COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF ICG TELECOM GROUP, INC.	)	
FOR ARBITRATION OF ITS	)	
INTERCONNECTION AGREEMENT WITH	)	CASE NO. 97-042
CINCINNATI BELL TELEPHONE COMPANY	)	
PURSUANT TO SECTION 252(B) OF THE	)	
TELECOMMUNICATIONS ACT OF 1996	)	

O R D E R

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) ("the Act") was enacted to open all telecommunications markets to competition. See Conference Report, H.R. Rep. No. 458, 104th Cong., 2d Sess., at 113 (1996). Section 251 of the Act requires incumbent local exchange carriers to negotiate interconnection agreements in good faith with new entrants to the local exchange market. Section 252 permits the parties to those negotiations to petition a state commission to arbitrate unresolved issues. Subsection (b)(4)(C) states that the state commission "shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement." Subsection (b)(4)(A) requires the Commission to "limit its consideration . . . to the issues set forth in the petition and in the response." Subsection (b)(4)(C) requires the Commission to resolve the issues presented not later than nine months after the date on which the incumbent local exchange carrier received the request for negotiations.

On August 21, 1996, ICG Telecom Group, Inc. ("ICG") submitted a request for negotiations to Cincinnati Bell Telephone Company ("Cincinnati Bell"). The parties were

ultimately unable to agree on four issues. ICG submitted its petition for arbitration to this Commission on January 28, 1997. Pursuant to Section 252(b)(4)(C) of the Act, this proceeding is to be concluded by May 21, 1997.

Issues raised in this proceeding have been argued by the parties in filed documents and testimony, at the public hearing, in briefs, and in their best and final contract offers and accompanying explanations. Our discussion of the issues enumerated in the petition and not yet resolved by the parties comprises the body of this Order. The Commission's resolution of the issues presented should enable the parties to decide upon language for the contract and submit it for approval pursuant to Section 252(e)(1), within 60 days of the date of this Order.

The emphasis of the Act is on free negotiation between the parties. Accordingly, should Cincinnati Bell and ICG wish to alter any aspect of the contract based on decisions reached herein, they may negotiate such alteration and submit it to this Commission for approval. Further, the Commission encourages the parties to return to the Commission on rehearing with any specific, narrowly-defined issues they believe are appropriate for rehearing.

I. RESTRICTIONS ON USE OF UNBUNDLED ELEMENTS

Cincinnati Bell has argued that the Commission must address a threshold issue of whether the restrictions on the use on unbundled elements are even properly before the Commission. Cincinnati Bell argues that Section 252(b)(4)(A) limits the scope of the proceeding to those issues "set forth in the petition and in the response." ICG responds that supplementing its petition at any time through the proceeding is appropriate since

the Act does not preclude amendments of the petition. ICG further argues that Cincinnati Bell's witness addressed the substantive argument of the recombination of unbundled elements, and there can be no allegation that Cincinnati Bell had insufficient notice of ICG's request. Cincinnati Bell alleges that it would be "prejudiced" by the Commission's addressing this issue at this time.[1] However, Cincinnati Bell does not state how it would be so prejudiced.

The Commission finds that the arguments of neither Cincinnati Bell nor ICG regarding this issue are meritorious. The Commission is restricted in its review to issues addressed in the new entrant's petition and the incumbent carrier's response. However, because ICG's petition raises issues inextricably related to the issue of restrictions on unbundled network elements the Commission will address the issue at this time. For example, ICG refers to pricing as an issue for the Commission to resolve on an interim basis.[2] Furthermore, ICG addresses the obligations under Section 252(i) by suggesting seven topics for possible picking and choosing in other agreements, including interconnection and unbundled access. These matters indicate that ICG envisioned an agreement in which these topics would be present. The restrictions or lack thereof on combining unbundled network elements are a pricing issue. Accordingly, the Commission will address this issue and finds that nonrestricted reconstitution of unbundled network elements is required by the Act.

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1 Post Hearing Brief of Cincinnati Bell at 4.

2 ICG Petition at 6.

Though Cincinnati Bell has argued that ICG should not be allowed to combine unbundled network elements to create an existing Cincinnati Bell retail service unless it pays the resale rate for that service, the Act provides pricing standards for the sale of unbundled elements that differ from the pricing standards for the sale of "service to another carrier." Thus, ICG's request does not allow it to circumvent any pricing requirements of the Act. The Act at Section 251(c)(3) also states unequivocally that a requesting carrier must be provided with "nondiscriminatory access to network elements on an unbundled basis" and that the incumbent must provide the elements "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." Thus, the Act confers upon ICG the authority to combine unbundled network elements to provide any service it chooses. Cincinnati Bell may not restrict its provision of unbundled network elements. Instead, unbundled network elements may be combined at unbundled element prices, without restriction, with other elements to provide telecommunications services. Without access to both the loop and the switching elements, no telecommunications service could be provided through the combination of unbundled network elements as prescribed by the Act.

Cincinnati Bell further argues that the application of the Act should be suspended or modified as it has less than two percent of the nation's access lines pursuant to Section 251(f). On May 8, 1997, Cincinnati Bell filed an application requesting such suspension or modification of certain of the Act's requirements.[3] This application will be

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[3] Case No. 97-247, Application of Cincinnati Bell Telephone Company For Suspension/Modification of Certain Requirements of Section 251(b) and (c) and the FCC Rules Implementing Those Provisions.

processed by the Commission in a separate proceeding. No suspension or modification will be granted while this separate proceeding is pending Commission review.

II. PERFORMANCE STANDARDS AND LIQUIDATED DAMAGES

ICG requests the inclusion of performance standards and stipulated penalties for failure to meet the standards in its agreement with Cincinnati Bell. Cincinnati Bell argues that liquidated damages are inappropriate in such an agreement. Moreover, Cincinnati Bell reasons, it is inappropriate to assume that it will not comply with its agreement in good faith. The parties have agreed to a proposed framework of performance standards. The Commission will accept any negotiated agreement for performance standards but declines to establish such performance standards or liquidated damages.

Furthermore, the Commission finds that, as Cincinnati Bell is required to provide the same quality of service to ICG as it provides to itself pursuant to Section 251(c)(2)(C), and since Cincinnati Bell has agreed to do so, there does not appear to be any reason to assume that Cincinnati Bell will not in good faith comply with this requirement. Should problems arise regarding the quality of service, ICG may of course bring the matter to the Commission's attention.

III. THE "MOST FAVORED NATION" CLAUSE; SECTION 252(i) OBLIGATIONS

ICG proposes that it be permitted to "pick and choose" language from other agreements if it chooses all of the provisions within any one of seven categories.[4]

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[4] The seven categories are: (1) interconnection, (2) exchange access, (3) unbundled access, (4) resale, (5) collocation, (6) number portability, and (7) access to rights-of-way. ICG testimony of William Jennings Rich at 15.

Cincinnati Bell argues that a carrier may adopt the provisions of another interconnection agreement only in its entirety because to allow a "most favored nation" clause would defeat private negotiations. Moreover, Cincinnati Bell asserts that the "pick and choose" rule of the Federal Communications Commission ("FCC") has been stayed by the Eighth Circuit Court of Appeals. The stay does not, however, prevent this Commission from finding on its own that principles embodied in the FCC's pricing rules are appropriate for, and should be implemented in, Kentucky. Moreover, the Act itself was not stayed by the Court. The Act states, in pertinent part:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Telecommunications Act of 1996, Section 252(i).

Though Cincinnati Bell is willing only to offer a competing local exchange carrier the entire contract, the Act refers to an interconnection, service, or network element in the singular. Therefore, based on the Act and without reference to the FCC's "pick and choose" rule, the Commission finds that Congress intended that discriminatory terms and conditions given by incumbent local exchange carriers to competing carriers should be avoided by a "most favored nation" clause. If, as in this proceeding, ICG elects to limit its ability to "pick and choose" to seven defined categories rather than each interconnection, service, or network element, then it may do so. Therefore, the

Commission will accept ICG's seven-category limitation on the "pick and choose" requirement.[5]

IV. INTELLECTUAL PROPERTY RIGHTS

Cincinnati Bell has proposed the ICG be responsible for any additional license requirements or fees imposed by a third party claimed as a result of ICT's interconnection agreement with Cincinnati Bell. ICG contends that it is unreasonable to assume that Cincinnati Bell's rates are not sufficient for potential intellectual property disputes, and that the cost of such disputes should be borne by all parties on a competitively neutral basis.[6] ICG has agreed to be responsible for future usage once Cincinnati Bell notifies it that a third party may be claiming an additional license fee. The issue of liability for a third party's intellectual property claim should be brought to the Commission's attention for resolution if and when it arises.

IT IS THEREFORE ORDERED that the parties shall complete their agreement in accordance with the principles and limitations described herein and shall submit their final agreement for Commission review within 60 days of the date of this Order.

Done at Frankfort, Kentucky, this 21st day of May, 1997.

PUBLIC SERVICE COMMISSION

Vice Chairman

Commissioner

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5 On May 20, 1997, ICG filed a motion for "Leave to Submit New Evidence." Attached to the motion is part of an agreement filed in Ohio by Cincinnati Bell and another carrier. ICG asserts the agreement may be relevant to the Commission's determinations in this proceeding. Yet, ICG has voluntarily limited its own right to "pick and choose" terms from other carrier's agreements. Parties may continue to negotiate and present additional agreements to the Commission for review.

6 ICG Brief at 9.

DISSENT OF CHAIRMAN LINDA K. BREATHITT

I continue to dissent from the majority opinion regarding the issue of recombination of unbundled network elements. My original dissent appeared in Case No. 96-431 on January 29, 1997. I further confirmed my dissenting opinion in Case No. 96-482 on March 18, 1997.

Section 251(c)(3) states that 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. On its face, this would logically lead to the conclusion that recombination of the unbundled elements in any manner was contemplated by Congress.

However when taken in context with other sections of the Act, this conclusion fails. In particular if recombinations were contemplated, there would have been no reason for Congress to establish two distinct pricing programs - one for resale and one for network element pricing. The establishment of two pricing arrangements is inconsistent with the idea of recombination of all elements.

Since my original dissent there has been further evidence that Commissions throughout the Southeast have affirmed their decisions of not allowing rebundling of network elements to duplicate retail services. I agree with those Commissions that have found that rebundling that duplicates retail services must be priced at the resale rate. Those Commissions are Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

My understanding of the issues, which led me to this conclusion, have not waivered. It is my continued belief that customers, particularly residential customers, will

bear the consequences of this pricing scheme. I fear this will only lead to customer confusion as we enter the new competitive era. I respectfully dissent.

Linda K. Breathitt
Chairman

ATTEST:

Executive Director