



1                   (The aforementioned cause came on to  
2 be heard on Monday, June 21, 2004, beginning at  
3 approximately 2:08 p.m., before Chairman Deborah Taylor  
4 Tate, Director Pat Miller, and Director Ron Jones, when  
5 the following proceedings were had, to-wit:)

6  
7                   CHAIRMAN TATE: Good afternoon. We  
8 are without our docket clerk; I'm now lost.  
9                   We are here on Docket 03-00119,  
10 petition for arbitration of ITC DeltaCom  
11 Communications, Inc., and BellSouth Telecommunications,  
12 Inc.

13                   Why don't you-all just go ahead and  
14 identify yourselves for the record so we'll know that  
15 you were here and present.

16                   MR. HICKS: Guy Hicks on behalf of  
17 BellSouth Telecommunications.

18                   MR. WALKER: Henry Walker and Nanette  
19 Edwards here on behalf of ITC DeltaCom.

20                   CHAIRMAN TATE: Thank you-all.

21                   Do you-all have any questions for the  
22 parties?

23                   (No response.)

24                   CHAIRMAN TATE: As you-all know for  
25 some time, actually for months, I've really been

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1 encouraging commercially negotiated agreements between  
2 the parties. This dates back to I think Chairman  
3 Powell's first request for the parties to do that, and  
4 then I tried to do that as well. Mr. Walker admonished  
5 me not to undermine the FBO process, although it is  
6 really not very much in my nature because, as you all  
7 know, I really am much more of a mediator.

8 I have played with cutting the numbers  
9 in half. I have thought through this a lot, but in  
10 order to, I think, be true to my requests and my  
11 philosophies about market-based rates, what I would  
12 like to propose is -- because from my reading of the  
13 record, the only rate that has ever been negotiated was  
14 the \$14 rate, and I would propose that we accept that,  
15 that we continue the present rate on an interim basis  
16 and subject to true up or true down as the case might  
17 be. And I believe I said on an interim basis until  
18 this Authority or the FCC or there is another rate  
19 negotiated by the parties. I believe that that would  
20 be most consistent with my previous request by the  
21 parties and my philosophy regarding market-based rates.

22 DIRECTOR JONES: In this arbitration  
23 we've gone back and forth with this issue, and we wound  
24 up at a place where we requested final best offers to  
25 make a determination as what the market rate should be

1 for unbundled switching provided pursuant to  
2 Section 271 of the Act.

3                   Based on that particular requirement,  
4 unbundled network elements under Section 271, the  
5 pricing for them and market base has a particular  
6 standard of just and reasonable. And also as a final  
7 best offer for a switching element only, that is the  
8 rate that we requested in the FBO, and unlike DeltaCom,  
9 BellSouth did not propose a standalone rate for  
10 switching in its final best offer. And according to  
11 the case law that exists with respect to a just and  
12 reasonable rate, it covers the utility's operating  
13 expenses as well as a fair return on investments, and  
14 DeltaCom's FBO contained those elements.

15                   On the other hand, BellSouth failed to  
16 demonstrate that its proposed final best offer, its 271  
17 switching rate, is at or below the rate at which  
18 BellSouth offers comparable functions to similarly  
19 situated purchasing carriers under its interstate  
20 access tariff or that the 271 switching element final  
21 best offer is reasonable by showing that it has entered  
22 into arm's length agreements with other similarly  
23 situated purchasing carriers to provide an inclusive  
24 standalone switching at the rate proposed in the final  
25 best offer.

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1                   And for those reasons, my position is  
2   that we adopt DeltaCom's rate as an interim rate for  
3   switching.

4                   MR. HICKS: Directors, may I comment  
5   on --

6                   DIRECTOR JONES: I think at this point  
7   we're in the middle of deliberating this issue, and I  
8   think it's appropriate for us to continue to finish the  
9   deliberations, Mr. Hicks.

10                  MR. HICKS: I know we had -- you heard  
11   from counsel earlier about whether to defer the issue,  
12   but I'm not sure you heard from counsel on the merits  
13   of the issue.

14                  DIRECTOR JONES: I think we're right  
15   in the middle of deliberating at this point, and I have  
16   a motion by Chairman Tate and I have a motion out here  
17   and I believe after Director Miller gets an opportunity  
18   to weigh in --

19                  DIRECTOR MILLER: I'm going to move  
20   for a five-minute recess.

21                  CHAIRMAN TATE: We'll take a  
22   five-minute recess and be back on the record at  
23   2:20 p.m.

24                                 (Recess taken from 2:15 p.m.  
25                                 to 2:20 p.m.)

1                   CHAIRMAN TATE: If we could come back  
2 to order and we will be back on the record.

3                   DIRECTOR MILLER: Thank you, Madam  
4 Chair.

5                   DIRECTOR JONES: Director Miller,  
6 before you continue, I would just like to clarify that  
7 in my motion the interim period -- I'm defining that to  
8 be consistent with the DeltaCom proposal. I just  
9 wanted to make sure I defined the interim period.

10                  DIRECTOR MILLER: Chairman Tate, I  
11 would like to ask you to consider amending your motion  
12 to adopt the DeltaCom final and best offer of 5.08 as  
13 an interim rate subject to a true up based on the  
14 adoption of a generic rate and further request that you  
15 as chair open a docket to adopt a rate for switching  
16 outside of 251 requirements.

17                  I believe this approach to keep  
18 negotiations ongoing in light of -- this is the best  
19 approach to keep negotiations ongoing in light of the  
20 continued uncertainty at the FCC. In addition, I  
21 believe this approach will allow all interested parties  
22 to have input into the final rate adopted, and since  
23 it's impossible to predict either what will happen or  
24 when it will happen, assigning an interim rate will  
25 provide ITC DeltaCom with some level of relief and

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1 certainty while the true up will ensure that the  
2 current negotiation -- negotiating position of the  
3 parties remains intact, neither benefiting nor  
4 penalizing either party through the establishment of an  
5 interim rate.

6 CHAIRMAN TATE: I would certainly  
7 agree that it would be appropriate to open a generic  
8 docket.

9 Director Jones, would you agree with  
10 that?

11 DIRECTOR JONES: Are you agreeing  
12 with -- are you agreeing with Director Miller's motion?

13 CHAIRMAN TATE: No, I'm not. But I'm  
14 asking if you would agree to the part about a generic  
15 docket?

16 DIRECTOR JONES: It depends on the  
17 motion.

18 CHAIRMAN TATE: Well, I guess I'm just  
19 saying it sounds like the two of you-all have come to  
20 an agreement, if I'm hearing both of you-all correctly,  
21 about what would be the appropriate rate on an interim  
22 basis subject to true up. And if we all agreed that a  
23 generic docket could be opened, then at least I could  
24 be in agreement with that portion.

25 DIRECTOR JONES: I am in agreement

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1 with that portion.

2 CHAIRMAN TATE: Good. Then I believe  
3 that we've come to a -- I'm not in agreement with the  
4 rest of the motion, but I would be regarding opening a  
5 generic docket.

6 Gentlemen?

7 DIRECTOR JONES: One moment, please.

8 CHAIRMAN TATE: Certainly.

9 (Off the record.)

10 DIRECTOR JONES: Okay. We still  
11 have -- left on your motion, Director Miller, is the  
12 true up aspect of your motion, and I will --

13 DIRECTOR MILLER: Why don't I just  
14 make a separate motion that we adopt the DeltaCom final  
15 best offer of 5.08 and establish that as an interim  
16 rate subject to true up and request that the chair open  
17 a generic docket to adopt a rate for switching outside  
18 251 requirements.

19 CHAIRMAN TATE: And I am in agreement  
20 with all of that except for the rate, as noted in my  
21 previous motion.

22 Director Jones?

23 DIRECTOR JONES: I do have a question,  
24 Director Miller, as to what event will the true up be  
25 trued? Will it be to the generic docket? Will it be



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1 to FCC interim rules or permanent rules, or to what  
2 will the interim rate be tried?

3 CHAIRMAN TATE: Or to a negotiated  
4 market-based rate.

5 DIRECTOR JONES: Or to some negotiated  
6 rate.

7 DIRECTOR MILLER: Right. It would  
8 be -- the purpose of the generic docket is to set a  
9 rate applicable to every -- however, if in the interim,  
10 the FCC intervenes and sets rules and preempts that,  
11 then that will end the true up period or if commercial  
12 negotiations are successful and they come up with a  
13 rate on their own.

14 DIRECTOR JONES: I will agree to that.

15 CHAIRMAN TATE: I would just once  
16 again encourage the parties strongly that negotiations  
17 should be considered and that you-all move in that  
18 direction.

19 And with that said, I think we're --  
20 we can adjourn for today. Thank you-all for being  
21 here.

22 (Proceedings concluded at  
23 2:30 p.m.)

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## 1 REPORTER'S CERTIFICATE

2 STATE OF TENNESSEE )

3 COUNTY OF DAVIDSON )

4 I, Christina M. Rhodes, Registered  
5 Professional Reporter, Certified Court Reporter, and  
6 Notary Public for the State of Tennessee at Large,  
7 hereby certify that I reported the foregoing  
8 proceedings at the time and place set forth in the  
9 caption thereof; that the proceedings were  
10 stenographically reported by me; and that the foregoing  
11 proceedings constitute a true and correct transcript of  
12 said proceedings to the best of my ability.

13 I FURTHER CERTIFY that I am not  
14 related to any of the parties named herein, nor their  
15 counsel, and have no interest, financial or otherwise,  
16 in the outcome or events of this action.

17 IN WITNESS WHEREOF, I have hereunto  
18 affixed my official signature and seal of office this  
19 21st day of June, 2004.

20

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22 CHRISTINA M. RHODES  
23 REGISTERED PROFESSIONAL REPORTER  
24 AND NOTARY PUBLIC FOR THE STATE  
OF TENNESSEE AT LARGE

25 My Commission Expires  
January 28, 2006