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January 10, 2000

David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

In Re: Petition of ICG Telecom Group, Inc. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996
Docket No. 99-00377

Dear David.

Enclosed herewith are the original and thirteen copies of the Post-Hearing Brief on Remaining Open Issues filed on behalf of ICG Telecom Group, Inc. in the above-referenced docket.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker, attorney for ICG

HW/nl
Enclosure
cc: Guy Hicks, attorney for BellSouth

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: PETITION OF ICG TELECOM GROUP, INC. FOR ARBITRATION WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252 OF THE TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. 99-00377

POST-HEARING BRIEF OF ICG TELECOM GROUP, INC. ON REMAINING OPEN ISSUES

ICG Telecom Group, Inc. ("ICG") hereby files its Post-Hearing Brief in the above-captioned proceeding.

STATEMENT OF CASE

ICG is a competitive local exchange carrier ("CLEC") that offers local exchange and other services in Tennessee. In order to provide service, ICG sought, and entered into, an interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). On December 18, 1998, pursuant to the terms of the parties' agreement, BellSouth notified ICG that it wished to negotiate a new agreement pursuant to Section 251 of the Communications Act of 1934, as amended ("Act"). Despite meeting for several negotiating sessions over the next several months, the parties were unable to reach agreement on a number of issues. On May 27, 1999, ICG filed a Petition for Arbitration pursuant to Section 252 of the Act, requesting that the Tennessee Regulatory Authority ("Authority" or "TRA") resolve twenty-six disputed issues.

As a result of settlement negotiations between the parties, only six issues remain for decision by the Authority. They are as follows:

1. Whether the Authority should require reciprocal compensation for calls to Internet Service Provides ("ISPs") (Petition for Arbitration Issues 1 and 8);

2. Whether, if ICG's switch serves a similar geographic area as BellSouth's tandem switch, ICG is entitled to reciprocal compensation at the tandem rate, particularly where (although not required), ICG's switch also provides the same functionality as BellSouth's tandem switch (Petition for Arbitration Issue 7);

3. Whether BellSouth should be required to make the Enhanced Extended Link ("EEL") available as a unbundled network element ("UNE") combination, at UNE prices (Petition for Arbitration Issue 4);

4. Whether the Authority should order performance measurements, backed by appropriate enforcement mechanisms, to ensure that BellSouth provides nondiscriminatory service to ICG on parity with the service BellSouth provides to itself and its other customers (Petition for Arbitration Issues 19-26);

5. Whether BellSouth should be required to provision the requisite trunking facilities to deliver traffic from BellSouth's network to ICG when ICG is willing to enter into a binding forecast of traffic volume from BellSouth to ICG and will pay BellSouth for the provisioned facilities, regardless of whether the traffic reaches the forecasted levels (Petition for Arbitration Issue 11); and

6. Whether BellSouth should be required to offer packet switching on a UNE basis (Petition for Arbitration Issue 3).

One of those issues – whether the Authority should require reciprocal compensation for calls to ISPs – was consolidated with the same issue in the Petition for Arbitration filed by ITC^DeltaCom ("DeltaCom") in Docket No. 99-00430.[1] That issue was addressed by ICG in a brief filed in both dockets on December 7, 1999 (the "ICG Reciprocal Compensation Brief").

ICG has also already filed a brief addressing the legality of performance measures and liquidated damages. That brief was filed in this Docket on December 8, 1999 (the "ICG Performance Measures Brief"). The ICG Performance Measures Brief only addressed whether the Authority *could* order enforcement mechanisms; it did not discuss in detail why the Authority *should* do so or the underlying question of which set of performance measures the TRA should adopt. Those issues are addressed in this brief.

The disputed issues between ICG and BellSouth, have been or are being arbitrated by the parties in five other states throughout BellSouth's operating region. As of the filing of this brief, two of those states – North Carolina and Alabama – have issued arbitration orders resolving the disputed issues. Both states ruled in ICG's favor on virtually every issue before them,[2] including reciprocal compensation for ISP-bound traffic. *In re Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. P-582, Sub 6 (N.C. Utils. Comm. Nov. 4, 1999) ("*North Carolina Order*"); *In re Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of*

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[1] *See* October 25, 1999 *Notice of Arbitration Hearing*. The remaining ICG issues were addressed at a hearing held by the Authority on November 22-23, 1999 in Docket No. 99-00377.

[2] Many of the issues had been settled by the parties, eliminated by Commission ruling, or otherwise were not before the Alabama and North Carolina commissions.

the Telecommunications Act of 1996, Docket 27069 (Ala. Pub. Serv. Comm. Nov. 10, 1999) ("*Alabama Order*").

The Florida Public Service Commission has also adopted an order in the parties' arbitration proceeding, but the text of that order has not yet been released. Apparently, the Florida Commission adopted the staff's recommended decision in the proceeding. The staff recommendation largely found in favor of BellSouth, with the exception of reciprocal compensation for ISP-bound traffic. On that issue, the staff did not question ICG's right to reciprocal compensation, and provided two alternative recommendations. Apparently, by a two to one vote, the Florida Commission adopted the staff's second alternative, which was that the parties' existing agreement would continue to govern with respect to reciprocal compensation for ISP-bound traffic. The parties are currently in litigation over the effect of that agreement, with ICG contesting BellSouth's refusal to pay.

Each of the remaining open issues is addressed below.

ARGUMENT

I. ICG Is Entitled to Reciprocal Compensation at the Tandem Interconnection Rate

It is ICG's position that it is entitled to reciprocal compensation at the tandem interconnection rate.

A. ICG's Switch Serves a Geographic Area Comparable to that Served by BellSouth's Tandem Switch

Section 51.711 of the Federal Communications Commission's rules, 47 C.F.R. § 51.711, sets forth the sole criteria for determining whether ICG is eligible for interconnection at the tandem rate. Section 51.711(a)(3) 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. § 51.711(a)(3). Thus, if ICG's switch serves a geographic area similar to BellSouth's tandem, the appropriate reciprocal compensation rate is the tandem rate.

The uncontroverted evidence in this proceeding is that ICG's switch serves a comparable geographic area to that served by BellSouth's tandem switch. ICG presented direct testimony to that effect. Starkey Direct (Phase II) at 10, Diagram 3; Starkey Rebuttal (Phase II) at 2.

ICG has a single switch in Tennessee, located in downtown Nashville. Starkey Cross, Tr. 109. ICG serves all of its customers in the LATA through that single switch. As Mr. Starkey explained, ICG is able to do so because of the "advent of fiber optic technologies and multi-function switching platforms." Starkey Direct (Phase II) at 10. Those new technologies have made possible network architectures that allow carriers "to serve an entire statewide or LATA-wide customer base from a single switch platform." *Id.* ICG is collocated in four BellSouth central offices. Starkey Redirect, Tr. 119. At each of those collocations, ICG has put into place switching nodes, generally SONET equipment, which are connected to one another and to ICG's switch by a fiber ring. Starkey Cross, Tr. 110. In addition to the customers that ICG serves through those collocated facilities, ICG also has 88 customers directly on its own network. ICG Response to BellSouth Interrogatory No. 7 (October 20, 1999). ICG installs similar switching nodes in its on-network buildings. Starkey Redirect, Tr. 120. Thus, as Mr. Starkey testified, ICG's network architecture allows ICG to "carry calls from customers across wide geographic regions that might otherwise have required a network like BellSouth's to use many switches in the process." *Id.*, Tr. 110-11.

By contrast, BellSouth has provided absolutely no testimony or other evidence rebutting that showing. *See* Varner Direct (Oct. 29, 1999) at 17-20; Varner Rebuttal (Phase II) at 2-14. The *only* testimony provided by BellSouth on geographic scope was BellSouth's witnesses Varner's assertion that "[w]ithout additional information, it is not possible to determine whether ICG's switch would actually serve a geographic area comparable to BellSouth's tandem." Varner Direct (Oct. 29,

1999) at 18. BellSouth, however, offers no support or explanation for this claim, failing even to specify what additional showing it believes ICG is required to make.

ICG showed through the testimony of its witnesses that its switch serves a geographic area comparable to that served by BellSouth's tandem. BellSouth has offered no evidence in rebuttal. Thus, as both the North Carolina and Alabama commissions found when presented with essentially the same evidence that is before the Authority, "ICG is entitled to compensation at the tandem interconnection rate." *North Carolina Order* at 10; *Alabama Order* at 22.

B. Although Not Required by the FCC's Rule, ICG Has Demonstrated that its Switch Provides Functionality Comparable to BellSouth's Tandem

Unable to rebut ICG's showing that ICG's switch serves a geographic area similar to a BellSouth tandem switch, BellSouth reads the *Local Competition Order* as requiring an additional criterion, not found in the plain language of Section 51.711(a)(3), that BellSouth claims ICG must meet in order to qualify for the tandem interconnection rate. According to BellSouth witness Varner, ICG is only entitled to reciprocal compensation at the tandem rate if ICG's switch performs the same functionality as an ILEC tandem in addition to serving a similar geographic area. *See* Varner Rebuttal (Phase II) at 4-5. The plain language of Section 51.711 makes clear, however, that serving a similar geographic area is the *only* requirement under the FCC's rules. 47 C.F.R. § 51.711(a)(3); *see also North Carolina Order* (rejecting BellSouth's argument that switch functionality is relevant under Section 51.711 and finding that the *Local Competition Order* "requires only that a [CLEC's] switch serve a geographic area comparable to that served by an ILEC's tandem to qualify for the tandem termination rates"); *Alabama Order* at 21 (functional equivalency is not a requirement of the FCC's rules).

At least one court has held that if a CLEC is able to make the showing that its switch serves a geographic area comparable to that served by the ILEC, it is entitled to the tandem rate,

regardless of whether it is able to make the functionality showing. *US West Communications, Inc. v. Min. Pub. Utils. Comm'n*, 55 F. Supp. 968, 979 (D. Minn. 1999) (under the FCC's rule, evidence that a CLEC's switch covers a geographic area comparable to that covered by a tandem switch "alone provides sufficient grounds for a finding that the appropriate rate for the [switch] is the tandem rate"). While there are also cases that have held that a CLEC must make both showings, *see, e.g., US West Communications, Inc. v. Pub. Service Comm'n of Utah*, 1999 U.S. Dist. LEXIS 18148, *12 (D. Utah Nov. 23, 1999), ICG believes that the explicit language of the rule makes clear that the better view is that only the geographic showing need be made.

In any case, as both the Alabama and North Carolina commission found, ICG's switch "provides functionality comparable to that provided by BellSouth tandem's switch." *Alabama Order* at 22; *see North Carolina Order* at 10 ("there is comparable functionality between [BellSouth's] tandem and ICG's switch"); Starkey Direct at 24–25. As described in Mr. Starkey' testimony, ICG's network consists of a centrally located host switch that supports other switching nodes that are collocated either in BellSouth central offices or in customer locations. ICG's fiber optic ring connects these discrete nodes within its network and transfers traffic amongst those nodes. This is exactly the function that BellSouth's tandem switch serves in the BellSouth network. Starkey Rebuttal (Phase II) at 2-4.

The fact that ICG is able to deploy SONET nodes, instead of placing full Class 5 switches in each of its collocations or customer buildings, does not detract from the fact that the ICG network performs exactly the same functions as the BellSouth network. Because of technological developments not available when BellSouth built its network, ICG is able to use a different network architecture employing different technology to accomplish the same tasks. This is exactly what the FCC had in mind when it directed state commissions to "consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an Incumbent

LEC's tandem." *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1090 (1996).

BellSouth argues that ICG's switch cannot perform tandem functionality (and thus qualify for the tandem rate) because ICG's network architecture does not resemble BellSouth's. BellSouth sets up a test that only its network meets. According to BellSouth witness Varner, "one of the primary distinguishing characteristics of a tandem switch is that a tandem switch interconnects end offices." Varner Rebuttal (Phase II) at 8. While ICG's switch does not meet this test, it is because ICG has chosen to deploy a fiber ring and optical switching nodes in lieu of building numerous end offices. As Mr. Starkey testified, ICG should not be handicapped because it chose to take advantage of those new technologies, instead of mirroring BellSouth's network architecture. *See* Starkey Direct (Phase II) at 11-12.

BellSouth witness Varner attempts to dismiss ICG's fiber ring as nothing more than a "long loop" that has nothing to do with tandem functionality. Varner Rebuttal (Phase II) at 11. However, Mr. Varner acknowledged, a loop is defined, both under Section 51.319(a)(1) of the FCC's rules and the parties' interconnection agreement, as "a transmission facility between the distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises." 47 C.F.R. § 51.319(a)(1). ICG's fiber ring does not fall within that definition. Moreover, as Mr. Varner acknowledged on cross examination, if ICG sought to purchase the equivalent of any of the internodal segments of its fiber ring from BellSouth, it would buy the facilities as "unbundled transport." Varner Cross, Tr. 263-64. Clearly, if the facilities in question are transport facilities, they cannot be characterized as another sort of loop, long or not.

In addition to the traffic routing functions described above, ICG's switch also performs the other functions typically performed by tandem switches. As Mr. Starkey testified

> Tandem switches (what are commonly referred to as Class 4 switches in the tradition AT&T hierarchy) generally aggregate toll traffic from a number of central offices (Class 5 switches) for purposes of passing that traffic to the long distance network. The tandem switch is also the traditional focal point for other purposes as well, including the aggregation and processing of operator services traffic, routing traffic that is to be transferred between the trunk groups of two separate carriers and measuring and recording toll traffic detail for billing. While ILECs have traditionally employed two separate switches to accomplish these Class 4 and Class 5 functions, ICG's Lucent 5ESS platform performs all of these functions in addition to a number of others within the same switch.

Starkey Direct (Phase II) at 11. Among other things, ICG "uses its switching platform as its Feature Group D access point for originating and terminating traffic to and from IXCs. Likewise, ICG uses its Lucent 5ESS as its Operator Services access point for all of its local customers. Starkey Rebuttal (Phase II) at 6.

Significantly, in previous arbitrations between the parties, BellSouth took the position that it would only consider ICG's switch to be equivalent to a tandem if it were identified in the local exchange routing guide ("LERG")[3] as such. For example, BellSouth witness Varner testified before the Florida Public Service Commission that "BellSouth will pay the tandem interconnection rate only if ICG's switch is identified in the [LERG] as a tandem." Varner Florida Direct (filed with the Florida Public Service Commission August 7, 1999) at 44 (copy attached as Exhibit 1 hereto). While this criterion is an invention of BellSouth's, not found in the FCC's rules, it is met by ICG. As ICG witness Schonhaut testified, also before the Florida Public Service, "every one of ICG's switches is registered in the LERG as a tandem."[4] Realizing its error, BellSouth does not make the same argument regarding the LERG in the instant proceeding. However, having said very explicitly what

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[3] The LERG contains area code and central office numbering assignments as identified by the North American Numbering Plan, as well as carrier identification codes and specialty dialing codes.

[4] Petition of ICG Telecom Group, Inc. for Arbitration of Unresolved Issues in Interconnection Negotiations with BellSouth Telecommunications, Inc., Docket No. 990691–TP, Tr. 281–282 (October 7, 1999). The relevant excerpt is attached hereto as Exhibit 2.

it regards as the touchstone for whether or not ICG's switch qualifies for the tandem rate, BellSouth should be held to that position.

In sum, ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switches, performs the same functions, and is identified in the LERG as a tandem. Therefore, ICG is entitled to a reciprocal compensation rate equal to the rate that BellSouth levies for calls terminated to its tandem. BellSouth's tandem termination rates recover costs associated with (1) tandem switching, (2) transport between BellSouth'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 BellSouth.

II. BellSouth Should Be Required to Make the EEL Available as a UNE Combination

ICG has requested that BellSouth provide the EEL as a UNE combination. The EEL consists of (1) the loop running from a customer's premises to the serving BellSouth central office, and (2) a dedicated transmission path from that central office to a second BellSouth central office or to an ICG switch. 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 Tennessee businesses and consumers than ICG currently is able to serve. Holdridge Direct (Phase II) at 10-11. Without the EEL, ICG would be forced to incur the debilitating expense of collocation in each of BellSouth' central offices where ICG wishes to serve even a single customer. *Id.* at 11.

BellSouth, for its part, has said that it will provide the EEL through a "commercial agreement." Varner Direct (Oct. 29, 1999) at 12. BellSouth has made clear, however, that it regards this offer as voluntary and as outside of its obligations under Sections 251 and 252. *Id.* Thus, the retail rates under which BellSouth has said it will make EELs available are much higher than the TELRIC rates at which BellSouth is required to provide UNEs and UNE combinations. Holdridge

Direct (Phase II) at 10. This retail pricing of the EEL "severely limits ICG's emergence as a competitor to BellSouth." *Id.* at 11.

The issue before the Authority thus is whether BellSouth must make EELs available as a UNE combination at UNE prices. As discussed in Section II.A. below, Section 51.315(b) of the FCC's rules, 47 C.F.R. § 51.315(b), and the FCC's released *UNE Remand Order*[5] make clear that where loop and transport are actually combined within BellSouth's network, the answer to that question is yes.[6] And, as discussed in Section III.B. below, to the extent that BellSouth does not currently combine loop and transport, the Authority can and should use its authority under Section 251 of the Act to require that BellSouth make EELs available as a means of efficiently bringing the benefits of competition to all Tennessee consumers.

A. Where BellSouth Currently Combines Loop and Transport Within Its Network, It Must Make 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 Section 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), which is controlling federal law. The application of that law is straightforward. The parties agree that EEL is simply the combination of two network elements—loop and transport.[7] *See* Varner Direct (Phase II) at 10. Under Section

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[5] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Rulemaking, CC Docket No. 96-98, released November 5, 1999.

[6] BellSouth devotes much of its testimony to arguing that the FCC declined to add the EEL to the FCC's national list of UNEs. While ICG believes that the Authority could make the necessary finding to itself define the EEL as a UNE, it is ICG's position in this proceeding that BellSouth should be required to make the EEL available as a combination of other, existing UNEs. Whether or not the EEL is also independently a UNE is irrelevant to the question of whether the EEL must be made available as a combination.

[7] The FCC's *UNE Remand Order* has resolved whatever debate there may have been among the parties as to whether the cross connect between the loop and transport elements is part of the EEL UNE combination. The FCC clarified that cross connects between network elements are not themselves UNEs. *UNE Remand Order*, ¶ 179 ("We continue to view the cross connect as a means of interconnection with network elements, rather than as part of the

51.315(b), if those two elements are currently combined in BellSouth's network, BellSouth must make that combination available to ICG without separating the combined elements. 47 C.F.R. § 51.315(b).

Section 51.315(b) makes clear that the requirement that BellSouth make available UNE combinations that it "currently combines" applies to all UNEs that are actually connected together in BellSouth's network. Section 51.315(b) provides that "an incumbent LEC *shall not separate* requested elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b) (emphasis added). In other words, incumbent LECs are prohibited from taking apart combinations that actually exist in their networks. *See AT&T v. Iowa Utilities Board*, 119 S.Ct. at 737 ("As the [FCC] explains," Section 51.315(b) is "aimed at preventing incumbent LECs from 'disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'").

The FCC specifically addressed the combination of loop and transport elements comprising the EEL in the *UNE Remand Order*. The FCC held that, where an unbundled loop is connected to unbundled dedicated transport, "the statute and our rule 51.315(b) require the incumbent to provide such elements to requesting carriers in combined form." *UNE Remand Order*, ¶ 480. Moreover, the FCC held that "requesting carriers are entitled to obtain such existing loop-transport combinations at unbundled network element prices." *Id.*

1. Special Access Is a Clear Instance of Loop and Transport Elements Being Currently Combined in BellSouth's Network

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network element."). The FCC went on to say that ILECs must "provide cross connect facilities according to sections 252(d)(1) and 251(c)(3) at any technically feasible point that a requesting carrier seeks access to the loop . . . ." *Id.* Furthermore, charges for cross connects "must meet the cost-based standard provided in section 252(d)(1), and the terms and conditions of providing cross connect facilities must be reasonable and nondiscriminatory under section 251(c)(3)." *Id.*, ¶ 178.

In particular, the FCC explicitly held that "incumbent LECs may not separate loop and transport elements that are currently combined and purchased through the special access tariffs." *Id.* Thus, where ICG (or any other CLEC for that matter) is providing local exchange service to a customer using facilities purchased out of BellSouth's special access tariff, the FCC's order makes clear that ICG is entitled to convert the special access facilities to an EEL at UNE pricing.

Notwithstanding the *UNE Remand Order*'s unequivocal direction, BellSouth continues to balk at converting special access facilities to EELs. According to BellSouth witness Varner, "BellSouth is still determining whether even this circumstance does, in fact, constitute currently combined UNEs. Even if it does, it is unclear whether ICG can convert the special access to UNEs prior to the completion of the FCC's Further Notice of Proposed Rulemaking." Varner Rebuttal (Phase II) at 21.

That BellSouth is "still determining" whether or not it is required to convert special access facilities to EELs is sheer nonsense. The *UNE Remand Order* could not have spelled out BellSouth's obligations in this regard any more clearly. In any case, the day after the conclusion of the hearing in this proceeding, the FCC released its *Supplemental Order* in the *UNE Remand* proceeding, which specifically addressed the conversion of special access facilities to EELs. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order*, CC Docket No. 96-98 (released November 24, 1999) (copy attached hereto as Exhibit 3). The *Supplemental Order* clarifies that ILECs have an absolute obligation to convert special access facilities to EELs, so long as the special access facilities are being used to "provide a significant amount of local exchange service." *Supplemental Order*, ¶ 5. The FCC went on to say that it will "presume that the requesting carrier is providing significant local exchange service if the requesting carrier is providing all of the end user's local exchange service." *Id.*, ¶ 5 n.9. The FCC

also said that it was up to the requesting carrier to self-certify that it is providing a significant amount of local exchange traffic. *Id.*

ICG has already made absolutely clear that it "intends to use the EEL primarily for offering its customers local exchange service." Holdridge Direct (Phase II) at 11. Since ICG is willing to comply with the single precondition established by the FCC for conversion of special access facilities to EELs, there is no basis for BellSouth's continued refusal to concede that it is required to do so.[8]

Mr. Varner's suggestion that BellSouth's obligation to convert special access facilities may not be effective until the FCC completes its Further Notice of Proposed Rulemaking is nothing short of ludicrous. The *UNE Remand Order* is explicit that, as of the order's effective date, ILECs are required to convert special access facilities being used to provide local exchange service to EELs. *UNE Remand Order*, ¶ 480. The Further Notice portion of the order deals only with whether or not special access facilities that are being used to provide *exchange access* service can be converted to EELs. *See UNE Remand Order*, ¶¶ 492-96. This effort to read uncertainty into the *UNE Remand Order* where there is none is just another example of obstructionist, anticompetitive behavior on the part of BellSouth.

BellSouth may argue here, as it has in other arbitrations between the parties, that the TRA should restrict ICG's ability to convert facilities purchased out of BellSouth's special access tariff to UNEs by requiring a six-month waiting period for such conversions. BellSouth, however, is barred from raising this argument. Not only did BellSouth not raise the issue in its response to ICG's petition for arbitration; it did not so much as present a single line of testimony on this point. The

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[8] BellSouth witness Varner contends that BellSouth should not be required to make the EEL combination available because "ICG plans to the use the EEL . . . as a substitute for access service." Varner Rebuttal at 40. This is simply not so and the record shows the contrary; ICG intends to use the EEL combination to provide local exchange service to existing customers and to extend the range of customers to whom it can provide local exchange service.

issue is thus not properly before the TRA for consideration. In any case, Section 51.315(b) establishes ICG's right to UNE combinations at UNE prices. It is hardly gaming the system for ICG to exercise that right. If ICG wishes to order special access and convert the facilities to UNE pricing, it is entitled to do so, at will, and without a waiting period.

Furthermore, BellSouth's proposed restriction would clearly violate Section 51.309(a) of the FCC's rules. Section 51.309(a) provides that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends." 47 C.F.R. § 51.309(a). Indeed, the FCC's *Supplemental Order* in the UNE remand proceeding clarifies that CLECs are entitled to convert special access facilities to UNEs without delay. *Supplemental Order*, ¶ 5 n 9. BellSouth's proposed waiting period is directly contrary to the FCC's ruling.

2. In addition to Special Access, the FCC Has Enumerated Several Combinations of Loop and Transport that Constitute the EEL

In addition to special access, the FCC also cited in another context several other examples of where ILECs' "routinely provide combinations of loop and transport elements" in their networks and where failure to provide the combination would be discriminatory. Among those are where the ILECs use the combination of loop and transport to "(1) deliver data traffic to their own packet switches; (2) provide private line services; and (3) provide foreign exchange service." *UNE Remand Order*, ¶ 481. Clearly, under Section 51.315(b), where the ILECs provide these current combinations to themselves, they are required to make them available to requesting carriers. 47 C.F.R. § 51.315(b); *UNE Remand Order*, ¶¶ 480–81; *see Alabama Order* at 28 (holding that Section 51.315(b) requires BellSouth to provide the EEL "where it currently combines . . . loops with transport within its network").

3. BellSouth's View of What Constitutes an Existing Combination Is Absurdly Narrow

ICG witness Holdridge provides another example of existing combinations of loop and transport within BellSouth's network. Mr. Holdridge testified that "[i]t is my understanding that not all of BellSouth's switches have ISDN capability, but that BellSouth provides ISDN Basic Rate Interface (ISDN-BRI) service, and possibly ISDN Primary Rate Interface (ISDN-PRI) service, in all exhanges." Holdridge Direct (Phase II) at 11. As Mr. Holdridge explained, this is possible because, "[i]n exchanges where the serving switch does not have ISDN capability, BellSouth provides ISDN by combining a loop from the serving central office with transport to an ISDN-capable switch." *Id.* Where BellSouth provides ISDN in this manner, ICG is entitled under Section 51.315(b) of the FCC's rules to convert the existing combination of loop and transport facilities to the EEL if it wins the customer.

Notwithstanding the FCC's clear direction, BellSouth does not agree; it continues to maintain an unreasonably narrow view of what constitutes an existing combination of loop and transport. BellSouth witness Varner contends that when a combination of loop and transport elements is being used by BellSouth to provide service to an end user and that end user converts its service from BellSouth to ICG, the combination is no longer an "existing combination." Varner Cross, Tr. 256. According to Mr. Varner, this is because moving even the final cross connect between the transport element and BellSouth's switch "to an ICG collocation" destroys the combination. *Id.* Thus, in Mr. Varner's view, there can be no existing combination in any case where a CLEC wishes to avail itself of a combination that the ILEC is providing to itself.[9]

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[9] Under this reasoning, the only possible existing combination of UNEs that can remain in place when a CLEC converts an ILEC customer is the UNE platform, where the CLEC buys all of the elements necessary to provide service to the end user from the ILEC and thus does not require a cross connect to collocated facilities. Any other combination would require moving a cross connect from the ILEC's switch to the CLEC's collocation.

The FCC's enumeration of several combinations of loop and transport elements in the ILECs' networks that are equivalent to the EEL makes clear that this is not what Section 51.315(b) intended. Moreover, Mr. Varner's position rests on the notion that the cross connect is part of the combination. As discussed above, *see* n. 8, the FCC has clarified that this is not the case. BellSouth must make available to ICG any current combination of loop and transport in BellSouth's network, regardless of whether that entails moving a cross connect to ICG's collocation.[10]

B. The Authority Can and Should Require BellSouth to Make the EEL Available as an Efficient Means of Bringing the Benefits of Competition to Tennessee.

Even to the extent that the EEL is not an existing combination within BellSouth's network, the Authority can and should require BellSouth to make the EEL available to ICG as an important tool for creating effective competition in the state.

1. The Supreme Court's Decision in *AT&T Corp. v. Iowa Utilities Board* Makes Clear that Section 251(c)(3) Provides Ample Authority for Requiring BellSouth to Combine the Loop and Transport UNEs Comprising the EEL

In light of the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, it is clear that the Authority has authority under Section 2515 of the Act to require BellSouth to provide EELs as a UNE combination, regardless of whether the combination is currently combined in BellSouth's network. Section 251(c)(3) imposes on incumbent LECs:

> [t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

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10 ICG would pay a reasonable, cost-based nonrecurring charge to BellSouth for moving the cross connect.

47 U.S.C. § 251(c)(3).

Both Section 51.315(b), which requires ILECs to provide UNE combinations that the ILEC currently combines, and Sections 51.315(c)–(f), which requires ILECs to combine previously uncombined elements, were vacated by the Eighth Circuit. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). The Supreme Court, however, in reversing the Eighth Circuit with respect to Section 51.315(b), held that the FCC's interpretation of Section 251(c)(3) was "entirely rational, finding its basis in § 251(c)(3)'s nondiscrimination requirement." *AT&T Corp.*, 119 S.Ct. at 737. According to the Court, Section 51.315(b) was designed to prevent incumbent LECs from imposing "wasteful costs" on requesting carriers and that it was "well within the bounds of the reasonable for the [FCC] to opt in favor of ensuring against an anticompetitive practice." *Id.* at 738.

While Sections 51.315(c)–(f) were not before the Supreme Court, the Court's logic in reinstating Section 51.315(b) clearly extends to those other provisions. The same nondiscrimination requirement that undergirds Section 51.315(b)'s requirement that combined elements not be separated also underlies the requirement that the incumbent LECs must combine elements for requesting carriers. *See, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15647, ¶ 294 (1996) ("we conclude that section 251(c)(3) should be read to require incumbent LECs to combine elements requested by other carriers").

Thus, regardless of whether Sections 51.315(c)-(f) of the FCC's rules are in effect, the Commission has more than ample authority under Section 251(c)(3) of the Act to require BellSouth to make the EEL combination available regardless of whether loop and transport are currently combined in BellSouth's network. The United States Court of Appeal for the Ninth Circuit has recently confirmed that this is the case in *US West Communications v. MFS Intelnet, Inc.*, No. 98-35146 (October 8, 1999). In that case, the Ninth Circuit upheld the Washington Utilities and

Transportation Commission's decision in an arbitration proceeding to require US West to combine UNEs. In so holding, the court specifically found that the Supreme Court's reasoning in *AT&T* makes clear that not only does the nondiscrimination provision of Section 251(c)(3) prohibit ILECs from separating existing combinations, it is also the basis for requiring ILECs to combine UNEs upon request. *US West*, slip op. at 21. The Ninth Circuit thus affirmed the Washington Commission, holding that "it necessarily follows from [the Supreme Court's decision in *AT&T*] that requiring US West to combined unbundled network elements is not inconsistent with the Act." *Id.*

2. The Authority Is Not Barred from Acting Because the Eighth Circuit Has Vacated Sections 51.315(c)-(f) of the FCC's Rules

BellSouth points out that the Eighth Circuit has vacated Sections 51.315(c)–(f) of the FCC's rules, which required incumbent LECs to combine UNEs for requesting carriers. US West made exactly this argument to the Ninth Circuit. The Ninth Circuit's reasoning in rejecting the argument is exactly correct:

> The Supreme Court opinion, however, undermined the Eighth Circuit's rationale for invalidating [Sections 51.315(c)–(f)]. Although the Supreme Court did not directly review the Eighth Circuit's invalidation of Section 51.315(c)–(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the . . . FCC regulation.

Id.

Moreover, the FCC itself stated in the *UNE Remand Order* that the Supreme Court's decision in *AT&T v. Iowa Utilities Board* requires the reinstatement of Sections 51.315(c)–(f). *UNE Remand Order*, 481 ("the reasoning of the Supreme Court's decision to reinstate rule 51.315(b) based on the nondiscrimination language of section 251(c)(3) applies equally to rules 51.315(c)–(f)"). While the FCC declined in the *UNE Remand Order* to reinstate Sections

51.315(c)–(f) because of the remand proceeding before the Eighth Circuit, the FCC was quite clear that "section 251(c)(3) provides a sound basis for reinstating rules 51.315(c)–(f)." *Id.*, 482.

Unlike the FCC, the Authority need not feel that its hands are tied; its rules are not before the Eighth Circuit. The Authority can and should do what the FCC felt it could not and use its authority under Section 251 to order BellSouth to provide the EEL regardless of whether it is currently combined in BellSouth's network.

III. The Authority Should Order the Performance Measurements Proposed by ICG, Backed by Appropriate Enforcement Mechanisms, to Ensure that BellSouth Provides Nondiscriminatory Service

There is no dispute between the parties as to whether their Agreement should include a set of performance measures to help ensure that BellSouth provides nondiscriminatory service to ICG at parity with the service BellSouth provides to itself and its other customers. The question is which set of proposed performance measures should be adopted. ICG proposes a series of performance measures recently adopted by the Public Utility Commission of Texas in a comprehensive "mega-arbitration" proceeding (the "Texas Performance Measures"). A copy of the Texas Performance Measures is attached as Exhibit 1 to the Direct Testimony of ICG witness Gwen Rowling. BellSouth, for its part, contends that the TRA should adopt BellSouth's proposed Service Quality Measurements ("SQMs"). In Section III.A. below, ICG demonstrates why the Texas Performance Measures are superior to BellSouth's proposed SQMs.

The other open issue is whether the performance measures adopted by the parties will be backed by meaningful enforcement mechanisms. ICG believes that it is critical that there be a stick in order to ensure that BellSouth suffers some consequence if it fails to meet the established benchmarks. The Texas Performance Measures proposed by ICG include liquidated damages payments that are triggered when BellSouth *repeatedly* fails to meet the performance benchmarks included in the plan. Predictably, BellSouth for its part maintains that no enforcement mechanisms

are needed. Varner Rebuttal (Phase II) at 27. Alternatively, BellSouth urges that the TRA adopt the enforcement mechanism plan that BellSouth has proposed before the FCC (the "BellSouth Enforcement Plan"), which is essentially a watered-down, less well-developed version of the Texas enforcement plan. In Section III.B. below, ICG demonstrates why it is critical that the TRA require a self-executing enforcement mechanism to ensure BellSouth's compliance with its performance measures. In Section III.C., ICG demonstrates why the best available option is the enforcement mechanism contained in the Texas Performance Measures.

A. The TRA Should Require BellSouth to Adopt the Texas Performance Measures Proposed By ICG

The evidence in this proceeding makes clear that the Texas Performance Measures are superior to the SQMs proposed by BellSouth.

1. Unlike the SQMs, the Texas Performance Measures Were Developed in Conjunction with a Set of Enforcement Mechanisms

The Texas Performance Measures include a fully-developed, self-executing enforcement mechanism in the form of two tiers of liquidated damages payments. Rowling Direct (Phase II) at 9. As discussed in more detail below, it is critical that any performance measures adopted by the TRA include an enforcement mechanism. As Ms. Rowling testified, "BellSouth has every incentive not to live up to [its] obligations. The system needs teeth to ensure BellSouth's compliance, without which the Telecommunications Act's policy goal of robust competition will never be fulfilled." *Id.* at 13. The liquidated damages associated with the Texas plan "would provide the enforcement strength necessary." *Id.* While liquidated damages could be grafted on to the SQMs, the Texas Performance Measures offer a ready-made package of performance measures that were designed in conjunction with an associated set of enforcement mechanisms. Thus, while the Texas plan can essentially be used off the shelf, considerable work would be required to fashion enforcement mechanisms to be used with the SQMs.

2. While the SQMs Are Still Under Development, the Texas Plan Is Fully Realized

The Texas plan is, as Ms. Rowling testified, a "complete set of fully articulated performance measurements." Rowling Summary, Tr. 39. It contains over 120 categories of measurements, all of which have been fully developed. While the Texas Commission and interested parties are continuing to refine the plan, it is fully functional in every respect. The bulk of the measures have already been implemented, with the few remaining measurements currently in the process of implementation. Rowling Direct (Phase II) at 13. Thus, the Texas plan "can be incorporated into an interconnection agreement today." Rowling Summary, Tr. 42.

In contrast, "BellSouth's proposal is actually a work in progress that is not finalized." Rowling Summary, Tr. 39. As BellSouth witness Coons conceded on cross examination, BellSouth's SQMs are still under development in several critical areas. Coons Cross, Tr. 178, 179. Attached as Exhibit 4 hereto is a copy of the table of contents of BellSouth's SQMs marked to show which of the measurements are under development. As the exhibit reflects, of the 43 measurements reported by BellSouth, in 24 some aspect of the measurement is under development. In other words, 56% of BellSouth's proposed SQMs are incomplete.

The aspect of the measurement under development varies from case to case. In 10 instances, the measurement is incomplete in that there is no retail analog or benchmark against which BellSouth's performance can be measured. *See* Exhibit 3. In another 11 instances there is no retail analog in the critical area of UNEs. Thus, in 23 of the 43 measurements, there is no way to compare the service that BellSouth provides to CLEC with the service that BellSouth provides to itself and/or its retail customers with respect to at least some subset of the measurement. A raw measurement is of no utility in measuring discrimination if there is not some standard to compare it against.

In 14 instances, BellSouth has yet to define how a particular measurement will be applied to a particular "Product" (service offering). *See* Exhibit 3; *see also* Coons Cross, Tr. 179 ("What we're trying to show here is for our CLEC customers there are a number of things that we're still refining in our performance measurements, product disaggregation being one of them. [There] are several categories which we are working on developing"), 180 ("I will stipulate there's a lot of product disaggregations here that we're working on."). As Mr. Coons acknowledged, this "means that in the BellSouth model at the moment" there is "no standard for what will measure switching, local transport, [or] the other categories under development." *Id.* at 179.

One example of an SQM where the product measurements are undefined is Provisioning measure 4, "Average Completion Interval/ Order Completion Interval Distribution," which is under development with respect to Switching, Local Transport, Combos (UNE Combinations), and NP (Number Portability). Coons Cross, Tr. 178; *see* Exhibit 3. That the measurement is incomplete with respect to those Products is no minor matter. According to the SQM, "the 'average completion interval' measure monitors the interval of time it takes BST to provide service for the CLEC or its own customers." Without the ability to report that measurement in the critical areas of Switching, Local Transport, Combinations, and Number Portability, it is almost impossible to determine if BellSouth is providing nondiscriminatory service. By contrast, as Mr. Coons acknowledged, the counterpart measurements in the Texas Performance Measures are fully in place. Coons Cross, Tr. 179.

Another area in which several of the SQMs are incomplete are the business rules for local number portability. As Mr. Coons acknowledged, BellSouth is still developing the SQMs in that area, Coons Cross, Tr. 184, even though, as Mr. Coons acknowledged, local number portability has been required in Tennessee since June 1998, *id.* at 187. By contrast, the Texas Performance Measures contain meaningful measures of performance relating to local number portability.

3. The SQMs Fail to Address Several Areas Measured by the Texas Plan

As Mr. Coons conceded, there are several measurements contained in the Texas plan that BellSouth does not even propose to address in its SQMs, including Bona Fide Requests, Loading of NXXs, Directory Assistance, and Poles, Conduits and Rights of Way. *Id.* at 181-82. While Mr. Coons attempted to shrug each of these areas off as unimportant and not worth measuring, *id.* at 182-83, it should not be for BellSouth to decide where it will and will not be required to demonstrate that it is providing nondiscriminatory service.

More generally, BellSouth contends that many of the measures contained in the Texas plan are unnecessary. *See* Joint Late-Filed Exhibit 2. ICG, however, has fully explained the need for each of the measures that it has proposed. *Id.* In most cases, ICG demonstrated that the measure in question, which BellSouth regarded as duplicative, is in fact necessary to provide CLECs with a key piece of information regarding BellSouth's performance. *Id.*

4. The Texas Plan Meets the Broad Needs of CLECs

BellSouth contends that its SQMs should be adopted instead of the Texas Performance Measures so that there will be "a consistent set of measurements applicable to all CLECs." Coons Summary, Tr. 158. This, however, assumes that, if the Texas plan is adopted, it will not replace the SQMs as the standard set of performance measures adopted by all or nearly all CLECs operating in Tennessee. That would appear to be an unwarranted assumption. Different CLECs may have different needs, depending on their respective business plans. Rowling Cross, Tr. 58. For example, the robust performance measures relating to DSL that might be appropriate for a data CLEC might be unnecessary for other carriers. *Id.* The comprehensive set of measures contained in the Texas plan are much more likely to meet the needs of various CLECs than are the more limited, less well-

developed measures contained in the SQMs. It is thus likely that the Texas plan will become the new standard set of performance measures if adopted by the Authority.

BellSouth makes much of the fact that ICG was willing to accept the SQMs in Georgia but is unwilling to do so in Tennessee. *See* Rowling Cross, Tr. 45. As ICG witness Rowling explained, however, "the situation in Georgia was very different than the one in Tennessee." *Id.*, Tr. 45. Georgia had already opened a generic proceeding where it was examining and refining the SQMs. *Id.*, Tr. 46. Some 20 performance measures had already been made available to CLECs. *Id.* Mindful of the considerable amount of work that had already been done by the Georgia Commission and interested parties, ICG felt that it could not ask the Georgia Commission to start from scratch with a whole new set of measurements. *Id.* Here, by contrast, there was no equivalent proceeding and ICG felt that it was appropriate to propose the Texas plan. Moreover, even though it accepted the SQMs in Georgia, ICG made clear that it believed that the SQMs were less than ideal, and simply represented an expedient way for ICG to accomplish some, but not all, of what it believed was necessary to ensure BellSouth's compliance with its nondiscrimination obligations. *Id.*, Tr. 48.[11]

B. Any Performance Measures Adopted by the Authority Must Be Backed by a Self-Executing Enforcement Mechanism

Performance measurements merely identify standards; to have real meaning there must be an incentive for BellSouth to meet those standards. Notwithstanding BellSouth's obligations under the Act to provide ICG with nondiscriminatory service on par with the service that BellSouth

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[11] BellSouth made much of the fact that ICG has not reviewed until recently the PMAP data available on BellSouth's website in conjunction with BellSouth's performance for ICG. ICG, however, has no need to review BellSouth's data in order to know how poorly BellSouth is providing an acceptable level of service to ICG. Two additional points are worth noting. As ICG witnesses testified, there has been difficulty accessing the website. Of greater importance, the service levels ICG (or any other CLEC) is receiving are not meaningful without a benchmark against which to measure them and without some means of motivating BellSouth to perform at the benchmark level.

provides to its own retail customers, BellSouth has every economic incentive not to do so. Holdridge Direct (Phase II) at 14. As ICG witness Holdridge testified, "by providing competitors inadequate service for use of its bottleneck facilities – whether through understaffing or cumbersome systems that lead to installation delays, trunk blockage, uncoordinated cutovers, etc. – BellSouth makes it more difficult for those competitors to lure away BellSouth customers." *Id.* In fact, BellSouth has a direct incentive not to perform in a manner that allows ICG to best serve its customers. The longer that BellSouth can delay effective competition, the longer it can preserve its monopoly market position. *Id.* Thus, it is critical that the Authority adopt an effective set of enforcement mechanisms to provide incentive to BellSouth to perform its obligations in a nondiscriminatory manner. Unless BellSouth suffers greater harm for failing to provide nondiscriminatory service, than the benefit it realizes by impairing its competitors, it is economically rational for BellSouth continue to do everything in its power to forestall competition.

Even BellSouth has acknowledged that an enforcement mechanism might be appropriate for ensuring it meets the performance standards to which it agrees. BellSouth recently filed a Proposal for Self-Effectuating Enforcement Measures with the FCC in conjunction with its pursuit of Section 271 authority to enter the long distance market. Holdridge Direct (Phase II) at 15. In that proposal, BellSouth recognizes the need for monetary liquidated damages to be paid to a CLEC for BellSouth's failure to meet certain performance standards.

Despite BellSouth's willingness to make enforcement mechanisms available at the federal level, it has steadfastly refused to negotiate enforcement mechanisms with ICG. It is not enough that BellSouth is willing to consider enforcement mechanisms when it has Section 271 authority to gain at the federal level. Enforcement mechanisms are a critical tool for opening BellSouth's markets to effective competition. The TRA must ensure that that tool is available to ICG and other CLECs to use in Tennessee.

C. The Authority Should Adopt the Enforcement Mechanisms Contained in the Texas Performance Measures

1. As Demonstrated in the ICG Performance Measures Brief, the TRA Has the Authority to Adopt an Enforcement Mechanism Based on Liquidated Damages

In the ICG Performance Measures Brief, ICG demonstrated that the TRA has the authority to adopt an enforcement mechanism based on liquidated damages. Tennessee law provides that liquidated damage provisions are appropriate where they are a "reasonable prediction of potential damages," which, are "indeterminable or difficult to ascertain." ICG Performance Measures Brief at 5 (quoting *Guiliana v. Cleo*, 995 S,W, 2d 88, 97 (Tenn. 1999)). In fact, as the TRA is aware, many of BellSouth's tariffs and contracts on file at the agency contain liquidated damages provisions. *Id.* at 2; Starkey Direct (Phase II) at 16.

The TRA thus can and should adopt the enforcement mechanisms contained in the Texas Performance Measures. As explained fully in the ICG Performance Measures Brief, the primary enforcement mechanisms in the Texas plan are the so-called Tier 1 payments. "Tier One payments are liquidated damages payable to the CLECs to compensate them for the ILEC's breach of the performance measures." ICG Performance Measures Brief at 4 n.2. As ICG witness Rowling testified at some length, the Tier 1 payments represent the best efforts of many parties, including Southwestern Bell, the Texas Commission, ICG, and others, to estimate what those damages would be. Rowling Cross, Tr. 59-63; *see* ICG Performance Measures Brief at 3-5.

The Texas plan also contains Tier 2 payments, which are payable to the state. While those payments, as presently constituted, may be more in the nature of fines, the TRA could, if it believes it is necessary, easily modify the Tier 2 payment structure to comply with Tennessee law. One option would be to treat the Tier 2 payments as liquidated damages payable to Tennessee ratepayers to compensate them for the delay in the arrival of effective competition and the attendant

benefits.[12] Alternatively, the TRA could eliminate the Tier 2 payment structure and adjust the Tier 1 payments correspondingly by increasing the Tier 1 ceilings.

Contrary to BellSouth's claims, the Texas Performance Measures plan will not result in unjustifiably high levels of damages. Rowling Summary, Tr. 41. Not only are the payments capped at an annual amount, but payments per CLEC on a monthly basis are also capped. *Id.* In addition, the statistical showings under the Texas plan have a high level of forgiveness for noncompliance built in. *Id.*

If the Authority adopts the Texas plan, it may be appropriate to adjust the level of the annual cap to reflect that BellSouth's revenues in Tennessee are significantly less than Southwestern Bell's revenues in Texas. That said, any adjustment should also reflect the fact that, as the FCC's Common Carrier Bureau Chief Lawrence Strickling recently indicated in a September 28, 1999 letter to SBC, the Texas plan's overall cap of $120 million was far too low in light of the fact that this amount represented only 2.9% of SWBT's in-state gross local revenues. Rowling Rebuttal (Phase II) at 6. Mr. Strickling emphasized that "the potential liability under such a plan must be high enough that an incumbent could not rationally conclude that making payments under an enforcement plan is an acceptable price to pay for hindering competition." *Id.* Subsequently, Southwestern Bell voluntarily increased the annual cap to $225 million.

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[12] The Tier 2 payments could be treated as exogenous adjustments within the current regulatory scheme.

2. The Enforcement Mechanisms in the Texas Performance Measures Are Superior to the BellSouth Enforcement Plan

BellSouth urges that the Authority adopt the BellSouth Enforcement Plan instead of the Texas plan. BellSouth's plan, however, is inferior to the enforcement mechanisms contained in the Texas Performance Measures for several reasons. First, as with its proposed performance measures, the enforcement mechanism proposed by BellSouth is incomplete. BellSouth's filing with the FCC is a work-in-progress, based on the Texas plan. By contrast the Texas plan is fully developed.

Second, as detailed in ICG's Late-Filed Exhibit 4, "Comparison of the Texas Enforcement Plan and BellSouth's Enforcement Proposal," the BellSouth plan is far weaker than the Texas plan. Whereas the Texas plan provides 91 measurements that can trigger liquidated damages, the BellSouth proposal includes only 21. *See* ICG Late-Filed Exhibit 4 at 1. Moreover, the enforcement amount per measure is considerably lower in the BellSouth plan. *Id.* Finally, the annual payment cap is considerably lower per state. *Id.*

Third, the Texas Performance Measures are available immediately. By contrast, BellSouth is only willing to make the BellSouth Enforcement Plan available once it has obtained Section 271 approval.

3. The Complaint Procedures Proposed By BellSouth Are Not a Viable Alternative

BellSouth argues that instead of adopting liquidated damages, the TRA should rely on its complaint procedures to ensure BellSouth's compliance with any performance measures adopted in this proceeding. As ICG witness Rowling testified, however, the

> complaint process puts the burden on the CLEC in spite of the fact that it is the ILEC who bears responsibility to fulfill its legal obligations under Section 251 of the Act. Using the complaint process alone ensures that CLECs, which generally are smaller companies with far less resources than an ILEC such as BellSouth, must carry the responsibility to litigate on a complaint by complaint basis the issue of BellSouth's failure to comply with the Act. The complaint process is much less efficient than self-effectuating enforcement

mechanisms to ensure an ILEC's broad scale compliance with the Act's requirements.

Rowling Rebuttal (Phase II) at 5. Moreover, the need to litigate every BellSouth violation will be a significant strain on not only ICG's resources, but the Authority's as well. Rowling Summary, Tr. 41.

IV. BellSouth Should Be Required to Provide ICG with the Option of Binding Forecasts for Trunking Facilities to Deliver to ICG Traffic Originated on BellSouth's Network

ICG builds or leases the trunks that carry traffic on its own network and the trunks that deliver traffic from ICG to BellSouth. The trunks used to deliver traffic from BellSouth to ICG, however, are BellSouth's responsibility. Jenkins Direct (Phase II) at 3. ICG's traffic volumes have grown significantly over the past several years and ICG expects this trend to continue. *Id.* at 2. ICG needs some way of ensuring that BellSouth will provision adequate trunking facilities to carry calls from BellSouth's customers to ICG's growing customer base. This is a matter of critical importance because if BellSouth's customers are unable to reach ICG's customers because of a blockage on BellSouth's network due to a lack of capacity, it is ICG that will be seen as the cause of the problem. 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 would ensure that there is no blockage of incoming traffic to ICG's network and would be at no cost to BellSouth since, as described below, ICG would be willing to bear all of the financial risk.

A. The Binding Forecast Proposal Will Ensure that BellSouth Provisions the Trunking Capacity Necessary to Ensure that There Is No Blockage of Incoming Calls to ICG's Network.

Currently, ICG provides BellSouth with quarterly traffic forecasts. Jenkins Direct (Phase II) at 3. These forecasts are intended to assist BellSouth in planning the expansion of its network to accommodate ICG's traffic. As relevant here, the forecasts provide BellSouth with guidance in

planning how much end office trunking capacity it will require to deliver traffic from BellSouth end offices to ICG's switch. *Id.* Because these trunks carry BellSouth's customers' originating traffic, they are BellSouth's responsibility to provision and administer, and BellSouth bears their cost.

Currently, BellSouth is under no obligation to respond in any way to ICG's forecasts. BellSouth is not required to expand its trunking capacity even if ICG's forecasts indicate that more trunks are or soon will be needed. *Id.* Nor is BellSouth 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 BellSouth will provision the trunking capacity necessary to ensure that there is no blockage of incoming calls to ICG's network. *Id.*

Under ICG's binding forecast proposal, ICG would have the option of committing to a particular level of traffic. BellSouth 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 BellSouth's network to meet demand. This in turn will ensure that there are no blockages which would frustrate not only ICG's customers, who would be unable to receive calls from BellSouth customers, but also BellSouth's customers, who would be unable to place the calls to ICG's customers.

ICG does not contemplate that the binding forecast mechanism would be used in every instance. Jenkins Direct (Phase II) at 3. In many cases, ICG would continue to rely on the nonbinding quarterly forecasts it currently provides BellSouth to assist BellSouth in planning. ICG anticipates only using the binding forecast mechanism where it is (i) confident of substantial additional growth and (ii) concerned that, absent a binding commitment from BellSouth to timely provision the necessary trunks, there would be an unacceptable risk of blockage of incoming calls to ICG's customers because of BellSouth's inability to handle the traffic flow. *Id.* at 3–4.

B. ICG Would Bear All of the Financial Risk of the Binding Forecast Proposal

While ordinarily BellSouth 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 BellSouth's tariffed rate for any trunks that BellSouth provisions but which go unutilized. *Id.* at 4. ICG believes that its forecasting methodologies are accurate enough that such shortfalls are unlikely and that, where they do occur, traffic volumes will quickly rise to the forecasted level.

C. It Is Within the Authority's Section 251 Authority to Require Binding Forecasts

Notwithstanding that ICG would bear all of the financial risk associated with the binding forecasts and that BellSouth's own customers would be well served, BellSouth is unwilling to accept ICG's proposal. According to BellSouth, Section 251 of the Act does not require BellSouth to provide binding forecasts. Varner Direct (Phase II) at 21. This, however, is an empty argument. There are any number of provisions that are not explicitly provided for by Section 251 that have been ordered to be included in interconnection agreements by this and other state commissions.

The issue of whether a state commission has authority in an arbitration proceeding to decide issues and/or impose requirements not enumerated in Sections 251 or 252 of the Act was recently addressed in *US West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F.Supp.2d 968 (D.Minn. 1999). In that case, US West sought review of a provision that had been approved by the Minnesota Public Utilities Commission ("MPUC") in an arbitration proceeding regarding the interconnection agreement between US West and AT&T Wireless Services, Inc. ("AT&T Wireless"). The provision required US West to make its recording and billing services available to AT&T Wireless to facilitate AT&T Wireless' collection of termination charges. US West argued that the MPUC lacked authority under the Act to impose this requirement, and that the

MPUC had violated Sections 252(b)(4) and (c) of the Act in doing so. The court disagreed with US West, holding that the MPUC had the authority under Section 252 of the Act to resolve in an arbitration proceeding any open issues between the parties presented to it for resolution—regardless of whether those issues are covered by the Act—provided the MPUC's resolution of those open issues did not violate or conflict with the Telecommunications Act of 1996. *Id.* at 985.

The relevant inquiry is thus whether requiring binding forecasts is consistent with the obligations set forth in Section 251. The answer is yes. Section 251(c)(2) generally imposes on incumbent LECs the duty to provide interconnection with requesting carriers, and in particular Section 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 Authority's authority under Section 251.

V. ICG Accepts BellSouth's Offer Concerning the Provision of Packet Switching as an UNE

BellSouth has taken the position that, in connection with the interconnection agreement, it will provide packet switching as a UNE, including all data speeds requested by ICG, at the prices set forth in Exhibit AJV–8 attached to BellSouth witness Varner's direct testimony. ICG accepts this offer.

Conclusion

For the foregoing reasons, ICG Telecom Group, Inc. respectfully submits that the Authority should resolve the outstanding issues in the interconnection agreement between ICG and BellSouth by ruling:

1. That BellSouth and ICG must pay each other reciprocal compensation for ISP-bound traffic;

2. That ICG is entitled to receive reciprocal compensation payments from BellSouth at the tandem interconnection rate;

3. That BellSouth must make the EEL available to ICG as an UNE combination, at UNE prices;

4. That the interconnection agreement between ICG and BellSouth must incorporate performance measures and enforcement mechanisms contained in the Texas Performance Measure plan;

5. That BellSouth must provide ICG with the option of binding forecasts for trunking facilities to deliver traffic originated on BellSouth's network to ICG; and

6. That BellSouth should be required to offer packet switching as a UNE, including all data speeds requested by ICG, at the prices set forth in Exhibit AJV–8 attached to BellSouth witness Varner's direct testimony.

Respectfully submitted,

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January 10, 2000

EXHIBIT 1

BELLSOUTH TELECOMMUNICATIONS, INC.

DIRECT TESTIMONY OF ALPHONSO J. VARNER

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 990691-TP

AUGUST 2, 1999

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") AND YOUR BUSINESS ADDRESS.

A. My name is Alphonso J. Varner. I am employed by BellSouth as Senior Director for State Regulatory for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. PLEASE GIVE A BRIEF DESCRIPTION OF YOUR BACKGROUND AND EXPERIENCE.

A. I graduated from Florida State University in 1972 with a Bachelor of Engineering Science degree in systems design engineering. I immediately joined Southern Bell in the division of revenues organization with the responsibility for preparation of all Florida investment separations studies for division of revenues and for reviewing interstate settlements.

Subsequently, I accepted an assignment in the rates and tariffs organization with responsibilities for administering selected rates and tariffs including

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

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

Issue 7: 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?

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth's position is that if a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth will pay the tandem interconnection rate only if ICG's switch is identified in the local exchange routing guide ("LERG") as a tandem. A tandem switch connects one trunk to another trunk and is an intermediate switch or connection between an originating telephone call location and the final destination of the call. An end office switch is connected

to a telephone subscriber and allows the call to be originated or terminated. If ICG's switch is an end-office switch, then it is handling calls that originate from or terminate to customers served by that local switch, and thus ICG's switch is not providing a tandem function. ICG is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide. Therefore, this Commission should deny ICG's request for tandem switching compensation when tandem switching is not performed.

Q. PLEASE RESPOND TO ICG's CONTENTION THAT ICG'S SWITCH SERVES A GEOGRAPHIC ARE \ COMPARABLE TO BELLSOUTH'S TANDEM.

A. At the present time ICG is not collocated in any BellSouth central office in Florida. Therefore, it is not possible to determine whether ICG's switch would actually serve a geographic area comparable to BellSouth's tandem. If ICG intends to provide service in Florida similar to how they are providing service in Alabama then their switch would not serve an area comparable to BellSouth's tandem. In Alabama, ICG has collocation arrangements in only two of BellSouth's central offices. For ICG to imply that this equates to serving a geographic area comparable to BellSouth's tandem switch is inappropriate. ICG ignores the fact that BellSouth's Alabama tandem switch serves six central offices in addition to the two central offices ICG has chosen to serve. Obviously, the area served by BellSouth's tandem switch (eight central offices) is not comparable to the area ICG has elected to serve (two central offices). The clear intent of the FCC's order and rules is that if the

EXHIBIT 2

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of	:	DOCKET NO. 990691-TP
Petition of ICG Telecom Group, Inc. for arbitration of unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.	:	

VOLUME 3
Pages 219 through 386

PROCEEDINGS:	HEARING
BEFORE:	COMMISSIONER J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER E. LEON JACOBS
DATE:	October 7, 1999
TIME:	Commenced at 9:30 a.m. Concluded at 6:30 p.m.
LOCATION:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	JANE FAUROT, RPR NOTARY PUBLIC IN AND FOR THE STATE OF FLORIDA AT LARGE

APPEARANCES:

(As heretofore noted.)

A I don't know. That is the answer. I don't know what this Commission's priorities of goals are.

Q Or what they should be? Do you have an opinion?

A I would have to take time to think about it and I would study the statute and study the Commission's cases and I certainly wouldn't give that off the top of my head. But I think what is missing in the question is that the Commission's role with respect to the development of the Internet and the urgent priority I think that is presented by this case really isn't related to the Internet as we -- you know, the worldwide web. It is related to the telecommunication services that are needed to provide access to the Internet, and that is part of this Commission's goal, and that definitely overlaps if not is totally overlapping with the goal of promoting competition.

Because Internet access is the largest growing service, and if BellSouth accomplishes its goals in this case, then you will see very little if no competition in providing Internet access in this state. And the Internet access is a telecommunications service. So I think that the goals overlap, actually.

Q Are you familiar with the LERG?

A Yes.

Q Do you know whether any of ICG's switches are identified in the LERG as providing a tandem functionality?

COMMISSIONER CLARK: Could you remind us what a LERG is?

Q Ms. Schonhaut, what is a LERG?

A Local Exchange Rooting Guide.

Q And what is that exactly?

A Well, it is essentially a database of routing tables so that dialed numbers can be sent to the right place, I think. And it has to be consistent and everybody registers switches in there so that traffic will go to the right place. And the answer to your question is yes, every one of ICG's switches is registered in the LERG as a tandem.

Q They are registered as providing tandem functionality for local traffic?

A They are registered in the LERG as a tandem.

MR. EDENFIELD: Thank you, Ms. Schonhaut.

COMMISSIONER DEASON: Staff.

MR. FORDHAM: Just a couple of questions. Thank you, Commissioner.

CROSS EXAMINATION

BY MR. FORDHAM:

Q In your rebuttal testimony you stated that the enhanced extended link is a UNE combination that does currently exist in BellSouth's network, is that correct?

A Yes.

Q You know that to be a fact?

EXHIBIT 3

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of the	)	CC Docket No. 96-98
Local Competition Provisions	)	
of the Telecommunications Act of 1996	)	

SUPPLEMENTAL ORDER

Adopted: November 24, 1999 **Released: November 24, 1999**

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

I. INTRODUCTION

1. On September 15, 1999, we adopted the Third Report and Order and Fourth Further Notice of Proposed Rulemaking in this docket responding to the Supreme Court's January 1999 decision that directed us to reevaluate the unbundling obligations of section 251 of the Telecommunications Act of 1996. (1996 Act).[1] We hereby modify that Order with regard to the use of unbundled network elements to provide exchange access services.[2]

2. We conclude that, until resolution of our Fourth FNPRM, which will occur on or before June 30, 2000, interexchange carriers (IXCs) may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.

II. DISCUSSION

3. In the *Third Report and Order and Fourth FNPRM*, we concluded that we would address in the Fourth FNPRM whether there were any legal or policy ramifications of applying

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (*Third Report and Order and Fourth FNPRM*) (citing *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999)).

[2] *Id.* at paras. 483-89.

our unbundling rules in a way that could "cause a significant reduction of the incumbent LECs' special access revenues prior to full implementation of access charge and universal service reform."[3] We also concluded, in paragraph 486, that any requesting carrier is entitled to obtain existing combinations of loops and transport between the end user and the incumbent LEC's serving wire center on an unrestricted basis at unbundled network element prices, and that a carrier that is collocated in a serving wire center is free to order combinations of loops and dedicated transport to that serving wire center as unbundled network elements as a substitute for the incumbent LECs' regulated special access services.[4]

4. Since the release of the *Third Report and Order and Fourth FNPRM*, several incumbent LECs have claimed that we did not sufficiently preserve the special access issue in the Fourth FNPRM. Specifically, they contend that paragraph 486 allows collocated IXCs that self-provision entrance facilities (or obtain them from third parties) to convert the remaining portions of their special access circuits to unbundled network elements, even though the IXCs are not using the facilities to provide local exchange service. They contend that this would have significant effects in the competitive local exchange market as had been asserted previously to the Commission by BellSouth.[5] We intended to compile a complete record in the Fourth FNPRM prior to determining whether IXCs may employ unbundled network elements solely to provide exchange access service.[6] Accordingly, in order to preserve this issue in the Fourth FNPRM as we intended, we modify our conclusion in paragraph 486 to now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service subject to the requirements in this Order.[7] We also modify our conclusion in paragraph 489 to the extent that it limited our concerns to entrance facilities.[8] We now conclude that, until

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[3] *Id.* at para. 489.

[4] *Id.* at para. 486.

[5] *See* Letter from Michael Kellogg, on behalf of SBC, to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Nov. 18, 1999); Letter from Dee May, Director, Federal Regulatory Affairs, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Nov. 17, 1999); Letter from William B. Barfield, Associated General Counsel, BellSouth Corporation, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 96-98 (filed Aug. 9, 1999) (*BellSouth Aug. 9, 1999 Ex Parte*). BellSouth's *Aug. 9, 1999 Ex Parte* indicated that the use of combinations of unbundled loops and transport solely for exchange access service would either increase the incumbent's local rates or undermine universal service, or both. *BellSouth Aug. 9, 1999 Ex Parte* at 1. We underestimated the extent of the policy implications associated with temporarily constraining IXCs only from substituting entrance facilities for the incumbent LEC's special access service, and we therefore now, as explained herein, include combinations of unbundled loops and transport network elements within the scope of this temporary constraint.

[6] *See Third Report and Order and Fourth FNPRM* at para. 496.

[7] *Id.* at para. 486 (stating that it would be impermissible for incumbent LECs to require that a requesting carrier provide a certain amount of local service over combinations of unbundled loop and transport facilities).

[8] *Id.* at para. 489 (stating that we will consider in the Fourth FNPRM the "discrete situation involving the use of dedicated transport links between the incumbent LEC's serving wire center and an interexchange carrier's switch or point of presence (or 'entrance facilities')."

resolution of our Fourth FNPRM, which will occur on or before June 30, 2000, IXCs may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties). This will give us sufficient time to issue an order addressing the Fourth FNPRM.

5. This constraint does not apply if an IXC uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.[9] It therefore does not affect the ability of competitive LECs to use combinations of loops and transport (referred to as the enhanced extended link) to provide local exchange service. It also does not affect the ability of competitive LECs that are collocated and have self-provided transport (or obtained it from third parties), but are purchasing unbundled loops, to provide exchange access service. As we stated in paragraph 487 of the *Third Report and Order and Fourth FNPRM*, such a competitive carrier is entitled to purchase unbundled loops in order to provide advanced services (*e.g.*, interstate special access xDSL service).[10] Finally, the constraint will have no effect on competitive LECs using long distance switches to provide local exchange service.

6. We also expand the scope of the Fourth FNPRM to seek comment on whether there is any basis in the statute or our rules under which incumbent LECs could decline to provide combinations of loops and transport network elements at unbundled network element prices. We also seek comment on the argument that the "just and reasonable" terms of section 251(c) or section 251(g) permit the Commission to establish a usage restriction on combinations of unbundled loops and transport network elements. Parties should also address whether there is any other statutory basis for limiting an incumbent LEC's obligation to provide combinations of loops and transport facilities as unbundled network elements. As we stated in the *Third Report and Order and Fourth FNPRM*, in light of the fact that it is not clear that the 1996 Act permits any restrictions to be placed on the use of unbundled network elements,[11] we particularly urge parties to consider and address what long term solutions may be necessary to avoid adverse effects on any special access revenues that support universal service.

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[9] For example, we would consider the local service component as described in a joint Ex *Parte* submitted by Intermedia to be significant. *See* Letter from Edward D. Young, III, Senior Vice President and Deputy General Counsel, Bell Atlantic; Heather B. Gold, Vice President-Industry Policy, Intermedia Communications; Robert W. McCausland, Vice President-Regulatory and Interconnection, Allegiance Telecom; Don Shepheard, Vice President, Federal Regulatory Affairs, Time Warner Telecom, to Chairman Kennard and Commissioners, Federal Communications Commission, CC Docket No. 96-98, at 1-2 (filed Sept. 2, 1999). In addition, we will presume that the requesting carrier is providing significant local exchange service if the requesting carrier is providing all of the end user's local exchange service. Because we intend the constraint we identify in this Order to be limited in duration, we do not find it to be necessary for incumbent LECs and requesting carriers to undertake auditing processes to monitor whether or not requesting carriers are using unbundled network elements solely to provide exchange access service. We expect that allowing requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements will not delay their ability to convert these facilities to unbundled network element pricing, and we will take swift enforcement action if we become aware that any incumbent LEC is unreasonably delaying the ability of a requesting carrier to make such conversions.

[10] *Third Report and Order and Fourth FNPRM* at para. 487.

[11] *Id.* at para. 484.

7. This temporary constraint on the use of combinations of unbundled loops and transport network elements to provide exchange access service is consistent with the Commission's finding in the *Local Competition First Report and Order*, that we may, where necessary, establish a temporary transitional mechanism to help complete all of the steps toward the pro-competitive goals of 1996 Act, including the full implementation of a competitively-neutral system to fund universal service and a completed transition to cost-based access charges.[12] We believe that this short-term constraint will avoid disturbing the status quo while we consider the legal and economic implication of allowing carriers to substitute combinations of unbundled loops and transport network elements for the incumbent LECs' special access services. As we did in the *Local Competition First Report and Order*, we emphasize that this constraint will apply only as an interim measure.[13]

III. FINAL REGULATORY FLEXIBILITY ANALYSIS

8. In the *Third Report and Order and Fourth FNPRM*, we conducted a Final Regulatory Flexibility Analysis, as required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603. The changes we adopt in this Order do not affect that analysis.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1, 3, 4, 201-205, 251, 256, 271, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 256, 271, 303(r), the Commission amends paragraph 486, 489, and 494-96 in the *Third Report and Order and Fourth FNPRM* to be consistent with the discussion set out above. Thus, the constraint on the use of unbundled network elements as a substitute for special access service and the scope of the corresponding inquiry in the Fourth FNPRM are not limited to entrance facilities, but instead include combinations of unbundled loops and transport network elements. This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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[12] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd at 15499, 15862-69, paras. 716-32 (1996) (*Local Competition First Report and Order*).

[13] *Id. at* 15866, para. 725.

DISSENTING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order, CC Docket 96-98.

I dissent from the Commission's modification of its *Third Report & Order* in this docket, in which the Commission broadens the restriction it placed on competing carriers' uses of combinations of unbundled loops and transport network elements. Not only is the order procedurally defective, but also the Commission's use restrictions are without a basis in the statute.

First, I believe that, in issuing this order, the Commission has failed to comply with statutory procedural requirements. An agency may not fundamentally reinterpret a published order or regulation without complying with the Administrative Procedure Act's notice and comment provisions. *See* 5 U.S.C. § 551. The United States Court of Appeals for the District of Columbia has recognized that, "[w]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *See Alaska Professional Hunters Ass'n v. FAA*, 177 F. 3d 1030, 1035 (D.C. Cir. 1999) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."); *see also National Whistleblower Center v. Nuclear Regulatory Commission*, 1999 WL 1024662, at * 4 (D.C. Cir. Nov. 12, 1999) ("[T]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment would undermine those APA requirements.") (quoting *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997). In my opinion, it is improper for the Commission to modify its prior position on this issue without first having made the public aware that it was considering changing its order and without first having obtained comment from interested parties.

Second, as I explained when the Commission released the *Third Report & Order*, the statute simply does not authorize the Commission to limit the uses to which a competing carrier may put an unbundled network element. *See* Statement of Commissioner Furchtgott-Roth, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, CC Docket 96-98 (concurring in part and dissenting in part). The statute's only requirement is that an unbundled network element be used in "the provision of a telecommunications service." 47 U.S.C. § 251(c)(3). Section 251(c)(3) says nothing more about the uses to which a requesting carrier may put an unbundled network element, and no other provision in the 1996 Act authorizes the Commission to limit the ways in which a requesting carrier may use an incumbent's network elements.[1] Thus, a competitor may use *any* network element or combination of elements in *any* way it wishes, subject only to the requirement that the elements be used to provide "a telecommunications service."

[1] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 15679 [¶ 356] (1997) (hereinafter *Local Competition First Report and Order*).

The Commission is concerned that, without the restriction, the market for special access services will be undermined, because competitors will be able to offer combinations of network elements as a lower-priced substitute for incumbents' special access services. I believe that there are other ways that the Commission could have addressed this concern consistent with the statute. Since the problem stems from the Commission's rules for access charges, the obvious answer is a prompt revision of those rules, so that incumbent carriers are no longer required to include implicit subsidies in their prices for access services. *See Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999). Pending a revision of these access charge requirements, the Commission could have implemented a temporary pricing mechanism that prevents new carriers from undercutting incumbent carriers' prices. *See Local Competition First Report & Order*, 11 FCC Rcd at 15864 [¶ 720] (permitting incumbents, for a limited period of time, to recover a percentage of carrier common line and transport interconnection charges for all interstate minutes traversing the incumbents' local switches for which the interconnecting carriers pay unbundled local switching element charges). Or it could have, in the *Third Report & Order*, decided against unbundling local transport. What the Commission may not legally do, however, is impose restrictions on the ways in which requesting carriers may use the network elements that they purchase from incumbents.

EXHIBIT 4

BellSouth
Service Quality Measurements
Regional Performance Reports

TABLE OF CONTENTS

* These reports are subject to change due to regulatory requirements or to correct errors and etc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served via U.S. First Class Mail or Hand Delivery on the parties of record on this the 10 day of January, 2000.

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