BELLSOUTH

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VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth Telecommunications, Inc.*
Docket No. 01-00193

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Post-Hearing Brief. Copies are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

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Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Docket To Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth Telecommunications, Inc.***

Docket No. 01-00193

POST HEARING BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC.

I. INTRODUCTION

This proceeding has its beginning in the Orders entered in the DeltaCom Arbitration (Docket No. 99-00948). On May 15, 2001, the Tennessee Regulatory Authority ("TRA" or "Authority") issued an Order[1] stating that generic performance measurements and enforcement mechanisms will be established in the instant proceeding. (Order, p. 8). The Order also stated that the determinations made in the DeltaCom Arbitration would be used as the "starting point" for the determinations to be made in this docket. (*Id.*).

BellSouth believes that the Authority ruled correctly in the DeltaCom Arbitration in many regards. The DeltaCom decision is primarily in need of revision in three areas: (1) The Authority adopted as a starting point BellSouth's 1999 SQM. The Authority should adopt the revisions and enhancements that BellSouth has made to its SQM over the past two years. (2) The Authority ordered the inclusion of a number of measurements previously ordered by the Texas Public

[1] Order Consolidating Docket Nos. 99-00347 and 00-00392 Into Docket No. 01-00193 And Opening Docket No. 01-00362.

Service Commission. As will be described later, these measures are either unnecessary, inappropriate or duplicative of measures currently in BellSouth's SQM, and, accordingly, should be deleted. (3) In the DeltaCom Order, the Authority mismatched BellSouth's plan structure (which assesses penalties on a per- transaction basis) with penalty amounts that DeltaCom proposed for a plan that assesses penalties on a per measure basis. The result of this mismatch is excessive penalty amounts, which the TRA should revise to more reasonable levels. BellSouth advocates the adoption of its current SQM and its SEEM plan, which differs from the "starting point" of the DeltaCom Orders in the three major aspects mentioned above and in some minor regards that will also be addressed herein.

The Authority should reject the revisions to the DeltaCom Order advocated by the CLECs. The CLEC proposals would cause the excessive payment of penalties from BellSouth to CLECs, even in those circumstances in which BellSouth is providing service at parity. Adoption of the CLEC proposals would result in a transfer from BellSouth to CLECs of extremely large amounts of money by the assessment of unwarranted penalties, but would accomplish little else. Specifically, the CLEC proposal suffers from a number of problems, including, (1) a degree of measurement disaggregation that would result in so many submeasurements that the plan could likely never be implemented, (2) excessively large and unwarranted penalties, and (3) the association of an excessive penalty payment with every disaggregated sub-measurement. Finally, even under the most optimistic set of assumptions, the CLEC plan would take a very long time to

implement, and after implementation, would be so complicated that its administration would be difficult, if not impossible.

In considering the plan to be ultimately adopted, BellSouth submits that the Authority should be mindful of what will be required to implement the various proposals. BellSouth's plan can be implemented quickly. Substantial changes to BellSouth's plan, such as would be necessary to implement the essentially duplicative Texas measurements, will cause substantial delays in implementation. BellSouth's proposal not only presents the best balance of the concerns of all interested parties, it is, without question, also the proposal that can be implemented most expeditiously.

II. MEASUREMENTS

The measurements contained in BellSouth's current SQM should be adopted in this proceeding. To achieve this result, the Authority must change the measurement plan set forth in the DeltaCom Arbitration in two respects: 1) the measurements in BellSouth's SQM that were not part of the 1999 BellSouth SQM must be added; 2) a number of the Texas measurements adopted by the Authority in the DeltaCom arbitration must be deleted. Finally, the additional measures proposed by the CLECs (including those that relate to special access services) must be rejected.

Necessary Changes To The DeltaCom Arbitration Order

Obviously, BellSouth agrees with the decision of the TRA in the DeltaCom Arbitration to adopt the 1999 SQM as the starting point to permanently set

performance measures. However, the SQM is not a static document. Instead, it has changed since 1999 to reflect the continuing development of performance measurements. Consequently, the current SQM offers significant enhancements over the previous version of the SQM. Mr. Coon specifically addressed three types of enhancements in his testimony.

First, a significant number of measures have been added to the SQM since 1999. Mr. Coon identified in his testimony the following new measures:

- Acknowledgement Message Timeliness
- Acknowledgement Message Completeness
- CLEC LSR Information
- LSR Flow-Through Matrix
- Service Inquiry with LSR Firm Order Confirmation
- Firm Order Confirmation and Reject Response Completeness
- Coordinated Customer Conversions—Hot Cut Timeliness % Within Interval and Average Interval
- Coordinated Customer Conversions—Average Recovery Time
- Hot Cut Conversions--% Provisioning Troubles Received Within 7 Days of a Completed Service Order
- Cooperative Acceptance Testing--% of DSL Loops Tested
- LNP—Average Time of Out of Service for LNP Conversions
- LNP—Percentage of Time BellSouth Applies the 10-digit Trigger Prior to the LNP Order Due Date

- Mean Time to Notify CLEC of Network Outages
- Recurring Charge Completeness
- Non-Recurring Charge Completeness
- Percent Database Update Accuracy
- Timeliness of Change Management Notices
- Change Management Notice Average Delay Days
- Timeliness of Documents Associated with Change
- Change Management Documentation Average Delay Days
- Notification of CLEC Interface Outage

(Coon Direct, pp. 31-32).

Second, the current SQM provides a more comprehensive description of the various measurements and the accompanying business rules. (Coon Direct, p. 32). Although these changes are too extensive to describe each one in this Brief, Mr. Coon did provide a representative example in his testimony, the firm order confirmation ("FOC") timeliness interval (*Id.*, p. 40). By comparing the language of the business rule for this measure in the current and former SQM, Mr. Coon demonstrated that the current language provides "a more definitive description [of] the calculation of the measurement." (*Id.*).

Third, the current SQM contains additional product disaggregation. Again, using the FOC interval as an example, Mr. Coon noted that the disaggregation by product has increased from 8 products to 21 products (Coon Direct, p. 40). This

example reflects the more general increase in disaggregation of measures from the 1999 to the 2001 SQM.

All parties agree that the performance measures plan must continue to evolve. For this reason, all parties advocate periodic review of the plan after a "permanent" plan is adopted in this proceeding.[2] Consistent with this approach, the TRA should not freeze the SQM (even until further periodic review) in the form that was current two years ago. Instead, the TRA should approve the enhanced, 2001 SQM offered by BellSouth.

On the issue of which measurements to adopt, BellSouth's principal disagreement with the DeltaCom Orders involves the adoption of measurements taken from the Texas measurement plan. BellSouth has added to its SQM some of the additional measures ordered by the TRA, as described in the testimony of Mr. Coon (Coon Direct, pp. 30-31). However, BellSouth is opposed to adding other measures because, as Mr. Coon testified, "BellSouth is already measuring many of the events and processes that the Texas plan measurements address—just in a different manner." (Coon Direct, p. 42).

The selection of appropriate metrics must be based on the systems to which the measurements will apply. Although the Texas measurements may be appropriate for Texas, the Texas Commission chose to measure certain performance in ways that are not efficient or appropriate to make an analogous measurement of BellSouth's performance (Coon Direct, p. 42). For many of the

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[2] *See*, e.g., Coon Direct, pp. 107-08; Kinard Direct, p. 47.

measures (which will be discussed below), BellSouth has developed a comparable measurement that is appropriate to its systems. Further, BellSouth has "developed a database and programming to allow the data for the measures to be collected, analyzed and reported mechanically. The analysis is done based on the business rules and requirements of the BellSouth plan." (Coon Direct, p. 44). If Texas measurements are substituted for the comparable BellSouth measurement, BellSouth's software will have to be rewritten (*Id.*). This substitution would serve no real purpose, yet it would entail substantial expense and a potentially lengthy delay in implementation of the plan.

Mr. Coon specifically identified fourteen measures from the Texas plan that were adopted in the DeltaCom Order, which BellSouth believes should not be in the final plan. He also provided BellSouth's rationale, as follows:

1. **Percent Firm Order Confirmation Returned Within Specified Time (Texas No. 5)**

This measurement duplicates of an existing BellSouth measure, BellSouth's "Firm Order Confirmation (FOC) Timeliness." "Like the Texas Plan, BellSouth's FOC Timeliness measurement reflects the percent of FOCs returned within specified time frames." (Coon Direct, p. 43). However, the BellSouth measurement provides more information than its Texas equivalent about the timeframes in which FOCs are received. BellSouth's measurement also provides for greater disaggregation. (*Id.*).

2. Percent of Accurate and Complete Formatted Mechanized Bills (Texas No. 15)

This measurement provides no useful additional information. Instead, this measurement "reflects whether all the components of the bill are added up correctly by the computer producing the bill. Thus this measurement does not reflect the accuracy of the numbers on the bill – only that the computer took whatever numbers were on the bill and added them up correctly." (Coon Direct, p. 45). Also, the "Texas Plan measurement applies only to EDI billing data, which further limits its usefulness." (*Id.*).

By comparison, BellSouth's SQM for "Invoice Accuracy" provides a more accurate indication of any discrepancies in the handling of CLEC bills versus BellSouth bills. Finally, the Texas measurement, while appearing to be simple, would be quite difficult to implement. (*Id.*).

3. Billing Completeness (Texas No. 17)

"This measurement also duplicates an existing BellSouth measure." (Coon Direct, p. 45). This Measurement is intended to determine if the billing for completed service orders is posted in the billing systems on time. BellSouth measures the timeliness of billing for completed service orders by using two measurements: "Recurring Charge Completeness" and "Non-Recurring Charge Completeness." (Coon Direct, p. 46).

4. Unbillable Usage (Texas No. 20)

This measurement serves no real purpose. In the Texas Plan, unbillable usage is reported as the total for the CLECs and for the ILEC. Since unbillable usage is combined in this way, the measurement can do nothing to determine a lack of parity between BellSouth's retail performance and performance to CLECs. Moreover, the Texas Commission recently deleted this measurement from the Texas Plan. (Coon Direct, p. 46).

5. Percentage of LNP Only Due Dates Within Industry Guidelines (Texas No. 91)

This measurement also provides no real useful information. The Texas Measurement is intended to determine "if the interval for implementing LNP is within "Industry Guidelines." (Coon Direct, p. 47). However, LNP is not provisioned according to industry standard intervals, but rather according to intervals based on customer requests. As long as due dates are met, a measure that compares these requested due dates to industry standards is of no real use. The real question is whether due dates are being met, and BellSouth has a measurement in its SQM that addresses this question, "Percent Missed Installation Appointments for LNP." (Coon Direct, pp. 47-48).

6. **Percentage of Time the Old Service Provider Releases the Subscription Prior to the Expiration of the Second Nine Hour (T2) Timer (Texas No. 92)**

7. **Percentage of Time Customer Account Restructured Prior to LNP Due Date. (Texas No. 93).**

These measurements are to ensure the ILEC performs certain administrative activities prior to a number port: the release of a "subscription" to the Number Portability Administration Center (NPAC) and the issuance of a trigger order, when one is required. (Coon Direct, p. 48). BellSouth measures these activities with the measurement, "LNP-Average time BellSouth Applies the 10-digit trigger Prior to the LNP Order Due Date." Because BellSouth has a single process for the release of the Subscription to NPAC and the issuance of the Trigger, this single BellSouth measure serves the same purpose as the two Texas measures. (Coon Direct, pp. 48-49).

8. **Percentage of Premature Disconnects for LNP Orders (Texas No. 96)**

This measurement "identifies the percentage of LNP cutovers where the ILEC prematurely removes translations, including the 10-digit trigger, prior to the scheduled conversion time. BellSouth's proposed measurements, 'LNP-Average time BellSouth Applies the 10-digit trigger Prior to the LNP Order Due Date' and 'LNP—Average Time Out of Service for LNP Conversions' address any substantive issues regarding premature disconnects for LNP." (Coon Direct, p. 49). Accordingly, there is no need for this measurement.

9. **Average Days Required to Process a Request (Texas No. 106)**

This measurement relates to the processing of requests for access to poles,

ducts, conduits, and rights-of-way. "To develop this measurement as defined in the Texas Plan, would require BellSouth to implement a new system capability to capture the data, as well as to modify BellSouth's PMAP system to produce reports on the performance of the new system capability." (Coon Direct, p. 49). Moreover, there is no indication that the processing of these requests has been a problem. In fact, the FCC determined that BellSouth has provided "non-discriminatory procedures for access to poles, ducts, conduits and rights-of-way" (Second Louisiana Order, CC Docket 98-121, ¶ 174), and done so without the data that would be captured by this measurement. Given this, BellSouth believes that it should not be required to sustain the burden of developing a new system for a measurement that is not needed. (Coon Direct, pp. 49-50).

10. Percentage of Updates Completed into the Database within 72 Hours for facility based CLECs (Texas No. 110)

This measurement is unnecessary. "All directory assistance database updates are processed at the same time and in the same manner for BellSouth retail customers and CLEC customers." (Coon Direct, p. 50). Thus, discriminatory treatment is just not possible.

Moreover, BellSouth's SQM has a similar measurement, "Average Database Update Interval," which measures how long it takes to update databases for CLECs, and which is not restricted to facility-based CLECs, as is the Texas measurement. (*Id.*).

11. Percentage DA Database Accuracy for Manual Updates (Texas No. 112)

This measurement is both unnecessary and in conflict with the other provisions of the TRA's prior decisions. Under the Texas Plan, SWBT does not capture the data to calculate this measure, but rather "verifies" CLEC-produced data for inclusion in the performance report. The Authority approved the use of BellSouth data for all measurements and calculations in the DeltaCom Order (See, *Interim Order of Arbitration Award*, August 11, 2000, p. 16), a practice that is consistent with BellSouth's approach to all of its measurements (Coon Direct, pp. 50-51). Basing a measure on CLEC-provided data obviously conflicts with this decision.

Moreover, BellSouth's metric "Percent Database Update Accuracy" is intended to measure the accuracy of DA and LIDB database updates by BellSouth for all CLECs, including facility based CLECs." (Coon Direct, p. 51).

12. Percentage of Missed Mechanized INP Conversions (Texas No. 116)

It makes little sense to develop a measurement of performance on Interim Number Portability conversions "because Interim Number Portability has been replaced with LNP in nearly all areas of Tennessee where the CLECs have customers." (Coon Direct, p. 51). At present, 95% of the access lines in Tennessee are in wire centers that have converted to permanent LNP, and the remaining wire centers are scheduled to convert by the end of October (*Id.*). There is no reason to develop a measurement of a process that will cease to exist

later this year. "In fact, Texas recently eliminated this measurement and the Authority should do so as well." (Coon Direct, p.51).

13. Average Delay Days for NXX Loading and Testing (Texas No. 118)

This measurement addresses the same area as BellSouth's "Percent NXXs and LRNs Loaded by the LERG Effective Date." (Coon Direct, pp. 51-52). Although the two measurements are structured somewhat differently, both would detect the same failure (*Id.*).

14. Mean Time to Repair NXX Trouble Reports (Texas No. 119)

This measurement "calculates the mean time of repair of NXX trouble reports from the receipt of the customer trouble report to the time the trouble report is cleared." (Coon Direct, p. 52). Given this, it essentially duplicates BellSouth's Maintenance Average Duration measurement. Moreover, Texas recently eliminated this measurement. (*Id.*).

15. Bona Fide Requests Processed within 30 Business Days and Percentage of Quotes Provided for Authorized BFRs/Special Requests within X (10,30,90) Days (Texas 120 & 121)

These measurements are not necessary because they would apply to an area in which there is very little activity. "During the period of January 200 through October 2000, BellSouth received only seven Bona Fide Requests from CLECs across the entire region." (Coon Direct, p. 53). "It is impossible to draw any conclusions about BellSouth's performance based upon such a limited number of transactions," (*Id.*) and there is no reason to believe these requests will increase in the future. Further, given the extremely wide range of the complexity of these

requests, it is not appropriate to measure BellSouth's performance against a set interval, i.e., one that does not vary in a way that reflects the range of activities measured. (*Id.*).

Taken as a whole, the above-described Texas measurements add nothing of real value to BellSouth's SQM. Some measurements are unnecessary or inappropriate; others duplicate measures BellSouth already has in place. Further, altering BellSouth's SQM to include these measures will unquestionably result in delays that could otherwise be avoided. As Mr. Coon testified, "every additional measure takes time to implement, uses limited resources to collect data and analyze the data and should be avoided if these measures are going to be implemented in any sort of reasonable timeframe." (Coon Direct, pp. 53-54).

The CLEC-Proposed Measures

The CLECs' general approach is to look for every opportunity to increase the potential for the unwarranted transfer of penalty payments. This approach consists of arguing for (1) unnecessary penalties, (2) an excessive amount of disaggregation, (3) inordinately large penalties, and (4) the application of a penalty to every single sub-metric. As the first step in this scheme, the CLECs argue for the adoption of thirty-five additional measurements, albeit on the basis of rather questionable logic.

Although the CLECs acknowledge that this proceeding is to set generic performance measures by making appropriate changes to the measurements previously ordered by the TRA (e.g., Kinard Direct, p. 8), Ms. Kinard makes the

inexplicable suggestion that the Georgia compliance filing should be the "starting point for this proceeding" (*Id.*, p. 17). Although illogical, this approach is consistent with the CLECs' attempts to mischaracterize the Authority's previous Orders as a wholesale adoption of the CLECs' plan, while arguing for wholesale changes to these prior Orders. As Mr. Coon testified, "While purporting to build on the Authority's decisions in Docket No. 99-00430, Ms. Kinard disagrees with the disaggregation that the Authority adopted, disagrees with the definitions and business rules adopted by the Authority and interjects unnecessary issues into this proceeding such as mini-audits and affiliate reporting." (Coon Rebuttal, p. 53). Ms. Kinard's proposals became even more confusing considering that, even as she advocates using the Georgia measures as a starting point, she opposes much of what the Georgia Commission ordered. In Mr. Coon's words, "Notwithstanding her proposal to adopt the Georgia compliance filing as the starting point for this proceeding, she goes on to attack the decisions reached in the Georgia proceeding, specifically with respect to business rules, disaggregation levels and benchmarks." (Coon Rebuttal, pp. 53-54). The only thing clear about the CLECs' approach is the obvious goal of adding as many measures as possible.

Of the 35 measures Ms. Kinard proposes to add, 15 are already in BellSouth's plan. Specifically,

1. O-1: Acknowledgement Message Timeliness
2. O-2: Acknowledgement Message Completeness
3. O-11: Firm Order Confirmation and Reject Response Completeness

4. P-6B: Average Recovery Time

5. P-7: Cooperative Acceptance Testing - % of xDSL Loops Tested

6. B-5: Usage Data Delivery Timeliness

7. M&R-7: Mean Time to Notify CLEC of Network Outages

8. D-1: Average Database Update Interval

9. D-2: Percent Database Update Accuracy

10. CM-5: Notification of CLEC Interface Outages

11. CM-1: Timeliness of Change Management Notices

12. CM-2: Change Management Notice Average Delay Days

13. CM-3: Timeliness of Documents Associated with Change

14. CM-4: Change Management Documentation Average

15. Service Oder Accuracy

(Coon Rebuttal, pp. 56-57).

The twenty remaining additional measures that the CLECs propose are unnecessary, duplicative of measures in the BellSouth plan or otherwise inappropriate for inclusion. In his testimony, Mr. Coon provided a point-by-point rationale for rejecting each of these measurements, as follows:

1. Mean Time to Provide Response to Request for BellSouth-to-ALEC Trunks
2. Percent Responses to Request for BellSouth-to-ALEC Trunks Provided within 7 Days
3. Percent Negative Responses to Requests for BellSouth-to-ALEC Trunks

These measurements are unnecessary. To the extent they are intended to evaluate the reasons for trunk blocking, BellSouth has two measurements that do

this, TGP-1 and TGP-2. Beyond this, these measurements appear designed to determine the sufficiency of the trunking capacity from BellSouth to the CLEC switch when traffic is increased substantially, such as when a CLEC adds an ISP provider as a customer. BellSouth has no way of knowing when these potentially dramatic increases in demand may occur, and BellSouth does not believe it is appropriate to have a measurement of its success in meeting this unanticipated demand. The better approach would be to ensure that adequate trunking capacity exists by requiring each CLEC to give BellSouth an adequate forecast of future demand so that BellSouth can meet its needs. (Coon Rebuttal, p. 58).

Also, Ms. Kinard proposes that, in connection with these measures, trunk relief levels be set at 50%, that is, to provide every CLEC with 50% spare capacity in each trunk group. Although this proposal would involve substantial costs, the CLECs have not offered to pay (or even contribute to) these costs. As Mr. Coon noted, this demand for excessive spare capacity is "an operational issue that does not belong in a performance measurements proceeding." (Coon Rebuttal, p. 59).

4. Percent Completions/Attempts Without Notice or With Less than 24 Hours Notice

The addition of this measurement "would duplicate areas of performance already addressed in BellSouth's provisioning measurements that deal with order completion, intervals, held orders and completion notices." (Coon Rebuttal, p. 59). This measure would capture a piece-part of five separate measures that are already in place, thereby adding complexity without adding substance (*Id.*).

5. Percent On-Time Hot Cut Performance

This measurement is not necessary because performance in this area is addressed by measures already included in BellSouth's SQM, i.e., "P-6: Coordinated Customer Conversion Interval," and "P-6A Coordinated Customer Conversions – Hot Cut Timeliness % Within Interval and Average Interval." (Coon Rebuttal, p. 61).

6. Percent of Orders Cancelled or Supplemented at the Request of the ILEC

This proposed measurement is based on the CLEC's apparent belief that BellSouth will request that CLECs supplement or cancel orders just to obtain a later due date. The CLECs presented no evidence that this has occurred, or will occur. Further, if CLECs are concerned that cancellation requests may become a problem, they can always refuse the request. This measurement is not necessary. (Coon Rebuttal, pp. 61-62).

7. Percent of Coordinated Cuts Not Working as Initially Provisioned

BellSouth's SQM has a "hot cut" measurement to address this issue, "P-6C, % Provisioning Troubles Received within 7 Days of a Completed Service Order." Services that do not work should be identified and resolved during the cut-over process, before the order is completed in the system. If the problem is not resolved during the cut-over process, then the BellSouth-proposed measurement will reflect this. For this reason, the CLEC-proposed measurement is simply duplicative. (Coon Rebuttal, p. 62).

8. Average Recovery Time

BellSouth has proposed a measurement that addresses this area directly in P-6B: Coordinated Customer Conversions—Average Recovery Time. Thus, the CLEC-proposed measurement is not needed.

9. Mean Time to Restore a Customer to the ILEC
10. Percent of Customers Restored to the ILEC

These measures "relate to customers who were going to be switched to a CLEC but who were not because of a problem in the porting process." (Coon Rebuttal, p. 63). However, these measures only "record the time that lapses before the customer is returned to service with BellSouth and the percent of customers that are returned (*Id.*). These measures are not meaningful because it is impossible to know the nature of the problem in the porting process or whether it is properly attributable to BellSouth. Given this, these measures provide CLECs with opportunities to receive penalties when BellSouth has not failed to perform in any way. Moreover, to the extent these measures are intended to relate to the "hot cut" process, there are already a number of measurements in place to detect any problem that exists in this process. (*Id.*, pp. 63-64).

11. Call Abandonment Rate – Ordering and Provisioning
12. Call Abandonment Rate – Maintenance

There is no need for these additional measurements because abandoned calls are already captured by the BellSouth proposed measurements "Speed of Answering in the Ordering Center" and "Average Answer Time—Repair Center." (Coon Rebuttal, p. 64). The CLECs propose that these two measurements have

benchmarks of "< 1% of calls abandoned from queue" (Coon Rebuttal, pp. 64-65). Thus, if more than 1 in 100 callers abandons a call for any reason whatsoever, BellSouth fails the proposed measure. (*Id.*, p. 65). The CLEC proposed measures (and the proposed benchmarks) should be rejected because they would provide an opportunity for CLECs to receive unwarranted penalty payments.

13. Percent Successful xDSL Service Testing
14. (disaggregation or new metric) – Percent Completion of Timely Loop Modification/Conditioning on xDSL Loops

These two measures address activity already measured by BellSouth's provisioning measures. The former measurement is similar to BellSouth's proposed measurement, "P-8, Cooperative Acceptance Testing." The latter essentially duplicates BellSouth's provisioning measures, such as order completion interval and percent missed installation appointments. (Coon Rebuttal, pp. 65-66).

15. Percent Billing Errors Correct in X Days

This measurement is unnecessary because the BellSouth-proposed measurements, "B-1, Invoice Accuracy" and "B-2, Mean Time to Deliver Notices" provide adequate information to assess the performance of BellSouth's billing processes. Also, "BellSouth's Billing Verification Group conducts monthly audits wherein samples of bills are evaluated to check accuracy [and] completeness . . .." (Coon Rebuttal, p. 66).

16. Percent Response Commitments Met On Time

Apparently, this measurement is an attempt to determine "the time between when a question is posed to a BellSouth 'help desk' and when the answer is

received by the CLEC." (Coon Rebuttal, p. 66). This measure would be all but impossible to implement because of difficulties in determining specifically when a question is asked, the nature of the question, and a reasonable timeframe to answer the question. This is a good example of an issue that cannot appropriately be addressed through performance measurements. (*Id.*, pp. 66-67).

17. Percent ILEC vs. ALEC Changes Made

This is another example of an issue that cannot be appropriately dealt with by the use of performance measurements. This measurement would compare the percentage of BellSouth-proposed changes BellSouth makes in the change management process, as opposed to those proposed by the CLECs. (Coon Rebuttal, p. 68). Apparently, the underlying assumptions are that all BellSouth changes are favorable to BellSouth, all CLEC changes are favorable to the CLECs, and all are of equal validity. The first and third assumptions are simply wrong. The change control process is a collaborative process by which BellSouth and the CLECs work together to resolve issues related to change requests. (*Id.*). It makes no sense to treat every change by BellSouth as creating an entitlement for each CLEC to make a change of its own, even if the CLEC requested change is unreasonable or not technically feasible. Further, this measure has been summarily rejected in other jurisdictions in which the CLECs have made the same proposal.

Finally, the Order Reflecting Action Taken At May 1, 2001 Pre-hearing Conference, entered May 10, 2001 in this matter expressly excluded the consideration of the change control process in this proceeding. Consistent with

this ruling, Ms. Kinard's testimony on this issue (as well as Mr. Pate's rebuttal to that testimony) were stricken at the time of the hearing (Tr. Vol. IB, pp. 138-39). Thus, measures that relate to the change control process can not properly be added, even if there were otherwise a basis to do so (which there is not).

18. Percent Software Certification Failures
19. Software Problem Resolution Timeliness
20. Software Problem Resolution Average Delay Days

These measures apply to software updates. This is another issue that is better dealt with in the context of the change management process rather than through performance measurements. As Mr. Coon stated, "participating in that process would eliminate the need for those proposed measures." (Coon Rebuttal, p. 69). Also, as with the previous measure, the exclusion of the change control process from this proceeding makes the consideration of these additional measures inappropriate.

The CLECs' proposed additional measures are either covered already by a BellSouth measurement, will not provide any useful information, or are categorically inappropriate to include in a performance measurement plan. For this reason, the measurements that should be adopted by the Authority are those proposed by BellSouth.

Measurements For Access Service

Time Warner and MCI have urged this Authority to go beyond the scope of its previous Orders, and to order performance measures to apply to special access services ordered through state or federal tariffs. Such a ruling is unnecessary and,

in fact, inconsistent with the entire purpose of this docket. Performance measurements have essentially two purposes. One, in conjunction with enforcement mechanisms, they may be used to satisfy the public interest requirements of § 271 by demonstrating that "back sliding" has not occurred after 271 relief is granted. Two, they may be utilized to demonstrate that non-discriminatory access is being provided to the tools for local entry specified in the Telecommunications Act. These tools do not include special access services offered under state and federal tariffs, and that have been offered since well before the advent of the 1996 Act for purposes other than the provision of local service. Section 251 sets forth the duties of incumbent local exchange carriers under the Act to provide interconnection, unbundled network elements and resale. It is these obligations that are negotiated pursuant to the Act and included in Interconnection Agreements. It is also these obligations to which performance measurements have been applied in the states in which 271 authority has been granted. There is nothing in the Act that supports the notion that a mechanism designed to monitor compliance with the Act (i.e., performance mechanisms) should be extended to entry vehicles not contemplated by the Act, a category into which special access services fall.

Special access services have been long available to carriers who utilize them to provide long distance services. Because they are not prohibited from using services to provide local service, some CLECs have elected to do so, even though this is clearly not the purpose for which these services are intended. Now, at least

two CLECs contend that because they have made this election, performance measures designed to apply to the provision of UNEs and resale (and the systems used to deliver them) should be extended to tariffed services. However, beyond their professed desire for this extension, the CLECs have offered no real justification for the request.

To begin with the obvious, it is routinely recognized that state Commissions have jurisdiction over intrastate services, while the FCC has jurisdiction over interstate services. Standing alone, these well-accepted jurisdictional realities are sufficient to raise serious questions about any proposal for this Authority to impose measurements on federally-tariffed interstate services that are not within its jurisdiction, such as interstate access services. Further, on July 16, 2001, Time Warner filed an *ex parte* with the FCC to propose that the FCC adopt special access performance measurements. Time Warner's filing of its proposal before the TRA on the very same day is a blatant attempt to forum shop. The Authority should not allow this gambit by Time Warner to succeed, but should, instead, defer to the FCC on this essentially interstate matter.

Even if the Authority is inclined to address an issue currently before the FCC, the CLECs have failed completely to demonstrate any need for the requested performance measures for access services. Even if the TRA could properly consider imposing measurements on federally tariffed services, there is no need to do so because, as Mr. Coon testified "key measurements are already provided for in the tariffs from which Time Warner is ordering the Special Access service. As

an example, Section 2 of the FCC Tariff No. 1 contains standards and consequences for service delivery and for service interruption (Coon Rebuttal, p. 125). Likewise, the applicable state tariffs contain the terms under which interstate access services are offered. Ms. Kinard admitted that MCI's proposal is inconsistent with the applicable tariff as currently written. (Tr. Vol. IVB, pp. 94-95). Although she testified that she did not know whether MCI has objected to this tariff in the past, she also admitted that MCI has not requested a change to the tariff in this proceeding, or even acknowledged in its pre-filed testimony that a conflict exists. (*Id.*, pp. 95-96).

Also, Mr. Kagele testified on behalf of Time Warner that CLECs utilize special access services "to avoid the pitfalls of UNEs, and pay a premium over the prices paid for equivalent unbundled services" to do so (Kagele Direct, p. 3). Mr. Koegle opined on these pitfalls by stating that "the processes and procedures associated with ordering special access have been used for many years and is [sic] well developed, but the processes for ordering unbundled or resold services are still new and competitors experience delays in provisioning." (*Id.*). This argument ignores the entire purpose of performance measures (and this proceeding) and simply assumes that UNEs provide (and will continue to provide) an inferior entry vehicle into the local market. Even if this conclusion were justified (and it is not), the leap in logic that Mr. Koegle next makes is totally unsupported. Mr. Kagele contends that because BellSouth proposes more measurements for UNEs and resold services than those that exist for special access services, "CLECs that use Special Access

services are placed at a competitive disadvantage relative to CLECs that purchase equivalent high capacity services on a resold or unbundled basis" (*Id.*, p. 5). Thus, he argues that the CLECs who choose special access over UNEs because of the claimed superiority of the former service are placed at a competitive disadvantage to CLECs who purchase the UNEs that he believes to be inferior. This circular argument makes no sense.

The lack of any need for these measurements was demonstrated at the hearing by the fact that Ms. Kinard could not identify any specific problems that CLECs have experienced in Tennessee with special access services. (Tr. Vol. IVB, pp. 98-99). She did allude to claimed problems in other states, but could not explain why MCI elected to request special access measurements in Tennessee, but not in any of the states in BellSouth's region in which problems have ostensibly occurred.[3]

In the course of making the argument that other states are considering performance measurements, both CLEC witnesses referred to pending dockets that are designed to investigate special access services in proceedings that are separate and apart from a proceeding that addresses performance measures for entry vehicles covered pursuant to the Act (Kagele Direct, p. 6; Kinard Rebuttal, p. 5). Although BellSouth believes such an investigation is unnecessary, CLECs are free

[3] Further, Ms. Kinard's contention that MCI advocated these measures in Tennessee, but not other states, because of "limited resources" fails to address the question of why MCI's resources were used to raise this issue in Tennessee, rather than in the states in which the CLECs actually claim problems exist. (*See*, Tr. Vol. IVB, pp. 104-05).

to request an investigation here, just as they have done in other states. However, for the reasons stated above, performance measures of the type contemplated in this proceeding should not be extended to Access Services.

Necessary Changes to Previously Ordered Standards

In the various Orders entered in the DeltaCom proceeding, the TRA set standards that are to be applied to the measures chosen for inclusion in the measurement plan. As Mr. Coon stated, "determining the appropriate standard requires matching the measurements and submetrics from the August 11, 2000 Order that adopted BellSouth's 1999 SQMs with the standard for that measurement and that submetric in DeltaCom's Final Best Offer, adopted in the Authority's February 23, 2001 Order." (Coon Direct, p. 64). However, in two instances, the standards ordered by the Authority do not appear to match the measurements that were ordered. In other words, two measurements were ordered in August that do not have corresponding standards in the DeltaCom Final Best Officer adopted in February. (*Id.*). For each of these measures, BellSouth proposes herein an appropriate standard. For the first of these measurements, "Average Response Time and Response Interval." BellSouth proposes the standard of parity + 4 seconds. This standard is "consistent with rulings by the FCC in the Orders granting New York and Texas InterLata authority" (Coon Direct, p. 66).

The second measure for which standards are missing is "Percent Firm Order Confirmation Return within Specified Time." The most significant factor in determining the time required for a CLEC to receive a Firm Order Confirmation

("FOC") is the degree of mechanization (Coon Direct, pp. 66-67). Thus, the SQM adopted by the Authority in the August Order included sub-measurements based on whether the FOCs were for fully mechanized, partially mechanized or non-mechanized orders (*Id.*, p. 67). The benchmarks and intervals proposed by BellSouth reflect these differences in mechanization. Therefore, for the measurements that were ordered, BellSouth proposes the standards adopted in Georgia. As Mr. Coon testified,

> Since there is not a standard for these submetrics BellSouth proposes its standard of 95% within 3 hours for Mechanized. For partially mechanized BellSouth proposes 85% within 24 hours effective immediately, 85% within 18 hours after 3 months and 85% within 10 hours after 6 months. For non-mechanized, BellSouth proposes 85% within 24 hours.

(Coon Direct, p. 67).

Adoption of these benchmarks is necessary to reflect the distinctions in mechanization that are an integral part of the BellSouth-proposed measures/sub-measures that the Authority has previously adopted.

Turning to the standards the Authority did adopt for use with the measurements in BellSouth's SQM, BellSouth agrees with most of these retail analogs and benchmarks. Mr. Coon specifically identified twenty standards that fall into this category:

- Interface Availability
- Percent Flow-Through for Service Requests (Summary)
- Percent Flow-Through for Service Requests (Detail)

- Reject Interval (Mechanized)
- Average Response Time for Loop Make-up Information (Manual)
- Mean Held Orders
- Average Jeopardy Notice Interval
- Percent Missed Installation Appointments
- Average Completion Notice Interval
- Percent Provisioning Troubles w/1 30 days
- Coordinated Customer Conversion Interval
- Percent of NXXs Loaded and Tested Prior to the LERG Effective Date
- Customer Trouble Report Rate
- Maintenance Average Duration
- % Repeat Troubles Within 30 Days
- OSS Interface Availability
- Invoice Accuracy
- Mean Time to Deliver Invoices
- Usage Data Delivery Accuracy
- Average Speed to Answer (Toll)
- Percent Answered within "X" Seconds (Toll)
- E911 Timeliness, Accuracy and Mean Interval

(Coon Direct, pp. 68-69).

There are, however, nine measurements for which the TRA has set standards (specifically benchmarks) that BellSouth believes are unreasonable or

inappropriate. Mr. Coon specifically discussed BellSouth's reason for asserting this view:

1. Reject Interval

As discussed previously, processing of manual orders can be considerably more complex and time consuming than the processing of electronic orders. Both manual orders and orders that are submitted electronically, but which "fall out" for manual handling should have different standards than electronic (i.e., mechanized) orders. (Coon Direct, p. 69). The TRA has adopted a benchmark for non-mechanized orders that reflects a 24 hour interval. The interval for partially mechanized orders, however, is reduced under the Authority's previous Order to five hours, even though an order that "falls out" for manual handling is essentially the same as a non mechanized Order (*Id.*, at 70). BellSouth proposes a more stringent benchmark for mechanized orders than the TRA has ordered (97% rather than 95%). However, BellSouth proposes an 85% benchmark for both partially mechanized and non-mechanized orders, and has proposed longer intervals than the TRA has ordered for partially mechanized orders. BellSouth's proposal recognizes the more complex and labor intensive processes involved in handling these orders (*Id.*).

2. Average Response Time for Loop Make-up Information

BellSouth proposes two measurements for Loop Make-up Information: "Loop Make-up Response Time – Manual" and "Loop Make-up Response Time – Electronic." (Coon Direct, p. 70). The TRA appears to have set 95% benchmarks

with intervals that range from ten to twenty seconds for the "Loop Make-up Response Time-Electronic" measurement. However, these benchmarks were adopted, even though DeltaCom offered absolutely no reason why the benchmarks from the Texas plan are appropriate for BellSouth. (*Id.*) In fact, it appears that the standards in the Texas plan apply to the provision of significantly less information than is provided in the process to which the BellSouth measure applies. (*Id.*) Specifically, the Texas plan refers to "loop qualification," which "is simply a determination of whether a loop can support a given service." (*Id.*). In contrast, the BellSouth measurement applies to the provision of loop-makeup information, i.e., the electrical characteristics of a loop such as local call placement, bridge tap and loop length.

As Mr. Coon testified, "while the standards from the Texas plan might be appropriate when applied to simple Loop Qualification, this time frame is unreasonable when applied to the substantially more complex process required to provide all loop information discussed above." (Direct, p. 72). Accordingly, BellSouth proposes a benchmark of 90% within 5 minutes, for providing the more extensive loop make-up information (*Id.*)

3. Speed of Answer in the Ordering Center

The benchmark for this measure requires that "greater than 95% of calls by center are answered within 20 seconds and 100% of all calls answered within 30 seconds." (Coon Direct, p. 72). BellSouth objects to this measurement, in part, because "the ordering center, called the Local Carrier Service Center (LCSC), is

really not an 'ordering center' in the traditional sense of a customer calling into a large call center to place an order." (Coon Direct, p. 72). Instead, CLECs place orders electronically or by fax. CLEC calls to the LCSC are typically directed to a help desk that responds to CLEC inquires. Other arrangements exist, however, for the CLEC to place orders, track order status and obtain information about products. For this reason, this measurement should only be a diagnostic measurement.

4. Usage Data Delivery Completeness
5. Usage Data Delivery Timeliness
6. Mean Time to Deliver Usage

Mr. Coon described the problem with these measures as follows:

> Although there are a number of instances in which benchmarks have been ordered even though retail analogs exist, these measurements are somewhat unique in that the Authority ordered a retail analog when, as discussed below, a benchmark is more appropriate.

(Coon Direct, p. 74).

The process by which usage data is obtained is fundamentally different for CLECs and for BellSouth. Given this, use of a retail analog is not appropriate. Instead, BellSouth has proposed benchmarks for this measure as follows:

Mean Time to Deliver Usage:	Less than or equal to 5 days
Usage Data Delivery Timeliness:	95% within 6 calendar days
Usage Data Delivery Completeness:	98% within 30 calendar days

(Coon Direct, pp. 74-75).

7. Collocation Average Response Time
8. Collocation Average Arrangement Time

As described in detail in Mr. Coon's testimony, the TRA has ordered substantially shorter intervals for collocation than those proposed by BellSouth. (Coon Direct, pp. 75-76). BellSouth's proposal, however, is more consistent with the standards approved by the FCC in the Memorandum Opinion and Order (released February 21, 2001), which granted BellSouth a waiver from certain of the previously established national standards. There is no reason for the TRA to set more stringent standards than those approved by the FCC. Instead, the Authority should order intervals consistent with the FCC standards (*Id.*, pp. 76-77).

9. Collocation Percent of Due Dates Missed

"This measure identifies the percent of total collocation arrangements, both virtual and physical, which BellSouth is unable to complete by the end of the committed due date." (Coon Direct, p. 77). The TRA adopted the DeltaCom-proposed standard of 100% completion by the due date. However, as Mr. Coon testified,

> The level and complexity of collocation related activities can vary widely from wire center to wire center. Many of the factors that may threaten the chances of meeting established due dates are not discovered until much later in the process which means that they cannot be factored in at the time that dates are negotiated.

(*Id.*) Moreover, "requiring a 100% on time completion standard is certain to trigger enforcement payments, although no discrimination is involved. Compliance with

the intent of the 1996 Act requires parity, not perfection." (*Id.*). Accordingly, BellSouth proposes a 90% benchmark.

The CLEC-Proposed Standards

Not surprisingly, the CLECs have proposed substantially higher benchmarks than those proposed by BellSouth, and those previously adopted by the Authority. As Ms. Kinard confirmed during the hearing, the CLECs have proposed that almost all benchmarks be set at a minimum of 95% (Tr. Vol. IVC, p. 144). Further, this is only the minimum. Some CLEC proposed benchmarks are set at 99%, and, amazingly, many are set at 100%. (*Id.*). In fact, Ms. Kinard admitted on cross examination that almost 30% of the CLEC's proposed benchmarks (i.e., 13 of the approximately 50) are set at 100%. (*Id.*, p. 145). Ms. Kinard also admitted that the CLECs have no study analysis to support the conclusion that "perfection" is required for these measures to allow the CLECs a meaningful opportunity to complete (*Id.*, pp. 146-47). Nor, for that matter, do the CLECs have an analysis to support the position that 95% is the required minimum to provide a meaningful opportunity to compete (*Id.*, p. 147). In fact, Ms. Kinard admitted that, depending on the interval, a benchmark as low as 80% would be appropriate. (*Id.*, p. 148).

The benchmarks proposed by the CLECs are especially troubling given the fact that, as stated above, the CLECs propose that a penalty be paid for every missed measure or submeasure. Clearly, the CLECs have not proposed benchmarks at reasonable, achievable levels. Instead, they have proposed ridiculously high standards with full knowledge that BellSouth cannot achieve

perfection, and would, therefore, have to pay penalties under the CLEC plan, even if BellSouth's performance is near perfect.

Disaggregation

The purpose of the disaggregation of measurements is, as Mr. Coon testified, to provide "the Authority, CLECs and BellSouth with a more granular measure of performance for a specific part of BellSouth's business" (Coon Direct, p. 55). The term disaggregation refers generally to the breaking down "for reporting purposes, of measurements into specific sub-metrics," based on categories such as product type, activity type and volume of orders (*Id.*). Although disaggregation needs to be sufficient to discern discriminatory treatment, there are substantial problems related to disaggregating more than is necessary. First, as the level of disaggregation increases, the number of submeasures in the plan increase exponentially. Thus, having too much disaggregation prompts the very real danger of paralyzing any attempts to analyze results by providing a deluge of numbers that provide no real useful information (*Id.*, p. 57).

Also, as the CLEC witnesses admitted, more disaggregation means smaller numbers of transactions in each submeasure. (Tr. Vol. IVC, p. 141). Specifically, Ms. Kinard admitted that if disaggregation is adopted as proposed by the CLECs, some submeasures will likely have very few if any transactions. (*Id.*, p. 143). Having measures with so few transactions will unquestionably distort results. For example, assume that a measurement with a 90% benchmark has 100 transactions for a particular CLEC in a given month. If there are 10 failures, BellSouth meets

the 90% benchmark. If disaggregation results in sub-measures with fewer than 10 transactions, any failed transactions would mean that BellSouth misses the 90% benchmark for that submeasure. Thus, excessive disaggregation, and the resulting low transaction levels, creates failures simply as a function of the mathematics involved. In light of these factors, BellSouth submits that a specific level of disaggregation should only be ordered based on "a determination that such detail is necessary to evaluate nondiscriminatory access." (Coon Direct, p. 56).

Applying this standard, BellSouth's primary disagreement with the Authority's prior orders involves the decision to disaggregate all measures to the state level. Mr. Coon summarized the reason for BellSouth's position on this point as follows:

> The vast majority of measurements in BellSouth's SQM already disaggregate performance data to the State level. However, certain performance measurements only capture regional data by virtue of the regional nature of the systems or processes involved. These regional performance measurements either cannot reasonably be disaggregated at the State level or can only be disaggregated to the State level at considerable time and expense, although there is no real benefit to doing so.

(Coon Direct, p. 59).

As a specific example, Mr. Coon pointed to the measures that relate to the availability of Pre Ordering and Maintenance Repair Interfaces. Since BellSouth's OSS are regional in nature, these systems are either available throughout the region at a given time, or they are not (Coon Direct, p. 59). The system makes no distinction as to where the order originates from, and, in fact, these orders are

frequently received from CLEC service centers that also handle orders on a regional basis. (*Id.*, p. 60). Given this, systematic, state-specific discrimination is not possible, and there is no need for disaggregation to the state level.

Mr. Coon specifically identified the measurements that are regional in nature as follows:

- Average Response Time and Response Interval (Pre-Ordering/Ordering)
- OSS Interface Availability (Pre-Ordering/Ordering)
- OSS Interface Availability (Maintenance & Repair)
- Response Interval (Maintenance & Repair)
- Acknowledgement Message Timeliness
- Acknowledgement Message Completeness
- Percent Flow-Through Summary
- Percent Flow-Through Detail
- Speed of Answer in the Ordering Center
- Average Answer Time-Repair Center
- Mean Time to Notify CLEC of Network Outages
- Usage Data Delivery Accuracy
- Usage Data Delivery Completeness
- Usage Data Delivery Timeliness
- Mean Time to Deliver Usage
- Recurring Charge Completeness
- Non-Recurring Charge Completeness

- Average Database Update Interval
- Percent Database Update Accuracy
- Percent NXXs and LRNs Loaded by the LERG Effective Date
- Timeliness of Change Management Notices
- Change Management Notice Average Delay Days
- Timeliness of Documents Associated with Change
- Change Management Documentation Average Delay Days
- Notification of CLEC Interface Outages

(Coon Direct, pp. 60-61).

Beyond the regionality issue, BellSouth takes issue with the portion of the DeltaCom Orders regarding disaggregation in two very limited requests. First, BellSouth advocates additional disaggregation for UNE loops, as described in Mr. Coon's testimony (Coon Direct, p. 62). BellSouth also advocates that there be an additional product category added for UNE combos (*Id.*, p. 63).

BellSouth's proposed measurements are disaggregated into 1,200 sub-metrics. (Coon Rebuttal, p. 6). BellSouth believes that the level of disaggregation it proposes is more than adequate to make meaningful comparisons for the purpose of determining whether BellSouth is providing service at parity. In contrast, the CLECs advocate a truly staggering degree of disaggregation. The CLECs advocate that the measurements be disaggregated by ten separate categories, which are identified in the testimony of Ms. Kinard as "geography, interface type, pre-order query type, product, service order activity, volume category, trouble type, trunk

design and type (for trunk blockage measurements), maintenance and repair query type, and collocation category." (Kinard Direct, p. 35) Not every disaggregation category would apply to every measurement in the CLEC proposal, but many (if not most) measurements would have multiple types of disaggregation applied to them. This would result in the number of smaller measurements, or sub-metrics, expanding exponentially. In other words, the CLECs proposal would involve disaggregating a given measure by a certain number, then multiplying that number by a second number (representing a second disaggregation category), and then, in some instances, multiplying the result again and again until there are potentially thousands of sub-metrics for each measurement.

Mr. Coon gave in his testimony a specific example of how disaggregation would affect one particular measure, Mean Held Order and Distribution Interval. Applying disaggregation as described in Ms. Kinard's testimony and exhibits, this category would be disaggregated by 33 types of products, 8 levels of geography, 3 levels of volume, 5 types of service order activity, 3 levels of dispatch, and finally three categories that correspond to "facilities," "local" and "other." (Coon Rebuttal, p. 81). Thus, the calculation of disaggregation for this measure would be 33 x 8 x 3 x 3 x 5 x 3, which equals 35,640 sub-metrics for this single measure. The fact that a single measure would be broken down under the CLEC proposal into so many sub-measures prompts the question of how many total sub-measurements there would be in the CLPs' plan in the aggregate. The answer is that no one knows. However, Mr. Coon testified that applying the type of

multiplication described above to all measures in the CLEC plan yields an estimate of over 400,000 sub-measures (Coon Rebuttal, pp. 82-83).

At the same time, Ms. Kinard claimed that the CLEC proposal has 2,778 sub-measures (Kinard, Exhibit KK-E). Ms. Kinard arrived at this number via a truly bizarre route. The CLEC disaggregation proposal is not described comprehensively anywhere in Ms. Kinard's testimony, but is, instead, scattered throughout in several pieces. For example, KK-D presented the closest thing to a single document containing all CLEC-proposed disaggregation, and was very similar to what the CLECs filed in other states (Coon Rebuttal, p. 76). Exhibit KK-E was, in Mr. Coon's words "Ms. Kinard's estimate of the number of sub-measures in the CLEC plan once their proposed disaggregation has been completed." (Coon Rebuttal, p. 79). However, the estimate in KK-E does not reflect the disaggregation in KK-D. As Mr. Coon testified, the likely reason for this discrepancy is that "Ms. Kinard is attempting to downplay the sheer magnitude of the number of sub-metrics she is proposing because it clearly renders the proposal useless on its face." (Coon Rebuttal, p. 83).

At the hearing, it became apparent how far the CLECs are willing to go in this effort. Amazingly, Ms. Kinard withdrew all portions of exhibit KK-D that refer to disaggregation. (Tr. Vol. IVA, p. 43). Thus, the CLECs no longer have a description of their proposal in evidence, but only a grossly understated estimate of what the CLEC proposal yields. Moreover, Exhibit KK-E is at such obvious odds with Ms. Kinard's testimony, that it renders the entire CLEC disaggregation

proposal meaningless. For example, Ms. Kinard's estimate treats disaggregation by geography in a way that is totally arbitrary. In her testimony, Ms. Kinard states that measures should be disaggregated by geography. Specifically, she attached to her rebuttal testimony what she describes as "a document that Ameritech provides on its state regions which mirrors its ordering and maintenance regions within its five states." (Kinard Rebuttal, p. 13-14).[4] She then asserts that "the Authority should require this kind of disaggregation for Tennessee" (*Id.*, p. 14). Although she provides no further explanation, the document appears to reflect a separate line entry for every wire center in Ameritech's five state region. The pages of this document that relate to Michigan alone have 337 entries for individual wire centers. Yet in Exhibit KK-E Ms. Kinard disaggregates by geography on the basis of only 3 zones. (Tr. Vol. IVC, p. 174)[5] Thus, Ms. Kinard has grossly understated the degree of disaggregation she proposes in her rebuttal testimony.

Further, the estimate in KK-E conflicts with yet another geographic disaggregation proposal made in Ms. Kinard's direct testimony. In this testimony, she states that "the geographic disaggregation being sought is at the MSA (Metropolitan Statistical Area) level." (Kinard Direct, pp. 40-41).

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[4] Although this document was not identified, it is the only exhibit to Ms. Kinard's Rebuttal Testimony.

[5] During cross examination, Ms. Kinard claimed that the CLEC-proposed geographic disaggregation is based, not on MSAs (as has originally stated in exhibit KK-D), but on some sort of division between areas having low, medium and high levels of competition (Tr. Vol. IVC, p. 174). When asked to identify the portion of her testimony that actually contains this proposal, Ms. Kinard referred to exhibit KK-E (*Id.*, p. 176). Exhibit KK-E, however, does not contain any reference to such a proposal.

In Tennessee, there are six MSAs in BellSouth's service area. (Coon Rebuttal, Exhibit DAC-R1). Further, Ms. Kinard testified that CLPs would want separate disaggregation to reflect activity in rural areas not included in MSAs (Tr. Vol. IVC, p. 173). Ms. Kinard also stated that the CLECs want disaggregation that will reflect the state aggregate numbers, as well. (*Id.*) This means that there are a total of eight geographic areas that would be used for calculating disaggregation under the CLEC original proposal.

If Ms. Kinard's calculation is duplicated, but eight geographic areas are substituted for the three she used, measure P-4 has 2,376 sub-measures, almost as many sub-measures as Ms. Kinard claims there are in the entire CLEC plan.[6] (*Id.*) Moreover, if performance were disaggregated to allow reporting at areas as small as the wire center (i.e., the Ameritech approach she commends to the Authority, this single measure could likely have tens of thousands of measures. It is no wonder that the CLEC plan has never been implemented, and, as Ms. Kinard admitted, she does not even know if implementation is possible. (Tr. Vol. IVC, p. 183).

Further, by deleting the references to disaggregation in KK-D, the CLECs have not made their proposal more reasonable. They have simply made it illogical. For example, in her testimony, Ms. Kinard advocates disaggregation by product because, she claims, "product disaggregation is key because different performance

[6] According to KK-E (p. 7), using three geographic zones, this measure has 891 submeasures (i.e., 33 x 3 x 3 x 3 = 891). Using eight geographic zones rather than three changes the calculation to 33 x 8 x 3 x 3 = 2,540).

can be expected based on the type of product being ordered." (Kinard Direct, p. 36). Based on this, Ms. Kinard proposed in KK-D to apply product disaggregation to all order, provisioning and maintenance and repair measures, that is, to disaggregate each by 33 products. Although this would result in an unmanageable number of sub-metrics, this approach is at least consistent with her testimony. In Exhibit KK-E, however, some ordering, provisioning and repair measurements are disaggregated by product, but most are not. Further, when product disaggregation is reflected in Exhibit KK-E, the number of products varies from one measurement to the next. Ms. Kinard's testimony fails to provide the slightest clue as to why the requested disaggregation is applied so inconsistently. This same type of inconsistency appears in KK-E for each of the ten categories of CLEC-proposed disaggregation. Given the paucity of explanation of the apparent inconsistencies in KK-E, it becomes clear that this document is nothing more than a desperate, but badly flawed, attempt to make the CLEC plan appear workable.

BellSouth has proposed a reasonable plan that is calculated to accomplish the task that performance measurement plans are intended to do, i.e., detect discriminatory performance. In marked contrast, the CLEC disaggregation proposal is ill-defined, and ultimately untenable. It should be rejected.

III. THE ENFORCEMENT PLAN

In the Main, BellSouth agrees with the decisions the Authority made in the DeltaCom Orders regarding the enforcement mechanism. Specifically, BellSouth agrees with the TRA's decision to utilize a two tiered remedy structure (Coon

Direct, p. 18), the choice of the truncated z methodology (*Id.*) and the use of the "measurement categories taken from the 'VSEEM' plan" (*Id.*, p. 85). The principle area in which BellSouth believes the remedy plan requires change involves the level (i.e., amount) of penalties.

As Mr. Coon testified, after adopting the basic structure of BellSouth's proposed plan, "BellSouth's fee schedule, which lists the per transaction unit payments, was radically adjusted based on DeltaCom's recommended payment amounts." (Coon Direct, p. 85). In other words, the DeltaCom proposed penalty amounts were based on payments per measure. BellSouth proposed a fee schedule that would require payment based on the number of failed transactions captured by each measure. Combining the DeltaCom "per measure" penalty amounts with the BellSouth structure results in the likelihood of massive penalties that can bear no relation to any reasonable estimate of the impact of disparate treatment upon the CLECs.

Mr. Coon illustrated this point by referring to the measurement "Pre-Ordering OSS Average Response Time." For this measure, the Authority "adopted a benchmark of 5 seconds, rather than the BellSouth-proposed benchmark of parity + 4 seconds." (Coon Direct, p. 88). In July, 2000, BellSouth processed 148,978 CLEC CSR queries in an overall average of 7.64 seconds." (*Id.*). The five second standard was missed 44.89% of the time (i.e., 66,876 missed transactions). (*Id.*). If we assume, for example, that 10% of these misses occurred in Tennessee (i.e., 6,687), the calculation under the Authorities DeltaCom Order would be 6,687

transactions times a penalty of $2,500 per transaction, for a total payment due of $16,717,500. This penalty would apply for failing a single measure in a single month.

Although this is only one example, this same mismatch of penalty structure and penalty amount occurs throughout the plan ordered in the DeltaCom proceeding. As Mr. Coon testified,

> The penalty proposed by the Authority cannot be seriously considered as compensation for damages but rather is punitive in nature. This payment level goes well beyond any harm that could possibly be caused by the few seconds of delay experienced.

(Coon Direct, p. 88)

Moreover, in the aggregate, the penalty payments under this approach would be so massive that they would dwarf the amount of payments ordered by any other state commission anywhere in the country.

The CLECs present themselves as largely supporting the enforcement mechanism adopted by the TRA in the DeltaCom arbitration. Upon review of the CLECs' positions, however, it becomes hard to believe that they are reading the Orders actually entered by the Authority. Again, the Authority approved in the Final Order of Arbitration (issued February 23, 2001) BellSouth's process (Order, p. 6) and BellSouth's proposed table of measurements to which penalties apply (*Id.*, p. 11). Despite this, Ms. Bursh asserts in her testimony that the TRA ruled that there must be a penalty associated with every measurement or sub-measurement (Bursh Direct, p. 10). She also claims that the TRA approved the CLECs' method of

calculating penalties (which includes the use of a "n" factor, a multiplier to be applied to Tier II penalties based on CLEC market penetration levels) (*Id.*, p. 9). Finally, Ms. Bursh claims that the TRA adopted the additional Tier 1 penalties the CLECs advocate for "chronic" violations. (*Id.*, pp. 16-17). Again, a reasonable reading of the Final Order does not support this conclusion. Further, each of the above-noted positions of the CLECs should be rejected.

Under BellSouth's plan, penalties are paid for the failure to achieve key measures in areas that affect customers. (Coon Direct, p. 22). Further, "the measurement set is patterned after those used in New York and Texas." (*Id.*) BellSouth took the approach ordered by those commissions of assigning penalties only to the measurements that are most "customer impacting." (*Id.*) Apply this standard, BellSouth identified specific reasons that measurements should not have penalties associated with them. These reasons correspond to seven categories of measurements for which penalties are not proposed. Specifically:

1. Aggregation of Measures. While there may be some usefulness in disaggregating measurements to a fairly granular level for purposes of making comparisons, this level of disaggregation is not always appropriate when penalties are applied. An example is xDSL services. Various xDSL unbundled loops are provided over copper wires. The different types of xDSL services are the result of the electronics installed by the CLEC. Given the similarity of these various xDSL unbundled loops, BellSouth has aggregated them together for the purpose of determining whether remedy

payments are warranted. This aggregation is also appropriate to avoid the inherent unreliability of small sample sizes; in other words, to ensure meaningful comparisons. (Coon Rebuttal, pp. 27-28).

2. Diagnostic Measurements. There are a number of measurements included because they provide information to CLECs, but a failure to meet these measures really has no effect on the customer. An example of this type of measurement is Percent Rejected Service Requests. Because service requests are often rejected due to errors made by a CLEC, this measurement could help a CLEC determine whether its service representatives are completing and issuing local service requests properly, but it does not truly reflect BellSouth's performance. (Coon Rebuttal, p. 28)

3. Method of Submission. For some measurements (reject interval, for example), BellSouth's SQM disaggregates the measure by method of submission, in other words, fully mechanized, partially mechanized and non-mechanized. In BellSouth's remedy plan, however, only the measurement for fully mechanized submission has an attendant penalty, since this is the measurement category in which virtually all activity will occur. (Coon Rebuttal, p. 29).

4. Parity by Design Measures. Certain measures are categorized as parity by design. A parity by design measure occurs when BellSouth orders and CLEC orders are processed in a way that makes it impossible for

BellSouth to distinguish between the two. In these instances, discrimination is simply not possible. (Coon Rebuttal, p. 29).

5. Correlated Measures. In some instances, measurements are correlated, so that the failure of one measure will also result in the failure of a second measure. BellSouth does not believe that duplicative penalties should be paid when this occurs. Mr. Coon attached to his testimony (Exhibit DAC-R2) a matrix that lists specifically the measures in BellSouth's proposed SQM that are correlated.

6. Regional Measures. Some of BellSouth's measurements are regional in nature. Since BellSouth's OSS systems are regional, measurements such as OSS Average Response Time and Response Interval and OSS Interface Availability apply regionally, i.e., to the CLEC industry as a whole. Since the point of Tier 1 penalties is to provide penalty payments to a particular affected CLEC, it makes no sense to have a Tier 1 penalty for a measurement that, if failed, will affect the entire CLEC industry. (Coon Rebuttal, p. 30).

7. Volume Categories. "SEEM addresses systemic functions, so volume categories are not needed." (Coon Rebuttal, p. 30).

Again, BellSouth's Plan is patterned after the plans utilized in Texas and New York, in that penalties are assigned only to certain key measures. In every state that has received 271 approval (and to BellSouth's knowledge every state in the country that has adopted an enforcement plan) the selection of key measures has

entailed winnowing out those measurements that are less critical, and that should not have penalties associated with them for this reason. Moreover, the FCC has endorsed this approach. Specifically as Mr. Coon testified, the FCC rejected the idea that there must be a penalty associated with every measure when it reviewed the plan adopted in New York:

> We also believe that the scope of performance covered by the Carrier-to-Carrier metrics is sufficiently comprehensive, and that the New York Commission reasonably selected key competition-affecting metrics from this list for inclusion in the enforcement plan. (emphasis added)

(Coon Direct, p. 34, quoting Bell Atlantic Order at ¶ 439).

The CLECs claim to apply the same standard. If this is indeed true, then the CLEC method of applying this standard is novel, to say the least. The CLECs claim that every single sub-measurement is a key measurement that should have a penalty associated with it. Mr. Coon addressed the fallacy of this approach as follows:

> The CLECs simply apply the same penalty to each measurement with the only variable being their assessment of relative severity. CLECs can hardly claim that each sub-measure monitors a "key" area of activity. Any such claim is easily contradicted by the fact that the CLECs' plan would define more than 400,000 "key areas" of activity. This is absurd, especially given the fact that although the CLECs have a substantial volume of competitive activity, many of these so-called "key" areas have no transactions for any CLEC in the state.

(Coon Rebuttal, p. 31).

Given the implausibility of the CLECs' approach on its face, it is clear why the FCC and the Commissions in every state in which 271 approval has been

granted have declined to order a penalty for every measure/submeasure. The CLECs urge the Authority to adopt (and, in fact, claim the Authority has already adopted) this uniformly-rejected approach. The TRA should decline the invitation to become the only state Commission in the country to take this approach.

The market penetration adjustment proposed by the CLECs for Tier 2 penalties would have the effect of inappropriately increasing remedies under circumstances when the increase is not justified. As Dr. Taylor stated in his testimony, "the essential point here is that compensation owed to CLPs for BellSouth's failure to comply with set performance standards must be proportional to the financial or economic significance of the non-compliance." (Taylor Rebuttal, pp. 40-41) This principle supports the sort of transaction-based remedy plan that is advocated by BellSouth and that was adopted by the Authority. Under this approach, a small number of failed transactions results in a small penalty, and a larger number of failed transactions results in a commensurately larger penalty payment. In general, this is as it should be.

In contrast, the CLECs propose adjusted (i.e., increased) penalties that would apply in addition to the usual Tier 1 and Tier 2 penalties that would always apply. Specifically, the CLECs propose a Market Penetration Adjustment (for Tier 2 penalties), whereby, based on the percentage of the local market that is served by BellSouth (as opposed to CLEC competitors), penalties would be multiplied substantially. (Bursh Direct, pp. 18-19).

This approach is not appropriate because, as Dr. Taylor stated:

> The use of market share in isolation, as a predictor or estimate of the state of competition in a market, can be particularly misleading. The real issue is whether the incumbent firm, here BellSouth, has either the incentive or the ability to exercise market *power* (e.g., restrict competitive entry and/or manipulate market prices), not market share *per se*. If other indicators confirm that BellSouth is unable, in any way, to exercise that market power, then adjusting Tier 2 remedies for BellSouth's current market share is both unnecessary and distortive. Indeed, the whole point of Tier 1 remedies is to prevent BellSouth from exercising market power, such as by raising barriers to entry for potential competitors. If Tier 1 remedies are successful at accomplishing this, then scaling Tier 2 penalties by a market penetration factor would be overkill and economically inefficient.

(Taylor Rebuttal, p. 39).

In our case, there is absolutely no evidence to suggest that the penetration level achieved to date by CLEC competitors is the result of barriers to entry attributable to BellSouth. Further, the CLEC approach is structured so that the adjustment would apply regardless of the reason for the penetration levels. In other words, this adjustment would apply, even if the CLEC penetration level is attributable solely to the CLEC's business plans, rather than some external factor that is impeding their attempt to enter the market. As Mr. Coon testified, "if CLECs choose not to enter the market or compete vigorously due to any reason, BellSouth would have to pay higher penalties (Coon Rebuttal, p. 38).

Clearly, the CLEC-proposed adjustment represents an attempt to provide a windfall of excessive penalty payments to the CLECs in circumstances in which there is no justification for the adjustment. The Authority has not adopted this adjustment in the past, and it should not do so now.

Two other aspects of the CLEC proposed plan were not adopted, and should not now be adopted: (1) the Tier 1 penalty for "chronic" performance; (2) the CLECs proposed Tier 2 penalties. In Ms. Bursh's testimony, she proposes to deal with "chronic" failures by adding to the otherwise applicable Tier I penalties, a penalty of $25,000, per CLEC, for each sub-metric in which the performance deficiency is not resolved within three months. (Bursh Direct, pp. 16-17). This proposal should be rejected because, as Mr. Coon explained, it contains all the flaws of the CLEC's Tier 1 proposal, and "simply makes each of these flaws twice as onerous by doubling the penalty amount." (Coon Rebuttal, p. 36). BellSouth's SEEM provides the better approach to addressing persistent deficiencies. Under SEEM, "the penalty per transaction increases each consecutive month that the performance standard is not met, up through month 6." (Coon Rebuttal, p. 36).

The Tier 2 penalty described in Ms. Bursh's testimony should also be rejected because it is nothing more than an unwarranted multiplier of the Tier 1 penalty. The Tier 2 penalties she proposes apply every month that performance is below the established standard statewide. Of course, penalties can only be sub-standard statewide if they are also below standard for individual CLECs to whom Tier 1 penalties are being paid. Thus, this approach to Tier 2 penalties serves no purpose other than to make BellSouth pay twice for a single given failure. As Mr. Coon stated, "a more appropriate role for Tier 2, as the Authority has already recognized, is to address performance that is persistently below the analogs or

benchmarks. However, assessing Tier 2 each month negates the ability to do this." (Coon Rebuttal, p. 37).

The Effective Date of The Enforcement Mechanism

The Authority, of course, ruled in the DeltaCom Orders that the enforcement mechanism should become effective immediately (albeit with a reduced cap). Also, BellSouth reached a settlement with DeltaCom that allowed for the early implementation of a penalty plan (i.e., pre-271) "in the context of the total agreement of the parties." (Coon Direct, p. 93). This does not mean, however, that the issue of when penalties should begin to apply has been definitively resolved.

As to the DeltaCom settlement, this was reached in the context of the totality of negotiations between the parties. This agreement contained an acceptance by DeltaCom of an enforcement plan much like the one advocated in this proceeding (as opposed to the plan ordered by the Authority) as well as certain other compromises. Any party may opt into the agreement, but in doing so, it must follow the FCC's "pick and choose" rules (FCC Rule 51.809).

The distinctly different question before the TRA now concerns the effective date of a generically-ordered enforcement plan that will be available to all CLECs, without their accepting the attendant compromises of the ITC^DeltaCom Agreement. In resolving this issue, the Authority should consider the FCC's explicitly-stated intention for this mechanism.

The enforcement provisions of any plan approved by the Authority should not go into effect until after BellSouth receives 271 relief and is able to provide long distance service in Tennessee. The FCC has never indicated that it considers the existence of an enforcement plan to be a prerequisite to 271 relief. Instead the FCC has plainly stated that the penalty plan is simply one way to satisfy the public interest requirements of 271 by ensuring that there will be no backsliding by the respective ILEC after 271 authority is granted. (*See* Bell Atlantic New York Order ¶¶ 429-430; Southwestern Bell Texas Order ¶¶ 420-421; Southwestern Bell Kansas/Oklahoma Order ¶ 269.).

For example, in the context of stating its public interest analysis, the FCC provided the following in the Bell Atlantic, New York Order:

> [O]ur examination of the New York monitoring and enforcement mechanisms is solely for the purpose of determining whether the risk of post-approval [271] non-compliance is sufficiently great that approval of its section 271 application would not be in the public interest.

(footnote 1326.)

Further, referring to Bell Atlantic's proposed plan, the FCC stated that,

> [b]ecause this aspect of our public interest inquiry necessarily is forward-looking and requires a predictive judgment, this is a situation where it is appropriate to consider commitments made by the applicant to be subject to a framework in the future. (emphasis added)

(*Id.*)

In short, while the FCC has encouraged "state performance monitoring and post-entry level enforcement," it has "never required BOC applicants to

demonstrate that they are subject to such mechanisms as a condition of section 271 approval." (¶ 429).

Not surprisingly, the CLECs contend otherwise. As stated previously, the gist of every CLEC position is a quest for more penalty-generated revenue. So it should not be a surprise that the CLECs want this revenue stream to begin sooner rather than later. Ms. Bursh contends, on behalf of the CLECs, that local competition will not develop without a penalty plan, and that BellSouth has no incentive to comply with a performance plan without penalties. (Bursh Rebuttal, p. 7). She is wrong on both counts. As Mr. Coon testified:

> As demonstrated by the FCC's latest Local Competition Report[7], local competition is developing quite well in Tennessee without the payment of penalties. Although the FCC's latest report is somewhat dated, Table 6 in that report shows that, as of December 31, 2000, CLECs served 8% of the end user lines in Tennessee. BellSouth's recent estimates of CLEC-served lines are 10% or greater as of May 2001.

(Coon Rebuttal, pp. 18-19).

Further, as Mr. Coon also testified, "it is ridiculous to imply that BellSouth has no incentive to comply with performance standards unless threatened with self-effectuating penalties" (Coon Rebuttal, p. 17). To the contrary, BellSouth's compliance is required by law, and the CLECs have many options other than enforcement mechanisms that they can pursue if they believe BellSouth is not

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[7] *See* Federal Communications Commission Releases Latest Data on Local Telephone Competition, May 21, 2001, Local Telephone Competition: Status as of December 31, 2000.

meeting its obligations (Coon Rebuttal, pp. 17-18). Moreover, as Mr. Coon testified:

> BellSouth cannot gain the authority to provide long distance service in Tennessee unless it is determined by the FCC—with input from this Authority—that BellSouth is providing nondiscriminatory access to all CLECs in Tennessee. These are powerful incentives for BellSouth to comply with its obligations under the Act, and these incentives have not been diminished by the lack (to-date) of enforcement mechanisms.

(*Id.*, p. 18).

Again, the entire purpose of the remedies paid under an enforcement plan is to prevent backsliding post-271. The CLECs have provided no legitimate reason to implement a penalty plan pre-271. In fact, there is none. For this reason, the Authority should revisit its previous decision to have penalties apply (albeit with a reduced cap amount) prior to 271 approval. This is the only approach consistent with the clear directives of the FCC regarding the purpose of an enforcement mechanism.

IV. STATISTICAL ISSUES/CHOICE OF PARAMETER DELTA

In the main, the statistical issues in this proceeding are uncontested. As. Dr. Mulrow testified, BellSouth's proposed statistical methodology is based upon a joint Statisticians Report that resulted from a collaborative effort in the context of Louisiana's performance measurement, between Dr. Mulrow, other Ernst & Young statisticians and Dr. Colin Mallows, a now-retired statistician from AT&T Research Labs (Mulrow, p. 5). Perhaps because of this effort, the statistical issues relating to performance measurements are fairly limited. In most proceedings throughout

BellSouth's region, the issues have been limited to (1) whether the truncated z test should be used or the modified z test; and (2) whether error probability balancing will be used. In this case, however, the Authority determined to utilize both the truncated z test and error probability balancing, and the statistician representing the CLECs, Dr. Bell, testified that he does not take issue with either decision (Bell Direct, pp. 4, 10). Thus, there appear to be no real statistical issues in the case.

There are, however, two issues on which statistics have some bearing: (1) the issue of whether the TRA has ordered a penalty for every measurement (as Ms. Bursh asserts); (2) the selection of the parameter Delta.

Again, Dr. Bell agreed that the Authority has selected the truncated z. He agreed on cross examination that the truncated z is utilized when there is an aggregation of results (Tr. Vol. IV-C, p. 197). He also agreed, that the modified z would be used if there is "no aggregation in this plan" (*Id.*), that is, if a penalty were applied to every measurement without aggregation. Finally, he agreed that the Authority needs only to "decide which type of plan they want and the statistic they'll use will follow that decision." (*Id.*). The converse proposition must necessarily also be true: having selected the truncated z, it only makes sense that the Authority must have chosen the only approach that works with this statistic, aggregating results (as BellSouth proposes) rather than having a penalty for every sub-metric. Ms. Bursh's contention that the TRA accepted the CLEC-proposed penalty plan is untenable for a number of reasons discussed previously. Her unlikely assertion is weakened even further by the fact that, as Dr. Bell

acknowledged, the Authority chose a statistical approach that is only compatible with aggregating sub-metric results, and not with having a penalty for every sub-metric.

On the second point, the selection of the parameter Delta, the Authority selected 0.25 as the initial parameter delta. As Mr. Coon testified, this is the lowest delta value selected by any state Commission in BellSouth's region (Coon Direct, pp. 82-83). BellSouth advocates a delta value of 1.0.

Essentially, "error probability balancing" involves the determination of a "balancing critical value," a figure that represents the point at which, in a statistical analysis, the probability of Type 1 and Type 2 errors are exactly balanced. (Mulrow Direct, p. 13). Although there are complicated formulas that can be used to calculate the single value that represents a "balancing critical value," (*Id.*), a simple approximation of that figure can be determined that will facilitate the discussion of this issue. This approximation is calculated by simply taking the negative of the square root of the number of CLP transactions that have been observed, and multiplying that figure by a number that is derived by dividing "delta" by 2. (*Id.*, p. 14). To illustrate, if there were 25 CLP transactions, and a "delta" of 1 is used, the resulting "critical balancing value" would be "-2.5."[8]

[8] The "balancing critical value" is always assumed to be negative, because if the test statistic were positive, it would suggest that the CLPs were getting better service than BellSouth was providing to itself, which is, of course, not the issue in this proceeding.

Using "-2.5" as the balancing critical value, any test statistic smaller than "-2.5" (that is any number further from 0) would indicate the presence of a material statistical difference. Any number larger than "-2.5" would indicate the absence of a material statistically significant difference.

Clearly, in such circumstances the value of "delta" has a significant impact on the single number that has been identified as the "balancing critical value." The higher the value of "delta," the higher the "balancing critical value," all other things being equal. Therefore, it is not surprising that there is a dispute regarding the parties as to the appropriate value of "delta."

In order to resolve which value to use for "delta," it is important to understand the purpose it serves. Basically, "delta" is a factor that is used to identify whether a meaningful difference exists between the BellSouth and CLEC performance, in addition to a statistical difference. (Mulrow Direct, p. 16). To use an example, assume that for a given month the average time that BellSouth took to provision a dispatched residential retail order was five days. Assume further that the standard deviation associated with that average was 1.5 days. This means that about 68 percent of all of those services were provisioned to BellSouth customers within a period of 3.5 to 6.5 days. (*Id.*, p. 16). If the threshold of materiality, as represented by "delta," were set at a value of 1.0, as long as the average time to provision similar services to the CLECs did not take longer than the BellSouth mean (5 days), plus one half of the standard deviation (1.5 days), the difference in the averages would not be material. Stated another way, if the

average interval for BellSouth to provision services to its customers were five days and the average of the time to provision services to the CLECs was less than 5.75 days, the difference, even though it exists, would not be material. (*Id.*).

The question then becomes, how does one decide what is material? How was the decision made that .75 days' difference between the service performed for the CLECs and for BellSouth's own customers was not material? The simple answer is that this has to be a business judgment. (Mulrow Direct, p. 18). Unfortunately the exercise of business judgment requires time and experience, and this process is so new that assumptions have to be made in selecting the value of "delta." It is precisely for that reason that BellSouth has proposed that the Authority set a value for "delta" and revisit that decision six months after the Plan goes into effect in order to determine whether the value of "delta" was set inappropriately. If the Authority elects that course, it still has to determine the initial value of "delta." In this regard, BellSouth has proposed the values for "delta," selected by the Louisiana Public Service Commission.

However, as Dr. Bell agreed, BellSouth will begin paying penalties to the CLECs when the observed differences between BellSouth transactions and the CLECs transactions equal one-half of the value of "delta." (Tr. Vol. IV-C, p. 203). As a practical matter, this means that under BellSouth's proposal, BellSouth would begin paying penalties when the difference in the observed means of the BellSouth and CLP transactions was equal to half of a standard deviation. Using a delta of

.25, the penalties would start when the discrepancy was equal to one-eighth of a standard deviation.

The simple truth is that not all differences are material and some judgment has to be exercised in determining whether a difference equal to half of a standard deviation is material, or whether materiality dictates that one-eighth of a standard deviation is appropriate. Again, because of this uncertainty, BellSouth urges the Authority to adopt the same standards that Louisiana adopted, and to plan to review that decision at six month intervals until the Authority can be certain that it has found the correct value for "delta."

V. LEGAL AUTHORITY TO IMPOSE PENALTIES

In the order entered by the TRA on September 7, 2001, in the arbitration between Intermedia and BellSouth (Docket No. 99-00948), payments under the enforcement plan are referred to as "liquidated damages" (for Tier I) and "voluntary payments" (Tier II) (p. 4). These characterizations are accurate to the extent that the Order adopts the payment schedule set forth in BellSouth's VSEEM III. Further, to the extent BellSouth agrees to voluntary liquidated damages, or any other voluntary payments, the Authority obviously has the ability to accept this offer. As a general proposition, BellSouth believes that the Authority has the authority to act as it sees fit in any matter under its general jurisdiction to the extent that the affected parties consent to the action.

The more difficult question, however, is whether the Authority has the ability under either federal or state law to impose upon BellSouth a "self executing remedy

plan" (i.e., a plan under which BellSouth would pay liquidated damages when it fails to meet the plan's measurements) without its consent. This issue would come into play under two circumstances: (1) if the Authority ultimately determines to commence the payment of penalties before BellSouth consents to this payment (i.e., before BellSouth obtains 271 relief in Tennessee); (2) if the Tier I and Tier II payments ordered by the Authority are more than BellSouth consents to pay. BellSouth submits that, in either case, the Authority lacks the ability to order BellSouth to make "involuntary" penalty payments.

There is no Federal Circuit Court case that BellSouth is aware of that has stated definitively whether the federal act gives a state commission the authority to order automatic penalties that would function in much the same manner as liquidated damages. All we know for sure is that there is clearly no explicit grant of such authority in the Act. Consistent with this, the FCC has specifically stated that imposition of an enforcement plan (i.e., penalties) is not a prerequisite to Section 271 relief.

The only case in BellSouth's region in which a federal court has considered whether a state commission has the authority to impose penalties comparable to liquidated damages is *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286 (U.S.D.C., No. D. FL, 2000). This case, however, is in no way dispositive. In *MCI*, the Federal District Court for the Northern District of Florida considered the claim of MCI that the Florida Public Service Commission erred by refusing to arbitrate the question of whether a

provision for liquidated damages (i.e., involuntary penalties) should be included in an interconnection agreement between the parties. (Order, pp. 31-32.)

The Court held that the Florida Commission must consider literally anything that a party raises in an arbitration. The Court's logic was as follows: (1) parties are free to negotiate anything they wish; (2) to the extent negotiations fail to yield an agreement, parties may raise in arbitration issues that were the subject of negotiations; and (3) when a Commission undertakes to arbitrate a dispute between the parties, it is required to arbitrate all "open issues," i.e., whatever the parties raise. This constitutes perhaps the broadest interpretation of the Act that has been made by any federal court in the country. Still, the Court was careful to clarify its ruling as follows:

> Nothing in this Order should be read as an indication that the Telecommunications Act imposes on state commissions an obligation to perform any enforcement role requested by the parties, or that Congress lawfully could impose any such obligation on state commissions. The holding here is simply that, having undertaken to arbitration any open issues under the Act, the Florida Commission must arbitrate the open issue of whether or not the parties' arbitrated interconnection agreement should or should not include an enforcement or compensation mechanism of the type requested by MCI. (emphasis added)

(*Id.*, p. 36, footnote 16.)

There is no authority anywhere for the conclusion that automatic penalties are required by the Act. Even the parties that have taken the most aggressive stance on this issue argue only that the Authority can impose these penalties if it wishes to do so, not that it is required by federal law to do so. Further, the only

federal court in BellSouth's region to address this issue squarely declined to determine whether Congress intended to empower state commissions to impose penalties. Given this, and the general paucity of authority otherwise, there is no firm legal basis for the Authority to conclude that the Act contains an implied grant of this power. To find to this effect would create a potential legal infirmity in the Authority's ruling on performance measurements, and further create the prospect that the Order that results from this docket would be undercut by future federal court decisions on this point.

As an administrative agency, the Authority has only the powers conferred upon it by statute, "and any action which is not authorized by the statutes is a nullity." *Madison Loan & Thrift Co. v. Neff*, 648 S.W.2d 655, 657 (Tenn. Ct. App. 1982); *General Portland v. Chattanooga-Hamilton County Air Pollution Control Board,* 560 S.W.2d at 910, 913 (Tenn. Ct. App. 1976). Although statutes from which agencies derive their authority often "should be construed liberally because they are remedial, the authority they vest in an administrative agency must have its source in the language of the statutes themselves." *Wayne County v. Solid Waste Disposal Control Bd.,* 756 S.W.2d 274, 282 (Tenn. App. 1988). Applying these principles to the former Public Service Commission, the Court of Appeals has noted that "the powers of the Commission must be found in the statutes. If they are not there, they are non-existent." *Deaderick Paging v. Public Service Com'n*, 867 S.W.2d 729 (Tenn. App. 1993).

Here, the CLECs' proposed "performance guarantees" constitute penalties that are unenforceable under federal or state law. Because neither the Authority nor a court could enforce such penalties even if they were voluntarily agreed to by the parties, the Authority necessarily lacks the power to require that the parties incorporate such penalties in their interconnection agreements.

The Authority is not vested with such power simply because the penalties proposed by the CLECs may be good "public policy" in the minds of some by encouraging "better" performance by BellSouth (a position with which BellSouth does not agree). In the *Wayne County* case, for example, an agency found that a landfill had contaminated a family's well, causing the family to haul water from a nearby school for all their cooking, drinking, and bathing. *See* 756 S.W.2d at 278. The agency ordered the operator of the landfill to: (1) close the landfill in a satisfactory manner; and (2) to provide the family with a permanent, uncontaminated supply of water. In support of the second aspect of its order, the agency claimed that it had the authority "to fashion remedies for essentially private wrongs even though the Act does not give it explicit authority to do so" because such authority, according to the agency "is implicit in its authority to abate public nuisances and to issue orders of correction ...."

Id. at 283.

While acknowledging the appeal of the agency's argument in light of the facts before it, the Court of Appeals held that the agency had no authority to order

the operator of the landfill to provide the family with an uncontaminated supply of water. The Court explained that

> notwithstanding the logic and appeal of the [agency's] position, it provides an insufficient basis for this Court to engraft remedies onto the Act that were not put there by the General Assembly.

Id. at 283. The Court concluded that the family could pursue relief "in courts where the full range of legal and equitable remedies will be available to them ...." *Id.* at 284.

Moreover, no statute empowers the Authority to impose fines that even approach the magnitude of the penalties sought by the CLECs. *Cf.* T.C.A. §65-4-120 (Authority may impose a $50 per day penalty for failure to comply with "any lawful order, judgment, finding, rule, or requirement of the authority"). Therefore, the Authority lacks the power to impose the penalties the CLECs propose.

This conclusion is apparent from the Court of Appeals' decision in *General Portland v. Chattanooga-Hamilton County Air Pollution Control Board*, 560 S.W.2d 910 (Tenn. Ct. App. 1976). In that case, an agency found that a company had failed to meet an air pollution emission standard. In an attempt to discourage the company's poor performance in the future, the agency ordered the company to post a $10,000 bond, which the company would forfeit in the event of a future failure to meet the standard. The company subsequently failed to meet the standard, and the agency sued for forfeiture of the bond.

In considering the agency's claim that it had the statutory authority to effectively fine the company $10,000 for a violation of the emission standard, the Court stated that

> an administrative agency such as this board has no inherent or common law powers. Being a creature of statute, it can exercise only those powers conferred expressly or impliedly upon it by statute. In this absence of statutory authority, administrative agencies may not enforce their own determinations. Administrative determinations are enforceable only by the method and manner conferred by statute and by no other means. The exercise of any authority outside the provisions of the statute is of no consequence.

Id., 560 S.W.2d at 914. In light of these principles, the Court held that the agency had no statutory authority to either require the company to post the bond or to seek forfeiture of the bond. Similarly, the Authority has no statutory power to order BellSouth to subject itself to the penalties the CLECs seek to impose in this proceeding.

The result would not change even had the CLECs proposed a liquidated damages provision rather than penalties (which is not the case). The General Assembly knows how to enact statutes that prescribe liquidated damages or that allow certain persons or entities to prescribe liquidated damages, and it has done so on several occasions. *See, e.g.,* T.C.A. § 43-16-134 (authorizing cooperative marketing associates to fix liquidated damages for breach of marketing contracts); § 46-2-406 (prescribing liquidated damages upon default of certain cemetery contracts); § 47-11-107 (prescribing liquidated damages for retail installment sales contracts); § 50-2-204 (prescribing liquidated damages for violations of wage

statutes); § 66-24-120 (prescribing liquidated damages for failure to record boundary survey). None of these statutes appear in Title 65 or empower the Authority to prescribe liquidated damages.

VI. OTHER ISSUES

In addition to the issues addressed above, the CLECs raised numerous other issues in their testimony. Each issue amounts to a request that the Authority add to the requirements of the previous DeltaCom Order additional restrictions or burdens on BellSouth and/or additional opportunities for the CLECs to receive even greater unjustified penalty payments. As to each of these issues, the CLEC position should be rejected for the reasons set forth below.

Penalties for Posting of Late or Inaccurate Reports

In this proceeding, AT&T argued, through its witness, Ms. Bursh, that BellSouth should be subjected to a penalty for filing reports that are late or inaccurate (Bursh Direct, p. 20). To the contrary, BellSouth should not be subjected to an automatic penalty for the late posting of reports or for the inadvertent posting of reports that are inaccurate. BellSouth will make every effort to meet any deadline that is imposed upon it. However, the volume of data processed and the need to validate reports prior to posting impose fairly severe burdens on BellSouth. It is not reasonable to assume that this burden will be met each and every month without exception, i.e., that BellSouth will achieve perfection in filing reports. Therefore, unless there is a systematic failure in posting reports, there should be no penalty for late posting. (Coon Rebuttal, p. 49).

In additional to the fact that setting perfection as the standard for timeliness seems patently unfair, there should also be no penalty because there is no evidence that the occasional posting of a late report would cause any harm to the CLECs. As Mr. Coon testified, the data in question is available monthly for every CLEC certificated in the BellSouth region, but very few CLEC access this data. (Coon Rebuttal, p. 50). Thus, the CLECs would be hard pressed to argue that they would be harmed by the occasional late posting of data which, to date, they have generally chosen not even to review. Nevertheless, if the Commission finds otherwise, then the penalty assessed should be no more than $2,000 per day for the aggregate of all reports, rather than for each individual report. (*Id.*)

BellSouth's position regarding inaccurate reports is much the same. BellSouth believes that it is no more appropriate to set the standard for providing accurate reports at perfection than it is to apply this standard to the timeliness of reports. There should be no penalty for the occasional issuance of an inaccurate report. (Coon Rebuttal, p. 51). Moreover, there are two factors that favor BellSouth's position regarding the submission of inaccurate reports that do not apply to late reports. First, there is no generally accepted definition of what would constitute "an incomplete or inaccurate" report, and no party in this proceeding has proposed one. (*Id.*) Thus, one could anticipate ongoing disputes as to how minor a discrepancy can be and still render a report "incomplete" or "inaccurate." By setting up a debate on this point, a penalty for inaccurate or incomplete reports would invite CLECs to game the penalty system.

Second, as Mr. Coon testified, finding and correcting errors is the sort of activity that should be encouraged. "Applying a penalty, once an error has been corrected or a report has been completed would seem to discourage such corrections, even if they were appropriate." (Coon Rebuttal, p. 51).

There is no record evidence that occasional inaccuracies in the reports would cause any harm to CLECs, and there should be no penalty for these inaccuracies. However, if the Authority finds otherwise, the penalty should be no more than $400 per day, for the aggregate of all reports, rather than for each inaccurate or incomplete report. (Coon Rebuttal, p. 51). Any penalties for late or inaccurate reports should be payable to the Authority rather than to CLECs.

Affiliate Reporting

In her testimony, Ms. Kinard contends that BellSouth should be required to report to both the Authority and to CLECs information concerning the service it provides to its affiliates (Kinard Direct, pp. 55-58). Specifically, Ms. Kinard advocates reporting of BellSouth's performance to all its affiliates "that buy interconnection or unbundled elements or that resell BellSouth's services" (Kinard Direct, p. 57). Strangely, she includes in the list of affiliates for whom information is sought "any future BellSouth long distance affiliate." (*Id.*, p. 58).

The only performance data of BellSouth affiliates that should be considered is the data that can be used to make an "apples to apples" comparison with the services provided to CLECs. Under this standard, the only BellSouth affiliate that

should report data is one that provides local service in Tennessee, i.e., a BellSouth-affiliated CLEC.

The parties appear to agree that information related to BellSouth affiliates should not be used at this time to measure BellSouth's performance, or as the basis for any penalty. Thus, the dispute regarding affiliates reporting comes down to two specific issues: (1) What data should be reported, or, put differently, which affiliates should report data; and (2) to whom should this data be reported.

To put the former question in perspective, it is important to consider the fact that, as Mr. Coon testified, the FCC has made virtually no use of affiliate data. A good example of the FCC's typical treatment of affiliate data appears in the Bell Atlantic-New York Order. In that Order, the FCC does discuss the development of a retail analog based on the performance that the BOC provides to "itself, its customers or its affiliates." However, as Mr. Coon noted,

> . . . [T]he FCC determined that nondiscriminatory access had been demonstrated because there was 'no statistically significant difference between Bell Atlantic's provision of service to competitive LECs and its own retail customers....' (emphasis added) (*See* Bell Atlantic New York Order ¶ 58; *See also* Southwestern Bell Kansas/Oklahoma Order ¶ 58).

(Coon Rebuttal, p. 104)

In other words, performance to affiliates did not play any specific role in the FCC's comparative analysis. Having made this point, BellSouth also notes that it does not object specifically to reporting affiliate data. Instead, BellSouth requests only more limited reporting than that urged by the CLECs.

To date, three states in BellSouth's region have ruled upon the issue of affiliate reporting. As Mr. Coon noted, "the Georgia PSC refused to adopt a proposal for comparisons between the performance for CLECs and the performance for the BellSouth affiliate, concluding that if a CLEC believes that BellSouth is showing preference to its affiliate, the CLEC may file a complaint with the Commission (GPSC Order at p. 13)." (Coon Rebuttal, pp. 105-06) The Louisiana PSC has ordered that if "the activity in Louisiana of BellSouth's affiliated CLEC reaches a certain threshold, then it should be reviewed in the context of future audits to determine whether there is any statistically significant indication of discriminatory treatment." (*Id.*, p. 106) Finally, in a recent decision, the Florida Public Service Commission required reporting, but held expressly "that only BellSouth ALEC affiliate data shall be reported for purposes of monitoring under the Performance Assessment Plan" (Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, p. 198).

BellSouth believes that any of these approaches is appropriate. In other words, it is reasonable to take no action unless a CLEC demonstrates that BellSouth has shown preference to its affiliates, and it is equally reasonable to require only reporting of BellSouth's affiliated CLEC for the time being. However, any reporting requirement should apply only to a BellSouth-affiliated CLEC, not all

BellSouth affiliates.[9] Again, this approach is consistent with the prior decisions of the Commissions in Florida, Louisiana and Georgia.

Again, Ms. Kinard appears to advocate that to the extent that any BellSouth affiliate purchases something comparable to what is provided to CLECs, then it should be reported, even if the BellSouth affiliate is not in the local market, and even if it does something totally different with this wholesale input than would a CLEC providing local service.

First, there is no reason to believe that non-CLEC affiliates of BellSouth will purchase, for example, local services on a wholesale basis, and then use them to do something other than provide local service. Certainly, the CLECs presented no testimony to identify a situation in which this might occur. For this reason, there appears to be no real point to reporting BellSouth's service to affiliates that are not providing local retail service and that do not function in a manner comparable to the CLECs.

Further, Ms. Kinard's nominal explanation for her position—that the reporting that relates to BellSouth's long distance affiliate is necessary "to ensure it is not being given more favorable treatment than BellSouth's combined local and long distance competitors" (Kinard Direct, p. 55) is less than plausible. Although there is some dispute as to the appropriate scope and purpose of the performance measurements at issue, no one has asserted that these measures are intended to

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[9] Because there is no BellSouth-affiliated CLEC currently operating in Tennessee (Coon Rebuttal, p. 1023), this reporting requirement would only apply in the future, when (or if) this affiliate CLEC begins operation.

police BellSouth's treatment of its long distance affiliate as compared to MCI, AT&T and the other current long distance providers. Although Ms. Kinard stops short of making this argument, this seems to be the implication of her testimony.

However, a more plausible explanation for Ms. Kinard's proposal is an intent to misuse performance measures as a vehicle to obtain sensitive competitive information from BellSouth once BellSouth has entered the long distance market that her employer (MCI), AT&T and other carriers have fought so hard to protect. Regardless of the CLEC's true motive, Ms. Kinard has failed to state any legitimate reason for the reporting of information that relates to BellSouth's long distance affiliate.

Finally, BellSouth and the CLECs disagree as to whom should receive any affiliate data that is required to be reported. The CLECs take the position that both the Authority and the CLECs should receive any data that a BellSouth affiliate is required to report. BellSouth submits that this information should only be provided to the Authority and its Staff. BellSouth believes it is inappropriate to unnecessarily put a (future) BellSouth-affiliated CLEC in the position of being the only CLEC that must report its competitive activity to its competitors. It is even more inappropriate to provide CLECs with information about BellSouth affiliates that do not provide local service, as Ms. Kinard requests. The only legitimate reason for the reporting of affiliate data is to determine whether there is some indication of preferential treatment, or some other basis to consider putting into place measurements that compare service to competitive CLECs with service to a

BellSouth-affiliated CLEC. This Authority and its Staff are more than capable of scrutinizing the information to make this determination. BellSouth does not believe that the Authority would be greatly aided by providing this information to CLEC competitors and requesting their input as to whether they believe that there is some basis for creating new measurements. The only result of providing this information to competitive CLECs would be to give them access to BellSouth's extremely sensitive, competitive information. Given the fact that there is no need to do so, BellSouth believes that the Authority should reject the request of the CLECs to provide them with this information.

Audits

Ms. Kinard proposes in her testimony that there be periodic third-party audits of SQM data and reports. BellSouth agrees that audits are appropriate, within reason. As Mr. Coon testified:

> . . . BellSouth's measurement data is produced by a regional system and managed by the same regional organization. Therefore, to the extent possible, audits should be conducted regionally since many of the processes and programs are the same from state to state.

(Coon Rebuttal, p. 108)

Moreover, the cost of comprehensive annual audits should be borne 50% by BellSouth and 50% by the CLPs. (Coon Rebuttal, p. 109) This approach is appropriate because CLECs can effectively define the scope of the audit, which will determine the audit cost. Ms. Kinard, however, maintains on behalf of the CLECs that BellSouth should pay 100% of the audit costs (Kinard Direct, p. 49).

However, as Mr. Coon testified, "since the audit is for the benefit of the CLECs, it seems reasonable that they help pay for it (Coon Rebuttal, p. 110).

If CLECs are required to pay 50% of the audit cost, this total cost will be divided among the various CLECs, which will result in each paying a relatively small amount. BellSouth agrees to have a comprehensive annual audit and has agreed to pay, by itself, 50% of the cost. Requiring the CLECs to split the remaining 50% of the costs among themselves is both fair and reasonable.

Mini-Audits

Ms. Kinard has also proposed that CLECs should have the right to require BellSouth to undergo an individual audit by a third party (i.e., a "mini-audit") whenever it "has reason to believe" that the data collected for the measure is flawed or that the report criteria is not being adhered to. BellSouth does not believe the requested mini-audits are necessary. As Mr. Coon testified, "BellSouth provides the CLECs with the raw data underlying many of the BellSouth Service Quality Measurement reports as well as the user manual on how to manipulate the data into reports." (Coon Rebuttal, p. 110) This raw data can be used to validate the results that appear in the BellSouth SQM. (*Id.*, p. 111).

The CLECs appear to reject entirely the possibility of even attempting to utilize raw data rather than having mini-audits. At the same time, the CLECs propose a method of conducting mini-audits that would be, at best, extremely burdensome and, more likely, impossible. Ms. Kinard testified that each CLEC should be able to request an audit of "all systems, processes and procedures

associated with the production of reporting and performance measurement results for the audited measure/sub-measure." (Kinard Direct, p. 51) Further, each CLEC would be able to demand each year an audit of "three single measures/sub-measures or one domain area (preorder, ordering, provisioning, maintenance or billing)." (*Id.*)

As Mr. Coon testified, a conservative estimate based on comprehensive audits in Georgia and Florida is that the annual comprehensive audit will take six months to complete in each given year. (Coon Rebuttal, p. 111) This leaves six months each year to conduct all of the mini-audits requested by the CLECs. There are approximately 96 CLECs operating in Tennessee. (Coon Rebuttal, p. 111). If each CLEC demands an audit of a sub-measure three times in each year, BellSouth would be responsible for conducting 288 CLEC-specific audits each year, just in Tennessee. (*Id.*) How BellSouth could possibly accomplish this is a mystery. Clearly, the CLECs have proposed something that simply cannot be done.

Moreover, this extreme number of audits would have to be conducted by BellSouth in any circumstances that the CLECs subjectively consider to be appropriate. Ms. Kinard testified that CLECs should have a right to a mini-audit "when a CLEC has reason to believe the data collected for a measure is flawed or the reporting criteria for the measure is not being adhered to." (Kinard Direct, p. 50) She does not offer, however, any objective standard for determining whether the CLEC has a sound basis for such a request. Further, Ms. Kinard confirmed during the hearing that, under her proposal, there is no requirement that the

demand for a mini-audit be reasonable. Instead, whenever a CLEC believes, in its "subjective judgment," that a mini-audit is appropriate, BellSouth cannot refuse. (Tr. Vol. IVC, p. 159)

Ms. Kinard also testified that, under the CLEC proposal, BellSouth should pay for a minimum of fifty percent of the cost of each and every mini-audit demanded by any CLEC. (Kinard, p. 51) This is the minimum cost to BellSouth because, if BellSouth were found to be materially at fault, then, under Ms. Kinard's proposal, BellSouth would have to "pay for the entire cost of the third party auditor." (Kinard Direct, p. 51) (emphasis added) Thus, as Ms. Kinard conceded at the hearing, the CLECs' proposal creates the possibility of CLPs' demanding hundreds of audits without good cause, and BellSouth having to pay for fifty percent of every one of these audits, even those that are generated by frivolous requests. (*Id.*, p. 161)

The CLPs' audit demand is not only unreasonable, it is, in all likelihood, impossible to meet. BellSouth submits that the TRA should not approve any result in the performance measurement docket that has the potential to place upon BellSouth (or for that matter any other party), a burden that is impossible to sustain. The CLECs' demand for mini-audits should be rejected.

The Cap on Penalty Payments

The Authority has, of course, set an absolute cap on BellSouth's liability under the enforcement plan of 36% of "BellSouth's Tennessee generated 'Net Return' based on ARMIS reporting data." (Coon Direct, p. 25) BellSouth supports

this approach. In contrast, in Ms. Bursh's testimony, she advocates what she refers to as a "procedural cap." (Bursh Direct, p. 22). Under this approach, when the penalties paid by BellSouth in a given year reach the procedural cap, BellSouth could then initiate a proceeding before the Authority to request that it make no further payments in that year. (*Id.*). However, the procedural cap is not really a cap at all, but rather a threshold that must be reached before the process of setting a cap begins. (Coon Direct, pp. 42-43).

The use of an absolute cap is consistent with the concept of a self-effectuating remedy plan. It only makes sense to set the cap at the outset so that it can go into effect automatically, just as with every other aspect of the remedy plan. There is no point in deferring to some future time the potentially lengthy process of filing testimony and other evidence and conducting a hearing, prior to determining whether (or at what point) a real cap should be set.

Moreover, setting an absolute cap is the only approach that is consistent with what has been done in other states, as well as by the FCC. As Mr. Coon testified, "the FCC has now approved enforcement plans for five states and in each instance an absolute cap such as the one BellSouth proposes here, was imposed." (Coon Rebuttal, p. 44). Thus, in every state in which the FCC has granted 271 authority, there has been an absolutely cap. No state has employed a procedural mechanism whereby the cap (if any) would be set at a future point.

Although the CLP Coalition pays lip service to the idea of a procedural cap, their proposal really amounts to having no cap at all. Again, the CLEC proposal

amounts to nothing more setting a threshold which, if reached at some future point, would trigger a proceeding to determine whether payments should continue to be made. The CLECs identify nothing that they believe would be good cause to set a real cap on BellSouth's payments in this future proceeding. Indeed, they would be free to argue in the future proceeding they propose that there should be no real cap imposed even though the "procedural cap" has been reached. Thus, it is obvious that the CLEC's nominal support of a procedural cap is simply a way to ensure that, in the short-term, there will be no cap, while preserving the option of arguing in a future procedural cap proceeding that there should be no cap at any time or for any reason.

Clearly, the better approach is to adopt an absolute cap of thirty-six percent. Doing so will serve the purposes for which the enforcement plan is intended, rather than converting the plan into an opportunity for the CLECs to receive unjustified, limitless payments. Further, the imposition of an absolute cap is the result reached in every state in which a 271 application has been approved by the FCC.

VII. CONCLUSION

For the reasons set forth above, BellSouth urges the Authority to adopt the current BellSouth SQM and BellSouth's SEEM plan in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 9, 2001, a copy of the foregoing document was served on the following parties, via the method indicated:

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