BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Petition of ICG Telecom Group, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Cincinnati Bell Telephone Company.	)	Case No. 97-92-TP-ARB

OPINION AND ORDER

The Commission, considering the interconnection agreement, the comments of record, and being otherwise fully advised, hereby issues its Opinion and Order.

APPEARANCES:

Muldoon & Ferris LLP, by Boyd B. Ferris, 2733 West Dublin-Granville Road, Columbus, Ohio 43235, and Dickstein, Shapiro, Morin & O'Shinsky, LLP, by Albert H. Kramer, 2101 L. Street N.W., Washington D.C. 20037, on behalf of ICG Telecom Group, Inc.

Frost & Jacobs LLP, by Douglas E. Hart, 2500 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202, and Thomas E. Taylor, Cincinnati Bell Telephone Company, 201 East Fourth Street, Cincinnati, Ohio 45202, on behalf of Cincinnati Bell Telephone Company.

OPINION:

I. Background

On January 28, 1997, ICG Telecom Group, Inc. (ICG) filed in this case, Case No. 97-92-TP-ARB (97-92), a petition for arbitration of numerous issues to establish an interconnection agreement between it and Cincinnati Bell Telephone Company (CBT), pursuant to the Telecommunications Act of 1996 (the Act).[1] Previously, on July 18, 1996, this Commission established guidelines in order to carry out its duties under Section 252 of the Act. *See*, *In the Matter of the Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996*, Case No. 96-463-TP-UNC, Entry (July 18, 1996) (hereinafter referred to as 96-463). Pursuant to those guidelines, an internal arbitration panel, composed of members of the Commission's staff, was assigned to recommend a resolution of the issue(s) in dispute.

---

[1] Codified at 47 U.S.C. 151 *et seq.*

On February 24, 1997, CBT timely filed its response to the arbitration petition. By letter dated March 31, 1997, the attorney examiner scheduled a conference with the parties in the arbitration proceeding and, on April 7, 1997, the conference was held as scheduled. On April 11, 1997, the attorney examiner issued an entry which ordered the filing of arbitration packages in this case and scheduled the arbitration hearing and oral arguments. Moreover, the April 11, 1997 entry addressed several matters relating to the arbitration petition, the response to the arbitration petition, CBT's pending suspension/modification request (Case No. 96-1317-TP-UNC), and CBT's pending alternative regulation proceeding (Case No. 96-899-TP-ALT). Four of the rulings contained in the April 11, 1997 entry are particularly relevant to this proceeding. First, the entry established that the 12 additional issues raised in CBT's response to the petition would be considered in this proceeding in order to establish an interconnection agreement between the parties. Second, the entry clarified that only interim rates would be established in this arbitration proceeding for unbundled network elements (UNEs), reciprocal compensation for transport and termination, and collocation. Interim arrangements would be established, as best as can be determined, pending the completion of the review in CBT's pending alternative regulation proceeding, after which the determinations in the alternative regulation proceeding will supplant the interim determinations made in the arbitration proceeding. Third, the entry stated the Commission's intention to review the resale discount issue and issue a permanent ruling within this proceeding. Fourth, the entry explained that, to the extent that any of CBT's pending suspension/modification requests relate to necessary issues for the establishment of an interconnection agreement between ICG and CBT, interim conclusions will be made in this arbitration proceeding. The review of the suspension/modification requests for permanent determinations will occur in conjunction with the Commission's review in CBT's alternative regulation proceeding.

ICG and CBT filed their arbitration packages on April 17, 1997, as directed. The arbitration hearing was held on April 22, 1997. Prior to the hearing, the parties did come to a meeting of the minds regarding many of the 29 issues identified for arbitration. Pursuant to an agreement reached by the panel and the parties at the close of the hearing, post-hearing briefs were submitted on April 25, 1997, in lieu of oral arguments before the panel. On May 29, 1997, the panel issued its report on the four issues then remaining for arbitration. On June 5, 1997, CBT filed exceptions to the panel report. ICG filed no exceptions to the panel report but, on June 9, 1997, timely filed its reply to CBT's exceptions to the panel report.

We issued our arbitration award on August 20, 1997. In it, we addressed the only two issues which, by then, were left unresolved between the parties: (1) whether, when, and in what amount to apply liquidated damages; and (2) who should be responsible for obtaining intellectual property licenses from third-party vendors. As regards the liquidated damages issue, we made three related determinations. First, we determined that the parties had already agreed among themselves that liquidated

damages would be utilized to compensate ICG for CBT's breach of the performance criteria established in the agreement. Second, we determined that a provision should be incorporated into the agreement which would trigger the application of liquidated damages at the 90 percent performance level proposed by CBT. Third, we determined that the liquidated damages amount should be established at $15,000 per breach. As regards the intellectual property rights issue, we also made three determinations. First, we determined that CBT must obtain authorizations from CBT's various vendors in order for CBT to provide the services which the Act requires CBT to offer. Second, we directed the parties to revise Section 28.16 of their agreement so as to include certain language specifically set forth in the arbitration award. The required language indicates, among other things, that each party shall ensure that it has obtained the necessary license required in order to carry out its own responsibilities under the agreement. Third, we directed that the interconnection agreement be revised to include certain language whereunder ICG would agree to take responsibility for future usage of a license once CBT put ICG on notice that a third party may be claiming that an additional license (or license fee) is necessary.

We directed the parties to incorporate the directives of the arbitration award into their interconnection agreement and to file, within 14 days of the arbitration award, their entire interconnection agreement for our review, in accordance with Mediation/Arbitration Guideline X.J. We noted that, if the parties were unable to agree upon an entire interconnection agreement within this time frame, each party should file for Commission review its proposed version of the language that should be used in a Commission-approved interconnection agreement.

Within our August 20, 1997 arbitration award, the Commission sought public comment pertaining to the interconnection agreements presented for the Commission's review in this matter. Parties or other interested persons wishing to submit written comments, either supporting or opposing the proposed interconnection agreement, were directed to file them on or before September 15, 1997, while any responses to such comments were to be filed on or before September 22, 1997.

On September 3, 1997, the parties jointly filed a request for a seven-day extension of time, not only for the filing of their entire agreement, but also for the filing of written comments supporting or opposing the proposed agreement and for the filing of responses to those comments. On September 11, 1997, counsel for ICG filed an original and eight copies of "the final agreement interconnection agreement between ICG Telecom Group, Inc. and Cincinnati Bell Telephone Company". In a cover letter to that filing, counsel indicated that an executed copy of the final agreement would soon be filed. On September 18, 1997, the parties filed an executed version of their final agreement. We find that, under the circumstances presented, the parties' request for an extension of time of the various filing deadlines established under the August 20, 1997 arbitration award should be granted. Thus, the parties' September 11, 1997 filing of their entire agreement shall be considered as a timely filing. Further,

the time period for the filing of written comments supporting or opposing the proposed agreement and for the filing of responses to those comments should be extended a like number of days, namely, until September 23, 1997 and September 30, 1997, respectively.

II. Statutory Standard of Review

It appears that the submitted interconnection agreement is of the type contemplated by Section 252(b) of the Act. Consequently, it appears to the Commission that the applicants, in seeking Commission review and approval of the arrangements in this case, have taken appropriate action as mandated under Section 252(e)(1) of the Act. That provision states:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

Furthermore, Section 252 of the Act establishes procedural requirements and substantive review standards that the state commissions must follow in determining whether to approve or reject interconnection agreements of the type contemplated by Section 252(b) of the Act. Among other things, this means that the Commission must either approve or reject the interconnection agreement submitted in this case by no later than October 11, 1997 (i.e., 30 days from the submission of the agreement adopted by arbitration), otherwise it will be deemed approved under Section 252(e)(4) of the Act.

Section 252(e)(2) of the Act limits the criteria upon which a state commission may rely in finding that negotiated and arbitrated interconnection agreements, properly subject to its review, should be rejected. It states:

> The State commission may only reject --- (A) an agreement (or any portion thereof) adopted by negotiation ... if it finds that --- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or (B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251, or the [pricing] standards set forth in [section 252(d)].

III. Summary of Comments

On September 15, 1997, Time Warner Communications of Ohio, L.P., (Time Warner) filed comments in this case. Time Warner's comments do not specifically address any aspect of the interconnection agreement between ICG and CBT, itself, but rather are devoted exclusively to the language of the Commission's August 20, 1997 Arbitration Award. In stating the reason for its filing, Time Warner states:

> On August 20, 1997, the Commission issued its Arbitration Award in this case. In its decision, consistent with prior arbitration awards, the Commission directed any parties or interested persons wishing to do so to file comments on the Arbitration Award not later than September 15, 1997. Time Warner Communications of Ohio, L.P. (Time Warner), is such an interested party, having received certification as a new entrant in Ohio. *In the Matter of the Application of Time Warner Communications of Ohio, L.P., for a Certificate of Public Convenience and Necessity to Provide Local Telecommunications Services in Ohio*, Case No. 94-1695-TP-ACE (August 24, 1995). Furthermore, Time Warner has an approved interconnection agreement with Ameritech Ohio (Case No. 96-66-TP-CSS), and an interconnection agreement with Cincinnati Bell Telephone Company (CBT) awaiting Commission approval (Case No. 97-873-TP-NAG).
>
> One aspect of the Commission's Arbitration Award in this case merits comment -- the Commission's discussion of "pick and choose."

Time Warner then proceeds to discuss the manner in which the Commission has addressed the "pick and choose" issue within its August 20, 1997 Arbitration Award. In the conclusion section of its comments, Time Warner states the ultimate reason for its comments in this case, as follows:

> Time Warner asks for clarification on the Commission's position on MFN [most favored nations] clauses in negotiated agreements.

We find it unnecessary and inappropriate to address, at this time and in this docket, the substantive issues raised in Time Warner's comments. We are not called upon, in this docket, to take any generic position regarding “pick and choose” clauses in negotiated agreements. Time Warner is seeking a blanket endorsement of “pick and choose” provisions appearing in negotiated agreements. We will not

categorically say that negotiated terms will be upheld simply because they were negotiated. We will review each and every agreement, whether the product of arbitration or negotiation, and determination if it should be approved or rejected. We have not approved of every term in the negotiated agreements that have been submitted for our review and we will continue to evaluate each agreement on its merits. Contrary to the claim made by Time Warner in its comments, the Commission did not invite interested persons to comment on its arbitration award, itself, but rather, only upon the proposed interconnection agreement between ICG and CBT. By Time Warner's own admission, its comments do not address the ICG/CBT interconnection agreement, but only the Commission's discussion within the August 20, 1997 Arbitration Award of the "pick and choose" issue. Never does Time Warner take issue with the manner in which the "pick and choose" issue is actually addressed within the ICG/CBT agreement itself. Accordingly, its comments will not be further considered or addressed in this docket.

IV. Discussion and Conclusion

The parties were instructed to submit their complete interconnection agreement, within 14 days after the arbitration award. As noted above, we find that the parties have sufficiently complied with this instruction, based on their September 3, 1997 request for an extension of time, their September 11, 1997 filing of their entire agreement, and their September 18, 1997 filing of an executed interconnection agreement.

Upon review of record in this matter, the Commission finds that no reasonable grounds exist upon which to find that the interconnection agreement submitted for approval in this case should be rejected under the criteria of Section 252(e) of the 1996 Act. Nevertheless, this Commission's finding is conditional in the sense that it has, as its basis, the Commission's own understanding of the manner in which certain key provisions of the agreement will be interpreted and enforced among the parties.

Our approval of Section 7.3.4 of the agreement, for example, is conditional and should be explained. That Section pertains to transit service and its last sentence provides:

> If arrangements between ICG and Third Party Carriers are not entered into by the earlier of the one hundred fiftieth (150th) day following execution of the Agreement or October 30, 1997, either Party may block such Local Traffic, subject to the approval of the Commission where required.

We use this opportunity to state, unequivocally, that either party would, in fact, need to secure this Commission's approval prior to blocking any traffic of a third party provider in the manner contemplated by Section 7.3.4 of the ICG/CBT agree-

ment. In fact, our approval of this provision of the agreement does not constitute a specific authorization for either party to actually block any traffic of a third-party provider. Rather, we only acknowledge that both companies have agreed with each other that either of them may seek Commission approval to do such blocking as is contemplated by the last sentence of Section 7.3.4 of their agreement. However, the parties are hereby put on notice that such specific Commission authorization would be granted only for good cause shown and only if requested on a case-by-case basis at the time when the company actually intends, at the end of the contemplated 150-day period, to instigate the blocking. Even in granting such a conditional approval of this provision, the Commission must observe that, presently, it is aware of no reason why it should permit the denial of service to any customer to be used, in effect, as a means of gaining leverage in the negotiation of local traffic delivery arrangements between two local service providers. The Commission notes that we have adopted Guideline IV.D., which requires LECs to establish compensation arrangements for transport and termination of local traffic under pricing terms established by the Commission. Thus, as a practical matter, it seems quite unlikely that ICG would find itself unable to enter in an arrangement with a third-party LEC during the allotted l50-day period for doing so and, thereby, trigger the operation of the last sentence of Section 7.3.4 of the agreement. In any event, we fully expect ICG to exercise due diligence, during the next six months, in pursuit of reaching local traffic delivery arrangements with all third-party LECs. ICG should be directed to keep the Commission apprised of its progress in this regard and, more specifically, to provide to the Commission a written report of the status of all such negotiations on the 120th day of the 150-day period contemplated, which begins to run on the agreement’s activation date.

In Section 15.0 of the agreement, CBT and ICG have agreed to share access to each other's poles, ducts, and rights-of-way at reciprocal rates, terms and conditions which are (1) at least as favorable as those contained in CBT's tariffs and (2) consistent with Section 224 of the Act. We note that such rates, terms, and conditions must be submitted to the Commission for prior review and approval before they could become effective.

In several places, the agreement before us makes references to other agreements (including some not yet executed) between CBT and ICG (e.g., a possible future agreement regarding interconnection methodology [Section 4.4.2], a meet-point billing agreement [Section 6.3], a resale agreement [Section 10.0], and a forecast special service arrangement [Section 19.4.5]). The Commission finds that the fact that the agreement before us contains references to other separate agreements that the parties have not yet executed and that the Commission has not yet reviewed and approved does not present valid grounds for rejecting it pursuant to the criteria established under Section 252(e) of the 1996 Act. However, such separate agreements would need to be submitted for review and approval by the Commission before they could become effective. Approval of the agreements in this case does not constitute Commission approval of any other agreement, including any other separate agreements which

may be referenced in the interconnection agreements. Further, our approval, under the facts presented, should not be interpreted to mean that we would enforce the applicability of such provisions of the agreement before us as would require us to interpret and/or enforce the provisions of any other separate agreement(s) that have never been approved by the Commission.

In the similar vein, references appear throughout the agreement before us which make use of the words "applicable tariffs". Each time such a reference appears, it is in a context which connotes that the particular provision of the agreement will somehow become operable through the adoption-by-reference of some particular, though always unspecified, tariff. The Commission finds the fact that the agreement so often contains only vague references to certain unspecified tariffs does not present valid grounds for rejecting the agreement under the criteria established under Section 252(e) of the 1996 Act. However, the Commission emphasizes that its approval of the agreement, itself, in this case, does not constitute Commission approval of any tariff, including any either specifically or nonspecifically referenced in the agreement. Further, immediate Commission approval of the agreement, under the facts presented, should not be interpreted to mean that we would enforce the applicability of such provisions of the agreement as would require us to interpret and/or enforce any tariff, whether referred to as "applicable" or not, which had never been approved by the Commission.

While reaching these conclusions, the Commission notes that approval of any of the terms and provisions of the agreement before us does not signify a determination that such elements are satisfactory for any purposes, including the Commission's rules in Case No. 95-845-TP-COI or the Commission's minimum telephone service standards. Approval of the agreement before us shall not signify a specific interpretation of the 1996 Act or be considered as a limitation on an eventual application or interpretation of any section of the 1996 Act. The Commission specifically notes that ICG and CBT must, at all times, comply with the local service carrier subscription/slamming provisions as established in Case No. 95-845-TP-COI.

Section 28.17 of the ICG/CBT agreement sets forth a process for any disputes arising under the agreement. The Commission underscores that, in the event of unresolved disputes, the Commission shall be the ultimate arbiter of all disputes, including issues regarding the meaning of terms under the agreement. The Commission will either entertain requests to mediate or arbitrate disputes, or under the authority provided by Section 4905.26, Revised Code, the Commission will consider carrier-to-carrier complaints. Moreover, the expedited complaint process for carrier-to-carrier complaints, established in 95-845-TP-COI, is available. Either or both parties may request that the Commission mediate any differences arising during negotiations or any dispute resolution process by notifying the chief of the Telecommunications Division. The decision as to whether unresolved disputes should be formally treated as complaints or arbitration cases should be considered on a case-by-case basis.

Our approval of the agreement before us today is limited to the implementation of the terms and conditions of the agreement between the parties themselves and/or their affiliated successors possessing ownership of any of the network capabilities to be utilized in the provision of the pertinent services. Notwithstanding Section 28.8 of the ICG/CBT agreement, any assignment or transfer of the approved agreement to any entity shall require prior Commission approval. The Commission notes that approval of the limitation of liability language in the ICG/CBT agreement does not constitute a determination that the limitation of liability imposed by a party should be upheld.

CBT and ICG will be expected to implement the terms and provisions under the approved agreement as soon as possible and, at all times, the agreement will be implemented in such a manner as to advance the policies of the state of Ohio as set forth in Section 4927.02, Revised Code, and the policies embodied in the 1996 Act. The Commission shall continue to exercise its jurisdiction to ensure that the execution and approval of the agreement continues to effectuate the telecommunications policies of the state of Ohio. The parties should continue to keep the Commission apprised of their efforts to timely implement the terms of this agreement.

In accordance with Section 4905.15, Revised Code, the parties shall furnish such accounts, reports, and information, as requested by the Commission. As a final matter, the Commission wishes to make it clear that, by this Opinion and Order, it is not our intent to resolve interconnection issues for all entities. Other entities seeking interconnection with CBT or ICG are in no way precluded from pursuing different terms which may be more appropriate for them or availing themselves of any rights provided under the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On September 11, 1997, the parties jointly submitted an interconnection agreement for Commission approval pursuant to Section 252 of the Act. On September 18, 1997, the parties submitted an executed version of that agreement.

(3) This Commission has continuing regulatory oversight over such agreements, at all times, pursuant to Title 49 of the Revised Code, as well as the Act. The parties' agreement shall be governed by and construed in accordance with the applicable laws of the state of Ohio, except insofar as the Act and the Federal Communications Commission's rules and regulations may control any aspect of the agreement.

(3) The submitted agreement, which is appropriately before the Commission, is consistent with the applicable law and policies of the state of Ohio, as well as the Telecommunications Act of 1996, and, therefore, should be approved to the extent set forth in this Opinion and Order.

(4) The parties should keep the Commission apprised of their efforts to implement the terms of the agreement. ICG should provide to the Commission a written report of the status of its progress in reaching local traffic delivery arrangements on the 120th day of the 150-day period contemplated by Section 7.3.4 of the agreement.

(5) Unless an application for rehearing is filed within 30 days of this Opinion and Order, this order is a final appealable order.

ORDER:

It is, therefore,

ORDERED, That the parties' September 3, 1997 request for extension of time for filing the interconnection agreement, for filing comments pertaining to it, and for filing responses to such comments is granted in accordance with the above findings. It is, further,

ORDERED, That the executed interconnection agreement submitted by the parties in this case on September 18, 1997 be approved as set forth above. It is, further,

ORDERED, That the Commission's approval of this interconnection agreement to the extent set forth in this Opinion and Order does not constitute state action for the purpose of antitrust laws. It is not our intent to insulate the companies from any provisions of any state or federal law which prohibits the restraint of trade. It is, further,

ORDERED, That nothing in this Opinion and Order shall be binding upon the Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any charge, rule, or regulation. It is, further,

ORDERED, That this case is closed of record. It is, further,

ORDERED, That a copy of this Opinion and Order be served on ICG and its counsel, CBT and its counsel, Time Warner and its counsel, on all parties of record in Case Nos. 96-899-TP-ALT and 93-1317-TP-UNC, on all certified NECs in the state of Ohio as well as those with pending applications for NEC certification, upon all ILECs who have received requests for interconnection, and upon all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

_____
Craig A. Glazer, Chairman

_____
Jolynn Barry Butler

_____
Ronda Hartman Fergus

_____
David W. Johnson

_____
Judith Jones

DEF/pdc

Entered In The Journal
October 2, 1997

Gary E. Vigorito
Secretary