ITC DELTACOM

4092 South Memorial Parkway ▶ Huntsville, AL 35802 ▶ 1-256-382-3900

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EXECUTIVE SECRETARY

March 29, 2000

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

99-00430

Dear Mr. Waddell:

We are in receipt of the March 28, 2000 letter to you by Mr. Guy Hicks. In that letter Mr. Hicks goes to great length to characterize the discussions between ITC^DeltaCom and BellSouth. We completely disagree with the characterization and recitation of the facts contained in Mr. Hicks' letter. BellSouth failed to meet the minimum threshold conditions requested by ITC^DeltaCom throughout the negotiations and further discussion does not appear to hold any promise.

ITC^DeltaCom has requested that the TRA issue an arbitration decision because those who have been personally involved in the discussions think the remaining issues cannot be resolved through negotiation.

With regard to the "two recent decisions that are relevant to the Authorities deliberation" discussed in the Hicks letter, it is critical for the TRA to realize that there are several other decisions that are clearly relevant to this case. Most significantly, the March 24, 2000 decision of the U.S. Court of Appeals for the D.C. Circuit vacating the FCC's decision regarding inter-carrier compensation for ISP-bound traffic. The vacated FCC decision formed the basis for BellSouth's arguments in this case before the TRA regarding inter-carrier compensation. A copy of that decision is attached.

Additionally, BellSouth omitted several critical decisions from other states including the Georgia Public Service Commission's decision in the ICG arbitration, the Georgia

POSTED 3-31-00

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 22, 1999 Decided March 24, 2000

No. 99-1094

Bell Atlantic Telephone Companies,
Petitioner

v.

Federal Communications Commission and
United States of America,
Respondents

Telecommunications Resellers Association, et al.,
Intervenors

Consolidated with
99-1095, 99-1097, 99-1106, 99-1126,
99-1134, 99-1136, 99-1145,

On Petitions for Review of a Declaratory Ruling of the
Federal Communications Commission

Public Service Commission's decision regarding combinations of unbundled network elements, the Alabama Public Service Commission's decision in the ICG arbitration and the North Carolina Utilities Commission decision in the ICG arbitration. Copies of all of those decisions are also attached hereto.

Again, we appreciate the Authority's attention to and speedy resolution of this matter.

Sincerely,

Nanette S. Edwards

Nanette S. Edwards
Regulatory Attorney

cc: Bennett Ross
Guy Hicks

Mark L. Evans and Darryl M. Bradford argued the causes for petitioners. With them on the briefs were Thomas F. O'Neil, III, Adam H. Charnes, Mark B. Ehrlich, Donald B. Verrilli, Jr., Jodie L. Kelley, John J. Hamill, Emily M. Williams, Theodore Case Whitehouse, Thomas Jones, Albert H. Kramer, Andrew D. Lipman, Richard M. Rindler, Robert M. McDowell, Robert D. Vandiver, Cynthia Brown Miller, Charles C. Hunter, Catherine M. Hannan, Michael D. Hays, Laura H. Phillips, J. G. Harrington, William P. Barr, M. Edward Whelan, III, Michael K. Kellogg, Michael E. Glover, Robert B. McKenna, William T. Lake, John H. Harwood, II, Jonathan J. Frankel, Robert Sutherland, William B. Barfield, Theodore A. Livingston and John E. Muench. Maureen F. Del Duca, Lynn R. Charytan, Gail L. Polivy, John F. Raposa and Lawrence W. Katz entered appearances.

Christopher J. Wright, General Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were Daniel M. Armstrong, Associate General Counsel, and John E. Ingle, Laurence N. Bourne and Lisa S. Gelb, Counsel. Catherine G. O'Sullivan and Nancy C. Garrison, Attorneys, U.S. Department of Justice, entered appearances.

David L. Lawson argued the cause for intervenors in opposition to the LEC petitioners. With him on the brief were Mark C. Rosenblum, David W. Carpenter, James P. Young, Emily M. Wiliams, Andrew D. Lipman, Richard M. Rindler, Robert D. Vandiver, Cynthia Brown Miller, Theodore Case Whitehouse, Thomas Jones, John D. Seiver, Charles C. Hunter, Catherine M. Hannan, Carol Ann Bischoff and Robert M. McDowell.

William P. Barr, M. Edward Whelan, Michael E. Glover, Mark L. Evans, Michael K. Kellogg, Mark D. Roellig, Dan Poole, Robert B. McKenna, William T. Lake, John H. Harwood, II, Jonathan J. Frankel, Robert Sutherland, William B. Barfield, Theodore A. Livingston and John E. Muench were on the brief for the Local Exchange Carrier intervenors.

Robert J. Aamoth, Ellen S. Levine, Charles D. Gray, James B. Ramsay, Jonathan J. Nadler, David A. Gross, Curtis T. White, Edward Hayes, Jr., and David M. Janas entered appearances for intervenors

Before: Williams, Sentelle and Randolph, Circuit Judges.

Opinion for the Court filed by Circuit Judge Williams.

Williams, Circuit Judge: The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. ss 151-714, requires local exchange carriers ("LECs") to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Id. s 251(b)(5). When LECs collaborate to complete a call, this provision ensures compensation both for the originating LEC, which receives payment from the end-user, and for the recipient's LEC. By regulation the Commission has limited the scope of the reciprocal compensation requirement to "local telecommunications traffic." 47 CFR s 51.701(a). In the ruling under review, it considered whether calls to internet service providers ("ISPs") within the caller's local calling area are themselves "local." In doing so it applied its so-called "end-to-end" analysis, noting that the communication characteristically will ultimately (if indirectly) extend beyond the ISP to websites out-of-state and around the world. Accordingly it found the calls non-local. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689, 3690 (p 1) (1999) ("FCC Ruling").

Having thus taken the calls to ISPs out of s 251(b)(5)'s provision for "reciprocal compensation" (as it interpreted it), the Commission could nonetheless itself have set rates for such calls, but it elected not to. In a Notice of Proposed Rulemaking, CC Docket 99-68, the Commission tentatively concluded that "a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set by regulation," FCC Ruling, 14 FCC Rcd at 3707 (p 29), but for the nonce it left open the matter of implementing a system of federal controls. It observed that in the meantime parties may voluntarily include reciprocal compensation provisions in their interconnection agreements, and that state commissions, which have authority to arbitrate disputes over such agreements, can construe the agreements as requiring such compensation; indeed, even when the agreements of interconnecting LECs include no linguistic hook for such a requirement, the commissions can find that reciprocal compensation is appropriate. FCC Ruling, 14 FCC Rcd at 3703-05 (p p 24-25); see s 251(b)(1) (establishing such authority). "[A]ny such arbitration," it added, "must be consistent with governing federal law." FCC Ruling, 14 FCC Rcd at 3705 (p 25).

This outcome left at least two unhappy groups. One, led by Bell Atlantic, consists of incumbent LECs (the "incumbents"). Quite content with the Commission's finding of s 251(b)(5)'s inapplicability, the incumbents objected to its conclusion that in the absence of federal regulation state commissions have the authority to impose reciprocal compensation. Although the Commission's new rulemaking on the subject may eventuate in a rule that preempts the states' authority, the incumbents object to being left at the mercy of state commissions until that (hypothetical) time, arguing that the commissions have mandated exorbitant compensation. In particular, the incumbents, who are paid a flat monthly fee, have generally been forced to provide compensation for internet calls on a per-minute basis. Given the average length of such calls the cost can be substantial, and since ISPs do not make outgoing calls, this compensation is hardly "reciprocal."

Another group, led by MCI WorldCom, consists of firms that are seeking to compete with the incumbent LECs and which provide local exchange telecommunications services to ISPs (the "competitors"). These firms, which stand to receive reciprocal compensation on ISP-bound calls, petitioned for review with the complaint that the Commission erred in finding that the calls weren't covered by s 251(b)(5).

The end-to-end analysis applied by the Commission here is one that it has traditionally used to determine whether a call is within its interstate jurisdiction. Here it used the analysis for quite a different purpose, without explaining why such an extension made sense in terms of the statute or the Commission's own regulations. Because of this gap, we vacate the ruling and remand the case for want of reasoned decision-making.

* * *

In February 1996 Congress passed the Telecommunications Act of 1996 (the "1996 Act" or the "Act"), stating an intent to open local telephone markets to competition. See H.R. Conf. Rep. No. 104-458, at 113 (1996). Whereas before local exchange carriers generally had state-licensed monopolies in each local service area, the 1996 Act set out to ensure that "[s]tates may no longer enforce laws that impede[ ] competition," and subjected incumbent LECs "to a host of duties intended to facilitate market entry." AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 726 (1999).

Among the duties of incumbent LECs is to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. s 251(c)(2). ("Telephone exchange service" and "exchange access" are words of art to which we shall later return.) Competitor LECs have sprung into being as a result, and their customers call, and receive calls from, customers of the incumbents.

We have already noted that s 251(b)(5) of the Act establishes the duty among local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. s 251(b)(5). Thus, when a customer of LEC A calls a customer of LEC B, LEC A must pay LEC B for completing the call, a cost usually paid on a per-minute basis. Although s 251(b)(5) purports to extend reciprocal compensation to all "telecommunications," the Commission has construed the reciprocal compensation requirement as limited to local traffic. See 47 CFR s 51.701(a) ("The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers."). LECs that originate or terminate long-distance calls continue to be compensated with "access charges," as they were before the 1996 Act. Unlike reciprocal compensation, these access charges are not paid by the originating LEC. Instead, the long-distance carrier itself pays both the LEC that originates the call and links the caller to the long distance network, and the LEC that terminates the call. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 16013 (p 1034) (1996) ("Local Competition Order").

The present case took the Commission beyond these traditional telephone service boundaries. The internet is "an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world." Reno v. ACLU, 521 U.S. 844, 844 (1997). Unlike the conventional "circuit-switched network," which uses a single end-to-end path for each transmission, the internet is a "distributed packet-switched network, which means that information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." In the Matter of Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501, 11532 (p 64) (1998) ("Universal Service Report"). ISPs are entities that allow their customers access to the internet. Such a customer, an "end user" of the telephone system, will use a computer and modem to place a call to the ISP server in his local calling area. He will usually pay a flat monthly fee to the ISP (above the flat fee already paid to his LEC for use of the local exchange network). The ISP "typically purchases business lines from a LEC, for which it pays a flat monthly fee that allows unlimited incoming calls." FCC Ruling, 14 FCC Rcd at 3691 (p 4).

In the ruling now under review, the Commission concluded that s 251(b)(5) does not impose reciprocal compensation requirements on incumbent LECs for ISP-bound traffic. FCC Ruling, 14 FCC Rcd at 3690 (p 1). Faced with the question whether such traffic is "local" for purposes of its regulation limiting s 251(b)(5) reciprocal compensation to local traffic, the Commission used the "end-to-end" analysis that it has traditionally used for jurisdictional purposes to determine whether particular traffic is interstate. Under this method, it has focused on "the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." FCC Ruling, 14 FCC Rcd at 3695 (p 10). We save for later an analysis of the various FCC precedents on which the Commission purported to rely in choosing this mode of analysis.

Before actually applying that analysis, the Commission brushed aside a statutory argument of the competitor LECs. They argued that ISP-bound traffic must be either "telephone exchange service," as defined in 47 U.S.C. s 153(47), or "exchange access," as defined in s 153(16).1 It could not be the latter, they reasoned, because ISPs do not assess toll charges for the service (see id., "the offering of access ... for the purpose of the origination or termination of telephone toll services"), and therefore it must be the former, for which reciprocal compensation is mandated. Here the Commission's answer was that it has consistently treated ISPs (and ESPs generally) as "users of access service," while treating them as end users merely for access charge purposes. FCC Ruling, 14 FCC Rcd at 3701 (p 17).

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1 "Telephone exchange service" is defined as:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. s 153(47). "Exchange access" is defined as:

> the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

Id. s 153(16).

Having decided to use the "end-to-end" method, the Commission considered whether ISP-bound traffic is, under this method, in fact interstate. In a conventional "circuit-switched network," the jurisdictional analysis is straightforward: a call is intrastate if, and only if, it originates and terminates in the same state. In a "packet-switched network," the analysis is not so simple, as "[a]n Internet communication does not necessarily have a point of 'termination' in the traditional sense." FCC Ruling, 14 FCC Rcd at 3701-02 (p 18). In a single session an end user may communicate with multiple destination points, either sequentially or simultaneously. Although these destinations are sometimes intrastate, the Commission concluded that "a substantial portion of Internet traffic involves accessing interstate or foreign websites." Id. Thus reciprocal compensation was not due, and the issue of compensation between the two local LECs was left initially to the LECs involved, subject to state commissions' power to order compensation in the "arbitration" proceedings, and, of course to whatever may follow from the Commission's new rulemaking on its own possible ratesetting.

* * *

The issue at the heart of this case is whether a call to an ISP is local or long-distance. Neither category fits clearly. The Commission has described local calls, on the one hand, as those in which LECs collaborate to complete a call and are compensated for their respective roles in completing the call, and long-distance calls, on the other, as those in which the LECs collaborate with a long-distance carrier, which itself charges the end-user and pays out compensation to the LECs. See Local Competition Order, 11 FCC Rcd at 16013 (p 1034) (1996).

Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP. The Commission's ruling rests squarely on its decision to employ an end-to-end analysis for purposes of determining whether ISP-traffic is local. There is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate. But it has yet to provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.

In fact, the extension of "end-to-end" analysis from jurisdictional purposes to the present context yields intuitively backwards results. Calls that are jurisdictionally intrastate will be subject to the federal reciprocal compensation requirement, while calls that are interstate are not subject to federal regulation but instead are left to potential state regulation. The inconsistency is not necessarily fatal, since under the 1996 Act the Commission has jurisdiction to implement such provisions as s 251, even if they are within the traditional domain of the states. See AT&T Corp., 119 S. Ct. at 730. But it reveals that arguments supporting use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to this context.

In attacking the Commission's classification of ISP-bound calls as non-local for purposes of reciprocal compensation, MCI WorldCom notes that under 47 CFR s 51.701(b)(1) "telecommunications traffic" is local if it "originates and terminates within a local service area." But, observes MCI WorldCom, the Commission failed to apply, or even to mention, its definition of "termination," namely "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." Local Competition Order, 11 FCC Rcd at 16015 (p 1040); 47 CFR s 51.701(d). Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the "called party."

In its ruling the Commission avoided this result by analyzing the communication on an end-to-end basis: "[T]he communications at issue here do not terminate at the ISP's local server ..., but continue to the ultimate destination or destinations." FCC Ruling, 14 FCC Rcd at 3697 (p 12). But the cases it relied on for using this analysis are not on point. Both involved a single continuous communication, originated by an end-user, switched by a long-distance communications carrier, and eventually delivered to its destination. One, Teleconnect Co. v. Bell Telephone Co., 10 FCC Rcd 1626 (1995), aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, 116 F.3d 593 (D.C. Cir. 1997) ("Teleconnect"), involved an 800 call to a long-distance carrier, which then routed the call to its intended recipient. The other, In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, 7 FCC Rcd 1619 (1992), considered a voice mail service. Part of the service, the forwarding of the call from the intended recipient's location to the voice mail apparatus and service, occurred entirely within the subscriber's state, and thus looked local. Looking "end-to-end," however, the Commission refused to focus on this portion of the call but rather considered the service in its entirety (i.e., originating with the out-of-state caller leaving a message, or the subscriber calling from out-of-state to retrieve messages). Id. at 1621 (p 12).

ISPs, in contrast, are "information service providers," Universal Service Report, 13 FCC Rcd at 11532-33 (p 66), which upon receiving a call originate further communications to deliver and retrieve information to and from distant websites. The Commission acknowledged in a footnote that the cases it relied upon were distinguishable, but dismissed the problem out-of-hand: "Although the cited cases involve interexchange carriers rather than ISPs, and the Commission has observed that 'it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs,' Access Charge Reform Order, 12 FCC Rcd at 16133, the Commission's observation does not affect the jurisdictional analysis." FCC Ruling, 14 FCC Rcd at 3697 n.36 (p 12). It is not clear how this helps the Commission. Even if the difference between ISPs and traditional long-distance carriers is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation. Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long-distance carriers).

In this regard an ISP appears, as MCI WorldCom argued, no different from many businesses, such as "pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies," which use a variety of communication services to provide their goods or services to their customers. Comments of WorldCom, Inc. at 7 (July 17, 1997). Of course, the ISP's origination of telecommunications as a result of the user's call is instantaneous (although perhaps no more so than a credit card verification system or a bank account information service). But this does not imply that the original communication does not "terminate" at the ISP. The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, "simply a communications-intensive business end user selling a product to other consumer and business end-users." Id.

The Commission nevertheless argues that although the call from the ISP to an out-of-state website is information service for the end-user, it is telecommunications for the ISP, and thus the telecommunications cannot be said to "terminate" at the ISP. As the Commission states: "Even if, from the perspective of the end user as customer, the telecommunications portion of an Internet call 'terminates' at the ISP's server (and information service begins), the remaining portion of the call would continue to constitute telecommunications from the perspective of the ISP as customer." Commission's Br. at 41. Once again, however, the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not "terminate" at the ISP. However sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation.

Adding further confusion is a series of Commission rulings dealing with a class, enhanced service providers ("ESPs"), of which ISPs are a subclass. See FCC Ruling, 14 FCC Rcd at 3689 n.1 (p 1). ESPs, the precursors to the 1996 Act's information service providers, offer data processing services, linking customers and computers via the telephone network. See MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1138 (D.C. Cir. 1995).2 In its establishment of the access charge system for long-distance calls, the Commission in 1983 exempted ESPs from the access charge system, thus in effect treating them like end users rather than long-distance carriers. See In the Matter of MTS & WATS Market Structure, 97 F.C.C.2d 682, 711-15 (p 77-83) (1983). It reaffirmed this decision in 1991, explaining that it had "refrained from applying full access charges to ESPs out of concern that the industry has continued to be affected by a number of significant, potentially disruptive, and rapidly changing circumstances." In the Matter of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4534 (p 54) (1991). In 1997 it again preserved the status quo. In the Matter of Access Charge Reform, 12 FCC Rcd 15982 (1997) ("Access Charge Reform Order"). It justified the exemption in terms of the goals of the 1996 Act, saying that its purpose was to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." Id. at 16133 (p 344) (quoting 47 U.S.C. s 230(b)(2)).

This classification of ESPs is something of an embarrassment to the Commission's present ruling. As MCI WorldCom notes, the Commission acknowledged in the Access Charge Reform Order that "given the evolution in [information service provider] technologies and markets since we first

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2 The regulatory definition states that ESPs offer "services ... which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 CFR s 64.702(a).

established access charges in the early 1980s, it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs [inter-exchange carriers]." 12 FCC Rcd at 16133 (p 345). It also referred to calls to information service providers as "local." Id. at 16132 (p 342 n.502). And when this aspect of the Access Charge Reform Order was challenged in the 8th Circuit, the Commission's briefwriters responded with a sharp differentiation between such calls and ordinary long-distance calls covered by the "end-to-end" analysis, and even used the analogy employed by MCI WorldCom here--that a call to an information service provider is really like a call to a local business that then uses the telephone to order wares to meet the need. Brief of FCC at 76, Southwestern Bell v. FCC, 153 F.3d 523 (8th Cir. 1998) (No. 97-2618). When accused of inconsistency in the present matter, the Commission flipped the argument on its head, arguing that its exemption of ESPs from access charges actually confirms "its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary." FCC Ruling, 14 FCC Rcd at 3700 (p 16). This is not very compelling. Although, to be sure, the Commission used policy arguments to justify the "exemption," it also rested it on an acknowledgment of the real differences between long-distance calls and calls to information service providers. It is obscure why those have now dropped out of the picture.

Because the Commission has not supplied a real explanation for its decision to treat end-to-end analysis as controlling, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); 5 U.S.C. s 706(2)(A), we must vacate the ruling and remand the case.

There is an independent ground requiring remand--the fit of the present rule within the governing statute. MCI WorldCom says that ISP-traffic is "telephone exchange service[ ]" as defined in 47 U.S.C. s 153(16), which it claims "is synonymous under the Act with the service used to make local phone calls," and emphatically not "exchange access" as defined in 47 U.S.C. s 153(47). Petitioner MCI WorldCom's Initial Br. at 22. In the only paragraph of the ruling in which the Commission addressed this issue, it merely stated that it "consistently has characterized ESPs as 'users of access service' but has treated them as end users for pricing purposes." FCC Ruling, 14 FCC Rcd at 3701 (p 17). In a statutory world of "telephone exchange service" and "exchange access," which the Commission here says constitute the only possibilities, the reference to "access service," combining the different key words from the two terms before us, sheds no light. "Access service" is in fact a pre-Act term, defined as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." 47 CFR s 69.2(b).

If the Commission meant to place ISP-traffic within a third category, not "telephone exchange service" and not "exchange access," that would conflict with its concession on appeal that "exchange access" and "telephone exchange service" occupy the field. But if it meant that just as ESPs were "users of access service" but treated as end users for pricing purposes, so too ISPs are users of exchange access, the Commission has not provided a satisfactory explanation why this is the case. In fact, in In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 22023 (p 248) (1996), the Commission clearly stated that "ISPs do not use exchange access." After oral argument in this case the Commission overruled this determination, saying that "non-carriers may be purchasers of those services." In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 99-413, at 21 (p 43) (Dec. 23, 1999). The Commission relied on its pre-Act orders in which it had determined that non-carriers can use "access services," and concluded that there is no evidence that Congress, in codifying "exchange access," intended to depart from this understanding. See id. at 21-22 (p 44). The Commission, however, did not make this argument in the ruling under review.

Nor did the Commission even consider how regarding non-carriers as purchasers of "exchange access" fits with the statutory definition of that term. A call is "exchange access" if offered "for the purpose of the origination or termination of telephone toll services." 47 U.S.C. s 153(16). As MCI

WorldCom argued, ISPs provide information service rather than telecommunications; as such, "ISPs connect to the local network 'for the purpose of' providing information services, not originating or terminating telephone toll services." Petitioner MCI WorldCom's Reply Br. at 6.

The statute appears ambiguous as to whether calls to ISPs fit within "exchange access" or "telephone exchange service," and on that view any agency interpretation would be subject to judicial deference. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). But, even though we review the agency's interpretation only for reasonableness where Congress has not resolved the issue, where a decision "is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service." SEC v. Chenery Corp., 318 U.S. 80, 88 (1943). See also Acme Die Casting v. NLRB, 26 F.3d 162, 166 (D.C. Cir. 1994); Leeco, Inc. v. Hays, 965 F.2d 1081, 1085 (D.C. Cir. 1992); City of Kansas City v. Department of Housing and Urban Development, 923 F.2d 188, 191-92 (D.C. Cir. 1991).

* * *

Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] ... local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission. We do not reach the objections of the incumbent LECs--that s 251(b)(5) preempts state commission authority to compel payments to the competitor LECs; at present we have no adequately explained classification of these communications, and in the interim our vacatur of the Commission's ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed.

So ordered.

GEORGIA PUBLIC SERVICE COMMISSION

Docket No. 10767-U

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

ORDER

Appearances

On behalf of ICG Telecom Group, Inc.
Charles V. Gerkin, Attorney
Albert H. Kramer, Attorney
Jacob S. Farber, Attorney

On behalf of BellSouth Telecommunications, Inc.
Fred McCallum, Attorney
Lisa Foshee, Attorney
A. Langley Kitchings, Attorney

On behalf of the Commission Staff
Daniel Walsh, Attorney

On behalf of the Consumers' Utility Counsel Division
Of the Governor's Office of Consumer Affairs
Ron Jackson, Attorney
John Maclean, Attorney

BY THE COMMISSION:

On May 27, 1999, ICG Telecom Group, Inc. ("ICG") petitioned the Commission to decide the unresolved issues in the interconnection negotiations with BellSouth Telecommunications, Inc. ("BellSouth").

I. JURISDICTION AND PROCEEDINGS

Under the Federal Telecommunications Act of 1996 (the Federal Act), State Commissions are authorized to decide the issues presented in a petition for arbitration of interconnection agreements. In addition to its jurisdiction of this matter pursuant to Sections 251 and 252 of the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§46-5-160 *et seq*., and generally O.C.G.A. §§ 46-1-1 *et seq*., 46-2-20, 46-2-21, and 46-2-23.

On December 18, 1998, BellSouth notified ICG that it wished to negotiate a new interconnection agreement. On May 27, 1999, pursuant to Section 252 of the Federal Act, ICG petitioned the Commission to arbitrate the issues that the parties were unable to negotiate. ICG's initial Petition for Arbitration included 26 issues; however, the parties have settled the majority of these issues.

On August 25, 1999, the Hearing Officer issued a Consent Procedural and Scheduling Order. Both ICG and BellSouth filed testimony on October 8, and rebuttal testimony on October 25, 1999. The Commission held hearings on the matter on November 4 and 5, 1999. The Commission Staff and the Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs appeared but did not question the witnesses.

The testimony at the hearing addressed the six issues that remained as of the time of the hearing:

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 provide as a UNE "Enhanced Extended Link" Loops ("EELs")?

4. Should BellSouth be required to enter into a binding forecast of future traffic requirements for a specified period?

5. Should the Commission order enforcement mechanisms to ensure BellSouth's compliance with the Performance Measures included in the interconnection agreement?

6. Should BellSouth be required to make available as UNEs packet-switching capabilities?

At the hearing, BellSouth and ICG agreed to a set of service quality measurements ("SQMs") contained in the attachment to BellSouth witness Coon's testimony. These are the same service quality measurements that BellSouth agreed to in Louisiana. If the parties agree to amend the SQMs, then the changes would be automatically incorporated into the interconnection agreement. Tr. 127. Any new SQMs ordered by either this or the Louisiana Commission would be automatically adopted into the agreement. Id. Any performance measurement that BellSouth agrees to in either Louisiana or Georgia will be automatically incorporated into this BellSouth-ICG agreement, without the need for Commission approval. Id. The parties were not able to reach agreement on whether enforcement mechanisms to hold BellSouth to the performance standards should be included in the interconnection agreement. After the hearing, ICG and BellSouth reached an agreement on the final issue stated above, the obligation of BellSouth to make available as UNEs packet-switching capabilities.

Pursuant to the Consent Procedural and Scheduling Order, ICG and BellSouth filed briefs on November 22, 1999 and reply briefs on December 6, 1999. The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

II. FINDINGS AND CONCLUSIONS

A. 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?

In its Petition, ICG asserted that reciprocal compensation is appropriate for calls prior to the adoption of a prospective rule by the FCC. ICG argues that, while the FCC found in its February 26, 1999 Declaratory Ruling, in CC Docket 96-98 (Declaratory Ruling), that ISP traffic is mostly interstate in nature, it also authorized state commissions to find in arbitrations that reciprocal compensation is appropriate for ISP-bound calls until a federal rule is adopted concerning inter-carrier compensation for such traffic. Further, ICG asserts that BellSouth should be economically indifferent to whether it incurs the transport and delivery costs directly or through a reciprocal compensation arrangement with ICG. ICG Post-Hearing Brief, p. 11.

BellSouth maintains the position that the FCC, in its Declaratory Ruling, held that the obligation to pay reciprocal compensation is not applicable to ISP-bound traffic, and that therefore, any inter-carrier compensation mechanism adopted by a state commission is outside the provisions of 252(b)(5). BellSouth Post-Hearing Brief, p. 3. BellSouth urged the Commission to decline ruling on reciprocal compensation, until the final resolution of the FCC's Notice of Proposed Rule-Making on ISP-bound traffic. BellSouth proposed that the parties track ISP-bound traffic and true-up any compensation due after the FCC reaches a final decision on whether ISP traffic is due reciprocal compensation. BellSouth's Post-Hearing Brief, p. 13.

The Commission finds that it has the authority under Section 252 of the Federal Act to order a provision in the arbitration agreement that reciprocal compensation be due for ISP-bound traffic. see Declaratory Ruling ¶ 25 (State commissions "may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic."). The Commission concludes that, pending the adoption of a federal rule, dial-up calls to ISPs should be treated as local calls for purposes of reciprocal compensation. As the FCC has stated, the FCC's own 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. ILECs and CLECs should be compensated for transport and delivery of ISP-bound calls based on the rates established in Docket No. 7061-U. While the FCC's issuance of a Notice of Proposed Rule-Making on ISP-bound traffic does not mean the Commission cannot, or should not, address this question in the context of this Petition, it is efficient to structure its decision in an effort to accommodate, to the degree possible, potential outcomes of the Rule-Making. Accordingly, the Commission directs the parties to track all reciprocal compensation payments, which shall be subject to a true-up mechanism approved by this Commission as warranted by the outcome of the FCC's Rule-Making in CC Docket 99-68 on ISP-bound traffic. Except to the extent the FCC's forthcoming Rule-Making directs otherwise, the parties shall continue under all applicable terms of this order until further order of this Commission.

B. 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?

The Commission must answer two questions in order to determine whether ICG should receive reciprocal compensation for end office, tandem and transport elements of termination. The first issue is whether ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch. ICG testified that the answer to this question is yes. Tr. 173. BellSouth argues in brief that ICG did not make an adequate showing that the geographic areas are comparable. However, at the hearing, BellSouth did not contradict ICG's assertion. The Commission finds that the ICG's switch serves a comparable geographic area because ICG's assertion to that effect went undisputed.

The second question concerns whether ICG's switch performs the same function as BellSouth's. ICG argues that similar functionality is not a prerequisite to receive the tandem reciprocal compensation rate. However, ICG states that even if the Commission were to find that the same functionality is required, its switch performs the same function as BellSouth's tandem switch. To support this conclusion, ICG references both Alabama and North Carolina Commission findings that the switch functions are similar. Finally, ICG argues that because ICG's switch is identified in the local exchange routing guide ("LERG") as a tandem, it meets BellSouth's own standards for payment of the tandem reciprocal compensation rate. ICG cited BellSouth testimony in an arbitration case before the Florida Public Service Commission that BellSouth would only pay ICG the interconnection rate if ICG's switch was identified in the LERG as a tandem. ICG Post-Hearing Brief, p.28.

In its Post-Hearing Brief, BellSouth references the FCC's language in its First Report and Order that states state commissions "shall consider whether new technologies perform functions similar to those performed by an incumbent LEC's tandem switch" to demonstrate that similar functionality is required to receive the tandem reciprocal compensation rate. BellSouth argues that since ICG has only one voice switch it cannot operate as a tandem switch, and thus, cannot achieve similar functionality.

The Commission finds that the appropriate policy is to compensate ICG for the service that it provides. First, the record supports the conclusion that ICG's switch serves the same geographic area as BellSouth. On the issue of functionality, the Commission finds that ICG's switch serves the same function as a BellSouth switch. For instance, even if a BellSouth customer calls an ICG customer within the same service area, the call has to go through an ICG switch. Therefore, granting ICG the tandem interconnection rate for purposes of reciprocal compensation would allow ICG to recover its costs associated with the transport and termination on its network facilities. See U.S. West Communications v. MFS Intelenet, Inc, 1999 WL 799082, *9 (9th Cir. Oct. 9, 1999). Finally, the Commission is persuaded by the evidence that the LERG identifies ICG's switch as a tandem, and, in other proceedings, BellSouth has considered such identification a prerequisite for receiving the interconnection rate.

C. Should BellSouth be Required to Provide as a UNE, "Enhanced Extended Link" Loops ("EELs")?

The EEL is a UNE combination consisting of a loop, transport and a cross-connect. Like the FCC, the Commission declines to define the EEL itself as a UNE. Third Report and Order, ¶ 478. However, as discussed below, CLECs can obtain at UNE rates combinations of UNEs that BellSouth ordinarily combines in its network.

FCC Rule 315 addressed combinations of unbundled network elements. Rule 315(b) provides:

> Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent currently combines.

(Emphasis added). BellSouth has interpreted the term "currently combines" as "currently combined." BellSouth defines the term to mean those elements "that are physically in a combined state as of the time the CLEC requests them and which can be converted to UNEs on a 'switch as is' or 'switch with changes' basis. . . Currently combined elements only include loops, ports, transport or other elements that are currently installed for the existing customer that the CLEC wishes to serve." BellSouth's Post-Hearing Brief, p. 23. ICG argued that BellSouth is obligated to provide EELs as a UNE combination at UNE prices. ICG's Post-Hearing Brief, p. 31.

When the Supreme Court reinstated Rule 315(b), it stated its understanding of the intent of the rule:

> The reality is that §251(c)(3) is ambiguous on whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis in §251(c)(3)'s nondiscrimination requirement. As the Commission explains, it is aimed at preventing incumbent LECs from "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." Reply Brief for Federal Petitioners 23. It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.

Iowa Board.

It appears clear that the Supreme Court believed that at least one major purpose of Rule 315(b) was to prevent the incumbent from ripping apart elements which were already connected to each other. The Commission agrees that at the very least, Rule 315(b) requires BellSouth to provide combinations of elements that are already physically connected to each other regardless of whether they are currently being used to serve a particular customer. The Supreme Court, however, did not state that it was reinstating Rule 315(b) only to the extent it prohibited incumbents from ripping apart elements currently physically connected to each other. It reinstated Rule 315(b) in its entirety, and it did so based on its interpretation of the nondiscrimination language of Section 251(c)(3). See Third Report and Order, ¶¶ 481 and 482.

The Ninth Circuit Court of Appeals has even recently ruled that it "necessarily follows from AT&T that requiring [the ILEC] to combine unbundled network elements is not inconsistent with the Act . . . the Act does not say or imply that network elements may only be leased in discrete parts." U.S. West Communications v. MFS Intelenet, Inc, 1999 WL 799082, *7 (9th Cir. Oct. 9, 1999). The Commission, however, does not at this time order BellSouth to combine for CLEC's UNEs that BellSouth does not ordinarily combine for itself.

Rule 315(b), by its own terms, applies to elements that the incumbent "currently combines," not merely elements which are "currently combined." In the FCC's First Report and Order, the FCC stated that the proper reading of "currently combines" is "ordinarily combined within their network, in the manner which they are typically combined." First Report and Order, ¶ 296. In its Third Report and Order, the FCC stated that it was declining to address this argument at this time because the matter is currently pending before the Eighth Circuit. Third Report and Order, ¶ 479.[1] Accordingly, the only FCC interpretation of "currently combines"

[1] While the FCC declined to address this argument again in its Third Report and Order, significantly the FCC did not disavow the position it took in the First Report and Order. BellSouth argues that "the FCC made clear that 'currently combined' elements are those elements physically combined as of the time the CLEC requests them and which can be converted to UNEs on a 'switch as is' or 'switch with changes basis." BellSouth's Brief on Impact of Third Report and Order, p. 5. The FCC, however, was not stating that Rule 51-315(b) is limited only to currently combined elements. Instead, the FCC was stating that since, at the least, Rule 51-315(b) includes currently combined elements, and since when a CLEC purchases special access the elements are currently combined, that even under the

remains the literal one contained in the First Report and Order. The Commission finds that "currently combines" means ordinarily combined within the BellSouth's network, in the manner which they are typically combined. Thus, CLECs can order combinations of typically combined elements, even if the particular elements being ordered are not actually physically connected at the time the order is placed. However, in the event that the Eighth Circuit Court of Appeals determines that ILECs have no legal obligation to combine UNEs under the Federal Act, the Commission will reevaluate its decision on this issue.

Based on the FCC's Third Report and Order, even if this Commission were to limit the definition of "currently combines" to the more restrictive "currently combined" interpretation, CLECs would still be able to obtain and use the same UNE combinations. The process of obtaining them would be more cumbersome, however, and would serve no purpose except to complicate the ordering process and impede competition. According to the FCC, CLECs can purchase services such as special access and resale even when the network elements supporting the underlying service are not physically connected at the time the service is ordered. At the point when the CLEC begins to receive such service, the underlying network elements are necessarily physically connected. The CLECs can then obtain such currently combined network elements as UNE combinations at UNE prices. Third Report and Order, ¶¶ 480, 486. The Commission finds that even assuming arguendo that "currently combines" means "currently combined," rather than go through the circuitous process of requiring the CLEC to submit two orders (e.g., one for special access followed by another to convert the special access to UNEs) to receive the UNE combination, the process should be streamlined to allow CLECs to place only one order for the UNE combination.

To the extent that ICG seeks to obtain other combinations of UNEs that BellSouth ordinarily combines in its network, which have not been specifically priced by this Commission when purchased in combined form, the Commission finds that ICG can purchase such UNE combinations at the sum of the stand-alone prices of the UNEs which make up the combination. If ICG is dissatisfied with using the sum of the stand-alone rates, it is free to pursue the bona fide request process with BellSouth to seek a different rate. ICG may purchase EELs from BellSouth at the rates and subject to the conditions established in the Commission's Docket No. 10692-U.

On November 24, 1999, the FCC issued a Supplemental Order to its Third Report and Order. In this Supplemental Order, the FCC modified its conclusion in paragraph 486 of the Third Report and Order to now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service. Supplemental Order, ¶ 4. IXCs may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities, unless the IXC uses the combination "to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." Id. at ¶ 5. Accordingly, the Commission finds that in order for ICG to use a loop/transport combination to provide special access service, it must provide a significant amount of local exchange service over the combination. Further, such loop/transport combinations must be connected to a CLEC switch and must be used in the provision, of circuit switched telephone exchange service. ICG

more restrictive "currently combined" interpretation, CLECs would be able to convert special access to loop-transport combinations at UNE rates. Third Report and Order ¶ 480.

must "self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements" in order to convert special access facilities to UNE pricing. Id. at footnote 9. The FCC did not find it to be necessary for ILECs and requesting carriers to undertake auditing processes to monitor whether requesting carriers are using UNEs solely to provide exchange access service. Id. The Commission finds that BellSouth shall not make auditing a precondition to converting special access to UNEs; thus the conversion of facilities will not be delayed. The Commission finds, however, that BellSouth shall be allowed to audit ICG's records in order to verify the type of traffic being transmitted over EELs. If, based on its audits, BellSouth concludes that ICG is not providing a significant amount of local exchange traffic over the facilities, BellSouth may file a complaint with this Commission.

D. Should BellSouth be required to enter into a binding forecast of future traffic requirements for a specified period?

ICG requested that the interconnection agreement include binding forecasts for trunking facilities to deliver to ICG traffic originated in BellSouth's network. Currently, BellSouth is responsible for the costs associated with the trunking for calls from a BellSouth customer to an ICG customer. Tr. 86. However, ICG testified that binding forecasts would ensure that BellSouth would have the requisite capacity on its network to meet ICG's traffic needs as its business expands. In addition, ICG testified that it would commit to BellSouth for a specified volume of traffic to be delivered by BellSouth. If the traffic volume does not meet the forecasted levels, ICG committed to pay BellSouth's full costs for the unused trunks. Tr. 86-87. In response, BellSouth argued that binding forecasts are not required by the Federal Act. Moreover, BellSouth questions whether ICG has contemplated all the costs related to binding forecasts. BellSouth's Post-Hearing Brief, p.30.

Merely because an issue is not explicitly spelled out in the Federal Act, does not render it outside its scope. Binding forecasts relate to the quality of service that ICG can provide its customers. Enabling CLECs to provide quality service to its customers promotes competition, and promoting competition is an intent of the Federal Act. The binding forecasts would provide a benefit to ICG without exposing BellSouth to any risk, so long as the costs of unused trunks are passed on to ICG. The interconnection agreement should include the option of the binding forecasts requested by ICG, under the condition that ICG pays for BellSouth's full costs for the unused trunks.

E. Should the Commission order enforcement mechanisms to ensure BellSouth's compliance with the Performance Measures included in the interconnection agreement?

In its May 27, 1999, Petition for Arbitration, ICG included the following issues related to Performance Standards/Measures:

a. Should BellSouth be subject to liquidated damages for failing to meet the time intervals for provisioning UNEs?

b. 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?

c. 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?

d. 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)?

e. Should BellSouth continue to be responsible when the duration of service's failure exceeds certain benchmarks?

f. 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?

g. Should BellSouth continue to be responsible when the duration of service's failure to meet the grade of service requirements exceeds certain benchmarks?

h. 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?

i. Should BellSouth continue to be responsible when the duration of its failure to provide the requisite data exceeds certain benchmarks?

Although the parties reached agreement at the hearing on service quality measurements, the issue of enforcement of the measurements remains unresolved. ICG argued that in order for the performance standards to which the parties have agreed to have meaning, enforcement mechanisms must be in place. ICG Post-Hearing Brief, p. 41. Without the threat of penalty, BellSouth does not have enough of an incentive to meet the performance standards. BellSouth counters with both a legal and a policy argument. Its legal argument is that ICG is asking the Commission to award compensatory damages, which is outside the scope of Commission authority. BellSouth's Post-Hearing Brief, p. 32-33. BellSouth's policy argument is that it is unnecessary to include enforcement mechanisms in the interconnection agreement because ICG can make use of the Commission's complaint procedures. Id. at 34.

Addressing the legal issue first, the inclusion of enforcement mechanisms in an interconnection agreement are distinguishable from awarding compensatory damages. BellSouth cites Georgia Public Service Commission v. Atlanta Gas Light Company,[2] to support its claim that the Commission does not have the authority to order the inclusion of enforcement mechanisms in an interconnection agreement. This case involved the Commission ordering a refund to customers after the Company charged a rate that the Commission approved. There is nothing retroactive, however, about the Commission ordering enforcement mechanisms in an interconnection agreement. Moreover, the mere inclusion of the enforcement mechanisms does not, in and of itself, amount to compensatory damages. It is only providing an incentive for BellSouth to meet the performance standards to which it has agreed. In any event, the Commission is specifically authorized to set and enforce terms and conditions of interconnection and unbundling. O.C.G.A. § 46-5-164. Therefore, the Commission concludes that it has the authority to order enforcement measures as part of an interconnection agreement.

Despite the Commission's jurisdiction in this area, the specific enforcement measures advocated by ICG, and listed under the Statement of Proceedings, do not find adequate support in the record. The Commission reserves the jurisdiction to adopt for this agreement, enforcement mechanisms that are ordered in future arbitration proceedings.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues that the parties presented to the Commission for arbitration should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, pending the adoption of a federal rule, dial-up calls to ISPs should be treated as local calls for purposes of reciprocal compensation. ILECs and CLECs should be compensated for transport and delivery of ISP-bound calls based on the rates established in Docket No. 7061-U. However, the Commission directs the parties to track all reciprocal compensation payments, which shall be subject to a true-up mechanism, based upon the outcome of the FCC's Rule-Making in CC Docket 99-68 on ISP-bound traffic.

ORDERED FURTHER, that for the purposes of reciprocal compensation, ICG is entitled to the tandem switch rate,

ORDERED FURTHER, that BellSouth is obligated to provide to ICG EELs at UNE prices because the network elements that comprise EELs are routinely combined in BellSouth's system,

ORDERED FURTHER, that the arbitration agreement shall provide ICG with the option of binding forecasts for trunking facilities to deliver to ICG traffic originated in BellSouth's network, provided that ICG is responsible for the costs of unused trunks,

[2] 205 Ga. 863, 55 S.E.2d 618 (1949)

ORDERED FURTHER, that enforcement mechanisms are within the Commission's authority. However, the measures proposed by ICG in this proceeding are not supported by the record. Therefore, the Commission will reserve its jurisdiction to incorporate enforcement measures that are approved in a future interconnection arbitration into the ICG-BellSouth interconnection agreement.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 1st day of February, 2000.

Helen O'Leary
Executive Secretary

Bob Durden
Chairman

Date

Date

GEORGIA PUBLIC SERVICE COMMISSION

DOCKET NO. 10692-U

PROPOSED ORDER

In re: Generic Proceeding to Establish Long-Term Pricing Policies For Unbundled Network Elements

BY THE COMMISSION:

The Georgia Public Service Commission ("Commission") initiated this docket to establish long-term pricing policies for combinations of Unbundled Network Elements (UNEs) and to establish recurring and nonrecurring rates for particular combinations of UNEs.

I. INTRODUCTION

A. Background

On December 4, 1996, the Commission issued its Order on the AT&T Petition for Arbitration. In that Order, the Commission set interim rates for unbundled network elements (UNEs). The Commission stated in the AT&T Arbitration Order: "The Commission further rules that it shall conduct a generic proceeding to develop appropriate long-term pricing policies regarding recombination of unbundled capabilities." Docket 6801-U, AT&T Arbitration Order, p. 52.

On December 6, 1996, the Commission issued a Procedural and Scheduling Order to consider cost-based rates in Docket 7061-U, In Re: Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services. The Commission issued its final order in that case on December 16, 1997 setting permanent rates for stand-alone UNEs. In its order, the Commission stated: "The Commission reaffirms its corollary decision in Docket 6801-U that it shall conduct a generic proceeding to develop long-term pricing policies regarding recombination of UNEs. . . . Indeed, the Commission notes that this proceeding is not, and was not intended to be the 'Generic Proceeding' to develop appropriate long-term pricing policies regarding recombination of unbundled capabilities that was envisioned in the Commission's December 4, 1996 order ruling on Arbitration in docket 6801-U." Docket 7061-U, UNE Cost Order, pp. 48-49.

Various parties have continued to show an interest in this issue. For example, on April 10, 1998, AT&T filed a petition with this Commission to commence a generic proceeding to establish long-term pricing policies for UNEs. See Docket 9097-U. On January 23, 1999, MCIMetro Access Transmission Services, LLC, filed a complaint against BellSouth to obtain DS1 Loop - Transport combinations at UNE prices. See Docket 6865-U.

On January 25, 1999, the Supreme Court issued its decision in AT&T Corporation v. Iowa Utilities Board, 119 S.Ct. 721 (1999). This matter had come before the Supreme Court on writs of certiorari from the decision of the Eighth Circuit Court of Appeals which had vacated portions of the Federal Communications Commission's First Report and Order issued on August 8, 1996. Among other provisions, the Eighth Circuit had vacated FCC Rule 315(b) which prohibited ILECs from separating elements which are already combined. The Supreme Court reversed the Eighth Circuit on this issue, reinstating Rule 315(b). The Supreme Court affirmed the ruling of the Eighth Circuit that CLECs can provide local service relying solely on the elements in an incumbent's network. The Supreme Court ruled, however, that the FCC did not adequately consider the "necessary and impair" standard in determining which network elements incumbents must provide to CLECs. As a result, the Supreme Court vacated the FCC's Rule 319.

On September 15, 1999, the Federal Communications Commission (FCC) completed its reconsideration of Rule 319, adopting its Third Report and Order and Fourth Further Notice of Proposed Rulemaking (Third Report and Order), Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98. The FCC's written order was released on November 5, 1999. In this Third Report and Order, the FCC revised, in light of the Supreme Court's order, the list of the network elements that ILEC must provide on an unbundled basis and issued a new Rule 319. The FCC ruled that the following elements must be unbundled: Loops, subloops, network interface device (NID), circuit switching, interoffice transmission facilities, signaling and call-related databases, and operations support systems (OSS). For circuit switching, the FCC ruled that Incumbent LECs must offer unbundled access to local circuit switching, except for switching used to serve business users with four or more lines in FCC access density zone 1 (the densest areas) in the top 50 Metropolitan Statistical Areas (MSAs), provided that the incumbent LEC provides non-discriminatory, cost-based access to the enhanced extended link (EEL, a combination of an unbundled loop, multiplexing/concentrating equipment, and dedicated transport.). The FCC ruled that, pursuant to section 51.315(b) of the FCC's rules, incumbent LECs are required to provide access to combinations of loop, multiplexing/concentrating equipment and dedicated transport if they are currently combined. The FCC did not readdress whether an incumbent LEC must combine network elements that are not already combined in the network, because that issue is pending before the Eighth Circuit Court of Appeals. Finally, the FCC sought comment on the legal and policy bases for precluding requesting carriers from substituting dedicated transport for special access entrance facilities.

On November 24, 1999, the FCC issued a Supplemental Order to its Third Report and Order. In this Supplemental Order, the FCC modified its conclusion in paragraph 486 of the Third Report and Order to allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service. Supplemental Order, ¶ 4. IXCs may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities, unless the IXC uses the combination "to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." Id. at ¶ 5.

B. Statement of Proceeding

On May 18, 1999, the Commission issued its Procedural and Scheduling Order that set forth the scope of the hearing in this matter. The Scheduling Order stated that the purpose of this proceeding was to establish long-term pricing policies for combinations of Unbundled Network Elements (UNEs). The Scheduling Order stated that the Commission would set recurring and non-recurring rates for certain combinations of UNEs. In addition, it stated that the Commission would set pricing policies for combinations of UNEs generally. Finally, the Scheduling Order stated that the Commission would consider, and parties testimony should address, the following issues:

1. How should the recurring and nonrecurring charges for UNEs combinations be determined?

2. What are the appropriate recurring and nonrecurring charges for the following combinations:

   i. DS1 Loop - Transport combination
   ii. 2-wire analog loop-port combination

3. What other UNE combinations have CLECs requested from BellSouth and what are the appropriate recurring and nonrecurring charges for these combinations?

The Scheduling Order provided that any party submitting a cost study was required to provide comprehensive and complete work papers that fully disclosed and documented the process underlying the development of each of its economic costs, including the documentation of all judgments and methods used to establish every specific assumption employed in each cost study. The Scheduling Order required that the work papers clearly and logically represent all data used in developing each cost estimate, and be so comprehensive as to allow others initially unfamiliar with the studies to replicate the methodology and calculate equivalent or alternative results using equivalent or alternative assumptions. The Scheduling Order required that the work papers be organized in such a manner as to clearly identify and document all source data and assumptions, including investment, expense, and demand data assumptions.

BellSouth and AT&T filed cost studies in this proceeding. BellSouth presented recurring and non-recurring cost studies which used basically the same methodology adopted by the Commission in its December 16, 1997 Order in Docket 7061-U. Most, but not all, of the adjustments that were ordered by the Commission in Docket 7061-U were incorporated into the new studies. AT&T presented the HAI Model 5.1 (HAI or Hatfield) for a limited number of the recurring costs and the AT&T and MCI Non-Recurring Cost Model for a limited number of the non-recurring costs. For those costs, not covered by its models, AT&T recommended that use BellSouth's cost studies with modifications.

In hearings commencing July 13, 1999, the Commission heard testimony from witnesses for AT&T Communications of the Southern States (AT&T), Inc., BellSouth Telecommunications, Inc. (BellSouth), the Competitive Telecommunications Association (Comptel), the United States Department of Defense and All Other Federal Executive Agencies (collectively referred to as DOD), Excel Telecommunications, Inc. (Excel), Intermedia Communications, Inc. (Intermedia), MCI WorldCom, Inc. (MCI WorldCom), Sprint Communications Company, L.P. (Sprint), and Qwest Communications (Qwest). After the conclusion of the hearings, the Commission received closing briefs from interested parties. In addition to receiving briefs from most of the parties sponsoring witnesses, the Commission received briefs from the Consumers' Utility Counsel Division (CUCD), ICG Telecom Group, Inc. (ICG), and NEXTLINK Georgia, Inc. (NEXTLINK).

As discussed above, on November 5, 1999, the FCC issued its Third Report and Order. On December 7, 1999, the Commission issued its Order Setting Briefing Schedule which allowed any interested parties to file briefs addressing the impact of the FCC's Third Report and Order on the issues in this case. The Commission received Briefs from AT&T, BellSouth, Certain Facilities-Based CLECs (Focal Communications Corp. of Georgia, ICG, Intermedia, and NEXTLINK), CUCD, KMC Telecom, Inc. and KMC Telecom II, Inc. (KMC), MCI, and Sprint.

C. Jurisdiction

Under the Federal Telecommunications Act of 1996 (Federal Act), State Commissions are authorized to set rates and pricing policies for interconnection and access to unbundled elements. In addition to its jurisdiction of this matter pursuant to Sections 251 and 252 of the Federal Act, the Commission also has general authority and jurisdiction over the subject matter of this proceeding, conferred upon the Commission by Georgia's Telecommunications and Competition Development Act of 1995 (Georgia Act), O.C.G.A. §§46-5-160 *et seq.*, and generally O.C.G.A. §§ 46-1-1 *et seq.*, 46-2-20, 46-2-21, and 46-2-23.

II. FINDINGS AND CONCLUSIONS

A. UNE Combinations Generally

Before determining the actual rates for any combinations of unbundled network elements, the Commission must address certain underlying issues. In particular, the Commission must determine the scope of BellSouth's obligation to provide combinations of UNEs and the applicable pricing standards that apply to combinations of UNEs.

1. Rule 319 / Necessary and Impair Standard

In January 1999, the Supreme Court ruled that the FCC did not adequately consider the "necessary and impair" standard in determining which network elements incumbent LECs must provide to CLECs. As a result, the Supreme Court vacated the FCC's Rule 319. In the hearings held before this Commission, BellSouth argued that this Commission should consider the necessary and impair standard in making its determination. Since the hearing was held, the FCC has completed its reconsideration of Rule 319 and specified a national list of UNEs that ILECs must provide: Loops, subloops, network interface device (NID), circuit switching[1], interoffice transmission facilities, signaling and call-related databases, and operations support systems (OSS).

For UNEs on the national list, there is no need for this Commission to consider the necessary and impair standard since the FCC already made that determination. Indeed, the FCC stated that the goals of the Act would better be served if network elements are not removed from the national list on a state-by-state basis, at this time. The FCC order did recognize that state commissions are authorized to require incumbent LECs to unbundle additional elements as long as the obligations are consistent with the requirements of section 251. Accordingly, this Commission would apply the necessary and impair standard to the extent it considered a request to expand the unbundling requirements under the Federal Act. Since this Commission is not expanding the national list in this order, there is no need for this Commission to undertake such an analysis. Some CLECs have requested that the Commission define the enhanced extended link (EEL) as a UNE. Joint Supplemental Brief of Certain Facilities-Based CLECs, p. 7. The EEL is a UNE combination consisting of a loop, transport and a cross-connect. Like the FCC, the Commission declines to define the EEL itself as a UNE. Third Report and Order, ¶ 478. However, as discussed below, CLECs can obtain at UNE rates combinations of UNEs that BellSouth ordinarily combines in its network.

[1] For circuit switching, the FCC ruled that Incumbent LECs must offer unbundled access to local circuit switching, except for switching used to serve business users with four or more lines in FCC access density zone 1 in the top 50 Metropolitan Statistical Areas (MSAs), provided that the incumbent LEC provides non-discriminatory, cost-based access to the enhanced extended link.

2. Applicability of FCC Rules to Pricing UNE Combinations

In its First Report and Order, the FCC had required that prices for unbundled network elements be developed using the TELRIC methodology. The Eighth Circuit had vacated the FCC's pricing rules on the grounds that pricing was outside of the FCC's jurisdiction and was reserved for the states. The Supreme Court overturned the Eighth Circuit on this issue, ruling that the FCC had jurisdiction to design a pricing methodology that the States must use. Since it had determined that the FCC lacked the jurisdiction to require a particular pricing methodology, the Eighth Circuit never reached the issue of whether TELRIC complies with the Act. The Supreme Court remanded this issue back to the Eighth Circuit. The FCC's pricing rules have been reinstated by the Supreme Court and are currently in effect pending the Eighth Circuit's review of TELRIC.[2]

BellSouth had argued in this proceeding that while "the FCC was very specific to establish pricing rules for the provision of individual UNEs. The FCC did not establish pricing rules to govern the provision of currently combined UNEs." (Pre-filed Direct Testimony of Varner, p. 24). The Commission disagrees.

The FCC's pricing rules provide:

Rule 51.501 Scope.

(a) The rules in this subpart apply to the pricing of network elements, interconnection, and methods of obtaining access to unbundled network elements, including physical collocation and virtual collocation.
(b) As used in this subpart, the term "element" includes network elements, interconnection, and methods of obtaining access to unbundled elements.

Rule 51.503 General Pricing Standard.

(a) An incumbent LEC shall offer elements to requesting carriers at rates terms and conditions that are just, reasonable and nondiscriminatory.
(b) An incumbent LEC's rates for each element it offers . . . shall be established, at the election of the state commission-
    (1) pursuant to the forward-looking economic cost-based pricing methodology set forth in §§51.505 and 51.511 of this part; or
    (2) consistent with the proxy ceilings and ranges set forth in §51.513 of this part.
(c) The rates that an incumbent LEC assesses for elements shall not vary

2 As discussed below, the portion of the pricing rules which requires geographic deaveraging has been stayed by the FCC.

> on the basis of the class of customers served by the requesting carrier, or on the type of service that the requesting carrier purchasing such elements uses them to provide.

The rules clearly apply to the pricing of all network elements. Nowhere in the rules does the FCC imply that they apply only to network elements that are physically separated from other network elements. The rules do refer to "unbundled" elements; however, the Supreme Court specifically rejected BellSouth's argument that the term unbundled means physically separated:

> Nor are we persuaded by the incumbents' insistence that the phrase "on an unbundled basis" in §251(c)(3) means "physically separated." The dictionary definition of "unbundled" (and the only definition given, we might add) matches the FCC's interpretation of the word: "to give separate prices for equipment and supporting services." Webster's Ninth New Collegiate Dictionary 1283 (1985).

Iowa Board, (Emphasis added).

In its Third Report and Order, the FCC made it clear that it considered its pricing rules for UNEs to be applicable to combinations of UNEs. Third Report and Order ¶¶ 480 and 486. Based on the FCC's statements in its Third Report and Order, BellSouth has stated that "[w]hile the merits of the FCC's pricing rules are currently on appeal, BellSouth will provide currently combined network elements at cost-based rates in accordance with the FCC's TELRIC pricing rules." BellSouth's Brief on the Impact of the FCC's Third Report and Order, p. 8.

The Commission finds that the FCC pricing rules do apply to combinations of network elements.

3. Reasonable Profit

The cost model that BellSouth presented in this proceeding includes the return on equity which this Commission adopted in Docket 7061-U. Thus, the costs that the model generates includes as profit a reasonable return on BellSouth's investment. In addition to the costs plus profit generated by its cost model, however, BellSouth has argued that its rates should include an additional sum, which it refers to as a "reasonable profit." BellSouth argues that the "reasonable profit" for a 2-wire analog loop-port combination should be an additional recurring charge of $9.19. For a 4-wire DS1 loop-transport combination, BellSouth argues that it should be an additional $78.25. While BellSouth's cost models generate costs for other combinations, it has not recommended a rate or an amount of "reasonable profit" for them.

In Docket 7061-U, the Commission addressed the issue of the meaning of the term "reasonable profit" as it is used in 47 U.S.C. § 252(d)(1)(B). The Commission stated:

> The Commission does not accept BellSouth's assertion that the "reasonable profit" referred to in 47 U.S.C. § 252(d)(1)(B) means a profit over and above the cost including cost of capital. . . . [T]he Commission notes that BellSouth's interpretation would run counter to established pricing principles that the reasonable profit is incorporated within the concept of cost of capital.

Order in Docket 7061-U, p. 24. The Commission hereby reaffirms its finding in Docket 7061-U.

BellSouth argued that the best way to provide for a reasonable profit is to set the price of currently combined UNEs at the resale rate. BST's Brief, p. 24. While this Commission previously ruled that UNE combinations that replicate a retail service should be priced as resale, in light of the court decisions rejecting BellSouth's arguments that UNE combinations are, or should be treated as, resale, this position is no longer tenable. The Eighth Circuit rejected the ILEC argument that when a CLEC uses only leased network elements to provide a service that the wholesale rate should apply. Instead, the Eighth Circuit affirmed the FCC's "all elements" rule, ruling that even when a CLEC used only leased elements to provide service, the elements would be priced at the cost-based rates, not the wholesale rate. 120 F.3d at 814. The Supreme Court affirmed the Eighth Circuit's holding on the "all elements" rule. The Supreme Court went even further. When it reinstated Rule 315(b), the Court explicitly recognized that this rule would allow CLECs to lease a complete, preassembled network at cost-based rates (assuming the list of elements under Rule 319 was not changed). As the Court stated:

> Rule 315(b) forbids an incumbent to separate already-combined network elements before leasing them to a competitor. As they did in the Court of Appeals, the incumbents object to the effect of this rule when it is combined with others before us today. TELRIC allows an entrant to lease network elements based on forward-looking costs, Rule 319 subjects virtually all network elements to the unbundling requirement, and the all-elements rule allows requesting carriers to rely only on the incumbent's network in providing service. <u>When Rule 315(b) is added to these, a competitor can lease a complete, preassembled network at (allegedly very low) cost-based rates.</u>
>
> The incumbents argue that this result is totally inconsistent with the 1996 Act. They say that it not only eviscerates the distinction between resale and unbundled access, but that it also amounts to Government-sanctioned regulatory arbitrage. Currently, state laws require local phone rates to include a "universal service" subsidy. Business customers, for whom the cost of service is relatively low, are charged significantly above cost to subsidize service to rural and residential customers, for whom the cost of service is relatively high. Because this universal-service subsidy is built into retail rates, it is passed on to carriers who enter the market through the resale provision.

> Carriers who purchase network elements at cost, however, avoid the subsidy altogether and can lure business customers away from incumbents by offering rates closer to cost. This, of course, would leave the incumbents holding the bag for universal service.
>
> As was the case for the all-elements rule, our remand of Rule 319 may render the incumbents' concern on this score academic. Moreover, §254 requires that universal-service subsidies be phased out, so whatever possibility of arbitrage remains will be only temporary. In any event, we cannot say that Rule 315(b) unreasonably interprets the statute.

Iowa Board, (Emphasis added).

While BellSouth proposed several other alternative theories which it claimed could be used to calculate its proposed "reasonable profit" of $9.19, no such calculation appears in the record. BellSouth merely makes a conclusory statement as to what its reasonable profit should be without any showing of how it arrived at the number. In addition, as discussed in the prior section, the FCC's UNE pricing rules apply to UNE combinations. BellSouth's "reasonable profit" proposals are contrary to FCC rules that prohibit the consideration of certain factors when setting rates:

> § 51.505(d) Factors that may not be considered. The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:
> (1) Embedded costs. Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's book of accounts.
> (2) Retail costs. Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in § 51.609 of this part.
> (3) Opportunity costs. Opportunity costs include revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carrier that purchase elements.
> (4) Revenues to subsidize other services. Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

Based on the above, the Commission rejects BellSouth's so-called reasonable profit adjustment.

4. Currently Combines

FCC Rule 315 addressed combinations of unbundled network elements. Rule 315(b) provides:

> Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent <u>currently combines</u>.

Emphasis added. BellSouth has interpreted the term "currently combines" as "currently combined." BellSouth defines the term to mean those elements "that are physically in a combined state as of the time the CLEC requests them and which can be converted to UNEs on a 'switch as is' or 'switch with changes' basis. . . . Currently combined elements only include loops, ports, transport or other elements that are currently installed for the existing customer that the CLEC wishes to serve." BellSouth's Posthearing Brief, p. 9. The CLECs have interpreted the term to mean elements that are typically combined in the ILECs network, even if the particular elements being ordered are not actually combined at the time the order is placed.

When the Supreme Court reinstated Rule 315(b), it stated its understanding of the intent of the rule:

> The reality is that §251(c)(3) is ambiguous on whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis in §251(c)(3)'s nondiscrimination requirement. As the Commission explains, it is aimed at preventing incumbent LECs from "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." Reply Brief for Federal Petitioners 23. It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.

<u>Iowa Board</u>.

It appears clear that the Supreme Court believed that at least one major purpose of Rule 315(b) was to prevent the incumbent from ripping apart elements which were already connected to each other. The Commission agrees that at the very least, Rule 315(b) requires BellSouth to provide combinations of elements that are already physically connected to each other regardless of whether they are currently being used to serve a particular customer. The Supreme Court, however, did not state that it was reinstating Rule 315(b) only to the extent it prohibited incumbents from ripping apart elements currently physically connected to each other. It reinstated Rule 315(b) in its entirety, and it did so based on its interpretation of the nondiscrimination language of Section 251(c)(3). <u>See</u> Third Report and Order, ¶¶ 481 and 482.

Indeed, the Ninth Circuit Court of Appeals has recently ruled that it "necessarily follows from AT&T that requiring [the ILEC] to combine unbundled network elements is not inconsistent with the Act . . . the Act does not say or imply that network elements may only be leased in discrete parts." U.S. West Communications v. MFS Intelenet, Inc, 1999 WL 799082, *7 (9th Cir. Oct. 9, 1999). In response to U.S. West's argument that the Eighth Circuit's invalidation of FCC Rules 315(c)-(f) required the Ninth Circuit to conclude that a state commission's order requiring an ILEC to provide combinations violates the Act, the Ninth Circuit stated:

> The Supreme Court opinion . . . undermined the Eighth Circuit's rationale for invalidating this regulation. Although the Supreme Court did not directly review the Eighth Circuit's invalidation of § 51.315(c)-(f), its interpretation of 47 U.S.C. § 251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation.

Id.

Rule 315(b), by its own terms, applies to elements that the incumbent "currently combines," not merely elements which are "currently combined." In the FCC's First Report and Order, the FCC stated that the proper reading of "currently combines" is "ordinarily combined within their network, in the manner which they are typically combined." First Report and Order, ¶ 296. In its Third Report and Order, the FCC stated that it was declining to address this argument at this time because the matter is currently pending before the Eighth Circuit. Third Report and Order, ¶ 479.[3] Accordingly, the only FCC interpretation of "currently combines" remains the literal one contained in the First Report and Order. The Commission finds that "currently combines" means ordinarily combined within the BellSouth's network, in the manner which they are typically combined.[4] Thus, CLECs can order combinations of typically combined elements, even if the particular elements being ordered are not actually physically connected at the time the order is placed. However, in the event that the Eighth Circuit Court of Appeals determines that ILECs have no legal obligation to combine UNEs under the Federal Act, the Commission will reevaluate its decision on this issue. The Commission further finds that the particular loop/port and loop/transport combinations at issue in this case are

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3 While the FCC declined to address this argument again in its Third Report and Order, significantly the FCC did not disavow the position it took in the First Report and Order. BellSouth argues that "the FCC made clear that 'currently combined' elements are those elements physically combined as of the time the CLEC requests them and which can be converted to UNEs on a 'switch as is' or 'switch with changes basis." BellSouth's Brief on Impact of Third Report and Order, p. 5. The FCC, however, was not stating that Rule 51-315(b) is limited only to currently combined elements. Instead, the FCC was stating that since, at the least, Rule 51-315(b) includes currently combined elements, and since when a CLEC purchases special access the elements are currently combined, that even under the more restrictive "currently combined" interpretation, CLECs would be able to convert special access to loop-transport combinations at UNE rates. Third Report and Order ¶ 480.

4 BellSouth's argument that the cost studies it presented in this matter are based on its definition of "currently combined" is discussed below in Section II.B.4, below.

ordinarily combined in BellSouth's network.

Based on the FCC's Third Report and Order, even if this Commission were to limit the definition of "currently combines" to the more restrictive "currently combined" interpretation, CLECs would still be able to obtain and use the same UNE combinations. The process of obtaining them would be more cumbersome, however, and would serve no purpose except to complicate the ordering process and impede competition. According to the FCC, CLECs can purchase services such as special access and resale even when the network elements supporting the underlying service are not physically connected at the time the service is ordered. At the point when the CLEC begins to receive such service, the underlying network elements are necessarily physically connected. The CLECs can then obtain such currently combined network elements as UNE combinations at UNE prices. Third Report and Order, ¶¶ 480, 486. The Commission finds that even assuming arguendo that "currently combines" means "currently combined," rather than go through the circuitous process of requiring the CLEC to submit two orders (e.g., one for special access followed by another to convert the special access to UNEs) to receive the UNE combination, the process should be streamlined to allows CLECs to place only one order for the UNE combination.

5. BellSouth's Proposed Restrictions

BellSouth had proposed in its testimony in this matter numerous restrictions on the use of UNE combinations. These proposed restrictions included:

- Combinations would be available for only two years, beginning only after BellSouth obtains Section 271 approval;

- Customers must be in service for six months before they may be served through a UNE combination;

- Combinations would only be available in the areas defined by BellSouth rate groups 2 and 5;

- Loop/Transport combinations must terminate on a CLEC circuit-switched, local voice switch;

- Loop/Transport combinations can only be used to provide local voice switched service.

- Loop/Transport combinations cannot be used by the entrant to provide special access service; and,

BellSouth's justification for proposing these restrictions was that they were necessary to create "the appropriate economic incentives." BellSouth's Posthearing Brief, p. 27. BellSouth also stated that the restrictions were necessary "to ensure that the use of combinations does not stifle the growth of competition." Id. at 31.

As previously discussed, BellSouth is required by the Federal Act and the FCC's rules to allow CLECs to purchase combinations of UNEs. Further, the nondiscriminatory provisions of the Federal Act and the FCC's rules are applicable to such combinations. With a limited exception discussed below, BellSouth's proposed restrictions would violate the Federal Act and the FCC's rules.

Section 251(c)(3) of the Act establishes:

> The duty to provide, to any requesting telecommunications carrier for the provision of telecommunications service, nondiscriminatory access to network elements.

Emphasis Added. More specifically, FCC Rule 51.309(a) provides:

> An incumbent LEC shall not impose limitations, restrictions or requirements on requests for, or the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.

Emphasis added. Accordingly, except as discussed below, the Commission rejects BellSouth's proposed restrictions on the use of UNE combinations.

One of BellSouth's proposed restrictions was that Loop/Transport combinations cannot be used by the entrant to provide special access service. On November 24, 1999, the FCC issued a Supplemental Order to its Third Report and Order. In this Supplemental Order, the FCC modified its conclusion in paragraph 486 of the Third Report and Order to now allow incumbent LECs to constrain the use of combinations of unbundled loops and transport network elements as a substitute for special access service. Supplemental Order, ¶ 4. IXCs may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities, unless the IXC uses the combination "to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." Id. at ¶ 5. Accordingly, the Commission finds that in order for a CLECs to use a loop/transport combination to provide special access service, the CLEC must provide a significant amount of local exchange service over the combination. Such CLECs must "self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements" in order to convert special access facilities to UNE pricing. Id. at footnote 9. The FCC did not find it to be necessary for ILECs and requesting carriers to undertake auditing processes to monitor whether requesting carriers are using UNEs solely to provide exchange access service. Id. The Commission finds that BellSouth shall not make auditing a precondition to converting special access to UNEs; thus the conversion of facilities will not be delayed. The Commission finds, however, that BellSouth shall be allowed to audit CLEC records in order to verify the type of traffic being transmitted over EELs. If, based on its audits, BellSouth concludes that a CLEC is not providing a significant amount of local exchange traffic over the facilities, BellSouth may file a complaint with this Commission.

6. Commercial Agreements

BellSouth has stated that it is willing to make certain UNE combinations available to CLECs through "Commercial Agreements." BellSouth claims that these commercial agreements are not subject to Commission review or approval. As explained in the prior sections, BellSouth has an obligation under the Act to provide elements that it currently combines to CLECs at cost-based rates. A review of the Commercial Agreements filed with the Commission in this matter indicates that the combinations provided under the Commercial Agreements include combinations of elements that BellSouth currently combines. In addition, the combinations provided under the Commercial Agreements include combinations that are analogous to services that could be purchased at resale rates or under an existing tariff.

All interconnection agreements must be submitted to the Commission for approval. Section 252(e)(1). For negotiated agreements, the primary purpose of this requirement is so that the Commission can insure that the agreement does not "discriminate against a telecommunications carrier not a party to the agreement" and to insure that "implementation of the agreement [is consistent] with the public interest." Section 252(e)(2)(a)(i) and (ii). Obviously, the Commission cannot fulfill its obligations if it cannot even look at the agreements.[5] Accordingly, the Commission finds that BellSouth's commercial agreements are subject to Commission review and approval.

B. Cost Study Methodology and Major Assumptions

Both BellSouth and AT&T filed cost studies in this proceeding. BellSouth presented recurring and non-recurring cost studies which used basically the same methodology adopted by the Commission in its December 16, 1997 Order in Docket 7061-U. Most, but not all, of the adjustments that were ordered by the Commission in Docket 7061-U were incorporated into the new studies. AT&T presented the HAI Model 5.1 for a limited number of the recurring costs and the AT&T and MCI Non-Recurring Cost Model for a limited number of the non-recurring costs. For those costs not covered by its models, AT&T recommended that use BellSouth's cost studies with modifications. Other parties to this proceeding have recommended that the Commission make various adjustments to the proffered models.

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5 Certainly, BellSouth cannot seriously suggest that the Commission simply ignore allegations that BellSouth is giving more favorable rates to CLECs that agree not to invest in facilities in Georgia than to those that do invest in Georgia. This is particularly the case where, for all practical purposes, BellSouth is simply selling a UNE combination at a rate other than the cost-based rate or is providing a resale discount other than the avoided cost discount set by the Commission.

1. Openness and Documentation

The Scheduling Order provided that any party submitting a cost study was required to provide comprehensive and complete work papers that fully disclosed and documented the process underlying the development of each of its economic costs, including the documentation of all judgments and methods used to establish every specific assumption employed in each cost study. The Scheduling Order required that the work papers clearly and logically represent all data used in developing each cost estimate, and be so comprehensive as to allow others initially unfamiliar with the studies to replicate the methodology and calculate equivalent or alternative results using equivalent or alternative assumptions. The Scheduling Order required that the work papers be organized in such a manner as to clearly identify and document all source data and assumptions, including investment, expense, and demand data assumptions.

BellSouth contends that AT&T has failed to support the basic underpinnings of the HAI Model and has failed to submit the documentation required by the Scheduling Order. BellSouth's Posthearing Brief, pp. 40- 42.

PNR and Associates (PNR) generated data for AT&T that was used to create inputs to the HAI cost proxy model for AT&T. In essence, when customers cannot be located by a mailing address (e.g., a customer has a rural P.O. Box), PNR uses mathematical processes to place the customers in surrogate locations. The customers are grouped into "clusters." This grouping process is considered by PNR to be a proprietary process. The clusters are then reconfigured to "serving areas." This process is also considered to be proprietary.

These processes are relevant to the Hatfield model because Hatfield builds its hypothetical network to these "serving areas." Since loop length is a major cost driver, the distribution of customers can greatly affect the costs generate by a model. BellSouth sought access to the PNR processes and data to determine whether the model designs these serving areas in a way that reflects the way customers are actually distributed and, if it does not, whether this results in an understatement of the costs. As BellSouth has stated, however, "AT&T has not produced a single document, study, or report that in any way validates or verifies the geocoding and clustering work performed by PNR for purposes of Hatfield version 5.1, even though AT&T was specifically requested to do so by BellSouth." BellSouth's Posthearing Brief, pp. 40-41.

AT&T, not BellSouth, must carry the burden of proof in regards to the HAI model. It is AT&T's responsibility to demonstrate to this Commission that its model produces costs in a well-reasoned way based on data shown to be reliable. See Docket 5825-U, January 20, 2000 Order. As the Commission's Order in Docket 7061-U demonstrated, when adopting a cost model, the Commission must weigh various competing factors, including, but not limited to, openness. Order in Docket No. 7061, p. 16. The Commission finds that AT&T has not adequately supported the basic underpinnings of the Hatfield Model in this proceeding. The Commission finds that while some of the principles used in constructing the Hatfield model are useful to consider in evaluating and in making adjustments to BellSouth's model, the Hatfield model itself has not been demonstrated to be a reliable method for computing the cost-based rates.

2. Conformance with TELRIC

CLECs have alleged that because the BellSouth models are premised on an assumption of the existing network configuration, while the FCC's pricing rules require the use of a "scorched node" network configuration, that the Commission should not use the BellSouth models. The Commission's options in this matter are limited to accepting or adjusting the competing models presented to it. As discussed in the prior section, from the standpoint of documentation in the record, AT&T's network configuration is essentially pulled out of thin air. In contrast, BellSouth's network configuration has verifiable underpinnings that have an objective basis. The Commission has previously approved the use of this model and has found it to be reliable, consistent, and accurate in computing forward-looking costs. The Commission finds that the costs generated by the BellSouth models, with the proper modifications and inputs, best reflect the forward-looking costs of UNE Combinations.

In addition, because HAI Model 5.1 and the AT&T and MCI Non-Recurring Cost Model only produce costs for a limited number of UNEs, even if the Commission were to approve the use of such models, the Commission would still have to use the BellSouth models for the remaining elements. Even without the openness problem discussed above, the Commission would not be inclined to use two completely different sets of methodologies to compute the costs of different UNE.

Most importantly, however, after reviewing the costs generated by the various models using different sets of inputs, the Commission is of the opinion that the decisions most effecting the costs generated are the inputs and adjustments used, rather than the choice of the basic model itself. As AT&T demonstrated, when BellSouth's recurring cost model is modified to include AT&T's proposed inputs, the cost generated for a 2-wire analog loop/port UNE combination, \$11.94, is virtually identical to the HAI cost of \$11.75. AT&T's Post hearing Brief, p. 19. Regardless of which model the Commission selected, the Commission would need to adjust the model and modify the inputs. The Commission has selected to use the BellSouth model and has made adjustments which reduce the costs generated by that model. However, even if the Commission were to choose the HAI model, it could not do so without modifications.[6] It appears that, after all the necessary adjustments were made, the costs ultimately produced by either model to would be very similar.

3. Geographic Deaveraging

Some parties in this proceeding have recommended that the Commission geographically deaverage UNE rates. See DOD Brief, pp. 8-10. In Docket No. 7061-U, the Commission found that it should not implement geographical deaveraging until it addressed universal service. At the time the Order in Docket 7061-U was issued, Rule 51.507, which required geographic deaveraging, had been stayed by the Eighth Circuit. While the Supreme Court's Iowa decision resulted in reinstating

6 For example, while the Commission finds that the BellSouth model does not use enough IDLC, the HAI model's use of 100% GR-303 IDLC is also inappropriate.

the FCC's pricing rules, the FCC itself subsequently stayed Rule 507. Since Rule 507 is stayed until this spring, the Commission currently has no obligation to set deaveraged UNE rates. The Commission intends to deaverage UNE rates at the appropriate time.

4. Nonrecurring Costs

Nonrecurring costs are one-time charges associated with UNEs. For example, costs associated primarily with the ordering and provisioning of UNEs are reflected as nonrecurring charges for such elements. In Docket 7061-U, the Commission approved the use of BellSouth's non-recurring cost model, subject to certain modifications. The Commission finds that the non-recurring costs generated by the BellSouth models best reflect the appropriate cost-based non-recurring charges. The key assumptions underlying the AT&T nonrecurring model are flawed; thus, the costs generated by that model are suspect. For example, the model assumes that BellSouth's current OSS can be transformed to permit a fallout rate of only 2 percent, even though BellSouth has not achieved that kind of flowthrough for its own orders. Further, it assumes that not a single CLEC order will require manual handling by BellSouth due to CLEC error. Finally, it is not consistent with the HAI model. Post-hearing Brief of BellSouth, pp. 42-45.

BellSouth has stated that its cost studies presented in this matter are based on its definition of "currently combined." Direct Testimony of Mr. Varner, p, 10; Direct Testimony of Ms. Caldwell, pp. 8, and 12-14. MCI WorldCom argued that the results of the BellSouth cost studies are not a result of the application of BellSouth's definition of currently combined; instead, they are the result of no longer assuming that elements must be physically separated and recombined in a collocation space. See Rebuttal Testimony of Mr. Wood, pp. 15-17. The Commission finds that BellSouth's recurring cost models are not impacted by BellSouth's definition of currently combined; and, as discussed elsewhere in this order, the Commission finds that, subject to certain modifications, the recurring rate for UNE combinations should be set using BellSouth's model. The Commission also finds that BellSouth's non-recurring cost models should be used to set the nonrecurring costs for those UNE combinations where the UNEs are currently in place. However, the non-recurring costs generated by BellSouth's model may be inappropriate for those UNE combinations where the elements are not, in fact, currently in place. The Commission finds, on an interim basis, that for those UNE combinations where the elements are not currently in place, the nonrecurring charge for such UNE combinations shall be the sum of the stand-alone NRCs of the UNEs which make up the combination. These interim rates shall be subject to true-up. Within 45 days of the date of this order, BellSouth shall file a cost study for nonrecurring charges for such new UNE combinations. The Commission shall conduct a review of the cost study.

C. Input Assumptions

1. Inputs Set in Docket No. 7061-U.

In Docket 7061-U, the Commission adopted a pricing methodology and resulting cost-based rates for the unbundling of BellSouth's network elements. As part of that proceeding, the Commission made several findings regarding the appropriate model inputs to be used in determining UNE rates. The Commission has taken judicial notice of the administrative record in Docket 7061-U during the hearing in this matter. Tr. 1019.

Many of the model inputs that the Commission adopted in Docket 7061-U have already been incorporated into the model that BellSouth has filed in this proceeding. For example, BellSouth has used the Commission approved rate of return and the plant lives and depreciation rates as prescribed by the FCC for BellSouth's operations in Georgia. The Commission finds that, except as otherwise specified in this order, all input adjustments to the BellSouth model which the Commission made in Docket 7061-U shall be approved for purposes of this proceeding and shall be properly incorporated into BellSouth's model.

2. Loop Sample and the inclusion of ESSX

In Docket 7061-U, the Commission recognized that the length of loops and their types of construction are major cost drivers. Order in Docket 7061-U, p. 34. Thus, the Commission rejected BellSouth's omission of shorter business-type loops, including ESSX, because exclusion of these shorter loops would result in an overstatement of loop costs. Order in Docket 7061-U, pp. 36-37. In the cost study filed in this case, BellSouth incorporated PBX trunks in its loop sample, but did not incorporate ESSX Service loops. Tr. at 431. AT&T and MCI argue that the ESSX loops should be included. The Commission agrees that ESSX should be included in the loop sample. BellSouth currently combines the loop and port used to provide ESSX service and this UNE combination should be available for use by the CLEC to provide the customer with local service. Rebuttal Testimony of Mr. Don Wood, pp. 24-25.

Including ESSX loops results in two adjustments to the TELRIC Calculator. Adding in the ESSX loops results in a reduction of the average cost of business loops since ESSX loops tend to be shorter. Adding in the ESSX loops also increases the total number of business loops by 367,997 (Docket 7061-U, BellSouth's response to Staff's Third Data Request, Item No. STF-3-5), thus increasing the proportion of business loops to total loops. Since business loops are cheaper than residential loops, as the percentage of business loops increases, the average loop cost decreases. The Commission finds that adding ESSX loops requires modifying BellSouth's model to reflect 68% residential loops and 32% business loops. This adjustment would result in a $0.55 decrease to the 2-wire loop/port UNE combination price.

3. Integrated Digital Loop Carrier (IDLC)/GR-303 IDLC

BellSouth's model assumes that 49% of digital loop carrier (DLC) loops are served by IDLC. AT&T and MCI argue that BellSouth's model should be adjusted so that all DLC loops are served by IDLC. BellSouth counters by arguing that an assumption of 100% IDLC ignores the realities of network design since BellSouth states that it will continue to deploy universal DLC in its network for the foreseeable future. Tr. 346. While the Commission agrees that an assumption of 100% IDLC ignores the realities of network design, the Commission finds that the percentage of IDLC currently assumed by BellSouth is not forward-looking. The Commission finds that BellSouth's model should be adjusted to reflect 98% IDLC. This adjustment would result in a $0.71 decrease to the 2-wire loop/port UNE combination price.

AT&T also advocates that BellSouth's cost studies be adjusted so as to assume GR-303 for all IDLC loops. BellSouth states that currently less than 1% of its access lines are served by GR-303, while 99% are served on TR-008. BellSouth states that it still deploys TR-008 in its network and will continue to do so throughout the study period. Tr. at 336. Bellcore estimated that, in 1997, 16% of BellSouth's lines were GR303 capable digital loop carriers. Tr. 372. BellSouth's model assumes 0% GR-303. While GR-303 is the forward-looking technology, the Commission finds that the replacement of TR-008 will be too gradual to warrant modifying BellSouth cost study to assume 100% GR-303 at this time. On the other hand, since GR-303 is already being deployed on a limited basis by BellSouth and is the forward-looking technology, 0% is also inappropriate. Based on its review of the evidence, the Commission finds that BellSouth's model should be modified to reflect 20% GR-303. This would result in a $0.18 decrease to the 2-wire loop/port UNE combination price.[7]

4. Rate Design for Switch Features (Vertical Features)

In Commission Docket 7061-U, the Commission reaffirmed its earlier decision in the AT&T-BellSouth arbitration (Docket No. 6801-U), that there should be no additional, separate charges for switch features. The Commission found "that switch vertical features should not be priced separately as individual elements, but should instead be incorporated within the unbundled switch port element." Docket 7061-U, Order, p. 39. The Commission noticed this proceeding to determine pricing for UNE combinations, not to revisit its decision on vertical features. In any event, the Commission finds no reason to change its prior decision on this matter. Accordingly, the Commission does not approve BellSouth's proposed additional costs for switch features. This would result in a $4.28 decrease to the 2-wire loop/port UNE combination price.

D. Rates For Combinations of Network Elements

1. Electronic versus Manual Orders

BellSouth has proposed different non-recurring charges for electronic orders versus manual orders. It does not appear that any party has objected to separately pricing orders based on the type

7 AT&T had proposed an adjustment to the TELRIC Calculator to make up for the lack of using GR-303 in multiplexer inputs. See Rebuttal of Donovan, pp. 21-22. The adjustment, which assumes 100% GR-303, resulted in a reduction in the price of $0.91. Based on AT&T's reasoning, an assumption of 20% GR-303 results in a reduction of $0.18 (0.20 x 0.91 = 0.18).

of order. More importantly, the Commission finds that manual orders are more expensive for BellSouth to process than electronic orders. Accordingly, the Commission approves BellSouth's proposal to price manual orders and electronic orders separately.

2. Pricing of Specific UNE Combinations

Based on the adjustments discussed above, the Commission hereby approves the recurring and non-recurring rates for certain combinations of UNEs.

a. 2-wire loop/port UNE combination.

The Commission has made the following adjustments to BellSouth's proposed rate for the 2-wire loop/port UNE combination:

(i).	Eliminate Reasonable Profit Additive	$9.19
(ii).	Eliminate Vertical Feature Additive	$4.28
(iii).	Adjust for addition of ESSX loops	$0.55
(iv).	Adjust for use of 98% IDLC	$0.71
(v).	Adjust for use of 20% GR-303	$0.18

These adjustments result in a total recurring cost for 2-wire loop/port combination of $14.34. As discussed above, this combination (sometimes referred to as UNE-Platform or UNE-P) shall be available statewide and shall not be subject to the restrictions proposed by BellSouth in this matter.

As discussed above, the Commission finds that BellSouth's non-recurring cost model should be used to set the nonrecurring costs for those UNE combinations where the UNEs are currently in place. Accordingly, the nonrecurring cost for an existing 2-wire loop/port combination is $2.01 when ordered electronically. The non-recurring charges for additional orders and for manual orders for existing 2-wire loop/port combinations are set forth in Attachment A hereto.

The non-recurring costs generated by BellSouth's model may be inappropriate for those UNE-P combinations where the elements are not, in fact, currently in place. The Commission finds, on an interim basis, that for those UNE-P combinations where the elements are not currently in place, the nonrecurring charge for such UNE combinations shall be the sum of the stand-alone NRCs of the UNEs which make up the combination. These interim rates shall be subject to true-up. Within 45 days of the date of this order, BellSouth shall file a cost study for nonrecurring charges for such UNE combination. The Commission shall conduct a review of the cost study.

b. Loop/Transport Combinations.

BellSouth computed recurring and non-recurring costs for various loop/transport combinations:

2-wire voice grade extended loop with DS1 Dedicated Interoffice Transport;
4-wire voice grade extended loop with DS1 Dedicated Interoffice Transport;
4-wire 56 or 64 kbps extended digital loop with Dedicated DS1 Interoffice Transport;
Extended 2-wire VG Dedicated Local Channel with Dedicated DS1 Interoffice Transport;
Extended 4-wire VG Dedicated Local Channel with Dedicated DS1 Interoffice Transport;
Extended 4-wire DS1 Digital Loop with Dedicated DS1 Interoffice Transport;
Extended 4-wire DS1 Digital Loop with Dedicated DS3 Interoffice Transport; and,
Extended DS1 Dedicated Local Channel with Dedicated DS3 Interoffice Transport.

As discussed above, BellSouth had proposed a "reasonable profit" additive of $78.25 for the 4-wire DS1 loop-transport combination, which the Commission has disallowed.

The Commission finds that BellSouth shall provide these loop/transport combinations to CLECs. These combinations shall be available statewide and shall not be subject to the restrictions proposed by BellSouth in this matter except as specifically set forth in this order. The recurring rates for such combinations, whether currently in place or new, are set forth in Attachment A. BellSouth's non-recurring cost models should be used to set the nonrecurring costs for those loop/transport combinations where the UNEs are currently in place. These non-recurring charges are set forth in Attachment A hereto.

On an interim basis, for those loop/transport combinations where the elements are not currently in place, the nonrecurring charge for such UNE combinations shall be the sum of the stand-alone NRCs of the UNEs which make up the combination. These interim rates shall be subject to true-up. Within 45 days of the date of this order, BellSouth shall file a cost study for nonrecurring charges for such new loop/transport combinations. The Commission shall conduct a review of the cost study.

3. Pricing of UNE Combinations Not Costed In This Proceeding

To the extent that CLECs seek to obtain other combinations of UNEs that BellSouth ordinarily combines in its network which have not been specifically priced by this Commission when purchased in combined form, the Commission finds that the CLEC can purchase such UNE combinations at the sum of the stand-alone prices of the UNEs which make up the combination. If the CLEC is dissatisfied with using the sum of the stand-alone rates, the CLEC is free to pursue the bona fide request process with BellSouth to seek a different rate.

III. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the rates, terms and conditions as discussed in the preceding sections of this Order should be adopted for the interconnection with and unbundling of BellSouth's telecommunications services in Georgia, pursuant to Sections 251 and 252 of the

Telecommunications Act of 1996 and Georgia's Telecommunications and Competition Development Act of 1995.

WHEREFORE IT IS ORDERED, that all findings, conclusions, statements, and directives made by the Commission and contained in the foregoing sections of this Order are hereby adopted as findings of fact, conclusions of law, statements of regulatory policy, and orders of this Commission.

ORDERED FURTHER, the cost-based rates determined by the Commission in this Order are established as the rates for BellSouth's unbundled network elements. BellSouth shall submit such compliance filings as are necessary to reflect and implement the rates and policies established by this Order. BellSouth shall file a revised Statement of Generally Available Terms and Conditions (SGAT) reflecting and implementing the rates and policies established by this Order and reflecting the unbundling requirements of the FCC's Third Report and Order within thirty (30) days of the date of this Order.

ORDERED FURTHER, that, as set forth in the body of this Order, BellSouth shall file the cost studies for those loop/port and loop/transport combinations that are not currently in place within 45 days of the date of this Order.

ORDERED FURTHER, the Commission shall reevaluate the availability of UNEs every three years in a manner consistent with the Third Report and Order.

ORDERED FURTHER, that if the Eighth Circuit Court of Appeals determines that ILECs have no legal obligation to combine UNEs under the Federal Act, the Commission will reevaluate its decision with regard to the requirement that BellSouth provide combinations of typically combined elements where the particular elements being ordered are not actually physically connected at the time the order is placed. Further, this docket shall remain open in the event the FCC's rules are modified to mandate different requirements for Enhanced Extended Links.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 1st day of February, 2000.

Helen O'Leary
Executive Secretary

Date

Bob Durden
Chairman

Date

STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P O BOX 991
MONTGOMERY, ALABAMA 36101-0991

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

WALTER L. THOMAS, JR.
SECRETARY

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	)	

ORDER DENYING RECONSIDERATION

I. Background

BY THE COMMISSION:

On December 10, 1999, BellSouth Telecommunications, Inc. (BellSouth), filed a Motion for Reconsideration (BellSouth's Motion) of certain portions of the Commission's November 10, 1999 Final Order on Arbitration (the Commission's Order) entered in the above-styled cause. Specifically, BellSouth seeks reconsideration concerning: (1) The interim inter-carrier compensation rates adopted by the Commission for Internet service provider (ISP) traffic; and (2) the Commission's determination that ICG Telecom Group, Inc. (ICG) is entitled to reciprocal compensation at BellSouth's tandem interconnection rate. ICG filed a Response in Opposition (ICG's Response) to BellSouth's Motion for Reconsideration on December 20, 1999.

II. BellSouth's Arguments in Support of Reconsideration

BellSouth bases its request for the Commission to reconsider the interim inter-carrier compensation rates established for ISP traffic in the November 10, 1999 Order on a claim that the Commission improperly relied on the elemental rates established in the *UNE Pricing Docket*[1] in arriving at those rates. BellSouth alleges that the elemental rates established in the *UNE Pricing Docket* are based on an assessment of BellSouth

[1] *In the Matter of Generic Proceedings; Consideration of TELRIC Studies*, Docket No. 26029 (August 25, 1998).

cost studies which examine the costs of transporting and terminating voice traffic, not the costs of handling ISP-bound traffic.

The crux of BellSouth's argument is that ISP traffic has, on average, significantly longer holding times than traditional voice traffic. BellSouth relies primarily on a March 1998 National Association of Regulatory Utility Commissioners (NARUC) study[2] and a 1996 study performed by BellCore[3] for this proposition.

BellSouth advocates an adjusted ISP call length proposal for Alabama similar to one submitted to the North Carolina Utilities Commission by ICG. BellSouth asserts that the adoption of such a proposal in Alabama would result in rates for ISP traffic which are approximately twenty-five percent (25%) lower than the rates approved by the Commission in the *UNE Pricing Docket* for traditional voice traffic. The BellSouth Motion for Reconsideration contains a rate comparison chart reflecting the magnitude by which elemental rates will be reduced if an adjusted ISP call length proposal is utilized.

Based on the foregoing, BellSouth asserts that the payment of reciprocal compensation for ISP-bound traffic based on the rates for transporting and terminating traditional local voice traffic will result in an over-recovery of call set-up costs. BellSouth thus urges the Commission to reconsider the decision rendered in its November 10, 1999 Order concerning elemental rates for interim inter-carrier compensation for ISP traffic.

With regard to the Commission's ruling that ICG is entitled to reciprocal compensation at the tandem interconnection rate, BellSouth asserts that the Commission is relying on a misinterpretation of the prevailing law and unsupported findings of fact. Specifically, BellSouth argues that ICG failed to establish at hearing that its switch actually performs functions similar to BellSouth's tandem switch.

BellSouth maintains that the only evidence presented by ICG concerning switch functionality revolved around a network diagram submitted by ICG witness Starkey. Based on that diagram, BellSouth asserts that it is clear that: (1) ICG does not

[2] *Report of the NARUC Internet Working Group, Pricing and Policies for Internet traffic on the Public Switched Network*, at 2 (March 1998).
[3] Atai and Gordon, *Impacts of Internet Traffic of LEC Networks and Switching Systems*, at 3-4 (BellCore 1996).

interconnect end offices or perform trunk-to-trunk switching, but rather performs line-to-trunk or trunk-to-line switching; (2) to the extent ICG has a switch in Alabama, it performs only end office switching functions and does not switch BellSouth's traffic to another ICG switch; and (3) based on the information provided, ICG's switch does not provide other centralization functions such as call recording, routing of calls to operator services and signaling conversion for other switches as BellSouth's tandem switches do.

BellSouth also alleges that the equipment which ICG collocates in BellSouth central offices appears to be nothing more than a subscriber loop carrier which is part of loop technology and provides no switching functionality. BellSouth thus maintains that ICG's switch is not providing a transport or tandem function, but is switching traffic through its end office for delivery of traffic from that switch to the called party's premises. Since no switching is performed in such collocation arrangements, BellSouth asserts that the lines involved are simply long loops transported to ICG's switch, not trunks. BellSouth argues that such long loop facilities do not qualify as facilities over which local calls are transported and terminated as described by the Telecommunications Act of 1996. BellSouth therefore, argues that such facilities are not eligible for reciprocal compensation.

BellSouth further asserts that even if it is incorrectly assumed that ICG's switch performs the same functions as BellSouth's tandem switch, there is no evidence in the record that ICG's switch actually serves a geographic area comparable to BellSouth's tandem switch. According to BellSouth, ICG failed to identify where its customers are located - information that is essential to support a finding that ICG's switch serves a comparable geographic area. BellSouth thus urges the Commission to reconsider its decision and deny ICG's request for reciprocal compensation at the tandem interconnection rate.

III. The Arguments Raised by ICG

In its December 20, 1999, Response in Opposition to BellSouth's Motion for Reconsideration, ICG contends that BellSouth's argument that the rates established in the *UNE Pricing Docket* are inappropriate for purposes of determining reciprocal compensation for ISP traffic due to the alleged longer holding times for ISP traffic constitutes a substantial new argument which BellSouth is improperly raising for the first time in its Motion for Reconsideration. ICG further alleges that BellSouth is attempting to support its substantial new argument with evidence which was available prior to the arbitration proceedings in Alabama, but was not introduced by BellSouth.

According to ICG, the Commission must look to Rule 21 of the Commission's Rules of Practice and Rule 59 of the Alabama Rules of Civil Procedure (ARCP) in order to determine whether BellSouth is entitled to reconsideration based on the new evidence submitted in its Motion for Reconsideration[4]. ICG insists that BellSouth is entitled to relief only if it can demonstrate that the new evidence it seeks to introduce was discovered after trial, that such evidence could not have been discovered with due diligence prior to trial, that such evidence is material to the issue and not merely cumulative or impeaching, and that said evidence is of such a nature that a different verdict would probably result if a new hearing were granted[5].

ICG contends that BellSouth cannot meet the standards discussed immediately above. According to ICG, BellSouth is intimately familiar with the BellSouth cost studies relied upon by the Commission in its establishment of interim inter-carrier compensation rates for ISP traffic. ICG asserts that BellSouth was in a position at any time prior to or during the arbitration hearing, or even following the hearing in post-hearing briefs, to make the arguments it now attempts to make in its Motion concerning its cost studies.

ICG further alleges that the NARUC Report that BellSouth cites for the proposition that the hold times associated with ISP-bound calls are longer than the hold times for other calls hardly constitutes new evidence given its March 1998 date. ICG also points out that the modified ISP call holding time proposal it submitted to the North Carolina Utilities Commission was known to BellSouth prior to the arbitration hearing in Alabama, but was not even referenced by BellSouth in its presentation before the Arbitration Panel in Alabama.

ICG further clarifies that the modified ISP call holding time proposal it submitted

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[4] Citing *Walker v. Alabama Public Service Commission*, 297 So.2d 370 (Ala. 1974); *overruled on other grounds*, *Ex Parte Andrews*, 520 So.2d 507 (Ala. 1987).
[5] Citing *Talley v. Kellogg Co.*, 546 So.2d 385 (Ala. 1989).

to the North Carolina Commission was filed in response to a settlement directive from that Commission. ICG maintains that the North Carolina Commission ultimately rejected its modified ISP call holding time proposal in favor of an ISP compensation arrangement identical to that adopted by this Commission in its November 10, 1999 Order.

ICG surmises that BellSouth's blatant attempt to change the rules of the game in midstream should not be entertained by the Commission based on the principles of the Alabama Rules of Civil Procedure and the Alabama case law discussed above. ICG thus urges the Commission to deny BellSouth's Motion for Reconsideration on the grounds of improperly submitted new evidence and improperly raised arguments.

ICG further asserts that even if the Commission determines that BellSouth's Request for Reconsideration is due to be granted, the interim inter-carrier compensation rates adopted by the Commission for ISP-bound traffic are supported by the evidence of record. ICG in fact maintains that the testimony before the Arbitration Panel and ultimately before the Commission was that the costs associated with a voice call versus an ISP call are exactly the same. ICG argues that the Commission's findings are consistent with that established principle.

ICG further maintains that BellSouth presented no evidence that the costs ICG incurs in delivering calls from BellSouth customers to ICG's ISP customers are in any way different that the costs ICG incurs in delivering traffic originated on BellSouth's network by BellSouth customers to an ICG business or residential customer. In fact, ICG points out that BellSouth presented no evidence whatsoever regarding the costs that ICG incurs in delivering BellSouth-originated calls to ISP's.

Concerning the Commission's determination that ICG is entitled to reciprocal compensation at BellSouth's Tandem interconnection rate, ICG maintains that the Commission's holding in this regard is indeed supported by the evidence of record. ICG alleges that BellSouth simply refuses to recognize that the evidence it claims to be non-existent regarding this issue is amply spread throughout the record and is totally consistent with the Commission's findings and conclusions regarding same. ICG maintains that it amply demonstrated that its switch serves a geographic area comparable to BellSouth's tandem switch and performs functions which closely approximate those performed by BellSouth's tandem switch. ICG alleges that its demonstrations in this regard are uncontroverted by BellSouth.

ICG further notes that BellSouth's claim that the facilities between ICG's collocation points in the BellSouth network and ICG's switch location are nothing more than long loop facilities is totally unfounded and constitutes a new argument not previously raised in this proceeding. ICG alleges that had this issue been properly raised in Alabama, ICG would have demonstrated, as it did in proceedings before the Tennessee Regulatory Authority, that the facilities BellSouth characterizes as long loops are in fact purchased from BellSouth as transport.

IV. The Findings and Conclusions of the Commission

We have considered the Motion for Reconsideration submitted by BellSouth and ICG's Response thereto in light of the record compiled in this proceeding. Having done so, we are somewhat perplexed by BellSouth's advancement of substantial new arguments which are supported by evidence which is also new to this proceeding. Although BellSouth did not specifically request a hearing on its Motion or further proceedings to address the issues raised therein, the magnitude of the new arguments and the new evidence submitted by BellSouth dictates that the Commission treat BellSouth's Motion as it would a request for rehearing.

ICG is correct in noting that the Commission is primarily guided by Rule 21 of the Commission's Rules of Practice in its evaluation of motions for reconsideration and/or rehearing. The Commission is also required to adhere to the requirements of Code §37-1-105 where rehearings are concerned. Additional consideration must be given to the requirements governing new trials established by Rule 59 of the Alabama Rules of Civil Procedure (ARCP Rule 59) given the Supreme Court of Alabama's long standing holding that the requirements governing motions for a new trial in civil matters in the circuit courts of Alabama also apply to requests for rehearing on Orders of the Commission[6].

[6] *Walker v. Alabama Public Service Commission* at p. 374.

BellSouth did not specify its justification for submitting the new evidence it seeks to introduce in its Motion, but the Commission can only assume that such new evidence is being treated by BellSouth as "newly discovered evidence". The determination of whether to grant a request for a new trial, or in this case a rehearing, based on such newly discovered evidence is largely at the discretion of the Commission. However, well established Alabama case law dictates that in order to be entitled to a new trial on the grounds of "newly discovered evidence", a movant must show that the evidence in question was discovered after trial, that it could not have been discovered with due diligence prior to trial, that it is material to the issue and not merely cumulative or impeaching, and that it is of such a nature that a different verdict would probably result if a new trial were granted[7].

Clearly, the new evidence relied upon by BellSouth to establish its newly introduced proposition that the allegedly different call holding times associated with ISP traffic dictate lower reciprocal compensation rates for such traffic could, with due diligence, have been discovered and presented to the Commission during the August 11, 1999 arbitration hearing in this cause. The cost studies which BellSouth now attempts to distinguish and the NARUC and BellCore reports which BellSouth relies upon to do so were all available well before the August 11, 1999 arbitration hearing and could have been discovered and introduced by BellSouth. Therefore, it would not now be appropriate to grant BellSouth's request for reconsideration and/or rehearing based on such evidence. The fact that the arguments concerning modified call holding times for ISP traffic had been raised in prior proceedings before the North Carolina Utilities Commission only strengthens this conclusion.

With regard to the issue whether ICG is entitled to reciprocal compensation at the BellSouth tandem interconnection rate, it does not appear that BellSouth has introduced entirely new arguments as contended by ICG. It does, however, appear that BellSouth has expanded its arguments concerning the alleged functional limitations of the switching equipment which ICG operates.

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[7] *Weeks v. Danford*, 608 So.2d 387 (Ala. 1992).

Despite BellSouth's enhanced arguments to the contrary, we are persuaded that the record in this cause reflects that ICG's switch, and the facilities it uses in conjunction therewith, perform functions which so closely approximate those performed by BellSouth's tandem switch that ICG is entitled to the tandem interconnection rate. More particularly, ICG's network relies upon distributed network intelligence to aggregate ICG's customer base into a central switching platform. Even though ICG utilizes a different network architecture than does BellSouth, ICG's switching platform transfers traffic amongst discreet network nodes that exist in the ICG network for purposes of serving groups of ICG customers in the same fashion that BellSouth's tandem switch distributes traffic. The switch employed by ICG in this configuration also serves as ICG's toll center, its operator position system and as ICG's interconnection point with other carriers. BellSouth relies upon its tandem switch to perform the same type functions[8].

We also expressly affirm our previous conclusion that ICG's switch serves a geographic area comparable to that served by BellSouth's tandem switch. In conjunction with its Birmingham, Alabama switch, ICG utilizes approximately one hundred and fifty miles of company owned fiber-optic facilities, leased fiber-optic facilities, high capacity connections leased from BellSouth and collocation arrangements with BellSouth to aggregate and serve its customers which are spread across the Birmingham metropolitan area[9]. We remain of the opinion that ICG's testimony in this regard sufficiently demonstrates geographic comparability. BellSouth's argument that ICG is collocated in only two BellSouth central offices does not sufficiently controvert ICG's representations of geographic comparability.

In conclusion we affirm our Order of November 10, 1999 in all respects and deny in all respects BellSouth's Motion for Reconsideration and/or Rehearing. The parties are hereby instructed to submit their arbitrated interconnection agreement for Commission approval no later than twenty (20) days from the effective date of this Order.

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[8] Starkey, Tr. p. 103, 130.
[9] Starkey, Tr. pp. 129-130.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That based on the foregoing, the Motion for Reconsideration and/or Rehearing submitted by BellSouth Telecommunications, Inc. is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION, That the parties to this cause must submit, within twenty (20) days of the effective date of this Order, their arbitrated interconnection agreement for Commission approval.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause in 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 effective as of the date hereof.

DONE at Montgomery, Alabama, this 3rd day of February, 2000.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan

Jim Sullivan, President

Jan Cook

Jan Cook, Commissioner

George C. Wallace, Jr.

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr.

Walter L. Thomas, Jr., Secretary

GENTLE, PICKENS & ELIASON
ATTORNEYS AND COUNSELLORS AT LAW
SUITE 1500 - COLONIAL BANK BUILDING
1928 FIRST AVENUE NORTH
BIRMINGHAM, ALABAMA 35203

EDGAR C. GENTLE, III
DEBORAH A. PICKENS
JEAN M. ELIASON
MICHAEL K. ABERNATHY
TERRY D. TURNER, JR.
KATHERINE A. HARBISON
G. NICOLE MAPP

TELEPHONE (205)716-3000
TELECOPIER (205)716-3010

Sent by Karen Mainous
Our File No. -3184-1

TO:	**Albert H. Kramer, Esq.**	**(202) 887-0689**
	Cindy Z. Schonhaut, Esq.	**(303) 414-8839**
	Julia Waysdorf, Esq.	**(303) 414-5414**
	Marsha A. Ward, Esq.	**(770) 284-5488**
	Ms. Gwen Rowling	**(512) 381-3046**
	Mr. Mark Long	
	Ms. Cathy J. Quinn	**(704) 319-0069**
	Nanette S. Edwards, Esq.	**(256) 382-3969**

FROM: **Edgar C. Gentle, III, Esq.**

DATE: **February 8, 2000**

NUMBER OF PAGES (Including this Cover Page) 9

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PLEASE CALL <u>Karen Mainous</u> AT (205) 716-3000 IF TRANSMISSION TO YOU IS INCOMPLETE.

STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P.O. BOX 991
MONTGOMERY, ALABAMA 36101-0991

In the Matter of: **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**

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:

On behalf of ICG Telecom Group, Inc.:

Edgar C. Gentle, III, Esq.
G. Nicole Mapp, Esq.
Gentle, Pickens & Eliason
Colonial Bank Building, Suite 1500
1928 First Avenue North
Birmingham, Alabama 35203

Albert H. Kramer, Esq.
Jacob S. Farber, Esq.
Dickstein, Shapiro, Morin & Oshinsky
2100 L Street, N.W.
Washington, D.C. 20037-1526

On behalf of BellSouth Telecommunications, Inc.

D. Owen Blake, Jr., Esq.
BellSouth Telecommunications, Inc.
3196 Highway 280 South
Room 304N
Birmingham, Alabama 35243
A. Langley Kitchings, Esq.
E. Earl Edenfield, Jr., Esq.

675 Peachtree Street,
Atlanta, Georgia 30375

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 8, 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

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[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

[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. 8 (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

[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. T098070426 (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.

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[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

[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 or 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[16]. Clearly, ISP-bound traffic is not subject to an access charge regulatory framework but rather is treated as local exchange traffic for regulatory purposes.

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[16] 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.

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[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*).

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

[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.[23] 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

[23] *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,

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[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

Even though the FCC's Rule 51.315(c)-(f) requiring ILECs to combine previously uncombined elements remains vacated at present,[34] 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

[34] 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.[35]

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.[36] 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

[35] 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.

[36] *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

[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[38].

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*

[38] 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

Jim Sullivan, President

Jan Cook

Jan Cook, Commissioner

George C. Wallace, Jr.

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr.

Walter L. Thomas, Jr., Secretary

DOCKET 27069
APPENDIX A

California. Opinion-Decision 99-06-088, *In the Matter of Petition of Pacific Bell for Arbitration with Pac-West*, Application 98-11-024 (Cal. Pub. Util. Comm'n June 24, 1999)

California. Order Modifying and Denying Application for Rehearing of Decision 98-10-057 – Decision 99-07-047, *Order Instituting Rulemaking and Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, 95-04-043 (Rulemaking) and 95-04-044 (Investigation) (Cal. Pub. Util. Comm'n July 22, 1999)

Delaware. Arbitration Award, *In the Matter of the Petition of Global Naps South for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware*, PSC Docket No. 98-540 (Del. Pub. Serv. Comm'n Mar 9, 1999)

Delaware. Order No. 5092 and Findings and Opinion to Accompany Order, *In the Matter of Application of Global Naps South for the Arbitration of Unresolved Issues from the Interconnection Negotiations with Bell Atlantic-Delaware*, PSC Docket No. 98-540 (Del. Pub. Serv. Comm'n June 22, 1999)

Florida. Order Resolving Complaint and Notice of Proposed Agency Action and Order Requiring Determination of Terminated Traffic Differential, Order No. PSC-00-0658-FOF-TP, *In re: Request for Arbitration Concerning Complaint of ACSI and e-spire against BellSouth*, Docket No. 981008-TP (Fla. Pub. Serv. Comm'n Apr. 6, 1999)

Florida. Order on Arbitration of Interconnection Agreement, Order No. PSC-99-1477-FOF-TP, *In re: Request for Arbitration Concerning Complaint of Intermedia Against GTE Florida*, Docket No. 980986-TP (Fla. Pub. Serv. Comm'n July 30, 1999)

Hawaii. Decision and Order 16975, *In the Matter of the Petition of GTE Hawaiian for a Declaratory Order*, Docket No. 99-0067 (Haw. Pub. Util. Comm'n May 6, 1999)

Indiana. Order on Reconsideration, *In the Matter of the Complaint of Time Warner Against Indiana Bell for Violation of the Terms of the Interconnection Agreement*, Cause No. 41097 (Ind. Util. Reg. Comm'n June 9, 1999)

Maryland. Order No. 75280, *In the Matter of the Complaint of MFS Intelnet against Bell Atlantic-Maryland for Breach of Interconnection Terms and Request for Immediate Relief*, Case No. 8731 (Md. Pub. Serv. Comm'n June 11, 1999)

Minnesota. Order Denying Petition, *In the Matter of the Petition of US West for a Determination that ISP Traffic Is Not Subject to Reciprocal Compensation*, Docket No. P-421/M-99-529 (Mn. Pub. Util. Comm'n Aug 17, 1999)

Nevada. Arbitration Decision, *In re Petition of Pac-West for Arbitration to Establish Interconnection Agreement with Nevada Bell*, Docket No. 98-10015 (Nev. Pub. Util. Comm'n Mar. 4, 1999)

Nevada. Order Adopting Revised Arbitration Decision and Revised Arbitration Decision, *In re Petition of Pac-West for Arbitration to Establish Interconnection Agreement with Nevada Bell*, Docket No. 98-10015 (Nev. Pub. Util. Comm'n Apr. 8, 1999)

New York. Order Instituting Proceeding to Reexamine Reciprocal Compensation, *Proceeding on Motion of Commission to Reexamine Reciprocal Compensation*, Case No. 99-C-0529 (N.Y. Pub. Serv. Comm'n Apr. 15, 1999)

New York. Opinion and Order Concerning Reciprocal Compensation, *Proceeding on Motion of Commission to Reexamine Reciprocal Compensation*, Case No. 99-C-0529 (N.Y. Pub. Serv. Comm'n Aug. 26, 1999)

Ohio. Entry on Rehearing, *In the Matter of the Complaints of ICG, MCImetro, and Time Warner v. Ameritech Ohio Regarding the Payment of Reciprocal Compensation*, Case No. 97-1557-TP-CSS, et al. (Oh. Pub. Util. Comm'n May 5, 1999)

Oregon. Commission Decision, Order No. 99-218, *In the Matter of Petition of Electric Lightwave for Arbitration of Interconnection with GTE Northwest*, ARB 91 (Or. Pub. Util. Comm'n Mar. 17, 1999)

Pennsylvania. Joint Motion of Chairman Quain and Commissioners Rolka, Brownell & Wilson, *Joint Petition for Adoption of Partial Settlement Resolving Pending Telecommunications Issues*, P-00991648 and P-00991649 (Penn. Pub. Util. Comm'n Aug. 26, 1999)

Rhode Island. Order, *Re: NEVD of Rhode Island Petition for Declaratory Judgement*, Docket No. 2935 (R.I. Pub. Util. Comm'n July 21, 1999)

Tennessee. First Order of Arbitration Award, *In Re: Petition of Nextlink for Arbitration of Interconnection with BellSouth*, Docket No. 98-00123 (Tenn. Reg. Auth. May 18, 1999)

Washington. Arbitrator's Report and Decision, *In the Matter of Petition for Arbitration of an Interconnection Agreement Between Electric Lightwave and GTE Northwest*, Docket No. UT-980370 (Wash. Util. and Trans. Comm'n March 22, 1999)

Washington. Third Supplemental Order Granting WorldCom's Complaint, *WorldCom v. GTE Northwest*, Docket No. UT-980338 (Wash. Util. and Trans. Comm'n May 12, 1999)

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APPENDIX B

Massachusetts. *Complaint of MCI WorldCom Against New England Telephone and Telegraph for Breach of Interconnection Terms*, D.T.E. 97-116-C (Mass. Dept. of Telecommunications and Energy May 19, 1999)

Missouri. Order Denying Application for Rehearing, *In the Matter of Petition of Birch Telecom for Arbitration with Southwestern Bell*, Case No. TO-98-278 (Mo. Pub. Serv. Comm'n Mar. 9, 1999)

Missouri. Order Clarifying Arbitration Order, *In the Matter of Petition of Birch Telecom for Arbitration with Southwestern Bell*, Case No. TO-98-278 (Mo. Pub. Serv. Comm'n April 16, 1999)

West Virginia. Commission Order, *Sprint Petition for Declaratory Ruling*, Case No. 99-0166-T-PC (W.V. Pub. Serv. Comm'n May 7, 1999)

DOCKET 27069
APPENDIX C

Illinois Bell Tel. Co. v. Worldcom Tech., Inc., 179 F.3d 566, No. 98-3150 (7th Cir. June 18, 1999)

BellSouth Telecomm. v. ITC Deltacom Comm., No. 99-D-287-N, 99-D-747-N (M.D. Ala. August 18, 1999) (Upon the Motion of BellSouth to Alter or Amend the Court's Aug. 18 1999 Order of Dismissal, this matter has subsequently been briefed on the merits and is awaiting further action by the Court.)

Michigan Bell Telephone Co., v. MFS Intelenet of Michigan, Inc., No. 5:98 CV 18, (W.D. Mich. August 4, 1999) (*affirming* Michigan PSC Order, January 28, 1998)

U.S. West Communications, Inc. v. Worldcom Technologies, Inc., No. 97-857-JE (D. Or. Mar. 24, 1999)

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 Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	)) RECOMMENDED ARBITRATION 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:

FOR ICG TELECOM GROUP, INC.:

Henry Campen, Jr., Parker, Poe, Adams & Bernstein, First Union Capitol Center, Suite 1400, 150 Fayetteville Street Mall, Raleigh, North Carolina 27602

Albert H. Kramer, Dickstein, Shapiro, Morin & Oshinsky, 2101 L Street NW, Washington, D.C. 20037-1526

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Edward L. Rankin, III, General Counsel - North Carolina, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

A. Langley Kitchens, General Attorney, and E. Earl Edenfield, Jr., General Attorney, BellSouth Telecommunications, Inc., 675 West Peachtree Street, Atlanta, Georgia 30075

FOR THE USING AND CONSUMING PUBLIC:

Robert B. Cauthen, Jr., Staff Attorney, Public Staff - North Carolina Utilities Commission, Post Office Box 29520, Raleigh, North Carolina 27626-0520

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.See footnote 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.See footnote 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 OrderSee footnote 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 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 stated 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 133i). In conjunction with opening a generic docket to address performance measurements, the Commission will also issue an Order in Docket No. P-100, Sub 133i 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 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.

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, Chief Clerk

bc110399.02

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

Footnote: 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.

Footnote: 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).

Footnote: 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.