

ORIGINAL

MCWHIRTER REEVES

ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:

TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

October 29, 1999

BY HAND-DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

RECEIVED-PSC
OCT 29 PM 4:09
RECORDS AND REPORTING

Re: Docket Number 990691-TP

Dear Ms. Bayo:

On behalf of ICG Telecom Group, enclosed for filing and distribution are the original and fifteen copies of the following:

- ▶ ICG Telecom Group's Brief.

Please acknowledge receipt of the above on the extra copy and return the stamped copy to me. Thank you for your assistance.

Yours truly,

Joseph A. McGlothlin

A	_____
P	_____
F	_____
M	_____
JAM/jk	_____
R	_____
enc.	_____
G	_____
IG	_____
AS	_____
PC	_____
V	_____
EC	_____
AW	_____
TH	_____

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN, ARNOLD & STEEN, P.A.

DOCUMENT NUMBER-DATE
13305 OCT 29 99
FPSC-BUREAU OF RECORDS

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In re:)
)
Petition by ICG TELECOM GROUP, INC.)
for Arbitration of unresolved issues)
an Interconnection Negotiations with)
BELLSOUTH TELECOMMUNICATIONS,)
INC.)
_____)

Docket No. 990691-TP

Filed: October 29, 1999

**ICG TELECOM GROUP, INC.'S
POST-HEARING STATEMENT OF ISSUES AND POSITIONS
AND
POST-HEARING BRIEF**

**Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Decker, Kaufman,
Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850)222-2525
Telecopy: (850)222-5606**

**Albert H. Kramer
Dickstein, Shapiro, Morin & Oshinsky, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037
Telephone: (202) 785-9700**

Attorneys for ICG Telecom Group, Inc.

DOCUMENT NUMBER-DATE

13305 OCT 29 99

FPSO-RECORDS/REPORTING

A
A
C
C
C
E
L
M
C
P
R
V
C

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:)
)
Petition by ICG TELECOM GROUP, INC.)
for Arbitration of unresolved issues)
an Interconnection Negotiations with)
BELLSOUTH TELECOMMUNICATIONS,)
INC.)
_____)

Docket No. 990691-TP

Filed: October 29, 1999

ICG TELECOM GROUP, INC.'S
POST-HEARING STATEMENT OF ISSUES AND POSITIONS
AND
POST-HEARING BRIEF

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Decker, Kaufman,
Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850)222-2525
Telecopy: (850)222-5606

Albert H. Kramer
Dickstein, Shapiro, Morin & Oshinsky, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037
Telephone: (202) 785-9700

Attorneys for ICG Telecom Group, Inc.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:)
)
Petition by ICG TELECOM GROUP, INC.)
for Arbitration of unresolved issues)
an Interconnection Negotiations with)
BELLSOUTH TELECOMMUNICATIONS,)
INC.)
_____)

Docket No. 990691-TP

Filed: October 29, 1999

**ICG TELECOM GROUP, INC.'S
POST-HEARING STATEMENT OF ISSUES AND POSITIONS
AND
POST-HEARING BRIEF**

**Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Decker, Kaufman,
Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850)222-2525
Telecopy: (850)222-5606**

**Albert H. Kramer
Dickstein, Shapiro, Morin & Oshinsky, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037
Telephone: (202) 785-9700**

Attorneys for ICG Telecom Group, Inc.

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

SUMMARY OF ARGUMENT 1

ISSUE I:

UNTIL THE FCC ADOPTS 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? 3

1. ISP-Bound Traffic Should Be Subject to Reciprocal Compensation 3

A. The Commission Has the Authority to Address Compensation for ISP-Bound Traffic and Should do So Without Delay 3

1. The February 26, 1999 FCC *Declaratory Ruling* Makes Clear that the Commission Has the Authority to Address Compensation for Calls to ISP Now 4

2. BST's Contention that Reciprocal Compensation for ISP-Bound Traffic is Outside the Scope of §252 Was Rejected by the FCC 5

3. The Commission Should Not Delay In Acting on Compensation for ISP-Bound Traffic 6

a. The Commission Should Not Delay Merely Because the February 26, 1999 FCC *Declaratory Ruling* Is Subject to Court Challenge 6

b. If the Commission Delays Acting Until the FCC Issues a Final Rule, ICG and Other ALECs Will Never Receive Any Compensation for ISP-Bound Traffic Carried Prior to FCC Action. Such Inaction Will Cripple Local Competition 7

B. The Commission Should Require Reciprocal Compensation for ISP-Bound Calls 7

1. Requiring Reciprocal Compensation for ISP-Bound Traffic Is Sound Public Policy 7

a. Requiring Reciprocal Compensation for ISP-Bound Traffic Is Economically Efficient 8

b.	Calls Over LEC Facilities to ISPs are Functionally Identical to Local Voice Calls which are Subject to Reciprocal Compensation	8
c.	If the Commission Does Not Require Reciprocal Compensation for ISP-Bound Traffic, ICG will Incur Significant Costs Caused by BST's Customers that ICG will be Unable to Recover	10
d.	Eliminating the ALEC's Ability to Recover the Costs Associated with Serving ISPs is Likely to Distort One of the Few key Local Exchange Market Segments that is Well on the Way to Effective Competition	11
e.	Requiring Reciprocal Compensation for ISP-Bound Traffic Will Ensure that Florida Reaps the Benefits of the Explosive Growth of the Internet and Electronic Commerce	12
2.	The February 26, 1999 FCC <i>Declaratory Ruling</i> Strongly Suggests that Requiring the Payment of Reciprocal Compensation for ISP-Bound Traffic is Consistent with the FCC's Policy of Treating ISP-Bound Traffic as Local for Purposes of Interstate Access Charges	14
3.	Almost Without Exception, the State Public Service Commissions and Federal Courts that have Addressed the Issue since the <i>Declaratory Ruling</i> have Required Reciprocal Compensation for ISP-Bound Traffic ...	16
4.	BST's Arguments Ignore the Law and Economic Reality. To Give Credence to them would Lead to Anticompetitive Results	17

ISSUE II:

SHOULD THE FOLLOWING PACKET-SWITCHING CAPABILITIES BE MADE AVAILABLE AS UNES: 20

- a) User-to-user interface (UNI) at 56 kbps, 128 kbps, 384 kbps, 1.544 Mbps and 44.736 Mbps;;
- b) Network-to-network interface (NNI) as 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, 13.896 Mbps, 15.440 Mbps, 16.984 Mbps, 18.525 Mbps and 20.072 Mbps.

ISSUE III.

UNDER THE TELECOMMUNICATIONS ACT OF 1996, SHOULD “ENHANCED EXTENDED LINK” LOOPS (EELs) BE MADE AVAILABLE TO ICG IN THE INTERCONNECTION AGREEMENTS AS UNEs? 22

1. BST Currently Combines Loop and Transport within its Network. Therefore, it Must Make the EEL Available to ICG as a Combination of UNEs. 23

2. The EEL is an Efficient Means of Bringing the Benefits of Competition to a Broad Base of Florida Businesses and Consumers 24

3. BST’s Argument that it Should Not Be Required to Make EEL Available Because it Replicates Special Access Service is Without Merit 25

4. The EEL Must be Made Available Fully, at UNE Prices 25

ISSUE IV:

SHOULD VOLUME AND TERM DISCOUNTS BE AVAILABLE TO ICG FOR UNEs? 26

1. ICG Should Share in BST’s Cost Savings that Result from ICG Purchase of UNEs Within Volume and with Term Commitments 27

2. The Commission Has the Authority under §252 to Require Volume and Term Discounts for UNEs 27

3. Neither of BST’s Arguments as to Why it Should Not Be Required to Provide Volume and Term Discounts has Merit 29

A. Volume and Term Discounts are Not Already Reflected in the TELRIC - Based Prices for UNEs Established by the Commission 29

B. It is Irrelevant that BST Provides Unbundled Loops at Statewide Average Rates 29

ISSUE V:

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? 30

ISSUE VI:

- A. SHOULD BELLSOUTH BE REQUIRED TO ENTER INTO A BINDING FORECAST FOR A SPECIFIED PERIOD?**

- B. IF SO, ARE THEY THEN REQUIRED TO PROVISION THE REQUISITE NETWORK BUILDOUT AND NECESSARY SUPPORT? 32**
 - 1. The Binding Forecast Proposal will Assure that BST Provisions the Trunking Capacity Necessary to Ensure that there is No Blockage of Incoming Calls to ICG's Network. 33
 - 2. ICG Protects BST by Bearing All of the Financial Risk..... 33
 - 3. It is Within the Commission's Section 251 Authority to Require Binding Forecasts. 34

CONCLUSION 35

PRELIMINARY STATEMENT

Pursuant to rule 28.106.215, Florida Administrative Code, ICG Telecom Group, Inc. (ICG) files its Post-Hearing Statement of Issues and Positions and its Post-Hearing Brief.

ICG is an Alternative Local Exchange Company (ALEC) that seeks to interconnect with BellSouth Telecommunications, Inc. (BST) in order to offer competitive local exchange and other services in Florida. This proceeding was initiated by a Petition for Arbitration pursuant to Section 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act), 47 U.S.C. § 252, filed by ICG on May 27, 1999 (the Petition). In the Petition, ICG requested that the Commission resolve 26 disputed issues arising out of its interconnection agreement negotiations with BST. BST filed its Response to ICG's arbitration Petition on June 21, 1999. As a result of the settlement negotiations between the parties as well as certain rulings by the Prehearing Officer, six issues remain for Commission decision.

The following abbreviations are used in this brief. ICG Telecom Group, Inc. is referred to as ICG. BellSouth Telecommunications, Inc. is referred to as BST. The Florida Public Service Commission is called the Commission. The Federal Communications Commission is referred to as the FCC. The Communications Act of 1934, as amended by the Telecommunications Act of 1996, is called "the Act."

SUMMARY OF ARGUMENT

This arbitration proceeding presents the Commission with several issues that are significant to the development of local competition in Florida. The issues presented for arbitration encompass BST's refusal to include ISP-bound traffic within the mechanism for reciprocal compensation; the adequacy of the compensation rate to be paid to ICG within the mechanism; BST's attempt to limit the availability of, and impose high retail prices on, both packet switching and enhanced extended links (EEL); ICG's need for binding forecasts; and BST's refusal to build provisions for volume and term discounts into the interconnection agreement.

The inclusion of ISP-bound traffic within the reciprocal compensation mechanism is necessary to enable ICG to recover the costs that BST's customers impose on ICG's system

when they call ICG's ISP customers. Such calls are functionally no different than other calls that ICG completes for BST, for which BST agrees to compensate ICG. The FCC has confirmed this Commission's authority to arbitrate the matter; has ruled repeatedly that such traffic must be treated as "local" for regulatory purposes; and has even noted that ISP-bound traffic requires compensation, *whether through the reciprocal compensation mechanism or an alternative means*. In the face of these FCC pronouncements and economic reality, BST's opposition can only stem from anticompetitive motives. If it succeeds in denying ICG the ability to recover the costs that BST's customers impose on ICG's system, BST can hope to regain through a distorted regulatory result the customers it has been losing in the competitive marketplace. This result would be unfair to ICG and devastating to the development of competition in Florida.

As critical as the recognition of the types of traffic properly included in the reciprocal compensation mechanism is the sufficiency of the compensation rate that is to be applied to it. ICG's business practice is to configure its network such that its switch serves a geographic area comparable to that served by BST's tandem switch. Accordingly, to calculate the amount of reciprocal compensation to which ICG is entitled, applicable FCC criteria require BST to apply its tandem interconnection rate to the traffic that is subject to the mechanism.

BST refuses to provide packet switching and the EEL as unbundled network elements in the interconnection agreement. ICG needs each to offer an array of competitive services. BST camouflages its anticompetitive stance by offering to provide them outside the interconnection agreement. Its proposals are designed to impede effective competition by fragmenting ICG's market, increasing ICG's costs, and creating inefficiencies for ICG. With respect to the EEL, even under its voluntary offer BST refuses to provide smaller DS0 transport, thereby arbitrarily rendering service to an important market segment – small and medium-sized businesses – infeasible. Further, BST intends to impose exorbitant, non-TELRIC, prices on the EEL. With respect to packet switches, BST would charge tariffed, retail prices for interoffice transport, even though packet switches do not reside in all of BST's central offices. In these ways, BST hopes to fracture the availability of the elements and/or require ICG to duplicate BST's network anywhere it wishes to compete. BST's strategy conflicts with the intent and objectives of the Act.

BST opposes ICG's proposal for selective binding forecasts, even though ICG is willing

to commit to pay BST for any facilities it does not use. Providing a fast-growing new entrant with assurance that needed facilities will be available is an essential component of the environment needed to promote and encourage competition.

ICG requests the Commission to require BST to include term and volume discounts in the interconnection agreement. If ICG commits to volumes and terms that enable BST to use its network more efficiently, the savings will not be shared with ICG unless the agreement provides for such terms.

ISSUE I

UNTIL THE FCC ADOPTS A RULE WITH PROSPECTIVE APPLICATION, SHOULD DIAL-UP ACCESS TO INTERNET SERVICE PROVIDERS (ISPs) BE TREATED AS IF IT WERE A LOCAL CALL FOR PURPOSES OF RECIPROCAL COMPENSATION?

ICG: *Yes. The FCC has clearly determined that, until its rule takes effect on a prospective basis, state commissions have jurisdiction to require that reciprocal compensation should be paid for ISP traffic. Moreover, it has stated its view that state commissions have an obligation to require ILECs to compensate ALECs for ISP traffic.*

1. ISP-Bound Traffic Should Be Subject to Reciprocal Compensation.

ICG submits that the Commission should require BST to sign an interconnection agreement providing that ISP-bound traffic is subject to reciprocal compensation.

A. The Commission Has the Authority to Address Compensation for ISP-Bound Traffic and Should Do So Without Delay.

The threshold issue that the Commission must address in deciding whether to require reciprocal compensation for ISP-bound traffic is whether it has the authority to do so in light of the FCC February 26, 1999 Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling*).¹

The answer to that question is yes. In the *Declaratory Ruling*, the FCC held that, although mixed, calls to ISPs appear to be largely interstate for jurisdictional purposes. *Id.* at

¹ The Commission took official recognition of this order. (Tr. 5-6).

3690, ¶ 1. As discussed below, however, the FCC made absolutely clear that its jurisdictional determination in *no way* affected the authority of state public service commissions to address compensation for ISP-bound traffic. *Id.* at ¶ 27.

BST does not even contest the Commission's jurisdiction to address compensation for ISP-bound traffic under the *Declaratory Ruling*. Rather, BST contends that, while the Commission may have the authority to address compensation for ISP-bound calls, it is inappropriate for the Commission to do so in a § 252 arbitration. For the reasons discussed below, this argument is completely without merit.

BST also argues that, the Commission's authority to act notwithstanding, the Commission should decline to do so because the *Declaratory Ruling* is under appellate challenge. (Tr. 312-313). As discussed in Section I.A.3. below, however, the *Declaratory Ruling* is a clear statement of the controlling law. There is no reason for the Commission to delay. In fact, delay would cripple local competition in Florida/

1. The February 26, 1999 FCC Declaratory Ruling Makes Clear that the Commission Has the Authority to Address Compensation for Calls to ISPs Now.

In the *Declaratory Ruling*, the FCC held that, although mixed, ISP-bound traffic appears to be largely interstate. *Declaratory Ruling* at 3690, ¶ 2. The FCC therefore asserted jurisdiction over ISP-bound traffic. *Id.*

However, the FCC explicitly said that its jurisdictional ruling does not at all affect the authority of the state public service commissions to require reciprocal compensation for ISP-bound traffic under Section 252 of the Act. The following excerpts from the *Declaratory Ruling* make this absolutely clear:

Our determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption. ESPs, including ISPs, continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs. Nor, as we discuss below, is it dispositive of interconnection disputes currently before state commissions. *Id.*, ¶ 20.

* * *

We find no reason to interfere with state commission findings as to whether

reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic. *Id.*, ¶ 21.

* * *

[N]othing in this *Declaratory Ruling* precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate [in this *Declaratory Ruling*]. *Id.*, ¶ 27.

* * *

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. *Id.*, ¶ 25 (emphasis added).

Thus, one of the *Declaratory Ruling's* central findings is that state public service commissions remain free to address compensation for ISP-bound traffic. Indeed, numerous state public service commissions and federal courts have ruled that state commissions have the authority to address compensation for ISP-bound calls.

The recent ruling of the United States Court of Appeals for the Seventh Circuit is typical of these cases. In *Illinois Bell Telephone Company v. WorldCom Technologies, Inc., et al.*, 179 F.3d 566, 574 (7th Cir. 1999) (*Illinois Bell*), the Seventh Circuit considered an order of the Illinois Commerce Commission requiring Ameritech-Illinois to pay reciprocal compensation for ISP-bound calls. The Court found the Illinois Commission's order consistent with the FCC's *Declaratory Ruling*. The Court stated that "the FCC could not have made clearer its willingness—at least until the time a [FCC] rule is promulgated—to let state commissions make the call." *Id.* at 574. Significantly, the Seventh Circuit found that the Illinois Commission's decision was "in the mainstream of thought on the issue," and that "the commissions in well over half the states have made the same determination that the [Illinois Commission] made, including some interpretations made after the [*Declaratory Ruling*]." *Id.*

2. BST's Contention that Reciprocal Compensation for ISP-Bound Traffic is Outside the Scope of § 252 Was Rejected by the FCC.

Precluded by the clear language of the *Declaratory Ruling* from launching a direct challenge to the Commission's authority to address compensation for ISP-bound calls, BST is

left to argue that the Commission cannot do so in a § 252 proceeding. In BST's view, since § 251(b)(5) of the Act concerns inter-carrier compensation for *local* traffic and the FCC has held that calls to ISPs are jurisdictionally *interstate*, § 251(b)(5) does not govern inter-carrier compensation for ISP-bound calls. Thus, BST argues, state public service commissions do not have the authority to address reciprocal compensation for ISP-bound calls in § 252 arbitration proceedings since § 252 only gives the state commissions jurisdiction over areas within the scope of § 251. (Tr. 316).

The *Declaratory Ruling*, however, makes it clear that this is not the case. The FCC held that:

Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding – or a subsequent state commission decision that those obligations encompass ISP-bound traffic – does not conflict with any [FCC] rule regarding ISP-bound traffic. (emphasis added.)

Declaratory Ruling, at 3706, ¶ 26 (emphasis added). Accordingly, “in the absence of a federal rule, state commissions have the authority under § 252 of the Act to determine inter-carrier compensation for ISP-bound traffic.” *Declaratory Ruling*, at 3706, ¶ 26 n.87.

3. The Commission Should Not Delay in Acting on Compensation for ISP-Bound Traffic.

BST raises two arguments as to why the Commission should refrain from addressing reciprocal compensation for ISP-bound traffic, even though the *Declaratory Ruling* clearly permits it to do so. Neither argument is of any merit.

a. The Commission Should Not Delay Merely Because the February 26, 1999 FCC *Declaratory Ruling* is Subject to Court Challenge.

BST witness Varner argues that it would be a waste of the Commission's efforts to address reciprocal compensation for ISP-bound traffic because, in his view, 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 arrangement.” (Tr. 313). However, as ICG witness Schonhaut testified, in making this argument “Mr. Varner concedes that the present state of the law is such that this Commission has the requisite authority to order reciprocal compensation for calls to ISPs. Only a court can remove this authority, but no court has thus far given any indication that it will change the existing situation before the FCC adopts a rule.” (Tr. 436-464). Until such time as a court does change the *status quo*, the *Declaratory Ruling* is controlling federal law.

b. If the Commission Delays Acting Until the FCC Issues a Final Rule, ICG and Other ALECs Will Never Receive Any Compensation for ISP-Bound Traffic Carried Prior to FCC Action. Such Inaction Will Cripple Local Competition.

As for BST’s argument that the Commission should not act because of the FCC’s pending ruling, the FCC has made it clear that its ruling will have prospective effect only. (Tr. 462; see *Declaratory Ruling*, at 3707, ¶ 28.) If the Commission does not take action to compensate calls to ISPs, ICG and other carriers with ISP customers will *never* be compensated for the calls they deliver to ISPs during the interim period between the approval of the parties’ interconnection agreement and the time the FCC adopts a rule. (Tr. 462). Compounding the adverse economic impact on ICG, as ICG witness Schonhaut points out, “the interim period could stretch for several months or even a year.” *Id.* In this regard, it is worth noting that it “took the FCC almost two years (20 months) to respond to the June 1997 request for clarification that led to the *Declaratory Ruling*.” *Id.* There is no reason to believe that the FCC will act more expeditiously in promulgating a final rule than it did in releasing the *Declaratory Ruling*. Assuming a roughly similar timetable, a final rule could be a year or more away. Further, the FCC has indicated its action at that time may be to refer the issue to the states for resolution. (*Declaratory Ruling*, at 3709 ¶30).

B. The Commission Should Require Reciprocal Compensation for ISP-Bound Calls.

1. Requiring Reciprocal Compensation for ISP-Bound Traffic Is Sound Public Policy.

The *Declaratory Ruling* makes clear that the Commission has the authority to require reciprocal compensation for ISP-bound calls. Economic and public policy considerations dictate that it must.

a. Requiring Reciprocal Compensation for ISP-Bound Traffic Is Economically Efficient.

Reciprocal compensation is cost-based. It imposes the cost of delivering traffic on the cost-causer, *i.e.* the carrier whose subscriber initiates the call. In an efficiently functioning market, BST should be economically indifferent as to whether it incurs the costs to deliver an ISP-bound call on its own network or whether it incurs that cost through a reciprocal compensation rate paid to ICG.

The calls in both scenarios will travel very similar paths. The only difference will be that when the ISP is an ICG customer, ICG performs the switching function to deliver the call to the ISP. (Tr. 139-140). In this way, BST avoids those switching costs and ICG incurs them. *Id.* Hence, if BST has accurately established its terminating reciprocal compensation rate based on its own cost of delivering the call, BST should be economically indifferent to whether a call that originates on its network is delivered to a BST customer or to an ICG customer. In the first instance, BST will incur the cost of delivering the call via its own switch; in the second, BST will incur that cost via a cost-based rate paid to ICG for delivering the call. *Id.*

b. Calls Over LEC Facilities to ISPs are Functionally Identical to Local Voice Calls which are Subject to Reciprocal Compensation.

ISP-bound calls are functionally identical to local voice calls that are subject to reciprocal compensation. As explained in detail by ICG witness Starkey, a “ten minute call originated on the BST network and directed to the ICG network travels exactly the same path, requires the use of exactly the same facilities and generates exactly the same level of cost regardless of whether that call is dialed to an ICG local residential customer or to an ISP provider.” (Tr. 137-232). (“[T]he functions performed by ICG’s network are the same when it delivers a call from BST’s customer to ICG’s customer as when ICG terminates any other call.”).

That the call to an ISP continues on to its ultimate destination, an Internet website, is

irrelevant. While ICG incurs no costs for the component of the call that takes place off the network, the relevant portion of the call is that which is carried on ICG's facilities. In terms of how ICG's network is used, that segment of the call is identical to any local voice call. As ICG witness Starkey testified:

[R]egardless of whether the originating customer dials either [an] ICG residential or [an] ISP customer, the call travels from the originating customer's premises to the BST central office switch, which then routes the call to the BST/CG interconnection point and ultimately to the ICG switch. From the ICG switch the call is then transported to either the residential customer or the ISP customer depending upon the number dialed by the BST customer.

(Tr. 137. See Diagram 1, Exhibit 2, showing that calls from a BST customer to an ICG residential customer and to an ICG ISP customer are identical in their use of ICG's network). Most importantly, the costs to deliver the calls to the residential customer and the ISP customer are identical. (Tr. 137). There is no basis for treating ISP-bound calls differently than calls to any other local exchange customer.

That there is no difference between how BST-originated local voice calls and ISP-bound calls are carried by ICG's network is made apparent by BST's own exhibits in this proceeding. Compare Diagrams "B" and "G", attached to witness Varner's Direct Testimony. Diagram "B" depicts a call originated by a BST end user, carried by BST to the point of interconnection, and then delivered by an ALEC to the ALEC's non-ISP end user. Diagram "G" depicts a call originated by a BST end user, carried by BST to the point of interconnection, and then delivered by an ALEC to the ALEC's ISP end user customer. Significantly, the two charts are completely identical, except for the labeling of the ALEC's customer in the one instance as an ISP and in the other as a non-ISP. In other words, by BST's own admission, calls to ICG's customers, whether or not they happen to be an ISP, transit BST's and ICG's networks in *exactly* the same manner.

The Act requires, and the parties have agreed, that they will pay one another reciprocal compensation for local calls. Yet, BST would have functionally identical calls to ISPs go completely uncompensated. This runs counter to one of the most basic economic principles: Given that the costs to deliver calls made to residential customers and to ISP customers are identical, the rates associated with recovering those costs should be identical. As ICG witness

Starkey testified:

To single out the ISP call and suggest that \$0 compensation should be paid for purposes of carrying that particular call and some other, non-zero rate should be applied to all other calls ignores the simple economic reality that both calls generate equal costs that must be recovered by the reciprocal compensation paid for their carriage.

(Tr. 137-138).

c. If the Commission Does Not Require Reciprocal Compensation for ISP-Bound Traffic, ICG will Incur Significant Costs Caused by BST's Customers that ICG will be Unable to Recover.

The costs incurred by ICG in delivering a call originating in BST's system and bound for an ISP customer do not differ from those generated by calls bound for other types of ICG customers. In both instances, ICG is entitled to recover those costs from BST. It is BST's position, however, that ICG should make its facilities available to BST's customers at no cost.

If the Commission does not require reciprocal compensation for ISP-bound calls, "ICG will not receive any compensation for calls to ISPs" and "will be unable to recover its costs of delivering calls to ISP customers on behalf of end users served by BellSouth." (Tr. 231-232). It is especially critical that ICG be able to recover its costs for delivering ISP-bound traffic from BST customers, because ISPs have comprised a significant portion of ICG's customer base in all of ISG's service areas. BSTs attempt to exclude calls to ICG ISP customers from reciprocal compensation unfairly targets that customer base and threatens to leave ICG in the position of delivering a tremendous number of calls from BST customers without any payment from BST. (Tr 127). This will inevitably result in ICG either incurring costs that go uncompensated or cause ICG to lose its ISP customers by raising its price for serving them. (Tr. 414-432).

Moreover, ICG's loss will be BST's gain; BST will be given a free-ride while ICG incurs the costs associated with providing Internet access to BST's customers. This translates into a double competitive advantage for BST; not only will it avoid paying the costs generated by its customers, it will foist those costs off on a competitor. BST's proposal turns on its head one of the most basic principles of regulatory economics: that costs should be borne by cost-causers.

BST suggests that it is inappropriate for ICG to focus so heavily on ISPs as opposed to

other customers. ICG, however, does not focus only on ISP customers. ISPs represent a significant but not dominant percentage of ICG's customers. (Exhibit No. 4).

That ICG is committed to non-ISP customers is reflected in its positions on the issues in this proceeding. ICG would have no need for EELs, UNEs, or binding forecasts if it intended to serve only ISPs. ICG is preparing to offer service to a variety of Florida consumers and, as ICG witness Schonhaut testified, will provide service to all Florida consumers when it becomes economically feasible to do so. (Tr. 271-273). This is obviously made more difficult if ICG is forced to bear significant costs resulting from the uncompensated use of ICG's network by BST's customers.

Moreover, if ICG and other ALECs were not successful in obtaining ISP customers (as BST intended by competing for ISP business through BellSouth.net), BST would be responsible for both originating and delivering every call to ISPs. To accommodate the growth of ISP-bound traffic, BST would be forced to incur the substantial costs of providing the network capacity necessary to handle the increased traffic. It seems highly unlikely that, under these circumstances, BST would argue that it should deliver ISP-bound traffic for free; yet, that is exactly what BST is asking the Commission to order ICG to do in this proceeding. The only difference between the issue presented to the Commission and the above hypothetical is that, instead of BST investing in its network to meet the capacity requirements resulting from the explosion of Internet traffic, ICG and other new entrants are investing their own capital to accommodate the growth. ICG and other ALECs should be compensated for carrying that traffic so that they can recover their investments. (Tr. 140-141).

Through cross-examination, BST implied that the rates that ICG charges ISPs do not cover ICG's costs. The record reflects that, however they are measured, ICG's rates to ISPs recover the costs properly attributable to them and provide a contribution to joint costs. (Tr. 286). ICG's rates to ISPs do not, however, recover costs caused by BST's customers, which is why reciprocal compensation is appropriate.

d. Eliminating the ALECs' Ability to Recover the Costs Associated with Serving ISPs is Likely to Distort One of the Few Key Local Exchange Market Segments that is Well on the Way to Effective Competition.

Losing their ability to serve their ISP customer base would hit ICG and other ALECs

particularly hard. ISPs and other technologically advanced customers are a natural entry point into the local exchange marketplace for competitive providers. Mr. Starkey, ICG's economist, testified that, in marketplaces undergoing a transition towards competition, new entrants are usually most successful in attracting customers that:

- (1) are most disaffected by the services or quality offered by the incumbent, (2) have technological, capacity or specific requirements that are not easily met by the incumbent's oftentimes inflexible service offerings and/or (3) don't have a long history of taking service from the incumbent.

(Tr. 132). ISPs meet all three of these criteria, "making them far more likely to explore competitive opportunities than more traditional residential and/or business customers." (Tr.133).

The success of ICG and other ALECs in attracting ISP customers away from BST and other ILECs has resulted in the ISP "market segment exhibiting some of the most competitive characteristics of any segment in the local market." (Tr. 134-135). It is thus no coincidence that BST refuses to pay reciprocal compensation for ISP-bound traffic. If ICG and other ALECs cannot recover the costs that ILECs' customers impose on ISP traffic, those customers will "immediately turn from highly valued customers to customers that are likely to be unprofitable." (Tr. 136). In other words, BST will have succeeded in turning one of the ALECs' most notable competitive successes into a defeat. Given the large volume of ICG's ISP customer base, the "impact of no reciprocal compensation for [ISP-bound traffic] would be felt across ICG's operations." (Tr. 227). This in turn could have serious ramifications for the spread of competition in the local exchange marketplace. Having lost their toehold in the local marketplace and without the growth potential produced by ISPs, it will be significantly more difficult for ALECs to successfully enter other, more traditional residential and business markets. (Tr. 133-134).

e. Requiring Reciprocal Compensation for ISP-Bound Traffic Will Ensure that Florida Reaps the Benefits of the Explosive Growth of the Internet and Electronic Commerce.

Not only would ALECs suffer if the Commission does not require reciprocal compensation for ISP-bound traffic; ISPs and their customers (who are mostly BST residential customers receiving access to the Internet) would also be significant losers. ICG has been highly

successful in attracting ISP customers in other states in large part because of the failure of the ILECs to adequately serve those customers. Before ALECs began to offer competitive service, ISPs and other end users with specialized needs were dependent exclusively on the ILECs, which, as monopoly providers, have little incentive to tailor services to meet the needs of ISPs. As ICG witness Schonhaut testified, “Without competitive pressures, the ILECs offered only ‘one size fits all’ service at high rates. Often the ‘size’ offered to ISPs was one that barely fit [their] operations.” (Tr. 226).

Once ICG entered the market in other states, however, it was able to “offer ISPs service packages that are carefully tailored to the ISP’s operators.” *Id* at 226. For example, ICG has led the way in offering volume and term discounts to ISPs. *Id*. ICG has also gone beyond offering ISPs simple delivery of traffic and has provided turn-key solutions to ISPs needs. *Id*. Among other things, ICG offers ISPs the option of collocating ISP equipment alongside ICG equipment in ICG’s central offices. (Tr. 227). ISPs have also been attracted by ICG’s superior network, which consists entirely of digital switching and fiber optic transport as opposed to the ILEC’s hybrid legacy networks. Tr. 226).

Without the arrival of ICG and other ALECs, there is no reason to believe that the ILECs would have been spurred to develop the attractive service packages that ALECs offer ISPs. *Id*. at 5. They certainly would not have done so at the accelerated pace that competition has produced.

If the Commission does not require reciprocal compensation for ISP-bound traffic, many of the benefits provided to ISPs by ALECs will be lost. ICG and other ALECs would be forced either to raise their rates or absorb significant costs. If ALECs are forced to raise their rates, it could result in increased costs to end users of ISP services. (Tr. 228). As ICG witness Schonhaut testified, this in turn could deter the growth of the Internet in Florida: “[t]here is no way of knowing how ISPs would handle rate increases, and whether ISP rate increases would artificially suppress demand for services in such a way that the growth of the Internet in this state would not reach the levels it otherwise would have.” (Tr. 228-229).

Another negative outcome that could result if there is no reciprocal compensation for ISP-bound traffic is a distortion of the marketplace, making ISPs artificially less attractive than other high volume customers. In other words, “instead of encouraging the development of

products and specialized services to support the Internet and data services, the marketplace would reward service providers that support more traditional users whose telecommunications needs are already being addressed.” (Tr. 465). While BST scoffs at this concern, the continued growth of the Internet is obviously of critical importance to Florida’s economy. (Tr. 225-226).

2. The February 26, 1999 FCC Declaratory Ruling Strongly Suggests that Requiring the Payment of Reciprocal Compensation for ISP-Bound Traffic is Consistent with the FCC’s Policy of Treating ISP-Bound Traffic as Local for Purposes of Interstate Access Charges.

Not only does the *Declaratory Ruling* leave the states free to require reciprocal compensation for ISP-bound traffic: It suggests strongly that this is the correct policy result. The FCC notes this outcome is consistent with the FCC’s treatment of ISP-bound traffic as local for purposes of interstate access charges.

Since 1983, the FCC’s policy has been to exempt ISPs and other enhanced service providers (ESPs) from the payment of access charges.¹ Pursuant to this exemption, ISPs are “treated as end users for purposes of assessing access charges” and they are permitted to purchase “their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs.” *Declaratory Ruling*, at 3692, ¶ 5. Thus, the FCC “discharges its interstate regulatory obligations by treating ISP-bound traffic as though it were local,” *Declaratory Ruling*, at 3693, ¶ 5, notwithstanding the ruling that *jurisdictionally* ISP-bound calls are largely interstate.

The FCC also made clear that, in deciding whether to require reciprocal compensation for ISP-bound traffic, state public service commissions should be guided by the FCC’s policy of treating ISP-bound traffic as functionally local:

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

¹ See *Declaratory Ruling*, at 3691-92, ¶ 5 (citing *MTS/WATS Market Structure*, 97 FCC 2nd 682, 715 (1983)). The FCC recently decided to maintain the exemption in effect. *Access Charge Reform, First Report and Order*, 12 FCC Rcd 15982, 16133-34 (1997), *aff’d sub nom, Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

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.

Declaratory Ruling, ¶ 25 (emphasis added). A determination by this Commission that the parties should pay one another reciprocal compensation would be consistent with the functionally local nature of ISP-bound traffic and with the FCC’s regulatory framework for that traffic.

Importantly, the FCC goes on to say that “in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic *and* to adopt another compensation mechanism.” *Declaratory Ruling*, at 3706, ¶ 26 (emphasis added). The FCC’s point here—as the use of “and” as opposed to “or” makes clear—is not that state commissions can elect to provide *no* compensation for ISP-bound calls. Rather, the FCC observed that a state commission can elect to provide some form of compensation for ISP-bound calls other than reciprocal compensation. In other words, the question is not whether compensation will be provided but what rate of compensation is appropriate.

Both Maryland and Minnesota have specifically agreed with this reading of the FCC’s directive in the course of ruling that ISP-bound traffic is subject to reciprocal compensation. As ICG witness Starkey pointed out in his testimony (Tr. 480-482), the Maryland Public Service Commission’s recent order on this point is particularly well reasoned. The Maryland Commission first recognized the need for a compensation mechanism. It then concluded that the *Declaratory Ruling* not only permits the state commissions to act to provide compensation for ISP-bound calls, it compels them to do so:

We are very concerned that [denying reciprocal compensation for ISP-bound traffic] will result in CLECs receiving no compensation for terminating ISP-bound traffic. Such an effect will be detrimental to our efforts to encourage competition in Maryland. No one disputes that local exchange carriers incur

costs to terminate the traffic of other carriers over their network. In the absence of finding that reciprocal compensation applies, a class of calls (ISP traffic) will exist for which there is no compensation. Absent [a cost recovery] mechanism, CLECs will be forced to absorb those costs. (Emphasis added.)

* * *

Thus, under the [*Declaratory Ruling*], it is incumbent upon this Commission to determine an interim cost recovery methodology which may be used until the FCC completes its rulemaking on this issue and adopts a federal rule governing inter-carrier compensation arrangements. In fact, according to the FCC, 'State commissions are free to require reciprocal compensation for ISP-bound calls, or not require reciprocal compensation and **adopt another compensation mechanism**, bearing in mind that ISPs/ESPs are exempt from paying access charges.' This directive does not leave us the option of providing for no compensation for ISP-bound traffic calls. State commissions must either require reciprocal compensation or develop another compensation mechanism. (emphasis added.)

* * *

In the Matter of the Complaint of MFS Intelnet of Maryland, Inc. Against Bell Atlantic-Maryland, Inc. for Breach of Interconnection Terms and Request for Immediate Relief, Case No. 8731, Order No. 75280, released June 11, 1999, at 16-17. (emphasis in original; citations omitted) (*Maryland Reciprocal Compensation Order*).

3. Almost Without Exception, the State Public Service Commissions and Federal Courts That Have Addressed the Issue since the *Declaratory Ruling* have Required Reciprocal Compensation for ISP-Bound Traffic.

Of the numerous states that have considered the question and reached the merits since the *Declaratory Ruling* was issued, all except two – New Jersey and South Carolina – have upheld the application of reciprocal compensation to ISP-bound traffic. (Three other states – Massachusetts, Missouri, and West Virginia – declined to render a final ruling until the FCC addresses the issue.) For the Commission's reference, all 19 state commission decisions were provided in Exhibit No. 3.²

²In Docket No. 990149-TP, this Commission instructed BST and MediaOne to continue to abide by the provisions of an existing agreement. In that case, prior to the decision both parties signaled that they would be willing to accept that outcome. In this case, because BST has yet to acknowledge ICG's right to receive compensation for ISP-bound traffic pursuant to the existing agreement, such a result is unacceptable to ICG. ICG asks the Commission to arbitrate

Similarly, all four federal courts that have issued decisions addressing appeals of state public service commission decisions requiring reciprocal compensation for ISP-bound traffic after the release of the *Declaratory Ruling* have upheld the state commission's determination. The four courts include the United States Court of Appeals for the Seventh Circuit and three District Courts.

4. BST's Arguments Ignore the Law and Economic Reality. To Give Credence to them Would Lead to Anticompetitive Results.

As BST's opposition to doing so attests, BST is not economically indifferent to paying reciprocal compensation for ISP-bound traffic. This is because BST has an anticompetitive interest in denying its competitor, ICG, the ability to recover a substantial portion of its costs. (Tr. 140-141). BST may also not be economically indifferent because its rate for call termination is not representative of the underlying costs. With respect to the great majority of the services included in the interconnection agreement between BST and ICG, ICG will be required to pay BST for services rendered. BST has every incentive to overestimate its underlying costs associated with the services it provides to ICG. By doing so, it increases its revenues from providing these services; at the same time it also raises ICG's costs, thereby slowing its competitor's entry into the marketplace. However, BST is aware that because ALECs have been successful in attracting ISP providers and other technologically demanding customers, BST has become a net payor of reciprocal compensation. As a result, if BST's rates for traffic transport and termination are indeed overstated, BST becomes the party most likely to be harmed. Given this scenario, BST would act to: (1) reduce its charges to reflect cost-based rates, or (2) remove from the reciprocal compensation equation the reason for its "net payor" status. It is apparent that BST has chosen the second option by refusing to pay reciprocal compensation for calls directed to ISP providers served by its ALEC competitors. (Tr. 141-143).

Through comparisons of different scenarios, BST witness Varner disputes ICG's claim that BST should be economically indifferent to whether it pays reciprocal compensation for ISP-bound traffic. (Tr. 323-234). However, he does not compare a BST-originated call delivered to

the present dispute and require BST to include ISP traffic in reciprocal compensation.

a BST ISP customer with a BST-originated call delivered to an ICG ISP customer. Indeed, neither of Mr. Varner's two illustrative diagrams even depicts a situation in which BST both originates and delivers ISP-bound traffic. Instead, both of Mr. Varner's diagrams depict a scenario in which BST passes the call to an ALEC which in turn passes the call on to an Interexchange Carrier (IXC) or ISP. The two diagrams are identical except that in one diagram, BST is shown as receiving switched access revenue and in the other it is shown as not receiving switched access revenue.

Mr. Varner's analysis is grossly, fatally flawed. His underlying premise is that ISPs are purchasers of exchange access service – that they are essentially “IXCs in disguise.” Governing decisions of the FCC leave no room for this argument – and haven't for some sixteen years! The FCC has stated repeatedly and emphatically that, pursuant to the 1983 ESP exemption, ISP-bound traffic is *not* to be treated as exchange access for regulatory purposes. *See Declaratory Ruling*, at 3691-92, ¶ 5 and the authority cited therein. The FCC held that “[o]ur determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption.” *Declaratory Ruling*, at 3702, ¶ 20.

The exemption leads to two regulatory results. First, ISPs are treated as end users—not carriers—in terms of how they relate to the public switched network. *Declaratory Ruling*, at 3692, ¶ 5. Second, the FCC treats “ISP-bound traffic as though it were local” traffic, *Declaratory Ruling*, at 3703, ¶ 23; *See id.* at 3701, ¶ 16, and requires the states to do the same, *id.* at 3706, ¶ 26 n. 88. These two regulatory results, in turn, dictate that ISPs purchase services from LEC local exchange tariffs instead of from LEC access tariffs. *Id.* (Tr. 174-177). As the FCC found in the *Declaratory Ruling*, typically the ISP “purchases business lines from a LEC for which it pays a flat monthly fee that allows unlimited incoming calls.” *Declaratory Ruling*, at 3691, ¶ 4. In other words, pursuant to the ESP exemption, ISPs purchase the same local exchange service as any other business customer. For their part, incumbent LECs have traditionally characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes. *Declaratory Ruling*, at 3703, ¶ 23.

Few words in the English language are as definite in their meaning as “exempt,” and few policies have been as steady and unwavering as the FCC's exemption of ISPs from the access charge regime. Yet, BST dares to contend that the rates ISPs pay local exchange carriers are

actually access charges assessed on a per month, instead of a per minute basis. This is simply not the case. Pursuant to the FCC's exemption, ISPs purchase local exchange service, like any other local exchange customer, on a monthly basis. As local exchange customers, ISPs *do not* pay access charges. The FCC emphasized in the *Declaratory Ruling* that neither ICG nor BST can force ISPs to pay switched access charges for access to their networks: "[U]nder the ESP exemption, LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share." *Declaratory Ruling*, at 3695, ¶ 9. BST cannot convert the purchase of monthly local exchange dialtone service into the purchase of access service simply by asserting that it is the case.

Moreover, the analytical framework propounded by Mr. Varner rests on an assumption that has been explicitly rejected by the FCC. According to Mr. Varner, ISPs use the public switched network in precisely the same manner as IXCs. Mr. Varner confirmed this view on cross-examination. When asked whether IXCs' and ISPs' "use of the network is the same," Mr. Varner's answer was an unequivocal "yes." (Tr. 424). Yet, in its May 1997 order reforming the access charge regime, the FCC held to the contrary:

We decide here that ISPs should not be subject to interstate access charges. The access charge system contains non-cost-based rates and inefficient rate structures and this order only goes part of the way to remove rate inefficiencies. Moreover, given the evolution in ISP technologies and markets since we first established access charges in the early 1980s, *it is not clear that ISPs use the public switched network in a manner that is analogous to IXCs.*

In the Matter of Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, ¶345 (1997). While Mr. Varner refused to concede that IXCs and ISPs use the network differently, even after being asked to read the above-quoted language into the record, see Tr. 430-32, the FCC's holding makes Mr. Varner's position completely untenable.

BST's assertions to the contrary notwithstanding, it is clear that ISP-bound traffic is not subject to an access charge regulatory framework, but rather is to be treated as local exchange traffic for regulatory purposes:

In the Access Charge Reform Order, the [FCC] decided to maintain the existing price structure pursuant to which ESPs are treated as end users for the purposes

of applying access charges. Thus, the [FCC] continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local. (emphasis added.)

Declaratory Ruling, at 3692, ¶ 5.

In essence, in his testimony Mr. Varner compares a world in which BST is permitted to charge access charges with one in which is not. For that reason, Mr. Varner's diagrams are irrelevant and meaningless. They assume a regulatory outcome that has been flatly and unequivocally rejected by the FCC. The FCC has repeatedly made clear that ISPs are not subject to access charges. *Declaratory Ruling*, at 3709, ¶ 34. Mr. Varner's analysis is not only unresponsive to ICG's argument; it assumes a regulatory outcome that does not exist. The local calling regime, and not the access charge regime, provides the framework in which the Commission must analyze and resolve the ISP issue. The proper resolution of the issue – and, ICG submits, the only outcome that is consistent with law, fact, and policy – is to include ISP-bound traffic within the reciprocal compensation mechanism.

ISSUE II

SHOULD THE FOLLOWING PACKET-SWITCHING CAPABILITIES BE MADE AVAILABLE AS UNES:

- a) **User-to-user interface (UNI) at 56 kbps, 128 kbps, 384 kbps, 1.544 Mbps and 44.736 Mbps;**
- b) **Network-to-network interface (NNI) as 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, 13.896 Mbps, 15.440 Mbps, 16.984 Mbps, 18.525 Mbps and 20.072 Mbps.**

ICG: *Yes. It now appears that BST will provide packet-switching capabilities as UNES as an interim measure until the FCC's decision on remand is published.

However, BST wants to provide them at "modified" TELRIC rates. BST should be required to provide these capabilities as UNEs at TELRIC rates, including the capability to connect at TELRIC rates a BST central office where ICG is collocated (but which does not have a BST frame relay packet switch) with a BST central office that does have a BST frame relay packet switch, where ICG is not collocated.*

Frame relay service is a service which employs a special switch to send data rapidly. Frame relay switches reside in some, but not all, of BST's central offices. ICG seeks frame relay end user access and interoffice transport facilities as a UNE. ICG would then have access to all components of packet switching needed to serve all of its customers based on UNE prices. These include, but are not limited to, the packet assembler/dis-assembler (PAD), the customer access circuit, any circuit link(s) between the customer serving central office in which the frame relay switch is located and the frame relay switch port as required per customer application. (Tr. 84-85). ICG also needs network to network interface (NNI) at speeds from 56 kbps to 44.736 Mbps. The NNI UNEs let ICG provide facilities-based packet-switching services and efficiently interconnect its users with users of BST's packet-switching services. ICG also needs data link control identifiers (DLCI) as UNEs that provide committed information rates (CIRs) between 0 kbps and 20.072 Mbps so that ICG can efficiently utilize the UNEs and NNIs for competitive product offerings. (Tr. 85).

While it now appears that BST will provide these components pending the publication of the FCC's order on remand, it wants to charge ICG "modified TELRIC" rates. (Tr. 96). Further, BST proposes to provide end user access to frame relay service *only* when the customer is directly served out of the same central office housing the BST frame relay switch or when the ICG customer premise is served out of a BST central office in which ICG is collocated. (Tr. 102).

Significantly, BST's packet switches reside in only certain of BST's central offices. One problem with BST's approach is that it gives BST the ability to dictate where it will make packet switching available. If the ICG customer premise is served out of a central office that has no frame relay switch and ICG is not collocated there, ICG will have to purchase transport from that central office to the frame relay switch. (Tr. 102-103). BST wants to impose tariffed prices on this interoffice transport rather than the TELRIC prices applicable to UNEs. (Tr. 103). The

imposition of tariff prices for interoffice transport and frame relay end user access will mean that until ICG's network is substantially established in Florida, ICG will not be able to offer to the public a competitively priced frame relay product. Use of the tariffed-based transport rates in ICG's frame relay product will simply cause the product to be too expensive and not competitive in the market. (Tr. 103). Alternatively, ICG will have to offer the product at rates where it will be unable to recover its full costs. (Tr. 103). This result would not be consistent with the Act.

ISSUE III

UNDER THE TELECOMMUNICATIONS ACT OF 1996, SHOULD "ENHANCED EXTENDED LINK" LOOPS (EELs) BE MADE AVAILABLE TO ICG IN THE INTERCONNECTION AGREEMENT AS UNES?

ICG: *Yes. BST's proposal to charge at retail prices for EEL would undercut ICG's ability to offer services to its customers. Further, the availability of the EEL on a UNE basis will obviate the need for ICG to incur the exorbitant expense of collocating at each central office from which it hopes to serve customers, and will also free up valuable collocation space.*

ICG has requested BST to provide enhanced extended link loops (EELs) as a UNE combination. EELs are local loops combined with dedicated transport. Essentially, the EEL consists of (1) the loop running from a customer's premises to the serving BST central office, (2) a dedicated transmission path from that central office to a second BST central office or to an ICG switch, and (3) the "cross-connect" necessary to combine the loop and the transport. By extending the range of ICG's ability to serve customers, the EEL would permit ICG to bring the benefits of competition to a much broader base of Florida businesses and consumers.

BST has said that it will provide EELs only through its "Professional Services Agreement." (Tr. 86). BST has made clear, however, that it regards this offer as voluntary and as outside of its obligations under §§ 251 and 252. The retail rates under which BST has said it will make EELs available are many times higher than the TELRIC rates at which BST is required to provide UNES and UNE combinations. (Tr. 284). In refusing to offer ICG an economically affordable and functional EEL, BST has hobbled ICG's ability to serve all Florida customers, large and small.

The issue before the Commission is whether BST must make EELs available as a UNE

combination at UNE prices. BST currently combines loop and transport elements within its network. Section 51.315(b) of the FCC's rules requires BST to make available as a UNE combination any elements BST combines in its network.

To the extent this Commission determines that BST does not currently combine loop and transport, the Commission can and should use its authority under § 251 of the Act to require that BST make EELs available as a means of efficiently bringing the benefits of competition to all Florida consumers, large and small.

1. BST Currently Combines Loop and Transport Within Its Network. Therefore, it Must Make the EEL Available to ICG as a Combination of UNEs.

Section 51.315(b) of the FCC's rules states that "except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). While § 51.315(b) had been vacated by the United States Court of Appeals for the Eighth Circuit, it was reinstated by the Supreme Court's January 25, 1999 decision in *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999). The application of Section 51.315(b) is straightforward. The parties agree that EEL is simply the combination of two network elements—loop and transport. (Tr. 312). Under § 51.315(b), if those two elements are currently combined in BST's network, BST must make that combination available to ICG without separating the combined elements.

The FCC has specifically addressed the combination of loop and transport elements comprising the EEL in a decision adopted on September 9, 1999 in the proceeding it initiated to address the Supreme Court's ruling in *AT&T Corp. v. Iowa Utilities Board*. While the full text of that order has not been released as of the date of this Brief, the FCC has issued a News Release summarizing the Order. *FCC Promotes Local Telecommunications Competition*, FCC 99-238 (September 15, 1999) ("*News Release*"). According to the News Release, the FCC ruled that "[p]ursuant to section 51.315(b) of the Commission's rules, incumbent LECs are required to provide access to combinations of loop, multiplexing/concentrating equipment and dedicated transport,"--the component elements of the EEL--"if they are currently combined." *News Release* at 4. It is clear that BST currently combines such elements. In fact, BST observes that these elements, in combination, form the basis for special access service. (Tr. 436-441). Ironically, while BST's objection to providing the EEL because it replicates retail services has

been roundly discredited and rejected (see below), the same BST premise demonstrates that BST currently combines the elements that constitute the EEL. Further, while ICG acknowledges the importance of reviewing the full FCC order, it is clear from the unofficial press release that the FCC will not require ILECs to unbundle local switching in certain situations in which EEL is available to ALECs. Implicitly and necessarily, then, the FCC has determined that the EEL meets the criteria of its own rule.

Even if this were not the case, at a minimum the FCC has determined that in certain situations requiring the EEL is consistent with its rules and with implementing national policy. It is apparent that the FCC has given states the authority and discretion to do likewise. The record of this case exhibits compelling policy reasons for the Commission to require BST to provide the EEL to ICG in this arbitration proceeding.

2. The EEL is an Efficient Means of Bringing the Benefits of Competition to a Broad Base of Florida Businesses and Consumers.

Currently ICG can generally only provide service to end users who are served out of a BST central office where ICG is physically collocated. However, if a customer is served out of one central office in a local calling area, yet ICG is only collocated in another central office in the same exchange, by using the EEL, ICG could nevertheless provide local service to the customer in the first central office. (Tr. 85). ICG could serve a customer where ICG is not collocated by combining the loop from the serving central office to the customer with transport from the central office to either the central office, where ICG is collocated, or to an ICG switch. In either case, the EEL would enable ICG to serve – and thus bring the benefits of competition to – a much broader base of Florida end users than it is currently able.

By contrast, if the EEL is not made available, ICG would be forced to incur the unnecessary and anticompetitive costs of being forced to collocate in each and every BST central office in which ICG finds a customer. As ICG witness Holdridge testified, this “...would be cost prohibitive and require ICG to duplicate the public switched telephone network by collocating equipment in every conceivable central office.” (Tr. 98). Such a duplication of existing network facilities would be highly inefficient. If ICG is “required to incur the large expenses of collocation at every central office, then the expansion of facilities-based competition and related

new products will be slowed.” (Tr. 98). Instead, ICG and other new competitors should be permitted to spend their capital bringing new, innovative service offerings to Florida consumers.

Requiring ICG to collocate at every one of BST’s central offices where ICG wishes to serve a customer is also inefficient, in that it would force ICG to replicate the network architecture that evolved in a piecemeal fashion as BST built out its network over time. An explicit element of the TELRIC pricing model adopted by the Commission is that it is forward-looking; it presumes that decisions regarding where and how to construct network facilities will be made assuming the most efficient modern technologies and architectures instead of the incumbent ILECs’ legacy networks. ICG should not be tied to decisions made by BST years, and in some cases decades, ago regarding where to build central offices. This is all the more true given the explosive growth in Internet usage and access and other advanced services that are transforming the local telecommunications market.

An additional benefit of the EEL is that it would free up central office space by obviating the need for collocation in many instances. Enabling ICG and other carriers to serve customers without collocating in the particular customer’s serving central office will help ensure that there is sufficient space within BST’s central offices for those new entrants that need collocation. (Tr. 98).

3. BST’s Argument that it Should Not Be Required to Make EEL Available Because it Replicates Special Access Service is Without Merit.

BST witness Varner contends that BST should not be required to make the EEL combination available because it “replicates private line and/or special access services.” (Tr. 312). This objection has been rejected by the courts. (Tr. 471). Further, ICG intends to use the EEL to provide local exchange services to its customers, not private line or special access services. (Tr. 85). BST’s argument misses the mark entirely.

4. The EEL Must Be Made Available Fully, and at UNE Prices.

BST has offered to make the EEL available at retail prices. Further, BST has arbitrarily refused to provide the EEL with DS-0 transport under any circumstances. As ICG witness Schonhaut testified, BST’s attempt to “provide the EEL outside of the requirements of the Act

is a transparent attempt to levy prices for these elements that are outside of its TELRIC based prices as adopted by the Commission.” (Tr. 471-472). If BST is permitted to do so, it will drastically diminish the utility of the EEL as a mechanism for bringing service to Florida consumers, by requiring ICG to pay a price hundreds of percentages above TELRIC. (Tr. 86). In addition, BST refuses to voluntarily configure the EEL with DS0 transport. Its arbitrary proposal to “combine” high prices and large “pipes” would have the effect of preventing ICG from using EEL to serve smaller business customers. (TR-98).

The Commission should therefore order that the EEL be offered at the TELRIC-based UNE prices established by the Commission. Specifically, the total price charged by BST for the EEL should be precisely the sum of the following three individual elements necessary to provide the EEL functionality: (1) the TELRIC rate for an unbundled loop; (2) the TELRIC rate for a cross-connect of appropriate capacity (including DS-0); and (3) the TELRIC rate for unbundled interoffice dedicated transport. BST should not be permitted to impose any charge for combining the individual elements.

ISSUE IV

SHOULD VOLUME AND TERM DISCOUNTS BE AVAILABLE TO ICG FOR UNES?

ICG: *Yes. ICG should receive the benefit of any reduced costs that BST experiences from provisioning service either in high volumes within a specified period or for extended terms.*

It is ICG’s position that BST must provide ICG with volume and term discounts for UNES. Because the market demands it, BST routinely passes on to other types of customers the cost savings associated with providing services in larger volume or for specified terms. (Tr. 157-159). BST, however, refuses to make discounts available to ICG, no matter in what quantity or for what term ICG is willing to commit to purchasing UNES. In BST’s eyes, ICG is a direct competitor first, and a customer only second. BST has a greater interest in protecting its market share from competition than it does in serving, and retaining, ICG as a customer. Hence, “BST doesn’t have the same incentive that a normal commercial participant in a competitive transaction has to pass on some portion of its [cost] savings in this regard.” (Tr. 137). In fact,

BST has every incentive *not* to pass on cost savings to ICG. The Commission should therefore intervene and set volume and term discounts for UNEs at the levels that would be produced in a properly functioning competitive market. *Id.* (Tr. 137).

1. ICG Should Share in BST's Cost Savings that Result from ICG's Purchase of UNEs Within Volume and with Term Commitments.

When ICG commits to buying a large number of UNEs, BST can utilize its facilities more efficiently than when a carrier purchases a single unbundled element. As a result, BST's costs per unbundled network element are reduced. Absent an agreement to pass at least some of these cost savings on to ICG through a volume discount, BST reaps the entirety of these per-unit cost savings and is free to apply those cost savings to its retail services. (Tr. 168).

The same is true in the case of term service commitments. To the extent ICG or any other customer is willing to commit to using the BST network over a period of time, BST's volatility of demand, and therefore its level of risk experienced in providing network elements, is reduced. The result is that BST can more efficiently utilize its resources and decrease the likelihood of stranded investment. This, in turn, drives down BST's cost per UNE. Once again, however, absent some mechanism that allows ICG to share in the cost savings it has generated on BST's behalf, BST is the sole beneficiary of the efficiencies that are gained, and will not share them with ICG, who caused the savings in the first place. (Tr. 168).

2. The Commission Has the Authority Under § 252 to Require Volume and Term Discounts for UNEs.

BST argues that nothing in the Act or the FCC's rules require volume and term discounts for UNEs. (Tr. 342). BST misses the point. The question is not whether the Act specifically requires volume and term discounts. Rather, the question is whether volume and term discounts are consistent with, and further, the pricing standards set forth for UNEs in § 252 of the Act.

Section 252(d)(1) provides:

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes

of subsection (c)(3) of such section—

(A) shall be—

1. *based on the cost* (determined without reference to a rate-of-return or other rate-based proceeding) of (whichever is applicable), and
2. *nondiscriminatory*; and

(B) may include a reasonable profit.

47 U.S.C. § 252(d)(1) (emphasis added). Section 252(d)(1) thus establishes two primary criteria by which prices for UNEs “shall be” established: (1) rates must be based on the cost of providing the UNEs; and (2) rates must be nondiscriminatory. Each of these criteria is consistent with requiring volume and term discounts.

With respect to the first criteria, that UNE rates must be cost-based, the FCC has interpreted the requirement to mean that

incumbent LECs’ rates for interconnection and unbundled elements must recover costs in a manner that reflects the way they are incurred. . . . We note that this conclusion should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnected and unbundled elements based on costs similar to those incurred by the incumbents

Local Competition Order, ¶ 743. Volume and term discounts would serve this goal by ensuring that prices paid by ICG for UNEs reflect BST’s costs. If BST is able to avail itself of economies of scale resulting from the volume of UNEs purchased by ICG, or efficiencies resulting from a term commitment on the part of ICG, those savings should be passed on to ICG.

With respect to the second requirement for UNE pricing, that it be nondiscriminatory, volume and term discounts would place ICG and BST on equal footing where BST experiences any reductions in cost as a result of ICG’s high volume purchases or term commitments. Absent the availability of the discounts, ICG’s purchases would contribute to BST’s service volume and hence its economies of scale, producing cost savings for BST, but ICG itself would not be able to share in the cost savings. Such a result is plainly discriminatory because it permits BST to take advantage of cost savings, but prohibits ICG from doing the same.

3. Neither of BST’s Arguments as to Why it Should Not Be Required to Provide

Volume and Term Discounts Has Merit.

BST advances two arguments as to why it should not be required to make volume and term discounts for UNEs available to ICG. First, BST contends that the TELRIC-based prices for UNEs set by the Commission already incorporate the savings inherent in volume and term purchases. Second, BST argues that its obligation to provide statewide average loop prices precludes its ability to pass through savings associated with volume purchases in a particular locality. Neither argument has merit.

A. Volume and Term Discounts Are Not Already Reflected in the TELRIC-Based Prices for UNEs Established by the Commission.

BST argues that there is no need to establish volume and term discounts for UNEs because the TELRIC-based prices for UNEs set by the Commission “already reflect any economies involved when multiple UNEs are ordered and provisioned at the same time.” (Tr. 342). However, as discussed more fully in the testimony of ICG’s economist, Michael Starkey, that simply is not the case. (Tr. 160-162).

ICG witness Starkey gave a number examples of how BST realizes cost savings not accounted for by TELRIC when ICG commits to volume or term purchases. First, as the volume of ICG’s UNE purchases increases, the “actual fill,” i.e. the utilization rate, of BST’s plant increases, which in turn reduces the per unit cost to BST of provisioning UNEs. (Tr. 161-162). Second, when ICG purchases UNEs in large volumes, BST’s common costs are spread over a greater number of elements, thereby reducing the per unit cost. (Tr. 114-15). Third, when ICG commits to the purchase of UNEs for a known term, BST’s cost of capital is reduced because its risk of stranded investment is minimized. (Tr. 115).

B. It is Irrelevant that BST Provides Unbundled Loops at Statewide Average Rates.

BST’s argument that it would not realize cost savings from volume and term purchases of UNEs because of its statewide averaged loop rates is unavailing for two reasons. First, ICG purchases network elements other than loops, and the volume and term discounts would apply more generally than just with respect to loops. (Tr. 167-168). Second, ICG seeks a discount that is “applied generally to the unit-at-a-time price.” (Tr. 160-165). Just as BST’s averaged loop

costs currently allow it recover its costs on average across the entire state, the volume and term discounts will allow BST “to reflect average cost savings resulting from volume and term commitments across the state as well,” by simply “apply[ing] a percentage reduction to the average state rate.” (Tr. 160-165).

In summary, ICG’s request for volume and term discounts on UNEs is supported by the record, and would stimulate competition. Moreover, since the volume/term discount request is in accord with the Commission’s previous UNE-pricing decisions, it should be granted.

ISSUE V

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?

ICG: *Yes. In other states, ICG’s switch serves a geographical area comparable to that served by a tandem switch and it provides comparable functionality. As ICG grows its business in Florida, it intends to develop the type of network that typifies its approach to network design in other jurisdictions.*

The FCC’s *Local Competition Order* provides the following guidance with respect to the rate of reciprocal compensation that ICG should receive from BST:

We find that the “additional costs” incurred by a LEC when transporting and terminating a call that originated on a competing carrier’s network are likely to vary depending upon whether tandem switching is involved. We, therefore, conclude, that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to an end-office switch. In such event, states shall also consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC’s tandem switch and thus, whether some or all calls terminating on the new entrant’s network should be priced the same as the sum of transport and termination via the incumbent LEC’s tandem switch. Where the interconnecting carrier’s switch serves a geographic area comparable to that served by the incumbent LEC’s tandem switch, the appropriate proxy for the interconnecting carrier’s additional costs is the LEC tandem interconnection rate. (Emphasis added.)

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 16042 ¶ 1090 (1996) This policy is codified in § 51.711 of the FCC's rules, which provides:

Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

47 C.F.R. §51(a)(3).

The evidence in this proceeding is that whenever ICG develops a network, its switch serves a geographic area comparable to that served by BST's tandem switch. (Tr. 152, 506).

Moreover, although the FCC order requires only that a ALEC's switch serve a geographic area comparable to that served by an ILEC tandem to qualify for tandem termination rates, ICG's switch will perform the same functionality as BST's tandem. "ICG's switching platform transfers traffic amongst discrete network nodes that exist in the ICG network for purposes of serving groups of its customers in exactly the same fashion that [BellSouth's] tandem switch distributes traffic." (Tr. 507). BST witness Varner's argument that this functionality is provided through equipment somewhat different than the functionality in BST's tandem switch is misguided. (Tr. 343-344). As ICG witness Starkey testified, "the fact that different equipment is used does not alter the fact that the exact same functionality is provided, i.e. calls are transferred between the two companies at a central switching location, their destination is determined by a switching platform and ultimately transported to discrete network nodes for termination to a customer's premises." Thus, ICG "employs a network configuration in which the switch serves a geographical area comparable to that served by a tandem switch, and provides the comparable functionality." (Tr. 506).

BST invents a new criterion, not found in the FCC's order or rules, by which to determine if ICG qualifies for the tandem switching rate. According to BST witness Varner, "BellSouth will pay the tandem interconnection rate only if ICG's switch is identified in the local exchange routing guide (LERG) as a tandem." (Tr. 342). While this BST criterion is completely irrelevant under the FCC's policy and rules, it is met by ICG. (Tr. 282).

Therefore, ICG is entitled to a reciprocal compensation rate equal to the rate that BST

levies for calls terminated to its tandem. BST's tandem termination rates recover costs associated with (1) tandem switching, (2) transport between BST's tandem and its end office switches, and (3) end office switching. Thus, those three categories of costs should be recovered by ICG from the reciprocal compensation it receives from BST.

ISSUE VI

A. SHOULD BELLSOUTH BE REQUIRED TO ENTER INTO A BINDING FORECAST OF FUTURE TRAFFIC REQUIREMENTS FOR A SPECIFIED PERIOD?

B. IF SO, ARE THEY THEN REQUIRED TO PROVISION THE REQUISITE NETWORK BUILDOUT AND NECESSARY SUPPORT?

ICG: *(A) Yes. ICG's traffic requirements will continue to grow. In order to support competition, by ensuring that the requisite capacity will be in place, BST should be required to enter a binding forecast with ICG. BST has nothing to lose in agreeing to a binding forecast because ICG will pay BST for the increased capacity whether or not it actually uses it.

B. ICG must have the requisite capacity on BST's network as into its traffic requirements grow in order to serve its customers. By entering into a binding forecast, ICG commits to pay for the facilities; accordingly, BST should be required to provision them.*

ICG's traffic volumes have grown significantly over the past several years and ICG expects this trend to continue. (Tr. 59). ICG needs some way of ensuring that BST will provision adequate trunking facilities to carry calls from BST's customers to ICG's growing customer base. This is a matter of critical importance because, if BST's customers are unable to reach ICG's customers as a result of a blockage on BST's network due to a lack of capacity, it is ICG that will be seen as the cause of the problem. As a new entrant, ICG can ill afford this perception in the marketplace.

To this end, ICG has requested that a binding forecast mechanism be included in the parties' interconnection agreement. Such a mechanism, which ICG would only use very selectively, would ensure that there is no blockage of incoming traffic to ICG's network and would be at no cost to BST since, as described below, ICG would be willing to bear all of the

financial risk.

1. The Binding Forecast Proposal will Assure that BST Provisions the Trunking Capacity Necessary to Ensure that there is No Blockage of Incoming Calls to ICG's Network.

Currently, ICG provides BST with quarterly traffic forecasts. These forecasts are intended to assist BST in planning the expansion of its network to accommodate ICG's traffic. As relevant here, the forecasts provide BST with guidance in planning how much end office trunking capacity it will require to deliver traffic from BST end offices to ICG's switch. Because these trunks carry BST customers' originating traffic, they are BST's responsibility to provision and administer, and BST bears the capital cost of their construction. BST is under no obligation to respond in any way to ICG's forecasts. BST is not required to expand its trunking capacity even if ICG's forecasts indicate that more trunks are, or soon will be, needed. Nor is BST required to provision the additional trunking capacity called for by ICG's forecasts in a timely manner. ICG thus has no way of ensuring that BST will provision the trunking capacity necessary to ensure that there is no blockage of incoming calls to ICG's network. (Tr. 61-62).

Under ICG's binding forecast proposal, ICG would have the option of committing to a particular level of traffic. BST would then be obligated to, in a timely manner, provision the trunking necessary to carry that level of traffic. This will ensure that there is adequate capacity in BST's network to meet demand. This in turn will ensure that there are no blockages which would frustrate not only ICG's customers unable to receive calls from BST customers but also BST's customers who would be unable to place the calls.

ICG contemplates that the binding forecast mechanism would be used only on a selective basis, not in every instance. In many cases, ICG would continue to rely on the nonbinding quarterly forecasts it currently provides BST to assist BST in planning. ICG anticipates using the binding forecast mechanism only where it is (i) confident of substantial additional growth and (ii) concerned that, absent a binding commitment from BST to timely provision the necessary trunks, there would be an unacceptable risk of blocking incoming calls to ICG's customers because of BST's inability to handle the traffic flow.

2. ICG Protects BST by Bearing All of the Financial Risk.

While ordinarily BST is responsible for the cost of the trunking necessary to carry its originating traffic to ICG, under the binding forecast mechanism ICG would assume all of the financial risk. ICG would pay BST's tariffed rates for the commitment period for any trunks that BST provisions but which are not utilized. (Tr. 59, 62, 66).

ICG is only asking for binding forecasts with respect to BST's direct end office trunks delivering traffic from BST's end offices to ICG's switch. (Tr. 65). Although these facilities would normally be paid for only by BST, ICG's binding forecast proposal results in ICG picking up all or part of the tab by paying BST for the forecasted plant if the trunks are not used. Clearly, ICG's proposal protects BST and increases its revenues.

In summary, the Commission must conclude that BST is resisting ICG's binding forecast, take or pay, proposal for anticompetitive reasons, because there is no economic or policy reason for doing so.

3. It is Within the Commission's Section 251 Authority to Require Binding Forecasts.


Although ICG would bear all of the financial risk associated with the binding forecasts and BST's own customers would be well served, BST is unwilling to accept ICG's proposal, throwing up a purported legal roadblock. According to BST, §251 of the Act does not require BST to provide binding forecasts. (Tr. 349). This, however, is an empty argument. There are any number of provisions that are not explicitly provided for by § 251 that have been ordered to be included in interconnection agreements by this and other state commissions. The relevant inquiry is not whether there is any direct reference to binding forecasts in § 251 but whether requiring binding forecasts is consistent with the obligations set forth in § 251. The answer to that question is yes.

Section 251(c)(2) generally imposes on incumbent LECs the duty to provide interconnection with requesting carriers, and in particular §251(c)(2)(C) requires that the interconnection provided be "at least equal in quality to that provided by the local exchange carrier to itself." 47 U.S.C. § 251(c)(2). ICG's binding forecast proposal clearly relates to interconnection and is designed to ensure that it be provided to ICG on nondiscriminatory terms. ICG's proposal therefore falls well within the scope of the Commission's authority under § 251.

CONCLUSION

For the reasons shown above, the Commission should find that:

1. Pending the adoption of a federal rule, ISP-bound traffic is subject to reciprocal compensation.
2. ICG's switch serves an area comparable to, and provides the same functionality as, BST's tandem switch. Therefore, ICG is entitled to a reciprocal compensation rate equal to the rate that BST levies for calls terminated to its tandem. BST's tandem termination rates recover costs associated with (1) tandem switching, (2) transport between BST's tandem and its end office switches, and (3) end office switching. Thus, those three categories of costs shall be recovered by ICG from the reciprocal compensation it receives from BST.
3. The Commission has jurisdiction under §§ 251 and 252 of the Act to require BST to include a binding forecast provision in the parties' interconnection agreement. The parties shall include in their agreement a binding forecast provision in their agreement. The provision shall make explicit that, while neither party is required to request a binding forecast, once a party does make such a request, it is binding on the other party and must be fulfilled pursuant to the terms of the provision.
4. BST should provide Enhanced Extended Link Loops (EELs) to ICG as a UNE at TELRIC prices applied to transport of appropriate capacity, including DS-0.
5. BST should provide volume and term discounts for providing UNEs to ICG, based upon a BST cost study to be conducted by BST and ICG.
6. BST should make packet-switching capabilities available as UNEs.



Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter Reeves McGlothlin Davidson
Decker Kaufman Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850)222-2525

Albert H. Kramer
Dickstein, Shapiro, Morin & Oshinsky, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037
Telephone: (202) 785-9700

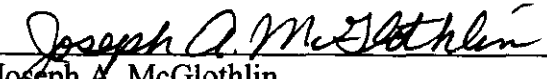
Attorneys for ICG Telecom Group, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy ICG Telecom Group, Inc.'s Post-Hearing Statement of Issues and Positions and Post-Hearing Brief was delivered by U.S. mail and by hand-delivery* this 29th day of October, 1999 to:

*Lee Fordham
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Gunter Building, Room 370
Tallahassee, FL 32399

*Nancy B. White
*Michael P. Goggin
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301



Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter Reeves McGlothlin Davidson
Decker Kaufman Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, FL 32301
Telephone: (850) 222-2525
Telecopier: (850) 222-5606

Albert H. Kramer
Dickstein Shapiro Morin & Oshinsky, L.L.P.
2101 L Street, N.W.
Washington, D.C. 20037
Telephone: (202) 785-9700

Attorneys for ICG Telecom Group, Inc.