BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of ICG Telecom Group, Inc. for arbitration of unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.	DOCKET NO. 990691-TP ORDER NO. PSC-00-0128-FOF-TP ISSUED: January 14, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

APPEARANCES:

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TABLE OF CONTENTS

I. BACKGROUND 2

II. ISP ISSUES 3

III. PACKET SWITCHING CAPABILITIES 5

IV. ENHANCED EXTENDED LINK LOOPS 7

V. VOLUME AND TERM DISCOUNTS FOR UNEs 8

VI. RECIPROCAL COMPENSATION FOR SWITCH SERVICES 9

VII. BINDING FORECAST 11

VI. CONCLUSION 12

FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

I. CASE BACKGROUND

On October 27, 1997, we approved a one-year agreement between ICG Telecom Group, Inc. (ICG), and BellSouth Telecommunications, Inc. (BellSouth), providing for interconnection services. That agreement expired on October 27, 1998, but the parties mutually agreed to extend it pending finalization of a successor agreement. Negotiations for a successor agreement failed, and on May 27, 1999, ICG filed a Petition for Arbitration, seeking our assistance in resolving the remaining issues. The Petition enumerated 25 issues. Subsequently, 10 of those issues have been resolved and withdrawn by the parties. At the September 21, 1999 Prehearing Conference, the Prehearing Officer granted BellSouth's Motion to Remove Issues From Arbitration, and 9 additional issues were removed from consideration, leaving 6 issues to be addressed at the October 7, 1999 hearing.

The first matter addressed herein concerns originating and terminating traffic from Internet service providers (ISPs). Specifically, we have been asked to determine whether calls that originate from or terminate to ISPs should be defined as "local traffic" for purposes of the ICG/BellSouth Interconnection Agreement. The parties were also unable to reach agreement on reciprocal compensation arrangements.

We have also been asked to determine whether certain packet-switching capabilities and Enhanced Extended Link Loops (EELs) should be made available to ICG as Unbundled Network Elements (UNEs). Related thereto, the parties have been unable to agree as to whether volume and term discounts should be made available to ICG for UNEs.

We have further been asked to determine whether, for purposes of reciprocal compensation, ICG should 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.

Finally, we have been asked to decide whether BellSouth should be required to enter into a binding forecast of future traffic requirements for a specified period and, if so, whether BellSouth is then required to provision the requisite build-out and necessary support for that forecast.

II. ISP ISSUES

In examining this issue, we refer to our recent decision in Order No. PSC-99-2009-FOF-TP, issued on October 14, 1999, in Docket No. 990149-TP, the Petition by MediaOne Florida Telecommunications, Inc. for arbitration of an interconnection agreement with BellSouth Telecommunications, Inc. In that case, the issue itself was framed somewhat differently than in this docket, but the assertions are distinctly similar, particularly with respect to BellSouth's position. In the MediaOne case, we decided to maintain the status quo pending the FCC's decision with respect to how ISP traffic should be treated.

The root of the problem in determining whether ISP-bound traffic is local and whether reciprocal compensation is due, stems from the FCC's treatment of this traffic. The FCC, admittedly, has treated ISP-bound traffic as though it were local traffic and has

exempted ISPs from paying access charges. In its Declaratory Ruling it stated:

> 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. (FCC 99-38, ¶5)

The FCC explains that the exemption was adopted at the inception of the interstate access charge regime to protect certain users of access services, such as ESPs, that had been paying the generally much lower business service rates, from the rate shock that would result from immediate imposition of carrier access charges. The FCC continues to allow ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs. In addition, incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes.

The FCC has realized the problems that its treatment of this traffic has caused throughout the country.

> Until now, however, it has been unclear whether or how the access charge regime or reciprocal compensation applies when two interconnecting carriers deliver traffic to an ISP. . . . As a result, and because the Commission had not addressed inter-carrier compensation under these circumstances, parties negotiating interconnection agreements and the state commissions charged with interpreting them were left to determine as a matter of first impression how interconnecting carriers should be compensated for delivering traffic to ISPs, leading to the present dispute. (FCC 99-38, ¶9)

In its Declaratory Ruling, the FCC has concluded that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate. (FCC 99-38, ¶1) However, the FCC stated that it currently has no rule governing inter-carrier compensation for ISP-bound traffic, but believes that adopting such a rule to govern

prospective compensation would serve the public interest. (FCC 99-38, ¶28) To this end, the FCC has issued a Notice of Proposed Rulemaking, seeking comments on two proposals for a rule. In the meantime, they have left it to state commissions to determine whether reciprocal compensation is due for this traffic.

We find that the FCC has claimed jurisdiction over this traffic and will ultimately adopt a final rule on this matter.

> We emphasize that the Commission's decision to treat ISPs as end users for access charge purposes and, hence, to treat ISP-bound traffic as local, does not affect the Commission's ability to exercise jurisdiction over such traffic. FCC 99-38, ¶16

Further, as mentioned earlier, the FCC intends to adopt a final rule to govern inter-carrier compensation for ISP-bound traffic. Therefore, any decision we make would only be an interim decision. For that reason, in the MediaOne and BellSouth arbitration in Docket No. 990149, we ruled that the parties should continue to operate under their current contract pending a decision by the FCC. We still believe this approach to be reasonable under the facts of this case and in view of the uncertainty over this issue. Any decision we might make would, presumably, be preempted if it is not consistent with the FCC's final rule. Accordingly, we find that the parties should continue to operate under the terms of their current contract until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local and whether reciprocal compensation is due for this traffic.

III. PACKET SWITCHING CAPABILITIES

This issue does not address whether BellSouth will provide the packet-switching capabilities that ICG has requested, but whether these capabilities will be provided as UNEs. According to 47 C.F.R. Section 51(f), Pricing of Elements, certain pricing rules apply to UNEs, interconnection, and methods of obtaining access to unbundled elements, including physical collocation and virtual collocation. Specifically, FCC Rule 47 C.F.R. Section 51.503(b) reads:

> An incumbent LEC's rates for each element it offers shall comply with the rate structure

> rules set forth in Sections 51.507 and 51.509, and shall be established, at the election of the state commission.
>
> (1) Pursuant to the forward-looking economic cost-based pricing methodology set forth in Sections 51.505 and 51.511; or
>
> (2)Consistent with the proxy ceilings and ranges set forth in Section 51.513.

Therefore, the real issue before us is how the prices for the packet-switching capabilities should be set. The list of UNEs that an incumbent LEC must provide to requesting telecommunications carriers was provided in FCC Rule 47 C.F.R. Section 51.319. However, this rule was vacated by the United States Supreme Court and remanded back to the FCC. AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366(1999) The FCC recently issued its Order on this rule; however, the Order was not issued until after the hearing in this case was held, and will not likely be final for some time.

Packet-switching capabilities were not a part of the original list of UNEs contained in FCC Rule 47 C.F.R. Section 51.319, which was vacated. However, the FCC did address packet-switching capabilities as a UNE in its First Report and Order. It stated:

> At this time, we decline to find, as requested by AT&T and MCI, that incumbent LEC's packet switches should be identified as network elements. Because so few parties commented on the packet switches in connection with section 251(c)(3), the record is insufficient for us to decide whether packet switches should be defined as a separate network element. We will continue to review and revise our rules, but at present, we do not adopt a national rule for the unbundling of packet switches. FCC 96-325, ¶427

Further, the FCC mentioned packet switching in its press release regarding the new list of UNEs. Specifically, it stated:

> Packet Switching. Incumbent LECs are not required to unbundle packet switching, except in the limited circumstance in which a

> requesting carrier is unable to install its Digital Subscriber Line Access Multiplexer (DSLAM) at the incumbent LEC's remote terminal, and the incumbent LEC provides packet switching for its own use. Packet switching involves the routing of individual data message units based on address or other routing information and includes the necessary electronics (e.g., DSLAMs).

Again, we note that the information contained in the FCC's press release is not legally binding, and is not dispositive by itself of the issue. Nonetheless, we point out that the press release does indicate that the new FCC Rule 47 C.F.R. Section 51.319 will not require incumbent LECs to unbundle their packet-switching capabilities except in a very narrow and limited instance. We do not believe that ICG's argument that innovation and competition necessitate TELRIC-based pricing of packet-switching capabilities sufficiently demonstrates that these capabilities are intended under the Act to be provided as UNEs. ICG has only argued its value to ICG's own business plan. Therefore, the evidence of record indicates that packet-switching capabilities are not UNEs. BellSouth has, however, agreed to provide these capabilities to ICG; therefore, the parties are encouraged to negotiate a price.

The record does not contain substantial evidence regarding the interoffice transport that would be used to connect central offices where a frame relay switch does not exist and where ICG is not physically collocated. ICG states that this element should be provided as a UNE. ICG witness Holdridge states that if ICG must pay special access for interoffice transport, it will not be able to offer a competitively priced frame relay product. BellSouth did not present any evidence on this topic. Therefore, we find that the evidence in the record is insufficient for us to determine that the interoffice transport that ICG seeks is a UNE.

IV. ENHANCED EXTENDED LINK LOOPS

Again, the issue is not whether BellSouth will provide the EEL to ICG, but whether the EEL will be provided as a UNE. According to Rule 47 C.F.R., Section 51,(F)-Pricing of Elements, certain pricing rules apply to UNEs, interconnection, and methods of obtaining access to unbundled elements, including physical

collocation and virtual collocation. Specifically, FCC Rule 47 C.F.R. Section 51.503(b) reads:

> An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in Sections 51.507 and 51.509, and shall be established, at the election of the state commission.
>
> (1) Pursuant to the forward-looking economic cost-based pricing methodology set forth in Sections 51.505 and 51.511; or
>
> (2)Consistent with the proxy ceilings and ranges set forth in Section 51.513.

Therefore, the real issue before us is what the price should be for the EEL. The list of UNEs that an incumbent LEC must provide to requesting telecommunications carriers was provided in FCC Rule 47 C.F.R. Section 51.319. This rule was, however, vacated by the United States Supreme Court and remanded back to the FCC. AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366(1999) As indicated earlier, the recently released FCC Order will not be final for some time. We also note that the EEL was not listed in the press release as a mandatory UNE.

BellSouth argues that in order to provide the EEL, it would have to combine the loop and dedicated transport for ICG, and it is not required to do that. We agree that FCC Rule 47 Sections 51.315(c)-(f) regarding incumbent LEC provisioning of combinations were vacated by the Eighth Circuit and remain vacated. Both parties to this case recognized that reconsideration may be given to these rules. Nevertheless, at this time, incumbent LECs are not required to combine network elements for other telecommunications carriers.

ICG also argued that the EEL is a preexisting combination in BellSouth's network. FCC Rule 47 C.F.R. Section 51.315(b) reads:

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

Therefore, according to this rule, if the elements were currently combined in an incumbent's network, they must be provided in

combined form to requesting carriers. We note that this rule was vacated by the Eighth Circuit but reinstated by the Supreme Court. AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366(1999)

While ICG argues that the EEL is a UNE combination that currently exists in BellSouth's network, we do not believe that the record of this case supports ICG's argument. In fact, when ICG witness Schonaut was asked if she knew for a fact that the EEL was currently combined in BellSouth's network, she replied "[w]ell, I believe that to be true." The evidence presented in this case, however, demonstrates that the EEL consists of a customer loop and dedicated transport. If a customer is served from one central office and is connected directly to that serving central office by the customer loop, there would normally be no need to be connected to a different central office by dedicated transport unless the customer has requested specific service(s) that would require such a connection, such as foreign exchange service or private line services. At best, the evidence suggests that such a combination would be the exception rather than the rule. Therefore, we find ICG's arguments are unpersuasive on this matter.

We also point out that the EEL was not offered in the existing agreement between BellSouth and ICG. Understanding the pricing benefit of having the EEL at TELRIC rates, we note that ICG has been providing service under its existing agreement without such pricing benefits.

ICG has not demonstrated that the EEL must be provided as a UNE. Further, the state of the law currently does not require an incumbent LEC to combine network elements for requesting telecommunications carriers. Therefore, we shall not require BellSouth to provide EELs to ICG in the interconnection agreement as UNEs. BellSouth has, however, agreed to provide EELs to ICG, and the parties are encouraged to negotiate the price for the EEL.

V. VOLUME AND TERM DISCOUNTS FOR UNEs

The basis for ICG's request for volume and term discounts rests on the presumption that there will be cost savings associated with BellSouth's provision of such discounts. The record in this docket does not, however, provide sufficient evidence that we should require BellSouth to provide such discounts at this time.

ICG argues that if BellSouth experiences cost savings due to volume offerings, it is required to reflect such savings in its rates. The threshold question to be answered, however, is whether BellSouth will actually realize any cost savings by providing the requested volume and term discount arrangements. Although ICG provides a few mathematical scenarios demonstrating a potential reduction in costs for BellSouth, BellSouth contends that certain theoretical assumptions made in the analysis are inaccurate. BellSouth witness Varner emphasizes that ICG witness Starkey does not understand the manner in which the cost studies were done. Even if ICG is correct in its assumptions, the record in this docket does not provide persuasive evidence regarding the existence of cost savings that will be achieved through offering volume and term discounts. No cost studies were filed, nor were any specific parts of previous studies filed with us specifically referenced. Since there is no reliable evidence in the record in this proceeding that the provision of volume and term discount plans result in lower UNE costs, ICG's request that volume and term discounts be made available for UNEs is denied.

VI. RECIPROCAL COMPENSATION FOR SWITCHED SERVICES IN A GEOGRAPHIC AREA COMPARABLE TO THAT SERVED BY BELLSOUTH'S TANDEM SWITCH

The evidence of record shows that ICG presently has no facilities (i.e., switches or transport facilities) in Florida. While ICG states that it will begin facilities-based service in Florida by fourth quarter 1999, the evidence of record does not show that its switch will serve a geographic area comparable to an area served by a BellSouth tandem switch. ICG simply states it is in "start-up mode" in Florida, but plans to develop the type of network in which its switch will serve a geographic area comparable to that of the BellSouth tandem. Because ICG currently does not have a network in place in Florida, we cannot determine if ICG's network will, in fact, serve a geographic area comparable to one that is served by a BellSouth tandem switch.

While FCC Rule 47 C.F.R. Section 51.711 allows us to provide for reciprocal compensation at the tandem rate if the switch of a carrier other than an incumbent LEC serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the evidence of record does not provide an adequate basis to determine that ICG's network will fulfill this geographic criterion.

Similarly, the evidence of record in this arbitration does not show that ICG will deploy both a tandem and end office switch in its network. In addition, since tandem switching is described by both parties as performing the function of transferring telecommunications between two trunks as an intermediate switch or connection, we do not believe this function will or can be performed by ICG's single switch. As a result, we cannot at this time require that ICG be compensated for the tandem element of termination.

Transport is defined in the FCC's Rules as:

> the transmission and any necessary tandem switching of local telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent. FCC Rule 47 C.F.R. Section 51.701(c).

This definition describes the transmission of local telecommunications traffic from the point of interconnection to the end office of the terminating carrier. While the definition provides for "any necessary tandem switching," transport need not include tandem switching. As such, we believe the record shows that the fiber network ICG intends to deploy will provide a transport and end office function. Therefore, for the purpose of reciprocal compensation, BellSouth shall compensate ICG for the elements of transport and end office switching. The evidence of record, however, does not support ICG's claim that its network serves a geographic area comparable to the area served by BellSouth's tandem switch. Therefore, BellSouth shall not be required to compensate ICG for the tandem element of termination.

VII. BINDING FORECAST

Based on the evidence in the record, BellSouth is not required by the Act, FCC rule, FCC Order, or FPSC Order to enter into a binding forecast arrangement with ICG. Therefore, we shall not here require them to do so. Accordingly, BellSouth shall not be required to provide the requisite network build-out and necessary support to accommodate such a forecast.

ICG's argument relies, in large part, upon the language in the KMC/BellSouth Agreement. Though ICG is referring to the

KMC/BellSouth Agreement for support, we also note that ICG does not believe that Section 20.4 of the KMC/BellSouth Agreement requires the "binding forecast" that it is requesting. The language contained in that provision speaks only to a party's option to request that the other party begin negotiating towards establishing a binding forecast. ICG witness Jenkins recognized this when he stated that "Section 20.4 of the KMC Agreement refers to -- requires that negotiations take place between the forecast provider and the forecast recipient." BellSouth has offered this provision to ICG and is willing to discuss the specifics of such an arrangement. Nevertheless, regardless of what is contained in the KMC/BellSouth Agreement, that was a negotiated agreement between those two parties and has no precedential value in this case. It is not a basis for requiring BellSouth to enter into a binding forecast arrangement with ICG. However, if the parties so choose, they may negotiate such an arrangement.

ICG witness Jenkins described an event where overflow situations resulted because trunks that had been ordered had not been installed in time and no binding forecast existed. He also stated that it is anticipated that "the situation will only get worse as ICG's needs increase, and as we move into other large markets, such as Miami." We believe that BellSouth and ICG have an opportunity to avoid the situation described above by including language similar to the KMC provision in the new agreement. This should allow ICG to make its forecasted needs known to BellSouth and also provide a forum in which the parties could negotiate towards a mutually agreeable binding forecast arrangement. BellSouth has already offered to include the KMC provision in the new agreement with ICG, and to negotiate the details of such an arrangement. BellSouth is not required to enter into a binding forecast of future traffic requirements for a specified period with ICG and, accordingly, will not be required to provision the requisite network build-out and necessary support.

VIII. CONCLUSION

We have conducted these proceedings pursuant to the directives and criteria of Sections 251 and 252 of the Act. We believe that our decisions are consistent with the terms of Section 251, the provisions of the FCC's implementing Rules that have not been vacated, and the applicable provisions of Chapter 364, Florida Statutes.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the specific findings set forth in the body of this Order are approved in every respect. It is further

ORDERED that the parties shall submit a written agreement memorializing and implementing our decisions herein within 30 days of the issuance of this Order. It is further

ORDERED that the agreement shall be submitted for approval in accordance with Section 252(e)(2)(b) of the Telecommunications Act of 1996. It is further

ORDERED that this docket shall remain open pending approval of the agreement submitted in compliance with this Order.

By ORDER of the Florida Public Service Commission this 14th day of January, 2000.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

CLF

DISSENT

Commissioner Jacobs dissents, with comment, from the decision contained herein regarding reciprocal compensation for traffic to Internet Service Providers (ISP).

Commissioner Jacobs

I share my fellow Commissioners's frustrations over the position in which we find ourselves regarding ISP traffic. The FCC has retained jurisdiction in this subject area and declared as

"interstate", ISP-bound traffic terminated to alternative local exchange carriers (ALEC) and generated by customers of incumbent local exchange carriers. However, it has given mixed signals as to the ultimate means of cost recovery, and has set no certain date for its final decision. Additionally, in its February 1999 declaratory ruling, the FCC deferred to state commissions the responsibility for resolving disputes among these parties within interconnection agreements over this traffic, pending its final decision.

Historically, the FCC treated ESPs as end-users, allowing them to purchase from retail tariffs, and relieving them of the requirement to pay interstate access charges. ESPs were permitted, and pursuant to the FCC's most recent ruling, will continue to purchase their links to the public switched telecommunications network through intrastate business tariffs, rather than interstate access tariffs.

I believe we clearly have jurisdiction by express authority under the Act, in addition to the FCC's acquiescence and its further direction to treat the traffic for all intents and purposes, as local. More importantly, I believe we are obligated to provide some means by which ALECs may recover their costs for ISP-bound traffic. The FCC directs in its February, 1999 order that either state commissions treat ISP-bound traffic as local for purposes of reciprocal compensation, or find some other alternative means of compensation. (FCC 99-38 ¶26)

I am persuaded that the "cost causer" should bear the reciprocal, proportional responsibility for the delivery of calls to and from their own network. The elimination of reciprocal compensation for traffic to ISPs would not be equitable, and I believe would do harm to the competitive interests of the carriers that would be forced to terminate this traffic without compensation.

For these reasons, I dissent from the majority vote. I would vote to define ISP traffic as local, for purposes of reciprocal compensation.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review in Federal district court pursuant to the Federal Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6).