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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

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COMMISSIONERS

- MARC SPITZER, Chairman
JIM IRVIN
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON

DOCKET NO. T-03566A-99-0743

IN THE MATTER OF THE APPLICATION OF ICG TELECOM GROUP, INC. FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE FACILITIES-BASED AND RESOLD LOCAL EXCHANGE AND EXCHANGE ACCESS TELECOMMUNICATIONS SERVICE IN ARIZONA AND FOR COMPETITIVE CLASSIFICATION OF ITS SERVICES.

DECISION NO. 65758

OPINION AND ORDER

DATE OF HEARING: January 7, 2003
PLACE OF HEARING: Phoenix, Arizona
ADMINISTRATIVE LAW JUDGE: Philip J. Dion III
APPEARANCES: Mike Patten, ROSHKA HEYMAN & DEWULF, PLC. on behalf of ICG Telecom Group, Inc.
Timothy Labo, Staff Attorney, Legal Division, on behalf of the Utilities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

- 1. On December 23, 1999, ICG Telecom Group, Inc. ("ICG" or "Applicant") filed with the Commission an application for a Certificate of Convenience and Necessity ("Certificate") to provide competitive facilities-based and resold local exchange and exchange access telecommunications services statewide.
2. On November 20, 2002, Applicant docketed a Notice of Filing of Affidavits of Publication that comply with Commission rules.
3. ICG is a Colorado corporation, authorized to do business in Arizona. ICG is a wholly

1 owned subsidiary of ICG Communications, Inc., which is a Delaware corporation.

2 4. On July 15, 2002, the Commission's Utilities Division Staff ("Staff") filed its Staff  
3 Report, which recommended approval of the application and included a number of additional  
4 recommendations.

5 5. On October 9, 2002, a Procedural Order was issued setting this matter for hearing on  
6 January 7, 2003 and setting various procedural deadlines.

7 6. On January 7, 2003, a full public hearing in this matter was held as scheduled.  
8 Applicant appeared telephonically and was represented by counsel. Staff appeared and was  
9 represented by counsel. The hearing was conducted before a duly authorized Administrative Law  
10 Judge. Evidence was presented and testimony was taken. At the conclusion of the hearing, the  
11 Administrative Law Judge took the matter under advisement and informed the parties that a  
12 Recommended Opinion and Order would be prepared for the Commissioners' consideration.

13 7. Applicant has the technical capability to provide the services that are proposed in its  
14 application.

15 8. Currently there are several incumbent providers of local exchange and interexchange  
16 services in the service territory requested by Applicant, and numerous other entities have been  
17 authorized to provide competitive local and interexchange services in all or portions of that territory.

18 9. It is appropriate to classify all of Applicant's authorized services as competitive.

19 10. The Staff Report stated that Applicant has no market power and the reasonableness of  
20 its rates would be evaluated in a market with numerous competitors.

21 11. According to the Staff Report, ICG submitted unaudited financial statements for the  
22 year ending December 31, 2001. These financial statements list assets of \$193,889,000, negative  
23 equity of \$2.6 million, and a net loss of \$173,134,000.

24 12. At the hearing, Scott Beer, an officer of ICG Communications, Inc., testified that the  
25 financial condition of ICG Communications, Inc. and its affiliates had dramatically improved after  
26 they emerged from Chapter 11 bankruptcy on October 10, 2002. He stated that the primary reason  
27 ICG Communications, Inc. and its affiliates are in a healthy financial condition is that ICG  
28 Communications, Inc. had restructured its debt from approximately \$2.75 billion to \$250 million.

1           13. Mr. Beer went on to testify that ICG Communications, Inc. had revenue of \$285  
2 million and \$50 million in EBITDA in the first eight months of 2002. He went on to state that those  
3 figures compare favorably to ICG Communications, Inc.'s revenue figure of \$500 million and its  
4 EBITDA of \$40 million for the entire year of 2001.<sup>1</sup>

5           14. Mr. Beer further testified that the ICG had changed its business plan. He stated that  
6 ICG will not serve residential customers, rather it will focus on serving business customers that have  
7 proven to be profitable to ICG.

8           15. The Application states that ICG collects advances and deposits from its customers.

9           16. Staff recommends that ICG's application for a Certificate to provide competitive  
10 facilities-based and resold local exchange and exchange access telecommunications services be  
11 granted subject to the following conditions:

- 12           (a) that, unless it provides services solely through the use of its own facilities,  
13 Applicant be ordered to procure an Interconnection Agreement, within 365  
14 days of the effective date of the Order in this matter or 30 days prior to the  
15 provision of service, whichever comes first, that must remain in effect until  
16 further order of the Commission, before being allowed to offer local exchange  
17 service;
- 18           (b) that Applicant be ordered to file with the Commission, within 365 days of the  
19 effective date of the Order in this matter or 30 days prior to the provision of  
20 service, whichever comes first, its plan to have its customers' telephone  
21 numbers included in the incumbent's Directories and Directory Assistance  
22 databases;
- 23           (c) that Applicant be ordered to pursue permanent number portability  
24 arrangements with other LECs pursuant to Commission rules, federal laws and  
25 federal rules;
- 26           (d) that Applicant be ordered to abide by and participate in the AUSF mechanism  
27 instituted in Decision No. 59623, dated April 24, 1996 (Docket No. RT-T-  
28 03905A-00-0513E-95-0498);
- (e) that Applicant be ordered to abide by the quality of service standards that were  
approved by the Commission for USWC in Docket No. T-0151B-93-0183;
- (f) that in areas where it is the sole provider of local exchange service facilities,  
Applicant be ordered to provide customers with access to alternative providers  
of service pursuant to the provisions of Commission rules, federal laws and  
federal rules;
- (g) that Applicant be ordered to certify, through the 911 service provider in the  
area in which it intends to provide service, that all issues associated with the

<sup>1</sup> EBITDA is an acronym for earnings before interest, taxes, depreciation and amortization.

1 provision of 911 service have been resolved with the emergency service  
2 providers within 365 days of an Order in this matter or 30 days prior to the  
3 provision of service, whichever comes first, which certification must remain in  
4 effect until further Order of the Commission;

- 5 (h) that Applicant be ordered to abide by all the Commission decisions and  
6 policies regarding CLASS services;
- 7 (i) that Applicant be ordered to provide 2-PIC equal access;
- 8 (j) that Applicant be required to notify the Commission immediately upon  
9 changes to its address or telephone number;
- 10 (k) that Applicant be ordered to comply with all Commission rules, orders, and  
11 other requirements relevant to the provision of intrastate telecommunications  
12 service;
- 13 (l) that Applicant be ordered to maintain its accounts and records as required by  
14 the Commission;
- 15 (m) that Applicant be ordered to file with the Commission all financial and other  
16 reports that the Commission may require, and in a form and at such times as  
17 the Commission may designate;
- 18 (n) that Applicant be ordered to maintain on file with the Commission all current  
19 tariffs and rates, and any service standards that the Commission may require;
- 20 (o) that Applicant be ordered to cooperate with Commission investigations of  
21 customer complaints; and
- 22 (p) Applicant be ordered to participate in and contribute to a universal service  
23 fund, as required by the Commission.

24 15. Staff further recommended that the Applicant be subject to the Commission's rules  
25 governing interconnection and unbundling and the 1996 Telecommunications Act and the rules  
26 promulgated thereunder. In the event that the Applicant provides essential services or facilities that  
27 potential competitors need in order to provide their services, the Applicant should be required to offer  
28 those facilities or services to these providers on non-discriminatory terms and conditions pursuant to  
federal laws, federal rules and state rules.

16. Staff further recommended that ICG's application for a CC&N to provide intrastate  
telecommunications services should be granted subject to the following conditions:

- 26 (a) ICG be ordered to file conforming tariffs within 365 days from the date of an  
27 Order in this matter or 30 days prior to providing service, whichever occurs  
28 first, and in accordance with the Decision;
- (b) In order to protect ICG's customers:

- 1 (1) ICG should be ordered to procure a performance bond equal to \$125,000.  
 2 The minimum bond amount of \$125,000 should be increased if at any time  
 3 it would be insufficient to cover prepayments or deposits collected from  
 4 ICG's customers. The bond amount should be increased in increments of  
 \$62,500 whenever the total amount of the advances, deposits and  
 prepayments is within \$12,500 of the bond amount;
- 5 (2) if ICG desires to discontinue service, it should be required to file an  
 application with the Commission pursuant to A.A.C. R14-2-1107;
- 6 (3) ICG should be required to notify each of its local exchange customers and  
 7 the Commission 60 days prior to filing an application to discontinue  
 8 service pursuant to A.A.C. R14-2-1107; and any failure to do so should  
 result in forfeiture of the Applicant's performance bond;
- 9 (4) ICG should docket proof of the performance bond within 365 days of the  
 10 effective date of an Order in this matter or 30 days prior to the provision of  
 11 service, whichever comes first, and must remain in effect until further  
 Order of the Commission;
- 12 (5) if, at some time in the future, ICG does not collect from its customers an  
 13 advance, deposit and/or prepayments, Staff recommends that ICG be  
 14 allowed to file a request for cancellation of the resold long distance portion  
 15 of its established performance bond. Such request should be filed with the  
 Commission for Staff review. Upon receipt of such filing and after Staff  
 review, Staff will forward its recommendation to the Commission; and
- 16 (c) If any of the above timeframes are not met, that ICG's CC&N should become  
 17 null and void without further Order of the Commission and no extensions for  
 18 compliance should be granted.

19 17. In its Staff Report, Staff stated that based on information obtained from the Applicant,  
 20 it has determined that ICG's fair value rate base is zero, and is too small to be useful in setting rates.  
 21 Staff further stated that in general, rates for competitive services are not set according to rate of return  
 22 regulation, but are heavily influenced by the market. Staff recommended that the Commission not set  
 23 rates for ICG based on the fair value of its rate base.

24 18. The rates to be ultimately charged by ICG will be heavily influenced by the market.  
 25 Because of the nature of the competitive market and other factors, a fair value analysis is not  
 26 necessarily representative of the company's operations.

27 19. Staff stated that ICG lacks the market power to adversely affect the  
 28 telecommunications market by either restricting output or raising prices. Also, Staff has

1 recommended that ICG's services be classified as competitive and thus subject to the flexible pricing  
2 authority allowed by the Commission's Competitive Telecommunications Services rules. Staff  
3 believes that these two factors, lack of market power and the competitive marketplace for the services  
4 ICG proposes to offer, support the conclusion that a fair value analysis is not necessarily  
5 representative of the company's operations, and that the rates charged by ICG will be reasonable.

6 20. Staff's recommendations, as set forth herein, are reasonable.

7 21. ICG's fair value rate base is determined to be zero for purposes of this proceeding.

### 8 CONCLUSIONS OF LAW

9 1. Applicant is a public service corporation within the meaning of Article XV of the  
10 Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

11 2. The Commission has jurisdiction over Applicant and the subject matter of the  
12 application.

13 3. Notice of the application was given in accordance with the law.

14 4. A.R.S. § 40-282 allows a telecommunications company to file an application for a  
15 Certificate to provide competitive telecommunications services.

16 5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised  
17 Statutes, it is in the public interest for Applicant to provide the telecommunications services set forth  
18 in its application.

19 6. Applicant is a fit and proper entity to receive a Certificate authorizing it to provide  
20 competitive facilities-based and resold local exchange and exchange access telecommunications  
21 services in Arizona as conditioned by Staff's recommendations.

22 7. The telecommunications services that the Applicant intends to provide are competitive  
23 within Arizona.

24 8. Pursuant to Article XV of the Arizona Constitution as well as the Competitive Rules,  
25 it is just and reasonable and in the public interest for Applicant to establish rates and charges that are  
26 not less than the Applicant's total service long-run incremental costs of providing the competitive  
27 services approved herein.

28 9. Staff's recommendations, as set forth herein, are reasonable and should be adopted.

1 10. ICG's competitive rates, as set forth in its proposed tariffs, are just and reasonable and  
2 should be approved.

3 **ORDER**

4 IT IS THEREFORE ORDERED that the application of ICG Telecom Group, Inc. for a  
5 Certificate of Convenience and Necessity for authority to provide competitive facilities-based and  
6 resold local exchange and exchange access telecommunications services in Arizona shall be, and is  
7 hereby, granted, conditioned upon ICG Telecom Group, Inc.'s timely compliance with the following  
8 three Ordering Paragraphs.

9 IT IS FURTHER ORDERED that ICG Telecom Group, Inc. shall file conforming tariffs in  
10 accordance with this Decision within 365 days of this Decision or 30 days prior to providing service,  
11 whichever comes first.

12 IT IS FURTHER ORDERED that ICG Telecom Group, Inc. shall procure a performance  
13 bond equal to \$125,000 the earlier of 365 days from the effective date of this Order or 30 days prior  
14 to the commencement of service. The minimum bond amount of \$125,000 shall be increased if, at  
15 any time, it would be insufficient to cover prepayments or deposits collected from the Applicant's  
16 customers. The bond amount shall be increased in increments of \$62,500. This increase shall occur  
17 when the total amount of the advances, deposits, and prepayments is within \$12,500 of the bond  
18 amount.

19 IT IS FURTHER ORDERED that ICG Telecom Group, Inc. shall comply with all of the Staff  
20 recommendations set forth in the above-stated Findings of Fact and Conclusions of Law.

21 IT IS FURTHER ORDERED that if ICG Telecom Group, Inc. fails to meet the timeframes  
22 outlined in the Ordering Paragraphs above, that the Certificate of Convenience and Necessity  
23 conditionally granted herein shall become null and void without further Order of the Commission.

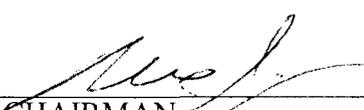
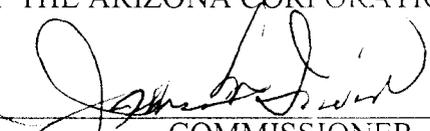
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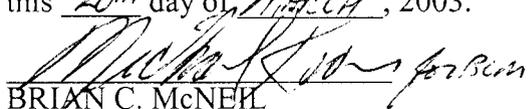
1 IT IS FURTHER ORDERED that if ICG Telecom Group, Inc. fails to notify each of its  
2 customers and the Commission at least 60 days prior to filing an application to discontinue service  
3 pursuant to A.A.C. R14-2-1107, that in addition to voidance of its Certificate of Convenience and  
4 Necessity, ICG Telecom Group, Inc.'s performance bond shall be forfeited.

5 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

6 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

7  
8  CHAIRMAN  COMMISSIONER  COMMISSIONER  
9  
10  COMMISSIONER  COMMISSIONER

11  
12 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive  
13 Secretary of the Arizona Corporation Commission, have  
14 hereunto set my hand and caused the official seal of the  
15 Commission to be affixed at the Capitol, in the City of Phoenix,  
16 this 20<sup>th</sup> day of MARCH, 2003.

  
17 BRIAN C. McNEIL  
18 EXECUTIVE SECRETARY

19 DISSENT \_\_\_\_\_

20 DISSENT \_\_\_\_\_

21 PJD:mlj

1 SERVICE LIST FOR: ICG TELECOM GROUP, INC.

2 DOCKET NO.: T-03566A-99-0743

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