

Alabama Public Service Commission

Orders

In the Matter of:

) DOCKET 27069

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)

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FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

HEARD : Wednesday August 11, 1999, Commission Hearing Room 904, RSA Union Building, 100 North Union Street, Montgomery, Alabama

BEFORE: The Honorable John A. Garner- Arbitration Facilitator, Mr. David House - Arbitrator, and Jimmy B. Pool, Esq.- Arbitrator

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I. INTRODUCTION/BACKGROUND

This arbitration proceeding is pending before the Alabama Public Service Commission (the "Commission") pursuant to Section 252(b) of the Telecommunications Act of 1996 (the "Act"). This proceeding was initiated by ICG Telecom Group, Inc.'s ("ICG") filing of a *Verified Petition For Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.* ("BellSouth") Pursuant to Section 252(b) of the Telecommunications Act of 1996 (the "Petition") on May 27, 1999. In said Petition, ICG requested that the Commission arbitrate certain terms and conditions with respect to an interconnection agreement between itself as the petitioning party, and BellSouth. On June 21, 1999, BellSouth filed its *Verified Response to ICG's Petition For Arbitration* (the "Response").

In accordance with the Commission's Telephone Rule T-26(C), the Commissioners appointed The Honorable John A. Garner, Administrative Law Judge, as Arbitration Facilitator, and Mr. David House, Public Utilities Auditor III, and Jimmy B. Pool, Esq. as Arbitrators in this Matter (collectively the "Arbitration Panel" or "Panel").

On July 1, 1999, ICG and BellSouth submitted a Joint Motion to Establish a Procedural Schedule. Through a Procedural Ruling issued on July 16, 1999, the Arbitration Panel set forth a discovery schedule, established a Status Conference to be held on July 23, 1999, and ordered the Arbitration hearing to begin on August 9, 1999. On July 8, 1999, a discovery conference was held during which oral presentations concerning outstanding discovery disputes were heard. An Oral Ruling resolving the outstanding discovery disputes was entered on July 9, 1999. The findings rendered

in the July 9, 1999 Oral Ruling were ratified by a written ruling issued on July 16, 1999.

On July 23, 1999 the Status Conference was held as scheduled. In an effort to reduce the number of controverted issues, the parties engaged in informal mediation

immediately following the Status Conference. The mediation was conducted by Ms. Judy McLean, Director of the Commission's Advisory Division.

By agreement of the Arbitration Panel and the parties, the Arbitration hearing was continued until August 11, 1999, to permit the continuation of an informal Mediation session conducted by Ms. McLean. As a result of the mediation efforts of Ms. McLean, and the parties, the list of Issues requiring arbitration was reduced from twenty-six (26) to five (5). At the outset of the Arbitration hearing, ICG and BellSouth submitted to the Arbitration Panel a *Statement of Partial Settlement* in which the parties informed the Panel that they had resolved all but the following Issues:

1. Until the FCC adopts a rule with prospective application, should dial-up calls to Internet service providers (ISPs) be treated as if they were local calls for purposes of reciprocal compensation?
2. 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?
3. Should BellSouth be required to commit to provisioning the requisite network buildout and necessary support when ICG agrees to enter into a binding forecast of its traffic requirements in a specified period?
4. Should BellSouth be required to provide the "Enhanced Extended Link" as a UNE combination (EEL)?
5. Should volume and term discounts be available for UNEs?

At the August 11, 1999 hearing, ICG offered the testimony of Michael Starkey, President of the telecommunications consulting firm of Quantitative Solutions, Inc.; Philip Jenkins, ICG's Senior Director - Engineering and Operations for the Southeast Region; Bruce Holdridge, Vice President of Government Affairs for ICG Communications, Inc.; and Cindy Schonhaut, Executive Vice President for Government and Corporate Affairs for ICG Communications, Inc. BellSouth offered the testimony of Alphonso Varner, the company's Senior Director for State Regulatory.

At the conclusion of the August 11, 1999 hearing, the parties indicated a preference to submit post-Arbitration hearing briefs. In order to accommodate the filing of those briefs, the parties orally agreed on the record at the August 11, 1999 proceeding to jointly extend the statutory deadline for the Commission's decision in this matter as set forth at 47 U.S.C. §252(b)(4)(C). Both parties submitted simultaneous post-Arbitration hearing briefs.

The Arbitration Panel issued its Arbitration Panel Recommendation and Proposed Order Regarding Interconnection Agreement (the Arbitration Panel's Recommendation) on October 13, 1999. The Arbitration Panel's Recommendation set forth recommendations for the resolution of the issues set forth in the Petition and Response which remained open.

Pursuant to the Commission's Telephone Rule T-26, the Arbitration Panel's Recommendation was served on the parties to the Arbitration as well as all parties on the Commission's Telecommunications service list. Although Telephone Rule T-26(I)(2) allows interested parties who were not parties to the Arbitration to file comments concerning the Arbitration Panel's Recommendation within 10 days, and allows the parties to the Arbitration to submit replies to those comments and any exceptions to the Arbitration Panel's Recommendations in a subsequent 10 day period, the Arbitration Panel accompanied the service of its Recommendation with a Procedural Ruling requiring initial comments to be submitted no later than October 22, 1999. The Procedural Ruling required that reply comments/exceptions by the parties be filed no later than October 28, 1999. As set forth in the Procedural Ruling, the modification of the comment cycles was necessary to accommodate the rendering of a decision by the Commission in this matter at the November 1, 1999 meeting of the Commission.

The Commission received comments from the following interested non-parties: GTE South, Incorporated (GTE); e.spire Communications, Inc. (e.spire); AT&T Communications of the South Central States, Inc. (AT&T); Sprint Communications Company, L.P. (Sprint); a joint filing by Hyperion Communications, Inc./KMC Telecom, Inc.; and a joint filing from MCI WorldCom, Inc./ITC DeltaCom Telecommunications, Inc. In addition, BellSouth and ICG each submitted reply comments/exceptions. The Commission also received a recommendation concerning the findings, conclusions and recommendations of the Arbitration Panel from the Commission's Advisory Division.

After careful consideration of the entire record in this matter including the post-Arbitration hearing briefs filed by the parties, the Arbitration Panel's Recommendation, the comments of the parties and interested non-parties, and the recommendation of the Advisory Division, we render the findings and conclusions set forth below. Due to the fact that we largely concur with the findings, conclusions and recommendations of the Arbitration Panel, we have for the most part adopted the Arbitration Panel's Recommendation as our final Order in this cause. Our specific findings and conclusions as to each issue are, however, specifically set forth.

II. FINDINGS AND CONCLUSIONS

ISSUE NO. 1: UNTIL THE FCC ADOPTS A RULE WITH PROSPECTIVE APPLICATION, SHOULD DIAL-UP CALLS TO INTERNET SERVICE PROVIDERS ("ISPs") BE TREATED AS IF THEY WERE LOCAL CALLS FOR PURPOSES OF RECIPROCAL COMPENSATION (PETITION ISSUES 1 AND 8).

The ICG Position

ICG argues that while the FCC found in its *Declaratory Ruling and Notice of Proposed Rulemaking in CC Docket 96-98*, released on February 26, 1999 (the FCC's "ISP Declaratory Ruling"), that ISP traffic is mostly interstate in nature, the FCC stated that, until a federal rule is adopted concerning inter-carrier compensation for ISP-bound calls, state commissions have the authority in an arbitration to conclude that reciprocal compensation is an appropriate compensation mechanism. Notwithstanding the jurisdictional nature of ISP-bound calls, ICG argues that the Commission has the authority to set a rate for this traffic by virtue of its 47 U.S.C. §252 authority over interconnection agreements which extends to both intrastate and interstate matters.

ICG points out that the FCC has treated ISP-bound traffic as local for purposes of interstate access charges and in fact stated in the *ISP Declaratory Ruling* that this treatment would suggest that reciprocal compensation is due for such traffic. According to ICG, the FCC has made it clear that the question regarding ISP traffic is not whether compensation will be provided, but what rate of compensation is appropriate.

ICG maintains further that public policy supports payment of reciprocal compensation for ISP-bound traffic. ICG notes that ISPs are an important market segment for competing local exchange carriers ("CLECs") and a segment of the local exchange market that is well on its way toward effective competition. ICG represents that an elimination of its ability to recover its costs for transport and delivery of BellSouth-originated calls to ICG-served ISPs will negatively affect the development of local competition. Starkey, Tr. pp. 53-54.

ICG argues that requiring carriers to pay reciprocal compensation for the transport and delivery of ISP-bound calls is economically efficient. According to ICG, BellSouth should be economically indifferent as to whether BellSouth incurs the transport and delivery costs directly or through a reciprocal compensation arrangement with ICG because BellSouth's rates for transport and delivery are based upon BellSouth's underlying costs. Starkey, Tr. pp. 59-60.

ICG alleges that BellSouth's recommendation for addressing ISP traffic pending adoption of a federal rule is unreasonable. Specifically, ICG asserts that BellSouth's proposal that carriers track ISP traffic and retroactively apply whatever rate is ultimately adopted by the FCC would deprive ICG of compensation for services it provides now, thereby ignoring the time value of money. Schonhaut, Tr. p. 315.

ICG further asserts that there is no guarantee as to when the FCC will adopt a federal rule governing inter-carrier compensation for ISP-bound traffic. ICG contends that the FCC has indeed indicated that it may leave this issue to the states to decide. ICG further stresses that there is the possibility, if not the likelihood, that the FCC rule will be prospective in a way that permanently deprives ICG of compensation for traffic carried in the interim between this Commission's ruling and the FCC's ruling. Schonhaut, Tr. p. 311.

The BellSouth Position

According to BellSouth, the FCC's February 26, 1999 *ISP Declaratory Ruling* affirmed that the FCC has, and will, retain jurisdiction over ISP-bound traffic. BellSouth maintains that the FCC has now conclusively established that ISP-bound traffic is non-local interstate traffic due to the fact that most calls to ISPs terminate at distant exchanges in other states as opposed to local exchanges. Since the 47 U.S.C. §251(b)(5) obligation to pay reciprocal compensation has been interpreted by the FCC to apply only to traffic that originates and terminates within the local exchange, BellSouth concludes that interstate ISP traffic is not subject to reciprocal compensation. Given that conclusion, BellSouth urges that there is no basis for requiring a compensation mechanism for ISP-bound traffic in an arbitration conducted pursuant to 47 U.S.C. §252 since that section of the Act only gives state commissions jurisdiction over areas within the scope of 47 U.S.C. §251. Varner, Tr. p. 397.

BellSouth further argues that while the FCC's *ISP Declaratory Ruling* appears to give states authority to create an interim compensation mechanism pending adoption of a federal rule governing that subject, the interim authority granted states by the FCC is being challenged in court. If this challenge is successful, BellSouth contends that the Commission could find that it does not have even interim authority to implement a compensation mechanism for ISP traffic. BellSouth accordingly urges that it would be a wasted effort for the Commission to undertake the establishment of an interim compensation mechanism for ISP traffic under such circumstances. Even if the Commission's interim authority to impose an interim ISP compensation mechanism withstands challenge, BellSouth points out that it will only be valid until the FCC adopts a federal rule.

BellSouth further argues that the Commission should not require reciprocal compensation for ISP-bound traffic under any circumstances because ISP-bound traffic is interstate "access" traffic which is not subject to reciprocal compensation. BellSouth accordingly contends that a portion of the rates that ISPs pay ICG for their monthly business service should be shared with BellSouth as "access" revenues. Varner Tr. p. 421-422.

If, in spite of the aforementioned arguments, the Commission determines that it has jurisdiction to implement an interim inter-carrier compensation mechanism and that such a mechanism is warranted for ISP-bound traffic, BellSouth urges the implementation of the mechanism proposed by BellSouth witness Varner. Tr. pp. 395-396. The mechanism proposed by Mr. Varner would require the parties to track ISP-bound calls originating on their respective networks on a going-forward basis and to abide by any final and non-appealable FCC ruling on the issue of inter-carrier compensation for ISP calls. Any inter-carrier compensation mechanism established by the FCC would apply retroactively from the date of the interconnection agreement entered between ICG and BellSouth. The parties would be required to "true up" any compensation due for ISP-bound calls based on the FCC's final, non-appealable ruling.

The Arbitration Panel's Discussion of Issue No. 1

The fact that both ICG and BellSouth devoted the major portion of their respective post-Arbitration hearing briefs to a discussion of the treatment of ISP-bound traffic is demonstrative of the critical importance of this issue to each party. The issue is also of critical importance to the Commission given its potential impact on the development of competition in this state. The decision reached on ISP-bound traffic in this proceeding will have a broad impact on the issue in Alabama generally because this case will establish precedence concerning future treatment of ISP-bound traffic.

Our analysis concerning this issue logically begins with an assessment of our jurisdictional authority concerning compensation for ISP-bound traffic in light of the FCC's February 26, 1999 *ISP Declaratory Ruling*. BellSouth is correct in pointing out that the FCC, in that ruling, concluded that ISP-Bound traffic is jurisdictionally mixed and appears to be largely interstate. BellSouth is also correct in noting that the FCC concluded that since ISP traffic is jurisdictionally non-local interstate traffic, the reciprocal compensation obligations of 47 U.S.C. §251(b)(5) do not cover inter-carrier compensation for ISP-bound traffic. From that, however, BellSouth improperly concludes that state commissions do not have authority to address reciprocal compensation for ISP-bound calls in 47 U.S.C. §252 arbitration proceedings since that section of the Act only gives state Commissions jurisdiction over areas within the scope of 47 U.S.C. §251. What BellSouth casually and improperly discounts is the fact that the FCC specifically recognized the authority of state Commissions under 47 U.S.C. §252 to determine inter-carrier compensation for ISP-bound traffic and to impose reciprocal compensation obligations in arbitration proceedings in the absence of a federal rule to the contrary.

By way of background, the FCC specifically recognized in its *ISP Declaratory Ruling* that while ISP-bound traffic is jurisdictionally interstate, the FCC will continue, as it has in the past, to discharge its interstate regulatory obligations regarding ISP-bound traffic by treating that traffic as though it is local. The FCC also specifically recognized that in light of its continued policy of exempting ISP-bound traffic from the imposition of access charges, it has created something of an inter-carrier compensation void for ISP-bound traffic by finding in the *ISP Declaratory Ruling* that such traffic is largely interstate and, therefore, not subject to the reciprocal compensation obligations of 47 U.S.C. §251(b)(5). Given that void, the FCC recognized that the establishment of a rule governing inter-carrier compensation for ISP-bound traffic would serve the public interest. The FCC concluded, however, that the record it had before it in the *ISP Declaratory Ruling* proceeding was insufficient for the adoption of such a rule. The FCC accordingly issued a Notice of Proposed Rulemaking concerning the promulgation of such an inter-carrier compensation rule for ISP-bound traffic.

For purposes of this arbitration, it is important to note that the FCC specifically held that prior to the establishment of a federal rule governing inter-carrier compensation for ISP-bound traffic, state Commission's could determine in arbitration proceedings that reciprocal compensation should be paid for ISP-bound traffic. In arriving at that conclusion in its *ISP Declaratory Ruling*, the FCC reasoned that:

"Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to §252 "extends to both interstate and intrastate matters." Thus, the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the Section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." *Id. at & 25.*

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"As we stated previously, the Commission currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic. In the absence of a federal rule, state Commission's that have had to fulfill their statutory obligation under §252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state Commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding--or a subsequent state Commission decision that those obligations encompass ISP-bound traffic--does not conflict with any Commission rule regarding ISP-bound traffic." *Id. at & 26.*

We note that this Commission has previously had occasion to consider the FCC's *ISP Declaratory Ruling* and its impact on the Commission's jurisdiction concerning ISP-bound traffic. In an Order entered on March 4, 1999 in Docket 26619, the Commission held that it had jurisdiction to determine the reciprocal compensation obligations of the parties to the agreements under review in that proceeding concerning ISP-bound traffic. The Commission further found that the exercise of that jurisdiction was totally consistent with the FCC's *ISP Declaratory Ruling*. Similarly, in an Order on Reconsideration entered in that same proceeding on June 21, 1999, the Commission specifically noted the FCC's recognition at & 24 and & 26 of its *ISP Declaratory Ruling*

that state Commission's have wide latitude to decide the issue of payment for ISP-bound traffic pursuant to existing interconnection agreements or through arbitrations.

We also note that some 16 other state commissions have addressed the issue of whether reciprocal compensation

should apply to ISP-bound traffic since the FCC issued its *ISP Declaratory Ruling*. Of those 16 state commission's that have rendered decisions on the merits of the applicability of reciprocal compensation to ISP-bound traffic, 15 have upheld the application of reciprocal compensation to such traffic. Three additional states have decided to withhold the issuance of a final ruling concerning inter-carrier compensation for ISP-bound traffic until the FCC further addresses the issue. To date, only one state has expressly declined to require reciprocal compensation for ISP-bound traffic.

In addition to the aforementioned state commission's, all four of the federal courts that have issued decisions addressing appeals of state commission decisions requiring reciprocal compensation for ISP-bound traffic after the release of the FCC's *ISP Declaratory Ruling* have upheld the determinations of the applicable state commissions. The four courts include the United States Court of Appeals for the Seventh Circuit and three district courts, including the Federal District Court for the Middle District of Alabama.

The opinion of the Seventh Circuit upholding a decision of the Illinois Commerce Commission which required the payment of reciprocal compensation for ISP-bound traffic pursuant to existing interconnection agreements is particularly enlightening. Specifically, the Seventh Circuit Court stated that "[The] FCC could not have made clearer its willingness--at least until the time a [FCC] rule is promulgated--to let state Commissions make the call. We see no violation of the Act in giving such deference to state Commissions; in fact the Act specifically provides state Commissions with an important role to play in the field of interconnection agreements".

Although the Seventh Circuit's opinion in *Illinois Bell* involved the review of an Illinois Commerce Commission decision interpreting existing interconnection agreements, we see little or no distinction in the applicability of the Seventh Circuit's reasoning to post-*ISP Declaratory Ruling* arbitration proceedings conducted pursuant to 47 U.S.C. §252. It is apparent that the FCC envisioned state action concerning the applicability of inter-carrier compensation for ISP-bound traffic in such arbitrations pending the promulgation of a federal rule and even thereafter. In fact, the FCC specifically noted at & 30 of the *ISP Declaratory Ruling* the following:

"We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state Commissions, which are appealable to federal district courts." *Id.*

Having determined that the Commission has the appropriate jurisdiction to address the issue of inter-carrier compensation of ISP-bound traffic and to in fact require that such compensation be paid in the form of reciprocal compensation, our analysis now turns to an assessment of whether it is prudent to exercise that jurisdiction at this juncture. BellSouth urges that since the FCC'S *ISP Declaratory Ruling* is currently subject to a court challenge, states could find that they do not have the authority to create even an interim compensation arrangement. BellSouth further asserts that even if the states do have the authority, such authority is valid only until the FCC completes its rulemaking on the subject. Therefore, any effort devoted by this Commission to establishing interim compensation arrangements for ISP-bound traffic would likely be wasted effort. Varner, Tr. p. 394. For the reasons set forth in more detail below, we reject BellSouth's arguments in favor of inaction.

It is apparent from our analysis thus far that the FCC envisioned and, in fact encouraged, continued state action concerning the determination of inter-carrier compensation for ISP-bound traffic. The mere fact that the FCC's *ISP Declaratory Ruling* is currently subject to a legal challenge does not in and of itself render the determinations of the FCC in that ruling void. To be sure, the determinations made by the FCC in the *ISP Declaratory Ruling* represent controlling federal law on the issue until such time as a court of competent jurisdiction determines otherwise. The Commission, therefore, has a duty and responsibility to exercise the authority it currently has, at least until such time as a federal rule is implemented.

One of the major factors which dictates immediate action on the issue of inter-carrier compensation for ISP-bound traffic is the fact that the FCC has indicated that any federal rule governing that issue which is ultimately promulgated in the future, will have prospective application only. It accordingly appears that if the Commission does not take action to require compensation for calls to ISPs, ICG will never be compensated for the calls it delivers to ISPs during the interim period between the approval of an interconnection agreement between ICG and BellSouth and the time the FCC

adopts a federal rule governing that subject. Schonhaut, Tr. p. 311. This problem will only be exacerbated if the FCC does not act quickly to implement a federal inter-carrier compensation rule governing ISP-bound traffic. As noted by ICG witness Schonhaut, it took the FCC almost 2 years (20 months) to respond to the June, 1997 request for clarification that led to the issuance of its *ISP Declaratory Ruling* in February of 1999. *Id.*

In light of the concerns set forth immediately above, we do not find merit in BellSouth's fall-back proposition that the parties simply track ISP-bound traffic until such time as the FCC promulgates its federal rule and apply any compensation mechanism adopted by the FCC retroactively. As discussed in more detail below, it is undeniable that ICG will incur costs in terminating traffic to its ISP customers which originates from BellSouth customers. It would be entirely inconsistent with the competitive principles underlying the Act not to provide ICG with some mechanism to recover those costs as they are incurred. The immediate need for such a mechanism is only heightened given the delay which may well transpire before a federal rule is finally promulgated by the FCC for prospective application. The Commission's failure to implement such a mechanism in the interconnection agreement between ICG and BellSouth at this juncture would likely preclude ICG from competing for ISP customers and ultimately from competing for other types of customers as well. Starkey, Tr. pp. 53-54.

Having arrived at the conclusion that the Commission has the jurisdiction to establish inter-carrier compensation for ISP-bound traffic (including reciprocal compensation) and that said jurisdiction should be exercised in this arbitration proceeding, the question now becomes what type of inter-carrier compensation is most appropriate for ISP-bound traffic. Our analysis of that inquiry turns on further consideration of the FCC's *ISP Declaratory Ruling* and the concept of cost recovery. More particularly, our analysis centers on a determination of the costs ICG incurs in terminating traffic that is originated on BellSouth's network and terminates to ISP end user customers of ICG, as well as the recovery of those costs.

ICG asserts that the costs it incurs in delivering a call bound for an ISP customer do not differ from those generated by calls bound for other types of ICG customers. In fact, ICG argues that ISP-bound calls are functionally identical to local voice calls which are subject to reciprocal compensation. According to ICG witness, Starkey, a "ten minute call originated on the BellSouth network and directed to the ICG network travels exactly the same path, requires the use of exactly the same facilities and generates exactly the same level of costs regardless of whether that call is dialed to an ICG local residential customer or to an ISP provider. Tr. p. 56. ICG asserts that it is, therefore, irrelevant that once the call reaches the ISP it continues on to its ultimate destination of an Internet web site.

While ICG incurs no costs for the component of the call not on its network, it is the portion of the call that is carried on ICG's facilities that is relevant. According to ICG, that segment of the call is identical to any local call in terms of how ICG's network is used. ICG, therefore, asserts that there is no basis for treating ISP-bound calls differently than calls to any other local exchange customer when the costs to deliver the calls made to the residential customer and the ISP customer are identical. ICG asserts that if the Commission does not require reciprocal compensation for ISP-bound calls, ICG will not receive any compensation for calls to ISPs and will be unable to recover its costs of delivering calls to ISP customers on behalf of end users served by BellSouth. Schonhaut, Tr. p. 307.

ICG further argues that reciprocal compensation for ISP-bound traffic is economically efficient and should be required in this arbitration. More particularly, ICG asserts that reciprocal compensation is cost based and imposes the costs of delivering traffic on the cost causer--the carrier whose subscriber initiates the call. ICG, therefore, maintains that in an efficiently functioning market, BellSouth should be economically indifferent as to whether it incurs the cost to deliver an ISP-bound call on its own network or whether it incurs that cost through a reciprocal compensation rate paid to ICG.

In support of its economic indifference theory, ICG argues that calls which originate on the BellSouth network and are delivered to a BellSouth-served ISP, and calls that originate on the BellSouth network and terminate to ICG-served ISPs travel very similar paths. According to ICG, the only difference will be that when the ISP is an ICG customer, ICG performs the switching function to deliver the call to the ISP. In such a scenario, BellSouth avoids the switching costs and ICG incurs them. ICG asserts that if BellSouth has accurately established its terminating reciprocal compensation rate based on its own costs of delivering the call, BellSouth should be economically indifferent to whether a call that originates on its network is delivered to a BellSouth customer or to an ICG customer. In the first instance, BellSouth will incur the

cost of delivering the call via its own switch. In the second, BellSouth will incur that cost via a cost-based rate paid to

ICG for delivering the call. Starkey, Tr. pp. 59-60.

In addition to the legal arguments previously discussed, BellSouth counters the ICG arguments in favor of reciprocal compensation as an appropriate inter-carrier compensation mechanism with a strained claim that the Commission should not require reciprocal compensation for ISP-bound traffic because such traffic is interstate "access" traffic for which reciprocal compensation does not apply. Varner, Tr. p. 401.

The premise of BellSouth's "access" traffic argument is that ISP-bound traffic should be treated as "access" traffic for which the revenues generated must be shared between the local exchange carriers involved in originating and terminating the traffic. Under BellSouth's proposal, the LEC serving-and therefore billing-the ISP would treat the ISP's payments for business services purchased out of the serving carriers local exchange tariff as "access" revenue and share it with the other carrier. Varner, Tr. pp. 421-422.

In evaluating the appropriateness of requiring reciprocal compensation as the appropriate inter-carrier compensation mechanism for ISP-bound traffic in this proceeding, we find BellSouth "access" traffic arguments to be misplaced and totally contrary to prevailing regulatory mandates. The FCC has repeatedly emphasized that it has since 1983 treated ISP-bound traffic as though it were local and continues to do so. The FCC's *ISP Declaratory Ruling* is in fact replete with references to this continued practice:

"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. Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs. Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to the local exchange company's central offices. In addition, incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes. ESPs also pay the special access surcharge when purchasing special access lines under the same conditions as those applicable to end users. In the *Access Charge Reform Order* the Commission decided to maintain the existing price and structure pursuant to which ESPs are treated as end users for the purpose of applying access charges. Thus the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local." *Id.* at & 5.

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"As explained above, under the ESP exemption LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover the Commission has directed states to treat ISP traffic as if it were local by permitting ISPs to purchase their PSTN links through local business tariffs." *Id.* at & 9.

* * *

"Our determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption. ESPs, including ISPs, continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs." *Id.* at & 20.

* * *

"The Commission's treatment of ESP traffic dates from 1983 when the Commission first adopted a different access regime for ESPs. Since then, the Commission has maintained the ESP exemption pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate

access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes." *Id.* at & 23.

It is abundantly clear from the above references that ISPs purchase monthly local exchange service much like any other local exchange customer. As local exchange customers, ISPs do not pay access charges and neither ICG nor BellSouth can force ISPs to pay switched access charges for access to their networks. Thus, there are no access revenues for interconnecting carriers to share. Clearly, ISP-bound traffic is not subject to an access charge regulatory framework but rather is treated as local exchange traffic for regulatory purposes.

Having rejected BellSouth's "access" traffic arguments, we find merit in ICG's arguments regarding the similarities between local exchange traffic and ISP-bound traffic. In fact, we are persuaded that calls over local exchange carrier (LEC) facilities to ISPs appear functionally equivalent to local voice calls which are subject to reciprocal compensation. Since the same network facilities and functions are utilized to complete both types of calls, it is axiomatic that the costs to deliver them are identical. We find that those identical costs dictate that the rates associated with recovering those costs should also be identical. We accordingly find that reciprocal compensation should apply to ISP-bound traffic just as it does to local voice traffic.

We are also persuaded that reciprocal compensation is economically efficient because it is cost based and imposes the cost of delivering traffic on the carrier whose subscriber causes the cost by initiating the call. We further believe that reciprocal compensation based on the elemental rates of transport, end office, and tandem switching adopted on August 25, 1998 in our *UNE Pricing Docket* and equaling \$.00351 per minute is the most reasonable and appropriate interim inter-carrier compensation mechanism we can require. The adoption of such a rate ensures that BellSouth will incur the same costs as it would if the calls in question were delivered to a BellSouth-served ISP.

We further believe that adopting a TELRIC-based compensation mechanism is more likely to be consistent with the federal rule which will ultimately be adopted by the FCC. Such a mechanism certainly appears to be consistent with the FCC's traditional treatment of ISP-bound traffic and ISPs generally. It further appears that such an interim mechanism is consistent with the provisions of the FCC's *ISP Declaratory Ruling* as set forth above. Perhaps most importantly, however, the interim inter-carrier compensation mechanism required herein appears to be the most reasonable means of ensuring that ISP-bound traffic does not become a class of traffic for which there is no mechanism of cost recovery.

The Conclusion of the Arbitration Panel as to Issue No. 1

Based on the foregoing discussion, the Arbitration Panel concluded that, pending the adoption of a federal rule by the FCC, dial-up calls to ISPs should be subject to reciprocal compensation. The Panel further found that the reciprocal compensation rate for such traffic should be based on the elemental rates of transport, end office and tandem switching adopted in the Commission's *UNE Pricing Docket* and equaling \$.00351 per minute. The Arbitration Panel specifically rejected the BellSouth position that the parties track ISP traffic pending the establishment of a federal rule and retroactively apply any mechanism ultimately adopted by the FCC to such traffic.

The Findings and Conclusions of the Commission as to Issue No. 1

We concur with the Arbitration Panel's conclusion that pending the adoption of a federal rule by the FCC, dial-up calls to ISPs should be subject to reciprocal compensation. We further concur with the reasoning relied upon by the Arbitration Panel in reaching that recommendation. It is, however, the belief of the Commission that the public interest would be best served by requiring that the interim inter-carrier compensation required herein be subject to retroactive "true-up" once the FCC issues its final federal rule governing inter-carrier compensation for ISP-bound calls and said rule becomes effective. More specifically, we adopt the recommendation of the Advisory Division that the compensation herein ordered for ISP-bound traffic be retroactively "trued-up" to the level of inter-carrier compensation ultimately adopted by the FCC.

In order to prepare for the eventuality of a "true-up" of the interim inter-carrier compensation ordered herein for ISP-bound traffic, we hereby instruct the parties to track all ISP-bound calls and their duration effective immediately upon the approval and implementation of the interconnection agreement which will result from this Arbitration. Once the FCC issues its anticipated federal rule governing inter-carrier compensation for ISP-bound traffic and said rule

becomes effective, that rule will prospectively govern the compensation to be paid by the parties to this proceeding for ISP-bound traffic. Similarly, the compensation ordered to be paid in this proceeding for ISP-bound traffic will be retroactively "true-up" to the FCC mechanism from the effective date of the interconnection agreement that results from this Arbitration. If through that retroactive "true-up" process any funds are found to be owing by one party to the other, the party owing such funds shall submit them to the opposite party within thirty (30) days of the completion of the "true-up" process.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 2: 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 (PETITION ISSUE 7).

The ICG Position

According to ICG, FCC Rule 51.711 requires that where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent local exchange carrier ("ILEC"), the appropriate rate for the interconnecting carrier's additional cost is the incumbent's tandem interconnection rate. To be eligible for this rate, the FCC requires only that the interconnecting carrier's switch serve the same geographical area as the incumbent's switch. ICG asserts that the record indicates that this is the case for ICG's switch in Alabama. Starkey, Tr. pp. 72, 102. Moreover, ICG maintains that its switch performs the same functionality as the BellSouth tandem switch. In fact, ICG contends that its Lucent 5ESS switching platform meets the definition and performs the same functions identified in the Local Exchange Routing Guide ("LERG") for a tandem office and for a Class 4/5 switch.

The BellSouth Position

BellSouth's position regarding this issue is that if a call is not handled by a switch on tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth accordingly maintains that it will pay the tandem

interconnection rate if ICG's switch is identified in the LERG as a tandem. Varner, Tr. p. 413.

A tandem switch connects trunks and is an intermediate connection between an originating telephone call location and the final destination of the call. If ICG's switch is an end office switch, it is handling calls that originate or terminate to customers served by that local switch and is not a tandem switch. According to BellSouth, ICG is thus seeking compensation for equipment it does not own and functionality it does not provide.

BellSouth also asserts that the evidence in the record does not support ICG's position that it provides the transport elements. BellSouth maintains that the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually provide the network facility for which it seeks compensation. BellSouth accordingly urges the Commission to deny ICG's request for tandem switching compensation when tandem switching is not performed.

The Arbitration Panel's Discussion of Issue No. 2

The FCC's Rule 51.711 expressly states that where the interconnecting carrier's switch serves a geographic area comparable to that served by the ILEC's tandem switch, the appropriate interconnection rate for the interconnecting carrier is the tandem interconnection rate. We find nothing in the record to controvert ICG's claim that its switch is geographically comparable to BellSouth's tandem switch. BellSouth does not in fact argue the issue of geographic comparability, but instead argues distinctions in functional equivalency which are not requirements of the aforementioned FCC Rule. Varner, Tr. pp. 413-415. Even if FCC Rule 51.711 is read to include functional equivalency requirements as BellSouth seems to suggest, we find that ICG has demonstrated the requisite functional equivalency by introducing evidence

that its Lucent 5ESS switch meets the definition of a tandem switch in the Local Exchange Routing Guide. Starkey, Tr.

The Conclusion of the Arbitration Panel as to Issue No. 2

Based on the foregoing discussion, the Arbitration Panel concluded that ICG's switch serves an area geographically comparable to that served by BellSouth's tandem switch and provides functionality comparable to that provided by BellSouth's tandem switch. The Arbitration Panel therefore concluded that ICG is entitled to reciprocal compensation at the tandem interconnection rate which is comprised of (1) tandem switching; (2) transport between the BellSouth tandem and its end office switches and (3) end office switching. The established TELRIC-based rates for these elements equals \$.00351 per minute pursuant to the Commission's *UNE Pricing Docket*.

The Findings and Conclusions of the Commission as to Issue No. 2

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 3: SHOULD BELLSOUTH BE REQUIRED TO COMMIT TO PROVISIONING THE REQUISITE NETWORK BUILDOUT AND NECESSARY SUPPORT WHEN ICG AGREES TO ENTER INTO A BINDING FORECAST OF ITS TRAFFIC REQUIREMENTS IN A SPECIFIED PERIOD (PETITION ISSUE 11).

The ICG Position

ICG points out that it relies on BellSouth end office trunks to deliver traffic to ICG's switch. These trunks are usually BellSouth's responsibility to provision and administer. ICG provides BellSouth with quarterly traffic forecasts to assist BellSouth in planning for facilities to handle traffic between their networks. BellSouth is under no obligation to add more end office trunks even though ICG's forecasts may indicate that additional trunking is necessary. Jenkins, Tr. pp. 235-236. ICG wants the option of requiring BellSouth to provision additional end office trunks dictated by ICG's forecast. In exchange, ICG will agree to pay BellSouth for any trunks which are not fully utilized as indicated by the forecast. i.e., a take or pay agreement.

ICG maintains that under its proposal, BellSouth will not assume any risk for additional trunks that are underutilized. ICG in fact asserts that it will assume all of the risk. If this provision is ordered by the Arbitration Panel, ICG expects to use it sparingly.

ICG asserts that BellSouth has agreed to a binding forecast mechanism on at least two prior occasions in Alabama. ICG further maintains that BellSouth's revised Statement of Generally Available Terms and Conditions ("SGAT") filed with the Commission in September 1998 contains a binding forecast provision which largely mirrors the arrangement ICG requests. Also, in the interconnection agreement between BellSouth and KMC Telecom II, BellSouth agreed to a binding forecast provision similar to that requested by ICG.

The BellSouth Position

BellSouth asserts that although it is continuing to analyze the possibility of providing binding forecasts and has not foreclosed the idea, BellSouth can not be ordered to agree to binding forecasts because there is no requirement that it do so pursuant to 47 U.S.C. §251. Varner, Tr. p. 416. BellSouth accordingly argues that pursuant to 47 U.S.C. §252(c), binding forecasts are not properly subject to arbitration. According to BellSouth, the binding forecast provision of BellSouth's September 1998 SGAT provides that neither party is required to enter into a binding forecast.

The Arbitration Panel's Discussion of Issue No. 3

The threshold question regarding this issue is whether the Commission has jurisdiction to require a binding forecast provision in a 47 U.S.C. §252 arbitration as requested by ICG. BellSouth is correct in pointing out that there is not a specific provision of 47 U.S.C. §251 which requires ILECs to enter binding forecasts. The relevant inquiry, however, is

not whether there is any direct reference to binding forecast in 47 U.S.C. §251, but whether requiring binding forecasts is consistent with

the general interconnection obligations of ILECs as set forth in that section of the Act. As noted below, we believe the answer to that inquiry is yes.

Pursuant to 47 U.S.C. §251(c)(2)(C), incumbent LECs are required to provide interconnection with requesting carriers that is at least equal in quality to that provided by the local exchange carrier to itself. ICG's binding forecast proposal clearly relates to interconnection and is designed to ensure that such interconnection is provided to ICG on a non-discriminatory basis. ICG's proposal, therefore, falls well within the parameters of 47 U.S.C. §251 and the Commission's authority pursuant to that section.

We note that BellSouth normally has the financial responsibility for the facilities which ICG seeks to make subject to binding forecasts. Under the proposal put forth by ICG, however, ICG will be required to pick up all or part of the cost for those facilities by either (1) paying BellSouth one-twelfth of the tariffed price for the forecasted plant, as a binding forecast fee, if the binding forecast trunks are used; or (2) paying BellSouth one-hundred-percent of the tariffed price for the forecasted plant if the trunks are not used. Jenkins, Tr. pp. 234-236. Clearly, ICG's proposal protects BellSouth from assuming unreasonable or unnecessary risk. We accordingly find that ICG's proposal is a just and reasonable basis for the parties to negotiate the details of a binding forecast arrangement.

The Conclusion of the Arbitration Panel as to Issue No. 3

Based on the foregoing, the Arbitration Panel concluded that it, and therefore the Commission, had jurisdiction under the provisions of 47 U.S.C. §§251 and 252 to require BellSouth to include a binding forecast provision in its interconnection agreement with ICG. The Arbitration Panel accordingly found that BellSouth should be required to include in its interconnection agreement with ICG a provision which requires the parties to negotiate in good faith the specific terms and conditions of binding forecasts.

The Findings and Conclusions of the Commission as to Issue No. 3

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 4: SHOULD BELLSOUTH BE REQUIRED TO PROVIDE THE "ENHANCED EXTENDED LINK" (EEL) AS A UNE COMBINATION (PETITION ISSUE 4).

The ICG Position

ICG asserts that the provisioning of EELs as UNEs at the DS-0 and DS-1 level will act to extend the range of ICG's ability to serve customers, thus permitting ICG to bring the benefits of competition to a much broader base of Alabama businesses and customers than ICG is currently able to serve. ICG asserts that the FCC's Rule 51.315(b) makes clear that if BellSouth currently combines loop and transport, BellSouth must make loop and transport available as a UNE combination at UNE prices.

ICG asserts that the FCC's September 15, 1999 *News Release*, issued in FCC Docket 99-238, makes clear that the Commission has the authority to require BellSouth to combine the loop and transport UNEs comprising the EEL under 47 U.S.C. §251. Even to the extent that the EEL is not an existing combination within BellSouth's network, ICG asserts that the Commission should require BellSouth to make the EEL available to ICG and other competitors. ICG maintains that the Commission has the authority under 47 U.S.C. §251 (c)(3) of the Act to order such UNE combinations. ICG urges the Commission to use its authority to require BellSouth to provide EELs. ICG maintains that the EEL is an efficient mechanism for bringing the benefits of competition to Alabama because it will allow ICG and other CLECs to serve customers without having to be collocated in a particular customer's serving central office.

ICG also argues that the EEL should be offered at the TELRIC-based UNE prices established by the Commission.

According to ICG, the total price charged by BellSouth for the EEL should be the sum of (1) the TELRIC rate for an unbundled loop; (2) the TELRIC rate for a cross-connect of appropriate capacity; and (3) the TELRIC rate for unbundled interoffice dedicated transport. BellSouth should not be permitted to impose any charge for combining the individual elements.

ICG contends that the Commission has already awarded the EEL to ITC^DeltaCom Communications, Inc. in its interconnection agreement with BellSouth. ICG requires the same service in order to compete.

The BellSouth Position

BellSouth argues that the EEL is nothing more than a combination of three separate UNE's which replicates private line and/or special access services. Varner, Tr. p. 393. BellSouth further argues that at the time of the August 11, 1999 hearing, there was no FCC rule requiring BellSouth to provide such a UNE combination and that BellSouth should not, therefore, be ordered to provide such a combination of UNEs in this proceeding. Varner, Tr. p. 376.

Absent an FCC order, however, BellSouth will, on a voluntary basis, provide EELs through "Professional Services Agreements." BellSouth asserts that since those offers are separate and apart from any obligations under 47 U.S.C. §§251 and 252, there is no requirement that the EEL be provided at TELRIC rates. Therefore, the EEL is offered at prices approximating retail.

The Arbitration Panel's Discussion of Issue No. 4

The combination of UNEs has been one of the more contentious issues arising from the passage of the Act and the rules originally promulgated by the FCC to implement the requirements of the Act. The rules governing UNE combinations originally promulgated by the FCC in its *Local Competition Order* have their genesis in 47 U.S.C. §251(c)(3) which imposes on incumbent LECs:

"[T]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this Section and §252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

Pursuant to the above provisions, the FCC adopted its Rule 51.315(b) which prohibits incumbent LECs from separating UNEs combined in their networks. The FCC also adopted its Rule 51.315(c)-(f) which requires incumbent LECs to combine previously uncombined elements

The FCC reasoned that the only way to give meaning to the requirement that incumbent LECs "shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements" was to interpret it as compelling the incumbent LECs to do the combining for the benefit of the requesting carriers. The FCC rejected the concept of requiring the requesting carrier to do the combining itself as impossible because it found that "new entrants lacked the facilities and information about the incumbent's network necessary" to do the combining. The FCC, therefore, reasoned that "we do not believe it is possible that Congress, having created the opportunity to enter the local telephone markets through the use of unbundled elements, intended to undermine that opportunity by imposing technical obligations on requesting carriers that they might not be able to readily meet."

FCC Rules 51.315(b) and 51.315(c)-(f) were subsequently vacated by the United States Court of Appeals for the Eighth Circuit which found that 47 U.S.C. §251(c)(3) could not be read to levy a duty on incumbent LECs to do the actual combining of elements. The Eighth Circuit's decision regarding FCC Rule 51.315(b) was, however, reversed by the United States Supreme Court. In reversing the Eighth Circuit, the Supreme Court held that the FCC's interpretation of §251(c)(3) was "entirely rational, finding its basis in §251(c)(3)'s nondiscrimination requirement." According to the Supreme Court, Rule 51.315(b) was designed to prevent incumbent LECs from imposing "wasteful costs" on requesting carriers and that it was "well within the bounds of the reasonable for the [FCC] to opt in favor of ensuring against an anti-competitive practice."

Although the Supreme Court's ruling clearly validated FCC Rule 51.315(b) and the Eighth Circuit subsequently reinstated that Rule, there remained some uncertainty regarding the impact of the rule due to the Supreme Court's decision to vacate the FCC's Rule 51.319 on the grounds that the FCC had not adequately considered the "necessary" and "impair" standards of 47 U.S.C. §251(d)(2) in establishing its Rule 319 list of UNEs. FCC Rule 51.319 establishes the network elements that must be provided on an unbundled basis and, therefore, cannot be "uncombined" pursuant to Rule 51.315(b) if they are already combined in the ILEC's network.

In its *News Release* issued on September 15, 1999, the FCC summarized a yet to be released order addressing the reestablishment of the Rule 319 list of UNEs. The FCC specifically noted therein that "[p]ursuant to §51.315(b) of the Commission's Rules, incumbent LECs are required to provide access to combinations of loop, multiplexing/concentrating equipment and dedicated transport" – the components of the EEL- if they are currently combined."

Based on the foregoing, the Commission can and should require BellSouth to provision the EEL at the DS-O and DS-1 levels where it currently combines those loops with transport within its network. Reinstated FCC Rule 51.315(b) mandates such a result given the FCC's specific statements concerning the EEL in its efforts to reinstate the Rule 51.319 list of UNEs. Such a result is entirely consistent with controlling law and the principles of efficient competition.

Even though the FCC's Rule 51.315(c)-(f) requiring ILECs to combine previously uncombined elements remains vacated at present, we nonetheless find that BellSouth must, for a reasonable cost-based fee, combine the UNEs comprising the EEL for ICG in situations where those elements currently are not combined in the BellSouth network. We find support for this proposition not only from the Supreme Court's discussion of the FCC's reasoning which undergirded the reinstatement of FCC Rule 51.315(b) in *AT&T Corp.*, but also from the Act generally at 47 U.S.C. §252.

In reinstating FCC Rule 51.315(b), the Supreme Court placed great emphasis on the FCC's reliance on 47 U.S.C. §251 (c)(3) and the FCC's pro-competitive logic in general. Had FCC Rule 51.315(c)-(f) been before the Supreme Court in *AT&T Corp.*, we are quite sure that the Supreme Court's logic in reinstating FCC Rule 51.315(b) would have clearly dictated reinstatement of Rule 51.315(c)-(f). Such a result would be logical because the same nondiscrimination requirement that undergirds Rule 51.315(b)'s requirement that combined elements not be separated also underlies the requirement that the incumbent LECs must combine elements for requesting carriers which is codified in FCC Rule 51.315 (c)-(f). Thus, in light of the Supreme Court's decision in *AT&T Corp.*, there is ample authority for the proposition that under 47 U.S.C. §251(c)(3), incumbent LECs can be required to combine UNEs for requesting carriers.

Regardless of the current status of FCC Rule 51.315(c)-(f), the Commission has independent authority pursuant to 47 U.S.C. §252 to order EEL combinations on its own. More particularly, 47 U.S.C. §252(c)(1) states that "[i]n resolving by arbitration ... any open issues and imposing conditions on the parties to the agreement, a state commission shall ... ensure that such resolution and conditions meet the requirements of §251, including the regulations prescribed by the [FCC] pursuant to §251." It is important to note that while the FCC's implementing regulations are included among the factors that state commissions must consider in implementing 47 U.S.C. §251, the Act plainly contemplates that the state's authority under 47 U.S.C. §251 is not restricted to applying the FCC's rules. To the contrary, states are free to act as they see fit to give substance to 47 U.S.C. §251 so long as they are not in conflict with the FCC's rules.

We arrived at the conclusion that the EEL must be provided to ICG by BellSouth even in situations where the elements comprising the EEL are not currently combined in the BellSouth network only after carefully undertaking the "necessary" and "impair" analysis embraced by the Supreme Court in *AT&T Corp.* Among other things, we considered the alternative methods and/or facilities available to ICG for the provisioning of the functions that could be achieved by the EEL in circumstances where the network elements comprising the EEL are not presently combined in the BellSouth network. As part of that analysis, we assessed whether in those circumstances ICG has alternative methods of providing the functionality achieved by the EEL without the imposition of undue financial burden or a degradation of service.

From the foregoing analysis, we determined that the EEL is the only efficient mechanism currently available to ICG for bringing the benefits of competition to Alabama businesses and consumers because it will allow ICG to serve customers without having to be collocated in the BellSouth Central Office serving that particular customer. Widespread availability of the EEL will thus enable ICG to serve, and bring the benefits of competition, to a much broader base of Alabama end users than it is currently able to. The EEL is necessary to provide service, particularly in less dense

residential areas where collocation is not feasible. In such instances, the unavailability of the EEL would certainly "impair" ICG's ability to provide service because there is no other source for this access.

Further, if the EEL is made available only in circumstances where the UNEs comprising it are already combined in the BellSouth network, ICG will be forced to incur the unnecessary and duplicative costs associated with collocating in the BellSouth Central Offices where ICG has customers and BellSouth does not currently combine the elements comprising the EEL. Such a scenario is cost prohibitive and requires ICG to unnecessarily duplicate the public switched telephone network through widespread collocation. Holdridge, Tr. p 277 We find such a result unacceptable and counterproductive to the development of competition in this state. We accordingly hold that BellSouth must make the EEL available to ICG even in situations where the elements comprising the EEL are not currently combined in the BellSouth network.

The Conclusion of the Arbitration Panel as to Issue No. 4

Based on the foregoing discussion, the Arbitration Panel found BellSouth's arguments that the EEL should be provided outside the context of the Act and at prices approximating retail services meritless. The Arbitration Panel majority further found that the EEL must be made available to ICG by BellSouth regardless of whether the elements comprising the EEL are currently combined in the BellSouth network. In all cases, the Arbitration Panel found that EEL should be provided by BellSouth at the TELRIC-based UNE prices established by the Commission in the *UNE Pricing Docket*, and at the DS-O and DS-1 levels. Specifically, the Arbitration Panel concluded that the total price charged by BellSouth for the EEL should be precisely the sum of the Commission established TELRIC rates for: (1) an unbundled loop; (2) a cross-connect of appropriate capacity; and (3) unbundled interoffice dedicated transport.

The Arbitration Panel noted that BellSouth should not be permitted to impose any charge for combining the individual elements set forth above where they are already combined in the BellSouth network. However, the Arbitration Panel concluded that BellSouth should be entitled to impose a reasonable, cost-based fee for combining the elements which comprise the EEL in situations where those elements are not currently combined in the BellSouth network. The Arbitration Panel recommended that the parties be required to submit cost studies establishing such a fee such as soon as possible, but no later than sixty (60) days following the Order of the Commission adopting the Arbitration Panel's recommendation in that regard. The Arbitration Panel noted that the Commission should act expeditiously on the establishment of such a combination fee or "glue charge." Until the establishment of such a fee by the Commission or an agreement among the parties concerning such a fee, the Arbitration Panel held that BellSouth should not be required to combine the elements comprising the EEL where those elements are not currently combined in the BellSouth network.

The Findings and Conclusions of the Commission as to Issue No. 4

We fully concur with the findings and conclusions of the Arbitration Panel with regard to the provision of the EEL by BellSouth when the elements comprising the EEL are already combined in BellSouth's network. The FCC's long-awaited order regarding UNEs was released on November 5, 1999. As anticipated, the FCC's *UNE Order* prohibits incumbent LECs such as BellSouth from separating loop and transport elements where they are currently combined. We accordingly hold that based on the FCC's *UNE Order* and the reasoning relied on by the Arbitration Panel, BellSouth must provide the EEL to ICG in situations where the elements comprising the EEL are currently combined in the BellSouth network.

The provision of the EEL by BellSouth in situations where it is currently combined in the BellSouth network shall be in accordance with the parameters established by the FCC in its November 5, 1999 *UNE Order*. Further, the EEL shall be provided at the TELRIC-based UNE prices established by the Commission in the *UNE Pricing Docket* and at the DS-O and DS-1 levels. Specifically, the total price charged by BellSouth for the EEL shall be precisely the sum of the Commission-established TELRIC rates for: (1) an unbundled loop; (2) a cross connect of appropriate capacity; and (3) unbundled interoffice dedicated transport.

With regard to the provision of the EEL in circumstances where the elements comprising it are not already combined in the BellSouth network, the Commission majority, consisting of Commission President Sullivan and Commissioner Cook, does not concur with the findings and conclusions of the Arbitration Panel. To the contrary, the Commission majority adopts the recommendation of the Advisory Division and finds that it would be unwise to require an

incumbent LEC such as BellSouth to combine network elements that are not currently combined in its network since that issue is still pending before the Eighth Circuit. BellSouth is not, therefore, required to provide the combination of loop, multiplexing/concentrating equipment, and dedicated transport where those elements are not currently combined in the BellSouth network. However, in the event that the Eighth Circuit subsequently determines that incumbent LECs must indeed combine UNEs, including the loop, multiplexing/concentrating equipment, and dedicated transport where they are not currently combined in the incumbent LEC's network, the Commission majority finds that BellSouth must, from the effective date of such a requirement, combine UNEs for ICG in a manner consistent with any such requirement so implemented.

It should be noted that Commissioner Wallace dissented from the Commission majority and voted to accept the Arbitration Panel majority's recommendation that BellSouth be required to combine the elements comprising the EEL even in instances where those elements are not currently combined in the BellSouth network. Commissioner Wallace does, however, concur with the notion that BellSouth must be required to provide the EEL where it is not currently combined in the BellSouth network in the event that the Eighth Circuit subsequently determines that ILECs such as BellSouth must do so.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 5: SHOULD VOLUME AND TERM DISCOUNTS BE AVAILABLE FOR UNEs (PETITION ISSUE NO. 6).

The ICG Position

ICG asserts that when it commits to purchase a large volume of UNE's, BellSouth benefits because it is able to use its facilities more efficiently, and its costs per UNE go down. ICG represents that when BellSouth refuses to pass on any of those benefits to ICG, not only does ICG not gain the benefits of economy that it has generated for BellSouth through its volume purchases, it faces a more efficient

BellSouth in the marketplace wherein BellSouth can offer lower prices to its retail customers. Starkey, Tr. p. 120.

ICG further contends that when ICG and BellSouth agree to provision UNEs over long terms, BellSouth benefits through little or no volatility of demand, and therefore, experiences little or no risk. According to ICG the result is that BellSouth can more efficiently utilize its resources and decrease the likelihood of stranded investment. *Id.*

ICG asserts that BellSouth should pass the above described saving and/or economies on to ICG. ICG contends that it is within the authority of the Commission to require BellSouth to do so.

The BellSouth Position

BellSouth argues that neither the Act nor any FCC order or rule requires volume and term discount pricing for UNEs. Varner, Tr. p. 412. BellSouth also maintains that the UNE recurring rates that ICG will pay are cost-based in accordance with the requirements of §252(d) and are derived using least-cost, forward looking technology consistent with the FCC's rules. Furthermore, BellSouth argues that its non-recurring rates already reflect any economies involved when multiple UNEs are ordered and provisioned at the same time. *Id.*

BellSouth additionally contends that the TELRIC-based prices for UNEs set by the Commission already incorporate the savings inherent in volume and term purchases because they are calculated on future plant utilization and network costs, not current utilization and network costs. BellSouth also asserts that its obligations to provide statewide average loop prices precludes its ability to pass through savings associated with volume purchases in a particular locality. BellSouth maintains that the basis upon which ICG seeks volume and term discounts would require the Commission to rethink the pricing methodology adopted in its *UNE Pricing Docket*. According to BellSouth, the cost methodology employed by the Commission in that proceeding is compliant with the provisions of the Act and the rules of the FCC. BellSouth, therefore,

concludes that there is no reason to reconsider the cost methodology employed by the Commission in that proceeding.

The Arbitration Panel's Discussion of Issue No. 5

We conclude that the Commission clearly has jurisdiction to require volume and term discounts for UNEs pursuant to 47 U.S.C. §252. In particular, 47 U.S.C. §252(d)(1) dictates that prices for UNEs shall be established on the basis of cost and in a non-discriminatory manner.

While we concur with the basic premise of ICG's argument that UNE prices must reflect cost savings attributable to UNE volume and term purchases, we note that there are various methods of achieving this result. The Panel finds that the method which will most benefit overall competition in Alabama is to consider any cost savings from increased UNE purchase volumes in establishing overall UNE rates. This is the method that would most ensure that smaller CLECs are not disadvantaged.

We note at this juncture that the Commission previously determined UNE prices generically in its *UNE Pricing Docket*. We, therefore, conclude that arguments concerning cost savings from increased UNE purchase volumes and extended term commitments must be addressed generically in the context of that previously established Docket. We, therefore, recommend that ICG petition the Commission for reconsideration of the previous findings entered in the *UNE Pricing Docket* if it feels that the existing UNE prices do not generically incorporate cost savings resulting from increased UNE purchase volumes and term commitments.

The Conclusion of the Arbitration Panel as to Issue No. 5

Based on the foregoing, the Arbitration Panel concluded that any cost savings resulting from increased UNE purchase volumes and extended term commitments must be addressed generically in the context of the Commission's *UNE Pricing Docket*. The Arbitration Panel, therefore, recommend that ICG Petition the Commission for reconsideration of the previous findings entered in the *UNE Pricing*

Docket if it feels that the UNE prices established therein do not generically incorporate cost savings resulting from increased UNE purchase volumes and term commitments.

The Findings and Conclusions of the Commission as to Issue No. 5

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama this 10th day of November, 1999.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary

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