BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

JANUARY 24, 2002

IN RE:	)	
	)	
PETITION OF SPRINT COMMUNICATIONS COMPANY L.P. FOR ARBITRATION WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	)	**DOCKET NO. 00-00691**

FINAL ORDER OF ARBITRATION AWARD

This docket came before the Directors of the Tennessee Regulatory Authority (the "Authority"), acting as arbitrators, immediately following the December 18, 2001 Authority Conference for disposition of the petition of Sprint Communications Company L.P. ("Sprint") for arbitration of an interconnection agreement pursuant to Section 252(b) of the Telecommunications Act of 1996 with BellSouth Telecommunications, Inc. ("BellSouth").

I. Procedural and Factual History

Sprint filed its petition for arbitration on August 7, 2000, and BellSouth filed a response to the petition on September 1, 2000. The petition for arbitration included twenty-six (26) issues, and an attachment marked Exhibit B contained additional issues. At the September 26, 2000 Authority Conference, the Directors voted unanimously to accept the petition for arbitration, but limited the acceptance to the twenty-six (26) issues listed in the body of the petition. The Directors voted unanimously to appoint themselves as arbitrators and the general counsel or his designee as the Pre-

Arbitration Officer. The Directors also instructed the parties to participate in a mediation/negotiation meeting with an Authority mediator.[1]

On November 20, 2000, the parties filed a *Joint Positions Matrix.* The matrix indicated that the parties had settled Issue Nos. 1, 2, 5, 15 and 19.[2] In addition, as a result of the mediation, the parties requested that the Authority consider Issue Nos. 29, 43, 45 and 47 listed in Exhibit B.[3] Thereafter, the parties participated in discovery and filed pre-filed direct and rebuttal testimony. On June 11, 2001, the Authority issued a *Notice of Arbitration Hearing* scheduling the arbitration for June 24 through June 26, 2001.

On June 18, 2001, BellSouth filed a motion to reschedule the hearing. On June 20, 2001, the Pre-Arbitration Officer granted the motion.[4] In addition, the Pre-Arbitration Officer requested the parties submit alternate arbitration dates and state whether they would agree to defer Issue No. 25 to Docket No. 01-00193, *In re: Generic Docket on Performance Measurements.*[5] BellSouth and Sprint filed a joint response on June 29, 2001. In the response, BellSouth and Sprint suggested the week of September 17th for the arbitration and agreed to defer Issue Nos. 22 through 26 to Docket No. 01-00193.[6] Thereafter, the Authority issued a *Notice of Arbitration Hearing* scheduling the arbitration for September 18 and 19, 2001.

Sprint and BellSouth filed a witness list on September 11, 2001and a *Revised Joint Issues Matrix* on September 12, 2001. The *Revised Joint Issues Matrix* revealed that the parties had settled

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[1] *See Order Accepting Petition for Arbitration* (Nov. 29, 2000).
[2] *See Joint Positions Matrix*, pp. 2, 3, 8, 10 (Nov. 7, 2000).
[3] *See id.* at 1.
[4] *See Order* (Jun. 20, 2001).
[5] *See id.* at 1-2.
[6] *See* BellSouth letter dated June 28, 2001 (Jun. 29, 2001).

Issue Nos. 5, 8, 9, 10, 11, 12, 13, 14, 20, 21, 45(a) and (d), and 47.[7] In addition, the parties explained their agreement "to stipulate prefiled testimony into the record and waive cross examination on the following issues: Issue 4 (UNE combos) and Issue 6 (EELS)."[8] On September 13, 2001, Sprint and BellSouth telephonically notified the Pre-Arbitration Officer that they had settled Issue Nos. 3, 7, 16, 17, 18, 29, 43 and 45(b) and (c). The parties further agreed that live testimony would not be necessary for the remaining unresolved issues, Issue Nos. 4 and 6, and requested that the arbitration scheduled for September 18 and 19, 2001 be canceled.[9]

On September 14, 2001, the parties filed a *Joint Motion of Sprint Communications Company L.P. and BellSouth Telecommunications, Inc. to Cancel Hearing and Accept Testimony on Certain Issues*, which reiterated and memorialized the parties' requests of September 12 and 13, 2001. Specifically, the parties requested that the Authority accept their deferral of Issue Nos. 22 through 26 to Docket No. 01-00193.[10] As to Issue Nos. 4 and 6, the only remaining issues, the parties requested their stipulation be approved and that the following specific pre-filed testimony be admitted into the record without cross-examination or objection: (1) Sprint witness Melissa Closz's direct testimony from page 4, line 7 through page 11, line 4 and (2) BellSouth witness John Ruscilli's direct testimony from page 7, line 9 through page 15, line 6, and his rebuttal testimony from page 6, line 6 through page 9, line 19.[11] The parties then proposed to file briefs on Issue Nos. 4 and 6 no later than October 9, 2001. The Pre-Arbitration Officer granted the joint motion in its entirety by order entered on September 14, 2001.[12]

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[7] *See Revised Joint Issues Matrix*, pp. 3-11 (Sept. 12, 2001).
[8] *Id.*, cover letter, p.1.
[9] *See Order Granting Joint Motion to Cancel Hearing and Accept Testimony on Certain Issues*, p. 2 (Sept. 14, 2001).
[10] *See Joint Motion of Sprint Communications Company L.P. and BellSouth Telecommunications, Inc. to Cancel Hearing and Accept Testimony on Certain Issues*, p. 2 (Sept. 14, 2001).
[11] *See id.* at 2-3.
[12] *See Order Granting Joint Motion to Cancel Hearing and Accept Testimony on Certain Issues*, p. 2 (Sept. 14, 2001).

BellSouth filed its brief on October 9, 2001, and Sprint filed its brief on October 10, 2001. The Directors, acting as arbitrators, deliberated Issue Nos. 4 and 6 and the question of whether to defer Issue Nos. 22 through 26 immediately following a regularly scheduled Authority Conference on December 18, 2001.

II. Issue No. 4: Pursuant to Federal Communications Commission ("FCC") Rule 51.315(b), should BellSouth be required to provide Sprint at TELRIC rates combinations of Unbundled Network Element ("UNEs") that BellSouth typically combines for its own retail customers, whether or not the specific UNEs have already been combined for the specific end user customer in question at the time Sprint places its order?

Sprint contends that FCC Rule 51.315(b) requires an Incumbent Local Exchange Carrier ("ILEC") to provide any UNE combination that the ILEC "currently combines."[13] Sprint asserts that if an ILEC normally combines the requested elements in the provision of a retail service to any customer, then the ILEC should provision the UNE combination to the Competing Local Exchange Carrier ("CLEC").[14] Sprint argues that the adoption of the "actually combined" definition asserted by BellSouth is anti-competitive and imposes wasteful costs on both ILECs and CLECs.[15] Sprint also contends that BellSouth does not have to provide a UNE combination if it is not technically feasible.[16]

BellSouth argues that it is only required to provide combinations to Sprint at cost-based rates if the elements are combined and providing service to a particular customer at a particular location.[17] In support of its position, BellSouth relies on the FCC's *UNE Remand Order*.[18] Additionally,

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[13] *See* Melissa L. Closz, Pre-Filed Direct Testimony, p. 6 (Jan. 5, 2001).
[14] *See id.* at 8.
[15] *See id.*
[16] *See id.* at 7-9.
[17] *See* John A. Ruscilli, Pre-Filed Direct Testimony, p. 8 (Jan. 5, 2001).
[18] *See id.* at 8-9 (citing *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 99-238, 15 FCC Rcd 3696 (Nov. 5, 1999) (Third Report and Order and Fourth Further Notice of Proposed Rulemaking)) (referred to herein as the *UNE Remand Order*).

BellSouth asserts that the United States Court of Appeals, Eighth Circuit, vacated Sections 51.315(c) – (f) of the FCC's rules, which purportedly require ILECs to combine UNEs, and this ruling was not appealed to nor overturned by the United States Supreme Court.[19]

In Docket No. 99-00948, *In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, the parties asked the Arbitrators to define the term "currently combines" as that term is used in Section 51.315(b) of the FCC's rules. The Arbitrators provided the following detailed analysis of the issue in Docket No. 99-00948:

> Rules governing combinations of network elements have been the subject of continuous litigation since their introduction in 1996. The Eighth Circuit of the United States Court of Appeals vacated Section 51.315 (b) through (f) of the FCC Rules in 1997.[20] The Eighth Circuit stated that subsection (b) "is contrary to § 251(c)(3) because the rule would permit the new entrants access to the incumbent LEC's network elements on a bundled rather than unbundled basis" and that the subsection (c) – (f) could not "be squared with the terms of subsection 251(c)(3)."[21] The Supreme Court overruled the Eighth Circuit's decision as to Section 51.315(b) and held that the FCC's interpretation of Section 251(c)(3) was "entirely rational" and "well within the bounds of the reasonable."[22] On remand, the Eighth Circuit recognized that the Supreme Court reversed the Eighth Circuit's decision to vacate Section 51.315(b) and, therefore, only discussed Section 51.315(c)-(f), the "Additional Combinations Rule."[23]
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> Section 51.315(b) provides: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines."[24] The Arbitrators agree with the [Georgia Public Service Commission's] conclusion that Section 51.315(b) applies to elements that BellSouth currently combines, not only those elements that are currently combined.[25] In the *First Report and Order*, the FCC stated that the proper reading of "currently combines" is "ordinarily combined within their network, in the manner which they are typically

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[19] *See id.* at 9.

[20] *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) *aff'd in part rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721, 737-38 (1999).

[21] *Id.*

[22] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 395, 119 S.Ct. 721, 737-38 (1999).

[23] *See Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758-59 (8th Cir. 2000) *cert. granted in part*, 121 S.Ct. 878 (2001).

[24] 47 C.F.R § 51.315(b).

[25] *See GPSC February 2000 Order*, p. 11.

combined."[26] In the *UNE Remand Order*, the FCC declined to further elaborate on the meaning of "currently combines" after noting that the matter was pending in the Eighth Circuit Court of Appeals.[27] Therefore, the only FCC interpretation of "currently combines" is the interpretation in the *First Report and Order*.

The Authority has addressed this same issue and the Directors acting as Arbitrators have addressed a similar, related issue in other dockets. In the Permanent Prices Docket, the Authority held that "ILECs are now prevented from separating network elements that are already combined before leasing them to a competitor."[28] In a later Order, the Authority affirmed this holding by ruling that "BellSouth must provide the combination throughout its network as long as it provides this same combination to itself anywhere in its network."[29]

In *ICG Telecom*, the Arbitrators ruled that BellSouth was to provide Enhanced Extended Links ("EELs"), which consist of two combined UNEs, to ICG Telecom Group, Inc. Although the Arbitrators did not specifically define "currently combines" in *ICG Telecom*, the Arbitrators find that decision should serve as guidance in determining the proper definition of "currently combines" herein.

Given the plain language of Section 51.315(b), federal decisions related to the validity of Section 51.315(b), the FCC's interpretation of Section 51.315(b), the Authority's decision in the Permanent Prices Docket, and the Arbitrators' decision in *ICG Telecom*, the Arbitrators voted unanimously to define "currently combines" as any and all combinations that BellSouth currently provides to itself anywhere in its network. Thus, the Arbitrators reject BellSouth's position that the combination has to be already combined for a particular customer at a particular location. Instead, BellSouth must provide any combination to Intermedia throughout Intermedia's network as long as BellSouth provides that same combination to itself anywhere in its network.[30]

The Arbitrators find that neither party has presented any basis for resolving the issue presented in this Docket differently than the issue presented in Docket No. 99-00948. Therefore, consistent with the Arbitrators' decision in Docket No. 99-00948 and the authorities cited therein, the Arbitrators

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[26] *First Report and Order*, ¶ 296.

[27] *See UNE Remand Order*, ¶ 479.

[28] *Permanent Prices, Order Re Petitions for Reconsideration and Clarification of Interim Order of Phase I*, p. 20 (Nov. 3, 1999). Although the discussion of Section 51.315(b) was commingled with the discussion of whether BellSouth must provide Integrated Digital Loop Carrier ("IDLC"), IDLC is distinguishable in that it is a service "platform" rather than an unbundled network element. As such, it combines the loop and switch port functions, not loop and switch port unbundled network elements. It should be noted that those same IDLC functions cannot be separated without destroying the identity and many of the advantages of the IDLC platform itself.

[29] *Permanent Prices, Second Interim Order Re: Cost Studies and Geographic Deaveraging*, p. 10 fn. 17 (Nov. 22, 2000).

[30] *In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00948, *Interim Order of Arbitration Award*, pp. 26-28 (Jun. 25, 2001) (footnotes 20 through 29 appear in the original).

voted unanimously to require BellSouth to provide Sprint any UNE combinations at the sum of TELRIC[31] rates that BellSouth combines for its own retail customers anywhere in BellSouth's network.

II. Issue No. 6: Should BellSouth be required to universally provide access to Enhanced Extended Links ("EELs") that it ordinarily and typically combines in its network at UNE rates?

Sprint argues that BellSouth is obligated to provide EELs to CLECs at the sum of the TELRIC rates for each UNE.[32] Sprint further asserts that this result is consistent with the Arbitrators' ruling in Docket No. 99-00377, *In Re: Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996.*[33] BellSouth maintains that it is not required to provide EELs.[34] BellSouth asserts its disagreement with the Arbitrators' previous decisions on this issue and relies on FCC rulings and the United States Court of Appeals, Eighth Circuit decisions.[35]

In Docket No. 99-00377, the Arbitrators ordered BellSouth to provide EELs at the sum of TELRIC rates to ICG Telecom Group, Inc.[36] The Arbitrators began their analysis of this issue by reviewing Section 51.315(b)'s requirement that ILECs provide CLECs with UNE combinations that the ILEC currently combines and the FCC's ruling in the *UNE Remand Order* that "a requesting carrier is entitled to obtain existing combinations of loop and transport between the end user and

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[31] TELRIC is an acronym for Total Element Long Run Incremental Cost, a cost methodology.

[32] *See* Melissa L. Closz, Pre-Filed Direct Testimony, p. 10 (Jan. 5, 2001).

[33] *See id.* at 10.

[34] *See* John A. Ruscilli, Pre-Filed Direct Testimony, p. 14 (Jan. 5, 2001).

[35] *See id.* at 15.

[36] *In re: Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00377, *Final Order of Arbitration*, p. 7 (Nov. 27, 2000).

[ILEC's] serving wire center on an unrestricted basis at unbundled network element prices."[37] The Arbitrators next recognized that BellSouth can create the EEL combination and has done so in the past.[38] Lastly, the Arbitrators noted that requiring BellSouth to provide EELs is appropriate public policy in that the requirement will help open residential markets to competition.[39] Relying on their decision in Docket No. 99-00377, the Arbitrators rendered the same ruling in Docket No. 99-00430, *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*,[40] and Docket No. 99-00948, *In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*.[41]

The Arbitrators find that neither party has presented any basis for departing from the Authority's previous holdings. Therefore, consistent with Docket Nos. 99-00377, 99-00430, and 99-00948, the Arbitrators voted unanimously to require BellSouth to provide EELs to Sprint at the sum of the TELRIC rates for each individual element.

III. Issue Nos. 22, 23, 24, 25, and 26

Based on the parties' filings and consistent with the parties' agreement, the Arbitrators voted unanimously to defer Issue Nos. 22, 23, 24, 25, and 26 to Docket No. 01-00193, *In re: Generic Docket on Performance Measurements*.

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[37] *Id.* at 4-5 (quoting the *UNE Remand Order* at para. 486).

[38] *See id.* at 5.

[39] *See id.* at 5-6.

[40] *See In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 99-00430, *Interim Order of Arbitration Award*, pp. 27-30 (Aug. 11, 2000).

[41] *In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00948, *Interim Order of Arbitration Award*, pp. 30-31 (Jun. 25, 2001).

IV. Ordered

The foregoing *Final Order of Arbitration Award* reflects the Arbitrators resolution of Issue Nos. 4 and 6. All resolutions contained herein comply with the provisions of the Telecommunications Act of 1996 and are supported by the record in this proceeding. BellSouth Telecommunications, Inc. and Sprint Communications Company L.P. shall file their interconnection agreement no later than January 17, 2002.

TENNESSEE REGULATORY AUTHORITY,
BY ITS DIRECTORS ACTING AS
ARBITRATORS

Sara Kyle, Chairman

H. Lynn Greer, Jr., Director

Melvin J. Malone, Director

ATTEST:

K. David Waddell, Executive Secretary