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July 15, 2002

VIA HAND DELIVERY

The Honorable Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

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

Dear Chairman Kyle:

Enclosed are the original and fourteen copies of an Erratum to Bellsouth's Motion for Reconsideration of the Amended Final Order Granting Reconsideration and Clarification and Setting Performance Measurements, Benchmarks and Enforcement Mechanisms, and Request that this Matter be Considered at the July 23, 2002 Agenda Conference which was filed on Friday, July 12, 2002. BellSouth has discovered that the document that was filed on Friday contained two errors, which are corrected by this Erratum. BellSouth is serving all parties by facsimile to bring the correction to the attention of all parties.

Cordially,

Joelle Phillips

JP/jej

Enclosure

454767

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

Docket No. 01-00193

ERRATUM TO
BELLSOUTH'S MOTION FOR RECONSIDERATION OF THE AMENDED FINAL ORDER GRANTING RECONSIDERATION AND CLARIFICATION AND SETTING PERFORMANCE MEASUREMENTS, BENCHMARKS AND ENFORCEMENT MECHANISMS AND REQUEST THAT THIS MATTER BE CONSIDERED AT THE JULY 23, 2002 AGENDA CONFERENCE

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files this Erratum to correct three errors contained in the Motion for Reconsideration of the Amended Final Order Granting Reconsideration and Clarification and Setting Performance Measurements, Benchmarks and Enforcement Mechanisms and Request That This Matter be Considered at the July 23, 2002 Agenda Conference, filed by BellSouth on July 12, 2002.

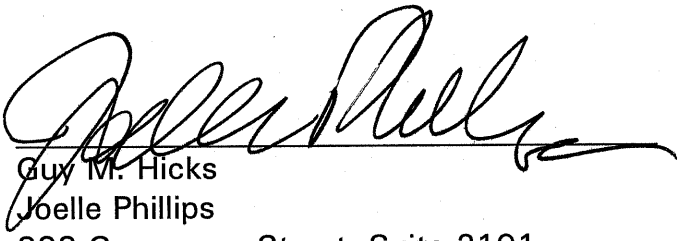
1. In paragraph 1, the phrase "unique to Tennessee, i.e. that is unlike any other plan adopted by any state commission in the country" should be deleted and replaced with the following: "unlike any plan adopted in BellSouth's nine-state region. Moreover, BellSouth is aware of no such plan in place anywhere in the country."

2. In paragraph 14, on page 7, the phrase "there are 576 Tier I penalties and 872 Tier II penalties" should be deleted and replaced with the phrase "there are 870 Tier I penalties and 908 Tier II penalties."

For ease of reference, BellSouth attaches to this Erratum, a complete corrected copy of the Motion, including the three corrections listed above.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2002, a copy of the foregoing document was served on the following parties, via the method indicated:

[ ] Hand [ ] Mail [X] Facsimile [ ] Overnight	James Lamoureux, Esquire AT&T 1200 Peachtree St., NE Atlanta, GA 30309
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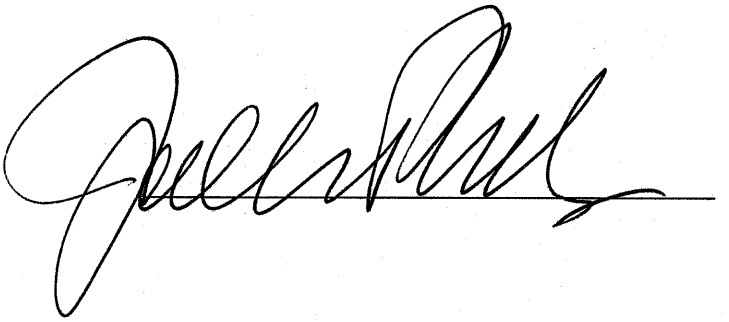

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

Docket No. 01-00193

BELLSOUTH'S MOTION FOR RECONSIDERATION OF THE AMENDED FINAL ORDER GRANTING RECONSIDERATION AND CLARIFICATION AND SETTING PERFORMANCE MEASUREMENTS, BENCHMARKS AND ENFORCEMENT MECHANISMS AND REQUEST THAT THIS MATTER BE CONSIDERED AT THE JULY 23, 2002 AGENDA CONFERENCE

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files its Motion for Reconsideration of the Amended Final Order Granting Reconsideration and Clarification and Setting Performance Measurements, Benchmarks and Enforcement Mechanisms and Request That This Matter be Considered at the July 23, 2002 Agenda Conference, and states as follows:

1. On June 28, 2002, two of the three Directors of the Authority at that time ("former Directors") voted in the above-referenced Amended Final Order to adopt a Performance Measurement and Enforcement plan that is unlike any plan adopted in BellSouth's nine-state region. Moreover, BellSouth is aware of no such plan in place anywhere in the country. The third Director that voted in this proceeding, Director Kyle, dissented, and, instead, moved that the Authority adopt as an interim plan for a period of six months, the Performance Measurement and Enforcement Plans ("Georgia plan") currently in place in Georgia, which was

recently approved by the FCC (Memorandum Opinion and Order, FCC 02-147, released May 15, 2002 in CC Docket No. 02-35).

2. The purpose of this Motion is to request that the current Directors reconsider the actions of the former Directors, reject the adoption of a plan unique to Tennessee and, instead, adopt for use in Tennessee the above-referenced Georgia plan. The request of BellSouth differs from the proposal of Director Kyle in one respect: BellSouth requests that the Authority adopt the Georgia plan not just for six months, but for an indefinite period. There may well come a time when changes to this plan are appropriate. BellSouth requests, however, that the Authority consider such changes on an ad hoc basis, rather than necessarily limiting the duration of this plan to six months.

3. The plan approved by the former Directors ("Tennessee plan") is dramatically different than any of the state-ordered plans that have been approved by the FCC. Moreover, implementing this plan would be an extremely difficult and time consuming process that would necessarily delay the availability of any performance measurement plan, with attendant penalties. Finally, the plan ordered by the former Directors is legally suspect, and carries with it the prospect of attenuated appeals and subsequent changes to conform the plan to the requirements of law.

4. In contrast, the adoption of the Georgia plan would make immediately available a performance measurement plan, with penalties, that the FCC has specifically found to be sufficient to ensure that the market for local

telecommunications service will remain open after BellSouth obtains approval to offer long distance service. Adopting this plan will allow for an immediate step toward assuring that the conditions have been met for BellSouth's entry into the long distance market, which means that the consumers of long distance services in Tennessee will likely have an additional competitive alternative much more quickly than would be possible if the plan ordered by the former Directors is left in place. For all of these reasons, BellSouth requests that the Georgia plan be immediately adopted in place of the plan ordered by the former Directors.

5. The purpose of a performance and enforcement plan is to provide a means to satisfy the public interest requirements of 271 by ensuring that there will be no backsliding by the ILEC after 271 authority is granted. (See Bell Atlantic New York Order, Paras. 429-430; Southwestern Bell Texas Order, para. 402-421; Southwestern Bell Kansas/Oklahoma Order, par. 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).

6. At the same time, the Amended Order states that "the performance measurements, benchmarks and enforcement mechanisms adopted herein provide a vehicle for determining whether BellSouth provides nondiscriminatory access to its

network elements, one of the requirements that must be satisfied before BellSouth's application to provide interLATA long distance service pursuant to 47 U.S.C. 271 can be approved." (Amended Order, p. 5).

7. The pronouncements of the Authority and of the FCC relate to two different aspects of the same standard. To gain entry into the long distance market, BellSouth must demonstrate that the local market is open. To keep this authority (and to otherwise avoid sanctions), BellSouth must ensure by its continued performance that the local market stays open. The standard that applies to both issues is the same. A measurement plan that is appropriate to ensure compliance with the Act is, by definition, also appropriate to ensure future compliance.

8. Of course, it is ultimately the FCC that will make both these judgments (whether the local market is open and how to ensure that it will stay open) based upon, among other factors, its evaluation of BellSouth's performance. The FCC has expressly found that the Georgia plan is appropriate for this purpose. As the FCC stated:

> [W]e find that the existing service performance measurements and enforcement mechanisms (SEEM Plans) currently in place for Georgia and Louisiana provide assurance that these local markets will remain open after BellSouth receives Section 271 authorization.

(FCC Order, ¶ 191).

9. The Georgia plan was the first performance and enforcement plan developed and approved in BellSouth's region, and it has essentially served as the

template for the entire region. The plan adopted by the Louisiana Public Service Commission, although somewhat different in the level of disaggregation applied to measurements, is generally based upon the Georgia plan. Moreover, the Georgia performance plan has been adopted, either on an interim basis or for a longer timeframe, by the respective Commissions in Kentucky, North Carolina, South Carolina, Mississippi and Alabama. Thus, the Georgia plan that has been approved by the FCC is currently in place, at least on an interim basis, in every state in the BellSouth region except Florida and Tennessee.

10. The plan ordered in Tennessee by the former Directors differs radically from the Georgia plan. No doubt some of the differences are attributable to the long and tortured history of the development of performance measures in Tennessee. Since the Amended Order recites in some detail this history, BellSouth will not reiterate it here in its entirety. However, to summarize, the first performance measurement plan ordered in Tennessee arose in the DeltaCom arbitration referenced in the Amended Order. In this arbitration, the Authority entered a series of three Orders over the course of approximately one year, each of which addressed certain aspects of the ordered plan. Thus, determining the substance of the plan required reading these three Orders together and cross-referencing them to glean the details of the plan. Further, in the DeltaCom arbitration, the Authority adopted a number of measurements that had, in effect, been imported from the measurement plan ordered by the Texas Commission, a

plan that measures an entirely different Operational Support system than the system utilized by BellSouth.

11. The plan ordered in the DeltaCom arbitration, however, was never implemented because BellSouth and DeltaCom entered into a settlement, whereby the parties agreed that DeltaCom's Interconnection Agreement would contain the performance plan proposed by BellSouth. Thus, the considerable challenges that would necessarily inhere in any attempt to implement this plan have, fortunately, never had to be addressed. Nevertheless, in the instant proceeding, the plan developed in the DeltaCom arbitration was utilized as the starting point, and changes were made to that plan in order to arrive at the plan described in the Amended Order.

12. Every other Commission in BellSouth's region has first addressed in a generic proceeding the question of what performance plan is appropriate to further the goals of the Act, and what penalty plan should be ordered in conjunction with the performance plan. Tennessee is the only state in BellSouth's region in which a plan was formulated, first, by considering the measures advocated by a single CLEC (DeltaCom), adding to that measures from a state outside BellSouth's region, then using the result as the basis to develop a generically-applicable plan. Perhaps as a result of this unusual course of development, the Tennessee plan differs radically from the state-approved plans from around the country that have been utilized by the FCC for 271 purposes, and is different as well from all other plans ordered by State Commissions in BellSouth's region.

13. As set forth in the Amended Order, the Tennessee plan has 78 measures, while the Georgia plan has 76 measures. (Amended Order, p.34). However, an assessment of the tremendous differences between these two plans involves more than simply comparing the number of measurements. The substance of a particular measurement depends on the business rules that apply to the measure (including the definitions of what is to be measured), the type of standard that is applied (i.e., retail analog or benchmark), the level of which the standard is set and the pertinent disaggregation (i.e., the extent to which the measurement is broken down into submeasurements for reporting purposes). Considering all of these defining factors, almost every measurement in the plan approved by the former Directors in Tennessee differs from the comparable measures in the Georgia plan.

14. Moreover, the Tennessee plan reflects an approach to penalties that is also radically different from the Georgia plan. The Georgia plan applies penalties only to key, customer affecting measurements. The Tennessee plan, in contrast, applies a penalty to almost every disaggregated submeasure in the plan. As a consequence, the Georgia plan has 74 Tier I penalties (which are to be paid to CLECs) and 98 Tier II penalties (which are to be paid to the state). In the plan approved by the former Directors, there are 870 Tier I penalties and 908 Tier II

penalties.[1] Put simply, the plan approved by the former Directors has the potential to result in massive penalties (both in number and amount) that are not only unprecedented in BellSouth's experience, but that are very different from the penalty levels under the plans that have been approved by the FCC.

15. Based on the foregoing, the comparison between the Georgia plan and the current Tennessee plan is clear. The Georgia plan has been in development for a number of years, has been adopted by most states in BellSouth's region, and has been specifically approved by the FCC as sufficient for the purposes of 271 consideration. The plan approved by the former Directors is a radically different plan that has not been implemented in any state and has not been considered in the context of a 271 application by the FCC. All of these differences beg the question of what could be the possible benefit to creating a unique plan for Tennessee when a Georgia plan exists that has already been deemed by the FCC as appropriate to serve all purposes for which the plan is intended.

16. Although the answer to this question is unclear, what <u>is</u> clear is the potential for undesirable results arising from the plan approved by the former Directors. Having a plan in Tennessee that differs from the Georgia plan that predominates in the BellSouth region, and that the FCC has approved, creates the potential for BellSouth to provide non-discriminatory service to CLECs (as measured by the FCC-approved Georgia plan), but still be adjudged <u>not</u> to meet this standard

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[1] Further, under both plans, penalties are assessed on a per transaction basis, which creates the prospect of BellSouth's paying penalties on a large number of transactions for each measure/submeasure in each month.

under the plan approved by the former Directors. In this case, even though BellSouth would meet the FCC-approved standards, its 271 application to the FCC could be needlessly delayed. Although the CLECs would no doubt welcome this result, it would have an undeniably negative impact upon Tennessee consumers who are eager to receive the benefits of true competition in the long distance market.

17. The second distinct advantage that the Georgia plan has over the plan ordered by the former Directors is that the Georgia plan can be implemented very quickly, while the former Director's plan could only be implemented after considerable delay. In the Order Setting Performance Measurements, Benchmarks and Enforcement Mechanisms (dated May 14, 2002), the Authority ordered BellSouth to implement measures immediately in some cases, and in other cases, within 90 days. BellSouth responded to this requirement in its Motion for Reconsideration by noting that plan changes require a considerable amount of time even under the best of circumstances. In fact, as BellSouth has previously stated, even implementing the BellSouth plan, exactly as BellSouth proposed it, would take 90 days. Implementing the extensive changes ordered by the Authority would take considerably longer. The Authority accepted BellSouth's position and ordered implementation on a schedule under which those measurements already in place would be implemented in ten days, other measurements would be implemented in 90 days, and measurements requiring substantial changes would be implemented in six months.

18. Given the extensive nature of the plan changes ordered by the former Directors, most of the measurements in the plan will require the full six months for implementation. Thus, the ordering of this plan by the former Directors ensures that there will be no measurement plan in place, and no penalties paid pursuant to a plan, for a period of at least six months.

19. In contrast, the Georgia plan could be implemented very quickly. Again, as part of the Amended Order, the Authority required BellSouth to implement within a period of ten days the measurements it was already reporting in Tennessee or other states. This Order was issued June 28, 2002. Since, as BellSouth has previously stated, it cannot implement measures in the middle of a month, compliance with this ten day timeframe required that BellSouth implement the measures by the next business day, Monday, July 1, 2002. BellSouth met this timeframe for 17 separate measurements. Although BellSouth cannot warrant that it can implement all measurements in the Georgia plan for Tennessee within twenty-four hours, it can state that this plan can be implemented very quickly.

20. Thus, comparing the two plan options, if the Georgia plan is selected, there will immediately be in place a plan that the FCC has determined is appropriate for 271 purposes, and that is more than sufficient to ensure that the local market is open. At the same time, changes can be made to this plan in the future, as necessary. In contrast, under the plan ordered by the former Directors, there would be no performance plan in place for at least six months. Then, after six months, the plan in place would be one that has not been approved (or even

considered) by the FCC and one that varies drastically from the plans in place in other states. Between these two alternatives, the appropriate choice is clearly the Georgia plan.

21. Certainly, the ability to implement without delay a plan approved by the FCC is, standing alone, a more than compelling reason to adopt the Georgia plan. However, an additional reason exists. The decisions of the former Directors have resulted in the creation of a plan that is questionable from a legal standpoint. Adoption of the Georgia plan would, as a practical matter, allow any such question to be avoided.

22. The question of the legal authority of a state or federal regulatory agency to order automatic enforcement penalties[2] is a matter of first impression, i.e., it has never been ruled upon by any Court. The well- settled law that relates generally to the powers of regulatory bodies, however, makes it clear that the Authority does not have the power to order automatic penalties without the consent of the party to whom the penalty would apply, BellSouth.

23. To support the ordering of automatic penalties, the Authority has relied, in part, on the case law that it cited in the original DeltaCom arbitration as the ostensible authority for this action. None of the cases cited in the DeltaCom Order, however, dealt with a generic proceeding to set performance measurements,

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[2] By an automatic penalty, BellSouth refers to a penalty that is set in advance at a pre-determined amount that would apply automatically upon the failure to meet a performance standard. This type of penalty obviously differs from a penalty that is levied after the sort of procedural requirements that typically apply before a penalty can be levied, e.g., a hearing.

or to generically set penalties, especially penalties that would be automatically applied in the event that performance measurements are not met. Instead, each of the cited cases dealt with the arbitration of an interconnection agreement, and stated, at most, the very narrow proposition that interconnection agreements may include provisions for liquidated damages. Since BellSouth covered in great detail in its Motion for Reconsideration these particular cases, the facts of these cases, the rulings of the respective courts, and the reasons that they are simply not applicable, it will not repeat itself here. (See BellSouth Motion, pp. 5-7). Suffice it to say that none of the cases dealt with penalties of this sort at issue in this proceeding.

24. The reason that the question at issue, the legal ability of a regulatory body to generically order automatic penalties, has not been litigated is likely nothing more than a question of practicality. Although the FCC does not require a performance measurement plan with enforcement penalties as a prerequisite to 271 approval, it has (as discussed previously) considered the existence of such a plan as a factor in determining whether granting the 271 application would be in the public interest. This approach by the FCC has presented a strong inducement for all ILECs seeking 271 approval, including BellSouth, to accept enforcement plans that have been ordered by state Commissions, and to do so without raising on appeal the legal question of whether, strictly speaking, any given Commission has the authority to order such a mechanism. Consistent with this practical reality,

BellSouth has effectively accepted the decision of the Georgia Commission to set its enforcement plan, in that BellSouth did not appeal this ruling.

25. There is, however, the distinct possibility that, at some point, a regulatory body will order an enforcement plan so harsh and inequitable that BellSouth is (again, as a practical matter) left with no alternative but to seek appellate review of this decision. The plan adopted by the former Directors is such a plan. As stated above, the plan adopted by the former Directors includes penalties that are applied in a manner that is different (and considerably harsher) than any State Commission-ordered plan that has been approved by the FCC.

26. Moreover, in the event of a legal challenge to the involuntary imposition of automatic penalties, the plan ordered by the former Directors simply cannot withstand appellate review. As BellSouth noted in its Motion for Reconsideration, the Authority (like every other regulatory agency in the country) is a body that may exercise only the express powers granted to it. It is well-settled under Tennessee law that the Authority must conform its actions to its enabling legislation. *Tennessee Public Service Comm. v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977). Moreover, Tennessee courts have held that the broad grant of regulatory jurisdiction contained in the statute should not be construed so liberally as to grant powers to the Authority beyond those either expressly granted by the statute or arising by necessary implication from express language contained in the statute. *Id.* (citing *Pharr v. Nashville, C. & St. L. Ry.*, 208 S.W.2d 1013, 1016 (Tenn. 1948); *Tennessee Carolina Transp., Inc. v. Pentecost*, 334 S.W.2d

950, 953 (Tenn. 1960); *Nashville Chattanooga and St. Louis Ry. v. Railroad and Public Utilities Commission, et al.,* 15 S.W.2d 751 (Tenn. 1929); *Tennessee Public Service Comm. v. Southern Ry. Co.,* 554 S.W.2d 612, 613 (Tenn. 1977)). As demonstrated by the foregoing case authority, notwithstanding the language contained in T.C.A. § 65-4-106 instructing that the powers of the Authority are to be broadly construed, Tennessee courts have limited the powers of the agency to those explicit in, or necessarily arising from, the statutes.

27. In its Motion for Reconsideration, BellSouth pointed out the undeniable fact that there is no legislative grant of authority that gives the Authority the power to levy penalties in the prospective manner that is an integral part of the plan approved by the former Directors. (BellSouth Motion, p. 12). BellSouth also pointed out that the only pertinent statute that allows the Authority to assess penalties (§ 65-4-120) limits these penalties to $50.00 per day and sets forth procedural requirements that cannot be satisfied if penalties are levied automatically (e.g., the requirement of a hearing).

28. BellSouth also pointed out in its Motion that there is a similar limitation to that set forth in § 65-4-120 in Article VI, § 14 of the Tennessee Constitution. The Amended Order responded to this point by stating, without citation to any legal authority, that the constitutional prohibition of fines in excess of $50.00 does not apply to "monetary sanctions." (Amended Order, p. 31). Instead, the Amended Order states that Tier 1 penalties constitute compensatory payment to CLECs, in other words, a sort of liquidated damages payment. (*Id.*). There is,

however, nothing in the record to establish that a liquidated damage provision in this instance would comport with the requirements of Tennessee law regarding such provisions. The Amended Order also states that the Tier 2 penalties (to be paid to the Authority) are not liquidated damages or penalties, and therefore concludes that the parties are also not limited by the above-described constitutional prohibition.

29. Although the legal sustainability of these conclusions is, at best, questionable, there is a more fundamental problem with this decision. The Amended Order appears to take the approach that the Authority may take whatever action it wishes, so long as it is not specifically prohibited from taking such action by the Tennessee Constitution. To the contrary, as stated above, it is not enough for there to be an absence of law specifically forbidding the contemplated action. Instead, there must be law that authorizes the action of the Authority. Thus, if the Authority wishes to order automatic penalties, there must be a statute in place to authorize this action. The same is true of injunctive relief or any other type of action that might be taken. The unassailable fact is that there is absolutely nothing in the Tennessee statutes that expressly empowers the Authority to order involuntary, automatic penalties. Given this, an order of automatic penalties is extremely unlikely to withstand appellate review.

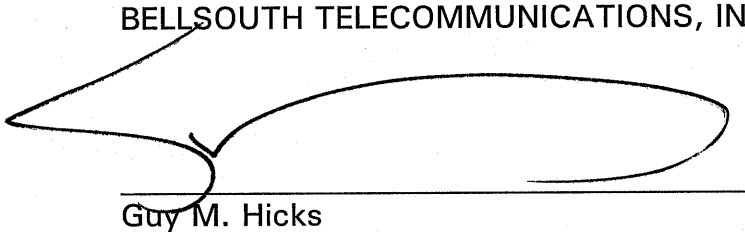
30. In light of all of the above, the choice between the Georgia plan and the plan ordered by the former Directors is very clear. The Georgia plan has been approved by the FCC, the plan ordered by the former Directors has not. The

Georgia plan can be implemented quickly, the Tennessee plan can be implemented only after an extended period of delay. Finally, the Georgia plan, as a practical matter, can be ordered without having to ultimately resolve the legal issue of the Authority's legal ability to order automatic penalties. The plan ordered by the former Directors necessarily makes this issue ripe for consideration. In light of the foregoing, the only choice that will benefit all parties, as well as the consumers of the state of Tennessee, is to immediately adopt the Georgia plan.

WHEREFORE, BellSouth respectfully requests that the Authority address this matter at the Agenda Conference scheduled for July 23, 2002 and enter an Order reconsidering the Amended Order and replacing the plan adopted by the former Directors with the Georgia Performance Measurement and Enforcement plan.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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