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December 8, 1999

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: *Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996*
Docket No. 99-00377

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Brief on "Enforcement Mechanisms" and "Penalties." Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH/jem

Enclosure

FILE

188977

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Petition by ICG TELECOM GROUP, INC. for Arbitration of an Interconnection Agreement with BELLSOUTH TELECOMMUNICATIONS, INC. pursuant to Section 252(b) of the Telecommunications Act of 1996***

Docket No. 99-00377

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF ON "ENFORCEMENT MECHANISMS" AND "PENALTIES"

I. INTRODUCTION

Pursuant to the request of the Tennessee Regulatory Authority ("Authority"), BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this brief addressing the Authority's power as arbitrators under the Telecommunications Act of 1996 to order that "enforcement mechanisms" or "penalties" be included in an interconnection agreement as requested by ICG Telecom Group, Inc. ("ICG"). Even if the parties voluntarily agreed to ICG's proposed "enforcement mechanisms," neither the Authority nor a court could enforce them because, as explained below, they are impermissible penalties. The Authority necessarily lacks the power to require the parties to adopt contractual provisions that are unenforceable as a matter of law. Accordingly, the Authority should deny ICG's request.[1]

[1] In addition to the legal issues concerning the Authority's power to require "enforcement mechanisms" or "penalties," there are also policy considerations that should be taken into account in determining whether to grant ICG the relief it seeks. Consistent with the Authority's instructions, this Brief will only address the legal issues, while BellSouth's Post-Hearing Brief will address the policy considerations.

II. DISCUSSION

A. ICG's Proposed "Enforcement Mechanisms" Constitute Penalties That Are Unenforceable Under Federal Or State Law.

ICG has proposed a two-tiered system of so-called "enforcement mechanisms." (Rowling Direct, Tr. Vol. IA at 2). As explained by ICG witness Rowling, Tier-One requires BellSouth to make payments to ICG when it does not meet specified single measurements, and Tier-Two requires BellSouth to pay what Ms. Rowling herself refers to as "penalties" to the State of Tennessee for each single measurement that it does not meet over a specified period of time. (Rowling Direct, Tr. Vol. IA at 11). Although ICG prefers to call these payments "enforcement mechanisms," they actually constitute unenforceable penalties.

When a contractual provision "entitles one party to a stipulated recovery following an event that constitutes a breach of contract," courts must look to "the substance of the provision and the intentions of the parties" to determine whether the provision is one for liquidated damages or penalties. *Guiliano v. Cleo*, 995 S.W.2d 88, 97 (Tenn. 1999). A provision is for liquidated damages only if: (1) the actual damages that would occur upon breach of the contract are indeterminable or difficult to measure as of the time the parties enter the contract; (2) the provision reflects the parties' intentions to compensate in the event of a breach; and (3) as of the time the parties enter the contract, the amount set forth in the provision is a reasonable estimate of potential damages that would occur upon breach of the contract. *Id.* at 100-101. Provisions that satisfy each of these factors generally are enforceable.

By contrast, a penalty is "a sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default, or by way of security for actual damages which may be sustained by reason of nonperformance, and it involves the idea of punishment." *Cleo*, 995 S.W.2d at 98 n.9. Tennessee law disfavors the enforcement of

provisions which serve to "penalize the defaulting party for a breach of contract." *Id.* at 98. Accordingly, "if the provision and circumstances indicate that the parties intended merely to penalize for a breach of contract, then the provision is unenforceable as against public policy." *Id.* at 101.[2]

1. ICG's proposed "enforcement mechanisms" are intended to -- and would, if adopted -- penalize or otherwise punish BellSouth for nonperformance of the interconnection agreement.

Throughout her testimony on direct, rebuttal, and cross examination, Ms. Rowling acknowledged that ICG's proposed "enforcement mechanisms" are not intended to compensate ICG for damages ICG may incur upon BellSouth's nonperformance of the interconnection agreement. Instead, it is clear that ICG intends for these "enforcement mechanisms" to do just what that term suggests -- enforce performance of the interconnection agreement by punishing BellSouth for alleged nonperformance. In fact, Ms. Rowling made it clear that punishment is ICG's main objective when she testified that

> actual damages may not be sufficient to deter [nonperformance by BellSouth]. Actual damages may not provide a sufficient economic incentive to obey, sometimes costly, legal obligations. On the other hand, punitive damages would create a general deterrence.

(Rowling Rebuttal, Tr. IA at 7)(emphasis added). This use of the term "punitive damages" in ICG's pre-filed rebuttal testimony is telling. The Tennessee Supreme Court has clearly stated that "punitive damages are not intended to compensate an injured plaintiff ...." *Coffey v. Fayette*

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[2] Federal law and state law are generally consistent on this point. Liquidated damages provisions are enforceable under federal common law only if the harm that will be caused by a breach is "very difficult or impossible to estimate" and if the amount fixed is "a reasonable forecast of just compensation for the harm caused. *Idaho Plumbers and Pipefitters Health and Welfare Fund v. United Mechanical Contractors*, 875 F.2d 212, 217 (9th Cir. 1989); *Robins Motor Transp. v. Associated Riggings & Hauling Corp.*, 944 F. Supp. 409, 411 (E.D. Pa. 1996). Conversely, liquidated damage provisions that are not reasonably related to the anticipated amount of damages upon a breach are void and unenforceable penalties. *Id.*

Tubular Products, 929 S.W.2d 326, 328 (Tenn. 1996)(emphasis added). Instead, punitive damages are awarded for the purpose of "punishing wrongdoers and deterring them from similar conduct in the future." *Id.* (emphasis added). Because they are designed to punish or deter and not to compensate for damages, "as a general rule punitive damages are not proper in breach of contract cases." *Medley v. A.W. Chesterton Co.*, 912 S.W.2d 748, 753 (Tenn. Ct. App. 1995)(emphasis added).

ICG's acknowledgement that its proposed "enforcement mechanisms" are in the nature of punitive damages is but one of many concessions showing that ICG intends for these proposed mechanisms to punish BellSouth for alleged nonperformance of the interconnection agreement. In explaining the Texas penalty system that ICG has asked the arbitrators to adopt, for instance, Ms. Rowling testified:

> In other words, I'll have to quote the chairman of the Texas commission. His idea was if the ILEC is going to provide widespread nonperformance on their 251 and 252 obligations and they were going to do it, quote, big time, he wanted to see them financially hurt big time. Not because the CLEC suffered massive financial damage, but in terms of the public policy as far as fostering competition suffered significant damage.

(Cross, Tr. Vol. IA at 80, lines 16-24). Other portions of Ms. Rowling's testimony confirm that ICG intends for its proposed "enforcement mechanisms" to punish BellSouth:

(1) Ms. Rowling testified that ICG's proposed "enforcement mechanisms" must cause BellSouth to "suffer greater financial liability" for nonperformance and argued that "the financial cost imposed for noncompliance needs to be high enough so that making the payments under an incentive plan will actually not be an acceptable price to pay ...." Tr. Vol. IA at 40, lines 16-19. *See also* Tr. Vol. IA at 41 (claiming that if ICG's penalty proposal is not adopted, "BellSouth will not suffer swift and immediate repercussions" for nonperformance); Tr. Vol. IA at 62 (stating that ICG's penalty proposal has the effect of "incenting the ILEC to deliver adequate performances ...."); Tr. Vol. IA at 74-75 ("There has to be a financial incentive to compel the ILEC to fulfill those obligations."); (Rowling Direct, Tr. Vol. IA at 14) (arguing that ICG's "enforcement mechanisms" are "necessary to act as a deterrent to sub-standard

performance and to provide incentive to BellSouth to fulfill its contractual and statutory obligations ...."); *Id.* ("The system needs teeth to ensure BellSouth's compliance ....").

(2) Ms. Rowling acknowledged that ICG's proposed enforcement mechanisms are in the nature of fines, stating "to the extent that the Texas penalties exceed the TRA's authority to impose fines, I would assume that the TRA would amend the Texas fine to clarify that the TRA may only impose a fine up to the maximum level fixed by Tennessee law." (Rowling Direct, Tr. Vol. IA at 11) (emphasis added);

(3) Ms. Rowling acknowledged that ICG's proposed enforcement mechanisms are in the nature of penalties, stating in her pre-filed direct testimony that the "Texas Commission believes that the measurements and penalty structure [which ICG asks the TRA to adopt in this proceeding] will foster the development of local competition by reflecting whether [Southwestern Bell's] Section 251 obligations are being met." (Rowling Direct, Tr. Vol. IA at 4). *See also Id.* at Tr. Vol. IA at 11)("But to the extent that the Texas penalties exceed the TRA's authority to impose fines, I would assume that the TRA would amend the Texas fine to clarify that the TRA may only impose a fine up to the maximum level fixed by Tennessee law.").

Ms. Rowling could not have been more clear that ICG intends for its proposed "enforcement mechanisms" to fine, penalize, or otherwise punish BellSouth for alleged nonperformance of the interconnection agreement.

2. The amounts set forth in ICG's proposed "enforcement mechanisms" are not reasonable estimates of potential damages ICG anticipates it would incur upon an alleged breach of the interconnection agreement.

It is equally clear that ICG's proposed "enforcement mechanisms" are *not* intended to compensate ICG for any damages that it reasonably anticipates may arise from an alleged breach of the interconnection agreement. In fact, the amounts associated with ICG's proposal cannot be reasonable estimates of the damages ICG may incur upon a breach of an interconnection agreement in Tennessee because they reflect absolutely no conditions that exist in the State of Tennessee. ICG's proposed amounts are not based on the rates it intends to charge its customers for services it intends to provide in Tennessee. Nor are these amounts based on any Tennessee

labor or materials costs or on anything else that might arguably be used to estimate the damages ICG may incur upon BellSouth's nonperformance of the interconnection agreement.

Instead, ICG's proposal is based on its understanding of what the Texas Public Utility Commission decided in a Texas docket addressing Texas issues. As Ms. Rowling testified,

> [The Texas Commission] wanted to impose a system that financially could support the public policy position that substandard performance should have a financial liability on [Southwestern Bell]. So part and parcel of what they did, the process, they pulled November 1998 data from [Southwestern Bell], looked at the performance measures for that particular month, looked at how [Southwestern Bell] succeeded or failed in delivering performance, and then calculated an amount of damages or assessments that would attempt to strike the balance.

Tr. Vol. IA at 59-60. Ms. Rowling later explained that "it was definitely a process . . . of pulling the actual performance of Southwestern Bell in particular and trying to equate the number of missed measurements if [the Texas system of measurements] had been in operation at that period of time along with the remedy plan, and what type of damages Southwestern Bell would have to pay to the CLECS [operating in Texas]." Tr. Vol. IA at 87. Obviously, BellSouth had no opportunity to participate in this Texas proceeding, and aside from the fact that the "Texas staff had no reason to consider Tennessee law on the enforceability of penalties," Tr. Vol. IA at 72, the record in this docket does not reveal what information the Texas Commission "pulled." Additionally, nothing in the record suggests that this Texas-specific information is even remotely consistent with the conditions existing in Tennessee. Clearly, the amounts associated with ICG's proposed "enforcement mechanisms" are not related to any damages ICG reasonably anticipates may arise from BellSouth's nonperformance of an interconnection agreement in Tennessee.[3]

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[3] ICG's contention that it should be allowed to impose Texas-specific penalties upon BellSouth in an interconnection agreement addressing Tennessee operations is flatly inconsistent with other positions it has taken in this very docket on the issue of performance measures and "enforcement mechanisms." Ms. Rowling, for instance, testified that the Florida Commission's rejection of ICG's proposed "enforcement mechanisms" did not deter ICG from

In fact, Ms. Rowling acknowledges that the amounts associated with both the Tier-One and Tier-Two penalties are based upon the aggregate effect Southwestern Bell's breach of a Texas interconnection agreement would have on CLECs operating in Texas. *See, e.g.,* Tr. Vol. IA at 63, 80. In light of this fact, Ms. Rowling conceded that neither ICG's proposed Tier-One penalties nor ICG's proposed Tier-Two penalties are related to any damages ICG reasonably anticipates may arise for BellSouth's nonperformance:

> Q. My question was, these amounts are not tied to any estimate of actual damages ICG would incur in the event of a breach of contract, are they?
>
> A. Not particular to ICG, no, that's correct.

Tr. Vol. IA at 60. In response to Chairman Malone's questions regarding the amount of Tier-One damages, Ms. Rowling again conceded that there is no "correlation in terms of lost revenue" between the Tier-One amounts and any damages ICG may incur upon nonperformance. Tr. Vol. IA at 87. In fact, ICG made no attempt whatsoever to identify any financial damages it may incur as a result of BellSouth's nonperformance of any proposed provision of the interconnection agreement at issue in this docket. Finally, Ms. Rowlings' testimony clearly shows that the

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seeking to impose similar penalties upon BellSouth in Tennessee because "[i]t's my understanding that there was a particular state situation as far as a particular state legal situation in Florida that, in fact, may not be applicable to any other state." Tr. Vol. IA at 45. *See also* Tr. Vol. IA at 49 ("I think we always need to keep in mind of what's appropriate in terms of the state context."). Ms. Rowling also testified that ICG is not accepting BellSouth's SQMs in Tennessee despite its acceptance of BellSouth's SQMs in Georgia because "[t]he situation in Georgia is different than the situation here in Tennessee." Tr. Vol. IA at 45. Finally, Ms. Rowling testified that ICG will not accept BellSouth's SQMs subject to amendment in light of the Louisiana workshop because "I must point out that ICG is not a certificated CLEC in Louisiana so we will have no opportunity to participate in that proceeding." Tr. Vol. IA at 48. In light of this testimony, it is truly disingenuous for ICG to ask the arbitrators to adopt penalty provisions that the Texas Commission adopted in a proceeding in which BellSouth had no opportunity to participate, especially when these penalty provisions are based on the application of Texas law to facts and circumstances that are peculiar to Texas.

amounts associated with ICG's proposed Tier-Two penalties are not related to any damages ICG may incur upon nonperformance by BellSouth. For instance, Ms. Rowling conceded that:

> The Tier-Two amounts are based on industry-wide conditions in the state of Texas, not on any conditions related specifically to ICG in the state of Tennessee. Tr. Vol. IA at 63;
>
> The Tier-Two amounts are based on the public policy of the state of Texas, not on the specific damages ICG reasonably anticipates might arise from the nonperformance of an interconnection agreement in Tennessee. Tr. Vol. IA at 79-80;
>
> The Tier-Two amounts are "not directly tied to specific lost revenue of CLECs [in Texas] in the aggregate ...." Tr. Vol. IA at 80;
>
> The Tier-Two amounts "are in no way tied to ICG's performance or ICG's losses in case of a breach of contract." Tr. Vol. IA at 64.

The fact that the amounts associated with ICG's proposed Tier-Two penalties would be paid to the State of Tennessee is the final nail in the coffin of any argument that ICG's proposed "enforcement mechanisms" are intended to compensate ICG for anticipated damages. As Ms. Rowling conceded, payments to the State of Tennessee do not compensate ICG for anything. *See* Tr. Vol. IA at 63 (agreeing that "with respect to the Tier-Two that are paid to the state, that clearly doesn't compensate ICG for any damages ...."). Instead, payments to the State of Tennessee upon a deviation from performance standards are nothing more than a fine or penalty. *See, e.g.,* T.C.A. §65-3-119 (providing a "penalty" for violations of certain statutes and requiring that all such "penalties and fines" be paid to the state treasury); §65-4-120 (providing a "penalty" for violations of TRA rulings to be "placed to the credit of the public utility account"); §65-4-125 (providing a "civil penalty" payable to the TRA for slamming or cramming violations); §65-4-308 (providing a "penalty" payable to the state treasury for failure to pay regulatory fees). Clearly, ICG cannot reasonably contend that the proposed Tier-Two "enforcement mechanisms" are intended to do anything other than punish BellSouth for nonperformance of a contract.

Thus even if ICG's proposed "enforcement mechanisms" were to be incorporated into an interconnection agreement, they would be penalty provisions that would be unenforceable under Tennessee law.

B. The Authority Does Not Have The Power To Impose Penalties In The Context Of An Arbitration Under Federal Or State Law.

The actions of the Authority in this arbitration are governed by the 1996 Act and the provisions of Title 65 of the Tennessee Code Annotated. Neither the 1996 Act nor Title 65 empowers the Arbitrators or the Authority to impose penalties whenever a party to an interconnection agreement misses a "performance measure."

Section 251 sets forth a specific series of topics regarding which incumbent local exchange carriers such as BellSouth must negotiate. In particular, Section 251(c)(1) obligates incumbents to "negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section." If those negotiations do not result in an agreement, the State commission that arbitrates the matter must ensure that its resolution of the remaining "open issues" "meet[s] the requirements of section 251" -- that is, that the incumbent has fulfilled the duties enumerated in sections 251(b) and (c). 47 U.S.C. § 252(c)(1). None of the requirements of Section 251 involves a duty to agree to penalties. Thus, the 1996 Act does not require an arbitrated agreement to contain such provisions. *See, e.g., MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 40 F. Supp. 2d 416, 428 (E.D. Ky. 1999) (argument that 1996 Act requires that state commission establish "penalty provisions" "must fail"); *MCI Telecommunications Corp. v. U.S. West Communications, Inc.*, 31 F. Supp. 2d 859, 861 (D.

Oregon 1998) (commission decision to reject proposed standards and remedies "was not arbitrary and capricious and does not violate the Act").[4]

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).[5]

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[4] The court in *MCI Telecommunications* indicated that a state commission's decision to adopt "performance standards and specific remedies" is discretionary. 41 F. Supp.2d at 1182. In *US West Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1121 (D. Colo. 1999), the federal court suggested in dicta that requiring "liquidated damages and penalties provisions" was within a state commission's authority, although it was not clear to the court that the issue was "ripe for full consideration, as the agreements state only that the parties 'remain subject to any applicable liquidated damages provision that may be adopted by this Commission.'" *Id.* at 1122. However, there is a significant difference between the "penalties" at issue here and the "specific remedies" and "liquidated damages" at issue in *MCI Telecommunications* and *Hix.* BellSouth is not aware of a case that upholds the imposition of penalties such as proposed by ICG.

[5] Even when it is acting in a quasi-legislative rulemaking capacity, "it is a well-established principle of administrative law and procedure that an agency cannot promulgate rules and regulations arrogating power greater than that authorized in the enabling legislation." *Sanifill v. Solid Waste Disposal*, 907 S.W.2d 807, 811 (Tenn. 1995). *Accord* T.C.A. §65-2-102 (permitting the TRA to "adopt rules implementing, interpreting, or making specific the various laws which it enforces or administers; provided, that the authority shall have no power to vary or

Here, ICG's proposed "enforcement mechanisms" 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 agreement.

The Authority is not vested with such power simply because the penalties proposed by ICG 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. It is not our role to determine whether a party's suggested interpretation of a statute is reasonable or good public policy or

deviate from those laws, nor to extend its power or jurisdiction to matters not provided for in those laws.").

> whether it is consistent with the General Assembly's purpose. We must limit our consideration to whether the power exercised by the [agency] is authorized by the express words of the statute or by necessary implication therefrom.

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.

Just as the agency in the *Wayne County* case had no statutory authority to grant the relief set out in its order, the Authority has no statutory power to impose a penalty upon a party for its failure to perform a contract. Although some statutes permit the Authority to impose penalties in specific instances, a past or future breach of contract simply is not one of them. *See, e.g.,* T.C.A. §65-4-123(d) ($500 - $2000 fine for extortion); §65-4-125(f) ($100 per day penalty for slamming or cramming); §65-21-109 ($500 penalty for certain discriminations in messages). Moreover, no statute empowers the Authority to impose fines that even approach the magnitude of the penalties proposed by ICG. *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 ICG proposes under the guise of "enforcement mechanisms."[6]

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

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[6] Even Ms. Rowling recognized the limitations on the TRA's ability to impose fines, noting that "to the extent that the Texas penalties exceed the TRA's authority to impose fines, I would assume that the TRA would amend the Texas fine to clarify that the TRA may only impose a fine up to the maximum level fixed by Tennessee law." (Rowling Direct, Tr. Vol. IA at 5). It is true that Tennessee law limits the amount of money the TRA may impose as a fine. Tennessee law, however, also prescribes the specific instances in which the TRA is authorized to impose a fine, and a breach of a contract simply is not one of those instances. The

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:

> A reading of the [Tennessee Air Quality Act] clearly shows the only enforcements for violations applicable to this case are: a fine,[7] an action to abate a nuisance, or an action for an injunction. These methods being the only ones allowed by the Act, all others must be considered as being illegal. By no stretch of the imagination can these provisions of the Act be logically construed to authorize the exacting of bond as was done in this case or the forfeiture of the bond.

Id. at 913. Similarly, the Authority has no statutory power to order BellSouth to subject itself to the penalties ICG seeks to impose in this arbitration proceeding.

The result would not change even had ICG 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

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TRA, therefore, has no power to impose the fines or penalties proposed by ICG.

[7] The Act provided that violations were punishable by "a fine of not less than $50.00 nor more than $1,000.00, with each day of violations being a separate offense." *Id.* at 913.

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.

Furthermore, it would be difficult if not impossible to craft a lawful "liquidated damages" provision in the context of performance measures. After all, this is not a situation in which one party agrees to pay the remainder of its contractual commitment if it decides to terminate the contract without cause. Here, if ICG had its way, any deviation by BellSouth from any performance measure would trigger "damages" even if BellSouth's non-performance is not likely to cause "damage." For example, ICG's Tier-Two penalties arguably would apply whether BellSouth misses a collocation commitment by two months, two weeks, two days, or two hours. This is tantamount to requiring a customer to pay an amount equal to the remainder of its contractual commitment if it pays its bill one day late or if it misses a minimum revenue commitment by $1.

As such, ICG's proposal is similar to the bond the Court addressed in *City of Nashville v. Nashville Traction Co.,* 220 S.W. 1087 (Tenn. 1920). In that case, the city awarded a construction contract to the plaintiff, and the contract required the plaintiff to post a $200,000 bond. In determining that the bond provision of the contract was an unenforceable penalty, the Court stated that

> The single lump sum of $200,000 is made payable for any breach of the contract, regardless of the importance of the particular stipulation that may be breached.

> For instance, if the company spent a few dollars less than $500,000 on the work within the time prescribed, $200,000 might be recovered on the bond. If a few days more than the prescribed time were occupied in expending the $500,000, $200,000 might be recovered on the bond. Likewise for any failure of the defendant traction company to secure the city against any claim for damages occasioned by the use of electricity in the streets, in the operation of the road, or in the construction thereof, $200,000 might be recovered, regardless of the amount of the claim and the city's damage. Under circumstances like these the bond must be treated as one for a penalty. It cannot be supposed that the parties intended to liquidate or stipulate the sum of $200,000 as the amount of damage recoverable upon every such breach, regardless of its importance.

Id., 220 S.W. at 1088. Regardless of the impact of *Cleo* on the Supreme Court's legal conclusion in *City of Nashville*, the case only underscores the difficulty inherent in tying "liquidated damages" to a broad range of performance measures.

BellSouth is not seeking to prevent ICG from obtaining appropriate relief in the event BellSouth deviates from acceptable levels of performance, including damages. However, ICG may seek relief from this Authority or "the courts where the full range of legal and equitable remedies will be available" to it. *See Wayne County*, 756 S.W.2d at 284. Neither ICG nor the Authority, however, may force BellSouth to agree to pay penalties for any performance measurement deviation and to waive its right to determine the actual amount of damages, if any, resulting from such a deviation.

III. CONCLUSION

For the foregoing reasons, the Authority should find that it lacks the authority to order the "enforcement mechanisms" proposed by ICG.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

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