BOULT ▪ CUMMINGS
CONNERS ▪ BERRY PLC

Jon E. Hastings
(615) 252-2306
Fax: (615) 252-6306
Email: jhastings@boultcummings.com

RECD TN
REGULATORY AUTH.
'02 JAN 11 PM 2 10
OFFICE OF THE
EXECUTIVE SECRETARY

January 11, 2002

Mr. David Waddell
Executive Director
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Re: In Re: Petition of MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996
Docket No. 00-00309

Dear Mr. Waddell:

Enclosed please find an original and thirteen (13) copies of the Best and Final Offer (Issues 55, 67 and 95) and the Supplemental Brief on Issue 67 of WorldCom which we would appreciate your filing in the above-referenced docket.

Thank you for your attention to this matter.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Jon E. Hastings

JEH/th

Enclosures

cc: Guy M. Hicks, Esq.
Dulaney L. O'Roark III, Esq.
Susan Berlin, Esq.

LAW OFFICES
414 UNION STREET - SUITE 1600 - P.O. BOX 198062 - NASHVILLE - TN - 37219
TELEPHONE 615.244.2582 FACSIMILE 615.252.6380 www.boultcummings.com

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In re: Petition of MCImetro Access Transmission Services, LLC and Brooks Fiber Communication of Tennessee, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996	)	Docket No. 00-00309

BEST AND FINAL OFFER OF WORLDCOM

MCImetro Access Transmission Services, LLC ("MCIm") and Brooks Fiber Communication of Tennessee, Inc. ("Brooks Fiber") (also collectively referred to herein as "WorldCom") hereby submit their best and final offer to Issues 55, 67 and 95.

Issue 55:

2.1.1.3 Application Response. Unless otherwise specified, BellSouth will respond to an application within ten (10) calendar days as to whether space is available or not available within a BellSouth Premises. BellSouth will also respond as to whether the Application is Bona Fide and if it is not Bona Fide the items necessary to cause the Application to become Bona Fide.

BellSouth will provide a written response ("Application Response") within 15 calendar days of receiving a collocation application, provided MCIm has given BellSouth a forecast of MCIm's collocation needs. Such forecast shall be given semi-annually for a two year period (i.e., current year plus one), or more frequently if MCIm's needs change. Such forecasts shall be incorporated into the requirements of the forecast meetings described in Section 5 of Attachment 4.

The Application Response will include, at a minimum, the configuration of the space, the Cable Installation Fee, Cable Records Fee, and the space preparation fees. If the amount of space requested is not available, BellSouth will notify MCIm of the amount of space that is available and no Application Fee shall apply. When BellSouth's response includes an amount of space less than that requested by MCIm, or differently configured, MCIm must resubmit its Application to reflect the actual space available.

Issue 67:

No Effect on BellSouth's Right to Convey Property. Nothing contained in this Attachment or in any license issued hereunder shall in any way affect the right of BellSouth to convey to any other person or entity any interest in real or personal property, including any poles, conduit or ducts to or in which MCIm has attached or placed facilities pursuant to licenses issued under this Section provided however that BellSouth shall give MCIm reasonable advance written notice of such intent to convey, and further provided that BellSouth shall only convey the property subject to any licenses granted hereunder.

Issue 95:

With respect to Issue 95, WorldCom's position has not changed since our original submittal (Attachment 8).

RESPECTFULLY SUBMITTED this 11th day of January, 2002.

Jon E. Hastings
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2306

Susan Berlin
Dulaney L. O'Roark, III
MCI Worldcom, Inc.
Six Concourse Parkway, Suite 3200
Atlanta, Georgia 30328
(770) 284-5498

Attorneys for MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been hand delivered or mailed to Guy M. Hicks, BellSouth Telecommunications, Inc., 333 Commerce Street, Suite 2101, Nashville, Tennessee 37201-3300 this the 11th day of January, 2002.

Jon E. Hastings

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In re: Petition of MCImetro Access Transmission Services, LLC and Brooks Fiber Communication of Tennessee, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996	)	Docket No. 00-00309

SUPPLEMENTAL BRIEF OF WORLDCOM ON ISSUE 67

BACKGROUND

On April 14, 2000, MCImetro Access Transmission Services, LLC ("MCIm") and Brooks Fiber Communication of Tennessee, Inc. ("Brooks Fiber") petitioned the Tennessee Regulatory Authority ("Authority") to arbitrate, pursuant to Section 252(b) of the Telecommunications Act of 1996, certain terms and conditions of proposed agreements between MCIm and BellSouth Telecommunications, Inc. ("BellSouth") and between Brooks Fiber and BellSouth. (MCIm and Brooks Fiber are referred to collectively herein as "WorldCom".)

On August 3, 2000, the Authority issued an order accepting the WorldCom petition and appointing the Directors as Arbitrators.

On December 18, 2001, the Directors, as Arbitrators, held a conference in which they deliberated regarding the outstanding arbitration issues. Specifically, the Directors discussed issue 67:

> **DIRECTOR MALONE:** The issue, as Director Greer has raised in itself uses the word "property." The embolded language that's in dispute according to the petition of MCI does not concern that language but affects that language. The parties did not site [sic] any legal authority in support of positions.

> My concern is that in addressing issues concerning real and personal property that the issues can balloon into subissues, and depending on what is done, could have untoward or unintended consequences. I guess my question on the issue, the word "property" and the way the issue is phrased, is that relegated to the provisioning of poles, conduits, ducts, and rights-of-way, and the parties have resolved or will resolve on their own any implication and effect on real or personal property?

Transcript of Dec. 18, 2001 Directors' Conference at 23. At this Conference, Director Malone requested that the parties brief this issue.

ISSUE 67

When WorldCom has a license to use BellSouth rights-of-way, and BellSouth wishes to convey the property to a third party, should BellSouth be required to convey the property subject to WorldCom's license?

DISCUSSION

As Director Malone has presented the question, the issue is actually twofold:

1. To the extent that Issue 67 refers to "property", what property is at issue?

2. Should BellSouth have the ability to transfer the property covered by the license of WorldCom free of any interest of WorldCom?

I. The "property" discussed in Issue 67 is BellSouth's "rights-of-way".

Director Malone's initial concern appears to be that the reference to "rights-of-way" and to "property" in Issue 67 are ambiguous. Mr. Hicks, the BellSouth representative at the hearing, suggests that he understood "property" to include any of BellSouth's rights in real property. Mr. Hicks stated:

> I believe the issue does encompass, as you have anticipated, the possibility that it does encompass real property. In other words, BellSouth's rights, whether it's by easement or ownership or some other means, would be implicated in this issue.

Transcript of Dec. 18, 2001 Directors' Conference at 23-24. The statement of Mr. Hicks demonstrates BellSouth's belief and understanding that "rights-of-way" include BellSouth's interest in real property, which interest may be in the form of a right-of-way, an easement, fee ownership or any other form.

The proposed Interconnection Agreement defines right-of-way as:

> ...the right to use the land or other property of BellSouth to place poles, conduits, cables, other structures and equipment, or to provide passage to access such structures and equipment. A Right-of-Way may run under, on, above, across, along or through public or private property or enter multi-unit buildings...

MCImetro/BellSouth Interconnection Agreement, Attachment 6 at § 2.23. WorldCom's position is that "property", as it is used in Issue 67, includes BellSouth's rights in real property, whether arising by virtue of a right-of-way, an easement, fee ownership or any other form of real property interest.

II. Any conveyance by BellSouth of its property upon which a license has been granted to WorldCom, should be subject to the license of WorldCom.

If BellSouth wishes to convey to a third party property or its rights in property in which BellSouth has previously granted to WorldCom a license, the conveyance should be subject to the WorldCom license. Tennessee common law provides that the third party in such an instance would receive the property subject to WorldCom's license. Additionally, requiring that the third party take the property subject to WorldCom's license protects the investment in facilities that WorldCom will make in reliance on the license and places no unreasonable burdens on BellSouth. For these reasons, the Authority should adopt that language that WorldCom has proposed on this issue.

A. The language that WorldCom has proposed is consistent with the jurisprudence of the State of Tennessee on the issue of licenses.

The common law in the State of Tennessee is that a license like that provided to WorldCom by BellSouth in the Interconnection Agreement would survive BellSouth's conveyance of the property subject to the license. See Daugherty v. Toomey, 222 S.W2d 195 (Tenn. Ct. App. 1949); Farley v. Ellis, No. W2000-00354-COA-R3-CV, 2000 Tenn. App. LEXIS 827 (Tenn. Ct. App. Dec. 27, 2000) (copy attached). Under Tennessee law, any party to whom BellSouth sold property or rights in property in which WorldCom held a license would take subject to the license of WorldCom.

Daugherty, 222 S.W2d at 195, is the leading case on this subject. In that case, DeLay suggested to Toomey that Toomey place a portion of his garage on DeLay's property. See id. Toomey did so. See id. When DeLay died, the executor of his estate sold the property to Daugherty. See id. Ultimately, a dispute arose when Daugherty wanted Toomey to remove the portion of his garage on Daugherty's property. See id. at 195-96. Had the license that DeLay granted to Toomey not survived the conveyance of the property from DeLay's executor to Daugherty, then Daugherty would be free to tear down the portion of Toomey's garage that was on Daugherty's property. The Court of Appeals, however, refused to require Toomey to remove his garage from Daugherty's property because Daugherty took his property subject to Toomey's license. See id. at 197. Quoting Corpus Juris Secundum, the Daugherty court stated:

> Where the licensee has acted under the license in good faith, and has incurred expense in the execution of it, by making valuable improvements or otherwise, it is regarded in equity as an executed contract and substantially an easement, the revocation of which would be a fraud on the licensee, and therefore the licensor is estopped to revoke it.

Id. at 196. The court continued: "This furnishes a clear case for the application of the doctrine of equitable estoppel, which is in operation **not only against [the licensor] himself, but his privies.**" Id. (quoting Heiskell v. Cobb, 58 Tenn. 638 (1872)) (emphasis added).

In the recent case of Farley, 2000 Tenn. App. LEXIS 827, the Court of Appeals again found that a license like the one currently at issue survives a conveyance of the property to which the license applies. In that case, Farley moved to Tennessee from Arkansas at the insistence of Ellis, who was married to Farley's mother. See id. at 1. Ellis told Farley he could live on Ellis' property as long as he paid the property taxes. See id. at 1-2. Farley lived on the Ellis property, made improvements to it and paid the taxes for about three years. See id. In the fourth year, after Ellis and Farley's mother divorced, Ellis paid the property taxes and refused to accept reimbursement from Farley. See id. at 2. Ellis then quitclaimed the property to Borders, who attempted to have Farley removed as a trespasser. See id. If the license that Ellis granted to Farley did not survive the conveyance of the property from Ellis to Borders, then Farley would be a trespasser and Borders could have him removed. The Farley court found that Ellis had granted Farley a license, that Farley had complied with the terms of the license and that Farley had made improvements to the property. Id. at 8. Based on this finding, the court concluded that Ellis would be estopped from removing Farley because of the license and that Borders, who had received the property from Ellis, was also estopped to revoke Farley's license. See id. at 8.

Daugherty and Farley demonstrate that the license that BellSouth is granting to WorldCom survives any conveyance of the property. No question exists that BellSouth is granting a license to WorldCom. There is also no question that WorldCom is making improvements to the property based on the license. In both Daugherty and Farley, a licensor granted a license to a licensee who made improvements to the licensor's property based on the license. In both Daugherty and Farley, the licensor transferred title to the property to a third

party. In both Daugherty and Farley, the Court of Appeals held that the licensee retained his rights in the property pursuant to the license despite the transfer of title to the property. Thus, the law of the State of Tennessee is that in a situation like the one presently before the Authority, any third party purchasing from BellSouth property to which a WorldCom license applies would take the property subject to the license.

WorldCom has proposed language that would provide that its license from BellSouth survives conveyance of the underlying property or property interests. WorldCom's proposed language is as follows:

> 3.6 No Effect on BellSouth's Right to Convey Property. Nothing contained in this Attachment or in any license issued hereunder shall in any way affect the right of BellSouth to convey to any other person or entity any interest in real or personal property, including any poles, conduit or ducts to or in which MCIm has attached or placed facilities pursuant to licenses issued under this Section provided however that BellSouth shall give MCIm reasonable advance written notice of such intent to convey, and further provided that BellSouth shall only convey the property subject to any licenses granted hereunder.

MCImetro/BellSouth Interconnection Agreement, Attachment 6 at § 3.6. This position is consistent with the jurisprudence of this State, and the Authority should thus adopt the language that WorldCom has proposed.

B. The language that WorldCom has proposed protects WorldCom's investment without placing an unreasonable burden on BellSouth.

In reliance on its license from BellSouth, WorldCom will expend a large sum on facilities that will be located on BellSouth's property, whether it be on property owned in fee simple, or leased by BellSouth, or on property in which BellSouth has been granted an easement, rights-of-way or license. WorldCom's investment will enhance the telecommunications services available to the citizens of the State of Tennessee and allow for greater competition among carriers. It is

unreasonable to expect WorldCom to make this investment without some measure of security that WorldCom will have the opportunity to recoup its costs.

If BellSouth is allowed to unilaterally convey its property to a third party free of the license of WorldCom, WorldCom will be left in the position of having to either forfeit its facilities or spend additional resources to remove the facilities and obtain new rights-of-way, easements or licenses.[1] Additionally, if the Authority adopts BellSouth's position, BellSouth would arguably be free to undertake intra-company or even bad faith conveyances that would protect BellSouth's facilities while working a forfeiture of the facilities of WorldCom. BellSouth's position places the facilities of WorldCom at risk of unilateral moves by BellSouth, a competitor of WorldCom. If the Authority adopts BellSouth's position, the citizens of Tennessee will be less likely to experience the benefits of increased competition in this industry.

The language that WorldCom has proposed allows WorldCom a reasonable opportunity to recover its expenses in placing facilities on BellSouth's property and places no greater burden on BellSouth than what the jurisprudence of the State of Tennessee already places on this type of license.[2] See supra Part II.A.

CONCLUSION

The question before the Authority is to what extent BellSouth should be able to convey property in which it has granted WorldCom a license free from the license of WorldCom.

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[1] WorldCom could, for example, use its power of eminent domain to obtain new rights-of-way. See Tenn. Code Ann. § 65-21-204. This would, however, result in a duplication of land purchase costs and attorney fees that could have been avoided by allowing WorldCom to continue to use the existing right-of-way in which WorldCom held a license.

[2] Additionally, by adopting the language that WorldCom has proposed, the Tennessee Regulatory Authority simply confirms that any utility that purchases from BellSouth property subject to a WorldCom license complies with the Pole Attachments Act. See 47 U.S.C. § 224 (requiring that all utilities provide to telecommunications carriers non-discriminatory access to their poles, conduits and rights-of-way).

Consistent with the common law of the State of Tennessee, the Authority should require that any conveyance by BellSouth of its property or any of its rights or interests in property in which WorldCom holds a license, must be subject to the license of WorldCom. This position protects investments that WorldCom will make in reliance on the license without unreasonably burdening BellSouth's right to transfer its property or its interests in property.

RESPECTFULLY SUBMITTED this 11th day of January 2002.

Jon E. Hastings
Austin L. McMullen
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2306

Susan Berlin
Dulaney L. O'Roark, III
WorldCom, Inc.
Six Concourse Parkway, Suite 3200
Atlanta, Georgia 30328
(770) 284-5498

Attorneys for MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been hand delivered or mailed to Guy M. Hicks, BellSouth Telecommunications, Inc., 333 Commerce Street, Suite 2101, Nashville, Tennessee 37201-3300 this the 11th day of January 2002.

Jon E. Hastings

CHRIS FARLEY
vs.
CHARLES ELLIS, ET AL.

No. W2000-00354-COA-R3-CV
COURT OF APPEALS OF TENNESSEE, WESTERN SECTION, AT JACKSON
2000 Tenn. App. LEXIS 827
December 27, 2000, Filed
A Direct Appeal from the Chancery Court for Crockett County. No. 7642. The Honorable George R. Ellis, Judge.

SYLLABUS

Plaintiff sued defendants to enforce alleged oral agreement to convey real estate or alternatively for damages. The trial court found that the oral agreement violated the statute of frauds, but ordered, under the doctrine of equitable estoppel, the specific performance of the oral agreement. Defendants have appealed.

COUNSEL

Mitchell G. Tollison, Humboldt, For Appellants, Charles Ellis and Wanda Borders Ellis.
Jerald M. Campbell, Jr., Trenton, For Appellee, Chris Farley.

JUDGES

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.
AUTHOR: CRAWFORD

OPINION

Plaintiff, Chris Farley, filed a complaint on March 9, 1999, against defendants, Charles Ellis (hereinafter defendant or Ellis) and Wanda Borders Ellis (hereinafter Ms. Borders) seeking specific performance of an alleged oral agreement to convey real estate or in the alternative for money damages. The complaint alleges that the defendants, Charles Ellis and Dorothy Ellis, plaintiff's mother, were married in June 1990. In the summer or fall of 1993, defendant began asking the plaintiff to move from Arkansas to Crockett County, Tennessee, to help defendant care for plaintiff's mother. The complaint avers that in exchange for plaintiff doing this, Charles Ellis agreed to deed "some" acreage of land to plaintiff. The complaint further avers that Ellis continued asking plaintiff to move and, finally, in approximately June or July, 1994, plaintiff did begin improving the real property. He worked on clearing the land for nearly three months and lived there part of that time in a trailer in defendant's yard. Plaintiff further avers that subsequently he purchased a double-wide trailer, moved it on the property, and moved his family from Arkansas to the property. He alleges that he expended sums of money in placing improvements on the property and spent many hours of labor improving the property. Plaintiff further avers that some time after doing this work, he requested the defendant to deed the property as he had agreed, but that instead, defendant "told plaintiff he could live on the property

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as long as he liked, so long as he paid the property taxes on the land." The complaint avers that plaintiff's mother and Ellis divorced and that plaintiff had paid the property taxes every year that he lived on the property since he was told to do so by the defendant, except for the 1998 property taxes, which Ellis paid before plaintiff knew that they were due. Plaintiff avers that in April of 1998, defendant, began telling the plaintiff that he must move himself and his mobile home from the real property, and also quit claimed the property to defendant, Wanda Borders Ellis, who was then Wanda Borders. Ms. Borders then made attempts to remove plaintiff from the property and filed a criminal trespass warrant against the plaintiff. The complaint alleges that the property was transferred to said Wanda Borders in an attempt to defraud the court and the plaintiff and prays that the conveyance be set aside. Plaintiff avers that defendant breached his contract with plaintiff by not transferring the property and prays that defendant be required to specifically perform the contract.

Alternatively, plaintiff seeks reimbursement for his labor and improvements on the real estate, for the losses he incurred by moving from Arkansas and for the cost of moving his home to another location. Alternatively, he prays that he be allowed to live on the property as long as he pays the taxes.

Defendants responded to the complaint by a motion to dismiss for failure to state a claim, a motion to strike the allegations concerning the alleged fraudulent transfer, and an affirmative defense of the statute of frauds. Defendants further answered the complaint by denying the material allegations thereof as to an agreement. Defendants also filed a counter-complaint seeking possession of the property and rental for the property from April 17, 1998 until plaintiff removes himself from the property at the rate of $ 150.00 per month.

A non-jury trial was held on September 27, 1999. Mr. Farley testified regarding the oral agreement as follows:

But the property itself, I invested all the money into it. Charlie said, "Hey, you can put you a trailer up there. You can live there as long as want. I'm going to give you the property. Eventually, I'll deed it in your name."

Me and my wife eventually started having trouble, as far as the marriage and stuff. You know, it wasn't nothing that we didn't breeze through later on. But he told me - - the exact words he said is, "Hey, if ya'll got a divorce, I don't want a bunch of scallywags living up there, so right now I'm going to hang on to the deed."

Once it became apparent to Mr. Farley that he was not going to receive the deed, he continued living on the property. Prior to the marriage of Ms. Borders to Ellis in June of 1999, Mr. Farley was called to testify in a custody dispute regarding Ms. Borders' child from a previous marriage. The nature of his testimony was that Ms. Borders was living with Ellis. Subsequent to testifying, he received a letter from Ms. Rainwater, counsel for Ms. Borders, asking him to remove himself from the property.

Mr. Farley claimed to have spent fourteen thousand to fifteen thousand dollars in making

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improvements to the property, however, he did not have documentation to verify that amount. He stated that the improvements to the property at his expense include: a septic tank, a concrete driveway, a water line, dozer work, grass seed, trees, a concrete pad, an outbuilding, concrete sidewalks and molding. He also claims compensation for his labor in making these improvements. Regarding the property taxes on the land, Mr. Farley estimates they were $ 22.23 before he moved his trailer on the land and $ 232.00 after.

Mrs. Dorothy Ellis next testified, stating that she wanted her son and his wife and child to move to Crockett County. Charles Ellis said that they could have the place where Chris Farley now resides. Mr. Ellis told her two times that he was going to deed the land to her son, but after they had relocated, Mr. Ellis stated that he wanted to wait a while before changing the deed. Mr. Farley and his wife worked very hard to make the land level and attractive. Dorothy Ellis further testified that the terms of the agreement included that her son would receive the land, if he helped in taking care of her, as she had suffered two nervous breakdowns. Barbara Froio, Mr. Ellis's sister, testified that before Mr. Farley moved from Arkansas, her brother told her sometime in 1993 or 1994 that he had made a verbal agreement with Mr. Farley to give him a place to live.

Mr. Wayne B. Parlow, owner of Parlow Realty Company and Parlow Appraisal Services, testified on behalf of the defendants. Mr. Parlow stated that he had prepared an appraisal of the 5.62 acre tract of land deeded from Ellis to Ms. Borders on March 17, 1999, and determined that the value of the land was $ 15,000.00. Mr. Parlow estimated that the market rental value of the property was $ 150.00 per month, $ 1,800.00 annually.

Mr. Charles Ellis testified on his own behalf, denying that he told Mr. Farley that he could live on his land as long as he paid the taxes. He admits that he allowed Mr. Farley to live on the land so that Dorothy Ellis's grandchild could be near her, and stated that Mr. Farley never paid any rent while living on the property. Mr. Ellis had no intention of reimbursing Mr. Farley for improvements made on the land, because he benefitted from the improvements, as he was living on the land. Mr. Ellis denies that he encouraged, or asked Mr. Farley to move from Arkansas, and testified that he had no intention at any time of deeding the property to Mr. Farley. Mr. Ellis stated that the only thing that he had communicated to Mr. Farley regarding the land was that "while he was living there, he would pay the taxes. Not as long as you want to live there, no." Mr. Ellis testified that he conveyed the property to Ms. Borders in April of 1998, for the consideration of $ 10.00, but denies that the conveyance had any relation to a court order mandating that Ms. Borders's daughter not reside or be left alone with Mr. Ellis. Ms. Borders testified that she is the owner of the 5.62 acre tract and although she has no plans for the land, she wants Mr. Farley to leave, because she would rather have the land vacant.

On February 3, 2000, the trial court filed its decree which included finding of facts and conclusions of law. The court found that in the summer of 1993, Mr. Ellis made an offer to plaintiff that he would deed plaintiff land for a home in exchange for plaintiff relocating his family from Arkansas to Crockett County, Tennessee, to help Mr. Ellis with his wife, Dorothy Ellis. The trial court found that after one year, Mr. Farley accepted the offer, began improving the subject land, and relocated his family. After Mr. Farley fulfilled his part of the agreement, Mr.

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Ellis refused to deed the promised property to him, but told him he could remain on the property for as long as he paid the property taxes. The court took judicial notice that Charles Ellis began a liaison with Wanda Borders, and that she alleged that she was not living with Mr. Ellis, but staying in the camper trailer outside of his residence. The trial court found that in 1998, Charles Ellis told Chris Farley that he would have to move. Mr. Ellis subsequently transferred the property to Wanda Borders, following the entry of an order forbidding Wanda Borders to bring her minor daughter on to the property of Charles Ellis. The trial court found that Chris Farley had testified at a custody hearing that Wanda Borders had been living with Charles Ellis. That court found a lack of credibility in the testimony of Charles Ellis and Wanda Borders. Some time thereafter, Charles Ellis married Wanda Borders, and Chris Farley continued to make improvement on the property. In addition, the trial court found that although Charles Ellis denied that he made an offer to induce Chris Farley to move from Arkansas to Tennessee, he had no creditable explanation as to why Chris Farley moved to this property, and expended time and money to improve the land. The court found that Charles Ellis was not a credible witness.

The trial court found that plaintiff relied upon the promise of Mr. Ellis in moving his family from Arkansas to Tennessee, and in spending a great deal of money on the subject property, and that a valid contract existed between plaintiff and Mr. Ellis, based upon the theory of promissory estoppel. The trial court stated in pertinent part:

The agreement between Charles Ellis and Chris Farley violates the statute of frauds; nevertheless, specific performance is appropriate under the equitable estoppel doctrine. At this juncture, justice and good conscience dictate that the agreement, which Charles Ellis entered into with Chris Farley should be enforced. The conveyance to Wanda Borders Ellis is set aside as an attempt by Charles Ellis and Wanda Borders to fraudulently evade performing his contract with his former stepson. Charles Ellis is ordered to deed the property to Chris Farley as he agreed to do when he induced him to move to Tennessee.

Defendants have appealed and present five issues for review.

Since this case was tried by the trial court sitting without a jury, we review the case **de novo** upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. Tenn. R. App. P. 13(d).

The first issue for review as stated in defendants' brief is:

I. The trial court erred in taking judicial notice of matters not presented at trial.

Defendants complain about the trial court's following statements in the findings of fact:

The court takes judicial notice that at sometime between then and this hearing Charles Ellis began a liaison with Wanda Borders. At one point she alleged that she was not living with Charles Ellis but was staying in the camper trailer outside of his residence.

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Charles Ellis told Chris Farley that he would have to remove himself from the property in 1998. After a hearing in this court where Wanda Borders was ordered not to take her minor daughter back to the home of Charles Ellis where the court found she had been living, Charles Ellis testified that he sold this property to Wanda Borders for ten dollars. In the custody hearing of Wanda Borders, Chris Farley had testified that she had been living with Charles Ellis. The court found a lack of credibility in the testimony of Charles Ellis and Wanda Borders.

"The court cannot take judicial knowledge of a former suit in the same court. It must be established by evidence." (Citations omitted.) **Hudson v. Shoulders** , 22 Tenn. App. 301, 122 S.W.2d 817, 819 (1938).

In **Sutherland v. Sutherland** , 831 S.W.2d 283 (Tenn. Ct. App. 1991), this Court said:

Courts may not take "judicial notice" of testimony in prior unrelated cases. Courts must decided cases on competent evidence introduced in the trial of the case. However, it may take judicial notice of certain facts which are common knowledge to all intelligent men. 29 Am. Jur. 2d **Evidence** § 14 (1967). "Facts which are not judicially cognizable must be proved, even though known to the judge or to the court as an individual." **Id.** at § 15.

Id. at 285.

While it appears that the trial court erroneously took judicial notice of certain facts in a prior case it appears from the record as a whole that the facts which the trial court noticed did not have a bearing on the trial court's decision in this case. Therefore, this issue is without merit.

The second issue presented for review, as stated in appellants' brief, is:

II. The evidence preponderates against the trial court's finding that defendant Charles Ellis had no credible explanation as to why plaintiff moved to the property at issue and spent time and money making it livable.

The trial court merely stated in its findings of fact that "he [Ellis] had no credible explanation why Chris Farley moved to this property and spent so much time and money on making it livable. The court did not find Charles Ellis a credible witness."

Defendants point out in their brief that Ellis testified that plaintiff's mother wanted him to move and have the grandchild there and also that the plaintiff wanted to move to be with his mother.

The transcript shows no factual basis for these statements, such as conversations with Farley and similar testimony. Perhaps, the trial judge felt that this was Ellis's impression. In any event, the trial court considered the record as a whole and as the trier of fact must give the testimony the weight, faith, and credit which it deserves. The trial court had the benefit of other explanations made by Mr. Ellis concerning his dealings with plaintiff and was charged with the responsibility of weighing that evidence, along with all the other evidence, to determine Mr. Ellis's credibility.

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We find no merit in this issue.

The three remaining issues presented for review, as stated in appellants' brief, are:

III. The trial court erred in setting aside the conveyance from defendant Charles Ellis to defendant Wanda Borders Ellis.

IV. The trial court erred in concluding that plaintiff had an enforceable parol contract for the sale of land in violation of the statue of frauds and ordering defendant Charles Ellis to deed the property to plaintiff.

V. The trial court erred in refusing to grant the relief sought in defendants' counter-complaint.

We believe these three issues can be combined into a single issue:

Whether the trial court erred in ordering the specific performance of the alleged oral contract, and, if so, whether plaintiff is entitled to any relief.

Charles and Wanda Ellis contend that, assuming that there existed an oral contract, as alleged by plaintiff, such contract would be in violation of the statue of frauds, and therefore unenforceable. Defendants contend that under Tennessee law, such a contract is voidable at the election of either party. Once an oral contract is disaffirmed, neither specific performance, nor damages are available. They further argue that the alleged oral contract is not enforceable, as it did not contain the essential terms or mutuality of obligation. Defendants assert that Mr. Farley realized a profit of $ 15,000.00 by selling his property and moving from Arkansas to Tennessee to be closer to his mother at her request. Furthermore, after Charles and Dorothy Ellis divorced, there was no longer a reason for Chris Farley to live on the property.

The Tennessee statute of frauds prohibits the enforcement of contacts for the sale of land unless the promise or agreement is in writing, and signed by the party to be charged. **See** T. C.A. § 29-2-101(5). Tennessee appellant courts continuously have denied enforcement of an oral contract for the sale of land on the basis of part performance, making it the rule in this state that part performance of an oral contract for the sale of land will not take the agreement out of the statute of frauds. **Baliles v. Cities Service Co.,** 578 S.W.2d 621, 624 (Tenn. 1979) (citing **Knight v. Knight,** 222 Tenn. 367, 436 S.W.2d 289 (1969); **and Goodloe v. Goodloe** , 116 Tenn. 252, 92 S.W. 767 (1905)). The statue of frauds is designed "to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other." **Price v. Tennessee Products & Chemical Corporation,** 53 Tenn. App. 624, 385 S.W.2d 301 (1964). Therefore, to comply with the statute of frauds, such agreement must show, with reasonable certainty, the material terms intended by the parties to the sale. **See Johnson v. Haynes** , 532 S.W.2d 561 (Tenn. Ct. App. 1975), ("The memorandum must contain the essential terms of the contract expressed with such certainty that they may be understood from the memorandum itself or some other writing to which it refers or with which it is connected without resort to parol evidence.") **Id** . at 565. To comply with the statute of frauds, the memorandum agreement to sell real estate must show with reasonable certainty the estate intended to be sold. **See Baliles** at 623.

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In exceptional cases, the application of the doctrine of equitable estoppel has been used to mitigate the harshness of this rule, "where to enforce the statute of frauds would make it an instrument of hardship and oppression, verging on actual fraud." **Baliles,** 578 S.W.2d 621 (citing **Covington v. McMurry,** 4 Tenn. Civ. App. 378 (1913); and **Gheen v. Osborne,** 58 Tenn. (11 Heisk.) 61 (1872). **See also Decherd v. Blanton,** 35 Tenn. 373 (1855); **Williams v. Conrad,** 30 Tenn. 412 (1850); **Bloomstein v. Clees Brothers,** 3 Cooper's Tenn. Ch. 433 (1877); **and Interstate Co. v. Bry-Block Mercantile Co.,** 30 F.2d 172 (D.C.W.D. Tenn.) (1928)).

The record in the instant case is devoid of proof of the material terms of any agreement to convey the real estate, including, but not limited thereto, the terms of the performance, price, if any, and the specific property covered by the alleged agreement. Mr. Farley's own testimony tended to negate a certain oral agreement for conveyance of the title to the property. Under the state of this record, the doctrine of equitable estoppel cannot be used to order a conveyance of the property. To do so would be in effect making a contract for the parties. Courts do not make contracts; they only interpret and enforce them. **See Turner v. Zager** , 50 Tenn. App. 674, 363 S.W.2d 512, 519 (Tenn. Ct. App. 1962). However, Mr. Farley is not without relief. The proof demonstrates that Mr. Farley was granted a license to enter and occupy some of Ellis's property for as long as he wished if he paid the property taxes. We distinguish Mr. Farley's right from a lease, as he was granted permission by Mr. Ellis under their agreement which was not a leasehold.

"A 'license', with respect to real estate, is an authority to do a particular act or series of acts on another's land without possessing any estate therein." **Barksdale v. Marcum** , 7 Tenn. App. 697, 708, cert, den., (1928).

In **Heiskell v. Cobb** , 58 Tenn. 638 (1872) the Court held an oral agreement enforceable that allowed the plaintiff to erect a milldam which flooded a section of the adjacent land owned by the defendant, where the defendant not only encouraged the plaintiff to build the dam, but also assisted in its construction, and acquiesced in the use of the dam for several years. The **Heiskell** Court stated:

If one enters upon the land of another by virtue of a parol license, given for a consideration, and erect fixtures, such license becomes irrevocable.

Id. at 639.

In **Daugherty v. Toomey,** 32 Tenn. App. 155, 222 S.W.2d 195, 196 (Tenn. Ct. App. 1949) the parties owned adjoining property and orally agreed to build a wall near the property line to serve as a shared garage wall. The wall, and part of the defendants' garage, were on the plaintiffs' property, a fact of which the plaintiffs were aware. **Id.** Several years after the wall was built, the plaintiffs sought to require the defendants to remove that part of their garage located on the plaintiffs' property. **Id.** The trial court decision, denying plaintiffs' request, and applying the doctrine of equitable estoppel was affirmed on appeal. The **Daugherty** Court quoted the

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following from 53 C.J.S., Licenses § 90:

> Where the licensee has acted under the license in good faith, and has incurred expense in the execution of it, by making valuable improvements or otherwise, it is regarded in equity as an executed contract and substantially an easement, the revocation of which would be a fraud on the licensee, and therefore the licensor is estopped to revoke it, particularly where the licensor joins in the enterprise and accepts the benefits of the licensee's labor and expense; and the rights of the licensee will continue for as long a time as the nature of the license calls for. **It has also been held that the license cannot be revoked without reimbursing the licensee for his expenditures or otherwise placing him in statu quo.**

Dougherty, 222 S.W.2d at 196 (emphasis added). The Court also stated that the plaintiffs had acquired an estimate of the cost to move and rebuild defendants garage, yet they had made no offer to pay the expense, or to reimburse the defendants. Therefore, the Court reasoned, it would be a manifest inequity to grant the plaintiffs the sought relief. **Id.** at 197.

In **Lee Highway & Associates, L.P., v. Pryor Bacon Company, supra,** the Eastern Section of this Court held that a license for a right of access could be revoked "without working a fraud on the plaintiff provided the defendant fully reimburses the plaintiff for the monies it expended in building the cut-through." **Id.** at *5.

In the instant case, the record indicates that Charles Ellis gave Chris Farley permission to enter and occupy the subject property for as long as he wished, as long as he paid the taxes. We agree with the trial court that the consideration provided by Mr. Farley pursuant to his agreement was that he "move his home in Arkansas to Crockett County, Tennessee to help Charles Ellis care for Dorothy Ellis." However, we believe the evidence preponderates against the trial court's finding that the agreement was an oral contract for the sale of land. Instead, we believe that Mr. Ellis granted Mr. Farley a license, allowing Mr. Farley to occupy the property in exchange for the consideration he provided, as long as he paid the taxes. The record shows that upon Mr. Ellis's representations, Mr. Farley moved his family to Crockett County, taking up residence on the property adjacent to the home of Charles and Dorothy Ellis. Mr. Farley paid the property taxes from 1994 though 1997, while Charles Ellis owned the property. He attempted to meet the condition of his occupancy by mailing a check to Wanda Ellis for the 1998 property taxes, however, was prevented from fulfilling his obligation in 1998, as she returned the check.

Based on the trial court's findings which are supported by the record and under the above authorities, Mr. Ellis is estopped from removing Mr. Farley from the property without proper reimbursement for the damages lawfully due. When parties would be estopped, their heirs and privies in estate are also estopped. **See LaRue v. Greene County Bank** , 179 Tenn. 394, 166 S.W.2d 1044, 1052 (1942) and **Heiskell v. Cobb** , 58 Tenn. 638 (1872). Therefore, although it was Mr. Ellis that granted a license to Mr. Farley, Wanda Ellis, as the present owner of the property, is estopped to revoke Mr. Farley's license without tendering reimbursement to Mr. Farley for his expenditures for permanent improvements on the land.

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In his complaint, Mr. Farley sought the alternative relief of damages to reimburse him for his labor and the material purchased in making permanent improvements to the property as well as his moving expenses. Although Mr. Farley claims that he spent somewhere between $ 15,000 and $ 16,000 in improving the land, the record does not establish the value of the improvements on the land. It appears that Mr. Farley and his wife did much of the work themselves and were able to trade some of the materials. Mr. Farley should not receive reimbursement for the property taxes paid nor for his relocation expenses, as these appear to be part of the licensing agreement. Also, no additional rent is due Mr. and Mrs. Ellis, as he provided the consideration agreed to and when requested to vacate the premises, he was not tendered reimbursement for the improvements made. The case should be remanded to the trial court for a determination of damages based upon the value of the permanent improvements to the land.

The decree of the trial court setting aside the deed of the property to defendant Wanda Ellis is reversed, and that part of the decree ordering Charles Ellis to deed the property to Chris Farley is reversed. The decree is modified to order that the plaintiff and counter-defendant, Chris Farley, remove his mobile home and vacate the property upon reimbursement by Wanda Ellis for the permanent improvements made to the property by Mr. Farley. The case is remanded to the trial court for further proceedings to determine the value of the permanent improvements made to the property by Mr. Farley. Costs of the appeal are assessed one-half to Chris Farley and his surety and one-half to counter-plaintiffs, Charles Ellis and Wanda Ellis, and their surety.

DISPOSITION

Tenn.R.App.R. 3; Appeal as of Right; Judgment of the Chancery Court Reversed As Modified and Remanded.

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