COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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

O R D E R

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

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. 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.

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:

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Executive Director