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March 3, 2000

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

In Re: ICG Arbitration
Docket No. 99-00377

Dear David.

Attached are copies of recent decisions on ICG's arbitrations in Georgia, Alabama, North Carolina, and Kentucky. BellSouth has previously supplied you with copies of the ICG decision in Florida. There are no other ICG arbitrations in any BellSouth state except, of course, the pending case in Tennessee.

Each of these decisions is a matter of public record in each state. ICG is providing these copies for the convenience of the TRA, its staff, and the parties.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker
Henry Walker

HW/th

Attachments

cc: Guy Hicks, Esq.

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046885-000 03/03/2000

Docket No. 10767-U

In Re: Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996.

ORDER

Appearances

On behalf of ICG Telecom Group, Inc.
Charles V. Gerkin, Attorney
Albert H. Kramer, Attorney
Jacob S. Farber, Attorney

On behalf of BellSouth Telecommunications, Inc.
Fred McCallum, Attorney
Lisa Foshee, Attorney
A. Langley Kitchings, Attorney

On behalf of the Commission Staff
Daniel Walsh, Attorney

On behalf of the Consumers' Utility Counsel Division
Of the Governor's Office of Consumer Affairs
Ron Jackson, Attorney
John Maclean, Attorney

BY THE COMMISSION:

On May 27, 1999, ICG Telecom Group, Inc. ("ICG") petitioned the Commission to decide the unresolved issues in the interconnection negotiations with BellSouth Telecommunications, Inc. ("BellSouth").

I. JURISDICTION AND PROCEEDINGS

Under the Federal Telecommunications Act of 1996 (the Federal Act), State Commissions are authorized to decide the issues presented in a petition for arbitration of interconnection agreements. In addition to its jurisdiction of this matter pursuant to Sections 251 and 252 of the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§46-5-160 *et seq*., and generally O.C.G.A. §§ 46-1-1 *et seq*., 46-2-20, 46-2-21, and 46-2-23.

On December 18, 1998, BellSouth notified ICG that it wished to negotiate a new interconnection agreement. On May 27, 1999, pursuant to Section 252 of the Federal Act, ICG petitioned the Commission to arbitrate the issues that the parties were unable to negotiate. ICG's initial Petition for Arbitration included 26 issues; however, the parties have settled the majority of these issues.

On August 25, 1999, the Hearing Officer issued a Consent Procedural and Scheduling Order. Both ICG and BellSouth filed testimony on October 8, and rebuttal testimony on October 25, 1999. The Commission held hearings on the matter on November 4 and 5, 1999. The Commission Staff and the Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs appeared but did not question the witnesses.

The testimony at the hearing addressed the six issues that remained as of the time of the hearing:

1. Until the FCC adopts a rule with prospective application, should dial-up calls to internet service providers ("ISPs") be treated as if they were local calls for purposes of reciprocal compensation?

2. 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?

3. Should BellSouth be required to provide as a UNE "Enhanced Extended Link" Loops ("EELs")?

4. Should BellSouth be required to enter into a binding forecast of future traffic requirements for a specified period?

5. Should the Commission order enforcement mechanisms to ensure BellSouth's compliance with the Performance Measures included in the interconnection agreement?

6. Should BellSouth be required to make available as UNEs packet-switching capabilities?

At the hearing, BellSouth and ICG agreed to a set of service quality measurements ("SQMs") contained in the attachment to BellSouth witness Coon's testimony. These are the same service quality measurements that BellSouth agreed to in Louisiana. If the parties agree to amend the SQMs, then the changes would be automatically incorporated into the interconnection agreement. Tr. 127. Any new SQMs ordered by either this or the Louisiana Commission would be automatically adopted into the agreement. Id. Any performance measurement that BellSouth agrees to in either Louisiana or Georgia will be automatically incorporated into this BellSouth-ICG agreement, without the need for Commission approval. Id. The parties were not able to reach agreement on whether enforcement mechanisms to hold BellSouth to the performance standards should be included in the interconnection agreement. After the hearing, ICG and BellSouth reached an agreement on the final issue stated above, the obligation of BellSouth to make available as UNEs packet-switching capabilities.

Pursuant to the Consent Procedural and Scheduling Order, ICG and BellSouth filed briefs on November 22, 1999 and reply briefs on December 6, 1999. The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

II. FINDINGS AND CONCLUSIONS

A. Until the FCC adopts a rule with prospective application, should dial-up calls to internet service providers (ISPs) be treated as if they were local calls for purposes of reciprocal compensation?

In its Petition, ICG asserted that reciprocal compensation is appropriate for calls prior to the adoption of a prospective rule by the FCC. ICG argues that, while the FCC found in its February 26, 1999 Declaratory Ruling, in CC Docket 96-98 (Declaratory Ruling), that ISP traffic is mostly interstate in nature, it also authorized state commissions to find in arbitrations that reciprocal compensation is appropriate for ISP-bound calls until a federal rule is adopted concerning inter-carrier compensation for such traffic. Further, ICG asserts that BellSouth should be economically indifferent to whether it incurs the transport and delivery costs directly or through a reciprocal compensation arrangement with ICG. ICG Post-Hearing Brief, p. 11.

BellSouth maintains the position that the FCC, in its Declaratory Ruling, held that the obligation to pay reciprocal compensation is not applicable to ISP-bound traffic, and that therefore, any inter-carrier compensation mechanism adopted by a state commission is outside the provisions of 252(b)(5). BellSouth Post-Hearing Brief, p. 3. BellSouth urged the Commission to decline ruling on reciprocal compensation, until the final resolution of the FCC's Notice of Proposed Rule-Making on ISP-bound traffic. BellSouth proposed that the parties track ISP-bound traffic and true-up any compensation due after the FCC reaches a final decision on whether ISP traffic is due reciprocal compensation. BellSouth's Post-Hearing Brief, p. 13.

The Commission finds that it has the authority under Section 252 of the Federal Act to order a provision in the arbitration agreement that reciprocal compensation be due for ISP-bound traffic. see Declaratory Ruling ¶ 25 (State commissions "may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."). The Commission concludes that, pending the adoption of a federal rule, dial-up calls to ISPs should be treated as local calls for purposes of reciprocal compensation. As the FCC has stated, the FCC's own policy of "treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation suggest that such compensation is due for that traffic." Id. ILECs and CLECs should be compensated for transport and delivery of ISP-bound calls based on the rates established in Docket No. 7061-U. While the FCC's issuance of a Notice of Proposed Rule-Making on ISP-bound traffic does not mean the Commission cannot, or should not, address this question in the context of this Petition, it is efficient to structure its decision in an effort to accommodate, to the degree possible, potential outcomes of the Rule-Making. Accordingly, the Commission directs the parties to track all reciprocal compensation payments, which shall be subject to a true-up mechanism approved by this Commission as warranted by the outcome of the FCC's Rule-Making in CC Docket 99-68 on ISP-bound traffic. Except to the extent the FCC's forthcoming Rule-Making directs otherwise, the parties shall continue under all applicable terms of this order until further order of this Commission.

B. 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?

The Commission must answer two questions in order to determine whether ICG should receive reciprocal compensation for end office, tandem and transport elements of termination. The first issue is whether ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch. ICG testified that the answer to this question is yes. Tr. 173. BellSouth argues in brief that ICG did not make an adequate showing that the geographic areas are comparable. However, at the hearing, BellSouth did not contradict ICG's assertion. The Commission finds that the ICG's switch serves a comparable geographic area because ICG's assertion to that effect went undisputed.

The second question concerns whether ICG's switch performs the same function as BellSouth's. ICG argues that similar functionality is not a prerequisite to receive the tandem reciprocal compensation rate. However, ICG states that even if the Commission were to find that the same functionality is required, its switch performs the same function as BellSouth's tandem switch. To support this conclusion, ICG references both Alabama and North Carolina Commission findings that the switch functions are similar. Finally, ICG argues that because ICG's switch is identified in the local exchange routing guide ("LERG") as a tandem, it meets BellSouth's own standards for payment of the tandem reciprocal compensation rate. ICG cited BellSouth testimony in an arbitration case before the Florida Public Service Commission that BellSouth would only pay ICG the interconnection rate if ICG's switch was identified in the LERG as a tandem. ICG Post-Hearing Brief, p.28.

In its Post-Hearing Brief, BellSouth references the FCC's language in its First Report and Order that states state commissions "shall consider whether new technologies perform functions similar to those performed by an incumbent LEC's tandem switch" to demonstrate that similar functionality is required to receive the tandem reciprocal compensation rate. BellSouth argues that since ICG has only one voice switch it cannot operate as a tandem switch, and thus, cannot achieve similar functionality.

The Commission finds that the appropriate policy is to compensate ICG for the service that it provides. First, the record supports the conclusion that ICG's switch serves the same geographic area as BellSouth. On the issue of functionality, the Commission finds that ICG's switch serves the same function as a BellSouth switch. For instance, even if a BellSouth customer calls an ICG customer within the same service area, the call has to go through an ICG switch. Therefore, granting ICG the tandem interconnection rate for purposes of reciprocal compensation would allow ICG to recover its costs associated with the transport and termination on its network facilities. See U.S. West Communications v. MFS Intelenet, Inc, 1999 WL 799082, *9 (9th Cir. Oct. 9, 1999). Finally, the Commission is persuaded by the evidence that the LERG identifies ICG's switch as a tandem, and, in other proceedings, BellSouth has considered such identification a prerequisite for receiving the interconnection rate.

C. Should BellSouth be Required to Provide as a UNE, "Enhanced Extended Link" Loops ("EELs")?

The EEL is a UNE combination consisting of a loop, transport and a cross-connect. Like the FCC, the Commission declines to define the EEL itself as a UNE. Third Report and Order, ¶ 478. However, as discussed below, CLECs can obtain at UNE rates combinations of UNEs that BellSouth ordinarily combines in its network.

FCC Rule 315 addressed combinations of unbundled network elements. Rule 315(b) provides:

> Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent currently combines.

(Emphasis added). BellSouth has interpreted the term "currently combines" as "currently combined." BellSouth defines the term to mean those elements "that are physically in a combined state as of the time the CLEC requests them and which can be converted to UNEs on a 'switch as is' or 'switch with changes' basis. . . Currently combined elements only include loops, ports, transport or other elements that are currently installed for the existing customer that the CLEC wishes to serve." BellSouth's Post-Hearing Brief, p. 23. ICG argued that BellSouth is obligated to provide EELs as a UNE combination at UNE prices. ICG's Post-Hearing Brief, p. 31.

When the Supreme Court reinstated Rule 315(b), it stated its understanding of the intent of the rule:

> The reality is that §251(c)(3) is ambiguous on whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis in §251(c)(3)'s nondiscrimination requirement. As the Commission explains, it 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." Reply Brief for Federal Petitioners 23. It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.

Iowa Board.

It appears clear that the Supreme Court believed that at least one major purpose of Rule 315(b) was to prevent the incumbent from ripping apart elements which were already connected to each other. The Commission agrees that at the very least, Rule 315(b) requires BellSouth to provide combinations of elements that are already physically connected to each other regardless of whether they are currently being used to serve a particular customer. The Supreme Court, however, did not state that it was reinstating Rule 315(b) only to the extent it prohibited incumbents from ripping apart elements currently physically connected to each other. It reinstated Rule 315(b) in its entirety, and it did so based on its interpretation of the nondiscrimination language of Section 251(c)(3). See Third Report and Order, ¶¶ 481 and 482.

The Ninth Circuit Court of Appeals has even recently ruled that it "necessarily follows from AT&T that requiring [the ILEC] to combine unbundled network elements is not inconsistent with the Act . . . the Act does not say or imply that network elements may only be leased in discrete parts." U.S. West Communications v. MFS Intelenet, Inc, 1999 WL 799082, *7 (9^{th} Cir. Oct. 9, 1999). The Commission, however, does not at this time order BellSouth to combine for CLEC's UNEs that BellSouth does not ordinarily combine for itself.

Rule 315(b), by its own terms, applies to elements that the incumbent "currently combines," not merely elements which are "currently combined." In the FCC's First Report and Order, the FCC stated that the proper reading of "currently combines" is "ordinarily combined within their network, in the manner which they are typically combined." First Report and Order, ¶ 296. In its Third Report and Order, the FCC stated that it was declining to address this argument at this time because the matter is currently pending before the Eighth Circuit. Third Report and Order, ¶ 479.[1] Accordingly, the only FCC interpretation of "currently combines"

[1] While the FCC declined to address this argument again in its Third Report and Order, significantly the FCC did not disavow the position it took in the First Report and Order. BellSouth argues that "the FCC made clear that 'currently combined' elements are those elements physically combined as of the time the CLEC requests them and which can be converted to UNEs on a 'switch as is' or 'switch with changes basis." BellSouth's Brief on Impact of Third Report and Order, p. 5. The FCC, however, was not stating that Rule 51-315(b) is limited only to currently combined elements. Instead, the FCC was stating that since, at the least, Rule 51-315(b) includes currently combined elements, and since when a CLEC purchases special access the elements are currently combined, that even under the

remains the literal one contained in the First Report and Order. The Commission finds that "currently combines" means ordinarily combined within the BellSouth's network, in the manner which they are typically combined. Thus, CLECs can order combinations of typically combined elements, even if the particular elements being ordered are not actually physically connected at the time the order is placed. However, in the event that the Eighth Circuit Court of Appeals determines that ILECs have no legal obligation to combine UNEs under the Federal Act, the Commission will reevaluate its decision on this issue.

Based on the FCC's Third Report and Order, even if this Commission were to limit the definition of "currently combines" to the more restrictive "currently combined" interpretation, CLECs would still be able to obtain and use the same UNE combinations. The process of obtaining them would be more cumbersome, however, and would serve no purpose except to complicate the ordering process and impede competition. According to the FCC, CLECs can purchase services such as special access and resale even when the network elements supporting the underlying service are not physically connected at the time the service is ordered. At the point when the CLEC begins to receive such service, the underlying network elements are necessarily physically connected. The CLECs can then obtain such currently combined network elements as UNE combinations at UNE prices. Third Report and Order, ¶¶ 480, 486. The Commission finds that even assuming arguendo that "currently combines" means "currently combined," rather than go through the circuitous process of requiring the CLEC to submit two orders (e.g., one for special access followed by another to convert the special access to UNEs) to receive the UNE combination, the process should be streamlined to allow CLECs to place only one order for the UNE combination.

To the extent that ICG seeks to obtain other combinations of UNEs that BellSouth ordinarily combines in its network, which have not been specifically priced by this Commission when purchased in combined form, the Commission finds that ICG can purchase such UNE combinations at the sum of the stand-alone prices of the UNEs which make up the combination. If ICG is dissatisfied with using the sum of the stand-alone rates, it is free to pursue the bona fide request process with BellSouth to seek a different rate. ICG may purchase EELs from BellSouth at the rates and subject to the conditions established in the Commission's Docket No. 10692-U.

On November 24, 1999, the FCC issued a Supplemental Order to its Third Report and Order. In this Supplemental Order, the FCC modified its conclusion in paragraph 486 of the Third Report and Order 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. Supplemental Order, ¶ 4. 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, unless the IXC uses the combination "to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." Id. at ¶ 5. Accordingly, the Commission finds that in order for ICG to use a loop/transport combination to provide special access service, it must provide a significant amount of local exchange service over the combination. Further, such loop/transport combinations must be connected to a CLEC switch and must be used in the provision, of circuit switched telephone exchange service. ICG

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more restrictive "currently combined" interpretation, CLECs would be able to convert special access to loop-transport combinations at UNE rates. Third Report and Order ¶ 480.

must "self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements" in order to convert special access facilities to UNE pricing. Id. at footnote 9. The FCC did not find it to be necessary for ILECs and requesting carriers to undertake auditing processes to monitor whether requesting carriers are using UNEs solely to provide exchange access service. Id. The Commission finds that BellSouth shall not make auditing a precondition to converting special access to UNEs; thus the conversion of facilities will not be delayed. The Commission finds, however, that BellSouth shall be allowed to audit ICG's records in order to verify the type of traffic being transmitted over EELs. If, based on its audits, BellSouth concludes that ICG is not providing a significant amount of local exchange traffic over the facilities, BellSouth may file a complaint with this Commission.

D. Should BellSouth be required to enter into a binding forecast of future traffic requirements for a specified period?

ICG requested that the interconnection agreement include binding forecasts for trunking facilities to deliver to ICG traffic originated in BellSouth's network. Currently, BellSouth is responsible for the costs associated with the trunking for calls from a BellSouth customer to an ICG customer. Tr. 86. However, ICG testified that binding forecasts would ensure that BellSouth would have the requisite capacity on its network to meet ICG's traffic needs as its business expands. In addition, ICG testified that it would commit to BellSouth for a specified volume of traffic to be delivered by BellSouth. If the traffic volume does not meet the forecasted levels, ICG committed to pay BellSouth's full costs for the unused trunks. Tr. 86-87. In response, BellSouth argued that binding forecasts are not required by the Federal Act. Moreover, BellSouth questions whether ICG has contemplated all the costs related to binding forecasts. BellSouth's Post-Hearing Brief, p.30.

Merely because an issue is not explicitly spelled out in the Federal Act, does not render it outside its scope. Binding forecasts relate to the quality of service that ICG can provide its customers. Enabling CLECs to provide quality service to its customers promotes competition, and promoting competition is an intent of the Federal Act. The binding forecasts would provide a benefit to ICG without exposing BellSouth to any risk, so long as the costs of unused trunks are passed on to ICG. The interconnection agreement should include the option of the binding forecasts requested by ICG, under the condition that ICG pays for BellSouth's full costs for the unused trunks.

E. Should the Commission order enforcement mechanisms to ensure BellSouth's compliance with the Performance Measures included in the interconnection agreement?

In its May 27, 1999, Petition for Arbitration, ICG included the following issues related to Performance Standards/Measures:

a. Should BellSouth be subject to liquidated damages for failing to meet the time intervals for provisioning UNEs?

b. Should BellSouth be required to pay liquidated damages when BellSouth fails to install, provision, or maintain any service in accordance with the due dates set forth in an interconnection agreement between the Parties?

c. Should BellSouth continue to be responsible for any cumulative failure in a one-month period to install, provision, or maintain any service in accordance with the due dates specified in the interconnection agreement with ICG?

d. Should BellSouth be required to pay liquidated damages when BellSouth's service fails to meet the requirements imposed by the interconnection agreement with ICG (or the service is interrupted causing loss of continuity or functionality)?

e. Should BellSouth continue to be responsible when the duration of service's failure exceeds certain benchmarks?

f. Should BellSouth be required to pay liquidated damages when BellSouth's service fails to meet the grade of service requirements imposed by the interconnection agreement with ICG?

g. Should BellSouth continue to be responsible when the duration of service's failure to meet the grade of service requirements exceeds certain benchmarks?

h. Should BellSouth be required to pay liquidated damages when BellSouth fails to provide any data in accordance with the specifications of the interconnection agreement with ICG?

i. Should BellSouth continue to be responsible when the duration of its failure to provide the requisite data exceeds certain benchmarks?

Although the parties reached agreement at the hearing on service quality measurements, the issue of enforcement of the measurements remains unresolved. ICG argued that in order for the performance standards to which the parties have agreed to have meaning, enforcement mechanisms must be in place. ICG Post-Hearing Brief, p. 41. Without the threat of penalty, BellSouth does not have enough of an incentive to meet the performance standards. BellSouth counters with both a legal and a policy argument. Its legal argument is that ICG is asking the Commission to award compensatory damages, which is outside the scope of Commission authority. BellSouth's Post-Hearing Brief, p. 32-33. BellSouth's policy argument is that it is unnecessary to include enforcement mechanisms in the interconnection agreement because ICG can make use of the Commission's complaint procedures. Id. at 34.

Addressing the legal issue first, the inclusion of enforcement mechanisms in an interconnection agreement are distinguishable from awarding compensatory damages. BellSouth cites Georgia Public Service Commission v. Atlanta Gas Light Company,[2] to support its claim that the Commission does not have the authority to order the inclusion of enforcement mechanisms in an interconnection agreement. This case involved the Commission ordering a refund to customers after the Company charged a rate that the Commission approved. There is nothing retroactive, however, about the Commission ordering enforcement mechanisms in an interconnection agreement. Moreover, the mere inclusion of the enforcement mechanisms does not, in and of itself, amount to compensatory damages. It is only providing an incentive for BellSouth to meet the performance standards to which it has agreed. In any event, the Commission is specifically authorized to set and enforce terms and conditions of interconnection and unbundling. O.C.G.A. § 46-5-164. Therefore, the Commission concludes that it has the authority to order enforcement measures as part of an interconnection agreement.

Despite the Commission's jurisdiction in this area, the specific enforcement measures advocated by ICG, and listed under the Statement of Proceedings, do not find adequate support in the record. The Commission reserves the jurisdiction to adopt for this agreement, enforcement mechanisms that are ordered in future arbitration proceedings.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues that the parties presented to the Commission for arbitration should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, pending the adoption of a federal rule, dial-up calls to ISPs should be treated as local calls for purposes of reciprocal compensation. ILECs and CLECs should be compensated for transport and delivery of ISP-bound calls based on the rates established in Docket No. 7061-U. However, the Commission directs the parties to track all reciprocal compensation payments, which shall be subject to a true-up mechanism, based upon the outcome of the FCC's Rule-Making in CC Docket 99-68 on ISP-bound traffic.

ORDERED FURTHER, that for the purposes of reciprocal compensation, ICG is entitled to the tandem switch rate,

ORDERED FURTHER, that BellSouth is obligated to provide to ICG EELs at UNE prices because the network elements that comprise EELs are routinely combined in BellSouth's system,

ORDERED FURTHER, that the arbitration agreement shall provide ICG with the option of binding forecasts for trunking facilities to deliver to ICG traffic originated in BellSouth's network, provided that ICG is responsible for the costs of unused trunks,

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[2] 205 Ga. 863, 55 S.E.2d 618 (1949)

ORDERED FURTHER, that enforcement mechanisms are within the Commission's authority. However, the measures proposed by ICG in this proceeding are not supported by the record. Therefore, the Commission will reserve its jurisdiction to incorporate enforcement measures that are approved in a future interconnection arbitration into the ICG-BellSouth interconnection agreement.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 1st day of February, 2000.

Helen O'Leary Executive Secretary	Bob Durden Chairman
Date	Date

T. Br.

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

A PETITION BY ICG TELECOM GROUP, INC. FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTIONS 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	))))))	CASE NO. 99-218

O R D E R

ICG Telecom Group, Inc. ("ICG") seeks arbitration of specific issues related to its interconnection contract with BellSouth Telecommunications, Inc. ("BellSouth"). Many of the issues originally pending have been resolved by agreement between the parties. A public hearing was held December 2, 1999. The matter now stands ready for Commission decision on five unresolved issues: (1) reciprocal compensation for calls to Internet service providers ("ISPs"); (2) the appropriate compensation rate for ICG's switch; (3) the availability and pricing of the enhanced extended link ("EEL"); (4) issues related to performance measures and enforcement mechanisms; and (5) issues related to take and pay arrangements for binding forecast of traffic volumes.

I. WHETHER RECIPROCAL COMPENSATION SHOULD BE REQUIRED FOR CALLS TO INTERNET SERVICE PROVIDERS.

ICG argues that the Commission should require BellSouth to pay reciprocal compensation for ISP-bound traffic. None of the Federal Communications Commission's ("FCC") decisions, according to ICG, preclude state commissions from determining that reciprocal compensation is an appropriate inter-carrier compensation rule pending final FCC action.[1] The FCC determined that state commissions may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic.

ICG asserts that BellSouth itself agrees that reciprocal compensation should be paid for all non-ISP local calls to compensate for costs that one carrier incurs on behalf of the other. In the absence of reciprocal compensation for ISP-bound traffic, ICG would be handling a large number of calls from BellSouth customers and incurring costs that BellSouth would avoid. Moreover, the FCC indicated that its "policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in a separate context of reciprocal compensation, suggest that such compensation is due for that traffic."[2] ICG contends that BellSouth's proposal for tracking the traffic and making payments retroactively based on FCC decisions indefinitely delays its ability to cover current costs.

BellSouth, on the other hand, asserts that reciprocal compensation is not an appropriate cost recovery mechanism for ISP-bound traffic. BellSouth argues that the longer hold times for ISP-bound calls result in an over-recovery of call setup costs. BellSouth argues that the parties should track the ISP-bound traffic. Once the FCC has established an inter-carrier compensation mechanism for ISP-bound traffic, then the

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[1] FCC 99-38, Implementation of Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98) and Inter-Carrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68), Rel. February 26, 1999 ["Declaratory Ruling"] at ¶25.

[2] Id. Even the FCC acknowledges that no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network. Declaratory Ruling at ¶29.

parties would true-up the payments retroactively from the effective date of this interconnection agreement.

After careful consideration, the Commission concludes that ISP-bound traffic should be eligible for reciprocal compensation, pending a final determination by the FCC. The FCC has indicated that this Commission has the legal authority to order a reciprocal compensation arrangement in this proceeding. Equity precludes this Commission from denying ICG any compensation from BellSouth for carrying BellSouth's traffic on ICG's local network. Furthermore, it is logical to consider a call to an ISP to be a call that is "terminated" locally, at the ISP server, because a protocol conversion occurs before the information is passed on to the Internet. In the wake of the FCC's pending determination, the most reasonable method for compensation is at the current rate for local calls. However, in addition the parties should track the minutes of use for calls to ISPs and be prepared to "true-up" the compensation consistent with the FCC's decision. Thus, the compensation ordered herein for ISP-bound traffic should be retroactively "trued-up" to the level of compensation ultimately adopted by the FCC.

II. <u>WHETHER, IF ICG'S SWITCH SERVES A GEOGRAPHIC AREA SIMILAR TO THAT SERVED BY BELLSOUTH'S TANDEM SWITCH, ICG IS ENTITLED TO RECIPROCAL COMPENSATION AT THE TANDEM RATE.</u>

ICG states that its switch provides service to a geographic area that is at least as large as the area served by BellSouth's tandem switches. As is common among new entrants, ICG uses a single switching platform to transfer calls between multiple ILEC central offices as well as to transfer calls between the ICG and ILEC network. A tandem switch connects trunks and is an intermediate connection between an originating telephone call location and the final destination of the call. ICG's switch performs many of the same functions that the ILEC tandem switch performs. According to ICG this is further indication that tandem termination rates are appropriate for its switch's use.

BellSouth contends ICG is entitled to recover the tandem switching elemental rate only when ICG's switch actually performs the same tandem switching function as the ILEC switch and actually serves a geographic area comparable to the ILEC switch. However, Rule 51.711(a)(3) of the FCC's Interconnection Order states:

> 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 ILEC's tandem interconnection rate.

Accordingly, pursuant to FCC requirements, tandem interconnection rates are required. ICG should be compensated at the tandem interconnection rate.

III. WHETHER BELLSOUTH SHOULD BE REQUIRED TO MAKE THE ENHANCED EXTENDED LINK ("EEL") AVAILABLE AS AN UNBUNDLED NETWORK ELEMENT COMBINATION, AT AN UNBUNDLED NETWORK ELEMENT PRICE.

ICG asserts that the provisioning of EELs as unbundled network elements ("UNEs") at the DS-0 and DS-1 level will act to extend the range of ICG's ability to serve customers, thus permitting ICG to bring the benefits of competition to a much broader base of customers than ICG is currently able to serve. ICG asserts that the FCC's Rule 51.315(b) makes clear that if BellSouth currently combines loop and transport, BellSouth must make loop and transport available as a UNE combination that is priced accordingly. ICG maintains that the EEL is an efficient mechanism for bringing the benefits of competition to Kentucky because it will allow ICG and other CLECs to serve customers without requiring collocation in a particular customer's serving central office.

ICG also argues that the EEL should be offered at the TELRIC-based UNE prices established by the Commission. According to ICG, the total price charged by BellSouth for the EEL should be the sum of the TELRIC rate for the three components.

BellSouth argues that the EEL is nothing more than a combination of three separate UNEs that replicate private line and/or special access services. BellSouth will, on a voluntary basis, provide EELs through "Professional Services Agreements." BellSouth asserts that since those offers are separate and apart from any obligations under 47 U.S.C. §§251 and 252, there is no requirement that the EEL be provided at TELRIC rates. Therefore, the EEL is offered at prices approximating retail rates.

A competitor's right to obtain combinations of UNEs has been one of the more contentious issues arising from the passage of the Act and the rules originally promulgated by the FCC to implement the requirements of the Act. The rules of this Commission and of the FCC governing UNE combinations have their genesis in 47 U.S.C. §251(c)(3) which imposes on ILECs

> [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.

Accordingly, the Commission requires BellSouth to provision the EEL at the DS-0 and DS-1 levels where it currently combines those loops with transport within its network. The EEL is the only efficient mechanism currently available to ICG to serve customers without collocating in the BellSouth central office serving that particular customer. The EEL is necessary to provide service, particularly in less dense residential areas where collocation is not feasible. In such instances, the unavailability of the EEL would certainly impair ICG's ability to provide service because there is no other source for this access. The EEL must be available to ICG at the TELRIC-based UNE prices. Specifically, the total price charged by BellSouth for the EEL should be the sum of the established TELRIC rates for: (1) an unbundled loop; (2) a cross-connect of appropriate capacity; and (3) unbundled interoffice dedicated transport.

Further, BellSouth should combine previously uncombined elements for a reasonable cost-based fee in situations where those elements currently are not combined in the BellSouth network.

IV. <u>WHETHER PERFORMANCE MEASURES WITH ENFORCEMENT MECHANISMS, SHOULD BE ORDERED TO ENSURE THAT BELLSOUTH PROVIDES NONDISCRIMINATORY SERVICE TO ICG ON PARITY WITH THE SERVICE BELLSOUTH PROVIDES TO ITSELF AND ITS RETAIL CUSTOMERS.</u>

ICG requests that the performance measures and enforcement mechanisms adopted by the Texas Utilities Commission should be ordered for BellSouth in this case.

BellSouth asserts that its "Service Quality Measurements" ("SQMs") will provide sufficient protection to ICG. According to BellSouth, the SQMs cover BellSouth's performance in preordering, ordering, provisioning, maintenance and repair, billing, operator services, directory assistance, E911, trunk group performance, and co-location. According to BellSouth, these are available now to all CLECs in Kentucky.

As the Commission has noted in several previous orders, BellSouth is required to provide the same quality of service to ICG as it provides to itself. There is no need to assume that BellSouth will not in good faith comply with that requirement. Thus, performance measures and enforcement mechanisms of the nature requested by ICG are not necessary. Should ICG have a basis on which to allege that poor quality of service is being delivered to its customers by BellSouth then it should bring this matter to the Commission's attention through a complaint petition.

V. WHETHER BELLSOUTH SHOULD BE REQUIRED TO PROVIDE TRUNKING FACILITIES TO DELIVER TRAFFIC FROM BELLSOUTH'S NETWORK TO ICG WHEN ICG IS WILLING TO ENTER INTO A BINDING FORECAST OF TRAFFIC VOLUMES.

ICG relies on BellSouth end office trunks to deliver traffic to ICG's switch. These trunks are usually BellSouth's responsibility to provision and administer. ICG provides BellSouth with quarterly traffic forecasts to assist BellSouth in planning for facilities to handle traffic between their networks. However, ICG contends that BellSouth is under no obligation to add more end office trunks even though ICG's forecasts may indicate that additional trunking is necessary.

ICG asks this Commission to require BellSouth to provision additional end office trunks dictated by ICG's forecast. In exchange, ICG will agree to pay BellSouth for any trunks that are not fully utilized as indicated by the forecast. ICG maintains that under its proposal, BellSouth will not assume any risk for additional trunks that are underutilized.

BellSouth asserts that although it is continuing to analyze the possibility of providing binding forecasts and has not foreclosed the idea, BellSouth cannot be ordered to agree to binding forecasts because there is no requirement that it do so pursuant to 47 U.S.C. §251. BellSouth accordingly argues that, pursuant to 47 U.S.C. §252(c), binding forecasts are not properly subject to arbitration.

The threshold question here is whether the Commission has jurisdiction to require a binding forecast provision in a 47 U.S.C. §252 arbitration as requested by ICG. BellSouth is correct in pointing out that there is not a specific provision of 47 U.S.C. §251 that requires ILECs to enter binding forecasts. The relevant inquiry, however, is not whether there is any direct reference to binding forecast in 47 U.S.C. §251, but whether requiring binding forecasts is consistent with the general interconnection obligations of ILECs as set forth in that section of the Act.

Pursuant to 47 U.S.C. §251(c)(2)(C), ILECs are required to provide interconnection with requesting carriers that is at least equal in quality to that provided by the ILEC to itself. ICG's binding forecast proposal clearly relates to interconnection and is designed to ensure that such interconnection is provided to ICG on a non-discriminatory basis. ICG's proposal, therefore, falls well within the parameters of 47 U.S.C. §251 and the Commission's authority to enforce the provisions of that Section.

BellSouth normally has the financial responsibility for the facilities which ICG seeks to make subject to binding forecasts. Under ICG's proposal, however, ICG will pick up the cost for those facilities by paying BellSouth 100 percent of the tariffed price for the forecasted plant if the trunks are not used.

ICG's proposal fully protects BellSouth from assuming unreasonable or unnecessary risk. ICG's proposal is a just and reasonable basis for the parties to negotiate the details of a binding forecast arrangement. The parties should include a binding forecast provision in their interconnection agreement. BellSouth should have the network in service as forecasted by ICG by the end of the forecasted period. Thus, ICG must provide BellSouth at least three months' notice of its capacity requirements.

The Commission, having considered ICG's petition and BellSouth's response thereto, and all other evidence of record, and having been otherwise sufficiently advised, HEREBY ORDERS that:

1. Reciprocal compensation shall be required for calls to ISPs at the agreed upon rate for compensation of local calls, pending the FCC's determination.

2. Parties shall track the minutes of use for ISP-bound calls so that a retroactive "true-up" to the level of compensation ultimately adopted by the FCC may occur.

3. Within 30 days of the date of this Order, parties shall submit information regarding the manner in which they will track ISP-bound traffic.

4. BellSouth shall compensate ICG for use of its switch at the tandem interconnection rate.

5. The EEL shall be made available to ICG at the TELRIC-based UNE prices for the sum of an unbundled loop, a cross-connect, and an unbundled interoffice dedicated transport.

6. BellSouth shall combine previously uncombined elements for a reasonable cost-based fee.

7. Within 30 days of the date of this Order, BellSouth shall file its proposed "combining" fee and cost support workpapers.

8. Performance measures and enforcement mechanisms shall not be required at this time, however, BellSouth shall continue to provide SQMs to ICG.

9. The parties shall include a binding forecast provision in their interconnection agreement consistent with the Commission's decisions herein.

10. Within 30 days of the date of this Order, parties shall submit a signed agreement consistent with the mandates herein.

Done at Frankfort, Kentucky, this 2nd day of March, 2000.

By the Commission

ATTEST:

Deputy Executive Director

STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P O BOX 991
MONTGOMERY, ALABAMA 36101-0991

JIM SULLIVAN, PRESIDENT
JAN COOK ASSOCIATE COMMISSIONER
GEORGE C. WALLACE JR., ASSOCIATE COMMISSIONER

WALTER L. THOMAS JR
SECRETARY

In the Matter of: 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 27069

ORDER DENYING RECONSIDERATION

I. Background

BY THE COMMISSION:

On December 10, 1999, BellSouth Telecommunications, Inc. (BellSouth), filed a Motion for Reconsideration (BellSouth's Motion) of certain portions of the Commission's November 10, 1999 Final Order on Arbitration (the Commission's Order) entered in the above-styled cause. Specifically, BellSouth seeks reconsideration concerning: (1) The interim inter-carrier compensation rates adopted by the Commission for Internet service provider (ISP) traffic; and (2) the Commission's determination that ICG Telecom Group, Inc. (ICG) is entitled to reciprocal compensation at BellSouth's tandem interconnection rate. ICG filed a Response in Opposition (ICG's Response) to BellSouth's Motion for Reconsideration on December 20, 1999.

II. BellSouth's Arguments in Support of Reconsideration

BellSouth bases its request for the Commission to reconsider the interim inter-carrier compensation rates established for ISP traffic in the November 10, 1999 Order on a claim that the Commission improperly relied on the elemental rates established in the *UNE Pricing Docket*[1] in arriving at those rates. BellSouth alleges that the elemental rates established in the *UNE Pricing Docket* are based on an assessment of BellSouth

[1] *In the Matter of Generic Proceedings; Consideration of TELRIC Studies*, Docket No. 26029 (August 25, 1998).

cost studies which examine the costs of transporting and terminating voice traffic, not the costs of handling ISP-bound traffic.

The crux of BellSouth's argument is that ISP traffic has, on average, significantly longer holding times than traditional voice traffic. BellSouth relies primarily on a March 1998 National Association of Regulatory Utility Commissioners (NARUC) study[2] and a 1996 study performed by BellCore[3] for this proposition.

BellSouth advocates an adjusted ISP call length proposal for Alabama similar to one submitted to the North Carolina Utilities Commission by ICG. BellSouth asserts that the adoption of such a proposal in Alabama would result in rates for ISP traffic which are approximately twenty-five percent (25%) lower than the rates approved by the Commission in the *UNE Pricing Docket* for traditional voice traffic. The BellSouth Motion for Reconsideration contains a rate comparison chart reflecting the magnitude by which elemental rates will be reduced if an adjusted ISP call length proposal is utilized.

Based on the foregoing, BellSouth asserts that the payment of reciprocal compensation for ISP-bound traffic based on the rates for transporting and terminating traditional local voice traffic will result in an over-recovery of call set-up costs. BellSouth thus urges the Commission to reconsider the decision rendered in its November 10, 1999 Order concerning elemental rates for interim inter-carrier compensation for ISP traffic.

With regard to the Commission's ruling that ICG is entitled to reciprocal compensation at the tandem interconnection rate, BellSouth asserts that the Commission is relying on a misinterpretation of the prevailing law and unsupported findings of fact. Specifically, BellSouth argues that ICG failed to establish at hearing that its switch actually performs functions similar to BellSouth's tandem switch.

BellSouth maintains that the only evidence presented by ICG concerning switch functionality revolved around a network diagram submitted by ICG witness Starkey. Based on that diagram, BellSouth asserts that it is clear that: (1) ICG does not

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[2] *Report of the NARUC Internet Working Group, Pricing and Policies for Internet traffic on the Public Switched Network*, at 2 (March 1998).
[3] Atal and Gordon, *Impacts of Internet Traffic of LEC Networks and Switching Systems*, at 3-4 (BellCore 1996).

interconnect end offices or perform trunk-to-trunk switching, but rather performs line-to-trunk or trunk-to-line switching; (2) to the extent ICG has a switch in Alabama, it performs only end office switching functions and does not switch BellSouth's traffic to another ICG switch; and (3) based on the information provided, ICG's switch does not provide other centralization functions such as call recording, routing of calls to operator services and signaling conversion for other switches as BellSouth's tandem switches do.

BellSouth also alleges that the equipment which ICG collocates in BellSouth central offices appears to be nothing more than a subscriber loop carrier which is part of loop technology and provides no switching functionality. BellSouth thus maintains that ICG's switch is not providing a transport or tandem function, but is switching traffic through its end office for delivery of traffic from that switch to the called party's premises. Since no switching is performed in such collocation arrangements, BellSouth asserts that the lines involved are simply long loops transported to ICG's switch, not trunks. BellSouth argues that such long loop facilities do not qualify as facilities over which local calls are transported and terminated as described by the Telecommunications Act of 1996. BellSouth therefore, argues that such facilities are not eligible for reciprocal compensation.

BellSouth further asserts that even if it is incorrectly assumed that ICG's switch performs the same functions as BellSouth's tandem switch, there is no evidence in the record that ICG's switch actually serves a geographic area comparable to BellSouth's tandem switch. According to BellSouth, ICG failed to identify where its customers are located - information that is essential to support a finding that ICG's switch serves a comparable geographic area. BellSouth thus urges the Commission to reconsider its decision and deny ICG's request for reciprocal compensation at the tandem interconnection rate.

III. The Arguments Raised by ICG

In its December 20, 1999, Response in Opposition to BellSouth's Motion for Reconsideration, ICG contends that BellSouth's argument that the rates established in the *UNE Pricing Docket* are inappropriate for purposes of determining reciprocal compensation for ISP traffic due to the alleged longer holding times for ISP traffic constitutes a substantial new argument which BellSouth is improperly raising for the first time in its Motion for Reconsideration. ICG further alleges that BellSouth is attempting to support its substantial new argument with evidence which was available prior to the arbitration proceedings in Alabama, but was not introduced by BellSouth.

According to ICG, the Commission must look to Rule 21 of the Commission's Rules of Practice and Rule 59 of the Alabama Rules of Civil Procedure (ARCP) in order to determine whether BellSouth is entitled to reconsideration based on the new evidence submitted in its Motion for Reconsideration[4]. ICG insists that BellSouth is entitled to relief only if it can demonstrate that the new evidence it seeks to introduce was discovered after trial, that such evidence could not have been discovered with due diligence prior to trial, that such evidence is material to the issue and not merely cumulative or impeaching, and that said evidence is of such a nature that a different verdict would probably result if a new hearing were granted[5].

ICG contends that BellSouth cannot meet the standards discussed immediately above. According to ICG, BellSouth is intimately familiar with the BellSouth cost studies relied upon by the Commission in its establishment of interim inter-carrier compensation rates for ISP traffic. ICG asserts that BellSouth was in a position at any time prior to or during the arbitration hearing, or even following the hearing in post-hearing briefs, to make the arguments it now attempts to make in its Motion concerning its cost studies.

ICG further alleges that the NARUC Report that BellSouth cites for the proposition that the hold times associated with ISP-bound calls are longer than the hold times for other calls hardly constitutes new evidence given its March 1998 date. ICG also points out that the modified ISP call holding time proposal it submitted to the North Carolina Utilities Commission was known to BellSouth prior to the arbitration hearing in Alabama, but was not even referenced by BellSouth in its presentation before the Arbitration Panel in Alabama.

ICG further clarifies that the modified ISP call holding time proposal it submitted

[4] Citing *Walker v. Alabama Public Service Commission*, 297 So.2d 370 (Ala. 1974); *overruled on other grounds*, *Ex Parte Andrews*, 520 So.2d 507 (Ala. 1987).

[5] Citing *Talley v. Kellogg Co.*, 546 So.2d 385 (Ala. 1989).

to the North Carolina Commission was filed in response to a settlement directive from that Commission. ICG maintains that the North Carolina Commission ultimately rejected its modified ISP call holding time proposal in favor of an ISP compensation arrangement identical to that adopted by this Commission in its November 10, 1999 Order.

ICG surmises that BellSouth's blatant attempt to change the rules of the game in midstream should not be entertained by the Commission based on the principles of the Alabama Rules of Civil Procedure and the Alabama case law discussed above. ICG thus urges the Commission to deny BellSouth's Motion for Reconsideration on the grounds of improperly submitted new evidence and improperly raised arguments.

ICG further asserts that even if the Commission determines that BellSouth's Request for Reconsideration is due to be granted, the interim inter-carrier compensation rates adopted by the Commission for ISP-bound traffic are supported by the evidence of record. ICG in fact maintains that the testimony before the Arbitration Panel and ultimately before the Commission was that the costs associated with a voice call versus an ISP call are exactly the same. ICG argues that the Commission's findings are consistent with that established principle.

ICG further maintains that BellSouth presented no evidence that the costs ICG incurs in delivering calls from BellSouth customers to ICG's ISP customers are in any way different that the costs ICG incurs in delivering traffic originated on BellSouth's network by BellSouth customers to an ICG business or residential customer. In fact, ICG points out that BellSouth presented no evidence whatsoever regarding the costs that ICG incurs in delivering BellSouth-originated calls to ISP's.

Concerning the Commission's determination that ICG is entitled to reciprocal compensation at BellSouth's Tandem interconnection rate, ICG maintains that the Commission's holding in this regard is indeed supported by the evidence of record. ICG alleges that BellSouth simply refuses to recognize that the evidence it claims to be non-existent regarding this issue is amply spread throughout the record and is totally consistent with the Commission's findings and conclusions regarding same. ICG maintains that it amply demonstrated that its switch serves a geographic area comparable to BellSouth's tandem switch and performs functions which closely approximate those performed by BellSouth's tandem switch. ICG alleges that its demonstrations in this regard are uncontroverted by BellSouth.

ICG further notes that BellSouth's claim that the facilities between ICG's collocation points in the BellSouth network and ICG's switch location are nothing more than long loop facilities is totally unfounded and constitutes a new argument not previously raised in this proceeding. ICG alleges that had this issue been properly raised in Alabama, ICG would have demonstrated, as it did in proceedings before the Tennessee Regulatory Authority, that the facilities BellSouth characterizes as long loops are in fact purchased from BellSouth as transport.

IV. The Findings and Conclusions of the Commission

We have considered the Motion for Reconsideration submitted by BellSouth and ICG's Response thereto in light of the record compiled in this proceeding. Having done so, we are somewhat perplexed by BellSouth's advancement of substantial new arguments which are supported by evidence which is also new to this proceeding. Although BellSouth did not specifically request a hearing on its Motion or further proceedings to address the issues raised therein, the magnitude of the new arguments and the new evidence submitted by BellSouth dictates that the Commission treat BellSouth's Motion as it would a request for rehearing.

ICG is correct in noting that the Commission is primarily guided by Rule 21 of the Commission's Rules of Practice in its evaluation of motions for reconsideration and/or rehearing. The Commission is also required to adhere to the requirements of Code §37-1-105 where rehearings are concerned. Additional consideration must be given to the requirements governing new trials established by Rule 59 of the Alabama Rules of Civil Procedure (ARCP Rule 59) given the Supreme Court of Alabama's long standing holding that the requirements governing motions for a new trial in civil matters in the circuit courts of Alabama also apply to requests for rehearing on Orders of the Commission[6].

[6] *Walker v. Alabama Public Service Commission* at p. 374.

BellSouth did not specify its justification for submitting the new evidence it seeks to introduce in its Motion, but the Commission can only assume that such new evidence is being treated by BellSouth as "newly discovered evidence". The determination of whether to grant a request for a new trial, or in this case a rehearing, based on such newly discovered evidence is largely at the discretion of the Commission. However, well established Alabama case law dictates that in order to be entitled to a new trial on the grounds of "newly discovered evidence", a movant must show that the evidence in question was discovered after trial, that it could not have been discovered with due diligence prior to trial, that it is material to the issue and not merely cumulative or impeaching, and that it is of such a nature that a different verdict would probably result if a new trial were granted[7].

Clearly, the new evidence relied upon by BellSouth to establish its newly introduced proposition that the allegedly different call holding times associated with ISP traffic dictate lower reciprocal compensation rates for such traffic could, with due diligence, have been discovered and presented to the Commission during the August 11, 1999 arbitration hearing in this cause. The cost studies which BellSouth now attempts to distinguish and the NARUC and BellCore reports which BellSouth relies upon to do so were all available well before the August 11, 1999 arbitration hearing and could have been discovered and introduced by BellSouth. Therefore, it would not now be appropriate to grant BellSouth's request for reconsideration and/or rehearing based on such evidence. The fact that the arguments concerning modified call holding times for ISP traffic had been raised in prior proceedings before the North Carolina Utilities Commission only strengthens this conclusion.

With regard to the issue whether ICG is entitled to reciprocal compensation at the BellSouth tandem interconnection rate, it does not appear that BellSouth has introduced entirely new arguments as contended by ICG. It does, however, appear that BellSouth has expanded its arguments concerning the alleged functional limitations of the switching equipment which ICG operates.

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7 *Weeks v. Danford*, 608 So.2d 387 (Ala. 1992).

Despite BellSouth's enhanced arguments to the contrary, we are persuaded that the record in this cause reflects that ICG's switch, and the facilities it uses in conjunction therewith, perform functions which so closely approximate those performed by BellSouth's tandem switch that ICG is entitled to the tandem interconnection rate. More particularly, ICG's network relies upon distributed network intelligence to aggregate ICG's customer base into a central switching platform. Even though ICG utilizes a different network architecture than does BellSouth, ICG's switching platform transfers traffic amongst discreet network nodes that exist in the ICG network for purposes of serving groups of ICG customers in the same fashion that BellSouth's tandem switch distributes traffic. The switch employed by ICG in this configuration also serves as ICG's toll center, its operator position system and as ICG's interconnection point with other carriers. BellSouth relies upon its tandem switch to perform the same type functions[8].

We also expressly affirm our previous conclusion that ICG's switch serves a geographic area comparable to that served by BellSouth's tandem switch. In conjunction with its Birmingham, Alabama switch, ICG utilizes approximately one hundred and fifty miles of company owned fiber-optic facilities, leased fiber-optic facilities, high capacity connections leased from BellSouth and collocation arrangements with BellSouth to aggregate and serve its customers which are spread across the Birmingham metropolitan area[9]. We remain of the opinion that ICG's testimony in this regard sufficiently demonstrates geographic comparability. BellSouth's argument that ICG is collocated in only two BellSouth central offices does not sufficiently controvert ICG's representations of geographic comparability.

In conclusion we affirm our Order of November 10, 1999 in all respects and deny in all respects BellSouth's Motion for Reconsideration and/or Rehearing. The parties are hereby instructed to submit their arbitrated interconnection agreement for Commission approval no later than twenty (20) days from the effective date of this Order.

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[8] Starkey, Tr. p. 103, 130.
[9] Starkey, Tr. pp. 129-130.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That based on the foregoing, the Motion for Reconsideration and/or Rehearing submitted by BellSouth Telecommunications, Inc. is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION, That the parties to this cause must submit, within twenty (20) days of the effective date of this Order, their arbitrated interconnection agreement for Commission approval.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause in hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 3rd day of February, 2000.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan

Jim Sullivan, President

Jan Cook

Jan Cook, Commissioner

George C. Wallace, Jr.

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas

Walter L. Thomas, Jr., Secretary

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-582, SUB 6

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of 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	)))))))	ORDER RULING ON OBJECTIONS, REQUEST FOR CLARIFICATION, RECONSIDERATION, AND COMPOSITE AGREEMENT

BEFORE: Jo Anne Sanford, Chair; and Commissioners Robert V. Owens, Jr. and Sam J. Ervin, IV

BY THE COMMISSION: On November 4, 1999, the Commission entered its Recommended Arbitration Order (RAO) in this docket. As part of that Order, the Commission made the following

FINDINGS OF FACT

1. The parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to Internet Service Providers (ISPs) at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by this Order, subject to true-up at such time as the Commission has ruled pursuant to future Federal Communications Commission (FCC) consideration of this matter.

2. ICG Telecom Group, Inc.'s (ICG's) Charlotte switch serves an area comparable to that served by BellSouth Telecommunications, Inc.'s (BellSouth's) Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, ICG is entitled to compensation at the tandem interconnection rate (in addition to the other appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

3. The Commission declines to decide at this time whether BellSouth should be required to commit to provisioning the requisite network buildout and necessary support. The Commission encourages BellSouth and ICG to continue to negotiate on this issue. Further, the Commission notes that since a similar provision is found in BellSouth's

Revised Statement of Generally Available Terms (SGAT) and at least one interconnection agreement, it would appear reasonable for a similar provision to be voluntarily included in the BellSouth/ICG interconnection agreement.

4. The issue of performance measurements and liquidated damages has been, in essence, withdrawn from the arbitration and accordingly is not in need of resolution in this docket. Further, the Commission will create a new docket, Docket No. P-100, Sub 133k, and issue an Order in that docket establishing the generic docket and requesting that the industry, the Public Staff, the Attorney General, and any other interested parties form a Task Force to attempt to agree on all potential issues concerning performance measurements and enforcement mechanisms. Further, the Commission will issue an Order in Docket No. P-100, Sub 133i (AT&T's Petition for Third-Party Testing) stating that the Commission is investigating performance measurements in a generic docket as a first step, but will keep the third-party testing docket open for future consideration.

On December 6, 1999, BellSouth filed its Objections and Request for Clarification and Reconsideration with an additional letter filed on December 14, 1999, correcting the citations referenced in its Objections and Request for Clarification and Reconsideration. BellSouth stated in its Objections and Request for Clarification and Reconsideration that it seeks clarification and reconsideration concerning: (1) the interim inter-carrier compensation plan adopted by the Commission for ISP traffic; and (2) the Commission's determination that ICG is entitled to reciprocal compensation at BellSouth's tandem interconnection rate. BellSouth stated that it seeks clarification of the RAO on two points. First, BellSouth stated that it desires confirmation that any compensation paid pursuant to the interim inter-carrier compensation plan will be trued-up retroactively to the effective date of the Interconnection Agreement resulting from this Arbitration in accordance with the mechanism established by the FCC and the Notice of Proposed Rulemaking (CC Docket 99-68). Second, BellSouth stated that it seeks clarification that the true-up will be triggered, and based on, an effective order by the FCC in CC Docket 99-68 which ensures the most expeditious resolution of this issue for all competing local providers (CLPs) and incumbent local exchange companies (ILECs) operating under the Commission's interim inter-carrier compensation plan. Finally, BellSouth requested the Commission to reconsider its position on the interim inter-carrier compensation rates for ISP-bound traffic and consider an alternative for the payment of those rates and to reconsider its conclusion that ICG is entitled to reciprocal compensation at the tandem interconnection rate.

On December 14, 1999, ICG filed a letter confirming its intentions to file on or before December 21, 1999, a response to BellSouth's Objections and Request for Clarification and Reconsideration.

On December 22, 1999, ICG filed its Opposition to BellSouth's Objections and Request for Clarification and Reconsideration. ICG maintained that BellSouth's filing is nothing more than a rehash of arguments already considered and rejected by the Commission. ICG further maintained that BellSouth's request for clarification is unclear. ICG concluded that neither of the requested clarifications is in any way necessary.

On January 3, 2000, the Public Staff filed its Response to Request for Reconsideration. The Public Staff stated that the single issue it wished to address concerned whether ICG should be compensated for tandem switching. The Public Staff stated that it did not address this issue in its Proposed Order in this docket, however, it now believes that the Commission should reconsider and reverse its finding on this issue on the grounds that ICG failed to demonstrate that its switch provides the tandem function in terminating a call delivered to it by the LEC.

On January 10, 2000, ICG filed its Reply to the Public Staff's Response. ICG maintained that the Commission correctly concluded that FCC Rule 51.117 provides a single criterion for tandem rate eligibility and that though not required, the record demonstrates that ICG's switch functions as a tandem. ICG recommended that the Commission deny BellSouth's Request for Reconsideration.

On January 20, 2000, the Commission issued an Order Regarding Maps. The Commission required ICG and BellSouth to submit as late-filed exhibits a map showing ICG's network with relevant switches in North Carolina overlaid against the geographic area which BellSouth's tandem switch serves and the number of BellSouth central offices ICG is presently collocated in within North Carolina by no later than January 23, 2000.

On January 20, 2000, BellSouth filed the Final Order of the Florida Public Service Commission in its ICG/BellSouth arbitration docket.

On February 7, 2000, BellSouth filed its maps in response to the Commission's January 10, 2000 Order. ICG also filed its maps in response to the Order on February 7, 2000.

On February 14, 2000, ICG filed a Notice of Supplemental Authority which included decisions of the Alabama and Georgia Public Service Commissions.

On February 14, 2000, ICG filed a letter to protest the letter filed by BellSouth with its maps stating that BellSouth used its transmittal letter as an opportunity to present its arguments on the tandem rate eligibility issue.

Discussions and Commission conclusions regarding the issues raised by BellSouth in its Objections and Request for Clarification and Reconsideration follow. These matters are addressed below by reference to the specific Findings of Fact which coincide with those findings set forth in the Commission Order entered in this docket on November 4, 1999, which are the subject of said Objections and Request for Clarification and Reconsideration.

<u>FINDING OF FACT NO. 1</u>: Until the FCC adopts a rule with prospective application, should dial-up calls to ISPs be treated as if they were local calls for the purposes of reciprocal compensation?

INITIAL COMMISSION DECISION

The Commission concluded that the parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by the Commission's Order in this docket, subject to true-up at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

COMMENTS/OBJECTIONS

BELLSOUTH: BellSouth has asked the Commission for clarification or reconsideration of the following:

1. Confirmation that any compensation paid pursuant to the interim inter-carrier compensation mechanism will be trued-up retroactively to the effective date of the Interconnection Agreement resulting from this Arbitration. BellSouth requested clarification on this point because of the dual true-up referenced by the Commission in its RAO — (1) an interim true-up based on the establishment of final unbundled network element (UNE) rates and (2) a final true-up based on the upcoming FCC decision. BellSouth believes that the reciprocal compensation rates should be trued-up once the Commission establishes rates in the UNE docket without regard to any action from the FCC.

2. Clarification regarding the procedure that the parties are to utilize to effectuate the true-up. BellSouth argued that the true-up should be triggered and based upon an effective Order by the FCC. Theoretical alternative dates would be when the FCC decision is released, or as the Commission has implied, after Commission action pursuant to that Order.

3. Reconsideration of the interim-carrier compensation rates for ISP-bound traffic and consideration of an alternative for payment of those rates. BellSouth noted that the Commission had established interim inter-carrier compensation rates at the same level as reciprocal compensation rates for local traffic but, in light of the fact that the interim inter-carrier compensation plan adopted here will be the template for other agreements, BellSouth argued that the rates paid for ISP-bound traffic should reflect the longer holding times associated with ISP-bound traffic. Specifically, BellSouth stated it is willing to accept

the 20-minute call duration originally proposed by ICG in this Arbitration. This would yield a minute of use (MOU) total rate of $0.0022806.

BellSouth also requested that the Commission reconsider its ruling regarding payment and allow BellSouth to make payments pursuant to the plan in an interest-bearing escrow account. BellSouth cited substantial risk that it would be unable to recover those funds at final true-up, especially from smaller CLPs.

ICG: ICG urged the Commission to reject BellSouth's request that it modify the inter-carrier compensation rates for ISP-bound traffic based on an average call length (ACL) factor of 20 minutes. ICG argued that the costs it incurs for delivering calls to BellSouth customers are the same regardless of whether the called party is an ISP and thus there is no basis for a different compensation rate. ICG also chided BellSouth for attempting to insert new data in this proceeding purporting to show that the flow of compensation would be one-sided on a statewide basis by citing evidence in another proceeding (BellSouth/Time Warner, Docket No. P-472, Sub 15). Finally, ICG also maintained that BellSouth had not presented the Commission with a workable, alternative compensation mechanism.

ICG further noted that the 20-minute ACL proposal had been originally submitted by ICG itself in response to the Commission's Order seeking alternative approaches to compensation, but that the ICG proposal assumed that the proposed rate would be applied to all calls, not just ISP-bound calls. Moreover, ICG had noted that it had not done a study of actual call lengths and that the 20-minute figure was an "overly conservative" estimate of actual call lengths. In any event, the Commission rejected the ACL proposal. BellSouth is also using the new costs/rates which it proposed in the UNE docket, but these are final rates and not in effect yet. ICG further stated that ISP-bound calls are indistinguishable from other calls; thus there is not a reliable way to identify them.

With respect to BellSouth's requests for clarification, ICG expressed puzzlement. To the extent that BellSouth is asking whether the true-up will be to the final UNE rates and will occur when the FCC issues its final ruling, this would appear consistent with the Order. The true-up, however, should not occur upon the effective date of the FCC Order, since the Commission has made it plain that subsequent proceedings to implement the FCC ruling will be needed.

ICG emphatically rejected BellSouth's proposal that the payments be held in escrow as the Commission did in its original ruling.

PUBLIC STAFF: The Public Staff did not address this issue in its Response to Request for Reconsideration.

DISCUSSION

There are two major issues for consideration. The first is BellSouth's request for an alternative inter-carrier compensation mechanism based on a 20-minute ACL rather than one based on the sum of certain UNE rates. The other is BellSouth's request for clarification.

With respect to the first item, the Commission sees no reason to depart from the decision that it has already made on this matter. It is, to say the least, ironic for BellSouth to propose what in essence was a tentative proposal, later withdrawn, originally made by ICG in response to the Commission's request for "creative thinking" on inter-carrier compensation. Apparently, the merits of this proposal became obvious to BellSouth only after its own proposal was rejected. Meanwhile, the merits have become less persuasive to ICG, since it extensively critiqued the deficiencies of the ACL proposal in its reply to BellSouth. This only fortifies the Commission's belief that it would be on the right track to stand by an interim mechanism that is relatively simple and straight forward and tracks the reciprocal compensation rates applicable to other calls.

With respect to BellSouth's request for clarification regarding the inter-carrier compensation rates for ISP-bound traffic, the Commission makes the following clarification:

1. There is to be a first true-up applicable to all traffic subject to reciprocal compensation when the interim UNE rates become final UNE rates. However, if the final UNE rates are effective before the Interconnection Agreement becomes effective, then the final UNE rates will apply, and no such true-up will be necessary. The true-up will be retroactive to the effective date of the Interconnection Agreement resulting from this Arbitration.

2. There is to be a second true-up applicable to ISP-bound traffic at such time as the Commission has issued an Order setting up a permanent inter-carrier compensation mechanism for ISP-bound traffic. The true-up will be retroactive to the effective date of the Interconnection Agreement resulting from this Arbitration.

Finally, with respect to BellSouth's request that BellSouth be allowed to make payments into an interest-bearing escrow account rather than to the CLPs, the Commission finds it appropriate to reject this proposal for the reasons originally set out in the RAO.

CONCLUSIONS

The Commission upholds and reaffirms its original decision in this regard. Further, the Commission finds it appropriate to clarify the true-up process as outlined above.

FINDING OF FACT NO. 2: For purposes of reciprocal compensation, should ICG be compensated for end office, tandem, and transport elements of termination where ICG's switch services a geographic area comparable to the area served by BellSouth's tandem switch?

INITIAL COMMISSION DECISION

The Commission concluded that ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, the Commission found that ICG is entitled to compensation at the tandem interconnection rate (in addition to the other appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

COMMENTS/OBJECTIONS

BELLSOUTH: BellSouth contended that in its RAO, the Commission relied heavily on FCC *Rule* 51.711(a)(3), and failed to consider the FCC's *discussion* of Rule 51.711, which sets forth a two-prong test that must be satisfied prior to a CLP being entitled to reciprocal compensation at the ILEC's tandem interconnection rate. BellSouth noted that, in its discussion, the FCC identified two requirements that ICG, or any CLP, must satisfy in order to be compensated at the tandem interconnection rate: (1) the CLP's network must perform functions similar to those performed by the ILEC's tandem switch; and (2) the CLP's switch must serve a geographic area comparable to the geographic area served by the ILEC.

BellSouth stated that ICG failed to satisfy the first prong of the FCC's two-prong test because ICG's network does not actually perform functions similar to those performed by BellSouth's tandem switch. While ICG's switch may be capable of performing tandem switching functions when connected to end office switches, capability is not the test. Throughout the testimony, ICG repeatedly concluded that ICG's switch "performs the same functionality as the BellSouth tandem switch and end office switch combined." ICG, however, did not offer any evidence to support a conclusion that the ICG switch actually performs functions similar to BellSouth's tandem switch.

BellSouth contended that the only evidence presented by ICG concerning switch functionality revolved around a network diagram attached to witness Starkey's direct testimony. (Starkey direct, at page 22 - diagram 3.) Based on ICG's network diagram, it is clear that: (1) ICG does not interconnect end offices or perform trunk-to-trunk switching, but rather performs line-to-trunk or trunk-to-line switching; (2) to the extent ICG has a switch in North Carolina, it performs only end-office switching functions and does not switch BellSouth's traffic to another ICG switch; and (3) based on the information provided, ICG's switch does not provide other centralization functions, namely call recording, routing of calls to operator services, and signaling conversion for other switches, as BellSouth's tandems do and as required by the FCC's rules.

BellSouth argued that while ICG witness Starkey insists that ICG's switch performs the same functions as a BellSouth tandem switch, the network design included in witness Starkey's testimony shows that each of ICG's collocation arrangements serve only as an intermediate point in ICG's loop plant. Without specific information from ICG to the contrary, the "piece of equipment" in ICG's collocation cage appears to be nothing more than a Subscriber Loop Carrier, which is part of loop technology and provides no "switching" functionality. ICG's switch is not providing a transport or tandem function, but is switching traffic through its end office for delivery of traffic from that switch to the called party's premises. No switching is performed in these collocation arrangements. These lines are simply long loops transported to ICG's switch; they are not trunks. Long loop facilities do not quality as facilities over which local calls are transported and terminated as described by the Telecommunications Act of 1996 (TA96) and therefore are not eligible for reciprocal compensation.

BellSouth stated that other state commissions have rejected arguments that a CLP's switch performs the same functions as a tandem switch. BellSouth specifically referenced orders by the Florida Public Service Commission which concluded that "...MCI is not entitled to compensation for transport and tandem switching unless it actually performs each function." Order No. PSC-97-0294-FOF-TP, Docket 962121-TP, at 1011 (March 14, 1997), and also Order No. PSC-96-1532-FOF-TP, Docket No. 960838-TP, at 4 (December 16, 1996) which concluded that "...evidence in the record does not support MFS' position that its switch provides the transport element; and the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually use the network facility for which it seeks compensation."

BellSouth argued that even assuming ICG's switch performs the same functions as BellSouth's tandem switch, there is no evidence in the record that ICG's switch serves a geographic area comparable to BellSouth's tandem switch. BellSouth pointed out there is a distinction between actually serving and being capable of serving. BellSouth stated that, in fact, other than generally referencing ICG switches, there is no record evidence that ICG has a switch in North Carolina.

BellSouth contended that when it attempted to determine the number of customers ICG has in North Carolina, ICG conveniently refused, claiming that such information was proprietary. BellSouth stated that ICG also failed to identify where the unknown number of customers are located — information that is essential to support a finding that ICG's switch serves a comparable geographic area. BellSouth contended that under no set of circumstances could ICG seriously argue in such a case that its switch services a comparable geographic area to BellSouth. See Decision 99-09-069, In Re: Petition of

Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom, Application 99-03-047, at 15-16 (September 16, 1999) California Public Service Commission (finding "unpersuasive" MFS's showing that its switch served a comparable geographic area when many of MFS's ISP-bound customers were actually collocated with MFS's switch.)

BellSouth contended that ICG failed to make a showing that its network performs functions similar to those performed by BellSouth's tandem switch and that its switch serves a geographic area comparable to BellSouth's. For these reasons, BellSouth argued that the Commission should reconsider its decision and deny ICG's request for reciprocal compensation at the tandem interconnection rate.

ICG: ICG contended that the Commission's determination that ICG is entitled to reciprocal compensation at BellSouth's tandem interconnection rate is supported by the evidence of record. In response to BellSouth's claim that the Commission failed to consider the FCC's discussion of Rule 51.711, specifically, that the Commission failed to address both parts of the FCC's two-prong test, ICG contended that the Commission did consider BellSouth's contention that Rule 51.711 contains a two criterion test — and squarely rejected it. The Commission expressly held that the FCC "requires only that a CLP's switch serve a geographic area comparable to that served by an ILEC's tandem to qualify for the tandem termination rates." The Commission should summarily reject BellSouth's attempt to re-argue a point on which the Commission has clearly, and correctly, ruled.

ICG further argued that the only relevant criterion is whether ICG's switch serves a geographic area comparable to that served by BellSouth's tandem. BellSouth simply refuses to recognize that the evidence it claims to be nonexistent is amply spread throughout the record and that it is totally consistent with the Commission's findings and conclusions on this issue. ICG witnesses Starkey and Schonhaut presented evidence demonstrating that ICG's switch serves a comparable geographic area to that served by BellSouth's tandem switch.

ICG contended that the record evidence is uncontroverted. BellSouth has not so much as suggested, much less proven, that the geographic area served by its tandem switch is not comparable to the area served by ICG's switch. Nor did BellSouth introduce any evidence whatsoever and did not cross-examine ICG's witnesses on this point.

ICG further contended that the record in this proceeding clearly demonstrates that ICG's switch also provides the same functionality as BellSouth's tandem. As ICG witness Starkey testified: "ICG's switching platform transfers traffic amongst discrete network nodes that exist in the ICG network for purposes of serving groups of its customers in exactly the same fashion that [BellSouth's] tandem switch distributes traffic."

ICG argued that BellSouth misses the point of Rule 51.711. BellSouth essentially argues that ICG's switch cannot meet the tandem switching definition because ICG's switch does not route traffic between other ICG switches. Rule 51.711 contemplates that a single CLP switch will serve the same function in the CLP's network that a tandem and multiple serving central office switches serve in the ILEC's network. The rule would be rendered meaningless if CLPs were required to duplicate the ILEC's network architecture in order to qualify for the tandem rate. The FCC made clear that in constructing their networks CLPs may opt to use new technologies that were unavailable when the ILEC's networks were designed: "... states shall ... consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and, thus, whether some or all calls terminating on the new entrant's network should qualify for the tandem rate." ICG contended that its fiber ring is precisely the sort of new technology the FCC had in mind when it adopted Rule 51.711.

In its Reply to the Public Staff's Response to Request for Reconsideration, ICG restated that Rule 51.711 of the FCC rules provides a single criterion for tandem rate eligibility — whether the competing carrier's switch serves an area comparable to that of the ILEC's tandem switch. ICG maintained that the Commission thus correctly rejected the Public Staff's argument that, in order to qualify for the tandem rate, Rule 51.711 requires a competing carrier to also demonstrate that its switch provides functionality similar to that provided by the incumbent's tandem switch.

ICG maintained that Rule 51.711 speaks for itself and is unambiguous. If a competing carrier is able to make the geographic showing, it is entitled to the tandem rate, regardless of whether it is able to make the functionality showing.

ICG suggested that the Public Staff's Response should be disregarded and that BellSouth's Request should be denied. As noted in ICG's Opposition to BellSouth's Request, ICG's evidence that the ICG switch serves an area comparable to that served by the BellSouth tandem is uncontroverted in the record.

ICG also contended that even though it is not required, the record demonstrates that ICG's switch functions as a tandem. ICG explained that its witness Starkey offered detailed testimony explaining the configuration of ICG's network and specifically addressed the switch functionality issue. Witness Starkey testified that ICG's network consists of a Lucent 5ESS switch which performs both Class 4 and Class 5 functions, SONET nodes collocated at BellSouth end offices and in ICG on-network buildings, and a fiber optic ring.

ICG contended that the fact that ICG's network incorporates collocated SONET nodes instead of Class 5 central office switches, as BellSouth witness Varner pointed out in his direct testimony, is irrelevant. This difference in architecture between the two networks is a result of the technology each carrier has chosen in an effort to best serve its particular customer base. Witness Starkey testified:

> At the time the majority of the ILEC network was built, switches were very limited in the number of individual lines they could service and copper plant was the most expensive portion of the network to deploy. Therefore, ILECs chose to trade switching costs for copper plant costs by deploying greater numbers of switches and shorter copper loops. However, with the advent of relatively inexpensive fiber optic transport facilities and the enormous switching capacity available in today's switching platforms, the economics of the switch/transport tradeoff have changed.

As witness Starkey further explained in his testimony, ICG's network consists of a centrally-located host switch (defined in the Local Exchange Routing Guide (LERG) as a combination Class 4/Class 5 switch) that supports other, individual switching nodes that are collocated either in BellSouth central offices or in customer locations. ICG's fiber optic ring connects these discrete switching 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. The fact that ICG is not required to place fully-featured Class 5 switches in each collocation does not detract from the fact that the ICG network performs exactly the same function as the BellSouth network; it simply uses a different architecture to accomplish the same tasks. This is exactly what the FCC envisioned in paragraph 1090 of the Local Competition First Report and Order 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...."

ICG stated that the arguments of the Public Staff and BellSouth are premised on the faulty assumption that competing carriers must mimic the incumbents' network to qualify for the tandem interconnection rate. ICG believes that tandem rate eligibility depends solely on geographic service area comparability as expressly provided in Rule 51.711. However, even if the Commission were to conclude that functionality is a second requirement, the Commission could not conclude that identical functionality is the standard. The often quoted paragraph 1090 from the Local Competition First Report and Order expressly contemplates that competing carriers will employ different network architectures than those used by incumbents. In that Order, the FCC notes that new technologies may "perform functions similar - not identical - to those performed by incumbents' tandem switches."

ICG contended that the Public Staff is mistaken in its belief that ICG relies on the fact that its switch serves as a point of interconnection for interexchange carriers (IXCs) and an access point for operator services to establish the tandem status of ICG's switch. These two functions are included in a general description of tandem functionality. Witness Starkey testified that the ICG switch performs nearly all of the functions included in the tandem definition included in the LERG. Indeed, the LERG definition provides that a switch is defined as a tandem if it performs one or more of a list of functions. Witness Starkey testified that the ICG switch performed "nearly all" of the functions enumerated in the LERG. ICG reiterated, however, that no FCC rule or order makes inclusion of a switch in the LERG a requirement for tandem rate eligibility.

In conclusion, ICG stated it has met its burden of proving that its Charlotte switch serves an area comparable to that of BellSouth's tandem. ICG asserted that the record evidence on this issue is uncontroverted, and there is no basis to disturb the Commission's conclusion.

PUBLIC STAFF: The Public Staff did not address this issue in its Proposed Order. However, in its Response to Request for Reconsideration, the Public Staff stated that it now believes that the Commission should reconsider and reverse its finding on this issue on the grounds that ICG failed to demonstrate that its switch provides the tandem function in terminating a call delivered to it by a LEC.

The Public Staff indicated that by reading Paragraph 1090 of the FCC's First Report and Order in CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499, as a whole, and as an indication of the FCC's intent in promulgating Rule 51.711, it is clear that the functionality of the interconnecting carrier's network must be considered for the purpose of determining whether the carrier should be compensated for tandem switching. The FCC specifically directs the states to consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an ILEC's tandem switch. If the only requirement were that the interconnecting carrier's switch serve an area comparable to the LEC's tandem switch, any consideration of the new technologies would be completely irrelevant.

The Public Staff contended that ICG's fiber ring is apparently a means of connecting its switch to its customers. Fiber rings can also be used to interconnect end office switches and to reroute traffic in the event that an interoffice circuit is cut. Such is the case with BellSouth. ICG's ring, on the other hand, does not extend between switches, but between ICG customers, and between ICG customers and the ICG switch from which dial tone is provided. Under normal circumstances, in the termination of a call delivered to ICG by BellSouth, the ICG ring does not perform a function even remotely similar to that of a tandem switch. It actually serves as the loop between the ICG switch, where end office switching is done, and the ICG customer. Tandem switching, if it was involved, would occur at the other end of the circuit, even before the call reached the end office from which dial tone is provided.

The Public Staff stated that ICG's assertions that its switch qualifies as a tandem because it serves as a point of interconnection for traffic to and from IXCs, and as ICG's access point for operator services for its customers are not persuasive. Even if these are considered tandem functions for some purposes, they have no bearing on the issue at hand unless they are actually employed in the process of terminating calls delivered to

ICG by BellSouth. Since they are not so employed, they do not qualify ICG for tandem switching and transport compensation.

The Public Staff recommended that the Commission reconsider and reverse Finding of Fact No. 2 and Ordering Paragraph No. 2 of the RAO dated November 4, 1999.

The Public Staff also suggested that the Commission consider this issue in conjunction with its deliberations in the pending arbitration between BellSouth and ITC^DeltaCom in Docket No. P-500, Sub 10.

DISCUSSION

The difference in the positions of the parties appears to be due to ambiguity between the language in the FCC's discussion of this issue, Paragraph 1090, and the language in the FCC's Rule 51.711.

ICG's position is that the only relevant criterion is whether ICG's switch serves a geographic area comparable to that served by BellSouth's tandem as stated in Rule 51.711(a)(3). However, even if that is the only requirement, ICG believes that its switch performs the same functionality as BellSouth's tandem switch as discussed in Paragraph 1090 of the FCC's First Report and Order.

BellSouth's position is that the discussion of Rule 51.711 which addresses functionality must be considered as well as Rule 51.711(a)(3) and that ICG does not meet either requirement.

The Public Staff's position supports that of BellSouth.

Paragraph 1090 of the First Report and Order states:

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

interconnecting carrier's additional costs is the LEC tandem interconnection rate. (First Report and Order, CC Docket 96-98, Paragraph 1090) (August 6, 1996).

Rule 51.711(a)(3) states:

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.

On February 7, 2000, ICG and BellSouth filed maps in response to a Commission Order. BellSouth filed a map depicting the geographic coverage of BellSouth's local access and transport area (LATA) tandem switch and a map depicting BellSouth's local tandem switch in the Charlotte area. ICG filed a map showing ICG's Charlotte serving area. These maps are hereby allowed in evidence in this proceeding as late-filed exhibits.

The Commission is unpersuaded by the arguments of BellSouth and the Public Staff in this matter. The Commission believes, based on the evidence in the record, including the maps filed by the parties on February 7, 2000, that ICG has met its burden of proof that its switch serves a comparable geographic area to that served by BellSouth's tandem switch for the Charlotte serving area. Although such information may be both useful and relevant, the Commission can find no basis for BellSouth's argument that the location of actual customers is essential to support a finding that ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch in either Paragraph 1090 or Rule 51.711 of the FCC's First Report and Order. The Commission believes that the testimony of ICG witness Starkey was more cogent and convincing than that of BellSouth witness Varner and that witness Starkey clearly demonstrated that the technologies employed by ICG's network provide functions that are the same as or similar to the functions performed by BellSouth's tandem switch and, in fact, meet both the criteria discussed in the parties' filings.

Since we are persuaded that ICG has demonstrated both geographic and functional capability in this case, we believe that it is unnecessary at this time to decide the question of whether both criteria must be satisfied in order for a CLP such as ICG to receive compensation at the tandem interconnection rate for reciprocal compensation purposes.

CONCLUSIONS

The Commission upholds and reaffirms its original decision and concludes that for reciprocal compensation purposes, based on the fact that ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and provides functionality the same as or similar to that provided by BellSouth's tandem switch, ICG is entitled to compensation at the tandem interconnection rate.

The Commission strongly advises parties involved in future arbitrations where inclusion of the tandem switch element for reciprocal compensation purposes is an issue to file maps showing their serving areas as compared to that of the ILEC serving area, along with substantial testimony including a description of the switch(es) and associated technology necessary to provide service; the number and location of customers, if available; and any other information relevant to capability or intent to serve.

IT IS, THEREFORE, ORDERED as follows:

1. That the Composite Agreement submitted by BellSouth and ICG is hereby approved, subject to such modifications as may be required by this Order.

2. That BellSouth and ICG shall revise the Composite Agreement in conformity with the provisions of this Order and shall file the revised Composite Agreement for review and approval by the Commission not later than 15 days from the date of this Order. Should no revisions be necessary to the Composite Agreement, the parties shall so advise the Commission not later than 15 days from the date of this Order.

3. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

4. That the maps filed in this docket by BellSouth and ICG on February 7, 2000, be, and the same are hereby, admitted in evidence as late-filed exhibits.

ISSUED BY ORDER OF THE COMMISSION.

This the 1st day of March, 2000.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

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