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EXECUTIVE SECRETARY

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

Re: Petition by ICG Telecom Group, Inc. ("ICG") for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. ("BellSouth") Pursuant to Section 252 of the Telecommunications Act of 1996
Docket No. 99-00377

Dear David:

On August 4, 2000, the Authority issued its Final Order of Arbitration. Since that Order, the parties have negotiated disputed conforming language. Although reaching some agreement, the parties still disagree on conforming language for two provisions: binding forecasts and EELs.

Below, ICG submits its proposal for the unresolved issues and explains why its proposals better conform to the Authority's Order than BellSouth's proposal. ICG sets out (1) BellSouth's contrary language in redline format; (2) ICG's added language in bold; and (3) agreed to language in regular type.

BINDING FORECASTS

PROPOSED LANGUAGE

BellSouth's Proposed Language

3.6.5 Binding forecast:

- 2.5.4.1 In addition to, and not in lieu of, non-binding forecasts, ICG may provide to BellSouth a binding forecast of the trunks **and switchports** that BellSouth will need to interconnect with ICG in order to terminate traffic to ICG. ~~Unless otherwise agreed, a binding forecast may not be requested for an existing trunk group that is underutilized as defined~~

~~in this section or for exhausted BellSouth switch locations. ICG shall provide to BellSouth sufficient justification for the quantity of trunks contained within the binding forecast. The due date contained in the binding forecast shall be no less than three months unless otherwise agreed to, from the date of the binding forecast. Once the binding forecast is submitted to BellSouth, ICG agrees to make no changes to said forecast.~~

- 2.5.4.2 BellSouth shall provide the total amount of requested trunks from either tandem or end offices depending on trunk and facilities availability.
- 2.5.4.3 A binding forecast shall not replace the ASR process of ordering trunks and BellSouth shall order the quantity of trunks from ICG set forth in the binding forecast. BellSouth shall request due dates on the trunk orders to coincide with the due dates specified in the binding forecast, and the Parties shall provision the ordered trunks by the due date.
- ~~2.5.4.4 To recover the cost associated with assuring that the quantity of trunk port terminations needed to meet the binding forecast are available on the agreed upon due date, ICG shall pay to BellSouth ICG shall pay \$305.00 for the first DS1 trunk port and \$152.50 for each additional DS1 trunk port forecasted in a trunk group (i.e. between an A to Z location or BellSouth switch location to an ICG switch location).~~
- 2.5.4.5 If, within 180 days of the installation of the trunks, 60 percent of the capacity of the trunks is not being utilized, ICG will pay BellSouth a percentage of the total monthly recurring trunk and facility charges as set forth in BellSouth's tariffs **or the Parties' Interconnection Agreement, whichever is lower**, for the percentage of the trunks' capacity that is not being utilized.
- 2.5.4.6 If, within 360 days of the installation of the trunks, ~~85~~**60** percent of the capacity of the trunks is not being utilized, ICG will pay BellSouth a percentage of the total monthly recurring trunk and facility charges as set forth in BellSouth's tariffs **or the Parties' Interconnection Agreement, whichever is lower**, for the percentage of the trunks' capacity that is not being utilized.
- 2.5.4.7 If, within 405 days of the installation of the trunks, the trunks are not being utilized to ~~85~~**60** percent of the capacity of the trunks, the excess of the trunks may be disconnected by BellSouth.
- 2.5.4.8 Utilization on BellSouth reciprocal interconnection trunk groups associated with a binding forecast shall be measured monthly and shall be measured at the time consistent busy hour. The charges as a result of under-utilization as described in the preceding section shall apply monthly.

- 2.5.4.9 Except in the instance of underutilization by ICG in section 3.6.5.5, neither Party shall charge the other for nonrecurring trunk and recurring, if applicable, trunk charges associated with a binding forecast.

ICG's PROPOSED LANGUAGE BETTER CONFORMS WITH
THE AUTHORITY'S ORDER

In 3.6.5.1, BellSouth proposes, with no justification in the Authority's Order or elsewhere, to carve out two exemptions from ICG's right to a binding forecast. First, BellSouth would exempt any BellSouth switch locations which are "exhausted" at the time of the forecast. Accordingly, BellSouth wants to prolong indefinitely its failure to provide nondiscriminatory interconnection at such locations. BellSouth's position violates Section 251 of the Telecommunications Act and, by creating an exception that swallows the rule, flouts this Authority's February 1, 2000 order that the binding forecast option be available to ICG. The Authority underscored the relationship of the binding forecast option and the Telecommunications Act (Order at page 8):

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.

Under BellSouth's proposed "already exhausted switch locations" exemption to binding forecasts, BellSouth could, for example, indefinitely deny ICG interconnection to an important competitive marketplace where BellSouth maintains an "exhausted" switch. Simultaneously, BellSouth could allocate capital required to provide non-discriminatory interconnection to the allegedly "exhausted" switch, to another purpose which pursues its own business initiatives in other switch areas, other states, or other countries. This anticompetitive conduct should not be allowed. The Authority should not enable BellSouth to eviscerate, in the circumstances it is most necessary, the binding forecast option.

In addition to the "already exhausted switch location" exemption, BellSouth tries to impose a second exemption to binding forecasts. The second exemption would exclude binding forecasts "for an existing trunk group that is underutilized as defined in this agreement." First, there is no basis to impose such an exemption. Second, the inability of the parties to agree on the definition of "underutilization" (See discussion below concerning section 3.6.5.6) further underscores the impropriety of such an exemption. Indeed, if BellSouth's proffered underutilization percentage, below 85 percent, were the standard before binding forecasts could be submitted by ICG for a trunk group, the forecasting process would be unworkable and severely obstruct ICG's ability to plan its business. BellSouth certainly does not operate its network on such a level of efficiency – 85 percent. Its attempt to impose that standard on ICG's right to a binding forecast reflects again BellSouth's intent to deny ICG interconnection that is at least equal in quality to its own standards.

BellSouth also proposes that it be required to satisfy the binding forecast in "no less than" three months, and not within any specific time beyond three months. This is another

attempt by BellSouth to circumvent the Authority's Order that binding forecasts be an option. Accordingly, the Authority should order that the Parties include ICG's language requiring a reasonable due date of three months, unless the Parties agree otherwise.

Further, with respect to ordering a binding forecast, BellSouth demands ICG provide BellSouth "sufficient justification for the quantity" forecasted. First, there is no basis for requiring "sufficient justification" in the judgment of BellSouth. At its essence, the binding forecast process boils down to ICG ordering the capacity it needs. BellSouth must provide the capacity, at no risk to itself, and is ensured against any ICG mistakes with financial reimbursement.

Further, in connection with 3.6.5.1, BellSouth's demand that ICG be prohibited from making changes after it has submitted its binding forecast should be denied. There is no reason asserted by BellSouth to justify this extraordinary measure aimed at destroying ICG's planning flexibility. As long as any delay caused by a forecast change by ICG is added to the associated due date for BellSouth to perform, ICG should not be barred from making forecast changes.

Finally, in 3.6.5.1, the contract language should clarify that switchports are part of the binding forecast obligation. Very often, it is the switchports which are unavailable to competing interconnectors.

In 3.6.5.4, BellSouth would impose a charge "associated with assuring the quantity of trunkport terminations to meet the binding forecast are available", \$305 for the first trunk group and \$152.50 for each additional trunk group. Despite repeated requests by ICG for BellSouth to identify the alleged costs "associated with assuring the quantity of trunkport terminations" and how such costs were measured to support the proposed rates, BellSouth has provided nothing. The cost of facilities on BellSouth's side of the point of interconnection is BellSouth's responsibility. The cost recovery compensation for BellSouth in connection with binding forecasts is a proportionate usage payment in the event the trunks subject to the forecast are underutilized. These proposed surtaxes are yet another attempt by BellSouth to undermine the binding forecast process.

In its proposed 3.6.5.6, BellSouth would require ICG to make payments for trunk underutilization. BellSouth would define "underutilization" as less than 85 percent of capacity. There is no basis for BellSouth to impose this high level of usage. Indeed, when ICG asked whether BellSouth meets this usage level in its own network, BellSouth responded only that 85 percent is a "goal". Accordingly, an industry standard percentage of utilization, such as the 60 percent cited by ICG and suggested by BellSouth for the first 180 days in its proposed 3.6.5.5, should be the trigger for penalty payments to BellSouth for underutilization in all cases, not a percentage BellSouth sets as an *unmet* goal for its own network. Finally, with respect to 3.6.5.6, and its proposed 3.6.5.5, BellSouth's arbitrary assertion that ICG be charged higher tariff rates, rather than the rates in the interconnection agreement, to compensate BellSouth in the event of any underutilization should be rejected on its face as baseless.

Further, this unfounded 85 percent capacity threshold would bar ICG from opting for a binding forecast in connection with any trunk group not reaching the 85 percent. According to BellSouth's proposal in 3.6.5.1, "unless otherwise agreed, a binding forecast may not be

requested for an existing trunk group that is underutilized as defined in this [3.6.5.5] section.” This is yet another example of BellSouth’s effort to do indirectly what it has failed to do directly – evade the binding forecast process. Also noteworthy is that under 3.6.5.6, discussed below, BellSouth would disconnect trunks not below 85 percent use.

In its proposed 3.6.5.7, BellSouth wants the right to disconnect trunks ordered pursuant to the binding forecast in the event the trunks are being underutilized as measured by the Parties’ agreed upon trunk utilization standard in 3.6.5.5. ICG proposes that BellSouth be required, prior to any disconnection, to notify ICG pursuant to the TSR process. Such notification is the minimal process required to avoid the disastrous consequences associated with disconnecting trunks that are not underutilized or otherwise disconnecting the wrong trunks. The notification requested by ICG is a minimal burden compared to the consequences of erroneous disconnection.

For the Authority’s convenience, ICG has attached a copy of the Alabama Order of April 19, 2000, which addressed the same language issue before this Authority. The Alabama Order adopts most of ICG’s positions.

ENHANCED EXTENDED LINKS

PROPOSED LANGUAGE

1.9 Enhanced Extended Link

0.8.1 Definitions

0.8.1.1 For Enhanced Extended Links (EELs), “Currently Combined” network elements shall mean that such network elements are in fact already combined by BellSouth in the BellSouth network to provide service to a particular end user at a particular location. “Currently Uncombined” or “New” EELs shall mean that such network elements are not Currently Combined.

0.8.2 The Parties shall devise and implement a means to extend the unbundled loop sufficient to allow ICG to use a collocation arrangement at any BellSouth location per LATA (e.g., tandem switch) to obtain access to the unbundled loop(s) at any other BellSouth serving central office within the LATA. The means of extending the unbundled loop, hereinafter collectively referred to as “EEL”, shall include, to the extent necessary, the loop, cross connects at the serving central office, aggregating, multiplexing, and routing at the serving central office, and transport to ICG’s switch or an ICG collocation site and otherwise shall be in accordance with the parameters established by the FCC in its November 5, 1999 UNE Order.

0.8.3 BellSouth shall make available to ICG Currently Combined EELs and Currently Uncombined, or New, EELs ~~combinations and transport only to the extent such~~

~~combinations of loop and transport network elements are Currently Combined. BellSouth will make available Currently Combined, combinations of loops and transport network elements in density Zone 1 of the Miami, Orlando, Fort Lauderdale, Charlotte, New Orleans, Greensboro and Nashville MSAs to ICG.~~

- 0.8.4 The total price charged by BellSouth for the ~~currently combined EELs and new, not Currently Combined EELs described in section 1.9.3,~~ shall be precisely the sum of the Commission-based TELRIC rates for: (1) an unbundled loop, (2) a cross connect of appropriate capacity, and (3) unbundled interoffice dedicated transport.
- ~~0.8.5 Although not required to provide EELs which are not Currently Combined in the network, BellSouth agrees to combine loop and transport network elements and provide such elements at rates mutually agreed upon by the Parties.~~
- 0.8.6 There may be instances wherein ICG will require multiplexing functionality. Multiplexing will be provided pursuant to the interconnection agreement at TELRIC rates when unbundled network elements are used for interoffice transport.

ICG'S PROPOSED LANGUAGE CONFORMS WITH THE AUTHORITY'S ORDER

ICG proposes language reflecting the Authority's Final Order that BellSouth must provide both EELs that are already physically combined and new EELs that are not yet physically combined. In its recent DeltaCom arbitration award ("Interim Order"), Docket 99-0043 (page 30) the Authority clarified, to the extent there had been any question about the ICG Final Order, that BellSouth must provide EELs, whether loop and transport elements are currently combined or whether still must be combined:

The Arbitrators adopt the resolution reached in the ICG/BellSouth Arbitration, Docket No. 99-00377. Consistent with that decision and pursuant to FCC orders and the Supreme Court, the Arbitrators find that in locations where loops and transport co-exist, BellSouth shall, when requested by DeltaComm, combine the loop and transport elements at the sum of the associated unbundled network element prices. Interim Order at 30.

Based upon BellSouth's recently filed motion for Reconsideration in the ITC DeltaCom arbitration, Docket No. 99-0043, (pages 17-20). ICG anticipates that BellSouth will argue that it was unlawful both in the instant matter and as clarified in the DeltaCom matter for the Authority to order that CLECs are entitled to EELs that are not yet physically combined. BellSouth's position is simply wrong.

BellSouth contends that the recent 8th Circuit ruling, *Iowa Utilities Board v. FCC*, Case No. 99-3321 (8th Cir. July 18, 2000), said that it is unlawful for a state commission to require an ILEC to make available new EELs, or EELs not yet already physically combined. But that is not what the Court held. To the contrary, the Court expressly stated that it did not address

"whether the Act prohibited the combination of network elements" but only addressed the question of "who [the ILEC or the CLEC] shall be required to do the combining." Emphasis added.

In that regard, the 8th Circuit stated "It is not the duty of the ILECs to 'perform the functions' necessary to combine unbundled networks elements in any manner...' We reiterate what we said in and our prior opinion: '[T]he Act does not require the incumbent LECs to do all the work.' Iowa Utilities Bd., 120 F.3d at 813." As long as ICG is willing to tie the loop end transport elements together (or pay BellSouth or a third party to do the work), there is no conflict between the TRA's decision and the Court's opinion.


BellSouth confuses what is not confusing. The 8th Circuit is clear. Federal law prohibits requiring the ILEC to perform the "work"—the "functions"—involved with combining the elements. Federal law nowhere prohibits requiring ILECs to make available new combinations at the sum of UNE rates after the currently physically uncombined elements have been physically combined.

Based on the foregoing, ICG requests that the Commission order that its submitted language be inserted into the final interconnection agreement.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:


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