BELLSOUTH

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Guy M. Hicks
General Counsel

April 25, 2000

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Time Warner Telecom of the Mid-South, L.P. Pursuant to Section 252(b) of the Telecommunications Act of 1996*
Docket No. 99-00797

Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996
Docket No. 99-00430

Petition of NEXTLINK TENNESSEE LLC for Arbitration of Interconnection with BellSouth Telecommunications, Inc.
Docket No. 98-00123

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Motion for Clarification. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

026900

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Time Warner Telecom of the Mid-South, L.P. Pursuant to Section 252(b) of the Telecommunications Act of 1996***

Docket No. 99-00797

Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996

Docket No. 99-00430

Petition of NEXTLINK TENNESSEE LLC for Arbitration of Interconnection with BellSouth Telecommunications, Inc.

Docket No. 98-00123

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR CLARIFICATION

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully moves for clarification of the decision of the Tennessee Regulatory Authority ("Authority"), acting as Arbitrators pursuant to Section 252 of the Telecommunications Act of 1996 ("1996 Act"), concerning the interim compensation mechanism for traffic to Information Service Providers ("ISPs") under BellSouth's interconnection agreements with Time Warner Telecom of the Mid-South, L.P. ("Time Warner"), ITC^DeltaCom Communications, Inc. ("DeltaCom"), and NEXTLINK Tennessee, Inc.

("NEXTLINK"). Specifically, BellSouth requests the Authority to clarify: (1) that the payment of reciprocal compensation for ISP traffic on a "interim" basis will be subject to a retroactive "true-up" once the Federal Communications Commission ("FCC") adopts rules establishing an inter-carrier compensation mechanism for ISP traffic; and (2) that the parties will be required to comply with the FCC's inter-carrier compensation rules once they become effective.

II. DISCUSSION

In Docket No. 99-00797, the Authority was asked to arbitrate the appropriate definition of local traffic for purposes of BellSouth's and Time Warner's reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act. In resolving this issue, the Authority ruled that "reciprocal compensation is an appropriate interim method to be used to recover the cost associated with the delivery of ISP-bound traffic pending completion of the FCC's rulemaking with regard to this traffic." The Authority reached the same conclusion in resolving similar issues in BellSouth's arbitrations with DeltaCom and NEXTLINK. BellSouth seeks clarification of two aspects of the Authority's resolution of this issue.

First, BellSouth seeks clarification that the payment of reciprocal compensation for ISP traffic on an "interim" basis will be subject to a retroactive "true-up" once the FCC adopts rules establishing an inter-carrier compensation mechanism for such traffic. For example, if the FCC adopts rules establishing a specific per minute charge for ISP traffic that is higher than the local interconnection rate set by the Authority, the parties should compensate each other at the FCC rate for any ISP traffic exchanged over the life of the agreements. By contrast, if the FCC adopts rules establishing bill and keep as the appropriate inter-carrier compensation mechanism for ISP traffic, the parties should abide by such an arrangement over the life of the agreements. Such a result is the only way to ensure that neither party to the interconnection agreements receives a windfall or is unduly disadvantaged pending the completion of the FCC's rulemaking.

For example, assume BellSouth's new interconnection agreement with Time Warner is effective January 1, 2000, and during the year 2000 BellSouth sends Time Warner 100,000,000 minutes of ISP traffic for which BellSouth pays reciprocal compensation at a rate of $.002 per minute of use (or a total of $2 million). Assume further that the FCC adopts rules effective January 1, 2001 which establishes $.003 per minute of use as the appropriate inter-carrier compensation rate for ISP traffic. Under BellSouth's proposal, BellSouth would be required to pay Time Warner an additional $1 million in reciprocal compensation, which represents the difference between what BellSouth should have paid in the year 2000 had the FCC's rules been in effect ($3 million) versus the amount BellSouth actually paid on an "interim" basis ($2 million). By contrast, if the FCC adopts rules effective January 1, 2001, which establishes bill and keep as the appropriate inter-carrier compensation mechanism, under BellSouth's proposal Time Warner would be required to reimburse the $2 million BellSouth paid in reciprocal compensation.

Clarifying that the payment of reciprocal compensation on an "interim" basis includes a retroactive true-up is consistent with decisions of every other state commission in BellSouth's region that has ordered the payment of reciprocal compensation for ISP traffic on an interim basis. Specifically, the Alabama Public Service Commission, the Georgia Public Service Commission, the Kentucky Public Service Commission, and the North Carolina Utilities Commission have all ordered a true-up in Section 252 arbitrations. *See Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Sections 252(b) of the Telecommunications Act of 1996*, Case No. 99-218, at 3 (Ky. Public Service Comm'n, March 2, 2000) (directing that reciprocal compensation paid for "ISP-bound traffic should be retroactively 'trued up' to the level of compensation ultimately adopted by the FCC") (copy attached); *In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Time Warner Telecom of North Carolina, LP Pursuant to Section 252(b) of Telecommunications Act of 1996*, Docket No. P-472, Sub 15, at 3 (N.C. Utilities Comm'n, March 13, 2000) (directing that the parties on an interim basis "pay reciprocal compensation for dial-up calls to ISPs at the rates the parties have agreed upon for reciprocal compensation for local traffic ... subject to true-up at such time as the Commission has ruled pursuant to FCC consideration of this matter") (copy attached); *In re: Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Sections 252(b) of the Telecommunications Act of 1996*, Docket

No. 10767-U, at 4 (Ga. Public Service Comm'n Feb. 10, 2000) ("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 96-98 on ISP-bound traffic") (copy attached); Final Order on Arbitration, *In re: Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Sections 252(b) of the Telecommunications Act of 1996*, Docket 27069, at 19-20 (Nov. 10, 1999) (copy attached).[1]

For example, as the Alabama Commission noted in resolving the ISP issue:

> 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 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.*

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[1] The state commissions in both South Carolina and Florida recently have held in Section 252 arbitrations that ISP traffic is interstate in nature for which reciprocal compensation should not be paid during the pendency of the FCC's rulemaking. *See* Order No. 1999-690, *In re: Petition of ITC^DeltaCom Communications for Arbitration with BellSouth Telecommunications, Inc.,* Docket No. 1999-259-C, at 64 (S.C. Public Service Comm'n Oct. 4, 1999); *See* Order No. PSC-OO-0537-FOF-TP, *In re: Petition of ITC^DeltaCom Communications for Arbitration with BellSouth Telecommunications, Inc.,* Docket No. 990750-TP, at 35 (Fla. Public Service Comm'n March 15, 2000). Neither the Louisiana nor Mississippi Public Service Commissions has ruled on the issue.

> In order to prepare for the eventuality of a "true-up" of the 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 would 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 upon 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.

Id. at 19-20 (emphasis added). Accordingly, the Authority should clarify its ruling concerning the "interim" payment of reciprocal compensation for ISP traffic to include a retroactive true-up.

Second, the Authority should clarify that "completion of the FCC's rulemaking" refers to when the FCC's rules establishing an inter-carrier compensation mechanism for ISP traffic take effect, as opposed to when judicial review of such rules may be completed. If the past is any indication, the FCC's rules will be challenged in court regardless of what those rules say. However, the parties should be required to abide by any effective FCC rules (which have not been stayed), even though such rules may be subject to judicial review. BellSouth believes that such clarification is consistent with the intent of the Arbitrators and will help resolve uncertainty about how long the "interim" compensation arrangements ordered by the Arbitrators should remain in effect.

For the foregoing reasons, the Authority should grant BellSouth's Motion for Clarification.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

[✓] Hand [ ] Mail [ ] Facsimile [ ] Overnight	Richard Collier, Esquire Tennessee Regulatory Authority 460 James Robertson Parkway Nashville, TN 37243-0500
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194138

T. Br.

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
MAR 2 2000
LEGAL DEPT. (KY.)

In the Matter of:

A PETITION BY ICG TELECOM GROUP, INC. FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTIONS 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	)	CASE NO. 99-218

ORDER

ICG Telecom Group, Inc. ("ICG") seeks arbitration of specific issues related to its interconnection contract with BellSouth Telecommunications, Inc. ("BellSouth"). Many of the issues originally pending have been resolved by agreement between the parties. A public hearing was held December 2, 1999. The matter now stands ready for Commission decision on five unresolved issues: (1) reciprocal compensation for calls to Internet service providers ("ISPs"); (2) the appropriate compensation rate for ICG's switch; (3) the availability and pricing of the enhanced extended link ("EEL"); (4) issues related to performance measures and enforcement mechanisms; and (5) issues related to take and pay arrangements for binding forecast of traffic volumes.

I WHETHER RECIPROCAL COMPENSATION SHOULD BE REQUIRED FOR CALLS TO INTERNET SERVICE PROVIDERS.

ICG argues that the Commission should require BellSouth to pay reciprocal compensation for ISP-bound traffic. None of the Federal Communications Commission's ("FCC") decisions, according to ICG, preclude state commissions from determining that reciprocal compensation is an appropriate inter-carrier compensation

DL TBA
BK DJC
NDB

rule pending final FCC action.[1] The FCC determined that state commissions may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic.

ICG asserts that BellSouth itself agrees that reciprocal compensation should be paid for all non-ISP local calls to compensate for costs that one carrier incurs on behalf of the other In the absence of reciprocal compensation for ISP-bound traffic, ICG would be handling a large number of calls from BellSouth customers and incurring costs that BellSouth would avoid. Moreover, the FCC indicated that its "policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in a separate context of reciprocal compensation, suggest that such compensation is due for that traffic."[2] ICG contends that BellSouth's proposal for tracking the traffic and making payments retroactively based on FCC decisions indefinitely delays its ability to cover current costs.

BellSouth, on the other hand, asserts that reciprocal compensation is not an appropriate cost recovery mechanism for ISP-bound traffic. BellSouth argues that the longer hold times for ISP-bound calls result in an over-recovery of call setup costs. BellSouth argues that the parties should track the ISP-bound traffic. Once the FCC has established an inter-carrier compensation mechanism for ISP-bound traffic, then the

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[1] FCC 99-38, Implementation of Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98) and Inter-Carrier Compensation for ISP-Bound Traffic (CC Docket No. 99-68), Rel. February 26, 1999 ["Declaratory Ruling"] at ¶25.

[2] Id. Even the FCC acknowledges that no matter what the payment arrangement, LECs incur a cost when delivering traffic to an ISP that originates on another LEC's network. Declaratory Ruling at ¶29.

parties would true-up the payments retroactively from the effective date of this interconnection agreement.

After careful consideration, the Commission concludes that ISP-bound traffic should be eligible for reciprocal compensation, pending a final determination by the FCC. The FCC has indicated that this Commission has the legal authority to order a reciprocal compensation arrangement in this proceeding. Equity precludes this Commission from denying ICG any compensation from BellSouth for carrying BellSouth's traffic on ICG's local network. Furthermore, it is logical to consider a call to an ISP to be a call that is "terminated" locally, at the ISP server, because a protocol conversion occurs before the information is passed on to the Internet. In the wake of the FCC's pending determination, the most reasonable method for compensation is at the current rate for local calls. However, in addition the parties should track the minutes of use for calls to ISPs and be prepared to "true-up" the compensation consistent with the FCC's decision. Thus, the compensation ordered herein for ISP-bound traffic should be retroactively "trued-up" to the level of compensation ultimately adopted by the FCC.

II. <u>WHETHER, IF ICG'S SWITCH SERVES A GEOGRAPHIC AREA SIMILAR TO THAT SERVED BY BELLSOUTH'S TANDEM SWITCH, ICG IS ENTITLED TO RECIPROCAL COMPENSATION AT THE TANDEM RATE.</u>

ICG states that its switch provides service to a geographic area that is at least as large as the area served by BellSouth's tandem switches. As is common among new entrants, ICG uses a single switching platform to transfer calls between multiple ILEC central offices as well as to transfer calls between the ICG and ILEC network. A tandem switch connects trunks and is an intermediate connection between an originating telephone call location and the final destination of the call. ICG's switch performs many of the same functions that the ILEC tandem switch performs. According to ICG this is further indication that tandem termination rates are appropriate for its switch's use.

BellSouth contends ICG is entitled to recover the tandem switching elemental rate only when ICG's switch actually performs the same tandem switching function as the ILEC switch and actually serves a geographic area comparable to the ILEC switch. However, 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 ILEC's tandem interconnection rate.

Accordingly, pursuant to FCC requirements, tandem interconnection rates are required. ICG should be compensated at the tandem interconnection rate.

III. WHETHER BELLSOUTH SHOULD BE REQUIRED TO MAKE THE ENHANCED EXTENDED LINK ("EEL") AVAILABLE AS AN UNBUNDLED NETWORK ELEMENT COMBINATION, AT AN UNBUNDLED NETWORK ELEMENT PRICE.

ICG asserts that the provisioning of EELs as unbundled network elements ("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 customers than ICG is currently able to serve. ICG asserts that the FCC's Rule 51.315(b) makes clear that if BellSouth currently combines loop and transport, BellSouth must make loop and transport available as a UNE combination that is priced accordingly. ICG maintains that the EEL is an efficient mechanism for bringing the benefits of competition to Kentucky because it will allow ICG and other CLECs to serve customers without requiring collocation 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 BellSouth for the EEL should be the sum of the TELRIC rate for the three components.

BellSouth argues that the EEL is nothing more than a combination of three separate UNEs that replicate private line and/or special access services. 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 rates.

A competitor's right to obtain combinations 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. The rules of this Commission and of the FCC governing UNE combinations have their genesis in 47 U.S.C. §251(c)(3) which imposes on ILECs

> [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 conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 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.

Accordingly, the Commission requires BellSouth to provision the EEL at the DS-O and DS-1 levels where it currently combines those loops with transport within its network. The EEL is the only efficient mechanism currently available to ICG to serve customers without collocating in the BellSouth central office serving that particular customer. 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. The EEL must be available to ICG at the TELRIC-based UNE prices. Specifically, the total price charged by BellSouth for the EEL should be the sum of the established TELRIC rates for: (1) an unbundled loop; (2) a cross-connect of appropriate capacity; and (3) unbundled interoffice dedicated transport.

Further, BellSouth should combine previously uncombined elements for a reasonable cost-based fee in situations where those elements currently are not combined in the BellSouth network.

IV. WHETHER PERFORMANCE MEASURES WITH ENFORCEMENT MECHANISMS, SHOULD BE ORDERED TO ENSURE THAT BELLSOUTH PROVIDES NONDISCRIMINATORY SERVICE TO ICG ON PARITY WITH THE SERVICE BELLSOUTH PROVIDES TO ITSELF AND ITS RETAIL CUSTOMERS.

ICG requests that the performance measures and enforcement mechanisms adopted by the Texas Utilities Commission should be ordered for BellSouth in this case.

BellSouth asserts that its "Service Quality Measurements" ("SQMs") will provide sufficient protection to ICG. According to BellSouth, the SQMs cover BellSouth's performance in preordering, ordering, provisioning, maintenance and repair, billing, operator services, directory assistance, E911, trunk group performance, and co-location According to BellSouth, these are available now to all CLECs in Kentucky.

As the Commission has noted in several previous orders, BellSouth is required to provide the same quality of service to ICG as it provides to itself. There is no need to assume that BellSouth will not in good faith comply with that requirement. Thus, performance measures and enforcement mechanisms of the nature requested by ICG are not necessary. Should ICG have a basis on which to allege that poor quality of service is being delivered to its customers by BellSouth then it should bring this matter to the Commission's attention through a complaint petition.

V. WHETHER BELLSOUTH SHOULD BE REQUIRED TO PROVIDE TRUNKING FACILITIES TO DELIVER TRAFFIC FROM BELLSOUTH'S NETWORK TO ICG WHEN ICG IS WILLING TO ENTER INTO A BINDING FORECAST OF TRAFFIC VOLUMES.

ICG 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. However, ICG contends that BellSouth is under no obligation to add more end office trunks even though ICG's forecasts may indicate that additional trunking is necessary

ICG asks this Commission to require BellSouth to provision additional end office trunks dictated by ICG's forecast. In exchange, ICG will agree to pay BellSouth for any trunks that are not fully utilized as indicated by the forecast. ICG maintains that under its proposal, BellSouth will not assume any risk for additional trunks that are underutilized

BellSouth asserts that although it is continuing to analyze the possibility of providing binding forecasts and has not foreclosed the idea, BellSouth cannot be ordered to agree to binding forecasts because there is no requirement that it do so pursuant to 47 U.S.C. §251. BellSouth accordingly argues that, pursuant to 47 U.S.C. §252(c), binding forecasts are not properly subject to arbitration.

The threshold question here 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 that 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.

Pursuant to 47 U.S.C. §251(c)(2)(C), ILECs are required to provide interconnection with requesting carriers that is at least equal in quality to that provided by the ILEC 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 to enforce the provisions of that Section.

BellSouth normally has the financial responsibility for the facilities which ICG seeks to make subject to binding forecasts. Under ICG's proposal, however, ICG will pick up the cost for those facilities by paying BellSouth 100 percent of the tariffed price for the forecasted plant if the trunks are not used.

ICG's proposal fully protects BellSouth from assuming unreasonable or unnecessary risk. ICG's proposal is a just and reasonable basis for the parties to negotiate the details of a binding forecast arrangement. The parties should include a binding forecast provision in their interconnection agreement. BellSouth should have the network in service as forecasted by ICG by the end of the forecasted period. Thus, ICG must provide BellSouth at least three months' notice of its capacity requirements.

The Commission, having considered ICG's petition and BellSouth's response thereto, and all other evidence of record, and having been otherwise sufficiently advised, HEREBY ORDERS that:

1. Reciprocal compensation shall be required for calls to ISPs at the agreed upon rate for compensation of local calls, pending the FCC's determination.

2. Parties shall track the minutes of use for ISP-bound calls so that a retroactive "true-up" to the level of compensation ultimately adopted by the FCC may occur.

3. Within 30 days of the date of this Order, parties shall submit information regarding the manner in which they will track ISP-bound traffic.

4. BellSouth shall compensate ICG for use of its switch at the tandem interconnection rate.

5. The EEL shall be made available to ICG at the TELRIC-based UNE prices for the sum of an unbundled loop, a cross-connect, and an unbundled interoffice dedicated transport.

6 BellSouth shall combine previously uncombined elements for a reasonable cost-based fee.

7. Within 30 days of the date of this Order, BellSouth shall file its proposed "combining" fee and cost support workpapers.

8. Performance measures and enforcement mechanisms shall not be required at this time, however, BellSouth shall continue to provide SQMs to ICG.

9. The parties shall include a binding forecast provision in their interconnection agreement consistent with the Commission's decisions herein.

10. Within 30 days of the date of this Order, parties shall submit a signed agreement consistent with the mandates herein.

Done at Frankfort, Kentucky, this 2nd day of March, 2000.

By the Commission

ATTEST.

Wm H Bowker

Deputy Executive Director

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-472, SUB 15

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Petition for Arbitration of the Interconnection Agreement	)	RECOMMENDED
Between BellSouth Telecommunications, Inc., and Time	)	ARBITRATION
Warner Telecom of North Carolina, L.P., Pursuant to	)	ORDER
Section 252(b) of the Telecommunications Act of 1996	)	

BEFORE: Commissioner Sam J. Ervin, IV, Presiding; and Chairman Jo Anne Sanford and Commissioners Ralph A. Hunt, Judy Hunt, William R. Pittman, J. Richard Conder, and Robert V. Owens, Jr.

APPEARANCES:

For BellSouth Telecommunications, Inc.

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

R. Douglas Lackey and Bennett L. Ross, General Attorneys, BellSouth Telecommunications, Inc., 675 West Peachtree Street, N.E., Atlanta, Georgia 30375

For Time Warner Telecom of North Carolina, L.P.

Wade H. Hargrove, Marcus W. Trathen, Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., Attorneys at Law, Post Office Box 1800, Raleigh, North Carolina 27602

BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission (Commission) pursuant to Section 252(b) of the Telecommunications Act of 1996 (1996 Act) and G.S. 62-110(f1) of the North Carolina General Statutes. This proceeding was initiated by a Petition filed in this docket by BellSouth Telecommunications, Inc. (BellSouth). By its Petition, BellSouth requested that the Commission arbitrate a single issue in dispute between BellSouth and Time Warner Telecom of North Carolina, L.P. (Time Warner). The issue as originally stated is: "What should be the appropriate definition of 'local traffic' for purposes of the parties' reciprocal compensation obligations under Section 251(b)(5) of the 1996 Act?" The parties agree that the issue in dispute is, in essence, whether reciprocal compensation should be paid for traffic to Internet service providers (ISPs).

The Commission had set this matter for hearing on January 25, 2000. In lieu of a hearing, BellSouth and Time Warner jointly filed a motion on January 10, 2000, which requested that: (1) the Commission take administrative notice of the records developed in Docket No. P-582, Sub 6 (ICG Proceeding) and Docket No. P-500, Sub 10 (DeltaCom Proceeding); (2) the record from those proceedings as well as the parties' prefiled testimony in this case be used as the evidentiary record for the Commission's decision; and (3) the parties' briefs be permitted to reference the prefiled testimony in this case and the record developed in the ICG Proceeding and DeltaCom Proceeding. By Order entered on January 19, 2000, the Commission granted BellSouth's and Time Warner's Motion, and the January 25, 2000 hearing was canceled.

The purpose of this arbitration proceeding is for the Commission to resolve the single issue set forth in the Petition and Response. 47 U.S.C. § 252(b)(4)(C). Under the 1996 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, shall establish rates according to the provisions of 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. § 252.

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

FINDING OF FACT

The parties should, as an interim inter-carrier compensation mechanism, pay compensation to each other for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for local traffic, subject to true-up retroactive to the effective date of the interconnection agreement resulting from this arbitration at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT

POSITIONS OF PARTIES

BELLSOUTH: "Local traffic" should be defined to apply only to traffic that originates and terminates within a local area. The definition should expressly exclude traffic to ISPs, which the FCC's Declaratory Ruling states is interstate in nature. However, inasmuch as the Commission has previously determined in an earlier arbitration what it believes to be an "appropriate template for an interim inter-carrier compensation mechanism" for

ISP-bound traffic, BellSouth conceded that the parties should incorporate the rulings on this issue made in Docket No. P-582, Sub 6 (ICG/BellSouth Arbitration).

TIME WARNER: The Commission has already resolved this issue, on an interim basis, in the context of the ICG/BellSouth Arbitration. The Commission's Order in that docket should be applied in this proceeding.

The FCC's Declaratory Ruling clearly contemplates that state commissions may adopt interim reciprocal compensation arrangements. Time Warner incurs costs on behalf of BellSouth whenever it terminates calls originated by BellSouth's end users to ISPs served by Time Warner. Without payment of reciprocal compensation, Time Warner will not receive compensation at all until the FCC adopts a prospective compensation rule at some indefinite point in the future, which will harm competition.

DISCUSSION

Testimony regarding this issue was presented by BellSouth witness Varner and Time Warner witness Wood. In addition, considerable testimony on this issue was presented by the parties in Docket No. P-582, Sub 6 (ICG/BellSouth Arbitration) and Docket No. P-500, Sub 10 (DeltaCom/BellSouth Arbitration), the records of which have been considered in this proceeding.

The Commission notes that BellSouth's recommendation in its proposed order filed on February 15, 2000, is that the parties incorporate the Commission's ruling on this issue in Docket No. P-582, Sub 6. This is essentially the same as Time Warner's recommendation. Accordingly, the Commission concludes that good cause exists to apply the decision in Docket No. P-582, Sub 6, to this proceeding. In the Commission's November 4, 1999 Recommended Arbitration Order in Docket No. P-582, Sub 6, the Commission ordered 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...subject to true-up at such time as the Commission has ruled pursuant to FCC consideration of this matter."[1]

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, subject to true-up retroactive to the

[1] The Commission reaffirmed its position on this matter in its March 1, 2000, Order Ruling on Objections, Request for Clarification, Reconsideration and Composite Agreement. This Order is subject to any rulings or clarifications stemming from the March 1, 2000, Order.

effective date of the interconnection agreement resulting from this arbitration at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

2. That BellSouth and Time Warner 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).

3. 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.

4. 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.

5. That, with respect to objections or comments filed pursuant to decretal paragraph 1, 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.

6. 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 5 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 13th day of March, 2000.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

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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

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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,

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[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

02/09/00
Date

Bob Durden
Chairman

2/10/00
Date

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STATE OF
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P.O. E
MONTGOMERY, AL

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

FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

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

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

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DOCKET 27069 - #2

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

[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

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

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

* * *

"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

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

[9] See Appendix A attached hereto.

[10] See Appendix B attached hereto.

[11] Telecommunications Decision and Order *In the Matter of the Petition of Global Naps for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Bell Atlantic - New Jersey*, Docket No. 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 ¶19.
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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 ¶19

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

[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

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[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, President

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)

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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)

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

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