

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 96-98

In the Matter of)
)
Implementation of the Local)
Competition Provisions of the)
Telecommunications Act of 1996)
)

**PETITION OF ITC^DELTA COM COMMUNICATIONS, INC.
FOR WAIVER OF SUPPLEMENTAL ORDER CLARIFICATION**

ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom ("ITC^DeltaCom"), by its attorneys, hereby petitions the Commission to waive the safe harbor requirements established in the *Supplemental Order Clarification* issued in the above-captioned proceeding on June 2, 2000.¹ ITC^DeltaCom requests that the Commission consider this petition expeditiously because it will have a significant impact on decisions facing the company today whether to enter or exit numerous markets for the provision of local services.

I. INTRODUCTION AND SUMMARY

ITC^DeltaCom is a full-service telecommunications provider serving business customers throughout the southeastern United States. ITC^DeltaCom offers a bundled package consisting of facilities-based long distance, local, data and Internet network services, as well as customer premises equipment. Unlike many competitive local exchange carriers ("CLECs"), ITC^DeltaCom focuses primarily on secondary and other underserved markets within its service

¹ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98, Supplemental Order Clarification, FCC 00-183 (rel. June 2, 2000) [*"Supplemental Order Clarification"*].

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region. In many cities, ITC^DeltaCom is the only facilities-based CLEC in competition with the incumbent local exchange carrier (“ILEC”).

Today ITC^DeltaCom has more than 3,000 local customers served via a configuration involving DS1 transport facilities and DS3 entrance facilities ordered through the ILEC’s Special Access tariffs. These facilities are used primarily to provide local service, and they satisfy the local usage criterion as articulated by the Commission in the *Supplemental Order Clarification*. Nevertheless, BellSouth has refused to convert this configuration into the unbundled network element (“UNE”) combination known as the enhanced extended link (“EEL”) by claiming that it would constitute prohibited commingling. ITC^DeltaCom respectfully requests that the Commission waive the safe harbor requirements so that ITC^DeltaCom can establish DS1 EELs from its customers’ premises to ITC^DeltaCom’s point of presence. In this EEL configuration, which does not involve the use of any collocation arrangements, the interoffice transport segment would be a DS1 facility, which would then be multiplexed onto a DS3 entrance facility which would carry both EEL and non-EEL traffic through channelized facility usage. With regard to the DS3 entrance facility, while ITC^DeltaCom would prefer paying lower UNE rates for the EEL circuits through a type of “ratcheting” arrangement, ITC^DeltaCom is not seeking a ratcheting solution for the DS3 entrance facility as part of this waiver request.² Rather, the purpose of this request is to ensure that ITC^DeltaCom can obtain the EEL functionality on an end-to-end basis from the customer’s premises to ITC^DeltaCom’s POP with channelized usage of the DS3 entrance facility.

² Of course, ITC^DeltaCom would expect to receive UNE rates for the loop and interoffice transport portion of the EELs.

II. THE COMMISSION SHOULD WAIVE THE SAFE HARBOR RULES

On June 2, 2000, the Commission issued the *Supplemental Order Clarification* establishing interim rules surrounding the UNE loop-transport combinations known as EELs. In that order, the Commission held that CLECs are entitled to use EELs to provide local exchange services.³ In order to ensure that CLECs could obtain EELs for that purpose, the Commission promulgated three interim, non-exclusive safe harbors whereby CLECs can obtain and use EELs to provide a “significant amount of local exchange service.”⁴ The third safe harbor option is particularly relevant to ITC^DeltaCom’s services, and it entitles a CLEC to an EEL where “[t]he requesting carrier certifies that at least 50 percent of the activated channels on a circuit are used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these local dialtone channels is local voice traffic, and that the entire loop facility has at least 33 percent local voice traffic.” The Commission contemplated that this safe harbor would apply in situations where the loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), in which case “each of the individual DS1 circuits must meet this [sic] criteria.” The Commission expressly stated that collocation is not required under this option, and that “[t]his option does not allow loop-transport combinations to be connected to the incumbent LEC’s tariffed services.”

³ Although ITC^DeltaCom disagrees with the Commission’s preliminary determination that interim usage-based restrictions on EELs are lawful and in the public interest, ITC^DeltaCom is not challenging the lawfulness of the *Supplemental Order Clarification* in this petition. Similarly, while ITC^DeltaCom believes that CLECs should be able to obtain and use EELs where the interoffice transport segment is a DS3 facility with channelized usage, ITC^DeltaCom is not requesting such relief in this petition.

⁴ *Supplemental Order Clarification* at ¶ 22.

ITC^DeltaCom wishes to convert customers currently served in the BellSouth region under Special Access tariffs to DS1 EELs where the EEL runs directly from the customers' premises to ITC^DeltaCom's POP on a DS1 basis without going through a collocation arrangement. Because ITC^DeltaCom's entrance facilities are DS3 Special Access services obtained from BellSouth, it is necessary to route the DS1 EELs over those facilities through channelized usage. The attached Exhibit A illustrates how ITC^DeltaCom provides service to these customers today, while Exhibit B shows this configuration as a DS1 EEL from the customer's premises to ITC^DeltaCom's point of presence.

It is worth noting that when ITC^DeltaCom first entered the local exchange market in 1997, it always ordered DS1 interoffice transport and DS3 entrance facilities out of BellSouth's Special Access tariffs because it did not have the option of obtaining EELs from BellSouth. As a result, ITC^DeltaCom has established over 3000 network configurations utilizing BellSouth's tariffed Special Access arrangements to provide local exchange services to customers. Further, it should be noted that BellSouth has agreed in Section 1.4 of its interconnection agreement with ITC^DeltaCom to permit the combination of UNE loops with tariffed Special Access interoffice transport services, thereby demonstrating that combining UNEs and Special Access services is both feasible and beneficial.

The only objection raised by BellSouth to ITC^DeltaCom's desire to route DS1 EELs on a channelized usage basis over DS3 entrance facilities is its claim that this configuration constitutes the type of commingling prohibited by the Commission in all three safe harbors. Assuming *arguendo* that BellSouth has correctly construed the anti-commingling

language in the *Supplemental Order Clarification*,⁵ the Commission should expeditiously grant a waiver rules to permit ITC^DeltaCom to obtain and use the DS1 EEL described above and in the attached Exhibits. Pursuant to Section 1.3 of its rules, the Commission has the authority to waive a rule, in whole or in part, for good cause shown. The Commission expressly contemplated waivers when it adopted the *Supplemental Order Clarification* if a carrier could show “extraordinary circumstances under which a requesting carrier is providing a significant amount of local exchange service but does not qualify under any of the three options.”⁶ ITC^DeltaCom submits that its situation satisfies the “good cause” standard under Section 1.3, and that it qualifies as the type of “extraordinary circumstances” contemplated by the Commission in the *Supplemental Order Clarification*. Because ITC^DeltaCom meets, and is willing to certify that it meets, the local usage criterion in the third safe harbor, there should be no concern that grant of the waiver would circumvent the Commission’s desire that EELs be used primarily to provide local services to subscribers.

A waiver of the safe harbor rules is necessary to ensure that business customers in smaller cities and other underserved communities will have some choice among facilities-based local service providers. ITC^DeltaCom has sought to provide local services to such customers since 1997, and it has learned through experience that the most efficient network configuration for its business plan requires using a single switching hub to serve multiple communities. This configuration does not require collocation arrangements and it generates significant backhaul

⁵ In fact, ITC^DeltaCom does not agree that BellSouth’s interpretation of the anti-commingling language in the third safe harbor is the correct one, but it is not raising its disagreement with BellSouth on this issue in this petition.

⁶ *Supplemental Order Clarification* at ¶ 23.

transport requirements – often as much as 100-150 miles -- between ITC^DeltaCom's point of presence serving a community and the switching hub.

Moreover, smaller cities and towns normally do not produce as many EEL-suitable business customers per end office as larger metropolitan areas. As a result, the carrier is less likely to have enough EEL customers per end office to justify a DS3 facility at the interoffice transport level. Further, it is likely that the interoffice transport segment of EELs in smaller communities will traverse greater distances than those serving large cities. These distances have economic implications, as it will take even more DS1 EELs to justify migrating to a DS3 interoffice transport facility than would be the case in large cities where distances are shorter.

In addition, there is a much higher risk of stranded investment where the CLEC orders a DS3 interoffice transport facility in a smaller city or town. If, as often occurs, one or a few EEL customers leave their current location – either moving into a new building, or going out of business – it is impossible to re-use the EEL circuit in those States that require EELs to be purchased as a Special Access service and then converted to an EEL. Even in those few states (*e.g.*, Georgia and Tennessee) that do not require such conversions to establish an EEL, it might be difficult to find a substitute EEL customer served by the same end office, with the result that the DS3 facility might no longer be economical and the carrier would be stuck with an underutilized and inefficient facility.

The most efficient and least risky way for ITC^DeltaCom to implement its business plan to serve customers in smaller cities and other underserved communities is through the use of DS1 interoffice transport circuits, which are multiplexed onto DS3 facilities only at the entrance facility portion of the network. While CLECs serving large cities may be able to more

readily justify the use of DS3 interoffice transport facilities for their EEL customers, CLECs serving smaller cities are much more likely to find DS1 interoffice transport to be the only economically feasible solution.

Granting a waiver of the safe harbor rules to enable the above-described EEL will promote facilities-based local competition in smaller cities and underserved communities. As noted above, ITC^DeltaCom is today the only facilities-based CLEC (or one of only a few CLECs) in many cities and towns within its region. The above-described EEL is critical for ITC^DeltaCom to serve those markets. If it receives the requested waiver, ITC^DeltaCom will strive to remain an active competitor in its current markets, and it will seek to enter new markets that today do not have even one facilities-based CLEC. Without the requested waiver, ITC^DeltaCom will not enter any of those new markets, and it likely will be forced to withdraw from some existing markets, thereby leaving customers in those markets without any choice among facilities-based local carriers. In today's market environment, where the cost of capital has increased significantly in the past 18 months, it is critical for a CLEC like ITC^DeltaCom to receive the efficiency benefits of a DS1 EEL with channelized usage of DS3 entrance facilities to serve smaller cities and communities in the U.S. Southeast.

BellSouth's interpretation of the anti-commingling language in the third safe harbor would effectively require ITC^DeltaCom to either (i) install multiple collocation arrangements in tandem offices and serving wire centers within the region; or (ii) order separate (and redundant) DS3 entrance facilities for EEL and non-EEL traffic. Neither option is even remotely feasible. The first option would require a massive outlay of capital far beyond what any CLEC can justify in today's market and capital environments. Further, it would require CLECs like ITC^DeltaCom, which today make highly selective use of collocation arrangements,

to modify and reshape their business plans and carrier operations in ways that are both disruptive and inefficient. The second option is equally infeasible. No CLEC today can afford the luxury of two redundant, underutilized and inefficient sets of entrance facilities serving their POPs. The obvious result of BellSouth's interpretation of the anti-commingling policy is that no CLEC will ever obtain a DS1 EEL under the third safe harbor.

In sum, ITC^DeltaCom submits that it has shown "good cause" for a waiver of the safe harbor rules consistent with the *Supplemental Order Clarification*. Such a waiver would promote the public interest by assisting ITC^DeltaCom to provide competitive local services in the smaller cities and underserved communities in its region. Further, ITC^DeltaCom's current network configuration for serving those communities is not typical of other CLECs, particularly those serving larger cities. Rather, the requested waiver would be tailored to the needs of CLECs seeking to devise and implement efficient network configurations to serve smaller cities without extensive collocation arrangements. As a result, granting this waiver would not undermine the general anti-commingling policy established by the Commission as a gating mechanism for EELs, nor would it result in all CLECs qualifying for the same waiver. Rather, granting this waiver will assist ITC^DeltaCom to use its particular network configuration to provide high-quality, efficient service to numerous smaller cities and other underserved communities in the Southeastern United States.

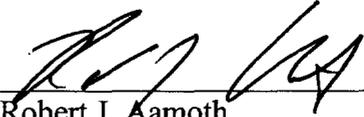
III. CONCLUSION

ITC^DeltaCom respectfully requests that the Commission grant the instant petition as expeditiously as possible.

Respectfully submitted,

ITC^DELTA COM COMMUNICATIONS, INC.

By:



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Dated: August 17, 2001

Exhibit A

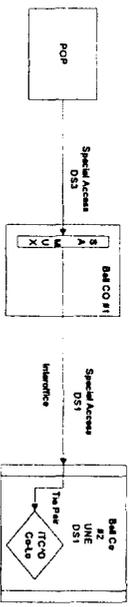
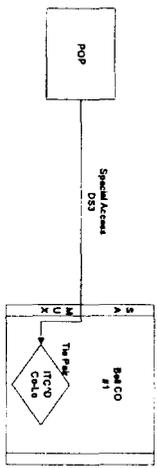
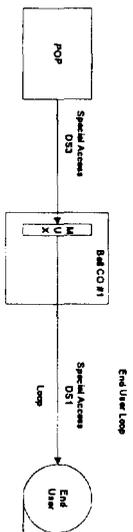
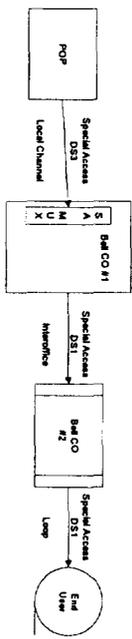
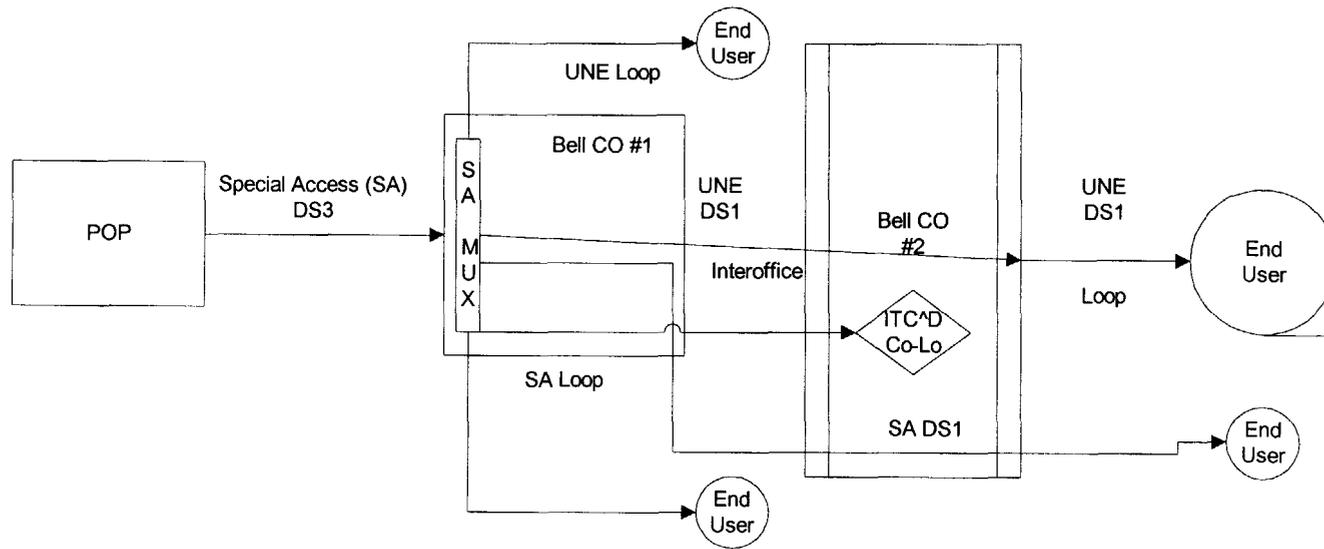


Exhibit B



Key

SA = Special Access

CERTIFICATE OF SERVICE

I, Theresa A. Baum, hereby certify that on this 17th day of August, 2001, copies of the Petition Of ITC^DeltaCom Communications, Inc. For Clarification, Or Alternatively, For Waiver Of The Supplemental Order Clarification in CC Docket No. 96-98 were served by hand or first-class mail on the following:

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