

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-99-1926-PHO-TP
ISSUED: September 28, 1999

Pursuant to Notice and in accordance with Rule 28-106.209,
Florida Administrative Code, a Prehearing Conference was held on
September 21, 1999, in Tallahassee, Florida, before Commissioner
Susan F. Clark, as Prehearing Officer.

APPEARANCES:

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Gadsden Street, Tallahassee, Florida 32301
On behalf of ICG Telecom Group, Inc.

Vicki Gordon Kaufman, Esquire, McWhirter Law Firm, 117
Gadsden Street, Tallahassee, Florida 32301
On behalf of ICG Telecom Group, Inc.

Michael P. Goggin, Esquire, 150 West Flagler Street,
Suite 1910, Miami, Florida 33130
On behalf of BellSouth Telecommunications, Inc.

Edwin E. Edenfield, Jr., Esquire, 675 West Peachtree
Street, #4300, Atlanta, Georgia 30375
On behalf of BellSouth Telecommunications, Inc.

C. Lee Fordham, Esquire, Florida Public Service
Commission, 2540 Shumard Oak Boulevard, Tallahassee,
Florida 32399-0850
On behalf of the Commission Staff.

PREHEARING ORDER

DOCUMENT NUMBER-DATE

11693 SEP 28 89

FPSC-RECORDS/REPORTING

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this Order is issued to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

On October 27, 1997, this Commission approved a one year agreement between ICG Telecom Group, Inc. (ICG), and BellSouth Telecommunications, Inc. (BellSouth), providing for interconnection services from BellSouth to ICG. 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 the assistance of the Commission in resolving the remaining unresolved issues. The Petition enumerated a total of twenty-five issues. Since it was filed, however, ten of those issues were resolved and withdrawn by the parties. In the Prehearing, BellSouth's Motion to Remove Issues From Arbitration was granted and nine additional issues were removed from consideration. The remaining six issues are set forth in this Order.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section

364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183(3), Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the

proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of Records and Reporting's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties and Staff has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Cindy Schonhaut	ICG	1
Michael Starkey	ICG	1,4,5
Bruce Holdridge	ICG	2,3,4
Philip Jenkins	ICG	6
D. Daonne Caldwell	BellSouth	2
Alphonso J. Varner	BellSouth	1,2,3,4,5,6
<u>Rebuttal</u>		
Cindy Schonhaut	ICG	1,2,3
Michael Starkey	ICG	1,5
Bruce Holdridge	ICG	2,3
Philip Jenkins	ICG	6
Alphonso J. Varner	BellSouth	1,2,3,4,5,6

VII. BASIC POSITIONS

ICG: While ICG and BellSouth have settled many issues that led to the filing of ICG's arbitration petition, those that remain are critical to ICG's ability to provide competitive and innovative local services. For instance, ICG's ability to nurture the growing ISP market would be hampered--or worse--by BellSouth's refusal to pay reciprocal compensation for ISP traffic. If the Extended Enhanced Link (EEL) is not available, or is available only at prohibitive prices, ICG will be forced to collocate at every central office from which it hopes to serve customers, which would be exorbitantly expensive and would unnecessarily use scarce CO space. The

absence of performance standards--and consequences for failing to meet those standards-- is so important to competition that ICG proposes a generic proceeding on that topic.

BELLSOUTH:

Each of the individually numbered issues in this docket represent a specific dispute between BellSouth and ICG Telecom Group, Inc. ("ICG") as to what should be included in the Interconnection Agreement between the parties. Some of these issues involve matters that are not properly within the scope of the Telecommunications Act of 1996 ("1996 Act") or the jurisdiction of this Commission and should, therefore, not be part of an Arbitrated Agreement. As to all other issues, BellSouth's positions are the more consistent with the 1996 Act, the pertinent rulings of the FCC and the rules of this Commission. Therefore, the Commission should sustain each of BellSouth's positions.

STAFF:

Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

ISSUE 1: Until the FCC and the FPSC adopt a rule with prospective application, should dial-up access to the Internet through Internet Service Providers (ISPs) be treated as if it were a local call for purposes of reciprocal compensation?

POSITIONS

ICG: Yes. The FCC has clearly determined that, until its rule takes effect on a prospective basis, state commissions may determine that reciprocal compensation should be paid for ISP traffic; moreover, it has stated its view that state commissions have an obligation to require ILECs to compensate

ALECs for ISP traffic. Physical and policy reasons compel the result that BellSouth provide reciprocal compensation for calls to ISPs at a rate that reflects the network functions ICG performs in delivering traffic to all customers, including ISPs.

BELLSOUTH:

No. The FCC's recent Declaratory Ruling in CC Docket Nos. 96-98 and 99-68, released on February 26, 1999, confirmed unequivocally that traffic bound for the Internet through ISP's ("ISP-bound traffic") is interstate in nature, not local. Under the provisions of the 1996 Act and FCC rules, only local traffic is subject to reciprocal compensation obligation. Thus, reciprocal compensation is clearly not applicable to ISP-bound traffic. In addition to being contrary to the law, treating ISP-bound traffic as local for reciprocal compensation purposes is contrary to sound public policy.

The issue in this proceeding is vastly different from prior ISP decisions rendered by the Commission, which were based on findings that the parties intended to pay reciprocal compensation for ISP-bound traffic. In this proceeding, there is absolutely no doubt that BellSouth does not intend to pay reciprocal compensation for ISP-bound traffic.

The FCC made clear that any inter-carrier compensation mechanism for ISP-bound traffic is outside of the scope of 251(b)(5), as such traffic is interstate, not local. See FCC Declaratory Ruling, at FN 87. Thus, this issue is not proper for 252 arbitration. Notwithstanding, BellSouth proposed an interim mechanism for ISP-bound traffic pending the FCC's issuance of a final order in its inter-carrier compensation docket.

STAFF:

Staff takes no position at this time.

ISSUE 2: Should the following packet-switching capabilities be made available as UNEs:

a) user-to-network interface (UNI) at 56 kbps, 64 kbps, 128 kbps, 256 kbps, 384 kbps, 1.544 Mbps and 44.736 Mbps.

b) network-to-network interface (NNI) at 56 kbps, 64 kbps, 1.544 Mbps and 44.736 Mbps

c) data link control identifiers ("DLCIs") at committed information rates ("CIRs") of 0 kbps, 8 kbps, 9.6 kbps, 16 kbps, 19.2 kbps, 28 kbps, 32 kbps, 56 kbps, 64 kbps, 128 kbps, 192 kbps, 256 kbps, 320 kbps, 384 kbps, 448 kbps, 512 kbps, 576 kbps, 640 kbps, 704 kbps, 768 kbps, 832 kbps, 896 kbps, 960 kbps, 1.024 Mbps, 1.088 Mbps, 1.152 Mbps, 1.216 Mbps, 1.280 Mbps, 1.344 Mbps, 1.408 Mbps, 1.472 Mbps, 1.536 Mbps, 1.544 Mbps, 3.088 Mbps, 4.632 Mbps, 6.176 Mbps, 7.720 Mbps, 9.264 Mbps, 10.808 Mbps, 12.350 Mbps, 13.896 Mbps, 15.440 Mbps, 16.984 Mbps, 18.528 Mbps and 20.072 Mbps.

POSITIONS

ICG: Yes. It now appears that BellSouth will provide packet-switching capabilities as UNEs. However, BellSouth wants to provide them at "modified" TELRIC rates. BellSouth should be required to provide these capabilities at TELRIC rates, including the capability to connect at TELRIC rates a BellSouth central office where ICG is collocated (but which does not have a BellSouth frame relay packet switch) with a BellSouth central office that does have a BellSouth frame relay packet switch.

BELLSOUTH:

With certain exception, BellSouth agrees to comply with ICG's request until the FCC issues a final non-appealable order on Rule 51.319. Moreover, until a recent (August 25, 1999) pre-hearing conference before the Tennessee Regulatory Authority, BellSouth believed that this issue was settled regionally, subject only to ICG's review of BellSouth's rates in each

state. BellSouth's understanding was based upon agreements reached in a mediation conference in Montgomery, Alabama, held on August 10, 1999. While BellSouth acknowledges that ICG raised collocation questions relating to this issue during that mediation, the parties settled the issue in its entirety in Alabama.

BellSouth opposes ICG's attempt to broaden Issue 3 to include a collocation issue related to packet-switching. Section 252(b)(2) of the 1996 Act requires the petitioner (in this case ICG) to state the unresolved issues in the Arbitration Petition. In addition, 252(b)(4) limits the Commission's consideration of 252 arbitration issues to those "set forth in the petition and in the response..." The packet-switching issue raised by ICG in the Arbitration Petition is limited strictly to whether BellSouth is required to provide packet-switching capabilities as a UNE. To allow ICG to change and expand this issue would be a violation of the requirements of the 1996 Act and would prejudice BellSouth's right to a fair arbitration.

STAFF: Staff takes no position at this time.

ISSUE 3: Under the Telecommunications Act of 1996, should "Enhanced Extended Link" Loops (EELs) be made available to ICG in the interconnection agreement as UNEs?

POSITIONS

ICG: Yes. BellSouth has refused to provide the EEL to ICG on a UNE basis. ICG needs the ability to obtain the unbundled elements that comprise the services its customers seek at TELRIC-based rates. BellSouth's provision of the EEL at retail prices would undercut ICG's ability to offer services to its customers. Further, provision of the EEL on a UNE basis will obviate the need for ICG to incur the exorbitant expense of collocating at each central office from which it hopes to serve customers. Availability of the EEL will also free up valuable collocation space.

BELLSOUTH:

No. First, because the Supreme Court vacated the FCC's Rule 47 C.F.R. Section 51.319, neither loops, ports, nor transport have been defined by the FCC as UNEs that BellSouth must provide. Second, even if loops, ports and transport are defined as UNEs, BellSouth is only obligated to provide combinations of those elements where they are currently combined in BellSouth's network. Notwithstanding, BellSouth is willing to provide the EEL combination through commercial agreement.

Because BellSouth is not required to combine network elements for ALECs under the 1996 Act, the issue of applicable rates for such network combinations is not properly the subject of arbitration. To the extent the Commission concludes otherwise, or determines to establish rates for network elements that are currently combined in BellSouth's network, the Commission should do so in the context of the UNE generic proceeding (Dkt. 990649-TP) rather than an arbitration involving one ALEC. Thus, this issue is not appropriate for arbitration.

STAFF: Staff takes no position at this time.

ISSUE 4: Should volume and term discounts be available to ICG for UNEs?

POSITIONS

ICG: Yes. ICG should receive the benefit of any reduced costs that BellSouth experiences from provisioning service either in high volumes within a specified period or for extended terms.

BELLSOUTH:

No. BellSouth should not be required to provide volume and term discounts for UNEs. Neither the 1996 Act nor any FCC order or rule require volume and term discount pricing. The UNE recurring rates that ICG pays are cost-based in accordance with the requirements of Section 252(d) and are derived using least-cost, forward looking technology consistent with the FCC's rules. Also, BellSouth's nonrecurring rates already

reflect any economies involved when multiple UNEs are ordered and provisioned at the same time. To the extent the Commission decides to consider volume and term discounts for UNEs, the Commission should do so in the context of the UNE generic proceeding (Dkt. 990649-TP) rather than an arbitration involving one ALEC.

STAFF:

Staff takes no position at this time.

ISSUE 5: For purposes of reciprocal compensation, should ICG 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?

POSITIONS

ICG: Yes. In Florida, ICG is in a start-up mode. In states in which ICG has an established business, it employs a network configuration in which its switch serves a geographical area comparable to that served by a tandem switch and it provides comparable functionality. As ICG grows its business in Florida, it intends to develop the type of network that typifies its approach to network design in other jurisdictions.

BELLSOUTH:

No. The appropriate rates for reciprocal compensation are the elemental rates for end office switching, tandem switching and common transport that are used to transport and terminate local traffic. If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth's position is consistent with the Commission's December 16, 1996 Order in the MFS/Sprint Arbitration (Order No. PSC-96-1532-FOF-TP), which was reaffirmed in the MCI/Sprint Arbitration in an Order dated April 14, 1997 (Order No. PSC-97-0294-FOF-TP).

STAFF: Staff takes no position at this time.

- ISSUE 6:** (A) Should BellSouth be required to enter into a binding forecast of future traffic requirements for a specified period?
- (B) If so, are they then required to provision the requisite network buildout and necessary support?

POSITIONS

ICG: (A) Yes. ICG believes its traffic requirements will continue to grow. In order to support competition, by ensuring that the requisite capacity will be in place, BellSouth should be required to enter a binding forecast with ICG. BellSouth has nothing to lose in agreeing to a binding forecast because ICG will pay BellSouth for the increased capacity whether or not it actually uses it.

(B) ICG must have the requisite capacity on BellSouth's network as its traffic requirements grow in order to serve its customers. By entering a binding forecast, ICG commits to pay for the facilities; accordingly, BellSouth should be required to provision them.

BELLSOUTH:

(A) No. BellSouth is not required by the 1996 Act or any FCC order or rule to commit to a binding forecast with ICG or any ALEC.

(B) If BellSouth were to be required to enter into a binding forecast with ICG for ICG's traffic requirements, BellSouth would honor its contractual obligation. If BellSouth were required to enter into such binding forecast, however, BellSouth should remain free to determine the necessity for any network buildout or support or the manner in which such resources should be deployed. In addition, BellSouth should be permitted to reserve the right to challenge any ICG forecast ICG contends should be binding if BellSouth believes it would not be technically feasible for BellSouth to provision or support the forecasted requirements.

STAFF:

Staff takes no position at this time.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Michael Starkey	ICG	_____	Resume
		(MS-1)	
		_____	Diagram 1
		(MS-2)	
		_____	Diagram 2
		(MS-3)	
		_____	Diagram 3
		(MS-4)	
Alphonso J. Varner	BellSouth	_____	ISP Traffic
		(AJV-1)	Diagrams (A and B)
		_____	ISP Traffic
		(AJV-2)	Diagrams (C and D)
		_____	BellSouth's
		(AJV-3)	Inter-Carrier Compensation Proposal at the FCC
_____	ISP Traffic		
(AJV-4)	Diagrams (E and F)		
_____	ISP Traffic		
(AJV-5)	Diagrams (G and H)		
_____	Proposed		
(AJV-6)	Interim Inter-Carrier Access Service Compensation Plan		

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Alphonso J. Varner	BellSouth	_____ (AJV-7)	Calculation of S h a r i n g Percentage
		_____ (AJV-8)	Florida UNE Rate and Cost Analysis
Alphonso J. Varner (Rebuttal)		_____ (AJV-1)	Newspaper a r t i c l e s r e g a r d i n g I n t e r n e t access prices
D. Daonne Caldwell	BellSouth	_____ (DDC-1)	Cost Study

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. PENDING MOTIONS

ICG's Motion To Strike portions of BellSouth witness Varner's direct testimony is deferred to the Hearing. During preliminary matters, each party will have 5 minutes for oral argument on that motion.

X. RULINGS

BellSouth's Motion to Remove Issues From Arbitration is granted. Issues 5, and 18 through 25, from ICG's Prehearing Statement, are removed from arbitration in this proceeding. All these issues deal with liquidated damages, and are not arbitratable in these proceedings.

It is therefore,

ORDERED by Commissioner Susan F. Clark, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

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By ORDER of Commissioner Susan F. Clark, as Prehearing Officer, this 28th day of September, 1999.



SUSAN F. CLARK
Commissioner and Prehearing Officer

(S E A L)

CLF

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.