proceedings on this issue. *See* In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Declaratory Ruling*, CC Docket No. 96-98, and Inter-Carrier Compensation for ISP-Bound Traffic, *Notice of Proposed Rulemaking*, CC Docket No. 99-68, FCC 99-38 (Released Feb. 26, 1999). In its *Declaratory Ruling*, the FCC determined that, while ISP-bound traffic is largely interstate in nature, state commissions retain authority to determine in arbitration proceedings that reciprocal compensation should be paid for ISP-bound traffic. Specifically, the FCC concluded:

Even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. The passage of the 1996 Act raised the novel issue of the applicability of its local competition provisions to the issue of inter-carrier compensation for ISP-bound traffic. Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to section 252 “extends to both interstate and intrastate matters.” Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. While to date the

Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.

Id., ¶ 25 (footnotes omitted, emphases added). The FCC concluded that state commissions have authority to interpret existing interconnection agreements and adopt interim payment mechanisms providing for payment for ISP-bound traffic on a going-forward basis pending further FCC orders. *Id.*, at ¶¶ 21-27. However, the FCC's *Declaratory Ruling* was appealed to the United States Court of Appeals for the District of Columbia Circuit. On appeal, BellSouth and other ILECs argue that the FCC erred in allowing state commissions to determine that ISP traffic is "local" for purposes of interpreting interconnection agreements and resolving interconnection disputes.

6. In its companion *Notice of Proposed Rulemaking*, the FCC sought comment on two alternative proposals to address the issue of inter-carrier compensation for ISP traffic on a going forward basis. The comment cycle in response to the *Notice* is now complete and the matter is now pending before the FCC.

7. Either the rulemaking proceeding before the FCC or the appeal from the FCC's *Declaratory Ruling* may render moot any further proceedings on the ISP issue at the state level. The FCC's rulemaking proceeding may result in the adoption of a rule or procedure mandating consistent action at the state level. Similarly, the appellate court may expand or contract the FCC's grant of authority to the states to resolve prospective ISP compensation disputes. In any event, resolution of either of these two pending federal proceedings may impact this Commission's determination of a prospective mechanism for inter-carrier compensation for ISP traffic.

8. In the context of the BellSouth/ITC^Deltacom Arbitration before the North Carolina Utilities Commission, BellSouth argued that further proceedings at the state level would appear to be “fruitless” stating:

The FCC's recent Declaratory Ruling . . . clearly established that the FCC has, and will retain, and will exercise jurisdiction over this traffic. As a practical matter, it appears fruitless for state commissions to deal with this issue at this time. Although the FCC appears to give states authority to create an interim compensation arrangement until the FCC establishes rules, the FCC's authority to confer this ability on the states is being challenged in court. Consequently, states could find that they do not have the authority to create even an interim compensation mechanism. Even if the states do have this authority, such authority is valid only until the FCC completes its rulemaking on the subject.

Direct Testimony of Alphonso J. Varner, BellSouth Telecommunications, Inc., Docket No. P-500, Sub 10 (October 14, 1999), at 45 (emphasis added). A copy of the Direct Testimony of Alphonso Varner is attached hereto as Exhibit A.

9. Time Warner Telecom of the Mid-South, L.P. and BellSouth Telecommunications, Inc., are also in the midst of a pending arbitration before the Tennessee Regulatory Authority regarding the exact same unresolved ISP issue before this Commission. In Re: *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Time Warner Telecom of the Mid-South, L.P. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket 99-00797. In the Tennessee proceeding, BellSouth joined Time Warner in an *Agreed Procedural Order* in which the parties agreed to take administrative notice of the records developed in the following proceedings: In re: *Petition by ICG TELECOM GROUP, INC. for Arbitration of an Interconnection Agreement with BELLSOUTH TELECOMMUNICATIONS, INC.*

pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 99-00377; In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., pursuant to the Telecommunications Act of 1996, Docket No. 99-00430. In addition, the parties agreed that the record of the ICG and ITC^DeltaCom proceedings would be used as the evidentiary record for the Arbitrator's decision in the Time Warner/BellSouth arbitration, and that no discovery would be propounded or testimony submitted by the parties. A copy of the *Agreed Procedural Order* filed in Docket No. 99-00797 is attached hereto as Exhibit B.

10. In addition, Time Warner Telecom of North Carolina, L.P., and BellSouth Telecommunications, Inc. are arbitrating the exact same ISP issue before the North Carolina Utilities Commission ("NCUC"). In re: *Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Time Warner Telecom of North Carolina, L.P. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. P-472, Sub 15.* In the North Carolina proceeding, BellSouth joined Time Warner in a *Joint Motion to Amend Procedural Schedule* in which the parties moved that the NCUC resolve the proceeding by taking administrative notice of the records developed in the following proceedings: In re: *Petition by ICG TELECOM GROUP, INC. for Arbitration of an Interconnection Agreement with BELLSOUTH TELECOMMUNICATIONS, INC. pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. P-55, Sub 1156; In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., pursuant to the Telecommunications Act of 1996, Docket No. P-500, sub 10.* While the parties have filed direct and rebuttal testimony, the parties have

agreed to file briefs and forego a hearing and cross-examination. A copy of the *Joint Motion to Amend Procedural Schedule* is attached hereto as Exhibit C.

11. The specific issue raised by BellSouth in this proceeding is precisely the same issue presented in *two* previous arbitrations before this Commission. *In re: Petition of ICG Telecom Group, Inc. for Arbitration of Unresolved Issues in Interconnection Negotiations with BellSouth Telecommunications, Inc.*, Docket No. 990691-TP; *In re: Petition by MediaOne Florida Telecommunications, Inc. for arbitration of an interconnection agreement with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 990149-TP, Order No. PSC-99-2009-FOF-TP (Oct. 14, 1999). In the interest of judicial economy, Time Warner has offered to enter into an agreement to streamline this proceeding similar to the agreements in North Carolina and Tennessee but BellSouth has declined to do so.

12. The arguments for and against payment of reciprocal compensation for ISP-bound traffic have been made repeatedly by ALEC and ILEC representatives and have been considered and determined by the Commission. In the MediaOne/BellSouth arbitration, the ICG Telecom/BellSouth arbitration, and the ITC^DeltaCom/BellSouth arbitration, the Commission ruled that the parties should continue to operate under the terms of their current interconnection agreement until the FCC issues its final ruling on whether reciprocal compensation is due for ISP-bound traffic. Inasmuch as there are no unresolved issues of material fact between the parties, and the one unresolved legal issue between Time Warner and BellSouth has been extensively and consistently addressed by the Commission in previous proceedings, no interest would be served by further proceedings in this docket. Accordingly, Time Warner is entitled to a summary order in this proceeding.

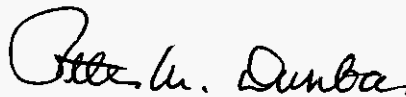
II.

CONCLUSION

For all the reasons set forth above, the Commission should direct the parties to continue to operate under the existing Time Warner/BellSouth Interconnection Agreement thereby requiring BellSouth to pay Time Warner reciprocal compensation pursuant to that Interconnection Agreement until the FCC issues its final ruling on the ISP issue.

WHEREFORE, Time Warner respectfully requests that the Commission issue a Summary Order in its favor as a matter of law.

RESPECTFULLY SUBMITTED this 12th day of January, 2000.



PETER M. DUNBAR, ESQ.

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Counsel for Time Warner Telecom
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CERTIFICATE OF SERVICE
DOCKET NO. 991605-TP

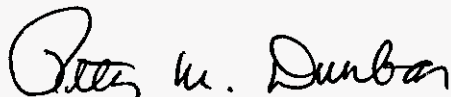
I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S.

Mail on this 12th day of January, 2000, to the following parties of record:

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Florida Cable Telecommunications Assoc., Inc.
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Represented by: Pennington Law Firm



PETER M. DUNBAR, ESQ.

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BELLSOUTH TELECOMMUNICATIONS, INC.
DIRECT TESTIMONY OF ALPHONSO J. VARNER
BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-500, SUB 10

JULY 9, 1999

OFFICIAL COPY

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") AND YOUR BUSINESS ADDRESS.

A. My name is Alphonso J. Varner. I am employed by BellSouth as Senior Director for State Regulatory for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. PLEASE GIVE A BRIEF DESCRIPTION OF YOUR BACKGROUND AND EXPERIENCE.

A. I graduated from Florida State University in 1972 with a Bachelor of Engineering Science degree in systems design engineering. I immediately joined Southern Bell in the division of revenues organization with the responsibility for preparation of all Florida investment separations studies for division of revenues and for reviewing interstate settlements.

Subsequently, I accepted an assignment in the rates and tariffs organization with responsibilities for administering selected rates and tariffs including



1 Q. WHAT IS BELLSOUTH'S POSITION ON THE APPLICABILITY OF
2 RECIPROCAL COMPENSATION TO ISP-BOUND TRAFFIC?

3

4 A. Reciprocal compensation is not applicable to ISP-bound traffic. BellSouth's
5 position is that payment of reciprocal compensation for ISP-bound traffic is
6 inconsistent with the law and is not sound public policy. Further, BellSouth
7 believes that carriers are entitled to be compensated appropriately based on the
8 use of their network to transport and deliver traffic.

9

10 Q. IS THERE ANY REASON FOR THIS COMMISSION TO ADDRESS THIS
11 ISSUE AT THIS TIME?

12

13 A. No. The FCC's recent Declaratory Ruling, FCC 99-38 in CC Docket Nos. 96-
14 98 and 99-68, released February 26, 1999 ("Declaratory Ruling"), clearly
15 established that the FCC has, will retain, and will exercise jurisdiction over this
16 traffic. As a practical matter, it appears fruitless for state commissions to deal
17 with this issue at this time. Although the FCC appears to give states authority
18 to create an interim compensation arrangement until the FCC establishes rules,
19 the FCC's authority to confer this ability on the states is being challenged in
20 court. Consequently, states could find that they do not have the authority to
21 create even an interim compensation arrangement. Even if the states do have
22 the authority, such authority is valid only until the FCC completes its
23 rulemaking on the subject. Therefore, any effort devoted by this Commission
24 to establishing an interim compensation arrangement for ISP-bound traffic
25 would likely be wasted effort.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Time Warner Telecom of the Mid-South, L.P. Pursuant to Section 252(h) of the Telecommunications Act of 1996*

Docket No. 99-00797

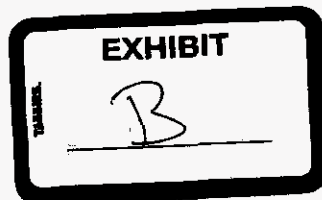
AGREED PROCEDURAL ORDER

To provide for the resolution of the issue in this matter by the Arbitrators appointed by the Tennessee Regulatory Authority ("Authority"), BellSouth Telecommunications, Inc. ("BellSouth") and Time Warner Telecom of the Mid-South, L.P. ("Time Warner") respectfully submit the following Agreed Procedural Order for consideration by the Hearing Officer:

1. For purposes of this proceeding, BellSouth and Time Warner agree to abide by Arbitration Rules 1220-5-1 through 1220-5-3, Rules of Practice and Procedure governing proceedings under Section 252 of the Federal Telecommunications Act of 1996;
2. For purposes of this proceeding, neither BellSouth nor Time Warner object to the Authority Staff asking questions of witnesses during any hearing conducted in connection with this proceeding ;
3. Time Warner and BellSouth submit the following Issues Matrix to the Arbitrators and Staff.

ISSUE	PETITIONER'S POSITION	RESPONDENT'S POSITION	FCC RULING
What should be the appropriate definition of "local traffic" for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act?	"Local Traffic" should be defined to apply only to traffic that originates and terminates within a local area. The definition should expressly exclude traffic to Internet Service	The parties have agreed to the definition of "local traffic" with the exception of the inclusion (or exclusion) of ISP traffic. For the purposes of reciprocal compensation, calls to	First Report and Order, <u>Implementation of the Local Compensation Provisions in the Telecommunications Act of 1996</u> , 11 FCC Red 13042, 16013 ¶ 1034; Declaratory Ruling, CC

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	Providers, which is interstate traffic.	ISPs are to be treated as local traffic.	Docket 96-98, ¶ 26 n. 87 (Feb. 26, 1999)
--	---	--	--

4. For purposes of this proceeding, Time Warner and BellSouth agree to submit the above-referenced issue to the Arbitrators for resolution in the following manner. The parties agree that the Arbitrators should take administrative notice of the records developed in the following proceedings:

In Re: *Petition by ICG TELECOM GROUP, INC. for Arbitration of an Interconnection Agreement with BELLSOUTH TELECOMMUNICATIONS, INC. pursuant to Section 252(b) of the Telecommunications Act of 1996*
Docket No. 99-00377 ("the ICG proceeding")

In Re: *Petition for Arbitration of ITC-DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*
Docket No. 99-00430 ("the DeltaCom proceeding")

The parties agree that the record from these proceedings will be used as the evidentiary record for the Arbitrators' decision in this proceeding and in the event either party appeals the determination of the Arbitrators in this proceeding, that the record from the ICG proceeding and the DeltaCom proceeding will be included in the record on appeal.

5. The parties will submit briefs on January 21, 2000 which may reference the record developed in the ICG and DeltaCom proceedings.


6. Time Warner and BellSouth agree that, provided the Hearing Officer and Arbitrators approve the proposed procedure set forth in Paragraphs 4 and 5 above, no discovery will be propounded by either party in connection with this proceeding, and the parties will submit the case to the Arbitrators for resolution without the submission of testimony or cross-examination.


7. BellSouth and Time Warner agree to extend until February 19, 2000, the time period within which this proceeding must be concluded and to waive any right under federal or state law to require that this proceeding be concluded prior to that date.

Respectfully submitted,

FARRIS, MATHEWS, BRANAN
& HELLEN, P.L.C.

BELLSOUTH TELECOMMUNICATIONS, INC.

BY: 
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APPROVED:

Hon. Gary Holvedt, Hearing Officer
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

In re:)
)
Petition for Arbitration of the Interconnection)
Agreement Between BellSouth Telecommunications,)
Inc. and Time Warner Telecom of North Carolina, L.P.)
Pursuant to Section 252(b) of the Telecommunications)
Act of 1996.)
_____)

Docket No. P-472, Sub 15

JOINT MOTION TO AMEND
PROCEDURAL SCHEDULE

To provide for the resolution of this matter by the North Carolina Utilities Commission ("NCUC"), BellSouth Telecommunications, Inc. ("BellSouth") and Time Warner Telecom of North Carolina, L.P. ("Time Warner") respectfully submit the following Joint Motion to Amend the Procedural Schedule in this case.

1. Time Warner and BellSouth have submitted the following issue for resolution by the NCUC: What should be the appropriate definition of "local traffic" for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act?

2. The NCUC has set this matter for hearing on January 25, 2000. In lieu of a hearing, Time Warner and BellSouth jointly move that the above-referenced issue be resolved by the NCUC taking administrative notice of the records developed in the following proceedings:

In Re: *Petition by ICG TELECOM GROUP, INC for Arbitration of an Interconnection Agreement with BELLSOUTH TELECOMMUNICATIONS, INC. pursuant to Section 252(b) of the Telecommunications Act of 1996*
Docket No. P-582, Sub 6

In Re: *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*
Docket No. P-500, Sub 10



The parties move that the record from these proceedings as well as the prefiled testimony submitted in this proceeding be used as the evidentiary record for the NCUC's decision in this arbitration and, in the event either party appeals the determination of the NCUC in this arbitration, that the record from the ICG proceeding and the DeltaCom proceeding be included in the record on appeal.

3. The parties move that briefs be submitted on February 15, 2000 which may reference the record developed in the ICG and DeltaCom proceedings as well as the prefiled testimony in this proceeding.

4. Time Warner and BellSouth agree, provided the NCUC approves the proposed procedure set forth in Paragraphs 2 and 3 above, that the case be submitted to the NCUC for resolution without a hearing or cross-examination.

Respectfully submitted this 10th day of January, 2000.

TIME WARNER TELECOM
OF NORTH CAROLINA, L.P.

Marcus W. Trathen, Sr. & Co. III
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NORTH CAROLINA, L.P.

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