

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

AUGUST 4, 2000

IN RE:

**PETITION BY ICG TELECOM GROUP, INC.
FOR ARBITRATION OF AN INTERCONNECTION
AGREEMENT WITH BELL SOUTH
TELECOMMUNICATIONS, INC. PURSUANT TO
252(b) OF THE TELECOMMUNICATIONS ACT OF 1996**

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**DOCKET NO.
99-00377**

FINAL ORDER OF ARBITRATION

This matter came before the Tennessee Regulatory Authority ("Authority") immediately following the March 14, 2000 Authority Conference upon the filing of a petition by ICG Telecom Group, Inc. ("ICG"), a competing local exchange telecommunications carrier ("CLEC") operating in Tennessee. In its petition, ICG requested that the Authority arbitrate an interconnection agreement between ICG and BellSouth Telecommunications, Inc., ("BellSouth"), an incumbent local exchange telecommunications carrier ("ILEC"). 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).

I. PROCEDURAL BACKGROUND

Under Sections 251 and 252 of the Act, ILECs 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 id.* § 252(b)(1). A final interconnection agreement, whether

negotiated or arbitrated, must be reviewed by the state commission in order to determine whether it complies with the Act. *See id.* § 252(e)(1).

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

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

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

The Arbitrators publicly deliberated this matter immediately following the March 14, 2000 Authority Conference. Prior to the Conference, the parties informed the Arbitrators that all of the issues raised in the petition had been resolved except for Issue 4, extended loops, and Issue 11, binding forecasts.

II. 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 combined unbundled network elements ("UNEs"), an unbundled local loop that is cross-connected to an interoffice transport. EELs allow ICG to reach customers served by BellSouth's central office without having to collocate in that central office. The issue before the Arbitrators is whether BellSouth must make EELs available to ICG and, if so, at what price.

POSITIONS OF THE PARTIES

ICG

ICG contends that its customer base is not sufficient to warrant the cost of installing Integrated Services Digital Network ("ISDN") capable switches or collocating in every BellSouth central office. ICG's witness Bruce Holdridge testified:

Without 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.¹

ICG also alleges that BellSouth has offered to provide EELs to ICG through professional services agreements at rates that appear to be substantially higher than TELRIC² rates. ICG contends it will not be able to achieve the same efficiencies as BellSouth and its emergence as a competitor will be severely limited if it is forced to pay BellSouth higher EEL rates under professional services agreements. Finally, ICG suggests that requiring BellSouth to offer EELs at the sum of prices for an unbundled local loop that is cross-connected to an interoffice transport is the only economical and efficient way to expand the use of innovative telecommunications services in Tennessee.

BELLSOUTH

BellSouth argues that neither the Act, FCC rules, nor Supreme Court decisions require it to combine network elements on behalf of CLECs. BellSouth points out that the Eighth Circuit vacated FCC Rules 51.315(c) through (f) requiring ILECs to provide new UNE

¹ Bruce Holdridge, Rebuttal Testimony at 3.

² TELRIC is an acronym for Total Elemental Long Run Incremental Cost.

combinations and that the Supreme Court did not review that portion of the Eighth Circuit's decision. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) *aff'd in part rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 395, 119 S.Ct. 721, 737-38 (1999).

Because the rules are not in effect, BellSouth contends it is not required to combine network elements. With regard to Rule 51.315(b), the pre-existing combinations rule, BellSouth argues that the rule cannot be effectively applied until the FCC establishes the UNE list in FCC Rule 51.319 that was vacated by the Supreme Court. BellSouth argued that there is no reasonable way for the Authority to mandate combinations of network elements unless and until it is clear what those elements are and what constitutes currently combined UNEs.

BellSouth is particularly opposed to offering combinations that replicate end user retail or access services at the sum of UNE prices. Nevertheless, it is willing to provide combinations for certain functions upon execution of a voluntary commercial agreement that is not subject to the requirements of the Act.

DELIBERATIONS

FCC rules governing combinations of network elements have been the subject of continuous litigation since the FCC first introduced the rules in 1996. When ILECs first challenged the rules, the Eighth Circuit vacated Rules 51.315 (b) through (f). That Court stated that the rules could not "be squared with the terms of subsection 251(c)(3)" of the Telecommunications Act of 1996. *See Iowa Utils. Bd.*, 120 F.3d at 813. The Supreme Court overruled this decision and held 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 Utils. Bd.*, 525 U.S. 366, 395, 119 S.Ct. 721, 737-38 (1999). As a result of this decision, the FCC issued an order that includes an extensive discussion on enhanced extended links. The FCC

concluded that “under existing law, a requesting carrier is entitled to obtain existing combinations of loop and transport between the end user and the [ILEC’s] serving wire center on an unrestricted basis at unbundled network element prices.” *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd. 3696, ¶ 486 (Nov. 5, 1999) (Third Report and Order and Fourth Further Notice of Proposed Rulemaking). The FCC based its ruling on the reinstatement of Rule 51.315(b) by the Supreme Court and the fact that ILECs combine loop and transport for themselves to provide services to their customers. The FCC also held that requesting carriers are entitled to obtain the current combinations at UNE prices. *See id.* ¶ 480.

In addition, BellSouth has not denied that it can perform combinations of network elements referred to as extended links. In fact, BellSouth admitted that it has inadvertently performed such combinations on behalf of CLECs. Clearly, this affirms the statement made by the FCC that ILECs routinely combine loop and transport in their networks.

Finally, it is appropriate public policy to order BellSouth to provide EELs to ICG based on BellSouth’s prevailing experience in the telecommunications market. If ICG is unable to receive EELs from BellSouth, it must either install its own switches, trunks, and loops or collocate in BellSouth owned and operated central offices. Either of these options demands ICG to expend a substantial amount of money in the form of fixed or sunk costs. As a result, ICG will be forced to incur a significantly higher per-customer cost of providing services than BellSouth, which has a larger customer base over which to spread its fixed or sunk costs. This result will necessarily impair ICG’s ability to expand its telecommunications services throughout Tennessee. Moreover, telephone customers of Tennessee, both business and residential, will greatly benefit if ICG is allowed to obtain combinations of loop and

transport in BellSouth's network. Evidence suggests that the availability of EELs to CLECs is the key factor in opening the residential market to competition. According to the FCC, "[s]ince these combinations of [UNEs] have become available in certain areas, [CLECs] have started offering service in the residential mass market in those areas." *Id.* ¶ 12.

BellSouth has also raised the issue of whether a CLEC can convert special access to UNEs prior to the completion of the FCC's further proceedings on that issue. The FCC has allowed ILECs "to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service" *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd. 1760, ¶4 (November 24, 1999) (Supplemental Order). This constraint, however, does not apply if a CLEC "uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." *Id.* ¶ 5.³ Although ICG has expressly said that it "intends to use the EEL primarily for offering its customers local exchange service,"⁴ such representation does not fulfill the requirement that ICG serve a significant amount of local exchange service in addition to exchange access service. Therefore, ICG has a right to convert special access to UNEs, but must first meet the requirements outlined in the Supplemental Order, including self-certification on a customer-by-customer basis.

³ Subsequent to this proceeding, on June 2, 2000, the FCC released a clarification of its Supplemental Order. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 2000 WL 713746 (June 2, 2000) (Supplemental Order Clarification). This order further specifies the requirements a requesting carrier must meet before converting special access to combinations of unbundled loop and transport network elements. *See id.*

⁴ Bruce Holdridge, Direct Testimony at 10-11.

Given the above discussion, the Arbitrators have determined that it is reasonable to require BellSouth to offer ICG extended loop links consisting of combinations of unbundled local loops that are cross-connected to interoffice transports pursuant to applicable FCC orders and federal rulings. Furthermore, BellSouth should not charge a monopoly price to combine these elements, but should charge the sum of their prices at TELRIC rates.

III. 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?

POSITIONS OF THE PARTIES

ICG

ICG relies on BellSouth's end office trunks to deliver traffic from BellSouth customers to ICG's network. 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 ICG will need additional trunking. Therefore, ICG 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.

BELLSOUTH

In response, BellSouth argues that Section 251 of the Act does not require it to provide end office trunks to accommodate ICG's forecasts. In addition, BellSouth contends that the Arbitrators may not impose a duty or obligation that is not expressly delineated in Section 251.

DELIBERATIONS

The only relevant question is whether the Arbitrators have jurisdiction to require a binding forecast provision in a Section 252 arbitration. After considering the arguments of the parties in this proceeding and the state of the record on this issue, a majority of the Arbitrators⁵ conclude that it is within the scope of the Act to require BellSouth to commit to the requisite

⁵ Director Kyle voted against the prevailing motion on Issue 11.

network buildout and necessary support when ICG agrees to provide BellSouth a binding forecast of its traffic requirements for a specified period.

This issue was recently addressed in *US West Communications, Inc. v. Minnesota Public Utilities Commission*. 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. *See US West Communications, Inc. v. Minnesota Pub. Utils. Comm’n*, 55 F. Supp.2d 968, 985 (D. Minn. 1999).


Section 251(c)(2) generally imposes on ILECs 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.” 47 U.S.C. § 251(c)(2)(C). ICG’s binding forecast proposal clearly relates to interconnection and is designed to ensure that such interconnection is provided to ICG on nondiscriminatory terms. Therefore, ICG’s proposal falls well within the scope of the Arbitrators’ jurisdiction under Section 251.

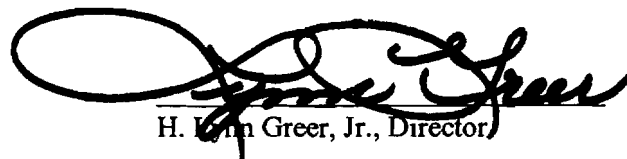
The Arbitrators require BellSouth to commit to the requisite network buildout and necessary support when ICG agrees to a binding forecast of its traffic requirements in the specified period and agrees to assume financial responsibility for the provision of the buildout.

IV. ORDERED

The foregoing Final Order reflects the Arbitrators resolution of the issues presented by the parties for arbitration. Within fifteen (15) days of the issuance of this order, the parties shall submit a signed, interconnection agreement consistent with this Order.


TENNESSEE REGULATORY AUTHORITY,
BY ITS DIRECTORS ACTING AS ARBITRATORS


Melvin J. Malone, Chairman


H. Lynn Greer, Jr., Director


Sara Kyle, Director

ATTEST:


K. David Waddell, Executive Secretary