**BELLSOUTH**

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EXECUTIVE SECRETARY

September 7, 1999

**VIA HAND DELIVERY**

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

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
Docket No. 99-00377

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Brief Regarding the Inappropriateness of Certain Issues for Arbitration in this Proceeding. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH/jem

Enclosure

FILE

177510

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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*

Docket No. 99-00377

## BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING THE INAPPROPRIATENESS OF CERTAIN ISSUES FOR ARBITRATION IN THIS PROCEEDING

### I. INTRODUCTION

On August 25, 1999, pursuant to a Notice of Pre-Arbitration Conference dated July 15, 1999, the Tennessee Regulatory Authority, through its duly appointed Pre-Hearing Officer, conducted a Pre-Arbitration Conference at which both parties were represented. At the conclusion of the August 25 conference, the Hearing Officer requested that the parties file a Joint Issues List and address certain of the issues through a legal brief. The parties' Joint Issues List of the remaining unresolved issues is being filed separately. Pursuant to the directions from the Pre-Hearing Officer, this Brief will demonstrate the inappropriateness of the following issues for arbitration in this proceeding: Issue 1, Issue 4, Issue 6, Issue 11 and Issues 5 and 19-26. BellSouth will address each of the requested issues below.

Section 251 of the Act sets forth a specific series of topics regarding which incumbents must negotiate. In particular, Section 251(c)(1) places on incumbents the obligation "to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section." 47 U.S.C. § 251(c)(1). If those negotiations do not result in an agreement, the State commission that arbitrates the matter must ensure that its resolution of the remaining "open issues" "meet[s] the requirements of section 251" -- that is, that the incumbent has fulfilled the duties enumerated in Sections 251(b) and (c). 47 U.S.C. § 252(c)(1). If the duty the CLEC attempts to impose on the incumbent is not defined in Section 251, a Section 252 arbitration is not appropriate.

## II. ARGUMENT

### Issue 1: Reciprocal Compensation

**For purposes of this agreement, should dial up calls to Internet Service Providers ("ISPs") be treated as if they were local calls for purposes of reciprocal compensation?**

BellSouth Telecommunications, Inc.'s ("BellSouth's") position on the question of whether reciprocal compensation is applicable to dial up calls to Internet Service Providers ("ISPs") is straightforward. BellSouth primarily relies upon FCC rulings, particularly the FCC's February 26, 1999 Declaratory Ruling in CC Docket Nos. 96-98 and 99-68 ("Declaratory Ruling").

The payment of reciprocal compensation for ISP-bound traffic is not required under Section 271 of the Act. Under Section 271, reciprocal compensation is applicable only to "local traffic", not to all traffic that can be routed over "local" trunks. FCC Rule 51.701 defines "local traffic" to which reciprocal compensation is applicable as "telecommunications traffic between a LEC and a telecommunications carrier other than a CMRS provider that originates and terminates within a local service area established by the state commission." ISP-bound traffic is not "local" traffic under the FCC's definition, and thus is not subject to reciprocal compensation. The payment of reciprocal compensation for ISP-bound traffic is inconsistent with the law and is contrary to sound public policy.

The FCC's recent Declaratory Ruling makes it abundantly clear that because traffic to ISPs is access traffic and largely interstate in nature, the FCC has, will retain, and will exercise jurisdiction over ISP traffic. Moreover, because reciprocal compensation in the 1996 Act is limited to "local traffic", compensation for ISP-bound traffic is not a part of the Act's reciprocal compensation obligations and should not be arbitrated. Although the FCC's Declaratory Ruling attempts to, at least temporarily, authorize state commissions to arbitrate the issue of inter-carrier compensation for ISP-bound traffic, it is highly questionable whether the FCC can delegate this task. Further, the FCC does not have the authority to broaden the scope of Section 252 to include this issue in arbitration proceedings. Thus, the Authority should not address the issue of compensation for ISP-bound traffic in this proceeding.

Until such time as the FCC issues a final ruling with respect to inter-carrier compensation for ISP-bound traffic, the Authority should simply direct the parties to establish a mechanism to track ISP-bound calls originating on each party's respective network on a going-forward basis. Each party also should agree to abide by the FCC's final and nonappealable order on the issue of inter-carrier compensation for ISP traffic. The parties would then simply agree to "true-up" any compensation that may be due for ISP-bound calls based upon the FCC's intercarrier compensation mechanism.

With respect to the appropriate rate for reciprocal compensation, the rate should be established using the elemental rates for end office switching, tandem switching, and common transport that are actually used to transport and terminate the traffic. Elemental based prices are the appropriate rates to use since they will more closely match the costs actually incurred to transport and terminate the traffic. The Authority has already considered evidence of the appropriate rates for reciprocal compensation in its generic UNE cost proceeding, and does not need to do so again in a two party arbitration proceeding. The permanent rates ultimately established by the Authority in Docket No. 97-01262 simply should be incorporated into the ICG/BellSouth Interconnection Agreement.

Finally, with respect to whether the Authority has previously resolved the ISP-bound traffic and reciprocal compensation issue in other proceedings, BellSouth's position is that such rulings should not be determinative in this proceeding. Specifically, the Authority should not rely upon its NEXTLINK Arbitration order in Docket No. 98-00123, where the Authority found that "consistent with the Authority's decision in Docket 98-00118 [Brooks Fiber's Complaint over payment for ISP-bound traffic under its existing Interconnection Agreement], the parties are required to treat traffic that originates from and terminates to an ISP as local traffic subject to the payment of reciprocal compensation." (*See* First Order of Arbitration Award, Petition of NEXTLINK First Order of Arbitration Award, with BellSouth Telecommunications, Inc. Tennessee Regulatory Authority Docket No. 98-00123, May 18, 1999, at p. 15)(emphasis added).

BellSouth respectfully disagrees with the Authority's decision in the NEXTLINK Arbitration Order on this issue. Even were that decision correct, however, it should not be applied to this Arbitration proceeding. The Authority's underlying decision in the Brooks Fiber ISP complaint case was: (1) based upon an interpretation of an existing Interconnection Agreement; and (2) premised upon "a finding that [ISP-bound] traffic terminated at an ISP server," which the FCC has made clear is not the case. *See* ¶¶ 13 and 27 of Declaratory Ruling. Obviously, the issue presented in this Arbitration involves a new interconnection agreement. Therefore, the Authority's Brooks Fiber decision is not relevant to this case, which will look at the issue on a going-forward basis. BellSouth has clearly stated during its negotiations with ICG that it does not intend in any way to have reciprocal compensation apply to ISP-bound traffic.

**Issue 4: Should a local loop combined with dedicated transport be provided as a UNE?**

Neither the 1996 Act nor the FCC's Rules require BellSouth to combine UNEs on behalf of another carrier such as ICG. BellSouth's offer, indeed its commitment to the FCC, to continue providing the same individual UNEs until the FCC finalizes its proceeding regarding Rule 51.319, does not extend generally to UNE combinations. The FCC's Rules (51.315(c) – 51.315(f)) that attempted to impose a requirement on ILECs to combine UNEs were vacated by the Eighth Circuit in the *Iowa Utilities Bd.* case and, because no party challenged that ruling before the U.S. Supreme Court, those rules are not in effect. Thus, BellSouth is not required to combine network elements on behalf of another carrier.

Although BellSouth is not required to combine UNEs, BellSouth has voluntarily offered to provide a number of UNE combinations to CLECs at the sum of the UNE prices. Additionally, BellSouth is willing to provide combinations of certain functions upon the execution of a voluntary commercial agreement that is not subject to the requirements of the 1996 Telecommunications Act.

With respect to ICG's specific request for an "enhanced extended loop" or "EEL," there is no question that an extended loop constitutes a combination of a UNE loop and UNE dedicated transport. BellSouth is not required to provide such a UNE combination. The Authority has previously held that it will not require BellSouth to provide UNE combinations to CLECs when it expressly found in the NEXTLINK Arbitration Order:

> That, to the extent BellSouth is willing to combine network elements for NEXTLINK, the parties should negotiate the charge that would apply to such combinations with the combinations and charges not being subject to the requirements of the 1996 Act.

(First Order of Arbitration Award, Petition of NEXTLINK Tennessee, L.L.C. for Arbitration of Interconnection with BellSouth Telecommunications, Inc., Tennessee Regulatory Authority Docket No. 98-00123, dated May 18, 1999, at p. 14.)

As stated previously, BellSouth is willing to voluntarily negotiate a commercial arrangement with ICG for the combination of certain UNEs outside of the requirements of the 1996 Act.

**Issue 6: Should Volume and term discounts be available for UNEs?**

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

**Issues 5 and 19-26: Performance Measurements and Liquidated Damages**

**Should BellSouth be subject to liquidated damages or other concessions or remedies for failing to meet the time intervals for provisioning UNEs? Should the following installation benchmarks, provisioning benchmarks, maintenance benchmarks performance measures and liquidated damages be approved by the arbitrators?**

ICG's Petition for Arbitration with the Tennessee Regulatory Authority, ("Authority") filed on May 27, 1999, asked the Authority to arbitrate twenty-six (26) disputed interconnection agreement issues with BellSouth. Fully one-third of these issues (including Issues 5 and 19-26), relate to so-called performance measures and/or liquidated damages. These issues are not appropriate for arbitration in this proceeding for a number of reasons, including the fact that the Authority does not have the legal authority to assess or impose liquidated damages in an interconnection agreement. Therefore, the Authority should find that ICG's proposal to have the Authority impose so called "performance guarantees" should not be arbitrated in this proceeding. BellSouth's position is bolstered by several factors: the Authority lacks statutory authority to award or impose liquidated damages in the context of an interconnection agreement; the undisputed fact that other remedies are available under both state and federal law to address the issue (e.g., breach of contract lawsuits in civil court, as well as complaint cases brought before the Authority or the FCC); and, finally, the Authority has already correctly determined that it will not "require a system of penalties and credits" in the context of an arbitration of an interconnection agreement. (*See* Brief of the Tennessee Regulatory Authority, Case No. 3-97-0616, at 26, U.S. Dist. Court, M.D. Tenn. (filed April 13, 1998)).

The issue of liquidated damages is not a topic that is ever addressed in the local competition provisions of the 1996 Act; it is thus wholly beyond the scope of the arbitration proceedings before the Authority. None of the "requirements of section 251" involves a duty to agree on a liquidated damages provision. Thus, the Act does not specifically require an arbitrated agreement to satisfy any conditions regarding liquidated damages. That should be the end of the matter.

In any event, even the FCC has concluded that State commissions should impose only the compliance requirements that they "deem necessary." First Report and Order, 11 FCC Rcd at 15657, ¶ 210. It is certainly appropriate for an agency not to "deem" the imposition of a liquidated damages provision necessary where, as here, there are ample alternative modes for obtaining relief, such as petitioning the Authority or filing a common-law contract claim (which could group many small claims together to make such litigation more cost-effective).

Furthermore, as noted above and as the FCC itself has recognized, ICG has available to it the full array of contractual and administrative remedies should BellSouth breach its agreement. *See* First Report and Order, 11 FCC Rcd at 15565, ¶ 129 (emphasizing the existence of common-law and administrative remedies in this context). ICG is certainly not the first company to enter into an agreement with a company that also competes with it, and there is no reason that the standard legal remedies -- the remedies that parties to commercial agreements have pursued for centuries -- are somehow uniquely inadequate here.

The Florida Public Service Commission has reached the same conclusion with respect to the issue of liquidated damages as the Authority reached in connection with the MCI arbitration (Docket No. 96-01271). In a recent arbitration case between BellSouth and MediaOne Florida Telecommunications, Inc.[1], the Florida Public Service Commission issued a Prehearing Order, which among other issues, addressed whether the issue of liquidated damages should be included in an arbitration. The Prehearing Order states as follows:

> B. Issue 13, filed by MediaOne, raised the following issue: Should the Florida Public Service Commission arbitrate performance incentive payments and/or liquidated damages for purposes of the MediaOne/BellSouth Interconnection Agreement? If so, what performance incentive payments and/or liquidated damage amounts are appropriate, and in what circumstances?
>
> The issue regarding the award of liquidated damages has been raised and denied in other dockets that have been arbitrated by this Commission. Petition of DIECA Communications, Inc. D/b/a Covad Communications Company, Order No. PSC-99-01715-PHO-TP (April 15, 1999). Based on the prior rulings in those dockets, I find that the Commission is without jurisdiction to arbitrate issues on damages. Thus, Issue 13 shall not be arbitrated in this proceeding[2].

[1] Florida Public Service Commission Docket No. 990149-TP.

[2] Prehearing Order No. PSC-99-1309-PHO-TP of Commissioner E. Leon Jacobs, Jr., as Prehearing Officer, Dated July 8, 1999, in Docket 990149-TP.

Many other state commissions that have considered the issue of liquidated damages concur in the same conclusion reached by the Authority on this issue.[3]

Finally, with respect to ICG's proposed performance measurements, i.e., those recently adopted by the Texas Commission, BellSouth believes that performance standards and similar type provisions are inappropriate for two-party arbitrations.[4] If at all, these types of provisions are better considered in a proceeding where all interested parties may participate. Indeed, the performance measurements advocated by ICG were the product of an industry-wide workshop in Texas. Therefore, if the Authority were to decide that it is appropriate to further investigate performance standards, it should do so by means of a generic type proceeding in which all interested parties may participate. Otherwise, the Authority faces the very real danger of addressing this issue on a piecemeal basis, which would most likely produce disparate results.

Alternatively, if the Authority decides to hear evidence on these issues, BellSouth maintains that many ILECs have proposed voluntary remedies for key CLEC performance

[3] *See, e.g., In re Petition by Sprint Comm. Co. Limited Partnership for Arbitration with BellSouth Telecomm., Inc.*, No. 961150-TP, at 5 (Fla. PSC Feb. 3, 1997) (refusing to "arbitrate issues regarding liquidated damages or other indemnification provisions"); Petition of TCG Pittsburgh for Arbitration to Establish an Interconnection Agreement with Bell Atlantic - PA, Inc., No. A-310213F0002, at 19 (Pa. PUC Nov. 1, 1996) ("the need for explicit penalties is obviated by the plethora of other remedies available"); *In re Petition by Brooks Fiber Comm. of New Mexico, Inc. for Arbitration with US WEST Comm., Inc.*, No. 96-337TC, at 33 (N.M. SCC Dec. 27, 1996) ("it is unnecessary to include the liquidated damages clause"); *In re Petitions for Approval of Arbitration of Unresolved Issues*, No. 8731, at 35 (Md. PSC Nov. 8, 1996) ("existing procedures and remedies are sufficient" and the Commission does "not see the necessity for any further . . . penalties"); *In re Interconnection Agreement Negotiations Between AT&T and BellSouth*, No. 96-AD-0559, at 9 (Miss. PSC 1997) ("AT&T already has appropriate recourse if BellSouth fails to satisfy the terms of the final Interconnection Agreement . . . there is no need for additional provisions.")

[4] Interestingly, in a recent arbitration involving ICG and BellSouth, ICG's witness testified that the "issue of performance standards and enforcement mechanisms is one of industry-wide importance. A generic proceeding aimed at a single set of performance standards and enforcement mechanisms is the only practical approach." See Pre-filed Rebuttal Testimony of Karen Notsund for ICG Telecom Group, Inc., North Carolina Utilities Commission Docket No. P-582, Sub 6, pp. 8-9.

measurements where the levels of service significantly falls below that received by the ILECs retail customers or below an established benchmark. A statistical test is utilized to determine the materiality of the failure.

BellSouth is in the process of developing a similar voluntary proposal that is very close to the one developed through a collaborative effort between SBC and AT&T in Texas. The BellSouth plan has 22 key measurements and 45 sub-metrics that are key measures of Timeliness and Quality.

The BellSouth proposal employs a two-tiered penalty structure in which penalties are determined when BellSouth fails to provide: 1) substantially the same level of service to its CLEC customers as it does to BellSouth retail customers or, 2) where retail comparisons are not available, service falls below a predetermined benchmark. As with other ILEC plans a statistical test is utilized to determine materiality.

The first tier payment is paid to the CLECs and the per unit dollar amount escalates each successive month when the same measure fails. Second tier penalties are invoked when a measure fails in three consecutive months. The second tier payment is paid to the State Treasury or as otherwise directed by the State Public Service Commission.

This plan demonstrates BellSouth's commitment to quality service for our CLEC and our retail customers. It is a product of ongoing discussions with the FCC staff. However, BellSouth does not plan to offer this proposal to any state in which we operate until the long distance approval is granted.

## Issue 11: Binding Forecasts

**Should BellSouth commit to the requisite network buildout and necessary support when ICG agrees to a binding forecast fits traffic requirements in a specified period?**

Like performance measurements and liquidated damages, the Authority must look to Section 251 of the Act to determine whether "binding forecasts" is an appropriate topic for arbitration.

None of the requirements of Section 251 involves a duty to agree on a binding forecast provision. Thus, the Act does not specifically require an arbitrated agreement to satisfy any conditions regarding binding forecasts, and this Authority should reject ICG's attempt to impose such on BellSouth.

## IV. CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Authority to adopt BellSouth's positions and decline to arbitrate the issues addressed herein.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By:______________________________

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## CERTIFICATE OF SERVICE

I hereby certify that on September 7, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

| | |
|---|---|
| [✓] Hand<br>[ ] Mail<br>[ ] Facsimile<br>[ ] Overnight | Richard Collier, Esquire<br>Tennessee Regulatory Authority<br>460 James Robertson Parkway<br>Nashville, TN 37243-0500 |
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