

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In the Matter of:)
)
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.)

Docket No. 990691-TP

Filed: September 7, 1999

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RECORDS AND
REPORTING

REBUTTAL TESTIMONY

OF

CINDY Z. SCHONHAUT

ON BEHALF OF

ICG TELECOM GROUP, INC.

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5 **ON BEHALF OF ICG TELECOM GROUP, INC.**

6 **DOCKET NUMBER 990691-TP**

7 **Q. ARE YOU THE CINDY SCHONHAUT THAT CAUSED DIRECT TESTIMONY**
8 **TO BE FILED IN THIS PROCEEDING?**

9 **A. Yes, I am.**

10 **Q. HAVE ICG AND BELLSOUTH REACHED A SETTLEMENT OF ANY OF THE**
11 **ISSUES IN THIS PROCEEDING SINCE THE PARTIES FILED THEIR DIRECT**
12 **TESTIMONY?**

13 **A. Yes, subsequent to the filing of direct testimony, ICG and BellSouth have**
14 **settled several issues. These include issues relating to the bona fides request**
15 **process (Issue Number 2), the reporting of the breakdown between intrastate**
16 **and interstate traffic (Issues 8 and 9) and various matters concerning collocation**
17 **(Issues 11-16). However, issues still remain regarding the application of**
18 **reciprocal compensation for ISP-bound calls (Issue Number 1), the availability of**
19 **unbundled network elements ("UNEs") associated with packet switching (Issue**
20 **Number 3), the availability of the enhanced extended link ("EEL") as a UNE**
21 **(Issue Number 4), volume and term discounts for UNEs (Issue Number 6),**
22 **payment of reciprocal compensation to ICG at the tandem rather than the end**

1 office rate (Issue Number 7), binding forecasts (Issue Number 10) and
2 performance standards and remedies (Issues 5 and 18-25).

3 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY TODAY?**

4 A. I would like to take this opportunity to respond to the testimony of Mr.
5 Varner, particularly his analysis of the various orders of the Federal
6 Communications Commission ("FCC") and court opinions that have some
7 bearing on the instant proceeding. I will also respond to Mr. Varner's testimony
8 about reciprocal compensation for calls to ISPs, and about the availability of the
9 EEL as a UNE.

10 **Q. WHAT IS THE PROBLEM, IN GENERAL TERMS, WITH MR. VARNER'S**
11 **TESTIMONY?**

12 A. Mr. Varner spends a good deal of time discussing various FCC orders and
13 corresponding court decisions. In virtually every case, Mr. Varner's point is that
14 this Commission should not become involved in this issue because the concerns
15 may one day be addressed elsewhere. Under Mr. Varner's approach, the
16 existence of any legal uncertainty is cause for competitive paralysis. Mr. Varner
17 preaches inaction and offers no prescription to break the current regulatory
18 gridlock.

19 The regulatory vacuum that would result from this Commission's inaction
20 would have significant effects on both ICG and competition within this state.
21 The carriers would be left to fight out their differences among themselves, with
22 BellSouth the all-but-certain winner in every instance. In addition, if this

1 Commission does not act on the issues in ICG's petition for arbitration, it will
2 either be a very long time indeed before ICG is able to win relief (as in the case
3 of UNEs or UNE combinations), or ICG will be forever foreclosed from relief for
4 the period before the FCC finally acts (as in the case of reciprocal compensation
5 for ISP calls). The delay that ICG and other ALECs face in having these issues
6 addressed will dictate the speed with which competition begins to flourish in this
7 state. ICG hopes to continue to provide more innovative services to more
8 customers at better prices, but this can occur only if the regulatory environment
9 is supportive and attentive to competitive concerns. To this end, ICG
10 respectfully requests that this Commission act in this proceeding to bring much
11 needed certainty to the competitive playing field in Florida.

12 **Q. DO YOU AGREE WITH MR. VARNER'S ARGUMENT THAT IT WOULD BE**
13 **"WASTED EFFORT" FOR THIS COMMISSION TO ADDRESS THE ISSUE OF**
14 **RECIPROCAL COMPENSATION FOR CALLS TO ISPS?**

15 A. No. While the FCC will eventually take up the issue of how calls to ISPs
16 are to be compensated, its rule will be prospective only. See Declaratory Ruling
17 and Notice of Proposed Rulemaking in CC Docket 96-98, released on
18 February 26, 1999 ("Declaratory Ruling"). If this Commission does not take
19 action to compensate for calls to ISPs, ICG will *never* be compensated for the
20 calls it delivers to ISPs during the interim until the FCC adopts a rule, because
21 the FCC rule will be prospective only in application. To compound the adverse
22 impact on ICG, the interim period until the FCC acts could stretch for several

1 months or even a year. It previously took the FCC almost two years (20
2 months) to respond to the June 1997 request for clarification that led to the
3 Declaratory Ruling. Letter from Richard Metzger, General Counsel for the
4 Association for Local Telecommunications Services to Regina Keeney, Chief,
5 Common Carrier Bureau, FCC (June 20, 1997). If reciprocal compensation for
6 calls to ISPs were foreclosed as a source of revenue for several months or more,
7 ICG would be forced to re-think its options concerning its operations in this
8 state. See Schonhaut direct at 16.

9 For its part, the FCC has given the state commissions the proverbial green
10 light to consider reciprocal compensation for ISP-bound traffic until the FCC
11 adopts a prospective rule. The Declaratory Ruling states that:

12 Although reciprocal compensation is mandated under section
13 251(b)(5) only for the transport and termination of local traffic,
14 neither the statute nor our rules prohibit a state commission from
15 concluding in an arbitration that reciprocal compensation is
16 appropriate in certain instances not addressed by section
17 251(b)(5), so long as there is no conflict with governing federal
18 law. A state commission's decision to impose reciprocal
19 compensation obligations in an arbitration proceeding - or a
20 subsequent state commission decision that those obligations
21 encompass ISP-bound traffic - does not conflict with any [FCC]
22 rule regarding ISP-bound traffic.

1 Declaratory Ruling, ¶26 (citations omitted). This language makes clear that this
2 Commission's consideration of reciprocal compensation will not result in
3 "wasted effort," as suggested by Mr. Varner.

4 Mr. Varner's argument that the Commission would waste its efforts in
5 addressing reciprocal compensation for calls to ISPs is particularly weak. He
6 states that the FCC's authority "to confer this ability on the states is being
7 challenged in court." Varner direct at 15. He then adds that "states could find
8 they do not have the authority to create even an interim compensation
9 arrangement" and that the "authority is valid only until the FCC completes its
10 rulemaking..." *Id.* In making this argument, however, Mr. Varner concedes that
11 the present state of the law is such that this Commission has the requisite
12 authority to order reciprocal compensation for calls to ISPs. Until the FCC acts,
13 only a court order can remove this authority, but no court has thus far given any
14 indication that it will change the existing situation before the FCC adopts a rule.
15 Mr. Varner's theory would have the existence of any legal challenge to an FCC
16 decision result in competitive paralysis. That is precisely the outcome that this
17 Commission should act to preclude.

18 **Q. WHAT ARE THE CONSEQUENCES TO ICG, OTHER ALECS, AND ISPS IF**
19 **THIS COMMISSION DECLINES TO ADDRESS THE ISSUE OF RECIPROCAL**
20 **COMPENSATION FOR CALLS TO ISPS?**

21 A. In my direct testimony, I set forth a number of the consequences that will
22 befall ICG and other ALECs if the Commission declines to address reciprocal

1 compensation or otherwise precludes such compensation. Schonhaut direct at
2 6-7. In brief, without reciprocal compensation for delivering traffic to ISPs, ICG
3 and other ALECs would be left to raise their rates or absorb their costs – either
4 of which would be destructive to their ability to attract and keep customers.
5 The remaining option would be to decline to provide service to ISPs. In addition,
6 if reciprocal compensation for calls to ISPs were precluded as a source of
7 revenue, the marketplace might dictate that future growth in the provision of
8 telecommunications service be directed toward end users other than ISPs with
9 more conventional calling needs. In other words, instead of encouraging the
10 development of products and specialized services to support the Internet and
11 data services, the marketplace would reward service providers that support
12 more traditional users whose telecommunications needs are already being
13 addressed.

14 ISPs would also be required to make strategic business decisions. If
15 ALECs like ICG are forced to raise their rates to ISPs because the ALECs are not
16 recovering their cost of terminating the traffic, it could result in increased costs
17 to end users. There is no way of knowing how ISPs would handle rate
18 increases, and whether ISP rate increases would artificially suppress demand for
19 services in such a way that the growth of the Internet in this state would not
20 reach the levels it otherwise would have.

21 **Q. WHAT IS WRONG WITH MR. VARNER'S VIEW THAT SINCE ISP-BOUND**
22 **TRAFFIC IS NOT LOCAL TRAFFIC IT IS NOT SUBJECT TO THE RECIPROCAL**

1 **COMPENSATION OBLIGATIONS?**

2 A. Mr. Varner misses the point of the recent FCC Declaratory Ruling. In that
3 *ruling, the FCC made a jurisdictional finding that calls to ISPs when exchanged*
4 *between two carriers within the same local calling area in a state are*
5 *"jurisdictionally mixed and appear to be largely interstate." FCC Ruling at ¶¶18-*
6 20. For compensation purposes, however, the FCC concluded that calls to ISPs
7 are to be compensated in accordance with the actions of the *state commission*
8 unless and until the FCC adopts a further order governing compensation. Any
9 FCC order will have prospective application only. Declaratory Ruling ¶¶21-27.
10 In the interim, the FCC permitted state commissions to *treat calls to ISPs as*
11 *local for purposes of reciprocal compensation. Id.*

12 **Q. IS THERE ANY BASIS FOR MR. VARNER'S CLAIM THAT RECIPROCAL**
13 **COMPENSATION FOR ISP CALLS IS NOT A PROPER SUBJECT OF A STATE**
14 **ARBITRATION PROCEEDING UNDER SECTION 252 OF THE ACT?**

15 A. No . This is simply a variation of Mr. Varner's argument that calls to ISPs
16 are not local. Mr. Varner reasons that because calls to ISPs are not local, the
17 reciprocal compensation provisions of Sections 251 and 252 are not implicated,
18 so calls to ISPs cannot be the subject of a Section 252 arbitration proceeding
19 under his theory. Varner direct at 15-16. The FCC has already provided the
20 answer to Mr. Varner's theory: calls to ISPs may be treated as local for
21 purposes of reciprocal compensation until the FCC adopts a new rule with
22 prospective application only. The FCC concluded in the Declaratory Ruling that:

1 [S]tate commission authority over interconnection agreements
2 pursuant to section 252 "extends to both interstate and intrastate
3 matters." Thus the mere fact that ISP-bound traffic is largely
4 interstate does not necessarily remove it from the section 251/252
5 negotiation and arbitration process.

6 Declaratory Ruling, ¶25 (citations omitted).

7 **Q. DO YOU AGREE WITH MR. VARNER'S STATEMENT THAT ISPS ARE**
8 **CARRIERS THAT PURCHASE ACCESS SERVICE?**

9 A. No. ISPs purchase business services out of local exchange tariffs. Mr.
10 Varner attempts to show that ISPs are carriers, because if they are considered
11 as such, according to Mr. Varner, the ISPs would be purchasing access service
12 and the ALEC serving them would not be eligible for reciprocal compensation.

13 The Declaratory Ruling provides the answer to Mr. Varner's argument:

14 In the Access Charge Reform Order, the Commission decided to
15 maintain the existing pricing structure pursuant to which ESPs are
16 treated as end users for the purpose of applying access charges.
17 Thus, *the [FCC] continues to discharge its interstate regulatory*
18 *obligations by treating ISP-bound traffic as though it were local.*

19 Declaratory Ruling, ¶ 5.

20 Elsewhere in the ruling, the FCC makes clear that, until it adopts a
21 prospective rule, the consequence of "treating ISP-bound traffic as if it were
22 local" under the access charge regime suggests that calls to ISPs be subject to

1 reciprocal compensation:

2 While to date the Commission has not adopted a specific rule
3 governing the matter, we note that our policy of treating ISP-bound
4 traffic as local for purposes of interstate access charges would, if
5 applied, in the separate context of reciprocal compensation,
6 suggest that such compensation is due for the traffic.

7 Declaratory Ruling, ¶25.

8 **Q. SHOULD THIS COMMISSION ADOPT BELLSOUTH'S INTERIM PROPOSAL**
9 **DESCRIBED AT PAGES 29-36 OF MR. VARNER'S TESTIMONY CONCERNING**
10 **COMPENSATION FOR CALLS TO ISPS?**

11 A. No. For the reasons set forth in Mr. Starkey's rebuttal testimony, the
12 interim inter-carrier mechanism suggested by BellSouth is inappropriate.
13 Furthermore, for the reasons set forth in ICG's Motion To Strike filed
14 concurrently with this rebuttal testimony, it is outside the scope of the issues
15 of this arbitration proceeding.

16 **Q. DO YOU AGREE WITH THE WAY MR. VARNER CHARACTERIZES WHAT**
17 **UNES AND UNE COMBINATIONS BELLSOUTH MUST CURRENTLY MAKE**
18 **AVAILABLE?**

19 A. No. Mr. Varner's lengthy recitation of the history of FCC's local
20 competition rules, combined with his analysis of the current state of the law,
21 appears to be designed to intimidate this Commission from taking up this issue
22 in this case. He argues, in effect, that in the face of any uncertainty

1 surrounding the status of the FCC's rules on UNEs, this Commission should do
2 nothing. Unfortunately, doing nothing on an important issue like the availability
3 of UNEs will significantly retard, if not halt, the growth of competition in the
4 telecommunications marketplace of this state. As a consequence, customers
5 would be deprived of the full benefits of competition.

6 This Commission should reject all suggestions that it do nothing while
7 competition struggles to grow in this state. In fact, the Commission should do
8 exactly the opposite of what BellSouth suggests. The Commission should step
9 into the vacuum created by the vacating of the FCC's rule on UNEs, and actively
10 oversee the provision of UNEs and UNE combinations until the time the FCC
11 implements a new rule. Although BellSouth states that it will make some UNEs
12 available to ICG, it does not specify which ones. Rather than letting BellSouth
13 set its own rules, this Commission must take affirmative steps in this arbitration
14 to ensure that the growth of competition is not stymied.

15 **Q. WHAT ARE THE UNES AND UNE COMBINATIONS AT ISSUE IN THIS**
16 **PROCEEDING?**

17 A. In this proceeding, the availability of UNEs and UNE combinations arise
18 with regard to two specific issues. First, ICG has requested that packet
19 switching capabilities be available as UNEs. Mr. Holdridge discusses in his
20 rebuttal testimony this particular issue and BellSouth's apparent agreement to
21 provide these capabilities on a UNE basis.

22 Second, ICG has requested that BellSouth provide the enhanced extended

1 loop ("EEL") as a UNE. Mr. Holdridge reviews ICG's need for the EEL in his
2 rebuttal testimony. BellSouth's position is that an EEL is a "combination of
3 loops and dedicated transport" that would "replicate private line and/or special
4 access services." Varner Direct at 14. Mr. Varner argues that BellSouth is not
5 required to perform this combination for ICG. Id.

6 **Q. SHOULD BELLSOUTH BE REQUIRED TO PROVIDE ICG THE EEL AS A**
7 **UNE?**

8 A. Yes. During negotiations, BellSouth offered to provide the EEL, which is
9 an existing combination of UNEs, to ICG on a contract basis outside of the
10 interconnection agreement context. This Commission has the option of requiring
11 BellSouth to make available existing UNE combinations for the interim until the
12 FCC adopts a new UNE rule. BellSouth need not "perform" the UNE
13 combination, as stated by Mr. Varner; it should merely provide the EEL, a UNE
14 combination that already exists in the network, anywhere ICG requests it at
15 TELRIC rates.

16 In any event, the EEL simply combines two UNEs (loop and line-side
17 transport) that are key elements in the competitive telecommunications scheme.
18 As evidence of their centrality to the ability to compete, the local loop and
19 transport (albeit trunk side) are two of the essential elements included in the
20 Act's 14 point checklist. 47 U.S.C. §271. This Commission should not hesitate
21 to mandate the EEL's combination of two of the elements most necessary to
22 continuing competition in Florida.

1 Q. DO YOU AGREE WITH MR. VARNER THAT BELL SOUTH IS NOT
2 REQUIRED TO PROVIDE ICG THE EEL AS A UNE BECAUSE IT COMBINES A
3 LOOP AND DEDICATED TRANSPORT THAT REPLICATES A RETAIL SERVICE?

4 A. No, I do not. In this regard, I note that the Commission at its August 31,
5 1999 meeting adopted a Staff recommendation on this issue in a proceeding
6 involving a dispute between BellSouth, on the one hand, and AT&T and MCI
7 WorldCom, on the other, in Docket No. 971140 . In that proceeding, the Staff
8 analyzed the U.S. Supreme Court's decision in AT&T Corp. V. Iowa Utilities Bd.,
9 119 U.S. 366 (1999), and stated "it is staff's belief that the Court's opinion
10 allows an entrant to purchase UNE combinations that recreate retail services at
11 prices based on forward-looking costs."

12 Q. AT PAGE 14 OF HIS TESTIMONY, MR. VARNER DESCRIBES THE EXTENT
13 TO WHICH BELL SOUTH WILL PROVIDE AN "ENHANCED EXTENDED LINK"
14 (EEL) TO ICG PURSUANT TO A "...COMMERCIAL AGREEMENT THAT IS NOT
15 SUBJECT TO THE REQUIREMENTS OF THE ACT." WHY IS THIS NOT
16 ACCEPTABLE?

17 A. This approach is unacceptable because it allows BellSouth to avoid its
18 obligations under Section 251 of the Act to provide access to unbundled
19 network elements at cost-based rates. The enhanced extended link is an
20 existing combination of unbundled network elements that exist within the
21 BellSouth network. As such, BellSouth is required to provide the EEL to ICG at
22 TELRIC based prices. BellSouth's attempt to provide the EEL outside of the

1 requirements of the Act is a transparent attempt to levy prices for these
2 elements that are in excess of its TELRIC based prices as adopted by the
3 Commission.

4 **Q. IS THERE ANOTHER REASON WHY BELL SOUTH SHOULD BE REQUIRED**
5 **TO OFFER ICG THE EEL ON A UNE BASIS?**

6 A. Yes, there is. BellSouth's refusal to provide ICG the EEL on a UNE basis
7 constitutes unlawful discrimination in violation of Section 251(c)(3) of the Act.
8 BellSouth has offered to provide an EEL as a UNE in an interconnection
9 agreement with at least one other ALEC, DeltaCom. The BellSouth/ DeltaCom
10 Interconnection Agreement contains the following EEL provision under Section
11 IV. (Access to Unbundled Network Elements):

12 B. 14 The Parties shall attempt in good faith to mutually devise
13 and implement a means to extend the unbundled loop sufficient to
14 enable DeltaCom to use a collocation arrangement at one BellSouth
15 location per LATA (e.g., tandem switch) to obtain access to the
16 unbundled loop(s) at another such BellSouth location over
17 BellSouth facilities.

18 Under Section 251(c)(3) of the Act, BellSouth has the duty to provide to any
19 requesting telecommunications carrier "nondiscriminatory access to network
20 elements on an unbundled basis." BellSouth has failed to fulfill this duty in its
21 negotiations with ICG. BellSouth also has violated §202(a) of the Act which
22 prohibits "...any unjust or unreasonable discrimination in charges ... facilities,

1 or services...." 47 U.S.C. §202(a).

2 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

3 **A. Yes, it does.**

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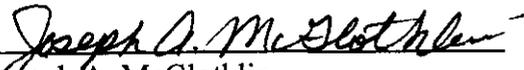
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the ICG Telecom Group, Inc.'s Rebuttal Testimony of Cindy Z. Schonhaut has been furnished by (*)hand-delivery and by U.S. mail this 7th day of September, 1999 to:

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