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REC'D TN REGULATORY AUTH. '99 DEC 7 PM EXECUTIVE SECRETARY

December 7, 1999

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** Original
**and**
**Petition For Arbitration of ITC Delta^Com Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996**
**Docket No. 99-00430**

Dear David.

Enclosed herewith are the original and thirteen copies of the Post-Hearing Brief of ICG Telecom Group, Inc. in the above reference dockets.

Copies have been sent to parties.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker
Henry Walker, attorney for ICG

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

FILE

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**BEFORE THE TENNESSEE REGULATORY AUTHORITY**
**Nashville, Tennessee**

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

PETITION FOR ARBITRATION OF ITC^DELTACOM COMMUNICATIONS, INC. WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996

Docket No. 99-00430

# ICG TELECOM GROUP, INC.'S POST-HEARING BRIEF


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December 7, 1999

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**ICG TELECOM GROUP, INC.'S
POST-HEARING BRIEF**

ICG Telecom Group, Inc. ("ICG") hereby files its Post-Hearing Brief in the above-captioned proceeding.

## STATEMENT OF CASE

ICG is a competitive local exchange carrier ("CLEC") that offers local exchange and other services in Tennessee. In order to provide service, ICG sought, and entered into, an interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). On December 18, 1998, pursuant to the terms of the parties' agreement, BellSouth notified ICG that it wished to negotiate a new agreement pursuant to Section 251 of the Communications Act of 1934, as amended ("Act"). Despite meeting for several negotiating sessions over the next several months, the parties were unable to reach agreement on a number of issues. On May 27, 1999, ICG filed a Petition for Arbitration pursuant to Section 252 of the Act, requesting that the Tennessee Regulatory Authority ("Authority") resolve twenty-six disputed issues.



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One of those issues – whether the Authority should require reciprocal compensation for calls to Internet Service Providers ("ISPs") – was consolidated with the same issue in the Petition for Arbitration filed by ITC^DeltaCom ("DeltaCom") in Docket No. 99-00430.[1] The disputed issues between ICG and BellSouth, including the issue of reciprocal compensation for ISP-bound traffic, have been or are being arbitrated by the parties in five other states throughout BellSouth's operating region.

As of the filing of this brief, two states – North Carolina and Alabama – have issued arbitration orders resolving the disputed issues.[2] Both states ruled in ICG's favor on virtually every issue before them,[3] including reciprocal compensation for ISP-bound traffic. *In re Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. P-582, Sub 6 (N.C. Utils. Comm'n rel. Nov. 4, 1999) ("*North Carolina Order*"); *In re Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket 27069 (Ala. Pub. Serv. Comm'n rel. Nov. 10, 1999) ("*Alabama Order*").[4]

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1 *See* October 25, 1999 *Notice of Arbitration Hearing*. The remaining ICG issues were addressed at a hearing held by the Authority on November 22-23, 1999 in Docket No. 99-00377.

2 The parties also have concluded their arbitration in Florida and a decision is expected there on December 7, 1999. An arbitration proceeding is currently underway in Kentucky.

3 Many of the issues had been settled by the parties or otherwise were not before the Alabama and North Carolina commissions.

4 Copies of the *North Carolina Order* and the *Alabama Order* are attached hereto as Exhibits 1 and 2, respectively.

## ARGUMENT

The record in this proceeding establishes that the issue of reciprocal compensation for ISP-bound traffic is one of critical importance to ICG in particular and CLECs generally. ISPs have not had their needs met by BellSouth and other incumbent local exchange carriers ("ILECs"). *See* Schonhaut Direct at 3-4; Starkey Direct at 8, 10-11, 20-21. As a result, ICG and other CLECs have been far more successful in obtaining ISP customers than has BellSouth. ISP access lines represent approximately 50% of ICG's total access lines in BellSouth territory, including Tennessee. Schonhaut Cross-Exam. at Tr. 492. BellSouth's attempt to exclude those customers from reciprocal compensation targets that segment of ICG's customer base where ICG has been most successful in competing with BellSouth and threatens to leave ICG in the position of delivering a tremendous number of calls from BellSouth customers – and thereby incurring the costs that BellSouth avoids – without any compensation from BellSouth. Schonhaut Direct at 8-9.

ICG's loss would be BellSouth's gain because BellSouth would be given a free ride while ICG incurred the costs associated with providing Internet access to BellSouth's customers. This would translate into a double competitive advantage for BellSouth: not only would it avoid paying the costs generated by its customers, it would foist those costs off on a competitor.

Having lost in the marketplace, BellSouth is now asking the Authority to distort that market result and provide BellSouth with protection from the competition that has begun to erode its monopoly market share. The Authority should not allow BellSouth to shield itself from the pressures of competition and to avoid having to pay for the costs its customers have generated.

## I. THE AUTHORITY HAS JURISDICTION TO ADDRESS COMPENSATION FOR ISP-BOUND TRAFFIC.

The threshold issue that the Authority must address in deciding whether to require reciprocal compensation for ISP-bound traffic is whether it has the authority to do so under the Federal Communications Commission's ("FCC's") February 26, 1999 order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Declaratory Ruling in CC Docket No. 96-98 & Notice of Proposed Rulemaking in CC Docket No. 99-68*, 14 FCC Rcd 3689 (1999) ("*Declaratory Ruling*"). As discussed in Section I.A below, the answer to that question is yes. The FCC's *Declaratory Ruling* is unequivocal that the Authority has the power to address compensation for ISP-bound traffic. Moreover, as explained in Section I.B below, even leaving the *Declaratory Ruling* aside, the Authority would have the authority – indeed the duty – under Section 252 of the Act to address compensation for ISP-bound traffic as an "open issue" for the parties' negotiation/arbitration.

BellSouth does not seriously contest the Authority's jurisdiction to address compensation for ISP-bound traffic under the *Declaratory Ruling*. Rather, BellSouth argues that the Authority lacks the power to do so in a Section 251/252 arbitration. For the reasons discussed in Section I.C, this argument depends on a tortured reading of the Act and is completely without merit.

### A. The FCC's February 26, 1999 *Declaratory Ruling* Makes Clear That the Authority Has Jurisdiction to Address Compensation for Calls to ISPs.

In the *Declaratory Ruling*, the FCC held that, although mixed, ISP-bound traffic appears to be largely interstate. *Declaratory Ruling* ¶ 12. The FCC therefore asserted jurisdiction over ISP-bound traffic. *Id.*

The FCC was explicit, however, that its jurisdictional ruling in no way precludes state commissions from requiring reciprocal compensation for ISP-bound traffic under Section 252 of the Act. The following excerpts from the *Declaratory Ruling* make this absolutely clear:

> Our determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption . . . . *Nor, as we discuss below, is it dispositive of interconnection disputes currently before state commissions.*[5]
>
> We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic.[6]
>
> *[N]othing* in this Declaratory Ruling *precludes state commissions from determining*, pursuant to contractual principles or other legal or equitable considerations, *that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate [in this Declaratory Ruling.]*[7]
>
> *Even where parties to interconnection agreements do not voluntarily agree* on an inter-carrier compensation mechanism for ISP-bound traffic, *state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic.*[8]

While the *Declaratory Ruling* was completely clear on this point, the FCC has since provided an interpretation of that decision that removes any doubt as to the authority of state commissions to address reciprocal compensation for ISP-bound traffic in Section 252 arbitrations. In *Bell Atlantic Delaware, Inc. v. Global NAPs, Inc.*, FCC 99-381 (Dec. 2, 1999), the FCC had before it a formal complaint brought by Bell Atlantic challenging Global NAPs' federal tariff, which included a per-minute charge assessed on originating local exchange carriers ("LECs") for the delivery of ISP-bound traffic.[9] Bell Atlantic contended that compensation for the delivery of ISP-bound calls was an open issue before the Massachusetts Department of Telecommunications and Energy ("Massachusetts DTE") and the tariff provision was therefore unreasonable because it imposed an uncertain charge. *Id.* at 2. The FCC agreed, finding that there was an open dispute concerning the application of reciprocal compensation to ISP-bound

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[5] *Declaratory Ruling* ¶ 20 (emphasis added).

[6] *Id.* ¶ 21.

[7] *Id.* ¶ 27 (emphasis added).

[8] *Id.* ¶ 25 (emphasis added).

[9] A copy of the decision is attached hereto as Exhibit 3.

traffic before the Massachusetts DTE and that the tariff therefore was contingent and unclear. *Id.* at 12-14.

In the course of so holding, the FCC analyzed the *Declaratory Ruling*'s discussion of state authority to address reciprocal compensation for ISP-bound traffic. The FCC stated:

> [I]t was within our discretion to direct in the [*Declaratory Ruling*] that, on an interim basis, inter-carrier compensation for ISP-bound traffic should be treated as an "open issue" subject to the state-supervised negotiation/mediation/arbitration processes set forth in sections 251 and 252 of the Act. Accordingly, whether the existing interconnection agreement between Bell Atlantic and Global NAPs does or should provide for inter-carrier compensation for ISP-bound traffic is an appropriate area of inquiry for the Massachusetts DTE under sections 251 and 252 of the Act, even though ISP-bound traffic is largely interstate.

*Id.* at 12. Obviously, if reciprocal compensation for ISP-bound traffic is an appropriate subject for review by the Massachusetts DTE, it is also appropriate for review by the Authority.

### B. Section 252 Provides Authority with Jurisdiction to Address the Issue.

Second, as the *Global NAPs* decision suggests, the Authority would have ample power to address this issue under Section 252 of the Act even absent the *Declaratory Ruling*. Section 252(b)(4)(C) of the Act expressly mandates that state commissions take action during an arbitration proceeding to "resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of [Section 252] upon the parties to the agreement. . . ." 47 U.S.C. § 252(b)(4)(C). Section 252(c) of the Act goes on to state, in relevant part, that:

> [I]n resolving by arbitration . . . any open issues and imposing any conditions upon the parties to the agreement, a State commission shall –
>
> (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251 of this title . . . .

47 U.S.C. § 252(c). Accordingly, state commissions are not only permitted but are in fact obligated by Section 252 of the Act to resolve any and all issues for which the parties have

requested resolution, provided that those issues remain open and that resolution of those issues does not conflict with Section 251 of the Act.

### C. BellSouth's Contention That Reciprocal Compensation for ISP-Bound Traffic Is Outside the Scope of the Authority's Section 252 Jurisdiction Has Been Unanimously Rejected.

Precluded by the clear language of the *Declaratory Ruling* and the Act from making a direct challenge to the Authority's jurisdiction, BellSouth is left to argue that, given the *Declaratory Ruling*'s finding that ISP-bound calls are jurisdictionally largely interstate, such calls are outside of the scope of the local interconnection provisions of Sections 251 and 252 of the Act. In BellSouth's view, since Section 251(b)(5) of the Act concerns inter-carrier compensation for ***local*** traffic and the FCC has held that calls to ISPs are jurisdictionally ***interstate***, Section 251(b)(5) does not govern inter-carrier compensation for ISP-bound calls. Thus, according to BellSouth, state commissions do not have the authority to require reciprocal compensation for ISP-bound calls in Section 252 arbitration proceedings since Section 252 only gives the state commissions jurisdiction over agreements negotiated pursuant to Section 251. *See* Varner Direct at 4-5.

The *Declaratory Ruling* makes clear that BellSouth's view is wrong. The FCC held explicitly:

> Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, **neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law.** A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding -- or a subsequent state commission decision that those obligations encompass ISP-bound traffic -- does not conflict with any [FCC] rule regarding ISP-bound traffic.

*Declaratory Ruling* ¶ 26. Thus, "in the absence [of] a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic." *Id.* ¶ 26 n. 87; *see also Alabama Order* at 9 ("the FCC specifically recognized the authority of state Commissions under 47 U.S.C. §252 to determine inter-carrier compensation for ISP-bound traffic and to impose reciprocal compensation obligations in arbitration proceedings in the absence of a federal rule to the contrary").

Not only does the *Declaratory Ruling* hold that the states can set inter-carrier compensation rates for ISP-bound traffic, but also the FCC tentatively concluded that the final rule it ultimately will adopt will be that the states *should* do so:

> We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions, which are appealable to federal district courts.

*Declaratory Ruling* ¶ 30. Obviously, if the FCC believes that the most appropriate mechanism for establishing inter-carrier compensation mechanisms for ISP-bound traffic is the negotiation/state arbitration process, then, in the FCC's view, there is no question that state commissions have the authority to address the issue in Section 252 arbitrations, notwithstanding the FCC's jurisdictional finding.

BellSouth's arguments to the contrary are nothing more than a collateral attack on the FCC's *Declaratory Ruling* and, as such, may not be heard by the Authority. The Hobbs Act grants exclusive jurisdiction to the United States Courts of Appeals to determine the validity of all final orders of the FCC. 28 U.S.C. § 2342. The United States Court of Appeals for the Ninth Circuit has explicitly held that challenges to the FCC's holding in the *Declaratory Ruling* that state commissions have jurisdiction to address reciprocal compensation for ISP-bound traffic fall within the scope of the Hobbs Act. *US West Communications v. MFS Intelenet, Inc.*, Nos. 98-35146, 98-35203, 1999 U.S. App. LEXIS 25032, at *27 (9th Cir. Oct. 8, 1999) ("[T]he Hobbs Act grants exclusive jurisdiction to courts of appeals to determine the validity of all final orders of the FCC"). Thus, the only appropriate forum for BellSouth's arguments was an appellate court challenge of the *Declaratory Ruling*. *Id.*

In fact, BellSouth raised precisely such a challenge before the United States Court of Appeals for the District of Columbia Circuit. *See Bell Atlantic Tel. Cos., et al. v. FCC*, No. 99-1094, *et al.* (D.C. Cir. filed Mar. 8, 1999). BellSouth is proceeding with its court challenge to the *Declaratory Ruling*. That proceeding is the appropriate forum. BellSouth is precluded, as a matter of law, from raising the same challenge here.

## II. THE AUTHORITY SHOULD REQUIRE RECIPROCAL COMPENSATION FOR ISP-BOUND CALLS.

Having established that the Authority has jurisdiction to require reciprocal compensation for ISP-bound traffic, the question becomes whether it should. Both the simple principle that ICG is entitled to be reimbursed for the costs that it incurs on behalf of BellSouth and important public policy considerations dictate that the answer to that question is yes. Moreover, the FCC, in the *Declaratory Ruling*, strongly suggested that state commissions should require reciprocal compensation for ISP-bound traffic. Finally, it is significant that the overwhelming majority of the state commissions and all of the federal courts that have addressed the issue have required or upheld reciprocal compensation for ISP-bound traffic.

### A. ICG Incurs Costs – That BellSouth Avoids – in Delivering BellSouth Traffic to ISP Customers and Is Entitled to Recover Those Costs.

At issue is whether BellSouth should be required to pay the costs that ICG incurs when ICG delivers traffic that originates on BellSouth's network and is directed to a customer on ICG's network that happens to be an ISP. The costs incurred by ICG in delivering a call bound for an ISP customer do not differ from those generated by calls bound for an ICG business or residential customer. As discussed in subsection II.A.1 below, ICG believes that in both instances it is entitled to recover those costs from BellSouth.

It is BellSouth's position that in the case of ISP-bound traffic, not only should ICG make its facilities available to BellSouth's customers for free, but ICG should ***pay BellSouth*** a portion of the revenue that ICG receives from its ISP customers. As discussed in subsection II.A.2 below, that argument is utterly without merit because (aside from being economically irrational) it assumes a regulatory framework for ISP traffic that the FCC has repeatedly and unequivocally rejected.

#### 1. ICG Incurs the Same Costs in Delivering BellSouth Traffic to an ICG Customer Regardless of Whether the Customer Is an ISP.

The parties agree that one of the chief principles governing inter-carrier compensation is that carriers should be compensated for the costs they incur as a result of delivering each other's traffic. As BellSouth witness Taylor put it in his opening statement, "I think everybody agrees that both BellSouth and ITC^DeltaCom and ICG ought to be compensated for the costs that are caused when the end-user dials up the Internet." Taylor Summary at Tr. 533. All that ICG is requesting is that it be permitted to recover the costs it incurs in delivering BellSouth's traffic to ICG's ISP customers.

#### a. BellSouth Acknowledges That in the Case of Local Calls to Non-ISP Customers, It Should Pay Reciprocal Compensation to ICG to Compensate ICG for the Costs ICG Incurs on Behalf of BellSouth.

In the case of a BellSouth-originated call delivered by ICG to an ICG business or residential customer, BellSouth does not contest that the payment of reciprocal compensation is appropriate because BellSouth is paying ICG for the costs ICG incurs in delivering BellSouth's traffic. This was made clear in two of the diagrams attached to BellSouth witness Varner's direct testimony: Diagram A, depicting a local call originated on BellSouth's network and delivered to a BellSouth customer; and Diagram B, depicting two calls, one a local call originated by an End User on BellSouth's network and delivered by a CLEC to the CLEC's End User, and the other a call flowing in the other direction (a call originated by an End User on the CLEC's network and delivered by BellSouth to a BellSouth End User). As between paying reciprocal compensation for the delivery of a local call and delivering that call itself, BellSouth is economically indifferent because in the first case, BellSouth is simply paying a CLEC for the costs BellSouth avoids by not delivering the call itself. Starkey Direct at 16.[10]

[10] See also Varner Cross-Exam. at Tr. 689:

> Q. So the amount of the reciprocal compensation represents costs that Bell would otherwise incur; is that correct?
>
> A. Yes, and we're still paying them through the reciprocal

### b. The Network Functionality and the Costs Incurred Are the Same Regardless of Whether the End User to Whom ICG Delivers a BellSouth Call Is an ISP.

The record in this proceeding establishes that BellSouth-originated calls delivered by ICG to an ISP are no different from calls delivered to a residential or business customer in either their use of ICG's network or the costs ICG incurs on BellSouth's behalf. As ICG witness Starkey testified:

> [R]egardless of whether the originating customer dials either [an] ICG residential customer or [an] ISP customer, the call travels from the originating customer's premises to the BST central office switch, which then routes the call to the BST/ICG interconnection point and ultimately to the ICG switch. From the ICG switch the call is then transported to either the residential customer or the ISP customer depending upon the number dialed by the BST caller.

Starkey Direct at 14; *see* Starkey Direct, Diagram 1 (showing that calls from a BellSouth customer to an ICG residential customer and to an ICG ISP customer are identical in their use of ICG's network). Thus, a "ten minute call originated on the BST network and directed to the ICG network travels exactly the same path, requires the use of exactly the same facilities and generates exactly the same level of cost regardless of whether that call is dialed to an ICG local residential customer or to an ISP provider." Starkey Direct at 14.[11]

BellSouth concedes that the use of a CLEC's network and the costs incurred by the CLEC in delivering a call from a BellSouth customer are the same regardless of whether the call is

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> compensation rate.
>
> Q. And so the reason there is no cost savings is because you are paying it out in reciprocal compensation instead of – because you are paying out that amount in reciprocal compensation; isn't that correct?
>
> A. That's correct.

[11] It is irrelevant that once the call reaches the ISP, it continues on to its ultimate destination, an Internet website. ICG incurs no costs for the component of the call not on its network. It is the portion of the call that is carried on ICG's facilities that is relevant and that segment of the call is identical to any local voice call in terms of how ICG's network is used.

delivered to a residential or business customer of the CLEC or to an ISP customer. Taylor Summary at Tr. 534 ("ISP-bound calls and local calls use the same network elements").

That there is no difference between how BellSouth-originated local voice calls and ISP-bound calls are carried by ICG's network is made apparent by BellSouth's own exhibits in this proceeding. Compare Diagrams B and F attached to BellSouth witness Varner's Direct Testimony. Diagram B depicts a call originated by a Bellsouth end user, carried by BellSouth to the point of interconnection, and then delivered by a CLEC to the CLEC's non-ISP end user. Diagram F depicts a call originated by a BellSouth end user, carried by BellSouth to the point of interconnection, and then delivered by a CLEC to the CLEC's ISP end user customer. Significantly, the two charts are completely identical, except for the labeling of the CLEC's customer in the one instance as an ISP and in the other as a non-ISP. In other words, by BellSouth's own admission, calls to ICG's customers, whether or not they happen to be an ISP, transit BellSouth's and ICG's networks in exactly the same manner.

#### c. There Is No Basis for Treating Calls to ISPs Differently from Other BellSouth-Originated Calls Delivered by ICG.

The Act requires, and the parties have agreed, that they will pay one another reciprocal compensation for local calls. Yet BellSouth would have functionally identical calls to ISPs go completely uncompensated. This runs counter to one of the most basic economic principles: Given that the costs to deliver calls made to residential customers and to ISP customers are identical, the rates associated with recovering those costs should be identical. As the Alabama Commission held in finding in ICG's favor on the issue of reciprocal compensation for ISP-bound traffic,

> calls over [LEC] facilities to ISPs appear functionally equivalent to local voice calls which are subject to reciprocal compensation. ***Since the same network facilities and functions are utilized to complete both types of calls, it is axiomatic that the costs to deliver them are identical. We find that those identical costs dictate that the rates associated with recovering those costs should also be identical.***

*Alabama Order* at 18 (emphasis added). Thus, as with BellSouth-originated calls delivered to business or residential customers, ICG is entitled to recover the costs it incurs on BellSouth's behalf when it delivers a call to an ISP.

According to BellSouth, the reason that calls delivered to ISPs should not be subject to reciprocal compensation is that when BellSouth delivers a call to its ISP customer, it receives revenue from the ISP, who is a BellSouth subscriber, but when ICG delivers a call to an ICG ISP customer, ICG collects the revenue.[12]

That ICG collects revenue from the ISP to whom the call is delivered, however, is irrelevant to the question of whether BellSouth should pay ICG for delivering the call. Those revenues recover ICG's costs of providing service to its ISP customers, not the costs ICG incurs in delivering traffic ***to*** those customers. ILECs typically charge end users a monthly fee for local exchange service. From that payment, the ILEC provides the end user with transport and termination of local calls throughout the local calling area. End users do not pay for local calls terminated to them. What is true for end users generally is no less true for ISP customers. *See Declaratory Ruling* ¶ 4 (typically, an ISP "purchases business lines from a LEC for which it pays a flat monthly fee that allows unlimited local calls").

Local exchange rates are set such that end users pay for the facilities dedicated to them and for the use of their provider's network to originate calls. The costs incurred by a carrier in delivering a call are paid from the revenue received for originating the call. Thus, where a BellSouth customer calls an ISP, whether that ISP is on BellSouth's network or on ICG's, the costs incurred in delivering the call must be recovered from the revenue BellSouth

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[12] *See* Varner Cross-Exam. at Tr. 672:

> [I]f we serve the ISP, we're billing the ISP revenues to cover those costs, so we're billing them the amount of money. The CLEC that serves the ISP, we're not. We don't have anybody to bill.

receives from its originating subscriber. Where BellSouth delivers the call, the originating revenue covers its costs incurred in doing so. Where ICG delivers the call and incurs the costs that BellSouth avoids, it is no less entitled to recover those costs through BellSouth's originating revenue in the form of reciprocal compensation.

While there **may**, on average, be differences in costs between longer and shorter calls, that has nothing to do with differences in costs between ISP-bound calls and other calls. A carrier incurs the same costs in delivering a 5 minute-long call to an ISP as it does in delivering a 5 minute-long call to a residential customer, and incurs the same costs in delivering a 100 minute-long call to an ISP as it does in delivering a 100 minute-long call to a residential customer. To the extent that BellSouth has a valid concern, it is with long calls whether or not they are placed to an ISP.

2. **There Is No Merit Whatsoever to BellSouth's Contention That Calls to ISPs Are More Like Calls Made to IXCs Than Local Calls and That ICG, Accordingly, Should Share Its "Access" Revenue With BellSouth.**

The FCC has said time and time again that ISP-bound traffic is ***not*** treated as exchange access for regulatory purposes. Nevertheless, BellSouth proposes that ISP-bound traffic be treated the same way that interexchange carrier access traffic is treated when two LECs are involved in delivering the traffic, *i.e.*, the LECs should share the revenue generated for originating (or delivering) the traffic. Under this proposal, the LEC serving – and therefore billing – the ISP would treat the ISP's payments for business exchange services as "access" revenue and share it with the other carrier. Varner Direct at 8-16. In other words, not only would the LEC ultimately delivering the ISP-bound traffic receive no compensation for the costs it incurs in carrying the other carrier's customers' calls, it would ***pay the originating LEC for doing so.***[13]

The FCC's policy long has been to exempt ISPs and other enhanced service providers ("ESPs") from the payment of access charges, pursuant to the FCC's so-called "ESP exemption."[14] *Access Charge Reform Order* at ¶ 345 ("We decide here that ISPs should not be subject to interstate access charges"). The *Declaratory Ruling* explicitly left the ESP exemption in place. The FCC held: "Our determination that at least a substantial portion of dial-up ISP-

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[13] Mr. Varner's analysis is predicated on the notion that "ISPs are carriers." Varner Rebuttal at 13. According to Mr. Varner, ISPs should be treated "just like" IXCs. *Id.* at 9. This, however, flies in the face of the FCC's finding that "it is not clear that ISPs use the public switched network in a manner analogous to IXCs." *Access Charge Reform, First Report and Order,* 12 FCC Rcd 15982 ¶ 345 (1997) (*"Access Charge Reform Order"*), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523 (8th Cir. 1998).

Moreover, in other contexts, BellSouth does not treat ISPs as carriers. Under the FCC's expanded interconnection rule, 47 C.F.R. § 64.1401, ILECs must permit interstate carriers to collocate in their central offices, and under 47 U.S.C. § 251(c)(6), they must permit competitive local exchange carriers to do so. Yet in response to discovery in this docket, BellSouth stated that it does not permit ISPs to collocate in its central offices, as it would be required to do if ISPs were carriers.

[14] *See Declaratory Ruling* ¶ 5 & n.9 (citing MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983)).

bound traffic is interstate does not, however, alter the current ESP exemption." *Declaratory Ruling* ¶ 20; *see also id.* ¶ 34 ("We emphasize, however, that we do not seek comment on whether interstate access charges should be imposed on ESPs as part of this proceeding. We recently reaffirmed that exemption in the *Access Charge Reform Order*, and do not reconsider it here.").

There are two regulatory concomitants of the ESP exemption. First, ESPs, including ISPs, are treated as end users – not carriers – in terms of how they access the public switched network, including access charges. *Declaratory Ruling* ¶ 5. Second, the FCC treats "ISP-bound traffic as though it were local" traffic, *id.* ¶ 23; *see id.* ¶ 16, and requires the states to do the same, *id.* ¶ 26 n.88. These two regulatory results, in turn, dictate that ISPs purchase services from LEC local exchange tariffs instead of from LEC access tariffs. *Id.* ¶ 23. As the FCC found in the *Declaratory Ruling*, typically the ISP "purchases business lines from a LEC for which it pays a flat monthly fee that allows unlimited incoming calls." *Id.* ¶ 4. In other words, pursuant to the ESP exemption, ISPs subscribe to the same local exchange service as any other business customer. For their part, incumbent LECs traditionally have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes. *Id.* ¶ 23.

Notwithstanding the ESP exemption, BellSouth suggests that the rates ISPs pay LECs are actually charges for access assessed through local exchange tariffs. This is simply not the case. Pursuant to the FCC's exemption, ISPs purchase local exchange service. As local exchange customers, ISPs ***do not*** pay access charges. BellSouth cannot convert the purchase of monthly local exchange service into the purchase of access service simply by asserting that that is the case. The FCC emphasized in the *Declaratory Ruling* that, in light of the ESP exemption, neither ICG nor BellSouth can force ISPs to pay switched access charges for access to their networks: "[U]nder the ESP exemption, LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share." *Declaratory Ruling*

¶ 9; *see also Alabama Order* at 16 ("It is abundantly clear . . . that ISPs purchase monthly local exchange service much like any other local exchange customer. As local exchange customers, ISPs do not pay access charges and neither ICG nor BellSouth can force ISPs to pay switched access charges for access to their networks.").

Thus, BellSouth's assertions to the contrary notwithstanding, it is clear that ISP-bound traffic is not subject to an access charge regulatory framework, but rather is treated as local exchange traffic for regulatory purposes:

> In the *Access Charge Reform Order*, the [FCC] decided to maintain the existing price structure pursuant to which ESPs are treated as end users for the purpose of applying access charges. Thus, ***the [FCC] continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local.***

*Declaratory Ruling* ¶ 5 (emphasis added); *see also Alabama Order* at 17 ("Clearly, ISP-bound traffic is not subject to an access charge regulatory framework but rather is treated as [l]ocal exchange traffic for regulatory purposes."). As the Alabama Commission found, "BellSouth['s] 'access' traffic arguments [are] misplaced and totally contrary to prevailing regulatory mandates." *Alabama Order* at 16.[15]

Instead, the FCC made clear that, in deciding whether to require reciprocal compensation for ISP-bound traffic, state commissions should be guided by the FCC's policy of treating ISP-bound traffic as functionally local:

> The passage of the 1996 Act raised the novel issue of the applicability of its local competition provisions to the issue of inter-carrier compensation for ISP-bound traffic. Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to Section 252, "extends to both interstate and intrastate matters." Thus the mere fact that ISP-bound

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[15] Mr. Varner's view that calls to ISPs constitute access traffic also ignores the plain reality that BellSouth-originated calls delivered by ICG to ICG ISP customers transit ICG's network in exactly the same manner as calls delivered to a business or residential subscriber.

> traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. ***While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.***[16]

Thus, a determination by the Authority that the parties should pay one another reciprocal compensation would be consistent with the functionally local nature of ISP-bound traffic and with the FCC's regulatory framework for that traffic.[17]

### B. Requiring Reciprocal Compensation for ISP-Bound Traffic Is Sound Public Policy.

Not only will requiring BellSouth to pay reciprocal compensation for ISP-bound traffic ensure that ICG is able to recover the costs it incurs in delivering BellSouth's traffic, it is also sound public policy.

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16 *Declaratory Order* ¶ 25 (emphasis added)(footnotes omitted).

17 Mr. Varner advances two other alternative proposals. Under the first, the parties would simply track ISP-bound traffic until the FCC issues a final order setting a rate, at which point the parties would "true-up" any compensation due. Under the second, the parties would implement a "bill-and-keep" arrangement until the FCC rules. *See* Varner Direct at 7-8. Both proposals are unacceptable. Bill-and-keep is a reasonable arrangement only where the traffic exchanged between carriers is balanced. Starkey Rebuttal at 17. Under BellSouth's bill-and-keep proposal, which is inconsistent with the FCC's rules and with BellSouth's previous positions, ICG would never be reimbursed for the costs it incurs on BellSouth's behalf. *Id.* at 17-20. Under the tracking proposal, ICG's compensation would be deferred to the indeterminate future, denying ICG a critical revenue stream in the present. *See infra* Section III.B.

### 1. Eliminating CLECs' Ability to Recover Their Costs Associated with Serving ISPs Would Be Likely to Distort One of the Few Key Local Exchange Market Segments That Is Well on the Way to Effective Competition.

If ICG is unable to recover the costs of delivering BellSouth traffic to ICG's ISP customers, it would make it difficult for ICG to continue to provide competitive service to ISP customers. Schonhaut Direct at 8-9. Losing the ability to serve its ISP customer base would hit ICG particularly hard because ISPs and other technologically advanced customers are a natural entry point into the local exchange marketplace for competitive providers. As ICG's economist testified, in marketplaces undergoing a transition towards competition,

> new entrants are usually most successful in attracting customers that (1) are most disaffected by the services or quality offered by the incumbent, (2) have technological, capacity or specific requirements that are not easily met by the incumbent's oftentimes inflexible service offerings and/or (3) don't have a long history of taking service from the incumbent.

Starkey Direct at 10. ISPs meet all three of these criteria, making them "far more likely to explore competitive opportunities than more traditional residential and/or business customers." *Id.* at 10-11. This, in turn, has made ISPs an extremely important customer base for ICG and other CLECs. *Id.* at 11. For their part, because of their unproven track record, CLECs have been forced to market to ISPs, who are often themselves new market entrants, instead of the incumbent LECs' entrenched base of existing residential and general business customers. CLECs and ISPs are thus "'made for one another' [and] ISP's [sic] have flocked to new entrant CLECs in increasing numbers." *Id.*

The success of ICG and other CLECs in attracting ISP customers away from BellSouth and other ILECs has resulted in the ISP "market segment exhibiting some of the most competitive characteristics of any segment in the local market." Starkey Direct at 12. If ICG and other CLECs cannot recover their costs associated with their ISP customers, those customers will "immediately turn from highly valued customers to customers that are likely to be unprofitable." *Id.* at 13. In other words, BellSouth will have succeeded in turning one of the CLECs' most notable competitive successes into a defeat. This, in turn, could have serious ramifications for the spread of competition in the local exchange marketplace. Having lost their toehold and without the revenue stream and growth potential produced by ISPs, it would be significantly more difficult for CLECs to successfully enter other more traditional residential and business markets. *Id.* at 11.

**2. Requiring Reciprocal Compensation for ISP-Bound Traffic Will Ensure That Tennessee Continues to Reap the Benefits of the Explosive Growth of the Internet and the Information Economy.**

Not only would CLECs suffer if the Authority does not require reciprocal compensation for ISP-bound traffic, ISPs and their customers would also be significant losers. ICG has been highly successful in attracting ISP customers in large part because of the failure of the ILECs to adequately serve those customers. Before CLECs began to offer competitive service, ISPs and other end users with specialized needs were dependent exclusively on the ILECs. The ILECs, however, operating as monopoly providers, have little incentive to tailor services to meet the needs of ISPs. As ICG witness Schonhaut testified, "[w]ithout competitive pressures, the ILECs offered [only] 'one size fits all' service at high rates. Often the 'size' offered to ISPs was one that barely fit their operations." Schonhaut Direct at 4. ICG and other CLECs, however, are "able to offer ISPs service packages that are carefully tailored to the ISPs' operations." *Id.* For example, ICG offers ISPs the option of collocating ISP equipment alongside ICG equipment in ICG's central offices. *Id.* ISPs have also been attracted by ICG's superior network, which consists entirely of digital switching and fiber optic transport as opposed to the ILECs' hybrid legacy networks. *Id.*

Without the arrival of ICG and other CLECs, there is no reason to believe that the ILECs would have been spurred to develop the attractive service packages that CLECs offer

ISPs. *Id.* They certainly would not have done so at the accelerated pace that competition has produced.

If the Authority does not require reciprocal compensation for ISP-bound traffic, many of the benefits provided to ISPs by CLECs will be lost. ICG and other CLECs would be forced to either raise their rates or absorb significant costs. "If CLECs are forced to raise their rates to ISPs because the CLECs are not recovering the cost of delivering the traffic, it could result in increased costs to end users of ISP services." Schonhaut Direct at 5-6. As ICG witness Schonhaut testified, this in turn could deter the growth of the Internet in Tennessee: "There is no way of knowing how ISPs would handle rate increases, and whether ISP rate increases would artificially suppress demand for services in such a way that the growth of the Internet in this state would not reach the levels it otherwise would have." *Id.* at 6.

### C. The Great Majority of the State Commissions and All of the Federal Courts That Have Addressed the Issue Since the *Declaratory Ruling* Have Required Reciprocal Compensation for ISP-Bound Traffic.

It is significant that of the twenty-five state commissions that have addressed the issue since the *Declaratory Ruling*, the great majority have required or upheld the application of reciprocal compensation to ISP-bound traffic. The post-*Declaratory Ruling* state commission decisions fall into two categories. First, and most directly relevant, are those that have been decided in the context of an arbitration proceeding for a new interconnection agreement or in a generic proceeding applicable generally to all future agreements. To date, eight states have reached the merits of reciprocal compensation for ISP-bound traffic in this context. Of those, seven decisions – including the *North Carolina Order* and the *Alabama Order* and decisions in

New Mexico,[18] New York, Oregon, Pennsylvania, and West Virginia – have held that reciprocal compensation is required. Only South Carolina has ruled to the contrary.[19]

The second category of post-*Declaratory Ruling* state commission decisions are those interpreting existing agreements. Twenty-one state commissions have issued rulings on the merits. Of those, nineteen – including Tennessee – found that the agreement in question required the payment of reciprocal compensation for ISP-bound traffic. The other eighteen states are: Alabama, California, Colorado, Delaware, Florida, Hawaii, Indiana, Maryland, Minnesota, Nevada, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and West Virginia. Only two states – Louisiana and New Jersey – have held that an existing agreement does not require reciprocal compensation for ISP-bound traffic.[20]

Similarly, all five federal courts that have issued post-*Declaratory Ruling* decisions addressing appeals of state commission decisions requiring reciprocal compensation for ISP-bound traffic have upheld the state commission's determination. The five courts include the United States Courts of Appeals for the Seventh Circuit and the Ninth Circuit and three district courts.

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[18] The New Mexico decision, which was released November 22, 1999, is the recommended decision of an arbitrator.

[19] In addition, two states – Florida and Louisiana – were presented with the issue but did not reach the merits.

[20] In addition, two states – Massachusetts and Missouri – did not reach the merits.

## III. THE AUTHORITY SHOULD NOT DELAY IN ACTING ON COMPENSATION FOR ISP-BOUND TRAFFIC.

Perhaps because it recognizes that its position on the merits is a losing one, BellSouth raises two arguments as to why the Authority should refrain from requiring reciprocal compensation for ISP-bound traffic at this time. First, in BellSouth's view, since the FCC's *Declaratory Ruling* is currently subject to appeal, "states could find that they do not have the authority to create even an interim compensation arrangement." Varner Direct at 3. Second, according to BellSouth, "[e]ven if the states do have the authority, such authority is valid only until the FCC completes its rulemaking on the subject. Therefore, any effort devoted by the Authority to establishing an interim compensation arrangement for ISP-bound traffic may not be the best use of resources." *Id.* at 3-4. As discussed below, neither of these arguments has any merit.

### A. The Authority Should Not Delay Acting Because the *Declaratory Ruling* Is Subject to Appeal.

According to BellSouth witness Varner, it would be a waste of the Authority's efforts to address reciprocal compensation for ISP-bound traffic. However, as ICG witness Schonhaut testified, in making this argument, "Mr. Varner concedes that the present state of the law is such that this Authority has the requisite authority to order reciprocal compensation for calls to ISPs. Until the FCC acts, only a court order can remove this authority, but no court has thus far given any indication that it will change the existing situation before the FCC adopts a rule." Schonhaut Rebuttal at 4.

Under Mr. Varner's analysis, the simple fact that a ruling has been challenged is reason enough not to give it effect. Such an approach would lead to "competitive paralysis," Schonhaut Rebuttal at 4, which in the end can benefit only BellSouth. Until such time as some court acts to vacate the *Declaratory Ruling*, it is controlling federal law. In the meantime, as the Alabama Commission held, the "mere fact that the [*Declaratory Ruling*] is currently subject to a legal challenge does not in and of itself render the determinations of the FCC in that ruling void. . . . [The Alabama] Commission, therefore, has a duty and responsibility to exercise the authority it currently has, at least until such time as a federal rule is implemented." *Alabama Order* at 13.

### B. If the Authority Delays Acting Until the FCC Issues a Final Rule, ICG and Other CLECs Will Never Receive Any Compensation for the Interim Period.

As for BellSouth's argument that the Authority should not act in light of the FCC's pending ruling, the FCC has made clear that its ruling will have prospective effect only. Schonhaut Rebuttal at 3; *see Declaratory Ruling* ¶ 28. Thus, as the Alabama Commission found, "if the Commission does not take action to require compensation for calls to ISPs, ICG will never be compensated for the calls it delivers to ISPs during the interim period . . . [until] the FCC adopts a federal rule governing that subject." *Alabama Order* at 13; *see also* Schonhaut Rebuttal at 3.

Compounding the adverse impact on ICG, as ICG witness Schonhaut points out, "the interim period until the FCC acts could stretch for several months or even a year." Schonhaut Rebuttal at 2. In this regard, it is worth noting that it "took the FCC almost two years (20 months) to respond to the June 1997 request for clarification that led to the *Declaratory Ruling*." *Id.* at 2-3. There is no reason to believe that the FCC will necessarily act more expeditiously in promulgating a final rule than it did in releasing the *Declaratory Ruling*. Assuming a roughly similar timetable, a final rule is still roughly a year away.

BellSouth's proposal that carriers simply track ISP-bound traffic during the interim period and that any rule compensation mechanism adopted by the FCC be applied retroactively is at first blush of some superficial appeal, but does not survive scrutiny. The problem with this proposal is that it would absolve BellSouth of the obligation to pay compensation ***now***. As the North Carolina Commission found, this "may adversely affect competition because . . . ICG will not have the 'bird in the hand' to pay [its] bills, even while [ICG] continue[s] to incur costs." *North Carolina Order* at 7-8; *see also Alabama Order* at 14 ("[i]t would be entirely inconsistent with the competitive principles underlying the Act not to provide ICG with some mechanism to recover those costs as they are incurred").

In any case, Mr. Varner assumes that the FCC's ultimate rule will be inconsistent with a determination by the Authority that reciprocal compensation should be paid for ISP-bound traffic. This assumption is unwarranted. In the Notice of Proposed Rulemaking portion of the *Declaratory Ruling*, the FCC "tentatively conclude[d]" that it will leave it to the parties and the state commissions to determine appropriate rates for compensation for ISP-bound traffic. *Declaratory Ruling* ¶ 30. According to the FCC, "the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. ***Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions.***" *Id.* (emphasis added).

## CONCLUSION

For the foregoing reasons, the Authority should resolve the issue of reciprocal compensation for ISP-bound traffic by ruling that BellSouth and ICG must pay each other reciprocal compensation for ISP-bound traffic.

Respectfully submitted,

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December 7, 1999

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served via U.S. First Class Mail or Hand Delivery on the parties of record on this the 7 day of December, 1999.

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**STATE OF NORTH CAROLINA**
**UTILITIES COMMISSION**
**RALEIGH**

DOCKET NO. P-582, SUB 6

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

| | | |
|---|---|---|
| In the Matter of | | |
| Petition by ICG Telecom Group, Inc. For Arbitration | ) | |
| of Interconnection Agreement with BellSouth | ) | RECOMMENDED |
| Telecommunications, Inc. Pursuant to Section 252(b) | ) | ARBITRATION |
| of the Telecommunications Act of 1996 | ) | ORDER |

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on Tuesday, August 3, 1999

BEFORE: Chairman Jo Anne Sanford, Presiding; and Commissioners Robert V. Owens, Jr. and Sam J. Ervin, IV

APPEARANCES:

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FOR THE USING AND CONSUMING PUBLIC:

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BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission pursuant to Section 252(b) of the Telecommunications Act of 1996 (TA96 or the Act) and Section 62-110(f1) of the North Carolina General Statutes. On May 27, 1999, ICG Telecom Group, Inc. (ICG) filed a Petition in this docket which initiated this proceeding. By its Petition, ICG requested that the Commission arbitrate certain terms and conditions with respect to interconnection between itself as the petitioning party and BellSouth Telecommunications, Inc. (BellSouth).

The purpose of this arbitration proceeding is for the Commission to resolve the issues set forth in the Petition and Responses. 47 U.S.C.A. Section 252(b)(4)(C). Under the Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission (FCC) regulations pursuant to Section 252. Additionally, the Commission shall establish rates according to the provisions in 47 U.S.C.A. Section 252(d) for interconnection, services or network elements, and shall provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C.A. Section 252(c).

Pursuant to Section 252 of TA96, the FCC issued its First Report and Order in CC Docket Numbers 96-98 and 95-185 on August 8, 1996 (Interconnection Order). The Interconnection Order adopted a forward-looking incremental costing methodology for pricing unbundled network elements (UNEs) which an incumbent local exchange company (ILEC) must sell new entrants, adopted certain pricing methodologies for calculating wholesale rates on resold telephone service, and provided proxy rates for State Commissions that did not have appropriate costing studies for UNEs or wholesale service. Several parties, including this Commission, appealed the Interconnection Order and on October 15, 1996, the United States Court of Appeals for the Eighth Circuit issued a stay of the FCC's pricing provisions and its "pick and choose" rule pending the outcome of the appeals.

The July 18, 1997 ruling of the Eighth Circuit, as amended on rehearing October 14, 1997, was largely in favor of state regulatory commissions and local phone companies and adverse to the FCC and potential competitors, primarily long distance carriers. The Eight Circuit held that 47 U.S.C.A. Sections 251 and 252 "authorize the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act." The Court of Appeals also vacated the FCC's "pick and choose rule." Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

On January 25, 1999, the United States Supreme Court entered its Opinion in AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999). The Supreme Court held, in pertinent part, that (1) the FCC has jurisdiction under Sections 251 and 252 of the Act to design a pricing methodology and adopt pricing rules; (2) the FCC's rules governing unbundled access are, with the exception of Rule 319, consistent with the Act; (3) it was proper for the FCC in Rule 319 to include operator services and directory assistance, operational support systems, and vertical switching functions such as caller I.D., call forwarding, and call waiting within the features and services that must be provided by competitors; (4) the FCC did not adequately consider the Section 251(d)(2) "necessary and impair" standards when it gave requesting carriers blanket access to network elements in Rule 319; (5) the FCC reasonably omitted a facilities-ownership requirement on requesting carriers; (6) FCC Rule 315(b), which forbids ILECs to separate already-combined network elements before leasing them to competitors, reasonably interprets Section 251(c)(3) of the Act, which establishes the duty to provide access to network elements on nondiscriminatory rates, terms, and conditions and in a manner that allows requesting carriers to combine such elements; and (7) FCC Rule 809 (the "pick and choose" rule), which tracks the pertinent language in Section 252(i) of the Act almost exactly, is not only a reasonable interpretation of the Act, it is the most readily apparent. The Supreme Court remanded the cases back to the Eighth Circuit Court of Appeals for proceedings consistent with its opinion.

On June 10, 1999, the Eighth Circuit Court of Appeals entered an Order on remand in response to the Supreme Court's decision which, in pertinent part, reinstated FCC Rules 501-515, 601-611, and 701-717 (the pricing rules), Rule 809 (the "pick and choose" rule), and Rule 315(b) (ILECs shall not separate requested network elements which are currently combined). The Eighth Circuit also vacated FCC Rule 319 (specific unbundling requirements). The Court set a schedule for briefing and oral argument of those issues which it did not address in its initial opinion because of its ruling on the jurisdictional issues. The Court also requested the parties to address whether it should take any further action with respect to FCC Rules 315(c) - (f) regarding unbundling requirements. Iowa Utilities Board v. FCC, ____ F.3d ____ (Order Filed June 10, 1999).

By Order dated June 8, 1999, the Commission set this matter for hearing on July 6, 1999. By Order dated June 17, 1999, the Commission rescheduled the hearing in this matter for August 2, 1999.

On July 14, 1999, the Commission issued an Order stating that it would not consider the three issues presented by ICG that dealt with UNEs.

At the start of the hearing, ICG and BellSouth presented a Statement of Stipulation, which withdrew from consideration ten of the remaining twenty-three issues for which arbitration had been requested.

At the hearing which began as rescheduled on August 3, 1999, ICG offered the direct and rebuttal testimony of Karen Notsund, Senior Director of Governmental Affairs for ICG; the direct testimony of Phillip Jenkins, Senior Director of Engineering and Operations for the Southeast Region for ICG; the direct, supplemental, and rebuttal testimony of Michael Starkey, President of Quantitative Solutions, Inc., a consulting firm; and the direct and rebuttal testimony of Cindy Z. Schonhaut, Executive Vice President for

Government and Corporate Affairs for ICG. BellSouth offered the direct and supplemental testimony of Alphonso J. Varner, Senior Director for State Regulatory Affairs.

WHEREUPON, based upon a careful consideration of the entire record in this arbitration proceeding, the Commission now makes the following

## FINDINGS OF FACT

1. The parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to Internet service providers (ISPs) at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by this Order, subject to true-up at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

2. ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, ICG is entitled to compensation at the tandem interconnection rate (in addition to the other appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

3. The Commission declines to decide at this time whether BellSouth should be required to commit to provisioning the requisite network buildout and necessary support. The Commission encourages BellSouth and ICG to continue to negotiate on this issue. Further, the Commission notes that since a similar provision is found in BellSouth's Revised Statement of Generally Available Terms (SGAT) and at least one interconnection agreement, it would appear reasonable for a similar provision to be voluntarily included in the BellSouth/ICG interconnection agreement.

4. The issue of performance measurements and liquidated damages has been, in essence, withdrawn from the arbitration and accordingly is not in need of resolution in this docket. Further, the Commission will create a new docket, Docket No. P-100, Sub 133k, and issue an Order in that docket establishing the generic docket and requesting that the industry, the Public Staff, the Attorney General, and any other interested parties form a Task Force to attempt to agree on all potential issues concerning performance measurements and enforcement mechanisms. Further, the Commission will issue an Order in Docket No. P-100, Sub 133i (AT&T's Petition for Third-Party Testing) stating that the Commission is investigating performance measurements in a generic docket as a first step, but will keep the third-party testing docket open for future consideration.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

**MATRIX ISSUE NOS. 1 AND 8:** Until the FCC adopts a rule with prospective application, should dial-up calls to ISPs be treated as if they were local calls for the purposes of reciprocal compensation?

### POSITIONS OF PARTIES

**ICG:** Yes. Until the FCC adopts a rule of prospective application, reciprocal compensation is appropriate for calls to ISPs. In the meantime, the FCC's Declaratory Ruling clearly contemplates that state commissions may adopt interim reciprocal compensation arrangements. ICG incurs costs on behalf of BellSouth whenever it terminates calls originated by BellSouth's end users to ISPs served by ICG. Without payment of reciprocal compensation, ICG will not receive compensation at all until the FCC adopts a prospective compensation rule at some indefinite point in the future. ISPs are an important market segment for competing local providers (CLPs) which is well on its way to effective competition. Eliminating ICG's ability to recover its cost for transport and delivery of BellSouth-originated calls to ICG-served ISPs will negatively impact that competition.

Originally, ICG made an adjusted call length (ACL) proposal for development of a reciprocal compensation rate applicable to voice and Internet calls. The ACL proposal spread the set up costs of a call over a longer hold time to derive a per-minute cost for all calls to be more indicative of current traffic patterns. The ACL proposal assumed that all calls were longer and thus derived a single compensation rate ($0.0048 per minute) that would apply to all calls.

However, ICG abandoned this proposal and now advocates that ILECs and CLPs should be compensated for transport and delivery of ISP-bound calls based on the "elemental" rates established in the UNE docket--namely, transport, end office, and tandem switching. ICG argued that such a total element long-run incremental cost (TELRIC)-based compensation mechanism is more likely to be consistent with whatever is ultimately adopted by the FCC.

ICG criticized BellSouth's proposal for an inter-carrier compensation mechanism based on the access charge regime. The FCC has repeatedly and explicitly rejected the proposition that ISPs are purchasers of access services. Similarly, ICG also rejected the view that carriers should simply track ISP traffic and apply the rate ultimately adopted retroactively. This is tantamount to ignoring the issue and puts an unacceptable burden on fledgling competitors.

**BELLSOUTH:** No. The FCC's Declaratory Ruling confirmed unequivocally that the FCC has and will exercise jurisdiction over ISP traffic as interstate, not local. Under the Act and the FCC rules, only local traffic is subject to reciprocal compensation obligations.

BellSouth proposed an inter-carrier compensation plan which it contended was more in line with the interstate access nature of ISP traffic. BellSouth proposed that the terminating carrier should share 9.3% of the revenue derived from a call with the carrier originating the call. This figure represents half of the switching and transport portion of average voice grade traffic.

**PUBLIC STAFF:** Yes. The Commission determined in its February 26, 1998, Order in Docket No. P-55, Sub 1027, that calls to ISPs would be treated as local and therefore subject to reciprocal compensation. In its Declaratory Ruling, the FCC not only left such determinations undisturbed but explicitly allowed for the prospective requirement of reciprocal compensation in arbitration proceedings.

## DISCUSSION

Testimony regarding this issue was presented by ICG witnesses Starkey and Schonhaut and BellSouth witness Varner.

The issue of reciprocal compensation for ISP-bound traffic is an exceedingly complex one. This arbitration is the first opportunity that the Commission has had since the FCC's Declaratory Ruling released on February 26, 1999, in CC Docket Nos. 96-98 and 99-68 to address what should happen in the interim period between that ruling and the point at which the FCC will presumably furnish further guidance.

The Declaratory Ruling has plainly held that ISP-bound traffic is largely jurisdictionally interstate. The Declaratory Ruling has also plainly held that the FCC will decline "to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism." (Paragraph 21). The FCC further stated at Paragraph 25, that "[e]ven where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic." The Declaratory Ruling is both a statement of principle — that ISP traffic is interstate — and a concession to practicality — that previous state decisions and interim period decisions not necessarily consistent with this principle will not be disturbed.

The Commission commends ICG and BellSouth for their efforts in presenting interim proposals for ISP compensation in response to the Commission's June 16, 1999, Order Concerning Interim Proposals for Compensation in which the Commission asked the parties for "creative thinking" concerning interim prospective compensation mechanisms for ISP traffic which would be subject to true-up. Of the proposals received from the parties, the Commission believes that ICG's proposal, which is based on UNE rates, has the greater merit.

In response to a September 29, 1999, data request from the Chair filed on October 11, 1999, the parties indicated that, although they had not agreed upon a rate structure for reciprocal compensation for local traffic, they had agreed on a rate level.[1] The parties now agree that the rates applicable to reciprocal compensation should be the interim elemental rates as ordered by the Commission in Docket No. P-100, Sub 133d, subject to true-up when the Commission issues final rates, under the same terms as those in the current Agreement between the parties.[2]

Thus, the parties have agreed on a proposal for reciprocal compensation for local traffic which is very similar to that proposed by ICG as an interim measure for ISP traffic. Both proposals are based on the UNE rates.

The Commission believes that, in light of the complexity of the task of arriving at a separate interim rate for ISP traffic, the uncertainty as to the substance of the FCC's future decision, and the relative shortness of time in which any interim proposal would be in effect, the better course of action is to require the parties to pay inter-carrier compensation for dial-up calls to ISPs at the same level and in the same manner that the parties have agreed upon for reciprocal compensation for local traffic and as determined by the Commission's Order in this Order[3]. The ISP rate would be subject to true-up based upon the FCC's future decision and this Commission's Order pursuant to it.

The Commission believes that this course of action is preferable to simply keeping track of the minutes for settlement at a later date. The latter proposal may adversely affect competition because CLPs such as ICG will not have the "bird in the hand" to pay their

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[1] Tandem switching as part of the rate structure is addressed in Issue No. 2. There are four elements applicable to reciprocal compensation — the end office switch element, the tandem switching element, the common transport element, and the common transport facilities termination element. ICG contends that it should recover the sum of the four elements while BellSouth believes that ICG is not entitled to the tandem switching element.

[2] These rates are: End Office Switching, $0.004 per minute of use (mou); Tandem Switching, $0.0015 per mou; Common Transport, $0.00004 per mile per mou; and Common Transport Facilities Termination, $0.00036 per mou. (Dedicated facilities termination may be used instead of common transport with facilities' termination).

[3] That is, the applicable rate structure for reciprocal compensation tandem switching as determined elsewhere in this Order. It is the Commission's intent that the ISP inter-carrier compensation rate track the reciprocal compensation rate exactly until such point as the Commission has ruled pursuant to the FCC's future ISP Order.

bills, even while they continue to incur costs. At the same time, the application of the reciprocal compensation rate for ISP traffic as an interim inter-carrier compensation mechanism is ultimately just because there will come a time when the parties must settle up based on the new rule. While not perfect, this approach is the one that does the least harm to the companies and to the public interest in a competitive marketplace.

## CONCLUSIONS

The Commission concludes that the parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by the Commission's Order in this docket, subject to true-up at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

MATRIX ISSUE NO. 7: For purposes of reciprocal compensation, should ICG be compensated for end office, tandem, and transport elements of termination where ICG's switch services a geographic area comparable to the area served by BellSouth's tandem switch?

## POSITIONS OF PARTIES

ICG: Yes. FCC Rule 51.711 requires that where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent, the appropriate rate for the interconnecting carrier's additional cost is the incumbent's tandem interconnection rate. To be eligible for this rate, the FCC's Order requires only that the interconnecting carrier's switch serve the same geographical area as the incumbent's switch. ICG deploys a single switch to service its Charlotte market served by a common transport network. The advent of fiber optic technologies and multi-function switching platforms has allowed ICG to serve an entire statewide or local access and transport area (LATA)-wide customer base from a single switch. The ability to aggregate unbundled local loops from collocations in a number of ILEC central offices while transporting that traffic to a single location permits ICG to originate, switch, and terminate traffic between callers many miles apart. ICG's switch performs the same functionality as the BellSouth tandem switch. ICG's Lucent 5ESS switching platform meets the definition and performs the same functions identified within the Local Exchange Routing Guide (LERG) for a tandem office and for a Class 4/5 switch.

BELLSOUTH: No. If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth will pay the tandem interconnection rate only if ICG's switch is identified in the LERG as a tandem. ICG is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide. Therefore, ICG's request for tandem switching compensation when tandem switching is not performed should be denied.

**PUBLIC STAFF:** The Public Staff did not address this issue in its Proposed Order.

## DISCUSSION

Testimony on this issue was presented by ICG witness Starkey and BellSouth witness Varner.

BellSouth witness Varner stated that "BellSouth's position is that if a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth will pay the tandem interconnection rate only if ICG's switch is identified in the local exchange routing guide ("LERG") as a tandem." Witness Varner explained that a tandem switch connects one trunk to another trunk and is an intermediate switch or connection between an originating telephone call location and the final destination of the call. An end office switch is connected to a telephone subscriber and allows the call to be originated or terminated. If ICG's switch is an end office switch, then it is handling calls that originate from or terminate to customers served by that local switch, and thus ICG's switch is not providing a tandem function. Witness Varner contended that ICG is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide.

ICG emphasized that its switch serves a geographic area comparable to that of BellSouth's tandem. ICG witness Starkey testified that "ICG, like many new entrant competing local exchange companies (CLECs), generally deploys its individual switches to cover a large geographic area served by a common transport network. The advent of fiber optic technologies and multi-function switching platforms have, in many cases, allowed carriers like ICG to serve an entire statewide or local access and transport area (LATA)-wide customer base from a single switch platform. Likewise, the ability to aggregate unbundled loops from collocations within a number of ILEC central offices while transporting that traffic to a single location allows these carriers to originate, switch and terminate traffic between callers located many miles apart with a single switch." Witness Starkey further stated that ". . . ICG uses its single switching platform not only to transfer calls between multiple ILEC central offices and the customers that are served by those central offices, but also to transfer calls between the ICG and ILEC network. In this way, the ICG switch provides services to customers in a geographic area at least as large as that serviced by the ILEC tandem."

ICG further contended that its switch performs many of the same functions that the ILEC's tandem performs. ICG witness Starkey testified that ". . . in the case of ICG, its switch also performs many of the same functions that the ILEC tandem performs, further indicating that tandem termination rates are appropriately paid for its use." In addition, witness Starkey stated that "Tandem switches (what are commonly called Class 4 switches in the traditional AT&T hierarchy), generally aggregate toll traffic from a number of central office switches (Class 5 switches) for purposes of passing that traffic to the long distance network. The tandem switch is also a traditional focal point for other purposes as well, including the aggregation and processing of operator services traffic, routing traffic that is to be transferred between the trunk groups of two separate carriers and measuring and recording toll traffic detail for billing. While ILECs have traditionally employed two separate switches to accomplish these Class 4 and Class 5 functions, ICG's Lucent 5ESS platform performs all of these functions in addition to a number of others within the same switch."

Rule 51.711(a)(3) of the FCC's Interconnection Order states "Where the switch of a carrier other than an Incumbent LEC serves a geographic area comparable to the area served by the Incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate."

The Commission is of the opinion that ICG has presented sufficient evidence to show that its switch serves a geographic area comparable to that of BellSouth's tandem switch. The Commission is also of the opinion that ICG has shown that there is comparable functionality between the ILEC's tandem and ICG's switch even though the FCC Interconnection Order requires only that a CLP's switch serve a geographic area comparable to that served by an ILEC's tandem to qualify for the tandem termination rates.

## CONCLUSIONS

The Commission concludes that ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, the Commission finds that ICG is entitled to compensation at the tandem interconnection rate (in addition to the other appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

**MATRIX ISSUE NO. 11**: Should BellSouth be required to commit to provisioning the requisite network buildout and necessary support when ICG agrees to enter into a binding forecast of its traffic requirements in a specified period?

## POSITIONS OF PARTIES

ICG: Yes. ICG stated that it relies on BellSouth's end office trunks to deliver traffic to ICG's switch and that those trunks are the responsibility of BellSouth to provision and administer. ICG maintained that it provides BellSouth with quarterly traffic forecasts to assist BellSouth in planning for facilities to handle traffic between the BellSouth and the ICG networks. ICG stated that BellSouth is under no obligation to add more end office trunks if ICG's forecast indicates that additional trunking is necessary. ICG stated that it wants the option of requiring BellSouth to provision additional end office trunks as dictated by ICG's forecast. ICG maintained that in exchange, it would agree to pay BellSouth for any trunks which are not fully utilized as indicated by the forecast. ICG argued that under its proposal, BellSouth would not assume any risk that additional trunks are underutilized and that ICG will assume all of this risk. ICG assured that if the Commission ordered this provision, ICG expects to use it sparingly. In fact, in its Brief, ICG stated that it anticipates only using the binding forecast mechanism where it is (1) confident of substantial additional growth and (2) concerned that, absent a binding commitment from BellSouth to timely provision the necessary trunks, there would be an unacceptable risk of blockage of incoming calls to ICG's customers because of BellSouth's inability to handle the traffic flow. ICG also mentioned that BellSouth's Revised SGAT filed in September 1998 contains a binding forecast provision which largely mirrors ICG's proposal.

ICG argued that the Commission has the jurisdiction to require a binding forecast provision as proposed by ICG. ICG stated that Section 251(c)(2) of the Act states that ILECs have the obligation to provide interconnection: (1) for the transport and routing of telephone exchange traffic; (2) at any technically feasible point; (3) at least equal in quality to that provided by the ILEC to itself or an affiliate; and (4) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. ICG maintained that its proposal is clearly for the transport and routing of telephone exchange traffic; and that technical feasibility and equality of interconnection are not at issue. ICG stated that the only issue raised by its proposal is whether the rates, terms, and conditions are just, reasonable, and nondiscriminatory; ICG maintained that its proposal meets this test. ICG also noted that the BellSouth/KMC Telecom, Inc. (KMC) interconnection agreement filed with the Commission on March 21, 1997 contains a provision substantially identical to the one in the SGAT. ICG stated that as was provided in both the SGAT and KMC binding forecast provisions, the specific terms and conditions of the binding forecast should be negotiated between the parties. ICG recommended that the Commission conclude that it does have jurisdiction under Sections 251 and 252 of the Act to require BellSouth to include a binding forecast provision in the parties' interconnection agreement. Further, ICG recommended that the Commission conclude that BellSouth should be required to include in its interconnection agreement with ICG a binding forecast provision like the ones included in BellSouth's Revised SGAT and in the BellSouth/KMC interconnection agreement. ICG recommended that the provision should require the parties to negotiate in good faith the specific terms and conditions of the binding forecast.

BELLSOUTH: No. BellSouth stated that although it has been analyzing such an offering, it is not required by the Act to commit to a binding forecast with any CLP, including ICG. BellSouth argued that the Commission should not impose a burden on BellSouth that is not required by the Act. BellSouth maintained that while the specifics of such an arrangement have not been finalized, BellSouth is agreeable to continue to negotiate with ICG on this issue. Additionally, BellSouth stated that the standard for arbitration imposed on the Commission is set forth in Section 252(c) of the Act. Specifically, Section 252(c)(1) states that the Commission shall "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251." BellSouth stated that on cross-examination, ICG witness Phillip Jenkins agreed that BellSouth is not required by Sections 251 or 252 of the Act to provide binding forecasts. Therefore, BellSouth maintained, the Commission cannot impose such an obligation on BellSouth and that this topic is not appropriate for arbitration.

**PUBLIC STAFF:** No. The Public Staff stated that while such a clause would not be an inappropriate term in an interconnection agreement, the Public Staff does not believe that the Act mandates a requirement of this sort. The Public Staff maintained that the issue is not appropriate for arbitration and that the issue of whether to provide a guarantee of the sort requested by ICG, and what to charge for such a guarantee, are essentially business decisions and matters for negotiation between the parties. Therefore, the Public Staff recommended that the Commission decline to require commitment to a binding forecast and that the Commission encourage the parties to continue negotiations toward this goal.

**DISCUSSION**

Testimony on this issue was presented by ICG witness Jenkins and BellSouth witness Varner.

ICG stated in its Brief that it needs some way of ensuring that BellSouth will provision adequate trunking facilities to carry calls from BellSouth's customers to ICG's growing customer base. Further, ICG argued that this matter is of critical importance because if BellSouth's customers are unable to reach ICG's customers as a result of a blockage on BellSouth's network due to a lack of capacity, it is ICG that will be seen as the cause of the problem. ICG maintained that its binding forecast proposal would obligate BellSouth to, in a timely manner, provision the trunking necessary to carry a forecasted level of traffic and that this would ensure that there is adequate capacity in BellSouth's network to meet demand. ICG stated that this in turn would ensure that there are no blockages; if there were blockages this would frustrate not only ICG's customers who would be unable to receive calls from BellSouth customers but also BellSouth's customers who would be unable to place the calls.

ICG witness Jenkins stated in the summary of his prefiled testimony that ICG is not asking BellSouth to take any risk. Witness Jenkins stated that ICG is willing to commit to BellSouth for a specified volume of interconnection trunks as a part of its binding forecast, whether or not ICG's traffic achieves the forecasted demand. Additionally, witness Jenkins argued that if the traffic volume falls short of the forecasts, ICG will pay BellSouth fully for the full cost of the unused trunks; in other words, ICG will take all of the risk, and BellSouth will assume no risks. On cross-examination, witness Jenkins denied that there is anything specific in Sections 251 and 252 of the Act requiring BellSouth to provide binding forecasts to ICG.

The Commission declines to decide at this time whether the Act mandates a binding forecast requirement of the sort requested by ICG. However, the Commission does note that ICG's request for this type of requirement does not appear inappropriate. In fact, the Commission notes that a similar provision can be found in BellSouth's Revised SGAT and the BellSouth/KMC interconnection agreement. Additionally, the Commission notes that BellSouth has specifically stated that it is agreeable to continue to negotiate on this term. Although the Commission will not require BellSouth to commit to provisioning the requisite network buildout and necessary support, the Commission strongly encourages BellSouth and ICG to continue to negotiate on this issue.

## CONCLUSIONS

The Commission declines to decide at this time whether BellSouth should be required to commit to provisioning the requisite network buildout and necessary support. The Commission strongly encourages BellSouth and ICG to continue to negotiate on this issue. Further, the Commission notes that since a similar provision is found in BellSouth's Revised SGAT and at least one interconnection agreement, it would appear reasonable for a similar provision to be voluntarily included in the BellSouth/ICG interconnection agreement.

## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

**MATRIX ISSUE NO. 5:** Should BellSouth be subject to liquidated damages for failing to meet the time intervals for provisioning UNEs?

**MATRIX ISSUE NO. 19:** Should BellSouth be required to pay liquidated damages when BellSouth fails to install, provision, or maintain any service in accordance with the due dates set forth in an interconnection agreement between the parties?

**MATRIX ISSUE NO. 20:** Should BellSouth continue to be responsible for any cumulative failure in a one-month period to install, provision, or maintain any service in accordance with the due dates specified in the interconnection agreement with ICG?

**MATRIX ISSUE NO. 21:** Should BellSouth be required to pay liquidated damages when BellSouth's service fails to meet the requirements imposed by the interconnection agreement with ICG (or the service is interrupted causing loss of continuity or functionality)?

**MATRIX ISSUE NO. 22**: Should BellSouth continue to be responsible when the duration of service's failure exceeds certain benchmarks?

**MATRIX ISSUE NO. 23**: Should BellSouth be required to pay liquidated damages when BellSouth's service fails to meet the grade of service requirements imposed by the interconnection agreement with ICG?

**MATRIX ISSUE NO. 24**: Should BellSouth continue to be responsible when the duration of service's failure to meet the grade of service requirements exceeds certain benchmarks?

**MATRIX ISSUE NO. 25**: Should BellSouth be required to pay liquidated damages when BellSouth fails to provide any data in accordance with the specifications of the interconnection agreement with ICG?

**MATRIX ISSUE NO. 26**: Should BellSouth continue to be responsible when the duration of its failure to provide the requisite data exceeds certain benchmarks?

## POSITIONS OF PARTIES

ICG: Yes. ICG maintained that the Commission has the jurisdiction to adopt performance measurements and enforcement mechanisms. ICG stated that Section 251 of the Act and the FCC's implementing rules require that an ILEC provide interconnection and access to UNEs and resale at parity to that which it provides itself. Additionally, ICG maintained that if the Commission were to decide to adopt such measurements and enforcement mechanisms, it would have the legal authority to do so since G.S. 62-30 and G.S. 62-32 provide the Commission with broad powers to supervise and control public utilities. Further, ICG state` that G.S. 62-110(f1) provides the Commission with statutory authority to "provide reasonable interconnection of facilities" between carriers; "to provide reasonable unbundling of essential facilities"; and "to carry out the provisions of this subsection in a manner consistent with the public interest . . ." ICG further stated that the FCC has encouraged state commissions to adopt performance measurements and that the Commission's decision in the AT&T Communications of the Southern States, Inc. (AT&T)/BellSouth arbitration not to arbitrate this issue at that time does not cut off the Commission's jurisdiction to consider the issue now.

ICG also argued that performance measurements and enforcement mechanisms are necessary to ensure that interconnection, access to UNEs, and resale are provided at parity with what BellSouth provides itself or its affiliates. ICG maintained that as a facilities-based carrier, it is dependent upon BellSouth for essential network elements. ICG maintained that because of the industry-wide implications of the performance measurements and damages issues, they should be considered in a generic proceeding with the results of the dockets at the California and Texas Public Service Commissions to be the starting point for such a proceeding. ICG concluded that the posture of this issue does not require any Commission action in this docket and that ICG has effectively withdrawn this issue from the arbitration. ICG recommended that the Commission issue an Order in the local competition docket (P-100, Sub 133d) soliciting comments on initiation of a generic proceeding to consider performance measurements and enforcement mechanisms.

**BELLSOUTH:** No. BellSouth stated that the issues of performance measurements and liquidated damages are not appropriate for arbitration. BellSouth stated that the Commission lacks the statutory authority to award or order liquidated damages. BellSouth maintained that state law and Commission procedures are available, and perfectly adequate, to address any breach of contract situation should it arise. BellSouth concluded that the issue of liquidated damages was previously addressed by the Commission in the AT&T/BellSouth arbitration (Docket No. P-140, Sub 50) and that in that case, the Commission concluded that it was not appropriate for the Commission to resolve the issue and that the parties should negotiate reasonable terms and conditions. BellSouth argued that in the instant proceeding, the Commission should find that it lacks the statutory authority to impose liquidated damages on a party to an interconnection agreement for the reasons generally discussed by BellSouth in its Brief.

Concerning performance measurements, BellSouth maintained that this is an industry-wide issue and should not be addressed by the Commission in a two-party arbitration proceeding. BellSouth argued that it is more appropriate to address the issue of performance measurements in the context of BellSouth's Section 271 proceeding, Docket No. P-55, Sub 1022. BellSouth recommended that the Commission agree with BellSouth that this issue is inappropriate in a two-party arbitration proceeding, and to the extent the Commission desires to address performance measurements in the future, it should do so in a more generic context so as to involve the entire industry.

**PUBLIC STAFF:** The Public Staff recommended that the Commission state that it will take this matter under consideration, but will not rule at this time.

## DISCUSSION

Testimony on this issue was presented by ICG witness Notsund and BellSouth witness Varner.

ICG has conceded that this issue does not require any Commission action in this docket and that it has effectively withdrawn this issue from the arbitration. ICG stated in its Brief that the issue is not appropriate for bilateral resolution because it is one of industry-wide relevance and importance. The issue that does remain to be addressed is whether the Commission should establish a generic proceeding to consider performance measurements and enforcement mechanisms. ICG witness Notsund confirmed when asked by Commissioner Ervin that the only relief ICG is requesting that the Commission provide in this proceeding with respect to performance measurements is to convene a generic proceeding.

ICG recommended that the Commission issue an Order in the local competition docket (Docket No. P-100, Sub 133d) soliciting comments on the initiation of a generic proceeding to consider performance measurements and enforcement mechanisms. ICG stated in its Brief that the Commission first addressed the issue of performance standards in the 1997 BellSouth/AT&T arbitration. ICG maintained that by the terms of the Commission's Arbitration Order, the Commission did not foreclose further consideration of performance measurements and reserved the right to revisit the issue. ICG argued that a great deal of experience has been gained by the Commission and the CLP industry since the BellSouth/AT&T Arbitration Order was issued. ICG stated that in the two years since the release of that Arbitration Order, the Commission and the industry have gained the expertise necessary to allow the Commission to revisit the question of performance standards. ICG maintained that the experience of ICG and other CLPs has shown that performance standards are badly needed and are no longer premature. ICG further stated in its Brief that when BellSouth's performance to ICG falls short, ICG's performance to its end users often also suffers. ICG argued that, when BellSouth fails to perform installations in a timely manner, it is the end user who is left waiting. Further, ICG stated, when BellSouth fails to perform a coordinated cutover, it is the end user who experiences a service disruption. ICG maintained that, when any of these things happen, the customer has no way of knowing that it is BellSouth's fault; all the customer knows is that it is ICG's customer and in the customer's eyes, ICG is responsible. ICG asserted that ICG and other CLPs need the performance measurements stick to compel BellSouth to perform its obligations in a satisfactory manner. Finally, ICG stated in its Brief that even BellSouth has acknowledged the need for performance standards and enforcement mechanisms. ICG maintained that in a filing with the FCC made in conjunction with its efforts to win Section 271 approval, BellSouth has proposed a set of performance measurements to assure nondiscriminatory access to UNEs. ICG stated that the BellSouth proposal includes payments which BellSouth would make to CLPs for failure to meet performance benchmarks.

BellSouth recommended that to the extent that the Commission desires to address performance measurements, it should do so in a more generic context so as to involve the entire industry. BellSouth further stated that it is more appropriate to address performance measurements in the context of BellSouth's Section 271 proceeding, Docket No. P-55, Sub 1022.

The Public Staff recommended that the Commission take this matter under consideration but not rule on it at this time.

The Commission concludes that it is appropriate at this time for the Commission to institute a generic proceeding to consider performance measurements and enforcement mechanisms. The Commission notes that state regulatory commissions in several BellSouth states have addressed performance measurements. Therefore, the Commission will establish a newly created generic docket devoted to performance measurements and enforcement mechanisms, Docket No. P-100, Sub 133k. The Commission will issue an Order in Docket No. P-100, Sub 133k creating the generic docket and requesting that the industry, the Public Staff, the Attorney General, and any other interested parties form a Task Force.

Finally, the Commission notes that in May 1999, AT&T filed a Petition for the Establishment of a Third-Party Testing Program of Operations Support Systems (OSS) with the Commission (Docket No. P-100, Sub 133l). In conjunction with opening a generic docket to address performance measurements, the Commission will also issue an Order in Docket No. P-100, Sub 133l stating that the Commission is investigating performance measurements in a generic docket as a first step, but will keep the third-party testing docket open for future consideration.

## CONCLUSIONS

The Commission concludes that this issue has been, in essence, withdrawn from the arbitration and accordingly is not in need of resolution in this docket. Further, the Commission will create a new docket, Docket No. P-100, Sub 133k, and issue an Order in that docket establishing the generic docket and requesting that the industry, the Public Staff, the Attorney General, and any other interested parties form a Task Force to attempt to agree on all potential issues concerning performance measurements and enforcement mechanisms. Further, the Commission will issue an Order in Docket No. P-100, Sub 133l (AT&T's Petition for Third-Party Testing) stating that the Commission is investigating performance measurements in a generic docket as a first step, but will keep the third-party testing docket open for future consideration.

IT IS, THEREFORE, ORDERED as follows:

1. That the parties shall, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by this Order, subject to true-up at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

2. That ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, ICG is entitled to compensation at the tandem interconnection rate (in addition to the other

appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

3. That the Commission declines to decide at this time whether BellSouth should be required to commit to provisioning the requisite network buildout and necessary support. BellSouth and ICG are encouraged to continue to negotiate on this issue.

4. That the issue of performance measurements and liquidated damages has been, in essence, withdrawn from the arbitration and accordingly is not in need of resolution in this docket. Further, the Commission will create a new docket, Docket No. P-100, Sub 133k, and issue an Order in that docket establishing the generic docket and requesting that the industry, the Public Staff, the Attorney General, and any other interested parties form a Task Force to attempt to agree on all potential issues concerning performance measurements and enforcement mechanisms. Further, the Commission will issue an Order in Docket No. P-100, Sub 133i (AT&T's Petition for Third-Party Testing) stating that the Commission is investigating performance measurements in a generic docket as a first step, but will keep the third-party testing docket open for future consideration.

5. That BellSouth and ICG shall prepare and file a Composite Agreement in conformity with the conclusions of this Order not later than 45 days after the date of issuance of this Order. Such Composite Agreement shall be in the form specified in paragraph 4 of Appendix A in the Commission's August 19, 1996, Order in Docket Nos. P-140, Sub 50, and P-100, Sub 133, concerning arbitration procedure (Arbitration Procedure Order).

6. That, not later than 30 days from the date of issuance of this Order, a party to the arbitration may file objections to this Order consistent with paragraph 3 of the Arbitration Procedure Order.

7. That, not later than 30 days from the date of issuance of this Order, any interested person not a party to this proceeding may file comments concerning this Order consistent with paragraphs 5 and 6, as applicable, of the Arbitration Procedure Order.

8. That, with respect to objections or comments filed pursuant to decretal paragraphs 6 or 7 above, the party or interested person shall provide with its objections or comments an executive summary of no greater than one and one-half pages single-spaced or three pages double-spaced containing a clear and concise statement of all material objections or comments. The Commission will not consider the objections or comments of a party or person who has not submitted such executive summary or whose executive summary is not in substantial compliance with the requirements above.

9. That parties or interested persons submitting Composite Agreements, objections or comments shall also file those Composite Agreements, objections or comments, including the executive summary required in decretal paragraph 8 above, on an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files created or saved in WordPerfect format.

ISSUED BY ORDER OF THE COMMISSION.

This the 4th day of November, 1999.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

ba110399.02

# GLOSSARY OF ACRONYMS
## Docket No. P-582, Sub 6

| | |
|---|---|
| ACL | Adjusted Call Length |
| Act | Telecommunications Act of 1996 |
| AT&T | AT&T Communications of the Southern States, Inc. |
| BellSouth | BellSouth Telecommunications, Inc. |
| CLP | Competing Local Provider |
| CLEC | Competing Local Exchange Company (Carrier) |
| Commission | North Carolina Utilities Commission |
| FCC | Federal Communications Commission |
| ICG | ICG Telecom Group, Inc. |
| ILEC | Incumbent Local Exchange Company (Carrier) |
| ISP | Internet Service Provider |
| ITC^DeltaCom | ITC^DeltaCom Communications, Inc. |
| KMC | KMC Telecom, Inc. |
| LATA | Local Access and Transport Area |
| LEC | Local Exchange Company (Carrier) |
| LERG | Local Exchange Routing Guide |
| MOU | Minute of Use |
| OSS | Operations Support Systems |
| Public Staff | Public Staff-North Carolina Utilities Commission |
| SGAT | Statement of Generally Available Terms |
| TA96 | Telecommunications Act of 1996 |
| TELRIC | Total Element Long-Run Incremental Cost |
| UNE | Unbundled Network Element |

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ALABAMA PUBLIC
P.O.
MONTGOMERY, AL

JIM SULLIVAN, PRESIDENT
JAN COOK, ASSOCIATE COMMISSIONER
GEORGE C. WALLACE, JR., ASSOCIATE COMMISSIONER

WALTER L. THOMAS, JR.
SECRETARY

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| In the Matter of: | ) | DOCKET 27069 |
| | ) | |
| Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996 | ) ) ) ) ) ) ) | |

## FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

HEARD: Wednesday August 11, 1999, Commission Hearing Room 904, RSA Union Building, 100 North Union Street, Montgomery, Alabama

BEFORE: The Honorable John A. Garner- Arbitration Facilitator, Mr. David House - Arbitrator, and Jimmy B. Pool, Esq.- Arbitrator

APPEARANCES:

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DOCKET 27069 - #3

675 Peachtree Street,
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## I. INTRODUCTION/BACKGROUND

This arbitration proceeding is pending before the Alabama Public Service Commission (the "Commission") pursuant to Section 252(b) of the Telecommunications Act of 1996 (the "Act")[1]. This proceeding was initiated by ICG Telecom Group, Inc.'s ("ICG") filing of a *Verified Petition For Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.* ("BellSouth") *Pursuant to Section 252(b) of the Telecommunications Act of 1996* (the "Petition") on May 27, 1999. In said Petition, ICG requested that the Commission arbitrate certain terms and conditions with respect to an interconnection agreement between itself as the petitioning party, and BellSouth. On June 21, 1999, BellSouth filed its *Verified Response to ICG's Petition For Arbitration* (the "Response").

In accordance with the Commission's Telephone Rule T-26(C), the Commissioners appointed The Honorable John A. Garner, Administrative Law Judge, as Arbitration Facilitator, and Mr. David House, Public Utilities Auditor III, and Jimmy B. Pool, Esq. as Arbitrators in this Matter (collectively the "Arbitration Panel" or "Panel").

On July 1, 1999, ICG and BellSouth submitted a Joint Motion to Establish a Procedural Schedule. Through a Procedural Ruling issued on July 16, 1999, the Arbitration Panel set forth a discovery schedule, established a Status Conference to be held on July 23, 1999, and ordered the Arbitration hearing to begin on August 9, 1999. On July 8, 1999, a discovery conference was held during which oral presentations concerning outstanding discovery disputes were heard. An Oral Ruling resolving the outstanding discovery disputes was entered on July 9, 1999. The findings rendered in the July 9, 1999 Oral Ruling were ratified by a written ruling issued on July 16, 1999.

On July 23, 1999 the Status Conference was held as scheduled. In an effort to reduce the number of controverted issues, the parties engaged in informal mediation

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[1] Pub. L. No. 104-104, 110 Stat. 56, Codified at 47 U.S.C. §§151 et seq.

immediately following the Status Conference. The mediation was conducted by Ms. Judy McLean, Director of the Commission's Advisory Division.

By agreement of the Arbitration Panel and the parties, the Arbitration hearing was continued until August 11, 1999, to permit the continuation of an informal Mediation session conducted by Ms. McLean. As a result of the mediation efforts of Ms. McLean, and the parties, the list of issues requiring arbitration was reduced from twenty-six (26) to five (5). At the outset of the Arbitration hearing, ICG and BellSouth submitted to the Arbitration Panel a *Statement of Partial Settlement* in which the parties informed the Panel that they had resolved all but the following issues:

1. Until the FCC adopts a rule with prospective application, should dial-up calls to Internet service providers (ISPs) be treated as if they were local calls for purposes of reciprocal compensation?

2. For purposes of reciprocal compensation, should ICG be compensated for end office, tandem and transport elements of termination where ICG's switch serves a geographic area comparable to the area served-by BellSouth's tandem switch?

3. Should BellSouth be required to commit to provisioning the requisite network buildout and necessary support when ICG agrees to enter into a binding forecast of its traffic requirements in a specified period?

4. Should BellSouth be required to provide the "Enhanced Extended Link" as a UNE combination (EEL)?

5. Should volume and term discounts be available for UNEs?

At the August 11, 1999 hearing, ICG offered the testimony of Michael Starkey, President of the telecommunications consulting firm of Quantitative Solutions, Inc.; Philip Jenkins, ICG's Senior Director - Engineering and Operations for the Southeast Region; Bruce Holdridge, Vice President of Government Affairs for ICG Communications, Inc.; and Cindy Schonhaut, Executive Vice President for Government and Corporate Affairs for ICG Communications, Inc. BellSouth offered the testimony of Alphonso Varner, the company's Senior Director for State Regulatory.

At the conclusion of the August 11, 1999 hearing, the parties indicated a preference to submit post-Arbitration hearing briefs. In order to accommodate the filing of those briefs, the parties orally agreed on the record at the August 11, 1999 proceeding to jointly extend the statutory deadline for the Commission's decision in this matter as set forth at 47 U.S.C. §252(b)(4)(C). Both parties submitted simultaneous post-Arbitration hearing briefs.

The Arbitration Panel issued its Arbitration Panel Recommendation and Proposed Order Regarding Interconnection Agreement (the Arbitration Panel's Recommendation) on October 13, 1999. The Arbitration Panel's Recommendation set forth recommendations for the resolution of the issues set forth in the Petition and Response which remained open.

Pursuant to the Commission's Telephone Rule T-26, the Arbitration Panel's Recommendation was served on the parties to the Arbitration as well as all parties on the Commission's Telecommunications service list. Although Telephone Rule T-26(I)(2) allows interested parties who were not parties to the Arbitration to file comments concerning the Arbitration Panel's Recommendation within 10 days, and allows the parties to the Arbitration to submit replies to those comments and any exceptions to the Arbitration Panel's Recommendations in a subsequent 10 day period, the Arbitration Panel accompanied the service of its Recommendation with a Procedural Ruling requiring initial comments to be submitted no later than October 22, 1999. The Procedural Ruling required that reply comments/exceptions by the parties be filed no later than October 28, 1999. As set forth in the Procedural Ruling, the modification of the comment cycles was necessary to accommodate the rendering of a decision by the Commission in this matter at the November 1, 1999 meeting of the Commission.

The Commission received comments from the following interested non-parties: GTE South, Incorporated (GTE); e.spire Communications, Inc. (e.spire); AT&T Communications of the South Central States, Inc. (AT&T); Sprint Communications Company, L.P. (Sprint); a joint filing by Hyperion Communications, Inc./KMC Telecom, Inc.; and a joint filing from MCI WorldCom, Inc./ITC DeltaCom Telecommunications, Inc. In addition, BellSouth and ICG each submitted reply comments/exceptions. The Commission also received a recommendation concerning the findings, conclusions and recommendations of the Arbitration Panel from the Commission's Advisory Division.

After careful consideration of the entire record in this matter including the post-Arbitration hearing briefs filed by the parties, the Arbitration Panel's Recommendation, the comments of the parties and interested non-parties, and the recommendation of the Advisory Division, we render the findings and conclusions set forth below. Due to the fact that we largely concur with the findings, conclusions and recommendations of the Arbitration Panel, we have for the most part adopted the Arbitration Panel's Recommendation as our final Order in this cause. Our specific findings and conclusions as to each issue are, however, specifically set forth.

## II. FINDINGS AND CONCLUSIONS

**ISSUE NO. 1: UNTIL THE FCC ADOPTS A RULE WITH PROSPECTIVE APPLICATION, SHOULD DIAL-UP CALLS TO INTERNET SERVICE PROVIDERS ("ISPs") BE TREATED AS IF THEY WERE LOCAL CALLS FOR PURPOSES OF RECIPROCAL COMPENSATION (PETITION ISSUES 1 AND 8).**

**The ICG Position**

ICG argues that while the FCC found in its *Declaratory Ruling and Notice of Proposed Rulemaking in CC Docket 96-98*, released on February 26, 1999 (the FCC's "*ISP Declaratory Ruling*"), that ISP traffic is mostly interstate in nature, the FCC stated that, until a federal rule is adopted concerning inter-carrier compensation for ISP-bound calls, state commissions have the authority in an arbitration to conclude that reciprocal compensation is an appropriate compensation mechanism. Notwithstanding the jurisdictional nature of ISP-bound calls, ICG argues that the Commission has the authority to set a rate for this traffic by virtue of its 47 U.S.C. §252 authority over interconnection agreements which extends to both intrastate and interstate matters.

ICG points out that the FCC has treated ISP-bound traffic as local for purposes of interstate access charges and in fact stated in the *ISP Declaratory Ruling* that this treatment would suggest that reciprocal compensation is due for such traffic. According to ICG, the FCC has made it clear that the question regarding ISP traffic is not whether compensation will be provided, but what rate of compensation is appropriate.

ICG maintains further that public policy supports payment of reciprocal compensation for ISP-bound traffic. ICG notes that ISPs are an important market segment for competing local exchange carriers ("CLECs") and a segment of the local exchange market that is well on its way toward effective competition. ICG represents that an elimination of its ability to recover its costs for transport and delivery of BellSouth-originated calls to ICG-served ISPs will negatively affect the development of local competition. Starkey, Tr. pp. 53-54.

ICG argues that requiring carriers to pay reciprocal compensation for the transport and delivery of ISP-bound calls is economically efficient. According to ICG, BellSouth should be economically indifferent as to whether BellSouth incurs the transport and delivery costs directly or through a reciprocal compensation arrangement with ICG because BellSouth's rates for transport and delivery are based upon BellSouth's underlying costs. Starkey, Tr. pp. 59-60.

ICG alleges that BellSouth's recommendation for addressing ISP traffic pending adoption of a federal rule is unreasonable. Specifically, ICG asserts that BellSouth's proposal that carriers track ISP traffic and retroactively apply whatever rate is ultimately adopted by the FCC would deprive ICG of compensation for services it provides now, thereby ignoring the time value of money. Schonhaut, Tr. p. 315.

ICG further asserts that there is no guarantee as to when the FCC will adopt a federal rule governing inter carrier compensation for ISP-bound traffic. ICG contends that the FCC has indeed indicated that it may leave this issue to the states to decide. ICG further stresses that there is the possibility, if not the likelihood, that the FCC rule will be prospective in a way that permanently deprives ICG of compensation for traffic carried in the interim between this Commission's ruling and the FCC's ruling. Schonhaut Tr. p. 311.

## The BellSouth Position

According to BellSouth, the FCC's February 26, 1999 *ISP Declaratory Ruling* affirmed that the FCC has, and will, retain jurisdiction over ISP-bound traffic. BellSouth maintains that the FCC has now conclusively established that ISP-bound traffic is non-local interstate traffic due to the fact that most calls to ISPs terminate at distant exchanges in other states as opposed to local exchanges. Since the 47 U.S.C. §251(b)(5) obligation to pay reciprocal compensation has been interpreted by the FCC to apply only to traffic that originates and terminates within the local exchange, BellSouth concludes that interstate ISP traffic is not subject to reciprocal compensation. Given that conclusion, BellSouth urges that there is no basis for requiring a compensation mechanism for ISP-bound traffic in an arbitration conducted pursuant to 47 U.S.C. §252 since that section of the Act only gives state commissions jurisdiction over areas within the scope of 47 U.S.C. §251. Varner, Tr. p. 397.

BellSouth further argues that while the FCC's *ISP Declaratory Ruling* appears to give states authority to create an interim compensation mechanism pending adoption of a federal rule governing that subject, the interim authority granted states by the FCC is being challenged in court[2]. If this challenge is successful, BellSouth contends that the Commission could find that it does not have even interim authority to implement a compensation mechanism for ISP traffic. BellSouth accordingly urges that it would be a wasted effort for the Commission to undertake the establishment of an interim compensation mechanism for ISP traffic under such circumstances. Even if the Commission's interim authority to impose an interim ISP compensation mechanism withstands challenge, BellSouth points out that it will only be valid until the FCC adopts a federal rule.

BellSouth further argues that the Commission should not require reciprocal compensation for ISP-bound traffic under any circumstances because ISP-bound traffic is interstate "access" traffic which is not subject to reciprocal compensation. BellSouth accordingly contends that a portion of the rates that ISPs pay ICG for their monthly business service should be shared with BellSouth as "access" revenues. Varner Tr. p. 421-422.

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[2] Through an appeal of the FCC's *ISP Declaratory Ruling* which is presently pending before United States Court of Appeals for the District of Columbia Circuit (*Bell Atlantic Telephone Companies, et al. v. Federal Communications Commission*, No. 99-1094 (D.C. Cir. March 5, 1999))..

If in spite of the aforementioned arguments, the Commission determines that it has jurisdiction to implement an interim inter-carrier compensation mechanism and that such a mechanism is warranted for ISP-bound traffic, BellSouth urges the implementation of the mechanism proposed by BellSouth witness Varner. Tr. pp. 395-396. The mechanism proposed by Mr. Varner would require the parties to track ISP-bound calls originating on their respective networks on a going-forward basis and to abide by any final and non-appealable FCC ruling on the issue of inter-carrier compensation for ISP calls. Any inter-carrier compensation mechanism established by the FCC would apply retroactively from the date of the interconnection agreement entered between ICG and BellSouth. The parties would be required to "true up" any compensation due for ISP-bound calls based on the FCC's final, non-appealable ruling.

**The Arbitration Panel's Discussion of Issue No. 1**

The fact that both ICG and BellSouth devoted the major portion of their respective post-Arbitration hearing briefs to a discussion of the treatment of ISP-bound traffic is demonstrative of the critical importance of this issue to each party. The issue is also of critical importance to the Commission given its potential impact on the development of competition in this state. The decision reached on ISP-bound traffic in this proceeding will have a broad impact on the issue in Alabama generally because this case will establish precedence concerning future treatment of ISP-bound traffic.

Our analysis concerning this issue logically begins with an assessment of our jurisdictional authority concerning compensation for ISP-bound traffic in light of the FCC's February 26, 1999 *ISP Declaratory Ruling*. BellSouth is correct in pointing out that the FCC, in that ruling, concluded that ISP-Bound traffic is jurisdictionally mixed and appears to be largely interstate[3]. BellSouth is also correct in noting that the FCC concluded that since ISP traffic is jurisdictionally non-local interstate traffic, the reciprocal compensation obligations of 47 U.S.C. §251(b)(5) do not cover inter-carrier compensation for ISP-bound traffic. From that, however, BellSouth improperly concludes that state commissions do not have authority to address reciprocal

[3] FCC's *ISP Declaratory Ruling* at ¶1.

compensation for ISP-bound calls in 47 U.S.C. §252 arbitration proceedings since that section of the Act only gives state Commissions jurisdiction over areas within the scope of 47 U.S.C. §251. What BellSouth casually and improperly discounts is the fact that the FCC specifically recognized the authority of state Commissions under 47 U.S.C. §252 to determine inter-carrier compensation for ISP-bound traffic and to impose reciprocal compensation obligations in arbitration proceedings in the absence of a federal rule to the contrary[4].

By way of background, the FCC specifically recognized in its *ISP Declaratory Ruling* that while ISP-bound traffic is jurisdictionally interstate, the FCC will continue, as it has in the past, to discharge its interstate regulatory obligations regarding ISP-bound traffic by treating that traffic as though it is local. The FCC also specifically recognized that in light of its continued policy of exempting ISP-bound traffic from the imposition of access charges[5], it has created something of an inter-carrier compensation void for ISP-bound traffic by finding in the *ISP Declaratory Ruling* that such traffic is largely interstate and, therefore, not subject to the reciprocal compensation obligations of 47 U.S.C. §251(b)(5). Given that void, the FCC recognized that the establishment of a rule governing inter-carrier compensation for ISP-bound traffic would serve the public interest. The FCC concluded, however, that the record it had before it in the *ISP Declaratory Ruling* proceeding was insufficient for the adoption of such a rule[6]. The FCC accordingly issued a Notice of Proposed Rulemaking concerning the promulgation of such an inter-carrier compensation rule for ISP-bound traffic.

For purposes of this arbitration, it is important to note that the FCC specifically held that prior to the establishment of a federal rule governing inter-carrier compensation for ISP-bound traffic, state Commission's could determine in arbitration proceedings that reciprocal compensation should be paid for ISP-bound traffic. In arriving at that conclusion in its *ISP Declaratory Ruling*, the FCC reasoned that:

> "Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to

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[4] *Id.* at ¶26, n. 87.
[5] *Id.* at ¶¶5, 23, and 24.
[6] *Id.* at ¶28.

> arbitrate interconnection disputes. As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to §252 "extends to both interstate and intrastate matters." Thus, the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the Section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." *Id. at ¶25.*

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> "As we stated previously, the Commission currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic. In the absence of a federal rule, state Commission's that have had to fulfill their statutory obligation under §252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state Commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding—or a subsequent state Commission decision that those obligations encompass ISP-bound traffic—does not conflict with any Commission rule regarding ISP-bound traffic." *Id at ¶26.*

We note that this Commission has previously had occasion to consider the FCC's *ISP Declaratory Ruling* and its impact on the Commission's jurisdiction concerning ISP-bound traffic. In an Order entered on March 4, 1999 in Docket 26619, the Commission held that it had jurisdiction to determine the reciprocal compensation obligations of the parties to the agreements under review in that proceeding concerning ISP-bound traffic. The Commission further found that the exercise of that jurisdiction was totally consistent with the FCC's *ISP Declaratory Ruling*[7]. Similarly, in an Order on Reconsideration entered in that same proceeding on June 21, 1999, the Commission specifically noted the FCC's recognition at ¶24 and ¶26 of its *ISP Declaratory Ruling*

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[7] *In Re: Emergency Petitions of ICG Telecom Group, Inc and ITC Deltacom Communications, Inc. for a Declaratory Ruling*, Docket No. 26619 (Alabama Public Service Commission, March 4, 1999) p. 6 (hereinafter the Commission's March 4, 1999 *Reciprocal Compensation Order*)

that state Commission's have wide latitude to decide the issue of payment for ISP-bound traffic pursuant to existing interconnection agreements or through arbitrations[8].

We also note that some 16 other state commissions have addressed the issue of whether reciprocal compensation should apply to ISP-bound traffic since the FCC issued its *ISP Delcaratory Ruling*. Of those 16 state commission's that have rendered decisions on the merits of the applicability of reciprocal compensation to ISP-bound traffic, 15 have upheld the application of reciprocal compensation to such traffic[9] Three additional states have decided to withhold the issuance of a final ruling concerning inter-carrier compensation for ISP-bound traffic until the FCC further addresses the issue[10] To date, only one state has expressly declined to require reciprocal compensation for ISP-bound traffic[11].

In addition to the aforementioned state commission's, all four of the federal courts that have issued decisions addressing appeals of state commission decisions requiring reciprocal compensation for ISP-bound traffic after the release of the FCC's *ISP Declaratory Ruling* have upheld the determinations of the applicable state commissions. The four courts include the United States Court of Appeals for the Seventh Circuit and three district courts, including the Federal District Court for the Middle District of Alabama[12].

The opinion of the Seventh Circuit upholding a decision of the Illinois Commerce Commission which required the payment of reciprocal compensation for ISP-bound traffic pursuant to existing interconnection agreements is particularly enlightening. Specifically, the Seventh Circuit Court stated that "[The] FCC could not have made clearer its willingness--at least until the time a [FCC] rule is promulgated--to let state Commissions make the call. We see no violation of the Act in giving such

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8 *In Re: Emergency Petitions of ICG Telecom Group, Inc. and ITC DeltaCom Communications, Inc. for a Declaratory Ruling - Application of ICG Telecom Group, Inc. for Partial Reconsideration*, Docket No. 26619 (Alabama Public Service Commission, June 21, 1999) p. 11 (hereinafter the Commission's June 21, 1999 *Order on Reconsideration*).

9 See Appendix A attached hereto.

10 See Appendix B attached hereto

11 Telecommunications Decision and Order *In the Matter of the Petition of Global Naps for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Bell Atlantic - New Jersey*, Docket No. TO98070426 (N.J. Bd. of Pub. Util., July 12, 1999).

12 See appendix C attached hereto.

deference to state Commissions; in fact the Act specifically provides state Commissions with an important role to play in the field of interconnection agreements".[13]

Although the Seventh Circuit's opinion in *Illinois Bell* involved the review of an Illinois Commerce Commission decision interpreting existing interconnection agreements, we see little or no distinction in the applicability of the Seventh Circuit's reasoning to post-*ISP Declaratory Ruling* arbitration proceedings conducted pursuant to 47 U.S.C. §252. It is apparent that the FCC envisioned state action concerning the applicability of inter-carrier compensation for ISP-bound traffic in such arbitrations pending the promulgation of a federal rule and even thereafter. In fact, the FCC specifically noted at ¶30 of the *ISP Declaratory Ruling* the following:

> "We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state Commissions, which are appealable to federal district courts." *Id.*

Having determined that the Commission has the appropriate jurisdiction to address the issue of inter-carrier compensation of ISP-bound traffic and to in fact require that such compensation be paid in the form of reciprocal compensation, our analysis now turns to an assessment of whether it is prudent to exercise that jurisdiction at this juncture. BellSouth urges that since the FCC'S *ISP Declaratory Ruling* is currently subject to a court challenge, states could find that they do not have the authority to create even an interim compensation arrangement. BellSouth further asserts that even if the states do have the authority, such authority is valid only until the FCC completes its rulemaking on the subject. Therefore, any effort devoted by this Commission to establishing interim compensation arrangements for ISP-bound traffic would likely be wasted effort. Varner, Tr. p. 394. For the reasons set forth in more detail below, we reject BellSouth's arguments in favor of inaction.

[13] *Illinois Bell* at p. 574.

It is apparent from our analysis thus far that the FCC envisioned and, in fact encouraged, continued state action concerning the determination of inter-carrier compensation for ISP-bound traffic. The mere fact that the FCC's *ISP Declaratory Ruling* is currently subject to a legal challenge does not in and of itself render the determinations of the FCC in that ruling void. To be sure, the determinations made by the FCC in the *ISP Declaratory Ruling* represent controlling federal law on the issue until such time as a court of competent jurisdiction determines otherwise. The Commission, therefore, has a duty and responsibility to exercise the authority it currently has, at least until such time as a federal rule is implemented.

One of the major factors which dictates immediate action on the issue of inter-carrier compensation for ISP-bound traffic is the fact that the FCC has indicated that any federal rule governing that issue which is ultimately promulgated in the future, will have prospective application only[14]. It accordingly appears that if the Commission does not take action to require compensation for calls to ISPs, ICG will never be compensated for the calls it delivers to ISPs during the interim period between the approval of an interconnection agreement between ICG and BellSouth and the time the FCC adopts a federal rule governing that subject. Schonhaut, Tr. p. 311. This problem will only be exacerbated if the FCC does not act quickly to implement a federal inter-carrier compensation rule governing ISP-bound traffic. As noted by ICG witness Schonhaut it took the FCC almost 2 years (20 months) to respond to the June, 1997 request for clarification that led to the issuance of its *ISP Declaratory Ruling* in February of 1999. *Id.*

In light of the concerns set forth immediately above, we do not find merit in BellSouth's fall-back proposition that the parties simply track ISP-bound traffic until such time as the FCC promulgates its federal rule and apply any compensation mechanism adopted by the FCC retroactively[15]. As discussed in more detail below, it is undeniable that ICG will incur costs in terminating traffic to its ISP customers which

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14 FCC's *ISP Declaratory Ruling* at ¶28.

15 BellSouth asserts that the Commission should require such an approach only if it finds that it has jurisdiction to implement an inter-carrier compensation mechanism and that such a mechanism is warranted.

originates from BellSouth customers. It would be entirely inconsistent with the competitive principles underlying the Act not to provide ICG with some mechanism to recover those costs as they are incurred. The immediate need for such a mechanism is only heightened given the delay which may well transpire before a federal rule is finally promulgated by the FCC for prospective application. The Commission's failure to implement such a mechanism in the interconnection agreement between ICG and BellSouth at this juncture would likely preclude ICG from competing for ISP customers and ultimately from competing for other types of customers as well. Starkey, Tr, pp. 53-54.

Having arrived at the conclusion that the Commission has the jurisdiction to establish inter-carrier compensation for ISP-bound traffic (including reciprocal compensation) and that said jurisdiction should be exercised in this arbitration proceeding the question now becomes what type of inter-carrier compensation is most appropriate for ISP-bound traffic. Our analysis of that inquiry turns on further consideration of the FCC's *ISP Declaratory Ruing* and the concept of cost recovery. More particularly, our analysis centers on a determination of the costs ICG incurs in terminating traffic that is originated on BellSouth's network and terminates to ISP end user customers of ICG, as well as the recovery of those costs.

ICG asserts that the costs it incurs in delivering a call bound for an ISP customer do not differ from those generated by calls bound for other types of ICG customers. In fact, ICG argues that ISP-bound calls are functionally identical to local voice calls which are subject to reciprocal compensation. According to ICG witness, Starkey, a "ten minute call originated on the BellSouth network and directed to the ICG network travels exactly the same path, requires the use of exactly the same facilities and generates exactly the same level of costs regardless of whether that call is dialed to an ICG local residential customer or to an ISP provider. Tr. p. 56. ICG asserts that it is, therefore, irrelevant that once the call reaches the ISP it continues on to its ultimate destination of an Internet web site.

While ICG incurs no costs for the component of the call not on its network, it is the portion of the call that is carried on ICG's facilities that is relevant. According to ICG, that segment of the call is identical to any local call in terms of how ICG's network is used. ICG, therefore, asserts that there is no basis for treating ISP-bound calls differently than calls to any other local exchange customer when the costs to deliver the calls made to the residential customer and the ISP customer are identical. ICG asserts that if the Commission does not require reciprocal compensation for ISP-bound calls, ICG will not receive any compensation for calls to ISPs and will be unable to recover its costs of delivering calls to ISP customers on behalf of end users served by BellSouth. Schonhaut Tr. p. 307.

ICG further argues that reciprocal compensation for ISP-bound traffic is economically efficient and should be required in this arbitration. More particularly, ICG asserts that reciprocal compensation is cost based and imposes the costs of delivering traffic on the cost causer--the carrier whose subscriber initiates the call. ICG, therefore, maintains that in an efficiently functioning market, BellSouth should be economically indifferent as to whether it incurs the cost to deliver an ISP-bound call on its own network or whether it incurs that cost through a reciprocal compensation rate paid to ICG.

In support of its economic indifference theory, ICG argues that calls which originate on the BellSouth network and are delivered to a BellSouth-served ISP, and calls that are originate on the BellSouth network and terminate to ICG-served ISPs travel very similar paths. According to ICG, the only difference will be that when the ISP is an ICG customer, ICG performs the switching function to deliver the call to the ISP. In such a scenario, BellSouth avoids the switching costs and ICG incurs them. ICG asserts that if BellSouth has accurately established its terminating reciprocal compensation rate based on its own costs of delivering the call, BellSouth should be economically indifferent to whether a call that originates on its network is delivered to a BellSouth customer or to an ICG customer. In the first instance, BellSouth will incur the cost of delivering the call via its own switch. In the second, BellSouth will incur that cost via a cost-based rate paid to ICG for delivering the call. Starkey, Tr. pp. 59-60.

In addition to the legal arguments previously discussed, BellSouth counters the ICG arguments in favor of reciprocal compensation as an appropriate inter-carrier compensation mechanism with a strained claim that the Commission should not require reciprocal compensation for ISP-bound traffic because such traffic is interstate "access" traffic for which reciprocal compensation does not apply. Varner, Tr. p. 401.

The premise of BellSouth's "access" traffic argument is that ISP-bound traffic should be treated as "access" traffic for which the revenues generated must be shared between the local exchange carriers involved in originating and terminating the traffic. Under BellSouth's proposal, the LEC serving-and therefore billing-the ISP would treat the ISP's payments for business services purchased out of the serving carriers local exchange tariff as "access" revenue and share it with the other carrier. Varner, Tr. pp. 421-422.

In evaluating the appropriateness of requiring reciprocal compensation as the appropriate inter-carrier compensation mechanism for ISP-bound traffic in this proceeding, we find BellSouth "access" traffic arguments to be misplaced and totally contrary to prevailing regulatory mandates. The FCC has repeatedly emphasized that it has since 1983 treated ISP-bound traffic as though it were local and continues to do so. The FCC's *ISP Declaratory Ruling* is in fact replete with references to this continued practice:

> "Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs. Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to the local exchange company's central offices. In addition, incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes. ESPs also pay the special access surcharge when purchasing special access lines under the same conditions as those applicable to end users. In the *Access Charge Reform*

*Order* the Commission decided to maintain the existing price and structure pursuant to which ESPs are treated as end users for the purpose of applying access charges. Thus the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local." *Id.* at ¶5.

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"As explained above, under the ESP exemption LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover the Commission has directed states to treat ISP traffic as if it were local by permitting ISPs to purchase their PSTN links through local business tariffs." *Id.* at ¶9.

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"Our determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption. ESPs, including ISPs, continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs." *Id.* at ¶20.

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"The Commission's treatment of ESP traffic dates from 1983 when the Commission first adopted a different access regime for ESPs. Since then, the Commission has maintained the ESP exemption pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes." *Id.* at ¶23.

It is abundantly clear from the above references that ISPs purchase monthly local exchange service much like any other local exchange customer. As local exchange customers, ISPs do not pay access charges and neither ICG nor BellSouth can force ISPs to pay switched access charges for access to their networks. Thus, there are no access revenues for interconnecting carriers to share[14]. Clearly, ISP-bound traffic is not subject to an access charge regulatory framework but rather is treated as local exchange traffic for regulatory purposes.

[14] FCC's *ISP Declaratory Ruling* at ¶9

Having rejected BellSouth's "access" traffic arguments, we find merit in ICG's arguments regarding the similarities between local exchange traffic and ISP-bound traffic. In fact, we are persuaded that calls over local exchange carrier (LEC) facilities to ISPs appear functionally equivalent to local voice calls which are subject to reciprocal compensation. Since the same network facilities and functions are utilized to complete both types of calls, it is axiomatic that the costs to deliver them are identical. We find that those identical costs dictate that the rates associated with recovering those costs should also be identical. We accordingly find that reciprocal compensation should apply to ISP-bound traffic just as it does to local voice traffic.

We are also persuaded that reciprocal compensation is economically efficient because it is cost based and imposes the cost of delivering traffic on the carrier whose subscriber causes the cost by initiating the call. We further believe that reciprocal compensation based on the elemental rates of transport, end office, and tandem switching adopted on August 25, 1998 in our *UNE Pricing Docket*[17] and equaling $.00351 per minute is the most reasonable and appropriate interim inter-carrier compensation mechanism we can require. The adoption of such a rate ensures that BellSouth will incur the same costs as it would if the calls in question were delivered to a BellSouth-served ISP.

We further believe that adopting a TELRIC-based compensation mechanism is more likely to be consistent with the federal rule which will ultimately be adopted by the FCC. Such a mechanism certainly appears to be consistent with the FCC's traditional treatment of ISP-bound traffic and ISPs generally. It further appears that such an interim mechanism is consistent with the provisions of the FCC's *ISP Declaratory Ruling* as set forth above. Perhaps most importantly, however, the interim inter-carrier compensation mechanism required herein appears to be the most reasonable means of ensuring that ISP-bound traffic does not become a class of traffic for which there is no mechanism of cost recovery.

[17] *In the Matter of Generic Proceedings: Consideration of TELRIC Studies*, Docket No. 26029 (Alabama Public Service Commission, August 25, 1998) (hereinafter the *UNE Pricing Docket*).

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**The Conclusion of the Arbitration Panel as to Issue No. 1**

Based on the foregoing discussion, the Arbitration Panel concluded that, pending the adoption of a federal rule by the FCC, dial-up calls to ISPs should be subject to reciprocal compensation. The Panel further found that the reciprocal compensation rate for such traffic should be based on the elemental rates of transport, end office and tandem switching adopted in the Commission's *UNE Pricing Docket* and equaling $.00351 per minute. The Arbitration Panel specifically rejected the BellSouth position that the parties track ISP traffic pending the establishment of a federal rule and retroactively apply any mechanism ultimately adopted by the FCC to such traffic.

**The Findings and Conclusions of the Commission as to Issue No. 1**

We concur with the Arbitration Panel's conclusion that pending the adoption of a federal rule by the FCC, dial-up calls to ISPs should be subject to reciprocal compensation. We further concur with the reasoning relied upon by the Arbitration Panel in reaching that recommendation. It is, however, the belief of the Commission that the public interest would be best served by requiring that the interim inter-carrier compensation required herein be subject to retroactive "true-up" once the FCC issues its final federal rule governing inter-carrier compensation for ISP-bound calls and said rule becomes effective. More specifically, we adopt the recommendation of the Advisory Division that the compensation herein ordered for ISP-bound traffic be retroactively "trued-up" to the level of inter-carrier compensation ultimately adopted by the FCC.

In order to prepare for the eventuality of a "true-up" of the interim inter-carrier compensation ordered herein for ISP-bound traffic, we hereby instruct the parties to track all ISP-bound calls and their duration effective immediately upon the approval and implementation of the interconnection agreement which will result from this Arbitration. Once the FCC issues its anticipated federal rule governing inter-carrier compensation for ISP-bound traffic and said rule becomes effective, that rule will prospectively govern the compensation to be paid by the parties to this proceeding for ISP-bound traffic. Similarly, the compensation ordered to be paid in this proceeding for ISP-bound traffic will be retroactively "trued-up" to the FCC mechanism from the effective date of the interconnection agreement that results from this Arbitration. If through that retroactive "true-up" process any funds are found to be owing by one party to the other, the party owing such funds shall submit them to the opposite party within thirty (30) days of the completion of the "true-up" process.

*IT IS SO ORDERED BY THE COMMISSION.*

**ISSUE NO. 2: FOR PURPOSES OF RECIPROCAL COMPENSATION SHOULD ICG BE COMPENSATED FOR END OFFICE, TANDEM AND TRANSPORT ELEMENTS OF TERMINATION WHERE ICG's SWITCH SERVES A GEOGRAPHIC AREA COMPARABLE TO THE AREA SERVED BY BELLSOUTH's TANDEM SWITCH (PETITION ISSUE 7).**

**The ICG Position**

According to ICG, FCC Rule 51.711[18] requires that where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent local exchange carrier ("ILEC"), the appropriate rate for the interconnecting carrier's additional cost is the incumbent's tandem interconnection rate. To be eligible for this rate, the FCC requires only that the interconnecting carrier's switch serve the same geographical area as the incumbent's switch. ICG asserts that the record indicates that this is the case for ICG's switch in Alabama. Starkey, Tr. pp. 72, 102 Moreover, ICG maintains that its switch performs the same functionality as the BellSouth tandem switch. In fact, ICG contends that its Lucent 5ESS switching platform meets the definition and performs the same functions identified in the Local Exchange Routing Guide ("LERG") for a tandem office and for a Class 4/5 switch.

**The BellSouth Position**

BellSouth's position regarding this issue is that if a call is not handled by a switch on tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth accordingly maintains that it will pay the tandem

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[18] 47 CFR §51.711

interconnection rate if ICG's switch is identified in the LERG as a tandem. Varner, Tr. p. 413.

A tandem switch connects trunks and is an intermediate connection between an originating telephone call location and the final destination of the call. If ICG's switch is an end office switch, it is handling calls that originate or terminate to customers served by that local switch and is not a tandem switch. According to BellSouth, ICG is thus seeking compensation for equipment it does not own and functionality it does not provide.

BellSouth also asserts that the evidence in the record does not support ICG's position that it provides the transport elements. BellSouth maintains that the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually provide the network facility for which it seeks compensation. BellSouth accordingly urges the Commission to deny ICG's request for tandem switching compensation when tandem switching is not performed[19].

**The Arbitration Panel's Discussion of Issue No. 2**

The FCC's Rule 51.711[20] expressly states that where the interconnecting carrier's switch serves a geographic area comparable to that served by the ILEC's tandem switch, the appropriate interconnection rate for the interconnecting carrier is the tandem interconnection rate. We find nothing in the record to controvert ICG's claim that its switch is geographically comparable to BellSouth's tandem switch. BellSouth does not in fact argue the issue of geographic comparability, but instead argues distinctions in functional equivalency which are not requirements of the aforementioned FCC Rule. Varner, Tr. pp. 413-415. Even if FCC Rule 51.711 is read to include functional equivalency requirements as BellSouth seems to suggest, we find that ICG has demonstrated the requisite functional equivalency by introducing evidence

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19 See BellSouth Brief at p. 13.
20 47 C.F.R. §51.711

that its Lucent 5ESS switch meets the definition of a tandem switch in the Local Exchange Routing Guide. Starkey, Tr. pp. 105-108.

**The Conclusion of the Arbitration Panel as to Issue No. 2**

Based on the foregoing discussion, the Arbitration Panel concluded that ICG's switch serves an area geographically comparable to that served by BellSouth's tandem switch and provides functionality comparable to that provided by BellSouth's tandem switch. The Arbitration Panel therefore concluded that ICG is entitled to reciprocal compensation at the tandem interconnection rate which is comprised of (1) tandem switching; (2) transport between the BellSouth tandem and its end office switches and (3) end office switching. The established TELRIC-based rates for these elements equals $.00351 per minute pursuant to the Commission's *UNE Pricing Docket*.

**The Findings and Conclusions of the Commission as to Issue No. 2**

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

*IT IS SO ORDERED BY THE COMMISSION.*

**ISSUE NO. 3: SHOULD BELLSOUTH BE REQUIRED TO COMMIT TO PROVISIONING THE REQUISITE NETWORK BUILDOUT AND NECESSARY SUPPORT WHEN ICG AGREES TO ENTER INTO A BINDING FORECAST OF ITS TRAFFIC REQUIREMENTS IN A SPECIFIED PERIOD (PETITION ISSUE 11).**

**The ICG Position**

ICG points out that it relies on BellSouth end office trunks to deliver traffic to ICG's switch. These trunks are usually BellSouth's responsibility to provision and administer. ICG provides BellSouth with quarterly traffic forecasts to assist BellSouth in planning for facilities to handle traffic between their networks. BellSouth is under no obligation to add more end office trunks even though ICG's forecasts may indicate that additional trunking is necessary. Jenkins, Tr. pp. 235-236. ICG wants the option of requiring BellSouth to provision additional end office trunks dictated by ICG's forecast.

In exchange, ICG will agree to pay BellSouth for any trunks which are not fully utilized as indicated by the forecast. i.e., a take or pay agreement.

ICG maintains that under its proposal, BellSouth will not assume any risk for additional trunks that are underutilized. ICG in fact asserts that it will assume all of the risk. If this provision is ordered by the Arbitration Panel, ICG expects to use it sparingly.

ICG asserts that BellSouth has agreed to a binding forecast mechanism on at least two prior occasions in Alabama. ICG further maintains that BellSouth's revised Statement of Generally Available Terms and Conditions ("SGAT") filed with the Commission in September 1998 contains a binding forecast provision which largely mirrors the arrangement ICG requests. Also, in the interconnection agreement between BellSouth and KMC Telecom II, BellSouth agreed to a binding forecast provision similar to that requested by ICG.

**The BellSouth Position**

BellSouth asserts that although it is continuing to analyze the possibility of providing binding forecasts and has not foreclosed the idea, BellSouth can not be ordered to agree to binding forecasts because there is no requirement that it do so pursuant to 47 U.S.C. §251. Varner, Tr. p. 416. BellSouth accordingly argues that pursuant to 47 U.S.C. §252(c), binding forecasts are not properly subject to arbitration. According to BellSouth, the binding forecast provision of BellSouth's September 1998 SGAT provides that neither party is required to enter into a binding forecast.

**The Arbitration Panel's Discussion of Issue No. 3**

The threshold question regarding this issue is whether the Commission has jurisdiction to require a binding forecast provision in a 47 U.S.C. §252 arbitration as requested by ICG. BellSouth is correct in pointing out that there is not a specific provision of 47 U.S.C. §251 which requires ILECs to enter binding forecasts. The relevant inquiry, however, is not whether there is any direct reference to binding forecast in 47 U.S.C. §251, but whether requiring binding forecasts is consistent with the general interconnection obligations of ILECs as set forth in that section of the Act. As noted below, we believe the answer to that inquiry is yes.

Pursuant to 47 U.S.C. §251(c)(2)(C), incumbent LECs are required to provide interconnection with requesting carriers that is 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 such interconnection is provided to ICG on a non-discriminatory basis. ICG's proposal, therefore, falls well within the parameters of 47 U.S.C. §251 and the Commission's authority pursuant to that section.

We note that BellSouth normally has the financial responsibility for the facilities which ICG seeks to make subject to binding forecasts. Under the proposal put forth by ICG, however, ICG will be required to pick up all or part of the cost for those facilities by either (1) paying BellSouth one-twelfth of the tariffed price for the forecasted plant, as a binding forecast fee, if the binding forecast trunks are used; or (2) paying BellSouth one-hundred-percent of the tariffed price for the forecasted plant if the trunks are not used. Jenkins, Tr. pp. 234-236. Clearly, ICG's proposal protects BellSouth from assuming unreasonable or unnecessary risk. We accordingly find that ICG's proposal is a just and reasonable basis for the parties to negotiate the details of a binding forecast arrangement.

**The Conclusion of the Arbitration Panel as to Issue No. 3**

Based on the foregoing, the Arbitration Panel concluded that it, and therefore the Commission, had jurisdiction under the provisions of 47 U.S.C. §§251 and 252 to require BellSouth to include a binding forecast provision in its interconnection agreement with ICG. The Arbitration Panel accordingly found that BellSouth should be required to include in its interconnection agreement with ICG a provision which requires the parties to negotiate in good faith the specific terms and conditions of binding forecasts.

**The Findings and Conclusions of the Commission as to Issue No. 3**

The Commission concurs with the findings and conclusions of the Arbitration

Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

*IT IS SO ORDERED BY THE COMMISSION.*

**ISSUE NO. 4: SHOULD BELLSOUTH BE REQUIRED TO PROVIDE THE "ENHANCED EXTENDED LINK" (EEL) AS A UNE COMBINATION (PETITION ISSUE 4).**

**The ICG Position**

ICG asserts that the provisioning of EELs as UNEs at the DS-0 and DS-1 level will act to extend the range of ICG's ability to serve customers, thus permitting ICG to bring the benefits of competition to a much broader base of Alabama businesses and customers than ICG is currently able to serve. ICG asserts that the FCC's Rule 51.315(b)[21] makes clear that if BellSouth currently combines loop and transport, BellSouth must make loop and transport available as a UNE combination at UNE prices.

ICG asserts that the FCC's September 15, 1999 *News Release*, issued in FCC Docket 99-238[22], makes clear that the Commission has the authority to require BellSouth to combine the loop and transport UNEs comprising the EEL under 47 U.S.C. §251. Even to the extent that the EEL is not an existing combination within BellSouth's network, ICG asserts that the Commission should require BellSouth to make the EEL available to ICG and other competitors. ICG maintains that the Commission has the authority under 47 U.S.C. §251 (c)(3) of the Act to order such UNE combinations. ICG urges the Commission to use its authority to require BellSouth to provide EELs. ICG maintains that the EEL is an efficient mechanism for bringing the benefits of competition to Alabama because it will allow ICG and other CLECs to serve customers without having to be collocated in a particular customer's serving central office.

ICG also argues that the EEL should be offered at the TELRIC-based UNE prices established by the Commission. According to ICG, the total price charged by

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21 47 CFR §51.315(b).

22 *FCC Promotes Local Telecommunications Competition*, FCC 99-238 (September 15, 1999) (hereinafter the FCC's *News Release*)

BellSouth for the EEL should be the sum of (1) the TELRIC rate for an unbundled loop; (2) the TELRIC rate for a cross-connect of appropriate capacity; and (3) the TELRIC rate for unbundled interoffice dedicated transport. BellSouth should not be permitted to impose any charge for combining the individual elements.

ICG contends that the Commission has already awarded the EEL to ITC^DeltaCom Communications, Inc. in its interconnection agreement with BellSouth. ICG requires the same service in order to compete.

**The BellSouth Position**

BellSouth argues that the EEL is nothing more than a combination of three separate UNE's which replicates private line and/or special access services. Varner, Tr. p. 393. BellSouth further argues that at the time of the August 11, 1999 hearing, there was no FCC rule requiring BellSouth to provide such a UNE combination and that BellSouth should not, therefore, be ordered to provide such a combination of UNEs in this proceeding. Varner, Tr. p 376.

Absent an FCC order, however, BellSouth will, on a voluntary basis, provide EELs through "Professional Services Agreements." BellSouth asserts that since those offers are separate and apart from any obligations under 47 U.S.C. §§251 and 252, there is no requirement that the EEL be provided at TELRIC rates. Therefore, the EEL is offered at prices approximating retail.

**The Arbitration Panel's Discussion of Issue No. 4**

The combination of UNEs has been one of the more contentious issues arising from the passage of the Act and the rules originally promulgated by the FCC to implement the requirements of the Act.[31] The rules governing UNE combinations originally promulgated by the FCC in its *Local Competition Order* have their genesis in 47 U.S.C. §251(c)(3) which imposes on incumbent LECs:

> "[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

[31] *Implementation of the Local Competition Provisions in The Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 (August 8, 1996) (hereinafter the FCC's "*Local Competition Order*")

> conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this Section and §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."

Pursuant to the above provisions, the FCC adopted its Rule 51.315(b)[24] which prohibits incumbent LECs from separating UNEs combined in their networks. The FCC also adopted its Rule 51.315(c)–(f) which requires incumbent LECs to combine previously uncombined elements[25]

The FCC reasoned that the only way to give meaning to the requirement that incumbent LECs "shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements" was to interpret it as compelling the incumbent LECs to do the combining for the benefit of the requesting carriers.[26] The FCC rejected the concept of requiring the requesting carrier to do the combining itself as impossible because it found that "new entrants lacked the facilities and information about the incumbent's network necessary" to do the combining.[27] The FCC, therefore, reasoned that "we do not believe it is possible that Congress, having created the opportunity to enter the local telephone markets through the use of unbundled elements, intended to undermine that opportunity by imposing technical obligations on requesting carriers that they might not be able to readily meet."[28]

FCC Rules 51.315(b) and 51.315(c)-(f) were subsequently vacated by the United States Court of Appeals for the Eighth Circuit which found that 47 U.S.C. §251(c)(3) could not be read to levy a duty on incumbent LECs to do the actual combining of elements.[29] The Eighth Circuit's decision regarding FCC Rule 51.315(b) was, however, reversed by the United States Supreme Court.[30] In reversing the Eighth Circuit, the Supreme Court held that the FCC's interpretation of §251(c)(3) was "entirely rational,

[24] 47 C.F.R. §51.315(b)
[25] 47 C.F.R §51.315(c)-(f)
[26] FCC's *Local Competition Order* at ¶293
[27] *Id.*
[28] *Id.*
[29] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (Eighth Circuit 1997)
[30] *AT&T Corp. v Iowa Utilities Board*, 119 S.Ct.721(1999)

finding its basis in §251(c)(3)'s nondiscrimination requirement."[31] According to the Supreme Court, Rule 51.315(b) was designed to prevent incumbent LECs from imposing "wasteful costs" on requesting carriers and that it was "well within the bounds of the reasonable for the [FCC] to opt in favor of ensuring against an anti-competitive practice."[32]

Although the Supreme Court's ruling clearly validated FCC Rule 51.315(b) and the Eighth Circuit subsequently reinstated that Rule, there remained some uncertainty regarding the impact of the rule due to the Supreme Court's decision to vacate the FCC's Rule 51.319[33] on the grounds that the FCC had not adequately considered the "necessary" and "impair" standards of 47 U.S.C. §251(d)(2) in establishing its Rule 319 list of UNEs. FCC Rule 51.319 establishes the network elements that must be provided on an unbundled basis and, therefore, cannot be "uncombined" pursuant to Rule 51.315(b) if they are already combined in the ILEC's network.

In its *News Release* issued on September 15, 1999, the FCC summarized a yet to be released order addressing the reestablishment of the Rule 319 list of UNEs. The FCC specifically noted therein that "[p]ursuant to §51.315(b) of the Commission's Rules, incumbent LECs are required to provide access to combinations of loop, multiplexing/concentrating equipment and dedicated transport" -- the components of the EEL- if they are currently combined."

Based on the foregoing, the Commission can and should require BellSouth to provision the EEL at the DS-O and DS-1 levels where it currently combines those loops with transport within its network. Reinstated FCC Rule 51.315(b) mandates such a result given the FCC's specific statements concerning the EEL in its efforts to reinstate the Rule 51.319 list of UNEs. Such a result is entirely consistent with controlling law and the principles of efficient competition.

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[31] *Id.* at 737
[32] *Id.* at 738
[33] 47 C.F.R. §51.319

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Even though the FCC's Rule 51.315(c)-(f) requiring ILECs to combine previously uncombined elements remains vacated at present,[24] we nonetheless find that BellSouth must, for a reasonable cost-based fee, combine the UNEs comprising the EEL for ICG in situations where those elements currently are not combined in the BellSouth network. We find support for this proposition not only from the Supreme Court's discussion of the FCC's reasoning which undergirded the reinstatement of FCC Rule 51.315(b) in *AT&T Corp.*, but also from the Act generally at 47 U.S.C. §252.

In reinstating FCC Rule 51.315(b), the Supreme Court placed great emphasis on the FCC's reliance on 47 U.S.C. §251(c)(3) and the FCC's pro-competitive logic in general. Had FCC Rule 51.315(c)-(f) been before the Supreme Court in *AT&T Corp.*, we are quite sure that the Supreme Court's logic in reinstating FCC Rule 51.315(b) would have clearly dictated reinstatement of Rule 51.315(c)-(f). Such a result would be logical because the same nondiscrimination requirement that undergirds Rule 51.315(b)'s requirement that combined elements not be separated also underlies the requirement that the incumbent LECs must combine elements for requesting carriers which is codified in FCC Rule 51.315 (c)-(f). Thus, in light of the Supreme Court's decision in *AT&T Corp.*, there is ample authority for the proposition that under 47 U.S.C. §251(c)(3), incumbent LECs can be required to combine UNEs for requesting carriers.

Regardless of the current status of FCC Rule 51.315(c)-(f), the Commission has independent authority pursuant to 47 U.S.C. §252 to order EEL combinations on its own. More particularly, 47 U.S.C. §252(c)(1) states that "[i]n resolving by arbitration ... any open issues and imposing conditions on the parties to the agreement, a state commission shall ... ensure that such resolution and conditions meet the requirements of §251, including the regulations prescribed by the [FCC] pursuant to §251." It is important to note that while the FCC's implementing regulations are included among the factors that state commissions must consider in implementing 47 U.S.C. §251, the

[24] As noted by the FCC in its *New Release*, the Eighth Circuit is currently considering the Status of Rule 51.315 (c)-(f)

Act plainly contemplates that the state's authority under 47 U.S.C. §251 is not restricted to applying the FCC's rules. To the contrary, states are free to act as they see fit to give substance to 47 U.S.C. §251 so long as they are not in conflict with the FCC's rules.

We arrived at the conclusion that the EEL must be provided to ICG by BellSouth even in situations where the elements comprising the EEL are not currently combined in the BellSouth network only after carefully undertaking the "necessary" and "impair" analysis embraced by the Supreme Court in *AT&T Corp.* Among other things, we considered the alternative methods and/or facilities available to ICG for the provisioning of the functions that could be achieved by the EEL in circumstances where the network elements comprising the EEL are not presently combined in the BellSouth network. As part of that analysis, we assessed whether in those circumstances ICG has alternative methods of providing the functionality achieved by the EEL without the imposition of undue financial burden or a degradation of service.

From the foregoing analysis, we determined that the EEL is the only efficient mechanism currently available to ICG for bringing the benefits of competition to Alabama businesses and consumers because it will allow ICG to serve customers without having to be collocated in the BellSouth Central Office serving that particular customer. Widespread availability of the EEL will thus enable ICG to serve, and bring the benefits of competition, to a much broader base of Alabama end users than it is currently able to. The EEL is necessary to provide service, particularly in less dense residential areas where collocation is not feasible. In such instances, the unavailability of the EEL would certainly "impair" ICG's ability to provide service because there is no other source for this access.

Further, if the EEL is made available only in circumstances where the UNEs comprising it are already combined in the BellSouth network, ICG will be forced to incur the unnecessary and duplicative costs associated with collocating in the BellSouth Central Offices where ICG has customers and BellSouth does not currently combine the elements comprising the EEL. Such a scenario is cost prohibitive and requires ICG to unnecessarily duplicate the public switched telephone network through widespread collocation. Holdridge, Tr. p 277 We find such a result unacceptable and counterproductive to the development of competition in this state. We accordingly hold that BellSouth must make the EEL available to ICG even in situations where the elements comprising the EEL are not currently combined in the BellSouth network.[33]

**The Conclusion of the Arbitration Panel as to Issue No. 4**

Based on the foregoing discussion, the Arbitration Panel found BellSouth's arguments that the EEL should be provided outside the context of the Act and at prices approximating retail services meritless. The Arbitration Panel majority further found that the EEL must be made available to ICG by BellSouth regardless of whether the elements comprising the EEL are currently combined in the BellSouth network.[34] In all cases, the Arbitration Panel found that EEL should be provided by BellSouth at the TELRIC-based UNE prices established by the Commission in the *UNE Pricing Docket*, and at the DS-O and DS-1 levels. Specifically, the Arbitration Panel concluded that the total price charged by BellSouth for the EEL should be precisely the sum of the Commission established TELRIC rates for: (1) an unbundled loop; (2) a cross-connect of appropriate capacity; and (3) unbundled interoffice dedicated transport.

The Arbitration Panel noted that BellSouth should not be permitted to impose any charge for combining the individual elements set forth above where they are already combined in the BellSouth network. However, the Arbitration Panel concluded that BellSouth should be entitled to the impose a reasonable, cost-based fee for combining the elements which comprise the EEL in situations where those elements are not currently combined in the BellSouth network. The Arbitration Panel recommended that the parties be required to submit cost studies establishing such a fee such as soon as possible, but no later than sixty (60) days following the Order of the Commission adopting the Arbitration Panel's recommendation in that regard. The Arbitration Panel noted that the Commission should act expeditiously on the establishment of such a combination fee or "glue charge." Until the establishment of

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[33] Arbitration Facilitator Garner does not concur in the holding that the EEL should be made available even in circumstances where the elements comprising it are not already combined in the BellSouth network.
[34] *Id*

such a fee by the Commission or an agreement among the parties concerning such a fee, the Arbitration Panel held that BellSouth should not be required to combine the elements comprising the EEL where those elements are not currently combined in the BellSouth network.

**The Findings and Conclusions of the Commission as to Issue No. 4**

We fully concur with the findings and conclusions of the Arbitration Panel with regard to the provision of the EEL by BellSouth when the elements comprising the EEL are already combined in BellSouth's network. The FCC's long-awaited order regarding UNEs was released on November 5, 1999[37]. As anticipated, the FCC's *UNE Order* prohibits incumbent LECs such as BellSouth from separating loop and transport elements where they are currently combined. We accordingly hold that based on the FCC's *UNE Order* and the reasoning relied on by the Arbitration Panel, BellSouth must provide the EEL to ICG in situations where the elements comprising the EEL are currently combined in the BellSouth network.

The provision of the EEL by BellSouth in situations where it is currently combined in the BellSouth network shall be in accordance with the parameters established by the FCC in its November 5, 1999 *UNE Order*. Further, the EEL shall be provided at the TELRIC-based UNE prices established by the Commission in the *UNE Pricing Docket* and at the DS-0 and DS-1 levels. Specifically, the total price charged by BellSouth for the EEL shall be precisely the sum of the Commission-established TELRIC rates for: (1) an unbundled loop; (2) a cross connect of appropriate capacity; and (3) unbundled interoffice dedicated transport.

With regard to the provision of the EEL in circumstances where the elements comprising it are not already combined in the BellSouth network, the Commission majority, consisting of Commission President Sullivan and Commissioner Cook, does not concur with the findings and conclusions of the Arbitration Panel. To the contrary, the Commission majority adopts the recommendation of the Advisory Division and finds

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[37] *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 (November 5, 1999) (hereinafter the FCC's *UNE Order*)

that it would be unwise to require an incumbent LEC such as BellSouth to combine network elements that are not currently combined in its network since that issue is still pending before the Eighth Circuit. BellSouth is not, therefore, required to provide the combination of loop, multiplexing/concentrating equipment, and dedicated transport where those elements are not currently combined in the BellSouth network. However, in the event that the Eighth Circuit subsequently determines that incumbent LECs must indeed combine UNEs, including the loop, multiplexing/concentrating equipment, and dedicated transport where they are not currently combined in the incumbent LEC's network, the Commission majority finds that BellSouth must, from the effective date of such a requirement, combine UNEs for ICG in a manner consistent with any such requirement so implemented.

It should be noted that Commissioner Wallace dissented from the Commission majority and voted to accept the Arbitration Panel majority's recommendation that BellSouth be required to combine the elements comprising the EEL even in instances where those elements are not currently combined in the BellSouth network. Commissioner Wallace does, however, concur with the notion that BellSouth must be required to provide the EEL where it is not currently combined in the BellSouth network in the event that the Eighth Circuit subsequently determines that ILECs such as BellSouth must do so.

*IT IS SO ORDERED BY THE COMMISSION.*

**ISSUE NO. 5: SHOULD VOLUME AND TERM DISCOUNTS BE AVAILABLE FOR UNEs (PETITION ISSUE NO. 6).**

**The ICG Position**

ICG asserts that when it commits to purchase a large volume of UNE's, BellSouth benefits because it is able to use its facilities more efficiently, and its costs per UNE go down. ICG represents that when BellSouth refuses to pass on any of those benefits to ICG, not only does ICG not gain the benefits of economy that is has generated for BellSouth through its volume purchases, it faces a more efficient

BellSouth in the marketplace wherein BellSouth can offer lower prices to its retail customers. Starkey, Tr p. 120.

ICG further contends that when ICG and BellSouth agree to provision UNEs over long terms, BellSouth benefits through little or no volatility of demand, and therefore, experiences little or no risk. According to ICG the result is that BellSouth can more efficiently utilize its resources and decrease the likelihood of stranded investment. *Id.*

ICG asserts that BellSouth should pass the above described saving and/or economies on to ICG. ICG contends that it is within the authority of the Commission to require BellSouth to do so.

**The BellSouth Position**

BellSouth argues that neither the Act nor any FCC order or rule requires volume and term discount pricing for UNEs. Varner, Tr. p. 412. BellSouth also maintains that the UNE recurring rates that ICG will pay are cost-based in accordance with the requirements of §252(d) and are derived using least-cost, forward looking technology consistent with the FCC's rules. Furthermore, BellSouth argues that its non-recurring rates already reflect any economies involved when multiple UNEs are ordered and provisioned at the same time. *Id.*

BellSouth additionally contends that the TELRIC-based prices for UNEs set by the Commission already incorporate the savings inherent in volume and term purchases because they are calculated on future plant utilization and network costs, not current utilization and network costs. BellSouth also asserts that its obligations to provide statewide average loop prices precludes its ability to pass through savings associated with volume purchases in a particular locality. BellSouth maintains that the basis upon which ICG seeks volume and term discounts would require the Commission to rethink the pricing methodology adopted in its *UNE Pricing Docket*. According to BellSouth, the cost methodology employed by the Commission in that proceeding is compliant with the provisions of the Act and the rules of the FCC. BellSouth, therefore, concludes that there is no reason to reconsider the cost methodology employed by the Commission in that proceeding.

**The Arbitration Panel's Discussion of Issue No. 5**

We conclude that the Commission clearly has jurisdiction to require volume and term discounts for UNEs pursuant to 47 U.S.C. §252. In particular, 47 U.S.C. §252(d)(1) dictates that prices for UNEs shall be established on the basis of cost and in a non-discriminatory manner[36].

While we concur with the basic premise of ICG's argument that UNE prices must reflect cost savings attributable to UNE volume and term purchases, we note that there are various methods of achieving this result. The Panel finds that the method which will most benefit overall competition in Alabama is to consider any cost savings from increased UNE purchase volumes in establishing overall UNE rates. This is the method that would most ensure that smaller CLECs are not disadvantaged.

We note at this juncture that the Commission previously determined UNE prices generically in its *UNE Pricing Docket*. We, therefore, conclude that arguments concerning cost savings from increased UNE purchase volumes and extended term commitments must be addressed generically in the context of that previously established Docket. We, therefore, recommend that ICG petition the Commission for reconsideration of the previous findings entered in the *UNE Pricing Docket* if it feels that the existing UNE prices do not generically incorporate cost savings resulting from increased UNE purchase volumes and term commitments.

**The Conclusion of the Arbitration Panel as to Issue No. 5**

Based on the foregoing, the Arbitration Panel concluded that any cost savings resulting from increased UNE purchase volumes and extended term commitments must be addressed generically in the context of the Commission's *UNE Pricing Docket*. The Arbitration Panel, therefore, recommend that ICG Petition the Commission for reconsideration of the previous findings entered in the *UNE Pricing*

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[36] See 47 U.S.C. §§252(d)(1)(A)(i)-(ii).

*Docket* if it feels that the UNE prices established therein do not generically incorporate cost savings resulting from increased UNE purchase volumes and term commitments.

**The Findings and Conclusions of the Commission as to Issue No. 5**

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

*IT IS SO ORDERED BY THE COMMISSION.*

*IT IS FURTHER ORDERED BY THE COMMISSION*, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

*IT IS FURTHER ORDERED*, That this Order shall be efective as of the date hereof.

DONE at Montgomery, Alabama this 10th day of November, 1999.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr.

Walter L. Thomas, Jr., Secretary

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of<br><br>Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company, and New England Telephone and Telegraph Company,<br><br>Complainants,<br><br>v.<br><br>Global NAPs, Inc.,<br><br>Defendant. | ) | File No. E-99-22 |

## MEMORANDUM OPINION AND ORDER

**Adopted: December 2, 1999** **Released: December 2, 1999**

By the Commission:

## I. INTRODUCTION

1. In this Memorandum Opinion and Order, we resolve a formal complaint brought by various Bell Atlantic companies (collectively, Bell Atlantic) against a competitive local exchange carrier (CLEC), Global NAPs, Inc. (Global NAPs), pursuant to section 208 of the Communications Act of 1934, as amended (Act or Communications Act).[1] The complaint challenges the lawfulness and application of certain Global NAPs tariff provisions that purport to charge a per-minute interstate rate for Internet calls, specifically, calls originated by Bell Atlantic customers that are handed off to Global NAPs for delivery to Internet service providers (ISPs).[2]

[1] 47 U.S.C. § 208.

[2] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1 (Tariff)

2. As explained below, we conclude that the challenged provisions of Global NAPs' tariff, as applied to ISP-bound traffic delivered by Bell Atlantic to Global NAPs in Massachusetts, are unjust and unreasonable under section 201(b) of the Act,[3] because those tariff provisions condition the imposition of charges on circumstances that were indeterminate when the tariff took effect and remain indeterminate today. In particular, the challenged tariff provisions purport to apply only to ISP-bound traffic for which Global NAPs receives no compensation from Bell Atlantic under the parties' existing interconnection agreement; however, the Massachusetts Department of Telecommunications and Energy (Massachusetts DTE) has yet to make a final determination whether and how the parties' existing interconnection agreement provides for inter-carrier compensation for ISP-bound traffic. Moreover, we conclude that the challenged tariff provisions violate section 61.74(a) of our rules, because they refer to a document other than the Tariff itself, *i.e.*, an interconnection agreement.[4] Accordingly, we hereby grant Bell Atlantic's complaint and hold that Sections 7 and 7A of Global NAPs' Tariff F.C.C. No. 1 are unlawful.

## II. BACKGROUND

### A. Events Preceding the Commission's *Reciprocal Compensation Order*

3. On April 15, 1997, Global NAPs and New England Telephone and Telegraph Company for Massachusetts (Bell Atlantic) entered into an interconnection agreement that continues until April 15, 2000.[5] Pursuant to this agreement, Bell Atlantic carries traffic from its end user customers in Massachusetts to a point of interconnection with Global NAPs in Massachusetts; then Global NAPs delivers the traffic from the point of interconnection to its ISP customers in Massachusetts.[6]

at 82-83, Sections 7, 7A.1, 7A.2, 7A.3, 7A.4 (effective April 15, 1999).

[3] 47 U.S.C. § 201(b).

[4] 47 C.F.R. § 61.74(a).

[5] *See* Interconnection Agreement under Sections 251 and 252 of the Telecommunications Act of 1996, by and between New England Telephone and Telegraph Company and Global NAPs for Massachusetts (April 15, 1997) (Bell Atlantic-Global NAPs Interconnection Agreement), attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22. The agreement will automatically renew and remain in effect unless (1) either party gives notice of termination at least 60 days before April 15, 2000, or (2) after that date, either party gives a 90-day notice of termination. *Id.* at 36, Section 21; *see also* Global NAPs Answer, File No. E-99-22 (filed July 28, 1999) (Global NAPs Answer) at Attachment C.

[6] *See* Bell Atlantic-Global NAPs Interconnection Agreement at 14, Section 5.7.2; *see also* Joint Statement of Stipulated Facts, Disputed Facts and Key Legal Issues Pursuant to Section 1.732(h) and Joint Statement Pursuant to Section 1.733(7)(b)(2), File No. E-99-22 (filed August 10, 1999) (Joint Statement) at 2.

4. The parties' interconnection agreement provides that "[r]eciprocal compensation only applies to the transport and termination of Local Traffic billable by NYNEX [now Bell Atlantic] which a Telephone Exchange Service Customer originates on NYNEX's or Global NAPs' network for termination on the other Party's network."[7] "Local Traffic" is defined as "a call which is originated and terminated within a given LATA, in the Commonwealth of Massachusetts. . . ."[8] The interconnection agreement further provides that the parties "shall compensate each other for the transport and termination of Local Traffic in an equal and symmetrical manner at the rate provided in the Pricing Schedule."[9] According to the Pricing Schedule, reciprocal compensation for "Local Traffic" is $.008 per-minute.[10]

5. The parties executed their interconnection agreement despite their inability to reach a consensus on whether the above-quoted language in the interconnection agreement requires payment of reciprocal compensation for traffic that is delivered to ISPs, *i.e.*, calls made by one carrier's customers that are handed off to the other carrier for delivery to the latter carrier's ISP customers.[11] In place of such a consensus, the parties agreed to interpret the applicable language in their agreement in the same manner in which identical language in other Bell Atlantic/CLEC interconnection agreements was ultimately interpreted by the Massachusetts DTE.[12]

6. On June 26, 1998, MCI WorldCom Technologies, Inc. (MCI WorldCom), which provides competitive local exchange service in Massachusetts, filed a complaint against Bell Atlantic before the Massachusetts DTE regarding Bell Atlantic's failure to pay reciprocal compensation for ISP-bound traffic pursuant to their interconnection agreement.[13] On October

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[7] Bell Atlantic-Global NAPs Interconnection Agreement at 14, Section 5.7.1. According to section 252 of the Act, "reciprocal compensation" arrangements must (1) provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and (2) "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A).

[8] Bell Atlantic-Global NAPs Interconnection Agreement at 5, Section 1.38.

[9] Bell Atlantic-Global NAPs Interconnection Agreement at 14, Section 5.7.2.

[10] Bell Atlantic-Global NAPs Interconnection Agreement at 8, Pricing Schedule.

[11] *See* Chronology of Events Submitted Pursuant to Staff Request of August 3, 1999, File No. 99-22 (filed August 11, 1999) (Chronology of Events) at 11-12.

[12] Chronology of Events at 11-12.

[13] Complaint of MCI WorldCom, Inc. v. New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 97-116-C

21, 1998, the Massachusetts DTE ruled in favor of MCI WorldCom, holding that the parties' agreement requires Bell Atlantic to pay reciprocal compensation for ISP-bound traffic.[14] The Massachusetts DTE noted that other CLECs' interconnection agreements (including Global NAPs') with Bell Atlantic contain identical provisions and directed Bell Atlantic to pay the applicable reciprocal compensation rate contained in those agreements, as well.[15] The express and exclusive basis for the Massachusetts DTE's decision was that: (a) the link between the caller and the ISP in ISP-bound traffic is jurisdictionally severable from the continuing link from the ISP to the target Internet site; (b) ISP-bound traffic is a "local" call under federal law and the interconnection agreement; and (c) ISP-bound traffic is subject to the Massachusetts DTE's jurisdiction as an intrastate call.[16] In essence, the Massachusetts DTE viewed an Internet call as effectively two calls: a local call from the end user to the ISP, and a non-local call from the ISP to the Internet, *i.e.*, the "two-call" theory.[17]

### B. The Commission's *Reciprocal Compensation Order*

7. On February 26, 1999, in response to a number of requests to clarify whether reciprocal compensation applies to ISP-bound traffic, we released the *Reciprocal Compensation Order*.[18] In that *Order*, we concluded that ISP-bound traffic "is jurisdictionally mixed and appears to be largely interstate in nature."[19] In reaching this conclusion, we "analyze[d] ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site."[20] Applying this analysis, we found that ISP-bound traffic "do[es] not terminate at

(filed June 26, 1998), attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22.

[14] *See* Complaint of MCI WorldCom, Inc. v. New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 97-116 (Mass. D.T.E. rel. October 21, 1998) (*Massachusetts DTE October 21, 1998 Order*) at 12, attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22.

[15] *See Massachusetts DTE October 21, 1998 Order* at 14.

[16] *See Massachusetts DTE October 21, 1998 Order* at 6, 11-13.

[17] *See Massachusetts DTE October 21, 1998 Order* at 11-12.

[18] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, 3703, 3707, ¶¶ 1, 23, 28 (Feb. 26, 1999) (*Reciprocal Compensation Order*).

[19] *Reciprocal Compensation Order*, 14 FCC Rcd at 3689-90, ¶ 1; *see also id.* at 3697, 3701-3, 3704-5, ¶¶ 12, 18, 20, 23, 24.

[20] *Reciprocal Compensation Order*, 14 FCC Rcd at 3698-9, ¶ 13.

the ISP's local server, . . . but continues to the ultimate destination or destinations, specifically at an Internet website that is often located in another state."[21] We expressly rejected the argument -- on which the Massachusetts DTE had heavily relied in its October 21, 1998 order -- that ISP-bound calls consist of severable local and non-local components, reasoning that "this argument is inconsistent with Commission precedent . . . holding that communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts."[22]

8. We emphasized, however, that our conclusion that ISP-bound traffic is largely interstate "does not in itself determine whether reciprocal compensation is due in any particular instance."[23] As we explained, there currently is no federal rule governing inter-carrier compensation for ISP-bound traffic.[24] Consequently, whether such compensation is due in any particular instance hinges on the parties' contractual intent in entering into their interconnection agreement, or on the state commission's application of other legal or equitable principles to the parties' compensation dispute.[25]

9. Regarding the parties' intent, we stated that, given the absence of a federal rule governing inter-carrier compensation for ISP-bound traffic, "parties may [have] voluntarily include[d] this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act. . . ."[26] We explained that, where a state commission determines that the parties did, indeed, voluntarily include compensation for ISP-bound traffic in their interconnection agreement, the parties "are bound by those [interconnection] agreements, *as interpreted and enforced by the state commission[].*"[27] Moreover, we determined that such deference to state commission interpretations of parties' contractual intent regarding compensation for ISP-bound traffic applies to state commission decisions that post-date, as well as pre-date, the *Reciprocal Compensation Order*.[28]

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[21] *Reciprocal Compensation Order*, 14 FCC Rcd at 3697, ¶ 12.

[22] *Reciprocal Compensation Order*, 14 FCC Rcd at 3700, ¶ 15.

[23] *Reciprocal Compensation Order*, 14 FCC Rcd at 3689, ¶ 1.

[24] *Reciprocal Compensation Order*, 14 FCC Rcd at 3689, 3690, 3695, 3703, 3704-5, ¶¶ 1, 9, 22, 24, 25, 26; *see also* Joint Statement at 2.

[25] *Reciprocal Compensation Order*, 14 FCC Rcd at 3703-4, 3706, ¶¶ 22, 24, 27.

[26] *Reciprocal Compensation Order*, 14 FCC Rcd at 3703, ¶ 22; *see also id.* at 3703-4, ¶¶ 21, 24.

[27] *Reciprocal Compensation Order*, 14 FCC Rcd at 3703, ¶ 22 (emphasis added); *see also id.* at 3689-90, 3703-4, ¶¶ 1, 21, 24.

[28] *Reciprocal Compensation Order*, 14 FCC Rcd at 3703-4, ¶ 24 ("Nothing in this Declaratory Ruling, therefore, necessarily should be construed to question any determination a state commission has made, *or may make in the*

10. We went on to explain that, even where a state commission concludes that the parties did not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, "state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. . . . By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism."[29] Indeed, we observed that, "[i]n the absence of a federal rule, state commissions that have had to fulfill their statutory obligation under section 252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation."[30] We, therefore, concluded that "[u]ntil adoption of a final [federal] rule, state commissions will continue to determine whether reciprocal compensation is due for this traffic," pursuant to their authority to approve interconnection agreements under sections 251 and 252 of the Act.[31] In sum, "in the absence of a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic," even where the parties' existing interconnection agreement is silent on the subject.[32]

### C. Events After the Commission's *Reciprocal Compensation Order*

11. On April 14, 1999, Global NAPs filed with this Commission the federal tariff at issue here.[33] Global NAPs filed the Tariff on one day's notice pursuant to section 61.23(c) of our

*future*, that parties have agreed to treat ISP-bound traffic as local traffic under existing interconnection agreements.") (emphasis added); *see also id.* at 3707, ¶ 28 ("[T]he Commission's holding that parties' agreements, as interpreted by state commissions, should be binding also applies to those state commissions that have not yet addressed the issue.").

[29] *Reciprocal Compensation Order*, 14 FCC Rcd at 3704-5, ¶¶ 25, 26 (footnotes omitted).

[30] *Reciprocal Compensation Order*, 14 FCC Rcd at 3705-6, ¶ 26.

[31] *Reciprocal Compensation Order*, 14 FCC Rcd at 3707, ¶ 28.

[32] *Reciprocal Compensation Order*, 14 FCC Rcd at 3706, n.87. In the *Reciprocal Compensation Order*, the Commission also issued a notice of proposed rulemaking (NPRM) in which the Commission "tentatively conclude[d] that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act." *Id.* at 3707, ¶ 30. The comment cycle for this NPRM has concluded, and the Commission expects to issue an order resolving that proceeding in the near future.

[33] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1 (effective April 15, 1999).

rules.[34] The Tariff purports to charge an interstate rate of $.008 per minute for all ISP-bound calls for which Global NAPs does not receive compensation under an interconnection agreement.[35] Towards that end, the Tariff states:

> This tariff applies to telecommunications delivered to the Company [*i.e.*, Global NAPs] by a local exchange carrier (the "Delivering LEC") for further delivery to an Internet Service Provider ("ISP") which obtains connections to the public switched network from the Company. This tariff applies to all ISP-bound traffic for which the Company does not receive compensation from the Delivering LEC under the terms of an interconnection agreement entered into pursuant to Sections 251 and 252 of the Communications Act of 1934, as amended (an "Interconnection Agreement").[36]

12. On May 19, 1999, the Massachusetts DTE vacated its October 21, 1998 decision, concluding that our *Reciprocal Compensation Order* had invalidated the "two-call" theory on which the Massachusetts DTE had asserted jurisdiction over, and required reciprocal compensation for, ISP-bound traffic.[37] The Massachusetts DTE ruled, therefore, that Bell Atlantic is not presently required to pay reciprocal compensation for ISP-bound traffic, retroactive to February 26, 1999.[38] The Massachusetts DTE expressly preserved the possibility,

[34] 47 C.F.R. § 61.23(c).

[35] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82-83, Sections 7A.1, 7A.4 (effective April 15, 1999); *see also* Joint Statement at 1-2.

[36] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1 (effective April 15, 1999). Moreover, section 7A.2 of Global NAPs' tariff provides that "[a] delivering LEC with which Company has an Interconnection Agreement may avoid charges under this Tariff by agreeing to treat ISP-bound calls delivered to Company as 'local traffic' subject to reciprocal compensation under Section 251(b)(5) and applicable terms of the Interconnection Agreement. Failure by such a carrier to actually compensate Company for ISP-bound traffic as local traffic under the terms of an Interconnection Agreement shall constitute an election to compensate Company under the terms of this Tariff." Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.2 (effective April 15, 1999). In addition, Section 7A.3 of Global NAPs' tariff provides that "[t]his tariff applies to all ISP-bound traffic that is subject to the jurisdiction of the Federal Communications Commission. To the extent that a Delivering LEC asserts that the terms of an Interconnection Agreement do not apply to some or all ISP-bound traffic due to the jurisdictionally interstate nature of such traffic, that assertion shall constitute a binding election to treat all ISP-bound traffic not subject to an Interconnection Agreement as jurisdictionally interstate and subject to this tariff." *Id.* at 82, Section 7A.3.

[37] *See* Complaint of MCI WorldCom, Inc. v. New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 97-116-C (Mass. D.T.E. rel. May 19, 1999) (*Massachusetts DTE May 19, 1999 Order*), attached to Bell Atlantic Complaint, Attachment A at 24-25.

[38] *See Massachusetts DTE May 19, 1999 Order* at 28.

however, that provisions within existing interconnection agreements not inextricably bound to the "two-call" theory might require the payment of some compensation for the delivery of ISP-bound traffic.[39] Indeed, the Massachusetts DTE repeatedly acknowledged that, notwithstanding its vacation of its October 21, 1998 Order, the issue of whether existing interconnection agreements between Bell Atlantic and CLECs require some form of compensation for ISP-bound traffic remains a live dispute.[40] Accordingly, in express reliance on the directives contained in our *Reciprocal Compensation Order*, the Massachusetts DTE stated that Bell Atlantic and applicable CLECs, including Global NAPs, should negotiate about the appropriate compensation mechanism for inter-carrier delivery of ISP-bound traffic pursuant to section 252 of the Act.[41]

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[39] In this regard, the Massachusetts DTE stated:

> During negotiations, the parties to this agreement may determine that adequate pricing and other terms for these transactions are already governed by other contract provisions (and, certainly, arguments along these lines have been advanced in the CLECs' comments. . . .). Or else, accepting or at least acquiescing in our view of Section 5.8 of the interconnection agreement, they may jointly conclude that the present agreement is silent on the point and needs to be supplemented to provide new terms for these mutual services. They are free to arrive at either judgment in coming to terms over the present dispute. The best outcome is for Bell Atlantic and MCI WorldCom (or other CLECs where other interconnection agreements are concerned) to arrive at a resolution themselves. A far less satisfactory outcome is for the Department to have to interpret, or even to supply, terms, because the parties cannot agree. *Massachusetts DTE May 19, 1999 Order* at 29 (emphases added).

[40] The Massachusetts DTE stated, for example:

> Although MCI WorldCom and Bell Atlantic may still disagree about reciprocal compensation obligations under their interconnection agreement, there is - *post* February 26, 1999 - no valid and effective D.T.E. order still in place to resolve their dispute. Unsatisfying as it may be to say so, all that remains is a now-unresolved dispute.

*Massachusetts DTE May 19, 1999 Order* at 25-26 (emphases added). *See also, Massachusetts DTE May 19, 1999 Order* at 27 ("MCI WorldCom may choose to renew its complaint upon some claim that Massachusetts contract law or 'other legal or equitable considerations' give rise to mutual obligation on its and Bell Atlantic's parts to pay reciprocal compensation for ISP-bound traffic, even despite the FCC's jurisdictional pronouncement.") (emphasis added); *Massachusetts DTE May 19, 1999 Order* at 27 n.29 ("We do not, at this point, hazard a judgment whether such an alternative basis exists in the Bell Atlantic-MCI WorldCom interconnection agreement before us. If such a basis can be convincingly shown, then it would not be the Department's role to save contracting parties from later-regretted commercial judgments."); *Massachusetts DTE May 19, 1999 Order* at 28 n.30 (declining to rule whether MCI WorldCom must refund reciprocal compensation payments made by Bell Atlantic prior to the *Reciprocal Compensation Order*, because "[t]o do so now would be premature," given the continuing possibility that the existing interconnection agreement might be construed to have required such payments by Bell Atlantic.); n. 39, *supra*.

[41] *See Massachusetts DTE May 19, 1999 Order* at 30 ("[W]e expect carriers to begin the voluntary negotiation process provided in section 252 of the 1996 Act, in order to establish insofar as may be warranted, an inter-carrier compensation mechanism that would apply to compensation for all ISP-bound traffic that was not disbursed as of February 26, 1999, as well as all later-occurring ISP-bound traffic.").

The Massachusetts DTE also offered to provide a mediator pursuant to section 252(a)(2) to facilitate the parties' negotiations.[42] The Massachusetts DTE further observed:

> If these negotiations do not resolve the present interconnection agreement dispute, the Department can arbitrate the matter under section 252(b). At that time, consistent with the discretion we have been given by the FCC (at least until the NPRM is settled), the Department would resolve whatever issues are put before it.[43]

13. On May 27, 1999, Global NAPs forwarded a bill to Bell Atlantic pursuant to Sections 7 and 7A of its FCC Tariff No. 1, in which it sought payment, in the amount of $1,726,679, for ISP-bound traffic that Bell Atlantic delivered to Global NAPs in Massachusetts between April 15, 1999 and April 30, 1999.[44] Bell Atlantic has refused to pay this bill.[45] Subsequent to April 30, 1999, Global NAPs has forwarded to Bell Atlantic additional similar bills pursuant to its FCC Tariff No. 1, which Bell Atlantic has also not paid.[46]

14. On July 8, 1999, Bell Atlantic filed the instant complaint pursuant to section 208 of the Act challenging the lawfulness of Sections 7 and 7A of Global NAPs' F.C.C. Tariff No. 1. In its complaint, Bell Atlantic seeks a Commission finding that those tariff provisions are unjust and unreasonable under section 201(b) of the Act for the following reasons. First, Bell Atlantic claims that Global NAPs' tariff violates the so-called "ESP exemption," because said exemption allegedly precludes any carrier from assessing any per-minute interstate charges on ISP-bound traffic.[47] Second, Bell Atlantic argues that, if the ESP exemption does not apply, then Global

[42] *See Massachusetts DTE May 19, 1999 Order* at 30 ("If need be, we would be willing to provide a Department mediator to facilitate agreement, pursuant to the mediation provision of section 252(a)(2).").

[43] *See Massachusetts DTE May 19, 1999 Order* at 30.

[44] Bell Atlantic Complaint at Attachment B; *see also* Joint Statement at 2.

[45] *See* Global NAPs Answer, Proposed Findings of Fact, at 2-3.

[46] *See* Global NAPs Answer, Proposed Findings of Fact, at 2-3.

[47] Bell Atlantic Complaint at 3, 8-9, 15 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3700, ¶ 16; GTE Telephone Operating Cos., GTOC Tariff No. 1 GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) (*GTE ADSL Order*)); Bell Atlantic's Brief on Non-Cost Issues, File No. E-99-22 (Bell Atlantic Non-Cost Brief) at 2, 6, 7-8 (filed Sept. 2, 1999) (*citing GTE ADSL Order*, 13 FCC Rcd at 22469-70, ¶ 7; MTS and WATS Market Structure, CC Docket No. 78-72, Memorandum Opinion and Order, Phase I, 97 F.C.C. 2d 682, 721 (1983) (*MTS and WATS Market Structure Order*)); Bell Atlantic Reply Brief on Non-Cost Issues, File No. E-99-22 (Bell Atlantic Non-Cost Reply Brief) at 2, 13-15 (filed Sept. 15, 1999) (*citing MTS and WATS Market Structure Order*, 97 FCC 2d 682, 721; *Reciprocal Compensation Order*, 14 FCC Rcd at 3705-6, ¶ 26.).

NAPs' tariff violates our rules governing inter-carrier shared access arrangements, because said rules allegedly preclude carriers that jointly provide access service from charging each other for such service, and may even require Global NAPs to reimburse Bell Atlantic for a portion of the fees that Global NAPs receives from its ISP customers.[48] Third, Bell Atlantic asserts that Global NAPs' tariff violates our decision in the *Reciprocal Compensation Order* that, until a federal rule is adopted, the issue of compensation for inter-carrier delivery of ISP-bound traffic must be addressed exclusively through negotiations and state arbitrations under sections 251 and 252 of the Act.[49] Fourth, Bell Atlantic maintains that Global NAPs' tariff constitutes "cramming," because Bell Atlantic allegedly has not agreed to subscribe to the tariffed services at issue;[50] and finally, Bell Atlantic claims that Global NAPs' tariffed rates are unreasonably high.[51] For the reasons described below, we find that Global NAPs' tariff is unlawful, but for reasons other than those asserted by Bell Atlantic.[52]

## III. DISCUSSION

15. The parties do not dispute one principle: the *Reciprocal Compensation Order* holds that carriers whose interconnection agreements include an inter-carrier compensation

[48] Bell Atlantic Complaint at 3, 9-10 (*citing* Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Memorandum Opinion and Order, 4 FCC Rcd 7183, 7185-86 (1989); Waiver of Access Billing Requirements and Investigation of Permanent Modifications, CC Docket No. 86-104, Memorandum Opinion and Order, 2 FCC Rcd 4518, 4519 (1987); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Memorandum Opinion and Order, Phase I, 97 F.C.C. 2d 1082, 1176-77 (1984)); Bell Atlantic Non-Cost Brief, at 2, 8-9 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3695, ¶ 9; Access Billing Requirements for Joint Service Provision, 4 FCC Rcd 7183, ¶¶ 22-24; Waiver of Access Billing Requirements and Investigation of Permanent Modifications, 2 FCC Rcd 4518, ¶¶ 39-40; Investigation of Access and Divestiture Related Tariffs, 97 F.C.C. 2d 1082, 1176-77); Bell Atlantic Non-Cost Reply Brief, at 2, 12-15 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3695, 3705-6, ¶¶ 9, 26).

[49] Bell Atlantic Complaint at 3-4, 10 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3705-6, 3707-10, ¶¶ 26, 28-36); Bell Atlantic Non-Cost Brief, at 2, 9-13 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3704-6, ¶¶ 25-27); Bell Atlantic Non-Cost Reply Brief, at 1-2, 3-7 (*citing Reciprocal Compensation Order*, 14 FCC Rcd at 3705-6, 3707, ¶¶ 26, 28).

[50] Bell Atlantic Complaint at 4, 10-13; Bell Atlantic Non-Cost Brief at 1-2, 3-4, 14; Bell Atlantic Non-Cost Reply Brief, at 2, 10-12 (*citing United Artists Payphone Corp. v. New York Telephone Company*, Memorandum Opinion and Order, File Nos. E-90-181, E-90-182, 8 FCC Rcd 5563 (1993); *MGC Communications Inc. v. AT&T Corp.*, DA 99-1395 (rel. July 16, 1999)).

[51] Bell Atlantic Complaint at 13, 15-16; Bell Atlantic's Brief on Cost Issues, at 1-2, 8; Bell Atlantic Reply Brief on Cost Issues, at 2, 5.

[52] Given our determination that Global NAPs' tariff violates the *Reciprocal Compensation Order*, we need not, and do not, reach the other issues raised in Bell Atlantic's complaint.

mechanism for ISP-bound traffic must abide by the state commission's determination regarding the existence and meaning of the mechanism.[53]

16. As described above, the Massachusetts DTE has yet to make a full and final determination whether the existing interconnection agreement between Bell Atlantic and MCI WorldCom -- and by extension, other CLECs, including Global NAPs -- provides for any inter-carrier compensation for ISP-bound traffic.[54] Not only did the Massachusetts DTE state repeatedly in its May 19, 1999 Order that this issue remains live and disputed, but the May 19, 1999 Order itself (from which 2 of the 5 Commissioners partially dissented) is the subject of several pending petitions for reconsideration.[55] Moreover, on April 16, 1999, Global NAPs filed with the Massachusetts DTE a complaint against Bell Atlantic regarding this very issue, and the Massachusetts DTE has not yet resolved Global NAPs' complaint.[56] Indeed, in its briefs here, Global NAPs acknowledges (albeit in passing) that the Massachusetts DTE still could decide that the existing interconnection agreement between the parties requires Bell Atlantic to compensate Global NAPs in some way for the delivery of ISP-bound traffic.[57]

17. Sections 251 and 252 of the Act create, *inter alia*, negotiation and arbitration procedures for CLECs to interconnect with incumbent LECs in order to provide competing communications services. Congress gave exclusive authority over those processes to state commissions, even though the interconnection matters encompassed by sections 251 and 252

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[53] *See* ¶ 9, *supra; see also US West Communications v. MFS Intelenet, Inc.*, ___F.3d ___, 1999 WL 799082 (9th Cir. (Wash.)) ("The FCC has held parties are bound by interconnection agreements that include ISP-Bound Traffic in their reciprocal compensation provisions and are approved by a state commission."); *Illinois Bell Telephone Company v. WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999) (stating that "[t]he Commission could not have made clearer [in the *Reciprocal Compensation Order*] its willingness -- at least until a federal rule is promulgated -- to let state commissions make the call [regarding the appropriate compensation mechanism for ISP-bound traffic.]").

[54] *See* ¶ 12, *supra*.

[55] *See, e.g.*, MCI WorldCom Technologies, Inc. Order, D.T.E., 97-116-D, Motions for Reconsideration filed by Global NAPs, Sprint Communications, and RCN Telecom (July 13, 1999).

[56] *See* Complaint of Global NAPs, Inc. v. Bell Atlantic, Commonwealth of Massachusetts Department of Telecommunications and Energy, D.T.E. 99-39 (filed April 16, 1999), attached to Letter from Karlyn D. Stanley to Magalie Roman Salas, dated August 10, 1999, File No. E-99-22; *see also* Initial Brief of Global NAPs on Non-Cost Issues, at 41 n.32.

[57] Initial Brief of Global NAPs on Non-Cost Issues, at 41; Reply Brief of Global NAPs, at 20. Global NAPs characterizes this possibility as remote, at best, but we must accept at face value the Massachusetts DTE's repeated assertions that it still could construe the existing interconnection agreement as requiring inter-carrier compensation for ISP-bound traffic.

have both interstate and intrastate aspects.[58] Thus, the fact that ISP-bound traffic is largely interstate does not necessarily mean that such traffic cannot fall within the state-supervised negotiation and arbitration processes set forth in sections 251 and 252.[59]

18. A careful reading of sections 251 and 252 reveals, in fact, that ISP-bound traffic may fall within the state-supervised negotiation and arbitration processes set forth therein.[60] It is beyond debate that the rates, terms, and conditions under which carriers will exchange traffic may be essential terms of some interconnection agreements. Moreover, sections 252(b)(1), (b)(4)(C), and (c)(1) require a state commission to resolve any "open issues" between the parties negotiating an interconnection agreement, and, in doing so, to ensure that such resolution meets the requirements of section 251.[61] Section 251(d)(3) specifically preserves state authority to impose any "access and interconnection obligations" that are not either inconsistent with or disruptive of the requirements and purposes of the Act.[62] Thus, it was within our discretion to direct in the *Reciprocal Compensation Order* that, on an interim basis, inter-carrier compensation for ISP-bound traffic should be treated as an "open issue" subject to the state-supervised negotiation/mediation/arbitration processes set forth in sections 251 and 252 of the Act. Accordingly, whether the existing interconnection agreement between Bell Atlantic and Global NAPs does or should provide for inter-carrier compensation for ISP-bound traffic is an appropriate area of inquiry for the Massachusetts DTE under sections 251 and 252 of the Act, even though ISP-bound traffic is largely interstate.

19. Global NAPs does not appear to argue otherwise. In fact, Global NAPs (along with other Intervenors) filed a brief in the appeal of the *Reciprocal Compensation Order* contending (consistent with our analysis here) that state commissions do have authority under

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[58] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15520, ¶ 41 (1996) (*Local Competition Order*), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) (*CompTel*), *aff'd in part and vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd*), *aff'd in part and rev'd in part sub nom. AT&T Cos. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999); *Order on Reconsideration*, 11 FCC Rcd 13042 (1996); *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996); *Third Order on Reconsideration and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12460 (1997); *further recon. pending*; *see also Reciprocal Compensation Order*, 14 FCC Rcd at 3704-5, ¶ 25.

[59] *Reciprocal Compensation Order*, 14 FCC Rcd at 3704-5, ¶ 25.

[60] In conducting arbitration procedures under section 252 of the Act, however, state commissions still must comply with our rules and our interpretation of the Act. Thus, when we adopt federal rules for inter-carrier compensation for ISP-bound traffic, state commissions conducting arbitrations must abide by these rules.

[61] 47 U.S.C. §§ 252(b)(1), 252(b)(4)(C), and 252(c)(1).

[62] 47 U.S.C. § 251(d)(3).

sections 251 and 252 of the Act to determine whether interconnection agreements do or should contain inter-carrier compensation mechanisms for ISP-bound traffic.[63]

20. Global NAPs points to our brief in the appeal of the *Reciprocal Compensation Order* to support its position that, until we adopt a federal rule on the subject, state commissions have *concurrent*, not *exclusive*, authority to establish inter-carrier compensation for ISP-bound traffic.[64] This means, in Global NAPs' view, that its federal tariff properly invokes the Commission's concurrent jurisdiction. The Commission, however, speaks through its orders, and nothing in our *Reciprocal Compensation Order* changes the analysis herein.

21. We need not decide here in the abstract whether Global NAPs may file any tariff addressing compensation for terminating ISP-bound traffic, because we find the tariff before us to be unjust and unreasonable. Section 7A.1 of the tariff provides that the tariff applies "to all ISP-bound traffic for which the Company does not receive compensation from the Delivering LEC under the terms of an interconnection agreement entered into pursuant to sections 251 and 252 of the Communications Act. . . ."[65] As first explained above, however, the parties do not know at this time whether compensation is due pursuant to their agreement, and will not know until the Massachusetts DTE makes its final determination. Indeed, they have apparently been unsure of the answer to this question even since the agreement was signed.[66] Thus, the parties are unable today to determine whether this tariff is actually applicable. We find that Global

[63] *See* Joint Brief of Intervenors in Support of Respondents in Opposition to the LEC Petitioners, *Bell Atlantic Telephone Companies, Inc. et al. v. FCC*, Nos. 99-1094, *et al.* (filed August 5, 1999).

[64] *See* Initial Brief of Global NAPs on Non-Cost Issues, at 4, 34-35; Reply Brief of Global NAPs, at 18-19; *see also* Brief for Federal Communications Commission, *Bell Atlantic Telephone Companies, et al v. FCC*, Nos. 99-1094 *et al*, at 47 (filed July 22, 1999). The portion of the Commission's D.C. Circuit brief to which Global NAPs refers states:

> The ILECs assert that the Commission has no authority to "authorize" state commissions to impose reciprocal compensation obligations to calls beyond the scope of Section 251(b)(5).... In this case, the Commission is not affirmatively authorizing the state commissions to impose reciprocal compensation obligations; the Commission is rendering an interpretation that imposing such obligations is not inconsistent with the Act or with existing federal rules, and therefore is not prohibited. The Commission issued a declaratory ruling to remove uncertainty and to settle a controversy, rather than an order authorizing, mandating, or prohibiting any particular action. Thus, the issue is not whether the Commission improperly authorized the state commissions to take a particular action, but whether the Commission correctly determined that state commissions have authority to take that action in the absence of contrary federal law. *Id.*

[65] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1 (effective April 15, 1999).

[66] *See* ¶ 4, *supra.*

NAPs has acted unreasonably in implementing tariff provisions under which the purported customer cannot readily discern whether it is incurring the tariffed charges at the time that they are allegedly incurred. We find that Global NAPs cannot reasonably bill Bell Atlantic under this tariff when the very applicability of the tariff has yet to be determined.

22. The contingent and unclear applicability of the tariff defies the Commission's longstanding interpretation of section 201(b) of the Act, as reflected in section 61.2 of our rules.[67] Those authorities require that the applicability of the tariff rate, and its terms, be clear and explicit.

23. Moreover, it seems evident that any federal tariff purporting to govern inter-carrier compensation for ISP-bound traffic could be reasonable only if it mirrors any applicable terms of the party's interconnection agreement, as construed by the appropriate state commission. Using the tariff process to circumvent the section 251 and 252 processes cannot be allowed. In this regard, we find the tariff to be unreasonable in another respect. Section 7A.1 purports to apply the tariff even when a valid interconnection agreement could be in place. That is, the tariff by its terms applies not simply where no agreement addresses compensation for the traffic at issue, but in any circumstance where Global NAPs does not receive compensation. It is certainly possible that parties could have addressed ISP-bound traffic in their agreements without requiring payment to the terminating carrier, *e.g.*, by agreeing to a bill and keep arrangement. This tariff provision seems to purport to override any such agreement.

24. Finally, in addition to the above findings, Global NAPs' tariff is unlawful on independent grounds. In particular, its tariff is not self-contained, but instead cross references, impermissibly, "an interconnection agreement."[68] This violates section 61.74(a) of our rules,[69] which provides that, in the absence of a waiver granted under sections 61.151, 61.152, and 61.153 of the Commission's rules,[70] "no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument."[71] As the Commission has declared previously,

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[67] 47 U.S.C. § 201(b). Section 61.2 of the Commission's rules states that "[i]n order to remove all doubt as to their proper application, all tariff publications must contain clea[r] and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2.

[68] Specialized Common Carrier Service Regulations and Rates of Global NAPs, Inc., Tariff F.C.C. No. 1, at 82, Section 7A.1.

[69] 47 C.F.R. § 61.74(a).

[70] 47 C.F.R. §§ 61.151, 61.152, 61.153.

[71] 47 C.F.R. § 61.74(a).

"a tariff should be complete when filed. Confusion may result if references to other tariffs [or documents] are allowed since all important information will not be consolidated in one place and references may be incomplete. In addition, referenced documents may not be easily accessible to the public."[72]

Global NAPs' improper cross-referencing of an exogenous document renders the challenged tariff provisions unlawful and is an independent and sufficient basis for granting Bell Atlantic's complaint.[73]

## IV. CONCLUSION

25. For the foregoing reasons, we grant Bell Atlantic's complaint and hold that Sections 7 and 7A of Global NAPs' tariff are unlawful under section 201(b) of the Act. In addition, we find that Sections 7 and 7A of Global NAPs' tariff are unlawful, because they do not comply with Part 61 of our rules.

26. Having found that the Tariff is unlawful for the reasons set forth above, we need not reach each of the other grounds asserted by Bell Atlantic in its complaint. We caution that this does not, however, constitute a conclusion that the Tariff is reasonable with respect to issues not raised or discussed here.

[72] Amendment of Parts 1 and 61 of the Commission's Rules, Report and Order, 98 F.C.C.2d 855, 876 at ¶80 (1984).

[73] *See* Revisions to Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Order, 4 FCC Rcd 2624 (1988); AT&T Communications Revisions to Tariff F.C.C. No. 15, Competitive Pricing Plan No. 12, DA 93-383, Order, 1993 WL 756821 (Com. Car. Bur. rel. April 2, 1993); Lincoln Telephone and Telegraph, Memorandum Opinion and Order, 78 F.C.C. 2d 1219 (1998).

## V. ORDERING CLAUSE

27. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201(b), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201(b), and 208 and sections 61.2 and 61.74 of the Commission's rules, 47 C.F.R. §§ 61.2, 61.74, that Bell Atlantic's complaint is GRANTED, to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary