ORIGINAL

Legal Department

RECEIVED-FPSC

99 OCT 29 PM 4:43

RECORDS AND REPORTING

E. EARL EDENFIELD, Jr.
General Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0763

October 29, 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. 990691-TP (ICG Arbitration)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief of the Evidence, which we ask that you file in the captioned docket.

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,

E. Earl Edenfield, Jr.

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

Favors
1
3
SEC 1
PAI 1

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
12819 OCT 29 99
FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
Docket No. 990691-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 29th day of October, 1999 to the following:

C. Lee Fordham
Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

ICG Telecom Group, Inc.
Mr. Carl Jackson
50 Glenlake Parkway, Suite 500
Atlanta, GA 30328
Tel. No. (678) 222-7342
Fax. No. (678)222-7413
Represented by McWhirter Law Firm

McWhirter Law Firm
Joseph McGlothlin
Vicki Gordon Kaufman
117 South Gadsden Street
Tallahassee, FL 32301
Tel. No. (850) 222-2525
Fax. No. (850) 222-5606
Represents ICG

Michael A. Gross
VP - Regulatory Affairs & Regulatory Counsel
Florida Cable Telecommunications Association, Inc.
310 North Monroe Street
Tallahassee, FL 32301
Tel. No. (850) 681-1990
Fax. No. (850) 681-9676

E. Earl Edenfield, Jr. (AM)

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:	)	
	)	
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. 990691-TP
	)	Filed: October 29, 1999

BELLSOUTH TELECOMMUNICATIONS, INC.
BRIEF OF THE EVIDENCE

NANCY B. WHITE
MICHAEL P. GOGGIN
150 West Flagler Street
Suite 1910
Miami, Florida 33130
(305) 347-5558

R. DOUGLAS LACKEY
E. EARL EDENFIELD JR.
A. LANGLEY KITCHINGS
675 West Peachtree Street
Suite 4300
Atlanta, Georgia 30375
(404) 335-0747

ATTORNEYS FOR BELLSOUTH TELECOMMUNICATIONS, INC.

FOR COUNSEL:
Jeffrey P. Brown
Vice President & General Counsel
BellSouth Telecommunications, Inc.
675 West Peachtree Street, NE
Room 4504
Atlanta, GA 30375

TABLE OF CONTENTS

STATEMENT OF THE CASE

The Telecommunications Act of 1996 ("1996 Act") requires interconnection negotiations between local exchange companies and new entrants. Parties that cannot reach a satisfactory resolution of their negotiations are entitled to seek arbitration of the unresolved issues by the appropriate state commission. 47 U.S.C. § 252(b)(1).

On October 27, 1997, the Florida Public Service Commission ("Commission") approved a one-year agreement between ICG Telecom Group, Inc. ("ICG"), and BellSouth Telecommunications, Inc. ("BellSouth"), providing for interconnection services from BellSouth to ICG. That agreement expired on October 27, 1998, but the parties mutually agreed to extend it pending finalization of a successor agreement. Negotiations for a successor agreement failed, and on May 27, 1999, ICG filed a Petition for Arbitration, seeking the assistance of the Commission in resolving the remaining unresolved issues. The Petition enumerated a total of twenty-five issues. Since the date it was filed, however, ten of those issues were resolved and withdrawn by the parties. At the Pre-hearing Conference, BellSouth's Motion to Remove Issues From Arbitration was granted and nine additional issues were removed from consideration.

The hearing in this matter was held on October 7, 1999. At the hearing, BellSouth submitted the direct and rebuttal testimony of Alphonso J. Varner. The hearing produced a transcript of 511 pages and 6 exhibits.

This Brief of the Evidence is submitted in accordance with the post-hearing procedures of Rule 25-22.056, Florida Administrative Code. A summary of BellSouth's position on each issue to be resolved in this docket is set forth in the following pages and marked with a double asterisk.

STATEMENT OF BASIC POSITION

Each of the individually numbered issues in this docket represent a specific dispute between BellSouth and ICG Telecom Group, Inc. ("ICG") as to what should be included in the Interconnection Agreement between the parties. Some of these issues involve matters that are not properly within the scope of the 1996 Act or the jurisdiction of this Commission and should, therefore, not be part of an Arbitrated Agreement. Other issues are more appropriately addressed in one of the generic proceedings currently underway in Florida. As to all other issues, BellSouth's position is the more consistent with the 1996 Act, the pertinent rulings of the Federal Communications Commission ("FCC") and the rules of this Commission. Therefore, the Commission should sustain each of BellSouth's positions.

The issue of whether Internet Service Provider ("ISP") traffic should be included within a reciprocal compensation clause relating to the termination of local traffic was resolved by the FCC, which ruled that this traffic is interstate in jurisdiction. Therefore, this Commission should decline to enter an order that would treat interstate traffic as if it were local traffic and await the final resolution of the FCC's Notice of Proposed Rulemaking ("NPRM") on this issue. If, however, the Commission is determined to adopt an interim inter-carrier compensation mechanism, such a mechanism should be based on either a revenue sharing arrangement or a bill and keep arrangement.

As to volume and term discounts and binding forecasts, neither is required under Section 251 or Section 252 on the 1996 Act. Thus, these issues are inappropriate for arbitration under Section 252 of the 1996 Act and the Commission should deny the relief requested by ICG.

The issues of packet switching and enhanced extended loops ("EELs") are currently the subject of the FCC's UNE Remand Docket (CC Docket 96-98) wherein the FCC is developing

the list of UNEs to be provided by the Incumbent Local Exchange Companies ("LECs"). The Commission should decline to take any action on these issues until such time as the FCC issues its UNE Remand Order. As an alternative, the Commission should deny the relief sought by ICG and consider these issues in the broader context of the various generic proceedings currently pending in Florida, such as the UNE Pricing Docket (990649-TP).

The issue of tandem switching was previously addressed by the Commission. BellSouth contends that the resolution of this issue should be consistent with previous Commission precedent finding that Alternative Local Exchange Carriers ("ALECs") are entitled to the tandem switching elemental rate only in those circumstances where the ALEC switch performs the same functions as the Incumbent LEC switch.

STATEMENT OF POSITION ON THE ISSUES

Issue 1: Until the FCC and the FPSC adopt a rule with prospective application, should dial-up access to the Internet through Internet Service Providers (ISPs) be treated as if it were a local call for purposes of reciprocal compensation?

**Position: No. ISP traffic represents the continuous transmission from the end-user to a distant internet site. The FCC has ruled that this traffic is jurisdictionally mixed and largely interstate in nature. Therefore, the FCC has also ruled that this traffic is subject to interstate jurisdiction.

In its February 26, 1999 Declaratory Ruling,[1] the FCC ruled definitively that the obligation to pay reciprocal compensation, per Section 251(b)(5) of the 1996 Act, is not applicable to ISP-bound traffic. (*See* footnote 87 of the FCC ISP Ruling) Payment of reciprocal compensation for ISP-bound traffic is inconsistent with the law and is not good public policy.

[1] *See* Declaratory Ruling, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98 and Notice of Proposed Rulemaking, *Inter-Carrier Compensation for ISP-Bound Traffic,* CC Docket No. 99-68, 1999 WL 98037 (February 26, 1999)(hereinafter the "FCC ISP Ruling").

(Tr. 375) Moreover, carriers are entitled to be compensated appropriately based on the use of their network to transport and deliver traffic.

As an initial matter, it is important to note that, in the instant proceeding, the Arbitration panel is arbitrating a new interconnection agreement between BellSouth and ICG. It is not interpreting the terms of an existing interconnection agreement. In fact, the Commission addressed this very issue of an interim inter-carrier compensation mechanism in the BellSouth/MediaOne Section 252 arbitration (Docket No. 990149-TP).[2]

While acknowledging that the Commission previously established on interim inter-carrier compensation mechanism, BellSouth maintains that the FCC does not have the authority to vest jurisdiction in the states as to this issue on an interim basis. As the FCC made clear in its Declaratory Ruling, any interim inter-carrier compensation mechanism adopted by state commissions is outside the provisions of Section 251(b)(5) of the Act, because ISP traffic is interstate in nature, not local.[3]

Regardless of jurisdictional issues, reciprocal compensation is not a reasonable inter-carrier compensation mechanism for interstate access services such as ISP-bound traffic. When two carriers collaborate to complete a local call, the originating carrier receives compensation from its end user in the form of local exchange rates and pays the terminating carrier reciprocal compensation for that local call. When two carriers jointly provide interstate access, the carriers

[2] In MediaOne, the Commission, based on the consent of the parties, determined that the appropriate course of action was to await the FCC's decision on a national inter-carrier compensation mechanism. In the interim, BellSouth and MediaOne would continue to treat ISP traffic in the same manner as they had under their Interconnection Agreement.

[3] BellSouth contends that one regulatory agency (in this case the FCC) does not have the authority to grant jurisdiction to another regulatory agency (in this case the Commission). This issue is currently on appeal to the United States Court of Appeals for the District of Columbia Circuit (Bell Atlantic Telephone Companies, et al. v. Federal Communications Commission, et al., No. 99-1094 (D.C. Cir. March 8, 1999)).

share access revenues received from the IXC. (Tr. 377) ISP-bound traffic is similar to long distance traffic where it is appropriate to share the revenues obtained from the ISP customer.

1. The Telecommunications Act of 1996 Requires Payment of Reciprocal Compensation Only for Traffic that is Local, not Interstate.

The 1996 Act establishes, *inter alia*, the duty of all LECs to interconnect their networks with other LECs and "to establish reciprocal compensation arrangements for the transport and termination of *telecommunications*." 47 U.S.C. § 251(b)(5) (emphasis added). Section 252(d)(2) states that, for the purpose of compliance by an incumbent local exchange carrier ("ILEC") with Section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless such terms and conditions both: (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier;" and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A).

In August 1996, the FCC construed the term "telecommunications" as used in Section 251(b)(5) to mean that the Act's reciprocal compensation obligation applies only to traffic that is local, *i.e.*, "traffic that originates and terminates within a local calling area":

> We conclude that section 251(b)(5)'s reciprocal compensation obligations should apply only to traffic that originates and terminates within a local calling area. . . .
>
> . . . .
>
> We note that our conclusion that long distance traffic is not subject to the transport and termination of section 251 does not in any way disrupt the ability of IXCs to terminate their interstate long distance traffic on LEC networks. Pursuant to section 251(g), LECs must continue to offer tariffed interstate access services just as they did prior to enactment of the 1996 Act. **We find that the reciprocal compensation provisions of section**

> **251(b)(5) for transport and termination of traffic do not apply to transport or termination of interstate or intrastate interexchange traffic.**
>
> . . . .
>
> State Commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state commissions' historical practice of defining local service areas for wireline LECs.

First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 F.C.C. Rcd. 15499 (August 8, 1996) (hereinafter "FCC Interconnection Order") at ¶¶ 1034-35; 47 CFR §51.701 (emphasis added). The 1996 Act, therefore, preserved the distinction between charges for transport and termination of **local** traffic (governed by the reciprocal compensation provisions in Sections 251(b)(5) and 252(d)(2)) and charges for termination of **interstate** traffic (governed by the access charge provisions in Sections 201 and 202 of the Act).

2. ISP Traffic is not Local Traffic.

Historically, the FCC has exercised jurisdiction over, and regulated charges for, use of the local exchange network to originate and terminate interstate calls. ISPs use a LEC's local network to collect traffic from their end user customers, which is then forwarded on to the Internet. In FCC CC Docket No. 96-98, the FCC considered whether the reciprocal compensation provisions of the 1996 Act were applicable to ISP traffic. In that docket, numerous CLECs and ISPs contended that ISP traffic is divided into two discrete components: a **local** telecommunications call that travels from the end user and terminates at the ISP server, and a separate **interstate** "information" component provided by the ISP.

The FCC, in its ISP Ruling, firmly rejected this "two-call" theory of ISP traffic. (FCC ISP Ruling at ¶¶ 1-15) It explained that the jurisdictional nature of a communication is determined by the end-to-end points of the communication, rejecting attempts to divide the communications at any intermediate points. *Id.* Consistent with these precedents, the FCC concluded that ISP traffic does not terminate at the ISP's local server, as the CLECs and ISPs contended, but rather continues to the ultimate destination, specifically, at an Internet website that is often located in another state. See FCC ISP Ruling at ¶¶ 12-13 (" we analyze ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site").[4]

South Carolina is the only other state in BellSouth's service territory besides Florida to consider, in an arbitration proceeding, the ISP traffic issue on a going forward basis. The South Carolina PSC found that ISP traffic is non-local interstate traffic and that no compensation was due for such ISP traffic. (Order on Arbitration, Docket No. 1999-259-C – Order No. 1999-690, pp. 60-66; dated October 4, 1999.)

2. The FCC's Recent ISP Ruling Confirms that ISP Traffic is, and Always Has Been, Interstate Traffic Subject to the FCC's Jurisdiction.

[4] See also Memorandum Opinion and Order, *In the Matter of Teleconnect Company Complaint v. The Bell Telephone Company of Pennsylvania, et al.*, File Nos. E-88-83, *et seq.*, 10 F.C.C. Rcd. 1626, 1629 (February 14, 1995), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC,* 116 F.3d 593 (D.C. Cir. 1997) ("an interstate communication does not end at an intermediate switch .... The interstate communication itself extends from the inception of a call to its completion, regardless of any intermediate facilities."); Memorandum Opinion and Order, *In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation,* CC Docket No. 92-18, 7 F.C.C. Rcd. 1619 (February 14, 1992) (voice mail traffic consisting of an incoming interstate transmission (call) to the switch serving a voice mail subscriber and an intrastate transmission of that message from that switch to the voice mail apparatus constitute a single interstate call because there is a continuous path of communications across state lines between the caller and the voice mail service); Order Designating Issues for Investigation, *In the Matter of Southwestern Bell Telephone Company Transmittal Nos. 1537 and 1560 Revisions to Tariff F.C.C. No. 68,* CC Docket No. 88-180, 3 F.C.C.R. 2339, 2341 (April 22, 1988) (credit card calls consisting of transmission (call) from card user to IXC's switch and another transmission from the ISC switch to the called party constitutes a single interstate call because "switching at the credit card switch is an intermediate step in a single end-to-end communication.").

In the FCC ISP Ruling, the FCC confirmed that ISP-bound traffic is not local, ISP-bound traffic does not terminate at the ISP's local server, but continues over the internet to host computers that may be located in another state or another nation. FCC ISP Ruling at ¶ 12. In the FCC ISP Ruling, the FCC also made clear that ISPs are users of exchange access service. FCC ISP Ruling at ¶ 5. Rather than pay local carriers for their use of such exchange access service through the payment of access charges, as do interexchange carriers, The FCC has determined that ISPs can compensate local carriers by paying a price for exchange access that is equal to the rate charged by local carriers for local exchange service. *Id.* the FCC made clear, however, that its decision to exempt ISPs from the payment of access charges does not change the nature of the service ISPs receive – it is exchange access service, not local exchange service. ICC ISP Ruling at ¶ 16.

In the final analysis, the FCC merely confirmed what has been BellSouth's position all along: ISP traffic is, and always has been, interstate access traffic subject to the FCC's jurisdiction and, therefore, not subject to the reciprocal compensation obligation of the 1996 Act or the FCC Interconnection Order. Instead, ISP traffic is subject to the FCC's rules governing transport and termination of interstate traffic. Mr. Varner, in the summary of his testimony, quoted at least five (5) citations from the FCC ISP Ruling which make this position crystal-clear:

> Now, contrary to there assertions, the FCC has made it very clear that ISP-bound traffic is not local. There are at least five cites to that effect in the FCC's February 26 declaratory ruling. And I wanted to go through just a few of them.
>
> In Paragraph 5, "Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services." Paragraph 5, again, "Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections."
>
> Paragraph 16, "The Commission traditionally has characterized the link from an end user to an ESP as an interstate access service." Paragraph 16, again,

> "That the Commission exempted ESPs from access charges indicates this understanding that ESPs, in fact, use interstate service. Otherwise the exemption would not be necessary." And finally, Paragraph 17, "The Commission consistently has characterized ESPS as users of access service, but has treated them as end users for pricing purposes."

(Tr. at p. 374)

4. ISPs Use the LEC's Interstate Access Service.

Like interexchange carriers, ISPs use the LEC's local telephone network to originate interstate calls made by their end user customers. (Tr. 377) As noted above, this fact does not transform the portion of the call from the end user to the ISP server into a local call. The FCC has traditionally characterized the link from the end user to the ISP, not as local service, but as interstate service, specifically, an interstate access service. See FCC ISP Ruling at ¶¶ 5 & 16 (citing Memorandum Opinion and Order, *In the matter of MTS and WATS Market Structure*, CC Docket No. 78-72 Phase I, 97 F.C.C.2d 682, 711, 715 (August 22, 1983) (hereinafter "MTS/WATS Order") (Enhanced Service Providers ("ESPs") are "[a]mong the variety of users of access service" in that they "obtain local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls")[5]; Order, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, 3 FCC Rcd. 2631 (April 27, 1988) (hereinafter "ESP Exemption Order") (referring to "certain classes of exchange access users, including enhanced service providers"); Notice of Proposed Rulemaking, *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, 2 FCC Rcd. 4305, 4306 (July 17, 1987) (ESPs, "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services").

[5] ISPs are a subset of ESPs. FCC ISP Ruling, n. 1.

Typically, interexchange carriers pay the LEC interstate access charges for use of the LEC's network to carry interstate calls. (Tr. 377) These interstate access charges in part compensate the LEC for the costs of carrying the interstate calls over the LEC's network. Since 1983, the FCC has exempted all ESPs, including ISPs, from the payment of interstate access charges for the LEC interstate access service that they use. See FCC ISP Ruling at ¶ 5. The exemption was adopted at the inception of the interstate access charge regime to protect ESPs and encourage the growth of their fledgling industries. See MTS/WATS Order, 97 FCC 2d at 715. The exemption from interstate access charges that applies to ISPs is contained in BellSouth's FCC interstate access tariffs. (FCC No. 1 § 3.5.3).

For the purpose of implementing the interstate access charge exemption, ISPs are treated as end users for pricing purposes that are permitted to purchase their lines from the LEC's flat-rated intrastate business tariffs, rather than its interstate access tariffs. See ESP Exemption Order, 3 F.C.C. Rcd. at 2635 n. 8, 2637 n. 53. Thus, pursuant to FCC orders that are the direct result of the access charge exemption, ISPs pay local business rates for their switched access connections to local exchange company central offices. (Id.) Further, a LEC's expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes due to FCC rules (see Notice of Proposed Rule Making, *Amendments of Part 69 of the FCC's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, CC Docket No. 89-79, 4 FCC Rcd. 3983, 3987-88 (May 9, 1989)).

The fact that ISPs are allowed to purchase local business service for purposes of the access charge exemption, however, in no way transforms the fundamental nature of ISP traffic. Paragraph 16 of the FCC ISP Ruling provides, "the fact that ESPs are exempt from access charges and purchase their PTSN lines through local tariffs does not transform the nature

of the traffic routed to ESPs." This traffic is not and has not ever been, intrastate or local traffic, and the fact "[t]hat the Commission **exempted** ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary." FCC ISP Ruling at ¶ 16 (emphasis added).

The FCC did not reclassify ISP traffic as local traffic in its recent ISP Ruling. To the contrary, and as already noted, the FCC confirmed that such traffic is, and always has been, interstate traffic subject to the FCC's jurisdiction. For this reason, the FCC acknowledged that Section 251(b)(5) of the 1996 Act does not require reciprocal compensation for ISP-bound calls:

> As noted, section 251(b)(5) of the Act and our rules promulgated pursuant to that provision concern inter-carrier compensation for interconnected *local* telecommunications traffic. We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic. Thus, the reciprocal compensation requirements of section 251(b)(5) of the Act and Section 51, Subpart H (Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic) of the Commission's rules do not govern inter-carrier compensation for this traffic.

FCC ISP Ruling at ¶26, n. 87.

In summary, BellSouth requests that the Commission keep its focus on the overall development of competition in Florida, not just the Internet as ICG suggests. (Schonhaut Direct) ISPs are only one segment (and a small one) of all telecommunications users in Florida. ICG and other Competitive Local Exchange Carriers ("CLECs") should not be further incented to continue to ignore the residential market by presenting them with a reciprocal compensation mechanism that rewards them for avoiding the provision of service to that market.

As the Commonwealth of Massachusetts Department of Telecommunications and Energy found in its May 19, 1999 Order regarding reciprocal compensation:

> The unqualified payment of reciprocal compensation for ISP-bound traffic, implicit in our October Order's construing of the 1996 Act, does not promote real

> competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition.[6]

Recently, in a case of first impression for the state of Louisiana, the Louisiana Public Service Commission ("LPSC") issued an order on an ISP Complaint proceeding. (See Order No. U-23839; KMC Telecom, Inc. v. BellSouth Telecommunications, Inc., dated October 28, 1999). In determining that repaid compensation was not owed to KMC, the LPSC concluded that ISP traffic does not "terminate" locally (p. 15) and that ISP provide switched exchange access service (p. 17).

More importantly, the LPSC noted "the negative impact on competition in the local market as well as the potential for abusing the reciprocal compensation obligation from permitting such an arrangement are obvious." (p. 21).

Issue 2: Should the following packet-switching capabilities be made available as UNEs:

a) user-to-network interface (UNI) at 56 kbps, 64 kbps, 128 kbps, 256 kbps, 384 kbps, 1.544 Mbps and 44.736 Mbps.

b) network-to-network interface (NNI) at 56 kbps, 64 kbps, 1.544 Mbps and 44.736 Mbps.

c) data link control identifiers ("DLCIs") at committed information rates ("CIRS") of 0 kbps, 8 kbps, 9.6 kbps, 16 kbps, 19.2 kbps, 28 kbps, 32 kbps, 56 kbps, 64 kbps, 128 kbps, 192 kbps, 256 kbps, 320 kbps, 384 kbps, 448 kbps, 512 kbps, 576 kbps, 640 kbps, 704 kbps, 768 kbps, 832 kbps, 896 kbps, 960 kbps, 1.024 Mbps, 1.088 Mbps, 1.152 Mbps, 1.216 Mbps, 1.280 Mbps, 1.344 Mbps, 1.408 Mbps, 1.472 Mbps, 1.536 Mbps, 1.544 Mbps, 3.088 Mbps, 4.632 Mbps, 6.176 Mbps, 7.720 Mbps, 9.264 Mbps, 10.808 Mbps, 12.350 Mbps, 3.896 Mbps, 15.440 Mbps, 16.984 Mbps, 18.528 Mbps and 20.072 Mbps.

[6] See Commonwealth of Massachusetts Department of Telecommunications and Energy Order dated May 19, 1999, D.T.E. 97-116-C, p. 32.

**Position: BellSouth agreed to provide packet switching to ICG, pending the FCC's Rule 51.319 UNE remand proceeding. The transport issue raised by ICG is beyond the scope of the issue raised in the arbitration petition and response thereto.

Subject to the FCC's Final Order in its proceeding regarding Rule 51.319, BellSouth has agreed to comply with ICG's request for unbundled packet switching. BellSouth reserves its rights to review the provision of packet switching on an unbundled basis upon receipt of the FCC's Final Order. BellSouth's cost and proposed rates applicable for unbundled packet switching capabilities were included in Exhibit AJV-8 (Hearing Exhibit 6), attached to Mr. Varner's testimony. ICG did not object to the rates as proposed. Thus, this issue should be resolved.

In its Prehearing Statement and prefiled testimony, ICG impermissibly broadened the issue originally presented in ICG's Arbitration Petition and BellSouth's Response thereto. Specifically, ICG raised at the hearing (over BellSouth's objection) issues concerning whether ICG is required to pay tariff rates or UNE rates for transport when ICG is not collocated at a BellSouth premise. Section 252(b)(2) of the 1996 Act requires the petitioner (in this case ICG) to state the unresolved issues in the Arbitration Petition. In addition, 252(b)(4) limits the Commission's consideration of 252 arbitration issues to those "set forth in the petition and in the response . . .". The packet-switching issue raised by ICG in the Arbitration Petition is limited strictly to whether BellSouth is required to provide packet-switching capabilities as a UNE. The Commission should not consider ICG's expanded version of Issue 2.

In the event the Commission does consider the expanded version of Issue 2, BellSouth specifically addresses the transport issues (ICG basically is requesting the Enhanced Extended Loop ("EEL")) in the discussion of Issue 3, below.

Issue 3: Under the Telecommunications Act of 1996, should "Enhanced Extended Link" Loops (EELs) be made available to ICG in the interconnection agreement as UNEs?

**Position: The EEL is a combination of UNEs that is not currently combined in BellSouth's network. Thus, under the law, BellSouth cannot be required to combine the UNEs that comprise the EEL. Requiring BellSouth to provide the EEL would result in the arbitrage of special access service rates.

For a variety of reasons, the Commission should not require BellSouth to provide the EEL to ICG in this arbitration. First, the Eighth Circuit Court of Appeals ("Eighth Circuit") vacated the FCC's rules requiring LECs to combine UNEs for ALECs. As the Eighth Circuit's ruling was not challenged on appeal, any attempt to require BellSouth to provide a UNE combination (loop and transport) that does not currently exist in BellSouth's network would be contrary to the law. (Tr. 382) ICG does not dispute the fact that the EEL is a combination of UNEs. Specifically, ICG witness Holdridge testified:

> Q. Can you tell this Commission, sir, what the EEL is comprised of?
>
> A. Yes, sir. Commissioners, the EEL is comprised of the loop, a cross connect, and a transport facility....
>
> Q. So is it fair to say then, Mr. Holdridge, that the EEL consists of three separate components, or at least three separate components?
>
> A. Three if you count the cross connect, as well, yes, sir.

(Tr. 112) While the definition of "currently combined" as it relates to a loop and transport combination is not clear, it appears that the FCC will define "currently combined" to apply to UNE combinations already in existence and providing service to a BellSouth end-user at the time an ALEC requests the combination. (Tr. 383) As to the more specific issue of whether the EEL is currently combined in BellSouth's network, Mr. Varner testified that "the facility that ICG is requesting must be created by BellSouth. It doesn't already exist." (Tr. 382) ICG provided no

competent evidence to suggest that the EEL is a combination of UNEs currently combined in BellSouth's network.

Second, the FCC is currently reviewing Rule 51.319 as a result of the United States Supreme Court's remand of that rule to the FCC. On September 15, 1999, the FCC issued a press release (Report No. CC 99-41) concerning the adoption of rules regarding UNEs. While it is academic that the press release has no legal effect, it is interesting to note that the EEL is not listed as one of the six UNEs identified by the FCC. As Mr. Varner noted, "they apparently considered it, decided not to put it on." (Tr. 383)

Finally, requiring BellSouth to provide the EEL, which contains a UNE transport element, will result in ALECs being able to arbitrage the pricing of special access services. (Tr. 383) Clearly, ICG intends to use the EEL, or the transport portion thereof, as a substitute for special access service. (Tr. 383) (*See* also, ICG's expansion of Issue 3 regarding packet switching) This ability of ALECs to use certain UNEs as a substitute for the Incumbent LECs' special access service is the subject of a Further NPRM (Tr. 383) (*See* also, FCC press release, Report No. CC 99-41, dated September 15, 1999)

In summary, the parties anticipate that an order will soon be forthcoming from the FCC addressing all of the UNE issues, including the EEL. In the interim, ICG acknowledges that BellSouth has offered to provide the EEL through a professional service arrangement outside of the parameters of the 1996 Act. (Tr. 113) In fact, ICG admits that the issue in this arbitration is not whether BellSouth will provide the EEL, but at what price BellSouth will provide the EEL. (Tr. 113) BellSouth submits that the prudent course of action for the Commission is to order BellSouth to comply with the final non-appealable Order of the FCC, which should be issued in the immediate future. To do otherwise subjects the Commission to the unnecessary risk of

issuing an Order that conflicts with FCC Rule 51.319. If the FCC requires BellSouth to provide the EEL as a UNE, then the Commission can address the issue of price in the UNE pricing docket (990649-TP).

Issue 4: Should volume and term discounts be available to ICG for UNEs?

> **Position: Volume and term discounts are not required by Section 251of the 1996 Act and are not appropriate for a Section 252 arbitration. The implementation of volume and term discounts will result in a departure from the Commission's previously adopted costing and pricing methodologies.

BellSouth should not be required to provide volume and term discounts for UNEs. Neither the Act nor any FCC order or rule requires volume and term discount pricing. (Varner Pre-Filed Direct, p. 44). The UNE recurring rates that ICG will pay are cost-based in accordance with the requirements of Section 252(d) and are derived using least-cost, forward looking technology consistent with the FCC's rules. Furthermore, BellSouth's nonrecurring rates already reflect any economies involved when multiple UNEs are ordered and provisioned at the same time. (Id.)

ICG's claim that volume and term commitments by ICG would reduce Total Element Long Run Incremental Cost ("TELRIC") prices is incorrect. ICG assumes that TELRIC prices are based on network costs as they are instead of as they are projected to be. (Varner Rebuttal, p. 14). An example of this flawed understanding of TELRIC pricing is instructive. ICG claims that a volume commitment by ICG would increase the utilization of plant. In reality, plant utilization in the TELRIC study represents the Commission's view of plant utilization in the future, not what it is today. Therefore, the TELRIC study already accounts for any volume that ICG, or any other CLEC might use in the future. (Varner Rebuttal, pp. 14-15; Tr. Vol. 4, pp. 455-456).

Regarding term commitments, ICG's position is similarly flawed. ICG maintains that, in the retail world, the risk of stranded plant costs would be reduced by a term commitment. None of the costs that a term commitment would reduce, however, are included in a TELRIC study. (Varner Rebuttal, p. 15). Thus, even if the risk of stranded plant was reduced, it is irrelevant because none of the costs were included in the prices in the first place. (Id.).

Moreover, retail prices typically exceed cost. Consequently, discounts due to term commitment simply reduce the level of contribution, not the level of cost. UNE prices do not include any contribution; therefore, there is no saving of TELRIC cost, and thus no basis exists for offering term discounts. (Id.).

The basis upon which ICG seeks volume and term discounts would require the Commission to re-think the pricing methodology previously adopted. The Commission's cost methodology is compliant with the provision of the 1996 Act and rules of the FCC. Specifically, Section 252(d)(1) requires the Commission to set rates that are based on the cost of providing the element, are nondiscriminatory, and may include a reasonable profit.

If the Commission decides, however, that this notion of volume and term discounts has merit, BellSouth submits that it is more appropriate to fully develop the issue in Docket No. 990649-TP, the Commission's UNE price docket. In that setting, all parties: CLECs, ILECs, etc., can be heard and the issue can be settled on a generic, not piecemeal, basis.

Issue 5: For purposes of reciprocal compensation, should ICG be compensated for end office, tandem, and transport elements of termination where ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch?

**Position: No. Based on prior Commission and FCC precedent, ICG must establish that its switch performs the same functions and covers the same geographic area as BellSouth's tandem switch. As ICG has no switch in Florida, it cannot meet its burden of proof on this issue.

If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. (Tr. 385). BellSouth will pay the tandem interconnection rate only if ICG's switch is identified in the local exchange routing guide ("LERG") as a tandem. (Varner Pre-Filed Direct, p. 44). A tandem switch connects one trunk to another trunk and is an intermediate switch or connection between an originating telephone call location and the final destination of the call. An end office switch is connected to a telephone subscriber and allows the call to be originated or terminated. If ICG's switch is an end-office switch, then it is handling calls that originate from or terminate to customers served by that local switch, and thus ICG's switch is not providing a tandem function. ICG is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide. (Varner Pre-Filed Direct, pp. 44-45).

In fact, on cross-examination, Ms. Schonhaut stated that ICG has no facilities in Florida, not even a switch.

> Q. Does ICG have any facilities in Florida, and by that I'm referring to switches and/or transport facilities?
>
> A. No.

(Tr. 240) In light of this admission, ICG's position is not credible. Without a switch, how can ICG's switch serve a geographic area comparable to the area served by BellSouth's tandem switch or provide similar functionality? Obviously it cannot and, therefore, as a matter of law ICG cannot meet its burden of proof.

Further, this commission has previously reached the same conclusion recommended by BellSouth in the Commissions Metropolitan Fiber Systems of Florida, Inc. ("MFS") and Sprint arbitration orders. The Commission determined that "MFS should not charge Sprint for transport because MFS does not actually perform this function." (Order No. PSC-96-1532-FOF-TP,

issued December 16, 1996.) The Commission reaffirmed this conclusion when it issued its Order in the MCI/Sprint arbitration case in Docket No. 961230-TP. (Order No. PSC-97-0294-FOF-TP, issued April 14, 1997.) The circumstances in the MFS/Sprint arbitration case can be logically extended to the issue raised by ICG in this arbitration proceeding. The evidence in the record does not support ICG's position that its switch provides the transport element; and the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually provide the network facility for which it seeks compensation. For the foregoing reasons, this Commission should deny ICG's request for tandem switching compensation when tandem switching is not performed.

Issue 6(A): Should BellSouth be required to enter into a binding forecast of future traffic requirements for a specified period?

> **Position: No. Binding forecasts are no required by Section 251 of the 1996 Act and, therefore, are not appropriate for a Section 252 arbitration. Further, BellSouth has offered ICG binding forecast language identical that found in the KMC Interconnection Agreement.

Any duty or obligation not included in Section 251 of the 1996 Act is not appropriate for arbitration under Section 252 of the 1996 Act. Specifically, Section 252(c) requires that:

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission, pursuant to Section 251;

Clearly, BellSouth is not required by Section 251 of the 1996 Act to commit to binding forecasts with any ALEC, including ICG. Mr. Phillip Jenkins (ICG's witness on this issue) admitted that there is no requirement contractually, legally, or otherwise that requires BellSouth to provide binding forecasts. (TR, at 68) Thus, this topic is not appropriate for arbitration.

Notwithstanding, BellSouth offered ICG the exact binding forecast language found in BellSouth's Interconnection Agreement with KMC. (TR 68) Additionally, BellSouth continues to study the idea of binding forecasts, and has not foreclosed the idea of ultimately agreeing to some kind of binding forecast outside of the parameters of the 1996 Act.

The simple fact remains, however, that binding forecasts are not required by Sections 251 or 252 of the 1996 Act. Consequently, binding forecasts are outside the scope of BellSouth's requirements under the law, and the Commission should reject the imposition of such on BellSouth.

Issue 6(B): If so, are they then required to provision the requisite network buildout and necessary support?

**Position: Again, there is no basis in the law for such a requirement. BellSouth, however, will comply with any final non-appealable Order of this Commission. If the Commission institutes such a requirement, BellSouth should be given the right to protest any proposed binding forecast submitted by ICG.

If BellSouth is ultimately required to provide binding forecasts for ICG's traffic requirements, BellSouth will honor its contractual obligation. If BellSouth is required to enter into such binding forecasts, however, BellSouth should remain free to determine the necessity for any network buildout or support, including the manner in which such resources should be deployed. In addition, BellSouth should be given the right to challenge any forecast ICG contends should be binding, if BellSouth believes such binding forecast is not feasible for BellSouth to provision or support.

CONCLUSION

For the reasons set forth above, BellSouth requests that the Commission (1) find that reciprocal compensation is not due for ISP-bound traffic; (2) reject ICG's request for tandem switching compensation when tandem switching is not performed; (3) allow BellSouth to

provide packet switching capability as a UNE until the FCC's Order on Rule 51.319 is issued and then, if necessary, review and modify its offer in accordance with the FCC's Order; (4) reject ICG's request for enhanced extended links and volume and term discounts for UNEs; and (5) reject the notion that BellSouth should be required to commit to binding forecasts with ICG.

Respectfully submitted this 29th day of October 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White (BWL)
NANCY B. WHITE
MICHAEL P. GOGGIN
c/o Nancy Sims
150 South Monroe Street, #400
Tallahassee, Florida 32301
(305) 347-5558

R. Douglas Lackey (BWL)
R. DOUGLAS LACKEY
E. EARL EDENFIELD JR.
A. LANGLEY KITCHINGS
675 West Peachtree Street, #4300
Atlanta, Georgia 30375
(404) 335-0763

183199