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June 2, 2000

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

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

Dear David.

As requested by the Authority, ICG Telecom Group, Inc. submits the attached, proposed order reflecting the Authority's decision in the ICG/BellSouth arbitration proceeding. I am also providing the TRA's legal division with a copy of the order in electronic form.

Thank you for your assistance in this matter. If you have any questions, please feel free to call me at 252-2363.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:
Henry Walker, attorney for ICG

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

Diskette in Legal Division DC

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 2, 2000

IN RE:	)	
	)	
PETITION OF ICG TELECOM GROUP, INC.	)	**DOCKET NO.**
FOR ARBITRATION OF INTERCONNECTION	)	**99-00377**
WITH BELLSOUTH TELECOMMUNICATIONS, INC.	)	

Proposed **FINAL ORDER OF ARBITRATION**

This matter is before the Authority upon the petition of ICG Telecom Group, Inc. ('ICG"), a competing local exchange telecommunications carrier ("CLEC") operating in Tennessee. ICG requests that the Tennessee Regulatory Authority ("TRA" or"the Authority") arbitrate an interconnection agreement between ICG and BellSouth Telecommunications, Inc, ("BellSouth"), an incumbent local exchange telecommunications carrier ("incumbent LEC"). ICG filed this petition pursuant to Section 252(b) of the federal Telecommunications Act of 1996 ("the Act"). *See* 47 U.S.C. § 252(b)1.

I. Procedural Background

Under §§ 251 and 252 of the federal Act, incumbent LECs and CLECs have the duty to negotiate in good faith the terms and conditions of agreements regarding facilities access, interconnection, resale of services, and other arrangements contemplated under these sections. If the parties are unable to reach an agreement voluntarily, either party may petition the state commission for arbitration. *See* 47 U.S.C. § 252(b)(1). A final interconnection agreement,

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whether negotiated or arbitrated, must be reviewed by the State Commission in order to determine whether it complies with the Act. *See* 47 U.S.C. § 252(e)(1).

The Authority, sitting as arbitrators under the federal Act, heard this matter on November 22, 1999. Chairman Melvin J. Malone, Director H. Lynn Greer, Jr. and Director Sara Kyle presided. The following appearances were entered:

Henry Walker, Esquire, Boult Cummings Conners & Berry, PLC, 414 Union Street, Suite 1600, P.O. Box 198062, Nashville, Tennessee 37219, appearing on behalf of ICG Telecom Group, Inc. **Albert H. Kramer, Esquire**, Dickstein, Shapiro, Morin & Oshinsky, LLP, 2101 L Street, N.W., Washington, D.C. 20037-1526. **Jacob Farber, Esquire,** Dickstein, Shapiro, Morin & Oshinsky, LLP, 2101 L Street, N.W., Washington, D.C. 20037-1526.

Guy Hicks, Esquire, BellSouth Telecommunications, Inc., Room 2101, 333 Commerce Street, Nashville, Tennessee 37201; and **A. Langley Kitchens, Esquire,** BellSouth Telecommunications, Inc., Suite 4300, 675 West Peachtree St., NE, Atlanta, Georgia 30375, appearing on behalf of BellSouth. **Lisa Foshee, Esquire**, BellSouth Corporation, 1155 Peachtree Street, N.E., Atlanta, Georgia, 30309-3610.

The Authority considered this matter at a deliberative session on March 14, 2000. Prior to the session, the parties informed the Authority that all of the issues raised in the petition had been resolved except two, which are identified in the record as Issue 4 (extended loops) and Issue 11 (binding forecasts). Based on the evidentiary record, the briefs and arguments of the parties, the Authority makes the following findings of fact and conclusions of law regarding issues 4 and 11.

II. Decision on the Merits

Issue 4: Should a local loop combined with dedicated transport be provided as a UNE. If so, what is the proposed rate.

In the context of this proceeding, an enhanced extended loop ("EEL") consists of two unbundled ("UNEs") — a local loop and interoffice transport — combined together. An EEL

allows ICG to reach customers served by a BellSouth central office without having to collocate in that office . As ICG's witness Bruce Holdridge testified:

> [w]ithout the EEL, ICG would be forced to collocate in each and every BellSouth central office in which ICG finds a customer. This would be cost prohibitive and require ICG to duplicate the public switched telephone network by collocating equipment in every conceivable central office, including those that may serve only a few ICG customers or prospective customers. If a carrier is required to incur the large expense of collocation at every central office, then the expansion of facilities-based competition and related new products will be unduly slowed.

Holdridge Rebuttal Testimony at 3.

The issue before the Authority is whether BellSouth must make EELs available to ICG and, if so, at what price. As the parties acknowledge, there are two categories of combinations that the Authority must address: (1) combinations of loop and transport that are currently combined in BellSouth's network and (2) so-called "new" combinations, which are combinations not currently combined in BellSouth's network.

It is ICG's position that it is entitled to UNE combinations regardless of whether the elements are currently combined in BellSouth's network. According to ICG, Section 51.31(b) of the FCC's rules, 47 C.F.R. § 51.315(b), and the FCC's *UNE Remand Order*[1] make clear that where the loop and transport UNEs are currently combined within BellSouth's network, BellSouth must provide them to ICG as a UNE combination. ICG further argues that, to the extent that the loop and transport UNEs are not currently combined, the arbitrators should use their authority under the Act to require that BellSouth combine the elements at ICG's request.

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

BellSouth, on the other hand, argues that it is not required by the Act or the FCC's rules to combine network elements on behalf of CLECs. Tr. 216. As BellSouth witness Al Varner testified, "To provide [EELs] as requested by ICG, BellSouth would have to combine UNEs, an activity that BellSouth is not required to do." Varner, Direct Testimony, 11. BellSouth points out that the Eighth Circuit's decision in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), vacated FCC Rules 51.315(c) through (f), which required incumbent LECs to provide new UNE combinations, and that the Supreme Court did not review that portion of the Eight Circuit's decision. With the rules in limbo, BellSouth contends it is not required to combine elements that are not currently combined in its network. *Id.* [2].

For the reasons described below, the Arbitrators find that BellSouth must provide ICG with EEL combinations at the sum of unbundled element network prices, regardless of whether the component loop and transport UNEs are currently combined in BellSouth's network.

With respect to current combinations, the FCC specifically held in the *UNE Remand Order* that, where an unbundled loop is connected to unbundled transport, "the statute and our rule 51.315(b) require the incumbent to provide such elements to requesting carriers in combined form." *UNE Remand Order*, ¶ 480. Moreover, the FCC held that "requesting carriers are entitled to obtain such existing loop-transport combinations at unbundled network element prices." *Id.* The Authority therefore finds that, based on the FCC's rules and orders, a requesting carrier is entitled to obtain current combinations of loop and transport on an unrestricted basis at UNE prices. .

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[2] In regard to network elements that are already combined, BellSouth initially argued that this requirement cannot be effectively applied until the FCC establishes a new list of UNEs based on the "necessary" and "impair" standards as directed by the Supreme Court. *Id.*, at 7. In light of the release of the FCC's *UNE Remand Order*, this contention is now moot.

The Authority further finds that an EEL combination is "currently combined" under the meaning of Section 51.315(b) if the loop and transport UNEs are actually connected together in BellSouth's network. One example is special access facilities. As the FCC held in the *UNE Remand Order*, "incumbent LECs may not separate loop and transport elements that are currently combined and purchased through the special access tariffs." *UNE Remand Order,* ¶ 480. Thus, where ICG (or any other CLEC for that matter) is providing local exchange service to a customer using facilities purchased out of BellSouth's special access tariff, ICG is entitled to convert those facilities to UNEs at UNE pricing.[3]

In addition to special access, the FCC cited a number of other instances where incumbent LECs routinely combine loop and transport elements. For example, ILECs use loop and transport combinations to "(1) deliver data traffic to their own packet switches; (2) provide private line services; and (3) provide foreign exchange service." *UNE Remand Order*, ¶ 481. Clearly, under Section 51.315(b), where the ILECs provide these current combinations to themselves, they are required to make them available to requesting carriers. 47 C.F.R. § 51.315(b); *UNE Remand Order,* ¶¶ 480–81.

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[3] BellSouth has also raised the issue of whether ICG can convert special access to UNEs prior to the completion of the FCC's further proceedings on that issue. The FCC addressed this issue in its *Supplemental Order* in the *UNE Remand* proceeding. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, *Supplemental Order*, CC Docket No. 98-98 (released November 24, 1999). The *Supplemental Order* states that incumbent LECs have an absolute obligation to convert special access facilities to EELS, so long as the special access facilities are being used to "provide a significant amount of local exchange service." *Supplemental Order*, ¶ 5. The FCC also said that it was up to the requesting carrier to "self-certify that it is providing a significant amount of local exchange traffic." *Id.* ICG has expressly said that it "intends to use the EEL primarily for offering its customers local exchanger service." Holdridge Direct Testimony, at 11. Since ICG is willing to comply with the single precondition established by the FCC, there is no basis for BellSouth to refuse to convert special access facilities to EELs.

The Authority further finds that where the loop and transport UNEs are not currently combined in BellSouth's network, BellSouth must combine the elements and provide the EEL to ICG. As explained below, the TRA concludes that the legal authority to order ILECs to combine elements and to offer those combined elements to CLECs is derived from Section 251(c)(3) of the Act. That section 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.

Based on that language, the FCC promulgated both rule 51.315(b), which requires incumbent LECs to provide UNE combinations that the incumbent LEC currently combines, as well as rules 51.315(c)-(f), which require incumbent LECs to combine previously uncombined elements. All of these rules were vacated by the Eighth Circuit. *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). The Supreme Court, however, reversed the Eighth Circuit with respect to Rule 51.315(b), holding that the FCC's interpretation of Section 251(c)(3) was "entirely rational," and "well within the bounds of the reasonable." *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, 738 (1999).

While Rules 51.315(c)-(f) were not before the Supreme Court, the Court's logic in reinstating Rule 51.315(b) extends as well to rules (c) through (f). As the Ninth Circuit recently held in *US West Communications v. MFS Intelnet, Inc.*, 193 F.3d 1112 (Ninth Circ., 1999) the

Supreme Court's reasoning in *AT&T* makes clear that not only does the nondiscrimination provision of Section 251(c)(3) prohibit incumbent LECs from separating existing combinations, it also provides the basis for requiring incumbent LECs to combine UNEs upon request. *Id.*, at 1121. While acknowledging that the Eighth Circuit had vacated rules (c) through (f), the Ninth Circuit explained that the *AT&T* decision had effectively reinstated those rules:

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

Id.

Finally, the FCC itself stated in the *UNE Remand Order* that the Supreme Court's decision in *AT&T* validates Rules 51.31(c)-(f). *UNE Remand Order*, ¶ 481 ("the reasoning of the Supreme Court's decision to reinstate rule 51.315(b) based on the nondiscrimination language of section 251(c)(3) applies equally to rules 51.315(c)-(f)"). In deference to pending proceedings before the Eight Circuit, the FCC declined in the *UNE Remand Order* to formally reinstate Rules 51.315(c)-(f) at this time, but the agency made it quite clear that "section 251(c)(3) provides a sound basis for reinstating rules 51.315(c)-(f)." *Id.*, 482.

The Authority agrees with the Ninth Circuit and the FCC. Based on Section 251(c)(3) of the Act, FCC's rules, and the *AT&T* decision, the Authority finds that BellSouth should be required to combine loops and interoffice transport and offer these EELs to ICG at the sum of the unbundled element prices. Based on the testimony of ICG witness Bruce Holdridge, the Authority finds that this requirement promotes competition and the public interest. If competitors

do not have access to EELs, they will be forced to collocate in a central office in order to serve just one customer located in the area served by that office. Such an undertaking would be prohibitively expensive, would require competitors unnecessarily to duplicate incumbent facilities, and would be a deterrent to the spread of competition in the State of Tennessee.

Issue 11: Should BellSouth commit to the requisite network buildout and necessary support when ICG agrees to a binding forecast of its traffic requirements in a specified period?

ICG relies on BellSouth end office trunks to deliver traffic from BellSouth customers to ICG's network. *See* Jenkins Direct Testimony at 3. ICG provides BellSouth with quarterly traffic forecasts to assist BellSouth in planning for facilities to handle the traffic between their networks, but BellSouth has no obligation to add more end office trunks even though ICG's forecast may indicate that additional trunking will be needed. *Id.*

ICG, therefore, requests the option to require that its forecasts be binding on BellSouth. In exchange, ICG is willing to pay BellSouth in full for any trunks that are not utilized by ICG on the schedule indicated in the forecast. *Id*, at 4.

In response, BellSouth argues that it is not required to provide the binding forecasts sought by ICG under Section 251 of the Act and that the Authority cannot impose a duty or obligation that is not expressly delineated in Section 251. Varner Direct Testimony, at 21.

ICG's proposal is a reasonable one, and BellSouth offers no reason for rejecting it other than arguing that this issue should not be subject to arbitration. Therefore, the only relevant question is whether the Authority has jurisdiction to require a binding forecast provision in a Section 252 arbitration.

This issue was recently addressed in *US West Communications, Inc. v. Minnesota Public Utilities Commission*, 55 F. Supp.2d 968 (D. Minn. 1999). Quoting from Section 252 of the Act, the Court held that a state commission has the authority to resolve in an arbitration proceeding "any open issues" relating to interconnection whether or not those issues are expressly covered by Section 251. *Id.* at 985.

After considering the arguments of the parties in this proceeding and the state of the record on this issue, the Authority concludes that it is within the policy and purpose of the Act to require BellSouth to commit to the requisite network buildout and necessary support when ICG agrees to a binding forecast of its traffic requirements for a specified period. Section 251(c)(2) generally imposes on incumbent LECs the duty to provide interconnection with requesting carriers, and Section 251(c)(2)(C) requires that the interconnection provided be "at least equal in quality to that provided by the local exchange carrier to itself." ICG's binding forecast proposal clearly relates to interconnection and is designed to ensure that it be provided to ICG on nondiscriminatory terms. ICG's proposal therefore falls well within the scope of the Authority's jurisdiction under Section 252.

The Authority will therefore require BellSouth to enter into a binding forecast arrangement if requested by ICG. Under this arrangement, ICG will provide a forecast of trunking usage and BellSouth will be obligated to, in a timely manner, provision the trunking necessary to carry that level of traffic. During the forecast period, ICG will pay BellSouth's applicable rate for any trunks that are not utilized on the schedule indicated in the forecast.

CONCLUSION

The foregoing Final Order reflects the arbitrators resolution of the issues presented by the parties for arbitration. Within fifteen (15) days, the parties are directed to submit a signed, interconnection agreement consistent with this Order.

Melvin J. Malone, Chairman

H. Lynn Green, Jr. Director

Sara Kyle, Director[4]

Attest:

David Waddell, Executive Secretary

[4] Director Kyle dissented on the binding forecast issue basing her dissent on the lack of a specific provision of the 1996 Act requiring incumbent LECs to enter binding forecasts.