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Legal Department

MICHAEL P. GOGGIN  
General Attorney

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BellSouth Telecommunications, Inc.  
150 South Monroe Street  
Room 400  
Tallahassee, Florida 32301  
(305) 347-5561

RECORDS AND  
REPORTING

August 25, 1999

Mrs. Blanca S. Bayó  
Director, Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Docket No. 990691-TP (ICG Arbitration)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion to Remove Issues from Arbitration, which we ask that you file in the above-referenced matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

*Michael P. Goggin*  
Michael P. Goggin

cc: All Parties of Record  
Nancy B. White  
Marshall M. Criser III  
R. Douglas Lackey

AFA \_\_\_\_\_  
APP \_\_\_\_\_  
CAF \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**  
**Docket No. 990691-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

U.S. Mail this 25th day of August, 1999 to the following:

C. Lee Fordham  
Staff Counsel  
Florida Public Service  
Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

ICG Telecom Group, Inc.  
Mr. Carl Jackson  
50 Glenlake Parkway, Suite 500  
Atlanta, GA 30328  
Tel. No. (678) 222-7342  
Fax. No. (678)222-7413  
Represented by McWhirter Law Firm

McWhirter Law Firm  
Joseph McGlothlin \*  
Vicki Gordon Kaufman  
117 South Gadsden Street  
Tallahassee, FL 32301  
Tel. No. (850) 222-2525  
Fax. No. (850) 222-5606  
Represents ICG

  
Michael P. Goggin

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:	)	Docket No. 990691-TP
	)	
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.	)	
<hr/>		Filed: August 25, 1999

**MOTION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO REMOVE ISSUES FROM ARBITRATION**

BellSouth Telecommunications, Inc. ("BellSouth") hereby moves for an order removing certain issues from the issues to be decided in this arbitration. BellSouth requests an expedited ruling from the prehearing officer with respect to this motion to avoid unnecessarily requiring the parties and the Commission Staff to address in their prehearing statements issues that are not appropriate for arbitration.

1. On August 4, 1999, the Commission issued its Order Establishing Procedure in this matter (Order No. PSC-99-1532-PCO-TP). Attached to that Order as Appendix A were a list of 25 tentative issues. Tentative Issues 5 and 18-25 concern demands by ICG that the Commission impose liquidated damage or penalty requirements on BellSouth. In particular, Tentative Issues 5, 18, 20, 22 and 24 ask whether liquidated damages or penalties should be imposed if BellSouth were to fail to meet certain obligations that may be included in the parties' agreement. Tentative Issues 19, 21, 23 and 25 ask whether additional liquidated damages or penalties should be imposed if BellSouth's failures to meet such obligations were repeated or continuing. As the Commission ruled in its

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Order No. PSC-96-1579-FOF-TP (December 31, 1996), it lacks the statutory authority to award damages and thus, these issues are not appropriate for arbitration. *See also*, Order No. PSC-99-1309-PHO-TP (July 8, 1999).

BellSouth objected to the inclusion of these issues at the Issue Identification Workshop held in this matter on July 7, 1999 and requested that its objections be decided by the Prehearing Officer. In order to conserve the resources of the Commission Staff and the parties, BellSouth hereby requests a ruling on these issues prior to the Prehearing Conference.

2. Even if the Commission had the authority to grant the remedies ICG seeks in these issues, ICG, in arbitration proceedings it has brought in other states, has either withdrawn these issues or submitted testimony to the effect that such issues were not appropriate for arbitration. In Alabama, ICG and BellSouth agreed to withdraw a number of issues from a virtually identical complaint. ICG also unilaterally withdrew the exact same issues "pertaining to performance standards, measures and remedies" that BellSouth requests be excluded by the Commission in this Motion. *Statement of Partial Settlement, In the Matter of Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Dkt. No. 27609 (APSC filed Aug. 11, 1999) (attached as Exhibit A). Similarly, in testimony before the North Carolina Utilities Commission, ICG's witness stated that ICG believes that the liquidated damages issues there, which were, again, virtually identical to the issues BellSouth requests be excluded in this Motion, were "not appropriate for a

two party arbitration proceeding." Prefiled Rebuttal Testimony of Karen Notsund on Behalf of ICG Telecom Group Inc. at 8-9, *In the Matter of Petition of ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Dkt. No. P-582, Sub 6 (NCUC filed 1999) (attached as Exhibit B). Jurisdictional obstacles aside, ICG cannot demonstrate that these issues would be any more appropriate to be decided in the context of a two party arbitration in Florida than they would be in North Carolina.

For the reasons stated, BellSouth respectfully requests that its motion be granted.

Respectfully submitted this 25th day of August, 1999



NANCY B. WHITE (PW)  
MICHAEL P. GOGGIN  
c/o Nancy Sims  
150 South Monroe Street, #400  
Tallahassee, Florida 32301  
(305) 347-5558



R. DOUGLAS LACKEY (PW)  
E. EARL EDENFIELD, JR.  
675 West Peachtree Street, #4300  
Atlanta, Georgia 30375  
(404) 335-0747



In accordance with the foregoing, BellSouth withdraws the proffed testimony offered by witnesses Pate, Thierry and Caldwell, and ICG withdraws the proffed testimony offered by witness Notrond. Within one week of the conclusion of the hearing both parties will submit revised versions of the proffed direct and rebuttal testimony of the remaining witnesses redacted to omit testimony relative to the issues listed above.

This the 11<sup>th</sup> day of August, 1999.

ICG TELECOM GROUP, INC.

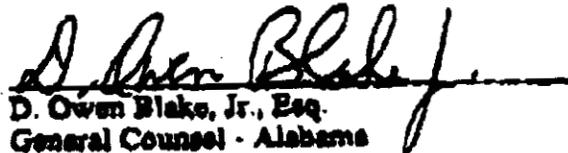
By:



Edgar C. Gentle, III, Esq.  
GENTLE, PICKENS & ELLASON  
Attorneys for ICG Telecom Group, Inc.

BELLSOUTH TELECOMMUNICATIONS, INC.

By:



D. Owen Blake, Jr., Esq.  
General Counsel - Alabama



1 Regulatory Manager to the Director of Regulatory Affairs in June 1997. In that position, I  
2 was responsible for TCG's regulatory interests in six states. In May 1999 I joined ICG as  
3 a Senior Director of Government Affairs.

4 Q. HAVE YOU TESTIFIED IN STATE REGULATORY PROCEEDINGS BEFORE?

5 A. Yes. On behalf of ICG, I recently participated in a technical workshop before and  
6 Administrative Law Judge ("ALJ") of the California Public Utilities Commission on the  
7 appropriate performance measures incentives plan for GTE California (GTEC"). I was the  
8 lead presenter of a proposal supported by a coalition of competitive local exchange carriers.  
9 In February of this year, I presented a similar plan on behalf of AT&T, to the same ALJ to  
10 be applied to Pacific Bell. I made a similar proposal to the Nevada Commission staff in  
11 1999. On behalf of TCG, I have testified before the state public service commissions of  
12 California, Colorado, Utah and Arizona.

13 Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

14 A. The purpose of my testimony is to rebut Alphonso Varner's testimony concerning  
15 performance standards and enforcement mechanisms on page 38 of his testimony.

16 Q. ARE YOU FAMILIAR WITH THE PORTION OF THE 1997 AT&T/BELLSOUTH  
17 ARBITRATION ORDER REFERENCED ON PAGE 38 OF MR. VARNER'S  
18 TESTIMONY?

19 A. Yes.

20 Q. DID THE COMMISSION'S DECISION IN THAT ARBITRATION FORECLOSE  
21 FURTHER COMMISSION CONSIDERATION OF PERFORMANCE MEASURES  
22 AND BENCHMARKS?

1 A. No. By the terms of its Recommended Arbitration Order, the Commission reserved the right  
2 to revisit this issue. The Commission's Order states that it was not practical for the  
3 Commission to "become involved, at this stage, in the minutiae of performance standards"  
4 and that it "would be premature for the Commission to impose" performance standards at  
5 that time. *Recommended Arbitration Order, Petition of AT&T Communications of the*  
6 *Southern States, Inc. for Arbitration of Interconnection with BellSouth Telecommunications,*  
7 *Inc., Docket No. P-140, Sub 50, (the "AT&T/BellSouth RAO"), p. 11. A great deal of*  
8 *experience has been gained since this Order was issued. The AT&T/BellSouth arbitration*  
9 *was the first interconnection arbitration conducted by the Commission after the*  
10 *Telecommunications Act of 1996 (the "Act"). The hearing was conducted in July 1996, only*  
11 *four months after the Act became law. The Commission, the parties and, indeed, the*  
12 *industry - ILECs and CLPs alike - had almost no experience in the competitive local*  
13 *exchange environment. The experience gained over the past two years is sufficient to allow*  
14 *the Commission to consider the issue thoroughly at this time. Furthermore, the evidence will*  
15 *clearly demonstrate the need for Commission adoption of a thorough set of performance*  
16 *measures and self-effectuating enforcement mechanisms. At this stage in the development*  
17 *of competition, Commission involvement is badly needed and no longer premature.*

18 Q. **WHAT IN PARTICULAR ABOUT THIS EXPERIENCE SUGGESTS THE NEED**  
19 **FOR THE COMMISSION TO ADOPT PERFORMANCE MEASURES AND**  
20 **ENFORCEMENT MECHANISMS?**

21 A. The Commission's expectation that BellSouth would negotiate with CLPs on this issue has  
22 not been fulfilled. In the *AT&T/BellSouth RAO*, the Commission concluded that:

1 BellSouth has indicated a willingness to negotiate performance  
2 standard terms which may include "incentives." The Commission  
believes that parties negotiating in good faith can resolve this  
question without further need of Commission intervention.

5 *AT&T/BellSouth RAO*, p. 11.

6 The stark contrast of this Commission expectation with Mr. Varner's testimony demonstrates  
7 why Commission intervention is necessary after all. Mr. Varner dismisses the issue in ten  
8 lines of testimony. He does not acknowledge the Commission's expectation that BellSouth  
9 will negotiate this issue in good faith. He challenges the Commission's authority and  
10 jurisdiction to even consider the issue, a position apparently not expressed by BellSouth in  
11 the AT&T arbitration. Finally, Mr. Varner states that enforcement mechanisms are  
12 unnecessary.

13 **Q. DO YOU AGREE WITH MR. VARNER THAT THE COMMISSION LACKS THE  
14 LEGAL AUTHORITY TO ADOPT PERFORMANCE STANDARDS AND  
15 ENFORCEMENT MECHANISMS?**

16 **A.** No. While, like Mr. Varner, I am not an attorney, the Commission appears to have ample  
17 legal authority. The Telecommunications Act of 1996 (the "Act") and implementing FCC  
18 rules require that incumbent local exchange companies provide interconnection, access to  
19 unbundled network elements and resale at parity to that which it provides to itself. See 47  
20 U.S.C. § 251(e)(2)(C); 47 C.F.R. § 51-503(a)(3). Access to network elements must be  
21 provided on a nondiscriminatory basis, and the level of access must be equal in terms of  
22 "quality, accuracy, and timeliness." *Application of Ameritech Michigan Pursuant to § 271*  
23 *of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services*  
24 *in Michigan*, CC Docket 96-98, ¶ 139. N.C.G.S. § 62-110 contains provisions authorizing

1 the Commission to adopt rules regarding interconnection and unbundled access to network  
2 elements. Also, in its decision rejecting BellSouth's second Louisiana Section 271  
3 application, the FCC cited the Louisiana Commission's requirement that BellSouth develop  
4 performance standards and, indeed, applauded the Louisiana Commission for taking these  
5 steps. *In the Matter of Application of BellSouth Corporation, BellSouth*  
6 *Telecommunications, Inc., and BellSouth Long Distance, for Provisions of In-Region,*  
7 *InterLATA Services in Louisiana, CC Docket 98-121, ¶ 93. This Commission also has*  
8 *general supervisory authority over telephone companies.*

9 **Q. DO YOU AGREE WITH MR. VARNER THAT PERFORMANCE MEASURES AND**  
10 **ENFORCEMENT MECHANISMS ARE NOT NECESSARY?**

11 **A. No. A facilities-based carrier such as ICG is dependent upon BellSouth for essential**  
12 **network elements. Preordering, ordering, provisioning, billing, repair and maintenance of**  
13 **these facilities is provided by BellSouth. ICG is similarly dependent upon BellSouth with**  
14 **respect to resold services. If BellSouth's performance on any of these functions falls short,**  
15 **ICG's customer holds ICG responsible. ICG's customer does not care if it was really**  
16 **BellSouth's fault. In the customer's eyes, ICG is responsible. This dependent relationship**  
17 **is what makes this issue so important to the development of local competition. Performance**  
18 **standards and enforcement mechanisms must be put in place to hold BellSouth accountable.**  
19 **Otherwise, BellSouth has no incentive to perform at a level that will enable ICG to meet the**  
20 **expectations of its customers.**

21 **Q. HAS THERE BEEN RECENT ACTIVITY BY OTHER STATE COMMISSIONS ON**  
22 **THE ISSUE OF PERFORMANCE MEASURES AND ENFORCEMENT**

1           **MECHANISMS?**

2           **A. Yes. The Texas Public Service Commission staff has conducted an investigation of**  
3           **performance measures in the context of its ongoing Section 271 docket. A week after ICG**  
4           **filed its petition in this docket, the Texas Commission staff filed its recommendation on**  
5           **performance measures to be adopted by that Commission. It is widely anticipated that the**  
6           **staff report will be adopted by the Commission. A copy of the staff report along with**  
7           **modifications to measurements 1, 2 and 13 which the staff filed on July 9, 1999 are attached**  
8           **to my testimony as Exhibit A.**

9           **Also On July 1, 1999 an Administrative Law Judge (ALJ) of the California Public Utilities**  
10           **Commission (CPUC) issued a draft decision adopting 44 performance measurements. A**  
11           **copy of this draft decision is included as Exhibit B to my testimony. Nearly all of these**  
12           **measures were agreed to by Pacific Bell and GTE California. The draft decision includes**  
13           **an attachment that describes each of the performance measurements. In addition, the**  
14           **following information is included for each performance measure: calculation formula, level**  
15           **of disaggregation, reporting requirements, geographic level, measurable standard (i.e., retail**  
16           **analog or benchmark), business rules and notes. Each of these components is necessary to**  
17           **actually implement the performance measures. Without this degree of specificity, much of**  
18           **the implementation would be left to the ILECs and will be invisible to either the Commission**  
19           **or to the competing local providers ("CLPs").**

20           **The CPUC has held a technical workshop to hear all parties' positions on how to define a**  
21           **violation of the performance standards and on the amounts to be paid in the event of a**  
22           **violation. A separate decision will be issued on these issues. Only when a framework like**

1 this is in place will the Commission know whether the BellSouth is meeting its obligation  
2 to provide performance parity, as required by the Act, and have a mechanism in place to  
3 enforce the obligation.

4 **Q. HAS BELL SOUTH ACKNOWLEDGED THE NEED FOR PERFORMANCE**  
5 **STANDARDS AND ENFORCEMENT MECHANISMS?**

6 **A.** Yes. BellSouth has proposed a set of performance measures to assure nondiscriminatory  
7 access to unbundled network elements to the Federal Communications Commission  
8 ("FCC"). The BellSouth proposal also includes payments which BellSouth would make to  
9 CLPs for failure to meet the performance benchmarks established. A copy of the ~~ex parte~~  
10 filing by BellSouth regarding this proposal is attached as Exhibit C to my testimony.

11 **Q. HAS BELL SOUTH OFFERED TO INCLUDE THIS PROPOSAL IN THE**  
12 **BELL SOUTH/ICG INTERCONNECTION AGREEMENT?**

13 **A.** No. BellSouth has been unwilling to negotiate performance measures and corresponding  
14 enforcement mechanisms with ICG. The proposal to the FCC was part of BellSouth's effort  
15 to win Section 271 approval. From what ICG can determine, BellSouth's proposal is  
16 conditioned on FCC approval of a BellSouth Section 271 application.

17 **Q. WHAT IS REQUIRED TO DEVELOP AN EFFECTIVE SET OF PERFORMANCE**  
18 **STANDARDS AND ENFORCEMENT MECHANISMS?**

19 **A.** Four steps must be taken. First, all relevant performance measurements must be identified  
20 at a level of disaggregation such that a like-to-like comparison can be made between the  
21 performance the ILEC provides to itself and to the CLP. For example, a performance  
22 measurement of the Average Response Time to a Firm Order Commitment must be

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disaggregated by interface type, and service group type. Without this level of disaggregation,  
a comparison would be meaningless, i.e., an apples-to-oranges comparison. The second step  
is to collect monthly data on the performance of the ILEC, the ILEC's affiliates, if any, each  
CLP individually and in the aggregate for each of the submeasures. The third step is to  
apply a statistical test to the data to evaluate whether the performance given to the CLP is  
"at least equal" to that the ILEC gave to itself. The fourth step is to develop the parity  
benchmark that then triggers an enforcement mechanism (a payment) for not having  
provided parity service. This requires the establishment of critical values that define when  
an ILEC has fallen short of a benchmark.

10 **Q. WHY IS COMMISSION ACTION NECESSARY ON THIS ISSUE?**

11 **A.** The Commission's hope in 1997 that BellSouth would negotiate with CLPs on this issue was  
12 not unreasonable. However, more than two years have passed, and BellSouth has not  
demonstrated any willingness to negotiate this issue. The Commission must intervene, or  
13 CLPs will be left completely without recourse.

14 **Q. IS ICG ASKING THE COMMISSION TO ARBITRATE THIS ISSUE?**

15 **A.** No. ICG believes that the Commission should initiate a generic proceeding to consider  
16 appropriate performance measurements and enforcement mechanisms. As ICG has reviewed  
17 the developments at the Texas and California commissions and BellSouth's movement on  
18 this issue at the FCC, ICG has concluded this issue is not appropriate for a two-party  
19 arbitration proceeding. The issue of performance standards and enforcement mechanisms is  
20 one of industry-wide importance. The concern expressed in the *AT&T/BellSouth RAO* about  
21 different standards for different ILECs and CLPs was well-founded. A generic proceeding  
22

1 aimed at a single set of performance standards and enforcement mechanisms is the only  
2 practical approach. To give this important issue the careful, in-depth consideration it  
3 deserves will require expert testimony and a separate proceeding where the views of the  
4 entire industry can be voiced. ICG believes that the actions taken by the Texas and  
5 California Commissions provide a sound basis for action by the North Carolina Utilities  
6 Commission.

7 Q: DOES THIS CONCLUDE YOUR TESTIMONY?

8 A: Yes.