BEFORE THE TENNESSEE REGULATORY AUTHORITY

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 Telecommunication Act of 1996	Docket No. 99-00377

SUPPLEMENTAL REPLY TO BELLSOUTH'S EXCEPTIONS

Introduction

On September 13, 1999, Hearing Officer Gary Hotvedt issued a report and initial order in the above-captioned arbitration proceeding. The report allowed the parties ten days to file objections. On September 23, the tenth day, BellSouth filed an eight-page brief objecting to the Hearing Officer's report on several grounds. Since ICG agreed with the report, ICG had not filed objections. Upon receiving BellSouth's brief, however, ICG quickly prepared and filed a short response in order to meet the ten-day deadline. In the time allowed, ICG's response could not fully address BellSouth's arguments.

Hearing Officer Hotvedt has since informed ICG that the Directors will not be able to consider BellSouth's objections and ICG's response until Tuesday, October 12. Under these circumstances, ICG respectfully requests permission to file this Supplemental Reply that addresses more completely the objections raised by BellSouth.

1. Packet Switching

In this arbitration proceeding, ICG requests that BellSouth be directed to offer ICG access to various packet switching functions as unbundled network elements (UNEs) and asked that those

elements be priced at cost-based rates. In his initial order, the Hearing Officer agreed that ICG's request is an appropriate issue for arbitration in this proceeding.

On September 15, 1999, the FCC issued a news release and a summary of a forthcoming order in FCC Common Carrier Docket 96-98 concerning federally mandated UNEs. (A copy of the FCC's press release and summary are attached to BellSouth's Exceptions.) Although the FCC's final order has not yet been released, the agency's summary states that the FCC has decided not to order incumbent carriers like BellSouth to offer packet switching functions as UNEs. The summary also states, however, that state regulatory agencies may "require incumbent LECs to unbundle additional elements" such as, presumably, packet switching services, as long as those additional requirements are not inconsistent with the federal Telecommunications Act.

Relying on the first part of the FCC's decision, BellSouth contends that the packet switching issue "was definitively addressed by the FCC" and that it is now "unnecessary for this issue to remain" in dispute. BellSouth Exceptions 1, 2.

BellSouth's brief apparently overlooks the later portion of the FCC's summary which specifically authorizes state regulators to require additional UNEs. While no one yet knows what the FCC's final order will say, the agency's summary clearly states that the FCC's decision does not resolve this issue nor does it prohibit the TRA from considering ICG's request in this arbitration proceeding.

2. Performance Measures and Liquidated Damages

To measure and enforce BellSouth's compliance with the interconnection agreement, ICG believes that the interconnection agreement should incorporate the performance measures and liquidated damages provisions recently adopted by the Texas Public Service Commission. During

the upcoming arbitration proceeding, ICG's witnesses will describe the Texas plan and propose its adoption in Tennessee until such time as the TRA can develop its own, state-specific plan.

BellSouth argues, however, that the TRA should prohibit ICG from even presenting evidence on this issue. BellSouth makes four arguments for excluding this issue from consideration.

a. First, BellSouth contends that there is no "requirement" in the federal Telecommunications Act that an interconnection agreement include performance measures and liquidated damages. Therefore, according to BellSouth, the TRA has no authority to consider ICG's proposal. The TRA, however, has repeatedly ruled on issues in arbitration proceedings which are not specifically required by the Act.

The Act states that an interconnection agreement is a contract to provide "interconnection, services, or network elements" and must include a "detailed schedule of itemized charges for interconnection" and charges for "each service or network element included in the agreement." 47 USC §252(a)(1). If the parties are unable to reach final agreement on a total contract, state regulators may arbitrate "any open issues." 47 USC §252(b)(1).

As the TRA is aware from having conducted other arbitrations, an interconnection agreement involves more than just fixing rates. Like any complex contract, an interconnection agreement should also contain a description of how and when UNEs and other services will be provided, a method of resolving disputes, definitions of terms, notification requirements, and many other provisions not specifically listed in the federal Act. If the parties cannot agree on those provisions, there is no way to arrive at a final contract other than by submitting those disputes to state regulators in an arbitration proceeding.

Similarly, many telecommunications contracts and tariffs include performance measures and liquidated damages provisions. Even BellSouth's basic service tariff, for example, requires the carrier to give the customer a credit on his bill if service is interrupted for more than a specified period of time. BellSouth's contracts with business customers also typically include performance standards and provisions for liquidated damages. As BellSouth has recently argued to the TRA, liquidated damages are both an appropriate and effective means of enforcing telecommunications agreements.

For the same reasons, ICG believes that an interconnection agreement with BellSouth should include performance standards to measure BellSouth's compliance and liquidated damages to deter non-compliance. Such provisions, ICG suggests, are as much a part of a successful interconnection agreement as the UNE rates themselves.

BellSouth cites no authority for the argument that, because performance measures and liquidate damages are not required by federal law, those issues cannot be considered in this arbitration. Indeed, performance standards and damages have been considered by other state commissioners in interconnection arbitrations. See, e.g., Petition of MCI Telecommunications Corporation for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio, Case No. 96-888-TP-ARB, Arbitration Award at § VII(D). The TRA itself has considered similar proposals in other arbitration proceedings. Although this agency has not previously required BellSouth to include performance standards and liquidated damages provisions in an interconnection contract, the TRA has never suggested that these issues cannot legally be considered in an arbitration proceeding.

b. BellSouth cites decisions from other states holding that those state commissions have no authority to award monetary damages for contract violations. BellSouth implies, but never directly argues, that the TRA also lacks authority to award damages.

That argument, of course, is flatly inconsistent with the liquidated damages provisions found throughout BellSouth's tariffs and CSAs. The agency does not, of course, have jurisdiction to fix and award damages arising, for example, from a carrier's violation of its tariff or a CSA. On the other hand, the agency unquestionably has authority to interpret and enforce its tariffs and CSAs which typically require the payment of fees for services rendered or liquidated damages for the premature cancellation of service. Thus, whenever the TRA finds that a tariff, CSA or an interconnection agreement requires one party to pay the other and so holds in a final order, that order is enforceable through the state courts. See, T.C.A. § 65-3-105. If the law were otherwise, BellSouth could not rely on its tariffs to collect a simple telephone bill.

Although some state agencies have interpreted their own laws differently, there is no doubt that in Tennessee the TRA has authority under state law to consider, amend, or require provisions for liquidated damages in tariffs, CSAs, or this arbitration proceeding.[1]

c. BellSouth also contends that, even if performance measure and liquidated damages are appropriate, the TRA should consider them in a generic, workshop-type context rather than in an arbitration proceeding.

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[1]Liquidated damages may also be required in other kinds of utility contracts. When, for example, a gas company builds an extension line to reach a new contract customer, the TRA typically requires that the contract include a liquidated damages provision so that, if the customer fails to purchase a minimum amount of gas, the customer must reimburse the gas company for part of the cost of the extension.

ICG agrees that, in the long run, Tennessee should adopt a state-specific plan. It may not be practical or necessary, however, for every state to undertake such a proceeding. In the meantime, ICG recommends that the TRA adopt the Texas plan in this arbitration proceeding. If and when the TRA develops Tennessee-specific performance measures and liquidated damages provisions, the interconnection contract between ICG and BellSouth should require that those provisions be applied to the parties on a going forward basis.

d. Finally, BellSouth contends that, because the TRA did not incorporate performance measures and liquidated damages provisions in last year's NEXTLINK arbitration or in the MCI/AT&T arbitration in 1996, ICG should not be allowed to present such evidence in this proceeding.

Unlike those earlier proceedings, ICG will present in this case a detailed proposal for performance measures and liquidated damages that has been hammered out by representatives of all segments of the industry. In fact, BellSouth itself has acknowledged that it is working with FCC staffers on a similar proposal that includes performance standards and liquidated damages. Brief of BellSouth filed September 7, 1999, p. 10. BellSouth, however, has said it will not offer its plan to any state until after that state approves BellSouth's entry into the interLATA market. Id.[2]

BellSouth's statement implicitly acknowledges that performance measures and liquidated damages are necessary to make competition work and will eventually be incorporated in each

[2]Through discovery, ICG has requested a copy of BellSouth's own proposal for performance measures and liquidated damages.

state's rules or tariffs. If that is the case -- and ICG agrees that it is -- those provisions must also be included in the interconnection agreement between ICG and BellSouth.

3. Volume and Term Discounts

ICG is legally entitled to purchase cost-based UNEs. If BellSouth's cost studies indicate that UNEs purchased in volume amounts and over fixed terms should be priced at a discount, ICG is entitled to that savings. BellSouth has not denied that volume and term sales, as a general rule, provide an economic benefit to BellSouth. Because of that benefit, BellSouth has entered into hundreds of volume and term contracts with large customers at prices well below tariffed rates. ICG wants the same benefits of a volume and term agreement.

There is no reason for the TRA to rule on this issue until ICG has had the chance to examine BellSouth's cost studies and no basis whatsoever to exclude this issue from consideration before the hearing even begins.

4. Binding Forecasts

To avoid network blockage, ICG has offered to provide BellSouth a "binding" forecast of ICG's anticipated traffic so that BellSouth may make appropriate network improvements. The forecasts are binding because ICG has offered to guarantee that the improvements will be utilized. If not, ICG will reimburse BellSouth for the cost of the improvements.

BellSouth has no principled reason to refuse ICG's offer and has agreed to a similar proposal in at least one other interconnection agreement.[3] The company, however, argues that this issue should be excluded from this arbitration proceeding because binding forecasts are not

[3] *See*, Section 20.4 of the Interconnection Agreement between BellSouth and KMC Telecom, executed on February 24, 1997.

mentioned in the federal Act. Such a requirement, however, is clearly an interconnection-related "service," within the meaning of Section 252(a). It is not, as BellSouth jokes, an issue over the color of the carpet (BellSouth brief, at 8) but a matter of serious importance to the quality of ICG's service to its customers. As the Hearing Officer concluded, nothing in the federal Act prohibits state consideration of ICG's request. Therefore, ICG is entitled to present evidence on this issue.

Conclusion

The Hearing Officer correctly ruled that all of these issues are properly subject to arbitration. He did not purport to decide them, only to give ICG the opportunity to present its case. ICG submits that his ruling is plainly correct and should be affirmed.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Arbitration Petition in the above captioned proceeding has been hand-delivered to the office of Guy Hicks, BellSouth Telecommunications, 333 Commerce St., Suite 2101, Nashville, Tennessee 37201-3300 on this the 29 day of September, 1999.

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