

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

NASHVILLE, TENNESSEE

August 24, 1995

IN RE: APPLICATION OF ICG ACCESS SERVICES, INC. (formerly TELEPORT DENVER, INC.) FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE PRIVATE LINE AND TELECOMMUNICATIONS ACCESS SERVICE WITHIN THE STATE OF TENNESSEE

DOCKET NO. 93-07922

ORDER

This matter is before the Tennessee Public Service Commission (the "Commission") upon the application of ICG Access Services, Inc. (formerly Teleport Denver, Inc.) (the "Applicant" or "ICG Access") for a certificate of convenience and necessity, pursuant to T.C.A. § 65-4-201, to operate as a Competing Telecommunications Service Provider within the state of Tennessee to provide telecommunications services including private line, access and basic local exchange services. In addition, pursuant to T.C.A. § 65-4-107, the Applicant requests that the Commission approve its telecommunications franchise granted by the Metropolitan Government of Nashville and Davidson County on October 18, 1994 to provide telecommunications service in Davidson County, Tennessee.

This matter was set for hearing and heard on June 28, 1995 before Chairman Keith Bissell, Commissioner Steve Hewlett and Commissioner Sara Kyle. The following appearances were entered at the hearing:

MS. D. BILLYE SANDERS,
Waller Lansden Dortch & Davis,
511 Union Street, Suite 2100,
Nashville, Tennessee 37219,
appearing on behalf of the Applicant, ICG Access
Services, Inc.;

MS. JEANNE MORAN, General Utility Counsel for the
Tennessee Public Service Commission,
460 James Robertson Parkway,
Nashville, Tennessee 37243,
appearing on behalf of the Commission Staff;

MR. CHARLES L. HOWORTH, JR., General Counsel and
MS. JACQUELYN S. SHAIA, General Attorney for South
Central Bell,
333 Commerce Street, Suite 2101,
Nashville, Tennessee 37201-3300,
appearing on behalf of Bell South Telecommunications,
Inc. d/b/a/ South Central Bell Telephone Company;

MR. T.G. PAPPAS,
Bass Berry & Sims,
2700 First American Center,
Nashville, Tennessee 37238,
appearing on behalf of United Telephone Company and
Tennessee Telephone Company;

MR. DAVID YATES,
Associate Consumer Advocate,
Office of the Tennessee Attorney General, Consumer
Advocate Division,
appearing on behalf of the Consumers of the State of
Tennessee;

MR. VAL SANFORD and
MR. KNOX WALKUP,
Gullett, Sanford, Robinson & Martin,
230 Fourth Avenue North, Third Floor
P.O. Box 198888,
Nashville, Tennessee 37219-8888
appearing on behalf of AVR, L.P., d/b/a/ Hyperion of
Tennessee, L.P.;

MR. CHARLES B. WELCH, JR.,
Farris, Mathews, Gilman, Branan & Hellen, P.L.C.
511 Union Street, Suite 2400
Nashville, Tennessee 37219
appearing on behalf of Time Warner AxS of Tennessee,
L.P.;

MR. JOHN KENNEDY,
Metropolitan Attorney,
204 Metropolitan Courthouse,
Nashville, Tennessee 37201,
appearing on behalf of the Metropolitan Government of
Nashville and Davidson County.

Upon conclusion of the proof in this case, the Commission granted the authority requested by the Applicant and approved the franchise to serve Davidson County. However, the Commission took under advisement the question of whether any prohibition against entry (by a Competing Telecommunications Service Provider holding a state-wide certificate) into areas served by incumbent local exchange telephone companies with fewer than 100,000 access lines ("small LECs") is lifted by operation of law when, as set forth in T.C.A. § 65-4-201(d), (a) a small LEC enters into an interconnection agreement with a competing telecommunications provider, or (b) a small LEC applies for a certificate to provide telecommunications services outside its service area; or whether a Competing Telecommunications Service Provider holding a state-wide certificate must seek additional action/authority from the Commission before entry. In addition, the Commission took under advisement the issue of whether its approval of the Davidson County franchise can and should include a restriction against serving areas served by small LECs. These issues will be briefed by interested parties and a separate decision will be rendered, which shall not otherwise affect the uncontested portion of the authority granted herein.

Background and Preliminary Matters

On October 4, 1993 Teleport Denver, Inc., a Delaware corporation, doing business as Intelcom Group, filed an application with the Tennessee Public Service Commission seeking a certificate of public convenience and necessity pursuant to T.C.A. § 65-4-201 to provide intrastate private line and telecommunications services as a non-dominate provider to the public within Tennessee.

Subsequent to filing of such application, Teleport Denver, Inc., merged with and into Intelcom Group (U.S.A.), Inc. ["ICG (U.S.A.)"], a Colorado corporation. ICG (U.S.A) is a wholly owned subsidiary of Intelcom Group, Inc. ("ICG") which is a publicly held company listed on the American Stock Exchange. ICG (U.S.A.) is a holding company with four operating subsidiaries. The Applicant, ICG Access Services, Inc., is a subsidiary of ICG (U.S.A) which operates all of the access services of ICG (U.S.A.). ICG Access Services, Inc. is the successor of the applicant, Teleport Denver, Inc.

In October 1994, ICG Access obtained a franchise from the Metropolitan Nashville and Davidson County Government to provide telecommunications services in Davidson County.

On June 6, 1995, Chapter 408 of the Public Acts of 1995 became effective. This law amended Title 65, Chapter 4, Parts 1 and 2, and Title 65, Chapter 5, Part 2, of the Tennessee Code regarding the regulation of telecommunication service providers by the Commission. As a result of its change in ownership and the change in the law, ICG Access Services, Inc. filed an Amended and

Restated Application on June 22, 1995 seeking authority to operate as a Competing Telecommunications Service Provider under the new Act and for approval of its franchise to operate in Davidson County pursuant to T.C.A. § 65-4-107. In the Amended and Restated Application, ICG Access indicated that it intended to offer private line and telecommunications access services to businesses and individuals within the state of Tennessee. At the hearing, ICG Access, by and through its attorney, moved to amend its application to include the provision of basic local exchange services on a state-wide basis, excluding those areas served by telephone cooperatives to the extent that such competing service is contrary to state law. The Commission voted unanimously to approve the Applicant's motion to amend its application to include the provision of basic local exchange services on a state-wide basis.

Findings of Facts and Conclusions of Law

In evaluating the evidence in the record and in making findings of fact and conclusions of law, the Commission considered the criteria for granting certificates to Competing Telecommunications Service Providers and the statutes regarding approval of franchises as set forth below.

T.C.A. § 65-4-201(c) and (d) provide:

- (c) After notice to the Incumbent Local Exchange Telephone Company and other interested parties and following a hearing, the Commission shall grant a certificate of convenience and necessity to a Competing Telecommunications Service Provider if after examining the evidence presented, the Commission finds:

- (i) The applicant has demonstrated that it will adhere to all applicable Commission policies, rules and orders; and
 - (ii) The applicant possesses the sufficient managerial, financial and technical abilities to provide the applied for services.
- (d) Subsection (c) shall not be applicable to areas served by an Incumbent Local Exchange Telephone Company with fewer than 100,000 total access lines in this state unless such company voluntarily enters into an interconnection agreement with a Competing Telecommunications Service Provider or unless such Incumbent Local Exchange Telephone Company applies for a certificate to provide telecommunications services in an area outside its service area existing on the effective date of this act.

T.C.A. § 65-4-207 provides:

- (a) The provisions of this part do not apply where any municipality or county by resolution or ordinance declares that a public necessity requires a competing company in that municipality or county.
- (b) The provisions of this section shall not apply to Telecommunications Service Providers; provided however this section shall continue to apply with respect to any ordinance adopted and any franchise granted pursuant to such an ordinance prior to the effective date of this act.

T.C.A. § 65-4-107 provides:

No privilege or franchise hereafter granted to any public utility by the state of Tennessee or by any political subdivision thereof shall be valid until approved by the commission. Such approval to be given when, after hearing, the commission determines that such privilege or franchise is necessary and proper for the public convenience and properly conserves the public interest, and the commission shall have power, if it so approves, to impose such conditions as to construction, equipment, maintenance, service or operation as a public convenience and interest may reasonably require; provided that nothing contained in this chapter shall be construed as applying to the laying of sidings, sidetracks, or switchouts, by any public utility, and it shall not be necessary for any such public utility to obtain a

certificate of convenience from the commission for such purpose.

Section 16 of Chapter 408 of the Public Acts of 1995 provides that:

Competing Telecommunications Service Providers shall file such plan [a small and minority owned telecommunications business participation plan] with their application for a certificate. Such plan shall contain the applicant's plan for purchasing goods and services from small and minority telecommunication business and information on programs, if any, to provide technical assistance to such businesses.

Michael Boyd, Vice President, External Affairs, ICG (U.S.A.) testified on behalf of the Applicant in support of the application. The Commission finds the facts to be as set forth in the following summary of the testimony and evidence in the record.

Mr. Boyd described the ownership of the ICG Access Services, Inc. as set forth in the preliminary section of this Order and affirmed to the Commission that ICG Access intends to adhere to all applicable Commission policies, rules and orders.

Mr. Boyd testified that ICG Access seeks authority to operate as a provider of telecommunication services including private line, access and basic local exchange services within the state of Tennessee as a non-dominant carrier. He stated that ICG Access would provide the services through the use of its own facilities and through the resale of services of other common carriers. The initial services would be provided in Nashville/Davidson County, Tennessee.

Mr. Boyd explained that ICG is a public company which owns ICG (U.S.A.) which in turn owns ICG Access, the Applicant.

ICG will provide the necessary financial resources for the construction of facilities and the operations of the Applicant. Mr. Boyd testified that the Applicant reports its financial information on a consolidated basis with its parent company, ICG. He submitted as supporting information the 1994 annual report of ICG, which shows current assets of \$43.1 million, including \$6 million in cash and cash equivalents. Although ICG ended the fiscal year (September 1994) with a loss, it is experiencing rapid growth and completed a public offering in October 1994 which increased the Applicant's current assets to \$119.1 million, including \$82.1 million in cash and cash equivalents, providing working capital of \$67.4 million. Mr. Boyd testified that the Applicant has sufficient financial resources to provide the services it seeks to offer in Tennessee.

Mr. Boyd testified that the Applicant also has the managerial and technical capabilities to provide the proposed telecommunication services, including basic local exchange service. In support of his assertions, he stated that the Applicant currently provides telecommunication services in Denver and Colorado Springs, Colorado; Charlotte, North Carolina; Milbourne, Florida; Cleveland and Dayton, Ohio; and is expanding operations to Phoenix, Arizona. He further testified that ICG has several hundred employees, most of whom have extensive telecommunications experience, who are available to provide expertise to the Applicant for its Tennessee operations. The resumes of the managerial and technical staff that will be located in Tennessee were submitted as

exhibits to the application. Joseph Buck, Vice President of Operations for ICG Access, who will have direct responsibility for Tennessee operations, has worked in telecommunications engineering and sales for over twenty years.

The Applicant filed a small and minority owned telecommunications business participation plan with its Amended and Restated Application. Mr. Boyd affirmed the commitment of ICG Access to its plan and to participate in the small and minority telecommunications business assistance program as set forth in Section 16 of Chapter 408 of the Public Acts of 1995.

The Applicant filed with its Amended and Restated Application a copy of the telecommunications franchise contract between the Metropolitan Government of Nashville and Davidson County and ICG Access Services dated October 18, 1994 in which the Metropolitan Government of Nashville and Davidson County granted the Applicant a franchise to construct and operate a telecommunications system within Metropolitan Nashville and Davidson County. The ordinance granting the franchise, which was passed on October 18, 1994 and approved by the Mayor of Nashville on October 24, 1994, was also submitted with the application.

The Applicant also submitted evidence that it served its Amended and Restated Application on the incumbent local exchange telephone companies operating in the state of Tennessee and other interested parties, as provided to the Applicant from the Commission's records.

Based upon the evidence in the record, including the testimony of Michael Boyd and the application as amended and the exhibits to the application, the Commission finds that the Applicant has demonstrated that it will adhere to all applicable Commission policies, rules and orders; and that the Applicant possesses sufficient managerial, financial and technical abilities to provide the applied for services.

The Commission concludes that the Applicant has met the applicable statutory criteria as set forth in Chapter 408 of the Public Acts of 1995 and therefore should be granted a certificate of convenience and necessity to operate as a Competing Telecommunication Service Provider on a state-wide basis, except in those areas served by telephone cooperatives and incumbent local telephone companies with fewer than 100,000 total access lines. The interpretation of T.C.A. § 65-4-201(d) relative to the triggering of the conditions precedent upon which competing service may be provided in such territories shall be taken under advisement by the Commission and a separate order shall be issued on that matter, after opportunity for filing briefs by interested parties.

In light of the declaration of the policy of the Tennessee General Assembly and the Metropolitan Government of Nashville and Davidson County to foster the development of telecommunications competition, the Commission concludes that it is necessary and proper to approve the franchise granted to ICG Access by the Metropolitan Government of Nashville and Davidson County. The Commission preliminarily concludes that it has the authority,

pursuant to T.C.A. § 65-4-107, to impose conditions upon the approval of a franchise; however, the Commission reserves the right, after the submission of briefs, to decide the issue as to whether a condition can and/or should be imposed on Applicant's franchise which would restrict the Applicant from providing service in areas of Davidson County which are served by incumbent local exchange companies with fewer than 100,000 access lines (in particular, the territories of Tennessee Telephone Company and United Telephone Company).

IT IS THEREFORE ORDERED:

1. That the application of ICG Access Service, Inc. is hereby granted for a certificate of convenience and necessity to operate as a Competing Telecommunications Service Provider authorized to provide telecommunications services including private line, access and basic local exchange services on a state-wide basis, except in those areas served by telephone cooperatives and incumbent local telephone companies with fewer than 100,000 total access lines.

2. That the Commission reserves the issue of interpretation of T.C.A. § 65-4-201(d) relative to the triggering of the conditions precedent for competing service in territories served by incumbent local exchange companies with fewer than 100,000 total access lines. Such issue shall be taken under advisement by the Commission and a separate order shall be issued, after opportunity for filing briefs by interested parties.

3. That the franchise granted to ICG Access Services, Inc. to operate a competitive telecommunication service in Davidson County is hereby approved; however, the Commission reserves the question as to whether it can or should impose a condition upon such approval as to service in areas served by incumbent local exchange companies with less than 100,000 total access lines.

4. That the authority granted to ICG Access Services, Inc. pursuant to approval of its franchise in Davidson County shall be subject to the Commission's regulatory authority in the same manner as the authority granted pursuant to its certificate of convenience and necessity.

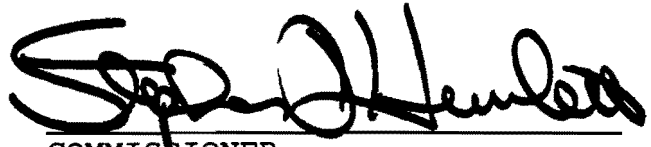
5. That ICG Access Services may commence service under its certificate and franchise when it has filed proper tariffs for services to be offered and is otherwise in compliance with all applicable Commission rules and regulations;


6. That any party agreed with the Commission's decision in this matter may file a Petition to Reconsider with the Commission within (10) days from and after the date of this Order;

7. That any party aggrieved with the Commission's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.



CHAIRMAN


COMMISSIONER


COMMISSIONER

ATTEST


EXECUTIVE DIRECTOR