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April 28, 2000 **ORIGINAL**

VIA HAND DELIVERY

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 000121-TP - Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies.

Dear Ms. Bayó,

Enclosed for filing on behalf of MCImetro Access Transmission Services LLC, and MCI Telecommunications Corporation d/b/a MCI Telecommunications Corporation and d/b/a MCI WorldCom, and MCI WorldCom Communications, Inc. (collectively "MCI WorldCom") are an original and fifteen copies of their Comments Concerning Staff's Proposal.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance in this matter.

Sincerely,

Donna Canzano McNulty
Donna Canzano McNulty

Enclosure

cc: Parties of Record

Harvey

AF 2

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MS

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In re: Investigation into the)
Establishment of Operations)
Support Systems Permanent) Docket No. 000121-TP
Performance Measures for)
Incumbent Local Exchange) Filed: April 28, 2000
Telecommunications Companies)

**MCI WORLDCOM'S COMMENTS
CONCERNING STAFF'S INITIAL PROPOSAL**

MCI WorldCom, Inc. ("MCI WorldCom") submits these comments in response to Staff's Initial Proposal concerning an Operations Support Systems Performance Assessment Plan.

INTRODUCTION

MCI WorldCom agrees with Staff that the development of a performance assessment plan is "vitaly important to opening the local telecommunications market and ensuring nondiscriminatory access to LEC services and facilities." Staff is on the right track in recommending that a performance assessment plan be developed through a series of collaborative workshops that builds on work that has been done in other jurisdictions. This approach is the best way to address the complex issues involved in establishing performance metrics, performance standards and an appropriate remedy structure.

Although MCI WorldCom agrees with Staff's general approach, MCI WorldCom proposes certain modifications to the Staff's Initial Proposal. MCI WorldCom recommends that the Proposal be modified to (i) recommend that a self-executing remedies plan be adopted, and include discussion of the structure and levels of self-executing remedies in the workshops; (ii) note additional metrics that should be

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considered during the workshops; and (iii) address interim performance measures that should be adopted with respect to GTE and Sprint. Each of these issues is discussed below.

PROPOSED MODIFICATIONS

A. Self-Executing Remedies

Staff's Initial Proposal recognizes that penalties for noncompliance are appropriate, and that the Commission has authority to assess penalties. Staff also states that severity and frequency of noncompliance should be taken into account in determining the remedy to be applied. Staff stops short, however, of recommending that a self-executing remedy plan be adopted. Instead, Staff encourages ILECs to develop and implement voluntary self-enforcement programs, and states that Commission penalty assessments will be made on a quarterly basis, if necessary. MCI WorldCom respectfully requests that Staff's Initial Proposal be changed to recommend that a self-executing remedies plan be adopted, and to include in the workshop discussions the issue of what self-executing remedies the Commission should require.

Consideration of what remedies to impose, if any, on a quarterly basis would require the expenditure of substantial time and resources by the Commission and parties and would leave uncertain what remedies would be required for discriminatory conduct. Self-executing remedies are necessary to ensure swift and certain consequences that would give ILECs appropriate incentives to provide nondiscriminatory treatment to ALECs. Without self-executing remedies, discrimination would go undeterred for long periods, which could put some ALECs out of business or damage their reputations severely before any remedies were paid. A quarterly review plan would not leave

ALECs in a much better position than was described by the Department of Justice in its Louisiana II Evaluation:

We find no evidence in the record that BellSouth has committed itself in any significant way to specific levels of performance or to any enforcement provisions to remedy inadequate performance. Rather, it appears that, as a general matter, CLECs who feel that BellSouth's performance is inadequate would need to file complaints with the [state] PSC and then, in the course of the resulting regulatory proceedings, establish the appropriate level of performance, whether BellSouth had failed to meet that performance level, and finally, establish the remedy. To be most effective in preventing backsliding, such issues should be resolved in advance, either in contracts between BellSouth and its competitors or through regulatory proceedings.

Evaluation of the United States Department of Justice at 39, filed in *In re Application of BellSouth Corporation Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231.

Likewise, the FCC noted in its Bell Atlantic 271 Order that “[i]t is important that these [remedy] plans are designed to function automatically without imposing administrative and regulatory burdens on competitors.” *In re Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in New York*, CC Docket No. 99-295, Memorandum Opinion and Order, ¶ 12 (rel. Dec. 22, 1999). The FCC also stated:

In this instance, we believe that the enforcement mechanisms developed in New York will be effective in practice. We base this predictive judgment on the fact that the plan has the following important characteristics:

- Potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;
- Clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;

- A reasonable structure that is designed to detect and sanction poor performance when it occurs;
- *A self-executing mechanism that does not leave the door open unreasonably to litigation and appeal;* and
- Reasonable assurances that the reported data is accurate.

Id. ¶ 433 (emphasis added).

Encouraging ILECs to adopt voluntary self-executing remedies plans will not resolve the remedies issue. ILECs have no incentive to volunteer for a remedies plan with substantial consequences for discriminatory performance. The Commission can be assured that if it directs ILECs to “go out and pick their switches,” the ILECs will return with twigs. The only way an adequate remedies plan can be achieved is through the active intervention of the Commission. In New York, for instance, the commission adopted a modified version of Bell Atlantic’s plan after receiving ALEC comments in informal discussions and a formal rulemaking proceeding.

This Commission has ample authority to require self-executing remedies. In Pennsylvania, for example, Bell Atlantic contended that the Commission lacked the authority to adopt remedies. The Pennsylvania Commission strongly disagreed, finding that it had the authority under federal and state law. With respect to federal law, the Pennsylvania Commission stated: “The Commission has oversight authority to ensure that ILECs, including BA-PA, provide nondiscriminatory access to their OSS pursuant to Section 251. This Commission’s implementation of performance measures and standards is a legitimate exercise of the Commission’s authority to ensure that BA-PA fulfills its Section 251 obligations.” *Joint Petition of NEXTLINK of Pennsylvania, Inc. et al. for an Order Establishing a Formal Investigation of Performance Standards, Remedies, and*

Operations Support Systems Testing for Bell Atlantic-Pennsylvania, Inc., Docket No. P-00991643, Opinion and Order (Dec. 31, 1999). The Commission further stated:

Our authority to establish performance measures, standards, and self-executing remedies is based on authority delegated to us by TA-96. If an ILEC such as BA-PA chooses not to accept Commission-implemented performance measures, standards, and remedies by it [sic] own volition, this Commission has the authority to direct performance measures, standards, and remedies as regulatory requirements pursuant to section 271.

Id.

Just this month, the Tennessee Regulatory Authority (“TRA”) reached a similar conclusion. In moving (among other things) to adopt enforcement mechanisms in the ITC DeltaCom arbitration, Director Greer explained at length why the TRA had the authority to do so. He noted that (i) BellSouth tariffs approved by the TRA contain self-effectuating performance measures and guarantees; (ii) the Department of Justice has concluded that the issue of performance guarantees should be resolved through contracts or regulatory proceedings; (iii) numerous courts have held that public service commissions may impose performance guarantees in interconnection agreements¹; and (iv) the Telecommunications Act of 1996 requires the TRA to arbitrate those issues brought before it. *In re Petition for Arbitration of ITC DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 99-00430, Transcript at 7, 10-11 (April 4, 2000). (A copy of the Transcript is attached as Exhibit A.) As Director Greer stated, “[t]he Act, the FCC, and the DOJ have concluded that state commissions have the authority where the parties have not agreed to the terms of agreement to impose enforcement mechanisms as a vehicle to

¹ See, e.g., *US West Communications, Inc. v. TCG Oregon*, 31 F. Supp.2d 828 (D. Ore. 1998).

ensure that the telecommunications market is irreversibly open to competition in accordance with congress's intent." Transcript at 11-12. The TRA approved the motion unanimously.

Although the decision was issued in an arbitration proceeding, a public service commission's authority to require self-executing remedies is not limited to that context. As Director Greer stated: "Performance measures provide the necessary information to determine if BellSouth is complying with these requirements [of Section 251(c) of the Act], and enforcement mechanisms encourage BellSouth to meet the requirements of Section 251." Transcript at 14. He continued: "I find the Arbitrators should adopt performance measures with standards and benchmarks and enforcement mechanisms. These measurement mechanisms should remain in effect until this Authority conducts a generic proceeding to adopt permanent performance measurements with standards and enforcement mechanisms applicable to all CLECs." *Id.* The Tennessee and Pennsylvania decisions demonstrate that this Commission has authority under Sections 251 and 252 of the Act to require self-executing remedies. Such remedies may be required in arbitration proceedings or in a generic docket such as this one.

The Michigan Public Service Commission recently has taken an approach similar to what MCI WorldCom is proposing here. The Michigan Commission initially declined to order self-executing remedies, but stated that such remedies could be voluntarily negotiated. *In re Ameritech Michigan's Submission on Performance Measures, Reporting, and Benchmarks Pursuant to October 2, 1998 Order in Case No. U-11654.* Case No. U-11830, Opinion and Order, p. 15 (May 27, 1999). Earlier this year, the Michigan Commission changed course, entering an order directing Ameritech-Michigan

to commence a collaborative process with commission staff and ALECs that includes the issue of self-executing remedies. The Commission stated:

The collaborative process should be used to develop specific performance assurance measures, including a self-effectuating system to prevent backsliding. Ameritech Michigan's performance enforcement plan shall include the key elements discussed in the December 22, 1999 order in CC Docket No. 99-295, FCC 99-404 involving Bell Atlantic's Section 271 order. In particular, the performance enhancement plan shall include provisions for Ameritech Michigan to make self-executing performance payments in the event its performance does not meet standards.

In the Matter, on the Commission's Own Motion, to Consider Ameritech-Michigan's Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996, Case No. U-12320, Order, p. 5 (Feb. 9, 2000).

In short, self-executing remedies will be critical to local market entry in Florida, and the Commission has the authority to impose them. Staff should recommend that self-executing remedies be adopted, and the structure of such remedies should be one of the key issues addressed during the upcoming workshops.

B. Additional Measures

MCI WorldCom respectfully submits that the following metrics, in addition to those identified in the Staff's Initial Proposal, should be included in the workshop discussions:

- Percent and Timeliness of Firm Order Confirmations, Rejections
- Percent Provisioned Orders Not Completed in Provisioning System
- Percent Missing Orders Resubmitted at the ILEC's Request But Rejected As Duplicates
- Percent BST Response to Requests for Inbound ILEC-to-ALEC Trunks Received in X Days
- Mean Time to Respond to Requests for Inbound ILEC-to-ALEC Trunks

- Percent Requests for Inbound ILEC-to-ALEC Trunks Denied

Other new metrics also may be required as ALEC business experience develops. MCI WorldCom therefore recommends that discussion of additional metrics not be foreclosed during the workshops.

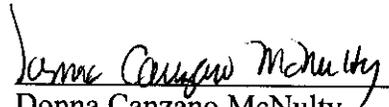
C. GTE and Sprint

MCI WorldCom agrees that this proceeding can best be handled by developing a performance assessment plan for BellSouth before moving on to develop plans for GTE and Sprint, as recommended by Staff. MCI recommends, however, that interim measures be adopted for GTE and Sprint so that measures will be in place while the BellSouth phase of the proceeding is moving forward. In North Carolina, GTE, Sprint and ALECs were able to agree on such interim performance measures based on GTE's and Sprint's national measurement plans. Little effort would be required to reach a similar agreement in Florida.

CONCLUSION

Staff's Initial Proposal is on the right track toward addressing performance measurement issues. MCI WorldCom respectfully requests that the Proposal be modified along the lines proposed above so that it fulfills more completely its stated objectives.

RESPECTFULLY SUBMITTED this 29th day of April, 2000.


Donna Canzano McNulty

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by U.S. Mail or Hand Delivery (*) this 28th day of April, 2000.

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Attorney

ATTACHMENT A

BEFORE THE TENNESSEE REGULATORY AUTHORITY

1

2

3

4

IN RE:)

5)

PETITION FOR ARBITRATION OF ITC) Docket No.

6 DELTACOM COMMUNICATIONS, INC. WITH) 99-00430

BELLSOUTH TELECOMMUNICATIONS, INC.)

7 PURSUANT TO THE TELECOMMUNICATIONS)

ACT OF 1996)

8

9

10

TRANSCRIPT OF THE PROCEEDINGS

11

Tuesday, April 4, 2000

12

13

14

APPEARANCES:

15

For ITC DeltaCom: Mr. H. LaDon Baltimore

16

Mr. Christopher J. Rozycki

17

For BellSouth: Mr. Bennett Ross

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25 Reported By:

Christina Meza, RPR, CCR

1 (The aforementioned cause came on to
2 be heard on Tuesday, April 4, 2000, beginning at
3 approximately 9:00 a.m., before Chairman Melvin Malone,
4 Director Lynn Greer, and Director Sara Kyle, when the
5 following proceedings were had, to-wit:)

6
7 CHAIRMAN MALONE: Call to order the
8 hearing in Docket No. 99-00430, petition for
9 arbitration of ITC DeltaCom, Inc., with BellSouth
10 Telecommunications, Inc., pursuant to the
11 Telecommunications Act of 1996.

12 Previously the parties have submitted
13 to the Authority that they had resolved several of the
14 issues in dispute. The Authority at its last status
15 conference on this matter decided not to issue
16 deliberations on the outstanding issues but to permit
17 the parties further time to negotiate. The parties
18 have subsequently notified the Authority that not only
19 could they not reach agreement on the remaining
20 outstanding issues, but whatever preliminary agreement
21 they had on the other issues fell through.

22 As I understand it from the parties,
23 none of the issues in this matter has settled, is that
24 correct? Mutually so?

25 MR. ROSS: Mr. Chairman, Bennett Ross

1 this case is Issue 1(A). Should BellSouth be required
2 to comply with performance measures and guarantees for
3 preordering, ordering, resale, and unbundled network
4 elements, provisioning, maintenance, interim number
5 portability and local number portability, collocation,
6 coordinated conversions, and the bona fide request
7 processes as set forth fully in Attachment 10 of the
8 Exhibit A to this petition?

9 DIRECTOR GREER: Mr. Chairman, I would
10 like to make some comments, and they are not
11 necessarily brief, and then present a motion.

12 DeltaCom sets forth three reasons for
13 DeltaCom's request of performance measures and
14 enforcement mechanisms. One, BellSouth recognizes
15 competitive and financial incentives by deterring entry
16 of competitive carriers; two, BellSouth is in control
17 of the telecommunications network; and three, requiring
18 CLECs to seek remedies through a complaint process will
19 thwart competition.

20 DeltaCom also argues that without
21 performance measures and guarantees BellSouth is
22 unlikely to provide service to CLECs in the same manner
23 that it provides to itself, and that if BellSouth is
24 granted 271 approval, antibacksliding measures must be
25 in place to ensure the quality of service to CLECs.

1 on behalf of BellSouth.

2 According to DeltaCom, none of the
3 issues have mutually settled. I believe we're getting
4 some conflicting signals as to where we are in the
5 actual settlement process. Mr. Rozycki --

6 CHAIRMAN MALONE: That's immaterial.

7 MR. ROSS: As far as DeltaCom is
8 concerned, none of the issues have been settled.

9 CHAIRMAN MALONE: Mr. Baltimore?

10 MR. BALTIMORE: It's the complete set
11 of issues we have -- we're ready for a decision on
12 those. None of them have settled.

13 CHAIRMAN MALONE: Would you please
14 come forward and identify yourself and whom you
15 represent for the record and make your statement.

16 MR. BALTIMORE: For the record, I'm
17 Don Baltimore, local counsel for ITC DeltaCom, and with
18 me is Mr. Chris Rozycki of ITC DeltaCom.

19 CHAIRMAN MALONE: And your statement
20 with respect to the settlement of any issues?

21 MR. ROZYCKI: We have worked quite a
22 bit towards settling all these issues. We have --

23 CHAIRMAN MALONE: Are any of the
24 issues settled?

25 MR. ROZYCKI: Are any of the issues

1 DeltaCom points out that because the telecommunications
2 industry is currently transitioning to competition
3 these measurements are necessary.

4 Concerning the enforcement mechanisms,
5 although the Tier Two and Tier Three dollar amounts are
6 significant, DeltaCom maintains they are justified
7 because of BellSouth's market dominance. DeltaCom
8 attempts to dispel BellSouth's accusation that Tiers
9 Two and Three provide DeltaCom with a windfall by
10 recommending that BellSouth pay those amounts to the
11 State.

12 DeltaCom asserts that the TRA has
13 authority to order the use of monetary enforcement
14 mechanisms and award damages for poor performance.
15 DeltaCom bases its assertion on: One, the
16 Telecommunications Act of 1996 and the authority
17 provided therein to those who arbitrate interconnection
18 terms according to the 1996 Act; number two,
19 BellSouth's existing tariffs that were approved by this
20 Authority and contain late payment penalties and
21 interest; and, three, BellSouth currently offers
22 unconditional satisfaction guarantees, performance
23 guarantees, and service installation guarantees in its
24 access and retail tariffs.

25 Additionally, DeltaCom references

1 settled?

2 CHAIRMAN MALONE: I'm confused.
3 Mr. Baltimore just stood up and said that you were
4 ready for deliberation on all the issues, and then I
5 ask you if -- are any of the issues settled, and you
6 pause as though some of them might be.

7 MR. ROZYCKI: No, none of the issues
8 are settled. We had discussions with BellSouth. Those
9 discussions broke down because the settlement involved
10 a set of issues together that were linked and we could
11 not come to closure on that linked set of issues.

12 CHAIRMAN MALONE: No announcement of
13 settlement from the parties on any of the issues this
14 morning?

15 MR. BALTIMORE: That's correct,
16 Mr. Chairman.

17 CHAIRMAN MALONE: Thank you. We will
18 proceed.

19 Are there any comments or objections
20 from the Directors with proceeding toward
21 deliberations?

22 DIRECTOR GREER: None.

23 CHAIRMAN MALONE: Director Kyle?

24 DIRECTOR KYLE: Huh-uh. None.

25 CHAIRMAN MALONE: The first issue in

1 BellSouth's 271 application in Louisiana and the FCC's
2 recognition of the Louisiana Commission for taking
3 steps to develop performance measurements. DeltaCom
4 addresses Tennessee law on the matter by stating that
5 any Tennessee law that would prevent the TRA from
6 awarding damages is inapplicable in this context for
7 two reasons. First, the TRA is charged with
8 implementing federal law in this docket. Second,
9 DeltaCom is not asking for damages but merely
10 self-effectuating performance guarantees that would
11 compel BellSouth to waive charges or pay penalties to
12 the State when it fails to perform. BellSouth cited no
13 authority to the contrary.

14 As DeltaCom points out, current
15 BellSouth tariffs approved by the Authority contain
16 self-effectuating performance measures and guarantees.
17 Further, DeltaCom states that if the TRA has the
18 authority to approve monetary enforcement mechanisms
19 applicable to BellSouth's retail customers, then the
20 TRA has the Authority to approve monetary enforcement
21 mechanisms applicable to BellSouth's wholesale
22 operations.

23 DeltaCom states that the service
24 quality measurements, that is the SQMs, as proposed by
25 BellSouth are inadequate and not acceptable to all

1 CLECs. Specifically, DeltaCom complains that the SQMs
2 do not include bona fide request and coordinated
3 conversions, both of which are extremely important to
4 DeltaCom.

5 Additionally, DeltaCom states that
6 substantial portions of the BellSouth SQMs are still
7 under development. Nonetheless, DeltaCom suggests that
8 the TRA could combine the proposals of BellSouth and
9 itself. For example, the TRA could assure that the SQM
10 measurement and benchmarks are proper, add to the SQMs
11 the new measurements included in the DeltaCom proposal
12 and adopt the guarantees proposed by DeltaCom.

13 BellSouth proposes the SQMs as
14 attached to the direct testimony of David Coon.
15 BellSouth contends that they are sufficient for the
16 CLEC industry, including DeltaCom. Additionally,
17 BellSouth states that the SQMs as presented are
18 continually being revised based on the requirements of
19 the CLEC industry.

20 According to BellSouth, DeltaCom's
21 proposed performance guarantees are unnecessary and
22 Section 251 of the Act does not require such
23 guarantees. BellSouth also argues that these penalties
24 or liquidated damages are not appropriate for
25 arbitration and that the TRA lacks statutory authority

1 Numerous courts have held that state
2 commissions may impose performance guarantees in
3 interconnection agreements. In one such case in US
4 West Communications, Incorporated versus TCG Oregon,
5 the Court evaluated liquidated damages provision
6 included in an interconnection agreement between TCG
7 and US West. The Court stated that, quote, Although
8 the Act does not expressly provide for such damages,
9 neither does it categorically preclude such provisions
10 in an interconnection agreement so long as they are
11 reasonable and justified under the circumstances, close
12 quote. It is instructive and important to note that
13 the Oregon commission used a last best offer in
14 establishing the performance standards and liquidated
15 damages provisions in this case.

16 In this case BellSouth and DeltaCom
17 have presented the enforcement mechanisms issues for
18 arbitration by the Authority.

19 Pursuant to Sections 252(b)(4)(A) and
20 Section 252(c)(1) of the Act, the Authority may resolve
21 those issues brought before it and impose conditions on
22 the parties so long as the Authority's actions are
23 just, reasonable, and nondiscriminatory. The Act, the
24 FCC, and the DOJ have concluded that state commissions
25 have the authority where the parties have not agreed to

1 to adopt liquidated damages. In lieu of the proposed
2 monetary enforcement mechanisms, BellSouth points to
3 state law and federal -- excuse me -- points to state
4 law and state and federal commission procedures as
5 being adequate to address any breach of contract.

6 BellSouth states that it is aware of
7 its obligation under the Act to provide
8 nondiscriminatory access to CLECs, but that additional
9 incentives, such as monetary enforcement mechanisms,
10 are unnecessary. Nonetheless, as BellSouth witness
11 Dr. Taylor stated, with everything held constant, the
12 threat of a fine for noncompliance is an incentive for
13 a company to comply?

14 BellSouth states that the
15 self-effectuating performance measures it filed with
16 the FCC were proposed solely to address the concerns of
17 the FCC regarding Section 271 approval. That is, the
18 concerns of the FCC should be addressed in these
19 self-effectuating measures, not those of DeltaCom.
20 BellSouth also claims that the filing with the FCC is
21 just a draft and, therefore, cannot be placed before
22 this Authority for consideration. BellSouth also
23 argues that these measures should become effective at
24 the same time BellSouth is given 271 approval.

25 In evaluating BellSouth's arguments

1 the terms of agreement to impose enforcement mechanisms
2 as a vehicle to ensure that the telecommunications
3 market is irreversibly open to competition in
4 accordance with congress's intent.

5 Section 251 requires that the
6 provisions and interconnection agreements addressing
7 rates, terms and conditions must be just, reasonable,
8 and nondiscriminatory. In concluding that the
9 Authority may impose enforcement mechanisms under the
10 federal law, the Authority must apply a reasonableness
11 standard to evaluate the performance guarantees
12 proposed by DeltaCom. Thus, under federal law and
13 state law the Authority may impose enforcement
14 mechanisms so long as such mechanisms satisfy the
15 standards of being just, reasonable, and
16 nondiscriminatory as required by the Act.

17 DeltaCom argues convincingly that once
18 BellSouth receives 271 approval there will be no
19 incentive for BellSouth to provide services in a
20 competitively neutral manner. In this docket BellSouth
21 noted that as a prelude to its 271 application it has
22 filed and continues to update voluntary
23 self-effectuating enforcement measures -- that's
24 VSEEMs -- with the FCC. These measures include the
25 exact action being measured, the methodology for

1 against the Authority's potential imposition of
2 enforcement mechanisms, it is important to consider the
3 requirements of the Act. BellSouth contends that
4 DeltaCom's proposal on this issue calls for monetary
5 enforcement mechanisms that are unenforceable under
6 federal or state law and the Authority does not have
7 the power to impose penalties in arbitration.
8 Nonetheless, the Act requires the Authority to
9 arbitrate any issues set forth in the position and in
10 the response, according to Section 252(b)(4)(A).

11 The Department of Justice has spoken
12 on this issue and concluded that to be most effective
13 in preventing backsliding, such issues guarantees and
14 future performance -- guarantees of future performance
15 should be resolved in advance either in contracts
16 between BellSouth, its competitors, or through
17 regulatory proceedings, and that was stated in the
18 evaluation of the United States Department of Justice
19 Second Application by BellSouth Corporation for
20 provision of in-region interLATA services in Louisiana
21 CC Docket No. 98-121, dated August 19, 1998, on page
22 34. This language implies that in the absence of
23 voluntary action on the part of BellSouth, the state
24 commission should establish guidelines to ensure future
25 performance.

1 testing, whether the CLEC has received inferior
2 service, and the remedy procedure. All measurements
3 are to be provided to CLECs monthly. Not every
4 measurement, however, contains a specific benchmark.

5 Included with the VSEEMs are Tier One
6 and Tier Two enforcement mechanisms. Tier One is
7 referred to as liquidated damages and is payable to the
8 CLEC upon BellSouth's noncompliance with the
9 measurement. Tier Two is based on an aggregate of all
10 CLEC data and is an assessment paid to the state
11 regulatory agency or its designee when BellSouth fails
12 to meet a performance standard for three consecutive
13 months in a quarter.

14 Finally, VSEEMs contain an annual cap
15 for Tier One and Tier Two payments for the entire
16 BellSouth region of 120 million with a Tennessee cap of
17 13 million. BellSouth will calculate all measurements
18 using BellSouth-generated data. Although the
19 BellSouth -- although BellSouth and others may not
20 agree on the specifics of performance measures and
21 guarantees, it is evident from BellSouth submissions of
22 VSEEMs to the FCC that BellSouth, the FCC, and even
23 DeltaCom agree on the general concept that performance
24 measures and guarantees are necessary.

25 Section 251(c) of the Act places

1 additional obligations on incumbent local carriers.
2 These obligations include: One, interconnection that
3 is at least in quality to that provided by the local
4 exchange carrier to itself or any subsidiary affiliate;
5 number two, the duty to provide unbundled access in a
6 nondiscriminatory manner; three, the duty to offer
7 nondiscriminatory resale; and, four, the duty to
8 provide collocation on a nondiscriminatory basis.

9 Performance measures provide the
10 necessary information to determine if BellSouth is
11 complying with these requirements, and enforcement
12 mechanisms encourage BellSouth to meet the requirements
13 of Section 251.

14 Based on the proceeding, I find the
15 Arbitrators should adopt performance measures with
16 standards and benchmarks and enforcement mechanisms.
17 These measurement mechanisms should remain in effect
18 until this Authority conducts a generic proceeding to
19 adopt permanent performance measurements with standards
20 and enforcement mechanisms applicable to all CLECs.

21 Additionally, the data used to
22 calculate performance measurements should be reported
23 on a Tennessee basis to reflect BellSouth's performance
24 in this state. While the SQMs of BellSouth are not
25 100 percent complete, the methods of collecting data

1 CLECs.

2 Finally, failure by BellSouth to meet
3 a standard and/or a benchmark may occur through no
4 fault of BellSouth. Therefore, I find that a procedure
5 by which BellSouth may request that this Authority
6 waive an enforcement mechanism is needed. Establishing
7 this procedure in the interconnection agreement will
8 eliminate confusion in the future should BellSouth seek
9 such a waiver.

10 During the hearing Mr. Varner made it
11 clear that BellSouth did not feel that either the Texas
12 plan nor the VSEEMs that BellSouth is proposing to the
13 FCC were appropriate for use in the interconnection
14 agreement between BellSouth and DeltaCom. During the
15 hearing, I implored Mr. Varner to present to the
16 Authority something that would be acceptable to
17 BellSouth. He plainly stated that no plan involving
18 enforcement mechanisms would be acceptable to BellSouth
19 without 271 approval.

20 I further implored Mr. Varner to
21 negotiate on this point, but there was no positive
22 response. Therefore, in my motion that follows I have
23 crafted a plan that I believe to be just, reasonable,
24 and nondiscriminatory, as required by federal law.
25 I have a copy of the formal motion. I

1 and measuring is complete for many of the measurements.

2 If the Authority adopts the proposed
3 SQMs, the lead time for implementation should be
4 shorter than if new measurements are adopted which have
5 to be developed from scratch. It should not take any
6 longer to implement those measurements and the SQM
7 noted under development than it would to take -- to
8 implement another type of measurement in the Texas
9 plan.

10 I find that the format of BellSouth's
11 proposal to the FCC is appropriate for use in the
12 interconnection agreement resulting from this
13 arbitration. I further find that the reports and
14 underlying data used to prepare the reports should be
15 made available to DeltaCom. During the hearing in both
16 DeltaCom and ICG, there was no evidence presented
17 regarding a method of data collection or for not using
18 BellSouth data. Thus, I find that BellSouth data
19 should be used for all measurements and calculations
20 and that performance reports be made available to the
21 CLEC through an electronic medium on a monthly basis.

22 Although BellSouth proposes the
23 adoption of SQMs, they provide no evidence
24 demonstrating that services are or will be provided in
25 the same manner or at the same quality that BellSouth

1 want to give it to each of my Directors so you can
2 follow with it. I will give a copy to the court
3 reporter.

4 Based on the record and my comments, I
5 move that the Arbitrators:

6 (A) Rule that performance measurements
7 with standards and/or benchmarks and enforcement
8 mechanisms will be adopted by the Arbitrators in this
9 proceeding. Additionally, these should be treated as
10 proxy measurements and enforcement mechanisms. Should
11 this Authority adopt generic measurements and
12 enforcement mechanisms in another proceeding, those
13 will replace the proxies adopted in this proceeding.

14 (B) Adopt BellSouth's SQMs with
15 associated definitions and business rules for the
16 purpose of measurement along with the following
17 additions, deletions, and revisions. For the following
18 additions, the definitions and business rules
19 associated with the Texas plan measurement should be
20 adopted.

21 And on your sheet you will see I have
22 listed 30 of them, and you may want to take a few
23 minutes to look at them, as opposed to me reading each
24 and every one of them as we go through, because this
25 has been lengthy enough as it is and doesn't need to be

1 provides to itself. That is because the SQMs lack a
2 standard or benchmark with enforcement mechanisms.
3 Even though BellSouth's VSEEMs propose several testing
4 methodologies for this purpose, specific tests are not
5 related to specific performance measures.

6 Without a standard or benchmark, there
7 is no way to determine when enforcement measures should
8 apply. Without enforcement mechanisms, there is no
9 incentive for BellSouth to meet the standard or
10 benchmark and to provide nondiscriminatory access.

11 BellSouth's adoption of performance
12 measures and guarantees in an interconnection agreement
13 is certainly a step towards ensuring that BellSouth
14 opens the local market to telecommunications providers
15 in a competitively neutral manner. Nonetheless, this
16 step may fall short of what this Authority would accept
17 prior to BellSouth receiving 271 approval.

18 As BellSouth argues, performance
19 measures should be applied consistently between all
20 CLECs. Thus, prior to obtaining 271 approval,
21 BellSouth should have in place a performance
22 measurement plan on which all interested CLECs have had
23 an opportunity for comment. Ultimately this Authority
24 should adopt a set of performance measures with
25 enforcement mechanisms that are applicable to all

1 dragged out any further. But there are 30 additions
2 that need to be covered.

3 (The additions as documented
4 are as follows:)

- 5 (1) Remove the SQM on firm order
6 confirmation timeliness;
- 7 (2) Add percent firm order
8 confirmation returned within specified time (Texas Plan
9 Measurement No. 5);
- 10 (3) Add percent mechanized rejects
11 returned within one hour of receipt of reject in LASR
12 (Texas Plan Measurement No. 10);
- 13 (4) Add percent of accurate and
14 complete formatted mechanized bills (Texas Plan
15 Measurement No. 15);
- 16 (5) Add billing completeness (Texas
17 Plan Measurement No. 17);
- 18 (6) Add unbillable usage (Texas Plan
19 Measurement No. 20);
- 20 (7) Add percent busy in the local
21 service center (LSC) (Texas Plan Measurement No. 23);
- 22 (8) Add percent busy in the local
23 operations center (LOC) (Texas Plan Measurement
24 No. 26);
- 25 (9) Add percent installations

1 completed within industry guidelines for LNP with loop
 2 (Texas Plan Measurement No. 56.1);
 3 (10) Add average response time for
 4 loop makeup information (Texas Plan Measurement
 5 No. 57);
 6 (11) Add directory assistance average
 7 speed of answer (Texas Plan Measurement No. 80);
 8 (12) Add operator services speed of
 9 answer (Texas Plan Measurement No. 82);
 10 (13) Add percentage of LNP only due
 11 dates within industry guidelines (Texas Plan
 12 Measurement No. 91);
 13 (14) Add percentage of time the old
 14 service provider releases the subscription prior to the
 15 expiration of the second nine-hour (T2) timer (Texas
 16 Plan Measurement No. 92);
 17 (15) Add percentage of customer
 18 account restructured prior to LNP due date (Texas Plan
 19 Measurement No. 93);
 20 (16) Add percentage premature
 21 disconnects for LNP orders (Texas Plan Measurement
 22 No. 96);
 23 (17) Add average days required to
 24 process a request (Texas Plan Measurement No. 106);
 25 (18) Add cageless collocation to the

1 "BellSouth will make performance reports available to
 2 DeltaCom on a monthly basis. The reports will contain
 3 information collected in each performance category and
 4 will be available to DeltaCom through some electronic
 5 medium. BellSouth will also provide electronic access
 6 to the raw data underlying the performance
 7 measurements."
 8 (F) Order final best offers from each
 9 party for the following five issues:
 10 (1) The electronic medium to be used
 11 in providing DeltaCom with access to the performance
 12 report and underlying data.
 13 (2) The process to be utilized to
 14 determine BellSouth's compliance or noncompliance with
 15 the standard and/or benchmark.
 16 (3) Standards and/or benchmarks for
 17 each measurement. Standards must be specific and
 18 measurable. Parity or retail analog should include the
 19 specific service to which parity will be measured or
 20 the retail analog companion. Additionally, a
 21 methodology should be provided for defining or
 22 calculating the performance standard and/or benchmark
 23 for each measure, such as the method contained in the
 24 voluntary self-effectuating enforcement mechanisms for
 25 each measure.

1 level of disaggregation on BST's SQM
 2 "collocation/average response time";
 3 (19) Add cageless collocation to the
 4 level of disaggregation on BST's SQM
 5 "collocation/average arrangement time";
 6 (20) Add cageless collocation to the
 7 level of disaggregation on BST's SQM
 8 "collocation/percent of due dates missed";
 9 (21) Add percentage of updates
 10 completed into the DA database within 72 hours for
 11 facility-based CLECs (Texas Plan Measurement No. 110);
 12 (22) Add average update interval for
 13 DA database for facility-based CLECs (Texas Plan
 14 Measurement No. 111);
 15 (23) Add percentage DA database
 16 accuracy for manual updates (Texas Plan Measurement
 17 No. 112);
 18 (24) Add percentage of premature
 19 disconnects (coordinated cutovers) (Texas Plan
 20 Measurement No. 114);
 21 (25) Add percentage of missed
 22 mechanized INP conversions (Texas Plan Measurement
 23 No. 116);
 24 (26) Add percent NXXs loaded and
 25 tested prior to the LERG effective date (Texas Plan

1 (4) Enforcement mechanisms. These
 2 must be specific and should provide the number of
 3 occurrences at which the enforcement mechanisms applies
 4 at the threshold and the specific enforcement mechanism
 5 once the threshold is met. Enforcement mechanisms
 6 should be categorized by tiers structured similar to
 7 those contained in BellSouth's VSEEMs and should
 8 include appropriate caps.
 9 (5) Circumstances which would warrant
 10 a waiver request from BellSouth and the time frame for
 11 submitting such a waiver request.
 12 DIRECTOR KYLE: Vote yes.
 13 CHAIRMAN MALONE: I would like to take
 14 a few minutes break to see if the motion reconciles
 15 with my notes.
 16 (Recess taken at 9:41 till
 17 10:00 a.m.)
 18 CHAIRMAN MALONE: I will make the
 19 result of the motion unanimous.
 20 DIRECTOR GREER: Thank you.
 21 CHAIRMAN MALONE: The next issues,
 22 Issues 2, 2(A), 4, and 6(A), have been combined as
 23 follows: Pursuant to this definition should BellSouth
 24 be required to provide the following, and, if so, under
 25 what conditions and at what rates: One, operational

1 Measurement No. 117);
 2 (27) Add average delay days for NXX
 3 loading and testing (Texas Plan Measurement No. 118);
 4 (28) Add mean time to repair (Texas
 5 Plan Measurement No. 119);
 6 (29) Add percentage of requests
 7 processed within 30 business days (Texas Plan
 8 Measurement No. 120); and
 9 (30) Add percentage of quotes provided
 10 for authorized BFRs/special requests within X (10, 30,
 11 90) days (Texas Plan Measurement No. 121).
 12 (Discussion of motion
 13 resumes.)
 14 (C) Require all measurements at the
 15 state level, meaning the Tennessee level.
 16 (D) Require BellSouth to provide a
 17 reasonable commitment date for when the measurements
 18 will be available for the SQMs where it is noted that
 19 the level of disaggregation is under development.
 20 Additionally, BellSouth should provide a reasonable
 21 commitment date for when the additional measures listed
 22 above in (B)(2) through (B)(30) will be available.
 23 (E) Approve the use of BellSouth data
 24 for all measurements and calculations as in BellSouth's
 25 proposal in the VSEEMs. The Arbitrators should order,

1 support systems; two, UNEs; and, three, unbundled loop
 2 using IDLC technology?
 3 It appears to me that each of these
 4 issues are issues that have been thoroughly presented
 5 by the parties in their testimony, but also are issues
 6 that have thoroughly been commented on and ruled upon
 7 by the Directors in other dockets. And so I think it's
 8 unnecessary to traverse the testimony here, and suffice
 9 it to say, that I think the rulings that the Directors
 10 have made previously on each of these three issues
 11 should be adopted here today.
 12 And so I would move that the
 13 Arbitrators adopt the underlying methodology and rates
 14 for operations support systems and unbundled network
 15 elements as ordered in Docket 97-01262. Until such
 16 time that the final rates are adopted in said docket,
 17 the existing proxy rates from the AT&T-BellSouth
 18 arbitration should continue to be used. The final
 19 rates resulting from the permanent price docket should
 20 then be applied retroactively to the date of the new
 21 agreement resulting in a true up.
 22 Finally, I think the Arbitrators
 23 should require BellSouth to provide IDLC to DeltaCom in
 24 serving areas where IDLC is available to BellSouth
 25 consistent with the TRA's decision in Docket 97-01262.

1 DIRECTOR KYLE: Vote yes.
 2 DIRECTOR GREER: I agree.
 3 CHAIRMAN MALONE: The next issue is
 4 2(B)(ii). Until the FCC makes the decision regarding
 5 UNEs's and UNE combinations should BellSouth be
 6 required to continue providing those UNEs in
 7 combinations that it is currently providing to ITC
 8 DeltaCom under the interconnection agreement previously
 9 approved by this Commission?
 10 Issue 2(B)(iii)(a), should BellSouth
 11 be required to provide ITC DeltaCom the following
 12 combinations: One, loop port combination; two, loop
 13 transport UNE combinations; three, loop UNE connected
 14 to access transports. (b) If so, at what rates?
 15 These issues have been combined by
 16 agreement of the parties and presented in such manner
 17 in the matrix and in the testimony. I would move that
 18 the Arbitrators adopt the resolution they reached in
 19 the ICG-BellSouth-DeltaCom Issue No. 4, which was the
 20 same issue as is presented in these combined issues.
 21 DIRECTOR GREER: I agree.
 22 DIRECTOR KYLE: Vote yes.
 23 CHAIRMAN MALONE: The next issue,
 24 Issue 3(1), Should BellSouth be required to pay
 25 reciprocal compensation to ITC DeltaCom for all calls

1 permanent prices Docket No. 97-01262 with true up
 2 retroactive to the effective date of the new agreement.
 3 Secondly, that we adopt the two proxy
 4 rates for reciprocal compensation based on the type of
 5 connection, those being end office switched reciprocal
 6 compensation rate and the tandem switch compensation
 7 rate. The end office reciprocal compensation rate
 8 would equal the sum of the rates for local end office
 9 switching and common transport. The tandem reciprocal
 10 compensation rate would equal the sum of the rates for
 11 a tandem switching at the tandem common transport
 12 between the tandem and the end office -- and end office
 13 switching.
 14 And let me state that on the record as
 15 presented DeltaCom did not carry the burden in
 16 demonstrating that its network and the configuration of
 17 its network provided the tandem functions. Should
 18 DeltaCom be capable of carrying the burden on that
 19 particular point at a later time, it may be appropriate
 20 for DeltaCom to also receive the tandem rate for
 21 reciprocal compensation when the tandem function is
 22 utilized.
 23 DIRECTOR GREER: I agree. I will
 24 second your motion.
 25 DIRECTOR KYLE: Well, I'm convinced

1 that are properly routed over local trunks, including
 2 calls to information service providers?
 3 I would move that that -- this is an
 4 issue that in several cases we've heard the testimony
 5 and we've heard the testimony of BellSouth on a number
 6 of occasions and including in this docket and the ICG
 7 Telecom docket, which were combined, likewise in the
 8 Time-Warner arbitration. And so I would move that this
 9 issue be resolved here consistent with the manner in
 10 which it was resolved in the Time-Warner arbitration.
 11 DIRECTOR GREER: I agree.
 12 DIRECTOR KYLE: Vote yes.
 13 CHAIRMAN MALONE: The next issue is
 14 3(2). What should be the rate for reciprocal
 15 compensation per minute of use, and how should it be
 16 applied?
 17 Section 251(b)(5) of the '96 Act
 18 states that all telecommunications carriers have the
 19 duty to establish reciprocal compensation arrangements
 20 for the transporting and termination of
 21 telecommunications.
 22 In addition, Section 252(d)(2) of the
 23 Act specifically stipulates that for purposes of
 24 compliance an incumbent local exchange carrier --
 25 compliance with 251(b)(5) a state commission shall not

1 that the state-of-the-art least-cost networks being
 2 installed by CLECs are capable of providing similar
 3 functionalities and results to BellSouth tandem. Also
 4 I believe that DeltaCom intends on installing their
 5 switch and serving the same geographical area as Bell's
 6 tandem.
 7 Therefore, consistent with the FCC
 8 local competition order, I would be in favor that
 9 DeltaCom be entitled to receive the tandem switching
 10 rate element as part of their reciprocal compensation
 11 rate. This encourages state-of-the-art investment by
 12 CLECs and promoting competition in Tennessee, and
 13 that's the message I want to send for technology
 14 development and deployment. That will be my position
 15 on this case based on the record, experience, and
 16 public interest.
 17 CHAIRMAN MALONE: The next issue is
 18 Issue 4(A). Should BellSouth provide cageless
 19 collocation to ITC DeltaCom 30 days after a firm order
 20 is placed?
 21 ITC DeltaCom has requested that
 22 BellSouth commit to a 30-day turnaround for cageless
 23 collocation. While such a provisioning interval is
 24 significantly shorter than for walled or caged
 25 collocation, ITC DeltaCom contends that it is

1 consider the terms and conditions for reciprocal
 2 compensation to be just and reasonable unless such
 3 terms contain both, one, provide for the mutual and
 4 reciprocal recovery by each carrier of cost associated
 5 with the transport and termination on each carrier's
 6 network facilities of calls that originate on the
 7 network facilities of the other carrier, and, two, to
 8 determine such costs on the basis of a reasonable
 9 approximation of the additional costs for terminating
 10 such calls.
 11 The FCC has acknowledged that
 12 regardless of the payment arrangement LECs incur costs
 13 when delivering traffic to an ISP that originates on
 14 another LEC's network. On the other hand, the FCC
 15 determined that states electing to set rates through a
 16 cost study must use the forward-looking economic
 17 cost-based methodology to deal with the reasonable
 18 approximation of the additional costs.
 19 I've concluded that Mr. Varner's
 20 testimony with respect to the manner in which DeltaCom
 21 approximated that cost is correct. It was not
 22 cost-based, as it had a declining scale, if you will.
 23 So I would move that the proxy rates set forth in the
 24 second and final order of arbitration awards in Docket
 25 No. 96-01152 and 96-01271 pending final order in

1 reasonable.
 2 BellSouth on the other hand, contends
 3 that they are not required by the FCC's advanced
 4 services order to provide cageless collocation within
 5 30 days. BellSouth stated that because space
 6 preparation and network infrastructure work must be
 7 completed regardless of the type of arrangements
 8 selected, the dates and intervals that it put forward
 9 were more than reasonable.
 10 In order to meet the conditions of the
 11 Telecommunications Act of '96, incumbent LECs have the
 12 duty to provide rates, terms, and conditions that are
 13 just and reasonable and nondiscriminatory for physical
 14 collocation of equipment necessary for interconnection
 15 or access to unbundled network elements at the premises
 16 of the local exchange carrier.
 17 In some circumstances, based on the
 18 record, it would appear that DeltaCom's request for 30
 19 days may not be unreasonable. On the other hand, there
 20 are scenarios of which were -- some of which were
 21 presented at the hearing in which appeared at 90 days
 22 it may take some extraordinary action and may, in fact,
 23 be impossible.
 24 And based upon those issues, I think
 25 it appropriate for the parties to submit final best

1 offers recognizing the validity of both positions and
 2 that the best way to resolve this is probably with a
 3 compromise or at least an acknowledgement on DeltaCom's
 4 part that there are occasions where 30 days would be
 5 not enough time and a compromise on BellSouth's part
 6 that there are occasions in which provisions -- the
 7 provisioning can occur within the 30 days as requested.

8 DIRECTOR KYLE: I'm very well aware of
 9 what the FCC has stated regarding cageless and very
 10 much aware of the US Court's decision and the fact that
 11 Bell has already agreed to provide and that this
 12 particular issue is the time factor at this time, and I
 13 am also in favor of the parties providing final and
 14 best offer.

15 DIRECTOR GREER: I agree with the
 16 Chairman's motion.

17 CHAIRMAN MALONE: Issue 5, should the
 18 parties continue operating under existing local
 19 interconnection arrangements?

20 DIRECTOR GREER: BellSouth states that
 21 DeltaCom provided no real indication as to what it is
 22 seeking by adding this issue in its position and failed
 23 to provide any proposed contract language in connection
 24 with this issue.

25 Contrary to BellSouth's claim,

1 compatible loops, two-wire SL1 loops, two-wire SL2
 2 loops, or two-wire SL2 loop order coordination for
 3 specified conversion time with this proceeding. I
 4 would move that the Arbitrators adopt the proxy rates
 5 until the completion of the permanent price proceedings
 6 with a true up retroactive to the expiration of the
 7 current agreement or the beginning of the new
 8 agreement, which are the same.

9 DIRECTOR GREER: Second.

10 DIRECTOR KYLE: Vote yes.

11 CHAIRMAN MALONE: With respect to
 12 nonrecurring rates for SL1, SL2, and order coordination
 13 with a specified conversion time, DeltaCom presented
 14 nonrecurring rates for SL1, SL2, and order coordination
 15 for specified conversion time. DeltaCom contends that
 16 its proposed rates result from adjusting certain inputs
 17 in the BellSouth cost calculator. There is, however,
 18 upon my review, no detail provided to explain exactly
 19 how the inputs were adjusted by DeltaCom.

20 Therefore, I would move with respect
 21 to the nonrecurring rates on SL1, SL2, and order
 22 coordination with a specified conversion time that the
 23 Arbitrators adopt BellSouth's position and order that
 24 the nonrecurring rates in the current agreement be used
 25 with a true up retroactive to the expiration date of

1 DeltaCom states that this issue is set forth in
 2 Attachment 3 of DeltaCom's petition and that concerns
 3 regarding this issue are set forth in Exhibit B of the
 4 petition. DeltaCom, however, claims that it does not
 5 identify or elaborate on any specific concern or issue.
 6 Instead DeltaCom only states that it generally proposes
 7 the interconnection language in the existing agreement
 8 as a solution to Issue 5 and that Exhibit B lists the
 9 proposed language.

10 Upon review of Exhibit B, it appears
 11 that there are 19 concerns referencing Issue 5. For
 12 each of the 19 concerns DeltaCom's position varies, but
 13 in the majority DeltaCom wants the language as
 14 contained in the current interconnection agreement.

15 Therefore, I would like to move that
 16 the Arbitrators should rule on the concerns listed by
 17 DeltaCom in Exhibit B because some appear to be
 18 fundamental to completion of an interconnection
 19 agreement. The record, however, is insufficient to
 20 formulate a sound recommendation. I would like to move
 21 to order final best offers on each of the 19 concerns
 22 listed for Issue 5 in Exhibit B of DeltaCom's petition
 23 for arbitration.

24 DIRECTOR KYLE: I agree. Vote yes.

25 CHAIRMAN MALONE: Make it unanimous.

1 the current agreement.

2 DIRECTOR KYLE: Vote yes.

3 DIRECTOR GREER: Yes.

4 CHAIRMAN MALONE: As concerning the
 5 final grouping, which would be the ADSL/HDSL
 6 nonrecurring rates, it appears that the best
 7 presentation of a thorough examination of the issues
 8 here is, in fact, in the permanent prices docket. I
 9 think it would be not prudent to attempt to resolve
 10 this issue on the record in the DeltaCom docket.

11 Therefore, I would move that the
 12 Arbitrators again adopt BellSouth's proposal that the
 13 nonrecurring rates in the current interconnection
 14 agreement be applied for two-wire ADSL, two-wire HDSL,
 15 and four-wire HDSL until the Authority concludes the
 16 permanent prices docket with a true up retroactive to
 17 the expiration date of the current agreement.

18 DIRECTOR KYLE: Vote yes.

19 DIRECTOR GREER: I agree.

20 CHAIRMAN MALONE: The next issue is
 21 Issue 6(B). What should be the appropriate recurring
 22 and nonrecurring charges for cageless and shared
 23 collocation in light of the recent FCC advance
 24 services Order Number FCC 99-48 issued March 31, 1999,
 25 in Docket No. CC 98-147.

1 Issue 6(B), What are the appropriate
 2 recurring and nonrecurring rates and charges for one,
 3 two-wire ADSL/HDSL compatible loops; (B) four-wire HDSL
 4 compatible loops; (C) two-wire SL1 loops; (D) two-wire
 5 SL2 loops; or (E) two-wire SL2 loop order coordination
 6 for specified conversion time?

7 Let me state -- let me not place my
 8 notes into the record when reading the issue. On (B)
 9 the issue as set forth by the parties actually says
 10 four-wire ADSL/HDSL compatible loops.

11 In addressing these issues, it's
 12 probably more orderly to break them up into three
 13 categories: Recurring rates; nonrecurring rates for
 14 SL1 and SL2 and order coordination with the specified
 15 conversion time; and ADSL/HDSL nonrecurring rates.

16 With respect to the first grouping,
 17 recurring rates, DeltaCom provides testimony and rates
 18 for nonrecurring rates only. Other than the joint
 19 matrix in which DeltaCom requests that rates be
 20 FCC-compliant TELRIC rates, there is no record or
 21 evidence presented for recurring rates.

22 Due to the inadequacy of the
 23 evidentiary record in this regard, I would move that
 24 the Arbitrators not establish recurring rates for
 25 two-wire ADSL/HDSL compatible loops, four-wire HDSL

1 DIRECTOR GREER: BellSouth's argument
 2 that the rates found in the current interconnection
 3 agreement should be used until the Authority issues a
 4 final order in the generic UNE cost proceeding is
 5 somewhat flawed in that neither the current agreement
 6 nor the generic UNE cost proceeding contains rates that
 7 exactly cover the definition of virtual collocation.
 8 The rates for physical collocation in either of the
 9 documents would have to be prorated somehow to be used
 10 for shared collocation.

11 DeltaCom states that they will be
 12 using cageless collocation, and then until rates for
 13 cageless collocation can be produced, the existing rate
 14 for virtual collocation with adjustments to remove
 15 maintenance costs should be used for cageless
 16 collocation.

17 After reviewing the rates in FCC
 18 Tariff No. 1, it appears that the rates for virtual
 19 collocation have been established on a per square foot
 20 basis for floor space and on a per AMP basis for power.
 21 Maintenance of the collocator's equipment, when
 22 necessary, is billed separately from the actual
 23 collocation fees using FCC Tariff No. 1, Section
 24 13.3.1.

25 Therefore, the virtual collocation

1 rates listed in FCC Tariff No. 1, Section 20.31 are
2 appropriate to use as interim rates as they do not
3 contain inappropriate maintenance charges. BellSouth's
4 proposed rates for point of termination bays and fiber
5 cross-connects are acceptable for use by DeltaCom if
6 they so choose. The cost methodology used in these
7 cost studies is consistent with the costing methodology
8 as well as the cost of money, depreciation, lives, and
9 shared and common factors ordered by the Authority in
10 Docket No. 97-01262.

11 Therefore, I move that until a
12 separate proceeding can be concluded by the Tennessee
13 Regulatory Authority, rates for virtual collocation
14 should be utilized for cageless collocation and the
15 rates for physical collocation with appropriate
16 prorations for shared collocation is ordered in FCC
17 Docket No. 98-147, paragraph No. 41. I further move to
18 adopt BellSouth's proposed rates for point of
19 termination bays for fiber cross-connects.

20 DIRECTOR KYLE: Vote yes.
21 CHAIRMAN MALONE: Make it unanimous.
22 The next issue is Issue 7(B)(4).
23 Which party should be required to pay for the percent
24 local usage-percent interstate usage audit in the event
25 such audit reveals that either party was found to have

1 overstated the PLU or PIU by 20 percentage points or
2 more?

3 DeltaCom witness Rozycki asserts that
4 the requesting party, regardless of the outcome, should
5 pay for the audit. BellSouth proposes that the party
6 requesting an audit should pay for it if no substantial
7 errors are found. If either party is found to have
8 overstated the PLU or the PIU by 20 percent, however,
9 BellSouth contends that the party in error should be
10 required to pay for the cost of conducting the audit.

11 Since the PIU and PLU percentages are
12 important factors for purposes of billing, it is
13 important that the factors provided by each party are
14 correct. Both parties recognize this importance by
15 agreeing that they should have audit rights to make
16 sure that the reported usage numbers are correct.

17 Therefore, I would move that the
18 Arbitrators adopt the language proposed by DeltaCom and
19 the supplemental language proposed by BellSouth in
20 Attachment 3, Section 2.0, and that it would read as
21 follows: Thirty days written notice each party must
22 provide the other the ability and opportunity to
23 conduct an annual audit to ensure the proper billing of
24 traffic. BellSouth and ITC DeltaCom shall retain
25 records of call detail for a minimum of nine months

1 from which a PLU can be ascertained. The audit shall
2 be accomplished during normal business hours at an
3 office designated by the party being audited. Audit
4 requests shall not be submitted more frequently than
5 one time per calendar year. Audits shall be performed
6 by a mutually acceptable independent auditor paid for
7 by the party requesting the audit.

8 If as a result of an audit either
9 party is found to have overstated the PLU and/or PIU by
10 20 percentage points or more, that party shall
11 reimburse the auditing party for the cost of the audit.
12 The PLU shall be adjusted based upon the audit results
13 and shall apply to the usage for the quarter the audit
14 was completed, the usage for the quarter prior to the
15 completion of the audit, and to the usage for the two
16 quarters following the completion of the audit.

17 DIRECTOR KYLE: Vote yes.
18 DIRECTOR GREER: I agree.
19 CHAIRMAN MALONE: The next issue is
20 Issue 8(B), whether the losing party to an enforcement
21 proceeding or proceeding for breach of the
22 interconnection agreement should be required to pay the
23 cost of such litigation.

24 It would appear that while parties may
25 agree to such a requirement, that it would be both

1 inappropriate and not prudent for the Arbitrators to
2 force such an agreement upon the parties. I would so
3 move.

4 DIRECTOR KYLE: Of course, I believe
5 in following the Tennessee law that such is only --
6 attorney fees are only awarded if it's statutory or by
7 contract agreement.

8 DIRECTOR GREER: As a Director, I'm
9 allowed to make decisions according to my personal
10 experiences as well as the evidence presented by the
11 parties. Throughout my business career I have seen too
12 many instances where frivolous lawsuits have been filed
13 because the complainant had nothing at risk. There is
14 nothing in this docket that convinces me on a practical
15 basis that loser pays is not a viable position. I am a
16 firm believer in the loser pays system, and, thus,
17 support DeltaCom's proposal. I vote no.

18 CHAIRMAN MALONE: Then that issue --
19 is it two-to-one, Director Kyle?

20 DIRECTOR KYLE: That's right. I was
21 following law, contractor statute.

22 CHAIRMAN MALONE: Were any of the
23 lawsuits defined as frivolous filed by you, Director
24 Greer?

25 DIRECTOR GREER: Believe it or not, I

1 have never filed a frivolous lawsuit against anyone.

2 CHAIRMAN MALONE: That supports my
3 position on the issue.

4 Issue 8(E), whether language covering
5 tax liability should be included in the interconnection
6 agreement, and, if so, should that language simply
7 state that each party is responsible for its own tax
8 liability?

9 Is there a motion?

10 DIRECTOR GREER: Yes. Simply, I would
11 like to move that the parties submit final and best
12 offers for language that clearly and concisely sets
13 forth the tax liabilities of the parties to the
14 agreement.

15 DIRECTOR KYLE: At this time I would
16 agree with that statement, that they present final and
17 best offers.

18 CHAIRMAN MALONE: I'll agree.

19 The last and final issue, Issue 8(F),
20 whether BellSouth should be required to compensate
21 ITC DeltaCom for breach of material terms of the
22 contract.

23 Is there a motion?

24 (No response.)

25 CHAIRMAN MALONE: Having reviewed

1 carefully the respective positions of the parties to
2 make sure I understood their positions, I think it
3 problematic to have the sentence in the clause
4 presented with respect to the \$100,000 included or
5 ordered to be included. If that sentence is stricken,
6 then all other remedies provided in that section are
7 remedies that are freely available to any party at any
8 time ever. So I find no justification for the contract
9 at all. I think it at that point would be superfluous.

10 I move that the Arbitrators disregard
11 the language presented by DeltaCom in Issue 8(F) and
12 not order that it be placed into the interconnection
13 agreement.

14 DIRECTOR GREER: I agree.

15 DIRECTOR KYLE: I agree.

16 CHAIRMAN MALONE: We have during the
17 deliberations requested final best offers on a number
18 of issues in order to move things speedily along and
19 not needlessly delay the effectuation of a final
20 interconnection agreement. It would seem to me that --
21 and also given the -- given the passage of time since
22 the filing of this arbitration and the extensive
23 negotiations both before and after the hearing that a
24 request for final best offers 30 days from receipt of
25 the transcript is not unreasonable or too burdensome.

1 Any objections from the parties?
 2 MR. ROSS: Mr. Chairman, Directors,
 3 certainly as to the I believe all the best and finals,
 4 with the exception of performance measurements I think
 5 are straightforward and I believe we can easy do within
 6 30 days. I hesitate to commit as to the performance
 7 measurements because I believe there was a lot that was
 8 discussed, and I have not had a chance to look at the
 9 actual written five areas where we have to do best and
 10 finals.
 11 And particularly with the time
 12 commitments, I believe one of the things we are
 13 supposed to do is to give the TRA an indication as to
 14 when we can comply. I've got to get the 30 or 15
 15 however -- 19 additions and changes that the Authority
 16 has ordered to our folks to take a look at. It's going
 17 to take a little while, I think, to get a good faith
 18 estimate as to how long it will take to comply with
 19 those modifications.
 20 What I would suggest if we possibly
 21 could have 60 days as to Issue 1(A), and the others
 22 the -- the other best and finals 30 days should be, I
 23 think, sufficient.
 24 CHAIRMAN MALONE: Any comments from
 25 DeltaCom?

1 recognizing the reality, and, you know, 45 certainly
 2 would be better than 30. Sixty would be ideal, but,
 3 you know, I understand.
 4 CHAIRMAN MALONE: Then I would move
 5 that it's the 45 days. You know, we've had occasions
 6 where if the shoe was on the other foot, Mr. Ross, you
 7 would like speed. And I think 45 days, given the
 8 length of time these issues have been on the table, is
 9 a reasonable amount of time.
 10 DIRECTOR GREER: I agree with the 45
 11 days and would prefer 30 if they could make it.
 12 CHAIRMAN MALONE: Are there any other
 13 matters the parties wish to bring before the
 14 Arbitrators at this time?
 15 MR. BALTIMORE: No, Mr. Chairman.
 16 CHAIRMAN MALONE: Other comments or
 17 items by the Arbitrators?
 18 (No response.)
 19 CHAIRMAN MALONE: Then this
 20 arbitration hearing is adjourned.
 21 (Proceedings concluded at
 22 10:35 a.m.)
 23
 24
 25

1 And I would -- I would -- I would be
 2 of the opinion that given the length of time this
 3 discussion has been going on and our familiarity with
 4 these issues that final best offers be made within 30
 5 days from the filing of the -- within 30 days of the
 6 filing of the transcript with the Authority.
 7 It's your motion, Director Greer, with
 8 respect to the performance measurements.
 9 DIRECTOR GREER: Mr. Baltimore, would
 10 you comment on his comments concerning the performance
 11 measurements issue? I mean, I -- I will not comment at
 12 this point.
 13 MR. BALTIMORE: We'll accept the
 14 60 days, if that's the Authority's decision.
 15 DIRECTOR KYLE: I believe it's fair
 16 what he has proposed on 60 days on 1(A) and 30 on the
 17 other. I think that's only fair.
 18 DIRECTOR GREER: Well, Mr. Chairman
 19 and Director Kyle, since they both agreed, I guess it's
 20 okay. I would like to have had them a little sooner.
 21 I realize it's the first time you've seen this list,
 22 and I will grant you that. Although, it's not --
 23 shouldn't come as a total surprise that the Texas plan
 24 was under consideration or parts of it were under
 25 consideration during the deliberations and during the

1 REPORTER'S CERTIFICATE
 2
 3 STATE OF TENNESSEE)
 4 COUNTY OF DAVIDSON)
 5 I, Christina Meza, Registered Professional
 6 Reporter, and Notary Public for the State of Tennessee
 7 at Large,
 8 DO HEREBY CERTIFY that the foregoing
 9 proceedings were taken at the time and place set forth
 10 in the caption thereof; that the proceedings were
 11 stenographically reported by me in shorthand; and that
 12 the foregoing proceedings constitute a true and correct
 13 transcript of said proceedings to the best of my
 14 ability.
 15 I FURTHER CERTIFY that I am not related to
 16 any of the parties named herein, nor their counsel, and
 17 have no interest, financial or otherwise, in the
 18 outcome or events of this action.
 19 IN WITNESS WHEREOF, I have hereunto affixed
 20 my official signature and seal of office this 5th day
 21 of April, 2000.
 22
 23 CHRISTINA MEZA, Registered
 24 Professional Reporter and
 25 Notary Public in and for the
 State of Tennessee at Large
 My Commission Expires:

1 negotiations. And I fully realize that BellSouth
 2 rejected the Texas plan out of hand, and basically
 3 DeltaCom rejected the BellSouth plan out of hand. In
 4 fact, you had not seen the VSEEMs until we ordered that
 5 they be submitted.
 6 CHAIRMAN MALONE: What about 45 days?
 7 DIRECTOR GREER: Yeah. I'm just
 8 concerned that this has been a long process. Mr. Ross,
 9 could you cut it a couple of weeks and make it 45 days?
 10 MR. ROSS: We'll certainly do what the
 11 Authority directs. I was just --
 12 CHAIRMAN MALONE: Then we can direct
 13 30 days if you can do what we direct.
 14 MR. ROSS: Absolutely. You can direct
 15 tomorrow and we'll do -- we can do whatever you direct.
 16 DIRECTOR GREER: I don't want to be
 17 unreasonable and --
 18 MR. ROSS: I understand -- I know from
 19 dealing with performance measurements that getting a
 20 good faith estimate of how long it's going to take to
 21 do these things takes some time because generally we
 22 have contractors and vendors who we've got to contact
 23 and say we need to make this change, what's involved,
 24 how long is it going to take? And then we have to get
 25 a lot of people involved in that process. And I'm just